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

JEFFREY BROWN	:	CIVIL ACTION
	:	
v.	:	
	:	
DB SALES, INC. t/a ACTIONLINK, D.B. GROUP, SERVICE PLUS and PRODUCT LINK, and f/k/a YRS, INC.	:	NO. 04-1512

MEMORANDUM

Baylson, J. **December 29, 2005**

I. Introduction

Plaintiff Jeffrey Brown ("Plaintiff" or "Brown") filed this action, based on employment discrimination, against Defendant Actionlink ("Defendant" or "Actionlink") on April 6, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as the case involves causes of action arising under federal law. Venue is appropriate under 28 U.S.C. § 1391(b).

Presently before the Court is Defendant's Motion for Summary Judgment. For the reasons set forth below, the Defendant's Motion is denied as to the race discrimination claim and granted on the FMLA claim.

II. Background

A. Procedural Background

On April 6, 2004, Plaintiff filed a Complaint in which he alleged that Defendant violated both 42 U.S.C. § 1981 and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq. Defendant's Motion for Summary Judgment (Doc. No. 24) was filed on June 10, 2005 and

on July 12, 2005 Plaintiff filed a Response in Opposition. Defendant filed a Reply Brief on July 19 and Brown filed a Sur Reply on August 2, 2005. Oral argument was held on December 21, 2005.

B. Factual Background

Actionlink is headquartered in Akron, Ohio and provides national in-store detailing services, including product merchandising, in-store displays and fixtures, sales support, and sales associate training.[1] Brown, an African-American male, was hired by Actionlink in or about September 2000 as a field merchandiser in Pennsylvania and New Jersey.

Brown was subsequently promoted to the position of regional manager in September 2001 and his area of responsibility included parts of Pennsylvania, New Jersey, New York, Delaware, Maryland, the District of Columbia, Virginia, and Connecticut. At all times relevant to this lawsuit, Brown was the only African-American manager at Actionlink. While working as a manager, Brown's supervisors included Rene Swanson ("Swanson") and Kim Hollerman ("Hollerman"). Swanson was Brown's direct supervisor until February 2004 when Hollerman assumed that role.

On January 23, 2004, Brown took a day off of work to undergo elective surgery. He ultimately elected to delay the surgery and returned to work the next day. Brown also took the day off on February 16, 2004 in order to care for his mother, who had been experiencing health

[1] In his Complaint Plaintiff named as Defendants Actionlink, Inc., D.B. Sales, Inc., D.B. Group, Service Plus, and Product Link f/k/a YRS, Inc. It appears from the Complaint and the briefs submitted that the relevant employer for purposes of this suit is Actionlink, Inc. As discussed at oral argument on December 21, 2005, the Court directs the parties to verify that the other named parties are not relevant to the present inquiry. Assuming that Defendants are correct in asserting that the additional parties were unnecessarily named in the Complaint, the Court directs Plaintiff to withdraw D.B. Sales, Inc., D.B. Group, Service Plus, and Product Link f/k/a YRS, Inc. as Defendants in this case.

problems. On February 18, 2004, he requested two additional days off (February 23 and 24) to assist his mother.

On February 17, 2004, Swanson requested that Brown go to West Virginia for a work-related assignment, and Brown refused this request. In a conversation with Swanson thereafter, Brown asserts that he overheard her say "that is the reason we don't like hiring black managers." Pl's Resp. at ¶ 89. On February 20, 2004, Brown was informed in a call with Swanson and another manager, Angela Radick, that his job performance was unsatisfactory, and a thirty-day action plan was issued (the "thirty-day plan"). Under the terms of the thirty-day plan if Brown did not show "noticeable improvement" during the prescribed time period, he would be terminated at the end thereof. Later that same day, Brown received an e-mail from Swanson reducing the probationary period from thirty days to ten days (the "ten-day action plan"). On February 23, Brown was informed that he would not be traveling to Boston two days later for a scheduled training session.

On March 8, 2004, Hollerman became Brown's direct supervisor and that same day reversed course yet again and put Brown back onto a thirty-day action plan. Hollerman subsequently claimed that Brown was not satisfactorily completing his duties, complaining that he had not submitted faxes or sent e-mails which he should have.

On March 23, 2004, a job was posted on the internet by Actionlink for a regional manager position based in Washington, DC and covering territory including the District of Columbia, Maryland, and Virginia. Although Brown contends that the job posting was for his specific position, Actionlink denies this allegation and characterizes the posting as a search for an additional regional manager. On March 25, Hollerman called Brown while he was traveling for

work and requested various documents which she claimed had not been received. While the specific number and tone of these calls is debated, Brown acknowledges having raised his voice in the last call with Hollerman. Brown does not admit that he hung up on Hollerman after yelling at her, acknowledging only that the cell phone signal was lost in perfect sequence with the conclusion of his angry words. Hollerman subsequently called Brown back and informed him that he was terminated for insubordination.

III. Parties' Contentions

A. Defendant's Motion for Summary Judgment

Defendant argues that under the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Plaintiff is unable to set forth a case of discrimination. The Court notes that Defendant has filed no affidavits in support of its position in this case, but relies on what it characterizes as admissions by Plaintiff and Plaintiff's failure to meet his burden under McDonnell Douglas. Here, Defendant argues that even if the first three elements of a *prima facie* case are established by the Plaintiff, the record does not indicate that any similarly situated employees of Actionlink were treated more favorably than Plaintiff. Defendant contends that a similarly situated employee in this case means not just a regional manager but a regional manager who engaged in insubordinate conduct while on probation for previous insubordination and performance problems. As for the similarly situated caucasian regional managers who Plaintiff claims were treated more favorably, Defendant asserts that they do not meet the legal standard of "similarly situated," since none of them were alleged to have been on probation for insubordination or performance issues.

Next, Defendant argues that even if Plaintiff is able to establish a *prima facie*

discrimination claim, summary judgment should still be granted since Plaintiff fails to show that the legitimate non-discriminatory reason for his termination was pretextual. Defendant argues that Plaintiff was terminated for an act of insubordination and that the immediacy of his termination after such insubordination greatly diminishes the probability of pretext. Defendant contends that it is irrelevant whether the termination was imprudent, as courts have held that the laws barring discrimination were not created to interfere with an employer's legitimate nondiscriminatory business decisions.

Defendant argues that Swanson's racist remark should not be given great weight in finding discrimination in this case. Defendant contends that in addition to being temporally remote from the adverse employment decision at issue in this case, Swanson was no longer Plaintiff's manager and that Hollerman was the decisionmaker at the time of his termination. Defendant asserts that Plaintiff's attempt to show discriminatory intent through a job posting on the internet prior to his termination is merely a bald conclusion and insufficient to cast doubt upon the employer's reasons for the firing.

Defendant also attempts to rebut Plaintiff's arguments that Actionlink maintained discriminatory company policies. Although Plaintiff references the discriminatory remark made by Swanson as well as a general knowledge of the racial composition of Actionlink's regional managers, Defendant argues that these general observations and the "stray remark" are not enough to demonstrate the existence of any company-wide policies of discrimination.

Defendant also argues that it is entitled to summary judgment on the FMLA claim, since Plaintiff did not engage in any protected activity and no causal link exists between his FMLA leave and his termination. Even if protected activity is established, Defendant argues that a

causal link between that activity and his termination is still not shown in the record. Timing alone is insufficient to establish the requisite causal connection and, moreover, because Plaintiff had been reprimanded by his employer prior to the requested leave, there is no retaliatory inference present in this case. According to Defendant, specific acts of insubordination and general performance problems serve to defeat Plaintiff's arguments for a causal connection, and summary judgment should therefore be granted as to Count II.

Finally, even if a *prima facie* case is established under the FMLA, Defendant argues that Plaintiff is unable to show that the non-discriminatory reasons for termination were pretextual. For all of the reasons set forth in its argument as to the discrimination claim (existing probationary status at time leave was requested, insubordinate acts, and general performance deficiencies), Defendant contends that the record fails to demonstrate that the reasons provided by Actionlink for Plaintiff's discharge were pretextual.

B. Plaintiff's Response

Plaintiff first argues that Defendant has failed to demonstrate the absence of any genuine issues of material fact with respect to Plaintiff's claims for race discrimination. In order to show that similarly situated workers were treated more favorably, Plaintiff can put forth evidence from which a jury may reasonably infer that his discharge occurred in circumstances giving rise to an inference of unlawful race discrimination. Pl's Resp. at 24–25. Plaintiff submitted an affidavit dated July 11, 2005 in support of his position. Pl's Resp. at Ex. G.

In the context of summary judgment, Plaintiff contends that the discriminatory statement made by Swanson must be taken as true and in the light most favorable to Plaintiff for the purposes of this motion. Plaintiff argues that the comment from Swanson in conjunction with

the March 23, 2004 posting for a job vacancy fitting Brown's job description is sufficient for jury to infer that a plan existed between Hollerman and Swanson to fire Plaintiff prior to his actual termination.

Plaintiff argues that Defendant has failed to produce any testimony or evidence of Plaintiff's purported performance deficiencies in the time period in which his "erratic behavior" allegedly began. Brown also argues that he was treated differently from all other regional managers in the company and, because he was the only black regional manager, such treatment is indicative of racial discrimination.

As to the FMLA claim, Plaintiff argues that Defendant both interfered with the exercise of protected activity under the Act and retaliated against him for exercising those rights. As to the interference issue, Plaintiff asserts that he remains protected under the statute whether he took vacation days or not and that he need not expressly assert rights under the FMLA in order to benefit from its provisions.

Finally, Plaintiff argues that there was a causal connection between his request for leave and his subsequent termination. Plaintiff maintains that he was promoted and commended on his good job performance in the three and a half years before he started engaging in protected activities. Plaintiff argues that Defendant's proffered reasons for taking these adverse employment actions have been adequately challenged by Plaintiff and that the motion for summary judgment should therefore be denied.

C. Defendant's Reply

In its reply, Defendant argues that Plaintiff has failed to demonstrate any material issues of genuine fact to preclude the granting of summary judgment. First, Defendant asserts that

Defendant's factual admissions regarding his job performance do not permit an inference of any retaliatory conduct on the part of the employer. Defendant contends that these performance deficiencies, including failure to submit paperwork in a timely manner and refusal to forward a copy of his schedule to his supervisor, predated any alleged protected activity. Defendant therefore argues that no retaliatory inference can arise with respect to the allegations contained in the Complaint.

Defendant also argues that no genuine issues of material fact exist with respect to the legitimate nondiscriminatory reasons proffered for his discharge. Defendant asserts that Plaintiff's attempt to challenge to reasonableness and soundness of Defendant's business decisions is inappropriate as anti-discrimination laws do not seek to interfere with an employer's nondiscriminatory business decisions. Defendant argues that the allegation that it decided to terminate Plaintiff prior to his last insubordinate act on March 25, 2004 is unsupported and fails to demonstrate that the reason for his discharge was pretextual.

D. Brown's Sur Reply

Plaintiff takes issue with Defendant's characterizations of the facts in its Reply. Specifically, Plaintiff notes that the e-mails cited by Defendant as evidence of inadequate job performance are simply requests for documents and do not "counsel Mr. Brown for any performance deficiencies." Pl's Sur Reply at 1. Plaintiff argues that the e-mails are only "benign requests for documents" and his admission that the e-mails were ordinary business communications at the workplace did not in any way serve as admission that the e-mails are proof of Plaintiff's performance deficiencies.

Plaintiff also reasserts his contentions as to the internet job posting, noting that this fact is

highly relevant to his argument that the Defendant had a preexisting desire to fire Plaintiff and therefore purposely instigated him to act in a manner that would justify his termination.

IV. Legal Standard

The burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the appropriate analysis for summary judgment motions in cases alleging employment discrimination. Holness v. Penn State University, 1999 U.S. Dist. LEXIS 6240, at *14 (E.D. Pa. May 5, 1999). In order to establish a *prima facie* case of discrimination, the plaintiff must demonstrate the existence of four elements: (1) he is a member of a protected class; (2) he was qualified for the position which he held; (3) he suffered an adverse employment action; and (4) similarly situated nonmembers of the protected class were treated more favorably than the plaintiff. See Burch v. WDAS AM/FM, 2002 U.S. Dist. LEXIS 12290, at *20 (E.D. Pa. 2002) (citing Pivirotto v. Innovative Systems, Inc., 191 F.3d 231, 234 (3d Cir. 1999)). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The Defendant satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes, 32 F.3d at 763. The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from

which a factfinder could reasonably either (1) disbelieve the defendant's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. Id. at 764. To discredit the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions. Id. at 765. What is at issue is the perception of the decision maker, not the plaintiff's view of his own performance. Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) (citations omitted); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important).

V. Discussion

If Plaintiff is able to successfully establish *prima facie* cases of both race discrimination claim and FMLA retaliation, both claims will be analyzed using the McDonnell Douglas three-stage burden shifting framework outlined above. Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (applying McDonnell Douglas framework to claims under § 1981); Lepore v. LanVision Sys., Inc., 133 Fed. Appx. 449, 452 (3d Cir. 2004) (non-precedential) (applying McDonnell Douglas to FMLA retaliation claims); Sommer v. Vanguard Group, 380 F. Supp. 2d 680, 687 (E.D. Pa. 2005) (same).

A. § 1981 Race Discrimination Claim

1. Plaintiff Has Established a *Prima Facie* Case of Race Discrimination

Defendant contends that Plaintiff has failed to set forth a *prima facie* case for race discrimination. Defendant specifically focuses on the fourth prong, arguing that Plaintiff has not shown that similarly situated nonmembers of the protected class were treated more favorably than the plaintiff. It is important to note that Plaintiff's burden at the *prima facie*s stage is not meant to be onerous. Burdine, 450 U.S. at 253; Simpson v. Kay Jewelers, Inc., 142 F.3d 639, 646 (3d Cir. 1988).

Plaintiff, as an African-American, is a member of a protected class. Defendants concede for purposes of summary judgment that Brown was qualified for the position of regional manager. Def's Br. at 6. It is also uncontested that Brown was terminated on March 25, 2004 and thus suffered an adverse employment decision, satisfying the third prong of the *prima facie* case.[2]

As to the contested fourth prong, Defendants argue that Plaintiff was unable to establish that similarly situated nonmembers of the protected class were treated more favorably than the plaintiff, since the other regional managers on which Plaintiff focused were not "similarly situated." Plaintiff maintains that all regional managers besides him were permitted to attend a

[2] The United States Supreme Court has defined "adverse employment action" as encompassing all tangible employment actions including "hiring, firing, failing to promote, reassignment or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); see also Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d. Cir. 2004) (defining "adverse employment action" in the context of Title VII as "an action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment"). Because this case involves the termination of Brown by his employer, the adverse employment action prong of the *prima facie* case is clearly satisfied.

training seminar in Boston and that all other regional managers were assigned to monitor his work while he was never permitted to do the same for their work. Pl's Resp. at 30. Considering the low threshold set for establishing a *prima facie* case of race discrimination, the Court is willing to assume *arguendo* that Brown has raised a sufficient inference of discrimination against Actionlink. Brown was terminated by Actionlink, while the other regional managers (all of whom were caucasian) were not.

2. Defendant Has Proffered a Legitimate, Non-Discriminatory Motive, Refuting Plaintiff's *Prima Facie* Case

Assuming that Brown has established a *prima facie* case, the defendant employer must proffer a legitimate, non-discriminatory reason for Brown's displacement. Fuentes, 32 F.3d at 763. Defendant argues that notwithstanding Plaintiff's allegations, Plaintiff was terminated due to an act of insubordination on March 25, 2004. Def's Br. at 10. Defendant also notes that Plaintiff was on probation at the time of his termination on account of performance deficiencies as well as a specific act of insubordination on February 17, 2004. Id. at 8.

Looking first at the February 17 incident, the Defendant has cited the Actionlink Regional Manager Employee Manual in characterizing Brown's behavior as insubordination. Defendant contends that Brown received and should have read the Manual, and that it addresses the very situation at issue on February 17. Under the heading "Expenses and Travel" the Manual reads as follows: "Regional Managers are required to travel within their region and on occasion outside of their region to provide assistance as needed." Def's Br. at Ex. C. Also, in detailing the job expectations for Regional Managers, the Manual also states that they "will be expected to maintain their area and make necessary arrangements to do so. There will be time when you may

need to work a long day or week to get the job done." Id. Defendant argues that Brown's failure to go to West Virginia as instructed by his supervisor was a refusal to perform duties described in his job description and clearly amounted to insubordination. Plaintiff admits refusing a request from his supervisor to travel to West Virginia for work. Pl's Resp. at ¶¶ 35–36.[3]

In addition to the February 17 incident, Defendant also cites another act of insubordination as the ultimate basis for Brown's termination. Specifically, Defendant contends that Brown yelled at Hollerman during a phone call on March 25, 2004. Though Brown argues that he was "harassed" prior to raising his voice to his supervisor, he does not dispute that the incident occurred. Consequently, the Court holds that the reasons provided by Actionlink constitute a legitimate, nondiscriminatory basis for Brown's termination, and Defendants have therefore satisfied their burden under the second stage of the McDonnell Douglas framework. See Fuentes, 32 F.3d at 763 (setting forth the criteria for establishing a legitimate non-discriminatory justification and noting that defendant's burden is "relatively light").

3. On Summary Judgment, Plaintiff Has Met the Burden of Showing that Defendant's Proffered Reason Was Pretextual

As stated above, if in an employment discrimination case the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a factfinder could reasonably either (1) disbelieve the defendant's articulated legitimate reasons or (2) believe that an invidious

[3] Though Plaintiff resists characterizing his response to his supervisor on February 17, 2004 as a "refusal," he does acknowledge responding to the e-mail request by writing "I do not believe this is my problem because West Virginia is not in my area." Pl's Resp. at ¶ 35. This appears to be a matter of semantics, and whatever label Plaintiff prefers to place on his actions, the Court will treat his February 17 response as a refusal to make the requested West Virginia trip.

discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. Id. A plaintiff can establish the first prong by "demonstrat[ing] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." Id. at 765 (internal quotations and citations omitted). After carefully reviewing the record, including Brown's July 11, 2005 affidavit, and conducting oral argument, the Court concludes that Plaintiff has presented sufficient evidence to create a genuine issue of material fact regarding the credibility of Defendant's legitimate non-discriminatory reasons for terminating his employment. The evidence now before the Court is sufficient to allow a trier of fact to disbelieve Defendant's proffered reasons and the Court therefore finds that summary judgment in this case is not appropriate. Although Defendant argues that the incidents which gave rise to Plaintiff's probationary status and subsequent termination have been admitted to by the Plaintiff, the Court finds that many relevant facts remain in dispute. These include:

1. Whether the derogatory racial remark allegedly made by Ms. Swanson thirty days before Plaintiff's termination should be considered in determining whether the proffered reasons supplied by Defendant for termination were pretextual and how much weight this statement should be given.

2. Whether the derogatory racial remark made by Ms. Swanson was an isolated incident or part of a pattern of discriminatory acts.

3. Whether the job vacancy posted on a website on March 23, 2004 was in fact an advertisement for Plaintiff's specific position or was an additional position to be added within his region.

4. Whether the demands made on Plaintiff which resulted in Plaintiff being placed on probationary status were pretextual, by setting up a situation in which he could be terminated for unsatisfactory work performance.

5. Whether the March 25, 2004 incident involving Plaintiff yelling on the phone at a supervisor amounted to insubordination and was a legitimate reason for termination in light of other relevant events .

6. Whether Plaintiff continued to be supervised by Ms. Swanson after the supposed transfer of supervisory duties to Kim Hollerman and if so, what kind of supervision was involved.

4. Defendant's Motion for Reconsideration

After oral argument, but prior to the filing of this Memorandum, Defendant filed a document entitled "Motion for Reconsideration," which the Court will treat as a supplemental brief. As to Defendant's renewed argument that Plaintiff was not summarily situated, the Court finds that this is a jury issue because the exact comparison which should be made to other people is highly disputed on the factual record.

The Defendant also asserts that "stray remarks" about race are not actionable under Third Circuit precedent. However, several of the cases which the Defendant cites are non-precedential opinions which turn on their facts. One precedential opinion, Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999), concerned remarks that the plaintiff asserted showed general hostility to women, which contributed to the plaintiff's discharge. In affirming summary judgment, the court reiterated its holding in Ezold, that "stray remarks by non-decision makers or by decision makers unrelated to the decision process are rarely given great weight, particularly if they were made temporarily remote from the date of decision." 983 F.2d at 545.

As noted above, there is an issue in this case as to whether the person who made the racial remark in this case was a decision maker at the time and/or continued to be a decision maker. It is entirely possible that on a trial record, the evidence produced by both parties will be different, and the Defendant can, of course, renew its position by a motion for directed verdict.

However, the Court has decided that the tender issue of race should be decided by a jury and not by a judge.

B. FMLA Retaliation Claim

The FMLA, 29 U.S.C. 2601 et seq., provides up to twelve workweeks of unpaid leave during a twelve-month period for certain family reasons and any serious health condition that makes the employee unable to perform the functions of his position. Id. § 2612(a)(1). The statute expressly prohibits an employer from retaliating against an employee for exercising his FMLA rights. 29 U.S.C. § 2615(a)(2). To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must show that (1) he took an FMLA leave, (2) he suffered an adverse employment decision, and (3) the adverse decision was causally related to his leave. Conoshenti v. Public Serv. Elec. & Gas Co., 364 F.3d 135, 146 (3d Cir. 2004). Once a plaintiff makes out a *prima facie* case, the usual McDonnell Douglas burden shifting framework is implicated. See Weston v. Pennsylvania, 251 F.3d 420, 432 (3d Cir. 2001); Sommer v. Vanguard Group, 380 F. Supp. 2d 680, 687 (E.D. Pa. 2005); Ketchum v. Merck & Co., 2003 U.S. Dist. Lexis 12106, at * 17 (E.D. Pa. June 18, 2003).

Defendant argues that the three days which Plaintiff took off to care for his mother do not qualify as FMLA leave, since he chose to take paid vacation time to which he was entitled.[4]

[4] In analyzing the FMLA retaliation claim, the Court will consider only the three days which Plaintiff took off to care for his mother: February 16, 23, and 24, 2004. Though Brown took a day off on January 23, 2004 in order to undergo a vasectomy (a procedure which he decided not to forego after speaking with his doctor that day), the Court has determined that this elective, outpatient procedure does not fit within the definition of serious health condition under the FMLA. "Serious health condition" is defined as follows: "[A]n illness injury, impairment, or physical or mental condition that involves: (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider." 29 U.S.C. § 2611 (11).

Moreover, Actionlink contends that the methods by which Plaintiff informed Actionlink of his need for time off did not give it any notice that the requested leave was protected by the FMLA. Actionlink asserts that it had no knowledge Plaintiff engaged in protected activity, and therefore, Actionlink should not held accountable for determining whether leave was FMLA-qualifying when the demand is made in very general terms.

An employee giving notice of the need for FMLA leave "need not expressly assert rights under the FMLA," but at a minimum, must provide sufficient information to notify the employer that he needs FMLA leave. 29 C.F.R. § 825.302(c). If the employer has not been provided with enough information to have been put on notice that FMLA leave is needed then "[t]he employer will be expected to obtain any additional required information through informal means." Id. § 825.303(b). "In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee." Id. § 825.208(a).

First, Plaintiff's reason for missing work on February 16, 23, and 24 was to care for his mother who had suffered a heart attack. Defendant concedes that a heart attack is a "serious medical condition" under the FMLA and that the statute entitles employees to take reasonable leave for the care of a parent who has serious health conditions. Def's Br. at 15–16. Here, the record does not indicate that Actionlink ever designated Plaintiff's leave as FMLA-qualifying. Since Defendant contends that Plaintiff took paid vacation for the days at issue, there is some question as to whether Brown's time away from work qualified as FMLA leave. The Court will assume for purposes of the summary judgment motion that the leave taken on February 16, 23, and 24, 2004 was FMLA qualifying. There is no question that Brown suffered an adverse

employment action, thus satisfying the second prong of the test.

As for the third prong, Brown argues that his termination resulted from his requesting and taking leave under the FMLA, and that he has thus successfully set forth a *prima facie* FMLA retaliation case. He asserts that within days of requesting the leave, he was issued the ten-day action plan which would result in termination if he did not show improvement in "virtually every aspect of his job." Pl's Resp. at 38. Plaintiff also contends that his request for further leave on February 23 and 24, 2004 as well as a written complaint for prior FMLA violations resulted in further adverse employment actions, including the issuance of a thirty-day action plan on March 8, 2004, the posting of his job on the internet on March 23, 2004, and his termination on March 25, 2004.

While the timing of the relevant disciplinary actions and termination are relevant factors in assessing causation, timing alone is not usually sufficient to establish the causation prong in a claim for retaliation. Helfrich v. Lehigh Valley Hospital, 2005 WL 670299, at *19 (E.D. Pa. Mar. 18, 2005) ("[E]xcept in circumstances where the timing of the alleged retaliatory act is 'unusually suggestive,' timing alone is never sufficient to demonstrate a causal link between the termination decision and an exercise of FMLA rights." (citing Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997))). In Mutz v. Agere, Inc., 2005 U.S. Dist. LEXIS 14777 (E.D. Pa. July 21, 2005), Judge Stengel of this Court held that a time gap of over two months between the FMLA leave and the adverse employment action is not "unusually suggestive" of a causal link. Id. at *12 Considering the timing of the requested leave and any performance deficiencies, Helfrich also noted that "when an employer expresses concern about an employee's performance deficiencies prior to the time the employee engages in allegedly protected activity,

no retaliatory inference arises." Helfrich, 2005 WL 670299, at *20.

In this case, Actionlink's complaint about Brown's performance deficiencies existed prior to his requesting and taking FMLA leave. The multiple e-mails from a supervisor concerning missing documents clearly establishes an existing performance deficiency for Plaintiff going back to August of 2003, well before any leave was requested. In addition, part of the FMLA-qualifying leave was not requested until February 18, 2004, a day after he had engaged in the first act of insubordination by refusing to travel to West Virginia for work. The Court concludes that in light of the existing performance deficiencies, as to which there is no factual dispute, at the time that Plaintiff requested leave, no retaliatory inference arises in regard to the FMLA leave.

As to the timing of the adverse employment actions in relation to the dates when leave was requested and taken, the Court holds that the timing is not "unusually suggestive," so as to permit timing on its own to establish causation in this case. Plaintiff argues that the FMLA leave taken on February 16 (requested on February 13) as well as on February 23 and 24 (requested on February 17) was followed by various adverse employment actions, including the invocation of ten-day and thirty-day action plans on February 20 and March 8 respectively, and Plaintiff's termination on March 25. Pl's Resp. at 36. The Third Circuit in Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000), held that the district court had erred in taking too restrictive a view of the evidence to be considered in considering the causal link and that causation can be inferred from "other evidence gleaned from the record as a whole." Id. at 281.

Here, the timing is not unusually suggestive, since it is impossible to disengage the various uncontested performance deficiencies and insubordinate acts cited by Defendant from the dates of FMLA-qualifying leave. Therefore, because Defendant presents uncontested facts to

show the proximity of Brown's termination, in relation to his leave, was actually the result of his insubordination and other performance deficiencies, Plaintiff's "timing" argument is insufficient on its own to establish causation in this case. Though Plaintiff argues that taking the entire factual record into account and considering both the existing performance deficiencies and the separate incidents of insubordination, Plaintiff has not provided sufficient evidence for a causal connection to be inferred. Plaintiff, in his response, spends considerable time detailing the timing of various protected activities under the FMLA and the adverse employment decisions which he claims followed soon thereafter. Pl's Resp. at 36–39. What Plaintiff fails to address are the other work-related incidents occurring in the same time period which also explain the various adverse employment actions at issue. Therefore, Plaintiff is unable to establish the third prong for a *prima facie* case of retaliation under the FMLA.

The McDonnell Douglas analysis in the FMLA context is nearly identical to the one performed for the racial discrimination claim, as Defendant claims that Brown was fired for insubordination and poor work performance. Plaintiff contends that the adverse employment actions, including the various action plans and his eventual termination, were invoked in retaliation for his request for and use of FMLA leave as well as his subsequent complaints regarding FMLA violations. Even assuming that Plaintiff has established a *prima facie* FMLA retaliation case, under the McDonnell Douglas burden shifting framework, Plaintiff fails to show that Defendant's proffered reasons for termination were pretextual, related to his FMLA claims.

Though Brown attempts to show that Defendant's reasons for terminating him are pretextual, he fails to do so as to the FMLA claim. Brown's job performance had been placed in question prior to the time he took off to assist his mother, and his subsequent insubordination on

March 25 provides a sufficient basis for his termination based on performance deficiencies. "The FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA claim." Cohen, 2001 U.S. Dist. LEXIS 10876, at *9.

Defendant also argues that the disciplinary actions taken against him, especially the implementation of the various action plans, were based not on his job performance but were instead due to his use of FMLA leave. While Brown acknowledges his failure to go to West Virginia as requested by supervisor, he contends that this single incident does not amount to the "erratic behavior" cited by Swanson when the first thirty-day action plan was instituted on February 20, 2004.

Plaintiff's attempt to challenge the propriety of the various disciplinary actions taken by Defendant ultimately must fail. Defendant cited five e-mails from Swanson to Plaintiff from August 12, 2003 to December 14, 2003 as evidence of Plaintiff's failure to submit proper paperwork and failure to comply with the requirements of the "communications" section of the Regional Manager Employee Manual. Pl's Resp. at Ex. I. Brown admits receiving the e-mails but attempts to characterize them as simple requests for documents. See Pl's Resp. at 29; Pl's Sur Reply at 1. Whether Brown considers such messages from his supervisors to be routine requests for information, it is not his perception which matters in this analysis. "An employer's articulated reasons are not incredible, simply because the employee asserts that such is the case." Billet, 940 F.2d at 828.

In addition to his attempt to reframe the performance deficiencies cited by his employer, Brown includes, as exhibits, questionnaires from various customers demonstrating overall

satisfaction with his work. See Pl's Resp. at Ex E. Perceptions of third parties, in this case customers, are not helpful to a Plaintiff, as it is the Defendant's perceptions that matter and "not what plaintiff claims to be the objective truth." Cohen v. Pitcairn Trust Co., 2001 U.S. Dist. LEXIS 10876, at *22 (E.D. Pa. June 20, 2001). Disagreement with the defendant's decisions is insufficient, as a matter of law, to survive summary judgment. See Simpson, 142 F.3d at 647; Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-11 (3d Cir. 1997); Fuentes, 32 F.3d at 765-66. The Court therefore holds that Brown's own characterization of the communications from his supervisor and the positive performance reviews from third parties are insufficient to show that retribution for Plaintiff's use of FMLA leave motivated the Defendant's decision, since it is the perception of the employer and not the defendant or third parties which is the focus of the analysis.

Similarly, it does not matter whether Actionlink reached an incorrect conclusion in deciding to terminate Brown. In attempting to show pretext, "plaintiff cannot simply show that defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions." Fuentes, 32 F.3d at 765; see also Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa. 1995) (holding that even if a decision is ill-informed or ill-considered, that does not make it pretextual). Plaintiff's attempt to explain away his non-contested acts of insubordination and failure to provide proper documents to his supervisors is irrelevant if he is unable to demonstrate that Actionlink's decision to reprimand and/or terminate him for those actions was based on his taking FMLA leave.

Plaintiff alleges that Swanson made various statements which specifically discouraged him from using FMLA-qualifying leave, including an assertion that his time away from work was

"causing a hardship for the company." Pl's Resp. at ¶ 107. Though such statements are indicative of potential discrimination based on the employee's invocation of the FMLA, Defendant cites to Plaintiff's deposition testimony in refuting the claim. Defendant argues that Brown admitted that it was only "implied" that Actionlink had a problem with his time off from work. Brown Depo. at 110–11. Considering Brown's own deposition testimony concerning the response from the company to his requests for leave, the Court finds that there is inadequate evidence that the reason proffered by Defendant was pretextual.

In this case, Plaintiff does not present sufficient evidence that retaliation for FMLA was more likely than not the motivating factor driving the decision to place the Plaintiff on probationary status or to terminate him. The Court therefore holds that even if Plaintiff set forth a *prima facie* case for FMLA retaliation, he has failed to either present evidence that would allow a trier of fact to disbelieve Defendant's legitimate non-discriminatory reasons for the adverse employment action or to present sufficient evidence that discrimination was more likely than not the motivating factor driving the adverse employment actions.

VI. Conclusion

Plaintiff was able to establish a *prima facie* case of racial discrimination. Though Defendant proffered legitimate non-discriminatory reasons for terminating Plaintiff's employment, Plaintiff has presented sufficient evidence to create a genuine issue of material fact regarding the credibility of Defendant's proffered reasons. Summary judgment is therefore inappropriate as to the race discrimination claim.

As for the FMLA claim, the Court finds that Plaintiff has failed to establish the causation prong of a *prima facie* retaliation claim, and even if he has set forth a *prima facie* case, has failed

to show that Defendant's proffered reasons for termination were pretextual. Consequently, the Court must grant Defendant's motion for summary judgment as to the FMLA retaliation claim.

An appropriate Order follows.

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

JEFFREY BROWN	:	CIVIL ACTION
	:	
v.	:	
	:	
DB SALES, INC. t/a ACTIONLINK, D.B. GROUP, SERVICE PLUS and PRODUCT LINK, and f/k/a YRS, INC.	:	NO. 04-1512

ORDER

AND NOW, this 29th day of December, 2005, it is hereby ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 24) is GRANTED in part as to Count II (FMLA), and DENIED in part as to Count I (racial discrimination). The trial date, which had been set for January 19, 2006, as to Count I, is moved to January 24, 2006. This case will be a back-up to a criminal trial.

A final pretrial telephone conference will be held on January 12, 2006 at 3:00 p.m. Plaintiff will initiate the telephone conference and when all counsel are on the line, call Chambers at (267) 299.7520.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.