[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-12095

Non-Argument Calendar

STEPHANIE NORMAN,

Plaintiff-Appellant,

versus

H. LEE MOFFITT CANCER CENTER AND RESEARCH INSTITUTE, INC.,
d.b.a. Moffitt Cancer Center,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:19-cv-02430-WFJ-CPT

Before NEWSOM, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Stephanie Norman, proceeding *pro se*, appeals the grant of summary judgment to the Moffitt Cancer Center, her former employer, on her claims of interference, disability discrimination, and retaliation under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2615(a)(1), 2617(a); the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112(a), 12203(a); and the Florida Civil Rights Act of 1992 ("FCRA"), Fla. Stat. §§ 760.10(1), (7). Norman argues that the district court erred in dismissing her suit without considering her evidence on the matter. After reviewing the record and reading the parties' briefs, we affirm the district court's order granting summary judgment to the Moffitt Cancer Center.

I.

When appropriate, we review a district court's order granting summary judgment *de novo*, "viewing all the evidence, and drawing all reasonable inferences, in favor of the non-moving party." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th

Cir. 2005). We can affirm the district court's judgment on any basis supported by the record, "regardless of whether the district court decided the case on that basis." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1378 (11th Cir. 2019).

We construe *pro* se pleadings liberally, *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998); however, *pro se* litigants are required to comply with applicable procedural rules. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (citation omitted). We consider forfeited an issue that was not raised in the district court and is raised for the first time on appeal in a civil case, and we will not address its merits absent extraordinary circumstances. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331-32 (11th Cir. 2004); *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (*en banc*), *petition for cert. denied*, 143 S. Ct. 95 (2022). Further, an appellant abandons an issue if she fails to raise it prominently in an opening appellate brief. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-82 (11th Cir. 2014).

Summary judgment is appropriate if the pleadings and evidence of record show "that there is 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). The moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the evidentiary record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) (quoting Fed. R. Civ. P. 56(c)). If the moving party meets its

initial burden, the nonmovant must then show that a genuine dispute exists regarding any issue for which she will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553. The nonmovant can withstand a summary judgment motion by establishing that "based on the evidence in the record, there can be more than one reasonable conclusion as to the proper verdict." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999).

II.

The FMLA creates two types of claims -- interference claims and retaliation claims. 29 U.S.C. § 2615(a)(1)–(2); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000). To establish a *prima facie* FMLA interference claim, an employee must show, *inter alia*, that she was entitled to a benefit under the FMLA that was denied. *See* 29 U.S.C. § 2615(a)(1); *Drago v. Jenne*, 453 F.3d 1301, 1306 (11th Cir. 2006). A plaintiff is not denied a benefit under the FMLA when she receives all the leave she requests, however. *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1275 (11th Cir. 1999). Moreover, where an employer did not deny leave time, the plaintiff cannot establish an FMLA interference claim, even when the employer terminated her and prevented her from the continued use of such leave. *Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1275 (11th Cir. 2020).

To establish an FMLA retaliation claim, an employee must show her employer intentionally discriminated against her for exercising a right guaranteed under the FMLA. *Strickland v. Water Works and Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1207

(11th Cir. 2001). Unlike an interference claim, an employee bringing a retaliation claim faces the increased burden of showing her employer's actions "were motivated by an impermissible retaliatory or discriminatory animus." *Id.* (citation omitted).

The ADA provides that no employer shall discriminate against a qualified individual on the basis of disability in discharging its employees. 42 U.S.C. § 12112(a). Discrimination under the ADA includes the failure to make a reasonable accommodation to the known physical or mental limitations of the individual. *Id.* § 12112(b)(5)(A). To support a claim of discrimination under the ADA, a plaintiff must show, among other things, that she is a disabled person. *Holly v. Clairson Indus., LLC*, 492 F.3d 1255-56 (11th Cir. 2007).

An employer's failure to reasonably accommodate a disabled individual is itself discrimination. *Id.* at 1262. However, to "trigger an employer's duty to provide a reasonable accommodation, the employee must (1) make a specific demand for an accommodation and (2) demonstrate that such accommodation is reasonable." *Owens v. Governor's Off. of Student Achievement*, 52 F.4th 1327, 1334 (11th Cir. 2022) (applying ADA principles in Rehabilitation Act case).

The ADA also provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . . ." 42 U.S.C. § 12203(a). Because this provision creates a prohibition on retaliation under the ADA that is similar to the prohibition on retaliation

found in Title VII, courts should evaluate ADA retaliation claims under the same framework used for Title VII retaliation claims. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). To support a claim for retaliation under the ADA, a plaintiff must show that (1) she engaged in statutorily protected conduct, (2) she suffered an adverse action, and (3) there was a causal link between the adverse action and her protected conduct. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1260–61 (11th Cir. 2001) (summary judgment case).

The FCRA forbids employers from "discriminat[ing] against any individual ... because of such individual's . . . handicap . . . ." Fla. Stat. § 760.10(1)(a). The FCRA also prohibits employers from discriminating against any person because that person has opposed any practice which is an unlawful employment practice under the law. Fla. Stat. § 760.10(7).

III.

The record in this case demonstrates that the district court did not err in granting the Moffitt Cancer Center's properly supported motion for summary judgment. After the Moffitt Cancer Center moved for summary judgment, Norman had an opportunity to provide evidence supporting her claims or to argue why the evidence in the record supported her claims. She failed to do so; rather, she filed a short *pro se* response, accompanied by copies of two letters she had written, neither of which provided evidence to defeat the motion for summary judgment. One letter requested notification of her deposition transcript, and one letter requested

information from her former counsel regarding her inquiries with social security and the Internal Revenue Service. The district court warned her that if she did not properly respond to the motion it could deem the motion unopposed. Because Norman failed to respond to the motion, she has failed to preserve for appeal any arguments in opposition to the grant of summary judgment.

Additionally, we conclude that, even if she had preserved arguments for appeal, she fails to challenge on appeal several of the district court's findings supporting summary judgment. Thus, she has abandoned those points. Accordingly, based on the aforementioned reasons, we affirm the district court's order granting summary judgment to the Moffitt Cancer Center on Norman's claims.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHANIE NORMAN,

Plaintiff

v. CASE NO. 8: 19-cv-2430-WFJ-CPT

H. LEE MOFFITT CANCER CENTER
AND RESEARCH INSTITUTE, INC.
d/b/a Moffitt Cancer Center,

Defendant.

_____/

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court upon the Defendant's motion for summary judgment. Docs. 49, 54. The *pro se* Plaintiff filed a traverse or bare denial, stating without elaboration that "Plaintiff has factual evidence that states otherwise." Doc. 57. Plaintiff filed nothing further in opposition to the motion for summary judgment. Upon review of this entire record it is clear that Defendant's motion for summary judgment should be, and is hereby, granted.

THE LEGAL STANDARD: The legal standard is familiar. Summary judgment applies when "there is 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). The proponent of the motion proceeds first, bearing the burden of establishing a basis for its motion and identifying those materials that demonstrate an absence of material fact. *Gonzalez v. Lee Cnty. Hous. Auth.*, 161 F.3d 1290, 1294 (11th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). By competent, substantial evidence the movant must show an absence of evidence to support the opponent's case. *Id.*

Once this burden has been met, the party in opposition must provide more than conclusory allegations or a bare traverse. A party opposing a motion for summary judgment must rely on more than conclusory allegations, denials, or statements unsupported by facts. *Id.*; *see also Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). A mere "scintilla" of evidence in favor of the non-moving party is insufficient as a matter of law to overcome summary judgment. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof. *See Celotex Corp.*, 477 U.S. at 322.

Here, the Plaintiff has not provided any case proof or pointed to competent, substantial evidence (or any evidence for that matter) in this record that would defeat the well-established grounds asserted by the Defendant. The motion is, in

effect, uncontested. The case background and grounds for the motion are set forth below.

CASE BACKGROUND: The complaint was drafted by Plaintiff's former counsel, who has since withdrawn. Docs. 15, 16. Plaintiff was a coder at Defendant's hospital. Some two years after working on the job, in August 2017, she was approved for leave under the Family and Medical leave Act (FMLA), 29 U.S. C. § 2601. Doc. 1 at 2. Count I alleges a cause of action for interference in her FMLA leave, claiming that she was terminated in February 2018 prior to the FMLA expiration. *Id.* at 3. Count II seeks redress for retaliation under the FMLA. *Id.* at 4–5. Counts III and IV allege violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §12112. *Id.* at 5–7. Counts V and VI assert claims under the Florida Civil Rights Act for disability discrimination and retaliation, Chapter 760, Fla. Stat. *Id.* at 7–9.

UNCONTESTED FACTS SUPPORTING SUMMARY JUDGMENT: The uncontested facts in this record support summary judgment. Plaintiff struggled to perform well as a coder for Defendant, and in July 2017, she was placed on an "Employee Improvement Plan (EIP)" and told that if she did not improve her productivity within 90 days she would be terminated. Doc. 51-2 at Pl.'s Dep. at 170; Doc. 51-2 at 153, 231, 237. At the time she was placed on this plan in July 2017 she was not sick and did not suffer from the respiratory disability. Doc. 51-2

at Pl.'s Dep. at 172–173, 175. She developed a chronic debilitating asthmatic cough. She went out on FMLA leave in August 2017 and never returned to work. *Id.*

Defendant granted Plaintiff FMLA leave, and granted her additional leave as an accommodation, although Plaintiff was unable to squarely testify that she ever asked Defendant for a reasonable accommodation for her illness. Doc. 51-2 at Pl.'s Dep. at 77–78. She received over five months of continuous leave. Doc. 51-2 at Pl.'s Dep. at 173–175. As her FMLA leave expired, Defendant sent Plaintiff several letters about returning to work. Doc. 50-5 at 2–3, 5, 7. Defendant received no response. As Plaintiff had not communicated with Defendant as of February 2018 concerning return to work, Defendant was terminated. *Id.* Plaintiff stated she did not receive this correspondence, which was mailed to her house, but she apparently made no effort otherwise to contact Defendant about returning to work. Nor did she respond to the termination letter. Doc. 51-2 at Pl.'s Dep. at 184–187.

During the time while she was on FMLA leave, Plaintiff applied for, and received, long term disability benefits with the carrier, Aetna. These benefits were granted from December 2017 to December 2022. *Id.* at Pl.'s Dep. at 26, 61. Since her last day at work in August 2017, Plaintiff has received, continuously, compensation in the form of short term disability, long term disability and social security disability income ("SSDI"). *Id.* at Pl.'s Dep. at 118. She presently

receives $1,101 in SSDI and $2255 in long term disability insurance monthly. *Id.* at Pl.'s Dep. at 26. Plaintiff's pulmonologist provided a letter stating she is on permanent disability. Doc. 51-2 at Pl.'s dep. at 70.

In short, at the conclusion of her FMLA leave, which Defendant extended 30 days as an accommodation, Plaintiff did not return to work or seek to return to work. Her doctor never cleared her for return to work; she never advised Defendant she was ready to return. The record contains no competent evidence Plaintiff was retaliated against for asking for FMLA leave, nor did she receive less than a full amount of FMLA leave. Her work productivity problems and employment improvement plan arose, and were addressed, prior to her seeking FMLA leave and prior to her disability manifesting itself. Nor does this record constitute or contain a clear request for accommodation under any fair reading of the ADA. Plaintiff has simply not shown a direct, or indirect, *prima facie* case for an FMLA violation or retaliation, or any similar actionable conduct under the ADA or the analogous Florida statute. And Defendant has shown to the contrary.

The Court grants the motion for summary judgment (Doc. 49) on all counts. Judgment shall enter for Defendant and the Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on May 26, 2021.

WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHANIE NORMAN,

Plaintiff,

v. Case No. 8:19-cv-2430-WFJ-CPT

H. LEE MOFFITT CANCER CENTER AND RESEARCH INSTITUTE, INC.,

Defendant.
_____/

REPORT AND RECOMMENDATION

Before me on referral are Plaintiff Stephanie Norman's construed motions to proceed on appeal *in forma pauperis* (IFP Motions). (Docs. 70, 71). For the reasons discussed below, I respectfully recommend that Ms. Norman's IFP Motions be denied.

I.

Ms. Norman initiated this action in October 2019 by filing a complaint—signed by an attorney who has since withdrawn—against her former employer, Defendant H. Lee Moffitt Cancer Center and Research Institute, Inc. (Moffitt). (Docs. 1, 15, 16). Ms. Norman alleged in her complaint that Moffitt authorized her to take time off from work pursuant to the Family and Medical Leave Act (FMLA) but then improperly terminated her employment. (Doc. 1). Based on these averments, Ms. Norman

asserted claims against Moffitt for violations of the FMLA, the Americans with Disabilities Act, and the Florida Civil Rights Act. (Doc. 1).

In April 2021, Moffitt moved for summary judgment on all counts. (Docs. 49, 54). Ms. Norman filed a brief response to that motion, arguing simply that she "ha[d] factual evidence that state[d] otherwise." (Doc. 57). The Court granted Moffitt's motion in May 2021 and entered Judgment in its favor. (Docs. 61, 62).

Shortly thereafter, Ms. Norman filed both a Notice of Appeal (Doc. 65) and a "Motion for Waiver of Appeal Fee" (Doc. 67). The Court denied Ms. Norman's motion for a waiver without prejudice because she neglected to specify a basis for proceeding *in forma pauperis*. (Doc. 68). The Court also instructed her to obtain the proper form from the Clerk. *Id.* The instant IFP Motions followed. (Docs. 70, 71).

II.

Motions to proceed *in forma pauperis* on appeal are governed by Federal Rule of Appellate Procedure 24 and Section 1915 of Title 28 of the United States Code. *See Ex Parte Chayoon*, 2007 WL 1099088, at *1 (M.D. Fla. Apr. 10, 2007). Rule 24 provides, in pertinent part, that a party seeking leave to proceed *in forma pauperis* on appeal must file a motion in the district court with an affidavit that: (a) shows in detail the party's inability to pay or give security for the fees and costs of the appeal; (b) claims an entitlement to redress; and (c) identifies the issues the party intends to present on appeal. Fed. R. App. P. 24(a)(1).

Section 1915 similarly authorizes an "appeal . . . without prepayment of fees or security therefor" when an appellant submits an affidavit evidencing her inability to tender such fees or security. 28 U.S.C. § 1915(a)(1). In this context, an appellant need not show she is "absolutely destitute" to qualify for indigent status. *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1307 (11th Cir. 2004) (per curiam) (citation omitted). Rather, an affidavit of indigency will be deemed "sufficient if it represents that the [appellant], because of [her] poverty, is unable to pay for the court fees and costs, and to support and provide necessities for [herself] and [her] dependents." *Id.*

In addition to these requirements, section 1915 mandates that an appeal be brought in good faith. 28 U.S.C. § 1915(a)(3). To satisfy this standard, an appellant must demonstrate that any issues she seeks to pursue are "not frivolous when examined under an objective standard." *Ghee v. Retailers Natl'l Bank*, 271 F. App'x 858, 859 (11th Cir. 2008) (per curiam) (citation omitted).[1] An *in forma pauperis* action is deemed to be frivolous "if it is 'without arguable merit either in law or fact.'" *Id.* at 859–60 (quoting *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001)).

In the end, a district court has "wide discretion" to grant or deny an *in forma pauperis* application, and—in civil cases for damages—that privilege should be granted "sparingly." *Martinez*, 364 F.3d at 1306 (citation omitted).

[1] Unpublished opinions are not considered binding precedent but may be cited as persuasive authority. 11th Cir. R. 36-2.

III.

Ms. Norman has not satisfied the strictures of Rule 24 and section 1915 here. With respect to her financial status, her IFP Motions reveal that she receives monthly disability payments totaling $3,564 and has monthly expenses (stemming from her support of herself, her parents, and her two adult children) which add up to $3,584. (Doc. 70 at 2–5; Doc. 71 at 1–2). Her IFP Motions further reveal that she has $50 in cash, owes debts totaling approximately $106,000 (largely from student loans), and owns two 2016 Volkswagen cars used by her two adult children. *Id.*

These disclosures do not support Ms. Norman's claim of indigency. Although her monthly expenses slightly exceed her monthly income, her total disability payments equate to an annual sum of $42,816, which is well above the poverty line for a family of five.[2] Furthermore, approximately one-third of Ms. Norman's expenses pertain to car payments she makes for her adult children without any explanation as to the necessity of these payments or her children's financial wherewithal. *See Schmitt v. U.S. Off. of Pers. Mgmt.*, 2009 WL 3417866, at *2 (M.D. Fla. Oct. 19, 2009) (finding the plaintiff's allegations of poverty insufficient based upon a review of his monthly income and assets); *Irvin v. Mister Car Wash*, 2008 WL 5412217, at *2 (M.D. Fla. Dec. 29, 2008) (concluding that, despite the plaintiff's assertions that he was involved in

[2] The 2021 poverty line for a family of five is $31,040 per annum. *See* Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732, 7732–34 (Feb. 1, 2021). For purposes of my analysis, I accept without deciding that Ms. Norman fully supports her parents and her adult children. I note, however, that she claims to provide eighty-five percent of the support required for her mother and adult children and ninety-five percent of the support required for her father. (Doc. 71 at 2).

bankruptcy proceedings and incapable of paying the requisite fees and costs, he did not demonstrate an inability to pay such amounts after an evaluation of his income and debts).

In addition to these deficiencies, Ms. Norman fails to identify the legal issues she seeks to pursue on appeal or present an arguable, good faith basis to challenge the Court's summary judgment decision. Instead, she claims only that "the [f]actual evidence I have prove[s] that [Moffitt] discriminated against [me] and all counts in the [c]omplaint [are] valid." (Doc. 70 at 1). Such general averments do not provide a valid ground for an appeal. *Schmitt*, 2009 WL 3417866, at *2 (finding that the plaintiff's "failure to identify any good faith issue to be addressed on appeal warrants denial of permission to proceed *in forma pauperis*"); *see also* Fed. R. Civ. P. 56(c) (explaining that a party challenging a fact at the summary judgment stage must do more than merely assert that a factual dispute exists).

IV.

In light of the above, I recommend that the Court:

1. Deny Ms. Norman's IFP Motions (Docs. 70, 71); and

2. Direct the Clerk of Court to notify the Court of Appeals of its ruling in accordance with Federal Rule of Appellate Procedure 24(a)(4).

Respectfully submitted this 15th day of July 2021.

HONORABLE CHRISTOPHER P. TUITE
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen (14) days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections, or to move for an extension of time to do so, waives that party's right to challenge on appeal any unobjected-to factual finding(s) or legal conclusion(s) the District Judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1).

Copies furnished to:
Honorable William F. Jung, United States District Judge
Pro se Plaintiff
Counsel of record

Additional material from this filing is available in the Clerk's Office.