

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

TARA VOORHEES,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TIME WARNER CABLE NATIONAL	:	
DIVISION, t/d/b/a LOWER BUCKS	:	
CABLEVISION,	:	
	:	
Defendant.	:	NO. 98-1460

MEMORANDUM

Reed, S. J.

August 26, 1999

Before the Court are the motion of plaintiff Tara Voorhees (“Voorhees”) for summary judgment (Document No. 15), the response of defendant Time Warner Cable National Division, t/d/b/a Lower Bucks Cablevision (“Time Warner”) (Document No. 16), and the motion of Time Warner for summary judgment (Document No. 14), the response of Voorhees (Document No. 17), and the reply of Time Warner (Document No. 19). Based on the following, the motion of Voorhees will be denied, and the motion of Time Warner will be granted in part and denied in part.

I. TIME WARNER’S MOTION FOR SUMMARY JUDGMENT

A. Background

The following facts are taken from the record presented by the parties in the light most favorable to Voorhees, the non-moving party. Voorhees worked for Lower Bucks Cablevision,

which was operated by Time Warner Cable, from December of 1978 until the date she was terminated, September 9, 1997. At the time of her termination, she was a Customer Service Manager. Voorhees was supervised by Brenda McCullough (“McCullough”), General Manager of Lower Bucks Cablevision. (Def.’s Mem. Ex. A, Deposition of McCullough at 12, 25; Def.’s Ex. D, Deposition of Voorhees at 15).

As the Customer Service Manager, Voorhees was responsible for, among other duties, managing the Customer Service Department. (Def.’s Mem. Ex. E). The Customer Service Department also consisted of a Customer Service Supervisor and Customer Service Representatives (“CSRs”), who reported to Voorhees. (Def.’s Mem. Ex. D, Deposition of Voorhees at 11 through 13).

On March 7, 1997, Voorhees requested a leave of absence because of medical problems she was experiencing, which was granted by Time Warner. (Def.’s Mem. Ex. D, Deposition of Voorhees at 94-97). On April 3, 1997, Voorhees signed a leave form, which indicated that her leave began on March 17, 1997 and would end on June 6, 1997. (Def.’s Ex. F).

Voorhees returned from her first leave of absence on June 9, 1997 to the position of Customer Service Manager. (Def.’s Ex. D, Deposition of Voorhees at 127-128). However, there is no dispute between the parties that Voorhees’ job duties changed when she returned from her first leave of absence. (Deposition of Voorhees at 127; Deposition of McCullough at 69).

Although Voorhees received the same salary and benefits and continued to report to McCullough, her office location changed and she no longer had supervisory responsibility over the CSRs. (Deposition of McCullough at 69-70).

Voorhees worked from June 9, 1997 until July 24, 1997, at which time she requested an

additional leave of absence for continued medical problems. (Deposition of Voorhees at 135-136). Voorhees signed a leave request form on August 22, 1997, which granted her a leave of absence effective from July 24, 1997 until August 22, 1997. (Def.'s Mem. Ex. K).

During Voorhees' first leave of absence, McCullough decided to create a new management position in the company. (Def.'s Ex. A, Deposition of McCullough at 59-61). Darlene Stapleton was hired and began working in this new position as the Business Manager on July 28, 1997. (Def.'s Ex. B, Affidavit of McCullough ¶ 14). At that time, the Customer Service Supervisor began reporting directly to Stapleton. (Def.'s Mem. Ex. G, Deposition of Stapleton at 6, 31-32).

Voorhees did not return to work on August 22, 1997. (Def.'s Ex. B, Affidavit of McCullough ¶ 16). Voorhees sent McCullough a short-term disability application which Voorhees had signed on August 22, 1997, indicating from her doctor that it was undetermined when she would be able to return to work, but that it would be at least one to two months. (Def.'s Mem. Ex. L; Deposition of Voorhees at 170-171; Deposition of McCullough at 41-42). Voorhees was terminated on September 9, 1997.

Voorhees filed a complaint in this Court alleging claims for violation of the Family Medical Leave Act of 1993 ("FMLA"). Voorhees alleges that Time Warner did not provide her with a proper notice of her rights under the FMLA, that Time Warner did not restore her to the same or an equivalent position after she returned from leave, and that Time Warner interfered with her exercise of her rights under the FMLA by retaliating against her by altering her job responsibilities, by hiring a Business Manager, which effectively replaced Voorhees' position, and by terminating her.

B. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment may be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. at 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in her favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in her favor. See Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

C. Analysis

The FMLA provides that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one for more of the following: . . . (D) Because 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). The parties do not dispute that Voorhees was entitled to 12 workweeks of leave under the FMLA due to her medical condition.

Section 2614 of the FMLA provides that “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). The regulations promulgated under the FMLA provide that the employer of an employee seeking leave shall “provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. . . . Such specific notice must include, as appropriate: (i) that the leave will be counted against the employee’s annual FMLA leave entitlement . . . (ii) the employee’s right to restoration to the same or an equivalent job upon return from leave.” 29 C.F.R. § 825.301 (b)(1).

An employee returning from FMLA leave does not have an absolute right to restoration in

the same or an equivalent position. The regulations promulgated under the FMLA provide that “[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.” 29 C.F.R. § 825.216(a).

In § 2615(a)(1), the FMLA provides that “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.” 29 U.S.C. § 2615(a)(1). Section 2615(a)(2) provides that “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.” 29 U.S.C. § 2615(a)(2). Although the wording of this section does not on its face encompass a claim for retaliation based on an employee’s exercise of her right to leave, the federal regulations interpret section 2615(a)(2) as providing a cause of action for employees who have been discriminated against for taking FMLA leave. See 29 C.F.R. § 825.220(c).

Time Warner points out that courts are divided over whether claims under the FMLA should be analyzed under the McDonnell Douglas burden-shifting framework utilized in other employment discrimination contexts. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Some courts have reasoned that the burden-shifting framework should not be applied to claims that are based on the denial of rights granted under the FMLA, such as entitlement to leave and to restoration in the same or an equivalent position. See, e.g., Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-713 (7th Cir. 1997) (noting that the burden-shifting

framework is not appropriate for claims for violations of the substantive rights conveyed under the FMLA because such claims do not depend on discrimination). In the context of claims based on retaliation under the FMLA however, there is some consensus that the McDonnell Douglas burden-shifting framework is useful. See Chaffin v. John H. Carter Co., Inc., 179 F.3d 316 (5th Cir. 1999); Morgan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997); Holmes v. Pizza Hut of American, Inc., No. 97-4967, 1998 WL 564433, *7 (E.D. Pa.).

The uncertainty of what standard to apply to Voorhees' claims is exacerbated by the five separate counts of the Complaint, which are overlapping and somewhat convoluted. In essence, in Count I of the complaint, Voorhees alleges that Time Warner violated § 2614(a)(1) of the FMLA, regarding an employer's duty to restore an employee in the same or an equivalent position after FMLA leave. In Count II of the complaint, Voorhees alleges that Time Warner violated the FMLA by interfering with her exercise of her FMLA rights by advertising the position of Business Manager, which Voorhees argues was essentially her position, while she was on leave. Count III of the complaint alleges that Time Warner terminated her in retaliation for her taking leave under the FMLA. In Counts IV and V, Voorhees alleges that Time Warner violated the FMLA and the regulations promulgated thereunder by not providing adequate notice detailing her rights under the FMLA.

Because the basis of the claim in Count III is retaliation, the Court will analyze Count III under the burden-shifting framework applied in other employment contexts. The Court will analyze Voorhees' other claims directly by determining whether Voorhees has presented a genuine issue of material fact in support of her allegation that she was denied rights granted under the FMLA.

1. Right to Restoration under § 2614(a)(1)- Count I

Count I of the Complaint alleges that Time Warner violated § 2614(a)(1) of the FMLA because Voorhees did not return to the same or an equivalent position after her first leave of absence and that she was effectively replaced by the new Business Manager during her second leave of absence. Time Warner argues that Voorhees was restored to her same position, Customer Service Manager, at the same salary and benefits when she returned from her first leave of absence.¹

To support her claim in Count I, Voorhees presented evidence that her job responsibilities were changed after she returned from her first leave of absence and her supervisory responsibilities over the CSRs were eliminated. (Pl.'s Motion for Summary Judgment Ex. 5 , Ex. 10 ¶¶ 29, and Ex. 13; Def.'s Answer to the Complaint ¶¶ 15). Voorhees presented evidence that the position of Business Manager that was created while she was on her first leave of absence took over some of the responsibilities that had previously been part of Voorhees' position as

¹ Time Warner argues that Voorhees was not entitled to restoration after her second leave of absence because Voorhees had already exhausted her entitlement to leave under the FMLA, and as such her second leave of absence was not protected under the FMLA. Time Warner contends that Voorhees used her full twelve weeks of leave during her first leave of absence. Voorhees, however, argues that she was terminated before the twelve weeks of leave to which she was entitled expired. Voorhees claims that because McCullough did not sign the first leave form until March 31, 1997, Voorhees' leave under the FMLA did not begin until that date. Thus, Voorhees reasons, when she returned from leave on July 9, 1997, she had not exhausted the twelve weeks to which she was entitled under the FMLA, but rather had two weeks of leave left. Voorhees contends that because McCullough did not sign the second leave of absence form until August 12, 1997, Voorhees was entitled to two more weeks of FMLA leave starting on that date. Thus, Voorhees argues that she was still protected by the FMLA when her second leave expired on August 22, 1997.

Even taking Voorhees calculation of her leave as correct, the problem with Voorhees' argument is that she did not return to work at the end of her second leave of absence such that she could be restored into the same or an equivalent position. Thus, she cannot argue that she was denied her rights under § 2614 on this ground and her termination after her second leave of absence does not create a genuine issue of material fact on her claim for restoration.

Customer Service Manager. (Pl.'s Mem. Ex. 1, Affidavit of Coble; Ex. 3, Deposition of Sanders at 31; Def.'s Answer to the Complaint ¶¶ 15). Taking the evidence in the light most favorable to Voorhees, a reasonable jury could find that Time Warner did not restore Voorhees in the same or an equivalent position when she returned from leave.

Alternatively, Time Warner argues that McCullough would have changed Voorhees' job responsibilities and created the new position of Business Manager even if Voorhees had not taken leaves of absence. Thus, Time Warner contends that under 29 C.F.R. § 825.216(a), Voorhees did not have a right to restoration in the same or an equivalent position. Time Warner contends that McCullough reorganized the Customer Service Department while Voorhees was on leave so that the CSRs could report to the Customer Service Supervisor instead of Voorhees. (Def.'s Mem. Ex. B, McCullough Declaration ¶ 6). In addition, McCullough testified that she decided that the dispatchers, who had previously been under the supervision of Voorhees, should report to a different department. (Def.'s Mem. Ex. B, McCullough Declaration ¶ 7). In addition to these changes, Time Warner contends that changes to Voorhees' job description were the result of a petition that was filed by the CSRs with the National Labor Relations Board to unionize the department. (Def.'s Mem. Ex. A, Deposition of McCullough at 57-58). The CSRs filed the petition while Voorhees was out on her first leave of absence. (Id.). Time Warner argues that during McCullough's interviews with the CSRs after the petition was filed, several of the CSRs complained to McCullough that Voorhees managed them through intimidation and fear. (Def.'s Mem. Ex. A, Deposition of McCullough at 27; Ex. B, Affidavit of McCullough ¶ 8). The CSRs who complained included Jennifer Coble and Tara Garabedian. (Def.'s Mem. Ex. A, Deposition of McCullough at 27). McCullough testified that she decided to eliminate

Voorhees' supervisory responsibilities over the CSRs based on these complaints. (Def.'s Mem. Ex. A, Deposition of McCullough at 26). McCullough testified that she decided to retain Voorhees as manager of the Customer Service Department with the same salary, but to focus her duties on managing the goals of the department and addressing strategic initiatives to improve customer service. (Def.'s Mem. Ex. B, Affidavit of McCullough ¶ 10).

Voorhees presented affidavits from three CSRs, Denise Careby, Jennifer Coble, and Tara Garabedian, testifying that they had no complaint with Voorhees as a manager.² (Pl.'s Mem. Ex. 1). Coble and Garabedian were two of the CSRs whom McCullough testified had complained about Voorhees' management. Coble testified that Voorhees was an "excellent" manager and "one of the best managers, if not the best" she had ever had. The testimony in these affidavits contradicts McCullough's testimony, and taken in the light most favorable to Voorhees, undermines McCullough's proffered reasons for reducing Voorhees' job responsibilities. The Court concludes that Voorhees has presented a genuine issue of material fact as to whether her position would have been reduced or ultimately eliminated if she had not taken her first leave of absence.

2. Interference with Rights under § 2615(a)(1)- Count II

Count II of the Complaint alleges that Time Warner violated the FMLA by interfering

² Time Warner argues in its reply that the Court should not consider these affidavits because Voorhees failed to produce them in discovery. Alternatively, Time Warner argues that the Court should impose sanctions on Voorhees for Time Warner's costs and fees relating to this motion. Although it may be true that Voorhees failed to timely update her response to the document requests of Time Warner, in the interest of justice, the Court will consider the affidavits. Because Time Warner would have clearly filed this motion for summary judgment even if it had received the affidavits, given the motion's partial success, the Court concludes that there are no grounds for imposing sanctions on Voorhees.

with Voorhees' exercise of her rights under the FMLA by advertising Voorhees' position while she was on FMLA leave. Time Warner argues that McCullough's decision to hire a Business Manager was not an effort to reassign Voorhees' duties to another position because she was on leave. McCullough testified that after she was promoted in March of 1996 from Assistant General Manager to General Manager, there was no one filling the Assistant General Manager position. (Def.'s Mem Ex. B, Affidavit of McCullough ¶ 11). After discussing the problem with her manager, Nancy Sanders, McCullough testified that she decided to hire a Business Manager to assist in management of Lower Bucks Cablevision. (Def.'s Mem. Ex. B, Affidavit of McCullough ¶ 12). McCullough hired Darlene Stapleton as the Business Manager in late July of 1997. (Def.'s Ex. A, Deposition of McCullough at 59-61).

Although Time Warner argues that the creation of the Business Manager position was for a legitimate business reason, they are not entitled to summary judgment on this claim. The defense provided to an employer in 29 C.F.R. § 825.216(a) applies only to a claim that an employee was entitled to restoration in the same or equivalent position under the FMLA. While assertion of a legitimate business reason satisfies the employer's burden under the burden-shifting framework applied in retaliation cases, as decided above, such a framework does not apply to Voorhees' claim that Time Warner interfered with her right to take a leave of absence under the FMLA. As noted above, Voorhees presented evidence that at least some of her job responsibilities were assumed by the Business Manager position that was advertised while she was on her first leave of absence, which is sufficient to establish a genuine issue of fact that she was not restored to the same or equivalent position after she returned from her first leave of absence. In the FMLA regulations, interference with an employee's rights under the FMLA

includes violating the FMLA and manipulating the workforce to avoid responsibilities under the FMLA. See *Dodgens v. Kent Manufacturing Co.*, 955 F. Supp. 560, 564 (D.S.C. 1997) (citing 29 C.F.R. § 825.220(b)). Taking the evidence in the light most favorable to Voorhees, a reasonable jury could find that the creation of the Business Manager position while she was on leave interfered with the exercise of her rights under the FMLA.

3. Retaliation for Exercise of Rights Under the FMLA-- Count III

Count III of the Complaint alleges that Voorhees was effectively demoted, replaced by the Business Manager, and eventually terminated on September 9, 1997 in retaliation for exercising her rights under the FMLA. To establish a prima facie case for retaliation under the FMLA, a plaintiff must establish that (1) she engaged in protected activity, (2) she suffered an adverse employment decision, and (3) a causal connection existed between the protected activity and the adverse employment decision. See *Morgan*, 108 F.3d at 1325; *Keiss v. St. Francis Hospital of Evanston*, No. 96-4466, 1997 WL 417524, *5 (N.D. Ill.). Once the plaintiff has established a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. Id. at *6. Then, the plaintiff must show that the legitimate reason offered by the defendant was pretext for discrimination. Id.

It is clear that Voorhees engaged in protected activity when she took her first leave of absence, and there is a genuine issue of fact as to whether at least some of her second leave of absence was protected under the FMLA. (See, supra, note 1). As for the second prong of the prima facie case, Voorhees suffered an adverse employment action when her job responsibilities were reduced and assigned to the Business Manager position and when she was terminated on

September 9, 1997.

To establish a causal connection between her protected activity of taking FMLA leave and the adverse employment actions she incurred, Voorhees presented evidence that the timing of the adverse employment action was contemporaneous with her leaves of absence. Voorhees was terminated shortly after her second leave of absence ended and approximately six months after she started her first leave of absence. In addition, Voorhees presented evidence that the other adverse employment actions she suffered which led to her termination, such as the reduction in her job responsibilities and replacement of her position with the Business Manager, were closely related in time to her leaves of absence. For example, Voorhees job responsibilities were changed as soon as she returned from leave and the position of Business Manager was created during her first leave of absence and filled during her second leave of absence. A reasonable jury could infer a causal connection between Voorhees' leaves of absence and her termination from the close proximity in time between her leave of absence and the adverse employment actions she suffered. See Keiss, 1997 WL 417524 at * 5 (citing McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 797 (7th Cir. 1997) and holding that the timing between the protected activity and the adverse employment decision was alone sufficient to satisfy a prima facie showing of causation under the FMLA). Thus, the Court concludes that Voorhees has presented evidence sufficient to establish a prima facie case for retaliation under the FMLA.

As discussed above in connection with Count I of the complaint, Voorhees presented sufficient evidence of pretext, through the testimony of Coble and Garabedian, such that a reasonable jury could disbelieve Time Warner's proffered reasons for altering her job responsibilities and switching some of her job duties to the new Business Manager position and

find that Time Warner acted in retaliation for Voorhees' taking leave under the FMLA. The Court concludes that Voorhees has presented a genuine issue of material fact as to whether the responsibilities associated with her position would have been reduced or switched to the new Business Manager position if she had not taken leaves of absence.

Time Warner offers a distinct legitimate business reason for Voorhees' termination. Time Warner argues that Voorhees was terminated because there was no indication from Voorhees when she would be able to return to work after her leave of absence had expired on August 22, 1997.³ (Def.'s Ex. B, Affidavit of McCullough ¶ 16).

Once a defendant has proffered a legitimate non-retaliatory reason for the plaintiff's discharge, a plaintiff must present evidence from which a jury could determine that her termination was in retaliation for taking leave under the FMLA and not for the legitimate reason proffered by the defendant. To satisfy this burden, a plaintiff may either discredit the proffered reason with direct or circumstantial evidence or by adducing direct or circumstantial evidence that discrimination was more likely than not a motivating cause of the termination. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

Although Voorhees presented evidence that if believed would cast doubt on Time Warner's proffered reasons for changing her job responsibilities after her first leave of absence, she offered no evidence to undermine the distinct reason proffered for her termination after her second leave of absence ended. The record is clear that Voorhees did not return to work at the

³ Time Warner also contends that the fact that the Customer Services Department was running smoothly without Voorhees was a legitimate business reason for terminating her. However, the fact that Voorhees claims that her job responsibilities were reduced and assigned to the new Business Manager in violation of the FMLA casts doubt as to whether this business reason proffered by Time Warner is legitimate. Because Time Warner has proffered another legitimate business reason for terminating Voorhees, the Court need not resolve this issue.

end of her second leave of absence designated on her leave form, August 22, 1997, nor, even by Voorhees' own calculation, by the end of the leave she was entitled to under the FMLA. The fact that Time Warner terminated her before she had returned from her second leave of absence is not evidence of pretext for retaliation because Voorhees had already used her entitled leave and was no longer protected under the FMLA. Voorhees presented no evidence from which a reasonable jury could infer that she was terminated because she took leave under the FMLA, rather than for the reason proffered by Time Warner. Thus, the Court will grant summary judgment to Time Warner on Voorhees' claim for retaliation based on her termination in Count III of the complaint.

3. Failure to Comply with the Notice Provisions of the FMLA

Count IV of the Complaint alleges that Time Warner failed to comply with the FMLA because it did not provide Voorhees with notice that the leaves of absence she took were being counted against her annual FMLA leave.

Time Warner points to the plaintiff's own deposition testimony, in which Voorhees testified that she was familiar with the FMLA before she took her leaves of absence because she had managed at least one CSR who had taken a leave of absence. (Deposition of Voorhees at 88-94). Voorhees also testified that she understood that the first leave of absence was FMLA leave because the form indicated such. (Def.'s Mem. Ex. D, Deposition of Voorhees at 97-98). However, the Court's inspection of the form relating to Voorhees' first leave of absence did not reveal that Time Warner had given Voorhees explicit notice that the leave would be counted against the employee's annual FMLA leave entitlement. (Def.'s Mem. Ex. H). The form indicates in the section entitled "Medical Leave of Absence Request Form" that if the employee

returns within twelve weeks from the start of the leave of absence, the employee would be covered under the Family and Medical Leave Act. However, the form also discussed leaves of absence generally and in relation to short term disability, long term disability, and workers' compensation. Further, in the section of the form which indicates that Voorhees' request for leave was approved, there is no statement that the leave that was granted would be counted against her FMLA leave, as opposed to some other type of leave. There is no evidence in the record that Time Warner gave Voorhees any other type of written notice regarding how her leave would be counted to comply with 29 C.F.R. § 825.301(b)(1)(i).

However, despite the presence of genuine issues of material fact regarding whether Voorhees received proper notice that her leave was FMLA leave, Voorhees has presented no evidence as to how she suffered any injury from the alleged defective notice. Indeed, under Voorhees' own calculation of when her leave under the FMLA began to run, the record is clear that she received the full twelve weeks of leave to which she was entitled before she was terminated on September 9, 1997. See, supra, note 1. As the court in Dodgens v. The Kent Manufacturing Company reasoned under similar factual circumstances, "the court would be elevating form over substance to permit this claim to go forward in light of the fact that [the employee] received all of the leave benefits that he was guaranteed pursuant to the FMLA." 955 F. Supp. 560, 565 (D.S.C. 1997). See also Chidebe v. MCI Telecommunications Corp., 19 F.Supp.2d 444, 448 (D. Md.) (granting summary judgment to defendant where defendant had committed paperwork errors in processing of plaintiff's leave request but plaintiff had received all of the FMLA benefits to which she was entitled), aff'd, 163 F.3d 598 (4th Cir. 1998). Thus, the Court will grant summary judgment to Time Warner on Count IV of the complaint.

5. Count V

Count V of the Complaint alleges that Time Warner violated the FMLA because the leave of absence form signed by Voorhees provided that she would be returned to “the same or similar” position, not “the same or an equivalent” position as required by the FMLA.

The leave form signed by Voorhees for her first leave of absence provides that if the employee returns from leave within twelve weeks, the employee would be reinstated to her previous position if it was open, or to a similar position at the same rate of pay and benefit level that the employee had prior to the start of the leave. (Def.’s Mem. Ex. H). This language does not parrot the language of 29 C.F.R. § 825.301 (b)(1)(vii) or 29 U.S.C. § 2614(a)(1), which provides for the same or an equivalent position, and thus, did not technically provide Voorhees with proper notice under the FMLA. However, similar to her claim in Count IV, Voorhees has presented no evidence of how she was injured by this imperfect notice or of how this imperfect notice interfered with her rights under the FMLA. The record is clear that she took all the leave to which she was entitled under the FMLA. While it is true that Voorhees has presented evidence sufficient to establish a genuine issue of material fact as to whether she was restored to the “same or an equivalent” position, which is the language the notice should have contained, the Court has already concluded that Voorhees may proceed on that claim, which is alleged in Count I of the complaint, and any injury that she suffered in connection with Time Warner’s failure to restore her in a position in accordance with the FMLA may be compensated in connection with that claim. Thus, the Court will grant summary judgment to Time Warner on Count V of the complaint.

II. VOORHEES' MOTION FOR SUMMARY JUDGMENT

Voorhees argues that she is entitled to summary judgment on Count I of her complaint because there is no dispute in the record that her job responsibilities changed when she returned from her first leave of absence. As noted above in the analysis of Count I in the context of Time Warner's motion for summary judgment, the Court concludes that there are genuine issues of material fact as to whether the position to which Voorhees returned was the same or an equivalent position to the position she held before her first leave of absence and as to whether Voorhees' job responsibilities would have been altered even if she would not have taken leave under the FMLA. Thus, Voorhees will not be granted summary judgment on Count I of the complaint.

Voorhees argues that she is entitled to summary judgment on Count II of the her complaint because the record is clear that Time Warner created a new position of Business Manager, which assumed some of the duties which Voorhees had performed before she went on leave. As noted in the above analysis of Time Warner's motion for summary judgment on Count II of the complaint, there is a genuine issue of material fact as to whether Time Warner interfered with Voorhees' rights under the FMLA when it created and filled the position of Business Manager. Thus, Voorhees' motion for summary judgment will be denied on Count II of the complaint.

Similarly, because the Court has already decided that there is a genuine issue of material fact as to whether Time Warner retaliated against Voorhees for taking leave under the FMLA by reducing her job responsibilities and assigning them to the position of Business manager, the Court will deny Voorhees' motion for summary judgment on Count III. Further, because the

Court has decided to grant summary judgment to Time Warner on Voorhees' claim for retaliation based on her termination in Count III and her claims based on imperfect notice of her rights under the FMLA in Counts IV and V, Voorhees' motion for summary judgment on those claims will be denied.

III. CONCLUSION

Based on the foregoing, the motion of Time Warner will be granted in part and denied in part and the motion of Voorhees will be denied.

An appropriate Order follows.

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

TARA VOORHEES,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TIME WARNER CABLE NATIONAL	:	
DIVISION, t/d/b/a LOWER BUCKS	:	
CABLEVISION,	:	
	:	
Defendant.	:	NO. 98-1460

ORDER

AND NOW, this 26th day of August, 1999, upon consideration of the motion of plaintiff Tara Voorhees (“Voorhees”) for summary judgment (Document No. 15), the response of defendant Time Warner Cable National Division, t/d/b/a Lower Bucks Cablevision (“Time Warner”) (Document No. 16), and the motion of Time Warner for summary judgment (Document No. 14), the response of Voorhees (Document No. 17), and the reply of Time Warner (Document No. 19), and based on the reasoning of the foregoing Memorandum, it is hereby **ORDERED** that the motion of Time Warner is **GRANTED IN PART AND DENIED IN PART** and the motion of Voorhees is **DENIED**. **JUDGMENT IS HEREBY ENTERED** in favor of Time Warner on the claim for retaliation based on Voorhees’ termination in Count III and the claims in Count IV and V. The motion of Time Warner on all other claims is **DENIED**.

IT IS FURTHER ORDERED that the parties shall submit a joint report to the Court no later than **September 13, 1999** as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report should so indicate.

LOWELL A. REED, JR., S. J.