

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

DENNIS HERON	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 02-CV-7209
v.	:	
	:	
AMERICAN HERITAGE	:	
FEDERAL CREDIT UNION	:	
Defendant.	:	

MEMORANDUM AND ORDER

Tucker, J.

May 2, 2005

Presently before this Court is Defendant American Heritage Federal Credit Union’s Motion for Summary Judgment (Doc. 18). For the reasons set forth below, upon consideration of Defendant’s Motion, Plaintiff’s Response (Doc. 22) and Defendant’s Reply (Doc. 26), this Court will deny the Defendant’s Motion for Summary Judgment.

BACKGROUND

From the evidence of record, taken in a light most favorable to the Plaintiff, the pertinent facts are as follows. In June 2000, Plaintiff, Dennis Heron, was employed by Defendant, American Heritage Federal Credit Union (“American Heritage”). Defendant is a federally chartered credit union headquartered in Philadelphia, Pennsylvania.

Plaintiff served as the Vice President of Marketing at American Heritage, earning a yearly salary of \$78,000. Plaintiff was hired and supervised by Bruce Foulke, who is and was at all relevant times, the President and CEO of American Heritage. Plaintiff’s duties as the Vice President of Marketing included managing the marketing, advertising and promotions programs. Plaintiff asserts that during his tenure, his duties increased in the area of business development, including developing business for the credit union as well as supervising the manager of the

business development department. According to Plaintiff, the manager of that department supervised his own employees.¹

In early July 2001, Plaintiff was granted leave under the Family and Medical Leave Act (“FMLA”) for a medical condition.² When Plaintiff’s leave expired in October 2001, he returned to work. On the day of his return, Foulke and Flora Caranci, the Vice President of Human Resources, held a meeting with Plaintiff. Plaintiff was then informed that his position had been eliminated due to a restructuring of the marketing department. Plaintiff was given 24 hours to decide whether he would accept the newly created position of marketing manager. The salary offered to Plaintiff for the new position was \$58,000 – \$20,000 less than his former salary. Foulke alerted Plaintiff that his new duties would be essentially the same as the duties he had previously performed, but that the business development manager would now report to Foulke, rather than to Plaintiff.³ Plaintiff was further instructed that if he chose to pursue other employment, he could accept the position until he found employment elsewhere. Plaintiff responded that he would consider the offer and respond the next day. Ultimately, Plaintiff chose not to return to Defendant’s employ.

¹ According to Defendant, Plaintiff’s responsibilities included supervising employees in the business development department.

² Although the reason that Plaintiff took medical leave is unclear from the Complaint, Plaintiff explains in his Response to Defendant’s Motion for Summary Judgment that he suffered from depression, anxiety, headaches, dizziness and loss of appetite. It has been suggested by Defendant that this was due to “work-related stress.”

³ Defendant contends that Plaintiff’s responsibilities were significantly reduced as he would no longer have been responsible for business development.

LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L. Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322, 106 S. Ct. at 2552-53. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit

the movant's version of events against opponent, even if the quality of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513-14.

DISCUSSION

Defendant claims an entitlement to summary judgment on the remaining count of Plaintiff's Complaint, which alleges that Defendant violated FMLA by refusing to restore Plaintiff to the work assignment that he had as of the date when his medical leave commenced, and/or to an equivalent work assignment with equivalent pay and other terms and conditions of employment. Compl. ¶ 23.

Employees who request FMLA leave are protected by regulations promulgated by the Department of Labor, including a provision prohibiting employers from discriminating against those employees who have taken FMLA leave. 29 C.F.R. §825.220(c) (2004). This section further provides that leave cannot be used as a negative factor in employment decisions such as hiring, promotions or discipline. Id. To be successful on his claim, Plaintiff must show that: (1) Plaintiff took FMLA leave; (2) Plaintiff suffered an adverse employment decision, and (3) the adverse decision was causally related to his leave. Conoshenti v. Public Service Elec. & Gas Co., 364 F.3d 135, 146 (3d Cir. 2004). Each element will be discussed in turn.

I. First Element – “Plaintiff took FMLA leave.”

It is undisputed that Plaintiff took FMLA leave and that he was entitled to such leave. Foulke acknowledges that he not only granted the leave, but that he encouraged Plaintiff's leave.

Foulke Deposition at 37. There is no issue of material fact with respect to the first element of the claim.

II. Second Element – “Plaintiff suffered an adverse employment decision.”

The question of whether Plaintiff suffered an adverse employment decision can likewise be disposed of summarily. The FMLA provides that an employee who is eligible for leave, shall “be restored by the employer to the position of employment held by the employee when the leave commenced,” or alternatively, “to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” 29 U.S.C. §2614(a)(1)(A)-(B) (2004). “An equivalent position is one that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.” 29 C.F.R. §825.215(a) (2004).

Here, neither party can dispute the fact that the position offered to the Plaintiff after he returned from FMLA leave was not the equivalent of the position that he had prior to his FMLA leave. Not only did Plaintiff’s job title change from “Vice President of Marketing” to “Marketing Manager,” arguably a change in status, but his salary was reduced by \$20,000, clearly a change in pay. Furthermore, both parties agree that after the alleged restructuring, the business development manager would no longer report to Plaintiff, but rather, would report to Foulke, evidencing a change in duties and responsibilities. Therefore, despite the dispute regarding the extent of the changes to Plaintiff’s responsibilities, it is clear from the definition of “equivalent

position” that the Marketing Manager position offered to Plaintiff upon his return was not the equivalent of his former position as Vice President of Marketing. Thus, the second prong of the claim is met, and there is no genuine issue of material fact.

III. Third Element – “The adverse decision was causally related to his leave.”

The sole remaining issue is whether the record reflects a dispute of material fact as to the third prong of this analysis, namely, whether there is a causal connection between Plaintiff’s FMLA leave and his demotion and pay cut. The provision of FMLA providing for an employee’s restoration to an equivalent position upon return from leave is qualified by a directive that nothing in the section shall be construed to entitle any restored employee to “any right, benefit, or position...other than [one]...to which the employee would have been entitled had the employee not taken the leave.” 29 U.S.C. §2614(a)(3)(B) (2004).

Defendant’s main contention is that Plaintiff could not be restored to his position as Vice President of Marketing because the position was eliminated during a restructuring of the department. Since there was no equivalent position after the restructuring, Defendant offered Plaintiff the most equivalent position there was – the position of Marketing Manager. Thus, Defendant argues that Plaintiff would not have been entitled to his former position as Vice President of Marketing even if he had not taken leave. Defendant further claims that the decision was made in part because Plaintiff complained that his duties were overwhelming, and Plaintiff previously requested that some of his duties be removed.

In contrast, Plaintiff alleges that Mr. Foulke’s decision to demote him and reduce his salary upon his return from leave violates FMLA. Plaintiff states that he never suggested that

business development be removed from his duties. Plaintiff suggests that Defendant's reason for his demotion was merely an after-the-fact justification that is implausible and not supported by the evidence. Plaintiff claims that Defendant's decision to eliminate his position as Vice President of Marketing was made immediately preceding his return from medical leave and that there is no evidence to the contrary. To support this contention, Plaintiff points to the fact that there is no evidence in the minutes of any meeting of Defendant's Board of Directors or of its management committees that suggests that Defendant was planning to restructure its marketing department prior to Plaintiff's leave.

The evidence that Defendant proffers to show that the decision was not made in violation of FMLA is disputed as unreliable by Plaintiff. A memo, drafted by Foulke and dated June 27, 2001, suggests that he planned on restructuring the marketing department and eliminating Plaintiff's position. Plaintiff suggests that the memo is contradicted by Plaintiff's annual performance review, also prepared by Foulke in June 2001. Plaintiff signed and dated the evaluation on June 29, 2001. That performance review provided that Plaintiff was "meet[ing] expectations." Plaintiff suggests that this review, along with the 5% pay raise he received, directly contradict the memo that Foulke allegedly drafted prior to Plaintiff's medical leave.

Further, Foulke testified in his deposition that he had conversations about the plan to restructure the marketing department with Caranci. Plaintiff asserts that Foulke had not informed Caranci of his decision to restructure the marketing department until just before the meeting with Plaintiff upon his return to work and that Caranci did not know when that decision was actually

made.⁴

In support of its position, Defendant unsuccessfully attempts to analogize this case to that of Bearley v. Friendly Ice Cream Corp., 322 F. Supp. 2d 563 (M.D. Pa. 2004). Defendant relies on Bearley for the proposition that summary judgment should be granted where the evidence shows that the employer would have eliminated the position irrespective of whether leave was taken. However, Bearley is distinguishable from the instant case.

In Bearley, the employer adopted a new automated payroll system while the plaintiff, a bookkeeper, was on medical leave. Upon her return, the employer could not offer the plaintiff a substantially equivalent position because none existed. In Bearley, it was clear that the adoption of the automated payroll system was planned prior to the plaintiff's leave. All of the defendant's district and general managers were informed that some bookkeeping functions were going to be automated. Even prior to plaintiff's request for medical leave, her direct supervisor was required by the company to attend a training session to learn the new payroll system. Additionally, prior to the plaintiff's request for leave, she was informed that there would be some changes to her position.

Here, it is not clear whether the restructuring of the Marketing Department was planned prior to Plaintiff's leave. In fact, it is not clear that there was a "restructuring." This is where the factual dispute arises. If the new position of Marketing Manager did entail significantly less responsibility, as the Defendant suggests, then it is more likely that there was a restructuring of the department and that there was no equivalent position available. Under those circumstances,

⁴Defendant, on the other hand, suggests that Caranci testified in her deposition that Foulke told her about his decision in or about June 2001. Caranci Dep. at 55, 59.

Plaintiff might not have been entitled to his old position even if he had never taken leave, thereby falling into the limitation explained in § 2614(a)(3)(B). However, the position of “Marketing Manager” may really be the position of Vice President of Marketing with lower pay and different status or authority, thereby negating the possibility that an actual restructuring took place. Thus, there is a dispute of material fact as to whether a restructuring occurred. The record read in a light most favorable to Plaintiff suggests that no other employees of Defendant were aware of this planned restructuring or were impacted as a result of the changes. The Board of Directors was not aware, and it is disputed whether Ms. Caranci was aware.

To support the argument that Foulke planned these changes prior to Plaintiff’s request for leave, Defendant additionally asserts that Foulke had been unhappy with Plaintiff’s performance. The record, however, reflects that Foulke gave Plaintiff a neutral, if not positive, performance review of “meets expectations” as well as a 5% salary increase on June 29, 2001, two days after the memo was allegedly written. This performance review also lists future goals for the employee. If Foulke had planned on removing the business department from Plaintiff’s responsibilities prior to Plaintiff’s request for medical leave, why did Foulke list “redevelop business development dep[artmen]t” as one of Plaintiff’s future goals? Defendant attempts to use this statement as contemporaneous support for Foulke’s decision to restructure the business department in late June. However, the statement was made in Plaintiff’s future goals section, not Foulke’s. Thus, a reasonable fact finder could believe that this statement supports the opposite conclusion— that Foulke planned on leaving the business department as one of Plaintiff’s responsibilities, until Plaintiff took FMLA leave.

Lastly, Defendant points to Plaintiff’s comment that Foulke may have been trying to

punish Plaintiff for embarrassing Foulke (by taking leave and thereby bringing to light Foulke's harsh manner), as evidence that the position was not eliminated in retaliation for FMLA leave, but for some other reason. This again illustrates that there is a genuine issue of material fact as to the reason that Plaintiff's position was eliminated. That is a question for the finder of fact to answer.

In summary, a genuine issue of material fact exists as to whether the adverse employment decision was causally connected to Plaintiff's FMLA leave. Therefore, Plaintiff has met his burden of setting forth specific facts to exceed the "mere scintilla threshold" and has offered a genuine issue for trial. Defendant's motion for summary judgment is denied.⁵

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is denied. Count I of Plaintiff's Complaint remains.

⁵Some courts in the Third Circuit have applied the McDonnell Douglas burden shifting framework to FMLA claims. See, e.g., Callison v. City of Philadelphia, 2004 WL 765479, at *4 n.5 (E.D. Pa. Mar. 31, 2004) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). But cf., Shalley v. Fleet Credit Card Serv., 2003 WL 22100858, at *3-4 (E.D. Pa. Aug. 1, 2003). Under this framework, Plaintiff must first establish a *prima facie* case of retaliation under the FMLA. Callison, 2004 WL 765479, at *4, n. 5. After establishing a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. Id. If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to plaintiff to establish that the employer's reasons are pretextual. Id. Neither party in this case has briefed this issue. However, the Court finds that even if the McDonnell Douglas framework were to be applied, the result would be the same. The questions of whether there is a causal connection between the demotion and the FMLA leave and whether the demotion was for a legitimate business reason, are questions that must be left for the finder of fact.

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v.	:	
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AMERICAN HERITAGE	:	
	:	
FEDERAL CREDIT UNION	:	
	:	
Defendant.	:	

ORDER

AND NOW, this ____ day of May, 2005, upon consideration of Defendant American Heritage Federal Credit Union’s Motion for Summary Judgment (Doc. 18), Plaintiff’s Response (Doc. 22) and Defendant’s Reply (Doc. 26), **IT IS HEREBY ORDERED and DECREED** that Defendant’s Motion is **DENIED**. Count I of the Plaintiff’s Complaint shall remain.

IT IS FURTHER ORDERED that this case will be a **DATE CERTAIN** for trial on

Monday, August 1, 2005 at 9:30 a.m. The parties shall refer to this Court's scheduling order (Doc. 10) for all pre-trial filing deadlines.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.