UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JILLIAN LANKFORD,

Plaintiff,

v

THE SALVATION ARMY

Defendant.

Case No. 2:20-cv-12656
Hon. Nancy G. Edmunds
Magistrate Kimberly G. Altman

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PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED

1. Whether there is a genuine issue of material fact that Defendant discharged Plaintiff for requesting pregnancy leave where Defendant demonstrated hostility toward Plaintiff due to her pregnancy and leave request, offered shifting rationales for her termination, and proffered reasons for her termination that were ordinarily insufficient to warrant termination.

Plaintiff says "Yes."

Defendant says "No."

I. INTRODUCTION

Plaintiff Jillian Lankford was terminated by Defendant Salvation Army in retaliation for taking FMLA leave immediately after giving birth to her second child. At the time of Ms. Lankford's termination, she had been an employee for eleven years with a stellar performance record. Defendant's managerial witnesses described Ms. Lankford as an "amazing," "phenomenal," "exceptional," and "fantastic" employee. (***Exhibit 11,*** 33-34; 47-50**;** ***Exhibit 15,*** 27**)** Despite this positive acclaim, Plaintiff was terminated upon returning to work from maternity leave on October 1, 2018.

In an attempt to explain Plaintiff's termination, Defendant threw mud against the proverbial wall to see what would stick. Namely, Plaintiff was told that she was being terminated for sending negative emails that created a hostile work environment and for re-enrolling on the Defendant's health insurance back in late 2017. (***Exhibit 5,*** 148) As for the first gob of mud, the Robert Idzior ("R. Idzior) and Larry Manzella, two of Defendant's managers responsible for the decision to terminate Plaintiff testified under oath that he did not review the negative statements in question. (***Exhibit 15****,* 40-41; ***Exhibit 16,*** *60*) Another manager, Jacqulynn Idzior ("J. Idzior") could not testify to a single person being terminated for being rude in the past. (***Exhibit 2,*** *para. 24; E****xhibit 5,*** 162; ***Exhibit 11,*** 134;). Neither R. Idzior or J. Idzior could testify as to following up with the witnesses or providing Ms. Lankford with an opportunity to respond. ***(Exhibit 11****,* 111-115; 120; ***Exhibit 15,*** 45) Instead, the lead decision maker, Manzella, testified

that he did not even know that was a reason offered for her termination. **(*Exhibit 16,*** 62)

Yet, in its Position Statement to the EEOC, Defendant relied almost exclusively on the alleged tone of Plaintiff's emails to explain why Plaintiff was discharged. (***Exhibit 14,*** n5) Only in a rather perfunctory footnote did the Defendant allege that Ms. Lankford had attempted to commit fraud by signing up for the employer's healthcare insurance. It is easy to understand why the Defendant initially relegated this baseless allegation to a footnote—Plaintiff's re-enrollment on health insurance provided by the Defendant was done with full knowledge of Defendant. Namely, Plaintiff's re-enrollment was completed using Defendant's health insurance forms prepared with the assistance of Defendant and authorized by personnel in Human Resources. (***Exhibits* 7**; ***Exhibit 8*)** While Defendant feigns ignorance, all three management officials responsible for terminating Plaintiff arguably possessed knowledge having audited Plaintiff's personnel file as recently as January 2018. (***Exhibit 5,*** 104, 110; ***Exhibit 11,*** 97) This Court should not reward such untoward conduct by granting Defendant's meritless Motion. That Motion should be denied and Plaintiff should be awarded costs and attorneys' fees for being forced to respond.

II. STATEMENT OF FACTS

A. Background.

On August 19, 2007, Plaintiff was hired by Defendant as a cashier. (***Exhibit 17***) During her eleven years with the employer, Ms. Lankford received glowing praise and

compliments from management as well as numerous promotions. (***Exhibit 18***) By May 27, 2015, Plaintiff was promoted to the Assistant Director of Operations. (***Exhibit 1*****).** In December 2016, Ms. Lankford was told by the Director of Operations, Jacqulynn Idzior, that Ms. Idzior was going to be the new Administrator of Southeast Michigan after the prior Administrator retired. (***Exhibit 2***, ¶ 3-7) Ms. Lankford was told by Ms. Idzior that she would be promoted to Director once Ms. Idzior became the Administrator. (Id. at ¶7) At that time, Plaintiff notified Ms. Idzior that she was pregnant and intended to take maternity leave. (Id.)

After informing Ms. Idzior of her intent to maternity leave, Plaintiff was written up for allegedly creating a hostile work environment for the first time in the nine years that she had worked for Defendant. (Id. at ¶8) Then, Defendant began removing Plaintiff's job duties, including her role as a supervisor. (Id.) Prior to commencing her maternity leave, she was informed that she was not going to be returned to her old position of Assistant Director of Operations. (Id.) As noted by Ms. Lankford, she essentially "had to hand over [her] entire job before [she] left for maternity leave." (Id.) In April 2017, Plaintiff took her first maternity leave. (***Exhibit 5,*** 63) After recovering from giving birth to her son (Id.), she returned to work on July 3, 2017. Upon her return, Plaintiff was informed that she was going to be the Idziors' Executive Assistant. (Id. at 51, 67) Ms. Lankford's new position was dramatically different than her prior position significantly broadening her responsibilities, but without any commensurate change in

her compensation. (Id. at 65, 130; ***Exhibit 2***, ¶9)[1]

B. Plaintiff's Second Maternity Leave and Subsequent Termination

Ms. Lankford found out that she was pregnant with her second child and informed the employer in January 2018. (***Exhibit 2***, ¶14) At that time, Ms. Lankford had indicated that she intended to work throughout her leave. (Id.) However, she began to believe that it would be too much for her to do so and she emailed management on May 15th that she was not going to be able to work during her leave. (Id.) Whereas she had received a discretionary bonus based on her work performance in December 2017 and constant praise from January to May 2018, that all ended on May 15th. (Id. at ¶15)

At that point, there was a noticeable change in management's attitude toward Plaintiff with managers no longer making eye contact, excluding her from emails that she ordinarily had been copied on, and nit-picking her over minor issues. (Id.) Both Manzella and R. Idzior expressed frustrations over finding people to take over Plaintiff's numerous job responsibilities while she was on leave. (***Exhibit 2***, ¶16; ***Exhibit 5***, 122-24) J. Idzior testified to emailing other managers admitting to be distraught over Ms. Lankford's May 15th email requesting maternity leave. (***Exhibit 9***, 85) After that, Plaintiff heard from Dea Weathers in Human Resources that R. Idzior had been going

[1] Despite Defendant's mischaracterization that it had granted Plaintiff an "exorbitant raise," Plaintiff's exhibit 4 to the Manzella dep shows that Plaintiff's salary was right about at the average of where it should be for the Executive Assistant position– not at the high end or the low end.

through Plaintiff's personnel file, which was not regularly done. (**Exhibit 5,** 91**; Exhibit 2,** ¶17) Even Manzella admitted that the normal process for reviewing an employee's personnel file is through the Legal Department. (***Exhibit 16***, 56)

Plaintiff's leave began unexpectedly four days early on July 11, 2018 due to Plaintiff suffering a back injury at home. (***Exhibit 5,*** 121-22; 134-35) On October 1, 2018, Plaintiff returned to work. That same day, Plaintiff's "temporary" replacement while she was on leave had already been set up in Ms. Lankford's office with Plaintiff's personal items already boxed up and off to the side. (***Exhibit 16***, 67) Plaintiff was terminated that day for allegedly being rude and using a disrespectful tone months prior and for re-enrolling on the employer's health insurance. (***Exhibit 2***, ¶18; ***Exhibit 11***, 100; ***Exhibit 12***) Ms. Lankford was not provided the statements that were allegedly "rude" or "disrespectful." (Id. at ¶19) Plaintiff was not even given examples. (Id.) Nor was she asked any questions by the Defendant or allowed to respond in any way. (Id.) After her termination, Ms. Lankford was told that the Defendant had been calling in Plaintiff's co-workers asking questions about her while she was out on leave. (Id. at ¶20). Only after Plaintiff filed an EEOC charge did Plaintiff receive the statements that the Defendant had collected against her. (Id. at ¶22) Nothing in the statements appeared to claim that Plaintiff was rude or disrespectful. (***Exhibit 11***, 93-95) Notably, the statements involved individuals who Plaintiff had a good relationship with or spent time with socially. (Id. at ¶21) Other statements that were produced came from employees

with whom Plaintiff did not even closely work with. (Id.) The Defendant's other rationale for Plaintiff's termination was relegated to a footnote in its Position Statement that Ms. Lankford's termination was due to her re-enrolling in the Defendant's health insurance. (***Exhibit 14, n5)*** Now, Defendant has changed its story primarily relying on that second rationale for Plaintiff's discharge. This convenient shift is likely due to the deposition testimony of its managers. Namely, Manzella (the lead decision maker) testified that he was unaware of the investigation into Jillian's alleged "rude" behavior until after it happened nor did he ever look at the statements. (***Exhibit 16***, 59-60) Manzella noted that he did not recall any other employee who had been fired for rudeness or having an attitude. (Id. at 64) Instead, Manzella believed that Plaintiff was only terminated for the health insurance issue. (Id. at 60)[2]

C. Defendant's Rationale for Terminating Plaintiff has No Basis in Fact

Defendant asserts that Plaintiff committed fraud by re-enrolling for health insurance benefits allegedly in violation of the terms of an offer for a raise that Plaintiff received in 2016. Specifically, Plaintiff had asked Ms. Idzior for a $20,000 raise.

[2] Similarly, J. Idzior testified that she did not think that many of the emails that Defendant allegedly relied on before the EEOC were rude. (***Exhibit 11,*** 128-32) Furthermore, J. Idzior testified that she did not rely on any of these emails to terminate Jillian for rudeness, even though they are presented that way in the EEOC position statement. (Id.) More so, she testified that there had been other complaints about tone or curtness, including her husband R. Idzior. (Id. at 134-35) Yet, not single person had been fired for that. (Id.)

(***Exhibit 2***, ¶3) While a $20,000 raise would have exceeded the pay range for the Assistant Director of Operations position, Plaintiff asserted that the $20,000 raise would compensate her for the extra responsibilities that she had taken on as she was in training to become the new Director of Operations at the time. (Id.) Ms. Idzior suggested that Plaintiff prepare a proposal as the Administrator of Southeast Michigan was "handing out money." (Id.) Ms. Lankford submitted her proposal in May 2016. (***Exhibit 3***) Plaintiff requested raise would bring her annual compensation to $75,000 per year. Plaintiff's salary would remain the same for three years, i.e, until 2019. Plaintiff offered to unenroll from the Defendant's insurance program and accept the following additional responsibilities as the Assistant Director of Operations including: 1) management of all operations; 2) executing lease renewals 3) regular visits to challenging stores; 4) development of regular and routine training programs; 4) supervision of additional stores and/or warehouses; among other responsibilities. (Id.)

That proposal was expressly limited to the position of Assistant Director of Operations. (Id.)

On June 20, 2016, Defendant provided Plaintiff with a $20,000 raise. The terms of this raise are documented in a handwritten note on Defndant's Payroll Change Notice:

> Jillian has guaranteed 3 years to the company at this proposed wage. Next annual [review] due May 15, 2019 (please see her attached proposal).

(***Exhibit 4***) No mention was made in Defendant's handwritten acceptance of Plaintiff's $20,000 raise proposal about any disenrollment from Defendant's health insurance

coverage. (Id.) This form was produced by Defendant to Plaintiff from Plaintiff's "Personnel File, Bates numbers 0077-00278," which is maintained by Defendant's Human Resources ("HR") department. The pay raise had been processed by Human Resources Director, Dea Weathers ("Weathers").

More than a year later, on July 12, 2017, Plaintiff waived her health insurance coverage because she and her child were covered under her husband's health insurance program. (***Exhibit 7***) Plaintiff submitted this form to Defendant's Human Resources Department. (***Exhibit 5***, 52-53). After returning from her first maternity leave, however, she was no longer an Assistant Director of Operations and, instead, returned from leave to a new position of Executive Assistant as indicated above. As Plaintiff was no longer in the Assistant Director of Operations position, Plaintiff spoke to Defendant's HR Director, Dea Weathers, in October 2017 to see if she could re-enroll in Defendant's health insurance coverage. (Id.) This conversation resulted in Ms. Weathers providing Plaintiff with the necessary paperwork for re-enrollment. (Id.) At no time did Ms. Weathers mention to Plaintiff any putative healthcare waiver of 2016. (Id.) On October 25, 2017, Defendant processed its Health Benefits reinstatement confirmation for Plaintiff acknowledging that she and her family had been re-enrolled for healthcare coverage effective January 1, 2018 to December 31, 2018. (***Exhibit 6***; ***Exhibit 8***)

After she had been re-enrolled in the employer's health insurance, Ms. Lankford's personnel file was reviewed as part of a regular annual audit. On January 23-26, 2018,

Defendant received the results of the audit. (***Exhibit 9***; ***Exhibit 16)*** Larry Manzella, Defendant's Administrator at the time, forwarded a copy of this Internal Audit to J. Idzior and R. Idzior. (Id.) After he reviewed the audit, Manzella told Plaintiff that her file had been flagged because her $20,000 pay raise in 2016 had not been approved by the Board at Command. (***Exhibit 5***, 110) Manzella said he had to justify this raise for the Executive Assistant position. (Id.) Manzella asked Plaintiff to prepare an Executive Assistant job description. (***Id.*** at 110-11). On January 29, 2018, Plaintiff submitted the Executive Assistant job description to J. Idzoir and R. Idzior. (***Exhibit 10***) At no time did Manzella indicate that there was an issue with Ms. Lankford's health insurance. The document was produced by Defendant to Plaintiff from Plaintiff's "Personnel File Produced in 2018, Bates numbers 00279-00414," which is maintained by Defendant's HR department.

On August 9, 2018, Plaintiff completed Defendant's Health Care Special Enrollment/Change Form in order to add her newborn son to Defendant's healthcare coverage. (***Exhibit 20***) This form was approved by Defendant, again, without issue. ***Id.*** This form was produced by Defendant to Plaintiff from Plaintiff's "Insurance Documents" file, Bates numbers 0077-00278, which is maintained by Defendant's HR department. Simply put, there is no evidence in the record that Ms. Lankford made one misrepresentation, hid anything at all from the Defendant, or was otherwise not permitted to enroll on the employer's health insurance plan.

III. STANDARD OF REVIEW

Under FED. R. CIV. P. 56(a), the Defendant must show that there is no genuine dispute as to material fact and movant is entitled to judgment as a matter of law. However, moving party must support its assertions of fact in a "form admissible in evidence."[3] "[T]he movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."[4] The Sixth Circuit instructs that "caution should be exercised in granting summary judgment once a plaintiff has established a *prima facie* inference of retaliation through direct or circumstantial evidence."[5]

IV. ARGUMENT

Under the Family Medical Leave Act, Plaintiff is entitled to twelve weeks of leave per twelve-month period of time because she is an eligible employee working for a covered employer and suffering from a serious health condition. Upon returning from leave, Defendant was required to restore Plaintiff to her position prior

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[3] FED. R. CIV. P. 56(c)(2).

[4] ***Smith v. Hudson***, 600 F.2d 60, 63-64 (6th Cir. 1979). Furthermore, employment actions are inherently fact-based. Summary judgment should "seldom be granted . . . unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." ***Hindman v. Transkrit Corp.***, 145 F.3d 986, 990 (8th Cir. 1998).

[5] ***Singfield v. Akron Metropolitan Housing Auth.***, 389 F.3d 555, 564 (6th Cir. 2004).

to the leave.[6] Plaintiff alleges that her termination both interfered with her rights under the FMLA and constituted retaliation. Similarly, Plaintiff alleges that she was discriminated against on the basis of her pregnancy and childbirth in violation of the Pregnancy Discrimination Act of 1978 (PDA) and Michigan's Elliott Larsen Civil Rights Act (ELCRA). MCL §372.2101, *et seq.*[7]

A. Plaintiff has Produced Sufficient Evidence that There Exists a Genuine Issue of Material Fact Over Whether Her Discharge was Caused by Her Pregnancy and Request for Leave

Under FMLA, Defendant may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."[8] Employees have a right to be restored to their position or a similar position upon returning from leave.[9] Under ***Jennings v. Mid-American Energy Co.***, Even though Plaintiff was allowed to take leave, Plaintiff also had a right to be restored to her position once she returned.[10] To demonstrate a *prima facie* case for interference with substantive rights, Plaintiff must show:

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[6] 29 USC § 2614(a)(1)(A).
[7] In the interest of judicial economy, Plaintiff will address her claim of pregnancy discrimination in conjunction with her claim of retaliation under the FMLA as the analysis is substantially similar considering the basis of Defendant's Motion.
[8] 29 USC § 2615(a)(1).
[9] ***Wysong v. Dow Chem. Co.***, 503 F.3d 441, 447 (6th Cir. 2007)("If an employer takes an employment action based, in whole or in part on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled.")
[10] 282 F. Supp. 2d 954, 960 (S.D. Iowa 2003).

> (1) She was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee FMLA benefits to which she was entitled.[11]

Defendant has already admitted that Plaintiff was an eligible employee, that it was a covered employer, and that Ms. Lankford's leave was approved. (***Exhibit 5,*** *116)* Under the FMLA, "serious health condition" is defined as "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***."[12] 29 C.F.R. 825.120(a)(4)***, Leave for pregnancy or birth***. ("The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child."); *see also* ***George v. Russel Stove Candies, Inc.,*** 106 Fed. Appx. 946, 949 (6th Cir. 2004)(The FMLA considers pregnancy a "serious health condition involving treatment by a health care provider."). Here, Plaintiff satisfies all of these requirements and was entitled to FMLA leave due to her pregnancy, for prenatal care, and for her own serious health condition following the birth of her child.

As for restoration to her former position, Defendant interfered with Plaintiff's

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[11] ***Killian v. Yorozu Auto. Tenn., Inc.***, 454 F.3d 549, 556 (6th Cir. 2006) (citing ***Walton v.Ford Motor Co.***, 424 F.3d 481, 485 (6th Cir. 2005)). 29 USC §§ 2612(a)(1)(D), 2614(a)(1)(A); ***Jennings***, 282 F. Supp. 2d at 961.

[12] 29 USC § 2611(11)(emphasis added).

restoration by discharging her the morning she returned to work. Since Plaintiff was entitled to the right that was denied by Defendant, Defendant's motive is irrelevant.[13] The facts, show that Plaintiff was entitled under the FMLA to take leave and be restored to her previous position, but the Defendant refused to do so. Consequently, Defendant's motion should be denied.

B. There Exists a Genuine Issue of Material Fact over Whether Defendant Reasonably Believed Its Reason or Acted with Retaliatory Animus.

An employer may not discharge, or otherwise discriminate against an employee for exercising rights under the FMLA.[14] In order to meet Plaintiff's *prima facie* case alleging retaliation for exercising rights under the FMLA, Plaintiff must demonstrate the following:

> (1) Plaintiff availed himself of a protected right under FMLA; (2) Defendant knew that Plaintiff exercised a protected right; (3) Plaintiff was adversely affected by an employment decision; and (4) there was a causal connection between the exercise of the protected right and the adverse employment action.

See e.g. ***Hoge v. Honda of America Mfg., Inc.***, 384 F.3d 238, 244 (6th Cir.2004); ***Canitia v. Yellow Freight Sys., Inc.***, 903 F.2d 1064, 1066 (6th Cir.1990).[15]

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[13] ***Jennings***, 282 F. Supp. 2d at 961.

[14] 29 U.S.C. §2615(a)(2).

[15] To establish a prima facie case of pregnancy discrimination, an employee must show: "1) she was pregnant, 2) she was qualified for her job, 3) she was subjected to an adverse employment decision, and 4) there is a nexus between her pregnancy and the adverse employment decision." ***Deboer v. Musashi Auto Parts, Inc.***, 124 F. App'x 387, 391 (6th Cir. 2005)(quoting ***Cline v. Catholic Diocese of Toledo***, 206 F.3d 651, 658 (6th Cir. 2000)).This is not meant to be an onerous burden. *Id.* The

1. Plaintiff has Produced Sufficient Evidence to Create a Genuine Issue of Material Fact as to Retaliation

Of the four elements listed above, Defendant only argues that there is no genuine issue of material fact as to a causal link. In this case, there is significant evidence of causation. First, the two events—Plaintiff's return from FMLA leave and her termination—occurred the very same day. The Sixth Circuit held in ***Mickey v. Zeidler Tool and Die Co.***, very close temporal proximity is enough to show causation. In ***Mickey***, on the same day that the plaintiff filed an EEOC charge, his supervisor discharged the plaintiff. *Id.* at 525, The Court found that casual connection could be inferred between defendant learning of the protected activity and firing the plaintiff. 516 F.3d 516 (6th Cir. 2008); *see also* ***Deboer v. Musashi Auto Parts, Inc.***, 124 F. App'x 387, 391 (6th Cir. 2005)(Sixth Circuit held that a demotion that took place the day after the plaintiff's request for maternity leave was sufficient to meet her *prima facie* case). This is a similar situation to the current case at bar where Defendant's attitude toward Ms. Lankford changed dramatically after she requested to utilize maternity leave.

However, Plaintiff relies on more than just temporal proximity. After Plaintiff told Defendant that she was pregnant and would be taking leave, management's

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elements are similar to those necessary to show a claim for discrimination under ELCRA. *Id.* Again, in the interest of brevity, Plaintiff addresses her pregnancy discrimination claims by discussing the elements of FMLA as both claims require a showing of causation.

attitude toward her completely flipped. (***Exhibit 5***, 59-61, 92, 173) Management expressed frustration over having to reassign Plaintiff's job duties and began a witch hunt while she was on leave to discharge her. (***Exhibit 2***, ¶16-17; ***Exhibit 5***, 91, 122-24; ***Exhibit 9***, 85). Courts do not just look to when leave was requested in determining temporal proximity; instead, the Sixth Circuit has reiterated that, "We have found sufficient evidence of a causal connection where the time between the employee's leave expired . . . and the employee's termination was two to three months." ***Judge v. Landscape Forms, Inc.***, 592 F. App'x 403 , 409 (6th Cir. 2014) (citing ***Bryson v. Regis Corp.***, 498 F.3d 561 , 571 (6th Cir. 2007)); ***Cooley v. East Tenn. Human Res. Agency, Inc.***, 720 F. App'x 734, 743 (6th Cir. 2017)(holding temporal proximity for purposes of showing causation can be measured from the date employee's FMLA leave expired and plaintiff returned to work).

Defendant had no issues with Plaintiff prior to her decision to take maternity leave, which was conveyed to Defendant on May 15, 2018. She was given glowing performance reviews and received numerous promotions. (***Exhibit 11,*** 33-34; 47-50***;*** ***Exhibit 15,*** 27**)** Despite this, Plaintiff was terminated the **VERY SAME** day that she returned to work from leave. Consequently, Plaintiff has produced sufficient evidence to meet her *prima facie* showing.

2. Defendant's Proffered Reason for Plaintiff's Termination is Mere Pretext

In wrongful termination lawsuits, courts typically apply the burden-shifting test under ***McDonnell Douglas v. Green***:

1) Plaintiff establishes a *prima facie* case by a preponderance of the evidence;
2) Burden of production shifts to Defendant to rebut the prima facie case by providing a legitimate non-discriminatory reason for Plaintiff's termination; and
3) Plaintiff must show that Defendant's reason is pretext for behavior actually motivated by discrimination.[16]

Pretext can be established by showing that: (1) employer's reason had no basis in fact; (2) the reason did not actually motivate the discharge; or (3) the reason was insufficient to motivate the discharge.[17] Defendant argues that it had a legitimate non-discriminatory reason for Plaintiff's termination—namely, that Plaintiff requested to re-enroll in the employer's health insurance and, in doing so, somehow committed fraud.[18]

First, that allegation has no basis in fact. Plaintiff's proposal for the $20,000 raise was in exchange for Plaintiff performing additional job functions as

[16] 411 U.S. 792, 802 (1973).
[17] ***Deboer v. Musashi Auto Parts, Inc.***, 124 F. App'x 387, 392 (6th Cir. 2005).
[18] While Defendant initially asserted that Plaintiff was terminated for her "rude" tone in emails, this rationale seems to have been dropped entirely by the Defendant. In the interest of judicial economy, The reason for this about-face is likely due to the deposition of J. Idzior that management had no reason to believe that Plaintiff was rude or that the statements that Defendant pointed to were not rude. (***Exhibit 11***, 93-95) Also, other employees were far ruder, yet, that was never a sufficient reason for discharge in the past. (***Exhibit 2,*** ¶ 24) Nonetheless, Plaintiff will not deal with that rationale as thoroughly given the recent priority given to the other baseless rationale.

the "Assistant Director of Operations." (***Exhibit 3)*** After requesting leave, she was forced to give that position up and resumed her employment as an "Executive Assistant" performing a completely different set of job responsibilities. (***Exhibit 5***, 63) At that point, that proposal was null and void.

Furthermore, the paperwork approving the raise makes no mention of waiving healthcare insurance provided to all other employees at the Salvation Army. All the foregoing events and concomitant documentation existed long before the putative events that Defendant claims led to its perfunctory firing of Plaintiff the very same day she returned from maternity leave. (***Exhibit 12)*** Literally, this issue was not raised by the Defendant until October 1, 2018 despite Defendant possessing knowledge that Plaintiff re-enrolled in July 2017. As the Michigan Supreme Court held in ***Quality Products and Concepts Co. v. Nagel Precision, Inc***. 469 Mich. 362, 374 (2003):

> [A] waiver is a voluntary and intentional abandonment of a known right. *Roberts v Mecosta Co Hosp*, 466 Mich. 57, 64 n. 4; 642 N.W. 2d 663 (2002); *People v Carines*, 460 Mich. 750 , 762 n 7; 597 N.W. 2d 130 (1999). This waiver principle is analytically relevant to a case in which ***a course of conduct*** is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. Stated otherwise, when a ***course of conduct*** establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied.

Id. A jury considering the foregoing documented facts easily could find that Defendant, through its agents' course of conduct, never accepted Plaintiff's offer to relinquish her healthcare coverage or, if accepted, Defendant waived that requirement. Moreover,

there is additional documentation authored in handwriting by Defendant's employee and approved by Plaintiff's supervisor, J. Idzior showing that Defendant's decision to increase Plaintiff's compensation had nothing to do with her relinquishing her healthcare coverage and, therefore, was not part of the agreement. Defendant's June 20, 2016 Payroll Change Notice:

> [G]uaranteed 3 years to the company at this proposed wage. Next annual due May 15, 2019 (please see her attached proposal).

(Exhibit 4) These corporate business records are presumed to be accurate and reliable. ***Parker v. Reda,*** 327 F.3d 211, 214 (2d Cir. 2003) ("Business records are made reliable by … a duty to make an accurate record as part of a continuing job or occupation.") (quoting ***Fed.R.Civ.P. 803(6)*** Advisory Comm. Note). The Court noted in ***Cobbins*** an employer has an "independent motivation for creating and maintaining reliable business records." ***Cobbins v. Tenn. Dept. of Transp.,*** 566 F.3d 582, 588. (6th Cir. 2009).[19]

A jury could easily find that Defendant's decision to accept Plaintiff's proposed compensation increase was based only on her agreement to forego any further compensation reviews and adjustments for three years. (***Exhibit 4***) The foregoing Defendant-authored and Defendant-approved document confirms this. Another Defendant-authored document provides additional confirmation. Plaintiff's

[19] It is undisputed that Defendant's business records were made in the regular course of its business, they were kept in Defendant's HR Department as part of its regular course of business, it was the regular practice of Defendant to store all personnel documents with its HR Department, and all of these documents were made by persons with knowledge of the transactions and meet the four-part test for reliability enumerated in ***Cobbins*** and are admissible Under FRE 803(6).

participation in Defendant's healthcare insurance continued for more than a year after she received her June 2016 compensation increase. On July 12, 2017, Plaintiff waived her health insurance coverage because she and her child were covered under her husband's health insurance program. (***Exhibit*** **5**, 52-53; ***Exhibit 7***) The shift in healthcare insurance from Defendant's program to the insurance program provided by her husband's employer did not occur until July 31, 2017; a fact that, once again, is confirmed by Defendant's own documentation. *Id*. Plaintiff re-enrolled in Defendant's healthcare insurance program effective on January 1, 2018 as confirmed in Defendant's own documents. **(*Exhibit 8*)**. A jury could easily conclude that the Defendant by its course of conduct either waived or agreed that it was never part of the 2016 agreement with respect to Plaintiff's proposal to forego healthcare coverage.

Second, Defendant was clearly motivated by Plaintiff's request for pregnancy leave. Defendant gave her, in effect, the cold shoulder and silent treatment until she went on leave in July 2018. (***Exhibit 5***, 59-61, 92, 173) Defendant earlier retaliated for Plaintiff's first request for leave. When she came back from her first leave, Plaintiff was forced to give that position up and resumed her employment as an "Executive Assistant" performing a completely different set of job responsibilities. (***Exhibit 5***, 63; ***Exhibit 2,*** ¶ 23) Then, upon returning after her second maternity leave, she came back to her personal possessions being boxed with her replacement already situated in her office. Other employees had received

the same negative treatment upon their announcement that they would be taking FLMA leave. **(*Exhibit 2*,** para. 23*; **Exhibit 5***, 59-60*).*

Third, the reason offered is insufficient to warrant termination. Discovery has shown the Defendant reasonably could not have had an honest belief that Plaintiff committed fraud. Defendant continued Plaintiff's enrollment in its health insurance program for more than a year after increasing Plaintiff's compensation. (**Exhibits 4, 7**) Plaintiff's re-enrollment in Defendant's health insurance program was well known to Defendant long before Defendant concocted a false claim of healthcare fraud as an excuse for terminating Plaintiff's employment the day she returned to work from her second maternity leave. (**Exhibit 8**) At the time Plaintiff re-enrolled in Defendant's health insurance program Defendant had possession of Plaintiff's written compensation increase proposal. (**Exhibit 4,** pg. 3-4) Defendant also had documents confirming and granting Plaintiff's requested compensation increase based exclusively on Plaintiff's agreement to waive any compensation review for three years. (**Exhibit 4**) The Defendant corporation had full knowledge of Plaintiff's re-enrollment in Defendant's healthcare program. Defendant offered no evidence to even suggest that Plaintiff attempted to conceal her applying to Defendant for resumption of her healthcare coverage. That contention by Defendant is preposterous on its face. Plaintiff had to make her request directly to Defendant. It was Defendant's employees who prepared the forms – Defendant's forms – needed for Plaintiff to sign to obtain that insurance.

Those forms were counter-signed by Defendant's employees. (***Exhibits* 7, 8)** Even after a thorough audit of Plaintiff's personnel file by Mr. Manzella in January 2018, the issue was never once raised prior to Plaintiff's termination.

It is a well-settled "under Michigan law, the knowledge of a corporate agent can be imputed to the entire corporation." ***Gold v. Deloitte & Touche, LLP (In re NM Holdings Co.)***, 622 F.3d 613, 620 (6th Cir. 2010).

> A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of their employment, constitute the acts of the corporation. Likewise, knowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by anyone individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

Id.; *see,* ***U.S. v. One Parcel of Land Located at 7326 Highway 45, N.***, 965 F.2d 311 (7th Cir. 1992) ("A corporation acts through its agents. Similarly, a corporation 'knows' through its agents." (quoting W. Fletcher, 3 Corporations § 787 (1986). Those same forms were placed in Plaintiff's personnel file – the very same file that contained Plaintiff's compensation increase proposal and the Defendant's documentation granting that compensation increase. Hence, there exists a genuine issue of material fact that Defendant's proffered non-discriminatory reason was mere pretext.

3. <u>There is a Genuine Issue of Material Fact Over Whether Defendant Possessed an Honest Belief that Plaintiff Improperly Re-Enrolled in Health Insurance Benefits</u>

Defendant's argument that it "honestly believed" that Plaintiff had engaged in fraud is without merit considering the record. In the Sixth Circuit, Defendant must have more than just an "honest belief" that Plaintiff was committing fraud—it must also establish "reasonable reliance on the ***particularized facts*** rather than on ***ignorance and mythology***."[20] The burden is on Defendant to show particularized facts and reasonable belief.[21] In this case, there are no particularized facts in this report that show any fraud. Here, Defendant's reasoning for Plaintiff's discharge has changed since Plaintiff was discharged creating the appearance of pretext. Defendant originally told Plaintiff that she was being terminated for her rude tone and disrespectful behavior. (***Exhibit 5,*** 157 158) Post-litigation, Defendant's explanation has changed to Plaintiff re-enrolling in healthcare benefits. This change in the Defendant's rationale for termination indicates pretext and is merely a legal theory being proffered to prevent liability over Defendant's unlawful conduct. As noted by the Sixth Circuit Court of Appeals:

> An employer's changing rationale for making an adverse employment decision can be evidence of pretext." Shifting justifications over time calls the credibility of those justifications into question. By showing that the [employer's] justification for firing him changed over time, [the plaintiff] shows a genuine issue of fact that the [employer's] proffered reason was not only false, but that the falsity was a pretext for discrimination.

[20] ***Smith v. Chrysler Corp.***, 155 F.3d 799, 806 (6th Cir. 1998)(emphasis added).
[21] ***Id.***

Cicero v. Borg-Warner Auto., Inc., 280 F.3d 579, 592 (6th Cir.2002)(quoting ***Thurman v. Yellow Freight Sys.,*** 90 F.3d 1160, 1167 (6th Cir. 1997) am. on other grounds, 97 F.3d 833 (6th Cir 1997). Consequently, Plaintiff has produced sufficient evidence to, at minimum, demonstrate that there is a genuine issue of material fact on pretext that needs to be resolved by a jury

Furthermore, in order to constitute an honest belief, Defendant must show that Plaintiff's discharge was a "reasonably informed and considered decision."[22] In ***Smith v. Chrysler***, the employee was falling asleep while driving home from work and was consequently diagnosed with a sleeping disorder. The employee requested an accommodation under ADA. His employer discharged him for allegedly falsifying a medical survey provided during the employment application process because he stated that he did not suffer from tiredness or fatigue. The Sixth Circuit held that employers must engage in a broader investigation of Plaintiff's condition in validating its own opinion, but only to the point of a general understanding.[23]

In ***Gurne v. Michigan Bell Telephone Co.***, the court found that there was a genuine issue of material fact as to whether the employee had lied about her FMLA leave, as to the employee's retaliation claim.[24] Even though the employee was

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[22] *See* ***Braithwaite v. The Timken Co.***, 258 F.3d 488, 494 (6th Cir.2001).
[23] ***Id.*** at 808 (The court did not look to whether the employer understood the medical definition of narcolepsy, only whether it had a reasonable basis to believe employee lied).
[24] 2011 WL 5553817, at *13-15 (E.D. Mich. 2011)***(Exhibit 21)***.

observed at a party when she was on leave for migraines, the court found that a jury could reasonably find that the employer did not make a reasonable and considered decision before termination.[25] The court based this finding on the facts that: (1) the decision-maker did not even know what the employee's "serious health condition" was; (2) had already made the determination to discharge the employee before she had an opportunity to respond; and (3) where other managerial employees believed a more thorough investigation should be done prior to discharge. ***Id.*** The Court once again found in ***Rhea v. Wal-Mart Stores, Inc.*** that the employee had been discriminated against by his employer, and that reasonable jury could conclude that the employer failed to make a reasonably informed and considered decision before terminating the employee.[26] In ***Wal-Mart***, the employee was accused of sexual harassment. The incident had been videotaped, but the employer could not provide the tape. However, a co-worker reported him. The court relied upon the following evidence produced by the employee demonstrating that: (1) he was a long-term employee who had "met expectations;" (2) had not received the basis of his charge; (3) had not been offered an opportunity to rebut the accusations; and (4) had not discussed any discipline short of termination. ***Id.*** at *6-7.

Plaintiff was a long-time employee of defendant with a strong performance

[25] ***Id.*** at 13.

[26] No. 06-13617, 2007 WL 3408546 (E.D. Mich. 2007)(attached as ***Exhibit 23***.

record. Yet, she was terminated without receiving the basis for the employer's decision and without having an opportunity to rebut the accusations levied against her. It should be stated that if Defendant was truly concerned that Plaintiff re-enrolling was contrary to the terms of the alleged agreement under which Defendant granted the requested compensation increase, Defendant should have confronted Plaintiff at that time in 2017. At a minimum, Defendant should have raised this issue in January 2018 when her personnel file was flagged. Instead, Defendant unlawfully sought to "stick its head in the sand" until after Plaintiff requested FMLA on May 15, 2018. Consequently, Defendant's Motion should be denied as there exists a genuine issue of material fact.

Conclusion

For the foregoing reasons, Defendant's Motion should be denied, and this case should proceed to trial as soon as time is available on this Court's schedule.

Respectfully submitted,
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DATED: NOVEMBER 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on *November 8, 2021*, the foregoing document was electronically filed by the undersigned's authorized representative, using the ECF system, which will send notification of such filing to all counsel of record.

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