

I. FACTUAL RECORD AND PROCEDURAL HISTORY

The defendant, the City of Bethlehem (“the City”), submitted a statement of undisputed material facts on June 16, 2017. Statement of Undisputed Material Facts in Support of Summ. J. Mot. of Def. City of Bethlehem (“Undisputed Facts”), Doc. No. 25-1. The plaintiff, Richard Hoffman (“Hoffman”) did not submit a statement of undisputed material facts (or a response to the City’s statement), and instead incorporated by reference the City’s statement of undisputed material fact into his opposition to the motion for summary judgment. Pl.’s Mem. of Law in Opp. to Def. City of Bethlehem’s Mot. for Summ. J. (“Pl.’s Opp.”) at 3, 5, Doc. No. 28. Thus, the material facts in this case as stated below are undisputed, and the court may resolve the defendant’s motion as a matter of law.

Hoffman is a former patrol officer for the City. Undisputed Facts at ¶ 1. The Bethlehem City Council (“City Council”) terminated Hoffman on March 18, 2014. Chief Craig S. Finnerty became Chief of the BPD in late August 2013, and ultimately made the decision that the Bethlehem Police Department (“BPD”) would request termination of Hoffman. Def. City of Bethlehem’s Exs. for Mot. for Summ. J. (“Record”) at 00505-00506, Doc. No. 26.¹ Prior to his termination, former City Solicitor John F. Spirk, Jr., Esq., prepared a memorandum addressed to the City Council explaining that the BPD requested Hoffman’s discharge, and providing the BPD’s reasons for that request. Undisputed Facts at ¶ 2; *see also* Record at 0020. Solicitor Spirk’s memorandum, dated December 30, 2013, states that Hoffman had been involved in four off-duty alcohol-related incidents, had been subject to two disciplinary actions, and had been internally investigated for various other incidents. *Id.* Those prior incidents include: (1) a physical altercation in a bar with an on-duty Philadelphia police officer in 2005, (2) failing to

¹ Although the defendant submitted the exhibits under separate exhibit designations on the docket, each page contains a Bates-type number in the lower right-hand corner. For ease of reference, the court has referred to this number rather than to the exhibit name.

detect a nine millimeter handgun on an individual he arrested and searched in 2010, (3) grabbing another man by the throat in a Bethlehem pub, and subsequently threatening to use his authority to cause the pub owner “problems” in 2013, (4) transmitting obscene communications over his mobile data terminal while on duty in violation of BPD regulations, and (5) getting asked to leave a casino for his behavior in 2013. *Id.* at 0020-0022.

The final incident the memorandum describes is a car accident that occurred on August 8, 2013, for which BPD charged Hoffman with driving under the influence and careless driving. *Id.* at 0020. After consuming alcohol at a concert, and then subsequently at the Fraternal Order of Police (“FOP”) Hall, Hoffman attempted to drive home with a blood-alcohol level of .16, twice the legal driving limit. *Id.* at 0022. At approximately 3:00 a.m., he drove his vehicle into a parked car, forcing three other vehicles to collide and flipping his own vehicle on its side. *Id.* at 0023. He was due to report to work at 6:45 a.m. that morning, and would have still been intoxicated based on his blood-alcohol level at the time of the accident. *Id.* Hoffman originally told the investigating officers that he crashed after attempting to swerve to avoid a pedestrian, but after a witness refuted that explanation, he admitted that he was distracted by an incoming text message when the collision occurred. *Id.* Hoffman’s conduct related to the August 8, 2013, incident violated various police directives and provisions of the Law Enforcement Code of Ethics. *Id.* Again, Hoffman does not dispute the facts in the memorandum related to the August 8, 2013 car accident or any of his prior misconduct.

The memorandum concludes that after considering Hoffman’s “disciplinary history, past job performance, the potential impact of the violation on citizens, and [Hoffman’s] truthfulness during the investigation,” the BPD believed “that the conduct of Officer Hoffman [was] so egregious that termination [was] warranted.” *Id.* at 0024. The memorandum also says that

“[t]hrough his repeated conduct Officer Hoffman has diminished the reputation of and confidence in the BPD and lowered the respect for police officers as a whole.” *Id.*

On February 24, 2014, the City Council held a public hearing, which Hoffman chose not to attend. Undisputed Facts at ¶¶ 17, 18. Chief Finnerty testified that after reviewing the results of the investigation into the August 8, 2013 car accident and Hoffman’s personnel file, he recommended to the City Council that the City terminate Hoffman. *Id.* at ¶¶ 19, 21. According to BPD guidelines, the standard discipline range for off-duty drunk driving with collision is a suspension lasting for five to twenty days, but Chief Finnerty believed that more serious discipline was warranted based on Hoffman’s repeated violations, aggravating factors surrounding the accident, and Hoffman’s prior disciplinary record. Record at 0040-0044. Such aggravating factors included, according to Chief Finnerty, the destruction of property, the risk to which Hoffman subjected himself and others, the likelihood that Hoffman would have reported for duty the next morning while still intoxicated, Hoffman’s dishonesty about the cause of the accident during the investigation, the resulting negative publicity for the BPD, and the potential lack of confidence in the BPD that the incident could cause. *Id.* at 00503, 00505.

Chief Mark DiLuzio, who became Police Chief of the BPD in January 2014, also testified and agreed with Finnerty’s recommendation that the City terminate Hoffman because he had no confidence that Hoffman could any longer reliably and consistently follow BPD directives or maintain the high standard of conduct expected of the City’s police officers. Undisputed Facts at ¶¶ 22, 25, 26. He stated that incidents such as the August 2013 accident defeat the public trust in the BPD, affect the BPD’s integrity and credibility, affect the BPD’s morale, and affect the BPD’s ability to discipline its officers. Record at 00173, 00175. Chief DiLuzio also opined at the Council hearing that the biggest problem with keeping Hoffman on the force was “credibility

and also a possible recurrence” of the incident, and that Hoffman’s termination was consistent with BPD directives and protocol. *Id.* at 00179, 00182. On March 18, 2014, the City Council terminated Hoffman’s employment by resolution, effective December 20, 2013. Undisputed Facts at ¶ 28.

The FOP challenged the City Council’s decision to terminate Hoffman through grievance arbitration. *Id.* at ¶ 29. A hearing commenced on October 8, 2014, during which Chief Finnerty testified that the circumstances surrounding the August 8, 2013, car accident alone warranted termination because of “the aggressive behavior while intoxicated, the careless driving and texting,” and “the destruction of four other cars on top of the fact that [Hoffman] was scheduled to report to duty the next morning.” *Id.* at ¶ 30; Record at 00503. He also testified that “there seemed to be an ongoing trend of alcohol, disorderly behavior, aggressive behavior and poor temper.” Record at 00502. Chief DiLuzio also testified that after reviewing the police reports about every incident in which Hoffman was involved, and after reviewing BPD guidelines, protocols, and directives, he could come to no other conclusion than agreeing with Chief Finnerty’s recommendation of termination. Undisputed Facts at ¶ 37. He said that Hoffman’s behavior seemed to follow a pattern demonstrating “a lack of understanding of the directives” and an “inability to conform his behavior to his directives on and off duty.” Record at 00525. He also described the importance of a police department maintaining citizens’ trust and respect. *Id.* at 00524.

On February 9, 2015, the labor arbitrator rendered a decision disagreeing with Chief Finnerty’s recommendation of termination, and ordered that Hoffman be reinstated conditioned on the City’s right to require a fitness for duty evaluation. Undisputed Facts at ¶ 41. The City appealed, and also had Frank M. Dattilio, Ph.D., a clinical psychologist, perform a fitness for

duty evaluation. *Id.* at ¶ 42. Dr. Dattilio stated in his report that it was his opinion that Hoffman was “unfit for work as a patrolman due [to] the strong potential for relapse.” Record at 00726. Because Dr. Dattilio’s evaluation concluded that Hoffman was not fit for duty, the BPD did not reinstate him and the City Solicitor advised Hoffman’s attorney that the City owed no duty of reinstatement. Undisputed Facts at ¶ 43; Record at 00684. After receiving the written positions of both the FOP and the City, the arbitrator rendered a second opinion agreeing with the City and holding that it had no obligation to reinstate Hoffman because of his failure to pass a fitness for duty evaluation. *Id.* at ¶¶ 44-46. The FOP did not appeal that decision. According to Mayor Robert Donchez, the City did not reinstate Hoffman because of Hoffman’s ethics violations, and the fact that the position of a police officer involves the public safety of the community. *Id.* at ¶ 77.

II. DISCUSSION

A. Standard of Review

A district court “shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Additionally, “[s]ummary judgment is appropriate when ‘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 judgment as a matter of law.’” *Wright v. Corning*, 679 F.3d 101, 103 (3d Cir. 2012) (quoting *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Cir. 1995)). An issue of fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Id.*

The party moving for summary judgment has the initial burden “of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). Once the moving party has met this burden, the non-moving party must counter with “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *see* Fed. R. Civ. P. 56(c) (stating that “[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . .; or . . . [by] showing that the materials cited do not establish the absence . . . of a genuine dispute”). The non-movant must show more than the “mere existence of a scintilla of evidence” for elements on which the non-movant bears the burden of production. *Anderson*, 477 U.S. at 252. Bare assertions, conclusory allegations, or suspicions are insufficient to defeat summary judgment. *See Fireman’s Ins. Co. v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982) (indicating that a party opposing a motion for summary judgment may not “rely merely upon bare assertions, conclusory allegations or suspicions”); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (explaining that “speculation and conclusory allegations” do not satisfy non-moving party’s duty to “set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor”). Additionally, the non-moving party “cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial.” *Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000). Thus, it is not enough to “merely [] restate[] the allegations” in the complaint; instead, the non-moving party must “point to concrete

evidence in the record that supports each and every essential element of his case.” *Jones v. Beard*, 145 F. App’x 743, 745-46 (3d Cir. 2005) (citing *Celotex*, 477 U.S. at 322). Moreover, arguments made in briefs “are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion.” *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109-10 (3d Cir. 1985).

“When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party’s favor.” *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). 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 plaintiff on the evidence presented.” *Anderson*, 477 U.S. at 252. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial’” and the court should grant summary judgment in favor of the moving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citation omitted). Nonetheless, when one party’s claims are “blatantly contradicted by the record, so that no reasonable jury could believe it,” the court should not take those claims as true for the “purposes of ruling on a Motion for Summary Judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

B. Analysis

“The Rehabilitation Act forbids employers from discriminating against persons with disabilities in matters of hiring, placement, or advancement.” *Shiring v. Runyon*, 90 F.3d 827, 830-31 (3d Cir. 1996). The burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies in analyzing the parties’ burdens in proving and defeating claims of discrimination under the Rehabilitation Act. *Wishkin*, 476 F.3d at 185. Accordingly, the

plaintiff bears the burden of establishing a prima facie case of discrimination under the Rehabilitation Act: “(1) that he or she has a disability, (2) that he or she is otherwise qualified to perform the essential functions of the job . . . ; and (3) that he or she was nonetheless terminated or otherwise prevented from performing the job.” *Shiring*, 90 F.3d at 831. In the Rehabilitation Act context, an individual who is regarded as having “a physical or mental impairment which substantially limits one or more of such person’s major life activities” qualifies as an “individual with a disability.” 29 U.S.C. § 705(20)(B). Alcoholism is a disability that falls under the protections of the Rehabilitation Act. *See Golson-El v. Runyon*, 812 F. Supp. 558, 560 (E.D. Pa.), *aff’d sub nom. Golson-El v. U.S. Postal Serv.*, 8 F.3d 811 (3d Cir. 1993).

If the plaintiff establishes a prima facie case, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason” for the employer’s action. *McDonnell Douglas*, 411 U.S. at 802. If the employer meets this burden, the employer has successfully rebutted the presumption of discrimination, but the plaintiff is then afforded an opportunity to show that the employer’s proffered reason for the action was pretextual. *Wishkin*, 476 F.3d at 185 (citing *McDonnell Douglas*, 411 U.S. at 804). A plaintiff may do so, and thus defeat summary judgment in the employer’s favor, by either “(i) discrediting the employer’s proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.” *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

The City contends that summary judgment is appropriate because Hoffman has failed to (1) establish a prima facie case because he had not offered evidence that the City regarded him as an alcoholic, and (2) show that the nondiscriminatory reasons it offered for firing and failing to

reinstate Hoffman were pretextual. Mem. of Law in Supp. of Mot. for Summ. J. of Def. City of Bethlehem at 3, Doc. No. 25. Hoffman contends that a jury question exists as to why he was not reinstated. Pl.'s Opp. at 11.

Assuming that Hoffman has made out a prima facie case by putting forth some evidence that the City regarded him as an alcoholic and that he was otherwise qualified to perform the essential functions of the job, the City has proffered numerous legitimate, nondiscriminatory reasons for terminating and declining to reinstate him. The undisputed factual record demonstrates that the BPD requested Hoffman's termination, and the City Council subsequently terminated him, because of, *inter alia*, the prior incidents of misconduct outlined in Solicitor Spirk's memorandum to the City Council that "diminished the reputation of and confidence in the BPD and lowered the respect for police officers as a whole," Record at 0024; Chief Finnerty's belief that Hoffman could no longer reliably and consistently follow BPD directives or maintain the high standard of conduct expected of the City's police officers, Undisputed Facts at ¶¶ 22, 25, 26, Record at 00525; the possibility of an incident like the August 2013 car accident that endangered the lives of both Hoffman and citizens recurring, Record 00179, 00503; and the "ongoing trend of alcohol, disorderly behavior, aggressive behavior and poor temper in situations that [Hoffman] found himself," *id.* at 00502. The undisputed factual record demonstrates that in addition to those reasons, the BPD refused to reinstate Hoffman after the conclusion of the arbitration proceedings because a clinical psychologist found that he was unfit for duty, *id.* at 00726; an arbitrator held that the City had no obligation to reinstate him, Undisputed Facts at ¶¶ 44-46; and, according to Mayor Donchez, because of Hoffman's ethics violations, and the fact that the position of a police officer involves the public safety of the community, *id.* at ¶ 77.

These reasons, as long as they were not pretextual, all constitute legitimate, nondiscriminatory reasons for an adverse employment action. While it is true that an employer may not take an adverse employment action against an employee simply for being an alcoholic, termination based on misconduct is not analogous to termination based on alcoholism, even if an employee's alcoholism caused the misconduct. *See Sever v. Henderson*, 220 F. App'x 159, 161 (3d Cir. 2007) ("Though an employer is prohibited from discharging an employee based on his disability, the employer is not prohibited from discharging an employee for misconduct, even if that misconduct is related to his disability."); *see also Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 980-81 (3d Cir. 1998). Employers need not establish special behavioral and ethical standards for alcoholics who engage in misconduct in order to comply with federal law.² *See Sever*, 220 F. App'x at 161 ("[E]ven assuming that [the plaintiff] suffers from a disability, his employer may nevertheless hold him to certain 'qualification standards,' including the requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace.").

By admitting all of the facts in the City's Undisputed Facts, and by failing to provide his own statement of material facts, the court must conclude that Hoffman does not dispute that the City's proffered reasons are the actual reasons it terminated and refused to reinstate him. Thus, Hoffman has failed to meet his burden of establishing that the City's proffered reasons were pretextual. That is, he has failed to "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the [City's] articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or

² The Rehabilitation Act makes this clear by excluding from coverage "any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 705(20)(C)(v).

determinative cause of the [City's] action.” *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Thus, the court must grant summary judgment in favor of the City.³

III. CONCLUSION

The undisputed record demonstrates that the City fired and refused to reinstate Hoffman for legitimate, nondiscriminatory reasons, and not because it regarded him as an alcoholic. Hoffman has not met his burden of showing that the City's proffered reasons for the adverse employment actions were pretextual. Thus, the court will grant summary judgment in favor of the City.

A separate order follows.

BY THE COURT:

/s/ Edward G. Smith
EDWARD G. SMITH, J.

³ In his opposition to the City's motion, Hoffman raises several substantive challenges to the arbitrator's decision and Dr. Dattilio's finding that he was unfit for duty at the time. Because this is a free-standing employment discrimination action and not an appeal of any sort it would be inappropriate for the court to assess the merits of the arbitrator's or Dr. Dattilio's opinions. The only issue before the court is whether the City has rebutted a prima facie case of discrimination by presenting legitimate, nondiscriminatory reasons for terminating and refusing to reinstate Hoffman, and whether Hoffman has met his burden of demonstrating that those reasons were pretextual.

Hoffman also challenges the City's refusal to allow him to implement some of Dr. Dattilio's recommendations before deciding that it would not reinstate him. It is not the court's duty in this case to review the City's compliance with Dr. Dattilio's report. First, the recommendations are just that—recommendations, not mandates. Second, Dr. Dattilio's report is not binding on the City. Finally, again, all the court must decide in order to dispose of the City's motion for summary judgment is whether the City presented legitimate, nondiscriminatory reasons for terminating and refusing to reinstate Hoffman, and whether Hoffman met his burden of demonstrating that those reasons were pretextual. The City has presented such legitimate reasons—for example, Hoffman's misconduct and Dr. Dattilio's conclusion that he was unfit to serve as a patrolman—and Hoffman has failed to put forth evidence demonstrating that those reasons were pretextual.