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U.S. DIST. COURT  
MIDDLE DIST. OF LA.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA 02 SEP 30 PM 2:24

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by DEPUTY CLERK

KELLY B. GRACE

CIVIL ACTION

VERSUS

NUMBER 00-482-B

GEORGIA GULF CORPORATION

OPINION

Kelley Grace filed this suit against Georgia Gulf Corporation ("Georgia Gulf") claiming that the defendant violated the Family and Medical Leave Act<sup>1</sup> ("FMLA"). Grace claims that Georgia Gulf violated the FMLA when it denied her request for leave based on the serious medical condition from which she allegedly suffered. The defendant denies that it violated any provisions of the FMLA and contends that plaintiff did not qualify for leave under the Act. This case was tried to the Court without a jury. The Court now makes its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure. In making its findings of fact, the Court took into consideration the credibility of the witnesses who testified in this case.<sup>2</sup>

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<sup>1</sup>29 U.S.C. § 2601, et seq.

<sup>2</sup>The Court has considered all of the contentions and arguments of the parties whether specifically discussed herein or not.

DKT. & ENTERED

DATE 9/30/02  
NOTICE MAILED TO:

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## I. Background

Plaintiff is a former employee of Georgia Gulf. On December 21, 1998, the plaintiff was involved in a non-work related automobile accident from which she allegedly sustained neck injuries. Following this accident, the plaintiff was required to miss work on several occasions for medical reasons. Plaintiff's requests for medical leave were always granted until September of 1999. Approximately two months prior to the time plaintiff was denied medical leave, the work in the section where plaintiff worked drastically changed.

In July of 1999, Jonette Buatt was promoted to a supervisory position over the plaintiff. After this promotion, the plaintiff's complaints about her work environment began and her sick leave increased dramatically. There is no dispute that a personality conflict existed between the plaintiff and Buatt. In August of 1999, a meeting was held between Buatt, Steve Mowry, the Director of Information Services, and plaintiff. At this meeting, plaintiff was advised of job performance deficiencies. Buatt and Mowry testified that these deficiencies were so severe that they told the plaintiff to take off the rest of the week so she would have time think about whether or not she wanted to remain as an employee at Georgia Gulf. The plaintiff never returned to work after this meeting.

Plaintiff claims that she began to suffer debilitating pain related to an alleged herniated disk injury beginning in September

of 1999. During this time, plaintiff sought treatment from Dr. Richard Gold, a neurologist. On September 8, 1999, Georgia Gulf received a release to work form from Dr. Gold stating that the plaintiff could return to work on September 13, 1999. On the very same date, Georgia Gulf received a facsimile from Dr. Gold's office which stated that the plaintiff needed an additional six weeks leave from work. Thus, Georgia Gulf received contradictory work release forms from Dr. Gold.

Georgia Gulf contacted Dr. Gold in an effort to resolve the discrepancy between the two medical reports delivered on the same day. Dr. Gold advised JoPaula O'Neal, an employee at Georgia Gulf, that he only gave the second release to the plaintiff after he had been "harassed" by the plaintiff. After speaking with Dr. Gold, Georgia Gulf made an appointment for the plaintiff to have an independent medical examination conducted pursuant to the Georgia Gulf employment handbook and the FMLA to determine whether she should be granted additional medical leave.

Plaintiff's medical appointment was scheduled with Dr. James Grace. The plaintiff failed to attend the first appointment which had been scheduled for September 21, 1999. When plaintiff failed to keep her appointment, Mowry left a telephone message for the plaintiff advising her that he had rescheduled her appointment with Dr. Grace for September 23, 1999. Mowry also advised the plaintiff that it was imperative that she keep this appointment or give

Georgia Gulf a satisfactory reason why she could not attend or keep the appointment.

When the plaintiff failed to keep the second appointment with Dr. Grace, Georgia Gulf notified the plaintiff by letter that her job was considered abandoned since she had not provided verifiable medical documentation to Georgia Gulf to justify her leave beyond September 13, 1999. The plaintiff then filed this lawsuit.

## II. Law and Analysis

### A. "Serious Health Condition" under the FMLA<sup>3</sup>

Under the FMLA, an employee who meets the tenure and hour requirements set forth in 29 U.S.C. § 2611(2)(A) is entitled to as many as 12 weeks unpaid leave over the course of 12 months when the employee suffers from a "serious health condition." The plaintiff bears the burden of proving that a "serious health condition" rendered her unable to perform the functions of her job.<sup>4</sup> A "serious health condition" is defined in 29 U.S.C. § 2611, which states:

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<sup>3</sup>29 U.S.C. § 2601, *et seq.*

<sup>4</sup>29 U.S.C. § 2612(1); 29 C.F.R. § 825.114; 29 C.F.R. § 852.800.

(11) Serious health condition

The term serious health condition means 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.

To establish the existence of a serious health condition, the employee is required to submit medical certification to the employer.<sup>5</sup> An employer who has reason to doubt the validity of the certification is allowed, at the employer's expense, to require the employee to have a second opinion by a health care provider of the employer's choosing.<sup>6</sup>

During the course of the trial the Court heard the testimony of the plaintiff, plaintiff's daughter, and plaintiff's friend and co-employee. The Court has read the deposition and medical records of Dr. Gold and Dr. Brian Gremillion, and the medical records of Dr. Isaza.

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<sup>5</sup>29 U.S.C. § 2613(a).

<sup>6</sup>See 29 U.S.C. § 2613(c)(1).

These medical records and deposition testimony reveal that the plaintiff began seeing Dr. Brian Gremillion as her primary care physician in February of 1999.<sup>7</sup> Dr. Gremillion testified in his deposition that he "really didn't treat the neck."<sup>8</sup> Because the existence and severity of patient's neck injury was the sole issue at trial, the Court finds that Dr. Gremillion's testimony is irrelevant in determining the plaintiff's "serious health condition."

The plaintiff began seeing Dr. Gold in April of 1999. In his trial deposition, Dr. Gold testified that the main complaint the plaintiff presented during her initial visit was headaches. Dr. Gold also testified that he saw nothing in her examination and medical tests that rendered the plaintiff incapable of light-duty or secretarial work.<sup>9</sup> Dr. Gold further testified that he extended the plaintiff's leave to six weeks with the expectation that the plaintiff would comply with his instructions to see him regularly for pain management and evaluation.<sup>10</sup> Dr. Gold also stated that, in his opinion, there was nothing physically wrong with the plaintiff which would keep her from returning to work on September 13, 1999. Finally, Dr. Gold testified that he changed plaintiff's

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<sup>7</sup>Deposition of Dr. Brian Gremillion, p. 6.

<sup>8</sup>Deposition of Dr. Gremillion, p. 9, line 8.

<sup>9</sup>Trial Deposition of Dr. Gold, p. 21.

<sup>10</sup>Trial Deposition of Dr. Gold, p. 27.

leave request to six weeks based on her repeated requests and not because of a medical necessity.<sup>11</sup>

The FMLA requires that the serious health condition from which an employee suffers be so severe that it renders the employee incapable of performing her job functions. The FMLA also states in 29 U.S.C. § 2612 under "Leave entitlement," as follows:

(a) In general

(1) Entitlement to leave

. . .

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Based on the conflicting leave forms and explanations therefor given by Dr. Gold, the Court finds that the plaintiff has failed to prove that she in fact suffered a "serious health condition" as stated under the FMLA which prevented her from performing the functions of her job as a secretary. Thus, plaintiff has failed to prove an essential element of her FMLA claim. Therefore, since plaintiff has failed to prove she had a serious health condition, she is not entitled to recover on this claim.

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<sup>11</sup>Trial Deposition of Dr. Gold, p. 40.

B. Georgia Gulf's Request for a Second Opinion

Plaintiff also contends that Georgia Gulf violated the FMLA by requesting a second opinion. Georgia Gulf argues that it was entitled to request a second opinion regarding the plaintiff's condition based on the conflicting medical documents that had been presented to them on September 8, 1999 by Dr. Gold. The FMLA authorizes an employer to request a second medical opinion in 29 U.S.C. § 2613, which states as follows:

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under paragraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, **at the expense of the employer**, that the eligible employee obtain the opinion of a second health care provider **designated or approved by the employer** concerning any information certified under subsection (b) of this section for such leave.

(2) Limitations

A health care provider designated or approved under paragraph (1) **shall not be employed on a regular basis by the employer.** (Emphasis added).

The Court finds that sufficient confusion and actual conflicts existed regarding the plaintiff's medical condition to allow Georgia Gulf to seek a second opinion under the provisions of the

FMLA. Georgia Gulf made two appointments for the plaintiff with Dr. Grace after it received the two conflicting September 8, 1991 reports from Dr. Gold. The plaintiff agreed to attend both medical appointments but failed or refused to attend either appointment.

During the trial, plaintiff strenuously argued that Georgia Gulf violated the FMLA by requiring the plaintiff to see a "company doctor." Plaintiff contends that Dr. Grace is employed or contracted by Georgia Gulf. However, this contention is not supported by the evidence. Mowry testified that he had referred to Dr. Grace on numerous occasions as "the Georgia Gulf doctor" or the "company doctor." However, Mowry clarified his statement by stating he simply meant Dr. Grace was selected to examine the plaintiff and would be paid by Georgia Gulf for the medical examination. The evidence reveals that Georgia Gulf used many other doctors in addition to Dr. Gold for its employees, including the Baton Rouge Clinic.

The Court finds that Georgia Gulf was entitled to seek a second medical opinion as provided in the FMLA. The Court further finds that plaintiff did not present any credible evidence proving that Dr. Grace was employed on a regular basis by Georgia Gulf. This claim is without merit.

### C. Damages

Because the Court finds that plaintiff has not proven that she suffered from a "serious health condition" which rendered her incapable of performing the functions of her job as a secretary, or that Georgia Gulf violated the FMLA by seeking a second opinion, plaintiff is not entitled to damages.

However, even assuming that the plaintiff had proven liability, she has failed to prove by a preponderance of evidence that she is entitled to damages. The record is totally void of any credible evidence to support plaintiff's claim for damages. The plaintiff failed to introduce recent tax returns. Plaintiff testified from her own memory regarding her salary and benefits package, but did not present any credible evidence of the value of her alleged loss. Furthermore, the fact that plaintiff allegedly could not afford to hire an expert economist to establish her alleged damages does not relieve the plaintiff of her burden of proof in this case.

Finally, had plaintiff proven she was entitled to damages, the award would be offset by any sums that the plaintiff received from other sources, such as unemployment compensation or subsequent employment. The plaintiff testified that she was hired by Lindsey's Amusements and was actually making more at this job than at Georgia Gulf. The plaintiff also testified that she quit this job shortly thereafter because she was not satisfied with the

benefits package. In short, plaintiff would not have been entitled to recover damages even had she proved liability in this case.

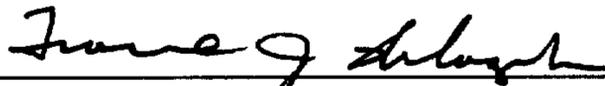
### III. Conclusion

The Court finds that the plaintiff has failed to prove that she suffered a "serious health condition" under the Family and Medical Leave Act which rendered her incapable of performing her job functions as a secretary. The Court further finds that Georgia Gulf did not violate the FMLA by requiring plaintiff to attend a second opinion examination with a doctor designated and paid for by Georgia Gulf. Finally, the plaintiff is not entitled to, nor did she present credible evidence to establish any damages for the loss of her position at Georgia Gulf.

Therefore:

IT IS ORDERED that judgment shall be entered in favor of the defendant Georgia Gulf Corporation, dismissing plaintiff's suit at her costs with prejudice.

Baton Rouge, Louisiana, this 30 day of September, 2002.



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CHIEF JUDGE FRANK J. POLOZOLA  
MIDDLE DISTRICT OF LOUISIANA