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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JANUARY 5, 2023)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN KOWAL,

Appellant,

v.

FERNDALE AREA SCHOOL DISTRICT;
FERNDALE AREA SCHOOL DISTRICT
BOARD OF EDUCATION

No. 21-3386

On Appeal from the United States District Court
for the Western District of Pennsylvania
(W.D. Pa. Civil Action No. 3:18-cv-00181)
District Judge: Honorable Kim R. Gibson

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 27, 2022

(Opinion filed: January 5, 2023)

Before: AMBRO, KRAUSE, and
SCIRICA, Circuit Judges.

OPINION*

PER CURIAM

Pro se appellant John Kowal appeals the District Court's grant of summary judgment in favor of defendants Ferndale Area School District and the Ferndale Area School District Board of Education.[1] Kowal brought claims of retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act ("PHRA"). For the reasons that follow, we will affirm the District Court's judgment.

I.

Kowal worked as the Business Manager for the Ferndale Area School District from 1987 until he retired in September 2017.[2] In his position, Kowal was responsible for the financial aspects of running the School District, including managing payroll, retirement, and insurance benefits. As an employee, Kowal received benefits through an Act 93 agreement. This benefits package allowed qualifying employees approaching retirement to either cash out their unused accumulated sick time or apply that time toward receiving certain healthcare benefits in retirement. Employees were eligible to choose the latter option

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 Kowal was represented by counsel in the District Court, but began representing himself pro se before briefing on appeal began.

2 Because we write primarily for the parties, we will recite only the facts necessary for our discussion. These facts are undisputed unless otherwise noted.

only if they retired before the age of eligibility to receive Medicare—65 years old.

Kowal was 66 years old when he retired and had been enrolled in Medicare for over a year. He accumulated 353.5 unused sick days before he retired. Kowal continued to receive healthcare coverage from Ferndale after his retirement, although the parties dispute how and why his coverage was able to temporarily continue.

Kowal and Ferndale executives met several times immediately after his retirement. By November 2017, Kowal had been informed that he was not eligible to apply unused sick time toward retirement healthcare coverage under the Act 93 agreement due to his eligibility for Medicare and that he could receive the cash value of his unused sick time. However, after a School Board meeting, the superintendent was given authority to negotiate an alternative healthcare package with Kowal, in recognition for his years of service.

The School Board met in December 2017 and approved a waiver of the Act 93 agreement for Kowal. The superintendent offered Kowal and his spouse a health reimbursement arrangement ("HRA proposal") based on his amount of unused sick days, requested a written response by December 20, 2017, and informed Kowal that he would subsequently be removed from his then-current healthcare plan provided by Ferndale. Kowal negotiated with the superintendent about several terms in the HRA proposal by email. Then, on December 18, Kowal informed the superintendent that he had filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), requested an extension of time to respond

to the HRA proposal, and indicated that he sought to address the School Board at an upcoming meeting.

Kowal's healthcare coverage was extended into 2018 while Ferndale sought legal advice, and the deadline to respond to the HRA proposal was also temporarily extended. The superintendent informed Kowal that the School Board declined to meet with him because: (1) Kowal had placed himself on Ferndale's insurance after retirement without speaking with the appropriate authorities; (2) he had initiated legal proceedings against Ferndale and had an upcoming EEOC interview; and (3) he informed Ferndale that it may need to secure an attorney. The superintendent subsequently restated that Kowal was not eligible for healthcare coverage after retirement under the Act 93 agreement and gave him until February 15, 2018, to accept the HRA proposal. She also informed Kowal that if he rejected the proposal or did not respond, his Ferndale-provided health insurance would be terminated and the balance of his unused sick time would be reconciled and paid out to him. Kowal did not respond to the HRA proposal or request an extension of time to consider the proposal.

On February 27, 2018, Kowal was notified that his healthcare coverage would end on February 28. On March 5, 2018, the superintendent informed Kowal that he would be issued a check for $22,213.71 for his unused accumulated sick time, after subtracting the cost of the post-retirement healthcare coverage he had been provided and withholding appropriate payroll deductions.

On March 22, 2018, Kowal told the superintendent that the EEOC investigation was complete and that he wanted to accept the HRA proposal. The School

Board discussed Kowal's request and ultimately decided to complete the process of cashing out Kowal's remaining sick days rather than reinstating the HRA proposal; the superintendent mailed him a check for $22,213.71 on April 19, 2018. Kowal again requested to meet with the School Board, but the School Board notified Kowal that it would not continue exploring options to provide post-retirement healthcare coverage. Kowal then filed a second charge of discrimination with the EEOC in June 2018. Kowal did not attend any public School Board meetings between January and April 2018.

In September 2018, Kowal filed a lawsuit in the District Court alleging retaliation under the ADEA and the PHRA, as well as breach of contract. On defendants' motion, the District Court dismissed the PHRA and breach-of-contract claims without prejudice. Kowal filed an amended complaint alleging retaliation under the ADEA and a violation of the Wage Payment Collection Law; the District Court dismissed the latter claim with prejudice. Kowal then filed a second amended complaint alleging retaliation under the ADEA and the PHRA.[3] Defendants moved for summary judgment, which the District Court granted. Kowal timely appealed.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over

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3 Although Kowal referred to his ADEA claim as a discrimination claim in his counseled complaints, he alleged only that he suffered retaliation after he engaged in protected activity—filing a complaint of discrimination with the EEOC—and included no allegations of discriminatory treatment based on his age.

the District Court's grant of summary judgment for defendants. *See Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if the evidence is sufficient for a reasonable factfinder to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III.

Summary judgment was appropriately granted for defendants. Under the familiar burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which applies in cases like this without direct evidence of retaliation, a plaintiff must first establish a *prima facie* case by showing "(1) . . . protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015) (citation omitted). To satisfy the second prong, "the plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *See id.* at 195 (internal quotation marks and citation omitted).

Kowal has argued that defendants took adverse actions against him when they: (1) declined his requests to meet with the School Board; (2) did not

continue negotiations regarding the HRA proposal; and (3) decided not to reinstate the HRA proposal and instead sent him a check for less than what he believed he was owed.[4] However, based on the facts of this case, these are not circumstances that are objectively "likely to dissuade employees from complaining or assisting in complaints about discrimination," which is the goal of anti-retaliation protections. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006).

First, the School Board held public meetings between January and April 2018 that Kowal chose not to attend; he does not point to any evidence in the record showing that he would have been unable to speak to the School Board at a public meeting during the time of this dispute. Next, the record shows that Ferndale was negotiating the HRA proposal with Kowal before he filed his EEOC charge, and Kowal did not propose any further changes to the proposal after that point. Ferndale extended the HRA proposal into 2018, but Kowal did not request additional time to consider the proposal further, and ultimately sought its reinstatement without any changes. It is not clear what further negotiations should have taken place under these circumstances.

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4 We note that Kowal includes numerous new arguments and theories of liability in his briefs that were never raised in his counseled filings in the District Court. He cannot pursue these arguments and claims for the first time on appeal. *See Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 88 n.12 (3d Cir. 2013). We also do not "reach arguments raised for the first time in a reply brief." *See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146 (3d Cir. 2017).

Finally, the record shows that Kowal was not eligible to use his accrued sick leave to receive post-retirement health insurance from Ferndale per the Act 93 agreement because he retired after he was able to enroll in Medicare. Although the School Board approved a waiver to offer Kowal the HRA proposal, Kowal did not accept that offer before it expired. Kowal believes that he should be paid the value of the HRA proposal over the course of several years, which he has calculated at a significantly higher sum than the check he received. However, Kowal was informed that he would be paid the cash value of his unused sick time, with deductions to cover the cost of his postretirement healthcare and payroll withholdings, if he did not accept the HRA proposal by the stated deadline. He did not request an extension of time or suggest any changes to the proposal at that point.

Because none of the actions Kowal has identified would have dissuaded a reasonable person from seeking to pursue a discrimination complaint, he cannot state a *prima facie* case of retaliation. *See Daniels*, 776 F.3d at 195. Summary judgment was thus properly granted on his ADEA retaliation claim, as well as his parallel PHRA claim.

For these reasons, we will affirm the judgment of the District Court.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JANUARY 5, 2023)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN KOWAL,

Appellant,

v.

FERNDALE AREA SCHOOL DISTRICT;
FERNDALE AREA SCHOOL DISTRICT
BOARD OF EDUCATION

No. 21-3386

On Appeal from the United States District Court
for the Western District of Pennsylvania
(W.D. Pa. Civil Action No. 3:18-cv-00181)
District Judge: Honorable Kim R. Gibson

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 27, 2022

Before: AMBRO, KRAUSE, and
SCIRICA, Circuit Judges.

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on December 27, 2022. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered November 30, 2021, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Patricia S. Dodszuweit
Clerk

Dated: January 5, 2023

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (NOVEMBER 29, 2021)

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

JOHN KOWAL,

Plaintiff,

v.

FERNDALE AREA SCHOOL DISTRICT and FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

Case No. 3:18-cv-181

Before: Kim R. GIBSON, United States District Judge.

MEMORANDUM OPINION

I. Introduction

This case arises from Defendants Ferndale Area School District ("School District") and Ferndale Area School District Board of Education's ("School Board" or "Board") (collectively "Ferndale" or "Defendants") alleged acts of retaliation against Plaintiff John Kowal ("Kowal") in violation of the Age Discrimination

in Employment Act("ADEA"), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 et seq. Pending before the Court is Defendants' Motion for Summary Judgment. (ECF No. 45). The Motion is fully briefed (ECF Nos. 47, 55) and ripe for disposition. For the reasons that follow, the Court GRANTS Defendants' Motion for Summary Judgment.

II. Jurisdiction and Venue

This Court has subject-matter jurisdiction because Plaintiff's ADEA claim arises under federal law. 28 U.S.C. § 1331. The Court has supplemental jurisdiction over Plaintiff's PHRA claim because it forms part of the same case or controversy as his ADEA claim. 28 U.S.C. § 1367. Venue is proper because a substantial portion of the events giving rise to Plaintiff's claims occurred in the Western District of Pennsylvania. 28 U.S.C. § 1391.

III. Factual Background

The following facts are undisputed unless otherwise noted.[1]

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[1] The Court derives these facts from a combination of Defendants' Concise Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (ECF No. 46), Plaintiff's Response to Concise Statement of Undisputed Material Facts in Opposition to Defendant's Motion for Summary Judgment (ECF No. 59), Defendants' Reply to Plaintiff's Response to Concise Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment (ECF No. 60), and Plaintiff's Second Amended Complaint (ECF No. 26).

A. Introduction

Mr. John Kowal was employed as a business manager by Ferndale from 1987 until his retirement on September 12, 2017. (ECF No. 46 at ¶¶ 1-2). As a business manager, Kowal was responsible for all financial aspects of the School District including financial reporting, accounting, payroll, accounts payable, insurance (including health insurance), all components of the Administrator/Supervisor Compensation package, and retirement benefits. (*Id.* at ¶¶ 3-4).

B. Sick Leave Incentive Upon Retirement

While employed by Ferndale, Kowal received contractual benefits tied to an Act 93 Agreement. (*Id.* at ¶¶ 6-9; ECF No. 46-2 at Exhibits D-6, D-7). During the relevant time period in this case, Kowal's Act 93 Agreement permitted Act 93-covered individuals to apply unused accumulated sick days towards health care coverage in retirement through a program called the Sick Leave Upon Retirement Incentive ("Sick Leave Incentive Program"). (ECF Nos. 46 at ¶ 15; 59 at ¶ 15; 46-2 at Exhibit D-6). To be eligible to participate in the Sick Leave Incentive Program, an Act 93-covered individual was required to meet several criteria.[2] (ECF No. 46-2 at Exhibit D-6). If an

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[2] In its entirety, the Sick Leave Incentive provides that "an employee shall be eligible for 'Sick Leave Incentive Upon Retirement' if and only if: (i) the employee shall submit his/her resignation for purposes of retirement to the Superintendent prior to January 15 of the year in which he/she elects to retire; (ii) the retirement shall be effective subsequent to the last school day of the year and prior to August 15 of the year of retirement; (iii) the employee shall have a minimum of 15 years of service as a professional employee under the provisions of the Pennsylvania School Employees Retirement System and have

employee was qualified to participate in the Sick Leave Incentive Program by meeting the criteria listed within the Act 93 Agreement, the employee was then permitted to choose one of several options when applying their unused accumulated sick days towards their health care coverage in retirement.[3] (*Id.*).

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attained the age of 51 as of retirement; (iv) the employee shall have provided, as a professional employee of 'DISTRICT', at least 8 years of service; (v) the retirement shall occur before the employee attains the age of eligibility for Medicare; (vi) the employee shall not (except for 'Restoration of Health Sabbatical' have taken a Compensated Leave at any time within the 6 fiscal years (July 1-June 30) immediately preceding the fiscal year during which retirement occurs." (ECF No. 46-2 at D-6).

[3] The options available to qualifying employees included: "(i) 1 year of health care coverage (exclusive of Dental Insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof, the coverage provided in Article IX, Section A) for the employee and his/her dependents for each 45 days of unused accumulated sick leave as of the 'effective date' of retirement, with any block of days not equal to 45 to be pro-rated to provide a portion of the coverage in the final year (*i.e.*, 110 unused days shall result in two years of complete coverage, and 'DISTRICT' being obligated for 44% of the 3rd year premium); (ii) 1 year of health care coverage (exclusive of Dental Insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof, the coverage provided in Article IX, Section A) for the employee only for each 20 days of unused accumulated sick leave as of the 'effective date' of retirement, with any block of days not equal to 20 to be pro-rated to provide a portion of the coverage in the final year (*i.e.*-110 days shall result in five years of complete coverage, and 'DISTRICT' being obligated for 50% percent [sic] of the 5th year premium); (iii) 'DISTRICT' being responsible for the percentage of health care coverage premiums (exclusive of Dental Insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof, the coverage provided in Article IX, Section A) for the employee until the earlier of his/her demise, attainment of age 65, or eligibility for Medicare, determined as set forth

C. Ferndale's Health Insurance Plan

Ferndale is part of a self-funded consortium of school districts for healthcare, the Greater Johnstown Health Consortium ("Consortium"), with Ferndale paying its bills out of its own funds. (ECF No. 46 at ¶ 33). Ferndale employs the Reschini Group, a healthcare broker, to act as an intermediary between the Consortium and Highmark, the Consortium's insurance provider. (*Id.* at ¶ 34). As part of its healthcare coverage, the Consortium maintains a stop loss insurance policy to protect school districts from paying high claims caused by an individual incurring medical expenses that exceed a $250,000 or $300,000 threshold ("Catastrophic Claim Threshold"). (*Id.* at ¶ 52). The premium for the stop loss insurance policy is built into the premium that all ten Consortium school districts pay, and each school district pays its claims out of the School District's own funds. (*Id.* at ¶¶ 53-54). The stop loss insurance policy covers claims from active, currently employed members over the age of 65 enrolled in Ferndale's healthcare coverage. (*Id.* at ¶ 55). The stop loss insurance policy does not

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below, to a maximum 'DISTRICT' liability of $2,000 per annum. The percentage of annual premium to be paid by the 'DISTRICT' shall be determined by dividing the number of unused accumulated sick days as of the 'effective date' of retirement by the total number of sick days earned by the employee while employed by 'DISTRICT' or its predecessors (*i.e.*-(200) total sick days earned while employed by Ferndale/Dale and 'District', 120 days of unused accumulated sick days as of 'effective date' of retirement, results in 60% premium payment); (iv) Payment by 'DISTRICT' to' employee', on or before October 15 of each year, of the amount 'DISTRICT' would have been required to pay as health care coverage premium for employee had 'employee elected option (iii)'; (v) Payment by the District to employee of $115 for each sick day not used for the above." (ECF No. 46-2 at D-6).

cover claims for inactive, currently unemployed members over the age of 65 enrolled in Ferndale's healthcare coverage.[4] (*Id.* at ¶ 56).

D. Kowal's Post-Retirement Healthcare Benefit Discussions with Ferndale

At the time of his retirement on September 12, 2017, Kowal was 66 years old (*Id.* at ¶ 21), had been enrolled in Medicare for over a year (ECF No. 59 at ¶ 41), and had accumulated 353.5 unused sick days (ECF Nos. 46 at ¶ 143; 59 at ¶ 143). On September 14, 2017,[5] Kowal, Ferndale Business Manager David Gates ("Gates"), Superintendent Carole Kakabar ("Kakabar"), and Reschini Group account executive Greg Sanford ("Sanford") met at Asiago's Restaurant in Johnstown, Pennsylvania, to discuss post-retirement healthcare coverage and Medicare. (ECF No. 46 at ¶¶ 88-91). At this meeting, Ferndale contends they informed Kowal that, consistent with the Act 93 Agreement, he was ineligible to receive Ferndale-provided post-retirement healthcare coverage because he was over 65 years old and eligible for Medicare on the date he retired. (*Id.*). Kowal contends that the Act 93 Agreement was not discussed at this meeting. (ECF No. 59 at ¶ 89). Rather, Kowal claims he was

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[4] Kowal disputes that the stop loss insurance policy does not cover inactive members over the age of 65 who are enrolled in Ferndale's healthcare coverage. (ECF No. 59 at ¶ 56).

[5] Kowal disputes the date of the meeting held at Asiago's Restaurant in Johnstown, Pennsylvania, claiming the meeting occurred on September 20, 2017 (ECF No. 59 at ¶ 88). Although the date of the meeting is immaterial, the Court will use the September 14, 2017 meeting date provided in the Affidavit of Greg Sanford. (ECF No. 46-7 at ¶ 8).

only informed of the penalties associated with late enrollment in Medicare. (*Id.*).

At a subsequent meeting, on October 31, 2017, Kowal met with Gates and Kakabar at which time he was informed that he was not eligible for the Sick Leave Incentive Program and Ferndale-provided post-retirement healthcare coverage. (ECF No. 46 at ¶ ¶ 92-93). During that meeting, Gates and Kakabar discussed the estimated value of Kowal's unused sick days, personal days, and vacation days and offered him $52,000 in cash for the value of his unused days. (*Id.* at ¶ 94; ECF No. 46-3 at 14:7-25; 15:1-2). Kowal, Kakabar, and Gates also discussed Kowal's separate health reimbursement account ("HRA") which was active within Ferndale's health insurance group. (ECF Nos. 46 at ¶ 97; 59-2 at Exhibit 17). Kowal, Kakabar, and Gates left the meeting without any resolution with respect to how Kowal wanted to handle his unused vacation, personal, and sick days.

Another meeting was held on November 6, 2017, between Kowal, Kakabar, Gates and Ferndale's then-Solicitor James Walsh ("Walsh") where Walsh informed Kowal that that he was not eligible for the Sick Leave Incentive Program and Ferndale-provided post-retirement healthcare coverage. (ECF No. at ¶¶ 100-101). Walsh reviewed the Act 93 Agreement with Kowal at this meeting and asked if Kowal and his wife would submit to a health audit to determine their risk assessment towards catastrophic illness. (*Id.* ¶¶ 102-103). Kowal refused to submit to the health audit. (*Id.* ¶ 104).

Following that meeting, on November 15, 2017, the School Board held an executive session School Board meeting in which it authorized Kakabar to

work towards an agreement with Kowal to provide an alternative, equivalent healthcare package in light of his years of service to Ferndale. (*Id.* ¶ 105). Kowal contends that following this School Board meeting, Kakabar called him and told him that the Board had agreed he was entitled to 7.85 years of coverage, and that she was calling to ask him his preferences for his benefit package. (ECF No. 59 at ¶ 105). Kowal indicated to Kakabar that he would like to continue with his current coverage.[6] (*Id.*). Kakabar informed Kowal that he should expect a memorandum of understanding ("MOU") confirming his request to continue with his present coverage from Walsh once she had contacted him about Kowal's healthcare coverage choice. (*Id.*).

At another School Board meeting held on December 6, 2017, the Board approved a waiver of "the Act 93 Agreement, Sick Leave Incentive Upon Retirement, for the retirement benefit of John Kowal," stating that "[a]pproval is subject to Kowal accepting

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6 Ferndale contends that, prior to Kowal's retirement, he instructed payroll clerk Brenda Rhodes ("Rhodes") to process a healthcare insurance spreadsheet containing post-retirement healthcare coverage for himself and his wife through March 2025. (ECF No. 46 at ¶¶ 38-43). Rhodes processed the paperwork as requested and Kowal and his wife received continuing coverage from Ferndale following his retirement. (*Id.*). Ferndale also contends that Kowal knew Ferndale did not permit inactive, unemployed members over the age of 65 to be part of its Ferndale-provided healthcare coverage. (*Id.* at ¶ 48). Kowal contends that the spreadsheet he handed to Rhodes contained a list of Ferndale-provided HRA coverage, not healthcare coverage. (ECF No. 59 at ¶ 42). Regardless of the contents of the spreadsheet, both parties agree that Kowal was receiving post-retirement healthcare coverage from Ferndale after he retired on September 12, 2017. (ECF Nos. 46 at ¶ 44; 59 at ¶ 105).

in writing the retirement healthcare terms offered, by December 20, 2017." (ECF No. 46-3 at Exhibit 2). Early that next morning, on December 7, 2017, Kakabar emailed Kowal a healthcare option authorized by the School Board which would establish a Health Reimbursement Arrangement ("HRA Proposal") for Kowal and his spouse. (ECF No. 46-2 at Exhibit D-9). In that email, Kakabar informed Kowal that she or Gates would need to be notified by Kowal, in writing, by December 20, 2017, whether he accepted the HRA Proposal offered in the email. (*Id.*). Kakabar's email also informed Kowal that he would be removed from his "current district-provided Qualified High Deductible Healthcare Plan at day's end December 31, 2017." (*Id.*).

Kowal replied to Kakabar's email on December 11, 2017, requesting additions and/or revisions to the HRA Proposal. (*Id.* at Exhibit D-10). Kakabar responded on December 13, 2017, indicating that changes had been made to the HRA Proposal based on Kowal's comments. (*Id.* at Exhibit D-11). Kakabar reminded Kowal that he had until December 20, 2017, to accept the HRA Proposal and that he would be removed from his current health plan on December 31, 2017. (*Id.*). Kowal responded to Kakabar on December 15, 2017, stating he had two remaining concerns left with respect to the HRA Proposal. (ECF No. 46-12 at 2). Kakabar responded on December 18, 2017, indicating final revisions had been made to the HRA Proposal and reminded Kowal of both the deadline of acceptance and the date he would be dropped from his health plan. (*Id.* at 3). That same day, Kowal contacted the EEOC and filed a Charge of Discrimination against Ferndale alleging they had

violated the ADEA.[7] (ECF Nos. 26 at ¶ 28; 6-2). Kowal dual-filed his charge with the Pennsylvania Human Relations Commission ("PHRC"). (ECF No. 26 at ¶ 29).

On December 19, 2017, Kowal emailed Kakabar and formally requested that the December 20, 2017 deadline to accept the HRA Proposal be set aside. (ECF No. 46-13). Kowal gave two reasons for his request: (1) Kowal wanted to address the Board at its scheduled January 17, 2018 meeting, and (2) Kowal had an initial interview scheduled with the EEOC to determine if Ferndale had violated the ADEA. (*Id.*). In that same email, Kowal indicated his preference to discuss the matter before an "open meeting" of the School Board. (*Id.*). From December 20, 2017, to March 2018, Kowal did not communicate any additional terms he wanted incorporated into Ferndale s HRA Proposal, nor did he raise concerns that Ferndale had not incorporated the changes he requested in the HRA Proposal. (ECF Nos. 46 at ¶ 141; 59 at ¶ 141).

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[7] Kowal alleges that he filed a Charge of Discrimination with the EEOC on December 18, 2017. (ECF No. 26 at ¶¶ 27-29). However, other than mere assertions, Kowal has not presented any evidence that he filed his Charge of Discrimination on December 18, 2017. The earliest record evidence produced by Kowal of his protected activity with the EEOC is dated and time-stamped February 16, 2018. (ECF No. 6-2). Further, Kowal has not produced any record evidence of when he filed his second EEOC Complaint-which he alleges he filed on June 18, 2018 (ECF No. 26 at ¶ 43). Ferndale accepts Kowal's assertions that he filed a Charge of Discrimination on December 18, 2017, but this Court notes that no documentation of such protected activity on December 18, 2017, has been produced. (*Id.* at ¶¶ 27-29). For the purposes of this memorandum opinion, the Court will analyze Kowal's retaliation claims as if he did engage in protected activity with the EEOC on December 18, 2017.

E. Ferndale Extends the HRA Proposal Acceptance Deadline and Continues Kowal's Healthcare Coverage into 2018

Following Kowal's requests for a deadline extension and to meet with the School Board, Kakabar emailed Kowal on December 27, 2017, informing him that his current Ferndale-provided healthcare plan would be extended into 2018 until Ferndale could get legal advice. (ECF No. 46-14). On January 16, 2018, Kakabar notified Kowal by correspondence that the deadline to accept or reject the HRA Proposal was temporarily postponed. (ECF No. 46-3 at Exhibit 4). In that same correspondence, Kakabar told Kowal that his request to address the Board in "open/executive session"[8] was declined by the School Board. (*Id.*). Kakabar stated that "while Section 708 of the Sunshine Law[9] would permit the Board to meet with [him], the

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[8] The Court notes that there is confusion among the parties with respect to the type of meeting Kowal requested from Ferndale when he requested an "open meeting" with the Board. (ECF No. 46-13). In his December 19, 2017 email, Kowal requested an "open meeting" with the Board after quoting Section 708(a)(1) of the Pennsylvania Sunshine Act. (*Id.*). Ferndale appears to have interpreted Kowal's request as a demand to meet with the Board in executive session, or, at the very least, an "open/executive session." (ECF No. 46-3 at Exhibit 4). It appears to the Court that Kowal was citing Section 708 of the Pennsylvania Sunshine Act as a basis for requesting that further discussions of his retirement benefits be removed from the School Board's executive sessions and discussed only in a publicly held or "open" School Board meeting. The Court will analyze Kowal's "open meeting" request as a request to discuss his retirement benefits in a publicly held or "open" School Board meeting.

[9] In relevant part, Section 708 of the Pennsylvania Sunshine Act states:

Board [was] respectfully declining that offer," giving several reasons to justify their decision. (*Id.*). Specifically, Kakabar cited four reasons the School Board was declining to meet with Kowal including: (1) Kowal had placed himself on Ferndale's insurance without having spoken with Kakabar or Walsh before retiring, (2) Kowal was instituting legal proceedings against Ferndale, (3) Kowal indicated he had an initial interview with the EEOC to determine if other fair employment laws had been violated, and (4) Kowal informed Ferndale it may be necessary for Ferndale to secure an attorney. (*Id.*).

A few days later, on January 19, 2018, Kakabar again notified Kowal by correspondence that he was not eligible for Ferndale-provided post-retirement healthcare coverage because he was an Act 93 covered

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(a) Purpose.–An agency may hold an executive session for one or more of the following reasons:

(1) To discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee, *provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting*. The agency's decision to discuss such matters in executive session shall not serve to adversely affect the due process rights granted by law, including those granted by Title 2 (relating to administrative law and procedure). The provisions of this paragraph shall not apply to any meeting involving the appointment or selection of any person to fill a vacancy in any elected office. 65 Pa.CS. § 708(a)(1) (emphasis added).

employee. (ECF No. 46-3 at Exhibit 5). In that same correspondence, Kakabar informed Kowal that he had until February 15, 2018, to decide whether to accept the HRA Proposal. (*Id.*). If Kowal did not accept the HRA Proposal by the deadline, Kakabar stated that Ferndale would take the necessary steps to remove Kowal from Ferndale's coverage, reconcile Kowal's remaining sick days, and pay the balance out to Kowal. (*Id.*). Lastly, Kakabar stated that Ferndale was providing Kowal until February 15, 2018 to give him an opportunity to consult with counsel, or with the EEOC. (*Id.*).

On February 13, 2018, Kowal emailed Kakabar stating that he had completed the EEOC initial interview process and informed Kakabar that the EEOC would be contacting her within 10 to 60 days. (ECF No. 46-15 at 2). Kowal did not accept or respond to Ferndale's HRA Proposal by the deadline of February 15, 2018. (ECF Nos. 46 at ¶ 133; 59 at ¶ 133). On February 27, 2018, Kowal was notified by Kakabar that his healthcare coverage would be terminated on February 28, 2018 (ECF No. 46-3 at Exhibit D-2). The following day, on February 28, 2018, Kowal emailed Gates and Kakabar informing them that (1) he had completed his EEOC interview process, (2) he had completed his Charge of Discrimination Form and returned it to the EEOC and (3) consistent with EEOC advice, he had dual-filed his complaint with both the EEOC and PHRA. (ECF Nos. 46-17 at 2; 6-2). Kowal also reiterated a point made in his December 19, 2017 email to Kakabar in which he stated "'it would not be appropriate for me to jeopardize any rights I may have under the EEOC as well as the ADEA and any other laws by making any decision,

including any proposed 'payout' demands, until the EEOC had completed its investigation of his complaint." (ECF No. 46-17 at 2). Kowal further stated he would evaluate his options after the EEOC investigation was completed. (*Id.*).

F. Ferndale Cashes Out Kowal's Unused Sick Days

Following the expiration of Ferndale's HRA Proposal deadline, Ferndale began the process of cashing out Kowal's unused accumulated sick days. To cover the costs of Kowal's Ferndale-provided healthcare coverage following his retirement, Kowal was charged 3.75 unused sick days per month from October 2017 to February 28, 2018 for a total of 18.75 sick days. (ECF No. 46-2 at Exhibit D-12). In a letter dated March 5, 2018, Kakabar informed Kowal that Ferndale was paying him $38,496.25 for his remaining 334.75 unused sick days at a rate of $115 per day. (ECF No. 46-3 at Exhibit D-12). In that same letter, Kakabar also informed Kowal that with the appropriate payroll deductions withheld, Ferndale was issuing him a check for his unused accumulated sick days totaling $22,213.71. (ECF No. 46-18). Lastly, Kakabar notified Kowal that Ferndale had received his Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") Continuation Coverage Election Form, but Ferndale would not accept or otherwise charge 3.75 days of Kowal's unused sick days as payment for the coverage as he requested. (*Id.*). Rather, Kowal would have to submit payment of $1,485.33 for continued "husband and wife" coverage. (*Id.*).

On March 22, 2018, Kowal sent Kakabar and Gates an email notifying them that EEOC had completed its investigation and issued a Right to Sue Letter. (ECF No. 46-19). In that same email, Kowal informed Kakabar and Gates that he and his wife had decided to accept the Board's HRA Proposal. (*Id.*). Kakabar responded that she would contact her legal counsel and respond to Kowal as soon as possible. (*Id.*).

A week later, on March 29, 2018, Kakabar sent an email to the School Board following up on a discussion which had occurred at its March 28, 2018 School Board Meeting in which the Board discussed Kowal's email and request to accept the HRA Proposal. (ECF No. 59-3 at Exhibit 40). Kakabar gave the Board Members two options: (1) reinstate the HRA Proposal minus the five months for healthcare coverage Kowal received after he retired (Kakabar also proposed having Kowal pay Ferndale's attorney's fees and sign a document preventing Kowal from bringing suit with respect to unused sick days) or (2) pay Kowal the cash value of his remaining sick days. (*Id.*). The Board ultimately decided they would not reinstate the HRA Proposal. (ECF No. 46 at ¶ 155). Kakabar notified Kowal by correspondence on April 19, 2018, that the School Board would not be reinstating the HRA Proposal. (ECF No. 46-18). In that same letter, the Kakabar included a $22,213.71 check for the remaining value of Kowal's sick days, minus payroll deductions and the cost of his health insurance from October 2017 to February 2018. (ECF No. 46-18).

G. Kowal Requests to Speak to the School Board Again

Between January 2018 and April 2018, Kowal did not attend a public School Board meeting, nor did he sign up to speak at any public comment portion of any public School Board meetings held between January 2018 and April 2018. (ECF No. 46 at ¶¶ 160-161).

On April 28, 2018, Kowal emailed School Board President Sandi Chobany ("Chobany") requesting that she facilitate sending a letter to the email addresses of all the members of the School Board. (*Id.* at ¶ 162). The letter Kowal requested Chobany share with the School Board reiterated his stance that he was wrongfully denied his post-retirement healthcare benefits and repeated his request to meet with the Board. (ECF No. 46-21). Chobany responded on May 3, 2018, indicating that she did not feel it was her place to provide Kowal the email addresses of the members of the School Board. (*Id.* at 8). Further, Chobany informed Kowal that the Board would discuss his request to meet at their May 9, 2018, monthly Board Meeting, and a response to his request would be provided thereafter. (*Id.*). Around the same time Kowal asked to meet with the School Board and have his letter shared with members of the School Board, Kowal also requested to meet with Kakabar to discuss the HRA Proposal. (*Id.*).

Following the May 19, 2018, School Board meeting, Kakabar emailed Kowal informing him that the Board had discussed both his request to meet with the Board as well as his request to meet with Kakabar. (ECF No. 59 at ¶ 164). In that email, Kakabar notified Kowal that neither she nor the Board would meet with Kowal. (*Id.*). Further, Kakabar stated that the

Board was not interested in exploring any type of retirement incentive that included paid health coverage. (*Id.*). Finally, Kowal was instructed that all future communication to "the District, Board Members, Superintendent, Business Manager, or any other school official should be sent to" Ferndale's attorney of record. (*Id.*). Kowal then filed his second Charge of Discrimination with the EEOC and PHRC on June 18, 2018. (ECF No. 26 at ¶¶ 43-44).

IV. Procedural Background

On September 14, 2018, Kowal filed his Complaint bringing three claims against Ferndale: Discrimination in Violation of the ADEA (Count I), Discrimination in Violation of the PHRA (Count II), Breach of Contract (Count III). (ECF No. 1). On November 19, 2018, Ferndale filed a Motion to Dismiss Pursuant to F.R.C.P. 12(B)(6) with an accompanying brief in support. (ECF Nos. 6, 7). Kowal responded with a Brief in Opposition on December 11, 2018, (ECF No. 9), and this Court entered a Memorandum Order on January 3, 2019 dismissing Counts II and III of Kowal's complaint without prejudice. (ECF No. 13).

Kowal then filed a First Amended Complaint on January 30, 2019, bringing two claims against Ferndale: Discrimination in Violation of the ADEA (Count I) and Wage Payment Collection Law (Count II). (ECF No. 16). Ferndale filed a Motion to Dismiss and accompanying brief in support (ECF No. 18, 19). On March 25, 2019, this Court entered a Memorandum Opinion and Order dismissing Count II of Kowal's Amended Complaint with prejudice. (ECF No. 22).

On April 4, 2019, Kowal filed a Second Amended Complaint bringing two claims against Ferndale:

Discrimination Violation of the ADEA (Count I) and Retaliation in Violation of the PHRA (Count II). (ECF No. 26). Ferndale answered Kowal's Second Amended Complaint on April 24, 2019. (ECF No. 29). Ferndale moved for summary judgment on March 22, 2021. (ECF No. 43). Kowal responded in opposition on June 1, 2021 (ECF No. 55) and Ferndale replied on June 21, 2021 (ECF No. 60).

V. Legal Standard

This Court will grant summary judgment "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Melrose, Inc. v. Pittsburgh*, 613 F.3d 380,387 (3d Cir. 2010) (quoting *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 380 n.6 (3d Cir. 2007)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is a genuine issue of fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also McGreevy v. Stroup*, 413 F.3d 359, 363 (3d Cir. 2005). Material facts are those that affect the outcome of the trial under governing law. *Anderson*, 477 U.S. at 248. The Court's role is "not to weigh the evidence or to determine the truth of the matter, but only to determine if the evidence of record is such that a reasonable jury could return a verdict for the non-moving party." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009). In deciding a summary judgment motion, this Court "'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor.'" *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278

(3d Cir. 2000) (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994)).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party meets this burden, the party opposing summary judgment "may not rest upon the mere allegations or denials" of the pleading, but "must set forth specific facts showing that there is a genuine issue for trial." *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 n.11 (1986)). "For an issue to be genuine, the non-movant needs to supply more than a scintilla of evidence in support of its position—there must be sufficient evidence (not mere allegations) for a reasonable jury to find for the non-movant." *Coolspring Stone Supply v. Am. States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993); *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (noting that a party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue").

VI. Discussion

Kowal alleges claims of retaliation against Ferndale under both the ADEA and PHRA.[10] Kowal

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[10] Courts analyze claims under ADEA and PHRA in the same manner. *See Kelly v. Drexel University*, 94 F.3d 102, 105 (3d Cir. 1996). The Court references only the ADEA framework for brevity—if Defendant is entitled to summary judgment on

asserts that Ferndale retaliated against him because he filed a Charge of Discrimination with the EEOC. (ECF No. 26 at ¶ 1). The ADEA makes it unlawful for an employer to discriminate against an employee who has made a charge of discrimination against their employer under the ADEA. 29 U.S.C. § 623(d).

It is undisputed that during the period of time relevant to this case, Defendant was an "employer" subject to the ADEA's provisions. 29 U.S.C. § 630(b). Further, neither party disputes Kowal was an "employee" or "individual" entitled to statutory protection from retaliatory discrimination under the ADEA. (ECF Nos. 47, 55). 29 U.S.C. § 630(b). *See Erie Cnty. Retirees Ass'n v. Cnty. Of Erie*, 220 F.3d 193, 209-210 (3d Cir. 2000) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-345 (1997)).

Since this is a retaliation case in which Kowal has presented no "direct evidence" of retaliation, the Supreme Court's framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), provide the formulation for allocating the requisite burdens of proof and production for purposes of the instant motion for summary judgment.[11] In a

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Plaintiff's ADEA claim, it is likewise entitled to summary judgment on Plaintiff's PHRA claims.

[11] The *McDonnell Douglas-Burdine* burden-shifting framework does not apply in an employment discrimination case in which a plaintiff presents "direct evidence" of discrimination. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). "Direct evidence" of discrimination is evidence that is "so revealing of discriminatory animus that it is not necessary to rely on any presumption" from the plaintiff's *prima facie* case to shift the applicable burden of production to the defendant. *Starceski v. Westinghouse*

retaliation case of this kind, the plaintiff must first establish a *prima facie* case of illegal retaliation. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff establishes a *prima facie* case of retaliation, the defendant must articulate legitimate, non-discriminatory reasons for treating the plaintiff in an adverse manner. *Id.* at 802-03. If the defendant articulates legitimate, non-discriminatory reasons for the plaintiff's adverse treatment, the plaintiff must demonstrate that the reasons given by the defendant for such treatment are merely a pretext for unlawful retaliation. *Id.* at 804-05.

a. Kowal Cannot Show that Ferndale Retaliated Against Him for Engaging in Protected Activity

1. The Parties' Arguments

Ferndale argues it did not retaliate against Kowal for engaging in protected activity. First, Ferndale contends that Kowal cannot establish a *prima facie* claim of retaliation because (a) he cannot demonstrate that he suffered an adverse action either subsequent to or contemporaneous to engaging in protected activity, and (b) he cannot establish that there was a causal connection between the protected activity he engaged in and the alleged adverse actions taken by Ferndale. (ECF No. 47 at 4).

More specifically, Ferndale argues Kowal cannot establish that he suffered an adverse action because (i) he was not entitled to post-retirement healthcare

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Electric Corp., 54 F.3d 1089, 1096 n.4 (3d Cir. 1995). The evidence presented in this case does not constitute "direct evidence" of discrimination.

coverage under the Act 93 Agreement, (ii) Ferndale provided Kowal with fair compensation for his unused accumulated sick days, and (iii) Ferndale did not prevent Kowal from addressing the School Board in violation of Pennsylvania's Sunshine Act. (ECF No. 47 at 9-15). Further, Ferndale contends Kowal cannot establish there was a causal connection between the protected activity he engaged in and the alleged adverse actions taken by Ferndale because there is neither an unusually suggestive temporal proximity between the protected activity Kowal engaged in and Ferndale's alleged retaliatory acts, nor is there a pattern of antagonism coupled with the timing to establish a causal link between Kowal's activity and Ferndale's actions. (*Id.* at 15-25) (citing *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007)).

Ferndale also asserts that even if Kowal can establish a *prima facie* case of retaliation, Ferndale can show it had legitimate, non-discriminatory reasons for taking the actions it did. (ECF No. 47 at 25). Finally, Ferndale argues Kowal cannot show that the legitimate, non-discriminatory reasons for Ferndale's actions were pretextual because Kowal's protected activity did not motivate Ferndale to deny Kowal's requests to speak with the School Board, discontinue negotiations with respect to its HRA Proposal, or issue a check for Kowal's unused accumulated sick days. (*Id.* at 28-31).

Kowal contends the Ferndale retaliated against him for filing a Charge of Discrimination with the EEOC (ECF No. 26 at ¶ 1). Kowal argues he can establish a *prima facie* claim of retaliation because (a) he suffered an adverse action contemporaneous

with and subsequent to his protected activity of filing a Charge of Discrimination with the EEOC and (b) there is a causal connection between his protected activity and Ferndale's adverse actions. (ECF No. 55). Kowal alleges he experienced adverse actions because (i) Ferndale repeatedly denied him the opportunity to address the School Board in violation of Pennsylvania's Sunshine Act, 65 Pa.CS. § 701 *et seq.*, (ii) Ferndale stopped negotiations with respect to his post-retirement healthcare coverage, and (iii) Ferndale unilaterally mailed him a check for the value of his unused accumulated sick days in an amount significantly less than the amount to which he is entitled. (ECF No. 55). Further, Kowal argues there is a causal connection between Ferndale's adverse actions and his protected activity because the adverse actions taken by Ferndale and the protected activity Kowal engaged in are closely linked in time. (*Id.* at 7).

Finally, Kowal argues he can demonstrate that the legitimate, non-discriminatory reasons articulated by Ferndale for taking the adverse actions against him are merely pretextual because there are several emails among Ferndale School Board members articulating their disappointment, distaste, and animus toward Kowal following his filing of a complaint with the EEOC. (*Id.*).

2. Kowal Cannot Establish a *Prima facie* Case of Retaliation Under the ADEA

To establish a *prima facie* case of proscribed retaliation under either the ADEA or the PHRA, the plaintiff must show that: (1) he engaged in a protected employee activity; (2) he was subject to adverse action by the employer either subsequent to or con-

temporaneous with the protected activity; and (3) that there is a causal connection between the protected activity and the adverse action. *Fasold v. Justice*, 409 F.3d 178, 188 (3d. Cir. 2005) (citing *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 (3d Cir. 2002).

Here, it is undisputed that Kowal engaged in protected employee activity by filing his Charge of Discrimination with the EEOC. (ECF No. 47 at 4). Therefore, the Court must only determine whether (A) Kowal was subject to an adverse action by Ferndale and (B) whether Kowal has demonstrated a causal connection between filing his EEOC Complaint and the adverse actions taken by Ferndale.

A. Kowal Was Not Subject to an Adverse Action

Kowal alleges three adverse actions taken by Ferndale including (i) declining Kowal's requests to meet with the School Board, (ii) refusing to continue negotiations with respect to its HRA Proposal and other post-retirement healthcare coverage, and (iii) unilaterally mailing him a check for the value of his unused accumulated sick days in an amount significantly less than the amount to which he is entitled. (ECF No. 26 at ¶¶ 32-34, 39-42, 51).

"For an employer's action to satisfy the second prong of a *prima facie* case of retaliation, the plaintiff 'must show that a reasonable employee would have found the challenged action materially adverse,' which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 195-196 (3d Cir. 2015) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*,

548 U.S. 53, 68 (2006). The Court is to analyze the employer's alleged adverse action "from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 71 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). "[P]etty slights, minor annoyances, and simple lack of good manners" generally will not suffice. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 71 at 68. However, "[c]ontext matters" such that "an act that would be immaterial in some situations is material in others." *Id.* at 69, (quoting *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005) (internal quotation marks omitted)). The Court will address each of Ferndale's alleged adverse actions in turn.

First, Kowal alleges that the School Board took materially adverse action against him by declining to meet with him. (ECF Nos. 26 at ¶ 31-35; 46-3 at Exhibit 4; 59 at ¶ 164). Kowal's argument hinges on the fact that Kakabar informed him that the School Board was declining to meet with him at its scheduled public School Board meeting on January 17, 2018. (ECF No. 46-3 at Exhibit 4). However, despite the School Board declining to meet with Kowal at its scheduled public meeting on January 17, 2018, nothing in the record indicates that Kowal was prohibited from attending the January 17, 2018 meeting. (ECF Nos. 46-13; 46-1 at 148: 9-24; 46-1 at 149: 1-24; 46-1 at 151:11-18; 57-2 at 32-33). Nothing in the record indicates Kowal was prevented from speaking during the public comment period of the January 17, 2018 meeting. (*Id.*). Furthermore, nothing in the record indicates that Kowal was prohibited from attending *any* publicly held School Board meeting and/or speaking

during any public comment period of any publicly held School Board meeting from the time of his initial meeting request on December 19, 2017, through April 2018. (*Id.*). Indeed, even though Kowal specifically asked the School Board to meet in an "open meeting," he never attended any publicly held School Board meeting from the time of his initial meeting request through April 2018. (*Id.*). No reasonable person in Kowal's position could view the School Board declining a meeting request as a materially adverse action when any person, including Kowal, could have attended any publicly held School Board meeting and/or spoken during any public comment portion of any publicly held School Board meeting. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 71. Here, the Court finds that the School Board declining to meet with Kowal does not constitute an adverse action for the purpose of establishing a *prima facie* claim of retaliation.

Second, Kowal argues that Ferndale's refusal to continue negotiations regarding its HRA Proposal and other post-retirement healthcare benefits constitutes a materially adverse action against him. (ECF No. 55 at 5-7). As an initial matter, nothing in the factual record indicates that the HRA Proposal was open for further negotiation following Kakabar's December 18, 2017 email. (ECF No. 46-12 at 3). Following Kakabar's email stating that "final revisions" had been made to the HRA Proposal, Kowal did not communicate any additional terms he wanted incorporated into the HRA Proposal, nor did he raise any concerns with Kakabar that she had failed to incorporate changes he had previously requested. (ECF Nos. 46 at ¶ 141; 59 at ¶ 141). Further, in response to Kowal's email informing Ferndale of his contact

with the EEOC, Ferndale postponed the expiration date of the HRA Proposal until February 15, 2018. (ECF No. 46-3 at Exhibit 4). Even after Ferndale extended the HRA Proposal deadline—a deadline set before Kowal engaged in protected activity—Kowal did not accept or respond to Ferndale's HRA Proposal by the deadline of February 15, 2018. (ECF Nos. 46 at ¶ 133; 59 at ¶ 133). Indeed, Kowal's only communication with respect to the HRA Proposal was to request that the HRA Proposal be reinstated more than a month after it had expired. (ECF No. 46-19). Moreover, nothing in the factual record indicates any other offers or negotiations for post-retirement healthcare coverage were made between Kowal and Ferndale. No reasonable person in Kowal's position could conclude that Ferndale's extension of a deadline to accept the HRA Proposal—a deadline set before Kowal engaged in protected activity—and Ferndale's subsequent refusal to reinstate the HRA Proposal more than a month after it expired establishes a materially adverse action. The Court finds that Ferndale's refusal to reinstate the HRA Proposal and/or negotiate other post-retirement healthcare coverage negotiations does not constitute an adverse action against Kowal.

Third, Kowal contends that Ferndale unilaterally mailing him a check for the value of his unused accumulated sick days in an amount significantly less than the amount to which he feels he is entitled is an adverse action. (ECF No. 55 at 5-7). Kowal was ineligible to participate in the Sick Leave Incentive Program, and, as such, was not entitled to sick day benefits at the time he retired. (ECF Nos. 26 at ¶ 8; 46-2 at Exhibits D-6, D-7; 59 at ¶ 41). Although the

School Board granted a waiver of Kowal's Act 93 Agreement, the Board's waiver was no longer valid because Kowal did not accept the HRA Proposal by the deadline of February 15, 2018. (ECF No. 46-3 at Exhibit 2). Notwithstanding Kowal's failure to respond by the February 15, 2018 deadline, Ferndale paid Kowal for the value of his unused accumulated sick days at the Act 93 rate of $115 per day (less his months of post-retirement healthcare coverage and payroll withholdings). (*Id.*). No reasonable person in Kowal's position could conclude that receiving a cash payment for a benefit he or she was not entitled to, at a rate he or she was not entitled to, constitutes a materially adverse action. The Court finds that Ferndale unilaterally mailing a check to Kowal for the value of his unused accumulated sick days is not a materially adverse action for the purposes of establishing a *prima facie* claim of retaliation against Ferndale.

In sum, none of the actions taken by Ferndale constitute a materially adverse employment action for the purpose of establishing a *prima facie* case of retaliation. Nevertheless, even if Ferndale's actions qualified as such, Kowal fails to fully establish the third element of a *prima facie* case of retaliation as discussed in the next section.

B. Kowal Can Partially Demonstrate a Causal Connection Between Ferndale's Alleged Adverse Actions and His Engagement in Protected Activity

Assuming *arguendo* Kowal can establish he was subject to adverse actions by Ferndale, he can only

partially demonstrate a causal connection between Ferndale's alleged adverse actions and his EEOC activity. "To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007)). The Court "consider[s] a 'broad array of evidence' in determining whether a sufficient causal links exists [for a plaintiff] to survive a motion for summary judgment." *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 195-196 (3d Cir. 2015) (quoting *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 232 (3d Cir. 2007).

First, Kowal contends that his filing a Charge of Discrimination with the EEOC caused Ferndale to deny his meeting requests with the School Board. (ECF No. 55 at 5-7). Here, Kowal can show a causal connection between the Board's refusal to allow him to meet with the School Board and his protected activity of filing a Charge of Discrimination with the EEOC. Specifically, in her email to Kowal in response to his request to meet with the School Board, Kakabar informed Kowal that the School Board would not meet with Kowal because (1) Kowal had placed himself on Ferndale's insurance without having spoken with Kakabar or Walsh before retiring, (2) Kowal was instituting legal proceedings against Ferndale, (3) *Kowal indicated he had an initial interview with the EEOC to determine if other fair employment laws had been violated*, and (4) Kowal informed Ferndale it may be necessary for them to secure an attorney.

(ECF No. 46-3 at Exhibit 4) (emphasis added). Ferndale clearly indicates that, among several reasons, Kowal's contact with the EEOC was a factor in the Board's decision to decline Kowal's meeting request. (*Id.*). Notwithstanding the causal connection between Kowal's protected activity and the School Board declining his meeting requests, for the reasons stated in Section VI(a)(2)(A), the Court has determined that Kowal cannot establish that Ferndale took materially adverse action against him by declining his meeting requests. *Supra* Section VI (a)(2)(A). The School Board declining to meet with Kowal had no impact on Kowal's ability to attend a publicly held School Board meeting and discuss his Sick Leave Incentive Program status with the School Board. *Id.* Because Kowal cannot demonstrate School Board took a materially adverse action against him by declining to meet with him, he fails to establish a *prima facie* claim of retaliation against Ferndale.

Second, Kowal argues that his activity with the EEOC caused Ferndale's refusal to continue negotiations regarding its HRA Proposal and other post-retirement healthcare benefits. (ECF No. 55 at 5-7). Ferndale set December 20, 2017, as the deadline for Kowal to accept the HRA Proposal which was prior to Kowal engaging in protected activity. *Supra* Section VI(a)(2)(A). Upon learning of Kowal's protected activity, Ferndale extended the deadline for Kowal to accept the HRA Proposal until February 15, 2018. *Id.* The only activity caused by Kowal engaging in protected activity was an extension of a deadline already established before Kowal had engaged in protected activity with the EEOC. (ECF No. 46-3 at Exhibit 5). Kowal has failed to demonstrate any causal link

between Ferndale's refusal to continue the HRA Proposal and other post-retirement healthcare negotiations and his protected activity with the EEOC for the purpose of establishing a *prima facie* claim of retaliation.

Third, Kowal contends that his protected activity with EEOC caused Ferndale to unilaterally mail him a check for the value of his unused accumulated sick days in an amount significantly less than the amount to which he feels he is entitled. (ECF No. 55 at 5-7). Again, as discussed above, Kowal was ineligible to participate in the Sick Leave Incentive Program and was not entitled to sick day benefits at the time he retired. *Supra* Section VI(a)(2)(A). Following Kowal's failure to respond by the February 15, 2018 deadline, Ferndale paid Kowal for the value of his unused accumulated sick days at the Act 93 rate of $115 per day (less his months of post- retirement healthcare coverage and payroll withholdings). *Id.* The Court finds there is no unusually suggestive temporal proximity between Kowal's protected EEOC activity on December 18, 2017, and Ferndale issuing Kowal a check for his unused accumulated sick days on March 5, 2018. *DeFlaminis*, 480 F.3d at 267. Further, Kowal cannot demonstrate a pattern of antagonism, coupled with timing, that would establish a causal link between the date he received his sick day payment and the date he filed a Charge of Discrimination with the EEOC. *Id.* The Court holds that Kowal cannot establish any causal link exists between Ferndale issuing him a check for the value of his sick days and his protected activity with the EEOC for the purposes of establishing a *prima facie* claim of retaliation,

especially since he was not eligible for participation in the Sick Leave Incentive Program.

In sum, Kowal has failed to establish a *prima facie* claim of retaliation against Ferndale. However, even if Kowal had established a *prima facie* claim of retaliation against Ferndale, the Court would still grant Ferndale's motion for summary judgment because Ferndale has met their burden of offering legitimate, non-retaliatory reasons for the adverse employment actions taken against Kowal and Kowal has failed to rebut those reasons.

3. Ferndale Has Put Forth Evidence that Permits a Jury to Find that it Took Adverse Actions Against Kowal for Legitimate, Non-retaliatory Reasons

Assuming *arguendo* Kowal can establish a *prima facie* claim of retaliation against Ferndale, the burden of production shifts to Ferndale to introduce admissible evidence that, if taken as true, would permit a finding that the challenged employment actions were taken for legitimate, non-retaliatory reasons. *Moore v. City of Philadelphia*, 461 F.3d 331, 342 (3d Cir. 2006).

The Court holds that Ferndale has produced evidence that shows it denied a School Board meeting with Kowal, refused further HRA Proposal and other post-retirement healthcare benefit negotiations with Kowal, and paid Kowal the actual value of his unused accumulated sick days for legitimate, non-retaliatory reasons. A jury could find that Kowal experienced these adverse actions because: (1) Kowal was not entitled to an executive session meeting with the School Board, (2) Kowal could have attended any publicly held School Board meeting between December

2017 and April 2018, (3) Kowal could have spoken to the School Board during any public comment period of any publicly held School Board meeting, (4) Kowal failed to meet all prerequisites to be eligible to participate in the Sick Leave Incentive Program, (5) Kowal failed to accept Ferndale's HRA Proposal by the deadline of February 15, 2018 and did not request any extensions to the deadline, (6) Kowal did not request further changes be made to the HRA Proposal or negotiate any other post-retirement healthcare benefits, and (7) Kowal was paid the actual value of his unused accumulated sick days minus the cost of his healthcare coverage and payroll deductions at the Act 93 rate.

Accordingly, Ferndale has satisfied its burden of production to show that it took adverse actions against Kowal for non-retaliatory reasons.

4. Kowal Cannot Show that Ferndale's Reasons for its Adverse Actions Against Him Are Pretextual

Given that Ferndale has met its burden under *McDonnell Douglas*, the burden shifts back to Kowal to show that Ferndale's stated reasons are a pretext for retaliation. Kowal must show pretext by pointing to some evidence which: "(1) casts sufficient doubt upon each of the legitimate reasons proffered by [Ferndale] so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Kowal has failed to demonstrate pretext under both prongs of

Fuentes. (ECF No. 55 at 7). Indeed, the only evidence produced by Kowal to rebut Ferndale's legitimate, non-retaliatory proffered reasons are two email chains—one occurring after the HRA Proposal initial deadline expired on December 21, 2017, and the other email chain occurring after Kowal requested the HRA Proposal be reinstated in March 2018. (ECF No. 59 at 1[155). Neither email chain produced by Kowal demonstrate fabrication, much less that Kowal's EEOC activity was more likely than not a motivating cause for Ferndale's adverse employment actions against him. Kowal has failed to establish that Ferndale's legitimate, non-retaliatory reasons are a pretext for retaliatory conduct.

VII. Conclusion

For the forgoing reasons, the Court grants Defendants' Motion for Summary Judgment. (ECF No. 45). An appropriate order follows.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (NOVEMBER 29, 2021)

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

JOHN KOWAL,

Plaintiff,

v.

FERNDALE AREA SCHOOL DISTRICT and FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

Civil Action No. 3:18-181

Before: Kim R. GIBSON, United States District Judge.

AND NOW, this 29th day of November, 2021, in accordance with Federal Rule of Civil Procedure 58, and the Memorandum Opinion and Order dated November 29, 2021, Judgment is hereby entered in favor of Defendants and against Plaintiff.

BY THE COURT:

/s/ Kim R. Gibson
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (NOVEMBER 29, 2021)

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

JOHN KOWAL,

Plaintiff,

v.

FERNDALE AREA SCHOOL DISTRICT and FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

Case No. 3:18-cv-181

Before: Kim R. GIBSON, United States District Judge.

NOW, this 29th day of November, 2021, upon consideration of Defendants' Motion for Summary Judgment (ECF No. 45), and for the reasons set forth in the accompanying Memorandum Opinion, it is HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF No. 45) is GRANTED.

BY THE COURT:

/s/ Kim R. Gibson
United States District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (JANUARY 3, 2019)

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

JOHN KOWAL,

Plaintiff,

v.

FERNDALE AREA SCHOOL DISTRICT and FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

Case No. 3:18-cv-181

Before: Kim R. GIBSON, United States District Judge.

MEMORANDUM OPINION

I. Introduction

Before the Court is the Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) (ECF No. 6) of Defendants Ferndale Area School District and Ferndale Area Board of Education. In their Motion, Defendants move to dismiss Counts II and III of Plaintiff John Kowal's three-count Complaint. This Motion is fully briefed

(*see* ECF Nos. 7, 9) and is ripe for disposition. For the reasons that follow, the Court will GRANT Defendants' Motion and dismiss Counts II and III of Plaintiff's Complaint without prejudice.

II. Jurisdiction

The Court has jurisdiction over Plaintiff's federal claim pursuant to 28 U.S.C. § 1331. The Court has supplemental jurisdiction over Plaintiff's state-law claims under 28 U.S.C. § 1367. Venue is proper under 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claims occurred in the Western District of Pennsylvania.

III. Background

The following facts, which the Court accepts as true for purposes of deciding this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), are alleged in Plaintiff's Complaint. (ECF No. 1.)

Defendant Ferndale Area School District ("Ferndale") is a public school district in Johnstown, Pennsylvania.[1] (*Id.* ¶ 6.) Ferndale's affairs are governed by Defendant Ferndale Area School District Board of Education (the "Board").[2] (*Id.* ¶ 7.)

Plaintiff John Kowal ("Kowal") worked as the business manager for Ferndale from 1987 until he

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[1] Because Ferndale is a public school district, Ferndale and the Board operate according to the provisions in the Pennsylvania Public School Code of 1949, 24 P.S. § 1-101 *et seq.* (*Id.* ¶¶ 6-7.)

[2] Collectively, Ferndale and the Board are referred to as "Defendants."

retired on September 12, 2017. (*Id.* ¶ 9.) Kowal was 66 years old when he retired. (*Id.* ¶ 10.)

This case arises from a dispute regarding Kowal's healthcare coverage upon his retirement. (*See Id.*) Ferndale has a policy that allows an administrator to exchange forty-five days of unused sick days for one year of employee-spouse healthcare coverage. (*Id.* ¶ 11.)

Kowal retired with 353.5 unused sick days. (*Id.* ¶ 13.) At an October 31, 2017 Board meeting, Ferndale's Superintendent and new Business Manager offered to pay Kowal a total sum of $52,046.70 for his unused leave time.[3] (*Id.* ¶¶ 15-16.) This offer was based on $115 for each unused sick day and $115 for each of his twenty unused vacation days and three unused personal days. (*Id.* ¶ 15.) Kowal refused the offer. (*Id.* ¶ 17.)

The Board discussed Kowal's unused leave time at its November 15, 2017 meeting. Kowal alleges that the Board agreed that Kowal is entitled to exchange his unused sick time for 7.85 years of family healthcare coverage. (*Id.* ¶ 18.) Ferndale's Superintendent conveyed this information to Kowal after the meeting and told him that a Memorandum of Understanding would be forthcoming. However, the Board did not provide Kowal with a Memorandum of Understanding. (*Id.* ¶ 19.)

In December 2017, the Board offered to provide Kowal and his wife with a funded Health Reimbursement Account. (*Id.* ¶ 21.) The Board told Kowal

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[3] Kowal's Complaint does not name the Superintendent. But subsequent filings indicate that Kowal refers to Superintendent Carole Kakabar. (*See* ECF No. 7 at 7 n.2, 9, 10.)

that he must accept the offer by December 20, 2017. (*Id.* ¶ 22.) On December 11, 2017, Kowal sent a counteroffer to the Board. (*Id.* ¶ 23.) In response, Ferndale's Superintendent sent Kowal another version of the offer with final revisions. (*Id.* ¶ 24.)

On December 19, 2017—one day before the offer's expiration—Kowal sent the Superintendent an email requesting an extension to decide on Defendants' offer. (*Id.* ¶ 26.) In this email, Kowal advised the Superintendent that he filed a charge of discrimination against Defendants with the Equal Employment Opportunity Commission (EEOC). (*Id.*) In his December 19 email, Kowal also complained that he repeatedly requested to meet with members of the Board. (*Id.* ¶ 28.)

In a January 16, 2018 letter, the Superintendent advised Kowal that the Board would delay meeting with him because Kowal had indicated that he considered taking legal action against the Defendants.[4] (*Id.* ¶ 29.)

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[4] Specifically, the January 16, 2018 letter stated that:

> [while] Section 708 of the Sunshine Law should permit the Board to meet with you, the Board is respectfully declining that offer to meet with them. There are several factors that come into play. 1) You placed yourself on the District's insurance without ever having talked to me, the Solicitor, or the Board before you retired. 2) You have indicated that you would possibly be instituting legal proceedings against the School District. 3) You have indicated that you have an initial interview with the EEOC to determine if other fair employment laws have been violated. 4) You have indicated that it may be necessary to secure an attorney. In light of the above, and particularly with the threat of litigation and claims that the District has

Kowal's health coverage was terminated on March 1, 2018. (*Id.* ¶ 31.) On March 22, 2018, Kowal sent an email to the Superintendent stating that he and his wife had decided to accept the Board's offer to establish a Health Reimbursement Account. (*Id.* ¶¶ 32-33.) Kowal also stated that the EEOC had completed its investigation and had issued a Dismissal and Notice of Rights. (*Id.* ¶ 32.) The Superintendent responded by stating that she would forward the email to legal counsel. (*Id.* ¶ 34.)

On April 19, 2018, Defendants sent Kowal a check for $22,213.71. (*Id.* ¶ 35.) Kowal alleges that this check did not adequately compensate him for his unused sick days, which are worth approximately $196,000, or his unused vacation and personal days, which are worth approximately $11,452. (*Id.* ¶ 36.)

On June 18, 2018, after receiving the check, Kowal filed a second charge of discrimination with the EEOC. (*Id.* ¶ 39.) Kowal alleged that Defendants retaliated against Kowal after he filed his first charge of discrimination with the EEOC. (*Id.*) Specifically, Kowal alleges that Defendants refused to allow Kowal to address the Board and refused to continue negotiations over his healthcare coverage. (*Id.*) The EEOC mailed Kowal a Dismissal and Notice of Rights on July 10, 2018. (*Id.* ¶ 40.)

On September 14, 2018, Kowal filed a Complaint in this Court. (*See* ECF No. 1.) Kowal's Complaint alleges: (1) that Defendants violated the Age Discrimi-

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somehow violated fair employment practices laws, gives us a moment for pause to meet with you.

(ECF No. 1 ¶ 29.)

nation in Employment Act (ADEA) (Count I); (2) that Defendants discriminated against him in violation of the Pennsylvania Human Resources Act (PHRA) (Count II); and (3) breach of contract (Count III).

Defendants filed a Motion to Dismiss (ECF No. 6) Counts II and III of Kowal's Complaint and a Brief in Support on November 19, 2018. (ECF No. 7.) Kowal filed his response on December 11, 2018. (*See* ECF Nos. 8, 9.)

IV. Standard of Review

A complaint may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016). But detailed pleading is not generally required. *Id.* The Rules demand only "a short and plain statement of the claim showing that the pleader is entitled to relief' to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)).

Under the pleading regime established by Twombly and Iqbal, a court reviewing the sufficiency of a complaint must take three steps.[5] First, the court must "tak[e] note of the elements [the] plaintiff

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[5] Although *Iqbal* described the process as a "two-pronged approach," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), the Supreme Court noted the elements of the pertinent claim before proceeding with that approach, *id.* at 675-79. Thus, the Third Circuit has described the process as a three-step approach. *See Connelly*, 809 F.3d at 787; *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 n.4 (3d Cir. 2011) (citing *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (2010)).

must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679; *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224 (3d Cir. 2011) ("Mere restatements of the elements of a claim are not entitled to the assumption of truth.") (citation omitted). Finally, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Connelly*, 809 F.3d at 786. Ultimately, the plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

V. Discussion

A. The Court Will Dismiss Count II Because Kowal Acknowledges that he Did Not Exhaust Administrative Remedies

In their Motion to Dismiss, Defendants argue that Count II of Kowal's Complaint—discrimination under the PHRA—fails because Kowal did not exhaust his administrative remedies with the Pennsylvania Human Rights Commission. (ECF No. 7 at 5.) *See also Burgh v. Borough Council of Montrose*, 251 F.3d 465, 471 (3d Cir. 2001).

In his response to Defendants' Motion to Dismiss, Kowal acknowledges that he did not exhaust his

administrative remedies with the Pennsylvania Human Rights Commission, and therefore concedes that Count II of the Complaint must be dismissed. (ECF No. 9 at 2.) Accordingly, the Court will dismiss Count II of Kowal's Complaint.

In his response, Kowal further notes that he "will file an Amended Complaint on February 29, 2019, incorporating the PHRA count." (*Id.* at 2.) The Court notes that according to the Federal Rules of Civil Procedure, Kowal must seek leave of Court to amend his Complaint in the future.[6]

B. The Court Will Dismiss Count III Because Defendants and Kowal Did Not Form a Binding Contract

In Count III of his Complaint, Kowal alleges that Defendants are liable to him for breach of contract. Kowal alleges that the Board agreed to provide Kowal with 7.85 years of family health coverage at the November 17, 2017 board meeting, but then never followed through on its this agreement. (ECF No. 1 ¶¶ 51-52.)

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[6] Federal Rule of Civil Procedure 15(a)(l) provides that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(6), (e), or (f), whichever is earlier." Since the time periods to amend as a matter of course under Rule 15(a)(l) will have passed by February 29, 2019, Kowal must seek leave to amend. *See* Fed. R. Civ. P. 15(a)(2) ("In all other cases, a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so required.").

In his Complaint and Motion to Dismiss, Kowal alleges that a contract was formed whenever the Board "agreed" that he was entitled 7.85 years of family health coverage in exchange for his unused sick days. (*See* ECF No. 1 ¶¶ 51-52; ECF No. 9 at 2-3.) The breach of contract count in Kowal's Complaint contains only two paragraphs—one incorporating prior allegations by reference and another stating that "[t]he failure of the Defendants to provide to Mr. Kowal 7.85 years of family coverage, as agreed at the School Board meeting of November 15, 2017, is a breach of the agreement between the parties, depriving Mr. Kowal of the benefits of the bargain." (*Id.*)

Kowal's Motion to Dismiss does little to bolster or explain the sparse allegation in his Complaint. (*See* ECF No. 9 at 2-3.) In his Motion to Dismiss, he reiterates that the Board agreed that Kowal was entitled to 7.85 years of family health coverage at the November 17, 2017 Board meeting. (*Id.* at 2.) He further alleges that Ferndale's Superintendent stated the Board would provide Kowal with a "Memorandum of Understanding," but did not follow through. (*Id.* at 2-3.)

Based on these allegations, Kowal fails to adequately plead a breach of contract claim. "It is well-established that three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of the contract, and (3) resultant damages." *See, e.g., Meyer, Darragh, Buckler, Benenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1528 (Pa. 2016) (citing *J.F. Walker Co., Inc. v. Excalibur Oil Grp. Inc.*, 792 A.2d 1269, 1272 (Pa. Super. 2002)). Under Pennsylvania law, the question of whether an undisputed set of facts estab-

lishes a contract is a matter of law. *Quandry Sols. Inc. v. Verifone Inc.*, No. 07-097, 2009 WL 997041, at *5 (E.D. Pa. Apr. 13, 2009) (quoting *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1101 (Pa. Super. Ct. 2001)).

"Although a plaintiff need not state every term of the contract in complete detail, every element must be specifically pleaded." *Ebrahimzadeh v. Sharestates Inv., LLC*, No. 18-1659, 2018 WL 6065419, *5 (E.D. Pa. Nov. 20, 2018) (citing *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999)). Here, Kowal fails to plead the existence of a valid contract.

Specific pleading "is particularly important where an oral contract is alleged." *Pennsy Supply, Inc. v. Am. Ash. Recycling Corp. of Pa.*, 895 A.2d 595, 600 (Pa. Super. 2006). "The party alleging the breach of an oral contract bears the burden of proving the existence of that contract with clear and convincing evidence." *Bennett v. Itochu Int'l, Inc.*, No. 09-cv-1819, 2012 WL 2637404, *16 (E.D. Pa. Aug. 23, 2012) (citing *Luther v. Kia Motors Am., Inc.*, 676 F. Supp. 2d 408,416 (W.D. Pa. 2009)).

Kowal's breach of contract claims fails because he does not sufficiently allege that he and the Board formed a valid contract. Even accepting the allegations in his Complaint as true, Kowal does not establish any of the three essential elements to contract formation-offer, acceptance, and consideration.

First, Kowal's breach of contract claim fails because he does not allege that there was a valid offer. To form a valid contract, one party must make an offer to another party. An offer "is a manifestation of willingness to enter into a bargain, which would justify

another person in understanding that his assent to that bargain is invited and will conclude it." *See, e.g.*, *Delaware River Tow, LLC v. Nelson*, No. 04-2850, 2005 WL 331706, *4 (E.D. Pa. Feb. 10, 2005); *Phila. Newspapers, Inc. v. Comm. Unemployment Comp. Bd. of Review*, 426 A.2d 1289 (Pa. Cmwlth. 1981) (citing RESTATEMENT (SECOND) OF CONTRACTS § 24).

However, Kowal's Complaint does not indicate which party made an offer, which party accepted an offer, or any other conduct by the parties that led to the formation of a binding contract. (*See* ECF No. 1 ¶¶ 51-52.)

Kowal's Complaint alleges that an "agreement" was reached at the School Board meeting of November 15, 2017. (*Id.* ¶ 52.) However, Kowal's Motion to Dismiss states that Defendants did not inform Kowal of this alleged agreement until after the meeting. (ECF No. 9 at 2.) Kowal does not allege that he made an offer to the Board before or during the November 15, 2017 meeting. He does not allege that the Board made an offer to him in connection with the "agreement" before or during the November 15 meeting. Rather, he alleges that the members of the Board reached an agreement at the November 15 meeting without Kowal's participation. Kowal does not allege that the Board invited his assent to the agreement. Thus, the "agreement" Kowal refers to appears to be a unilateral agreement reached among member of the Board without Kowal's input or participation. This indicates that neither party made a valid offer, and therefore that a valid contract never existed.

Kowal also alleges that when the Board informed him of the "agreement" after the November 15, 2017 meeting, the Board stated that it would subsequently

provide him with a Memorandum of Understanding. (ECF No. 1 ¶ 19.) This allegation further indicates that the parties did not form a valid contract. It appears that the Board stated that it would provide Kowal with a written offer to memorialize the Board's unilateral "agreement" at a later date through a Memorandum of Understanding—at which point Kowal could manifest assent to the Board's agreement. Therefore, the Court finds that Kowal's allegations regarding the "agreement" are only evidence of preliminary negotiations, and not evidence of a binding contract. *See Bennett*, 2012 WL 3627404, at *16 ("It is not enough to show preliminary negotiations or an agreement to enter into a binding contract in the future.").

Second, Kowal's breach of contract claim fails, even assuming that Kowal alleges a valid offer, because he does not allege acceptance. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Delaware River Tow*, 2005 WL 331706, *4 (citing RESTATEMENT (SECOND) OF CONTRACTS § 50). Here, Kowal does not allege that he manifested assent to the terms of any offer made by the Board after the November 15, 2017 Board meeting. Therefore, Kowal does not allege that the parties formed a binding contract.

Third, Kowal's breach of contract claim fails because he does not allege consideration.[7] Consider-

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[7] Consideration is a basic requirement for contract formation. Consideration has also been defined as the "inducement to a contract . . . [through] some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other." *Great Northern*

ation "confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance, or return promise bargained for and given in exchange for the original promise." *Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291, 299 (3d Cir. 1986) (interpreting Pennsylvania law). "Where . . . there is no agreement or even a discussion as to any of the essential terms of an alleged bargain, such as . . . consideration, the 'agreement' is too indefinite for a party to reasonably believe that it could be enforceable in an action at law." *Ecore Int'l, Inc. v. Downey*, No. 11-6843, 2018 WL 6333965, *20 (E.D. Pa. Oct. 12, 2018) (citing *Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. Ct. 2006)). Here, Kowal does not allege that he and the Board exchanged value in consideration of a bargained-for performance, forbearance or return promise. Moreover, Kowal does not allege that the "agreement" at the Board's November 15, 2017 meeting created an affirmative, bargained-for obligation for the Board to act or Kowal to refrain from acting.

Accordingly, the Court will dismiss Kowal's breach of contract claim because Kowal fails to allege facts indicating that he and the Board entered into a valid contract. However, the Court will grant leave to amend because it finds that Kowal may be able to

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Ins. Co. v. ADT Sec. Servs., Inc., 517 F. Supp. 2d 723, 736 (W.D. Pa. 2007); *Crawford's Auto Ctr., Inc. v. Commw. of Pa.*, 655 A.2d 1064, 1068 n. 8 (Pa. Commw. Ct. 1995) (citing BLACK'S LAW DICTIONARY at 277-78 (5th ed.1979); RESTATEMENT (SECOND) CONTRACTS § 71 (1981)).

cure the deficiencies of his breach of contract claim through more specific pleading.[8]

VI. Conclusion

For the reasons set forth above, the Court will grant Defendants' Motion to Dismiss. The Court will dismiss Counts II and III of Kowal's Complaint without prejudice.

A corresponding order follows.

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[8] "[I]f a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile." *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App'x 116, 126 (3d Cir. 2015) (quoting *Phillips*, 515 F.3d at 245). Amendment would be futile "if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted." *Munchak v. Ruckno*, 692 F. App'x 100, 102 (3d Cir. 2017) (internal citations omitted); *see also Munksjo Paper AB v. Bedford Materials Co.*, No. 3:16-CV-270, 2018 WL 1866086, at "6 (W.D. Pa. Apr. 18, 2018) (Gibson, J.).

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (JANUARY 3, 2019)

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

JOHN KOWAL,

Plaintiff,

v.

FERNDALE AREA SCHOOL DISTRICT and FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Defendants.

Case No. 3:18-cv-181

Before: Kim R. GIBSON, United States District Judge.

AND NOW, this 3rd day of January, 2019, upon consideration of the Defendants' Motion to Dismiss (ECF No. 6), IT IS HEREBY ORDERED that the Motion is GRANTED. Counts II and III of Plaintiff's Complaint are hereby dismissed without prejudice. IT IS FURTHER ORDERED THAT:

(1) Kowal must file an amended complaint on or before January 31, 2019;

(2) If Kowal chooses to refile Count II after January 31, 2019, he must seek leave of court to do so.

BY THE COURT:

/s/ Kim R. Gibson
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC (FEBRUARY 9, 2023)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN KOWAL,

Appellant,

v.

FERNDALE AREA SCHOOL DISTRICT;
FERNDALE AREA SCHOOL DISTRICT
BOARD OF EDUCATION

No. 21-3386

(W.D. Pa. No. 3:18-cv-00181)

Before: CHAGARES, Chief Judge, AMBRO*, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and SCIRICA**, Circuit Judges.

* At the time the petition for rehearing was submitted to the en banc panel, Judge Ambro was an active judge of the Court. 3rd Cir. I.O.P.9.5.2.

** Judge Scirica's vote is limited to panel rehearing only.

ORDER

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Thomas L. Ambro
Circuit Judge

Dated: February 9, 2023

Tmm/cc: John Kowal
Carl P. Beard, Esq.
Jennifer L. Dambeck, Esq.

FERNDALE AREA SCHOOL DISTRICT
ACT 93 AGREEMENT

SICK LEAVE INCENTIVE UPON RETIREMENT

An employee shall be eligible for Sick Leave Incentive Upon Retirement if and only if:

(i) the employee shall submit his/her resignation for purposes of retirement to the Superintendent prior to January 15 of the year in which he/she elects to retire;

(ii) the retirement shall be effective subsequent to the last school day of the school year and prior to August 15 of the year of retirement;

(iii) the employee shall have a minimum of 15 years of service as a professional employee under the provisions of the Pennsylvania School Employees Retirement System and have attained the age of 51 as of retirement;

(iv) the employee shall have provided, as a professional employee of "DISTRICT", at least 8 years of service;

(v) the retirement shall occur before the employee attains the age of eligibility for Medicare; and

(vi) the employee shall not (except for "Restoration of Health Sabbatical") have taken a Compensated Leave at any time within the 6 fiscal years (July 1–June 30) immediately proceeding the fiscal year during which retirement occurs.

An employee who qualifies for Sick Leave Incentive Upon Retirement by meeting each of the aforesaid criteria shall, prior to the effective date of retirement, be permitted to elect, in writing, option (i), (ii), (iii) or (iv) set forth below. Such election, once made, shall be final. Such election by administrators may be changed.

The options available to a qualified employee shall be as follows:

(i) 1 year of health care coverage (exclusive of dental insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof, the coverage provided in Article IX, Section A) for the employee and his/her dependents for each 45 days of unused accumulated sick leave as of the effective date of retirement, with any block of days not equal to 45 to be pro-rated to provide a portion of the coverage in the final year (*i.e.*, 110 unused days shall result in two years of complete coverage, and the District being obligated for 44% of the 3rd year premiums);

(ii) One year of health care coverage (exclusive of dental insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof the coverage provided in Article IX, Section A) for the employee only, for each 20 days of unused accumulated sick leave as of the effective date of retirement, with any block of days not equal to 20 to be pro-rated to provide a portion of the coverage in the final year (*i.e.*, 110 days shall result in five years of complete coverage, and Dis-

trict being obligated for 50% percent of the 5th year premium);

(iii) The District being responsible for the percentages of health care coverage premiums (exclusive of dental insurance) as provided for in the contract in effect for the year of coverage (as of the date hereof, the coverage provided in Article IX, Section A) for the, employee until the earlier of his/her demise, attainment of the age of 65, or eligibility for Medicare, determined as set forth below, to a maximum District liability of $2,000.00 per annum, The percentage of annual premium to be paid by the District shall be determined by dividing the number of unused accumulated sick days as of the effective date of retirement by the total number of sick days earned by the employee while employed by the District or its predecessors (*i.e.*, 200 total sick days earned while employed by Ferndale /Dale and District, 120 days of unused accumulated sick days as of effective date of retirement, results in 60% premium payment); or

(iv) Payment by the District to employee, on or before October 15 of each year, of the amount the District would have been required to pay as health care coverage premiums for employee had employee elected option (iii),

(v) Payment by the District to employee of $115 for each sick day not used for the above.

FERNDALE AREA SCHOOL DISTRICT
RETIREMENT HEALTHCARE AGREEMENT

The Ferndale Area School District will establish a Health Reimbursement Arrangement (HRA) for Medicare eligible retiree (John Kowal) of the Ferndale Area School District. The Highmark HRA shall be administered as follows:

1. A Highmark Health Reimbursement Arrangement for Medicare premium and eligible medical expenses will be established for the retiree and spouse. Medicare premium shall include Medicare Part B, Part D, and Medicare Supplement or Advantage Plans, whichever is applicable/chosen. Eligible medical expenses shall include health plan deductibles, co-payments, coinsurance amounts and other qualifying medical expenses that are payable by the retiree/spouse under the Medicare Plan covering the retiree and spouse.

2. The District provided retiree/spouse contribution amount, credited annually, shall be an amount equal to the annual premium cost, plus the District HSA Contribution Amount for an employee/spouse plan under the Ferndale Area School District Medical/Drug plan in effect for similarly situated active employees for the applicable plan year. Any funds remaining in the HRA at the end of each year will rollover to the next year.

3. Kowal has 353 sick days to exchange for healthcare coverage at 45 days per 1 year of employee and spouse coverage, or 20 days per 1 year single (individual) coverage, per the Act 93 Agreement covering July 1, 2015-June 30, 2018.

4. The District provided annual retiree/spouse contribution arrangement shall remain in effect for the period beginning January 1, 2018 and ending on July 31, 2025. In 2025 the retiree/spouse contribution amount will be pro-rated for 7 months. Any funds remaining in the HRA as of July 31, 2025 will remain available for use towards eligible medical expenses for 18 months at which time the HRA will be closed, and any remaining funds in the HRA will be forfeited.

5. In the event of the death of the retiree or spouse, the District provided annual contribution amount will be converted from retiree/spouse to an Individual contribution amount. The length of health-care coverage for the surviving spouse will be calculated at 20 days per 1 year of single (individual) coverage, using the balance of sick days remaining to exchange at this rate until exchanged sick days are exhausted. In the last year of eligibility, if less than 20 sick days remain to exchange the contribution amount will be pro-rated. The Individual contribution amount, credited annually, shall be an amount equal to the annual premium cost, plus the District HSA Contribution Amount for an Individual plan under the Ferndale Area School District Medical/Drug plan in effect for similarly situated active employees for the applicable plan year, ln the event both the retiree and spouse pass away prior to the expiration period stated above, benefits shall cease at the end of the first month in which both are deceased, and any remaining funds in the HRA will be forfeited. The balance of unused sick days remaining to exchange for health-care coverage will be payable to the Estate of John Kowal at the rate of $115 per sick day remaining, minus any required tax deductions.

FERNDALE AREA SCHOOL DISTRICT AND JOHN KOWAL INDEPENDENT CONTRACTOR CONTRACT

FERNDALE AREA SCHOOL DISTRICT

100 Dartmouth Avenue
Johnstown, PA 15905
[814] 535-1507
Fax [814] 535-8527

Contract between Ferndale Area School District and John Kowal (Independent Contractor)

The length of this contract will be for the period September 1, 2017 – August 31, 2018.

The Ferndale Area School District will employ John Kowal as an independent contractor for the District Business Office. Salary paid will be at Mr. Kowal's hourly rate. Mr. Kowal will be called in on an as needed basis, determined by the Superintendent and the District Business Manager.

Mr. Kowal will keep and submit to the Superintendent a monthly log of hours worked. Mr. Kowal will report directly to the District Business Manager and the Superintendent.

Mr. Kowal will also sign the attached Acknowledgement of Risk and Hold Harmless Agreement with FASD.

Contracted Services include:

- Mentor and help to transition the new Business Manager.
- Other duties as necessary or identified.

/s/ John Kowal
John Kowal, Independent Contractor

8-11-17/Date

/s/ Carole Kakabar
Carole Kakabar, FASD Superintendent

8-17-17/Date

/s/ David Gates
David Gates, FASD Business Manager

8-21-17/Date

It is the policy of the FASD not to discriminate in employment or program service for reasons or race, color, sex age, religion, national origin, or handicapping condition.

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