IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN J. DOMNICK,

Plaintiff, OPINION AND ORDER

v. 02-C-375-X

VER HALEN, INC.,

Defendant.

This is a civil action for monetary and equitable relief brought pursuant to the Family and Medical Leave Act, 29 U.S.C. §§ 2601- 2654. Plaintiff Stephen J. Domnick contends that his employer, defendant Ver Halen, Inc., interfered with his exercise of his right to take leave for a serious health condition when it terminated him on May 9, 2001 after he was hospitalized for treatment of alcoholic pancreatitis, in violation of 29 U.S.C. § 2615(a)(1).

Before the court is Ver Halen's motion for summary judgment. Although Ver Halen concedes that Domnick's inpatient treatment for alcohol-related symptoms was a "serious health condition" under the FMLA, it contends that the FMLA does not protect absences that are the result of substance use "regardless if substance use leads to serious consequences that lead to hospitalization." Ver Halen's contention is based upon an administrative regulation which provides that absences from work because of substance use are not covered by the FMLA. Alternatively, Ver Halen contends that even if Domnick's absence was

covered by the FMLA, Ver Halen could legitimately fire Domnick because it had warned him in September 2000 that his continued drinking could lead to termination.[1]

Although there are many equities favoring Ver Halen, the administrative regulation upon which it bases its summary judgment motion does not support the interpretation urged by Ver Halen. Furthermore, disputed issues of fact preclude me from finding that Ver Halen would have terminated Domnick even if he had not taken leave protected by the FMLA. Accordingly, I must deny the motion for summary judgment.

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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *Oates v. Discovery Zone,* 116 F.3d 1161, 1165 (7th Cir. 1997). For the purpose of deciding Ver Halen's motion for summary judgment, I find from the parties' proposed findings of fact that there is no genuine dispute with respect to the following facts, with one exception that is noted below.

[1] Initially, Ver Halen also contended that Domnick is not a qualified employee under the FMLA because he was not employed at a work site within a 75 mile radius of a work site that employs 50 or more employees. *See* 29 C.F.R. § 825.110(a)(3). Subsequently, Ver Halen withdrew that contention as a basis for its summary judgment motion, acknowledging a factual dispute regarding the distance between Ver Halen's Madison and Brookfield work sites.

FACTS

Plaintiff Steven J. Domnick is an adult resident of Wisconsin. Defendant Ver Halen, Inc. operates work sites in Madison and Brookfield, Wisconsin. Domnick worked for Ver Halen at its Madison work site from August 1993 to May 9, 2001.

On September 11, 2000, Ver Halen gave Domnick a letter that stated:

> This correspondence shall serve as VerHalen, Inc.'s position with respect to your work performance and attendance.
>
> Reliable and predictable attendance is an essential function of every position at VerHalen, Inc. Due to your drinking habits, your attendance and performance have been unsatisfactory.
>
> VerHalen has accommodated your time away from work; however, the burden it is placing on drivers from the Green Bay and Milwaukee offices is becoming a hardship which is difficult to continue to accommodate.
>
> VerHalen very much wants you to succeed in your position with us; however, this will require greater effort from you.
>
> As a condition of your continued employment as an at-will employee with VerHalen, we will require that you submit to random drug/alcohol screening as well as successfully complete an alcohol treatment program, such program to be approved by both you and VerHalen.
>
> To monitor your compliance with the program, VerHalen also requests that you sign a release of medical information, allowing VerHalen to have contact with your AODA treatment providers. VerHalen will keep the information confidential and will share it only with those members of management who have a "need to know."
>
> Further, this correspondence is to inform you that your most recent time away from work shall be counted against your medical leave entitlement under both federal and state laws.
>
> Steve, we are pulling for your success.

Domnick signed the letter, indicating that he agreed to the conditions of his continued employment.

After September 11, 2000, Ver Halen never required Domnick to submit to any random drug or alcohol screening. At Ver Halen's urging, in late September or early October 2000, Domnick was evaluated at New Start, an AOD recovery facility affiliated with Meriter Hospital. New Start did not accept Domnick into the program. The parties dispute what happened next. According to Domnick, the subject of AOD treatment never was brought up again either by him or by Ver Halen. Ver Halen's Madison manager, Mike Farrell, swears to the contrary, stating that he had "more than one verbal conversation" with Domnick between September 11, 2000 and May 10, 2001 in which he warned Domnick that his continued employment was conditioned on his successful completion of an AOD treatment program.

At 11 p.m. on May 8, 2001, Domnick went to Urgent Care at the William S. Middleton Memorial Veteran's Hospital, complaining that he had been having severe abdominal and back pain since 11 a.m. that day. Domnick reported that he had drank heavily during the preceding weekend, and triage staff noted that he smelled of alcohol. Domnick was admitted to the hospital for treatment of alcoholic pancreatitis until his discharge on May 11, 2001. During that time, he received treatment for alcoholic pancreatitis, pain management and the prophylactic administration of medicines designed to combat alcohol withdrawal symptoms.

On May 9, 2001, Domnick called Farrell and told him that he had been admitted to the hospital and would be unable to report to work. On May 11, 2001, Domnick informed Farrell that he would be able to return to work. At this time, Farrell informed him that he had been terminated effective May 9, 2001. Sometime after May 11, 2001, Domnick received a letter from Farrell dated May 9, 2001, which stated:

> This correspondence shall serve as VerHalen, Inc.'s position with respect to your work performance and attendance.
>
> VerHalen, Inc. has requested that you successfully complete an alcohol treatment program which you have not done. Your absence was unexcused for both May 8th and 9th.
>
> Those are both terms and conditions that you agreed to comply with to continue employment with VerHalen, Inc.
>
> As you have failed to comply with the terms and conditions that VerHalen, Inc. has set, it has been decided to terminate your employment effective immediately. We will send you a follow up letter regarding your COBRA plan with VerHalen, Inc.

OPINION

For the purpose of analysis I have broken Ver Halen's argument into its two component parts.

I. Substance Use vs. Treatment

The Family and Medical Leave Act establishes two categories of protections for employees.[2] First, the Act creates a set of substantive statutory rights, which include the

[2] For the purposes of this motion, the parties agree that Ver Halen is an employer and Domnick is an employee covered by the FMLA.

right of eligible employees to take up to twelve weeks of unpaid leave annually for a serious health condition as defined by the Act. 29 U.S.C. § 2612(a)(1). After the period of qualified leave expires, the employee is entitled to be reinstated to the former position or an equivalent one with the same benefits and terms of employment that existed prior to the exercise of the leave. 29 U.S.C. § 2614(a)(1). To protect these guarantees, the FMLA makes it unlawful for an employer to "interfere with, restrain, or deny" the employee's exercise of or the attempt to exercise a substantive right under the FMLA. 29 U.S.C. § 2615(a)(1). However, "the substantive right created by § 2614(a)(1) does not include an entitlement to any right, benefit, or condition to which the employee would not have been entitled if the leave had not been taken." *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000).

Second, the FMLA "affords employees protection in the event they are discriminated against for exercising their rights under the Act." *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999). "Thus, the Act proscribes action by the employer to discriminate or retaliate against an employee for the exercise of rights created by the Act." *Rice*, 209 F.3d at 1017.

Domnick claims that Ver Halen interfered with or denied his substantive right to take unpaid leave for a serious health condition. Under the FMLA, qualified employees are entitled to take unpaid leave "[b]ecause of a serious health condition that makes the

employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612 (a)(1)(D). A serious health condition means:

> [a]n illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11). *See also* 29 C.F.R. § 825.114 (interpreting phrase "serious health condition").

Ver Halen concedes that Domnick's hospitalization between May 8 and May 11, 2001 amounts to a serious health condition within the meaning of 29 U.S.C. § 2611(11). *See* 29 C.F.R. § 825.114(1). Nonetheless, it contends that Domnick's leave did not qualify for protection under the FMLA because Domnick's hospitalization was the result of his use of alcohol, which is not protected by the Act. As support for its position, Ver Halen relies upon a regulation promulgated by the Secretary of Labor pursuant to Congress' directive to issue regulations "necessary to carry out" the Act. 29 U.S.C. § 2654. The regulation provides that:

> Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health are services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

29 C.F.R. § 825.114(d). Ver Halen argues that under the regulation, the employee must be in treatment for substance abuse in order for substance abuse to amount to a serious health

condition. According to Ver Halen, Domnick was not treated during his hospital stay for substance abuse, but for "the pain associated with his excessive use of alcohol." In other words, argues Ver Halen, the FMLA applies to an employee's leave for treatment that addresses his underlying substance addiction, but it does not apply to treatment that merely salves the physical consequences of a drinking binge.

Ver Halen's argument has substantial curb appeal, but it reads into the regulation a limitation that simply isn't there. A plain reading of the regulation does not support the interpretation that"treatment" is limited to treatment addressing chronic dependency issues as opposed to treatment for acute physical symptoms resulting from alcohol use. Ver Halen's interpretation would exclude hospitalization for genuinely accidental alcohol poisoning (for instance, unwittingly drinking heavily spiked punch). At the other extreme, even inpatient treatment at a substance abuse rehabilitation center, which Ver Halen would presumably concede constitutes qualified leave under the Act, occurs "because of the employee's use" of a substance, and such dependency treatment could well involve treatment for physical symptoms associated with the use.

Ver Halen has conceded that during Domnick's absence from May 8 through May 11, he received treatment and inpatient care for alcoholic pancreatitis and other alcohol-related symptoms. Thus, there is no claim in this case that Domnick was simply "too intoxicated to come to work," which is the situation that 29 C.F.R. § 825.114(d) clearly meant to exclude from FMLA protection. Granted, there is potential overlap here that looks

like a regulatory loophole: what if a savvy alcoholic checks himself into the hospital rather than nurse his hangover at home in order to hide behind the remarkably broad protection offered by the FMLA? Must employers rely on the health care provider to make a frank assessment of whether "treatment" genuinely was necessary as opposed to aspirin and a nap? Having raised these questions, I need not answer them today. Domnick's abuse of alcohol on this occasion was profound enough to require three nights in the hospital for treatment.

In sum, the regulations interpreting the FMLA do not support Ver Halen's contention that the Act does not apply to leave taken for a condition that would otherwise qualify as a serious health condition where that condition resulted from alcohol use. Ver Halen's motion for summary judgment on this basis will be denied.

II. The September 11, 2000 Letter

Ver Halen contends that even if Domnick's absence was covered by the FMLA, it had the right to terminate him anyway on the basis of its September 11, 2000 letter. Where an employer comes forth with evidence to show that it would have discharged the employee even if he had not been on FMLA leave, the employee must overcome that assertion by proving that he would not have been discharged if he had not taken FMLA leave. *See Rice*, 209 F.3d at 1018.

It is unclear whether Ver Halen is contending that it would have fired Domnick if he had not taken FMLA leave. Although Ver Halen makes this suggestion in its brief, none of

Ver Halen's representatives have sworn to this in an affidavit. In any case, even if Ver Halen is making such a contention, genuine disputes of fact preclude me from granting summary judgment to Ver Halen on this basis. First, Ver Halen contends that it fired Domnick for his failure to complete an AOD program. Although it is undisputed that Domnick never completed an alcohol treatment program, it would be possible for a reasonable factfinder to conclude that Ver Halen's alleged failure to pursue the matter after Domnick's initial rejection from the New Start program constituted an implicit waiver of that portion of Domnick's continued employment agreement.[3] Also, the fact that Ver Halen invoked Domnick's failure to get AOD treatment at the same time he took FMLA leave gives rise to an inference that Domnick would not have been fired absent his taking of leave. *See Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 806 (7th Cir. 2001) (indicating circumstance in which timing of termination decision could lead factfinder to infer that employee would not have been fired if she would not have taken leave).

Second, Ver Halen contends that Domnick violated the condition of the September 11, 2000 letter which warned him that "his continued drinking, resulting in unacceptable attendance, would lead to the termination of his employment." Dkt. #11, at 5. However, the letter does not state as a condition that no further alcohol-related absences would be allowed, or that Domnick was to abstain from drinking. Furthermore, even if a factfinder reasonably could infer this from the letter, it would not allow Ver Halen to do what it

[3] I am not making any determination whatsoever regarding waiver in this order.

otherwise could not do under the FMLA. As I have previously found, even though Domnick's hospitalization from May 8 through May 11 may have been brought on by a weekend of binge drinking, Domnick's absence from work qualified for protection under the FMLA as interpreted by the regulations; therefore, Ver Halen could not terminate him because of it.[4]

In sum, construing the facts in the light most favorable to Domnick, I am unable to conclude from the present record that no reasonable finder of fact could conclude that Domnick would have been terminated even if he had not taken leave protected by the FMLA. Accordingly, to the extent that Ver Halen seeks summary judgment on this ground, its motion must be denied.

CONCLUSION

Summary judgment is appropriate only when the material facts are undisputed and the movant is entitled to judgment as a matter of law. By virtue of the broad wording of the applicable regulation, Domnick's hospital admission and the timing of Ver Halen's decision to terminate Domnick, summary judgment cannot be granted.

[4] Because Ver Halen has conceded that it did not have a policy regarding substance abuse that was communicated to all employees, 29 C.F.R. § 825.112(g) does not apply to this case.

ORDER

It is ORDERED that defendant Ver Halen, Inc.'s motion for summary judgment is DENIED.

Entered this 10th day of March, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge