NO. 03-11276

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEBBIE URBAN
Plaintiff-Appellee,

v.

DOLGENCORP OF TEXAS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas, Abilene Division

Brief of The American Diabetes Association as *Amicus Curiae* in Support of Plaintiff-Appellee's Petition for Rehearing

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December 22, 2004

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal:

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Interest of Amicus Curiae

The American Diabetes Association ("Association") is a nationwide, nonprofit, voluntary health organization founded in 1940. It consists of patients, health professionals, research scientists, and other concerned individuals. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by the disease.

The Association is the largest non-governmental organization dealing with the treatment and impact of diabetes.[1] It establishes, reviews, and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes.[2] The Association publishes the most authoritative professional journals concerning diabetes research and treatment.[3]

Among the Association's principal concerns is the equitable and fair treatment of persons with diabetes. Presently, there are more than 18,000,000 Americans with diabetes, including over 4,000,000 persons who take some insulin to help treat their

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[1]The Association has over 400,000 general members, over 17,000 health professional members and over 3 million contributors.

[2]American Diabetes Association: Clinical Practice Recommendations 2004, *Diabetes Care* 27: Supp. I (2004).

[3]The Association publishes four professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

diabetes.[4] Around 6.3% of the American population has diabetes and fully one-third of them are unaware that they even have the disease.[5]

Consistent with its concerns, the Association has appeared as *amicus curiae* throughout the United States in cases involving the actual or potential interests of persons with diabetes. This is such a case, as diabetes is without question a "serious health condition" as the Family and Medical Leave Act defines the term. *See* 29 C.F.R. § 825.114(a)(2)(iii).

Diabetes requires extensive, ongoing management – management which sometimes goes well beyond the daily routine of monitoring and injections. For example, patients may require time to alter their insulin regimen, going – for example – from multiple daily shots to use of an insulin infusion pump. Such a change may require an employee to need time off for training and acclimation to her new treatment. Likewise, diabetes increases the risk for a host of medical complications, including heart disease, stroke, kidney failure, blindness, nerve damage, and foot and skin complications.[6] Thus, those with diabetes – or their parents, spouses or children – may well have occasion to use the protected leave afforded by the FMLA.

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[4]Centers for Disease Control & Prevention, *National Diabetes Fact Sheet* (2003).

[5]*See* http://www.diabetes.org/about-diabetes.jsp

[6]*See* http://www.diabetes.org/type-1-diabetes/complications.jsp and http://www.diabetes.org/type-2-diabetes/complications.jsp

Summary of Argument

Because the Court's holding is such an important issue for the Association's members, their families, and its health care professional members, the Association urges this Court to reconsider its decision in this case. In this regard, the Association expresses two critical concerns about the result in this case.

First, the Court's opinion disrupts the delicate balance of employee and employer interests, and imposes upon employees a level of strict compliance that neither the statute nor the regulations reflect.

Second, and of serious concern to the Association, this Court's holding will potentially shift the burden from employers to physicians. The record in this case indicates that the physician's office staff failed to handle Urban's FMLA certification form in a timely manner. By narrowly interpreting the applicable regulation, this Court has unintentionally shifted the responsibility from the employer – upon which Congress imposed it – to the physician. As a policy choice, it makes far more sense to afford employees an opportunity to fix a problem they had no reason to believe existed, rather than to encourage them to make claims against their own physicians.

A. The Court's Holding Disrupts the Careful Balance Contemplated by the Regulations.

The Department of Labor's ("the Department's") regulations strike a careful balance between the employer's request for certification and the employee's request for leave. While the employer surely has a right to request certification and may even state a deadline, the regulations make clear that compliance is ultimately excused where "it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts." 29 C.F.R. § 825.305(b). Further, the Department has provided a safe harbor whenever the employer finds a certification incomplete; in such a case, "the employer shall . . . provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305(d).

The Court's opinion holds that the physician's complete failure to submit anything by way of a certification brings the situation outside of the § 825.305(d) safe harbor. *Urban v. Dolgencorp of Texas, Inc.*, 2004 WL 2810080, *4-5 (5th Cir., December 8, 2004). The opinion does not address the issues of practicability and diligence under § 825.305(b).

In deciding that no certification is something different than an "incomplete" certification, the Court places FMLA job protection entirely in the hands of the health care providers, and likely with illogical results. For example, if Dr. Hendrix had

submitted the form – but neglected to describe the probable duration of the condition, 29 U.S.C. § 2613(b)(2) – Dolgencorp would unquestionably have had to both advise Urban of the deficiency and provide her a reasonable opportunity to fix it. 29 C.F.R. § 825.305(d). The same would even be true if Dr. Hendrix submitted nothing but a blank form with Urban's name written at the top. By elevating physical submission of a piece of paper above the real question – whether the employer has received a "sufficient certification" as defined by 29 U.S.C. § 2613(b) – otherwise diligent employees like Urban may lose their jobs without regard to the balance drawn by Congress and the Department. Simply put, employees deserve the same opportunity for FMLA leave whether their physician submits a mostly-completed form, a virtually incomplete form, or no form at all.

Only this reading of § 825.305(d) balances all the relevant interests. The burden on Dolgencorp under the facts of this case – simply to give Urban notice of that it lacked a sufficient certification – is no different than if the doctor had submitted a form with no information on it. If the inadequacy remained unremedied after the employee was given notice, then of course the employer should be free to deny the FMLA leave. But all the employee sought in this case was an opportunity to fix the problem, which is precisely how the regulations envision the balance.

Further, the record in this case at the very least raises a fact issue whether meeting the deadline was "not practicable under the particular circumstances . . . despite the employee's diligent, good faith efforts." 29 C.F.R. § 825.305(b). After all, the record showed that Urban promptly advised Dolgencorp of her need for additional time (and why), that she provided Dr. Hendrix's office with the form at her very next office visit, that she told the nurse it needed to be faxed to her employer as soon as possible, and that Dr. Hendrix's office then mishandled the form. There is no reading of § 825.305(b) that imposes any deadline upon the employee without at least considering the employee's diligence. At worst that is a fact issue that can only be resolved by the jury.

Finally, though the Court professes to balance both employer and employee interests, it makes no mention of the fact that Dolgencorp's first request for leave was dilatory, at least within the meaning of 29 C.F.R. § 825.305(c). This regulation states that employers should ordinarily request certification when the employee gives notice of her need for leave, or within two business days thereafter. In the case of unforseen leave, certification should be requested within two business days after the leave commences. Otherwise, the employer may request certification at some later date "if the employer later has reason to question the appropriateness of the leave or its duration." 29 C.F.R. § 825.305(c). The record definitively shows that Dolgencorp's

request for certification came well in excess of two days after Urban first requested leave. The Association is aware of nothing in the record or the prior briefing suggesting that Dolgencorp later developed any reason to question the appropriateness of the leave after missing its regulation-established deadline. In fact, it did not even mail its certification request until a week after May 28, 2002, which was the date of Urban's first carpal tunnel surgery. The Association believes that all interests should be balanced, but it seems a terribly unjust result that Urban should have lost her job because of a physician-caused non-compliance with an untimely request.

In sum, the Association urges the Court to reconsider the logic behind its decision. If an all-but-blank form sent by a physician would have entitled Urban to notice and an opportunity to cure, then both consistency and logic dictate that the physician's failure to submit any form entitle her to the same opportunity. Only such an interpretation balances all the competing interest, particularly since the employee has essentially no control over the timing and substance of the physician's submission.

B. The Court's Holding Unintentionally Shifts Responsibility to Physicians.

By holding that the physician's total failure to submit the certification form eviscerates the employee's FMLA protection, this Court has unintentionally shifted to physicians the costs of the employee's termination. To the Association, this is an extremely troubling development.

On the record in this case, there is no question that Dr. Hendrix's office was not diligent in completing the form. His office was familiar with such forms. His nurse knew there was some urgency because Urban communicated as much. His office accepted responsibility to submit the form to Dolgencorp. And the record reflects no question but that it lost the form in the hectic bustle of the practice of medicine.

Having lost her job, and having no remedy against Dolgencorp, Urban potentially will look to her physician for the losses associated with her termination. Such a claim, sounding in negligence or the fiduciary relationship, is certainly not outside the realm of possibility. *See Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) (remarking that courts regularly view doctors and their patients as standing in a fiduciary relationship); *Murphy v. Godwin*, 303 A.2d 668, 674 (Del. Super. Ct. 1973) (physician owed duty of reasonable care as to disposition

of form that was a necessary predicate to his patient obtaining insurance coverage); *Ahnert v. Wildman*, 376 N.E.2d 1182, 1186 (Ind. Ct. App. 1978) (observing that a treating physician has a duty to fill out forms).

As a policy matter, this would be a terrible result, especially since the harm would almost certainly be avoided by the employer simply notifying the employee that a certification is lacking, as contemplated by § 825.305(d). After all, Congress has established by the FMLA that the employee enjoys an unfettered right to take up to twelve weeks of leave, so long as she is in fact entitled. The statute surely imposes a burden on employers to keep the eligible employee's job open during the leave's duration, but that is a legitimate burden that Congress long ago elected to impose upon employers. On policy grounds, that burden should not lightly be shifted from employers to physicians.

Because the eligible employee is entitled to job protection in any event, it seems obvious that requiring the employer to give employees a notice imposes far lower societal costs than encouraging needless claims against doctors whose staff's administrative bungling leads to unnecessary and easily avoidable job losses like Urban's. To put this in context, a single cure letter from Dolgencorp would have avoided all the costs associated with Urban's termination and this litigation, as well as the potential conflicts between doctor and patient. The Association surely does not

believe that the Court intended such a result. It therefore urges the Court to reconsider its decision in this case.

Conclusion

The Association respectfully urges the panel to reconsider its decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 2004, I sent by first class mail, postage prepaid, a true and correct copy of the *amicus* brief of the American Diabetes Association, along with a diskette containing a copy of the brief in portable document format, to all counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, and Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

1. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), but including the Interest of Amicus Curiae section, this brief contains **1,984** words. This is less than half of the permitted length of the principal brief of Plaintiff-Appellee's Petition for Rehearing.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font) using Wordperfect Version 10.0.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands that a material misrepresentation in this certificate may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

_____

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