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SUPREME COURT
STATE OF WASHINGTON
2012 AUG - 8 CA 9 46

NO. 87056-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

R/C

ROBERT CHANEY,

Respondent,

v.

PROVIDENCE HEALTH CARE D/B/A SACRED HEART MEDICAL
CENTER & CHILDREN'S HOSPITAL,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER PROVIDENCE
HEALTH CARE D/B/A SACRED HEART MEDICAL CENTER &
CHILDREN'S HOSPITAL**

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I. INTRODUCTION

The trial court correctly denied Robert Chaney's motion for directed verdict requesting that the Court find, as a matter of law, that Sacred Heart interfered with his rights under the Family Medical Leave Act (FMLA) by not reinstating him to his position as an interventional radiology technician at the conclusion of his leave. The case was submitted to a jury that unanimously determined that Sacred Heart did not interfere with Mr. Chaney's FMLA rights.

The Court of Appeals incorrectly overturned the jury's verdict and ruled that that Mr. Chaney was entitled to be restored to his former job. The Court of Appeals decision is incorrect because (1) Mr. Chaney did not provide a contemporaneous fitness for duty certificate at the end of his leave as required by the FMLA and (2) there was sufficient evidence and a reasonable inference from that evidence to warrant submitting the case to the jury and to sustain the jury's verdict.

II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that Robert Chaney was entitled to automatic reinstatement to his former job at the end of his FMLA leave despite Mr. Chaney's failure to provide a contemporaneous fitness for duty certificate at the end of his leave as required by the Family Medical Leave Act.

2. The Court of Appeals erred in reversing the trial court's denial of Mr. Chaney's motion for directed verdict as there was substantial evidence or a reasonable inference from the evidence presented at trial sufficient to support the jury's verdict for Sacred Heart, the nonmoving party.

III. STATEMENT OF THE CASE

Robert Chaney was employed by Sacred Heart from April 9, 2001, to August 27, 2007. RP 425. Mr. Chaney worked as an Interventional Radiology Technician in the Radiology Department. *Id.* An Interventional Radiology Technician receives training on specialized equipment used in invasive radiology procedures with patients. RP 48, 65.

While employed at Sacred Heart, Mr. Chaney received drug therapy for chronic back pain managed by his physician, Dr. Jeffrey Jamison. RP 432. Mr. Chaney was taking nine or more medications including the narcotic Methadone. Ex. P33; RP 362-363; RP 436. Potential side effects for Methadone include depressed brain function, marked drowsiness, slurred speech and an inability to walk normally. RP 373.

In January 2007, Mr. Chaney received two written warnings relating to his fitness for duty including not showing up for work and nodding off while with a patient. Exs. P15; P16. On June 25, 2007, Mr.

Chaney was observed by at least two registered nurses as demonstrating erratic behavior which raised questions about his fitness for duty. RP 504-505; Ex. D126, D127. Mr. Chaney was observed as having dilated or constricted pupils, glassy or reddened eyes, slurred speech, and a staggering or unsteady gate while walking. Ex. D126. One of the nurses, Judy Chessar, testified at trial that Mr. Chaney was incoherent and was having difficulty speaking. RP 463; 505-506. Mr. Chaney was suspended from work and placed on administrative leave pending test results for a drug screening. Ex. D134. The results of Mr. Chaney's drug test were positive for Methadone. RP 466; Ex. P28. Based on Mr. Chaney's behavior, Sacred Heart arranged for a fitness-for-duty examination. RP 162.

Mr. Chaney was examined by Dr. Royce Van Gerpen on July 16, 2007. RP 469; Ex. P29. During the exam, Mr. Chaney discussed the medications that had been prescribed to him and provided Dr. Jamison's medical records. Ex. P33; RP 362-363.

Dr. Van Gerpen determined that Mr. Chaney could not be released back to work at Sacred Heart as an interventional radiology technician because the medications he was taking could adversely affect his ability to concentrate and make rapid and appropriate sequential decisions. Exs. P33; P34; RP 367; 400-403. In his progress notes, Dr. Van Gerpen stated

that he “pointed out that [Chaney’s] position in an interventional radiology setting is more directly critical for an individual patient’s safety and thus must not be compromised.” Ex. P33. Dr. Van Gerpen provided a limited release for Mr. Chaney to return to work as a general x-ray technician Ex. P34.

Based on Dr. Van Gerpen’s assessment and other information Mr. Chaney made available, Sacred Heart advised Mr. Chaney that he appeared to have a “serious health condition” making him eligible for FMLA leave effective July 16, 2007, the date of Dr. Van Gerpen’s assessment. Ex. P36.

Sacred Heart gave Mr. Chaney notice of his eligibility for leave under the FMLA and further advised him that FMLA leave was provisional pending receipt of a certification from his treating physician regarding his serious medical condition. Ex. P36. Mr. Chaney was advised that his FMLA leave would expire on August 27, 2007 and that if he did not provide a certification of fitness for duty to return to work by that date, his position would not be held for him. Ex. P36. Mr. Chaney does not dispute that he was required to provide this release. RP 476-477; 494-495. In fact, Mr. Chaney advised Sacred Heart that he was “confident” that Dr. Van Gerpen would provide a certification that he could return to work. Ex. P36.

Subsequently, however, Mr. Chaney failed to provide a certification of fitness for duty at the time his FMLA leave expired. Four days before the expiration of his FMLA leave, Mr. Chaney contacted Dr. Van Gerpen for another consultation to determine if he was fit to return to work. Exs. P37, P42, P47. Based on this consultation, Dr. Van Gerpen again advised Mr. Chaney and Sacred Heart that his opinion provided July 16, 2007 (stating Mr. Chaney was not fit for duty) remained unchanged. Ex. P47, Ex. D111. Mr. Chaney did not provide any certification from any physician that he was able to return to work without limitations as of August 27, 2007. Thus, on August 27, Sacred Heart advised Mr. Chaney that his FMLA leave had expired, that he was released from his position, and that he could apply for an open position. Ex. P49.

Mr. Chaney bases his case on a certification from Dr. Jamison dated August 10, 2007, in which Dr. Jamison certified that Mr. Chaney needed FMLA leave. The certification provides that **as of August 10, 2007**, Mr. Chaney (1) had a serious health condition, (2) needed absence from work plus additional treatment and (3) needed continuous leave for two to four weeks after August 10, 2007. Ex. P45; RP 264-267. This certification was not a fitness for duty or medical release contemporaneous with Mr. Chaney's medical condition at the conclusion of his FMLA; it

was an estimate of how much additional leave time might be needed for the FMLA leave that had begun on July 16, 2007.

At trial Mr. Chaney moved for a directed verdict regarding his claim that Sacred Heart violated the FMLA by not reinstating him to his position. RP 521-522. The motion was denied. RP 523-525. At the close of testimony, the trial court properly instructed the jury that, as a condition of restoring Mr. Chaney to his position upon return from FMLA leave, Sacred Heart could require Mr. Chaney to obtain and present certification from his health care provider that he was able to resume work. CP 253. The Court further instructed the jury that the certification needed to be a simple statement of his ability to return to work. CP 253. Finally, the jury was instructed that Mr. Chaney had to prove by a preponderance of the evidence that Sacred Heart improperly interfered with his right to be restored to his position upon return from FMLA leave. CP 249. The jury considered all of the evidence and testimony and unanimously determined that Mr. Chaney's FMLA rights were not violated. CP 269-270.

IV. ARGUMENT

- A. Mr. Chaney did not provide a certification from his physician at the conclusion of FMLA leave that he was fit for duty.**

The Court of Appeals erroneously held that Dr. Jamison's August 10, 2007 statement to Sacred Heart was a certification that Mr. Chaney

was fit to return to work as an interventional radiology technician and, as such, Sacred Heart was required to reinstate him to his former position under the FMLA. But, the August 10 statement was not a certification that Mr. Chaney was able to return to employment as required by the FMLA. Dr. Jamison only certified that Mr. Chaney had a serious health condition, needed absence from work and needed treatment for two to four additional weeks after August 10, 2007.

Mr. Chaney does not dispute the requirements that must be met in order to return to work once his FMLA leave expired. An employer may condition an employee's right to reinstatement to his former position on the employee obtaining certification from his healthcare provider of his ability to return to work at the expiration of FMLA leave. 29 U.S.C. §2614(a)(4); *Conoshenti v. Public Service Elec. & Gas Co.*, 364 F.3d 135, 148 (3d Cir. 2004). The certification must attest "that the employee is able to resume work." 29 C.F.R. §825.310(a) "[U]nless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated." 29 C.F.R. §825.311(c); *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1001 (6th Cir. 2005); *Hanson v. Sports Authority*, 256 F. Supp. 2d 927, 926 (W.D. Wis. 2003) (employee may be terminated if she does not submit required doctor's

work release certification indicating she is capable of performing her full-time duties *at the time FMLA leave concludes*).

If an employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration and there is no substantive claim for interference with the employee's FMLA rights. 29 C.F.R. §825.214(b); *Colburn v. Parker/Hannifin/Nicholas, Portland Div.*, 429 F.3d 325, 332 (1st Cir. 2005).

Before the duty to reinstate arises, the employee must provide an unconditional release to return to work. 29 C.F.R. §825.311(c). ("the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work"); *Burkett v. Beaulieu Group, LLC*, 382 F. Supp. 2d 1376, 1381 (N.D. Ga. 2005), *aff'd* 168 F. Appx. 895 (11th Cir. 2006). The employer may delay restoration until the certification is provided. 29 C.F.R. §825.310(f); 29 C.F.R. §825.312(c). While the fitness for duty certification need only be a simple statement of an employee's ability to return to work, "it is axiomatic that the 'simple statement' be made *contemporaneously* with the employee's ability to work." *Burkett v.*

Beaulieu Group, 382 F. Supp. at 1380-81 (emphasis added). A prospective statement by the health care provider that he or she *believes* the employee will be able to return to work at the end of the FMLA leave is not sufficient. Instead, the “simple statement of the employee’s ability to return to work...must be relevant to the employees’ condition *at the time FMLA leave is concluded.*” *Barnes v. Ethan Allen, Inc.*, 356 F. Supp. 2d 1306, 1311-12 (S.D. Fla. 2005), *aff’d*, 149 F. Appx. 845 (11th Cir. 2005) (emphasis added) (letter from doctor stating that plaintiff could prospectively return to work in 4-6 weeks was not a valid release to work under the FMLA).

If an employee does not provide a contemporaneous, unconditional certification of fitness for duty at the end of disability leave, an employer is not required to reinstate the employee. *See generally Bloom v. Metro Heart Group of St. Louis, Inc.*, 440 F.3d 1025, 1031 (8th Cir. 2006).

In this case, Mr. Chaney was placed on a provisional FMLA leave beginning July 16, 2007. Mr. Chaney was advised, and does not dispute, that his FMLA leave would expire on August 27, 2007. RP 476-477; 494-495. Mr. Chaney was also advised, and does not dispute, that he needed to provide a certification that he was fit to return in that position before August 27, 2007. RP 476-477; 494-495. Mr. Chaney did not provide a certification of fitness for duty or a release to return to work at the time his

FMLA leave expired. On the contrary, Mr. Chaney consulted with Dr. Van Gerpen who advised Sacred Heart and Mr. Chaney that he was not fit to return to work as an interventional radiology technician. Exs. P47 and P48, Mr. Chaney did not provide any certification from any physician that he was able to return to work without limitations prior to August 27, 2007. As such, Sacred Heart was not required to reinstate him to this position.

The Court of Appeals incorrectly held that the information provided by Dr. Jamison on August 10 was sufficient to trigger Sacred Heart's duty to reinstate Mr. Chaney as of the end of his FMLA leave. The document prepared by Dr. Jamison only indicated **that as of August 10, 2007**, Mr. Chaney (1) had a serious health condition; (2) that he needed absence from work plus additional treatment; (3) that he needed continuous leave for two to four weeks after August 10, 2007 and (4) could return to work as soon as the employer allowed. This was not a contemporaneous medical release at the conclusion of Mr. Chaney's FMLA leave. *See Diaz v. Transatlantic Bank*, 367 F. Appx. 93, 96 (11th Cir. 2010) (statement from doctor that plaintiff would be out for six to eight weeks was the "very opposite of medical clearance") and *Rogers v. New York University*, 250 F. Supp.2d 310, 314 (S.D.N.Y. 2002) (a physician's statement that the employee could return to work in "one or

two months” after FMLA leave was set to expire was not sufficient to support a claim for FMLA interference.)

Mr. Chaney’s reliance on *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996 (6th Cir. 2005) is misplaced. In *Brumbalough*, the Court held the doctor’s certification that the plaintiff could return to work at 40-45 hours a week and limit her out of town travel to one day per week was sufficient and triggered the employer’s duty to reinstate the employee. Mr. Chaney erroneously argues that Dr. Jamison certified on August 10 that “Mr. Chaney’s serious health condition had resolved and that he was able to return to work.” (Answer to Petition for Review, pg. 15-16). This is simply not the case. Dr. Jamison indicated on August 10 that Mr. Chaney had a serious health condition and needed *additional* FMLA leave for treatment of at least two to four more weeks. Unlike the facts in *Brumbalough*, no physician had certified that Mr. Chaney was fit to return for duty at the time of the end of his FMLA leave.¹

The Court of Appeals ruling that Sacred Heart should have reinstated Mr. Chaney incorrectly assumes that Dr. Jamison certified that

¹ The two unpublished cases referenced in *Brumbalough* and cited by Mr. Chaney also do not apply in this case. In *Matthews v. Fairview Health Servs.*, WL 1842471 (D. Minn 2003) the employer required the employee to undergo another physical even though the physician stated the employee could return to work “without restriction.” In *Underhill v. Willamina Lumber Co.*, WL 421596 (D.Or. 1999), the physician certified that the employee could return to work and the employer would not allow his return to work until the employer’s concerns over his condition had been addressed to its satisfaction. Neither factual scenario is present in the case before this Court.

Mr. Chaney could actually return to work. However, Dr. Jamison did not provide a certification that Mr. Chaney could return to work.² Dr. Jamison provided a certification that, as of August 10, 2007, Mr. Chaney was not fit to return to work, needed additional treatment and two to four weeks of FMLA leave. Dr. Van Gerpen, the other physician that examined Mr. Chaney indicated on two occasions that Mr. Chaney was not fit to return to work: once on July 16, 2007 and again on August 23, 2007 after Mr. Chaney scheduled another appointment. Contrary to Mr. Chaney's argument and the facts of *Albert v. Runyon*, 6 F. Supp. 2d 57, 62-63 (D. Mass. 1998) cited by Mr. Chaney, Sacred Heart did not insist that he submit to a second fitness for duty exam to justify his leave. Rather, Mr. Chaney was advised on July 31, 2007 that he needed to provide a certificate at the conclusion of his leave that he was fit for duty in order to be reinstated after August 27, 2007. Dr. Jamison's August 10 certification did not indicate he was fit to return to work as of August 27, 2007.

As Mr. Chaney did not provide a release at the time his FMLA leave expired, he was not entitled to reinstatement and the Court of Appeals decision should be reversed.

² The Court of Appeals' opinion references 29 CFR §825.307(a) which deals with clarification and authentication of a medical certification, not a fitness for duty certification and 29 CFR §825.312(b) dealing with an employee's return to work are versions of the regulation from 2009, rather than 2007.

B. The Trial Court's denial of the motion for directed verdict was correct.

In reversing the trial court's denial of Mr. Chaney's motion for directed verdict, the Court of Appeals observed that, "Dr. Jamison's certificate was not inadequate." Op. at 14. This statement improperly shifted the burden to Sacred Heart, the non-moving party. A motion for directed verdict may be granted only if the court can say, as a matter of law, that no reasonable person could have found in favor of the nonmoving party. *Ayers v. Johnson & Johnson Baby Products*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). A directed verdict is appropriate only if there was no substantial evidence or reasonable inferences to sustain a verdict for Sacred Heart, the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.2d 872 (2004). If there was sufficient evidence or reasonable inference from the evidence to warrant submitting the case to the jury it is inappropriate for the Court of Appeals to reverse the trial court's denial of plaintiff's motion for directed verdict. *Industrial Indemnity Co. of the NW., Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990).

When reviewing a trial court's denial of a motion for directed verdict, the Court of Appeals' inquiry should have been limited to whether the evidence presented was insufficient to sustain the jury's verdict.

Industrial Indemnity Co. of the NW., Inc. v. Kallevig, 114 Wn.2d.at 916. See also *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992) (reversal is appropriate “only where it is clear that the evidence and all reasonable inferences are insufficient to support the jury’s verdict”) On appeal, the Court must accept as true all evidence submitted by Sacred Heart and all favorable inferences from that evidence. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

In reviewing the trial court’s denial of Mr. Chaney’s motion for directed verdict, the question before the Court of Appeals was whether, viewing all the evidence in a light most favorable to Sacred Heart, there was no substantial evidence or reasonable inferences from that evidence to support the jury’s verdict that Mr. Chaney did not establish interference of his rights under the FMLA. Here, construing Sacred Heart’s evidence and all favorable inferences as true, Mr. Chaney lacked a contemporaneous release pronouncing him fit for duty to return to work at the conclusion of his FMLA leave. The only report that had been submitted at the conclusion of his FMLA leave indicated that Mr. Chaney was not fit to return to duty as an interventional radiology technician. Contrary to the Court of Appeals’ holding, Dr. Jamison’s August 10 certification was not a fitness for duty release to return to work. Rather, it was a certification indicating that Mr. Chaney needed FMLA leave. In reviewing all the

evidence and testimony, the jury agreed that it did not constitute a release to return to work as of August 27 even though it contained a prospective statement that Mr. Chaney would be “okay to work as soon as Employer allows.” The burden regarding his motion for directed verdict was on Mr. Chaney to prove, as a matter of law, that Dr. Jamison’s certificate was adequate as a matter of law. Clearly, it was not. The absence of a contemporaneous release to return to work at the conclusion of his FMLA leave meant that Mr. Chaney was not entitled to a directed verdict and the case was properly submitted to the jury for its consideration.

V. CONCLUSION

The Court of Appeals incorrectly ruled that Mr. Chaney complied with requirements of federal law to supply a contemporaneous certification that he was fit to return to his job as an interventional radiology technician in order to be reinstated at the expiration of his FMLA leave on August 27, 2007. Dr. Van Gerpen certified that Mr. Chaney was not fit for duty as of July 16, 2007 and again on August 23, 2007. Mr. Chaney’s lack of a medical clearance to return to work at the end of his FMLA leave made him ineligible for reinstatement. The trial court correctly denied his motion for directed verdict and the case was properly submitted to the jury. The Court of Appeals’ decision should be reversed.

RESPECTFULLY SUBMITTED this 7th day of August, 2012

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CERTIFICATE OF SERVICE

I, Veronica J. Clayton, the undersigned, hereby certify and declare that the following statements are true and correct:

1. I am a resident of the State of Washington, over the age of 18 years, not a party to this matter and am employed by the law firm of Workland & Witherspoon, PLLC. The business and mailing address for the law firm are both 601 W. Main, Suite 714 Spokane, WA 99201.

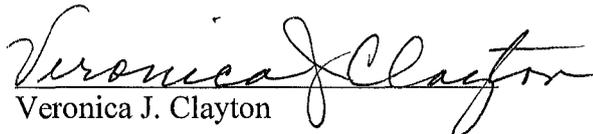
2. On the 7th day of August, 2012, I caused to be sent for filing an original and one copy of *Petitioner's Supplemental Brief* via Federal Express delivery service (next day delivery) to:

Clerk of Court
Supreme Court
Temple of Justice
415 12th Ave. SW
Olympia, WA 98504

3. On the 7th day of August, 2012, I caused to be served a copy of *Petitioner's Supplemental Brief* via Federal Express delivery service (next day delivery) to:

Steven C. Lacy
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East Wenatchee, WA 98802

I swear under penalty of perjury under the laws of the State of Washington that this foregoing is true and correct.


Veronica J. Clayton