IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

ERIC M. ANDERSEN **PLAINTIFF**

V. **CASE NO. 5:18-CV-5026**

CITY OF SPRINGDALE, ARKANSAS; CHIEF MIKE IRWIN, in his official and individual capacities; CHIEF KEVIN MCDONALD, in his official and individual capacities; and CHIEF RON SKELTON, in his official and individual capacities **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

Currently before the Court are:

- Defendants City of Springdale, Arkansas's, Chief Mike Irwin's, Chief Kevin McDonald's, and Chief Ron Skelton's Motion to Dismiss (Doc. 16) and Brief in Support (Doc. 17), and Plaintiff Eric M. Andersen's Response in Opposition (Doc. 22); and
- Mr. Andersen's Motion for Leave to Amend Complaint (Doc. 21), and the Defendants' Response in Opposition (Doc. 23).

For the reasons given below, Mr. Andersen's Motion is **DENIED**, the Defendants' Motion is **GRANTED**, and Mr. Andersen's Complaint is **DISMISSED WITHOUT PREJUDICE**.

I. BACKGROUND

Mr. Andersen was employed as a firefighter by the City of Springdale from around September 2008 until his resignation in early 2018. Chiefs Irwin, McDonald, and Skelton were all members of the Springdale Fire Department ("SFD") administration during the

events relevant to this lawsuit. The events giving rise to this case began in 2016, when Mr. Andersen's child, who was diagnosed with a cancerous brain tumor, began to experience a worsening of the terminal condition.

According to Mr. Andersen's pleadings, the SFD had a "shift-swap" policy, which allowed firefighters to trade shifts with one another when they needed to miss a shift but did not desire to use vacation time. This practice would result in one firefighter covering another's shift in exchange for the covering of his own shift at a different time. Throughout 2016 and 2017, due to the deterioration of his child's condition, Mr. Andersen utilized this policy alongside requests for intermittent leave under the Family and Medical Leave Act of 1993 ("FMLA") to take the time needed to care for his child, who was admitted to St. Jude Children's Hospital on various occasions for extended periods of time throughout 2016 and 2017.

Mr. Andersen claims the SFD administration, and the individual Defendants in particular, were irritated with his use of FMLA leave and began a campaign of harassment and bullying against him. He eventually complained of this in May 2017 to Chief Skelton; then, at Chief Irwin's request, the human resources department conducted a formal investigation into Mr. Andersen's complaint. Roughly a month later in June 2017, Chief Skelton filed a complaint with human resources against Mr. Andersen. Mr. Andersen alleges that the human resources department recommended action against the parties involved in bullying and harassing him, and found Chief Skelton's complaint against him to be unsubstantiated.

Also in June 2017, Chief Irwin announced in a letter to all SFD personnel that a new shift-swap policy would be implemented, limiting employees to 240 hours of shift-

swaps per calendar year. That letter explained that this change in policy was motivated by a recent employee complaint that was filed and by the investigation that had resulted from that complaint. Mr. Andersen claims that this policy change caused many of his coworkers to be angry with him and to begin ostracizing him, to the point that friendships were lost and trust was compromised. Mr. Andersen's child passed away in August 2017. Eventually, Mr. Andersen alleges that he was treated with such contempt that his continued employment at the SFD was intolerable, and he was forced to find work elsewhere.

Mr. Andersen initiated this lawsuit on February 9, 2018 by filing a Complaint in this Court, bringing a claim against the Defendants for retaliation in violation of the FMLA. The Defendants filed their Answer on March 20, and their Motion to Dismiss on June 7. The Defendants' Motion argues that Mr. Andersen's Complaint fails to allege facts sufficient to state a plausible claim for relief under the FMLA. On June 21, Mr. Andersen filed his Response to the Defendants' Motion, along with his own Motion for Leave to Amend Complaint. Mr. Andersen's proposed amendment would bring two claims against the Defendants under the FMLA: one for discrimination, and one for retaliation. The Defendants oppose Mr. Andersen's Motion on the grounds that his proposed amendment would be futile. They contend that his proposed amendment, like his original Complaint, fails to allege facts sufficient to state a plausible claim for relief under the FMLA; the Defendants' Response to Mr. Andersen's Motion incorporated the arguments they had previously made in support of their own Motion. On July 31, the Court held oral argument on both Motions, which are now ripe for decision.

II. LEGAL STANDARD

Fed. R. Civ. P. 15(a)(2) instructs the Court to "freely give leave [to amend pleadings] when justice so requires." However, this mandate does not give parties an absolute right to amend pleadings whenever they wish, and the Court may deny a request to amend when a good reason exists, "such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the non-moving party, or futility of the amendment." *Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir. 1992). Leave to amend should be denied for futility when the proposed amendment would not survive a Rule 12(b)(6) motion to dismiss. *See Zutz v. Nelson*, 601 F.3d 842, 853 (8th Cir. 2010).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court must accept all of the Complaint's factual allegations as true, and construe them in the light most favorable to the plaintiff, drawing all reasonable inferences in the plaintiff's favor. *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

However, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and

conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* In other words, while "the pleading standard that Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.*

III. DISCUSSION

Mr. Andersen's proposed amended complaint asserts two counts against the Defendants under the FMLA: retaliation and discrimination. A claim of *retaliation* under the FMLA arises when an employer takes "adverse action" against an employee for having "oppose[d] any practice made unlawful under the FMLA," for example, by complaining "about an employer's refusal to comply with the statutory mandate to permit FMLA leave." *See Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1005–06 (8th Cir. 2012). As for FMLA *discrimination*, an employee must show three things to establish a *prima facie* case: "(1) that he engaged in activity protected under the Act, (2) that he suffered a materially adverse employment action, and (3) that a causal connection existed between the employee's action and the adverse employment action." *Id.* at 1007. But importantly, "a plaintiff need not plead facts establishing a prima facie case of discrimination" in order to survive a Rule 12(b)(6) motion. *See Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1014 (8th Cir. 2013). Rather, a plaintiff simply must plead facts showing that one is *plausible*, as the aforementioned requirements for a *prima facie* case are "an evidentiary, not a pleading, standard." *See id.* at 1016.[1]

[1] Thus, unmeritorious workplace discrimination and retaliation claims will usually be disposed of on summary judgment rather than at the pleading stage. *See Wilson v. Ark. Dept. of Human Servs.*, 850 F.3d 368, 372 (8th Cir. 2017). Nevertheless, the ordinary

Here, Mr. Andersen's retaliation and discrimination claims are premised on two separate protected activities: the protected activity for his retaliation claim is his human resources complaint of FMLA discrimination, *see* Doc. 21-1, ¶ 76, and the protected activity for his discrimination claim is his use of intermittent FMLA leave, *see id.* at ¶ 67. However, for both claims, Mr. Andersen's alleged materially adverse action is his constructive discharge.[2] *See id.* at ¶¶ 73, 80. A materially adverse employment action is "a tangible change in working conditions that produces a material employment disadvantage," and that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *See Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013). Circumstances amounting to a constructive discharge constitute an adverse employment action. *See id.* The Defendants do not appear to dispute that Mr. Andersen has alleged that he engaged in protected activities under the FMLA, but they do contend that he has not alleged a plausible claim of constructive discharge.

To establish constructive discharge, a plaintiff must demonstrate that: (1) a reasonable person in his situation would find the working conditions intolerable, and (2) the employer intended to force him to quit. *See Quinn v. St. Louis Cnty.*, 653 F.3d 745, 752 (8th Cir. 2011). Mere ostracism alone is not an adverse employment action, but

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Rule 12(b)(6) legal standard described in Section II *supra* applies to motions to dismiss such claims. *See id.* at 371.

[2] Mr. Andersen also alleges a denial of a shift-swap request in April 2017 as an additional adverse action on which his discrimination claim is premised. *See* Doc. 21-1, ¶ 69. The Court believes that neither this particular incident nor the June 2017 department-wide cap on shift-swap hours qualifies as a material adverse action, because they do not appear, on the facts alleged, to have been tangible changes in working conditions that produced a material employment disadvantage.

behavior that "substantially and directly interferes with [a plaintiff]'s ability to do [his] job" may be. *See LaCanne v. AAF McQuay, Inc.*, 2001 WL 1344217, at *5 (D. Minn. Oct. 30, 2001). "The intolerability of working conditions is judged by an objective standard, not the employee's subjective feelings; the question is whether working conditions were rendered so objectionable that a reasonable person would have deemed resignation the only plausible alternative." *See Tatom v. Ga.-Pac. Corp.*, 228 F.3d 926, 932 (8th Cir. 2000). The intent requirement may be satisfied if the plaintiff's resignation "was a reasonably foreseeable consequence of the employer's actions." *See Quinn*, 653 F.3d at 752.

As mentioned above, Mr. Andersen alleges that when he was implicitly singled out in a department-wide letter as the reason for the policy change regarding shift-swaps, this caused him to be "ostracized by his co-workers to the point that friendships were lost and trust was compromised," and that after the announcement of the policy change, he was "treated with such contempt that his continued employment was intolerable and he was forced to find work elsewhere." *See* Doc. 21-1, ¶¶ 59, 61. As already noted, he also alleges that this occurred while the Defendants knew he was dealing with his child's terminal illness and eventual death. It seems plausible to the Court that some level of ostracism and contempt by Mr. Andersen's coworkers would have been a reasonably foreseeable consequence of singling him out as the reason for an unpopular policy change. So the critical issues to the Court's mind, then, are: (1) what, concretely, the alleged ostracism and contempt by Mr. Andersen's coworkers consisted of, at least generally speaking; and (2) whether that ostracism and contempt substantially and

directly interfered with Mr. Andersen's ability to do his job. And this is where Mr. Andersen's pleadings run into trouble.

During the hearing on these motions, counsel for Mr. Andersen argued that the loss of trust and comradery between Mr. Andersen and his coworkers presented a safety problem because firemen need to rely on each other when doing the dangerous work of fighting fires. But counsel never identified any specific examples of danger to Mr. Andersen or anyone else that was caused by the ostracism and contempt he suffered from his coworkers. More importantly, Mr. Andersen's written pleadings do not contain any discussion at all of safety issues. The only concrete example of ostracism and contempt in Mr. Andersen's pleadings is that he had "difficulty obtaining a shift-swap within his rank because of the letter" blaming him for the change in the shift-swap policy. *See* Doc. 21-1, ¶ 60. But Mr. Andersen does not allege that his difficulty obtaining shift-swaps interfered with his ability to do his job, nor does he provide allegations from which this Court could infer that it did so. For example, the proposed amended complaint does not allege that his difficulty obtaining shift-swaps prevented him from coming to work, or from performing any particular work-related tasks competently. This is not to say the Court believes it impossible that any set of facts *could* be alleged to show this; but at least so far, they have not been.

In other words, the Court believes that Mr. Andersen's proposed amended complaint does not allege facts showing that he plausibly suffered the sort of materially adverse action required by the FMLA as interpreted by the Eighth Circuit. Accordingly, it would be futile to permit Mr. Andersen to file it, as it would be unable to survive a Rule 12(b)(6) motion to dismiss. For the same reason, Mr. Andersen's original Complaint (Doc.

1) cannot survive the Defendants' Rule 12(c) Motion to Dismiss, which is governed by the same legal standard as a Rule 12(b)(6) motion. *See Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). But since the Court cannot conclude that it is impossible for Mr. Andersen to supplement his allegations with additional facts that would change this analysis, his Complaint will be dismissed *without* prejudice, so that he will have the opportunity to so supplement it if he wishes and is able to do so.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff Eric M. Andersen's Motion for Leave to Amend Complaint (Doc. 21) is **DENIED**, Defendants City of Springdale, Arkansas's, Chief Mike Irwin's, Chief Kevin McDonald's, and Chief Ron Skelton's Motion to Dismiss (Doc. 16) is **GRANTED**, and Mr. Andersen's Complaint is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED on this 20th day of August, 2018.

TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE