

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

<p>DONALD WORTHINGTON</p> <p style="text-align:center">v.</p> <p>CHESTER DOWNS AND MARINA, LLC, OWNER/LICENSEE OF HARRAH'S PHILADELPHIA d/b/a HARRAH'S PHILADELPHIA CASINO AND RACETRACK</p>	<p>CIVIL ACTION</p> <p>NO. 17-1360</p>
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Baylson, J.

December 21, 2018

MEMORANDUM RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this case, we must determine whether genuine disputes of material fact preclude summary judgment on behalf of Defendant, Chester Downs and Marina, LLC, Owner/Licensee of Harrah's Philadelphia d/b/a Harrah's Philadelphia Casino and Racetrack. Plaintiff Donald Worthington, a former employee of Defendant, initiated this suit alleging that Defendant violated the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"), and related Pennsylvania law, by unlawfully terminating his employment as a Table Games Dealer at Defendant's casino in Chester, Pennsylvania.

For the reasons discussed below, summary judgment for Defendants is GRANTED IN PART and DENIED IN PART.

I. UNDISPUTED FACTS

The following is a fair account of the factual assertions at issue in this case, as taken from both parties' Statements of Fact and not genuinely disputed.

Defendant employed Plaintiff as a “table games dealer” at its casino in Chester, Pennsylvania from April, 2011, to July 6, 2016. See Def.’s Statement of Undisputed Material Facts (ECF 32-2, “SUMF”) ¶ 2; Pl.’s Resp. to Def.’s Statement of Undisputed Material Facts (ECF 34-1, “Resp. to SUMF”) ¶ 2. On June 12, 2016, Plaintiff was involved in a physical altercation with Allen Glassman, another dealer with whom Plaintiff had previously had a contentious relationship. SUMF ¶¶ 8, 10; Resp. to SUMF ¶¶ 8, 10. The incident was precipitated by both dealers’ desire to sign the “early-out” list in order to obtain permission to leave work early. SUMF ¶¶ 10–21; Resp. to SUMF ¶¶ 10–21. At the time of the incident, Plaintiff remained in close proximity to Glassman, who had possession of the early-out list. Id. ¶ 18. After Glassman signed the list, he turned around and “body checked” Plaintiff as Plaintiff was waiting to sign the list. Id. ¶ 19

Plaintiff immediately reported the altercation to William Totten, Assistant Shift Manager. SUMF ¶ 22; Resp. to SUMF ¶ 22. Totten took Plaintiff’s statement and offered an ambulance to take Plaintiff to the hospital. SUMF ¶¶ 24–27; Resp. to SUMF ¶¶ 24–27. Plaintiff asked Totten about workers’ compensation benefits and Totten instructed him to tell the hospital staff that his injury was work related. Resp. to SUMF ¶ 25. Plaintiff declined the offer of an ambulance and, at some point, drove himself to the hospital due to pain in his shoulder. SUMF ¶¶ 27–28; Resp. to SUMF ¶¶ 27–28.

Following the altercation, Glassman’s employment was suspended pending an investigation. SUMF ¶ 66. Glassman’s employment was then terminated as a result of the June 12, 2016 incident on June 27, 2016. SUMF ¶ 69.

The incident between Plaintiff and Glassman was captured on surveillance video. SUMF ¶ 29; Friedman Decl. Ex. 9. On June 12, 2016, Totten reviewed the surveillance footage and wrote

in his Accident Investigation Form that the primary cause of the accident was Glassman deliberately body checking Plaintiff. See Opp'n Ex. G. On June 13, 2016, Tim Kreischer, Defendant's Employee Labor Relations Manager, viewed the surveillance video and emailed Veronica Bethea Durham, Risk Manager, to report that Plaintiff initiated contact with Glassman and both dealers appeared to be at fault. SUMF ¶¶ 34–35; Resp. to SUMF ¶¶ 34–35; Friedman Decl. Ex. 12. Charles O'Hala, Vice President of Human Resources, also reviewed the video one week after the incident and reported seeing elements of physical contact. SUMF ¶ 36; Resp. to SUMF ¶ 36; O'Hala Dep. (Opp'n Ex. W) 25:8-12.

On June 14, 2016, Plaintiff attended a meeting (the "June 14th Meeting") with Durham, Kreisher, and other representatives of Defendant. SUMF ¶ 37; Resp. to SUMF ¶ 37. At the meeting, Plaintiff claims to have disclosed his injury, and to have expressed an intent to file a claim for workers' compensation. SUMF ¶ 39; Resp. to SUMF ¶¶ 37, 39. Plaintiff recalls being told by a representative of Defendant that his injury was not work related and he was ineligible for such benefits. SUMF ¶¶ 39–40; Resp. to SUMF ¶¶ 39–40.

On June 15, 2016, Plaintiff requested FMLA leave. SUMF ¶ 82; Resp. to SUMF ¶ 82. The request was evaluated by a team that was separate from the team making Plaintiff's employment termination decision, and Plaintiff was ultimately approved for a combination of FMLA leave and Defendant's in-house medical leave for a total term of six-months. SUMF ¶¶ 80, 83–89; Resp. to SUMF ¶¶ 80, 83–89.

Following the June 14th Meeting, Totten re-reviewed the surveillance footage and determined, as memorialized in an email dated June 20, 2016, that Plaintiff was at least partially at fault for the incident with Glassman. SUMF ¶¶ 32–33; Resp. to SUMF ¶¶ 32–33. Defendant then made numerous phone calls to Plaintiff between June 14, 2016 and July 5, 2016. SUMF ¶¶

44–56; Resp. to SUMF ¶¶ 44–56. Defendant explains these calls were meant to give Plaintiff an opportunity to tell his side of the story as Defendant considered whether to terminate Plaintiff’s employment. SUMF ¶ 44–46. Plaintiff, on the other hand, felt the calls were intended to intimidate and harass him. Resp. to SUMF ¶ 44.

Plaintiff’s employment was terminated by letter on July 6, 2016. SUMF ¶ 60; Resp. to SUMF ¶ 60. Glassman was suspended immediately following the incident on Jun 12, 2016, and his employment was terminated on June 27, 2016. SUMF ¶¶ 66–69.

II. PROCEDURAL BACKGROUND

Plaintiff filed the Second Amended Complaint, which is the operative complaint at issue in this Motion, on August 21, 2017. (ECF 19). The Second Amended Complaint asserts the following claims:

- Count I: Disability Discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (the “ADA”);
- Count II: Retaliation under the ADA;
- Count III: Disability Discrimination under the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. (“PHRA”);
- Count IV: Retaliation under the PHRA;
- Count V: Retaliation and Interference under the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (“FMLA”); and
- Count VI: Wrongful Discharge in violation of Pennsylvania Public Policy, as articulated through the Workers’ Compensation Act, 77 P.S. § 1 et seq.

Defendant then filed this Motion for Summary Judgment on May 4, 2018. (ECF 32, “Mot.” or “Motion”). Plaintiff responded in opposition on June 4, 2018 (ECF 34, “Opp’n”), Defendant filed a Reply on June 13, 2018 (ECF 35, “Reply”), and Plaintiff filed a Surreply with leave of

Court on June 21, 2018 (ECF 38, “Surreply”). The Court then held oral argument on December 3, 2018.

III. LEGAL STANDARD

A district court should grant a motion for summary judgment if the movant can show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute 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 factual dispute is “material” if it “might affect the outcome of the suit under the governing law.” Id.

A party seeking summary judgment always bears the initial responsibility for informing the district 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 moving party’s initial burden can be met simply by “pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325. After the moving party has met its initial burden, the adverse party’s response must, “by citing to particular parts of materials in the record” set out specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(c)(1)(A). “Speculation and conclusory allegations do not satisfy [the non-moving party’s] duty.” Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999) (superseded by statute on other grounds as recognized by P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 730 (3d Cir. 2009)). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor.” Id. Under Rule 56, the Court must view the

evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

IV. DISCUSSION

A. Disability Discrimination under the ADA and PHRA (Counts I and III)

Counts I and III allege discrimination under different frameworks—Count I alleges discrimination under the ADA, and Count III alleges discrimination under the PHRA. The ADA prohibits “discriminat[ion] against a qualified individual on the basis of disability in regard to . . . the hiring, advancement, or discharge of employees.” 42 U.S.C. § 12112(a). The PHRA makes it unlawful “[f]or any employer because of the . . . non-job related handicap or disability . . . to discharge from employment such individual . . . if the individual . . . is the best able and most competent to perform the services required.” 43 P.S. § 955(a).

Both of Plaintiff’s discrimination claims are subject to the three-part burden-shifting framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and can be analyzed together. See Oden v. SEPTA, 671 F. App’x 859, 862 (3d Cir. 2016) (explaining the ADA and PHRA are to be “interpreted consistently and have the same standard for determination of liability”). *First*, a plaintiff must establish a *prima facie* case of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802. *Second*, if the plaintiff is successful, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the treatment. Id. at 802–03. *Third*, if the defendant successfully puts forth such a reason, the burden shifts back to the plaintiff to prove that the defendant’s explanation is merely a pretext for the employment discrimination. Id. at 804–05.

To make out a *prima facie* case under the ADA, an employee must establish that he “(1) has a disability; (2) is a qualified individual; and (3) has suffered an adverse employment action

because of that disability.” Deane v. Pocono Medical Center, 142 F.3d 138, 142 (3d Cir. 1998) (citing ADA, § 2 et seq.).

Defendant first argues that Plaintiff cannot establish that he is a qualified individual—the second prong of his prima facie ADA claim—because the record shows that Plaintiff provided contradictory representations about his ability to work in this lawsuit as compared with his parallel application for disability benefits. Mot. at 5–9 (explaining how Plaintiff sought payments for “full disability” that began on June 12, 2016 and was “ongoing” as of the date of the application on May 29, 2017).¹ The Supreme Court considered a similar situation in Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), where a plaintiff claimed to the Social Security Administration that his injury rendered him too disabled to work, and subsequently pursued an ADA claim on the basis that he had been qualified to work at the relevant point in time, notwithstanding his disability. In determining whether to allow such an ADA claim to go forward, the Court held that a district court “should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim.” Id. at 807. This framework, rather than the traditional doctrinal approach to judicial estoppel, is applicable to summary judgment motions where the plaintiff takes a contradictory position to the one he earlier assumed before an agency. Detz v. Greiner Indus., Inc., 346 F.3d 109, 117-18 (3d Cir. 2003). In applying Cleveland, the Court must look for “additional rationale to explain the plaintiff’s apparent about-face concerning the extent of the injuries,” such as “detail regarding the facts of his . . . case, demonstrating how the differing statutory contexts make[] [his]

¹ Due to the ADA Amendments Act of 2008 (“ADAAA”), the definition of “disabled” under the ADA is more relaxed than it is under the PHRA. See 42 U.S.C. § 12102(4)(A) (“The definition of disability . . . shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of this chapter.”)

statements made under one scheme reconcilable with [his] claims under the other.” Motley v. N.J. State Police, 196 F.3d 160, 165 (3d Cir. 1999).

Defendant highlights numerous inconsistencies in Plaintiff’s statements about the term of his disability. See Mot. at 7–8. Plaintiff first filed his Complaint before this Court on March 27, 2017, where he alleged that he was a qualified individual with a disability. See ECF 1. On May 29, 2017, Plaintiff then applied for workers’ compensation benefits on the basis of “full disability” that began June 12, 2016, and was listed as “ongoing” at the time of the application. SUMF ¶¶ 101, 103. Plaintiff amended his complaint twice thereafter, and alleged in both that he was a qualified individual with a disability. See ECF 8, 19. At his deposition on the workers’ compensation proceeding, held on September 20, 2017, Plaintiff testified that he could not return to work until March of 2017. See Worthington Dep. 39:1-12; id. Ex. 7. Then, on September 22, 2017, Plaintiff amended his workers’ compensation petition to assert that his “full disability” ended on December 12, 2016. See Worthington Dep., Ex. 25. See also Mot. at 8 n.7 (listing a number of other inconsistencies in Plaintiff’s statements regarding his period of disability).

In response, Plaintiff argues that his request for a finite period of leave constituted a reasonable accommodation, such that he was qualified to work *with a reasonable accommodation*. Opp’n at 13–14. Plaintiff also argues that Defendant’s case law is distinguishable to the extent it relates to inconsistencies between ADA claims and petitions for Social Security Disability Insurance on the basis of “permanent disability.” Finally, Plaintiff points the Court to his revised workers’ compensation petition for the “correct” period of his disability.

Although this Court is mindful of the strong rationale for estopping inconsistent representations in agency and judicial proceedings, we do not find sufficient evidence to prohibit Plaintiff from making his claim here. First and foremost, Plaintiff is correct that the ADA requires

only that he be qualified to work *with a reasonable accommodation*. As far as the Court is aware, the Pennsylvania Workers' Compensation Bureau has no similar reasonable-accommodation requirement. We are thus satisfied that Plaintiff's representation to the Bureau is not so inconsistent with his representation before this Court such that he should be estopped from asserting his claims under the ADA (and PHRA). It will be up to the factfinder in this case to decide how much weight to give the apparent inconsistencies in Plaintiff's various statements regarding the period of his disability.

Moving on to the third prong of Plaintiff's prima facie case, Defendant contends that there is no evidence to show Plaintiff's employment was terminated as a result of his disability.² Mot. at 10–11. Defendant argues that the fact that Plaintiff was treated the same as Glassman, who was not disabled, is “highly probative” as to whether Plaintiff's disability motivated Defendant. *Id.* at 10. Defendant contends that it treated Plaintiff *more* favorably because it allowed him the opportunity to view the surveillance video and explain his side of the story. *Id.* at 10–11. In Opposition, Plaintiff argues there is sufficient evidence to show a pattern of antagonism following his disclosure of the injury: Defendant's representatives were unfriendly and adversarial to him at the June 14th Meeting—so much so that one representative discouraged him from seeking benefits; and Plaintiff received a string of phone calls from Defendant that he deemed intimidating. Opp'n at 21. Plaintiff also argues that the temporal proximity of three weeks between disclosure and the termination of his employment establishes causation. *Id.* at 20. Finally, Plaintiff argues that he and Glassman were *not* treated the same—Glassman was suspended immediately after the incident, and his employment was terminated much earlier than Plaintiff's. *Id.* at 23.

² It became apparent at Oral Argument that there is a dispute of material fact as to whether and when Plaintiff disclosed his disabilities to Defendant. *See* Oral Argument Tr. (ECF 42) 13:22-24, 20:19-23. The dispute further weighs against granting summary judgment on this claim.

The parties' arguments on this matter reveal that several issues of material fact remain in dispute. Although Defendant eventually terminated both Glassman's and Plaintiff's employment, a reasonable jury could find that the two were treated differently based on Glassman's swift suspension and termination, as compared with Defendant's waiting to fire Plaintiff until after he disclosed his injury and requested FMLA leave. Plaintiff has also highlighted evidence that Defendant's representatives treated him in an "adversarial" manner when he requested an accommodation at the June 14th Meeting, followed up with a string of "harassing" phone calls, and then fired him just three weeks after he disclosed his disability and requested an accommodation. Taken together, this evidence could lead a reasonable jury to conclude that Plaintiff's disability and request for accommodation was the cause of Defendant's termination decision.

Even assuming that no reasonable jury could conclude Plaintiff has established a prima facie employment discrimination case, though, summary judgment remains inappropriate on these claims. Turning to the third prong³ of the McDonnell Douglas analysis, the record contains disputes of material fact regarding Plaintiff's assertion that Defendant's legitimate, nondiscriminatory reason for firing him was pretextual. Once a defendant has satisfied its burden to establish a legitimate, nondiscriminatory reason for the employment decision at issue, "the burden of production shifts back to the plaintiff to proffer evidence 'from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that

³ The parties do not dispute that Defendant has satisfied the second prong of the McDonnell Douglas analysis, and we therefore need not discuss it at length here. In short, Defendant asserts that there were legitimate, nondiscriminatory reasons for its decision to terminate Plaintiff's employment. Defendant points to record evidence showing that it believed Plaintiff contributed to and aggravated the altercation with Glassman. Mot. at 11 (citing previous warnings issued to Plaintiff, SUMF ¶¶ 3–5, and the surveillance footage showing, at the least, that "both are at fault," SUMF ¶¶ 34–35).

an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.” Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 235 (3d Cir. 1999) (quoting Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)).

To show there is evidence of pretext, Plaintiff cites to: the temporal proximity between his disclosure and Defendant's decision; the pattern of antagonism; Totten's decision to re-review the surveillance footage after the June 14th Meeting; emails between Defendant's representatives suggesting animus; and the different treatment of Glassman. Opp'n. at 24–28. In response, Defendant notes that Plaintiff admitted at his deposition that he believed Defendant actually felt Plaintiff did something wrong on June 12, 2016. See SUMF ¶ 65. Defendant argues that “an employer can make a ‘bad’ decision to terminate an employee as long as the ‘bad’ decision is not based on a disability.” See Garvin v. Progressive Cas. Ins. Co., 2010 WL 1948593 at *7 (E.D. Pa. May 10, 2010) (Goldberg, J.)). Thus, “[t]he only inquiry is whether the decisionmaker . . . at the time of his decision, honestly believed that Plaintiff had violated the company's policy at issue.” Id. However, based on the evidence Plaintiff put forth, a reasonable jury could disbelieve Defendant's articulated reasoning or believe that an invidious discriminatory reason was more likely at play. While Plaintiff's statement at his deposition may weigh against a finding of pretext, Plaintiff's own feelings about what Defendant did or did not believe is not dispositive and does not overcome the numerous factual issues Plaintiff has put forth to show pretext.

On this record, a reasonable jury could conclude that Defendant acted out of a discriminatory motivation in terminating Plaintiff's employment. The Court will deny summary judgment on Counts I and III.

B. Failure to Accommodate under the ADA and PHRA (Counts I and III)

In the Second Amended Complaint, Plaintiff asserts that he requested to remain on continued medical leave as a reasonable accommodation, and Defendant's denial of that request was discriminatory treatment. 2d Am. Compl. ¶ 26. Thus, we also analyze Counts I and III under a failure-to-accommodate theory of discrimination under the ADA and PHRA.

“An employer commits unlawful disability discrimination under the ADA if [it] ‘does not make reasonable accommodations to the known physical or mental limitations of an employee who is an otherwise qualified individual with a disability . . .’” Conneen v. MBNA America Bank, N.A., 334 F.3d 318, 325 (3d Cir. 2003) (quoting 42 U.S.C. § 12112(b)(5)(A)). A successful failure to accommodate claim depends on the employer having been on notice that the employee desired accommodation: “‘while the notice of a desire for an accommodation does not have to be in writing, be made by the employee, or formally invoke the magic words ‘reasonable accommodation,’ the notice nonetheless must make clear that the employee wants assistance for his or her disability.’” Jones v. United Parcel Service, 214 F.3d 402, 408 (3d Cir. 2000) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999)). Once the employer has notice of an employee's wish to be accommodated for a disability, it has an obligation to engage in “good faith” in an “interactive process” with the employee to determine what type of accommodations might be reasonable and sufficient. Taylor, 184 F.3d at 315-320. The Third Circuit has elucidated the requirements of the “interactive process,” holding that both the employer and the employee “have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.” Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997).

Defendant argues that Plaintiff cannot make out his failure to accommodate claim because there is no evidence that Plaintiff requested a reasonable accommodation, to the extent the

reasonable accommodation was for workers' compensation. Mot. at 11, 22. Defendant points to a portion of Plaintiff's deposition where he was asked what accommodation he requested, and Plaintiff replied that he believed he was owed workers' compensation benefits, but instead applied for FMLA because he was told that he was not eligible for workers' compensation. Mot. at 22 (citing SUMF ¶ 109). A "belief" that one should not have to pay medical expenses is not a request for accommodation, Defendant explains, nor is a request for medical expenses.

But Plaintiff responds that his request for a finite medical leave of absence constitutes a reasonable accommodation, and further argues that Defendant is improperly relying on a section of Plaintiff's deposition transcript where Defendant questioned him regarding his understanding of legal terminology. Opp'n at 29. Defendant concedes that decisions in this Circuit have held that a request for FMLA leave may qualify as a request for reasonable accommodation "in certain circumstances," and treats Plaintiff's request as one for reasonable accommodation for purposes of this Motion. Mot. at 23 (citing Capps v. Mondelez Global LLC, 847 F.3d 144, 156–57 (3d Cir. 2017); Isley v. Aker Philadelphia Shipyard, Inc., 275 F. Supp. 3d 620, 631 (E.D. Pa. 2017)). As the parties seem not to dispute this issue, the Court makes no decision regarding whether such a request qualifies as a request for a reasonable accommodation.

The Court is satisfied that there is no material dispute regarding Plaintiff's failure to accommodate claim on the basis of Plaintiff's request for FMLA leave. Assuming, *arguendo*, that Plaintiff's request for FMLA leave was a request for a reasonable accommodation, the claim still fails. The law clearly requires that Defendant engage in the interactive process with Plaintiff regarding the request. It is undisputed that Defendant did so here—indeed, Defendant granted Plaintiff's requested FMLA leave. Plaintiff cites no case for the proposition that Defendant's termination *during* his approved period of leave somehow subverts the interactive process or

otherwise constitutes failure to accommodate. The Court will therefore grant summary judgment for Defendant on the failure to accommodate claims pled in Counts I and III.

C. Retaliation under the ADA and PHRA (Counts II and IV)

Counts II and IV allege retaliation under different frameworks—Count II alleges retaliation under the ADA and Count IV alleges retaliation under the PHRA.

It is unlawful to “discriminate against any individual because such individual has opposed any act or practice made unlawful” by the ADA. 42 U.S.C. § 12203(a). As with discrimination claims, these retaliation claims are appropriately subject to the same evaluation.

A claim alleging retaliation for protected ADA activity is subject to the same McDonnell Douglas burden shifting analysis as a discrimination claim: a plaintiff must first establish a prima facie case by showing: “(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee’s protected activity; and (3) a causal connection between the employee’s protected activity and the employer’s adverse action.’ If the plaintiff is able to establish these elements of his/her prima facie case, ‘the burden shifts to the employer to advance a legitimate, non-retaliatory reason for its adverse employment action.’ If the employer satisfies that burden, the plaintiff must then prove that ‘retaliatory animus played a role in the employer’s decisionmaking process and that it had a determinative effect on the outcome of that process.’” Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183 (3d Cir. 2003) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997)).

Defendant explains that for purposes of its motion it will “assume that [Plaintiff’s] request for leave is a request for a reasonable accommodation such that it is protected activity.” Mot. at 26. Defendant therefore only argues that Plaintiff has failed to demonstrate he engaged in protected activity “[t]o the extent that [Plaintiff] asserts anything other than his request for medical

leave was protected activity.” Id. In response, Plaintiff does not identify as protected activity anything other than his request for medical leave. The Court thus finds that the parties do not dispute that Plaintiff has satisfied the first prong of his prima facie showing.

Defendant does, however, contend that the record contains no evidence of a causal connection between Plaintiff’s request for leave and the termination of his employment. In analyzing this third prong of the retaliation analysis, “[c]ourts look to a broad array of evidence to determine causation, including temporal proximity, intervening antagonism or retaliatory animus, inconsistencies in the employer’s articulated reasons for terminating the employee, or any other evidence in the record sufficient to support the inference of retaliatory animus.” Gavurnik v. Home Properties, L.P., 227 F. Supp. 3d 410, 420–21 (E.D. Pa. 2017) (Schiller, J.), aff’d, 712 F. App’x 170 (3d Cir. 2017). Like with Plaintiff’s ADA and PHRA discrimination claims, addressed above, Defendant argues that Plaintiff’s evidence of temporal proximity and antagonism are insufficient to support a finding of causation. The Court rejects Defendant’s position on this evidence for the same reasons it rejected it under Counts I and III.

Defendant also highlights evidence that on June 13, 2016, two days before Plaintiff requested medical leave, Kreisler wrote in an email that he believed both Plaintiff and Glassman were at fault. See Mot. at 27 (citing SUMF ¶¶ 29, 34-35). While this fact may support Defendant’s position, it does not, in and of itself, refute the evidence Plaintiff has put forth to show retaliation. A reasonable jury would have to juxtapose Kreisler’s statement against other undisputed facts in this case—the decision to suspend and fire Glassman weeks before Plaintiff; O’Hala’s ambiguous response to the surveillance video; and Totten’s decision to re-watch the video and change his mind about Plaintiff’s culpability after Plaintiff engaged in protected activity—to make a determination as to the sufficiency of Plaintiff’s evidence on ADA and PHRA retaliation.

For all of these reasons, summary judgment on Counts II and IV is denied.

D. FMLA Retaliation & Interference (Count V)

In addition to Plaintiff's retaliation claims under Count II and IV, Count V alleges retaliation pursuant to the FMLA. Count V also alleges interference under the FMLA. The FMLA makes it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA. 29 U.S.C. § 2615(a)(2). This section provides the source for FMLA "retaliation" claims. It is also unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA regime. 29 U.S.C. § 2615(a)(1). This section provides the source for FMLA "interference" claims. "Although neither provision expressly forbids employers from terminating employees 'for having exercised or attempted to exercise FMLA rights,' a Department of Labor regulation has interpreted the sum of the two provisions as mandating this result." Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 301 (3d Cir. 2012).

"To prevail on a retaliation claim under the FMLA, the plaintiff must prove that (1) [he] invoked [his] right to FMLA-qualifying leave, (2) [he] suffered an adverse employment decision, and (3) the adverse action was causally related to [his] invocation of rights." Id. at 301–02. FMLA retaliation claims are "assessed [] through the lens of employment discrimination law," that is, under the McDonnell Douglas framework. Id. at 302.

In moving for summary judgment on Plaintiff's FMLA retaliation claim, Defendant again argues that temporal proximity on its own is not enough to show causation and that Plaintiff's evidence of retaliatory animus is insufficient to support his claim. Mot. at 30–31. The Court rejects these arguments for the same reasons it rejected them under Counts II and IV.

We turn next to Plaintiff's interference claim. "An interference claim is not about discrimination, it is only about whether the employer provided the employee with the entitlements guaranteed by the FMLA." Callison v. City of Philadelphia, 430 F.3d 117, 120 (3d Cir. 2005). In order to be successful on an interference claim, then, a plaintiff must simply show that (1) he was entitled to an FMLA benefit, and (2) his employer denied his right to that benefit. Lichtenstein, 691 F.3d at 312 (citing Callison, 430 F.3d at 119).

Defendant argues that summary judgment is warranted on Plaintiff's FMLA interference claim "because [Plaintiff's] termination was caused by his wrongful conduct and had nothing to do with his invocation of FMLA rights." Mot. at 34. This Court has already found that a reasonable jury could find that Plaintiff's employment was terminated because of his invocation of FMLA leave. We therefore reject Defendant's argument for judgment on Plaintiff's FMLA interference claim. The motion for summary judgment on Count V is thus denied.

E. Wrongful Termination in Violation of Pa. Common Law (Count VI)

In Count VI of the Amended Complaint, Plaintiff alleges wrongful termination in violation of Pennsylvania common law. Generally, there is no common law cause of action for the discharge of an at-will employee. Krajsa v. Key punch, Inc., 622 A.2d 355, 358 (Pa. Super. 1993); Field v. Philadelphia Electric Co., 565 A.2d 1170, 1179 (Pa. Super. 1989). "The Third Circuit has observed Pennsylvania Courts have construed the public policy exception to at will employment narrowly, lest the exception swallow the general rule. . . . Because the power to formulate public policy rests with the legislature, a court has a sharply restricted power to declare pronouncements of public policy." Spyridakis v. Riesling Group, Inc., 09-cv-1545, 2009 WL 3209478, *22 (E.D. Pa. Oct. 6, 2009), aff'd, 398 Fed.Appx. 793 (3d Cir. 2010). "Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten

clear mandates of public policy.” Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989).

Although the Pennsylvania Supreme Court has not specifically spoken on the issue, a handful of federal district court decisions have found that a wrongful termination claim can arise under state common law where an employee expresses an intent to file for workers’ compensation benefits. See, e.g., Runion v. Equip. Transp., LLC, No. 1:15-CV-2159, 2017 WL 3839917, at *4 (M.D. Pa. Sept. 1, 2017) (Connor, C.J.), appeal dismissed, No. 17-3158, 2017 WL 8751899 (3d Cir. Nov. 30, 2017); Kofa-Lloyd v. Brookside Healthcare & Rehab. Ctr., LLC, No. 14-00668, 2014 WL 1159677, at *3 (E.D. Pa. Mar. 21, 2014) (Quiñones Alejandro, J.); Smith v. R.R. Donnelley & Sons Co., No. 10-1417, 2011 WL 4346340, at *6 (E.D. Pa. Sept. 16, 2011) (Tucker, J.).

To the extent such a common law claim may exist before this Court, we find that Plaintiff has not met its burden of showing it. The Court finds little evidence that the Plaintiff expressed an intent to file a workers’ compensation claim before his employment was terminated, although the parties do not seem to dispute this point. More important, the evidence shows Defendant anticipated that Plaintiff might file such a claim and put its workers’ compensation administrator on notice on June 14, 2016. SUMF ¶¶ 95-98. Had Plaintiff’s potential claim been the motivating factor for the termination of his employment—either to hide the claim or somehow dissuade Plaintiff from filing—Defendant likely would not have opened such a file. It is further unclear how firing Plaintiff *could* have dissuaded him from applying for workers’ compensation benefits. It certainly did not keep him from eventually filing his claim in May of 2017.

In light of the foregoing, the Court grants summary judgment for Defendant on Count VI.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF 32) is GRANTED IN PART and DENIED IN PART.

An appropriate Order follows.

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

<p>DONALD WORTHINGTON</p> <p style="text-align:center">v.</p> <p>CHESTER DOWNS AND MARINA, LLC, OWNER/LICENSEE OF HARRAH'S PHILADELPHIA d/b/a HARRAH'S PHILADELPHIA CASINO AND RACETRACK</p>	<p>CIVIL ACTION</p> <p>NO. 17-1360</p>
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**ORDER RE: MOTION FOR SUMMARY JUDGMENT,
GRANTING IN PART AND DENYING IN PART**

AND NOW, this 21st day of December, 2018, upon consideration of Defendant's Motion for Summary Judgment (ECF 32), the submissions related to the Motion, and after holding oral argument, and as discussed further in the Court's accompanying Memorandum, which details the specific portions of the Plaintiff's claims that remain in dispute, it is hereby ORDERED that:

1. Defendant's Motion is GRANTED IN PART and DENIED IN PART;
2. Counts I and III are DISMISSED IN PART; and
3. Count VI is DISMISSED.

BY THE COURT:

/s/ **Michael M. Baylson**

MICHAEL M. BAYLSON, U.S.D.J.