IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANN BAKKEN,

Plaintiff,

v.

MERRICK MANAGEMENT GROUP, LLC,

Defendant.

OPINION AND ORDER

11-cv-332-bbc

- -

In this civil suit brought under the Family and Medical Leave Act, 29 U.S.C. § 2601, plaintiff Ann Bakken alleges that defendant Merrick Management Group, LLC violated the Act in two way: it interfered with her right to reinstatement to the same or equivalent position after she returned from medical leave, in violation of 29 U.S.C. § 2614(a)(1), and it terminated her employment in retaliation for taking medical leave, in violation of 29 U.S.C. § 2615(a)(1). Defendant has moved for summary judgment, dkt. #15, arguing that the record shows that plaintiff was not terminated for her use of medical leave but for poor performance and for falsifying records about her medical leave. Because I find that plaintiff has established a genuine dispute of fact about the reason for her termination, I will deny defendant's motion for summary judgment on both claims.

From the parties' proposed findings of fact, I find that the following facts are undisputed.

FACTS

A. The Parties

Defendant Merrick Management Group, LLC produces and sells food products for farm animals. Bill Merrick is defendant's president. Diane Merrick is defendant's executive vice president and secretary and was plaintiff's direct supervisor at all relevant times.

Defendant hired plaintiff as its human resource manager in July 2006. Plaintiff's responsibilities included processing employee payroll, administering employee benefit programs, including short-term disability benefits and personal time off and ensuring compliance with the various employment laws, including the FMLA. Plaintiff was the only person working for defendant who handled FMLA paperwork and the only one who would approve FMLA leave. When plaintiff was unavailable to process the payroll, Cheryl Fenner, defendant's controller, performed that job.

B. Defendant's Hours and Leave Policies

Defendant uses a web-based timekeeping program called TimeStar to track the hours of its salaried and hourly employees. As human resource manager, plaintiff was responsible for seeing that employees' hours were properly tracked. For FMLA leave, plaintiff's practice was to require an employee to complete the company's application form. She would make sure that the employee was eligible for FMLA leave and respond to the employee on the company's behalf, asking for a medical certification if necessary.

Plaintiff was familiar with defendant's policy for approving and tracking FMLA leave,

which is included in its handbook. On February 9, 2010, she sent an email to all defendant's supervisors and managers in which she summarized the policy and emphasized the importance of recording employee time properly in TimeStar. Plaintiff included a memorandum that she wrote explaining how to record hours when employees are off work for reasons that qualify for FMLA leave.

Defendant provides "personal time off" to its employees which they can use to take time away from work while still receiving their regular pay. Employees earn personal time off for each hour worked and these hours accumulate in a personal time-off account. When an employee is on FMLA leave, her time is to be designated as FMLA in the system so that it is not treated as regular work time for which compensation is owed. Time for which an employee is absent should not be marked as if that employee were working.

FMLA leave may be covered by defendant's short-term disability policy. Under the policy, a qualifying salaried employee receives the lesser of two-thirds of her weekly salary subject or $500 each week. The policy has a one-week elimination period, so benefits begin in the employee's second week of disability.

Plaintiff's memorandum included examples of how the policies regarding personal time-off, FMLA leave and disability benefits interact. One of these read as follows:

> John went hunting on Sunday, fell out of his tree stand and broke his leg. John informs his supervisor and Human Resources that his doctor thinks he will be out of commission for 6 weeks. Human Resources supplies John with disability paperwork (for income continuation-short term disability) and FMLA paperwork. John has banked 80 hours of PTO. Disability payments do not start for John until one week has passed. Disability payments from the insurance company will pay John starting with week two and continue until week six. The first week of disability is always unpaid. John's supervisor

> enters 40 hours of PTO/FMLA time in TimeStar for the first week. Weeks two through six, the supervisor enters 40 hours of FMLA for each week.

Sterken Decl. Ex. 3, dkt. #19-3, at 4. This method of tracking time applies to all employees, whether salary or hourly.

C. Plaintiff's Prior Absences

Plaintiff was absent from work for medical reasons on four occasions preceding the incident that precipitated her termination. She was absent for various surgical procedures for several days in December 2006, for approximately ten days in January 2008, for approximately nine days in August 2008 and for several days at the end of February and beginning of March 2010. She took sick leave for some of these days and worked part-time some of them, but none of them were taken as FMLA leave.

In September 2009, Diane Merrick noticed that many of the personal time-off accounts were much larger than she expected. In particular, Merrick noted that plaintiff had accumulated a particularly large amount of personal time off despite her health-related absences. (According to plaintiff, she explained to Merrick that she took her laptop with her and worked during those absences, and Merrick agreed that her coding was proper. According to Merrick, she remained suspicious that plaintiff's coding was incorrect but could not prove it.)

D. Plaintiff's Absences in March and April 2010

On March 23, 2010, plaintiff was taken to the hospital by ambulance for an

emergency surgery to repair a jejunal ulcer. She had no opportunity to notify defendant before her hospitalization, but a nurse called from the hospital to inform defendant of plaintiff's absence. She returned to work for approximately four hours on Tuesday, April 6, 2010, but went to the emergency room the next day for complications from the surgery. She returned to work part-time on Friday, April 9, 2010 but was hospitalized again the following Friday for an infection from the surgery. After being discharged again on Monday, April 19, 2010 she worked part-time from Tuesday until she was terminated on Friday, April 23, 2010.

After being released from the hospital, plaintiff completed the FMLA paperwork and left it on her desk. She did not complete a medical certification form. Plaintiff states she approved her own FMLA leave and that she believed a medical certification was unnecessary because her leave was for hospitalization and therefore clearly covered by the FMLA. She did not give anyone else the FMLA paperwork or inform anyone else that she was using FMLA leave to cover her absences. At the time of her termination, no one working for defendant except plaintiff was aware that she was treating her absences as FMLA leave.

E. Plaintiff's Coding of Leave Hours

During plaintiff's absence, Fenner, defendant's controller, processed the April 2 payroll. Fenner recorded all of plaintiff's absences in the TimeStar system as personal time off, allocating 72 hours from plaintiff's personal time off account. On April 12, plaintiff logged on to the payroll and TimeStar systems and reversed the allocation of personal time

off. She returned all the personal time off to her account and left the entire period of time coded as regular salary, as if she had been at work. Plaintiff did not designate any of the time as personal time off, FMLA or "nonwork time."

That same day, April 12, plaintiff also sent an email to Diane Merrick about her payroll and TimeStar coding, stating,

> I will make the adjustments to payroll when I know what disability "allows"—using PTO to cover anything not paid by disability. Treating myself just as I would any other employee.

Bakken 4/12/10 email, dkt. #19-6, at 2. Plaintiff did not tell Diane Merrick that she had altered her TimeStar records to code her absences as regular work time. Plaintiff never received approval from Diane Merrick or any other supervisor to code her absences as time worked or to add hours back into her personal time off account. She cannot recall any other instance in which a salaried employee's time away from work was coded as time worked rather than personal time, unless an error had occurred. Plaintiff testified that she would never intentionally leave an employee's absence coded as time worked.

Fenner later noticed that the coding had been reversed in the system. At plaintiff's request, Fenner and plaintiff met to discuss plaintiff's changes to the time records. Fenner did not suggest that plaintiff should do anything differently.

In April 2010, Brad Morris discovered plaintiff's coding. As defendant's chief financial officer, Morris regularly monitored defendant's contingent liabilities, including its outstanding personal time-off balances. He used a report prepared regularly by Fenner. While reviewing this report in "mid to late" April, Morris noticed that the liability for

personal time off was higher than he expected, since he knew that plaintiff had taken several weeks off and her use of personal time off should have reduced the overall figures. When he asked Fenner about the report, she explained that she had coded plaintiff's absence as personal time off but plaintiff had reversed the entry. Morris informed Diane Merrick of plaintiff's actions.

F . Short Term Disability Form

While investigating plaintiff's actions, Morris found a short-term disability claim form that plaintiff had filed seeking benefits for her March and April absences. The short-term disability claim form requires the employer to sign the form, so employees must have a supervisor or the human resources manager review the form prior to submission. When it was the human resources manager who was filing a claim, his or her supervisor would sign the form. On plaintiff's benefits claim form, she listed her "weekly earnings" incorrectly as "$2,163.46." That amount is exactly twice her weekly income of $1,081.73. Although Diane Merrick is her supervisor, plaintiff did not ask Merrick to review her claim form before submitting it to the insurer.

G. Defendant's Termination Decision

Diane Merrick and Morris discussed plaintiff's actions and Diane Merrick decided to terminate plaintiff's employment. Merrick was unable to meet with plaintiff in person, so she asked Morris and defendant's vice president of sales to meet with plaintiff. On April

23, 2010, they informed plaintiff that she was being terminated. During the meeting, they told plaintiff she was terminated because she had coded her absences as personal time off and because she was not meeting performance expectations. In support of the latter claim, they recounted a number of alleged payroll errors that had occurred during her tenure.

H. Email from Diane Merrick to Morris

On May 20, 2010, Diane Merrick sent an email to Morris, defendant's chief financial officer, discussing plaintiff's termination and listing various reasons for it. Merrick recounted her discussion with plaintiff in September 2009 about plaintiff's accumulated personal time off. She stated that plaintiff's "answer to me was that during each and every time she was out of the office for one of her many health issues her computer was with her and she was therefore officially working." Merrick also states that she told plaintiff not to continue this practice because "[t]here was no way I could go backward and verify each of the many many many days she was out, and for what reason."

The email also includes a discussion about plaintiff's medical leave in March and April 2010 that preceded her termination. Merrick states,

> The general attitude and lack of communication about her ability to work in the most recent health issues was disruptive to our entire work force. She would come into the office at any time of day, without a word to anyone, and leave at any time with still no further word. I had several calls inquiring whether I had any knowledge of her intentions and unfortunately I did not. Even when she finally indicated in a letter that she would be working half days, we did not hear from her just what 'half' she intended to work, and was not consistent in any way with her time schedule. I finally called her telephone, to inquire of her "health" and to ask of her current plans. She did tell me of her plan, but she did not follow it in any way shape or form—hence

the calls from the office of her whereabouts.

Diane Merrick 5/20/2010 email, dkt. #24-1, at 2.

I. Defendant's Treatment of Other Employees

Another employee of defendant engaged in misconduct allegedly similar to plaintiff's. On July 14, 2011, defendant terminated Amy Revels for accessing TimeStar under her supervisor's username and altering her own payroll records. (Plaintiff avers that shortly before her termination, she informed Diane and Bill Merrick that Revels was logging into the TimeStar system from home and falsifying her payroll records for time she had not worked. Although Bill and Diane Merrick told plaintiff they would take action, no actions were taken against Revels at that time. Diane Merrick avers that plaintiff told her only that Revels was leaving work during the lunch hour without clocking out; she instructed plaintiff to discipline Revels; and she learned that Revels was altering her time records for the first time in July 2011.)

OPINION

I. FAMILY AND MEDICAL LEAVE ACT

The FMLA provides an employee up to twelve weeks of medical leave for serious health conditions, 29 U.S.C. § 2612(a)(1)(D), with the right to return to the same position and benefits received before the medical leave. 29 U.S.C. § 2614(a). The FMLA recognizes two types of claims: interference and retaliation.

First, the FMLA prohibits an employer from interfering with the employee's attempt to exercise her rights under the FMLA. 29 U.S.C. § 2615(a)(1). To prevail on an FMLA interference claim, an employee must show

> (1) he was eligible for the FMLA's protections, (2) the employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled.

Burnett v. LFW Inc., 472 F.3d 471, 477 (7th Cir. 2006). "Firing an employee to prevent her from exercising her right to return to her prior position can certainly interfere with that employee's FMLA rights." Simpson v. Office of Chief Judge of Circuit Court of Will County, 559 F.3d 706, 712 (7th Cir. 2009). However,"[a]n employee is not entitled to return to her prior position if she would have been . . . terminated regardless of whether she took FMLA leave," so an employer may fire an employee for misconduct or poor performance without interfering with her FMLA rights. Id. (misconduct); Kohls v. Beverly Enterprise Wisconsin, Inc., 259 F.3d 799, 804 (7th Cir. 2001) (mishandling funds and poor performance). If an employer produces evidence that the employee was not entitled to return to her position because of misconduct or poor performance, then the employee has the burden to prove that the employer "would not have discharged her had she not taken FMLA leave." Id. at 805.

The Court of Appeals for the Seventh Circuit has stated that to prove interference "an employee need only show that his employer deprived him of an FMLA entitlement; no finding of ill intent is required." Burnett, 472 F.3d at 477; Goelzer v. Sheboygan County, Wisconsin, 604 F.3d 987, 995 (7th Cir. 2010) ("The difference between a retaliation and

interference theory is that the first requires proof of discriminatory or retaliatory intent while [an interference theory] requires only proof that the employer denied the employee his or her entitlements under the Act.") (quotation omitted). Despite these statements, an interference claim becomes a dispute about the employer's intent when an employer argues that the employee had no right to reinstatement because she would have been fired for misconduct despite her FMLA leave. Simpson, 559 F.3d at 714 (to maintain interference claim, employee must "raise a genuine issue of fact. . . that her termination was illegally motivated by her choice to take leave and not motivated by other, valid reasons") (quotations incorporated); Goelzer., 604 F.3d at 993-95 (analyzing interference claim by asking whether supervisor terminated plaintiff from retaliatory motive or out of desire for more skilled employee).

Under the second type of FMLA claim, an employer is prohibited from discharging or discriminating against employees for exercising FMLA rights. 29 U.S.C. § 2615(a). A plaintiff may establish a retaliation claim using a direct or indirect method of proof. Under the direct method of proof, plaintiff must establish that she engaged in a protected activity, she suffered an adverse employment action and her protected conduct was a "substantial or motivating factor," though not necessarily the only motive in the decision to terminate her employment. Lewis v. School District #70, 523 F.3d 730, 742 (7th Cir. 2008). Plaintiff may establish motive by direct or circumstantial evidence. Id. "If the plaintiff's evidence [of motive] is contradicted, the case must proceed to trial unless the employer presents unrebutted evidence that it would have taken the adverse action against the plaintiff even

if it did not have a retaliatory motive." Goelzer, 604 F.3d at 995 (quotations omitted).

Under the indirect method of proof, plaintiff establishes her prima facie case by showing "that after taking FMLA leave . . . [she] was treated less favorably than other similarly situated employees who did not take FMLA leave, even though [she] was performing [her] job in a satisfactory manner." Hull v. Stoughton Trailers, LLC., 445 F.3d 949, 951 (7th Cir. 2006). Plaintiff and her comparator must be "similar enough to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, so as to isolate the critical independent variable." Simpson, 559 F.3d at 719 (quotations and modification incorporated). Then, if defendant produces evidence of a legitimate reason for its action, plaintiff must prove that "the ostensible reason for the employment decision is really a lie contrived to mask unlawful discrimination." Wolf v. Buss (America) Inc., 77 F.3d 914, 919 (7th Cir.1996). An employer is not liable simply because the decision was "ill-considered or unreasonable . . . provided that the decision maker honestly believed the nondiscriminatory reason he gave for the action." Little v. Illinois Dept. of Revenue, 369 F.3d 1007, 1012 (7th Cir. 2004). If plaintiff lacks direct evidence of pretext, she "must show that the employer's reason is not credible or factually baseless" and "provide evidence that supports the inference that the real reason was discriminatory." Stockwell v. City of Harvey, 597 F.3d 895, 901-02 (7th Cir. 2010).

II. ANALYSIS

Plaintiff alleges that defendant terminated her employment after she took FMLA leave because Diane Merrick was tired of her repeated medical absences. She contends that her termination violated 29 U.S.C. § 2615(a)(1) because it interfered with her right to FMLA leave and her right to reinstatement and violated 29 U.S.C. § 2615(a)(2) because it was retaliatory and she offers to prove this under the direct and indirect method.

Defendant presents modest challenges to several elements of all three theories that I will discuss in § B below. However, defendant's primary argument for each theory is that plaintiff was fired for valid reasons. Defendant argues that Diane Merrick chose to terminate plaintiff for (1) misconduct for reversing the personal time-off codes to regular work time; (2) misconduct for inflating her income on the short-term disability claim form; and (3) poor performance for repeated errors in the company payroll. It is undisputed that plaintiff coded her time incorrectly and misstated her income and that ten payroll errors occurred during her final two years as human resources manager.

Accordingly, all of plaintiff's claims come down to a common question. For her interference claim, plaintiff must show "that her termination was illegally motivated by her choice to take leave and not motivated by other, valid reasons." Simpson, 559 F.3d at 714. For her direct retaliation theory, she must rebut defendant's reasons, Goelzer, 604 F.3d at 995, to show retaliation was "the true reason" for her termination. Burnett, 472 F.3d at 482. For her indirect retaliation theory, she must show that defendant's ostensible reasons are "not credible" and "the real reason was discriminatory." Stockwell, 597 F.3d at 902.

Despite semantic differences, these tests make it clear that defendant is entitled to summary judgment on all of plaintiff's claims unless she establishes a genuine dispute about whether defendant's alleged reasons were pretext for a decision motivated by retaliation.

A. Defendant's Reasons for Discharging Plaintiff

This is a close case. Defendant presented convincing justifications for firing plaintiff—in particular, for coding her hours incorrectly. Nevertheless, viewing all of the disputed facts in plaintiff's favor, I find that a reasonable jury could conclude that defendant's three alleged reasons were a pretext for firing plaintiff for taking medical leave.

1. Merrick's email

A jury reading Diane Merrick's email might infer that plaintiff's medical absences in April 2010 motivated Merrick's decision to terminate plaintiff. The email's tone reflects Merrick's frustration with plaintiff's medical absences. She refers to the "many many many days" that plaintiff was absent in 2009 and later refers to plaintiff's illness in 2010 sarcastically, noting that she called "to inquire about her 'health'." With respect to plaintiff's recent medical leave, Merrick complained about plaintiff's "general attitude and lack of communication about her ability to work," her erratic schedule and the difficulty in predicting whether and when she would come into the office. (Plaintiff misquoted the email in its brief, removing sentences and rearranging them, Plt.'s Opp. Br., dkt. # 23, at 13, but I have relied on the text of the email attached as an exhibit to plaintiff's declaration in

support of her brief in opposition to defendant's motion for summary judgment. Dkt. #24-1. I expect plaintiff's counsel to handle the evidence more carefully in the future.)

According to defendant, Diane Merrick was frustrated with plaintiff's failure to communicate and to maintain a regular schedule. These can be legitimate concerns. Simpson, 559 F.3d at 714 ("[f]iring an employee for failing to communicate about her leave is different from firing an employee for taking that leave."). However, in this case, these irritations were also the natural consequences of plaintiff's medical leave and its emergency nature. Plaintiff missed work initially for emergency surgery. She attempted to return to work twice, only to face further emergency complications. On summary judgment, I cannot say that no jury could find in plaintiff's favor. Lewis, 523 F.3d at 744 (failure to be present at office to perform general office duties and to address vendor and employee questions may be "direct result of the [defendant's] failure to respond appropriately to challenges presented by [plaintiff's] FMLA protected absences"). A reasonable jury may read Merrick's statements as an admission that plaintiff's medical leave was a substantial motivation in her termination. The email meets plaintiff's burden of production under the direct method of proof for retaliation, Mach v. Will County Sheriff, 580 F.3d 495, 499 (7th Cir. 2009) ("An isolated comment or 'stray remark' is typically insufficient . . . but it may suffice if it (1) was made by the decision-maker, (2) around the time of the decision, and (3) referred to the challenged employment action.") (citations omitted), and is evidence of discriminatory motive to question defendant's alleged reasons as pretextual.

2. Plaintiff's incorrect coding

Under defendant's leave policy, medical leave should be coded as personal time off if the employee has personal time off remaining. If the leave qualifies for short-term disability, then the first week should be coded as personal time off and the second through sixth week should be coded as FMLA leave. As the human resources manager, plaintiff knew defendant's leave policy; in fact, she wrote a memo explaining the policy to defendant's supervisors. Plaintiff violated this policy by coding all of her medical leave as regular work hours and returning all 72 hours of personal time off to her reserve account.

Plaintiff does not argue that she followed the policy. Rather, she attempts to rebut this reason for her discharge by asserting that she informed Diane Merrick of her plan. According to plaintiff, her plan was to wait for the insurer to inform her about how many hours would be covered, then correct the coding and deduct those hours from her next payroll. Her excuse has limited persuasive value. She told Merrick that she intended to adjust her hours after hearing from the insurer but not that she coded the time as regular work hours. She identified no other instance in which she followed this procedure.

Although plaintiff has little persuasive evidence that Diane Merrick approved her conduct, Merrick's different reaction to Revels's misconduct is evidence that Merrick's real reason was the medical leave itself. Amy Revels is similarly situated because she and plaintiff faced similar allegations of misconduct and had Diane Merrick as a superior. On summary judgment, I must assume that plaintiff told Merrick that Revels was falsifying time records, yet Merrick took no action for more than a year, well after plaintiff filed this lawsuit.

Venturelli v. ARC Community Services, Inc., 350 F.3d 592, 601 (7th Cir. 2003) (differential treatment of similarly situated individuals can be circumstantial evidence of "pretext" for direct method and an element of the prima facie case under the indirect method). Although Diane Merrick avers that plaintiff never told her Revels was altering her payroll codes, this dispute poses a credibility determination inappropriate for resolution on summary judgment. (Defendant also argues incorrectly that plaintiff's declaration is inadmissible hearsay. Plaintiff's declaration was offered only for proof of what she said to Bill and Diane Merrick, not for the truth of her allegations against Revels.)

In light of Diane Merrick's email and her differential treatment of Revels's similar misconduct, I find a reasonable jury could conclude that plaintiff would not have been discharged for miscoding if she had not taken FMLA leave.

3. Plaintiff's short-term disability form

Defendant also argues that it fired plaintiff for making fraudulent statements about her income on her short-term disability claim form. Plaintiff admits listing her income as double her weekly income but argues that she accidentally listed her bi-weekly income rather than her weekly income. She also argues that Diane Merrick and Brad Morris could not have believed honestly that her misstatement was fraudulent because they knew it was impossible to increase her benefit payments by inflating her income. Two-thirds of her weekly income was $721.15, which is already more than the maximum benefit of $500.

Plaintiff lacks direct evidence that Diane Merrick and Brad Morris knew the policy

had a $500 maximum. However, both filed declarations describing the contents of the policy. In virtually identical language, they aver that

> [Defendant] provides [its] employees with benefits under a short-term disability policy secured through Mutual of Omaha Insurance Company. Under the policy, a qualifying employee is paid two-thirds of his or her weekly pay (subject to certain maximums) beginning with his or her second week of disability (i.e., there is a one-week elimination period).

Morris Decl., dkt. #18, at ¶ 145; Diane Merrick Decl., dkt. #20, at ¶ 7. Because Merrick and Morris averred that they had personal knowledge of the policy's standard percentage and its elimination period, one might infer reasonably that they also knew the policy's "certain maximums." Drawing all reasonable inferences in favor of the plaintiff, I conclude that a reasonable jury might find that Diane Merrick and Brad Morris knew plaintiff had made an honest mistake on the claim form that would have no effect on her disability claim.

4. Past performance

Last, defendant argues that plaintiff was fired for poor performance and would have been fired for poor performance regardless whether she took FMLA leave. Defendant does not identify any negative performance evaluations or even internal memos criticizing plaintiff's performance. Instead, defendant lists ten payroll errors that occurred during the last two years of plaintiff's employment as human resources manager.

It is undisputed that ten errors occurred, but the parties dispute whether these errors were significant and whether all of them were plaintiff's responsibility. (Defendant argues incorrectly that plaintiff's declaration is an insufficient factual basis for her proposed facts.

Though self-interested, the declaration is not conclusory and describes facts within plaintiff's personal knowledge, which is sufficient to establish a genuine dispute. Kellar v. Summit Seating Inc., 664 F.3d 169, 175 (7th Cir. 2011).) Defendant asserts that it is irrelevant whether plaintiff actually caused these errors because she was ultimately responsible for payroll as human resources manager. However, if the errors were outside plaintiff's control and her supervisors knew they were outside her control, then this may be a reasonable basis to infer that the allegations about her poor performance were pretextual.

In any case, the dispositive question is whether Diane Merrick fired plaintiff because of these payroll errors. The problem for defendant is that nothing in the record indicates that Diane Merrick was aware of these specific errors. Defendant supported its proposed facts about payroll errors with nothing more than a declaration from Fenner, who it asserts was not involved in the termination decision. Fenner does not declare that she spoke to anyone about these errors. Diane Merrick avers generally that she was aware of "various payroll management issues" or "errors in processing employee payroll," but she never identifies the issues or errors to which she was referring. Diane Merrick Decl., dkt. #20, at ¶ 13. Merrick does not describe any performance reviews or any discussions about the errors before plaintiff's termination. Morris avers that he and Merrick discussed a "number of performance issues" when deciding whether to fire plaintiff, but again there is no indication of what these performance issues were. Morris Decl., dkt. #18, at ¶ 18.

Plaintiff avers that Diane Merrick made only two comments about her performance. On one occasion, Merrick asked her to spend more time on the production floor so

employees could gain access to her services more readily. On another occasion, Merrick asked plaintiff to turn in a payroll summary each week. Plaintiff denies that Merrick mentioned any other concerns about her performance, including any concerns about payroll errors. (Plaintiff also argues that she received satisfactory reviews in 2007 and 2008, but these reviews are not relevant to her performance in 2009 and 2010 leading up to the termination decision. Moser v. Indiana Dept. of Corrections, 406 F.3d 895, 901 (7th Cir. 2005). Neither party proposed facts about plaintiff's performance review in 2009.)

Interpreting the facts in the light most favorable to plaintiff, I find that a reasonable jury could conclude that Diane Merrick was not aware of the alleged payroll errors and did not raise the errors before plaintiff's termination because they were ad hoc rationalization for a decision motivated by her FMLA leave. Compare Lang v. Illinois Dept. of Children and Family Services, 361 F.3d 416, 419-20 (7th Cir. 2004) (lack of negative performance evaluations before protected activity raises suspicion of pretext), with Mach v. Will County Sheriff, 580 F.3d 495, 499 (7th Cir. 2009) (poor performance was well-known and thoroughly documented with repeated warnings); Benjamin v. Katten Muchin & Zavis, 10 Fed. Appx. 346, 353 (7th Cir. 2001) (many memos in personnel file documenting concerns).

This is a close case that rests on credibility determinations, but I conclude that a reasonable jury might find that defendant would not have discharged plaintiff had she not taken FMLA leave because Diane Merrick's real motive was plaintiff's repeated use of medical leave.

B. Remaining Elements of Plaintiff's Claims

In addition to disputing the ultimate reason for plaintiff's discharge, defendant has presented several minor arguments about other elements of her interference or discrimination claims that defendant alleges she failed to prove.

1. No notice for interference claim

With respect to the interference claim, defendant argues that plaintiff provided inadequate notice because she never told anyone of her intent to count the absences as FMLA leave. Dft.'s Reply Br., dkt. #29, at 20. To be entitled to FMLA leave, an employee must notify her employer of her need for leave 30 days in advance or as soon as practicable for unforeseeable needs. Stevenson v. Hyre Electric Co., 505 F.3d 720, 724 (7th Cir. 2007) (citing 29 C.F.R. §§ 825.302, 825.303(a)). However, this notice requirement is "not demanding" or "overly formalized," and an employee need only "succeed in alerting the employer to the seriousness of the health condition" that renders her unable to perform the functions of her job. Id. at 724-25; Burnett, 472 F.3d at 479 (employee need only "provide information sufficient to show that [she] *likely* has an FMLA-qualifying condition"). "[A]n employee is not required to refer to the FMLA in order to give notice of her intent to take FMLA leave." de la Rama v. Illinois Dept. of Human Services, 541 F.3d 681, 687 (7th Cir. 2008). Furthermore, an employee may "substitute any of [her] accrued . . . personal leave . . . for any part of the 12 week period" guaranteed by the FMLA. 29 U.S.C.A. § 2612; Simpson, 559 F.3d. at 711. Regardless whether Fenner, Merrick or Morris knew that

plaintiff intended to count her absences as FMLA leave, she notified defendant from the hospital about her emergency surgery and this satisfies the notice element.

2. No direct evidence of discrimination

With respect to the discrimination claim, defendant argues that Diane Merrick's email cannot constitute direct evidence of discriminatory motive for her claim under the direct method of proof, because one must infer a retaliatory motive from her ambiguous statements. However, it is a short inference from Merrick's statements to a retaliatory motive and, in any case, plaintiff may use circumstantial evidence to prove intent under the direct method of proof. Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 902-03 (7th Cir. 2006) (distinguishing "direct method of proof" from "direct evidence").

3. Indirect method of proof of discrimination

For purposes of summary judgment, defendant concedes that plaintiff meets all but two elements of the prima facie case for retaliation under the indirect method of proof. Relying on the payroll errors, defendant asserts that plaintiff was not meeting defendant's legitimate performance expectations. A legitimate expectation is one that is objectively reasonable and communicated to the employee. Dale v. Chicago Tribune Co., 797 F.2d 458, 463 (7th Cir. 1986). A reasonable jury may conclude that before plaintiff's termination, Diane Merrick did not know about the alleged payroll errors or inform anyone about these errors, much less plaintiff. Gordon v. United Airlines, Inc., 246 F.3d 878, 886 (7th Cir.

2001) (if plaintiff alleges that reasons for discipline were false, legitimate expectations and pretext discussion dovetail).

Second, defendant argues that plaintiff has not identified a similarly situated individual because defendant did not know that Revels was altering records and once it found out, it fired Revels just as it had fired plaintiff. Coleman v. Donahoe, 667 F.3d 835, 851 (7th Cir. 2012) (similarly situated prong satisfied if comparator engaged in conduct of "comparable seriousness" but received "more lenient discipline"). However, on summary judgment, I must assume that plaintiff told Bill and Diane Merrick that Revels was altering payroll records but defendant waited more than a year to terminate Revels, until after plaintiff filed suit.

ORDER

IT IS ORDERED that defendant Merrick Management Group, LLC's motion for summary judgment, dkt. #15, is DENIED.

Entered this 30th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge