19-3435

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SALVATORE ZICCARELLI,
Plaintiff-Appellant,

v.

THOMAS J. DART, Sheriff of Cook County, Illinois, WYOLA SHINNAWI, and COOK COUNTY ILLINOIS, a municipal corporation,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division,
Case No. 17 C 3179
Honorable Ronald A. Guzman,
Judge Presiding

BRIEF OF DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of plaintiff-Appellant Salvatore Ziccarelli ("Plaintiff") is not complete and correct. Consequently, in accordance with FEDERAL RULE OF APPELLATE PROCEDURE 28(a)(4), defendants-appellees Thomas J. Dart, Sheriff of Cook County, Wyola Shinnawi and the County of Cook (collectively "Defendants") will submit a complete jurisdictional summary. *See Baez-Sanchez v. Sessions*, 862 F.3d 638, 641 (7th Cir. 2017) (Wood, J., in chambers) ("If the appellant's statement is not complete, or not correct, the appellee must file a "complete jurisdictional summary.") The following statement is complete and correct and is provided pursuant to Circuit Rule 28(b). *See* CIR. R. 28(b).

Plaintiff was a Deputy Sheriff employed with the Cook County Sheriff's Office ("CCSO") as a correctional officer until he retired on September 20, 2016. (R. 31 at 5:6-8.)[1] After he retired, he brought this lawsuit alleging, in part, that Defendants violated his rights under the Family Medical Leave Act ("FMLA"). (R. 1 at ¶ 16-17.) Defendants moved for summary judgment, and on June 20, 2018, the district court entered judgment in favor of Defendants. (R. 53.)

On July 18, 2018, Plaintiff filed a motion for reconsideration on the summary judgment order (R. 55.), and on December 11, 2018, the district court denied Plaintiff's motion for reconsideration. (R. 62.)

On January 10, 2019, Plaintiff filed a motion for an extension of time to file a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5). (R. 63.)

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[1] Defendants will refer to the district court docket document as (R. __.) For pinpoint cites, Defendants will refer to the district court document and page number as (R. __ at or R. __ at ¶ __.).

Pursuant to an order dated December 12, 2019, in case number 19-2864, this Court directed the Clerk of the District Court to re-docket the motion to extend time to appeal as a notice of appeal with a filing date of January 10, 2019.

As such, this Court has jurisdiction over the district court's June 20, 2018 and December 11, 2018 orders.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Defendants respectfully suggest that oral argument is unnecessary in this case. The issues presented involve the application of familiar and well-established legal principles. The facts and legal arguments are adequately presented in the briefs and the record. Oral argument would not significantly aid the decisional process.

ISSUE PRESENTED FOR REVIEW

Did the district court properly enter summary judgment in favor of Defendants on Plaintiff's FMLA retaliation and FMLA interference claims when the CCSO never denied any FMLA leave that Plaintiff was entitled to take and never disciplined him for taking FMLA leave?

STATEMENT OF THE CASE

The Parties

Plaintiff was a Deputy Sheriff with the CCSO, employed as a correctional officer. (R. 1 at ¶ 4; R. 43 ¶ 1.) Defendant Wyola Shinnawi was the FMLA manager with the CCSO's Human Resources Department. (R. 43 at ¶ 22.) Defendant Thomas Dart is the Sheriff of Cook County. (R. 1 at ¶ 4.) Defendant County of Cook was named for indemnification purposes. (R. 1 at ¶ 140.)

FMLA Request

CCSO has a policy and procedure for when employees request leave under the FMLA. (R. 31-3 at 52.) In order to apply for FMLA leave, Plaintiff was required to complete and submit required documentation, including the FMLA Request form. (R. 31-3 at 52-53.) In September 2016, Plaintiff telephoned Defendant Shinnawi and requested that he be permitted to take eight weeks of FMLA time. (R. 43 at ¶ 8.) The CCSO tracks FMLA hours in a database that Defendant Shinnawi was able to access. (R. 43 at ¶ 11.) During this one telephone conversation, Defendant Shinnawi informed Plaintiff that he did not have sufficient FMLA time to cover eight weeks, as he had already used substantial FMLA time, and only had approximately 170 hours left that he could utilize. (R. 43 at ¶ 9.) Plaintiff testified that Defendant Shinnawi told him that if Plaintiff took unauthorized FMLA time, he would be disciplined. (R. 43 at ¶ 11.) Defendant Shinnawi explained that if Plaintiff used FMLA that he did not have, that it would be coded unauthorized and then attendance review would handle it moving forward. (R. 31-4 at 9.) Plaintiff concedes that the CCSO's Human Resources Department does not discipline employees. (R. 43 ¶ 22.) There is nothing in the record to suggest that Plaintiff submitted *any* FMLA documentation, including the FMLA Request form, in September 2016.

While Plaintiff had vacation time available at the time of his FMLA request, he did not ask Defendant Shinnawi during this telephone call whether he could use vacation time to receive medical care. (R. 43 at ¶ 15.) Defendant Shinnawi explained that she only deals with approving FMLA leave and did not evaluate

whether Plaintiff had other forms of leave he could use and that if he needed additional medical time or vacation time or any other type of benefit time, he would have to go through his chain of command. (R. 31-4 at 9, 11.) Defendant Shinnawi explained that she could only approve FMLA time and she could not approve other types of leave because she does not have that authority. (R. 31-4 at 15.) Plaintiff only spoke with Defendant Shinnawi this one time during this one telephone call. (R. 43 at 3.)

Days after he had this one telephone conversation, Plaintiff retired, effective September 20, 2016. (R. 43 at 4; R.31-3 at 42.) Plaintiff was never disciplined for taking FMLA leave. (R. 43 at ¶ 11.) Plaintiff remained a fully employed correctional officer at his regular salary until he retired on September 20, 2016. (R. 43 at ¶ 5.)

The Lawsuit

On April 27, 2017, Plaintiff filed his lawsuit. Plaintiff alleged that as a result of Defendant Shinnawi's "actions and threats," he "suffered a nervous breakdown" and took early retirement "[f]earing that [he] would be subject to disciplinary action if he took time off to address his psychiatric needs and trauma." (R. 1 at ¶ 16-17.) Plaintiff's complaint alleged Disability Retaliation under Title VII (count I), FMLA Retaliation (count II), ADEA Violation (count III), Violation of Equal Protection of the Fourteenth Amendment (count IV), and indemnification against Cook County (count V). (R. 1.)

The District Court Orders

Defendants moved for summary judgment on all claims pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1 (R. 29-31.) On June 20, 2018, the district court noted in its summary judgment order that Plaintiff failed to respond to Defendants' arguments with respect to his disability and age discrimination (counts I and III) and equal protection (count IV) claims, and entered judgment in favor of Defendants on these claims. (R. 53.) Relevant here, the district court entered judgment against Plaintiff on his FMLA retaliation and FMLA interference claims. (R. 52, p. 2-3.) The district court found that the FMLA retaliation claim failed because Plaintiff did not present evidence that he was subject to an adverse employment action that occurred because he requested or took FMLA leave. (R. 52 at 2.) The district court noted that to the extent Plaintiff was attempting to allege constructive discharge, the claim failed because the record was "devoid of any facts" that Plaintiff's working conditions were unbearable. (R. 52 at 3.)

The district court found that the FMLA interference claim similarly failed, finding:

> Plaintiff failed to create a genuine issue of material fact that he was denied FMLA benefits; indeed Plaintiff points to no record evidence that he was told he could not take his remaining FMLA leave. Shinnawi told Plaintiff in a telephone conversation that he did not have sufficient hours to take the full eight weeks he requested as FMLA leave and that there could be consequences from the attendance review unit if he took time off to which he was not entitled. From what the Court can tell, Shinnawi did her job. … Plaintiff admits he made no effort to follow up with anyone to find out if he could use his sick days or vacation time to supplement any FMLA time he had remaining and instead, almost immediately retired.

(*Id.*)

On July 18, 2018, Plaintiff filed a motion for reconsideration on the summary judgment order. (R. 54.) On December 11, 2018, the district court denied Plaintiff's motion for reconsideration, finding that Plaintiff's motion for reconsideration failed to raise manifest errors of law or fact or present new evidence. (R. 62.)

The Appeal

As explained above, this Court has jurisdiction to review both district court orders.

SUMMARY OF ARGUMENT

This Court should affirm the district court's orders which found no FMLA violations. Defendants never improperly denied FMLA leave to Plaintiff and never disciplined Plaintiff for taking FMLA leave. Plaintiff voluntarily retired days after a single telephone call to the FMLA manager without submitting any paperwork requesting FMLA leave.

The district court properly entered summary judgment and that judgment should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*. *Guzman v. Brown Cty.*, 884 F.3d 633, 638 (7th Cir. 2018). While this Court must construe all the facts and reasonable inferences in the light most favorable to the nonmoving party, this deference does not extend to drawing inferences that are supported by only speculation or conjecture. *Monroe v. Ind. DOT*, 871 F.3d 495, 503

(7th Cir. 2017). This Court reviews the district court's denial of a motion for reconsideration under Rule 59(e) for an abuse of discretion. *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000).

II. CCSO Did Not Retaliate Against Plaintiff For Taking FMLA Leave

The record is devoid of evidence that CCSO ever retaliated against Plaintiff for taking FMLA leave. On appeal, Plaintiff argues that he was "threatened" with discipline if he took unauthorized leave. (App. Br. at 53.) Plaintiff's FMLA retaliation claim fails.

In order to prevail on a FMLA retaliation claim, a plaintiff must present evidence that he was subject to an adverse employment action that occurred *because* he requested or took FMLA leave. *Guzman*, 884 F.3d at 640. Here, the undisputed evidence demonstrates that Plaintiff voluntarily retired without taking the FMLA leave; thus, there was no adverse action that pertained to his requesting the FMLA leave at issue. Moreover, a threat of discipline that does not occur is not an adverse employment action. *Lewis v. Wilkie*, 909 F.3d 858, 870 (7th Cir. 2018) ("There is ample precedent in this Circuit and in Supreme Court case law supporting the proposition that an adverse action in the Title VII retaliation context must produce a material injury or harm, and that unfulfilled threats do not meet that standard."); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004) ("We evaluate a claim of FMLA retaliation the same way that we would evaluate a claim of retaliation under other employment statutes, such as the ADA or Title VII.")

Additionally, to the extent Plaintiff argues that his retirement was forced, his claim of constructive discharged similarly fails. An employee is constructively discharged only when, from the standpoint of a reasonable employee, the working conditions become unbearable and comes in two forms: either (1) an employee resigns due to alleged discriminatory harassment; or (2) when an employer acts in a manner whereby a reasonable employee would believe that he will be terminated. *Chapin v. Fort-Rohr Motors Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). To support a constructive discharge claim, a plaintiff's working conditions must be even more egregious than the high standard for hostile work environment claims. *Boumehdi v. Plastag Holdings, LLC,* 489 F.3d 781, 719 (7th Cir. 2007).

Plaintiff cannot dispute that his decision to retire was not based on any harassment, let alone the excessive harassment he must demonstrate, nor did he have a reasonable belief of imminent discharge. Even if taken as true, his allegations that he was threatened to be disciplined for being in an unauthorized status during the one telephone conversation does not come close to establishing a hostile work environment as he could not have had a reasonable belief of imminent discharge, let alone an environment so intolerable it amounted to constructive discharge.

III. No One Interfered With Plaintiff's FMLA Rights

No one interfered with Plaintiff taking the leave he was entitled to take under the FMLA. In order to prevail on a FMLA interference claim, an employee must establish that: (1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he

provided sufficient notice of his intent to take leave, and (5) his employer denied his FMLA benefits to which he was entitled. *Guzman*, 884 F.3d at 638. The plaintiff carries the burden of proving an FMLA interference claim and must establish an entitlement to the disputed leave. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 908 (7th Cir. 2008).

Defendants do not dispute the first four elements of the FMLA interference claim. However, CCSO and Defendant Shinnawi did not deny Plaintiff any FMLA benefits to which he was entitled. As Plaintiff had previously used FMLA time (and previously gone through the process of seeking FMLA leave), he only had 177 hours, about a month and a week, remaining. (R. 43 at 3, ¶¶ 9, 11.) Defendant Shinnawi merely told him was that he did not have sufficient FMLA time to cover all eight weeks, which would require 400 hours. (*Id.*) Defendant Shinnawi only approves FMLA time, and Plaintiff did not inquire whether he could use other accrued time. (R. 43 at ¶ 15.) In order to apply for FMLA leave, Plaintiff was required to complete and submit the required documentation, including the FMLA Request form. (R. 31-3 at 52-53.) Nothing in the record suggests that Plaintiff submitted *any* FMLA documentation, including the FMLA Request form, in September 2016. Plaintiff chose to retire days after this single conversation and remained a fully employed correctional officer until his retirement. (R. 43 at ¶ 5.)

Plaintiff's situation can be distinguished from the plaintiff in *Valdivia,* because there, the plaintiff had the requisite amount of FMLA benefit time, and the issue was whether her employer was put on notice of her need to take FMLA time. *Valdivia v. Twp. High Sch. Dist. 214*, 942 F.3d 395, 400 (7th Cir. 2019). Here,

Plaintiff sought to use *more benefit time* than he had. Plaintiff failed to provide any evidence that Defendants denied him any FMLA benefits to which he was entitled and which he properly requested.

On appeal, Plaintiff tries to create an issue of fact as to whether Defendant Shinnawi told him he could not take *any* FMLA leave and threatened him with discipline *or* whether Defendant Shinnawi told him the total amount of FMLA time he had remaining, explained he did not have enough remaining FMLA leave time to take eight weeks of leave, and advised him of the potential consequences if he took unauthorized leave. (App. Br. at 15.) To support his contention that there is a factual dispute, Plaintiff poses the following question:

> [W]hy would Ziccarelli leave $15,000-$20,000 on the table unless the version of the facts as he testified to in both deposition and affidavit for was true? Ziccarelli literally could have sat home and been paid had the CCSO not told him that he could not take his FMLA leave and threatened him with discipline.

(App. Br. at 20.)

Plaintiff's remorse in choosing to retire before exhausting all benefit time is not evidence that Defendant Shinnawi denied him the use of his FMLA benefits. It is undisputed that Plaintiff did not have sufficient FMLA leave time to take eight weeks of FMLA leave. (R. 43 at ¶ 9.) It is undisputed that Defendant Shinnawi could only approve FMLA time (and not other forms of benefit time). (R. 31-4 at 15.) It is further undisputed that Defendant Shinnawi, who works in the CCSO's Human Resources Department, does not discipline employees. (R. 43 at 6.) *Plaintiff's* rationale for not seeking additional leave time from his supervisor prior to retiring, *Plaintiff's* decision to not follow up with Defendant Shinnawi to clarify

his FMLA benefits, and *Plaintiff's* choice to not do *anything* beyond having a single telephone call is not evidence of FMLA interference.

IV. Plaintiff Raised No Manifest Errors Of Law Or Fact In His Motion For Reconsideration

Plaintiff's motion for reconsideration largely rehashed his arguments from summary judgment briefing, mainly arguing that Defendant Shinnawi refused to grant him his requested time off and insisting that he would be subject to discipline if he took the time off as directed. (R. at 54.)

For the reasons set forth above, because Defendant Shinnawi did not have the authority to discipline Plaintiff and because Plaintiff chose to retire rather than further inquiring about other benefit time, the district court correctly denied the motion.

CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully request that this Court affirm the district court's orders granting Defendants' motion for summary judgment and denying Plaintiff's motion for reconsideration.

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Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief is less than thirty pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 point font and footnotes in 11 point font in Century type.

/s/ Kathleen Ori
Kathleen Ori
Assistant State's Attorney
Attorney for Defendants-Appellees

Dated: April 3, 2020

PROOF OF SERVICE

I, Kathleen Ori, Assistant State's Attorney, hereby certify that the attached document, along with the accompanying BRIEF OF DEFENDANTS-APPELLEES was served upon the below-listed registered e-filer, electronically, on April 3, 2020 and, upon acceptance by the Court of Appeals, will be mailed a hard copy.

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