

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

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|--------------------------------|---|--------------------------|
| HEIDI ROSICH, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Cause No.: 2:09CV155-PPS |
| |) | |
| SUR-TOWNSEND PONTIAC, INC. and |) | |
| MICHAEL SUR, |) | |
| |) | |
| Defendants. |) | |

OPINION AND ORDER

At Christmas-time in 2006, plaintiff Heidi Rosich was hired by defendant Sur-Townsend Pontiac, Inc. to work as a service advisor at its Paul Sur Pontiac-GMC dealership in Valparaiso, Indiana. Defendant Michael Sur is the President of Sur-Townsend Pontiac, Inc. Rosich alleges that approximately seven months later, in July 2007, she informed defendants that within the next year or so she would be having a surgery related to a female health condition and wanted to use “Paul Sur’s family and medical leave and/or disability leave policy” in connection with the surgery. [DE 16, ¶11.] A year later, before she had scheduled the contemplated surgery, Rosich’s employment was terminated.

Rosich has filed a first amended complaint asserting three claims against Sur-Townsend Pontiac and Michael Sur relating to her discharge. In Count I, Rosich alleges that she was discriminated against on the basis of her sex in violation of Title VII.¹ Count II alleges that defendants’ conduct in terminating Rosich’s employment constituted interference with and

¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

retaliation relating to ERISA benefits.² Lastly, Count III is brought under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §2601, *et seq.* Now before me is defendants' motion to dismiss Count III, asserting that the FMLA does not apply because the company has too few employees to be within the coverage of the FMLA.

The FMLA requires certain employers to give eligible employees 12 weeks of leave per 12-month period for qualifying reasons. The FMLA defines "employer" as "any person engaged in commerce...who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. §2611(4)(A)(I). Michael Sur's affidavit in support of the motion to dismiss attests that in 2007 Sur-Townsend Pontiac, Inc. employed approximately 34 employees, that for 2008 the number was approximately 29, and that the business "never had fifty (50) employees for each working day in each of 20 or more calendar weeks at any time during 2007 or 2008." [DE 21-1, ¶¶5-7.]

Defendants' motion is made pursuant to Fed.R.Civ.P. 12(b)(6) but centrally relies on Sur's affidavit to dispute a fact expressly pled in the complaint. *See* First Amended Complaint [DE 16], ¶51. "Yet a Rule 12(b)(6) motion must be decided solely on the face of the complaint and any attachments that accompanied its filing." *Miller v. Herman*, 600 F.3d 726, 733 (7th Cir. 2010). Movants don't suggest that their motion may be construed as one for summary judgment, but to the contrary set out the standard applicable to a motion under Rule 12(b)(6), including (ironically) that the court accept as true the facts pled in the complaint. Def. Brief in Support [DE 21], p.4. In response to the motion, plaintiff Rosich does not expressly dispute the number of employees as set forth in the affidavit, but instead offers other theories for her FMLA claim to

² The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*

