

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

LISA BEFFERT : CIVIL ACTION  
: :  
v. : :  
: :  
PENNSYLVANIA DEPARTMENT OF :  
PUBLIC WELFARE, et al. : NO. 05-43

MEMORANDUM

Bartle, J.

April 18, 2005

Plaintiff Lisa Beffert has sued her former employer, the Pennsylvania Department of Public Welfare and her former supervisor Ron Weaver ("Weaver") under various federal statutes for gender discrimination and retaliation. She also includes state law claims of intentional and negligent infliction of emotional distress. Before the court is the motion of defendants to dismiss Counts II and III of plaintiff's complaint under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, et seq. for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).<sup>1</sup>

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1. Plaintiff acknowledges that her Title VII claim, 42 U.S.C. §§ 2000(e)(k), et seq., can be asserted properly against only her employer and that Count I should thus be dismissed as to defendant Ron Weaver. See Dici v. Commw. of Pa., 91 F.3d 542, 552 (3d Cir. 1996). In addition, Count IV of the complaint alleges a claim against defendant Pennsylvania Department of Welfare for violation of plaintiff's rights under the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §§ 951, et seq. Defendant has invoked its Eleventh Amendment immunity from suit in federal court. See Chittister v. Dep't of Cmty. and Econ. Dev., 226 F.3d 223, 227-28 (3d Cir. 2000). Plaintiff has  
(continued...)

In considering a motion to dismiss for failure to state a claim, we accept as true all well-pleaded facts in the complaint and draw any reasonable inferences in plaintiff's favor. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994). We should grant the motion only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" contained in the complaint. Id. The Supreme Court has held that to survive a motion to dismiss, a plaintiff alleging employment discrimination is not required to plead facts necessary to establish a prima facie case of discrimination, but rather simply a "short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (citing Fed. R. Civ. P. 8(a)(2)).

Plaintiff alleges the following facts, which for present purposes we assume to be true. On July 28, 2003, she began her employment as a storeroom clerk at the Allentown State Hospital, which is operated by the Pennsylvania Department of

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1.(...continued)  
voluntarily withdrawn Count IV and reserves her right to re-file her PHRA claim in state court. Counts V and VI of her complaint contain claims for intentional infliction of emotional distress and negligent infliction of emotional distress, respectively. Plaintiff brings these claims against both the Pennsylvania Department of Public Welfare and Ron Weaver, acting within the scope of his employment. See 42 PA. CONS. STAT. § 8501. Because defendants claim immunity under Pennsylvania law, plaintiff has voluntarily withdrawn Counts V and VI. See Shoop v. Dauphin County, 766 F. Supp. 1327, 1333-34 (M.D. Pa.), aff'd, 945 F.2d 396 (3d Cir. 1991).

Public Welfare. Compl. ¶ 27. On January 6, 2004, she notified the hospital that she was pregnant. Compl. ¶ 27. Plaintiff was not expected to deliver her baby until after July 28, 2004, more than twelve months following the start of her employment. Compl. ¶ 27. Between January 6 and 20, 2004, after she had notified Allentown State Hospital and Weaver of her pregnancy, they discriminated and retaliated against her by subjecting her to a pre-disciplinary conference, a written reprimand, and a negative performance evaluation, and then by terminating her on January 20, 2004, effective the next day. Compl. ¶¶ 30, 34. According to the complaint, defendants' actions were in violation of the FMLA. See Compl. ¶¶ 30, 34.

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 and compelling family reasons. 29 U.S.C. § 2601(b). Section 2612(a)(1)(A) of the FMLA entitles an "eligible employee" to take up to twelve weeks of unpaid leave in a twelve month period because of the birth of a child. An employee is eligible for FMLA protection when he or she: (1) has been employed by the employer for at least twelve months; (2) has been employed for at least 1,250 hours of service during the twelve-month period immediately preceding the leave; and (3) has been employed at a work site where 50 or more employees are employed within 75 miles of the work site. 29 U.S.C. § 2611(2)(A); 29 C.F.R.

§ 825.110(a). In addition, an employee is required to give not less than 30 days' notice to an employer of the intent to take leave unless it is not practicable to do so. 29 U.S.C.

§ 2612(e). In requesting FMLA leave, "[a]n employee need not mention the FMLA by name in order to invoke its protections; the employee need only make the employer aware that leave is required for a purpose covered by the FMLA." Babcock v. BellSouth Adver. and Publ'g Corp., 348 F.3d 73, 78 n.5 (4th Cir. 2003) (citing Rhoads v. FDIC, 257 F.3d 373, 383 (4th Cir. 2001); 29 C.F.R. §§ 825.302(c), 825.303(b)).

Following qualified leave, an employee is entitled to reinstatement to his or her former position or to an equivalent position with the same pay, benefits, and employment terms. 29 U.S.C. § 2614(a)(1). The FMLA makes it an unlawful practice for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right" under that Act. 29 U.S.C. § 2615(a)(1). Furthermore, the employer may not discharge or discriminate against an individual who opposes any unlawful acts under the FMLA. 29 U.S.C. § 2615(a)(2).

In her complaint, plaintiff alleges she was pregnant, a condition covered under the FMLA. Compl. ¶ 27. A request to take time off for the birth of a child by an "eligible employee" is clearly "protected activity" under the FMLA. See 29 U.S.C. § 2615(a)(2). As noted above, plaintiff avers that the Department of Public Welfare terminated her shortly after she announced her pregnancy.

Defendants argue that plaintiff's FMLA claims must be dismissed because she had been employed less than a year at the time of the alleged adverse actions.<sup>2</sup> See 29 U.S.C. § 2611(2)(A)(i); McInerney v. Moyer Lumber and Hardware, Inc., 244 F. Supp. 2d 393, 399-400 (E.D. Pa. 2002). Defendants assert that plaintiff's expectation that she would still have been employed by the date of her expected delivery was too tenuous and speculative to make her an "eligible employee" for purposes of the FMLA. Plaintiff acknowledges that she had been at work for less than a year when she announced she was pregnant and was terminated. Nonetheless, she contends that she would have been an "eligible employee" under the FMLA at the time of her anticipated leave because at that point she would have been employed for at least twelve months.

The issue is one of first impression in this circuit. The only other case to discuss this question that has been called to our attention is Walker v. Elmore County Bd. of Educ., 223 F. Supp. 2d 1255 (M.D. Ala. 2002), aff'd, 379 F.3d 1249 (11th Cir. 2004). The district court, although ultimately ruling against the plaintiff, opined that a pre-eligibility employee had a claim under the FMLA for retaliation when almost all of her leave would have taken place after a year of employment. Id. at 1261. However, the Court of Appeals for the Eleventh Circuit concluded that because the plaintiff's leave was scheduled to begin prior

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2. Defendants do not argue that the pleading of plaintiff's FMLA claim was deficient in any other respect.

to the expiration of the year, she was not entitled to relief.<sup>3</sup> The appellate court held that "[t]here can be no doubt that the request--made by an ineligible employee for leave that would begin when she would still have been ineligible--is not protected by the FMLA." Walker, 379 F.3d at 1253. The court specifically declined to decide whether the result would have been different if plaintiff had made a pre-eligibility request for leave to begin after her one year anniversary date. This precise issue is now before us.

To be an "eligible employee" under the FMLA, a person must be "an employee who has been employed for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title." 29 U.S.C. § 2611(2)(A)(i). The United States Department of Labor has promulgated regulations implementing the FMLA, as authorized by 29 U.S.C. § 2654. The regulations provide that the determination of whether the employee has worked for twelve months "must be made as of the date the leave commences." 29 C.F.R. § 825.110(d). It is well established that a court must defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Res.

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3. In Walker, plaintiff's maternity leave would have commenced on August 3, 2000, the first day upon which she would have been required to report for work following both her due date (August 2) and her actual delivery date (July 27). Her twelve-month anniversary date was August 9, 2000. Walker, 379 F.3d 1249 at 1253 n.9.

Def. Council, Inc., 467 U.S. 837, 844 (1984). This construction, set forth in 29 C.F.R. § 825.110(d), is manifestly reasonable.

While an employee cannot be an eligible employee unless "the date leave commences" is after the employee has worked at least twelve months, the FMLA also requires that "an employee" provide the employer with not less than 30 days' notice of the date leave is to begin where such notice is practicable. 29 U.S.C. § 2612(e)(1). This provision is designed to minimize the disruption to the employer that will be caused by the absence of the employee. See Aubuchon v. Knauf Fiberglass GmbH, 359 F.3d 950, 951 (7th Cir. 2004). This reference to "employee" rather than "eligible employee" is a recognition that some employees will and should give notice of future leave before they have been on the job for twelve months. Since the FMLA contemplates notice of leave in advance of becoming an eligible employee, the statute necessarily must protect from retaliation those currently non-eligible employees who give such notice of leave to commence once they become eligible employees. See 29 U.S.C. § 2615(a). Otherwise, the advance notice requirement under 29 U.S.C. § 2612(e) becomes a trap for newer employees who comply with this provision of the FMLA and affords a significant exemption from liability for employers. We do not think Congress intended this anomalous result.

Accordingly, we conclude that an employee is not barred from proceeding with a retaliation claim under the FMLA if he or she has been employed for less than twelve months but requests

leave to begin more than one year after employment commenced. Recognizing that notice pleading is all that is necessary and deeming the allegations in the complaint to be true for present purposes, we will deny the defendants' motion to dismiss plaintiff's claims under the FMLA. In doing so, we express no opinion as to whether plaintiff will or should ultimately prevail on the merits.

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ORDER

AND NOW, this 18th day of April, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants to dismiss plaintiff's complaint is GRANTED in part and DENIED in part;

(2) the motion of defendants to dismiss Count I of plaintiff's complaint against defendant Ron Weaver is GRANTED;

(3) the motion of defendants to dismiss Counts II and III of plaintiff's complaint is DENIED;

(4) the motion of defendants to dismiss Count IV of plaintiff's complaint is GRANTED without prejudice to plaintiff's ability to re-file such claim in state court; and

(5) the motion of defendants to dismiss Counts V and VI of plaintiff's complaint is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III

J.