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

JOSEPH ZOREK,	:	No: 1:13-cv-01949-JEJ
	:	
Plaintiff	:	Hon. John E. Jones, III
	:	
v.	:	
	:	JURY TRIAL DEMANDED
CVS PHARMACY, INC., CVS Rx	:	
SERVICES, INC., PAXTON SQUARE	:	ELECTRONICALLY FILED
CVS, INC., and PENNSYLVANIA	:	
CVS PHARMACY, L.L.C.,	:	
	:	
Defendants.	:	

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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I. ARGUMENT

A. There is No Factual or Legal Basis to Hold That CVS is a "Public Body" Under the PWL.

Plaintiff argues that CVS is a "public body" because it receives Medicaid funds from the Pennsylvania Department of Public Welfare (DPW) in the form of reimbursements for prescriptions purchased by Medicaid-eligible patients at CVS stores in Pennsylvania. This position continues to be without merit.[1]

1. The Court Can Consider the Updyke Affidavit Without Converting This into a Summary Judgment Motion.

Plaintiff first argues that the Court should disregard the Affidavit of Eileen Updyke, a representative of the DPW who summarized the type of Medicaid funds paid to CVS. However, this issue is actually moot in light of plaintiff's more detailed allegations about Medicaid funds in the Second Amended Complaint. Plaintiff's original Amended Complaint only vaguely alleged that CVS "received Medicaid and Medicare funds" from the Commonwealth, without any explanation of what *type* of funds. *See* Doc. 25, ¶ 160. As a result of this ambiguity, CVS submitted the Updyke Affidavit in its first Motion to Dismiss solely to confirm that CVS was not receiving any grant funding or agency appropriations from DPW –

[1] In his Second Amended Complaint, plaintiff also alleged for the first time that alleged *overbilling* of Medicaid by CVS can constitute "funding" because there was no benefit to patients attendant to the alleged excess revenue. *See* SAC, ¶¶ 172-178. Presumably in response to CVS's argument that the two Medicaid lawsuits upon which these allegations were based are irrelevant, *see* Def. Moving Br. [Doc. 38], at 9-10 & n.2, plaintiff has abandoned this argument in his brief. Pl. Opp. Br. [Doc. 42], at 9-12. Therefore, the only issue here is whether Medicaid Reimbursements transform CVS into a public body under the PWL.

which clearly would constitute government funding – but rather was only receiving patient Medicaid Reimbursements. However, in his Second Amended Complaint, plaintiff has clarified his allegations to state that CVS only receives Medicaid funds in the form of "revenue" from patient Medicaid "reimbursements." *See* SAC, ¶¶ 172-178. Since there is now no dispute that CVS only receives Medicaid Reimbursements, there is no reason to disregard the Updyke Affidavit.[2]

2. CVS Did Not Elect to be Treated as a Public Body By Receiving Medicaid Reimbursements.

Plaintiff's central argument is that "CVS elected to be treated as a public body under the PWL by receiving Medicaid funding through the Commonwealth." Pl. Opp. Br. at 7-12. This argument is meritless. Plaintiff's strained effort to change the plain meaning of government funding – from the traditional notion of a business receiving subsidies from government grants or appropriations, to an absurd notion of a healthcare provider earning "revenue" from prescription sales made to patient beneficiaries of a government assistance program – should be rejected.

[2] Even if this issue was relevant, the Court could take "judicial notice" of the facts stated in the Updyke Affidavit. *See* Fed. R. Evid. 201(b)(2). Because the DPW is the very agency responsible for administering the Pennsylvania Medical Assistance program, the accuracy of its sworn statement about what types of Medicaid payments were made to one of its providers "cannot reasonably be questioned." *Id*. Even under *Pension Benefit Guaranty Corp. v. White Consol. Indus.*, 998 F.2d 1192 (3rd Cir. 1993) this Court could consider the Updyke Affidavit because the contents thereof are "integral" to plaintiff's claim that CVS was "funded by or through" the Commonwealth. *See In re: Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3rd Cir. 1997); *Sands v. McCormick*, 502 F.3d 263, 268 (3rd Cir. 2007).

a. The Plain Meaning and Legislative History of the PWL Support CVS's Position.

In predicting how Pennsylvania's Supreme Court would resolve an unresolved issue of state law, the District Court can consider "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *Nationwide Mut. Inc. Co. v. Buffetta*, 230 F.3d 634, 637 (3rd Cir. 2000); *see also Pacific Employers Ins. Co. v. Global Reinsurance Corp. of America*, 693 F.3d 417, 433 (3rd Cir. 2012) (court "can…give due regard, but not conclusive effect, to the decisional law of lower state courts"). Here, the most "reliable data" on this issue is the PWL's plain language and legislative history. *See Petty v. Hospital Service Ass'n of N.E. Pa.*, 611 Pa. 119, 126-27, 23 A.3d 1004, 1008 (2011). Both make clear that the phrase "funded…by or through [the] Commonwealth" refers to traditional government funding and not to mere receipt of "revenue" earned from patient Medicaid Reimbursements.

The statute lists three types of entities that can be considered a "public body" thereunder: (1) a state agency, department, "or other body in the executive branch of State government;" (2) a county, city, or other local governing body, board or commission; and (3) "Any other body which is created by Commonwealth or subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that

body." 43 P.S. § 1422. Under the interpretive doctrine of *ejusdem generis*, "general expressions used in a statute are restricted to things and persons similar to those specifically enumerated in the language preceding the general expressions." *Petty*, 611 Pa. at 128, 23 A.3d at 1009. Here, the language preceding the phrase "funded…by or through [the] Commonwealth" lists state, county, and local government agencies as "public bodies." Thus, the "funded…by or through" language can only mean that the subject entity received traditional government funding from one of those public bodies. Had the legislature intended for this phrase to apply to mere receipt of payment from a government body for services rendered to beneficiaries of public assistance, the legislature would have included such language in the definition. *Commonwealth of Pa. v. Russo*, 594 Pa. 119, 130-31, 934 A.2d 1199, 1205-06 (2007) (applying doctrine of *ejusdem generis*).

The PWL's legislative history confirms that the definition of public body was intended to be limited to government agencies and entities that receive traditional government funding. When legislators debated the definition of "public body" in the original bill, the discussions centered on the threshold levels of "State funding" received by non-governmental organizations that would subject them to the PWL. *See* Exhibit A [Pa. Legislative Journal—House, June 18, 1985, at 1230-1233, 1277-1278]. In context of the debate, the phrase "State funding" clearly referred to the level of traditional government funding provided to the subject

entity. There was no suggestion that an organization's mere receipt of payments from the Commonwealth for services rendered – such as patient Medicaid Reimbursements – would constitute such "funding." *See Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 240-41, 622 A.2d 355, 360 (1993) (performance of "government contracts" did not transform private company into "public body" under PWL). In fact, there is a bill currently pending in the Pennsylvania Legislature that would extend the PWL's definition of "Employer" to include a "public body" or any individual, partnership, or corporation "which receives money from a public body to perform work or provide services." *See* Exhibit B [2013 Pa. House Bill No. 118]. This bill demonstrates that the Legislature does not believe that the current version of the PWL applies to private entities that receive "money from a public body to perform work or provide services." There would be no reason for this amendment if the PWL already covers such entities.

In sum, the text and legislative history of the PWL, as well as the recently introduced bill, make clear that the PWL only applies to entities that receive "State funding" as that phrase has been commonly understood; and not to private entities that only receive "revenue" for services rendered to Medicaid-eligible patients.

Viewed in this light, *Denton v. Silver Stream Nursing and Rehab. Center*, 739 A.2d 571 (Pa. Super. 1999) is inapposite. First, it is unclear that the funds received from Medicaid in that case were *reimbursements*, as the plaintiff only

alleged that the defendants "receive Medicaid *funds* through the state," and the Court only held "that a recipient of Medicaid *funding* is a 'public body' for purposes of the Whistleblower Law." *Id.* at 576 (emphasis added). It is possible that the "Medicaid funds" could have been grant funding or appropriations, which would clearly constitute government funding, as the Superior Court held in *Riggio v. Burns*, 711 A.2d 497, 499-500 (Pa. Super. 1998). Moreover, *Denton* primarily addressed the defendant's argument that no Medicaid money *at all* could qualify as government funding since the money passed through the Commonwealth from the federal government, instead of being "appropriated" by the legislature. *Id.* at 576. The Court correctly held that "pass through funds" qualify as funding, since the definition of "public body" includes entities "funded in any amount by *or through*" the Commonwealth. *Id.* at 576. But that is as far as the Court went in its analysis:

> The [PWL] clearly indicates that it is intended to be applied to bodies that receive not only money appropriated *by* the Commonwealth, but also public money that passes *through* the Commonwealth. We find, therefore, that a recipient of Medicaid funding is a 'public body' for purposes of the Whistleblower Law.

Id. at 576 (emphasis in original).

In short, *Denton* did not address the issue presented here and therefore is not "persuasive data" that can override the PWL's plain meaning and legislative history. Indeed, just days ago, the Eastern District of Pennsylvania again declined to follow *Denton* and instead adopted the reasoning of *Cohen* and *Tanay* in holding

that government assistance reimbursements do not constitute government funding, and that therefore the defendant was not subject to the PWL. *See Bickings v. NHS Human Servs.*, No. 13-2894, 2014 WL 307549, at *5-7 (E.D. Pa., Jan. 27, 2014) (reiterating reasoning of *Tanay* that legislature could not have intended to "transform private entities into public bodies" merely by "accept[ing] payment from a recipient of government assistance"). We urge this Court to do the same.

b. The Medicaid Regulatory Scheme Supports CVS's Position.

Plaintiff argues that the Medicaid regulatory scheme supports his position that CVS is a "public body" under the PWL. Pl. Opp. Br. at 9-12. However, the Medicaid statutes and regulations only support CVS's position that Medicaid Reimbursements do not constitute government "funding" of private entities.

The federal and state Medicaid statutes provide for medical assistance, including prescription drugs, to those termed "categorically needy" and "medically needy." *See* 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(12); 55 Pa. Code §§ 1101.31 and 1121.1; *see also Pennsylvania Pharma. Ass'n v. Department of Pub. Welfare*, 542 F. Supp. 1349, 1350-51 (W.D. Pa. 1982). Healthcare companies such as pharmacies can be qualified as Medicaid "providers" that get reimbursed for providing medical services or products to Medicaid-eligible patients. *See* 55 Pa. Code §§ 1101.21, 1101.41-.43 and 1101.51. However, it is the patients, not the Providers, who are considered to be the beneficiaries of the Medicaid program.

See Pennsylvania Pharma. Ass'n, 542 F. Supp. at 1355-56; *accord Green v. Cashman*, 605 F.2d 945, 946 (6th Cir. 1979); *Geriatrics, Inc. v. Harris*, 640 F.2d 262, 265 (10th Cir. 1981); *Silver v. Baggiano*, 804 F.2d 1211, 1217 n.3 (11th Cir. 1986); *Tanay v. Encore Healthcare, LLC*, 810 F.Supp.2d 734, 742-44 (E.D. Pa. 2011); *see also E.D.B. v. Clair*, 605 Pa. 73, 987 A.2d 681, 684-85 (2009).

Under this regulatory scheme, the fact that a pharmacy "Provider" may receive revenue for selling prescription drugs to Medicaid-eligible patients is merely incidental to the statute's principal goal – to aid the "needy." It does not mean that those Providers are being "funded" or subsidized by the government. *See Pennsylvania Pharma. Ass'n*, 542 F. Supp. at 1355-56 (Medicaid was intended to "provide health care for the poor and aged, not to subsidize or otherwise to benefit health care providers); *Green*, 605 F.2d at 946 ("We do not find in [the Medicaid statute] any legislative intention to provide financial assistance to providers of care for their own benefit. Rather, the statute is designed to aid the patients and clients of such facilities"); *Tanay*, 810 F.Supp.2d at 742-44 ("a governmental assistance program…does not qualify as funding" because "the intended beneficiaries of Medicaid are patients, not healthcare providers").[3]

[3] Plaintiff's citation to *Riggio* on this point (Pl. Opp. Br. at 12) is completely misplaced. There, the Court's statement that "it is not unreasonable for the legislature to condition the receipt of state funds on the acceptance of the responsibilities embodied in the Whistleblower Law" was based on the admitted fact that the defendant received "yearly appropriations" – i.e., direct government funding – from the Commonwealth. *Riggio*, 711 A.2d at 499. Plaintiff makes no such allegation here.

Moreover, the fact that the Medicaid scheme contains various prohibitions and penalties for fraud, overbilling and submission of false claims by Providers (Pl. Opp. Br. at 10-12) does not suggest that the Providers are considered to be receiving government "funding" or are otherwise deemed public bodies under the PWL. At bottom, the reimbursements paid to the Providers are government-sponsored insurance payments, and the insurance carriers – i.e., the federal and state governments – have every right to condition participation on the Providers adhering to basic integrity and billing rules. Those rules do not transform private healthcare providers into public bodies under the PWL.

B. Plaintiff Did Not Report "Wrongdoing" Under the PWL.

Plaintiff next argues that by informing his supervisors that his store was dispensing mislabeled and misfilled prescriptions, he was reporting "wrongdoing" under the PWL since pharmacy regulations require accurate prescriptions. Pl. Opp. Br. at 12-13. This argument mischaracterizes plaintiff's own allegations.

In his Second Amended Complaint, plaintiff does not allege that he was complaining in a vacuum that his store was making dispensing errors. Rather, the gravamen of plaintiff's claim is that he was complaining about a particular *corporate decision* – namely, CVS's reduction of pharmacy technician hours – which he claims created the conditions that allegedly led to a higher incidence of inadvertent technician mistakes. *See* SAC, ¶¶ 54, 56, 58, 180-181. Plaintiff's

attempt in his opposition brief to ignore his own allegations that the staffing decision is what led to the mistakes should be rejected, and the Court must analyze whether that corporate decision constitutes "wrongdoing" under the PWL. For the reasons stated in CVS's moving brief, it does not.[4] See Def. Moving Br. at 10-13.

C. A Wrongful Termination Claim Under the PWL is Time-Barred.

Plaintiff argues that his PWL claim – relating to the alleged "threats" made to him on April 29, 2011 – is timely. Pl. Opp. Br. at 15. However, CVS did not argue in its motion that any claim of wrongful threats was time barred. Rather, CVS only argued that, *if* plaintiff is attempting to pursue a *wrongful termination claim* under the PWL, that claim is time barred. Plaintiff's attempt to twist CVS's argument is baffling. Be that as it may, plaintiff has not addressed, and therefore appears to concede, that any claim of *wrongful termination* under the PWL, is time barred, and the Stipulation filed by the parties (Doc. #26) does not affect this analysis. That Stipulation merely effectuated the parties' agreement to transplant the "*existing* state court PWL count" – which solely alleged a threat of demotion – into this action without impacting any statute of limitations arguments applicable to *that claim*. The Stipulation cannot save a heretofore unasserted, and now time-barred, wrongful discharge claim under the PWL.

[4] Plaintiff also argues that he adequately pleaded a "causal connection" between his alleged complaints and Pete Gaetani's alleged threats on April 29, 2011. Pl. Opp. Br. at 13-15. However, in its motion, CVS did not argue lack of causal connection regarding plaintiff's "wrongful threat" claim, but rather only regarding any claim of wrongful termination. Thus, plaintiff's Question Presented # 3 is completely immaterial to this motion.

D. Even Under His Newly-Pleaded Theory, Plaintiff Fails to State a Claim of Wrongful Discharge Because His Termination Did Not Offend Any "Clear Mandate of Public Policy."

As for plaintiff's common law wrongful discharge claim, plaintiff appears to have abandoned his original claim that he was terminated in retaliation for his alleged complaints in early 2011 regarding staffing. Although that allegation still appears in the Second Amended Complaint (SAC, ¶ 155), plaintiff's brief focuses solely on his new theory that on April 27, 2012, he informed state investigators (a) of the alleged increase in dispensing errors occurring in early 2011 after the reduction in staffing, and (b) of dispensing errors occurring from the store's automated "ScriptPro" machine, which took place while he was on leave of absence in early April 2012; and that he was "wrongfully terminated" on July 5, 2012. Pl. Opp. Br. at 16-21; SAC, ¶¶ 103-104, 163-167.

In support of this theory, plaintiff asserts that, in disclosing the automation errors to state investigators, he was "fulfilling his statutorily-imposed duty" as a "pharmacy manager" to "to supervise the ScriptPro dispensing operations." Pl. Opp. Br. at 16-17. He concludes that when an employee "is fired for performing a function that he is *required* to perform by law," an action for wrongful discharge is allowed. Pl. Opp. Br. at 18 (emphasis in original). This claim is without merit, for the simple reason that plaintiff was not statutorily "required" to report the ScriptPro errors to state investigators.

Under the second exception to the at-will rule, a wrongful discharge claim will be allowed only if the plaintiff was "fired for performing a function that he is *required* to perform by law." *See Hunger v. Grand Central Sanitation*, 447 Pa. Super. 575, 670 A.2d 173, 176 (1996), *appeal denied*, 681 A.2d 178 (Pa. 1996) (emphasis in original), *citing Field v. Philadelphia Electric Co.*, 388 Pa. Super. 400, 565 A.2d 1170 (1989) (employee fired for reporting nuclear safety violation that he was required to report under federal law). In this case, a "pharmacist manager" (or PIC)[5] is generally "responsible for operations involving the practice of pharmacy," and for the supervision of an automated medication system such as the ScriptPro. *See* 49 Pa. Code §§ 27.1, 27.204(b)(1) and (c). However, neither the Pharmacy Act (63 P.S. § 390-4) nor its regulations (49 Pa. Code §§ 27.1 et seq.) impose any affirmative duty upon a PIC to report dispensing errors to state investigators, and plaintiff has not pointed to any such provision.

Moreover, as a practical matter, plaintiff had not worked in the store for the previous ten months, as he was on a medical leave of absence. As a consequence, he was not then working as the PIC when he met with state investigators on April 27, 2012, and thus he could not have been carrying out any perceived duty to supervise the operations of the ScriptPro machine by informing the investigators of the ScriptPro errors.

[5] CVS uses the phrase "pharmacist-in-charge" (PIC) interchangeably with "pharmacy manager." References herein to "PIC" should be understood to refer to the statutory "pharmacist manager" role.

Plaintiff attempts to bolster his "statutory duty" argument by asserting that, as the person still technically listed as the "pharmacy manager" on the store's pharmacy permit, he would be "held responsible for transactions" involving the ScriptPro, "including transactions he did not personally make, which resulted in dispensing errors to patients." Pl. Opp. Br. at 17, *citing* 49 Pa. Code §§ 27.204(b)(4). This argument is blatantly false. The provision plaintiff cites for this proposition, Section 27.204(b)(4), states only that "***A pharmacist*** will be held responsible for transactions ***performed by that pharmacist*** or under supervision of ***that pharmacist***." *Id*. (emphasis added). Pennsylvania's pharmacy regulations are very precise in distinguishing between a "pharmacist manager" and a regular licensed "pharmacist." *See* 49 Pa. Code §§ 27.1, 27.11(a), 27.11(c), 27.12(a), 27.12(b). Thus, here, when Section 27.204(b)(4) states that the "pharmacist," who physically performed or supervised the automated transaction, will be held responsible for that transaction, that section is clearly not purporting to hold the "pharmacist *manager*" responsible even when he was not on duty. In this case, plaintiff was on leave of absence during April 2012 and had no involvement in the ScriptPro errors made at that time. Therefore, he was not legally responsible for those errors, and he cannot use any purported legal responsibility to support his argument that he had a statutory duty to report those errors.

In this regard, plaintiff's attempt to distinguish *Diberardinis-Mason v. Super Fresh*, 94 F.Supp.2d 626 (E.D. Pa. 2000), on the basis that the plaintiff there was not a PIC, is misplaced. Plain and simple, there are no provisions of the Pharmacy Act or its regulations that require a pharmacist *or* a PIC to report dispensing errors to state investigators. Thus, for this purpose, the difference between a staff pharmacist and a PIC is a distinction without a difference, and the dismissal of the pharmacist's public policy claim in *Diberardinis-Mason* is dispositive of plaintiff's claim here. *See also Hennessey v. Santiago*, 708 A.2d 1269, 1273 (Pa. Super. 1998) (discharge of plaintiff for reporting rape of resident of mental health facility did not violate public policy because, although laws mandated "safe habilitative environment" for residents, those laws imposed no legal duty to report rape).

Similarly, plaintiff's reliance on the public policy discussion in *Tanay v. Encore Healthcare, LLC*, 810 F.Supp.2d 734 (E.D. Pa. 2011) should be rejected because the circumstances there are distinguishable. In *Tanay*, the statutory scheme applicable to nursing homes was much more detailed in mandating that the administrator keep the owner apprised of all safety-related policies, procedures, and violations. *Id.* at 738-39. Thus, there was some statutory support for the plaintiff's argument that he had a legal duty to report health and safety violations, and so the Court allowed his wrongful discharge cause of action. *Id.* at 740-41. In contrast, here, there are no provisions of the Pharmacy Act or its regulations

requiring even an active PIC – let alone one who has been inactive for ten months – to report dispensing errors to state investigators. Therefore, plaintiff cannot prove that CVS terminated him for performing a function that he was required by law to perform, *see Hunger*, 670 A.2d at 176, and his termination did not violate a clear mandate of public policy.[6]

E. Plaintiff Cannot Show That His Termination Was Causally Connected to His Alleged Protected Activity.

Plaintiff next argues that he has sufficiently pleaded a causal nexus between his April 2012 report of ScriptPro-related dispensing errors and his termination on July 5, 2012. In support of this argument, plaintiff cites to: CVS's alleged removal of his name from the store permit shortly after he met with state investigators; the "temporal proximity" of plaintiff being terminated just over two months later; and his "automatic" termination after exhausting his leave of absence benefits, which he claims violated the Americans with Disabilities Act. Pl. Opp. Br. at 19-20. None of these factors suggest a plausible theory of retaliatory causation.

CVS's removal of plaintiff's name as the PIC on the store's pharmacy permit cannot be considered evidence of retaliatory motive. First, this change took place *before* plaintiff met with state investigators on April 27, 2012. According to

[6] Plaintiff also argues that he fits within the third common law wrongful discharge theory, namely, that CVS discharged him when specifically prohibited from doing so by statute (i.e., the PWL). Pl. Opp. Br. at 16 & n.10. However, plaintiff's termination did not violate the PWL, as argued above and in CVS's moving brief. Therefore, he cannot rely on the PWL to bootstrap his common law public policy claim. *See Clark v. Modern Group, Ltd.*, 9 F.3d 321, 332 (3rd Cir. 1993) (private sector employee cannot invoke the PWL as source of "public policy" to save common law wrongful discharge claim, because PWL "applies only to public employees").

public records available on the Department of State website, Robert Ung became officially listed on the Store 1917 license as of February 26, 2012.[7] *See* Exhibit C. Since the change occurred before plaintiff's protected activity, it cannot be considered retaliatory. Second, the removal of plaintiff's name from the permit cannot be considered retaliatory because it was *mandated* by pharmacy regulations. Plaintiff had been on a leave of absence since July 5, 2011, and thus CVS was required by law to replace him as PIC. *See* 49 Pa. Code § 27.11(g).

Next, although plaintiff alleges that he met with state investigators on April 27, 2012, he does not allege that CVS was *aware* of that meeting at the time of his termination. *See* SAC, ¶¶ 103-104, 165-167. If an employer is not aware that the plaintiff engaged in protected activity, there cannot be a finding of retaliatory causation even if there is close "temporal proximity" between the alleged complaint and the termination. For this reason alone, plaintiff's wrongful discharge claim should be dismissed. *See Andreoli v. Gates*, 482 F.3d 641, 650 (3rd Cir. 2007); *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 494 (3rd Cir. 2002). In any event, two months between protected activity and a termination is not so unduly suggestive as to create an inference of retaliatory causation. *See Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 760 (3rd Cir. 2004).

[7] The Court can take judicial notice of this "public record." *See In re: Wellbutrin SR/Zyban Antitrust Litig.*, 281 F.Supp.2d 751, 755 n.2 (E.D. Pa. 2003) (court can take judicial notice of public records available on government agency website without converting motion into one for summary judgment).

Finally, plaintiff cannot avoid the impact of his own factual allegation that he was terminated "automatically" after exhausting his one year leave of absence. *See* SAC, ¶¶ 108-109, 167. In order to prove a public policy claim, the plaintiff must allege that the retaliatory motive was the sole cause of his discharge. *See Geary v. U.S. Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 184-85 (1974) ("where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship…, an employee at will has no right of action against his employer for wrongful discharge"). Here, plaintiff's own Complaint alleges another reason for his termination, namely, his exhaustion of leave. If CVS terminated plaintiff even partially because of that reason, he cannot, by definition, prove that his April 27, 2012 complaint was the sole cause of his discharge.

Plaintiff argues that the causation issue cannot be resolved on a motion to dismiss. Pl. Opp. Br. at 20. However, in *Geary*, the plaintiff's Complaint was dismissed on the defendant's "preliminary objections in the nature of a demurrer," *Geary*, 456 Pa. at 173, 319 A.2d at 174, which is akin to a motion to dismiss. *Compare* Pa. R.C.P. No. 1028(a)(4) *with* Fed. R. Civ. P. 12(b)(6). Indeed, the Court dismissed the case because "the complaint itself" disclosed another reason for plaintiff there being discharged other than his protected activity. *See Geary*, 456 Pa. at 184-85, 319 A.2d at 180. In short, the Court certainly can, and should, resolve this issue on a motion to dismiss.

II. CONCLUSION

For the foregoing reasons, defendants' Partial Motion to Dismiss should be granted, and Counts V and VI of the Second Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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Dated: January 31, 2014

CERTIFICATION OF WORD COUNT

Pursuant to Local Rule 7.8(b)(1) and (2), this Brief satisfies the Local Rules of Court regarding page limitations because, although it exceeds 15 pages, the Brief contains less than 5,000 words (4,494).

s/ Renee C. Mattei Myers
Renee C. Mattei Myers

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system:

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