

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LILIANA SANCHEZ,

Plaintiff,

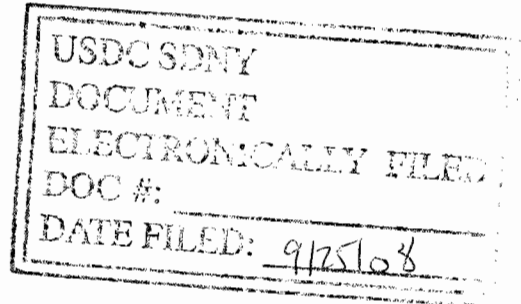
-against-

MetTel INC., METTEL, and MANHATTAN  
TELECOMMUNICATIONS CORPORATION,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

Plaintiff Liliana Sanchez ("Plaintiff") brought this action against Defendants MetTel Inc., METTEL, and Manhattan Telecommunications Corporation (collectively "MetTel" or "Defendants") for alleged violations of the Family Medical Leave Act ("FMLA"). 29 U.S.C. § 2601, et seq.; (Compl. at ¶ 1.) According to Plaintiff, Defendants both "interfered" with her FMLA rights, "discriminated" against her, and "constructively discharged" her from her employment "for opposing Defendant's unlawful employment practice and attempting to exercise her rights." (Compl. at ¶ 43.) Plaintiff's employment was terminated two weeks after she allegedly informed her supervisor that doctors had found a mass in her abdomen for which she was getting medical treatment and would need time off. (Compl. at ¶¶ 27, 28, 33.) Before this Court is Defendants' Motion for Summary Judgment. For the reasons contained herein, Defendants' Motion



05 Civ. 9530 (DAB)  
ORDER

is GRANTED in part and DENIED in part.

#### I. BACKGROUND

MetTel is a "nationwide integrated communications provider serving customers from coast-to coast." (Defs'. 56.1 Stmt. at ¶ 1.) Plaintiff commenced her employment at MetTel in March 2003 and was promoted to supervisor of the Major Accounts Team approximately June of 2004. (Id. at ¶¶ 6, 7.) According to her supervisor, William Prince, she was promoted because "[a]fter we sent her back for training on the products, she started to display trades [sic] - she started to display trades [sic], you know, that you generally look for in supervisors; she started helping - she was proactive, in other words, general." (05 Civ. 9530, Dkt. No. 34, Prince Depo. at 42:9-16.) As the supervisor of the Major Accounts Team Plaintiff was responsible for, among other things, "overseeing day-to-day operations of the group, hiring and supervising employees, creating schedules, training, interfacing with the Public Service Commissions, and working with other departments within MetTel to make sure that the needs and inquires of [Defendants'] major accounts were met on a timely basis." (Defs'. 56.1 Stmt. at ¶ 9.)

According to Plaintiff, on April 10, 2005 she had a conversation with her supervisor, William Prince, the Director of

Operations for MetTel, in which she told him "I was sick and I was seeking medical treatment and that I had some more doctors appointments planned...I had just mentioned that I had seen a doctor and that they had found a mass. I had been sick for a while." (Pl. Mem. of Law, Ex. A (Pl. Dep.), 10:14-24.) She also testified that she was aware at that time that: "I had a mass on my ovary, on my right ovary, and I had a larger mass in my abdomen that was thought to be a hernia." (Id. at 11:10-12.) She testified that doctors had told her that the mass on her right ovary "had to be removed." (Id. at 11: 20-21.) However, it is unclear from the deposition transcript whether she was aware that she needed surgery during the April 10 conversation. (Id. at 13:19-21.) She did testify that "before I was terminated, I knew I needed surgery." (Id.)

Prior to her termination, Plaintiff also told at least four other MetTel employees about her illness, including Provi Devito a "supervisor, manager in Collections Department" and Janice Mankin in Human Resources. (Id. at 15-17:8.) She testified that she told Ms. Devito that "I sought medical treatment, I had a tumor and I was going to need surgery." (Id. at 15:21-22.) She testified that she told Ms. Mankin "the same thing" that "I had a mass or tumor, and I was going to need surgery." (Id. at 16:17-18.) Plaintiff did not inform anyone in writing because, she

testified, "I didn't know when I was having surgery...I hadn't met with the specialist at the time that the conversation took place to determine how long the surgery would take and the recovery time...And I had the flexibility of, being that it wasn't life threatening, to schedule my surgery in advance, so I could forecast and plan to have someone in my absence." (Id. at 17:11-18.)

Plaintiff's supervisor, William Prince, has submitted a Declaration stating "[a]t no point during her employment, do I recall Sanchez ever informing me, verbally or in writing, that she would be needing surgery or telling me anything about an alleged medical condition." (Prince Decl. at ¶ 28.) Prince states that he had agreed with other MetTel directors to move another employee, Thacker, into the Major Accounts supervisor position around April 10 or 11, 2005." (Prince Decl. at ¶ 26.) Prince states that, "I decided not to terminate Sanchez until April 23, 2005 after I learned that Sanchez's birthday was on April 15, 2005." (Id.)

Plaintiff was terminated on April 23, 2005, approximately two weeks after she alleges that she informed Prince of her medical condition. (Prince Decl. at ¶ 4; Pl. Depo. at 83:9-19.)

According to Prince, "[m]y decision to terminate Sanchez was based solely on Sanchez's habitual tardiness and ineffectiveness

as a manager.” (Prince Decl. at ¶¶ 1, 4, 28.) In addition to Prince’s Declaration, Defendants have submitted a Declaration of Kathryn A Pacey in which she writes, “[u]nder Sanchez’s supervision, I frequently observed an overall unprofessional atmosphere in Major Accounts Group which included employees reading newspapers or magazines at their desk, playing Tetris or other on-line games on their work computers, and engaging in excessive office gossip...Tardiness, customer complaints, and high employee turn over [sic] were also significant problems for the Major Accounts Team under Sanchez’s supervision.” (Pacey Decl. at ¶ 3.) Defendants have submitted Plaintiffs time records which they allege show “Sanchez swiped in late on 42 different occasions.” (Def. R. 56.1 Stmt. at ¶ 25.) Plaintiff admits that she was sometimes tardy because her son was sick, because of public transportation delays, or she would swipe in late because she would come in and “something was happening” or she “had to grab a phone call.” (Pl. Mem. of Law, Ex. A, 62-66:14.) She said, “I swiped in when I needed to.” (Id. at 66:13-14.)

Defendants have moved for summary judgment on the grounds that Plaintiff did not provide Defendants with sufficient notice under the FMLA, that MetTel had a legitimate non-discriminatory reason for terminating Plaintiff (her tardiness and poor performance), and that Plaintiff cannot raise any genuine issue

showing the reason for her termination was pretextual. (Def. Mem. of Law at 1.)

## II. DISCUSSION

### A. Legal Standard for Summary Judgment

A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 107 (2d Cir. 2000). Genuine issues of material fact cannot be created by mere conclusory allegations; summary judgment is appropriate only when, "after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." Heublein v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993) (citing Matsushita Elec. Industr. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

In assessing when summary judgment should be granted, "there must be more than a 'scintilla of evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). While a court must always "resolv[e] ambiguities and draw[ ] reasonable

inferences against the moving party," Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (citing Anderson), the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Id. at 12. Instead, when the moving party has documented particular facts in the record, "the opposing party must 'set forth specific facts showing that there is a genuine issue for trial.'" Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) (quoting Fed. R. Civ. P. 56(e)). Establishing such facts requires going beyond the allegations of the pleadings, as the moment has arrived "'to put up or shut up.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (citation omitted). Unsupported allegations in the pleadings thus cannot create a material issue of fact. Id.

Defendants present two theories by which they argue summary judgment is proper. First, they argue that Plaintiff failed to provide sufficient notice under the FMLA. Second they argue that even if notice was sufficient, Defendants have a non-discriminatory reason for Plaintiff's termination and Plaintiff cannot raise any genuine issue showing that their proffered reason is pretextual.

#### B. The Prima Facie Case

In order to establish a prima facie case under the FMLA the Plaintiff must show that, (1) that she is an "eligible employee" under the FMLA; (2) that defendants constitute an employer under the FMLA; (3) that she was entitled to leave under the FMLA; (4) that she gave notice to defendants of her intention to take leave; and (5) that defendants denied her benefits to which she was entitled by the FMLA. Esser v. Rainbow Advertising Sales Corp., 448 F.Supp.2d 574, 580 (S.D.N.Y. 2006) (citing Kennebrew v. N.Y.C. Hous. Auth., No. 01 Civ. 1654, 2002 WL 265120, at \*19 (S.D.N.Y. Feb. 26, 2002)).

Defendants in this motion challenge only the fourth prong, arguing that even if, as Plaintiff alleges, she notified Prince of her illness, her notice was insufficiently detailed as to the duration of her requested leave and that it failed to inform Defendants that Plaintiff had a qualifying "serious health condition."

1. Notice of Duration

Defendants argue that Plaintiff did not provide Defendants with sufficient notice under the FMLA in that, "she did nothing more than inform Prince that she might have to be absent from work at some unforeseen time in the future for a medical condition that had not been fully diagnosed." (Def. Mem. of Law at 7-8.)

Defendant argues that "[c]onspicuously absent from the Complaint is any allegation regarding the anticipated timing and duration of Sanchez's purported request for leave." (Id. at 8.)

Regarding the adequacy of notice, the relevant FMLA regulation states:

An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.

29 C.F.R. § 825.302. The regulations further state that notice should be given 30-days in advance of the anticipated leave, or if 30 days is not possible, then "notice must be given as soon as practicable." 29 C.F.R. § 825.302; see also Slaughter v. American Bldg. Maintenance Co. of New York, 64 F.Supp.2d 319, 325-326 (S.D.N.Y. 1999). Courts have held that the amount of information required when giving notice is "[s]ufficient information" "to provide reasonable notice." Id.

Defendants argue that because Plaintiff did not inform Defendants of the precise duration of her requested leave at the time she informed them of her illness her notice was defective.

However, Defendants have not cited a single case in this Circuit that supports such a conclusion. Indeed, Defendants' argument reads out of the regulations the language "notice must be given as soon as practicable." 29 C.F.R. § 825.302. Plaintiff has provided evidence that she gave notice of her illness two weeks prior to her termination. She did not give notice of the duration because, as Defendants agree, she was not yet aware of when her surgery could be scheduled or how long the recovery period would take. (Def. Mem. of Law at 8.) Hence, it was not "practicable" for her to inform them of the duration of her leave, and she was under no obligation to speculate as to the duration merely to preserve her FMLA rights. See Golden v. New York City Dept. of Environmental Protection, 2007 WL 2319130 \*4 (S.D.N.Y. 2007) (holding that, "[w]hen the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case."). Defendants' argument, if accepted, would create a perverse incentive to employers to terminate employees prior to employees knowing how much leave they require for their particular illness.<sup>1</sup>

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<sup>1</sup> Defendants also argue that Plaintiff's notice fails because she did not comply with internal MetTel procedures

Plaintiff testified that she informed her supervisor and others that she "was seeking medical treatment," that she "had some more doctors' appointments planned" and that she "had seen a doctor and that they had found a mass." (Pl. Dep. at 10:14-24.) At that point reasonable notice had been given; if there was a question as to whether the leave was FMLA-qualifying, the onus was on the Defendant to inquire. In any event, it was not "practicable" for Plaintiff to inform Defendants as to the duration of her leave. Consequently, Defendants are incorrect that, as a matter of law, Plaintiff's notice regarding the duration of her leave was insufficient under the FMLA.

## 2. Notice of a Serious Health Condition

Defendants argue that, "Sanchez's purported notice is defective on the additional ground that it failed to provide MetTel with notice of an FMLA-qualifying condition." (Def. Mem. of Law at 12.) Defendants assert that, "[v]ague comments about a possible tumor, cyst, mass, or hernia - in this case, still in the process of being diagnosed by Sanchez's doctors - are not

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requiring that requests for leave be made in writing. However, the regulations clearly state that, "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." 29 C.F.R. § 825.302.

sufficient to inform MetTel that Sanchez was requesting FMLA qualifying leave." (Id.)

One reason an employee can seek FMLA qualifying leave is for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612. The law states that "[t]he term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves - (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611. This Court has been unable to locate any other case in this Circuit where it was challenged that a tumor or mass was not a serious health condition. However, the Senate Report accompanying the FMLA, published in 1993, stated that "[e]xamples of serious health conditions include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema... All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery." S.

REP. 103-3 at 29, as reprinted in 1993 U.S.C.C.A.N. 3, 31

(emphasis added).

Because Plaintiff provided evidence that she informed her employer that she had a mass, tumor, cyst or hernia in her abdomen, such notice, if proven, would be sufficient notice of a serious health condition as a matter of law.

C. Defendants Proffered Non-Discriminatory Reason for Plaintiff's Termination

Plaintiff in this case has asserted both interference and retaliation claims under the FMLA. (Compl. at ¶ 43.) Defendants assert that summary judgment is proper on both claims because Plaintiff cannot establish that Defendants' asserted reasons for discharging her are pretextual. By using this language Defendants seek to impose a McDonnell Douglas-type burden shifting analysis on both of Plaintiff's FMLA claims.<sup>2</sup> However, the proper

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<sup>2</sup> "Under the McDonnell Douglas framework, once a plaintiff makes out a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. If the defendant produces evidence of such a reason, the plaintiff must show that the defendant's reason is merely a pretext for discrimination." O'Reilly v. Consolidated Edison Co. of New York, Inc., 173 Fed.Appx. 20, 22 (2d Cir. 2006) (citing McDonnell Douglas, 411 U.S. at 802-04).

analytical framework for FMLA cases alleging "interference" is largely unresolved.

The Second Circuit has held that, as to FMLA claims for retaliation, "the retaliation analysis pursuant to McDonnell Douglas is applicable." Potenza v. City of New York, 365 F.3d 165, 168 (2d Cir. 2004). On the other hand, the Circuit has noted that in cases alleging employer interference with the exercise of rights under by the FMLA<sup>3</sup> other Circuits have held that "a plaintiff need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her." Sista v. CDC, Ixis North America, Inc., 445 F.3d 161, 175 -176 (2d Cir. 2006) (quoting Potenza, 365 F.3d at 167). The Circuit quoted the Ninth Circuit as holding that, a Plaintiff "can prove this claim [interference], as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both .... No

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<sup>3</sup> Section 2615(a)(1) of the FMLA states that, "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). The regulations promulgated pursuant to the FMLA explain that, "[i]nterfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave," 29 C.F.R. § 825.220(b), and that "[a]n employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave." 29 C.F.R. § 825.220(c). See also Potenza, 365 F.3d at 167.

scheme shifting the burden of production back and forth is required." Id. Further this Circuit Court "noted with some favor the manner in which the Seventh Circuit had distinguished the approaches" where Seventh Circuit held that, "the difference between the two approaches inheres in the relevance of the employer's intent to the determination of whether or not a violation has occurred." Sista, 445 F.3d at 176; Potenza, 365 F.3d at 168 (discussing King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999)). The Second Circuit characterized the Seventh Circuit rule as finding "it would be appropriate to apply the McDonnell-Douglas analysis to claims of retaliation - where the employer's intent is material - but not to assertions of interference - where the question is simply whether the employer in some manner impeded the employee's exercise of his or her right." Id. However, the Circuit has yet to "decide whether or not to adopt the Seventh Circuit's analysis in its entirety." Id.

Further, the caselaw is largely unresolved as to the set of facts that make out a retaliation claim versus those that make out an interference claim. As a starting point, the regulations promulgated pursuant to the FMLA indicate that interference claims relate to situations where an employee "attempts to exercise" "any rights provided by the Act." 29 C.F.R. § 825.220.

“‘Interfering with’ the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA.” 29 C.F.R. § 825.220. The retaliation provisions, on the other hand, prohibit the employer “from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.” 29 C.F.R. § 825.220; see also Potenza, 365 F.3d at 165-7 (finding a retaliation cause of action where the Plaintiff was fired after returning from medical leave). The difference between the two types of claims, therefore, is whether the employer’s negative action occurs 1) after the Plaintiff has already exercised his or her rights protected by the Act (giving rise to a retaliation claim) or 2) after Plaintiff has notified Defendants of an intention to exercise FMLA protections (giving rise to an interference claim).

Plaintiff has submitted no evidence that she exercised her rights under the FMLA, that she either took FMLA leave (and was later discriminated against) or opposed her employer’s unlawful practices under the FMLA. Consequently, she has failed to meet her summary judgment burden with respect to an FMLA retaliation

claim. Defendant's Motion for Summary Judgment on Plaintiff's claim for Retaliation under the FMLA is GRANTED.

Plaintiff, however, has submitted evidence that Defendants terminated her in order to avoid their obligations under the FMLA. Therefore, Plaintiff's claim is best understood as an interference claim.

1. The "Negative Factor" Test for FMLA Interference Claims

In order to establish an FMLA interference claim Plaintiff must first to establish a prima facie case of interference under the FMLA. Defendants in this action have not contested Plaintiff's prima facie case, except as to notice, already rejected by this Court supra. Second, Plaintiff must prove by a preponderance of the evidence, that "taking of FMLA-protected leave constituted a negative factor in the decision to terminate her." Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1125 (9th Cir. 2001); King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999); see also Sista, 445 F.3d at 175-6 (2d Cir. 2006) (quoting Potenza, 365 F.3d at 167). Plaintiff has raised at least a genuine issue of material fact that notice of her need for FMLA-protected leave constituted a negative factor in the decision to terminate her.

First, Plaintiff testified that when she was terminated she asked her supervisor, William Prince, if the termination "had anything to do with" her "being sick". (Pl. Depo. at 83: 22-25; 88:11-89:4.) She stated that, "he didn't answer my question. He just stood up and shook my hand and agreed that he would give me a good reference. That is what led me to believe that." (Id.) When asked if she took her supervisor's silence and apology as a reason for claiming that she was terminated because she was sick, she answered, "I took it as an affirmation." (Id.) In Prince's recollection of the conversation, Plaintiff did not question the relation of her termination to her illness. (Prince Depo. 94:16-99:11.) However, Prince does confirm that he said he would be "more than happy" to give her a reference. (Id.) A reasonable fact-finder could infer from Plaintiff's recollection of the conversation and the offer of a reference, that Plaintiff was not terminated because of poor performance as a manager, but because she required medical leave.

Second, Plaintiff was terminated only two weeks after informing Defendants of her need for medical leave. (Def. 56.1 Stmt. at ¶ 8; Pl. 56.1 Stmt. at ¶ 45.) The Second Circuit has held in the related employment discrimination/retaliation context that, "a plaintiff can indirectly establish a causal connection to support a discrimination or retaliation claim by 'showing that

the protected activity was closely followed in time by the adverse [employment] action.'" Gorman-Bakos v. Cornell Co-op Extension of Schenectady County, 252 F.3d 545, 554 (2d Cir. 2001) (citing Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996), for the proposition that, "twelve days between alleged sexual harassment and discharge could suggest a causal relationship."). However, the Circuit has expressly declined to draw "a bright line to define the outer limits beyond which a temporal relationship is too attenuated". (Id. Collecting cases.) Nevertheless, a reasonable fact-finder could conclude that the two-week period between the Plaintiff's alleged notice and her termination is sufficient to demonstrate that the notice of the need for FMLA leave was a "negative factor" in Defendants' decision to terminate her employment.

## 2. Burden-Shifting Analysis of Plaintiff's Inteference Claims

However, even if the Second Circuit ultimately holds that a burden-shifting analysis is appropriate in FMLA interference claims, Plaintiff would nonetheless survive summary judgment. Defendants argue that, "MetTel terminated Sanchez because of her tardiness and ineffectiveness as a manager - legitimate, non-discriminatory reasons under the law - and did not consider

Sanchez's alleged request for FMLA leave when it decided to terminate her employment." (Def. Mem. of Law at 1.) Further, they argue that, "Sanchez will not be able to show MetTel's reasons were pretextual." (Id.) However, contrary to Defendant's arguments, there are numerous factual disputes in the record that, when viewed in the light most favorable to the Plaintiff, preclude summary judgment.

In support of their arguments regarding tardiness, Defendants have submitted time sheets for Plaintiff covering approximately 72 days. (Decl. of Joseph Brown, Ex. G.) Of those days, Plaintiff was on time approximately 35 days, less than ten minutes late approximately 23 days, and more than 10 minutes late approximately 13 days. (Id.) She was also early on a number of days and stayed beyond 5 P.M. a number of days. (Id.) Regarding her tardiness, Plaintiff has responded that although it was a requirement to swipe in, there were times that she did not swipe in immediately upon her arrival at work because "something was happening" or she needed to "grab a phone call." (Pl. Dep. at 66:9-14.) She testified that characterizing all of the "tardies" as instances where she was "late to work" would be incorrect. (Id. at 66:15-18.) Further, there is no record that Defendants provided Plaintiff with a written warning or a "written and final

warning" in accordance with company procedures. (Pl. Mem. of Law at 11; Pl. Ex. 5 at 29.)

In support of their argument that Plaintiff was an ineffective manager, Defendants submitted two, short declarations of William Prince, Plaintiff's supervisor, and Kathryn Pacey, a "major accounts representative" supervised by Sanchez. (05 Civ. 9530, Dkt. Nos. 16, 17.) The declarations mentioned "an overall unprofessional atmosphere in Major Accounts Group" and cited specific types of employee behavior such as playing Tetris on the computer, reading magazines or newspapers, and gossiping. (E.g. Decl. of Pacey at ¶ 3.) In the deposition of Prince, submitted by Plaintiff, he recalls one specific incident in August, September or October of 2004 in which Plaintiff failed to follow up with a larger customer undergoing a "move service." (Prince Depo. at 46:5-20.) Other than that incident, Prince was unable to recall and does not have any documentation regarding other alleged managerial problems. (Id. at 49:7-25.) Plaintiff responds that problems such as employees reading magazines and newspapers or playing computer games were "ongoing issue" from the time she started as Manager. (Pl. Dep. 81:7-14.) She also testified that complaints about the group predated her arrival as a manager. (Id. at 81:18-19.) Finally, she testified that employee turnover was a problem company-wide. (Id. at 81-82: 7.)

Plaintiff was terminated only nine months after she was promoted to manager, and about two years after she was initially hired by MetTel. (Prince Decl. at ¶ 4; Pl. Depo. at 83:9-19.)

Of course, the "FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave." Geromanos v. Columbia Univ., 322 F.Supp.2d 420, 429 (S.D.N.Y. 2004). Yet, in the case at bar, when viewed together Plaintiff's evidence, the close temporal connection between her notice and termination, and the lack of documentary evidence in support of the Defendants' case are sufficient to raise at least a genuine issue of material fact as to whether Defendants' non-discriminatory reasons for her termination are in fact a pretext for Defendants intention to avoid their obligations under the FMLA.

Therefore, under either a "negative factor test" or a McDonnell Douglas burden-shifting analysis, Plaintiff has submitted enough evidence to survive summary judgment on the question of whether Defendants interfered with her exercise of her FMLA rights.

CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's claim of retaliation under the FMLA is GRANTED.

Defendants' Motion for Summary Judgment as to Plaintiff's claim of interference under the FMLA is DENIED.

Proposed Requests to Charge and Proposed Voir Dire shall be submitted to this Court within 60 (sixty) days of the date of this Order. A Joint Pre-trial Statement, which shall conform to the Court's Individual Practices and Supplemental Trial Procedure Rules, also shall be submitted within 60 (sixty) days of the date of this Order. Memoranda of Law addressing those issues raised by the Joint Pre-trial Statement shall be submitted on the same day as the Joint Pre-Trial Statement, and responses to such Memoranda, if any, shall be submitted within 15 (fifteen) days thereafter. There shall be no replies.

SO ORDERED.

Dated: New York, New York

September 24, 2008

Deborah A. Batts

Deborah A. Batts  
United States District Judge