UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PATRICE M. WARREN	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 97-0188-B**
	)	
RITE AID OF MAINE, INC.	)	
	)	
Defendant	)	

MEMORANDUM OF DECISION

The plaintiff, Patrice M. Warren, brings this action against the defendant, Rite Aid of Maine [hereinafter "Rite Aid"] claiming that the defendant wrongfully terminated her employment. Specifically, the plaintiff claims the defendant violated the Family and Medical Leave Act ["FMLA"] (Count I), 29 U.S.C. section 2601, *et. seq.*, and the Maine Family and Medical Leave Act ["MFMLA"] (Count II), 26 M.R.S.A. section 843, *et. seq*. In addition the plaintiff asserts the following common law claims: breach of contract (Count III), negligent infliction of emotional distress and intentional infliction of emotional distress (Count IV). Before the Court are the defendant's Motion for Summary Judgment, the plaintiff's Response and the defendant's Reply. For the reasons explained below, the Court DENIES the motion in part and GRANTS the motion in part.

I. Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994)

(quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

II. Background

The plaintiff began her part-time employment as a Pharmacy Technician at the Shop-n-Save Rite Aid in Bucksport, Maine on March 6, 1994. Roland Hughes was the pharmacy supervisor and Larry Rehlander was the pharmacist who was the plaintiff's immediate supervisor. While working at Rite Aid in late July 1995, the plaintiff suddenly experienced severe pain. She was taken to the hospital emergency room and doctors diagnosed her with an enlarged uterus that contained several tumors both inside an outside the uterus.

Soon after the diagnosis, the plaintiff called Rehlander at Rite Aid and told him that she would be unable to return to work until mid-September. Rehlander told the plaintiff that taking that time off would not be a problem. On August 17, 1995 the plaintiff underwent a hysterectomy. Approximately one week later the plaintiff received a letter from Rite Aid stating that she had been terminated. Plaintiff called the defendant immediately and spoke with Rehlander. The plaintiff asked for reinstatement of her position but was told that her position was filled.

Count I - Partial Summary Judgment Motion on FMLA

The defendant asks for partial summary judgment on plaintiff's lost wages claim under the FMLA because the plaintiff failed to produce her tax returns. In her Response, the plaintiff attached the tax returns requested by the defendant. Despite the untimely response to defendant's discovery request, the Court does not think summary judgment is an appropriate sanction in this case. Fed. Rule Civil Proc. 37(a). Accordingly, the defendant motion for partial summary judgment as to the plaintiff's claim for lost wages is DENIED.

The defendant also asserts that it is entitled to summary judgment on whether the plaintiff's back pay claim should be limited to wages lost before May 21, 1996. After the plaintiff was available to work again on September 17, 1995 she was unable to secure a job until she took a position as a desk clerk at an Inn on May 21, 1996. Defendant claims that any loss of employment after she began work at the Inn is not attributable to it. The FMLA permits damages for "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. section 2617(1)(A)(i)(1). The plaintiff contends that even though she left her job at the Inn because of family problems, she may not have left her job at Rite Aid because she enjoyed working there. Additionally, the plaintiff points out that if she remained employed at Rite Aid she would have been employed with them for two years, whereas being employed only one month at the Inn made it impractical to ask for time off. Speculation on what may have happened are not facts and do not raise sufficient issues to survive summary judgment. Accordingly, the Court GRANTS the defendant's motion and limits the amount of back pay the plaintiff can recover to before May 21, 1996.

Count II - Maine Family Medical Leave Act

At issue are the terms of the Maine Family Medical Leave Act as it stood prior to the 1997 amendments. The MFMLA requires an employer to provide up to eight consecutive weeks of leave to employees who have been employed for twelve consecutive months.[1] 26 M.R.S.A. section 844. The Act applies to employees who work at a "permanent work site". *Id.* The statute does not define the terms "permanent work site". The defendant maintains that because Rite Aid employed between ten to fifteen employees at the plaintiff's particular job site, the MFMLA does not apply to the defendant.

The plaintiff maintains that the term"permanent work site" should be read broadly to include Rite Aid employees at another location in Bucksport because Rehlander and the employee who replaced the plaintiff worked at both sites. The Court is satisfied that the term "permanent work site" only applies to the Rite Aid at which the plaintiff was employed. There are several reasons for the Court's finding. First, the plaintiff has presented no evidence that plaintiff ever work at the other Rite Aid in Bucksport. Therefore, the plaintiff's permanent work site was the Shop-n-Save Rite Aid. Second, if the state wanted to cover additional Rite Aid stores, they could have clearly done so by adopting the model of the FMLA when they amended the MFMLA in 1997. *See*, 29 U.S.C. section 2611 (2)(B)(ii) (an eligible employee is one employed at a worksite where there are at least fifty or more employees within a seventy-five mile radius of the employee's worksite.) Third, when the Court interprets a statute the Court will first look to the plain meaning of the statute to determine the legislative intent, if the meaning of the statute is clear on its face, the Court will conduct no further

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[1] Amendments to the Act in 1997 now require the employer to provide up to ten weeks of leave.

examination. *Cook v. Lisbon School Comm.*, 682 A.2d 672, 676 (Me. 1996). In this case the Court is satisfied that the term "permanent work site" is clearly intended to apply only to the Rite Aid the plaintiff worked at, the Shop-n'-Save Rite Aid in Bucksport, Maine.

The plaintiff also argues that the Court should not grant summary judgment on the claim because the defendant has not provided documentation in its possession listing the employees at the Rite Aid in question during the time the plaintiff was employed by Rite Aid. Specifically, the plaintiff points to an affidavit of Roland Hughes, a manger at the Rite Aid, in which Hughes states that he recently reviewed the personnel information of the plaintiff, while the plaintiff was employed at Rite Aid. The reasoning the plaintiff follows seems to be that since Rite Aid claimed that it did not have the personnel information of the plaintiff and now it apparently does, perhaps the plaintiff also has a list of employees who worked at the Rite Aid which they have not turned over to the plaintiff.

As an initial matter it is important to address what the plaintiff is not arguing. The plaintiff does not argue that the Shop-n'-Save Rite Aid employed more than twenty-five employees. Additionally, the Court is not convinced the defendant has withheld information from the plaintiff on the issue as to how many employees work at the Shop-n'-Save Rite Aid. In Defendant's Objections to Plaintiff's Interrogatories the defendant states that the Shop-n-Save Rite Aid at which Plaintiff was employed maintained a payroll of approximately ten employees. The defendant also lists the names of the employees within their knowledge, about six, who worked at the Rite Aid when the plaintiff was employed there. After reviewing the record, the Court is satisfied that no genuine issues of material fact exist that the defendant employed less than twenty-five employees at the Shop-n-Save Rite Aid. Accordingly, the Court GRANTS defendant's motion on this claim.

Count III - Contract Claim

The plaintiff claims that the inclusion of the terms of the FMLA under the benefits section of the employee handbook created a contract between the plaintiff and the defendant. In the Rite Aid employee handbook the substantive provisions of the FMLA are reprinted under the benefits section along with various notice provisions an employee is required to provide to Rite Aid before taking leave. Federal law requires Rite Aid to notify its employees of their rights under the FMLA. 29 C.F.R. section 825.301 (a)(1) ("If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document.")

The issue for the Court is whether the notice provision in the employee handbook created a contract independent of the provisions in the FMLA. At least one other court has answered the question in the negative. 91 F. 3d 497, 512 (3rd Cir. 1996) (holding that providing notice as required under the New Jersey Family Medical Leave Act, which has provisions similar to the FMLA, only notifies the employee of her legal rights and does not create an independent contract.) The Rite Aid employee handbook contains a subsection clearly titled "Family and Medical Leave Act" and lists the substantive provisions of the FMLA. The Court is satisfied that the defendant only intended to fulfill its legal duties and notify the plaintiff of her legal rights under the FMLA. Having concluded that the defendant did not intend to provide additional benefits to the plaintiff the Court is satisfied that no contract existed. Accordingly, the Court GRANTS the defendant's motion on this Count.

Count IV - Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress

Defendant also moves for summary judgment on plaintiff's claims of negligent infliction of emotional distress and intentional infliction of emotional distress. To assert a claim of negligent infliction of emotional distress one must demonstrate that a "'reasonable person normally constituted, would be unable to cope with the mental distress engendered by the circumstances of the event.'" *Rowe v. Bennett*, 514 A.2d 802, 805 (Me. 1986) (citations omitted). The plaintiff asserts the following facts to support her claim: that at the time she left Rite Aid she asked for medical leave, that her immediate supervisor, Rehlander, assured her that there would be no problem with her taking leave, that Rehlander told her he would tell the manager that the plaintiff was taking medical leave, that despite these assurances the plaintiff received a letter a month into her leave that her employment had been terminated, and that she called the manager and asked for her position back but her request was denied.

When the plaintiff lost her job she claims she suffered severe emotional distress. She could not eat or sleep, she cried constantly and became severely depressed. The emotional distress the plaintiff describes does not rise above the level expected of persons who experience loss of employment. It certainly does not rise to the level of severe emotional distress required to assert a claim of negligent infliction of emotional distress.

The plaintiff also asserts a claim of intentional infliction of emotional distress. To make this claim, the plaintiff must demonstrate that the defendant's conduct was extreme and outrageous. *Vogt v. Churchill*, 679 A.2d. 522, 524 (Me. 1996). After reviewing the record the Court is satisfied that

no reasonable trier of fact could determine that the defendant's termination of the plaintiff amounts to extreme and outrageous conduct. Accordingly, the Court GRANTS the defendant's motion as to Count IV of the Complaint.

III. Conclusion

Accordingly, the Court GRANTS the defendant's motion in part and DENIES the motion in part as to Count I and GRANTS the defendant's motion as to Counts II, III and IV.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on August 28, 1998.