UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT J. BALDING, Plaintiff-Appellant, v. SUNBELT STEEL TEXAS, INC.; SUNBELT STEEL TEXAS, LLC, RELIANCE STEEL & ALUMINUM CO., DOES 1 through 50, inclusive, Defendants-Appellees.	No. 16-4095 (D.C. No. 2:14-CV-00090-CW) (D. Utah)

ORDER AND JUDGMENT*

(Filed Mar. 13, 2018)

Before **BALDOCK**, **KELLY**, and **O'BRIEN**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

After he was fired from his job as a steel salesman, Robert Balding sued his employer, Sunbelt Steel Texas, Inc., its predecessor, Sunbelt Steel Texas, LLC (together, Sunbelt), and Sunbelt's parent company, Reliance Steel & Aluminum Co. (Reliance). He asserted claims for breach of contract and quantum meruit/unjust enrichment[1] under Utah state law, and for violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The district court entered summary judgment in favor of defendants on all claims, and Balding appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse on the breach-of-contract claim as to both Sunbelt and Reliance and affirm in all other respects.

BACKGROUND

In April 2009, Balding began working as a salesman for Sunbelt, a distributor of specialty steel bar headquartered in Texas. Balding was the lone Sunbelt employee based in Utah. The terms of his compensation were originally set out in an email from Sunbelt's Vice-President of Sales, Jerry Wasson: $30,000 a year in base salary plus 1.5% commissions on "total gross sales." Aplt. App., Vol. I at 56. Wasson told Balding his

[1] We will refer to this claim as the "unjust enrichment" claim. *See Jones v. Mackey Price Thompson & Ostler*, 355 P.3d 1000, 1012 (Utah 2015) (explaining that unjust enrichment, also known as "[c]ontracts implied in law" or "quasi-contract[ ]," is one of quantum meruit's "two distinct branches" (the other being "contracts implied in fact")). In this claim, Balding sought relief under the "unjust enrichment" branch of quantum meruit. *See* Aplt. App., Vol. I at 35.

base salary was lower than that of a salesman who could not earn commissions and he could not "have it both ways" (i.e., higher salary and commissions). *Id.* Sunbelt never paid Balding any commissions, but it did raise his base salary to $40,000 in January 2010. Sunbelt's Executive Vice President, Kathy Rutledge, who directly supervised Balding at the time, claimed she told Balding the raise was in lieu of commissions, but Balding denied ever having been told that. Sunbelt later raised his base salary to $45,000 in April 2011, $52,000 in January 2012, and $60,000 in May 2012. Between December 2010 and October 2012, Sunbelt also paid Balding seven bonuses totaling $23,250.

During the course of his employment with Sunbelt, Balding suffered from, and Sunbelt was aware of, various medical issues, including a panic attack on November 20, 2013. The next day, Balding informed Sunbelt that his doctor recommended he take some time off work, and Sunbelt told him he could do so.

While Balding was out, his supervisor, Mike Kowalski, Jr., was monitoring his email. On November 26, one of Balding's customers, Weatherford, emailed Balding about the status of an order and also emailed him a copy of the associated purchase order, which was dated November 5, 2013. Kowalski and Sunbelt's Inside Sales Manager, Todd Perrin, investigated and determined that although the order had not been entered into Sunbelt's system, Balding had promised Weatherford by email on November 21 that the order was "in process," he was "rushing [it] through," the "dock date" would be "3 days," and the parts would be "to freight

forwarder" by November 26, 2013. *Id.*, Vol. II at 355-56. According to Kowalski and Perrin, none of that could have been true without a purchase order in Sunbelt's system.

Kowalski and Perrin called Balding and asked why he had told Weatherford the order was in process. According to Kowalski, Balding denied having told Weatherford the order was in process until Kowalski revealed that he had reviewed Balding's email. But according to Balding, he told Kowalski he did not know why he had not entered the Weatherford order, and that although Kowalski accused him of lying about his representations to Weatherford, he told Kowalski he had reserved steel bars for the order while waiting for the hardcopy of the purchase order.

Kowalski Jr. then informed Rutledge and Sunbelt's President, Mike Kowalski, Sr., what had happened. The three of them agreed to terminate Balding's employment because he had made misrepresentations about the order to Weatherford and then lied about it to them, and because Kowalski Jr. previously had received complaints from two of Balding's other customers, had issued a written warning in August 2013 to Balding based [sic] one of those complaints, and had issued another written warning less than two weeks prior to the Weatherford incident because Balding was consistently late with reports and his voicemail was constantly full. Rutledge called Balding that day (November 26) and told him he was fired.

In this action, Balding alleged Sunbelt owed him $173,277.92 in commissions based on the compensation agreement set out in Wasson's email or under a theory of unjust enrichment. In his claims under FMLA (interference and retaliation) and the ADA (discrimination, retaliation, and failure to accommodate), Balding alleged he was fired because of his health issues and for trying to take FMLA leave. He further claimed Reliance was jointly liable with Sunbelt for any alleged wrongful conduct.

In seeking summary judgment, Sunbelt maintained there was no breach of the promise to pay commissions because Balding agreed to new compensation terms when he continued to work while accepting the raises and bonuses without objection to not being paid any commissions. Sunbelt also argued the contract between Sunbelt and Balding foreclosed the unjust enrichment claim under Utah law. And Sunbelt asserted there was no evidence Balding had a disability as defined in the ADA, it had provided all the accommodations Balding had requested, and it had fired Balding for a legitimate, non-discriminatory and non-retaliatory reason, which foreclosed relief under the ADA and FMLA. Reliance, which had acquired Sunbelt in October 2012, argued it was not liable on any claims because it was not Balding's employer and also for the same reasons set out in Sunbelt's motion for summary judgment.

After a hearing, the district court issued an oral ruling granting defendants' motions for summary judgment on all claims. Balding sought relief under

Fed. R. Civ. P. 59, which the court granted in part as to the FMLA claims and the ADA retaliation claim against Sunbelt, concluding there was sufficient evidence of pretext to get to the jury. The court left unchanged the remainder of its oral rulings, although it fleshed out its reasoning on most of the other claims, including that Sunbelt was entitled to summary judgment on the ADA discrimination and accommodation claims because Balding had not established that he had a qualifying disability and because Sunbelt had provided every accommodation Balding had requested.

Sunbelt and Balding then both filed Rule 59 motions seeking reconsideration of the first post-judgment decision. The court granted Sunbelt's motion and denied Balding's. The court concluded that in its first post-judgment decision, it had misapprehended the controlling law on pretext, and under the correct analysis, Balding's evidence was insufficient to avoid summary judgment. The court therefore awarded summary judgment to Sunbelt on *all* the FMLA and ADA claims, including the ADA discrimination and accommodation claims. Balding appeals.

DISCUSSION

We review an order granting "summary judgment de novo, applying the same standards that the district court should have applied." *Fields v. City of Tulsa*, 753 F.3d 1000, 1008 (10th Cir. 2014) (internal quotation marks omitted). A "court shall grant summary judgment if the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]e examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the nonmoving party." *Fields*, 753 F.3d at 1009 (internal quotation marks omitted).

A. ADA and FMLA claims

The district court granted summary judgment to Sunbelt on the FMLA and ADA claims by applying the *McDonnell Douglas*[2] burden-shifting analysis and concluding that Balding had not shown a genuine dispute of material fact that Sunbelt's proffered reason for terminating his employment was pretextual. *See* Aplt. App., Vol. IV at 1156-65. It was proper to do so for the FMLA retaliation and ADA claims. *See DeWitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1306-07 (10th Cir. 2017) (describing three-step burden-shifting analysis applicable to FMLA retaliation and ADA discrimination and accommodation claims); *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1186 (10th Cir. 2016) (same with respect to ADA retaliation claim). But because the burden-shifting analysis does not apply to a FMLA interference claim, "no pretext analysis is necessary"; instead, "summary judgment for [an] employer is warranted when there is no genuine dispute as to any material fact regarding alternative reasons for termination." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 978 (10th Cir. 2017) (internal quotation marks

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

omitted). The district court recognized this distinction in its first post-judgment decision, *see* Aplt. App., Vol. IV at 1028, but in its second post-judgment decision, the court engaged in only a pretext analysis for *all* the FMLA and ADA claims, including the FMLA interference claim.

That was incorrect. But regardless, the two standards are similar enough that we are confident in the court's final analysis. In examining pretext, the relevant inquiry, as the district court correctly noted, is not whether Sunbelt's "'proffered reasons were wise, fair, or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.'" Aplt. App., Vol. IV at 1160 (quoting *Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1289 (10th Cir. 2013)). Similarly, in considering an employer's proffered rationale for an adverse employment action that allegedly interfered with an employee's FMLA leave, "[w]hat is important is . . . whether the [employer] terminated [the employee] because it sincerely, even if mistakenly, believed [in the proffered rationale]." *Dalpiaz v. Carbon Cty.*, 760 F.3d 1126, 1134 (10th Cir. 2014).[3]

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[3] As to his FMLA claims, Balding argues, as he did before the district court, that where wrongful conduct is carried out by the employer's "corporate proxy," the employer is subject to strict liability under *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Aplt. Opening Br. at 57. Like the district court, we reject this argument. Although Balding is correct that the burden-shifting analysis does not apply to FMLA interference claims, that is not because of anything in *Harris*. *Harris* was not a FMLA case and makes no mention of strict liability for conduct by a "corporate proxy." Hence, *Harris* is wholly irrelevant to Balding's argument,

In reaching the conclusion that summary judgment in favor of Sunbelt was warranted on all the FMLA and ADA claims, the district court examined four facts bearing on Sunbelt's claimed reason for firing Balding: (1) Sunbelt knew about a number of Balding's health issues before terminating him; (2) Sunbelt decided to fire Balding the same day it learned about the Weatherford issue and while Balding was on leave and without a meaningful investigation; (3) Sunbelt's senior management (including Kowalski Sr. and Rutledge) had agreed on November 22 that Sunbelt might have to fire Balding after January 1, 2014;[4] and (4) management was on notice that Weatherford might have backdated to November 5 the purchase order it sent on November 26.

The district court concluded that despite these facts, there was no genuine dispute that Sunbelt honestly

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and we are at a loss why his counsel has repeated this argument on appeal.

[4] This fact was set out in Exhibit O to Balding's declaration filed with his opposition to summary judgment. The district court considered this fact despite finding defendants' evidentiary objection to it "well taken." Aplt. App., Vol. IV at 1033 n.9. The court also considered "well taken" defendants' evidentiary objections to a large number of paragraphs of Balding's declaration and other exhibits attached to it. *Id.* In his opening appellate brief, Balding did not take issue with the court's ruling on the evidentiary objections, so defendants argued he therefore waived any challenge to that ruling. In his reply brief, Balding finally challenged the ruling. We need not sort out the evidentiary ruling because the district court considered Exhibit O, and none of our rulings in this decision are dependent solely on any of the other stricken provisions or exhibits. We express no view on the propriety of the district court's ruling on the evidentiary objections.

believed Balding had misled Weatherford about the status of the order and then lied about it when confronted. The court provided a thorough explanation that we need not repeat here; we have reviewed it, along with the record, the controlling law, and the parties' arguments, and we agree with the court's analysis. We therefore affirm summary judgment on the FMLA and ADA claims for substantially the same reasons stated in the district court's second post-judgment decision. In addition, to the extent the ADA accommodation claim concerns pre-termination conduct, we also affirm summary judgment in favor of Sunbelt because Balding failed to show he did not receive any pre-termination accommodation he requested. *See* Aplt. App., Vol. IV at 1043 (concluding, in first post-judgment decision, that Balding's failure to make this showing "independently defeats [his] ADA failure to accommodate claim"). We do not see how the failure to show pretext warrants summary judgment on any pre-termination accommodation claim Balding may have asserted.

B. Breach-of-contract claim

On the breach-of-contract claim, the district court ruled that Balding was precluded from claiming entitlement to the 1.5% commission on his total gross sales set out in his original compensation agreement because he accepted raises and bonuses for several years and did not object to Sunbelt's failure to pay him any commissions. The court determined "a jury could find only that from January 2010 through the end of his employment in November 2013, Balding accepted

salary increases, accepted bonuses, never complained to his direct supervisors about not receiving commissions, and never asked Sunbelt for an accounting or in any way made a demand for commission payments." *Id.* at 1026.

The court reached this conclusion by testing the facts against several principles of Utah law concerning modification of unilateral contracts with implied-in-fact terms. In doing so, however, the court seems to have overlooked an important component of such a modification—whether Balding could only have reasonably believed Sunbelt was extending a new offer based on the new terms.

In *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997 (Utah 1991), the Utah Supreme Court set out the general principle that in unilateral employment contracts, an employee's conduct can result in a new or changed contractual obligation:

> In the case of unilateral contract[s] for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the

> employment supplies the necessary consideration for the offer.

Id. at 1002 (internal quotation marks omitted).[5] The district court relied on this passage from *Johnson*. But *Johnson* went on to state that although it was unclear "what type of evidence is sufficient to raise a triable issue concerning the intentions of the parties and therefore the existence of an implied-in-fact contract term," it was "clear that the evidence must be sufficient to fulfill the requirements of a unilateral offer." *Id.* And to find an implied-in-fact provision in a unilateral contract enforceable, *Johnson* requires the employer to communicate to the employee its intent that it is offering a new term in a manner sufficiently definite for the employee to reasonably believe the employer is offering that term:

> [F]or an implied-in-fact contract term to exist, it must meet the requirements for an offer of a unilateral contract. There must be a manifestation of the employer's intent that is communicated to the employee and sufficiently definite to operate as a contract provision. Furthermore, the manifestation of the employer's intent must be of such a nature that the employee can *reasonably believe* that the

[5] The issue in *Johnson* was whether an implied-in-fact contract between an employer and employee included a provision that the employee, who otherwise was an at-will employee, could be fired only for good cause. Notwithstanding this factual distinction, *Johnson*'s analysis can be applied here.

> employer is making an offer of employment [on new terms].

Id. (emphasis added) (footnotes omitted).

The chief manifestation of Sunbelt's intent concerning base-salary raises is disputed – whether Rutledge told Balding the initial $10,000 raise was in lieu of commissions. The district court considered this factual dispute immaterial under *Johnson* and other Utah law and instead focused on Balding's conduct in accepting raises without complaining about the lack of commission payment.[6]The district court concluded it would be unreasonable for Balding to believe he was still on a commission structure when his first raise ($10,000) far exceeded the commissions he alleged he

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[6] In addition to the one quote from *Johnson*, the district court also relied on Restatement (Second) of Contracts § 202(4) (Am. Law Inst. 1981), which provides: "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." And the district court cited *B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc.*, 754 P.2d 99, 103 (Utah Ct. App. 1988), for the principle that "one cannot prevent a waiver by a private mental reservation contrary to an intent to waive, where his or her actions clearly indicate such an intent." As we proceed to explain, there is a genuine dispute of material fact whether Balding had "knowledge" of the claimed nature of the raises and bonuses such that he had to have reasonably believed commissions were no longer part of his compensation package. And tied to that disputed material fact is whether Balding "clearly indicate[d]," *id.*, (or could have indicated) an intent to waive the base-salary+commission structure.

was owed at that point ($3,725),[7] and Wasson's initial email offer of employment told Balding he could not have both commissions and a base salary as high as a non-commissioned salesman.

The court also relied on the fact that after the initial raise in January 2010, the only conversation Balding had with a supervisor occurred in April 2012, when Balding sent an email to Kowalski Sr. after having had an oral discussion with him about commissions. Balding wrote:

> I could tell that you were surprised to hear of a commission which was written up for me. I would like you to know that I am grateful for profit sharing and other incentives Sunbelt Steel gives. I am here to help grow [the company] and become [a] huge part of Sunbelt Steel. If there could be some consideration that [sic] would be grateful.

Aplt. App., Vol. II at 536. Kowalski Sr. replied: "Thanks, Rob. I plan to have follow-up conversations with Kathy [Rutledge] & Jerry [Wasson] this week and will get back to you. Hang in there!" *Id.* Kowalski Sr. never got back to Balding. In his affidavit, Kowalski Sr. explained that he "let the matter drop" and "no one at Sunbelt was earning commissions at [that] time." *Id.* at 373. The court declined to accept Balding's

[7] As time went on, Balding's sales grew to the point where the total in commission he alleges he is owed far exceeds what he earned in raises and bonuses. The district court did not take that into consideration, but it bears on the reasonableness of Balding's belief that the raises and bonuses were not in lieu of commissions.

speculation that Kowalski Sr.'s failure to get back to him was evidence of deceit and guilt. The court also pointed out that when asked, Balding said he did not know why he did not raise the commission issue with either Rutledge or his other direct supervisor, Kowalski Jr., other than he thought Wasson was the one to go to.[8]

The district court's focus on Balding's conduct overlooked whether the offer of a raise in lieu of commissions was adequately communicated to Balding (setting aside what Rutledge allegedly told Balding) such that the only reasonable inference to be drawn from the facts is that Balding must have reasonably believed that Sunbelt had made that offer. And the only other record evidence of a manifestation of Sunbelt's intent regarding the raises is a "Personnel Change Notice" Sunbelt entered on January 6, 2012, reflecting a "*merit increase* effective 1/2/2012" for Balding. *Id.*, Vol. III at 622 (emphasis added). The notice states that his "Old Title/Salary" was "$45,000," and

[8] The district court also noted Balding twice asked Wasson when he might get paid commissions he was owed. Wasson first told Balding the "keystone group" of investors would not authorize a commission payment, Aplt. App., Vol. I at 258, and later said Sunbelt was just getting profitable and Balding should start seeing his commissions "shortly," *id.* at 259-60. But as the court observed, Balding testified he had contacted Wasson about commissions *before* the first raise in January 2010, so those contacts do not support Balding's argument that he believed he was entitled to commissions despite the parties' course of conduct *after* the January 2010 raise. Balding testified he spoke with Wasson about commissions again some time later, but he could not recall when or the content of the discussion.

his "Job and Salary Change" was to "$52,000 yearly." *Id.* (some capitalization omitted). By referring only to base salary and not commissions, the notice could be viewed as a manifestation of Sunbelt's intent to supplant commissions with raises. But the space for Balding's signature is empty; hence, it is unclear whether Balding saw the notice prior to his termination (neither he nor Sunbelt asserts that he did). Even if he did, a factfinder could view the notice as evidence that Sunbelt simply gave Balding a merit-based raise to his base salary. Because the notice is subject to interpretation by a factfinder, it is, along with whether Rutledge told Balding the initial raise was in lieu of commission, material to the definiteness of an offer to substitute raises for commissions.[9]

As for the bonuses, the only evidence bearing on Sunbelt's intent comes in the form of a memo Kowalski Sr. sent to all employees in September 2011 explaining the bonus plan Sunbelt had put in place for 2011: "[A]ll employees are eligible to receive quarterly and annual bonuses that are based on the company's performance once a brief employment period has been satisfied. The bonus amounts are discretionary and are primarily based on the achievement of certain goals such as sales

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[9] In addition to the Personnel Change Notice, the record contains two emails from Kowalski Sr. to Sunbelt's controller informing the controller of increases in Balding's base pay (from $30,000 to $40,000 in January 2010, and from $40,000 to $45,000 in April 2011). *See* Aplt. App., Vol. III at 616, 618. Like the notice, neither of the emails mentions commissions, but unlike the notice, there is no indication Balding may have seen them during his employment.

volume and profitability." *Id.*, Vol. II at 377. By the time of this memo, Balding had already received three bonuses (in December 2010, April 2011, and July 2011). But the memo says the bonuses are tied to company performance, not individual performance, as were Balding's commissions. The memo, therefore, sheds little light on whether Balding had to have reasonably believed the bonuses were in lieu of the 1.5% commission on his total gross sales he was originally promised.

In sum, there are genuinely disputed issues of material fact on the contract claim. We therefore reverse the grant of summary judgment to Sunbelt on that claim.

C. Unjust enrichment

We affirm the grant of summary judgment to Sunbelt and Reliance on the unjust enrichment claim. Although the parties dispute the terms of Balding's compensation, the existence of a valid, enforceable compensation contract between Sunbelt and Balding is undisputed. As the district court ruled, under Utah law, the existence of a valid, enforceable contract forecloses relief under a theory of unjust enrichment because the two theories of recovery are inconsistent. *See Helf v. Chevron U.S.A., Inc.*, 361 P.3d 63, 78 (Utah 2015) ("Because a breach of contract remedy requires a valid, enforceable contract, while a quantum meruit remedy presupposes that no contract governs the services provided, a plaintiff may recover only one of these two inconsistent remedies."); *Concrete Prods. Co. v. Salt Lake*

Cty., 734 P.2d 910, 911 (Utah 1987) ("Unjust enrichment is a doctrine under which the law will imply a promise to pay for goods or services when there is neither an actual nor an implied contract between the parties."). Balding contests only an "additional reason" the district court gave for granting summary judgment on the unjust enrichment claim – that even if there was no contract, unjust enrichment is unavailable because his compensation was reasonable. Aplt. App., Vol. IV at 1027. We need not decide the correctness of the court's "additional reason."

D. FMLA, ADA, and contract claims against Reliance

Balding brought the same FMLA, ADA, and breach-of-contract claims against both Sunbelt and Reliance, contending that Reliance and Sunbelt were a joint enterprise and that Reliance was as much his employer as Sunbelt. We affirm the grant of summary judgment to Reliance on the FMLA and ADA claims. But we reverse with respect to the contract claim because the district court never decided whether Reliance was also Balding's employer or a party to Balding's compensation agreement, and we decline to do so in the first instance.

At the oral hearing on defendants' motions for summary judgment, the district court granted summary judgment to Reliance because the evidence was insufficient "for a jury to conclude that the elements for the FMLA interference and other claims that [the

court] discussed would be sufficient to hold Reliance liable all for the same reasons that [the court] explained as to Sunbelt." *Id.* at 944.[10] This ruling encompassed all of Balding's claims because the court had already "discussed" them all. In its first post-judgment decision, the court summarily denied Balding's Rule 59 motion "as to Reliance on all claims," *id.* at 1019, because Balding had "simply reargue[d] the same facts that the court previously considered and found to be inadequate to sustain his burden of going forward, particularly as to his 'joint' employer/enterprise theory claims against defendant Reliance, Sunbelt's parent 'umbrella' corporation," *id.* at 1022. In its second post-judgment decision, "the court decline[d] to revisit its prior ruling dismissing Balding's joint employer/enterprise theory claims against Reliance" and also ruled that Balding's claims against Reliance were moot because the court had dismissed "Balding's FMLA and ADA claims against Sunbelt on the grounds that their reasons for terminating him were not a pretext." *Id.* at 1149 n.3.

We agree with the district court's ruling that Reliance cannot be liable on the FMLA and ADA claims if Sunbelt is not. The same facts concerning the legitimacy of the proffered reason for terminating Balding's employment are the same as to both Sunbelt and Reliance; the only role Balding claimed Reliance played in the decision to fire him was approving Sunbelt's

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[10] The court also considered whether the claims against Reliance were moot because of the rulings in favor of Sunbelt on all claims. *See* Aplt. App., Vol. IV at 939. But the court did not base the grant of summary judgment to Reliance on mootness.

decision. But the sole reason the district court gave for granting summary judgment to Reliance on the contract claim was its grant of summary judgment to Sunbelt on that claim. Because we are reversing on the contract claim as to Sunbelt, the basis for the district court's ruling as to Reliance is wholly undermined. Despite claiming in its first post-judgment decision that it had already considered and found Balding's joint employer/enterprise theory inadequate, the court had not done so in its oral ruling; it simply granted summary judgment to Reliance for the same reasons it had granted summary judgment to Sunbelt.[11] We therefore must reverse on the contract claim as to Reliance. We decline to resolve in the first instance Balding's joint employer/enterprise theory.

CONCLUSION

The district court's grant of summary judgment to all defendants on the breach of contract claim is reversed. The grant of summary judgment to all defendants is otherwise affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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[11] Balding pointed this out in his second Rule 59 motion, arguing the court failed to provide "any analysis let alone a sound conclusion for ruling that . . . Reliance is somehow not also Balding's employer and a contracting party with Balding given the agreements and contractual duties by Reliance to Balding." Aplt. App., Vol. IV at 1049 n.1.

16-4095, *Balding v. Sunbelt Steel Tex., Inc.*
O'BRIEN, J., concurring

The majority reverses the summary judgment entered in favor of defendants on Balding's breach of contract claim. While a reversal is necessary, I would limit the scope of reconsideration. In all other respects, I join the Order and Judgment.

At-will employment permits either of the parties to modify or end the relationship at any time for any reason – motive or purpose matter not. Of course, any change is prospective only (both parties are bound by their agreement until it is changed or terminated) and the employer's right to unilaterally terminate employment is limited by state and federal laws forbidding myriad discriminatory practices. Those exceptions aside, an employee may demand a raise (or other changes) and may walk away without consequence if the demand is not met. Conversely, an employer may, for whatever not improperly discriminatory reason, decide an employee is overpaid and require him to work for less pay or under different, but not legally prohibited, circumstances. The employee must then decide whether to accept the new terms or forego continued employment; it is a binary choice – unpleasant perhaps, but a choice nonetheless. There is no requirement that demanded or imposed changes be agreeable to the other party, or negotiable, or fair or even reasonable. If they are not accepted (or modified), employment ends. However, to be effective the changes must be clearly communicated to the affected party, either expressly or tacitly, and the affected party's response must be clearly communicated,

either expressly or tacitly. "Clearly communicated" is an objective test. With those principles in mind, I turn to the matter at hand.

Balding signed on with Sunbelt in April 2009 as an at-will employee at a salary of $30,000 per year plus a 1.5% commission on sales. Wasson (the hiring authority for Sunbelt) explained that a commission was included because Balding's salary was lower than salesmen who did not receive commissions; Balding was pointedly told he could not have it both ways (higher salary and commissions).

No commissions were ever paid and no explicit change to the employment agreement was ever formally negotiated or even formally proposed. However, Balding's compensation changed significantly. Starting in January 2010 he received substantial raises and some bonus payments, summarized as follows:

Employment start	April 2009 – $30,000 + 1.5% commission
Raise 1	January 2010 – to $40,000
Bonus 1	December 2010
Bonus 2	April 2011
Raise 2	April 2011 – to $45,000
Bonus 3	July 2011
Bonus 4	October 2011
Raise 3	January 2012 – to $52,000
Bonus 5	January. 2012
Bonus 6	April 2012
Ambiguous email	April 2012 – for email text see majority opinion at 12
Raise 4	May 2012 – to $60.000 [sic]

Bonus 7	October 2012 (the 7 bonuses total $23,200)
Employment end	November 26, 2013

According to Sunbelt, contemporaneously with his first raise, Ms. Rutledge, Balding's supervisor, told him the raise was in lieu of commissions. Her testimony is the only proof. Balding says he was told no such thing by Rutledge or anyone else. Moreover, he claims to have repeatedly complained to Sunbelt's management team about its failure to pay his commissions. Indeed, two of those complaints appear in the record, but they occurred before his first raise. Beyond that, no admissible evidence clearly supports his claim of repeated complaints. There is, however, an email he sent to Kowalski, Sr. in April 2012. It is, at best, equivocal and the parties offer conflicting interpretations.

The district judge dutifully acknowledged the dissonance in the Rutledge and the Balding positions and resolved the matter in Balding's favor. But that did not end the debate. The judge went on to properly conclude that Balding's employment was at-will and to announce the substance of his reasoning on the breach of contract claim, writing:

> On the evidence presented by Balding, a jury could find only that from January 2010 through the end of his employment in November 2013, Balding accepted salary increases, accepted bonuses, never complained to his direct supervisors about not receiving commissions, and never asked Sunbelt for an accounting or in any way made a demand for

> commission payments. The one conversation with Kowalski, Sr. in April 2012 in which Balding said he would be grateful if some consideration could be given to a commission, even drawing all inferences in favor of Balding, is not sufficient for a jury to find, in the face of Balding accepting raises and bonuses for four-and-one-half years without complaint, that the original agreement for compensation including a commission had not been superseded by the parties' course of dealing.

Aplt. App., Vol. IV at 1026.

Significantly, Balding knew from the start of his employment with Sunbelt that "he could not have it both ways" (a higher salary and commissions). Somewhere along the time continuum detailed above, but no later than May 2012, when Balding accepted a raise to $60,000 without comment or complaint about commissions, no person could reasonably fail to recognize that the employment terms had changed – no commissions were paid, but raises and bonuses magically appeared and were accepted. Balding might not have liked or agreed with the new reality, but he was undeniably aware of it. Knowing the probable result of demanding payment for commissions – termination of his employment – he chose not to rock the boat. At that point his silence and decision to soldier on, coupled with an understanding of his binary option (accept the new compensation scheme or quit), was an assent to the changes (implied acceptance). No jury could reasonably conclude otherwise. In summary, there is a tipping point where minute factual distinctions cease to matter.

Where it falls, exactly, on the timeline is a matter of fact, but the figurative "edge of the universe" is a matter of law and common sense, not fact.

The district judge looked at roughly four years of experience and concluded things had changed, but then he made his conclusion retroactive to the earliest possible date, January 2010. I don't see how that can be said without factual findings. Balding may have smelled something in the wind, but at that early date he cannot be charged with knowledge sufficient for summary judgment against him. For that reason I concur in the reversal and remand on the breach of contract issue. However, I would limit the remand to establishing a date prior to the May 2012 raise when Balding was sufficiently aware of the new employment terms to trigger his obligation to fish or cut bait. Damages for breach of contract, if any, should be accordingly limited. Balding is entitled to commissions at least through January 2010. The parties' dispute the amount; it will require resolution.

Balding argues that the defendants interfered with his ADA and FMLA rights and retaliated against him for attempting to exercise them. The district court entered summary judgment against Balding on those claims and we have affirmed. That said, on remand, any argument about the propriety of Balding's termination should have no place; he was an at-will employee – the only issues are, 1) the date of Balding's implied acceptance of the newly imposed compensation regime and 2) damages, if any.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re: ROBERT J. BALDING, Plaintiff, v. SUNBELT STEEL TEXAS, INC., SUNBELT STEEL TEXAS, LLC, RELIANCE STEEL & ALUMINUM CO., DOES 1 through 50, inclusive Defendants.	)	Case No. 2:14-CV-00090CW

Transcript of Motions for Summary Judgment
BEFORE THE HONORABLE CLARK WADDOUPS
April 21, 2016

* * *

[77] THE COURT: We have to be able to show that the decision to terminate was based upon a belief that this was a false – was not a good-faith belief based or that he misled the customer. And you said, well, because somebody else in the company had sent these e-mails. How do we say that they didn't in good faith believe that what the customer told them was true?

MR. ANDRUS: Because by that time the customer didn't have an opinion, a bad opinion, of Mr. Balding.

THE COURT: How do we know that Mr. – the two Mr. Kowalskis didn't know that, or knew that?

MR. ANDRUS: That they didn't – well, we know they had a bad opinion of Mr. Balding and they had for some months now, and they wanted to terminate him.

THE COURT: And had every right to terminate him unless they were doing it to interfere with him taking his FMLA rights.

MR. ANDRUS: Exactly, and that's what they did.

THE COURT: And that's the link I'm missing.

MR. ANDRUS: That's the link you just stated, that a jury can conclude that based on this [78] evidence and this story that there's triable issues of fact, and they can come to that same conclusion because of the conversations that they had the day before and the history of these other documentations that they did this because he was a problem, and yet they promised that they were going to meet with him and not terminate him. They had some instance to terminate him and tell him – in fact, they promised him to have a meeting in think February of 2014, but instead they wanted to find something, and they were working on it too for months, and they finally thought that they

had him, that they had this big lie, that he had made this lie, and I guess that's the crux of this case. And actually the liar is the company, this grandiose lie is that they thought he was a liar and they tried to lie about it to terminate him and cover up and create a pretext. And the triable issues of fact there are sufficient enough to meet our burden that it is incredible, it is improper, it is unworthy of credence by the trier of fact in this situation. Even though we don't have that burden, we can show that there was pretext, a coverup, and triable issues of fact to allow that to be decided. Thank you.

* * *

[82] THE COURT: All right.

Mr. Andrus, anything further you want to say before I make my decision?

[83] MR. ANDRUS: Just on this comment before this last one about the reasonableness of the perception. That's a question for the trier of fact, weighing the credibility of the witnesses and the evidence. That is not an issue right now for as a matter of law, but the reasonable perception is a question for the jury. Thank you.

THE COURT: All right. Thank you.

I'm prepared to make a decision on this cause of action as well on Count 3. There are three claims – well, two claims, I guess is the way to state this. There's a claim for interference and a claim for retaliation.

To prove interference the employee must show that he is entitled to FMLA leave. There is no dispute about that in this case.

He must show that there's an adverse action by the employer that interfered with his right to take FMLA leave. I think there's a dispute about that, but there's probably sufficient evidence to create a prima facie case. The employer must show – the employee must show that the employer's action was related to the exercise or attempted exercise of his FMLA rights. Again, I think there is a dispute about whether or not Mr. Balding ever really requested FMLA, given the e-mail [84] in which he says I want to characterize it as vacation or take sick leave. Nevertheless, I'm going to assume for purposes of the analysis that that element could be satisfied.

And, next, the employee must demonstrate the employer was on notice that the employee may be entitled to leave under the FMLA. I believe that element is met.

Finally, that there's a – burden shifting does not apply to the interference claim, but if the employee makes a prima facie showing of each element, the employer has the opportunity to show it would have taken the adverse action regardless of the pursuit of FMLA leave. That means that he was terminated for a legitimate non-retaliatory reason.

Under the retaliation claim the employee has to demonstrate that he was engaged in a protected

activity. I believe there is an argument that would support the claim that he was.

Two, that the employee was subject to an adverse employment action. In this case it's undisputed that he was terminated.

Three, there was a causal connection between the protected activity and the adverse action. The only evidence that would support that in this case is proximity, which by itself is a very weak read, but [85] probably enough, as defendants have conceded, to support a prima facie case.

And, finally, that the employee must demonstrate that there is a genuine issue of material fact as to whether the employer's proffered reason is pretextual.

The law is well established that an employee who requests FMLA leave, or is on leave, does not have greater rights than an employee who's regularly employed. In other words, if there were valid reasons, justifiable reasons for his termination, or the fact that he was on FMLA leave or was seeking FMLA leave does not preclude the termination. The relevant inquiry then becomes whether or not the employer honestly believed the asserted reasons for termination and acted in good faith per those beliefs.

The facts that relate to this are that Mr. Balding was an at-will employee, there's no dispute about that fact.

Second, it's undisputed that on November 21, 2013, November 22, 2013, November 24, 2013, and

November 25, 2013, Mr. Balding told either Ms. Rutledge, who was his direct supervisor, or Pickering, who was the H.R. manager, about his medical issues. There was a dispute about whether he was requesting vacation or time [[86] off and was intending or filling out FMLA paperwork. There is no evidence that he ever filled out the FMLA paperwork. This is not relevant if in fact there was a legitimate reason for termination.

It is undisputed that Mr. Balding alleges that he communicated with Pickering regarding his desire to take leave and she told him to fill out the FMLA paperwork. Mr. Balding claims to have obtained the FMLA paperwork from his doctor and filled it out, but that document, if it happened, is not in the record and has not been produced.

It is undisputed that Sunbelt never denied leave to address the health or medical issue. His request for leave on November 25 was specifically granted. The only dispute is whether anyone made any negative comments to Mr. Balding regarding his request for leave. He admitted in his deposition that no one did, but his subsequent declaration contradicts that. The law is well established that you cannot overcome sworn testimony in a deposition by submitting a declaration to the contrary. So the court rejects the declaration testimony to the extent it contradicts his deposition testimony.

It is undisputed that while Mr. Balding was on leave his e-mails were forwarded to his supervisor, [87]

Mr. Kowalski, Jr. The only dispute he raises is whether this was a standard practice. I believe that for purposes of this is irrelevant.

It is undisputed that on November 26, 2013, Mr. Balding's customer, Weatherford, e-mailed an inquiry about the status of purchase order 10407337. Mr. Kowalski, Jr. could not find any open or invoiced order with this number in Sunbelt's system and it had not been entered. These facts are undisputed. Mr. Balding only disputes that he had not received a hard copy of the purchase order until that day.

It is undisputed that upon review of Mr. Balding's correspondence with Weatherford, Mr. Kowalski, Jr. discovered that a few days earlier, on November 21st, Mr. Balding had made a series of representations to Weatherford that the order was in process. Mr. Balding now would argue what he meant by "in process," but, given the custom and practice of the company, it was fair for Mr. Kowalski to make an inference that that meant that it was in the system and being processed.

It's undisputed that Mr. Kowalski received the purchase order that was referred to above in a hard copy on November 26th and it bore a date of November 5, 2013, on it, suggesting, or at least allowing an [88] inference by Mr. Kowalski, Jr., that he had received the order three weeks earlier.

It is disputed whether or not November 5th is a real date or a date that was added after the fact. Mr. Balding claims that he factually did not receive the order three weeks earlier. This dispute however does not

change the fact that Mr. Kowalski had a reason to believe from the face of the order that Mr. Balding had received the order earlier and that Sunbelt did not – there is no basis to conclude that Sunbelt did not honestly believe that the order had been received at an earlier date at the time it decided to terminate him, and given that fact together with the other e-mails and the discussions that are referred to in the e-mails.

It's undisputed that Kowalski, Jr. called Mr. Balding on November 26th and that Mr. Balding admitted he had not received the purchase order until that morning, the day that he had promised it would be shipped. Mr. Kowalski asked why he had made the representation to the customer. Mr. Balding tried to explain why these statements were not misleading. Mr. Balding admits that Mr. Kowalski accused him of lying. It is disputed as to whether or not Mr. Balding claims he did not say I don't know, which is what Mr. Kowalski indicates when he was asked if he was [89] lying. Again, that disputed fact does not go to the issue of whether or not Mr. Kowalski believed in good faith that there had been misrepresentations to the customer.

It is undisputed that Mr. Balding has admitted that even though he only had a purchase order number on November 21, 2013, which is the date he made the misrepresentations to the customer that the order was in process, he needed more information than a purchase order number in order to in fact put the order in process. Mr. Balding knew of the steps required to process the purchase order, and none of those steps had

been performed. The only dispute is whether or not Mr. Balding's motive and statement about what he meant by the words "in process" and that he was doing something. There is nothing to dispute that Mr. Kowalski had every reason to believe and accept that those were used in the normal way that Mr. Kowalski understood those words.

It is not in dispute as to what Mr. Kowalski and the other managers at Sunbelt believed at the time.

It is undisputed that when Sunbelt reported to Weatherford that its order would be delayed the Weatherford representative indicated that she had been misled by writing, my contact with Sunbelt has given me [90] false information. The only dispute is about whether she had been misled from – was missing from a Weatherford e-mail.

It's undisputed that Mr. Balding had received two formal written warnings prior to this about poor communication with customers and Sunbelt employees. Mr. Balding admits that there were grounds for the warnings and that he was on notice that termination would be considered. Mr. Balding admits a recent complaint from other customers demanding to be assigned to another sales person due to his inaccuracies. Although these facts are not specifically disputed, Mr. Balding claims that he did dispute the warnings and that all of the warnings and notices were due to retaliation for having medical problems and the company not providing help.

It is undisputed that Mr. Balding received copies of Sunbelt's employee handbook stating that providing false and misleading information was grounds for immediate termination. Mr. Balding disputes what type of misinformation this had reference to. That really doesn't change the nature of what Mr. Kowalski, Jr. and Mr. Kowalski, Sr. believed.

It's undisputed that Mr. Kowalski reported the Weatherford order handling to Mr. Kowalski, Sr. and [91] Ms. Rutledge, and that the decision was made based on that information to terminate Mr. Balding. Mr. Balding asserts that this was a pretext, based on the fact that the termination decision was made within 30 to 45 minutes after being questioned by Mr. Kowalski on the order.

It's undisputed that since Mr. Balding was terminated, he's worked continuously for two Sunbelt competitors doing the same duties without any accommodation for disability. He's not told those employers that he has any medical condition that would affect his ability to perform his job, and has not taken leave of absences for any medical or health-related issues. He did tell one employer specifically that he had indicated it's not a problem for his job and asked for accommodation for that.

I'm going to grant summary judgment on this ground because I believe the basis that Mr. Balding has come forward with to show pretext on these claims is not adequate. There's also other problems. There's generally no medical evidence in the record that would

support the fact that Mr. Balding was suffering from a limiting or medical condition that affected his ability to perform, there's no evidence in the record to support that this was a limiting medical condition that would [92] justify FMLA leave, and there is little evidence in the record from which a jury could find that this was adequate to justify FMLA leave. There is testimony that a jury might consider based on Mr. Balding's own testimony and the fact that he had reported this to the employer. That's not disputed. But at this stage of the proceeding, as I understand Tenth Circuit law, Mr. Balding was required to come forward with some stronger medical evidence to show that this was a limiting disability and had a limiting effect on his ability to do the job. I don't think the evidence is sufficient for a jury to find that that element has been met.

As I indicated, I also find that the evidence is inadequate for a jury to conclude that Sunbelt, in making the decision, was acting under pretext and that there was no good-faith belief that Mr. Balding's representations to the customer had caused damage to Sunbelt and its relationship with its customers and that those were grounds for termination.

Based on those reasons, the motion for summary judgment on the FMLA claims are granted.

With respect to the ADA claims, I believe the same analysis would support summary judgment granting judgment in favor of Sunbelt on the ADA claims. [93] There is not sufficient evidence of admissible testimony that Mr. Balding had a recognized medical

impairment and that the impairment affected or limited one or more of his major life activities. For the same reasons, I believe that there is not adequate proof from which a jury could find that the conduct was a pretext.

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT J. BALDING, Plaintiff, v. SUNBELT STEEL TEXAS, INC.; SUNBELT STEEL TEXAS, LLC; RELIANCE STEEL & ALUMINUM CO.; DOES 1 through 50, inclusive, Defendants.	**MEMORANDUM DECISION AND ORDER** (Filed Apr. 22, 2016) Case No. 2:14-CV-00090 Judge Clark Waddoups

This matter is before the court on Sunbelt Steel Texas, Inc. and Sunbelt Steel Texas, LLC's Motion for Summary Judgment on all counts (Dkt. No. 53), Reliance Steel & Aluminum Co.'s Motion for Summary Judgment on all counts (Dkt. No. 52); and Defendants' Motion to Exclude Plaintiff's Non-Retained Expert Testimony (Dkt. No. 65). A hearing on all motions was held before the Honorable Clark Waddoups on April 21, 2016. Randy Andrus appeared on behalf of Plaintiff and James Barrett appeared on behalf of Defendants. After due consideration of the parties' filings and oral arguments, and otherwise being fully advised,

IT IS HEREBY ORDERED, for the reasons stated on the record, that Sunbelt Steel Texas, Inc. and Sunbelt Steel Texas, LLC's Motion for Summary Judgment on all counts (Dkt. No. 53) is **GRANTED**, Reliance

Steel & Aluminum Co.'s Motion for Summary Judgment on all counts (Dkt. No. 52) is **GRANTED**; and Defendants' Motion to Exclude Plaintiff's Non-Retained Expert Testimony (Dkt. No. 65) is **DENIED AS MOOT**.

The Clerk of Court is directed to enter judgment in favor of Defendants on all counts.

SO ORDERED this 22nd day of April, 2016.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District
Court Judge

United States District Court

Central Division for the District of Utah

ROBERT J. BALDING,

Plaintiff,

v.

SUNBELT STEEL TEXAS, INC.; SUNBELT STEEL TEXAS, LLC; RELIANCE STEEL & ALUMINUM CO.; DOES 1 through 50, inclusive,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed May 16, 2016)

Case Number: 2:14CV90 CW

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Defendants and against Plaintiff.

May 16, 2016
Date

D. Mark Jones
Clerk of Court

/s/ Anne W. Morgan
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT J. BALDING, Plaintiff, v. SUNBELT STEEL TEXAS, INC.; SUNBELT STEEL TEXAS, LLC; RELIANCE STEEL & ALUMINUM CO.; DOES 1 through 50, inclusive, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING MOTION TO RECONSIDER IN PART AND GRANTING IN PART** (Filed Oct. 24, 2016) Case No. 2:14-CV-00090 Judge Clark Waddoups

Plaintiff Robert J. Balding moves the court, pursuant to Federal Rules of Civil Procedure 52, 56, 59 and 60, to vacate the summary judgment entered against him and in favor of defendants on May 16, 2016. (Dkt. No. 89.) Balding requests that the court reconsider the matter, reevaluate the legal analysis, and allow him to submit additional evidentiary support. Defendants Sunbelt Steel Texas, Inc., Sunbelt Steel Texas, LLC (collectively "Sunbelt") and Reliance Steel & Aluminum Co. ("Reliance") oppose the motion, arguing that relief is not available under Rules 52 and 56, and that Balding does not meet the requirements for relief under either Rule 59(e) or Rule 60(b).[1] The court denies

[1] The court finds that oral argument would not materially assist the court in deciding the issues presented, so the court issues this order based on the transcript of the summary judgment

the motion as to Reliance on all claims; denies the motion as to Sunbelt on the contract and quantum meruit claims; denies the motion as to Sunbelt on the ADA discrimination and failure to accommodate claims; grants reconsideration of the claims against Sunbelt for breach of the FMLA and for ADA retaliation and vacates its order granting summary judgment to Sunbelt on those claims; and vacates the clerk's judgment entered in favor of the Sunbelt defendants.

BACKGROUND

Balding was hired to sell steel for Sunbelt in 2009. He alleges that his employment agreement was for $30,000 annual base salary and 1 ½ percent commission of his "total gross sales." In 2010, Sunbelt increased his salary to $40,000. It is disputed whether Sunbelt told Balding that the increase was in lieu of commissions. Sunbelt gave Balding further increases in his salary: $45,000 in April 2011, $52,000 in January 2012, and $60,000 in May 2012. Over this same period, Sunbelt paid Balding $23,250 in bonuses based on the company's overall performance. Balding was not paid commissions for any period.

During 2013, Balding suffered from various medical issues, including an anxiety/panic attack on November 20, 2013. Upon the recommendation of his doctor, Balding requested that he be allowed to take time off from work. It is undisputed that Sunbelt told

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motion hearing and on the written briefs and supporting materials.

Balding he could take time off and that he did take time off from work. It is disputed whether he requested vacation time or FMLA leave. On November 26, 2013, while Balding was on leave, one of Balding's customers inquired about the status of an order it expected to be delivered that day. Upon review of the inquiry, Sunbelt discovered that notwithstanding that the order was not yet entered into Sunbelt's system, Balding had promised the customer on November 21, 2013 that the order was "in process," that he was "rushing this through," and that the "dock date" would be "three days." Within several hours of reviewing the emails, investigating the status of the order in the company's computer system, and talking to Balding, Sunbelt terminated his employment.

Balding asserted four causes action against Sunbelt and Reliance: (1) breach of his employment agreement by wrongfully terminating him and failing to pay him commissions; (2) unjust enrichment (quantum meruit); (3) violation of his rights under the Family And Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654; and (4) violation of his rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. (*Am. Compl.*, Dkt. No. 30.) After extensive briefing and a lengthy oral argument, the court granted summary judgment in favor of defendants, dismissing all counts. The court provided a detailed explanation for its ruling on the record. (*Hr'g Tr.* 39-44, 50-51, 83-93, 98; Dkt. No. 86.) A Memorandum Decision and Order granting Summary Judgment was entered on April 22, 2015,

(Dkt. No. 85), and the clerk entered final judgment against Balding on May 16, 2016. (Dkt. No. 88.)

ANALYSIS

The Tenth Circuit has recently set out the requirements for a motion to reconsider once judgment has been entered:

> A Rule 59(e) motion may be granted only if the movant establishes: (a) an intervening change in controlling law, (b) the availability of new evidence, or (c) the need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Similarly, relief under Rule 60(b) "is extraordinary and may only be granted in exceptional circumstances." *Amoco Oil Co. v. EPA*, 231 F.3d 694, 697 (10th Cir. 2000) (quoting *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990)).

Callahan v. Commun. Graphics, Inc., No. 16-5011, 2016 U.S. App. LEXIS 13315, at *11-12 (10th Cir. July 21, 2016).

Balding does not argue that there has been an intervening change in controlling law. He does attempt to supplement the record with the declaration of his physician offered to provide an expert opinion to support that Balding had a qualifying medical condition that had a limiting effect on his ability to perform his work, an opinion for which there was no support in the

record at the time summary judgment was entered.[2] Importantly, the declaration is not newly available evidence. Balding testified by deposition that this same doctor had advised him to take time off work and that he had requested time off based on this doctor's recommendation. The doctor confirms these facts in the proffered declaration.[3] (Dkt. No. 89-1.) Accordingly, the court concludes that Balding has not established a legally sufficient basis to now present and rely upon the delayed declaration of his physician to support his claims.

Finally, Balding argues that the court committed clear error by failing to construe the facts in a "light most favorable to the non-moving party." (*Mot. to Recons.* 6, citing *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530, 538 (10th Cir. 2014); Dkt. No. 89.) As support, Balding submits 18 pages of essentially the same facts submitted in opposition to the motion for summary judgment and which were thoroughly explored at oral argument. Balding simply reargues the same facts that the court previously considered and found to be inadequate to sustain his burden of going forward, particularly as to his "joint" employer/enterprise theory claims against defendant Reliance, Sunbelt's parent "umbrella" corporation. Accordingly, the court denies

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[2] The court did question Balding's counsel about the lack of such support at the hearing, but the lack of support was not the basis for the court's decision.

[3] This lately produced physician's declaration contains an almost identical reproduction of the language in both Mr. Balding's amended complaint (*Am. Compl.* ¶¶ 40-42, Dkt. No. 30) and in Balding's declaration. (*Balding Decl.* ¶¶ 28-30, Dkt. No. 72-1.)

Balding's motion to reconsider his claims against Reliance. Nevertheless, as to the claims against Sunbelt, the court accepts its responsibility to again review the facts and consider whether under the required standard that they be viewed in a light most favorable to him as the non-moving party they would be sufficient to sustain a jury verdict in Balding's favor on any of the four causes of action. It is important to observe that beyond the conclusory assertion that the court has failed to view the facts in a light most favorable to Balding, Balding does not present in detail any facts that he believes the court failed to properly construe in his favor. Thus the court has been left with the burden of itself reviewing the supporting evidence to determine upon reexamination whether they would support a verdict in Balding's favor. That reexamination supports the following conclusions.[4]

1. Breach of Contract

To successfully oppose a motion for summary judgment on the breach of contract claim, Balding must come forward with evidence from which a jury could find that each of the following elements have been satisfied: (1) a contract (express written, oral or implied) existed between the parties, (2) performance by the party seeking recovery or excused performance, (3) breach of contract by the other party, and (4) damages.

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[4] Because the court agrees with defendants that Rules 52, 56, and 60 are not appropriate bases for relief in this case, the following is based upon a clear error analysis under Rule 59(e).

Bair v. Axiom Design, LLC, 2001 UT 20 ¶ 13 (Utah 2001). (*Mem. in Opp'n to Sunbelt's Mot. for Summ. J.* 56, Dkt. No. 71.) Balding's principal claim under this cause of action is that Sunbelt breached his employment agreement by failing to pay him commissions. The determinative issue is whether Balding has presented sufficient evidence to create a material issue of fact on the first element. No party raises serious questions about whether, at this stage of the case, Balding can satisfy the other requirements. As to the first element, it is undisputed that Balding and Sunbelt entered into an employment agreement. There is also evidence from which a jury could find that initially, Balding's agreed upon compensation was a base salary of $30,000 annually plus a commission of 1 ½ percent of "total gross sales." It is disputed whether the commission was to be based on all accounts or limited to new accounts. Viewing the facts most favorably to Balding that the commission was to be based on all accounts, the evidence would support that total sales of $248,364 through the end of 2009 would have provided a commission of $3,725.[5] (*Decl. of M. Kowalski, Sr.* ¶ 8, Ex. 2; Dkt. Nos. 62, 62-2).

The fact that Balding's initial contract may have entitled him to a commission of $3,725, however, does

[5] The court does not address whether the evidence would be sufficient for a jury to find what the amount of commissions would have been after January 2010. The foundation for evidence Balding submits for sales in the years after 2010 is in dispute and the court need not resolve that issue given the court's ruling that Balding accepted new terms for compensation that did not include a commission.

not end the analysis. It is undisputed that in January 2010, Sunbelt increased Balding's salary to $40,000. The evidence supports that he was told by his supervisor, Kathy Rutledge, that this increase was in lieu of commissions. (*Decl. of Kathy Rutledge* ¶ 6, Dkt. No. 60.) Balding disputes that testimony. When asked in his deposition about this conversation, Balding simply denied being told the increase was in lieu of commissions. (*Balding Depo.* 104:16-105:3, Dkt. No. 72-36.) Viewing the facts most favorably to Balding, a jury may reject Rutledge's testimony. Nevertheless, following the increase to his salary in January 2010, Balding was not paid commissions on any sales, but did receive and accept additional increases in salary to $45,000 in May 2011, to $52,000 in January 2012 and to $60,000 in May 2012. During this same period, Balding received seven bonuses totaling $23,250. (*Balding Depo.* 119:12-120:10, Dkt. No. 72-36; *Decl. of M. Kowalski, Sr.* ¶ 11, Dkt. No. 62). After the first salary increase in January 2010, the only evidence of a conversation Balding had with one of his actual supervisors about commissions was an email exchange with Michael Kowalski, Sr. in April 2012 in which Balding wrote: "I could tell that you were surprised to hear of a commission which was written up for me. I would like you to know that I am grateful for profit sharing and other incentives Sunbelt Steel gives. I am here to help grow and become [a] huge part of Sunbelt Steel. If there could be some consideration that would be grateful." Kowalski, Sr. responded, "I plan to have follow-up conversations with Kathy & Jerry this week and will get back to you. Hang in there!" (*Balding Appx.* Ex. D, Dkt.

No. 72-4.) There is no evidence in the record of the content of the referenced conversation, nor of any follow up. Kathy Rutledge and Michael Kowalski, Jr. were Balding's direct supervisors. When Balding was asked during his deposition why he did not raise the commission issue with his direct supervisors, Balding answered he did not know. (*Balding Depo.* 143:13-144:5, Dkt. No. 58-1.)

The record supports only that Balding was an at-will employee. He admitted in his deposition that no one had told him his employment would be for a certain term. Under Utah law, "[a]n employment relationship for an indefinite term gives rise to a presumption that the employment relationship is at will." *Tomlinson v. NCR Corp.*, 2014 UT 55 ¶ 11. Nothing in the record would support a jury finding to the contrary. In assessing the rights of an at-will employee, two legal principles govern Balding's contractual rights. First, "where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation," and "by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer." *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991).

Second, "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the

agreement" and can provide the basis for a waiver and estoppel. Restatement (Second) of Contracts § 202(4) (1979); *B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc.*, 754 P.2d 99, 103-04 (Utah App. 1988) ("Stated another way, one cannot prevent a waiver by a private mental reservation contrary to an intent to waive, where his or her actions clearly indicate such an intent.").

These legal principles preclude Balding from claiming that, after accepting only salary and bonuses for four-and-one-half years, he actually had a different compensation agreement than the one he willingly accepted while an at-will employee free to resign at any time. (*See Balding Depo.* 127:11-17, Dkt. No. 58-1) ("Q. Did anybody at Sunbelt or Reliance tell you that you were guaranteed to be employed at Sunbelt for a particular length of time?" "A. No, not that I can recall." "Q. Do you agree that you had the right to resign from Sunbelt at any time for any reason if you wanted?" "A. Yes."). On the evidence presented by Balding, a jury could find only that from January 2010 through the end of his employment in November 2013, Balding accepted salary increases, accepted bonuses, never complained to his direct supervisors about not receiving commissions, and never asked Sunbelt for an accounting or in any way made a demand for commission payments. The one conversation with Kowalski, Sr. in April 2012 in which Balding said he would be grateful if some consideration could be given to a commission, even drawing all inferences in favor of Balding, is not sufficient for a jury to find, in the face of Balding

accepting raises and bonuses for four-and-one-half years without complaint, that the original agreement for compensation including a commission had not been superseded by the parties' course of dealing. The court properly granted summary judgment on the first cause of action and there is no basis for the court to reconsider its ruling.

2. Unjust Enrichment/Quantum Meruit

The law is well established in Utah that the "doctrine of unjust enrichment is inapplicable when there is a contract between the parties." *Kirk v. Rockwell Collins, Inc.*, 2:12-cv-1107, 2015 U.S. Dist. LEXIS 20851 (D. Utah Feb. 3, 2015). As the Utah Supreme Court has long held, "[u]njust enrichment is a doctrine under which the law will imply a promise to pay for goods or services when there is neither an actual nor an implied contract between the parties." *Concrete Prods. Co. v. Salt Lake City*, 734 P.2d 910, 911 (Utah 1987). It is undisputed that Balding entered an employment agreement with Sunbelt. Those undisputed facts preclude Balding from succeeding on an unjust enrichment claim and required the court to grant summary judgment in favor of the defendants. Nothing submitted by Balding in his motion for reconsideration supports a different outcome. Further, "[a]n employee cannot state a claim for unjust enrichment where the employee was compensated for his services unless the employee presents facts showing that his compensation as unreasonable or that the employer was unjustly enriched when it compensated the employee." *Kirk*,

supra, 2015 U.S. Dist. LEXIS 20851 at *24. Balding has not presented such facts here. Rather, Balding admits that prior to obtaining employment with Sunbelt in 2009 he had been performing similar sales duties for another metals company, Encore Metals, for which he received a salary of $30,000 per year plus a bonus based on company performance and no commissions. (*Balding Depo.* 47-49, Dkt. No. 58-1.) After leaving Sunbelt in 2013, Balding admits that he worked for a competitor, Ryerson, performing similar sales duties for $60,000 per year plus bonuses and no commissions, the same compensation structure he had at Sunbelt. (*Id.* 68:25-69:7; 70:17-23.) In other words, both before and after his employment with Sunbelt, Balding earned exactly the same amount Sunbelt paid him for doing the same kind of work. This is undisputed evidence showing that Balding's Sunbelt compensation was not unreasonable, and for that additional reason his unjust enrichment claim fails.

3. ***FMLA Interference and Retaliation***

Balding alleges that Sunbelt terminated his employment in interference with, or in retaliation for, his exercise of his rights under the FMLA. Each of these claims requires proof of distinct and separate elements and has separate burdens of proof. *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006). To establish a claim for FMLA interference under 29 U.S.C. § 2615(a)(1), Balding must show (1) that he was entitled to FMLA leave; (2) that some adverse action by Sunbelt interfered with his right to

take FMLA leave; and (3) that Sunbelt's action was related to the exercise or attempted exercise of his FMLA rights. *Id.* at 1180. He must also demonstrate that he put Sunbelt on notice that he might be entitled to leave under the FMLA. *Bones v. Honeywell Int'l Inc.*, 366 F.3d 869, 877, n. 2 (10th Cir. 2004). The burden shifting analysis under *McDonnell Douglas* does not apply to interference claims. *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002). Nevertheless, if the employee makes a prima facie showing of each element, the employer may defeat the claim by proof that it would have taken the adverse action for legitimate non-retaliatory reasons, regardless of the request for FMLA leave. *Metzler*, *supra*, 464 F.3d at 1180.

To establish a claim for FMLA retaliation under 29 USC § 2615(a)(2), Balding must establish that he (1) engaged in protected activity; (2) was subject to an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *Metzler*, 464 F.3d at 1171. If Balding successfully makes a prima facie showing of each element, Sunbelt has the burden of demonstrating a legitimate, non-retaliatory reason for its termination decision. *Id.*at 1172. Once Sunbelt does so, to defeat summary judgment, Balding must show a genuine issue of disputed material fact as to whether Sunbelt's proffered reason is pretextual.[6] *Id.* (*See Sunbelt Mot.*

[6] The court disagrees with Balding's repeated assertion that *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) has any bearing on the court's analysis under the FMLA or the ADA.

S.J. 26-27, Dkt. No. 53; *Balding Opp. Re S.J.* 34-35, Dkt. No. 71).

For both the FMLA interference and retaliation claims, summary judgment turns on whether Sunbelt terminated Balding's employment for legitimate, non-retaliatory reasons or whether the termination was a pretext.[7] It is undisputed that Balding was entitled to FMLA leave, that he had experienced a panic attack, and that he requested time off work. The evidence supports that Balding may have requested vacation time rather than unpaid FMLA, but was in the process of obtaining FMLA forms to submit to Sunbelt. Drawing all inferences in favor of Balding, a jury may find that he was requesting FMLA leave which Sunbelt understood. The evidence is undisputed that his supervisors told him to take time off work and that he was on leave at the time of his termination. Sunbelt submitted the following facts as undisputed in support of its motion.[8]

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[7] The court in its prior oral ruling did not separately analyze Balding's claims under the ADA because on the issue of pretext, the analysis is the same as the analysis under the FMLA. Because the court has granted the motion to allow Balding to proceed on the FMLA claims, and this pretext analysis still applies to Balding's claims of retaliation under the ADA, the court also allows the ADA retaliation claim to proceed. The court will separately address Balding's ADA claims of disability discrimination and failure to accommodate below.

[8] Sunbelt's statement of undisputed material facts is copied essentially verbatim from Sunbelt's Rule 56 Motion for Summary Judgment (*Sunbelt's Mot. Sum. J.* 23-26, 27; Dkt. No. 53.) The court has verified that the facts are supported by the referenced evidence.

1. Balding was an at-will employee of Sunbelt. (*Balding Depo.* 127:11-17, Dkt. No. 58-1.)

2. On November 21, 2013, Balding reported to Sunbelt's Human Resources Manager that his doctor wanted him to take a few days off after a "panic attack," and he requested vacation. The next day, on November 22, 2013, Balding reported to Pickering that he had a scheduled appointment to see his psychiatrist. The following Sunday, on November 24, 2013, Balding reported to Pickering that he had been diagnosed with a condition related to his adrenal gland. On Monday, November 25, 2013, Balding told Kowalski, Sr. and Rutledge that he had low testosterone and low energy and, according to him, that he was taking medications and had scheduled an appointment to see his doctor. (*Balding Depo.* 159:18-160:22; 162:23-163:17; 168:4-171:3, Dkt. No. 58-1; *Decl. of N. Pickering* ¶¶ 3-7, Dkt. No. 63; *Decl. of M. Kowalski, Sr.* ¶ 14, Dkt. No. 62; *Decl. of K. Rutledge* ¶ 9, Dkt. No. 60.)

3. Balding alleges that, while communicating with Pickering regarding his desire to take leave, she told him that he needed to get his FMLA paperwork filled out. Balding claims to have obtained FMLA paperwork from his doctor that he filled out, but he has never produced it. (*Balding Depo.* 165:1-166:23, Dkt. No. 58-1.)

4. Balding understood that his request for leave was approved. On Monday, November 25, 2013, Kowalski, Jr. told him to take "the time that I needed." No one made a negative comment to Balding regarding his

request for leave. No one at Sunbelt has ever denied Balding leave to address a health or medical issue. (*Balding Depo.* 162:5-7, 167:21-23, 217:5-218:16, 220:15-24; Dkt. No. 58-1.)

5. Because Balding was on leave, Kowalski, Jr. had Balding's emails forwarded to him for monitoring, a standard Sunbelt practice. On November 26, 2013, Kowalski, Jr. noticed that one of Balding's customers, Weatherford, had sent an email inquiry regarding the status of a purchase order number PO10407337. After an investigation, Kowalski, Jr. could not find any open order or invoiced order in Sunbelt's system that referenced PO10407337. In fact, the purchase order had not been entered. (*Decl. of M. Kowalski, Jr.* ¶¶ 10-12, Dkt. No. 61.)

6. In reviewing Balding's correspondence with Weatherford, Kowalski, Jr. discovered that, a few days earlier, on November 21, 2013, Balding had made a series of representations to Weatherford that the order was "in process." (*Decl. of M. Kowalski, Jr.* ¶ 14, Ex. 5; Dkt. No. 61.)

7. Kowalski, Jr. identified a copy of PO10407337 from Weatherford later in the morning on November 26, 2013, and it was dated November 5, 2013, suggesting that Balding had received the order three weeks earlier. (*Decl. of M. Kowalski, Jr.* ¶ 13, Ex. 7; Dkt. No. 61.)

8. Kowalski, Jr. arranged a telephone call with Balding to find out what happened. Balding admitted to Kowalski, Jr. that he had not received a copy of

PO10407337 from Weatherford until that morning, November 26, 2013, the same day Weatherford had expected the order to be shipped. Kowalski, Jr. asked Balding why, if he did not have a copy of PO10407337 until November 26, 2013, he had told Weatherford five days earlier that the same order was "in process," that he was "rushing this through" and that it would have a dock date in "three days." Balding alleges that he did not deny that he had made the representations to Weatherford, but tried to explain why the representations were not misleading. He admits that Kowalski, Jr. accused him of lying about the order, and when Kowalski, Jr. asked him why he would be untruthful, he responded "I don't know." (*Balding Depo.* 182:8-12; 183:12-23, Dkt. No. 58-1; *Balding Unempl. Tr.* 18:2-8, Dkt. No. 58-1, p. 75; *Decl. of M. Kowalski, Jr.* ¶ 15, Dkt. No. 61.)

9. Balding admitted that, although he had only a PO number on November 21, 2013, when he represented to Weatherford that its order was "in process," he needed more information than a PO number "to get an order in process." Balding knew the steps that were necessary to process a purchase order for the Weatherford PO 10407337, and Sunbelt confirmed that none had been performed. (*Balding Depo.* 173:8-177:1; 178:13-181:24, Dkt. No. 58-1; *Balding Unempl. Tr.* 12:3-7, Dkt. No. 58-1, p. 74; *Decl. of T. Perrin* ¶¶ 5, 7-8; Dkt. No. 64.)

10. When Sunbelt reported to Weatherford that its order would be delayed, its representative indicated that she believed she had been misled by writing: "[M]y

contact at Sunbelt has given me false information." (*Decl. of T. Perrin* ¶ 7, Ex. 5, p. 4; Dkt. No. 64.)

11. Kowalski, Jr. had given Balding two previous formal written warnings regarding his poor communications with customers and Sunbelt employees, one on August 27, 2013, and one on November 14, 2013. Balding does not dispute the grounds for those warnings. Balding was on notice that termination would be considered if his performance did not improve. Kowalski, Jr. recently had received a complaint from another customer who demanded to be reassigned to another salesperson because Balding had not provided accurate information. (*Balding Depo.* 131:1-6; 132:16-20; 151:20-152:24, Dkt. No. 58-1; *Decl. of M. Kowalski, Jr.* ¶¶ 4-8, Ex. 1-4; Dkt. No. 61.)

12. Balding's misrepresentations to Weatherford violated Sunbelt's Employee Handbook, a copy of which had been given to Balding. The Handbook stated that providing false or misleading information was grounds for immediate termination. (*Balding Depo.* 123:21-124:4, Dkt. No. 58-1; *Decl. of M. Kowalski, Jr.* ¶ 16, Ex. 8; Dkt. No. 61.)

13. Kowalski, Jr. reported Balding's handling of the Weatherford order to Kowalski, Sr. and Rutledge. All concluded that Balding's conduct justified the immediate termination of his employment, especially in light of Kowalski, Jr.'s two previous written warnings. (*Decl. of M. Kowalski, Sr.* ¶ 15, Dkt. No. 62; *Decl. of M. Kowalski, Jr.* ¶ 16, Dkt. No. 61; *Decl. of K. Rutledge* ¶ 10, Dkt. No. 60.)

14. On November 26, 2013, about 30 to 45 minutes after Kowalski, Jr. questioned Balding about the Weatherford order, Rutledge called Balding and informed him of Sunbelt's decision to terminate his employment. (*Balding Depo.* 187:23-188:25, Dkt. No. 58-1.)

15. Since the time Sunbelt terminated Balding's employment, he has worked continuously at two Sunbelt competitors performing the same outside salesperson duties he performed for Sunbelt without an accommodation of any disability. Balding has not told his post-Sunbelt employers that he has any medical condition that would affect his ability to perform his job, and he has not taken any leaves of absence for any medical or mental health reason. (*Balding Depo.* 59:3-62:3, 67:12-23, 72:7-73:17; Dkt. No. 58-1.)

The evidence supports the facts cited by Sunbelt. Balding argues that they are disputed, but the dispute is primarily argumentative rather than factual. For example, Balding argues that the employment was not at-will because of rights created by the FMLA and the ADA, that Balding requested "time off" rather than specifically asking for vacation time. (*See Balding Opp. Re S.J.* 12-13, Dkt. No. 71.) Similarly, Balding often cites to his declaration which is largely a paraphrase of the allegations in the complaint that are conclusory and lack foundation.[9] The court rejected these

[9] Both Reliance and Sunbelt filed Evidentiary Objections to Balding's Declaration requesting the court to disregard and/or strike certain paragraphs as deficient material. (Dkt. No. 75-1, Dkt. No. 76-1). In ruling on the motion for summary judgment the

assertions as lacking evidentiary support. Nevertheless, some of Balding's "disputed facts" warrant further discussion.

The thrust of the dispute turns on whether Sunbelt terminated Balding for legitimate, nondiscriminatory reasons, which would defeat the interference claim, and whether Balding met his burden from which a jury could find the reasons were a pretext under the retaliation claim. The core facts are not in dispute. While Balding was on leave, Sunbelt rerouted copies of his emails to his supervisor, Kowalski, Jr. In reviewing the emails on November 26, 2013, Kowalski, Jr. learned that Balding had told a customer, Weatherford, that an order for steel bars was "in process," that Balding was "rushing this through," and it would have a dock date in "three days." When Kowalski, Jr. checked on the status of the order, he learned that no order had been entered into Sunbelt's sales order and processing computer system. Upon further review of the emails, Kowalski, Jr. learned that Balding had a purchase order number, PO10407337, as early as November 21, 2013, the same date he made the above representations to Weatherford. Attached to the November 26, 2013 email dated 9:23 AM was a hard copy purchase order with the same number, PO10407337, bearing on its face a date of November 5, 2013, which

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court elected to disregard the statements that were conclusory or lacked foundation. The court now finds that defendants' objections were well taken as to the following paragraphs: 3, 5-7, 11-18 and Exhibit C, 19-35, 41 and Exhibit J, 45-46, 48, 49, 51, 54 and Exhibit O, 55, 57-59, 68-73, 75-79, 85-87, 89-90.

suggested to Kowalski, Jr. that Balding had received the order some three weeks earlier but failed to enter it into the system before making representations to the customer. Earlier exchanges in the email chain reviewed by Kowalski, Jr., to be clear, did not reflect the previous delivery of a hard copy purchase order with the details necessary to process the order. Rather, the email chain reviewed showed only that a bid request had been submitted and a number provided.

Kowalski, Jr. then called Balding and asked him why he had not entered the order. Balding responded, "I don't know." Balding alleges that he did not deny making the representations to Weatherford, but that Kowalski, Jr. accused him of lying about the order. Balding told Kowalski, Jr. that he had only received the hard copy for the first time on November 26, 2013, but that he had "reserved" the order with Sunbelt personnel and had been told delivery could be made within about three days. Balding acknowledged that he knew the steps to process an order and that a hard copy was required. None of the required steps had been performed when Balding told Weatherford that the order was in process. Balding had previously received two written notices about his performance with customers and had been told that if his performance did not improve, he may be terminated. Balding claims he disputed the prior warnings. After discussing the situation, Sunbelt made the decision to terminate Balding and communicated his termination to him. When Sunbelt reported to Weatherford that the order would be

delayed, its representative responded that "[M]y contact has given me false information."

Balding argues that additional facts, when the inferences are drawn in his favor, are sufficient for a jury to find both that the reasons given for his being fired were not legitimate and non-retaliatory and that they were a pretext for the real reason, which was his request for FMLA leave to address his medical issues. As previously discussed, the majority of Balding's asserted additional facts are conclusory, lack foundation, or are misrepresentations of or unsupported by the evidence. The court did, however, review several facts relevant in its reconsideration analysis, as follows:

1. During Balding's employment with Sunbelt, Balding informed Jerry Wasson, previously a Vice President at Sunbelt, that he suffered from bipolar disorder and was taking medication to treat it, and that he suffered from low testosterone. (*Answer* ¶ 103, Dkt. No. 34.)

2. On August 28, 2013, Balding told Nancy Pickering, the Human Resources Manager at Sunbelt, that he had ADD and as a result, sometimes has trouble communicating. (*Balding's Appx.*, Ex. I; Dkt. No. 72-9.)

3. According to a November 13, 2013 note in Balding's employee file provided to him during discovery, on November 7, 2013 a Sunbelt representative who called Balding to speak to him about issues on his expense report noted that "he sounded like he was crying" and that "he sounded very depressed." (*Balding's Appx.*, Ex. J; Dkt. No. 72-9.)

4. On November 21, 2013, Balding told Pickering that he had experienced a panic attack on November 20, 2013. (*Answer* ¶ 100, Dkt. No. 34.) As a result, Balding requested time off. (*Balding's Appx.*, Ex. M; Dkt. No. 72-13.)

5. According to another file note dated November 22, 2013 provided to Balding by Sunbelt during discovery, Balding complained to a Sunbelt representative on November 18 about his supervisor Michael Kowalski, Jr.'s latest performance write-up. The note also stated that on November 19, Balding had called, crying, about a complaint he had received concerning one of his orders and that he was very upset. The note indicated that the representative suggested that Balding take a few days off work to clear his head. The note went on to identify Balding's November 21, 2013 e-mail about experiencing a panic attack on November 20 and his request for time off. Finally, the note indicated that the representative met with Michael Kowalski, Sr., the President of Sunbelt, and Nancy Rutledge, the Executive Vice President of Sunbelt, on November 22, 2013 and that "we are all in agreement that after the first of the year, we may have to proceed with termination." (*Balding's Appx.*, Ex. O; Dkt. No. 72-15.)

6. On November 24, 2013, Balding told Pickering that he suffered from low testosterone and problems with his adrenal glands, conditions for which he had seen a doctor on November 22, 2013. (*Answer* ¶ 100, Dkt. No. 34.)

9. Also on November 24, 2013, Balding spoke with Pickering by telephone to discuss his time off starting the next day, November 25, 2013, to which Pickering responded: "This works for us, take some time off and get better." (*Balding Decl.* ¶ 56, Dkt. No. 72-1.)

10. On the next day, November 25, 2013, Sunbelt's information technology personnel routed Balding's email and Outlook contacts to Kowalski, Jr. (*Balding's Appx.*, Ex. P; Dkt. No. 72-16.) On the same day, Kowalski, Sr. and Rutledge called Balding and discussed his medical conditions. (*Balding Depo.* 168-170, Dkt. No. 58-1; *Decl. of K. Rutledge* ¶ 9, Dkt. No. 60; *Decl. of M. Kowalski, Sr.* ¶ 14, Dkt. No. 62.)

11. On November 26, 2013 Kowalski, Jr. reviewed the email from Weatherford inquiring about the status of its order; reviewed an e-mail from Todd Perrin, at that time an Inside Sales Manager, stating that the order was not in Sunbelt's system; and reviewed the purchase order sent via e-mail by Weatherford shortly thereafter, which had an order date of November 5, 2013. (*Decl. of M. Kowalski, Jr.*, Dkt. No. 61.)

12. Kowalski, Jr. then called Balding and asked him why he had not entered the Weatherford order, to which Balding responded "I don't know." (*Balding Depo.* 182:8-12, Dkt. No. 58-1.) Kowalski, Jr. asked Balding if he had told Weatherford that the order was in process and that he was rushing it through. (*Id.* at 182:13-23.) Kowalski, Jr. also accused Balding of being

untruthful to him about what he had told Weatherford about the order. (*Id.* at 183:12-17.)

13. Although the purchase order was dated November 5, 2013, Balding told Kowalski, Jr. he had not received it until the morning of November 26, 2013, at which time he immediately forwarded it to another Sunbelt employee. (*Id.* at 183:19-23.)

14. Balding claims he also tried to explain that he had not misrepresented the status of the order because he had previously "reserved" or "pulled out" the steel bars he would need for the order by calling someone in the warehouse; and that he had contacted Mr. Melvin Watson in the shop to ask how long it would take for this rush job, and was informed three days. (*Id.* at 179-183.)

15. Sunbelt does not dispute that Kowalski, Jr. accused Balding of lying to him about the Weatherford customer order and supported his termination on that basis. (*Sunbelt's Reply to Balding's Add'l Facts* ¶ 37, Dkt. No. 76-2.) The metadata in the Weatherford PDF purchase order identifies a creation date of November 26, 2013 at approximately 9:21 a.m. Central Time. (*Balding's Appx.*, Ex. Q; Dkt. No. 72-17.) Sunbelt admits that it has no evidence that Balding actually received the purchase order earlier than November 26, 2013. (*Sunbelt's Reply to Balding's Add'l Facts* ¶¶ 40-42, Dkt. No. 76-2.)

16. After Sunbelt management discussed the Weatherford purchase order situation and its conversation with Balding about the situation, Sunbelt

terminated Balding on November 26, 2013, the same day Kowalski, Jr. first raised the concerns about the Weatherford purchase order. Sunbelt has produced no evidence that prior to making the decision to terminate Balding it had investigated his claims that he had only received the hard copy that same day, that he had previously reserved the bars with the warehouse, or that he had previously discussed an estimated delivery date with the shop. Sunbelt presented no evidence that it asked Weatherford when it had in fact placed the order or whether there had been prior discussions about the order from which Balding could have attempted to reserve the bars.

The question before the court on the motion to reconsider is whether these additional facts would be sufficient to support a jury verdict in Balding's favor if all of the inferences are drawn most favorably to him. In its initial ruling, the court was persuaded by the argument that the undisputed material facts supported that Sunbelt believed in good faith at the time it made the decision to terminate Balding that he had misrepresented to Weatherford that the purchase order was in process and would be delivered to the dock within three days. After all, this was not the first (or even second) time that a customer had indicated that Balding had provided inaccurate information. The court concluded that if Sunbelt management acted in the good faith belief that he had made misrepresentations to a customer at a time when Balding had not entered any purchase order into Sunbelt's system, that belief established a legitimate, non-retaliatory reason for the

decision to terminate. *See Lobato v. New Mexico Env't Dept.*, 733 F.3d 1283, 1289 (10th Cir. 2013) (The "relevant inquiry is not whether the employer's proffered reasons were wise, fair, or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs."). The court, however, failed to consider whether on the additional facts provided by Balding a jury could reasonably infer that Sunbelt's explanation was a pretext and the real reason was Balding's request for FMLA leave necessitated by his medical conditions.

The facts that would support such an inference include that Sunbelt had knowledge of a number of Balding's medical issues prior to November 26, 2013; that Sunbelt made the decision to terminate Balding the very same day it learned of the alleged misrepresentation to Weatherford, knowing he was on leave and without a meaningful investigation to verify Balding's explanation; and that senior management had previously agreed that Balding may have to be terminated at the first of the year, again being fully aware at the time that his medical issues may require FMLA leave. Further, management was at least on notice that the customer may not have fully disclosed that it had only sent in the hard copy purchase order on November 26, 2013, while back dating the order to November 5, perhaps to cover its representative's own lack of diligence. A jury may infer from these facts that Sunbelt management may have used the alleged problems with the Weatherford order as cover to terminate Balding because they no longer wanted to have to deal with his

health issues. If such inferences can be reasonably drawn from the admissible evidence, the motion to reconsider reasonably states grounds that the court erred in failing to construe the facts in a light most favorable to Balding.

The Tenth Circuit recently addressed an FMLA claim on facts very similar to those in this case. *Olson v. Penske Logistics, LLC*, No. 15-1380, 2016 U.S. App. LEXIS 15780 (10th Cir. August 26, 2016). In that case, the plaintiff requested FMLA leave to deal with a medical condition. The same day that he began his leave, the employer learned that there were problems with the inventory at the warehouse the plaintiff managed. The following week, when management began to investigate, it learned that the problems with the inventory had created a "crisis" and was putting at risk a relationship with a major customer. *Id.* at *5. The employer then undertook additional investigation which confirmed the problems and concluded they were a result of a "lack of processes and training" by the plaintiff. *Id.* at *6. The management initially discussed bringing in a temporary replacement for the plaintiff and then terminating him on his first day back from FMLA leave. *Id.* at *7. Before terminating the plaintiff, however, management continued its investigation to verify whether the plaintiff was on approved FMLA leave and also brought in a loss prevention team to audit the warehouse thoroughly. The further investigation supported that the problems were worse than initially believed and that the plaintiff had engaged in dishonest conduct to cover up the problems. The loss prevention

report recommended that the plaintiff be terminated. *Id.* at *8-11. He was terminated the next day while he was still on FMLA leave and two weeks after the issue first arose. *Id.* at *11-12.

The district court in *Olson* granted summary judgment in favor of the employer which was affirmed on appeal. The court concluded that on these facts the evidence was not sufficient to connect the termination to plaintiff's request for FMLA leave and rejected plaintiff's claim that the district court had failed to draw the inferences most favorable to plaintiff. Plaintiff argued that if he had not taken leave, he would have been at work and would have been able to defend his job performance and perhaps have shown that the problems were really the fault of the inventory clerk. *Id.* at *13. He also argued that he was really fired for missing too much work, which placed a travel burden on his supervisor causing the supervisor to resent him and motivating him to want to replace plaintiff. *Id.* at *14. The court rejected both arguments, stating that while they seem "plausible," plaintiff had failed to provide sufficient support in the record to create a genuine issue of material fact. *Id.*

Balding's case is distinguishable from the *Olson* case. First, the relevant facts reviewed by the court in support of Balding's claim are supported by the record. Second, in *Olson,* the employer did not act on its initial impulse to terminate the employee, but conducted a thorough investigation which confirmed the severity of the problem and disclosed dishonesty and an attempted cover up. In Balding's case, Sunbelt's only

investigation was done in short period of time on the same day that it made the decision to terminate. *See Smothers, supra*, 740 F.3d at 539 ("A failure to conduct what appeared to be a fair investigation of the violation that purportedly prompted adverse action may support an inference of pretext.") (internal quotations omitted). Sunbelt did not follow up on Balding's explanations, and a jury may reasonably conclude that further investigation would have confirmed what Balding said. Finally, and significantly, the jury may reasonably infer from management's statement that they may have to terminate Balding at the first of the year that the issue with the Weatherford purchase order was simply an opportunity and excuse to accelerate the date of termination to avoid having to deal with the medical issues for which Balding had requested leave.

Sunbelt has presented a strong case that it had good cause to terminate Balding for poor performance and dishonesty. Nevertheless, Balding has also presented evidence, which if believed by the jury, could support that the real reason for the termination was Balding's health issues for which he requested FMLA leave. The requirement that the court draw all inferences most favorably to Balding mandates that the court allow him the opportunity to try to convince the jury.

4. ***ADA Discrimination and Failure to Accommodate***

The court's prior ruling on Balding's ADA claims focused on its conclusion that Sunbelt's proffered reasons for terminating Balding's employment were not a pretext. On reconsideration, having ruled that Balding may proceed on his FMLA claims and ADA retaliation claim to prove otherwise, the court must now separately address plaintiff's argument that Balding has failed to established a prima facie case that he was "disabled" within the meaning of the ADA, which is the first element in both his ADA discrimination and failure to accommodate claims. *See* 42 U.S.C. § 12112(a) and *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (as to ADA discrimination claims); *Selk v. Brigham Young University*, 2015 WL 150250, *5 (D. Utah Jan. 12, 2015) (as to ADA failure to accommodate claims).

A person is "disabled" under the ADA if he has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). To satisfy this requirement, Balding "must (1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one or more of those activities." *Felkins v. City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014). Lay evidence is insufficient to establish either a recognized impairment or the limitations the impairment imposes on an individual's major life activities. *Id.* at 651. The court has already determined that Balding's after-the-fact attempt

to submit a physician's declaration to bolster his claims is not newly discovered evidence and is thus inadmissible. Upon careful review of the record, the court can find no admissible medical evidence of any recognized impairment combined with evidence of the limitations imposed from such impairment on one or more of Balding's major life activities. Balding's medical records were exchanged during discovery, but the only evidence in the record regarding those medical documents comes from defendants' counsel, who submitted a declaration stating that upon review of the records, (1) no diagnosis of an adrenal gland disorder in 2013 could be located, (2) no evidence could be found of any limiting effect of Balding's slightly lower than normal testosterone level, (3) no evidence could be found of any limiting effects caused by references in the records to bipolar disorder, anxiety, benign familial tremor, panic attack, and depression, and (4) a February 2013 reference to ADHD stated the condition was "well controlled." (*Decl. of J. Barrett* ¶ 4, Dkt. No. 58).

Several nearly identical paragraphs in the Amended Complaint and in Balding's declaration provide lay evidence of various impairments and limitations asserted by Balding, and there is evidence in the record that Balding told various individuals at Sunbelt about some of them. Under Tenth Circuit law, "[s]uch lay evidence, however, is inadmissible in court and thus cannot be used to oppose summary judgment." *Felkins, supra*, 774 F.3d at 651-52 (plaintiff's declarations identifying her medical diagnoses, limitations, and who she told of these conditions were insufficient

proof of impairment for an ADA claim because her own opinions do not establish diagnoses and are not proper evidence that her limitations are caused by such diagnoses.) Furthermore, the record is also undisputed that after Balding was terminated from Sunbelt, he obtained replacement employment with two competitor companies performing "similar" duties and responsibilities, that he did not inform either employer of his litany of medical conditions, and that he has not asked for an accommodation including medical leave for any disability. (*Balding Depo.* 59-61, 70-72; Dkt. No. 58-1.)

On this record, the court agrees with Sunbelt that Balding has not met his burden of establishing a prima facie case that he is "disabled" under the ADA. This defeats his claims for ADA discrimination and ADA failure to accommodate.[10] The court notes, in addition, that Balding has also failed to show that he requested any accommodation from Sunbelt that he did not receive. (*Balding Depo.* 158:6-159:11, 217:5-218:16; Dkt. No. 58-1.) This independently defeats Balding's ADA failure to accommodate claim.

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[10] Failure to establish an actual disability is not required to prosecute an ADA retaliation claim, on the other hand. Rather, "the plaintiff need only show that he had a reasonable, good-faith belief that he was disabled." *Foster v. Mt. Coal Co., LLC*, 830 F.3d 1178 (10th Cir. 2016). There is sufficient evidence in the record to support Balding's good-faith belief that he was disabled; thus, for the reasons stated in Section 3, *supra*, Balding's ADA retaliation claim may proceed.

CONCLUSION

The court rejects and denies Balding's motion to reconsider its ruling dismissing defendant Reliance, dismissing the breach of contract claims, and dismissing the ADA discrimination and failure to accommodate claims, but grants the motion to reconsider its decision to dismiss the FMLA and ADA retaliation claims. (Dkt. No. 89.) As to those claims the order granting summary judgment is vacated and the claims will proceed.

DATED this 24th day of October, 2016.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District
Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ROBERT J. BALDING, Plaintiff, v. SUNBELT STEEL TEXAS, INC.; SUNBELT STEEL TEXAS, LLC, RELIANCE STEEL & ALUMINUM CO., DOES 1 through 50, inclusive, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTIONS AND GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION** (Filed Apr. 21, 2017) Case No. 2:14-cv-00090 Judge Clark Waddoups

This is plaintiff Robert J. Balding's second motion for reconsideration of his contract, quantum meruit, and ADA discrimination and failure to accommodate claims. (Dkt. No. 104.) Balding has also moved to amend his summary judgment pleadings to include supplemental disclosure of expert testimony in support of his ADA claims. (Dkt. Nos. 108-109). For their part, defendants Sunbelt Steel Texas, Inc. and Sunbelt Steel Texas, LLC (collectively "Sunbelt") move the court to reconsider its October 24, 2016 decision vacating summary judgment in favor of defendants on Balding's FMLA interference and retaliation claims and his ADA retaliation claim.[1] (Dkt. No. 105.) For the reasons

[1] The court finds that oral argument would not materially assist the court in deciding the issues presented, so the court

stated below, the court DENIES Balding's motions and GRANTS Sunbelt's motion. Accordingly, all of Balding's claims are dismissed and the matter is ripe for Balding's pending appeal.

BALDING'S MOTIONS

I. Motion for Reconsideration Legal Standard

As he did in his first motion for reconsideration, Balding brings his second motion for reconsideration under Rules 52, 56, 59, and 60 of the Federal Rules of Civil Procedure. The Tenth Circuit has held that "regardless of how it is styled or construed . . . , a motion filed within ten days of the entry of judgment that questions the correctness of the judgment is properly treated as a Rule 59(e) motion." *Phelps v. Hamilton*, 122 F.3d 1309, 1323 (10th Cir. 1997).[2] Furthermore, when a motion involves "reconsideration of matters properly encompassed in a decision on the merits," it is properly considered under Rule 59(e). *Id.* at 1324. Because Balding's motion was timely filed, the court construes Balding's motion as a motion to alter or amend the judgment under Rule 59(e).

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issues this order based on the transcript of the summary judgment motion hearing, its October 24, 2016 decision, and on the written briefs and supporting materials.

[2] The rule has subsequently been modified to extend to 28 days the time within which to file a post-judgment motion. *See* Fed. R. Civ. P. 59(b) and (e), amended Mar. 26, 2009, eff. Dec. 1, 2009.

Rule 59(e) relief is limited, and requires that Balding establish "(1) an intervening change in the controlling law, (2) new evidence [that was] previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Also relevant is the Tenth Circuit's admonition that successive motions "are inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments or supporting facts which were available at the time of the original motion." *Id.* "Absent extraordinary circumstances . . . the basis for [a] second motion must not have been available at the time the first motion was filed[,]" and "[i]t is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."[3] *Id.* The court refers to the relevant factual background in its prior order and does not repeat that factual history here.

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[3] Balding cites no extraordinary circumstances to warrant the court's reconsideration of his claims against Reliance Steel, Sunbelt's parent company, which he requests only in a footnote in his motion. (*Pl.'s Motion* 5 n. 1; Dkt. No. 104.) Based on this cursory request, which he expanded only in his reply brief, the court declines to revisit its prior ruling dismissing Balding's joint employer/enterprise theory claims against Reliance. *See Reedy v. Werholtz*, 600 F.3d 1270, 1274 (10th Cir. 2011) ("a party waives issues and arguments raised for the first time in a reply brief.") Furthermore, in light of the court's decision herein dismissing Balding's FMLA and ADA claims against Sunbelt on the grounds that their reasons for terminating him were not a pretext, his claims against Reliance are moot. (*See Hr'g Tr.* 93-99; Dkt. No. 86.)

II. Contract Claim

Balding does not present new evidence or identify a change in the controlling law regarding his contract claim. Instead, he merely asserts that the court's ruling against him on these claims is "flawed," "absurd," "false" and made "in error." (*Pl.'s Motion* 7-9; Dkt. No. 104.) He claims that the court should not have granted summary judgment against him on his contract claims because there are disputed facts regarding whether his commissions were to be based on all sales accounts or limited to new accounts, and on whether Kathy Rutledge or anyone else ever told him that his salary increase was in lieu of his original commission compensation agreement. He also claims that the court ignored evidence that he discussed commissions with Jerry Wasson, Sunbelt's Vice President of Sales, who was instrumental in hiring Balding and making the original commission agreement with him. (*Id.* at 6.)

Similarly, he argues that the court failed to consider Balding's e-mail communication with Michael Kowalski, Sr. about commissions in the light most favorable to Balding, namely, that Kowalski's "silence" and failure to follow up on Balding's e-mail is "a form of deceit and evidence of guilt" about which a jury can "draw inferences in Balding's favor." (*Id.* at 6-7.) He claims there is "not a shred of evidence anywhere" that his commissions would not be paid per the original agreement. (*Id.* at 5.) Finally, he argues that he never "accepted new terms for compensation that did not include a commission" because such an acceptance requires an offer, which he claims he did not receive, or

at least that there are disputed facts as to whether he had knowledge of new or changed conditions in his employment compensation. Any "private mental reservations" about Balding's commissions are Sunbelt's, not his, according to Balding. (*Id.* at 9-10.)

The court has previously agreed that there are disputed facts regarding the meaning of terms in Balding's original commission agreement and whether Rutledge informed Balding that his increased salary was in lieu of commissions. Whether the commissions were originally to be paid on all sales accounts or only new accounts was not material to the court's conclusion, however, while the court acknowledged that a jury may reject Rutledge's testimony. (*Mem. Dec.* 6; Dkt. No. 103.) The court also acknowledges that its prior decision does not refer to Balding's communications with Wasson regarding commissions. Because it was undisputed that Wasson had no employees reporting to him and was not Balding's supervisor, however, this evidence was also not material to the court's conclusion. Furthermore, Balding's deposition testimony reflects that these communications with Wasson occurred prior to Balding accepting his first raise in January 2010, and thus do not support his assertion that he believed he was entitled to them after his original compensation terms were superseded by the parties' subsequent course of performance. (*Balding Depo.* 105:11-25; Dkt. No. 72-36.)

As for Balding's communications with Kowalski, Sr., the court is not required to accept Balding's "speculation" or "suspicion" to comply with its obligation

to view facts in the light most favorable to the non-moving party. *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Rather, "[t]he litigant must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." *Id.* As discussed in the court's previous order, the only communication Balding had with a supervisor about his commissions after January 2010 was with Kowalski, Sr. in April 2012. To recap, Balding wrote: "I could tell that you were surprised to hear of a commission which was written up for me. I would like you to know that I am grateful for profit sharing and other incentives Sunbelt Steel gives. I am here to help grow and become [a] huge part of Sunbelt Steel. If there could be some consideration that [sic] would be grateful." (*Mem. Dec.* 6; Dkt. No. 103.) Kowalski, Sr.'s response was: "I plan to have followup conversations with Kathy & Jerry this week and will get back to you. Hang in there!" There is no evidence of any follow up. *Id.* The court need not accept Balding's conclusion that Kowalski, Sr.'s "[s]ilence is a form of deceit and evidence of guilt" to view this e-mail in the light most favorable to Balding. At most, viewed in Balding's favor, it suggests that he inquired about commissions to a direct supervisor once in April 2012.

The key point that Balding misses is Sunbelt's undisputed history of increasing his salary and paying bonuses in a manner at odds with the agreement Balding continues to assert was breached by Sunbelt's failure to pay him commissions. In January 2010, as the court previously summarized, Sunbelt increased

Balding's annual salary from $30,000, as stated in his hiring contract, to $40,000. This $10,000 increase was more than double the $3,725 in commissions Balding may have been entitled to by the end of 2009. (*Mem. Dec.* 5-6; Dkt. No. 103.) Even if a jury were to discount Rutledge's testimony that she informed Balding the salary increase was in lieu of the commission agreement, thereafter, Sunbelt increased Balding's salary to $45,000 in April 2011 and again to $52,000 in January 2012. And most fatal to Balding's claim that he did not accept salary increases and bonuses in lieu of commission, in May 2012, one month after Balding's e-mail to Kowalski, Sr. asking for "some consideration" of commissions, Sunbelt increased Balding's salary to $60,000. Five months after that, Balding received a $13,000 bonus. All in all, Sunbelt doubled Balding's salary and gave him $23,250 in bonuses based on the company's overall performance from 2009 to 2013. *Id.* None of these salary increases or bonuses was made pursuant to the terms of the original employment compensation agreement, and Balding admitted that he never raised the issue of commissions with anyone else at Sunbelt after April 2012. (*Balding Depo.* 115:8-11; Dkt. No. 72-36.)

Contrary to Balding's arguments, the undisputed history of Balding retaining his employment as an at-will employee after Sunbelt paid him compensation at odds with his initial agreement constitute more than "a shred of evidence" that his employment contract had been superseded by new or changed conditions. *See Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002

(Utah 1991) ("where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation," and "by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer."). Even viewing in his favor Balding's claim that he raised commission objections to Kowalski, Sr. once in April 2012 prior to receiving his final raise and bonus payment, Balding's assertion that he did not accept these new terms, or was not aware of them, is inconsistent with his having accepted the money and his continuing to work for Sunbelt thereafter. *See B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc.*, 754 P.2d 99, 103-04 (Utah App. 1988) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."). Balding did not submit sufficient evidence for a factfinder to find that these new and changed conditions of employment did not constitute a course of performance that waived the original commission-based compensation agreement pursuant to *Johnson* and *B.R. Woodward*.

For all of the foregoing reasons, as well as the reasons set forth by the court in its prior rulings, the court concludes that it properly granted summary judgment to defendants on Balding's contract claims.

III. Quantum Meruit Claim

Balding does not present new evidence or identify a change in the controlling law regarding his quantum meruit claim. Instead, he mischaracterizes the court's decision as contradictory. (*Pl.'s Motion* 11; Dkt. No. 104.) First, he alleges, the court ruled that Balding had a contract with Sunbelt, and then, that Balding was "an at-will employee with no contract of employment." *Id.* That is not what the court said. Rather, the court found that Sunbelt had both a contract with Balding and an at-will relationship. (*Mem. Dec.* 7, 9; Dkt. No. 103.) These are not contradictory. "An at-will relationship does not mean that there is no contract between employer and employee. The at-will rule merely 'creates a presumption that any employment contract which has no specified term of duration is an at-will relationship.'" *Cook v. Zions First Nat'l. Bank*, 919 P.2d 56, 60 (Utah App. 1996).

The consequence of Balding's at-will relationship with Sunbelt is that Balding's assertion of a commission-based compensation contract, even if its terms were superseded by a course of performance between the parties that substituted for the original contract terms, precludes Balding's claim for unjust enrichment or quantum meruit. *Concrete Prods. v. Salt Lake City*, 734 P.2d 910, 911 (Utah 1997) ("Unjust enrichment is a doctrine under which the law will imply a promise to pay for goods or services where there is neither an actual nor an implied contract between the parties.")

Balding also argues that the court failed to consider the "proper test" for a quantum meruit claim, including facts he submitted claiming that two other salespersons at Sunbelt were paid more than he was. These facts, he asserts, require the court to allow his claim to go forward so that a jury can determine whether Sunbelt was unjustly enriched by his labor and retained the benefits of that labor without payment for its value. (*Pl's Motion* 11-12; Dkt. No. 104). Even if Balding's quantum meruit claim were not precluded by his contract claim, Balding has failed to present sufficient evidence to support it. Balding's assertion that two other sales employees were paid more than he was does not meet the requirements to prove a quantum meruit claim. Balding presented no evidence demonstrating that he and the other employees were substantially similar in experience, performance, number of accounts managed and volume of sales, etc. Rather, there was undisputed evidence that Sunbelt paid Balding exactly what his skills and experience warranted in the marketplace, as demonstrated by his earnings from Sunbelt's competitors at the time he was hired and after he was terminated from Sunbelt. (*Mem. Dec.* 8-9; Dkt. No. 103.) For both reasons, the court declines to reconsider this ruling.

IV. ADA Discrimination and Failure to Accommodate Claims and Motion to Allow Supplemental Disclosure of Expert Testimony in Support

In its October 2016 Memorandum Decision and Order, the court reversed its grant of summary judgment to defendants and allowed Balding's FMLA interference and retaliation claims, as well as his ADA retaliation claim, to go forward. This decision was based on the court's conclusion, upon reconsideration, that it had failed to adequately draw the appropriate inferences in Balding's favor on facts that may support a finding of pretext regarding Sunbelt's reasons for firing Balding. (*Mem. Dec.* 9-23; Dkt. No. 103.)

As a result, the court conducted a separate analysis of Balding's ADA discrimination and failure to accommodate claims, concluding on reconsideration that these claims were correctly dismissed because Balding failed to establish a prima facie case of disability under the ADA and because there was no evidence that Sunbelt failed to grant any of Balding's requests for accommodation. *Id.* at 23-25. Balding's current motion for reconsideration challenges this analysis, and separate motions seek to bolster support for his prima facie case of disability by submitting for admission Dr. Allred's Declaration and Supplemental Expert Disclosure.

Because the court concludes below that its original pretext ruling was correct and that all of Balding's FMLA and ADA claims should be dismissed on that basis, it is not necessary for the court to rule on Balding's

motion to reconsider the ADA discrimination or failure to accommodate claims or the motion to admit Dr. Allred's Declaration and Supplemental Expert Disclosure. The court DENIES those motions as moot. (Dkt. No. 104 as to ADA claims; Dkt. No. 108 as to Supplemental Disclosure of Expert Testimony; Dkt. No. 109 as to Motion to Amend.)

SUNBELT'S MOTION

I. Legal Standard on Motion to Reconsider

Sunbelt's motion to reconsider the court's October 2016 decision is brought under Fed. R. Civ. P. 54(b):

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Id. Sunbelt's motion was filed within ten days of the court's decision. Whether it is properly analyzed under Rule 59(e) or Rule 54(b) does not change the standard required to modify the court's prior order, because Rule 54(b), like Rule 59(e), requires a showing of "substantially different, new evidence," "subsequent, contradictory controlling authority," or that "the original order is clearly erroneous." *Arnett v. Howard*, 2:13-cv-591 TS, 2014 U.S. Dist. LEXIS 101770 (D. Utah Jul. 16, 2014). The court has considered Sunbelt's arguments and

authority and concludes that its October 2016 ruling misapprehended the controlling law, and that its original decision dismissing all of Balding's FLMA and ADA claims on summary judgment was correct.

II. Pretext Analysis on FMLA and ADA Claims

In its ruling on Balding's first motion to reconsider, the court reviewed the facts presented by both parties and analyzed whether a jury could reasonably infer that Sunbelt's explanation for firing Balding based on his dishonesty and poor performance was a pretext for firing him because of his request for FMLA leave. Based on the court's review of *Olson v. Penske Logistics, LLC*, No. 15-1380, 2016 U.S. App. LEXIS 15780 (10th Cir. Aug. 26, 2016), the court concluded that there were four facts that may support the inference of pretext: (1) that Sunbelt had knowledge of a number of Balding's medical issues prior to November 26, 2013; (2) that Sunbelt made the decision to terminate Balding the very same day it learned of the alleged misrepresentation to Weatherford, knowing he was on leave and without a meaningful investigation to verify Balding's explanation; (3) that senior management had previously agreed that Balding may have to be terminated at the first of the year, again being fully aware at the time that his medical issues may require FMLA leave; and (4) that management was at least on notice that the customer may not have fully disclosed that it had only sent in the hard copy purchase order on November 26, 2013, while back dating the order to

November 5, perhaps to cover its representative's own lack of diligence.

Of those four reasons, the one that carried the most weight and influenced the court's consideration of the other reasons was the length and quality of Sunbelt's investigation into Balding's alleged misconduct prior to terminating his employment. Nevertheless, the court now re-examines each of these four facts to determine whether controlling law provides support for the conclusion that they may allow a factfinder to infer pretext. Notwithstanding that the court is required to view the facts in the light most favorable to Balding, it remains Balding's burden to rebut Sunbelt's assertion that his misconduct and poor performance were the motivating factors for its decision to terminate his employment. *Estate of Bassatt v. Sch. Dist. No. 1*, 775 F.3d 1233, 1239 (10th Cir. 2014) ("Although it is generally true that the moving party has the burden to show that there is no genuine issue of material fact on a motion for summary judgment, the same is not true in the context of an adverse employment decision. When an employment decision is made based on alleged misconduct, the plaintiff must present evidence that rebuts the defendant's claim that the misconduct was the motivating factor for the employment decision.")

The court begins with Sunbelt's knowledge that Balding had reported medical issues over the years, including the "panic attack" that led to his taking leave in November 2013. A prime facie case of retaliation requires the plaintiff to show that "a causal connection

existed between the protected activity and the materially adverse action." *Argo v. Blue Cross & Blue Shield of Kan.*, 452 F.3d 1193, 1202 (10th Cir. 2006). Balding has shown—and Sunbelt has not disputed—that Sunbelt was aware of Balding's reports of various medical issues and concerns. Additionally, there was close temporal proximity between Balding's November 21, 2013 request for time off following his "panic attack" and Sunbelt's termination of him on November 26, 2013. These facts are sufficient to show a "causal connection" between a protected activity and an adverse action and thus sufficient to state a prima facie case of retaliation. Beyond the possibility of a causal link, however, neither temporal proximity nor an employer's knowledge of protected activity are sufficient alone to establish pretext. Once Sunbelt met its burden of articulating a legitimate, nondiscriminatory reason for taking an adverse action, Balding was required to go beyond his prima facie case and produce evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Sunbelt's explanation sufficient to allow a reasonable factfinder to find Sunbelt's reasons for firing Balding "unworthy of credence." *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 490 (10th Cir. 2006). Accordingly, to the extent Balding failed to make such a showing, the court concludes that it was error to rely on temporal proximity or Sunbelt's knowledge or awareness of Balding's alleged medical concerns to support an inference of pretext.

The second, and most critical, fact in the court's prior reconsideration analysis is Sunbelt's termination

of Balding within hours of when his dishonesty and misconduct were discovered without first conducting a "meaningful investigation." When the court originally granted summary judgment to Sunbelt, it had not sufficiently focused on the quality or extent of Sunbelt's investigation of Balding's misconduct or Balding's explanations about why his actions were not dishonest. Instead, the court attempted to follow the guidance of *Lobato v. New Mexico*, 733 F.3d 1283, 1289 (10th Cir. 2013), which states that "[i]n determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear to the person making the decision, not the plaintiff's subjective evaluation of the situation." *Id.* Thus, the court examined (1) whether it was fair for Kowalski, Jr. to evaluate Balding's assertion that an order was "in process" by the usual practices and custom of the company rather than by Balding's idiosyncratic definition, (*Hr'g Tr.* 87; Dkt. No. 86), (2) whether it was reasonable for Sunbelt to believe from the face of the purchase order that Balding had received it on November 5 but not entered it prior to making his representations to the customer, even though Balding claimed to have only received it that day—and was later shown to be correct about that, (*Id.* at 88), and (3) whether Kowalski, Jr. honestly believed that Balding was lying after asking Balding for his version of events. (*Id.*at 89.)

In its first reconsideration analysis of these facts, the court took great pains to determine whether this analysis had mistakenly failed to view the facts in the light most favorable to Balding. The court recognized

that "Sunbelt has presented a strong case that it had good cause to terminate Balding for poor performance and dishonesty." The court concluded, however, that the evidence of pretext may be sufficient to infer the real reason was Balding's health issues, even though the support was weak. (*Mem. Dec.* 13; Dkt. No. 103.) Upon further analysis the court concludes this was error.

The court now concludes that it misapprehended *Olson* and did not give sufficient attention to the more robust body of pretext precedent in the Tenth Circuit. *Olson* does not stand for the principle that an employer must conduct a thorough investigation to rebut an allegation of pretext. In fact, in *Olson*, the plaintiff struggled even to make a prima facie showing that his firing was causally connected to his leave, objecting that he was never given an opportunity to defend himself or tell his side of the story, something Balding was given here. *See Olson,* 2016 U.S. App. LEXIS 15780. Similarly, the court's reliance on *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530, 541 (10th Cir. 2014) for the principle that "[a] failure to conduct what appeared to be a fair investigation of the violation that purportedly prompted adverse action may support an inference of pretext" failed to consider that the decision makers in *Smothers* never gave the employee an opportunity to tell his side of the story, and thus make a fair determination that his version of events was more or less credible than was the version reported by coworkers. *See also Dewitt v. Southwestern Bell Telephone Co.*, 845 F.3d 1299, 1315 (10th Cir. 2017) (upholding dismissal

of discrimination and retaliation claims and distinguishing *Smothers* because Dewitt was given an opportunity to tell her side of the story). By contrast, here Balding was given an opportunity to present his version of events to Kowalski, Jr. and Todd Perrin. They found his explanation lacking credibility. (*See MK Jr. Decl.* ¶ 15; Dkt. No. 61 and *TP Decl.* ¶ 6; Dkt. No. 64.) "[U]nder [Tenth Circuit] precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was . . . discriminatory." *E.E.O.C.*, 450 F.3d at 488. The court erred by focusing on whether a factfinder may believe Balding's reported version of events, supported by the thinnest of threads of inference, not on the relevant inquiry of whether Balding has shown that *Sunbelt did not genuinely believe* that Balding's explanation lacked credibility. *See Lobato*, 733 F.3d at 1289 ("[T]he relevant inquiry is not whether the employer's proffered reasons were wise, fair, or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.")

Focusing on the correct inquiry, the court cannot conclude that Balding has presented sufficient evidence that Sunbelt did not genuinely believe that Balding had engaged in the dishonesty and misconduct alleged. For example, he presented no evidence of a pattern supporting a prior practice by himself or other employees of "reserving" or "pulling out" steel bars by calling the warehouse, or that he or other employees could get an order "in process" without a purchase order or without entering it into Sunbelt's

system. In fact, Balding admitted that when he represented to Weatherford that its order was "in process," he needed more information than a purchase order number "to get an order in process." (*Mem. Dec.* 13; Dkt. No. 103.) This admission affirms Sunbelt's genuine belief that Balding's explanation was not credible. And while Sunbelt could conceivably have called the warehouse or Mr. Melvin Watson to conduct a more thorough investigation of Balding's explanation, "[t]he proper inquiry is not whether the inadequacy of the investigation foreclosed [Sunbelt] from the possibility of believing [Balding]. Rather, the relevant inquiry is whether [Sunbelt] subjectively, but honestly, believed that [Balding] had engaged in misconduct." *Estate of Bassatt*, 775 F.3d at 1240-41. The court also notes that Balding failed to rebut Todd Perrin's testimony that Balding's explanation would have "been highly irregular" and made no sense. (*TP Decl.* ¶ 8; Dkt. No. 64.) ("Without at least an open order in Sunbelt's computer system, there would have been no way for anyone to process the order.")

In addition to Balding's failure to adequately challenge the genuineness of Sunbelt's belief that his explanations for the misconduct lacked credibility, under Tenth Circuit precedent, an attack on the adequacy of the investigation as a means of showing pretext—even when an employer fails to get the plaintiff's side of the story, as in *Smothers*—requires plaintiff to present evidence of a "disturbing procedural irregularity" that is "often exemplified by an employer's 'falsifying or manipulating of relevant criteria.'" *Cooper v. Wal-Mart*

Stores, Inc., 296 Fed. Appx. 686, 2008 WL 4597226, **10 (10th Cir. Oct. 6, 2008). In *Cooper*, Wal-Mart's failure to "follow its normal investigative practice of seeking out the employee's side of the story was insufficient to suggest that its reasons for terminating the plaintiff were false." *Id.* Likewise, in *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108 (10th Cir. 2007), an employer terminated an employee without interviewing her about a customer complaint. The Tenth Circuit noted that while "allowing [the plaintiff] to complete her side of the story would seem to be the most fair way of addressing the situation, we cannot say that [her supervisor's] failure to do so in these circumstances constitutes a 'disturbing procedural irregularity' sufficient to prove pretext." *Id.* at 1119. The Tenth Circuit went on to caution that it is not the court's role to "act as a superpersonnel department" and decide in the employer's stead whether certain infractions warrant summary termination. *Id.*

Finally, in *Estate of Daramola v. Coastal Mart, Inc.*, 170 Fed. Appx. 536 (10th Cir. 2006), the employer's "lack of thoroughness" in investigating an employee's misconduct was "not sufficient evidence of pretext to undermine the district court's grant of summary judgment." *Id.* at 544. Notwithstanding that the court found "little doubt" that the employer, Coastal Mart, "could have been more thorough in its pre-discharge investigation, consulting in-store videotapes and bank records and interviewing employees of Mr. Daramola's store," Mr. Daramola failed to provide evidence that Coastal Mart did not "honestly believe" the reasons it

gave for terminating his employment. *Id.* Even if the employer's reasons are "poorly founded" but "honestly described," a plaintiff has failed to show pretext unless he or she successfully challenges the genuineness of the employer's belief in the misconduct. *Id.*

Thus, the court concludes that even viewing the facts in the light most favorable to Balding, Balding has failed to meet his burden "to show that the employer's proffered honest belief is in fact nothing more than a pretext for discrimination." *DeWitt*, 845 F.3d at 1313. Sunbelt sought Balding's response to the allegations of his misconduct. It did not find his explanations credible. In the absence of evidence from Balding that Sunbelt did not genuinely believe his explanations lacked credibility, the court cannot conclude that Sunbelt's failure to conduct further investigation into his explanation amounts to a "disturbing procedural irregularity" sufficient to support an inference of pretext.

The court now considers the third fact it previously found may support an inference of pretext: that senior management had previously agreed that Balding may have to be terminated at the first of the year, again being fully aware at the time that his medical issues may require FMLA leave. As discussed above, *see supra* p. 11-12, management's knowledge alone of Balding's reported medical issues cannot support an inference of pretext, although the court has already determined that such knowledge supports Balding's prima facie case. *Argo*, 453 F.3d at 1202. But once the court eliminates management's knowledge of Balding's reported medical issues as the primary support for

Balding's pretext claim, the question becomes whether management's discussions about potentially terminating Balding's employment at the first of the year sufficiently supports the inference of pretext.[4] The court concludes that even viewed in the light most favorable to Balding, it does not.

The record reveals numerous deficiencies in Balding's communications with customers, co-workers, and supervisors; poor sales performance; delayed delivery dates on customer orders that resulted in demands for management to reassign customer accounts to other sales representatives, and wrong shipments of materials that resulted in demands to be assigned a different salesperson. (*MK Jr. Decl.* 2-4; Dkt. No. 61.) While Balding claims he disputed one formal Warning Notice he received, (*see id.* at Ex. 61-1 p. 2), he does not dispute that such issues warranted management concern.

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[4] Management's discussions about termination come from notes from Sunbelt's Human Resources Manager, Nancy Pickering, where she documents a meeting with Kowalski, Sr. and Rutledge to discuss Balding's performance issues. She wrote:

> Met with Mike Sr. and Kathy regarding the situation. I related to them what has transpired this week. We were all in agreement that [Balding] is not being asked to do more than any other salesman and that the continued write-ups all revolve around the same issues. My comment to Mike and Kathy was that, unfortunately, the situation with [Balding] did not seem to be getting resolved. I advised them of his apparent worsening financial position (employment verifications from loan companies). Kathy offered to contact [Balding]. We are all in agreement that after the first of the year, we may have to proceed with termination.

(*Balding's Appx.*, Ex. O; Dkt. No. 75-15.)

(*Balding Depo.* 131:1-6, 132:16-20, 151:20-152:24.) Prior to the incident with Weatherford, Sunbelt acknowledges that it had considered placing Balding on a "90-day Performance Improvement Plan (PIP)" once he returned from taking some time off. (*MK Jr. Decl.* 2-4; Dkt. No. 61.) The Weatherford incident, however, persuaded Balding's supervisor that "Balding had removed himself as a PIP candidate and could not be trusted to communicate with customers." (*Id.* at 6.) Balding has failed to rebut this evidence with anything to show that Sunbelt's belief in Balding's dishonesty about his communications with Weatherford was insincere. He has failed to show that others were treated more leniently than he was for similar conduct. Most importantly, he has failed to present evidence that his leave status—rather than performance issues and dishonesty—was a factor in Sunbelt's termination decision.[5]

Finally, the court considers the fact that at the time it terminated Balding, management was on notice that Weatherford may not have fully disclosed that it had only sent in the hard copy purchase order on November 26, 2013, while back dating the order to November 5, perhaps to cover its representative's own

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[5] The record reflects, instead, that Sunbelt worked with Balding's medical complaints and time off requests for years without complaint. In *Smothers,* by contrast, the record reflected that "managers and coworkers complained about his FMLA-protected absences," considered forcing him to change his shifts to make it easier to deal with his absences, and gave him negative performance evaluations "because of his absenteeism." *Smothers*, 740 F.3d at 534.

lack of diligence. Tenth Circuit precedent states that "[w]e have repeatedly held that the relevant inquiry in such cases concerns the belief of the employer that the employee engaged in misconduct, not whether the actual facts, as shown by evidence extrinsic to the employer's assessment, may have been otherwise." *Sorbo v. United Parcel Services*, 432 F.3d 1169, 1178 (2005). Where Balding has failed to produce evidence that Sunbelt did not genuinely believe at the time of his termination that Balding had received a hardcopy of the purchase order before November 26, it is irrelevant that it was later shown that Balding did not receive it until the day he was terminated. Furthermore, even if Sunbelt had known that Balding did not receive the purchase order on November 5, 2013, Balding has failed to rebut the testimony of Michael Kowalski, Jr. that such knowledge "would not have changed my recommendation that his employment be terminated. . . . Whether he had a purchase order or not, the point is that he hadn't entered any order on November 21, 2013, when he misrepresented to [Weatherford] that the order was 'in process.'" (*MK Jr. Decl.* 6; Dkt. No. 61.)

Therefore, on reconsideration of the controlling Tenth Circuit law and the facts of this case, viewing the facts in the light most favorable to Balding but requiring him to bear the burden of rebutting Sunbelt's nondiscriminatory explanation for its termination decision, the court concludes that its original order granting summary judgment to defendants was proper. The court GRANTS Sunbelt's motion for reconsideration.

(Dkt. No. 105.) As a result, the court denies as MOOT Sunbelt's motion as to certain claimed damages and its motion to exclude nonretained expert testimony. (Dkt. No. 53, § V.E. and Dkt. No. 65.)

CONCLUSION

For the reasons stated above, the court DENIES Balding's motion to reconsider his contract and quantum meruit claims (Dkt. No. 104), denies as MOOT Balding's motion to reconsider his ADA discrimination and failure to accommodate claims (Dkt. No. 104), and denies as MOOT his motions to admit Dr. Allred's Declaration and Supplemental Expert Disclosure. (Dkt. No. 108 as to Supplemental Disclosure of Expert Testimony; Dkt. No. 109 as to Motion to Amend.) The court GRANTS Sunbelt's motion to reconsider Balding's FMLA interference and retaliation claims and his ADA retaliation claim, (Dkt. No. 105), and denies as MOOT Sunbelt's motion as to certain claimed damages and its motion to exclude non-retained expert testimony. (Dkt. No. 53, § V.E. and Dkt. No. 65.) Balding's claims are dismissed, and this decision resolves all pending issues before the court. This matter is now ripe for Balding's appeal. *See* Dkt. No. 123.

DATED this 21st day of April, 2017.

BY THE COURT:

/s/ Clark Waddoups
CLARK WADDOUPS
United States District
Court Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT J. BALDING, Plaintiff-Appellant, v. SUNBELT STEEL TEXAS, INC., et al., Defendants-Appellees.	No. 16-4095

ORDER

(Filed Mar. 28, 2018)

Before **BALDOCK**, **KELLY**, and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

STATUTORY PROVISIONS INVOLVED

FAMILY AND MEDICAL LEAVE ACT

29 U.S.C. § 2601. Findings and purposes

(a) **Findings**

Congress finds that –

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against

employees and applicants for employment who are of that gender.

(b) **Purposes**

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2611. Definitions

As used in this subchapter:

(1) **Commerce**

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) **Eligible employee**

(A) **In general**

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(4) **Employer**

(A) **In general**

The term "employer".

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more

calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(5) **Employment benefits**

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

* * *

(11) **Serious health condition**

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

29 U.S.C. § 2612. Leave requirement

(a) **In general**

(1) **Entitlement to leave**

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

* * *

(c) **Unpaid leave permitted**

Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

* * *

(e) **Foreseeable leave**

(1) **Requirement of notice**

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of

the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) **Duties of employee**

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) **Notice for leave due to covered active duty of family member**

In any case in which the necessity for leave under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an

impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

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29 U.S.C. § 2614. Employment and benefits protection

(a) **Restoration to position**

(1) **In general**

Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) **Loss of benefits**

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) **Limitations**

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

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29 U.S.C. § 2615. Prohibited acts

(a) **Interference with rights**

(1) **Exercise of rights**

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) **Discrimination**

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) **Interference with proceedings or inquiries**

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding

relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

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29 U.S.C. § 2617. Enforcement

(a) **Civil action by employees**

(1) **Liability**

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) **Right of action**

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of –

(A) the employees; or

(B) the employees and other employees similarly situated.

AMERICANS WITH DISABILITIES ACT

42 U.S.C. § 12101. Findings and purposes

(a) **Findings**

The Congress finds that –

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who

have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose**

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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42 U.S.C. § 12102. Definition of disability

As used in this chapter:

(1) **Disability**

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) **Major life activities**

(A) **In general**

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) **Major bodily functions**

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) **Regarded as having such an impairment**

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) **Rules of construction regarding the definition of disability**

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact

lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph –

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

42 U.S.C. § 12111. Additional definitions

As used in this subchapter:

(1) **Commission**

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) **Covered entity**

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **Direct threat**

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **Employee**

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) **Employer**

(A) **In general**

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this

subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **Exceptions**

The term "employer" does not include –

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

* * *

(8) **Qualified individual**

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) **Reasonable accommodation**

The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **Undue hardship**

(A) **In general**

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **Factors to be considered**

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of

persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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42 U.S.C. § 12112. Discrimination

(a) **General rule**

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction**

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless

such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(d) **Medical examinations and inquiries**

(1) **In general**

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

* * *

(4) **Examination and inquiry**

(A) **Prohibited examinations and inquiries**

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **Acceptable examinations and inquiries**

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) **Requirement**

Information obtained under subparagraph (B) regarding the medical condition or history of

any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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42 U.S.C. § 12203. Prohibition against retaliation and coercion

(a) **Retaliation**

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) **Interference, coercion, or intimidation**

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) **Remedies and procedures**

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

CONSTITUTION

CONSTITUTION OF THE UNITED STATES

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.