IP 03-0930-C M/S Mason v St Vincent Hospital
Judge Larry J. McKinney Signed on 11/8/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TERRY MASON,	)	
Plaintiff,	)	
	)	
vs.	)	1:03-cv-0930-LJM-VSS
	)	
ST. VINCENT HOSPITAL AND HEALTH	)	
CARE CENTER,	)	
MARY SPINK,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on defendants', St. Vincent Hospital and Health Care Center, Inc., ("St. Vincent"), and Mary Spink ("Spink") (collectively "Defendants") Motion for Summary Judgment. Plaintiff Terry Mason ("Mason") brings claims under the Family and Medical Leave Act ("FMLA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and 42 U.S.C. § 1981 (§ 1981), for terminating her employment on September 9, 2002, when she requested leave to treat depression. Mason conceded that summary judgment is appropriate as to her Title VII and § 1981 claims. Pl.'s Resp. at 1 n. 1. Therefore, the Court considers only Mason's accommodation and retaliation claims under the FMLA.

For the reasons stated herein, the Court **GRANTS** Defendants' Motion for Summary Judgment.

I. BACKGROUND

Mason was hired by St. Vincent as a full-time Account Representative in Patient Accounts

on or about August 14, 2000. Pl.'s Dep. at 23-24. After working for St. Vincent in that position for over two years, Mason saw an Internet posting for a full-time Administrative Assistant position at St. Vincent's West Lake Counseling Center ("West Lake Counseling"), and contacted Spink, the supervisor for the position. *Id*. at 31-32. Mason was transferred to the new position on July 29, 2002. *Id*. at 67-68. Her responsibilities included working the front desk, answering the telephone, making payments, and setting up appointments. *Id*. at 33. Mason held this position for approximately six weeks, until September 12, 2002,when her employment ended. *Id*. at 68. The material events leading to the end of Mason's employment primarily occurred during the week beginning September 9, 2002, but the parties present markedly different versions of the facts surrounding Mason's separation from St. Vincent.

Mason asserts that she began experiencing overwhelming symptoms of depression, including crying spells, feelings of anxiousness and of being overwhelmed, hot flashes and sweaty palms, feeling sad, and inability to think clearly. *Id*. at 8, 10. Mason missed work on Monday, September 2, 2002, worked only three hours on Thursday, September 5, 2002, and missed work on Friday, September 6, 2002. Pl,'s Exh. 8. Mason was again absent on Monday, September 9, and visited Dr. Bonnie R. Strate ("Dr. Strate"), who diagnosed her as being depressed, and prescribed the anti-depressant Zoloft. Pl.'s Exh. 9. Dr. Strate noted Mason's complaint that she "can't go back to her present job – too stressful," and that Mason was "tearful." *Id*.

On Tuesday, November 10, 2002, Mason returned to work and provided a "doctor's note" to Spink, dated September 9, 2002, which read, "Terry L. Mason was seen in our office today and is under treatment. She may return to work on 9/10/02." Pl.'s Exh. 13. Mason testifies that a letter from Dr. Strate, explaining that she suffers from "major depression," accompanied the note. Pl.'s

Dep. at 85-86. Mason worked Tuesday, September 10, 2002, and Wednesday, September 11, 2002, without incident. Pl.'s Exh. 8.

Mason claims that on Thursday, September 12, 2002, her symptoms of depression again became overwhelming. Pl.'s Resp. at 4. Mason testifies that when checking out a patient, Spink saw that she was having trouble, and intervened to finish the task. Pl.'s Dep. at 97-98. Soon thereafter, Spink held a weekly staff meeting, attended by Mason, Christa Brown ("Brown"), and Michelle Spalding ("Spalding"). *Id*. at 88-89. In the meeting, Mason testified that she asked for a few days off to get some medicine into her system, and that she was suffering from depression. *Id*. at 100-01. Mason also testified that she asked to go home and Spink said "we need you here" and "well, if you leave, you're fired." *Id*. at 100-03. Mason alleges that she was fired in the meeting. *Id*. at 99-100. St. Vincent alleges a very different story, specifically, that Mason resigned. St. Vincent asserts that during the September 12, 2002, meeting, Spink noticed that Mason was shaking her head and Spink asked her what was wrong. Spink Aff. ¶ 12. Mason responded that she could not do her job and there was too much work. Spink then asked what Mason would like to do, and she responded that she guessed she would "quit" and look for another job. Spink Aff. ¶ 12; Spalding Aff. at 3; Brown Aff. ¶ 5. Spink told Mason it would take more time to learn her job. *Id*. Mason got up and began walking out of the room, at which time Spink asked for Mason's keys and badge and asked her to write out a letter of resignation. *Id*. Mason handed Spink her keys and badge, but refused to write out a resignation. *Id*. Spink followed Mason out of the room and accompanied her as she was walking out of the facility. Spink Aff. ¶ 12.

II. STANDARDS

A. SUMMARY JUDGMENT

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562

(7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

On certain occasions, the Seventh Circuit had suggested that a court approach a motion for summary judgment in an employment discrimination case with a particular degree of caution. *See e.g ., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). The language implied that summary judgment might be less appropriate in this context based upon the presence of issues of motive and intent. *Holland*, 883 F.2d at 1312. As the Seventh Circuit has emphasized, however, these cases do not establish a heightened summary judgment standard for employment-related cases. Instead, the

language from the prior cases simply means "that courts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be." *Wallace v. SMC Pneumatics*, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997). Even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. *See Holland*, 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. *See Cliff v. Board of School Comm'rs*, 42 F.3d 403, 408 (7th Cir. 1994).

B. FMLA STANDARDS

The FMLA establishes two categories of broad protections for employees. First, the FMLA contains prescriptive protections that are expressed as substantive statutory rights. *See King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999). The Act provides eligible employees of a covered employer the right to take unpaid leave for a period of up to twelve work weeks in any twelve-month period for a serious health condition as defined by the Act. *See id.* (*citing* 29 U.S.C. § 2612(a)(1)). After the period of qualified leave expires, the employee is entitled to be reinstated to the former position or an equivalent one with the same benefits and terms of employment that existed prior to the exercise of the leave. *See id.* (*citing* 29 U.S.C. § 2614(a)). To insure the availability of these guarantees, the FMLA declares it "'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided.'" *Id.* (*quoting* 29 U.S.C. § 2615(a)(1)).

When an employee alleges a deprivation of these substantive guarantees, the employee must

demonstrate by a preponderance of the evidence only entitlement to the disputed leave. In such cases, the intent of the employer is immaterial. *See id*. (*citing Diaz v. Fort Wayne Foundry Corp*., 131 F.3d 711, 713 (7th Cir. 1997) ("We shall continue to resolve suits under the FMLA . . . by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims")).

In addition to the substantive guarantees contemplated by the Act, the FMLA also affords employees protection in the event they are discriminated against for exercising their rights under the Act. *See id*. (*citing* 29 U.S.C. § 2615(a)(1)-(2)). Specifically, "'[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave.'" *Id*. (*quoting* 29 C.F.R. § 825.220(c)). Furthermore, an employer may not consider the taking of FMLA leave as a negative factor in employment actions. *See id*. Because the FMLA's implementing regulations bar certain discriminatory conduct, the protections contemplated by these sections have been characterized as proscriptive in nature. *See id*.

In contrast to what an employee must show to establish a deprivation of a substantive guarantee under the Act, when an employee raises the issue of whether the employer discriminated against that employee by taking adverse action against him for having exercised an FMLA right, the question of intent is relevant. *See id*. The issue becomes whether the employer's actions were motivated by an impermissible retaliatory or discriminatory animus. *See id*.

FMLA retaliation claims are evaluated in the same way as claims of retaliation under Title VII. *See Buie v. Quad/Graphics, Inc*., 366 F.3d 496, 503 (7th Cir. 2004). The plaintiff can proceed by the direct method, with direct or circumstantial evidence that the employer acted for prohibited reasons, or by the indirect method. Under the indirect method, if the plaintiff establishes a prima

facie case, and the employer articulates a noninvidious reasons for its action, the plaintiff must provide evidence from which a jury reasonably could find this reason was a pretext. If so, summary judgment is inappropriate. *See Id*. at 503.

III. DISCUSSION

To succeed on her FMLA claim, Mason must prove: (1) that she is an eligible employee under the FMLA, 29 U.S.C. § 2611(2); (2) that St. Vincent is an employer under the FMLA, 29 U.S.C. § 2611(4); (3) that she is entitled to leave under the FMLA, 29 U.S.C. § 2612(a)(1); and (4) that St. Vincent improperly denied her leave under the FMLA, 29 U.S.C. § 2615. *See, e.g. Hammond v. Interstate Brands Corp*., 2002 WL 31093603, at *11 (S.D. Ind. Aug. 28, 2002). It is undisputed that Mason is an eligible employee under the FMLA and that St. Vincent is an employer under the FMLA; therefore, the first two elements are met. However, the parties dispute whether Mason was entitled to FMLA leave on and after September 12, 2002, whether Mason gave adequate notice, and whether St. Vincent improperly denied Mason's alleged request for leave under the FMLA. The issue of whether Mason suffered from a "serious health condition" is determinative, therefore, the Court will not reach all of the issues raised by the parties.

The FMLA authorizes leave, among other reasons: "Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). "Serious health condition" is a term of art defined by the statute and the Department of Labor regulations. This provision of the FMLA is aimed at genuinely serious and incapacitating conditions. It was not intended to mandate, as a matter of federal law, a uniform national sick leave policy for minor or temporary illnesses and discomforts. S.Rep. No. 103-3, at

28 (1993), *reprinted in* 1993 U.S. Code Cong. & Ad. News 3, 30. Further, it is not sufficient for an employee to merely assert that he suffered from a serious health condition; a claimant must provide evidence of his serious health condition. *See Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 500 (7th Cir. 1999). The FMLA defines "serious health condition" as follows:

> The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –
>
> > (A) inpatient care in a hospital, hospice, or residential medical care facility; or
> >
> > (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11).

Mason did not receive inpatient care in a hospital or other residential medical care facility at any relevant time. She visited Dr. Strate on one occasion before her separation from St. Vincent. Therefore, Mason's condition did not satisfy the criteria of 29 U.S.C. § 2611(11)(A). Whether Mason suffered from a serious health condition rendering her unable to do her job therefore depends on whether she was receiving "continuing treatment by a health care provider" within the meaning of 29 U.S.C. § 2611(B). The applicable Department of Labor regulation defines "continuing treatment by a health care provider," in pertinent part, as:

> (2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> > (i) A *period of incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
> >
> > > (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care

> provider, or by a provider of health care services (*e.g.*, physical therapist) under the orders of, or on referral by, a health care provider; or
>
> (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. . . .

29 U.S.C. § 2611(B)(2)(i)(A)-(B). In other words, to substantiate a "serious health condition," Mason must show: (1) that she had a period of incapacity requiring absence from work; (2) that this period of incapacity exceeded three days, and (3) that she received continuing treatment by a health care provider within the period. *See Haefling*, 169 F.3d at 499.

In support of her claim of incapacity, Mason relies exclusively on her own affidavit and deposition testimony.[1] *See* Pl.'s Resp. at 12. In sum, her testimony asserts that she experienced a period of incapacity for more than three calendar days due to the symptoms of her depression. Pl.'s Resp. at 9. However, Mason's allegations are too general and conclusory to create a genuine issue of material fact for trial. A plaintiff's own statement is insufficient to establish incapacity under the FMLA. *See Haefling*, 169 F.3d at 500 (without evidence from treating physician, plaintiff's self-serving assertions regarding the severity of his medical condition and the treatment it required were insufficient to raise issue of fact under FMLA); *Bell v. Jewel Food Store*, 83 F. Supp. 2d 951, 959 (N.D. Ill. 2000) ("[Plaintiff's] own statement is not enough to establish he was incapacitated: [he] must provide evidence from a medical professional or health care provider that he was unable to work."), *citing Joslin v. Rockwell Intern. Corp.*, 8 F. Supp. 2d 1158, 1160 (N.D. Iowa 1998) (finding that an employee's own testimony that she was unable to work because of her illness was

[1] Arguably, Mason also attempts to rely on the testimony of Michelle Spalding and Krista Brown that Mason was "frazzled" during the weekly staff meeting. *See* Pl.'s Exh. 10; Pl.'s Exh. 11. However, such observations, without more, do not, in any discernable manner, support the notion that Mason was "incapacitated."

insufficient to prove that she was incapacitated); *accord*, *Austin v. Haaker*, 76 F. Supp. 2d 1213, 1221 (D. Kan. 1999) (same). *See also Levine v. Children's Museum of Indianapolis*, 2002 WL 180054, at *6 (S.D. Ind. July 1, 2002) (granting summary judgment for employer on FMLA case where employee offered only his own and his wife's statements that he was incapacitated, and offered no evidence from a health care provider showing need to take time off from work), *aff'd mem*., 61 Fed. Appx. 298 (7th Cir. 2003); *Brannon v. OshKosh B'Gosh, Inc*., 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (plaintiff's testimony that she was too sick to work was insufficient to satisfy her burden on summary judgment; her doctor's "speculation" that it was not unreasonable for someone with her condition to be incapacitated three to four days also did not satisfy burden).[2]

Mason rests only on conclusory allegations that her depression forced her to miss several days of work the week before she was fired and that she was unable to perform her job duties. Furthermore, the only evidence from her treating physician does not support her assertion that she was incapacitated and unable to work. Dr. Strate, in a note regarding Mason's September 9, 2002, appointment, wrote: "Terry L. Mason was in our office today and is under treatment. She may return to work on 9/10/02." Pl.'s Exh. 13. On October 4, 2002, Dr. Strate also filled out an Indiana Department of Workforce Development form for unemployment benefits, where Dr. Strate indicated that Mason was released to work, is available to work, and was not advised to quit work. *See* Pl.'s Exh. 12. Mason has produced no evidence, that, at any time, Dr. Strate – or any other health care professional for that matter – opined that Mason was unable to work due to her illness.

[2] The Court assumes there may be clear-cut cases in which any reasonable person would agree, without needing medical testimony, that the employee was incapacitated, but Mason's depression is not such a case.

Mason also seems to argue that depression constitutes a *per se* "serious health condition," and diagnosis alone entitles her to leave under the FMLA. *See* Pl.'s Resp. at 8-9. Mason cites several Seventh Circuit cases where depression was found to be a serious medical condition for the purposes of the FMLA. *See* Pl.'s Resp. at 7-9 (*citing Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 382 (7th Cir. 2003*; Collins v. NTN-Bower Corporation*, 272 F.3d 1006, 1008 (7th Cir. 2001); *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996). The Court disagrees with this contention. In the cases cited by Mason, the plaintiffs presented, through evidence provided by health care professionals and treating physicians, evidence of their depression. Here, Mason has merely asserted that she suffered from a serious health condition, without providing the Court with supporting evidence, which is insufficient to state a claim under the FMLA. Clearly, there are cases in which depression is considered to be a "serious health condition," but mere diagnosis of depression does not necessarily dictate that the diagnosed individual is *per se* "incapacitated" or suffering from a "serious medical condition."

The record does not contain any evidence demonstrating that Mason's depression health condition was of the severity contemplated by the FMLA. Indeed, although Mason testified in her deposition that she suffered from a number of symptoms indicative of depression, there is no evidence in the record establishing that Mason was "incapacitated." Mason did not submit an affidavit from her doctor or any other medical personnel demonstrating that she was unable to work, and Mason's own self-serving assertions regarding the severity of her medical condition and its effects are insufficient to raise an issue of fact on this point. The complete dearth of evidence submitted by Mason on this issue compels the conclusion that Mason is incapable of establishing that she suffered from a "serious health condition," as this term is defined by the FMLA.

Without evidence of incapacity, Mason's substantive FMLA claim fails as a matter of law because she cannot make a prima facie showing that he suffered from a "serious health condition," and summary judgment must be granted in favor of St. Vincent. Because Mason was not entitled to FMLA leave, her FMLA retaliation claim adds nothing to her case, so summary judgment must also be granted on the retaliation theory.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** defendants', St. Vincent Hospital and Health Care Center, Inc., and Mary Spink, Motion for Summary Judgment.

IT IS SO ORDERED this ___ day of November, 2004.

_____
LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.