UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-23449-BLOOM/Louis

JULIE FERRO,

Plaintiff,

v.

DOCTORS HEALTHCARE PLANS, INC., *et al*.

Defendants.

DEFENDANTS DOCTORS HEALTHCARE PLANS, INC. AND RAFAEL PEREZ'S MOTION TO DISMISS

Defendants Doctors HealthCare, Plans, Inc. ("DHCP") and Rafael Perez, (collectively, the "Defendants") hereby move to dismiss Plaintiff Julie Ferro's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and in support state:

INTRODUCTION

In June 2020, Ms. Ferro was terminated from her employment at DHCP. Two months after her termination, she filed the instant action, asserting claims for interference and retaliation under the Family and Medical Leave Act ("FMLA"). In her Complaint [ECF No. 1], Ms. Ferro alleges that DHCP and its Chief Executive Officer, Mr. Perez, interfered with her right to take FMLA leave by failing to provide her with notice of her right to take FMLA leave and then retaliated against her for exercising this right. These claims juxtapose the FMLA's requirements. It is, in fact, the covered employee's responsibility to provide notice to his or her employer that need for leave is required. Ms. Ferro failed to provide that required notice, and this fact alone is fatal to both her claims. Because Ms. Ferro's Complaint fails to state a viable cause of action, it must be dismissed.

FACTUAL BACKGROUND

DHCP is a South Florida-based health insurance company offering Medicare Advantage plans to the local market. *See* Compl. at ¶ 1. In 2002, Mr. Perez recruited Ms. Ferro to work at his previous health insurance startup, Medica HealthCare Plans, Inc., as its director of Provider Relations. *Id*. at ¶¶ 34, 33. UnitedHealthgroup purchased Medica in 2012, and Ms. Ferro continued on in her prior capacity under United's management for a time. *Id*. at ¶¶ 35-36. Between 2013 and 2017, Ms. Ferro claims to have worked in a consulting capacity for "several management services organizations and other healthcare entities." *Id*. at ¶ 39.

Based on their long history together, Mr. Perez asked Ms. Ferro to join his new startup as DHCP's Vice President of Provider Relations in 2017. *Id*. at ¶¶ 27, 40. She, of course, accepted. *Id*. In this role, Ms. Ferro was responsible for training and in-servicing the various healthcare companies comprising DHCP's provider network. *Id*. at ¶ 31. At the time of her hire, she was one of DHCP's first employees, although the company's staff now numbers over 100. *Id*. at ¶ 31.

In late-November 2019, Ms. Ferro was hospitalized for a week due to an adverse reaction from drugs she had been prescribed to treat a growth on the side of her mouth. *Id*. at ¶¶ 45, 48. Ms. Ferro alleges that she "regularly" kept Mr. Perez updated on her medical issues and the progress of her recovery, although she does not allege the timing of any such communications between the two or whether Mr. Perez even knew how long she had been in the hospital. *Id*. at ¶ 49. Following her hospitalization, Ms. Ferro worked from home for the next two weeks and subsequently returned to DHCP's Coral Gables offices. *Id*. at ¶ 48. There is no allegation that anyone from DHCP required her to return to the office. *See generally* Complaint. Indeed, Ms. Ferro admits that she returned to work in the office on Christmas Eve that year of her own volition. *Id*. at ¶ 52.

In March 2020, the COVID-19 pandemic began to impact the South Florida community in earnest. *Id*. at ¶ 61. Following the March 16, 2020 advisory issued by the Centers for Disease Control and Prevention (the "CDC"), Mr. Perez informed Ms. Ferro, along with the majority of other employees at DHCP, that she should work

remotely from that point forward. *Id*. at ¶ 71. Although Mr. Perez announced in late-May that certain employees would begin returning to the office on May 26, 2020, Ms. Ferro was never told she needed to do so. *Id*. at ¶ 79. Indeed, she admits that Mr. Perez spoke to her to confirm that she was not, in fact, planning to return to the office. *Id*. at ¶¶ 81-82. Nevertheless, and again of her volition, Ms. Ferro returned to the office on May 26, 2020. *Id*. at ¶¶ 79, 83.

There is no allegation in the Complaint that, at any point, from her initial November 2019 hospitalization until her termination in June 2020, Ms. Ferro ever told Mr. Perez or anyone at DHCP that she believed she would need to take leave of any sort for any reason, let alone for a reason implicating the FMLA.

In June 2020, Mr. Perez told Ms. Ferro he was terminating her employment for poor performance, including making an unauthorized settlement offer. *Id.* at ¶¶ 97, 100-02. Ms. Ferro alleges the reasons given for her termination are untrue and that she was instead terminated in alleged retaliation for taking medical leave. *Id.* at ¶¶ 102, 104, 112, 117. This lawsuit followed.[1]

ARGUMENT

A. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter, which if accepted as true, states a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility requires "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the as-pleaded facts permit

[1] The Complaint states that Ms. Ferro is concurrently filing a Charge of Discrimination with the Equal Employment Opportunity Commission and that she intends to add discrimination and hostile work environment claims upon issuance of a Notice of Right to Sue from the EEOC. *See* Compl. at ¶¶ 21-23, 108. Ms. Ferro filed her Charge of Discrimination with the EEOC on August 24, 2020. DHCP and Mr. Perez filed their Position Statement in response to that Charge on October 9, 2020, providing email evidence to the Commission that Ms. Ferro made the unauthorized settlement offer she claims she did not make, and then, when confronted about the offer, lied to Mr. Perez about doing so.

only the *possibility* of misconduct, then the complaint is insufficient and must be dismissed.. *Id.*

The Complaint "must contain allegations addressed to each material element 'necessary to sustain a recovery under some viable legal theory.'" *Napier ex rel. Napier v. Florida Dept. of Corr.*, No. 09-CV-61158, 2010 WL 2327442 at *2 (S.D. Fla. June 16, 2010) *citing Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001). "Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Absent the necessary "factual content," claims of "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" cannot "empower plaintiff to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Iqbal*, 556 U.S. at 678, 689.

B. Both FMLA Claims Fail Because Ms. Ferro Never Requested Leave

The FMLA

Under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12–month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" is further defined as "an illness, injury, impairment, or physical or mental condition that involves . . .inpatient care in a hospital, hospice, or residential medical care facility [or] continuing treatment by a health care provider." *Id*. at § 2611(11).

Eligible employees are required to provide their employer with thirty days advance notice of the need for leave, when the need is foreseeable. *Id*. at § 2612(e)(2)(B). If the need for leave is not foreseeable, notice must be given *by the employee* "as soon as practicable under the facts and circumstances of the particular case." *See* 29 C.F.R. § 825.303(a). And while the employee is not required to expressly assert the right to take leave under the FMLA, the required notice must be "*sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.*" *Id*. (emphasis added). Once an

employee gives sufficient notice to her employer that potentially FMLA-qualifying leave is needed, the employer must then ascertain whether the employee's absence actually qualifies for FMLA protection. See *Strickland v. Water Works and Sewer Bd. of the City of Birmingham*, 239 F.3d 1199, 1209 (11th Cir. 2001) (citing 29 C.F.R. § 825.303(b)).

The FMLA creates a private right of action for employees to seek equitable relief against, and money damages from, employers who interfere with, restrain, or deny the exercise of or the attempt to exercise their FMLA rights. *See* 29 U.S.C. §§ 2615(a)(1), 2617(a); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724-25 (2003). Accordingly, two types of claim are available to employees under the FMLA: "*interference claims*, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and *retaliation claims*, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act." *Strickland*, 239 F.3d at 1206 (cleaned up) (emphasis added).

Both Ms. Ferro's interference claim and retaliation claim fail for the same reason: she never provided notice of her need for FMLA-qualifying leave.

Interference Claim

Ms. Ferro alleges that DHCP and Mr. Perez interfered with her right to leave under the FMLA by not informing her of her right to take leave and for terminating her for having a serious medical condition that required her to take medical leave. *See* Compl. at ¶¶ 116-17. Neither theory is supported by the facts alleged.

To establish an interference claim, "an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied." *Id.* at 1207; *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir. 2000). "While suffering from a serious health condition is necessary, it is not sufficient for an employee to earn FMLA leave. She must also give her employer notice of her need for leave, *see* § 2612(e), and she can state an interference claim only if she gave proper notice." *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1195 (11th Cir. 2015) (internal citation omitted).

In her Complaint, Ms. Ferro describes an adverse drug reaction in November 2019 that required a week-long hospital stay. *See* Compl. at ¶ 48. She further alleges that she "regularly kept Mr. Perez updated on her medical issues and the progress of her recovery." *Id*. at ¶ 49. Notably absent is any allegation regarding the beginning point of these communications or that Mr. Perez and DHCP had any knowledge she had been hospitalized, and if so, for how long. Nevertheless, despite these purported "regular" communications, the Complaint contains no allegations that Ms. Ferro requested leave or an extended absence of any sort. Nor does she allege that she gave notice sufficient to make Mr. Perez or anyone at DHCP aware that her "illness" was of the sort eligible for FMLA-qualifying leave, or that she gave DHCP notice of either the anticipated timing or duration of the leave, as is required. *See* 29 C.F.R. § 825.303(a).

Nor would she have. Ms. Ferro's hospitalization was due to an adverse drug reaction caused by medications she had taken to treat a sore on the side of her mouth. *See* Compl. at ¶¶ 46-47. Such an acute medical episode neither requires long-term inpatient care nor constitutes an illness, injury, impairment, or physical or mental condition involving the "continuing treatment by a health care provider." 29 U.S.C. § 2611(11). By Ms. Ferro's own allegations, it was little more than a discrete occurrence her doctors were able to effectively treat within a week. *See* Compl. at ¶ 48. Indeed, she admits that she was already working from home after being released from the hospital. *Id*.

Ms. Ferro does not allege that she notified DHCP or Mr. Perez of her adverse drug reaction prior to being released from the hospital. Nor does she allege that she saw any healthcare professionals related to this episode after her discharge, that she was subject to a regimen of continuing treatment, or that was she ever hospitalized again. Accordingly, without Ms. Ferro requesting leave of some sort, there would have been no reason for anyone at DHCP to provide her with any information related to an extended leave, FMLA or otherwise. By all accounts, her treatment had resolved any medical issues at play. This failure to inform Mr. Perez and DHCP of her need for leave is fatal to her interference claim. *See Sanders v. Temenos USA, Inc.*, No. 16-

cv-63040, 2017 WL 4577235, at *6 (S.D. Fla. Oct. 13, 2017) (Bloom, J.) (granting summary judgment on FMLA interference and retaliation claims where plaintiff sent multiple communications to defendant regarding his alleged illnesses, but "never made a request for leave, nor did he communicate a need for leave") (citations omitted); *see also Martinez v. Mercedes Home Realty, Inc.*, No. 6:04-cv-1467, 2005 WL 2647884, at *5 (M.D. Fla. Oct. 17, 2005) ("The bottom line, however, is that while the employee need not cite the FMLA, she must clearly state that leave is necessary.")

The Complaint also contains numerous allegations regarding the onset of the COVID-19 pandemic and DHCP's response to the national crisis. *See* Compl. at ¶¶ 61-108. Nevertheless, Ms. Ferro fails to allege what health-related issue would require her to have taken leave during this period or what actions should have been taken by either DHCP or Mr. Perez with respect to her in light of the pandemic. Indeed, the substance of these allegations appears to be that Ms. Ferro believes she should have been permitted to work from home beginning in March 2020 and continuing indefinitely. *Id.* at ¶¶ 61-94. But the FMLA does not provide a right to telecommute; it provides a right to take leave. *See* 29 U.S.C. § 2612(a)(1)(C). More importantly, however, DHCP permitted Ms. Ferro—along with the majority of DHCP's employees—to work remotely. *Id.* at ¶ 67. Indeed, she does not allege that anyone at DHCP ever instructed her to physically return to the office or that she was not permitted to work remotely if she had continuing concerns about her health. Quite the opposite. Ms. Ferro concedes that she alone made the decision to return to the office on May 26, 2020, and never at any point told anyone in the company she required leave of any sort, whether with respect to the pandemic or otherwise. *Id.* at ¶ 83.

Finally, Ms. Ferro alleges that "Defendants further unlawfully interfered with Ms. Ferro's rights under the FMLA by terminating her employment because she suffered from a serious medical condition that had in the past, and likely would continue to in the future, require Ms. Ferro to take leave to treat her serious medical condition." *Id.* at ¶ 117. But Ms. Ferro does not allege—because she cannot—that there is any realistic potential of future medical implications caused by the adverse

drug reaction caused by the treatment for her temporary skin condition. Nor does she allege that she took leave for this condition—or any other condition. Indeed, the crux of her interference claims is that *she was prevented from taking* such leave because she had no prior knowledge of her right to elect FMLA leave.[2] At bottom, Ms. Ferro never took leave of any sort nor gave DHCP or Mr. Perez notice that she would need to take future medical leave for any reason. Accordingly, she could not have been terminated for this reason.

Because Ms. Ferro neither alleges she gave DHCP sufficient notice of her need for leave nor that she provided the company with notice of the probable timing and duration of any requested leave, her claim for FMLA interference fails and dismissal is required. *See, e.g., Finch v. Morgan Stanley & Co., LLC*, No. 15-CIV-81323, 2016 WL 4248248, at *4 (S.D. Fla. Aug. 11, 2016) (dismissing claim for FMLA interference where plaintiff failed to allege she had provided her employer with information necessary to determine whether FMLA leave may apply or the duration of such leave).

Retaliation Claim

As with her claim for interference under the FMLA, Ms. Ferro alleges that DHCP and Mr. Perez retaliated against her by terminating her for taking leave. *See* Compl. at ¶ 112. As a preliminary matter, she does not allege that she ever took leave. Indeed, the sole basis for her interference claim is that she was *prevented* from taking leave by DHCP and Mr. Perez's purported failure to provide her with notice of her right to take such leave. For that reason alone, Ms. Ferro's retaliation claim requires dismissal. But even if she had taken FMLA leave, or indeed engaged in any other type of protected activity, her retaliation claim would fail for precisely the same reason her interference claims fails: she at no point gave anyone at DHCP notice of her intention to take leave or a need for same.

[2] This is contradicted by the undisputable fact that Ms. Ferro both received and acknowledged in writing that she had received and agreed to DHCP's FMLA policy. *See* Section D, *infra*.

In order to state a claim of FMLA retaliation, an employee must allege that (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment decision; and (3) the decision was causally related to the protected activity. *See, e.g., Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298, 1301 (11th Cir. 2000). The claim here does not get past the first element. As described above, nowhere in the Complaint does Ms. Ferro allege that she engaged in protected activity by requesting leave from Mr. Perez or anyone at DHCP. Nor does she allege that she requested *any* sort of accommodation related to any medical condition she may have been experiencing.[3] Accordingly, Ms. Ferro's claim for FMLA retaliation also fails and dismissal is required. *See, e.g., Sparks v. Sunshine Mills, Inc.*, 580 F. App'x 759, 766 (11th Cir. 2014) ("Because [defendant] was unaware [plaintiff] needed or desired FMLA leave . . . [plaintiff has failed to establish [defendant] retaliated against him for engaging in a protective activity under the statute."); *Sanders*, 2017 WL 4577235, at *6 ("By extension, because no request for leave was ever expressed, there can be no requisite causal link between such a request and [plaintiff's] termination."); *Finch*, 2016 WL 4248248, at *5 ("As Finch fails to allege that she engaged in protected activity under the FMLA, her claim for retaliation under the statute must be dismissed.").

C. The FMLA Does Not Permit Recovery of Non-Monetary Losses

In her Prayer for Relief, Ms. Ferro requests, among other things, "[a]n award of damages against Defendants, or any jointly or severally liable entity or person, in an amount to be determined at trial, plus prejudgment interest, to compensate Plaintiff for all non-momentary and/or compensatory damages, including but not limited to, compensation for her emotional distress." Compl. at Prayer for Relief (D). In addition, Ms. Ferro requests an award of punitive damages, as well as all other

[3] Quite the opposite, in fact. Ms. Ferro admits that during the onset of the COVID-19 pandemic, DHCP—despite being an essential business under CDC, CISA, the State of Florida, and Miami-Dade County guidelines—permitted vast swaths of its workforce to work from home, including Ms. Ferro and most of her department. *See* Compl. at ¶¶ 71-72

monetary and/or non-monetary losses suffered by Plaintiff, including "reputational harm, and harm to professional reputation, in an amount to be determined at trial, plus prejudgment interest." *Id.* at (E) & (F).

For claims under the FMLA, Congress allows for the recovery of "wages, salary, employment benefits, or other compensation denied or lost," or "any actual monetary losses sustained ... as a direct result of the violation, such as the cost of providing care." *Canigiani v. Banc of Am.*, No. 17-CV-61270, 2017 WL 4390170, at *4 (S.D. Fla. Oct. 3, 2017) (Bloom, J.) (granting motion to strike claims for damages unrecoverable under the FMLA, including non-pecuniary and punitive damages) (citations omitted). Recovery of non-monetary losses, including emotional pain, suffering, mental anguish, loss of enjoyment of work and humiliation are not recoverable under the FMLA. *Id.* Nor does the FMLA provide for an award of punitive damages. *See, e.g., Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999)*; Matamoros v. Broward Sheriff's Office*, No. 0:18-CV-62813-KMM, 2019 WL 4731931, at *5–6 (S.D. Fla. June 8, 2019) ("However, the FMLA does not provide for either emotional or punitive damages.") (citing 29 U.S.C. § 2617).

Accordingly, because the FMLA does not permit a plaintiff to recover for non-monetary losses or punitive damages, Ms. Ferro's claims for "all non-momentary and/or compensatory damages, including but not limited to, compensation for her emotional distress," "reputational harm and harm to professional reputation," and punitive damages should be dismissed with prejudice. *See Matamoros*, 2019 WL 4731931, at *5–6 (dismissing claims for non-pecuniary and punitive damages under FMLA causes of action). In the alternative, DHCP and Mr. Perez respectfully move this Court to strike these claims for relief under Rule 12(f). *See Canigiani*, 2017 WL 4390170, at *4.

D. Ms. Ferro's Claims Should Be Dismissed with Prejudice

As described above, the allegations in Ms. Ferro's Complaint support neither a claim for FMLA interference nor a claim for FMLA retaliation, and therefore both claims should be dismissed. The dismissal of the interference claim should be with prejudice because no amount of artful pleading will ever be able to get around the

undisputable fact that Ms. Ferro was at all times aware of her ability to take medical leave at any point—whether under the FMLA or otherwise.

As part of her ongoing employment training, Ms. Ferro—like every other DHCP employee—was provided with the company's Employee Handbook. *See* 2019 DHCP Employee Handbook, attached hereto as **Exhibit 1**. Section 6.0 of the Handbook covers *Leaves of Absence*, with the first section titled *Family Medical Leave Act (FMLA)*. *See* Employee Handbook at 34-36. The very first sentence of this section places DHCP employees on notice of their rights under the FMLA: "Regular full-time employees are eligible to take up to 12 weeks of unpaid FMLA Leave within any 12-month period and be restored to the same or an equivalent position upon your return from leave." *Id*. The policy further informs employees that "You may take FMLA Leave for any of the following reasons: . . . (5) because of your own serious health condition which renders you unable to perform an essential function of your position." *Id*. Accordingly, Ms. Ferro cannot ever credibly allege that she was not on notice of her right to take leave for any serious medical conditions she may face.

Consistent with the tenets of the FMLA, DHCP employees seeking leave under the FMLA are further directed to provide the company with written notice "as soon as practicable" and to subsequently obtain medical certification for any applicable serious health conditions. *Id*. at 35. Just as did every other employee at DHCP, Ms. Ferro received an updated version of the Handbook in 2019. On September 5, 2019, Ms. Ferro executed an acknowledgment that she had received and would abide by the policies in the 2019 update to the Handbook, including the FMLA policy. *See* Handbook at 52. This was less than three months before her adverse drug reaction and shortly before the COVID-19 pandemic swept across the globe. *See* Compl. at ¶¶ 46-48.

Because Ms. Ferro can never allege that DHCP did not inform her of her right to take leave, an essential element of both her claims, the dismissal should be with prejudice. *See, e.g., Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) ("A proposed amendment may be denied for futility when the complaint as amended would still be properly dismissed.") (cleaned up); *see also* Fed. R. Civ. P. 1 (requiring

both the Federal Rules of Civil Procedure be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

CONCLUSION

For the foregoing reasons, Defendants Doctors HealthCare Plans, Inc. and Rafael Perez respectfully request that Plaintiff's Complaint be dismissed.

Dated: October 19, 2020.

Respectfully submitted,

/s/ Eric S. Boos
Daniel B. Rogers
drogers@shb.com
Florida Bar No.: 195634
Eric S. Boos
eboos@shb.com
Florida Bar No.: 0107673
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 3200
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: 305.358.5171

Counsel for Defendants Doctors HealthCare Plans, Inc. and Rafael Perez