NOT FOR PUBLICATION (Doc. Nos. 68, 69, 70)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

ELAINA L. APATOFF,	:	
Plaintiff,	:	Civil No. 11-7570 (RBK/KMW)
v.	:	**OPINION**
MUNICH RE AMERICA SERVICES, INC.,	:	
Defendant.	:	

KUGLER, United States District Judge:

This matter comes before the Court on the motions of Munich Reinsurance America, Inc. ("Munich Re" or "Defendant") to strike the expert testimony of Dr. John Penek (Doc. No. 68), and for summary judgment on all claims asserted by Elaina Apatoff ("Plaintiff") (Doc. No. 69), and upon Plaintiff's motion for summary judgment on Defendant's counterclaims. For the reasons expressed herein, Defendant's motion to strike will be **DENIED**. Defendant's motion for summary judgment will be **GRANTED IN PART, DENIED IN PART**. Plaintiff's motion for summary judgment on Defendant's counterclaims will be **DENIED**.

I. BACKGROUND

Plaintiff began working at Munich Re in 1997 as an executive secretary in the company's IT Department. (Defendant's Statement of Undisputed Material Facts ("SUMF") ¶ 1.)[1] In 2009,

[1] Plaintiff disputes some facts alleged in Defendant's Rule 56.1 statement without citation to the record, some of which are evidently based upon the speculation of counsel. See, e.g., Plaintiff's Response to Defendant's Statement

she transferred to a new position as a retrocessional accounting analyst. (Id. ¶ 3.) She reported to Claude Miller, a Senior Accounting Manager, in her new position. (Id. ¶ 4.) Her job duties mostly involved work at a computer, while seated, although she sometimes was required to walk to other floors of the building. (Id. ¶ 6; Plaintiff's Response to Statement of Undisputed Material Facts ("Pl.'s Resp. to SUMF") ¶ 6).

Plaintiff claims to have been diagnosed with asthma in 2008, although a disputed issue in this case is whether Plaintiff actually did suffer from asthma during the relevant time period. (SUMF ¶ 10.) It is however, undisputed that Plaintiff suffered from a breathing disorder of some type. (Id. ¶ 12.) This condition led to requests by Plaintiff to use periodic "sick days" and also to receive treatment at the company's "Wellness Center" which was located on-site at the Munich Re campus. (Id. ¶ 13.)

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of Undisputed Material Facts ("Pl.'s Resp. to SUMF") ¶ 57 ("Disputed . . . as it is believed that Munich had already began formulating a plan for Plaintiff's termination"). Such statements are deemed admitted. See Stouch v. Twp. of Irvington, Civ. No. 03-6048, 2008 WL 2783338, at *2 n.1 (D.N.J. July 16, 2008) (deeming as undisputed facts not disputed with accurate record citations). Similarly, where Plaintiff disputes a statement and cites generally to "Apatoff Deposition," which is over 400 pages long, the asserted facts are deemed admitted. See Doeblers' Pa. Hybrids, Inc. v. Doebler, 442 F.3d 812, 820 n.8 (3d Cir. 2006) (disregarding imprecise citations to a voluminous record, as "[j]udges are not like pigs, hunting for truffles buried in the record"). Further, Plaintiff's frequent response of "disputed as self-serving, rehearsed testimony that is inappropriate to use in support of summary judgment" is disregarded, as these responses do not cite to the record, and "arguments as to the force of" facts asserted in a Rule 56.1 statement "belong[] in the brief." See Durkin v. Wabash Nat'l, Civ. No. 10-2013, 2013 WL 1314744, at *6 (D.N.J. Mar. 28, 2013); Pl.'s Resp. to SUMF ¶¶ 64-66, 78-82. Local Civil Rule 56.1 does not contemplate agreeing with facts along with the caveats of counsel, such as those added by both parties in this case. See L. Civ. R. 56.1(a) ("The opponent of summary judgment shall . . . indicat[e] agreement or disagreement and, if not agreed, stat[e] each material fact in dispute and cit[e] to the affidavits and other documents submitted in connection with the motion.") (emphasis added). In yet other instances, Plaintiff evidently disputes facts in order to indicate disagreement with the inference that she believes underlies the stated facts, and not with the facts themselves. For example, Plaintiff's response to paragraph 74 of the Rule 56.1 statement indicates "Disputed. Defendants never called Plaintiff or asked her to see their own doctor. Defendants made no further honest effort to gather information before terminating Mrs. Apatoff." However, the paragraph that this responds to says absolutely nothing about whether any of the defendants called Plaintiff or asked her to see their own doctor. The Court disregards all such responses that are not responsive to the stated facts, but rather attempt to marshal additional facts in rebuttal. Perhaps indicative of Plaintiff's apparent misunderstanding of the purpose of Local Rule 56.1 is the word "rebuttal" in the title of her responsive Rule 56.1 statement, a term which is found nowhere in the text of Local Rule 56.1. Defendant is not entirely without blame, as it also improperly attempts to include legal arguments into the Rule 56.1 statements in certain instances. See, e.g., Def.'s Resp. to Pl.'s Supplemental Statement of Material Facts ¶ 62 ("Defendant disputes, however, that the availability of that option in any way delegitimizes the Company's decision instead to conduct surveillance"). The Court cautions both parties to comply with the Local Rules when engaging in future motion practice in this District.

On November 10, 2010, Mr. Miller met with Plaintiff for the purpose of discussing her work attendance. (Id. ¶ 19.) He observed that she had taken thirteen sick days over the course of five "occurrences" during the previous twelve months, which could result in discipline under Munich Re's policy in connection with use of sick time. (Id. ¶¶ 19-20.) The company's policy provided that "five absence occurrences in any 12-month period may be considered excessive and may be the basis for Corrective Action up to and including termination." (Id. ¶ 20.)

Mr. Miller memorialized his meeting with Plaintiff in a memorandum to Deborah Scerbo, a Human Resource Business Partner, and Tom Mauch, who Mr. Miller reported to. Mr. Miller indicated that:

> I held a meeting with [Plaintiff] on this date concerning her sick days and occurrences. . . . I told her the number of days and occurrences were excessive and creates performance issues with her work, in addition to requiring others to fill in on her behalf while she is out of the office. . . . [Plaintiff] said she has an asthma condition which seemed to develop last year as she never had this problem before. She suspects that it may be caused by mold in the townhouse she is renting. . . . I told her she may want to discuss this with HR to see what options she may have.

(Id. ¶¶ 21-22.)

The following day, Plaintiff met with Ms. Scerbo. Plaintiff indicates that she told Ms. Scerbo during the meeting that she "was getting the feeling that they didn't believe that [she] had asthma and [she] couldn't understand why anyone would lie about that," to which Ms. Scerbo responded that "people make things up all the time." (Pl.'s Resp. to SUMF ¶ 25). At Ms. Scerbo's recommendation, the two agreed that Plaintiff would complete paperwork for protection under the Family and Medical Leave Act ("FMLA"), which, if approved, could prevent Plaintiff from accruing sick time occurrences in the event that she needed future asthma-related absences. (SUMF ¶ 25.)

The FMLA application required a certification from a physician. Plaintiff's physician, Dr. Elyse Carty, completed and signed a Certification of Health Care Provider for Employee's Serious Health Condition (the "FMLA Certification") on November 12, 2010. (Id. ¶ 30.) The FMLA Certification, which evidently related to Plaintiff's need for future use of FMLA leave, indicated that she would experience "incapacity" approximately twice per month, lasting approximately five days per episode, and that she "may work at home with a computer access via laptop" during such periods of incapacity. (Id.) The next business day, Plaintiff returned the FMLA certification to the necessary persons at Munich Re. (Id. ¶ 32.)

The same day that she turned in the FMLA certification, November 15, 2010, Mr. Miller met with Plaintiff in the morning to discuss a job performance error that she allegedly made. (Id. ¶ 34.) The alleged error related to the way that she had applied certain settlement proceeds, and was an error that Mr. Miller considered to be "a serious matter" that "could not continue." (Id. ¶ 35.) The same afternoon, Plaintiff sent an email to Mr. Miller indicating that she "will be away from [her] desk for a brief period of time each day this week," for "doctor-required asthma treatment." (Id. ¶ 36.)

The next day, Mr. Miller asked to speak with Plaintiff shortly after her arrival at work in the morning. (Id. ¶¶ 40-41.) When they got to his office, he asked Plaintiff to provide a note from her physician to corroborate her email sent the previous afternoon that her daily asthma treatment was in fact ordered by her doctor. (Id. ¶ 42.) Plaintiff was "very upset" when she returned to her desk, after which she experienced difficulty breathing, and went to the Wellness Center. (Id. ¶ 44.) Ms. Scerbo notified emergency medical personnel, and Plaintiff was given a nebulizer treatment at the Wellness Center, but declined to be transported to a local hospital. (Id. ¶¶ 46-47.) Ms. Scerbo told Plaintiff to take the rest of the day off from work, and told Plaintiff

and her husband, who had arrived by then, to have lunch in the company's cafeteria before leaving. (Id. ¶ 49.) After lunch, Plaintiff drove herself to her physician's office. (Id. ¶ 51.)

Munich Re subsequently approved Plaintiff's request for FMLA leave, retroactively effective to November 15, 2010. (Id. ¶ 52.) Plaintiff originally indicated to Mr. Miller that she would be returning to work on Monday, November 29, 2010. (Id. ¶ 57.) However, on November 28, she sent an email to Mr. Miller and the benefits analyst who had approved her FMLA request indicating that she would be out of work for one more week, and attaching a doctor's note in support of that request. (Id. ¶¶ 57-58) The note indicated that Plaintiff's leave should be extended by one week because she was "currently experiencing symptoms and actively undergoing evaluation to find a cause." (Id. ¶ 59.) Approximately one week later, Plaintiff sent another email, indicating that her physician extended her leave for another week, with a new anticipated return date of December 13, 2010. (Id. ¶ 60.) This time, Plaintiff did not attach a doctor's note to the email. Then, on Thursday December 9, 2010, Plaintiff emailed Mr. Miller and the benefits analyst again, indicating that her doctor had extended her "medical disability leave through year-end." (Id. ¶ 61.) At no time did Munich Re indicate to Plaintiff that any problem existed with her leave status, and Plaintiff continued to collect her full salary while she was on FMLA leave. (Id. ¶ 80.)

In December 2010, while Plaintiff was on FMLA leave, Ms. Scerbo allegedly received reports that Plaintiff had been seen out in public shopping. (Id. ¶ 64.) Ms. Scerbo was unable to identify the source of these reports, although she indicated that she found them "suspicious." (Id.) As a result, she recommended that Munich Re arrange for surveillance of Plaintiff in order to determine if she was abusing her FMLA leave. (Id.) Her request was approved by the necessary persons at Munich Re, and a private investigator was hired to surveil Plaintiff. (Id. ¶

66.) On December 7 and December 8, 2010, Plaintiff was observed and filmed while going to medical office buildings, as well as walking across mall parking lots, walking inside of retail stores, pushing shopping carts, and carrying bags of purchases to her car. (Id. ¶ 67; Pl.s Resp. to SUMF ¶ 67.)

When Ms. Scerbo and others at Munich Re were informed of the results of the surveillance efforts, they believed that Plaintiff's activities constituted misuse of her FMLA disability leave. Donald Barth, an Assistant General Counsel for Munich Re, sent Ms. Scerbo an email on December 8, 2010 indicating that "[w]e should get whatever note or notes were sent to extend her FMLA absence and plan to meet with her upon her return to work to confront her about her activities during the week and to terminate her." (SUMF ¶ 68.) Apparently he had second thoughts about immediately beginning plans to terminate her, as a few minutes later, he sent Ms. Scerbo another email indicating that "[w]e need to know exactly what the doctor said so we can determine whether her activities are consistent with the doctor's instructions." (Id. ¶ 69.)

Daniel Fisher, a Senior Vice President of Human Resources who had been copied on some of the emails, weighed in in favor of termination, indicating that "if you can go shopping . . . you should be able to come to work." (Id. ¶ 70.) Over the following days, Munich Re attempted to contact Plaintiff's doctors, but were evidently unable to obtain much information. (Id. ¶ 74.) No one from Munich Re attempted to contact Plaintiff to discuss her condition and restrictions. Nor did Munich Re request an evaluation of Plaintiff by a doctor of its choosing, as is permitted under the FMLA. (Plaintiff's Supplements Statement of Material Facts ¶ 62). Munich Re did authorize additional surveillance, and from December 16, 2010 through December 21, 2010, the investigator filmed Plaintiff engaged in similar activities as

during the first round of surveillance, as well as moving from her old home into a new home, which involved carrying boxes. (SUMF ¶ 76.)

After receiving the surveillance results from the second round, Ms. Scerbo concluded that Plaintiff was abusing her FMLA leave and should be terminated. (Id. ¶ 77-78.) She concluded that her observations of Plaintiff in the Wellness Center on her last day before starting leave, which she believed indicated that Plaintiff was "fine," coupled with Plaintiff's repeated extensions to her leave indicated misconduct when contrasted with the activities captured on surveillance footage. (Id. ¶ 77.) Because Mr. Miller, Mr. Barth, Mr. Fisher, and Mr. Mauch all agreed that termination was appropriate, representing Plaintiff's managers and the legal and human resources departments of Munich Re, Plaintiff was terminated via a letter sent to her on December 21, 2010. (Id. ¶¶ 79-83.)

Plaintiff does not believe that her activities were inconsistent with her physicians' advice or her FMLA leave requests, and has presented evidence that her physicians had encouraged her to exercise as much as possible. Her cardiologist instructed her on November 30, 2010 to exercise. (Certification of Alan H. Schorr ("Schorr Cert.") Ex. 50.) Her pulmonologist indicated that while he was not involved in the decision to keep Plaintiff out of work, he did instruct her to exercise, and that it is not at all uncommon for an asthmatic patient to be unable to attend work but to be assigned an exercise regimen by doctors. (Deposition of Dr. Anthony J. Ricketti at 21:13-22:2, Schorr Cert. Ex. 44.) Plaintiff's general practitioner testified similarly. (Deposition of Dr. Laura Riggins ("Riggins Dep.") at 29:3-19, Schorr Cert. Ex. 37.) Plaintiff has also presented evidence that the reason her physicians kept her out of work was not because she was unable to walk or leave her home, but because they wanted to determine if some airborne

material in the office or workplace stressor was the cause of her respiratory symptoms.[2] (Id. at 17:10-21.) She argues that Munich Re terminated her in retaliation for taking medical leave in violation of New Jersey and federal law.

Plaintiff subsequently filed suit in the Superior Court of New Jersey, Law Division, Burlington County, against Munich Re, Mr. Miller, and Ms. Scerbo, alleging disability discrimination and retaliation claims under the New Jersey Law Against Discrimination ("NJLAD"). Plaintiff also asserts a claim under the NJLAD for failure to accommodate her disability, for a hostile work environment, and for retaliation and harassment post-termination as a result of Defendant's opposition to her claim for unemployment benefits. Finally, Plaintiff asserts a cause of action under the FMLA for retaliatory discharge in violation of the FMLA. Defendants removed the action to this Court. Plaintiff has voluntarily dismissed her claims against Mr. Miller and Ms. Scerbo, and Munich Re is the sole remaining defendant. See ECF Doc. Nos. 4, 80. All of the pending motions have been briefed and are now ready for decision.

II. LEGAL STANDARD

The Court should grant a motion for summary judgment when the moving party "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "material" to the dispute if it could alter the outcome, and a dispute of a material fact is "genuine" if "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,

[2] For example, a note created as a result of a visit to the Wellness Center prior to Plaintiff's FMLA leave indicated that a vent over her desk may have caused respiratory problems, although the vent was subsequently closed. (Plaintiff's Supplemental Statement of Material Facts ¶ 8.)

there is no 'genuine issue for trial.'") (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)). In deciding whether there is any genuine issue for trial, the court is not to weigh evidence or decide issues of fact. Anderson, 477 U.S. at 248. Because fact and credibility determinations are for the jury, the non-moving party's evidence is to be believed and ambiguities construed in its favor. Id. at 255; Matsushita, 475 U.S. at 587.

Although the movant bears the burden of demonstrating that there is no genuine issue of material fact, the non-movant likewise must present more than mere allegations or denials to successfully oppose summary judgment. Anderson, 477 U.S. at 256. The nonmoving party must at least present probative evidence from which the jury might return a verdict in his favor. Id. at 257. The movant is entitled to summary judgment where the non-moving party fails to "make a showing 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

A. Admissibility of Dr. Penek's Testimony

The Court first considers Defendant's motion to strike the testimony of Plaintiff's expert witness, Dr. John Penek. Dr. Penek, a pulmonologist, examined Plaintiff, reviewed medical records and the surveillance videos, and was deposed by Defendant's counsel. See Certification of Robert H. Bernstein ("Bernstein Cert.") Ex. A. Defendant argues that his testimony does not meet the standard for admissibility of expert testimony under Federal Rule of Evidence 702 because his opinions are not reliable.

Rule 702 allows an expert witness to provide opinion testimony if it (1) is based upon sufficient facts or data; (2) is the product of reliable principles and methods; and (3) the witness

has applied the principles and methods reliably to the facts of the case. F.R.E. 702. In order to be reliable, an "expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation;' the expert must have 'good grounds' for his or her belief." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 557, 590 (1993)). Expert opinions must thus be grounds in scientifically valid reasoning and methodology. Daubert, 509 U.S. at 580.

Defendant first argues that Dr. Penek ignored Plaintiff's medical records. Plaintiff sought treatment with a number of physicians in November and December 2010, some of whose conclusions might be interpreted as inconsistent with Dr. Penek's finding that she suffered from asthma. For example, Dr. Laura Riggins, Plaintiff's general practitioner, completed an FMLA form diagnosing Plaintiff with "shortness of breath" with no mention of asthma. See Bernstein Cert Ex. G.[3] Her allergist and pulmonologist who she treated with in November 2010 indicated that "the shortness of breath may not be asthma related." Id. Ex. I. Dr. Riggins concluded on December 23, 2010 that shortness of breath issues that Plaintiff presented with on that date were not related to asthma. Id. Ex. L. However, other medical providers aside from Dr. Penek did indicate an asthma diagnosis, including Dr. Riggins. See Visit Note from Dr. Elyse Carty dated November 12, 2010, Bernstein Cert. Ex. D (indicating that Plaintiff's asthma was "active" and that Plaintiff had a history of asthma dating back three years); Visit Note from Dr. Laura Riggins dated November 16, 2010, Bernstein Cert. Ex. F. (diagnosing Plaintiff with "asthma exacerbation"). Dr. Riggins also testified that Plaintiff suffered from asthma attacks in November 2010. Riggins Dep. at 16:14-18; 18:17-24. Thus, it was not Dr. Riggins' opinion that

[3] The signature on the cited form is that of Dr. Laura Hargro, which is Dr. Riggins' former name. (Deposition of Dr. Laura Riggins at 6:3-14, Schorr Cert Ex. 37.) For the sake of clarity, this Opinion will refer to her at all times as Dr. Riggins.

Plaintiff did not have asthma, but rather that the symptoms that she complained of on a particular visit were not related to her asthma. See Riggins Dep. at 82:16-83:13 (indicating that when Plaintiff's symptoms persisted "it seemed like the shortness of breath was due to something more than the asthma").

Defendant's argument that Dr. Penek did not consider all of Plaintiff's medical records from other physicians is not sufficient to render his opinions inadmissible, particularly in light of the fact that many of Plaintiff's medical records from the relevant time period also support a diagnosis of asthma. The cases cited by Defendant are inapposite, as they all relate to opinions tying a disease to a specific cause. See Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 610 (D.N.J. 2002) (excluding opinion tying the plaintiff's leukemia to her time working at a dry cleaning business); Schepise v. Saturn Corp., Civ. No. 1997 WL 897676, at *18 (D.N.J. July 30, 1997) (excluding expert opinion that the headliner in the plaintiff's automobile caused her respiratory problems); Diaz v. Johnson Matthey, Inc., 893 F. Supp. 358, 376-77 (D.N.J. 1995) (excluding opinion tying the plaintiff's asthma to workplace exposure to platinum salts, because the expert offered no reasonable explanation for discounting the plaintiff's fifteen-year-long cigarette smoking habit as a possible cause). Defendant has not cited any law that indicates that when a qualified physician examines a patient and renders a diagnosis, that opinion as is inadmissible if the physician has not extensively discussed other diagnoses that are potentially inconsistent. The law in this circuit is that either a review of a patient's medical records or a personal examination provides a reliable source of information that is sufficient to render an expert's diagnosis admissible. See Paoli R.R. Yard, 35 F.3d at 762 ("a physician who evaluates a patient in preparation for litigation . . . should either examine the patient or review

the patient's medical records . . . in order to determine that a patient is ill and what illness the patient has contracted").

Dr. Penek is a specialist in pulmonary, respiratory and sleep disorders with over forty years of experience in this field. See Schorr Cert. Ex. A. He examined Plaintiff, and testified that he did review Plaintiff's medical records. (Deposition of Dr. John Penek ("Penek Dep.") at 16:20-17:11, Schorr Cert. Ex. 38.) Many of the records from other physicians support Dr. Penek's finding that Plaintiff suffered from asthma. The fact that another physician reached a different conclusion is clearly insufficient deem his testimony inadmissible. Because there is no dispute that Dr. Penek personally examined Plaintiff, there is no basis for excluding his testimony merely because he did not respond in detail to every record in her file. Defendant may argue at trial that Dr. Penek's conclusions are wrong and those of other physicians are correct, but this does not make them unreliable at the gatekeeping stage.

Defendant's second argument as to the admissibility of Dr. Penek's testimony is that his definition of asthma is not generally accepted in the medical community, and his opinion should be excluded for this reason. Medical expert opinions must be supported by "medical or scientific literature" and should be "generally accepted in the medical community." In re Human Tissue Prods. Liability Litig., 582 F. Supp. 2d 644, (D.N.J. 2008).

Dr. Penek indicated in his report that Plaintiff suffered from "bronchospastic disorders (sometimes referred to as 'asthma')." Bernstein Cert Ex. B. Defendant cites the International Classification of Diseases, 9th Edition ("ICD-9"), which indicates that the disorder of "acute bronchospasm" excludes asthma, which is a separate diagnosis. (Bernstein Cert. Ex. N.) For this reason, Defendant argues that Dr. Penek's association of bronchospasm with asthma is his own definition, and not one accepted in the medical community.

Dr. Penek explained the difference between the ICD-9 definition and his diagnosis at his deposition. He believes that bronchospasm is a broad diagnosis that can relate to "many causes." (Penek Dep. 25:13-19.) It is characterized by a "sudden contraction of smooth muscles in the bronchial wall." (Id. at 27:5-7.) However, asthma is a "much more narrow definition" that can be one of the causes of acute bronchospasm. (Id. at 25:15-19.) In other words, "bronchospasm is one manifestation of asthma." (Id. at 27:12-15.) Dr. Penek believed that the ICD-9 excludes allergic asthma, but not "the pulmonary definition of asthma." (Id. at 29:23-30:19.) Although the ICD-9 is often considered a reliable source, Dr. Penek thus explained why his correlation of asthma with acute bronchospasm appears to conflict with it. See Heard v. Astrue, Civ. No. 11-1584, 2013 WL 4659525, at *2 n.2 (N.D. Ill. Aug. 30, 2013) (recognizing, in a social security case, that "[t]he ICD coding system . . . is a universal system for diseases and medications created by the Centers for Medicare and Medicaid Services and the National Center for Health Statistics"). While courts have refused to accept diseases that are not recognized at all by the ICD-9, Defendants have not cited any law that suggests that a court should entirely exclude expert testimony that otherwise bears indicia of reliability merely because the expert diagnosed an individual with two recognized disorders that are assigned separate codes under the ICD-9. See Young v. Burton, 567 F. Supp. 2d. 121, 131 (D.D.C. 2008) (indicating that a diagnosis of an illness not found in the ICD-9, not used in any medical school in the country, with no peer-review articles published on it, is not a reliable diagnosis).

Further, it appears that Defendant's argument is premised upon a misunderstanding of what an "excludes" note means in the ICD-9. Defendant cites the section on "acute bronchospasm," which is assigned code 519.11, and then cites the ICD-9 where it indicates that "519.11 excludes" the disorder code associated with asthma. (Bernstein Cert. Ex. N.) Without

any further citation to authority or supporting testimony from a physician, Defendant wishes the Court to conclude that this means that a person diagnosed with one disorder can never be diagnosed with the other, according to the ICD-9. However, this is not necessarily what "excludes" means under the ICD-9. The ICD-9 indicates that "[t]erms following the word 'excludes' are to be coded elsewhere. The term excludes means "DO NOT CODE HERE." See Conventions Used in the Tabular List, International Classification of Diseases, 9th ed.[4] Thus, it appears that the "excludes" designation relates to the application of a code to a person's condition, and does not necessarily indicate that two diseases are mutually exclusive. According to the official guidelines for coding under the ICD-9, while an "excludes" note in the ICD-9 can mean that the two conditions cannot occur together, it can also mean that the condition excluded is not part of the condition it is excluded from but a patient may have both conditions at the same time. See ICD-9-CM Official Guidelines for Coding and Reporting.[5] Defendant has not produced any evidence as to which meaning the "excludes" note should be given in this case, and thus the Court will not make the assumption in Defendant's favor. For these reasons, Defendant's motion to exclude Dr. Penek's testimony will be denied.

[4] Available at: http://ftp.cdc.gov/pub/health_Statistics/ncHS/publications/iCD9-CM/2011/prefac12.rtf. Further, the ICD-9 indicates that it "is designed for the classification of morbidity and mortality information for statistical purposes, and for the indexing of hospital records by disease and operations, for data storage and retrieval." Introduction, International Classification of Diseases, 9th ed. Defendant has pointed to nothing indicating that the ICD purports to be, or has been interpreted by courts as, black letter law as to the clinical symptoms that may or may not be part of any recognized disease.

[5] The full text of the Guidelines document indicates under "Includes and Excludes Notes and Inclusion Terms" that an:

> excludes note under a code indicates that the terms excluded from the code are to be coded elsewhere. In some cases the codes for the excluded terms should not be used in conjunction with the code from which it is excluded. An example of this is a congenital condition excluded from an acquired form of the same condition. The congenital and acquired codes should not be used together. In other cases, the excluded terms may be used together with an excluded code. An example of this is when fractures of different bones are coded to different codes. Both codes may be used together if both types of fractures are present.

ICD-9-CM Official Guidelines for Coding and Reporting, available at: http://www.cdc.gov/nchs/data/icd/icd9cm_guidelines_2011.pdf.

B. FMLA Retaliation Claim

Plaintiff asserts a retaliation claim under the FMLA in connection with her termination. Such a claim is analyzed under the burden-shifting approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012). Under the McDonnell Douglas framework, the plaintiff "bears the initial burden of establishing a prima facie case by a preponderance of the evidence." Sarullo v. United States Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003) (citation omitted). Then, the burden of production shifts to the defendant to set forth a legitimate, nondiscriminatory reason for the adverse employment action, and if the defendant meets this burden, the plaintiff must prove by a preponderance of the evidence that the defendant's proffered reason was actually a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04.

To set forth a prima facie case of FMLA retaliation, Plaintiff "must show that "(1) [she] availed herself of a protected right under the FMLA; (2) [she] suffered an adverse employment action; and (3) there was a causal connection between the employee's protected activity and the employer's adverse employment action." Naber v. Dover Healthcare Assocs., Inc., 473 F. App'x 157, 159 (3d Cir. 2012).

Here, Plaintiff has established a prima facie case, although this is disputed by Defendant. First, she indisputably availed herself of a protected right under the FMLA by taking FMLA leave. Although Defendant argues that this is not the case because it was Defendant's agents who first brought up the idea of using FMLA leave, Plaintiff nonetheless availed herself of the right. Further, it was Plaintiff who sought to extend the length of her FMLA leave several times, without any suggestion from Defendant that she should do so. Thus, even if somehow, her initial taking of FMLA leave was insufficient, obtaining extensions to her leave would constitute the

availment of a right protected under the FMLA. The second factor is not in dispute, as termination is an adverse employment action. Defendant disputes the third element, arguing that there is no causal connection between Plaintiff's FMLA leave and her termination.

Establishing a causal relationship between an employee's decision to take FMLA leave and an adverse employment event requires the employee to raise an inference of retaliatory intent on the employer's part. Retaliation need not be the sole reason motivating the adverse employment decision; rather, it will suffice for the plaintiff to show that the retaliatory animus was "a determinative factor," i.e., that "the action would not have been taken but for [the] protected activity." Culler v. Shinseki, 840 F. Supp. 2d 838, 846 (M.D. Pa. 2011) (citing LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 231-32 (3d Cir. 2007)).[6] Thus, the Court's inquiry is whether the proffered evidence "suffices to raise the inference" that the plaintiff's request for FMLA leave was causally related to the adverse employment action in question. See LeBoon, 503 F.3d at 232. Where there exists "unusually suggestive" timing between the leave request and the adverse employment action, such timing may be "sufficient standing alone to create an inference of causality and defeat summary judgment." LeBoon, 503 F.3d at 232 (citing Clark County School Dist. v. Breeden, 532 U.S. 268, 273-74 (2001)).

[6] The Culler court freely relies on cases like LeBoon to inform its FMLA retaliation claim prima facie analysis, even though the plaintiff in LeBoon was asserting a retaliation claim not under the FMLA but rather under Title VII of the Civil Rights Act. LeBoon, 503 F.3d at 231. Indeed, numerous district courts in this Circuit have observed that the Third Circuit's decisions involving claims of retaliation under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act provide "helpful guidance" in the FMLA context. See, e.g., Chapman v. UPMC Health System, 516 F. Supp. 2d 506, 523-24 (W.D. Pa. 2007); Grosso v. Federal Exp. Corp., 467 F. Supp. 2d 449, 459 (E.D. Pa. 2006); Collier v. Target Stores Corp., Civ. No. 03-1144, 2005 WL 850855, at *7 (D. Del. Apr. 13, 2005). While the Third Circuit has never explicitly approved of this borrowing practice, its endorsement of this approach can be inferred based on its own FMLA analyses. See, e.g., Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 307 (3d Cir. 2012) (discussing the causation element in the FMLA retaliation prima facie case and explaining the concept by reference to its Title VII discrimination precedents) (citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279-81 (3d Cir. 2000) and LeBoon, 503 F.3d at 232); Schofield v. Metro. Life Ins. Co., 252 F. App'x 500, 504 (3d Cir. 2007) (employing the same practice by reference to Title VII and ADA discrimination precedents) (citing Weston v. Pennsylvania, 251 F.3d 420, 431 (3d Cir. 2001) (Title VII) and Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 760 (3d Cir. 2004) (ADA)). The Court will adhere to this practice in the instant matter.

Defendant has not cited any law where a court found that an inference of causation did not exist when an employee was terminated while on FMLA leave. Because Plaintiff here was terminated while still on FMLA leave, the timing of her termination is sufficient to establish an inference of causation.

Defendant's proffered nondiscriminatory reason for terminating Plaintiff is that it sincerely believed that Plaintiff was abusing her FMLA leave. Assuming this is an adequate nondiscriminatory reason, Plaintiff's FMLA claim still survives summary judgment because Plaintiff has set forth sufficient evidence of pretext.

In determining whether a plaintiff has adequately demonstrated pretext, the question "is not whether [the employer's] decision was wrong or mistaken but whether [it] acted with discriminatory animus." Parker v. Verizon Pa., Inc., 309 F. App'x 551, 557 (3d Cir. 2009) (citing Geddis v. Univ. of Del., 40 F. App'x 650, 652 (3d Cir. 2002)). If the employer can show an "honest belief that the plaintiff either misused or failed to use her medical leave for the intended purpose," the employer can defeat an FMLA claim on summary judgment. Warwas v. City of Plainfield, 489 F. App'x 585, 588 (3d Cir. 2012). Defendant argues that under this test, even if Plaintiff did not misrepresent her condition and her activities while she was on leave were consistent with her doctor's orders, this only shows that Defendant was mistaken, and not that its decisions were pretext for discrimination.

Defendant relies heavily upon Parker in arguing that pretext does not exist, and believes that the facts in the instant case are similar. The plaintiff in Parker was an employee at a Verizon call center who was diagnosed with sarcoidosis and pulmonary fibrosis, both diseases that affect the lungs. Parker, 309 F. App'x at 553. As a result, he took three short-term disability leaves of absence from work, and received approval for intermittent FMLA leave in connection with his

illnesses. Id. at 553, 559. The plaintiff subsequently purchased a new home, and before moving in, started a construction project at the site of the new home. Id. at 554. One day the following month, he called out sick from work. That day, a Verizon manger learned that he had been seen at the construction site unloading materials from a van. Id. A Verizon supervisor decided to conduct a home visit, and heard an electric saw being used in the basement and then, when the saw stopped running, observed the plaintiff come up from the basement "perspiring and wiping his hands on a rag." Id. The plaintiff was terminated from his job based on his alleged misrepresentation of his health condition when he called out sick. Id. The district court granted summary judgment on the plaintiff's FMLA claim, and the Third Circuit upheld the decision. Although the plaintiff denied performing any work on his home the date he called out sick, the question was not whether an issue of material fact existed as to whether he had misrepresented his health condition, but whether Verizon acted with discriminatory animus. Id. at 557. The Third Circuit found no evidence suggesting that Verizon did not legitimately believe that the plaintiff had misrepresented his health status. Id. Thus, any dispute of fact as to whether the plaintiff actually performed work went "solely to whether the decision was wrong, not discriminatory." Id. Further, Verizon indicated that being at the construction site alone was sufficient reason to terminate him, since it believed that this was inconsistent with his inability to come to work, regardless of whether he performed any work at the construction site. Id.

First, there are some distinctions between the claimed factual disputes in Parker and in this case. In Parker, the activity that the employer reasonably and honestly believed that its employee engaged in—operating a saw—would have rather clearly been an abuse of FMLA leave. Here, there is no dispute over what activities Plaintiff engaged in while on leave, but rather a dispute over whether her activities actually constituted abuse of the FMLA's leave

provisions. In fact, some managers at Munich Re recognized that, indicating that they should find out exactly what her doctor's restrictions were before arriving at a conclusion.

However, the primary distinction between this case and Parker is that Plaintiff has produced additional evidence of pretext. Plaintiff relies on emails exchanged within Munich Re in order to establish pretext for retaliation. In an email sent by Deborah Scerbo to Donald Barth, after Barth informed her of the investigator's findings, Ms. Scerbo responded "Nice. Where do we go from here." Schorr Cert. Ex. 68. Plaintiff thus seeks to characterize Ms. Scerbo's response as evidence that Defendants were hoping for a reason to terminate Plaintiff. Plaintiff also cites an email from Ms. Scerbo to Mr. Mauch. The email was sent at 5:13 PM on December 21, 2010, the day that the official decision to terminate Plaintiff was made. Ms. Scerbo began her email with a "smiley face emoticon," asking ":-)) did Ray chat with you about Elaina?" Id. Ex. 69. Plaintiff argues that this is a reference to Plaintiff's termination, to which Mr. Mauch responded "Yes he did. Thank you for your help. That deserves a big :-))!!!" Id.

The Court believes that a reasonable jury could find that the "emoticons," attached to the emails of two Munich Re managers late in the day on which Plaintiff was terminated, are evidence that the decisionmakers at Munich Re were happy to be able to terminate Plaintiff. The same applies to the "nice" response to the news that Plaintiff was observed shopping. Further, in an email from Ms. Scerbo to Mr. Fisher sent December 8, 2010, Ms. Scerbo indicated that:

> [w]e are gathering whatever note or notes were sent to excuse her FMLA absence . . . so we can determine whether her activities were consistent with the doctor's instructions. And, we are planning our meeting so we can meet with her upon her return to work to confront her about her activities during the week and to terminate her.

Bernstein Cert. Ex. 34. A rational conclusion that a factfinder might draw from this email is that Ms. Scerbo was beginning the process of terminating Plaintiff, although she knew that it had not

yet been determined whether Plaintiff had abused her FMLA leave by engaging in activities that were inconsistent with her physicians' instructions.

These documents leave open the question of whether Munich Re believed in good faith that Plaintiff had misrepresented her disability status and abused her FMLA leave. A jury could conclude that Munich Re managers were happy to terminate Plaintiff because her FMLA leave was inconvenient for them. Such a conclusion is suggested by Mr. Miller's observation that "requiring others to fill in on her behalf while she is out of the office" created difficulties for him and other employees. (SUMF ¶¶ 21.) While that may not be the case, it is a reasonable conclusion, and Defendant has not offered any other explanation for the seeming glee accompanying the discovery of potential justification for her termination or the termination decision itself. Further, courts that have considered cases where an employee is allegedly caught "red-handed" on surveillance video performing activities while on disability leave have denied summary judgment on FMLA retaliation claims. See Casseus v. Verizon N.Y., Inc., 722 F. Supp. 2d 326, 338-39 (E.D.N.Y. 2010) (denying summary judgment where employer placed employee under surveillance almost immediately after he took FMLA leave and observed him driving and doing errands, because a jury could conclude that the proffered reason for termination was not only erroneous "but that it was not honestly held and was pretextual"); Nelson v. Oshkosh Truck Corp., Civ. No. 07-509, 2008 WL 4379557, at *2-3 (E.D. Wis. Sept. 23, 2008) (denying summary judgment where employee was terminated after surveillance showed her driving and shopping, because based upon evidence that the activities were not inconsistent with doctor's restrictions, "a jury could conclude that [the employer] simply saw an

opportunity to get rid of" a chronically ill employee whom it deemed unreliable). Summary judgment will therefore be denied on Plaintiff's FMLA claim.

C. Discrimination and Retaliation Under NJLAD

Plaintiff also presents a claim for wrongful discharge on the basis of disability under the NJLAD. "In analyzing claims under the NJLAD, the New Jersey Supreme Court has adopted the analysis outlined by the U.S. Supreme Court in McDonnell Douglas." Thurston v. Cherry Hill Triplex, 941 F. Supp. 2d 520, 535 (D.N.J. 2008) (citing Andersen v. Exxon Co., U.S.A., 89 N.J. 483 (1982)). In order to set forth a disability discrimination claim under the NJLAD, an employee must show "(1) that plaintiff is in a protected class; (2) that plaintiff was otherwise qualified and performing the essential functions of the job; (3) that plaintiff was terminated; and (4) that the employer thereafter sought similarly qualified individuals for that job." Victor v. New Jersey, 203 N.J. 383, 409 (2010) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596-97 (1988)). Once a prima facie case is established, "the McDonnell Douglas analysis is followed in all other respects." Clowes, 109 N.J. at 596-97.

On the other hand, in order to establish a prima facie case of retaliation under the NJLAD, a plaintiff must show that: (1) she was in a protected class; (2) she was engaged in protected activity known to the employer; (3) she was thereafter subjected to an adverse employment consequence; and (4) there is a causal link between the protected activity and the adverse employment consequence. Victor, 203 N.J. at 409. The McDonnell Douglas burden-shifting analysis applies to retaliation claims just as it does to discrimination claims, except that the plaintiff must show that retaliation was the real reason for the adverse employment decision. See Sgro v. Bloomberg L.P., 331 F. App'x 932, 939-40 (3d Cir. 2009).

Defendant first argues that Plaintiff was not in a protected class, because she did not have a disability. Def.'s Mot. Summ. J. at 19. Although Defendant points to law indicating that it is not clear whether asthma is a disability under the NJLAD, it does not point to any cases that ever failed on that basis. See Matthews v. New Jersey Institute of Tech., 772 F. Supp. 2d 647, 656 n.20 (D.N.J. 2011) (indicating that although it is unclear whether asthma is a disability under the meaning of the NJLAD, the court "assume[d] for the purposes of the instant motion that asthma is a disability covered under the NJLAD"). New Jersey courts have broadly interpreted what constitutes a disability under the NJLAD. See Thurston, 941 F. Supp. 2d at 535 (observing that New Jersey courts have determined that alcoholism and obesity are entitled to protection under the NJLAD).[7] Therefore, this Court will not run ahead of the New Jersey courts in interpreting New Jersey law, and will assume that asthma may constitute a disability, thus placing Plaintiff in a protected class.

Defendant further argues that because Plaintiff could not point to ways that asthma limited her essential job functions, her claims must fail, because she must "demonstrate some 'inability to work.'" Def.'s Mot. Summ. J. at 19 (citing Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 150 (3d Cir. 2004)). This is, at best, a stretch of what Conoshenti says. Although the Third Circuit found that a "temporary inability to work while recuperating from a

[7] The NJLAD provides a statutory definition of disability, stating that:

> "Disability" means physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

N.J.S.A. 10:5-5(q).

surgery or injury," is a handicap under the NJLAD,[8] nowhere does it indicate that this is a required element. Conoshenti, 364 F.3d at 150. Finding no precedent supporting the argument that a plaintiff must show an inability to perform specific job functions to have a disability under the NJLAD, the Court rejects this argument.

Similarly unavailing is Defendant's argument that Liebeskind v. Colgate-Palmolive Co., 2010 WL 2557765 (N.J. Super. App. Div. June 11, 2010) controls here. Liebeskind is a New Jersey Appellate division opinion upholding summary judgment in a case where asthma was the alleged disability. There, the plaintiff evidently submitted no report from a medical expert indicating that his particular asthma condition was a disability, nor any evidence that his employer perceived him as having a disability. Id. at *1. Here, Plaintiff has submitted evidence from multiple physicians indicating that she had asthma or another breathing disorder that rendered her temporarily disabled, and her employer at least initially perceived her as having a disability, as it approved her FMLA leave. A plaintiff is in a protected class if she either "has a disability or is perceived by the employer as disabled." Thurston, 941 F. Supp. 2d at 535. Because Plaintiff has produced evidence of both methods of demonstrating her protected status, the Court finds that she has met her burden for a prima facie showing of membership in a protected class.

Defendants do not challenge the other elements of NJLAD discrimination or retaliation claims, and thus the Court finds that Plaintiff has established a prima facie case under the NJLAD. Because after the prima facie stage, New Jersey Courts follow the McDonnell-Douglas burden-shifting test that was applied in the previous section, it is unnecessary to analyze

[8] The NJLAD was amended in 2003 to replace statutory references to "handicap" with the term "disability." 2003 N.J. Sess. Law. Serv. Ch. 180 (Assembly 3774) (West). See also New Jersey v. Dixon, 396 N.J. Super. 329 (App. Div. 2007) (indicating that although "the LAD was amended to delete the term 'handicap' and substitute 'disability' . . . [t]he current definition of the term remains essentially the same").

Defendant's alleged legitimate reason for termination and evidence of pretext in detail again. However, the Court does address one other issue that Defendant raised in connection with the NJLAD discrimination claim, which is an affidavit from Lisa Dudley, another Munich Re employee with asthma who works in the same department that Plaintiff formerly worked in. Ms. Dudley indicates that Munich Re has always accommodated her asthma condition, and has never discouraged her from using the Wellness Center or from taking time away from work to recuperate from an asthma episode. See Affidavit of Lisa Dudley ("Dudley Aff.") ¶¶ 8-12. She also indicates that no one at Munich Re has ever made a disparaging remark about her asthma, and she is unaware of anyone making such a remark to or about Plaintiff. Id. ¶¶ 14-20.

First, the Court observes that Defendant did not mention Ms. Dudley in its moving brief or attach her affidavit as an exhibit. Rather, this evidence was included for the first time with the reply brief. A moving party cannot raise new issues in a reply brief because "[n]o sur-reply is permitted, so the opponent has no opportunity to address the new defense." D'Alessandro v. Bugler Tobacco Co., Civ. No. 05-5051, 2007 WL 130798 (D.N.J. Jan. 12, 2007); see also Stern v. Halligan, 158 F.3d 729, 731 n.3 (3d Cir. 1998) ("A party cannot raise issues for the first time in a reply brief"). Nonetheless, the Court observes that Defendant's evidence that another employee in the same department has not been discriminated against due to having asthma may or may not be admissible at trial. Compare Buller v. PPG Indus., Inc., Civ. No. 13-229, 2014 WL 294968, at *1 (W.D. Pa. Jan. 27, 2014) (granting motion in limine to exclude the testimony of an allegedly similarly situated employee who was not discriminated against because "[d]iscrimination can occur against one individual and not against another similar employee within the same company") with Baptiste v. New York City Transit Auth., Civ. No. 02-6377, 2004 WL 626198, at *5 (S.D.N.Y. Mar. 29, 2004) ("lack of discrimination against other

similarly situated employees is further evidence that prevents the creation of an inference of discrimination"). However, this evidence is insufficient to conclude as a matter of law that Plaintiff was not discriminated against. Nothing in the affidavit indicates that Ms. Dudley ever was supervised by Mr. Miller, as Plaintiff was. Further, drawing all inferences in Plaintiff's favor, Plaintiff was comparatively more seriously ill than Ms. Dudley, as Ms. Dudley indicates that after an asthmatic episode she typically needs "simply the balance of the day to rest." Dudley Aff. ¶ 10. On the other hand, if Plaintiff's evidence is to be believed, she required more extensive time away from her job duties to recover from her asthma-related episodes. It would certainly be reasonable that a jury might conclude that it was only Plaintiff's extended absence, which evidently never was required by Ms. Dudley, that caused inconvenience to Defendant and prompted it to seek to terminate Plaintiff. Further, there is no indication that Ms. Dudley ever sought protection under the FMLA. When one employee is on disability leave and another is not, the Court does not believe they are similarly situated. See Gardull v. Perstorp Polyols, Inc., 382 F. Supp. 2d 960, 966 (N.D. Ohio 2005) (one employee alleging a disability was not similarly situated to another employee when one was on FMLA leave, and the other was not). For these reasons, the Court finds that Plaintiff has provided adequate evidence to defeat summary judgment on the NJLAD discrimination and retaliation claims.

D. Failure to Provide Reasonable Work Accommodations Under the NJLAD

Plaintiff further alleges that Munich Re failed to provide reasonable work accommodations because it did not allow her reasonable time off from work and sufficient access to the company's Wellness Center.

In order to establish a reasonable accommodations claim under the NJLAD, a plaintiff must demonstrate (1) she was disabled and her employer knew of the disability, (2) she requested

an accommodation or assistance for the disability; (3) her employer did not make a good faith effort to assist; and (4) she could have been reasonably accommodated but for the employer's lack of good faith. Tynan v. Vicinage 13 of Superior Ct., 351 N.J. Super. 385, 400-01 (App. Div. 2002).

To the extent that Plaintiff asserts a claim in connection with Defendant's failure to adequately accommodate her request for FMLA leave, the Court believes that these claims must be pursued under an FMLA cause of action.[9] Plaintiff cites Brown v. Dunbar Armored, Inc., Civ. No. 08-3286, 2009 WL 4895237 (D.N.J. Dec. 10, 2009), which allowed a reasonable accommodations claim based upon a denial of leave to survive summary judgment. However, the reasonable accommodations claim in Brown was specifically based on additional leave that the plaintiff sought after his FMLA leave was exhausted. Id. at *4. The Court is aware of no law permitting a second cause of action for failure to provide reasonable accommodations based upon facts that already support an FMLA claim. See, e.g., Ellis v. Mohenis Servs., Inc., Civ. No. 96-6307, 1998 WL 564478, at *5 (E.D. Pa. Aug. 24, 1998) (indicating that FMLA leave provisions "are wholly distinct" from reasonable accommodations obligations under federal law). Further, as described above, Plaintiff does not allege that her leave request was denied, but rather that she was wrongly terminated for allegedly abusing her disability leave. Thus, Defendant's conduct in connection with Plaintiff's FMLA leave request does not support a claim for failure to provide reasonable accommodations.

Plaintiff's second argument is that Defendant denied her request for reasonable accommodations when it required her to obtain a doctor's note in order to continue to use the

[9] An FMLA interference claim, which Plaintiff did not assert in her complaint, is available where an employee shows that she "was entitled to benefits under the FMLA and that [s]he was denied them." Sommer v. The Vanguard Grp., 461 F.3d 397, 399 (3d Cir. 2006).

Wellness Center. However, Plaintiff has not produced evidence that Munich Re ever prevented her from using the Wellness Center when she thought it was necessary. In fact, Plaintiff testified that up to and including November 16, 2010, which was her last day of work at Munich Re before going out on FMLA leave and being terminated, she was never prevented from using the Wellness Center. (Deposition of Elaina Apatoff at 252:1-11, Bernstein Cert. Ex. 1.) She has pointed to no law indicating that when an employer seeks documentation in support of an accommodation, but never actually denies the accommodation, a plaintiff may proceed with a failure to provide reasonable accommodations claim. Thus, summary judgment will be granted on these NJLAD claims.

E. Hostile Work Environment under the NJLAD

In order to set forth a prima facie case of a hostile work environment under the NJLAD, a plaintiff must show that the complained-of conduct (1) would not have occurred but for the employee being a member of a protected class; and it was (2) severe or pervasive enough to make a (3) reasonable member of the protected class believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993).

Here, Plaintiff's claim fails because she cannot meet the fourth element of a hostile work environment claim. Plaintiff argues that her supervisor created a hostile work environment because he "reprimanded" her for alleged excessive use of sick days. She also suggests that the job performance issues that Mr. Miller discussed with her on November 16, 2010 were retribution for her illness. Finally, she indicates, without citation to the record, that Mr. Miller "berated" Plaintiff about her need to use the Wellness Center. The Court cannot consider allegations unsupported by the record to defeat summary judgment, and the other allegations are

insufficient for a reasonable jury to conclude that Plaintiff's conditions of employment were altered. When Mr. Miller met with Plaintiff about her use of sick days, the evidence indicates that he pointed out to her that she had exceeded the threshold at which an employee could be disciplined for excessive absences under its policies. He also encouraged her to discuss "what options she might have" for future absences with human resources. (SUMF ¶ 22.) Plaintiff does not allege that Mr. Miller did anything improper during the course of this meeting, or that she faced any adverse consequences as a result. Viewing the evidence in the light most favorable to Plaintiff, this meeting constituted a "warning" that Plaintiff could be subject to discipline if she continued to incur absences. The meeting also prompted Plaintiff to actually explore options with the human resources department that might help her avoid negative job consequences. Plaintiff does not produce any evidence that Mr. Miller's discussion with her of an alleged performance issue was motivated by knowledge of her alleged disability, except for the temporal proximity between the two. She does not even produce anything to suggest that Mr. Miller's impression about the alleged error was incorrect.[10] One warning about excessive use of sick days, prior to Plaintiff's application for FMLA leave, and a talk with her about a performance problem does not alter the conditions of employment. See Beckwith v. Career Blazers Learning Ctr. of Wash., D.C., Inc., 946 F. Supp. 1035, 1044 (D.D.C. 1996) (noting that "mere criticism and warnings concerning alleged misconduct do not, of themselves, constitute adverse changes in the terms and conditions of employment"). Accordingly, summary judgment will be granted on Plaintiff's hostile work environment claim under the NJLAD.

F. Post-Termination Claims under the NJLAD

[10] In her responsive statement of material facts, Plaintiff indicates that it is "[d]isputed that Plaintiff made the error discussed in Miller's memorandum," without any citation to the record. Pl.'s Resp. to SUMF ¶ 35. Plaintiff must cite to some admissible evidence in order to establish a dispute of fact for the purposes of a summary judgment motion. Fed. R. Civ. P. 56(e).

Plaintiff's post-termination claims relate to Defendant's opposition to her application for unemployment benefits after she was terminated. The NJLAD follows Title VII's approach to post-termination retaliation. Roa v. Roa, 200 N.J. 555, 573 (2010). Title VII "created a distinct cause of action for retaliatory conduct that need not be related to the workplace," which "applies with equal force to the [NJ]LAD." Id. at 574.

As with any other type of retaliation claim under the NJLAD, a plaintiff must show that: (1) she was in a protected class; (2) she was engaged in protected activity known to the employer; (3) she was thereafter subjected to an adverse employment consequence; and (4) there is a causal link between the protected activity and the adverse employment consequence. Victor v. New Jersey, 203 N.J. 383, 409 (2010). If a prima facie case of retaliation is set forth, then the Court must move on to apply the McDonnell Douglas burden-shifting test. See Sgro v. Bloomberg L.P., 331 F. App'x 932, 939-40 (3d Cir. 2009).

Plaintiff points to a four-page letter submitted by Mr. Barth on behalf of Munich Re to an appeals board that reviewed Plaintiff's entitlement to benefits. In the letter, Mr. Barth states that she "went out on disability on the very same day she was given a warning about her excessive absences," and that her "doctor wrote that she could not work because she was limited in her ability to walk due to her asthma." (Schorr Cert. Ex. 73.) Plaintiff argues that these statements are both false. Munich Re's objection to Plaintiff's retaliation claim appears to be primarily based upon its belief that these statements were made for a legitimate reason, in that the statements unfavorable to Plaintiff were justified, instead of resulting from Plaintiff's protected activity.[11]

[11] It is not clear that the third element of a prima facie case is met, which requires that the employee be subjected to an adverse employment consequence. Evidently, Defendant was initially unsuccessful in defeating Plaintiff's application for unemployment benefits, and it is not clear to the Court what the result of the appeal was. See Pl.'s

As the record indicates, Plaintiff was "warned" about the number of her absences on November 10, 2011, and her FMLA disability began November 15, 2011, which would appear to make Mr. Barth's statement to the appeals board that her disability began the same day that she was warned about absences incorrect.

Plaintiff does not cite anything in support of her claim that Mr. Barth's statement about her ability to walk is false. In fact, the FMLA form completed by Dr. Ricketts indicates that Plaintiff's condition "makes it difficult for [her] to do everyday activities, walk, etc." (Bernstein Cert. Ex. G.) Thus, Mr. Barth's statement that Plaintiff's doctor wrote that she was limited in her ability to walk appears to fairly represent what appears in Plaintiff's records.

Therefore, this claim comes down to whether Mr. Barth's representation that Plaintiff began disability leave the same day that she was warned about excessive absences, when she actually commenced her leave five days after the warning, constitutes retaliation that can be linked to protected conduct. Even if incorrect, the Court finds no evidence that this one error in a four page letter by Mr. Barth was made with retaliatory animus, in order to make it less likely that she would receive unemployment compensation. Whether Plaintiff began her disability leave the same day that her supervisor discussed absences with her, or five days later, the distinction is not meaningful enough that a reasonable factfinder could find that it was an intentional falsehood made with the objective of preventing Plaintiff from obtaining unemployment benefits. Thus, summary judgment will be granted as to the post-termination retaliation claim.

G. Punitive Damages

Opp'n at 37. However, the Court does not consider this issue as it was not raised by Defendant and thus Plaintiff has not been afforded an opportunity to respond. See Fed. R. Civ. P. 56(f).

In order to recover punitive damages under the NJLAD, a plaintiff must show that there was "actual participation by upper management or willful indifference," and that the conduct "was especially egregious." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 274 (2010) (citing Rendine v. Pantzer, 141 N.J. 292, 313-14 (1995)).[12] Conduct is "especially egregious" when it is "evil-minded," or "accompanied by a wanton and willful disregard for the rights of" the plaintiff. Id. at 274. The New Jersey Supreme Court has also indicated that a finding that the defendant acted with "actual malice" will support a finding of especially egregious conduct. Id. Here, the Court cannot determine as a matter of law that Munich Re did not act with willful indifference to Plaintiff's rights, as if a jury were to find in Plaintiff's favor based upon the evidence discussed in this Opinion, a reasonable jury could also find willful indifference. See Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 352-54 (App. Div. 1997) (punitive damages properly was submitted to the jury in a NJLAD claim involving, in part, allegations that the plaintiff was singled out for surveillance). This is a proper question for the jury, and thus summary judgment will be denied as to the punitive damages claims against Munich Re.

H. Defendant's Counterclaims

Defendant has asserted counterclaims for unjust enrichment and fraudulent misrepresentation, indicating that issues of fact exist as to whether Plaintiff defrauded it by collecting salary and benefits while misrepresenting that she was disabled.

Plaintiff first objects that the pleadings fail to state a claim for either of these theories because it does not plead the claims with particularity. However, Plaintiff never filed a motion to dismiss the counterclaims. Courts have rejected the attempts of litigants to "explain for the

[12] Punitive damages are not available in an FMLA cause of action. See Santosuosso v. NovaCare Rehabilitation, 462 F. Supp. 2d 590, 600-01 (D.N.J. 2006). Although the Complaint seeks punitive damages in the FMLA count, Plaintiff does not now argue that such a claim should survive, and thus summary judgment will be granted as to punitive damages under the FMLA count.

first time why the case should not have proceeded in the first place" at the summary judgment stage. See Seabron v. American Family Mut. Ins. Co., Civ. No. 11-1096, 2012 WL 1520156, at *3 (D.Colo. Apr. 30, 2012) (a Rule 56 motion "is not the proper vehicle for attacking a pleading for failure to plead fraud with particularity"). Thus, the Court declines to examine the sufficiency of the pleadings and moves on to address the sufficiency of the evidence produced by Defendant in support of its counterclaims.

1. Unjust Enrichment

In order to establish an unjust enrichment claim, a plaintiff must show that the defendant received a benefit and that retention of the benefit without payment would be unjust. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Because it is clear that Plaintiff received a benefit—her salary and other benefits while she was on FMLA leave—the issue is whether Defendant has produced evidence to support a showing that it would be unjust for Plaintiff to retain the benefit. Defendant's theory is that Plaintiff's FMLA leave was a pretense to secure paid time off from work. Under New Jersey law, an employer may seek to recover "benefits paid to a claimant where it is based on the wrongful acts or omissions of that claimant" under an unjust enrichment theory. Hajnas v. Engelhard Mineral & Chem. Co., 231 N.J. Super. 353, 360-61 (App. Div. 1989).

Defendant's alleged evidence consists of the investigator's observations and photographic evidence, which it believes demonstrates that Plaintiff knew she could come to work, but made no attempt to do so. Defendant also produces reports from a doctor who examined Plaintiff, indicating that she did not suffer from asthma and could have performed her duties at the time when she took FMLA leave. See Report of Dr. Frederick C. Cogen 12-13, Bernstein Cert. Ex. C. Further, Plaintiff evidently reported to her general practitioner that she

had difficulty walking approximately two weeks before the surveillance footage was captured, which a jury could find to be inconsistent with the surveillance footage. See FMLA Form dated November 29, 2010, Bernstein Cert Ex. G. Just as there is evidence from which a reasonable jury could conclude that Plaintiff was unable to work, and Defendant acted for pretextual reasons, there is evidence from which a factfinder could conclude that Plaintiff was able to perform her job duties, and thus it would be unjust for her to retain the benefits she received during some or all of the time she was on leave.

2. Fraudulent Misrepresentation

To establish its claim for fraudulent misrepresentation, Defendant must prove "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the [plaintiff] of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Konover Constr. Corp. v. East Coast Constr. Servs. Corp., 420 F. Supp. 2d 366, 370 (D.N.J. 2006) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Defendant's fraudulent misrepresentation counterclaim is based upon the same evidence as the unjust enrichment claim. Defendant argues that Plaintiff deliberately suppressed a material fact, which is "equivalent to a material misrepresentation." See Kuzian v. Electrolux Home Prods., Inc., 937 F. Supp. 2d 599, 614 n.13 (D.N.J. 2013). The facts that Plaintiff allegedly deliberately suppressed are that she could come to work and sit at her desk, and that she ran errands after her doctors' appointments.

The Court finds that if Defendant's evidence is believed, a reasonable factfinder could determine that at some point in her communications with Munich Re management about extending her leave, she suppressed the fact that she was well enough to return to work. Plaintiff

does not argue that any of the other elements of a fraudulent misrepresentation claim are not met, and thus the Court denies summary judgment on this counterclaim as well.

IV. CONCLUSION

For the reasons expressed above, Defendant's motion for summary judgment will be **GRANTED IN PART, DENIED IN PART**. The motion will be granted as to the NJLAD reasonable accommodations claim, the NJLAD post-termination retaliation claim, the NJLAD hostile work environment claim, and Plaintiff's punitive damages claim in connection with her FMLA count. The remainder of Defendant's motion for summary judgment will be denied. Defendant's motion to strike the testimony of Dr. Penek will be **DENIED**. Plaintiff's motion for summary judgment on Defendant's counterclaims will be **DENIED**. An appropriate Order shall issue.

Dated: 8/1/2014

s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge