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Employer not required to list illness

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A U.S. Postal Service employee requested leave under the Family and Medical Leave Act. With the application, the employee submitted a completed copy of the Labor Department form WH-380, a health care provider certification for employees seeking FMLA-protected leave. In the form, her physician described her illness and symptoms and stated that she had a "serious health condition … caused by her work environment exclusively."

USPS did not record this illness on either OSHA's form 300, Log of Work-Related Injuries and Illnesses, or OSHA's Form 301, Injury and Illness Report.

OSHA issued USPS a citation alleging two violations of the record-keeping regulations for failing to record the illness. Following a hearing, the chief administrative law judge affirmed the citation and assessed a $5,000 proposed penalty.

USPS requested review by the Occupational Safety and Health Review Commission. At issue were the implications of the confidentiality requirements of the FMLA's implementing regulations, in light of an employer's obligations under OSHA's record-keeping regulations.

USPS contended that the citation should be vacated for three reasons:

- The confidentiality provision of the FMLA regulations, 29 C.F.R. §825.500 (g), requires USPS to maintain an employee's FMLA documentation in a separate system of confidential records and precludes USPS from recording the information on its OSHA log and report.
- The knowledge of USPS's FMLA coordinator, who knew of the employee's illness from the form WH-380, was not imputable to USPS.

- There was no basis to infer that the employee's supervisor knew the employee had a work-related illness independent of the FMLA documents.

To meet the burden of establishing employer knowledge, the labor secretary must show that the employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.

The secretary argued that USPS was obligated to review FMLA information to determine whether it was required to be recorded on OSHA's forms pursuant to OSHA's record-keeping regulations. As noted, USPS contended that pursuant to the confidentiality provision of the FMLA regulations section 825.500(g), the documentation at issue had to be kept confidential:

"Records and documents relating to certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements … except that:

"(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

"(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment;

and

"(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request."

By its terms, the confidentiality provision set forth in section 825.500(g) prohibited USPS disclosure of FMLA medical information to supervisors and managers unless the information involves "necessary restrictions on the work or duties of an employee and necessary accommodations" or the information is necessary for "emergency treatment."

Because the provision plainly prohibits the use of FMLA documentation for non-excepted purposes, OSHRC concluded that such documentation may not be reviewed by an employer for OSHA record-keeping purposes.

The secretary also argued that the express exception in subsection (g)(3) of the FMLA regulations applied.

Here, though, if the FMLA-protected information were to be disclosed, it would go beyond government officials — it would be seen by USPS personnel examining the FMLA documents for non-FMLA purposes; further, as required by the OSHA record-keeping regulations, USPS employees and their representatives have access to the OSHA injury and illness records. Therefore, this FMLA exception, like the rest of the provision, was clear — it did not permit the disclosure of FMLA medical information for purposes of OSHA record-keeping.

As such, USPS could not review the FMLA documentation to identify OSHA recordable illnesses because USPS was prohibited from doing so under the FMLA regulations. Therefore, the secretary failed to establish constructive knowledge as an element of its case.

Contrary to the judge's finding, the record also failed to establish that USPS had actual knowledge of the employee's illness. The secretary claimed that the FMLA coordinator was a supervisor whose knowledge could be imputed to USPS.

While the FMLA coordinator had authority to decide FMLA claims, this authority did not relate to control of employee work, and the record did not show that the FMLA coordinator otherwise had the requisite control indicative of supervisory status.

Thus, the secretary failed to establish USPS's actual knowledge of the employee's illness through the FMLA coordinator.

Finally, there was no support in the record for the conclusion that the employee's supervisor knew of her illness from sources other than the FMLA documentation. OSHRC vacated the administrative law judge's decision relating to failure to record the illness.

The Occupational Safety and Health Review Commission case is *Secretary of Labor v. United States Postal Service*, OSHRC No. 08-1547 (Sept. 29, 2014).