

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GAIL SHEPARD,

Plaintiff,

v.

CASCADE HARDWOOD, a limited  
liability company,

Defendant.

CASE NO. C12-5117-RBL

ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

(Dkt. #12)

Plaintiff Gail Shepard sued Cascade Hardwood, alleging Cascade violated the Family and Medical Leave Act by terminating her for missing work after a car accident. Shepard moves for partial summary judgment on whether Cascade is liable under the FMLA. Cascade responds that Shepard cannot establish she was entitled to FMLA leave, and that material facts are in dispute. Shepard's Motion for Partial Summary Judgment is DENIED.

**I. FACTS**

In January 2007, Shepard began working at Cascade as a full-time employee. On February 23, 2011, Shepard was involved in a car accident on her way to work. Shepard fractured her sternum and sprained her back in the accident. Shepard finished her work week,

1 but missed parts of some work days for chiropractic appointments. Shepard worked during  
2 lunch to make up the missed time.

3 On March 7, 2011, Shepard did not go to work as scheduled. Instead, Shepard went to  
4 see her doctor, Paul Williams, M.D., about her injuries. Shepard notified Cascade about her  
5 doctor's appointment that day.

6 After her doctor's appointment, Shepard informed Cascade about her injuries and her  
7 need to take off work for the rest of the week. Originally, Shepard planned to use her vacation  
8 time, but Cascade told Shepard her leave would be under the FMLA.

9 On March 9, 2011, Cascade sent Shepard a package of information about FMLA leave.  
10 The package included an FMLA notice, an FMLA leave request form, and a Health Care  
11 Provider Certification for Shepard's doctor to complete. The FMLA notice stated Shepard was  
12 on FMLA leave as of March 7, 2011. It also asked Shepard to bring a fitness-for-duty note from  
13 her doctor when she returned to work. Cascade told Shepard to fill out and return the FMLA  
14 paperwork before she came back to work.

15 On the following Monday, March 14, 2011, Shepard attempted to return to work.  
16 Shepard, however, did not have a fitness-for-duty note clearing her for work or her completed  
17 FMLA paperwork. Cascade informed Shepard that she could not return to work without the  
18 required note. Shepard contacted Dr. Williams, who faxed a fitness-for-duty note to Cascade.  
19 Dr. Williams' note cleared Shepard for work on March 7, 2011. This date contradicted  
20 Shepard's absence from work. Cascade scheduled a meeting with Shepard on March 16 to  
21 discuss this discrepancy, and informed her that she was now on extended leave without pay.

1 On March 15, 2011, Shepard saw Dr. Williams again. He completed Shepard's FMLA  
2 paperwork, which cleared Shepard for work on March 15. Shepard provided this paperwork to  
3 Cascade that day.

4 The next day, Shepard met with her supervisor and two human resources representatives  
5 at Cascade to discuss the discrepancy between Dr. Williams' note clearing Shepard for work on  
6 March 7 and Shepard's absence from work that week. At the end of the meeting, Cascade  
7 terminated Shepard because of her unexcused absences from work.

8 Shepard sued, alleging that Cascade violated the FMLA by failing to restore her to her  
9 former employment position and by denying her FMLA benefits to which she was entitled. She  
10 now claims she is entitled to judgment as a matter of law on Cascade's liability for this claim. In  
11 response, Cascade argues that Shepard cannot establish she was entitled to FMLA leave, because  
12 Shepard's fitness-for-duty note contradicts her request for FMLA leave and is therefore invalid.  
13 Cascade also argues that summary judgment is not warranted because material facts surrounding  
14 the note are in dispute.

## 15 II. DISCUSSION

### 16 1. Summary Judgment Standard

17 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
18 the nonmoving party, there is no genuine issue of material fact which would preclude summary  
19 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to  
20 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to  
21 interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for  
22 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of  
23 evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v.*  
24

1 | *Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not  
2 | affect the outcome of the suit are irrelevant to the consideration of a motion for summary  
3 | judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words,  
4 | “summary judgment should be granted where the nonmoving party fails to offer evidence from  
5 | which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d at  
6 | 1221.

## 7 | **2. Summary Judgment is Not Warranted Because Material Facts Are in Dispute**

8 | Shepard seeks partial summary judgment on Cascade’s liability under the FMLA. A  
9 | plaintiff asserting an FMLA claim must establish five elements: (1) she was eligible for the  
10 | FMLA’s protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave  
11 | under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her  
12 | employer denied her FMLA benefits to which she was entitled. *Sanders v. City of Newport*, 657  
13 | F.3d 772, 778 (9th Cir. 2011).

14 | Cascade argues that Shepard cannot establish she was entitled to FMLA leave (element  
15 | 3), because Shepard’s fitness-for-duty note contradicts her request for FMLA leave and is thus  
16 | invalid. Def.’s Resp., Dkt. #18 at 8. Cascade also argues that summary judgment is not  
17 | available because the material facts surrounding the fitness-for-duty note are in dispute. Def.’s  
18 | Resp., Dkt. #18 at 9–10.

19 | Under the FMLA, an employer may require an employee to provide a fitness-for-duty  
20 | note before returning to work. 29 C.F.R. § 825.312. Cascade asked Shepard to provide a  
21 | fitness-for-duty note before she came back to work. At Shepard’s request, Dr. Williams faxed a  
22 | fitness-for-duty note to Cascade. Dr. Williams’ note stated Shepard was able to work on March  
23 | 7. Zanzig Decl., Ex. G, Dkt. #19 (“Shepard was seen today...[s]he is released to go back to  
24 |

1 work with no restrictions.”). Shepard, however, did not return to work until the next week. As a  
2 result of this discrepancy, Cascade contends the fitness-for-duty note is invalid and therefore  
3 Shepard is not entitled to FMLA leave.

4 In response, Shepard argues Dr. Williams’ fitness-for-duty note was “misdated.” Pl.’s  
5 Mot., Dkt. #12 at 7. In his declaration, Dr. Williams stated he had prepared an initial note  
6 clearing Shepard for work before March 15, and inadvertently sent this note to Cascade on  
7 March 14. Williams Decl., Dkt. #15 at 2. At his deposition, Dr. Williams testified that he wrote  
8 the fitness-for-duty note on March 10 rather than March 7 as the note indicates. Zanzig Decl.,  
9 Ex. C, Dkt. #19 at 23. Dr. Williams also testified that he was releasing Shepard to go back to  
10 work when he wrote the note on March 10. Zanzig Decl., Ex. C, Dkt. #19 at 25.

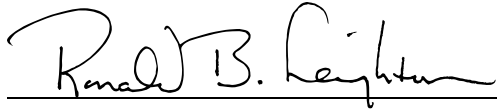
11 Shepard also argues that she provided a valid fitness-for-duty certification on March 15  
12 when she submitted her FMLA paperwork to Cascade. Pl.’s Reply, Dkt. #24 at 3. Dr. Williams  
13 completed this paperwork and cleared Shepard for work on March 15. Thus, Shepard argues that  
14 she is entitled to FMLA leave. Pl.’s Reply, Dkt. #24 at 6.

15 Taken in the light most favorable to Cascade, there are genuine issues of material fact  
16 regarding whether Shepard was entitled to FMLA leave during the period she was absent from  
17 work. As discussed above, there is conflicting evidence regarding the fitness-for-duty note and  
18 when Shepard was cleared for work. On its face, Dr. Williams’ fitness-for-duty note cleared  
19 Shepard for work on March 7. There is evidence, however, that Shepard was not cleared for  
20 work until March 10 or March 15. These facts indicate that there is a genuine issue for trial  
21 regarding Shepard’s entitlement to FMLA leave. Accordingly, partial summary judgment on  
22 Cascade’s liability under the FMLA is not warranted.

1 **III. CONCLUSION**

2 For the reasons stated above, the Motion for Partial Summary Judgment (Dkt.  
3 #12) is **DENIED**.

4 Dated this 18<sup>th</sup> day of April, 2013.

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6 RONALD B. LEIGHTON  
7 UNITED STATES DISTRICT JUDGE

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