

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

DOUGLAS HELFRICH : CIVIL ACTION  
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: :  
v. : :  
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LEHIGH VALLEY HOSPITAL : NO. 03-cv-05793

**MEMORANDUM and ORDER**

March 18, 2005

PRATTER, District Judge

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff Douglas J. Helfrich (hereinafter referred to as “Plaintiff” or “Helfrich”) filed a Complaint in the Court of Common Pleas of Lehigh County against Lehigh Valley Hospital (hereinafter “LVH”). Count I of the Complaint alleges violations of the Age Discrimination in Employment Act of 1967 (the “ADEA”), 29 U.S.C. §§ 621, et seq.; Count II alleges violations of the Pennsylvania Human Relations Act (the “PHRA”), 43 P.S. §§ 955 and 962; Count III alleges violations of the American with Disabilities Act, 42 U.S.C. §§12101 et seq. (the “ADA”); Count IV alleges illegal retaliation under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (the “FMLA”); Count V alleges illegal retaliation under the ADEA; and Count VI alleges LVH unlawfully retaliated against Plaintiff under the ADA.

On October 20, 2003, LVH removed the action to this Court. Mr. Helfrich filed an Amended Complaint in order to add another count in which he alleged that LVH violated the Employee Retirement Income Security Act (“ERISA”). LVH moved to dismiss Counts IV, V, VI and VII. This Court denied the motion to dismiss Counts IV, V, and VI, but granted the motion to dismiss the ERISA claim in Count VII.

LVH has now submitted a motion for summary judgment that Mr. Helfrich opposes. LVH filed a Reply Brief and Helfrich was granted leave to file a Memorandum of Law in Opposition to LVH’s Reply Brief.

Following oral argument presented on February 23, 2005, by letter to the Court, dated February 24, 2005, Helfrich voluntarily withdrew Count II of the Amended Complaint inasmuch as that claim was filed after the controlling statute of limitations had run. For the reasons discussed below, summary judgment will be entered in favor of LVH as to all remaining counts.

## II. FACTUAL BACKGROUND AND SUMMARY RULING

### A. Facts

Helfrich was born on August 6, 1951. (Helfrich Dep. at 9) (Def. Ex. “A”). Helfrich was fifty (50) years old when LVH terminated his employment on November 9, 2001. (*Id.* at 9). At that time, Helfrich was a Senior Management Engineer in the Department of Management Engineering. (Amended Complaint, ¶5) (Def. Ex. “B”); (Helfrich Resume) (Def. Ex. “C”). Steven W. Jagiela was an LVH administrator with responsibilities for materials management, clinical engineering and management engineering. (Jagiela Dep. at 5) (Def. Ex. “D”). Jagiela, as Director of Management Engineering, was Helfrich’s supervisor until July of 2001, when Debra

Halkins assumed that role. (Jagiela Dep. at 38-39) Pl . (Ex. “D”); (Ms. Halkins Dep. at 38-39) (Def. Ex. “E”). Helfrich and Jagiela were personal friends and business partners and, along with Marilyn Guidi, principal co-inventors of a computer program known as Scorecard. (Helfrich Dep. at 41-42, 88) (Def. Ex. “A”). Scorecard is a computer program that was initially developed for monitoring and accessing performance of Hospital cost centers. (Helfrich Dep. at 88-91) (Def. Ex. “A”); (Jagiela Dep. at 34) (Def. Ex. “D”). The Scorecard program is a software application used to develop budgets and to set staffing. (Ms. Halkins Dep. at 17-21, 52) (Def. Ex. “E”).

On May 4, 2000, the Scorecard principal co-inventors, including Helfrich, assigned their patent rights in the Scorecard software application to Lehigh Valley Health Network (“LVHN”). (Helfrich Dep. at 88-91) (Def. Ex. “A”); (Patent Application/Assignment) (Bates Nos. 1200, 1204) (Def. Ex. “F”). Jageila and Helfrich formed a company known as DataVantage to market the Scorecard software application to other hospitals and health care systems. (Helfrich Dep. at 39-40) (Def. Ex. “A”). Helfrich alleges that an oral agreement existed between DataVantage and LVH that provided that if LVH made a profit from selling Scorecard to third parties, 20% of this profit would be remitted to DataVantage. (Id. at 30). Jageila and Helfrich soon experienced a business dispute over DataVantage’s entitlement to a percentage of the profits from the sale of Scorecard. (Helfrich Dep. at 77-78) (Def. Ex. “A”). While Helfrich was still employed by LVH, LVH sold the Scorecard program to a third party for \$25,000.00. (Helfrich Dep. at 77-78) (Def. Ex. “A”). DataVantage never received any proceeds from this Scorecard sale, and Helfrich contends, based on the alleged oral agreement, that LVH owes DataVantage \$5,000.00 from this sale. (Id. at 78-86).

While Helfrich was employed at LVH, Helfrich was the only LVH employee with the knowledge and information necessary to operate, maintain and update Scorecard. (Helfrich Dep. at 114-16) (Def. Ex. "A"); (Hawkins Dep. at 24, 36-37, 50-51) (Ex. "C"); (Jagiela Dep. at 61) (Def. Ex. "D"). Helfrich's supervisors, first Jagiela, and then Ms. Halkins, and even Helfrich himself, recognized the inherent problems and risks when only one employee is capable of managing a critically important software application like Scorecard that is used on an institution-wide basis. If that employee is, for whatever reason, incapacitated or unavailable, no one else would be able to maintain and update the Scorecard software application in that employee's absence. (Ms. Halkins Dep. at 24, 28, 36-37, 50-51) (Def. Ex. "C"); (Jagiela Dep. at 61) (Ex. "D"); (Helfrich Dep. at 114-15) (Def. Ex. "A"). While Jagiela was Director of Management Engineering he contends that he convened several meetings between Information Systems Department ("IS") and Helfrich in order to enable IS to assume responsibility for Scorecards' maintenance, operations, and updating. (Jagiela Dep. at 42-49) (Def. Ex. "D"). LVH and Helfrich disagree regarding whether Helfrich ever provided the necessary information to IS. Jagiela promoted Ms. Halkins to Director of Management Engineering effective July of 2001, and instructed her to transfer the Scorecard maintenance responsibilities from Helfrich to IS so that Scorecard would not be dependent upon a single individual's knowledge and availability. (Id. at 49). Helfrich concedes that (1) Ms. Halkins was qualified for promotion to Director of Management Engineering *and* (2) *the decision to promote her was not based on age discrimination.* (Helfrich Dep. at 61-62) (Def. Ex. "E").

By mid-summer 2001, Ms. Halkins was personally experiencing and receiving from others, negative information about Helfrich's job performance. On August 17, 2001 she met

with Helfrich to go over his workload and the timetable to transfer Scorecard's maintenance to IS. At this meeting, Ms. Halkins contends that Helfrich refused to agree to share Scorecard maintenance information with IS. Ms. Halkins viewed Helfrich's refusal to cooperate in the transfer of Scorecard maintenance over to IS as insubordination.<sup>1</sup> (Ms. Halkins Dep. at 24-26); (Helfrich Dep. at 107-08, 112-14, 128).

Later in August, Ms. Halkins met with Jagiela who assured her that LVH owned the Scorecard patent rights and that IS therefore had every right to the information needed to maintain and update Scorecard. (Ms. Halkins Dep. at 27) (Ex. "E").<sup>2</sup> On September 4, 2001,

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<sup>1</sup> Insubordination is "disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer." BLACK'S LAW DICTIONARY 720 (5th ed. 1979).

Here, based on the record presented to this Court and viewing the facts in a light most favorable to Mr. Helfrich, there is no doubt that Helfrich refused to provide Ms. Halkins, his superior, with the passwords to Scorecard merely because it was Helfrich's subjective belief that he was not adequately compensated with regard to the assignment to LVH of all of Helfrich's intellectual property rights in Scorecard. The record further supports that Helfrich's actions were an intentional disregard of the lawful instructions of the employer that Helfrich turn over the passwords to Scorecard so that LVH could avoid the single dependency issue that existed because only Helfrich had the ability to manipulate the Scorecard program. In fact, because of Helfrich's insubordinate behavior, and following his termination by LVH for insubordination, the hospital was forced to reverse-engineer Scorecard because Helfrich never provided them with the passwords to which LVH was rightfully entitled.

<sup>2</sup> Despite the aggressive arguments made on behalf of Helfrich that (a) the unemployment compensation referee found that there was a "legitimate legal dispute" between LVH and Helfrich or that (b) Helfrich's subjective beliefs with regard to the legal status of the patent assignment drove him to engage in a campaign of passive resistance and self-help, none of these arguments serve as a legitimate justification for Helfrich's documented poor performance and insubordination. In fact, with regard to the determination by the Pennsylvania Unemployment Board of Review, Referee James A. Norris found,

The employer discharged claimant for the stated reason that he was insubordinate. The claimant's insubordination was his reluctance to work on the [S]corecard **due to his belief that there was a patent violation**. He informed the director of his belief when the director informed the claimant that the employer believed there was no violation; the claimant then agreed to work on [S]corecard. He provided a "chalk talk" that was unsatisfactory. . . . **Because the claimant explained reasonably his course of conduct**, the Referee concludes that the claimant's conduct does not rise to the level of willful misconduct.

(Pennsylvania Unemployment Board of Review Referee's Decision at 3) (Def. Ex. U) (emphasis added). Such a finding by the Referee does not, by itself, or when viewed with the record as a whole, as Helfrich's counsel is required to do before making a representation to this Court, establish evidence of "a *legitimate* legal dispute," as argued by Helfrich's counsel at oral argument. See Oral Arg. Tr. at 27 (emphasis added). Even assuming *arguendo*

Terry Capuano, Sr. Vice President, Clinical Services, complained to Ms. Halkins about Helfrich's deficient performance. Capuano accused Helfrich of "playing games." (Helfrich Dep. at 135-40) (Def. Ex. "A"); (Capuano e-mail to Ms. Halkins dated Sept. 4, 2001) (EEOC 170) (Def. Ex. "I"). On September 21, 2001, Sheila Saferrella, Director of Diagnostic Services, complained to Ms. Halkins about Helfrich's failure to give her the "correct data" for cost centers. Saferrella had been trying to obtain this information from Helfrich for over a year. (Ms. Halkins Dep. at 12-22) (Def. Ex. "E"); (Saferrella e-mail to Ms. Halkins dated Sept. 21, 2001) (345) (Ex. "J"). On October 12, 2001, Helfrich presented a "chalk talk" to IS on Scorecard maintenance. (Helfrich Dep. at 143-46) (Def. Ex. "A"). Margaret Schaffer, IS Director and Department Manager, complained to Ms. Halkins that Helfrich's presentation at the IS "chalk talk" meeting

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that a legitimate legal dispute existed, actions taken against an employer consistent with such a dispute could be considered insubordinate, giving rise to summary termination.

Moreover, in fact, as Helfrich and his counsel presumably know, based upon the record, on May 4, 2000, the Scorecard principal co-inventors, including Helfrich, assigned all of their patent rights to the Scorecard software application LVH. (Helfrich Dep. at 88-91) (Def. Ex. "A"); (Patent Application/Assignment) (Bates Nos. 1200, 1204) (Def. Ex. "F").

Furthermore, on this weak record, and in light of the clarity of the evidence of the patent assignment, the Court must question all of Helfrich's causes of action, because **it is clear from the record** that the only existing animus among the persons involved in this case has to do with a potential contractual commercial business dispute between LVH, Helfrich and Jageila, as opposed to some discriminatory motive in the employment relationship.

The Court's summary judgment inquiry focuses on factual evidence that actually exists in the record and counsel is precluded from positing arguments to the Court of what counsel wishes could be found in the record or hopes the record supports. At this juncture, discovery is closed, the record is established and counsel must apply the record facts to the applicable law. This is not the stage for taking liberties with undisputed facts and objectively reasonable inferences that exist within the record. See, e.g., LaSalle Nat'l Bank v. First Connecticut Holding Group, L.L.C. XXIII, 287 F.3d 279, 293 (3d Cir. 2002) ("As an officer of the court, an attorney must comport himself/herself with integrity and honesty when making representations regarding a matter in litigation. 'An attorney's obligation to the court is one that is unique and must be discharged with candor and with great care. The court and all parties before the court rely upon representations made by counsel. We believe without qualification that an attorney's word is his bond.'") (quoting Baker Industr., Inc. v. Cerberus Ltd., 764 F.2d 204, 212 (3d Cir. 1985)); In re Universal Minerals Inc., 755 F.2d 309, 312-13 (3d Cir. 1985) ("Above and beyond the dictates of courtesy, counsel have 'a continuing duty to inform the Court of any development which may conceivably affect an outcome' of the litigation. This is so, even where the new developments, new facts, or recently announced law may be unfavorable to the interests of the litigant") (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); cf. Model Rules of Professional Conduct, Rule 3.3 (candor toward tribunal); Pinkham v. Sara Lee Corp., 983 F.2d 824, 833 (8th Cir. 1992) ("Attorneys, as officers of the court, have the responsibility to present the record with accuracy and candor.")).

lacked useful, detailed information. (Id. at 143-46) (Def. Ex. “A”); (series of e-mails sent in Aug. and Oct. of 2001) (Ex. “K”). Ms. Halkins e-mailed Helfrich on October 14, 2001, and advised him that she was “very disappointed” in the level of detail of the information Helfrich provided to IS at the October 12, 2001 Scorecard maintenance “chalk talk” meeting. (Ms. Halkins e-mail to Helfrich dated Oct. 14, 2001) (EEOC 235-36) (Def. Ex. “K”). Helfrich apologized to Margaret Schaffer because the level of detail of the information that he provided at the October 12, 2001 Scorecard maintenance “chalk talk” meeting did not meet her expectations. (Helfrich Dep. at 143) (Def. Ex. “A”); (Helfrich e-mail to Schaffer dated Oct. 16, 2001) (EEOC 233) (Def. Ex. “K”).

After the October 12, 2001 Scorecard maintenance meeting, Ms. Halkins informed Helfrich that he was to provide IS with the needed Scorecard maintenance information by October 31, 2001, in preparation for the next Scorecard informational meeting, scheduled for November 5, 2001. (Helfrich Dep. at 140) (Def. Ex. “A”); (Ms. Halkins e-mail to Helfrich dated Oct. 17, 2000) (EEOC 234-35) (Def. Ex. “K”). On October 18, 2001, Helfrich requested emergency paid time off (“PTO”) leave. (Helfrich Dep. at 106) (Ex. “A”); (Helfrich e-mail to Ms. Halkins dated Oct. 18, 2004) (Ex. “L”). On October 19, 2001, before Helfrich’s one week PTO leave was scheduled to begin, Helfrich showed Ms. Halkins and Steven Bogar, a management engineer (who was significantly younger than Helfrich) how to run the bi-weekly reports and update the Scorecard application. (Ms. Halkins Dep. at 25-26) (Def. Ex. “E”). Helfrich also showed them how to generate bi-weekly FTE reports, but he did not give them the passwords needed to operate the Scorecard program in his absence. (Ms. Halkins Dep. at 24-26) (Def. Ex. “E”); (Helfrich Dep. at 118-22) (Def. Ex. “A”). Beginning October 22, 2001, Helfrich

commenced his one week of PTO leave without providing information to anyone at LVH to enable anyone, in his absence, to operate, update and maintain the Scorecard program. (Ms. Halkins Dep. at 24-26) (Def. Ex. “E”); (Helfrich Dep. at 118-23) (Ex. “A”).

Helfrich’s PTO request apparently was prompted by “some serious health concerns,” (Helfrich e-mail to Ms. Halkins dated Oct. 18, 2001) (Def. Ex. “L”), and Ms. Halkins promptly granted Helfrich’s PTO leave request to begin Monday, October 22, 2001 and end Friday, October 26, 2001. (Ms. Halkins e-mail to Helfrich dated Oct. 19, 2001) (Def. Ex. “L”). Helfrich, in his October 18, 2001 e-mail request, did not specify or identify the nature of the “serious health concerns.” (Id.). Helfrich met with Ms. Halkins on October 19, 2001, to discuss the requested PTO leave. (Helfrich Dep. at 187-88); (Def. Ex. “A”). At this October 19, 2001 meeting, the only “health concern” mentioned by Helfrich was a finger cyst. (Id. at 187-88).<sup>3</sup> At this October 19, 2001 meeting, Helfrich did not tell Ms. Halkins that he was requesting one week of PTO leave because he was suffering from headaches, blurred vision, or suspected that he was suffering from a possible brain tumor. (Helfrich Dep. at 187-92).

During his PTO leave, Helfrich chose to attend a meeting at work, exercised at a gym approximately three or four times, attended an LVH dinner and dance function<sup>4</sup>, played golf, and

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<sup>3</sup> Helfrich now contends that, despite his previous testimony, he showed Ms. Halkins the cyst on his finger in August 2001. See Helfrich’s Declaration, ¶ 4, filed February 18, 2005.

<sup>4</sup> Ironically, at this event Mr. Helfrich was honored for many years of good service. Nevertheless, it is clear from LVH’s proffered factual evidence that by late summer / early fall 2001, many of Helfrich’s co-workers and supervisors had tired of what LVH alleges to have been Helfrich’s “campaign of passive resistance” that festered because of Mr. Helfrich’s subjective belief that he had not been properly compensated or recognized for his development and maintenance of the Scorecard application.

sang in his church choir. (Id. at 142, 172-74, 182-185, 192-93, 197-98, 271) (Def. Ex. “A”).<sup>5</sup>

Helfrich’s primary care physician, Dr. Shore, placed no physical restrictions on Helfrich during the one week of PTO leave. (Id. at 176-78, 199). Dr. Shore did not schedule any diagnostic tests during Helfrich’s PTO leave. (Id. at 180). Instead, Dr. Shore provided for diagnostic tests “to be done later.” (Shore Dep. at 22-23).

On October 23, 2001, Helfrich voluntarily attended a 90 minute meeting at work, which Helfrich refers to as the “Clockwork ED meeting.” (Helfrich Dep. at 182). LVH alleges that Helfrich attended this meeting without authorization and without advising his supervisor, Ms. Halkins. Helfrich returned to work on Monday, October 29, 2001, and was scheduled to meet with Ms. Halkins that afternoon to discuss his refusal to provide Scorecard maintenance information to IS and the Scorecard “disappointment” memos. (Helfrich Dep. at 211-12). Martin Everhart, LVH’s Director of Human Resources, attended the October 29 meeting with Ms. Halkins and Helfrich. (Everhart Dep. at 5, 21) (Def. Ex. “N”); (Helfrich Dep. at 212) (Def. Ex. “A”). At the October 29 meeting, Helfrich did not mention any specific health concerns. (Helfrich Dep. at 216). Both Everhart and Ms. Halkins perceived from Helfrich’s conduct and comments at this meeting that he neither trusted nor reposed any confidence in his supervisor, Ms. Halkins. (Helfrich Dep. at 218-28) (Def. Ex. “A”); (Ms. Halkins Dep. at 42-43, 49) (Def. Ex. “E”); (Everhart Dep. at 40-41, 58-59) (Def. Ex. “N”). Helfrich, at his deposition, admitted

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<sup>5</sup> At a minimum, these activities call into serious question whether Helfrich was “incapacitated” by his alleged “serious health concerns,” as he contends.

that he did not respond to his employer's questions about whether he could trust Ms. Halkins to his employer's satisfaction. (Helfrich Dep. at 228) (Def. Ex. "A").<sup>6</sup>

At the conclusion of the October 29 meeting, Helfrich was suspended with pay and told to go home so that he could, at home, decide whether he wanted to continue to work for Ms. Halkins. (Helfrich Dep. at 219-20); (Everhart Dep. at 51). Helfrich alleges that the word "suspended" was never used. Helfrich returned to work on November 9, 2001, and met with Ms. Halkins and Everhart to further discuss his employment status. (Id. at 240). Ms. Halkins terminated Helfrich's employment at the conclusion of the November 9, 2001 meeting. (Helfrich Dep. at 240-43) (Def. Ex. "A"); (Ms. Halkins' termination letter to Helfrich dated Nov. 9, 2001) (Def. Ex. "O"). Although Everhart was involved in the decision to fire Helfrich, Ms. Halkins was the primary decision maker. (Everhart Dep. at 42); (Ms. Halkins Dep. at 41-42). Ms. Halkins consulted with Jagiela about her decision to terminate Helfrich only after she resolved to fire Helfrich. (Jagiela Dep. at 50-51) (Ex. "D").

As of the time of his termination, Helfrich still had not transferred the data needed to enable IS to maintain and update Scorecard. (Helfrich Dep. at 270); (Jagiela Dep. at 47-48) (Def. Ex. "D"). Ultimately, LVH's IS Department was forced to "reverse engineer" the Scorecard software application to enable IS to maintain and update Scorecard. (Jagiela Dep. at 47-48) (Def. Ex. "D").

Describing the situation some six months later, Helfrich wrote to Mary Kay Gooch, LVH's Sr. Vice President of Human Resources, and blamed his business dispute with Jagiela as

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<sup>6</sup> Helfrich contends that he was not given an opportunity to respond to the question.

the reason for his termination. (Helfrich Dep. at 280-82); (Helfrich Letter to Gooch dated May 20, 2002) (Def. Ex. "G").

LVH, through Ms. Halkins and Everhart, contends that it decided to terminate Helfrich's employment for the following reasons: (1) Helfrich's long-standing insubordinate refusal to transfer Scorecard maintenance/update information to IS to end LVH's "single dependency" concern; (2) Helfrich's perceived lack of trust in his supervisor, Ms. Halkins; (3) Helfrich's attendance at a work meeting on October 23, 2001, during his PTO leave week, without telling Ms. Halkins and/or seeking her authorization; (4) Helfrich's failure to return any of Ms. Halkins' urgent voice mail messages left on Helfrich's work and home telephones during the PTO leave week seeking Scorecard password information; (5) the perception that Helfrich, overall, was not providing the tools necessary for LVH to run the software program with respect to benchmarking, the labor budget work sheet and Scorecard; and (6) Ms. Halkins' growing lack of trust in Helfrich's conduct, especially given Helfrich's sole access to Scorecard. (Halkins Dep. at 49-54) (Def. Ex. "E"); (Everhart Dep. at 22-27, 31-32, 34-36, 38-41; 58-59) (Def. Ex. "N").

On November 11, 2001, Helfrich applied for unemployment compensation benefits. (Bureau of Unemployment Compensation Benefits and Allowances Notice of Determination) (Def. Ex. "P"). On November 28, 2001, Everhart, on behalf of LVH, wrote a letter to the Allentown Unemployment Compensation Service Center opposing, on grounds of willful misconduct, Helfrich's application for unemployment compensation benefits. (Everhart Dep. at 54-56) (Def. Ex. "N"); (Everhart letter to Bashore dated Nov. 28, 2001) (Def. Ex. "Q"). The Bureau awarded unemployment compensation benefits to Helfrich by Notice of Determination, December 13, 2001. (Def. Ex. "P"). On December 20, 2001, Everhart, on behalf of LVH, faxed

a Petition for Appeal to the unemployment compensation Referee from the Bureau's Notice of Determination. (Petition for Appeal dated Dec. 20, 2001) (Ex. "T"). The Referee, after conducting a hearing, affirmed the Bureau's award. (Referee Decision, dated April 1, 2002) (Ex. "U"). Helfrich was paid all benefits to which he was entitled. (Everhart Dep. at 55) (Ex. "N").

By letter dated December 18, 2001, Helfrich's then attorney, Quintes D. Taglioli, Esquire, wrote to Mary Kay Gooch, LVH's Senior Vice President of Human Resources, in response to his client's receipt of a proposed Separation Agreement and Release from LVH. (Taglioli settlement demand letter) (Ex. "R"). LVH alleges that Everhart made the decision to oppose, on willful misconduct grounds, Helfrich's application for UC benefits weeks before the Taglioli's settlement demand letter was received at LVH. (Everhart Dep. at 54-56) (Ex. "N").

## **B. Summary Ruling**

LVH has presented a number of legitimate, nondiscriminatory reasons for terminating Helfrich. Helfrich has produced neither credible, convincing evidence, nor any circumstantial evidence, to show that there existed an age animus towards him. Likewise, Helfrich has not produced any credible evidence to support his allegations that LVH regarded him as disabled. The only evidence that Helfrich produced with regard to potential age discrimination is that Steve Bolgar, the person who may have been assigned some of Helfrich's responsibilities following his termination, was significantly younger than Helfrich. However, Helfrich concedes, and the record supports, LVH's argument that Mr. Bolgar actually was hired many months before Helfrich was terminated and that his hiring was in response to Mr. Helfrich's complaints that he

was overworked.<sup>7</sup> Furthermore, there is no evidence in the record that could lead to the conclusion that Helfrich was “regarded as” having a disability and that this perceived disability had any causal link to his termination. Therefore, summary judgment for LVH is appropriate on all counts. For the reasons stated more fully below, each of the claims in the Amended Complaint alleged against LVH are dismissed with prejudice.

### III. DISCUSSION

#### A. Jurisdiction

The Court has original jurisdiction over this matter pursuant to 28 U.S.C. §1331. Helfrich alleges violations of the Americans With Disabilities Act, 42 U.S.C. §§12101 et seq. (the “ADA”)<sup>8</sup>, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq. (the “ADEA”) and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (the “FMLA”). All of Helfrich’s federal claims also include an allegation of retaliation.

Supplemental jurisdiction pursuant to 28 U.S.C. §1367(a) exists for the alleged violations of the Pennsylvania Human Relations Act (the “PHRA”), specifically , 43 P.S. §§ 955 and 962. Under the PHRA, Helfrich alleges state law violations for discrimination based on age and being regarded as disabled.

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<sup>7</sup> Helfrich testified that Mr. Bogar was hired on July 9, 2001. (Helfrich Dep. at 55). Bogar was “an appropriate candidate to be hired.” (Id.) Bogar was “qualified and competent for the position.” (Id.)

<sup>8</sup> The “analysis of an ADA claim applies equally to a PHRA claim.” Taylor v. Phoenixville School Dist., 184 F.3d 296, 306 (3d Cir. 1999) (citing Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)). Accordingly, the Court need only address Helfrich’s ADA claim because the analysis of the ADA claim is, under the circumstances, coterminous with the PHRA claim.

Helfrich has withdrawn voluntarily Count II of the Amended Complaint containing his claims under the PHRA because those claims are time-barred.

**B. Standard of Review**

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law.” Celetox Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). To avoid a ruling granting summary judgment pursuant to the applicable standard, disputes must be both (1) material, i.e., predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law and (2) genuine, i.e., the evidence must support a finding by the court that a reasonable jury could return a verdict for nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Cella v. Villanova Univ., 2003 WL 329147 at \*6 (E.D. Pa. Feb. 12, 2003) (citing Celetox, 477 U.S. at 322-23). In such circumstances, there is only one reasonable conclusion regarding the potential verdict under the governing law and judgment must be awarded to the moving party. Anderson, 477 U.S. at 250 (finding that the standard is the same as for a motion for judgment as a matter of law under

Fed.R.Civ.P. 50(a)).

When making a determination on a motion for summary judgment, the Court expects the moving party to bear the primary responsibility of explaining the basis for the motion and for identifying those parts of the record that demonstrate the absence of a genuine issue of material fact. Celetox, 477 U.S. at 323. Thus, the moving party is not required to produce any evidence negating the nonmovant's claim. Id. The burden then shifts to the nonmovant to produce, through affidavits and other evidentiary materials in the record, specific facts to show that there exists a genuine issue to be determined by the factfinder at trial. Id. at 324; Fed.R.Civ.P. 56(e). The evidence provided by the nonmovant is to be believed, and the court must draw all reasonable and justifiable inferences in the nonmovant's favor. Anderson, 477 U.S. at 255. However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmovant must present to the court competent evidence from which the court can draw such inferences. Cella, 2003 WL 329147 at \*6. Furthermore, the Court of Appeals for the Third Circuit, in Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995) (citing Celotex, 477 U.S. at 322), held that a nonmovant plaintiff cannot defeat a motion for summary judgment by merely "restating the allegations of his Amended Complaint," but instead, must "point to concrete evidence in the record that supports each and every essential element in his case." Thus, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citing Celotex, 477 U.S. at 325 (1986)).

The Court of Appeals for the Third Circuit has advised, in Abramson v. William Patterson College of New Jersey, 260 F.3d 265, 278 (3d Cir. 2001), that, in a discrimination case, where the plaintiff always carries the burden of proof, “an employer . . . will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent.” Therefore, the Abramson court emphasized that a district court should not view the evidence “in a piecemeal fashion, giving credence to innocent explanations for individual strands of evidence, for a jury . . . would be entitled to view the evidence as a whole.” Id. at 285 (citing Howley v. Town of Stratford, 217 F.3d 141, 151 (2d Cir. 2000)).

Moreover, in employment discrimination cases, when intent is at issue, the district court must be particularly cautious before granting summary judgment to an employer. Goodsby v. Johnson Medical, Inc., 228 F.3d 313, 321 (3d Cir. 2000). For example, the Court of Appeals for the Sixth Circuit has found that an employer’s motive is rarely susceptible to resolution at the summary judgment stage. Ross v. Campbell Soup Co., 237 F.3d 701, 705 (6th Cir. 2001).

With these concepts in mind, the Court has scrutinized the record presented by the parties in this case and determined that Helfrich has fallen short of his obligations in order to escape summary judgment.

## **C. Analysis**

### **1. Alleged Age Discrimination in Violation of the ADEA**

Count I of Helfrich’s Amended Complaint contains an allegation of age discrimination in violation of the ADEA. The Court of Appeals for the Third Circuit has adopted the preexisting law of Title VII to guide its analysis of ADEA claims. See Barber v. CSX Distrib. Serv., 68 F.3d

694, 698 (3d Cir. 1995). Thus, the burden-shifting procedural framework in ADEA claims, based on circumstantial evidence, is applied as established for Title VII disparate treatment cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). See also, Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). In an age discrimination case, an ADEA plaintiff must show that he “lost out because of his age.” O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (holding that the relevant issue is whether the evidence could support a reasonable factfinder’s conclusion that a discriminatory animus served as the basis for the employer’s decision); Pivrotto v. Innovative Systems, Inc., 191 F.3d 344, 355 (3d Cir. 1999). Helfrich is not required to prove that age was the sole factor for his discharge. Rather, the law requires Helfrich merely to show that age was a motivating factor. See Miller v. Cigna Corp., 47 F.3d 586, 597 f.9 (3d Cir. 1995).<sup>9</sup> If the

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<sup>9</sup> In Miller, the Court of Appeals for the Third Circuit noted that its analysis of “mixed motives” jury cases had been thoroughly discussed in Griffiths, 988 F.2d at 470, and Hook v. Ernst & Young, 28 F.3d 366, 373-76 (3d Cir. 1994):

"[M]ixed motives" cases are cases not only where the record would support a conclusion that both legitimate and illegitimate factors played a role in the employer's decision, but where the plaintiff's evidence of discrimination is sufficiently "direct" to shift the burden of proof to the employer on the issue of whether the same decision would have been made in the absence of the discriminatory animus. . . . Only in a "mixed motives" ADEA case is the plaintiff entitled to an instruction that he or she need show only that the forbidden motive played a role, i.e., was "a motivating factor." (Emphasis in original). Even then, the instruction must be followed by an explanation that the defendant may escape liability by showing that the challenged action would have been taken in the absence of the forbidden motive. See Griffiths v. CIGNA Corp., 988 F.2d at 472. In all other ADEA disparate treatment cases, the jury should be instructed that the plaintiff may meet his or her burden only by showing that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process.

Miller, 47 F.3d at 597 f.9 (3d Cir. 1995). Furthermore, at trial, a plaintiff may attempt to frame his discrimination action as a "mixed motive" case or a "pretext" case. In a mixed motive case, the plaintiff alleges that the decision to terminate him resulted from a mixture of proper and illegal motives. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993). Thus, if Helfrich is alleging mixed motives by LVH, he is required to produce evidence of documents, conduct, or statements made by the LVH employees involved in the termination decision that can be viewed as directly reflecting some alleged discriminatory attitude. In such a situation, Helfrich would only need to prove that “the discriminatory motive made a difference in the decision.” Griffiths v. CIGNA Corp., 988 F.2d 457, 471

replacement employee(s) are “sufficiently younger” than the discharged employee, the replacement(s) do not have to be under the age of 40 years old. Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231 (3d Cir. 1999).

Here, the factual evidence is clear that, upon Helfrich’s termination, even *he* did not consider his age to be a factor relevant to his termination. Nor has Mr. Helfrich pointed to any credible evidence within the record to support his allegations that anyone at LVH exhibited an age animus towards him. In fact, in a letter, dated May 20, 2002, more than six (6) months following his termination, in attempting to obtain severance benefits from LVH, Helfrich made no mention of his belief that LVH had regarded him as disabled or that he had, in any way, been unlawfully discriminated against on the basis of age or otherwise:

I recognize Lehigh Valley Health Network’s right to terminate me without cause as an “at will” employee.

...

According to my termination letter, I was discharged because I allegedly said I did not trust my supervisor, not for any disciplinary reasons of misconduct or insubordination.

...

It is unfortunate to lose my job because of disagreements with a superior pertaining to personal matters outside of hospital business. However, this situation is not a reason to deny severance pay to which I feel entitled.

Helfrich Letter to Mary Kay Gooch, Sr. Vice President of Human Resources (Helfrich Letter to Gooch dated May 20, 2002) (Def. Ex. “G”); (Helfrich Dep. at 280-82).

(a) ***McDonnell Douglas Burden Shifting***

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(3d Cir.), cert. denied, 510 U.S. 865 (1993).

The McDonnell Douglas burden-shifting analysis is, in an employment discrimination case, a required corollary to the obligations of the parties at the stage of summary judgement. See McDonnell Douglas, 411 U.S. at 802-03; Keller, 130 F.3d at 1108. This corollary analysis consists of three potential rounds of argument by the parties here. Id. First, Helfrich *must produce* evidence that is sufficient to convince a reasonable factfinder of *all* the elements of his prima facie case. Id. If Helfrich is able to establish his prima facie case, the *burden of production* shifts to LVH, at which point LVH must offer sufficient credible evidence that would support the Court’s finding that LVH had legitimate nondiscriminatory reasons for terminating Helfrich. Id. Thereafter, if LVH satisfies its burden of production, the burden shifts back to Helfrich to provide additional evidence from which a reasonable factfinder could either (1) disbelieve the articulated “legitimate” reasons for Helfrich’s termination or (2) believe that an invidious discriminatory reason was more likely than not to have been a motivating or determinative cause of LVH’s actions. Id.; see also, Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). This final prong of the burden-shifting analysis provides Helfrich with the opportunity to allege that LVH’s ostensibly legitimate non-discriminatory reasons for terminating Helfrich served as a pretextual reason for actual age discrimination or LVH had some other illegal motivation is at issue.

Helfrich could have satisfied the “pretext” option of the burden-shifting scheme by offering evidence “from which a factfinder could reasonably . . . disbelieve [LVH’s] articulated legitimate reasons.” Fuentes, 32 F.3d at 764. However, as the Court of Appeals for the Third Circuit has emphasized, the obligation of the plaintiff still is to offer evidence to show that discriminatory animus served as the motivation for the employee’s termination:

To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. See Ezold, 983 F.2d at 531, 533; Villanueva v. Wellesley College, 930 F.2d 124, 131 (1st Cir.), cert. denied, 502 U.S. 861, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence. . ." (emphasis in original) (citation omitted).

Id. at 765. In other words, under the pretext prong, the question is not whether LVH made the best or even a good business decision by terminating Helfrich, but whether LVH's *real* reason for Helfrich's termination was discriminatory. See Harrison v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996).

In fact, LVH has presented competent evidence to support the conclusion that its decision to fire Helfrich was based on Helfrich's insubordinate behavior, *vis á vis* his supervisors and colleagues, and, particularly, Helfrich's non-disclosure of the necessary Scorecard information. As the record shows, Helfrich was a senior management engineer with sole access to Scorecard who repeatedly refused to give the working Scorecard "know-how" to any LVH colleagues to use in his absence. Such a situation created an untenable single dependency theory for LVH with regard to Scorecard. Moreover, the record provides strong factual evidence of (a) Helfrich's ongoing disregard for Ms. Halkins, his supervisor, (b) his overt contempt and lack of trust in her and her resulting lack of trust in him, and (c) Helfrich's apparent insubordinate lack of cooperation to ensure that reliable backup systems were in place for IS maintenance and Scorecard updates. These aspects of Helfrich's performance made his continued employment, in LVH's view, an impossibility.

To defeat summary judgment with regard to the age discrimination claims brought pursuant to the ADEA, Helfrich was required to show that Ms. Halkins' reasons for firing him were not merely wrong, but that they were so "plainly wrong" that the stated reasons were merely a pretext for the real, unlawful termination decision. See McDonnell Douglas, 411 U.S. at 802-03; Keller 130 F.3d at 1109. On the record presented to this Court, no reasonable factfinder could find that Ms. Halkins' stated grounds for terminating Helfrich were "plainly wrong." Id. Rather, it seems plainly clear that Helfrich was uncooperative and insubordinate and had no intention to modify his attitude in that regard.<sup>10</sup>

Helfrich's general, unsubstantiated denials and criticisms of the LVH management decisions do not establish that pretextual termination issues existed. See Simpson v. Kay Jewelers, 142 F.3d 639, 647 (3d Cir. 1998). Necessarily, it is LVH's belief or perception of the bases for termination, not Helfrich's, that govern in the burden shifting analysis. Id.; Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("[W]hat matters is the perception of the decision maker"); Martin v. Healthcare Bus. Resources, 2002 WL 467749 at \*7 (E.D. Pa. Mar. 26, 2002) ("that plaintiff may believe she was unfairly blamed for the deficiencies in her department does not establish pretext. It is the employer's belief that is important"). Furthermore, Helfrich's mere suspicion, belief or allegation that he was terminated on account of his age is not enough to establish a reasonable inference that the basis for his termination was pretextual. See Billet, 940 F.2d at 816 (holding that the "[i]ndirect evidence must be enough to

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<sup>10</sup> In fact, the record more clearly shows that it was Helfrich who attempted to hold LVH hostage by withholding information regarding Scorecard with a campaign of passive resistance based on Helfrich's subjective belief that he was not given adequate consideration from LVH for assigning his share of the patent rights for Scorecard to LVH. Unfortunately for Mr. Helfrich, because of the at-will nature of employment in Pennsylvania, such resistance is futile. See Wetherhold v. RadioShack Corp., 339 F.Supp.2d 670, 673 (E.D. Pa. 2004).

support a reasonable inference that the reasons given for the employment decision were pretextual. Merely reciting that age was the reason for the decision does not make it so.”); Williams v. Borough of West Chester, 891 F.2d at 460 (citing Celotex, 477 U.S. at 325) (“a non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion”).

**(b) Insubordination—Helfrich Allegedly Holding LVH Hostage**

LVH argues that Ms. Halkins fired Helfrich because of his “mutinous” refusal to provide to her, or anyone else at LVH, with all of the necessary access and information regarding the continued maintenance and update of Scorecard. (Halkins Dep. at 42-43, 50-52). The first deadline given to Helfrich for transferring Scorecard to the IS Department was June 30, 2002. However, on August 17, 2001, Helfrich refused to work with IS on a Scorecard related project. (“At that time, we talked about this project and you refused to work with I/S on it. Since that time, you have met with I/S and you working to provide them with further information”). (Ms. Halkins e-mail to Helfrich dated Oct. 14, 2001) (Def. Ex. “K”) (EEOC 235). Ms. Halkins also e-mailed Helfrich on October 14, 2001, and advised him that she was “very disappointed” in the level of detail of the information Helfrich provided to IS at the October 12, 2001 Scorecard maintenance “chalk talk” meeting. (Ms. Halkins e-mail to Helfrich dated Oct. 14, 2001) (EEOC 235-36) (Def. Ex. “K”). After the Scorecard maintenance meeting with IS on October 12, 2001, Ms. Halkins informed Helfrich that he was to provide IS with the needed Scorecard maintenance information by October 31, 2001, in preparation for the next Scorecard informational meeting, scheduled for November 5, 2001. (Helfrich Dep. at 140) (Def. Ex. “A”); (Ms. Halkins e-mail to Helfrich dated Oct. 17, 2000) (EEOC 234-35) (Def. Ex. “K”). (Halkins Dep. at 28).

Nevertheless, prior to his PTO, which Helfrich himself intimated may need to be extended,<sup>11</sup> Helfrich was instructed to teach Mr. Bolgar how to manipulate Scorecard in Helfrich's absence, but he failed to provide to Bolgar the indispensable passwords to even access the program. Thus, Helfrich's allegedly obdurate refusal to provide IS with the necessary information to ensure the Scorecard maintenance and upkeep was considered to be insubordinate. (Halkins Dep. at 24-26); (Everhart Dep. at 22-25, 31); (Jagiela Dep. at 45-46).

Helfrich concedes in his own deposition that he told Ms. Halkins on August 17, 2001, that he would not allow the IS Department to access Scorecard because of alleged patent issues. In fact, this refusal, in and of itself, could be considered insubordinate because Helfrich (as he is assumed to know) had previously assigned to LVH all of his patent rights to Scorecard. (Def. Ex. F).<sup>12</sup> Helfrich failed to provide LVH with the indispensable passwords to access Scorecard

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<sup>11</sup> "If everything goes well, I hope to return to the office on Monday, October 29. If I need any additional time off, I will request it as soon as I know it." (Helfrich e-mail to Ms. Halkins, dated October 18, 2001) (Def. Ex "L") (Helfrich 135).

<sup>12</sup> During oral argument, the Court inquired into LVH's allegations of insubordination, and counsel for Mr. Helfrich described the issue to be "**what [Helfrich] felt** to be a legally based difference of opinion . . . . But **he felt, at that point, that he had been cheated out of some money.** And whether or not he was legally correct about that, it was something that he assumed in good faith and he, at the one hand, was trying to balance [] his feelings about the legal implications, but by the same token, not doing anything to harm his employer's interest." Oral Arg. Tr. at 43 (emphasis added). Summary judgment is not based upon the production of feelings, but the production of record facts. Thereafter, counsel for Mr. Helfrich admitted to the Court that, with regard to withholding information about Scorecard from LVH, Helfrich was engaging in self-help:

- [5] MR. RUSSO: [Mr. Helfrich] testified that there was a lack of consideration. There was \$25,000. He was supposed to get \$5,000 of the \$25,000. They had never given him his money, so therefore, that vitiated -
- [9] THE COURT: **So, he's doing self-help?**
- [10] MR. RUSSO: **At that point, yes.**
- [11] THE COURT: Okay.
- [12] MR. RUSSO: On the patent -
- [13] THE COURT: Okay, I understand.

Oral Arg. Tr. at 44 (emphasis added). Thus, an employer at the receiving-end of an employee's attempt at such a campaign of self-help, when the information being withheld was, according to all parties involved, critical to running the hospital efficiently, could presume that such actions are insubordinate.

because, he says, he did not believe Ms. Halkins was authorized to receive them without approval from her superiors, including Mary Kay Gooch, Senior Vice President of Human Resources. (Helfrich Dep. at 107-08, 112-113, 118-22, 131-32; 157, 242-43, 270).<sup>13</sup> Helfrich's excuse strikes the Court as disingenuous. Furthermore, to obtain the Scorecard passwords, Ms. Halkins attempted numerous times (indicating on Helfrich's voicemail that her call was "urgent") to contact Helfrich by telephone (both at home and at work) during his week of PTO leave. Helfrich never returned any of her calls, claiming that he never received them because of a non-specified phone "service problem." (Halkins Dep. at 37-38); (Everhart Dep. at 24-27, 32-35) (Jagiela Dep. at 58-61); (Helfrich Dep. at 12-14).

**(c) *Helfrich's Stated Lack of Trust in Ms. Halkins***

LVH contends that an additional reason for Helfrich's termination was that he failed to give Ms. Halkins or LVH satisfactory assurances that he trusted Ms. Halkins and could continue to work with her. (Halkins Dep. at 42-43); (Everhart Dep. at 40-41, 50-58); (Jagiela Dep. at 52-53); Termination Letter (Def. Ex. O) (Helfrich Dep. at 225-28). Helfrich responded to questions regarding whether he would like to return to working with Ms. Halkins by saying, somewhat ambiguously, that he wanted to continue working in "the department," so long as a sense of teamwork and trust existed. (Helfrich Dep. at 224). Helfrich never answered the explicit question regarding whether he felt he could continue to work for Ms. Halkins.

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<sup>13</sup> Helfrich has also argued that, not including the alleged phone calls during his PTO leave, the passwords were never requested. Such an assertion is hard to believe, inasmuch as, when, according to the record, Ms. Halkins demanded that she and Mr. Bolgar be instructed on how to operate Scorecard in Helfrich's absence and, in fact, the indispensable information needed to work with Scorecard were the passwords to initially access the program. Without the passwords, despite having an intimate understanding of Scorecard's functionality, the program was rendered useless. It is not credible that the hospital management would not want and seek aggressively the information necessary to operate its budgeting and staffing software.

**(d) *Unauthorized Attendance at Business Meeting***

On October 23, 2001, Helfrich, while on PTO leave, attended a business meeting at LVH. (Halkins Dep. at 43-44). However, LVH contends that on October 19, 2001, prior to Helfrich's PTO leave, Ms. Halkins specifically requested that Helfrich tell her if he was going to attend the October 23 meeting. Helfrich now contends that he informed Ms. Halkins of his intention to attend the October 23 meeting. (Helfrich Declaration, ¶5, filed Feb 18, 2005). However, LVH previously has countered that Helfrich was not authorized to attend that meeting because he was on PTO leave. (Everhart Dep. at 27-28). Moreover, Ms. Halkins was concerned that since she "was responsible for Mr. Helfrich's work and by coming to meetings without [her] knowledge, and apparently doing some work during his PTO week, [Ms. Halkins] was compromised in [her] ability to manage [Helfrich] as [was her] responsibility." (Ms. Halkins Aff. ¶33) (Def. Ex. 10).

**(e) *Helfrich's Other Alleged Deficiencies***

LVH believed that, for a period of time, Helfrich was a vital employee. See Oral Arg. Tr. at 3-4. However, a growing number of deficiencies in his work and his apparent inability to be a team player caused great concern for the organization. According to Ms. Halkins, LVH

had a labor budget worksheet that was not functioning, . . . until I forced him into a meeting on October 17th with Marilyn Guidi to look at some of the problems and come up with a punchlist, he wasn't about to go out and fix the issues that were involved there, and that had to be ready for the next budgeting cycle, which would be in February of the next year.

The benchmarking, he had missed the deadline on the 21st. We found out it was pushed out in the schedule until - on September 27 we found out that it was going to be pushed out in the schedule until December, which would put in jeopardy whether we would have benchmarks for the budgeting process the next time, the next year.

[I]f something happened to Doug [Helfrich], this is the risk issue, or if he did not give me enough information that I could run it with IS in his absence, then that application is basically nonfunctional for the Hospital. So these were the tools that needed to be in place, each one of them was in jeopardy at this point.

(Halkins Dep. at 50-51). Helfrich candidly admitted that both he and Ms. Halkins genuinely believed that Scorecard was too important to LVH for Scorecard's continued operation to be dependent on a lone employee, Helfrich. (Helfrich Dep. at 114-116, 129-30). Nonetheless, the record is replete with testimony that Helfrich, because of issues involving his own views about proper ownership and control of Scorecard, based on his perception regarding the nature of both (a) Helfrich's patent rights and (b) Helfrich's contractual rights with regard to his business dealings with LVH, refused to cooperate with LVH's goal of transferring useful control of Scorecard to IS. (Helfrich Dep. at 107-08, 112-13, 131).

Furthermore, LVH contends that Helfrich's insubordinate behavior took many forms in the months preceding his termination: (a) direct insubordination during the August 17, 2001 meeting with Ms. Halkins; (b) Helfrich's failure to provide meaningful detail at the "chalk talk" meeting regarding Scorecard maintenance; (c) failing to furnish Ms. Halkins with Scorecard access passwords before PTO leave; and (d) Helfrich's failure to return any of Ms. Halkins' phone calls during Helfrich's PTO leave.

**(f) *Does Helfrich Believe That the LVH Decision-Makers, Ms. Halkins and Everhart, Harbored an Ape Animus?***

Indicative of the weakness of his ADEA claim, Helfrich merely suspects that Jagiela harbored an age animus. (Oral Arg. at 30-32).<sup>14</sup> During his deposition, Helfrich unequivocally stated that Ms. Halkins did not discriminate him based on his age when she terminated Helfrich. (Helfrich Dep. at 249); (Oral Arg. Tr. at 15). Helfrich cannot rely on “unsupported assertions, conclusory allegations, or mere suspicions” to survive a summary judgment motion. See West Chester, 891 F.2d at 460 (citing Celotex, 477 U.S. at 325). LVH contends that the record supports its contention that Jagiela neither influenced nor controlled Ms. Halkins’ decision to fire Helfrich. (Halkins Dep. at 41-42); (Jagiela Dep. at 40-41, 50-51). Nevertheless, in spite of his own admissions, Helfrich persists in speculating that Ms. Halkins’ termination decision was motivated by age.

Helfrich believes he was the oldest employee in the Management Engineering Department. (Helfrich Dep. at 43-46). However, the mere fact that Helfrich was the oldest employee in his department does not create a discriminatory inference capable of surviving summary judgment. The ADEA does not prohibit employers from terminating the oldest

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<sup>14</sup> In fact, Mr. Helfrich’s counsel intimated to this Court that his client’s allegation of age discrimination was merely a red herring for disagreeing with the label of insubordination attached to Helfrich after LVH tired of his self-help techniques:

I mean, they’re accusing Mr. Helfrich of insubordination for what appears to be a legitimate difference of opinion [with regard to the legal issues surrounding the patent assignment dispute] as the unemployment compensation referee himself seemed to conclude. All of a sudden, this becomes insubordination. Where is the document, the contract, the policy that says you, Doug Helfrich, are responsible for, you know assigning password . . . .

Oral Arg. at 30-32.

It is difficult for the Court to divine the basis for this argument by Helfrich’s counsel. LVH, Helfrich’s employer, demanded certain information from Helfrich beginning in August 2001, and, as the record clearly shows, such information was the rightful property of LVH. Thus, Helfrich had no right, power or privilege to refuse to provide this information to LVH without jeopardizing his employment status by being labeled as, and treated as, an insubordinate employee.

employee. See McCambridge v. Bethlehem Steel Corp., 1995 WL 424711 at \* 6 (E.D. Pa. Jul. 18, 1995). Generally, the ADEA prohibits employers from terminating employees aged 40 or above and replacing those employees with ones who are significantly younger. Here, Andrew Hyde, the employee that LVH claims it hired on December 2, 2002 to replace Helfrich, was 49 years old when hired. Helfrich was 50 years old when he was terminated. (Ms. Halkins Position Statement Affidavit at ¶ 53) (Def. Ex. 10).

Helfrich argues that to establish a prima facie case of age discrimination, the terminated older employee, who is in the protected class, only needs to be replaced by someone five (5) or more years younger. See, e.g., Keller, supra. However, “there is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination.” Barber v. CSX Distr. Servs., 68 F.3d 694, 699 (3d Cir. 1995); see also, Sempier v. Johnson & Higgins, 45 F.3d 724, 729 (3d Cir. 1995):

To complete his prima facie case, Sempier does not need to produce compelling evidence or conclusive proof that J & H's adverse employment decision resulted from age discrimination. Chipollini, 814 F.2d at 900. Rather he may point to a sufficient age difference between himself and his replacement such that a fact-finder can reasonably conclude that the employment decision was made on the basis of age. Maxfield v. Sinclair Intern'l, 766 F.2d 788, 792 (3d Cir.), cert. denied, 474 U.S. 1057 (1985). Nor is there any particular age difference that must be shown. Id. Different courts have held, for instance, that a five year difference can be sufficient, Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981), but that a one year difference cannot. Gray, 957 F.2d at 1087.

While, it may not be difficult to accept that a five (5) year age differential can give rise to an ADEA claim, a one (1) year difference cannot. See Sempier, 45 F.3d at 729. Here, the record supports LVH's contention that, months before any acute problems arose regarding Mr. Helfrich's insubordinate behavior, Mr. Bolgar (the only relevant employee who is significantly

younger than Helfrich), was actually hired in direct response to Helfrich's previous complaints that he was being overworked. Thereafter, when LVH finally hired Mr. Hyduke as a replacement for Helfrich, he was a mere one year younger than Helfrich was at the time of his termination. It would be unreasonable to find actionable age discrimination from such facts.

Helfrich also contends that his allegation that he was assigned too much work by Jagiela, while Jagiela was his supervisor, constitutes additional evidence of discrimination. (Helfrich Answ. To LVH's First Set of Interr., Nos. 11-12) (Def. Ex. 2). Helfrich has never indicated why he believes Jagiela assigned him so much work, but "assumes" it was age discrimination. (Helfrich Dep. at 43-46). Beyond the fact that Jagiela denies that Helfrich was overworked, (Jagiela Dep. at 30), there is no evidence that Jagiela had any age-related "issues" of any type at all. Again, Helfrich cannot rely on "unsupported assertions, conclusory allegations, or mere suspicions" to avoid summary judgment. See West Chester, 891 F.2d at 460 (citing Celotex, 477 U.S. at 325). This is the legal hurdle that Helfrich cannot clear.

Another similar factual hurdle also fatally obstructs Helfrich's path. Somewhat problematic for his claim, Helfrich's deposition testimony included his view that younger employees also considered Jagiela difficult to work with and these other employees allegedly also complained about the amount of work assigned to them by Jagiela. (Helfrich Dep. at 256-58). Furthermore, LVH argues that it was Ms. Halkins (not Jagiela) who had the power to, and made the actual decision to, fire Helfrich.<sup>15</sup> (Halkins Dep. at 41-42); (Jagiela Dep. at 50-51). Ms. Halkins merely informed Jagiela of her decision. Id.

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<sup>15</sup> This decision was supported by Everhart, who, as Director of Human Resources, was responsible for all hiring and firing at LVH. (Everhart Dep. at 6).

LVH further contends that, in the process of terminating Helfrich, it did nothing to violate the policies set out in its employee handbook. See “Employee Handbook” (Def. Ex. 3 and 4). In the Handbook, LVH expressly reserves the right to suspend or dismiss any employee, even an “exempt” employee such as Helfrich, for a specific reason such as insubordination. (Employee Handbook, “Rules of Conduct”) (Def. Ex. 4 at p. 8) (DH-683).<sup>16</sup> Moreover, LVH policies do not limit its right to dismiss any employee, with or without cause. See “Employee Handbook, Introduction”. Alternatively, LVH logically argues that even if it failed to follow its own policies within the Employee Handbook, its failure to follow these policies does not necessarily suggest discrimination. See EEOC v. Muhlenberg College, 2004 WL 945161 at \*11 (E.D. Pa. Apr. 29, 2004) (citing Randle v. City of Aurora, 69 F.3d 441, 454 (10th Cir. 1995)).

With regard to an allegation of disparate treatment, LVH contends that Helfrich has failed to point to any similarly-situated employees, involving the same decisionmaker and gravity of offenses, where LVH took action *consistent* with the Employee Handbook’s disciplinary policies. Cf. Keller, 130 F.3d at 1111. (“Evidence that a plaintiff was not criticized may take on significance if the plaintiff can show that other comparable employees regularly received express evaluations of their work, but [plaintiff] Keller does not point to any such evidence.”)

## **2. Helfrich’s Perceived Disability Claim Under the ADA**

Count III of Helfrich’s Amended Complaint alleges that LVH treated him as if he had a disability prior to his termination. There is little, if any, evidence in the record to support the

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<sup>16</sup> The “Rules of Conduct” contained in the Employee Handbook state “Violations could result in immediate dismissal if the offense is very serious. The Network reserves the right to suspend or dismiss any employee for specific reasons such as: incompetency, intoxication, insubordination or dishonesty.”

allegation that, prior to Helfrich's termination, LVH regarded him as having a disability. Instead, the record sufficiently establishes that a number of people at LVH seemed rather perturbed at Helfrich's attitude, work product and his continuing to "hide the ball" with regard to Scorecard access. In contrast, the record is almost devoid of any evidence that senior LVH personnel knew or believed they knew about any health issues Helfrich had or has.

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual with regard to . . . discharge . . . ." 42 U.S.C. § 12112(a). To establish a prima facie case of discrimination under the ADA, a plaintiff must show:

(1) [he] is a disabled [or "regarded as" a disabled] person within the meaning of the ADA; (2) [he] is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) [he] has suffered an otherwise adverse employment decision as a result of discrimination.

Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 761 (3d Cir. 2004) (citing Phoenixville, 184 F.3d at 306) (citations and internal quotations omitted).<sup>17</sup> For LVH to establish that summary judgment is appropriate for Helfrich's "regarded as" ADA claim, the following steps are involved: (1) Helfrich bears the burden of establishing his prima facie case

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<sup>17</sup> Under the Rehabilitation Act, the Supreme Court held that a "regarded as" employee is entitled to the same reasonable accommodations consistent with those that a person actually having such a disability would be entitled to if such an affliction had actually manifested itself. School Board of Nassau County v. Arline, 480 U.S. 273 (1987). Congress, therefore, purposefully added the "regarded as" language to the ADA to incorporate the Arline jurisprudence into the ADA. See H. R. Rep. No. 101-485 (III), 1990 U.S.C.A.N. 445, 453. This rule was intended to prevent discrimination against an individual who has a record of or is regarded as having some kind of impairment, but, in actuality, at present, may have no actual incapacity. Arline, 480 U.S. at 279.

The Supreme Court found that the plaintiff in the Arline case may not have been given an appropriate accommodation by her employer when the employer considered her bout with tuberculosis to be substantially limiting, when in fact it may not have been. Interpreting Arline, and because the Supreme Court made clear in Bragdon v. Abbott, 524 U.S. 624, 632 (1998), that the ADA must be read "to grant at least as much protection as provided by . . . the Rehabilitation Act," the Philadelphia Housing court held that "the conclusion seems inescapable that 'regarded as' employees under the ADA are entitled to reasonable accommodation in the same way as those who are actually disabled." 380 F.3d at 751.

of discrimination; (2) the burden then shifts to LVH to proffer a legitimate, non-discriminatory reason for Helfrich's termination; and (3) if LVH satisfies its burden in prong (2), Helfrich must provide evidence to the Court that LVH's proffered, legitimate, non-discriminatory reasons are pretextual. See Poyner v. Good Shepard Rehab. at Muhlenberg, 202 F. Supp. 2d 378, 382 (E.D. Pa. 2002).

Under the ADA,

a "disability is **(A)** a physical or mental impairment **that substantially limits one or more of the major life activities** of such individual; **(B)** a record of such an impairment; **or (C)** being **regarded as** having such an impairment.

§ 12102(2) ("Definitions") (emphasis added). A "qualified individual with a disability" includes

an individual with a disability who, **with or without reasonable accommodation, can perform** the essential functions of the employment position that such individual holds or desires.

§ 12111(8). Types of reasonable accommodations include "job restructuring, part-time or modified work schedules . . . and other similar accommodations for individuals with disabilities."

§ 12111(9)(B).

The Supreme Court held, in Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999), that major life activities can include a person's job and, to be substantially limited with regard to working, a claimant must have been barred from a broad range of available jobs, not just "one type of job, a specialized job or a particular job of choice." Thereafter, in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), the Supreme Court subsequently established the standard for determining whether a claimant is "substantially limited in performing manual tasks" and thus whether a claimant is disabled, in an employment context, under the ADA. Moreover, for a plaintiff to have a cause of action regarding disability discrimination, the

employer must actually know of the disability. Phoenixville, 184 F.3d at 313; see also, Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 932-33 (7th Cir. 1995) (holding that a plaintiff must show that the employer knew of the disability to state a prima facie case of unlawful discharge). Thus, in a “regarded as” case such as here, LVH would have needed to believe or treat Helfrich as suffering from an analogous affliction. No such evidence exists within the record to support any allegation that LVH regarded Helfrich as being disabled.

However, “[m]erely having an impairment **does not** make one disabled for purposes of the ADA.” Toyota, 534 U.S. at 196 (emphasis added). “Claimants also need to demonstrate the impairment limits a major life activity.” Id. Major life activities include “walking, seeing, hearing” and “performing manual tasks” associated with job performance. 45 CFR § 84.3(j)(2)(ii) (2001). Furthermore, the Supreme Court found that, in order for a claimant to qualify as disabled, it must be shown that the limitation on the major life activity is “substantia[1]” Toyota, 534 U.S. at 197 (citing ADA, §12012(2)(A)).<sup>18</sup>

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<sup>18</sup> In the absence of a HEWR definition of “substantially limits”, the EEOC created its own regulations and definitions to be applied to the ADA. Pursuant to the EEOC regulations, “substantially limited” means:

[u]nable to perform a major life activity that the average person in the general population can perform”; [or] “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 CFR § 1630.2(j) (2001). Furthermore, the regulation instructs that, when making a determination whether an individual is substantially limited in a major life activity, the following factors should be considered:

[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

§§ 1630.2(j)(2)(i)-(iii). After assessing these factors, the Supreme Court concluded that the requirement that the limitation be substantial “**clearly precludes impairments** that interfere in only a **minor** way” from being qualified as disabilities under the ADA. Toyota, 534 U.S. at 197 (emphasis added). Id.

The Supreme Court then considered the appropriate criteria for determining what constitutes a “major life activities.” The Supreme Court first noted the policy dictates that govern interpretation of the ADA:

That [terms such as “major life activities”] need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA . . . If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. at 487 (finding that because more than 100 million people need corrective lenses to see properly, “[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million] disabled persons in the findings”).

Therefore, in strictly interpreting the definition of disability under the ADA, the Supreme Court unambiguously stated the following rule:

to be substantially limited in performing manual tasks, an individual must have an impairment that **prevents or severely restricts** the individual from doing activities that are **of central importance to most people's daily lives**. The impairment's impact **must also be permanent or long term**. See 29 CFR §§ 1630.2(j)(2)(ii)-(iii) (2001). It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those “claiming the Act's protection ... to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial.”

Toyota, 534 U.S. at 198 (citing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)); See also, Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 569 (3d Cir. 2002); Sistrun v. Time-Warner Cable, 2004 WL 1858042 at \*11 (E.D. Pa., August 19, 2004); Cella, 2003 WL 329147 at \*10 (“the ADA requires more than a mere impairment in order to qualify as disabled; the individual must also show that such impairment limits his or her ability to engage in a major life activity”).

The record supports LVH's position that Helfrich has failed to establish a prima facie case of being "regarded as" disabled. The record contains no evidence that Everhart or Ms. Halkins, the LVH decisionmakers who chose to terminate Helfrich, erroneously believed that Helfrich had an impairment that substantially limited one or more of his major life activities or that Helfrich may have had a non-limiting impairment, which LVH erroneously believed substantially limited one or more of Helfrich's major life activities. Alternatively, LVH argues that Helfrich has provided no evidence to establish, at a minimum, an inference that LVH's numerous proffered reasons for terminating Helfrich were pretextual. See Section 2, "Alleged Age Discrimination", supra.

In an effort to give Helfrich the benefit of all doubts, the Court summarizes the facts in the record with respect to Helfrich's being "regarded as" disabled claim as follows. When Helfrich met with Ms. Halkins to request PTO on October 19, 2001, he only vaguely mentioned his belief that he had "serious health concerns" and informed Ms. Halkins of a finger cyst. (Helfrich Dep. at 187-92). Neither at that time nor upon his return from leave, did Helfrich mention that he was experiencing headaches, blurred vision or thought he might have a brain tumor, (Helfrich Dep. at 187-92)<sup>19</sup>, the symptoms his counsel now intimates were those he is and

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<sup>19</sup> In fact, there is absolutely no objective evidence in the record to even suggest Helfrich had a brain tumor, the condition his counsel now suggests is a part of the panoply of Helfrich's problems. Rather, the record consists of subjective testimony from Helfrich, based on an unsubstantiated belief that his bad headaches may have been caused by a terminal brain tumor. It is clear from the deposition testimony of Helfrich's doctor, Dr. Shore, that Shore did not provide any basis for Helfrich's dire beliefs.

Nevertheless, counsel for Helfrich persists in arguing that, following a 1992 MRI (almost a decade before the events in question), Helfrich feared that he had "a lesion" or spot on his brain and that lesion "had metastasized into terminal cancer and was causing Helfrich's headaches. (Helfrich Dep. at 33, 40). However, there is no indication whatsoever in Dr. Shore's deposition testimony that the doctor considered Helfrich's alleged condition as anything akin to terminal brain cancer. Instead, Dr. Shore agreed that his examination of Helfrich's health during his PTO was "unremarkable." (Shore Dep. at 16). Helfrich told Shore that Helfrich's previous MRI, the one from 1992 where the alleged lesion or spot appeared on his brain, was "normal." (Shore Dep. at 18). Dr. Shore's review of the 1992 MRI did not suggest that any evidence of a brain tumor existed. (Shore Dep. at 19). Dr. Shore did not even

was suffering from. Despite Helfrich's belief that he had a serious health problem, his primary care physician, Dr. Shore, after examining Helfrich on October 22, 2001, was apparently satisfied to order diagnostic tests *to be done at a later time*. (Shore Dep. at 22-23).<sup>20</sup> Dr. Shore also recommended that some time off from work and an adjustment of Helfrich's medication may relieve Helfrich's perceived stress and headaches. (*Id.*) Significantly, Dr. Shore testified that he recalled Helfrich as having a sense that he was being forced out of his job because of a business dispute regarding Scorecard. (Shore Dep. at 29-30, 33-34). Dr. Shore *did not* testify that Mr. Helfrich provided any other reason for his concerns, including the existence of any age animus or "regard" of disability.

Upon Helfrich's return from PTO leave, LVH contends that during the October 29, 2001 meeting, Helfrich did not relay to LVH any specific, continuing health concerns. Nevertheless, Helfrich claims to have provided LVH with two documents, an "Initial Injury Intake Notes" (the "Intake Notes") and "Medical Release Form" (the "MRF"). (Def. Ex. M); (DH-439, 440). The Intake Notes state that Helfrich claims that he took emergency PTO because of stress-induced

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suggest to Helfrich that he should take any specific time off of work to deal with stress. Instead, Dr. Shore merely told Helfrich that he would sign a note authorizing time off "as needed." (Shore Dep. at 21). After a full examination during Helfrich's PTO, Dr. Shore "thought the chances of there being something seriously endangering [Helfrich] were small." (Shore Dep. at 23). Helfrich's subsequent MRI results, from November 9, 2001, like the 1992 MRI, were deemed "normal" by Dr. Shore. (Shore Dep. at 30-31).

Basically, Dr. Shore's actual testimony contradicts many of the arguments presented by counsel for Mr. Helfrich. Such an overly aggressive manipulation of the facts or lack of candor to the Court and to opposing counsel is not appropriate. As indicated in the text above, at the summary judgment phase, counsel is not permitted to state the facts as he wishes them to be or to ignore facts that he finds detrimental to his case. Rather, he has an ethical obligation to state the facts as they clearly, unambiguously and objectively exist in the record. No "spin factor" to the extent employed here is permitted. Indeed, unsworn statements of counsel may not create a fact question when such statements contradict a party's own deposition testimony or that of the party's witnesses. See Schoch v. First Fidelity Bancorp., 912 F.2d 654, 657 (3d Cir. 1990). See note 2, supra.

<sup>20</sup> The record suggests that there was no sense of urgency with regard to these tests to support Helfrich's position that he or his doctor, at that time, felt that he had "serious health concerns."

headaches and blurred vision. (DH-439). The MRF indicates a diagnosis of “headaches.” (DH-440). Following the October 29 meeting, as a disciplinary measure in response to Helfrich’s perceived insubordination, he was sent home for a week.<sup>21</sup> Immediately following this suspension, on November 9, 2001, after Helfrich failed to expressly agree that he could trust and work with Ms. Halkins going forward, Helfrich was terminated.

Despite the absence of any supporting facts within the record, Helfrich has attempted to establish his ADA “regarded as” claim by contending that when an employee is placed on paid or unpaid *disability* leave, this fact conclusively establishes that an employee is, at a minimum, being regarded as disabled under the ADA. See Pritchard v. The Southern Company Services, 92 F.3d 1130, 1134 (11th Cir. 1996). However, Pritchard is inapposite to the facts presented here. There is no argument presented or evidence contained within the record that Helfrich was on

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<sup>21</sup> Here, again, the argument of counsel is at odds with the record. Notwithstanding the following statement to the Court from Mr. Helfrich’s counsel,

[5] . . . When [Helfrich]  
[6] was told to go home on October 29th, **he was not even told,**  
[7] **according to his testimony, he was not told he was being**  
[8] **suspended.** It was when he got his termination letter on  
[9] November 9, it said you were suspended and now you’re getting  
[10] terminated[,]

Mr. Helfrich actually had testified *under oath* that he knew he was being suspended for his obstinate refusals to directly answer Ms. Halkins’ questions at the October 29, 2001 meeting:

- A. I think it is safe to conclude that I didn’t respond to the question to their satisfaction.  
...  
A. If I had, they wouldn’t -- **Ms. Halkins would not have sent me home to think about an answer to the question.**  
...  
A. **So I was sent home to specifically think about it,** and never had an opportunity to respond.

(Helfrich Dep. at 228-29) (emphasis added). Some might see such an argument as Helfrich now tenders as analogous to a child claiming, after being sent to his room, that he had not been sent to his room to be punished because Mom did not explicitly use the phrase “I’m punishing you.” In any case, counsel’s argument cannot create a fact dispute in the face of his client’s own testimony to the contrary. See Schoch, 912 F.2d at 657.

*disability* leave during his PTO nor placed on *disability* leave following his PTO leave. Rather, the record unambiguously shows (and as Helfrich understood, according to his own deposition testimony) that he was suspended following the October 29, 2001 meeting with management because his attitude was deemed unacceptable and insubordinate. Helfrich was suspended at that time, **not** placed on disability leave.

Nonetheless, even if Helfrich had informed Ms. Halkins of his alleged headaches and blurred vision, the Court of Appeals for the Third Circuit has held that “the mere fact that an employer is aware of an employee’s impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action.” Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996); see also, Gallagher v. Sunrise Assisted Living, 268 F. Supp. 2d 436, 441 (E.D. Pa. 2003) (“Gallagher has produced no evidence to substantiate a claim that Sunrise regarded her as substantially limited in any life activity, including breathing. Sunrise’s awareness of Gallagher’s allergies alone is insufficient evidence to sustain a claim of disability under the ‘regarded as’ prong. Likewise, Gallagher’s argument that the granting of extra consideration to her by Sunrise demonstrates that the Defendant regarded her as disabled is also insufficient.”).

According to the record, there is no doubt that Helfrich was qualified to do his job, with or without accommodation by LVH. Helfrich’s burden of showing that he was qualified for his position is met by a showing that he was continuously employed by the LVH for a considerable number of years and that he received good reviews and salary increases during his entire tenure. See Anderson v. Haverford College, 868 F. Supp. 741, 745 (E.D. Pa. 1994). Furthermore, Helfrich argues that the proper analysis includes a “look at the Plaintiff’s entire work history, and

not just the limited circumstances involving [his] termination.” Chisholm v. National Corporation for Housing Partnerships, 2001 WL 115406 at \* 2 (E.D. Pa. Jan 31, 2001). An employer’s refusal to consider consistent, good past performance of an employee is evidence that discrimination may have occurred. See, e.g., Gunby v. Pennsylvania Electric Co., 840 F.2d 1108, 1117 (3d Cir. 1988) (considering nine years of excellent performance and regular promotions). Here, until the summer months prior to Helfrich’s termination in November 2001, there is no indication within the record that anyone at LVH was unhappy with his work performance.

Nevertheless, the crux of this case is whether LVH fired Helfrich (a) because it felt he was becoming an unreliable and insubordinate employee, (b) whether there existed some disability animus within LVH management with regard to Helfrich, or (c) merely because certain people just did not like working with Helfrich any more. Of these options, Helfrich can avoid summary judgment on his ADA claim only if he provided credible circumstantial evidence that *some* disability animus existed at the time of and prior to his termination. No such evidence has been provided to the Court by Helfrich; nor can the Court locate such evidence in the record.

Ms. Halkins’ reaction to Helfrich’s request for PTO especially undercuts his ADA claim. According to Helfrich, at the time of his PTO request, Ms. Halkins did not believe he even had a medical problem. (Helfrich Dep. at 189-90); (Helfrich’s Answ. to Def. First Set of Interr., No. 3). The perceived disability claim is further undercut because the record shows that Ms. Halkins was disappointed with Helfrich’s job performance both before and after his PTO. See Shaner v. Synthes USA, 204 F.3d 494, 504-05 (3d Cir. 2000) (finding that the record showed that the plaintiff’s performance evaluations contained similar criticisms both before and after he informed

the defendant that he suffered from multiple sclerosis and after plaintiff filed his first amended complaint with the EEOC); Rompola v. Lehigh Valley Hospital, 2004 WL 1508533 at \* 6 (E.D. Pa. Jul. 6, 2004) (finding that “the record is clear that Plaintiff’s employment problems that occurred after notifying Defendant of her intention to file an EEOC Charge were consistent with the problems she had before this notification.”).

### **3. The FMLA Retaliation Claim**

Count IV of Helfrich’s Amended Complaint alleges that LVH retaliated against him for taking one week of PTO. The FMLA provides eligible employees with up to 12 weeks of unpaid leave during a 12-month period and prohibits employers from discriminating against employees for exercising their rights under the Act. 29 U.S.C. §§ 2612, 2615(a)(i),(2). FMLA claims are subject to the McDonnell Douglas burden-shifting analysis discussed above. See Churchill v. Star Enterprises, 183 F.3d 184 (3d Cir.1999); Chaffin v. John H. Carter Co., Inc., 179 F.3d 316 (5th Cir. 1999); Morgan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997); Cohen v. Pitcairn Trust Co., 2001 WL 873050 at \* 9 (E.D. Pa. Jun. 20, 2001); Keeshan v. Home Depot, U.S.A., Inc., 2001 WL 310601 at \*11 (E.D. Pa. Mar. 27, 2001); Baltuskonis v. U.S. Airways, Inc., 60 F.Supp.2d 445, 448 (E.D. Pa. 1999).

To establish a prima facie case under the FMLA, Helfrich must establish that (1) he is protected under the FMLA, (2) he suffered an adverse employment action; and (3) a causal relationship exists between the decision to terminate Helfrich and his exercise of his FMLA rights. Farrell v. Planters Life Savers Co., 206 F.3d 271, 279 (3d Cir. 2000). Helfrich concedes that, except in circumstances where the timing of the alleged retaliatory act is “unusually

suggestive,” timing alone is never sufficient to demonstrate a causal link between the termination decision and an exercise of FMLA rights. See Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997).

Helfrich is unable to establish the necessary third prong of his FMLA claim. Helfrich admitted that Ms. Halkins became very critical of his work performance prior to the PTO. (Helfrich Dep. at 230). The record supports LVH’s contention that the acute problems with Helfrich’s performance began in or around August 2001. According to Helfrich, Ms. Halkins’ attitude towards him especially soured when he received highly critical emails from her on October 14, 2001, approximately four (4) days prior to Helfrich’s PTO leave request. Such a sequence of events is telling. For example, the Court of Appeals for the Ninth Circuit has held that when an employer expresses concern about an employee’s performance deficiencies *prior* to the time the employee engages in allegedly protected activity, no retaliatory inference arises. Zsenyuk v. City of Carson, 2004 WL 1157677 at \*\*2 (9th Cir. May 21, 2004); see also, Smith v. Memorial Hospital Corp. 302 F.3d 827, 834 (8th Cir. 2002) (“Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity.”); Shaner, 204 F.3d at 504-05, supra; Rompola, 2004 WL 1508533 at \*6, supra.

#### **4. Retaliation by Challenging Helfrich’s Filing for Unemployment Compensation**

Helfrich also alleges, in Counts V and VI of his Amended Complaint, that LVH retaliated against him, in violation of the ADEA and the ADA, when the hospital challenged Helfrich’s

filing for unemployment compensation. Helfrich conceded at oral argument that LVH has a statutory right to challenge a former employee's request for unemployment benefits. The disposition of this issue was a subject of LVH's Reply Brief. The Court also permitted Helfrich to file a Memorandum of Law in Opposition to the Reply Brief.<sup>22</sup>

On December 14, 2004, the Court of Appeals for the Third Circuit delivered an opinion in Glanzman v. Metropolitan Management Corp., 391 F.3d 506 (3d Cir. 2004) that severely weakens Helfrich's retaliation claims with regard to LVH's challenge to Helfrich's filing for unemployment compensation. The Glanzman facts are notably similar to those in the instant matter. Plaintiff Glanzman alleged that her former employer retaliated against her because Glanzman's unemployment compensation filing cited age discrimination as the cause of her termination. Id. at 515. The Court of Appeals, affirming the district court's granting of summary judgment in the employer's favor, held:

Assuming that Glanzman's filing of her claim for unemployment based on discrimination was a protected activity, her retaliation claims fail for two reasons.

First, Glanzman could not suffer adverse employment action after or contemporaneous with the protected activity. Quite obviously, given the nature of unemployment benefits, her employment was terminated before, not after or contemporaneous with, her filing for unemployment compensation. Once her employment was terminated it was not possible for her to suffer adverse employment action.

Second, she suffered no harm from these allegedly retaliatory actions of

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<sup>22</sup> The primary issue contained in LVH's Reply Brief was Helfrich's failure to cite to Glanzman v. Metropolitan Management Corp., 391 F.3d 506 (3d Cir. 2004), a recent, controlling decision handed down by our Court of Appeals approximately three (3) weeks prior to the January 6, 2005, filing of Helfrich's response to LVH's Motion for Summary Judgment.

Helfrich should have identified Glanzman in his opposition to the Motion for Summary Judgment, regardless of whether Helfrich agrees with the holding in that case. Glanzman is both on-point and controlling in this case, on these issues, and should have been addressed by counsel. See The Court's Practices and Procedures. (<http://www.paed.uscourts.gov/documents/procedures/prapol.pdf>) regarding citation to controlling case law.

Metropolitan. She continued, notwithstanding the notice to quit, to live in her apartment, rent free, until January 4, 2002. She was also successful in her claim for unemployment benefits in face of Metropolitan's opposition. **Because Glanzman did not suffer economic harm as a result of Metropolitan's actions her claim would be denied even if the actions had been retaliatory.**

...

Glanzman's retaliation argument fails because she was not employed by Metropolitan at the time of the alleged retaliation and **she suffered no legal injury because of the alleged retaliation.**

Id. Thus, Glanzman is dispositive with regard to Helfrich's ADEA retaliation claim based on LVH's actions in attempting to deny unemployment benefits to Helfrich. Helfrich was not employed by LVH at the time of the alleged "retaliation". He also suffered no legal injury as a result of LVH's actions because, like Glanzman, Helfrich was successful in receiving unemployment benefits.

Helfrich argues that Glanzman is in conflict with other controlling authority announced by the Court of Appeals for the Third Circuit. However, the case which Helfrich cites, Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193, 209 (3d Cir. 2000), merely states that a former employee can be retaliated against in violation of federal anti-discrimination laws. In Erie County Retirees, the Court of Appeals for the Third Circuit analyzed, in depth, the Supreme Court's decision in Robinson v. Shell Oil Co., 519 U.S. 337 (1997):

Robinson addressed the applicability of the anti-retaliation provision in Title VII of the Civil Rights Act of 1964 to actions taken against former employees. See id. at 339, 117 S.Ct. at 845. The plaintiff in Robinson had filed an EEOC charge alleging that Shell discharged him because of his race. Id. When the plaintiff applied for a job with another company, Shell allegedly retaliated against him by issuing a negative reference. Id. Title VII's anti-retaliation provision, section 704(a), 42 U.S.C. § 2000e-3(a)--which is nearly identical to the ADEA's anti-retaliation provision, see 29 U.S.C. § 623(d)--makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" because they have opposed discrimination. Section 701(f) of Title VII, 42 U.S.C. § 2000e(f), defines "employee" as "an individual employed by an employer"--the

same definition present in the ADEA. The Court in Robinson stated that, "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question." Robinson, 519 U.S. at 341, 117 S.Ct. at 846. However, the Court found that "[t]his initial impression . . . does not withstand scrutiny" because "the word 'employed' [in the definition of 'employee'] . . . could just as easily be read to mean 'was employed.'" Id. at 341, 342, 117 S.Ct. at 846, 847. The Court thus found the term "employees" to be "ambiguous as to whether it excludes former employees." Id. at 341, 117 S.Ct. at 846. The Court then construed this ambiguity in favor of Title VII's broad remedial purposes, and thus held that the anti-retaliation provision covered former employees. See id. at 345-46.

Notwithstanding this reasoning, Helfrich fails to recognize the significance of the Third Circuit's holdings in Glanzman that distinguish it from Robinson and Erie County Retirees.

Consistent with each of those controlling decisions, with regard to a challenge to unemployment compensation, Helfrich may be correct that the blanket statement that "[o]nce [Glanzman's] employment was terminated it was not possible for her to suffer adverse employment action," Glanzman, 391 F.3d at 515, seems to contradict Robinson's holding that the anti-retaliatory provisions of Title VII and the ADEA cover former employees, Robinson, 519 U.S. at 345-46. However, in this instance, Glanzman is easily distinguishable from Robinson because, with regard to an unemployment compensation challenge, where the filing party is successful, since there is no resulting legal injury, and there is no possible future economic harm, no retaliation can be found. This Court further finds the facts and issues in the instant case and Glanzman to be clearly distinguishable from Robinson, supra, where the plaintiff applied for a job with another company and Shell allegedly retaliated against him by issuing a negative reference. Id. Helfrich is not alleging that LVH took any action following his termination akin to providing a negative employment reference or otherwise jeopardizing any future employment opportunity.

Inexplicably, both in his submission to this Court and at oral argument, Helfrich also argued that his claim remains viable because in a previous ruling prior to Glanzman, the then-presiding judge in this case observed *in a preliminary matter*, that Helfrich may be able to state a claim for retaliation with regard to the challenge to employment compensation. In Helfrich v. Lehigh Valley Hospital, 2003 WL 23162431 at \* 6 (E.D. Pa. Dec. 22, 2003), the court held that, pursuant to Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) and Title VII, 42 U.S.C. § 2000e-2(a),

[r]etaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affects his [or her] status as an employee. . . '

Id. at 1300. Thus, although Helfrich ultimately prevailed in securing his unemployment benefits, he was not preliminarily barred from bringing an anti-retaliation claim against his employer. Helfrich, 2003 WL 23162431 at \* 6. Moreover, at that time, the court concluded that LVH's actions taken to protest Helfrich's right to receive unemployment compensation *could* be considered adverse to Helfrich's interests. See id.<sup>23</sup>

Helfrich argues that the trial court's prior ruling pre-dating Glanzman somehow predominates here. Helfrich's attempted analogy, that an employer could retaliate against a former employee by providing a negative reference wholly misses the mark, as that is the specific example provided by the Supreme Court in Robinson. In that instance, without a doubt, there is present and potential future harm to the plaintiff. However, in Helfrich's case, as with anyone

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<sup>23</sup> Nevertheless, at this stage of Mr. Helfrich's case, care should be taken not to confuse the challenge to survive a motion to dismiss with the significantly more demanding standards of providing factual and legal support to avoid summary judgment.

who successfully receives unemployment compensation, regardless of the former employer's challenge, no recognized legal injury exists. See Glanzman. Moreover, this Court is obligated to and will follow the law, as stated by the Court of Appeals for the Third Circuit. Helfrich's retaliation claims in Counts V and VI cannot now stand.

#### IV. CONCLUSION

While reviewing the respective parties' submissions and considering their collective arguments, this Court has not viewed the evidence "in a piecemeal fashion, giving credence to innocent explanations for individual strands of evidence." See Abramson, 260 F.3d at 278.

LVH decided to terminate Helfrich's employment for the following reasons: (1) Helfrich's persistent insubordinate refusal to transfer Scorecard maintenance/update information to IS to end LVH's "single dependency" concern; (2) Helfrich's perceived lack of trust in his supervisor, Ms. Halkins; (3) Helfrich's attendance at a work meeting on October 23, 2001, during his PTO leave week, without telling Ms. Halkins and/or seeking her authorization; (4) Helfrich's failure to return any of Ms. Halkins' voice mail messages seeking Scorecard password information that were left on Helfrich's work and home telephones during the PTO leave week; (5) the perception that Helfrich, overall, was not providing the tools necessary for LVH operations with respect to benchmarking, the labor budget work sheet and Scorecard; and (6) Ms. Halkins' growing lack of trust in Helfrich's conduct especially given his sole access to Scorecard.

With regard to each of his claims, Helfrich has not produced evidence sufficient to convince a reasonable factfinder of *all* the necessary elements of his prima facie case. See McDonnell Douglas, 411 U.S. at 802-03; Keller, 130 F.3d at 1108. Even if Helfrich had been

able to establish his prima facie case, LVH offered significant, sufficient credible evidence to support this Court's finding that LVH had many legitimate, nondiscriminatory reasons for terminating Helfrich. Id. Moreover, Helfrich did not meet his subsequent burden of providing the Court with sufficient, credible record evidence from which a reasonable factfinder could either (1) disbelieve LVH's articulated legitimate reasons for Helfrich's termination or (2) believe that an invidious discriminatory reason was more likely than not to have been a motivating or determinative cause of LVH's actions. Id.; see also, Fuentes, 32 F.3d at 763. Helfrich has failed to demonstrate any "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [LVH's] proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence. . ." See Fuentes, 32 F.3d at 765 (emphasis in original) (citation omitted). Therefore, Counts I, III and V and VI must fail.

Helfrich has also failed to satisfy the "pretext" prong of the burden-shifting scheme by offering evidence "from which a factfinder could reasonably . . . disbelieve [LVH's] articulated legitimate reasons." Fuentes, 32 F.3d at 764. In his opposition to summary judgment, Helfrich was obligated to demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in LVH's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence. . ." (emphasis in original) (citation omitted). Id. at 765. Nothing in the record contradicts LVH's belief that Helfrich's work product was becoming unacceptable, he was becoming difficult to work with, and that some of his superiors considered him to be insubordinate. Helfrich has provided no evidence to persuade this Court that LVH's stated, non-discriminatory reasons for terminating Helfrich are not credible.

Furthermore, the Court has been provided with no evidence that LVH's stated reasons serve as pretext for any unlawful animus towards Helfrich. Therefore, Counts I, III, V and VI must fail.

Despite Helfrich's belief that he had a serious health problem, his primary care physician, Dr. Shore, after examining Helfrich on October 22, 2001, ordered diagnostic tests *to be done at a later time*. (Shore Dep. at 22-23). Therefore, the only inference that can be drawn from this fact is that, in fact, while Mr. Helfrich may have been suffering from headaches, no debilitating or incapacitating health concerns actually existed. Even if Helfrich had informed Ms. Halkins of his alleged headaches and blurred vision, the mere fact that LVH may have known of Helfrich's alleged condition does not demonstrate either (a) that the LVH regarded Helfrich as disabled or (b) that this perception caused Helfrich's termination. Kelly, 94 F.3d at 109; see also, Gallagher, 268 F. Supp. 2d at 441. Therefore, Counts III and VI must fail.

Likewise, Helfrich has presented no evidence that he was terminated because of his age. See O'Connor, 517 U.S. at 312 (1996); see also, Pivrotto, 191 F.3d at 355. Furthermore, Helfrich has failed to provide even an inkling of evidence supporting his allegation that age was a motivating factor. See Miller, 47 F.3d at 597 f.9. The law requires Helfrich to show that age was a motivating factor, and he has failed to make this showing. See id. Therefore, Counts I and V must fail.

Because LVH has presented credible, unimpeached documentary and testimonial evidence that it was concerned about problems with Mr. Helfrich prior to his alleged protected activity, this Court finds no inference with regard to the temporal proximity of the protected activity and his termination. See Smith, 302 F.3d at 834; see also, Shaner, 204 F.3d at 504-05; Rompola, 2004 WL 1508533 at \* 6. Therefore, Count IV must fail.

Finally, throughout his submissions to this Court, and during oral argument, Helfrich attempted to rely on unsupported assertions, conclusory allegations, or mere suspicions in an attempt to keep his case alive. West Chester, 891 F.2d at 460 (citing Celotex, 477 U.S. at 325). Such a technique cannot succeed. Id. Helfrich failed to make showings sufficient to establish the existence of elements essential to his case. Such failures as to essential elements render all other facts immaterial. See Cella, 2003 WL 329147 at \*6 (E.D. Pa. Feb. 12, 2003) (citing Celetox, 477 U.S. at 322-23). Therefore, viewing all reasonable inferences in favor of Helfrich, the non-moving party, this Court finds that there are no genuine issues of material fact and an entry of summary judgment in favor of LVH is appropriate. See Celetox, 477 U.S. at 322; Wisniewski, 812 F.2d at 83.

An appropriate Order follows.

BY THE COURT:

/S/  
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GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

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

HELFRICH : CIVIL ACTION  
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v. : :  
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LEHIGH VALLEY HOSPITAL : NO. 03-cv-05793

**ORDER**

March 18, 2005

PRATTER, District Judge

AND NOW, this 18th day of March, 2005, upon consideration of the Amended Complaint (Docket No. 6) filed by Plaintiff Douglas Helfrich, the Motion For Summary Judgment and Brief in Support filed by Lehigh Valley Hospital (“LVH”) (Docket No. 26), the Memorandum in Opposition to the Motion for Summary Judgment filed by Helfrich (Docket No. 29), the Reply Brief filed by LVH (Docket No. 32), the Memorandum of Law in Opposition to LVH’s Reply Brief (Docket No. 36) and following oral argument held before this Court on February 23, 2005, for the reasons more fully stated in the accompanying Memorandum, it is hereby ORDERED that:

1. The LVH’s Motion for Summary Judgment is GRANTED in its entirety; and
2. Counts I through VI of the Amended Complaint are each DISMISSED with prejudice.

IT IS SO ORDERED.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE