United States Court of Appeals
For the Eighth Circuit

No. 23-1502

Raymond Black

Plaintiff - Appellant

v.

Swift Pork Company, doing business as JBS

Defendant - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: January 11, 2024
Filed: August 28, 2024

Before LOKEN, KELLY, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

After Raymond Black left work one day, Swift Pork Company fired him. He claims that he went home to care for his sick wife. The company's position was that he stormed off after a supervisor gave him a different assignment than usual. On both of his Family and Medical Leave Act ("FMLA") claims, the district court sided with Swift at summary judgment. We reverse and remand on the interference claim, but otherwise affirm.

I.

As a skilled mechanic at one of Swift's pork-processing plants, Black was responsible for operating and fixing the loin-puller machine. He often worked alone.

Over the years, he had taken quite a bit of FMLA leave to care for his wife, who had severe cardiovascular disease. *See* 29 U.S.C. § 2612(a)(1)(C). Black was the one who usually took her to the emergency room when she experienced chest pains. In total, he had taken leave 158 times in three years, typically without a problem. All that changed one day when a dispute arose over whether he had abandoned his shift.

The trouble began when he arrived at the plant after being out for several weeks with pneumonia. His supervisor told him he would receive a different assignment, so he grabbed his tools and waited around until he was told to check the COVID dividers in the plant.

Once he finished, he asked his supervisor why he did not receive his usual assignment. The answer, which was that other employees needed training on it, surprised him. He then accused the company of punishing him for being out with pneumonia, but his supervisor assured him that the training was necessary to accommodate his frequent leave "before that." That way, his absences would not leave the plant in a bind.

Clearly unhappy with the new arrangement, Black announced that he would "take a vacation [u]ntil [they] figure[d] [it] out." He requested five days, the number of paid days he had accrued, but his supervisor denied it because there had been no advance notice. So did the two other managers he asked.

In lieu of vacation time, Black opted for FMLA leave again. His wife had been sick, so he headed home to take care of her after his supervisor let him go. He stayed home again the next day. After that, he just called in sick.

At the end of the week, Black met with the human-resources director and plant manager to discuss his decision to leave early. The parties dispute what was said during the meeting, but everyone agrees that the human-resources director called a few days later to tell Black that his employment with Swift was over.

After exhausting the union grievance process, Black sued Swift for interference and discrimination under the FMLA. *See* 29 U.S.C. §§ 2615(a)(1), (a)(2). The district court dismissed both claims at summary judgment.

II.

We review the grant of summary of judgment de novo. *See Nagel v. United Food & Com. Workers Local 653*, 63 F.4th 730, 733 (8th Cir. 2023). "Summary judgment is appropriate when the evidence, viewed in a light most favorable to the nonmoving party, shows no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Couch v. Am. Bottling Co.*, 955 F.3d 1106, 1108 (8th Cir. 2020) (citation omitted). At this stage, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A.

The FMLA allows employees to take "intermittent[]" leave to care for family members "when medically necessary." 29 U.S.C. § 2612(b)(1). Interference with it occurs when an employer "refus[es] to authorize FMLA leave" or takes action that "discourag[es] an employee from using" it. *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (quoting 29 C.F.R. § 825.220(b)). Black alleges that Swift did both by refusing to credit his absences as FMLA leave and then firing him for leaving work to care for his sick wife.

For his interference claim to succeed, he must show that "(1) [he was] entitled to a benefit under the FMLA, (2) the employer 'interfered with' that entitlement, and

(3) the reason for the denial [of the benefit] was connected to [his] FMLA leave." *Thompson v. Kanabec County*, 958 F.3d 698, 705 (8th Cir. 2020). "The initial burden of proof . . . is on the employee to show . . . that he . . . was entitled to the benefit denied." *Ballato v. Comcast Corp.*, 676 F.3d 768, 772 (8th Cir. 2012) (citation omitted). Entitlement to intermittent leave exists if the employee can show that his absence was both "medically necessary," 29 U.S.C. § 2612(b)(1), and "attributable to [a] family member's serious health condition," *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671, 674 (8th Cir. 2000).

No one disputes that, after 13 heart attacks, Black's wife suffered from a "serious health condition." *Id.* Rather, the issue is whether it was "medically necessary" for him to be at home to care for her those days. On this record, there is just enough evidence to create a jury question on that issue.

The FMLA paperwork from her doctor estimated that her cardiovascular disease would "flare up" approximately four times per month, with each occurrence lasting about two days. In response to a question about whether she "*need[ed]* care during these flare-ups," he answered "[y]es." (Emphasis added). The "medically necessary" care included "transportation to appointments" or to the "hospital in case of worsening chest pain [or shortness of breath]."

"[C]hest pains" were exactly what she reported "feeling that morning." At his deposition, Black claimed that he told his supervisor he was going "home on FMLA" because his wife was "not feeling very good." Although he did not provide much in the way of details, a jury could reasonably conclude, based on the symptoms she was experiencing and the doctor's paperwork, that his presence at home was "medically necessary." Especially if her chest pains worsened or she had trouble breathing to the point that she needed to go to the emergency room.

Swift thinks the evidence tells a different story. In its view, Black's wife did not need him at home, so he invoked FMLA leave to hide his true motivation for leaving, which was his anger at the reassignment. If true, then Black's "termination

[would have been] based on a reason unrelated to the FMLA." *Phillips v. Mathews*, 547 F.3d 905, 911 (8th Cir. 2008).

Some of the evidence supports Swift's theory. For one thing, Black initially decided to come into work, even though his wife had already been experiencing chest pains. For another, he first tried to use vacation days rather than FMLA leave, which arguably suggests that his wife's condition was not his true motivation for leaving. And third, there are inconsistencies between his wife's affidavit and the paperwork her doctor submitted. At this stage, however, there is evidence going both ways, and we must draw "all justifiable inferences . . . in [Black's] favor." *Anderson*, 477 U.S. at 255. What we have, in other words, is a classic dispute of material fact for a jury to resolve.

The same goes for the question of whether Swift "'interfered with' [Black's] entitlement" to FMLA leave. *Thompson*, 958 F.3d at 705. At a minimum, the evidence shows it may have interfered with Black's entitlement by refusing to treat his absences as covered by the FMLA. *See Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 853 (8th Cir. 2002). And possibly by firing him for walking off the job, assuming he had a right to take leave in the first place. *See Stallings*, 447 F.3d at 1050 (quoting 29 C.F.R. § 825.220(b)).

To be sure, Swift will have a chance "to prove there was a reason unrelated to [Black's] exercise of FMLA rights for terminating" him. *Ballato*, 676 F.3d at 772; *see Phillips*, 547 F.3d at 911 ("The burden is on the employer to prove the reason for termination was unrelated to FMLA."). But "[g]iven the evidence suggesting a causal connection between [the FMLA] and" his decision to leave that day, *Clinkscale v. St. Therese of New Hope*, 701 F.3d 825, 829 (8th Cir. 2012), a jury must ultimately decide whether Swift denied a benefit to him. *See Ballato*, 676 F.3d at 772; *see also Stallings*, 447 F.3d at 1050 ("An employee can prevail under an interference theory if he was denied substantive rights under the FMLA for a reason *connected* with his FMLA leave." (emphasis added)).

B.

The same is not true of his discrimination claim. *See* 29 U.S.C. § 2615(a)(2). The general rule is that an employer may not discriminate against an employee for taking FMLA leave. *See Brown v. Diversified Distrib. Sys., LLC*, 801 F.3d 901, 908 (8th Cir. 2015). The specific question for us is whether Swift fired Black because he took FMLA leave, which would be an "illegal motive." *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1160 (8th Cir. 2016); *see id.* (explaining that any bias must be on the part "of the decision[-]maker and must relate to the decisional process").

There is no evidence of one here. *See Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006) (requiring the plaintiff to show, among other things, that a "[discriminatory] motive played a part in the adverse employment action") (citation omitted). Black had taken FMLA leave 158 times in the nearly three years before Swift terminated him. This long-running use of it "without repercussions" undercuts any inference that Swift suddenly decided to discriminate against him. *Malloy v. U.S. Postal Serv.*, 756 F.3d 1088, 1091 (8th Cir. 2014); *see Evans v. Coop. Response Ctr., Inc.*, 996 F.3d 539, 552 (8th Cir. 2021) ("[W]hile terminating an employee for absences that were FMLA-eligible may establish an entitlement claim, it does not prove the discriminatory intent needed to establish a discrimination claim."). After all, why would it wait until the 159th time to do so? *See Evans*, 996 F.3d at 551 (emphasizing that it was "undisputed that [the plaintiff] successfully used FMLA leave on many occasions").

Negative comments about FMLA leave made by Black's supervisors are also not enough to create a genuine issue of material fact. They did not make the decision to fire him. *See Thompson*, 958 F.3d at 707 (explaining that a supervisor's discriminatory animus could not "demonstrate a bias from a decision maker" because he "did not have the authority to terminate"). And the managers who did acted independently by meeting with Black and hearing him out themselves, hardly a "delegat[ion] [of] the factfinding portion of the investigation to [a] biased

supervisor." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011); *see Lovelace v. Wash. Univ. Sch. of Med.*, 931 F.3d 698, 706 n.3 (8th Cir. 2019). The bottom line is there is not enough to get past summary judgment.

III.

We accordingly reverse in part and remand for further proceedings on the FMLA interference claim, but otherwise affirm.

LOKEN, Circuit Judge, concurring in part and dissenting in part.

I concur in Part II.B. of the court's opinion, which affirms the grant of summary judgment dismissing Raymond Black's FMLA discrimination claim. However, I conclude the district court was also correct in granting summary judgment dismissing Black's FMLA interference claim. Accordingly, I respectfully dissent from Part II.A. of the opinion and the court's decision to remand for further proceedings on that claim.

The FMLA provides that an eligible employee is entitled to statutorily prescribed leave "[i]n order to care for the spouse [who] has a serious health condition." 29 U.S.C. § 2612(a)(1)(C). Leave to care for a spouse "may be taken intermittently or on a reduced leave schedule when medically necessary." § 2612(b)(1). The Department of Labor regulations define "needed to care for a family member" as physical and psychological care where, because of a serious health condition, a family member is "unable to care for his or her own basic medical, hygienic, or nutritional needs or safety." 29 C.F.R. § 825.124; see § 825.202(b).

The parties cited "no binding authority examining the need-to-care standard," but the district court found guidance in our unpublished decision in Miller v. Neb. Dep't of Econ. Dev., 467 F. App'x 536, 539-41 (8th Cir. 2012), in which we affirmed the district court's decision that the plaintiff employee "failed to raise a jury question

as to whether he used his absences from work to provide [his cancer-stricken father] with necessary care." Here, the court found it undisputed that Black left work in the middle of his shift on June 16, telling Supervisor Patrick Griffith he intended to use FMLA leave for the rest of his shift, and then used the time off at home with his wife, who suffered from a serious health condition, where he performed activities that related to her medical and hygienic needs. But "the pivotal question is whether Black's assistance was necessary to meet those needs." The court concluded that Black failed to meet his "burden to show that this time off was within the protection of the FMLA":

> As in Miller, the conclusory affidavit [from Black's wife] on which [he] relies is not enough to create a jury question as to the medical necessity of his leave. The undisputed facts surrounding Black's absence demonstrate that his decision to leave the plant was discretionary, not necessary. . . . He advances no evidence suggesting that, prior to his confrontation with his supervisors, he believed [his wife] needed his care. . . .
>
> Black alleges he had intended to take time off to help [his wife] prior to his confrontation with Griffith and that he first requested vacation only because his vacation time was paid and FMLA leave was not. However, Black did not ask to take vacation for June 16th. His unapproved request form clearly shows that he sought to begin his vacation the following day. Black also argues that the FMLA certification from [his wife's] doctor shows that [she] required Blacks' assistance with medication and oxygen. . . . The [FMLA] certification is not as broad as Black asserts and does not generate a question of fact. [Her] doctor certified only that [she] would need (1) help with transportation to medical appointments in the event of intermittent "flare-ups" in her condition and (2) help with "medications [and] oxygen" in the event of a "single continuous period" of incapacitation involving "hospitalizations." There is no dispute that [she] had no medical appointments on June 16th, and Black does not allege [she] had recently been hospitalized. . . . On the record before the Court, no reasonable juror could find that Black's use of intermittent leave on June 16th was medically necessary for [his wife's] care. See Miller,

> 467 F. App'x at 539; Overley [v. Covenant Transp., Inc., 178 F. App'x 488, 495 (6th Cir. 2006) (unpublished)].

I agree with the district court's analysis of the summary judgment record regarding Black's belated request for FMLA leave on June 16, and with the court's conclusion that whether his absence on June 17 was designated as FMLA "is immaterial, as he cannot establish a claim for interference based on an attendance point that was never used against him." Accordingly, I would affirm.
