

WAYNE STATE UNIVERSITY

MEMORANDUM

TO: XXXXXXXX
FROM: Michelle Fecteau, Labor Studies Center
DATE: July 3, 2003
RE: FMLA question

The purpose of this memo is to address your questions:

- 1) **Can my employer deny an FMLA leave to an employee because he has not submitted a certification form completed to the employer's satisfaction?**
- 2) **Is the employee who was denied FMLA leave for treatment of a serious health condition then protected by FMLA if he is fired for sleeping on the job due to medication he was taking for his illness?**

I am assuming the employee in question is eligible for FMLA coverage. You may want to review whether the employee actually is eligible. The requirements are: 1) he has completed 12 months of service; 2) worked at least 1250 hours in the 12 months before each FMLA absence; 3) works for a covered employer (more than 50 people on the payroll); and 4) there are at least 50 county employees within a 75 mile radius). To access the FMLA regulations governing eligibility go to FMLA Regulation.825.110 at:

www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.110.htm

In general the FMLA gives eligible employees strong rights to use family and medical leave.

"Because the FMLA grants to eligible employees the absolute right to take FMLA leave for qualifying reasons under the law, *employers have no discretion in this area* and cannot deny the legitimate use of FMLA leave for such purposes without violating the prohibits acts section of the statute."

- Preamble to Department of Labor FMLA, Regulations, page 26 (emphasis supplies)

Also, FMLA regulations clearly state that an employer cannot hold FMLA qualifying absences against an eligible employee in order to discipline or discharge that employee. Section 825.220(c) of the FMLA Regulations states:

"An employer is prohibited from discriminating against employees, or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, **employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions, nor can FMLA be counted under "no fault" attendance policies.**" (emphasis added).

With regard to denying FMLA medical leave because the employer claims the medical certification is not completed sufficiently I found the following regulations which speak to this issue:

FMLA Regulation 825.302(d)

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer

may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. **However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.**

Also:

Regulation 825.303(b)

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. **The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.**

And

Reg 825.305(c)(d)(e) (a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by Sec. 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) **When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request),** unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. **The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.**

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see Sec. 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

Answer regarding question #1

It is therefore my understanding that an employer can require medical certification in a timely and reasonable manner but they cannot delay or deny the FMLA leave while "the employee is granted a reasonable opportunity" to obtain medical certification or "cure any ...deficiency". In stead the employer should have granted the employee an FMLA leave on a provisional basis while awaiting the medical certification.

Answer regarding question #2

In order to argue that the employee should have been out on an FMLA leave the employee will have to submit a completed certification in which his health care provider supports that he has a

serious health condition. There are several categories of what is considered a serious health condition outlined in the FMLA regulation 825.114. You can access this at the following site: www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.114.htm. The union should also be able to show that the medication caused him to sleep on the job.

Enforcing FMLA Rights

The union may enforce FMLA rights by filing a grievance under the “just cause” or (discipline/discharge) provisions in your contract, as well as FMLA language incorporated in your contract. If this is not in your contract you can use language that states the employer will comply with federal and state law. The union also has the option of contacting an attorney regarding the grievant’s legal right to sue the employer as well as personally sue the human resource manager who made the decision to suspend/terminate in violation of the FMLA. Keep in mind that an attorney would be able to collect legal and expert witness fees in addition to the damages collected by the grievant.

The union can go back two years, three if the employer knew or should have known about FMLA requirements, to seek remedy under the law. Unions have also filed and won class action cases against employers who are not in compliance with the Act.

Since I do not know this employee’s work history, all the circumstances of the case or the contract language as well as your union rep, I would defer to him or her on what steps are best to take. Hopefully the information I have shared will be a helpful contribution in representing your fellow union members.

Best Wishes,
Michelle

We also discussed who is considered a health care provider under the FMLA. This is outlined in the FMLA regulation: 825.118 which you can access at this site: www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.118.htm