

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JOSEPH ZOREK,	)	
	)	CASE NO. 1:13-cv-01949-JEJ
	)	(Hon. John E. Jones III)
Plaintiff	)	(Filed July 17, 2013)
	)	
v.	)	
	)	
CVS PHARMACY, INC., <i>et al.</i> ,	)	
	)	
Defendants	)	
	)	

**PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANTS’ PARTIAL  
MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT**

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## **COUNTER-STATEMENT OF PROCEDURAL HISTORY**

This action arises out of CVS's termination of pharmacy manager Joseph Zorek in retaliation for his internal reports of dispensing errors involving misfilled and mislabeled prescriptions, and for his reports to state regulators about dispensing errors involving CVS Store # 1917's automated medication system.

On October 26, 2011, Mr. Zorek timely filed a state court complaint alleging that CVS retaliated against him in April 2011, in violation of the Pennsylvania Whistleblower Law, 43 P.S. §§ 1421–1428 ("PWL"). CVS filed an answer, and the parties engaged in discovery throughout 2012.

Mr. Zorek then exhausted his administrative remedies under the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA") by filing a charge with the EEOC on October 17, 2011. On July 2, 2013, the EEOC issued the Notice of Right to Sue, allowing him to file a civil suit.

Mr. Zorek filed the instant action on July 17, 2013 against CVS Pharmacy, Inc., CVS Caremark Corporation, CVS Rx Services, Inc., Paxton Square CVS, Inc. (collectively, "CVS"), and alleged violations of the ADA and PHRA and one count of common law wrongful termination in violation of public policy.

The parties agreed to merge Mr. Zorek's state PWL claim into the federal action. (D.I. 26.) Mr. Zorek filed an Amended Complaint, adding the PWL claim, and voluntarily dismissed without prejudice the state court action. (D.I. 25, 26.)

On November 15, 2013, after making no attempt to dismiss the state court PWL action during the two years it was pending in state court, CVS filed a Partial Motion to Dismiss the wrongful termination claim (Count V) and PWL claim (Count VI) of the Amended Complaint. (D.I. 28, 29). In response, Mr. Zorek filed a Second Amended Complaint (D.I. 31) (“SAC”).<sup>1</sup> CVS then filed the instant Partial Motion to Dismiss Plaintiff’s Second Amended Complaint.

### **COUNTER-STATEMENT OF FACTS**

At all relevant times, Joseph Zorek served as the pharmacy manager at CVS Store # 1917, and was listed as such on the pharmacy permit required by the Commonwealth. SAC ¶¶ 100, 104, 163. From January through April 2011, Mr. Zorek reported to Peter Gaetani, his second-level supervisor, that CVS was improperly dispensing mislabeled and misfilled prescriptions to patients. *Id.* ¶¶ 59, 67. These dispensing errors were the direct result of CVS’s recent cuts to the pharmacy technician staff budget. *Id.* Mr. Zorek repeatedly asked Mr. Gaetani to restore the pharmacy technician budget, but he refused. *Id.* ¶ 60.

On April 29, 2011, Mr. Zorek complained again to Mr. Gaetani about the dispensing errors caused by the staffing cuts. *Id.* ¶ 71. That same day, Mr. Gaetani threatened to issue unsubstantiated written warnings for purported performance

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<sup>1</sup> In the SAC, Mr. Zorek removed CVS Caremark, Inc. as a defendant, also pursuant to the stipulation between the parties. (D.I. 26, 32.)



deficiencies if Mr. Zorek did not agree to a demotion and transfer. *Id.* ¶ 72.

In April 2012, a year later, while serving as Pharmacy Manager, Mr. Zorek learned that the ScriptPro robot dispensed incorrect prescriptions to CVS Store # 1917 patients. *Id.* ¶ 103, 104. Andreas Chandra, Mr. Zorek's supervisor, instructed CVS pharmacists not to inform patients or other pharmacists of these errors. *Id.*

On April 27, 2012, Mr. Zorek reported the dispensing errors and attempted cover-up to state investigators. *Id.* ¶ 104. On May 1, 2012, CVS removed Mr. Zorek's designation as pharmacy manager on the pharmacy permit, one day before a scheduled visit to CVS Store # 1917 by state investigators. *Id.* ¶ 105. On May 2, 2012, state investigators interviewed Messrs. Chandra and Gaetani about the dispensing errors and subsequent cover-up. *Id.* ¶ 106.

On July 5, 2012, CVS terminated Mr. Zorek's employment, purportedly because he used the one year of leave available to him. *Id.* ¶ 109. However, CVS never determined whether Mr. Zorek could perform the essential functions of his job, or any job, with or without accommodations, so CVS's termination of his employment, purportedly for exhausting his leave, violated the ADA. *Id.*

### **COUNTER-STATEMENT OF QUESTIONS INVOLVED**

1. Whether CVS's receipt of Medicaid funds that passed through the Commonwealth rendered it a "public body" under the PWL. **Suggested Answer: Yes.**

2. Whether CVS committed “wrongdoing” under the PWL by dispensing mislabeled and misfilled prescriptions, in violation of 49 Pa. Code § 27.18.  
**Suggested Answer: Yes.**
3. Whether Mr. Zorek sufficiently pleaded a causal connection between his complaints of “wrongdoing” under the PWL and CVS’s threats to terminate his employment. **Suggested Answer: Yes.**
4. Whether Mr. Zorek’s PWL claim is timely. **Suggested Answer: Yes.**
5. Whether CVS’s termination of Mr. Zorek, in retaliation for fulfilling his statutorily mandated duty to supervise the pharmacy’s automated medication system, offended clear mandates of public policy. **Suggested Answer: Yes.**
6. Whether Mr. Zorek pleaded a causal connection between his exercise of his statutory duty to supervise the automated medication system in CVS Store # 1917 and CVS’s termination of his employment. **Suggested Answer: Yes.**

### **ARGUMENT**

In reviewing a motion to dismiss, the court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, plaintiff may be entitled to relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009); Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is proper only where the averments of the complaint plausibly fail to raise directly or

inferentially the material elements necessary to obtain relief under a viable theory of recovery. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007).

Generally, the court may consider only the facts alleged in the complaint and its attachments on a motion to dismiss. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The court may take into consideration “an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss” *only* when the claims are based on the document. *PBGC v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

I. MR. ZOREK STATES A CLAIM FOR CVS’S VIOLATIONS OF THE PENNSYLVANIA WHISTLEBLOWER LAW (COUNT VI).

As a threshold matter, this Court must reject CVS’s cherry-picking of the facts and their attempt to argue the facts in their favor, since the well-pled factual allegations and their reasonable inferences must be construed in Mr. Zorek’s favor at the Rule 12(b)(6) stage. In particular, this Court must disregard the Affidavit of Eileen Updyke (CVS Mot., Exhibit B), since Mr. Zorek’s claims against CVS are not based on her allegations, which cannot be taken into consideration in deciding the motion to dismiss. *PBGC*, 998 F.2d at 1196.<sup>2</sup>

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<sup>2</sup> If this Court were to consider the CVS Affidavit, Mr. Zorek requests leave to submit a Rule 56(d) motion to explain why discovery is needed to address the factual allegations made in the CVS Affidavit.

A. CVS Is a Public Body Under the Pennsylvania Whistleblower Law.

CVS elected to be treated as a “public body” for purposes of the PWL by accepting significant Medicaid funding through the Pennsylvania Department of Public Welfare (“DPW”). SAC ¶ 172.

1. Standard of review.

The PWL provides “protection for employees who report a violation or suspected violation of State, local or Federal law.” Intro. Para. of Act of Dec. 12, 1986, P.L. 1559, No. 169. That protection extends to all employees who are employed by a “public body.” 43 P.S. § 1423. The PWL defines a “public body” in relevant part, as “[a]ny other body which is . . . funded in any amount by or through Commonwealth or political subdivision authority.” *Id.* § 1422.

The PWL does not separately define “funded . . . by or through.” *Id.* Nor has the Supreme Court interpreted the phrase “funded . . . by or through.” In the absence of a controlling opinion from a state’s highest court on such a question of state law, this Court must predict how that court would decide the issue.

*Philadelphia v. Lead Industries Ass’n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993).

In making that prediction, this Court *may not* disregard opinions of intermediate appellate courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Employers Ins. Co. v. Global Reinsurance Corp. of Am.*, 693 F.3d 417, 433 (3d Cir. 2012).

2. CVS elected to be treated as a “public body” under the PWL by receiving Medicaid funding through the Commonwealth.

Mr. Zorek alleged that CVS, at all relevant times, received significant revenue from Medicaid, which is funded by or through the Commonwealth. SAC ¶ 172. Under persuasive intermediate Pennsylvania appellate court precedent, CVS’s receipt of Medicaid funds renders it a public body” for purposes of the PWL.

The Superior Court of Pennsylvania, in *Denton v. Silver Stream Nursing and Rehab. Ctr.*, 739 A.2d 571, 576 (Pa. Super. 1999), held that a private hospital that received Medicaid<sup>3</sup> funding through the Commonwealth of Pennsylvania constitutes a “public body” for purposes of the PWL. The *Denton* court noted that the PWL’s statutory language differentiates between appropriated and “pass-through” funds and clearly indicates that it is intended to be applied to bodies that receive not only money appropriated *by* the Commonwealth, but also public money—including Medicaid funds—that passes *through* the Commonwealth. *Id.*<sup>4</sup>

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<sup>3</sup> The DPW refers to Medicaid as “Medical Assistance” or “MA.” For purposes of this brief, references to Medicaid refer to the Medical Assistance program administered by the DPW. *See* <http://www.dpw.state.pa.us/dpworganization/officeofmedicalassistanceprograms/index.htm>.

<sup>4</sup> While Mr. Zorek’s PWL count was pending in state court, CVS made no effort to dismiss it for failure to state a claim. Instead, CVS waited to file this motion until the PWL count was joined in this federal court action—likely for one reason—to avoid what in state court would be the binding precedent of *Denton*. *See, e.g.*,

The court in *Denton* discussed and explicitly rejected the reasoning and holding in *Cohen v. Salick Health Care, Inc.*, 772 F. Supp. 1521, 1525–27 (E.D. Pa. 1991), upon which CVS relies. *Denton*, 739 A.2d at 576. *Cohen* held that receipt of Medicaid funds does not make an employer a “public body” under the PWL. *Cohen*, 772 F. Supp. at 1526. When *Cohen* was decided, no Pennsylvania appellate court had interpreted the PWL, so *Cohen* did not have the precedent of *Denton* or *Riggio*. *Id.* at 1525. Hence, defendants’ reliance on *Cohen* is misplaced, since *Denton* expressly rejected its reasoning.

“Public body” was expressly defined by the legislature for purposes of the PWL. *Riggio v. Burns*, 711 A.2d 497, 500 (Pa. Super. 1998) (*en banc*). “Where a statute provides internal definitions, we are bound to construe the statute according to those definitions.” *Hodges v. Rodriguez*, 645 A.2d 1340, 1348 (Pa. Super. 1994) (citing 1 Pa. C.S. § 1903(a)). Under Pennsylvania’s plain-meaning rules of statutory construction,<sup>5</sup> where “the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its

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*Langoussis v. Easton Hosp.*, 61 Pa. D. & C. 4th 176, 180-81 (Ct. Common Pleas 2002) (denying private hospital’s motion to dismiss because “following *Denton*,” plaintiff’s allegation that hospital received Medicaid funds through the state was sufficient to deem the hospital a “public body” under the PWL).

<sup>5</sup> In predicting the Supreme Court’s interpretation of the PWL, this Court may seek guidance from the Pennsylvania rules of statutory construction. *Transguard Ins. Co. of America, Inc. v. Hinchey*, 464 F. Supp. 2d 425, 433 (M.D. Pa. 2006).

spirit.” 1 Pa. C. S. 1921(b). The PWL plainly and unequivocally makes any body “funded in any amount by or through Commonwealth . . . authority” a public body under the PWL. *Riggio*, 711 A.2d at 500 (quoting 43 P.S. § 1422).

Two other U.S. District judges have adopted the reasoning in *Denton*, thereby further rejecting CVS’s reliance on *Cohen* and *Tanay*.<sup>6</sup> *Ellis v. Allegheny Specialty Practice Network*, 2013 WL 411477 at \*4 (W.D. Pa., Feb. 1, 2013) (private health care providers deemed “public bodies” funded through the Commonwealth by virtue of Medicaid reimbursements and other federal health funds); *Mayer v. Boys & Girls Clubs of Phila., Inc.*, 2011 WL 4467669 at \*5 (E.D. Pa., Sept. 23, 2011) (“This Court finds the reasoning in *Denton* compelling and consistent with the plain text of the statute, which broadly states that an entity is a ‘public body’ if it is funded in ‘any amount by or through’ the Commonwealth.”).

Other “persuasive data” suggests that the Supreme Court would deem CVS a “public body” under the PWL. The Supreme Court has recognized that Medicaid is funded in part by the Commonwealth. *E.D.B. ex rel. D.B. v. Clair*, 987 A.2d 681, 684 (Pa. 2009) (Medicaid “provides joint federal and *state funding* of medical care for those who cannot afford to pay.”) (emphasis added). The *Denton* ruling that

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<sup>6</sup> *Tanay v. Encore Healthcare, LLC*, 810 F. Supp. 2d 734 (E.D. Pa. 2011).

Medicaid is funded *through* the Commonwealth is therefore consistent with *Clair*.

Pennsylvania's statutory and regulatory scheme for Medicaid pharmacy providers also supports the conclusion that the Supreme Court would deem CVS a "public body" under the PWL.<sup>7</sup> Pennsylvania has enacted a comprehensive statutory and regulatory framework to monitor and ensure the proper expenditure of Medicaid funds.<sup>8</sup> Pharmacies such as CVS who provide Medicaid services must satisfy certain participation requirements, 55 Pa. Code §§1101.41–1101.43, 1101.51, and must permit DPW officials to conduct onsite pharmacy inspections to ensure that Medicaid services are properly billed and provided. *Id.* § 1121.42.

Pharmacy providers are prohibited from overbilling DPW for furnishing Medicaid services. 62 P.S. § 1407; 55 Pa. Code §1101.75. When a provider such as CVS overbills DPW for Medicaid services, or provides services "outside the scope of customary standards of pharmaceutical practice," DPW may terminate that provider's enrollment and participation in Medicaid and seek restitution and repayments. *Id.* § 1101.77; 1101.83.<sup>9</sup> Most significantly, any individual *pharmacist*

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<sup>7</sup> Pennsylvania authorizes DPW to "receive and to supervise the disbursement of *funds* . . . for assistance" and to "allocate to the several assistance programs *funds* with which to provide assistance." 62 P.S. § 406 (emphasis added).

<sup>8</sup> See 62 P.S. § 403.1 (authorizing DPW to establish rules and regulations for the administration of Medicaid, including establishing provider qualifications).

<sup>9</sup> In *Girard Prescription Ctr. v. Dep't of Public Welfare*, 496 A.2d 83 (Pa. Cmwlth.



responsible for a violation is also subject to preclusion from indirect participation in Medicaid for the same period as a sanction against the provider. *Id.* § 1121.81(b).

The Commonwealth has good reason to monitor closely the Medicaid funds it expends to reimburse CVS. In 2008, CVS reached a \$36.7 million settlement with the Commonwealth and several other states to resolve allegations that CVS overcharged DPW, and to reimburse DPW for improperly billed prescriptions for Medicaid patients. SAC ¶¶ 173, 175. In this \$36.7 million settlement, CVS pharmacists acting as whistleblowers brought CVS's improper Medicaid overcharges to the government's attention. *Id.* ¶ 178.

Considering the Commonwealth's interest in eradicating waste and fraud by Medicaid pharmacy providers, and the singular opportunity that pharmacists have to identify and report instances of this waste and fraud, it is likely that the Commonwealth intended not only to dissuade providers from misusing Medicaid funds with the threat of sanctions, 55 Pa. Code § 1121.81(b), but also to encourage pharmacists to report instances of misusing Medicaid funds by protecting them

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1985), the court affirmed the DPW's two-year suspension from Pennsylvania's Medicaid program of a pharmacy provider that permitted an unlicensed pharmacist's assistant to fill and dispense prescriptions. *Id.* at 87. Section 8(2) of the Pharmacy Act, 63 P.S. § 390-8(2) and 49 Pa. Code § 27.12 created a "customary standard of pharmaceutical practice" which the pharmacy provider violated, thereby subjecting itself to DPW sanctions under 55 Pa. Code § 1121.81.

from workplace retaliation through the PWL.

By participating as a Medicaid pharmacy provider, CVS agreed to be bound by the Commonwealth's statutory and regulatory framework to monitor and ensure the proper expenditure of Medicaid funds. In so doing, CVS also consented to be defined as a "public body" under the PWL. *See Riggio*, 711 A.2d at 500 ("[I]t is not unreasonable for the legislature to condition the receipt of state funds on the acceptance of the responsibilities embodied in the Whistleblower Law.").

B. Mr. Zorek Complained About "Wrongdoing" as Defined under the PWL.

Mr. Zorek complained about "wrongdoing," as defined in the PWL, when he reported to his supervisor that CVS was dispensing mislabeled and misfilled prescriptions. SAC ¶¶ 58-59. The PWL defines "wrongdoing," in relevant part, as "a violation which is not of a merely technical or minimal nature of a . . . State statute or regulation . . . designed to protect the interest of the public or the employer." 43 P.S. § 1422.

Mr. Zorek was listed as the pharmacy manager on the permit for CVS Store # 1917, SAC ¶¶ 100, 163, and therefore was responsible for all of its operations involving the practice of pharmacy, including the delivery, dispensing or distribution of prescription drugs. *See* 63 P.S. § 390-4(e); 49 Pa. Code §§ 27.1, 27.11. Mr. Zorek reported "wrongdoing" when he reported to his supervisor that CVS was dispensing mislabeled and misfilled prescriptions. SAC ¶¶ 58-59. State

regulations require a pharmacy to dispense prescription drugs in a container bearing a label that includes “the trade or brand name of the drug, strength, dosage form and quantity dispensed.” 49 Pa. Code § 27.18. By dispensing misfilled and mislabeled prescriptions, CVS violated this state regulation, and therefore committed “wrongdoing” under the PWL. CVS concedes that dispensing misfilled or mislabeled medication to patients is not a merely “technical” or “minimal” violation, and that the regulation requiring accurate labeling is unquestionably designed to protect the interest of the public. *See* CVS Motion at 10–13.

CVS suggests, however, that the violation of Section 27.18 cannot constitute “wrongdoing” under the PWL because the mislabeling and misfilling of prescriptions was merely negligent. *Id.* at 13. CVS misreads *Riggio*, which states that “wrongdoing,” as defined by the PWL, “does not encompass tort principles unless a statute, regulation, or code of conduct or ethics is violated by the tortious act or omission.” *Riggio*, 711 A.2d at 502. Mr. Zorek has alleged such a violation of regulation by tortious act—by negligently mislabeling and misfilling prescriptions, CVS violated section 27.18. *See* SAC ¶¶ 57–58; *see also Girard*, 496 A.2d at 87 (“There is no element of scienter included in the regulation and we will decline from engrafting one where none is required by law.”).

C. Mr. Zorek Pleaded a Causal Connection Between His Complaints of Wrongdoing and His Threatened Termination.

Mr. Zorek pled facts that establish a causal connection between his reports

of CVS's wrongdoing and Mr. Gaetani's threat to terminate his employment.

In deciding whether an employee has shown causation, the Third Circuit focuses on two factors: (1) the temporal proximity between the protected activity and the adverse action, and (2) the existence of a pattern of antagonism in the intervening period. *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006). Courts may also consider the record as a whole to determine whether a retaliatory motive can be inferred. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

Here, Mr. Zorek complained about increased dispensing errors from January 2011 through April 29, 2011, the same day that Mr. Gaetani threatened to create a record of Mr. Zorek's purportedly poor performance if he did not agree to request a demotion and relocation. *Id.* ¶ 184; 43 P.S. § 1423.

During the intervening period from January through April 29, 2011, CVS engaged in a pattern of antagonism and adverse treatment against Mr. Zorek, including a February 25, 2011 meeting to berate him and his team of pharmacists, a plan to replace Mr. Zorek as PIC, a baseless and onerous requirement that Mr. Zorek enter and exit the CVS Store # 1917 through the front door, remarks ridiculing Mr. Zorek's disability, and efforts to require and monitor Mr. Zorek's use of the lift chair. SAC ¶¶ 55, 58–60, 183.

The temporal proximity between Mr. Zorek's reports of wrongdoing and CVS's threats, and CVS's pattern of antagonism against Mr. Zorek in the

intervening period, are sufficient to establish a causal connection.

D. Mr. Zorek's PWL Claim Is Timely.

Mr. Zorek's PWL claim is timely. The PWL requires a plaintiff to file an action within 180 days of the occurrence of the alleged violation. 43 P.S. § 1424(a). Here, CVS's threatened to demote or terminate Mr. Zorek's employment on April 29, 2011. SAC ¶¶ 71-72. Mr. Zorek filed the PWL claim in the Court of Common Pleas on October 26, 2011, well within the 180-day statutory period.

When Mr. Zorek joined the PWL claim to the instant federal lawsuit, CVS stipulated that the statute of limitations and any other defense on the ground of timeliness were tolled as of the filing of the state court action on October 26, 2011. (D.I. 26.) This Court should not condone defendants' attempt to argue against this stipulation. Mr. Zorek's PWL claim is therefore timely.

II. MR. ZOREK'S ALLEGATIONS STATE A CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (COUNT V).

A. Mr. Zorek's Termination Offended a Clear Mandate of Pennsylvania Public Policy.

The public policy exception to the presumption of at-will employment applies when an employer: (1) requires an employee to commit a crime; (2) prevents an employee from complying with a statutorily imposed duty; and (3) discharges an employee when specifically prohibited from doing so by statute.

*Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250, 1252 (Pa. Super. 1999); *Hennessy v. Santiago*, 708 A.2d 1269, 1273 (Pa. Super. 1998).

Mr. Zorek's wrongful discharge claim fits within two of these three exceptions. CVS prevented him from complying with a statutorily imposed duty, and discharged him when it was specifically prohibited from doing so by statute.<sup>10</sup>

Mr. Zorek, as the pharmacy manager at CVS Store # 1917, SAC ¶ 104, was responsible for all operations involving the practice of pharmacy, including the supervision of the operation of any automated medication system. *See* 63 P.S. § 390-4(e); 49 Pa. Code §§ 27.1, 27.11, 27.204(a)(1). Most significantly, as pharmacy manager, he was "held responsible for transactions" involving the automated medication system. *Id.* § 27.204(b)(4); *see also* SAC ¶ 164.

Mr. Zorek learned that on April 9, 2012, one of the containers in the automated medication system in CVS Store # 1917 (the "ScriptPro robot") was improperly filled with the wrong dosage of Amoxicillin, and that some of the misfilled and mislabeled medication was dispensed to CVS patients. SAC ¶ 103. Andreas Chandra, Mr. Zorek's supervisor, improperly instructed CVS pharmacists to remain silent about these dispensing errors. *Id.* Although Mr. Zorek was not physically present in CVS Store # 1917 when the Amoxicillin dispensing errors occurred, he would nevertheless be "held responsible" for those transactions under

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<sup>10</sup> The PWL specifically prohibited CVS from terminating Mr. Zorek's employment for reporting CVS's "wrongdoing," i.e., dispensing improperly labeled Amoxicillin in violation of 49 Pa. Code § 27.18. *See* Part I, *supra*.

Pennsylvania law. *See* 49 Pa. Code § 27.204(b)(4).

On April 27, 2012, Mr. Zorek told state investigators about the dispensing errors, and the subsequent improper attempts by CVS managers to conceal those errors from patients. *Id.* ¶ 104. In doing so, he was fulfilling his statutorily-imposed duty to supervise the ScriptPro dispensing operations.

The cases cited by CVS do not support their argument. In *Diberardinis-Mason v. Super Fresh*, 94 F. Supp. 2d 626 (E.D. Pa. 2000), the court found that the Pharmacy Act did not require a pharmacist to take any action in response to her concerns about irregularities regarding her colleagues' dispensing of controlled substances. *Id.* at 629–30. However, CVS ignores a vital factual distinction—Mr. Zorek was the pharmacy manager listed on the pharmacy permit for CVS Store # 1917, not a staff pharmacist as in *Diberardinis-Mason*. SAC ¶ 104. As pharmacy manager, he had a “specifically delineated statutory dut[y]” to supervise the operation of the ScriptPro robot in CVS Store # 1917. *Diberardinis-Mason*, 94 F. Supp. 2d at 630. As pharmacy manager, Mr. Zorek would be “held responsible” for ScriptPro robot transactions, 49 Pa. Code § 27.204(b)(4), including transactions he did not personally make, which resulted in dispensing errors to patients. In contrast, staff pharmacists, as in *Diberardinis-Mason*, and all of Mr. Zorek's staff pharmacist colleagues at CVS Store # 1917, had no such statutory duties.

Therefore, the mandates of public policy, as articulated in 63 P.S. § 390-4(e)

and 49 Pa. Code §§ 27.1, 27.11, 27.204(a)(1), are applicable directly to Mr. Zorek's actions as pharmacy manager. *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173, 175-76 (Pa. Super. 1996) ("The stated mandate of public policy, as articulated in the constitution, statute, or judicial decision, must be applicable directly to the employee and the employee's actions."). When an employee is fired for performing a function that he is *required* to perform by law, an action for wrongful discharge on public policy grounds will be allowed. *Id.* at 176 (citing *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978) (employer fired an employee for jury service required by law)).<sup>11</sup>

For similar reasons, *Spierling* and *Hennessey* are inapposite. In *Spierling*, the statute cited by a registered nurse simply provided guidelines for professional conduct, and did not impose on her any duty to take the action that led to her termination—reporting suspected Medicare fraud to federal investigators. *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d at 1250-51, 1254. Likewise, in *Hennessey*, the statute, regulations, and code of conduct did not impose upon the employee any duty to report the rape of a resident at the facility where she worked. *Hennessey v. Santiago*, 708 A.2d 1269, 1273–74 (Pa. Super. 1998).

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<sup>11</sup> Defendants' argument that Mr. Zorek's internal complaints are insufficient (Mot., at 17), aside from improperly cherry-picking the facts (he also made external complaints), is irrelevant, since he was performing a statutory duty.



The facts in *Tanay v. Encore Healthcare, LLC*, 810 F. Supp. 2d 734 (E.D. Pa. 2011), are more closely analogous to Mr. Zorek's case. In *Tanay*, where the court did recognize a wrongful discharge claim, a nursing home administrator stated a claim for wrongful termination when he cited state regulations that required him to develop policies to provide a high level of resident care in a safe environment. *Id.* at 740. His employer fired him after he submitted an internal complaint about repeated vandalism and sabotage that presented a danger to residents of the nursing home. *Id.* at 736-37.

Here, Mr. Zorek's statutory and regulatory duty to supervise the operation of the ScriptPro robot, like the regulations at issue in *Tanay*, was intended to protect the safety of CVS patients who receive prescriptions dispensed by the ScriptPro robot. When Mr. Zorek's supervisor instructed CVS pharmacists to conceal the dispensing errors from CVS patients, he interfered with Mr. Zorek's statutory duty to supervise the ScriptPro robot, and to protect the health of CVS patients who received an incorrect prescription. Mr. Zorek therefore reported the dispensing errors, and Mr. Chandra's attempted cover-up, to state investigators. SAC ¶ 166. In doing so, he was fulfilling his statutory duty to supervise the operation of the ScriptPro robot and protect the safety of CVS patients.

**B. Mr. Zorek Pleaded a Causal Connection Between His Reports and His Subsequent Termination in Violation of Public Policy.**

Mr. Zorek has pleaded a sufficient causal connection between his reports

about the dispensing errors and his subsequent termination. CVS removed Mr. Zorek's name from the pharmacy permit just one day before state investigators were to arrive at CVS Store # 1917, and terminated his employment just over two months after he reported the errors. SAC ¶¶ 104–106, 109. This temporal proximity, combined with CVS's actions to remove Mr. Zorek's duties as pharmacy manager, is sufficient to establish a causal connection.

CVS incorrectly suggests that by alleging that it terminated his employment “automatically” after he had exhausted the one year of leave available, SAC ¶¶108–109, Mr. Zorek “discloses a plausible *and legitimate* reason” for his termination, and cannot state a claim for wrongful discharge. CVS Mot. at 20 (citing *Geary v. US Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974) (emphasis added)). As a threshold matter, whether an employer's reason was “plausible” is a factual issue that cannot be resolved on a Rule 12(b)(6) motion. Further, the SAC alleges that CVS's pretextual reason for his termination—purportedly because he exhausted the one year of leave available to him under CVS policy—itself violated the ADA. SAC ¶ 109; *EEOC v. UPS*, Case No. 09-5291, 2013 WL 140604, at \*5 (N.D. Ill., Jan. 11, 2013) (stating an ADA claim when employer failed to provide reasonable accommodations and instead automatically terminated employee for exceeding 12-month leave policy). This Court cannot resolve the cause of Mr. Zorek's discharge at the motion to dismiss stage, and should reject defendants'

attempt to argue the cause of his termination.

## CONCLUSION

For the foregoing reasons, this Court should deny CVS's partial motion to dismiss Count V and Count VI of Mr. Zorek's second amended complaint.

Respectfully submitted,

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DATED: January 10, 2014

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## **CERTIFICATION OF WORD COUNT**

Pursuant to Local Rule 7.8(b)(1) and (2), this Brief satisfies the Local Rules regarding page limitations because, although it exceeds 15 pages, the Brief contains less than 5,000 words (4,868).

*/s/* Peter Whelan

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Peter Whelan

## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2014, a copy of the foregoing Plaintiff's Brief in Opposition to Defendants' Partial Motion to Dismiss Plaintiff's Second Amended Complaint was served via this Court's electronic filing system, upon counsel for Defendants:

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