

THE FAMILY MEDICAL LEAVE ACT: WHAT YOU SEE AND WHAT YOU GET

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INTRODUCTION

Federal statutes seldom make for good reading, and in the boring statutes sweepstakes, the text of the Family Medical Leave Act (“FMLA”)¹ ranks right up there with its acronymic sibling, the Fair Labor Standards Act (“FLSA”).²

The dry, arcane language of the FMLA conveys little of the drama which led to its enactment and none of the emotional pizzazz with which it resonates in the courtroom. Perhaps only the handful of lawyers who have stood before a jury seeking redress for a client whose boss did not care about “family values” knows how compelling an FMLA claim can be.

In essence, the FMLA serves wholesome, widely-held ideals: the statute simply guarantees that a big employer, who presumably can afford it, accommodate employees taking time off to meet the most pressing needs of their immediate family. It seems safe to assume that average Americans, (including those who make their way onto juries), have sympathy for employees who serve their families by taking FMLA leave and have little patience with employers who get in the way. But gaining access to the courtroom for an FMLA plaintiff often takes too long for the statute’s leave provisions to serve their intended

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1. Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (1994).

2. Fair Labor Standards Act, 29 U.S.C. § 201 (2003).

purpose,³ and enabling the jury to express its sympathy monetarily requires the crafting of hybrid suits combining FMLA claims with other claims in which emotional distress damages and punitive damages are available.

In the end, unfortunately, the fulfillment of the FMLA's goals of helping workers spend time addressing family and medical needs and justly compensating them for damage caused by obstructive employers precariously depends on legal stratagems. As drafted, the law is but an imperfect vehicle for reaching its objectives and reform of the statute is needed.

CORE PROVISIONS OF THE FMLA

The FMLA gives a qualified employee up to twelve weeks of leave annually, which the employee may use to address medical crises and certain important family events.⁴ Generally, FMLA coverage is unavailable to persons employed by small businesses because the statute applies to those businesses that employ fifty or more full-time workers during twenty or more calendar work weeks in a year.⁵ FMLA coverage is also unavailable to new hires.⁶ An eligible employee must have worked for at least twelve months, for at least 1250 hours during the year preceding the start of leave, and at a work site where the employer employs at least fifty workers within a seventy-five mile radius.⁷

3. See 29 U.S.C. § 2601 (b)(1)-(5) (conveying Congressional intent to impart a means of balancing an individual's personal and professional lives by providing a leave of absence that does not hinder the economic integrity of employers).

4. See 29 U.S.C. § 2612(a)(1).

[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son or daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Id.

5. See 29 U.S.C. § 2611(4)(A)(i) (defining "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. . . .").

6. See 29 U.S.C. § 2611(2) (defining eligible employees).

7. 29 U.S.C. § 2611(2) (A)-(B)(ii).

The medical leave benefits protected by the FMLA are connected to the concept of a “serious health condition.”⁸ Under the statute, an employee may take leave because of the employee’s own “serious health condition,” if that condition makes the employee unable to perform the essential functions of the job.⁹ The employee may also take medical leave to care for a spouse, daughter, son, or parent suffering from a “serious health condition.”¹⁰ Although the definition of a “serious health condition” as it has evolved under the statute¹¹ and implementing regulations is far from exact, it seems clear that any illness, injury, impairment, or physical or mental condition involving either hospitalization, or a period of medical care extending more than three consecutive calendar days, will fit the bill.¹²

The FMLA also provides limited family leave benefits. Under the statute, a covered employee may take family leave in connection with the birth of the employee’s child, or the placement of a child with the employee for adoption or foster care.¹³

Although the FMLA requires that leave be made available under the requisite circumstances, there is no statutory requirement that an eligible employee be paid while taking leave. The significant exception to the FMLA’s norm of unpaid leave is the statutory provision that accrued paid leave benefits may be applied, either at the insistence of the employee or the employer, towards the twelve week FMLA leave “ration.”¹⁴ While the FMLA does not permit an employee to “stack” FMLA leave by first exhausting paid leave and then commencing twelve weeks of unpaid FMLA leave, an employee may take as much of the FMLA leave period with pay as is covered by accrued paid leave benefits.¹⁵

The FMLA imposes substantial responsibilities upon employers to ensure their workers are aware of FMLA benefits. The covered employer must post a notice of FMLA benefits in the work place, e.g.

8. See 29 U.S.C. § 2611(11) (defining “serious health condition” as “an illness, injury, impairment, or physical or mental condition that involves — (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.”).

9. 29 U.S.C. § 2612(a)(1)(D).

10. 29 U.S.C. § 2612(a)(1)(C).

11. See 29 C.F.R. § 825.114 (a)(2)(2004) (delineating the term “serious health condition” for purposes of FMLA).

12. *Id.*

13. 29 U.S.C. § 2612(a)(1)(A)-(B).

14. 29 U.S.C. § 2612 (c), (d).

15. 29 U.S.C. § 2612 (d).

on a bulletin board, in the lunchroom, etc.¹⁶ When an employee requests leave in connection with a potentially covered benefit, i.e., the employee's own serious health condition, the serious health condition of a family member, or the birth or placement of a child,¹⁷ the employer must inform the employee that FMLA leave may be available and assist the employee in making the application.¹⁸ The employer must refrain from harassing or retaliating against employees exercising FMLA rights.¹⁹ Employees returning from FMLA leave must be given their old jobs back, and, of course, may not be subjected to punitive measures such as demotion, reduction in pay or termination.²⁰

The remedies available under the FMLA are quite limited: neither punitive damages nor damages for emotional distress are available.²¹ Damages are confined to pecuniary losses, although—absent a good faith defense—"liquidated damages" of twice the plaintiff's pecuniary loss may be obtained.²² As with most remedial federal statutes, a prevailing plaintiff can collect reasonable attorney's fees and costs.²³ Injunctive and declaratory relief may be obtained under the FMLA,²⁴ but, because there is no effective administrative procedure established for handling complaints, the injunctive relief must generally be deferred until the end of a protracted judicial proceeding, and therefore typically comes too late to be of much practical value.

KNUSSMAN V. MARYLAND: AN FMLA CASE STUDY

The strengths and weaknesses of the FMLA are vividly highlighted in the case of *Knussman v. Maryland*.²⁵ In *Knussman*, a proud, new father denied parental leave on the basis of his gender succeeded in compelling his governmental employer to provide the leave and to

16. 29 U.S.C. § 2619 (1994).

17. 29 U.S.C. § 2612(a)(1).

18. 29 C.F.R. §§ 825.301(c), 825.302(c) (requiring employers to ensure that employees apply for FMLA leave whenever appropriate, even without the employee's initiative).

19. 29 U.S.C. § 2615 (1994).

20. 29 U.S.C. § 2614(a) (1994).

21. 29 U.S.C. § 2617, n. 13 (1994).

22. 29 U.S.C. § 2617(a)(1)(A)(i).

23. 29 U.S.C. § 2617(a)(3).

24. 29 U.S.C. § 2617(a)(1)(B).

25. 935 F. Supp. 659 (D. Md. 1996), *motion for summary judgment granted in part, denied in part* by 16 F. Supp. 2d 601 (D. Md. 1998), *motion for new trial granted in part, denied in part* by 65 F. Supp. 2d 353 (D. Md. 1999), *aff'd in part, vacated in part*, by 272 F.3d 625 (4th Cir. 2001).

compensate him for the attendant emotional distress; on the surface, the benevolent objectives of the statute were achieved. Unfortunately, however, Trooper Knussman spent five years to get the leave and eight years to get the money. In fact, the award of attorney's fees and costs as well as the separate awards for post-judgment interest, supplemental attorney's fees, and costs incurred during the final phase of litigation remain unpaid, pending a remand by the United States Court of Appeals for the Fourth Circuit.²⁶ Ironically, a case brought under a statute designed to provide timely relief for life's most pressing emergencies has now outlasted the Trojan War's nine-year duration.²⁷ There is perhaps no better way to gain insight into the difficulties of FMLA implementation than to retrace the *Knussman* case's long trek through the courts.

The story of the *Knussman* case begins in the spring of 1994.²⁸ At that time, Trooper Kevin Knussman and his wife Kim learned that, two years after their decision to start a family, they were finally "expecting."²⁹ Their joy was soon dampened by the discovery that Kim had developed preeclampsia, a potentially life threatening syndrome, which sometimes mysteriously accompanies pregnancy and involves extremely high blood pressure.³⁰ The Knussmans' realization that Kim's pregnancy would be complicated brought them to the brink of a dilemma.

The Knussmans were life-long residents of Maryland's Eastern Shore, an area known for its bedrock conservatism and for family values of the most traditional sort. Kevin Knussman was a Maryland State Trooper with fifteen years service, assigned as a paramedic to the helicopter-borne, Aviation Division (the "Division").³¹ Kevin was a Republican, a fundamentalist Christian and a die-hard law and order man who idolized the agency for whom he worked.³² As a part of his company man life-style, Kevin had taken few vacations and had accrued a plethora of unused leave.³³ When confronted with the

26. *Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001).

27. See Symposium, *The New Glass Ceiling: Litigating Bias Against Parents at Work* 41 (Jan. 24, 2003) (unpublished symposium presentations) (on file with American University, Washington College of Law: The Program on Gender, Work & Family) [hereinafter Symposium] (conveying the *Knussman* legal team and family's desire to undergo "torture at the hands of the CIA" than additional litigation).

28. *Knussman v. Maryland*, 16 F. Supp. 2d 601, 605 (D. Md. 1998).

29. See Symposium, *supra* note 27, at 39.

30. *Knussman*, 272 F.3d at 648 (Lee, J. concurring in part, dissenting in part).

31. See Symposium, *supra* note 27, at 44-45 (reflecting that he would continue as a full time State Trooper for only a few more years after the birth of his first child).

32. See *id.* at 39-44.

33. See *id.*

compelling need to provide care for a newborn, for whom his debilitated wife could not provide, and being given the cherished opportunity to be on hand during his child's infancy, Trooper Knussman made the difficult decision to seek as much leave as possible from his employer.³⁴

In October of 1994, Kevin Knussman went to his boss and requested four to eight weeks leave to begin at the birth of his child, the amount which, in his experience, was the most the Maryland State Police would ever approve.³⁵ A few days after he submitted his leave request, Trooper Knussman happened to be at the Aviation Division, where his boss, the ranking officer in flight operations, stopped him in the hallway.³⁶ There, in front of a small group of onlookers, Knussman's boss told him there was no way he was going to get more than two weeks off.³⁷

Shortly after this rebuff, Kim Knussman's doctors decided her medical condition had reached a crisis, and ordered her to complete bed rest.³⁸ When Kim's condition failed to improve, she entered the hospital on November 24, and remained there until she gave birth to Paige on December 9, 1994.³⁹

Meanwhile, Kevin Knussman seemingly had a breakthrough. On December 2, he received a teletype from a State Police Leave Specialist describing the newly enacted Maryland "nurturing leave" provision.⁴⁰ Under this state statute, an employee "who is responsible for the care and nurturing of a child may use, without certification of illness or disability, up to thirty days of accrued sick leave to care for the child" following the child's birth or placement for adoption, while an employee secondarily responsible may take up to ten days of accrued sick leave.⁴¹ Trooper Knussman immediately called the

34. See *id.* (noting that Knussman viewed his substantial accumulated leave time as being in his favor when he requested leave).

35. See *id.* at 45 (noting that even four to eight weeks might have been excessive if not for his accumulated leave time).

36. *Id.*

37. See *id.* (noting that Knussman's supervisor called the leave request "a bunch of crap," and stated that even the two weeks would be without pay).

38. *Knussman*, 272 F.3d at 628 (resulting in her confinement for the latter stages of the pregnancy prior to delivery).

39. See *Knussman*, 16 F. Supp. 2d at 606 (noting that Kim Knussman "endur[ed] severe medical problems" up until the delivery and was unable to care for the newborn as a result of ongoing post-delivery complications).

40. MD. CODE ANN., STATE PERS. & PENS. § 7-508(a)(1) (1994), *amended by* MD. CODE ANN., STATE PERS. & PENS. § 9-505 (2002) (allowing parents to more equally share time off); see also *Knussman*, 16 F. Supp. 2d at 606.

41. § 9-505.

Leave Specialist, told her he would be the person primarily responsible for taking care of his child, and asked if he would qualify for thirty days of leave under the new law.⁴² The Leave Specialist responded that he could not take thirty days off because only women can be primary care providers for a newborn child.⁴³ When Knussman protested that the interpretation seemed sexist, the Specialist told him that was the way it had to be because only a woman could breast-feed a baby.⁴⁴

After Paige's birth, Kim Knussman continued to experience pregnancy-induced high blood pressure, complicated by extreme physical weakness and a variety of other health complications.⁴⁵ As the doctors had feared, Kevin Knussman found himself doing it all, taking care not only of the newborn infant but of his bedridden wife as well.⁴⁶ Faced with this harsh reality, Kevin Knussman again sought to challenge his employer's determination that he was entitled to only ten days of "nurturing leave" as a "secondary care giver."⁴⁷ On December 20, he contacted his supervisor and asked the Division to reconsider its determination that males could not qualify as primary care givers under the statute.⁴⁸ After checking with upper management, Knussman's supervisor told him that the Leave Specialist had been right: only women could be primary care providers.⁴⁹

The morning before Trooper Knussman was to return to work, he again telephoned the Leave Specialist who had previously turned him down.⁵⁰ Knussman explained to her that he needed additional leave under the Nurturing Leave Statute because of his wife's continuing convalescence and Paige's needs.⁵¹ This time, with some asperity, the Leave Specialist said: "God made women to have babies and, unless

42. *Knussman*, 272 F.3d at 628-29.

43. *Knussman*, 16 F. Supp. 2d at 606 (stating that, according to Knussman, the Leave Specialist advised him that only birth mothers qualified as primary care givers).

44. *See id.* at 614, n.9 (adding that only if the mother were in a coma or dead would Knussman qualify as the primary care giver).

45. *See id.* at 606 (conveying that one of Mrs. Knussman's physicians submitted a letter relaying her ongoing medical problems that made her unable to care for the baby and required Knussman to provide assistance for at least twenty more days).

46. *See id.* (noting Knussman attempted to provide medical evidence as to his wife's inability to care for the child on two separate occasions).

47. *Id.*

48. *Id.*

49. *See id.* (noting that the division dismissed Knussman's request even after he submitted a letter from his wife's second doctor).

50. *Knussman*, 272 F.3d at 629.

51. *Id.* at 629-30.

[you] could have a baby, there is no way [you] could be [the] primary care [giver].”⁵² And so, Kevin Knussman returned to work.⁵³

At no point during this two-month leave dialogue did any state official suggest to Trooper Knussman that, irrespective of his rights under Maryland personnel law, he could apply his accrued paid leave benefits towards his twelve-week FMLA leave entitlement.⁵⁴ Knussman had apparently heard of the FMLA, but he was under the mistaken impression that FMLA leave was necessarily without pay.⁵⁵

As a result of his leave denial, Kevin Knussman filed his first grievance in more than a decade-long career as a state trooper.⁵⁶ When this grievance floundered, perhaps because one of the same officials involved in the original decision to deny Knussman adjudicated the grievance,⁵⁷ Trooper Knussman filed a discrimination complaint with the state police’s Fair Practices Officer, Lieutenant Namon Brown.⁵⁸ Lieutenant Brown issued a written decision upholding Knussman’s complaint:

The Maryland State Police had no regulations or rules which would prohibit TFC Knussman from receiving his entitled thirty days of sick leave after the birth or adoption of a child. . . . The Department should have allowed TFC Knussman the usage of the full thirty days sick leave. . . . I think the intent of [the Leave Specialist’s] conversation [with TFC Knussman] was meant to be negative and to discourage TFC Knussman from following up on any additional means to force the Department to do what is proper and just.⁵⁹

When Lieutenant Brown issued this decision, Kim Knussman was still in poor health, and Paige was still in diapers.⁶⁰ In short, the

52. *Id.*

53. *Id.* at 630.

54. *See id.* at 628 (stating that First Sergeant Ronnie P. Creel “misinformed” Knussman that the FMLA did not entitle Knussman to any paid leave beyond the two weeks that Creel would permit).

55. *See Knussman*, 16 F. Supp. 2d at 606 (noting Knussman’s claim that he never knew that he could apply paid leave to FMLA leave because his employer neither posted the FMLA notice nor informed him of his rights under the FMLA when Knussman made his first request).

56. Symposium, *supra* note 27, at 46.

57. *See id.* (observing that Captain David Czorapinski, who had originally told Knussman’s supervisor that the “primary care giver” was presumed to be the mother, determined after a hearing on that issue that Knussman failed to provide sufficient evidence of his primary care giver status).

58. *See* Joint Appendix at 1207, Memorandum from Lt. Namon Brown, Fair Practices Officer, *Knussman*, 272 F.3d 625 (4th Cir. 2001).

59. *Id.*

60. *See* Symposium, *supra* note 27, at 46 (stating that Kim Knussman’s pregnancy, delivery, and post-partum recovery were difficult and left her bedridden for a long

Knussman family could still have benefited from the twenty additional days permitted under the state law for a primary care provider.⁶¹ Such was not to be the Knussmans' lot, however, because Trooper Knussman did not receive Lieutenant Brown's decision at the time, and the Division took no action as a result of Brown's decision.⁶² In fact, the Knussman family learned of the decision only after Knussman's lawyers retrieved it from a pile of documents produced by the Division during the discovery phase of the ensuing litigation, years later.⁶³

A detailed account of the state police's handling of Trooper Knussman's grievances, fair practices complaints, and other concerns makes a long, circuitous story resembling a strange mixture of Kafka⁶⁴ and Arthur Koestler.⁶⁵ Stung by his superior's dismissal to resolve the dispute as "a bunch of crap,"⁶⁶ Knussman filed suit in April of 1995.⁶⁷

The route Trooper Knussman took to the U.S. District Court in Baltimore typifies the cross-political, unifying appeal of "family values."⁶⁸ Knussman, a conservative Christian and volunteer on local Republican campaigns, a man who had reached his forties without ever being involved in a lawsuit, sought the aid of the Centreville American Civil Liberties Union [ACLU].⁶⁹ The ACLU's regional manager, Deborah Jeon, quickly assembled a legal team comprising

time).

61. See *id.* (observing that, when Knussman's secondary care giver leave time ran out, he made a "desperate" telephone call to the Leave Specialist to ask for more time).

62. See *id.* (noting that Lieutenant Brown's favorable decision "immediately got buried" and that this officer was then transferred because he allegedly "didn't do his job").

63. *Id.* at 40.

64. See FRANZ KAFKA, *THE TRIAL* 35-224 (Breon Mitchell trans., Schocken Books 1998) (1925) (depicting the protracted and bureaucratic nature of the legal proceedings that haunt the protagonist, Josef K., after the police arrest him for an unnamed crime).

65. See SIDNEY KINGSLEY & ARTHUR KOESTLER, *DARKNESS AT NOON* 87-117 (Random House 1951) (1950) (presenting a theatrical rendering of the tortuous and dehumanizing interrogation and subsequent trial of a prisoner accused by Soviet authorities of "counter-revolutionary" activities).

66. See Symposium, *supra* note 27, at 35.

67. See *Knussman*, 935 F. Supp. at 662.

68. See Symposium, *supra* note 27, at 38 (observing that the concept of "family values" receives strong support from both ends of the political spectrum).

69. See *id.* at 47 (describing the high legal fees that Knussman initially encountered when he contacted a for-profit attorney, and tracing the thought process that led him to call the ACLU).

herself, a local trial lawyer, and a gender discrimination specialist from the ACLU's Women's Rights Project in New York.⁷⁰

Knussman's legal team soon filed suit, albeit with the expectation that the obvious merit of Knussman's claim would yield a prompt settlement.⁷¹ Instead, Fabian defense tactics, combined with the difficulties of interpreting a new law and the inherent delays in the American judicial system, had the Knussmans starring in an endless legal epic of *Jarndyce v. Jarndyce*⁷² proportions.⁷³ The good news was that the case's long journey through the courts produced a series of trenchant published opinions by District Court Judge Walter E. Black, Jr. that provided much-needed guidance in mapping the FMLA's *terra incognita*.⁷⁴

The complaint initially filed on behalf of Trooper Knussman, which relied upon 42 U.S.C. § 1983 as the federal law allowing civil actions for the deprivation of rights,⁷⁵ asserted claims under the Equal Protection Clause of the Fourteenth Amendment⁷⁶ and the FMLA.⁷⁷ The combination of the two claims was crucial because emotional distress damages, though unavailable under the FMLA, were available for a constitutional claim.⁷⁸

Following a motion to dismiss, the District Court held in the first *Knussman* decision that Congress did not intend the FMLA to be a sufficiently exhaustive statutory scheme as to preclude an unrelated §

70. *Id.* at 51.

71. *See id.* at 47 (stating that, as soon as Knussman contacted the ACLU and described his claim, the ACLU said, "this looks great," and agreed to help him).

72. *See* CHARLES DICKENS, *BLEAK HOUSE* 20-23 (Penguin Books 1964) (1853) (describing a lengthy chancery suit, "Jarndyce and Jarndyce," which had "in [the] course of time, become so complicated that no man alive knows what it means.").

73. *See* Symposium, *supra* note 27, at 47-50 (noting that the filing of the legal challenge triggered a flurry of aggressive media coverage and prompted the Maryland State Police to vigorously deny the allegations and conduct "invasive discovery" into virtually every aspect of Knussman's life).

74. *See, e.g.,* Knussman v. Maryland, 65 F. Supp. 2d 353, 361 (D. Md. 1999) (warning that the Leave Specialist's application of "widely-held stereotypical assumptions and understandings of parenting does not make it reasonable to act according to those assumptions and violate the basic [tenets] of equal protection law").

75. 42 U.S.C. § 1983 (1996) (declaring that "[e]very person who under color of any statute . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, . . . secured by the Constitution . . . shall be liable to the party injured in an action at law.").

76. U.S. CONST. AMEND. XIV § 1 (stating that the government may not "deny to any person within its jurisdiction the equal protection of the laws").

77. 29 U.S.C. §§ 2601-54 (1994).

78. In the face of Maryland precedent holding that the State's ERA did not give rise to a private cause of action, Knussman voluntarily dismissed his third claim, which his legal team filed under Maryland's ERA.

1983 claim for the same underlying misconduct.⁷⁹ In assessing defendant's Eleventh Amendment immunity claim, the District Court ruled that the State and the supervisors named as individual defendants in their official capacities were entitled to Eleventh Amendment immunity as to the Equal Protection claim.⁸⁰ The court ruled that Congress intended to waive Eleventh Amendment immunity as to the FMLA and held the defendants were not entitled to Eleventh Amendment immunity as to the FMLA.⁸¹

The Court's ruling cleared the way for discovery, which proceeded laboriously and exhaustively for two years. At the close of discovery, on cross motions for summary judgment, the District Court issued its second reported decision.⁸² In this decision, the District Court ruled, regarding the FMLA claim, that the individual defendants were entitled to qualified immunity, a defense only available to officials sued in their individual capacities.⁸³ Although the individual defendants remained liable as to all relief sought on the FMLA claim in their official capacities, they were not liable in their individual capacities.⁸⁴ In the wake of the ruling, the *Knussman* case finally went forward to trial.

On January 19, 1999, the *Knussman* case, seeking, *inter alia*, an injunction mandating leave to care for the newborn who was now four years old, went to trial before Judge Black and a jury drawn principally from the Baltimore-Washington metropolitan area.⁸⁵ During the ensuing eleven-day trial, the jury heard extensive testimony from Trooper Knussman's friends, family and, perhaps most significantly, State Police co-workers. The witnesses emphasized Knussman's devotion to his job and family, and the devastating impact of his employers' sexist refusal to allow him to address his family's pressing

79. *Knussman*, 935 F. Supp. at 667.

80. *Id.* at 662.

81. *Id.* at 664 (noting that the defendants had not briefed or in any way pressed the issue of whether there had been a valid waiver).

82. *Knussman*, 16 F. Supp. 2d at 601.

83. *Id.* at 610 (holding that qualified immunity is available to all defendants because the rights under FMLA were not so clear that the defendants should have known the rights were violated).

84. *Id.* at 615 (finding some defendants liable in their official capacities).

85. Interestingly, there were no jurors from Knussman's native Eastern Shore. In Maryland, a highly regionalized state, such distinctions are significant since the Eastern Shore and the lower part of the Western Shore are overwhelmingly rural, conservative, and "Southern." See Margaret Shapiro, *Maryland Voters More Liberal on Social Issues, Poll Says*, WASH. POST, Oct. 16, 1982, at C1 (indicating that Baltimore and Washington have big liberal voting blocks, as opposed to the Eastern Shore, parts of Anne Arundel County, and Western Maryland). The Baltimore-Washington area is highly urbanized and, at least by popular perception, teeming with liberals. See *id.*

needs on Knussman, “the family man” and “the company man.” The Plaintiff also presented extensive medical testimony that established not only the severity of Kim Knussman’s pregnancy-related illness, but also the severity of Kevin Knussman’s own near-breakdown.⁸⁶

The medical testimony by Trooper Knussman’s own health-care providers gave strong clinical corroboration to the abundant lay testimony of the emotional distress manifested by Kevin Knussman.⁸⁷ Knussman’s family physician testified that Kevin had come to him, concerned that he was experiencing symptoms of an approaching heart attack; the physician determined that what was really wrong with Knussman was a bad case of anxiety and suggested he consult a psychologist.⁸⁸ Trooper Knussman ignored his doctor’s advice until, upon reading about the symptoms of depression in a popular magazine, he realized he “fit the bill,” recollected his doctor’s advice, and belatedly sought a referral to a psychologist. The psychologist testified at trial as to the lengthy period of counseling Trooper Knussman underwent and as to anti-depressant medication a cooperating psychiatrist prescribed.⁸⁹ The psychologist explained that Trooper Knussman’s deep sense of betrayal and frustration at being unable to provide for his family in a time of great emotional and personal need led him into a truly profound depression in which he at one point experienced suicidal ideation.⁹⁰

Defendants presented no countervailing expert testimony. Instead, the defendants’ trial testimony seemed designed to establish that they attempted in good faith to interpret the new legislation, although they did little to contradict the shockingly crass statements attributed to them by Knussman. As such, on February 2, after two hours of deliberation, the jury returned its verdict and entered judgment in favor of Knussman for \$375,000.⁹¹ They also found, however, that all the individual defendants except the Leave Specialist, who personally rebuffed Knussman’s request, were entitled to qualified immunity.⁹²

86. *Knussman*, 272 F.3d at 640.

87. *Id.*

88. *Id.*

89. *Id.* at 641, n.11.

90. *Id.* at 641.

91. *Knussman*, 65 F. Supp. 2d at 355.

92. See Symposium, *supra* note 27, at 49 (noting that in a comic-opera epilogue to the trial, the State Police informed Trooper Knussman that, in light of trial testimony about the severity of his emotional distress, he would be suspended from duty until he had passed a psychiatric fitness for duty evaluation). When pressed for clarification, the State Police asserted that he would be permitted to perform highway patrol duty but not paramedic functions, thus leaving him in the odd predicament of being authorized to shoot suspects if necessary but not to provide them with first aid.

In post-trial motions, Defendants moved to set aside the judgment on the grounds of Eleventh Amendment immunity, among other things.⁹³ The District Court rejected Knussman's argument that the Defendants had waived immunity, and vacated the jury's monetary award as to all Defendants except the State's Leave Specialist, in her individual capacity.⁹⁴ Meanwhile, the Court gave Knussman a wide panoply of injunctive relief, including the directive that he finally be given the leave his Division deprived him of five years before.⁹⁵

Trooper Knussman's initial reaction to the District Court's ruling was alarm that the State might refuse to indemnify the Leave Specialist, a decision which would probably have forced her into bankruptcy and left the Knussmans without the jury awarded damages. Providentially, the State's Board of Public Works, a triumvirate consisting of the Governor, Comptroller and Treasurer of Maryland,⁹⁶ unanimously voted to indemnify its employee. Meanwhile, the State prosecuted an appeal to the United States Court of Appeals for the Fourth Circuit, in Richmond.⁹⁷

On appeal, the Defendants mounted a scatter-gun attack on almost every aspect of the case's District Court phase. On January 26, 2001, the case finally came for oral argument before a panel consisting of Circuit Court Judges Karen Williams and William Traxler, and specially assigned District Court Judge Gerald Bruce Lee, of the Eastern District of Virginia.⁹⁸ During oral argument, the panel focused exclusively upon whether the Leave Specialist against whom the judgment remained pending should have been given qualified

Id. After a flurry of motions, the issue was obviated by Trooper Knussman's decision to avail himself of an early retirement option coincidentally approved by the Maryland legislature. *Id.*

93. *Knussman*, 65 F. Supp. 2d at 355 (conveying that Defendants also moved to set aside the judgment claiming the damages were excessive and that the Leave Specialist was entitled to qualified immunity).

94. *See id.* at 359 (refusing to consider the State's submission to trial without first raising an Eleventh Amendment defense as a valid waiver of its sovereign immunity defense). The Court expressed its unwillingness to impinge on the jury's verdict because Plaintiff presented ample evidence of emotional distress. *Id.* at 360. The Court granted the qualified immunity privilege to all Defendants except the Leave Specialist because it was reasonable for the Plaintiff to rely wholly on the Leave Specialist's interpretation of the law. *Id.* at 360-61. If argued today, the State's Eleventh Amendment immunity claim would still prevail, despite the Supreme Court's recent decision in *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1985 (2003), because the claim was directed against the damages awarded to the plaintiff under his Equal Protection and Section 1983 claim, and did not pertain to his claim for equitable and declaratory relief under the FMLA.

95. *Id.* at 355.

96. *See* MD. CONST. art. XII (creating the Maryland Board of Public Works).

97. *Knussman*, 272 F.3d at 625.

98. *Id.* at 627.

immunity based upon the reasonable expectation that a civil servant, in December 1994, should have known that parental leave laws should apply on a gender-neutral basis. In its opinion released November 7, 2001,⁹⁹ the Court of Appeals had little difficulty concluding that the Leave Specialist who denied Knussman's request should have known that the child-nurturing leave law applied gender neutrally, and that she was therefore not entitled to qualified immunity.¹⁰⁰ However, on a 2-1 split (with Judge Lee dissenting), the panel ruled that the jury, in awarding Trooper Knussman damages for emotional distress, impermissibly compensated him for stress related to the litigation process, and not the initial leave denial.¹⁰¹ The Court vacated the jury award and remanded the case for a new trial as to damages only.¹⁰²

Faced with the mind-numbing prospect of retrying half of a case, three years after the original trial and eight years after the facts giving rise to the case, all parties agreed to waive a jury trial and permit Judge Black to assess damages based on the existing record.¹⁰³ After briefing and oral argument, Judge Black, on August 27, 2002, delivered his opinion. Severely limited by the damages analysis contained in the Fourth Circuit Opinion, Judge Black awarded Plaintiff \$40,000 in compensatory damages.¹⁰⁴ However, explicitly rejecting Defendant's argument that Plaintiff was "only minimally successful," he awarded Plaintiff \$556,897.30 in interim attorney's fees and \$59,151.99 in litigation costs.¹⁰⁵

Defendants reacted predictably to the District Court's dichotomous opinion, promptly tendering a \$40,000 check to cover Plaintiff's damage award and appealing the award of fees and costs to the Fourth Circuit.¹⁰⁶ Meanwhile, on April 9, 2003, the District Court issued two decisions, one directing that Defendants pay Trooper Knussman interest on his \$40,000 judgment computed from the date

99. *Id.* at 625.

100. *See id.* at 638-39 (finding the Leave Specialist's actions in violation of clearly established constitutional law).

101. *See id.* at 640-42 (finding Knussman's litigation-related distress to be too attenuated from the Leave Specialist's violation of Knussman's constitutional rights).

102. *Id.* at 642.

103. *Knussman v. Maryland*, 73 Fed. Appx. 608, 612 (4th Cir. 2003) (unpublished per curiam opinion).

104. *Id.* at 614.

105. *Id.* at 611-12. Defendants appealed the District Court's award of attorney's fees as excessive and the Fourth Circuit vacated the District Court's ruling because the lack of significance of Knussman's case as a legal matter warranted a significant reduction in his award of attorney's fees. *Id.* at 616.

106. *See id.* at 610.

of the original jury verdict, February 2, 1999 (approximately \$6000), and the other awarding Knussman an additional \$67,482.18 in attorney's fees and costs incurred during the case's remand to District Court.¹⁰⁷ With the inexorability of Greek drama, appeals were promptly lodged with the Fourth Circuit.¹⁰⁸

In briefing the combined fee appeals before the Fourth Circuit, the *Knussman* legal team focused upon the substantial equitable and declaratory relief secured for its client—getting the leave!¹⁰⁹ The Knussman team emphasized that the measure of review in fee cases is “a manifest abuse of discretion,” a comfortable standard for prevailing parties.¹¹⁰ And, Judge Black's opinion seemed premised on sound precepts: on the one hand, Knussman prevailed in achieving all goals available under the statute, and, on the other, the more the Defendants chose to appeal the jury and bench verdicts, the larger attorney costs would become.¹¹¹

The Fourth Circuit's analysis, however, took a divergent path: during oral arguments on May 8, 2003, the panel,¹¹² focused with unnerving exclusivity upon the disparity between Plaintiff's \$40,000 damage award and his award of fees and costs that totaled slightly under \$700,000. During oral argument, one of the Judges wondered aloud how the Court could publicly justify paying lawyers almost \$700,000 to secure only \$40,000 for their client.¹¹³ the Court of Appeals' “sticker shock” concerning the disparity between the Knussman's legal fees and the damages awarded manifested itself in the court's ensuing unpublished opinion that vacated Knussman's fee and cost awards entirely.¹¹⁴ The Fourth Circuit reasoned that the District Court “abused its discretion” in failing to adopt the State's characterization of Trooper Knussman's lawsuit as “only marginally successful when viewed in its entirety.”¹¹⁵ The fact that Knussman would never have received the leave to which he was entitled had he

107. *See id.* at 616, n.6.

108. *See id.*

109. Brief for Appellee at 35, *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (No. B-95-1255).

110. *Id.*

111. *Id.*

112. *Knussman v. Maryland*, 73 Fed. Appx. 608, 609 (4th Cir. 2001) (identifying the panel that again included Judges Williams and Traxler, who were joined by Senior Judge H. Emory Widener, Jr.).

113. *See Symposium, supra* note 27, at 41.

114. *Knussman*, 73 Fed. Appx. at 614.

115. *Id.* (using a somewhat subjective analysis of what Knussman gained through his counsel).

not brought his suit, through five difficult years, went largely unnoticed.

What remains of the *Knussman* case—assessment of fees and costs—is now back before the District Court in Baltimore. Judge Black, who presided over the case throughout its nine year history, has now retired, and the case has been assigned to another judge.¹¹⁶ What will happen now remains an unanswered—and to this writer, deeply interesting—question.

What do Kevin Knussman and his family have to show for almost a decade of grievances, claims, complaints, motions, appeals, hearings, settlement conferences, and, in short, the whole wretched arsenal of modern “dispute resolution?” Superficially, the Knussmans scored total victory: Kevin Knussman eventually got all the additional leave he demanded, he has been compensated in some measure for the emotional distress he suffered, and eventually he will collect at least some attorney’s fees and costs.¹¹⁷ Measured, however, against the fundamental criterion of whether Trooper Knussman achieved the FMLA’s goal of securing leave when needed, the Knussman litigation was a failure.¹¹⁸ To the Knussman family, who held steadfastly to their purpose throughout the long struggle, the value of their labors can be best seen in what they accomplished for others: employees who litigate FMLA and State leave claims no longer must forge a path through the wilderness. Judge Black’s three published decisions give needed definition to employee rights and employer obligations, and those decisions along with the publicity that attended the *Knussman* case, undoubtedly encouraged employers to toe the line. Significantly, when the Knussmans’ second child was born two years into the lawsuit, the State Police’s newly established leave procedures worked flawlessly: Trooper Knussman got his FMLA leave without a murmur.

STRENGTHENING THE FMLA

Congress did not enact the FMLA to give people time off from work.¹¹⁹ Instead, Congress enacted the legislation to enable workers

116. See *id.* at 616 (remanding the case to the district court to determine the appropriate fees and costs consistent with this most recent opinion).

117. The adequacy of Judge Black’s \$40,000 damage award is a bit of a vexed question. In fairness to Judge Black, even in today’s world of headline verdicts, the strictness of the Fourth Circuit opinion would render unlikely any greater award with the strength to withstand appellate challenge.

118. One cannot help but reiterate that, had the State Police acted upon Lieutenant Naamon Brown’s courageous decision upholding Knussman’s Fair Practices complaint, the leave could have been provided when still useful.

119. See Symposium, *supra* note 27, at 34.

to respond to exigent family and medical needs. While the means by which the statute attempts to accomplish its purpose requires employers to extend leave to employees who need to address the pressing circumstances covered by the statute, calling the statute a “leave act” is a misnomer that confuses the means with the end.¹²⁰ In this crucial respect the FMLA fails. As evidenced by his enormous stockpile of accrued paid leave, Kevin Knussman was not an employee interested in taking a vacation.¹²¹ Instead, Trooper Knussman wanted to care for his sick wife and spend as much time as possible with his newborn,¹²² the importance of whose arrival had been magnified by long deferral.¹²³ By the time Trooper Knussman won his suit under the FMLA, his “newborn” was in kindergarten and his wife had long since gone back to work, strong and healthy.¹²⁴ Though Trooper Knussman ultimately got the time off mandated by the statute,¹²⁵ the leave came far too late to serve the purposes facilitated by the statute.

In the eyes of some, allowing successful FMLA plaintiffs like Kevin Knussman a deferred vacation might seem to have some compensatory value, but that assessment trivializes the family values served by the FMLA. Moreover, such an assessment—again—confuses those values with the means provided to promote them: Timely leave from the workplace.

The principal difficulty in implementing the FMLA lies in fashioning an effective remedy: to achieve its goal of enabling an employee to leave the workplace and meet a compelling but ephemeral family or medical leave, there must exist a rapid-response procedure in which disputes over leave entitlement are resolved promptly.¹²⁶ While some might argue that the statute facilitates such a process by eliminating any requirement that the aggrieved employee exhaust administrative remedies before filing suit, expecting

120. See *id.* (explaining that the real objective of the FMLA is to allow individuals to spend time with a newborn infant or a dying family member – not to give them time off work).

121. See *Knussman*, 16 F. Supp. 2d at 606 (stating that Knussman had accrued over 1200 hours of paid sick leave and at least an additional 250 hours of accumulated “annual and personal leave”).

122. See *Knussman*, 272 F.3d at 628.

123. See Symposium, *supra* note 27, at 39 (conveying the Knussmans’ desire to have a child for a long time prior to Ms. Knussman’s pregnancy with Paige).

124. See *id.* (stating that Mr. Knussman did not actually receive his time off until five years after it was requested).

125. See *id.* at 40 (analogizing the outcome as the legal equivalent of throwing a lifeline to someone who already drowned).

126. See *id.* at 36 (emphasizing that grievances with the FMLA is a rare instance in which citizens can legitimately expect the Federal Government to take prompt action).

employees to resolve leave disputes by filing suit in federal court and waging a bloody and expensive battle over a preliminary injunction is unrealistic, wasteful, and unfair. A better approach would be for Congress to adopt legislation empowering the Department of Labor to establish a hotline procedure for an on-the-spot resolution of leave disputes.¹²⁷ Resolving leave disputes through a quick, inexpensive arbitration would not only foster the FMLA's goal of providing leave when necessary, but would obviate disputes over damages, costs, and monetary compensation.¹²⁸

Absent the creation of a mechanism to determine whether an employee is entitled to family or medical leave at a time when the employee can still use the leave, fairness dictates that the damage provisions of the FMLA be significantly enhanced. In Kevin Knussman's case, for example, the employer's obstruction of an entirely valid leave request¹²⁹ precipitated Trooper Knussman's breakdown,¹³⁰ which required lengthy psychotherapy and treatment with anti-depressants.¹³¹ The crisis of confidence the employer's obstruction engendered in the ultra-conservative Trooper Knussman became so severe he even (briefly) contemplated suicide.¹³² Despite the profundity and clinical corroboration of his emotional distress, Trooper Knussman could not have recovered a penny if there was no sexist basis for the leave denial, which entitled him to relief under 42 U.S.C. § 1983 and the Equal Protection Clause.¹³³ If, hypothetically, Trooper Knussman's Division denied him leave under circumstances that were equally offensive but did not implicate a suspect classification, his monetary remedy under the FMLA would have been limited to approximately \$20 in babysitting bills.¹³⁴

Employees, such as Kevin Knussman, whose FMLA rights are violated, should have the means either to compel the provision of leave at the time needed, or to seek truly compensatory damages. If the FMLA is to be of practical value to the workers it purports to protect, it must be rewritten.

127. *See id.*

128. *See id.* at 38-39.

129. *E.g., Knussman*, 272 F.3d at 630.

130. *See id.* at 640.

131. *See id.* at 649.

132. *See id.* at 640-41 (indicating a "lack of zest for life" among Knussman's symptoms of anxiety and depression).

133. *See id.* at 639-40; *see also* Symposium, *supra* note 27, at 36.

134. *See* Symposium, *supra* note 27, at 37.