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TWO WEEKS' VACATION: JUST WHAT THE DOCTOR ORDERED

By Kerri A. Wright

Recently, in *Hurley v. Kent of Naples, Inc.*, 746 F.3d 1161 (11th Cir. 2014), the United States Court of Appeals for the Eleventh Circuit vacated a $1 million award in favor of an executive of Kent of Naples, Inc., who had claimed his company violated the Family Medical Leave Act when it refused to permit him to take certain set vacation times throughout the year in order to stave off alleged bouts of depression and anxiety. The Eleventh Circuit found that Hurley's requested leave did not qualify for protection under the Family Medical Leave Act ("FMLA").

A win for employers struggling to reign in employees' misuse and abuse of medical and family leave, *Hurley* demonstrates that there are indeed limits to employees' seemingly boundless requests for leave under the federal FMLA and the New Jersey Family Leave Act ("NJFLA").

THE FACTS

Plaintiff Patrick Hurley was employed by the Defendant Kent of Naples, Inc. ("Kent") as an executive. One evening, after approximately seven years with the company, he sent an email to the CEO of Kent's parent company the subject line of which was "Vacation Schedule." In the body of the email,

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Hurley said, "attached is my vacation schedule going forward. The dates are subject to change." The attached schedule listed eleven weeks of vacation over the next two years. During the trial, Hurley testified that he meant this to be a medical leave request, not a vacation request, but that he had been embarrassed by his condition. Therefore, he had not specifically identified it as a request for medical leave.

The CEO of Kent's parent company responded, "Your request has been denied, please schedule a meeting with me to discuss this further." Dissatisfied with this response, Hurley replied that the "email below, which regards my upcoming vacation schedule, was not a request it was a schedule." Hurley also claimed that "I have been advised by medical/health professionals that my need to avail myself of vacation time that I have earned is no longer optional." Although not mentioned in the email, Hurley had been suffering from depression and anxiety which produced panic attacks. Hurley closed the letter by accusing the CEO of failing to pay him an overdue bonus and privately ridiculing his ideas.

The CEO called Hurley the next day to discuss the email. The parties dispute what happened next. Hurley said that during this conversation he explained his medical condition and need for leave. The CEO denies that Hurley mentioned his medical condition. Regardless, both parties agree that, during this conversation, the CEO terminated Hurley's employment. The CEO testified that he terminated Hurley for insubordinate behavior and poor performance.

A week after his termination, Hurley visited his doctor, who filled out a FMLA form for Hurley, despite knowing that Hurley had already been terminated. In the form, the doctor noted that Hurley suffered from depression and had received treatment for his condition. Nevertheless, the doctor also noted that he could not determine the duration and frequency of any incapacity.

PLAINTIFF FILES SUIT

As a result of these events, Hurley filed a lawsuit against Kent, its parent company, and the CEO of the parent company (hereinafter "defendants"). Hurley asserted two claims: (1) that defendants interfered with his right to unpaid leave

under the FMLA; and (2) that defendants retaliated against him by terminating his employment because he requested unpaid leave under the FMLA. Hurley claimed that he suffered from a "serious medical condition." However, apparently important to the Eleventh Circuit Court of Appeals, "Hurley never alleged that he was unable to work or incapacitated."

Hurley moved for summary judgment on liability in the case, and defendants moved for summary judgment on all issues. Defendants acknowledged that Hurley suffered from depression, but contended that Hurley's leave request was not protected under the FMLA because it was for vacation. They further relied upon the federal regulations that hold that "the term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 *C.F.R*. 825.113.

Hurley admittedly did not have any period of incapacity. Instead, he asserted that his leave was protected under the FMLA "because he had a chronic serious health condition."

The district court determined that there was a material factual dispute in the case and denied both summary judgment motions. The district court decided that some evidence supported a finding that Hurley suffered from a "chronic serious health condition," but never considered whether the leave Hurley requested was for a "period of incapacity or treatment for such incapacity." As such, the case was tried before a jury.

During the trial, the bulk of the evidence centered on the nature of the leave Hurley planned to take and whether he would be incapacitated. Hurley's doctor -- the one who completed the medical leave certification form after his termination -- testified that "he did not mean to imply that Hurley needed medical leave for the dates in the schedule that Hurley sent to [the CEO]." In fact, the doctor had never seen the schedule of dates. Therefore, the doctor was unable to certify that Hurley would be "incapacitated" on those specific dates. In addition to his doctor, Hurley's counselor testified that he encouraged Hurley to take time off work "to improve his health" but that there was a difference between

that and "necessary medical leave because he could not work."

Hurley testified that "he and his wife picked the leave days without any input from a healthcare professional." He further testified that his "leave was not intended to predict" when he would be incapacitated because he "just never knew when [he] was going to have an episode or when the panic attacks would come." He also acknowledged that he did not have any doctor's appointments or other medical treatment scheduled for those dates. Instead, he expected to speak with his physicians about "things [he] could do during these times that would help [him] get better."

The Eleventh Circuit described the jury's verdict as "puzzling" in that the jury awarded Hurley $200,000 in damages, despite its finding that Hurley's request for leave was NOT a substantial or motivating factor in defendants' decision to terminate Hurley. As Hurley had offered no basis for damages, other than his termination, the jury's verdict was inconsistent. Nevertheless, the district court upheld the jury's verdict and, in addition to the $200,000 in actual damages awarded by the jury, awarded liquidated damages (no explanation was given for the basis for this award), front pay (wages he would have earned over the next three years if he had not been unlawfully terminated), and attorneys' fees and cost of suit. All together, the district court entered judgment in favor of Hurley in the amount of $1,008,340.96.

THE ELEVENTH CIRCUIT REVERSES THE DISTRICT COURT'S DECISION

On appeal, the Eleventh Circuit focused on whether Hurley actually qualified for FMLA leave and then, if he did not, was that fatal to his claim that defendants interfered with his right to take FMLA and retaliated against him for requesting such leave. Ultimately, the Eleventh Circuit concluded that Hurley had not qualified for FMLA leave and, because of that, he could not seek refuge in the protections of the FMLA as related to a claim for interference and retaliation.

The FMLA grants an eligible employee the right to take up to 12 weeks of unpaid leave annually for any one or more of several reasons, including "because of a serious health

condition that makes the employee unable to perform the functions of the position of such employee." 29 *U.S.C.* 2612(a)(1)(D). The court noted that "to protect this right, the FMLA allows employees to bring a private cause of action for interference or retaliation." However, it determined that, to assert a claim for interference under the FMLA, "an employee must be entitled to the benefit denied" in the first place. Similarly, to assert a retaliation claim, "the employee must show -- among other elements -- that he engaged in statutorily protected activity." One cannot engage in statutorily protected activity under the FMLA unless he or she actually qualifies for the leave first. "[B]oth causes of action require the employee to establish that he qualified for FMLA leave." *Hurley*, 746 F.3d at *12.

Hurley argued that, once he gave notice of his desire to take leave, he was subject to the protections of the FMLA. In support of this argument, he noted that if employers were permitted to use after-acquired evidence to justify prior actions of interference and retaliation, that would inhibit employees from seeking such leave in the first place. Disagreeing with Hurley, the Eleventh Circuit held that "[g]iving an employer notice of unqualified leave does not trigger the FMLA's protection. Otherwise, the FMLA would apply to every leave request."

The Eleventh Circuit then analyzed, and subsequently rejected, Hurley's claim that he was qualified for FMLA leave. In doing so, the Eleventh Circuit noted that "the FMLA does not extend its potent protection to any leave that is medically beneficial leave simply because the employee has a chronic health condition. Rather, the FMLA only protects leave for any period of incapacity or treatment for such incapacity due to a chronic serious health condition." 29 *C.F.R.* 825.115(c). The regulations define "incapacity" as "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 *C.F.R*. 825.113. The Eleventh Circuit further held that Hurley would not necessarily have to have been "currently experiencing a period of incapacity" at the leave dates to qualify under the FMLA. However, if he was not, he would have to have been receiving treatment for a previous period of incapacity.

Hurley admitted that his leave was not for a period of incapacity nor was it for the treatment of a future or past period of incapacity. While Hurley argued that he "intended" to schedule treatments during his leave, that alone was not sufficient. Ultimately, the Eleventh Circuit noted that it comes down to whether there is a period of "incapacity." It found no such period of incapacity with Hurley. As such, he was not eligible for FMLA leave.

KEY TAKEAWAYS

Hurley reminds employers that requests for FMLA leave, while they must be reviewed and considered carefully, are not carte blanche for employees to take advantage of their employers. All employees ostensibly could experience health benefits from time away from work, particularly those with relatively stressful jobs. For this reason, most employers offer their employees vacation time, whether paid or unpaid. While not disagreeing that vacation time can be beneficial to employees from a health-standpoint, *Hurley* confirms that vacation time cannot be demanded by employees under the guise of the FMLA simply because a vacation would be beneficial. Whether an employee seeks to "recharge his batteries" or "take a mental health day," as is often the reason given for seeking a day off or a vacation, the FMLA is not implicated unless there is a serious medical condition and a period of incapacity.

Keeping in mind that *Hurley* suffered from both depression and anxiety attacks, this case reminds employers that it is not always easy to determine when an employee is seeking FMLA leave when he or she asks for time off. Human resource professionals and front-line managers who may be presented with requests for time off should receive specific training in recognizing when employees may be eligible for FMLA or NJFLA leave, even when the employees do not use the "magic words."

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