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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD J. KELLY,

Plaintiff,

vs.

LISA/CARRISON LTD., a Nevada limited liability company, dba PUTTER'S BAR & GRILL,

Defendant.

Case No. 2:09-CV-1573-KJD-GWF

ORDER

Presently before the Court is Plaintiff's Motion for Summary Judgment (#14). Plaintiff has filed an Opposition (#15) to which Defendant replied (#16).

FACTUAL BACKGROUND

Plaintiff was employed as a bartender for Defendant from February 5, 2004, through September 11, 2006. In April 2006, Plaintiff began experiencing neck pains and was diagnosed by his physician with "cervical ridiculopathy" which consisted of a herniated disc and cervical disc displacement. After chiropractic treatments failed to alleviate the pain, Plaintiff began treating with Dr. David Lanzkowky, M.D. The possibility of surgery was discussed, however it was determined that nerve root blocks might provide some relief short of surgery. The first injection provided

1 temporary relief, however the pain returned very quickly after the second injection. On August 8,
2 2009, Plaintiff was referred to Dr. John Thalgott, M.D. for surgery.

3 According to Plaintiff, after meeting with Dr. Thalgott on August 29, 2006, and receiving an
4 appointment for cervical spine surgery on August 31, 2006, he notified Mike Ortega, Defendant's
5 Regional Manager, that he would having surgery on September 27, 2006, for cervical spine pain.
6 Also, according to Plaintiff, on September 2, 2006, Renaldo Tiberti, Defendant's owner came to the
7 location where Mr. Kelly was working his regular shift. At that time, the topic of Plaintiff's
8 upcoming surgery arose and Mr. Tiberti inquired of Plaintiff as to how he was feeling. Plaintiff
9 replied "mentally I'm fine, but physically I'm miserable". On September 4, 2006, Plaintiff reported
10 to work. As part of his regular duties, he went to the corporate office to drop off weekly reports
11 where he met with Mike Berry, Defendant's General Manager. At that time, Mr. Berry confronted
12 him with the statement "I hear you are miserable". Mr. Berry then informed Plaintiff "your job
13 performance is lacking". At that time, Plaintiff informed Mr. Berry that he could not sit comfortably
14 and reiterated his need for the surgery scheduled later that month. According to Plaintiff, Mr. Berry
15 responded "we're going to put you on medical leave," and stated that he would inform Ms.
16 Thibodeau, who handled personnel matters. On September 6, 2006, Plaintiff was informed by a
17 fellow employee that he had heard Plaintiff was on medical leave. On September 11, 2006, Plaintiff
18 went to the corporate offices for a previously arranged meeting with Mr. Berry and Mr. Ortega and
19 was informed he was being terminated.

20 Plaintiff subsequently filed this action, alleging federal claims for violation of rights under
21 the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).
22 Defendant asserts that Plaintiff was terminated for excessive drinking on the job and acts of
23 insubordination. Defendant also states that it was not aware Plaintiff needed surgery or surgical
24 leave at the time of his termination.

1 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
2 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248

3 ANALYSIS

4 The parties have provided the Court with differing accounts of the last few weeks of
5 Plaintiff’s employment. Plaintiff has supported his version with a sworn affidavit. Defendants
6 dispute whether they were informed of the need for surgery. For example, Mr. Tiberti stated under
7 oath that he “did not recall” having been informed by Plaintiff that he would be needing surgery.
8 Defendant asserts in its Reply (#16), page 16, lines 2–3, that Mr. Tiberti “states unequivocally he
9 does not know Kelly and did not with him about health issues”. [sic] However, as pointed out Mr.
10 Tiberti’s actual sworn statements are only that he “did not recall” and “did not remember” such a
11 conversation. Similarly, supervisor Kim McElhney also states she has no recollection of discussion
12 with Plaintiff about Plaintiff’s upcoming surgery. In his affidavit, Plaintiff states that on August 31,
13 2006, he notified Mr. Ortega that he would be having surgery on September 27, 2006 for cervical
14 spine pain.

15 Plaintiff has met his burden of setting forth material issues of fact precluding summary
16 adjudication of his federal and state law claims. A reasonable jury could, viewing in the light most
17 favorable to the Plaintiff, find he was regarded by Defendants as having a disability, that he informed
18 Defendants of his need for medical leave, and that his termination for drinking and insubordination
19 was pretextual.

20 Plaintiff has offered evidence which, if believed, would be sufficient to establish a prima
21 facie case of disability-based discrimination due to an actual disability and due to being regarded as
22 having a qualifying disability. Second, there are genuine issues of material fact as to whether
23 Plaintiff would have continued to be employed by Defendants but for the fact that he requested a
24 medical leave of absence for scheduled surgery. The lack of prior disciplinary action and the
25 proximity in time of the employer learning of Plaintiff’s impairment and his need for surgery in
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1 relation to the time of termination could be considered by the jury determining whether the
2 employer's asserted grounds for termination are pretextual.

3 **CONCLUSION**

4 Genuine issues of material fact exist between the parties' respective versions of the events
5 leading up to Plaintiff's termination, thereby precluding summary adjudication of his claims.

6 Accordingly, Defendant's Motion for Summary Judgment (#14) is **DENIED**.

7 **DATED: 3/29/2011**

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9 **UNITED STATES DISTRICT JUDGE**

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