

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BRIAN COLBURN,)
)
 PLAINTIFF)
)
v.)
)
PARKER HANNIFIN/)
NICHOLS PORTLAND DIVISION,)
)
 DEFENDANT)

CIVIL No. 04-10-P-H

**ORDER AFFIRMING THE RECOMMENDED DECISION
OF THE MAGISTRATE JUDGE**

This is a lawsuit by a former employee charging that his employer violated the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601-2654 and its Maine counterpart, 26 M.R.S.A. § 843-848. After oral argument on January 3, 2005, I **ADOPT** the Recommended Decision of the Magistrate Judge that the employer be awarded summary judgment. My review is *de novo*. I make the following observations about issues that arose during the briefing and arguing of objections to the Recommended Decision.

The Magistrate Judge properly concluded that the employee’s affidavit directly contradicted portions of the employee’s earlier deposition, that the employee did not file this affidavit until after the employer moved for summary judgment, that his current lawyers had represented the employee at the

deposition, and that the employee failed to explain the contradiction.¹ The Magistrate Judge correctly struck the contradictory portions of the affidavit in accordance with Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994), and Torres v. E.I. DuPont de Nemours & Co., 219 F.3d 13, 20-21 (1st Cir. 2000).

I disagree with the Magistrate Judge's conclusion that a deposition of the employee's doctor could not create a genuine issue of material fact (beneficial to the employee) where the doctor's testimony contradicts the employee's deposition testimony. The Magistrate Judge reasoned that the doctor "merely states what the [employee] reported to him . . . it is not an independent source authority [sic] for the factual statement." Recommended Decision at 4, n.1. But the doctor's deposition concerned statements made by the employee well before the employee's deposition.² Thus, statements made to the doctor that contradicted the employee's deposition testimony would not be disqualified by Colantuoni. Moreover, such statements would not be inadmissible hearsay. See Fed. R. Evid. 803(4). They could therefore create a factual issue. This error is of no consequence to the outcome of this case, however, because the cited portions of the doctor's deposition reveal nothing that counters the employee's deposition statements that he was unable to return to work until April 15, 2003. Therefore, I agree with the Magistrate Judge that, according to

¹ Apparently the first explanation of this inconsistency occurred at the January 3 oral argument on the objections to the Recommended Decision.

² Dr. Sullivan testified at his deposition that on February 13, 2002, the employee had reported a visual aura that lasted for a few hours before the headache developed. The employee stated several times in his deposition that he did not experience warning signs before the onset of a migraine headache, including the flickering lights or black spots characterized as "aura."

the summary judgment record, “[t]he [employee] was unable to return to work due to his medical condition from the date of his termination on January 31, 2002 until April 15, 2003.” Recommended Decision at 9. This dooms the employee’s claim that his employer interfered with his FMLA rights.³ See, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 161-62 (2d Cir. 1999); Wilcock v. Nat’l Distributions, Inc., No. 00-298-P-H, 2001 WL 877547, at *4 (D. Me. Aug. 2, 2001).

The employee argues that even if his interference claim fails (based on his inability to return to work), his FMLA retaliation claim still stands, because at the time his employer terminated him, it believed he was (or would be) able to return to work. But the employee’s inability to return to work following the expiration of his FMLA leave extinguishes his retaliation claim under the FMLA.⁴ Damages are limited to lost or denied income (here, none since he could not work) and costs incurred (none) as a result of an FMLA violation; no nominal or consequential damages are available. Walker v. United Parcel Serv., Inc., 240 F.3d 1268-1277-78 (10th Cir. 2001); Montgomery v. Maryland,

³ Although the defendant has filed no objection to the Recommended Decision, it argues in a footnote that the plaintiff forfeited his interference claim by failing to address the claim in his opposition to summary judgment. I conclude that the claim was not forfeited: although the plaintiff’s memorandum responding to the defendant’s motion for summary judgment focused on the plaintiff’s retaliation claim, it did include a reference to and short discussion of the interference claim. See Pl.’s Opp’n Mot. Summ. J. at 2-3, 19. In any event, the question is moot in light of my ruling that the defendant obtains summary judgment on the interference claim because the plaintiff could not return to work.

⁴ The Department of Labor regulations say that an FMLA claim fails if an employee cannot return to work for medical reasons, 29 C.F.R. §§ 825.214(b), -216(d), and the plaintiff has not pointed to any contrary authority.

72 Fed. Appx. 17, 29 (4th Cir. 2003); Nero v. Indus. Molding Corp., 167 F.3d 921, 930 (5th Cir. 1999).⁵

The defendant's motion for summary judgment is **GRANTED**.

So ORDERED.

DATED THIS 25TH DAY OF JANUARY, 2005

/s/D. Brock Hornby _____
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

⁵ I recognize that in employment discrimination law generally, a defense that emerges after termination (here, the deposition testimony that the employee could not return to work) may limit damages, but does not eliminate liability altogether. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995). Under the factual circumstances on this summary judgment record, however, and given FMLA law, no damages (not even nominal) are available to the plaintiff.

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 04CV10**

BRIAN COLBURN

Plaintiff

represented by Howard T. Reben
Adrienne S. Hansen
Reben, Benjamin, & March
97 India Street
P.O. Box 7060
Portland, ME 4112
(207) 874-4771
email: hreben@rbmlawoffice.com
ahansen@rbmlawoffice.com

v.

**PARKER HANNIFIN NICHOLS
PORTLAND DIVISION**

Defendant

represented by Peter Bennett
Frederick B. Finberg
Bennett Law Firm, P.A.
P.O. Box 7799
Portland, ME 4112-7799
(207) 773-4775
email:
pbennett@thebennettlawfirm.com
rfinberg@thebennettlawfirm.com