

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KIMMBERLY A. PANTO,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 01-6013
v.	:	
	:	
PALMER DIALYSIS CENTER/TOTAL	:	
RENAL CARE,	:	
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

April 7, 2003

Presently before the Court is Defendant Palmer Dialysis Center/Total Renal Care's Motion for Summary Judgment, Plaintiff Kimmberly A. Panto's Response, and Defendant's Reply. For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

**I. BACKGROUND**

Kimberly A. Panto (hereinafter referred to as "Panto" or "Plaintiff") was diagnosed with rheumatoid arthritis in 1988 and systemic lupus erythmatosis ("lupus")<sup>1</sup> in 1990. See Pl.'s Resp.-Ex. I, Panto Dep. (hereinafter referred to as "Panto Dep.") at 36-37.

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1. Plaintiff's lupus affects her immune system. Plaintiff stated that "[m]y immune system does not shut down after a cold or a virus. What happens is my immune system still produces antibodies, and these antibodies attack my soft tissue organs like my joints, my liver, my spleen . . . ." Panto Dep. at 36.

In March 1997, Defendant Renal Treatment Center Northeast, Inc. d/b/a Palmer Dialysis Center<sup>2</sup> (hereinafter referred to as “Defendant” or “Palmer Dialysis” or the “Company”) hired Panto to serve as a dialysis technician. As with other companies, Palmer Dialysis had policies regarding leave under the Family and Medical Leave Act (“FMLA”), Paid Time Off (“PTO”) leave<sup>3</sup>, and extended illness leave. See Pl.’s Mot. Summ. J.-Ex. E, Mary Baker Dep. (hereinafter referred to as “Baker Dep.”) at 9-10. Palmer Dialysis’ Director of Nursing, Barbara Danko (“Danko”), felt Panto “deserved a chance,” even though she had been terminated from her prior employer for excessive absenteeism. Defendant knew upon hiring Panto that she was diagnosed with lupus.<sup>4</sup> See Def.’s Mot. Summ. J.-Ex. B, Verbal Warning Report.

Panto generally performed well at work, though the effects of her ailments often caused her to miss work. This was particularly true when her illness would “flare-up,” confining Panto to her couch for two or three days a month solely to rest. See Panto Dep. at 41. All of Panto’s absences were noted in her personnel file, see Baker Dep. at 13, and Danko testified that she did not question whether or not Panto was out due to real health problems. See Danko Dep. at 16.

Within the first ninety days of Panto’s employment with Palmer Dialysis, on May 12, 1997, Panto received a verbal warning for frequent absenteeism. Def.’s Mot. Summ. J.-Ex.

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2. Defendant was misnamed in the Complaint as Palmer Dialysis Center/Total Renal Care. Palmer Dialysis is a renal treatment clinic located in Easton, Pennsylvania.

3. The PTO policy is based on time worked. If an employee works the requisite number of hours, it is possible for the employee to accrue a maximum of 176 hours of PTO in the first year, 192 hours in the second year, and 200 hours in the third year. See Pl.’s Mot. Summ. J.-Ex. F, Susan Wright Dep. (hereinafter referred to as “Wright Dep.”) at 11-12.

4. During her employment with Palmer Dialysis, Panto was also treated for anxiety, depression, irritable bowel, and asthma. See Pl.’s Mot. Summ. J.-Ex. H, Zoe Caruso Dep. (hereinafter referred to as “Caruso Dep.”) at 49-50.

B, Verbal Warning Report. Panto received an “Unsatisfactory” rating with respect to “Availability” on her Introductory Period Performance Appraisal. Danko warned Panto that continued absences could result in termination. See Danko Dep. at 19.

A year after her hire, Panto continued to perform unsatisfactorily with regard to meeting the Company’s attendance standards. On March 31, 1998, Danko issued Panto an Employee Performance Planning and Review. Panto received a 2 rating—“performance needs improvement”—under the section “Personal Development and Professionalism,” which includes, among other things, the extent to which the employee meets attendance standards.

In the spring of 1998, Total Renal Care bought Palmer Dialysis. Total Renal Care’s handbook, which it distributed to all employees including Panto, stressed the importance of attendance: “Regular attendance is a necessary condition of employment. Frequent absences or lateness disrupts patient care, puts a burden on other employees and affects departmental performance.” See Panto Dep. at 108.

The record indicates multiple absences in late 1998 and early 1999. Specifically, Panto was absent from work on October 21, 22 and December 28, 1998, and January 15, 16, and February 2, 1999. On February 3, 1999, Panto’s supervisor, Mary Baker (“Baker”), who became the Director of Nursing at Palmer Dialysis after Danko left, issued Panto a verbal warning for excessive absenteeism. Baker informed Panto that her excessive absences were creating a hardship on the unit.

On May 18, 1999, Panto took FMLA leave for her pregnancy and subsequent birth of her daughter. The Company’s FMLA policy provided twelve weeks leave in a 12-month period. Panto’s FMLA leave expired on August 10, 1999, but Panto could not return to work

because she was still restricted from working by her physician. Total Renal Care granted Panto additional leave.

When Panto's physician cleared her to return to work on September 13, 1999, Total Renal Care reinstated Panto as a dialysis technician with the same hours and same shifts at the same rate of pay. Id. at 25. The only change in Panto's employment was that she floated through three Total Renal Care dialysis clinics rather than reporting to one.

When Panto returned from leave, or shortly thereafter, Zoe Caruso ("Caruso") replaced Baker as the Director of Nursing at Palmer Dialysis. Panto recorded additional absences on October 1, 21, November 12, 13, 14, 15, and 17, 1999.

Recognizing that her absenteeism was a problem, Panto wrote a letter to the administrator's at Total Renal Care's Whitehouse Dialysis Unit on November 18, 1999. In the letter, Panto wrote: "I realize I have been absent from your unit too much. I am working to correct the problem and will." Id. at 83-84. Panto wrote that she did not "see any other absences in the future." Id. at 84

Caruso placed Panto on a Performance Management Plan on November 24, 1999. The Performance Management Plan provided for a ninety-day probationary period, from November 24, 1999 to February 21, 2000. Panto was warned that two absences during the probationary period would result in a three-day suspension.

Despite her assurances that she would correct the problem, Panto was absent on December 4, 1999, for which she received another warning, and on January 10, 2000, for which she received the suspension set forth in the Performance Management Plan. After Panto's

January 10, 2000 absence, Caruso warned Panto that if she were absent again during the probationary period, her employment would be terminated.

Panto's probation expired on February 21, 2000. Just four days later, on February 25, 2000, Panto was absent from work once again. In accordance with Total Renal Care's progressive discipline policy, Caruso suspended Panto for three days without pay.

On February 29, 2000, Caruso placed Panto on another Performance Management Plan. The terms of the plan provided for a six-month probationary period and warned that Panto's first absence during the probationary period would result in the termination of her employment.

The following day, on March 1, 2000, Panto requested a leave of absence from March 4, 2000 to March 28, 2000, because her doctor wanted Panto to adjust to the medications for her anxiety and depression. Caruso granted Panto's request for leave of absence.

As a condition to Panto's leave of absence, Panto agreed that upon her return to work, she would begin the six-month probationary period set forth in the February 29, 2000 Performance Management Plan. Panto agreed to the terms of the plan, which included that "any infraction of the probation would result in termination."

Panto returned to work from her leave of absence on or about March 27, 2000. Upon her return to work, Panto requested that she be put on a thirty hours per week work schedule. Caruso granted Panto's request to be placed on a thirty hours per week work schedule.

Panto never had the opportunity to work thirty hours per week because, on April 13, 2000, she was absent once again. Panto's absence on this day was an infraction of the terms of the February Performance Management Plan, and, as a result, Total Renal Care terminated

Panto. It is not known whether Panto had any PTO available at the time of termination. See Wright Dep. at 21.

Panto filed the instant action alleging violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.*, the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 *et seq.*, and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. § 951 *et seq.* Palmer Dialysis filed a motion for summary judgment, to which Panto responds.

## **II. STANDARD OF REVIEW**

A motion for summary judgment will be granted where all of the evidence demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is “whether reasonable minds may differ as to the verdict.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.

### III. DISCUSSION

#### A. ADA/PHRA

The ADA<sup>5</sup> prohibits employment discrimination “against a qualified individual with a disability because of the disability of such individual . . . .” 42 U.S.C. § 12112(a). Employers are prohibited from discriminating against such individuals with regard to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* The term “discriminate” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A).

The Court follows the burden-shifting framework first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), when analyzing claims under the ADA. Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). Under this framework, Plaintiff/employee must show, by a preponderance of the evidence, a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. If the employee is able to do this, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions against the employee. *Id.* If the employer can meet this burden, then the burden shifts back to the employee to prove, by a preponderance of the evidence, that the reasons articulated

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5. It is well-established that the Pennsylvania courts have interpreted the PHRA using the same legal standards as the ADA. Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); Alifano v. Merck & Co., 175 F.Supp.2d 792, 796 (E.D. Pa. 2001). Therefore, the Court’s analysis of the ADA claim applies equally to Panto’s PHRA claim.

by the defendant were actually pretext for discriminatory practices. Id. at 804. Although “the burden of production may shift, ‘the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’” Shaner, 204 F.3d at 500-01 (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)).

To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate that: (1) she is a disabled person within the meaning of the ADA; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an adverse employment action because of that disability. See Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998). In the present case, Panto has presented sufficient evidence that a reasonable jury could find that she is disabled within the meaning of the ADA and that she is a “qualified individual.” As such, Plaintiff may be able to prove, by a preponderance of the evidence, a prima facie case of disability discrimination.

Defendant, however, presents a legitimate, non-discriminatory reason for Panto’s termination—excessive absenteeism. In support of her argument that Defendant’s reason is merely a pretext for discrimination, Panto simply states that “where an employer asserts excessive absenteeism as a non-discriminatory justification for an employee’s termination, that justification cannot analytically be considered apart from the alleged disability causing the absenteeism.” Barnett v. Revere Smelting & Ref. Corp., 67 F.Supp.2d 378, 392 (S.D.N.Y. 1999). The Court finds this argument persuasive and reserves the issue for a jury to decide whether Defendant’s proffered motive was pretextual.

Plaintiff also alleges that Defendant violated the ADA by failing to provide her with reasonable accommodations. An employer who fails to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless the accommodation can be shown to impose undue hardship. See 42 U.S.C. § 12112(b)(5)(A). The term “reasonable accommodation” may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9).

To establish a prima facie case of failure to accommodate under the ADA, Plaintiff must show that: (1) the defendant is a covered employer; (2) she is disabled within the meaning of the statute; (3) she can perform the essential functions of the job with or without reasonable accommodation; and (4) the defendant knew of her disability and failed to provide her with a reasonable accommodation. See Kralik v. Durbin, 130 F.3d 76, 78 (3d Cir. 1997). The employer’s duty to provide reasonable accommodations does not extend, however, to accommodations that “would impose an undue hardship on the operation of the business.” 42 U.S.C. § 12112(b)(5)(A).

Additionally, “[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] with a disability in need of accommodation.” 29 C.F.R. § 1630.2(o)(3) (2002). “This process should identify the precise limitations resulting from the disability and the potential reasonable

accommodations that could overcome those limitations.” Id. In turn, “both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.”

Mengine v. Runyon, 114 F.3d 415, 419-20 (3d Cir. 1997).

To show that an employer failed to participate in the interactive process, an employee must demonstrate: (1) the employer knew about the employee’s disability; (2) the employee requested reasonable accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 319-20 (3d Cir. 1999).

Plaintiff argues that Defendant did not earnestly engage in the interactive process as required by the ADA. Specifically, Panto argues that Defendant did not accommodate her when it placed her on a six month probationary program where she would be terminated as soon as she missed one day of work. In light of the Court’s finding that there are genuine issues of material fact as to whether Defendant discriminated against her based on her disability, the Court also reserves to a jury the issue of whether Defendant failed to reasonably accommodate Panto.

Accordingly, Defendant’s motion for summary judgment as to Plaintiff’s ADA and PHRA claims is denied.

## **B. FMLA**

The Family and Medical Leave Act (“FMLA”) entitles “employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.” 29 U.S.C. § 2601(b)(2).

The FMLA contains two distinct types of rights. See Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998). The first type, labeled as prescriptive or substantive rights, relates to the ability to take twelve weeks of unpaid leave. Id. The second type, called proscriptive rights, includes protection in the event that an employee is discriminated against for exercising the prescriptive rights as set forth in the statute. Id. at 159-60.

Plaintiff contends that Defendant violated both her substantive and proscriptive rights under the FMLA. The Court will address each argument in turn.

1. Prescriptive/Substantive Rights

The FMLA entitles “eligible employees”<sup>6</sup> “to a total of 12 workweeks of leave during any 12-month period” for certain, specified reasons set forth in the act. 29 U.S.C. § 2612(a)(1). The employer, however, is permitted to choose the method for determining the “12-month period” in which the 12 weeks of leave entitlement occurs. See 29 C.F.R. § 825.200(b).

It is undisputed that Panto was not entitled to FMLA leave at the time of her termination from employment on April 13, 2000. Panto admits that she was not eligible for leave under the FMLA on March 1, 2000 because she had already used 12 weeks of FMLA leave during the summer of 1999. See Def.’s Mot. Summ. J.-Tab 1, Pl.’s Answers to Def.’s Req. for Admis. at 65; Panto Dep. at 94. Under Total Renal Care’s policy, in accordance with 29 C.F.R.

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6. The term “eligible employee” means an employee who has been employed “(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2)(A). Defendant contends that Panto is not an “eligible employee” under the FMLA because she did not work the requisite 1,250 hours. See Def.’s Mot. Summ. J. at 8. Panto, however, contends that Defendant erroneously calculated her eligibility time, and, as such, that she is an “eligible employee.” See Pl.’s Resp. at 28. Drawing all inferences in the light most favorable to Plaintiff, the Court will assume, for purposes of the present Motion for Summary Judgment, that Plaintiff is an “eligible employee.” The Court can then address the arguments based on the amount of leave Plaintiff actually took from work.

§ 825.200(d), “the 12-month period is measured backward from the date an employee requests an FMLA leave.” Panto had already used all her FMLA leave from May 18, 1999 to August 10, 1999. Accordingly, Panto did not begin to reacquire FMLA leave time until after May 18, 2000.

Plaintiff argues, however, that Defendant is estopped from asserting that Panto’s leave was confined to twelve weeks because Defendant’s Employee Policy allowed for up to six months medical leave under the FMLA. See Pl.’s Resp. at 30. The Company’s policy states:

The Company recognizes there may be times when you are required to be away from your job an extended period of time. Leaves of absence will be administered in compliance with the Family and Medical Leave Act “FMLA”. . . Additionally, a qualified leave of absence, upon prior approval, may be extended for an additional three (3) months (not to exceed a total of six months).

Id. at Ex. C-Def.’s Extended Illness Leave Policy.

Despite the existence of additional leave in the policy, the Court finds that Defendant correctly asserted the affirmative defense that Panto exhausted her twelve weeks of FMLA leave to which she was entitled. Defendant’s policy provides a more generous benefit, but it does not convert this leave to an entitlement under the FMLA. Defendant’s FMLA policy clearly provides only twelve weeks leave. See Def.’s Mot. Summ. J.-Ex. F, Family and Med. Leave of Absence. The Company’s policy provides additional leave, but this grant of additional leave is within the discretion of the Company. See Pl.’s Resp.-Ex. C, Def.’s Extended Illness Leave Policy (stating that “a qualified leave of absence, upon prior approval, *may* be extended for an additional three months”) (emphasis added). The employee must also obtain prior approval before being granted extended leave. Although Defendant’s policy contemplates an additional three months “qualified leave of absence,” the FMLA does not create a federal cause of action to

enforce the voluntary employer policies of providing benefits that exceed those required by the FMLA. See Rich v. Delta Air Lines, Inc., 921 F.Supp. 767, 773 (N.D. Ga. 1996) (stating that “[s]ection 825.700<sup>7</sup> does not, and could not, however, create a federal cause of action under the FMLA to enforce the voluntary employer policies of providing benefits that exceed those required by the FMLA”).

Because Panto was not eligible for FMLA leave at the time her employment was terminated, she cannot establish an interference claim under the FMLA. As such, Defendant Palmer Dialysis’ Motion for Summary Judgment is granted.

## 2. Proscriptive Rights

The FMLA also makes it unlawful “for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.” 29 U.S.C. § 2615(a)(2). This portion of the FMLA prohibits retaliation by an employer for the employee’s exercise of rights under the FMLA. As with other retaliation claims, the Court utilizes the burden-shifting framework set forth by the United States Supreme Court in McDonnell Douglas in analyzing such a claim under the FMLA. See Sherrod v. Philadelphia Gas Works, 209 F.Supp.2d 443, 451 (E.D. Pa. 2002).

To establish a prima facie case of retaliation under the FMLA, Plaintiff must show that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the adverse action and Plaintiff’s exercise of her FMLA rights. Alifano, 175 F.Supp.2d at 795; Baltuskonis v. U.S. Airways, Inc., 60

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7. Section 825.700 provides, in part, that “[a]n employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.” 29 C.F.R. § 825.700(a) (2002).

F.Supp.2d 445, 448 (E.D. Pa. 1999). Although Defendant concedes that Panto engaged in a statutorily protected activity and that her termination was an adverse employment action, see Def.'s Mot. Summ. J. at 11, Defendant argues that Plaintiff cannot establish a causal connection between her discharge and her FMLA leave.

It is established that “[a] causal connection between an employee’s protected activity and an adverse action by her employer may be inferred if the events occurred close in temporal proximity to each other.” Harris v. SmithKline Beecham, 27 F.Supp.2d 569, 580 (E.D. Pa. 1988), aff’d 203 F.3d 816 (3d Cir. 1999). In the present case, Plaintiff relies on the close temporal proximity between her leave and her termination to demonstrate a causal connection. See Pl.’s Resp. at 33. Panto notes that she was fired approximately two weeks after her return from leave in March 2000, indicating that Defendant fired her in retaliation of Panto exercising her FMLA rights. See id.

The problem with Panto’s argument is that this assumes that her leave in March 2000 was FMLA leave. This, however, is not the case as the March 2000 leave was not protected under the FMLA. The Court has already determined that Panto exhausted her FMLA leave during the May 18, 1999 to August 10, 1999 period. Panto admits that she was not eligible for leave under the FMLA on March 1, 2000 because she had already used 12 weeks of FMLA leave during the summer of 1999. See Def.’s Mot. Summ. J.-Tab 1, Pl.’s Answers to Def.’s Req. for Admis. at 65; Panto Dep. at 94. Instead of a two week gap, seven months existed between the time Plaintiff returned from her FMLA/extended leave in September 1999 and the termination of her employment in April 2000. A causal connection between Panto taking FMLA leave and her subsequent termination cannot be inferred from a seven month intervening time period. See e.g.,

Keeshan v. Home Depot, Inc., No. 00-529, 2001 U.S. Dist. LEXIS 3607, at \*43-44 (E.D. Pa. Mar. 27, 2001) (stating that “[u]nder the facts of this case, a time period of approximately four months with no evidence of discriminatory conduct or animus by the Defendants in connection with [plaintiff’s] leave under the FMLA does not establish close temporal proximity”).

Finding that Panto cannot establish a prima facie case of retaliation under the FMLA, the Court grants Defendant’s motion for summary judgment as to Panto’s “retaliation claim.”

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant’s Motion for Summary Judgment is granted in part and denied in part. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KIMMBERLY A. PANTO,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 01-6013
v.	:	
	:	
PALMER DIALYSIS CENTER/TOTAL	:	
RENAL CARE,	:	
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 7<sup>th</sup> day of April, 2003, upon consideration of Defendant Palmer Dialysis Center/Total Renal Care's Motion for Summary Judgment (Docket No. 9), Plaintiff Kimmberly A. Panto's Response (Docket No. 11), and Defendant's Reply (Docket No. 12), it is hereby **ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. More specifically:

- 1) Defendant's Motion for Summary Judgment as to Plaintiff's ADA claim (Count I) is **DENIED**;
- 2) Defendant's Motion for Summary Judgment as to Plaintiff's FMLA claim (Count II) is **GRANTED**;
- 3) Defendant's Motion for Summary Judgment as to Plaintiff's PHRA claim (Count III) is **DENIED**.

Pre-trial memoranda are due within ten (10) days of the date of this Order.

Counsel are to contact the Courtroom Deputy, Matthew Higgins, for trial scheduling.

BY THE COURT:

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RONALD L. BUCKWALTER, J.