

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

CATHERINE E. HUGHES,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 05-5444
	:	
CITY OF BETHLEHEM, et al.,	:	
Defendants	:	

MEMORANDUM

STENGEL, J.

March 27 , 2007

Catherine E. Hughes is suing the city of Bethlehem, her former employer, its mayor, its director of human resources, and its business administrator, alleging employment discrimination based on her gender in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (“Title VII”); employment discrimination based on her having a disability, i.e., type II diabetes, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, (“ADA”); unlawful retaliation for seeking an accommodation under the ADA, as well as for having reported harassment under Title VII; a violation of the Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.*, (“PHRA”);¹ a violation of procedural due process; and a violation of the Family and Medical Leave Act, 29 U.S.C. § 2601 (“FMLA”). Defendants have filed a

¹ The PHRA provides “the opportunity for an individual to obtain employment for which she is qualified without discrimination because of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin.” Courts interpret the PHRA consistently with Title VII. *Weston v. Pennsylvania*, 251 F.3d 420, 426 n.3 (3d Cir. 2001) (The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably).

motion for summary judgment to which the plaintiff responded. For the following reasons, I will grant the motion in its entirety.

I. BACKGROUND

On July 16, 2001, Hughes began her employment with Bethlehem as a Water Control Room Operator, and became a member of the Service Employees International Union. In September 2003, Hughes spent six nights in Las Vegas for vacation. She planned to have her lips and eyebrows permanently tattooed during the trip.

Hughes was not scheduled to work from September 19, 2003 through September 23, 2003; but was scheduled to work on September 24, 25, and 26, 2003. Her original plan was to have the tattoo procedure on September 24, recuperate and return to Pennsylvania on September 25, and return to work on September 26.

Hughes was first diagnosed in 1998 with type II diabetes. This diagnosis was documented in her pre-employment physical with the city. At the time of the Las Vegas trip, Hughes took only pills to control her diabetes. While there, Hughes neither sought medical attention nor called her endocrinologist to discuss her medical condition. On a “brutally hot” September 24, 2003, between 12:30 and 2:30 in the afternoon, Hughes walked from her hotel approximately two blocks to visit two tattoo parlors. Hughes’ blood sugar was extremely high, she did not feel well, and she decided against having the procedure. Nevertheless, on September 24, 2003 and September 25, 2003, Hughes “called out” sick from Las Vegas, using her boyfriend’s cell phone.

On September 22, 2003, Bethlehem's mayor received an anonymous note informing him that Hughes had been bragging at her gym that she would be away on vacation in Las Vegas but using sick time to explain her absence instead of vacation time. The mayor forwarded the note to defendant Dennis Reichard, Bethlehem's Business Administrator. Reichard then left several messages on Hughes' home answering machine requesting she contact him as soon as possible. Defendant Jean Zweifel, Bethlehem's Human Resources Director, also left messages on Hughes' answering machine. On the morning of September 26, 2003, Zweifel left a message scheduling a meeting in Reichard's office for 11:00 that morning.

Present at the meeting, which occurred around 2:00 p.m., were Reichard, Zweifel, the plaintiff, the plaintiff's boyfriend, and her union representative. At the meeting, Reichard asked the plaintiff where she had been on September 24 and September 25, 2003. He also told her that the city had received an anonymous note, a part of which he read to her. Reichard asked the plaintiff if she had been in Las Vegas on the days in question. Hughes insisted that she had been sick and stated definitively that she had not been in Las Vegas. Reichard then asked why she had used her boyfriend's cell phone to "call out" sick. Hughes responded that she was staying at her boyfriend's house, that he did not have a telephone in the bedroom, and that she was too sick to leave the bedroom to call from anywhere else. The plaintiff presented a note from her endocrinologist, Dr. Larry Merkle, indicating that she was under his professional care, and that she was totally

incapacitated from September 24, 2003 to September 25, 2003 due to complications from diabetes. Reichard then responded, “Anyone can pay 20 bucks for a fake doctor’s excuse.”

The evidence demonstrated that the note was not given to Hughes by Dr. Merkle himself, but by a member of his office staff. The note was also not entered on Hughes’ medical chart which is contrary to Dr. Merkle’s office policy. See Dep. of Larry Merkle, M.D., at 24-25. Dr. Merkle testified at his deposition that he would not have given Hughes such a note if he knew that Hughes had been in Las Vegas. Id. at 28-29.

At the conclusion of the meeting, Reichard suspended Hughes indefinitely pending a full investigation by the city. The city attempted to have Hughes voluntarily turn over her boyfriend’s cell phone records, but she refused.² At the request of Reichard, the Bethlehem Police Department was able to obtain those records and determine that the cell phone calls reporting out sick had originated in Las Vegas.

A second meeting occurred on February 2, 2004, with Hughes, her attorney, her union representative, Reichard, Zweifel, and one of the city’s attorneys in attendance. Hughes finally admitted that she had been in Las Vegas on September 24 and 25, 2003. When asked why she attempted to provide the city with a physician’s note indicating that she had been totally incapacitated for those two days, Hughes replied that she was “unsure” why she had done that. At the conclusion of the meeting, Reichard announced

² The Amended Complaint indicates that Hughes was constantly harassed by the city for these records during her suspension.

that Hughes was terminated from her employment with the city of Bethlehem because of dishonesty. Hughes received formal written notice of the termination in a letter from Reichard dated February 17, 2004. See App. to Def's Motion for S.J., Exh. 3.

Hughes filed a grievance which was denied by the city on March 19, 2004.

Hughes' union refused to arbitrate the matter because Hughes admitted lying to both the city and the union, and the collective bargaining agreement specifically provides that dishonesty is just cause for termination.³ See Pl's Exh. E and F of Amended Complaint.

II. LEGAL STANDARD

Subject matter jurisdiction over the alleged violations is proper pursuant to 28 U.S.C. § 1331. Because Hughes' state law claims form part of the same case or controversy, subject matter jurisdiction over the Pennsylvania Human Relations Act claim is proper pursuant to 28 U.S.C. § 1367(a).

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such

³ Article XXXII of the Collective Bargaining Agreement between Bethlehem and Hughes' former union states, in pertinent part: "The City shall have the right to discharge, suspend, and otherwise discipline employees for just cause. Just cause shall include, but not be limited to, unexcused absence from work, persistently reporting late for work or leaving before quitting time or otherwise violating working hours, *dishonesty*, incompetence, insubordination, pilferage, or reporting to work intoxicated." (emphasis added). See Appendix to Def's Mot. for S.J., Exhibit 11, page 32.

that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the Hughes on the evidence presented. Id. at 252. If the non-moving party has

exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. Title VII

Title VII provides that "it shall be an unlawful employment practice for an employer to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. In her Amended Complaint, Hughes claims that she was terminated from her employment with the city of Bethlehem because of her gender, and in retaliation for her reporting harassment by a co-worker the month before she was suspended. She also claims that she was treated more harshly by the city because she is a female. Hughes names male co-workers who received lesser forms of punishment for allegedly more severe offenses than hers.

Because Hughes has not produced any direct evidence of discrimination, she must proceed under the burden-shifting framework first established by the Supreme Court of the United States in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999).

In the McDonnell Douglas analysis, a plaintiff bears the initial burden of establishing a *prima facie* case of employment discrimination by a preponderance of the evidence. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760 (3d Cir. 2004) (citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)). A *prima facie* case requires a plaintiff to show that: (1) she is a member of a protected class; (2) she satisfactorily performed the duties required by her position; (3) she suffered an adverse employment action; and (4) similarly-situated non-members of the protected class were treated more favorably. Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003).

Here, for purposes of this motion, the defendants concede that Hughes satisfies the first three elements of a *prima facie* case for gender-based employment discrimination. The defendants insist, however, that Hughes has not and cannot satisfy the fourth prong of the test, i.e., to show that similarly-situated employees who are outside of her protected class were treated more favorably than she. I agree.

To be deemed “similarly-situated,” the individuals with whom a plaintiff seeks to be compared must have dealt with the same supervisor, have been subject to the same standards of employment and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it. Atkinson v. Lafayette College, 2003 U.S. Dist. LEXIS 13951, *17-18 (E.D. Pa. 2003) (quoting Morris v. G.E. Fin. Assurance Holdings, 2001 U.S. Dist. LEXIS 20159, at *20 (E.D. Pa. 2001)).

Hughes cites deposition testimony for the proposition that male employees were not treated as harshly as she. For example, the president of Hughes' former union testified that a male employee of the city used a sick day to attend a funeral and was seen by his supervisor at the funeral. The president did not know if the employee had lied about being sick. An arbitration followed where it was decided that the employee had to take a half sick day and a half personal day. That employee was not terminated. The president also testified that another male employee called in sick and his supervisor followed the employee from a drinking establishment to his home. He was suspended for five days. The union filed a grievance which was denied. That employee won at arbitration and his sick time was restored. The union president opined that the only difference between Hughes and these male employees was that "the city didn't catch them in any sort of lie." See Dep. of Thomas Redgick at 30. A city police officer, unfamiliar with the disciplinary and/or absence policies at the city's Water Department and its collective bargaining agreement, testified that he had called in sick and it was discovered later that he was not sick. When confronted, the officer did not deny it. He was not disciplined in any way for that incident, and never disciplined by Reichard. See Dep. of Joseph Ocasio at 9-14.

I find that none of the males to whom Hughes refers are "similarly-situated," and thus are not probative of discrimination. It was not established that these male employees were subject to the same standards of employment as Hughes, or that they had engaged in

the same dishonest conduct as Hughes with a subsequent attempted coverup.

Accordingly, because the last element has not been satisfied, Hughes has not established a *prima facie* case.

Even assuming *arguendo* that Hughes satisfied this final element of a *prima facie* case of discrimination, her claim would still fail. A plaintiff's properly pled *prima facie* case eliminates the most common nondiscriminatory reasons for an employer's actions. Burdine, 450 U.S. at 253. While the *prima facie* case only raises an inference of discrimination, the Supreme Court has stated that, once the *prima facie* case is established, it will presume that the employer's action is more likely than not based on the consideration of impermissible factors. Id. at 254. Should the plaintiff establish her *prima facie* case, the burden of production (but not the burden of persuasion) shifts to the defendants to articulate some legitimate and nondiscriminatory reason for the employer's action. Sarullo, 352 F.3d at 797. If the defendants meet this burden, the presumption of a discriminatory action raised by the *prima facie* case is rebutted. Id.

Here, the defendants would meet their burden of production if the plaintiff had satisfied the elements of a *prima facie* case. The defendants could articulate a legitimate, non-discriminatory reason for terminating Hughes' employment, i.e., dishonesty. Hughes repeatedly lied to the city and to her union concerning her whereabouts on the dates in question. She knowingly planned to use sick time in lieu of vacation time for her trip to Las Vegas. She then presented a falsified physician's note in an attempt to cover up that

plan.

Because under this scenario the presumption of a discriminatory action would be rebutted, the burden would then shift back to Hughes who would have to demonstrate by a preponderance of the evidence that the employer's articulated reason was merely a pretext for discrimination, and not the actual motivation behind its decision. Sarullo, 352 F.3d at 797. In order to show pretext, Hughes must submit evidence which: (1) casts doubt on the legitimate reason proffered by the employer such that a factfinder could reasonably conclude that the reason was a fabrication; or (2) allow the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the employee's termination. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994). The non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons. Id.

Here, Hughes attempts to meet this shifted burden by arguing that the defendants failed to verify her illness during the days spent in Las Vegas, failed to follow their own disciplinary policy, and meted out less severe punishment to male employees who were also accused of abusing the sick leave policy. This argument neither casts doubt on the legitimate reason of the defendants for terminating Hughes' employment, nor allows a

factfinder to infer that discrimination was more likely than not a motivating or determinative cause of it. Hughes planned to go on vacation, she called in sick instead of using vacation time, when given the opportunity to explain, she repeatedly lied to her employer and her union officials, she provided a falsified physician's note, and she refused to cooperate in the investigation when asked to turn over her boyfriend's cell phone records. Moreover, the union president testified that although the city has a progressive discipline policy, some actions result in termination after the first offense. See Dep. of Thomas Ridgick at 34-35. The contract provides that dishonesty is a reason for termination. Id. Hughes' argument does nothing to show the defendants' reason for the termination unworthy of credence.

Hughes also claims that her employer retaliated against her because she filed a grievance against Dennis Posivak, a male co-worker, who wanted to work all of the group's overtime hours. See Pl's Response to Def's Mot for S.J. at 17.

Title VII provides that it shall be unlawful for an employer to discriminate against an employee because she has opposed any practice made an unlawful employment practice by this subchapter, or because she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a). To establish a *prima facie* claim of retaliation under Title VII, a plaintiff must show that she engaged in protected activity, that the employer took an adverse employment action against her, and that there is a causal connection

between the protected activity and the adverse employment action. Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 323 (3d Cir. 2000).

Hughes won the grievance against Posivak, but claims that Posivak continued to harass her verbally. A month before her suspension, Posivak made complaints about Hughes, and said that he wanted to get rid of all women working in the department. Hughes told her supervisor about the comments. She argues that the temporal proximity of these complaints about the co-worker and her termination establishes a *prima facie* case for retaliation.

Opposition to unlawful employment practices may take many forms, including “complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.” Sumner v. United States Postal Service, 899 F.2d 203, 209 (3d Cir. 1990). At essence, a plaintiff alleging retaliation must show some form of opposition, which is communicated to the employer, followed by adverse action by the employer. Id.

It is questionable whether Hughes’ complaints to her employer about Posivak’s negative comments qualify as “protected activity” for purposes of a claim of retaliation. As described above, protected activity involves an employee’s opposition to any practice made an unlawful employment practice, or her making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.

Nevertheless, whether Hughes' actions can be considered protected activity is not dispositive here. Hughes' claim for retaliation fails because she has not met the requirements of the McDonnell Douglas burden shifting analysis, which also apply to claims of retaliation. See Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 187 (3d Cir. 2003). The defendants claim that Hughes' dishonesty was the legitimate justification for the termination, and as shown above, Hughes could offer no evidence showing that this justification was likely pretextual.

Accordingly, I will grant summary judgment in favor of the defendants for Hughes' claims of gender-based employment discrimination.

B. ADA

Hughes also claims that she was terminated from her employment because of her disability and because when she placed the city on notice of her medical condition, the city took action against her in retaliation for seeking an accommodation for that condition.

The Third Circuit Court of Appeals has indicated that the McDonnell Douglas burden-shifting framework, as described above, applies to ADA claims. See Shaner v. Synthes (USA), 204 F.3d 494, 500-01 (3d Cir. 2000); see also Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 667-68 (3d Cir. 1999). Under the ADA, a qualified individual with a disability is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

individual holds” 42 U.S.C. § 12111(8). In order to prevail on a claim under the ADA, a claimant must prove that she is disabled within the meaning of the statute, proving that she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is “regarded as” having such an impairment.⁴ Wilson v. MVM, Inc., 475 F.3d 166, 179 (3d Cir. 2007).

In order to establish a *prima facie* case of disability employment discrimination, Hughes must demonstrate the existence of the following elements: (a) she is a disabled person within the meaning of the ADA; (b) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (c) she has suffered an otherwise adverse employment decision as a result of discrimination. See Shaner, 204 F.3d at 500; see also Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1998); Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998). Although the ADA prevents an employer from discharging an employee based on her disability, it does not prevent an employer from discharging an employee for misconduct, even if that misconduct is related to her disability. Fullman v. Henderson, 146 F. Supp. 2d 688, 699 (E.D. Pa. 2001) (citing Pernice v. City of Chicago, 237 F.3d 783, 785 (7th Cir. 2001) (the ADA does not prevent an employer from dismissing drug-addicted employee who is arrested for possession of drugs); Jones v. American Postal Workers Union, 192 F.3d 417, 429 (4th Cir. 1999) (the ADA is not violated when

⁴ The Amended Complaint indicates that Hughes is proceeding under all three theories in alleging disability.

Postal Service discharges employee for on-the-job threats)).

Whether Hughes is a disabled person within the meaning of the ADA is tenuous at best. To be considered disabled, Hughes must prove that she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Wilson, 475 F.3d at 179. A major life activity is defined as a function such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Sutton v. United Air Lines, 527 U.S. 471, 480 (1999).

Hughes has presented no evidence that she is substantially limited in these types of activities, which the Supreme Court has referred to as “activities that are of central importance to daily life.” Toyota Motor Mfg., Ky., Inc. v Williams, 534 US 184 (2002). Dr. Merckle, Hughes’ endocrinologist, testified that her condition had been “suboptimally” managed with medication until October or November of 2003 when he switched her back to daily insulin injections. See Dep. of Larry Merckle, M.D., at 8-10, 14-16. Before October 2003, Hughes had been taking a regimen of various medications, and would stop taking insulin from time to time with her physician’s consent. Id. Dr. Merckle also testified that he had never placed Hughes on any type of restrictions from work, and he opined that Hughes’ condition did not result in limitations of any activities of daily living or of any functions. Id. at 31-32. “A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment

that presently ‘substantially limits’ a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not ‘substantially limit’ a major life activity.” Sutton, 527 U.S. at 482-483. It “is contrary to both the letter and the spirit” of the ADA to deem a diabetic whose illness does not impair her daily activities disabled simply because she has diabetes. Id. at 483-84. Because Hughes has not produced sufficient evidence to convince a reasonable jury that any of her major life activities are substantially impaired, I find that she is not a disabled person as defined by the ADA.

Nevertheless, even assuming *arguendo* that Hughes could satisfy a *prima facie* case for disability determination, this claim would still fail. The McDonnell Douglas burden-shifting framework, as described above, applies to ADA claims. See Shaner, 204 F.3d at 500-01. When the burden of production would shift to the defendants, they would articulate that Hughes’ dishonesty was the legitimate justification for the termination. When the burden shifted back to Hughes, she could offer no evidence showing that this justification was likely pretextual.⁵

Hughes also claims that the defendants retaliated against her in violation of the ADA. To establish a *prima facie* case of retaliation under the ADA, a plaintiff must demonstrate the following elements: (1) that she engaged in an ADA-protected activity;

⁵ This result is identical whether Hughes’ claim were to proceed under the theory of having a disability, a record of a disability, or “regarded as” having a disability. Wilson, 475 F.3d at 179.

(2) an adverse employment action by the defendant employer, either after or contemporaneous with the protected activity; and (3) a causal connection between the protected activity and the adverse employment action. Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001). Protected activities under the ADA generally include: (1) opposition to a practice made unlawful under the ADA; and (2) participation in an ADA investigation, proceeding, or hearing by making a charge, testifying, or otherwise assisting in the investigation. See 42 U.S.C. § 12203(a); Merit v. Southeastern Pa. Transp. Auth., 315 F. Supp. 2d 689, 704 (E.D. Pa. 2004). Informal charges or complaints of discrimination are sufficient to constitute protected activities for establishing a *prima facie* case of retaliation. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 701-02 (3d Cir. 1995).

Here, the evidence shows that the only documented request for an accommodation by Hughes was in January 2002 when she requested a locker in which to store her syringes, a request which the city granted. Hughes testified that she did not ask Kathy Reese, her department head, for any other accommodations. Defendant Reichard also testified that Hughes never made the city aware of any additional accommodations. Furthermore, Hughes made no ADA charges against the city before her termination. Thus, I find that Hughes did not engage in protected activity under the ADA, and her claim for retaliation must fail.

For the sake of completeness, I must again note that whether Hughes participated

in protected activity is not dispositive here. In the alternative, if she were able to satisfy a *prima facie* case for retaliation, the claim would fail because of her inability to show that the defendants' legitimate justification for her termination was likely pretextual. See Shellenberger, 318 F.3d at 187.

Accordingly, I will grant summary judgment in favor of the defendants for Hughes' claim of disability-based employment discrimination.

C. Procedural Due Process

The Fourteenth Amendment to the United States Constitution prohibits deprivations "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under 42 U.S.C. § 1983, every person who, under color of any state law, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

When analyzing a § 1983 claim alleging a state actor's failure to accord appropriate levels of procedural due process, a court's inquiry is bifurcated. First, it must determine whether the asserted interest is encompassed within the Fourteenth Amendment's protection of life, liberty, or property; if so, the court must then ask whether the procedures available provided the plaintiff with adequate due process. Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

To have a property interest in a job, a person must have a legitimate entitlement to such continued employment. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). State law determines whether such a property right exists. Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005). A “for-cause” termination provision in an employment agreement, like the one here, may establish a protected property interest. Linan-Faye Constr. Co. v. Housing Auth., 49 F.3d 915, 932 (3d Cir. 1995) (a contract right is recognized as property protected under the Fourteenth Amendment where the contract itself includes a provision that the state entity can terminate the contract only for cause). “To have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment.” Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). In the governmental context, while at-will employment is not generally considered a property interest, see Thomas v. Town of Hammonton, 351 F.3d 108, 113 (3d Cir. 2003), employment contracts that contain a “just cause” provision create a property interest in continued employment. Kelly v. Sayreville, 107 F.3d 1073, 1077 (3d Cir. 1997).

Thus, because the collective bargaining agreement between the city and Hughes’ former union includes a “for-cause” termination provision, as shown above, I find that Hughes had a protected property interest in her employment with the city.

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), the Supreme Court held that when threatened with dismissal, a public employee with a property interest in her job is entitled to “a pre-termination opportunity to respond, coupled with post-termination administrative procedures.” Id. at 547. The pre-deprivation hearing need not be elaborate, but it is necessary, even if extensive post-deprivation remedies are afforded. Id. at 545. Prior to deprivation, “the tenured public employee is entitled to notice of the charges against her, an explanation of the employer’s evidence, and an opportunity to present her side of the story.” Id. The adequacy of any hearing must be evaluated in reference to the “two essential requirements of due process, . . . notice and an opportunity to respond.” Id. at 546.

No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. Kremer v. Chemical Construction Corp., 456 U.S. 461, 483 (1982). “Due process is flexible and calls for such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

The collective bargaining agreement governing Hughes’ former employment included grievance-arbitration procedures. Hughes availed herself of these procedures immediately following her suspension and her termination. See Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000) (Before bringing a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to her, unless those processes are unavailable or patently inadequate). The grievance process was

exhausted. However, the union determined not to carry the matter to arbitration.

Although a union can decide not to take an employee's claim to arbitration or can resolve a grievance before arbitration, it does so under a duty of fair representation and may be sued for breach of that duty. Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564, 1572 (3d Cir. 1995). The record is silent as to whether Hughes has brought an action against her former union in state court for an alleged breach.

In a case against a public employer "where an adequate grievance-arbitration procedure is in place and is followed, a plaintiff has received the due process to which she is entitled." Dykes, 68 F.3d at 1565. Grievance-arbitration procedures under collective bargaining agreements have "incorporated safeguards adequate to resolve . . . allegations in a manner consistent with the demands of due process." Id. at 1572; see also Jackson v. Temple Univ., 721 F.2d 931, 933 (3d Cir. 1983). If a plaintiff does not allege that the public employer interfered with the union's decisions in the grievance process, then the plaintiff's due process claims are properly dismissed. See Jackson, 721 F.2d at 933.

Being a public employee covered by a collective bargaining agreement, Hughes had a property interest in her employment. She took advantage of the grievance procedures in place. She has alleged no interference by the defendants with the union's decisions. As such, Hughes was provided all the procedural process due her, and no due process violation can lie. Accordingly, I will grant summary judgment in favor of the defendants on Hughes' procedural due process claim.

D. FMLA

Hughes finally claims that the defendants interfered with her right to take statutorily-protected leave, and took an adverse employment action against her for taking time off from work which should have been afforded protection under the FMLA.

The FMLA, 29 U.S.C. § 2601, *et seq.*, was enacted to provide leave for workers whose personal or medical circumstances require that they take time off from work in excess of what their employers are willing or able to provide. Victorelli v. Shadyside Hosp., 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101). The Act is intended “to balance the demands of the workplace with the needs of families ... by establishing a minimum labor standard for leave” that lets employees “take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.” Churchill v. Star Enters., 183 F.3d 184, 192 (3d Cir. 1999) (quoting 29 U.S.C. § 2601(b)(1), (2)). To accomplish these goals, courts have recognized that the FMLA creates two separate causes of action: (1) so-called “interference” or “entitlement” claims; and (2) “retaliation” or “discrimination” claims. Peter v. Lincoln Technical Inst., Inc., 255 F. Supp. 2d 417, 438 (E.D. Pa. 2002).

Interference claims arise from violations of 29 U.S.C. § 2615(a)(1), which provides that it is unlawful for an employer “to interfere with, restrain, or deny the exercise of or the attempt to exercise” any right secured by the FMLA. 29 U.S.C. § 2615(a)(1). To assert an interference claim, “the employee only needs to show that she

was entitled to benefits under the FMLA and that she was denied them.” Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005) (citing 29 U.S.C. §§ 2612(a), 2614(a)). Under this theory, the employee need not show that she was treated differently than others, and the employer cannot justify its actions by establishing a legitimate business purpose for its decision. Id. at 119-120. An interference action is not about discrimination, it is only about whether the employer provided the employee with the entitlements guaranteed by the FMLA. Id. at 120. Because an FMLA interference claim is not about discrimination, a McDonnell-Douglas burden-shifting analysis is not required. Sommer v. Vanguard Group, 461 F.3d 397, 399 (3d Cir. 2006) (citing Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 485 (D. N.J. 2002)).

Pursuant to FMLA regulations, an employee must give an employer notice that she needs to take FMLA leave. 29 C.F.R. § 825.302. If the leave is foreseeable, the employee must provide thirty days’ notice. 29 C.F.R. § 825.302(a). If thirty days’ notice is not practicable, then notice must be given “as soon as practicable.” Id. “As soon as practicable” means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, “as soon as practicable” ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee. 29 C.F.R. § 825.302(b). To satisfy the notice requirement, an employee need not specifically mention the FMLA or assert

rights under it but may only state that leave is needed for an expected birth or adoption, for example. 29 C.F.R. § 825.302(c). An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Id. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. Id.

Here, the record shows that Hughes purchased the ticket for the return flight from Las Vegas for the second day after she was scheduled to return to work. She must have realized that she needed to somehow explain her absence to her employer for those two days. Because she had planned to undergo a cosmetic procedure while in Las Vegas, she could have informed her employer thirty days before the trip as required for foreseeable leave, or even as soon as practicable if such a leave could be considered not foreseeable, if she needed to take a leave of absence to extend the recovery period. This would have made the defendants aware of the need for the leave, its anticipated timing and duration. It would further have allowed them to determine whether the requested leave qualified under the Act. Nevertheless, Hughes gave her employer no such notice of a need to take an FMLA-qualifying leave. Accordingly, Hughes' FMLA interference claim fails.

Furthermore, that she became ill while in Las Vegas does not change the outcome of this claim. Hughes had ample time to inform her employer, even verbally, of the

alleged need for an FMLA leave. She could have telephoned from Las Vegas to give the required notice, or explained the need for leave during the meeting in Reichard's office on the day she returned or during her several month suspension.

Retaliation or discrimination claims, by contrast, arise from violations of 29 U.S.C. § 2615(a)(2), which prohibits an employer from “discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful by this subchapter.” 29 U.S.C. § 2615(a)(2). To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must show that (1) she took an FMLA leave, (2) she suffered an adverse employment decision, and (3) the adverse decision was causally related to her leave. Conoshenti v. Public Svc. Electric & Gas Co., 364 F.3d 135 (3d Cir. 2004). Once a plaintiff makes out a *prima facie* case for retaliation under the FMLA, the McDonnell Douglas burden-shifting framework is implicated. Weston v. Pennsylvania, 251 F.3d 420, 432 (3d Cir. 2001).

Assuming *arguendo* that Hughes satisfies the elements for a *prima facie* case, her claim for retaliation under the FMLA would still fail. As discussed above, under the burden-shifting analysis, Hughes would be unable to show that the defendants' legitimate justification for her termination, i.e., her dishonesty, was likely pretextual.

Accordingly, I will grant summary judgment in favor of the defendants on Hughes' FMLA claims. An appropriate Order follows.

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

CATHERINE E. HUGHES,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 05-5444
	:	
CITY OF BETHLEHEM, et al.,	:	
Defendants	:	

ORDER

STENGEL, J.

AND NOW, this 27th day of March, 2007, upon consideration of the defendants' motion for summary judgment (Document #16), the plaintiff's response thereto (Document #27), and after a hearing on the motion with all parties present, it is hereby ORDERED that the motion is GRANTED in its entirety.

The Clerk of Court is directed to mark this case closed for all purposes.

BY THE COURT:

/s/ Lawrence F. Stengel _____
LAWRENCE F. STENGEL, J.

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

CATHERINE E. HUGHES,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 05-5444
	:	
CITY OF BETHLEHEM, et al.,	:	
Defendants	:	

ORDER OF JUDGMENT

STENGEL, J.

AND NOW, this 27th day of March, 2007, in accordance with my Order granting the defendants' motion for summary judgment, and in accordance with Federal Rule of Civil Procedure 58, judgment is hereby entered in favor of defendants City of Bethlehem, Jean Zweifel, Mayor John Callahan, and Dennis Reichard, and against the plaintiff Catherine E. Hughes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.