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FMLA DOES NOT PROTECT PARTIAL DAYS OF INCAPACITY

Pursuant to the Family and Medical Leave Act (FMLA), covered employers must provide eligible employees up to twelve workweeks of unpaid leave during any 12-month period because of, among other things, a serious health condition that makes the employee unable to perform the functions of his or her position. This leaves the question, however, of what constitutes a serious health condition.

In *Russell v. North Broward Hospital*, 346 F.3d 1335 (11th Cir. 2003), the Eleventh Circuit recently addressed this issue and in doing so evaluated the FMLA's definition of a serious health condition and the validity of the Department of Labor's (DOL) governing regulations, which require that a serious health condition involving continuing treatment by a health care provider include a period of incapacity of more than three consecutive calendar days. The Eleventh Circuit held that the DOL's regulation was valid and properly understood to require more than three consecutive full days of incapacity; consecutive partial days are insufficient.

FACTUAL BACKGROUND

Margaret Russell, a patient accounts adjustment representative for North Broward Hospital, was disciplined many times over the course of her employment for excessive absenteeism. Such discipline led to a three-day suspension without pay and a warning that further incident would result in termination. On May 31, 2000, Russell suffered a workplace injury when she slipped and fell. Russell fractured her right elbow, sprained an ankle, and aggravated a pre-existing wrist injury. The treating physician at the workers' compensation health care provider gave Russell a sling for her arm, prescribed pain medication and advised Russell to restrict the use of her right arm.

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The following day, Russell reported for work but left after two hours due to severe pain. Russell returned to the clinic and was instructed to seek the advice of an orthopaedist. Russell did not return to work. Instead, she called her supervisor and asked for the following day off; Russell's supervisor declined her request.

On June 2, Russell reported to work at 8:00 a.m. but left at 9:05 a.m. due to vomiting, allegedly from too much pain medication. Over the next week, Russell was intermittently absent from work. On two occasions, Russell failed to report to work entirely and only called in once to explain her absence (toward the end of her shift). Additionally, Russell worked five partial days and one full day. The hospital ultimately terminated Russell for excessive absenteeism.

Russell sued her former employer pursuant to the FMLA and alleged that she was entitled to protected leave due to a serious health condition. Russell contended that she had seven consecutive partial days of incapacity and satisfied the definition of "serious health condition." After being instructed that a "serious health condition" required three consecutive calendar days of incapacity, the jury ruled in favor of the hospital. Russell appealed to the Eleventh Circuit.

LEGAL ANALYSIS

As discussed above, the FMLA entitles an employee to unpaid leave due to a serious health condition. The FMLA defines a 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." See 29 U.S.C. § 2611(11). Part A of the definition was not at issue in Russell because Russell's absences did not involve inpatient care. Instead, the Eleventh Circuit focused on part B of the definition.

The FMLA is silent as to what constitutes "continuing treatment by a health care provider;" however, the DOL promulgated a regulation defining the phrase. See 29 C.F.R. § 825.114(a)(2)(i). In relevant part, the regulation provides that a serious health condition involving continuing treatment includes a "period of incapacity (i.e., inability to work, attend school, or perform regular daily activities...) of more than three consecutive calendar days..." Although Russell argued that she was incapacitated for seven consecutive partial days, she never claimed that she was incapacitated for more than three consecutive full calendar days.

In rejecting Russell's argument, the Eleventh Circuit relied on the plain language of the DOL regulation and the

ordinary meaning of calendar days: "The period from one midnight to the following midnight." The court's interpretation upheld Congress's intent that "serious health conditions" be, in fact, serious, and are conditions that cause an extended period of incapacity." Thus, the Eleventh Circuit established a bright-line rule defining the period of incapacity necessary to invoke the FMLA's protection for serious health conditions involving continuing treatment. The decision is a blessing for employers because it provides a straight-forward standard to be applied in certain situations under the FMLA.

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