IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION

KRISTI DEMJAN,	)	
Plaintiff	)	**No. C-48-CV-2014-3919**
	)	
v.	)	
	)	
NORTHAMPTON COUNTY,	)	
Defendant	)	

OPINION OF THE COURT

This matter is before the Court on Defendant's Motion for Summary Judgment ("Motion"), which was filed on October 26, 2015, and submitted to the undersigned for disposition, on briefs, at Argument Court on December 8, 2015.

On June 6, 2014, Plaintiff, a former employee of Defendant, filed a Complaint asserting claims for violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101-12213, retaliation under the ADA, and violation of the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §§ 951-963. Before the Court addresses the factual history of this case and the

merits of Defendant's Motion, it will first address the unusual procedural history with which it is confronted.

Plaintiff's Complaint contained requests for punitive damages, prompting Defendant to file Preliminary Objections on June 26, 2014. The Preliminary Objections argued solely that the requests for punitive damages should be stricken from Plaintiff's Complaint. On August 18, 2014, the parties filed a stipulation that Plaintiff was not entitled to and would not seek punitive damages against Defendant. As Defendant's Preliminary Objections were solely focused on the punitive damages claims, the stipulation appeared to have completely resolved the objections.

Accordingly, on August 19, 2014, Defendant filed an Answer with New Matter in response to Plaintiff's Complaint. Nearly one month later, on September 18, 2014, Plaintiff filed an Amended Complaint, purportedly "in response to Preliminary Objections filed by . . . Defendant." (Am. Compl. at 1.) However, as noted above, the Preliminary Objections were fully resolved by the stipulation filed on August 18, 2014. "A party may [only] file an amended pleading as of course within twenty days after service of a copy of preliminary objections." Pa.R.C.P. No. 1028(c)(1). Therefore, the Amended Complaint, filed more than twenty days after service of Defendant's Preliminary Objections, was not filed as of course or "in response" to the objections, which had already been disposed of. If not amended as of course within twenty days, the only way to amend a pleading is to obtain

either the filed consent of the adverse party or leave of court. Pa.R.C.P. No. 1033. Plaintiff obtained neither before filing her Amended Complaint.

Thus, the Court must determine the status of the Amended Complaint. In *Vetenshtein v. City of Philadelphia*, 755 A.2d 62, 64 (Pa. Cmwlth. 2000), the plaintiffs filed a second amended complaint without consent of the adverse parties or by leave of court, in violation of Pennsylvania Rule of Civil Procedure 1033. The second amended complaint removed several claims against the defendant, City of Philadelphia ("Philadelphia"), that were based on federal law and that had been pleaded in both plaintiffs' original complaint and their first amended complaint. *Id.* at 64-65. Philadelphia filed an answer to the second amended complaint. *Id.* at 65. One week prior to trial, Philadelphia filed a motion in limine, asking the trial court to preclude the plaintiffs from presenting any evidence in support of the federal claims on the basis of the statute of limitations. *Id.* The trial court granted the motion in limine. *Id.* at 65. On appeal, the plaintiffs argued that, because they had filed their second amended complaint in violation of Rule 1033, it was a nullity, and the first amended complaint, which contained the federal claims, was the operative pleading. *Id.* at 65-66. The Commonwealth Court rejected the plaintiffs' argument, reasoning that

> the second amended complaint . . . was filed by the Prothonotary. Although the second amended complaint did not strictly conform to [Rule] 1033, it was filed of record with the trial court and did constitute a pleading, albeit not in strict compliance with the rules. However, neither obtaining leave of court [n]or obtaining the filed consent of the defendant involves

> a matter of jurisdiction and can be waived by failure of opposing counsel to file preliminary objections for failure of the amended complaint to conform to the rules of court. Such a waiver occurred in this case. After [the plaintiffs] filed the second amended complaint, Philadelphia did not object to the [plaintiffs]' failure to obtain the trial court's express consent or to [the plaintiffs]' failure to file Philadelphia's written consent to the amendment. *Because Philadelphia never filed objections to the second amended complaint, it became the operative complaint.* Hence . . . it was the docketing of the second amended complaint by the Prothonotary and Philadelphia's failure to file preliminary objections to the filing of the second amended complaint that effected an amendment of the pleadings in this case by waiving the protection afforded Philadelphia in [Rule] 1033. *See, e.g., Skelton v. Lower Merion Township,* 318 Pa. 356, 178 A. 387 (1935) (when an amendment occurs, it virtually withdraws the originally filed pleading); 5 *Standard Pa. Practice 2d,* 34:89 ("[W]hen an amended complaint is filed it withdraws the original complaint and takes the place of the original pleading . . . [.]").

Id. at 67 (emphasis added) (citation omitted) (footnotes omitted).

Here, like Philadelphia in *Vetenshtein*, Defendant has waived the issue of Plaintiff filing the Amended Complaint in violation of Rule 1033 by not filing preliminary objections to it. Thus, like the second amended complaint in *Vetenshtein*, Plaintiff's Amended Complaint has become the operative pleading. Accordingly, the Court must further determine whether the pleadings are closed,[1] as a party may only move for summary judgment "[a]fter the relevant pleadings are closed." Pa.R.C.P. No. 1035.2.

[1] The Court notes that there were status conference Orders filed on June 29, 2015, and November 25, 2015, indicating that the pleadings were closed. The Court further notes that, in Northampton County, the Court does not have the docket or file when conducting telephone status conferences and relies upon the representations of counsel with regard to the status of the pleadings.

In *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 608 (Pa. Super. 2005), during discovery, the plaintiffs requested leave to file an amended complaint and, after obtaining leave, did so. The defendant had already filed an answer to the plaintiffs' original complaint but did not file an answer to the plaintiffs' amended complaint. *Id.* On appeal, the plaintiffs argued that, during the trial, certain averments in their amended complaint should have been entered into the record as admissions due to the defendant's failure to answer the amended complaint. *Id.* at 609. In rejecting this argument, the Superior Court reasoned as follows:

> Rule 1029(b) provides that "averments in a pleading to which a responsive pleading is *required* are admitted when not denied specifically or by necessary implication." Pa.R.C.P. 1029(b) (emphasis added). The purpose of this rule is to identify the issues in dispute between the parties. This purpose is adequately served by permitting an answering party to rely on an original answer where an amended complaint merely repeats the averments found in the original complaint. *Thus, we find that where an amended complaint is filed after an answer has already been filed in response to the original complaint, and the amended complaint contains no additional averments requiring a response, no further responsive pleading is required; the original answer will serve as [the] answer to the amended complaint.* Additionally, we note that even when new averments requiring a response are contained in the amended complaint, the answering party only need respond to those new averments to which a response is required.

Id. (emphasis added).

In line with the above, the Court can conclude that Plaintiff's Amended Complaint is the operative pleading and that a comparison of the Complaint and the Amended Complaint will reveal to what extent the Amended

Complaint required an answer from Defendant. In conducting this comparison, the Court finds the following changes.[2] Count II of the Complaint was titled as an *ADA* retaliation claim, whereas Count II of the Amended Complaint is titled as an *FMLA* retaliation claim. Despite this change, the facts averred in support of Count II of the Complaint are exactly the same as those averred in support of Count II of the Amended Complaint, except that the Amended Complaint, on two occasions, omits the term "statutory liquidated" in connection with Plaintiff's alleged damages. (*See* Am. Compl. ¶¶ 29, 31.) The only other changes in the Amended Complaint are the removal of the requests for punitive damages and the addition of Exhibit A, which is a letter from the Equal Employment Opportunity Commission to Plaintiff confirming her request for a "Notice of Right to Sue." (*See id.* Ex. A.) Based on these changes, it is clear that, per *Alwine*, Defendant was not required to answer Plaintiff's Amended Complaint and that its original Answer can serve as an answer to the Amended Complaint. As a result, the pleadings are closed, and Plaintiff brings three claims: 1) violation of the ADA (Count I); 2) retaliation in violation of the FMLA (Count

[2] The Court notes that in her Complaint, Plaintiff named Northampton County Children and Youth Services as Defendant, whereas the Amended Complaint identifies Defendant as Northampton County. (Compl. ¶ 2; Am. Compl. ¶ 2.) However, on November 9, 2015, the Court entered an Order of Court adopting the parties' stipulation that Defendant is Northampton County, not Northampton County Children and Youth Services, and amending the caption to reflect the same. Thus, this change is irrelevant to the Court's analysis.

II); and 3) violation of the PHRA (Count III). The pleadings being closed, Defendant's Motion is ripe for disposition.[3]

Pennsylvania Rule of Civil Procedure 1035.2 and applicable case law establish the standard of review relevant to Defendant's Motion as follows:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
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> . . . .
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action . . . which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2.

Summary judgment may only be granted when the record clearly shows that no genuine issue of material fact exists and that the moving

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[3] It may appear that by permitting Plaintiff to retitle Count II as an FMLA retaliation claim the Court is allowing Plaintiff "to benefit by . . . her own violation of the Rules of Civil Procedure," which the *Vetenshtein* court disapproved of. *Vetenshtein*, 755 A.2d at 69. However, the *Vetenshtein* court only voiced its disapproval of allowing a party to benefit from its own violation of procedural rules because *there was an argument raised before it* regarding whether the second amended complaint was a nullity.

In the instant case, Defendant raises no argument before this Court as to the status of the Amended Complaint or whether Plaintiff should be allowed to benefit from her violation of Rule 1033, and the Court will not consider the issue *sua sponte*. In any event, despite the titling of Count II of the original Complaint as an ADA claim, it appears that Count II was always intended to be an FMLA retaliation claim. (*See* Compl. ¶ 26 (mistakenly citing to 29 U.S.C.A. § 621, a provision of the Age Discrimination in Employment Act, when parallel FMLA provision is codified at 29 U.S.C.A. § 2601, suggesting typographical error); *id.* ¶ 27 ("Plaintiff believes, and therefore avers, that the aforementioned acts taken by . . . Defendant were intended to retaliate against her for having asserted her right to take FMLA leave.").)

party is entitled to judgment as a matter of law. *Weissberger v. Myers*, 90 A.3d 730, 733 (Pa. Super. 2014). The moving party bears the burden of proving that no genuine issue of material fact exists. *Barnish v. KWI Bldg. Co.*, 916 A.2d 642, 645 (Pa. Super. 2007). In deciding a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Smith v. Twp. of Richmond*, 82 A.3d 407, 415 (Pa. 2013). Even where the facts are agreed upon, summary judgment cannot be entered if the facts can support conflicting inferences. *Washington v. Baxter*, 719 A.2d 733, 740 n.10 (Pa. 1998).

> The party opposing a motion for summary judgment
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> > may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying
> >
> > . . . .
> >
> > > (2) evidence in the record establishing the facts essential to the cause of action . . . which the motion cites as not having been produced.

Pa.R.C.P. No. 1035.3(a).[4] In other words, the "[f]ailure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on

[4] Plaintiff has not filed a response to Defendant's Motion, as is required by Rule 1035.3(a). The Court, if it so chose, could enter summary judgment for Defendant on this ground alone. *See* Pa.R.C.P. No. 1035.3(d). However, the Court will refrain from doing so, given that Plaintiff has filed a brief, and given the extensive evidentiary record appended to Defendant's Motion, from which the Court can determine whether sufficient evidence exists for Plaintiff's claims to withstand summary judgment.

which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." *Babb v. Centre Cmty. Hosp.*, 47 A.3d 1214, 1223 (Pa. Super. 2012). In deciding a motion for summary judgment, the "record" available for the Court's examination includes the pleadings, discovery materials, affidavits, and expert reports. Pa.R.C.P. No. 1035.1.

The Court will now outline, in the light most favorable to Plaintiff, the factual basis of this case. Plaintiff alleges that she suffers from attention deficit disorder ("ADD"), severe anxiety, and depression. (Am. Compl. ¶ 9.) Plaintiff takes Ritalin and Valium as needed. (Pl.'s Dep. ("Dep.") 4:2-3.)[5] Plaintiff is "not sure exactly when [she] was diagnosed with ADD," nor does she know the name of the doctor who diagnosed her with her alleged conditions. (Dep. 20:9-23:17.) Plaintiff is also not clearly aware of when she was diagnosed with anxiety or depression. (Dep. 23:18-24.)

On November 19, 2007, Plaintiff was hired by Defendant, initially in a probationary status, to work as an intake caseworker, Caseworker 2, for Northampton County Children and Youth Services ("C&Y"). (Am. Compl. ¶ 3; Answer ¶ 3; R. at NC00031.) Prior to being hired by C&Y, Plaintiff worked for approximately one year as a confidential informant, serving the Allentown Police Department. (Dep. 8:5-25.) Following that, Plaintiff worked for approximately ten years at the Weaversville Intensive Treatment

[5] Plaintiff's deposition and the record ("R.") cited herein are attached to Defendant's Motion.

Unit in Northampton, Pennsylvania, a facility housing violent juvenile offenders. (Dep. 17:2-21.)

At all times pertinent to this lawsuit, Plaintiff's immediate supervisor was Glennie Racz ("Racz"). (Am. Compl. ¶ 5; Answer ¶ 5.) Racz's supervisor was C&Y's program manager, Bessie Cicero-Reese ("Cicero-Reese"). (Dep. 36:8-9.) On May 17, 2008, Plaintiff completed her probationary status as a Caseworker 2 and obtained regular civil service status. (*See* Am. Compl. ¶ 6; Answer ¶ 6; R. at NC00032.) In September 2008, Plaintiff met various criteria in a Certification Assessment Checklist, including "the ability to handle an appropriate caseload size" and "professionalism and aptitude for the position." (R. at NC00036.) As a result, Plaintiff was formally certified as a Child Welfare Direct Service Worker. (R. at NC00036-39.) As a caseworker for C&Y, Plaintiff was required to meet various statutory and regulatory deadlines relating to suspected child abuse. (Dep. 26:3-35:14.)

On February 9, 2009, Plaintiff requested a leave of absence pursuant to the FMLA, citing her "own serious health condition." (R. at NC00044-45.) On April 8, 2009, Abel A. Gonzalez, M.D., a psychiatrist, provided Plaintiff with a doctor's note indicating that she could return to work without restrictions as of April 9, 2009, and provided Defendant with a Return to Work Release Fitness for Duty form indicating the same. (R. at NC00046-47.) Plaintiff returned to work on April 13, 2009. (R. at NC00048.)

Effective May 11, 2009, Plaintiff was reassigned to "CPS-Investigation under the temporary supervision of Marisa Bold, pending the appointment of [a] CPS-Investigative Supervisor." (R. at 48.) Plaintiff initially moved between two different desk locations, both of which, due to their proximity to other employees, made it difficult for her to concentrate and complete her work. (Dep. 35:15-37:9.) Dissatisfied with these desk locations, Plaintiff requested that she be permitted to move to an office on a different floor ("Requested Office"). (Dep. 37:10-21.) This request was made by Plaintiff alone, without an accompanying doctor's note. (Dep. 42:25-43:3.) Plaintiff's Requested Office had a door that would enable her to work in a more secluded space. (Dep. 37:19-21.) Plaintiff was permitted to do work in the Requested Office on occasion, but her request to relocate there permanently was denied. (Dep. 37:21-39:1, 39:11-24.) At the time that Plaintiff asked to be moved, another C&Y employee in her unit occupied one desk in the Requested Office, with two other desks being unoccupied. (Dep. 39:15-24.) In her deposition, Plaintiff testified as follows: "[Racz] was . . . well aware of my . . . mental health diagnosis and so was [Cicero-Reese], and they knew . . . that I had an inability to sit there and stay focused. They . . . had a sign taped on my computer monitor that said focus, focus . . . for everybody to see." (Dep. 45:1-6.) Racz has also asked Plaintiff if she took her "meds" and commented, "I could tell you didn't take your meds today." (Dep. 95:6-7, 101:15-16.)

On January 22, 2010, Plaintiff received correspondence from Cicero-Reese warning her that she could be subject to discipline if she was absent from work without sufficient accrued sick time and requiring all future requests for sick leave to be accompanied by a medical note. (R. at NC00057.) On June 7, 2010, Racz signed a Disciplinary Action Report ("DAR-1"), in which a verbal warning was recommended due to substandard work and absenteeism. (R. at NC00058-59.) DAR-1 noted that, on June 1, 2010, Plaintiff took a day off while not having sufficient time accrued to do so and failed to coordinate with her supervisors regarding making up the missed day on a Saturday. (R. at NC00058.) DAR-1 indicated that Plaintiff's absenteeism was causing her to fall behind in her workload. (R. at 58.) Following the issuance of DAR-1, Plaintiff caught up on her work and earned sufficient vacation time to take a vacation from June 28, 2010, through July 2, 2010. (R. at NC00061.)

On July 27, 2010, Plaintiff was assigned a case involving a newborn baby in which she, according to a letter from Cicero-Reese to Plaintiff dated August 2, 2010, "failed to make contact with the family, failed to complete the required paperwork[,] and failed to turn the case over to the Intake and Referral unit the next morning," all of which were violations of C&Y protocol. (R. at 61.) Because of this incident, on August 5, 2010, Cicero-Reese filed a second Disciplinary Action Report ("DAR-2"), in which a written warning was recommended due to substandard work, negligence, and violation of state

and division procedures. (R. at NC00062-63.) Regarding DAR-2, Plaintiff asserts that the assignment involved a mother who was considering giving her baby up for adoption, that Plaintiff was told by her supervisor not to make contact with the client, and that Plaintiff simply followed that directive. (Dep. 52:11-54:12, 83:12-84:12.)

On August 26, 2010, a third Disciplinary Action Report ("DAR-3") was filed. (R. at NC00064.) The attachment to DAR-3 states that Plaintiff called out sick on August 3, 4, and 5 of 2010. (R. at NC00066.) On August 3, 2010, a client came into the C&Y office for a previously-scheduled meeting with Plaintiff. (R. at NC00066.) Racz covered the meeting for Plaintiff. (R. at NC00066.) While looking for the client's file, Racz discovered, in Plaintiff's desk drawer, a document entitled "Declaration of Wage Assignment," which was dated June 24, 2010, and which purported to contain Racz's signature. (R. at NC00066.) However, Racz did not sign the document, as she was on vacation at the time, suggesting that Plaintiff forged Racz's signature on the document. (R. at NC00066.) The signed Declaration of Wage Assignment was successfully faxed and indicates Plaintiff's consent to have her wages from C&Y assigned to 200Cash.Com, Inc. (*See* R. at NC00068-69.) As a result of this incident, DAR-3 recommended that Plaintiff receive a ten-day suspension, without pay. (R. at NC00064, NC00066.) Plaintiff admits that she forged Racz's signature on the document. (*See* Dep. 56:24-57:19 ("I was wrong, I admitted that, whatever.").)

On February 8, 2011, Plaintiff requested an intermittent period of FMLA leave of absence to be retroactively effective from January 28, 2011, to February 14, 2011, for which Larry Dumont, M.D., a psychiatrist, certified her to be qualified. (R. at NC00070-74.) On February 28, 2011, Dr. Dumont signed a Return to Work Release Fitness for Duty Form, indicating that Plaintiff could return to full duty, without restrictions, as of the same date. (R. at NC00079.)

On March 3, 2011, Racz completed a performance review of Plaintiff covering the period from November 2009 to March 2011. (R. at NC00084-87.) The performance review indicated, in summary form, as follows: 1) Job Knowledge and Skills: *Satisfactory*; 2) Work Results: *Needs Improvement* ("has improved on completing preliminary safety assessments but has difficulties with timely completion of the case") ("difficulty focusing on her job"); 3) Communications: *Needs Improvement* ("has good communication with her supervisor and comes prepared for her 10 day reviews") ("has poor communication when she is not in the office") ("supervisor often gets calls from clients complaining about the way [Plaintiff] handled the case or herself"); 4) Initiative/Problem Solving: *Satisfactory* ("takes initiative in addressing client problems and empowering them to problem solve"); 5) Interpersonal Relations: *Satisfactory* ("gets along with other workers and clients"); 6) Work Habits: *Needs Improvement* ("lateness and absenteeism result in an[] unproductive work environment and burden[] other workers")

("has to be reminded about the completion of her paperwork in a timely manner"). (R. at NC00084-86.)

On August 22, 2011, a fourth Disciplinary Action Report ("DAR-4") recommended a second ten-day suspension, without pay, due to substandard work, absenteeism, violation of county policies, and violation of Pennsylvania regulations. (R. at NC00090.) The attachment to DAR-4 cites Plaintiff's poor performance review, sixteen of Plaintiff's case assignments that were incomplete and overdue, Plaintiff's failure to complete a Pennsylvania Child Welfare Training Program, Plaintiff's disorganization with case files and untimely completion of assignments, and Plaintiff's lack of communication with C&Y regarding her absenteeism as the reasons in support of the recommended discipline. (R. at NC00093-94.) As a result of DAR-4, Plaintiff was removed from case assignment rotation. (R. at NC00095.) Plaintiff claims that other C&Y employees were behind on their paperwork but were never disciplined for it. (*See* Dep. 40:9-42:14, 49:14-52:9, 95:18-96:5, 109:5-22.)

In April 2012, citing "[diagnoses of] Severe Panic & Anxiety Disorder [without] Agoraphobia," Plaintiff requested an intermittent FMLA leave of absence from April 20, 2012, to May 8, 2012. (R. at NC00096-98.) Dr. Dumont certified that Plaintiff was qualified for the requested FMLA leave. (R. at NC00099.) Plaintiff also requested FMLA leave covering the same date range due to her daughter's contraction of scarlet fever. (R. at

NC000100-03; Dep. 7:10-18.) On May 3, 2012, Cicero-Reese sent Plaintiff a letter requesting that she return her C&Y-issued laptop to work, as she was not expected to work from home while on FMLA leave. (R. at NC000104.)

During Plaintiff's May 2012 FMLA leave, various developments occurred with regard to performance review and discipline. First, a performance review covering the period from March 2011 to March 2012 was prepared. The review indicated that Plaintiff completed training necessary to maintain her certification. (R. at NC000109.) In summary form, the review found as follows: 1) Job Knowledge and Skills: *Unsatisfactory* ("While [Plaintiff] worked to complete the overdue paperwork [detailed in her last performance review], she neglected to complete paperwork on the current cases that were assigned to her.") ("twenty[-]three (23) incomplete case records at present"); 2) Work Results: *Unsatisfactory* ("[Plaintiff] often discusses her personal and family business during work hours on her cell phone at her desk[,] which is distracting to co-workers.") ("far behind on service delivery and frequently misses regulatory deadlines") ("neglects to sign in and out during her workday with accuracy to destinations"); 3) Communication: *Needs Improvement* ("When in the office, [Plaintiff] does communicate with her supervisor.") ("[C]lients . . . complain that they have not received returned calls.") ("overheard using inappropriate language in a loud tone in the main

caseworker office area"); 4) Initiative and Problem Solving: *Satisfactory* ("utilizes agency case staffing process for planning when appropriate"); 5) Interpersonal Relations: *Satisfactory* ("willing to function as a team player"); 6) Work Habits: *Unsatisfactory*: ("not dependable and cannot be relied upon to follow her work schedule") ("When [Plaintiff] presents cases for review to her supervisor they are often handed back for . . . corrections."). (R. at NC000109-12.) Plaintiff's overall performance review rating was noted as unsatisfactory. (R. at NC000112 ("Instead of exhibiting improved work performance over the past year from the needs improvement rating of March 2011, [Plaintiff]'s performance has declined.").)

In addition, on May 22, 2012, while Plaintiff was still on FMLA leave, a fifth Disciplinary Action Report ("DAR-5") was issued recommending Plaintiff's termination due to substandard work, absenteeism, violation of county policies, conduct, and violation of Pennsylvania regulations. (R. at NC000117.) The attachment to DAR-5 largely echoes prior reports of Plaintiff's incomplete and late work assignments, violation of regulations, and absences from work despite insufficient accrued time. (R. at NC000119-22.) In addition, DAR-5 notes that, on March 20, 2012, Plaintiff agreed to pay a $40.00 criminal fine for a child on her caseload, accepted $40.00 from the child's foster parent to pay the fine, but subsequently failed to pay the fine. (R. at NC000122.) The $40.00 that Plaintiff took from the foster parent was never recovered. (R. at NC000122.) Plaintiff asserts that when

she was unable to pay the $40.00 at the magistrate's office, because it was closed, she placed the money in an envelope and left it on her desk. (Dep. 74:12-78:15.)

Plaintiff returned from FMLA leave on May 30, 2012, at which time, after working for four hours, she was informed that she was going to be terminated. (Dep. 60:7-12, 86:1-9.) Plaintiff then contacted her union representative, who, in negotiating with Defendant, learned that if Plaintiff did not voluntarily resign from her position, she would be fired. (Dep. 85:7-13.) On the same day, Plaintiff voluntarily resigned. (R. at NC000126.) On May 31, 2012, Defendant accepted Plaintiff's voluntary resignation, effective the previous day. (R. at NC000126.) According to Plaintiff, at some point before ending her employment with C&Y, Plaintiff was told by Cicero-Reese that "being out on FMLA [leave] is an issue." (Dep. 99:22-100:4.) Plaintiff was not informed of her impending termination before or during her last FMLA leave of absence. (Dep. 114:17-20.)

Following her departure from C&Y, Plaintiff obtained a gaming license and is now employed by the Sands Casino, in Bethlehem, Pennsylvania, as a dealer. (Dep. 10:9-23.) Between salary and tips, Plaintiff earns more at the Sands than she did at C&Y, and she receives comparable benefits. (Dep. 11:18-13:22.) As part of the instant lawsuit, Plaintiff seeks reinstatement to her position with C&Y. (Dep. 16:3-13.)

The factual history can be further supplemented with excerpts from the depositions of Racz and Cicero-Reese as follows.[6]

> [Q.] Were you personally aware of any medical issues that [Plaintiff] was saddled with?
>
> A. Yes.
>
> Q. Did she talk to you about these?
>
> A. Yes.
>
> . . . .
>
> Q. When [Plaintiff] told you about her health issues, what did she say?
>
> A. She would talk about her anxiety and her ADHD and having to go get medication.
>
> Q. She told you she was under the care of a physician?
>
> A. The care of somebody. . . .
>
> Q. She told you she had been prescribed medication?
>
> A. Correct.

(Racz Dep. 8:10-14, 8:19-9:5.)

> Q. Now, you said that [Plaintiff] discussed with you her ADD/ADHD issues?
>
> . . . .
>
> A. Yes.

[6] Although Plaintiff has attached excerpts of these depositions to her Brief, rather than a response to Defendant's Motion, in light of Pennsylvania Rule of Civil Procedure 126, which states that "[t]he [C]ourt at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties," the Court will overlook this procedural misstep. Pa.R.C.P. No. 126.

> Q. Did you ever tape a note on her computer that she should stay focused?
>
> A. I did.
>
> Q. Did you ever say, you know, [Plaintiff], did you take your medications today?
>
> A. Yes.
>
> . . . .
>
> Q. Were you present on May 30[, 2012,] in a meeting . . . in which [Plaintiff] was informed that she was facing termination?
>
> A. Yes.
>
> Q. And is it your understanding that she said, in lieu of being terminated, I'll voluntarily resign?
>
> A. I think so.
>
> Q. Who recommended the termination?
>
> A. That would have been addressed in the performance evaluation as a recommendation. Whenever it comes to that point, I would have consulted with Mr. Dolan and the human services director and probably with the assistant director because this was a serious matter in terms of taking that step. So it wouldn't have been just me alone. We would have pulled together her personnel file that we had at the time, had discussions about it, and then . . . taken that step.

(Cicero-Reese Dep. 10:12-25, 39:5-24.) While it is Cicero-Reese who, in her deposition, admits to asking Plaintiff whether she took her medications, Plaintiff testified, in her own deposition, that Racz was responsible for these comments. (*See* Dep. 95:6-7, 101:15-16.)

COUNT I - ADA CLAIM

The Court begins with Plaintiff's ADA claim, which contains claims sounding in both disparate treatment stemming from Plaintiff's termination[7] and discrimination stemming from Defendant's failure to provide Plaintiff with a requested reasonable accommodation during her employment.

> In construing the federal statutes and regulations at issue in this case, we bear in mind that "[w]e are not bound by decisions of the federal courts, but we may rely on them for persuasive authority." *EMC Mortgage, LLC v. Biddle,* 114 A.3d 1057, 1064 n. 6 (Pa. Super. 2015). Furthermore, "whenever possible, Pennsylvania courts follow the Third Circuit [courts] so that litigants do not improperly walk across the street to achieve a different result in federal court than would be obtained in state court." *Parr v. Ford Motor Co.,* 109 A.3d 682, 693 n. 8 (Pa. Super. 2014) (*en banc*) (internal citations and quotation marks omitted).

Deutsche Bank Nat'l Trust Co. v. Gardner, 125 A.3d 1221, 1224 (Pa. Super. 2015) (alterations in original).

Disparate Treatment

> The [ADA] prohibits an employer from discriminating against an employee on the basis of his or her disability in connection with hiring, advancement, or discharge of employees. 42 U.S.C. § 12112(a). Plaintiff claims that Defendant unlawfully terminated her on the basis of her [mental health] conditions. Plaintiff does not appear to argue, for purposes of summary judgment, that there is any direct evidence of discriminatory animus by Defendant and[, thus,] the parties [appear to] agree that the familiar *McDonnell Douglas* burden-shifting framework applies. *See McDonnell Douglas v. Green,* 411 U.S. 792, 802–04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[7] The Court will assume, for the sake of argument, that Defendant fired Plaintiff.

i. *Plaintiff's prima facie case*

> Under the *McDonnell Douglas* framework, Plaintiff must first establish a *prima facie* case of discrimination by demonstrating that: "(1) [s]he is a disabled person within the meaning of the ADA; (2) [s]he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) [s]he has suffered an otherwise adverse employment decision as a result of discrimination." *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 306 (3d Cir. 1999). If Plaintiff is successful in establishing her *prima facie* case, the burden shifts to Defendant to offer a legitimate, non-discriminatory reason ["LNDR"] for the adverse employment decision. *McDonnell Douglas,* 411 U.S. at 802; *Eastman v. Research Pharms., Inc.,* 2013 WL 3949236, at *7 (E.D. Pa. Aug. 1, 2013). If Defendant offers such a reason, Plaintiff then must provide evidence that Defendant's reason was merely pretext for discrimination. *McDonnell Douglas,* 411 U.S. at 804.
>
> An individual will qualify as "disabled" under the ADA if he or she: has "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment." 42 U.S.C. § 12102. Only the . . . third definition[] (referred to as . . . "regarded as" disabled . . .) appl[ies] to Plaintiff's claims here.[8]

Hammel v. Soar Corp., No. 14-3106, 2015 WL 505410, slip. op. at *2-3 (E.D. Pa. Feb. 6, 2015) (some alterations in original) (footnote omitted).

The Court will analyze Defendant's arguments as to whether the record contains evidence sufficient to create a *prima facie* case. First, Defendant argues that Plaintiff was not disabled under the ADA. (See Def.'s Br. at 6-10.) As noted above, Plaintiff only argues that the third, "regarded

[8] (*See* Pl.'s Br. at 3-6.)

as," form of disability applies. In 2008, by passing the ADA Amendments Act ("ADAAA"),

> Congress expanded the definition of "disability," which courts had interpreted narrowly under the ADA, and stressed that the ADA should be "construed in favor of broad coverage of individuals." ADA Amendments Act of 2008, Pub.L. No. 110–325, § 4(a), 122 Stat. 3553, 3555[.] . . . [T]he ADAAA's "command [is] to construe 'disability' broadly[.]" *Estate of Murray v. UHS of Fairmont, Inc.,* 2011 WL 5449364, at *6 (E.D. Pa. Nov. 10, 2011) . . . .

Hammel, 2015 WL 505410 at *3 (citation omitted).

> The [ADAAA], while not changing the statutory definition of disability, favors broad construction of the term: "The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). Because the actions out of which this action arise[s[9]] took place after the enactment of the ADAAA, we apply the more expansive construction of disability to this case.
>
> . . . .
>
> Under the ADAAA, an individual is regarded as having an impairment that substantially limits a major life activity "if the individual establishes that he or she has been subjected to an action prohibited under [the statute] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3). What is relevant here is the employer's perception. Some courts in this Circuit have found that knowledge of medical impairments alone is sufficient to establish the "regarded as" prong.

Sowell v. Kelly Servs., Inc., No. 14-CV-3039, 2015 WL 5964989, slip. op. at *9-10 (E.D. Pa. Oct. 14, 2015) (last alteration in original). Regulations

[9] In this context, Plaintiff's termination.

enacted by the Equal Employment Opportunity Commission after the passage of the ADAAA further define "regarded as" in this manner:

> The following principles apply under the "regarded as" prong of the definition of disability . . . :
>
> > (1) . . . Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment[.]
> >
> > (2) . . . [A]n individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.
> >
> > (3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

29 C.F.R. § 1630.2(I) (2012).

Defendant argues that "there is nothing in the record to suggest that [Defendant] ended [Plaintiff]'s employment based on its perception that she had ADD, anxiety, or depression." (Def.'s Br. at 10.) The Court is persuaded that this argument is correct and successfully defeats Plaintiff's argument that she meets the "regarded as" definition of disability, even under the relaxed standards of the ADAAA. The Court first notes that it is cognizant that the record *does* contain evidence that Plaintiff spoke to her

supervisors regarding her mental health, her resultant inability to concentrate at work, and the medication that she was taking for these issues. The Court is further cognizant that, in her deposition, Cicero-Reese admits that Plaintiff talked to her about her mental health, that she taped a "focus" note on Plaintiff's computer, and that she also made comments to Plaintiff asking her whether she had taken her medications. What is more, Plaintiff's deposition testimony leads the Court to believe that Plaintiff considered these actions to be harassing and humiliating.

That notwithstanding, however, Defendant's argument correctly identifies that there is a causation element built into the "regarded as" analysis. In other words, "[i]t is not enough for an employer to believe that an employee is disabled; rather, an employer must regard the employee to be suffering from an impairment within the meaning of the ADA *and make its employment decision on that basis*." *Sampson v. Methacton Sch. Dist.*, 88 F. Supp. 3d 422, 438 (E.D. Pa. 2015) (emphasis added). The causation element of the "regarded as" prong requires Plaintiff, in order to establish that she is an ADA-covered "disabled" person, to point to evidence linking Defendant's perception that she was mentally impaired *to its decision to fire her*. In her Brief, Plaintiff argues that the evidence of Plaintiff's supervisors' knowledge of and comments regarding her mental health "is clear and unquestionable factual evidence that . . . Plaintiff was regarded as disabled and limited in her ability to work." (Pl.'s Br. at 6.) While this may be true,

Plaintiff's argument overlooks the causation element, which is essential to establishing "regarded as" coverage under the ADA, as amended.[10]

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[10] The following interpretive guidance on the ADAAA identifies the causation element of the "regarded as" prong and confirms its importance to establishing coverage:

> To illustrate how straightforward application of the "regarded as" prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.
>
> A "prohibited action" under the "regarded as" prong refers to an action of the type that would be unlawful under the ADA (but for any defenses to liability). Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.
>
> Where an employer bases a prohibited employment action on an actual or perceived impairment that is not "transitory and minor," the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision. Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established only if an individual meets the burden of proving that the covered entity discriminated unlawfully within the meaning of section 102 of the ADA, 42 U.S.C. 12112.
>
> Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry.
>
> The fact that *the "regarded as" prong requires proof of causation in order to show that a person is covered* does not mean that proving a "regarded as" claim is complex. While a person must show, for both coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.

Even overlooking Plaintiff's failure to address the causation element of the "regarded as" prong in her Brief and her failure to file a response to Defendant's Motion attempting to identify evidence on that issue, the Court's independent survey of the record reveals no evidence that Plaintiff lost her job (the "prohibited action") *because of* a perceived mental impairment. The recommendation that Plaintiff be terminated first arose in her second performance review and in DAR-5. The second performance review and DAR-5 make no mention of a perception on Defendant's part that Plaintiff suffered from a mental impairment, much less that any such perceived impairment influenced its decision to end Plaintiff's employment. Rather, the performance review and DAR-5 recommend termination due to Plaintiff's incomplete and untimely work product, her tardiness and absenteeism, her lack of communication with supervisors, her long history of violating state and agency regulations, as well as county policies, and her multiple disciplinary misconducts, most notably her admitted forgery of Racz's signature and her misplacement of $40.00 of a client's money.[11] The same can be said of Plaintiff's first performance review and of DAR-1, DAR-2, DAR-3, and DAR-4. Without drawing a connection between Defendant's alleged

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Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978-01, 17,014-15 (Equal Emp't Opportunity Comm'n Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630) (emphasis added).

[11] "Although the ADA prevents an employer from discharging an employee based on h[er] disability, it does not prevent an employer from discharging an employee for misconduct, even if that misconduct is related to h[er] disability." *Sever v. Henderson*, 381 F. Supp. 2d 405, 420 (M.D. Pa. 2005) (quoting *Fullman v. Henderson*, 146 F. Supp. 2d 688, 699 (E.D. Pa. 2001)).

perception and Plaintiff's termination, all Plaintiff has established is that Defendant may have perceived her to have a mental impairment.

> Allowing such a showing to establish a prima facie case for "regarded as" disability would permit any employee to become protected by the ADA by simply announcing to his or her supervisor that he or she has an impairment. While the ADAAA sought to ensure disabled persons were protected from discrimination, it did not seek to open the floodgates to any person who suffered from a non-temporary or non-minor impairment *if the employer did not discriminate against the employee because of the impairment*.

Baughman v. Cheung Enterpruses, LLC, No. 1:13-CV-1511, 2014 WL 4437545, slip. op. at *12 (M.D. Pa. Sept. 9, 2014) (emphasis added).

In summary, while the record does contain evidence that Defendant may have perceived Plaintiff to have a mental impairment, even viewing the record in the light most favorable to Plaintiff, there is no evidence tying Defendant's perception about Plaintiff's mental condition to her termination. Because there must be evidence establishing this link in order for Plaintiff to meet the definition of "regarded as," Plaintiff has not demonstrated that she was entitled to the ADA's protection at the time of her termination.[12]

Failure to Accommodate

Plaintiff also brings a "failure to accommodate" claim pursuant to the ADA.

> The ADA's reasonable accommodations mandate is located at 42 U.S.C. § 12112(5)(A). That provision clarifies that a covered entity's "not making reasonable accommodations to the

[12] In light of the Court's conclusion that Plaintiff has not identified evidence showing that she was regarded as being disabled, it is unnecessary for the Court to continue its analysis of her ADA disparate treatment claim pursuant to *McDonnell Douglas*.

> known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" is a form of discrimination, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*
>
> "An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in [an] interactive process by showing that: `1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" *Williams v. Philadelphia Hous. Auth. Police Dep't,* 380 F.3d 751, 772 (3d Cir. 2004) (quoting *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 319–20 (3d Cir. 1999)).

Moore v. CVS Rx Servs., Inc., No. 4:14-CV-01318, 2015 WL 6692266 at *10-11 (M.D. Pa. Oct. 30, 2015) (footnote omitted).

Prior to the passage of the ADAAA, the law in the Third Circuit was that employees who were disabled under the "regarded as" definition were entitled to reasonable accommodations and, thus, could assert "failure to accommodate" claims. *See Williams*, 380 F.3d at 775. However, effective January 1, 2009, the ADAAA clarified that "failure to accommodate" claims were no longer available to plaintiffs proceeding solely under the "regarded as" definition, as Plaintiff does here. *See* 42 U.S.C.A. § 12201(h). There is no clear evidence in the record as to the exact date(s) on which Plaintiff requested to be moved to the Requested Office, nor when her request was denied. However, the evidence of record *does* indicate that Plaintiff's

request for an accommodation was made at a time when she was under the direction of the supervisors pertinent to this lawsuit, namely Racz and Cicero-Reese. (*See* Dep. 35:15-40:8.) When Plaintiff returned to work from her first FMLA leave on April 13, 2009, she was still under the supervision of a prior supervisor. (*See* R. at NC00048; Dep. 48:21-49:1.) Therefore, based on the record, the Court can deduce that Plaintiff requested an accommodation at a time when the ADAAA was in effect. As a result, Defendant is entitled to judgment as a matter of law on Plaintiff's ADA accommodation claim.

COUNT II - FMLA CLAIM

Turning to Defendant's request for summary judgment on Plaintiff's FMLA retaliation claim, the Court finds that Defendant has not adequately addressed the claim in its Motion and has not even addressed it at all in its Brief, precluding the Court from analyzing whether summary judgment should be granted on that claim.[13]

[13] In its Motion, Defendant cites only an unpublished Third Circuit opinion dealing with retaliation under Title VII of the Civil Rights Act of 1964, not the FMLA. (*See* Mot. ¶ 17.) Further, Defendant's Brief deals exclusively with whether summary judgment is warranted on Plaintiff's ADA claims and only mentions the term "FMLA" when listing the claims brought by Plaintiff and discussing her FMLA leave while arguing against her ADA claims. Defendant's Brief contains no actual legal argument in opposition to Plaintiff's FMLA retaliation claim.

While the *prima facie* elements of an FMLA retaliation claim are similar if not identical to those of a Title VII or ADA retaliation claim, Defendant fails to observe that there is an extensive body of case law analyzing the unique intricacies of an FMLA retaliation claim, starting with the seminal Third Circuit case of *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 146-48 (3d Cir. 2004), continuing with *Erdman v. Nationwide Insurance Co.*, 582 F.3d 500, 508-09 (3d Cir. 2009), which refined *Conoshenti*, and including numerous cases further clarifying what is required to establish a *prima facie* case of FMLA retaliation. *See, e.g.*, *Murray v. JELD-WEN, Inc.*, 922 F. Supp. 2d 497, 513-14 (M.D. Pa.

COUNT III - PHRA CLAIM

Finally, Defendant seeks summary judgment on Plaintiff's PHRA claim. The PHRA was created "to assure equal opportunities to all individuals . . . regardless of race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or *disability*." 43 P.S. § 952(b) (emphasis added). Claims of employment discrimination under the PHRA are frequently analyzed under the same framework as their federal counterparts. *Kroptavich v. Pa. Power and Light Co.*, 795 A.2d 1048, 1055 (Pa. Super. 2002) (holding that federal interpretation of anti-discrimination statutes may be applied to PHRA); *Imler v. Hollidaysburg Am. Legion Ambulance Serv.*, 731 A.2d 169, 173 (Pa. Super. 1999) ("PHRA and ADA are interpreted in a co-extensive manner"). However, Pennsylvania courts are not bound by the federal courts' interpretations of federal anti-discrimination statutes when applying the PHRA. *Harrisburg Sch. Dist. v. Com., Pa. Human Relations Comm'n*, 466 A.2d 760, 763 (Pa. Cmwlth. 1983).

As PHRA claims are construed in accordance with ADA claims, Plaintiff asserts PHRA claims sounding in both disparate treatment stemming from her termination and discrimination stemming from Defendant's failure to provide her with a reasonable accommodation.

2013); *Michniewicz v. Metacource, LLC*, 756 F. Supp. 2d 657, 667-69 (E.D. Pa. 2010). To the contrary, Plaintiff's Brief contains a substantive argument as to the merits of her FMLA retaliation claim. (*See* Pl.'s Br. at 7-10.) By neglecting to respond to this argument, or raise one of its own, Defendant has not presented the Court with an issue that is ripe for determination.

Disparate Treatment

> Under the PHRA, it is unlawful for an employer to terminate an individual's employment because of a non-job related handicap or disability. 43 P.S. § 955. Before the passage of the ADAAA, PHRA claims of perceived discrimination were interpreted under identical standards. But that changed when the ADAAA became effective and relaxed the pleading standards.
>
> Under the PHRA's "regarded as" standard,
>
> > the relevant inquiry is whether the [employer] perceived [the plaintiff] as disabled within the meaning of the PHRA and, thus, is a question of intent, and not whether [plaintiff] was actually disabled at the time of the adverse employment actions . . . . [The plaintiff] must also show that [her] employer believed that [her] perceived disability substantially limits a major life activity.
>
> *Rubano v. Farrell Area School Dist.,* 991 F. Supp. 2d 678, 694 (W.D. Pa. 2014).

Koci v. Cent. City Optical Co., 69 F. Supp. 3d 483, 489 (E.D. Pa. 2014) (alterations in original) (citations omitted).

Here, for the same reasons discussed above, namely, Plaintiff's supervisors' comments regarding Plaintiff's medications and the "focus" note placed on Plaintiff's computer, the Court finds that Defendant perceived Plaintiff to have a mental impairment. Under pre-ADAAA law, and, thus, PHRA law, the issue would then become whether Defendant perceived Plaintiff's mental impairment to substantially limit a major life activity. However, it is unnecessary for the Court to analyze this issue in this context, because, for the same reasons why the Court found that Plaintiff could not

establish that she was "regarded as" disabled under the ADA, Plaintiff cannot establish the third element of a *prima facie* PHRA disparate treatment claim, which requires her to show that "[s]he has suffered an otherwise adverse employment decision *as a result of discrimination*." *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998) (emphasis added).

Failure to Accommodate

Finally, the Court will interpret Plaintiff's PHRA accommodation claim in accordance with the ADA as it existed at the time Plaintiff requested an accommodation.[14] Thus, the same conclusion reached in Plaintiff's ADA accommodation claim applies here; namely, Plaintiff was not entitled to reasonable accommodation as a "regarded as" plaintiff. Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's PHRA accommodation claim.

SUMMARY

To conclude, Plaintiff has failed to establish a *prima facie* claim of disparate treatment under the ADA, is not entitled to assert an ADA accommodation claim, has failed to establish a *prima facie* claim of disparate treatment under the PHRA, and is not entitled to assert a PHRA accommodation claim. As a result, summary judgment will be entered in favor of Defendant on those claims, namely Counts I and III of Plaintiff's

[14] In other words, the ADAAA.

Amended Complaint. Count II of Plaintiff's Amended Complaint, her FMLA retaliation claim, remains viable.

WHEREFORE, the Court enters the following:

IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION

KRISTI DEMJAN,	)	
Plaintiff	)	**No. C-48-CV-2014-3919**
	)	
v.	)	
	)	
NORTHAMPTON COUNTY,	)	
Defendant	)	

ORDER OF COURT

AND NOW, this 4th day of March, 2016, Defendant's Motion for Summary Judgment, filed on October 26, 2015, is hereby **GRANTED**, in part, and **DENIED**, in part. Judgment is hereby entered in favor of Defendant and against Plaintiff on Counts I and III of Plaintiff's Amended Complaint.

BY THE COURT:

/s/ Anthony S. Beltrami
ANTHONY S. BELTRAMI, J.