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FMLA Leave For Vacation? Yes, Under The Right Circumstances!

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As any HR department will confirm, navigating the Family and Medical Leave Act (FMLA) can be a tricky thing. More than a few clients have lamented the never-ending struggle to curb FMLA abuse. That being said, a good dose of common sense and good employment counsel can go a long way in preventing future lawsuits.

In the recent case of *Ballard v. Chi. Park Dist.* (found here), the Seventh Circuit Court of Appeals affirmed a lower court's ruling refusing to grant the CPD summary judgment on Ballard's FMLA interference claim.

Ballard, a natatorium instructor, had been working at the CPD for 25 years. In 2006, her mother was diagnosed with end-stage congestive heart failure. Ballard requested and was allowed to take intermittent FMLA leave to care for mother. In 2008, a charity provided funding for one of Ballard's mother's end-of-life goals, which was to take a family vacation to Las Vegas. CPD denied Ballard's FMLA request to accompany her mother on the trip, and later terminated her based on unexcused absences accumulated during the trip, arguing that Ballard was not "caring for" her mother during the vacation.

The Seventh Circuit disagreed. As the opinion points out, Ballard – even though on vacation – continued to provide her mother with the same medical, nutritional, and hygienic care that she provided her mother while at home. On this point, the Seventh Circuit departed from the First and Ninth Circuits, which have required away-from-home trips to involve some type of "participation in ongoing medical treatment" to qualify for FLMA leave. The Court here pointed to the plain language of the FMLA, which entitles an employee leave to "care for" a family member suffering from a "serious medical condition." The statute requires that "care" be provided, not necessarily "treatment," at least in the context of away-from-home trips. In the absence of a Congressional mandate, the Court questioned "why participation in ongoing treatment is required when the employee provides away-from-home care, but not when she provides at-home care."

The Seventh Circuit also analyzed the DOL regulations, which "speak in terms of medical, hygienic, and nutritional needs" that do not change depending on whether someone is undergoing active medical treatment, or whether they are at home or in Las Vegas. Finally, the Court said that CPD's worries about potential FMLA abuse (will employees finagle additional vacation time by bringing seriously ill family members along?) is lessened both by the fact that this case arose in the hospice care context and because employers can request medical certification regarding the patient.

Apart from the legal niceties and interpretive guidance this case provides, there seems to be another lesson lurking here. On the one hand, from CPD's perspective, Ballard's termination was supported by two circuit courts of appeals. On the other hand, even though there may well be an unknown back story (and perhaps hindsight is 20-20), unlike many situations I have encountered, these facts here do not scream "abuse!" or "faker!" as I read

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them. The mother had end-stage heart failure, a non-profit charity (Fairygodmother Foundation) provided funds for a final wish, and a daughter (a 25-year veteran employee) accompanied her mother on this trip and provided the same care she always did, albeit in Las Vegas. In addition, discharging an employee over such a sensitive and emotional issue seems to be inviting a lawsuit. What are the costs and benefits of giving six days of FMLA leave?

Thus, employers should think long and hard not only about legal ramifications, but also the practical consequences and “optics” of taking adverse action against an employee. In other words, what will this case “look like” if presented to a judge or jury?