IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHELLE L. BOHMAN,

Plaintiff,

v.

COUNTY OF WOOD,

Defendant.

OPINION AND ORDER

03-C-571-C

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In this civil action for monetary relief, plaintiff Michelle L. Bohman contends that her employer, defendant Wood County, violated her rights under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654, when it terminated her employment after she could not return to work because of a family illness. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. As an initial matter, I note that both parties failed to comply with this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was sent to the parties with the magistrate judge's December 10, 2003 preliminary pretrial conference order. In particular, procedure II.C. requires plaintiff to respond to each numbered paragraph of the defendant's proposed findings of fact, stating clearly whether there is a genuine issue as to the whole or

a part of the factual proposition. If plaintiff believes there is a genuine issue as to part of the factual proposition, she is to identify precisely that part of the numbered paragraph with which she takes issue. In addition, she should state her own version of the fact and cite to the specific evidence in the record that would support his version of the fact. Procedure II.B. Plaintiff failed to submit a response to defendant's proposed findings of fact but submitted her own proposed findings of fact. In accordance with this court's procedures, I have treated defendant's proposed facts as undisputed. However, I have included those facts submitted by plaintiff that are relevant and that defendant did not put into dispute.

In its response to plaintiff's proposed findings of fact, defendant failed to follow this court's procedures when he cited inadmissible evidence. Dft.'s Resp. to PPFOF, dkt. #22, ¶¶ 9, 10. Under this court's Procedures to be Followed on Motions for Summary Judgment, "each proposed finding must be supported by admissible evidence." Procedure I.C.1. Nevertheless, defendant's mistake is not fatal to its motion. Because plaintiff's evidence of suspicious timing is insufficient to rebut the undisputed evidence that she had over 30 illness-related absences from work from January 2001 to September 2001 and was disciplined for illness-related absences, a reasonable juror could not infer that defendant terminated plaintiff in violation of the FMLA. Despite plaintiff's argument to the contrary, defendant did not have a duty to determine whether each of plaintiff's demands for sick leave was a FMLA-qualifying event. Therefore, I will grant defendant's motion for summary

judgment.

From the proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Michelle Bowman is a Wisconsin resident hired by defendant Wood County, a Wisconsin municipality, in March 1998 to work at the Norwood Health Center as a certified nursing assistant. From January 1, 2000 through December 31, 2001, plaintiff's employment was governed by a labor agreement between defendant and plaintiff's union, Local 1751 AFSCME, AFL-CIO. The agreement provides for paid sick leave benefits of one occurrence each month of each calendar year. The agreement provides defendant with the right to establish reasonable work rules and schedules of work and requires employees who are sick or unable to report to work to give notice, whenever feasible, to the supervisor at least two hours prior to the beginning of the employee's shift. The agreement states that "employees who abuse sick leave shall be subject to appropriate discipline."

In addition, defendant has a policy regarding sick leave and attendance. Under the policy, employees are assessed points for unexcused absences. An unexcused absence means any absence from work except those approved and prescheduled.

On September 15, 2000, defendant reprimanded plaintiff for excessive absences after

she was absent from six shifts from August 21, 2000 to September 12, 2000. On April 4, 2001, defendant disciplined plaintiff by letter, stating that she had accumulated 15 illness-related absences between December 6, 2000 and April 4, 2001. Defendant notified plaintiff that her excessive absences had triggered defendant's right under the Norwood Health Center Sick Time Policy to request documentation of illness. On August 17, 2001, plaintiff's supervisors sent her a memo, stating that they were suspending her for three days. A copy of the memo was sent to human resources along with a handwritten note from the director of nursing at Norwood, stating that "Shawna requested that this part be added in hopes that Michelle would resign." "Shawna" refers to Shawna Kovach, the Administrator at Norwood.

Plaintiff's three-day suspension began on August 21, 2001. Defendant supported the suspension on the ground that plaintiff had accumulated over 30 absences for illness since January 2001. For example, on January 23, 2001, January 29, 2001, March 4, 2001, March 19, 2001, March 20, 2001 and July 6, 2001, plaintiff requested sick leave because her child was ill. Plaintiff requested sick leave because she herself was feeling ill on February 5, 2001, March 11, 2001, March 13, 2001, March 25, 2001, April 3, 2001, May 30, 2001, June 10, 2001, June 24, 2001, July 23, 2001, July 31, 2001, August 13, 2001, August 14, 2001, August 20, 2001 and August 21, 2001. (In addition, plaintiff requested leave on other days for "other reasons" such as funerals or a family emergency. Plaintiff requested sick leave on

December 22, 2000, December 24, 2000 and December 26, 2000, because either she or her child was ill.) Almost each time that plaintiff requested leave, defendant had to find another person to cover plaintiff's shift. Defendant warned plaintiff that further absences could result in termination of her employment

After serving her three-day suspension, plaintiff resumed her employment on August 25, 2001. On September 6, 2001, defendant terminated plaintiff's employment because she had worked only one scheduled day since returning from her three-day suspension. Defendant advised plaintiff in the termination letter that if she had extenuating circumstances that would justify the absences, she should contact the Norwood Administrator. Upon receipt of the September 6, 2001 termination letter, plaintiff requested FMLA forms and had her son's physician complete some parts of the forms. (Defendant had a policy that required FMLA requests to be certified by a doctor.) Plaintiff filled out the FMLA form and dated it September 10, 2001, requesting leave because of her son's hospitalization from September 1 through September 10, 2001. Hearing no response to her request for FMLA benefits from defendant, plaintiff wrote defendant on September 19, 2001 about the matter. On September 20, 2001, plaintiff's physician certified her need for medical leave for September 1 through September 10, 2001. On September 20, 2001, defendant rescinded plaintiff's termination, approved FMLA leave for plaintiff for the dates certified by her physician and reinstated her effective September 25, 2001. When approving

plaintiff's FMLA leave, defendant warned her that it would terminate her employment if her attendance did not improve to a satisfactory level.

After returning from FMLA leave, plaintiff failed to show up for work on five scheduled days. In addition, plaintiff punched out early without approval on four work days. Plaintiff contacted defendant on October 14, 2001, to inform her supervisor that her son was ill again and that she would miss work on October 15, 2001. Plaintiff returned to work on October 16, 2001 and brought with her a physician's slip documenting her son's illness. The doctor's note stated that plaintiff needed to be at home to care for her son who was ill. The doctor did not state that plaintiff's son suffered from a serious health condition; he did not say that the condition was a continuation of the same condition suffered in September 2001; and he did not provide any other information that might have shed light on the type and seriousness of the illness. Plaintiff did not request FMLA leave protection for the October 15, 2001 absence. Defendant regarded the absence as unexcused. On October 19, 2001, plaintiff asked to leave early from work, citing headaches. Plaintiff was called into her supervisor's office and advised that her employment was terminated a second time. Defendant cited plaintiff's absence for one full day and part of a shift on another day as the reason for her termination.

Plaintiff's union filed a grievance objecting to the termination. Defendant reached an agreement with the union on the grievance in March 2003, reducing plaintiff's

termination to a suspension. After negotiations, defendant offered plaintiff the option of reinstatement or $1,000. Plaintiff accepted reinstatement but planned on suing defendant to attempt to recover back pay. Plaintiff filed this lawsuit against defendant on October 14, 2003.

OPINION

Congress enacted the Family Medical Leave Act (FMLA) in 1993 to balance "the demands of the workplace with the needs of families," among other purposes. Employees are eligible for up to 12 weeks of unpaid leave in any 12-month period if they are employed by an "employer" as that term is defined in 29 U.S.C. § 2611, for at least 12 months preceding their request for leave. (The parties do not dispute that defendant is a covered employer under § 2611.) The leave is available to employees who are providing care for a newly born or adopted child or for a family member who has a serious health condition or because the employee has a serious health condition that disables her from performing the functions of her job. 29 U.S.C. § 2612. Employees can take leave intermittently or on a reduced schedule "when medically necessary." Id.

Employees who take FMLA leave are entitled to be restored to the same position or an equivalent one when they return to work. 29 U.S.C. § 2614(a). Employers may require that requests for leave be supported by the certification of a health care provider and may

require recertifications on a reasonable basis, 29 U.S.C. § 2613(b) and (e). It is unlawful for an employer to discharge an employee in retaliation for invoking her rights under FMLA. 29 U.S.C. § 2615(a)(2); Aubuchon v. Knauf Fiberglass, GMBH, 359 F.3d 950, 954 (7th Cir. 2004).

Plaintiff argues that defendant violated her rights under the FMLA when it delayed awarding her FMLA benefits and reinstating her in September 2001 and when it terminated her on October 19, 2001. In addition to punitive damages, plaintiff seeks damages for lost wages and benefits from the date of her termination on October 19, 2001 to the date of her reinstatement on March 2, 2003. I understand plaintiff to raise three arguments to support her FMLA violation claim. First, the labor agreement between defendant and her union governed her use of sick leave, not defendant's policy on attendance and absences. Plt.'s Br., dkt. #17, at 11. It is undisputed that the labor agreement authorizes defendant to establish reasonable work rules, which may include policies on attendance and absences. However, even if I accept plaintiff's argument that the labor agreement governed her use of sick leave exclusively, the agreement states that employees who are sick or unable to report to work must give notice to the supervisor at least two hours prior to the beginning of the employee's shift, whenever feasible, and that "employees who abuse sick leave shall be subject to appropriate discipline."

Thus, even within the labor agreement defendant had authority to consider the

number of sick days taken by plaintiff when deciding to discipline her. It is undisputed that plaintiff accumulated over 30 illness-related absences in about an eight-month period between January 2001 and August 21, 2001 and that she was disciplined in April 2001 for accumulating 15 illness-related absences between December 6, 2001 and April 4, 2001. She was warned on August 21, 2001, after serving a three-day suspension for excessive absences, that further absences could result in employment termination.

Second, plaintiff contends that after she notified defendant of her need for FMLA leave in early September 2001, defendant failed to take reasonable steps in requesting follow-up information from her concerning her son's illness, resulting in an unreasonable delay in acknowledgment of FMLA benefits and an unwarranted termination. Plt.'s Br., dkt. #17, at 17-18. Plaintiff requested FMLA leave from September 1 through September 10, 2001, but did not make the request until after defendant sent her a termination letter halfway through her requested leave on September 6, 2001. Thus, plaintiff waited six days before notifying her employer that she needed time off to care for her son and only gave notice in response to defendant's termination letter. Defendant terminated plaintiff's employment on September 6, 2001, because she had worked only one scheduled day since returning from her three-day suspension that ended on August 24, 2001. As soon as plaintiff's physician submitted the required certification regarding the need for FMLA leave, defendant approved the request. Under FMLA, an employer has the right to wait for a

physician to certify the need for medical leave before granting a leave request. See, e.g., Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997) ("[A]n employer is entitled to verification of the need for medical leave."). It is difficult to understand plaintiff's argument that defendant delayed acknowledgment of plaintiff's entitlement to FMLA leave unreasonably when she herself delayed notifying defendant of her need for leave and when defendant approved the requested leave on the day that plaintiff's physician filed the last FMLA form. Moreover, given defendant's authority to consider abuse of sick time when disciplining employees, a reasonable juror could not conclude that defendant's decision to terminate plaintiff on September 6, 2001 for over 30 illness-related absences from January to September 2001 was unwarranted.

Third, plaintiff argues that defendant violated her rights under FMLA when it terminated her on October 19, 2001, after she informed her supervisor that she needed to be absent on October 15 to care for her son, who was ill. According to plaintiff, instead of undertaking its duty to request follow-up information regarding the severity of her son's illness, defendant terminated her employment. Plaintiff argues that defendant's termination of her employment was in retaliation for her invocation of her rights under FMLA. Plt.'s Br., dkt. #17, at 18.

A plaintiff may prove FMLA retaliation the same way she would prove a claim of retaliation under other employment statutes, such as the Americans with Disabilities Act or

Title VII. Buie v. Quad/Graphics, Inc., 366 F.3d 496, 503 (7th Cir. 2004). Thus, plaintiff may use either the direct or indirect method. Id. Under the direct method, a plaintiff may present either direct or circumstantial evidence. Radue v. Kimberly-Clark Corp., 219 F.3d 612, 616 (7th Cir. 2000). "Direct evidence essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." Id. (citing Troupe v. May Department Stores, Co., 20 F.3d 734, 736 (7th Cir. 1994); see also Lim v. Trustees of Indiana University, 297 F.3d 575, 580 (7th Cir. 2002) ("[D]irect evidence should prove the particular fact in question without reliance upon inference or presumption."). Plaintiff offers no direct evidence that defendant terminated her because she requested FMLA leave.

Circumstantial evidence can provide the basis for drawing an inference of intentional discrimination. Troupe, 20 F.3d at 736. Suspicious timing is one type of circumstantial evidence. Buie, 366 F.3d at 506. "However, a temporal sequence analysis is not a magical formula which results in a finding of a discriminatory cause." Id. Plaintiff argues that the following events leading up to her termination raise a suspicion that the termination was in response to her exercising her FMLA rights: 1) the August 17, 2001 three-day suspension, in conjunction with the memo confirming defendant's effort to force plaintiff's resignation; 2) plaintiff's September 6, 2001 termination during a FMLA-qualifying event; 3) defendant's disregard for plaintiff's sick leave claims; 4) a difficult and hostile working environment; and 5) defendant's complete disregard for her second leave request on October 15, 2001 and her

October 19, 2001 termination despite verification from a physician that her son was ill on October 15. Plt.'s Br., dkt. #17, at 20.

Plaintiff's evidence is insufficient to suggest discrimination in the light of the undisputed evidence that plaintiff had over 30 illness-related absences from work from January 2001 to September 2001 and that defendant had disciplined her before for accumulating excessive illness-related absences. These absences occurred *before* plaintiff invoked her FMLA rights. When defendant terminated plaintiff in September 2001, it was unaware that plaintiff's latest absence was covered by the FMLA because plaintiff did not provide notice of her son's hospitalization until after she received defendant's termination letter.

Plaintiff's numerous absences would explain what she alleges was a difficult and hostile working environment. Almost each time plaintiff requested sick leave, defendant had to find a replacement worker. An employer must expect that its employees will be absent occasionally and make allowances for such absences, but over 30 absences in a eight or nine-month period puts undue demands on both the employer and on the other employees who have to cover shifts. Thus, defendant's suspension of plaintiff for three days in August and warning her that further absences could result in termination do not support a reasonable inference that defendant terminated her in September and October 2001 because she requested FMLA leave. Buie, 366 F.3d at 507 (plaintiff did not create issue of fact when he

proffered suspicious timing evidence attempting to link his termination with fact that he had AIDS because undisputed evidence showed that he was on brink of discharge before his employer knew that he had AIDS).

As for plaintiff's termination in October, even if I assume that plaintiff's son suffered from a serious health condition on October 15, 2001, plaintiff did not provide defendant adequate notice that her leave on that day was a FMLA-qualifying event. On many previous occasions plaintiff had requested leave because her son was ill but did not indicate that her request was FMLA-qualifying leave. A reasonable juror could not infer that defendant would have had reason to believe that plaintiff's October 15, 2001 request was different from previous requests, particularly when the physician's note merely stated that plaintiff required the day of October 15 to care for her son, who was ill.

Plaintiff argues that defendant failed to investigate whether her October 15, 2001 leave request was a FMLA-qualifying event but rather jumped the gun and fired her. Plt.'s Br., dkt. #17, at 17. The Court of Appeals for the Seventh Circuit has rejected the view that a mere demand for sick leave triggers a duty on the part of the employer to determine whether the requested leave is covered by FMLA. Aubuchon, 359 F.3d at 953 (refusing to take extreme position of holding that mere demand for leave triggers employer's duty to determine whether request FMLA-qualifying when most employee leave requests are not FMLA-qualifying); see also Collins v. NTN-Bower Corp., 272 F.3d 1006, 1008-1009 (7th

Cir. 2001) (mere reference to being "sick" does not suggest to employer that medical condition might be serious or that FMLA otherwise could be applicable).

Defendant warned plaintiff after reinstating her in September 2001 that it would terminate her employment if she did not improve her attendance record. Despite this warning, plaintiff failed to show up for work on five scheduled days and punched out early without approval on four others. Plaintiff's circumstantial evidence fails to show that defendant had a retaliatory motive in terminating her employment. Buie, 366 F.3d at 509 (plaintiff's myriad problems at work could not allow reasonable jury to conclude from suspicious timing evidence alone that employer suspended or fired him because of his announcement that he had AIDS and, implicitly, because he would therefore request benefits under FMLA).

In addition, plaintiff's case fails under the indirect method. To establish a claim for retaliation under FMLA, a plaintiff must first show that "after engaging in protected conduct, only he, and not any similarly situated employee who did not engage in protected conduct was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." Buie, 366 F.3d at 503, n. 3 (noting that Court of Appeals for the Seventh Circuit eliminated requirement that plaintiff must prove causal link between protected activity and adverse employment action under indirect method in Stone v. City of Indianapolis, 281 F.3d 640 (7th Cir. 2002)). "If defendant presents unrebutted evidence

of a noninvidious reason for the adverse action, he is entitled to summary judgment." Id. at 503.

Plaintiff does not deny that she incurred over 30 illness-related absences between January 2001 and August 2001 or that defendant disciplined her in April 2001 for 15 illness-related absences between December 6, 2000 and April 4, 2001. She fails to submit any evidence showing that defendant did not terminate similarly situated employees who did not invoke FMLA leave but who incurred numerous illness-related absences. Id. at 508 ("The disparate treatment of similarly situated employees who were involved in misconduct of comparable seriousness, but did not have a similar disability, could establish pretext."). The only evidence on which plaintiff relies to rebut defendant's noninvidious reason for her termination, that is, excessive illness-related absences, are the "suspicious" events discussed earlier. Plt.'s Br., dkt. #17, at 20-21. I have determined that these events would not allow a reasonable juror to infer that defendant terminated plaintiff because she requested FMLA leave. See, e.g., Aubuchon, 359 F.3d at 954 (no evidence that motive for firing plaintiff was retaliatory under FMLA because plaintiff admitted to falsifying job application, which was mandatory ground for discharge under employer's rules; record contained no evidence that employer applied policy more harshly against plaintiff than similarly situated employees; and it was not case in which employer failed to discover lawful grounds for discharge until after firing plaintiff).

Plaintiff fails to make her case that defendant violated her rights under FMLA when it terminated her in September or October 2001. Buie, 366 F.3d at 509 (summary judgment in favor of defendant employer proper because plaintiff failed to rebut nondiscriminatory justifications that defendant offered for plaintiff's suspension and discharge). Therefore, I will grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that

1. Defendant County of Wood's motion for summary judgment against plaintiff Michelle L. Bohman is GRANTED;

2. The clerk of court is directed to enter judgment in favor of the defendant and close this case.

Entered this 7th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge