

STATE OF MICHIGAN
COURT OF APPEALS

SONYA NORTHERN,

Plaintiff-Appellant,

v

NATIONAL BANK OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

March 31, 2000

No. 206646

Wayne Circuit Court

LC No. 96-642111 CL

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition and mediation sanctions in defendant's favor in this wrongful discharge case brought under the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.* We affirm.

Plaintiff began employment with defendant on March 27, 1989 as an authorization clerk. In October 1990, defendant issued a written warning to plaintiff stating that she had incurred eleven absences in the past twelve months and that if she incurred another absence prior to her attendance record reaching an acceptable level, she would be subject to further disciplinary action, up to and including probation, suspension or termination. In June 1993, defendant verbally counseled plaintiff for absenteeism. In July 1993, defendant issued a formal warning of probation to plaintiff, stating that plaintiff understood that if she incurred another absence prior to her record reaching an acceptable level, she would be subject to further disciplinary action. In August 1993, defendant placed plaintiff on a ninety-day probation for accumulating twelve absences over the previous twelve months and advised plaintiff that any additional absence during the probationary period could result in termination. Defendant promoted plaintiff in October 1994 to the position of lock-box teller in the wholesale lock-box department. Defendant verbally counseled plaintiff in May 1995 for absenteeism. In September 1995, defendant formally warned plaintiff of probation, and advised her that if she incurred another absence before her attendance record reached an acceptable level, she would be subject to further disciplinary action up to and including probation, suspension or termination. In January 1996, defendant placed plaintiff on a ninety-day probation for having accumulated twenty-one absences in the

previous twelve months and advised plaintiff that any additional absence during the probationary period could result in termination.

Plaintiff scheduled a vacation from February 19 through February 25, 1996. Plaintiff called in sick on February 16, and upon returning from vacation on February 26, 1996, presented defendant with a note from her doctor which stated that the doctor had seen her on February 16, 1996, and recommended that she not work at all from February 16 to February 18, noting “dizziness” and “hypertension” on the note. Defendant discharged plaintiff.

Defendant argued in its motion for summary disposition that plaintiff could not establish that defendant’s articulated legitimate business reason for plaintiff’s discharge was pretextual, and that plaintiff was terminated for violating defendant’s attendance policy. Defendant also argued that plaintiff could not establish a violation of the FMLA because she could not show that her twenty-second and twenty-third absences were for a “serious health condition” as defined under the FMLA.

Defendant appended its attendance policy to its motion for summary disposition. The policy provided that discipline procedures pertinent to absenteeism were to be determined by the number of days of absence in the past twelve months and related factors, such as number of occurrences, reasons, and past record. A schedule set forth the normal action steps, stating that after the eleventh day of absence in the last twelve months, and after discussion with a human resources representative or Employee Relations, “the employee is to be placed on 90-day probation for poor attendance and informed that any full or partial day of absence during that probationary period could result in termination.” The policy also provided that

. . . Special rules apply to time off for an employee’s own serious health condition and for family leaves as defined in the Attendance Policy, Leaves of Absence.

In accordance with the Family and Medical Leave Act of 1993, time off due to an employee’s serious health condition . . . cannot be used for discipline. . . .

Defendant also appended to its motion for summary disposition inter-office memoranda setting forth plaintiff’s disciplinary warnings and probation, as discussed above. Each of the inter-office memoranda set forth the dates and reasons plaintiff had been absent or tardy and were signed by plaintiff.

In response to defendant’s motion, plaintiff submitted an affidavit stating that her doctor restricted her from work from February 16 through 18, 1996 “because he wanted to adjust my medication for high blood pressure,” that she went to the doctor because she was having headaches and dizziness which she “knew to be related to my high blood pressure condition,” and that she had missed “several days of work on prior occasions before February 16, 1996 because of [her] high blood pressure.” Plaintiff’s affidavit further averred that she had given defendant medical notes several times indicating that she needed to be off work because of high blood pressure, that defendant told her that she was being discharged on February 26, 1996 because she did not meet the FMLA requirements, and that had she been asked “to obtain additional, more complete medical documentation from my doctor, I would have done so rather than be discharged.”

We review the circuit court’s grant of summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The circuit court considers affidavits, pleadings, deposition, admissions, and documentary evidence submitted in the light most favorable to the non-moving party. The moving party has the initial burden of supporting its position with documentary evidence, and the opposing party is then “required to present evidentiary proofs creating a genuine issue of material fact for trial.” *Id.* at 455-456 n 2.

Under the FLMA, an eligible employee is entitled to a total of twelve workweeks of leave during any twelve-month period “because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 USC 2612(a)(1)(D). The FMLA defines the term “serious health condition” 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.” [29 USC 2611(11).]

Plaintiff argues that she received continuing treatment by a health care provider and that the circuit court erred in ruling that she did not suffer from a serious health condition as defined under the FMLA. We disagree.

Although the term “continuing treatment” is not defined under the FMLA, the United States Congress authorized the Secretary of Labor to prescribe regulations governing interpretation of the FMLA, and we look to those regulations in interpreting the term. *Summerville v ESCO Co Ltd*, 52 F Supp 2d 804, 810 (WD Mich, 1999). 29 CFR 825.114 provides in pertinent part:

(a) For purposes of [the] FMLA, “serious health condition” entitling an employee to FMLA leave means an illness, injury impairment, or physical or mental condition that involves:

* * *

(2) **Continuing treatment** by a health care provider. A serious condition involving continuing treatment by a health care provider includes any one or more of the following:

* * *

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

We conclude that plaintiff did not present sufficient evidence to raise a genuine issue of material fact on the question whether she suffered a “serious health condition” requiring continuing treatment by a health care provider because she presented no evidence that her condition requires periodic visits for treatment and continues over an extended period of time. See CFR 825.114(a)(2)(iii)(A-C).

The lower court record contains three pages of plaintiff’s medical records. One of the pages states that plaintiff saw Dr. Montasir at Henry Ford Medical Center on February 16, 1996:

The patient is a 28-year-old female with no significant past medical history who was noted in the past to have a mildly elevated blood pressure. She has a family history positive for hypertension, mother and father. She hasn’t had any problems until the last two weeks when she noted some slight lightheadedness, headaches, and also did not feel well. She denies any nausea or vomiting.

PHYSICAL EXAMINATION: On examination, the patient looks well in no apparent distress. She weighs 180 pounds. Her pulse was 64 and regular. Her temperature was 97.6. . . .

Since her blood pressure was noted to be elevated before and today it was 150[/]98 in one arm, the other arm was 140[/]95, probably we will consider adding an antihypertensive medication.

PLAN: We will start with Plendil 5 mg. One a day. We will see if this helps. Meanwhile, I would like to check her CBC and biochemistry profile to rule out any question of anemia or metabolic disorder causing these lightheadedness attacks. I will follow-up with the patient or she will follow-up with Dr. Jeffries in two weeks.

The second page of medical records before us is a standard Henry Ford Medical Center form completed by Dr. Montasir stating that plaintiff had been treated in the clinic on February 16, 1996, and that he recommended regarding her medical condition that she not work from February 16, 1996 to February 18, 1996. The third page is a copy of a telephone message plaintiff left by voice-mail at Dr. Montasir’s office on the morning of February 16, 1996, requesting an appointment that day.

Plaintiff’s affidavit makes no reference to treatment after February 16, 1996, and her deposition testimony refers only to being on a low-salt diet when she saw a different doctor relative to a back injury in late 1995 and early 1996. She provided no medical records or testimony establishing a prior history of treatment for high blood pressure and did not support her assertion that she missed work in the past due to high blood pressure. The reference in the doctor’s note to being “noted in the past to have a mildly elevated blood pressure” does not establish prior treatment or a chronic condition. The

record is devoid of documentary evidence that plaintiff sought or received any treatment related to high blood pressure before or after February 16, 1996. Plaintiff thus failed to establish a protected right under the FMLA and her claim was properly dismissed.

Plaintiff's argument that defendant's leave policy violates the FMLA is without merit. Defendant's absenteeism policy, quoted above, states that FMLA-qualifying absences are not considered when assessing discipline due to absenteeism.

Plaintiff's final argument is that she should not have been assessed mediation sanctions because the case was mediated on July 28, 1997, defendant filed its motion for summary disposition before the acceptance/rejection deadline of August 25, 1997, and defendant's motion was therefore "not caused by" plaintiff's rejection of the mediation. The record establishes that defendant was awarded fees from the date of plaintiff's rejection¹ of the mediation evaluation, i.e., August 25, 1997. A party prevailing on a motion for summary disposition may be awarded mediation sanctions even though the motion was filed before mediation. See *Meagher v McNeely & Lincoln*, 212 Mich App 154, 156-157; 536 NW2d 851 (1995). Plaintiff's argument that defendant should not be awarded mediation sanctions because it rejected the mediation is meritless. MCR 2.403(O)(1) (providing in pertinent part that "if the opposing party has *also* rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation." [Emphasis added.]

Affirmed.

/s/ Michael J. Kelly

/s/ Helene N. White

¹ Plaintiff did not file a written acceptance or rejection to the mediation evaluation within twenty-eight days, and was thus deemed to have rejected it. See MCR 2.403(L)(1).