



Psychological Care Under FMLA: How Can an Employee Qualify?

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Published: February 4, 2014



Knowing how to address the needs of employees with caregiving responsibilities can be complicated. It becomes even more challenging when an employee's parent or child becomes so seriously ill that the employee requests a leave of absence to provide care that is not physical, but psychological. Attorneys Dena B. Calo and Julia A. O'Halloran offer some insights into how an employer can handle such a situation based on a hypothetical scenario and actual court outcomes.

Dear Employment Law Specialists,

Several months ago, we approved FMLA leave for an employee to care for her father who was undergoing cancer treatment. We recently found out, through investigation, that our employee did not ever actually visit her father. Rather, she now claims that she spoke with him consistently over the phone throughout her leave, and that she consulted with her father's doctors about his treatment. Is it possible that her leave could still be protected under the [Family and Medical Leave Act](#), even though she never saw her father? – R.S., HR Director

Dear R.S.,

Unfortunately, you are dealing with a tricky area of FMLA as the law allows covered employees to take protected leave to care for a family member with a [serious health condition](#). Under the regulations, this care can include both physical care and psychological "comfort and reassurance that would be helpful to a child, spouse or parent with a serious health condition who is receiving inpatient or home care." This loose definition of psychological care has led courts to a range of conclusions concerning what an employee must do in order to qualify for FMLA protection.

Unauthorized FMLA Caregiver Leave Cases

Some courts have denied FMLA “care” cases based on lack of close and continuing proximity to the ailing family member. In one case, an employee from Washington State took FMLA leave to care for his pregnant wife. The couple’s car died, and the employee flew cross-country in order to retrieve a different car and bring it back to Washington. His wife gave birth while he was driving back home. The employee claimed that by providing a car for their family, and by remaining in frequent phone contact, he provided psychological comfort to his wife. The court disagreed; rather, it held that the employee could only care for his wife while remaining in “close and continuing proximity” to her. See *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005).

In a different case, an employee took FMLA leave to care for his daughter, who was badly injured on a family vacation. After several days, he left his daughter’s Florida hospital, while still on leave, to return home to Texas. The employee claimed that he needed to return in order to prepare their home for his daughter by cleaning it, mowing the lawn, and making accommodations for his daughter’s injuries. He also claimed that he remained in frequent phone contact with his wife. The employee did not claim that he participated in his daughter’s medical treatment. The court in this case held that the employee was not providing care to his daughter that would qualify under FMLA. The court also repeated the “close and continuing proximity” requirement. See *Baham v. McLane Foodservice, Inc.*, 431 Fed. Appx. 345 (5th Cir. 2011).

Authorized FMLA Caregiver Leave Cases

In other cases, courts have fleshed out what may qualify as psychological care under FMLA. Where the issue is “care” in close proximity to the ailing family member, courts have frequently found the leave protected.

In one instance, an employee from California took FMLA leave to temporarily move in with his father after the employee’s sister was murdered. The court in that case found that the employee provided protected psychological care to his father by talking with him daily, performing household chores, and driving his father to counselor appointments. See *Scamihorn v. Gen. Truck Drivers, Local 952*, 282 F.3d 1078 (9th Cir. 2002).

In a different matter, a Michigan employee took FMLA leave to care for his hospitalized father. The employee provided psychological comfort and reassurance to his father when possible; however, his father was unconscious or unresponsive for a large portion of the employee’s FMLA leave. While his father was unconscious, the employee spoke frequently with doctors and authorized many of his father’s medical decisions. The court found that this was sufficient “care” under FMLA. See *Bell v. Prefix*, 321 Fed. Appx. 423 (6th Cir. 2009).

In a case originating in Kentucky, an employee took several hours of FMLA leave to care for his five-year-old daughter. The daughter had late-stage cancer, and was being honored at a local football game during halftime. The employee requested leave in order to help his daughter onto the field, as well as provide psychological support during the event. The court upheld the leave, finding that it was important to facilitate the daughter’s participation in normal childhood activities, as well as to have her parents with her for support. See *Stepp v. Castrucci of Alexandria, LLC*, 2011 U.S. Dist. LEXIS 151619 (E.D. KY Dec. 19, 2011).

Most recently, FMLA leave was upheld for an employee who traveled with her terminally ill mother on a vacation to Las Vegas. The employee, who was her mother’s primary caretaker, accompanied

her mother to Las Vegas where she took care of her mother's basic needs while "participat[ing] in typical tourist activities." The court held that the employee's leave was protected, as "the FMLA's text does not restrict care to a particular place or geographic location...[t]he only limitation it places on care is that the family member must have a serious health condition." See *Ballard v. Chi. Park Dist.*, 2014 U.S. App. LEXIS 1747 (7th Cir. Ill. Jan. 28, 2014).

Further, the broad language in some cases dealing with this issue is also instructive. In one case dealing with an employee's visit to the hospital to see her mother, the court wrote that the employee providing psychological comfort and reassurance for her mother would be the "natural thing to do," and that was sufficient for an employer to infer that the employee was providing care during a hospital visit. See *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294 (3rd Cir. 2012).

In a different matter involving a hospital visit, a court wrote that the employee must state that he did "something — anything — to participate in his mother's care," and that it does not "[take] much to meet the very loose 'psychological care' standard." See *Fioto v. Manhattan Woods Golf Enters., LLC*, 270 F.Supp. 2d 401, 405 (S.D.N.Y. 2003), *aff'd*, 123 Fed. Appx. 26 (2nd Cir. 2005).

In each of these cases, the employee was in close and continuing proximity to his or her family member; however, the expansive language of the courts suggests that it is not difficult for an employee to make a claim that he or she provided psychological care when the family member is in the hospital and is visited by the employee.

As you can see, courts look closely at the facts of each case to determine whether an employee was providing enough "care" to qualify for FMLA leave protection. Additionally, different jurisdictions have proven to hold employees to different standards in determining what can constitute care for a family member under FMLA.

Although your employee may not have been in close and continuing proximity to her father, it's possible that a court with a liberal interpretation of FMLA may find that her comfort and reassurance over the phone, as well as her participation in his medical treatment could constitute "care."

Three Steps to FMLA Caregiver Leave

Given that FMLA has such fact-specific and evolving requirements, employers should always take a few steps before approving an FMLA leave application.

First, employers should require that employees who request FMLA leave to care for a family member's serious health condition be very specific about how they will provide care, as well as where the care will take place.

Second, the level of detail for the [certification from the family member's health care provider](#) is also important: the doctor should be specific about how the employee will provide care to his or her family member. This specificity is important to ensure that the employee is not committing fraud under FMLA by providing less care than promised.

Finally, employers should always consult with counsel about any application to which they may have questions.

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