

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLANDChambers of
George L. Russell, III
United States District Judge101 West Lombard Street
Baltimore, Maryland 21201
410-962-4055

July 26, 2013

MEMORANDUM TO COUNSEL RE: Janet E. Byington (Kennedy) v. NBRF Financial Bank
Civil Action No. GLR-12-705

Dear Counsel:

Pending before the Court is Defendant NBRF Financial Bank's ("NBRF") Motion for Summary Judgment. (ECF No. 26). The Court, having reviewed the pleadings and supporting documents, finds no hearing necessary pursuant to Local Rule 105.6 (D.Md. 2011). For reasons outlined in detail below, NBRF's Motion will be granted based upon Byington's failure to demonstrate any genuine issues of material fact for trial.

From January 1981 until February 2009, NBRF employed Plaintiff Janet E. Byington (Kennedy) in various capacities. (Compl. ¶¶ 3-4). At the time of her termination, Byington held the position of Customer Service Representative at NBRF's Havre de Grace branch. (Compl. ¶¶ 4-5). During her tenure at NBRF, Byington concurrently served as the primary caregiver of her son who, at age three months, was diagnosed with cerebral palsy and declared blind. (Compl. ¶ 6). Byington served in this concurrent position from July 1984 until her son's passing in November 2010. (*Id.*) Byington's role as the primary caregiver for her son required that she utilize a substantial amount of leave. In 2008, the time period relevant to this action, Byington used 296 hours of paid leave (24 hours of which were borrowed from 2009), 32 hours of short term disability, and 16 hours of leave under the Family Medical Leave Act ("FMLA"). (Def.'s Mot. Summ. J. ["Def.'s Mot."] Ex. 4, ECF No. 26-6; Byington Dep. 94:6-96:7, May 9, 2013, ECF No. 26-7). Despite using this leave, NBRF never denied Byington's leave requests. (Byington Dep. 96:8-10, 141:18-21). Moreover, Byington received an "above average" rating on her annual performance evaluation, which resulted in a salary increase. (Def.'s Mot. Exs. 10-11).

On February 13, 2009, Byington wrote a check in the amount of \$425 from the NBRF bank account she shared with her son and immediately deposited it into a separate account that Byington also owned. (Def.'s Mot. Ex. 17, at 4; *see also* Ex. 18). The \$425 was immediately credited to Byington's account. At the time she wrote the check, however, the account Byington shared with her son only had a balance of thirteen cents. (Def.'s Mot. Ex. 17, at 4; Ex. 21). Byington facilitated the transaction by asking the Head Teller, Lisa Simon, to complete it for her. (Byington Dep. 41:9-45:9; Simon Dep. 25:6-14, May 7, 2013, ECF No. 26-21). Because Byington's position was above Simon's, however, Byington had to use her personal code to override the transaction. (Byington Dep. 45:20-48:5; Simon Dep. 25:14-26:3). When NBRF discovered the transaction on February 26, 2009, it conducted an investigation into the matter and determined that Byington violated several company policies. (Def.'s Mot. Ex. 17, at 4-6). NBRF terminated Byington's employment the next day on the basis of check kiting. (*Id.* at 6; Compl. ¶ 15). Byington maintained that her transaction constituted a proper use of NBRF's overdraft policy and that NBRF terminated her for the leave she utilized to care for her son. (Compl. ¶ 15; Byington Dep. 133:16-20).

On June 25, 2009, Byington filed an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) alleging discrimination on the basis of associative disability and retaliation. (Compl. Ex. 1, at 2). The EEOC issued Byington a Right to Sue letter on December 7, 2011. (Id. Ex. 2). On February 6, 2012, Byington filed the pending action in the Circuit Court for Cecil County, Maryland, alleging violations of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e et seq. (2012); the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621 et seq. (2012); the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 et seq. (2012); and the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601 et seq. (2012); as well as various tort claims. On March 6, 2012, NBRIS removed the action to this Court and filed a Motion for Partial Dismissal or, in the alternative, for Partial Summary Judgment. (ECF Nos. 5-6). The Court granted NBRIS’ Motion for Partial Dismissal on October 10, 2012, which resulted in the dismissal of Byington’s ADEA and tort claims, as well as any ADA claims that preceded August 2008. (ECF Nos. 12-13). NBRIS now moves for summary judgment on the remaining claims, which consists of the portion of Byington’s ADA claim that covers August 2008 through February 2009, and her FMLA claim.

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). Rule 56(c) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

NBRIS avers that Byington’s ADA claim must fail because the actions she cites in support of the claim are either susceptible to dismissal for lack of subject matter jurisdiction, based on speculation, related to Byington’s past use of leave, fail to identify similarly situated comparators, and fail to establish pretext. Moreover, as to the FMLA claim, NBRIS avers that Byington failed to state a prima facie case of retaliatory treatment, due to her inability to satisfy the causal element, and that she failed to establish pretext. In her Opposition, Byington only addresses NBRIS’ pretext arguments. Byington’s approach is mystifying given her need to establish a prima facie case under the ADA and FMLA before the Court can even address the pretext issue. Byington’s conclusory statement that she “can establish that she was subject to harsher evaluation, to harsher standards, that no investigation of the basis for her termination occurred prior to her termination, . . . and the ‘proffered non-discriminatory reason’ is . . . merely a pretext” (Pl.’s Opp’n to Def.’s Mot. Summ. J. at 3, ECF No. 29) is insufficient. Rule 56 requires non-movants to identify specific facts in the record that show there is a genuine dispute for trial. Fed.R.Civ.P. 56(c)(1); see also Matsushita, 475 U.S. at 587. Byington has failed to make such a showing. Indeed, Byington’s failure to address NBRIS’ arguments regarding the sufficiency of her ADA and FMLA claims in opposition to a motion for summary judgment constitute an abandonment of both claims. See Mentch v. E. Sav. Bank, FSB, 949 F.Supp. 1236, 1247 (D.Md. 1997). Notwithstanding Byington’s abandonment, the Court finds that Byington cannot establish a prima facie case under either statute based upon the record in this matter.

