IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CAROL MILLARD,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-103-S

JO ANN MILLER, ROBERT HENZE and VILLAGE OF DEFOREST,

Defendants.

Plaintiff Carol Millard commenced this action for statutory and punitive damages pursuant to the Fair Credit Reporting Act alleging that defendants obtained her credit report in violation of FCRA requirements. Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on defendants' motion for summary judgment. The following facts are undisputed for purposes of the pending motion.

FACTS

In February 2004, while plaintiff was employed as a clerk by defendant Village of DeForest. She advised her supervisor that she had injured her back at work and was unable to work. On the day prior to her back compliant she had received a negative performance review. Plaintiff filed a worker's compensation claim with the Village's insurer which the insurer denied.

On June 4, 2004 the Village discharged plaintiff because she had no leave and was unable to work. The parties proceeded with

worker's compensation claims proceedings. In November 2004 plaintiff sought and obtained a delay in her worker's compensation related independent medical examination based on her representation that she was traveling to visit relatives at the time of the examination.

Defendants suspected plaintiff had lied to obtain the postponement of the examination. They further suspected that she intended to go shopping instead of visiting relatives. In an effort to prove the suspected deception they wished to obtain plaintiff's credit report for the purpose of discovering her credit card issuers so they could subpoena their records. Prior to obtaining the credit report defendants sought and received an opinion of counsel that they could lawfully obtain the report.

On or about February 7, 2005, defendants obtained a copy of plaintiff's credit report and provided it to the worker's compensation insurer. Defendants did not seek plaintiff's permission to obtain the report nor did they provide a disclosure that they were obtaining a report for employment purposes.

MEMORANDUM

Defendants make three arguments in support of their motion for summary judgment. First that FCRA permission and notice requirements were inapplicable because of the exclusion provided by 15 U.S.C. § 1681a(x). Second, that they are not subject to the

Act's restrictions because they received the document for a permissible purpose under § 1681b(a)(3)(D). Third, that there is no liability because they did not act either willfully or negligently in obtaining the report. Plaintiff opposes each argument as a matter of law and also contends that factual disputes preclude summary judgment.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

The parties agree that defendants' conduct was not in violation of the Act if defendants obtained the report under the circumstances described in 15 U.S.C. § 1681a(x):

> **(x) Exclusion of certain communications for employee investigations**
>
> **(1) Communications described in this subsection**
>
> A communication is described in this subsection if -
>
> **(A)** but for subsection (d)(2)(D) of this section, the communication would be a consumer report;
>
> **(B)** the communication is made to an employer in connection with an investigation of -
>
> **(i)** suspected misconduct relating to employment; or
>
> **(ii)** compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;
>
> **(C)** the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and
>
> **(D)** the communication is not provided to any person except -
>
> **(i)** to the employer or an agent of the employer;
>
> **(ii)** to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;
>
> **(iii)** to any self-regulatory organization with regulatory authority over the activities of the employer or employee;
>
> **(iv)** as otherwise required by law; or
>
> **(v)** pursuant to section 1681f of this title.

The parties agree that the circumstances described in elements (A) and (C) are present. Elements (B) and (D) are the subject of dispute.

Concerning element (B) plaintiff contends that as a matter of law her alleged misrepresentation to the worker's compensation administrative law judge was not "employment misconduct" because it occurred long after her employment was terminated. She further

argues that defendants' investigation did not relate to "compliance with Federal, State, or local laws and regulations." The court now concludes that both provisions are satisfied by the undisputed facts.

Contrary to plaintiff's contention, the statute is not limited to "employment misconduct" but is drafted more broadly to include any misconduct "related to employment." Any reasonable interpretation of this broader phrase includes conduct occurring in the worker's compensation context because a worker's compensation claim by definition relates to employment. As a result, misconduct in the making or prosecuting of the claim must relate to employment. It is also undisputed that defendants believed and intended to prove that plaintiff made misrepresentations to the ALJ in violation of the worker's compensation statute and administrative procedures and hoped to use this violation to persuade the ALJ to deny or limit her claim. In particular, Wis. Stat. § 102.13(1)(c) limits the recovery of a claimant who obstructs a medical examination. Accordingly, an investigation aimed at demonstrating such an obstruction falls within the parameters of § 1681a(x)(B)(ii).

Alternatively, plaintiff argues that the facts were insufficient to support a reasonable suspicion that plaintiff had lied in an effort to change the date of her medical examination. Plaintiff does not dispute, however, that regardless of

reasonableness, defendants were in fact acting on their suspicion that plaintiff lied to obtain a delay in the examination. So long as this was the genuine motivation for plaintiff's conduct the provision is applicable. There is no basis in the language of the statute to impose an objective reasonableness standard on such a suspicion. The fact that plaintiff ultimately submitted to an examination does not foreclose the possibility that she had obstructed the previously scheduled exam.

Defendants provided the credit report to their worker's compensation insurer. Plaintiff contends that this takes defendants' conduct outside the protection of § 1681a(x) because the insurer does not constitute "an agent of the employer" within the meaning of § (1)(D)(i). The Court now concludes that defendants' workers compensation insurer is the employer's agent for purposes of sharing such information. The insurer is representing the employer's interest as well as its own in seeking to avoid worker's compensation liability. For purposes of obtaining employee medical information the Wisconsin statutes treat employer and insurer as equals. See Wis. Stat. § 102.13. When defendants provided the report to the insurer for use in defending against the worker's compensation claim for which the Village remained primarily liable, the insurer was acting as its agent. See Mercer v. Carle Foundation Hospital, 633 N.E.2d 192, 193 (Ill. App. 1994) ("[b]ecause of the employer responsibilities necessarily

assumed by the insurer, both for the employer's protection and the insurer's protection, we conclude that the insurer is acting as a representative or agent of the employer."). Indeed it would be unreasonable to hold that an employer could gather the information in question free of the restriction of the FCRA but could not provide it to its insurer who is in a position to use it on the employer's behalf in defending against the claim.

Because defendants were not obligated to comply with the permission and notice requirements of the FCRA by virtue of the exclusion in 15 U.S.C. § 1681a(x), they are entitled to summary judgment and there is no need to reach defendants' additional arguments.

ORDER

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

IT IS FURTHER ORDERED that judgment be entered in favor of defendants and against plaintiff dismissing the complaint with prejudice and costs.

Entered this 9th day of August, 2005..

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge