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

ROBIN LITZINGER,	)	**Case No. 3:15-cv-306**
	)	
Plaintiff,	)	**JUDGE KIM R. GIBSON**
	)	
v.	)	
	)	
ALLEGHENY LUTHERAN SOCIAL MINISTRIES,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

For 28 years, Robin Litzinger worked as a licensed practical nurse for Allegheny Lutheran Social Ministries, until she was fired on July 22, 2014. Litzinger suffers from a back injury and cardiac problems, and in December 2015 she sued Allegheny Lutheran for discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"). She alleges that she was fired because of her age—she was 59-years-old when she was fired—and because of her heart problems. Allegheny Lutheran has now moved for summary judgment on both counts. It argues that Litzinger fails to state a prima facie claim of discrimination under either the ADEA or the ADA. Further, Allegheny Lutheran argues that it had a legitimate reason for firing Litzinger, and that she has not shown that this reason is a pretext for discrimination.

Allegheny Lutheran is correct on all points. The Court will therefore grant its motion for summary judgment.

I. Facts[1]

On January 6, 1986, Litzinger began working for Allegheny Lutheran as a licensed practical nurse at its Hollidaysburg facility. Allegheny Lutheran is a faith-based, not-for-profit organization that serves West Central Pennsylvania by providing various social services, including senior-living services. Allegheny Lutheran operates several senior-living communities as well as short- and long-term-care facilities, including the Lutheran Home at Hollidaysburg, Pennsylvania. Lutheran Home is a long-term-care facility—otherwise known as a nursing home—that provides care for approximately 89 residents. It was Litzinger's job to care for these residents; her duties included checking on ill residents, handling their medications, and assisting with their feeding and bathing. From approximately 2004 until she was fired in 2014, Litzinger reported to Eva Pope, the director of nursing at the Lutheran Home.

Litzinger suffers from some medical problems. She testified that between late 2011 and 2016 she regularly saw a chiropractor for a back injury. Also beginning in 2011, Litzinger submitted some medical documentation to Allegheny Lutheran in connection with her back injury. That documentation—four disability-release forms and a letter from her chiropractor—imposed limited work restrictions for set durations. Specifically, the disability-release forms recommended that Litzinger not lift, push, or pull more than 25 pounds, and that she not work more than 8 hours per day or more than 40 hours per week, all for periods of 4 weeks. The letter from Litzinger's chiropractor—dated February 10, 2014, and written in response to a letter from Allegheny Lutheran inquiring about Litzinger's job restrictions—also strongly recommended

[1] These facts are undisputed and are derived from the parties' concise statements of material facts (ECF Nos. 20, 23) and their responses (ECF Nos. 22, 26), as well as the exhibits submitted in support of those filings (ECF Nos. 18-5 to 18-18, 25).

that she not be required to work more than an eight-hour shift. The letter from Litzinger's chiropractor imposed no temporal limit on that restriction. Litzinger testified that, although she was required to work more than eight hours per day once or twice after she submitted her medical documentation, Allegheny Lutheran honored her work restrictions.

Litzinger also has coronary-artery disease, and in November 2013 she suffered a major heart attack.[2] She thereafter requested to take leave from Allegheny Lutheran under the Family and Medical Leave Act so that she could complete a cardiac-rehabilitation program. In connection with that request, she submitted a note from her cardiologist, which stated that she would remain off from work until at least her next follow-up. Allegheny Lutheran approved Litzinger's FMLA leave and she missed six to eight weeks of work. Litzinger's doctor approved her to return to work—without restrictions—effective January 13, 2014, and she did return later that month. In returning to work, Litzinger required no accommodations as a result of her heart attack or in connection with her coronary-artery disease. Allegheny Lutheran was not provided with any documentation regarding her cardiac issues other than her FMLA request, the note submitted in connection with that request, and the January 2014 note. After she returned to work Litzinger did have conversations related to her cardiac issues with two of her supervisors. At one time she asked Pope whether it would be permissible if she placed her medicine cart in a set area instead of pushing it around because pushing the cart was making her uncomfortable. Pope told her that would be fine. At another time Litzinger had a conversation about her coronary-

[2] Paragraph 63 of Litzinger response to Allegheny Lutheran's statement of uncontested material facts states that Litzinger disputes these facts. (ECF No. 22 ¶ 63.) That makes no sense; her cardiac issues are the basis for her ADA claim (*see* ECF No. 5 ¶ 24), and she herself testified that she has coronary-artery disease and that she suffered a major heart attack in November 2013 (ECF No. 18-6 at 131:20-21). The Court thus views paragraph 63 of Litzinger's response as an error by Litzinger.

artery disease with Debra Husick—a resident-nurse supervisor—during which Husick told her to take it easy and that Husick was concerned for her. Other than those two conversations, Litzinger had no discussions with any supervisor at Allegheny Lutheran about her cardiac issues and no supervisor ever made any critical comment about those issues.

Litzinger received several disciplinary warnings during her employment with Allegheny Lutheran. Four of the incidents underlying those warnings—all of which involved allegations of unprofessional and discourteous conduct—occurred between 2010 and her firing in 2014. Although the allegations in most of those incidents were found to be unsubstantiated, Litzinger was counseled and warned regarding her conduct after each incident. In addition, Litzinger regularly received training on topics relevant to her position, including residents' rights and resident abuse and neglect. Between 2012 and when she was fired, Litzinger took eight courses that touched on these topics.

In January 2010, Litzinger received a first written warning.[3] The report for this incident explains that the warning was given because Litzinger got into an argument with a supervisor about a nurse-aide assignment. (ECF No. 18-9 at 11.) In addition to being warned, Litzinger was required to take inservice training on work ethic and attitude. She completed that training a week later.

The second incident occurred in October 2010 when a resident's son lodged a complaint against Litzinger for verbally abusing the resident. Allegheny Lutheran submitted a report to the

[3] Allegheny Lutheran's team-member handbook states that a "first written warning is imposed for an unacceptable incident/behavior that is severe enough to warrant" such a warning "or if [the employee has] been counseled in the past for a similar incident." (ECF No. 18-7 at 27.) First written warnings are the second level of discipline; they are preceded by counseling, which is reserved for first time, minor infractions.

Pennsylvania Department of Health regarding this complaint, which states that the resident's son alleged that Litzinger "yelled at resident, pointed her finger at resident and said to resident, 'you ring your call bell too much, I can't please you no matter what I do, you want in bed and out of bed, no matter what I do I can't please you, and you are going to pay for it.'" (ECF No. 18-9 at 8.) Pursuant to both Allegheny Lutheran's and the Pennsylvania Department of Health's policies, Litzinger was suspended for one day while this complaint was investigated.

Allegheny Lutheran's policies prohibit resident abuse. Allegheny Lutheran's team-member handbook defines abuse as "an action which causes physical harm or mental distress to another person. If an action results in unnecessary discomfort to another person, it is considered abuse." (ECF No. 18-7 at 22.) Under Allegheny Lutheran's policies, "[v]erified evidence that abuse has occurred is grounds for dismissal." (ECF No. 18-7 at 22.) After investigating the October 2010 complaint, Allegheny Lutheran determined that the allegation of abuse was unsubstantiated and Litzinger returned to work. Although no discipline was imposed on Litzinger for this incident—other than the suspension to investigate—Pope and the facility's administrator met with her and counseled her to be more careful about how she spoke to and treated people.[4] As a result of that meeting, Litzinger also understood that she could be terminated for substantiated allegations of abuse.

[4] Litzinger purports to dispute that, following the October 2010 complaint, she "understood that she needed to watch her tone when speaking with residents and to make sure she did not yell or make them upset." (*Compare* ECF No. 22 ¶ 22, *with* ECF No. 22 ¶ 22.) But her argument on this point—that "[t]o the contrary, [she] stated that she was not yelling or screaming but just explaining" (ECF No. 22 ¶ 22)—and her citation to the record do not create a dispute about this fact. It is irrelevant whether Litzinger was yelling at, screaming at, or explaining something to the resident—or even if she never spoke to that resident at all. The point made in paragraph 22 of Allegheny Lutheran's statement of uncontested material facts is that, after the October 2010 complaint, Litzinger understood that she had to be mindful of her tone. And Litzinger herself testified that she understood this. (ECF No. 18-6 at 65:21-66:11.)

The third incident occurred in April 2013. A hospice aide reported that she had asked Litzinger to assist her with helping a resident go to the bathroom, and that while helping this resident Litzinger became angry with the resident and used profane language, upsetting the resident.[5] Allegheny Lutheran investigated this allegation and interviewed Litzinger, the hospice aide, the social worker who had received the complaint, as well as the resident. During the resident's interview, she "did not state that anything had occurred," and when asked said that she was not afraid of Litzinger and had no objection to letting Litzinger continue to care for her. (ECF No. 18-9 at 6.) Allegheny Lutheran thus concluded that the complaint was not substantiated. Nevertheless, Allegheny Lutheran issued Litzinger an "on-the-spot education" about the use of profanity around residents and coworkers.[6]

The fourth incident occurred in June 2013 when a resident reported that Litzinger had verbally abused her by yelling at her. Allegheny Lutheran suspended Litzinger for three days while it investigated this complaint. Litzinger testified that when she returned to work she met with Pope and the facility administrator and that during this meeting she denied yelling at the resident. (ECF No. 18-6 at 84:18-85:23.) Litzinger testified further that Pope and the administrator told Litzinger that the resident did not want Litzinger to lose her job, and that they said she had to apologize to the resident if she wanted to remain employed with Allegheny Lutheran. (*Id.* at 85:12-21.) Litzinger then apologized to the resident and this resolved the matter.

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[5] The report explains that the resident defecated on her wheelchair and alleges that Litzinger "got mad and told [the resident that] if she would stand her ass up she wouldn't have shit all over" her wheelchair. (ECF No. 18-9 at 3.)

[6] The term "on-the-spot education" does not appear in Allegheny Lutheran's team-member handbook, but it corresponds with the description of the first level of discipline—counseling. (*See* ECF No. 18-7 at 27.)

One more incident occurred after June 2013. On July 17, 2014, a resident—whom the Court will refer to as M.S.—reported to two different Allegheny Lutheran employees that Litzinger had threatened her. The facility administrator at that time, Danielle Hale Pettit, and Pope began investigating this complaint the same day. They interviewed Litzinger, M.S., and the two employees to whom M.S. made the report. From their statements, it appears that this incident was prompted by M.S. not wanting to go to an appointment. But Litzinger did not admit to saying anything inappropriate to M.S. In her statement, she said that M.S. had refused to go the appointment and told her to "get the hell out." (ECF No. 18-11 at 14.)

After getting Litzinger's statement, Allegheny Lutheran suspended her for three days while it investigated further. Pettit interviewed M.S., who said that Litzinger had told her "[y]ou will be left like an animal and no one would [sic] ever come in here again. I'll see to it that you won't get your meds." (ECF No. 18-11 at 11.) M.S. further stated that Litzinger went into "a wild rage" and that she felt threatened and never wanted Litzinger to take care of her again.[7] (*Id.*) Nobody other than Litzinger and M.S. was present when these statements were allegedly made. But the two employees reported—and testified during the course of discovery in this case—that they found M.S. visibly upset and crying, and that M.S. had told them too that Litzinger had threatened to take her medication away.

Pettit and Pope finished their investigation that same day—July 17, 2014. They concluded that firing Litzinger was warranted. She was terminated effective July 22, 2014. Litzinger's date of birth is December 5, 1954, meaning she was 59 years old when she was fired.

[7] These statements are set forth in Pettit's typed notes from her interview with M.S. (ECF No. 18-11 at 11), which appear to be signed by M.S. and are dated July 17, 2014.

On August 6, 2014, Allegheny Lutheran listed the opening for Litzinger's former position on its internal website. Lorraine Kiel—another licensed practical nurse who worked for Allegheny Lutheran but on a different shift—applied and was hired for Litzinger's former position. Kiel's date of birth is April 28, 1960, meaning she was 54 years old when she was hired for that position.

On December 1, 2015, Litzinger filed this lawsuit.

II. Jurisdiction & Venue

Because Litzinger's claims arise under federal law, this Court has subject-matter jurisdiction over them pursuant to 28 U.S.C. § 1331. And because the events giving rise to Litzinger's claims—namely her employment relationship with Allegheny Lutheran and her firing—occurred in the Western District of Pennsylvania, venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2).

III. Legal Standard

A grant of summary judgment is appropriate if "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 fact is material if it can affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine, resulting in denial of the motion, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant is entitled to summary judgment if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant has established the absence of a genuine dispute of material fact, then the nonmovant must present specific facts demonstrating the existence of a genuine dispute. *Anderson*, 477 U.S. at 250. In making this determination, the court must view all facts and draw all reasonable inferences in the light most favorable to the nonmovant. *Chavarriaga v. N.J Dep't of Corr.*, 806 F.3d 210, 218 (3d Cir. 2015). But to avoid summary judgment the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992)). Rather, there must be evidence on which the jury could reasonably find for the nonmovant. *Anderson*, 477 U.S. at 252.

IV. Discussion & Analysis

Litzinger sued Allegheny Lutheran for discrimination under both the ADEA and the ADA. Allegheny Lutheran has moved for summary judgment on both counts.

The ADEA prohibits employers from discriminating against employees on the basis of age and the ADA prohibits employers from discriminating against employees on the basis of a disability. In the absence of direct evidence of discrimination—like here—a plaintiff may prove discrimination claims under the ADEA and ADA through the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009) (applying *McDonnell Douglas* to an ADEA claim); *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996) (applying *McDonnell Douglas* to an ADA claim). Under this framework, the initial burden of establishing a prima facie case rests with the plaintiff. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff makes out a prima facie case, then the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its adverse

action. *Id.* If the defendant articulates such a reason, the burden shifts back to the plaintiff, who must then show that the employer's proffered reason is pretextual. *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981). At that stage, to survive a motion for summary judgment, a nonmoving plaintiff generally must point to evidence that: "1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant 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, 762 (3d Cir. 1994).

A. ADEA

To establish a prima facie case of age discrimination under the ADEA, a plaintiff must show that four elements are met: (1) that the plaintiff was forty years of age or older; (2) that the defendant took an adverse employment action against the plaintiff; (3) that the plaintiff was qualified for the position in question; and (4) that the plaintiff was ultimately replaced by another employee who was sufficiently younger to support an inference of discriminatory animus. *Smith*, 589 F.3d at 689-90 (citing *Potence v. Hazleton Area Sch. Dist.*, 357 F.3d 366, 370 (3d Cir .2004)). The first three elements are met here and not in dispute; Litzinger was 59 years old when she was fired, being fired is an adverse employment action, and Litzinger was qualified for the position she held. But Litzinger's claim falls short on the fourth element—she has not identified any evidence that she was replaced by another employee who was sufficiently younger to support an inference of age discrimination.

As Allegheny Lutheran points out, although the Third Circuit has not established a bright-line test for the age difference that will satisfy the "sufficiently younger" element, it has held that

a seven-year age difference is insufficient to support a claim of age discrimination. *Robinson v. City of Philadelphia*, 491 F. App'x 295, 299 n.1 (3d Cir. 2012) (citing *Grosjean v. First Energy Corp.*, 349 F.3d 332, 338 (6th Cir. 2003)); *Narin v. Lower Merion Sch. Dist.*, 206 F.3d 323, 333 n.9 (3d Cir. 2000). This is in line with "[t]he overwhelming body of cases in most circuits," which "[have] held that age differences of less than ten years are not significant enough to make out the fourth part of the age discrimination prima facie case." *Grosjean*, 349 F.3d at 338 (citing cases—extensively). Litzinger was 59 years old when she was fired. Litzinger's replacement—Kiel—was 54 years old when she was hired. Thus, the age difference between Litzinger and her replacement is five years, which is insufficient to satisfy the "sufficiently younger" element. Litzinger has therefore failed to state a prima facie age-discrimination claim under the ADEA.

B. ADA

To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show "(1) that he is disabled within the meaning of the ADA, (2) that he is otherwise qualified for the job, with or without reasonable accommodations, and (3) that he was subjected to an adverse employment decision as a result of discrimination." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 185 (3d Cir. 2010) (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999)). Although Litzinger satisfies the second element—she was qualified for the job she held—she has not satisfied the first and third element, and has thus also not stated a prima facie claim for disability discrimination under the ADA.

1. Whether Litzinger Is Disabled under the ADA

A person is disabled within the meaning of the ADA if she has "a physical or mental impairment that substantially limits one or more of the major life activities [of that person]," a

record of such an impairment, or if the person is regarded as having such an impairment. 42 U.S.C. § 12102(1). These three prongs are distinct, and a plaintiff can proceed under one or all three. Whether an individual is substantially limited in performing a major life activity is a question of fact. *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 763 (3d Cir. 2004) (citing *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 569 (3d Cir. 2002)). This means that—in deciding a motion for summary judgment—the court must decide whether the plaintiff has adduced sufficient evidence from which a jury reasonably could infer that the plaintiff was disabled.

Allegheny Lutheran argues that Litzinger's ADA claim is based on an alleged actual disability and that she is not claiming to be disabled under the "record of" or "regarded as" prongs. The Court is inclined to agree, but Litzinger's complaint and brief are less than clear on this point. (*See* ECF No. 24 at 10 ("The fact that [Litzinger] must have check-ups that are needed to be completed periodically regarding her heart condition would *lead one to believe* that it was a severe impairment . . . ." (emphasis added)).) The Court will therefore analyze her claim under all three prongs. Litzinger is, however, clear on one point: her ADA claim is based solely on her cardiac issues, and not on her back injury. (*Compare* ECF No. 20 ¶ 74 ("Plaintiff is not claiming that she was terminated because of any medical condition relating to her back."), *with* ECF No. 22 ¶ 74 (Litzinger admitting this assertion).) Thus, the Court will restrict its analysis to her cardiac issues.

a. Actual Disability

"[W]ith regard to the 'actual disability' prong, the test is whether, at the time of the adverse employment action, the limitation caused by the impairment was 'substantial.'" *Bush v. Donahoe*, 964 F. Supp. 2d 401, 417 (W.D. Pa. 2013) (citing *Koller v. Riley Riper Hollin & Colagreco*,

850 F. Supp. 2d 502, 513 & n.4 (E.D. Pa. 2012)). The disability must "limit[] the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). "Major life activities" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). Although the phrase "substantially limits" is to be "construed broadly in favor of expansive coverage" and "is not meant to be a demanding standard," 29 C.F.R. § 1630.2(j)(1)(i), a plaintiff "must still show a substantial limitation." *Cunningham v. Nordisk*, 615 F. App'x 97, 100 (3d Cir. 2015).

Here, Litzinger has neither identified a major life activity that was limited by her cardiac issues nor explained *how* that activity was substantially limited by those issues. Cardiac problems and a heart attack are certainly serious medical problems. But after completing her cardiac-rehabilitation program, Litzinger returned to work with no restrictions. And—other than the one time she asked Pope whether she could place her cart in a set spot—she testified that she needed no accommodations to perform her job. The only argument she offers regarding why she is disabled is that she was substantially limited because "[s]he need[ed] periodic check-ups to make sure she was healthy." (ECF No. 24 at 10.) But a need to periodically consult one's doctor—without more—is not a substantial impairment of a major life activity. Many people have to routinely consult their doctor for continuing care, and they are not automatically rendered disabled under the ADA just because they have to do so.

Because she has failed to identify a substantial impairment of a major life activity, and because the record does not reveal such an impairment, Litzinger does not qualify under the "actual disability" prong of the ADA.

b. Record of Impairment

Litzinger also does not qualify under the "record of impairment" prong of the ADA. "An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k)(1). Thus, Litzinger must identify evidence from which a factfinder could reasonably conclude that "she has a history of . . . or has been misclassified as" having an impairment that substantially limits a major life activity. *Id.* And she must "provide evidence that [Allegheny Lutheran] relied upon her record of impairment in making its employment decision." *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 437 (3d Cir. 2009) (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998)).

Three relevant records are presented here: the FMLA request Litzinger submitted to Allegheny Lutheran after she suffered her heart attack in November 2013, the note from her cardiologist that she submitted in connection with that request, and the January 2014 note from her cardiologist clearing her to return to work without restrictions. And it is true that—after she suffered her heart attack—Litzinger's cardiac issues appear to have limited a major life activity; she missed six to eight weeks of work. But "a relatively short-term absence from work, without any long-term impairment, is generally held to be insufficient to create a record of disability." *Id.* (citing *Colwell*, 158 F.3d at 646). That is the case here; Litzinger's heart attack prompted a relatively short absence from work, and she returned without any long-term impairment or

restrictions. As such, she does not qualify under the "record of impairment" prong of the ADA. *See Sampson v. Methacton Sch. Dist.*, 88 F. Supp. 3d 422, 438 (E.D. Pa. 2015) (holding that neither missing four to five months of work due to knee injury nor residual symptoms that included six months of pain and swelling rose to the level of substantial limitation of major life activity for record-of-impairment claim) (citation omitted)).

c. Regarded as Disabled

That leaves the regarded-as-disabled prong, but Litzinger does not qualify under that prong either. The regarded-as-disabled prong is satisfied "if the individual establishes that he or she has been subjected to an [adverse employment decision] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). The analysis in a regarded-as-disabled claim focuses not on the plaintiff and his actual abilities, "but rather on the reactions and perceptions of the persons interacting or working with him." *Kelly v. Drexel Univ.*, 94 F.3d 102, 108-09 (3d Cir. 1996) (citation omitted).

Here, there is no evidence that Allegheny Lutheran perceived Litzinger as disabled as a result of her heart condition. True, after she returned to work Litzinger spoke to Pope and Husick about her cardiac issues, meaning Pope—one of the decisionmakers in this case—was aware of Litzinger's heart problems. But "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." *Id.*, 94 F.3d at 109 (citation omitted). Litzinger has presented no evidence that Pope—or any other decisionmaker at Allegheny Lutheran—viewed her cardiac issues as impairing. Nor does Litzinger's FMLA

leave support such an inference. *See Robinson v. Lockheed Martin Corp.*, 212 F. App'x 121, 125-26 (3d Cir. 2007) (holding that supervisor's suggestion that plaintiff apply for FMLA leave did not create a genuine dispute of material fact that defendant viewed plaintiff as disabled) (citation omitted); *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1219-20 (10th Cir. 2007) (employer's approval of plaintiff's application for FMLA leave did not "demonstrate an issue of fact as to whether [plaintiff] was considered disabled under the ADA"). Litzinger thus also does not qualify under the regarded-as-disabled prong of the ADA.[8]

2. Whether Litzinger Was Subjected to an Adverse Employment Decision as a Result of Discrimination

Litzinger's claim for disability discrimination suffers from another defect: she fails to make a prima facie showing of causation. The third element of a disability-discrimination claim under the ADA requires that the plaintiff show that she was subjected to an adverse employment decision *as a result* of discrimination. *Sulima*, 602 F.3d at 185. But Litzinger identifies no evidence—at all—that suggests a causal connection between her supposed disability and her firing. Her ADA claim thus fails on this basis as well.

C. Pretext

For the reasons above, Litzinger has failed to state a prima facie discrimination claim under the ADEA or the ADA. But even if Litzinger had stated a prima facie case under one or both of those statutes, her claims still fail because she has not identified any evidence showing that Allegheny Lutheran's legitimate, non-discriminatory reason for firing her is pretextual. To

[8] Additionally, there is a question whether Litzinger would otherwise qualify under the regarded-as-disabled prong; a plaintiff cannot advance a regarded-as-disability claim for "impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). But the Court need not and therefore will not reach that issue.

review, once a plaintiff makes out a prima facie case under *McDonnell Douglas*—which Litzinger has not—the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its adverse action. 411 U.S. at 802. And if the defendant articulates such a reason, the burden shifts back to the plaintiff, who must then point to evidence that: "1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant 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*, 32 F.3d 762. Here, even if the Court could identify a prima facie claim, summary judgment in Allegheny Lutheran's favor is still appropriate because it has provided a legitimate, nondiscriminatory reason for Litzinger's termination and she has not identified any evidence that this reason is a pretext for discrimination.

Allegheny Lutheran asserts that it fired Litzinger "solely because she verbally abused a resident" (ECF No. 19 at 11), which is a legitimate, non-discriminatory reason. *See McNeil v. Comhar, Inc.*, No. 15-cv-4959, 2016 WL 4366984, at *5 (E.D. Pa. Aug. 16, 2016) (holding that support professional's verbal abuse of patients was a legitimate, non-discriminatory reason for firing her). Thus, Litzinger has to "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Allegheny Lutheran's proffered reason that a reasonable factfinder could rationally find this reason unworthy of credence. *Fuentes*, 32 F.3d at 765 (citing cases). Stated differently, "[she] must show, not merely that the employer's proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997).

Yet Litzinger's attempts at showing pretext are unavailing. She argues that the purported reason for firing her—her alleged abuse of M.S.—is unsubstantiated because "[t]here was no testimony by anyone who had first-hand knowledge [of the incident]," and that M.S.'s statement is "dubious at best" because it was taken and typed by Pettit and because there is no audio recording of M.S.'s interview. (ECF No. 24 at 9.) The main problem with this argument is that it does not actually present any evidence of pretext. Litzinger is essentially arguing that a factfinder could disbelieve Allegheny Lutheran—yet that does not equate to establishing pretext. *See Fuentes*, 32 F.3d at 764 ("We can reject out of hand . . . that the plaintiff can avoid summary judgment simply by arguing that the factfinder need not believe the defendant's proffered legitimate explanations . . . ."). Nor does this argument undermine Allegheny Lutheran's stated reason. The absence of additional evidence that M.S. made the statements set forth in Pettit's notes does not suggest that the notes are inaccurate, or that M.S. did not make those statements. And more importantly, there *is* additional evidence that M.S. made the statements set forth in Pettit's notes. At least two employees testified that they found M.S. upset and crying, and that M.S. told them much the same things as set forth in Pettit's interview notes. Thus, even if there were no witnesses to the actual incident, the allegation of abuse was sufficiently substantiated. The lack of an audio recording of M.S.'s interview is immaterial because this likewise does not discredit Allegheny Lutheran's stated reason for firing Litzinger.

Litzinger also suggests that her performance evaluations undermine Allegheny Lutheran's stated reason for firing her. She notes that her evaluations from 2010 through 2014 were positive, and argues that this makes it unlikely that Allegheny Lutheran would fire her for the July 17, 2014 incident. That argument misses the mark too; "[b]ecause courts do not judge the

prudence of an employer's business decision, the degree of an infraction and whether it rises to a level that justifies terminating an employee is irrelevant." *Gavurnik v. Home Properties, L.P.*, 227 F. Supp. 3d 410, 418 (E.D. Pa. 2017). The fact that Litzinger received positive evaluations does not make it implausible that Allegheny Lutheran would fire her for a substantiated allegation of resident abuse—especially when there was a history of similar incidents involving Litzinger. Additionally, some of the performance evaluations actually support Allegheny Lutheran's stated reason. Litzinger's January 2013 evaluation notes that she should "[c]ontinue to be aware of [her] attitude." (ECF No. 25-8 at 18.) Likewise, her January 2014 performance review states that she should "[r]emember to be mindful of [her] tone while communicating [with] staff, residents/families due to past incidents." (*Id.* at 7.) Litzinger's performance reviews are thus not evidence of pretext.

Litzinger offers one more argument that can be construed as attempting to show pretext. In passing, she mentions a certified nurse aide who she claims verbally abused a resident and was not terminated for doing so. It is true that a plaintiff can establish pretext by showing that the employer has treated similarly situated persons not within the protected class—here, persons 40 or older or without a disability—more favorably. *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 645 (3d Cir. 1998) (citing *Fuentes*, 32 F.3d at 765). But other than mentioning her, Litzinger presents no evidence regarding this nurse aide; the record is devoid of any evidence about whether this nurse aide was similarly situated, whether she was younger than 40 or not

disabled, or what the circumstances of the underlying incident were.[9] Thus, Litzinger has also not established pretext by showing that Allegheny Lutheran treated a similarly situated employee not within the protected class more favorably.

V. Conclusion

Litzinger has not stated a prima facie claim of discrimination under either the ADEA or the ADA. In addition, Allegheny Lutheran has provided a legitimate, non-discriminatory reason for firing Litzinger, and she has identified no evidence from which a factfinder could reasonably conclude that this reason is a pretext for discrimination. Allegheny Lutheran's motion for summary judgment will therefore be granted.

A corresponding order follows.

[9] The only evidence about this certified nurse aide is Litzinger's own deposition testimony, wherein she recounts statements this nurse aide made to her. (*See* ECF No. 18-6 at 26:9-27:5.) Putting aside the issue of whether those statements are inadmissible hearsay, they provide scarce information, to put it lightly, and are insufficient to show more favorable treatment of a similarly situated employee not within the protected class.

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

ROBIN LITZINGER,	)	Case No. 3:15-cv-306
	)	
Plaintiff,	)	JUDGE KIM R. GIBSON
	)	
v.	)	
	)	
ALLEGHENY LUTHERAN SOCIAL MINISTRIES,	)	
	)	
	)	
Defendant.	)	

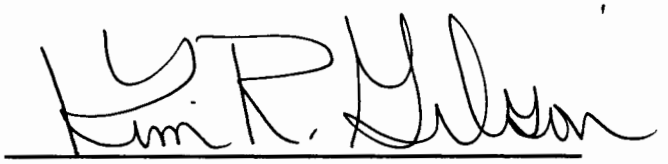
ORDER

NOW, this 20th day of July 2017, upon consideration of the motion for summary judgment by Allegheny Lutheran Social Ministries (ECF No. 18) and for the reasons in the memorandum accompanying this order, it is **HEREBY ORDERED** that:

1. Allegheny Lutheran's motion for summary judgment (ECF No. 18) is **GRANTED**.
2. Robin Litzinger's complaint (ECF No. 1) is **DISMISSED WITH PREJUDICE** with respect to all issues raised in this case.

A separate judgment shall issue with this order.

BY THE COURT:



KIM R. GIBSON
UNITED STATES DISTRICT JUDGE