

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SUSAN SCHWAGER

Plaintiff,

vs.

FRONTIER COMMUNITY SERVICES,
INC.

Defendant.

Case No. 3:07-cv-00128 TMB

ORDER
Granting Defendant's Motion for Summary
Judgment

I. MOTION PRESENTED

Defendant Frontier Community Services, Inc. ("FCS") has moved for summary judgment on Plaintiff Susan Schwager's claim that FCS interfered with her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2653, by terminating her employment with FCS the day after she returned from FMLA-covered leave. The motion has been fully briefed and the Court heard oral argument on January 9, 2009. For the reasons stated below, the Court GRANTS the Defendant's motion.

II. BACKGROUND

FCS is a non-profit agency based in Soldotna, Alaska that provides job training and other services to developmentally disabled individuals. Schwager began working for FCS in 1999, and in 2005 moved to the position of vocational aide. Her duties included supervising FCS clients at their job sites.¹ Following a November 2006 change in her supervisors, Schwager began to experience increasing work-related stress.² The record shows that by March 2007, she had received one "consult" and three verbal warnings from her supervisors, Toni Pease and Stephanie Crosby, and

¹ Dkt. 15, Ex. C at 9, Ex. D.

² *Id.* at 61.

another “consult” from a case manager.³ FCS has characterized all of the “consults” and warnings as related to “boundary issues” between Schwager and the agency’s clients.⁴

On April 9, 2007, Schwager went to see Dr. Pedro Perez about her mental stress and tight muscles in her right shoulder area. Dr. Perez gave Schwager an injection of Marcaine to release the tension in her muscles and prescriptions for Zanaflex, Norco and Valium.⁵ Schwager filled the prescriptions the following day and took the medications as prescribed before going to work.⁶ Her job that day was to supervise an FCS client employed at a Home Depot. After finishing her work with the client, Schwager called Pease and told her the medication had made her sleepy and that she wanted to take the rest of the day off.⁷ Pease thought Schwager sounded “loopy” and asked if she planned to take the same medication the following day.⁸ Schwager responded that she had no choice and needed to take the medication for pain. Pease then approved Schwager’s request for the afternoon off.⁹

Pease also reported the incident to Crosby, who then recommended to Rachelle Brehm, FCS’s human resources director, that Schwager be terminated.¹⁰ The agency’s executive director, Ken Duff, made the final decision to terminate Schwager after meeting with Brehm and Crosby.¹¹

³ Dkt. 15, Ex. F at 14-19, 23-28, 37-38; Ex. E at 14-17; Ex. G at 14-15.

⁴ *Id.*

⁵ Dkt. 32, Ex. 5 at 19, 59.

⁶ Dkt. 32, Ex. 6 at 81.

⁷ *Id.* at 116-17.

⁸ Dkt. 15, Ex. E at 9-11.

⁹ *Id.*

¹⁰ Dkt. 30, Ex. 2 at 74; Dkt. 31, Ex. 4 at 14.

¹¹ Dkt. 31, Ex. 3 at 14, 55.

Brehm indicated during her deposition that the decision to fire Schwager was made on April 10, 2007 and that termination paperwork was prepared to give to Schwager the next day.¹²

In the meantime, Schwager contacted Dr. Perez after leaving work on April 10 and reported that she was experiencing mental stress.¹³ Dr. Perez recommended that she take two weeks off.¹⁴ The following day, Schwager informed FCS that she needed to miss work due to stress, and Dr. Perez's office faxed a notice to FCS excusing her absences for two weeks. On April 23, Dr. Perez extended the medical release for another two weeks, and Schwager returned to work on May 9.¹⁵ On that day, Brehm and Crosby called Schwager into a meeting and informed her that she had been terminated.¹⁶ They also gave her a written "Employee Warning" document that summarized the "consults" and verbal warnings she had received earlier and listed the specific FCS policies she was alleged to have violated. These included polices on conflicts of interest, ethics, and general employee conduct and work rules.¹⁷

Schwager filed suit against FCS in U.S. District Court on July 17, 2007, alleging a single claim of interference with her rights under the FMLA.

III. LEGAL STANDARD

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."¹⁸ In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most

¹² Dkt. 15, Ex. A at 72-74.

¹³ Pl.'s Resp. Br. at 4.

¹⁴ *Id.*

¹⁵ Dkt. 32, Ex. 5 at 42-43; Dkt. 30, Ex. 1 at 20.

¹⁶ Dkt. 30, Ex. 2 at 80-82.

¹⁷ Dkt. 30, Ex. 1 at 72-82; Dkt. 15, Ex. A at 18-19.

¹⁸ Fed. R. Civ. Proc. 56(c).

favorable to the nonmoving party.¹⁹ Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.²⁰

IV. DISCUSSION

The FMLA provides job security and leave entitlements to employees who must take absences from work because of their own illnesses or to care for family members.²¹ The FMLA entitles qualifying employees to take unpaid leave for up to twelve weeks each year provided they have worked for the covered employer for twelve months.²² The Act also guarantees that an employee who takes FMLA-protected leave has the right to be reinstated to his or her original position or to a position equivalent in benefits, pay, and conditions of employment upon return from leave.²³ In tandem with these rights, the FMLA explicitly prohibits employers from interfering with employees' rights under the Act. Under the FMLA, it is illegal for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]."²⁴ Separately, the FMLA prohibits employers from taking action against an employee who protests or otherwise opposes employer actions that violate the Act. An employer may not "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the Act]."²⁵

_____ In *Bachelder v. America West Airlines, Inc.*, the Ninth Circuit distinguished between the FMLA's anti-interference and anti-discrimination provisions.²⁶ The court noted that "the issue is

¹⁹ See *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

²⁰ See *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

²¹ *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248-49 (1986).

²² 29 U.S.C. § 2612(a).

²³ 29 U.S.C. § 2614(a).

²⁴ 29 U.S.C. § 2615(a)(1).

²⁵ 29 U.S.C. § 2615(a)(2); see also 29 C.F.R. § 825.220(e).

²⁶ *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001).

one of interference with the exercise of FMLA rights . . . not retaliation or discrimination.”²⁷ The court further noted that the “plain meaning” of the anti-retaliation or anti-discrimination provisions does “not cover visiting negative consequences on an employee simply because he has used FMLA leave,”²⁸ instead such an action would be covered by the “interference” provision under § 2615(a)(1).²⁹

To prevail on an interference claim, a plaintiff must establish that: (1) she is an eligible employee, as defined in 29 U.S.C. § 2611(2); (2) the employer is covered by the FMLA, as defined in 29 U.S.C. § 2611(4); (3) she was entitled to take leave as defined in 29 U.S.C. § 2612(a)(1); (4) she gave notice of her intention to take leave, as defined in 29 U.S.C. §2612(e)(1) and 29 C.F.R. §§ 825.302-.303; and (5) defendants denied her the benefits to which she was entitled under the FMLA.³⁰

Schwager’s FMLA claim is one of interference; she asserts that Frontier improperly based her firing, at least in part, on her use of FMLA-covered leave. The first four elements of such a claim are undisputed; only the fifth is at issue here.

Frontier contends that it is entitled to summary judgment because Schwager would have been terminated regardless of whether she took leave, and because the decision to terminate her was made before the agency received notice that she planned to take leave. Therefore, the agency argues, her dismissal cannot be viewed as a denial of benefits. Frontier also points out that Schwager stated

²⁷ *Id.* (citing 29 U.S.C. § 2615(a)(1)).

²⁸ Under authorization from Congress, the Department of Labor (“DOL”) has issued implementing regulations for the FMLA. 29 U.S.C. §2654. Any violation of the FMLA or the DOL regulations constitutes an “interference” with an employee’s rights under the FMLA. The DOL regulations further interpret “interference” to include “not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.”29 C.F.R. § 825.220(b).

²⁹ *Bachelder*, 259 F.3d at 1124.

³⁰*Mak v. Asante*, 2007 WL 1887748 *7 (D.Or. 2007); *Price v. Multnomah County*, 132 F.Supp.2d 1290, 1297 (D.Or. 2001).

during her deposition that she never believed her termination was related to her use of FMLA-covered leave.³¹

Schwager asserts that Frontier violated the FMLA by basing her dismissal, in part, on her use of FMLA-covered leave and by failing to restore her to her position, or an equivalent one, after she returned from leave. She asserts two theories in support of this. The first is that her supervisors anticipated that she might take FMLA leave, and then fired her because of this. The second is that the written reasons given by FCS for her dismissal are at odds with the deposition testimony of Duff, Crosby and Brehm, and that because of this “mismatch” a jury could infer that her dismissal was based in part on her use of FMLA leave.

Schwager points out, accurately, that an FMLA claim can be proven through direct or circumstantial evidence.³² Yet her efforts to raise triable issues of fact through circumstantial evidence fall short. With regard to her fired-in-anticipation-of-leave theory, Schwager asserts:

[I]t can be inferred that it was FCS’s concern that Schwager, who was under stress and in pain regularly, would have to take off from and be absent for her medical condition and that FCS could not allow that to continue. So FCS terminated her for taking leave.

Schwager initially took off from work on April 10, the day FCS says the decision to terminate Schwager was made. Viewing this evidence in the light most favorable to plaintiff a jury could conclude that based upon the circumstances, FCS wanted to fire Schwager for having to take FMLA leave in the future because of her serious medical conditions of stress and pain.³³

In support of this theory, Schwager points to deposition testimony by Toni Pease, who said that she was bothered by Schwager’s daily application of a pain patch and discussion of her doctor’s appointments and medical condition.³⁴ Pease stated: “It just bothered me because I felt like I don’t want to know what other people’s medication business is, I don’t want to know your personal problems, and every day it became a part of her routine to put a pain patch on, or talk about a doctor

³¹ Dkt. 15, Ex. 6 at 68.

³² *See Bachelder*, 259 F.3d at 1125.

³³ Pl.’s Resp. at 14.

³⁴ Dkt. 15, Ex. E at 20-21.

appointment, and I just didn't want to hear none of that."³⁵ Given this testimony, a reasonable jury could conclude that there was friction between Schwager and her immediate supervisor over her use of pain medication. But this evidence does not support an inference that FCS fired Schwager in anticipation of her use of FMLA leave. Schwager has presented no evidence that FCS managers viewed the use of FMLA-covered leave, either generally or by her in particular, in a negative light. Nor has she pointed to any evidence refuting FCS's contention that the decision to dismiss her was made on April 10, the day before she actually notified the agency that she would be on medical leave.

Likewise, Schwager's argument that FCS's stated reasons for dismissing her were false or inapplicable is not supported by the evidence. The written notice given to Schwager accuses her of violating five FCS policies covering conflicts of interest, the agency's code of ethics, general employee conduct and work rules, and a policy prohibiting staff members from loaning or giving money to clients.³⁶ Schwager contends that "[i]f the reasons set forth in the employee warning termination document are clearly inapplicable to policy violations then the reason given for plaintiff's termination are bogus and could lead to a reasonable inference that Schwager's taking FMLA leave constituted a negative factor in the decision to terminate her."³⁷

The "Employee Warning" document dated April 11, 2007 alleges that Schwager violated the conflict-of-interest policy by taking a FCS client to meet former employees and to a coffee shop, and by allowing the client to speak with a former FCS employee on her cell phone. In response, Schwager notes that Duff testified that neither Brehm nor Crosby told him that she had violated this policy.³⁸ But she does not directly refute the alleged violations. FCS responds that although Duff

³⁵ *Id.* at 20.

³⁶ Dkt. 15, Ex. A at 18-19.

³⁷ Pl.'s Resp. Br. at 12.

³⁸ *Id.* at 5-6.

must approve all terminations, “as Executive Director of a 300+ employee non-profit organization, he relies on his management team in making termination decisions.”³⁹

The “Employee Warning” also accuses her of repeatedly violating the agency’s ethics policy by giving or receiving gifts from clients and by continually sneaking snacks such as soda pop and candy to clients.⁴⁰ In response, Schwager points to Duff’s deposition testimony that the ethics policy does not explicitly bar employees from exchanging gifts with clients, and to Crosby’s deposition testimony that she did not recall any incidents after March 21, 2007 when Schwager accepted gifts from clients or was disciplined for doing so. This testimony hardly supports an inference that the alleged policy violations were pretextual. As FCS points out in rebuttal, Crosby explained during her deposition that although not explicitly prohibited, Schwager’s exchanging of gifts with clients raised a “boundary issue” and was, thus, implicitly prohibited.⁴¹

Under FCS’s policy on “Employee Conduct and Work Rules,” Schwager was expected to provide “structure, supervision, and to monitor consumers while job coaching.”⁴² But the April 11, 2007 “Employee Warning” accuses her of “fail[ing] to maintain her job coaching responsibilities and placing the consumer at high risk” by taking medications that made her sleepy while working on April 10.⁴³ Schwager points out that the policy does not explicitly prohibit employees from taking prescription medications before or while they are working. She also notes that Duff could not identify Schwager’s specific job coaching duties at Home Depot, what drugs she had taken, or what dangers, if any, she posed to the FCS client working there.⁴⁴ As noted above, Duff was FCS’s executive director, and not Schwager’s immediate supervisor. Therefore, his lack of knowledge of her specific responsibilities or the details of her medical care do not support an inference that the

³⁹ Def.’s Reply Br. at 3.

⁴⁰ Dkt. 15, Ex. A at 18.

⁴¹ Dkt. 15, Ex. F at 19.

⁴² Dkt. 15, Ex. A at 18.

⁴³ *Id.*

⁴⁴ Pls.’s Resp. Br. at 7.

reasons given for her dismissal were pretextual. Even if Schwager's taking of the prescription drugs had no ill effect on her job performance, Pease's and Crosby's reaction to the Home Depot incident still does not support an inference that her dismissal was based on FMLA-covered leave.

The final two FCS policies Schwager is accused of violating address the mistreatment or neglect of clients, and loaning money to clients. FCS has offered no evidence to support the allegations that Schwager violated these two policies, suggesting that Schwager did not violate these policies. Nonetheless, the fact that FCS has failed to substantiate these accusations does not give rise to an inference that Schwager's use of FMLA leave was a factor in the agency's decision to fire her; nor does it invalidate the evidence related to the other reasons given for her dismissal.

In sum, Schwager has presented no evidence, either direct or circumstantial, from which a reasonable jury could conclude that FCS's dismissal of her was based, even in part, on her use of FMLA-covered leave. Given this, the Court grants summary judgment in favor of FCS.

V. CONCLUSION

The Court GRANTS the Defendant's Motion for Summary Judgment at Docket No. 15.

Dated at Anchorage, Alaska, this 20th day of January 2009.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE