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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

DEBORAH WARREN)	3:08-CV-667-ECR-VPC
)	
Plaintiff,)	
)	
vs.)	<u>Order</u>
)	
SNAP-ON TOOLS COMPANY, LLC)	
)	
Defendant.)	
)	
)	

This diversity case arises out of the termination of Plaintiff Deborah Warren ("Warren") by her employer, Defendant Snap-On Tools Company, LLC ("Snap-On"). Warren contends that her termination constitutes a violation of the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654. Both parties have filed motions for summary judgment (## 16, 21) on the issue of Snap-On's liability under the FMLA.

The motions are ripe, and we now rule on them.

I. Factual and Procedural Background

Warren was employed by Snap-On at its distribution center in Carson City, Nevada. On October 13, 2008, Warren notified Snap-On that she needed time off work for an upcoming wrist surgery, and applied for leave under the FMLA. She was approved to take FMLA leave from November 7, 2008, to December 19, 2008, on the

1 understanding that the surgery was to take place on November 7,
2 2008.

3 On the evening of November 6, 2008, Warren's doctor informed
4 her that her surgery was postponed until the following Monday,
5 November 10, 2008. During the day on November 7, 2008, Warren's
6 doctor again postponed the surgery, rescheduling it to November 11,
7 2008. On November 11, 2008, Warren's surgery was finally
8 performed.

9 Warren did not attempt to go to work on November 7 or November
10 10, 2008. Because of her requested FMLA leave, she was not
11 scheduled to work on either of those dates. Nevertheless, it is
12 undisputed that she would have been scheduled to work, absent the
13 FMLA leave. Warren also did not call Snap-On to report that her
14 surgery had been rescheduled by her doctor, making her unexpectedly
15 available to work on those dates. On November 13, 2008, Snap-On
16 learned from its short-term disability carrier that Warren's
17 surgery took place on November 11, 2008, not November 7, 2008. On
18 that same date, Snap-On terminated Warren for failing to work or to
19 call in on November 7 and November 10, 2008.

20 On December 22, 2008, Warren filed her Complaint (#1),
21 alleging that Snap-On had violated her rights under the FMLA by
22 terminating her. Snap-On answered (#4), denying it violated
23 Warren's FMLA rights. Snap-On's position is that Warren's
24 termination was consistent with the FMLA and Snap-On company
25 policies that are enforceable under the FMLA.

26 On October 13, 2009, Snap-On filed its motion for summary
27 judgment (#16) ("D.'s MSJ"). Warren opposed (#22) the motion
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1 (#16), and Snap-On replied (#24). On October 28, 2008, Warren
2 filed her motion for summary judgment (#21) ("P.'s MSJ"). Snap-On
3 opposed (#23) the motion (#21), and Warren replied (#31).

4 5 II. Summary Judgment Standard

6 Summary judgment allows courts to avoid unnecessary trials
7 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
8 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The
9 court must view the evidence and the inferences arising therefrom
10 in the light most favorable to the nonmoving party, Bagdadi v.
11 Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary
12 judgment where no genuine issues of material fact remain in dispute
13 and the moving party is entitled to judgment as a matter of law.
14 FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate
15 where there is no legally sufficient evidentiary basis for a
16 reasonable jury to find for the nonmoving party. FED. R. CIV. P.
17 50(a). Where reasonable minds could differ on the material facts
18 at issue, however, summary judgment should not be granted. Warren
19 v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert.
20 denied, 116 S.Ct. 1261 (1996).

21 The moving party bears the burden of informing the court of
22 the basis for its motion, together with evidence demonstrating the
23 absence of any genuine issue of material fact. Celotex Corp. v.
24 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
25 its burden, the party opposing the motion may not rest upon mere
26 allegations or denials in the pleadings, but must set forth
27 specific facts showing that there exists a genuine issue for trial.

1 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
2 Although the parties may submit evidence in an inadmissible form –
3 namely, depositions, admissions, interrogatory answers, and
4 affidavits – only evidence which might be admissible at trial may
5 be considered by a trial court in ruling on a motion for summary
6 judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs.,
7 Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

8 In deciding whether to grant summary judgment, a court must
9 take three necessary steps: (1) it must determine whether a fact is
10 material; (2) it must determine whether there exists a genuine
11 issue for the trier of fact, as determined by the documents
12 submitted to the court; and (3) it must consider that evidence in
13 light of the appropriate standard of proof. Anderson, 477 U.S. at
14 248. Summary judgment is not proper if material factual issues
15 exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260,
16 1264 (9th Cir. 1999). “As to materiality, only disputes over facts
17 that might affect the outcome of the suit under the governing law
18 will properly preclude the entry of summary judgment.” Anderson,
19 477 U.S. at 248. Disputes over irrelevant or unnecessary facts
20 should not be considered. Id. Where there is a complete failure
21 of proof on an essential element of the nonmoving party’s case, all
22 other facts become immaterial, and the moving party is entitled to
23 judgment as a matter of law. Celotex, 477 U.S. at 323. Summary
24 judgment is not a disfavored procedural shortcut, but rather an
25 integral part of the federal rules as a whole. Id.

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1 **III. Discussion**

2 Both parties seek summary judgment on the issue of whether
3 Warren's termination was in violation of the FMLA. It is
4 undisputed that Warren generally qualified for and was entitled to
5 the protections and rights provided by the FMLA. Moreover,
6 Warren's "taking of FMLA-protected leave constituted a negative
7 factor in the decision to terminate her." Bacheldor v. Am. W.
8 Airlines, 259 F.3d 1112, 1125 (9th Cir. 2001). Indeed, Snap-On has
9 cited no reason for Warren's termination other than Warren's taking
10 of leave pursuant to the FMLA on November 7 and November 10, 2008,
11 and her failure to call in to report the rescheduling of her
12 surgery that made her unexpectedly available for work on those
13 dates. (See D.'s Br. in Support of D.'s MSJ at 2 (#17) (stating
14 that Warren "was terminated on November 13 for failing to either
15 show up for work or call in on November 7 and 10".) Thus, for
16 Warren to prevail on her claim, she need only demonstrate that "she
17 is entitled to the benefit she claims," that is, that she was
18 entitled to take FMLA leave on November 7 and November 10, 2008.
19 Bacheldor, 259 F.3d at 1126.

20 Snap-On analogizes the circumstances of this case to cases
21 where an employee fraudulently misuses FMLA leave. We do not agree
22 that the analogy is apt. For example, in Parker v. Verizon
23 Pennsylvania, Inc., 309 F. App'x 551 (3d Cir. 2009), an employee
24 misrepresented his health condition to his employer by taking a
25 "sick day" to work on building his new house. Id. at 563.
26 Similarly, in Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th
27 Cir. 2005), an employee claimed to be taking leave for the purpose
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1 of caring for a family member, but instead used the time to travel
2 across the country to retrieve a family vehicle. Id. at 1046.
3 Here, by contrast, there is no evidence of any fraudulent intent on
4 the part of Warren. She properly sought and was approved for FMLA
5 leave to seek care for an actual medical condition; her surgery was
6 twice rescheduled on the doctor's initiative, not her own. The
7 question here is not one of fraud, but whether Warren was required
8 under the FMLA to inform Snap-On that she was unexpectedly
9 available to work on November 7 and November 10, 2008, and to offer
10 to work on those days, though she was not scheduled to do so
11 because of her requested and approved FMLA leave.

12 Snap-On also argues that the regulations implementing the FMLA
13 place on the employee the duty of notifying her employer "as soon
14 as practicable if dates of scheduled leave change or are extended,
15 or were initially unknown." 29 C.F.R. § 825.302(a). This argument
16 fails because the quoted regulatory language is taken out of
17 context. Under this section of the regulations, it is the duty of
18 the employee to give the employer advance notice, when practicable,
19 of a foreseeable need for the employee to take an FMLA leave. Id.
20 Here, Warren gave Snap-On advance notice of her foreseeable need
21 for FMLA leave, and was approved on the basis of her scheduled
22 surgery date. It was not until the evening of November 6, 2008,
23 after her last scheduled shift prior to her approved FMLA leave,
24 that Warren's doctor called to reschedule the surgery. Section
25 825.302(a) does not speak to the duties of an employee who

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1 discovers on the eve of an approved and scheduled FMLA leave that
2 her circumstances have changed.¹

3 The regulations implementing the FMLA in effect at the time of
4 Warren's termination contemplate that "an employee may discover
5 after beginning leave that the circumstances have changed and the
6 amount of leave originally anticipated is no longer necessary." 29
7 C.F.R. § 825.309(c). An employer may require that the employee
8 provide notice of such changed circumstances, either through
9 required periodic status reports or otherwise. Id. § 825.309(a)
10 and (c). To enforce such a requirement, however, the employer must
11 provide the employee with specific written notice. Id.
12 § 825.301(b) (1) ("The employer shall . . . provide the employee
13 with written notice detailing the specific expectations and
14 obligations of the employee and explaining any consequences of a
15 failure to meet these obligations").

16 Here, Snap-On provided Warren with a number of documents
17 detailing the specific expectations and obligations of Warren with
18 respect to her FMLA leave. Nowhere in those documents, however, is
19 any specific requirement that Warren inform Snap-On of unexpected
20 changes in circumstances such as the last minute rescheduling of
21 her surgery. On the contrary, Warren was explicitly not required
22 to make periodic reports regarding her status and intent to return
23 to work, and Snap-On explicitly disclaimed any requirement that

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25 ¹ The parties spill much ink on the issue of whether Warren was
26 already on FMLA leave or not on the evening of November 6, 2008, when
27 she was informed that her surgery was rescheduled. This issue,
28 however, is really beside the point. The problem of whether Warren
was provided with adequate notice of the specific expectations and
obligations of her, discussed below, applies equally in either case.

1 Warren notify it if the circumstances of her leave changed.
2 (Employer Response to Employee Request for Family or Medical Leave,
3 P.'s MSJ, Ex. C, ¶ 8 (#21-1).)

4 It must be noted that the language of this section of the
5 documentation provided to Warren is aimed more at changes in
6 circumstances that would hasten the end of an approved leave,
7 rather than changes that would delay the start of such a leave: "If
8 the circumstances of your leave change and you are able to return
9 to work earlier than the date indicated on the reverse of this
10 form, you . . . will not be required to notify us at least two work
11 days prior to the date you intend to report to work." (Id.)
12 Nevertheless, this is the only section of the FMLA notices provided
13 to Warren that she could have plausibly looked to for instruction
14 regarding her circumstance. To the extent that Warren could have
15 discerned from the documentation any guidance with regard to her
16 obligations under the circumstances, that guidance was that she
17 need not call in or report to work. At best, therefore, Snap-On
18 failed to provide Warren with "written notice detailing the
19 specific expectations and obligations" of her; at worst, the
20 written notice Warren received actively misled her.

21 The applicable regulations also provide that Snap-On could
22 require Warren "to comply with the employer's usual and customary
23 notice and procedural requirements for requesting leave." 29
24 C.F.R. § 825.302(d); see also id. § 825.301(a). On this basis,
25 Snap-On asserts a right to enforce its usual and customary policy
26 regarding "no call/no show absences." Under this policy, employees
27 are required to "call in their absence prior to the start of the

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1 shift." (Attendance Policy, P.'s MSJ, Ex. J at 2 (#21-1). If the
2 employee fails to do so once, the employee receives a written
3 warning; a second offense results in termination. (Id.)

4 There is nothing in the attendance policy, however, nor in any
5 of the other guidance regarding company policies in evidence, that
6 explicitly applies Snap-On's policy relating to "no call/no show
7 absences" to situations such as Warren's. Indeed, the attendance
8 policy states that it is intended to encourage "[r]egular
9 attendance during scheduled work hours" as a "basic expectation of
10 employment." (Id. at 1 (emphasis added).) Because of her
11 requested and approved FMLA leave, Warren was not scheduled to work
12 on either November 7 or November 10. Nor is there any specific
13 indication in the documents describing Snap-On's policy relating to
14 "no call/no show absences" that the policy might be applied to
15 circumstances where an employee is physically capable of working,
16 but was not scheduled to work.

17 Snap-On company policy also provides for the termination of
18 any employee who "engages in any type of gainful employment while
19 on family and medical leave, or who fraudulently obtains family and
20 medical leave." (Leave of Absence Policy, P.'s MSJ, Ex. K at 39
21 (#21-1).) There is no allegation that Warren engaged in any
22 "gainful employment" while on leave; it is undisputed that she
23 spent November 7 and November 10, 2008 at home, cleaning her house
24 or just "doing nothing." As discussed above, Warren did not engage
25 in fraud in obtaining her leave. It turned out, through no fault
26 of Warren, that her requested leave was scheduled less than
27 ideally. This does not, however, amount to fraud on the part of
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1 Warren, but only an unexpected circumstance. Warren did not, it
2 turns out, handle that unexpected circumstance as Snap-On would
3 have wished her to do. There is nothing in the record, however,
4 showing that Warren was provided with specific written notice of
5 Snap-On's expectations of her in such circumstances. C.f. Lewis v.
6 Holsum of Fort Wayne, Inc., 278 F.3d 706, 710 (7th Cir. 2002)
7 (employer entitled to enforce requirement, described in detail in
8 attendance policy, that employee call in each day under certain
9 circumstances).

10 In sum, nothing in the notices given to Warren when she was
11 approved for leave, nor in policies generally applicable to Snap-On
12 employees, put Warren on notice that she was required to inform
13 Snap-On of the last-minute rescheduling of her operation, or to
14 come in to work, though she was not scheduled to do so because of
15 her approved leave. As such, Warren's absences from work pursuant
16 to her approved FMLA leave on November 7 and November 10, 2008,
17 qualified for protection under the FMLA, even though her surgery
18 did not take place until November 11, 2008. Thus, Snap-On's
19 termination of Warren violated the FMLA.

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IV. Conclusion

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Warren properly sought and was approved for FMLA leave to
seek medical treatment, namely, surgery on her wrist. Through no
fault of her own, she did not receive the surgery on the expected
date. As such, she was physically capable of working on the two
business days prior to her surgery, the first two days of her
scheduled FMLA leave. Warren did not report this unexpected

1 circumstance to her employer, nor did she report to work on those
2 dates. Snap-On, however, failed to provide Warren specific written
3 notice that it expected her to call in or report to work in such a
4 circumstance. As such, Snap-On is liable for violating Warren's
5 rights under the FMLA by terminating her employment on that basis.

6 Neither party has addressed the issue of damages in their
7 respective motions for summary judgment. The case, therefore, will
8 proceed with respect to the issue of damages only.

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10 **IT IS, THEREFORE, HEREBY ORDERED** that Snap-On's motion for
11 summary judgment (#16) is **DENIED**.

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13 **IT IS FURTHER ORDERED** that Warren's motion for summary
14 judgment (#21) is **GRANTED**.

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16 DATED: July 21, 2010.

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18 UNITED STATES DISTRICT JUDGE

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