



Self-Diagnosis of Duration of Illness May Support FMLA Claim

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Employers in Pennsylvania, New Jersey, Delaware and the Virgin Islands should examine their policies under the Family and Medical Leave Act (FMLA) to recognize the more than three consecutive days of incapacity requirement for eligibility of FMLA leave may be satisfied through a combination of medical and lay evidence. The U.S. Court of Appeals, which has jurisdiction over federal cases in these states, rejected the proposition that the more than three days of incapacity must be established through medical evidence alone.

Under the FMLA, eligible employees who are unable to perform the functions of their job position due to a serious health condition are entitled to a total of 12 workweeks of leave during any 12-month period. The FMLA defines serious health condition as “an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider.” The Department of Labor (DOL) regulations further define “continuing treatment” as a period of incapacity of more than three consecutive calendar days. However, DOL regulations do not specify the three day incapacity must be established exclusively from a medical professional’s determination.

On March 11, 2010, the U.S. Court of Appeals for the Third Circuit rejected a Pennsylvania federal district judge’s dismissal of a medical receptionist’s case under the FMLA for failure to establish more than three days of incapacitation exclusively through medical evidence. The physician who treated the receptionist testified the antibiotic prescribed should have eliminated her symptoms within two days, but did not rule out the possibility that she might not be fully recovered enough to return to work after three days. The receptionist claimed that after two days her symptoms continued and three days later she was still sick and therefore entitled to FMLA leave.

Although the receptionist did not have any medical evidence to support her claim that her illness extended beyond the two day estimate set by her physician, the Court of Appeals found her testimony raised a question of fact as to whether her incapacity extended more than three days. The court held that some medical evidence is necessary to show the



incapacitation was due to a serious health condition, but the period of incapacity may be established through a combination of both medical and lay evidence.

Employers in Pennsylvania, New Jersey, Delaware and the Virgin Islands should be aware of this decision affirming some medical evidence is necessary to establish the incapacity, but allowing a combination of medical and lay evidence to establish the period of incapacity.

Schaar v. Lehigh Valley Health Services, Inc., No. 09-1635, 2010 U.S. App. LEXIS 5172 (3d Cir. Mar 11, 2010)

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