IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

AMY KOHLS,

Plaintiff,

v.

OPINION AND ORDER
99-C-442-C

BEVERLY ENTERPRISE OF WISCONSIN, INC. d/b/a MAPLE MANOR HEALTHCARE,

Defendant.

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This is a civil action for monetary relief in which plaintiff Amy Kohls contends that defendant Beverly Enterprise of Wisconsin, Inc. d/b/a Maple Manor Healthcare, violated her rights under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(a), by firing her because she took maternity leave, and the Family and Medical Leave Act, 29 U.S.C. §§ 2614(a)(1), 2615(a), by both failing to reinstate her after completion of her maternity leave and firing her in retaliation for her use of leave under the act.

After plaintiff filed suit in Wisconsin state court in St. Croix County, defendant removed this case to federal court pursuant to 28 U.S.C. § 1441. Subject matter jurisdiction is present.

28 U.S.C. § 1331. Presently before the court is defendant's motion for summary judgment. I find that plaintiff has not introduced facts from which a jury could conclude that (1) defendant fired her because of her pregnancy in violation of Title VII or in retaliation for the exercise of her right to maternity leave under the Family and Medical Leave Act; or (2) defendant failed to reinstate her after her leave in violation of the Family and Medical Leave Act. It is irrelevant whether defendant followed its own policies when terminating plaintiff or whether it fired her because it preferred someone else for the job. The only question is whether plaintiff has shown that a jury could conclude that her firing was motivated by her pregnancy or her use of leave. She has not.

For the sole purpose of deciding defendant's motion for summary judgment, I find the following facts submitted by the parties to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Until March 1999, defendant Beverly Enterprises Wisconsin, Inc. owned and operated Maple Manor Healthcare, a residential nursing home and rehabilitation facility. Plaintiff Amy Kohls was the activities director from May 1997 until November 30, 1998. Plaintiff was a full-time, at-will employee. Her duties included attending department head meetings, completing

the activities assessment for new resident admissions and implementing and overseeing the activities program.

B. Plaintiff's Supervisors

Plaintiff was supervised by four executive directors (Don Dill, Bob Larson, Becky Olson and Luanne Flick). In a performance review in May 1998, Larson gave plaintiff an overall rating of above average but noted that she needed to improve her performance in developing the weekend activity schedule and increasing volunteer membership. After Larson left, Olson acted as interim executive director. She classified plaintiff's work as “marginal,” meaning adequate. After Flick became the executive director in August 1998, she made favorable comments about plaintiff's job performance.

C. State Survey

In the summer of 1998, the state of Wisconsin performed a survey of defendant Maple Manor Healthcare that identified deficiencies in all of defendant's departments. In the state survey and an exit interview, state representatives discussed deficiencies in the activities department, including resident complaints about the lack of activities at night and on the weekends and the manner in which residents' funds were maintained. The survey cited plaintiff

for backdating minimum data set reports on residents. As the executive director, Olson addressed the issues relating to the state survey with plaintiff and implemented a plan of corrective action.

D. August 17, 1998 Meeting

At a meeting on August 17, 1998, Flick and plaintiff discussed ways to improve plaintiff's department in the areas that were criticized by the state survey. Specifically, they discussed the lack of (1) evening programming; (2) variety in the level of programming; and (3) mail distribution on the weekends. Plaintiff agreed that she could improve upon these areas. At Flick's request, plaintiff agreed to work two evenings a week to allow for more evening activities, arrange Saturday mail delivery and prepare a summary of how she spent her time. Flick did not make any recommendations or suggest that plaintiff make any changes in the level of programming. There was no discussion regarding plaintiff's pregnancy or upcoming maternity leave. Flick never followed up with plaintiff after the meeting regarding any of Flick's suggestions.

E. Plaintiff's Maternity Leave

On September 24, 1998, plaintiff completed the appropriate form requesting a leave of

absence from September 28, 1998 until December 1, 1998. Flick approved the request. (Plaintiff actually took leave from September 28 until November 29.) Flick neither questioned plaintiff about the dates or the length of time requested nor pressured her to return earlier than requested. Flick has never made any disparaging comments to plaintiff regarding (1) the amount of time plaintiff expected to be absent from work; (2) working mothers; or (3) people who have taken leaves of absence under the Family and Medical Leave Act, and she has never threatened plaintiff by telling her she might not have a job when she came back to work from her leave of absence.

In late October 1998, Flick called plaintiff at home while she was on leave to ask her to attend an all-day conference in River Falls, Wisconsin. Flick told plaintiff it was important for plaintiff to attend so she would be up to speed when she returned to work. The information plaintiff learned at the conference was relevant to her job as activities director.

During a second phone call while plaintiff was still on leave in mid-November 1998, Flick asked plaintiff to attend an all-day meeting in Hayward, Wisconsin. Plaintiff told Flick that she could not be away from her baby long enough to attend the conference because she was breast-feeding but she offered to attend the same conference in Madison, Wisconsin two weeks later. Flick became angry and snapped, "How is that going to change in two weeks when you come back?"

Although Flick had become concerned about plaintiff's management of the resident council checkbook shortly after plaintiff began her leave, Flick did not discuss her concerns with plaintiff in either telephone conversation. Because the resident council account was considered a trust account, Flick was required to report any suspected misappropriation of funds but failed to do so.

During plaintiff's leave, Shelly Price served as temporary activities director. Price has children but was not pregnant at that time. Plaintiff told Price that there were errors in the resident council checkbook before she went on maternity leave. Price did not think highly of plaintiff's choice of activities. Price made changes to programs she believed were difficult or unpopular and replaced them with programs she thought were more appropriate. During plaintiff's leave, Flick mentioned two or three times that she wished Price could be the activities director rather than plaintiff.

Flick and Price received complaints and criticisms from residents, family members, volunteers and other department heads about plaintiff's programming and work performance. Price did not pass on to Flick the negative comments she received from residents about plaintiff. Plaintiff did not hear complaints about her performance and the only time Flick conveyed complaints to her was at the August 17 meeting.

F. Plaintiff's Termination

Plaintiff returned to work on November 30, 1998, returning to her usual desk and resuming her normal duties. Plaintiff met with Flick later that morning; Becky Olson was also present. Flick asked plaintiff whether she had applied for another job. Flick informed plaintiff that she had received complaints from residents' relatives as well as volunteers about plaintiff's performance as activities director but did not give specific information when asked by plaintiff. Flick also expressed concerns that plaintiff had not maintained the resident council checking account properly by failing to fill in dates and check numbers in the check recorder. Flick told plaintiff that the checkbook was missing $70.86, accused plaintiff of embezzling money from residents' accounts and told plaintiff embezzlement led to automatic termination. Plaintiff was not given a chance to analyze the error or attempt to reconcile the differing balances.

Flick gave plaintiff the option to resign or to be terminated because of her mishandling of funds. Plaintiff resigned but then rescinded her resignation. Flick did not consult anyone in the human resources department or other administrative staff or review plaintiff's personnel file before making the decision to terminate plaintiff. Flick was the only individual involved in making the decision to terminate plaintiff.

Plaintiff had an obligation to use appropriate record-keeping practices with respect to the resident council checking account. She failed to do so. For example, (1) on some of the

register entries, she described the purpose for which the check was written rather than the name of the payee; (2) she did not provide an adequate explanation for how the money was used for a check written to “cash”; (3) she left an entry blank for a check for $30.92; and (4) she did not reconcile the checkbook register with the bank statement on a regular basis. Plaintiff also failed to maintain accurate and complete volunteer lists; however, she did maintain names of some of the volunteers in her card file.

G. Defendant's Discipline Policy

At all relevant times, defendant had a written discipline policy in effect that classified behavior as either a “category one” or a “category two” violation. According to the policy, misappropriation of funds is a category one violation and poor work quality is a category two violation.

Defendant's human resources management policy and procedures manual states: “The discipline and counseling procedures set forth below articulate factors and procedures that Beverly believes are generally appropriate to govern employees conduct and performance. Provisions of these procedures are not, however, absolute rules. In each case of misconduct or poor performance, the appropriate discipline or counseling action will be determined at Beverly's discretion on the basis of the particular facts or circumstances.”

The manual outlines a procedure in the event of a category one violation that includes immediate suspension of the employee without pay and an investigation. The manual states that "The results of the investigation should be reviewed by the supervisor and the Executive Director. The Human Resources Manager will be consulted and advised of the results of the investigation. The Executive Director and the associate's supervisor will make the final decision as to whether discharge is appropriate with input from the Human Resources Manager."

According to the manual, category two violations "will result in progressive disciplinary action up to and including discharge."

OPINION

A. Standard of Review

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Seventh Circuit has recognized that courts must apply the summary judgment standard with rigor in employment discrimination cases because "motive, intent and credibility are crucial issues." Crim v. Board

of Education of Cairo School Dist. No. 1, 147 F.3d 535, 540 (7th Cir. 1998). However, even in employment discrimination cases, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, see Celotex, 477 U.S. at 324, carrying her burden with more than mere conclusions and allegations. See id. at 321-22.

B. Pregnancy Discrimination Act

Title VII makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). In 1978, Congress amended Title VII to extend the statute's protection to pregnant women by enacting the Pregnancy Discrimination Act, which requires that "[w]omen affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k). Employers are not required to treat pregnant employees with special favor; however, employers must treat a pregnant employee "as well as that employee would have been treated had she not been pregnant." Marshall v. American Hosp. Ass'n, 157 F.3d 520, 524, 525 (7th Cir. 1998) (citing Kennedy v. Schoenberg, Fisher, & Newman, Ltd., 140 F.3d 716, 722 (7th Cir. 1998)); see also

Troupe v. May Dep't Stores, 20 F.3d 734, 738 (7th Cir. 1994). Therefore, to prove pregnancy discrimination, a plaintiff "'must show that she was treated differently because of her pregnancy.'" Maldonado v. U.S. Bank, 186 F.3d 759, 762 (7th Cir. 1999) (quoting Geier v. Medtronic, Inc., 99 F.3d 238, 241 (7th Cir. 1996)); see also Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago, 104 F.3d 1004, 1010 (7th Cir. 1997) ("An unlawful employment practice occurs whenever pregnancy is a motivating factor for an adverse employment decision.")

A plaintiff in a pregnancy discrimination action may prove discrimination either by demonstrating "'that her discharge was a result of intentional discrimination,'" Maldonado, 186 F.3d at 762 (quoting Kennedy, 140 F.3d at 722), or by setting forth a prima facie case under the McDonnell Douglas burden shifting framework. In order to prove intentional discrimination, plaintiff might produce direct evidence, such as an acknowledgment by the employer of discriminatory intent. See Geier, 99 F.3d at 241. Direct evidence, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." Randall v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989). Such evidence is rare. Plaintiff is more likely to have one of three types of circumstantial evidence, the first one being "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and

other bits and pieces from which an inference of discriminatory intent might be drawn." Troupe, 20 F.3d at 736. The second is evidence that other, similarly situated non-pregnant employees received systematically better treatment. See id. The third is that the plaintiff was qualified for the favorable treatment in question but was passed over in favor of a person equally or less qualified but not pregnant and that the employer's stated reason for its decision is "unworthy of belief, a mere pretext for discrimination." Id.

These types of evidence are quite similar to those required under the familiar burden-shifting approach and pretext analysis set out in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to establish a prima facie case of pregnancy discrimination, a plaintiff must show that (1) she was affected by pregnancy, childbirth or related medical conditions; (2) she was performing to her employer's legitimate expectations; (3) she was treated unfavorably; and (4) others similarly situated but not affected by pregnancy, childbirth or related medical conditions, were treated more favorably. See Kennedy, 140 F.3d at 726. If the plaintiff satisfies all of these elements, the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for its action. Id. at 241-42. The plaintiff then must establish by a preponderance of the evidence that the defendant's proffered nondiscriminatory reason is pretextual. Id. "The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the

employer honestly believes the reasons it offers." Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1029 (7th Cir. 1998) (quoting McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)). Pretext is not simply a bad or stupid reason; it is "a lie, specifically a phony reason for some action." Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996).

Plaintiff offers no direct evidence that she was fired as the result of illegal discrimination. Instead, she proceeds under the indirect, burden-shifting method. Defendant contends that plaintiff is unable to establish a prima facie case of discrimination and that even if she did, she has not produced evidence that defendant's proffered nondiscriminatory reasons for her termination are pretextual. I agree.

Defendant argues that plaintiff does not satisfy the first prong of a prima facie case because she does not fall within the Pregnancy Discrimination Act's protection of "[w]omen affected by pregnancy, childbirth or related medical conditions" since she was not pregnant at the time of her termination. 42 U.S.C. § 2000e(k). In support of its argument, defendant cites Piatanida v. Wyman Ctr., Inc., 116 F.3d 340, 342 (8th Cir. 1997), in which the Court of Appeals for the Eighth Circuit held that the plaintiff's "claim of discrimination based on her status as a new parent is not cognizable under the PDA." See also Santrizos v. Aramark Corp., No. 96-C-8391, 1998 WL 704114, at *5 (N.D. Ill. Sept. 29, 1998) (same). Plaintiff argues

that she qualifies as a woman *"affected* by pregnancy" because she was terminated the day she returned from maternity leave; she also argues that Flick must have made the decision to terminate her during her maternity leave.

Although the Court of Appeals for the Seventh Circuit has not addressed the precise contours of the scope of the act's protection, this case does not require that I decide what those limits are. See Piraino v. Int'l Orientation Resources, Inc., 84 F.3d 270 (7th Cir. 1996) (declining to rule on argument that discrimination post-birth is not pregnancy discrimination because plaintiff had not offered a claim that "relates only to an employer's refusal to hire (or reinstate) a mother with a young child, without a hint of any role that the earlier pregnancy played in the decision"). It is undisputed that plaintiff was not pregnant at the time of her termination; however, her argument is that defendant's decision to terminate her was based on her pregnancy and maternity leave. In contrast, the plaintiffs in Piatanida, 116 F.3d at 342 and Santrizos, 1998 WL 704114, at *5, admitted that they were not terminated because of their pregnancies or their decisions to take maternity leave. Because plaintiff is claiming discrimination based on her pregnancy, she falls within the act's protection and satisfies the first prong of a prima facie case. Plaintiff also satisfies the third prong that requires an adverse employment action because she was fired.

However, plaintiff has failed to meet the second prong of a prima facie case because she

has not produced sufficient evidence that she was meeting defendant's legitimate expectations. Defendant's asserted reasons for firing plaintiff tend to show both that plaintiff was not meeting its legitimate expectations and that it had a non-pretextual nondiscriminatory reason for its action. See Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1113 (7th Cir. 1998) (recognizing that factual inquiry relevant to issue of pretext often overlaps with analysis whether, for purposes of establishing the prima facie case, employee was performing his job well enough to meet employer's legitimate expectations). Before plaintiff left for maternity leave, Flick met with her to discuss the need for improvement in certain areas within plaintiff's responsibilities. When plaintiff returned from leave, Flick met with plaintiff to discuss her concerns about plaintiff's performance as the activities director. During plaintiff's absence, Flick learned about plaintiff's flawed record-keeping practices in managing the resident council checkbook, including her failure to reconcile the checkbook register with the bank statement on a regular basis, as well as the concerns of residents' relatives and volunteers about plaintiff's programming choices. Flick's biggest concern was money that was missing from the resident council account. Flick's concerns demonstrate that plaintiff was not meeting defendant's legitimate expectations as activities director.

Plaintiff argues that she was meeting defendant's expectations. In support of her argument, plaintiff states that she received an above average performance evaluation in May

and asserts that she made improvements after meeting with Flick in August. Such evidence falls short of establishing that plaintiff was meeting defendant's legitimate expectations at the time she was fired because (1) plaintiff's supervisor in May did not have the same information about her performance that Flick had; and (2) plaintiff provided no evidence that she made improvements after the August meeting and even if she did, the improvements did not cure all of the deficiencies that were of concern to defendant.

Plaintiff contends that the problems relating to the checkbook were not the true reasons for plaintiff's termination, and that this is shown by Flick's failure to report her suspicions of misappropriation. However, plaintiff cannot dispute that there was money missing from the resident council account, having informed Price about it before she left for maternity leave. Plaintiff dooms her own case when she argues that "[t]he evidence suggests that Flick wanted to terminate Kohls because she liked her replacement, Shelly Price, better, and seized on the checkbook matter as an opportunity to terminate Kohls," Plt.'s Br. at 3, rather than arguing (and offering proof) that defendant wanted to replace her with Price because Price was not pregnant and did not recently take a maternity leave. If plaintiff is right that defendant fired her because it preferred Price as activities director, such a firing would not violate Title VII; it would not be a decision based on illegal factors. This admission by plaintiff essentially ends her claim of pregnancy discrimination because "plaintiff has [failed to] establish[] a logical reason

to believe that the decision to terminate her rests on a legally forbidden ground." Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997).

In an effort to demonstrate that defendant's proffered reasons are pretextual, plaintiff points to Flick's comment, “How is that going to change in two weeks when you come back?,” referring to plaintiff's inability to leave her baby for the day because she was breast feeding. “In order for isolated comments to be probative of discrimination, the 'comments must be contemporaneous with the discharge or causally related to the discharge decision-making process.'” Marshall, 157 F.3d at 526 (quoting Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1140 (7th Cir. 1997)). Flick's comment was made to plaintiff while she was on maternity leave in a conversation in which Flick asked plaintiff to attend a seminar, a setting unrelated to discussions of Flick's concerns about plaintiff. Plaintiff has never argued that her termination was related to absenteeism related to breast feeding or child care or to her refusal to attend the seminar because she was breast feeding. Therefore Flick's comment lacks the requisite causal or temporal nexus to plaintiff's termination to demonstrate pretext. Similarly, any failure on the part of defendant to follow its disciplinary policy in terminating plaintiff provides no evidence of pretext because the policy set forth discretionary guidelines, not “absolute rules.” The policy specifically grants defendant “discretion on the basis of the particular facts or circumstances.” Flick's decision that embezzlement led to automatic

termination was one that was within her discretion as a supervisor to make and cannot demonstrate pretext.

The strongest evidence plaintiff can offer to support an inference of discrimination is that she was fired the day she returned from maternity leave. Although suspicious timing can constitute indirect evidence of discrimination, plaintiff must show some connection between her return from maternity leave and her termination. See Hunt-Golliday, 104 F.3d at 1011; see also Marshall, 157 F.3d at 525 (plaintiff "must show some connection between her pregnancy announcement and the unfavorable employment action"). It makes sense that Flick chose to meet with plaintiff her first day after maternity leave because she had received the complaints about plaintiff and discovered the problems with plaintiff's handling of the resident account while plaintiff was away. Plaintiff has failed to present any other evidence to call this rationale into question or to demonstrate the requisite link between her return from maternity leave and her termination.

Even if plaintiff could show that she was meeting defendant's legitimate expectations and that defendant's proffered legitimate reasons were pretextual, plaintiff does not satisfy the fourth prong of a prima facie case because she cannot demonstrate that others similarly situated but not affected by pregnancy, childbirth or related medical conditions, were treated more favorably. See Kennedy, 140 F.3d at 726. The reason for this is simple: there is no

"nonpregnant employee returning from extended leave" whose supervisor had received complaints about her performance and discovered mismanagement of funds during her absence. Hunt-Golliday, 104 F.3d at 1011. Plaintiff puts forth the unsupported assertion that "[t]here is evidence that Kohls was treated differently and more harshly than other employees who received discipline." In the absence of any factual support, plaintiff cannot argue that the discipline policy was applied to her unfairly because of her pregnancy.

In sum, plaintiff has not offered evidence from which a reasonable trier of fact could conclude that she has satisfied the requirements of a prima facie case of pregnancy discrimination or that defendant's proffered nondiscriminatory reasons for plaintiff's termination are pretextual. Therefore, her claim of pregnancy discrimination must fail.

C. The Family and Medical Leave Act

The Family and Medical Leave Act provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for certain situations, including "the birth of a son or daughter of the employee." 29 U.S.C. § 2612(1). When the period of leave is over, the employee is to be reinstated to his or her former position or an equivalent position. See § 2614(a)(1). However, "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had" not

taken the leave. 29 C.F.R. § 825.217(a). To guarantee the rights provided under the act, the act provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." See 29 U.S.C. § 2615(a)(1).

1. Failure to reinstate

The Court of Appeals for the Seventh Circuit has held that "[w]hen an employee alleges a deprivation of [the substantive guarantees of the FMLA], the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. In such cases, the intent of the employer is immaterial." King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999).

Defendant contends that plaintiff would have been terminated regardless whether she took FMLA leave and therefore it had no obligation to reinstate her. "An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is required in order to deny restoration to employment." 29 C.F.R. § 825.216(a). In Kariotis v. Navistar Int'l Transportation Corp., 131 F.3d 672, 681 (7th Cir. 1997), the defendant suspected that the plaintiff had not used her FMLA leave "for its 'intended purpose' of recovering from [] surgery." The Seventh Circuit concluded that "[i]f [defendant] had to provide more than an honest suspicion simply because [plaintiff] was on

leave, she would be better off (and enjoy 'greater rights') than similarly situated employees . . . who are not on leave." Id.

Defendant fired plaintiff because of problems with her performance as activities director and with her management of the resident council checkbook. Although it may be true that Flick would not have discovered the record-keeping problems with the checkbook or the missing money if plaintiff had not taken a leave, the Family and Medical Leave Act does not protect employees from discovery of their sloppiness or mistakes during the leave. As the Seventh Circuit recently held, "defendant[] did not violate the Family and Medical Leave Act by not reinstating and indeed discharging [plaintiff] because [it] could have discharged her for poor performance even if she had not taken the . . . leave." Clay v. City of Chicago Dep't of Health, 143 F.3d 1092, 1094 (7th Cir. 1998). Even if plaintiff's contention that defendant fired her because of its preference for Price as the activities director is true, firing her for that reason is not a violation of the act as long as defendant could have made the same decision if plaintiff did not take a leave. It is logical that defendant would prefer Price if she improved the choice of programs for the residents, because programming was one of the areas that caused defendant concern about plaintiff's performance in her position. Plaintiff has not offered evidence from which a reasonable trier of fact could conclude that defendant violated the Family and Medical Leave Act by failing to reinstate her after her leave.

2. Retaliation

Plaintiff also contends that defendant terminated her in retaliation for her exercise of her right to take a leave under the act in violation of § 2615(a)(1) & (2). "An employer is prohibited from discriminating against employees . . . who have used FMLA leave." 29 C.F.R. § 825.220(c). In order to succeed on this claim, plaintiff must show that defendant discharged her "because of medical absence." Clay, 143 F.3d at 1094. The McDonnell Douglas framework, set out above, applies to "claims that an employer discriminated against an employee exercising rights guaranteed by the FMLA." King, 166 F.3d at 891-92. To establish a prima facie case of retaliatory discharge, a plaintiff must establish that: (1) the plaintiff engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. See id. Unlike claims of substantive violations of the act, the question of the employer's intent is important in retaliation cases. See id. Defendant concedes that plaintiff has met the requirements of a prima facie case of retaliatory discharge; however, it argues that plaintiff has failed to demonstrate that its proffered reasons for firing her are pretextual. "To successfully challenge the honesty of the company's reasons she must specifically rebut those reasons. . . . [R]ebuttal must include facts tending to show that the employer's reasons for some negative job action are false, thereby implying (if not

actually showing) that the real reason is illegal discrimination." Kariotis, 131 F.3d at 677. For the reasons discussed above in connection with plaintiff's claim of pregnancy discrimination, I find that plaintiff has failed to demonstrate that defendant's proffered reasons for her termination are a pretext for retaliation.

ORDER

IT IS ORDERED that the motion of defendant Beverly Enterprise of Wisconsin, Inc. d/b/a Maple Manor Healthcare for summary judgment is GRANTED. The clerk of court is

ordered to enter judgment for defendant.

Entered this _____________ day of March, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge