

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

VINCENT M. CIALINI,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION No. 99-3954
)
 NILFISK-ADVANCE AMERICA, INC., et al.,)
)
 Defendants.)

MEMORANDUM

Padova, J. February , 2000

This matter arises on the parties' cross motions for summary judgment. For the reasons that follow, the Court will grant Defendants' Motion for Summary Judgment, and deny Plaintiff's Motion for Summary Judgment.

I. BACKGROUND

Plaintiff brings this action pursuant to the Family Medical Leave Act ("FMLA"), 29 U.S.C. §2601, et seq. In his Complaint, Plaintiff alleges that his employer, Defendant Nilfisk-Advance America, Inc. ("Nilfisk"), violated his FMLA rights when his supervisor, Defendant Paul Miller, allegedly implied Plaintiff would be demoted due to Plaintiff's absence to care for his daughter. The parties' cross motions for summary judgment raise one issue: whether the Nilfisk's sales representatives should be included in determining whether Nilfisk employs at least 50 employees as defined by the FMLA.

II. FACTS

Nilfisk manufactures and sells industrial vacuum cleaners. The company is headquartered in Copenhagen, Denmark, and its only North American facility is located in Malvern, Pennsylvania.

The Malvern site receives the vacuum cleaners from its parent corporation in Denmark, warehouses the product, and does some light manufacturing. Furthermore, Nilfisk maintains a sales and maintenance force to sell the vacuum cleaners, provide technical support, and to maintain and repair the machines. Plaintiff was employed by Nilfisk from June 1993 to October 2, 1998, at the Malvern facility.

In 1997 and 1998, Nilfisk employed between 48 and 54 total employees. Of these employees, however, twenty people were outside sales representatives, known as District Sales Managers or Senior District Sales Managers, or service technicians. These sales representatives and service technicians all report to one of three Regional Sales Managers who were located in either California or Rhode Island. Excluding this outside sales and service force, Nilfisk employed no more than 35 people at the Malvern facility during the relevant period.

Regional Sales Managers initiate the recruitment of new sales people, and conduct the first interview. The National Sales Manager conducts the second interview in the field. Third interviews are held at the Malvern facility. Furthermore, upon hiring, an outside employee reports to the Malvern facility for training. All personnel records are maintained at the Malvern site. Nilfisk issues each outside salesman a base salary via paycheck or direct deposit from the Malvern facility.

The sales representatives use their homes as their “base of operations.” (Carpenter Deposition, Plf. Ex. C, at 21:24, 32:6-8). Nilfisk provides each salesperson with a phone line, filing cabinets, and a fax machine for their home use. In addition, Nilfisk provides each field employee with a vehicle. The outside employees purchase any sundry office supplies locally, and then request reimbursement by submitting an expense report to the Malvern facility. Nilfisk provides its sales force with demonstration equipment, usually one sample of each of Nilfisk's products, and the accompanying accessories. Finally, Nilfisk issues each employee a business card. This card contains

Nilfisk's Malvern address, and the company's "1-800" number, as well as the employee's local home phone number, and sometimes a local home address.

The sales representatives turn in weekly call reports and expense reports. Original copies of these reports are sent directly to the Malvern facility. At the Malvern facility, the National Sales Manager takes a random cross sampling of the weekly call reports.

In addition, a copy of both the call reports and expense reports is sent to the employee's Regional Sales Manager. The Regional Sales Manager reviews the call reports, and tracks each employees' progress with leads. In addition, the Regional Sales Manager rides with each sales representative on a quarterly or trimesterly basis for several days to instruct and aid the sales representative. Furthermore, the Regional Sales Manager sets a yearly budget, and sales target for each sales representative in his or her region. The Regional Sales Manager distributes the budget to the sales representatives, and reviews the budget with each representative. Finally, the Regional Sales Manager evaluates each field employee's performance. Like the sales representatives, the Regional Sales Managers work out of a home office.

Each sales representative works from an existing customer base, and schedules their own appointments. When a client wants to contact a salesperson, the customer may call either the sales person's home number, or Nilfisk's "1-800" number. Through the "1-800" number, the customer is transferred to the particular sales representative's voice mail. Likewise, if there is no answer at the sales representative's home number, the customer's call is automatically forwarded to the employee's voice mail. The sales representatives are required to check their voice mail daily. However, when a sales representative is on vacation, the Regional Sales Manager checks the salesperson's voice mail. The voice mail system is maintained at the Malvern facility. Alternatively, a customer can exit the voice mail system and speak to a customer service representative at the Malvern facility. Customers

may also contact a salesperson by mail either at the salesperson's home address, or at the Malvern address. Items may be sold from the salesperson's own stock, or alternatively, items may be shipped from the Malvern facility directly to the customer.

Finally, Nilfisk's corporate advertising and marketing departments decide which trade shows the company will attend. The Regional Sales Managers, however, decide which sales representatives attend each show. The National Sales Manager then reviews these decisions.

III. STANDARD

The Court may grant a motion for summary judgment 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 judgment as a matter of law”. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome of the litigation will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

A moving party always bears the burden of informing the Court of the basis of its motion. Celotex, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the “mere existence of some alleged factual dispute”. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleadings. Anderson, 477 U.S. at 256. Rather, the non-movant must “make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file.” Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992). If upon consideration of cross motions

for summary judgment the Court finds no genuine dispute over material facts, the Court must order that judgment be entered in favor of the party deserving judgment in light of the law and undisputed facts. Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139, 145-46 (3d Cir. 1998).

IV. DISCUSSION

The Family and Medical Leave Act (“FMLA”) entitles all “eligible employees” to certain leave benefits. 29 U.S.C. §2611. The FMLA, however, does not cover any employee whose employer employs fewer than fifty employees within seventy-five miles of the worksite. 29 U.S.C. §2611(2)(B)(ii). In arguing the merits of the instant motion, Defendants contend that Nilfisk employed a total of 48 to 54 employees during the relevant period. Furthermore, of this number, Defendants argue that twenty employees constituted an outside sales force and did not report to the Malvern facility.

As a preliminary matter, the Court subtracts Messrs. Russell Seery, and Donald G. Bilson from the “outside sales force” because the sales territory of both men falls within seventy-five miles of the Malvern site. Second, the Court subtracts the three service technicians because the Court does not have enough information regarding these employees. Accordingly, the question before the Court concerns the remaining fifteen sales representatives.

The Department of Labor's FMLA regulations address the meaning of “worksite” for employees with no fixed worksite such as salespersons. Thus, for the Nilfisk sales representatives, the “worksite” is “the site to which they are assigned as their home base, from which their work is assigned, or to which they report.” 29 C.F.R. §825.111(a)(2)(1999). The regulations elaborate:

An employees personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence. . . Rather, their worksite is the office to which the report and assignments are made.

Id.

The parties agree that under the terms of this regulation, the sale representatives' worksite is not their home offices. Thus, the Court's inquiry narrows to whether the Malvern facility site was the site from which the sales representatives work was assigned; or whether the Malvern site was the site to which they reported. If either question can be answered in the affirmative, then the Malvern facility employed over fifty or more people during the relevant time period, and the FMLA applies to Nilfisk.

Nilfisk argues that because the sales representatives reported to the Regional Sales Managers, and received assignments from the Regional Sales Managers, the Malvern site should not be considered the “worksite” for these field employees. Nilfisk directs the Court's attention to Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139 (3d Cir. 1998). In Ciarlante, the United States Court of Appeals for the Third Circuit decided whether an administrative center was the “single site of employment” for a plaintiff class of former sales representatives under the Worker Adjustment and Retraining Act (“WARN”), 23 U.S.C. §§2101-2109. Because Congress “intended [the term 'worksite'] to be construed in the same manner as the term “single site of employment” under the Worker Adjustment and Retraining Notification Act,” S. Rep. No. 103-3 (1993), reprinted in, 1993 U.S.C.C.A.N. 3, 1993 WL 22195, at *50, Ciarlante provides a relevant framework for addressing the instant question.

Plaintiff urges the Court not to rely on Ciarlante for guidance because the WARN regulations do not contain the FMLA regulation's instruction regarding “personal residence[s].” The Court recognizes this difference, and thus, disregards the Ciarlante discussion regarding the employee's “home base.” In all other respects, the FMLA regulation employs identical language in defining “work site,” as the WARN regulation uses in defining “single work site.” Compare 29 C.F.R. §825.111(a)(1999) with 20 C.F.R. §639(i)(1)-(6)(1999). Furthermore, the legislative history

expressly states that the two terms are to be “construed in the same manner.” S. Rep. No. 103-3 (1993), reprinted in, 1993 U.S.C.C.A.N. 3, 1993 WL 22195, at *50. Accordingly, the Court finds Ciarlante relevant to the instant question.

In language identical to the FMLA regulations, the WARN regulations direct that a salespersons' “single site of employment” is “the site to which they are assigned as their home base, from which their work is assigned, or to which they report.” 20 C.F.R. §639.3(i)(6)(1999). Elaborating on the “assignment” prong of this definition, the Ciarlante Court explained that the court's “concern here is with the source of the 'day-to-day' instructions received by the sales representatives, notwithstanding centralized payroll and certain other centralized managerial or personnel functions.” Ciarlante, 143 F.3d at 147. This inquiry requires the court “to distinguish the true source of instructions from mere conduits through which the instructions passed.” Id.

The record indicates that the Regional Sales Managers were the origin of day-to-day instructions. Philip Carpenter, Nilfisk's National Sales Manager, testified that the Regional Sales Managers were the persons “ultimately responsible” for creating assignments and receiving reports from the sales representatives:

Q. What is your role in dealing with the outside sales force?

A. I'm the national sales Manager for the Company.

Q. And as the national sales Manager, what do you do?

A. I do a lot of things, but we don't have all day. I am primarily responsible for the sales of the company and to maintain -- I have three regional sales managers and approximately 17 salesmen under my responsibility. And it's my task to make sure that they perform their functions and meet yearly budgets.

...

Q. And what do [regional sales managers] do?

A. They personally are involved with each salesman, from the standpoint each salesman reports to them on a weekly basis. They review their call reports, they review their progress with leads in the field, and on a quarterly, trimesterly basis they ride with them to individually call on a one-on-one basis or two-on-one basis on their customers.

[Def. Ex. A, ¶. 8-9]. The weekly report takes place by phone. [Id. at 39: 8-9]. Mr. Carpenter described the purpose of this phone call as follows:

It's hands on managerial skills to determine what's happened during the week, good things, bad things, give them a stroke, kick them in the butt, find out where they stand as far as budget, that type of thing.

[Id. at 39:11-15]. The sales representatives do not do any other reporting on their day to day or weekly sales activities. [Id. at 39: 16-20]. Moreover, they do not call the Malvern facility to report on the status of sales in their territories. [Id. at 39: 21-24]. While Mr. Carpenter directly talks to salespeople from time to time, the calls are mainly social with an occasional discussion regarding sales quotas. [Id. at 44:2-12].

Finally, with respect to training, the Regional Sales Managers provide the hands-on training in the field for each salesperson. [Id. at 35:7-9]. This training lasts a week. [Id.] Moreover, the Regional Sales Managers ride with the each salesperson three or four times a year for several days. [Id. at 38: 15-19; 35:20-21]. The purpose of the ride-along is “to ascertain the condition of the territory, the salespeople, the salesmen's equipment, the customers. It's a fact-finding trip as well as an instructional trip, to aid them in any areas that they would find them lacking in.” [Id. at 38-39]. Based on the foregoing, the Court concludes that the Malvern facility is not the site from which the sales representatives' work is assigned.

Alternatively, the Court must consider whether the Malvern facility was the site “to which [the sales representatives] report[ed].” 29 C.F.R. §825.111(a)(2)(1999). Again, Ciarlante provides guidance. “This inquiry focuses on the location of the personnel who were primarily responsible for reviewing sales reports and other information sent by the sales representatives, in order to record sales, assess employee performance, develop new sales strategies, and the like.” Ciarlante, 143 F.3d at 148.

Again, the record shows that the sales representatives reported to the Regional Sales Managers. The regional sales managers are responsible for reviewing the weekly call reports and expense reports. [Def. Ex. A at 43: 10-15]. While Mr. Carpenter takes a random cross sampling of these reports once a week, he does so to “make sure that the regional managers don't miss anything.” [Id. at 45:8-22].

Similarly, the Regional Sales Managers similarly evaluate the sales representative's performance, and establish the yearly budget and sales targets. Mr. Carpenter testified that he reaches the target number for each region with input from the Regional Sales Managers. “Then it's the regional Manager's responsibility to divide the regional dollars and allocate them into budgets for the regions for the individual sales[men].” [Id. at 15:11-14]. The budgets are then distributed at the year end meeting held in Las Vegas. [Id. at 17:23-24]. “The regional managers hand it out so they can explain it to [the salespeople].” [Id. at 17-18]. Mr. Carpenter further testified that he does not personally discuss the yearly budgets with the salespeople. [Id. at 18:10-12]. The foregoing testimony establishes that the Malvern facility is not the site to which the sales representatives report.

Plaintiff argues that because the Regional Sales Managers work out of their personal residences, the Regional Sales Managers' office cannot be considered a “worksite” for the sales

representatives. Thus, Plaintiff contends that the only worksite to which any Nilfisk employee can report is the Malvern facility.

Plaintiff's reasoning extends beyond the language of the regulation. With respect to sales people, 29 C.F.R. § 825.111(a)(2) excludes consideration of a personal residence, i.e., the employees "home base," as that employee's work site, and directs the court to focus on the site from which their work is assigned or to which they report. Thus, the Court did not consider the personal residence of the sales force in reaching its conclusion. Rather, the Court focuses its attention on "the office to which the report and assignments are made." 29 C.F.R. §825.111(a)(2)(1999). On its face, the regulation does not prohibit consideration of a supervisor's personal residence as "the office to which [a salesperson]. . . report[s]," or from which the sales person receives an assignment. While no case law directly answers this question, the Court believes that based on the reasoning of Ciarlante, the Court cannot conclude that the Malvern facility is the sale representative's worksite.

Based on the foregoing, the Court concludes that the sales representatives' worksite was not the Malvern facility. Therefore, because the number of employees at the Malvern facility falls below the statutory minimum, Plaintiff is not an "eligible employee" under the FMLA. Accordingly, the Court will grant Defendant's Motion for Summary Judgment, and will deny Plaintiff's Motion for Summary Judgment. An appropriate Order follows.

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Defendants.)

ORDER

AND NOW, this day of February, 2000, upon consideration of Defendants' Motion for Summary Judgment, and Plaintiff's Counter-Motion for Partial Summary Judgment, **IT IS HEREBY ORDERED** that

1. Plaintiff's Counter-Motion for Partial Summary Judgment (docket #8) is **DENIED**;
2. Defendants' Motion for Summary Judgment (docket #7) is **GRANTED**;
3. **JUDGMENT** is entered in favor of Defendants and against Plaintiff in the above captioned action; and
4. This case is **CLOSED** for statistical purposes.

BY THE COURT:

John R. Padova