

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE SHAFNISKY : CIVIL ACTION
: :
v. : :
: :
BELL ATLANTIC, INC. : NO. 01-3044

M E M O R A N D U M

WALDMAN, J.

NOVEMBER 5, 2002

Introduction

Plaintiff alleges that defendant failed to accommodate her disability and terminated her employment because of that disability. She asserts a claim under the Americans with Disabilities Act and a parallel claim under the Pennsylvania Human Relations Act ("PHRA"). Plaintiff alleges that her termination was also in retaliation for her filing administrative charges of disability discrimination with the EEOC and PHRC, for exercising her rights under the Family and Medical Leave Act ("FMLA") and for filing a workers compensation claim. Plaintiff asserts retaliation claims under the ADA and FMLA, as well as a state law claim for wrongful discharge.

Presently before the court is defendant's motion for summary judgment.¹

¹Defendant was known as Bell Atlantic throughout plaintiff's employment. It changed its name to Verizon following its 1999 merger with GTE, Inc. Defendant refers to itself as Verizon throughout its pleadings and other submissions.

Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in the pleadings, but rather, must present competent evidence from which a jury could reasonably find in its favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252

(3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

Facts

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff was employed as a service representative in defendant's customer relations department from December 1979 to May 1998. She received and responded to inquiries presented by customers.

Throughout her employment, plaintiff was covered by defendant's short-term Sickness and Accident Disability Plan ("STD") which provided payments for up to 52 weeks to qualified employees who were unable to work due to physical disability resulting from illness. Under the plan, plaintiff was eligible to receive full salary for the first 26 weeks and half salary for the remaining six months. After 52 weeks, defendant terminated employees who were still unable to return to work.

The STD plan was administered by defendant's Benefit Claims Committee for the period predating August 1, 1996 when defendant contracted with CORE, Inc. ("CORE") prospectively to administer the plan. CORE assessed and determined an employee's eligibility for STD leave as well as an employee's ability to return to work. An employee on STD could return only if CORE

determined that he or she was no longer totally disabled from work. CORE relied largely on the assessments of treating professionals in making its determinations. If CORE determined that an employee remained totally disabled after one year, the employee would be terminated. This policy was clearly set out in an information packet provided to each employee. CORE was also charged with administering defendant's FMLA program and determining the eligibility of individual employees.

Plaintiff was also covered by defendant's Long Term Disability Plan ("LTD"). This plan was administered by Metropolitan Life Insurance Company. Any employee who is totally disabled from any job with defendant can apply for and receive LTD benefits. To qualify, the employee must be unable to perform any job at the company for which the employee is qualified due to illness. LTD eligibility begins when an employee has exhausted the 52 weeks of coverage under the STD and has been terminated.

While employed by defendant, plaintiff developed a mental illness which manifested itself in non-epileptic seizures, severe depression, personality disorder and anxiety. Plaintiff first suffered a seizure in 1992. Shortly thereafter, plaintiff asked her supervisor, Donald Furhy, about moving from her position in customer relations to a switchman's position.²

²A switchman is responsible for running wires back and forth when customers move and disconnect or connect telephone service.

Plaintiff did not inform her supervisor why she sought such a transfer. There was a waiting list for a switchman's position which was a desirable position.

In 1995, the plaintiff began to suffer from seizures at work and to take time off. Her first seizure at work occurred on April 26, 1995 and was followed by another seizure on December 29, 1995. Plaintiff also suffered from other bouts of mental illness. From December 30, 1995 through May 13, 1996, plaintiff was on medical leave due to depression.

At defendant's request, plaintiff visited a psychiatrist, Dr. Paul Orr, for an evaluation of her condition. In a report of January 16, 1996, Dr. Orr determined that plaintiff suffered from hysterical conversion reaction and depression, and was not actually experiencing physical seizures. He determined that the causes were childhood stressors and painful or strained relationships with her parents, husband and daughter. She characterized her relationship with her supervisors at work as "good." Dr. Orr concluded that plaintiff could return to her job only after her psychological problems were successfully addressed through intense psychotherapy.³

³It appears that Dr. Orr conducted a follow-up evaluation on June 12, 1996, as well as an evaluation on December 8, 1997 in connection with workers' compensation proceedings, in which he made similar findings. Copies of these, however, were not submitted.

Plaintiff returned to work on May 13, 1996 but had a relapse two days later. She then worked sporadically until a final relapse in the spring of 1997. Plaintiff sought benefits under the STD which she began to receive on May 26, 1997.⁴ During this period, plaintiff also saw her family physician, Dr. Taxin, regarding her condition. On May 30, 1997, he told CORE that he would continue to certify the plaintiff as disabled based on the conclusions of her treating psychologist, Dr. William Lee. Dr. Lee periodically reported from May to December 1997 that plaintiff was unable to work.

Plaintiff filed a claim for workers' compensation on May 27, 1997 and hearings were conducted later that year before a Workers' Compensation Judge. She concluded that plaintiff suffered from hysterical conversion disorder and seizures which were psychiatric in nature. She denied plaintiff's claim for benefits upon a determination that plaintiff's condition was not work related.

On June 12, 1997, plaintiff contacted CORE in response to a letter she had received about returning to work. She stated

⁴From the competent evidence of record, it appears that the only period during which plaintiff was absent without receiving STD benefits was July 31 to August 11, 1996. There were several periods during which defendant required plaintiff to attempt to return to work, however, she consistently claimed that she was disabled and should not be working. Indeed, she stated that she felt defendant had harassed her by asking her to return to work on those occasions.

that she was unable to return to work based on Dr. Lee's advice. Plaintiff did not return to work and CORE approved an extension of her STD benefits. In August 1997, CORE evaluated plaintiff's status and determined that it was unlikely she would be able to return to her former position or work in another capacity.

In a report to CORE of December 12, 1997, Dr. Lee advised that plaintiff suffered from depression, seizures and an inability to concentrate, was incapable of full or part-time work and would be unable ever to return to work. Dr. Lee confirmed this diagnosis and prognosis in subsequent reports of January 19 and February 20, 1998. Based on Dr. Lee's representations, plaintiff continued to receive STD benefits. In a report of March 27, 1998, Dr. Lee advised that plaintiff's disability was permanent.

In accord with defendant's policy, on March 12, 1998, after plaintiff spent nine months on STD, CORE notified Metropolitan Life to initiate the LTD process. Metropolitan Life sent plaintiff information about the program including notice that her employment would be terminated on her one-year anniversary on STD in accord with company policy. On March 26, 1998, while still on STD, plaintiff attempted to return to work but was told to leave because she was still on disability. By returning to work even for the day, however, plaintiff qualified for a wage increase of \$26.50 each week which she received.

Plaintiff applied for LTD on April 3, 1998, stating that she was unable to return to work because of her seizures. Her application was accompanied by a statement of functional capacity from Dr. Lee concluding that plaintiff was totally disabled from her occupation or any occupation.

In a telephone conversation with a CORE representative on January 21, 1998, plaintiff expressed a fear that defendant was planning to have her murdered. In a similar telephone conversation on April 16, 1998, plaintiff discussed the possibility of suicide. The CORE representative dispatched the police to her residence as a precaution.

Relying on Dr. Lee's representation that plaintiff was permanently disabled and plaintiff's statements in the application for LTD benefits, Metropolitan Life concluded that plaintiff would be unable to return to work and awarded her LTD benefits from the time of her termination on May 25, 1998.

After being terminated, plaintiff nevertheless appeared for work on July 6, 1998. She was instructed to leave as she was not then an employee.

Plaintiff applied for Social Security Disability Insurance ("SSDI") on June 12, 1996. After an initial denial of benefits, plaintiff filed a request for reconsideration on August 7, 1996 which was successful. An ALJ ultimately determined that plaintiff suffered from conversion reaction somatoform disorder

with seizures, major depression and mixed personality disorder. He found that she had been disabled from gainful employment since December 29, 1995. Plaintiff was awarded retroactive benefits of \$31,343.13 as well as prospective relief. In pursuing her claim for social security benefits, plaintiff represented that she was unable to concentrate, unable to balance a check book, unable to perform household chores, unable to remember the names of persons with whom she was speaking, unable to remember things she needed to do despite making lists, unable to remember why she went somewhere upon her arrival, unable to process thoughts correctly, unable to make basic decisions, unable easily to get dressed for days at a time and frequently unable to leave her house due to depression.

Discussion

I. ADA and PHRA Discrimination Claims

The ADA prohibits discrimination by covered entities against qualified individuals with a disability because of the disability of such individual. 42 U.S.C. § 12112(a). To establish a prima facie case of discrimination under the ADA, a plaintiff must show that she is a disabled person within the meaning of the ADA; that she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and, that she was subject to an adverse employment action as a result of discrimination." See 42

U.S.C.A. § 12101 et seq.; Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). An adverse employment action is any action by the employer that may be found to constitute a change in the terms, conditions or privileges of employment. See Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 786-87 (3d Cir. 1998).⁵

Defendant does not contest that plaintiff is a disabled person within the meaning of the ADA but does dispute whether she is a "qualified individual" under the ADA.

A qualified individual is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8). At the very least, a plaintiff must be able to show that she could work in some capacity before she can be considered qualified for a particular job she held or sought. See Motley v. New Jersey State Police, 196 F.3d 160, (3d Cir. 1999); Harris v. Smith Kline Beecham, 27 F. Supp. 2d 569, 581 (E.D. Pa. 1998). A person who is totally disabled and thus unable to perform in a job, even with

⁵The same standards and analyses are applicable to plaintiff's ADA and parallel PHRA claim. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). The McDonnell Douglas burden-shifting framework applies to claims for disability discrimination when direct evidence of discriminatory intent is not available. See Lawrence v. Nat'l Westminster Bank, 98 F.3d 61, 66 (3d Cir. 1996); McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996).

accommodation, is not a "qualified individual" under the ADA. See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1108-09 (9th Cir. 2001); Ross v. Ind. State Teacher's Ass'n Ins. Trust, 159 F.3d 1001, 1016 (7th Cir. 1999); Fennell v. Aetna Life Ins. Co., 37 F. Supp. 2d 40, 43-44 (D.D.C. 1999); Esfahani v. Medical College of Pennsylvania, 919 F. Supp. 832, 835 (E.D. Pa. 1996).

Plaintiff has not presented competent evidence from which one could reasonably find that she could have returned to work after her STD benefits expired with any type of reasonable accommodation. Throughout the pertinent period, Dr. Lee reported that plaintiff was unable to perform any work, was permanently disabled and unable ever to return to work. Plaintiff herself testified that she was "totally disabled and unable to return to work."

In early 1996, Dr. Orr opined that plaintiff could work again if she received and responded to intense psychotherapy. This was two years before plaintiff was terminated. Plaintiff thereafter received psychotherapy from Dr. Lee who never found plaintiff able to work. There is no medical or other competent evidence of record that plaintiff was able to work in any capacity after she applied for STD benefits in May 1997.

Plaintiff applied for and received disability benefits from defendant as well as Social Security Disability Insurance

("SSDI") payments during the period in question. While this does not per se preclude a determination that she is a qualified individual for purposes of an ADA claim, plaintiff must at least provide a rational explanation for the differing positions taken in pursuing the disability claim and the ADA claim which would permit one reasonably to conclude that assuming the truth of her earlier statements, plaintiff could nevertheless perform the essential functions of her job with or without accommodation. See Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 799 (1999); Motley, 196 F.3d at 164-65.

Plaintiff did not merely make a blanket statement or simply check a box on a form. She claimed to be totally disabled repeatedly to various parties throughout the pertinent period. In applying for LTD benefits, plaintiff represented that she was unable to work in any occupation on a full or part-time basis and specifically described various basic activities she could not perform. Plaintiff represented to the Social Security Administration that she was totally disabled from gainful employment and could not perform basic functions including household chores, could not concentrate or remember things, could not easily get dressed for days at a time and was frequently unable to leave her house due to depression.

Plaintiff's only explanation for her inconsistent statements is that she need not offer any explanation because her

SSDI and disability claims encompass different time periods than her ADA claim. The pertinent time periods actually overlap substantially. Plaintiff applied for LTD benefits six months before the allegedly discriminatory termination of her employment. Based on her representations to the Social Security Administration, she was found disabled and awarded SSDI for virtually the entire period in question.

Moreover, even if plaintiff were a qualified individual under the ADA, she has not discredited defendant's legitimate reason for terminating her.

Where a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment decision. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-55 (1981); Shaner, 204 F.3d at 500; DiBiase v. SmithKline Beecham Corp, 48 F.2d 719 n.5 (3d Cir. 1995)(legal principles regarding ADA, Title VII and ADEA are interchangeable). The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reason proffered was not the true reason for the discharge, but rather a pretext for discrimination. See Shaner, 204 F.3d at 500. A plaintiff must present evidence from which a fact finder reasonably could disbelieve the employer's articulated legitimate reasons, from which it may reasonably be inferred that the real reason was

discriminatory, or evidence from which one could otherwise reasonably conclude that invidious discrimination was more likely than not a motivating or determinative factor in the employer's decision. See Id. at 501; Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999); Lawrence v. Nat'l Westminster Bank N.J., 98 F.3d 61, 66 (3d Cir. 1996); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

The stated reason for plaintiff's termination is the application of defendant's medical leave policy under which any employee who is absent on disability for one year and still unable to perform any occupation with the company will be administratively terminated. In the absence of evidence that it has been applied in an inconsistent or discriminatory manner, the application of such a medical leave policy to terminate an employee after an extended absence from work is a legitimate reason for the employment action. See Scott v. Memorial Sloan-Kettering Cancer Center, 190 F. Supp. 2d 590, 598 (S.D.N.Y. 2002); Deily v. Waste Mgmt. of Allentown, 2000 WL 33358062, *3 (E.D. Pa. June 25, 2001); Benson v. Long Term Disability Income Plan for the Employees of Xerox, 108 F. Supp. 2d 1074, 1086 (C.D. Ca. 1999); Lewis v. Zilog, Inc., 908 F. Supp. 931, 952 (N.D. Ga. 1995); Ulloa v. American Express Travel Related Servs. Co., Inc., 822 F. Supp. 1566, 1571 (S.D. Fla. 1993).

The existence of defendant's medical leave policy is clear and uncontroverted. Plaintiff has presented no competent evidence that defendant has ever applied the policy other than uniformly. She has identified no employee who was treated differently under the policy. It is uncontroverted that defendant relied on the representations of plaintiff herself and her treating psychologist in determining that she was unable to return to work in any capacity. One cannot reasonably conclude from the competent evidence of record that defendant's legitimate reason for terminating plaintiff's employment is suspect or pretextual.

An employer also discriminates against a qualified individual when it fails to make reasonable accommodations to the known physical or mental limitations of such individual unless the employer can demonstrate that such accommodation would impose an undue hardship on the operation of its business. See 42 U.S.C. § 12112(b)(5)(A); Shapiro v. Township of Lakewood, 292 F.3d 356, 359 (3d Cir. 2002); Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 579 (3d Cir. 1998). An employer is obligated to engage in an informal interactive process with an employee seeking accommodation when necessary to assess what accommodations may be appropriate and feasible. See Taylor v. Phoenixville School Dist., 184 F.3d 296, 311 (3d Cir. 1999) (citing 29 C.F.R. § 1630.2(o)(3)). Such an accommodation may

entail a transfer provided that a vacant position exists at or below the level of plaintiff's prior position which she is qualified to perform with or without reasonable accommodation. See Donahue v. Consolidated Rail Corp., 224 F.3d 226, 230 (3d Cir. 2000); Gaul, 134 F.3d at 580-81. An employer, of course, need not engage in a process designed to identify a reasonable accommodation with an employee who represents that she is unable to perform any full or part-time work.

The burden is on the employee to show that the employer knew about her disability; that she requested accommodations for the disability; that the employer failed to make a good faith effort to assist the employee in seeking accommodations; and, that the employee could have been reasonably accommodated had such an effort been made. See id. at 319-20. While a request for accommodation need not be formal, the employee must make clear that she is seeking assistance for a disability. See id.; Kennelly v. Pa. Turnpike Comm'n, 208 F. Supp. 2d 504, 514 (E.D. Pa. 2002); Sicoli v. Nabisco, 2000 WL 1268255 (E.D. Pa. Aug. 30, 2000).

Defendant knew about plaintiff's disability. Plaintiff requested a transfer to a switchman's position in conversation with her supervisor, Donald Furhy. This was in 1992, however, and there is no competent evidence of record that plaintiff ever suggested that her interest in the switchman position reflected

any need or desire to accommodate a disability. There is also no competent evidence of record that a vacant switchman's position was available. The court assumes to be true plaintiff's statement that she had requested generally a job with "less stress." There is, however, no competent evidence of record to show that any specific identified position was available which would have obviated plaintiff's feeling of stress. The psychological factors professionally determined to cause plaintiff's distress were not work related. As in Gaul, plaintiff's stress level "would depend on an infinite number of variables, few of which [the employer] controls." Gaul, 134 F.3d at 581 (characterizing as "impractical" and "unreasonable" plaintiff's proposed accommodation of a transfer to a "lower-stress position").

Plaintiff now contends that the appropriate accommodation would have been an extension of leave with a continuation of disability benefits. As this suggested accommodation was first raised in plaintiff's response to defendant's motion for summary judgment, it need not be considered. See Walton v. Mental Health Ass'n, 168 F.3d 661, 671 n.9 (3d Cir. 1999) (court properly excluded proposed accommodation raised by plaintiff after complaint was filed). In any event, an employer which has provided an employee with a period of disability leave does not violate the ADA by refusing

thereafter indefinitely to extend her leave, even on an unpaid basis. See Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999); Walton v. Mental Health Assoc. of S.E. Pa., 168 F.3d 661, 671 (3d Cir. 1999).

II. Retaliation Claims

The ADA prohibits retaliatory action against an individual because she has opposed any act or practice made unlawful by the Act or because she made a charge under the Act. See 42 U.S.C. § 12203(a). This provision is analyzed under the same framework as retaliation claims under Title VII. See Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

To establish a prima facie case of retaliation under the ADA, a plaintiff must show that she engaged in protected activity; that she was subsequently or contemporaneously subject to an adverse action by the employer; and, a causal link between the protected activity and the adverse action. See Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567-68 (3d Cir. 2002); Shaner, 204 F.3d at 500; Krouse, 126 F.3d at 500.

Plaintiff engaged in protected activity when she filed administrative charges against defendant with the EEOC and the PHRC on August 16, 1996 and June 20, 1997. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir.), cert denied, 118 S. Ct. 299 (1997). Plaintiff was subject to an adverse action when she was terminated on May 25, 1998.

A causal connection may be inferred from temporal proximity between the protected activity and alleged retaliatory conduct when it is "unusually suggestive." See Krouse, 126 F.3d at 503; Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997). See also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279-84 (3d Cir. 2000); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997). In the instant case, plaintiff points to nothing other than the sequential timing of events to show causation. Almost a year passed between the time defendant was notified of plaintiff's second administrative complaint and her termination. Moreover, the only reasonable conclusion from the competent evidence of record is that plaintiff was terminated in accordance with defendant's medical leave policy.

The Family and Medical Leave Act ("FMLA") entitles eligible employees meeting certain criteria to twelve weeks of leave during any twelve-month period in the event of "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. §§ 2612(a)(1)(D). It is unlawful "for any employer to discharge or in any other manner discriminate against any individual for any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). As with other retaliation claims, the McDonnell Douglas burden-shifting framework is utilized in analyzing such a

claim under the FMLA. See Sherrod v. Philadelphia Gas Works, 209 F. Supp. 2d 443, 451 (E.D. Pa. 2002).

To establish a prima facie case of retaliation under the FMLA, a plaintiff must show that she engaged in statutorily protected activity; that she was subsequently or contemporaneously subject to an adverse action; and, a causal connection between the adverse action and plaintiff's exercise of her FMLA rights. See Parris v. Miami Herald Publ'g Co., 216 F.3d 1298, 1301 (11th Cir. 2001); McCarron v. British Telecom, 2002 WL 1832843 *7 (E.D. Pa. Aug 7, 2002); Alifano v. Merck Co., 175 F. Supp. 2d 792,795 (E.D. Pa. 2001); Wilson v. Lemington Home for the Aged, 159 F. Supp. 2d 186, 195-96 (W.D. Pa. 2001); Keeshan, 2001 WL 310601 *11 (E.D. Pa. Mar. 27, 2001).

A plaintiff who is an ineligible employee under the FMLA would not be engaging in statutorily protected activity in pursuing leave under that statute. See Morehardt v. Spirit Airlines, Inc., 174 F. Supp. 2d 1272, 1280-81 (M.D. Fla. 2001) (collecting cases); Coleman v. Prudential Relocation, 975 F. Supp. 234, 245 (W.D.N.Y. 1997). To be eligible for benefits under the FMLA, an employee must have been employed for at least twelve months by the employer from whom the leave is sought and for at least 1,250 hours of service during the previous twelve month period. See 29 U.S.C. § 2611(2)(A). It is uncontested that plaintiff did not work the requisite number of hours.

Plaintiff contends that nevertheless because she attempted to return to work on July 6, 1998, "her eligibility time for FMLA benefits would have started over again" and that defendant was retaliating against her by not allowing her to return to work. Plaintiff, however, had been terminated six weeks prior to her appearance at work on July 6, 1998 and was not an employee of defendant. Plaintiff was ineligible for FMLA benefits as she had not worked the requisite 1,250 hours in the preceding twelve months.

Moreover, one cannot reasonably find from the competent evidence of record any causal connection between her termination and her claimed right to leave under the FMLA.

Plaintiff also suggests that defendant's practice of not "carving out" from its absenteeism policy any period of time attributable to FMLA leave violates the Act. An employer need not inform an employee that leave taken pursuant to a company medical leave policy includes the twelve weeks of unpaid leave required under the FMLA where the employer provides employees with more generous leave. See Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155, 1165 (2002). The failure of an employer to designate leave time as FMLA does not entitle the employee to additional time beyond that provided by the company's existing leave policy. See Morgan v. Southern Guar. Ins. Co., 191 F. Supp. 2d 1321, 1330-31 (M.D. Ala. 2002). Defendant's STD policy

provided 52 weeks of leave, well in excess of the twelve weeks required under the FMLA. Defendant was not required to inform plaintiff that the 52 weeks of leave included the twelve weeks under the FMLA or to provide her with an additional twelve weeks of leave.

III. State Law Wrongful Discharge Claim

Plaintiff asserts that defendant also terminated her in retaliation for filing a claim for workers' compensation benefits on May 27, 1997. Pennsylvania recognizes a cause of action for wrongful discharge under circumstances that violate public policy which includes the termination of an employee for filing a workers' compensation claim. See Shick v. Shirey, 716 A.2d 1231, 1237 (1998). Such a cause of action, however, is limited to at-will employees. Workers employed under a collective bargaining agreement cannot maintain a tort action for wrongful discharge when the agreement provides protection from termination without cause. See Harper v. American Red Cross Blood Servs., 153 F. Supp. 2d 719, 721 (E.D. Pa. 2001); Ferrell v. Harvard Indus., Inc., 2001 WL 1301461 (E.D. Pa. Oct 23, 2001).

Plaintiff was subject to a collective bargaining agreement as a member of the Pennsylvania Telephone Guild Communications Workers of America, AFL-CIO Local 13500. That agreement provides a grievance procedure through which employees

may contest adverse employment actions including discharge without proper cause.

Plaintiff submits an exchange of correspondence between her lawyer and counsel for the union to suggest that the union refused to act on her behalf and thus her only avenue for redress is through the courts.⁶ The correspondence in fact does not refer or relate to any claim of retaliation allegedly resulting from her filing of a workers' compensation claim and demonstrates that the union was not derelict in representing plaintiff.

The correspondence references and relates to plaintiff's complaint of May 11, 1999 that Metropolitan Life failed to provide her with copies of medical documents she sought in connection with a requested review of an unspecified benefit determination. The correspondence from the union's lawyer, Paula Markowitz, on which plaintiff relies shows that the union successfully obtained consideration of her claim despite her failure to meet the deadline for submission of supporting information, pursued a grievance on her behalf when the claim was not sustained and was precluded by the terms of the collective bargaining agreement from arbitrating or further pursuing any

⁶This correspondence consists of a letter of December 9, 1999 from plaintiff's counsel, Donald Russo, to counsel for the union, Paula Markowitz; a letter of December 13, 1999 from Ms. Markowitz to Mr. Russo; a letter of February 17, 2000 from Mr. Russo to Ms. Markowitz; and, a letter of March 15, 2000 from Ms. Markowitz to Mr. Russo.

denial of a benefit claim. There also is no evidence of record that plaintiff's counsel responded to the request in Ms. Markowitz's letter of December 13, 1999 to specify precisely what loss plaintiff was claiming to have suffered.

The Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, "provides the exclusive remedy for violations of collective bargaining agreements." Costello v. United Parcel Serv., Inc., 617 F. Supp. 123, 124 (E.D. Pa. 1984), aff'd, 774 F.2d 1150 (3d Cir. 1985). A claim of wrongful discharge in retaliation for filing a workers' compensation claim is federally preempted because it involves conduct within the protections or prohibitions of the LMRA. See Scott v. Sysco Food Servs. Of Philadelphia, Inc., 1999 WL 554599 (E.D. Pa. June 18, 1999). See also Haper, 153 F. Supp. 2d at 721-22. As plaintiff did not first pursue her wrongful discharge claim in accord with the collective bargaining agreement and has not shown that her right of fair representation was violated, she cannot maintain her wrongful discharge claim here.

Moreover, one cannot reasonably find from the competent evidence of record that plaintiff's claim for workers' compensation benefits played any causal role in her termination.

Conclusion

One cannot reasonably conclude from the competent evidence of record that defendant terminated plaintiff in

violation of her rights under the ADA or that she could have been reasonably accommodated. Open-ended disability leave is not a reasonable accommodation. The purpose of the ADA is to deter employment discrimination against persons with disabilities and to create employment opportunities for such persons who can work with reasonable accommodations. The Act does not require employers to provide indefinite leave or benefits to persons unable to work with or without accommodation.

One cannot reasonably conclude from the competent evidence of record that defendant terminated plaintiff because she filed a charge with the EEOC and PHRC, because she exercised a right under the FMLA or because she filed a worker's compensation claim. Plaintiff was terminated in accordance with defendant's legitimate medical leave policy after exhausting her STD benefits and has presented no competent evidence that this policy was ever applied other than uniformly.

Accordingly, defendant is entitled to summary judgment. Defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE SHAFNISKY : CIVIL ACTION
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v. :
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BELL ATLANTIC, INC. : NO. 01-3044

O R D E R

AND NOW, this day of November, 2002, upon
consideration of defendant's Motion for Summary Judgment (Doc.
#19) and plaintiff's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
GRANTED and accordingly **JUDGMENT** is **ENTERED** in the above action
for the defendant.

BY THE COURT:

JAY C. WALDMAN, J.