IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EVAN S. HULL,

Plaintiff,

v. MEMORANDUM and ORDER

STOUGHTON TRAILERS, LLC., 04-C-721-S

Defendant.

Plaintiff Evan Hull commenced this civil action under the Family Medical Leave Act (FMLA) in Green County Wisconsin Circuit Court. He alleges that defendant Stoughton Trailers, LLC. terminated him for applying for medical leave under the FMLA. Defendant removed the above entitled action to this Court.

On February 15, 2005 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion for summary judgment has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Evan Hull is an adult resident of Green County, Wisconsin. Defendant Stoughton Trailers, LLC., has a principal place of business in the Western District of Wisconsin.

Plaintiff was employed by the defendant from February 1994 until his termination in November 2003. Robert Wahlin was plaintiff's supervisor. Plaintiff had taken leaves of absence

under the FMLA including one in June 2003 and did not suffer any negative employment consequences because of these leaves.

On November 3, 2003 plaintiff reported to Barb Patterson, a Human Resources employee, Bob Lawinger, the safety coordinator and Linda Lewis, the Occupational Health Nurse, that he was taking hydrocodone and diazepam for back pain. On November 10, 2003 around 10:30 a.m. plaintiff's co-worker, Holly Doverspike, spoke with him and believed him to be impaired. She reported her observation to Wahlin who told plaintiff to go home from work because he was impaired due to the prescription drugs.

Patterson spoke with Hull the morning of November 10, 2003 and believed that he was impaired. Patterson advised plaintiff that he could not continue to work that day because he was impaired after taking his prescription drugs.

The afternoon of November 10, 2003 plaintiff saw his doctor who placed him on leave from work. Defendant granted plaintiff's request for FMLA leave on November 11, 2003. Plaintiff did not return to work after he was advised to go home on November 10, 2003.

On November 20, 2003 Bradford Alfery, Stoughton's general manager, made the decision to terminate plaintiff after Wahlin and Patterson reported that plaintiff had come to work impaired on November 10, 2003. Plaintiff was advised by Alfery that he was

being terminated because he had reported to work impaired. The letter stated in pertinent part:

> The Company has determined that you failed to comply with these Company policies. By itself, this event is enough to terminate your employment and in light of your previous poor performance, decision making, and your failure to meet the performance improvement expectations as mutually agreed, your immediate termination of the Company is necessary.

Alfery did not know when he terminated plaintiff that he had requested FMLA leave on November 11, 2003.

Plaintiff met with Barb Patterson and Alfery on November 20, 2003 when he was advised of his termination. At his deposition plaintiff testified that at the meeting Alfery did not say anything about his FMLA leave. Further, at this meeting plaintiff did not mention his leave.

MEMORANDUM

Plaintiff claims he was terminated by the defendant in violation of the Family Medical Leave Act. Defendant moves for summary judgment.

The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999). To demonstrate a prima facie case that he was discriminated against for exercising his rights under the Act, plaintiff must show that 1) he engaged in activity protected by the Act, 2) that the

employer took an adverse employment action against him and that 3) there was a causal relationship between the protected activity and the adverse employment action.

In this case it is undisputed that plaintiff requested FMLA leave and was terminated. The issue is whether there is a causal relationship between the two. Plaintiff need only show that the protected activity and the adverse action were not wholly unrelated. Clover v. Total Sys. Servs, Inc., 176 F.3d 1346, 1354 (11th Cir. 1999). Plaintiff must also show that the decision maker was aware of the protected conduct at the time of the adverse employment action. Brungart v. BellSouth Telecomms, Inc., 231 F.3d 791, 799 (11th Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001). A decision maker cannot have been motivated to retaliate by something unknown to him. Id.

Alfery states in his affidavit that at the time he terminated plaintiff he did not know he had requested FMLA. There is no evidence that anyone including plaintiff had told Alfrey that plaintiff had requested leave under the Act. Plaintiff argues that Alfrey should have known because Wahlin, his direct supervisor, knew and had conferred with Alfery. In Clover, the Court stated as follows:

> The evidence that Miller and Hollingsworth spoke in the time period between Clover's participation in the investigation and Miller's decision to terminate her shows, at most, that Hollingsworth could conceivably have told Miller about Clover's participation. But because "could have told" is not the same as "did tell," it would be pure speculation to

> infer that Hollingsworth actually told Miller about Clover's participation. The fact that the vice-president who heads a corporate division and the vice-president in charge of Human Resources talk regularly is not surprising nor is it enough to support a reasonable inference that they discussed specific topics, much less an inference concerning what they said about it. A jury finding Miller was aware of Clover's protected conduct must be supported by reasonable inferences from the evidence, not mere speculation.

It is undisputed that Wahlin and Patterson believed that plaintiff was impaired at work on November 10, 2003 due to taking prescription drugs. They discussed this incident with Alfery. It was, however, Alfery, not Wahlin or Patterson, that decided to terminate plaintiff because of the November 10, 2003 incident. Although Patterson, Wahlin and plaintiff knew that plaintiff had been granted FMLA leave on November 11, 2003, there is nothing in the record to suggest that they so advised Alfery.

In this case there is no evidence from which a reasonable jury could infer that Alfery had knowledge that plaintiff had requested leave under the Act. Accordingly, plaintiff has not shown a causal relationship between the protected activity and the adverse employment action.

Had plaintiff demonstrated a prima facie case defendant has the opportunity to proffer a legitimate reason for its actions. On November 20, 2003 Alfery told plaintiff that he was terminated because he came to work impaired on November 10, 2003. Plaintiff must prove that this reason was a pretext and that the real reason

was his request for leave under the Act. Pretext means a dishonest explanation, a lie rather than an oddity or an error. See Peele v. Country Mut. Ins. Co., 288 F. 3d 319, 326 (7th Cir. 2002).

Plaintiff has not presented any evidence from which a reasonable inference could be made that Alfery did not honestly believe that he had come to work impaired on November 10, 2003. Plaintiff cannot prove pretext in this case because Alfery had no knowledge of plaintiff's protected conduct, FMLA leave. Accordingly, defendant is entitled to judgment in its favor.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 1st day of April, 2005.

BY THE COURT:

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JOHN C. SHABAZ
District Judge