

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 9 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSEPH J. MUNGER, Sr.,

No. 21-35573

Plaintiff-Appellant,

D.C. No. 3:18-cv-00970-SB

v.

MEMORANDUM*

CASCADE STEEL ROLLING MILLS,
INC., a domestic business corporation,

Defendant-Appellee.

JOSEPH J. MUNGER, Sr.,

No. 21-35618

Plaintiff-Appellee,

D.C. No. 3:18-cv-00970-SB

v.

CASCADE STEEL ROLLING MILLS,
INC., a domestic business corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Stacie F. Beckerman, Magistrate Judge, Presiding

Argued and Submitted November 10, 2022
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CLIFTON and H.A. THOMAS, Circuit Judges, and BAKER,**
International Trade Judge.
Partial Concurrence and Partial Dissent by Judge BAKER.

Plaintiff Joseph J. Munger, Sr., appeals the district court's order granting Defendant Cascade Steel Rolling Mills's (Cascade) motion for summary judgment. Cascade cross-appeals the district court's failure to adopt its alternative arguments. To prevail on a motion for summary judgment, a party must 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We have appellate jurisdiction under 28 U.S.C. § 1291. We dismiss Cascade's cross-appeal for lack of standing. We affirm the district court's grant of summary judgment.

1. As a threshold matter, because Cascade has not been adversely affected by the district court's grant of summary judgment in its favor, we lack jurisdiction over its cross-appeal. *See D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (holding that "whether or not the parties raise the issue," we are "*required* sua sponte to examine jurisdictional issues such as standing." (cleaned up)). Because Article III of the Constitution permits courts to hear only "controversies," it is a fundamental rule of appellate procedure that

** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

“[o]nly one injured by the judgment sought to be reviewed can appeal.” *Parr v. United States*, 351 U.S. 513, 516 (1956); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he irreducible constitutional minimum of standing” includes an “injury in fact.”). As Cascade conceded during oral argument, because the district court ultimately granted its motion for summary judgment, it has not been injured by the decision below. Its “cross-appeal” merely raised alternative grounds to defend the judgment. Cascade’s cross-appeal is therefore dismissed.

2. The district court properly granted summary judgment to Cascade on Munger’s Family Medical Leave Act of 1993 (FMLA) and Oregon Family Leave Act (OFLA) interference claims. We analyze FMLA and OFLA claims together because OFLA claims are to “be construed to the extent possible in a manner that is consistent with any similar provisions of the [FMLA].” Or. Rev. Stat. § 659A.186(2); *see Sanders v. City of Newport*, 657 F.3d 772, 783 (9th Cir. 2011). To recover on his interference claims, Munger must establish that: “(1) he was eligible for the FMLA’s protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled.” *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting *Sanders*, 657 F.3d at 778).

Because Munger did not provide information to Cascade sufficient to

demonstrate that he was requesting leave for a qualifying condition and failed to respond to Cascade's request for more information, Cascade was entitled to summary judgment on the FMLA and OFLA interference claims. The applicable regulations are clear that a "[f]ailure to respond to reasonable employer inquiries regarding [a] leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying." 29 C.F.R. § 825.303(b).

For his leave to be FMLA-qualifying, Munger must have suffered from a serious health condition. 29 U.S.C. § 2612(a)(1)(D); *see* 29 U.S.C. § 2611(11) (defining a "serious health condition" as one requiring either inpatient hospital care or "continuing treatment by a health care provider"). But Munger never provided Cascade with medical records of a serious health condition that required inpatient care or continuing treatment. The two doctor's notes Munger provided did not include any diagnosis. The notes stated that Munger was "seen and treated" but could return to work the next day or the day after. To determine whether Munger's leave was FMLA-qualifying, Cascade emailed Munger that he needed to contact its third-party administrator, FMLASource. Cascade also told Munger in person two days later about the email and, because there was "an issue that [he] need[ed]

to resolve,” directed him to talk with Human Resources.¹ Munger did neither. By failing to respond to Cascade’s requests for information, Munger lost the right to FMLA protection.

3. The district court also properly granted summary judgment to Cascade on Munger’s FMLA and OFLA retaliation claims. To succeed on his retaliation claims, Munger had the burden of showing that his “taking of FMLA-protected leave constituted a negative factor in the decision to terminate [him].” *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001). Because Munger did not provide sufficient notice, he did not actually take FMLA-protected leave; thus, such leave could not have constituted a negative factor in Cascade’s decision to terminate him.

Cascade’s cross-appeal is **DISMISSED**. The district court’s grant of summary judgment for Cascade is **AFFIRMED**. Each party is directed to bear its own costs on appeal.

¹ We acknowledge that Munger disputes whether he received actual notice from Cascade. But Munger does not dispute the facts discussed above. Upon independent review of the record, we agree with the district court that, viewing the evidence in the light most favorable to Munger, no reasonable juror could find that Cascade failed to provide Munger with actual notice of Cascade’s need for further supporting information. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” (cleaned up)); *cf. Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) (“[A] self-serving declaration does not always create a genuine issue of material fact for summary judgment.”).

Munger v. Cascade Steel Rolling Mills, Inc.,
Nos. 21-35573 and 21-35618

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BAKER, Judge, concurring in part and dissenting in part:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I join the disposition’s dismissal of the cross-appeal by Cascade Steel Rolling Mills, Inc. (Cascade). I respectfully dissent, however, from my colleagues’ conclusion that “[b]ecause [appellant Joseph] Munger did not provide information to Cascade sufficient to demonstrate that he was requesting leave for a qualifying condition, *and* failed to respond to Cascade’s request for more information, Cascade was entitled to summary judgment on the FMLA [Family Medical Leave Act of 1993] and OFLA [Oregon Family Leave Act] interference claims.” Mem. at 4 (emphasis added). In my view, there are disputed issues of material fact as to both these related questions, and therefore I would reverse and remand for a trial.

Before turning to the merits, it’s important to briefly frame the separate issues on appeal lest they blur together.

The district court granted summary judgment in favor of Cascade on two separate and independent grounds. First, the district court held that Munger’s FMLA interference claim failed because he did not timely submit his FMLA leave request to Cascade’s third-party administrator, FMLASource, as required by the company’s updated leave policy, and that Munger received actual notice of that policy. Second, the district court held that Munger’s claim failed for the additional reason that he failed to establish that “he provided Cascade with sufficient notice to trigger the FMLA’s protections.”

The majority affirms on the district court's second ground (that Munger provided insufficient notice of his leave request) and does not reach the first (that Munger's failure to submit his request to FMLASource justified its denial).¹ Therefore, for purposes of determining whether Munger provided sufficient notice, we must assume that he was not required to submit his leave request to FMLASource. With that important distinction flagged, I turn to whether Munger provided sufficient notice.

1. On May 25, 2016, Munger obtained approval from his supervisor to leave work because of severe abdominal pain. He invoked FMLA and plant security gave this as the reason for Munger's leave on Cascade's daily attendance record. Munger's wife picked him up from the plant in the middle of the night (he worked the graveyard shift) and took him to a hospital emergency room. After a battery of tests and treatment for his pain, the attending physician gave Munger two notes indicating that he could return to work on May 26 and May 27. The physician also suggested that Munger seek follow up treatment "if necessary as needed."

The next day, Thursday, May 26, at 2:56 p.m. Munger emailed the first doctor's note (indicating a return date of May 26) to his shop clerk, Kimberly Bartlett, copying his supervisor, Tom Kniola. He followed that up the next morning at 9:29

¹ As the majority expresses no view on this alternative basis for the district court's decision, neither do I.

a.m. with another email to Bartlett (again copying Kniola) and attaching a second note from the same doctor (indicating a return date of May 27).

The relevant regulation only requires that an employee claiming FMLA leave “provide sufficient information for an employer to reasonably determine whether the FMLA *may* apply to the leave request. Depending on the situation, *such information may include that a condition renders the employee unable to perform the functions of the job . . .*” 29 C.F.R. § 825.303(b) (emphasis added). Thus, the regulation does not require an employee claiming FMLA leave to definitively *establish* that FMLA applies to his or her request, as both we and the Third Circuit have recognized. *See Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001) (“Employees need only notify their employers that they will be absent under circumstances which indicate that the FMLA *might* apply . . .”) (emphasis added); *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 303 (3d Cir. 2012) (“The regulations thus clearly envision situations where an employee can satisfy her notice obligation without providing enough detailed information for the employer to know if FMLA actually applies.”).

Whether an employee’s notice is sufficient under this permissive standard depends upon the “facts and circumstances of the particular case.” 29 C.F.R. § 825.303(a). If anything, given the recitation of the facts described above, the district court erred in not granting *Munger’s* cross-motion for partial summary

judgment on this issue.² After all, it's hard to see what else Munger could have done to put Cascade on notice that he *might* be FMLA-qualified.³ He had his wife pick him up from work in the middle of the night to take him to the ER, where an attending physician provided him notes indicating that he could not “perform the functions of [his] job” for two days. 29 C.F.R. § 825.303(b). Munger then expressly sought FMLA leave and provided those notes to Cascade. Thus, I would hold that a genuine issue of material fact exists as to the sufficiency of the content of his FMLA notice under the permissive regulatory standard.

2. Once an employer receives a notice from an employee that FMLA “*may* apply to the leave request,” 29 C.F.R. § 825.303(b) (emphasis added), the regulation mandates that the “*employer* [shall] obtain any additional required information through informal means.” *Id.* (emphasis added). The regulation in turn requires the employee “to respond to an employer’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to *reasonable* employer inquiries regarding the leave request may result in denial of FMLA protection if the

² On appeal, Munger does not challenge this ruling by the district court.

³ Indeed, it seems to me that the only thing missing from Munger’s notice for purposes of establishing that he was *definitively* FMLA-eligible was a statement from his attending physician that Munger had been instructed to receive continuing treatment. *See* 29 U.S.C. § 2611(11) (defining a “serious health condition”—a prerequisite for FMLA eligibility, *see* 29 U.S.C. § 2612(a)(1)(D)—as one requiring either inpatient hospital care or “continuing treatment by a health care provider”).

employer is unable to determine whether the leave is FMLA-qualifying.” *Id.* (emphasis added).

So now we come to the crux of the issue. Instead of responding to Munger’s leave request in good faith with reasonable inquiries to determine whether Munger was FMLA-eligible as the regulation requires, the record at least arguably reflects that Cascade decisionmakers saw an opportunity to finally rid the company of this meddlesome crane operator.

Just 19 minutes after the receipt of Munger’s 2:56 p.m. email with the doctor’s note on Thursday, May 26, Kniola (apparently Munger’s immediate supervisor) emailed the head of HR, Greg Moore, and two other staff members stating:

Joe Munger went home sick two days ago, and called off sick yesterday. He called off FMLA, but it looks like he will be at work tonight. He has a suspension for attendance on the books, and the verbal doesn’t drop off until September. Is this FMLA, *or is this attendance incidents, and potential termination?*

(Emphasis added).

Less than an hour later, at 4:06 p.m., one of the staff members, Teresa Smith, replied to all:

If he has not exhausted his Vacation Sick hours, he is able to use up to 40 since 1/1/16. If he has, he has 48 hours to contact FMLASource [the third-party administrator] to initiate an FMLA claim. If he does not contact them, and it is not covered by FMLA, and he does not have Vacation Sick still available, it would be an incident for each day not covered. *The fact that he provided a doctor’s excuse shows that he is trying to make another statement.* I’m not sure where he was 12 months back, so a discipline may have fallen off.

(Emphasis added).

The following morning, Friday, May 27, one of the other staff members replied to all at 6:59 a.m. to advise that Munger “used all his sick vacation hours this year. No discipline has fallen off.”

Less than two hours later, at 8:40 a.m., Smith replied to all and stated, “If he does not contact FMLASource by Tuesday (assuming yesterday was the call-off), they can be entered as incidents. *If this puts him at termination*, we probably need to meet with Greg [Moore].” (Emphasis added).

Shortly thereafter, at 9:29 a.m., Munger sent another message to Kimberly Bartlett, copying Kniola, forwarding his second doctor’s note (indicating a return date of that same day, May 27) with the comment “FYI.” Three minutes later, Bartlett forwarded that message to Smith, Kniola, and another staffer, also stating simply “FYI.”

Twelve minutes later, at 9:44, Smith hit reply-all, added Moore, and commented, “So he provided a note to return yesterday, and then didn’t? Now he provided another one? What time did he call off again yesterday? So sorry for all of the questions. Nothing changes, [w]e don’t accept doctor’s excuses, and unless he has initiated FMLA by Tuesday, he receives incidents.” Two minutes later, Bartlett replied to all to advise that Munger had called off at 3:49 the previous afternoon.

After this flurry of emails on the morning of Friday, May 27, for the remainder of the day no one at Cascade made any attempt to let Munger know that the company needed more detail about his condition and treatment to determine whether he was FMLA-eligible.

That weekend was Memorial Day weekend. The following Tuesday morning, May 31, Bartlett emailed Munger, copying Moore and three others, advising Munger that he needed to contact FMLASource by the end of the day or else he would receive three “attendance incidents per the attendance policy.”⁴ Critically for purposes of the issue before us, Bartlett made no request for information relevant to whether Munger was FMLA-eligible.

Sixteen minutes later, at 10:27 a.m., Moore (the HR chief) emailed a subordinate with a request:

[W]e have an employee here, Joe Munger, who has until today to contact FMLA Source to initiate FMLA for call offs last week. *There is a long history with this employee*, but I would ask that you please follow up with FMLA Source and let me know tomorrow morning if a claim was initiated by him. We need to know in order to initiate the appropriate action here should he not initiate a claim. *This is a very critical situation for us with timing so we would appreciate your help as we want nothing slipping through with this employee.*

(Emphasis added).

⁴ Because Munger had already exhausted his ordinary sick leave, this would be grounds for his termination.

Two days later, on Thursday, June 2, two of Munger's supervisors summoned him for a meeting at approximately 6:00 a.m. They notified him that he was receiving "attendance incidents" for absences beginning with his visit to the ER on May 26. When Munger replied that these absences should be covered by FMLA, he was asked if he had submitted any FMLA paperwork. Munger replied that no one had sent him any paperwork. His supervisors then presented him with a notice of discipline for violating the company's attendance policy. They then asked if he had received the email Bartlett sent the day before. Munger responded that he had not checked his email and that he had previously requested Bartlett not communicate by email. They told him to follow up with Smith in HR to find out what his obligations were.

Significantly, neither of his supervisors informed Munger of the content of the email or told him to contact FMLASource, much less (as relevant here) that he needed to supply additional information to Cascade to confirm that he was FMLA-eligible.

Munger returned to his shift as a crane operator, where he was not permitted to use his phone for safety reasons. Before his shift ended, and before he contends he had an opportunity to either check his email or call HR, he was summoned to another meeting around 10:00 a.m., this time with Greg Moore, the head of HR. At that meeting, Moore suspended Munger pending termination because of excessive

absences and asked him to turn in his badge. Formal termination followed the next day.

What's telling here—and arguably damning from a jury's perspective—is that although the company knew on the afternoon of Thursday, May 26, 2016, that it needed more information to determine whether Munger was FMLA-qualified, Cascade waited two business days, until the following Tuesday (May 31), to respond. (Not coincidentally, that was also the last day for Munger to submit his FMLA claim to FMLASource under the company policy.)

When HR finally responded on the morning of May 31, rather than communicating with Munger directly in person at work or by telephoning him, HR chose to respond indirectly by email, even though Munger had previously told HR not to communicate with him by email because he checks it infrequently.

It was not until 6:00 a.m. on Thursday, June 2, that Cascade managers told Munger that his FMLA claim was deficient. Even then, they only told him to follow up with HR and check his email. They didn't tell him the nature of the deficiency relevant here—that he needed to supply more detail about his diagnosis and whether he needed continuing treatment. Approximately four hours later, the head of HR suspended Munger.

The majority concludes no reasonable jury could find that “Cascade failed to provide Munger with actual notice of [the company]’s need for further supporting

information.” Mem. at 5 n.1. The majority cites the May 31 email and the 6:00 a.m. meeting on June 2, where Munger was directed to contact HR. *Id.* at 5. The majority faults Munger for not acting on the May 31 email or contacting HR after being so advised in the June 2 meeting. *Id.*

The May 31 email was insufficient to provide notice because Munger had previously told HR that he only checks his email once a week.⁵ And the meeting at 6:00 a.m. on June 2 occurred only a few hours before Cascade suspended him. Because Munger had to return to work after that meeting, a jury might easily conclude that it was unreasonable for the company to give him only a few hours to submit the relevant information.⁶

In short, Cascade’s response to Munger’s FMLA leave request was delayed, indirect, and oblique. When combined with statements about Munger’s “history,” his making “another statement,” and the need to avoid letting anything “slip[] through with this employee,” a jury might conclude that the company prioritized terminating Munger rather than complying with its regulatory obligation to make

⁵ Munger’s credibility as a witness is a matter for the jury to determine, not us.

⁶ It seems unlikely it would have made any difference even if Munger had somehow managed to supply the relevant information in the few hours between his two meetings with management on the morning of June 2. Management appeared to be looking for a reason to terminate him, and his failure to submit a leave request to FMLA-Source by May 31 provided the excuse the company needed. In any event, these are quintessential factual issues for a jury to sort through.

“reasonable” efforts to determine whether he was FMLA-qualified. I therefore respectfully dissent from the majority’s conclusion that the few hours’ actual notice provided by Cascade complied as a matter of law with the company’s regulatory obligation to make “reasonable” efforts to determine whether Munger was so qualified. 29 C.F.R. § 825.303(b).⁷ On this record, that is a question for the jury.

⁷ The regulatory requirement that an employer make “reasonable” inquiries to determine whether an employee is FMLA-qualified necessarily implies that the former will give the latter a reasonable amount of time to respond to such inquiries.