IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PAUL PHILLIPS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 01-247-JJF
	:	
DAIMLERCHRYSLER CORPORATION,	:	
	:	
Defendant.	:	

Paul Phillips, Pro Se Plaintiff.

Richard Pell, Esquire of TYBOUT, REDFEARN & PELL, Wilmington, Delaware.
Of Counsel: Gary M. Smith and Kristine K. Kraft, Esquires of LEWIS, RICH & FINGERSH, L.C., St. Louis, Missouri.
Attorneys for Defendant.

MEMORANDUM OPINION

March 27, 2003
Wilmington, Delaware

FARNAN, District Judge

Pending before the Court is Defendant DaimlerChrysler Corporation's Motion for Summary Judgment (D.I. 50). For the reasons discussed below, the Motion will be granted.

I. BACKGROUND

Plaintiff Paul Phillips is a former hourly employee of DaimlerChrysler who worked at the Newark assembly plant. Plaintiff was a member of Local UAW 1183 throughout his employment at DaimlerChrysler. DaimlerChrysler and Local UAW 1183 have entered into a collective bargaining agreement ("CBA") regarding the terms and conditions of employment at the plant.

In 1991, Plaintiff was diagnosed with keratoconus, a condition which affects the shape of the cornea and causes vision problems. (D.I. 52, Tab 17). Plaintiff notified Defendant that he had been diagnosed with keratoconus and should avoid exposure to volatile solvents. Consequently, Defendant's plant physician gave Plaintiff a medical restriction, called a Physical Qualification Code ("PQX"), of 150, which limits exposure to volatile solvents.

In 1992, Plaintiff had a cornea transplant in his left eye. (D.I. 52, Tab 13). Subsequently, Plaintiff underwent repeated attempts to have rigid gas permeable plastic contact lenses fitted to help correct his vision. (Id.). Plaintiff's

uncorrected vision is 20/100 in the right eye and 20/70 in the left eye. (Id. at A42).

On January 19, 1999, Plaintiff filed for leave under the Family Medical Leave Act ("FMLA") to undergo a six month course of treatment to alleviate vision problems related to his keratoconus. (D.I. 52, Tab 3).

On May 7, 1999, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Delaware Department of Labor ("DDOL") alleging that Defendant discriminated against him from February 1999 to April 1999, on the basis of his visual disability. (D.I. 52, Tab 9).

On October 15, 1999, Plaintiff filed a Charge of Discrimination with the EEOC and the DDOL alleging that Defendant retaliated against him for filing the May 7, 1999, Charge of Discrimination. (D.I. 52, Tab 13).

On June 19, 2001, Plaintiff filed a six-count Second Amended Complaint (D.I. 13) alleging racial discrimination in violation of the Civil Rights Act of 1964 ("Title VII")(Count I) and 42 U.S.C. § 1981 (Count II), disability discrimination in violation of the Americans with Disabilities Act ("ADA")(Count III), retaliation under Title VII, the Occupational Safety and Health Act ("OSHA"), and the FMLA (Count IV), violation of the FMLA (Count V), and a common law claim of detrimental reliance (Count VI). Defendant now moves for summary judgment on all counts.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 200 (3d Cir. 1995). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to show that there is more than:

> some metaphysical doubt as to the material facts.... In the language of the Rule, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)(citations and punctuation omitted). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

III. DISCUSSION

A. COUNT I: TITLE VII

Plaintiff, a black male, contends Defendant racially discriminated against him in violation of Title VII; he contends he was denied three job assignments that were given to white employees.

In response, Defendant first contends that Plaintiff failed to exhaust his race discrimination claim under Title VII because he never filed an administrative charge with the EEOC regarding race discrimination. Defendant also contends Plaintiff has not established a prima facie case of disparate treatment under Title VII. Even assuming he did, Defendant contends it denied Plaintiff the three job assignments for legitimate nondiscriminatory reasons: PQX placement requirements and seniority requirements under the CBA.

Title VII requires a claimant to file an administrative charge within 300 days of the claimed discriminatory event. 42 U.S.C. § 2000e-5(e)(1). Plaintiff filed two charges with the DDOL and EEOC, one for disability discrimination and one for retaliation. (D.I. 52, Tab 9, 13). Neither contained any reference to racial discrimination. Id. However, Plaintiff did check the "race" box on DDOL's intake questionnaire, (D.I. 58, Ex. G), and now argues that the intake questionnaire satisfies Title VII's exhaustion requirement. As Defendant points out in

its Reply Brief (D.I. 61), the intake questionnaire does not serve the same function as the charge and therefore does not satisfy Title VII's exhaustion requirement. The Court finds the reasoning in Rogan v. Giant Eagle, Inc., persuasive:

> If we made the allegations in the intake questionnaire part of the charge itself, and therefore permitted the plaintiff to pursue claims made only in the questionnaire and not investigated by the EEOC, we would be circumventing the role of the Commission as well as depriving the defendant of notice of all claims against it.

113 F. Supp. 2d 777, 788 (W.D. Pa. 2000)(concluding plaintiff failed to exhaust her administrative remedies where claims of harassment and retaliation were included in intake questionnaire but omitted from charge); see also Park v. Howard Univ., 71 F.3d 904, 909 (D.C. Cir. 1995).

In the instant case, Plaintiff reviewed and signed both charges, and neither charge contained any reference to race discrimination. Therefore, until the filing of this lawsuit, Defendant received no notice that Plaintiff had made allegations of race discrimination. Moreover, because neither charge mentioned race discrimination, the EEOC did not investigate whether race discrimination occurred. See EEOC Determination Re: Charge 17C990322 & 17CA00024. Because of the omission of any allegation of race discrimination from the charge, neither purpose served by the charge was achieved. For these reasons, the Court concludes that Plaintiff has not satisfied Title VII's

exhaustion requirement, and therefore, the Court will grant summary judgment as to Count I.

B. COUNT II: SECTION 1981

Plaintiff contends Defendant racially discriminated against him in violation of 28 U.S.C. § 1981; he contends he was denied three job assignments that were given to white employees. Plaintiff also contends that Defendant's racial discrimination caused his constructive discharge.

Plaintiff has admitted that two of the denied transfers – involving the window bailey job (July 1998) and the park brake grommet job (March 1999) – occurred before April 30, 1999, (D.I. 62 at C11.1-11.2, C16-17) or two years before Plaintiff first alleged a Section 1981 claim in his first Amended Complaint (D.I. 5). The Court therefore concludes that Plaintiff's Section 1981 claim as to these two events is time barred. See Hall v. Bell Atlantic Corp., 152 F. Supp. 2d 543, 552 (D. Del. 2001)(noting that Section 1981 claims are subject to the two-year statute of limitations of 10 Del. C. § 8119).

The third assignment denied to Plaintiff was the wiring harness job, which was filled by Edda Clayton in July 1999. To establish a prima facie case of race discrimination based on a failure to transfer, a plaintiff must demonstrate: 1) that he is a member of a protected class; 2) that he applied for, was qualified for, and was denied the position sought; and 3) circumstances that give rise to an inference of discrimination.

Stewart v. Rutgers, The State Univ., 120 F.3d 426, 432 (3d Cir. 1997); Walker v. Pepsi-Cola Bottling Co., No. 898-225-SLR, 2000 WL 1251906, at *14 (D. Del. Aug. 10, 2000).

Defendant contends Plaintiff has not established a prima facie case, and even if he has, advances a legitimate, non-discriminatory reason for not placing Plaintiff in the wiring harness job. Defendant contends it was complying with specific placement procedures set for in the CBA for employees with PQX restrictions when it denied Plaintiff's assignment request.

Paragraph Fifteen of Defendant's Statement of Undisputed Facts asserts, "[a]n employee with PQX restrictions never has the right to select their job and the PQX committee does not consult with the employee about potential job assignments before assigning the employee to a job that is consistent with the employee's restrictions." (D.I. 51 at 5). In Paragraph Fifteen of his Affidavit, Plaintiff responds, "I do agree with the statements made in paragraph 15 of the Statement of Undisputed Facts." (D.I. 58, Ex. C at 9). Therefore, it is uncontested that Plaintiff, who is an employee with PQX restrictions, never had the right to select his job. Defendant denied Plaintiff's request because he had no right to make such a request under the PQX assignment procedures of the CBA. Accordingly, the Court concludes that Defendant had a legitimate, non-discriminatory

reason for denying Plaintiff's assignment request.[1] Because Plaintiff has not, as a matter of law, demonstrated that Defendant racially discriminated against him, Plaintiff's claim that he was constructively discharged because of Defendant's racially discriminatory acts must also fail. See e.g., Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 581 (3d Cir. 1998)(holding that because disability discrimination claim failed, constructive discharge claim based on same events must necessarily fails). Therefore, the Court will grant summary judgment as to Count II.

C. COUNT III: ADA

In Plaintiff's Second Amended Complaint, he alleges that "Defendant failed to provide reasonable accommodations to plaintiff based on plaintiff's disability." (D.I. 13, ¶ 49). The ADA mandates that employers provide "a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). To establish a prima facie case of failure to accommodate, Plaintiff must prove: (1) he is an individual with a disability under the ADA; (2) he can perform the essential functions of his position with an accommodation; (3) his employer

[1] Despite the fact that Plaintiff had no right to select his job, and even though he asserts his request for transfer was denied in July 1999, he was transferred to the wire transfer job in August 1999. See Deposition of Paul Phillips (D.I. 52, Tab 20 at A115-17)(Plaintiff testified that he worked the wire harness job from August 1999 to November 1999).

had notice of the alleged disability; and (4) the employer failed to accommodate him. Conneen v. MBNA America Bank, 182 F. Supp. 2d 370, 378-9 (D. Del. 2002).

In Defendant's Opening Brief (D.I. 51), it contends Plaintiff cannot establish elements one and four of the prima facie case. Specifically, as to element one, Defendant contends that Plaintiff is not disabled because he does not have "a physical or mental impairment that substantially limits one or more of [his] major life activities." 42 U.S.C. § 12102(2)(A).

There is no dispute that Plaintiff's keratoconus is a "physical impairment" and that seeing is a "major life activity." The issue is whether Plaintiff's keratoconus "substantially limits" his ability to see. EEOC regulations define the terms "substantially limits" to mean:

> i. Unable to perform a major life activity that the average person in the general population can perform; or
> ii. Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

29 CFR § 1630.2(j). Generally, courts have held that visual impairments must be severe in order to substantially limit the major life activity of seeing. See e.g., Overturf v. Penn Ventilator Co., Inc., 929 F. Supp. 895, 898 (E.D. Penn. 1996) (holding plaintiff was not substantially limited in seeing

despite double vision and lack of peripheral vision where he was able to drive a car, watch television, read, and work).

> A visual impairment which hinders, or makes it more difficult for an individual to function at a full visual capacity, does not amount to a substantial limitation on one's ability to see where the evidence suggests the individual can otherwise conduct activities requiring visual acuity.

Person v. Wal-Mart Stores Inc., 65 F. Supp. 2d 361, 364 (E.D.N.C. 1999)(quoting Cline v. Fort Howard Corp., 963 F.Supp. 1075, 1080 (E.D. Okla. 1997).

In the instant case, Plaintiff's keratoconus does not prevent him from attending college classes (D.I. 52 at A46-47), working a variety of jobs (Id. at A48-64), caring for himself (Id. at A71-74), or driving (Id. at A74-75). Therefore, the Court concludes that Plaintiff is not substantially limited in the major life activity of seeing.

"A plaintiff attempting to establish disability on the basis of substantial limitation in the major life activity of working must, at minimum, allege that he or she is unable to work in a broad class of jobs." Tice v. Centre Area Transp. Authority, 247 F.3d 506, 512 (3d Cir. 2001)(quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 492-93 (1999)). In the instant case, Plaintiff's keratoconus prevents him only from working around volatile solvents. Plaintiff has performed many different jobs at DaimlerChrysler and has also been employed as a teacher, computer technician, mail sorter, furniture delivery person,

United States Census Bureau enumerator, electrician, and salesperson (D.I. 52 at A48-64). Because Plaintiff's keratoconus does not prevent him from working in a broad class of jobs, the Court concludes Plaintiff is not substantially limited in the major life activity of working and, accordingly, also concludes that Plaintiff is not disabled within the meaning of 42 U.S.C. § 12102(2)(A).

Plaintiff, in his Answer Brief (D.I. 58), abandons the allegation that he is disabled within the meaning of 42 U.S.C. § 12102(2)(A); rather, for the first time in the litigation,[2] he contends that he is disabled under the "regarded as" prong of the

[2] Defendant, relying on Krouse v. American Sterilizer Co., 126 F.3d 494 (3d Cir. 1997), contends that the Court should bar Plaintiff from asserting this new argument because it was not alleged in his Complaint. In Krouse, the court stated that, "[a]lthough a complaint's allegations are to be construed favorably to the pleader, we will not read causes of action into a complaint when they are not present. The ADA is one statutory scheme, but it provides more than one cause of action. Where, as here, a plaintiff asserts a cause of action for retaliation ... we will not find an implicit cause of action for failure to accommodate." Id. at 499. In Plaintiff's Complaint, he alleged that Defendant failed to accommodate him. Plaintiff's new argument asserts a different definition of disabled but is not a new, unpled cause of action. If employers are not required to provide reasonable accommodation to employees regarded as disabled, which is currently an open question in the Third Circuit, see Deane v. Pocono Med. Ctr., 142 F.3d 138, 148-49 n.12 (3d Cir. 1998)(en banc), then Plaintiff's failure to allege in his Complaint that he was discriminated against because he was "regarded as" disabled could bar him from raising such an argument at this late stage of the proceedings. However, because employers may be required to reasonably accommodate employees regarded as disabled, see Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996), and because the issue arises on summary judgment, the Court concludes that Plaintiff will be permitted to raise the new argument.

ADA's definition of disabled. See 42 U.S.C. § 12102(2)("The term "disability" means ... (C) being regarded as having such an impairment.). Plaintiff contends that Defendant twice assigned him a PQX of 190, meaning that he was physically unable to work anywhere in the plant for safety reasons. Plaintiff contends these designations were unwarranted and demonstrate that Defendant regarded him as disabled.

Defendant contends it temporarily assigned Plaintiff a PQX of 190 in response to complaints by Plaintiff that he was having problems seeing. Defendant further contends that the PQX 190 designations indicated that Plaintiff could not work until he received medical treatment that would allow him to safely return to work. (D.I. 52 at A112.1). Defendant asserts that it did not regard Plaintiff as disabled within the meaning of the ADA; instead, it perceived Plaintiff as being temporarily unable to perform the essential functions of his job. Defendant contends that temporary impairments are not cognizable disabilities under the ADA, and thus, it did not violate the statute.

A person is "regarded as" having a disability if the person:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) Has [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.

Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187 (3d Cir.1999) (quoting 29 C.F.R. § 1630.2(1)) (brackets in original).

"[T]o be covered under the regarded as prong of the ADA the employer must regard the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled." Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002)(internal quotation marks and citations omitted).

Viewing the facts in the light most favorable to Plaintiff, the Court concludes that Defendant did not regard Plaintiff as disabled within the meaning of the ADA. Plaintiff's diagnosis of keratoconus is not what caused Defendant to assign Plaintiff the PQX 190 code. After being diagnosed with keratoconus, Plaintiff worked for Defendant in a wide variety of jobs over the course of several years. In 1999, Defendant regarded Plaintiff's visual problems resulting from ill-fitting remedial contacts as a safety issue and accordingly assigned him a temporary PQX 190 code that prevented him from returning to work until he had the problem corrected. Temporary conditions or problems are not covered by the ADA because, by definition, they do not substantially limit a major life activity. In re Carnegie Center Associates, 129 F.3d 290, 303 (3d Cir. 1997)(collecting cases). Defendant did not regard Plaintiff as substantially limited in a major life activity because it viewed Plaintiff's condition as temporary and correctable. In fact, Defendant removed the first PQX 190

designation after Plaintiff was treated by his doctor, and Plaintiff was able to return to work. (D.I. 52 at A113-14). Following the second PQX 190 designation, Defendant's physicians examined Plaintiff several times to assess his ability to return to work. (Id. at A124-125). These facts demonstrate the temporary nature of the PQX 190 designation. Rinehimer explains that for an employee to be regarded as disabled, an employer must believe not just that he has an impairment, but that he has an impairment that rises to the level of a cognizable disability under the ADA. Because the PQX 190 designation was temporary, the Court concludes that Defendant's actions do not demonstrate that it regarded Plaintiff as disabled under the ADA.

The Court further concludes that Defendant did not regard Plaintiff as disabled under the ADA because it viewed Plaintiff's problem as correctable. The United States Supreme Court has held that the effect of corrective measures "must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999). Plaintiff's medical records indicate that properly fitted contact lenses increased his visual acuity, but that he had problems wearing them because of irritation. (D.I. 52 at A30-33). At no point prior to Plaintiff's resignation from Defendant did he provide Defendant with documentation that he could not be fitted with contact lenses. (Id. at A219).

Therefore, the Court concludes that Defendant regarded Plaintiff as having vision problems that could be alleviated with contacts and thus did not regard Plaintiff as having an impairment that rose to the level of a disability under the ADA.

Because the Court concludes that Plaintiff is not disabled within the meaning of 42 U.S.C. § 12102(2)(A) or (C), the Court will grant summary judgment as to Count III.

D. COUNT IV: RETALIATION

By his Second Amended Complaint, Plaintiff alleges Defendant unlawfully retaliated against him for filing a complaint with OSHA, for filing a charge of discrimination with the EEOC, and for filing for leave under the FMLA.

OSHA prohibits retaliation and provides a statutory procedure for aggrieved parties to pursue; however, there is no private right of action under OSHA for retaliation. 29 U.S.C. § 660(c); Taylor v. Brighton Corp., 616 F.2d 256, 257 (6th Cir. 1980). Therefore, the Court will grant summary judgment as to Plaintiff's OSHA retaliation claim.

To establish a prima facie case of retaliation under the ADA or the FMLA, Plaintiff must show: (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. Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). "If an employee

establishes a prima facie case of retaliation under the ADA, the burden shifts to the employer to advance a legitimate, non-retaliatory reason for its adverse employment action." Id. "If the employer satisfies its burden, the plaintiff must be able to convince the fact finder both that the employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action." Id. at 501.

After examining all of Plaintiff's submissions, which are not a model of clarity, the Court has attempted to extract what it believes are the retaliatory acts complained of by Plaintiff. First, Plaintiff contends he was placed in the A/C Bolt-down job in retaliation for "making claims of racial and disability discrimination." (D.I. 58, Ex. C, ¶ 12). Plaintiff was assigned to the A/C Bolt-down job in February/March 1999. (D.I. 52 at A20, A215). Plaintiff filed his first charge of discrimination in April 1999. (D.I. 52, Tab 13). Thus, the alleged retaliation occurred before the protected activity of filing a charge of discrimination. The Court concludes that Plaintiff's contention regarding his assignment to the A/C Bolt-down job does not satisfy element two of the prima facie case, which requires that the retaliation occur after the protected activity.

Second, Plaintiff contends he was placed in the A/C Bolt-down job in retaliation for filing for leave under the FMLA on January 19, 1999. Defendant contends that Plaintiff was placed in the A/C Bolt-down job in February/March 1999 through the PQX

placement procedures set forth in the CBA. (D.I. 52 at A92, A215)("Q: And you understood at the time that you were placed in the A/C Bolt-down job based on your PQX restrictions; right? A: [by Plaintiff] Yes."). The Court finds that the following facts regarding Plaintiff's placement in the A/C Bolt-down job are uncontested. The A/C Bolt-down job involved bolting air conditioners onto vehicles with an air gun. (Id. at A93-94). The internal components of the air gun are lubricated with Tribol ATO 100 LS lubricating oil. (Id. at 215-16). While working the A/C Bolt-down job, Plaintiff complained that oil mist from the air gun irritated his eyes. In response to Plaintiff's complaints, Defendant issued Plaintiff safety goggles and a cloth to wrap around the handle of the air gun. (Id. at A10, A99). Plaintiff subsequently informed Defendant that the goggles were insufficient, and Defendant provided Plaintiff with a full face shield to wear, which enabled Plaintiff to perform the job. (Id. at A101-02). Also in response to Plaintiff's complaints about the A/C Bolt-down job, Defendant's plant physician and Director of Safety physically examined the requirements of the A/C Bolt-down job and confirmed the job was within Plaintiff's PQX restrictions. (Id. at A217). Additionally, Defendant had an industrial hygienist take air samples while Plaintiff was working on the A/C Bolt-down job. The tests confirmed that the hydrocarbons in the air were within permissible exposure limits. (Id. at A218, A239-41). After further complaints about the A/C

Bolt-down job by Plaintiff, Defendant transferred him to the Wire Harness job in August 1999. (Id. at A118). Plaintiff admitted in his deposition that he had no difficulty performing the Wire Harness job. (Id.). Based on the fact that the assignment comported with Plaintiff's PQX restrictions, the Court is unconvinced that Plaintiff's transfer to the A/C Bolt-down job was an adverse employment action and, even if it was, is also unconvinced that there was a causal connection between Plaintiff's application for FMLA leave and the transfer. Plaintiff relies solely on the temporal proximity between his application and the transfer, which is insufficient to establish a causal connection, particularly in light of Defendant's repeated attempts to accommodate Plaintiff's complaints about the position. The Court concludes that Plaintiff has not demonstrated that Defendant's proffered reason for the transfer was pretextual or animated by a retaliatory motive.

Third, Plaintiff contends that he was laid off on June 17, 1999, in retaliation for filing a charge of discrimination with the EEOC on April 19, 1999. (D.I. 52, Tab 13). In response, Defendant contends that there is no causal connection between the two events and that Plaintiff elected lay-off after being assigned a PQX of 190 for vision problems. Other than temporal proximity, Plaintiff offers no facts to demonstrate that there was causal connection between the filing of the charge and his layoff. Moreover, Defendant's legitimate, non-discriminatory

reason for the layoff is confirmed by Plaintiff in his deposition. Plaintiff testified that the plant physician noticed he was having eye problems, assigned him a PQX 190 code, which barred him from working in the plant for safety reasons, and sent him for medical treatment. (D.I. 52 at A112.1). Plaintiff's private doctor treated him for corneal graph rejection. (Id. at A113). During treatment, Plaintiff was unable to work and elected layoff rather than disability. (Id. at A114). Once treatment was complete, the plant physician removed the PQX 190 code and allowed him to return to work on July 14, 1999. (Id.). Because the uncontroverted facts show that Plaintiff's June 17, 1999, layoff was not pretextual, the Court concludes that Plaintiff's retaliation claim must fail.

In addition to the specific actions addressed above, Plaintiff also suggests many times throughout his affidavit that Defendant's actions or inactions were retaliatory. However, Plaintiff, in the two-paragraph retaliation section of his brief (filed through counsel), submits only that "if anything comes through the facts set forth by both parties in their briefs, it is the concept of retaliation." (D.I. 58 at 8). Plaintiff's brief does not address how any specific acts of Defendant satisfy the elements of the prima facie case to establish retaliation. It is unclear to the Court what protected activity, if any, the alleged acts were in retaliation for and what connection, if any, the alleged acts had to such activity. Plaintiff cannot prevent

summary judgment through bare allegations that acts he disagreed with or disliked were retaliatory. See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). For all of the above reasons, the Court will grant summary judgment as to Count IV.

E. COUNT V: FMLA

Plaintiff alleges that Defendant violated the FMLA by refusing to grant him continuous leave instead of intermittent leave. (D.I. 13, ¶ 57). Plaintiff applied for leave to accommodate a six month course of treatment related to his contact lenses. (D.I. 52, Tab 3). Plaintiff was aware that the FMLA would only allow him to take approximately three months of continuous leave, which was insufficient for the required treatment. (D.I. 52 at A89-90); see also 29 U.S.C. § 2612(a)(1)(allowing twelve work weeks of leave during twelve-month period). Thus, if Defendant granted Plaintiff continuous leave, he would not have been able to complete his treatment.

Plaintiff's contention that Defendant violated the FMLA by granting him intermittent leave is without merit for three reasons: (1) Plaintiff accepted the intermittent leave and now unreasonably complains it was unacceptable; (2) Plaintiff did not address the FMLA issue in his Response Brief (D.I. 58) and thus is resting on the bare allegations in the Second Amended Complaint (D.I. 13); and (3) Plaintiff suffered no wage loss during his employment with Defendant due to the alleged FMLA violation and thus is not entitled to any relief. 29 U.S.C. §

2617(a)(1); Lapham v. Vanguard Cellular Sys., Inc., 102 F. Supp. 2d 266, 269-70 (M.D. Pa. 2000)(the FMLA "simply leaves no room for recovery when an employee does not sustain economic loss during the period of his or her employment."). Therefore, the Court will grant summary judgment as to Count V.

F. COUNT VI: DETRIMENTAL RELIANCE

In Plaintiff's Second Amended Complaint, he alleges that he "relied to his detriment upon the many representations of defendant that defendant could and would accommodate his disability" and that these representations "caused him to forego other employment opportunities...." (D.I. 13 at 11). In his deposition, Plaintiff stated that he was offered a job at General Motors in 1993 (D.I. 52 at A62-62.1) and could have kept working at Info Systems in 1994 (Id. at A60.1-61).

Although Plaintiff labels his claim as one based on detrimental reliance, it is more appropriately characterized as a claim for promissory estoppel. To succeed on a claim for promissory estoppel, "a plaintiff must prove: (i) the making of a promise; (ii) with the intent to induce action or forbearance based on the promise; (iii) reasonable reliance; and (iv) injury." Brooks v. Fiore, 2001 WL 1218448, at *5 (D. Del. Oct. 11, 2001)(citing Scott-Douglas Corp. v. Greyhound Corp., 304 A.2d 309, 319 (Del. Super. 1973)). "The asserting party must be able to prove the[] elements of promissory estoppel by clear and convincing evidence. Moreover, the promise, in such a case, must

be definite and certain." Continental Ins. Co. v. Rutledge & Co., Inc., 750 A.2d 1219, 1233 (Del. Ch. 2000).

Defendant contends Plaintiff has not pointed to any promise that could support a promissory estoppel claim. Defendant further contends Plaintiff provides no evidence that Defendant intended to induce Plaintiff's reliance or that Plaintiff reasonably relied on Defendant's representations.

The Court concludes that Plaintiff's promissory estoppel claim fails as a matter of law. Plaintiff, resting on his pleadings, alleges that he detrimentally relied on Defendant's statement that it would accommodate his disability. However, "[p]romissory estoppel cannot be predicated upon a promise to do that which the promisor is already obliged to do," and Defendant is legally required to accommodate disabled employees. Brooks, 2001 WL 1218448, at *6 (citing Danby v. Osteopathic Assn. of Delaware, 104 A.2d 903, 907 (Del. Super. 1954)). Therefore, Defendant's alleged statement is not an actionable promise. Accordingly, the Court will grant summary judgment as to Count VI.

IV. CONCLUSION

For the reasons discussed, Defendant DaimlerChrysler Corporation's Motion for Summary Judgment (D.I. 50) will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PAUL PHILLIPS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 01-247-JJF
	:	
DAIMLERCHRYSLER CORPORATION,	:	
	:	
Defendant.	:	

ORDER

At Wilmington this 27th day of March 2003, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant DaimlerChrysler Corporation's Motion for Summary Judgment (D.I. 50) is **GRANTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE