MPT – July 2014 – Selected Answer 1

TO: Steven Glenn, Vice President, Human Resources for Sign's Inc.
FROM: Henry Fines DATE: July 29, 2014
RE: Demand Letter: Linda Duram is entitled to leave under the FMLA

My name is Henry Fines, and I am a partner at Burton and Fines LLC. I represent Ms. Linda Duram, a graphic artist employed by you. The purpose of this letter is to state that Linda is entitled to leave under the FMLA and to outline the legal and factual reasons why.

On July 7, 2014, Linda requested five days of leave under the Family and Medical Leave Act (FMLA) to accompany her grandmother to her sister's funeral. Signs Inc. denied this request for FMLA because of various reasons, stating that (1) the act does not apply to care for grandparents; (2) even if it did, the act only applies to care provided in a home hospital or similar facility, not to travel; 3) the act does not apply to funerals; and 4) that Linda failed to give the requisite 30 days notice. We have investigated Ms. Linda's claim for FMLA leave and the existing law in this jurisdiction regarding FMLA entitled leave, and we believe that Linda's leave was wrongfully denied. She is therefore entitled to leave, and we demand that this leave be retroactively granted and her probation status be removed.

In this letter, I will make our legal arguments as to why Linda is in fact entitled to leave, and in the process I will address each of your arguments and state why they are inapplicable to Linda's situation. IN summary, Linda is entitled to leave to care for her grandmother here because her grandmother stood in the shoes as in loco parentis to Linda, the employee, as her mother all throughout Linda's childhood. Second, there is no requirement under the FMLA as you have suggested, that care must be provided in a home hospital or similar facility--rather all that is required is close and proximate care of the dependent with the health condition during leave. Third, the act only does not apply to funerals if the person that the employee is seeking to care for is the one who has died, not a living person, so a funeral as the event in this case would not render the FMLA inapplicable. And finally fourth, Linda was not required to give the 30 days notice listed in the FMLA because this was not a foreseeable leave--all she was required to give was notice as soon as practicable, which she did in fact do.

First, Linda is entitled to FMLA leave of up to any 12 month period because 29 USC section 2612 of the FMLA states that an employee is entitled to leave when they need to "care for the spouse, or son or daughter, or parent of the employee, if such spouse son or daughter of the employee has a serious health condition. Here there is no dispute that Linda is a covered employee nor that Signs Inc is a covered employer. This initial question is twofold: (1) did Linda's grandmother Emma qualify as her parent even though she is not biologically so and, if so, (2) did her grandmother's condition qualify as a serious health condition? The answer to both questions is yes.

First, a parent is defined n the FMLA definitions section 2611 as a "biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or a daughter." Courts in this jurisdiction (in the fifteenth circuit) have clarified what this in locos parentis terms means in the FMLA. In Carson v. Houser Manufacturing Inc the court stated that in loco parentis refers to a person who intends to and does put himself in the situation of a lawful parent by assuming obligations incident to the parental relation without going through the formalities of the legal process such as guardianship. Many factors should be considered, Carston states, such as: child's age, degree of dependence, or amount of support provided by person claiming to be loco parentis. In this case, the court decided that the relationship did not qualify as in loco parentis because the child lived with his parents until he was 15 and they died in a car crash and then he lived with his older brother until he left for college- never did he live with his grandparents. He only spent weekends and extended vacations with the person claiming in loco parentis and received some financial support and moral advice while in college BUT the court stated that the person claiming in loco parentis/a grandparent in that case did not do anything that was dissimilar from what many parents do who do not assume parental role.

Carson also quoted another case, Phillips v. Franklin City where the court did find in loco parentis status- in this case the child lived with his grandparents from four and the grandparents took them to medical appointments, provided for day-to-day financial support growing up, attended parent-teacher conferences and served as a driver for his boy scout proof- the court in Phillips held that this was sufficient proof to meet the in loco parentis standard.

Linda is most like Phillips case and is distinguishable from the Carson case. Like in Phillips (and unlike Carson), Linda did in fact live with her maternal grandparents Emma and Bill for many extended periods of time since she was 6 years old.

She lived with them off and on in grade school, and then when she was 12 her parents went to prison so she moved in with her grandparents for 18 months. The parents did take them back after their prison terms, but only for 6 months, when they went to rehab. So the kids stayed again with their grandparents alone for 3 months. Then when the parents finished rehab, according to Linda's affidavit, the parents moved in with Linda and her grandparents until High School. And then in high school, the parents went to prison again for three more years. Thus, Linda lived at her grandparents home for 2 years and three months broken up (during early childhood) and then from the age of 13 on through high school. During this time, the grandparents acted more like parents than like the grandparent in Carson--they took care of Linda, fed her, clothed her, gave gifts at holidays, took them to school and to regular doctor appointments (all of which things the court pointed out in Phillips were sufficient proof for in loco parentis). They also came to games and band performances without the parents, made sure they did their homework, and paid for summer baseball and soccer parents. They even went steps beyond that to get Linda loaned money to get a car to go to college, when parents were drying out from drugs.

Therefore, Emma, Linda's grandma, did stand in the shoes of her parents sufficiently to qualify as in loco parentis because she is more like the grandparent described in Phillips (with constant care and support and lived with) than the grandparent in Carson (who never lived with the grandson and did not provide constant care and support).

The second question under the FMLA is brief and, so far, uncontested. It is whether Emma's illness qualified as a serious health condition, which she does. Under the FMLA definitions section 2611 the term serious health condition means "an illness, injury or impairment or physical or mental condition that involves (A) impatient care in a hospital, hospice or residential medical care facility; OR (B) continuing treatment by ah health care provider. While grandma Emma is not an impatient care in a hospital, she does have continuing treatment by various health care providers at home. The Code of Federal Regulations Title 29 Labor further defines a Serious Health Condition and Impatient care and continuing treatment in section 825.115. In 825.115, Continuing treatment is defined as treatment by health care provider that includes one or more of the following: (chronic conditions) - which include any period of incapacity or treatment for such incapacity due to chronic serious health condition-- which is one: (1) requiring periodic visits (at least 2 per year) for treatment by health care provider, or nurse under direct supervision of health care provider; (2) continues over extended period of time (including recurring episodes of single conditions; and (3) may cause episodic rather than continuing period of incapacity.

Treatment is further defined to examinations and evaluations of the condition (but not routine physical, eye or dental examinations. (Section 825.113). A reign of continuing treatment includes, for example, a course of prescription medication or therapy.

Emma, Linda's grandmother, has a chronic and continuing illness which does subject her to regular treatment as required by the FMLA and further clarified by the Code of Federal Regulations. We have a letter from her Cardiology Center and doctor (Marie Oliver, MD), that states that she has treated Emma for the past 10 years for her cardiac condition and high blood pressure. Two months ago, she diagnosed Emma with end-stage congestive heart failure which will likely kill her in a few months. She is incapable of day-today activities like walking, bathing, taking her medications, feeding, dressing or other similar functions without assistance. She uses a wheelchair and oxygen and needs to have fluids pumped from her heart. She also suffers from a mental condition: depression. Doctor Oliver ordered Home Health Services and chore services to assister her with daily functions and the doctor herself monitors her conditions weekly (as does Linda as she says in her affidavit). Clearly, grandma Emma's condition qualifies as a serious and even chronic health condition involving continuing treatment. Also the doctor even prescribed medication and therapies to be provided for Emma at home. So Emma has continuing care and treatment in the home and has been diagnosed and prescribed with medications, all ways of showing a serious health condition under the FMLA and the Code of Federal Regulations. And this has all occurred over an extended period of time, the most recent developments being 2 months ago. Also, the treatment that Emma gets is far beyond routine eye exams or physicals; it is daily are by nurses and weekly supervision by her doctor.

Thus, Emma definitely has a serious health condition under the FMLA.

The next contention you made regarding Linda's application for leave regarded the capacity covered by the FMLA. You stated that the FMLA does not apply to travel but only to care in hospitals or home. This is simply not a requirement provided anywhere in the FMLA supporting this contention. All the FMLA states that an employee is entitled to leave to "care" for the person with a serious health condition. The court of appeals in this jurisdiction clarified what is required by actual care in Shaw v. BG enterprises. All that is required from the person giving care is that the person be in "close and continuing proximity to the ill family member." The court nor the act both do not require any specific location for the leave to take place. In this case, the father did not qualify as being in close and continuing proximity to the person being

cared for because he left the paten in the hospital with his wife and was at home making repairs and phone calls to arrange the daughter's funeral. While helpful, the court decided that these actions were not in "close and continuing proximity" with the patient. The court also required that the employee seeking leave must offer some "actual care to the person with a serious health condition."

IN this case, Linda both offered actual care to her grandmother and she was in close and continuing proximity for the entire time of her requested leave, all 5 days. Additionally, she testified in her affidavit that her grandmother believed she was the ONLY one who could care for her on the difficult trip to her sister's funeral. The doctor's statements regarding the trip were similar stating that Emma must be accompanied by someone familiar with her condition and personal needs. But Even if a court decided that Linda was not the only one who could have helped her grandmother, this is not the standard. The standard is close and proximate care to the patient to where you can give actual care. I t is clear the Linda was in close proximity with her grandmother for the duration of the trip and she did in fact administer actual care which puts her situation within reach of the FMLA according to the act itself and Shaw.

The third contention you made in your denial of FMLA leave was that the act does not provide for funerals. While this is a true statement, it is ONLY true when the funeral is of the person who has the serious medical condition to be cared for. In Shaw, the court was dealing with an employee who requested FMLA to care for his daughter and administer to his daughter's funeral when she died. The court held that the FMLA contemplates that care must be given to a living person so the man was not entitled to leave to attend his daughter's funeral because she was no longer alive.

Here, Linda and Emma's situation is wholly different. Even though it involves a funeral, the FMLA should still apply because the person Linda is seeking to care for is still under the restraint of her serious bodily injury and has not died. The mere fact that she needed the assistance to travel to A Funeral does not bar the FMLA from applying. The FMLA would only be barred regarding funerals if this was Emma's funeral, but it is not--it is her sister's. So because Linda is helping Emma with her current serious health condition, a living person, the FMLA applies and is not barred by the mere fact that a funeral was the destination for Emma and Linda.

Your fourth and final contention that Linda failed to give the requisite 30 days notice also does not bar the FMLA's application to Linda's case. While you correctly stated that notice is required not less than 30 days under the FMLA, this requirement is only for foreseeable leave necessities (such as the intention to take leave for having a baby or adoption placement. Section 29 USC 2612(e_: Foreseeable leave. The code of Federal Regulations Title 29 clarifies employee notice requirements both for foreseeable and unforeseeable FMLA leave. In section 825.302, it states that for foreseeable FMLA leave the employee must provide the employer with at least 30 days notice in advance before leave is to begin (expected birth; adoption placement; planned medical treatment). But even this section says that if 30 days notices is not practicable because of lack of knowledge of when leave will be required to begin, change in circumstances, or medical emergency--notice is only required to be give n "as soon as practicable." Therefore, even for conditions that normally require 30 days advance notice to employers, they can still qualify for FMLA leave if they don't give 30 days notice in some circumstances.

For unforeseeable FMLA leave, employees are only required to provide notice to the employer as soon as practicable under the facts and circumstances under a particular case.

Here, Linda's leave was an unforeseeable FMLA leave, so she was only required to give Signs Inc. notice as soon as practicable under the circumstances. She did in fact give appropriate notice. She emailed you the morning after finding out about her grandmother's sister's death--less than 24 hours total. It sounds as though the death was at least unexpected enough to cause her grandmother and herself great distress. She says in her letter that both are distraught over the death, thus it was not foreseeable enough to initiate the 30 day notice policy under the FMLA. All she was required to do was give notice as soon as practicable; since she notified her employer mere hours after finding out about the death and funeral arrangements, she fulfilled that requirement.

Finally, for policy reasons, Linda should have been granted FMLA leave in the first place and minor nuance requirements like days of notice should not bar her recovery. The FMLA was enacted by Congress to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to promote national interests in preserving family integrity, and to entitle employees to take reasonable leave to care for the serious health conditions of specified family members. Shaw. This legislative intent shows that the spirit of the FMLA supports its application in Linda's situation

Therefore, Linda definitely qualifies for the FMLA leave that she requested because (1) her grandmother stands in loco

parentis (and Emma has a serious health condition); 2) the care does not apply only in the home or hospital but rather to any situation where the employee is in close proximity to the person with the condition sufficient to render actual care; (3) the act does apply to this situation even though a funeral is involved because the patient is not having her own funeral; and (4) the 30 days notice was not required for such unforeseeable FMLA leave purpose as death of her grandmother's sister.

Hus, Linda qualifies for FMLA leave, and this leave should have been granted on July 7, 2014. We submit this demand letter asking Signs Inc. to both reverse its earlier decision denying FMLA leave and to retract the threat of termination.

MPT – July 2014 – Selected Answer 2

BURTON AND FINES LLC
Attorneys at Law 963 N. Oak Street
Swansea, Franklin 33594

Steven Glenn
Vice President, Human Resources Signs Inc.

July 29, 2014

Dear Mr. Glenn,

My law firm has been retained by Ms. Linda Duram, an employee of Signs, Inc., regarding her recent request for Family and Medical Leave Act (FMLA or the Act) leave from your company. It is our understanding that she requested FMLA leave to accompany her grandmother to the funeral of the grandmother's sister. After having her request denied, Ms. Duram took leave anyway, and was placed on probation as a result. She now faces termination if she misses any more time off work. As you will see outlined in this letter, the denial of FMLA to Ms. Duram was wrong. Therefore, we respectfully demand that Ms. Duram: 1. Be granted leave under FMLA to take care of her grandmother in the future; 2. Be credited back with the two days of vacation time that were used up on her leave to attend the funeral; and 3. Be removed from disciplinary probation that she was placed on as a result of going to the funeral. Our arguments are as follows:

1. The Act applies to care for grandparents when the grandparent stood *in loco parentis* to an employee

The Act entitled eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, including the care of a child, spouse, of parents who has a serious health condition. 29 U.S.C. §2612. The Act defines parent as "the biological parent or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter." 29 U.S.C. §2611(7). The FMLA does not define the term *in loco parentis*, which is a term typically defined by state law. Carson v. Houser Manufacturing, Inc. (15th Cir. Court of Appeals, 2013). Under the law of the State of Franklin, the term *in loco parentis* refers to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process such as guardianship, custody, or adoption. Id. When determining *in loco parentis* status, the court may consider, among other factors, the amount of support provided by the person claiming to be i*n loco parentis*. Although Ms. Duram's grandmother is not claiming the status herself, this analysis is instructive to determine whether she would in fact be granted such status by a court.

In particular, the case of Phillips v. Franklin City Park District (Fr. Ct. App. 2006) is illustrative of the factors considered when determining in loco parentis status. In that case, the child's father died when the child was three, and the mother was unable to care of the child due to depression. As a result, the child went to live with his grandmother. The mother did not relinquish her parental rights to the child, and the grandmother did not seek to adopt the child; nonetheless, the child lived in the grandmother's home and the grandmother enrolled the child in school, took him to medical appointments, provided for his day-to-day support, attended parent-teacher conferences, and was involved in the child's extracurricular activities. This level of involvement and assumption of parental responsibilities was deemed by the court to be sufficient to meet the *in loco parentis* standard. Id. In summary, a grandparent is likely to be considered *in loco parentis* when the grandparent's support is dissimilar from what many grandparents do without assuming a parental role. Carson v. Houser Manufacturing.

In this case, Ms. Duram has testified that her maternal grandparents raised her and her brother since she was six years old. Because of their parents' drug abuse problems, the children lived in their grandparents' house for months at a time while their parents were in and out of jail and rehab. Eventually, Ms. Duram's parents moved into the grandparents' home as well, where they lived until they went back to prison for three more years when Ms. Duram was in high school. All this time, the grandparents took care of the children, fed them, clothed them, and in general took care of their well- being. Even while the parents were living with the children and the grandparents, it was the grandparents who made sure the children went to school, did their homework, and went to their medical appointments. The grandparents paid for summer sports camps and came to the children's sports games and band performances. The grandparents continued providing financial support to the children when the children went back to school. Although the grandparents never formally adopted the children, they did so only because the children's parents were afraid that giving up custody of their children would adversely affect their own legal problems. Therefore, under the tests spelled out in Phillips, Ms. Duram's grandmother clearly would receive *in loco parentis* status and would be covered under the FMLA under 29 U.S.C. §2611(7).

2. The Act is not limited to care provided in a home, hospital, or similar facility, and can be applied to travel when the caretaker needs to travel with the individual covered by the Act

The FMLA is designed to allow an employee to take leave to care for a qualified family member with a serious health condition, which is defined isn 29 C.F.R. §825.113 and §825.115. Under these sections, a serious health condition includes a chronic condition which requires periodic visits for treatment by a health care provider. In addition, treatment includes therapy requiring special equipment to resolve or alleviate a health condition such as the administration of oxygen. The doctor treating Ms. Duram's grandmother has indicated that Ms. Baston cannot perform activities of daily living without assistance and requires the use of oxygen as well as other therapies. Ms. Baston thus clearly has a serious health condition which requires care, and her physician has also stated that she has to be accompanied by someone familiar with her condition and personal needs.

While neither The Act nor the regulations accompanying it have defined "care", the courts have interpreted "care" to mean that the employee seeking leave needs 1. be in close and continuing proximity to the person being cared for, and 2. to offer some actual care to the person with a serious health condition. Shaw v. BG Enterprises. There is absolutely no authority that states that such care must be administered in a facility of any kind, and nothing in the act or any interpretation of the act precludes the possibility that such care may be provided during travel. Ms. Batson's physician has stated that Ms. Duram has learned how to assist Ms. Baston into and out of her chair, administer oxygen, operate the heart pump, and in general provide the *personal care* Ms. Baston requires. Therefore, it is clear that Ms. Baston required care on her trip and Ms. Duram was qualified to provide such care. Therefore, The Act is applicable when the caretaker must accompany the eligible individual on trips, if the caretaker is in close and continuing proximity to the person being taken care of and offers care to the person. Ms. Baston herself told Ms. Duram that Ms. Duram is the only person that can take care of her on this difficult trip to her sister's funeral.

3. The Act applies to funerals

Since the act can be applied to allow an employee to care for a qualified individual while that individual is traveling, there is nothing to prevent the Act from applying to an individual traveling to a funeral. Indeed, the legislative history of The Act can even be read as applying to accompanying the qualified individual to a funeral, since "the phrase 'to care for ... is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child... The same is often true for adults caring for a seriously ill parent or spouse." S. Rep. No. 103-3, at 24. Since "parent" includes an individual in loco parentis, it can be inferred that care can include providing psychological support to a grandparent. Ms. Baston's physician can testify that Ms. Baston is depressed; therefore, it is appropriate to have Ms. Duram accompany her grandmother to the funeral. While the Act has been interpreted not to apply to funerals of the person that was being taken care of by the employee but is now diseased, this does not preclude the caretaker from accompanying the individual in the caretaker's care to the funeral of another. The Act was designed to take care of the living, this accompanying the individual to the funeral of another is permissible and not outside the scope of the Act. Shaw v. BG Enterprises.

4. 30 days' notice is not required for unforeseen events

The Act requires a 30 days' notice only for events that are foreseeable, such as the birth or adoption of a child. 29 U.S.C. §2612. In addition, even that requirement can be waived if the date of the birth or placement requires the leave to begin in less than 30 days. In that situation, the employee shall provide notice as is practicable. 29 CFR §825.303 also states tha when the timing of the need for leave is not

foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. In this case, the death of Ms. Baston's sister was not foreseeable. Ms. Baston's sister passed away on Sunday, July 6, and Ms. Duram requested the leave first thing Monday morning. She requested leave as soon as was practicable, which was her duty under the FMLA.

Conclusion

In conclusion, we ask that you find Ms. Duram's grandmother to be eligible for care under the FMLA and allow Ms. Duram to take leave to take care of her grandmother in the future. In addition, we ask that you reinstate Ms. Duram's two days of leave and remove her from probation immediately. We hope that we can resolve this issue quickly. Please do not hesitate to contact us to discuss this matter further.

Sincerely,
Applicant

MPT – July 2014 – Selected Answer 3

Date: July 29, 2014
Re: Ms. Duram's Request for Family and Medical Leave

Dear Mr. Glenn:

My name is Applicant Last name and I represent Ms. Linda Duram at Burton and Fines LLC. I write you on behalf of Ms. Linda Duram in regards to your recent denial of her Family and Medical Leave Act ("FMLA") request and subsequent threat of termination. The purpose of this letter is to demand you rescind your refusal and withdraw your threat of termination. As you know, Ms. Duram's great-aunt tragically passed away on July 6, 2014. Immediately the following day, Ms. Duram responsibly requested leave under the FMLA to accompany her grandmother to the funeral. Her grandmother could not travel alone. As Ms. Duram's request alluded to, her grandmother -- Ms. Emma Baston -- has congestive heart failure and requires constant medical attention. Due to her grandmother's severe condition, Ms. Duram attended the funeral in order to take care of her grandmother, despite your rejection of her request. This was Ms. Duram's first request for FMLA leave of any kind. Because Ms. Duram made a lawful request and you are obligated by law to grant her the time off, I formally demand that you reverse the decision denying FMLA leave and retract your hostile threat of termination. If you refuse, Ms. Duram will have no choice but to pursue further legal action to protect her rights and career.

I. MS. LINDA DURAM QUALIFIES UNDER THE FAMILY AND MEDICAL LEAVE ACT BECAUSE SHE TIMELY REQUESTED LEAVE IN ORDER TO CARE FOR HER SERIOUSLY ILL GRANDMOTHER

To succeed on a claim of interference with FMLA leave, Ms. Duram must show that she: A) was entitled to take leave under the Act; B) provided sufficient notice of her intent to take leave; and C) was denied FMLA benefits by Signs, Inc. of which she was entitled. As you know, both your company and Ms. Duram qualify under the required definitions of employer and employee, respectively, and there is no dispute on those issues. However, as explained below, Ms. Duram would be able to successfully assert the above stated elements of an FMLA claim.

A. Ms. Duram was Entitled to Leave Under the Family and Medical Leave Act Because her Grandmother Stood in Loco Parentis to Ms. Duram, her Grandmother had Serious Health Conditions, and Ms. Duram Cared for her Grandmother in Close Proximity.

a. Ms. Baston falls under "parent" under The Family Medical Leave Act because she stood in loco parentis to Ms. Duram.

Pursuant to the Family and Medical Leave Act § 2611(7), the term "parent" means the biological parent of an employee "or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter." The 15th Circuit has previously held that the term *in loco parentis* "refers to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process." *See Carson v. Houser Manufacturing, Inc.* (15th Cir. 2013). The court considers the child's age, the child's degree of dependence, or the amount of support. *Id.* A paternal grandmother stands *in loco parentis* if she houses the child from a young age, enrolls the child from school, provides day-to-day financial support, and takes

care of medical support for the child. *Phillips v. Franklin City Park District* (Fr. Ct. App. 2006).

Here, Ms. Baston raised Ms. Duram since she was six years old because Ms. Baston's parents had drug problems. Throughout the next 12 years, Ms. Duram's parents were continuously in and out of jail or rehab. Throughout that entire period, Ms. Duram was effectively raised by her grandparents. Ms. Baston intended to, and did, put herself in the situation of a lawful parent because she assumed the obligations of a parental relationship. Similarly to *Phillips*, no legal papers were signed to legally transfer parental rights. Furthermore, Ms. Baston -- as in *Phillips* -- fed Ms. Duram, clothed her, gave her gifts, took her to school and the doctor, checked her homework, paid for summer camp, and loaned her money to buy a car to go to school. This continuous and overwhelming care is parallel to *Phillips*, in which the Franklin Court of Appeals found *in loco parentis*. Unlike in *Carson* -- in which the grandson never lived full-time with his grandfather -- Ms. Duram was raised, for all practical purposes, directly by her grandparents. Thus, Ms. Baston stood *in loco parentis* to Ms. Duram and qualifies as a "parent" under the Act. As clearly evidenced by 2611(7)'s definition of "parent," your assertion that the Act does not apply to grandparents is unfounded in law. On the contrary, grandparents standing *in loco parentis* are expressly qualified under the Act.

b. Ms. Duram cared for Ms. Baston, in close proximity, who had serious health conditions. The Act expressly mandates that eligible employees receive 12 workweeks of leave per-year "in order to care for...parent...if such...parent has a serious health condition." A "serious health condition" is one that requires continuing treatment by a health care provider. *Id.* A regiment of continuing treatments includes special oxygen equipment. 29 Code of Fed. Reg. 825.113(c). "Care for" requires "some actual care" and does not include hospital visits, home repairs, or attending the funeral of the parent. *Shaw v. BG Enterprises* (15th Cir. 2011)(citing *Tellis v. Alaska Airlines* (9th Cir. 2005)). The care must be provided in "close proximity." *Shaw*.

As explained by Dr. Maria Oliver, Ms. Baston has congestive heart failure. She cannot walk, bathe, take medication, feed herself, or dress without assistance. She requires a wheelchair and oxygen and requires fluids pumped from her heart. Dr. Oliver has taught Ms. Duram how to fully care for Ms. Baston. It is virtually indisputable that Ms. Baston qualifies as someone with serious health conditions. Unlike in *Shaw*, Ms. Duram directly cared for her grandmother. In *Shaw*, the plaintiff left the hospital where his daughter was and went home to make repairs to the house. He then attended her funeral. In contrast, Ms. Duram actively took care of her grandmother by providing the direct care she needs and did not leave her side. They were together the entire time and Ms. Duram was the one changing the oxygen tank, feeding her grandmother, clothing her grandmother, and assisting with all daily tasks. This certainly qualifies under "care[d] for" and "close proximity." Although you asserted that the Act does not cover funerals or travel, that statement is entirely misleading. It is true, as in *Shaw*, that the Act does not cover attending the funeral of the parent under the statute because it only applies to living people. However, here the funeral was not for the person Ms. Duram was caring for. Ms. Duram was caring for her living grandmother who is qualified under the Act. The fact that they happened to attend a funeral or travel is not relevant under the statute. The relevant analysis is the proximity, the care, and the requirement that the person be alive. All elements are satisfied by Ms. Duram.

B. Ms. Duram Provided Adequate Notice to Signs, Inc. Because She Provided Notice the Following Day and the Leave was Unforeseeable.

The Act requires notice at least 30 days in advance for foreseeable needs only, such as an expected birth. For unforeseeable needs, §825.303 explains that "an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case."

The death of Ms. Baston's sister, and her funeral, was not foreseeable. Your allegation that 30 days notice was required is untrue as indicated by §825.303 pertaining to unforeseeable circumstances. Ms. Duram provided notice the day after the death occurred. Given the circumstances, that is as fast as reasonably possible and clearly satisfies the statutory requirement of "as soon as practicable."

C. Signs, Inc. Wrongfully Denied Leave to Ms. Duram Because She was Entitled.

As explained above, Ms. Duram was entitled to leave under the Act because she was taking care of, in close proximity, a "parent" who suffered from serious health conditions. It is clearly not disputable that leave was in fact denied. This element is satisfied without requiring further analysis.

Accordingly, Ms. Duram demands that you rescind your denial of leave and withdraw your threat of termination. In support, I have attached medical evidence from Ms. Baston's doctor and an affidavit from Ms. Duram describing her

relationship with her grandmother. If you refuse her request, she will pursue a valid FMLA claim, as is her right. If you would like to discuss this situation further, please contact me at 1-234-567-8901.

Applicant Last name
Burton and Fines LLC

MPT – July 2014 – Selected Answer 4

Mr. Steven Glen
Vice President of Human Resources Signs, Inc.
July 29, 2014

Henry Fines
Burton and Fines LLC
963 N. Oak Street
Swansea, Franklin 33594

Dear Mr. Glen,

Burton and Fines LLC is a law firm in Swansea Franklin. I am a partner of the firm and represent Ms. Linda Duram as her attorney. This letter is to inform you that Ms. Duram has sought legal assistance from us regarding the recent denial of her Family and Medical Leave Act (FMLA) requested leave. The purpose of this letter is to inform you of Ms. Duram's legal right to leave under the FMLA, and to encourage you to reverse your earlier denial of her leave and retract any probation or termination proceedings you may have initiated.

On July 7, 2014, Ms. Duram notified Signs, Inc. that she would be required to take leave under the FMLA because her grandmother, Ms. Emma Batson, needed her help with her medications and therapies, as well as her psychological condition of depression, on a trip to attend a funeral. The same day, acting on behalf of Signs, Inc., Steven Glen denied her request for leave under the FMLA because (1) it does not apply to parents; (2) does not apply to care during travel; (3) does not apply to funerals; and (4) requires 30 days notice. When Ms. Duram was required to take leave anyway, for a period of five days, Signs, Inc. notified her that three of those days were unapproved time off, and that Ms. Duram was placed on probation with the possibility of termination if she took more unapproved time. Ms. Duram sought legal assistance from us as a result of these events, and we are writing this letter on her behalf to request you reverse her denial of FMLA leave and take her off of probation.

The Family Medical Leave Act allows for covered employees to take leave from covered employers if certain grounds exist for the leave. 29 U.S.C. Sections 2601 et. seq. The grounds for leave are set out in 29 U.S.C. Section 2612, which makes clear that an employee may receive leave if she is going to have a child, adopt a child, or in relevant part, "in order to care for the . . . parent, of the employee, if such...parent has a serious health condition." 29 U.S.C. Sec 2612(c). Furthermore, C.F.R. 825.112 makes clear that if an individual establishes these facts, the employee is required to permit the leave under the FMLA. Thus, an employee who can establish (1) that it is a "parent" as defined in the statute; (2) that requires care for a serious medical condition, is entitled to leave.

The definition section of the FMLA, as well as 15th Circuit precedent, makes clear that it is not only a "biological" parent that qualifies as a parent under the FMLA, but also an individual who stood in "loco parentis" to the child (employee). See 29 U.S.C. Section 2611 (7); Carson v. Houser Manufacturing, Inc. (COA 15th CIr. 2013). The 15th Circuit recently defined in loco parentis as a person who "intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of the legal process." Carson (15th Cir. 2013). Thus, one does not need to be a biological or adoptive parent to qualify as a parent under the FMLA. Factors to be considered include the age of the child, the amount of support provided by the person in loco parentis, as well as factors such as who cared for the child, enrolled them in school, and took them to appointments. See Carson (15th Cir. 2013); Phillips v. Franklin City Park District (Fr. Ct. App. 2006).

The definition of loco parentis provided by the 15th circuit, as well as the factors indicated above clearly indicate that while Emma Batson (grandmother) was not her biological parent, she quite clearly did stand in loco parentis to Ms. Duram, and thus qualifies under the act as an individual that Ms. Duram is entitled to take leave to care for. Ms. Duram lived with her grandparents for significant periods of time during her childhood, including for stretches as long as 18 months, three years, and

for a significant period during high school. (Affidavit of Ms. Duram). While the grandparents did not formally adopt Ms. Duram, the case law does not require formal adoption, but rather states that a person can be in loco parentis "without going through the formalities of the legal process." Carson (COA 15th CIr. 2013). Ms. Duram's grandparents took care of them, fed them, clothed them, took them to school and the doctor, did homework, paid for camps and care, and car money. This is far more assistance and help as parent that was evidenced in Carson, where the son never lived with the grandfather except for vacations and the grandfather never took him to appointments. This amount of care rather seems equivalent to the care in Phillips, which was found to be sufficient for loco parentis (medical appoints, school appoints, living together, etc.). While they did not live together continuously, the stretches of time and the functions the grandparents performed make clear that Emma Batson stood in loco parentis for her and qualifies under the act. Thus, the fact that the act does not specifically cover grandmothers does not bar Ms. Duram's claim.

Furthermore, it is equally clear that Ms. Duram's grandmother had a serious medical condition, defined under the act as one that involves either inpatient care or "continuing treatment by a health care provider." 29 U.S.C. Section 2611. 825.113 of the C.F.R. makes clear that treatment includes a course of prescription medications or a regimen of continuing treatment requiring special equipment to resolve. Furthermore, a serious condition includes a chronic condition that requires periodic visits (at least twice a year), is extended in time, and can cause episodic rather than continuing incapacity. C.F.R. 825.115(c). It is clear from these definitions that Ms. Batson has a serious medical condition, as she has been diagnosed with congestive heart failure which will lead to her death. She cannot walk, bathe herself, or take medications by herself. Furthermore, she needs oxygen and fluids pumped to her heart, as well as continuous therapies and medication. She also suffers from depression. Her doctor sees her weekly (which is far more than the twice a year); her condition will last until her death (a few months) which is extended, and her incapacity is not only episodic but actually continuous. Thus, Ms. Batson has a chronic condition which requires both prescription medications and special equipment including oxygen, as the C.F.R. sections require for "continuing treatment" to qualify as a serious medical condition.

As long as Ms. Duram was leaving work in order to "care for" her grandmother (who stood in loco parentis) and has a serious medical condition, Signs, Inc. would be required under the FMLA to grant her leave. Contrary to Signs, Inc. position that "care for" does not include travel or funerals, but only covers hospital or home care, the 15th Circuit has made clear that the test for what counts as "caring for" under the act is more flexible. In Shaw v. BG Enterprises, the 15th Circuit decided that to qualify for as caring for a person under the FMLA, the individual seeking leave must (1) be in close and continuing proximity to the person being cared for and (2) offer some actual care to the person with a serious health condition. This actual care can include psychological care if the person is receiving some treatment for a physical or psychological illness.

Under this test, Ms. Duram's action in taking off to accompany her grandmother to a funeral on a trip where her grandmother would require both physical care as well as psychological care, for her depression and grief, clearly qualifies as "caring for" her grandmother's serious medical condition. Ms. Duram was in close and continuous proximity to her grandmother on the trip. In fact, she was the only one who went along with her grandmother. Furthermore, the doctor of Ms. Batson indicated that it was "necessary" for Ms. Duram to go on the trip because someone needed to go who was familiar with her medical needs, including special equipment, therapies and medications. Thus, Ms. Duram was needed to "actually care" for her grandmother by giving her medicines and therapies. Furthermore, because Ms. Batson is under constant physical care with daily home care and weekly doctor visits, it is clear that Ms. Duram was also entitled to care for her grandmother psychologically during a tough time of grief. While travel and funerals are not specifically mentioned by the act, they can qualify. Case law indicating situations that do not count as care for include when the individual was not in close contact or did not actually do any care. Neither of those situations applies here, and it is clear that Ms. Duram did indeed care for her grandmother's serious medical condition on the trip.

Finally, while it is true that the FMLA requires 30 days notice under certain conditions, Ms. Duram's situation is not one of these times. 29 U.S.C. 2612(e) requires 30 days notice for foreseeable leave under 29 U.S.C. 2612 (a)(1)(A) and (B). These situations include pregnancy and adoption. C.F.R. 825.303 however makes clear that for unforeseeable events, thirty days notice is not required. Rather, notice is only required as soon as practicable and must include enough specificity for the employer to
tell that the employee qualifies for leave under the FMLA. A funeral appears to be quite unforeseeable. Even if the funeral was deemed to be foreseeable, or the necessity to care for her grandmother in the coming months was deemed to be foreseeable because of her heart condition, even foreseeable events do not require 30 days notice if there is a lack of knowledge as to when the need will arise, changed circumstances, or a medical emergency. C.F.R. 825.302. There was certainly a lack of knowledge as to when her care would need to arise in Ms. Duram's part because Ms. Batson does have home care. However, on an emergency trip, no such home care is provided, and Ms. Duram would not have notice of when such a trip would need to occur. Thus, while thirty days notice can be required under the FMLA, it is not always required.

Here, Ms. Duram provided Signs, Inc. with as much notice as she could. She informed Signs, Inc. at 9:15 the first morning after she learned of the death in the family. Furthermore, her notice provided evidence that she was entitled to leave under the act as she indicated that her "grandmother raised" her and that she needs care, medications, and therapies. While the sufficiency of notice is a case by case determination, this appears sufficient under the relevant code section so as to advise Signs, Inc. of their duty to provide her leave under the FMLA.

While we at Burton and Fines LLC can appreciate Signs, Inc. concerns regarding the application of the act to grandparents, travel, funerals, and without notice, we hope you can appreciate that the act, federal regulations, and 15th circuit precedent adequately address these concerns in Ms. Duram's case. The FMLA and C.F.R. mandates leave in a situation such as this, where the employee's grandmother was in loco parentis to her, with a serious medical condition that the employee would need to care for on the unforeseeable trip.

Based on the foregoing, we request that Signs, Inc. reverse their decision to deny Ms. Duram FMLA leave for the occurrences in early July within 10 days. Furthermore, we request that Signs, Inc. remove Ms. Duram from probation and remove any threat of termination regarding covered leave under the FMLA, whether it be past leave or necessary future leave. Please indicate your acceptance of these requests by following through on the above actions and notifying us within 15 days that you have done so. We hope that future legal action on the basis of Ms. Duram's complaint will not be necessary, and we look forward to hearing from you.

Sincerely,

Henry Fines
Partner
Burton and Fines LLC