IP 00-0495-C B/K Gerking v. Wabash Ford
Judge Sarah Evans Barker Signed on 9/6/02

INTENDED FOR PUBLICATION AND PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GERKING, LARRY,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
WABASH FORD/STERLING TRUCK SALES INC,	)	CAUSE NO. IP00-0495-C-B/?
	)	
	)	
Defendant.	)	

π Eric Hylton
Lowe Gray Steele & Darko
111 Monument Circle Suite 4600
P O Box 44924
Indianapolis, IN 46244-0924

John T L Koenig
Barnes & Thornburg
11 S Meridian Street
Indianapolis, IN 46204-3535

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LARRY GERKING,	)	
Plaintiff,	)	
	)	
vs.	)	IP IP00-0495-C B/K
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WABASH FORD/STERLING TRUCK SALES, INC.,	)	
	)	
Defendant.	)	

ENTRY GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. *Introduction.*

This is an employment discrimination case. The plaintiff Larry Gerking alleges that his former employer, Wabash Ford, demoted him from his position as parts manager and then terminated him because it perceived him to be disabled and thus violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. Mr. Gerking alleges, alternatively, that Wabash either fired him because he took a leave pursuant to the Family and Medical Leave Act (FMLA) 29 U.S.C. §§ 2601 et seq., or failed to return him to the position he occupied prior to his leave.[1]

The case is before us on Wabash's motion for summary judgment. Wabash argues that Mr. Gerking's demotion claim is time barred because he did not file a timely EEOC charge with respect to it. It argues in addition that, even if the demotion claim had been timely, Mr. Gerking has presented

[1]The original complaint included a claim of age discrimination pursuant to 29 U.S.C. § 621 et seq. That claim was dismissed with prejudice by joint stipulation of the parties, which we approved in our Order of January 29, 2002.

legally insufficient evidence to support the proposition that Wabash's decision maker, Mark Smith, demoted or discharged Mr. Gerking because he perceived Mr. Gerking to be disabled. Wabash also seeks summary judgment on Mr. Gerking's FMLA theories.

For the reasons that follow, we GRANT defendant's motion as to both of Mr. Gerking's ADA claims. Specifically, Mr. Gerking's demotion claim is time barred; were it not, he still has presented legally insufficient evidence to raise a reasonable inference that Mr. Smith demoted him because he perceived Mr. Gerking to be disabled. Similarly, Mr. Gerking has presented insufficient evidence to raise a reasonable inference that Mr. Smith discharged him because he perceived Mr. Gerking to be disabled.

We DENY Wabash's motion with respect to Mr. Gerking's FMLA claims. Mr. Gerking has presented sufficient evidence to raise a reasonable inference that he was on FMLA leave and that Mr. Smith failed to return him to the position he occupied before going on his leave and/or fired him because he took the leave. Mr. Gerking also has raised a reasonable inference that Mr. Smith's explanation of why he fired him is pretextual.

II. *Statement of Facts.*

The following facts are either uncontested by the parties or stated in a light reasonably most favorable to Mr. Gerking as the party opposing summary judgment.

Wabash Ford is a car and truck dealership. Mr. Gerking began working for Wabash in 1967

as a parts clerk. He was promoted to assistant parts manager in 1976 and manager of the parts department in 1996. As parts manager, he was responsible for the functioning of the parts department. DSOMF ¶¶ 1-5.[2]

At all times pertinent to this lawsuit, Mark Smith served as Wabash's General Manager. At all pertinent times he reported to Tom Gellenbeck, Wabash's majority owner. DSOMF ¶¶ 7, 8. Linda Goble served as Wabash's Secretary/Treasurer from July 7, 1982 through August 2001 when she resigned her employment. Goble Aff., ¶ 2. Her duties included running the business office and supervising the support staff. They also included maintaining employee personnel files, company forms and documents, and payroll. She also was involved in processing parts tickets and repair orders, entering and verifying financial information, and handling day-to-day operations. Goble Aff., ¶¶ 3, 4. PSAMF, ¶¶ 159-163.

In October 1998, Wabash opened a Truck Parts Store across the street from its sales facility. DSOMF ¶ 38. Mr. Gerking's managerial duties were expanded to include oversight of the new truck parts facility. Gerking Dep., 146-147; PSAMF ¶ 230-231 and Def. Resp. On October 19, 1998, Mr. Gerking complained to Mr. Smith that he wasn't sleeping well and was very unhappy. Mr. Smith suggested that he take Mr. Gerking to St. Vincent Hospital's Emergency Room. The doctor there

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[2]Pursuant to Local Rule 56.1 (as it existed when defendant filed its motion for summary judgment in this case), Wabash presented a Statement of Material Facts in support of its motion, which we abbreviate here as "DSOMF ¶ ___." Mr. Gerking responded to Wabash's statements and added a Statement of Additional Facts of his own, to which Wabash responded. We abbreviate Mr. Gerking's statement as "PSAMF ¶ ___."

pronounced Mr. Gerking well physically and Mr. Gerking returned to work the next day. No physician mentioned anything about Mr. Gerking having a heart condition. Mr. Gerking acknowledges that, as far as Mr. Smith knew after the hospital visit, Mr. Gerking was fine physically. DSOMF ¶¶ 55-64.

On November 15, 1998, Mr. Smith informed Mr. Gerking that he was being demoted and removed from his position as parts manager. DSOMF ¶ 45. The reasons for the demotion are hotly contested. Wabash contends that parts department sales to external customers were suffering under Mr. Gerking's marketing efforts and pricing schemes. DSOMF ¶¶ 11-14. It also contends that, though enlisted to help in finding solutions to the sales problems, Mr. Gerking was not cooperative; at times, it asserts, he was either no help at all or actively obstructionist. DSOMF ¶¶ 22-29, 31-33. Wabash further contends that, as early as April or May 1998, Mr. Gerking altered prices in the company's computer system in order to mask the declining sales in his department. DSOMF ¶¶ 35-37.

Upon being removed as parts department manager on November 15, 1998, Mr. Gerking became an outside parts salesman. Mr. Smith told Mr. Gerking that he would receive the same pay that he had been receiving as parts department manager until the end of the year. DSOMF ¶ 46.

On November 28, 1998, Mr. Gerking suffered a heart attack. DSMOF ¶ 63. Mr. Gerking acknowledges that Mr. Smith became aware of his heart condition only after he suffered the heart attack. DSMOF ¶ 66. Mr. Gerking was hospitalized for a few days after his heart attack. After being released from the hospital, he remained off work until January 6, 1999. In other words, Mr. Gerking was off work from November 28, 1998 to January 6, 1999 due to his heart surgery and recovery. He did not apply for any sort of formal leave and filled out no papers for FMLA or any other kind of leave.

DSOMF ¶¶ 67, 68. DSOMF ¶¶ 66. During his recovery, Mr. Gerking was paid his salary in full.

When Mr. Gerking was released to return to work, he was released without medical restrictions on his work activities, except that he had to be mindful of lifting. Mr. Gerking testified that he could lift up to 75 pounds. DSOMF ¶¶ 70, 72. Mr. Gerking testified that he was able to perform the tasks that he had performed prior to his heart attack, including ordering, inventory control, customer complaints, calling on customers, paper work and attendance at meeting. DSOMF ¶ 72. Mr. Gerking did not ask for any kind of work accommodation. DSOMF ¶ 73.

Mr. Gerking took up his duties as an outside parts salesman as of January 6, 1999 at an annual salary of $60,000. He served in that position until his termination on November 11, 1999. DSOMF ¶¶ 75, 76.

In October 1999, Mr. Gerking informed Mr. Smith that he was scheduled to undergo heart by-pass surgery on October 4. DSOMF ¶ 83. He asked Mr. Smith whether he should request a family leave. Mr. Smith told him that he didn't know, but to ask Ms. Goble. PSAMF ¶¶ 270, 271. Mr. Smith also did not know whether Wabash had any FMLA leave forms or whether Wabash complied with the FMLA. PSAMF ¶¶ 272, 274; Smith Dep., p. 132. Mr. Smith testified that Ms. Goble was familiar with any documents that might pertain to leaves of absence. PSAMF ¶ 277; Smith Dep., p. 199. Mr. Smith told Mr. Gerking to do whatever it takes to make himself healthy and to check with Linda Goble if he had any questions about taking time off. Mr. Gerking visited Ms. Goble, and expressed his intent to take FMLA leave. She gave him the appropriate form. Citing discomfort over his perception that he might be signing his job away, he did not sign and return the leave application.

Goble Aff., ¶ 18.[3] Mr. Gerking went on leave on or about October 4, 1999. It is unclear from the record whether he ever worked at Wabash again, but it appears that he did not return to active service prior to his November 11 termination.

Wabash insists that it never considered Mr. Gerking to be on FMLA leave. DSOMF ¶ 89; Def. Resp. to PSAMF ¶¶ 274-277. Instead, the company paid Mr. Gerking $600 per week during his leave and it appears reasonably clear that Mr. Gerking was paid for his time off work except, perhaps, for the last two weeks and a bonus that he ordinarily would have gotten while working. DSOMF ¶ 91; PSAMF ¶¶ 280, 281.

Wabash claims that October 1999 was a period of attrition during which it drastically reduced expenses, particularly in the truck parts store. Among the expense reductions was the decision to eliminate virtually all outside sales positions. Wabash asserts that six outside parts salesmen worked for the truck parts store and two worked at the Wabash Ford facility. DSOMF ¶¶ 79-81. It says that it eliminated all six outside sales people from the truck parts store and retained only one, Ray Schober, as an outside parts salesman at Wabash Ford, an assertion that Mr. Gerking contests. DSOMF ¶ 82;

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[3]Wabash filed a separate Motion to Strike, in which it asks us to find certain testimony and documentary evidence inadmissible. Instead of addressing each of its requests in detail, we discuss only the testimony and evidence subject to defendant's motion which have a bearing on our summary judgment analysis and determine the question of admissibility only with respect to those. Accordingly, we DENY defendant's motion to strike except where we expressly sustain an objection.

Thus, for example, Wabash argues that Ms. Goble's testimony in ¶ 18 is inadmissible because she did not claim to have unilateral authority to determine that an employee was on FMLA leave. As already noted, Mr. Smith acknowledged that Ms. Goble knew about the company's leave of absence policy and that she was the keeper of such forms. Her testimony that Mr. Gerking asked for FMLA leave and that she gave him the form appropriate for FMLA leave is well within the bounds of her job responsibilities and is admissible.

PSAMF ¶¶ 303-305. Mr. Gerking counters that he had been transferred to a sales position *in* the Wabash Ford facility as of October 4, 1999. Pl. Ex. 8, 9.

Wabash asserts that Mr. Smith tried to find Mr. Gerking work in the Wabash facility. However, Mr. Smith states that he learned from David Wilson – Mr. Gerking's replacement as parts manager – that employee Anita Burcham, who worked as a parts administrator, had felt sexually harassed by Mr. Gerking and Mr. Smith considered Ms. Burcham too valuable an employee to risk losing her by placing Mr. Gerking back in daily contact with her. DSOMF ¶¶ 97-120. In other words, Mr. Smith asserts that he terminated Mr. Gerking because there was no position available for Mr. Gerking and because Mr. Gerking's alleged misconduct toward Anita Burcham prohibited Mr. Smith from placing him back in the parts department. Mr. Gerking argues that, even if Ms. Burcham's allegations of sexual harassment were true (which, he says, they are not), Mr. Smith's excuse for firing him is pretextual because he did not know about Ms. Burcham's sex-harassment allegations at the time he made his decision. We address this latter point at the appropriate place in our analysis.

III. *Discussion.*

A. *The Standard on Summary Judgment.*

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a

verdict in favor of the non-moving party on the particular issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750 (7th Cir.1998).

On a motion for summary judgment, the burden rests on the moving party to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id*. at 322-23, 106 S.Ct. 2548. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex*, 477 U.S. at 322-24, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 249-52, 106 S.Ct. 2505).

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge*, 24 F.3d at 290. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. *Venters v. City of Delphi*, 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. See *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir.1989). But if it is clear that a plaintiff will be unable to satisfy the legal

requirements necessary to establish her case, summary judgment is not only appropriate, but mandated. *See Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *Waldridge*, 24 F.3d at 920.

B. *Mr. Gerking's ADA Claims*

Mr. Gerking alleges that Wabash unlawfully demoted him on November 15, 1998 and unlawfully discharged him on November 11, 1999, in both instances because it perceived him to be disabled. Wabash moves for summary judgment on both ADA claims: the demotion claim because it is time barred; and the demotion and discharge claims on the ground that Mr. Gerking has produced legally insufficient evidence. We take up the ADA claims in turn.

1. *The Timeliness of Mr. Gerking's Demotion Claim.*

Wabash argues that Mr. Gerking's demotion claim is time barred because he did not file a timely charge with the EEOC alleging discriminatory demotion. Mr. Gerking argues that his demotion claim is viable under the continuing violation theory. For the following reasons, we conclude that Mr. Gerking's demotion claim is time barred.

It is unchallenged on the record that Mr. Smith informed Mr. Gerking of his demotion on November 15, 1998. DSOMF ¶ 45. Mr. Gerking alleges in his EEOC charge that he was demoted as of January 5, 1999. He filed his charge of discrimination on November 15, 1999, 365 days after he was notified of his demotion and 314 days after the date on which he acknowledges having been notified. Since the ADA provides a three hundred charge-filing day statute of limitations, it is clear on the face of the charge that it was not timely as to the demotion. Unless Mr. Gerking can present good

reason to toll the limitations deadline or persuade us to consider the filing timely under the doctrine of "continuing violation," his claim is time barred. He does not present a case for tolling. Instead, he argues that his demotion claim should be construed as a continuing violation.

The Seventh Circuit has outlined three general circumstances in which it will apply continuing violation theory. *Place v. Abbott Labs.*, 215 F.3d 803, 807 (7th Cir.2000), *cert. denied,* 531 U.S. 1074, 121 S.Ct. 768, 148 L.Ed.2d 668 (2001); *Selan v. Kiley*, 969 F.2d 560, 565-566 (7th Cir. 1992). Common to all three varieties is that the continuing violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Place*, 215 F.3d at 807, *quoting, Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138, 1139 (7th Cir.1997). *See Robinson v. Dan Young Chevrolet, Inc.*, 2002 WL 1242575 (S.D. Ind. 2002). The form of continuing violation on which Mr. Gerking relies here is the circumstance in which the employer's discrimination is so subtle or covert as to defy its identification as discrimination by a reasonably diligent employee until the employee has the advantage of retrospect. *Selan*, 969 F.2d at 965; *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 281-82 (7th Cir.1993).

In his EEOC charge of November 15, 1999, Mr. Gerking alleged: "On or about January 05, 1999, I was demoted from my Parts Manager position when I returned from medical leave." In other words, we are dealing here with a specific employment action – a demotion – that occurred on a specific occasion. Such specific employment actions are the most difficult to draw into continuing violations theory largely because there is nothing subtle or covert about them. Discharges, demotions, job transfers, failures to hire, and failures to promote are, by their nature, single, significant events, and

not continuing acts. "[U]nlike low-level harassment that over time grows in intensity or in cumulative effect," such individual employment actions are "concrete, discrete development[s]." *Place*, 215 F.3d at 208.

Mr. Gerking's argument for the demotion as a continuing violation is undermined by two problems. First, the fact that the supposed basis for the discriminatory employment action – Mr. Smith's perception that Mr. Gerking had some sort of *mental* disorder – bears no resemblance to the apparent basis of Mr. Gerking's ADA discharge claim, his *heart condition*.[4] It is unchallenged on the record that, when Mr. Gerking went to the hospital on October 19, 1998, no one – neither he nor any physician – mentioned any problem with his heart. Nor did he mention anything about any mental disorder. When he returned to work the following day, he and Mr. Smith both believed that there was nothing physically wrong with Mr. Gerking. DSOMF ¶¶ 59-61.

Clearly, there is nothing "continuous" between Mr. Smith thinking that Mr. Gerking had mental problems and Mr. Smith perceiving Mr. Gerking as having a disabling heart condition. More important, Mr. Gerking acknowledges that, as of October 20, 1998, Mr. Smith had no reason to think that Mr. Gerking was *unwell*, much less *disabled*. In sum, prior to Mr. Gerking's November 28 heart attack, Mr. Smith correctly perceived Mr. Gerking to be "fine." DSOMF ¶ 62.

Mr. Gerking argues that, although he believed he was demoted because of his disability, he could not have known that Mark Smith *perceived* him to be disabled until

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[4]We say "apparent basis" because plaintiff nowhere specifically identifies a major life activity which it claims was substantially impaired. It appears that the demotion claim rests on Mr. Smith's supposed perception that Mr. Gerking had a mental disability, whereas his termination claim appears to rest on his heart condition.

the discovery phase of this lawsuit because Mr. Smith's memo dated September 15, 1998 (Pl. Ex. 7), indicating that he suspected Mr. Gerking had mental problems, was not revealed until then. He argues that Mr. Smith operated behind the scenes to seek Mr. Gerking's replacement and never shared with Mr. Gerking his feeling that Mr. Gerking had some sort of mental disability. Pl. Opp. Brief, p. 18.

But, to address the second problem, even assuming that Mr. Smith believed Mr. Gerking had a mental disorder, and even assuming that Mr. Smith demoted Mr. Gerking because of this perception, Mr. Gerking has presented insufficient evidence to support the contention that Mr. Smith perceived Mr. Gerking's supposed mental disorder to be an actionable "disability" for purposes of the ADA. The document on which Mr. Gerking relies, Pl. Ex. 7, is a memo in which Mr. Smith noted what Mr. Gerking allegedly revealed to him about his mental condition. Interpreted in a light most favorable to Mr. Gerking, the memo reveals what Mr. Gerking thought about his own mental condition, and not what Mr. Smith thought about it.[5] In other words, Mr. Gerking did not file a timely charge of discriminatory demotion based on his employer's perception that he suffered from a mental disability not because Mr. Smith's concealed his perception but because there was no basis for believing that he had such a perception.

Finally, even if we could find that Mr. Gerking's demotion charge had been timely, the law

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[5]Mr. Gerking argues, persuasively, that Mr. Smith created Pl. Ex. 7 some time after September 15, 1998, although its actual provenance is not known. The memo reads in pertinent part: "It should be noted that on 9/13/98 Larry Gerking contacted me, took me behind the parts department, and told me that he was unable to perform his duties as parts manager due to mental problems. Mr. Gerking stated that he did not know why he is feeling the way he is but that he is on the verge of crying fits and can barely lift himself out of bed and was severely limited in his work capabilities."

recognizes a difference between an "impairment" (or a work "restriction") and a "disability." *Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir.2001); *Krocka v. City of Chicago*, 203 F.3d 507, 512-513 (7th Cir. 2000); *Harrington v. Rice Lake Weighing Systems, Inc.*, 122 F.3d 456, 460-61 (7th Cir.1997). A disability is an impairment that substantially limits a major life activity. In order for Mr. Gerking to raise a reasonable inference that Mr. Smith perceived him to be disabled because of a mental disorder, he must show that Mr. Smith perceived him to be unable to perform not only his job as parts manager, but that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Sutton v. United Airlines*, 527 U.S. 471, 473, 119 S.Ct. 2139, 2142, 144 L.Ed.2d 450 (1999).

Even if we stretch Pl. Ex. 7 past the breaking point by assuming that Mr. Smith believed that Mr. Gerking could not do his job as parts manager because of some mental impairment, Mr. Smith clearly did not perceive Mr. Gerking to be significantly restricted in "a class of jobs or a range of jobs in a variety of classes." After all, upon demoting Mr. Gerking, he retained him in another responsible position. In sum, Mr. Smith's September 18, 1998 is insufficient to establish a genuine issue of material fact that Mr. Smith perceived Mr. Gerking to be disabled because of mental problems.

We conclude that Mr. Gerking's demotion claim is untimely because he did not file it within three hundred days after the alleged discriminatory act and it is not subject to continuing violation theory. We further conclude that, even if the charge had been timely filed, Mr. Gerking has presented insufficient evidence to raise an inference that Mr. Smith perceived him as disabled. Accordingly, Mr. Gerking was not a qualified individual with a disability for purposes of his demotion claim.

2. *Mr. Gerking's ADA Discharge Claim.*

Mr. Gerking's ADA termination claim is subject to much the same analysis and we arrive at the same conclusion. He has presented insufficient evidence to raise a reasonable inference that Mr. Smith perceived him to be disabled. Indeed, Mr. Gerking has not even identified the major life activity which, he claims, was impaired. He relies on a generalized notion that Mr. Smith began treating him differently after he complained about *ennui* in October 1998 and attributes the different treatment to Mr. Smith's perception that Mr. Gerking was disabled. Pl. Brief, p. 27.

In order to present a prima facie case of disability, however, Mr. Gerking must show that Mr. Smith regarded him as suffering from an impairment that substantially limited a major life activity. Even assuming that the major life activity on which Mr. Gerking seeks to rest his argument is the heart condition he discovered in November 1998 and had treated in October 1999, we conclude that the evidence is too attenuated to raise a reasonable inference that Mr. Smith perceived him to be disabled.

As we noted earlier, Mr. Gerking suffered a heart attack on November 28, 1998 and was off work until January 6, 1999. He was released without medical restrictions on his work activities, except for a lifting limitation of 75 pounds. He asked for no accommodation for any restriction. He was able to perform the tasks that he had performed prior to his heart attack. In fact, Mr. Gerking took up his duties as an outside parts salesman as of January 6, 1999 and served in that position until his termination ten months later on November 11, 1999. Concerning events prior to Mr. Gerking's by-pass surgery of October 4, 1999, there is no evidence to suggest that Mr. Gerking had a disability or that Mr. Smith perceived him as having one.

Nor is there any evidence to suggest that Mr. Smith perceived Mr. Gerking to be disabled even after Mr. Gerking's by-pass surgery. Although the surgery is obvious evidence that Mr. Gerking suffered from a heart disorder, the mere presence of a disorder and the fact that Mr. Smith terminated Mr. Gerking's employment in November of 1999 is insufficient to raise a reasonable inference that Mr. Smith fired him *because* he perceived him to be disabled. Mr. Smith was aware of Mr. Gerking's heart condition for about a year when he terminated his employment on November 11, 1999. Thus the mere existence of the heart condition does not explain Mr. Smith's action in firing him when he did.

Mr. Gerking argues that Mr. Smith's inability to find other work for him is evidence that Mr. Smith regarded him as disabled from "a class of jobs or a range of jobs in a variety of classes." We cannot reasonably draw that inference. Indeed, this argument contradicts Mr. Gerking's other argument – which we credit for purposes of his FMLA action – that Mr. Smith had actually assigned him to sales *inside* the Wabash Ford facility as of October 4, 1999. Mr. Gerking cannot have it both ways. If (as we conclude) Mr. Smith assigned him to sales inside the Ford dealership as of October 4, 1999 – knowing that Mr. Gerking was scheduled to undergo heart surgery – then a jury may not reasonably infer that he disqualified Mr. Gerking from a class of jobs because of his disability.

Since Mr. Gerking presents insufficient evidence to raise even a prima facie inference that Mr. Smith perceived him to be disabled, we need not address his argument for pretext in the context of his ADA termination claim.

D. *Mr. Gerking's FMLA Claims*

Mr. Gerking also asserts two claims under the FMLA: that Wabash failed to restore him to the

position he held immediately prior to his leave; and that Wabash interfered with his rights by firing him because he took the leave. The two claims – one based on substantive rights, the other on prohibited behavior – are subject to different legal analyses. *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1139 (7th Cir. 2002); *Rice v. Sunrise Express,* 209 F.3d 1008, 1016-17 (7th Cir.2000); *King v. Preferred Technical Group,* 166 F.3d 887 (7th Cir.1999).

1. *Failure to Restore.*

An employee who takes leave pursuant to the FMLA has a substantive right to be returned to the position he left prior to the leave or to an equivalent position. 29 U.S.C. § 2614(a)(1)(A); 29 CFR § 825.214(a). *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir.2000); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir.1997). The right is not, however, absolute. The employee has no greater right to the benefits of employment, including reinstatement, than if he had been employed continuously instead of on leave. 29 CFR § 825.216(a).

Before we can address the question of whether Wabash failed to restore Mr. Gerking to the position he occupied prior to his October 4-November 11, 1999 leave, we must resolve two other questions: first, whether Mr. Gerking was actually on FMLA leave (as contrasted with, say, "paid time off" as Wabash characterizes it); and second, whether the position Mr. Gerking occupied before going on leave was an outside sales position that had been eliminated (as Wabash argues) or a sales position inside the Wabash Ford dealership (as Mr. Gerking argues).

As to the question of whether Mr. Gerking's leave was an FMLA leave, Wabash argues that it never considered Mr. Gerking to be on FMLA leave. Mr. Gerking never "specifically mentioned" FMLA leave, he never signed the company's application asking for FMLA leave and Wabash paid him

substantially all of his salary during the leave. Wabash's argument rests almost entirely on Mr. Smith's testimony, but Mr. Smith at various times appears to have made a virtue of ignorance. He knew nothing about Wabash's FMLA leave policy and nothing about the papers necessary to secure such a leave; he professes not to have known that Mr. Gerking was out on FMLA leave. He knew, however, that Linda Goble was aware of the company's leave policy and the process by which an employee could invoke it. Along with other evidence, Ms. Goble provides ample testimony for a jury to conclude that Mr. Gerking sought FMLA leave and that the leave was granted.

Wabash acknowledges that, in October 1999, when he informed Mr. Smith that he was scheduled to undergo heart by-pass surgery, Mr. Gerking asked Mr. Smith whether he should request a family leave. Mr. Smith told him that he didn't know, but to ask Ms. Goble, who was familiar with all such documents. PSAMF ¶ 270-274. It appears evident from Wabash's admission of these facts that Mr. Gerking at least raised the issue of an FMLA leave with Mr. Smith. As an initial matter, all an employee need do is raise the possibility of an FMLA leave verbally. 29 U.S.C. § 825.302(c). Were that not enough to trigger FMLA coverage, Ms. Goble testified that Mr. Gerking also expressed to her his intent to take FMLA leave and she gave him the appropriate application form. Mr. Gerking did not sign the application because he had reservations about whether he could retain his job after signing it. Ms. Goble agreed with Mr. Gerking's reservations and told him that he did not need to sign the application. Goble Aff., ¶ 18.

Once an employer is on notice that an employee is seeking FMLA leave, the employer may require the employee to fill out forms requesting the leave and providing pertinent information:

An employer may also require an employee to comply with the employer's usual and customary

> notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave.

29 CFR § 825.302(d). But the employer may just as readily waive the requirement. "However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." *Id.* *See* 29 C.F.R. § 825.304(a). In view of Mr. Smith's deference to Ms. Goble as the company's agent who supervised leaves, we see no reason to believe that Ms. Goble was not authorized to make such a determination. An employee seeking FMLA leave need not bear the risk of his employer's ignorance of the company's FMLA policies or its failure to provide adequate procedures for invoking the leave. *Routes v. Henderson*, 58 F.Supp.2d 959, 980 (S.D.Ind. 1999). Similarly, an employee's rights under the federal statute cannot depend on the whim of an employer choosing to characterize a leave as "a paid leave" rather than an "FMLA leave." As Chief Judge McKinney of our court observed in an analogous case, this would reduce the employee's statutory protection to the whim of "the employer who would have an incentive to keep employees ignorant of their rights and to refrain from designating a qualifying absence as FMLA leave." *Id.*

In sum, there is sufficient evidence from which a jury could reasonably infer that Mr. Gerking was on FMLA leave. It follows that he was entitled to be returned to the position he occupied immediately before the leave.

But what position was that? On this second threshold issue, Wabash argues that, even if Mr. Gerking had been entitled to be returned to his job, he wasn't restored to that position because his position was one of the outside sales positions that was eliminated in October 1999. Mr. Gerking

argues that he had been transferred to an inside sales position as of October 4, 1999 and offers two company documents to support his claim. PSAMF ¶¶ 303-305; Pl. Ex. 8, 9.

It is unchallenged that Plaintiff's Exhibits 8 and 9 are company records. Both indicate that Mr. Gerking was transferred to the Wabash Ford facility as of October 4, 1999. Wabash asks us to strike Ms. Goble's testimony that Mr. Gerking had been transferred and to declare the documents inadmissible because Mr. Smith testified that Mr. Gerking's October 4, 1999 transfer was merely for "payroll purposes." We find no merit in Wabash's objection. First, company payroll records are ordinarily highly probative in verifying the position that an employee holds at any particular time. The employee's pay and the company's payroll expenses are generally reflected in such documents. Second, the mere fact that Mr. Smith dismisses their significance is insufficient for us to hold them inadmissible. We certainly cannot conclude on the basis of Mr. Smith's testimony that, as a matter of law, Mr. Gerking was one of the six outside sales persons associated with the truck parts store when the company's own documents indicate that he wasn't employed in the truck parts store as of October 4, 1999. In sum, a jury could reasonably infer from the documents that Mr. Gerking had, indeed, been transferred to a sales position inside Wabash Ford as of that date and that the position he occupied before his leave had not been eliminated.

Finally, it is uncontested that Mr. Gerking was not, in fact, restored to any position. He was on leave from October 4, 1999 and was terminated while on leave.

We thus arrive at the central issue: whether Wabash violated Mr. Gerking's substantive right to be returned to the position he occupied prior to his leave. Wabash argues that it was justified in

terminating Mr. Gerking while on leave because Mr. Smith learned of Ms. Burcham's complaints that Mr. Gerking had subjected her to sexual harassment. Wabash's justification clearly comes under the omnibus exception to reinstatement: an employee on FMLA is not entitled to *greater* rights of employment than he would enjoy if he had been continuously at work. 29 CFR § 825.216(a). Manifestly, if Wabash would have fired Mr. Gerking while he was at work because he sexually harassed Ms. Burcham, then it could fire him while he was on leave for the same offense.

This issue arises, however, in an unusual posture. Wabash's justification for firing Mr. Gerking – he allegedly harassed Ms. Burcham – is an affirmative defense. The federal regulation clearly places the burden of persuasion on the employer which seeks to excuse its failure to restore the employee to his position: "*An employer must be able to show* that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 CFR § 825.216(a) (emphasis added). *See, Strickland v. Water Works and Sewer Board, City of Birmingham*, 239 F.3d 1199, 1208 (11th Cir. 2001) (construing the code provision as an affirmative defense and locating burden of persuasion with employer). Accordingly, Wabash seeks summary judgment on an issue on which it bears the burden of persuasion under the substantive law.

The question before us is whether Mr. Smith *would* have fired Mr. Gerking for harassment had Mr. Gerking not been on FMLA leave. If Mr. Smith honestly believed that Mr. Gerking had engaged in harassment (a contested issue which we address shortly), then he *could* have fired Mr. Gerking for doing so. But that does not establish that he *would* have done so had Mr. Gerking not been on FMLA

leave.[6]

One way of showing that Wabash would have fired Mr. Gerking for harassing a female co-employee is to show that it has taken similar action under similar circumstances in the past. Wabash has offered no such evidence. Mr. Gerking has, however, offered evidence to the contrary; evidence indicating that Wabash has tolerated similar conduct under similar circumstances. Indeed, Linda Goble prepared a sex harassment policy and provided it to Mr. Smith for his approval. Mr. Smith asked Ms. Goble whether she really wanted to serve as the point person for the policy. She said that she did not. He said that he didn't want the job either. The policy was never implemented. Goble Aff., ¶ 15.

Ms. Goble also testified from personal knowledge that she observed Service Department Manager Jack Shores making sexual jokes and comments "on a daily basis"; that David Wilson, who succeeded Mr. Gerking as Parts Manager, also told sexual jokes and made comments containing sexual innuendo; and that sexual jokes were a routine part of the work environment. Goble Aff., ¶¶ 11, 13, 14. Although Ms. Goble's testimony is not a model of specificity, it is sufficiently factual and detailed in nature to overcome Wabash's objections to its admissibility, particularly on this issue on which Wabash bears the burden of persuasion. In short, Mr. Gerking has presented sufficient evidence to cast doubt on the proposition that Mr. Smith would have fired Mr. Gerking had he not been on

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[6]Wabash's burden is analogous to the employer's burden with respect to affirmative defenses in "mixed motive" cases. *See, Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In her often-cited concurring opinion, Justice O'Connor noted that the employer must "convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." 490 U.S. at 276-277, 109 S.Ct. at 1804. It is *not* enough for the employer to show that it had sufficient reason to take the adverse employment act, if the otherwise sufficient reason did not actually motivate the action. *Also see, McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S.Ct. 879, 885, 130 L.Ed.2d 852 (1995).

leave.

It follows that we cannot hold as a matter of law that Wabash was relieved of its duty to restore Mr. Gerking to the position he occupied before he went on FMLA leave. There are issues of fact with respect to the position Mr. Gerking occupied before his leave and the reason why Wabash did not restore him to it. Accordingly, we DENY Wabash's motion for summary judgment with respect to Mr. Gerking's FMLA failure-to-restore claim.

2. *FMLA Interference.*

We arrive at the same conclusion with respect to Mr. Gerking's FMLA interference claim, although it presents a closer call. The FMLA prohibits an employer from interfering with an employee's rights. 29 U.S.C. § 2615(a). Interference claims are subject to traditional employment discrimination analysis. To establish a prima facie case, Mr. Gerking must present evidence showing that: "(1) the plaintiff engaged in a protected activity; (2) the employer took adverse employment action against the employee; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. *King*,166 F.3d at 892; *Diaz*, 131 F.3d at 712. Where, as here, the plaintiff successfully presents a prima facie case and the employer sustains its burden of presenting evidence of a legitimate, non-discriminatory reason for taking its adverse employment action, the plaintiff must present sufficient evidence to raise a reasonable inference that the employer's explanation is pretextual. *Id.*

As to the first issue, we have already concluded that Mr. Gerking was on FMLA leave, so that his conduct was protected. As to the second, Wabash fired him. Finally, the fact that Wabash discharged him while he was on FMLA leave – and did not restore him to his prior position – is

sufficient to raise a prima facie inference of causation. *King*, 166 F.3d at .[7] Mr. Gerking's evidence is sufficient to make Wabash respond. Wabash has responded, asserting that it fired him because Mr. Smith discovered that Mr. Gerking had sexually harassed Anita Burcham.

We turn, then, to Mr. Gerking's evidence of pretext, reminding the parties that a pretext is not an instance of poor judgment or a bad business reason, but a "lie" or a "phony reason." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir.1995). Mr. Gerking's evidence must be sufficient to raise an inference that Mr. Smith did not honestly believe that Mr. Gerking sexually harassed Ms. Burcham or that, even if he had, Mr. Smith did not really discharge him for that reason.

Mr. Gerking offers several kinds of evidence to raise doubt as to the honesty of Mr. Smith's explanation. First, as we already noted in the context of Mr. Gerking's failure-to-restore claim, it is by no means clear that Mr. Smith would have discharged an employee for engaging in sexual harassment. Mr. Smith declined an opportunity even to implement an anti-harassment policy, which strikes us as a minimal threshold of preventive activity for an employer to take in this era of increasing sex harassment litigation. Additionally, Ms. Goble testified that sexual jokes and innuendo, including management participation, were a routine feature of the work environment. This evidence suggests that, even if Mr. Smith honestly believed that Mr. Gerking had subjected Ms. Burcham to harassment, there is reason to doubt that he would have fired Mr. Gerking because of it.

Second, while Wabash forthrightly proclaims that Mr. Smith fired Mr. Gerking because he sexually harassed Ms. Burcham, there is confusion on the record as to what Mr. Smith knew about the

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[7]The Seventh Circuit found close temporal proximity sufficient to establish a prima facie case in *King* where the employee was terminated a day *after returning* from leave.

alleged harassment and when he knew it. For example, Mr. Smith never spoke with Ms. Burcham. Nor did Ms. Burcham ever complain to him. Smith Dep., p. 139. Nor did she ever lodge any sort of formal internal complaint. Goble Aff., ¶ 17. Mr. Smith learned of the alleged harassment from Mr. Wilson. But Mr. Wilson testified only that Ms. Burcham told him Mr. Gerking made her feel "very uncomfortable" and made her skin "crawl." Wilson Dep., pp. 14, 17. Mr. Wilson expressly denied using the phrase "sexual advances." Wilson Dep., p. 17. Mr. Smith testified that Mr. Wilson told him about Mr. Gerking's "inappropriate acts" toward Ms. Burcham and that he based his decision solely on what Mr. Wilson told him. Smith Dep., p. 137.

In addition, Ms. Burcham signed an affidavit detailing a long train of sex harassment incidents that she allegedly suffered at Mr. Gerking's hands. Def. Ex. 9. Mr. Wilson testified that she did not mention the items listed in her affidavit until later. Wilson Dep., 17-18. Indeed, defendant has used the entire Burcham affidavit – including incidents that, on their face, occurred (if at all) long after Mr. Gerking was fired. These incidents could not, of course, have figured in Mr. Smith's decision and therefore have no place in an analysis designed to show us what Mr. Smith believed at the time he fired Mr. Gerking. Use of these incidents creates a kind of evidentiary overkill which can undermine our confidence in the employer's representations of fact.

Mr. Gerking had not worked in the same building as Ms. Burcham for more than a year. Wilson Dep., pp. 19-20; Goble Aff., ¶ 17. Mr. Wilson testified that the most recent example of harassment of which he was aware had happened more than a year before Mr. Gerking was terminated. Wilson Dep., pp. 20-21. These facts add to the confusion, because a jury might infer from them that the harassment had occurred (if at all) long before Mr. Gerking's termination – so long before

as to raise a question about the significance of harassment in Mr. Smith's discharge decision. Add to this Mr. Wilson's testimony that he told Mr. Smith of the "harassment" of Anita Burcham in September 1999. Wilson Dep., p. 23. If that is the case – and a jury could conclude that it was – then Mr. Smith not only didn't fire Mr. Gerking when he found out about the alleged harassment, but he transferred him to an inside sales position as of October 4, 1999.

For these reasons, a jury could reasonably conclude that Mr. Smith did not fire Mr. Gerking because he allegedly harassed Ms. Burcham; accordingly, it cold conclude that the employer's stated reason for discharging Mr. Gerking is a pretext. We do not say that a jury *must* find that Wabash's explanation is false. We merely cannot find as a matter of law that the evidence is insufficient to warrant such a conclusion. As the Seventh Circuit concluded in *King*, we conclude here "[t]he record contains evidence that, if believed, could demonstrate that [the employer's] explanation for her termination was, at a minimum, disingenuous." 166 F.3d at 894. Pursuant to *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993): "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity)[8] may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Also see, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 12105, 47 L.Ed.2d 105 (2000); *Sheehan v. Donlen*

[8]We are troubled by testimony that a document both parties believed material to this litigation – Pl. Ex. 7 – did not appear in Mr. Gerking's personnel file at the time of his discharge but appeared later. Goble Aff. ¶ 20.

Corp., 173 F.3d 1039, 1045 (7th Cir. 1999).

IV. Conclusion.

For the reasons addressed, we GRANT Wabash's motion for summary judgment as to Mr. Gerking's ADA demotion claim because it is time barred; and even if it had been timely filed, Mr. Gerking has presented legally insufficient evidence to warrant a reasonable conclusion that he had a disability. We also GRANT Wabash's motion with respect to Mr. Gerking's ADA discharge claim because he has adduced insufficient evidence to support a conclusion that he had a disability. We DENY Wabash's motion with respect to both of Mr. Gerking's FMLA claims. There is sufficient evidence to support a jury conclusion that Wabash did not restore him to the position he occupied prior to his leave and that it interfered with his FMLA rights by terminating him.

It is so ORDERED this _____ day of September 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution To:

π Eric Hylton
Lowe Gray Steele & Darko
111 Monument Circle Suite 4600
P O Box 44924
Indianapolis, IN 46244-0924

John T L Koenig
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204-3535