IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SALLY M. KINNEY, Plaintiff, vs. HOLIDAY COMPANIES, HOLIDAY STATIONSTORES, INC., HOLIDAY DIVERSIFIED SERVICES, INC., and HOLIDAY ALASKA, INC., Defendants.	Case No. 3:07-cv-0147-RRB **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Before the Court are Defendants Holiday Companies, Holiday Stationstores, Inc., Holiday Diversified Services, Inc., and Holiday Alaska, Inc. (collectively "Holiday"), with a Motion for Summary Judgment at Docket 34. Holiday seeks summary judgment against Plaintiff Sally Kinney ("Kinney") on the grounds that Kinney was not entitled to FMLA leave as alleged in her complaint, and that Holiday did not deny any request for FMLA leave.[1]

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[1] Docket 35.

Kinney argues in opposition that "it is clear that Sally Kinney did ask to be excused from work because she was not feeling well, due to the reoccurrence of cancer, and that there was a causal connection between the notice to the company that the cancer recurred and her termination shortly after that notice."[2]

II. BACKGROUND

Plaintiff Kinney has been in and out of treatment for kidney cancer since 1997. Due to her cancer treatment, Kinney took unpaid FMLA leave from her employment as a cashier at a Holiday gas station in May 2005, and then again in 2006.[3] The cancer returned in February 2007 and Kinney began taking Sutent, a chemotherapy medication.[4] Her side effects from the Sutent and other medications included dizziness, light-headedness, and nausea.[5]

On March 13, 2007, Kinney was scheduled for a 5:00 a.m. to 1:00 p.m. shift at Holiday. Kinney claims that she was feeling very tired and sick and "did not want to be there that day."[6] Nonetheless, Kinney went to work that day, with the expectation

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[2] Docket 42 at 13-14.

[3] Docket 35 at 2.

[4] Id.

[5] Docket 42 at 2.

[6] Docket 42 at 3.

that she would ask her manager, Luisa Nadore, if she "could go home".[7] Nadore arrived as expected at 7:00 a.m. According to Kinney, at that time she told Nadore, "I wasn't feeling good, that I needed to go home, and could she possibly find somebody to come in."[8] According to Kinney, Nadore told her that "she would try" to find a replacement for Kinney.[9] After that point, neither Nadore nor Kinney brought up the question of whether Kinney would finish working that day.[10]

On the same day, Kinney sold cigarettes to a secret shopper sent by Holiday to ensure compliance with Holiday's tobacco sales policy. Kinney did not card the secret shopper, which was a violation of Holiday's policy requiring employees to check the identification of all tobacco purchasers under the age of 40.[11] According to Holiday, this was Kinney's second tobacco compliance violation within a year, for which she was terminated on March 16,

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[7] Docket 46, Exhibit H at 59.

[8] Docket 46, Exhibit H at 61.

[9] Docket 46, Exhibit H at 61.

[10] Docket 46, Exhibit H at 62.

[11] Docket 42 at 4.

2007, in accordance with company policy.[12] The first violation allegedly occurred in November of 2006.[13]

Plaintiff's original complaint alleged two causes of action: (1) that Holiday had violated the Family and Medical Leave Act, 29 USC §§ 2601 et seq. ("FMLA") by denying her request for medical leave, and (2) that Defendants had interfered with Plaintiff's right to seek medical leave under the FMLA.[14]

III. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[15] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[16] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue

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[12] Docket 35 at 4.

[13] Docket 35 at 4.

[14] Docket 1 at Exhibit 1.

[15] Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[16] Id. at 323-325.

for trial.[17] All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.[18] However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[19]

IV. DISCUSSION

Holiday is entitled to summary judgment on both of Kinney's claims. Even if the Court were to believe all the evidence submitted by Kinney and draw every reasonable inference in her favor, she still cannot support an FMLA claim because her statements to her supervisor did not constitute a legally sufficient request for FMLA leave.

Under 29 U.S.C. § 2615(a)(1), it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the Family "and Medical Leave Act.[20] It is also unlawful under § 2615(a)(2) "for any

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[17] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-9 (1986).

[18] Id. at 255.

[19] Id. at 248-9.

[20] 29 U.S.C. § 2615(a)(1).

employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the FMLA."[21] Any employer who violates either of these provisions "shall be liable to any eligible employee affected."[22]

It is evident upon a careful reading of Kinney's complaint that both Count I and Count II arise under § 2615(a)(1). Count I alleges that Holiday "refused to grant Plaintiff medical leave when she requested it" and that Holiday's "refusal to grant Plaintiff leave violated the Family and Medical Leave Act."[23] Count II alleges that, "[b]y forcing Plaintiff Kinney to work when she was ill, Defendants interfered with Plaintiff's right to seek leave pursuant to the [FMLA]."[24]

In other words, Kinney has pled one claim for the "denial" of a right to leave under the FMLA and one claim for "interference" with the same right. Both of Kinney's claims for relief, however, require proof of the following factual premises: (1) that she was eligible for FMLA leave on March 13, and (2) that

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[21] 29 U.S.C. § 2615(a)(2).

[22] 29 U.S.C. § 2617(a)(1).

[23] Docket 1 at Exhibit 1, p. 3.

[24] Docket 1 at Exhibit 1, p. 4.

she made an effective request for FMLA leave. If either of these premises fail, then Kinney's claims are deficient.

It is unnecessary for the Court to determine whether Kinney was eligible for leave because her request for leave was ineffective as a matter of law. Kinney's testimony as to what she told Nadore on March 13, 2007 is as follows:

> Q. So when Luis came in and you discussed how you were feeling with her, do you recall what you told her?
>
> A. Well, best I can remember, I told her I wasn't feeling good, that I needed to go home, and could she possibly find somebody to come in.[25]

Aside from the inherent ambiguity of the request (i.e. "if she could find someone"), the Court agrees with Holiday that such a request does not fit within the statutory framework of FMLA at all. The FMLA comprehends two categories of leave: foreseeable leave (i.e., the need for leave is foreseeable at least 30 days in advance),[26] and unforeseeable leave.[27] As noted in Bachelder v. America West Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001), when the leave is foreseeable, an employee is expected to submit a request for leave in a timely manner so that an employer can

[25] Docket 46, Exhibit H at 61.

[26] 29 C.F.R. § 825.302.

[27] 29 C.F.R. § 825.303.

determine whether to approve or deny the leave in advance.[28] If the leave is unforeseeable, then the employee need only submit the request "as soon as practicable".[29]

It may be that the leave is so unforeseeable that the request for leave is either contemporaneous with the employee's absence or even subsequent to the absence.[30] In that case, the employee can simply submit the request so the absence may be retroactively approved or denied as FMLA leave after an evaluation by the employer.[31]

With either foreseeable or unforeseeable leave, the employer has a proper opportunity to consider the request and ask for necessary documentation from a medical provider[32] before issuing an approval or denial. Where the employee requests unforeseeable FMLA leave approval after the fact, the FMLA regulations require the employee to submit documentation supporting the leave and "to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying."[33]

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[28] 29 C.F.R. § 825.302.

[29] Bachelder at 1130, citing 29 C.F.R. § 825.303.

[30] See e.g. Bachelder at 1131.

[31] Id.

[32] 29 C.F.R. § 825.115 (2006).

[33] 29 C.F.R. § 825.303(b).

In Kinney's case, she gave Holiday no such opportunity. Presumably Kinney's requested leave was of the "unforeseeable" variety. If Kinney had actually called in sick on the day in question, then Holiday would have had the chance to determine after the fact whether her absence qualified as FMLA leave. That is not what happened. There was no "absence" for Holiday to evaluate after the fact. If a request for time off such as Kinney's could qualify as a valid FMLA request, that would put Ms. Nadore in the absurd position of deciding on her own, mid-shift, whether Kinney's request for leave was a valid one.

To illustrate the problem with Kinney's claims, suppose that Kinney does have an actionable claim for denial of FMLA leave. At what moment did that claim accrue? Did Nadore have a duty under the FMLA to dismiss Kinney from work immediately after Kinney asked for the rest of the day off? How long was Nadore allowed to look for a replacement before violating Kinney's FMLA rights? Twenty minutes? An hour? Were the six hours left on Kinney’s shift a reasonable amount of time for Nadore to decide whether Kinney's request met FMLA standards? Would Kinney's reading of the statute permit Nadore sufficient time to consult corporate counsel or human resources to obtain their opinion as to whether the leave was valid? What if Holiday had requested documentation of Kinney's need to take leave that day, as is their right under the FMLA?

These questions have no answer because Kinney has no cognizable claim under the FMLA. The statute cannot possibly require what Kinney says it does, which is that an employer must decide within hours or minutes whether an employee qualifies for leave under the FMLA. Because Kinney's request for leave was deficient as a matter of law, her FMLA claims cannot withstand a motion for summary judgment.

The Court notes, parenthetically, that there is no need to address Kinney’s allegations of wrongful termination. Her complaint is premised on the improper denial of FMLA leave, an allegation which is unsupportable regardless of the ultimate reasons for her termination.

V. CONCLUSION

For the foregoing reasons, Holiday’s Motion for Summary Judgment at **Docket 34** is **GRANTED.** The Court, however, noting the good faith nature of Plaintiff’s claims, the economic disparity between the parties, and the unique fact situation presented, concludes that each party should bear its respective costs and attorneys fees.

IT IS SO ORDERED.

ENTERED this 19th day of February, 2009.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE