

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

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AMANDA J. HOEFFER,

Plaintiff,

v.

MEMORANDUM AND ORDER

UNITED STATES CELLULAR CORPORATION  
and JEFFREY ALLEN,

06-C-725-S

Defendants.

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Plaintiff Amanda J. Hoefffer commenced this action under the Family Medical Leave Act against defendants United States Cellular Corporation and Jeffrey Allen. In her first amended complaint she alleges that Jeffrey Allen fired her in violation of the Act. In her second amended complaint plaintiff adds a third cause of action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq.

On March 26, 2007 defendants moved to dismiss plaintiff's third cause of action. This motion has been fully briefed and is ready for decision.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that plaintiffs can prove no set of facts in support of the claim which would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must

contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

#### FACTS

For the purposes of deciding defendants' motion to dismiss the following facts alleged in the complaint are taken as true.

Plaintiff Amanda Hoeffler is an adult resident of Wisconsin. Defendant United States Cellular Corporation (U.S. Cellular) is a Delaware Corporation and does business in Wisconsin.

Plaintiff was employed by the defendant U.S. Cellular as Retail Wireless Consultant beginning on September 9, 2002. On April 24, 2006 plaintiff requested intermittent leave pursuant to the Family Medical Leave Act (FMLA) and her request was granted. On June 8, 2006 plaintiff's employment was terminated.

#### MEMORANDUM

Plaintiff contends in her third cause of action that she was terminated in violation of ERISA because she took intermittent FMLA leave prior to her termination. In order to establish an ERISA violation plaintiff has the burden to demonstrate that the benefit plan at issue is an ERISA plan.

In Postma v. Paul Revere Life Insurance Company, 223 F.3d 533, 537 (7<sup>th</sup> Cir. 2000), a benefit plan requires five elements to be an ERISA plan:

(1) a plan, fund, or program, (2) established or maintained, (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal service or severance benefits, (5) to participants or their beneficiaries.

Plaintiff's leave under the FMLA is not a plan, fund or program established or maintained by an employer. The FMLA is a federal statute which allows eligible employees to take up to 12 weeks of unpaid leave for qualifying medical conditions. 29 U.S.C. §§2601 et seq. An employer could not terminate any benefit under the FMLA because it is a statutorily created benefit.

Plaintiff's third cause of action will be dismissed because the FMLA is not a benefit plan under ERISA. Defendants move for attorney's fees and costs they incurred in bringing this motion because plaintiff filed this cause of action without a good faith basis in fact or law. Defendants' motion for attorney's fees will be denied at this time.

ORDER

IT IS ORDERED that defendants' motion to dismiss plaintiff's third cause of action is GRANTED.

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IT IS FURTHER ORDERED that defendants' motion for attorney's fees and costs is DENIED at this time.

Entered this 27<sup>th</sup> day of April, 2007.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge