

'Emotional caregivers' win FMLA coverage

Truck driver Joseph Scamihorn Jr. saw his 73-year-old father fall into a deep depression soon after his daughter, Joseph's sister, was murdered. After notifying his employer, Scamihorn left his job for several months to help and to comfort his ailing father. Typically, he spent several hours each day talking with his dad, driving him to therapy or handling chores.

When he returned to work, Scamihorn found he had to start over as a probationary employee with no seniority. He sued, claiming his caretaking duties were covered under the Family and Medical Leave Act (FMLA), which says that qualified employees can take up to 12 weeks of unpaid leave a year to care for a child, spouse or parent with a serious health condition. Returning employees must be reinstated to the same or equivalent job, pay and seniority.

A lower court sided with the company, saying Scamihorn didn't fit the bill under FMLA because he hadn't physically "cared for" his father. But a federal appeals court disagreed, saying the employee's case should go to trial.

Reason: Although the FMLA doesn't specifically define the term "care for," the court pointed to legal and legislative evidence that the law meant to interpret "care" to include psychological comfort and reassurance. The appeals court concluded that "the regulations specifically contemplate situations that encompass both physical and psychological care for a family member." (*Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union*, No. 00-55722, 9th Cir., 2002)

Advice: Don't waste your time debating semantics when a qualified employee wants to take FMLA leave to care for a sick parent, child or spouse. It's best to assume that family caregiving for those with documented serious health conditions will be protected.

However, you still have to draw the line to prevent employees from taking FMLA leave simply to provide moral support. How? Require medical certification that clarifies the serious health condition that the caregiver claims. Make sure it includes the medical facts that support the health care provider's designation of the condition as "serious" for purposes of the FMLA. Your checklist should cover:

- The medical necessity for the leave.
- The expected duration of the leave.
- A statement that the employee can't perform the functions of the job during that period.

In this case, the employer argued that caring for a family member with a serious health condition involves participating in ongoing treatment of that condition. But the worker showed that his father's doctor had recommended that family members get involved in the recovery process, and that qualified him under the FMLA.