

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

DENNIS CLARK	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLEGHENY UNIVERSITY HOSPITAL	:	NO. 97-6113
	:	
Newcomer, J.	:	March , 1998

M E M O R A N D U M

Presently before this Court are defendant Allegheny University Hospital's Motion for Summary Judgment, and plaintiff Dennis Clark's response thereto, and defendant's reply thereto. Also before this Court are plaintiff's Motion for Partial Summary Judgment, and defendant's response thereto. For the following reasons, the Court will grant defendant's Motion and deny plaintiff's Motion.

I. Introduction

Plaintiff Dennis Clark has filed suit against defendant Allegheny University Hospital ("Allegheny"), alleging that Allegheny improperly denied him family leave in violation of the Family Medical Leave Act ("FMLA"), codified at 29 U.S.C. § 2601 et seq. In his Amended Complaint, plaintiff seeks unspecified damages, declaratory relief and reinstatement. Defendant has filed a timely Answer denying plaintiff's allegations.

In February 1976, plaintiff was hired as a "service person" in the Environmental Services Department of the Medical College of Pennsylvania, the predecessor to Allegheny.¹ Plaintiff held the position of service person at the Medical

1. These facts are undisputed unless otherwise stated.

College of Pennsylvania, and then Allegheny, until his recent termination. During the course of his employment with defendant, plaintiff was supervised by Rick Olivere.

From 1995 through early 1997, plaintiff received several written warnings for violations of Allegheny work rules governing excessive absenteeism and tardiness. He was warned in writing in October 1995 and December 1995. He was given a final written warning on January 3, 1996. Subsequently, he was suspended for one day on February 5, 1996. On June 3, 1996, plaintiff received another verbal warning for continued lateness and absenteeism. On July 15, 1996, he was suspended for lateness and absenteeism again; the suspension was for a period of three days. He was given another written warning for the same problem on August 22, 1996, with the proviso that any additional violations in the subsequent sixty days would result in termination. Each of these actions was taken with the knowledge of plaintiff's union.²

During this same time period, plaintiff also took two, separate multi-week periods of medical leave. Plaintiff was absent from work on medical leave for three months, from February 9, 1996 through May 12, 1996. At the time of this leave, Jeff Green, the Director of the Department of Human Resources for

2. During the course of his employment with Allegheny, plaintiff was a member of the National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, and its affiliated District 1199C. His employment was most recently governed by a 1995 collective bargaining agreement ("Agreement") between Allegheny and District 1199C. The Agreement does not address the FMLA.

Allegheny, sent plaintiff a notification that his leave was being designated as FMLA leave upon completion of enclosed certification forms. Mr. Green's letter informed plaintiff that his absence may fall under the FMLA, "which entitles an employee up to twelve (12) weeks of unpaid leave in a twelve (12) month period."

The first form sent to plaintiff was a "Request for Leave of Absence" form, informing plaintiff of his rights and responsibilities under the FMLA. The first page of the form states, "Have you taken a Family or Medical Leave in the past twelve months? If yes, how many hours?" The second page of the form contains a long list of information pertaining to the FMLA and states that the employee/recipient must "understand and agree to the following provisions." Among the provisions listed are that "My Family and Medical Leave shall be counted against the annual Family and Medical Leave entitlements."

Plaintiff signed this form and back-dated it to February 9, 1996. His leave was approved by Allegheny, East Fall's Human Resources Coordinator on March 8, 1996. The second form sent to plaintiff was a "Certification of Health Care Provider (Family and Medical Leave Act of 1993)" form. This form is identical to the form provided as a prototype by the Department of Labor in the appendices to the final regulations issued for implementation of the FMLA.

Plaintiff took an additional medical leave from December 3, 1996 through January 13, 1997 due to a broken finger.

This leave was approved by plaintiff's immediate supervisor without knowledge of the Department of Human Resources.

Only one week after returning from his latest leave, plaintiff was absent again, calling out on January 20, 1997.³ Plaintiff allegedly needed this day off from work to attend to his son, pursuant to a physician's orders, due to his son's psychotic condition. On January 20, 1997, plaintiff went with his son for psychiatric treatment by Dr. Ellen H. Sholevar of the Temple University, Department of Psychiatry. On January 21, 1997, plaintiff did not go to work again; plaintiff presently alleges that his son's condition required him to stay home for an indefinite period of time to take care of his son pursuant to Dr. Sholevar's written orders.

On January 25, 1997, plaintiff was terminated by defendant for excessive absenteeism. This termination was communicated by letter from his supervisor, which was delivered by certified mail on January 25, 1997.

At some point, plaintiff sent defendant a doctor's note purporting to establish that his absence was required as family leave to care for his son who was experiencing psychiatric

3. The record is not entirely clear as to when plaintiff actually informed his employer that he was taking leave. In his Amended Complaint, plaintiff avers that he contacted his supervisor, Olivere, on January 19, 1997 to inform Olivere of his inability to work the following day. In his instant Motion, plaintiff alleges that he contacted defendant on January 20, 1997 to inform defendant of his inability to work that day. For the purpose of disposition of the instant motions, this factual discrepancy is irrelevant.

problems. The date this information was provided to defendant is in dispute. Plaintiff alleges that the note was transmitted to defendant on January 22, 1997. Defendant claims that this letter was received by it after plaintiff was terminated.

After his termination, plaintiff attempted to obtain reinstatement. First, he filed a grievance under his union contract, which was ultimately denied. The union did not appeal this denial. Second, plaintiff filed a complaint with the Department of Labor. Shortly thereafter, the Department of Labor investigation was closed after a finding of no violation. This suit followed.

Defendant now moves for summary judgment against plaintiff on his sole claim - the FMLA claim. Defendant first argues that summary judgment should be entered in its favor because plaintiff is not an "eligible employee" under the FMLA in that plaintiff did not work for Allegheny for the minimum required 1250 hours in the twelve-month period prior to his termination. Second, defendant claims that plaintiff has no claim under the FMLA because he took more than twelve weeks of approved medical leave in the relevant twelve-month period prior to his firing.

Plaintiff, of course, opposes defendant's Motion and also counter moves for partial summary judgment. Plaintiff argues that he is an eligible employee because he worked the requisite 1250 hours during the relevant period. He also contends that he has a valid FMLA claim because the relevant

period for calculating his medical leave eligibility is the calendar year and, as such, he had not used all of his FMLA medical leave prior to his termination.

II. Summary Judgment Standard

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go

beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a 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." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The nonmovant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The nonmovant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). The motion must be denied only when "facts specifically averred by [the nonmovant] contradict facts specifically averred by the movant." Id.

III. Discussion

The FMLA was enacted to balance the demands of the workplace with the needs of families in a manner that minimizes the potential for gender-based employment discrimination by

ensuring that leave is available for eligible medical reasons and for compelling family reasons on a gender-neutral basis. 29 U.S.C. § 2601(b). To achieve this goal, the FMLA, with certain exceptions, provides eligible employees the right to reinstatement to their former position or an equivalent one with the employer at the conclusion of the approved leave.⁴

The FMLA does not, however, provide leave to every employee. To be eligible for leave under FMLA, an employee must meet two criteria: (1) the employee must have been employed by the employer from whom leave is requested for at least 12 months from the date leave commences; and (2) he or she must have provided the employer with at least 1250 "hours of service" during the previous 12-month period. 29 U.S.C. § 2611(2).⁵

The dispositive threshold issue in this case is the measure by which to determine whether an employee has provided 1250 "hours of service." In this regard, the FMLA instructs that

4. The FMLA reads in pertinent part:

- (1) . . . any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave:
 - (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
 - (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1).

5. An "eligible employee" is defined as an employee who has been employed: (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A).

"hours of service" must be determined by the same principles used in the Fair Labor Standards Act ("FLSA"), codified at 29 U.S.C. § 207, and by regulations created pursuant to that act, to determine "hours of work" for payment of overtime compensation. 29 U.S.C. § 2611(2)(C).⁶

"Under FLSA standards, an employee only gets credit toward the FMLA 'hours of service' requirement if the employee actually worked the hours in question." See Robbins v. Bureau of National Affairs, 896 F. Supp. 18, 21 (D.C. 1995). The FLSA provides that "payments made for occasional periods when no work is performed due to vacation, holiday, illness . . . and other similar causes" are not considered compensation for "hours of employment."⁷ 29 U.S.C. § 207(e)(2). Likewise, payments - "approximately equivalent to the employee's normal hourly rate" - made for comparable periods are not compensation for "hours of work." 29 C.F.R. § 778.218.

"Applying these standards to the FMLA, paid vacation and sick time are not considered 'hours of service' within the meaning of 29 U.S.C. § 2611(2)(C)." Robbins, 896 F. Supp. at 21.

6. The FMLA provides: "For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title [FLSA] shall apply." 29 U.S.C. § 2611(2)(C).

7. The FMLA uses the term "hours of service." 29 U.S.C. § 2611(2)(A)(ii). The FLSA refers to "hours of employment," 29 U.S.C. § 207(e)(2), and the regulations promulgated pursuant to the FLSA refer to "hours of employment," "hours worked" and "hours of work." 29 C.F.R. §§ 778.216, 785.1-.9. These terms appear to be used interchangeably.

Thus, "[i]f paid leave is not considered 'hours of service,' it follows logically that unpaid leave should not be considered 'hours of work,' as well." Id. (footnote omitted).

Allegheny contends that Clark was not eligible for FMLA leave on January 20 through 23, 1996, because he worked only 1037.75 hours from January 20, 1996 through January 19, 1997. Thus Allegheny argues that plaintiff has no valid FMLA claim because he was not an "eligible employee" as defined by the FMLA. Plaintiff rejoins that "vacation days, personal holidays, days of suspension, holidays and sick days must be counted toward his FMLA time." Yet, according to the clear language of the FLSA and its regulations, neither paid leave nor unpaid leave are included in any calculation of "hours of service" under the FMLA. Thus, plaintiff cannot validly argue that his vacation days, personal holidays, days of suspension, holidays and sick days must be counted as "hours of service."

In addition, plaintiff's argument - that this Court should consider these days because the Agreement counts vacation days, holidays, suspension days, personal days and sick days as time worked - is without merit. The Agreement simply does not address the question of whether such non-work days constitute "hours of service" for the purposes of the FMLA. Rather, the Agreement addresses only an employee's entitlement to be paid for such days under certain circumstances. Accordingly, the provisions in the Agreement upon which plaintiff relies are

immaterial and have no bearing on the ultimate question of whether plaintiff is an eligible employee under the FMLA.

Finally, the Court rejects plaintiff's attempt to create a factual dispute regarding defendant's recordkeeping with respect to plaintiff's time cards. Despite plaintiff's suggestion that an issue of fact remains as to defendant's recordkeeping, plaintiff offers no competent evidence to support his allegation. The Federal Rules of Civil Procedure require that, to avoid an entry of summary judgment in defendant's favor, plaintiff may not rest upon mere allegations but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Here, plaintiff fails to meet that burden. He sets forth no specific facts in dispute. Instead, his response rest entirely on unfounded, conclusory allegations. Accordingly, the Court rejects this argument.

Defendant having established that plaintiff only worked 1037.75 hours in the 12 months preceding January 19, 1997, and plaintiff having failed to offer or point to contradictory evidence, the Court finds that plaintiff does not meet the requirements of 29 U.S.C. § 2611(2)(A) and was not eligible for FMLA leave.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will grant defendant's Motion and deny plaintiff's Motion. The Court will enter judgment in favor of defendant and against plaintiff.

An appropriate Order so follows.

Clarence C. Newcomer, J.

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v.	:	
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O R D E R

AND NOW, this day of March, 1998, upon
consideration of the following Motions, and any responses
thereto, it is hereby ORDERED that:

1. Defendant Allegheny University Hospital's Motion
for Summary Judgment is GRANTED;
2. Plaintiff Dennis Clark's Motion for Partial
Summary Judgment is DENIED;
3. JUDGMENT is ENTERED in favor of defendant and
against plaintiff on all counts of plaintiff's Complaint; and
4. The Clerk of the Court shall mark this case
CLOSED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.