IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

TERESA A. PHILLIPS,	)	
	)	
Plaintiff,	)	
	)	
	)	
VS.	)	No. 01-1046-T
	)	
	)	
LEROY-SOMER NORTH AMERICA, ET AL.,	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING MAGNETEK'S MOTION FOR SUMMARY JUDGMENT
AND
DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO MAGNETEK

Plaintiff, Teresa A. Phillips, filed this action pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, and the Tennessee Human Rights Act (THRA), Tenn. Code Ann. § 4-21-101 *et seq.* She sued her former employers, Leroy-Somer North America, A.O. Smith Corporation, and Magnetek, Inc., and various supervisory personnel. Plaintiff alleges that the defendants violated the FMLA by refusing to return her to the same or an equivalent position following her return to work after maternity leave, and by discharging her for excessive absenteeism when the absences were covered under the FMLA. Plaintiff also alleged that the defendants violated the THRA by discriminating

against her on the basis of her pregnancy.[1] Before the Court is Magnetek's motion for summary judgment, and plaintiff's motion for partial summary judgment as to Magnetek.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence

[1] Various claims were dismissed by the Court on June 11, 2001, including all THRA claims asserted against the individual defendants, the THRA claim for failure to reinstate plaintiff to an equivalent position following her pregnancy, the claim for compensatory damages under the FMLA, and all claims for punitive damages.

presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

Pursuant to the FMLA, eligible employees are entitled to take up to a total of twelve weeks of leave per year under certain circumstances. Specifically, the FMLA provides, in pertinent part:

> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> > (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> >
> > (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> >
> > (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> >
> > (D) Because 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)(A)-(D). The FMLA also provides that an employee who takes family and medical leave is entitled, on return from such leave:

> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1)(A)-(B). An employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" under the FMLA, and may not discharge or discriminate in any way against a person for opposing practices that are unlawful under FMLA. 29 U.S.C. § 2615(a).

The following undisputed facts are relevant to the motions under consideration. Plaintiff began working at Magnetek's plant in Lexington, Tennessee on or about July 8, 1997, through a temporary agency, Personnel Placements. She became an employee of Magnetek, exclusively, on or about October 13, 1997. Subsequently, when plaintiff became unable to do her job due to complications from her pregnancy, she requested a medical leave of absence beginning September 28, 1998, and was approved for short term disability (STD). After plaintiff's child was born on December 31, 1998, her doctor did not release her to return to work until February 22, 1999. Plaintiff received STD benefits for almost all of the entire period of twenty-two weeks from September 28, 1998, until February 22, 1999. If an employee was eligible for both STD and FMLA, it was Magnetek's policy to run both types of leave concurrently.

Prior to commencing her leave of absence, plaintiff worked as a certified VTL operator in department 527, on the first shift. This job was a labor grade four position. Upon her return to work on February 22, 1999, plaintiff was told her position was no longer available, and was given a choice of several alternative jobs. She chose the only one

available on the first shift, the position of core press and chico operator, which was a labor grade five position. Although the pay level for a grade five job was lower than for grade four, plaintiff's pay was mistakenly maintained at the grade four level until the error was discovered in December 1999. Her pay was adjusted downward at that time, and plaintiff remained at labor grade five until she was terminated from her employment at the Lexington plant on October 4, 2000. However, plaintiff ceased to be an employee of Magnetek on April 25, 1999, when defendant Leroy-Somer North America acquired a portion of the Lexington plant.

Plaintiff has alleged that Magnetek violated the FMLA by failing to reinstate her to her previous position as a VTL operator, or to an equivalent position. Magnetek, however, contends that plaintiff was not entitled to be reinstated to the same or an equivalent position. First, Magnetek argues that plaintiff was not an eligible employee within the meaning of the statute. The term "eligible employee" is defined, *inter alia*, as one who has been employed "for at least 12 months by the employer with respect to whom leave is requested." § 2611(2)(A)(i). Magnetek states that plaintiff did not become employed by it until October 13, 1997. Plaintiff's leave commenced September 28, 1998; therefore, Magnetek argues that she had not been employed for at least twelve months, and was not entitled to FMLA leave or the statute's protections.

Magnetek does not dispute, however, that plaintiff actually began working at the Lexington plant in July 1997, albeit through Personnel Placements, the temporary agency.

The regulations promulgated under the FMLA by the Secretary of Labor provide that under certain circumstances, two or more employers may be deemed to have a joint employment relationship.

> (a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. . . .
>
> (b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.
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> . . . .
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> (d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one employer's payroll, in determining employer coverage and employee eligibility. . . .

29 C.F.R. § 825.106. Magnetek attempts to argue that, in considering the totality of the circumstances in this case, the Court should not find that a joint employment relationship exists. However, the regulation itself gives temporary employment agencies as an example of employment relationships which, viewed as a whole, should be considered joint. At least two other district courts have addressed this issue, and each has determined, in accordance with this regulation, that a joint employment relationship exists under the FMLA whenever a temporary agency provides employees for another employer. See Salgado v. CDW Computer Ctrs., Inc., No. 97 C 1975, 1998 WL 60779 (N.D. Ill. Feb. 5, 1998); Miller v. Defiance Metal Prods., Inc., 989 F. Supp. 945, 947-48 (N.D. Ohio 1997).

Magnetek has produced no evidence that the agreement it had with Personnel Placements from July 1997 until October 1997 was significantly different from the typical arrangements that temporary agencies have with the various employers they serve. The Secretary, through § 825.106(b), has declared that such ordinary arrangements are to be considered joint employment relationships under the FMLA. Therefore, when the time plaintiff worked as a joint employee of Magnetek and Personnel Placements is considered, Magnetek's contention that plaintiff was not eligible for FMLA leave is meritless.

Magnetek next argues that, even if plaintiff was eligible for FMLA leave, she was given all the leave to which she was entitled. It is contended that, because it is undisputed that plaintiff was unable to return to work at the end of twelve weeks, Magnetek was not obligated to keep her job open until her eventual return after an additional ten weeks. As stated, the FMLA requires that an employee be given up to twelve workweeks of leave during "any 12-month period." 29 U.S.C. § 2612 (a)(1). Plaintiff was given twelve such weeks of leave beginning September 28, 1998, but was unable to return to work at the end of that period.[2] Magnetek relies upon the decision in Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 784-85 (6th Cir. 1998), for the proposition that an employee who is unable to return to work after exhausting her twelve weeks of leave has no remedy

[2] The Court notes that the Lexington plant apparently shut down for approximately two weeks during the Christmas holidays, although the exact dates of the 1998 shutdown are not readily available in the record. Plaintiff's twelve weeks of leave, which began on September 28, 1998, expired on December 21, 1998, unless the plant was shut down during part of that period. The period of plant-wide closing cannot be counted as part of plaintiff's FMLA leave. See 29 C.F.R. § 825.200(f). Thus, her period of leave expired either in December 1998, or early January 1999.

under the FMLA.

While it is true that Cehrs supports Magnetek's argument, plaintiff contends that both 29 C.F.R. § 825.208(c) and § 825.200(e) preclude the result that Magnetek seeks. These regulations require employers to provide various notices to employees regarding their rights under the FMLA. With regard to § 825.200(e), plaintiff contends that the regulation requires an employer to give notice of the method that it has chosen to use in calculating the leave year for FMLA purposes, and that the failure to do so violates the FMLA by interfering with the exercise of her rights under the statute.

Section 825.200(b) sets forth the various methods that an employer may use to calculate the leave year. Section 825.200(d)(1) then provides:

> Employers will be allowed to choose any one of the alternatives in paragraph (b) . . . provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees . . . .

Notice is specifically required only when the employer changes the method used; no notice of the method initially selected is required. Similarly, § 825.200(e) provides:

> If an employer fails to select one of the options in paragraph (b) . . . , the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. . . .

This regulation applies only in the event the employer fails to select a method for calculating the leave year.

Plaintiff relies upon Batchelder v. America West Airlines, Inc., 259 F.3d 1112 (9th

Cir. 2001), for the proposition that an employer's failure to give notice of the method it initially chooses is the equivalent of failing to select a method. In Batchelder, the court acknowledged that § 825.200(d) and (e) do not specifically require an employer to give notice of which method it initially chooses. 259 F.3d at 1127-28. Nevertheless, the court examined a different regulation, regarding employee handbooks, and stated:

> The rule allowing employers a choice of calculating methods is one example of the flexibility afforded to employers in complying with the FMLA. Section 825.301(a)(1) requires employers to notify their employees of this choice, just as it requires employers to notify their employees of other policies adopted to comply with the Act.

Id., at 1127.

Section 825.301(a)(1) does not go so far as to require the specific notice to which the Ninth Circuit refers. Section 825.301(a)(1) states merely that, if written materials regarding benefits are given to employees, such as an employee handbook, those materials must contain "information on FMLA rights and responsibilities and the employer's policies regarding the FMLA." The Ninth Circuit interpreted this general statement as requiring specific notice of the method chosen to calculate the FMLA leave year, stating that the notice requirements "would be meaningless if the regulations . . . allowed employers to conceal the initial selection from their employees," and "[e]mployees cannot reasonably act in reliance on an employer's initial policy choice if that choice was kept secret from them." 259 F.3d at 1128.

There is no evidence whatsoever in the record before this Court suggesting that

Magnetek "concealed" its method of calculating the FMLA leave year, or kept it "secret" from its employees. Furthermore, there is no evidence that plaintiff mistakenly believed, at that time, that she would be entitled to an additional twelve weeks of FMLA leave beginning January 1, 1999. Finally, there is no evidence that plaintiff would have, or could have, returned to work any sooner than she did, regardless of Magnetek's method of calculating her FMLA leave. Thus, there is no evidence that plaintiff suffered any prejudice because of Magnetek's lack of notice regarding the method it selected. Under the recent decision of the United States Supreme Court in Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155, 1161 (2002), the FMLA provides no relief unless the plaintiff has been prejudiced by an alleged violation.

Plaintiff also contends that Magnetek failed to notify her that it was designating her paid STD as FMLA leave; therefore, she argues that none of the twenty-two weeks of leave that she took can be counted under the FMLA, yet she should retain all the protections of the Act. Although it was Magnetek's policy to run STD and FMLA leave concurrently, it is undisputed that plaintiff was not given specific, written notice that her STD was also designated as FMLA leave.

The regulations do require an employer to notify an employee if it requires paid leave, such as plaintiff's STD, to be counted as FMLA leave. § 825.208(b)-(c). The regulations also provide:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice

> of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee . . .), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the
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> designation may be counted against the employee's 12-week FMLA leave entitlement.

§ 825.208(c). Thus, the regulation penalizes the employer for failing to give notice by denying any credit under the FMLA for paid leave taken prior to the notice.

In Ragsdale, the Supreme Court considered the validity of § 825.700(a), a regulation that is very similar to § 825.208(c). Section 825.700(a) contains this sentence: "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The Supreme Court declared this regulation invalid. The Court stated that punishing the employer by denying any credit for leave taken before the required notice:

> is unconnected to any prejudice the employee might have suffered from the employer's lapse. If the employee takes an undesignated absence of 12 weeks or more, the regulation always gives him or her the right to 12 more weeks of leave that year. The fact that the employee would have acted in the same manner if notice had been given is, in the Secretary's view, irrelevant. Indeed, as we understand the Secretary's position, the employer would be required to grant the added 12 weeks even if the employee had full knowledge of the FMLA and expected the absence to count against the 12-week entitlement....
>
> The categorical penalty is incompatible with the FMLA's comprehensive remedial mechanism.... § 2617 provides no relief unless the employee has been prejudiced by the violation ....
>
> ....

> ... The penalty provision does not say that in certain situations an employer's failure to make the designation will violate § 2615 and entitle the employee to additional leave. Rather, the regulation establishes an irrebutable presumption that the employee's exercise of FMLA rights was impaired—and that the employee deserves 12 more weeks. There is no empirical or logical basis for this presumption ....
>
> The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves the employees of the burden of proving any real impairment of their rights and resulting prejudice.

122 S. Ct. at 1161-62.

In an attempt to distinguish her situation, plaintiff argues that Ragsdale involved unpaid leave as opposed to paid leave, and that there are valid reasons for treating the two situations differently. She relies on the Sixth Circuit's decision in Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000), which held that § 825.208(c) was a valid exercise of the Secretary's discretion. In Plant, which was decided before the Supreme Court's decision in Ragsdale, the Sixth Circuit did mention the fact that Plant's leave was paid rather than unpaid. However, in noting that fact, the Court of Appeals was attempting to distinguish Cehrs, *supra*, 155 F.3d at 784-85, which held that an employee who was not able to return to work after the expiration of the twelve-week period had no FMLA claim. The Court of Appeals merely stated that the Cehrs panel had no opportunity to address § 825.208(c) because the leave in Cehrs was unpaid.[3] In setting forth its reasons for finding § 825.208(c) valid, the Sixth Circuit stated:

[3] The Court of Appeals in Plant acknowledged that the regulations regarding the designation of leave as FMLA-qualifying are almost identical for both paid and unpaid leave.

> The FMLA itself is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave. We believe that § 825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the statute. Moreover, because the FMLA was intended to set out *minimum* standards, we do not believe that § 825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave in one twelve-month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave.

212 F.3d at 935-36 (citation omitted).[4]

This is the same rationale that was rejected in Ragsdale. Furthermore, the very regulation considered and invalidated in Ragsdale, § 825.700(a), specifically applied to both paid and unpaid leave. Before considering that regulation, the Supreme Court noted that § 825.208(a) provides that it is the employer's responsibility to designate leave as FMLA-qualifying. 122 S. Ct. at 1160. Section 825.208(a) also specifically applies to both paid and unpaid leave. Thus, nothing in Ragsdale suggests that the Supreme Court was limiting its holding to that portion of § 825.700(a) applying only to unpaid leave. Thus, the Court concludes that plaintiff's reliance on § 825.208(c) is foreclosed by the decision in Ragsdale. See also Summers v. Middleton & Reutlinger, P.S.C., 214 F. Supp. 2d 751, 757 (W.D. Ky. 2002) (noting that Ragsdale had invalidated the rationale of Plant).

For the foregoing reasons, the Court finds that there are no genuine issues of material fact precluding summary judgment in favor of Magnetek. Plaintiff was an eligible employee

[4] While the Sixth Circuit stated that the FMLA itself is silent as to the notice an employer must give before designating paid leave as FMLA leave, it did not acknowledge that the FMLA itself is silent as to any notices required by the employer, regardless of whether the leave is paid or unpaid.

under the FMLA, but she exhausted her twelve weeks of FMLA leave. Because plaintiff remained unable to do her former job at the end of that protected twelve-week period, Magnetek did not violate the FMLA when plaintiff was returned to a different job when she sought to resume work at the end of twenty-two weeks of leave. An employee who is on FMLA leave has no right to be restored to her job under the statute if she fails to return to work twelve weeks after her leave commenced. See 29 C.F.R. § 825.214(b); Hicks v. Leroy's Jewelers, Inc., No. 98-6596, 2000 WL 1033029, **5 (6th Cir. July 17, 2000); Green v. Alcan Aluminum Corp., No. 98-3775, 1999 WL 1073686, **1-2 (6th Cir. Nov. 16, 1999); Cehrs, 155 F.2d 784-85.

Accordingly, Magnetek's motion for summary judgment is GRANTED, and plaintiff's motion for partial summary judgment is DENIED with regard to Magnetek.

IT IS SO ORDERED.

_____
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE