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FLU CAN BE "SERIOUS MEDICAL CONDITION" UNDER FMLA

By David E. Dubberly

In Miller v. AT&T Corp. (May 7, 2001), a divided three-judge panel of the Fourth Circuit Court of Appeals, the federal appeals court with jurisdiction over South Carolina, ruled that certification by a treating physician that an employee's influenza A is a "serious health condition" is sufficient to bring the employee within the coverage of the Family and Medical Leave Act (FMLA). The FMLA entitles eligible employees to take up to 12 weeks of unpaid leave in any 12-month period for specified family and medical reasons, including to care for a child, spouse, or parent's "serious health condition," or the employee's own "serious health condition." This case points out the danger for employers of disregarding a doctor's certification that an illness is covered by the FMLA.

Miller worked as an Account Executive for AT&T from 1990 until 1997, when she was fired for excessive absences. After sending Miller two warning letters about her poor attendance, in June 1996 AT&T gave her a final warning letter stating that her next absence would result in termination.

Miller was absent again from December 27, 1996 until January 1, 1997, with a serious bout of the flu. She visited her doctor, who diagnosed her with influenza A. Finding her badly dehydrated, the doctor administered intravenous fluids and ordered blood work. At a follow-up visit two days later, she was feeling better, but her platelet counts were still low. The doctor gave her an excuse to miss work until January 1, and he told her to return to his office for additional blood work two weeks later.

When she returned to work, Miller obtained a certification form for FMLA leave. Her doctor filled it out and she submitted it to AT&T. The form certified that Miller's condition qualified as a serious health condition because she had a period of incapacity of more than three consecutive days and either (1) had been treated two or more times by a health care provider, or (2) had been ordered to undergo a regimen of continuing treatment.

AT&T rejected Miller's FMLA request and fired her. The company explained that U.S. Department of Labor regulations provide that the flu is not a serious medical condition under the FLMA, and in any case, the doctor did not provide enough detail on the certification form.

Miller filed suit in the U.S. District Court for the District of West Virginia, alleging that AT&T violated her rights under the FMLA by denying her request for leave for the December 27-January 1 absences. The District Court granted Miller's motion for summary judgment and awarded her back pay, with interest, from the date of her termination, and attorneys' fees. The District Court also ordered AT&T to offer Miller reinstatement.

The Fourth Circuit panel affirmed by a 2 to 1 vote, noting that 29 CFR §825.114(c) states that “Ordinarily, unless complications arise, . . . the flu, . . . etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.” The court concluded that this provision does not impose a per se rule that the flu can never be a serious health condition. Instead, the regulation leaves it up to health care providers to determine when an illness is a serious medical condition.

The Fourth Circuit judges also rejected AT&T’s position that there was insufficient information on the certification form. The form was the Department of Labor’s WH-380 form, and the doctor filled it out completely. If AT&T had a problem with the certification, it should have asked for a second opinion. Since it did not, it could not later attack the validity of the certification.

While typical cases of influenza may not fall under the FMLA, the Miller case shows that employers should not disregard physician certifications that employees with flu symptoms have a serious health condition. If presented with such a certification, the employer has the right to require the employee to secure a second opinion to support a claim for leave. But without a second opinion, any adverse action taken as a result of the leave may violate the FMLA and result in liability against the employer.