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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SCOTT DEARINGER, Plaintiff, vs. RACING ASSOCIATION OF CENTRAL IOWA d/b/a Prairie Meadows Racetrack and Casino, Defendant.	**No. 4:03-cv-40284** **ORDER ON MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on Motion for Summary Judgment by Defendant Racing Association of Central Iowa ("RACI") d/b/a Prairie Meadows Racetrack and Casino ("Prairie Meadows"). Plaintiff Scott Dearinger is represented by Thomas Newkirk; Defendant is represented by Michael Reck. The parties have not requested a hearing, nor does the Court deem one necessary. This matter is fully submitted and ready for disposition.

I. UNDISPUTED FACTS

Plaintiff Dearinger began working for Prairie Meadows in 1996 as a slot machine technician ("slot tech"). Prairie Meadow's slot techs are union members and are covered by a collective bargaining agreement ("CBA"). Slot techs are responsible for installing, servicing, and maintaining slot machines. Prairie Meadows has approximately 1500 slot machines with five to seven slot techs on duty during each shift.

To gain access to the slot machines, slot techs must use their technicians' card, which enters the employee's name, the date, and the time into an electronic log. The slot tech must then enter a code indicating the reason the machine was accessed. Inside each slot machine is a Machine Entry Access Log ("M.E.A.L.") book, which the slot tech must also complete and sign when a machine has been accessed. The M.E.A.L. book is an "internal control" used by Prairie Meadows for compliance with Iowa Racing and Gaming Commission regulations.

It is undisputed that while employed at Prairie Meadows, Dearinger received the following seventeen disciplinary actions:

1. February 14, 1996 - tardiness, absenteeism, and reduced productivity for the period January 1, 1996, to February 14, 1996.

2. March 17, 1997 - accumulated 8.5 points for excessive absenteeism and tardiness without proper call between July 1996 and March 1997.[1]

3. April 9, 1997 - left the building without returning his key set to his lead technician.

4. August 23, 1997 - verbally warned for walking around the track level of the casino with a female patron and opening a slot machine to show her the color screen.

5. August 31, 1997 - failure to sign the M.E.A.L. book.

6. February 2, 1998 - failure to sign the M.E.A.L. book.

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[1] Employees receive points for attendance violations; after accumulating a certain number of points, the employee receives a documented disciplinary action.

7. March 7, 1998 - showing inappropriate materials of a sexual nature. (Picture of a co-worker's face superimposed on the picture of scantily-clad/naked female body.)

8. December 19, 1998 - accumulation of 6.5 points for attendance policy violations.

9. January 15, 1999 - accumulation of 7.0 points for attendance policy violations; verbal warning issued and told that any additional points would result in written warning or 90 day probation.

10. March 12, 1999 - related to the March 1998 notice of counseling. In violation of company policy and took pictures of a co-worker without her permission. Warned that any further violation of harassment policy or misconduct would result in termination.

11. July 4, 1999 - accumulation of 6 points for attendance policy violations between August 11, 1998, and June 25, 1999.

12. September 10, 1999 - left slot machine door open and unattended.

13. January 1, 2001 - accumulation of 8.5 points for attendance policy violations. Placed on attendance probation and warned that he could be terminated if he had any further violations in the next 90 days.

14. January 23, 2001 - activated a slot machine that had not been tested and approved by the Iowa Racing and Gaming Commission ("IRGC").

15. February 20, 2001 - failure to sign the M.E.A.L. book.

16. March 8, 2001 - failure to sign the M.E.A.L. book; three day suspension. Warned that one more M.E.A.L. book violation would result in termination.

17. May 24, 2001 - failure to sign the M.E.A.L. book, terminated.

It is also undisputed that on May 10, 1998, Dearinger applied to take intermittent leave under the Family Medical Leave Act ("FMLA") to care for his son, who was born with serious health problems on March 27,1998; the application was re-certified on May 1, 1999. Proper attendance procedure was required for all time off, including time taken under the FMLA.[2]

As the record shows, Dearinger was disciplined for failing to sign a M.E.A.L. book on August 31, 1997, February 2, 1998, and February 20, 2001. On March 8, 2001, he received a three-day suspension for again failing to sign a M.E.A.L. book; he also was warned at that time that any future M.E.A.L. book violations would result in termination. On May 24, 2001, Dearinger was terminated for again failing to sign a M.E.A.L. book.

II. PROCEDURAL HISTORY

Dearinger filed this action on May 20, 2003, alleging Prairie Meadows discharged him in retaliation for taking time off under the FMLA. On June 14, 2004, Defendant filed the present motion for summary judgment, arguing Dearinger has failed to establish a connection between taking FMLA leave and his termination nor has he produced evidence to show that the basis upon which Defendant terminated him was pretext. In the alternative, Defendant argues that Dearinger's claim is preempted by Section 301 of the Labor Management Relations Act. Dearinger argues the motion

[2] Dearinger does not assert, nor does the record suggest, that Prairie Meadows' attendance procedure did not comply with FMLA policy.

must be denied because Defendant has failed to carry its burden of establishing that there are no questions of fact supporting his claim.

III. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) states "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (quoting Fed. R. Civ. P. 56(c)). "To preclude the entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial." Cont'l Grain Co. v. Frank Seitzinger Storage, 837 F.2d 836, 838 (8th Cir. 1988).

The Court's function on a motion for summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Niagara of Wis. Paper Corp. v. Paper Indus. Union-Mgmt. Pension Fund, 800 F.2d 742, 746 (8th Cir. 1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." Anderson, 477 U.S. at 257. "'On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Econ. Housing Co. v. Cont'l Forest Prods., Inc., 757 F.2d 200, 203 (8th Cir. 1985).

"[S]ummary judgment should seldom be granted in discrimination cases." Bassett v. City of Minneapolis, 211 F.3d 1097, 1099 (8th Cir. 2000). "Summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion." Johnson v. Minn. Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991) (citing Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 364 (8th Cir. 1987)). However, in discrimination cases, the plaintiff is not entitled to survive summary judgment merely by establishing a prima facie case. Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 365 (8th Cir. 1994) (citing Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1111 (1st Cir. 1989)). The "plaintiff's evidence must be sufficient to raise a genuine issue of material fact regarding defendant's reason for the employment action taken." Id.; see also Berg v. Norand Corp., 169 F.3d 1140, 1144 (8th Cir. 1999) ("[T]here is no 'discrimination case exception' to the application of Fed. R. Civ. P. 56, and it remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial.").

IV. DISCUSSION

Defendant argues summary judgment is appropriate because Dearinger's claim is preempted by Section 301 of the Labor Management Relations Act and that even if the claim was not preempted, Dearinger has failed to establish a prima facie case or show pretext. The Court addresses these arguments in turn.

A. Preemption Under LMRA

Prairie Meadows and the American Federation of State, County and Municipal Employees ("AFSCME") Council 61 along with its affiliated Local 2051, AFL-CIO, entered into a CBA which went into effect February 1999. Article XII of the CBA contains a grievance and arbitration procedure for resolution of alleged violation by the employer of a provision covered by the CBA. The FMLA is expressly incorporated in Article XXII, section 22.3 of the CBA. To comply with the grievance and arbitration provision, an employee must follow a three-step procedure.[3]

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[3] At step one of the grievance process, the employee-grievant must attempt to resolve the grievance informally by discussion with his supervisor within seven calendar days of the occurrence. If unresolved, grievant proceeds to step two, which provides that within fourteen days of the occurrence, the grievant or the union on behalf of the grievant shall submit a written grievance to the department director. If requested, the director shall arrange a meeting with the grievant and his union representative within seven days. If a resolution is not reached, the department will provide a written answer within five days of the meeting, and grievant may then proceed to step three.

At step three, within seven days after receipt of the director's written answer, the grievant must submit an appeal to the employer's labor relations manager, who will arrange a meeting within seven days. If a resolution is not reached, a written answer will be provided to the grievant within ten days of the meeting.

After the three steps have been followed, the dispute may be submitted to arbitration. The CBA clearly provides, "if a grievance is not presented or processed within the time limits, it shall be considered waived and the employee and the union shall be barred from further pursuit of the grievance."

Defendant moves for summary judgment, arguing that as a member of a bargaining unit, Dearinger was required to arbitrate his statutory claim. Citing Safrit v. Cone Mills Corp., 248 F. 3d 306, 308 (4th Cir. 2001), Defendant argues that since Dearinger failed to follow the grievance process set forth in the CBA, his claim is preempted. It is undisputed that Dearinger did not initiate the grievance process in the present case.

In response to Defendant's preemption argument, Dearinger merely states he was not required to exhaust remedies for an FMLA retaliation claim. Despite Dearinger's failure to adequately defend against the preemption issue, the Court concludes that Defendant's assertion about preemptive effect of the CBA in the present case is inaccurate.

Safrit, upon which Defendant relies, is distinguishable from the present case. In Safrit, the Fourth Circuit found that the plaintiff was required to proceed through the grievance process before pursuing an employment discrimination claim in federal court. Safrit, 248 F. 3d at 307. However, the CBA at issue in that case contained an *explicit* provision that all employment discrimination claims arising under Title VII would be subject to arbitration. Id. ("'The parties further agreed [sic] that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964.' Section XX further

noted, 'Unresolved grievances arising under this Section are the proper subjects for arbitration.'"). Relying on Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 80 (1998), the Fourth Circuit reasoned "the Supreme Court does not preclude a waiver of the right to a federal forum in a collective bargaining agreement if it is done in '*clear and unmistakable*' language." Id. at 308 (emphasis added).

No such "clear and unmistakable" language waiving the right to a federal forum exists in Dearinger's CBA. Section 22.3 of the CBA incorporates the FMLA and states as follows:

> Employees seeking Family and Medical Leave shall apply for FMLA leaves in accordance with the FMLA leave policy as adopted and amended from time to time by the Employer. The policy adopted by the Employer shall comply with federal law. Employees covered by this agreement shall receive a copy of any written FMLA policy adopted by the Employer and any amendments to it.

Unlike the provision in Safrit, the clause in Dearinger's CBA does not explicitly state that any grievance arising out of a right under the FMLA is subject to arbitration. In the absence of such language, the Court cannot presume a waiver has occurred. Wright, 525 U.S. at 80 ("[T]he right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."). Despite Dearinger's failure to defend against summary judgment on preemption grounds, the Court must still determine under Fed. R. Civ. P. 56(c) that Defendant is entitled to a summary judgment on this basis; and the Court concludes Defendant is not entitled to judgment as a matter of law on the CBA preemption ground.

B. Prima Facie Case

Defendant also argues summary judgment is appropriate because Dearinger has failed to establish a connection between taking FMLA leave and his termination, nor has he produced any evidence that the stated reason for his termination was pretextual. Dearinger defends by arguing the Defendant has failed to show there are no facts in dispute. Dearinger asserts that under Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), an employment discrimination plaintiff is entitled to all inferences; therefore, applying the burden shifting framework at the summary judgment stage puts an impermissibly high burden on the plaintiff.

Dearinger misreads Costa. The Supreme Court held that in a *mixed motive* discrimination case, a plaintiff is not required to present direct evidence. Costa, 539 U.S. at 101-02 ("In order to obtain an instruction under [Title VII], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'").[4] Costa did not, however, displace the McDonnell Douglas burden-shifting framework used in retaliation cases; a plaintiff still bears the initial burden of proving a prima facie case of retaliation.

> Because [plaintiff] has only circumstantial evidence that [defendant]'s decision not to rehire her was the result of her complaints, we analyze her

[4] In Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1190-2000 (N.D. Iowa 2003), Judge Bennett provides an exhaustive and informative discussion about the impact of Costa in employment discrimination litigation.

> retaliation claim within the familiar framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See Mayer v. Nextel W. Corp., 318 F.3d 803, 806-07 (8th Cir. 2003). *The initial burden falls on [plaintiff] to establish a prima facie case of retaliatory discrimination. If she meets this burden, the burden shifts to [defendant] to demonstrate that its decision not to rehire [plaintiff] was based on legitimate reasons unrelated to retaliation. Should [defendant] demonstrate legitimate reasons for its decision, the burden shifts back to [plaintiff] to prove that these reasons were a mere pretext for a retaliatory motive*.

Krough v. Cessford Const. Co., 336 F.3d 710, 712 (8th Cir. 2003) (emphasis added); see also, Trammel v. Simmons First Bank of Searcy, 345 F.3d 611, 615 (8th Cir. 2003) ("To establish a prima facie case of retaliation, [plaintiff] had to show that he 'participated in a protected activity,' that the bank 'took an adverse employment action against [him],' and that there was a causal relationship between the two.") (quoting Calder v. TCI Cablevision of Mo., Inc., 298 F.3d 723, 731 (8th Cir. 2002)).

To establish a prima facie case of retaliation, Dearinger must show that he "'participated in a protected activity,' that Prairie Meadows 'took an adverse employment action against [him],' and that there was a causal relationship between the two." Trammel, 345 F.3d at 615 (quoting Calder, 298 F.3d at 731). "'A plaintiff can establish a causal connection between statutorily protected activity and an adverse employment action through circumstantial evidence, such as the timing between the two events.'" Jackson v. Flint Ink No. Am. Corp., 370 F.3d 791, 798 (8th Cir. 2004) (quoting Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998)).

In the present case, Dearinger has established facts sufficient to prove that he participated in a protected activity (taking intermittent leave under the FMLA) and that he suffered adverse employment action (he was terminated). However, he utterly fails to present a scintilla of evidence that there is a causal connection between the two events. Instead, he engages in a lengthy discussion of *Defendant's* burden to show no dispute of fact regarding its motivation to terminate him. While the Defendant has the burden of going forward by presenting facts the Defendant believes show there is no genuine issue of material fact, that is not so onerous a threshold as Plaintiff suggests.

Dearinger, not the Defendant, in the context of a motion for summary judgment, has the burden of establishing a prima facie case of retaliation before the burden shifts to the Defendant to offer a non-pretextual reason for its action.

> A plaintiff asserting a Title VII retaliation claim must first establish a prima facie case of retaliation by showing that he or she engaged in a protected activity, that an adverse employment action occurred, and that there is a causal connection between the two events. If a plaintiff makes such a showing, the burden of production then shifts to the defendant to rebut the plaintiff's prima facie case under the principles set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Id. at 797 (citation omitted).

Dearinger does not allege, nor does the record support, a temporal relation between his termination and *any* FMLA leave taken or requested. Dearinger requested intermittent FMLA leave in May 1998. In this case, the protected activity was ongoing, beginning three years before the adverse employment action. In his deposition and in

response to Defendant's statement of undisputed facts, Dearinger admits that Defendant never denied any of his FMLA requests. There is no evidence that Dearinger had used more, or any, FMLA leave time at a point in close proximity to his termination. Dearinger makes no effort to argue a temporal connection between the protected activity and the adverse action, nor does the Court find that necessary causal connection. Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1051 (8th Cir. 2002).[5]

Without showing a causal connection between the protected activity and the adverse employment action, Dearinger has not met his burden of showing a prima facie case of retaliation. In resistance to summary judgment, Dearinger's only argument is that *Defendant* has the burden of showing there are no facts regarding its motivation in terminating Dearinger. As previously stated, Dearinger overstates the Defendant's initial burden of going forward on such a motion and attempts to prematurely shift the burden to the Defendant before he has demonstrated his prima facie case. However, since the motivating factor argument is the only defense Dearinger asserts, the Court will briefly address this argument.

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[5] Dearinger does not allege, nor does the record reflect, that he had used or requested FMLA leave in the days, weeks, or even months prior to his termination. Dearinger merely asserts that he used more FMLA leave for a longer period of time than any other employee, thereby giving Defendant a cause to treat him differently. This argument defeats rather than supports his claim. The fact that he used more FMLA for a longer period of time suggests the Defendant *did not* retaliate against him; rather, it suggests the Defendant heeded the provisions of the FMLA.

Assuming *arguendo*, Dearinger had proven a prima facie case of retaliation, his claim would still fail because Defendant met its burden of production by articulating a legitimate, nondiscriminatory reason for terminating Dearinger, that is, his failure to follow the M.E.A.L. book procedure in light of his employment history. Therefore, the burden would have shifted back to Dearinger to "show by a preponderance of evidence that [Defendant]'s proffered explanation is unworthy of credence." Groves v. Cost Planning and Mgt. Int'l, Inc., 372 F.3d 1008, 1010 (8th Cir. 2004). Dearinger has not made such a showing.

As "evidence" his FMLA leave was a motivating factor in his termination, Dearinger argues Defendant "cannot prove that it did not have reason to treat him differently" since he used more FMLA leave for a longer period of time than any other employee. Not only is this argument nonsensical, it is another attempt to improperly shift the burden back to Defendant to show that his use of FMLA leave was *not* a motivating factor.

Dearinger also suggests the evidence shows that Defendant's attitude changed toward him in 2000 and 2001 because of the FMLA use. Dearinger does not point to anything in the record, with the exception of his own testimony, that suggests such an attitude change ever occurred. Furthermore, Dearinger began taking FMLA leave *two years* before this alleged change in attitude occurred. Dearinger does not explain how the change in attitude had any connection to FMLA leave; again, he improperly argues

it is Defendant's burden to disprove that the alleged attitude change was *not* due to his FMLA leave.

Dearinger points out that shortly before his termination, Defendant began to monitor him in an attempt to catch him making mistakes. Dearinger does not explain why it is improper for an employer to have surveillance on an employee who has been disciplined several times for work procedure violations. He next argues that a discriminatory purpose is suggested by the fact that he received more M.E.A.L. book violations than anyone else. He argues that M.E.A.L. book violations were commonplace and often overlooked. However, Dearinger offers no support for this assertion. Furthermore, in his deposition, Dearinger admitted that if a supervisor knew a slot tech committed a M.E.A.L. book violation and did not discipline the slot tech, the supervisor would be in trouble. Dearinger also admitted that disciplines are confidential, and therefore he would not know who or how many slot techs received M.E.A.L. book violations. If this creates any issue of fact, it is neither material nor genuine.

Dearinger alleges there were negative comments made about his FMLA leave. He states that a lead slot tech, Justin Thevanout, told Robert Gomez, another slot tech, that he wanted to get rid of Dearinger any way he could for FMLA abuse. Dearinger asserts that Thevanout had the power to make or influence employment decisions. The only proof of this assertion is Dearinger's own affidavit and deposition. Defendant rebuts this argument and offers the deposition of Justin Thevanout, who denies ever

making that statement and further denies that he was in a position to make employment decisions. In addition, Defendant offers the declarations of Dan Byers, Prairie Meadow's human resources manager, and Michele Wilkie, Prairie Meadow's training manager. They state that Thevanout never disciplined or otherwise reported Dearinger for bad conduct. Byer denies that Thevanout had the authority to terminate anyone or that he was involved in the decision to terminate Dearinger.

Dearinger argues that on summary judgment, the Court must view all the facts in the light most favorable to him as the nonmovant and give him the benefit of all reasonable inferences. Matushita Elec. Indus. Co., 475 U.S. at 587-88. Affording Dearinger the most favorable view does not save his claim. The inferences arise from facts in the record. He has utterly failed to give the Court *any* evidence that a genuine issue of material fact exists. Instead, he merely argues that he is not required to set forth evidence of the elements of his claim, leaving the Court to allow inferences to fill the gaps. This is not the standard for summary judgment. "To preclude the entry of summary judgment, the *nonmovant* must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial." Cont'l Grain Co., 837 F.2d at 838.

V. CONCLUSION

For the foregoing reasons, the Court finds Plaintiff failed to show a causal connection between the protected activity and the adverse employment action; therefore, he has not met his burden of proving a prima facie case of retaliation. Trammel, 345 F.3d

at 615. Accordingly, Defendant's Motion for Summary Judgment (Clerk's No. 20) must be **granted**.

IT IS SO ORDERED.

Dated this 24th day of September, 2004.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT