IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN P. WALTERS,	:	**NO. 3:98-CV-1222**
Plaintiff	:	
v.	:	**(Judge Munley)**
	:	
A & P SUPERMARKET SERVICE, et al.	:	
Defendant	:	

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MEMORANDUM

Before us for consideration in this Family and Medical Leave Act (hereinafter "FMLA") case is the defendants' motion for summary judgment. The plaintiff in the instant case is John P. Walters, proceeding pro se, and the defendants are A & P Supermarket Service Corporation (hereinafter "A&P") and Gerald E. Helbeck, the former Director of Human Resources for A&P. The matter has been fully briefed and is thus ripe for disposition.

Background

In June 1983, the plaintiff was hired as a warehouseman for A&P. In that position, plaintiff was a member of a collective bargaining unit and was represented by the International Brotherhood of Teamsters, Local 229. Plaintiff first requested and was granted a medical leave of absence from September 13, 1993 through November 22, 1993. Plaintiff's Transcript (hereinafter "Pl. Trans.") 81. The defendant stated that the plaintiff

provided medical documentation to justify the continued leave of absence. Id. at 83-84. Plaintiff was again granted a medical leave of absence from July 8, 1994 through October 17, 1994. Id. at 85-86. The plaintiff also provided A&P with medical documentation for that leave.

In November 1995, plaintiff requested and was granted a third leave of absence after a back injury at work. Id. at 89:14-19. The plaintiff's treating physician, Dr. Teig Port, restricted the plaintiff to light duty as a result of the back injury. The plaintiff informed the defendants of this restriction by providing A&P with a note from Dr. Port. However, as there was no light duty work available, Defendant A&P granted the plaintiff a leave of absence, which was approved by Dr. Port through July 1, 1996. Dr. Port prepared a Medical Report Form in June 1996 that authorized the plaintiff to return to his regular duties on July 1, 1996. A&P received this form and then on June 28, 1996, the plaintiff telephoned A&P to confirm that he would return to work on July 1, 1996. Id. at 103-04.

On July 1, 1996, the date of plaintiff's scheduled return to work, the plaintiff did not report to work. Id. at 104:21-22. He did not telephone A&P to inform them of his absence or the reason for this absence. The plaintiff telephoned A&P between July 2, 1996 and July 26, 1996 and left messages on an answering machine stating that he was "reporting off due to an illness." Id. at 108-09. The plaintiff allegedly did not speak to any A&P employee regarding his continued absence other than leaving these messages. On July 22, 1996, A&P's Director of Human Resources, Gerald Helbeck wrote to the plaintiff and requested

that the plaintiff provide medical documentation by July 29, 1996 for his continued absence. Markey Aff., Ex. D. The plaintiff allegedly asked Dr. Eugene Turchetti for a note explaining the continued absence, but never gave such an explanation to A&P or its employees. On July 30, 1996, having received no further communication from the plaintiff, Defendant A&P terminated the plaintiff. Markey Aff., Ex. E.

Following his termination, the plaintiff filed a grievance pursuant to the terms of the collective bargaining agreement. In the grievance, as in the instant case, the plaintiff alleged that he was wrongly terminated. The plaintiff filed the complaint in the present case on July 27, 1998, alleging that the defendants improperly terminated him from his job as a distribution selector in violation of the FMLA, codified at 29 U.S.C. § 2601 et seq. In his complaint, the plaintiff seeks reinstatement and to recover lost wages and lost benefits. The defendants have filed a timely answer denying the plaintiff's allegations. The defendants then filed their motion for summary judgment on May 22, 2000.

Standard of Review

Federal Rule of Civil Procedure 56(c) provides that the moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

"Facts that could alter the outcome are material facts." Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 197 (3d Cir.), cert. denied, 115 S.Ct. 590 (1994). "Summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 329 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988); Continental Ins. Co. v. Bodie, 682 F.2d 436 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make sufficient showing on an essential element of her case with respect to which she has the

burden of proof." Id. at 323.

Discussion

In analyzing claims made under the FMLA, courts have applied the burden-shifting analysis that is applicable to employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Baltuskonis v. U.S. Airways, Inc., 60 F. Supp.2d 445, 448 (E.D.Pa. 1999) (citing Churchill v. Star Enterprises, 183 F.3d 184 (3d Cir.1999)); Leung v. SK Management, Inc., 1999 WL 1240961 (E.D.Pa.). The purpose of the burden-shifting standard is to determine whether the plaintiff has established a prima facie case. Geraci v. Moody-Tottrup Int'l Inc., 82 F.3d 578, 580 (3d Cir. 1996). In order to prove a prima facie case of retaliation, a plaintiff must demonstrate that: (1) he is protected under the FMLA; (2) he suffered an adverse employment action; and (3) that a causal connection exists between the adverse employment action and the plaintiff's exercise of his rights under the FMLA. See Baltuskonis, 60 F. Supp.2d at 448.

The defendants allege that they are entitled to summary judgment on the plaintiff's claim because he is not an "eligible employee" under the FMLA. The FMLA was originally enacted in order to balance the demands of the workplace with the needs of families in a manner that minimizes the potential for gender-based employment discrimination by ensuring that leave is available for valid medical reasons and for compelling family reasons. See 29 U.S.C. § 2601(b); see also Clark v. Allegheny University Hospital, 1998 WL 94803

(E.D.Pa.).

To achieve its goal, the FMLA, with certain exceptions, provides eligible employees with twelve (12) weeks leave for certain family and medical reasons with the right to reinstatement to their former position upon completion of the leave. The FMLA, however, does not provide leave to every employee. An employee must first be found to be eligible under the FMLA. The FMLA provides, in relevant part:

> (2) Eligible employee
> (A) In general
> The term "eligible employee" means an employee who has been employed--
> (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

28 U.S.C. § 2611.

The plaintiff began working for A&P in June 1983 as a part-time warehouseman. Therefore, the plaintiff satisfies the requirement set out by § 2611(2)(A)(i), that the plaintiff had been employed by the employer for at least 12 months.

We find, however, that the plaintiff has not had at least 1,250 hours of service with the employer during the previous 12 month period as required by § 2611(2)(A)(ii). In order to determine whether the plaintiff satisfies the hours of service requirement, the FMLA uses the same principles as those used in the Fair Labor Standards Act (hereinafter "FLSA") codified at 29 U.S.C. § 207. The FLSA provides that "payments made for occasional periods when no work is performed due to vacation, holiday, illness . . . and other similar causes" are not

considered compensation for "hours of employment." 29 U.S.C. § 207(e)(2). "Applying these standards to the FMLA, paid vacation and sick time are not considered 'hours of service' within the meaning of 29 U.S.C. § 2611(2)(C)." Clark, 1998 WL 94803, *4 (quoting Robbins v. Bureau of Nat'l Affairs Inc., 896 F. Supp. 18, 21 (D.D.C. 1995)). Thus, "[i]f paid leave is not considered 'hours of service,' it follows logically that unpaid leave should not be considered 'hours of work,' as well." Id.

In examining the instant case, it appears that the plaintiff failed to meet the required 1,250 "hours of service" in order to be an "eligible employee" under the FMLA. In the Clark case, the court found that the plaintiff did not meet the 1,250 hour requirement, as in the year preceding his request for FMLA leave, the plaintiff was on a three-month medical leave, was then suspended for several days, and then took medical leave for an additional six weeks. Clark, 1998 WL 94803, *1. The plaintiff in Clark was terminated for absenteeism when he did not report for work following his second leave. Id. Since one of the plaintiff's medical leaves in that case was approved as FMLA leave, the plaintiff alleged that the employer violated his FMLA rights by terminating him rather than allowing him to take his leave. Id. The court in Clark, however, found that the plaintiff was not an "eligible employee" and was not eligible for FMLA leave for the period in question, since the plaintiff only worked 1037.75 hours in the preceding twelve months, and not the 1,250 hours as required by the statute. Id. at *4.

We agree with the defendants and find that the instant situation parallels that set out in

Clark. In the present case, the plaintiff worked only 58 days[1] between July 30, 1995, and July 30, 1996, which was the date of his termination. The plaintiff does not dispute the calculation presented by the defendants in his Opposition to the Motion for Summary Judgment (hereinafter "Pl. Opp.") and does not provide any contradictory evidence. See, e.g., Clark, 1998 WL 94803, * 5. We have determined that the plaintiff worked between 464 and 493 hours in the twelve months preceding the termination, which is well below the 1,250 required.[2] Therefore, we find that the plaintiff does not meet the requirements set out in 29 U.S.C. § 2611(2)(A) and was not eligible for FMLA leave.

In addition, the defendants also allege that even if plaintiff were able to satisfy the "hours of service" requirement, that the plaintiff was not an "eligible employee" protected by the relevant statute, since he was not suffering from a "serious health condition" at the time of his discharge. In order to be granted FMLA leave, a plaintiff must state that he suffers from a "serious health condition" that causes him to be "unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Under the relevant statute, a "serious health condition" is defined as an "illness, injury, impairment, or physical or mental condition" that involves: either (1) inpatient care; or (2) continuing treatment by a health care

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[1]The defendants calculated 57 days, but according to the attendance sheet presented by the Defendant A&P, we counted 58 days in which the plaintiff worked between July 30, 1995 and July 30, 1996.

[2]Plaintiff does state in his deposition that the hours of the second shift were from 3:30 to midnight. Pl. Dep. 54:21. Calculating 8 ½ hours per day for 58 days results in a total number of 493 hours. Even if the plaintiff had worked 15 hours a day for those days, he still would not have even worked 1,000 hours, which is below the 1,250 required under the FMLA.

provider. 29 C.F.R. § 525.114(a).

The plaintiff never properly demonstrated that his last leave of absence was in accord with this statute. On June 27, 1996, during a leave of absence which had begun in November 1995, the plaintiff provided Defendant A&P with a physician's certification of his ability to return to full-time duty on July 1, 1996. The following day, the plaintiff also verbally confirmed that he would return to full-time work on July 1, 1996. Therefore, we find that as of July 1, 1996, the plaintiff's sanctioned leave due to medical problems had expired. The plaintiff did not provide further information or an additional physician's notice to demonstrate that he suffered from a continuing "serious health condition," other than leaving a message on an answering machine at work on July 2, 1996, stating that he would be absent "due to an illness." Pl. Dep. 106-07.

District courts, sitting within the Third Circuit, have found that an employer can rely on a physician's certification that an employee is not entitled to FMLA leave where there is no overriding medical evidence presented by the employee. Sicoli, et al v. Nabisco Biscuit Co., 1998 WL 297639, *12 (E.D.Pa.). In the instant case, since the defendants had received Dr. Port's certification that the plaintiff could return to work on July 1, 1996, and did not receive any evidence from the plaintiff that would be sufficient to override that certification, the defendants were justified in relying on Dr. Port's certification.

Therefore, the plaintiff failed to provide the defendants with notice that he had a

"serious health condition[3]" on July 1, 1996. According to the relevant statute, the "employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. 29 C.F.R. § 825.303. See Nanopoulos v. Lukens Steel Co., 1997 WL 438463, (E.D.Pa.) (finding that the fact that plaintiff telephoned employer to inform him that he was unable to work due to numbness in his arm, but then failed to report to work and failed to provide a medical reason for the absence was sufficient grounds to terminate the plaintiff). Even though, the plaintiff called in sick on July 2, 1996, he did not provide proper notice as he did not inform the plaintiff that he was taking leave on July 1, 1996 and he did not provide any medical evidence to demonstrate an illness. Therefore, we find that as there is not sufficient evidence to demonstrate that the plaintiff was suffering from a "serious health condition." Consequently, the plaintiff could not qualify as an "eligible employee" under the FMLA.

The plaintiff argues in his opposition brief that Defendant A&P violated many articles of agreement set out in the Labor agreement between the plaintiff's union and A&P Super Market Service, Corp. However, as stated by the defendants, the plaintiff in his complaint did not file a breach of contract claim, but filed an action based solely on the FMLA. We find that the plaintiff has not sufficiently demonstrated to this court why the motion for summary judgment should not be granted. As stated above, after the moving

[3]He did not provide a medical reason or a certification by a doctor that he was suffering from a "serious health condition" even though he did claim that he had a doctor's note explaining his condition.

party presents evidence to support its motion for summary judgment, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 256-57. The plaintiff has not attempted to do this in its opposition brief.

The plaintiff does present a copy of an "FMLA Narrative for Super Market Services Corporation, Inc." We find, however, that such a document, by itself is not sufficient to defeat the defendants' motion for summary judgment. First, as the defendants state, the United States Department of Labor later informed the plaintiff of the results of its investigation, and stated that the Department did not believe that further action against Defendant A&P was warranted. Second, while it is true that the narrative states that the employer may have provided only seven days notice before terminating the plaintiff instead of the fifteen days notice required under the FMLA, we find that we do not need to resolve that issue. The reason for this is that we have concluded in this memorandum that the plaintiff was not an eligible employee under the FMLA. Therefore, since the plaintiff was not an eligible employee under the FMLA and was not protected by that statute, the question of whether the plaintiff was given the proper notice before termination does not need to be addressed.

For all of the above-mentioned reasons, the motion for summary judgment will be granted, as the plaintiff is not an eligible employee under the FMLA. The plaintiff's complaint will therefore be dismissed. An appropriate order follows.

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v.	:	**(Judge Munley)**
	:	
A & P SUPERMARKET SERVICE, et al.	:	
Defendant	:	

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ORDER

AND NOW, to wit, this 31st day of January 2001, it is hereby **ORDERED** that:

1. The motion for summary judgment filed by the defendants, [28-1] is **GRANTED**; and

2. The Clerk of Court is directed to close this case.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

FILED: 1/31/01