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

JOE BURCH and ROSETTA BURCH	:	**CIVIL ACTION**
	:	
v.	:	
	:	
WDAS AM/FM, AM.FM INC. and LARRY JENNINGS	:	**No. 00-4852**

M E M O R A N D U M

WALDMAN, J. **June 28, 2002**

I. Introduction

Plaintiff has asserted claims for racial discrimination under Titles VI & VII and 42 U.S.C. § 1981 against his former employer, its parent corporation and its general sales manager. He has also asserted claims of interference with rights protected under the Family and Medical Leave Act ("FMLA") and retaliatory discharge for exercising those rights. Plaintiff has asserted additional supplemental state law claims for breach of contract, wrongful discharge and defamation.[1]

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[1] Rosetta Burch, Joe Burch's wife, is referenced in the caption of the complaint, however, no specific claim is pled on her behalf or referenced in any of the parties' submissions. The complaint refers repeatedly to "Plaintiff" in the singular. In one sentence of a lengthy complaint, there is an allegation that "Plaintiff and his wife's relationship suffered due to Plaintiff's inability to cooperate or due to Plaintiff's personal suffering." This conceivably could represent an attempt to assert a claim on behalf of Mrs. Burch for loss of consortium although that term is never used and the sentence is surrounded by allegations of the affect of defendants' actions on Mr. Burch. In any event, whether the drafter was attempting to present such a claim is immaterial to the court's analysis. The court refers to plaintiff Joe Burch in the singular.

Presently before the court is defendants' motion for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at

248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff Joe Burch is an African American man. He was hired by defendant WDAS in July 1989 as a senior account executive and served in this capacity for eight years. The account executives were responsible for generating revenue for the station by selling units of time for advertising. WDAS AM/FM is a Philadelphia radio station licensed by the Federal Communications Commission and a subsidiary of defendant AM.FM, Inc., a New Jersey corporation. More than 80% of its full-time employees are African American.

During plaintiff's tenure as a senior account executive, he was a top performer. In July 1997, he applied for and was promoted to the newly created position of local sales manager. The promotion decision was made by Kim Dziabis, a Caucasian woman who was then the general sales manager. Mr. Burch continued to work in this capacity until his termination on March 24, 2000.

WDAS sells units of advertising through two departments, the national sales department and the local sales department.[2] The general sales manager oversees both departments and is responsible for balancing the revenue generated from national and local sales.

As local sales manager, Mr. Burch was primarily responsible for coaching and leading a sales staff of twelve account executives in achieving monthly and quarterly sales quotas. He was also responsible for approving individual orders and providing incentives to account executives for outstanding work.

Prior to the creation of the local sales manager position, Ms. Dziabis, as general sales manager, was primarily responsible for achieving the monthly sales quotas. In 1995 and 1996, local sales failed to meet the monthly quotas. In 1997, local sales only met the quota twice. Overall sales at the station, however, were good.

In September 1998, Charles Warfield, an African American man who was the general station manager, promoted Ms. Dziabis to the position of Director of Sales.[3] In the nine months preceding her promotion, the station as a whole achieved

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[2] E. Stephen Collins was the National Sales Manager at all times relevant to this lawsuit.

[3] In this capacity she was responsible for sales at six AM.FM stations in Philadelphia.

the monthly sales quotas seven times. Defendant Larry Jennings, an African American man who had previously served as general sales manager at stations in Charlotte, North Carolina, was hired as general sales manager to fill the vacancy created by the promotion of Ms. Dziabis.

In the fall of 1998, Mr. Jennings was informed by corporate headquarters that each Philadelphia station was required to create a new position of director of market development and to fill the position by the beginning of 1999. Chancellor Marketing Group, a subsidiary of AM.FM, defined the position and the talents that the person hired was expected to have. Mr. Jennings conducted initial interviews of candidates and those who appeared to be suitable were then interviewed by Ms. Dziabis and two executives of Chancellor Marketing. These three interviewers then met to discuss the candidates and make a selection.

Two finalists, Debbie Kessler, a Caucasian woman, and Marie Tolson-Perry, an African American woman, were asked to complete talent profiles used for predicting an applicant's suitability for a particular job. Of the twenty-two attributes analyzed, Ms. Tolson-Perry achieved a higher score in nine categories, Ms. Kessler scored higher in seven categories and both candidates achieved identical results in six categories. After the process was completed, Ms. Kessler was offered the

position. Mr. Jennings did not participate in the decision to select Ms. Kessler.

Under Mr. Burch, local sales met the monthly quota seven months in 1998 and four of the first five months in 1999. From June 1999 until Mr. Burch was terminated in March 2000, however, local sales failed to meet the quota each and every month. Local sales failed to achieve the sales quota in 22 of the 34 months during which plaintiff was local sales manager.

While general sales manager, Ms. Dziabis discussed problems with local sales with plaintiff. A few months after Mr. Jennings took over in September 1998, he expressed concerns to Ms. Dziabis about plaintiff's ability to be an effective local sales manager. In June 1999, Mr. Jennings began performing certain duties for which plaintiff had previously been responsible. Mr. Jennings told Mr. Burch that he should no longer determine pricing, provide sales leads, give out bonuses or sign sales orders. Mr. Burch perceived that Mr. Jennings relieved plaintiff of this authority because he wanted to let everybody know that he was in charge and was jealous of Mr. Burch's good relationship with the WDAS staff and advertising community.

In October and November of 1999, Mr. Jennings sent plaintiff detailed e-mails expressing concern over the failure to

achieve local sales quotas and asking him to make changes in his coaching and management style to achieve better results.

In an e-mail sent on October 27, 1999, Mr. Jennings related that accountability had been an area of pronounced weakness in plaintiff's performance all year. He advised Mr. Burch that the sales people "require a strong, well-focused and individualized approach to coaching and leadership." Mr. Jennings warned that "[u]nless things get turned around in a hurry, I'll be forced to become more hands on with Local. I don't see that as a positive if I have to get more involved in helping you do your job. It will call into question your management talent and in the long run cost you this golden opportunity. I'd hate to see that happen."

In a November 7, 1999 e-mail, Mr. Jennings reminded plaintiff that "you may recall from our meeting with Chester a few weeks ago (the one regarding October's Local performance), he made several thinly veiled references to the two us being at risk as a result of Local sales performance" and advised that "the real key to delivering the quarter will still boil down to how closely you work with and monitor individual performance."

Chester Schofield had taken over as general manager of WDAS in August 1999. Plaintiff complained that Mr. Jennings was not permitting him to do his job. Mr. Schofield said that he would put together a formal job description detailing the

respective roles of Mr. Jennings and plaintiff. Mr. Schofield left the station in January 2000. With Mr. Schofield's departure, plaintiff explains there was nobody to whom he could complain and it "was just a matter of time" before he expected to be terminated.

Mr. Jennings met with plaintiff in February 2000 to discuss particular concerns with the performance of local sales and ways to improve that performance. He then sent an e-mail to Mr. Burch outlining the key points of discussion.

In e-mails dated February 10 and February 15, 2000, Mr. Jennings expressed concern about meeting the first quarter quota. In the February 15th e-mail, he also expressed concerns about holding the sales staff accountable for their responsibilities. In an e-mail of February 29,2000, Mr. Jennings identified six account executives who were under-performing and reminded plaintiff of tactics they had discussed to improve their performance. He urged that Mr. Burch "work more closely than you ever have before to ensure that each account executive receives the attention they require." In e-mails of March 3 and March 11, 2000, Mr. Jennings reminded plaintiff that his end of the month reports for February were overdue.

Mr. Jennings presented Mr. Burch with a performance and compensation plan on February 15, 2000. The plan contains three parts: responsibilities, performance expectations and

compensation. The responsibilities section contained a formalized description of the responsibilities of local sales manager including achieving sales goals, reviewing and approving local sales orders, assigning sales leads, providing a monthly lead report to the general sales manager, managing the sales staff by conducting individual focus meetings as well as informal monthly performance reviews and formal quarterly performance reviews, recommending staffing changes and documenting vacation days and absences. The performance expectations section listed in table form the monthly and quarterly gross revenue goals. The compensation section specified plaintiff's salary for the year and provided for incentive pay should certain performance goals be met.

On or shortly before February 28, 2000, Mr. Jennings and Ms. Dziabis discussed plaintiff's failure to perform to expectations. Together, they decided to terminate plaintiff's employment and had Rosemarie Galie, the WDAS business manager, contact corporate headquarters to obtain a severance package. Ms. Galie confirms that she was advised of the decision "in or about the end of February 2000."

Rosetta Burch had surgery on March 13, 2000. One or two days prior to the surgery, Mr. Burch sent an e-mail to Mr. Jennings in which he indicated that his priorities had changed and that he needed time off from work to be with his wife when

she underwent surgery. Mr. Burch took several days off to be with his wife. Mr. Jennings did not formally respond to the e-mail, but plaintiff recollects that Mr. Jennings "probably" told him to take time off. There is no evidence that Mr. Burch was ever denied leave. Upon his return, plaintiff states he did get a "cold feeling" from Mr. Jennings. Of course, unknown to plaintiff, Mr. Jennings had decided more than two weeks earlier to terminate him.

Plaintiff also points to the case of Lisa Boston, who was terminated in the fall of 1999 after taking pregnancy leave. Although not required by the FMLA, WDAS provided leave with pay. Ms. Boston's leave had extended well beyond the prescribed period and she sought to secure her position for still longer. Moreover, it was not Mr. Jennings who declined to extend her paid leave or secure her position. It was Mr. Schofield who expressed concern that Mr. Jennings had let her slide and that this could create a bad precedent.[4]

Mr. Jennings informed plaintiff of his termination on March 24, 2000. Mr. Jennings cited plaintiff's failure to achieve sales quotas, to coach the sales staff properly and to

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[4] Mr. Schofield avers that Ms. Boston was welcome to return but that she could no longer be paid while out from work and the station could not continue to hold an account list for her while also having to pay others who were actually handling the accounts. Ms. Boston apparently perceived this as an effective termination and for purposes of the instant motion the court has so assumed.

hold his staff accountable. Mr. Jennings offered plaintiff the opportunity to frame his departure as a resignation by submitting a letter to that effect and to continue to work until April 7th.

At a meeting the next day with the sales staff, plaintiff advised that "it had been determined that [he] leave the station" but would remain until April 7th to assist the staff with strategic account management. Some staff members asked plaintiff after the meeting why he was leaving. Plaintiff responded that he had been fired and related the reasons given by Mr. Jennings. Plaintiff also related to staff members his belief that he was fired because he made too much money and had too good of a relationship with the staff.[5]

On March 29, 2000, plaintiff declined the offer to frame his departure as a resignation at which time Mr. Jennings asked him to leave immediately. Dwayne Perry, an African American male account executive, was promoted to fill the vacant local sales manager position.

Between March 24 and March 29, 2000, several employees related to plaintiff statements they said Mr. Jennings made to them regarding plaintiff's departure. Mr. Tamburro, the program director, and two sales managers, Messrs. Perry and Liles, told

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[5] Plaintiff did not suggest that he was fired for taking family leave or because of his race. Indeed, in sworn discovery responses in this action, plaintiff variously stated that "race played no role" in his termination and at most that "race could be involved."

plaintiff that Mr. Jennings had indicated Mr. Burch was incapable of motivating and coaching his staff. Ben Hill, the chief station engineer, told plaintiff that Mr. Jennings told the managers at the station that Mr. Burch had quit and had not been able to take the station to another level. Marie Tolson told plaintiff that Mr. Jennings had opined that no one at WDAS was qualified to do that job.[6]

A few weeks later, Mr. Liles and Nate Dais, another account executive, told plaintiff that they were told by Ms. Dziabis that she was told by Mr. Jennings that he was looking for someone who could take the staff to the next level which Mr. Burch could not do. Paula Henson, an account executive, told plaintiff that Mr. Jennings told her that he had viewed Mr. Burch as a cancer at the station.

Plaintiff states that after interviewing for a job with WPHI, another local radio station, he was told by Kevin Jones, the general sales manager, that Larry Jennings had contacted Darryl Trent, the general station manager, and indicated that Mr. Burch was bitter, hostile and unable to focus on the job.

Mr. Trent testified that he never had any discussion with Mr. Jennings or anyone else at WDAS regarding Mr. Burch. Plaintiff has presented no affidavit or testimony of Mr.

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[6] Mr. Burch contends this reported statement was defamatory because although he had been terminated, he was still at the office and thus it applied to him.

Tamburro, Mr. Perry, Mr. Liles, Mr. Hill, Ms. Tolson, Mr. Dais or Ms. Henson or other competent evidence to show that Mr. Jennings made the statements that plaintiff says they told him they heard.

IV. Discussion

A. Race Discrimination Claims

It is uncontroverted that plaintiff has never filed a charge of discrimination with the Equal Employment Opportunity Commission or the Pennsylvania Human Relations Commission. This is a prerequisite for adjudication of a Title VII claim. See Alexander v. Gardner Denver Co., 415 U.S. 36, 47 (1974); Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3d Cir. 1997); Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990) ("Federal courts lack jurisdiction to hear Title VII claims unless a claim was previously filed with the EEOC").

It is also uncontroverted that WDAS is not a recipient of any federal funds. Thus, the Title VI claim also cannot survive. See 42 U.S.C. § 2000d; Fuller v. Rayburn, 161 F.3d 516, 517 (8th Cir. 1998) (receipt of federal funding is essential element of Title VI claim); Reynolds v. School Dist. No. 1, Denver Colorado, 69 F.3d 1523, 1531 (10 Cir. 1995) (plaintiff must show defendant received federal funds for primary objective of providing employment to sustain a Title VI claim); Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 276 (2d Cir.) (to sustain a Title VI claim of

discriminatory employment practices, "a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment"), cert. denied, 455 U.S. 988 (1981); Grimes v. Superior Home Health Care, 929 F. Supp. 1088, 1091 (M.D. Tenn. 1996) ("the general prohibition of [Title VI] applies only if a defendant receives federal funds").

To sustain a § 1981 discrimination claim, a plaintiff must show that the defendant intentionally discriminated against him because of race in the making, performance, enforcement or termination of a contract or for such reason denied him the enjoyment of the benefits, terms or conditions of the contractual relationship. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609 (1987); Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 385 (3d Cir. 1999); Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir. 1994); Mian v. Donaldson, Lufkin & Jenrette Securities, 7 F.3d 1085, 1087 (2d Cir. 1993); Williams v. Carrier Corp., 889 F. Supp. 1528, 1530 (M.D. Ga. 1995); Flagg v. Control Data, 806 F. Supp. 1218, 1223 (E.D. Pa. 1992). The elements of employment discrimination under § 1981 are the same as those for a Title VII claim. See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983); Marion v. City of Philadelphia/Water Dep't., 161 F. Supp. 2d 381, 385 (E.D. Pa. 2001). See also New York Transit Authority v. Beazer, 440 U.S.

568, 583 (1979) (§ 1981 "affords no greater substantive protection than Title VII").

A plaintiff can sustain such a claim by presenting direct evidence of discrimination or by using circumstantial evidence which satisfies the McDonnell Douglas requirements. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095-96 n.4 (3d Cir. 1995); Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994).[7]

Direct evidence is overt or explicit evidence which directly reflects a discriminatory bias by a decisionmaker. See Armbruster v. Unisys Corp., 32 F.3d 768, 778, 782 (3d Cir. 1994). Where it appears from such evidence that illegal discrimination was a substantial factor in an adverse employment decision, the burden shifts to the defendant to show that "the decision would have been the same absent consideration of the illegitimate factor." Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989).

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[7] The McDonnell Douglas analytic framework for Title VII claims also applies to employment discrimination claims under § 1981. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Patterson v McLean Credit Union, 491 U.S. 164, 186 (1989) (applying McDonnell Douglas framework to claims under § 1981); Pamintuan, 192 F.3d at 385 (same); Stewart v. Rutgers, The State Univ., 120 F.3d 426, 432 (3d Cir. 1997) (same); Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107, 112 (3d Cir. 1996) (same).

See also Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1113 (3d Cir. 1997); Jones v. School Dist. of Phila., 19 F. Supp. 2d 414, 417-18 (E.D. Pa. 1998). Where, as here, the plaintiff does not present such direct evidence of discrimination, he may survive summary judgment on a McDonnell Douglas pretext theory.

The plaintiff must first establish a prima facie case by showing that he was a member of a protected class; he was qualified for the job he held; he was discharged; and, he was replaced by a person not in the protected class, or otherwise present evidence sufficient to support an inference of unlawful discrimination. See Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 353-54 (3d Cir. 1999); Showalter v. Univ. of Pittsburgh Medical Ctr., 190 F.3d 231, 234 (3d Cir. 1999); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). The burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. See St. Mary's Honor Ctr., 509 U.S. at 506-07; Goosby v. Johnson & Johnson Medical Inc., 228 F.3d 313, 319 (3d Cir. 2000).

The plaintiff may still prevail by demonstrating that the employer's proffered reasons were not its true reasons but rather a pretext for unlawful discrimination. See Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 143 (2000); Goosby, 228 F.3d at 319. The plaintiff must present evidence from which a factfinder could reasonably disbelieve the

employer's proffered reasons from which it may then be inferred that the real reason was discriminatory, or otherwise present evidence from which one could reasonably find that unlawful discrimination was more likely than not a determinative cause of the employer's action. See Hicks, 509 U.S. at 511 & n.4; Keller, 130 F.3d at 1108. To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in that reason that one could reasonably conclude it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. See Hicks, 509 U.S. at 507, 511.

Mr. Burch is a member of a protected class. The court assumes in addressing the instant motion that he had the basic objective qualifications for the job he held.[8] He was discharged from his employment.

The decision to terminate plaintiff was made by someone who had promoted him to the position and by someone who is a

[8] See Goosby, 228 F.3d at 320-21 (noting distinction between objective qualifications and performance which generally is more appropriately considered at pretext stage).

member of the same protected class who then selected someone else in that class to replace plaintiff. While this does not per se foreclose a claim of discrimination, it certainly does not help to sustain plaintiff's claim. See Pivirotto, 191 F.3d at 354; Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1002 (5th Cir. 1996) (that decisionmaker is of same race as plaintiff "considerably undermine[s] the probability that race was a factor"); Dungee v. Northeast Foods, Inc., 940 F. Supp. 682 n.3 (D.N.J. 1996) (that decisionmaker is member of plaintiff's protected class "weakens any possible inference of discrimination").

Plaintiff relies on his success as local sales manager in contrast to Ms. Dziabis and the selection of Ms. Kessler to raise an inference of race discrimination.

Mr. Burch as local sales manager and Ms. Dziabis as general sales manager, however, had different responsibilities and were not similarly situated. Moreover, Ms. Dziabis performed more to expectation prior to her promotion than did plaintiff prior to his termination. Also, these respective employment decisions were made by different decisionmakers. See Radue v. Kimberly Clark Corp., 219 F.3d 612, 618 (7th Cir. 2000) ("Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination"); Hollins v. Atlantic Co., 188 F.3d 652, 659 (6th Cir. 1999) (plaintiff must

produce evidence that other relevant employees were similarly situated in all respects to show disparate treatment); Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8th Cir. 1988) (same).

That Ms. Tolson-Perry had a higher net score on two of 22 categories on a talent profile than Ms. Kessler does not suggest that her selection was racially motivated. The profile is not an empirical measurement but rather a predictive tool and only one criteria used in the selection process along with personal interviews and actual experience. Moreover, Mr. Jennings did not participate in the decision to choose Ms. Kessler and Ms. Dziabis, who had promoted plaintiff, was only one of three persons who did.

Plaintiff was replaced by a person in his protected class and has not presented competent evidence to support an inference that he was terminated because of his race. He has thus failed to satisfy the fourth element of a prima facie case.

Plaintiff has also failed to present competent evidence from which one could reasonably find that the stated reasons for his termination are incredible and unworthy of credence. That plaintiff may believe he was unfairly blamed for the failure to meet sales quotas does not establish pretext. It is the employer's perception that is important. See Fuentes, 32 F.3d at 765 ("To discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or

mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent"); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa.) (that a decision is ill-formed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995). See also Schaffner v. Glencoe Park District, 256 F.3d 616, 621-22 (7th Cir. 2001) (opinions of coworkers or customers are not relevant to rebut defendant's assessment as plaintiff must show defendant did not believe its own assessment); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Doyle v. Sentry Ins., 877 F. Supp. 1002, 1009 n.5 (E.D. Va. 1995) (it is the perception of the decisionmaker that is relevant).

One cannot reasonably find from the competent evidence of record that Ms. Dziabis and Mr. Jennings had not earnestly, even if wrongly, concluded that plaintiff's management performance was deficient and that he bore responsibility for the continuing failure to meet sales quotas. While plaintiff suggests that Mr. Jennings may have been jealous of him, even plaintiff claims no more than that race "could be involved" in his termination.[9]

[9] Even this speculation is limited to Mr. Jennings. Plaintiff has not sued Ms. Dziabis and clearly stated at his deposition that he does not claim she discriminated.

A. FMLA Claims

The FMLA entitles an eligible employee to take twelve work weeks of unpaid leave during any twelve-month period to care for a spouse who has a serious health condition. See 29 U.S.C. § 2612(a)(1)(C). A serious health condition includes an illness, injury, impairment, or condition which involves inpatient care in a hospital. See 29 U.S.C. § 2611(11)(A). The Act makes it unlawful for "any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA, 29 U.S.C. § 2615(a), or to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the Act, 29 U.S.C. § 2615(b), and permits an affected employee to bring a civil action against an employer who violates Section 2615. See 29 U.S.C. § 2617(a)(1).[10]

To sustain on a claim of wrongful denial or interference with the right to take requested leave, a plaintiff must prove that he was an eligible employee; that the defendant was an employer within the meaning of the Act; that he was entitled to leave under the Act; and, that the employer

[10] When taking leave, the "employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave." 29 C.F.R. § 825.302(c) (1995). Notice is sufficient if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. See Stoops v. One Call Communications, Inc., 141 F.3d 309 (7th Cir. 1998); Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).

interfered with plaintiff's right to take leave or otherwise wrongfully denied the requested leave. See Strickland v. Water Works & Sewer Bd., 239 F.3d 1199, 1206-07 (11th Cir. 1999); Jeremy v. Northwest Ohio Development Center, 33 F. Supp. 2d 635, 638 (N.D. Ohio 1999), aff'd, 210 F.3d 372 (6th Cir. 2000). An employer may interfere with the exercise of an employee's rights by discouraging an employee from using leave. See 29 C.F.R. § 825.220(b).

The court assumes that Mr. Burch is an eligible employee and that WDAS is an employer under the Act.[11] It appears

[11] An employer is anyone engaged in commerce "who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i). "Employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). Courts have found that employee supervisors may thus be sued under the FMLA. See Darby v. Bratch, 287 F.3d 673, 681 (8th Cir. 2002); Mears v. Bennett, 27 F. Supp. 2d 288, 291 (D. Mass. 1998). See also Cantley v. Simmons, 179 F. Supp. 2d 654, 656 (S.D. W.Va. 2002); Carter v. U.S. Postal Service, 157 F. Supp. 2d 726, 728 (W.D. Ky. 2001); Morrow v. Putnam, 142 F. Supp. 2d 1271, 1272 (D. Nev. 2001); Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 412 (M.D. Pa. 1999). The annual employment analysis submitted to the Federal Communications Commission shows that WDAS employed 38 full-time and 16 part-time employees as of May 31, 2000 and 40 full-time and 15 part-time employees as of February 26, 2001. Whether 50 employees were employed for each working day for each of 20 or more calendar workweeks is not clear. An employee who has been employed for at least 12 months by the employer from whom leave is requested is an eligible employee, however, excluded is "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(A). As no party addresses the issue, the court will assume that WDAS qualified as an employer and plaintiff as an employee.

that Mr. Burch was entitled to leave at the time of his wife's surgery.

Plaintiff was never denied leave. Rather, he contends that Mr. Jennings interfered with his FMLA rights by not responding promptly to plaintiff's e-mail in which he indicated that he would be taking some time off to be with his wife and by reminding plaintiff of overdue reports during the period when Mrs. Burch was ill.

There is no competent evidence that Mr. Jennings was aware before plaintiff's e-mail, just prior to Mrs. Burch's surgery, that plaintiff wanted to take leave. There was nothing in the wording of the e-mail as plaintiff describes it that called for a formal response and plaintiff's own recollection is consistent with testimony of Mr. Jennings that he verbally told plaintiff to take time off to be with his wife. That Mr. Jennings may have periodically reminded plaintiff about overdue reports and other matters required of him in the ordinary course of his job is not prohibited conduct. An employer is required to grant requested leave for a prescribed purpose, but is not required to excuse performance by an employee on days he is on the job. One cannot reasonably conclude from the competent evidence of record that Mr. Jennings discouraged plaintiff from taking leave at the time of his wife's surgery.

The cases on which plaintiff relies are plainly distinguishable. In Williams v. Shenango, Inc., 986 F. Supp. 309 (W.D. Pa. 1997), the Court denied summary judgment on plaintiff's

FMLA claim where the undisputed evidence showed that upon being notified of plaintiff's need for leave, the employer denied the request and asked plaintiff to request a different week. Id. at 320-21. In Shtab v. Greate Bay Hotel & Casino, 173 F. Supp. 2d 255 (D.N.J. 2001), the employer's benefit specialist in charge of family leave asked plaintiff to delay taking the leave he had requested. Id. at 259.

To establish a prima facie claim of retaliation under the FMLA, a plaintiff must show that he engaged in a statutorily protected activity; that he suffered an adverse employment action; and, a causal connection between the adverse employment action and the exercise of his rights under the Act. See Parris v. Miami Herald Publ'g Co., 216 F.3d 1298, 1301 (11th Cir. 2000); Alifano v. Merck & Co., 175 F. Supp. 2d 792, 795 (E.D. Pa. 2001); Agee v. Northwest Airlines, Inc., 151 F. Supp. 2d 890, 896 (E.D. Mich. 2001); see Soletro v. National Federation of Independent Business, 130 F. Supp. 2d 906, 913 (N.D. Ohio 2001); Jeremy v. Northwest Development Center, 33 F. Supp. 2d 635, 639 (N.D. Ohio 1999); Baltuskonis v. US Airways, Inc., 60 F. Supp. 2d 445, 448 (E.D. Pa. 1999); Routes v. Henderson, 58 F. Supp. 2d 959, 979 (S.D. Ind. 1999).

In the absence of direct evidence of the employer's intent, courts have applied the McDonnell Douglas burden shifting framework. See Nichols v. Ashland Hosp. Corp., 251 F.3d 496, 502 (4th Cir. 2001); Hunt v. Rapides Healthcare System, LLC, 277 F.3d 757, 768 (5th Cir. 2001); Skrjanic v. Great Lakes Power Service

Co., 272 F.3d 309, 315 (6th Cir. 2001); Brungart v. Bellsouth Telecommunications, Inc., 231 F.3d 791, 798 (11th Cir. 2000); King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999); Hodgens v. General Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998); Alifano, 175 F. Supp. 2d 792 at 795; Baltuskonis, 60 F. Supp. 2d at 448.

Taking qualified leave under the FMLA is a protected activity and plaintiff's termination was an adverse employment action. To establish a causal connection between the two actions, plaintiff relies on the close temporal proximity between his leave and his termination.[12]

At least when it is particularly suggestive, the temporal proximity of plaintiff's protected conduct and his termination can raise an inference that there is a causal link between the two. See, e.g., Harris v. SmithKline Beecham, 27 F. Supp. 2d 569, 580 (E.D. Pa. 1998), aff'd, 203 F.3d 816 (3d Cir. 1999); Keeshan v. Home Depot U.S.A. Inc., 2001 WL 310610, *12 (E.D. Pa. March 27, 2001); Vorhees v. Time Warner Cable Nat'l Div., 1999 WL 673062, *6 (E.D. Pa. Aug. 30, 1999). In the instant case, however, the evidence that the decision to terminate plaintiff was made before he requested or took leave is

[12] Plaintiff also suggests that the case of Lisa Boston demonstrates that Larry Jennings had a history of terminating employees for taking FMLA qualified leave. There is no competent evidence of record, however, that Mr. Jennings had anything to do with Ms. Boston's separation from WDAS. To the contrary, what evidence there is shows that he allowed her to remain on paid leave well beyond the prescribed period until Mr. Schofield objected.

uncontroverted. One cannot reasonably conclude that plaintiff was terminated for something which occurred after the decision to terminate him was made.[13]

C. State Law Claims

1. Breach of Contract/Wrongful Discharge

In Pennsylvania, at-will employees may be terminated at any time and for any reason or no reason. See Stumpp v. Stroudsburg Municipal Authority, 658 A.2d 333, 335 (Pa. 1995). See also Murray v. Commercial Union Ins. Co., 782 F.2d 432, 435 (3d Cir. 1986); Geary v. U.S. Steel Corp., 319 A.2d 174, 176 (Pa. 1974). Plaintiff concedes in his brief that he was an at-will employee and, in any event, has not presented evidence to rebut the strong presumption of at-will employment. See McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 287 (Pa. 2000). See also Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 660 (3d Cir. 1990) (at-will presumption cannot be easily overcome). "Great clarity" is necessary to overcome the at-will presumption. Scott v. Extracorporeal Inc., 545 A.2d 334, 338 (Pa. Super. 1988). A plaintiff bears the burden to produce clear and convincing evidence that the parties intended an employment relationship of a definite length. Green v. Oliver Realty, Inc., 526 A.2d 1192, 1200 (Pa. Super.), appeal den., 536 A.2d 1331 (Pa. 1987); see also Shaffer v. BNP/Cooper Neff, Inc., 1998 WL 575135, *4 (E.D. Pa. Sept. 4, 1998).

[13] As noted, plaintiff also has not discredited the reasons proffered by defendants for his termination which involve perceived deficiencies long pre-dating his request for leave.

That plaintiff was promised a specified annual salary does not overcome the at-will presumption. See Carlson v. Arnot-Agoden Memorial Hospital, 918 F.2d 411, 415 (E.D. Pa. 1990); Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013, 1015 (E.D. Pa. 1978)(compensation for stated amount for stated period does not make contract one for definite period), aff'd, 609 F.2d 500 (3d Cir. 1979).

An at-will employee may nevertheless pursue relief for wrongful discharge where the termination violates clear public policy. See Novosel v. Nationwide Ins. Co., 721 F.2d 894, 898 (3d Cir. 1983). The public policy exception, however, has been "interpreted narrowly." Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343, 1343-44 (3d Cir. 1990).

A discharge violates public policy only when it thwarts the administration of a Commonwealth agency or statutory mechanism, or undermines a statutory obligation of the employer or employee. See McLaughlin, 750 A.2d at 288. It is applicable where an employee has been required to commit a crime, prevented from complying with a statutory duty or discharged in violation of a specific statutory prohibition. See Spierling v. First American, 737 A.2d 1250, 1252, 1254 (Pa. Super. 1999).

In any event, the public policy exception applies "only where there is no available statutory means of vindicating the policy in question." Kinnally v. Bell of Pa., 748 F. Supp. 1136, 1146 (E.D. Pa. 1990). See also Bruffett v. Warner Comm., Inc., 692 F.2d 910, 919 (3d Cir. 1982) (public policy exception applies

only where no statutory remedy is available). Statutory remedies are clearly available to vindicate the type of misconduct plaintiff has alleged and indeed he has pursued some of them in this action.[14]

2. Defamation

To sustain a claim for defamation, a plaintiff must show the defamatory character of the communication; publication by the defendant; application to the plaintiff; the understanding of the recipient of its defamatory meaning; the understanding of the recipient that it was intended to apply to the plaintiff; special harm to the plaintiff from its publication; and, abuse of any conditionally privileged occasion. See Pa. C.S.A. § 8343(a). To recover damages, a plaintiff must also prove that the statement results from some fault on the part of the defendant. See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir.), cert. denied, 498 U.S. 816 (1990).

A communication is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 187 (3d Cir. 1999) (quotations omitted). An allegedly defamatory statement must also be viewed in context to assess the effect it is fairly calculated to produce and the impression it would ordinarily create with those among whom it is intended to

[14] Plaintiff's reliance on cases in which courts found a violation of public policy based on statutes which provided no private right of action is clearly misplaced.

circulate. See Weinstein v. Bullick, 827 F. Supp. 1193, 1197 (E.D. Pa. 1993). A communication is not defamatory because it may embarrass or annoy the person to whom it refers. See Maier v. Moretti, 671 A.2d 701, 704 (Pa. Super. 1995).[15]

A communication may also be privileged when made by one of several persons having a common interest in a particular subject matter to others sharing that interest which he reasonably believes they are entitled to know. See Jones v. Johnson & Johnson, McNeil-PPC, Inc., 1997 WL 549995, *8 (E.D. Pa. Aug. 22, 1997), aff'd, 166 F.3d 1205 (3d Cir. 1998).

The court, however, need not determine whether the statements about plaintiff being fired or his deficient performance attributed to Mr. Jennings were capable of defamatory meaning or privileged. This is because plaintiff has presented no competent evidence that these statements were made. His claim rests entirely on his hearsay testimony that fellow employees and an employee at WPHI told him that they had heard or heard from others of such statements by Mr. Jennings. The person at WPHI to whom Mr. Jennings purportedly made a negative statement about plaintiff testified that this never occurred and no sworn statement of any kind from the other purported witnesses was presented. Indeed, the only competent evidence of the publication of plaintiff's firing and the reasons given therefor

[15] Statements critical of an employee's job performance are generally not capable of defamatory meaning. See Sheehan v. Anderson, 2000 WL 288116, *2 (E.D. Pa. Mar. 17, 2000); Wendler v. DePaul, 499 A.2d 1101, 1103 (Pa. Super. 1985).

is plaintiff's admission that he himself contemporaneously communicated this information to a number of people at WDAS.

V. Conclusion

As plaintiff never filed a complaint with the EEOC or PHRC, he cannot maintain his Title VII claim. As defendants never received federal funding, plaintiff cannot sustain his Title VI claim.

Plaintiff has not sustained a prima facie case of racial discrimination in violation of § 1981, or presented competent evidence from which one could reasonably find that the stated reasons for his termination were incredible and unworthy of belief. One cannot reasonably find from the competent evidence of record that plaintiff was denied or discouraged from taking leave under the FMLA. Plaintiff cannot sustain his FMLA retaliatory discharge claim in the face of uncontroverted evidence that the decision to terminate him was made and communicated to the employer's business manager for action before plaintiff requested or took leave.

Plaintiff was an at-will employee. He has presented no clearly established public policy violation in connection with his termination for which statutory remedies do not exist. Plaintiff has failed to sustain his claims for breach of contract or wrongful discharge. Plaintiff has presented no competent

evidence that the statements he claims are defamatory were published by anyone other than himself.[16]

Defendants are entitled to summary judgment. Their motion will be granted. An appropriate order will be entered.

[16] Insofar as Mrs. Burch has attempted to assert a claim for loss of consortium, such a claim is derivative and could not survive the failure of Mr. Burch to sustain his claims. See Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 206 (3d Cir. 2001); Wakshul v. City of Philadelphia, 998 F. Supp. 585, 590 (E.D. Pa. 1998).

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

JOE BURCH and ROSETTA BURCH	:	**CIVIL ACTION**
	:	
v.	:	
	:	
WDAS AM/FM, AM.FM INC. and	:	
LARRY JENNINGS	:	**No. 00-4852**

O R D E R

AND NOW, this day of June, 2002, upon consideration of the defendants' Motion for Summary Judgment (Doc. #15) and the response thereto, consistent with the court's memorandum herein, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendants.

BY THE COURT:

_____
JAY C. WALDMAN, J.