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APPEALS COURT HOLDS THAT AN EMPLOYEE'S SELF-DIAGNOSIS CAN ESTABLISH ONGOING MEDICAL CONDITION UNDER THE FMLA

Insights
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Brace yourself for yet another twist in the ever-evolving standards governing an employee's leave under the Family Medical Leave Act (FMLA). On March 11, 2010, the U.S. Court of Appeals for the 3rd Circuit joined the 8th Circuit Court of Appeals in holding a combination of expert *and* lay testimony can establish that an employee was medically incapacitated for more than three days, thereby triggering FMLA protection. *Schaar v. LehighValley Health Services.*

At issue in *Schaar* was whether an employee was entitled to FMLA protection when she relied, in part, on her own diagnosis that she was incapacitated for more than three days, thus triggering FMLA protection.

Background
The FMLA gives employees a protected right under federal law to take leave for certain medical reasons, and prohibits employers from interfering with or discriminating against employees for invoking this right. In order to qualify for FMLA protection, there are several requirements. Among them, an employee must suffer from a "serious health condition," which is defined by the FMLA to include an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider.

The Department of Labor's regulations define "continuing treatment" by a health care provider as a period of incapacity of more than three consecutive calendar days that also involves treatment by a health care provider on at least one occasion followed by a regimen of continuing treatment under the supervision of the health care provider. *Schaar* addressed the type of evidence that courts will accept as proof of incapacitation.

Facts Of The Case
Rachael Schaar was an employee of Lehigh Valley Health Services. Two weeks before Schaar was fired, she was treated for lower back pain, fever, nausea and vomiting. Schaar's physician gave Schaar a note stating she could not work for two days and that Schaar was under his care.

Schaar took two days of paid sick leave â€“ on a Wednesday and a Thursday â€“ during which she was bedridden. Coincidentally, Schaar had previously scheduled vacation days for Friday and the following Monday. Schaar returned to work on the following Tuesday, and told her supervisor she had been sick on Friday and Monday. Six days later, Schaar was terminated. In explaining Schaar's termination, a supervisor wrote that Schaar "brought a note from her doctor for a 2 day excuse from work. She taped the note to her manager's door and left, never calling off from work."

Schaar sued Lehigh Valley for interference and discrimination in violation of the FMLA. Lehigh Valley asked to have the case thrown out, arguing that Schaar did not qualify for FMLA leave because she failed to establish that she was incapacitated for more than three days and failed to give proper notice that she may qualify for leave. A federal district court granted Lehigh Valley's request, holding that Schaar failed to present medical evidence that she was incapacitated for more than three days. The district court also held that expert medical testimony is necessary to establish the incapacity was due to illness.

The Appeals Court Decision
On appeal, the district court's holdings were reversed by the 3rd Circuit. It concluded that the doctor's note stating Schaar was incapacitated for two days *combined with* Schaar's testimony that she was sick for an additional two days created an issue of material fact as to whether Schaar suffered from a "serious medical condition" under the FMLA. In reaching its decision, the court looked to the language of the Department of Labor's regulations and determined that there was nothing in the regulations that required a health care provider to make the determination regarding the length of an employee's incapacitation. But the court also concluded that some medical testimony is still necessary to show that the incapacitation was due to a serious health condition.

The Significance Of The Case
This decision makes it clear that in determining the FMLA's incapacitation requirement, the employee's own self-diagnosis carries weight and may create a genuine issue of material fact in later litigation on the issue. An employee who is diagnosed as medically incapacitated for only two days would not be covered by the FMLA.

But *Schaar* suggests that if an employee is unable to work for the third day, then the employee's own report that they were medically incapacitated would be sufficient to invoke the protections of the FMLA. This opens the door to the possibility for employees to self-diagnose their way into the protections of the FMLA even where their physician did not make such a diagnosis.

Employers should take care in terminating an employee for sick leave absences and not automatically reject an employee's own account of her illness. However, when in doubt, require medical certification. It is also important to train front line supervisors, who often are the first to learn about a potentially FMLA-qualifying condition, to spot leave requests that might qualify under FMLA and to immediately bring them to HR and to never discipline an employee without first consulting HR.

This Legal Alert provides an overview of a specific new appellate decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.