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The FMLA and "regimen of continuing treatment" interpreted by the Eighth Circuit in Johnson v. *Wheeling Machine Products*, 779 F.3d 514, 517 (8th Cir. 2015)
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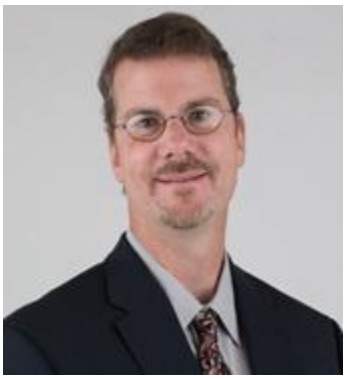
The Family and Medical Leave Act ("FMLA") entitles eligible employees to take up to twelve workweeks of unpaid leave because of a serious health condition that make the employee unable to perform the functions of his or her position. *See* 29 U.S.C. § 2612; 29 C.F.R. § 825.112. A serious health condition is defined as an illness, injury, impairment or physical or mental condition that involves: (a) inpatient care; (b) a period of incapacity combined with treatment by a health care provider; (c) pregnancy or prenatal care; (d) chronic conditions; (d) long-term incapacitating conditions, and; (e) conditions requiring multiple treatments. *See* 29 C.F.R. § 825.113(a); 29 C.F.R. § 825.115. Where absences from work are not attributable to a "serious health condition", the FMLA is not implicated and it does not protect an employee from disciplinary action based upon such absences. *Rankin v. Seagate Techs., Inc*. 246 F.3d 1145, 1147 (8th Cir. 2001); *see also Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1045-46 (8th Cir. 1999); *Darby v. Bratch*, 287 F.3d 673, 680 (8th Cir. 2002)(an employee "could be disciplined for taking unpaid leave not covered by the FMLA"); *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1195 (8th Cir. 2000)("Where an employee has not shown his absences to be a result of a serious health condition, he is not protected by the FMLA.").

The Eighth Circuit recognizes three categories of FMLA claims arising under 29 U.S.C. §2615 (a)(1)-(2): (1) entitlement claims, (2) discrimination claims, and (3) retaliation claims. *Johnson v. Wheeling Machine Products*, 779 F.3d 514, 517-518, (8th Cir. 2015). In an entitlement claim, "an employee alleges a denial of a benefit to which he was entitled under the statute[.]" *Id.* In a discrimination claim, an employee alleges the employer discriminated against him or her because the employee exercised his or her rights under the FMLA. *Id*. Finally, in a retaliation claim, "an employee alleges that the employer took adverse action against him for opposing a practice made unlawful under the FMLA." *Id*.; *see also Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005-1006 (8th Cir. 2012) (provides a detailed discussion of the three types of claims arising under 29 U.S.C. § 2612 (a)(1)-(2)). To succeed on a FMLA "entitlement claim" and a FMLA "discrimination claim", the employee must establish that he or she was, in fact, entitled to FMLA leave. *Johnson*, 779 F.3d at 517, *citing Stallings v. Hussmann Corp*., 447 F.3d 1041, 1050 (8th Cir. 2006) and *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1340 (11th Cir. 2003).

In *Johnson v. Wheeling Machine Products*, as recent as February 2015, the Eighth Circuit was tasked with deciding what constitutes "continuing treatment" insofar as "[t]reatment by a health care provider on at least one occasion, which results in a *regimen of continuing treatment under the supervision of the health care provider*" within the context of FMLA entitlement and discrimination claims. Johnson left work because he was not feeling well and he went to a local health care clinic where he saw a physician assistant whom he had never seen before. The physician assistant diagnosed Johnson with high blood pressure, prescribed blood pressure medication, and told him to follow up with his regular physician, but did not indicate when the follow up appointment should occur. Johnson contended those facts met the definition in 29 C.F.R. §825.115(a)(2) (the "regimen definition"). The Eighth Circuit ruled "...a single treatment by a health care provider resulting in a prescription, coupled with the requisite period of incapacity, can establish a serious health

condition under the regimen definition. As the regulation makes clear, however, the regimen of continuing treatment - in this case, a course of prescription medication - **must also be `under the supervision of the health care provider**.' §825.115(a)(2)." *Johnson*, 779 F.3d at 518 (emphasis supplied). In Johnson, the Eighth Circuit focused on what it means for a physician to *supervise* the regimen of continuing treatment (prescription medication). The Court quoted from the FMLA Final Rules and stated, "'it is envisioned that a patient would be under continuing supervision in this context, for example, where the patient is advised to call if the condition is not improved.' FMLA Final Rule, 60 Fed. Reg. 2180, 2195 (Jan. 6, 1995)." *Id*. The Eighth Circuit was unwilling to find that simply because prescription medication is prescribed, it follows that the medical care provider is "supervising" the prescription regimen. *Johnson*, 779 F.3d at 520. The supervision requirement "...helps to ensure that minor conditions will fall outside the FMLA's coverage, as Congress intended." *Id*. The Eighth Circuit did not find that the physician's assistant that prescribed the blood pressure medication for Johnson supervised the treatment regimen. Even though the physician's assistant instructed Johnson to follow up with his regular physician, the Eighth Circuit stated the physician's assistant "...did not oversee, watch, or direct any part of Johnson's treatment regimen; he simply prescribed Johnson medication and sent him on his way." *Id*. And, even though Johnson followed up with his regular doctor, the Eighth Circuit was unwilling to find that Johnson's regular physician "supervised" a regimen of continuing treatment because the record was unclear when the follow-up appointment occurred and whether Johnson was still taking the medication at the time of the appointment. And, at the follow up visit, Johnson's prescription was not renewed, instead, he was instructed to control his blood pressure with exercise. *Id*. The Eighth Circuit noted the regulations make it clear that bed rest, over the counter medication, drinking fluids, exercise and other similar activities that can be initiated without a visit to a health care provider are not sufficient to demonstrate a `regimen of continuing treatment'. *Johnson* stands for the proposition that a single visit to a health care professional who prescribes medication, without more, is insufficient to satisfy the "regimen of continuing treatment under the supervision of a health care provider" which thereby implicates the FMLA. In other words, someone that is in a car wreck, for example, and goes to the emergency room where they are prescribed medication, but does nothing more after leaving the ER insofar as follow up medical treatment, is not necessarily afforded protection under the FMLA for time taken off work after the wreck.

The thanks of the AADC go out to Thomas J. Diaz of Rainwater, Holt & Sexton for writing this article. We welcome your articles and thoughts for future editions.



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