BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

DIANA KING,	)	
Petitioner,	)	
	)	
v.	)	SEAC No.: 03-12-024
	)	
INDIANA VETERANS HOME	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 31, 2012, Respondent Indiana Veterans Home (IVH), by counsel, moved for summary judgment. Petitioner King, by counsel, responded on January 2, 2013. This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2-1, 42), the Petitioner's termination of employment from Respondent IVH on November 23, 2011. Petitioner King is an unclassified, at-will employee who alleges that the termination arose from unlawful retaliation due to her request for leave under the Family and Medical Leave Act (FMLA) contrary to public policy. Having considered the parties' submissions, and as further discussed herein, the ALJ determines there are one or more genuine issues of material fact that need to be resolved at an evidentiary hearing. Respondent IVH's Motion for Summary Judgment is therefore **DENIED**.

Respondent IVH sets forth several arguments to support the Motion. Respondent first argues that Petitioner King was lawfully terminated for not performing her job in a satisfactory manner by failing to update a patient's care plan and also leaving the facility without the permission of a supervisor. Respondent additionally argues that it did not have adequate notice of Petitioner's request for family medical leave (FML) and therefore has not violated any law, rule or policy. Part of this argument is Respondent IVH's claim that the supervisor responsible for terminating the Petitioner had no knowledge of Petitioner's request for FML and therefore could not have retaliated for Petitioner's use of FML. Petitioner King designated sufficient evidence to rebut each of these claims and raise genuine issues of material fact requiring the Motion's denial.

I. The Summary Judgment Standard

Summary judgment proceedings before SEAC are governed by Indiana Trial Rule 56. I.C. 4-21.5-3-23. Summary judgment is only appropriate when the designated evidence shows

no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Swineheart v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008). All inferences from the designated evidence are drawn in favor of the non-moving party. *Id*. "The burden is on the moving party to prove the nonexistence of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao (M.D.) et al*, 593 N.E.2d 189, 190 (Ind. 1992).

II. Employment at Will doctrine

In this Indiana Civil Service System case, Petitioner King is an unclassified state employee for Respondent IVH. Indiana follows the employment at will doctrine which allows an employer or an employee to terminate the employment at any time for a "good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N. E.2d 704, 705 (Ind. 2007). However, there are three recognized exceptions to the at will doctrine including "a public policy exception . . . if clear statutory expression of a right or duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. App. 2012). Whether public policy was violated is the issue in the instant matter. I.C. 4-15-2.2-42. An unclassified state employee may be "dismissed, demoted, disciplined or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b).

Petitioner King challenges her termination as the product of an illegal retaliation for the exercise of her FML rights. Unlawful retaliation against an employee for exercising her rights under the FMLA, if proven true, would violate federal law. 29 U.S.C.A § 2601 et seq., and 29 C.F.R. § 825.220(a). The Indiana State Personnel Department (SPD) has adopted a "Family – Medical Leave Policy," dated August 1, 2012, stating: "This policy applies to employees in the state civil service. It is the policy of the State of Indiana to allow eligible employees to take leave for the following qualifying events in accordance with the Family and Medical Leave Act of 1993, as amended . . ."[1] The Respondent's motion affirmatively asserts full compliance by the state with the FMLA.[2]

[1] Official notice of this policy is taken by the ALJ and a copy is available on SPD's website. See, http://www.in.gov/spd/2396.htm. SPD's older July, 2011 policy also stated that Indiana follows the FMLA. (See, Petitioner's Brief.)

[2] See, *Purdy v. Wright Tree Serv., Inc*., 835 N.E.2d 209, 215 (Ind. App. 2005) In *Purdy*, the Indiana Court of Appeals found that an injured employee who was discharged after returning from exhausted family medical leave and still unable to return to work did not suffer retaliatory discharge for a related worker's compensation claim. See also, *Frampton v. Central Ind. Gas Co*., 297 N.E.2d 425, 428 (Ind. 1973).

III. Family Medical Leave Act & Retaliation claims

The FMLA entitles eligible employees "to take up to twelve weeks of unpaid leave per year for "(A) the care of a newborn son or daughter; (B) the adoption or foster-care placement of a child; (C) the care of a spouse, son, daughter, or parent with a serious medical condition; and (D) the employee's own serious health condition." *Coleman v. Court of Appls. of Maryland*, 132 S.Ct. 1327, 1329 (2012). The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." *Pagel v. TIN Inc*., 695 F.3d 622, 627 (7th Cir. 2012) and See also 29 U.S.C. § 2611 (11). A "serious health condition" can include one that requires periodic treatments by a health care provider (e.g., diagnostic exams) and one that causes episodic rather than continuous incapacity. *Burnett* at 478.

It is unlawful for an employer to interfere with or retaliate against an employee who attempts to exercise her rights under the FMLA statute.[3] 29 U.S.C.A § 2601 et seq., 2615(a)(2). FMLA-retaliation claims "have been evaluated in federal circuit courts . . . by applying the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*." *Gary Comm. School Corp. v. Powell*, 906 N.E.2d 823, 830 (Ind. 2009). Under this analysis the employee must first show that she engaged in activity protected by the FMLA, that the employer took an adverse employment action against her, and that the adverse action was causally connected to the petitioner's protected activity. *Id*. The burden then shifts to the employer to present evidence of a lawful reason for the adverse employment action. *Id*. Finally, the burden shifts back to the employee who must establish that the employer's proffered reason is a pretext. *Id*. To succeed on a FMLA retaliation claim a petitioner "does not need to prove that retaliation was the *only* reason for her termination," but rather she must show that the protected conduct was "a substantial or motivating factor" in the employer's adverse employment decision. *Goelzer v. Sheboygan County Wis*., 604 F.3d 987, 995 (7th Cir. 2010).

"A 'pretext' is not merely a mistake or an imprudent reason; it is a false reason or a dishonest explanation, which, because of its falseness or dishonesty, raises a question as to whether the employer is hiding a discriminatory motive." *Vance v. Ball State Univ. et al*., 2008 U.S Dist. Lexis 69288, *59, (S.D. Ind. 2008, Hon. Sarah E. Barker) (discussing pretext in the Title VII context).

[3] Although the instant case contains elements of an FMLA-interference claim, the predominant issue is if there was retaliation against the Petitioner for the request of FML. To the degree that an interference claim is made by Petitioner, the inquiry here collapses into the retaliation claim under the designated facts.

IV. The designated evidence demonstrates genuine issues of material fact.

The following facts are taken from the designated evidence, as construed in the light most favorable to the Petitioner:

1. Petitioner King was at all relevant times an unclassified Nurse Supervisor for state agency Respondent IVH from October 12, 1999 to November 23, 2011. (Pet. Aff. ¶ 1)

A. The discipline facts

2. Petitioner King received a written reprimand from supervisor Connie Beutel (Beutel) on August 10, 2012 for a "failure to stay within approved overtime guidelines" and failure to attend an inservice meeting. (Resp. Ex. C)

3. Petitioner King received a One Day Suspension Without Pay from Connie Beutel on September 1, 2011 for "failure to stay at the facility . . . as directed . . . and your failure to notify your ADON that you were leaving the facility." Petitioner King refused to sign this discipline. (Resp. Ex. D)

4. On November 17, 2011, the Indiana State Department of Health (ISDH) visited IVH in response to a complaint and found that IVH was in substantial compliance with state and federal regulations. (Resp. Ex. E). However, during the inspection ISDH advised Tammy Hicks, the Director of Nursing for IVH, that there was no clip alarm on a patient's (A.J.) care plan. (Hicks' Aff. ¶ 6). On November 22, 2011, Hicks states that she met with Petitioner King, along with Beutel and Karen Hurst (Hurst) to "discuss her [Petitioner's] failure to put the clip alarm on the care plan" of patient A.J. and to inform King that "this was a serious issue and some disciplinary action would be taken." (Hicks' Aff. ¶ 8-9)

5. Petitioner King denied in a sworn affidavit that she had any meeting on November 22, 2011 or "any other day" with Hicks, Beutel or Hurst regarding the issue of the clip alarm on patient A.J.'s care plan. (King Aff. ¶ 8). Petitioner King has also designated evidence showing that a clip alarm was actually on the care plan of patient A. J. (Pet. Ex. I)

6. On November 23, 2011, Petitioner King's employment with Respondent IVH was terminated for failure to "update the careplan with all fall precautions" and "failure to follow through in checking the careplans for completeness, as well as [a] failure to obtain appropriate approval to leave work." (Pet. Complaint p. 2; Respondent's Brief, p.1)

7. Petitioner King denies that she failed to update the care plan for patient A. J. and has designated evidence showing written updates by King on patient A. J.'s care plan. The Petitioner also asserts that had she failed to update A. J.'s care plan common practice and her written performance expectations allows for up to three (3) "IVH's missed plans/necessary actions in a 6 month period." (King Aff. ¶ 25)

8. Petitioner King denies leaving work without obtaining appropriate approval on November 22, 2011 and asserts that she informed her immediate supervisor, Beutel, that she would be leaving due to illness and to see her doctor at "some time that day" and was given permission by Beutel to do so. (King Aff. ¶ 5) When King clocked out that day she informed the Staffing Office which then notified King's supervisor, Beutel. (King Aff. ¶ 6). King asserts that it was common practice to notify the Staffing Office of a departure due to illness and have that office relay the message to Beutel. (King Aff. ¶ 9; Pet. Ex. E)

9. At her doctor appointment, on November 22, 2011 King was diagnosed with very high blood pressure "which is potential stroke level" and her doctor provided her with a written certification of FMLA. (King Aff. ¶ 13)

10. Since the Petitioner has rebutted the alleged grounds for the discipline, she has demonstrated a question of fact over possible pretext of the Respondent's motives. *Goelzer v. Sheboygan County Wis*., 604 F.3d 987, 995 (7th Cir. 2010); *Vance v. Ball State Univ. et al*., 2008 U.S Dist. Lexis 69288, *59, (S.D. Ind. 2008).

B. The notice facts

11. Respondent IVH asserts that Petitioner King did not give adequate notice for taking FML. Respondent also asserts that Hicks had no knowledge of the Petitioner's submitted request for FML at the time she issued the termination letter for Petitioner. (Hicks Aff. ¶ 12).

12. On the afternoon of November 22, 2011 Petitioner King asserts that she gave verbal notice to her supervisor, Beutel, and a charge nurse supervisor, Milica von Stein, of the need to take FML after she left her doctor's office. (King Aff. ¶ 14; von Stein Aff. ¶ 6).[4]

[4] The adequacy of FMLA notice is a "fact specific question" and the notice requirements of the FMLA are not onerous. *Burnett v. LFW, Inc.*, 472 F.3d 471, 478-479 (7th Cir. 2006). Verbal notice, for instance, suffices and notice adequacy alone is usually insufficient to grant summary judgment.

13. On the afternoon of November 22, von Stein asserts that she received a phone call from Petitioner King stating that King's doctor put her on FML for two weeks. Von Stein then filled out a green sheet of paper documenting this and put it "in the administration outgoing box" and then went to Beutel's office and verbally told her that Petitioner King was requesting FML. (von Stein Aff. ¶ 6)

14. On the morning of November 23, 2011, Rena Washington, gave Petitioner King's FML paperwork to IVH Human Resources assistant Glinda Jones. (Washington Aff. ¶ 2)

15. Petitioner King was under a doctor's care for high blood pressure for approximately six months prior to the November 22, 2011 request for FML and had made her supervisors, Hicks and Beutel aware of her condition. (King Aff. ¶ 2)

16. Petitioner King's designated evidence shows that both verbal and written notice was given to Respondent IVH of her request to take FML. Therefore, there is a question of material fact as to whether adequate notice was given to Respondent.

17. Petitioner has shown that there is a possibility of suspicious timing between her request for FML to Respondent IVH and her subsequent termination of employment by Respondent.

V. Conclusions of Law & Analysis

1. Respondent IVH has asserted that Petitioner King was lawfully terminated under the at will employment doctrine. Respondent also contends a lack of FML notice.

2. Petitioner King has demonstrated she gave sufficient FML notice and rebutted Respondent IVH's reasons for her termination of employment creating questions of fact over pretext and causation. *Gary Comm. School Corp. v. Powell*, 906 N.E.2d 823, 830 (Ind. 2009); *Burnett v. LFW, Inc.*, 472 F.3d 471, 478-479 (7th Cir. 2006). Suspicious, or at least contemporary, timing is present in the termination decision. Ind. T.R. 56 requires denial of the summary judgment motion. An evidentiary hearing is necessary to determine under what circumstances the Petitioner was terminated.

3. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.

VI. Order Denying Respondent IVH's Motion for Summary Judgment

Respondent IVH's motion for summary judgment is **DENIED** in its entirety. The case shall proceed to an evidentiary hearing on February 13, 2013 as presently set. The parties are further **ORDERED** to discuss settlement to resolution or good faith impasse prior to the hearing date.

DATED: January 24, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
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