THE FAMILY AND MEDICAL LEAVE ACT: OVERVIEW AND UPDATE

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THE FAMILY MEDICAL LEAVE ACT: OVERVIEW AND UPDATE

I. INTRODUCTION

This paper provides a brief overview of the Family and Medical Leave Act, an important statute that protect the rights of certain, eligible employees to take extended leaves from employment. Additionally, this paper will summarize recent cases and note relevant issues related to FMLA leave.

II. OVERVIEW OF THE FMLA – THE BASICS

The Family and Medical Leave Act of 1993 ("FMLA" or the "Act") is a federal statute that requires covered employers to provide eligible employees with unpaid, job-protected leave for certain family and health reasons. 29 U.S.C. §2601 *et seq*. The FMLA is enforced by the Wage and Hour Division of the Department of Labor. The FMLA was enacted to "balance the demands of the workplace with the needs of families" and to "entitle employees to take reasonable leave for medical reasons." 29 U.S.C. §2601(b).

A. Covered Employers

The FMLA applies to employers who employ 50 or more employees for each working day during each of 20 or more workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A). The Act also applies to public agencies, regardless of the number of employees employed. 29 U.S.C. § 2611(4)(B).

B. Employee Eligibility

Employees are eligible to take FMLA leave if they: have been employed by a covered employer for at least 12 months; have worked at 1,250 hours during the previous 12-month period; and, are employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that specific worksite. 29 U.S.C. § 2611(2). The 75-mile requirement is measured over the roads driven by the employee rather than "as the crow flies." The 12 months of required services need not be consecutive; however, periods of employment prior to a break in service of seven years or more do not count unless the break in service is caused by National Guard or Reserve military service obligations or a written agreement exists that obligates the employer to rehire after the break in service. 29 C.F.R. § 825.110(b).

C. Employee Leave Entitlement

Under the FMLA, covered employers are mandated to provide eligible employees with a total of 12 workweeks (or 26 workweeks as applicable) during any 12-month period for one of more of the following reasons:

1. Because of the birth of a son or daughter of the employee and in order to care for the newborn child;
2. Because of the placement of a son or daughter with the employee for adoption or foster care;
3. In order to care for the spouse, child, or parent of the employee if the spouse, child, or parent has a serious health condition;
4. Because of a serious health condition that makes the employee unable to perform the functions or his or her position;
5. Because of any qualifying exigency arising out of the fact that the spouse, child, or parent of the employee is on covered active duty in the Armed Forces;
6. Up to 26 workweeks to care for a covered servicemember with a serious injury or illness if the eligible employee is the covered servicemember's spouse, child, parent or next of kin.

29 U.S.C. § 2612.

The FMLA allows leave taken for a serious health condition affecting the employee or the employee's spouse, child, or parent to be taken on an intermittent or reduced schedule basis. Any employee may take intermittent or reduced schedule leave for the birth or placement of a child only if the employer agrees, unless the newborn child has a serious health condition or the mother has a serious health condition related to the birth of the child – in which case the employer's agreement is not required. Further, intermittent or reduced schedule leave may be taken for a qualifying exigency. 29 C.F.R. § 825.202.

Spouses who work for the same employer are limited to a combined period of 12 weeks of leave if taken for the birth or adoption of a healthy child. If the leave is taken for another qualifying reason or if the newborn or adopted child has a serious health condition, then each spouse is entitled to take a full 12 weeks of leave. 29 C.F.R. §§ 825.120-121.

Qualifying exigency leave and military caregiver leave are newer types of leave that Congress added to the FMLA in 2008. Qualifying exigency leave allows eligible employees to take FMLA leave while the employee's covered military member (spouse, child or parent) is on active duty or called to active duty status for qualifying exigencies. These exigencies are:

- Short-notice deployment – to address issues that arise when a covered military member is notified of a call to duty in support of a contingency operation seven or less calendar days prior to deployment. This leave is limited to seven calendar days beginning on the date of notification of the call to duty;

- Military events and related activities – to attend official military-sponsored ceremonies, programs or events related to the call to duty or to attend family support/assistance programs and briefings sponsored by the military, military service organizations or the Red Cross related to the call to duty;
- Childcare and school activities – to arrange for alternative childcare when the call to duty necessitates a change in the existing childcare for a child of the covered military member, to provide childcare on an urgent immediate basis arising from the call to duty, to enroll in or transfer to a new school when necessitated by the call to duty, to attend meetings with school staff when such meetings are necessary arising from the call to duty;
- Financial and legal arrangements – to make or update financial or legal arrangements to address the covered military member's absence while on duty or to act as the covered military member's representative before government agencies relating to military service benefits;
- Counseling – to attend counseling provided by someone other than a health care provider for the employee, the covered military member or child arising from the call to duty;
- Rest and recuperation – to spend up to five days with a covered military member on a short-term R&R leave during deployment;
- Post-deployment activities – to attend arrival ceremonies and similar events for a period of 90 days following the termination of the covered military member's active duty status or to address issues related to the death of a covered military member while on active duty; and
- Additional activities – to address other events arising out of a call to duty, provided the employer and employee agree that the leave qualifies as an exigency.

29 C.F.R. § 825.126.

Under the National Defense Authorization Act for FY 2008 and the 2009 regulations, qualifying exigency leave was available only when the covered military member was a member of the National Guard, a Reservist or a retired member of the Regular Armed Forces or Reserves and was called for duty in that capacity. It was not available when the family member was on active duty as a member of the Regular Armed Forces. However, in the National Defense Authorization Act for FY 2010, the limitation that qualifying exigency leave could only be used when the covered military member was a member of the Reserves or Guard or a retired member of the Regular Armed Forces or Reserves was revoked. Qualifying exigency leave is now available when the covered military member is a regular member of the Armed Forces and has been deployed to a foreign country. 29 U.S.C. § 2611(14)-(15).

Similarly under the 2008 National Defense Authorization Act, military caregiver leave was not available to provide care for former members of the Armed Services, National Guard or Reserves or someone on the permanent disability retired list. The National Defense Authorization Act for FY 2010 changed this limitation, and now provides that military caregiver leave is available when the covered servicemember is a veteran who was a member of the Armed Forces, including Guard or Reserves, at any time during the five year period preceding the date on which the veteran undergoes medical treatment, recuperation or therapy. 29 U.S.C. § 2615(15), (18).

Finally, with respect to a current member of the Armed Forces, the National Defense Authorization Act for FY 2010 expanded the definition of "serious injury or illness" to include not only a serious injury or illness incurred in the line of active duty but also a serious injury or illness that "existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces." With respect to a veteran, a serious injury or illness is defined as a "qualifying injury or illness" (as defined by the DOL) that was incurred by the member in line of duty on active duty or that existed before the beginning of the member's active duty and was aggravated by service in line of active duty that manifested itself before or after the member became a veteran.

D. Medical Certifications

If an employee is taking leave because of a serious health condition affecting the employee or the employee's spouse, child, or parent or to care for a covered servicemember, the employer may require that the leave be supported by a certification issued by the health care provider of the eligible employee or of the spouse, child, parent of the employee (or next of kin for military caregiver leave) as appropriate. 29 U.S.C. § 2613(a).

The employer must request that an employee furnish medical certification at the time the employee gives notice of the need for leave or within five business days thereafter. The employee must be given 15 calendar days to return a complete and sufficient certification supporting the need for leave. It is always the employee's responsibility to provide a complete and sufficient certification or to provide the healthcare provider with necessary information to complete the certification, and an employee's failure to do so may result in the denial of leave. 29 C.F.R. § 825.305.

The employer generally can request recertification every 30 days, or more often if the underlying circumstances substantially change. The employer

must allow the employee 15 days to provide any requested recertification. 29 C.F.R. § 825.308.

The employer can also require an employee to provide a fitness-for-duty certification upon the employee's return to leave and as part of that certification can require that the health care provider specifically address the employee's ability to perform the essential functions of the employee's position. 29 C.F.R. § 825.312.

E. Continuation of Benefits and Right to Reinstatement

If an eligible employee takes FMLA leave, the employer must continue the employee's health care benefits on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. Employers are obligated to continue an employee's group health coverage while on leave just as if they were employed. This means not only paying the employer's portion of coverage, but also providing notice of any changes made in health coverage and providing any employee on leave an opportunity to take advantage of any such changes. 29 C.F.R. § 825.209.

In addition, upon an employee's return from FMLA leave, the employer must restore the employee to: (a) the position of employment held by the employee when the leave commenced; or (b) an equivalent position. 29 C.F.R. § 825.214. An equivalent position is one that is "virtually identical" to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status, and must involve the same or substantially similar duties and responsibilities. 29 C.F.R. § 825.215. An employee has no greater right to reinstatement to the employee's former or an equivalent position, or to restoration to the employer's benefit programs than if the employee had been continuously and actively employed during the period of FMLA leave. 29 C.F.R. § 825.216.

F. Prohibited Conduct

The FMLA makes it unlawful for an employer to interfere with, restrain, or deny the exercise of any rights provided in the Act. 29 U.S.C. § 2615(a)(1). Further, it is also unlawful to retaliate against an individual for opposing any practice made unlawful by the FMLA or for exercising any rights provided by the FMLA. 29 U.S.C. § 2615(a)(2).

III. FMLA: STATE SOVEREIGN IMMUNITY AND INDIVIDUAL LIABILITY FOR PUBLIC EMPLOYEES

Under the Eleventh Amendment of the United States Constitution, state governmental entities enjoy sovereign immunity and cannot be sued without their consent. State sovereign immunity under the Eleventh Amendment, however, is subject to the federal government's power to abrogate state immunity pursuant to the Fourteenth Amendment. Section 1 of the Fourteenth Amendment guarantees *inter alia* equal protection of the laws (the "Equal Protection Clause"). Section 5 vests Congress with the authority to enforce § 1 by enacting appropriate legislation, which has been interpreted to include the abrogation of state sovereign immunity.

In order for a Congressional abrogation of a State's Eleventh Amendment immunity to be Constitutionally valid, Congress must tailor the § 5 legislation such that it exhibits a "congruence and proportionality between the [§ 1] injury to be prevented and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507 (1997).

By express language, the FMLA creates a private right of action permitting the recovery of damages against any "employer (including a public agency) in any Federal or State court of competent jurisdiction" for violating the statute. 29 U.S.C. § 2617(a)(2). As demonstrated by the following cases, the question of whether an individual can bring suit against a state governmental agency depends on the specific FMLA provision at issue.

A. State sovereign immunity is abrogated with respect to the FMLA's family-care provision – *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)

In 2003, the United States Supreme Court resolved a split among the circuit courts when it held that state employees may recover damages against a state for violating § 2612(a)(1)(C) – the FMLA's so-called "family-care" provision that entitles eligible employees to take leave to care for a spouse, child, or parent with a serious health condition.

William Hibbs worked for the Nevada Department of Human Resources, and in April and May 2007, he sought FMLA leave to care for his wife who was recovering from neck surgery. The Department granted Hibbs' request to take 12 weeks of FMLA leave intermittently as needed between May and December 1997. Hibbs used the leave intermittently until August 5, 1997 after which he never returned to work. In October, the Department informed Hibbs that he had exhausted his FMLA leave and that he must return to work by November 12, 1997. Hibbs failed to return to work by the November deadline and was discharged.

Hibbs brought a civil action against the Department claiming that the FMLA's family-care provision had been violated. The district court granted the Department's summary judgment on the basis that the claim was barred by Eleventh Amendment and that Hibbs' Fourteenth Amendment rights had not been

violated. Hibbs appealed, and the Ninth Circuit reversed. The Supreme Court granted certiorari.

In affirming the Ninth Circuit's decision and finding that the states could be sued for violations of the family-care provision, the Supreme Court examined whether Congress validly abrogated the state's sovereign immunity with respect to that provision. First, the Court recognized that one of the FMLA's purposes is to protect the right to be free from gender-based discrimination in the workplace. Specifically, the text of the FMLA states that due to the societal roles of men and women, the duty of family caretaking often falls on women which has a greater effect on the working lives of women as opposed to men. 29 U.S.C. § 2601(a)(5). In response, Congress, therefore, stated that a purpose of the FMLA is to accomplish the other purposes of the Act "in a manner that, consistent with the Equal Protection Clause of Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender neutral basis." 29 U.S.C. § 2601(4). Thus, FMLA was enacted to promote and protect equal employment opportunities for men and women – a purpose in accord with the Equal Protection Clause.

Second, the Court reviewed Congressional evidence of states engaging in gender discrimination and gender stereotyping with respect to the administration of leave benefits. For example, the Court noted the prior existence of state laws limiting the number of hours women could work based on the belief that a woman's primary duty is at the home. Further, there was evidence showing that very few public and private sector employers had paternity leave policies while several had maternity leave policies which could only be attributed to the gender role stereotype that caring for family members is a woman's responsibility. Also, testimonial evidence was presented before Congress that the lack of uniform parental and medical leave policies in the workplace created an environment of sex discrimination.

Based on this evidence of the states' record of gender-based discrimination in the administration of leave benefits, the Supreme Court concluded that Congress was justified, under the Equal Protection Clause, in enacting the FMLA. More specifically, the Court held that FMLA's family-care provision was a "congruent and proportional" remedy to the state-sanctioned discrimination that was occurring. The Court noted that because the family-care provision was available to all employees irrespective of gender, the incentive of the states to base employment decisions on gender stereotypes would be reduced. Accordingly, Congress had validly abrogated the states' sovereign immunity with the respect to the FMLA's family-care provision.

B. State sovereign immunity is <u>not</u> abrogated with respect to the FMLA's self-care provision – *University of Texas at El Paso v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012)

The *Hibbs* case only addressed the FMLA's family-care provision and did not discuss whether states could be sued for violating 29 U.S.C. § 2612(a)(1)(D), the "self-care" provision that entitles eligible employees to take leave for their own serious health condition.

In 2010, the Texas Supreme Court held in *University of Texas at El Paso v. Herrera* that states could not be sued for violating the self-care provision because the provision did not validly abrogate state sovereign immunity. The plaintiff, Alfredo Herrera, worked for a public university as an HVAC technician and took a leave of absence to care for an injury he sustained on the job. Less than one month after returning to work, the university terminated his employment. Herrera sued the university claiming he was terminated in retaliation for taking self-care leave under the FMLA. The university filed a plea to the jurisdiction contending that Herrera's self-care claim was barred by sovereign immunity. The trial court denied the plea, and the court of appeals affirmed holding that the self-care provision validly abrogated the states' sovereign immunity.

The court of appeals had relied on the United States Supreme Court's *Hibbs* decision to conclude that Congress had enacted the self-care provision to counter the gender stereotype that women utilize leave policies more than men. The Texas Supreme Court rejected the appellate court's analysis noting that the *Hibbs* case issued the narrow holding that the family-care provision was enacted to redress gender discrimination in the workplace – a holding that was supported by evidence of state-sanctioned stereotyping with respect to leave to care for family members. The Court stated that while the evidence in *Hibbs* showed that women were more likely than men to take leave to care for family members, this evidence was not equivalent to women taking more leave than men (or vice versa) to care for themselves. In contrast to the family-care provision, the Texas Supreme Court found no evidence in the legislative record showing that Congress intended to remedy unconstitutional gender discrimination through the self-care provision. Accordingly, because there was no evidence that FMLA's self-care provision was enacted to address a right protected by the Equal Protection Clause, the Texas Supreme Court held that the states' sovereign immunity had not been abrogated with respect to that provision.

Two years later, the United States Supreme Court reached the same decision in *Coleman v. Court of Appeals of Maryland*. In *Coleman*, the Supreme Court

held that state sovereign immunity barred suits against the states for violating the FMLA's self-care provision. The Supreme Court stated that there was no evidence suggesting that states engaged in gender discrimination with respect to self-care leave policies nor was there any evidence of a stereotype that women take more self-care leave than men. Without such evidence, the Supreme Court concluded that the states' sovereign immunity was not abrogated pursuant to the Fourteenth Amendment.

C. Employees of a public agency are subject to individual liability under the FMLA – *Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006)

In *Modica v. Taylor*, the Fifth Circuit held that employees of a public agency could be held individually liable under the FMLA. Carolyn Modica worked as an inspector for the Texas Cosmetology Commission, a state entity. After suffering a work-related injury to her knee, Modica took a medical leave of absence. Before Modica went on leave, she was informed by Antoinette Humphrey, the Executive Director, that her inspection district was being eliminated due to budget constraints. Humphrey, however, offered Modica an inspector position in San Antonio which Modica accepted and was scheduled to begin working on August 1, 2003 after returning from leave. On August 1, 2003, Modica notified the Commission that she was still on leave. Humphrey informed Modica that the San Antonio position needed to be filled immediately but offered Modica an open position in El Paso. Modica accepted the El Paso job but never reported to work by the expected September 2, 2003 date. Shortly thereafter, Modica's employment was terminated.

Modica filed suit against the Commission and Humphrey, in her individual capacity, alleging that she was terminated for taking FMLA leave. Humphrey appealed the district court's denial of summary judgment on Modica's FMLA claim against her. On appeal, Humphrey argued that employees of public agencies may not be held individually liable as employers under the FMLA. With respect to private sector employees, there was no dispute that employees could be held individually liable. *See*, 29 C.F.R. §825.104(a) ("[I]ndividuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA."). With respect to public sector employees, however, the issue was not as clear as the Sixth and Eleventh have held that a public employee is not an employer for purposes of the FMLA when sued in his or her individual capacity while the Eighth Circuit reached the opposite conclusion. *Compare Mitchell v. Chapman*, 343 F.3d 811 (6th Cir. 2003) and *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999), with *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002).

Under the FMLA, the term "employer" is defined to include (1) "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer" and (2) any "public agency." 29 U.S.C. §2611(4)(a). In a matter of first impression, the Fifth Circuit interpreted the definition of "employer" to mean that if a public employee acts, directly or indirectly, in the interest of his or her public employer, then the employee will be deemed an employer under the FMLA and may be subject to individual liability.

In a recent case, the Third Circuit joined the Fifth and Eighth Circuits in holding that a supervisor of a public agency may be subject to individual liability under the FMLA. *Haybarger v. Lawrence County Adult Probation and Parole*, 667 F.3d 408 (3rd Cir. 2012).

IV. RECENT FMLA CASES

A. An employee's pre-eligibility request for leave is a protected activity under the FMLA – *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012)

Kathryn Pereda worked for Brookdale Senior Living Communities. In June 2009, Pereda advised Brookdale that she was pregnant and would be requesting FMLA leave after the birth of her child at the end of November 2009. After informing Brookdale of her pregnancy, Pereda alleged that management began to harass her about her performance. After missing work to deal with pregnancy-related medical issues, Pereda's employment was terminated. Pereda filed suit against Brookdale alleging interference with her right to take FMLA leave and retaliation for attempting to exercise those rights. The district court granted Brookdale's summary judgment because: (1) Brookdale could not have interfered with Pereda's FMLA rights because she was not entitled to FMLA leave at the time she requested it; and (2) since Pereda was not eligible for FMLA leave, she could not have engaged in a protected activity.

On appeal, the Eleventh Circuit rejected the district court's holding that because Pereda had not yet given birth to her child, she was not entitled to FMLA protection at the time of her request. The court pointed out that, in the event of foreseeable leave such as the birth of a child, the FMLA mandates the employee seeking leave to provide the employer with at least 30 days advance notice. The court reasoned that it would be illogical to require employees to provide advance notice of the need to take FMLA leave and, at the same time, expose them to retaliation or interference for which there is no remedy because the triggering event has not yet occurred. The court stated that the district court's interpretation of the statute would create a loophole that would allow employers to retaliate

against pre-eligible employees who comply with the statute's notice provisions – a scenario that would frustrate the very purpose of the FMLA.

Accordingly, the Eleventh Circuit held that the FMLA protects an employee's pre-eligibility request for post-eligibility leave from interference by the employer. In addition, the court held that an employee's pre-eligibility request for leave is a protected activity under the FMLA.

B. Exacerbation is not a valid theory under the FMLA – *Breneisen v. Motorola, Inc.*, (7th Cir. 2011)

James Breneisen worked for Motorola, and in January 2001, he took 12 weeks of FMLA leave to receive treatment for gastro-esophageal reflux. After exhausting his FMLA leave, Breneisen was reinstated to a different position because his former position had been eliminated while on leave. On April 20, 2001, just a couple of weeks after returning to work, Breneisen took non-FMLA medical leave for esophageal surgery. Breneisen returned to work from his second leave in September 2001. In February 2002, Breneisen took leave for a third time to undergo a total esophagectomy and never returned to work. Motorola eventually terminated Breneisen's employment in June 2003.

Breneisen filed suit under the FMLA alleging, *inter alia*, an "exacerbation" theory of retaliation. Specifically, he claimed that after returning from his second leave of absence in September 2001, his supervisor harassed him causing him to suffer stress, high blood pressure, and stomach reflux resulting in an *exacerbation* of his pre-existing medical condition. Breneisen claimed that his supervisor's harassment exacerbated his medical condition to the point that he was forced to take a third leave of absence to undergo the esophagectomy and could no longer work as a result.

The district court dismissed Breneisen's claims, and he appealed. On appeal, Breneisen argued that the district court had erred in holding that exacerbation is not a valid grounds for recovery of front pay under the FMLA. It should be emphasized that Breneisen was not alleging he was wrongfully terminated in retaliation for taking FMLA leave but rather that Motorola is liable for his ongoing damages because his supervisor's harassment caused him to take a third leave of absence. The Seventh Circuit noted the uniqueness of Breneisen's exacerbation theory but rejected the theory on two grounds.

First, the court held that the exacerbation theory was not viable because the actual cause of an employee's injury or medical condition – while relevant under tort law – is irrelevant under the FMLA. The court stated that the FMLA does not address the cause of an injury and, further, permitting an FMLA plaintiff to recover under an exacerbation theory would undermine the straightforward premise of the statute – "to protect employees from adverse actions during finite periods when short-term personal or family medical needs require it." The court observed that stress can adversely affect many common pre-existing ailments and, therefore, recognizing a new theory of liability for stress-based exacerbation of such ailments goes beyond the FMLA's purpose.

Second, even if Breneisen could proceed under an exacerbation theory, the court held that the FMLA did not even apply because, at that point, he was not eligible for any further FMLA leave. There was no dispute that Motorola fully complied with the FMLA during Breneisen's first leave of absence. When Breneisen took his second leave of absence, he had already exhausted his FMLA leave for the year, and, thus, his second reinstatement was not pursuant to any FMLA obligation but, rather, as the court put it, a simple courtesy extended by Motorola to a long-standing employee. Because the alleged harassment occurred after Breneisen's reinstatement from non-FMLA leave, the court held he was no longer entitled to rely upon the FMLA's anti-retaliation provisions. The court declined to extend the FMLA's reach simply because Motorola did Breneisen the favor of approving an additional leave of absence. In closing, the court stated that once the amount of available leave is exhausted, the FMLA no longer applies.

C. Employee disqualified from FMLA's protection because part of leave not used to "care" for injured child – *Baham v. McLane Foodservice, Inc.*, 431 F.3d 345 (5th Cir. 2011)

Girard Baham appealed the district court's grant of summary judgment on his FMLA retaliation claim arising out of his discharge from McLane Foodservice. In March 2008, Baham was on vacation with his family when his daughter fell and suffered severe head trauma. His daughter's injury was so severe she had to be airlifted to Miami, Florida for emergency surgery and treatment. Baham filled out the necessary FMLA paperwork, and his request for leave was approved from March 20, 2008 through May 5, 2008.

Baham and his wife remained with their daughter in Miami as she received follow-up treatment and recovered. On April 12, 2008, however, Baham returned home to Texas alone while his wife stayed in Miami with their daughter. Baham never informed McLane that he had returned to Texas, and he returned to work on May 5, 2008. Baham testified that he returned home because his neighborhood association had complained about his untended yard. He further claimed that he was cleaning and padding sharp edges in his home in preparation for his daughter's return. When Baham returned to work May 5th, McLane's HR representative informed him that his FMLA paperwork

was incomplete and requested him to provide the missing information. Later that same day, Baham left work leaving his keys and ID card with the security guard. McLane interpreted Baham's departure as a resignation and sent him a letter two days later confirming the termination of his employment. Baham denied he intended to resign.

Baham sued McLane claiming he was terminated in retaliation for taking FMLA leave. In order to establish a *prima facie* case of retaliation, Baham was required to show he engaged in a protected activity under the FMLA. Specifically, the district court stated that Baham was required to show he was entitled to FMLA leave throughout the approved period. The district court considered whether Baham was "needed" to care for his daughter after he returned to Texas. The district court concluded that Baham was not needed to care for his daughter because she was cared for in Miami by his wife. Further, the district court observed that "care" under the FMLA requires actual care in close and continuing proximity with the sick family member. Although cleaning and padding the house created a benefit for Baham's daughter, the district court held that that benefit was only incidental, and, therefore, he could not show he engaged in a protected activity.

On appeal, the Fifth Circuit noted that, to be entitled to leave, an employee must show that he is needed "to care for" a family member with a serious health condition. Relying on Ninth Circuit law, the court interpreted "to care for" under the FMLA as involving a particular activity conducted in close and continuing proximity to the ill family member.

Here, the evidence showed that Baham was not providing "care" to his daughter, as interpreted under the FMLA, because, after April 12, 2008, he was in a different state than his daughter for more than two weeks. The court held that the work Baham was doing while away from his daughter – yard work, cleaning, and padding the house – did not qualify as "care" under the FMLA. Baham argued his case by pointing out that he was in frequent telephone contact with wife who was physically caring for their daughter. The Fifth Circuit rejected that argument observing that it could no find no authority holding that mere telephone communication with a relative located in a different state is sufficient to meet the "care" requirement under the FMLA. Accordingly, the Fifth Circuit affirmed the dismissal because Baham could not establish he engaged in a protected activity after he returned to Texas.

This case shows that an employee may be disqualified from FMLA's protections for utilizing his or her FMLA leave for other purposes, even if those purposes are incidentally related to the reason for the FMLA leave.

D. Accompanying seriously ill husband on a spiritual healing trip did not constitute protected leave under the FMLA – *Tayag v. Lahey Clinic Hospital, Inc.* (1st Cir. 2011)

Maria Tayag's husband suffered from several serious medical conditions including gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems. Tayag was her husband's primary caretaker as she transported him to medical appointments, aided him in moving around the house, prepared his food, etc. In 2002, Tayag began working for Lahey Clinic Hospital as a clerk. During her employment, the Clinic consistently approved Tayag's requests for FMLA leave which typically lasted one or two days.

In May 2006, Tayag used her vacation time to travel with her husband to France to visit a site for Roman Catholic pilgrimage and reputed miraculous healings.

In July 2006, Tayag submitted a request to take FMLA leave from August 7, 2006 to September 22, 2006 in order to assist her husband while he traveled. Tayag neglected to inform the Clinic that the travel was for a spiritual pilgrimage to the Philippines. In connection with her leave request, the Clinic requested Tayag to provide a new medical certification from her husband's physician. In early August, Tayag provided the Clinic with a note from Dr. Dong, her husband's primary care physician, stating that the husband's diseases significantly affected his capacity to do activities of daily living and advised that Tayag receive medical leave to provide physical assistance to her husband on trips. Dr. Dong's note also stated, however, that her husband's incapacity would occur intermittently and for his lifetime. Tayag also provided the Clinic with the contact information of her husband's cardiologist to send a medical certification form. On August 8, 2006, the cardiologist returned the form stating that Tayag's husband was "presently not incapacitated" and leave for Tayag was not required.

Consequently, the Clinic did not approve Tayag's FMLA leave and attempted to notify her by mail and phone messages. Tayag did not receive these messages because she was in the Philippines, and she failed to provide the Clinic with any contact information to reach her during her trip. After receiving no response, the Clinic terminated Tayag's employment on August 18, 2006. Tayag sued the Clinic asserting numerous claims including that her termination violated the FMLA. The district court dismissed the FMLA claim on the grounds that the trip to the Philippines was not protected because it was effectively a vacation.

On appeal, the issue was whether the Tayag's spiritual healing pilgrimage to the Philippines constitutes medical care within the meaning of the FMLA. Under the FMLA, serious health conditions must be treated by a "health care provider" which is defined as a:

> doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or . . . [a]ny other person determined by the Secretary to be capable of providing health care services.

29 C.F.R. § 825.125(a). The evidence showed that, during the trip to the Philippines, the Tayags went to Mass, prayed, spoke with the priest and other pilgrims at the healing ministry, visited churches, and met with friends and family. During the trip, Tayag assisted her husband by administering medications, helping him walk, and carrying his luggage. Tayag's husband did not see any doctors or health care providers and received no conventional medical treatment for his ailments. Based on the above evidence, the First Circuit concluded that the Tayag's "healing pilgrimage" did not constitute care under the FMLA because her husband was not treated by a health care provider. The court pointed out that Tayag did not invoke the "Christian Science Practitioner" provision which may be used to classify certain faith healers as individuals capable of providing of health care services. 29 C.F.R. § 825.125(b)(3).

In addition, the First Circuit held that the Clinic was justified in denying Tayag's leave because Dr. Dong's note did not provide any explanation justifying the necessity of seven weeks of leave. Thus, the Clinic had reason to doubt the validity of the initial certification and was, therefore, entitled to seek a second opinion from the cardiologist. 29 U.S.C. § 2613(c)(1). The cardiologist's certification stated that leave for Tayag was not necessary. Hence, Tayag was not entitled to FMLA.

E. Employee, approved for FMLA, terminated because non-FMLA absences violated attendance policy – *Bell v. Dallas County*, 432 Fed. Appx. 330 (5th Cir. 2011)

Jack Bell worked for the Dallas County Department of Health and Human Services (the "County") as a disease intervention specialist. The County's attendance policy considers an employee's absences excessive if the employee is absent from work for more than six days (or a total of 48 hours) during a 12-month period and the absences negatively impact office productivity. Excessive absences is a ground for termination under the County's policy.

Bell suffered from allergic rinitis and ceruminosis (excessive earwax secretions) and was often absent from work due to his illness before he was FMLA eligible. Once Bell became FMLA eligible, he was approved for 480 hours (equating to 12 weeks of leave) of intermittent leave. Thereafter, Bell frequently called in sick and missed numerous days of work prompting management to warn Bell that his intermittent leave would be revoked and he would be placed on full-time FMLA leave. Thereafter, Bell returned to work and missed 4 days of work and the following month, missed 13 days of work. At the end of that month, the County sent Bell a letter informing that he had been placed on full-time FMLA leave because his absences were problematic and placing him on full-time leave would allow the County to plan for proper staffing. Bell sent a letter back stating that he had not requested to use his FMLA leave and that he had no need to exhaust his FMLA leave "at this time." The County sent a letter back to Bell informing him that because he indicated that did not need to use his FMLA leave, all future absences would be considered unexecused and would result in disciplinary action.

After this communication, Bell returned to work and subsequently missed an additional 5 days of work. The County then terminated Bell's employment for violating the attendance policy, and he filed suit alleging that his discharge constituted retaliation under the FMLA. The district court granted the County's motion for summary judgment, and Bell appealed.

The Fifth Circuit agreed with the district court that Bell's FMLA retaliation failed as a matter of law. The evidence showed that Bell's non-FMLA absences exceeded 102 hours and were a clear violation of the County's attendance policy. The court referred to Bell's letter in which he stated he was well enough to return to work and did not need to use his FMLA leave "at this time." After sending that letter, Bell then called in sick 5 days in a row which prompted the County to examine his attendance record for the past year revealing the excessive absences. Accordingly, the court held that the evidence showed that the County terminated Bell because his non-FMLA absences were excessive and the absences negatively impacted the office's productivity. Because Bell, per his own admission, was not seeking FMLA leave or opposing an unlawful practice under the FMLA, he could not sustain a *prima facie* case of retaliation.