

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RHONDA GREEN,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 08-cv-2569 P
THIRD PARTY SOLUTIONS, INC.)	
)	
Defendant.)	

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Before the court is plaintiff Rhonda Green's Motion for Partial Summary Judgment (D.E. 30) and defendant Third Party Solutions, Inc.'s ("TPS") Motion for Summary Judgment (D.E. 29). Both parties filed responses to the opposing parties' motions and TPS filed a reply to Green's response. For the reasons below, Green's motion is GRANTED and TPS's motion is GRANTED in part and DENIED in part.¹

I. BACKGROUND

On May 10, 2004, TPS hired Green as a Patient Account

¹All parties consented to have a United States Magistrate Judge conduct all proceedings in this case, including presiding at the trial, ordering the entry of a final judgment, and conducting all post-judgment proceedings. (D.E. 12.)

Representative.² TPS employed her continuously from May 10, 2004 until December 14, 2007 as a full-time employee. At all pertinent times, TPS was an "employer" and Green was an "eligible employee" covered under the Family and Medical Leave Act ("FMLA").³ TPS has an employee handbook, which contains TPS's employee attendance policy, and Green received a copy of this handbook when she started working for TPS.

In 2005, Green sought and received FMLA leave due to her mother's illness and subsequent death. In late 2005, Green requested FMLA intermittent leave to care for her father, Johnnie Greer. The leave was approved by TPS, but was never used. In early October of 2007, Green's father became ill, and on October 21, he suffered a stroke and was hospitalized. On October 22, Green met with her supervisor, Zandra Wicks-Kyle, and discussed her father's illness and her potential need for FMLA leave. On October 29, MetLife Disability ("MetLife"), TPS's third-party FMLA administrator, mailed to Green a packet containing information

²Unless otherwise indicated, all facts in this section are undisputed.

³An "eligible employee" is one "who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested . . . ; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). An "employer" is "any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A).

relating to the FMLA, including a Health Care Provider Certification form ("HCPC form"). Green gave the HCPC form to Dr. Mahmood Ali, her father's attending physician. Dr. Ali filled out the HCPC form and returned it to TPS on November 8, 2007 ("November 8 form").⁴ (Compl. Ex. A.)

The first page of the November 8 form identified Green as the employee and Johnnie Greer as the patient and father of the employee. In response to item 2 of the form, which listed a series of descriptions for qualifying "Serious Health Conditions," Dr. Ali marked the boxes identifying Greer's condition as requiring inpatient hospital care and describing it as a chronic condition requiring treatment. Item 3 of the form requested a description of "the medical facts supporting your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories." In response, Dr. Ali indicated "mental status change/seizure." Item 4 asked "[w]hen did the serious health condition commence," to which Dr. Ali responded "hospitalize

⁴It is not clear from the record whether Dr. Ali or his nurse practitioner, Elizabeth Wilson, filled out the November 8 form. Both Ali's and Wilson's names appear above the signature line. Dr. Ali's signature appears on the last page of the form, although Wilson may have signed it on his behalf. Green asserts that Wilson filled out the November 8 form, while TPS disputes that assertion without stating who it believes filled out the form. For purposes of resolving the pending motions, the court finds that it is immaterial whether Ali or Wilson filled out the November 8 form, because both qualify as "health care providers" under the FMLA. See 29 C.F.R. § 825.118. To avoid confusion, the court will refer to Dr. Ali as the individual who filled out the November 8 form.

10/21/06."⁵ The response to item 5 indicated that Greer was not incapacitated at the present time.⁶ Item 6 asked "[i]f the patient is not presently incapacitated, when and for how long will the patient be incapacitated," to which Dr. Ali responded "unknown presently." He responded "unknown presently" also to item 7, which asked "[w]hen will the patient's incapacity due to the serious health condition end?" Item 8 asked "[w]ill the patient need future treatments (or a regimen of continuing treatment) for the serious health condition," to which Dr. Ali checked "Yes" and wrote "physical therapy," "prescription drugs," and "follow-up visit." In response to item 9, which asked "[w]ill any of the treatments be provided by another provider of health services," Dr. Ali checked "Yes" and listed "orthopedic - PT/OT" and "neurologist - follow-up." Item 10, which only applied if the patient was the employee, was left blank by Dr. Ali.

Finally, item 11 of the form contained four sub-items (a, b, c, and d). It requested that "[i]f the patient is NOT the employee please check each that apply and answer the questions below each item that you check." Item 11a asked if "[t]he patient's

⁵This date was written in error, as it is undisputed that Greer's hospitalization began on October 21, 2007.

⁶This response to item 5 was also incorrect, as it appears from the other responses in the November 8 form that Greer was incapacitated at the time. Nonetheless, the error is immaterial because, as discussed later, a subsequent HCPC form filled out and submitted by Dr. Ali on November 28, 2007 stated that Greer was incapacitated.

incapacity, need for treatment, and/or need for care from the employee will take place in a single, continuous block of time." Dr. Ali left item 11a unchecked, and did not respond to the accompanying request to "provide the dates of such incapacity." Item 11b asked if "[t]he patient's incapacity, treatments, or need for care from the employee: will occur intermittently (i.e., on an occasional, irregular basis); or will require the employee to work a reduced schedule (i.e. to work less than a normal schedule)." Dr. Ali checked neither box in item 11b. Item 11b further requested that, if either or both of those statements were checked, "[w]hen (or how often) will the treatments, episodes of incapacity, and/or episodes of need for the employee's care occur (e.g., will need to take up to 1 day every 10 days (or 3 days/month) over the next 6 months)?" Although he did not check either box, Dr. Ali responded that it "will depend on requirement of appts scheduling for followups and treatments as deemed necessary by attending." Item 11b also asked "[h]ow many treatments or episodes of incapacity, and/or episodes of need for the employee's care will there be?" Dr. Ali did not respond to this question. Lastly, item 11b asked "[w]hen will all the foreseeable treatments, episodes of incapacity, and/or episodes of need for the employee's care, including period for recovery, be over?" Dr. Ali responded "unable to specify most likely it will be indefinitely." The boxes for item 11c, which stated "[t]he patient requires assistance for basic

medical or personal needs or safety, or for transportation," and for item 11d, which stated "[t]he employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery," were both checked by Dr. Ali.

On or about November 9, 2007, Green notified Wicks-Kyle that her father had been released from the hospital and that she would need FMLA leave to care for him beginning November 12, 2007. Beginning November 12 and continuing through her termination on December 14, Green was absent from work.⁷ Green spoke by telephone with MetLife on or about November 14, 2009, and stated that she intended to return to work after the first of the year. The MetLife representative who spoke with Green noted that Green requested approximately eight weeks of continuous leave and that subsequently she may need intermittent leave as well. On November 20, 2007, MetLife informed Green that it had denied her leave request because the November 8 form was "incomplete" and that MetLife had been "unable to obtain the necessary information" from Dr. Ali. MetLife informed Green that it needed information on the frequency and duration of intermittent leave and the end date for continuous leave. Green later received a letter from MetLife, dated November 20, denying her request for FMLA leave because the HCPC form was "incomplete."

⁷During the twelve months preceding these absences, she had not used any FMLA leave.

On November 21, Green called MetLife and asked that another HCPC form be faxed to Dr. Ali. MetLife faxed another form to Dr. Ali, which was identical to the first HCPC form provided to him. On November 26, Green called MetLife to determine if Dr. Ali had sent the form back. MetLife indicated that no information had been received. While at her father's appointment with Dr. Ali on November 28, Green informed Dr. Ali that MetLife needed dates on the HCPC form. Dr. Ali then filled out the form, signed it, and faxed it to MetLife on November 28 ("November 28 form"). (Compl. Ex. B.)

In the November 28 form, the response to item 2 of the form was the same, with the "Hospital Care" and "Chronic Condition Requiring Treatment" boxes checked. The response to item 3 indicated "FTT (failure to thrive)/Ataxia."⁸ Item 4 listed "10/21/07" as the beginning date of the serious health condition. Item 5 indicated that the patient was incapacitated. Dr. Ali indicated "N.A." in response to item 6, and "undetermined (chronic condition)" in response to item 7, which asked when the incapacity would end. He checked "Yes" for item 8, and described the nature of such treatment as "[h]elp at home with ADLs/PT/OT/clinic visit." He checked "No" to item 9, and wrote in "(except Home Health)."⁹

⁸Ataxia is a medical term referring to a debilitating neurological condition, for which there is no known cure. (D.E. 30-2 at 6.)

⁹TPS contends that, despite Dr. Ali's "No" response to item 9, through a subpoena of his medical records TPS "has now learned that

Item 10 again did not apply. Dr. Ali checked all five boxes listed under item 11. He again did not respond to the request in item 11a to "provide the dates of such incapacity." He did, however, respond to two of the three questions under item 11b. To the question "[w]hen (or how often) will the treatments, episodes of incapacity, and/or episodes of need for the employee's care occur," Dr. Ali responded "continuously currently; may change to intermittent in the future (undetermined)."¹⁰ To the question, "[h]ow many treatments or episodes of incapacity, and/or episodes of need for the employee's care will there be," he responded "undetermined." He left the third question of item 11b blank,

on 11/28/07, Dr. Ali had medical knowledge of the course of treatment and/or follow-up that could require Plaintiff's assistance/presence, because Dr. Ali scheduled a follow-up appointment for 2/13/08, three (3) months later, and Dr. Cleveland, a physician to whom Dr. Ali had referred Plaintiff's father, recommended a follow-up appointment in two (2) weeks. Therefore, the course of intermittent treatment was not 'undeterminable,' as Dr. Ali indicates in the Nov. 28 HCPC." (D.E. 31 at 4.) However, on the November 8 HCPC form, Dr. Ali indicated in response to item 9 that Greer would need "orthopedic - PT/OT" and "neurologist - follow-up," and thus MetLife was made aware of Dr. Ali's course of treatment by November 8. Moreover, the court does not understand how scheduling follow-up appointments with other physicians makes a course of treatment determinable. Had Dr. Ali indicated in the November 28 form the specific dates that Greer was scheduled to see other physicians for follow-up appointments, that information would not have addressed TPS's concerns regarding the "incompleteness" of the form, as TPS would still not have known the specific amount of time that Green needed to be off from work to care for her father.

¹⁰The court construes this response as two separate responses: "continuously currently" in response to item 11a, and "may change to intermittent in the future (undetermined)" in response to item 11b.

which asked "[w]hen will all the foreseeable treatments, episodes of incapacity, and/or episodes of need for the employee's care, including period for recovery, be over?" Finally, Dr. Ali checked the boxes for item 11c and 11d, as he had previously done with the November 8 form. Dr. Ali signed and dated the last page of the November 28 form.

On November 29, Green called MetLife and confirmed receipt of the November 28 form. MetLife called Dr. Ali's office on December 3 and 4, stating that it needed the end date for continuous leave and the frequency and duration for Green's intermittent leave. From approximately November 14 to December 17, 2007, Green had several conversations with MetLife and Dr. Ali regarding the "incomplete" information in the November 28 form. Dr. Ali informed Green that he could not provide specific dates due to the nature of her father's condition and because the duration of his treatment and therapy was open-ended. On December 10, MetLife received three faxes from Dr. Ali's office, transmitting identical copies of the November 28 form. By letter dated December 11, 2007, MetLife notified Green that her request for leave was denied "because your Health Care Provider Certification form was returned incomplete and we have been unable to obtain necessary information from your physician."

By letter dated December 14, 2007, Todd Walsh, Vice President of Human Resources for TPS, notified Green that her employment was

terminated effective December 14 for "exceed[ing] 30 days" of absences in violation of TPS's attendance policy.¹¹ Upon learning this, Green called Dr. Ali and MetLife on December 17. Green informed MetLife that she had been terminated and requested that her claim remain open. MetLife re-opened Green's claim. She asked Dr. Ali's office to send MetLife the information that it had requested. Dr. Ali's office faxed the exact same November 28 form to MetLife on December 18, without including any additional information.

On December 19, Karen Bedford, Senior Human Resources Generalist for TPS, advised MetLife that Green had been absent from work since November 12, and that TPS could apply its attendance policy to her absences because she had not been approved for FMLA leave. Bedford contacted MetLife again on December 20 to report that TPS had terminated Green as of December 14. Green received a letter from MetLife, dated December 20, denying her FMLA claim effective December 14. Green contacted MetLife for a final time just before December 25, and was told that her claim was denied because she was no longer employed with TPS. She did not appeal her termination.

On August 29, 2008, Green filed a complaint against TPS

¹¹TPS concedes that Walsh's determination that Green had missed "30 days" was in error. She had, in fact, missed twenty-four days. However, it is undisputed that twenty-four unexcused absences violated TPS's attendance policy.

alleging violations of the FMLA. Specifically, Green claims that TPS unlawfully interfered with her FMLA rights by terminating her while she was on FMLA leave, in violation of 29 U.S.C. § 2615(a)(1). She also claims that TPS terminated her employment in retaliation for her exercising her rights under the FMLA, in violation of 29 U.S.C. § 2615(a)(2). Green seeks, among other forms of relief, back pay, front pay, and liquidated damages.

II. ANALYSIS

A. Summary Judgment Standard

Green and TPS have filed cross-motions for summary judgment on Green's FMLA interference claim. TPS also moves for summary judgment on Green's retaliation claim and demand for damages. Federal Rule of Civil Procedure 56(c) provides that

[t]he judgment sought 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)(2); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Canderm Pharmacal, Ltd. v. Elder Pharms., Inc., 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the motion is supported by proof such as depositions and affidavits, the nonmoving party may not rest on the pleadings, but must present

some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Finally, the "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994).

B. FMLA Interference Claim

The FMLA entitles qualifying employees up to twelve weeks of unpaid leave to, among other things, care for a family member with a serious health condition. 29 U.S.C. § 2612(a). "[T]wo distinct theories for recovery on FMLA claims exist." Arban v. West Publ'g Corp., 345 F.3d 390, 400 (6th Cir. 2003). The "entitlement" or "interference" theory arises under 29 U.S.C. § 2615(a)(1), which provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided [by the FMLA]."¹² Id. More specifically, the FMLA prohibits an employer from counting FMLA leave against an employee under its "no fault" attendance policy. Brenneman v. MedCentral Health Sys., 366 F.3d 412, 422 (6th Cir. 2004) (citing 29 C.F.R. § 825.220(c)). Employees who believe they have been denied their FMLA rights may assert a cause of action for FMLA interference. Killian v. Yorozu Auto. Tenn., Inc., 454 F.3d 549,

¹²The second theory is a "retaliation" or "discrimination" theory and is discussed in section C below.

555 (6th Cir. 2006).

To prevail on an FMLA interference claim, a plaintiff must establish: "(1) she was an eligible employee as defined under the FMLA; (2) her employer was a covered employer as defined under the FMLA; (3) she was entitled to leave under the FMLA; (4) she gave the employer notice of her intention to take FMLA leave; and (5) her employer denied FMLA benefits to which she was entitled." Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 577-78 (6th Cir. 2007) (citing Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005)). The only dispute at issue on Green's interference claim is whether she was "entitled to leave" under the FMLA.¹³

An employer may require an employee to support a request for FMLA leave to care for a family member with a serious health condition with a medical certification issued by the health care provider of the family member. 29 U.S.C. § 2613(a). A medical certification of a serious health condition "shall be sufficient" if it provides: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) a statement that the eligible employee is needed to care for the family member and an

¹³TPS argues that the fifth prong, whether TPS denied Green FMLA benefits to which she was entitled, is also in dispute. Of course, if it is determined that Green was entitled to FMLA leave, Green would satisfy the fifth prong because TPS denied her request for leave and thus denied her FMLA benefits to which she was entitled.

estimate of the amount of time that the employee is needed to care for the family member.¹⁴ 29 U.S.C. § 2613(b). In its response in

¹⁴The FMLA statute reads, in pertinent part:

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states-

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

. . . .

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

opposition to Green's Motion for Partial Summary Judgment and its own Motion for Summary Judgment, TPS contends that Green's request for FMLA was properly denied because the HCPC forms submitted by Dr. Ali did not contain an estimate of the amount of time that Green needed to care for her father. (See D.E. 31 at 2, 8, 10, 13; D.E. 29-2 at 11.)

Based on the undisputed facts, the court concludes that Green provided TPS with a complete and sufficient HCPC form as a matter of law. Dr. Ali indicated on the November 28 form that Greer suffered from a serious chronic health condition, that he would need follow-up visits with other physicians and help at home, that he currently needed continuous care and "may change to intermittent" care in the future, and that the need for care from the employee was of an "undetermined" duration. Although the parties have not cited, and the court in conducting its own research could not find, any cases that have addressed the sufficiency of a similar certification, at least one court has suggested that a certification listing only "March 2005" as the probable duration of a plaintiff's incapacity would be sufficient

. . . .

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

29 U.S.C. § 2613.

under the FMLA because "doctors cannot pinpoint the exact length of one's incapacity to the day." Spencer v. Marygrove Coll., No. 07-CV-11135, 2008 WL 4056319, at *9 (E.D. Mich. Aug. 26, 2008). The court agrees with the observation in Spencer and concludes that the estimate of the amount of time that the employee is needed to care for the family member does not require the health care provider to identify an exact length of time. Where, as here, the health care provider has stated that he is unable to estimate the period of time needed for the employee to care for the family member due to the indefinite duration of the serious health condition, it would be unreasonable and illogical to require the health care provider to manufacture specific dates in an attempt to satisfy the formalistic interpretation of the FMLA suggested by TPS.

TPS relies heavily on Novak v. Metrohealth Medical Center, 503 F.3d 572 (6th Cir. 2007). In Novak, the plaintiff-employee sought FMLA leave for a chronic back injury, among other things. She sent an HCPC form to a physician, but the physician had not treated her for her recent back problems. Regardless, the physician filled out the form and faxed it to the defendant-employer, but the physician had "omitted required information, such as a description of the medical facts and the likely duration of [plaintiff's] condition." Id. at 576. When the plaintiff learned that the HCPC form was incomplete, she contacted the physician's assistant and insisted that the assistant complete the remainder of the form and fax it to

her employer. Plaintiff told the assistant what to write in the empty spaces and the assistant complied without obtaining the physician's permission. At a "pre-discharge" meeting, the employer questioned the authenticity of the HCPC forms and later contacted the physician with the employee's permission. In attempting to authenticate the HCPC forms, the employer was informed by the physician that she had not treated the employee for some time, lacked personal knowledge of her recent back problems, and did not complete the entire HCPC form. A few days later, the employee contacted the physician, described an examination with another doctor, and had the physician complete the form based on the secondhand information. The physician then submitted this additional HCPC form to the employer. When the employer reconvened the "pre-discharge" meeting, it determined that the employee's absences did not qualify for FMLA leave, noting that she had provided "contradictory information." The employer subsequently terminated her for violation of the attendance policy.

From these facts, the Court of Appeals determined that the employee's HCPC forms were insufficient to establish the existence of a serious health condition under the FMLA. Id. at 578. The court determined that her HCPC form "did not contain the date on which the serious health condition began, the probable duration of the condition, or the appropriate medical facts within the health care provider's knowledge." Id. As a result, the court found that

the HCPC form was not sufficient under 29 U.S.C. § 2613(b) and the employer was not required to credit it. The facts of the present case are clearly distinguishable from Novak. TPS does not dispute that Dr. Ali was Greer's physician, nor has TPS questioned the authenticity or validity of the HCPC forms submitted by Dr. Ali's office. Contrary to TPS's argument, the court does not read Novak to stand for the proposition that an "undetermined" duration of need renders an HCPC form insufficient as a matter of law. See McDougal v. Altec Indus., Inc., 553 F. Supp. 2d 862, 869 n.6 (W.D. Ky. 2008) (finding that Novak was distinguishable because the certification form in Novak had empty spaces in the "medical facts" and "duration" sections, while the plaintiff in McDougal provided a form that contained a probable duration of "unknown").

Because Green provided a complete and sufficient HCPC form, the certification is therefore presumptively valid, and the employer may only overcome the presumption by showing that the certification is invalid or inauthentic. Novak, 503 F.3d at 578 (citing Harcourt v. Cincinnati Bell Tel. Co., 383 F. Supp. 2d 944, 955-56 (S.D. Ohio 2005)). TPS has not overcome this presumption. If TPS believed that Dr. Ali's opinion that the duration of need could not be determined was wrong, then TPS could have obtained a second medical opinion. 29 U.S.C. § 2613(c); see also Harcourt, 383 F. Supp. 2d at 955. Alternatively, TPS had the opportunity to use the "recertification" procedures under the FMLA to address its

concerns about the duration of need. See Wage and Hour Opinion Letter, FMLA2004-2-A (Dep't of Labor May 25, 2004) (finding that recertification is appropriate where no minimum duration of incapacity is specified on the medical certification); see also Andrews v. CSX Transp., Inc., No. 3:06-cv-704-J-32HTS, 2009 WL 5176462, at *7 (M.D. Fla. Dec. 22, 2009) (finding "[w]hen a doctor's certification does not indicate how long the employee will continue to need intermittent leave, the employer is entitled to require the employee to obtain additional information" through recertification) (citing Muhammad v. Ind. Bell Tel. Co., 182 F. App'x 551, 553-54 (7th Cir. 2006); Williams v. Boeing Co., No. 97-36098, 1999 WL 50882, at *1 (9th Cir. Jan. 15, 1999); Parsley v. City of Columbus, Ohio Dep't of Pub. Safety, 471 F. Supp. 2d 858, 863-64 (S.D. Ohio 2006)). TPS took neither approach, and instead terminated Green. Thus, the court concludes that TPS interfered with Green's FMLA rights and, therefore, Green is entitled to summary judgment on her interference claim.

C. FMLA Retaliation Claim

In addition to the interference claim, TPS has moved for summary judgment on Green's retaliation claim. A plaintiff may bring an FMLA retaliation claim under 29 U.S.C. § 2615(a)(2). The court applies the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to claims of retaliation under the FMLA where, as here, there is no direct

evidence of discrimination. Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 314 (6th Cir. 2001). In order to establish a violation of the FMLA under a retaliation theory, the employee must show: (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the adverse employment action. Id. "In contrast to an interference claim where the employer's intent is not relevant as the court looks to whether the employer provided its employee with the entitlements set forth in the FMLA, under a retaliation claim, the employer's motive is an integral part of the analysis." McDougal, 553 F. Supp. 2d at 871. "Hence, a plaintiff may recover under a retaliation theory only by showing 'that the action was taken because the employee exercised, or complained about the denial of, FMLA-protected rights.'" McClain v. Detroit Entm't, L.L.C., 458 F. Supp. 2d 427, 438 (E.D. Mich. 2006) (quoting Edgar v. JAC Prods., Inc., 443 F.3d 501, 512 (6th Cir. 2006)). If the plaintiff is successful in establishing a *prima facie* case, an inference of retaliation arises and the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the employer articulates such a reason, the plaintiff must then prove by a preponderance of the evidence that the reason offered was pretextual. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The plaintiff

may prove pretext by showing that "a discriminatory reason more likely motivated the employer" or that "the employer's proffered explanation is unworthy of credence." White v. Baxter Healthcare Corp., 533 F.3d 381, 392 (6th Cir. 2008). A plaintiff must show not only that the stated reason is either untrue or insufficient, but also "that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

In McClain, the court concluded that the plaintiff established a *prima facie* case on her FMLA interference claim, but granted defendant's motion for summary judgment on her retaliation claim:

As the courts have recognized in analyzing motive-based claims of discrimination or retaliation, an "employer's reason for discharge does not have to be a *good* reason," so long as this reason is "based on grounds not proscribed by the statute." . . .

Here, while Defendant might have unlawfully denied FMLA leave to Plaintiff based on impermissibly stringent requirements, it cannot be said that Defendant then discharged Plaintiff because of her exercise of FMLA-protected rights. To the contrary, Defendant states without contradiction that it discharged Plaintiff because it concluded, however mistakenly or unlawfully, that her absences were *not* protected by the FMLA. For all that appears in the record, the policies relied upon by Defendant in making this determination are applied equally and across-the-board to all of the company's employees, without regard for whether an employee has been approved for FMLA leave or is absent from work for some other reason.

Plaintiff has not suggested otherwise in her response to Defendant's motion. Nor, more generally, was she able at her deposition to identify any specific facts in support of her FMLA retaliation claim. . . . It follows that she cannot meet her burden, at the third stage of the McDonnell Douglas inquiry, to show that Defendant's stated basis for discharging her was a mere

pretext for unlawful retaliation. . . . While Defendant's stated reason for discharging Plaintiff might not be a particularly good one, when viewed in light of the substantive terms of the FMLA and its implementing regulations, there is no evidence of Defendant's intent to retaliate against Plaintiff for her exercise of rights under the FMLA.

458 F. Supp. 2d at 438-39 (internal citations omitted).

Green argues that a jury could infer from the fact that she requested FMLA leave twice in 2005, and TPS granted those requests, that TPS had "lost its patience" with her exercise of FMLA rights and unlawfully terminated her for attempting to exercise them once more. (D.E. 34 at 18.) She also argues that a jury could find that TPS had acted with a retaliatory motive in denying her FMLA leave because MetLife reopened her FMLA claim on December 17 at Green's request, and MetLife finally denied the claim only after it was informed by TPS that Green had been terminated. Viewing the record in the light most favorable to Green, the court concludes that the evidence fails to support her claim of retaliation. The fact that TPS approved Green's prior requests for FMLA leave twice in 2005, if anything, tends to show TPS's willingness to allow Green to take FMLA leave to care for her parents. In addition, the fact that TPS notified MetLife that Green had been terminated could not reasonably be construed as retaliatory. Although the court has concluded that TPS unlawfully terminated Green due to her absences, there is no evidence that the non-retaliatory reason for Green's discharge was a pretext for discrimination. Thus, TPS's motion for

summary judgment on Green's retaliation claim is granted.

D. Damages

Finally, TPS has moved for summary judgment on damages on the grounds that Green has failed to mitigate her damages and based on the after-acquired evidence defense.

1. Mitigation of Damages

During 2008, Green conducted a search for a new job. She completed seven job applications and two resume submissions. In 2009, she completed one job application and three resume submissions. On June 11, 2009, Green enrolled in a program at Remington College for certification in medical billing and coding. Based on this evidence, TPS argues that Green failed to exercise reasonable diligence to mitigate her damages during the eighteen months between her termination at TPS and enrolling for classes at Remington College. TPS further argues that Green voluntarily removed herself from the job market on June 11, 2009 by enrolling at Remington College. Once Green withdrew from the job market and entered school, TPS argues, she lost all right to damages after June 11.

An employee's mitigation effort is one factor a court must consider when formulating a pay award. Killian, 454 F.3d at 556. The defendant employer has the burden of establishing lack of diligence in mitigation by the former employee. Id. at 557. An employer satisfies its burden by establishing that there were

substantially equivalent positions available and that the employee did not use reasonable care and diligence in seeking such positions. Id. An employee "is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence," and the reasonableness of an employee's effort "should be evaluated in light of the individual characteristics of the claimant and the job market." Id.

The sufficiency of Green's mitigation effort is properly a question of fact for the jury. Killian, 454 F.3d at 556 (finding that the "sufficiency of an employee's mitigation effort is a question of fact"). Moreover, enrollment in school after a diligent job search does not constitute failure to mitigate. Id. at 557. Therefore, TPS is not entitled to summary judgment on the issue of mitigation of damages.

2. After-Acquired Evidence

Finally, TPS argues that any damages should be disallowed after August 26, 2009, because on that date TPS discovered during Green's deposition that she lied on her job application. Specifically, when Green initially applied to TPS for employment, she stated that her former employment with UT Cancer Institute ended due to downsizing. At her deposition, Green admitted that she was actually fired from UT Cancer Institute for violating company policy. The employment application that Green filled out and submitted to TPS stated that "if any false information,

omissions or misrepresentations are discovered, my application may be rejected and, if I am employed, my employment may be terminated at any time." In support of its motion, TPS submitted the declaration of Todd Walsh, who states that "[i]t is TPS's practice that if false information, omissions or misrepresentations are discovered, an employment application may be rejected or, if employed, the employee may be terminated," and that "[h]ad TPS known of Green's lying about the reason for her termination from a prior employer, she would have been terminated." (Def.'s Mot. for Summ. J. Ex. C, D.E. 29-6 at 2).

Under the "after-acquired evidence" doctrine:

Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, [the courts] cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit.

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995); see also Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1168 (6th Cir. 1996) (finding that "[w]here any employer can show it would have been entitled to terminate the employee for severe wrongdoing, if it had known of the employee's wrongdoing at the time, the employee's remedies for discrimination are limited"). Under such circumstances, neither reinstatement nor front pay are appropriate remedies. McKennon, 513 U.S. at 362. As for backpay, "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful

discharge to the date the new information was discovered." Id. "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. at 362-63.

Green argues that TPS waived its right to assert the after-acquired evidence defense because it has not raised that defense in its answer. Although, as a general rule, failure to plead an affirmative defense results in a waiver, the Sixth Circuit has not addressed the issue of whether the after-acquired evidence defense must be pleaded as an affirmative defense. Most courts have held that it is an affirmative defense that must be pleaded in accordance with Federal Rule of Civil Procedure 8(c). See Stubbs v. Regents of Univ. of Cal., No. CIV. S-06-1, 2007 WL 1532148, at *8 (E.D. Cal. May 25, 2007) (finding that after-acquired evidence is an affirmative defense that must be pleaded in the answer); Jones v. Bd. of Trs. of Cmty. Coll. Dist. No. 508, 75 F. Supp. 2d 885, 887 (N.D. Ill. 1999) (same); Red Deer v. Cherokee County, 183 F.R.D. 642, 656 (N.D. Iowa 1999) (same). But see Arnold v. City of Dayton, No. 1:92-cv-562, 1994 WL 904688, at *3 (E.D. Tenn. Mar. 21, 1994) (finding that the after-acquired evidence defense need not be pleaded as an affirmative defense). The court agrees with the majority of the courts and concludes that the after-acquired

evidence defense is an affirmative defense that must be pleaded under Rule 8(c).

TPS learned of Green's misrepresentation during Green's deposition on August 26, 2009, at the latest, yet TPS made no effort to amend its answer. Instead, TPS allowed the discovery deadline of September 15, 2009 to lapse, and raised its after-acquired evidence argument for the first time in its Motion for Summary Judgment, filed on October 15, 2009. Moreover, after Green raised the issue of waiver in her Response to Defendant's Motion for Summary Judgment, TPS failed to acknowledge, much less address, the waiver issue in its reply.

Waiver of an affirmative defense may be avoided if the defendant raises the issue at a pragmatically sufficient time and the plaintiff has not been prejudiced in her ability to respond. Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993). TPS raised the defense after the close of discovery and without filing a motion to amend its answer. Also, Green has been prejudiced, in that discovery is now closed. As TPS failed to plead properly its after-acquired evidence defense, or alternatively raise it at a pragmatically sufficient time, and as Green has been prejudiced by TPS's failure, the defense is waived.¹⁵

¹⁵Even if the court were to conclude that TPS had not waived its after-acquired evidence defense, TPS has nevertheless failed to establish that there is no genuine issue of material fact as to whether it would have, in fact, terminated Green had it known of her prior misrepresentation. See Maiden v. APA Transp. Corp., No.

III. CONCLUSION

For the reasons above, Green's Motion for Partial Summary Judgment is GRANTED and TPS's Motion for Summary Judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

April 12, 2010
Date

C-1-00-883, 2002 U.S. Dist. LEXIS 8076, at *36 (W.D. Ohio May 3, 2002) (finding that employer's "bald statement" that it would not have hired employee because of her felony convictions, "without more, largely creates a credibility issue to be resolved by a jury"); see also Cole v. Tenn. Watercraft, Inc., No. 3:06-cv-381, 2008 WL 2783520, at *14 (E.D. Tenn. July 15, 2008) (finding a genuine issue of material fact regarding the severity of the employee's alleged wrongdoing); Boles v. Polyloom Corp. of Am., 459 F. Supp. 2d 647, 656 (E.D. Tenn. 2006) (finding that employer had not carried its burden that it would have terminated employee had it known of his prior criminal conviction). Therefore, summary judgment would be denied on this alternative basis.