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 ON MOTIONS FOR SUMMARY JUDGMENT

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] A motion for summary judgment has been filed

[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. Summary judgment was subsequently granted to defendant Magnetek on the claim for failure to reinstate under the FMLA.

on behalf of the defendant employers Leroy-Somer and A.O. Smith, and individual defendants David Sullivan, Bettye McCord, Ed Plott and Jerry Neisler. Plaintiff has also filed a motion for partial summary judgment as to these defendants. The Court notes that plaintiff concedes that summary judgment is appropriate in favor of defendant Neisler.

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

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).

Under the FMLA, an employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" provided by the statute, § 2615(a)(1), and may not "discharge or in any other manner discriminate against any individual for opposing any practice" that is unlawful under FMLA. § 2615(a)(2). Claims under § 2615(a)(1) are referred to as "interference" claims, while claims under § 2615(a)(2) are referred to as

"retaliation" or "discrimination" claims.

The evidence in the record shows that plaintiff, who had been working at defendant Magnetek's plant in Lexington, Tennessee from on or about July 8, 1997, became an employee of Leroy-Somer in April 1999, when Leroy-Somer took over the operation of a portion of Magnetek's plant. In August 1999, A.O. Smith took over the operation of the remaining portions of the plant, and the two employers operated the facility jointly. During the year 2000, the defendant employers had a written attendance policy. Under the purported attendance policy, an "absence" or "occurrence" was a period of missed work lasting from one to seven days, with ten specific exceptions for certain absences which would not be counted. One of those exceptions was FMLA leave.[2] The policy also provided for assessing one absence if an employee was tardy four times in any rolling ninety-day period.

Defendants' attendance policy further provided that after three absences were assessed in any rolling twelve-month period, the employee would be disciplined with an oral warning; after four absences in twelve months, a written warning would be given. A second written warning would be given after five absences in twelve months, and upon the sixth absence, the attendance policy called for the employee's termination. However, at the discretion of Human Resources Manager David Sullivan, Human Resources Benefits Manager Bettye McCord, and the employee's supervisor, some employees could be allowed

[2] The other exceptions included approved paid vacation, holidays, jury duty, bereavement, court subpoenas, layoffs, work-related injury or illness, documented military duty and approved personal holidays.

a "last chance" agreement after the sixth absence. There is some dispute as to whether and to what extent the attendance policy was actually followed. The record shows that plaintiff herself was given at least two verbal warnings in 2000 (February 26 and March 14) regarding her absenteeism prior to receiving her first written warning; thus, the policy was not always followed to the letter.[3]

On March 6, 2000, plaintiff missed work because both she and her child, Taryn Phillips, were sick. They were seen by Dr. Charles W. White, Jr., who diagnosed Taryn with upper respiratory infection and sinusitis, and plaintiff with sinusitis and pharyngitis. Dr. White gave plaintiff a note excusing her from work for three days, which stated that she could return to work on March 9. However, the note did not specify whether the excuse was for plaintiff's own illness, Taryn's illness, or both, and did not specifically state the nature of either illness. Plaintiff did not return to work on the March 9; on March 13 she either called or went to Dr. White's office and got a second written excuse stating that she could return to work on March 13; however, plaintiff actually returned to work on March 14. Dr. White testified that he extended the medical excuse based solely on plaintiff's representation that she had been unable to return to work. Again, however, it is unclear from the record whether plaintiff was unable to return to work because of her own illness, because of

[3] Plaintiff was also given a verbal warning on July 8, 1999, for being in violation of company rules regarding work habits (leaving her work station) and tardiness. She was given written warnings for the same problems on August 25, 1999 and December 10, 1999.

Taryn's illness, or both.[4] There is also evidence that plaintiff called in on each of these days to inform the defendants that she would not be at work, although there is no evidence regarding the amount of information that she provided in those calls.[5]

The evidence in the record shows, and plaintiff does not dispute, that she was properly assessed the following five absences: February 12, 2000; February 15, 2000; April 3, 2000; April 29, 2000; and May 17, 2000. On each of these occasions, regardless of whether plaintiff herself was sick, or whether she was caring for her sick child, she missed only one or two days of work; therefore, the absences were not FMLA-qualifying. See 29 C.F.R. § 825.114(a)(2)(i). Plaintiff also concedes that she missed work on June 23, 2000; however, plaintiff testified in her deposition that she turned in a vacation request for that day. Therefore, she contends that it should have been recorded as a vacation day, so that no absence should have been assessed. There is also some evidence of a seventh non-FMLA-qualifying absence in July 2000,[6] although the defendants did not note this absence on plaintiff's attendance calendar, and apparently did not assess plaintiff an absence in July.[7]

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[4] Plaintiff repeatedly insists in her memoranda that she missed work for more than three days in March 2000 in order to care for her sick child. That may be true; however, as stated, the actual evidence in the record does not reveal whether plaintiff requested that Dr. White extend his work excuse because of her own illness, that of her child, or both. Indeed, there appears to be nothing even in plaintiff's deposition that clarifies this issue.

[5] While the defendants assert that it is disputed whether plaintiff notified her employer that she would be absent each day, they have provided no evidence refuting the statement in plaintiff's declaration that the calls were actually made. The dispute concerns the amount of information plaintiff provided.

[6] Plaintiff testified during the hearing of her unemployment compensation appeal that she had turned in a doctor's excuse for July 27-28 because her child was sick.

[7] Despite her testimony during the unemployment compensation appeal, plaintiff now contends that she earned a credit for perfect attendance during the ninety-day period beginning approximately June 26, 2000. Such a credit apparently would allow plaintiff to discount an absence.

On June 28, 2000, plaintiff was assigned to the job of bearing press operator in department 549. She was given a raise on August 28, 2000, and defendant Neisler, her supervisor, noted that her absenteeism was better, that she worked requested overtime, and had a good attitude. Plaintiff testified that on September 25, 2000, her supervisor, defendant Neisler, had asked her to work overtime, and was angry when she told him she could not because she had a dental appointment for a tooth extraction. Defendants' employees were expected to work overtime if the supervisor deemed it necessary. Plaintiff kept her dental appointment that day, and was given prescription pain medication by her dentist.

Plaintiff reported for her regular shift the next day, September 26, and after lunch Neisler again requested that she work overtime. Plaintiff testified that Neisler agreed to check back with her later in the day because her tooth was bleeding and she had just taken pain medicine, so she did not know whether she would be able to work overtime. Neisler allegedly told plaintiff to ask a co-worker, Joey Marr, to work the needed overtime. However, Neisler testified that although plaintiff told him she had taken medication, she also agreed to work the overtime.

Plaintiff informed Marr that he was needed to work overtime, until 3:30 p.m., and he agreed. Plaintiff testified that when the pain did not subside, she paged Neisler twice, but he did not answer, so she left word with Marr that she was leaving, at approximately her regular time, and clocked out. Plaintiff did not attempt to contact anyone else to let them know she was leaving. Neisler testified that he never received any pages, and the next time

he saw Marr he was told that plaintiff had left. Neisler then informed the Human Resources department that plaintiff had left after being asked to work overtime.

Plaintiff testified that she went straight to her dentist's office after leaving work on the 26th and spoke to a dental assistant, who advised her to stop smoking, keep taking the medication, and to come back the next morning if the bleeding did not stop. Plaintiff did not actually see the dentist on that date. The next day, after plaintiff reported to work, Neisler told her to see Bettye McCord, who suspended her for three days without pay for leaving without permission, and told her she could discuss the matter with David Sullivan the following Monday.

When plaintiff discussed the matter with Sullivan, she explained her version of what had happened. Sullivan asked her to bring in a statement from her dentist's office showing that she had returned there on September 26. Although plaintiff claimed that she had obtained such a statement from her dentist, she was unable to produce it for Sullivan. The only statement that Sullivan was given was one plaintiff obtained for September 25. As Sullivan felt that plaintiff was lying about having gone back to the dentist on September 26, he made the decision to terminate her, with the agreement of Bettye McCord and Ed Plott, the Plant Manager.

In order to establish a claim of interference with the exercise of the right to FMLA leave, a plaintiff must prove: (1) that she was an eligible employee; (2) that the defendant was an employer within the meaning of the Act; (3) that she was entitled to leave under the

Act; and (4) that the employer interfered with plaintiff's right to take leave or otherwise wrongfully denied the requested leave. See Strickland v. Water Works & Sewer Bd., 239 F.3d 1199, 1206-07 (11th Cir. 1999); Jeremy v. Northwest Ohio Dev. Ctr., 33 F. Supp.2d 635, 638 (N.D. Ohio 1999), aff'd, 210 F.3d 372 (Table), 2000 WL 353524 (6th Cir. 2000). Plaintiff contends that the defendants interfered with her rights under FMLA by counting her March 2000 FMLA-qualifying leave against her in making the decision to discharge her. Defendants however, argue that the leave was not FMLA-qualifying.

Defendants' contention is based on two propositions. First, defendants assert that neither plaintiff nor her child had a "serious health condition" in March 2000 that would qualify under the FMLA. Defendants rely upon 29 C.F.R. § 825.114(c), which they claim excludes certain minor conditions, *per se*, from the coverage of the FMLA. Defendants state: "The term 'serious medical condition' is not intended to cover short-term conditions, such as Plaintiff's and her children's for which treatment is brief. Examples of health conditions covered by the Act include: heart attacks, cancer, back conditions requiring surgery, strokes, spinal injuries and serious accident." (Def.'s Mem. in Support of Mot. for Summ. J. at 13.)

The FMLA defines "serious health condition" as either inpatient care or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). The FMLA regulations further explain what is meant by a serious health condition involving continuous treatment by a health care provider:

> (2) .... A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> > (i) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
> >
> > ....
> >
> > (B) 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. § 825.114(a)(2)(i). The regulations further set forth examples of "ordinary" ailments that generally are not FMLA-qualifying unless complications arise. § 825.114(c). Section 825.114(c) is not, however, a *per se* rule excluding all such ailments. Indeed,

> [a]s a result of this regulation, the Department of Labor developed somewhat of a brightline test for what illnesses qualify as serious health conditions. If an employee is (1) incapacitated for more than three days, (2) seen once by a doctor, and (3) prescribed a course of medication, such as an antibiotic, she has a "serious health condition" worthy of FMLA protection.

Brannon v. OshKosh B'Gosh, 897 F. Supp. 1028, 1036 (M.D. Tenn. 1995) (footnotes omitted); see also Bond v. Abbott Labs., 7 F. Supp. 2d 967, 973 (N.D. Ohio 1998). Defendants' assertion that the FMLA covers only "major" health conditions such as heart attacks, cancer, surgery and strokes is a misstatement of the law.

Dr. White testified that he extended plaintiff's work excuse based solely on plaintiff's representation, to someone in his office, that she was unable to return to work after three days. However, the evidence contains no details regarding the illnesses or either plaintiff or Taryn. The written excuse that Dr. White provided contains no information other than

that plaintiff had been under his care since March 6, 2000 and that she could return to work on March 13. Defendants argue that this constitutes a lack of notice under the relevant regulations:

> (a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as is practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible....
> (b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.,* spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.303(a)-(b).

It is the employer's responsibility to designate leave as qualifying under the FMLA, and to notify the employee of that designation. § 825.208(a). However, the regulations also state:

> An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied.....
> (2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. . . .

§ 825.208(a)(1)-(2).

Although plaintiff's written doctor's excuse provided no details as to the nature of her medical condition, or Taryn's, plaintiff has stated in her declaration that she called in each day to state that she would not be at work. In the absence of any evidence regarding the specific information that was provided in those calls, the Court cannot say, as a matter of law, that plaintiff's notice was insufficient to alert the defendants that her leave might be FMLA-qualifying. Thus, there are material facts in dispute as to whether plaintiff and/or Taryn had a serious health condition in March 2000 that was FMLA-qualifying, and whether sufficient notice of that condition was given to the defendants.

Assuming that the March 2000 absences were FMLA-qualifying, there next inquiry is whether the defendants took those absences into account in the decision to terminate plaintiff. The defendants clearly considered plaintiff's absenteeism, as a whole, in making that decision. While defendants assert that FMLA leave is not counted as an absence under their attendance policy, there is evidence in the record that the March absences were counted against plaintiff in the progressive discipline that she received, including her termination. On May 1, 2000, plaintiff was counseled and given a written warning for her fourth absence. The absences specifically listed in the warning are February 12, February 15, March 8-13 and April 29. Plaintiff received a second written warning on June 26, 2000 which stated that it was for absences on May 17, June 2 and June 23. The defendants' written attendance policy stated that a second warning would be given after the fifth absence, and there are

seven total absences noted, so it is uncertain to what extent the March dates were counted against plaintiff at that point. However, during plaintiff's unemployment compensation appeal, Bettye McCord testified that the March dates were taken into account in the decision to terminate plaintiff.

While the defendants assert that plaintiff ignores the fact that she was terminated primarily for misconduct, the evidence clearly shows that her absenteeism was also taken into account. Therefore, there are material issues in dispute as to whether the defendants took plaintiff's FMLA leave into account in her termination, thus interfering with the exercise of her rights under the statute.

In order to establish a claim of discrimination or retaliation under 29 U.S.C. § 2615(a)(2), the Court must apply the analytical framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 315 (6th Cir. 2001). If plaintiff can establish a prima facie case of circumstantial evidence from which the jury can infer a discriminatory motive, the burden of production then shifts to the defendants "to articulate some legitimate, nondiscriminatory reason" for her discharge. McDonnell Douglas, 411 U.S. at 802; see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). If the defendants are able to articulate such a reason, the plaintiff must then prove the ultimate issue, *i.e.*, that the defendants' proffered reason is pretextual, and that discrimination is the true reason for the decision. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993); Skrjanc, 272 F.3d at 315.

In order to prove a prima facie case of retaliation, plaintiff must show the following: 1) that she availed herself of a protected right under the FMLA; 2) that she was affected by a materially adverse employment decision; and 3) that there was a causal connection between her exercise of a right afforded by the FMLA and an adverse employment action. Skrjanc, 272 F.3d at 314; Switala v. Schwan's Sales Enter., 231 F. Supp. 2d 672, 689 (N.D. Ohio 2002). Defendants contend that plaintiff can establish none of these elements.

The assertion that plaintiff cannot show that she availed herself of a right protected under the FMLA is based on defendants' position that none of plaintiff's leave was FMLA-qualifying, not even the March 2000 absence of more than three days. The Court has already determined that there are material facts in dispute on this issue.

The second element requires plaintiff to show that she was adversely affected by an employment decision. With regard to her termination, plaintiff clearly was affected in a materially adverse manner. Plaintiff has also, however, asserted that she was "harassed" in various other ways, such as not being allowed to go to the bathroom except on break time, not being given telephone messages from daycare regarding her children, and being moved from one job to another on the line. However, these are not the kinds of materially adverse employment decisions that will support a retaliation claim.

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to

a particular situation.

Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) (quoting Crady v. Liberty Nat'l Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). Other than her termination, there is no evidence that plaintiff was affected by any materially adverse change in the conditions of her employment.[8]

Assuming, but not deciding, that plaintiff's March 2000 leave was FMLA-qualifying, defendant also contends that there is no evidence of a causal connection between that leave and plaintiff's discharge. However, as stated earlier, there is evidence that the defendants considered plaintiff's absenteeism, including the March 2000 leave, as a factor in her termination. While the events may not have been close in time, this is sufficient to show a possible causal connection between her termination and FMLA-qualifying leave.

As the defendants have asserted that plaintiff was discharged for misconduct, they have articulated a legitimate, nondiscriminatory reason for her discharge. Thus, plaintiff must show that there is evidence of pretext. In order to demonstrate pretext, plaintiff must show that the defendants' proffered reason for her discharge had no basis in fact, did not actually motivate the action, or were insufficient to motivate the action. See Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

Again, it is clear that the defendants did not rely solely on plaintiff's alleged

[8] While plaintiff argues that defendant Magnetek demoted her following her return to work after twenty-two weeks of leave, including twelve weeks of FMLA leave, taken in connection with her pregnancy, the Court has determined that plaintiff was not entitled to be reinstated to her previous job.

misconduct in making the decision to terminate her. There is evidence in the record that plaintiff's absenteeism was a significant factor in that decision. Thus, the Court finds that the plaintiff has offered evidence that her misconduct was not sufficient to motivate her discharge. The defendant employers are not entitled to judgment as a matter of law on plaintiff's retaliation claim.

With regard to the individual defendants, plaintiff concedes that Neisler is entitled to summary judgment. The other individual defendants, Sullivan, McCord and Plott, first argue that they cannot be held individually liable under the FMLA. The Court has already held, however, in an order partially granting the defendants' motion to dismiss, that individual liability is appropriate under the FMLA in some circumstances. (Order filed 6/11/01.) The Court stated that the definition of "employer" under the FMLA should be analyzed like the definition in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(d). Since individual liability arises under FLSA, it also arises under the FMLA when the supervisor "exercise[s] sufficient control" over the employee's leave and employment status. See Bryant v. Delbar Prods., Inc., 18 F. Supp. 2d 799, 807 (M.D. Tenn. 1998); Rupnow v. TRC, Inc., 999 F. Supp. 1047, 1048 (N.D. Ohio 1998); Stubl v. T.A. Sys., Inc., 984 F. Supp. 1075, 1084-85 (E.D. Mich. 1997).

In this case, David Sullivan, as the Human Resources Manager, actually made the decision to terminate plaintiff, with the recommendation and input and agreement of Bettye McCord and Plant Manager Ed Plott. Although the authority of Bettye McCord is not

entirely clear, there is sufficient evidence of her involvement in plaintiff's termination for the claim against her to survive summary judgment. As stated, Sullivan testified that he made the decision to terminate plaintiff after discussing it with McCord and Plott. Therefore, although Plott himself testified that he had no involvement in the hiring and firing of hourly employees such as plaintiff, this testimony is directly contradicted by that of Sullivan. Thus, the Court finds that Sullivan, McCord and Plott are not entitled to summary judgment.

The Court is puzzled by the defendants' argument that plaintiff, because of her carpal tunnel syndrome, would have been unable to do the essential functions of her job even if she had not been terminated. In support of this argument, defendants cite Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 784-85 (6th Cir. 1998), which held that under the FMLA, an employee has no claim if she is unable to return to work after taking the maximum twelve weeks of leave. However, plaintiff was not on FMLA leave when she was terminated, and had taken no leave that was even arguably FMLA-qualifying since March 2000. This is not a case under the Americans with Disabilities Act. Except in the limited situation where the employee is unable to return to work after taking twelve weeks of FMLA leave, whether an employee can perform the essential functions of a job is generally irrelevant to the issue of whether the FMLA was violated.

The real issue defendants are trying to raise is whether plaintiff can prove any damages as a result of her termination. However, that issue cannot be resolved at this point,

as there are pending motions and objections that may affect that question.

For the foregoing reasons, the Court finds that, except for defendant Jerry Neisler, there are genuine issues of material fact regarding the issues raised in the motions for summary judgment. Thus, the defendants' motion for summary judgment (dkt. #79) is GRANTED as to defendant Neisler and DENIED in all other respects. Plaintiff's motion for partial summary judgment (dkt. #76) is DENIED in its entirety. The motion for oral argument on these motions is DENIED as moot.

IT IS SO ORDERED.

_____
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____
DATE