

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

LOUISE D. BOYD : CIVIL ACTION
 :
 :
 v. :
 : No. 06-1524
 :
 CITY OF PHILADELPHIA :

ORDER - MEMORANDUM

AND NOW, this 22nd day of March, 2007, “Defendant’s Motion for Summary Judgment” is granted. Judgment is entered in favor of defendant and against plaintiff. Fed. R. Civ. P. 56(c).¹

This is an action under the Family Medical Leave Act, 29 U.S.C. § 2601, et seq. The following facts are undisputed. Beginning in 1985, plaintiff Louise D. Boyd was employed by defendant City of Philadelphia in its Water Department. Complaint, ¶¶ 6, 7. According to her supervisor, during the course of her employment, plaintiff’s attendance was erratic and resulted in progressive discipline. Deposition Transcript of Francis Bevenour, at 17-19 and 21-31. In July 2005, during a meeting with her supervisor, plaintiff was advised that she would be subject to a 10-day suspension as a result of poor attendance. Id. at 19-20. During the meeting, she was presented with her attendance record for the period August 2004 to July 10, 2005. The record showed that she had worked only 885 hours in that 12-month period. See Employee Attendance Record, Exhibit “A” to Affidavit of Francis X. Meiers, Exhibit

¹ “Summary judgment is proper when there is ‘no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.’ A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof.” Doe v. Abington Friends School, – F.3d –, 2007 WL 777561, at * 3 (3d Cir., Mar. 15, 2007) (citations omitted).

“F” to defendant’s motion.

Upon being advised of the forthcoming suspension, plaintiff requested an additional 20-day leave of absence for “rehabilitation.” Deposition of Louise D. Boyd, at 9-11. According to plaintiff’s deposition testimony, her supervisor, in response, “stated that he did not know whether I had any Family Medical Leave available. If not that he would approve a leave of absence.” Boyd N.T. at 11. Plaintiff further testified that she had not requested “that sort of leave of absence” in the past, but that she had previously requested Family Medical Leave for health purposes. Boyd N.T. at 11. Plaintiff did not complete a written FMLA request for the requested leave of absence. Boyd N.T. at 19-20

On August 15, 2005, the City terminated plaintiff’s employment, having determined that more than 15 days had passed since the inception of her suspension and she had abandoned her employment. Complaint, ¶ 15. Plaintiff was undergoing treatment for alcohol abuse at a facility in Florida. Affidavit of Louise D. Boyd, 6.

According to the complaint, defendant’s denial of leave and the termination of her employment violated FMLA. Complaint, ¶ 21. Defendant contends that at the time of her termination, plaintiff was not entitled to leave under FMLA because she had not worked 1,250 hours in the preceding 12-month period.

Under FMLA, an “eligible employee” is “an employee who has been employed (i) for at least 12 months by the employer with respect to whom the leave is requested under 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)(i) and (ii). Here, plaintiff’s Employee Attendance Record establishes that she did not work the requisite number of hours in the 12-month period preceding her termination and, therefore, was not an eligible employee entitled to protection under FMLA.

Plaintiff counters that under a regulation of the Department of Labor, she should be deemed eligible under FMLA in that defendant did not affirmatively notify her of her ineligibility. See 29 C.F.R. § 825.110(d). However, this regulation has been uniformly rejected by the appellate courts that have considered it. Woodford v. Community Action of Greene County, Inc., 268 F.3d 51, 57 (2d Cir. 2001) (“The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute’s clear eligibility requirements.”); Brungart v. Bell South Telecommunications, Inc., 231 F.3d 791, 796-97 (11th Cir. 2000) (“There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled.”); Dormeyer v. Commerica Bank-Illinois, 223 F.3d 579, 582 (7th Cir. 2000) (“The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months.”) It is unlikely that our Court of Appeals would disagree with the reasoning of the three circuits that have considered the issues. In our view, the DOL regulation in question does not provide plaintiff protective standing under FMLA.

Plaintiff also urges that defendant is equitably estopped from asserting that she is not an eligible employee inasmuch as she justifiably relied upon defendant’s representations

when she chose to take leave. However, the record does not support plaintiff's position. The evidence is that plaintiff's supervisor told her that he did not know whether she was eligible for FMLA leave. Compare Woodford, 268 F.3d at 57 (if employer confirms employee's eligibility for leave, it is estopped to later challenge eligibility); Dormeyer, 223 F.3d at 582 (where an employer by his silence misleads an employee regarding eligibility for leave, it may later be estopped to deny eligibility).

Additionally, the evidence establishes that defendant provided plaintiff with the City of Philadelphia FMLA Guidebook, which discusses the requirements of the Act at length, see Exhibit "C" to defendant's motion. The requirements for FMLA leave were also posted on bulletin boards at plaintiff's place of employment. Compare Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 724 (2d Cir. 2001) (if defendant's failure to post required notices resulted in detrimental reliance, defendant could be estopped to deny eligibility).

Accordingly, judgment must be entered in favor of defendant and against plaintiff.

BY THE COURT:

/s/ Edmund V. Ludwig
Edmund V. Ludwig, J.