M-01558

LABOR RELATIONS

UNITED STATES POSTAL SERVICE

Mr. William H. Young
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, DC 20001-2144

Re: D98N-4D-C 02004163
Gaddy, Craven
Fayetteville, NC 28302-9998

Dear Mr. Young:

Recently, our representatives met in pre-arbitration discussion of the above-referenced grievance.

The issues in this case are whether a Step B team can determine if an employee's certification of a serious health condition provides the information required to protect the absence, in accordance with the Family and Medical Leave Act, and whether a certification for a chronic condition is acceptable, with regard to the duration and frequency, when it uses descriptors for the duration and frequency such as "unknown", "indefinite" or "intermittent."

We mutually agreed that there are no material facts in dispute in this case.

After reviewing this matter, we mutually agree to remand this case to the Step B team for application of the following:

> When responding to a Step B grievance appeal, the Step B Dispute Resolution Team has the authority to determine whether a certification of a serious health condition, submitted in connection with a potential Family and Medical Leave Act-protected absence, provides the information required to obtain FMLA protection.
>
> When addressing a dispute over whether certification submitted regarding a chronic condition meets the requirements of the FMLA, Step B teams will be guided by the attached Department of Labor Opinion Letter FMLA-90.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

A.J. Johnson
Manager
Labor Relations Policy and Programs
U.S. Postal Service

William H. Young
President
National Association of Letter
Carriers, AFL-IO

Date: 1-11-06

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U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FMLA - 90

July 3, 1997

This is in response to your request for written guidance from the Wage and Hour Division of the U.S. Department of Labor with regard to the application of the Family and Medical Leave Act of 1993 (FMLA) in your situation. In order to provide a concise response to your request, we will only address the situation you have outlined in your letter. We will assume that your employer is covered, you are an eligible employee, the reason you have requested leave is one specified in FMLA, and that both you and your employer have met those responsibilities not discussed in this response, but otherwise imposed by FMLA and the implementing regulations, 29 CFR Part 825.

According to your letter, you have requested FMLA leave to provide care for your wife and have given your employer a medical certification from you wife's health care provider stating in part that your wife's condition will, over the course of the next year, require that you provide care on an intermittent basis. The nature of your wife's illness is such that it is not possible to predict when or for how long it will be necessary to provide appropriate care. Your employer "provisionally" approve your request for leave indicating that a final determination will be made when you take leave. Your employer has also indicated that leave will not be approved in advance unless you can provide specific dates. Should your employer decide not to approve any specific absence, you would be subject to discipline under your employer's attendance policy.

The FMLA provides, in part, that an employee is entitled to leave for up to 12 weeks in any 12 months period to care for a spouse, son, daughter, or parent who has a serious health condition. The Act provides that leave may be taken all at once, or may be taken "intermittently or on a reduced leave schedule" when medically necessary. If FMLA leave is taken intermittently for planned medical treatment that is foreseeable, the employee must make a reasonable effort to schedule intermittent leave for such treatments so as not to unduly disrupt the employer's operations, contingent upon approval of the health care provider. When need for leave is not foreseeable, an employee is required to notify the employer "as soon as practicable" which ordinarily means at least verbal notice to the employer within one or two business days of when the need for leave becomes known to the employee. (See §§ 29 CFR 825.302 and .303.)

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Once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must promptly (within one or two business days absent extenuating circumstances) notify the employee that the leave is designated and counted as FMLA leave, and inform an employee of his/her rights and responsibilities under FMLA, including giving specific written notice on what is required of the employee and what might happen if the employee fails to meet these responsibilities. An employer, for instance, may require that a request for FMLA leave due to a serious health condition be supported by a certificate issued by the individual's health care provider and may require (at its own expense) a second and third opinion, if the employer has reason to doubt the validity of the original certification. Pending resolution of the employee's right to FMLA leave through the certification process, the employee is "provisionally" entitled to the benefits and protection of the Act. This provisional entitlement to FMLA leave is only applicable where the employer has elected to seek a second or third opinion and that opinion is not yet available. An employer also has the right to request subsequent medical recertifications on a reasonable basis. (See §§ 29 CFR 825.208, .301, .307 and .308.)

The FMLA lists those items of information that may be included in the medical certification. Included in this list is "the **probable** duration of the condition", "an **estimate**" of the time needed to care for a family member, and for intermittent leave or leave or a reduced leave schedule, "the **expected** duration" and schedule of such leave, and must indicate that the medical need for leave can be "**best accommodated**" through an intermittent or reduced leave schedule. (Emphasis added.) (See §§ 29 CFR 825.117 and .306.)

The FMLA, which recognizes that not all absences caused by certain serious health conditions will be predictable, does not provide any language to suggest or require an employee or health care provider to submit an exact schedule of leave when submitting the medical certification. Nor does FMLA permit an employer to withhold approval of a request for FMLA leave if an exact schedule of leave is not submitted. An employer who withholds approval of FMLA leave and who disciplines an employee under the company's attendance control policy for any "unscheduled" leave taken to care for a family member who has a serious health condition (for FMLA leave purposes) may be considered in violation under this law. (See §§ 29 CFR 825.114, .220, .306, and .312.)

The FMLA prohibits interference with an employee's rights under the Act. If an employee makes a bona fide request for FMLA, the employer must respond in the appropriate manner as outlined above. An employer that does not make a timely designation and is unable to cite extenuating circumstances cannot deny the leave or

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deny the benefits and protection of FMLA. In such circumstances, the employee is subject to the full protections of FMLA but the employer may not count any of the leave against the employee's 12-week entitlement. (See §§ 29 CFR 825.208 and .220.)

If this information has not full addressed your concerns, please contact the nearest office of the Wage and Hour Division, which is located at 26 Federal Plaza, Room 3838, New York, New York 10278, telephone number (212) 264-8185.

Sincerely,

Michael Ginley
Director
Office of Enforcement Policy