UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD PYE,	)	
	)	
Plaintiff	)	
	)	
v.	)	***No. 2:15-cv-380-JDL***
	)	
BATH IRON WORKS CORPORATION,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO DISMISS

The defendant, Bath Iron Works Corporation ("BIW"), moves to dismiss the complaint in this action arising under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*., and its Maine state equivalent, 26 M.R.S.A. § 843 *et seq*. The complaint alleges wrongful retaliation and interference with the plaintiff's rights under these statutes. Complaint and Demand for Jury Trial ("Complaint") (ECF No. 1) at 6-7. I recommend that the court grant the motion in part.

I. Applicable Legal Standard

The defendant's motion invokes Federal Rule of Civil Procedure 12(b)(6). Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to F.R.Civ.P. 12(b)(6) ("Motion") (ECF No. 7) at 1. The Supreme Court has stated:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and internal punctuation omitted). This standard requires the pleading of "only enough facts to state a claim to relief that

is plausible on its face." *Id*. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In ruling on a motion to dismiss under Rule 12(b)(6), a court assumes the truth of all of the well-pleaded facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Román-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 (1st Cir. 2011). Ordinarily, in weighing a Rule 12(b)(6) motion, "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citation and internal quotation marks omitted).

I. Factual Background

The complaint sets forth the following relevant factual allegations.[1] The plaintiff has been employed by the defendant since 1986. Complaint ¶ 7. He was certified to use intermittent family medical leave under the FMLA for treatment and management of his serious mental health condition. *Id*. ¶ 9. On April 21, 2015, the defendant sent a letter to the plaintiff approving his use of intermittent FMLA leave through April 16, 2016. *Id*. ¶ 15.

[1] The First Circuit has instructed that, in reviewing a complaint for sufficiency pursuant to Rule 12(b)(6), a court "should begin by identifying and disregarding statements in the complaint that merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (citation and internal punctuation omitted). "Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible." *Id*. "If that factual content, so taken, allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility." *Id*. (citation and internal quotation marks omitted).

The plaintiff believed he was to attend court in Lewiston, Maine, on July 1, 2015. *Id.* ¶ 16. The plaintiff's anxiety and depression worsened significantly as he anticipated this court appearance. *Id.* ¶ 17. The plaintiff approached his supervisor and requested an excused day for the court appearance. *Id.* ¶ 18. The supervisor denied his request. *Id.* On July 1, 2015, the plaintiff used his intermittent FMLA leave to attend court in the morning, after which he returned home to manage and recover from the flare-up of his mental health condition. *Id.* ¶ 19.

On July 2, 2015, the plaintiff's supervisor called a meeting with the plaintiff, his union representatives, and members of management, at which he questioned the plaintiff about his use of family medical leave the previous day. *Id.* ¶¶ 20-21. The plaintiff said that he had taken a full day of FMLA leave and that he had been at court until "maybe 10:30." *Id.* ¶ 22. He stated that he was stressed out about going to court. *Id.* ¶ 23. The supervisor instructed the plaintiff to schedule an appointment with BIW's medical department to have his fitness for work evaluated. *Id.* ¶ 24.

The supervisor reconvened the meeting on July 24, 2015, at which time he stated that he had concluded that the plaintiff had committed FMLA fraud and terminated his employment. *Id.*¶ 26. The plaintiff has been out of work since that date. *Id.* ¶ 30.

II. Discussion

A. Retaliation

The defendant contends that, because the plaintiff admits that he used his FMLA to attend court, he cannot plead facts sufficient to support a claim for retaliation under either the federal or the state statutes at issue.[2] Motion at 5. To make out a *prima facie* claim for retaliation under these statutes, a plaintiff must show that (1) he availed himself of a protected FMLA right; (2) he was adversely affected by an employment decision; and (3) there was a causal connection between

[2] The legal standard for analyzing claims under the federal and state statutory schemes is identical. *Martin v. Inhabitants of City of Biddeford*, 261 F.Supp.2d 34, 39 (D. Me. 2003).

the protected conduct and the adverse employment action. *Carrero-Ojeda v. Autoridad de Energía Eléctrica*, 755 F.3d 711, 719 (1st Cir. 2014). The complaint must be viewed "through that lens," to determine whether the plaintiff has pleaded enough facts to make his entitlement to relief plausible in light of that standard, which will pertain at trial. *Id*. The defendant challenges the complaint under the first and third elements of this test. Motion at 5.

Specifically, the defendant asserts, *id*., that using FMLA leave to attend court cannot be using FMLA "[b]ecause of a serious health condition." 29 U.S.C. § 2612(a)(1). The plaintiff responds, Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opposition") (ECF No. 9) at 4-5, by pointing to paragraph 19 of the complaint, which alleges as follows:

> On July 1, 2015, Plaintiff Pye's insomnia, anxiety and depression were so pronounced that he decided to use his intermittent leave for these conditions. He attended court in the morning. After attending court he returned home to continue to manage and recover from the flare up of his serious mental health condition.

Complaint ¶ 19.

The complaint certainly states that the plaintiff used part of the day for which he told the defendant that he needed to take FMLA leave for a non-FMLA purpose: attending court. The issue with respect to the first prong of the FMLA test is not whether the complaint alleges that the plaintiff used part of the time for which he claimed FMLA leave for an FMLA-related purpose; such an allegation is clearly stated. The plaintiff's emphasis on this fact in his opposition to the motion, Opposition at 4-5, is misplaced. The issue for resolution here is whether use of part of the time for which FMLA leave is claimed for a non-FMLA purpose establishes, without more, that the plaintiff did not avail himself of an FMLA-protected right within the meaning of the statutory test. The plaintiff cites no authority in support of his position on this issue.

This issue has not been addressed directly in any case law that my research has located, but some persuasive guidance is provided by at least one case, *Campbell v. Verizon Virginia, Inc.*, 812

F.Supp.2d 748 (E.D. Va. 2011). In that case, the defendant employer had approved the plaintiff's request for intermittent FMLA leave due to severe depression, migraines, and stress-related anxiety. *Id*. at 752. The plaintiff spent much of the time for which he had claimed FMLA leave gambling, to which he had become addicted. *Id*. at 753. He explained a trip to Atlantic City to gamble while ostensibly on FMLA leave as an effort to relieve his anxiety and cope with his depression. *Id*. at 754. Concluding that this was an inappropriate use of FMLA leave, the defendant terminated the plaintiff. *Id*. at 754-55.

Noting that "the obvious, inherent limitation [of FMLA leave is] that the absence in question must result from the approved FMLA purpose – in this case, to address medical or mental conditions, such as migraine headaches, severe depression, and anxiety[,]" *id*. at 760 (emphasis omitted), the court held that "the FMLA would not shield him from personal responsibility while *acting* upon his addiction." *Id*. (emphasis in original). Finally, "a vacation which *contributes* to an employee's own sickness is well[]beyond the bounds of any clinically-approved 'rest and relaxation.'" *Id*. at 761 (emphasis in original).

Here, the plaintiff used of part of his day off to go court, which is precisely what his complaint alleges *caused* the anxiety and depression, which he contends he needed the remainder of the day to "manage and recover from." Complaint ¶¶ 17, 19. Common sense suggests that engaging in an activity that causes the ailment for which treatment is needed is beyond the bounds of FMLA protection. By the terms of the complaint, the approved FMLA purpose was "for medical visits and treatments related to the condition" and "due to a flare up of your mental health condition[.]" *Id*. ¶ 15. The court can only conclude that the plaintiff's use of his time away from work on July 1, 2015, was not an FMLA-protected right and, accordingly, cannot provide the basis for a claim of FMLA retaliation.

B. Interference

The plaintiff also alleges interference with his rights under the FMLA. *Id*. ¶ 36. "[A]n employer violates [the FMLA] if it interferes with an FMLA-created right to medical leave[.]" *Tillman v. Ohio Bell Tel. Co.*, 545 Fed.App'x 340, 351 (6th Cir. 2013). The first three elements of such a claim are not in dispute here: the plaintiff is an employee eligible for FMLA leave, the defendant is an employer as defined in the FMLA, and the plaintiff was entitled to leave under the FMLA. *Id*. The remaining elements are that the plaintiff gave the defendant notice of his intention to take FMLA leave, and that the defendant denied him FMLA benefits to which he was entitled. *Id*.

The defendant focuses on July 1, 2015, Motion at 8, Defendant's Reply in Support of Its Motion to Dismiss the Complaint Pursuant to Rule 12(b)(6) ("Reply") (ECF No. 10) at 6-7, and the complaint's allegation about that day says only that the plaintiff sought "an excused day," not FMLA leave, in order to appear in court. Complaint ¶ 18. However, the plaintiff makes clear, Opposition at 9, that he relies in this regard on paragraph 33 of his complaint, which alleges that:

> [i]n the days leading up to his July 1, 2015, court date, Plaintiff Pye's serious mental health condition deteriorated. He explained his situation to his supervisors, who declined to allow him time off from work for his condition.

Complaint ¶ 33.

This paragraph alleges that the plaintiff gave the defendant notice of his intention to take FMLA leave and that the defendant refused to allow him to do so. Because this allegation, generously read, rises beyond the level of speculation, this claim survives the motion to dismiss. *Román-Oliveras*, 655 F.3d at 45.

The defendant argues that the affirmative defense of the employer's good faith belief that its employee has misused FMLA leave blocks the claims stated in the complaint. Motion at 7-8;

Reply at 3. At this stage of the case, where only the allegations in the complaint may be considered by the court (and the defendant has not even filed an answer), this argument cannot provide the basis for dismissal of the action.

III. Conclusion

For the foregoing reasons, I recommend that the court **GRANT** the motion to dismiss, but only as to the retaliation claim.

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 fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) 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.

Dated this 1st day of March, 2016.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge