

Court of Claims of Ohio

The Ohio Judicial Center
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JOHN M. EVERT

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2012-03719

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

DECISION

{¶1} On August 30, 2013, the magistrate issued a decision recommending judgment for defendant.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” On September 13, 2013, plaintiff filed both a transcript of the proceedings and his objections to the magistrate’s decision. On September 25, 2013, defendant filed a response.

{¶3} Plaintiff brought this action alleging violations of the Family and Medical Leave Act of 1993 (FMLA), disability discrimination under R.C. 4112.02 and 4112.99, and equitable and promissory estoppel. The issues of liability and damages were bifurcated for trial. Following a trial on the issue of liability, the magistrate recommended judgment in favor of defendant.

MAGISTRATE’S RECOMMENDATION

{¶4} According to the magistrate's recommendation, plaintiff was employed as a technician in the cardiac sonography lab at defendant's Ross Heart Hospital. The magistrate noted that plaintiff's duties included taking ultrasound images of patients' hearts. Shortly after beginning his employment with defendant, plaintiff began taking more leave than defendant's attendance policy allowed. On July 15, 2009, plaintiff received a written reprimand for violating defendant's attendance policy. According to plaintiff, his absences were largely attributable to migraine headaches.

{¶5} After receiving a written reprimand for violating defendant's attendance policy, at defendant's suggestion, plaintiff submitted an FMLA certification form dated July 24, 2009, providing that plaintiff may need intermittent leave one to three times a month, for one to three days at a time, due to migraines. Plaintiff subsequently submitted several additional FMLA certification forms providing for intermittent leave due to migraines and fibromyalgia. Plaintiff's FMLA certifications provided leave for migraines, head pain, fibromyalgia, chiropractic care for migraine relief, sleep apnea, asthma, restless leg syndrome and childbirth and prenatal care for plaintiff's wife. All of plaintiff's FMLA certifications were approved, and all of plaintiff's approximately 135 leave requests were granted.

{¶6} The magistrate found that since April 2011, plaintiff averaged about two full days each month of unscheduled leave relating to migraines or fibromyalgia. On March 1, 2012, defendant authored a "hardship letter" wherein defendant outlined the burden within the department as a result of plaintiff's FMLA absences. On April 9, 2012, after a meeting with plaintiff, defendant placed plaintiff on continuous leave until such time that plaintiff could provide documentation from a medical care provider showing that plaintiff's restrictions had changed such that he would no longer need as many unplanned, intermittent absences as he had been taking. Plaintiff did not request or require a continuous leave of absence as a result of a serious medical condition—defendant placed plaintiff on continuous leave as a result of the alleged

burden his absences were creating for the department. After exhausting plaintiff's remaining FMLA leave balance and an additional six months of unpaid leave offered by defendant, plaintiff's employment was terminated effective November 26, 2012.

{¶7} Regarding plaintiff's FMLA claim, the magistrate determined that "regular and consistent attendance" is a "bona fide requirement of the position that plaintiff held" and "that plaintiff was unable to perform an essential function of his job, i.e., maintaining regular and consistent attendance." Magistrate's decision, pg. 9-10. Accordingly, the magistrate concluded that "plaintiff did not have a right under the FMLA to the intermittent leave he sought for migraine headaches and fibromyalgia, that he did not have a right under the FMLA to be restored to his position, and that [he] was not denied any FMLA benefits to which he was entitled." *Id.*

{¶8} With respect to plaintiff's disability discrimination claim, the magistrate determined that plaintiff "could not substantially perform an 'essential function' of the job within the meaning of that term under the [Americans with Disabilities Act (ADA)]." *Id.* at 12. Regarding plaintiff's claim of estoppel, the magistrate concluded that "plaintiff failed to demonstrate either a definite misrepresentation or a clear and unambiguous promise to the effect that he had a long-term entitlement to take cumulatively substantial intermittent, unplanned absences." *Id.* Thus, the magistrate recommended judgment for defendant.

PLAINTIFF'S OBJECTIONS

{¶9} Plaintiff has interposed 26 objections to the magistrate's decision; however, plaintiff's objections generally address four different subject areas. In plaintiff's objections numbered 1-12, plaintiff challenges the magistrate's characterization and recitation of the facts and the magistrate's alleged failure to include in his recommendation various aspects of witness testimony and evidence presented at trial.

{¶10} In plaintiff's objections numbered 13-20, plaintiff challenges the magistrate's legal conclusions with regard to plaintiff's FMLA claim. Specifically, plaintiff argues that the magistrate erred in finding (1) that regular and consistent attendance is a bona fide requirement of the position that plaintiff held within the meaning of the FMLA; (2) that the FMLA does not afford plaintiff the right to unplanned, unpredictable absences; (3) that plaintiff was unable to perform an essential function of his job; (4) that plaintiff did not have a right under the FMLA to be restored to his position; (5) that plaintiff did not have a right under the FMLA to the intermittent leave he sought for migraine headaches and fibromyalgia; (6) that plaintiff was not denied any FMLA benefits to which he was entitled; and (7) that there was no causal connection between any protected FMLA activity and any adverse employment action.

{¶11} In plaintiff's objections numbered 21-24, plaintiff challenges the magistrate's legal conclusions regarding his disability discrimination claim. Specifically, plaintiff argues that the magistrate erred by (1) failing to conclude that the definition of disabled in a prima facie case of disability discrimination includes being perceived as disabled and that defendant perceived plaintiff as being disabled; (2) failing to find that defendant was entitled to provide plaintiff with a reasonable accommodation, and that defendant failed to provide plaintiff with such a reasonable accommodation; and (3) failing to find that plaintiff established a prima facie case of disability discrimination and that any justification for defendant's actions was mere pretext for impermissible disability discrimination.

{¶12} Finally, in plaintiff's objections numbered 25-26, plaintiff challenges the magistrate's conclusions regarding his claims of equitable and promissory estoppel.

STANDARD OF REVIEW

{¶13} In reviewing a party's objections, the "court must conduct an independent analysis of the underlying issues, undertaking the equivalent of a de novo determination

and independently assessing the facts and conclusions contained in the magistrate's decision." *Shihab & Assoc. Co. LPA v. Ohio Dept. of Transp.*, 168 Ohio App.3d 405, 2006-Ohio-4456, ¶ 13 (10th Dist.); *Dayton v. Whiting*, 110 Ohio App.3d 115, 118 (2nd Dist.1996).

FACTUAL FINDINGS

{¶14} The court accepts and adopts the factual findings of the magistrate. The court agrees with the magistrate's recitation of facts and credibility determinations. Accordingly, plaintiff's objections numbered 1-5, 7-11 are OVERRULED.

{¶15} With respect to plaintiff's 6th objection, as noted above, since April 2011, plaintiff averaged two full days each month of unscheduled leave relating to migraines or fibromyalgia, far short of the 12 weeks afforded under the FMLA. Additionally, defendant approved each of plaintiff's FMLA certifications and granted all of plaintiff's approximately 135 leave requests. At no point did plaintiff exceed the maximum amount of leave afforded under the FMLA. Accordingly, plaintiff's 6th objection is SUSTAINED.

{¶16} Finally, with respect to his 12th objection, the magistrate is under no obligation "to comment on each item of evidence." *Stanley v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 12AP-999, 2013-Ohio-5140, ¶ 50. Plaintiff's 12th objection is OVERRULED.

FMLA

{¶17} "The FMLA entitles qualifying employees to up to twelve weeks of unpaid leave each year if, among other things, an employee has a 'serious health condition that makes the employee unable to perform the functions of the position of such employee.'" *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir.2005), quoting 29

U.S.C. 2612(a)(1)(D). Pursuant to 29 U.S.C. 2612(b), FMLA leave may be taken “intermittently or on a reduced leave schedule when medically necessary.”

{¶18} “There are two separate theories of recovery under the FMLA: the ‘interference’ theory and the ‘retaliation’ theory. *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 244 (6th Cir.2004). The ‘interference’ theory is based on 29 U.S.C. 2615(a)(1), which states that employers cannot ‘interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided . . .’ by the FMLA. In order to state an interference claim pursuant to the FMLA, [plaintiff] ‘must show that (1) he was an eligible employee; (2) [defendant] was an employer subject to the FMLA; (3) he was entitled to leave under the FMLA; (4) he gave [defendant] notice of his intention to take FMLA leave; and (5) [defendant] denied him FMLA benefits to which he was entitled.’” *Gates v. United States Postal Serv.*, 502 Fed.Appx. 485, 488-489 (6th Cir.2012), quoting *Romans v. Mich. Dept. of Human Servs.*, 668 F.3d 826, 840 (6th Cir.2012). “The ‘retaliation’ or ‘discrimination’ theory arises from 29 U.S.C. 2615(a)(2), which states that an employer cannot ‘discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.’ To establish a prima facie case of retaliation pursuant to the FMLA, [plaintiff] must establish that (1) he was engaged in an activity protected by the FMLA; (2) the employer knew that he was exercising his rights under the FMLA; (3) after learning of his exercise of FMLA rights, the employer took an employment action adverse to him; and (4) there was a causal connection between his protected FMLA activity and the adverse employment action.” *Id.* at 489.

{¶19} Plaintiff may present direct evidence of unlawful conduct or circumstantial evidence using the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 313-16 (6th Cir.2001); *Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir.2000). Using the burden shifting analysis, if plaintiff establishes a prima facie case, the burden

shifts to defendant to proffer a legitimate, nondiscriminatory rationale for discharging the employee. *Id.*

{¶20} “The purpose of the FMLA is to allow an employee to be away from the job * * *. For example, an employee’s inability to work may be due to a required absence for chemotherapy. While the employee is receiving treatment and is away from his or her job, the employee is unable to perform the functions of his or her job and is entitled to leave under the FMLA. However, while the employee is at his or her job, the employee must be able to perform the essential functions of the job. * * * In short, the legislative history demonstrates that the FMLA protects an employee who must leave work, or reduce his or her work schedule, for medical reasons, as long as that employee can perform the job while at work.” *Hatchett v. Philander Smith College*, 251 F.3d 670, 677 (8th Cir.2001). One of the rights or benefits afforded by the FMLA is that an employee returning from FMLA leave is generally entitled to be restored to the position the employee held when the leave commenced, or to an equivalent position. *Id.*

{¶21} The magistrate found that plaintiff averaged two full days each month of unscheduled leave relating to migraines or fibromyalgia between April 2011 and April 2012, or approximately 25 days for the year. The court notes that defendant initially suggested that plaintiff seek FMLA certification. Defendant approved all of plaintiff’s FMLA certifications from 2009 through 2012 and granted all of plaintiff’s approximately 135 leave requests. At no time did plaintiff exceed the maximum amount of allowable FMLA leave during his employment with defendant. In April 2012, defendant placed plaintiff on unrequested, continuous FMLA leave, forcing plaintiff to exhaust his remaining FMLA leave balance despite plaintiff’s certifications providing for intermittent leave. Following an additional period of unpaid leave, defendant terminated plaintiff’s employment. The court finds that defendant terminated plaintiff’s employment

because he could not maintain consistent, reliable attendance as a result of his medical condition.

{¶22} Defendant argues that plaintiff's excessive absenteeism created a burden on the department and that such absenteeism was too frequent and unpredictable for scheduling purposes. Defendant maintains that such frequent, unscheduled intermittent requests for leave negatively affected plaintiff's department and compromised patient safety. As a result, defendant argues that regular, consistent attendance is an essential function of the position that plaintiff held and that plaintiff was not entitled to reinstatement or restoration under the FMLA inasmuch as plaintiff was unable to meet the essential functions of the position. However, it is not clear at what point plaintiff's FMLA absences became disruptive or at what point those absences began to violate defendant's attendance policy.

{¶23} While the court can sympathize with defendant's difficulty in dealing with such scheduling issues, the court is unaware of an exception within the FMLA for scheduling difficulties or the burden created on an employer based upon the facts of this case. Furthermore, it is unclear to the court at what point plaintiff's requests for FMLA leave became too frequent and too difficult for defendant to accommodate especially considering the fact that plaintiff never exceeded the maximum amount of allowable leave under the FMLA. Moreover, defendant has not suggested nor does the evidence establish what defendant considers to be an acceptable number of FMLA protected absences.

{¶24} Again, the magistrate determined, the evidence establishes, and the court has found, that, as a result of a serious medical condition, plaintiff averaged approximately two full days of leave each month from April 2011 through April 2012. There is no dispute according to the evidence that plaintiff required intermittent leave due to a serious medical condition that prevented him from being at work. Plaintiff's intermittent leave was always in accordance with his medical certifications and

defendant accommodated plaintiff's medical leave requests for approximately three years prior to terminating plaintiff's employment.

{¶25} Plaintiff was part of a team of as many as 12 or 13 technicians responsible for taking ultrasound images of patients' hearts, although defendant employed as few as 10 technicians at other times. The technicians work Monday through Friday, 8:00 a.m. to 4:30 p.m., and usually succeed in fulfilling all the orders for inpatient testing by the end of each shift. Remaining scans are usually performed the next day. Additionally, technicians rarely work past 4:30 p.m., although a technician is on call to work at all other times. There is no suggestion that plaintiff was unable to perform the essential functions of the job while he was at work.

{¶26} Based upon the evidence, the court finds that plaintiff has proven his FMLA claim under both interference and retaliation theories. The court finds that plaintiff was an eligible employee; defendant was an employer subject to the FMLA; that plaintiff was entitled to leave under the FMLA; and that defendant denied him FMLA benefits to which he was entitled by placing plaintiff on continuous leave, even when he did not request or need such leave, and by not permitting plaintiff to resume work unless and until he could provide documentation from a medical care provider that his restrictions had changed such that he would no longer need as many unplanned, intermittent absences as he had been taking.

{¶27} Additionally, the court finds that plaintiff engaged in an activity protected by the FMLA; that defendant knew that plaintiff was exercising his rights under the FMLA; that defendant took an employment action adverse to him by placing plaintiff on unrequested, continuous medical leave, prohibiting plaintiff's intermittent leave and ultimately terminating his employment; and that there is a causal connection between his protected FMLA activity and the adverse employment action. Plaintiff has presented direct evidence to satisfy his claims inasmuch as there is no dispute that defendant placed plaintiff on continuous FMLA leave because he was unable to

maintain consistent, regular attendance as a result of his medical condition. Furthermore, using the burden shifting framework established in *McDonnell Douglas*, the court finds that defendant has not articulated a legitimate, nondiscriminatory rationale for placing plaintiff on continuous medical leave and ultimately discharging plaintiff. Accordingly, plaintiff's objections numbered 13-20 are SUSTAINED.

DISABILITY DISCRIMINATION

{¶28} To establish a prima facie case of disability discrimination, a plaintiff must demonstrate: (1) that he was disabled; (2) that an adverse employment action was taken by his employer at least in part because plaintiff was disabled, and (3) that plaintiff, even though disabled, can safely and substantially perform the essential functions of the job in question. *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571 (1998). "Because an employee must prove all three elements in order to establish a prima facie case of disability discrimination, the failure to establish any single element is fatal to a discrimination claim." *Taylor v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 11AP-385, 2011-Ohio-6060, ¶ 20.

{¶29} "It is a 'rather common-sense idea . . . that if one is not able to be at work, one cannot be a qualified individual.' *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir.1999). Both before and since the passage of the ADA, a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir.2012) (regular attendance was an essential job function of a neo-natal intensive care unit nurse).

{¶30} The court agrees with the magistrate's conclusion that regular, consistent attendance is an essential function of the job within the meaning of the ADA and that plaintiff cannot establish one of the elements necessary for a prima facie showing of disability discrimination. Accordingly, plaintiff's objections numbered 21-24 are

OVERRULED.

EQUITABLE AND PROMISSORY ESTOPPEL

{¶31} “In order to establish a claim of equitable estoppel under the FMLA, an employee must show: (1) the employer made a definite misrepresentation of fact knowing the employee would rely upon it; (2) the employee reasonably relied upon the misrepresentation; and (3) the employee was harmed as a result of his/her reasonable reliance.” *Hershberger v. Altercare, Inc.*, 5th Dist. No. 2006CA00167, 2007-Ohio-1452, ¶ 48. “To establish a claim for promissory estoppel, an employee must prove: (1) a clear and unambiguous promise, (2) made by the employer, (3) which the employer should reasonably and foreseeably expect to induce reliance by the employee, and (4) upon which the employee must have actually relied and suffered injury as a result.” *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶ 35.

{¶32} The court agrees with the magistrate’s conclusion that plaintiff failed to demonstrate either a definite misrepresentation or a clear and unambiguous promise to the effect that plaintiff had a long-term entitlement to take intermittent, unplanned absences. Plaintiff’s objections numbered 25-26 are OVERRULED.

PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶33} On August 30, 2013, the magistrate issued a decision recommending judgment for defendant.

{¶34} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Plaintiff timely filed objections.

{¶35} Upon review of the record, the magistrate’s decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law with the exceptions noted in the decision filed concurrently herewith. Therefore, the objections are OVERRULED, in part, and SUSTAINED, in

part. The court modifies the magistrate's decision and recommendation, including findings of fact and conclusions of law contained therein, consistent with this decision.

{¶36} Judgment is rendered in favor of plaintiff with respect to plaintiff's FMLA claim. Judgment is rendered in favor of defendant with respect to plaintiff's claims of disability discrimination and equitable and promissory estoppel. A case management conference is set for *May 9, 2014, at 11:30 a.m.*, to discuss further proceedings. The court shall initiate the conference via telephone.

PATRICK M. MCGRATH

Judge

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