UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT J. THOMPSON Plaintiff, v. GOLD MEDAL BAKERY, INC., Defendant.	Civil Action No. 1:18-cv-10410-FDS

DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS
WITH RESPECT TO COUNTS III AND VI

Plaintiff Robert Thompson alleges that a leave policy issued by defendant Gold Medal Bakery, Inc., as written, violates the Family and Medical Leave Act ("FMLA"). The policy, which Thompson quotes in his Complaint, states that "absent unusual circumstances, an employee on an FMLA leave is expected to return at the end of the granted period of time, but no more than 12 weeks. An employee failing to return to work on the scheduled return date after an FMLA leave will be considered to have voluntarily resigned." Because this policy on its face fully complies with the FMLA, the Court should enter judgment for the pleadings on Count III. Alternatively, Count III should be dismissed because the pleadings establish that Thompson failed to provide a fitness-for-duty certification at the end of his FMLA leave (as required by Gold Medal's policy), which, pursuant to Federal regulations, affords Gold Medal the right to terminate Thompson's employment. Lastly, because injunctive relief is not a legally cognizable cause of action (but rather a form of relief), the Court should enter judgment for Gold Medal on Count VI as well.

I. BACKGROUND

In his Complaint, Thompson asserts a number of claims arising out of his failure to return to work at the conclusion of his twelve week FMLA leave. Specifically, in Count III he asserts a facial challenge to Gold Medal's FMLA policy (the "FMLA Policy") because it treats employees who fail to return to work after exhausting FMLA leave as having "voluntarily resigned." Compl., ¶¶ 67-72. The FMLA Policy, which Thompson quotes and attaches to the Complaint,[1] provides, in pertinent part:

> Return to Work
>
> **Absent unusual circumstances, an employee on an FMLA leave is expected to return at the end of the granted period of time, but no more than 12 weeks**. **An employee failing to return to work on the scheduled return date after an FMLA leave will be considered to have voluntarily resigned.**
>
> An employee returning from a FMLA leave of no more than 12 weeks will be returned to the job they held prior to the leave or to a position with equivalent pay and benefits, as long as they remain able to perform the essential functions of the position. **If the leave lasts longer than 12 weeks (or the amount of FMLA time available), the employee's return cannot be guaranteed.**

Compl. at Ex. C (emphasis added). Plaintiff contends that the above-quoted portion of the FMLA Policy violates the FMLA. Compl., ¶¶ 67-72.

Gold Medal's policy also provides that if an employee's FMLA leave is because of the employee's own serious health condition, the employee "will be required, prior to return to work, to submit to the Human Resources Department a letter from his/her health care provider that the employee's medical condition is sufficiently resolved to permit the employee to return to work."

[1] In ruling on Gold Medal's motion for judgment on the pleadings, the Court may consider extraneous documents when they are expressly referenced, attached and relied-upon in Thompson's Complaint. *Ford v. Lehman Capital, No*. CIV.A. 10-40092-FDS, 2012 WL 1343977, at *1 (D. Mass. Apr. 17, 2012) ("The Court will refer only to those exhibits explicitly referred to or implicitly relied on by the complaint.") (citing *Trans–Spec Truck Serv., Inc. v. Caterpillar Inc.,* 524 F.3d 315, 321 (1st Cir. 2008) ("Exhibits attached to the complaint are properly considered part of the pleading ....")).

Compl., Ex. C.

In addition, in Count VI, Thompson asserts a related standalone claim for "Injunctive Relief" seeking a court order enjoining Gold Medal from adopting and/or using the FMLA Policy.

Gold Medal now moves for judgment on the pleadings with regard to Count III and Count VI.

II. ARGUMENT

A Rule 12(c) motion for judgment on the pleadings "is treated much like a Rule 12(b)(6) motion to dismiss." *Perez–Acevedo v. Rivero–Cubano*, 520 F.3d 26, 29 (1st Cir. 2008). "To survive a motion to dismiss, the complaint must state a claim that is plausible on its face." *Robert Reiser & Co. v. Scriven*, 130 F. Supp. 3d 488, 493 (D. Mass. 2015) (Saylor, J., citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). Dismissal is appropriate where the alleged facts do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharm., LLC,* 521 F.3d 76, 84 (1st Cir. 2008) (alterations omitted) (internal quotation marks omitted). Moreover, "[w]hen . . . a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document . . . that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 16-17 (1st Cir. 1998).

As explained below, Counts III and VI should be dismissed because (1) Thompson's facial challenge to the FMLA Policy does not state a viable claim for relief, and (2) no standalone cause of action for injunctive relief exists.

A. Count III Should Be Dismissed For Failure to State a Claim.

The FMLA does not prohibit Gold Medal from adopting a leave policy that (1) provides for 12 weeks of FMLA leave and (2) considers an employee to have voluntarily resigned for failing to return to work after exhausting such leave. To the contrary, these provisions fully comport with the FMLA's leave and reinstatement provisions. "Among the substantive rights granted by the FMLA to eligible employees are the right to '**12 workweeks of leave during any 12–month period** . . . and the right following leave 'to be restored by the employer to the position of employment held by the employee when the leave commenced' or to an equivalent position." *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001) (citing 29 U.S.C. §§ 2612(a)(1) and 2614(a)(1) (emphasis added)); *see also* 29 C.F.R. § 825.200 (eligible employee's FMLA leave entitlement limited to 12 workweeks); 29 C.F.R. § 825.214 (employee has right to reinstatement upon return from FMLA leave).

As a corollary, the FMLA does not require an employer to reinstate or hold a position in excess of the statutory-mandated 12-week period. *See Bellone v. Southwick-Tolland Reg'l Sch. Dist.*, 915 F. Supp. 2d 187, 193 (D. Mass. 2013), *aff'd*, 748 F.3d 418 (1st Cir. 2014). Rather, an employee who fails to return to work after exhausting his allotment 12 weeks of FMLA leave may be subject to termination or separation without incurring any violating the FMLA. *See Coker v. McFaul*, 247 F. App'x 609, 620 (6th Cir. 2007) ("Once an employee exceeds his twelve work weeks . . . of FMLA leave, additional leave . . . is not protected by the FMLA, and termination of the employee will not violate the FMLA"); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 148 (3d Cir. 2004) (an employee is "subject to immediate discharge on the very first workday that he was both absent from work and no longer protected by the FMLA"); *Hasenwinkel v. Mosaic*, 809 F.3d 427, 432 (8th Cir. 2015).

Thus, Gold Medal's FMLA Policy fully comports with the FMLA's leave and reinstatement provisions.[2] Here, the FMLA Policy grants eligible employees "[a] Family and Medical Leave Act (FMLA) leave of up to 12 weeks," and provides that once an employee fails to return to work after exhausting 12 weeks of FMLA leave, there is no further guarantee to reinstatement that an employee is deemed to have "voluntarily resigned." *See, generally*, Compl. at Ex. C. These policy provisions correspond with FMLA requirements, which similarly grant eligible employees a 12-week period of leave and limits the right to reinstatement only to those employees who return within the prescribed 12-week period. *See* 29 U.S.C. §§ 2612(a)(1), 2614(a)(1)*;* 29 C.F.R. §§ 825.200, 825.214; *see also Bellone*, 915 F. Supp. at 193. As such, Gold Medal committed no violation of the FMLA in adopting its leave policy.

Although Thompson endeavors to ascribe special meaning to the Policy's use of the term "voluntarily resigned," these arguments are unavailing distinctions without a difference. Regardless of the terminology used to describe the employment status of employees who fail to return to work after the 12-week leave period, there is no right to reinstatement under the FMLA. Employees who fall outside the protections of the FMLA may be discharged, terminated or deemed to have voluntarily resigned. *See Coker*, 247 F. App'x at 620; *Conoshenti*, 364 F.3d at 148; *Hasenwinkel*, 809 F.3d at 432. Thus, the fact that Gold Medal's FMLA Policy treats these employees as having "voluntarily resigned" bears no consideration under the FMLA, and any efforts by Thompson to rely upon this distinction should be rejected by the Court.

Therefore, the Court should enter judgment for the pleadings on Count III.

[2] Gold Medal's motion addresses only the issue of whether the Gold Medal's FMLA Policy is facially unlawful under the FMLA. This motion does not address Thompson's claims that other statutes (such as the Americans with Disabilities Act) may have required Gold Medal to provide him with additional leave or other accommodations at the end of his 12 weeks of leave.

B. Count III Should Be Dismissed Because Thompson Never Provided Gold Medal With A Fitness-For-Duty Certification

Alternatively, the Court should enter judgment on the pleadings for Gold Medal on Count III because Thompson failed to provide the company with a fitness-for-duty certification.

The regulations issued pursuant to the FMLA clearly provide that an employee can be terminated when he seeks reinstatement but fails to provide a fitness-for-duty certification. Specifically, those regulations state as follows: "When requested by the employer pursuant to a uniformly applied policy for similarly situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.312(a)) if the employer has provided the required notice (see § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated." 29 C.F.R. § 825.313.

The pleadings establish that Gold Medal had such a policy, and that Thompson had notice of his need to provide a fitness-for-duty certification in order to return from his FMLA leave. *See, e.g.,* Compl. Ex. C (admitting Thompson's need to "submit a Fitness for Duty Certificate from your health care provider indicating that you are cleared to return to work full duty"); *see also* Compl. Ex. A (acknowledging receipt of Fitness for Duty Certificate and need to comply with submitting a completed form to Human Resources). It is similarly undisputed that Thompson did not provide Gold Medal with a fitness-for-duty certification. *Id.* ¶ 59 (claiming that, twelve days after his 12-week FMLA leave expired, Gold Medal did not allow Thompson "five more days to obtain a physician's note to return to work."). Thus, under Gold Medal's policy, and consistent with the FMLA, the company had the right to terminate his employment.

Accordingly, the Court should enter judgment on the pleadings for Gold Medal on Count III.

C. Count VI Should Be Dismissed For Failure to State a Claim.

Count VI, which seeks "[i]njunctive [r]elief," should be dismissed for failure to state a claim because (1) injunctive relief is not an independent cause of action and (2) the substantive claim upon which Count VI is based (Count III) fails to states a claim for relief. As an initial matter, injunctive relief is not an independent cause of action. *See In re WellNex Mktg. & Sales Practices Litig.*, 673 F. Supp. 2d 43, 58 (D. Mass. 2009) (dismissing count for injunctive relief because it is not a stand-alone cause of action); *O'Neil v. Daimler Chrysler Corp.*, 538 F. Supp. 2d 304, 308 (D. Mass. 2008) (claim for injunctive relief does not allege an independent legal claim). Rather, a request for injunctive relief is an appeal for a specific remedy. *See Who Dat Yat Chat, LLC v. Who Dat, Inc.*, CIV.A. 10-1333, 2012 WL 2087438, at *9 (E.D. La. June 8, 2012) ("[I]njunctive relief is not itself a cause of action, but rather a remedy."). For this reason alone, Count VI fails to state a claim upon which relief can be granted and should be dismissed. Further, Count VI's request for injunctive relief relies on the substantive allegations contained in Count III. *See* Compl., ¶¶ 80-81. For the reasons set forth above, Thompson failed to state any claim upon which relief can be granted as to Count III. Therefore, Thompson is not entitled to injunctive relief in connection with Count VI.

III. CONCLUSION

For the foregoing reasons, Gold Medal respectfully request that the Court enter judgment on the pleadings with regard to Counts III and VI because Thompson fails to state a claim upon which relief can be granted.

Respectfully submitted,

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October 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I electronically filed the foregoing document through the CM/ECF system which will be sent electronically to the registered participants as identified on the NEF.

/s/ Christopher B. Kaczmarek

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