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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1397**

Lisa Weidema,
Appellant,

vs.

State of Minnesota Department of Transportation,
Respondent

**Filed July 16, 2012
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-10-7053

Richard A. Saliterman, Brian P. Lundgren, Brett M. Larson, Saliterman & Siefferman,
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Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and
Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from summary judgment, appellant argues that the district court erred by dismissing her interference and retaliation claims under the Family and Medical Leave Act, 29 U.S.C. §§ 2612(a)(1)(D), 2615(a)(1) (2006) (FMLA). We affirm.

FACTS

Appellant Lisa Weidema began working for respondent Minnesota Department of Transportation in 1997. Due to appellant's job duties, she was subject to random drug and alcohol testing under the State of Minnesota's drug and alcohol testing plan. When an employee's supervisor directs an employee to take a test, the testing plan and federal regulations require the employee to immediately proceed to testing, which ensures the integrity of the testing process. A failure to immediately report to a test constitutes a refusal to test and is equivalent to a failed test.

On Sunday, July 26, 2009, appellant discovered a lump in her breast and was concerned that the lump might be cancerous. On Monday, July 27, appellant called her direct supervisor, Jeffery Streeter, at approximately 7:10 a.m. and told him that she had overslept and needed to take the day off. Appellant's work shift began at 7:00 a.m., and Streeter told her that calling after 7:00 a.m. was unacceptable and that she needed to report to work. At 7:20 a.m., appellant called Streeter and said that she would come into work. Streeter then told appellant that she had been selected for testing pursuant to the testing plan, and, upon her arrival, she needed to immediately submit to a drug and alcohol test. At 8:17 a.m., appellant called Streeter and told him that she would not be

coming into work that day or the rest of the week because of personal issues. Appellant then scheduled a doctor's appointment to have her breast examined the following day, July 28, at 10:00 a.m. Later on July 27, Streeter and Streeter's direct supervisor called appellant and explained that her absence that day was unexcused leave without pay. Appellant separately told Streeter's supervisor that she had discovered a lump in her breast.

On Tuesday, July 28, at 6:45 a.m., appellant waited for Streeter in his office. Because appellant appeared to be dressed for work, Streeter believed that appellant was reporting to work. Streeter told appellant that he would be taking her to a clinic for a drug and alcohol test. Appellant then gave Streeter a leave slip requesting "Comp. Time" leave from 7:00 a.m. July 28 through the end of her shift on July 31. Streeter declined to sign the request.

Appellant left Streeter's office and spoke with some other employees, then returned to Streeter's office and again asked him to sign her leave request. Streeter said he would not sign it, and, at approximately 7:30 a.m., appellant left the premises. At 8:43 a.m., appellant called Streeter and told him about her doctor's appointment at 10:00 a.m., which was the first that Streeter heard about the appointment. Streeter told appellant to report to work after her appointment.

During the appointment, the doctor examined the mass that appellant had discovered. The doctor's notes indicate that the mass felt cystic and that the doctor referred appellant for a biopsy to determine whether it was something other than a cyst. The doctor did not impose any work restrictions or tell appellant that she should not

return to work. Appellant scheduled a biopsy for Friday, July 31, 2009, but the record does not reflect the time of the biopsy.

Appellant returned to work and told Streeter that she was ready to undergo her drug and alcohol test. Streeter did not take her to be tested because she had refused to immediately submit to the test pursuant to the testing plan, which is equivalent to a failed test. Appellant was placed on paid investigatory leave while respondent investigated Streeter's allegation that appellant refused to submit to testing. As part of the investigation, appellant was interviewed at the workplace on Friday, July 31, at approximately 9:10 a.m.

After the interview, appellant underwent her biopsy, which was an outpatient procedure. The doctor's notes, which were written shortly after 2:00 p.m., do not indicate that the biopsy was difficult or unusual or that there were any postprocedure complications. Appellant was given an aftercare guide that instructed her to apply ice to the biopsy site for 24 hours, refrain from lifting anything heavier than a dinner plate for 24 hours, refrain from participating in strenuous activities for 24 hours, and take acetaminophen for discomfort. Appellant testified in a December 14, 2010 deposition that a nurse told her to "be extra careful."

On Monday, August 3, a nurse notified appellant that the mass was a benign cyst, and appellant told the nurse that she had not experienced any complications. Appellant testified that, after allowing her wound to heal over the weekend, she was ready to return to work on Monday, August 3. Appellant was called into work on August 3 and

terminated from her employment for refusing to immediately report for a drug and alcohol test on July 28.

Appellant brought this action under the FMLA, alleging that respondent interfered with her attempts to exercise FMLA leave on July 28 and retaliated against her for exercising her right to FMLA leave. Appellant asserted that she was entitled to FMLA leave because she had a serious health condition and a child placed with her in foster care.¹ The district court granted respondent's motion for summary judgment. The court concluded that appellant failed to show eligibility for FMLA leave under the serious-health-condition provision or to raise an issue of fact concerning her eligibility. The court also concluded that appellant failed to set forth a prima facie case of retaliation. This appeal follows.²

DECISION

On appeal from summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2008). To survive a summary-judgment motion, a party must present "sufficient evidence to permit

¹ We have not included facts pertaining to appellant's claimed FMLA eligibility under the child-in-foster-care provision because, on appeal, appellant does not assert error with respect to that claim.

² While this appeal was pending, the United States Supreme Court issued *Coleman v. Maryland*, 132 S. Ct. 1327, 1333-34 (2012), in which it held that because Congress did not validly abrogate the state's immunity from suit for damages concerning the self-care provision in 29 U.S.C. § 2617(a)(2)(D) (2006) of the FMLA, a state employee is barred from recovering damages in a claim under this provision from a state-entity employer. We do not apply *Coleman*, however, because respondent did not assert a sovereign-immunity defense in district court or raise the issue on appeal.

reasonable persons to draw different conclusions.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted)). We view the evidence in the record in the light most favorable to the party against whom judgment was granted. *Peterka*, 764 N.W.2d at 832. A district court’s grant of summary judgment will be affirmed if it can be sustained on any ground. *Horton v. Twp. of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

Interference Claim

Under the FMLA, “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). It is “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided under [the FMLA].” 29 U.S.C. § 2615(a)(1). Appellant argues that respondent interfered with her right to exercise her FMLA rights when Streeter refused to sign her leave request on July 28.

“In an [FMLA] interference claim, an employee must show . . . she was entitled to the benefit denied.” *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (quotation omitted). Appellant asserted that she was entitled to FMLA leave to attend her July 28 doctor’s appointment because she had a serious health condition that made her unable to perform the functions of her position. Under the FMLA, “serious health condition” is defined, in relevant part, as “an illness, injury, impairment, or physical or

mental condition that involves . . . continuing treatment by a health care provider.” 29 U.S.C. § 2611(11)(B) (2006).

Appellant argues that she was eligible for FMLA leave to attend her July 28 doctor’s appointment because she had a serious health condition involving continuing treatment under two definitions in 29 C.F.R. § 825.115 (2009): a condition causing incapacity and requiring treatment, and a condition requiring multiple treatments that if left untreated, would lead to incapacity. 29 C.F.R. § 825.115(a)(1)-(2), (e)(2). The district court concluded that appellant did not submit evidence sufficient to show that she was entitled to FMLA leave under either definition or to establish a genuine issue of fact whether she was entitled to FMLA leave under either definition.

a. Serious Health Condition under 29 C.F.R. § 825.115(a)

The administrative rules that implement the FMLA identify serious health conditions that involve continuing treatment by a health-care provider. *See* 29 U.S.C. § 2654 (2006) (directing Secretary of Labor “to prescribe such regulations as are necessary to carry out” the FMLA). The identified conditions include

[a] period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity . . . or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

29 C.F.R. § 825.115(a). At least one federal circuit has held that “more than three consecutive calendar days” of incapacity entails a period of 72 hours or more. *Russell v.*

N. Broward Hosp., 346 F.3d 1335, 1343-44 (11th Cir. 2003) (determining incapacity must be 72 hours or more based on language before regulation was amended by adding “full”). “[I]ncapacity’ means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” 29 C.F.R. § 825.113(b) (2009).

Appellant argues that the district court erred in concluding that she failed to establish a genuine issue of material fact whether she was incapacitated for more than three consecutive, full calendar days. Appellant contends that her incapacity began at the time of her biopsy on July 31. But she did not produce evidence that showed the time of her biopsy. On July 31, appellant began her investigatory interview with Brenner at 9:10 a.m., and her medical records indicate that the biopsy notes were composed shortly after 2:00 p.m. Taking the facts in the light most favorable to appellant, the earliest her incapacity began is approximately 10:00 a.m. on Friday, July 31.

Appellant alleged in her complaint that her “incapacity lasted until August 3, 2009, when [she] sought (again) to return to work.” And appellant testified that she experienced no complications from the biopsy and was ready to return to work on August 3. Appellant’s shift on August 3 would have begun at 7:00 a.m. Appellant submitted her medical records connected to the biopsy and the aftercare guide. The instructions in the aftercare guide imposed only 24-hour restrictions on appellant, and her medical records contain no restrictions on her activity. There is no evidence that appellant experienced any complications from the procedure or attended any follow-up appointments.

Appellant argues that she raised a genuine issue of material fact as to whether she was incapacitated for the required three-day period because on Monday, August 3, she could not perform all of the duties of her position. In a March 1, 2011 affidavit, appellant stated that on August 3, she would have been unable to do the heavy lifting required by her position. But an individual's own statement is insufficient to establish incapacity under the FMLA. *See, e.g., Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1194-95 (8th Cir. 2000) (affirming judgment as a matter of law against employee who provided no medical evidence showing that he was incapacitated for more than three days).

Citing *Rankin v. Seagate Techs., Inc.*, 246 F.3d 1145 (8th Cir. 2001), appellant argues that her affidavit is sufficient to create a genuine issue of material fact. But *Rankin* is distinguishable. In *Rankin*, the court reasoned that the employee's testimony, together with medical records that supported her description of her condition, were sufficient to create a genuine issue of material fact about the duration of her incapacity. 246 F.3d at 1148-49. Appellant provided no medical records that support her claim that she was not able to perform all of her job duties on August 3. Also, appellant's March affidavit contradicts her verified complaint and deposition testimony. Because appellant failed to produce any evidence showing incapacity longer than 24 hours, she failed to establish a genuine fact issue as to whether her incapacity lasted more than three consecutive calendar days. The district court did not err in concluding that appellant did not establish a genuine fact issue concerning whether she was incapacitated for more than three consecutive, full calendar days.

b. Serious Health Condition under 29 C.F.R. § 825.115(e)

Another identified serious health condition involving continuing treatment by a health-care provider is

[a]ny period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider . . . for: . . .

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

29 C.F.R. § 825.115(e). The district court concluded that, because appellant's condition was a benign cyst and appellant presented no evidence that a benign cyst would result in incapacity if left untreated, appellant failed to show that she had a serious health condition or to establish a genuine issue of fact as to whether she had a serious health condition under 29 C.F.R. § 825.115(e)(2).

Appellant argues that the mass she discovered on July 27, 2009, was a serious health condition because cancer is a covered condition. But no evidence shows that appellant had cancer. Appellant also describes her condition as "potential cancer" and argues that, if left untreated, cancer would result in more than three consecutive days of incapacity. Appellant points to the definition of treatment, which includes "examinations to determine if a serious health condition exists and evaluations of the condition." 29 C.F.R. § 825.113(c) (2009). But the eighth circuit has stated that an employee's visit to a doctor for evaluation of symptoms constitutes FMLA leave only when the symptoms "are eventually diagnosed as constituting a serious health condition." *Caldwell v. Holland of*

Tex., Inc., 208 F.3d 671, 676 (8th Cir. 2000) (quotation omitted). Also, no evidence supports appellant's description of her condition as "potential cancer." The evidence shows that the lump in appellant's breast felt cystic, the doctor referred her for a biopsy to rule out any other condition, the doctor did not diagnose her condition as potential cancer, the doctor did not offer a medical opinion that appellant had cancer, and the biopsy indicated that the mass was a benign cyst. Accordingly, appellant did not demonstrate that her condition would likely lead to three or more days of incapacity if left untreated or submit evidence that established a fact issue with respect to the cyst.

Appellant contends that her case is analogous to *Johnson v. Kmart*, 596 F. Supp. 2d 1045 (E.D. Mich. 2009). In *Johnson*, a doctor initially believed that an employee's son was possibly suffering from a medical condition that, if left untreated, would have resulted in blindness. 596 F. Supp.2d at 1053-54. The serious diagnosis required immediate further evaluation by a specialist, and the evaluation revealed that the son did not have the condition initially diagnosed. *Id.* at 1054. The court concluded that, based on the medical information the employee had when he requested leave, it was reasonable for him to believe that his son was suffering from a serious health condition. *Id.* at 1053-54. But *Johnson* is distinguishable because appellant provided no evidence that, after her July 28 doctor's appointment, she could reasonably believe that she likely had cancer. The district court did not err in granting summary judgment to respondent on appellant's interference claim under the FMLA.

Retaliation Claim

Appellant challenges the district court's dismissal of her retaliation claim. When the record does not contain direct evidence of retaliation, as in this case, an FMLA retaliation claim is analyzed using the three-step *McDonnell-Douglas* burden-shifting analysis. *Phillips v. Matthews*, 547 F.3d 905, 912 & n.3 (8th Cir. 2008) (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-06, 93 S. Ct. 1817, 1824-26 (1973)). To survive summary judgment, a retaliation-claim plaintiff must establish a prima facie case of wrongful retaliation by showing that (1) she engaged in conduct protected under the FMLA, (2) she suffered an adverse employment action, and (3) there is a causal connection between the two. *McBurney v. Stew Hansen's Dodge City, Inc.*, 398 F.3d 998, 1002-03 (8th Cir. 2005). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show evidence of a legitimate, nondiscriminatory reason for the adverse action. *Phillips*, 547 at 912. If the defendant offers such evidence, the plaintiff must offer evidence sufficient to create an issue of fact as to whether the defendant's reason was pretextual. *Stallings*, 447 F.3d at 1052.

Appellant claims that respondent retaliated against her for asserting her right to take protected FMLA leave when she requested leave to attend her doctor's appointment on July 28. Appellant contends that whether the appointment led to a cancer diagnosis is irrelevant to her prima facie case, and that the "district court erred when it ruled that appellant's retaliation claims require that she ultimately be diagnosed with cancer." But appellant misconstrues the district court's ruling. The district court concluded that because appellant neither showed entitlement to FMLA leave by establishing that she had

a serious health condition nor presented evidence to establish a genuine issue of material fact as to whether she had a serious health condition, she failed to establish a prima facie claim that she engaged in FMLA protected activity that led to an improper retaliatory termination of her employment. *See McBurney*, 398 F.3d at 1002 (stating prima facie claim of retaliation requires evidence that employee engaged in conduct protected by FMLA).

FMLA leave “include[s] visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined.” *Caldwell*, 208 F.3d at 676 (quotation omitted). But appellant’s symptoms were not eventually diagnosed as constituting a serious health condition. Thus, the district court did not err by granting respondent summary judgment on appellant’s retaliation claim.

Affirmed.