

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RENE M. PALMA :
v. : Civil No.
3:00CV1128(AHN)
PHARMEDICA COMMUNICATIONS, INC. :

RULING ON MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT

In this action, the Plaintiff, Rene M. Palma ("Palma"), alleges that her employer, Pharmedica Communications, Inc. ("Pharmedica"), violated her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq.

Presently pending before the court are Pharmedica's motion for summary judgment [doc. # 25] and Palma's motion to strike the affidavits attached to Pharmedica's motion for summary judgment [doc. # 32]. For the following reasons, Palma's motion to strike is DENIED and Pharmedica's motion for summary judgment is GRANTED in part and DENIED in part.

BACKGROUND

Rene Palma began working for Pharmedica in December 1990 as an Administrative Assistant to the company's President and CEO, Lawrence Timmerman ("Timmerman"). Shortly thereafter, she assumed the duties and title of bookkeeper as well. In 1995, Pharmedica promoted her to the position of Assistant Accounting Manager. From 1990 until her termination in 1998,

Palma's salary increased steadily from \$28,000 to \$46,000.

When Palma started working at Pharmedica, the company employed less than 50 people and thus was not subject to the requirements of the FMLA. The company grew over the years and became subject to the provisions of the FMLA in 1998.

In September 1998, Palma's doctor told her that she needed gall bladder surgery. She informed her supervisor of her need for the surgery and that she would have to take time off to recuperate. At that time, Palma also asked if it would be possible for her to work three half days a week after she returned from surgery until she was fully recuperated. Palma's supervisor told her that she could not work reduced hours because it would set a precedent for the whole company. Later, the day before her surgery, Palma again asked if she could work half days when she returned to work after her surgery, but her supervisor turned down her request.

Palma underwent surgery on November 20, 1998. On December 2, 1998, her doctor gave her a note stating that she was sufficiently recovered to return to "light duty" work for half days for approximately two weeks. At that point, Palma contacted the U.S. Department of Labor ("DOL") to ascertain her rights. The DOL told her that her employer would violate the FMLA if it did not permit her to work reduced hours.

Palma returned to work on December 7, 1998. She gave her supervisor the doctor's note, and again requested that she be permitted to work three half days a week. When her supervisor denied the request, Palma suggested she contact the DOL.

According to Palma, her supervisor consulted counsel, and Palma was allowed to work half days. Because she was intimidated and concerned, she refrained from working additional half days after December 11, 1998 even though her doctor recommend she do so.

On January 22, 1999, Palma was terminated. Palma alleges that Pharmedica interfered with the exercise of her rights under the FMLA and terminated her employment in retaliation for seeking leave under the FMLA.

Pharmedica writes at length about its accomodation of Palma's requests for time off for health reasons and to care for her parents prior to her surgery in 1998. Pharmedica repeatedly allowed Palma to borrow time from an upcoming year when she had exhausted all of her leave time for the current year. Pharmedica also details problems and dissatisfaction with Palma's job performance throughout her employment.¹ Pharmedica states that Palma refused to take courses in

¹Palma disputes this and notes that she continually received raises and positive evaluations.

accounting even though her supervisors repeatedly asked her to do so. Also, Pharmedica alleges that Palma was often a "difficult" and insubordinate employee who did not get along with her supervisors.

DISCUSSION

I. Motion to Strike

Palma moves to strike the affidavits (the "Affidavits")² attached to the Defendant's motion for summary judgment on the grounds that they were not disclosed to Plaintiff until Defendant moved for summary judgment on July 12, 2001, even though Plaintiff had requested such documents in earlier discovery requests.³ Further, Plaintiff claims the affidavits differ substantially from deposition testimony given by the same individuals who submitted the affidavits. Plaintiff has also moved to strike John Datsko's affidavit because it is not based on personal knowledge.

²These include the affidavits of Pharmedica employees Peter Stefanski, Susan Cippollone, Cindy Kane and Lawrence Timmerman, and non-employee John Datsko.

³The relevant discovery requests asked for:
1) "All documents, if any, relating to any incidents which were a factor in Ms. Palma's termination, including any written statements or affidavits taken from any person;" and
2) "All documents which defendant claims support its defense of the claims in this action."

Pharmedica responded initially to the discovery requests in January 2001, but did not disclose these affidavits until moving for summary judgment a month after discovery ended. Plaintiff argues that under Rule 37(c)(1), "a party that without substantial justification fails to disclose information required by Rule 26(a) or Rule 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." Plaintiff argues that allowing Defendant to use these affidavits in support of the summary judgment motion would result in "ambush" which courts shun. See Allen v. Bake-Line Products, Inc., 2001 WL 883693 *7 (N.D. Ill. Aug. 6, 2001); Suber v. Pitney Bowes Inc., 1999 WL 102815 n. 6 (S.D.N.Y. Feb. 26, 1999).

Defendant argues that the affidavits "were not clearly encompassed" within the scope of the document requests. Defendant further argues that even if the affidavits did fall within the discovery requests, it complied by making a timely disclosure. Most of the affidavits were executed just days before being disclosed to the Plaintiff. Two of the affidavits, however, were executed in March and June of 2001.

Defendant reads the document requests as asking for documents which were a factor in the termination and,

Pharmedica maintains, would only encompass documents in existence prior to or at the time of termination. This is a misreading of the requests. It is clear that the requests asked for documents relating to the incidents that were a factor in the termination and thus, the affidavits would be included among those documents. Defendant is correct that it "seasonably" amended its discovery responses. This does not appear to be a situation where the defendant was withholding documents in order to ambush the plaintiff. It is likely that the documents were created solely to support the summary judgment motion and would not have existed but for that motion. Furthermore, the Plaintiff deposed the affiants and had a full opportunity to explore the facts known to each.

In McNerney v. Archer Daniels Midland Company, 164 F.R.D. 584, 587 (W.D.N.Y 1995), the court held that preclusion under Rule 37(c)(1) is "a drastic remedy and should only be applied in cases where the party's conduct represents flagrant bad faith and callous disregard of the federal rules." That is not the case here.

The court also finds unpersuasive Plaintiff's argument that the Affidavits should be stricken because they differ from the affiants' previous deposition testimony. Although "it is well settled in this circuit that a party's affidavit

which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment," Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987), striking the affidavits would be inappropriate here. Any alleged discrepancies between the deposition testimony and the affidavits do not reach the level of inconsistency cited in Mack and the Defendant has put forth sufficient explanation of any possible discrepancies. The court also finds it significant that the cases cited by Plaintiff involve inconsistent affidavits submitted by the non-moving party. In those cases, the courts refused to allow the conflicting affidavits to create subsequent issues of fact in order to survive summary judgment. That differs substantially from the situation here.

Palma's additional objection to Datsko's affidavit likewise lacks merit. She offers no examples of statements in the affidavit that were not based on personal knowledge. Moreover, in his affidavit, Datsko specifically refers to his presence in the Pharmedica office, thus establishing first hand knowledge of the facts to which he swears.

II. Pharmedica's Motion for Summary Judgment

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of

material fact in dispute and that it is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court will grant summary judgment if a review of the record "show[s] that there is no genuine issue as to any material fact.'" Miner v. City of Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson, 477 U.S. at 248), cert. denied, 506 U.S. 965, 113 S. Ct. 440 (1992). Summary judgment is appropriate if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991).

Pharmedica moves for summary judgment on Counts One and

Two of Palma's complaint, which allege interference with the exercise of rights under the FMLA and retaliatory discharge under the FMLA.⁴ At oral argument, Palma agreed not to pursue the interference/entitlement claim; therefore, summary judgment shall be granted for the Defendant as to Count One.

Pharmedica urges that claims for discrimination/retaliation under the FMLA should be subjected to the same analytical framework as cases brought under Title VII. Under the burden-shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff claiming discrimination must first establish by a preponderance of the evidence a *prima facie* case of retaliation. To do so, Palma must show 1) she availed herself of a protected right under the FMLA; 2) she was adversely affected by an employment decision; and 3) there is a causal relationship between the employee's protected activity and the employer's adverse employment action. See Hodgens v. General Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998). If the plaintiff establishes a *prima facie* case, the employer bears the burden of production to establish a legitimate, nondiscriminatory reason for its action. See Bickerstaff v. Vassar College, 196 F.3d 435, 446

⁴This court previously dismissed a claim for violation of the FMLA's notice and posting requirements.

(2d Cir. 1999). If the employer offers an adequate explanation for its action, the presumption raised by the plaintiff's *prima facie* case is rebutted. Id. The plaintiff must then show that the defendant's explanation was not the true reason for the employment action and that the exercise of FMLA rights was a motivating factor. See Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000)(applying a burden-shifting analysis to age discrimination case).

Palma challenges Pharmedica's assertion that the Title VII analytical framework applies to FMLA cases. She cites the Ninth Circuit's opinion in Bachelor v. America West Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001), which held that a retaliatory discharge claim under the FMLA is not subject to the McDonnell Douglas burden-shifting paradigm. Instead, retaliatory claims should be analyzed along the lines of an "interfering with" claim, not a discrimination claim because the legislative prohibition on interference with the exercise of FMLA rights "encompasses an employer's consideration of an employee's use of FMLA-covered leave in making adverse employment decisions." Id. at 1122. Thus a plaintiff "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her." Id. at 1125

The Second Circuit has not ruled on whether a retaliation claim under the FMLA should be subject to an anti-discrimination analysis. The majority of courts that have examined the issue, however, generally found that the anti-discrimination analysis does apply because, as in Title VII cases, the employer's motivation is at issue. See Belgrave v. City of New York, No. 95-CV-1507(JG), 1999 WL 692034, at *42 n.38 (E.D.N.Y. Aug. 31, 1999) ("Although the Second Circuit has not decided the issue, other courts of appeals have held that FMLA retaliation claims are covered by the McDonnell Douglas analysis."); Strickland v. Water Works and Sewer Board of the City of Birmingham, 239 F.3d 1199, 1207 (11th Cir. 2001); Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998); Morgan v. Hilti, Inc., 108 F.3d 1319, 1324 (10th Cir. 1997); Sanders v. The May Dept. Stores, 2001 WL 578169 (E.D. Mo. 2001). This court joins the majority of courts in applying a burden-shifting analysis.

Palma has established a *prima facie* case of retaliation. There is no dispute that Palma exercised her rights under the FMLA and that she was subsequently terminated. Palma has also made a sufficient offer of proof to demonstrate that there was a causal connection between the exercise of those rights and her termination. The testimony of Ann Flaherty, a former

colleague at Pharmedica, provides Palma with evidence of retaliation. Ms. Flaherty testified at her deposition that she asked Ms. Cippollone, Palma's supervisor, where Palma was and Cippollone told her she had been fired. When Flaherty asked the reason for the termination, Cippollone told her that Palma

had requested coming back half days and had a letter from her doctor to come back half days and she was told she could not do that and then she questioned Larry [Timmerman] about it and then Susan [Cippollone] said, "You don't question Larry."

See Flaherty dep., p. 11. Pharmedica's contention that this should be disregarded as the stray comment of a coworker is unavailing. Ms. Cippollone was Palma's direct supervisor. There is also a dispute over whether Ms. Cippollone participated in the decision to terminate Palma. At one point during discovery, Pharmedica identified Ms. Cippollone as a decisionmaker in Palma's termination. Pharmedica revised its discovery response after the Flaherty deposition, eliminating Palma as a decisionmaker.

The proximity in time between the exercise of Palma's FMLA rights and her termination can likewise lead to an inference of retaliation. See Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986) ("[T]he protected activity was closely followed by adverse actions");

Grant v. Bethlehem Steel Corp., 622 F.2d 43 (2d Cir. 1980)

("[C]ourts have recognized that proof of causal connection can be established indirectly by showing that protected activity is followed by discriminatory treatment."). Pharmedica terminated Palma six weeks after granting her requested leave.

After a plaintiff makes a *prima facie* case for retaliation, the burden of production shifts to the defendant to put forth a legitimate, non-retaliatory explanation for the employment decision. See McDonnell Douglas, 411 U.S. at 802. Pharmedica cites a reorganization of the accounting department and an attempt to lower costs as the impetus for Palma's termination. Pharmedica claims that it found it could use temporary workers to perform Palma's duties more efficiently and economically. This reason will suffice to rebut Palma's *prima facie* case at this stage of the litigation.

Palma contends that Pharmedica's proffered explanation is mere pretext, masking the true retaliatory reason for her discharge. A number of questions do arise concerning Pharmedica's stated reasons for termination. First, Peter Stefanski, Pharmedica's manager of Budgeting, Purchasing and Planning, told Palma that she was not terminated because of her job performance. Despite this assertion, Pharmedica goes

to great length in its summary judgment motion papers to detail its dissatisfaction with Palma's handling of her duties and attitude toward her job and colleagues. Palma questions the need to "lambaste" her in this manner if the true reason for the termination was simply reorganization.

In addition, it is not entirely clear that Pharmedica did in fact eliminate Palma's position or reduce its costs. Several temporary workers have been hired to perform the duties once handled by Palma. Palma further disputes Pharmedica's claim that it was able to lower its costs by using temporary employees.

Finally, Pharmedica has offered differing responses on various occasions to the question of who made the decision to terminate Palma. In a proceeding before the Commission on Human Rights and Opportunities, Pharmedica stated it was Timmerman. In Stefanski's deposition, he also said Timmerman made the decision. But, Timmerman, in his deposition, could not recall who made the termination decision. During the initial discovery in this case, Pharmedica identified Timmerman, Stefanski and Cippollone as the decisionmakers. After Flaherty's deposition which quoted Cippollone saying that Palma had been fired for "question[ing] Larry [Timmerman]", Pharmedica revised its discovery response eliminating

Cipollone as a decisionmaker. Though Pharmedica claims that the initial inclusion of Cippollone among the decisionmakers was in error, the change is troubling coming as it did after Ms. Flaherty's potentially damning deposition testimony. A rational jury could find that this and the disputed explanations articulated by Pharmedica give rise to an inference of pretext.

The court finds that Palma has established a *prima facie* case of retaliation for exercising her FMLA rights. Genuine issues of fact exist regarding the non-retaliatory reasons put forth by Pharmedica for its decision to terminate her. Thus, summary judgment is inappropriate and Defendant's motion is therefore denied as to Count Two of the complaint.

CONCLUSION

For the foregoing reasons, Palma's Motion to Strike [doc. # 32] is DENIED and Pharmedica's Motion for Summary Judgment [doc. # 25] is GRANTED as to Count One and DENIED as to Count Two.

SO ORDERED this day of March, 2002, at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge

