IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

AMANDA J. HOEFER,

Plaintiff,

v. MEMORANDUM and ORDER

UNITED STATES CELLULAR CORPORATION and JEFFREY ALLEN, 06-C-725-S

Defendants

Plaintiff Amanda J. Hoefer brings this action against defendants United States Cellular Corporation and Jeffrey Allen under the Family Medical Leave Act (FMLA) and Title VII. In her second amended complaint she alleges that the defendants interfered with her rights under the FMLA, discriminated against her for exercising her FMLA rights and discriminated against her on the basis of her pregnancy when they terminated her employment.

On June 1, 2007 defendants 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 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 defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Amanda Hoefer is an adult resident of Wisconsin. Defendant United States Cellular Corporation (USCC) is a Delaware Corporation that has its corporate headquarters in Chicago, Illinois and operates a retail store at 2431 Milton Avenue,

Janesville, Wisconsin. It is in the business of selling cellular phones and monthly cellular phone service to its customers. Defendant Jeffrey Allen is a Sales Supervisor at the Janesville store.

Defendant USCC hired plaintiff on September 9, 2002 as a temporary part-time retail wireless consultant for its Janesville store. On February 3, 2003 plaintiff became a member of Cellular's regular part-time staff. As a retail wireless consultant plaintiff was responsible for selling phones, phone plans, accessories, accepting customer payments and assisting both retail and business customers. She was paid an hourly wage plus commissions based on her sales.

The store where plaintiff worked was managed by Store Manager Jeff Olson but the sales staff was supervised by Sales Supervisors. Plaintiff was on defendant Allen's team, however, on a daily basis she reported to the Sales Supervisor who was working during her shift. She had previously been on Lukas Dabson's team.

One of USCC's Associate Phone Plan Policies states as follows:

> Associates should not view or access their own accounts or any friends, family or another associate's accounts. If an associate does access or make changes to their own account, friend, family or another associate's, disciplinary action can take place, up to and including termination.

This policy was posted on USCC's Intranet, referred to as Cellsite.

Plaintiff testified at her deposition that in 2002 after she was hired she read a copy of the Associate Phone Plan Policy which stated that associates should not view or access their own accounts or any account of friends, family or other associates. (Plaintiff's deposition, p. 187). She also testified that she was verbally told about the policy and was aware of it. (Id. pp. 148-149.)

In February 2006 plaintiff informed Mr. Olson and Mr. Dabson that she was pregnant. That same month plaintiff developed extreme morning sickness. In March 2006 Mr. Olson advised plaintiff that she should apply for intermittent FMLA leave to protect her job because she was missing a lot of work and her sales could fall below her minimum quotas. Plaintiff followed the advice and applied for intermittent FMLA leave.

On April 24, 2006 plaintiff's request for intermittent FMLA leave was approved retroactive to February 21, 2006. Plaintiff took FMLA leave intermittently due to her pregnancy related conditions. Plaintiff was married to Shane Hoefer on May 6, 2006.

On June 5, 2006 plaintiff's brother-in-law Kyle Hoefer went to the Janesville store and reported to plaintiff who was working at the time that he had misplaced his phone. Kyle Hoefer was a current USCC customer. Plaintiff's husband, Shane Hoefer, also had a phone line on Kyle Hoefer's account.

Plaintiff assisted Kyle Hoefer with his USSC account by accessing his account, giving him a free replacement phone, adding

the electronic serial number onto the replacement phone, programming the phone number, activating the phone and placing the phone as an active line on his account. She also accepted a bill payment from him and sold him an accessory. She received a commission for the sale of the accessory on this account.

On June 6, 2006 one of plaintiff's co-workers, Dan Turner, informed Mr. Allen that plaintiff had performed several transactions on the account of Kyle Hoefer the previous day and he was concerned that their last names were the same. Mr. Allen confirmed this information. Mr. Allen then contacted Human Resource Representative, Susan Isberner, and at her request initiated an investigation.

On June 7, 2006 Mr. Allen asked plaintiff whether she was related to Kyle Hoefer. Plaintiff advised Mr. Allen that Kyle Hoefer was her brother-in-law. As part of his investigation Mr. Allen determined that plaintiff had been made aware of the policy against assessing accounts of friends or family.

Ms. Isberner, Associate Relations Manager Kim Gethers and Director of Sales Lou Brazzoni decided to terminate plaintiff because of her violation of the policy. Ms. Isberner told Mr. Allen to inform plaintiff that her employment was terminated for violating the Associate Phone Plan Policy. Mr. Allen and Scott Preston met with plaintiff on June 8, 2006 and informed her that her employment was terminated because she had violated the

Associate Phone Plan Policy when she accessed her brother-in-law's account.

In her deposition plaintiff testified that on June 5, 2006 she was aware of a policy that prohibited her from accessing family members' accounts. She further testified she considered Kyle Hoefer to be a family member. (Plaintiff's deposition, pp. 148-149.)

For the purposes of summary judgment defendants agree that Mr. Allen made the following statements. In May 2006 defendant Allen told plaintiff that "You are getting fat. It's no wonder you can't sell and get me my bonuses." In June 2006 plaintiff was joking with Mr. Allen and said he should move Jennifer Ruth over to their team so that they could be called the "disability team." Mr. Allen said, "What will they say about me then, you're already costing me my bonuses."

Defendants submit evidence that 25 associates for which Ms. Isberner, Ms Gethers and Mr. Brazzoni had decision making authority were terminated since 2003 for violating the Associate Phone Plan Policy. Plaintiff submits an affidavit of paralegal Jennifer Haefner stating that only four of the 25 associates were actually terminated solely for violating the phone policy. This affidavit is inadmissible because it is not based on personal knowledge. Further, a review of the termination forms indicates that the 25 terminations were based on violations of the policy. The Court

will disregard the affidavit of Jennifer Haefner and accept the defendants evidence that 25 associates were terminated for violating the policy.

Defendants also assert that there was only one associate, Helen Handy, who was not immediately terminated for violating the policy. She was issued a Final Written Warning because of extenuating circumstances. Plaintiff submits an affidavit by Kyle Knutson, a law student working at plaintiff's attorney's firm, who testifies that there were possible instances of other employees accessing accounts of possible family members. He submits no evidence that the defendants had knowledge of these possible violations of the policy. This affidavit is speculative and not admissible and will be disregarded. The Court does not accept the plaintiff's speculation that there were employees at the Janesville store that defendants knew violated the policy who were not terminated.

In 2005 employees who were found to have violated the Company's alcohol/illegal substance policy received written warnings rather than terminations.

MEMORANDUM

Plaintiff claims that defendants interfered with her rights under the Family Medical Leave Act and discriminated against her for taking leave under the Act. She also contends that defendants discriminated against her because of her pregnancy.

Plaintiff claims that the defendants interfered with her rights under the Family Medical Leave Act (FMLA) by terminating her for using leave under the Act. See 29 U.S.C. § 2615(a)(1). Under the FMLA an employer may refuse to reinstate a person to a position to which the employee would not be entitled regardless of the medical leave. Kohls v. Beverly Enter. Wisconsin, 259 F.3d 799, 805 (7th Cir. 2001). Although an employee may not be fired for taking medical leave, he or she may be discharged for poor performance when such dismissal would have occurred absent the medical leave. Id.

In Kohls plaintiff Amy Kohls worked for a residential nursing home and rehabilitation facility and was doing a good job. She took a maternity leave and the employer hired a temporary replacement. During this time the employer discovered Kohls' problems with programming activities and the Resident Council checkbook. The employer terminated Kohls rather than reinstating her after her medical leave. The Court held that the company had presented sufficient evidence to support its assertion that plaintiff had been terminated because of performance problems and not because of her medical leave.

In this case plaintiff was approved for FMLA leave in April retroactive to February 2006 to be used at her discretion due to her concerns for her pregnancy. She used this leave intermittently from February to June 2006. She was terminated in June 6, 2006 for

violating a policy of which she was aware that prohibited her accessing a family member's account. She admits that she accessed her brother-in-law's account on June 5, 2006. Like Amy Kohls, plaintiff was terminated for work rule violations discovered while she was on medical leave, not because of her medical leave. Accordingly, defendants did not interfere with plaintiff's rights under the FMLA by terminating her.

Plaintiff claims the defendants discriminated against her for taking FMLA leave. She asserts that she has direct evidence of discrimination based on Mr. Allen's comments. Defendant Allen concedes for purposes of this motion that he made the following statements to plaintiff: "You are getting fat. It is no wonder you can't sell and get me my bonuses;" and "What will they say about me then, you're already costing me my bonuses." These statements do not refer to plaintiff's taking of leave under the Act. These statements cannot be considered direct evidence that plaintiff was terminated for taking FMLA leave because they are not admissions by a decision-maker that the termination was based on her FMLA leave. See Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003).

Under the burden shifting methodology for indirect proof of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), plaintiff must first establish a *prima facie* case of discrimination by showing she was a member of a protected class, she was meeting her employer's legitimate performance expectations, she suffered an

adverse employment action and similarly situated employees not in the protected class were treated more favorably. Peters v. Renaissance Hotel Operation Company, 307 F.3d 535, 545-546 (7th Cir. 2002).

It is undisputed that plaintiff was taking leave under FMLA. It is also undisputed that plaintiff violated the Associate Phone Policy Plan and was terminated. Plaintiff has submitted no admissible evidence that other similarly situated employees of USCC who accessed family members accounts were not terminated for violating the policy. In fact, the record indicates that since 2003 known violators of the Associate Phone Plan Policy were all terminated except for one who was issued a final written warning.

Plaintiff has not shown that she was treated less favorably than other employees who did not take FMLA leave but violated the policy. Hull v. Stoughton Trailers, LLC., 445 F.3d 949 (7th Cir. 2006). The evidence that plaintiff submits concerning employees who were not terminated for violating another policy concerning drinking on company time is not material because these employees were not similarly situated to plaintiff since they violated a different policy. Plaintiff has not established a *prima facie* case of FMLA discrimination.

Were plaintiff to have demonstrated a *prima facie* case the burden shifts to defendant to articulate a non-discriminatory

legitimate reason for plaintiff's termination. Plaintiff would then have to prove that the reason was pretextual. Id.

Defendants assert that they terminated plaintiff because she violated the Associate Phone Policy Plan. Plaintiff has the burden to show that this reason was a pretext for discrimination. Plaintiff had been taking FMLA leave since February 2006 and no adverse action was taken against her. On June 5, 2006 a coworker reported that plaintiff had accessed a family member's account. Plaintiff admitted accessing her brother-in-law's account and that she was aware of the policy that prohibited her from doing so. She was terminated for this violation as were 25 other employees who violated the policy. Plaintiff has shown no causal connection between plaintiff's taking FMLA leave and her termination for a violation of the policy.

To show pretext plaintiff is required to prove that the employer did not honestly believe the reasons it gave for firing her. Wold v. Buss (America), Inc., 77 F.3d 914 (7th Cir. 1996). There is nothing in the record to demonstrate that the decision makers, Isberner, Gethers or Brazzoni or plaintiff's supervisor, Jeffrey Allen did not honestly believe that plaintiff had violated the Associate Phone Plan policy for which she was terminated. Plaintiff has not shown that the reason for her termination had no basis in fact, did not actually motivate the decision to terminate her or was insufficient to motivate the termination. Accordingly,

plaintiff has failed to meet her burden of showing pretext. Davis v. Wisconsin Department of Corrections, 445 F.3d 971, 977 (7th Cir. 2006). Defendants' motion for summary judgment on plaintiff's FMLA claims will be granted.

Plaintiff also claims that she was terminated because of her pregnancy. She argues that defendant Allen's statement that she was getting fat and costing him his bonuses was direct evidence of pregnancy discrimination which a jury could find. Accordingly, defendants' motion for summary judgment on plaintiff's Title VII pregnancy discrimination claim will be denied.

ORDER

IT IS ORDERED that defendants' motion for summary judgment on plaintiff's Family Medical Leave Act claims is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment on plaintiff's Title VII pregnancy discrimination claim is DENIED.

Entered this 9th day of July, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ
District Judge