

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

KRIS DEILY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
WASTE MANAGEMENT OF	:	
ALLENTOWN,	:	
	:	
Defendant.	:	NO. 00-1100

Reed, S.J.

June 25, 2000

M E M O R A N D U M

Now before this Court is the motion of defendant Waste Management of Allentown for summary judgment on the claims of plaintiff Kris Deily for violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (“ADA”), the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”), and Pennsylvania common law (Document No. 36). For the reasons that follow, the motion will be granted.

Background

Plaintiff Kris Deily suffers from schizophrenia and Sweet’s Syndrome, a disease of unknown origin that causes red nodules to form on the skin. He was employed by the defendant from 1988 until 1997, when his employment was terminated. It is the circumstances of Deily’s termination that form the crux of this case.

The wheels of plaintiff’s termination were set in motion on June 25, 1996, when plaintiff stopped coming to work for reasons he did not explain. His status during the following months

was unclear. In November 1996, he submitted a form requesting the 12 weeks of unpaid leave to which he was entitled under the Family Medical Leave Act, listing “sickness” as the reason he was seeking leave. The 12 weeks passed, as did 12 months, and plaintiff never returned to work. He had no meaningful contact Waste Management until late 1997, when he called to inquire whether he still had a position. That telephone call led Waste Management to review its records, which revealed the plaintiff was still on its employment rolls despite having not shown up for work in nearly 18 months. On December 15, 1997, Waste Management sent plaintiff a letter notifying him that he had been terminated effective June 25, 1997, because he had been continuously absent from work for more than a year.

Plaintiff contends that Waste Management terminated him because he suffered from schizophrenia and Sweet’s Syndrome in violation of the ADA. Plaintiff also claims that Waste Management terminated him to prevent him from taking advantage of ERISA-protected benefits. Finally, plaintiff alleges that he was wrongfully discharged in retaliation for filing a workers’ compensation claim, in violation of the public policy of the Commonwealth of Pennsylvania.

Summary Judgment Standard

Under Rule 56 (c) of the Federal Rules of Civil Procedure, “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 must be granted. The proper inquiry on a motion for summary judgment is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, 477 U.S. 242, 251-52, 106 S. Ct. 2505

(1986). Furthermore, “summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. at 248.

The moving party “bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). The nonmoving party must then “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file’ designate ‘specific facts showing that there is a genuine issue for trial.’” Id. at 324. On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993 (1962)).

ADA Analysis

Utilizing the familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), I will assume for the purpose of analysis only, that plaintiff has made out a *prima facie* case of disability¹ and move directly to a consideration of the defendant’s articulated legitimate, non-discriminatory reason for terminating him.

¹In an ADA wrongful discharge case, a plaintiff establishes a *prima facie* case if he demonstrates that (1) he is within the ADA’s protected class; (2) he was discharged; (3) at the time of his discharge, he was performing the job at a level that met his employer’s legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. See Ennis v. Nat’l Ass’n of Bus. & Educ. Radio, 53 F.3d 55, 58 (4th Cir. 1995).

The reason Waste Management advances for terminating plaintiff's employment is plain on the face of the letter notifying him of his termination. That letter reads:

It has been brought to my attention that you have been inquiring about your employment status with Waste Management. The first day that you were unable to work was June 25, 1996. Waste Management's policy is after 12 months of a medical leave of absence if the employee has not been released to return to work, the employee will be administratively terminated. Your effective date for the administrative termination was June 25, 1997.

(Exh. 8 to Tab A of Defendant's Motion for Summary Judgment, Letter from Christine Graver, Controller of Waste Management, dated Dec. 15, 1997.) The policy to which the letter refers comes from a Waste Management directive governing leaves of absence, which provides, in pertinent part:

C. Length of Medical Leave. Medical leaves of absence will continue for the length of the employee's injury, illness or other serious health condition, but no longer than 12 months (see paragraph O). However, if the employee is only entitled to an FMLA-mandated leave pursuant to the second sentence of paragraph A above, the length of the leave is limited to 12 weeks. Any medical leave taken under this directive will be counted as part of the employee's leave entitlement under FMLA. ...

O. Administrative Termination. If after 12 months of a medical leave of absence the employee has not been released to return to work, the employee will be administratively terminated, unless not allowed under applicable workers' compensation laws. ...

(Exh. 8 to Tab A of Defendant's Motion for Summary Judgment, Leaves of Absence Directive, dated Jan. 1, 1996, at 2, 5.) Furthermore, the FMLA form filled out and signed by plaintiff provided, "I understand that if I do not return from work on the date indicated above (which may, with the approval of the Company, be extended by appropriate notice), my employment can be terminated." (Exh. 6 to Tab A of Defendant's Motion for Summary Judgment, FMLA Request for Leave Form, at 2.)

The facts of this case fit squarely with the decision in Shaner v. Synthes (USA), No. 97-4212, 1998 U.S. Dist. LEXIS 20009 (E.D. Pa. Dec. 11, 1998), which was affirmed by the Court of Appeals for the Third Circuit, 204 F.3d 494 (3d Cir. 2000). In that case, the plaintiff went on

medical leave due to multiple sclerosis and never returned to work. He was sent a letter at the outset of his leave explaining the company policy that if an employee did not return to work after six months of medical leave, the employment would be terminated. See Shaner, 1998 U.S. Dist. LEXIS 20009, at *3. He was terminated at the close of the six-month term by a letter that referenced “our company policy of terminating employment after six months of medical leave of absence.” See Shaner, 204 F.3d at 499. In considering plaintiff’s retaliatory discharge claim, the district court observed:

Evaluating the evidence as a whole, the court finds that Shaner, even if he can establish a *prima facie* case, is unable to rebut Synthes’ legitimate, non-retaliatory explanation for its employment decision. Shaner does not offer any evidence challenging the existence of Synthes’ medical leave policy. Further, Shaner does not offer any evidence that Synthes applied the medical leave policy any differently to him as compared to employees who do not have MS or another disability. Under the facts presented, a rational factfinder could not reasonably find Synthes’ explanation not to be the true reason for terminating Shaner’s employment.

Id. at 16-17.

The commonalities between Shaner and the instant case are striking: both plaintiffs left work because of an alleged disability and never returned; both defendants had clear administrative policies concerning extended leaves; neither plaintiff produced evidence that the policies did not exist; and neither plaintiff produced evidence of disparate application of the policies. Thus, under the reasoning of the district court in Shaner, which I find persuasive and adopt, Deily could not rebut the legitimate, non-discriminatory reason put forward by Waste Management.² Other courts have noted that an extended absence from work is a valid reason for

² The Court of Appeals for the Third Circuit affirmed the district court decision in Shaner, noting that the plaintiff “does not challenge the company’s general policy requiring termination of employees who are on medical leave for six months.” See Shaner, 204 F.3d at 506. The court of appeals also noted that the employer in Shaner had gone to great lengths to accommodate the plaintiff, and the same is true in this case. Deily was given several months off work on a number of occasions because of his Sweet’s Syndrome and allowed to return, and another several months off because of a hernia. (Exh. B to Defendant’s Motion for Summary Judgment, Deposition of Kris Deily, dated July 18, 2000, at 7, 132.)

terminating an individual. See Aspirino v. Pennsylvania Independence Blue Cross Blue Shield, No. 96-7788, 1997 U.S. Dist. LEXIS 15963, at *15 (E.D. Pa. Oct. 16, 1997) (finding that absence from work for more than two years, even in the absence of a policy, was a legitimate, non-discriminatory reason for plaintiff's termination); Yurevich v. Sikorsky Aircraft Div., 51 F. Supp. 2d 144 (D. Conn. 1999) (holding that plaintiff's two-year absence demonstrated plaintiff was not qualified for position and therefore could be terminated without violating ERISA); Cichon v. Roto-Rooter Servs. Co., No. 97-3594, 1998 U.S. Dist. LEXIS 19175, at *26 (N.D. Ill. Dec. 2, 1998) (neutral company policy of termination after two consecutive days of absence from work without proper notice was legitimate non-discriminatory reason for termination; plaintiff had no evidence to show that the policy was a pretext).³

Even if Waste Management's one-year maximum medical leave policy was not in place, plaintiff signed a document in which he acknowledged that if he did not return from his FMLA leave within 12 weeks, he could be terminated. Plaintiff thus acknowledged with his own signature a legitimate, non-discriminatory reason for Waste Management to terminate him, and has produced no evidence to rebut that reason. In light of the company policy, the FMLA form, and relevant precedent, I conclude that plaintiff cannot overcome the legitimate, non-discriminatory reason presented by Waste Management.⁴

³ The cases cited by plaintiff are distinguishable in that the plaintiffs in those cases actually requested accommodation in the form of additional leave; Deily never requested additional leave prior to the expiration of his FMLA leave or his termination. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000); Shannon v. City of Philadelphia, No. 98-5227, 1999 U.S. Dist. LEXIS 18089 (E.D. Pa. Nov. 23, 1999).

⁴ Plaintiff's claims of disparate impact likewise fail, because the policy is a reasonable one. The fact that the extended medical leave policy affects disabled individuals moreso than non-disabled individuals does not alone render it a violation of the ADA. Requiring an employer to preserve a position for an individual who has been absent for over a year would be unduly burdensome to the employer. And again, it must be emphasized that plaintiff never asked for an exception to the policy or an extension during the time he was absent.

Plaintiff contends that Waste Management failed to engage in the interactive process of accommodation as required by the ADA. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311-312 (3d Cir. 1999). However, the employer's duty to engage in the interactive process is triggered only when it receives notice of a disability and a request for an accommodation. See id. at 313-14 ("Based on this evidence, the school district had more than enough information to put it on notice that Taylor might have a disability, and therefore, in order to trigger the school district's obligation to participate in the interactive process, Taylor or her representative only needed to request accommodation."). While there may be evidence that Waste Management was aware that plaintiff had a disability, plaintiff has advanced no evidence that he requested an accommodation. Instead, plaintiff cites a number of cases from outside this circuit to suggest that it was Waste Management's duty to accommodate him despite the fact that plaintiff never asked for an accommodation. In this circuit, the employer has no duty to participate in the interactive process unless it receives a request for accommodation. See id. at 313-14. There is no evidence on this record from which a reasonable jury could find that plaintiff requested an accommodation and thereby set the wheels of the interactive process in motion. See Jones v. United Parcel Serv., 214 F.3d 402, 408 (3d Cir. 2000) (holding that employer had no obligation to engage in interactive process because plaintiff never requested an accommodation).

Plaintiff also argues that an extended leave is itself a reasonable accommodation. It may well be that in certain cases, an employer will be required to offer an extended leave of absence to a disabled employee in order to comply with the ADA. However, here, plaintiff never requested a reasonable accommodation, and he had been absent from work for 18 months by the time Waste Management got around to terminating him. Even if that leave could be considered

an accommodation, a reasonable jury would have no choice but to find that Waste Management was reasonable in terminating Deily after an 18-month absence with no indication that Deily would ever return to work. See Shaner, 1998 U.S. Dist. LEXIS 20009, at *16-17.

I conclude that no genuine issues of material fact remain as to plaintiff's ADA claim, and therefore will grant summary judgment in favor of defendant on that claim.

ERISA Analysis

I come to the same conclusion as to plaintiff's claim that he was terminated to prevent him from taking advantage of ERISA-protected benefits in violation of Section 510 of ERISA.⁵ The McDonnell Douglas burden shifting framework applies here. See Sagaral v. Mountainside Hosp., No. 99-2785, 2001 U.S. Dist. LEXIS 6838 (D.N.J. Feb. 22, 2001) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1110 (2d Cir. 1988)). It is not clear that plaintiff can even establish a *prima facie* case of ERISA interference, because he lacks evidence to support a causal link between his benefits and his termination.⁶ He was terminated pursuant to a neutral policy, and produces no evidence to suggest that Waste Management intended to interfere with his benefits. The most plaintiff suggests is that Waste Management failed to inform him that he was eligible for certain types of benefits, but even if that were true, it does not create a genuine

⁵ Section 510 of ERISA provides, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled to . . .

29 U.S.C. § 1140.

⁶ To establish a *prima facie* case of a § 510 violation, the plaintiff must come forward with facts showing prohibited employer conduct taken for the purpose of interfering with rights or benefits protected by ERISA. See Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997) (citation omitted).

issue of material fact as to whether defendant fired him for the purpose of preventing him from receiving such benefits. The mere fact that plaintiff would have received benefits if he had not been terminated is not enough to survive summary judgment; plaintiff must produce some evidence to show a causal link between those benefits and his termination. Plaintiff has not done so here. Even if plaintiff could make out a *prima facie* case, for the reasons discussed above, he cannot establish that the legitimate, non-discriminatory reason Waste Management gave for terminating was pretextual. Therefore, the motion of defendants for summary judgment will be granted on plaintiff's ERISA claim.

Wrongful Discharge

Pennsylvania has long adhered to the doctrine of at-will employment under which an employer "may discharge an employee with or without cause, at pleasure, unless restrained by some contract." Henry v. Pittsburgh & Lake Erie R.R. Co., 139 Pa. 289, 297, 21 A. 157 (1891). Since 1974, the Supreme Court of Pennsylvania has recognized a cause of action for wrongful discharge under circumstances that violate public policy. See Geary v. United States Steel Corp., 456 Pa. 171, 184, 319 A.2d 174 (1974). In the years following Geary, the Superior Court of Pennsylvania identified a number of instances that would violate public policy and give rise to a cause of action for wrongful discharge. See Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (termination for absence due to jury duty violates public policy); Hunter v. Port Auth. of Allegheny County, 277 Pa. Super. 4, 419 A.2d 631 (1980) (denial of employment to pardoned individual because of an assault conviction violates public policy); Field v. Philadelphia Elec. Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989) (discharge for making statutorily required report to the Nuclear Regulatory Commission violates public policy).

Recently, in Shick v. Shirey Lumber, 552 Pa. 590, 592, 716 A.2d 1231 (1998), the Supreme Court of Pennsylvania explicitly recognized another instance in which a discharge would violate public policy: “We hold that an at-will employee who alleges retaliatory discharge for the filing of a workers' compensation claim has stated a cause of action for which relief may be granted under the law of this Commonwealth.” Id. at 592. While Shick unambiguously recognizes a cause of action when an employee is terminated in retaliation for filing a workers' compensation claim, the Supreme Court did not define the elements necessary to establish a *prima facie* case of “retaliation.”

However, in a recent case, this Court predicted that the Supreme Court of Pennsylvania will adopt the analysis that is already applied in retaliation cases in the federal employment context; the McDonnell Douglas burden shifting analysis. See Landmesser v. United Air Lines, Inc., 102 F. Supp. 2d 273, 277-78 (E.D. Pa. 2000). In order to advance a *prima facie* case of retaliation in the Title VII context, a plaintiff must show that: (1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000) (citations omitted).

Plaintiff has no evidence to establish a causal nexus between a workers' compensation claim and his termination. Plaintiff references a workers' compensation claim he filed on April 8, 1998, nearly four months *after* he was notified of his termination and 10 months after the effective date of his termination. Of course, a defendant cannot be retaliated against retroactively; in all but the rarest of cases, the protected activity must happen before the adverse

employment action. Thus, a reasonable jury could not find that plaintiff was fired in 1997 because he filed a workers compensation claim in 1998.

Plaintiff also points to a workers compensation claim he filed in 1994 that arose out of a work-related hernia injury. The temporal distance between the 1994 claim and his 1997 termination alone is enough to substantially undermine plaintiff's claim of retaliation; the fact that Waste Management allowed three years to pass after the workers' compensation claim would suggest to any reasonable jury that the workers' compensation claim was ancient history by the time plaintiff was terminated. Plaintiff offers no other evidence to show a causal link between the workers' compensation claim in 1994 and his 1997 termination.

As with his other claims, even if plaintiff could establish a *prima facie* case of retaliation, as discussed above, he could not overcome the legitimate, non-discriminatory business reason advanced by defendants. Under the law of wrongful discharge in Pennsylvania, an employee may be fired for a good reason, bad reason, or no reason at all, so long as public policy is not violated. See Nix v. Temple Univ., 408 Pa. Super. 369, 375, 596 A.2d 1132 (1991). Waste Management has brought forward a neutral, facially valid reason for its termination of plaintiff's employment, and plaintiff has produced no evidence that could cast doubt on that reason in the eyes of a reasonable jury.

Therefore, defendant's motion for summary judgment will be granted as to plaintiff's wrongful discharge claim.

An appropriate Order follows.

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

KRIS DEILY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
WASTE MANAGEMENT OF	:	
ALLENTOWN,	:	
	:	
Defendant.	:	NO. 00-1100

ORDER

AND NOW, on this 25th day of June, 2001, upon consideration of the motion of defendant Waste Management of Allentown for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 36) and the response of plaintiff, Kris Deily, and having considered the pleadings, depositions, affidavits and all other evidence submitted by the parties, and having concluded, for the reasons set forth in the attached memorandum, that there remains no genuine issue of material fact as to any of plaintiff's remaining claims, **IT IS HEREBY ORDERED** that the motion for summary judgment is **GRANTED** in full as to all plaintiff's remaining claims.

JUDGMENT is hereby **ENTERED** in favor of defendant Waste Management of Allentown and against plaintiff Kris Deily.

This is a final Order.

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