UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SARAH R. NOVO,

Plaintiff,

v.

CITY OF SACRAMENTO, ANGELIQUE ASHBY,

Defendants.

No. 2:13-cv-00521-MCE-AC

MEMORANDUM AND ORDER

Through this lawsuit, Plaintiff Sarah R. Novo ("Plaintiff") alleges that the City of Sacramento and Angelique Ashby (collectively "Defendants") violated Plaintiff's rights under the Family Medical Leave Act ("FMLA") and the California Family Rights Acts ("CFRA") and committed fraud. Presently before the Court is Defendants' Motion for Partial Summary Judgment (ECF No. 31), which seeks summary judgment on all four of plaintiff's FMLA and CFRA claims.[1] For the reasons that follow, Defendants' Motion for Partial Summary Judgment is DENIED.[2]

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[1] Defendants do not seek summary judgment on Plaintiff's fraud claim.

[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

BACKGROUND[3]

Plaintiff first started working for the City of Sacramento ("the City") in 2002. On November 23, 2010, Plaintiff began working as Executive Assistant to Councilmember Angelique Ashby. In October 2011, Plaintiff and her family moved into a house in Granite Bay, California. Two months later, Plaintiff and her family began experiencing flu-like symptoms. Plaintiff first reported this information to Ashby on December 14, 2011. On February 2, 2012, Plaintiff discovered significant mold growth in the house. Days later, an inspector recommended that Plaintiff and her family move after concluding that mold permeated the walls and floors of the house; they did so the following week.

On March 19, 2012, Ashby informed Plaintiff that Plaintiff "was no longer needed to be employed within [Ashby's] counsel office . . . ." Pl.'s Decl. at ¶ 6, ECF No. 48-4. However, Ashby allegedly stated that she "had a 'Plan B' for [Plaintiff's] continued employment with the City," and intimated she would seek to place Plaintiff in another City position. Id. at ¶¶ 6, 9. No one requested that Plaintiff return her City employee identification badge, cellular phone, or parking card, and Plaintiff did not receive a separation check or any information regarding continuing health insurance.

Ashby never followed up with a "Plan B." On March 27, 2012, Plaintiff—apparently believing that she was still an employee of the City—delivered a written request to the City for FMLA[4] leave from March 20 to May 7. On March 30, Plaintiff received her final paycheck, which paid her for employment through March 19. On April 1, Plaintiff received an email that contained two letters. The first was a termination letter, backdated to March 19, that explained Plaintiff's employment with the City concluded on March 19. The second letter explained that the City was denying Plaintiff's FMLA leave request because Plaintiff's employment with the City concluded on

[3] Unless otherwise noted, the parties do not dispute the following facts.

[4] "Since CFRA adopts the language of the FMLA and California state courts have held that the same standards apply," the remainder of this Order refers only to the FMLA, "with the understanding that CFRA leave is also included." Xin Liu v. Amway Corp., 347 F.3d 1125, 1132 n.4 (9th Cir. 2003).

March 19; that letter also requested that Plaintiff return her City employee identification badge, cellular phone, and parking card.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex, 477 U.S. at 325.

Rule 56 also allows a court to grant summary judgment on part of a claim or defense, known as partial summary judgment. See Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."); see also Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79 (C.D. Cal. 1995). The standard that applies to a motion for partial summary judgment is the same as that which applies to a motion for summary judgment. See Fed. R. Civ. P. 56(a); State of Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998) (applying summary judgment standard to motion for summary adjudication).

In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portions in the record "which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968).

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In attempting to establish the existence or non-existence of a genuine factual dispute, the party must support its assertion by

> citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits[,] or declarations . . . or other materials; or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also demonstrate that the dispute about a material fact "is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. In other words, the judge needs to answer the preliminary question before the evidence is left to the jury of "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Anderson, 477 U.S. at 251 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule [56(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Therefore, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id. 87.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn.

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Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

ANALYSIS

Defendants argue that they are entitled to summary judgment on Plaintiff's FMLA claims because plaintiff has failed to produce sufficient evidence to support a prima facie FMLA interference case. The Ninth Circuit has made clear that:

> To make out a prima facie case of FMLA interference, an employee must establish that (1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled.

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1243 (9th Cir. 2014) (citation and internal quotation marks omitted). Defendants contend Plaintiff has not established that she was entitled to leave under the FMLA or that she provided sufficient notice of her intent to take leave under the FMLA. The Court will address both of those arguments in turn, first assessing whether there was a serious health condition warranting leave under the FMLA and then whether Plaintiff provided adequate notice of that condition during her employment so as to trigger her potential entitlement to FMLA benefits.

A. Entitlement to Leave Under the FMLA

An employer covered by FMLA must grant leave to eligible employees "[t]o care for the employee's spouse, son, daughter, or parent with a serious health condition," or if "a serious health condition [] makes the employee unable to perform the functions of the employee's job." 29 C.F.R. § 825.112(a)(3)-(4).[5] Defendants contend that Plaintiff was not entitled to leave under the FMLA because neither she nor any of her family members suffered from a "serious health condition." Plaintiff counters that both she and her

[5] Although the regulation identifies other instances in which a covered employer must grant FMLA leave to an eligible employee, none are applicable in this case.

husband had a serious health condition, which the applicable regulations define as follows:

> For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

29 C.F.R. § 825.113. "Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility . . . or any subsequent treatment in connection with such inpatient care." 29 C.F.R. § 825.114. Plaintiff does not contend that she or her husband's symptoms resulted in an overnight stay in a hospital, hospice, or residential medical care facility; accordingly, she cannot establish a serious health condition by way of "inpatient care." However, Plaintiff has produced sufficient evidence that her husband underwent "continuing treatment" by a health care provider while she was employed with the City so as trigger her entitlement to FMLA leave.

"Continuing treatment" includes:

> Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
>
> (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
>
> (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
>
> (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.115. As to "chronic serious health condition," Plaintiff's evidence includes the declaration of Dr. Janette Hope (Hope Decl., ECF No. 48-1) and a March 26, 2012 letter bearing the signature of Dr. Travis A. Miller (Nick Novo Decl., ECF No. 48-2). Dr. Hope's declaration identifies Plaintiff's husband's specific chronic serious health conditions, including "significant fatigue, shortness of breath, chest tightness, toxic encephalopathy, recurrent upper respiratory infections, cough, chronic rhinitis, myalgia, and depression." Hope Decl. at ¶ 6. Dr. Miller's letter indicates that those

health conditions required periodic visits for treatment by a health care provider, as it states:

> Nick Novo has been evaluated in our clinical practice. He was first seen on March 6, 2012. His last appointment was March 20, 2012. He will also be seen March 27, 2012. He is undergoing an extensive medical workup for shortness of break, coughing and respiratory distress.

Nick Novo Decl., ECF No. 48-2 at 2. This evidence of periodic visits satisfies the first element of "continuing treatment" set forth in 29 C.F.R. § 825.115. As to duration (the second element), Dr. Hope's declaration suggests that the ailments "likely began in late 2011 and continued or reoccurred in the early part of 2012 . . . ." Hope Decl. at ¶ 4. Lastly, as to the third and final element of a "chronic serious health condition" by way of continuing treatment, Dr. Hope opined that Plaintiff's husband's condition "would cause [him] episodic periods of incapacity . . . ." Id. at ¶ 10. There is also evidence indicating that Plaintiff's husband's chronic serious health conditions did in fact result in incapacitation prior to March 27, 2012: Plaintiff's husband explained at his deposition that he missed several days of work in early 2012 because he was too ill to work. ECF No. 31-5 at 46.[6] Thus, Plaintiff has produced sufficient evidence that her husband required continuing treatment of a chronic serious health condition, and, consequently, a "serious health condition," by the time she requested FMLA benefits on March 27, 2012.

Defendants' arguments to the contrary are not compelling. Defendants contend that Plaintiff's husband did not have a chronic serious health condition because he "did not attend two in-person medical appointments during his wife's employment by the City of Sacramento." Defs.' Mot. Summ. J., July 28, 2014, ECF No. 31 at 10. Defendants also argue that a health care provider did not "make the determination that a second visit [was] necessary." Id. at 10-11. The Court finds that Dr. Miller's letter, which notes that

[6] Defendants note that Plaintiff's husband could not state exactly how many days of work he missed. But a serious health condition by way of a "chronic condition" requires "[a]ny period of incapacity or treatment for such incapacity." 29 C.F.R. § 825.115(c). Cf. 29 C.F.R. § 825.115(a) (a serious health condition by way of "incapacity and treatment" requires, inter alia, "[a] period of incapacity of more than three consecutive, full calendar days"). The deposition testimony is sufficient to establish that there was a period of incapacity for purposes of section 825.115(c).

Plaintiff's husband had three different appointments at Dr. Miller's clinical practice in March 2012, sufficiently rebuts both of these arguments. See also Defs. Mot. Summ. J. at 5 (noting that Plaintiff's husband had medical appointments on February 15 and March 6).

Defendants also object to Dr. Hope's declaration in its entirety on the grounds that it lacks a proper foundation. Defs.' Objs. to Pl.'s Evid., Dec. 11, 2014, ECF No. 56. But Dr. Hope's declaration notes that she is a licensed doctor in California, that she has been practicing medicine since 1995, and that her medical opinion was based on a May 23, 2012 examination of Plaintiff's husband. Hope Decl. at ¶¶ 1, 4. Defendants' objection that Dr. Hope's declaration lacks a proper foundation is overruled.[7]

Defendants also challenge Dr. Hope's use of "likely" in her statement that Plaintiff's husband's serious medical conditions "likely began in late 2011 and continued or reoccurred in the early part of 2012 . . . ." Defendants argue that "[e]xpert opinions that are mere possibilities, without more, are insufficient to overcome a motion for summary judgment." Defs.' Reply to Pl.'s Opp'n, Dec. 11, 2014, ECF No. 56 at 6 (citing Chaney v. Smithkline Beckman Corp., 764 F.2d 527, 529 (8th Cir. 1985). First, Chaney is distinguishable. In Chaney, the Eight Circuit found that "[e]xpert medical testimony to the effect that a causal connection between an occurrence and death or injury was merely 'possible' [was] insufficient to take a case to the jury." 764 F.2d at 529. Here, Dr. Hope's use of "likely" referred to the duration of symptoms—a fact less debatable and more easily verifiable than causal connection between an event and injury. Furthermore, "likely" expresses greater confidence than "possible." See Black's Law Dictionary (10th ed. 2014) (defining likely as "[a]pparently true or real; probable" and possibility as "[t]he quality, state, or condition of being conceivable in theory or in practice"). Second, Dr. Hope's declaration is not the only evidence of the duration of symptoms. Defendants' own Statement of Facts notes (1) "[a]t least as early as

[7] To the extent that Defendants object to other evidence not addressed in this Order, Defendants' objections are denied as moot.

December 2011, [Plaintiff's] family began to suffer from frequent flu-like symptoms," (2) Plaintiff's husband reviewed a chest X-ray with a physician on February 15, 2012, and (3) Plaintiff's husband met with another physician in March 2012. Defs.' Mot. Summ. J. at 4-5.

Because there is sufficient evidence that Plaintiff's husband had a serious health condition, Plaintiff was potentially entitled to leave under the FMLA. Defendants' argument that they are entitled to summary judgment on that issue therefore fails.

B. Notice of Intent to Take Leave

Defendants argue that even if Plaintiff's husband had a serious health condition entitling her to potential FMLA benefits, Plaintiff did not provide sufficient notice of her intent to take FMLA leave during the time she was employed by the City. Defendants do not dispute that Plaintiff delivered a written request for FMLA leave on March 27, 2012. But Defendants suggest that because Plaintiff's employment with the City ended when Ashby fired Plaintiff on March 19, plaintiff's request was untimely. Plaintiff, on the other hand, argues that although her employment with Ashby's office concluded on March 19, she was nevertheless employed with the City until March 30.

On Defendants' motion for partial summary judgment, the Court must believe Plaintiff's evidence and draw all reasonable inferences in Plaintiff's favor. Here, Plaintiff's evidence indicates: (1) when terminating Plaintiff from her office, Ashby stated she "had a 'Plan B' for [Plaintiff's] continued employment with the City"; (2) on March 19, no one requested that Plaintiff return her City employee identification badge, cellular phone, or parking card, and Plaintiff did not receive a separation check or any information regarding continuing health insurance; (3) Plaintiff did not receive her final paycheck until March 30; (4) on April 1, Plaintiff received a termination letter and a letter requesting that Plaintiff return her City employee identification badge, cellular phone, and parking card. Believing this evidence and drawing all reasonable inferences in Plaintiff's favor, the Court finds there is evidence that Plaintiff's employment with the City ended on March 30. Because Plaintiff delivered her written request for FMLA leave on

March 27, 2012 (i.e., before the termination of her employment with the City), she arguably provided sufficient notice of her intent to take FMLA leave.

Thus, Plaintiff has produced sufficient evidence of a prima facie FMLA interference case to withstand summary judgment. She has identified triable issues both with respect to a qualifying serious health condition and with regard to timely notice of that condition during her employment with the City. Because Defendants have consequently not demonstrated that they are entitled to judgment as a matter of law on Plaintiff's four FMLA claims, Defendants' Motion for Partial Summary Judgment must be denied.

CONCLUSION

For the reasons stated above, Defendants' Motion for Partial Summary Judgment (ECF No. 31) is DENIED.

IT IS SO ORDERED.

Dated: March 20, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT