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ERIE COUNTY LEGAL JOURNAL

Reporting Decisions of the Courts of Erie County
The Sixth Judicial District of Pennsylvania

Managing Editor: Megan E. Anthony

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Solo/Small Firm Division Meeting
Noon
ECBA Headquarters live (must RSVP*)
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Diversity and Inclusion Division Meeting
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WEDNESDAY, JUNE 23, 2021
AKT Kid Konnection Event
TBD
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THURSDAY, JUNE 24, 2021
Defense Bar Meeting
4:00 p.m.
ECBA Headquarters live (must RSVP*)
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FRIDAY, JUNE 25, 2021
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Noon
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MONDAY, JUNE 28, 2021
ECBA Board of Directors Meeting
Noon
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TUESDAY, JUNE 29, 2021
AKT 5K Run/Walk Committee Meeting
Noon
The William J. Schaaf & Mary B. Schaaf Education Center live (must RSVP*)
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WEDNESDAY, JUNE 30, 2021
Judicial Committee Meeting
Noon
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MONDAY, JULY 5, 2021
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ECBA Office Closed
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RONALD J. KIMMY, II v. HYTECH TOOL & DESIGN CO., INC.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

On summary judgment a court must view all facts of record and reasonable inferences therefrom in the light most favorable to the non-moving party.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A record that supports summary judgment will either show the material facts of the case are undisputed or contain insufficient evidence of facts to make out a nonmoving party's *prima facie* cause of action or defense.

LABOR AND EMPLOYMENT / EMPLOYMENT AT WILL / WRONGFUL DISCHARGE

The Americans with Disabilities Act and the Pennsylvania Human Relations Act create statutory exceptions to the general rule that an employee may be terminated by an employer for any or no reason.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE / MOTION FOR SUMMARY JUDGMENT

Pennsylvania courts apply the *McDonnell Douglas* tripartite framework to determine whether summary judgment is appropriate in employment discrimination cases according to which a plaintiff must first establish sufficient evidence of a *prima facie* case of discrimination; the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action; the burden then shifts back to the plaintiff to provide sufficient evidence that the articulated reasons were a mere pretext for discrimination.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

In order to establish a *prima facie* case of disability discrimination under the Americans with Disabilities Act a plaintiff must demonstrate: (1) that he or she is a disabled person within the meaning of the Act; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she has suffered an otherwise adverse employment decision as a result of discrimination.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

To qualify as disabled under the Americans with Disabilities Act, a plaintiff must satisfy the conditions for having either (1) an actual impairment; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Pursuant to the ADA Amendments Act of 2008, a plaintiff alleging qualification under the "regarded as" category of disability need no longer show that an impairment substantially limits one or more major life activities.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

When the Third Circuit has spoken on a federal issue, the ultimate answer to which has not yet been provided by the United States Supreme Court, it is appropriate for Pennsylvania courts to follow Third Circuit precedent in preference to that of other jurisdictions, and if the Third Circuit has not ruled on a specific question, Pennsylvania courts may seek guidance from the pronouncements of the other federal circuits, as well as the district courts, in the same spirit in which the Third Circuit itself considers such decisions.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

In light of the changes to the Americans with Disabilities Act made by Congress in the ADA Amendments Act of 2008, an employer's mere knowledge of an impairment is sufficient to create an inference of perception under a "regarded as" claim for disability, abrogating Third Circuit pre-ADA Amendments Act case law to the contrary.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

To qualify under the "regard as" category of disability the plaintiff's impairment cannot be one that is transitory and minor, although the employer bears the burden of proving the impairment is objectively both transitory and minor.

STATUTES / AMENDMENT

The disability discrimination standards of the Americans with Disabilities Act and the Pennsylvania Human Relations Act remain coterminous despite the fact that the Pennsylvania General Assembly has not updated the Pennsylvania Human Relations Act since Congress enacted the ADA Amendments Act of 2008.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

As part of its *prima facie* case under *McDonnell Douglas*, a plaintiff must provide evidence that supports a logical inference of causation between the alleged disability and the adverse employment action.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Because the Americans with Disabilities Act incorporates a but-for causation standard, an employer's concern over an employee's medical expenses stemming from a disability is sufficient to support a logical inference of causation so long as the employer's economic concern is inextricably bound up with the employee's disability.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE/EVIDENCE

The Stray Remarks Doctrine does not apply to comments made by a decisionmaker with the authority to discharge.

EVIDENCE / HEARSAY / EXCEPTIONS

For a statement to qualify under the party opponent exception to the hearsay rule found at Pa.R.E. 803(25)(D), relating to statements made by an opposing party's agent or employee, the proponent of the statement must establish that the declarant was an agent or employee of a party opponent, the declarant made the statement while employed by the party opponent, and the statement concerned a matter within the scope of agency or employment.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

The pretext inquiry under the third stage of *McDonnell Douglas* is distinct from the causation inquiry under stage one; however, the evidence relevant to each may be coextensive.

LABOR AND EMPLOYMENT/ WRONGFUL DISCHARGE

Suspicion or disbelief of the legitimate reasons for termination put forward by the employer, together with the elements of the plaintiff's *prima facie* case, may suffice to show pretext under the third stage of *McDonnell Douglas*.

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT/EVIDENCE

Under the rule established in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), a party moving for summary judgment cannot rely on oral testimony alone, either through testimonial affidavits or depositions, even if uncontradicted, to establish the absence of a genuine issue of material fact.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is inappropriate where the veracity of certain claims remain in dispute as weight and credibility determinations are inherently the province of the factfinder at trial to resolve.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 12107 of 2019

Appearances: Timothy D. McNair, Esq., on behalf of Plaintiff, Ronald J. Kimmy, II
Gery T. Nietupski, Esq., on behalf of Defendant, Hytech Tool& Design Co., Inc.

OPINION OF THE COURT

Piccinini, J., April 9, 2021

In Pennsylvania, an employment relationship may be terminated for any or no reason, absent a statutory or contractual provision to the contrary. *Weaver v. Harpster*, 975 A.2d 555, 562 (Pa. 2009). The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. create statutory exceptions to at-will employment for the discharge of an employee on the basis of physical or mental disability. The Plaintiff in this case was terminated from his employment and argues that he was fired because of a physical disability stemming from a heart attack. The Defendant, his former employer, claims he was fired for a nondiscriminatory reason, namely, poor job performance.

The question presently before the Court on Defendant's Motion for Summary Judgment is whether the Plaintiff has developed sufficient evidence to submit that factual question to a jury or whether this case should be dismissed without the need for trial. Because the Plaintiff has produced adequate evidence from which a reasonable jury could deliver a favorable verdict at trial, and because genuine issues of material fact remain to be resolved, the Court holds that summary judgment is inappropriate.

I. BACKGROUND

Plaintiff, Ronald J. Kimmy II, was employed by Defendant, Hytech Tool & Design Co., Inc., as a CNC machine programmer and operator of a Doosan CNC Lathe from February 2016 until he was discharged from his employment on September 7, 2017. He claims that termination was unlawful under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq.

On March 5, 2017, Kimmy suffered a heart attack and underwent open heart surgery. Upon recommendation from his doctor, Kimmy returned to work approximately six months later on Tuesday, September 5, 2017. Kimmy was fired two days later on Thursday, September 7, 2017. The parties dispute the intervening events that precipitated his termination.

Hytech claims that when Kimmy arrived to work on Tuesday he simply gave his medical work release documents to the receptionist without seeking any direction from management. Brief in Support of Defendant's Motion for Summary Judgment (Br. in Supp. of Def's Mot. for Summ. J.), p. 2. Rather than working on the Lathe, Kimmy was observed perusing his phone. Br. in Supp. of Def's Mot. for Summ. J., p. 2. Although Hytech admits there was a software glitch with the Lathe, which initially prohibited Kimmy from working, it claims

the issue was fixed by noon on the day of his return. Hytech further claims that Kimmy did not complete any work on Tuesday, Wednesday, or Thursday, telling Hytech's President and co-owner, David Reiser, that he was still "acclimating himself." Br. in Supp. of Def's Mot. for Summ. J., p. 8. On Thursday, when Kimmy failed to begin working after nearly two hours on the job, Reiser fired Kimmy due to his poor job performance. Br. in Supp. of Def's Mot. for Summ. J., pp. 8-9.

Kimmy recalls events differently. He claims that when he returned to work on Tuesday he found his work area in disarray and spent time cleaning the mess. Brief in Opposition to Defendant's Motion for Summary Judgment (Br. in Opp. to Def.'s Mot. for Summ. J.), p. 3. He then checked in with his immediate supervisor, Jim Jankowiak, who instructed him to make a certain part for a flashlight, but he was unable to program the machine because the software was unavailable. Br. in Opp. to Def.'s Mot. for Summ. J., pp. 3-4. Although Kimmy admits to being on his phone at times, he claims it was solely for the purpose of searching for codes to program the machine. Br. in Opp. to Def.'s Mot. for Summ. J., pp. 9-10. Kimmy also claims the software did not become available until Thursday, the day he was terminated. Br. in Opp. to Def.'s Mot. for Summ. J., p. 11.

Kimmy filed a Complaint with the Equal Employment Opportunity Commission (EEOC), claiming he was terminated on the basis of disability, cross-filing his Complaint with the Pennsylvania Human Relations Commission. The EEOC ultimately issued a Notice of Right to Sue. The present lawsuit was commenced on August 6, 2019. Hytech filed this motion for summary judgment on November 13, 2020, and Kimmy responded on December 15, 2020. Oral argument on the Motion was held on February 9, 2021. The Court now resolves that Motion.

II. APPLICABLE LAW

A. General Principles of Summary Judgment

Summary judgment serves a gatekeeping function. Its purpose is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." *Garzella v. Borough of Dunmore*, 62 A.3d 486, 497 (Pa. Cmwlth. 2013) (quoting *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996)). "Summary judgment is appropriate where the record clearly demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citations omitted). *Estate of Agnew v. Ross*, 152 A.3d 247, 259 (Pa. 2017). A court may only grant summary judgment "where the right to such judgment is clear and free from all doubt." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

Our Supreme Court has stressed "that it is not [a] court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried." *Fine v. Checcio*, 870 A.2d 850, 862 (Pa. 2005). The focus is not on weight and credibility; but rather, "whether the proffered evidence, *if credited by a jury*, would be sufficient to prevail at trial." *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (emphasis in original). Of paramount concern at this preliminary stage, "the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party." *Estate of Agnew*, 152 A.3d at 259.

"Our standard for summary judgment is twofold." *Pilchesky v. Gatelli*, 12 A.3d 430, 443 (Pa. Super 2011). These dual bases for summary judgment are codified at Pennsylvania Rule of

Civil Procedure 1035.2, governing a moving party's motion for summary judgment. It states:

> 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:
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (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 or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2. Thus, "a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury." *American Southern Insurance Co., Inc. v. Halbert*, 203 A.3d 223, 226 (Pa. Super. 2019) (quoting *Cigna Corp. v. Executive Risk Indemnity., Inc.*, 111 A.3d 204, 210-11 (Pa. Super. 2015)). Because these inquiries are distinct, it is often helpful to separate the analysis according to the following methodology:

> Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the [fact-finder] by resolving any material issues of fact.

Dudley v. USX Corp., 606 A.2d 916, 920 (Pa. Super. 1992); *see also Ack v. Carroll Township Authority*, 661 A.2d 514, 516-17 (Pa. Cmwlth. 1995) (citing *Dudley*, 606 A.2d at 916).

Pennsylvania Rule of Civil Procedure 1035.3 governs a non-moving party's response to a motion for summary judgment. Essentially, the rule provides that "[i]n response to a summary judgment motion, the nonmoving party cannot rest upon the pleadings, but rather must set forth specific facts demonstrating a genuine issue of material fact" or "evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." *Bank of America, N.A. v. Gibson*, 102 A.3d 462, 464 (Pa. Super. 2014); Pa.R.C.P. No 1035.3(a)(2). "Supporting affidavits in response to a motion for summary judgment are acceptable as proof of facts" and a non-moving party may "respond to a motion for summary judgment by relying solely on a proper affidavit to create a genuine issue of material fact, i.e., a credibility question for the jury." *Kardos v. Armstrong Pumps, Inc.*, 222 A.3d 393, 401 (Pa. Super. 2019) (citations omitted).

"[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence" *Bezjak v. Diamond*, 135 A.3d 623, 631 (Pa. Super. 2016) (citations omitted). Additionally, "evidence adduced by the non-moving party must

be of such a quality that a jury could return a favorable verdict to the non-moving party on the issue or issues challenged by a summary judgment request." *InfoSAGE Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616, 625 (Pa. Super. 2006) (citing *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa. Super. 1998)).

Although the function of summary judgment is to avoid useless trials, it must not be used to provide for trial by affidavits or depositions. *DeArmitt v. New York Life Insurance Co.*, 73 A.3d 578, 595 (Pa. Super. 2013). To that end, under the rule established in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), a party moving for summary judgment cannot rely on oral testimony alone, either through testimonial affidavits or depositions, even if uncontradicted, to establish the absence of a genuine issue of material fact. *Woodford v. Insurance Departmen*t, 243 A.3d 60, 69 (Pa. 2020) (citing Pa.R.C.P. 1035.2 Note). The *Nanty-Glo* rule is "premised on the notion that credibility determinations must be left to the finder of fact." *Id*. (citing *Bailets v. Pennsylvania Turnpike Commission*, 123 A.3d 300, 304 (Pa. 2015); *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900 (Pa. 1989); J. PALMER LOCKHARD, *Summary Judgment in Pennsylvania: Time for Another Look At Credibility Issues*, 35 DUQ. L. REV. 625, 629 (1997)). Because *Nanty-Glo* applies only to evidence offered by a moving party on summary judgment, it necessarily comes into play only under the third step of the *Dudley* framework. *Dudley*, 606 A.2d at 920.

These overarching principles guide the Court's analysis. Before turning to that analysis, however, the Court pauses to provide an overview of the substantive law in this area, derived from two landmark statutes.

B. The Americans with Disabilities Act & The Pennsylvania Human Relations Act

The Americans with Disabilities Act of 1990 (ADA) was enacted in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It directs that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to ... [the] discharge of employees ... and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Similarly, the Pennsylvania Human Relations Act (PHRA) declares it to be the public policy of this Commonwealth "to foster the employment of all individuals in accordance with their fullest capacities regardless [*inter alia*] of their handicap or disability." 43 P.S. § 952(b). To that end, it states that "[i]t shall be an unlawful discriminatory practice ... [f]or any employer because of ... non-job related handicap or disability ... to discharge from employment such individual." 43 P.S. § 955(a).

Generally, the ADA and PHRA "are interpreted in a co-extensive manner because both laws deal with similar subject matter and are grounded on similar legislative goals[,]" and courts of this Commonwealth may look to federal court decisions when interpreting either statute, even though those decisions are not binding on state courts. *Harrisburg Area Community College v. Pennsylvania Human Relations Commission*, 245 A.3d 283, 293 n.10 (Pa. Cmwlth. 2020) (citing *Imler v. Hollidaysburg American Legion Ambulance Service*, 731 A.2d 169, 173-74 (Pa. Super. 1999)); *see also Stultz v. Reese Bros., Inc.*, 835 A.2d 754, 759 (Pa. Super. 2003).

Moreover, "[w]hen the Third Circuit has spoken on a federal issue, the ultimate answer to which has not yet been provided by the United States Supreme Court, it is appropriate for [Pennsylvania courts] to follow Third Circuit precedent in preference to that of other

jurisdictions." *Werner v. Plater-Zyberk*, 799 A.2d 776, 782 (Pa. Super. 2002) (citation omitted). This practice discourages "litigants from 'crossing the street' to obtain a different result in federal court than they would in Pennsylvania court." *Graziani v. Randolph*, 856 A.2d 1212, 1218 (Pa. Super. 2004). "[I]f the Third Circuit has not ruled on a specific question, [Pennsylvania courts] may seek guidance from the pronouncements of the other federal circuits, as well as the district courts, in the same spirit in which the Third Circuit itself considers such decisions. *NASDAQ OMX PHLX, Inc. v. PennMont Securities*, 52 A.3d 296, 303 (Pa. Super. 2012) (quoting *Werner*, 799 A.2d at 782).

As both parties agree, in the absence of direct proof of discrimination, Pennsylvania courts apply the analytical model established by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973) to determine whether summary judgment is appropriate in employment discrimination cases. *Leibensperger v. Carpenter Technologies, Inc.*, 152 A.3d 1066, 1073 (Pa. Cmwlth. 2016); *Canteen Corp. v. Pennsylvania Human Rights Commission*, 814 A.2d 805, 811 (Pa. Cmwlth. 2003) ("Although we have never addressed whether [the *McDonnell Douglas* test] is the proper test applicable to an analysis under the [PHRA], we agree that it is the proper one."). Under the *McDonnell Douglas* framework: "a plaintiff must first establish a prima facie case of discrimination. If the plaintiff succeeds, the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to the plaintiff to prove ... that the articulated reason was a mere pretext for discrimination." *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 152 (3d Cir. 2017) (quoting *Ross v. Gilhuly*, 755 F.3d 185, 193 (3d Cir. 2014)); *Garner v. Pennsylvania Human Relations Commission*, 16 A.3d 1189, 1198 & n.5 (Pa. Cmwlth. 2011) (noting "[o]ur Supreme Court adopted the *McDonnell Douglas* model in *General Electric Corp. v. Pennsylvania Human Relations Commission*, 365 A.2d 649 (1976)"). While "*McDonnell Douglas* was a refusal to hire case ... the shifting burden of proof approach applies in any claim of employment discrimination, whether it involves an employee's discharge, compensation or terms of employment." *Garner*, 16 A.3d at 1198 n.5.

In order to establish a *prima facie* case of disability discrimination under the first stage of *McDonnell Douglas*, a plaintiff must demonstrate "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Stultz*, 835 A.2d at 760 (quoting *Gaul v. Lucent Technologies*, 134 F.3d 576, 580 (3d Cir.1998)).[1] The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

After the passage of the ADA, courts generally took a restrictive view of its definition of "disability." *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-89 (1999) (holding that mitigating measures, such as medication and prosthetic devices, should be taken

[1] Some courts separate the *prima facie* case into four, rather than three, elements. *See Leibensperger,* 152 A.3d at 1072-73 (noting that "[u]nder *McDonnell Douglas*: 'the complainant bears the burden of establishing a [prima facie] case by showing that: (i) he is in a protected class; (ii) he is qualified for the position; (iii) he suffered an adverse employment action; and (iv) he was discharged under circumstances that gave rise to an inference of discrimination.'") (quoting S*panish Council of York, Inc. v. Pennsylvania Human Relations Commission*, 879 A.2d 391, 397 (Pa. Cmwlth. 2005)). The Court addresses this discrepancy more fully in footnote 8, p. 25, *infra*.

into account in determining whether a person is disabled for purposes of the ADA, and further, that a plaintiff does not meet the criteria for being "regarded as disabled" unless the employer perceives the plaintiff's impairment as one that would substantially limit a major life activity); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 192-97 (2002) (holding the terms "substantially limits" and "major life activity" must "be interpreted strictly to create a demanding standard for qualifying as disabled").

In response, Congress passed, and President George W. Bush signed, the ADA Amendments Act of 2008 (ADAAA). In doing so "Congress expressly rejected the strict standards imposed on the definition of 'disability' by the Supreme Court and the EEOC ... amending the relevant provisions of the ADA to include clarifying details, rules of construction, and examples that underscore the broad applicability of the statute." *Mancini v. City of Providence by and through Lombardi*, 909 F.3d 32, 40 (1st Cir. 2018). The ADAAA mandates that "[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ... [and] to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). The EEOC has also promulgated new regulations to that effect. *See* 29 C.F.R. § 1630.2. Of particular significance, now, "under the ADAAA, a plaintiff who is proceeding under the 'regarded as' prong to establish a disability no longer needs to show that his impairment substantially limits a major life activity." *Rubano v. Farrell Area School District*, 991 F. Supp. 2d 678, 691 (W.D. Pa. 2014) (citing 29 C.F.R. § 1630.2(j)); *see also Equal Employment Opportunity Commission v. BNSF Railway Co.*, 902 F.3d 916, 922 (9th Cir. 2018); *Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016). These changes "ushered in a brave new world for disability discrimination claims." *Mancini*, 909 F.3d at 40.

III. ANALYSIS: SUFFICIENCY OF THE EVIDENCE UNDER RULE 1035.2(2)

Hytech asserts summary judgment is appropriate because "there are no issues of material fact" left to be resolved. Defendant's Motion for Summary Judgment, p. 1. This implicates the basis for summary judgment under Rule 1035.2(1). However, implicit in Hytech's argument is also the second species of summary judgment found at Rule 1035.2(2). *See* Def.'s Br. in Supp. of Summ. J., p. 3 (stating "in order to defeat a Motion for Summary Judgment, Plaintiff must show sufficient evidence on any issue essential to his case in which he bears the burden of proof such that a jury could return a verdict in his favor.") (citing *Ertel*, 674 A.2d at 1042). These two independent bases for summary judgment under Rule 1035.2 are often intertwined such that resolution of one may significantly bear on the resolution of the other. As is often the case, however, it is helpful to bifurcate the analysis. Utilizing the *Dudley* framework, the Court first addresses whether Kimmy has offered sufficient evidence to make out its cause of action pursuant to Rule 1035.2(2). At this stage, the Court looks only to the evidence produced by Kimmy. *Dudley*, 606 A.2d at 920.

Once again, to survive summary judgment under Rule 1035.2(2), Kimmy must provide sufficient evidence from which a reasonable jury could return a favorable verdict, which requires Kimmy to provide adequate evidence as to each stage of *McDonnell Douglas* for which he carries the burden of production. The first stage (confusingly enough) considers whether Kimmy has made out a *prima facie* case of disability discrimination under the ADA and PHRA. The Court begins it analysis here.

A. Kimmy's Prima Facie Case of Disability Discrimination

As previously noted, a *prima facie* case of disability discrimination is satisfied by a showing

that (1) the plaintiff is a disabled person within the meaning of the ADA or the PHRA; (2) the plaintiff is otherwise qualified to perform the essential functions of the job; and (3) the plaintiff has suffered an adverse employment decision as a result of discrimination. *Stultz*, 835 A.2d at 760. Hytech does not contest that Kimmy was qualified for his position, satisfying the second element. Hytech does dispute whether Kimmy offers sufficient evidence from which a reasonable jury could infer he was disabled within the meaning of the ADA and PHRA and whether he offers sufficient evidence that he suffered an adverse employment decision because of his alleged disability. The Court addresses each of these arguments in turn.

1. Evidence of disability under the ADA and PHRA

The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1). Thus, to satisfy any definition of disability under the ADA, one must first offer evidence of an impairment. EEOC regulations define "impairment" broadly to include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine[.]" 29 C.F.R. § 1630.2(h)(1).[2]

Kimmy undoubtedly suffered a heart attack, and that alone is arguably sufficient to support an inference of a cardiovascular impairment at the summary judgment stage. *See Mancini*, 909 F.3d at 41-42 (citing *Katz v. City Metal Co., Inc.*, 87 F.ed 26, 31 (1st Cir. 1996) ("Especially given that City Metal has never disputed that Katz had a heart attack, we have no doubt that a rational jury could conclude, even without expert medical testimony, that Katz had a condition affecting the cardiovascular system and therefore that he had a physical impairment under the ADA."); *Marinelli v. City of Erie*, 216 F.3d 354, 361 (3d Cir. 2000) ("failure to present medical evidence of his impairment" was not fatal because arm and neck pain are "among those ailments that are the least technical in nature and are the most amenable to comprehension by a lay jury.")).

For further support, Kimmy points to a medical report labeled as Defendant's Exhibit A, which denotes an EKG diagnosis of "S/P CABG" — short for Status Post Coronary Artery Bypass Graft — as evidence of such a cardiovascular condition. "Coronary artery bypass graft surgery (CABG) is a procedure used to treat coronary artery disease." John Hopkins Medicine, *Coronary Artery Bypass Graft*, available at https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/coronary-artery-bypass-graft-surgery (last viewed April 6, 2021). Viewing this medical report in the light most favorable to Kimmy, a jury could easily conclude he suffered from a cardiovascular disorder or condition, namely coronary artery disease, a form of heart disease. *See* Centers for Disease Control and Prevention, *Coronary Artery Disease (CAD)*, available at https://www.cdc.gov/heartdisease/coronary_ad.htm#:~:text=Coronary%20artery%20disease%20(CAD)%20is,reduce%20your%20risk%20for%20CAD (last viewed

[2] In this regard, EEOC regulations carry the force of law. *See* 42 U.S.C. § 12205a ("The authority to issue regulations granted to the [EEOC] ... under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 of this title (including rules of construction) and the definitions in section 12103 of this title, consistent with the ADA Amendments Act of 2008.").

April 6, 2021). Consequently, a jury could reasonably conclude Kimmy's heart disease satisfied the definition of impairment as set forth in the EEOC regulation.

However, not all impairments rise to the level of disability. To qualify as disabled under the statute, the individual must satisfy the conditions for having either: (1) an actual impairment; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1). The first two categories require that the impairment "substantially limits one or more major life activities of such individual." *Id*. On the other hand, "[w]here an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs[,]" and rather, "the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability[.]" 29 C.F.R. § 1630.2(g)(3). "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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)(A) (emphasis added). To that end, Kimmy need not show his heart disease substantially limited a major activity or even that Hytech perceived his heart disease to substantially limit a major life activity. 29 C.F.R. § 1630.2(l)(1). Instead, Kimmy need only offer evidence that Hytech perceived him to suffer from the cardiovascular condition.

Although perception of a disability is the hallmark of a "regarded as" claim, it remains an open question in the Third Circuit whether mere knowledge of an impairment is sufficient to create an inference of perception on the part of the employer. In the absence of precedential guidance from the Third Circuit, some federal district courts continue to follow, on the basis of *stare decisis*, pre-ADAAA case law holding "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996); *see Baughman v. Cheung Enterprises, LLC*, 2014 WL 4437545, at *12 (M.D. Pa. 2014). In a non-precedential opinion, a panel of the Third Circuit appeared to agree, finding that although the plaintiff's "supervisor and some co-workers were aware of her medical condition" she "did not provide any evidence that they regarded her as disabled." *Cunningham v. Nordisk*, 615 F. App'x. 97, 100 (3d Cir. 2015). Other federal district courts have held that the ADAAA impliedly overruled *Kelly* in this regard. *See Jakomas v. City of Pittsburgh*, 342 F. Supp. 3d 632, 647-48 (W.D. Pa. 2018); *Rubano*, 991 F. Supp. 2d at 692-93 (noting "all that an ADA plaintiff must show to raise a genuine issue of material fact for the 'regarded as' prong is that a supervisor knew of the purported disability.") (citing *Mengel v. Reading Eagle Co.*, 2013 WL 1285477, at *4 (E.D. Pa. 2013); *Estate of Murray v. UHS of Fairmount, Inc.*, 2011 WL 5449364, at *9 (E.D. Pa. 2011)).

First, upon closer reading of *Kelly*, it is not entirely clear the case stands for such a rule. *Jakomas*, 342 F. Supp. 3d at 648. *Kelly* held "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse action." *Id*. (quoting *Kelly*, 94 F.3d at 109 (emphasis in *Jakomas*)). Prior to the enactment of the ADAAA, plaintiffs claiming a disability under the "regarded as" prong were required to prove that the impairment substantially limited one or more major life activities. *Kelly*, 94 F.3d at 105. As a result,

knowledge of an impairment, alone, would not have been sufficient to prove a "regarded as" disability, as that term was defined in 1996, since mere awareness would not have provided any indication of whether the plaintiff was substantially limited as to a major life activity. Under this reading, *Kelly* merely stands for the proposition that awareness/perception of an impairment is inadequate to prove substantial limitation of a major life activity, something Kimmy is not required to prove here.

Even to the extent that *Kelly* does stand for the rule it is cited for in cases like *Baughman*, its rationale is no longer tenable in light of the ADAAA. This Court is not bound by the decisions of the Third Circuit as a matter of stare decisis, and so the concern over *Kelly*'s precedential value is somewhat academic. Be that as it may, to the extent that *Kelly* represents persuasive authority to which this court should defer in interpreting a federal statute, the Court agrees with the reasoning of Judge Lenihan in *Rubano* and now-Chief Judge Hornak in *Jakomas* that the ADAAA abrogated this portion of Kelly.

"Congress, through enacting the ADAAA, intended to alter the existing judicial interpretations of 'regarded as' claims under the ADA." *Jakomas*, 342 F. Supp. 3d at 648. And "[w]hen Congress amends legislation, courts must presume it intends [the change] to have real and substantial effect." *Hayes v. Harvey*, 903 F.3d 32 (3d Cir. 2018) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016)). "The amended 'regarded as' provision reflects the view that unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments." *Cannon v. Jacobs Field Services North America, Inc.*, 813 F.3d 586, 591 (5th Cir. 2016) (internal quotation marks and citations omitted). Under this straightforward application of "regarded as" disability the plaintiff need only show that "the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action." *Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016) (emphasis added). "Congress did not expect or intend that this would be a difficult standard to meet." *Eshleman v. Patrick Industries Inc.*, 961 F.3d 242, 248 (3d Cir. 2020) (citing H.R. Rep. No. 110–730 pt. 2, at 17 (2008)). Most telling, the rules of construction set forth in the text of the statute itself, instruct that "[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ... [and] to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A).

The additional rationale offered by the *Kelly* court is unpersuasive. *Kelly* noted "[i]f we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions *i.e.*, anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group[.]" *Kelly*, 94 F.3d at 109. But as the Court explains more fully at pp. 24-26, *infra*, causation is a necessary element of a plaintiff's *prima facie* case of disability discrimination, so even under the existing framework, "[e]mployer awareness of an employee's impairment alone, coupled only with the fact of an adverse employment action, is insufficient to survive summary judgment" *Jakomas*, 342 F. Supp. 3d at 649.

Likewise, the concern expressed in *Baughman* that "[a]llowing [knowledge of an impairment] 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" is misplaced. Satisfying the definition of disability is

merely one element of a plaintiff's *prima facie* case under the ADA, and an employer can still raise the defense that an impairment is transitory and minor to a "regarded as" claim, an inquiry which involves an objective analysis. 29 C.F.R. § 1630.15(f). In any event, a concern over possible policy ramifications of a duly enacted statute cannot overcome its plain meaning. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 314 (3d Cir. 2010) (stating the plain meaning of a statute can only be rebutted "in the rare cases where the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)) (internal quotation and alteration omitted). Congress intended the definition of "regarded as" disability to be a relatively undemanding standard to satisfy, and not surprisingly, drafted a statute to that effect. *Eshleman*, 961 F.3d at 248. For these reasons, *Kelly*'s purported rule that mere knowledge of an impairment is insufficient to create an inference of perception under the ADAAA must be rejected.

Here, without question, Hytech knew of Kimmy's alleged cardiovascular impairment as he had been on medical leave for nearly six months prior to his return. This alone is sufficient evidence from which a jury could reasonably conclude that Hytech perceived Kimmy to suffer from a cardiovascular impairment at the time of his termination, only two days after his return to work.[3]

The only question remaining is whether Kimmy's perceived impairment fell within the transitory and minor exception to "regarded as" disabilities. 42 U.S.C. § 12102(3)(B) (stating "[the regarded as category of disability] shall not apply to impairments that are transitory and minor."). Hytech vigorously asserts that it does. The ADAAA defines a transitory impairment as one "with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). Hytech notes that the actual date of Kimmy's heart attack was Sunday, March 5, 2017, and that Kimmy was cleared to return to work as of September 4, 2017, a period, it argues, that falls just shy of six months. Def.'s Br. in Supp. of Mot. for Summ. J., p. 6.

Even assuming, for the sake of argument, that Kimmy's impairment was transitory, he can still make out a *prima facie* case for disability so long as he can offer adequate evidence that his perceived impairment was not minor. In other words, as the Third Circuit recently held in *Eshleman*, to fall within the transitory and minor exception, the impairment must be both transitory and minor. *Eshleman*, 961 F.3d at 247-48; *see also Silk v. Board of Trustees, Moraine Valley Community College, District No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) ("In raising this argument, the College bears the burden of establishing that the impairment was *both* transitory and minor.") (emphasis added).

This construction aligns with the plain meaning of the statutory text. The word "and" is a coordinating conjunction whose job is to link independent ideas. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011); *see also United States v. Andrews*, 480 F.Supp.3d 669, 683 (E.D. Pa. 2020) ("When Congress chooses to speak in the conjunctive, it intends that each element of the conjunction be satisfied separately and individually."). If Congress had intended that either category serve as an independent basis for the exception, it would have utilized the

[3] Consistent with decisions both before and after the enactment of the ADAAA, "the relevant determination is whether plaintiff was disabled at the time of the adverse employment decision." *Rocco v. Gordon Food Service*, 998 F. Supp. 2d 422, 426 (W.D. Pa. 2014) (emphasis added); *see also Mancini*, 909 F.3d at 46 (citing *Bruzzese v. Sessions*, 725 F. App'x. 68, 71 (2d Cir. 2018)).

disjunctive "or" instead of the conjunctive "and" to connect the terms. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

This reading is also consistent with the intent of Congress in creating the exception. "[T]he transitory and minor exception was intended to weed out only claims at the lowest end of the spectrum of severity, such as common ailments like the cold or flu, and that the exception should be construed narrowly." *Eshleman*, 961 F.3d at 248 (citing H.R. Rep. No. 110-730 pt. 2, at 18 (2008) (internal quotation marks omitted)). This interpretation is further confirmed by the EEOC regulations. *See* 29 C.F.R. § 1630.15(f).

Although Section 12102(3)(B) defines the term "transitory" it does not define the term "minor." Rather, in determining whether an injury is minor, courts should consider "such factors as the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary — as well as the nature and scope of any post-operative care." *Eshleman*, 961 F.3d at 249. "Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively." 29 C.F.R. § 1630.15(f).

In this case, viewing the evidence in the light most favorable to Kimmy, he offers sufficient evidence such that a reasonable jury could find that his perceived cardiovascular impairment was not minor. The neuropsychological report labeled as Defendant's Exhibit B indicates that Kimmy suffered a "serious cardiac event" and underwent six rounds of defibrillation after his heart attack on March 5, 2017. Def.'s Ex. B, p. 4. He was hospitalized in Pittsburgh where he was noted to exhibit symptoms of confusion, impulsivity, and agitation, suggesting a possible anoxic brain injury. Def.'s Ex. B, p. 4. There is evidence which, if credited by a jury, further suggests that these cognitive deficits have lingered even after his discharge from Hytech. Def.'s Ex. B, p. 2. Moreover, the nature of a coronary artery bypass graft procedure itself would permit a jury to draw a conclusion that the impairment was not minor:

> One way to treat the blocked or narrowed arteries is to bypass the blocked portion of the coronary artery with a piece of a healthy blood vessel from elsewhere in your body. Blood vessels, or grafts, used for the bypass procedure may be pieces of a vein from your leg or an artery in your chest. An artery from your wrist may also be used. Your doctor attaches one end of the graft above the blockage and the other end below the blockage. Blood bypasses the blockage by going through the new graft to reach the heart muscle ... Traditionally, to bypass the blocked coronary artery, your doctor makes a large incision in the chest and temporarily stops the heart. To open the chest, your doctor cuts the breastbone (sternum) in half lengthwise and spreads it apart. Once the heart is exposed, your doctor inserts tubes into the heart so that the blood can be pumped through the body by a heart-lung bypass machine.

John Hopkins Medicine, Coronary Artery Bypass Graft, available at https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/coronary-artery-bypass-graft-surgery (last viewed April 6, 2021). The severity of Kimmy's condition is of a different ilk than those injuries which courts have found to be minor for purposes of Section 12102(3)(B). *See, e.g., Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245 (3rd Cir. 2014) (holding a broken bone in a hand constituted a minor impairment); *see also Eshleman*, 961

F.3d at 249 (noting that in *Budhun* "the temporary nature of a broken pinky finger served as a proxy for the lack of severity" but "[b]ecause even minimally invasive lung surgery is still thoracic surgery, more than likely requiring inpatient care, it is plausible that Eshleman's lung surgery was non-minor.").

At oral argument, Hytech contested the notion that Kimmy's impairment could be anything other than minor, noting Kimmy was ultimately able to return to work with no limitations whatsoever.[4] It further lamented the parade of horribles that would follow by setting such a precedent, fearing that any patient giving birth in a hospital would subsequently be able assert a viable claim for disability under the ADA. Hytech's concerns are overstated. As prior cases make clear, rather than formulating a broad definition of what constitutes a minor impairment, "courts have approached the issue on a case-by-case basis." *Eshleman*, 961 F.3d at 249. Under certain circumstances, giving birth may lead to non-minor impairment or perceived impairment, particularly where complications arise. But in most cases, hospitalization alone will not give rise to an inference of non-minor impairment, particularly when taken as a preventative, rather than a responsive, measure.

The record reveals that Kimmy was not only admitted to the hospital, but underwent open heart surgery and required a prolonged recovery to recuperate from the physical and cognitive repercussions of his heart attack. This set of facts is far more analogous to *Eshleman* than it is *Budhun*. All in all, the evidence of record, including evidence regarding the severity of the heart attack, the invasive nature of the surgery required to treat it, the prolonged period of recovery, and the potential for ongoing side effects possibly stemming from the cardiac event would reasonably permit a finding that Kimmy's perceived cardiovascular condition was not minor, and therefore, did not qualify under the transitory and minor exception to Section 12102(3)(B). As a result, Kimmy has made out a *prima facie* showing of disability under the ADA, the first element of his *prima facie* case of disability discrimination.[5]

The Court must address one final wrinkle before moving on. Since the enactment of the ADAAA in 2008, the Pennsylvania General Assembly has not updated or otherwise amended the PHRA to indicate whether federal and state law remain coterminous or whether pre-ADAAA case law applies to claims made under the PHRA.[6] In the wake of the ADAAA, some federal courts took the General Assembly's legislative inaction to mean that the revisions of the ADAAA do not apply in a cause of action alleged under the PHRA. *See Canfield v. Movie Tavern, Inc.*, 2013 WL 6506320, at *5 (E.D. Pa. 2013) ("[T]he PHRA does not follow the same standards and analysis as the ADAAA."); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *2 (E.D. Pa. 2013) ("The ADAAA relaxed the ADA's standard for disability[,] ... but the PHRA has not been similarly amended, necessitating separate analysis of Plaintiff's ADA and PHRA claims."). Other federal district courts have assumed that the two statutes remain coextensive. *See Morgenfruh v. Larson Design Group, Inc.*, 2019 WL 4511711, *2, n.37 (M.D. Pa. 2019).

[4] This conflicting characterization over the severity of the impairment is more properly addressed in Section IV, *infra*, pp. 38-39, discussing whether genuine issues of material fact remain.

[5] Because the Court holds that Kimmy has offered sufficient evidence to make out a *prima facie* case of disability under the "regarded as" prong of disability, it need not decide whether Kimmy has also offered sufficient evidence to make out a *prima facie* case under either the "actual" or "record of" prongs.

[6] The answer to this question impacts Kimmy's PHRA claim because, under pre-ADAAA precedent, he would be required to provide evidence that his impairment substantially limited one or more major life activities at the time of his discharge.

Although the Pennsylvania Supreme Court has not opined on the issue, the Commonwealth Court has since, albeit in an unpublished opinion, held that the revisions of the ADAAA are incorporated into the PHRA. *See Lazer Spot, Inc. v. Pennsylvania Human Relations Commission*, 2018 WL 670621, at *4 (Pa. Cmwlth. 2018). In so holding, the Commonwealth Court panel found relevant the fact that "Section 44.2(b) of the PHRC's Regulations expressly provides: 'This chapter will be construed consistently with other relevant [f]ederal and [s]tate laws and regulations except where the construction would operate in derogation of the purposes of the [PHRA] and this chapter.'" 16 Pa. Code § 44.2(b)." *Id*. (changes in original). Although the non-precedential decision in *Lazer Spot* is not binding, the Court finds its approach persuasive.

Interpreting the state statute as more restrictive than its federal counterpart would run counter to the overall aim of the General Assembly in enacting the PHRA "to foster the employment of all individuals in accordance with their fullest capacities regardless [*inter alia*] of their handicap or disability." 43 P.S. § 952(b). This is especially so where, as here, the plaintiff is able to make a factually identical and legally viable claim under federal law. Denying such a claim to proceed under state law while allowing the same claim to proceed in state court under federal law would frustrate, rather than serve, the purposes of the PHRA and would potentially create an absurd result. *See* 1 Pa. C.S. § 1922(1) (stating that "the General Assembly does not intend a result that is absurd."). Accordingly, the Court holds that the PHRA incorporates the amendments of the ADAAA, and as a result, Kimmy's separate claims under federal and state law may be analyzed coextensively. For purposes of this section, this means that Kimmy is not required to show that his impairment substantially limited a major life activity to make out a *prima facie* case of disability under the PHRA, and the Court will proceed to analyze Kimmy's federal and state claims as one cause of action for the remainder of this Opinion.

2. Evidence of an adverse employment decision taken as a result of disability.

It is undisputed that Kimmy was involuntarily terminated from his position from Hytech. Further, termination doubtless qualifies as an adverse employment decision as a matter of law. *See Mascioli v. Arby's Restaurant Group, Inc.*, 610 F. Supp. 2d 419, 434 (W.D. Pa. 2009) (citing *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006)). Kimmy would end the analysis there. But the formulation of the third element of a plaintiff's *prima facie* case for disability discrimination speaks of an adverse employment decision taken *as a result of* discrimination, or as other cases put it, a plaintiff must show "a causal connection between the employee's protected activity and the employer's adverse action." *Equal Employment Opportunity Commission. v. Allstate Insurance Co.*, 778 F.3d 444, 449 (3d Cir. 2015). The but-for causation standard is the "undisputed" test under *McDonnell Douglas*. *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1019 (2020). Kimmy argues that requiring evidence of such causation at this first stage of *McDonnell Douglas* would render superfluous the need to show evidence of pretext under the third step of the framework. The Court cannot agree.

McDonnell Douglas itself did not expressly mention causation in its formulation of the *prima facie* elements, although taken together, a causal element may be implied.[7] Not long

[7] The *prima facie* elements in *McDonnell Douglas*, a failure to hire case alleging racial discrimination, included "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S., at 802.

thereafter, the Supreme Court in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) explained:

> A prima facie case under *McDonnell Douglas* raises an *inference of discrimination* only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Id. at 577 (citation omitted) (emphasis added). Later, in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Court noted "[t]he burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination*." (emphasis added). Although *Furnco* speaks of a presumption of impermissible factors, as *Burdine* clarifies, that presumption only arises when circumstances permit an inference of discrimination, that is, where there is some evidence that the adverse employment action was taken because of an employee's protected trait. Put another way, "[t]o establish a presumption is to say that a finding of the predicate fact (here, the prima facie case) produces a required conclusion in the absence of explanation." *St. Mary's Honor Center. v. Hicks*, 509 U.S. 502, 506 (1993) (quoting 1 D. LOUISELL & C. MUELLER, *Federal Evidence* § 67, p. 536 (1977)) (internal quotation marks omitted). That required conclusion could only give rise to liability (in the absence of an explanation) if some form of causation had already been established.

Some lower courts, including the Pennsylvania Commonwealth Court, have removed all doubt by explicitly dividing a plaintiff's *prima face* case into four elements. *See Leibensperger*, 152 A.3d at 1072-73 (noting that "[u]nder *McDonnell Douglas*: 'the complainant bears the burden of establishing a [prima facie] case by showing that: (i) he is in a protected class; (ii) he is qualified for the position; (iii) he suffered an adverse employment action; and (iv) he was discharged under circumstances that gave rise to an inference of discrimination.'") (quoting *Spanish Council of York, Inc. v. Pennsylvania Human Relations Commission*, 879 A.2d 391, 397 (Pa. Cmwlth. 2005)).[8] These cases clearly confirm that an inference of discrimination — *i.e.* causation — is an essential element of a plaintiff's *prima facie* case.

Thus, "even when a plaintiff is 'regarded as' disabled, the plaintiff 'must provide evidence that supports a logical inference of causation between the alleged disability and the adverse employment action.'" *Jakomas*, 342 F. Supp. 3d at 649 (quoting *Rubano*, 991 F. Supp. 2d at 700). To do so, a plaintiff must introduce evidence concerning the scope and nature of the conduct and circumstances, relying on a broad array of evidence to demonstrate a link between the protected activity and the adverse action taken, such as a close temporal

[8] This alternate formulation merely separates the causation requirement from the requirement that an adverse employment action take place, but does not alter the substance of a *prima facie* case of discrimination in any meaningful way. A hyper-focus on this distinction would be misplaced as the *McDonnell Douglass* framework "was never intended to be rigid, mechanized, or ritualistic…. [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577.

proximity between the adverse action and the protected activity or evidence of intervening antagonism, retaliatory animus, or inconsistencies in an employer's articulated reasons for terminating an employee. *Young v. City of Philadelphia Police Department*, 651 Fed. Appx. 90, 95-96 (3rd Cir. 2016) (unpublished) (citing *Marra v. Philadelphia Housing Authority*, 497 F.3d 286 (3rd Cir. 2007); *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271 (3rd Cir. 2000)).

Kimmy relies heavily on testimony he gave at an unemployment compensation hearing held November 16, 2017. In that proceeding the following exchanged occurred:

> MR. KIMMY: Uh yeah that was probably when Dave [Reiser] came up and we had a conversation and uh he said that he had uh thought about our situation long and hard, really hard overnight and I am going to have to let you go. We're uh the company is going to go in a different direction and uh I'm just gonna have to let you go.
>
> COUNSEL FOR MR. KIMMY: And did he tell you it was because of this lack of productivity in the last two days?
>
> MR. KIMMY: No
>
> COUNSEL FOR MR. KIMMY: Okay and did he say anything else in terms of explanations for terminating you?
>
> MR. KIMMY: Yeah we had a conversation that went on for probably fifteen-twenty minutes. In that conversation, sometime in the conversation, there was a uh it was brought up about not having work. Uh Mr. Reiser at that point said something about "Well, that's another reason but I should let you off since we don't have work. We are slow; we don't have work for the machine."
>
> COUNSEL FOR MR. KIMMY: Okay
>
> MR. KIMMY: Uh.
>
> COUNSEL FOR MR. KIMMY: Did he say anything about Mr. Jankowiak taking over operation of the machine?
>
> MR. KIMMY: That's what my question was if the company is going to go in a different direction, what does that exactly mean and that's uh I believe Mr. Reiser at that point said "Well, Jim's got things going pretty good back here. I think we're [sic] continue in that direction uh let him program and set it up and have somebody, an operator come over and just operate the machine.
>
> COUNSEL FOR KIMMY: And did he give you any other reason for your termination?
>
> MR. KIMMY: Uh other than the uh you know I guess one more reason I should let you

> off for lack of work uh towards the end of conversation, he had made the statement that the [sic] his company was done paying my medical bills.

Unemployment Compensation Hearing Transcript (Unemploy. Comp. Hr'g Tr.), pp. 17-18. Here, Reiser's alleged comments to Kimmy that "his company was done paying [Kimmy's] medical bills" is sufficient to create a logical inference from which a jury could find that Kimmy was fired because of Kimmy's perceived disability, that is, because Hytech no longer wished to pay for Kimmy's medical expenses resulting from his heart attack.

Hytech argues, at most, this suggests Kimmy was terminated because of its concern over employee healthcare costs, not Kimmy's heart condition *per se*, and so is insufficient evidence to establish a causal connection that it discriminated against him because of disability. Most courts faced with this argument appear to reject it. *See Fratturo v. Gartner, Inc.*, 2013 WL 160375, *12 (D. Conn. 2013) (stating a reasonable jury could infer "anti-disability animus was a motivating factor in the decision to terminate" the plaintiff where the employer had an "admitted desire to reduce health insurance costs arising from chronic illnesses"); *Bideau v. Beachner Grain, Inc.*, 2011 WL 4048961 (D. Kan. 2011) (denying summary judgment because the circumstantial evidence supported a conclusion that the defendant's decision to terminate the plaintiff was motivated by its knowledge of increased health care costs); *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1160 (10th Cir. 2008) ("In this record, there was considerable evidence of concern about healthcare costs and facts that demonstrated that the company was aware high dollar claims like Charlie's could only increase those costs ... the evidence provides a reasonable inference that the Trujillos were costing the company time and money and considered it better to terminate them than to incur the costs of Charlie's illness."); *DeWitt v. Proctor Hospital*, 517 F.3d 944, 949 (7th Cir. 2008) ("the timing of Dewitt's termination suggests that the financial albatross of Anthony's continued cancer treatment was an important factor in Proctor's decision").

Some courts have observed that concern over healthcare costs alone, absent a showing that the plaintiff is disabled under the ADA, is not sufficient to confer liability on a defendant. *See South v. NMC Homecare, Inc.*, 943 F. Supp. 1336, 1341 (D. Kan. 1996) ("Discharging an employee merely because his physical infirmities (which do not amount to 'disabilities') impact company insurance premiums, although perhaps giving rise to state common law claims, does not implicate the ADA."). Others have opined that there can be no showing disability discrimination "if the disability plays no role in the employer's decision." *DeWitt*, 517 F.3d at 953 (Posner, J., concurring) (citing *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052-53 (7th Cir. 1997) ("By the plaintiff's own account, however, the defendant's motive in firing her had nothing to do with any disability resulting directly or indirectly from her high cholesterol.")). Many have not had the opportunity to consider the issue directly. *See Giles v. Transit Employees Federal Credit Union*, 794 F.3d 1, 14 (D.C. Cir. 2015) (assuming, without deciding, that "discrimination based on the costs associated with insuring a person with a disability is discrimination on the basis of the disability.").

On this point, however, the Court finds instructive the recent decision of the United States Supreme Court in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), where the Court considered whether an employer discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 when it fires an employee because of their sexual

orientation or gender identity. The Court held that it does for "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex" and as such "[s]ex plays a necessary and undisguisable role in the decision." *Id*. at 1737.

Writing for the majority, Justice Gorsuch explained that Title VII forbids employers from taking certain actions "because of" sex, incorporating the traditional but-for causation standard familiar in tort law. *Id*. at 1739 (citing *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009)). But-for causation, he noted, "can be a sweeping standard" since "[o]ften, events have multiple but-for causes." *Id*. As a result, "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee — put differently, if changing the employee's sex would have yielded a different choice by the employer — a statutory violation has occurred." *Id*. at 1741. Under this standard, "the plaintiff's [protected trait] need not be the sole or primary cause of the employer's adverse action." *Id*. at 1744. That other legally permissible factors may have contributed to the decision is of no consequence and the ultimate intent of the employer is not controlling. *Id*. at 1742. This can be illustrated through the following hypothetical:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based *in part* on that individual's sex.

Id. (emphasis added).

This reasoning applies with equal force to the ADA. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 n.25 (3d Cir. 1997) (en banc) (noting that Congress intended for the ADA to be interpreted "in a manner consistent with Title VII"). For purposes of this case, that means, even assuming Hytech's primary concern (indeed, even if its only concern) was the higher cost of Kimmy's healthcare, Kimmy's disability would still be a but-for cause of his termination as Kimmy's medical expenses would not have been at risk of increasing if it were not for his heart attack.[9] *Bostock* thus confirms what had already been apparent to

[9] Hytech argues that the cost of insuring Kimmy would remain the same regardless of what medical issues he faced because Kimmy's medical bill "were never the direct responsibility of the Defendant." Br. in Supp. of Def.'s Mot. for Summ. J., p. 11. This may be probative circumstantial evidence to call the credibility of Kimmy's testimony into doubt at trial, but on summary judgment, this argument actually works against Hytech. At this stage, the Court must assume a jury would credit Kimmy's version of the conversation that occurred between himself and Reiser. Assuming this, if Hytech did not have anything to gain financially from removing Kimmy from its healthcare plan, then Reiser was lying when he said Kimmy was fired, in part, because of his medical expenses. And if he was lying, then a factfinder could conclude his reference to medical bills was a pretext for something more disquieting, such as straightforward animus towards Kimmy because of his disability. Reiser's reference to medical bills would also permit a reasonable factfinder to infer that Hytech was aware of Kimmy's heart disease, and so, also permit the factfinder to infer that Kimmy' heart disease was the actual reason — perhaps even the sole reason — for his termination.

many lower federal courts to consider causation in the context of the ADA: liability can still attach so long as disability is "inextricably bound up with" the employer's concern over medical expenses. *Bostock*, 140 S. Ct. at 1742.

Of course, evidence which suggests only that an employee was terminated because of an employer's desire to reduce the cost of medical expenses is not indicative of a violation of the ADA.[10] For instance, an across-the-board termination of employees based on seniority in an effort to reduce healthcare costs would not ultimately impose that employer to liability under the ADA even if some of those employees happened to be disabled. And that would be so because disability would not have been a but-for cause of the termination; an individual in this scenario would be discharged based on seniority whether they were disabled or not. But Hytech has offered no evidence to suggest that other employees were discharged as part of an overall plan to reduce employee healthcare costs.[11] Rather, Hytech's frustration appears to be directed towards the but-for causation standard itself; yet, as Justice Gorsuch put it, "[y]ou can call the statute's but-for causation test what you will — expansive, legalistic ... wooden or literal. But it is the law." *Id*. at 1745.[12]

Additionally, Hytech argues that Reiser's alleged comments fall within the orbit of the so-called "stray remarks doctrine" Br. in Supp. of Def.'s Mot. for Sum. J. p. 11. "Ironically, the 'stray remarks' doctrine itself grew out of a stray remark in a concurring opinion by Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment)." *Mason v. Southeastern Pennsylvania Transportation Authority*, 134 F. Supp. 3d 868, 875 (E.D. Pa. 2015) (citation altered). In her concurring opinion, Justice O'Connor opined that "statements by non-decision-makers, or statements by decision-makers unrelated to the decisional process itself," would be insufficient to provide "direct evidence" of discrimination. 490 U.S. at 277 (O'Connor, J. concurring in the judgment).

However, this case involves not direct, but rather, indirect evidence of discrimination, as Hytech presumably agrees, given its acquiescence to *McDonnell Douglas* as the governing framework. *See Comcast*, 140 S. Ct at 1019. (stating *McDonnell Douglas* supplies "a tool for assessing claims [of discrimination], typically at summary judgment, when the plaintiff relies on *indirect* proof of discrimination."). Nevertheless, relying on Justice O'Connor's opinion, several jurisdictions have expanded the reach of the doctrine beyond direct claims of discrimination to those governed by *McDonnell Douglas*. *Diaz v. Jiten Hotel Management, Inc.*, 762 F. Supp. 2d 319, 335 (D. Mass. 2011). The Pennsylvania Superior

[10] It may be indicative, however, of a violation of the Employee Retirement Income Security Act of 1974 (ERISA). Section 510 of ERISA makes it illegal for an employer to terminate any person "for the purpose of interfering with the attainment of any right to which such [person] may become entitled to under [an employee benefit plan]." 29 U.S.C. § 1140. Under that law, federal district courts within the Third Circuit have held that a defendant violates Section 510 when it interferes with the attainment of rights to which an employee becomes entitled under an ERISA plan when it does not want to incur additional costs related to the recurrence of some medical condition. *Stabile v. Allegheny Ludlum, LLC*, 2012 WL 3877611, *10 (W.D. Pa. 2012) (citing in *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, *10 (E.D. Pa. 2010).

[11] Even if it had, such evidence would only be relevant to the Court's analysis under Rule 1035.2(1), concerning whether genuine issues of material fact exist, not whether the nonmoving party has shown sufficient evidence to survive Rule 1035.2(2).

[12] At least one Third Circuit case suggests that plaintiffs need only prove some lower threshold of causation as part of its *prima facie* case, perhaps something akin to the motivating factor standard, with a showing of but-for causation only necessary at the third stage of *McDonnell Douglas*. *See Young*, 651 Fed. App'x. at 96. In any event, the Court need not address the issue as evidence sufficient to satisfy but-for causation will necessarily satisfy any lower standard.

Court, in an unpublished opinion, incorporating the memorandum opinion below of then-Court of Common Pleas Judge Horan, recognized the stray remarks doctrine, noting "[o]ur cases distinguish between discriminatory comments made by individuals within and those by individuals outside the chain of decisionmakers who have the authority to discharge." *Knappenberger v. NexTier Bank*, 2015 WL 7185558, *7 (Pa. Super. 2015) (quoting *Walden v. Georgia-Pac. Corp.*, 126 F.3d 506 (3d Cir. 1997)).

In this case, the stray remarks doctrine is not implicated as Reiser was undoubtedly a decisionmaker with "the authority to discharge[,]" a discretion he exercised when he fired Kimmy. *Knappenberger*, 2015 WL 7185558, at *7. As such, his remarks are highly relevant to a determination or whether Hytech discriminated against Kimmy on the basis of disability, and the stray remarks doctrine has no application here.

Finally, Hytech argues that Reiser's alleged statement is inadmissible hearsay and should not be considered for purposes of summary judgment. Hytech is correct that, "summary judgment cannot be ... defeated by statements that include inadmissible hearsay evidence" *Bezjak*, at 631. "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement." *Commonwealth v. Kuder*, 62 A.3d 1038, 1055 (Pa. Super. 2013); Pa.R.E. 801(c). Kimmy's recollection of his conversation with Reiser (assuming Reiser would not testify to the same) would be an out-of-court statement and, to the extent that it would be offered to show that Hytech's concern over Kimmy's medical bills was the reason for his termination, would be offered to prove the truth of the matter asserted therein. This satisfies the definition of hearsay.

However, such testimony would, nonetheless, be admissible under the party opponent exception to the hearsay rule. *See* Pa.R.E. 803(25)(D) (concerning a statement offered against an opposing party and which was made by the party's agent or employee on a matter within the scope of that relationship while it existed). "For an admission of a party opponent to be admissible under Rule 803(25)(D), the proponent of the statement must establish three elements: (1) the declarant was an agent or employee of a party opponent; (2) the declarant made the statement while employed by the party opponent; and (3) the statement concerned a matter within the scope of agency or employment." *Harris v. Toys "R" Us-Penn, Inc.*, 880 A.2d 1270, 1275 (Pa. Super. 2005) (citing *Sehl v. Vista Linen Rental Serv. Inc.*, 763 A.2d 858, 862 (Pa. Super. 2000)). Here, Reiser was undoubtedly an agent or employee of Hytech, his statement was made while he was employed by Hytech, and the statement concerned a matter within the scope of his agency or employment, *i.e.*, his decision to terminate Kimmy, his subordinate. As such, Kimmy's testimony would be admissible at trial, and thus, can be offered by Kimmy now to defeat Hytech's Motion for Summary Judgment.

All things considered, Kimmy has offered sufficient evidence to make out a *prima facie* case of disability discrimination pursuant to the first stage of *McDonnell Douglas*. Having done so, the burden now shifts to Hytech to offer a legitimate, nondiscriminatory reason for Kimmy's termination.[13]

B. Hytech's Legitimate, Nondiscriminatory Reason for the Termination.

Under the second stage of *McDonnell Douglas* "the burden of production (but not the

[13] Although Rule 1035.2(2) concerns the burden of the non-moving party in a summary judgment motion to provide *prima facie* evidence (here Kimmy), the Court now addresses Hytech's burden of production under the second stage of *McDonnell Douglas* for the sake of clarity.

burden of persuasion) shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that the defendant had a legitimate, nondiscriminatory reason for the adverse employment decision." *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 323 (M.D. Pa. 2017) (quoting *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 465 (3d Cir. 2005)) (internal quotation marks omitted). Because only the burden of production, but not the burden of persuasion, shifts to an employer at this point it "need not prove, however, that the proffered reasons actually motivated the employment decision." *Id*. Hytech's offered reason for Kimmy's termination is his poor job performance. Br. in Supp. of Def.'s Mot. for Summ. J., pp. 7-10.

Hytech cites to evidence in the record to support this claim. *See* Br. in Supp. of Def.'s Mot. for Summ. J., p. 7 (citing depositional testimony of David Reiser); Br. in Supp. of Def.'s Mot. for Summ. J., pp. 9-10 (citing a neuropsychological examination of Dr. Neal, listed as Def.'s Ex. B, p. 2. wherein Kimmy allegedly indicated to Dr. Neal that he was terminated for poor job performance.). This clearly satisfies Hytech's burden of production under stage two. The Court now turns to the final step of *McDonnell Douglas* to determine whether Kimmy can survive summary judgment under Rule 1035.2(2).

C. Evidence that Hytech's Stated Reason for Termination Was Pretextual

Once an employer offers a legitimate, nondiscriminatory reason for the adverse employment decision, it is incumbent on a plaintiff to "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not [the] ... determinative cause of the employer's action." *Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).[14, 15] Although the inquiry is distinct from the question of causation raised in the first stage of *McDonnell Douglas*, the evidence relevant to each stage may be coextensive. As the Third Circuit has explained:

> We recognize that by acknowledging that evidence in the causal chain can include more than demonstrative acts of antagonism or acts actually reflecting animus, we may possibly conflate the test for causation under the prima facie case with that for pretext. But perhaps that is inherent in the nature of the two questions being asked — which are quite similar. The question: "Did her firing result from her rejection of his advance?" is not easily distinguishable from the question: "Was the explanation given for her firing the real reason?" Both should permit permissible inferences to be drawn in order to be answered. As our cases have recognized, almost in passing, evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other. It

[14] "The first prong involves an indirect showing of pretext, while the second prong involves a direct showing." *Proudfoot v. Arnold Logistics, LLC*, 629 Fed. App'x. 303, 307 n.4 (3d Cir. 2015) (unpublished) (citing *Josey v. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993)).

[15] Under Supreme Court precedent, both prongs must arguably be met to establish pretext. As Justice Scalia noted in *Hicks*, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis in original). The Third Circuit addressed this discrepancy in *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc), rejecting any notion of inconsistency, explaining *Hicks* had also held "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" *Sheridan*, 100 F.3d at 1068 (quoting *Hicks*, 509 U.S. at 511). Because the Court finds that Kimmy has shown evidence of pretext under either the standard, the Court need not directly address the issue.

is enough to note that we will not limit the kinds of evidence that can be probative of a causal link any more than the courts have limited the type of evidence that can be used to demonstrate pretext.

Farrell, 206 F.3d at 286 (citations omitted); *see also Jalil v. Avdel Corp.*, 873 F.2d 701, 709 n. 6 (3rd Cir. 1989) ("Although this fact is important in establishing plaintiff's prima facie case, there is nothing preventing it from also being used to rebut the defendant's proffered explanation. As we have observed before, the *McDonnell Douglas* formula does not compartmentalize the evidence so as to limits its use to only one phase of the case.") (internal quotation omitted). Moreover, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

At the unemployment compensation hearing, Kimmy testified that Reiser never mentioned poor job performance as a reason for his discharge. Unemploy. Comp. Hr'g Tr., p. 17. Instead, according to Kimmy, he gave various other vague reasons for the termination, including that Hytech was going in a different direction, that Hytech was "slow" and did not have work for the machine he operated, and that they were done paying his medical bills. Unemploy. Comp. Hr'g Tr., pp. 17-18. At trial, a jury would be free to draw the conclusion that all, one, or some of these factors were the real reasons for Kimmy's termination. It would also be free to draw a negative inference that poor job performance was not the true motivation for Kimmy's discharge based on its noticeable absence from Reiser's purported explanation.

In Kimmy's case, the mere fact that Reiser provided multiple reasons for the discharge, alone, would not be enough to create an inference of pretext. After all, multiple legitimate and nondiscriminatory but-for causes may factor into an employer's decision to discharge an employee. Neither can minor discrepancies between proffered reasons supply the necessary showing that an employer's reasons are false. *See Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076, 1081 (10th Cir. 1999). ("Any discrepancy [in the reasons given for termination] is simply too minor to give rise to an inference of pretext."). But here, Kimmy testified that Hytech never mentioned his lack of productivity as one of the considerations that led to his firing. Umemploy. Comp. Hr'g Tr., p. 17. And according to Kimmy, the reasons it did offer were suspiciously obscure and never fully explained. In particular, Kimmy was perplexed by Reiser's comment that the company was going in a different direction. Umemploy. Comp. Hr'g Tr., pp. 17-18. Additionally, Jankowiak's continued work on the Lathe machine could be viewed as refuting Resier's characterization that work was slowing down at Hytech. Umemploy. Comp. Hr'g Tr., pp. 17-18.

Still, there is other evidence on this record which could also reasonably create a "suspicion of mendacity" in the minds of reasonable jurors as to Hytech's proffered reason for termination. *Hicks*, 509 U.S. at 511. Several inconsistencies are apparent between Kimmy's and Hytech's version of events, including, for instance, whether Kimmy was actually working to clean and organize his work area after his six-month medical leave; whether Kimmy was using his phone for a permissible, work-related reason; and whether the software issue with the Lathe machine was fixed prior to his termination. If those factual questions were to be resolved in Kimmy's favor, then the jury could also draw the conclusion that the true motivation for

Hytech's dishonesty was to obfuscate its concern over Kimmy's disability.[16] *See, e.g., Quillen v. Touchstone Medical Imaging*, 15 F. Supp.3d 774, 782 (M.D. Tenn. 2014) ("The evidence reasonably could be construed as showing that Rice wanted to create a better record to conceal his true motivation: to avoid paying additional medical bills accrued by Quillen.").

Therefore, based on this record, there is sufficient evidence from which a jury could conclude that Hytech's stated reason for the termination is false and that Hytech's desire to reduce its medical costs on account of Kimmy's heart condition was the determinative cause of his termination. *See Bielich v. Johnson & Johnson, Inc.*, 6 F. Supp.3d 589, 605 n.2 (W.D. Pa. 2014) (noting "[t]he determinative factor, or but for, test applies to Bielich's disability claims.") (internal quotation marks omitted). In other words, a jury could conclude based on this record that Hytech's claim that Kimmy was fired for poor job performance is pretextual.

Hytech argues that Kimmy's version of events is not "worthy of credence." Br. in Supp. of Def.'s Mot. for Summ. J., p. 11. It is true that courts in the Third Circuit have held that "[t]o discredit the employer's proffered reason ... the plaintiff cannot simply show that the employer's decision was wrong or mistaken ... [r]ather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Fuentes*, 32 F.3d at 765 (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992) (other citations omitted) (emphasis in original). But here, Kimmy's testimony evinces the very "weaknesses" and "incoherencies" that would allow a jury to find Hytech's reason for termination "unworthy of credence." Hytech's argument, thus, confuses which party's evidence must be "unworthy of credence" at this stage, and its invocation of the "unworthy of credence" doctrine is inapposite here.

In sum, Kimmy offers sufficient evidence to survive the third and final stage of *McDonnell Douglas*. Accordingly, Hytech is not entitled to summary judgment under Rule 1035.2(2).

IV. ANALYSIS: GENUINE ISSUES OF MATERIAL FACT UNDER RULE 1035.2(1)

Having determined that Kimmy has offered sufficient evidence necessary to prove essential facts of disability discrimination from which a reasonable jury could deliver a verdict in its favor, there is really little to be said about Hytech's claim that no genuine issue of any material fact remains to be heard by a jury. Hytech does argue certain factual questions should be resolved in its favor. *See* Def.'s Br. in Supp., p. 11 ("Reiser testified he never made statements referencing 'medical expenses' or 'training.'"); Def.'s Br. in Supp., p. 12 (noting Reiser and Jankowiak's deposition testimony indicate that "Kimmy did nothing productive at work for more than two (2) days and sixteen (16) plus hours upon his return.").

However, there are two problems with Hytech's use of such evidence as a basis for supporting summary judgment. First, such evidence constitutes oral deposition testimony, which, even if uncontradicted, would fail to establish a genuine issue of material fact under *Nanty-Glo*. *Woodford*, 243 A.3d at 69. But even putting *Nanty-Glo* aside, precisely because Kimmy offers evidence sufficient to prove all essential elements of its cause of action, Hytech's evidence to the contrary is plainly contradicted.

Each parties' evidence casts doubt on the veracity of the other's claims, including whether

[16] These inconsistencies not only call into question the possible pretext of Hytech's reason for the discharge, they also form the basis of genuine issues of material fact in Section IV, *infra*.

Kimmy met the definition of disability at the time of his termination, whether Hytech discriminated against Kimmy because of disability when it terminated his employment, and whether the legitimate and nondiscriminatory reason for the termination proffered by Hytech is pretextual. Those genuine issues of material fact, and many other material factual issues implicating each of these questions, remain very much in dispute. To resolve those questions would require the Court to wade into questions of weight and credibility about the evidence offered by Kimmy and Hytech to support their claims. This, the Court cannot do on summary judgment. Rather, such weight and credibility determinations are inherently the province of a jury to decide after hearing all admissible evidence at trial. *Lancaster Newspapers*, 926 A.2d at 906; *Ack*, 661 A.2d at 517. Because these genuine issues of material fact remain as to necessary elements of Kimmy's cause of action, Hytech is not entitled to summary judgment under Rule 1035.2(1).

V. CONCLUSION

The Court cannot say on this record that Hytech's right to summary judgment is "clear and free from all doubt." *Summers*, 997 A.2d at 1159. Kimmy has offered sufficient evidence from which a jury could deliver a favorable verdict at trial were it to find such evidence credible. Hytech offers evidence to the contrary, but this at most creates genuine issues of material fact as to the essential elements of Kimmy's cause of action, and so, a trial cannot be avoided on this record. Therefore, this Court has no choice but to deny Hytech's Motion for Summary Judgment.

It is so ordered.

BY THE COURT
/s/ **Marshall J. Piccinini, Judge**

CHANGE OF NAME NOTICE
In the Court of Common Pleas of Erie County Pennsylvania
Docket No. 11097-2021
In re: Landon Matthew Kaluzne, a minor
Notice is hereby given that a Petition has been filed in the above named Court by Charles Page, requesting an Order to change the name of Landon Matthew Kaluzne to Landon Matthew Page.
The Court has fixed the 14th day of July, 2021 at 1:30 p.m. in Courtroom G, Room 222 of the Erie County Courthouse, 140 W. 6th St., Erie, PA 16501 as the time and place for the hearing on said petition, when and where all parties may appear and show cause, if any they have, why the prayer of the petitioner should not be granted.

June 18

CHANGE OF NAME NOTICE
In the Court of Common Pleas of Erie County Pennsylvania
Docket No. 11152-2021
In re: Donald W. Rhines III, a minor
Notice is hereby given that a Petition has been filed in the above named Court by Lindsey Quashnock, requesting an Order to change the name of Donald W. Rhines III to Luke Allan Diemer.
The Court has fixed the 9th day of July, 2021 at 11:00 a.m. in Courtroom G, Room 222 of the Erie County Courthouse, 140 W. 6th St., Erie, PA 16501 as the time and place for the hearing on said petition, when and where all parties may appear and show cause, if any they have, why the prayer of the petitioner should not be granted.

June 18

DISSOLUTION NOTICE
TO ALL CREDITORS OF JAB Enterprises, Inc.:
This is to notify you that JAB Enterprises, Inc., a Pennsylvania corporation with its registered office located at 1821 Nagle Road, Erie, PA 16510, is dissolving and winding up its business under the provisions of the Business Corporation Law of 1988, as amended.
Gery T. Nietupski, Esquire
Nietupski Angelone, LLC
818 State Street
Erie, PA 16501

June 18

FICTITIOUS NAME NOTICE
Pursuant to Act 295 of December 16, 1982 notice is hereby given of the intention to file with the Secretary of the Commonwealth of Pennsylvania a "Certificate of Carrying On or Conducting Business under an Assumed or Fictitious Name." Said Certificate contains the following information:

FICTITIOUS NAME NOTICE
1. Fictitious Name: Alcor Temperature Controlled
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Cold Storage, Inc., 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 2, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
Notice is hereby given that an Application for Registration of Fictitious Name was filed in the Department of State of the Commonwealth of Pennsylvania on March 23, 2021 for Dvorak Services at 4454 Holiday Drive, Erie, PA 16506. The name and address of each individual interested in the business is Michael Edward Dvorak at 4454 Holiday Drive, Erie, PA 16506. This was filed in accordance with 54 PaC.S. 311.417.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Hill Distribution Group, Inc.
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint 3PL, Inc., 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Moorehill Logistics, Inc.
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Transportation, Inc., 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Roberts Logistics Service, LLC
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Logistics, LLC, 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Roberts Realty Enterprises, LLC
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428

3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Realty, LLC, 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Roberts Trucking Company, LLC
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Trucking Company, LLC, 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Roberts Warehousing, Inc.
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Warehousing, Inc., 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 8, 2021 with the Pennsylvania Department of State.

June 18

FICTITIOUS NAME NOTICE
Notice is hereby given that an Application for Registration of Fictitious Name was filed in the Department of State of the Commonwealth of Pennsylvania on March 23, 2021 for UPROOTED at 5640 Alden Ln., Erie, PA 16505. The name and address of each individual interested in the business is Amelia E. Werner at 5640 Alden Ln., Erie, PA 16505. This was filed in accordance with 54 PaC.S. 311.417.

June 18

FICTITIOUS NAME NOTICE
1. Fictitious Name: Wavepoint Print Logistics
2. Address of the principal place of business, including street and number: 5501 Route 89, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Wavepoint Logistics, LLC, 5501 Route 89, North East, PA 16428
4. An application for registration of fictitious name under the Fictitious Names Act was filed on or about June 2, 2021 with the Pennsylvania Department of State.

June 18

INCORPORATION NOTICE
Notice is hereby given that Articles of Inc. were filed with the Dept. of State for JGB Lake Inc., a corp. organized under the PA Business Corp. Law of 1988.

June 18

INCORPORATION NOTICE
NOTICE is hereby given that Loyal and True Foundation has been Incorporated under the provisions of the Nonprofit Corporation Law of 1988, as amended. John F. Mizner, Esq., Mizner Law Firm, 311 West Sixth Street, Erie, PA 16507.

June 18

INCORPORATION NOTICE
Notice is hereby given that WAVEPOINT COLD STORAGE, INC. has been incorporated under the provisions of the 1988 Pennsylvania Business Corporation Law.
Michael P. Thomas, Esq.
MacDonald, Illig, Jones & Britton LLP
100 State Street, Suite 700
Erie, PA 16507-1459

June 18

INCORPORATION NOTICE
Notice is hereby given that Wolf House, Inc. has been incorporated under the Business Corporation Law of 1988.
NIETUPSKI ANGELONE, LLC
Gery T. Nietupski, Esquire
818 State Street, Suite A
Erie, Pennsylvania 16501

June 18

LEGAL NOTICE
ATTENTION: ANN MARIE CHAPMAN
INVOLUNTARY TERMINATION OF PARENTAL RIGHTS IN THE MATTER OF THE ADOPTION OF MINOR FEMALE CHILD B.G.C.
DOB: 03/24/2021
54 IN ADOPTION, 2021
If you could be the parent of the above-mentioned child, at the instance of Erie County Office of Children and Youth you, laying aside all business and excuses whatsoever, are hereby cited to be and appear before the Orphan's Court of Erie County, Pennsylvania, at the Erie County Court House, Judge Stephanie Domitrovich, Courtroom G-222, City of Erie on July 6, 2021 at 1:30 p.m. and there show cause, if any you have, why your parental rights to the above child should not be terminated, in accordance with a Petition and Order of Court filed by the Erie County Office of Children and Youth. A copy of these documents can be obtained by contacting the Erie County Office of Children and Youth at (814) 451-7740.
Your presence is required at the Hearing. If you do not appear at this Hearing, the Court may decide that you are not interested in retaining your rights to your children and your failure to appear may affect the Court's decision on whether to end your rights to your child. You are warned that even if you fail to appear at the scheduled Hearing, the Hearing will go on without you and your rights to your child may be ended by the Court without your being present.
You have a right to be represented at the Hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer, or

cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.
Family/Orphan's Court Administrator
Room 204 - 205
Erie County Court House
Erie, Pennsylvania 16501
(814) 451-6251
NOTICE REQUIRED BY ACT 101 OF 2010: 23 Pa. C.S §§2731-2742. This is to inform you of an important option that may be available to you under Pennsylvania law. Act 101 of 2010 allows for an enforceable voluntary agreement for continuing contact or communication following an adoption between an adoptive parent, a child, a birth parent and/or a birth relative of the child, if all parties agree and the voluntary agreement is approved by the court. The agreement must be signed and approved by the court to be legally binding. If you are interested in learning more about this option for a voluntary agreement, contact the Office of Children and Youth at (814) 451-6688, or contact your adoption attorney, if you have one.

June 18

LEGAL NOTICE

ATTENTION: JOSEPH M. SIPE
INVOLUNTARY TERMINATION OF PARENTAL RIGHTS IN THE MATTER OF THE ADOPTION OF MINOR FEMALE CHILD B.G.C.
DOB: 03/24/2021
BORN TO: ANN MARIE CHAPMAN
54 IN ADOPTION 2021
If you could be the parent of the above-mentioned children, at the instance of Erie County Office of Children and Youth you, laying aside all business and excuses whatsoever, are hereby cited to be and appear before the Orphan's Court of Erie County, Pennsylvania, at the Erie County Court House, Judge Stephanie Domitrovich, Court Room No. G-222, City of Erie on July 6, 2021 at 1:30 p.m. and there show cause, if any you have, why your parental rights to the above children should not be terminated, in accordance with a Petition and Order of Court filed by the Erie County Office of Children and Youth. A copy of these documents can be obtained by contacting the Erie County Office of Children and Youth at (814) 451-7740.
Your presence is required at the Hearing. If you do not appear at this Hearing, the Court may decide that you are not interested in retaining your rights to your children and your failure to appear may affect the Court's decision on whether to end your rights to your children. You are warned that even if you fail to appear at the scheduled Hearing, the Hearing will go on without you and your rights to your children may be ended by the Court without your being present.
You have a right to be represented at the Hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer, or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.
Family/Orphan's Court Administrator
Room 204 - 205
Erie County Court House
Erie, Pennsylvania 16501
(814) 451-6251
NOTICE REQUIRED BY ACT 101 OF 2010: 23 Pa. C.S §§2731-2742. This is to inform you of an important option that may be available to you under Pennsylvania law. Act 101 of 2010 allows for an enforceable voluntary agreement for continuing contact or communication following an adoption between an adoptive parent, a child, a birth parent and/or a birth relative of the child, if all parties agree and the voluntary agreement is approved by the court. The agreement must be signed and approved by the court to be legally binding. If you are interested in learning more about this option for a voluntary agreement, contact the Office of Children and Youth at (814) 451-6688, or contact your adoption attorney, if you have one.

June 18

LEGAL NOTICE

ATTENTION: UNKNOWN BIOLOGICAL FATHER
INVOLUNTARY TERMINATION OF PARENTAL RIGHTS IN THE MATTER OF THE ADOPTION OF MINOR FEMALE CHILD B.G.C.
DOB: 03/24/2021
BORN TO: ANN MARIE CHAPMAN
54 IN ADOPTION, 2021
If you could be the parent of the above-mentioned children, at the instance of Erie County Office of Children and Youth you, laying aside all business and excuses whatsoever, are hereby cited to be and appear before the Orphan's Court of Erie County, Pennsylvania, at the Erie County Court House, Judge Stephanie Domitrovich, Courtroom 222-G, City of Erie on July 6, 2021 at 1:30 p.m. and there show cause, if any you have, why your parental rights to the above children should not be terminated, in accordance with a Petition and Order of Court filed by the Erie County Office of Children and Youth. A copy of these documents can be obtained by contacting the Erie County Office of Children and Youth at (814) 451-7740.
Your presence is required at the Hearing. If you do not appear at this Hearing, the Court may decide that you are not interested in retaining your rights to your children and your failure to appear may affect the Court's decision on whether to end your rights to your children. You are warned that even if you fail to appear at the scheduled Hearing, the Hearing will go on without you and your rights to your children may be ended by the Court without your being present.
You have a right to be represented at the Hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer, or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.
Family/Orphan's Court Administrator
Room 204 - 205
Erie County Court House
Erie, Pennsylvania 16501
(814) 451-6251
NOTICE REQUIRED BY ACT 101 OF 2010: 23 Pa. C.S §§2731-2742. This is to inform you of an important option that may be available to you under Pennsylvania law. Act 101 of 2010 allows for an enforceable voluntary agreement for continuing contact or communication following

an adoption between an adoptive parent, a child, a birth parent and/or a birth relative of the child, if all parties agree and the voluntary agreement is approved by the court. The agreement must be signed and approved by the court to be legally binding. If you are interested in learning more about this option for a voluntary agreement, contact the Office of Children and Youth at (814) 451-6688, or contact your adoption attorney, if you have one.

June 18

LEGAL NOTICE

CIVIL ACTION
COURT OF COMMON PLEAS
ERIE COUNTY, PA
CIVIL ACTION-LAW
NO. 11763-20
NOTICE OF ACTION IN MORTGAGE FORECLOSURE
WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2005-3, ASSET-BACKED CERTIFICATES, SERIES 2005-3,
Plaintiff
v.
APRIL GODEL, IN HER CAPACITY AS HEIR OF MARK N. BEERS A/K/A MARK NOAL BEERS, DECEASED; et al,
Defendants
To: UNKNOWN HEIRS, SUCCESSORS, ASSIGNS, AND ALL PERSONS, FIRMS, OR ASSOCIATIONS CLAIMING RIGHT, TITLE OR INTEREST FROM OR UNDER MARK N. BEERS A/K/A MARK NOAL BEERS, DECEASED Defendant(s), 9984 PEACH STREET, GIRARD, PA 16417

COMPLAINT IN MORTGAGE FORECLOSURE

You are hereby notified that Plaintiff, WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2005-3, ASSET-BACKED CERTIFICATES, SERIES 2005-3, has filed a Mortgage Foreclosure Complaint endorsed with a Notice to Defend, against you in the Court of Common Pleas of ERIE County, PA docketed to No. 11763-20, seeking to foreclose the mortgage secured on your property located, 9984 PEACH STREET, GIRARD, PA 16417.

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in this notice you must take action within twenty (20) days after the Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you, and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.
YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.
IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH THE INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Lawyer Referral &
Information Service
PO Box 1792
Erie, PA 16507
814-459-4411
Robertson, Anschutz, Schneid, Crane & Partners, PLLC
ATTORNEYS FOR PLAINTIFF
Jenine Davey, Esq. ID No. 87077
133 Gaither Drive, Suite F
Mt. Laurel, NJ 08054
855-225-6906

June 18

AUDIT LIST
NOTICE BY
KENNETH J. GAMBLE
Clerk of Records
Register of Wills and Ex-Officio Clerk of the Orphans' Court Division, of the Court of Common Pleas of Erie County, Pennsylvania

The following Executors, Administrators, Guardians and Trustees have filed their Accounts in the Office of the Clerk of Records, Register of Wills and Orphans' Court Division and the same will be presented to the Orphans' Court of Erie County at the Court House, City of Erie, on **Wednesday, June 9, 2021** and confirmed Nisi.

July 21, 2021 is the last day on which Objections may be filed to any of these accounts.

Accounts in proper form and to which no Objections are filed will be audited and confirmed absolutely. A time will be fixed for auditing and taking of testimony where necessary in all other accounts.

2021	ESTATE	ACCOUNTANT	ATTORNEY
155	Jarecki Industries Defined Benefit Pension Plan and Trust	Sandra R. Jarecki Trustee	Nadia A. Havard, Esq. David M. Mosier, Esq.

KENNETH J. GAMBLE
Clerk of Records
Register of Wills &
Orphans' Court Division

June 18, 25

ESTATE NOTICES

Notice is hereby given that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same and all persons indebted to said estates are requested to make payment without delay to the executors or their attorneys named below.

FIRST PUBLICATION

BIELSKI, KATHLEEN A., a/k/a KATHLEEN BIELSKI, deceased
Late of Millcreek Township, Erie County, Pennsylvania
Executrix: Jacqueline M. Catrabone, c/o Jeffrey D. Scibetta, Esq., 120 West Tenth Street, Erie, PA 16501
Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

BRINKER, PATRICK SHAWN, a/k/a PATRICK S. BRINKER, deceased
Late of the City of Erie, Erie County
Executrix: Sue Walter
Attorney: Edwin W. Smith, Esq., Marsh Schaaf, LLP, 300 State Street, Suite 300, Erie, PA 16507

BUHITE, HAROLD, JR., deceased
Late of Greene Township, County of Erie and Commonwealth of Pennsylvania
Executor: Robert J. Buhite, c/o 504 State Street, Suite 300, Erie, PA 16501
Attorney: Alan Natalie, Esquire, 504 State Street, Suite 300, Erie, PA 16501

BURTON, MARGARET E., deceased
Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania
Co-executors: David Burton and Timothy Burton, c/o Anthony Angelone, Esquire, NIETUPSKI ANGELONE, 818 State Street, Suite A, Erie, PA 16501
Attorney: Anthony Angelone, Esquire, NIETUPSKI ANGELONE, 818 State Street, Suite A, Erie, PA 16501

CALVEY, CONNIE, a/k/a CONNIE L. CALVEY, a/k/a CONNIE LEE CALVEY, deceased
Late of the Township of Girard, County of Erie, Commonwealth of Pennsylvania
Executor: Paul Edward Calvey, 3699 E. Normandy Park Drive, Apt. U1, Medina, OH 44256
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

GARRETT, JUDITH H., a/k/a JUDITH HILDA GARRETT, a/k/a JUDITH GARRETT, a/k/a JUDY H. GARRETT, deceased
Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania
Administrator: Carl E. Garrett, c/o James J. Bruno, Esquire, 3820 Liberty Street, Erie, PA 16509
Attorney: James J. Bruno, Esquire, 3820 Liberty Street, Erie, PA 16509

HARF, JOAN S., deceased
Late of the Township of Millcreek, County of Erie and Commonwealth of Pennsylvania
Executor: Walter O. Harf, c/o Kurt L. Sundberg, Esq., Suite 300, 300 State Street, Erie, PA 16507
Attorney: Kurt L. Sundberg, Esq., MARSH SCHAAF, LLP, Suite 300, 300 State Street, Erie, PA 16507

LANIER, ARLENE E., deceased
Late of Millcreek Township, Erie County, Pennsylvania
Executor: Steven D. Lanier, c/o Jeffrey D. Scibetta, Esq., 120 West Tenth Street, Erie, PA 16501
Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

LYNCH, WILLIAM T., a/k/a WILLIAM THOMAS LYNCH, deceased
Late of the Township of Millcreek
Executrix: Irma M. Lynch
Attorney: Andrew J. Sisinni, Esquire, 1314 Griswold Plaza, Erie, PA 16501

McNULTY, JOHN JOSEPH, a/k/a JOHN J. McNULTY, deceased
Late of Millcreek Township, Erie County, Commonwealth of Pennsylvania
Executrix: Mary A. McNulty, c/o Jeffrey D. Scibetta, Esq., 120 West Tenth Street, Erie, PA 16501
Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

MENOSKY, JOAN, deceased
Late of the Township of Millcreek, County of Erie and Commonwealth of Pennsylvania
Executrix: Mary Laurie Holmwood, c/o Vlahos Law Firm, P.C., 3305 Pittsburgh Avenue, Erie, PA 16508
Attorney: Darlene M. Vlahos, Esq., Vlahos Law Firm, P.C., 3305 Pittsburgh Avenue, Erie, PA 16508

OLON, MARY AVIS, a/k/a MARY A. OLON,
deceased
Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Co-executors: Robert P. Olon and John T. Olon, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Melissa L. Larese, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

POLLOCK, RAYMOND CHARLES, JR.,
deceased
Late of Millcreek Township, County of Erie, Commonwealth of Pennsylvania
Executor: Kevin J. Pollock, Sr., c/o Frank R. Gustine, Esquire, Ruschell & Associates, LLC, P.O. Box 577, Midway, PA 15060
Attorney: Frank R. Gustine, Esquire, Ruschell & Associates, LLC, P.O. Box 577, Midway, PA 15060

ROTHMAN, CHRISTINE A., a/k/a CHRISTINE ROTHMAN,
deceased
Late of Summit Township, Erie County, Commonwealth of Pennsylvania
Executrix: Caitlin Andryka, c/o Thomas C. Hoffman, II, Esq., 120 West Tenth Street, Erie, PA 16501
Attorney: Thomas C. Hoffman, II, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

SMITH, GOLDIE C., a/k/a GOLDIE CATHERINE SMITH,
deceased
Late of Fairview Township, County of Erie and Commonwealth of Pennsylvania
Co-executors: Thomas J. Smith, Jr., 616 Lake Street, Girard, PA 16417-1322, Dale R. Smith, Sr., 5238 Rockton Road, DuBois, PA 15801-9667 and Dolores F. Eagley, 464 W. 9th Street, Apt. 2, Erie, PA 16502-1345
Attorneys: MacDonald, Illig, Jones & Britton LLP, 100 State Street, Suite 700, Erie, Pennsylvania 16507-1459

SMITH, RONALD W.,
deceased
Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania
Administrator: Gale Y. Jordan, c/o 504 State Street, Suite 300, Erie, PA 16501
Attorney: Alan Natalie, Esquire, 504 State Street, Suite 300, Erie, PA 16501

VIEIRA, EVELYN HAMMOND, a/k/a EVELYN M. VIEIRA,
deceased
Late of the City of Erie, Erie County, PA
Executrix: Susan Livingston, c/o Jeffrey D. Scibetta, Esq., 120 West Tenth Street, Erie, PA 16501
Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

WINSTON, RICHARD G.,
deceased
Late of the Township of Girard, County of Erie and Commonwealth of Pennsylvania
Executrix: Karen L. Winston, c/o 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Thomas E. Kuhn, Esquire, QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC., 2222 West Grandview Blvd., Erie, PA 16506

ZAHNER, VIRGINIA M.,
deceased
Late of the Township of Millcreek, County of Erie, Commonwealth of Pennsylvania
Executrix: Carolyn Zahner Englert, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Melissa L. Larese, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

SECOND PUBLICATION

CAMPAGNE, CHARLES H., JR.,
deceased
Late of the City of Erie, Erie County
Executrix: Lisa M. Winschel
Attorney: John F. Mizner, Esquire, 311 West Sixth Street, Erie, PA 16507

CORDIANO, MARIE R.,
deceased
Late of the City of Erie, Erie County
Executrix: Theresa C. Paterniti
Attorney: Edwin W. Smith, Esq., Marsh Schaaf, LLP, 300 State Street, Suite 300, Erie, PA 16507

DANILCZUK, MAREK,
deceased
Late of the Township of Millcreek, County of Erie and Commonwealth of Pennsylvania
Administratrix: Magdalena Danilczuk
Attorney: David J. Rhodes, Esquire, ELDERKIN LAW FIRM, 456 West 6th Street, Erie, PA 16507

DAWISON, WILLIAM J., a/k/a WILLIAM DAWISON,
deceased
Late of the Township of Girard, County of Erie, Commonwealth of Pennsylvania
Executrix: Billie Jo McCracken, 796 Clark Street, Conneaut, Ohio 44030
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

KLINE, EUGENE A.,
deceased
Late of Washington Township, Erie County, PA
Executrix: Natalie J. Kline Stone
Attorney: Kimberly S. Foulk, Esq., Cressman Erde Ferguson, LLC, 300 Arch Street, Meadville, PA 16335

KRYSIAK, BETTY JANE,
deceased
Late of the City of Erie
Executrix: Lynn Michelle Krysiak Bresslin
Attorney: Andrew J. Sisinni, Esquire, 1314 Griswold Plaza, Erie, PA 16501

ROBERTSON, NANCY E.,
deceased
Late of Erie City, Erie County, PA
Administratrix: Kristen Dobrich, 309 Cascade St., Erie, PA 16507
Attorney: Robert Freedenberg, Esquire, Skarlatos Zonarich LLC, 320 Market St., Ste. 600W, Harrisburg, PA 17101

SCHANZ, JAMES J., a/k/a JAMES SCHANZ,
deceased
Late of the Township of Elk Creek, County of Erie, Commonwealth of Pennsylvania
Administratrix: Nellie R. Schanz, 8583 Crane Road, Cranesville, PA 16410
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

TRABERT, LUDWIG M., a/k/a LOU TRABERT,
deceased
Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executor: Stanley Lewandowski, 3220 Charlotte Street, Erie, PA 16508
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

ZMIJEWSKI, THADDEUS W., JR.,
deceased
Late of the City of Erie
Executrix: Ellen E. Benczkowski, 2633 Vandalia Ave., Erie, PA 16511
Attorney: Michael A. Fetzner, Esquire, Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

ZYGAI, ESTHER,
deceased
Late of Millcreek Township, County of Erie, Pennsylvania
Executrix: Laura L. Yochim, c/o 3939 West Ridge Road, Suite B-27, Erie, PA 16506
Attorney: James L. Moran, Esquire, 3939 West Ridge Road, Suite B-27, Erie, PA 16506

THIRD PUBLICATION

COLEMAN, JOHN F.,
deceased
Late of the Township of Lawrence Park, County of Erie, and Commonwealth of Pennsylvania
Executrix: Michelle T. Gray, c/o 300 State Street, Suite 300, Erie, PA 16507
Attorney: Thomas V. Myers, Esquire, Marsh Schaaf, LLP, 300 State Street, Suite 300, Erie, PA 16507

GOODMAN, MAE I., a/k/a MAE GOODMAN,
deceased
Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executrix: Mary A. Tucholski, 1247 East 26th Street, Erie, Pennsylvania 16504
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

HESS, PATRICIA W., a/k/a PATRICIA HESS, a/k/a PATRICIA K. HESS,
deceased
Late of the City of Erie, Erie County
Executrix: Holly K. Hess
Attorney: Michael G. Nelson, Esq., Marsh Schaaf, LLP, 300 State Street, Suite 300, Erie, PA 16507

HOWARD, PATRICK C.,
deceased
Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Administratrix: Patricia M. Howard, 3428 Allegheny Road, Erie, PA 16509
Attorneys: MacDonald, Illig, Jones & Britton LLP, 100 State Street, Suite 700, Erie, Pennsylvania 16507-1459

KAZIMIEROWSKI, KAZIMIER E., a/k/a KAZIMIER KAZIMIEROWSKI,
deceased
Late of the Township of Millcreek, Commonwealth of Pennsylvania
Executor: Kazimier R. Kazimierowski, c/o Vendetti & Vendetti, 3820 Liberty Street, Erie, Pennsylvania 16509
Attorney: Richard A. Vendetti, Esquire, Vendetti & Vendetti, 3820 Liberty Street, Erie, PA 16509

MEANS, JAMES A., a/k/a JAMES ANTHONY MEANS, a/k/a J. A. MEANS,
deceased
Late of Millcreek Township, Erie County, Commonwealth of Pennsylvania
Executrix: Margaret Ann Means, 4908 Watson Rd., Erie, PA 16505
Attorney: None

MEYER, RICA ANN, a/k/a RICA A. MEYER, deceased
Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania
Executor: Dan A. Perfetto, Jr., c/o Vlahos Law Firm, P.C., 3305 Pittsburgh Avenue, Erie, PA 16508
Attorney: Darlene M. Vlahos, Esq., Vlahos Law Firm, P.C., 3305 Pittsburgh Avenue, Erie, PA 16508

RABELL, NATALIE, deceased
Late of the Township of Conneaut, County of Erie, Commonwealth of Pennsylvania
Co-executors: Dennis R. Rabell, 2801 Ellsworth Avenue, Erie, PA 16508 and Robert L. Rabell, 10560 East Washington Street, Albion, PA 16401
Attorney: Grant M. Yochim, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

SHELDON, ROBERT R., a/k/a ROBERT RAY SHELDON, a/k/a ROBERT SHELDON, deceased
Late of the Township of Girard, County of Erie, Commonwealth of Pennsylvania
Executor: Raymond L. Sheldon, 8421 Lexington Rd., Girard, PA 16417
Attorney: Valerie H. Kuntz, Esq., 24 Main St. E., P.O. Box 87, Girard, PA 16417

SZYMECKI, MARCEL, deceased
Late of the City of Corry, Erie County, Pennsylvania
Administratrix: Lorene Burns, c/o Mary Alfieri Richmond, Esq., 502 Parade Street, Erie, PA 16507
Attorney: Mary Alfieri Richmond, Esq., 502 Parade Street, Erie, PA 16507

WAIDE, LAURA ROSE, a/k/a LAURA R. WAIDE, deceased
Late of the Borough of Waterford, County of Erie, and Commonwealth of Pennsylvania
Administrator: David A. Waide
Attorney: Patrick J. Loughren, Esquire, Loughren, Loughren & Loughren, P.C., 8050 Rowan Road, Suite 601 Rowan Towers, Cranberry Township, Pennsylvania 16066

WOLESLAGLE, JAMES B., JR., a/k/a JAMES BERNARD WOLESLAGLE, JR., deceased
Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executrix: Mary Jane Hand, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Melissa L. Larese, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

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Weekly Wrap-up

June 18, 2021

Public scrutiny - LegalZoom and Intapp filed their intentions to go public with the SEC on June 4 and, according to market observers, it's a big deal. "There are two companies that believe that the public market is ready to finance legal technology. Which is very significant," Zach Abramowitz of Killer Whale Strategies. But will other legal tech companies be inspired to go public as well? Several already have IPOs in their sights. Jason Boehmig, CEO of Ironclad, told Law.com in March that the company would "100%" be filing an IPO at some point in the future. Evisort's CEO Jerry Ting also stated that the AI-powered contract management provider was planning to go public within the next five years. Meanwhile, companies such as MyCase and KLDiscovery have already consummated their IPOs in 2014 and 2019, respectively. But observers say that if other companies decide to go that route, they're going to need to differentiate themselves in a legal market that's increasingly becoming crowded with not just law firms and legal departments, but ALSPs, the Big Four, venture capitalists and private equity groups. "As all of these people go for the pie, the pie has to get bigger. The pie has to get better," Abramowitz said.

Federal judge throws out school committee's suit, which claimed board closed and merged schools without public input - A school committee has lost its lawsuit seeking to prevent the closure of its town's high school and consolidation with a nearby high school, which claimed that the latter community's board of education began the closure and merger processes before seeking proper public input under the law. Read more ... https://pennrecord.com/stories/602620195-federal-judge-throws-out-school-committee-s-suit-which-claimed-board-closed-and-merged-schools-without-public-input

Western Pa. media company says ex-employee's new job with market competitor violates its no-compete agreement - A Western Pennsylvania media company alleges that one of its former on-air personalities accepted a job with a competitor in the same market, thus violating the no-compete terms of an employment agreement she signed nearly seven years ago. Read more ... https://pennrecord.com/stories/603108210-western-pa-media-company-says-ex-employee-s-new-job-with-market-competitor-violates-its-no-compete-agreement

In closing brief, disbarred environmental lawyer claims his prosecution is 'run by an oil company' - Donziger is accused of stonewalling Chevron's efforts to collect a judgment against him in a civil RICO case after a judge determined that he obtained a fraudulent $8.6 billion judgment in Ecuador against the oil company. He is also accused of violating discovery orders, including that he must allow imaging of his electronic devices. Read more ... https://www.abajournal.com/news/article/in-closing-brief-disbarred-environmental-lawyer-claims-his-prosecution-is-run-by-an-oil-company

A Judge has thrown out a lawsuit brought by hospital workers over a vaccine mandate - In a five-page ruling issued Saturday, a U.S. judge upheld Houston Methodist Hospital's vaccination policy, saying its requirement that employees receive a COVID-19 vaccine breaks no federal law. Read more ... https://www.npr.org/2021/06/13/1006065385/a-judge-has-thrown-out-a-lawsuit-brought-by-hospital-workers-over-a-vaccine-mand

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