

C#14107
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REGULAR REGIONAL ARBITRATION PANEL

In the Matter)
of the Arbitration)
)
between) Grievant : Carol Wentworth
) Case No : H90N-4H-D94068273
UNITED STATES POSTAL SERVICE) GTS No : 023166
)
)
and) POST OFFICE : Miami, Florida
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : Daniel Smith
For the Union : William Burroughs

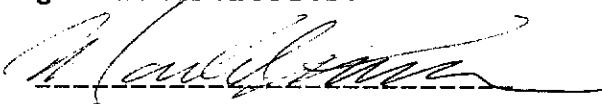
Place of Hearing : United States Post Office G.M.F.
 : Miami, Florida

Date of Hearing : November 8, 1994

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994


Mark I. Lurie
Arbitrator

Matthew Rose, NALC
National Business Agent

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DECISION AND AWARD**

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ISSUE

The issue, as stipulated by the parties, is whether the removal of the Grievant was for just cause and, if not, what the remedy should be.

FACTS

The Grievant, Carol Wentworth, was absent due to illness on the following dates, for which she used the types of leave indicated:

Date	Duration	Leave
February 15, 1994	2.02 hours	sick leave
February 25, 1994	8.00 hours	sick leave
March 19-29, 1994	64.00 hours	sick leave/LWOP

All of the dates between the Grievant's absences on February 15th and February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave. Her absence from March 19 to 29, 1994 was due to degenerative joint disease, for which the Grievant obtained treatment from a medical doctor. The Grievant telephoned her supervisor, Ms. Christina Norman, on Saturday, March 19th, and informed her that she had displaced her hip joint, and that she would be absent for a number of days. At the time, the Grievant did not request leave under the FAMILY AND MEDICAL LEAVE ACT OF 1993. (The Act will be discussed at length below.) That same day, Supervisor Norman completed and signed a Form 3971 - Request for or Notification of Absence - pertaining to the Grievant's absence. Supervisor Norman made no entry in the "Remarks" space on the Form 3971.

Upon returning to work on March 31, 1994 (or shortly after returning), the Grievant furnished a statement from her physician which stated that the Grievant was "unable to work from 3-19-94 to 3-31-94 DX: Degenerative Joint Disease." A second document from her doctor stated "Patient may return to work on 3-31-94 to 4-9-94 Work for Four Hrs and Full Duty pm 4-11-94."

The Grievant was issued a Notice of Removal dated April 29, 1994, for failure to be regular in attendance. The Notice cited 3 prior disciplinary elements, all for failure to be regular in attendance:

April 27, 1992	Letter of Warning
November 25, 1992	14-Day Suspension (also for AWOL)
November 16, 1993	14-Day Suspension

In the Step 2 Decision, Management noted that one of the contentions raised by the Union was that the Grievant had failed to request "family leave" because the Service had failed to publish or otherwise advise the Grievant of her rights under the FAMILY AND MEDICAL LEAVE ACT OF 1993, or of the formal procedures which she was required to follow in order to avail herself of the benefits of the Act.

The FAMILY AND MEDICAL LEAVE ACT OF 1993 (hereinafter referred to as the "FMLA", or the "Act") is federal legislation which took effect in August 1993. The FMLA requires employers of more than 50 persons, such as the Postal Service, to provide eligible employees¹ with up to 12 weeks of job-protected leave in any single leave year for certain family and medical reasons, including a "serious health condition"² which renders the employee unable to perform the functions of her position. In the case of the Postal Service, this job-protected leave can be taken in the form of the three traditional types of leave: annual leave, sick leave, or leave without pay. The rights and restrictions on the accrual and use of the traditional forms of leave has not changed by reason of the Act; the Act simply assures (among other things) that the employee will not lose her job or her benefits of employment if she uses up to 12 weeks of leave in any year for the qualifying purposes.³ Upon returning from FMLA leave, an employee must

1. To be qualified, an employee must have worked for the Service for at least 1 year, and have worked for 1,250 hours over the previous 12 months.
2. Part 515 of the Employee and Labor Relations Manual (the "EIM") was amended to comport with the FMLA. Part 515.2d defines a "serious health condition" as (among other things) an illness, impairment, or physical or mental condition that involves...
"Any period of incapacity requiring absence from work or regular daily activities of more than 3 calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider."
3. Part 515.42 of the EIM states
"Absences approved under this section [the FMLA] are charged as annual leave, sick leave, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements. Approving officials should note 'FMLA' in the approval block of the Form 3971, Request for or Notification of Absence."
[Underlining added]

generally be restored to her original (or equivalent) position, with equivalent pay, benefits and employment terms.⁴ In this regard, the Act supplants the discretion which Management had previously been invested to discipline absences covered by the Act.⁵

Under Part 515.51 of the ELM, in order to claim job-protection leave under the FMLA, the employee is required to file a Form 3971, Request for or Notification of Absence, "as soon as practicable". If the Form 3971 is not submitted initially, timely verbal notification is allowed.⁶

4. As described in a Postal Bulletin on the subject, entitled "YOUR RIGHTS under the FAMILY AND MEDICAL LEAVE ACT OF 1993",

VI. Return to Duty

At the end of your leave, you will be returned to the same position you held when the absence began (or a position equivalent to it), provided you are able to perform the functions of the position and would have held that position at the time you returned if you had not taken the time off.

5. In a letter to all Postal employees dated February, 1993, Postmaster Marvin Runyan stated, in part,

"Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

6. Part 515.51 of the ELM states, in part

"An employee must provide a Form 3971, *Request for or Notification of Absence*, together with documentation supporting the request... as soon as practicable. Ordinarily at least verbal notification should be given within 1 or 2 business days of when the need for leave becomes known to the employee. The employee will be provided with a notice detailing the specific expectations and obligations and consequences of a failure to meet these obligations. ..."

POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)

- Q. How do I apply for family leave?

A. Submit a form PS 3971, Request for or Notification of Absence, with the supporting documentation. Family leave is not a separate type of leave, so you apply for annual or sick leave or LWOP as appropriate the same as you have applied for leave before. Just as in the past, in emergency situations a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

Memorandum dated June 22, 1994 from the Chief Field Counsel for the Law Department of the U.S.P.S. Mid-Atlantic Office, on the subject of "Questions and Answers on the Family and Medical Leave Act", (hereinafter, "*The Chief Counsel's Memorandum*").

- Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?
- A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

Family leave need not be expressly requested by the employee, either on the Form 3971 or verbally.⁷ However, to obtain the protection of the FMLA, the employee must disclose the cause of her absence, and that cause must be one which Management reasonably concludes is covered by the FMLA. If Management does so conclude, then Management is obligated to treat the leave as FMLA leave.⁸

7. POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)

- Q. Do I have to request family leave if I need time off for a covered condition?
- A. No, however, if you request leave without specifying that it is for a covered condition, the leave may be denied, consistent with collective bargaining agreements and policies.

The Chief Counsel's Memorandum

- Q. If an employee is off with an illness... and does not request FML for the absence, is he entitled to [additional FML leave]?
- A. The supervisor would have placed FMLA in the approval block of the PS 3971 whether the employee requested FMLA or not. ... [Underlining added]
- Q. Must the employee state the leave is FML?
- A. No, leave requested for a covered condition is part of the 12 workweeks provided by the FML policy. When an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's approval block, and give the employee a copy of Publication 71.

8. *The Chief Counsel's Memorandum*

- Q. Must the employee designate as FMLA leave, leave taken which qualifies as FML, but was not requested or designated as such by the employee, i.e... is the employer REQUIRED to tell the employee he or she should take the leave as FMLA?
- A. ... When leave is requested for a covered condition, whether or not FML is specified by the employee, the supervisor should mark FMLA in the PS 3971 approval block and give the employee a copy of Publication 71.

- Q. What can be done about employees annotating all requests for leave "FMLA" on PS Form 3971?
- A. Whether or not the employee requests FML... makes little difference, it is up to the supervisor to determine if the leave qualifies or not, and to so note on the PS 3971.
[Underlining added]

Once the employee makes it known that her absence pertains to a covered condition, Management is required to inform the employee that she may take the leave under the auspices of the FMLA, by furnishing the employee with a written notice of her rights and obligations under the Act.⁹ (See also footnote 8, the first question and answer.) No such notation was made on the Grievant's Form 3971, and no such notice was issued to the Grievant. Supervisor Norman, who issued the Notice of Removal and who would have been the person to have furnished the Grievant with any such FMLA notice, testified that she was unfamiliar with the requirement to issue such a notice, and indeed was unaware of the existence of any such written form of notice.

9. POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)

- Q. How will I know if the requested leave is chargeable against the 12 week entitlement under the Family and Medical Leave Act?
- A. When you indicate the request is for one of the conditions covered by the Family and Medical Leave Act, you will be provided a notice of expectations and employee obligations. If the leave is approved as one of the covered conditions, the approving official will note "FMLA" in the approved block of the form 3971. [Underlining added]

The Chief Counsel's Memorandum

- Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?
- A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

To be protected leave under the FMLA, the employee must timely inform Management of her medical condition, and that condition must be one which Management reasonably concludes is a "serious health condition" covered by the Act. The Employee may not claim sick leave generally, and then subsequently reveal the nature of her condition, in the hope of obtaining retroactive coverage under the FMLA.¹⁰

-- 10. *The Chief Counsel's Memorandum*

Q. If an employee has simply applied for sick leave and then was diagnosed as having bronchitis and referred to another doctor, may the employee request to have the first one or two visits retroactively classified as FMLA leave?

A. Leave cannot be retroactively designated as FMLA leave after the leave is concluded.

RELEVANT PROVISIONS OF THE AGREEMENT

Article 19, Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. []

THE UNION'S POSITION

Since all of the dates between the Grievant's absence on February 15th and her absence on February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave, her absence between those dates was uninterrupted, and constituted a single absence of 10-days' duration, rather than 2 separate events of absenteeism, as it was viewed by Management. Her absences were for genuine illnesses, and did not warrant her removal.

Management was required, under Part 515.9 of the ELM, to post a notice setting forth employees' rights and obligations under the FMLA:

"Family Leave Poster. All postal facilities including stations and branches, are required to conspicuously display Poster 43, *Your Rights Under the Family and Medical Leave Act of 1993*. It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment."

The Postal Service failed to conspicuously display the document, with the result that the Grievant remained ignorant of her rights under the Act until after she had returned to work, and coincidentally learned of the enactment of the Act in reading a magazine (unrelated to the Postal Service). In fact, Management kept both the employees and their supervisors ignorant of their rights and responsibilities under the Act, as indicated by the fact that Supervisor Norman was unaware of her obligation to issue a written notice to employees claiming leave under the FMLA and, indeed, testified that she had never seen any such

notice. The Grievant's illness was one which was covered by the Act, and the issuance to her of the Notice of Removal was in violation thereof.

THE SERVICE'S POSITION

The Postal Service can not survive in a competitive environment if its employees are not regular in attendance. The Grievant was issued progressively more severe discipline for unsatisfactory attendance, but nonetheless failed to rehabilitate. Her unreliability contravened Parts 511 and 666 of the Employee and Labor Relations Manual:

511.43 Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

666.8 Attendance

666.81 Requirement for Attendance

Employees are required to be regular in attendance.

These provisions of the ELM are incorporated into the National Agreement through Article 19.

Under Part 515.51 of the ELM (see above), the Grievant's leave from March 19-29 would have been protected by the FMLA only if she had expressly requested FMLA leave prospectively, i.e. before taking the leave for which FMLA protection was claimed. She did not do so and, in fact, she did not assert any FMLA rights prior to Step 2 of this grievance. Leave cannot be retroactively designated as FMLA-protected, after the leave is concluded. The Grievant's leave was therefore not protected by the FMLA. Furthermore, no evidence was presented to show that the Grievant met the criteria for qualifying for family leave.

The Union's claim that the Postal Service failed to post the FMLA bulletin and otherwise publicize employees' rights under the Act through March, 1994 is an affirmative defense, for which the Union had the burden of proof. The claim was not proven. The Grievant failed to timely

exercise FMLA rights she might have had with respect to her March 19-29 absence, and the Union has not shown that this failure was caused by any act or omission of the Service.

DECISION

The Service's contention that the Grievant failed to timely request FMLA is misguided. Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor, Ms. Norman, of her medical condition. It was then the obligation of Supervisor Norman [1] to determine whether that condition was a "serious health condition" covered by the Act and, if so, [2] to note the fact on the Grievant's Form 3971, [3] to furnish the Grievant with written notification of her rights and responsibilities under the Act, and [4] to advise the Grievant as to any medical documentation that would be required. The Arbitrator finds that the Grievant did advise Supervisor Norman of her condition at the start of her leave on March 19, 1994; that, at the time, Supervisor Norman was unaware of the requirements imposed upon her by the Act; and that, consequently, Supervisor Norman failed to determine whether the Grievant's condition was covered under the Act.

The Arbitrator finds that the Grievant's condition was a "serious health condition" covered by the Act, inasmuch as it involved a physical impairment which required her absence from work for more than 3 days, and which involved continuing treatment by her physician. Supervisor Norman therefore violated the Act by failing to note "FMLA" on the Form 3971 she prepared for the Grievant, and by failing to furnish the Grievant with both written notice of her rights and obligations under the act, and any medical documentation which might be required of her.

Because the Grievant's absence was protected leave under the provisions of the FMLA, the reliance upon that leave as the basis for her removal from the Postal Service was in violation of the Act, and is void, as a contravention of public policy and the laws of this Country. The citation

of that leave was also a violation of Article 19 of the Agreement, inasmuch as the Act has been expressly endorsed by the Postal Service, and integrated into its handbooks and manuals.

In the past, this Arbitrator has often been called upon to determine whether an employee's attendance record has been just cause for his/her termination of employment. In those cases, I have judged Management's actions in the context of the impact of the employee's attendance upon the operational effectiveness of the Service, the discipline historically applied to other employees under like circumstances, the degree and frequency of the employee's recidivism and the duration of his/her absences, and mitigating circumstance, such as the employee's work record and length of service. Inasmuch as these cases have all involved fewer than 12 weeks absence in a 12-month period, it is clear that, in the future, for absences covered by the Act, these criteria will be irrelevant, replaced by [1] the absolute standard imposed by the Act, and [2] the factual questions of whether the employee's condition is covered by the Act, and whether the technical requirements of the Act have been complied with. As a national priority, family and medical leave, to the extent prescribed by the Act, has been given priority over the operational requirements of employers, including the Postal Service. As observed by Postmaster Runyan, and previously noted in this decision

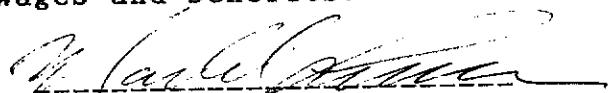
"Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

In the present case, the Service failed to adhere to the provisions of the Act, and the Grievant was wrongly denied the protection afforded by it. In view of this holding, the Union's arguments that the Grievant's leave on February 15th and 25 constituted a single absence, and that the Service violated Part 515.9 of the ELM by failing to post Poster 43 - *Your Rights Under the Family and Medical Leave Act of 1993* - are moot.

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994



Mark I. Lurie
Arbitrator