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AT ISSUE



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Third Circuit Court of Appeals Imposes Arbitrary Standard in FMLA Case

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A lot of media coverage points out that the United States lags behind the rest of the world in requiring employers to provide leave for illness and maternity. The only protection many American workers have is the Family Medical Leave Act of 1993 (FMLA), a federal law that protects some workers' jobs when they need to take leave to care for their own (or an immediate family member's) serious medical condition. 29 U.S.C. § 2601, et seq.

To be eligible for up to 12 weeks of unpaid, job-protected leave, an employee must have worked at least a year for an employer with 50 or more full-time employees within 75 miles of where she works and, during that year, must have worked a minimum of 1,250 hours. *Id.* at § 2611. The serious medical condition must require continuing treatment or inpatient care in a hospital or similar facility. *Id.* The federal regulations define "inpatient care" as "an overnight stay in a hospital." 29 C.F.R. § 825.114.

On May 22, 2015, the Third Circuit Court of Appeals adopted an arbitrary standard for determining what constitutes an overnight stay. This harmful decision places yet another hurdle in the way of employees whose livelihoods depend on holding on to their jobs during a period of illness.

In *Bonkowski v. Oberg Industries, Inc.*, Jeffrey Bonkowski left work early on a Monday afternoon after experiencing chest pain and shortness of breath. 992 F. Supp. 2d 501 (W.D. Pa. 2014) *aff'd*, 787 F.3d 190 (3d Cir. 2015). That evening his wife took him to the emergency room, but the hospital did not admit him until shortly after midnight – early Tuesday. After tests showed no complications with his various pre-existing medical conditions, the hospital released him about 19 hours

after his admission. The next day, Oberg Industries fired Bonkowski claiming he walked off the job on Monday.

Bonkowski sued, alleging that his former employer violated his FMLA rights by terminating him. Oberg Industries argued Bonkowski could not show that he had a serious medical condition that entitled him to FMLA job-protection because he did not meet the "overnight stay" requirement. In granting summary judgment for the employer, the district court explained that neither the statute nor the corresponding regulations defined "an overnight stay," so it had to consider the ordinary meaning of the word. The court consulted several dictionaries before determining that "an 'overnight' stay at a hospital is a stay from sunset on one day to sunrise the next." *Id.* at 511. The court held that, because Bonkowski was not admitted to the hospital until Tuesday – well after Monday's sunset – he had not shown he had a serious medical condition and, therefore, could not succeed in his lawsuit.

On appeal, the Court of Appeals for the Third Circuit rejected both the district court's sunset-sunrise approach and a totality-of-the-circumstances approach proposed by the plaintiff. Instead, the court held "that 'an overnight stay' means a stay in a hospital... for a substantial period of time from one calendar day to the next calendar day as measured by the individual's time of admission and his or her time of discharge." 787 F.3d at 199.

Despite purporting that the select-approach "constitutes an objective 'bright-line' criterion," the court left for another day the task of explaining what "a substantial period of time" means, though it did mention that "a minimum of eight



hours would seem to be appropriate." *Id.* at 209-10.

Because Bonkowski was admitted and discharged from the hospital on the same calendar day, the court held that he had not shown a serious medical condition entitling him to job-protected leave under the FMLA, despite that he had been hospitalized for 19 hours. Bonkowski did not allege, and the court did not consider, whether Bonkowski had a serious medical condition under the other "serious medical condition qualification" continuing medical treatment. 29 U.S.C. § 2611.

Judge Fuentes' dissent highlighted the arbitrary nature of the majority's calendar-day approach. A variety of logistical factors can impact admission times (e.g., the location of the hospital, the time of day or day of the week, transportation challenges and seasonal weather) which, in turn, make the approach inequitable.

The dissent proposes the "totality-of-the-circumstances" approach, which the majority had rejected because it would be "more difficult for both employers and employees to predict whether a specific set of circumstances rises to the level of 'an overnight stay'... and lead to additional litigation in the future with possibly inconsistent results." 787 F.3d at 214. The dissent counters that the facts normally considered in a totality-of-the-circumstances approach (e.g., length of admission, assignment to a room, comprehensive testing and treatment, etc.) are seldom matters of dispute and, therefore, that problem will infrequently arise.

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This Third Circuit precedent will lead to a host of anomalies; a person admitted to the hospital at 10 p.m. and discharged at 6 a.m. the next day may receive job-protection under the FMLA, whereas a person who is admitted at 2 a.m. and discharged at 9 p.m. does not, despite being hospitalized 11 hours longer. Moreover, logistical factors are not taken into account; for instance, delays in admission may occur where the hospital is faced with more emergent patients and those needing immediate intensive care. Additionally, the precedent neglects the public policy implications of this approach in that one doctor may let a patient stay a few more hours than necessary in order to protect her employment, while another doctor may discharge a similarly-ill patient as soon as possible — without any thought of the employment consequences.

Bonkowski v. Oberg Industries, Inc. creates yet another hurdle for a worker seeking job-protected medical leave. The approach created by the Third Circuit Court of Appeals is arbitrary and, as explained by the dissent, inequitable. Attorneys who represent employees must now be extra aware that a client's hospitalization does not automatically trigger employment protections under the FMLA. These attorneys should make sure to perform a thorough intake in which they ask potential clients about the exact dates of hospitalizations. If a client's stay at a hospital does not satisfy the "calendar-day" approach, the attorney should collect information regarding any and all follow-up treatment received by the client after his hospitalization in order to instead pursue a possible FMLA claim under the "continuing treatment" prong.



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