

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

ELVIA KANIUKA,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 05-CV-02917
	:	
v.	:	
	:	
GOOD SHEPHERD HOME, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J.

August 15, 2006

This employment discrimination action pits Elvia Kaniuka ("Plaintiff"), a certified nursing assistant, against her former employer Good Shepherd Home ("Good Shepherd" or the "home"). Plaintiff alleges that Good Shepherd and its employees "regarded" her as disabled and terminated her employment in violation of federal and state law. Good Shepherd and defendant Larry Greene (collectively "Defendants") have filed a Motion for Summary Judgment on each of Plaintiff's claims. For the reasons that follow, I will grant Defendants' motion with respect to all of Plaintiff's claims, except for her allegation of retaliation under the Family and Medical Leave Act of 1993.

I. BACKGROUND

Good Shepherd employed Plaintiff as a Certified Nursing Assistant ("CNA"). Plaintiff's responsibilities as a CNA included providing medical care and assistance to

Good Shepherd's patients. Good Shepherd scheduled Plaintiff to work a double shift on January 8 and 9, 2004. Specifically, Plaintiff was scheduled to work continuously from 3:00 p.m. on January 8, 2004, to 7:00 a.m. on January 9, 2004.

At approximately 11:45 p.m. on January 8, 2004, Plaintiff requested and received permission to drive her husband Seth Kaniuka, who also worked at Good Shepherd, to their nearby home. Plaintiff returned to work between 12:15 a.m. and 12:30 a.m. on January 9, 2004. Upon her return to work, Plaintiff's co-worker Kimberly Sherry noticed Plaintiff wearing sunglasses inside the home and observed that she "did not seem like herself." For example, when Sherry asked Plaintiff to assist her in a patient's room, Plaintiff did not respond and simply walked away.

Defendants claim that Sherry discovered Plaintiff sleeping on duty at the "back desk" of the nurse's station at approximately 1:15 a.m. on January 9, 2004. Plaintiff contends that she did not sleep on duty, but had instead become ill and unresponsive. In any event, it is clear that another of Plaintiff's co-workers, Jayne Sigler, suggested that Plaintiff take a break from her duties, and Plaintiff fell asleep in the employee lounge and dining area. At approximately 2:15 a.m., Sigler attempted to wake Plaintiff in the employee lounge, but Plaintiff did not respond and did not completely regain consciousness. Instead, she appeared groggy and could not stand up on her own. Sigler then contacted Courtney Sneath, Good Shepherd's night shift supervisor, and informed her of Plaintiff's condition. When Sneath attempted to question Plaintiff, the only

information she could elicit was that Plaintiff had taken several tablets of ibuprofen at some point during her shifts. Thereafter, Sneath instructed Plaintiff to sleep in one of the home's overflow rooms, and Good Shepherd's employees transported her by wheelchair to an overflow room.

Sherry found a note written by Plaintiff in Spanish in Plaintiff's purse shortly after she was taken to the overflow room. Sherry gave the note to Sneath, who had it translated by a Good Shepherd employee to read, in part: "I will never forget those who I love the most in my life: my family, my sons, my husband . . . I don't want to blame anyone, but I feel so [unfortunate or disgraced] for everything that has occurred that I feel like dying. . . ." Defendants contend that this translation suggested to Good Shepherd's employees that Plaintiff may have been contemplating suicide. Plaintiff, by contrast, argues that the note was not intended as a suicide note and that Plaintiff did not contemplate or attempt to commit suicide.

Sneath immediately called 911 upon receiving the note's translation, and an ambulance transported Plaintiff to the emergency room at Sacred Heart Hospital in Allentown, Pennsylvania. After the ambulance transporting Plaintiff to Sacred Heart left the home, Sherry found another note written in Spanish by Plaintiff. A Good Shepherd employee interpreted the second note to read, in part: "My life is over from the moment I lost my family. The love is finished. Finished!" Plaintiff disputes Defendants'

translation of the second note, and provided a different version at her deposition: "My vida -- my life is over and the moment I've lost my family, love -- lost the love -- lost everything and start the pain."

At approximately 7:00 a.m. on January 9, 2004, Seth Kaniuka contacted Sigler by telephone to discuss the events of the prior evening. Mr. Kaniuka informed Sigler that he believed some of his Klonopin[®], a prescription anti-seizure medication, was missing from the home he shared with Plaintiff. Symptoms of a Klonopin[®] over-dosage include somnolence, confusion, coma, and diminished reflexes.

A number of records regarding Plaintiff's condition and her statements related thereto were generated at and on the way to Sacred Heart Hospital. An Emergency Medical Services Patient Report provides: "[Plaintiff] stated that she is upset and did want to kill herself, she took a handful of Klonopin (more than 10 pills)." Medical records from the hospital provide that she was admitted on January 9, 2004, for a suicide attempt by intentional drug overdose. Plaintiff's Psychiatric Assessment and Master Treatment Plan also indicate that she attempted suicide, and the hospital's Emergency Department Report, dated January 9, 2004, identifies Plaintiff's chief complaint as: "Overdose. (She wants to die)." Hospital interview notes taken at 5:00 a.m. on January 9, 2004, provide that: "Upon being interviewed, stated she had taken 10-16 pills (Klonopin) that belonged to her husband for his seizures and that it was a 'split decision.'"

Finally, hospital interview notes dated January 12, 2004, indicate that "[Plaintiff] refers to her suicide attempt as a stupid act." Plaintiff admits that the reports and notes contain these statements, but denies that she ever made them.

Larry Greene is Good Shepherd's Director of Employee Relations. In this capacity, Greene conducted an investigation of the events leading to Plaintiff's inability to work during her second shift on January 8 and 9, 2004. Greene interviewed a number of Good Shepherd employees as a part of this investigation, including Seth Kaniuka. Mr. Kaniuka informed Greene during an interview that he (Mr. Kaniuka) believed between 10-15 of his Klonopin[®] pills were missing, and that he believed Plaintiff had ingested them. Plaintiff has testified that she did not take any of Mr. Kaniuka's Klonopin[®] medication. Mr. Kaniuka also informed Greene during the investigation that he and Plaintiff were having marital problems.

Tracy Gilson, who presently lives and has a child with Seth Kaniuka, informed Greene of a phone call that she received from Plaintiff after her discharge from Sacred Heart Hospital. Gilson testified that Plaintiff blamed her for ruining Plaintiff's marriage, and cited Gilson as one of the reasons for her attempted suicide. Plaintiff admits to calling Gilson at work on several occasions, but stated in an affidavit that Gilson refused to speak with her and denies that she ever discussed attempting suicide with Gilson.

Upon completing his investigation, Greene concluded that Plaintiff had intentionally ingested prescription medication that had not been prescribed to her. As a

result, she violated Good Shepherd's Drug and Alcohol Screening policy,¹ reported to work unfit for duty, and had therefore endangered the safety of the Good Shepherd patients for whom she was responsible. Greene recommended to Jolene Klotz, Plaintiff's immediate supervisor, that Plaintiff's employment be terminated. Klotz terminated Plaintiff's employment by issuing a memorandum dated January 21, 2004. Plaintiff provided Greene with a note from Dr. Farhad Sholevar, her treating physician, at some point before being terminated. The note indicated that Plaintiff would be medically released to return to work at the home on January 21, 2004.

Plaintiff commenced this action on June 20, 2005. The Amended Complaint² alleges claims for (1) violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (the "ADA"); (2) retaliation under the ADA; (3) violation of the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 951 *et seq.* (the "PHRA"); (4) aiding and abetting in violation of the PHRA; (5) retaliation under the PHRA; (6) violation of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (the "FMLA"), and (7) intentional infliction of emotional distress ("IIED"). The Amended Complaint seeks injunctive and declaratory relief for Defendants' actions, as well as \$100,000 in compensatory damages.

¹Good Shepherd's Drug and Alcohol Screening policy expressly prohibits employees from reporting to work under the influence of prescription drugs used for other than prescribed purposes.

²Plaintiff amended her initial Complaint on July 19, 2005.

After considering a Motion to Dismiss the Amended Complaint filed on September 19, 2005, I dismissed Plaintiff's IIED claim in a Memorandum and Order dated November 3, 2005. The Amended Complaint originally named Good Shepherd, Greene, Jayne Sigler, and Courtney Sneath as defendants in this case, but a joint stipulation between the parties on June 19, 2006 terminated Sigler and Sneath as defendants. Defendants filed this Motion for Summary Judgment on June 29, 2006.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" when a reasonable jury could return a verdict for the non-moving party based on the evidence in the record.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" when it could affect the outcome of the case under the governing law. Id.

A party seeking summary judgment initially bears responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the

non-moving party's case." Celotex, 477 U.S. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is therefore appropriate when the non-moving party fails to rebut by making a factual showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Under Rule 56 of the Federal Rules of Civil Procedure, the court must view the evidence in the record in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Anderson, 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. Id. at 252. If the non-moving party has produced more than a "mere scintilla of evidence" demonstrating a genuine issue of material fact, then the court may not credit the moving party's version of events against the opponent, even if the quantity of the moving party's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. The ADA and PHRA Discrimination Claims³

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Courts analyzing ADA claims based on circumstantial evidence apply the burden-shifting framework first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–4 (1973). See Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000); Olson v. Gen'l Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996).⁴

To avoid summary judgment on an ADA claim, a plaintiff must first establish a *prima facie* case of unlawful discrimination. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999). Should the plaintiff successfully demonstrate her *prima facie* case, the burden shifts to the defendant employer to show a legitimate, non-

³The PHRA is generally applied in conformance with the ADA, and "Pennsylvania courts . . . generally interpret the PHRA in accord with its federal counterparts." Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002) (quoting Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)). The following ADA discrimination analysis therefore applies equally to Plaintiff's PHRA discrimination claim.

⁴A plaintiff may also advance an ADA discrimination claim with direct evidence of discrimination by meeting the requirements of the "mixed-motive" analysis established in Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). The direct evidence required by the mixed motive analysis "must be such that it demonstrates that the decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998) (citations and quotations omitted). A mixed-motive theory of discrimination has not been raised by either party, and there is no such direct evidence of discrimination in the record. Accordingly, I will analyze Plaintiff's ADA discrimination claim under the McDonnell Douglas burden-shifting framework.

discriminatory reason for its employment action. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). If the employer makes this showing, the burden then shifts back to the plaintiff, who must "point to some evidence, direct or circumstantial, from which a fact finder could reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause" of the employment decision. Id.

1. *Prima Facie* Case of Unlawful Discrimination

Defendants argue first that Plaintiff cannot establish her *prima facie* case of discrimination because she is not "disabled" within the meaning of the ADA. I agree with Defendants because (1) Plaintiff has failed to demonstrate that her impairment is "permanent or long term;" and (2) Defendants had no knowledge of Plaintiff's impairment.

To establish a *prima facie* case of unlawful discrimination under the ADA, a plaintiff must demonstrate that she (1) has a "disability" within the meaning of the statute; (2) is a "qualified individual with a disability;" and (3) has suffered an adverse employment action because of that disability.⁵ Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998). I note that the Supreme Court has held that whether a person has a

⁵It is uncontested that termination is an adverse employment action. Thus, it is unnecessary to analyze whether Plaintiff meets the third element of her *prima facie* case.

disability under the ADA is a highly individualized determination. See Sutton v. United Airlines, 527 U.S. 471, 483 (1999). The issue of whether Plaintiff's condition is a disability as statutorily defined is therefore limited to the facts of this case.

a. Disability

The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The parties agree that Plaintiff is proceeding under the third, or "regarded as having . . . an impairment," definition of disability. The Code of Federal Regulations (the "CFR") defines an individual who is "regarded as having . . . an impairment" as a person who:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or
- (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1). Thus, to meet her initial McDonnell Douglas burden, Plaintiff must demonstrate that (1) she has a physical or mental impairment; and (2) her impairment "substantially limits" one of her major life activities.

i. Physical or Mental Impairment

The CFR defines a "physical or mental impairment" as either:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

Here, Plaintiff appears to allege that Good Shepherd regarded her as having a physical or mental impairment because she had intentionally overdosed on prescription drugs.⁶ The ADA protects individuals who are erroneously viewed as using illegal drugs, but who are not actually using illegal drugs. See 42 U.S.C. § 12114(b)(3) (an individual who is "erroneously regarded as engaging in [illegal drug] use, but is not engaging in such use," is not excluded from the definition of a "qualified individual with a disability").⁷

The record is replete with evidence that Good Shepherd terminated Plaintiff's employment, *inter alia*, based on its belief that she had illegally ingested prescription

⁶Plaintiff argued in her opposition to Defendants' Motion to Dismiss that she suffered from mental disabilities of anxiety and depression as well as from vertigo symptoms. She has apparently dropped these theories of impairment in her opposition to the instant Motion for Summary Judgment.

⁷The "illegal use of drugs" includes the use of prescription drugs by an unauthorized individual. See 42 U.S.C. § 12111(6).

drugs and was therefore either physically or mentally unable to perform her duties. See, e.g., Investigation Notes of Elvia Kaniuka Incident at 10; Green Dep. at 92–93. A reasonable jury could certainly find that Good Shepherd treated Plaintiff as having a disorder within the meaning of 29 C.F.R. § 1630.2(h), and there is a genuine issue of material fact as to whether Plaintiff has a physical or mental impairment.

ii. Substantially Limits a Major Life Activity

Plaintiff contends that as a result of her condition on January 8 and 9, 2004, she was substantially limited in the major life activity of working. A "major life activity" is one which is "of central importance to daily life." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002). See also 29 C.F.R. § 1630.2(i) ("Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"). Working is specifically listed by the CFR as an example of a major life activity. Thus, the issue of whether Plaintiff is disabled turns on whether her impairment "substantially limits" her ability to work.

The CFR states that the term "substantially limits" means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j). The CFR also identifies a number of factors that courts are to consider when determining whether an individual's impairment is substantially limiting, including: (1) the nature and severity of the impairment; (2) the impairment's duration or expected duration; and (3) the impairment's permanent or long-term impact. 29 C.F.R. § 1630.2(j)(2).

Congress did not intend the ADA to protect minor impairments or medical difficulties. Rather, "Congress desired to shield from adverse employment actions those individuals whose medical troubles prevent[] them from engaging in significant daily activities." Marinelli v. City of Erie, 216 F.3d 354, 356, 366 (3d Cir. 2000). Intermittent, isolated, or episodic impairments do not constitute disabilities under the ADA. See Rinehimer, 292 F.3d at 380 ("[A] temporary or non-chronic impairment of short duration is not a disability covered by the ADA") (citing McDonald v. Pa. Dep't of Pub. Welfare, Polk Ctr., 62 F.3d 92, 96 (3d Cir. 1995)). The plaintiff bears the burden of demonstrating that her impairment's impact is "permanent or long term." Toyota Mfg., 534 U.S. at 198.

In this case, Plaintiff has failed to offer any evidence demonstrating that a reasonable jury could find that her impairment is or was "permanent or long term." There is simply nothing in the record suggesting that Plaintiff's condition on January 8 and 9,

2004 was anything other than temporary. She has not presented any evidence showing that a similar episode occurred prior to January 9, 2004. Nor has she shown any similar episodes occurring after that date, or any other evidence that would allow me to find that she was similarly impaired on other occasions. Plaintiff has not met her burden of demonstrating that her impairment is "permanent or long term," and her impairment therefore does not "substantially limit" her ability to work. As a result, there is no genuine issue of material fact as to whether Plaintiff is "disabled" under the ADA, and she has not established an essential element of her *prima facie* case of discrimination. Accordingly, I will grant Defendants' Motion for Summary Judgment as to Plaintiff's ADA and PHRA discrimination claims.

b. Good Shepherd's Knowledge of the Disability

Even if I were to find that the issue of whether Plaintiff is disabled is one for trial, she has still failed to establish her *prima facie* case because there is no evidence that Good Shepherd knew of Plaintiff's disability. The Third Circuit has held that an employer must know of an employee's disability to create a "regarded as" claim under the ADA. Rinehimer, 292 F.3d at 381; Phoenixville Sch. Dist., 184 F.3d at 313. In fact, an employer must regard "the employee to be suffering from an impairment *within the meaning of the statute*[], not just that the employer believed the employee to be somehow disabled." Rinehimer, 292 F.3d at 381 (emphasis added).

In this case, Defendants have established that the record lacks any evidence demonstrating that Good Shepherd or its employees knew that Plaintiff's condition on January 8 and 9, 2004 was due to an impairment within the meaning of the ADA. Moreover, they have provided affirmative evidence that the persons responsible for Plaintiff's termination had no such knowledge. See Greene Aff. at ¶ 25 (averring that Greene had no knowledge that Plaintiff suffered from any type of disability during her employment); Klotz Aff. at ¶ 16 (same); Greene Dep. at 96 (same). Plaintiff has failed to set forth any specific facts showing that this is an issue for trial, and therefore I would grant Defendants' motion even if I had found that Plaintiff is disabled within the meaning of the ADA.

2. Legitimate, Non-Discriminatory Reason for Termination

Defendants argue, and the record demonstrates, that Greene and Klotz's decision to terminate Plaintiff's employment was based on the fact that she reported to work unfit for duty and out of concern for the safety of Good Shepherd's patients. See Greene Aff. at ¶ 23 (Plaintiff's employment terminated "for reporting to work unfit for duty and endangering the safety of the patients for whom she was responsible"); Klotz Aff. at ¶ 12 (same); Investigation Notes of Elvia Kaniuka Incident at 10 (stating Plaintiff's inability to perform her job could adversely impact the safety of patients). Even if Plaintiff had

established her *prima facie* case of discrimination, I would still grant Defendants' Motion for Summary Judgment because they have articulated a legitimate, non-discriminatory reason for terminating Plaintiff's employment.

Safety of patients is, and must be, a primary concern for Good Shepherd's administrators. Good Shepherd has ample justification for insisting that CNAs be able to care for patients and to attend to any emergencies that may arise during their shifts. Accordingly, the burden shifts back to Plaintiff to show that Good Shepherd's proffered reason for her termination is pretextual.

Plaintiff has not raised any evidence suggesting that a reasonable jury could either (1) disbelieve Defendants' articulated legitimate, nondiscriminatory reason for terminating her employment; or (2) believe that "an invidious discriminatory reason was more likely than not a motivating or determinative cause of Plaintiff's termination." Fuentes, 32 F.3d at 763. To the contrary, Plaintiff's Opposition to the Motion for Summary Judgment does not cite to the record at all on this issue. Instead, Plaintiff cites Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999), for the proposition that Defendants may not raise a legitimate, non-discriminatory reason for termination as a defense in a "regarded as" claim under the ADA.

Plaintiff's reliance on Taylor for this purported rule of law is misplaced. The portion of Taylor cited by Plaintiff addresses (1) the existence of a "regarded as" claim when an employer deems an employee to be unable to perform a wide range of jobs,

versus being unable to perform a particular job; and (2) the effects of an employer's mistaken evaluation of an employee as disabled under the ADA. Taylor, 177 F.3d at 188–92. The case does not address whether an employer's legitimate and non-discriminatory reason may be a defense in a "regarded as" claim. Rather, Taylor holds that a "regarded as" claim exists when an employer has erroneously regarded the plaintiff employee as being unable to perform "a wide class of jobs, as opposed to one particular and limited job." Id. at 192.

Here, Plaintiff has not cited to any evidence demonstrating that Good Shepherd deemed Plaintiff unable to perform a wide range of jobs at the home. The record at most suggests that Good Shepherd regarded Plaintiff as being unable to perform her particular job as a CNA due to safety concerns. See, e.g., Investigation Notes of Elvia Kaniuka Incident at 10 ("[Plaintiff] is in a highly sensitive caretaker role where her own ability to perform her job could impact the safety of patients"); Good Shepherd Job Description - Nursing Assistant at 1 (stating that CNAs have numerous responsibilities impacting patients' care and safety). Plaintiff has therefore failed to cast any doubt on Good Shepherd's proffered reason for terminating her employment, and Defendants have offered a legitimate, non-discriminatory reason for terminating Plaintiff's employment at Good Shepherd.⁸

⁸Plaintiff makes much hay over the applicability of 42 U.S.C. § 12114(b)(3) and how a "violation" of that subsection creates a genuine issue of material fact for trial. Section 12114(b)(3), however, provides that an individual who is "erroneously regarded as engaging in [illegal drug] use, but is not engaging in such use" is not excluded from the definition of a "qualified individual with a disability." Accordingly, this subsection of the ADA applies only to whether a plaintiff is a "qualified individual with a disability;" i.e. whether the plaintiff has met the

B. The ADA and PHRA Retaliation Claims⁹

The ADA's anti-retaliation provision states in relevant part: "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Courts in the Third Circuit analyze ADA retaliation claims using the McDonnell Douglas burden-shifting framework described supra in Section III.A. Shaner, 204 F.3d at 500. Moreover, a plaintiff's failure to establish a *prima facie* case of discrimination under the ADA does not preclude her from recovering on an ADA retaliation claim. Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 188 (3d Cir. 2003) (citing Krouse v. Am. Sterilizer Co., 126 F.3d 494, 498 (3d Cir. 1997)).

1. *Prima Facie* Case of ADA Retaliation

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must demonstrate the following elements: (1) that she engaged in an ADA-protected activity; (2) an adverse employment action by the defendant employer, either after or contemporaneous with the protected activity; and (3) a causal connection between the

second element of her *prima facie* case. A "violation" of section 12114(b)(3), therefore, would satisfy only the second element of Plaintiff's *prima facie* case, and it is unnecessary to further address this argument in light of the analyses above.

⁹The following analysis of Plaintiff's ADA retaliation claim applies with equal force to Plaintiff's PHRA retaliation claim. See Rinehimer, 292 F.3d at 382 (PHRA generally applied in conformance with the ADA).

protected activity and the adverse employment action. Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001). Only the first and third elements of Plaintiff's *prima facie* case are disputed in this case.

Plaintiff asserts that the note from Dr. Sholevar constitutes a request for a working accommodations and is therefore a "protected activity" under the ADA. The note states in its entirety: "Elvia has been under my care since 1/9/04. She will be released to return to work as of 1/26/04." Plaintiff argues that this note is a request for medical leave and, under Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 151 (3d Cir. 2004), is therefore a request for working accommodations.

Protected activities under the ADA generally include: (1) opposition to a practice made unlawful under the ADA; and (2) participation in an ADA investigation, proceeding, or hearing by making a charge, testifying, or otherwise assisting in the investigation. See 42 U.S.C. § 12203(a); Merit v. Southeastern Pa. Transp. Auth., 315 F. Supp. 2d 689, 704 (E.D. Pa. 2004). Informal charges or complaints of discrimination, as well as informal requests for accommodation, are sufficient to constitute protected activities for establishing a *prima facie* case of retaliation. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 701–2 (3d Cir. 1995). However, even informal charges, complaints, or requests for working accommodations must at least mention the type of discrimination

claimed. See Barber, 68 F.3d at 701–2 (letter written to employer "too vague" to constitute "protected conduct" under the Age Discrimination in Employment Act of 1967 because it did not specifically complain about age discrimination).

In Conoshenti, the Third Circuit noted that several federal courts have permitted a leave of absence to constitute a reasonable accommodation under the ADA. Conoshenti, 364 F.3d at 150–51 (citing Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998)). These courts reasoned that "applying such a reasonable accommodation at the present time would enable the employee to perform his essential job functions in the near future." Id. The Conoshenti decision did not, however, affect the holding of the Barber case, in which the Third Circuit found that a "vague" letter that did not specifically complain about age discrimination was not a protected activity under the Age Discrimination in Employment Act of 1967. Barber, 68 F.3d at 701–2.

Similarly, the note from Dr. Sholevar in this case does not make any mention of discrimination or even suggest that Plaintiff suffered from a disability. It merely states that Plaintiff was under the care of a doctor and that she would be released to return to work approximately 10 days after the date of the letter. Moreover, the plaintiff bears the burden of identifying a reasonable accommodation in an ADA case. See Skerski v. Time Warner Cable Co., 257 F.3d 273, 284 (3d Cir. 2001). Plaintiff has not presented evidence here suggesting that a leave of absence would have enabled her to perform the essential

duties of her job within a reasonable amount of time. See Conoshenti, 364 F.3d at 151 (citation omitted).¹⁰ Under Barber, Dr. Sholevar's note does not constitute protected activity under the ADA, and a reasonable jury could not find that this note demonstrated Plaintiff's opposition to a practice made unlawful under the ADA or her participation in an ADA investigation. Therefore, Plaintiff has not met the first element of her *prima facie* case of retaliation, and summary judgment will be granted with respect to the ADA and PHRA retaliation claims.

C. The PHRA Aiding and Abetting Claim Against Defendant Greene

Section 955(a) is the employment discrimination provision of the PHRA, and it allows a plaintiff to recover only from employers and not from individual employees. Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Section 955(e) of the PHRA, by contrast, may be applied to individual defendants who aid and abet a section 955(a) violation by their employer. See 43 PA. CONS. STAT. § 955(e). Direct incidents of employment discrimination by non-supervisory employees are not covered by PHRA section 955(e). See Dici, 91 F.3d at 552–53 (citation omitted). Supervisory employees, however, may be held liable under section 955(e) because they share the discriminatory

¹⁰In addition, Plaintiff specifically testified at her deposition that she did not request any accommodations from Good Shepherd. Elvia Kaniuka Dep. at 124 ("Q. Did you ask anyone from Good Shepherd for any type of accommodation? A. No.").

purpose and intent of the employer necessary to sustain a claim of aiding and abetting. Davis v. Levy, Angstreich, Finney, Baldante, Rubenstein & Core P.C., 20 F. Supp. 2d 885, 887 (E.D. Pa. 1998) (citing Dici, 91 F.3d at 552–53).

I have already granted summary judgment on Plaintiff's claims of unlawful discrimination and retaliation in violation of the PHRA against Good Shepherd. Individual defendants cannot violate PHRA section 955(e) when there is no corresponding section 955(a) violation by an employer to aid and abet. It is therefore unnecessary to determine whether defendant Greene is a supervisory employee for purposes of the PHRA, or whether he is liable for aiding and abetting any allegedly discriminatory practices of his employer. Since there is no genuine issue of material fact, and because Defendants are entitled to judgment as a matter of law, I will grant summary judgment on the PHRA aiding and abetting claim.

D. The FMLA Claims

Congress enacted the FMLA to accomplish two purposes: "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. §§ 2601(b)(1)–(2). To accomplish these goals, courts have recognized that the FMLA creates two separate causes of action: (1) so-called "interference" or "entitlement" claims; and (2) "retaliation" or "discrimination" claims. Peter v. Lincoln Technical Inst., Inc., 255 F. Supp. 2d 417, 438 (E.D. Pa. 2002). Interference claims arise from violations of 29 U.S.C. § 2615(a)(1),

which provides that it is unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise" any right secured by the FMLA. 29 U.S.C.

§ 2615(a)(1). Discrimination claims, by contrast, arise from violations of 29 U.S.C.

§ 2615(a)(2), which prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful by [section 2615]." 29 U.S.C. § 2615(a)(2).

1. The FMLA Interference Claim

As an initial matter, Defendants argue that the Amended Complaint does not allege an interference claim under the FMLA, and instead alleges only a retaliation claim. Not surprisingly, Plaintiff's opposition states that she has alleged that Good Shepherd violated both types of claims under the FMLA. After reviewing the Amended Complaint, I have found only three paragraphs that relate to Plaintiff's FMLA claims. Paragraph 37 provides that: "Greene stated that Plaintiff was being terminated for being out on leave." Am. Compl. ¶ 37. Paragraph 38 provides that: "at all times material hereto, an employer has been prohibited by the [FMLA] from terminating an employee for taking medical leave." Am. Compl. ¶ 38. Finally, paragraph 66 alleges that: "Defendant's [sic] actions as set forth above constitute a violation of the [FMLA]." Am. Compl. ¶ 66. These allegations, even when read in the light most favorable to Plaintiff, speak in terms of retaliation rather than interference or both; they do not allege that Defendants interfered with Plaintiff's FMLA-protected leave.

In Eddy v. V.I. Water and Power Auth., 256 F.3d 204, 209 (3d Cir. 2001), the Third Circuit held that a defendant did not waive an affirmative defense by raising it for the first time in its Motion for Summary Judgment. A cursory review of Eddy would seem to suggest that this rule established by the Third Circuit applies equally to new theories of liability that a plaintiff raises for the first time in opposition to a motion for summary judgment. A closer reading, however, indicates that this is not the case. The rule established in Eddy is inapplicable here because in this case it is Plaintiff, the party bearing the burden of proof at trial, who has failed to plead a claim. Moreover, allowing a new theory of liability at this stage of the litigation would prejudice the defense.

Courts in this and other districts have held that they need not address claims that are raised for the first time in opposition to a motion for summary judgment. United States v. Union Corp., 277 F. Supp. 2d 478, 490 (E.D. Pa. 2003). See also Logiodice v. Trs. of Me. Cent. Inst., 170 F. Supp. 2d 16, 30–31 n.12 (D. Me. 2001), aff'd, 296 F.3d 22 (1st Cir. 2002) ("Plaintiffs are not entitled to raise a new theory of liability for the first time in opposition to a motion for summary judgment") (citing Mauro v. S. New Eng. Telecomms., Inc., 208 F.3d 384, 386 n.1 (2d Cir. 2000)). Accordingly, I will disregard Plaintiff's purported FMLA interference claim because it is not contained in the Amended Complaint.

2. The FMLA Discrimination/Retaliation Claim

As with other claims of discrimination, discrimination claims under the FMLA are analyzed under the now familiar McDonnell Douglas framework described supra in Section III.A. To establish a *prima facie* claim of retaliation for requesting FMLA leave, a plaintiff must show that: (1) she took leave protected by the FMLA; (2) she suffered an adverse employment decision; and (3) the adverse decision was causally related to the protected leave. Conoshenti, 364 F.3d at 146.¹¹

In situations where the need for leave due to a medical condition is foreseeable, the FMLA generally requires that an employee provide her employer with advance notice. See 29 C.F.R. § 825.302. Where leave is unforeseeable, however, notice should be given "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303. Moreover, an employer may require its employees to provide medical certification of a serious health condition issued by the employee's healthcare provider within 15 days of the employer's request. 29 C.F.R. § 825.035(a).

In this case, it is undisputed that Plaintiff did not give advance notice for her hospitalization on January 9, 2004. However, a reasonable jury could find that: (1) Plaintiff's need for medical leave beginning on January 9, 2004 was unforeseeable; and (2) she provided notice to Good Shepherd as soon as was practicable under the circumstances. Plaintiff testified that she took two tablets of Meclizine, an over-the-

¹¹Defendants contest only the first element of Plaintiff's *prima facie* case, arguing that she did not take FMLA-protected leave.

counter drug for vertigo and nausea, after she drove her husband home around 11:45 p.m. on January 8, 2004. Elvia Kaniuka Dep. at 75. She also testified that she took three tablets of ibuprofen after she had returned to Good Shepherd around 1:00 a.m. on January 9, 2004. Id. at 76. Nothing else in the record suggests a reason for Plaintiff's condition on January 8 and 9, 2004, and a genuine issue of fact exists as to whether Plaintiff could have foreseen that she would need medical leave beginning on January 9, 2004.

A reasonable jury could also find that the note from Dr. Sholevar, and dated January 15, 2004, constituted notice of Plaintiff's need for medical leave under the circumstances of this case. An employee's notice for FMLA-qualifying leave "need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. . . ." 29 C.F.R. § 825.302(c). Additionally, an employee's "spokesperson" may provide the employer with notice if the employee is unable to do so personally. 29 C.F.R. § 825.303(b). Dr. Sholevar's note, which provides that Plaintiff was under his care and would be released to work approximately one week later, creates a genuine issue of material fact as to whether Plaintiff gave notice "as soon as practicable under the facts and circumstances" of this case. Accordingly, I find Plaintiff has established that she took FMLA-protected leave. Defendants have not challenged the other two elements, and Plaintiff has therefore established her *prima facie* case of FMLA discrimination.

As noted above, Defendants' proffered reason for terminating Plaintiff is that she reported to work unfit for duty and out of concern for the safety of Good Shepherd's patients. Thus, the burden shifts back to Plaintiff to show that Good Shepherd's proffered reason for her termination is pretextual.

In the absence of direct evidence of discrimination, the Third Circuit has held that "the proper inquiry is whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to [the] conclusion that the employer did act for discriminatory reasons." Josey v. John R. Hollingsworth, Corp., 996 F.2d 632, 638 (3d Cir. 1993) (quotations and citations omitted) (emphasis in original). The Third Circuit has also found that factors such as the defendant's credibility, the timing of the adverse employment action, and the defendant's treatment of the plaintiff may all raise an inference of a pretextual reason for the employer's action. Id. at 638–39.

Here, Greene and Klotz decided to terminate Plaintiff's employment approximately one week after receiving Dr. Sholevar's note. Additionally, the date of termination matches the date that the note provides Plaintiff would be medically released to return to work. A reasonable jury reviewing these facts could find that the timing of Plaintiff's termination raises the inference of a pretextual termination. See id. at 639 (timing of a plaintiff's termination may raise inference of pretextual reason for termination). In other

words, a reasonable jury could determine that Good Shepherd's decision to terminate Plaintiff's employment was in retaliation for taking medical leave, precluding summary judgment on this claim. While I note that it is unlikely that a jury would find in Plaintiff's favor on this claim, such an evaluation is not for me to determine on summary judgment. Accordingly, I must deny the Motion for Summary Judgment on the FMLA retaliation claim.

IV. CONCLUSION

For the reasons described above, I will grant Defendants' Motion for Summary Judgment with respect to all of Plaintiff's claims, except for her FMLA retaliation claim. An appropriate Order follows.

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

ELVIA KANIUKA,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 05-CV-02917
	:	
v.	:	
	:	
GOOD SHEPHERD HOME, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 15th day of August, 2006, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 17) and Plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED** in part and **DENIED** in part.

The motion is **GRANTED** with respect to Plaintiff's claims of (1) discrimination in violation of the ADA (Count I); (2) retaliation in violation of the ADA (Count II); (3) discrimination in violation of the PHRA (Count III); (4) aiding and abetting in violation of the PHRA (Count IV); and (5) retaliation in violation of the PHRA (Count V).

The motion is **DENIED** with respect to Plaintiff's claim of retaliation in violation of the FMLA (Count VI).

BY THE COURT:

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