



1 of “medical leave” on November 15, 2011, and was demoted for his absences. (*Id.* ¶ 9.)  
2 That same day, Plaintiff alleges he “decided that for safety reasons, he would not be  
3 able to finish his shift” and “requested permission to leave due to his serious mental and  
4 emotional health condition caused by the demotion.” (*Id.* ¶ 11.) Plaintiff’s supervisor  
5 allegedly told him he could leave, but he “could get a write-up” for doing so. (*Id.*) Plaintiff  
6 states that he left anyway and was suspended on November 16, 2011, and terminated  
7 on November 20, 2011, because he had “abandoned his job.” (*Id.* ¶¶ 11-13.)

### 8 **B. Procedural History**

9 Plaintiff filed his initial Complaint on September 25, 2012. (Dkt. no. 1.) He filed an  
10 Amended Complaint on November 9, 2012. (Dkt. nos. 10, 11.) Defendant moved to  
11 dismiss (dkt. no. 15) and the parties stipulated to permit Plaintiff to amend his Complaint  
12 (dkt. no. 18). The parties agreed that Plaintiff “should be granted leave to file a Second  
13 Amended Complaint which will delete the claim for relief under the Americans with  
14 Disabilities Act and will add clarifying factual information with respect to the remaining  
15 allegations of the pleading.” (*Id.* at 1.) The Court granted the stipulation. (Dkt. no. 19.)

16 Plaintiff filed a Second Amended Complaint (“SAC”), asserting a claim for  
17 interference under the Family Medical Leave Act (“FMLA”) and a claim for tortious  
18 discharge. (Dkt. no. 20.) Defendant moved for dismissal (dkt. no. 21), which the Court  
19 granted with leave to amend. (Dkt. no. 41.) Plaintiff then filed the TAC, alleging the same  
20 claims for interference under the FMLA and for tortious discharge. (Dkt. no. 42.)  
21 Defendant again moved for dismissal. (Dkt. no. 43.) The Court dismissed the TAC with  
22 prejudice. (Dkt. no. 49.)

### 23 **III. DISCUSSION**

24 Defendant relies on separate authorities to support its attorney’s fees request for  
25 defending against Plaintiff’s federal and state law claims. First, Defendant contends that  
26 an award of fees is appropriate because Plaintiff’s claim under the FMLA is frivolous.  
27 Second, Defendant relies on NRS § 18.010(2)(b) as the authority for its request for fees  
28 because Plaintiff’s tortious discharge claim was “brought or maintained without

1 reasonable ground.” (Dkt. no. 51 at 4.) Plaintiff argues that Defendant is not entitled to  
2 fees under the FMLA, his FMLA claim was not frivolous, and he had reasonable grounds  
3 for asserting his state law claim. The Court will address each claim in turn below.

4 **A. Fees under the FMLA**

5 “It is the general rule in the United States that in the absence of legislation  
6 providing otherwise, litigants must pay their own attorney's fees.” *Christiansburg*  
7 *Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434 U.S. 412, 415 (1978) (citing  
8 *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975)). Defendant argues  
9 that the FMLA provides the statutory source for its attorney’s fees request and relies on  
10 authorities that generally govern the standard for determining whether to impose an  
11 award of fees as support. Plaintiff points out that the FMLA does not authorize an award  
12 of attorney’s fees to a prevailing defendant. The Court agrees.

13 According to the FMLA’s counsel-fee provision, in an action against any  
14 employer, the court “shall, in addition to any judgment awarded to the plaintiff, allow a  
15 reasonable attorney’s fee, reasonable expert witness fees, and other costs of the action  
16 to be paid by the defendant.” 29 U.S.C. § 2617(a)(3). This provision makes fee awards  
17 mandatory for a prevailing plaintiff, but is silent as to fees for a prevailing defendant. The  
18 plain language of § 2617(a)(3) does not support Defendant’s argument that fees should  
19 be awarded to a defendant who prevails.

20 Defendant argues that the Supreme Court has determined that an award of fees  
21 is appropriate where “a plaintiff’s federal claims are ‘unreasonable, frivolous, meritless or  
22 vexatious.’” (Dkt. no. 51 at 3-4 (quoting *Christiansburg Garment*, 434 U.S. at 421).)  
23 However, the cited Supreme Court decision of *Christiansburg Garment* does not support  
24 such a general right to attorney’s fees.<sup>1</sup> To the contrary, in *Christiansburg Garment*, 434  
25 U.S. at 415–16, the Supreme Court observed that Congress has created limited

---

26 <sup>1</sup>Defendant also cites to *Margolis v. Ryan*, 140 F.3d 850, 854 (9th Cir. 1998), but  
27 that case involved the fee provision under 42 U.S.C. § 1988 (for claims brought under 42  
28 U.S.C. § 1983), which gives the court discretion to award fees to the prevailing party.  
Defendant has not identified any similar provision in the FMLA.

1 exceptions to the general rule that litigants bear their own fees by adopting federal  
2 statutes that allow for attorney's fees. The Court summarized these various statutory  
3 counsel-fee provisions, noting that "[s]ome of these statutes make fee awards mandatory  
4 for prevailing plaintiffs; others make awards permissive but limit them to certain parties,  
5 usually prevailing plaintiffs," and "many of the statutes are more flexible, authorizing the  
6 award of attorney's fees to either plaintiffs or defendants." *Id.* (footnotes omitted). The  
7 fee provision under Title VII, for instance, falls within this latter "more flexible" category.<sup>2</sup>  
8 *Id.* at 416. The Court then went on to determine the standard for awarding fees to a  
9 prevailing defendant in a Title VII action — a court must find that a plaintiff's claim "was  
10 frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it  
11 clearly became so." *Id.* at 422.

12 This standard does not apply here because the FMLA's counsel-fee provision  
13 provides for fees only for a plaintiff who prevails against a defendant. As the Ninth Circuit  
14 has observed, "Congress provided for an award of reasonable attorneys' fees to  
15 successful civil rights plaintiffs 'to ensure "effective access to the judicial process" for  
16 persons with civil rights grievances.'" *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1261-62  
17 (9th Cir. 1987) (quoting *Hensley v Eckerhart*, 461 U.S. 424, 429 (1983)). This policy  
18 does not carry over to a prevailing defendant in an action brought under the FMLA.

19 Defendant further argues that courts have evaluated requests for fees under the  
20 FMLA in the same manner as motions for fees under other civil rights statutes, such as  
21 Title VII. But Defendant confuses the statutory right to attorney's fees with the standard  
22 for determining the reasonableness of the fees requested. In one of Defendant's cited  
23 cases, *Navarro v. Gen. Nutrition Corp.*, No. C-03-0603SBAEMC, 2004 WL 2648373, at  
24 \*2 (N.D. Cal. Nov. 19, 2004), the court observed that courts evaluate motions for  
25 attorney's fees under the FMLA in the same manner as motions filed under other civil

---

26 <sup>2</sup>The relevant statute provides, in pertinent part, that "the court, in its discretion,  
27 may allow the prevailing party, other than the Commission or the United States, a  
28 reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C.  
§ 2000e-5(k).

1 rights statutes in that they apply the lodestar method. *Navarro* does not support  
2 Defendant's contention that fees should be awarded to a prevailing defendant under the  
3 FMLA.

4 In sum, the Court must make the following inquiries in determining whether to  
5 award attorney's fees to Defendant for prevailing on Plaintiff's FMLA claim: (1) whether  
6 the FMLA authorizes awarding fees to a prevailing defendant; (2) if so, what standard  
7 the Court should apply in determining whether to award fees; and (3) whether the  
8 amount of fees requested is reasonable. See *Christiansburg Garment*, 434 U.S. at 417-  
9 23; *Morales v City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) ("The lodestar  
10 determination has emerged as the predominate element of the analysis' in determining a  
11 reasonable attorney's fee award." (quoting *Jordan*, 815 F.2d at 1262)), *amended on*  
12 *denial of reh'g* by 108 F.3d 981 (9th Cir. 1997). The Court's inquiry ends with a  
13 determination that the FMLA does not authorize fees to Defendant. Defendant attempts  
14 to overcome this statutory bar by trying to collapse the three inquiries into the single  
15 determination of whether Plaintiff's FMLA claim was frivolous or vexatious.

16 Because the FMLA does not give a prevailing defendant the right to recover  
17 attorney's fees, Defendant's request for fees incurred in defending Plaintiff's FMLA claim  
18 is denied.<sup>3</sup>

### 19 **B. Fees under State Law**

20 "In an action where a district court is exercising its subject matter jurisdiction over  
21 a state law claim, so long as 'state law does not run counter to a valid federal statute or  
22 rule of court, and usually it will not, state law . . . giving a right [to attorney's fees], which  
23 reflects a substantial policy of the state, should be followed.'" *MRO Commc'ns, Inc. v.*  
24 *Am. Telephone & Telegraph Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (quoting *Alyeska*

---

25  
26 <sup>3</sup>In its reply, Defendant claims that because the Amended Complaint alleged a  
27 claim under the Americans with Disabilities Act ("ADA"), which authorizes fees to a  
28 prevailing party, Defendant is entitled to fees under the ADA. (Dkt. no. 55 at 2.)  
However, the parties stipulated to permit Plaintiff to amend the Amended Complaint to  
remove the ADA claim. (Dkt. no. 18 at 1.) The Court therefore cannot find that the  
Amended Complaint was frivolous.

1 *Pipeline Serv. Co.*, 421 U.S. at 259 n.3). Section 18.010(2)(b) of the Nevada Revised  
2 Statutes gives the court discretion to award attorney's fees to a prevailing party where  
3 the claim "was brought or maintained without reasonable ground or to harass the  
4 prevailing party." NRS § 18.010(2)(b). The court must determine if evidence in the record  
5 exists to support "the proposition that the complaint was brought without reasonable  
6 grounds or to harass the other party." *Kahn v. Morse & Mowbray*, 117 P.3d 227, 238  
7 (Nev. 2005) (quoting *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 687 (Nev.  
8 1995)).

9 The records here compel a finding that the tortious discharge claim was brought  
10 without reasonable grounds. The law governing this claim is well established. The  
11 Nevada Supreme Court does not recognize tortious discharge actions by at-will  
12 employees except in "those rare and exceptional cases where the employer's conduct  
13 violates strong and compelling public policy." *Wayment v. Holmes*, 912 P.2d 816, 818  
14 (Nev. 1996) (quoting *Sands Regent v. Valgardson*, 777 P.2d 898, 900 (Nev. 1989)).  
15 Nevada law does not permit recovery for tortious discharge where there are mixed  
16 motives for an employee's termination; rather, the employee's protected activity must  
17 have been the sole proximate cause of the termination. *Allum v. Valley Bank of Nev.*,  
18 970 P.2d 1062, 1066 (Nev. 1998).

19 Plaintiff's allegations failed to identify the particular law or policy necessary to  
20 show that he engaged in protected activity, and, in turn, to satisfy this proximate cause  
21 requirement. In dismissing the SAC, the Court noted that Plaintiff failed to identify  
22 specifically the "health and mine safety laws" alleged in the SAC, or to provide any facts  
23 to support his allegation that he was terminated solely because he refused to violate  
24 those laws. (Dkt. no. 41 at 5.) Yet, Plaintiff filed a TAC that contains essentially the same  
25 allegations as the SAC. The TAC also failed to address the two main factual deficiencies  
26 pointed out in the Court's Order dismissing the SAC. (Dkt. no. 49 at 6-7.) Plaintiff's  
27 failure to cure these deficiencies shows that he lacked reasonable grounds to assert the  
28 claim in the first place.

1 Plaintiff contends that by granting him leave to amend, the Court encouraged him  
2 to believe that he could convince the Court that his claims have merit. (Dkt. no. 54 at 1-  
3 2.) The parties have an obligation not to advance a frivolous claim. This obligation is not  
4 alleviated by the Court's decision to grant leave to amend, particularly where the Court  
5 identifies specific deficiencies in a complaint. Under these circumstances, Plaintiff's  
6 failure to cure only underscores the fact that he brought the claim without reasonable  
7 grounds.

8 The Court therefore grants Defendant's request for attorney's fees relating to its  
9 defense of the tortious discharge claim.

10 **IV. CONCLUSION**

11 It is therefore ordered that Defendant's Motion for Fees (dkt. no. 51) is granted in  
12 part and denied in part. It is granted with respect to attorney's fees relating to the state  
13 law claim. It is denied with respect to attorney's fees relating to the federal claim.  
14 Defendant is directed to submit a revised affidavit of counsel to identify the fees incurred  
15 relating to the state law claim. The revised affidavit must be filed within fifteen (15) days.  
16 Plaintiff will be given fifteen (15) days to object to the reasonableness of the fees  
17 requested.

18 DATED THIS 25<sup>th</sup> day of September 2015.

19  
20  
21   
22 \_\_\_\_\_  
23 MIRANDA M. DU  
24 UNITED STATES DISTRICT JUDGE  
25  
26  
27  
28