UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MATHEW BILA,

Plaintiff,

v.

Case Number 03-10177-BC
Honorable David M. Lawson

RADIOSHACK CORPORATION,

Defendant.
_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO COMPEL DEPOSITION OF PLAINTIFF'S WIFE

The defendant, RadioShack Corporation, has filed a motion for summary judgment seeking a dismissal of the plaintiff's claim that it retaliated against him for exercising his rights under the Family and Medical Leave Act, (FMLA) 29 U.S.C. § 2601 *et seq.*, and interfering with his exercise of those rights. The Court has reviewed the submissions and finds that the relevant law and facts have been set forth in the motion papers and that further oral argument will not aid in the disposition of the motions. Accordingly, it is **ORDERED** that the motions be decided on the papers submitted. *See* E.D. Mich. LR 7.1(e)(2). The Court finds that the plaintiff has come forward with evidence that creates material fact questions that must be resolved by a jury. The motion for summary judgment, therefore, will be denied.

I.

The plaintiff began employment as a sales associate with defendant RadioShack in Saginaw, Michigan on June 13, 1995. On May 30, 1997, the plaintiff became a store manager for the defendant's Midland, Michigan store. RadioShack asserts that store managers usually work fifty-two to fifty-four hours per week over five to six days in a workweek. While the store manager is

new and developing skills or learning a new store, RadioShack typically expects its managers to work fifty-four to sixty hours per week. RadioShack also expects its stores to meet certain sales goals and awards bonuses to managers with high sale volumes.

Bila received numerous awards for his performance as manager, including awards for being "Outstanding Manager in the District for the Month." He had no difficulty with his supervisors until a November 2000 incident with Scott Burke, his district manager. Bila informed Burke that an employee was cheating on an in-store sales contest. Burke said that he and the regional sales manager, Saeed Rouhifar, would handle the situation and ordered Bila not to report the incident to RadioShack's loss prevention department. Although Bila did not contact loss prevention directly, he reported the incident to RadioShack's sales promotion department, which soured his relationship with Burke.

In January 2001, the plaintiff requested FMLA leave due to the anticipated birth of his second child. He sent a leave request via telefax to the defendant's district office in Livonia, Michigan. Bila received no response and, at Burke's request, he submitted another leave application on February 15, 2001 covering the period from March 1, 2001 (or earlier depending on the actual date of his child's birth) to March 31, 2001. Both Burke and Rouhifar contacted RadioShack's People Services department to determine Bila's eligibility for FMLA leave. The People Services department incorrectly informed Bila's supervisors that the plaintiff was eligible for FMLA leave only if his wife needed medical attention and that the plaintiff could be granted only a personal leave of absence. The supervisors in turn told Bila that only four weeks of personal leave would be available to him.

Bila's son was born on Wednesday, February 21, 2001. Bila had not been scheduled to work on February 19 and 20, and he missed the next two days of work without contacting Burke. Burke initially was unaware that Bila was scheduled to miss work on the 19th and 20th, and he became frustrated when he could not make contact with Bila for most of the week. When Bila returned to the store on Friday, he called Burke to inquire about his requested leave. Burke informed Bila that the leave request had been granted, but that the leave could not begin until Bila, the substitute store manager, and Burke reviewed the store's inventory. On that Saturday, Bila did not report to work until 6 p.m. Within a day or two at around midnight, they completed the inventory and Burke presented two memos to Bila. One memo detailed the leave granted the plaintiff and requirements for the plaintiff to check-in periodically during his leave. The other memo, dated February 27, 2001, counseled Bila on his recent performance deficiencies from at least "March 17" [sic], 2001. Def.'s Mot. Summ. J. Ex. D. It stated that Burke expected Bila to maintain better contact and to work until 6 p.m. on Saturdays unless authorized to leave early. Bila refused to sign for receipt of the memos because he objected to Burke's delay in presenting the papers until the end of a long day and not mentioning the problem during the previous twelve hours, and Bila "[didn't] believe a word in them." Pl.'s Resp. Br. Ex. 2, Mathew Bila Dep. at 54-55.

On March 12, 2001, while on leave, Bila contacted RadioShack's People Services department and inquired whether he was entitled to take FMLA leave. The defendant's People Services Manager, Lori Youngblood, informed Bila that he was eligible to take leave under the FMLA as the father of a newborn child. Bila contacted Burke on March 26, 2001 as Burke ordered. Bila requested that his leave be extended to the full twelve weeks allowed by the FMLA. Burke told Bila to speak with Rouhifar about extending the leave. According to the plaintiff's testimony,

Rouhifar "ignored" Bila's request and informed Bila that he could not return to work without signing Burke's memos. The plaintiff subsequently signed the memos, adding extensive comments. The plaintiff's handwritten comments on the memos were as follows:

> Since this is not the standard approval for leave of absence, I first refused to sign it as it was just another instance of singling me out and harassing me. I believe whole heartedly that this in conjunction to the next write up were nothing but a harassing invitation to quit as soon as inventory was complete. They were not presented at any time during the sixteen hours we were here but at midnight after inventory was complete. I am only signing now under duress because I was told that if I didn't, I would no longer have a job. I'm not even sure if that is legal but I can't afford not to have a job and not be able to support my family. In addition, this was approval for personal leave. I had asked for Family Medical Leave because of the birth of my son. I was told I did not qualify for Family leave and therefore it was changed to personal and limited to four weeks. This left me with no chance to extend or take more later. A simple copy of approval of leave as seen in exhibit section of SOM [Store Operating Manual] would have sufficed.

Def.'s Mot. Summ. J. Ex. C.

> Totally, thoroughly disagree with this whole situation and write up. Once again, harassment at its best. Not going to details about which parts and disagree with [sic]. Let's just say that it should be filed in trash recepticle [sic] because that's what it is. Can't argue with it because I already tried and it's quit [sic] apparent that what I say does not matter. I'm a pawn in a hostile environment that must follow orders or be given my release. Therefore I must sign a paper that is nothing but falsehoods or I will be fired.

Id. Ex. D.

The plaintiff returned to work in early April 2001. At the end of April, Rouhifar offered the plaintiff a position as Store Manager in Fort Wayne, Indiana. The plaintiff considered the move and testified that initially he told Rouhifar that he did not want the position because he did not want to relocate and he felt that the position "wasn't that big of an increase." Def.'s Mot. Summ. J. Ex. A, Mathew Bila Dep. at 86. The plaintiff testified further that Rouhifar responded by saying that if Bila did not take the position he "would not be offered another promotion." *Ibid*. Subsequently, Bila

decided to accept the position. He began work in RadioShack's Fort Wayne, Indiana store in early May 2001. However, Bila testified that he felt unready to relocate until the middle of June when summer vacation from school would begin for his older son.

Bila testified that his first meeting with his new supervisor, district manager Gary Carleton, seemed to set the tone for their relationship. Bila inquired about moving expenses. He also told Carleton that he would be interested in taking the remainder of his FMLA leave at some point. According to the plaintiff's testimony, Carleton said that he was unfamiliar with the FMLA but would "check into it and see what he could do to help out on it," but also commented that he knew about Bila's problems with getting to work on time and leaving early. *Id.* at 95, 101. Bila felt that the comment was inappropriate because it was made in the presence of Bila's future subordinates. Bila also testified that he left the room when he became offended by Carleton's jokes about Mexican women and a gay employee at another store.

About a week later, the plaintiff and Carleton met for dinner to discuss business. The plaintiff told Carleton that he almost felt like quitting when they were introduced because Carleton embarrassed him in front of the staff at the store and because of Carleton's tasteless comments. Despite this, the two were friendly and the plaintiff described the dinner meeting as a cordial and clear exchange of ideas.

In reference to the transfer to Fort Wayne, Burke had told Bila that RadioShack would reimburse moving expenses, including hotel costs for up to sixty days. After the plaintiff began work in Fort Wayne, Burke called Bila and explained that hotel expenses would only be reimbursed for two weeks, according to company policy.

On May 20, 2001, the plaintiff telefaxed a request for more FMLA leave to Carleton. Bila, Carleton, and Rouhifar had a conference call soon after. The plaintiff testified Carleton and Rouhifar asked him if he had relocated yet. The plaintiff responded he had not begun to look for a place to live. Further, the plaintiff testified that Carleton and Rouhifar raised concerns about the plaintiff's hours of availability at the Fort Wayne store. Apparently, confusion resulted from the fact that Rouhifar and Carleton expected the plaintiff to relocate immediately upon taking the position in Fort Wayne, while the plaintiff did not intend to move for sixty days.

A few days later, Carleton responded to the FMLA request by asking the plaintiff why he had not brought up the subject of his requested leave during the conference call. Bila answered that he thought Carleton was already aware of the request.

On May 29, 2001 Rouhifar spoke with Youngblood regarding the plaintiff's second FMLA leave request. Def.'s Mot. Summ. J. Ex. E. According to Youngblood's notes, Rouhifar "claimed that [the plaintiff] had engage[d] in unethical behavior and [Burke] let him know." *Ibid*. Rouhifar's version of the "unethical behavior" was the plaintiff's alleged representation that he was moving when he apparently intended to take sixty days to finalize new living arrangements in the new town. Pl.'s Resp. Br. Ex. 4, Rouhifar Dep. at 36. Youngblood's notes indicate that Rouhifar wanted to turn down the plaintiff's second FMLA request. Youngblood further indicated in her notes that she advised Rouhifar to grant the plaintiff's leave request, that it is unlawful to interfere with an employee's FMLA request, and that the issue of the plaintiff's performance was to be treated separately from his FMLA request.

However, the plaintiff testified that Rouhifar told him he should not take the additional FMLA leave. He stated:

> "[Rouhifar] told me . . . we already gave you leave once, I just brought you down to [Fort Wayne] to help this store out. You've only been here a month. If you go out on leave again, you are setting this store back further than it was before, and that's not a good business idea."

Def.'s Mot. Summ. J. Ex. A, Mathew Bila Dep. at 141. Nonetheless, Rouhifar did not forbid Bila from taking leave. The plaintiff requested leave from June 21 to August 20, 2001. These dates did not suit his supervisors. They granted Bila leave from June 8 to August 9, 2001, although initially they wanted Bila to return on August 3, 2001. In all, Bila would receive a total of fourteen weeks of leave for his two leave periods.

After speaking with Youngblood on May 29, 2001, Carleton sent Youngblood weekly time reports for the Fort Wayne store detailing the hours the plaintiff worked since his transfer. After reviewing the reports, Youngblood drafted a letter describing workweek expectations and outlining assistance the defendant provided for relocating employees, which Carleton delivered to Bila. Bila signed the letter upon receipt and added comments that he felt the fact that he did not receive the dates of leave he requested was "harassment." The plaintiff further stated that he "would like to take [Carleton] up on his offer to transfer to Michigan." Def.'s Supp. Exs. Ex. F, Lori Youngblood Aff. at ¶ 10. However, RadioShack insists that there were no openings for managers in Michigan stores, although it appears that the manager that Bila replaced in Indiana was transferred to a store in Ann Arbor.

The plaintiff began his FMLA leave on June 8, 2001 and contacted Carleton as required on July 6, 2001. The plaintiff testified that he and Carleton discussed the possibility of the plaintiff transferring to a Michigan store. Within a day or two, the plaintiff received a message from Carleton stating the plaintiff should set forth his desire to move to a Michigan store, and Bila responded with a telefaxed letter to Carleton stating that he wanted a transfer. The plaintiff next spoke with Carleton

on July 20, 2001, the next date required for him to check-in with his supervisor. During this conversation, Carleton told the plaintiff plainly that the plaintiff would not be able to transfer to a Michigan store and that he either must report to the Fort Wayne store on August 9, 2001 or be fired.

Bila expected to conduct an inventory before assuming responsibility for the store, and he returned to work on August 9, 2001 at approximately 4:30 p.m. Carleton claims that he had ordered a 4:00 p.m. start time, so Bila arrived a half-hour late. Bila claims that traffic on his drive from Michigan slowed him down. The defendant alleges that Carleton expected Bila to begin work in the morning, since Carleton was not available to do inventory at 4:30, and he told the plaintiff by phone that he would contact the plaintiff the next day. The plaintiff drove home to Michigan, arriving in the early hours of the next day. In the meantime, Carleton had left a message with Bila's wife, which Bila alleges instructed him to report to Carleton's office in the morning or to call there. The defendant disputes whether Carleton gave Bila an option to call. Bila allegedly called Carleton the next morning between approximately 11:00 a.m and 12:00 p.m, however Carleton claims that Bila called around 1:30 p.m. Carleton told the plaintiff that he had not expected the plaintiff to return to work as he believed Bila had resigned as a result of the plaintiff's having "hung up" on Carleton during their July 20 conversation. Carleton then informed the plaintiff that he had conferred with Rouhifar who instructed him to place the plaintiff on "administrative payroll" and have the plaintiff "fill-in" at other stores until "they were sure of [the plaintiff's] commitment and dedication." Pl.'s Resp. Br. Ex. 2, Mathew Bila Dep. at 179. Because he was on administrative payroll and not in his position as manager of the Fort Wayne store, the plaintiff was not eligible for monthly bonuses and would not earn commissions on sales. The plaintiff testified that when told he would be placed on administrative payroll, he pressed Carleton for details and inquired why he was not allowed to return

to his previous position. Carleton told the plaintiff that he was being "insubordinate" and later in the conversation told the plaintiff that he "no longer had a place for [the plaintiff] in his district." *Id.* at 182-183. Carleton told the plaintiff that if he had any further questions he could contact Rouhifar.

The plaintiff proceeded to contact Rouhifar, who told the plaintiff that he felt the plaintiff was insubordinate and not dedicated or committed to his store. Rouhifar also said that the plaintiff had set the store back by working for a month and then taking FMLA leave, mentioned the plaintiff's failure to move to Fort Wayne, and told plaintiff that he was insubordinate and not a team player. Rouhifar finally told the plaintiff that "[Carleton] does not have a place for you in the district, I don't have a place for you in the region." *Id*. at 186. When he realized that he had been fired, the plaintiff testified he started crying and screaming and used profanity toward Rouhifar. Rouhifar later sent People Services Manager Youngblood an e-mail recounting the plaintiff's comment as not only using profanity but also uttering an ethnic slur. Bila disputes saying the slur. Following the incident, Youngblood had Carleton and Rouhifar submit reports detailing their conversations with the plaintiff. Youngblood testified that upon hearing of the plaintiff's remark to Rouhifar, she concluded that his firing was appropriate. The plaintiff's supervisors fired the plaintiff on August 13, 2001.

The plaintiff began working for Family Video as a manager trainee shortly after his conversations with Carleton and Rouhifar. The plaintiff had applied for employment with Family Video prior to being fired by the defendant because he believed the defendant was "not going to let [him] come back." Pl.'s Resp. Br. Ex. 2, Mathew Bila Dep. at 257. The plaintiff initially testified that he left his job with Family Video because the position required him to travel too far each day. The plaintiff later testified that he did not resign but was fired over a disagreement with his

supervisor. The defendant contends that Family Video fired the plaintiff for stealing from his store, although when the plaintiff later challenged his denial of unemployment benefits, an administrative law judge reinstated the plaintiff's benefits finding the theft charge questionable. The plaintiff testified he did not commit the theft.

The defendant states that during discovery it determined that the plaintiff had committed material resume fraud in his initial application for employment, which would have resulted in the plaintiff's termination had it been discovered during his employment. On his application, the plaintiff indicated he had not been convicted of a crime in the previous seven years. The plaintiff's criminal history, however, includes a number of convictions falling in this time period. The plaintiff admits lying on the application for employment, but states his supervisors became aware of his criminal history after he began employment. Bila testified that when he began working at RadioShack, he told his first store manager that the prior convictions had not been disclosed on the employment application and that the manager told him not to worry about it. Another store manager learned of Bila's convictions through conversation. This manager apparently had senior status and the authority to fire employees.

The plaintiff filed a complaint in this Court alleging that his termination violated the Family and Medical Leave Act because his employer retaliated against his exercise of right to take leave for the birth of his son. He also alleged that the termination was motivated in part by his complaint about Carleton's sexual comments; he brings that claim under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.* On May 10, 2004 this Court entered an order dismissing the plaintiff's Elliott-Larsen claim based on the parties stipulation. The defendant moved for summary judgment contending that the plaintiff cannot make out a *prima facie* case for unlawful

termination contrary to the FMLA, and that even if a *prima facie* case is established the plaintiff cannot show that the defendant's stated reason for terminating the plaintiff is pretextual. The defendant also argues that even if it improperly terminated the plaintiff, the plaintiff's damage claims are barred due to his failure to mitigate damages and because of after-acquired evidence that RadioShack would have used to terminate Bila.

II.

A motion for summary judgment under Fed. R. Civ. P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. NASA*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Simmons-Harris v. Zelman*, 234 F.3d 945, 951 (6th Cir. 2000). Thus a factual dispute which "is merely colorable or is not significantly probative" will not defeat a motion for summary judgment which is properly supported. *Kraft v.*

United States, 991 F.2d 292, 296 (6th Cir. 1993); *see also Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999).

The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record which demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Per. Care Home, Inc. v. Hoover Univ., Inc.*, 276 F.3d 845, 848 (6th Cir. 2002). The party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact" but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet his or her burden of proof, summary judgment is clearly proper. *Celotex Corp.*, 477 U.S. at 322-23. However, summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

The party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991). "[T]he party opposing the summary judgment motion must 'do more than simply show that there is some "metaphysical doubt as to the material facts."'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994), and

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)). "Thus, the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ibid.* (quoting *Anderson*, 477 U.S. at 252; internal quote marks omitted).

The Family Medical Leave Act grants to eligible employees, such as the plaintiff in this case, up to twelve weeks leave of absence from work for "the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1)(A). If the employee returns to work within twelve weeks, he or she is entitled to the prior job, or to an equivalent position if the prior job is no longer available. 29 U.S.C. § 2614(a)(1). An employer is prohibited from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided" under the FMLA, and may not discharge or discriminate in any way against an employee for opposing practices that are unlawful under the FMLA. 29 U.S.C. § 2615. The FMLA creates a right of action allowing employees to recover damages and equitable relief from employers who violate the Act. *See* 29 U.S.C. § 2617(a)(1).

A.

> To establish a claim of "interference" with FMLA rights, a plaintiff must show that:
>
> > (1) he is an "[e]ligible employee," 29 U.S.C. § 2611(2); (2) the defendant is an "[e]mployer," 29 U.S.C. § 2611(4); (3) the employee was entitled to leave under the FMLA, 29 U.S.C. § 2612(a)(1); (4) the employee gave the employer notice of his intention to take leave, 29 U.S.C. § 2612(e)(1); and (5) the employer denied the employee FMLA benefits to which he was entitled.

Cavin v. Honda of Am. Mfg., Inc. 346 F.3d 713, 719 (6th Cir. 2003); *see also Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 244 (6th Cir. 2004) (rejecting defendant's argument the Act requires restoration only within a "reasonable time"). The plaintiff contends that the defendant interfered

with his right to take FMLA leave by initially agreeing to grant only personal leave of four weeks, discouraging him from pursuing the balance of his FMLA leave after the transfer to Fort Wayne, Indiana, and not restoring him to a manager's position at the conclusion of his leave.

Under the Secretary of Labor's regulations, "'[i]nterfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). However, in this case the undisputed evidence shows that the plaintiff actually received his allotted FMLA time off work after the birth of his second son. "[A] plaintiff suffers no FMLA injury when []he receives all the leave []he requests." *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1275 (11th Cir. 1999); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (observing that "§ 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost 'by reason of the violation,' § 2617(a)(1)(A)(i)(I), for other monetary losses sustained 'as a direct result of the violation,' § 2617(a)(1)(A)(i)(II), and for 'appropriate' equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B)"). Consequently, the Court finds as a matter of law that the plaintiff's interference claim based on the erroneous advice he received concerning his entitlement to FMLA leave or the comments by regional manager Rouhifar attempting to dissuade him from taking more leave shortly after his transfer to Fort Wayne must fail.

The claim that the defendant did not restore the plaintiff to an equivalent manager position upon his return fairs better. It is undisputed that the plaintiff was put on administrative payroll after his leave with the consequence that he was not eligible for monthly bonuses or sales commissions. The defendant asserts that it was standard procedure not to install a store manager at a new location

until after an inventory was completed, and the plaintiff was placed on administrative payroll until the Fort Wayne store's inventory was taken. The defendant notes that "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." 29 C.F.R. § 825.312(d). However, that same regulation allocates to the employer the burden of justifying failure to restore for reasons other than leave-taking. *See ibid.* (stating that "[a]n employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment"). It is not at all clear from the evidence that placement on administrative payroll under the circumstances was a well-known or standard procedure. In fact, regional manager Carlton testified concerning that procedure as follows:

> Q. Okay. What did the administrative position involve?
> A. I have no idea.
> Q. Well, you told Mat Bila you would be putting him in an administrative position; right?
> A. Correct.
> Q. Well, what was your understanding of what that meant for Mat Bila's position?
> A. I have no idea.
> Q. Okay. Well, who told - -
> A. I was instructed by Saeed Rouhifar to give that to him.

Reply Df.'s Mot. Summ. J. Ex. DD, Carleton Dep. at 34. Moreover, there is evidence that Carlton told the plaintiff that Carlton and regional manager Rouhifar decided to place the plaintiff on administrative payroll "until they were sure of [his] commitment and dedication." Df.'s Mot. Summ. J. Ex. 2, Bila Dep. at 179.

The evidence establishes a question of fact as to whether the defendant interfered with the plaintiff's rights under the FMLA by failing to restore him to an equivalent position.

B.

The Act also protects employees from retaliation for exercising their rights under the FMLA. *See Chandler v. Specialty Tires of Am. (Tennessee), Inc*., 283 F.3d 818, 825 (6th Cir. 2002) (citing 29 U.S.C. § 2615(a)(1)). To establish retaliation, a plaintiff "must show: (1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action." *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 814 (6th Cir. 1999) (citing *Penny v. United Parcel Service*, 128 F.3d 408, 417 (6th Cir. 1997)). The defendant does not challenge in its summary judgment motion the first two elements of the plaintiff's retaliation claim. Rather, the defendant claims that there is no evidence of a causal link between the plaintiff's taking FMLA leave and his termination.

A plaintiff may prove that an employer's adverse action was retaliatory by offering either direct or circumstantial evidence. *See Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309, 315 (6th Cir. 2001). The plaintiff here has not come forward with any direct evidence of retaliation, so the Court must view the record in light of the familiar the *McDonnell-Douglas* burden-shifting analysis that is employed to evaluate a circumstantial case. *Ibid.* Under that construct, the plaintiff first must prove a *prima facie* case. Then the burden shifts to the defendant to come forward with a legitimate, non-discriminatory reason for the adverse action. If the defendant meets that burden, then the plaintiff must offer evidence to create a fact question on whether the defendant's proffered reason is a pretext for discrimination. *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 417 (6th Cir. 2004).

A *prima facie* case is established if the plaintiff provides evidence from which a reasonable jury could conclude that (1) he engaged in protected activity; (2) the exercise of his protected civil rights was known to the employer; (3) the defendant thereafter discharged him; and (4)

circumstances suggest that the discharge was due to the protected activity. *See Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990).

Once again, in this case it is the last element that the defendant attacks, contending that the plaintiff cannot establish that his discharge was on account of the FMLA leave that he took. Rather, the defendant insists that the plaintiff was fired as a result of ongoing difficulties with his supervisors and insubordination. Indeed, the record suggests several bases for the defendant's displeasure with Bila's performance, including reporting the contest cheating to the RadioShack Sale Promotion Department; failing to maintain the condition of the Indiana store; insulting comments to his managers; insubordination related to relocation expenses, work hours, and transfer back to Michigan; being unresponsive; declining to relocate as ordered; and allegedly failing to follow Carleton's instructions to report in person on August 10, 2001.

However, the existence of reasons other than retaliation for terminating an employee does not absolve an employer from liability under the FMLA, since the employee need only prove that the illegal motive was "a" factor in the adverse employment action. *See Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003) (noting that the plaintiff "did not need to prove that discrimination was the sole reason for his termination"). In this case, the plaintiff points to the fact that the discharge occurred immediately after the plaintiff completed his leave, which raises an inference of illegal motivation. But the defendant insists that proximity between the adverse action and the protected activity is not sufficient to prove causation.

Proximity of time between notice and adverse employment action usually, by itself, will not provide sufficient evidence of causation to survive summary judgment. *Chandler*, 283 F.3d at 826; *compare id. with Ford v. Gen. Motors Corp.*, 305 F.3d 545, 555 (6th Cir. 2002) (finding temporal

proximity sufficient where Title VII retaliation started immediately after the protected conduct occurred) and *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582-83 (6th Cir. 2000) (finding *prima facie* case for retaliation made when alleged retaliatory activity started the same day the complaint was made). However, the combination of proximity in time with other evidence, such as that, following the protected activity, the plaintiff was treated differently from similarly-situated individuals, can suggest a causal connection sufficient to establish a *prima facie* case of retaliation. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). This so-called "timing-plus" test can be satisfied by hostile comments from supervisors, but such comments are not probative of causation unless the supervisor in question was part of the process that led to the adverse action suffered. *See Smith v. Leggett Wire Co.*, 220 F.3d 752, 759 (6th Cir. 2000) (collecting Sixth Circuit cases on this rule, and finding that discriminatory comments made by co-workers other than the those who terminated the plaintiff were not probative of causation); *see also Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998) ("An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of . . . discrimination."); *cf. id.* at 355 (noting that "the discriminatory remarks of those who may have influenced the decision not to reassign the plaintiff to other positions in the company may be relevant when the plaintiff challenges the motive behind that decision").

In this case, the plaintiff has shown that he asked for FMLA leave for a purpose recognized by Congress – the birth of a child – and initially was refused; when he returned from personal leave he was transferred out of town contrary to his wishes; when the employer's "mistake" was uncovered and the plaintiff asked for the balance of the leave to which he was entitled, his regional supervisor attempted to discourage him from taking the leave; when the plaintiff met with his district

supervisor at Fort Wayne, Carlton, and asked to take the rest of his FMLA leave, Carlton stated that he was familiar with the plaintiff's "problems" with getting to work on time and leaving early, apparently referring to the incidents that occurred during the week in which the plaintiff's son was born; when the plaintiff attempted to return immediately following his FMLA leave and learned he was placed on administrative payroll, his questions to Carlton about the details of that status were deemed insubordinate; and when the plaintiff followed up with questions to the regional supervisor Rouhifar, he was fired. Based on this chain of events, a fact finder could infer that the plaintiff's supervisors were reluctant to comply with the FMLA, and that when the plaintiff insisted upon exercising his statutory right the defendant made working conditions unpleasant for the plaintiff and ultimately fired him when he refused to quit after his transfer out of town. Although a fact finder would not be compelled to make that inference, it is certainly permitted by the evidence presented, and under the indulgent summary judgment standard the Court is satisfied that the plaintiff has made out a prima *facie case* that includes the element of causation.

The defendant has stated valid, non-discriminatory reasons for terminating the plaintiff: insubordination and the failure to get along with his supervisors. The plaintiff, therefore, must show that these reasons are a pretext that mask the defendant's retaliatory intent. In this circuit, a plaintiff can demonstrate pretext "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003). A leading Sixth Circuit case, *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994), provides a thorough gloss on each of these methods of proving pretext. There, the court explained that the first method consists of a challenge to the factual basis for the employer's claim – i.e. "evidence that the

proffered bases for the plaintiff's discharge never happened." *Id.* at 1084. When using this method, the plaintiff need not introduce additional evidence of discrimination beyond his *prima facie* case. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"). The second method usually encompasses an acknowledgment by the employee that events proffered by the employer actually occurred and that they *could* justify dismissal, but it adds the argument that the employer's proffered reason was not the true motivation. "In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a . . . coverup." *Manzer*, 29 F.3d at 1084. The third method calls for a comparison of the treatment of similarly-situated employees outside the protected group, demonstrating that they "were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Ibid.*

The plaintiff's pretext arguments focus on the first two bases but not the third. The plaintiff argues in essence that he in fact was not insubordinate, at least not before his outburst at regional manager Rouhifar *after* he was fired, and his performance was not deficient. He also contends that the defendant's complaints about the plaintiff not getting along with his supervisors was not the real reason he was fired when he returned from his FMLA leave and reported to his new location in Fort Wayne.

It appears that the basis for the defendant's claim of insubordination is that the plaintiff criticized his supervisors for upbraiding him over the confusion in connection with his absence from and return to work around the time of his son's birth, for his equivocation over his willingness to

transfer to Fort Wayne, and his persistent questioning of Carlton on the issue of placement on administrative payroll. However, the comments the plaintiff made when he eventually signed the February 27, 2001 memo contained valid objections to his treatment, given the fact that the defendant improperly denied him leave under the FMLA when his child was born. Although this mistake was eventually corrected by the defendant, the plaintiff was not insubordinate for questioning the defendant's criticism of him at the time. According to the plaintiff's version of the events surrounding the transfer to Fort Wayne, he reported to the new store as directed, and he followed guidelines that his former district managed had given him concerning relocation. His questioning of Carlton about placement on administrative payroll was not inappropriate. The record contains conflicting reasons for this move: the defendant argues that it was standard procedure when a new manager goes into a store, while district supervisor Carlton had not heard of the procedure and told the plaintiff that regional supervisor Rouhifar ordered it as an interim measure until he could be sure that he would keep the plaintiff. The record therefore contains questions of fact on the genuineness and validity of the defendant's proffered reasons for terminating the plaintiff.

There is also a question on whether those reasons actually motivated the discharge. The record demonstrates that the plaintiff's tone with his supervisors was somewhat petulant and combative, and he did not conceal his displeasure with having to transfer out of Michigan and move his family. However, the record discloses a sequence of events in which the plaintiff was denied his proper request for FMLA leave, he took personal leave and was transferred to another city against his wishes shortly after he returned, he insisted on his rights to extended leave under the FMLA, regional manager Rouhifar attempted to discourage him from taking the leave because it would be harmful to the company, the plaintiff took his leave despite Rouhifar's comments, immediately upon

return he was placed on administrative payroll because Rouhifar was in doubt about the plaintiff's commitment to the company, the plaintiff questioned Carlton and later Rouhifar about this move, and both Carlton and Rouhifar responded by saying that the plaintiff no longer had a place in the district or region, and he was fired. The Court believes that, if viewed in the light most favorable to the plaintiff, a fact finder could infer from these events that the true reason Rouhifar fired the plaintiff was in retaliation for taking FMLA leave, and that the claim of insubordination was a pretext that masked the defendant's illegal motive.

The Court will therefore deny the defendant's motion for summary judgment on the plaintiff's retaliation claim.

C.

The defendant also contends that the plaintiff took a job with Family Video in Lansing, Michigan the day following his termination from RadioShack and therefore suffered no damages in the form of back pay. Although the plaintiff lost that job three months later, the defendant contends that the plaintiff's termination from Family Video resulted from his own misconduct and his separation memo contains the plaintiff's acknowledgment of committing theft. The plaintiff initially testified that he resigned from Family Video because the position required him to travel too far each day. He later testified that he did not resign but was fired over a disagreement with his supervisor. Family Video apparently fired the plaintiff for stealing from his store, but when the plaintiff later challenged his denial of unemployment benefits, an administrative law judge reinstated the plaintiff's benefits finding the theft charge questionable. The plaintiff testified he did not commit the theft, and he says that the statement on the separation memo was added after he signed it. The

defendant filed an affidavit confirming that the theft admission was written by someone else, but the affiant avers that the language was added with the plaintiff's knowledge and consent.

Employers who violate the FMLA shall be liable for "any wages, salary, employment benefits, or other compensation denied or lost to [the] employee by reason of the violation." 28 U.S.C. § 2615. "A backpay award should make the claimant whole, that is, to place him in the position he would have been in but for discrimination." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983). Because an employee has a duty to mitigate damages, the Sixth Circuit has held that an employer's liability for back-pay is tolled when an "employee suffers a willful loss of earnings." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1168-69 (6th Cir. 1996). Therefore, gross misconduct or a willful violation of company rules that results in an employee's discharge from subsequent employment will discharge an employer's liability to provide back-pay. *Id*. at 1169.

The defendant is entitled to assert this defense, but as noted above the issue is particularly fact-bound and cannot be adjudicated in summary fashion as a matter of law. The issue must be resolved by the fact finder at trial.

D.

Lastly, RadioShack argues that after it fired the plaintiff it discovered that he had lied on his resume by stating that he had no prior criminal convictions when in fact he had been convicted of several counts of burglary in Saginaw, Michigan in 1989. The plaintiff admits lying on the application for employment, but states his supervisors became aware of his criminal history after he began employment. Bila testified that when he began working at RadioShack, he told his first store manager that the prior convictions had not been disclosed on the employment application and that

the manager told him not to worry about it. Another store manager learned of Bila's convictions through conversation. This manager apparently had senior status and the authority to fire employees.

The Sixth Circuit has acknowledged that the after-acquired evidence rule applies in FMLA cases, but it does not absolve an employer from liability for interfering with or retaliating against the exercise of FMLA rights. *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109, 1112 (6th Cir. 1997). "[C]ourts should not consider evidence acquired by the employer after the decision to discharge an employee. Since the primary issue for purposes of liability in such cases is the employer's motive for the discharge, and the employer could not be motivated by information not in its possession at the time of its decision, the [Supreme] Court reasoned that after-acquired evidence could not be relevant for the purposes of establishing liability." *Ibid.* (citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358-60 (1995)). Rather, after-acquired evidence should be considered when determining the scope of equitable relief that should be awarded once a violation of the Act is found. *See McKennon*, 513 U.S. at 361 (noting that "[i]n determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern for the relative moral worth of the parties, but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing") (internal quotes and citation omitted); *see also Thurman,* 90 F.3d at 1168 (recognizing that"[w]here an employer can show that 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").

For the after-acquired evidence defense to apply, the employer has the burden to "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," or it would not have hired him had it known of the wrongdoing beforehand. *McKinnon*, 513 U.S. at 362-63; *Thurman*, 90 F.3d at 1168.

It is clear that this defense is not a ground upon which to grant summary judgment, but it is equally clear that the issue will be relevant if the question of remedies must be addressed eventually in this case.

III.

The defendant has also filed a motion to compel the deposition of the plaintiff's wife, Melanie Bila. The plaintiff responds by asserting the spousal privilege contained in Mich. Comp. Laws § 600.2162(1). The defendant contends, however, that the plaintiff has waived spousal privilege by naming his wife in his pleadings and testimony. The plaintiff testified that district supervisor Burke complained about the plaintiff to his wife, who was then a RadioShack employee. The plaintiff also testified that his wife told him that Carleton's August 9, 2001 message to the plaintiff was that the plaintiff was to either report for work or call Carleton the next morning. The defendant claims that Carleton only told the plaintiff to report to work. The plaintiff testified that he did not investigate schools for his son in the Fort Wayne area because his wife took responsibility for his son's education. The plaintiff also testified that he interviewed with Family Video while on FMLA leave to appease his wife, who submitted his resume for the position without the plaintiff's knowledge. In addition, the plaintiff testified that he was seeking emotional distress damages; that his wife told him he was depressed; that his wife complains of his lack of interest in sex since his

firing; that his firing has disrupted future plans he set with his wife; and that he could not provide information about his economic status because his wife knew the information better than he did.

Evidentiary privileges in federal courts are governed by Federal Rule of Evidence 501, which states:

> the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. In this case, there no longer is pending a State law claim, so the Michigan spousal privilege statute cited by the plaintiff is not controlling.

Federal court have recognized two kinds of evidentiary privileges that apply to the testimony of spouses. The spousal immunity privilege, which exists only during the term of a valid marriage, protects one spouse from being compelled to testify against the other. This privilege may not be asserted after a marriage has been terminated. *See Pereira v. United States*, 347 U.S. 1, 6 (1954). This privilege belongs only to the testifying spouse and may not be asserted by the opposite spouse. *Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Sims*, 755 F.2d 1239, 1240-41 (6th Cir. 1985). There is no indication in the record that Melanie Bila has asserted this privilege to forestall her deposition, and if she did, she would not be allowed to later revoke it and testify at trial.

The second testimonial privilege protects confidential communications made by one spouse to the other during the marriage. It may be asserted by either spouse, and it survives the termination of the marriage. *United States v. Porter*, 986 F.2d 1014, 1018 (6th Cir. 1993). The three elements of this second testimonial privilege are (1) a marriage recognized as valid by state law at the time of the

communication; (2) the expressions must be intended by one spouse to convey a message to the other and (3) the communication must be made in confidence. *See generally* 2 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence § 505[4] (1992). The third element – confidentiality – is the essence of most evidentiary privileges, and when confidentiality ceases, the privilege no longer applies. *Pereira*, 347 U.S. at 6.

In this case, the defendant seeks to discover the other half of conversations between the plaintiff and his wife that the plaintiff himself described during his deposition. When the plaintiff testified as to those conversations, the confidential nature of the communications, whatever it might have been previously, dissipated. The marital privilege for confidential communications no longer protected those conversations from disclosure since the plaintiff himself disclosed them. *See United States v. Burkhart*, 501 F.2d 993, 995 (6th Cir. 1974) (noting that "[a]ny marital privilege that may have existed was waived when Appellant introduced his wife's statements during cross-examination of the Government witnesses").

The confidential communications privilege does not protect the conversations already disclosed by the plaintiff and he may not resist the taking of his wife's deposition on the basis of that privilege as to that evidence. Melanie Bila has not asserted spousal immunity, so there is no basis to prevent the deposition on that ground. If she does assert that basis, the plaintiff may not later call her as a trial witness.

IV.

The Court finds that questions of material fact preclude summary judgment for the defendant. The Court also finds that the plaintiff's asserting of a privilege to prevent the deposition of his wife is invalid.

Accordingly, it is **ORDERED** that the defendant's motion for summary judgment [dkt # 15] is **DENIED**.

It is further **ORDERED** that the defendant's motion to compel the deposition of the plaintiff's wife, Melanie Bila, [dkt # 19] is **GRANTED**.

It is further **ORDERED** that the parties are to appear for a final pretrial conference in accordance with the Case Management and Scheduling Order on **January 19, 2005 at 2:30 p.m**. The parties shall submit to chambers a proposed joint pretrial order as directed by the Case Management and Scheduling Order on or before **January 12, 2005**. The parties are directed to be prepared to argue the plaintiff's motion *in limine* and to bifurcate the trial, the plaintiff's motion to strike the defendant's supplemental witness list and quash a document subpoena, and the defendant's motion *in limine* at the time of the final pretrial conference.

_____/s/_____
DAVID M. LAWSON
United States District Judge

Dated: November 22, 2004

Copies sent to: Julie A. Gafkay, Esquire
Thomas G. Kienbaum, Esquire
Robert Bruce Brown, Esquire