IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARYLEE ARRIGO,

Plaintiff,

MEMORANDUM

12-cv-700-bbc

v.

LINK STOP, INC., JAY E. LINK,
ASHLAND LAKE SUPERIOR LODGE, LLC,
GRANDMA LINK'S RESTAURANT AND LOUNGE, LLC
and GORDON PINES GOLF COURSE,
d/b/a LINK INTERNATIONAL INVESTMENTS, LLC,

Defendants.

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Plaintiff Marylee Arrigo is proceeding on a claim that her former employers violated her rights under the Family and Medical Leave Act by terminating her after she took leave for an anxiety disorder and before she was going to take maternity leave. She relies on 29 U.S.C. § 2615(a)(1), which states that, "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." Trial is scheduled for May 5, 2014 and the parties have submitted their proposed jury instructions and special verdict questions.

The parties agree that terminating an employee may qualify as interference under § 2615(a)(1), but they disagree about the standard for causation on plaintiff's claim. Because this is an important issue for trial and the language of the statute does not easily resolve the

dispute, I am issuing this memorandum to explain that my tentative conclusion is to apply the same standard as that applied in Title VII and First Amendment claims.

In her pretrial submissions, plaintiff argues that it is improper to consider defendants' intent because the Court of Appeals for the Seventh Circuit has held that intent is not an element of a claim under § 2615(a)(1). E.g., Smith v. Hope School, 560 F.3d 694, 699 (7th Cir. 2009) ("To prevail on an FMLA interference claim, an employee need only demonstrate that her employer has denied her leave under the act; she need not show discriminatory intent on the part of the employer."); Burnett v. LFW Inc., 472 F.3d 471, 477 (7th Cir. 2006) ("no finding of ill intent is required" for interference claim). However, a closer look at the cases reveals that the rule is not so straightforward.

In cases such as Smith and Burnett, the court of appeals stated that intent is not an element in the context of claims in which the plaintiff was contending that her employer interfered with her rights under the FMLA by denying a request for leave. In that context, it may make sense to say that the employee does not have to prove *why* the employer denied leave. Regardless whether the employer denied leave for business reasons or simply out of spite, the denial would interfere with the employee's FMLA rights.

However, when the employee is alleging that the employer interfered with the exercise of her rights, not by denying a leave request, but by retaliating against her for taking leave, the reason the employee took the adverse action becomes a central question. This is because the FMLA does not prohibit an employer from taking adverse actions against an employee that are unrelated to the employee's leave. 29 U.S.C. § 2614(a)(3)(B)(FMLA does not give

employee "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave"). In other words, an employee cannot use the FMLA as a shield to block her employer from terminating her for poor performance.

Once this proposition is established, it becomes clear that it is impossible to determine whether defendants "interfered" with plaintiff's FMLA rights in this case without first determining whether defendants fired plaintiff for exercising her rights or for some other reason. Phelan v. City of Chicago, 347 F.3d 679, 683 (7th Cir. 2003) ("[W]here an employee is terminated while taking FMLA leave, the trial court must determine whether the termination was illegally motivated by the employee's choice to take leave, or whether the termination was motivated by other, valid reasons."). This may be why the Court of Appeals for the Seventh Circuit has treated the type of interference claim at issue in this case as a retaliation claim under § 2615(a)(2) and assumed that such claims require proof of the employer's intent. Pagel v. TIN Inc., 695 F.3d 622, 631 (7th Cir. 2012) (in claim that defendant fired plaintiff for taking leave, evaluating evidence to determine whether reasonable jury could infer retaliatory intent); Burnett, 472 F.3d at 481-82 (same). As I noted in the summary judgment opinion, § 2615(a)(2) applies only to retaliation for "opposing" conduct that is prohibited by the FMLA, so it does not apply to this case. However, it may be inferred reasonably from cases such as Pagel and Burnett that the court of appeals has concluded that the evidentiary framework is the same for a retaliation claim under § 2615(a)(2) and an interference claim under § 2615(a)(1) when the interference

involves alleged retaliation for taking leave.

The next question is what the standard for causation should be. Unfortunately, the answer to that question is not obvious from the language of the statute or from the case law. Section 2615(a)(1) prohibits "intefere[nce]," but it does not define the term. In cases such as Phelan and Simpson v. Office of Chief Judge of Circuit Court of Will County, 559 F.3d 706, 713 (7th Cir. 2009), the court stated that the question was whether the employer's decision was "illegally motivated." In Pagel, 695 F.3d at 631, the question was whether there was "a causal connection" between the adverse action and the exercise of the employee's rights. In Burnett, 472 F.3d at 481, the court framed the question as whether the employer's adverse action was "on account of" the employee's protected activity. Although these general descriptions may be sufficient for summary judgment, more precision is required for trial to inform the jury what the parties are required to show.

Some guidance is provided in the regulations. Under 29 C.F.R. § 825.220(c), "employers cannot use the taking of FMLA leave *as a negative factor* in employment actions, such as hiring, promotions or disciplinary actions." In Pagel, 695 F.3d at 629, the court of appeals quoted this provision with approval. Similarly, in Lewis v. School District #70, 523 F.3d 730, 74-42 (7th Cir. 2008), the court stated that a plaintiff "need not prove that retaliation [for taking medical leave] was the only reason for her termination; she may establish an FMLA retaliation claim by showing that the protected conduct was a substantial or motivating factor in the employer's decision. A motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's

actions."

At the same time, the court has stated that "employers may fire employees for poor performance if they would have fired them for their performance regardless of their having taken leave." Ogborn v. United Food & Commercial Workers Union, Local No. 881, 305 F.3d 763, 768 (7th Cir. 2002). See also Burnett, 472 F.3d at 481-82 (in FMLA case, defendant may present "evidence that he would have taken the adverse employment action against the plaintiff even if [the defendant] had had no retaliatory motive"). This suggests a standard similar to the one applied in Title VII and First Amendment cases. In those cases, the employee has the initial burden to show that a protected characteristic or activity was a motivating factor in the defendant's decision and then the burden shifts to the employer to show that it would have taken the same action even if it had not taken the protected characteristic or activity into account. Mays v. Springborn, 719 F.3d 631, 634-35 (7th Cir. 2013); Cook v. IPC Intern. Corp., 673 F.3d 625, 628-29 (7th Cir. 2012). In this court, I have applied the "motivating factor" standard by asking the jury whether the protected conduct or characteristic was "one of the reasons" for taking the adverse action. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003).

I acknowledge that courts have determined that other employment discrimination statutes require that the plaintiff prove not just a motivating factor, but also that the employer would not have taken the adverse action "but for" the employee's protected activity or characteristic. E.g., Lindsey v. Walgreen Co., 615 F.3d 873, 876 (7th Cir. 2010) (Age Discrimination in Employment Act); Serwatka v. Rockwell Automation, Inc., 591 F.3d

957, 961-63 (7th Cir. 2010) (Americans with Disabilities Act). However, to apply that standard, I would have to ignore the FMLA regulation and cases such as Lewis. Accordingly, until the court of appeals indicates otherwise, I will apply the burden shifting framework from Title VII and the First Amendment to FMLA interference claims involving allegations of retaliation.

Entered this 23d day of April, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge