

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CATHLEEN ADAMS,)
)
Plaintiff,)
)
v.) Civ. No. 08-296-B-W
)
NORTHERN NEW ENGLAND)
TELEPHONE OPERATIONS, L.L.C,)
d/b/a FAIRPOINT COMMUNICATIONS,)
INC., d/b/a FAIRPOINT)
COMMUNICATIONS NNE)
)
Defendant.)

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT and
ORDER ON MOTION TO LIMIT TESTIMONY**

Defendant FairPoint Communications¹ sacked Plaintiff Cathleen Adams following a period of alleged disability leave. Adams brought suit under the Maine Human Rights Act and filed her suit in federal court based on diversity jurisdiction. Adams alleges a failure to accommodate her disability, disability discrimination, and retaliation for seeking accommodation. Now pending are two motions filed by FairPoint: a dispositive summary judgment motion (Doc. No. 24) and a non-dispositive motion to limit expert witness testimony (Doc. No. 26). The former motion has been referred pursuant to 28 U.S.C. § 636(b)(1)(B) and the latter motion pursuant to 28 U.S.C. § 636(b)(1)(A). Based on my review of the summary judgment filings, I recommend that the Court deny the motion for summary judgment. The motion to limit testimony is denied.

¹ Technically, FairPoint never employed Adams. However, as part of its acquisition of certain Verizon New England, Inc., telephone operations in New England, FairPoint assumed the defense against Adams's claims.

I. THE SUMMARY JUDGMENT MOTION

For purposes of summary judgment, FairPoint does not argue that the conditions Adams describes as her disability would not actually qualify as a disability under the Maine Human Rights Act. Instead, FairPoint argues that there is no factual basis for Adams's MHRA claims because the company thoroughly investigated Adams's leave-related conduct and concluded that Adams misrepresented her mental and physical health status in order to obtain short-term disability benefits by fraud. FairPoint also maintains that Adams's suit is preempted by the Labor Management Relations Act (LMRA), 29 U.S.C. § 1969, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, 1144. These arguments are addressed in the subsequent discussion of the summary judgment motion, but first I recite the summary judgment standard and tell the background story in the light most favorable to Adams.

A. Summary Judgment Standard

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. P. R. Elec. Power Auth. v. Action Refund, 515 F.3d 57, 62 (1st Cir. 2008). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy

controversy and summary judgment must be denied. Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 241 (1st Cir. 2006).

The following factual statement is drawn from the parties' competing statements of material facts, filed in accordance with Local Rule 56, and from the record cited in support of those statements. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the mandatory procedure for establishing factual predicates needed to support or overcome a summary judgment motion); Toomey v. Unum Life Ins. Co., 324 F. Supp. 2d 220, 221 n.1 (D. Me. 2004) (explaining "the spirit and purpose" of Local Rule 56). As required, the factual grounds for Adams's suit are cast in the light most flattering to her cause.

B. Summary Judgment Facts

Plaintiff Cathleen Adams began working for FairPoint's predecessor, Verizon New England, Inc., and its predecessor companies (VNE), in 1986. (Defendant's Statement of Material Facts (DSMF) ¶ 10, Doc. No. 24.) VNE initially hired Adams to work as an information operator. (Id. ¶ 11.) Beginning in 1997, Adams became an administrative assistant working in Augusta, Maine. (Id. ¶ 12.) Adams remained in the administrative assistant position until her termination on January 3, 2008. (Id. ¶ 13.) Adams's job function was sedentary and most duties could be performed seated at her desk, working on the computer, or making photocopies. (Id. ¶ 14.)

Over the course of her employment history Adams was repeatedly disciplined for attendance problems and could not say how many times she had been disciplined for attendance and other issues. (Id. ¶ 19.) Adams's work performance was satisfactory. (Pl.'s Additional Statement of Material Facts (PASMf) ¶ 1, Doc. No. 31.) Adams took family medical or short-term disability leave in 2003, 2004, 2005, and 2006. (DSMF ¶¶ 20, 21, 23; Pl.'s Opposing

Statement of Material Facts (POSMF) ¶¶ 20, 21, 23, Doc. No. 31; PASMF ¶ 2.) In 2004, Adams took some personal leave to care for a terminally ill pet dog. After the dog's death, Adams took a spell of family medical leave on account of depression and anxiety. (POSMF ¶ 20; Adams' Dep. Vol II at 14-15, Doc. No. 31-4.) In 2005, Adams was out most of the year due to various illnesses. (DSMF ¶ 21.) Adams went out on leave again in November 2006 due to worsening chronic anxiety. (DSMF ¶ 23; PASMF ¶ 3.) This history is relevant, but not directly material to the summary judgment contest, which involves events taking place in 2007, when Adams had a new office supervisor, Stephen Polyot. (DSMF ¶ 24.) However, FairPoint acknowledges that Polyot was aware of Adams's history of "absentee problems," as it puts it. (Id.)

The following facts relate events in 2007 and are drawn primarily from Adams's statement of additional material facts. FairPoint did not file a reply statement of material facts and, consequently, has failed to controvert Adams's statement of additional facts. District of Maine Local Rule 56(d) calls upon a summary judgment movant to reply to additional factual statements offered by the non-movant in opposition to a motion. D. Me. Loc. R. 56(d). FairPoint's failure to follow this requirement means that Adams's additional statements must be deemed admitted, provided that they are supported by record citations. D. Me. Loc. R. 56(f).

In April 2007, Adams required leave because her chronic anxiety, major depressive disorder, and pain in her shoulder, neck and back precluded her from performing her job. (PSAMF ¶ 5; see also DSMF ¶¶ 64-73.) Adams's medical provider, Kerri McGlew, PA, took Adams out of work on April 10, 2007, due to the conditions for which she was treating Adams. (PSAMF ¶ 6.) PA McGlew continued to keep Adams out of work as of July 20, 2007, and reflected her opinion in a July 20, 2007, note to MetLife indicating that Adams was not

medically cleared to work at that time. (Id. ¶ 7.) PA McGlew did not release Adams to return to work prior to ceasing treatment of Adams in August 2007. In McGlew's opinion, Adams's leave from work during the period from April 2007 to August 2007 was medically necessary. (Id. ¶ 8.)

Based on information provided to it, MetLife, as administrator of FairPoint's short-term disability plan, concluded on August 2, 2007, that Adams was disabled from performing her own occupation and paid Adams short term disability benefits for the period from April 10, 2007, through June 20, 2007. MetLife subsequently concluded on September 10, 2007, that Adams continued to be disabled from performing her own occupation and approved benefits through September 16, 2007. On September 20, 2007, MetLife again extended benefits, this time to October 2007. (Id. ¶ 9.)

In April 2007, Polyot called MetLife and expressed skepticism regarding Adams's need for leave and told a MetLife representative that he believed Adams was absent from work in order to breed puppies. (Id. ¶ 10; Diary Review—Report p. 1 of 96,² Doc. No. 31-16; see also DSMF ¶ 37.) On May 18, 2007, Polyot called MetLife again and told a representative that he wanted to terminate Adams for her absences. (PSAMF ¶ 11, Diary p. 11 of 96.) In April and July, Polyot sent Adams letters stating that she would be separated from employment if she did not return from leave by certain dates. (PSAMF ¶ 13; see also DSMF ¶ 39, citing Polyot Letters, Doc. No. 24-21.) FairPoint did not terminate Adams as of the dates specified in the letters because Adams had filed an "appeal" of MetLife's unfavorable benefits determination, which was eventually reversed on August 2, 2007. Adams asserts that these letters enhanced her stress and anxiety symptoms. (PSAMF ¶ 14; Polyot Dep. Vol. II at 49, Doc. No. 31-22.)

² Record citations to the MetLife Diary Review-Report are not perfectly clear, but date references make the record reference more accessible.

Adams testified at her deposition that, from April 2007 until July 2007, her conditions were completely debilitating. Her emotional symptoms were so severe that she would fail to bathe or dress herself for the day and, on some days, would not even leave the couch. She stopped performing activities of daily living including cleaning, shopping, and cooking. (Id. ¶ 15.) By mid-summer 2007, Adams began trying to resume more life activities. Her medical providers encouraged her to challenge herself to do what she could do as a path to recovery. Adams began by trying to do some grocery shopping and banking and then slowly added more activities. (Id. ¶ 16.) By August 2007, Adams suggested to her medical providers that she felt ready to try a return to work. Her medical providers then took steps to ensure that Adams's specialists would support a return to work. (Id. ¶ 17.) From August 2007 to September 2007, Adams's condition improved further. By September 2007 Adams made some attempts to go on short motorcycle rides. Adams had owned a motorcycle for five years and found riding to be a good source of stress relief. (Id. ¶ 18.) Adams would feel some physical pain following her rides but found that the emotional release that the rides provided were worth some additional physical pain. (Id. ¶ 19.) According to Tara Dwelley, NP, Adams was cleared of physical limitations as of August 11, and thus could perform any physical activity she wanted after August 10, 2007, including riding a motorcycle. (Id. ¶ 20.) NP Dwelley testified that Adams was medically cleared to return to work as of September 14, 2007. (Id. ¶ 21.) Adams's care providers called for a week of part-time work to transition to full time, assuming the week of part-time work went well. (Id.)

Adams and Dwelley faxed a return to work note and related documentation to MetLife. (Id. ¶¶ 22-23.) Adams also faxed a copy of the return to work note to Polyot. (Id. ¶¶ 24-27.) MetLife then called Polyot on September 14, 2007, to request, on Adams's behalf, that the

company permit her to return to work on a part time basis. (Id. ¶ 28.) Polyot immediately stated that the answer would likely be no. (Id. ¶ 29.) Polyot called MetLife back an hour later and told them that Adams had returned to work on a part-time basis in the past and that he therefore considered her present request to return to work part time as part of a "habitual trend" and evidence that Adams was "playing a big game" that he thought had "gone on for long enough." (Id. ¶ 31.) Polyot denied the request for a part-time return to work. (Id. ¶ 32.) MetLife then informed Polyot that they would extend benefits through October 2007 due to Verizon's decision not to allow her to return as requested. (Id. ¶ 33.)

During his deposition, Polyot suggested that one reason he denied Adams's September 2007 request to return to work part-time was that he felt it would create resentment among Adams's coworkers. (Id. ¶ 34.) Another reason that Polyot gave for not permitting Adams to return to work was that Polyot allegedly did not have part-time work but, rather, needed someone specifically who could work on a full-time basis. (Id. ¶ 35.) Polyot later conceded that he had a backlog of scanning work that was burdening other employees and that Adams could have done this work on a part-time basis. (Id. ¶ 36.) Polyot went on to concede that he did not have a good reason for refusing to allow Adams to return to work on a temporary part-time basis. (Id. ¶ 37.) When asked about other employees in the past needing to return to work from leave on a part-time basis, Polyot admitted that he has approved other employees' requests and could not remember another example when he had denied another employee's request. (Id. ¶ 38.)

NP Dwelley believed that Adams could not return to work full-time on September 17, 2007, because Adams had chronic anxiety and depression and had been out for a long period of time from work. Dwelley was concerned that putting Adams back on an immediate, full-time schedule would only increase Adams's anxiety and depression so that, after one week, she would

be out of work completely. NP Dwelley understood that Adams reported being fired by the company that summer and that this was a cause of anxiety for Adams in the context of returning to work. (Id. ¶¶ 39-40.) As of an October 2, 2007, office visit, NP Dwelley still felt that Adams going to work at an immediate, full-time schedule could be overwhelming and could worsen Adams's underlying anxiety and be more detrimental to Adams long term. (Id. ¶ 41.) During her October 2, 2007, office visit with NP Dwelley, Adams reported that her employer's refusal to allow her to return to work had increased Adams's stress in connection with returning to work and Dwelley found Adams credible when she said this. (Id. ¶ 42.) After being denied the part-time return to work "ordered" by NP Dwelley, Adams spent the next few weeks at home, continuing in her efforts to perform life activities per her NP's recommendations. She was awaiting the time when she would be permitted to return to work. (Id. ¶ 43.)

On September 25, 2007, despite understanding that Adams was requesting that she be permitted to return to work, Polyot submitted an absence fraud investigation in order to have Adams surveilled. (Id. ¶¶ 44-46; see also DSMF ¶ 44, citing Sept. 25, 2007, Absence Fraud—Case Summary, Doc. No. 24-24.) Surveillance transpired between October 5 and 7, 2007. (PSAMF ¶ 45.) The surveillance revealed that Adams was able to ride a motorcycle, drive a car, run errands, and rake leaves and gather them into a wheelbarrow. (DSMF ¶¶ 45-47.) MetLife's in-house medical provider, Dr. Marcia Satlow, reviewed the surveillance, failed to review any of Adams's recent medical records or any documentation regarding her treatment or prognosis after July 20, 2007, assumed that Adams was still claiming the same level of impairment that she had six months earlier in April 2007, and concluded that Adams's activities in October 2007 were inconsistent with her claimed impairments from April 2007. (PSAMF ¶ 48; see also DSMF ¶ 48.)

On November 13, 2007, in hopes of facilitating the requested part-time return to work, NP Dwelley drafted and faxed a note to MetLife stating: "Patient able to return to work without physical limitations as evaluated September 11, 2007 to return September 17, 2007 with restrictions from that point secondary to mental health." (Id. ¶ 47.) Ultimately, Adams returned to work on November 16, 2007, and used accrued personal and vacation time to fashion her own graduated return-to-work schedule. (Id. ¶ 49.)

In late December 2007, VNE received the surveillance and doctor's conclusions from MetLife and conducted an "absence fraud investigation." (Id. ¶ 51.) A member of VNE's security department, Daniel Jamroz, was assigned to draft an absence fraud report. (Id. ¶ 52.) Jamroz's report states that there existed evidence that Adams was not telling the truth when she claimed to have sought to return to work in September. (Id. ¶ 57.) Polyot did not inform Jamroz that Adams had, in fact, sought to return to work in September, prior to the surveillance. (Id. ¶¶ 53-55.) According to the report, Jamroz interviewed Polyot and Polyot denied being contacted by Adams in September and denied that she had provided him with a copy of a doctor's note. (Id. ¶ 58; Investigative Report at 5, Doc. No. 31-27.)³ The report concluded with a finding that Adams had made misrepresentations about her condition in order to obtain her 2007 leave and STD benefits. (Investigative Report, cover page.)

In late December 2007, Polyot had a conference call with numerous managers, including Erin Austin, the Director of Outside Plant Engineering. (PSAMF ¶ 59.) Austin was the Verizon employee with the authority to terminate Adams's employment. (Id. ¶ 60.) During the call, the

³ At his deposition, Polyot denied receiving a note from Adams in September but conceded that there was a communication relayed through MetLife to the effect that Adams was seeking to return to work in September. (Polyot Dep. Vol. II at 103, Doc. No. 31-22.) Elsewhere Polyot explained that MetLife ordinarily handles these issues (Polyot Dep. Vol. I at 25), so the distinction being drawn here between direct communication and indirect communication could be regarded as insignificant, even if the finder of fact concluded that there was no direct communication in September between Adams and Polyot.

managers present went over the report. (Id. ¶ 61.) Polyot did not correct the report's conclusion that Adams falsely claimed to have attempted to return to work in September 2007. (Id. ¶ 62.) Polyot also kept silent about receiving the medical note from Adams even though the report incorrectly stated that Polyot had never received these notes. (Id. ¶ 63.) At the time of this conference call, Austin was not aware that Adams had, in fact, requested a return to work in September 2007, a few weeks prior to the surveillance, and that Polyot had denied the request. (Id. ¶ 64.)

Austin decided to terminate Adams for absence fraud based on the fact that Adams had required leave in the past, Jamroz's report, and the information provided during the conference call. (Id. ¶ 65.) Austin did not do any evaluation of whether Adams's pre-2007 or 2007 absences were protected by the MHRA, but she was aware of Adams's asserted disabilities. (Id. ¶¶ 66-67.) Austin testified at her deposition that she did not know whether it would have made a difference if she had known at the time of her decision that Adams had asked to return to work a few weeks before the surveillance. (Id. ¶ 68.) Adams's employment was terminated effective January 3, 2008, because of her absences in 2007. (Id. ¶ 72.)

The company's submission to the Maine Human Rights Commission in response to Adams's charge expressly denied that Adams attempted to return to work in September 2007, stating:

In her Complaint, Adams alleges that she requested to come back to work part-time in September 2007 and her request was denied by Verizon. Putting aside the notion that it is simply illogical that an employee, who had been out for several months, would be denied the opportunity to come back to work in a sedentary position if such a request were, in fact, made and putting aside the coincidental nature of her alleged claim to return to work which supposedly just happened to have been made shortly before Verizon obtained surveillance of her defrauding the Company, there is no evidence that such a request to return to work was ever made. There are no company records or documentation evidencing that any

request to return to work was ever made. Ms. Adams has no evidence or documentation that establishes that such a request was ever made. Her supervisor has no recollection of any such request.

(Id. ¶ 74; Doc. No. 31-28 at 9-10.) Defendant's MHRC submission also asserts that Adams was an "undesirable employee" because of her attendance history. (PSAMF ¶ 75; Doc. No. 31-28 at 11.)

VNE's return to work policy recognizes that "returning employees to work as soon as medically feasible following an injury or illness helps control costs, improve productivity, safety, and morale." (PSAMF ¶ 76; Doc. No. 31-30 at 1.) The return to work policy states that, whenever possible, departments are to allow employees to perform their jobs on a restricted basis until they are able to return to full duty because, "[e]mployees with temporary restrictions tend to gain strength throughout the course of their restriction period, which increases their work capacity. This results in the employee being able to perform more of their regular job functions on a gradual basis, until such time they are able to perform all job functions without restrictions." (PSAMF ¶ 77; Doc. No. 31-30 at 3.)

The first nine paragraphs of FairPoint's factual statement are devoted to establishing the factual predicates for its argument that Adams's suit is preempted by the LMRA and ERISA. FairPoint's effort is frustrated by an objection that the related documents (a collective-bargaining agreement, memorandum of commitment, and an ERISA-governed disability plan) have not been properly authenticated. I sustain the objection because "[d]ocuments supporting or opposing summary judgment must be properly authenticated." Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000) (citing Fed. R. Civ. P. 56(e)). "To be admissible at the summary judgment stage, 'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e).'" Id. (quoting Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993)).

The initial exhibit attached to FairPoint's statement of material facts is the Affidavit of Dana L. Fleming (Doc. No. 24-2). Attorney Fleming's affidavit states, at paragraph 3: "I submit this affidavit in support of the Motion for Summary Judgment filed by Defendant FairPoint Communications, Inc. ('Fairpoint') in the above-captioned matter." Thereafter, there is a list identifying the additional exhibits attached to the statement of facts, including "Exhibit B—CBA" and "Exhibit C—STP Plan," but there is no language swearing to the authenticity of the exhibits. Nor does a review of the two documents in question reflect that they bear any separate certificate of acknowledgement. The documents are not even executed. Because FairPoint did not file any authenticating affidavit alongside the documents in question, or cite any authenticating deposition testimony,⁴ the court may not "give any credence" to these documents.

Id.

C. Summary Judgment Discussion

In addition to challenging whether Adams can shoulder her burden of proof on her MHRA claims, FairPoint argues that the claims are preempted under the LMRA and ERISA. I have already indicated that FairPoint has failed to properly introduce the documents needed to support its preemption arguments, but before discussing the MHRA claims, I explain why the preemption arguments would not call for summary judgment, notwithstanding the evidentiary problem.

⁴ In the first paragraph of its statement, Fairpoint states that there is a collective-bargaining agreement in effect and cites deposition testimony from Stephen J. Lowrie that is supportive of that simple fact. (DSMF ¶ 1, citing Lowrie Dep. at 27, Doc. No. 24-3.) However, Lowrie did not authenticate any document or discuss the contents of the document in the cited passage of the deposition transcript. After this initial statement, FairPoint states that a certain CBA "was effective at all times relevant to this action," citing an uncertified copy of a CBA and Lowrie's aforementioned testimony. This effort fails to authenticate the document in question. FairPoint's subsequent reference to the disability benefit plan at paragraph 4 of the statement falls short as well. The subsequent reference to a memorandum of commitment is equivalent to the reference made in relation to the CBA. (DSMF ¶ 7, citing Lowrie Dep. at 28.)

1. LMRA Preemption

FairPoint argues that Adams cannot maintain a claim under the MHRA because it "requires interpretation of a collective-bargaining agreement for its resolution." (Mot. for Summary J. Mem. at 14, Doc. No. 25.) According to FairPoint, it would be impossible to determine whether or not [FairPoint] discriminated against [Adams] by terminating her employment for suspected disability fraud without interpreting the provisions governing eligibility for short-term disability under the Agreement." (*Id.* at 15.) FairPoint states that the "complex deal" brokered by VNE and the IBEW overrides some aspect of what Adams sought in the way of benefits or accommodation. (*Id.* at 15-16.) As for the provisions contained in the referenced documents, they consist of language in the MoC that allegedly gives the employer "significant discretion in determining workplace accommodations" and establishes a "process for handling disagreements about whether an employee is capable of working." (Reply Mem. at 4-5.) This argument is tailored to justify what the factual record would otherwise depict as disparate treatment related to Adams's request to return to work on a part-time schedule, since Polyot's testimony and the VNE return-to-work policy do not support the denial of a temporary part-time schedule. (*Id.* at 5.) The difficulty I see in this preemption argument is that the MHRA claims are perfectly primed for a summary judgment disposition without any consideration of the documents whatsoever. Additionally, there is nothing in Adams's opposition to the motion that calls attention to the language of any of the CBA-related documents in order to support her litigation position.

"Section 301 of the LMRA empowers federal courts to hear disputes between unions and employers over contract violations." Warner v. Atkinson Freight Lines Corp., 350 F. Supp. 2d

108, 115 (D. Me. 2004). See also 29 U.S.C. § 185(a). Due to the need for uniform federal rules to determine the meaning of collective-bargaining agreements, the Supreme Court has held that the LMRA preempts application of state law for purposes of enforcing collective-bargaining agreements, including state law causes of action that depend upon provisions in a collective-bargaining agreement or require the court to construe a collective-bargaining agreement in order to reach a disposition. Id. at 116 (citing Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 405-407 (1988)); see also, e.g., Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 216 -18 (1985) (holding that state law claim of bad-faith handling of an insurance contract was preempted by LMRA where the insurance benefit in question was extended by, and defined by, the collective-bargaining agreement); Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962) (rejecting state court's use of state law rules of contract interpretation to construe a collective-bargaining agreement).

In Lingle, the Supreme Court held that the LMRA did not preempt an Illinois law that gave an employee a cause of action if the employer discharged the employee for filing a workers' compensation claim. 486 U.S. at 401. The holding in Lingle demonstrates that LMRA preemption is not a shield that protects employers from having to comply with state employment law simply because the employment relationship is governed by a collective-bargaining agreement. In Lueck, for example, the Court observed that the objective of LMRA preemption is to ensure that a collective-bargaining contract dispute proceeds under § 301 of the LMRA and that parties cannot "evade the requirements of § 301 by relabeling their contract claims" as tort claims. 471 U.S. at 211. There is no suggestion, however, "that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." Id. at 212.

Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id. Consequently, a claim derived from rights extended under state law and existing independently of private agreement is not preempted, id. at 213, unless the claim requires the court to construe the collective-bargaining agreement to reach a disposition, Lingle, 486 U.S. at 407. See also Livadas v. Bradshaw, 512 U.S. 107, 123-24 (1994) ("In Lueck and in Lingle, we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law . . ."); Bishop v. Bell Atl. Corp., 81 F. Supp. 2d 84, 90 (D. Me. 1999) (noting that "[t]he fact that [a defendant] may raise provisions of the CBA as a defense . . . does not change this analysis"). This is so even though the state law claim requires the court to consider the same factual matters that would be considered in a claim for breach of the collective-bargaining agreement. Lingle, 486 U.S. at 408-409.

The LMRA does not preempt Adams's MHRA claims in this case. As was the case in Lingle, none of the claims that Adams advances under the MHRA requires interpretation or construction of language in the CBA or related documents. FairPoint's contention that its alleged adherence to the CBA and MoC somehow exonerates it from compliance with Maine law amounts to an effort to give the substantive provisions of its CBA the force of federal law, which is contrary to LMRA preemption jurisprudence. Lueck, 471 U.S. at 212. As the Supreme Court explained in Lingle, the argument that FairPoint advances is really in the nature of a waiver proposition—a contention that the union waived any contrary state law protections by agreeing

to the terms of the CBA. 486 U.S. at 409 n.9. That sort of contention is neither supported by the existing summary judgment record nor briefed in the motion.⁵

2. *ERISA Preemption*

FairPoint raises ERISA preemption as well. The parties' discussion of ERISA preemption is a little more perfunctory. FairPoint argues: "To the extent Ms. Adams is challenging MetLife's initial refusal to accord her short-term disability – and to cover her absence – her claim is doubly preempted because the short-term disability plan is an ERISA-covered plan, and all matters 'relating' to such a plan are preempted by § 514(a) of ERISA, 29 U.S.C. § 1441(a)." (Mot. for Summary J. Mem. at 16-17.) Adams's response is that she "is not alleging a violation of ERISA or seeking any remedies available under ERISA[, but] . . . only seeking to hold Defendant accountable for failing to accommodate her disability, suspending her, and terminating her because of her disabilities and in retaliation for her use of leave as a reasonable accommodation." (Opposition Mem. at 24.) In reply, FairPoint again emphasizes its defense, stating that the STD plan is central to the case because Adams was fired for disability benefits fraud and the fraud investigation was a matter of plan administration. (Reply Mem. at 3.)

ERISA is designed to "provide a uniform regulatory regime over employee benefit plans." Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004). ERISA includes a "supercedure" provision to the effect that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This "expansive" preemption provision ensures that the regulation of employee benefit plans will be "exclusively a

⁵ FairPoint argues that the Court must interpret the CBA because an arbitrator would look to the terms of the CBA in the context of a grievance to determine whether the employer complied with the terms of the CBA. (Reply Mem. at 4-5.) The notion that the Court must do in this case what an arbitrator would do to resolve a parallel CBA grievance is erroneous. Lingle, 486 U.S. at 412-13.

federal concern." Davila, 542 U.S. at 208 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). ERISA also includes "an integrated system of procedures for enforcement" that delimits the remedies available to participants frustrated with plan administration or benefits determinations. Id. (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)). This "'carefully integrated' civil enforcement scheme" is essential to the achievement of ERISA's objectives and overrides state causes of action that would supplement or expand upon the remedial options prescribed by Congress. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987)). "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Davila, 542 U.S. at 209. Predictably, a state law claim in which the plaintiff "complains only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans," id. at 211, or a suit brought "only to rectify a wrongful denial of benefits," Id. at 214, is preempted by the Act.

Adams's claims under the MHRA are not preempted by ERISA. The MHRA does not relate to the administration of employee benefit plans and imposes duties on employees independent of the existence of employee benefit plans. Moreover, Adams is not seeking a remedy for the denial of benefits under the VNE short-term disability plan, so her suit does not fall within the scope of ERISA's civil enforcement scheme, 29 U.S.C. § 1132, or otherwise threaten to unbalance that remedial scheme. Nor is Adams alleging, in connection with her retaliation claim, that she was discharged in retaliation for taking benefits. Instead, she alleges retaliation for taking leave to accommodate her disability. ERISA does not preempt state law claims related to disability discrimination and disability accommodation simply because the

employer offers paid leave to disabled employees in an ERISA-regulated benefit plan. ERISA does provide a remedy, of course, for interference with protected rights, 29 U.S.C. § 1140, see Fitzgerald v. Codex Corp., 882 F.2d 586, 588 (1st Cir. 1989) (finding ERISA preemption where plaintiff's complaint was "grounded upon" employer's "alleged wrongful motivation" of avoiding payment under an ERISA plan), but in this case neither party's factual presentation depicts that Adams's receipt of benefits (paid leave), rather than her requested accommodation (medical leave), was the motivating factor behind Mr. Polyot's investigation and subsequent employment actions.⁶ Ultimately, this case boils down to a dispute over the *bona fides* of Adams's alleged condition and related request for leave in 2007. The factual issue of whether VNE's generous STD plan may have provided an incentive for Adams to fabricate her disability (because she could go on leave and continue to receive income) does not fundamentally change the nature of the case because it still relates directly to the question of whether Adams's alleged disability was genuine. The mutual focus is placed, squarely, on Adams's absenteeism and whether it was legitimately disability-related. Because Adams is not complaining about a denial of benefits or interference with rights arising from the STD plan, her claims under the MHRA are not preempted by ERISA.

3. *MHRA claims*

Adams's single-count complaint for violation of the MHRA incorporates three theories of liability: (1) failure to accommodate; (2) disability discrimination; and (3) retaliation for using

⁶ In its summary judgment memorandum, FairPoint states: "To the extent that Ms. Adams argues that VNE fired her in retaliation for her misuse of short-term disability benefits, . . . her claim is also preempted by ERISA." (Mot. for Summary J. Mem. at 2.) FairPoint takes the position that Adams was fired for this reason, for purposes of its preemption argument, but the factual presentation that FairPoint makes in support of summary judgment does not reflect that the payment of benefits to Adams, rather than Adams's recurrent absenteeism, was what motivated Mr. Polyot to deny a part-time return to work schedule or to instigate the fraud investigation. FairPoint's "to the extent" argument is unproductive because Adams does not base her retaliation claim on the benefits plan to any extent.

leave as an accommodation. (Opposition Mem. at 1.) The elements of these claims and the factual support for them are sketched out below. There are genuine issues of material fact in relation to each claim.

a. Failure to accommodate

The MHRA provides that the failure to make a reasonable accommodation for a "qualified individual with a disability" and the denial of employment opportunities to disabled employees on the basis of a need for accommodation are both acts of discrimination unless the employer can demonstrate that the requested accommodation would impose an undue hardship on it. 5 M.R.S. § 4553(2)(E), (F). To succeed on a failure to accommodate claim, the plaintiff need not produce any evidence that the employer subjectively harbored discriminatory animus. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (explaining that a failure to accommodate claim does not require a showing of discriminatory animus and that "any failure to provide reasonable accommodations for a disability is necessarily 'because of a disability'"). There are three elements to this claim: (1) the employee must qualify as disabled; (2) the employee must have been able to perform the essential functions of the job with or without reasonable accommodation; and (3) the employer must have refused to extend the accommodation despite knowing of the disability and the request for the accommodation. Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 102 (1st Cir. 2007).

FairPoint's position is that Adams cannot maintain a claim for failure to accommodate because she was permitted to remain home during the period of the investigation rather than return to work on a part-time schedule. (Mot. for Summary J. Mem. at 12.) According to FairPoint: "VNE reasonably believed it would be less disruptive for Ms. Adams to remain out of work until she was able to return, rather than test her ability to work on a part-time, week-by-

week basis." (Id.) There is a genuine issue whether the decisions made by Mr. Polyot in relation to Adams's request to return to work amounted to the denial of an accommodation where the focus of his attention was on discharging Adams from employment on the ground that she was faking her condition. Moreover, Polyot's testimony demonstrates that VNE did not have a practice of denying a part-time schedule as an accommodation to employees returning to work from disability-related leave. There is also a policy in the record that encourages accommodations in the nature of part-time, return-to-work schedules. In this light, a finder of fact could reject the notion that there was any kind of "permission" to remain at home, or that denial of the part-time schedule was a concession designed to accommodate Adams's alleged condition. Because genuine issues of material fact pervade this claim, summary judgment is inappropriate.

b. Disability discrimination

To succeed on her disability discrimination claim Adams must establish that "first, she suffers from a disability; second, she is otherwise qualified, with or without reasonable accommodations, and is able to perform the essential functions of the job; and third, she was adversely treated by the employer based in whole or in part on her disability." Doyle v. Dep't of Human Servs., 2003 ME 61, ¶ 14, 824 A.2d 48, 54; accord Whitney v. Wal-Mart Stores, Inc., 2006 ME ¶ 9; 895 A.2d 309, 312. The primary distinguishing feature between this claim and her failure to accommodate claims is that Adams needs to demonstrate that there is sufficient evidence in the record of a subjective intention on the part of the relevant decision maker(s) to terminate her employment because of her disability. Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 104 (1st Cir. 2005); Higgins, 21 F. Supp. 2d at 71. This burden can be carried with either direct evidence of discriminatory animus or with sufficient circumstantial evidence.

Conceivably, there might be occasion to debate whether proof of animus in this case depends on circumstantial evidence, such that a McDonnell Douglas burden-shifting analysis must follow. See Doyle, 2003 ME 61, ¶¶ 20-22, 824 A.2d at 55-57 (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in context of MHRA claim). The underlying theme of FairPoint's motion is, after all, that Adams was sacked precisely because of her disability contentions and her recurrent leave. However, the parties do not engage in that debate. FairPoint merely states that "VNE was entitled to rely upon MetLife's conclusion in November 2007 that [Adams] had fraudulently claimed to be unable to return to work." (Mot. for Summary J. Mem. at 12.) If this statement is treated as FairPoint's offer of a legitimate, nondiscriminatory justification for discharging Adams, the record creates a genuine issue related to pretext because a fact finder could conclude that Polyot understood that Adams was reporting a cessation or reduction in her emotional and physical symptoms so that his contemporaneous instigation of the fraud investigation was disingenuous. A finding that Adams's supervisor manipulated the fraud investigation process would delegitimize FairPoint's justification that it merely relied on MetLife's conclusions, which means that there is a genuine issue on the question of pretext and that summary judgment is inappropriate on the discrimination claim. The possibility of such a finding also distinguishes this case from Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 336-38 (1st Cir. 2005), where the employer's reliance on a surveillance video could not be portrayed as pretextual.

c. Accommodation-related retaliation

Finally, a retaliation claim under the MHRA has the following elements: (1) engagement in statutorily protected activity; (2) an adverse employment decision; and (3) a causal link between the two. Doyle, 2003 ME 61, ¶ 20, 824 A.2d at 55-56. FairPoint does not dissect the

prima facie case for accommodation-related retaliation any more than it did for disability discrimination. The appearance from the briefs is that FairPoint implicitly acknowledges the presence of a *prima facie* showing because it effectively concedes that Adams lost her job on account of her leave practices. For her part, Adams has briefed the discrimination and retaliation claims simultaneously in terms of whether the record demonstrates pretext. (Opposition Mem. at 15-19.) It is consistent with the Law Court's description of a plaintiff's burden of proof in a MHRA retaliation claim to analyze the MHRA retaliation claim in a parallel fashion as the MHRA disability discrimination claim, which would bring the Court to the same pretext analysis already discussed in connection with the disability discrimination claim. See Doyle, 2003 ME 61, ¶ 20, 824 A.2d 48, 55-56. FairPoint's justification that it relied on a MetLife fraud investigation fails no better under the retaliation scenario because the same genuine issues exist in relation to what Polyot understood about Adams's physical limitations as of the date he requested the fraud investigation.

d. Summary judgment conclusion

Genuine issues of material fact preclude a summary termination of this lawsuit. The ultimate factual contest that remains for trial pits Adams's contention that FairPoint violated her MHRA rights against FairPoint's contention that it had reasonable grounds to believe, and did in fact believe, that Adams fabricated her disability.

II. MOTION TO LIMIT TESTIMONY OF PROPOSED EXPERTS

Also pending is a motion to exclude expert testimony filed by FairPoint concerning Adams's proposed experts, Kerri McGlew, PA, and Tara Dwelley, NP, both members of Adams's primary care team. (Doc. No. 26.) FairPoint's argument is that, while it has no objection to these two witnesses offering testimony regarding their firsthand observations and

treatment of Adams, it does object to the notion that they could offer "expert" testimony regarding any psychiatric diagnoses. Its position is that a care provider should not be allowed to testify as to the presence of a diagnosis that he or she did not make and that a practitioner who does not specialize in mental health cannot offer an opinion that a patient has or had "major depressive disorder." (Id. at 1, 3.) FairPoint's challenges go to weight rather than admissibility.

Adams designated Kerri McGlew P.A. to testify "in accordance with her records as to her treatment and care of Cathleen Adams, and her diagnosis and prognosis at the time of those examinations." (Pl.'s Expert Witness Designation, Doc. No. 26-2.) PA McGlew will discuss her "office notes as to the nature and extent of Ms. Adams' diagnoses and overall health, Ms. Adams' level of impairment in the absence of treatment for her conditions, Ms. Adams' need for reasonable accommodations, Ms. Adams' ability to perform the essential functions of her job during the period in question, and the medical treatment that Ms. Adams has received." (Id.) This information will derive from PA McGlew's personal evaluations of Adams, medical records, and diagnostic tests, as well as "diagnoses and opinions of other health care providers." (Id.) Adams's designation for Tara Dwelley N.P. is drawn in parallel language.

FairPoint's challenge to NP Dwelley's testimony focuses on Dwelley's acknowledgement that she is not the care provider who diagnosed Adams with "major depressive disorder." (Dwelley Dep. at 84, Doc. No. 26-3.) FairPoint's challenge to PA McGlew's testimony focuses on a brief passage of her deposition transcript in which she relates that a portion of her training in the mental health area involved treatment of eating disorders, as if to suggest that such training is somehow incompatible with experience related to depression and anxiety. (McGlew Dep. at 99, Doc. No. 26-5.)

Federal Rule of Evidence 702 requires that federal courts screen expert testimony to ensure (1) that the expert is qualified to testify by knowledge, skill, experience, training, or education; (2) that the testimony involves scientific, technical, or other specialized issues, rather than mere matters of common knowledge; and (3) that the testimony is apt to assist the finder of fact with the task of understanding or determining a fact at issue in the case. Fed. R. Evid. 702; Correa v. Cruisers, 298 F.3d 13, 24 (1st Cir. 2002). The "ultimate purpose" behind this operation is "to determine whether the testimony of the expert would be helpful to the jury in resolving a fact in issue." Cipollone v. Yale Indus. Prod., Inc., 202 F.3d 376, 380 (1st Cir. 2000); accord Hochen v. Bobst Group, Inc., 290 F.3d 446, 452 (1st Cir. 2002) (quoting Cipollone). In this case, FairPoint is arguing that the witnesses in question do not have sufficient training or expertise to assist the finder of fact with the task of determining whether Adams's mental health condition could fairly be described as a "major depressive disorder."

In opposition to the motion, Adams has referred to lengthier passages from the witnesses' deposition transcripts. These passages reflect, among other things, that NP Dwelley completed a master of science program for nurse practitioners after obtaining a bachelor of science degree in psychology, and that this training included mental health issues addressed in an adult care class and a pharmacology class associated with her master's degree. (Dwelley Dep. at 6-8, Doc. No. 29-2.) In her subsequent professional practice, NP Dwelley has found that she is "good at recognizing symptoms of anxiety and depression" (id. at 9) and she has participated in continuing education conferences, every one of which has "a session on treating psychiatric issues" (id. at 10). PA McGlew has a master's degree in physician assistant studies. (McGlew Dep. at 13, Doc. No. 29-3.) Her education included clinical training in psychiatric disorders, including anxiety and depression. (Id. at 98-99, Doc. No. 29-4.) This clinical training included

many patients with eating disorders, though not exclusively such patients. (Id. at 99.) PA McGlew considers herself qualified to diagnose and treat psychological conditions. (Id.) In her practice she does exactly that. (Id. at 14-16, 100.) PA McGlew usually attends the national conference of the National Academy of Physician Assistants, where she obtains five to seven hours of continuing education training related to psychiatric disorders. (Id. at 101.) I do not recount the course of treatment described by PA McGlew and NP Dwelley during their depositions except to note that Adams primarily treated with PA McGlew prior to September of 2007, when McGlew left the practice where Adams goes for care. (McGlew Dep. at 21-24.) NP Dwelley took over Adams's treatment thereafter, but also participated to some extent in treating Adams prior to McGlew's departure from the practice.⁷ (Dwelley Dep. at 22-23.) There is nothing inherently unacceptable or unreliable about letting a nurse practitioner or a physician assistant articulate and discuss psychiatric conditions that they encounter and treat in the course of their regular practice. Akerson v. Falcon Transp. Co., No. CV-06-36-B-W, 2006 WL 3377940, *5 & n.5, 2006 U.S. Dist. Lexis 84870, *14-*15 & n.5 (D. Me. Nov. 21, 2006).

FairPoint's concern over the witnesses' potential use of the "major depressive disorder" label to describe Adams's condition is most appropriately aired in the context of cross-examination, without any prohibition from the Court that would bar use of such terminology. The jury will understand well enough that the witnesses do not have advanced medical degrees, that they do not practice in clinical settings devoted exclusively to mental health issues, that they were the only two practitioners in the practice to treat Ms. Adams, and that they did not administer a diagnostic test to "confirm" Adams's condition. The jury will also be able to

⁷ There was also a mental health counselor in the picture at one time, but that individual appears to have left the practice and has not been tracked down by the parties. (Dwelley Dep. at 22.)

understand that health care professionals like PA McGlew and NP Dwelley have standards to distinguish among conditions like situational anxiety, acute anxiety, generalized anxiety, chronic depression, and major depressive disorder, and that practitioners draw these distinctions based upon self-reports and overall treatment histories rather than discrete clinical tests. (Dwelley Dep. at 10-12, 37-42, Doc. No. 29-2.) All of these facts will provide sufficient opportunity for FairPoint to challenge the weight of the witnesses' testimony, but it does not follow that the testimony will be rendered unhelpful or that the witnesses' potential use of a diagnostic term like "major depressive disorder" to describe Adams's condition is beyond their professional abilities.

CONCLUSION

For reasons set out above, I RECOMMEND that the Court DENY Defendant's Motion for Summary Judgment (Doc. No. 23). Defendant's Motion to Limit Testimony is DENIED (Doc. No. 26).

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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

August 27, 2009

ADAMS v. NORTHERN NEW ENGLAND
TELEPHONE OPERATIONS LLC

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.

Date Filed: 09/09/2008

Jury Demand: Plaintiff

Nature of Suit: 442 Civil Rights: Jobs

KRAVCHUK
Cause: 28:1332 Diversity-Employment Discrimination

Jurisdiction: Diversity

Plaintiff

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