



Cage v. NTT Data, Inc.

2023 | Cited 0 times | W.D. Kentucky | March 30, 2023

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY

BOWLING GREEN DIVISION CIVIL ACTION NO. 1:21-CV-00122-GNS-HBB

RICKY CAGE PLAINTIFF v. NTT DATA SERVICES, LLC DEFENDANT

MEMORANDUM OPINION AND ORDER

36 38). The motions are ripe for adjudication.

I. STATEMENT OF FACTS AND CLAIMS to work as a Helpdesk Analyst. (-2). During his employment, NTT maintained an attendance policy that provided, in relevant part:

1. It is recognized that illnesses and emergencies may arise from time to time. If an employee is going to be absent or late for work, the employee must notify their Company manager as soon as possible, but no later than 30 minutes before the start o If the voicemail. If absent more than one day, the employee must notify their Company manager each day the employee is absent. 2. After three (3) consecutive working days of absence due to illness, an Business Partner, clearing the employee to return to work. Under certain

may be required for shorter periods of absence. 3. If an employee is absent without notifying the Company for three (3) consecutive work days, it is assumed that the employee has voluntarily abandoned their position with the Company, and the employee will be deemed to have resigned. 4. Absences due to an approved leave of absence or due to an emergency, where the employee was unable to notify the Company, are not subject to this policy. Otherwise, employees who do not follow this policy are subject to disciplinary action, up to and including termination. Ex. 2, at 1, DN 36-2). At the time of his superior was Helpdesk Supervisor Partial Summ. J. Ex. 1, at 2; Cox Decl. ¶¶ 2-3, DN 36-6).

On July 22, 2019, Cage received a written warning for four absences on May 1, 10, and 11, 2019, and July 16, 2019 for which he did not report to work or failed to report his absence. Ex. 4, at 1, DN 36-4; Cox Decl. ¶ 5). Cage was expressly warned that he would be subject to further discipline, including termination, if any further attendance policy violations occurred Partial Summ. J. Ex. 4, at 1).



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On August 2, 2019, Cage received what Cox characterized as a final written warning. Ex. 5, at 1, DN 36-5; Cox Decl. ¶ 6). This warning was given after Cage reported to work late on July 26, 2019, and called out sick alm Partial Summ. J. Ex. 5, at 1). On October 7, 2019, Cage completed a certification requesting leave pursuant to the due that he which require [him] to assis Partial Summ. J. Ex. 7, at 1, DN 36-7). T the certification

form completed by his fathers physician noted that Cage would need to help his father three times per week, and up to two consecutive days due to episodic flare-ups. Ex. 7, at 1-4). On October 16, 2019, Cages FMLA request was approved effective from September 23, 2019, to September 22, 2020 & Ex. 8, at 1, DN 36-8). On December 20, 2019, Steven Cole met with Cage and provided another final written w Summ. J. Ex. 10, at 1, DN 36-10; Cox Decl. ¶ 10). In

addition to discussing his conduct, Cage was reminded of the attendance requirements, and Cole ny repeated or further incidences, excluding any FMLA or other protected leave, may result in further disciplinary action, up to and including termination of your employment & Resp. Ex. 10, at 1; Cox Decl. ¶ 10). In January 2020, Cage was absent from work on three days for FMLA leave and missed five days due to illness. (Mot. Summ. J. Ex. 11, at 3, DN 36-11). By mid-February, Cage had utilized most of his sick leave, and Cox met with Cage to discuss his absences. (Cox Decl. ¶ 11). On February 25, 2020, Lanie Hobbs Analyst, also met with Cage to discuss his absences. Partial Summ. J. Ex. 13, at 1, DN 36-13). During the meeting, Hobbs notified Cage that he had

exhausted his sick leave for 2020 and discussed expectations for future tardies and FMLA leave. Ex. 13, at 1). She followed up that meeting with an email, which Cage acknowledged Partial Summ. J. Ex. 13, at 1). Cage was absent from work due to FMLA leave from March 10-12, 2020 Summ. J. Ex. 14, at 4-5, DN 36-14). On March 13, 2020, he

was again absent, and the parties dispute whether Cage provided advance notice of this absence and whether it was FMLA related. (Cage Aff. ¶ 5, DN 39-2; Bowman Decl. ¶ 9, DN 36-3; Cox Decl. ¶¶ 13, 16). employment on March 16, 2020. (Bowman Decl. ¶ 9; Cox Decl. ¶¶ 13-14)

Cage subsequently filed this action against NTT and alleges that NTT retaliated against him in violation of the FMLA. (Compl., DN 1-1; Am. Compl. ¶¶ 11-13, DN 10). Following discovery, the parties filed competing motions for summary judgment. 1

Sum Partial Summ. J., DN 36). In

addition, Cage moves s it filed

II. JURISDICTION Federal courts have jurisdiction over actions originating in state court but have been removed to the federal district court in the district and division embracing the place where the action was pending. 28 U.S.C. § 1441(a). The action was brought in Warren Circuit Court, within this



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Courts district and division. The Court has subject-matter jurisdiction over the action under federal question jurisdiction. See *id.* § 1331.

III. DISCUSSION A. Motions for Summary Judgment Under Fed. R. Civ. P. summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

1 d as one for partial summary judgment, he seeks summary -8, DN 24-1). Fed. R. Civ. P. 56(a). to the record as a whole, a reasonable mind could come to only one conclusion . . . *Mickler v.*

Nimishillen & Tuscarawas Ry. Co., 13 F.3d 184, 186 (6th Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). has the Automated Sols. Corp. v. Paragon Data Sys., Inc., 756 F.3d 504, 520 (6th Cir. 2014) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). hifts to the nonmovant, who must put Id. (citing *Horton v. Potter*, 369 F.3d 906, 909 (6th Cir. 2004)). While the evidence is viewed in the light most favorable to the non-moving party, it must

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted). Rather, the non-moving party must present specific facts proving that a genuine factual issue cited do not establish the absence . . . of a genuine dispute . . . Fed. R. Civ. P. 56(c)(1). mere existence of a scintilla of evidence in support of the [non-moving partys] position will be

insufficient; there must be evidence on which the jury could reasonably find for the [non-moving *Anderson*, 477 U.S. at 252. A plaintiff may prove a claim of FMLA retaliation with either direct or circumstantial evidence. See *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 707 (6th Cir. 2008). The parties disagree about regarding the proper characterization of the evidence in the record. 1. Direct Evidence

order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004) (citation omitted), overruled on other grounds by *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009); see also *Pelcha v. MW Bancorp, Inc.*, 455 F. Supp. 3d 481, 497 (S.D. Ohio irect evidence is smoking gun evidence that explains itself. (citation omitted)). To constitute direct evidence, it s employer was predisposed to discriminate on the basis of [FMLA leave], but also that the employer acted on *DiCarlo*, 358 F.3d at 415 (citation omitted). If believed, direct evidence of factor in the employers ac *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d

419, 432 (6th Cir. 2014) (internal quotation marks omitted) (citation omitted). There appears to be direct evidence in this case. According to NTT, the proverbial straw that broke the cam 0. (& 8-9; *Bowman Decl.* ¶ 9; *Cox Decl.* ¶¶ 13-14, 16). According ce notice of his absence on that day and *Cox* reported that he did not receive notice. (*Bowman Decl* built upon the various unprotected absences referenced in prior Written and Final Written



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the mandatory advance notice of necessary Decl. ¶ 9). Importantly, Cox stated that no one leave for that day and NTT made the decision records do not reflect a call to notify anyone at NTT of his absence. 2

& Ex. 15, at 1-4, DN 36-15). Cage recalls the events differently. He contends that his father suffered a decline in his health during the week of March 9, 2020, and was taken to an emergency room in Nashville, Tennessee, on March 12, 2020, and was admitted the following day. (Cage Aff. ¶ 3). According to Cage:

Prior to the start of [his] shift on the morning of March 12, 2020, [he] called Cameron Cox and advised him that s] father was having serious health issues and further advised [Cox] that [Cage] was going to be using FMLA leave on Thursday, March 12, 2020 and Friday, March 13, 2020. Cameron Cox indicated that he understood and told [Cage] that he would see [Cage] on Monday, March 16, 2020. (Cage Aff. ¶ 5) A document provided by NTT during discovery (Bates No. NTT-DATA-0089), reflects that Cage was on intermittent FMLA leave from March 10-13, 2020. 3

Summ. J. Ex. 5, at 1, DN 24-6). Thus, this document could be construed by the jury to contradict

2 While NTT cites these phone records, it is not self-evident which phone numbers may be related to NTT or any of its employees. 3 be an attempt to rebut that document, and she states:

While Mr. Cage ultimately applied to the third-party administrator for coverage of his March 13, 2020, absence and that absence was treated as covered by FMLA, that approval has no impact on the termination decision, which was instead by the Attendance Policy.

(Bowman Decl. ¶ 11). Nevertheless, there appears to be a factual dispute between Bowmans contention and the documentation that Cage was on FLMA leave at the time of his final straw absence. Accordingly, there is a genuine issue of material fact precluding summary judgment for either party to the extent that Cage relies on direct evidence. The parties summary judgment motions are denied on this basis. 2. Circumstantial Evidence 4 Even in the absence of direct evidence, Cage could rely upon circumstantial evidence to prove his claim, and both parties assert that they are entitled to summary judgment on this basis. 5-7 Summ. J. 15-19) An FMLA retaliation claim based solely upon circumstantial evidence of

unlawful conduct is evaluated according to the tripartite burden-shifting framework set forth in McDonnell Douglas. Daugherty, 544 F.3d at 707 (citing Bryson v. Regis Corp., 498 F.3d 561, 570 (6th Cir. 2007)). a. Prima Facie Case To prove a prima facie case of retaliation under the FMLA, Cage must present evidence that:

(1) [he] was engaged in an activity protected by the FMLA; (2) the employer knew that [he] was exercising [his] rights under the FMLA; (3) after learning of the employees exercise of FMLA rights,



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the employer took an employment action adverse to [him]; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action. Killian v. Yorozu Auto. Tenn., Inc., 454 F.3d 549, 556 (6th Cir. 2006) (citing Arban v. W. Publ g Corp., 345 F.3d 390, 404 (6th Cir. 2003)). A plaintiff must prove his prima facie case by a preponderance of the evidence. See Wysong v. Dow Chem. Co., 503 F.3d 441, 447 (6th Cir.

4 In Demyanovich, the Court discussed the reliance on both types of evidence in reversing the See Demyanovich, 747 F.3d at 432-33. both types of evidence. 2007) (citation omitted). This bu Bryson, 498 F.3d at 571 (internal quotation marks omitted) (citations omitted). For the purpose of its motion, NTT concedes that Cage can prove the first three prongs umm. J. 12-15). [his] prima facie case, [the employee] must produce sufficient evidence from which an inference could be drawn that [his] protected activity was a but-for cause of the alleged adverse action by [the] Woida v. , 4 F. Supp. 3d 880, 899 (E.D. Mich. 2014) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)). NTT contends that it is entitled to summary judgment based on a lack of temporal proximity and an intervening act - t. Summ. J. 12-15). more than five months after he requested FMLA leave

Foster v. Roadtec, Inc., No. 1:18-CV-270-TAV-CHS, 2021 WL 1910082 (E.D. Tenn. May 21, 2021). -15). The plaintiff in Foster had been taking intermittent FMLA leave and was included in a RIF. See Foster, 2021 WL 1910082, at *2-4. The plaintiff contended that his inclusion in the group of employees selected for the RIF was in retaliation for his exercise of FMLA leave, in addition to other arguments raised as to why he was improperly terminated. See id. at *11-13. The Court found the plaintiff failed to present sufficient evidence as to any theory of pretext to create a factual issue precluding summary judgment not that the plaintiff had failed to prove a prima facie case of retaliation. See id. at *8-9, *11-13. Here, the events and more importantly the reason for the absence that triggered are disputed. If the jury were to be believe Cage, he notified Cox of the absence due to intermittent FMLA leave, and Cox decided despite the notification of FMLA leave. If the jury were to believe NTT, Cage had an unexcused absence because he failed to report his absence in advance zation of the absence as being due to FMLA leave.

causation. (14-15). As discussed above, however, there is gave advance notice of the absence on March 13, 2020. If Cage did give proper notice, the

absence due to FMLA leave would not be an intervening act. As prima facie case is not onerous, and when construing the evidence in the proper light, this evidence is sufficient for Cage to meet his initial burden. See Bryson, 498 F.3d at 571 (citations omitted). b. Legitimate, Nondiscriminatory Reason Because Cage met his burden, NTT must articulate a legitimate, nondiscriminatory reason for the termination. See Gates v. U.S. Postal Serv., 502 F. Appx 485, 489 (6th Cir. 2012) (citation omitted). NTT maintains that its decision to terminate Cage was due to his violations of 15). Because courts have recognized that terminating an employee for violations of an attendance policy is a legitimate, nondiscriminatory reason, NTT has met its burden. See Norton v. LTCH, 620 F. . Servs. 521, 532 (6th Cir. 2012)). c. Pretext Because NTT met its burden, Cage must prove that the proffered



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reason was a pretext for discrimination. See Gates, 502 F. Appx at 489 (citation omitted). As the Sixth Circuit explained:

A plaintiff may establish pretext by showing that the employee's proffered reasons (1) have no basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action. He always bears the burden of producing sufficient evidence from which the jury could reasonably reject [the defendant's] explanation and infer that the

Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 285 (6th Cir. 2012) (alterations in original) (internal citation omitted) (citation omitted). The record reflects conflicting evidence upon which the jury could reasonably find for Cage or the jury could disbelieve Cage and find for NTT. Absences covered by FMLA leave on March 12-13, 2020. (Cage Aff. ¶ 5). Cox denies any notification, despite the fact that NTT included March 13, 2020, on its list of days that Cage took FMLA leave. (Cox Decl. ¶ 13; Ex. 5, at 1). NTT asserts that it can rely upon the honest belief rule in arguing that Cage cannot prove. 18-19). The Sixth Circuit has stated:

Under this rule, as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect. An employer has an honest belief in its reason for discharging an

Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001) (internal citation omitted) (citation omitted). The same disputed evidence discussed above, however, could lead a jury to find that NTT lacked an honest belief given that Cage arguably provided Cox advance notice of his need for FMLA leave on March 13, 2020, which NTT would have known when it made the decision to terminate Cage. See Briggs v. Univ. of Cincinnati, 11 F.4th 498, 517-18 (6th Cir. 2021) (reversing summary judgment for the employer because the record did not reflect an honest belief); Rush v. E.I. DuPont de Nemours & Co., 911 F. Supp. 2d 545, 567 (S.D. Ohio 2012) (stated reasons for the honest belief and denying the motion for summary judgment).

Given the conflicting evidence concerning Cage's claimed advance request to Cox to take FMLA leave, a reasonable jury could find that stated reason for the adverse employment action was pretextual and in retaliation for Cage exercising his rights under the FMLA. and find that Cage failed to provide proper notice of his intent to take FMLA leave. Accordingly, summary judgment is denied for both parties. 3.

Mot. Partial Summ. J. 19-22). only cited case is Gunasekera v. War Memorial Hospital,

Inc., which is distinguishable through its procedural posture. In that case, the plaintiff prevailed at arbitration but failed to present evidence to be awarded. See *id.* at 845. In this instance, Cage has not yet prevailed on his FMLA retaliation claim and his counsel is not yet entitled to challenge any



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such request and its reasonableness. See *Clements v. Prudential Protective Servs., LLC* The FMLAs attorney-fee provision requires that the attorneys fees be awarded at a reasonable rate. 29 U.S.C. § 2617)). Accordingly, the motion is denied on this basis. B. Motion to Strike Finally, Cage moves to strike what he characterizes as belated discovery responses by discovery responses until after the close of discovery and he had moved for summary judgment.

-2, DN 38-1). He asserts that NTT used the belated responses to assert that his termination was due to an Supp. Mot. Strike 2). In addition, he seeks to strike Bow as self-

serving and contradictory to , 4-5). Given the apparent limited discovery depositions taken in this case, 5

NTT responds that Cage should have deposed more witnesses and notes that Cage had scheduled Bowman and

6 -5, DN 42). During additional documents related to this dispute on

the last day to conduct the discovery depositions 42- -7).

While gamesmanship cannot be condoned to the extent that it may have occurred during 5

While Cage was deposed, the parties have only provided five pages from that transcript. It is unclear whether any other witnesses were deposed because the parties have provided limited evidence relating to their motions. 6 The original fact discovery deadline was June 15, 2022, and at the request of the parties, the Court extended that deadline until September 6, 2022, to allow for the depositions of Cage, Bowman, and Cox. (Scheduling Order 2, DN 14; Order, DN 26).

14 to depose. See *Rofail v. United States Open* discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred. Adherence to these principles assists the trier of fact and serves efficiency in the adjudication of disputes.); *Pauley v. United Operating Co.*, 606 F. Supp. 520, 527 (E.D. Mich. 1985) efendants have no one to blame but themselves for [] [any] flaws in their discovery strategy were sent on the last day of the extended deadline for discovery depositions. When provided

with the additional discovery, however, it does not appear that Cage sought an extension of time to conduct depositions in response to that eleventh-hour discovery.

As discussed above, neither party is entitled to summary judgment in this case due to the conflicting evidence surrounding the reasons for . Accordingly, as the issues raised in this motion pertain to the dispositive motions, the Court views the issues as moot.



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IV. CONCLUSION For the foregoing reasons, IT IS HEREBY ORDERED as follows: 1. DENIED. 2. DENIED. 3. DENIED AS MOOT.

cc: counsel of record

March 29, 2023

