

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

CHRISTINA PRINCE,

OPINION and ORDER

Plaintiff,

10-cv-266-bbc

v.

NORTH CENTRAL HEALTH FOUNDATION, INC.,
d/b/a NORTH CENTRAL HEALTH CARE,

Defendant.

Plaintiff Christina Prince brings this civil suit under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654. Plaintiff alleges that her young son, Markus Kuester, was given a diagnosis of leukemia in January 2009 and that she took approximately four days' leave from work each month while he underwent chemotherapy treatments from January 2009 until February 2010. Plaintiff contends that her employer at the time, defendant North Central Health Foundation, Inc., violated the FMLA by terminating her on February 5, 2010 because of her absences. Now before the court is plaintiff's motion for partial summary judgment on the issue whether Markus Kuester has a serious health condition as defined by the FMLA.

Because plaintiff has failed to submit admissible evidence in support of her motion for partial summary judgment, I will deny her motion. I will grant plaintiff's request for an extension of time in which to disclose an expert witness on the issue of her son's health condition.

DISCUSSION

Under the FMLA, covered employers must guarantee up to 12 weeks of unpaid leave in "any 12 month period" for eligible employees who are providing care for a family member who has a serious health condition. 29 U.S.C. § 2612(a)(1)(C). The Act defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves – (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). It is unlawful for an employer to discharge an employee in retaliation for invoking her rights under the FMLA. 29 U.S.C. § 2615(a)(2); Aubuchon v. Knauf Fiberglass, GMBH, 359 F.3d 950, 954 (7th Cir. 2004).

Plaintiff contends that her son Markus Kuester has a serious health condition because he has acute lymphocytic leukemia that requires continuing treatment by a health care provider. She seeks partial summary judgment on the issue of Markus's serious health condition, contending that success on her motion would obviate the need for a liability

expert. In support of her motion, plaintiff has submitted Markus's medical records and asserts that they show regular treatment by a health care provider from January 2009 through the end of plaintiff's employment with defendant in February 2010, thus satisfying the FMLA's definition of "serious health condition."

Defendant contends that partial summary judgment is not appropriate for two reasons. First, summary judgment is not appropriate with regard to a single element of plaintiff's FMLA claim; second, plaintiff's evidence is inadmissible because it is not authenticated. In addition, defendant contends that it should be granted more time to conduct discovery on the issue of Markus's medical condition and how it affected plaintiff.

Under Fed. R. Civ. P. 56(d), a court may enter an order deciding "what material facts are not genuinely at issue" without granting summary judgment on an entire case or claim. In other words, a court may make a declaration of fact regarding issues in the case to which there is no genuine dispute without entering judgment in favor of one party or the other. I can construe plaintiff's motion as seeking a declaration of fact that her son has leukemia (a fact that defendant has already admitted in its answer, dkt. #17, ¶ 11), and that his leukemia requires inpatient care at a hospital and continuing treatment by a healthcare provider, thus satisfying the definition of "serious health condition" under the FMLA. Although a declaration of this type may be appropriate in some circumstances, I do not believe it appropriate at this stage in this case.

Understandably, plaintiff wishes to avoid the costs of calling an expert witness to support her case. However, at this early stage in the case, I cannot determine for plaintiff whether an expert will be necessary to prove her case. Given Markus's diagnosis, it may be that defendant will decide that the seriousness of his health condition is not an issue worth challenging. However, even if I found that plaintiff's son has a serious health condition and defendant conceded it, defendant may dispute whether Markus's condition required plaintiff's absences at a particular time or whether plaintiff was in fact caring for during her absences. 29 C.F.R. § 825.124 (defining when an employee is "needed to care for" family member under FMLA). Testimony from treating medical personnel may be necessary on these issues, and providing plaintiff a declaration about Markus's condition would not obviate her need to prepare for such potential disputes.

More important, plaintiff has failed to present admissible evidence in support of her motion for partial summary judgment. Fed. R. Civ. P. 56(e) (moving party presenting affidavit to support motion for summary judgment "must set out facts that would be admissible in evidence, and show the affiant is competent to testify on the matters stated.") Markus's medical records are not admissible as evidence because they have not been authenticated as Fed. R. Evid. 901(a) requires. To authenticate a document, plaintiff must submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Ordinarily, documents are authenticated by attaching them to an

affidavit of an individual who swears that the documents are true and correct copies of the originals. The individual who authenticates the documents must have personal knowledge of their authenticity. Fed. R. Evid. 901(b)(1). Plaintiff has submitted nearly 400 pages of Markus's medical records with affidavits of her counsel, who state that they have "first-hand knowledge" of the documents. Aff. of Jennifer J. Allen, dkt. #20, ¶ 7; Aff. of Jennifer Allen, dkt. #25, ¶ 5; Aff. of Alan Olson, dkt. #26, ¶ 4. It is not clear how plaintiff's attorneys have first-hand knowledge of these medical records. If plaintiff wants the court to consider as evidence documents from Markus's medical file, she needs to ask the keeper of ' medical records, or the treating physicians and nurses who prepared the records, to swear in an affidavit that the documents are from Markus's medical file and are true and correct copies of the originals in that file. Then, defendant would have an opportunity, if it wished, to depose the medical personnel regarding the accuracy and meaning of the extensive medical records.

In sum, neither partial summary judgment nor a declaration that plaintiff's son has a serious health condition is appropriate at this stage in plaintiff's case. Therefore, her motion for partial summary judgment will be denied. Plaintiff requests that in the event her motion for partial summary judgment is denied, the court grant her an extension of time in which to disclose liability experts who could testify regarding Markus's health condition; defendant has not opposed the extension. Plaintiff may have until December 22, 2010 in

which to disclose her liability experts.

ORDER

IT IS ORDERED that

1. Plaintiff Christina Prince's motion for partial summary judgment, dkt. #18, is DENIED.

2. Plaintiff's motion for extension of time in which to disclose expert witnesses on liability is GRANTED. Plaintiff may have until December 22, 2010 in which to disclose her experts witnesses on liability.

Entered this 2d day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge