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This Should Go Without Saying: An Employee Who Is Only Potentially Qualified For FMLA Leave Is Not Actually Qualified For Leave

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Under the Family Medical Leave Act ("FMLA"), a qualified employee is permitted to take up to 12 weeks of leave in order to seek treatment for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." Additionally, the FMLA prohibits employers from retaliating against employees who have given notice of their need to take qualifying leave. What happens, though, when an employee simply gives notice of his need to take potentially qualifying leave at some point in the future? The Eleventh Circuit Court of Appeals recently considered that question. In *Hurley v. Kent of Naples*, an executive sent an email to his boss to which he attached a "vacation schedule" listing eleven weeks of vacation that the executive intended to take over the next two years. In response to the email, the executive's boss informed him that his "request" for vacation was denied. The executive replied that he had not sent a "request," he had sent a "schedule." The executive also stated that he had been advised by medical professionals that he needed to use more of his earned vacation time. (This, apparently, was because he suffered from depression.) In other words, the executive told his boss that he was taking the "scheduled" days off – which just happened to be grouped around holiday weekends – whether his boss liked it or not. You can guess what happened next: The executive was fired and he filed a lawsuit alleging that he was fired in retaliation for seeking protected FMLA leave. But the executive never suggested that he needed to schedule leave for the next two years because his depression was making it impossible for him to perform the functions of his job at the moment that his submitted his schedule. Instead, he alleged that he needed to take the days off because his depression might make it impossible for him to do his job. In short, he argued that the FMLA protects employees who "potentially qualify" for leave, not just employees who actually qualify. The Eleventh Circuit disagreed, and it reversed a jury decision in favor of the executive. That should come as a relief to all employers, but it should not come as a surprise. In essence, the Eleventh Circuit simply held that, to be qualified for FMLA leave, an employee must actually be qualified for FMLA leave. The fact that an employee has the potential to be qualified for FMLA leave in the future does not mean that an employee is qualified for leave now. So the employer in *Hurley* prevailed. Still, the case demonstrates why the FMLA can be problematic for employers and why it makes sense for employers to reach out to legal counsel when FMLA issues surface. If the facts of the case had been just slightly different – if the executive had been suffering from a bout of depression at the time that he sent his schedule to his boss the outcome could have been different. If you were wearing the boss' shoes, would you have felt comfortable firing an employee who was suffering from depression right after he had asked you for time off on the advice of medical professionals?

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