UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLADYS EJIOGU, Plaintiff,	15cv505 (DLC)
-v-	OPINION AND ORDER
GRAND MANOR NURSING AND REHABILITATION CENTER, CAROLYN MOOYOUNG, and HOWARD WOLF, Defendants.	

APPEARANCES:

For the Plaintiff:
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For Defendant Grand Manor Nursing and Rehabilitation Center:
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DENISE COTE, District Judge:

On April 1, 2017, Gladys Ejiogu ("Ejiogu") filed a motion for reconsideration of the Court's March 29 Opinion and Order largely dismissing upon summary judgment Ejiogu's interference and retaliation claims under the Family and Medical Leave Act

("FMLA"). Ejiogu v. Grand Manor Nursing & Rehab. Ctr., 15cv505 (DLC), 2017 WL 1184278 (S.D.N.Y. Mar. 29, 2017) ("Ejiogu").[1] The April 1 motion for reconsideration is denied. The plaintiff's principal arguments in support of the motion are addressed below.

DISCUSSION

The standard for granting a motion for reconsideration is "strict." Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted) (discussing a motion under Rule 59(e), Fed. R. Civ. P.). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." Id. (citation omitted). "A motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). It is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or

[1] The April 1 motion does not seek reconsideration of the dismissal of retaliation claims brought under the Rehabilitation Act and the New York City Human Rights Law.

otherwise taking a second bite at the apple." Analytical Surveys, 684 F.3d at 52 (citation omitted).

Familiarity with Ejiogu is presumed. Only those facts necessary to understand the arguments presented in the motion for reconsideration are repeated here. Ejiogu has sued her former employer Grand Manor Nursing and Rehabilitation Center ("Grand Manor") principally for interfering with her right to take FMLA leave and retaliating against her for taking such leave. Ejiogu worked as an In-Service Coordinator at Grand Manor for almost two years, beginning November 1, 2011. She was responsible for training staff members on resident care and conducting the orientation of new employees. She took leave from June 10 to 21, 2013 to care for her mother and to mourn her mother's passing. Following that leave, she did not return to Grand Manor as scheduled. Instead, on June 26, she requested FMLA leave for her own medical reasons. That leave was granted, and Ejiogu was on FMLA leave from June 25 to September 25, 2013.

Upon Ejiogu's return to Grand Manor, she complained about the new written description of her duties, which included certain human resource ("HR") duties. The owners told her to discuss her concerns with a senior supervisor, who would be returning to Grand Manor on September 30. But, following a confrontational meeting with her direct supervisor -- Carolyn

Mooyoung ("Mooyoung") -- on September 27, Ejiogu never returned to work. As described in detail in Ejiogu, the undisputed facts demonstrate that the plaintiff abandoned her employment at Grand Manor. The defendants were granted summary judgment on each of plaintiff's claims with the exception of her claim that Grand Manor failed to give her FMLA leave in June of 2013 so that she could care for her mother during her mother's serious illness.

I. FMLA Interference

Ejiogu's principal argument for reconsideration of the denial of her interference claims concerns changes made to her job description upon her return to Grand Manor. In Ejiogu, the Court held that "[n]o reasonable juror could avoid the conclusion that Ejiogu was restored to an 'equivalent position' at Grand Manor when she returned from FMLA leave." Ejiogu, 2017 WL 1184278, at *9. Ejiogu urges in her reconsideration motion that the determination of whether she was restored to an "equivalent position" upon her return to Grand Manor is a question of fact to be decided by a jury. While the judgment of whether the position offered an employee upon return from FMLA leave is equivalent to the one held prior to leave is typically a question of fact, in opposing this summary judgment motion Ejiogu was required to identify admissible evidence from which a jury could conclude that the positions were not equivalent.

This she failed to do. Indeed, she does not even now dispute any of the facts upon which the Court relied in making its determination.

For example, Ejiogu does not dispute that the temporary In-Services Coordinator hired in Ejiogu's absence was required to perform HR duties after Grand Manor lost its Director of Human Resources. Nor does Ejiogu dispute that "the new HR duties were few in number," and were "substantially similar to those she had previously performed, entailed substantially equivalent skill, and imposed substantially equivalent responsibility." Id. Moreover, Ejiogu does not challenge the Opinion's rejection of her argument that three particular duties had transformed her job.[2] Finally, beyond all of these hurdles to her claim, as she twice concedes in her motion for reconsideration, Grand Manor's owners "gave her permission to discuss the [changes in her job description] with Mr. Wolf when he returned" to work on Monday, September 30. Having failed to meet with Wolf about her job duties, it is not surprising that Ejiogu was unable in her opposition to the motion for summary judgment to identify with sufficient clarity or precision in which ways her job upon her

[2] These three duties were that Ejiogu "Not Stay in Office," that she use an "HR File Documents" checklist, and that she create a monthly calendar.

return to work would not have been "equivalent," as measured by the FMLA, to her prior position at Grand Manor.

II. FMLA Retaliation

The motion for reconsideration principally argues that Ejiogu relied on the wrong body of law in defining what constitutes an adverse employment action in the context of an FMLA retaliation claim. The use of the correct definition for an adverse employment action had no impact, however, on the plaintiff's chief complaint in this lawsuit -- which is that she was fired in retaliation for her opposition to a change in her job duties. It has never been disputed that the termination of employment constitutes an adverse action. In any event, none of Ejiogu's retaliation claim survives on reconsideration.

The motion for reconsideration recognizes that Ejiogu correctly described both the prima facie test for an FMLA retaliation claim and general standard for assessing the existence of an adverse employment action in the context of a retaliation claim. To establish a prima facie case of FMLA retaliation, a plaintiff must show that:

> 1) he exercised rights protected under the FMLA; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent.

Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 429 (2d Cir. 2016) (citation omitted). An adverse employment action is "any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights," and may include "changes in employment life outside of the terms and conditions of employment." Millea v. Metro-North R.R. Co., 658 F.3d 154, 164 (2d Cir. 2011) (applying the Supreme Court's standard for an "adverse employment action" in the Title VII retaliation context, see Burlington Northern & Santa Fe R.R. Co v. White, 548 U.S. 53, 67-69 (2006), to FMLA retaliation claims).

The adverse-action standard for retaliation "covers a broader range of conduct than does the adverse-action standard for claims of discrimination." Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 90 (2d Cir. 2015). With respect to adverse actions in the retaliation context, the Supreme Court has cautioned that:

> Context maters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by

> excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.

Burlington Northern, 548 U.S. at 69 (citation omitted).

Since clarifying the definition of an "adverse employment action" in Millea, the Second Circuit has found an adverse employment action where a high school teacher was denied tenure after taking FMLA leave. Donnelly v. Greenburgh Cent. Sch. Dist. No. 7, 691 F.3d 134, 147 (2d Cir. 2012). In the Title VII retaliation context, the Second Circuit has found adverse employment actions where a plaintiff was demoted to a non-managerial title after complaining about his employer's discriminatory employment practices, Littlejohn v. City of N.Y., 795 F.3d 297, 316 (2d Cir. 2015), and where a high school math teacher was assigned notoriously absent students, suffered a temporary paycheck reduction, was not notified that the curriculum for one of his classes had changed, and received a negative performance evaluation after filing a charge of discrimination with the Equal Employment Opportunity Commission. Vega, 801 F.3d at 91-92.

The motion for reconsideration correctly identifies an error, however, in Ejiogu's discussion of the precedent addressed to an "adverse employment action." Specifically, it

was error to describe precedent defining an adverse employment action in the discrimination context when addressing an adverse employment action in the retaliation context. Despite this error, the analysis of Ejiogu's FMLA retaliation claims remains unchanged. Each of the three adverse employment actions which the plaintiff identified in opposition to the motion for summary judgment is reconsidered below.[3]

A. Assault

As Ejiogu was attempting to secretly record Mooyoung during their meeting on September 27, Ejiogu's recording device -- a telephone -- made a noise. Ejiogu asserts that Mooyoung then lunged toward her to grab the phone. Ejiogu characterizes this lunge as an assault, even though she was not touched, and contends that it was an adverse employment action taken against her in retaliation for her complaints about changes made to her job description upon her return from FMLA leave. No jury could find that this single incident would dissuade a reasonable worker in Ejiogu's position from exercising her legal rights.

[3] Ejiogu repeatedly stated in opposition to the motion for summary judgment that she was asserting only three adverse actions. She identified them as "((1) assault; (2) unclearly communicated suspension or termination later reduced, but uncommunicated to suspension; then, finally, (3) outright termination)."

Millea, 658 F.3d at 164. Nor can Ejiogu show that the exercise of her rights under the FMLA was a motivating factor, let alone a "but for cause,"[4] of Mooyoung's decision to reach for the recording device. It was the sound of Ejiogu's phone -- not Ejiogu's expressed concerns about her new HR duties -- that prompted Mooyoung to lunge for the phone.

B. Suspension

The second adverse action to which Ejiogu pointed in opposition to summary judgment was the drafting of a disciplinary suspension on September 27. The broad "adverse employment action" standard articulated above, however, does not assist Ejiogu here either. Grand Manor never suspended Ejiogu and she was not aware of the draft suspension until after she commenced this litigation. Without knowledge that an employer was considering a suspension, a reasonable worker in Ejiogu's position could not point to the drafted suspension document as

[4] It is unclear in light of University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), what causal relationship must be shown in order to prove retaliation under the FMLA. In Nassar, the Supreme Court held that a "but-for" standard of causation, rather than a "motivating factor" standard, applies to Title VII retaliation claims. Id. at 2533-34. The Second Circuit has not addressed whether to extend the more demanding "but-for" standard to retaliation claims under the FMLA. Because there is no genuine issue of material fact as to whether Ejiogu's exercise of her FMLA rights was a motivating factor in Mooyoung's alleged assault, it is unnecessary to address which standard of causation governs.

an adverse action that would dissuade her from voicing her concerns about changes in her job description.

C. Termination

The principal adverse action upon which Ejiogu has always relied to support her retaliation claim was the termination of her employment at Grand Manor. But, the analysis of Ejiogu's retaliatory termination claim was never affected by the adverse action standard. The termination of employment is an adverse employment action under any standard. Instead, this prong of the retaliation claim foundered because Ejiogu abandoned her position at Grand Manor.

In the motion for reconsideration, Ejiogu argues again that the issue of abandonment is a question of fact to be decided by a jury. In her motion, however, Ejiogu does not contend that the Opinion incorrectly described any of the facts upon which it relied in finding that no reasonable jury could avoid concluding that the plaintiff abandoned her job. A motion for reconsideration is not a vehicle for a rehearing on the merits. Accordingly, Ejiogu's motion for reconsideration on the dismissal of the retaliatory termination claim is denied.

CONCLUSION

The plaintiff's April 1, 2017 motion for reconsideration of the dismissal upon summary judgment of her FMLA interference and retaliation claims is denied.

Dated: New York, New York
April 5, 2017

DENISE COTE
United States District Judge