**IN THE COURT OF APPEALS OF IOWA**

No. 1-964 / 11-0546
Filed May 9, 2012

**MELVIN HAYES,**
Plaintiff-Appellant,

**vs.**

**VERMEER MANUFACTURING CO.,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Marion County, Darrell Goodhue, Judge.

Plaintiff appeals from summary judgment entered in favor of defendant. **AFFIRMED.**

Jill Zwagerman of Newkirk Law Firm, P.L.C., Des Moines, for appellant.

Kelsey Knowles, James Swanger, Michael Reck, and Mark McCormick of Belin McCormick, P.C., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

**DANILSON, J.**

Melvin Hayes appeals from entry of summary judgment in favor of the defendant, Vermeer Manufacturing Company. Hayes brought suit against his former employer, Vermeer, for retaliation and violation of his rights under the Family Medical Leave Act (FLMA) after Hayes was terminated for repeated tardiness allegedly caused by side effects of medication taken for his mental health condition. The district court granted summary judgment, concluding the FMLA intermittent leave sought was not available to Hayes. Upon our review we conclude Vermeer's bankruptcy contentions, including that Hayes was not the real party in interest due to his bankruptcy, were not addressed by the district court and do not serve to uphold the judgment of dismissal. However, we conclude Hayes' FMLA certification was facially invalid and did not show he was entitled to FMLA leave. Absent a showing by Hayes of a right to FMLA leave, Vermeer was entitled to deny Hayes' request without further inquiry. Accordingly, we determine the district court properly granted summary judgment to Vermeer on Hayes' FMLA claim. We affirm the ruling of the district court.

**I. Background Facts and Proceedings.**

Vermeer Manufacturing Company is an agricultural and construction equipment manufacturer that employed plaintiff Melvin Hayes as a welder from June 1999 until it fired him for attendance policy violations on August 13, 2008.[1] During his employment, Hayes worked five days per week on the first shift, which began at 6:30 a.m. and ended at 3:30 p.m. Aside from his tardiness,

[1] Hayes was temporarily laid off in March 2001 due to a reduction in force and was rehired in March 2004.

absenteeism, and some episodes of depression and crying while on the job, Hayes was a very capable welder and performed his job in a satisfactory manner. He received excellent progress reports and annual raises.

For a short time during 2006 or 2007, Hayes requested and was granted FMLA leave for "anger and mental instability." Hayes' primary care physician, Dr. Daniel Wright, provided Hayes the FMLA certification for his request. Hayes was allowed to return to work after completing his FMLA leave. Apparently, he resumed his job duties in full capacity.

Late in 2007, Hayes learned his wife was having an affair. Hayes' mental health deteriorated. He began treatment at Pine Rest mental health facility in January 2008. From February 1 to February 5, 2008, he was admitted as an inpatient to Ottumwa Regional Health Center for suicidal ideations. Hayes was tardy to work on January 18, March 18, March 22, March 31, and April 1, 2008. Vermeer informed Hayes repeatedly that he must arrive on time or he would be considered tardy. Vermeer told Hayes if he was not able to get to work on time, he should call his immediate supervisor thirty minutes before his shift began.

Hayes told Vermeer that medication for his depression caused him to oversleep and feel drowsy. Some days, Hayes spent hours crying while at work. Vermeer suggested Hayes could apply for FMLA leave. On April 4, 2008, Hayes asked his primary care physician, Dr. Wright, to provide him an FMLA certification to excuse his tardiness. Dr. Wright declined to do so.

However, Hayes' treating psychiatrist, Dr. Elaine Duryea, did provide him an FMLA certification. The certification provided Hayes had a "Serious Health Condition" which qualified for FMLA leave under the category "Chronic Condition

Requiring Treatment." Dr. Duryea described the nature of Hayes' illness as "major recurrent depression plus personality disorder NOS." Dr. Duryea noted Hayes experienced his "1st episode" twelve years ago, and "this episode started early January '08." The certification further provided, the "Period of incapacity: 02/01/08 to 02/05/08—unable to work—inpatient; 2/05/08 to chronic—continued treatment, expect to be tardy 1 ½ hours due to sedation from meds 4-5 times/month." The certification noted Hayes was "able to perform all of his essential job functions," and did not "need to work less than a full schedule," but his treatment would be "ongoing" and "continuing." The certification was dated April 3, 2008, and was faxed to Vermeer on April 4, 2008.

The record includes a letter addressed to Hayes dated April 7, 2008, written by Patti Maloy, Vermeer's medical leave administrator, requesting "additional information" before a determination could be made on his FMLA request. The letter also asked, "If your medication is not changing why is it necessary for you to be tardy to work? Is there a way to change the medication time at night to keep you from oversleeping?" It is disputed whether this letter was received by Hayes, as he was having difficulty receiving his mail during that time period and had no recollection of receiving the letter. In addition, the letter is not signed by Patti Maloy, and it is not clear whether it was actually sent to Hayes.[2]

Hayes was tardy to work again on April 16 and April 30, 2008, due to the side effects of his medication. He was written up for these incidents. On April 30, 2008, Patti Maloy sent a letter to Hayes indicating his FMLA request

[2] Patti Maloy was not deposed.

was denied. The evidence in the record is contradictory as to whether Hayes received this letter denying his request for FMLA leave.

On August 11, 2008, Hayes was tardy again, due to having a flat tire en route to work. On August 13, 2008, Vermeer terminated Hayes "effective immediately" for excessive violations of its attendance policy, citing Hayes' tardiness in March, April, and August 2008. On September 11, 2008, Hayes filed a written notice of appeal of his termination with Vermeer, alleging a violation of his FMLA rights, which stated in part:

> An FMLA was filled out by my psychiatrist at Pine Rest and was rejected by [Vermeer employee] Patty Maloy, who is in charge of reviewing the FMLA's. I did not receive notice that the FMLA was rejected or what additional information might be needed for the FMLA to be approved.

On April 23, 2009, Hayes and his wife[3] filed a chapter 7 bankruptcy petition. The petition did not list any claim against Vermeer. The bankruptcy proceeding resulted in a discharge on August 4, 2009.

On December 23, 2009, Hayes filed a petition against Vermeer, alleging a violation of his rights under the FMLA and retaliation. On December 22, 2010, Hayes filed a motion to compel discovery. On that same day, Vermeer filed a motion for summary judgment, arguing (1) Hayes sought leave not permitted by the FMLA, (2) Hayes was estopped from pursuing his claim by having represented he had no such claim on his bankruptcy schedules; (3) Hayes was not the real party in interest; and (4) Hayes' claims were barred by the applicable statute of limitations. Hayes filed a motion for additional time to respond to summary judgment due to Hayes' illness and the need to complete discovery.

[3] Thereafter, Hayes and his wife were divorced.

The motion sought a delay until April 8, 2011, the date fixed in the scheduling order to complete discovery. The motion was granted by the district court, but the time granted was to be fixed at a subsequent hearing on Hayes' motion to compel that was set for January 14, 2011. A calendar entry order filed on January 14, 2011, reflects that Hayes was granted until February 11, 2011, to file his resistance, and the hearing on the motion for summary judgment was fixed for February 18, 2011. The calendar entry order also limited the hearing on the motion for summary judgment to two narrow legal issues: (1) whether Hayes' claim was precluded by his bankruptcy and (2) whether Hayes' FMLA certification "met the statutory requirements of a valid request." The calendar order also stated: "Plaintiff will be allowed to set out any factor which further discovery would reasonably affect the legal validity of the request made as a defense to the motion."

After the hearing, the district court entered a ruling on March 20, 2011, granting summary judgment in favor of Vermeer, determining "intermittent leave" under the FMLA was not available to Hayes because his requested leave was not for medical treatment, recovery, or because of incapacity. The court noted Hayes' physician "certified that he was able to perform the essential functions of the job and there was no direction to stay home." The court further concluded Hayes "simply overslept because of a medically related condition." The court did not reach the bankruptcy issues raised by Vermeer. Hayes appeals.

**II. Scope of Review.**

We review a district court's ruling on summary judgment for correction of errors at law. Iowa R. App. P. 6.907. "Summary judgment is appropriate when

there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). We are to view the facts on the record in the light most favorable to the nonmoving party. *Id*. Summary judgment should seldom be granted in the context of employment actions, because such actions are inherently fact based. *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). "Summary judgment is not appropriate unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." *Id*.

**III. Bankruptcy Issues.**

As an initial matter, Vermeer argues Hayes' bankruptcy precludes his FMLA claim. Specifically, Vermeer contends: (1) Hayes lacks standing to bring the claim; (2) Hayes' claim is barred by the applicable statute of limitations; and (3) Hayes is estopped from pursuing his claim by having represented he had no such claim on his bankruptcy schedules. Vermeer contends it "raised this issue in its summary judgment motion and, although the district court did not reach it after finding the FMLA did not allow the leave Hayes sought, it provides an alternative basis for affirming judgment in Vermeer's favor." Hayes argues "[t]he bankruptcy issue was not adjudicated at the district court level; thus, there is no final decision to appeal."

Although this issue was properly raised before and briefed to the district court, the district court did not address the issue in its ruling. It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Metz v.*

*Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue "without the benefit of a full record or the district court's determination." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If the district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). However, our supreme court has "recognized . . . a distinction between successful and unsuccessful parties for purposes of error preservation." *See Ritz v. Wapello Cnty. Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999) (citations omitted). As observed by our supreme court, "a successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court. This is because a party need not, in fact cannot, appeal from a favorable ruling." *Johnston Equip. Corp. v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992); *see also King v. State*, ___ N.W.2d ___, 2012 WL 1366597, at *6 (Iowa Apr. 20, 2012) (noting court "may choose to consider only grounds for affirmance raised in the appellee's brief, but [is] not required to do so, so long as the ground was raised below").[4]

Iowa Rule of Civil Procedure 1.904(2) permits a party to file a motion to request the district court to amend or enlarge its findings and conclusions, and to

[4] In the plurality opinion in *King* and the dissents to that opinion, our supreme court discussed error preservation issues as they relate to issues urged before the district court but not decided. 2012 WL 1366597, at *6 (Mansfield, J.); at *28-29 (Cady, C.J. concurring specially); at *36-37, 37 n.30, 39-41 (Wiggins, J. dissenting); at *41, 72 (Appel, J. dissenting). The plurality opinion and concurring opinion of Chief Justice Cady recognize the ability to determine issues on appeal that were litigated in district court, not raised on appeal but serve to uphold or affirm the district court. *Id*. at *6, *28-29

enable the court to modify its judgment or enter a new judgment. However, this rule only applies to the unsuccessful party, as the successful party has no motivation to file such a motion. *Ritz*, 595 N.W.2d at 789.

Here, Vermeer's contentions with regard to Hayes' bankruptcy precluding his FMLA claim were litigated in the district court, briefed on appeal, but not resolved by the district court. Under these circumstances we may consider the bankruptcy issues if they serve to uphold the district court's ruling. *See King*, 2012 WL 1366597, at *6.

However, contrary to Vermeer's contentions, even if the bankruptcy issues are resolved favorably to Vermeer, their resolution does not serve to uphold the district court's judgment of dismissal. The proper remedy for prosecuting an action by a party that is not the real party in interest is not to enter a judgment of dismissal, but rather the district court must determine if substitution of the real party is appropriate, and if so, to allow a reasonable time for such substitution. Iowa R. Civ. P. 1.201; *Frontier Leasing Corp. v. Links Eng'g*, *L.L.C.*, 781 N.W.2d 772, 776 (Iowa 2010); *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). Moreover, the related issue of whether any substitution of the real party in interest would violate the statute of limitations cannot be determined until the district court first concludes substitution is appropriate. Accordingly, we decline the invitation to entertain the bankruptcy issues because even if they were resolved favorably to Vermeer, they would not serve to affirm the judgment of dismissal but rather would require a remand to the district court.

**IV. The Family Medical Leave Act.**

The FMLA, 29 U.S.C. §§ 2601 *et seq.*, makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. 29 U.S.C. § 2615(a)(1). The FMLA affords an employee a private right of action against the employer for damages, interest, and other equitable relief. 29 U.S.C. § 2617(a)(2).

The FMLA allows eligible employees to take up to twelve weeks of intermittent leave during any twelve-month period if the employee is inflicted with a "serious health condition" that makes him "unable to perform the functions" of his position. 29 U.S.C. § 2612(a)(1)(D).

> The term "serious health condition" means 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.

29 U.S.C. § 2611(11). Here, evidence in the record indicates Hayes received "inpatient care" for his depression and his condition required "continuing treatment by a heath care provider." Accordingly, Hayes' depression would qualify as a serious health condition under both categories. *See Dollar v. Smithway Motor Xpress, Inc.*, 787 F. Supp. 2d 896, 911 (N.D. Iowa 2011).

An employee may take intermittent leave "for absences where the employee . . . is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider." *See* 29 C.F.R. § 825.203(c)(2). Intermittent leave under this category may be taken "when medically necessary." 29 U.S.C. § 2612(b)(1) ("Subject to subsection (e)(3) and section 2613 (f) of this

title, leave under subsection (a)(1)(E) may be taken intermittently or on a reduced leave schedule when medically necessary."). Section 2613(f) states an employer may require that a request for intermittent leave be supported by a certification, which "shall be sufficient" if it states:

> (1) the date on which the serious health condition commenced;
> (2) the probable duration of the condition;
> (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;
> (4)
> . . . .
> (B) for purposes of leave under section 2612 (a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee . . . .

The FMLA recognizes "[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition," which "continues over an extended period of time," and which may include "recurring episodes." 29 C.F.R. § 825.115(c). If a serious chronic health condition exists, absences attributable to incapacity, even if the employee does not receive treatment from a health care provider during the absence, are covered and protected. 29 C.F.R. § 825.115(f). Specifically, "any mental illness or condition that continues over an extended period of time and requires periodic doctor's visits because of, or to prevent, episodes during which the employee cannot perform regular daily activities qualifies as a serious health condition." *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 472 (8th Cir. 2007); *see also Spangler v. Federal Home Loan Bank of Des Moines,* 278 F.3d 847, 852 (8th Cir. 2002) (recognizing depression is a "serious health condition" within the meaning of the FMLA); *Dollar*, 787 F.

Supp. 2d at 911 (observing depression can qualify for FMLA by inpatient care, or by continuing required treatment).

The employer's duties under the FMLA are triggered when the employee provides enough information to put the employer on notice the employee may be in need of FMLA leave. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 786 (8th Cir. 2009). Here, Hayes' treating psychiatrist, Dr. Duryea, provided an FMLA certification to Vermeer stating Hayes was experiencing major recurrent depression plus personality disorder, and that his current episode had "started early January '08." Dr. Duryea checked the box "yes" to indicate Hayes "need[ed] to miss work intermittently," and further provided that Hayes' "period of incapacity" was "02/01/08 to 02/05/08—unable to work—inpatient; 2/05/08 to chronic—continued treatment, expect to be tardy 1 ½ hours due to sedation from meds 4-5 times/month." Dr. Duryea provided that Hayes' treatment would be "continuing" and "ongoing."

Hayes contends the district court erred in granting summary judgment and ignoring the FMLA regulations. He argues that "depression is a serious health condition and an FMLA qualifying event." Specifically, Hayes contends the district court erred in granting summary judgment because the FMLA leave he requested "is precisely the type of leave allowed for under 29 C.F.R. § 825.115."

Hayes states the district court incorrectly relied upon the fact Dr. Duryea checked the box "yes" to indicate Hayes was "able to perform all of his essential job functions" and checked the box "no" to indicate Hayes did not "need to work less than a full schedule" to conclusively determine he was not "incapacitated" by his serious health condition. As the district court observed:

> Plaintiff has directed the Court to 29 C.F.R. § 825.116(f) wherein examples of untreated absences are included as qualified leave. Examples given are the onset of an asthma attack or severe morning sickness, but in both cases it was qualified by the requirement that the employee was "unable to report for work" or when the employee's health care provider "advised the employee to stay home." When an employee is "unable to report for work," he *isn't able to perform the essential functions of the job*. When an employee is directed to stay home by the care provider, the doctor has given direction based on a medical necessity, and furthermore if the employee is at home under medical direction, *he is incapable of performing the essential functions of the job.* In the plaintiff's case, *the doctor certified that he was able to perform the essential functions of the job and there was no direction to stay home*. He simply overslept because of a medically related condition.

(Emphasis added.)

However, merely because Hayes was able, according to Dr. Duryea, to perform all his essential job functions *while he was at work*, does not alter the fact the treatment, and resulting incapacitation, for his serious health condition caused him to be intermittently tardy to work. Indeed, Hayes agrees he "could perform all the essential functions of his job, *except when* he was sedated from medication that he was prescribed for depression."

The district court ultimately found the instant case to be so similar to *Brown v. Eastern Maine Medical Center*, 514 F.Supp.2d 104 (D. Me. 2007), that it could not escape that court's analysis and conclusion. Although the court in *Brown*, 514 F.Supp.2d at 109, assumed the plaintiff was able to prove, because of her medical condition, it was impossible for her to arrive to work on time, the court did not find the plaintiff had proved "a medical need for leave" as required by the FMLA. The court in *Brown* based its conclusion on the fact the plaintiff was not able to find a physician to provide an explanation for her tardiness until *after* her termination. *Id*. at 109.

In contrast, in the instant case, Dr. Duryea provided an FMLA certification months prior to Hayes' termination. Further, the certification by Dr. Duryea explained all but one of the instances of Hayes' tardiness that Vermeer later relied upon its decision to terminate his employment as periods of incapacity related to his serious medical condition. This critical difference distinguishes this case from the facts of *Brown*.

Hayes contends Vermeer violated his FMLA rights by discharging him due to his tardiness, rather than keeping him in the same or equivalent position. The FMLA applies when an employee is not restored to his former employment for reasons relating to the taking of FMLA leave, *McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002), or when an employer informs its employee it is wrongfully denying the request for leave. *Beekman v. Nestle Purina Petcare Co.*, 635 F. Supp. 2d 893, 906 (N.D. Iowa 2009). Pursuant to 29 U.S.C. § 1614(a)(1):

> [A]ny eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Thus, after the period of qualified leave expires, eligible employees are entitled to reinstatement. *Snelling v. Clarian Health Partners, Inc.,* 184 F. Supp. 2d 838, 845 (S.D. Ind. 2002).

Here, as we have observed, Dr. Duryea's FMLA certification covered all but one of the instances of Hayes' tardiness that were listed by Vermeer as the

reason for his termination.[5] But we must also determine whether the "notice" Hayes gave for the tardiness was sufficient for the absences to be privileged.[6] *See Rask*, 509 F.3d at 472. "If it was, then the 'but for' cause of [Hayes'] dismissal might also have been privileged, creating a genuine issue of material fact as to whether [his] FMLA rights were violated." *Id*.

Upon our review, we conclude Hayes' statements to his superiors, his history of mental illness and FMLA leave in 2006 or 2007, and most significantly, Dr. Duryea's FMLA certification, provide sufficient evidence to Vermeer that Hayes had a serious health condition and may have been entitled to FMLA leave. *See Spangler*, 278 F.3d at 851 (finding sufficient evidence in the record that employee had provided notice to employer of her serious health condition, even though she did not mention the FMLA by name, but employer knew she suffered

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[5] The certification did not cover Hayes' final tardy on August 11, 2008, due to a flat tire.

[6] Vermeer raises numerous contentions in its brief regarding facts the parties dispute, or that are contradicted by the record. We are to view the facts on the record in the light most favorable to Hayes, the nonmoving party. *Koeppel*, 808 N.W.2d at 179. Further, where genuine issues of material fact exist, the matter is not appropriate for summary judgment. *Id*.

Indeed, Hayes argues he was prejudiced when the district court denied his motion to compel discovery. He states the court "prevented him from obtaining complete written discovery and refused to allow him to take depositions." Where a controversy raises factual issues, further discovery may be necessary. *See Kulish v. Ellsworth*, 566 N.W.2d 885, 890 (Iowa 1997); *Carter v. Jernigan*, 227 N.W.2d 131, 135 (Iowa 1975) ("[A] party against whom a summary judgment motion is made should first be allowed to discover the facts if he desires."). "The very purpose of . . . allowing prior discovery is to learn the facts so that the court can apply the appropriate substantive rule of law." *Carter*, 227 N.W.2d at 136.

As mentioned above, the hearing on Vermeer's motion for summary judgment was limited to consideration and argument of two issues: (1) whether Hayes' claim was precluded by his bankruptcy and (2) whether Hayes' FMLA certification "met the statutory requirements of a valid request." We do not find the court abused its discretion by postponing any further discovery until after it had resolved the narrow issues being considered at the summary judgment hearing. Hayes was entitled to bring to the court's attention any matter where additional discovery would affect the court's decision on the validity of the certification. Additional discovery would have had no implication to the limited issue regarding the facial validity of Hayes' FMLA certification.

from depression; she needed leave in the past for depression; and she specifically stated she was suffering from "depression again").

However, we conclude Hayes' FMLA certification was facially invalid. To be considered valid, a certification "must show that the employee's serious health condition makes [him] unable to perform job functions." *Coffman v. Ford Motor Co.*, 447 F. App'x 691, 696 (6th Cir. 2011) (internal quotation and citation omitted).

> Although certifications that contain all required information[7] are presumptively valid, an employer can rebut the presumption of sufficiency by demonstrating that a certification is invalid, contradictory, or of an otherwise suspicious nature. If the certification is invalid on its face, that in some cases *may* be enough for an employer to deny FMLA leave without engaging in further inquiry.

*Id.* (internal citations omitted).

Hayes' certification is facially invalid because it did not show Hayes was entitled to FMLA leave. Some courts have described this insufficient certification as a "negative certification," i.e., one that "facially demonstrates that the absence was not FMLA-qualifying." *Verkade v. U.S. Postal Serv.*, 378 F. App'x 567, 574 (6th Cir. 2010). The statutory and regulatory schemes of the FMLA, as well as the FMLA certification itself, allow an employee to take twelve medically-necessary weeks of intermittent leave per twelve-month period. However, the FMLA does not entitle an employee to take "unscheduled and unpredictable, but cumulatively substantial absences" or a right to "take unscheduled leave at a

[7] This includes, at a minimum: "(1) the date on which the serious health condition commenced; (2) the probable duration of the condition; [and] (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition." 29 U.S.C. § 2613(b); *Coffman*, 447 F. App'x at 696 n.6.

moment's notice for the rest of [his] life." *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1007 (7th Cir. 2001); *see also Spangler*, 278 F.3d at 853; *Brown*, 514 F. Supp. 2d at 110 n.9; *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 454-55 (W.D. Pa. 2008). In *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667, 676 (8th Cir. 2010), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011), the court stated:

> [T]he FMLA does not provide an employee suffering from depression with a right to unscheduled and unpredictable, but cumulatively substantial, absences or a right to take unscheduled leave at a moment's notice for the rest of [his] career. On the contrary, such a situation implies that [he] is not qualified for a position where reliable attendance is a bona fide requirement.

*Id*. (citation omitted). This is exactly the type of leave requested by Hayes' certification, as it sought occasional tardiness on a permanent basis.

Moreover, if "reliable attendance is a *bona fide* requirement" of a position, an employee's inability to comply with that requirement over the long term indicates he is not qualified for the position, and therefore not eligible for leave under the FMLA. *Spangler,* 278 F.3d at 853; *see also Wisbey*, 612 F.3d at 675-76; *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005) (observing "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends"); 29 C.F.R. § 825.214(b) (stating an employee who is "unable to perform an essential function of [his] position" at the end of his FMLA leave "has no right [under the FMLA] to restoration to another position"). Such certifications that, "on their face, show the employee is not entitled to FMLA protection may be relied

upon to deny FMLA leave without further inquiry by the employer." *Verkade*, 378 F. App'x at 574.[8]

In this case, the evidence before the district court included admissions by Hayes that his job was critically important to Vermeer and if he did not do his job that "production wouldn't get done." Patti Maloy, the medical leave administrator at Vermeer, also testified via an affidavit, stating in part that Hayes' request "would be extremely disruptive given the work environment at Vermeer." Further, "[r]egular attendance at work is an essential function of employment." *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008). On this record, we conclude reliable employment was a bona fide requirement of Hayes' employment.

Because Hayes requested "intermittent leave" for a "chronic" condition that would need "continuing" and "ongoing" treatment, on a permanent basis, which essentially translates to a "right to take unscheduled leave at a moment's notice for the rest of [his] career," he did not have a right to FMLA leave. Without showing the right to FMLA leave, Vermeer was entitled to deny Hayes' request without further inquiry.

We acknowledge a technical violation of the FMLA by Vermeer in its having contacted Hayes' doctor without his consent. *See* 29 C.F.R. § 825.307 (authorizing employer's representative to contact healthcare provider for "clarification" and "authentication," but prohibiting request for "additional

[8] Effective January 2009, the Department of Labor revised the regulations, which now require that if the medical certification is not complete and sufficient, the employer is required to notify the employee in writing of the deficiencies and allow the employee seven days to cure the deficiencies. 29 C.F.R. § 825.305(c) (2009). However, the regulation as it existed at the time of Hayes' request only required the employee be given a reasonable opportunity to cure any deficiency. We also observe that Hayes has not complained he was not given a reasonable opportunity to cure the deficiencies. 29 C.F.R. § 825.305(d) (1995).

information beyond that required by the certification form"). However, because Vermeer was entitled to deny his FMLA request without further inquiry, Hayes cannot show he is entitled to relief under the act and summary judgment is appropriate. *See Harrell v. U.S. Postal Serv*., 445 F.3d 913, 929 (7th Cir. 2006) ("Because Mr. Harrell was not harmed by the unauthorized contact with his physician, § 2617 provides him no remedy, including equitable relief, and the district court correctly granted the Postal Service summary judgment on this claim.").

For these reasons, we determine the district court properly granted summary judgment to Vermeer on Hayes' FMLA claim. We affirm the ruling of the district court.

**V. Conclusion.**

Upon our review, we conclude Vermeer's contentions in regard to Hayes' bankruptcy were not addressed by the district court and do not serve to uphold the judgment of dismissal. We further conclude Hayes' FMLA certification was facially invalid and did not show he was entitled to FMLA leave. Absent a showing by Hayes of a right to FMLA leave, Vermeer was entitled to deny Hayes' request without further inquiry. Accordingly, we determine the district court properly granted summary judgment to Vermeer on Hayes' FMLA claim. We affirm the ruling of the district court.

**AFFIRMED.**