



# DELAWARE

## EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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### **EVIDENCE**

## **Medical evidence and lay testimony sufficient to prove FMLA claim**

by Lauren E. Moak

*The Third U.S. Circuit Court of Appeals, which covers Delaware, recently decided an issue previously unresolved by the court. In doing so, it held that a combination of medical evidence and lay testimony is sufficient to show an employee was "incapacitated" as defined by the Family and Medical Leave Act (FMLA). The decision overturned the standard — that an employee must present expert medical testimony that she was incapacitated under the FMLA — adopted by most district courts in the Third Circuit.*

### ***Facts***

Rachael Schaar was a receptionist for Lehigh Valley Medical Services from 2002 until 2005. Two weeks before her termination, she left work early to seek treatment for an infection. Her doctor prescribed medication and wrote a note excusing her from work for the rest of that day and the following day.

After she left the doctor's office, Schaar returned to work, taped the doctor's note to her supervisor's door, and went home. She took two days of paid sick leave and two days of previously scheduled vacation before returning to work. Six days later, she was terminated.

In the termination letter, Schaar's supervisor stated that she was fired for performance issues and for taping the doctor's note to her supervisor's door rather than calling out sick from work, a violation of company

policy. Schaar sued Lehigh Valley, alleging interference and discrimination under the FMLA.

Lehigh Valley asked the court to dismiss the case because Schaar didn't qualify for FMLA leave. The District Court for the Eastern District of Pennsylvania dismissed her claims, and she appealed to the Third Circuit.

### ***Third Circuit lowers the boom — or the standard***

To be eligible for leave under the FMLA, an individual or a member of her family must suffer from a "serious health condition," which is defined as three consecutive days of incapacity requiring continuing treatment under the supervision of a health care provider. The issue before the court was how an employee may prove incapacity.

The district court held that Schaar had to present expert medical evidence that she was incapacitated for three days, even though her doctor excused her from work for only two days. Schaar relied on her own testimony to prove incapacitation for the remaining days. As a result, the district court dismissed her claims.

On appeal, the Third Circuit noted that courts have adopted one of three positions with respect to proving incapacitation. Some courts, like the district court, have held that incapacitation may be proved only by the testimony of a medical professional, while other courts have held that lay testimony is sufficient to prove incapacitation. The third group has taken the middle road, holding that lay testimony alone is insufficient to prove incapacitation, but it may be sufficient when presented in conjunction with medical evidence.

After reviewing the U.S. Department of Labor's FMLA regulations, the Third Circuit found there was no basis to require testimony of a medical professional to prove incapacitation. However, the court was concerned that allowing a witness to prove incapacitation based solely on her testimony would place too heavy a burden on the employer. As a result, it adopted the middle road, holding that "an employee may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony."

Delaware employers should be grateful that the court didn't adopt the most employee-friendly approach, permitting eligibility for FMLA leave to be based solely on the employee's self-diagnosed illness. Under the standard set by the court, at least some medical evidence is necessary. *Schaar v. Lehigh Valley Health Servs., Inc.*, No. 09-1635 (3d Cir., March 11, 2010).

### ***Bottom line***

The Third Circuit's opinion clarifies an issue that hadn't previously been decided by Delaware's federal court. In doing so, it lowered the standard

of proof adopted by the majority of district courts in this circuit. Going forward, you should be aware that credible testimony from an employee, in conjunction with a doctor's note or other medical evidence, is sufficient to sustain a claim under the FMLA.

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