

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Alex D. McMillen,  
Plaintiff

v.

Case No. 12-cv-077-SM  
Opinion No. 2014 DNH 197

Concord Hospital,  
Defendant

**O R D E R**

Alex McMillen was employed by Concord Hospital as a security officer. After the hospital fired him, he brought this action in state court, seeking damages for wrongful termination under New Hampshire's common law (count one), and unlawful retaliation under the federal Family and Medical Leave Act (count two). Concord Hospital removed the case, invoking this court's federal question jurisdiction. See 28 U.S.C. § 1331. See also 28 U.S.C. §§ 1441(a) and 1446. The parties have engaged in substantial discovery and Concord Hospital now moves for summary judgment on both counts. McMillen objects.

For the reasons stated, Concord Hospital's motion for summary judgment is granted.

**Standard of Review**

When ruling on a motion for summary judgment, the court must construe the record in the light most favorable to the non-moving

party and resolve all reasonable inferences in that party's favor. Pierce v. Cotuit Fire Dist., 741 F.3d 295, 301 (1st Cir. 2014). Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this context, "a fact is 'material' if it potentially affects the outcome of the suit and a dispute over it is 'genuine' if the parties' positions on the issue are supported by conflicting evidence." Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted). Nevertheless, if the non-moving party's "evidence is merely colorable, or is not significantly probative," no genuine dispute as to a material fact has been proved, and "summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted).

The key, then, to defeating a properly supported motion for summary judgment is the non-movant's ability to support his or her claims concerning disputed material facts with evidence that conflicts with that proffered by the moving party. See generally Fed. R. Civ. P. 56(c). It naturally follows that while a reviewing court must take into account all properly documented facts, it may ignore a party's bald assertions, speculation, and

unsupported conclusions. See Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997). See also Scott v. Harris, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

### **Background**

Concord Hospital hired McMillen as a “per diem” security officer in July of 2006. About a year later, he was promoted to a full-time position, working the second shift. During the course of his employment, McMillen reported to his shift supervisor, Carl Hamel, who, in turn, reported to the hospital’s security manager, Michael Payeur. All three men worked under the supervision of John Charron, the director of the hospital’s security operations.

According to the hospital, beginning in early 2008, concerns began to surface that McMillen was not performing his job with the requisite degree of seriousness. In April of that year, and again in August, he was given written warnings (from Mr. Payeur) concerning inappropriate and unprofessional behavior. See Reports of Disciplinary Action (documents no. 15-3 and 15-4).

In March of the following year, McMillen was injured in a motorcycle accident. In response, the hospital offered, and he accepted, leave under the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq. (the "FMLA"). He was out of work for seven weeks. During that time, several of McMillen's colleagues, including Hamel and Payeur, donated portions of their own leave time so McMillen could continue to receive pay after he had exhausted his earned time off. When McMillen returned to work in May, the hospital accommodated him with a "light duty" position, at the same rate of pay he had been earning prior to his accident. According to McMillen, the light duty position was "approved by both the Human Resources and Employee Health Departments and it was consistent with [his] physician's recommendations." Complaint, at para. 10. About two weeks later, McMillen's physician lifted his work restrictions and he returned to full duty as a security officer. Id. at paras. 12-13.

In June of 2009, as part of McMillen's annual evaluation, his direct supervisor (Carl Hamel), prepared an assessment of McMillen's job performance and submitted it to the security department manager (Mike Payeur). In it, Hamel made the following observations:

**Performance:** When under pressure or in emergent situations, Officer McMillen performs exceptionally well. He is able to quickly assess the situation and do what is required for a positive outcome. However, when Officer McMillen is just doing patrols or has free time, he does not seem to take his responsibilities seriously enough.

**Communications and Report Writing:** Again, Officer McMillen has both good and bad communications issues. Officer McMillen's radio transmissions are generally clear and precise. However, over the past year Officer McMillen's radio etiquette has become less and less professional. On a few occasions Officer McMillen has made inappropriate comments over the radio.

\* \* \*

**General Attitude:** Combined with the fact that Officer McMillen likes to joke around and have a good time his attitude, of late, seems to be that he really does not care one way or the other.

Memorandum dated June 16, 2009 (document no. 15-6). Other notable weaknesses in McMillen's job performance included a failure to patrol parking areas accurately and exercise good judgment when issuing tickets or speaking to individuals about parking issues, and a failure to complete his paperwork in a timely manner. Id.

After reviewing that memo as well as other information available to him, Payeur prepared McMillen's annual "Performance Evaluation." The details of that document need not be recounted. It is sufficient to note that Payeur made the following "Overall Assessment" of McMillen's performance:

Officer McMillen has slipped backwards in his overall performance over the last year becoming less engaged with the requirements of the job. Officer McMillen has reportedly used unprofessional radio etiquette and has seemingly taken on an attitude of "I don't care," regarding his job performance. I find Officer McMillen to be capable of very high performance and have witnessed him in very volatile and emergent situations where he performs exceptionally well. However it appears that when routine duties like interior and exterior patrols or daily reports are needed his enthusiasm tends to dwindle. I realize that it is always exciting to have code three response to attend to at all times but the reality is we are not in that business and perhaps Officer McMillen might be better suited for another career. I understand that his ambition is to be in law enforcement but while here with us in security I will have to insist that he become more engaged and be a part of a functioning team as well as being attentive to all aspects of his job requirements and remaining professional while on duty.

Performance Evaluation (June, 2009) (document no. 15-5) at 3.

The overall theme of those documents is clear. When McMillen was interested and motivated, he was a capable (if not laudable) employee. But, he had grown disinterested and somewhat complacent in performing the more commonplace and routine aspects of his daily responsibilities.

Payeur met with McMillen to discuss the evaluation.

According to McMillen, Payeur told him the hospital was concerned about his "I don't care attitude." McMillen Deposition (document no. 15-1) at 87. McMillen explained that his seemingly disinterested attitude was the product of feeling depressed in

the wake of his motorcycle accident and the perceived loss (due to his injuries) of an opportunity to become a police officer one day.

I just had pretty much everything taken away from me in the blink of an eye. Where I was at, I had a personal trainer. I was fit and all set and worked pretty hard to where I was going to be, to be an officer then lost it all. My plan was to get a law enforcement job before, and when I came back I pretty much told them, "I'm not going anywhere. This is where I'm going to be," and we kind of discussed that.

Id. at 88. McMillen returned to work and, while the hospital may have been less than enthused about his job performance, it did not take any adverse employment action.

In August, McMillen underwent arthroscopic surgery on his knee to repair damage he had sustained in the motorcycle accident. He took the time away from work as "vacation" time, rather than medical leave under the FMLA, because he "did not want to face the same hurdles returning to work after this second surgery as he did after his initial leave." Complaint at para. 23. Nevertheless, hospital policy still required McMillen to obtain medical clearance before resuming his duties. See Return to Work Clearance by Employee Health Services (document no. 15-7) at 1 (requiring medical clearance to return to work whenever "an employee has any type of surgical procedure, hospitalization, or emergency treatment, regardless of the amount of time missed from

work. This includes any surgical procedure done while on 'vacation' or 'off time.'").

McMillen had planned to return to work on the Saturday of Labor Day weekend (September 5, 2009), but was informed by a co-worker that he could not do so without medical clearance. Complaint, at para. 25. McMillen contacted his supervisor (Mr. Hamel), explained that he could not afford to take any unpaid days off from work, and asked if he could be permitted to work light duty over the weekend. Hamel agreed and McMillen worked at the dispatch desk over the weekend. Nevertheless, McMillen said that, during the following week, he heard rumors from co-workers suggesting that the hospital planned to fire him for having returned to work without the appropriate medical clearance. Id. at para. 30. That did not come to pass. And, according to McMillen, he "worked without incident for the next couple months." Id. at 39.

On November 17, 2009, John Charron, the hospital's Security Director, issued a directive to members of the security staff. In it, he informed all security officers that they were not permitted to be seated while working in the hospital's "Yellow Pod" (the behavioral unit). The purpose of that directive was simple and straight-forward: Charron did not want security

officers placing themselves in a vulnerable (seated) position when working with or near potentially violent patients. He was also concerned that an agitated patient might use a nearby stool or chair as a weapon. See Affidavit of John Charron (document no. 15-11), at para. 5. See also Deposition of Michael Payeur (document no. 15-2), at 114-16. Three days later, as part of a routine security audit, Charron was reviewing security footage from the night before. On it, he observed McMillen seated on a stool in the Yellow Pod - in direct contravention of the recently-issued security directive. See Security Footage Still Photographs (document no. 15-10) (showing McMillen seated on a stool outside a patient's room).<sup>1</sup>

McMillen admits that he was seated while working in the Yellow Pod - both inside the patient's room (while he says he was trying to calm the patient), and outside the patient's room (while a counselor spoke with the patient). He also acknowledges that the patient was "volatile," complaint at para. 57, and "very aggressive," McMillen Affidavit (document no. 19-12) at para. 45. Nevertheless, McMillen says he decided to sit outside the

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<sup>1</sup> Charron explained that he began "routine reviews of surveillance" footage a few weeks earlier, after receiving information "from various sources that the then second-shift supervisor, Carl Hamel, and the Security Officers under his supervision, were being lax with Department procedures." Carron Affidavit at para. 3.

patient's room because "he did not want the patient to feel that he was being guarded, and he also wanted to remain close by in case there was a violent incident." Complaint at para. 57. And, despite the unambiguous language in Charron's recent directive that no security officer should ever be seated in the Yellow Pod, McMillen says he was actually conforming to provisions in the hospital's employee handbook, which encourage staff members to "show care and concern" for patients by sitting with them and listening to what they have to say. See Staff Member Handbook (document no. 19-10) at 7.

Charron saw the matter differently, noting that, "Not only was Mr. McMillen's use of a stool a blatant violation of my directive, but it could have led (although thankfully did not) to a very dangerous situation if Mr. McMillen was overtaken by a violent patient or the stool was used by a dangerous patient as a weapon." Affidavit of David Charron at para. 5. Based upon McMillen's undeniable violation of the security directive, Charron decided to terminate his employment. Charron explained his decision as follows:

At the time I reviewed the footage on November 20, 2009, I knew that Mr. Mcmillen had received two prior written warnings for unprofessional conduct. Both warnings involved Mr. McMillen "goofing around" on electronic devices that are intended to be used for professional purposes only.

Given the nature of his prior warnings, my knowledge of Mr. McMillen's general "I don't care" attitude that permeated his work in the Department, and my observation of Mr. McMillen violating my directive, I made the determination that Mr. McMillen did not take his responsibilities seriously, and decided to fire him for sitting in violation of the directive.

I consulted with Human Resources, but I was the sole decision-maker in determining to fire Mr. McMillen.

Id. at paras. 6-8.

According to McMillen, Charron's explanation is simply a pretext for unlawful discrimination and wrongful termination.

### **Discussion**

#### **I. FMLA Retaliation.**

To prevail on his FMLA retaliation claim, McMillen must establish that: (1) he availed himself of a protected right under the FMLA; (2) he suffered an adverse employment action; and (3) there was a causal connection between that adverse action and his protected conduct. See Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447 F.3d 105, 113-14 (1st Cir. 2006). In an effort to satisfy that third element and demonstrate a causal connection between having taken FMLA leave in May of 2009 and his discharge six months later, McMillen points to the following:

1. his deposition testimony that he believed his absence while on FMLA leave created a burden on Charron to fill the vacant spot;

2. that, shortly after he told Payeur that he was depressed over his accident because he thought his injuries would prevent him from becoming a police officer, Payeur suggested that it might be time for him to "move on";
3. that Concord Hospital "ignored its clearly established hierarchy" when he was fired by "his supervisor's supervisor's supervisor" (i.e., the director of the security department, Charron); and, finally,
4. that Concord Hospital failed to follow "express procedures and protocols" when it terminated McMillen (presumably without giving him yet another warning about his unprofessional conduct or putting him on a performance improvement plan).

See Plaintiff's Memorandum (document no. 19-1) at 11-12. See also McMillen Deposition at 204-13 (speculating as to the link between his FMLA leave and his discharge). At best, that evidence is immaterial, speculative, and/or exceedingly weak. It is insufficient to create a genuine dispute as to whether McMillen was fired in retaliation for having availed himself of FMLA leave. See, e.g., Carrero-Ojeda v. Autoridad de Energia Electrica, 755 F.3d 711, 721 (1st Cir. 2014) (affirming dismissal of plaintiff's FMLA retaliation claim on grounds that the complaint failed to set "forth sufficient facts to demonstrate a causal connection between her FMLA leave-taking and defendants' acts to establish a plausible claim for relief"). Here, as in Carrero-Ojeda, the plaintiff has pointed to "no facts beyond the timing of [his] discharge - e.g., no negative comments,

complaints, or expressions of reluctance by [his] superiors or co-workers about [his] FMLA leave-taking, no discussion of [his] FMLA leave status in performance reviews, etc. – that would lead us to think that defendants took [his] FMLA requests or leave status into account when deciding to discharge [him].”).

It is well established that an employee’s invocation of rights under the FMLA cannot be used as a negative factor in deciding to fire, suspend, or demote him. It is, however, equally well established that such an employee can be discharged for independent reasons. See, e.g., Henry v. United Bank, 686 F.3d 50, 55 (1st Cir. 2012). In this case, the record evidence overwhelming supports Concord Hospital’s assertion that McMillen was fired because he had a history of failing to perform his job with the degree of seriousness the hospital expected and because, consistent with that history, he inexplicably disobeyed a direct order from the head of the security department regarding the performance of his duties. Even crediting the evidence on which McMillen relies, a properly instructed rational jury could not conclude that his termination was in any way related to his earlier invocation of rights under the FMLA.

## II. Wrongful Termination.

### A. Supplemental Jurisdiction.

Having disposed of plaintiff's only federal claim, the court must now determine whether it is appropriate to exercise supplemental jurisdiction over his remaining state common law claim. See 28 U.S.C. § 1367. McMillen suggests that if the court resolves his federal claim against him (as it has), it should refuse to exercise supplemental jurisdiction and remand his common law claim to state court. The court declines that invitation.

The Court of Appeals for the First Circuit has identified the following factors that district courts should consider when determining whether to exercise supplemental jurisdiction over state law claims: (1) the interests of fairness; (2) judicial economy; (3) convenience; and (4) comity. See Camelio v. American Fed'n, 137 F.3d 666, 672 (1st Cir. 1998). Here, each of those factors counsels in favor of exercising jurisdiction over McMillen's common law wrongful termination claim. This is particularly true since his claim raises no novel issues of state law but, rather, involves a fairly straight-forward claim invoking a well-developed body of New Hampshire common law.

Moreover, the parties themselves have indicated that they wish to resolve McMillen's claims in a cost-effective manner that avoids piecemeal litigation. To that end, they filed a joint motion asking the court to hold in abeyance all pending deadlines and to defer scheduling a trial date until it had resolved the hospital's pending motion for summary judgment. In that motion, the hospital noted (and McMillen agreed) that its pending motion seeks judgment on all of McMillen's claims, and the parties did not wish to expend additional resources preparing for a trial that might not be necessary.

In light of the foregoing, the court concludes that it is appropriate to exercise supplemental jurisdiction over McMillen's common law claim of wrongful discharge.

B. The Merit's of McMillen's Claim.

McMillen worked for Concord Hospital as an "at-will" employee - that is, he did not have an employment contract. Consequently, as a general matter, either party was "free at any time to terminate the employment relationship, with or without cause." Porter v. City of Manchester, 151 N.H. 30, 37 (2004) (citation and internal punctuation omitted). An exception to that general rule is that "at-will" employees may pursue a cause of action in tort for wrongful discharge. See Leeds v. BAE

Systems, 165 N.H. 376, 368-69 (2013). Under New Hampshire common law, to prevail on a claim for wrongful discharge, a plaintiff must demonstrate two things:

one, that the employer terminated the employment out of bad faith, malice, or retaliation; and two, that the employer terminated the employment because the employee performed acts which public policy would encourage or because he refused to perform acts which public policy would condemn.

Short v. Sch. Admin. Unit No. 16, 136 N.H. 76, 84 (1992) (citing Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 921-22 (1981)). As this court has noted, the first element focuses on the nature of the employer's actions, while the second element focuses on those of the employee. Antonis v. Elecs. for Imaging, Inc., 2008 WL 5083979 \*3, 2008 DNH 204 (D.N.H. Nov. 25, 2008).

As to the first essential element of McMillen's wrongful termination claim, there is simply insufficient evidence in the record to permit a rational and properly instructed jury to conclude that Carron (or Concord Hospital) acted out of bad faith, malice, or retaliation.

Bad faith or malice on the part of an employer may be established under New Hampshire law where (i) an employee is discharged for pursuing policies condoned by the employer, (ii) the record does not support the stated reason for the discharge, or (iii) disparate treatment was administered to a similarly situated employee.

Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 44 (1st Cir. 2001) (citing Cloutier, 121 N.H. at 921-22). Here, McMillen's belief that his employment was terminated in bad faith or with malice is entirely speculative; there is no evidence of disparate treatment, nor is there evidence that McMillen was discharged for pursuing policies condoned by Concord Hospital. In fact, just the opposite is true. There is overwhelming evidence supportive of Carron's assertion that he fired McMillen because he violated the directive issued to all security officers that they were never to be seated when in the so-called "Yellow Pod."

McMillen's wrongful termination claim also falls short on the "public policy" element of his cause of action. On that point, McMillen asserts that Concord Hospital terminated his employment because he might, some day, avail himself of additional leave time under the FMLA and/or because he attempted to calm an agitated patient (and, while doing so, assumed a seated position). Specifically, he alleges:

Public policy discourages terminating employees because they may need future medical care. In this case, the hospital anticipated that, due to his injuries from the accident, Mr. McMillen would need further treatment and would require leave. He told numerous hospital personnel about the prospect of future surgeries.

Public Policy (and indeed hospital policy) encourages employees to engage with agitated or distressed

patients in constructive ways, which may mean sitting with the patients or otherwise making efforts to make the patients feel comfortable with the interaction.

Complaint at paras. 79-80.

McMillen's first claim - to have been in a situation in which he might have invoked FMLA leave time at some point in the future - can be dispatched quickly. As noted above, the focus at this stage of the court's analysis is on McMillen's conduct, not the hospital's. That is, McMillen must point to some conduct in which he engaged that public policy encourages, or some conduct in which he refused to engage that public policy condemns. He has not. Instead, he relies on his "status" as an employee who had previously taken FMLA leave and who "might" have invoked such leave again in the future (but had not yet done so). This court has repeatedly rejected such status-based wrongful termination claims.

As the New Hampshire Supreme Court has made clear, the common law cause of action for wrongful discharge is not the proper means by which to remedy a discharge that was motivated by someone's status or physical condition. Instead, that cause of action is properly invoked only when an employee is discharged in response to his or her having engaged in a "narrow category" of conduct.

Parker v. MVM, Inc., 2006 WL 1724359 \*2-3, 2006 DNH 70 (D.N.H. 2006) (citing Howard v. Dorr Woolen Co., 120 N.H. 295, 297

(1980)). See also Cooper v. Thomson Newspapers, Inc., 6 F. Supp. 2d 109, 115 (D.N.H. 1998) ("The New Hampshire Supreme Court has rejected the notion that a termination based upon the employee's status could form the basis for a wrongful termination claim because such a termination is not based upon the employee's action.").

McMillen's second claim - that public policy encourages employees to engage agitated or distressed patients in constructive ways, if necessary from a seated position - fares no better. There is no public policy that encourages employees to be insubordinate and disregard direct orders from their supervisors, particularly when those orders were issued to protect the employee, co-workers, and hospital patients. See generally Short, 136 N.H. at 85 (noting that "an employee's expression of disagreement with a management decision is not an act protected by public policy"); cf. Bennett v. Thomson, 116 N.H. 453, 458 (1976) (holding that employee may be discharged when opposition to an employer's policy may "seriously impair the effectiveness of his performance, and substantially impede the very tasks he was assigned to accomplish.").

McMillen's invocation of the hospital's "policy" that encourages employees to sit with agitated patients in an effort

to calm them provides no support for his claim. For one thing, the still pictures of the events in question plainly show McMillen seated outside the patient's room, out of the patient's view, while a staff member was inside the room speaking with the patient. Given the circumstances presented (i.e., an agitated and potentially violent patient) and McMillen's role as a security officer in those circumstances (i.e., to be ready and able to lend assistance or summon help), there is no plausible public policy that McMillen can claim to have been pursuing or upholding when he chose to disregard a direct order of his supervisor related to the performance of his security duties and, contrary to his employer's direction, be seated in the Yellow Pod.<sup>2</sup>

### **Conclusion**

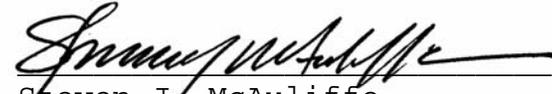
For the foregoing reasons, as well as those set forth in the hospital's memoranda, Concord Hospital has demonstrated that it is entitled to judgment as a matter of law on both claims advanced in McMillen's complaint. Accordingly, its motion for summary judgment (document no. 13) is granted. The Clerk of

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<sup>2</sup> "Although ordinarily the issue of whether a public policy exists is a question for the jury, at times the presence or absence of such a public policy is so clear that a court may rule on its existence as a matter of law, and take the question away from the jury." Leeds v. BAE Systems, 165 N.H. 376, 379 (2013) (quoting Short v. School Admin. Unit 16, 136 N.H. 76, 84 (1992)).

Court shall enter judgment in accordance with this order and close the case.

**SO ORDERED.**

  
Steven J. McAuliffe  
United States District Judge

September 22, 2014

cc: Anthony S. Augeri, Esq.  
Marie M. McKean, Esq.  
Stacie B. Collier, Esq.