IN THE COURT OF APPEALS OF IOWA

No. 8-460 / 07-1689
Filed October 29, 2008

MARCY ANN SMITH,
Plaintiff-Appellant,

vs.

STATE OF IOWA, KEVIN W. CONCANNON, in his official capacity only as the Director of the Iowa Department of Human Services, and MOLLIE ANDERSON, in her official capacity only as the Director of the Iowa Department of Administrative Services,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Marcy Smith appeals from the district court's granting of the State's motion to dismiss. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

J. Campbell Helton of Whitfield & Eddy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Barbara Galloway, Human Services Division, for appellee.

Considered by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Plaintiff Marcy Ann Smith was hired in 1996 as a state employee within the HIPP unit of the Department of Human Services. She always met her work requirements and received favorable reviews from her supervisor. Smith suffers from clinical depression, and sometimes took leave for self-care in accordance with the Family and Medical Leave Act (FMLA). Smith's supervisors cooperated with her and allowed her to take medical leaves of absence as directed by her physician.

Mollie Anderson and Kevin Concannon are supervisors in the Iowa Department of Human Services (DHS) and have authority over Smith's position.[1] In August of 2005, Smith's physician provided written notice to DHS that she would remain off work under the FMLA until September 7, 2005. Near the end of that period, Smith experienced a family crisis that exacerbated her mental health condition. She was excused from work by her physician on September 8, 2005. However, Smith went to her workplace that day and submitted a handwritten letter of resignation to her supervisor. Smith's supervisor was concerned by Smith's apparent emotional state and took steps to ensure Smith's safety. DHS nevertheless accepted her resignation that very day.

Later that week and again in October, Smith requested that her resignation be withdrawn and that she be reinstated. Her employer responded that Smith was not eligible to return to her job, but that she could request to be

[1] Uses of "State" and "DHS" in this opinion refer to defendants.

considered for other positions. Her subsequent applications for employment have been declined.[2]

Smith filed a petition alleging that the acceptance of her resignation and refusal to reinstate her constitute: (1) interference with FMLA rights, (2) retaliation for exercising FMLA rights, (3) disability discrimination under the Americans with Disabilities Act (ADA), (4) disability discrimination under the Rehabilitation Act of 1973, and (5) disability discrimination under the Iowa Civil Rights Act of 1965. The district court granted the State's pre-answer motion to dismiss all claims, finding Smith failed to state any claim for which relief could be granted. Smith appeals arguing that the district court erred in granting the motion to dismiss.

II. Standard of Review

We review a ruling on a motion to dismiss for correction of errors at law. Iowa R. App. P. 6.4; *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007).

> A motion to dismiss tests the legal sufficiency of the challenged pleading. Thus, the motion must stand or fall on the contents of the petition and matters of which the court can take judicial notice. Well-pled facts in the pleading assailed are deemed admitted. In addition, the petition is assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor.
>
> If the viability of a claim is at all debatable, courts should not sustain a motion to dismiss.

Southard, 734 N.W.2d at 194 (citations omitted). "A motion to dismiss a petition should only be granted if there is no state of facts conceivable under which a

[2] Smith does not base any claims on the subsequent refusals to hire, apparently conceding that she failed to exhaust administrative remedies as to any claims related to those actions.

plaintiff might show a right of recovery." *Kingsway Cathedral v. Iowa Dep't of Transp*., 711 N.W.2d 6, 7 (Iowa 2006).

III. Family Medical Leave Act

Smith first contends that the district court erred in granting the State's motion to dismiss her FMLA claims. The FMLA allows employees to miss a total of twelve work weeks within a twelve-month period and provides job security for employees who must miss work because of a serious health condition. 29 U.S.C. § 2612(a)(1)(D). The FMLA prohibits an employer from interfering with an employee's rights to take medical leave and also prohibits an employer from retaliating against an employee for exercising rights given by the FMLA.[3] 29 U.S.C. §§ 2615(a)(1), (2).

A. Interference

An employer is prohibited from interfering with, restraining, or denying an employee's exercise of or attempted exercise of any right provided by the FMLA. 29 U.S.C. § 2615(a)(1).

> [E]very discharge of an employee while [he] is taking FMLA leave interferes with an employee's FMLA rights. However, the mere fact of discharge *during* FMLA leave by no means demands an employer be held strictly liable for violating the FMLA's prohibition of interfering with an employee's FMLA rights. Thus, where an employer's reason for dismissal is insufficiently related to FMLA leave, the reason will not support the employee's recovery.

Stallings v. Hussmann Corp., 447 F.3d 1041, 1050-51 (8th Cir. 2006) (citations omitted). Thus, in order to prevail on a theory of interference, Smith's petition

[3] The State claims on appeal that the court lacks subject matter jurisdiction because the State has not consented to suit under the self-care provisions of the FMLA, and therefore Smith's claims are barred by sovereign immunity. The State failed to raise the issue in the district court.

must allege facts that could result in a finding that the State interfered with her FMLA rights by accepting her resignation and/or not reinstating her for a reason related to FMLA leave.

Presuming all of the facts in Smith's petition as true, no allegation indicates that the acceptance of Smith's resignation was related to FMLA leave or that Smith was denied FMLA rights, except for the coincidence of timing. DHS previously had granted all of the FMLA leave requested by Smith, establishing a history of tolerance of FMLA rights. Smith's loss of her job directly resulted from her resignation. Smith's petition alleges that she was incapable of voluntarily terminating her employment because she was unable to form an intent to resign. However, those allegations do not implicate any right under the FMLA. Therefore, Smith's petition does not state any facts that could lead to a finding that her employer interfered with any rights granted by the FMLA.

Considering all of the facts alleged in the amended petition in the light most favorable to Smith, we find, as did the district court, that the State's acceptance of her resignation was motivated by her letter of resignation, not by Smith's use of FMLA leave. The State's acceptance of her resignation, even a quick acceptance, is not an adverse employment action. *See Curby v. Solutia, Inc.*, 351 F.3d 868, 872 (8th Cir. 2003). Smith has failed to allege facts that conceivably could result in a finding that her employer's acceptance of her resignation constituted an adverse employment action or interfered with her rights under the FMLA.

B. Retaliation

The FMLA also prohibits an employer from retaliating against an employee for exercising rights given under the FMLA. 29 U.S.C. § 2615(a)(2). A claim of retaliation requires proof of retaliatory intent. *Stallings*, 447 F.3d at 1051. In order for Smith to present a prima facie case of retaliation under the FMLA, she must present evidence that: (1) she exercised rights protected under the FMLA, (2) she was qualified for her position, (3) she suffered an adverse *employment* action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. *Hamilton v. Sirius Satellite Radio Inc.*, 375 F. Supp. 2d 269, 275 (S.D.N.Y. 2005).

The State's refusal to reinstate Smith occurred in a context raising an inference of retaliatory intent based on the factual allegations of the petition. Smith alleges she had performed her job duties well until her resignation, she had just completed a period of FMLA leave, and she was beginning another stretch of leave. The petition sufficiently states her claim of retaliation, whether it is evaluated as a prima facie case, using the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 678 (1973), or as circumstantial evidence of retaliatory intent under *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003).

The State has not yet had an opportunity to show a non-discriminatory explanation.

IV. Americans with Disabilities Act

Smith also contends that her dismissal was a violation of the ADA. The ADA prohibits discrimination against an individual with a disability because of the disability in the hiring or discharge of employees. 42 U.S.C. § 12112(a). Discrimination is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). In order to establish a prima facie case under the ADA, Smith must show: (1) she is a disabled person within the meaning of the ADA, (2) she is qualified to perform the essential functions of the job, with or without a reasonable accommodation, and (3) she suffered an adverse employment decision because of her disability. *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1093 (8th Cir. 2007). Failure to make a reasonable accommodation is considered to be an adverse employment action. *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 521 (Iowa 2003).

The ADA defines "reasonable accommodation" to include:

> (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9). Looking to subsection (b), the applicable accommodations for Smith's mental disability might be job restructuring, part-time or modified work schedules, or reassignment to a vacant position. 42

U.S.C. § 12111(9)(b). Reassignment contemplates something similar to a change of jobs or positions, but something less than a change in the employment relationship, such as reinstatement.

Smith argues that her employer failed to make a reasonable accommodation both when she resigned and when she requested reinstatement a few days later and the following month. In a factually similar case, the United States District Court for the Northern District of Illinois found that reinstatement is not a reasonable accommodation under the ADA.[4] *Wooten v. Acme Steel Co.*, 986 F. Supp. 524, 528 (N.D. Ill. 1997). In *Wooten*, the plaintiff asked his employer for a one-time reinstatement after he submitted a resignation which he claimed was caused by his uncontrollable manic depressive condition. *Id.* The employer's reason for refusal of reinstatement in *Wooten* was based on a labor agreement between the employer and employee's union that prohibited reinstating employees who resigned. The district court in the present case ruled, in reliance on the decision in *Wooten*, that a request for reinstatement by definition is not a request for accommodation. The court found that reinstatement is a change in employment status, not a change in working conditions. The district court also ruled that reasonable accommodations are not owed to a former employee. However, whether or not she was a former employee, Smith was an "applicant" for reinstatement and so within the scope of 42 U.S.C. § 12112(b)(5)(A).

[4] The decision of the federal district court from another circuit is not binding on this court; however, the opinion can be used as persuasive authority on the issue.

Smith argues that her employer failed to initiate an informal, interactive process in order to determine the appropriate reasonable accommodation as required by the Code of Federal Regulations to implement the ADA. 29 C.F.R. § 1630.2(o)(3). To show that her employer failed to participate in this interactive process, Smith must show: (1) her employer knew about her disability, (2) she requested accommodations or assistance for her disability, (3) her employer did not make a good faith effort to assist in seeking accommodations, and (4) she could have been reasonably accommodated but for her employer's lack of good faith. *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002). The Eighth Circuit Court of Appeals has held that for the purposes of summary judgment "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith." *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 951-52 (8th Cir. 1999).

Taking Smith's amended petition as true and considering the facts in the light most favorable to Smith, it appears that her claim is that the State should have initiated an interactive process at the time she resigned and on the two occasions, a few days later and a month later, when she requested reinstatement. The amended petition states that the employer's response to the requests for reinstatement was contained in a letter dated October 19, 2005, telling her that she was not eligible for reinstatement and that she would have to request consideration for an open position. This letter is not in the record before us, nor is the content of Smith's verbal or written requests. We are required to give Smith the benefit of any doubt that arises from this lack of information.

The requirement of the initiation of an interactive process applies to a request for "assistance or accommodation". *Ballard*, 284 F.3d at 960. Although the amended petition does not reflect an explicit request for accommodation by Smith, the absence of such language in her requests for reinstatement is not "fatal" to her claim. *Walsted v. Woodbury County, IA*, 113 F. Supp. 2d 1318, 1335 (N.D. Iowa, 2000). This is particularly true when the employee suffers from a mental illness. *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996). In Bultemeyer, the Seventh Circuit Court of Appeals held that:

> [P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.

Bultemeyer, 100 F.3d at 1285.

It is possible that, once discovery has been completed, no issue of fact will exist that would entitle Smith to go forward with her claims under the ADA. However, our standard of review at this pre-answer stage of the proceedings requires us to conclude from the amended petition that there is no factual scenario that could result in a verdict favorable to Plaintiff. That standard has not been met here.

V. Rehabilitation Act of 1973

Smith also argues the district court erroneously dismissed her claim under the Rehabilitation Act. To establish a claim under the Rehabilitation Act, Smith must demonstrate: (1) she is a qualified individual with a disability, (2) she was

denied the benefits of a program or activity of a public entity which receives federal funds, and (3) she was discriminated against based on her disability. *Wojewski v. Rapid City Reg'l Hosp., Inc*., 450 F.3d 338, 344 (8th Cir. 2006). Because the ADA and Rehabilitation Act use the same basic standards and definitions, "cases interpreting the ADA and the Rehabilitation Act are interchangeable." *Ballard*, 284 F.3d at 960 n.3. Thus, this claim can be analyzed in the same manner as the claim under the ADA above.

VI. Conclusion

Though Smith failed to cite authority or argue in favor of her claim on appeal that her employer's action constituted a violation of her rights under the Iowa Civil Rights Act, we have considered all of the arguments presented. We find that the district court correctly dismissed Smith's interference claim under the FMLA and the Iowa Civil Rights Act of 1965, and erred in dismissing Smith's claim of FMLA retaliation and her claims under the ADA and Rehabilitation Act.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.