

UNITED STATES OF AMERICA
DISTRICT OF MAINE

HUBERT E. SAUNDERS,)
)
 Plaintiff)
)
 v.) Civil No. 99-246-B-H
)
 WEBBER OIL COMPANY, d/b/a)
 WEBBER ENERGY FUELS,)
)
 Defendant)

**RECOMMENDED DECISION DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Hubert Saunders, a former vice president of Defendant Webber Oil Company (“Webber”), has brought suit against his former employer alleging in Count I, a violation of the Americans With Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12117, Count II, a violation of the Maine Human Rights Act, 5 M.R.S.A. § 4572, Count III, a violation of both the state and federal Family Medical Leave Act, 29 U.S.C. § 2615 and 26 M.R.S.A. §§ 843-848, and finally in Count IV, a claim of common law fraud. Plaintiff seeks to recover compensatory and punitive damages on both his unlawful discharge and his fraud claims. Defendant has now moved for summary judgment on the punitive damages claims and on all four counts of Plaintiff’s complaint. I recommend that the Court **DENY** the Motion for Summary Judgment¹ (Docket No. 14).

¹ All of the pleadings and supporting materials filed in connection with the Motion for Summary Judgment were filed “under seal” pursuant to the confidentiality agreement between the parties. Some of those materials are cited herein. Prior to issuing this recommended decision I made telephonic contact with counsel to ascertain their position regarding the impact, if any, of the “under seal” status on this recommended decision. Defendant has indicated its position that this recommended decision should be filed under seal as well, citing as authority *Eldon Industries v. Rubbermaid, Inc.*, 735 F.Supp. 786, n.1 (N.D.Ill., 1990). Plaintiff has no objection to the opinion being filed without redaction. I am satisfied that

Standard of Review

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the moving party has come forward identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any” which “it believes demonstrate the absence of a genuine issue of material fact,” the adverse party may avoid summary judgment only by providing properly supported evidence of disputed material facts that would require trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The trial court must “view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party’s favor.” *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The court will not, however, pay heed to “conclusory allegations, improbable inferences [or] unsupported speculation.” *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990). Because Defendant has moved for summary judgment, where the facts are in dispute, the Court presents them in the light most favorable to Plaintiff.

Factual Background

Plaintiff, Hubert Saunders had been employed by Defendant Webber Oil Company since February, 1993, when he had become the General Manager of Webber Energy Fuels in Auburn, Maine. Prior to September, 1997, his salary was \$50,000. (Def.’s Statement of Material Facts (“DSMF” ¶ 1) (Docket #9)). During the four years Plaintiff worked for Defendant he received positive feedback from his employers. (Pl.’s

this opinion does not require redaction to protect Defendant’s confidential business information from public disclosure.

Statement of Additional Material Facts (“PSAMF” ¶ 3) (Docket #23, Pt. II)). In early September, 1997, Saunders received an offer from a former employer, Agway Petroleum Corporation, which would have paid \$63,000 per year plus potential bonuses, and other benefits. He gave notice of his resignation to be effective September 19, 1997. (PSAMF ¶¶ 3,4).

On September 11, 1997, Saunders met with Webber Vice President of Human Resources Ken Winters. The two men discussed the possibility of Saunders remaining with Webber, and Winters revealed that the company had been considering removing a current vice president, Larry Emerson, and replacing him with Saunders. Saunders indicated that he was interested in that possibility, but only if the job was limited to managing Webber’s retail subsidiaries located in Maine, but not those in New Hampshire. (PSAMF ¶ 5). Following that meeting, Saunders and his wife, Maureen Saunders, met with Winters and Jon Whittle, another Webber manager, on September 13, 1997. During that meeting the terms of a new position with Webber were discussed in some detail, including requiring Hubert Saunders to be a full-time Regional Manager with Webber’s office in Bangor, Maine, and Saunders relinquishing all responsibility for the New Hampshire facilities. Webber, however, had not made a formal offer to Saunders, because the company’s CEO, Larry Mahaney, had yet to endorse the proposed promotion. Saunders understood that a formal offer had not been made and that he would have to meet with Mahaney before that could occur. Two days later, on September 15, 1997, Mahaney and Saunders met at Webber Oil Company headquarters in Bangor, where Mahaney offered Saunders the position of Vice President and Maine Regional Manager in charge of all the Maine retail facilities. (*Id.* at ¶¶ 6,7).

During the September 15th meeting the Webber executives explained that the position would require Plaintiff to relocate to Bangor. They discussed Saunders' ethical concerns about backing out of the Agway job on such short notice. The interaction with CEO Mahaney was cordial and relaxed. Saunders said he would agree to the offer if they matched Agway's salary and paid the real estate expenses on the sale of Saunders' home in Auburn. Agreement was reached. At a company social event ten days later, Mahaney and Maureen Saunders, had a conversation during which Mahaney confirmed the need to relocate her husband to Bangor. (*Id.* at ¶¶ 8-13).

Beginning in late August, 1997, evidence of a possible prostate problem began to emerge in Plaintiff's medical background. Following a series of physical examinations and tests, doctors determined that Hubert Saunders had an enlarged prostate with an adenocarcinoma. Saunders discussed treatment options with his physician on September 23, 1997. At that time Saunders learned that if he chose to pursue one particular course of treatment (radiation seed implant) at the Lahey Clinic he first would have to undergo at least a two-month course of treatment with the drug Zoladex to reduce the size of his prostate. Initially deciding that he favored that course of treatment, Saunders received his first Zoladex injection on September 26, 1997. (DSMF ¶¶ 7-15).

On September 30, 1997, Saunders attended a meeting to discuss management philosophy and plans for the company with Mahaney. The two men apparently agreed on most issues. It was a friendly and cordial meeting. Among the items discussed was the topic of a manager candidate for the Auburn facility; Mahaney told Saunders to make arrangements through Ken Winters to complete a screening process. (PSAMF ¶ 14). Webber's practice had been to place a management trainee in a subsidiary location to be

trained by an experienced subsidiary manager in the field. (DSMF ¶ 5). Larry Emerson, a former Vice President whose demotion coincided with Saunders' promotion, had been in charge of all management trainees. (DSMF ¶ 6, PSAMF ¶ 5). At the conclusion of the meeting Saunders revealed to Mahaney that he had been diagnosed with prostate cancer and might undergo treatment at the Lahey Clinic later that fall. (PSAMF ¶ 15).

On October 2, 1997, Ken Winters told Plaintiff to cancel interviews of the management trainee candidates. Mahaney had decided that Saunders was not going to be replaced as a manager in Auburn, but that a management trainee would be sent there to assist him. On October 3rd Saunders was further advised that he would not be replaced as the Auburn manager and he would not be moving to Bangor for "probably at least two years." In Saunders' view being the manager of the Auburn facility was a full-time job in and of itself, and he would have a great responsibility with that job and the job of being the Regional Vice President in Maine. (PSAMF ¶¶ 16-18).

On October 16, 1997, Saunders and Mahaney met at a conference in Northport, Maine. Mahaney inquired of the Plaintiff regarding his cancer prognosis. Plaintiff informed him that he was considering treatment options, specifically at the Lahey Clinic, and that one option might involve his only being out of work for 3 to 5 days. Mahaney replied with words to the effect, "No more than five days because that's all the sick days you get." (PSAMF ¶ 19).

The next encounter between Mahaney and Saunders occurred on October 21, 1997, when both were present as members of the Interview Committee, which was meeting to recommend a candidate for the manager's position at one of the New Hampshire subsidiaries. During the course of the committee's discussion about one of

the candidates, Saunders remarked “it’s a lot harder to manage these companies or people, or something, than it was 30 years ago.” (Saunders Tr. p. 196, lines 4-6). Mahaney then recessed the meeting and called Saunders into his office down the hall. Mahaney expressed his displeasure at the perceived insult that Saunders had just caused him. Saunders apologized for his remark, indicating that he intended no offense by it and was merely referring to difficulties that can arise around personnel issues in the current climate. (PSAMF ¶ 20).

On October 22, 1997, Plaintiff was terminated. The reason given for his termination was that he insulted Larry Mahaney in front of senior management on October 21, 1997. (DSMF ¶¶ 39, 40). Defendant has never terminated the employment of any other managerial or supervisory employee for reasons similar to the reasons given in this case. (PSAMF ¶ 24). Claiming not to be supersensitive to criticism, Mahaney has said that he encourages his top managers to engage in robust and free exchange of opinions and to not hold back in expressing their opinions because they might hurt his feelings. (PSAMF ¶ 40).

Defendant Webber Oil Company, the entity responsible for Saunders’ termination, had in excess of six hundred employees during twenty or more weeks of the year 1997. (PSAMF ¶ 23). Through the years Defendant has had a number of employees diagnosed with various types of cancers, including prostate cancer, and many of those employees have lost time at work well in excess of 3 to 5 days. (PSAMF ¶¶ 55-72). The business of Defendant’s retail oil subsidiaries tends to be significantly busier in the winter season. Mahaney was concerned about the timing of Saunders’ resignation in September, 1997 because it was at the beginning of the busy winter season for the retail

oil subsidiaries. (PSAMF ¶ 28). Mahaney was aware that prostate cancer was a serious illness which could cause death, require surgery, and sometimes require radiation.

(PSAMF ¶ 34). Mahaney was himself diagnosed with colon cancer in the fall of 1995 and he missed three weeks from work due to treatment for his cancer and apparently unrelated problems. (PSAMF ¶ 35).

After the termination Mahaney maintained that Defendant had no intent to allow Saunders to move his work location to Bangor when it made the offer of promotion to him on September 15, 1997. Nor did Defendant have any intention of relieving Saunders of his duties managing the Auburn facility. (PSAMF ¶ 33). Saunders maintains that he was told by Webber personnel that his promotion would involve a contemporaneous move to Bangor and that he would not be expected to continue to manage the Auburn facility. Saunders relied upon those promises when he accepted the promotion at Webber and rescinded his acceptance of the position with Agway. (PSAMF ¶¶ 75-78).

On November 3, 1997, Saunders consulted with a physician at the Lahey Clinic. As a result of those discussions he decided to forego the radiation seed therapy and opted for surgery instead. By the time Saunders made this decision he had already received a second Zoladex injection on October 24, 1997. The surgery took place at the Lahey Clinic on November 24, 1997. Following four days of hospitalization, he was discharged. His doctors believe he has “probably” been cured of his prostate cancer. (DSMF ¶¶ 18-20).

According to Saunders’ treating physician, as of October 22, 1997, Plaintiff was unable to have sexual relations normal for an average 56 year old male due to the Zoladex therapy. The Zoladex administered on September 26, 1997 normally has the

effect of reducing a man's testosterone level to zero within three weeks after the shot is administered. If Zoladex treatment continues every twenty-eight days the impotence side effects are very similar to those for patients who undergo actual castration. Furthermore, the prostate surgery itself caused Mr. Saunders to suffer continuing sexual dysfunction. In Dr. Olstein's opinion since on or about October 17, 1997, continuously to the present, Saunders remains significantly restricted in his ability to achieve an erection sufficient to engage in sexual intercourse as a result of first the Zoladex treatments and then the prostate surgery itself. (PSAMF ¶¶ 21, 79). It was medically reasonable of Saunders to change his mind and ultimately decide to switch from the radiation seed implant option to the surgery option. (Olstein Aff. ¶ 9).

Discussion

I. Disability Discrimination

As a general proposition, cases alleging discriminatory employment discharge based upon disability or physical handicap are analyzed in a similar fashion whether brought under the federal Americans with Disabilities Act ("ADA") or the Maine Human Rights Act ("MHRA"), provided there are analogous statutory provisions in both acts. *Forrest v. Stinson Seafood Co.*, 990 F. Supp. 41, 43 (D. Me. 1998) ("The Law Court has consistently looked to federal law for guidance, but that guidance is limited to situations where 'federal courts [are] interpreting ... federal statutory equivalents' to the MHRA.") (citations omitted). This District specifically has rejected the argument that the definition of disabled person under the MHRA differs from its federal counterpart under the ADA. *See Bilodeau v. Mega Indus.*, 50 F. Supp. 2d 27, 32 n.2 (D. Me. 1999). Therefore, for the

purposes of this opinion the allegations in both Counts I and II are subject to the same analysis.

If a plaintiff lacks direct evidence of discrimination, as in this case, he or she can prove his or her case by using the now familiar prima facie case and burden shifting methods that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As applied to a motion for summary judgment in an ADA case, the first prong of the *McDonnell Douglas* analysis requires a plaintiff initially to demonstrate a prima facie case of discrimination by showing that he or she: (i) has a disability within the meaning of the Act; (ii) is qualified to perform the essential functions of the job with or without reasonable accommodations; (iii) was subject to an adverse employment action by a company subject to the Act; (iv) was replaced by a non-disabled person or was treated less favorably than non-disabled employees; and (v) suffered damages as a result. *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996). It is not contested in the papers filed for purposes of summary judgment that Plaintiff was qualified to perform the essential functions of the job and was subject to an adverse employment action. Nor is it disputed for purposes of this motion that he was replaced by nondisabled individuals and that he suffered damages. The facts indicate that Defendant terminated Plaintiff on October 22, 1997. The point of contention between the parties is whether Plaintiff can present evidence on the first part of the prima facie case: that he is disabled under the ADA and MHRA.

Under the ADA “disability,” with respect to an individual, is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as

having such an impairment.” 42 U.S.C. § 12102(2). Defendant argues that Plaintiff fails to meet the statutory definition under subsection (A) in at least two major respects. Next, Defendant argues that there is no evidence in the record to support the argument that the Plaintiff was regarded as having such an impairment under subsection (C). Finally Defendant contends that even if Plaintiff does present sufficient evidence under (A) or (C) to be determined disabled within the meaning of the state, there is insufficient evidence to survive summary judgment because Defendant has put forth evidence of a legitimate nondiscriminatory reason for the termination and Plaintiff has not shown that there is sufficient potential proof for the factfinder to conclude that the reason offered by Defendant was a mere pretext.

If a plaintiff establishes a prima facie case of disability discrimination, the burden then shifts to the defendant to produce sufficient evidence to permit a rational trier of fact to conclude that there is a nondiscriminatory reason for the challenged employment action. *See Dichner v. Liberty Travel*, 141 F.3d 24, 30 (1st Cir. 1998). In the present case, Plaintiff does not contest that Defendant has put forth such a reason, but he contests the veracity of the reason put forth as there are clearly factual disputes regarding the allegedly insubordinate conduct of the October 21st meeting. The issue becomes whether there is sufficient evidence in the record to allow the trier of fact to find that the employer engaged in intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000).

A. Plaintiff's Prima Facie Case

1. Plaintiff's Evidence of Disability under 42 U.S.C. § 12102(2)(A)

Turning to the first prong of Plaintiff's prima facie case, Defendant argues that Plaintiff cannot meet the definition of a disabled individual under subdivision (A) because as of the date of his termination he did not have a physical impairment which substantially limited a major life activity. Defendant is correct, but not for the reasons stated. The language of the subdivision requires the Court to undertake a three step analysis: (1) does Plaintiff have a physical impairment; (2) does the claimed impairment impact a "major life activity"; and (3) is the major life activity "substantially limited." *Monroe v. Cortland County*, 37 F. Supp. 2d 546, 550 (N.D.N.Y. 1999).

The first two steps can be addressed swiftly. The record supports the conclusion that Plaintiff had a physical impairment in that he was unable to obtain an erection. A male's ability to obtain an erection impacts his ability to engage in normal sexual relations. The Ninth Circuit has put forth the reasons why "engaging in sexual relations, just like procreation, is a major life activity" under the ADA. *See McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999). The Supreme Court has embraced a broad definition of the term "major life activity" and has indicated that it encompasses activities which are private in character. *Bragdon v. Abbott*, 524 U.S. 624, 625 (1998) ("major' denotes comparative importance and suggests that the touchstone is an activity's significance."). That engaging in normal sexual relations is of relatively great importance to the vast majority of the population requires only the application of common sense. I will not belabor the obvious.

The issue in this case is whether Plaintiff's ability to engage in sexual relations was *substantially limited* at the time the adverse action occurred. In making these definitional determinations it is important to note that no causal connection needs to be made between a particular limitation and an employer's discriminatory response. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998). Thus, Defendant's reliance upon record references supporting his argument that no one at Webber knew anything about Plaintiff's impotence at the time of the termination is inapposite. Equally irrelevant is Plaintiff's reliance upon the fact that the impairment impacting his major life activity has, at this point in time, continued uninterrupted for close to three years.

If Webber terminated Saunders today, the fact that Plaintiff has been impotent for three years might be relevant to this inquiry, whether that impotence arose from the Zoladex treatments, the surgery, or the prostate cancer itself. *See Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) ("if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act"). However, the focus of the inquiry must be on whether Saunders met the definition of a disabled individual "*at the time the adverse action occurred.*" *Monroe*, 37 F. Supp. 2d at 553 (emphasis added).

Whether Plaintiff's physical impairment impacted a major life activity does not benefit his case unless the impact was substantially limiting.

(1) The term substantially limits means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average

person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §§ 1630.2(j).

The First Circuit has relied on these regulations at least to the extent of recognizing that impairments do not necessarily have to be permanent in order to constitute disabilities within the statutory definition if the condition is potentially long-term (at least several months) and sufficiently severe. *Katz v. City Metal Co.*, 87 F.3d 26, 31 (1st Cir. 1996).

Viewing the evidence in the light most favorable to Plaintiff, at the time of the termination he had been “disabled” for five days. The litany of conditions which do not rise to the level of disabilities includes, “broken limbs, sprained joints, concussions, appendicitis, and influenza.” *Id.* (internal quotation omitted). A person with a broken leg may not be able to perform the major life activity of walking, but he is not substantially limited within the statutory definition. Here the impacted major life activity, sexual relations, is not an activity which necessarily occurs on a daily basis in the general population. There is little evidence in the record as to the expected duration of this physical impairment at the time of the termination. Although hindsight now reveals it has lasted three years, Plaintiff’s impairment was not long-term at the time of his discharge. If every individual who experiences five days of impairment of this nature meets the statutory definition of an individual with a disability, the possibilities for litigation under the ADA become boundless. Plaintiff cannot qualify under subsection 2(A) as an individual whose physical impairment substantially limits a major life activity.

2. Plaintiff's Evidence of Disability under § 12102(2)(C)

Defendant also argues that Plaintiff does not meet the definition of disabled individual under subsection 12102(2)(C) of the ADA, in that there is no evidence his employer regarded him as disabled in the major life activity of working. The EEOC regulations contain a special definition for what it means to be substantially limited in one's ability to work. In this context, an impairment is substantially limiting if a person is:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). Plaintiff contends that Webber perceived him as unable to work once company officers learned of his cancer diagnosis.

Saunders relies upon a number of factors in the record. First, he demonstrates that Webber has through the years experienced a number of workers who developed cancer and were then unable to work at a broad range of jobs. He also cites Mahaney's personal experience with his own cancer and his comments to Saunders regarding the limited amount of sick time available to him. He argues that his discharge in such close temporal proximity to the disclosure of his illness is significant. *Heyman v. Queens Vill. Comm. for Mental Health*, 198 F.3d 68, 73 (2d Cir. 1999). The facts of *Heyman* resemble those of the instant matter. In both cases the plaintiff suggests that part of the employer's motivation in the firing was the employer's need for a dependable individual. In the present case, an admitted part of the motivation for offering Saunders the promotion was to keep him at Webber during the busy winter season. The inference that Plaintiff argues

should be drawn is that when the employer learned that Plaintiff had cancer he became “damaged goods” who would not be reliably available to work during the winter season. Plaintiff has generated sufficient evidence to establish his prima facie case under this aspect of the ADA.

B. Sufficiency of the Evidence to Survive Summary Judgment

Once the employee has submitted a prima facie case under the ADA and the employer has met his burden of production by bringing forth a legitimate, nondiscriminatory reason for the termination, the matter normally becomes a question of fact *if* the plaintiff has sufficient evidence in the record to find that the employer’s asserted justification is false. *Reeves*, 120 S. Ct. at 2109. In the present case, for purposes of this motion, Plaintiff does not dispute that insubordination would be a legitimate, nondiscriminatory reason for termination and that Defendant has put forth evidence supporting that contention. However, Plaintiff has also put forth evidence that the asserted justification is merely a pretext.

There is substantial disagreement about what occurred at the October 21st meeting and about what information Mahaney may have had pertaining to other comments made by Saunders.² It is undisputed on this record that Mahaney appeared angry with Saunders and called him into his office for a private reprimand during a recess of the business meeting. There is, however, additional evidence which a jury might consider regarding the reasons for Mahaney’s conduct other than Saunders’ alleged insubordination.

² Mahaney contends that part of the reason behind firing Saunders for his alleged insubordination on the 21st of October was that he had received reports from others in his organization about prior disparaging remarks about Mahaney’s age and management practices. There is a factual dispute about when Mahaney heard about these statements in relationship to the adverse employment actions that occurred between October 2 and October 21, 1997. (DSMF ¶¶ 36-37, Pl.’s Statement of Material Facts (“PSMF” ¶¶ 36-37)(Docket # 23, Pt. I)).

Mahaney had recently learned of the cancer diagnosis, knew Saunders anticipated treatments at the Lahey clinic, had experience with his own battle with cancer, knew of other employees whose work had been significantly impacted by cancer, and faced the busiest season of the year for his company. Depending upon which version of events one credits, a factfinder could conclude that Saunders was fired for insubordination or because of the perception that his usefulness had been compromised. Saunders has met his burden of generating sufficient evidence to allow a factfinder to make that determination.

II. Family and Medical Leave Act

Plaintiff has sued under both the federal and state Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2615 and 26 M.R.S.A. §§ 843-848. Both parties’ arguments are addressed solely to the federal act. Saunders alleges that the Defendant terminated him after he indicated his likely need for medical leave. Plaintiff concedes that he never used nor attempted to use any time under the FMLA. His argument is that the employer cannot insulate himself from the FMLA by firing someone prior to that person’s actual use of sick leave under the FMLA. At the time of Plaintiff’s discharge he had expressed an intent to use three to five days of sick leave. His employer, based upon prior experience with other employees with cancer and the key decision-maker’s own personal experience with cancer, could have believed that he would need to take more sick leave than the three to five days requested.

The federal FMLA contains two types of provisions. First, it creates a series of substantive rights including the right of up to twelve weeks of unpaid leave per year for a serious health condition that makes the employee unable to perform the functions of his

job. The leave may be taken intermittently when medically necessary. Following a qualified absence the employee is entitled to return to the same position. *See* 29 U.S.C. § 2614(a)(1). Second, the federal FMLA also provides protection in the event an employee is discriminated against for exercising those statutory rights. *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998). Plaintiff is correct that the employee need not actually exercise these rights in order to be covered under the antidiscriminatory portion of the statute; he need only be denied in his “attempt to exercise[] any right provided under this subchapter.” 29 U.S.C. § 2615(a)(1).

The familiar *McDonnell Douglas* burden shifting analysis applies with equal force to FMLA cases when discrimination is alleged. *See Hodgens*, 144 F.3d at 160. Under the FMLA, however, to make out a prima facie case of retaliatory discrimination, Plaintiff must show that (1) he availed (or attempted to avail) himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; and (3) there is a causal connection between the employee’s protected activity and the employer’s adverse employment action. *See Id.* at 161. Plaintiff attempted to avail himself of a protected right under the FMLA when he indicated his intent to take three to five days of sick leave from work.

In order to qualify for FMLA protection, Plaintiff must show a “serious health condition.” 29 U.S.C. § 2611(11). “Serious health condition” is defined as inpatient care in a residential medical care facility. While it is true that Plaintiff did not receive inpatient care prior to his termination, inpatient care was clearly anticipated and in fact did occur in November, 1997, approximately one month after his termination. Plaintiff’s situation is closely analogous to the pregnant worker who is fired when she announces

that she is planning to take maternity leave. The question of whether there is a causal connection between the termination and the anticipated leave is a question of fact.

Timing is one consideration which the factfinder may find significant. *See, e.g., Williams v. Shenango, Inc.*, 986 F. Supp. 309, 322 (W.D. Pa. 1997); *Petsche v. Home Fed. Sav. Bank, Northern Ohio*, 952 F. Supp. 536, 538-539 (N.D. Ohio 1997).

III. Fraud

Count IV of Plaintiff's Complaint alleges a cause of action based upon common law fraud. A claim of fraudulent misrepresentation arises where a defendant:

(1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

McCarthy v. U.S.I. Corp., 678 A.2d 48, 53 (Me. 1996) (citation omitted). In the present case, the false representation that Plaintiff relies upon was the promise that his position would be at the company headquarters in Bangor and that he would be relieved of his duties at the Auburn facility. In Plaintiff's view these representations were material to his determination to refuse Agway's offer and to accept the promotion at Webber. He supports with record references his contention that the representations were false and were made to induce him to remain with Webber.

In order to be actionable, a claim of common law fraud must result in pecuniary harm. *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987). The income which Plaintiff would have made from the Agway position was measurable and not speculative. He gave up that position because of Defendant's inducement. Under Maine law recovery may be had for the loss of an earning opportunity in some circumstances. *Snow v. Villacci*, 754

A.2d 360, 365 (Me. 2000); 2000 ME 127, ¶ 16. At this juncture it is impossible to exclude that possibility in this case.

IV. Punitive Damages

In his prayer for relief under Counts I, II and IV, Plaintiff seeks both compensatory and punitive damages. Under the ADA (Count I), a plaintiff may recover punitive damages if the defendant acted with “malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1). The MHRA (Count II), provides for punitive damages in cases of intentional discrimination. 5 M.R.S.A. § 4613(8)(a). The evidence at trial could support punitive damages under either claim.

Under Maine common law fraud (Count IV), punitive damages may be awarded. *Fitzgerald v. Gamester*, 658 A.2d 1065, 1070 (Me. 1995). If the factfinder is persuaded by clear and convincing evidence that Defendant acted with actual malice or that his conduct was so outrageous that malice toward Plaintiff can be implied, Plaintiff could recover punitive damages. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). If Defendant deliberately lied about the nature of this promotion in order to keep Plaintiff from accepting the Agway job, a jury might be persuaded that Defendant acted with the requisite intent.

Conclusion

Based upon the foregoing analysis, I recommend that the Court **DENY** Defendant’s Motion for Summary Judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: November 17, 2000.

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-246

SAUNDERS v. WEBBER OIL COMPANY
10/22/99

Filed:

Assigned to: JUDGE D. BROCK HORNBY

Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 442

Lead Docket: None

Jurisdiction: Federal

Question

Dkt# in other court: None

Cause: 42:12101 American Disabilities Act

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