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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 20, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. MURRAY, M.D. – a Married Man,

Plaintiff-Appellant,

v.

MAYO CLINIC, a Minnesota Nonprofit Corporation; MAYO CLINIC ARIZONA, an Arizona Nonprofit Corporation; WYATT DECKER, M.D.-Husband; GEORGIANNA DECKER, Wife; LOIS KRAHN, M.D.-Wife; ERIC GORDON, M.D.-Husband; TERRENCE TRENTMAN, M.D.-Husband; LARALEE TRENTMAN, Wife; WILLIAM STONE, M.D.-Husband; MAREE STONE, Wife; DAVID ROSENFELD, M.D.-Husband; MELISSA ROSENFELD, M.D.-Wife; ROSHANAK DIDEHBAN, a Single Woman,

Defendants-Appellees.

No. 17-16803

D.C. No. 2:14-cv-01314-SPL

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Before: Ronald M. GOULD and
Sandra S. IKUTA, Circuit Judges,
and Benita Y. PEARSON,* District Judge.

PEARSON, District Judge:

Plaintiff Michael Murray appeals the district court's instruction to the jury on his claim under the Americans with Disabilities Act ("ADA"), requiring him to prove that he was discharged because of his disability. Murray claims that our decision in *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005), holding ADA discrimination claims are evaluated under a motivating factor causation standard, remains good law. Because it is not, we affirm.[1]

I.

Dr. Murray filed suit against Mayo Clinic, Mayo Clinic Arizona, Drs. Wyatt Decker, Lois Krahn, Terrence Trentman, William Stone, and David Rosenfeld, and Operations Administrator Roshanak Didehban. In anticipation of trial, the parties submitted joint proposed jury instructions. The parties disagreed whether Murray's ADA discrimination claim should be tried under a but-for causation standard or a motivating factor causation standard. Murray argued that our decision in *Head* required him to show only that the defendants' belief that he had a disability was a

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* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] In a memorandum disposition filed simultaneously with this opinion, we affirm the district court as to all other issues raised by Murray.

motivating factor in their adverse employment decision. He accordingly requested the following instruction:

> As to Dr. Murray's claim that his disability was the reason for Mayo Clinic Arizona's decision to discharge him, Dr. Murray has the burden of proving the following evidence by a preponderance of the evidence:
>
> [. . .]
>
> 3. Dr. Murray was discharged because Defendants regarded him as disabled, which means that Defendants' belief that Plaintiff had a disability was a motivating factor in Defendants' decision to terminate him.

The district court instead instructed the jury to apply a but-for causation standard to Murray's ADA claim. The instruction provided that Murray must prove he was discharged because of his disability:

> As to Dr. Murray's claim that his disability was the reason for Mayo Clinic Arizona's decision to discharge him, Dr. Murray has the burden of proving the following evidence by a preponderance of the evidence:
>
> [. . .]
>
> 3. Dr. Murray was discharged because of his disability.

In denying Murray's motion for reconsideration, the district court found that the Supreme Court's rulings in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), abrogated our reasoning in *Head*. The district court concluded that the but-for causation standard applied.

At trial, the jury returned a verdict for Defendants on all claims. Following entry of judgment, Murray timely filed a notice of appeal.

II.

"A district court's formulation of the jury instructions is reviewed for 'abuse of discretion.' If, however, 'the instructions are challenged as a misstatement of the law, they are then reviewed de novo.'" *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (per curiam) (citation omitted) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999), *as amended on denial of reh'g* (July 15, 1999)). Jury instructions must fairly and adequately cover the issues presented and must not be misleading. *Gantt v. City of Los Angeles*, 717 F.3d 702, 706 (9th Cir. 2013).

A.

Title I of the ADA provides that "[n]o 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." 42 U.S.C. § 12112(a) (emphasis added).

Title I of the ADA also contains an enforcement provision, which cross-references specific portions of Title VII:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this

> subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter. . . .

42 U.S.C. § 12117(a). Of the cross-referenced sections, only § 2000e-5 references a causation standard. Specifically, that section provides: "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor," the court may award only limited relief. 42 U.S.C. § 2000e-5(g)(2)(B). Section 2000e-2(m), in turn, provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

B.

We first analyzed the standard for causation in a Title I ADA discrimination action in *Head v. Glacier Northwest, Inc.* In that case, we addressed "whether the ADA's use of the causal language 'because of,' 'by reason of,' and 'because' means that discriminatory and retaliatory conduct is proscribed only if it was solely because of, solely by reason of, or solely because an employee was disabled or requested an accommodation." *Head*, 413 F.3d at 1063-64. We concluded that, under the "plain language of the ADA . . . 'solely' [was] not the appropriate causal standard under any of the ADA's liability provisions." *Id.* at 1065.

Considering whether the ADA instead requires but-for causation, or merely a showing that the dis-

ability was a motivating factor of the discrimination, we joined seven other circuits in concluding that "a 'motivating factor' standard [was] most consistent with the plain language of the statute and the purposes of the ADA." *Id.* We thus held "the ADA outlaws adverse employment decisions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation—a motivating factor standard." *Id.*

In so holding, we relied in part on the reasoning of our sister circuits. *See id.* at 1065 n.63. The Fifth and Eighth Circuits had held the motivating factor standard applied to the ADA by virtue of the ADA's incorporation in § 12117 of Title VII's remedies in § 2000e-5.[2] *See Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).[3]

The Second and Seventh Circuits had concluded that ADA discrimination claims, like Title VII discrimination claims, only required a showing that discrimination motivated an employer's adverse employment action. This is because ADA and Title VII, at the time, both used the words "because of" to indicate causation, suggesting Congress intended the statutes to employ the same causation standard. *See Parker v. Columbia*

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[2] Similarly, the Fourth Circuit had found the motivating factor standard applied in a Title II ADA case through the ADA's incorporation in 42 U.S.C. § 12133 of the remedies set forth in 29 U.S.C. § 794a, which, in turn, incorporated the remedies in 42 U.S.C. § 2000e-5. *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999).

[3] The First Circuit relied on *Pedigo*, without additional analysis, in applying the motivating factor standard. *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996).

Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000), *overruled by Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033 (7th Cir. 1999), *overruled by Serwatka v. Rockwell Automation Inc.*, 591 F.3d 957 (7th Cir. 2010). Both courts acknowledged that, although § 2000e-2(m) is not, by its terms, specifically applicable to ADA cases, Congress intended the mixed-motive framework to apply to ADA claims. *Parker*, 204 F.3d at 337; *Foster*, 168 F.3d at 1033.

C.

Four years after our decision in *Head*, the Supreme Court decided *Gross v. FBL Financial Services, Inc.* The Court held that the Age Discrimination in Employment Act ("ADEA")—which makes it unlawful for an employer to discharge or discriminate against any individual "because of such an individual's age"—requires the plaintiff to "prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 177-78. In so doing, the Court declined to extend[4] the "motivating factor" standard of causation to employment discrimination cases brought under the ADEA. *Id.* Four years after *Gross*, the Supreme Court in *Nassar* again declined to extend the motivating factor standard, this time to Title VII retaliation claims. 570 U.S. at 362-63.

Against this backdrop, "circuits have retreated from the motivating factor standard of causation in

[4] The Supreme Court recognized the "motivating standard" of causation as the appropriate standard for employment discrimination actions brought under Title VII of the Civil Rights Act of 1964. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion).

ADA cases." *Bukiri v. Lynch*, 648 F. App'x 729, 731 n.1 (9th Cir. 2016) (collecting cases). We have not yet decided whether *Gross* and *Nassar* have "eroded *Head's* vitality." *Mendoza v. Roman Catholic Archbishop of L.A.*, 824 F.3d 1148, 1150 n.1 (9th Cir. 2016) (per curiam). We do so now.

D.

Murray contends that the motivating factor standard applies because we are bound by our decision in *Head*. We disagree.

Generally, a three-judge panel may not overrule a prior decision of the court. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). If, however, "an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point," the three-judge panel may then overrule prior circuit authority. *Id.* (quoting *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002)). The issue decided by the higher court need not be identical. *Id.* at 900. The appropriate test is whether the higher court "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*

"The 'clearly irreconcilable' requirement is 'a high standard.'" *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017) (quoting *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013)). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal

citation omitted) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012), and *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (per curiam)). If the court can apply prior circuit precedent without running afoul of the intervening authority, it must do so. *Id.*

Because *Head*'s reasoning is clearly irreconcilable with *Gross* and *Nassar*, we overrule *Head*'s holding that a plaintiff bringing a discrimination claim under Title I of the ADA need show only that a disability was a motivating factor of the adverse employment action. We hold instead that an ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show that the adverse employment action would not have occurred but for the disability.

In *Head*, we relied on the reasoning of our sister circuits and our existing precedent in finding that a motivating factor was most consistent with the ADA's plain language and purpose. *Head*, 413 F.3d at 1065 & nn.63-64. Our prior precedent, however, provides no further analysis of the text or purpose of the ADA in support of applying a motivating factor causation standard. *See Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 568 (9th Cir. 2004); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001).[5] Additionally, *Gross* and *Nassar* undercut the reasoning set forth by our sister circuits.

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[5] *Head* noted *Hernandez*'s characterization of the burden on an ADA plaintiff as "proving that 'disability actually played *a* role in the employer's decisionmaking process and had a determinative influence on the outcome.'" *Head*, 413 F.3d at 1065 (quoting *Hernandez*, 362 F.3d at 568 (emphasis in *Head*)). *Head* also observed *Snead*'s statement that a plaintiff must demonstrate that "a discriminatory reason more likely motivated the employer."

Gross held that the ADEA, which also used "because of" to indicate causation, did not permit mixed-motive claims because "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." 557 U.S. at 174. The Court rejected the argument that Title VII decisions governed interpretation of the ADEA on the basis that the two statutes were distinguishable. *Id.* ("[W]e 'must be careful not to apply the rules applicable under one statute to a different statute without careful and critical examination.'" (quoting *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). The Court explained,

> Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was a 'motivating factor' for the adverse action, the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways.

Id. (citations omitted).

Gross's reasoning directly contradicts the textual reasoning *Head* and other courts applied to conclude that Title VII's motivating factor standard applied to ADA claims. *See Parker*, 204 F.3d at 337; *Foster*, 168

Head, 413 F.3d at 1065 (quoting *Snead*, 237 F.3d at 1094 (emphasis in *Head*)). Neither statement requires a motivating factor standard.

F.3d at 1033. Like the ADEA, and unlike Title VII, the ADA does not contain any explicit "motivating factor" language. *See Gross*, 557 U.S. at 174. Rather, Title I of the ADA provides that a plaintiff must show discrimination "on the basis of disability." 42 U.S.C. § 12112(a). Under *Gross*, the phrase "on the basis of disability" indicates but-for causation. *Gross*, 557 U.S. at 176; *see also Nassar*, 570 U.S. at 350 (explaining *Gross*'s holding that "because of," "by reason of," "on account of," and "based on" all indicate a but-for causal relationship).[6]

Nassar's reasoning likewise directly undercuts the reasoning of courts that relied on the ADA's incorporation in § 12117 of § 2000e-5. *See Buchanan*, 85 F.3d at 200; *Pedigo*, 60 F.3d at 1301; *cf. Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (ADA Title II's incorporation of § 2000e-5). *Nassar* rejected the argument that § 2000e-2(m), Title VII's motivating factor causation provision, applies to Title VII retaliation claims. *Nassar*, 570 U.S. at 353. The Court emphasized that "the text of the motivating-factor provision, while it begins by referring to 'unlawful employment practices,' then proceeds to address only

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[6] Title I of the ADA was amended in 2008 to prohibit discrimination "on the basis of" disability, rather than "because of" disability. We find no meaningful textual difference in the two phrases with respect to causation. The Second and Fourth Circuits likewise found no meaningful textual difference between the two standards and found nothing in the legislative history suggesting Congress intended to modify the ADA's standard for causation. *Natofsky v. City of New York*, 921 F.3d 337, 349-50 (2d Cir. 2019); *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016) (noting that the ADA amendment was enacted before *Gross*, and was therefore not in response to *Gross*'s causation analysis).

five of the seven prohibited discriminatory actions—actions based on the employee's status, *i.e.*, race, color, religion, sex, and national origin." *Id.* According to *Nassar*, the plain language of § 2000e-2(m) barred its application to retaliation claims, and "it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Id.*

The same logic applies to Title I ADA discrimination claims. Relief under § 2000e-5(g)(2)(B) is available only if the plaintiff proves a violation under § 2000e-2(m). Section 2000e-2(m) narrowly prohibits the consideration of race, color, religion, sex, or national origin as a motivating factor for any employment practice. It does not prohibit the consideration of disability. Congress's express listing of these status-based considerations under § 2000e-2(m) is best understood as an exclusion of all other considerations. *See, e.g.*, *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) ("The doctrine of *expressio unius est exclusio alterius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" (quoting *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9th Cir. 1991))). Section 2000e-2(m), by its plain language, is inapplicable to claims of disability discrimination.

Because *Head*'s reasoning—whether based on the ADA's cross-reference to § 2000e-5(g)(2)(B) or on the ADA's text—is irreconcilable with subsequent Supreme Court precedent, it cannot stand.

III.

Our decision comports with the decisions of all of our sister circuits that have considered this question

after *Gross* and *Nassar*. The Second, Fourth, and Seventh Circuits found the Supreme Court's intervening jurisprudence to be dispositive of the issue. *See Natofsky*, 921 F.3d at 348 ("*Gross* and *Nassar* dictate our decision here."); *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016) ("The Supreme Court's analysis in *Gross* dictates the outcome here."); *Serwatka*, 591 F.3d at 963 ("But in view of the Court's intervening decision in *Gross*, it is clear that the district court's decision . . . cannot be sustained."). The Sixth Circuit, following *en banc* review, similarly held that *Gross*'s reasoning was controlling. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir. 2012) (en banc) ("[*Gross*'s] rationale applies with equal force to the ADA.").

We agree. *Gross* and *Nassar* undermine *Head*'s reasoning such that the cases are clearly irreconcilable. We join our sister circuits in holding that ADA discrimination claims under Title I must be evaluated under a but-for causation standard.

AFFIRMED.

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 20, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. MURRAY, M.D. – a Married Man,

Plaintiff-Appellant,

v.

MAYO CLINIC, a Minnesota Nonprofit Corporation; Et Al.,

Defendants-Appellees.

No. 17-16803

D.C. No. 2:14-cv-01314-SPL

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Before: GOULD and IKUTA, Circuit Judges,
and PEARSON,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3

** The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

Plaintiff Michael Murray timely appeals from the district court's granting of Defendants' motion for partial summary judgment, its instructions to the jury, and its evidentiary rulings. We address Murray's challenge to the district court's jury instruction regarding the applicable causation standard for his ADA discrimination claim in a concurrently-filed opinion.

1. The district court properly applied the factors under *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002), and correctly granted summary judgment on Murray's claim for wrongful discharge in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4311(a), because no genuine issue of material fact exists regarding whether Murray's termination was motivated by anti-military animus. Viewed in the light most favorable to Murray, Defendants' intraoffice emails do not rise to the level of expressed hostility. Nor is the three-month gap between Murray's return from medical leave and Defendants' investigation of his conduct in the operating room, in and of itself, sufficient to support an inference of discrimination based on temporal proximity. Murray experienced no negative treatment from his employer during this period of time, and his placement on administrative leave occurred immediately after the incident in the operating room. Moreover, neither Defendants' decision not to report Murray's conduct in the operating room to the Arizona Medical Board nor Drs. Krahn and Trentman's questions concerning Murray's anger outbursts and concentration issues are inconsistent with Defendants' decision to terminate Murray based on his conduct. Finally, Murray fails to explain how Dr. Krahn's involvement in Murray's medical case after she handed the matter

off to Occupational Medicine is evidence of disparate treatment.

In the alternative, Defendants affirmatively established that they would have terminated Murray without regard to his military service, based on the incident in the operating room. By his own admission, Murray grabbed Dr. Chien by the shoulders, pushed him, and yelled at him not to touch the equipment. Murray then screamed at Dr. Chien to leave the room. Murray later admitted to Drs. Trentman and Krahn that his behavior was inappropriate. Murray, aware that Mayo Clinic Arizona had terminated a Certified Registered Nurse Anesthetist with no military affiliation for a similar reason, confessed to his psychiatrist shortly after the incident that he was worried he would be terminated. For the same reasons, the district court correctly granted summary judgment on Murray's claim for wrongful discharge in violation of USERRA, 38 U.S.C. § 4316(c), because there is no genuine issue of material fact that Defendants lacked cause to terminate Murray.

2. The district court properly granted summary judgment on Murray's FMLA and ADA claims against Mayo Clinic on the grounds that Mayo Clinic was not Murray's employer under the FMLA and Murray failed to exhaust his administrative remedies. Murray produced evidence suggesting only that Mayo Clinic Arizona is a subsidiary of Mayo Clinic. Evidence of a parent-subsidiary relationship is insufficient to impute liability to the parent corporation. *See United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (corporate personalities are distinct). Additionally, Murray made his EEOC charge against only one entity—"Mayo Clinic

in Arizona." He did not exhaust his administrative remedies against Mayo Clinic.

3. The district court did not abuse its discretion by instructing the jury on Mayo Clinic Arizona's "direct threat" affirmative defense. In its original Answer, Defendant pleaded that Murray's ADA claims were barred because "[a]ny requested accommodation would impose a direct threat to the health and safety of patients and co-workers." Later, Murray voluntarily dismissed with prejudice his failure to provide reasonable accommodation claim. After a hearing on the issue, the district court instructed the jury on the defense. Although Defendants' affirmative defense was imprecisely pleaded, the district court did not abuse its discretion by liberally construing Defendants' operative Answer.

4. The district court did not err by refusing to adopt Murray's requested jury instruction to find causation for Murray's ADA discrimination claim if Murray's termination was "motivated in part by [Defendants'] concern over conduct that may result from a disability that they regarded him as having[.]" This standard was derived from *Gambini v. Total Renal Care, Inc.*, in which we held that "a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability" when the employee establishes a causal link between the termination and conduct arising from the disability. 486 F.3d 1087, 1093 (9th Cir. 2007). *Gambini*'s reasoning does not extend to regarded-as ADA claims. "[C]onduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 946 (9th Cir. 2015) (quoting *Humphrey v.*

Mem'l Hosps. Ass'n, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). Furthermore, Murray, who alleged no disability and requested no accommodations, has not shown that his conduct resulted from a regarded-as disability.

5. The district court did not err by refusing to adopt Murray's proposed jury instruction allowing the jury to impute "his supervisors' bias and discriminatory motive . . . to the ultimate decisionmakers, regardless of whether the ultimate decisionmakers actually regarded Dr. Murray as disabled or held any discriminatory bias of their own when they decided to terminate Dr. Murray." Subordinate bias liability does not apply to FMLA interference claims. "In interference claims, the employer's intent is irrelevant to a determination of liability." *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011). Liability under a "cat's paw" theory, by contrast, is predicated on the imputation of a supervisor's bias onto an employer. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 414, 421 (2011) ("The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."). Moreover, the district court adequately instructed the jury on Murray's theory of subordinate bias liability with regard to his ADA discrimination claim.

6. The district court did not abuse its discretion in excluding evidence of a witness's drug use and of Defendants' intraoffice emails. The district court reasonably determined that the witness's drug use 21 months after the operating room incident was too remote in time to be relevant. *See United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1400 (9th Cir. 1991). Additionally, the excluded intraoffice emails are irrel-

evant to Murray's FMLA and ADA claims. *See* Fed. R. Evid. 402. Even assuming *arguendo* that the emails had relevance, any probative value is substantially outweighed by the danger of confusing the issue of Murray's dismissed USERRA claims with his FMLA and ADA claims. *See* Fed. R. Evid. 403.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (JUNE 8, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY, M.D.,

Plaintiff,

v.

MAYO CLINIC, ET AL.,

Defendants.

No. CV-14-01314-PHX-SPL

Before: Honorable Steven P. LOGAN,
United States District Judge.

Before the Court is Plaintiff's Request for Clarification of March 31, 2017 Order and June 2, 2017 Minute Order and Motion for Order of Final Judgment Pursuant to Fed. R. Civ. P. 54(b). (Doc. 266.)

I. Motion for Clarification[1]

A. Background Facts

The "Background" section in the Court's summary judgment Order (Doc. 228) described the events of February 19, 2014 as "hotly disputed." (Doc. 228 at 2.) The background section gave an overview of the dispute between the parties. The Court did not state or infer that it was making any findings of fact in the "Background" section.

B. Dr. Bright's Testimony

Both parties have listed Dr. Bright as a witness and his testimony is relevant to the FMLA claim. Plaintiff may challenge the accuracy and completeness of Dr. Bright's statements pursuant to the Federal Rules of Evidence.

C. Cause for Termination

The Court found that Defendants had cause to terminate Dr. Murray. (Doc. 228 at 11, 20.) Whether under USERRA, FMLA, or the ADA, a plaintiff may argue that the reasons a defendant provided for termination were pretextual. For example, under the FMLA, a plaintiff needs to prove that the FMLA leave was a negative factor in his or her termination. It is possible that Defendants had a legitimate non-discriminatory reason to terminate Plaintiff and negatively viewed his FMLA leave. Plaintiff may not, however, argue

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[1] Although the Court attempts to clarify the issues for Plaintiff, the Court is not making broad evidentiary rulings. Any evidence or testimony submitted at trial must comply with the Federal Rules of Evidence, and are subject to objection by the opposing party.

that the incident in the OR was not a valid reason for termination.

D. Discriminatory Motive Analysis

In summary judgment briefing, Plaintiff alleged that Defendants' behavior was inconsistent, which was one of the factors necessary to prove a discriminatory motive through circumstantial evidence. The Court found no inconsistency. (Doc. 228 at 15-17.) However, the Court analyzed the evidence as it specifically applied to proving a discriminatory motive in violation of 42 U.S.C. § 4311. Plaintiff may present evidence to support his legal theory. The same analysis holds true for Plaintiff's perceived delay in termination. He may raise the argument.

E. Plaintiff's Motion in Limine

At the final pretrial conference held on June 2, 2017, the Court denied Plaintiff's overly-broad motion in limine to preclude "evidence of Dr. Murray's personal medical history, diagnoses, and treatment—including the IME conducted in this case . . ." (Doc. 244 at 1.) The Court also ruled that it "will allow testimony as it relates to doctor visits after the incident and while on FMLA leave." (Doc. 264.) The Court clarifies that this ruling includes Dr. Murray's voluntary visits to any doctor after the incident, up to and including the completion of his FMLA leave. These parameters do not include the IME of Dr. Murray. Plaintiff's motion, including suppression of the IME, was denied without prejudice. The parties may raise individual objections to medical evidence submitted at trial.

II. Motion for Final Judgment

Plaintiff also moves the Court to certify its March 31, 2017 Order as a final and appealable judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Doc. 266 at 4-5.) Defendants oppose the motion. (Doc. 267.) Rule 54(b) permits the court, at its discretion, to direct entry of judgment on less than all of the parties or claims. Fed. R. Civ. P. 54(b). "Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. . . . A similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54 (b) order will be proper only where necessary to avoid a harsh and unjust result, documented by further and specific findings." *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981).

Here, the similarity of factual issues militates against entry of a final order. Plaintiff's First Amended Complaint identifies several different legal theories as to why he was improperly discharged, which is common in employment discrimination actions. *See Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005). The underlying factual events are the same. Permitting an interlocutory appeal would only serve to unnecessarily delay resolution of the entire case. Additionally, Plaintiff has not identified any harsh or unjust result that would occur by following the ordinary course of appeal. The motion will be denied. Accordingly,

IT IS ORDERED that Plaintiff's motion for clarification (Doc. 266) is granted in part. It is granted to the extent the Court clarified its' ruling as discussed above. It is denied to the extent that Plaintiff seeks a final order on Counts I and II pursuant to Fed. R. Civ. P. 54(b).

Dated this 8th day of June, 2017.

/s/ Honorable Steven P. Logan
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (MARCH 31, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY,

Plaintiff,

v.

MAYO CLINIC, ET AL.,

Defendants.

No. CV-14-01314-PHX-SPL

Before: Honorable Steven P. LOGAN,
United States District Judge.

Before the Court is Plaintiff's Motion for Partial Summary Judgment (Doc. 198), Defendants' Motion for Partial Summary Judgment (Doc. 194), and Defendants' Motion to Exclude Expert Testimony and Opinions of Jeffrey Vender, M.D. (Doc. 193).

I. Background

Plaintiff Michael J. Murray, M.D., filed this lawsuit against Defendants Mayo Clinic, Mayo Clinic Arizona ("MCA"), Drs. Wyatt Decker, Lois Krahn, Terrence Trentman, William Stone, David Rosenfeld, and Operations Administrator Roshanak Didehbon. (Doc. 1.)

Dr. Murray filed a First Amended Complaint ("FAC") on August 29, 2014. (Doc. 14.) Dr. Rosenfeld has since been dismissed. (Doc. 192.) Dr. Murray brought this action for violations of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, *et seq.* ("USERRA"), the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA"). The following counts remain: Count I for wrongful discharge in violation of § 4311(a) of USERRA against all Defendants, Count II for wrongful discharge in violation of § 4316(c) of USERRA against all Defendants, Count IV for discriminatory termination in violation of the FMLA against Mayo Clinic, MCA, and Dr. Krahn, and Count VI for unlawful termination in violation of the ADA against Mayo Clinic and MCA. (Docs. 14, 26, 123.)

Dr. Murray joined the Army Reserves in 1977. (Doc. 203 at 125.) He began working at the Mayo Clinic in Rochester, Minnesota in 1986 and worked there until 2000. (Doc. 203 at 124.) Dr. Murray transferred to Mayo Clinic in Jacksonville, Florida and worked there from 2000-2007. (*Id.*) In 2007, Dr. Murray transferred to MCA and worked there until his termination on May 19, 2014. (Doc. 203 at 42.) While employed with Mayo Clinic collectively, Dr. Murray was deployed multiple times. Two of those deployments occurred while he was employed at MCA. (Doc. 203-1 at 3.) The second deployment began on March 20, 2012, and Dr. Murray was originally scheduled to return on October 16, 2012. (Doc. 203 at 91.) Dr. Murray's military orders were repeatedly changed, and he was ultimately discharged on October 22, 2013. (Doc. 203 at 92-99.) He returned to work at MCA as an

anesthesiologist on November 20, 2013. (Doc. 194 at 3.) His return appears to have gone smoothly until February 19, 2014, the date of the incident (the "Incident"). (Docs. 199 ¶ 18; 210 ¶ 18.) The events of February 19, however, are hotly disputed.

Dr. James Chien entered the operating room ("OR") shortly after 3:00 p.m.[1] He needed to update Dr. Murray on a patient being handed over to Dr. Murray. He stood by the door waiting until Dr. Murray was free to talk. Certified Registered Nurse Anesthetist ("CRNA") Jennifer Warner was starting to inject the patient with propofol. Dr. Murray was typing on the anesthesia computer keyboard. Ms. Warner realized that the blood pressure cuff was about to inflate in 30 seconds, which would interfere with the injection of propofol. She asked Dr. Murray to stop the blood pressure cuff from cycling. Dr. Murray hit the go/stop button which caused the blood pressure cuff start to inflate.[2] This caused the patient to complain of burning and her arm started to raise. Ms. Warner asked Dr. Murray to hit the button again, which would cause the cuff to deflate. Dr. Murray did so. However, using the go/stop button did nothing to reset the blood pressure timer and the cuff was getting ready to inflate again. Dr. Murray had returned his attention to the anesthesia computer and Ms. Warner had her back to the vital signs display,

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[1] The following facts are primarily derived from the interviews of the witnesses unless otherwise noted. (Doc. 205-2 at 24-31.)

[2] There are three ways to control the blood pressure cuff: on the computer monitor with a go/stop button, a dial, and by disconnecting the tube. Dr. Murray used the computer monitor. (Doc. 203-1 at 80.)

leaving Dr. Chien as the only one who noticed that the blood pressure cuff was going to inflate again within 20 seconds. Dr. Chien walked over to Dr. Murray and the machine stating, "That didn't stop the cuff; let me help you turn it off." Dr. Murray states that Dr. Chien did not say anything. (Doc. 203-1 at 78.) Dr. Chien reached over to the dial to turn off the blood pressure timer.

Dr. Murray turned to face Dr. Chien and told him to take his hands off the machine and to never touch his anesthesia machine. Dr. Murray's tone was so serious that everyone in the room thought Dr. Murray was joking. Dr. Chien laughed a little, withdrew his hand, but remained standing in the same spot. Dr. Murray then raised his voice and forcefully stated that he was serious and that no one touches his anesthesia machine. He further told Dr. Chien to get away from the machine. Dr. Murray then got so close to Dr. Chien that they were physically contacting, which caused Dr. Chien to stumble backwards. Dr. Chien began apologizing, but Dr. Murray continued advancing on Dr. Chien. Dr. Murray commanded that Dr. Chien immediately leave the OR. As Dr. Chien backed up, Dr. Murray continued advancing on Dr. Chien. Dr. Chien turned and left.

Later, Dr. Chien tracked down Dr. Murray because he still needed to update him on the patient. Dr. Chien waited outside of the entrance of the OR. When Dr. Murray left the OR, Dr. Chien called to Dr. Murray, but Dr. Murray did not respond or acknowledge Dr. Chien, and walked right past him. Dr. Chien followed Dr. Murray and waited outside another OR for Dr. Murray to leave. Dr. Chien again addressed Dr. Murray by name, and this time, Dr. Murray stopped. Dr. Chien

again apologized and Dr. Murray said "apology accepted." Dr. Murray stated that if he needs someone's help, he will ask for it. Dr. Chien then asked Dr. Murray to accompany him to the PACU to discuss the patient Dr. Chien had signed over to Dr. Murray. Dr. Chien explained that he had had to reintubate the patient and explained why. Dr. Murray smiled, rolled his eyes, began chuckling and shaking his head from side to side. Dr. Chien took this to mean that Dr. Murray thought he had made a mistake. He expected Dr. Murray to explain or elaborate, but Dr. Murray said "I'll take care of it." When Dr. Chien did not leave right away, Dr. Murray made the sign of the cross and said "You can leave now," at which point Dr. Chien left.

On February 20, 2014, Dr. David Rosenfeld, Vice Chair of the Anesthesiology Department, and Roshanak Didehban, Operations Administrator, interviewed Dr. Murray. (Doc. 205-1 at 21.) Dr. Murray considered Dr. Chien to be the wrongdoer and felt no need to apologize for his actions. (*Id.*) Dr. Murray indicated that he raised his voice to Dr. Chien, but does not remember any physical contact. He did not feel that this was a significant issue. (Doc. 205-2 at 24.) Later that day, Dr. Krahn, Dr. Rosenfeld, and Ms. Didehban contacted Dr. Murray by phone. (Doc. 205-2 at 31.) Dr. Krahn told Dr. Murray that this was a serious matter and placed Dr. Murray on administrative leave while they investigated. (*Id.*) Dr. Murray agreed the matter was very serious. (*Id.*) Dr. Rosenfeld and Ms. Didehban began the investigation into the Incident by interviewing the witnesses. (Docs. 199 ¶ 22; 210 ¶ 22.) When Dr. Trentman returned from his absence, Dr. Rosenfeld and Ms. Didehban turned over the investigation to him.

(Doc. 205-3 at 177.) Ms. Didehban had limited involvement after that point. (*Id.*)

On February 21, 2014, Dr. Murray wanted to *see* his regular psychologist, Dr. Gary A. Grove, but Dr. Grove did not have any openings, so Dr. Murray saw Dr. Robert Bright for an urgent appointment. (Doc. 203-1 at 144.) Over the weekend of February 22 and 23, Dr. Murray left a message on the voicemail for the Center of Sleep Medicine informing MCA that he would be taking a six-week medical leave. (Doc. 205-1 at 46.) On February 24, 2104, Dr. Murray saw Dr. Grove. (Doc. 205-3 at 13.) The next day, Dr. Murray went to Banner Health. (*Id.*) Banner Health wanted to admit Dr. Murray, but there were no beds available. (*Id.*) Dr. Murray, however, was able to attend their intense outpatient dialectic behavioral therapy for six weeks. (*Id.*) Dr. Murray was medically cleared to return to work on April 10, 2014 (Doc. 203-1 at 75), but he remained on administrative leave (Doc. 203-1 at 76).

On April 16, 2014, Drs. Krahn and Trentman met with Dr. Murray. (Doc. 203-1 at 68-69.) Defendants state the primary purpose of the meeting was to give Dr. Murray another opportunity to describe what happened on February 19. (Docs. 199 ¶ 33; 210 ¶ 33.) Dr. Murray's description of the events will be discussed in detail below. Dr. Murray brought up the prospect of "chronic, severe PTSD" (Docs. 203-1 at 79; 205-3 at 215), but he did not state that he had PTSD (Doc. 203 at 19).[3] He stated that the episode of tampering

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[3] It is unclear whether Dr. Murray was ever diagnosed with PTSD, although he was diagnosed with mental health disorders. The Court need not identify his mental health diagnoses in order to resolve this case. For the limited purposes of this Order,

with his anesthesia machine and invading his space triggered his PTSD, which was inactive prior to this incident. (Doc. 203-1 at 79.) In response, Dr. Krahn asked additional questions because Dr. Murray had emailed Dr. Trentman that he had been cleared by military physicians, had no active diagnosis, and was not on any medication. (Docs. 203-1 at 79; 205-3 at 215.) Dr. Murray affirmed that, at the time, the statements were true. (Doc. 203-1 at 79.) He knew that things were not completely okay, but was having a hard time getting into medical care at the VA. (Doc. 203-1 at 80.) Dr. Krahn stated that he would not be able to return to work at the time and would probably need an independent medical evaluation before he returned. (Doc. 203-1 at 80-81.) Dr. Trentman advised Dr. Murray that he had violated Mayo's policies on mutual respect, disruptive behavior, and workplace violence. (Doc. 203-1 at 69.) Dr. Murray acknowledged he was aware of the policies. (Doc. 203-1 at 79.)

On April 24, 2014, Drs. Krahn and Trentman again met with Dr. Murray. (Doc. 203-1 at 69.) The purpose of the meeting was to discuss whether there had been a violation of Mayo Clinic policies and what the consequences should be. (Doc. 205-3 at 219.) They provided Dr. Murray with a severance agreement in exchange for his resignation. (Doc. 203 at 160-65.) No final decision had been made to terminate Dr. Murray, but they informed him that they believed they would recommend termination to the Executive Operations Team ("EOT"). (Doc. 205-3 at 68.)

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the Court will assume that Plaintiff's mental health diagnoses were service related.

On May 7, 2014, Dr. Krahn emailed Dr. Murray to inform him that, if the Committee endorses the recommendation for termination, his last day of employment would be May 16, 2014. (Doc. 205-1 at 13.) On May 9, 2014, Dr. Murray's counsel penned a letter to MCA's counsel notifying her of USERRA's provision. (Doc. 214-5 at 40-45.)

On May 14, 2014, Dr. Krahn recommended involuntary termination to the EOT. (Doc. 203-1 at 85.) The recommendation was supported by Dr. Trentman, the Personnel Committee, and an ad hoc committee comprised of two members of the EOT, Drs. Stone and Richard Zimmerman. (Doc. 203-1 at 69.) The EOT voted unanimously to terminate Plaintiff's employment. (Doc. 203-1 at 85.) On May 19, 2014, MCA sent Dr. Murray a termination packet. (Doc. 205-1 at 18-42.) The termination letter stated that Dr. Murray's actions violated the Mayo Mutual Respect policy, Workplace Violence policy, Unacceptable Conduct and Disruptive Behavior policy, and Commitment to Safety standards. (Doc. 205-1 at 22.) The key personnel involved in deciding whether to terminate Plaintiff, and the only ones who possessed the authority to do so, were: Dr. Krahn, Dr. Trentman, Dr. Decker, Dr. Andrews, Dr. Blair, Dr. Fonseca, Dr. Heilman, Dr. Leighton, Dr. Mayer, Dr. Stewart, Dr. Stone, Teresa Connolly, Jeff Froisland, and Paula Menkosky. (205-3 at 239-240.) Of those decision makers, four are Defendants in this action: Drs. Krahn, Trentman, Decker, and Stone.

On June 13, 2014, Plaintiff filed this action alleging he was terminated in violation of USERRA. (Doc. 1.) On August 18, 2014, Dr. Murray filed an EEOC complaint. (Doc. 203-1 at 23.) Plaintiff then filed his FAC to add the FMLA and ADA charges. (Doc. 14.)

Dr. Murray now moves for summary judgment on Count I. (Doc. 198.) Defendants move for summary judgment on Counts I and II, to dismiss Mayo Clinic and Ms. Didehban because they are not Plaintiff's employers, and to determine if Dr. Murray is entitled to liquidated damages. (Doc. 194.) In addition, Defendants move to exclude the expert testimony of Dr. Jeffrey Vender. (Doc. 193.) The motions are fully briefed and ready for decision.

II. Legal Standard

A. Summary Judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show[ ] 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, and affidavits, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the party opposing summary judgment, who "must make a showing sufficient to establish a

genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009) (citation omitted).

B. USERRA

Section 4311(a) provides that "[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." In short, a service member should not be denied retention in employment because of his military service. USERRA prevents such action if the employee's military obligations were "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such [service.]" 38 U.S.C. § 4311(c)(1). "Under USERRA, discriminatory motivation of the employer 'may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees with similar work records or offenses.'" *Leisek v. Brightwood*, 278 F.3d 895, 900 (9th Cir. 2002) (quoting *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1012 (Fed. Cir. 2001)). The plaintiff bears the burden of proving that his military obliga-

tions were one of the reasons that the employer took action against him. 20 C.F.R. § 1002.22.

Section 4316(c) of USERRA prohibits the termination of an employee within one year of the date of reemployment, except for cause. The employer bears the burden of showing cause. To show cause, the employer must prove that it was reasonable to discharge the employee for the conduct in question, and that the employee had notice that such conduct would constitute cause for discharge. 20 C.F.R. § 1002.248 (a).

III. USERRA Claims

A. Count I–42 U.S.C. § 4311

Defendants allege that they terminated Dr. Murray because of the events of February 19, 2014. (Doc. 205-1 at 18.) Plaintiff alleges Dr. Murray's military service was a motivating factor in Defendants' termination decision. Plaintiff argues that a discriminatory motive can be proven through circumstantial evidence. (Doc. 198 at 9.)

1. The Incident

No one disputes that something happened in the OR on February 19, 2014. However, Plaintiff and Defendants vigorously dispute what happened during those few short minutes. There were eight people in the OR at the time of the Incident: Dr. Murray; Dr. Chien, an anesthesiologist; Gina Taddea, RN; Jennifer Warner, CRNA; surgical tech Eric Bowers; prelim surgery resident Ryan Day; medical student Josh Groger; and RN student Mertai Gatani. MCA did not pursue interviews with the students, and Mr. Day's

back was to the event. He heard loud voices, but did not see any physical contact. (Doc. 205-2 at 24.) That leaves five accounts of what happened, including Dr. Murray's version.

Dr. Murray now says that while he was entering data into a computer,

> Dr. Chien squeezed into the small space between the patient and Dr. Murray and attempted to manipulate the anesthesia monitoring equipment. Startled, Dr. Murray asked Dr. Chien to stop and when Dr. Chien did not comply, in order to protect the patient, Dr. Murray moved Dr. Chien away from the anesthesia machine and directed Dr. Chien to leave the room. After being told to leave three times (eventually in a very loud voice), Dr. Chien finally turned and left the room—without saying a word. About 30 minutes later Dr. Chien apologized to Dr. Murray without ever explaining his behavior.

(Doc. 198 at 6.)

Over time, Dr. Murray has described the Incident in a variety of ways. The Court finds Dr. Murray's statements to Dr. Bright two days after the Incident to be the most compelling. Dr. Bright testified at his deposition that:

> [Dr. Murray] had contacted our office and had requested to be seen on a fairly urgent basis. He had learned that he had been placed on administrative leave from his work. He had had an episode, I think it was in the operating room, where he had become angry. He was worried that he could be terminated

> from his job for this. I guess someone else in the OR had been terminated recently for something along the same lines.

(Doc. 203-1 at 141.)[4] Dr. Bright's notes recount a similar version. Dr. Murray told him that "he became upset that this other anesthesiologist was making adjustments to a BP machine that Dr. Murray had just finished setting. He recalls having feelings of 'rage' and being verbally aggressive (but not threatening) to this other physician." (*Id.*) Dr. Murray further informed Dr. Bright that "there is a 'zero tolerance policy' for physical contact. He fears/anticipates that he will be terminated from his position, as apparently a similar incident occurred within the last few years involving a nurse anesthetist who was fired." (Doc. 203-1 at 144.) This version of events matches the witnesses' statements, but is in stark contrast to the version Dr. Murray now gives.

The day after the Incident, Dr. Murray downplayed the Incident stating that he had no need to apologize for his actions. (Doc. 205-1 at 21.)

During the April 16, 2014 meeting, "Dr. Murray stated that Dr. Chien 'tampered' with the anesthesia machine and that he 'batted' Dr. [Chien's] arm down when Dr. Murray tried to prevent Dr. Chien from touching the machine. Dr. Murray was very critical

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[4] This contradicts Dr. Murray's allegation that "[a]fter sitting for a few days on administrative leave without any information regarding Mayo's intentions, Dr. Murray began to struggle with some of the symptoms that he previously experienced from his PTSD and other military-service-related conditions." (Doc. 198 at 6.) In fact, he saw a psychiatrist on an urgent basis the day after he was placed on administrative leave.

of Dr. Chien touching the anesthesia equipment. Dr. Murray himself described that he pulled Dr. Chien by the shoulders and pushed him into an IV pole. In that interview Dr. Murray described his actions as 'inappropriate' but repeated that Dr. Chien's actions were inappropriate too." (Doc. 205-1 at 22.)

In his deposition, Dr. Murray stated that "[he] stepped a little bit grabbed him by the shoulders, pulled him, pushed him out of the way, and yelled at him not to touch that machine." (Doc. 205-3 at 16.) He further admits yelling, and then screaming at Dr. Chien. (Doc. 205-3 at 18.) He states that he was not angry; he was afraid for his patient. (Doc. 205-3 at 18.)

In comparison, here is how the witnesses describe the Incident. Ms. Warner, Ms. Taddeo, and Mr. Bowers thought Dr. Chien was waiting to either consult with Dr. Murray or take over for Dr. Murray. (Doc. 205-2 at 28-30.) When Dr. Chien reached over to turn off the blood pressure timer, Ms. Taddeo viewed his actions as trying to assist Dr. Murray. (Doc. 205-2 at 28.) When Dr. Murray told Dr. Chien to take his hands off his anesthesia machine, Ms. Taddeo and Ms. Warner described the tone as "yelling" and "stated firmly," respectively. (Doc. 205-2 at 28-29.) Mr. Bowers looked over at Dr. Murray right after the statement and noticed he was "red in the face, seemed angry." (Doc. 205-2 at 30.) Dr. Murray's tone was so serious that everyone in the room thought Dr. Murray was joking. (Doc. 205-2 at 25, 28, 30.) As for the physical interaction, Ms. Taddeo describes it as Dr. Murray "shoving Dr. Chien, who was pushed into an IV pole." (Doc. 205-2 at 28.) Mr. Bowers stated that Dr. Murray "pushed [Dr. Chien] into the IV pole." (Doc. 205-2 at 30.) Mr. Bowers further described it as "[n]ot a straight push

arm, but there was contact from Dr. Murray, wasn't a two handed push . . . more of a bump from Dr. Murray to Dr. Chien to cause him to go into the pole." (*Id.*) Ms. Warren did not *see* the commotion because her back was to Drs. Murray and Chien, but she heard the commotion and saw the IV pole pushed aside. (Doc. 205-2 at 29.) Ms. Taddeo stated that Dr. Murray continued screaming at Dr. Chien repeatedly saying "I'm serious! Get out of my room!" (Doc. 205-2 at 28.) Ms. Taddeo also states that Dr. Murray shoved Dr. Chien at least one more time. (*Id.*)

Even more telling is the reaction of the other employees after the Incident was over. Ms. Taddeo stated that "[w]e were all shaken up by this, and frightened by Dr. Murray's actions." (*Id.*) Furthermore, Ms. Warner, after stabilizing her patient, called her team lead to inform her of the situation. (Doc. 205-2 at 29.) When Dr. Murray encountered Ms. Warner an hour later, she responded that she was not involved in what goes on between two consultants. (Doc. 203-1 at 79.) These are not the reactions of employees who saw Mr. Murray merely "direct[ ] Dr. Chien to leave the room." (Doc. 198 at 6.)

MCA had cause to terminate Dr. Murray, but that is not the end of the analysis. USERRA provides that if the employee's military obligations were "a motivating factor" in the termination, Defendants could still be held liable.

2. Discriminatory Motive

A discriminatory motive may be inferred by factors such as "'proximity in time between the employee's military activity and the adverse employment action, inconsistencies between proffered reason and other

actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees with similar work records or offenses.'" *Leisek*, 278 F.3d at 900.

a. Proximity in Time

Plaintiff asserts that the "temporal proximity between certain key events . . . establishes that Dr. Murray's military service and obligations were a motivating factor in Defendants' decision." (Doc. 213 at 10.) Plaintiff defines these key events as the "close proximity between Defendants' private emails about Dr. Murray's military deployment and the decision to terminate him, coupled with the proximity between his return from military leave and the investigation, establish that his military service was a motivating factor in Defendants' decision to terminate him." (*Id.*) Defendants, on the other hand, argue that seven months between Plaintiff's discharge from the military and his termination is too distant to imply any negative inference. (Doc. 194 at 12.)

Dr. Murray makes much of the emails exchanged between Defendants during his military deployment in 2012 and 2013, especially the emails from July and August 2012. (Docs. 205 at 1-25; 205-2 at 10, 17-22; 205-3 at 1-3.) The emails express employees' frustration with trying to schedule anesthesiologists during Dr. Murray's deployment and frustration with Dr. Murray's constantly changing dates of return. (*Id.*; Doc. 205-3 at 38-39.)

In July 2012, Dr. Ramakrishna stated that "[t]he winter will be ugly if mike doesn't show up as per

schedule." (Doc. 205 at 5.) Later that month, when discussing that Dr. Murray might not return for another year, Dr. Cole wrote that "[i]f true, this is not sustainable. We'll have to discuss. How long can Dr. Murray be gone on leave from the military and we still have to hold a spot open for him, both from a legal and Mayo policy point of view?" (Doc. 205 at 7.) Dr. Trentman wrote that "[i]t can be a challenge figuring out what Dr. Murray is doing." (Doc. 205 at 9.) Ms. Didehban wrote that "[she would] find out from HR what the precedence/process is for replacing physicians on extended military deployments." (Doc. 205 at 11.) After research, Ms. Didehban's responded that "[t]he bottom line is that we can't 'replace' him as long as he is anticipated to return; any growth to our staff would be additional positions." (Doc. 205-3 at 2.) Dr. Trentman emailed Dr. Cole stating that "Mike M remains the international man of mystery." (Doc. 205 at 13.) In April 2013, email traffic picked up again when Dr. Murray's orders were extended until October 22, 2013. (Doc. 205 at 23.) Ms. Didehban wrote that "[she thought] we should also speak with Jennifer Boudreau to see if there is any end date or option to proceed with replacing an employee on military duty after a certain number of months . . . *i.e.* at what point do they lose their position?" (*Id.*) Dr. Murray argues these emails, coupled with his return from military leave and the investigation, "establish that his military service was a motivating factor in Defendants' decision to terminate him." (Doc. 213 at 10.)

What Dr. Murray fails to explain is how the emails, largely from 2012, apply after Dr. Murray

returned from deployment.[5] Each email was written because of either staffing shortages or Dr. Murray's changing dates of return. Once Dr. Murray returned from deployment, staffing of the anesthesiologists was no longer an issue and only a few emails even mention his military service. For example, on March 13, 2014, Dr. Krahn and Ms. Heinrich exchanged emails and Dr. Krahn stated "I predict that you will have to be assertive to get any documentation based on his past patterns for military absences . . . I suggest setting a RTW deadline to apply more pressure. Thanks." (Doc. 205-1 at 48.) This email had less to do with military service than it did with Dr. Murray's pattern and practice of procrastination in providing the necessary documents. Dr. Krahn's comment was apt given that Dr. Murray went on medical leave no later than February 24, 2013 and Occupational Health had still not received any paperwork by March 13, 2014. Plaintiff has not produced a single email that discussed termination of Dr. Murray prior to the Incident.[6] Additionally, the emails are remote in time. Plaintiff does not explain how emails regarding scheduling, authored primarily by co-workers in 2012, bear any relationship to his termination in 2014 for a serious workplace incident.

In an attempt to tie his military service to his termination, he cites to an email chain from April 23, 2014 discussing the dates of his deployments and

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[5] Many of these emails were not written by the key decision makers in Plaintiff's termination.

[6] Emails may have discussed MCA's responsibilities and options, but no one actually recommended termination. Plaintiff conflates asking questions with taking action.

how much MCA augmented his military salary. (Doc. 205-2 at 13.) This was the day before Drs. Krahn and Trentman met with Dr. Murray and provided him with a settlement agreement if he chose to resign. Defendants explain that they needed the information in order to design a resignation package (Doc. 205-3 at 142), but Dr. Murray emphatically argues that it "constitutes direct evidence of Defendants' anti-military animus." (Doc. 221 at 5.) The Court disagrees. MCA's policy requires a staff member to serve three years after release from active duty. If the staff member stays less than three years, they agree to reimburse MCA for the amount of the augmented salary on a pro rata basis. (Doc. 210-1 at 31.) In Dr. Murray's case, MCA chose not to seek reimbursement. (*Id.*) A resignation package with remuneration could not have been made without the facts in front of them. The April 23, 2014 email chain does not link Plaintiff's military service to his termination.

The undisputed facts show that Plaintiff returned from military duty and had no negative treatment for three months. Yet, within 24 hours of the Incident, MCA placed Plaintiff on administrative leave, and, approximately 12 weeks later (including a six-week medical leave), he was terminated. On the other hand, the emails are remote in time and the subject matter of the emails became moot upon Dr. Murray's return from military service. Temporal proximity favors Defendants and does not justify an inference of discrimination.

b. Inconsistent Reasons

Plaintiff alleges that "Defendants originally discussed terminating Dr. Murray while he was deployed

with the Army, specifically because of the length of his military deployment." (Doc. 213 at 11.) Plaintiff further alleges that "Defendants now claim that they terminated Dr. Murray based entirely on the February 19, 2014 incident." (*Id.*) Plaintiff states that Defendants' actions do not support the claim. (*Id.*) Plaintiff identifies the following inconsistencies: skipping all levels of intermediate levels of discipline but not reporting Plaintiff to the Arizona Medical Board; Defendants shifted the focus of the misconduct investigation from the Incident to Dr. Murray's service-connected PTSD; and Dr. Krahn's requirement that Plaintiff receive an additional medical evaluation despite established policy that she would have no more involvement in the medical aspects of Dr. Murray's case. (Doc. 213 at 11-12.)

First, Dr. Murray alleges that they imposed the harshest sanction possible and did not consider lesser sanctions. (Doc. 213 at 11.) However, this is consistent with MCA's behavior in 2011 when a CRNA was fired for grabbing another employee. (Doc. 203-1 at 3, 25-26.) The employee was terminated despite the fact that he had no prior disciplinary history. (*Id.*) Furthermore, the employee was not in the military. (*Id.*) Plaintiff finds Dr. Murray's termination inconsistent with MCA not reporting Plaintiff to the Arizona Medical Board, but Plaintiff is comparing apples and oranges. The Arizona Medical Board has rules and definitions, just as MCA has policies. "Unprofessional conduct," as it relates to the Arizona Medical Board, is defined by 32 A.R.S. § 1401. Behavior that violated MCA's policies does not necessarily mean that the behavior violated the Arizona Medical Board's requirements for reporting.

Second, Dr. Murray alleges that Defendants shifted the focus of the misconduct investigation from the Incident to Dr. Murray's service-connected PTSD. (Doc. 198 at 14.) However, this is a conclusory allegation that is not supported by the record. His sole basis for the "shift of focus" allegation is questions Drs. Krahn and Trentman asked Dr. Murray about angry outbursts and concentration difficulties. (Doc. 203-1 at 78-81.) They asked him if he had had previous angry outbursts or struggled with concentration difficulties. (Doc. 205-3 at 59-62.) Given Dr. Murray's behavior on the day of the Incident, these were valid questions. Additionally, Plaintiff brought up the subject of PTSD. (Doc. 205-3 at 65.) Dr. Krahn avows that she was not aware of any diagnoses that prompted Dr. Murray's medical leave. (Doc. 203-1 at 69.) The record also does not support an inference that Defendants were no longer focused on the Incident and were only concerned with his alleged PTSD symptoms.[7]

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[7] Plaintiff cites to *Montoya v. Orange County Sheriff's Dep't*, 2014 WL 6389433 (C.D. Cal. Nov. 13, 2014) for support. In *Montoya*, the employer conducted a "Threat Assessment" based on the plaintiff's military training, installed a camera outside his residence, and placed a GPS tracker on his car because they feared he would react violently to termination because of his PTSD. *Id.*, at *3. Plaintiff alleges that "Defendants engaged in the same conduct as the employer in *Montoya*. (Doc. 198 at 17.) Plaintiff is wrong. *Montoya* described a long pattern of abuse from the employer, none of which has been alleged here. Plaintiff tries to save his reliance on *Montoya* by stating that "the employer took certain actions against the employee out of fear of the possible symptoms of his service-connected PTSD." (Doc. 221 at 7.) However, *Montoya* does not stand for the proposition, that as long as the employee has a service-related disability, the employer cannot terminate the employee no matter how violent the behavior. Here, Plaintiff was angry and physically aggressive—

Lastly, Plaintiff argues that Dr. Krahn should not have required any further testing before Plaintiff returned to work. However, between Dr. Murray's physically aggressive behavior on February 19, and his raising the issue of PTSD, it understandably caused concern about patient care. (Doc. 203-1 at 70.) Plaintiff's argument that this is proof of military animus strains credulity.

To the extent Plaintiff finds Defendants' behavior inconsistent, the Court is not persuaded. None of the "inconsistencies" alleged by Dr. Murray are inconsistencies between Defendants' stated reasons and their actions. MCA's reasons for discharging Plaintiff were consistent. The Incident occurred on February 19, and Plaintiff was placed on administrative leave within 24 hours. He met with Drs. Krahn and Trentman on April 16 and April 24, 2014. In every meeting and conversation he was told that he had violated hospital policies—the very same policies he was terminated for violating.

c. Expressed Hostility

The next factor is whether Defendants expressed hostility towards service members with the knowledge of the particular employee's military service. Plaintiff

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a violation of Mayo Clinic's policies whether caused by PTSD or some other diagnoses. He cannot now claim that his behavior is the result of service-related PTSD and somehow gain immunity from Mayo Clinic's policies. Furthermore, he cannot disclose a possibly serious case of PTSD and expect his employer to not ask any questions about it. Mayo Clinic does not tolerate violent behavior and *Montoya* does not hold to the contrary. *Montoya* is not factually similar and provides no legal analysis relevant to the case at bar.

argues that the "record is saturated with examples of Defendants' hostility toward Dr. Murray's military obligations and a desire to terminate him specifically because of his military obligations." (Doc. 213 at 9.) Plaintiff relies on Defendants' emails to support this claim. Plaintiff further alleges that "Defendants cannot sufficiently decouple their hostility toward Dr. Murray's extended military deployment from their decision to terminate him." (Doc. 213 at 13.)

As detailed above, the record supports some MCA employees' frustration with the repeated extensions of Plaintiff's deployment and the resulting staffing issues it caused. Frustration, however, is not the same as expressed hostility. For example, Dr. Trentman's email that stated: "Mike M remains the international man of mystery" does not inherently express any hostility. (Doc. 205 at 13.) It reflects the unknown—that MCA has no idea when Plaintiff would return from military leave. Plaintiff assumes that if the military is mentioned, hostility must be automatically implied. Such is not the case. The second half of Plaintiff's statement is more puzzling—that the "record is saturated with examples of Defendants' . . . desire to terminate him specifically because of his military obligations." (Doc. 198 at 10.) Again, Plaintiff points to the emails exchanged while he was deployed and already quoted above. At no point did any of those emails state that anyone at MCA wanted to terminate Dr. Murray. The emails prove that MCA looked into its obligations to Dr. Murray, and whether they could temporarily fill his position in other ways, but to characterize them as a "desire to terminate him" is unsubstantiated by the record. In fact, Plaintiff was

previously deployed while working for MCA and suffered no negative treatment.

Plaintiff next argues that if the Defendants' behavior does not show hostility, it definitely shows antimilitary animus, which is enough to violate USERRA. Plaintiff cites to *Croft v. Village of Newark*, 35 F.Supp. 3d 359, 372 (W.D.N.Y. 2014), which states that antimilitary animus can "simply mean that the employer thought the plaintiff's military status negatively impacted his or her appropriateness for certain positions." *Id.* However, as noted earlier, Defendants took no adverse actions while Plaintiff was in the military. Defendants did not find Plaintiff inappropriate for certain positions because of his military service. Plaintiff does not allege that he was denied promotions, or suffered in any way from the date of his return to the date of the Incident. To the extent Plaintiff identifies hostility or animus, the reason for the hostility or animus disappeared upon Plaintiff's return to work.

Next, Plaintiff alleges that Defendants cannot "decouple the antimilitary animus . . . from their decision to terminate him." (Doc. 198 at 16.) He cites to *Reed v. Honeywell Int'l, Inc.*, CV-07-00396-PHX-MHM, 2009 WL 886844, at *6 (D. Ariz. Apr. 27, 2009), for the proposition that "[t]he issue under USERRA is not whether an employer is 'entitled' to dismiss an employee for a particular reason, but whether it would have done so if the employee were not in the military." *Id.* However, the record before the Court supports that MCA would have terminated Dr. Murray regardless of his service. (Doc. 203-1 at 69-70.) Dr. Trentman, himself a veteran, testified at his deposition that Plaintiff's military service was viewed

favorably. (Doc. 210-1 at 65.) MCA previously fired a CRNA for similar behavior. (Doc. 203-1 at 3.) Because of the prior firing for physical violence, Plaintiff knew that he was likely to be terminated as he told Dr. Bright one day after being placed on administrative leave. (Doc. 203-1 at 141.)

Plaintiff has failed to show that Drs. Trentman or Krahn, or any member of the Executive Operations Team expressed hostility because of Dr. Murray's military service. Defendants did not terminate him while he was on deployment and welcomed him back after his deployment. Defendants' earlier emails simply do not show that they wanted to terminate him at the earliest opportunity. To the extent that the emails show any negativity, it does not rise to the level of expressed hostility or antimilitary animus.

d. Disparate Treatment

The last factor is whether there was disparate treatment of certain employees with similar work records or offenses. In 2011, MCA terminated another employee for a one-time encounter with a co-worker, in which the employee shoved the co-worker. (Doc. 203-1 at 3, 25-26.) Like Plaintiff, the employee was given the harshest sanction—termination. (*Id.*) Like Plaintiff, his employment history was otherwise unremarkable. (*Id.*) But this other employee never served in the military. (*Id.*) Since 2011, 11 MCA physicians have violated Mayo Clinic's policies of Mutual Respect or Unacceptable Conduct and Behavior and have been disciplined. (Doc. 203-1 at 52-53.) Out of those 11, five physicians either voluntarily resigned or were terminated. (*Id.*) MCA has an established record of disciplining employees, including physicians, for infrac-

tions of the workplace violence, disruptive behavior, and mutual respect policies. None of the other disciplined physicians served in the military. (Doc. 203-1 at 70.) Plaintiff does not address disparate treatment in his response. (Doc. 213.)

Plaintiff has failed to show that his military service was a motivating factor in his termination. The facts support that the action would have been taken in the absence of Plaintiff's military service. As such, Count I will be dismissed.

B. Count II–42 U.S.C. § 4316(c)

Section 4316(c) of USERRA prohibits the termination of an employee within one year of the date of reemployment, except for cause. Plaintiff argues that "[b]ecause employers have the burden of proving that the discharge was reasonable, it is difficult for employers to achieve summary judgment on claims under § 4316(c)." (Doc. 213 at 14 citing *Reed*, 2009 WL 886844, at *8.) Plaintiff further alleges that "Defendants did not terminate him after the OR incident. Instead they waited until immediately after learning of the symptoms of his service-connected PTSD before deciding to terminate." (Doc. 213 at 15.) Plaintiff urges the Court to permit the jury to decide whether Plaintiff's termination was reasonable under the circumstances. (Doc. 213 at 15.)

As discussed extensively above, the evidence supports that Defendants had cause to terminate Dr. Murray, and that he had notice that such conduct would constitute cause for discharge. In addition, the delay in the decision to terminate Plaintiff was because he was on medical leave for six weeks. Defendants should not and did not make the determination until

Plaintiff returned from medical leave. No reasonable jury could find that Defendants lacked cause to fire Plaintiff. As such, Count II will be dismissed.

IV. Mayo Clinic's Liability as Employers

As Counts I and II will be dismissed, no charges remain against Ms. Didehbon and the Court need not reach her liability as an employer. Additionally, the Court need not reach Mayo Clinic's liability as an employer on the USERRA claims, but must still address its liability for the FMLA and ADA claims.

A. FMLA

It is undisputed that Dr. Murray was employed by MCA at the time of the events at issue; however, Plaintiff asserts that Mayo Clinic is also his employer. (Doc. 134 at 2.) Defendants argue that Mayo Clinic is not an employer under the FMLA. (Doc. 194 at 15.)

Plaintiff alleges that:

> Mayo Clinic is deeply involved in operations, labor relations, and financial control of all three of its campuses, including Mayo Clinic-Arizona. Mayo Clinic reserves to itself: (1) responsibility for Mayo-Clinic-Arizona's compensation and benefit policies; (2) final approval authority for all new appointments to the staff at Mayo Clinic-Arizona; and (3) oversight of any transfer of assets other than in the ordinary course of business. Additionally, Mayo Clinic's Code of Conduct expressly applies to "Employees at all Mayo sites." Plaintiff's W-2s came from Mayo Clinic, not Mayo Clinic-Arizona, and Mayo

> Clinic files a nonprofit tax return that consolidates all three of Mayo Clinic's campuses into one tax filing.

(Doc. 213 at 17.)

The test for whether two entities should be treated as one, for purposes of employment claims, is "if they have (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211, 1213 (9th Cir. 1989). However, courts generally recognize that corporate personalities are distinct. *See United States v. Bestfoods*, 524 U.S. 51, 69 (1998). "Appropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (citation and internal quotation marks omitted).[8] The corporate veil may be pierced if the parent or subsidiary is merely an agent of the other. *Id.* This type of "relationship is typified by parental control of the subsidiary's internal affairs or daily operations." *Id.*

1. Interrelated Operations

Dr. Murray alleges that Mayo Clinic determines MCA's "compensation and benefit policies" and issues the Code of Conduct applicable to all of Mayo's employees. (Doc. 213 at 17.) While there may be a

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[8] The Ninth Circuit is analyzing the parent-subsidiary relationship in light of jurisdiction over the parent corporation. Nevertheless, the framework is relevant to the proper levels of involvement between a parent and a subsidiary.

few interrelated operations between Mayo Clinic and MCA, it mostly consists of the typical parent-subsidiary relationship. The "articulation of policies and procedures," such as those identified by Dr. Murray, is "appropriate parental involvement." *Doe*, 248 F.3d at 926. This is not the type of "relationship [that] is typified by parental control of the subsidiary's internal affairs or daily operations." *Id.*

2. Common Management

Dr. Murray identifies two people, Drs. Krahn and Decker, who served in a leadership capacity for both Mayo Clinic and MCA. (Doc. 213 at 17.) Dr. Decker is the CEO of MCA and is the Vice President for Mayo Clinic. Similarly, Dr. Krahn was the Chair of the Personnel Committee of MCA at the time of Dr. Murray's termination and is on the EOT of MCA. (Doc. 203-1 at 68.) She is also on the Board of Trustees and Board of Governors for Mayo Clinic. (Doc. 203-1 at 68.) Directors of a parent corporation may appropriately serve as directors of the subsidiary and "that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (citation and internal quotation marks omitted). Here, the Boards and Committees for Mayo Clinic and MCA were not carbon copies of each other. Only two people out of dozens were involved in leadership at both Mayo Clinic and MCA. (Doc. 217 at 9.) This is simply not enough to show that Mayo Clinic and MCA shared common management.

3. Centralized Control of Labor Relations

Mayo Clinic must approve all new hires at MCA. However, once an employee is hired, Mayo Clinic is not

involved in the supervision, advancement opportunities, discipline, or firing of the employee. MCA has its own human resources department. This is not "deeply involved" in labor relations as Plaintiff alleges. Plaintiff also points to Dr. Decker's email to Dr. John Noseworthy, CEO and President of Mayo Clinic, alerting them to the incident in the OR at MCA. (Doc. 214-5 at 26.) Dr. Decker's email specifically states that the information was "a heads up." (*Id.*) It was not required reporting; it was not a formal report. The email proves that MCA did not need the permission of Mayo Clinic's Board to place Dr. Murray on administrative leave; MCA had already done so. The email served as a vehicle for passing along information regarding a serious workplace incident. This does not prove centralized control of labor relations.

4. Common Ownership or Financial Control

Mayo Clinic must approve the transfer of assets other than in the ordinary course of business. (Doc. 213 at 17.) However, such a task is appropriate parental involvement. *Doe*, 248 F.3d at 926 ("Appropriate parental involvement includes . . . supervision of the subsidiary's finance and capital budget decisions."). Plaintiff also alleges, without providing evidence, that Mayo Clinic issues his paycheck. However, MCA's paychecks are issued by Mayo Foundation for Medical Education and Research, who provides payroll services for MCA. (Doc. 203-1 at 2.) Further, Plaintiff argues that the three Mayo entities file a single tax return. In 2014, Mayo Clinic intended to file a consolidated tax return, but Plaintiff does not present any updated information on what happened to the 2014 tax filings. (Doc. 205-3 at 245.) Plaintiff also does not state how a consolidated tax return proves common ownership

or financial control. Undoubtedly, Mayo Clinic and MCA have a common link—Mayo Clinic is the parent and MCA is the subsidiary. What Plaintiff fails to explain is how Mayo Clinic and MCA are so entwined that one is essentially the agent for the other.

Plaintiff's argument that Mayo Clinic is Dr. Murray's employer fails. Mayo Clinic will be dismissed from Count IV.

B. ADA

Defendants allege that Dr. Murray filed a single EEOC charge related to this matter. (Doc. 194 at 16.) The charging document names "Mayo Clinic in Arizona" as the employer. (Doc. 203-1 at 23.) Essentially, Defendants argue that Dr. Murray never filed an EEOC claim against Mayo Clinic and has failed to exhaust his administrative remedies. 42 U.S.C. § 12117 (a) (incorporating the enforcement procedures from Title VII). In a footnote, Dr. Murray responds that Mayo Clinic and MCA are a single entity and that the right-to-sue letter mentions "Mayo Clinic Hospital." (Doc. 213 at 18, n.3.) For support, Dr. Murray submits a letter he sent to the EEOC where he designated the topic as "Dr. Michael Murray ADA Discrimination Charge Against Mayo Clinic & Request for Immediate Right to Sue Letter." (Doc. 214-5 at 28.) In the letter, he articulates the parent-subsidiary relationship and then proceeds to lump them together as a single entity. (Doc. 214-5 at 28.) Notably, Dr. Murray identified Mayo Clinic and MCA as separate entities when he filed his complaint in this Court on June 13, 2014. (Doc. 1.) He understood that separate legal entities have meaning. Dr. Murray's intent to charge both entities does not change the fact that, on August

18, 2014, he filed a single charge against a single entity—Mayo Clinic in Arizona. (Doc. 203-1 at 23.) As such, Mayo Clinic will be dismissed from Count VI.

V. Liquidated Damages

The Court need not reach the issue of liquidated damages under USERRA, but Defendants also seek a ruling on liquidated damages on the FMLA claim. Liquidated damages are available, but an employer may defeat a claim through an affirmative defense if it can show that it acted in good faith and with reasonable grounds. 29 U.S.C. § 2617(a)(1)(A)(iii). Here, the facts support an inference that Defendants acted in good faith and terminated Dr. Murray on reasonable grounds. However, Plaintiff's FAC is not detailed enough to know what facts the FMLA claim is based on or exactly how the FMLA was violated. Therefore, the Court finds it premature to rule on liquidated damages.

VI. Motion to Exclude Expert Testimony

Dr. Murray intends to offer the opinions of Jeffrey Vender, M.D. as expert testimony at trial. Defendants seek to exclude Dr. Vender's testimony under Federal Rule of Evidence 702. (Doc. 193.) Dr. Vender opined on four areas, all of which Defendants seek to exclude. (Doc. 193-1 at 2-3.) Dr. Murray, in response, states that he intends to offer only the first of Dr. Vender's opinions at trial:

> It is unusual for another anesthesiologist to enter an operating room during an elective procedure and unsolicitly [sic] intercede in the care or management of the supervising

> anesthesiologist, who is directly present and responsible for the care of said patient.

(Doc. 207 at 1.) The Court will grant Defendants' motion as to Dr. Vender's expert opinion on the other three areas. However, it is not clear from Plaintiff's FAC whether Dr. Vender's expert testimony is relevant to the FMLA or ADA claims. As such, the Court will deny the motion without prejudice as to the opinion cited above. If necessary, Defendants may refile the motion limited to the above opinion.

VII. Conclusion

In summary, Defendants' motion for partial summary judgment will be granted in part. Defendants' request for a ruling on liquidated damages will be denied. Plaintiff's motion for partial summary judgment will be denied. Defendants' motion to exclude expert testimony will be granted in part and denied in part. The following counts and Defendants remain and will go to trial: Count IV against MCA and Dr. Krahn, and Count VI against MCA. Accordingly,

IT IS ORDERED:

1. That Defendants' motion for partial summary judgment (Doc. 194) is granted in part. Defendants' request for a ruling on liquidated damages is denied. The remainder of the motion is granted;

2. That Plaintiff's motion for partial summary judgment (Doc. 198) is denied; and

3. That Defendants' motion to exclude expert testimony (Doc. 193) is granted in part. As to Dr. Vender's second, third, and fourth

opinions, the motion is granted. As to Dr. Vender's first opinion, the motion is denied without prejudice.

Dated this 31st day of March, 2017.

/s/ Honorable Steven P. Logan
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT GRANTING EXTENSION OF TIME TO FILE PETITION FOR REHEARING (AUGUST 26, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. MURRAY, M.D. – a Married Man,

Plaintiff-Appellant,

v.

MAYO CLINIC, a Minnesota Nonprofit Corporation; Et Al.,

Defendants-Appellees.

No. 17-16803

D.C. No. 2:14-cv-01314-SPL
District of Arizona, Phoenix

Before: GOULD and IKUTA, Circuit Judges, and PEARSON,* District Judge.

Appellant's motion for an extension of time to file a petition for rehearing en banc (Dkt. 58) is GRANTED. The deadline to file such a petition is extended to September 17, 2019.

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* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (NOVEMBER 5, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. MURRAY, M.D. – a Married Man,

Plaintiff-Appellant,

v.

MAYO CLINIC, a Minnesota Nonprofit Corporation; Et Al.,

Defendants-Appellees.

No. 17-16803

D.C. No. 2:14-cv-01314-SPL
District of Arizona, Phoenix

Before: GOULD and IKUTA, Circuit Judges, and PEARSON,* District Judge.

The full court was advised of the petition for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc. The petition for rehearing en banc is DENIED.

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* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 12112—Discrimination
Effective: January 1, 2009

(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).

(c) Covered Entities in Foreign Countries

(1) In General

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of Corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical Examinations and Inquiries

(1) In General

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

(2) Preemployment

(A) Prohibited Examination or Inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable Inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance Examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(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. § 12112—Discrimination
Effective: [See Text Amendments] to December 31, 2008

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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) of this section, the term "discriminate" 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).

(c) Covered Entities in Foreign Countries

(1) In General

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of Corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical Examinations and Inquiries

(1) In General

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

(2) Preemployment

(A) Prohibited Examination or Inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable Inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance Examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(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. § 2000e-2— Unlawful Employment Practices

(a) Employer Practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment Agency Practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor Organization Practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training Programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or Enterprises with Personnel Qualified on Basis of Religion, Sex, or National Origin; Educational Institutions with Personnel of Particular Religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-Action or Communist-Front Organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National Security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United

States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or Merit System; Quantity or Quality of Production; Ability Tests; Compensation Based on Sex and Authorized by Minimum Wage Provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or Enterprises Extending Preferential Treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential Treatment Not to Be Granted on Account of Existing Number or Percentage Imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of Proof in Disparate Impact Cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of Discriminatory Use of Test Scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened

pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

42 U.S.C. § 12117—Enforcement

(a) Powers, Remedies, and Procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, Jan-

uary 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

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42 U.S.C. § 2000e-5—Enforcement Provisions

(a) Power of Commission to Prevent Unlawful Employment Practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges By Persons Aggrieved or Member of Commission of Unlawful Employment Practices By Employers, etc.; Filing; Allegations; Notice to Respondent; Contents of Notice; Investigation By Commission; Contents of Charges; Prohibition on Disclosure of Charges; Determination of Reasonable Cause; Conference, Conciliation, and Persuasion for Elimination of Unlawful Practices; Prohibition on Disclosure of Informal Endeavors to End Unlawful Practices; Use of Evidence in Subsequent Proceedings; Penalties for Disclosure of Information; Time for Determination of Reasonable Cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission

shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one

year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or Local Enforcement Proceedings; Notification of State or Local Authority; Time for Filing Charges with Commission; Commencement of Proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for

the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or Local Enforcement Proceedings; Notification of State or Local Authority; Time for Action on Charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for Filing Charges; Time for Service of Notice of Charge on Respondent; Filing of Charge by Commission with State or Local Agency; Seniority System

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred

and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)

(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation

of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil Action by Commission, Attorney General, or Person Aggrieved; Preconditions; Procedure; Appointment of Attorney; Payment of Fees, Costs, or Security; Intervention; Stay of Federal Proceedings; Action for Appropriate Temporary or Preliminary Relief Pending Final Disposition of Charge; Jurisdiction and Venue of United States Courts; Designation of Judge to Hear and Determine Case; Assignment of Case for Hearing; Expedition of Case; Appointment of Master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Com-

mission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of

this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the

respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; Appropriate Affirmative Action; Equitable Relief; Accrual of Back Pay; Reduction of Back Pay; Limitations on Judicial Orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respond-

ent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of Chapter 6 of Title 29 Not Applicable to Civil Actions for Prevention of Unlawful Practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to Compel Compliance with Judicial Orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's Fee; Liability of Commission and United States for Costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

MICHAEL MURRAY–DIRECT EXAMINATION
REPORTER'S TRANSCRIPT OF PROCEEDINGS,
JURY TRIAL DAY 1, EXCERPT
(AUGUST 15, 2017)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY,

Plaintiff,

v.

MAYO CLINIC, ET AL.,

Defendants.

No. CV-14-1314-PHX-SPL

Before: Honorable Steven P. LOGAN,
United States District Judge.

[August 15, 2017 Transcript, p. 234]

A. July 31st, 1986, to October 3rd, 2016, 30 years.

Q. Okay. And during that time, were you deployed at all?

A. Yes, sir.

Q. Okay. How many times?

A. Seven times. But between 1986 and 2003 only twice. Between 2003 and 2012, five times. Because after 911 things have changed dramatically.

Q. Okay. And where were you deployed?

A. To the Army's biggest hospital in San Antonio, I went there twice. I went to Kuwait. I went to Afghanistan. I went to Iraq. And my last deployment was Germany.

Q. Okay. And talking about your last deployment, what were the dates of that deployment?

A. March 24th of 2012 through March 26th of 2013. But then the orders kept getting extended.

Q. Okay. After you finally ended that deployment, did you return to your employer?

A. Yes.

Q. And that employer was?

A. Mayo Clinic.

Q. And how was the return to Mayo Clinic after your deployment?

A. I was happy to get back to work. I had some pretty bad experiences in Germany. I spent seven months in a Warrior Transition Unit in San Antonio—excuse me, in El Paso when I . . . .

MICHAEL MURRAY–DIRECT EXAMINATION, JURY TRIAL DAY 2, EXCERPT (AUGUST 16, 2017)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY,

Plaintiff,

v.

MAYO CLINIC, ET AL.,

Defendants.

No. CV-14-1314-PHX-SPL

Before: Honorable Steven P. LOGAN,
United States District Judge.

[August 16, 2017 Transcript, p. 243]

. . . I was also a dean, I used to come into Phoenix on a regular basis for some programs we were trying to implement here in the southwest. I was the Director of Public Services for Mayo. I did it for eight years, it's normally a three-year appointment. So I was Mayo's face in St. Paul, state capital Washington, D.C. I was a lot of other things. I was on the Board of Directors for the for profit arm of Mayo Clinic, we brought in several hundred million dollars a year to Mayo.

I wore a lot of hats for Mayo.

Q. All right. Thank you, Dr. Murray.

Now, about three months after you returned—about three months after you returned to Mayo Clinic Arizona from your deployment with the military, there was an incident in operating room 6. Do you remember that?

A. Yes, sir.

Q. And we're talking about an incident that occurred on February 19th of 2014?

A. Yes.

Q. Okay. How did that day start?

A. I always arrive early, between 5:00 and 6:00 in the morning. I sit at my desk, I have something to eat. I take care of some administrative issues. I was on the Finance Committee for Mayo Clinic Arizona for their research programs. And I was still trying to finish up some of that business from before I deployed.

And then around 6:00 o'clock in the morning I start seeing patients. And I had that particular day—the way I explain it to patients, because patients don't understand what happens up in a confined space in the operating room, I use an analogy that my son gave me, and he's a graduate of the Naval Academy, he's a pilot. And the first time he flew in combat, I said, Carl, you haven't been out of the academy that long, you're going to be landing in a combat zone. There have been other people in this room that have landed in a combat zone. It's stressful.

He said, well, Dad, there's a mission commander and a flight commander on board. It's a big plane, it's a submarine hunter.

And so it's kind of the analogy I use with patients. I said, I'm going to be your pilot today. There's a copilot—that's the woman who has been potentially called as a witness—Jenn Warner, she's a certified registered nurse anesthetist. She's going to be involved in your care.

As it turns out today I'm also a flight commander, because I've got responsible for other rooms. But during the procedure today, takeoff and landing, the pilot at the copilot will be in the room with you. One of us will be with you at all times.

And I explain for the first two patients I'm going to see that day—I was covering two rooms. Explain what's going to happen, we're going to wheel them into the room, on a gurney, move them over onto the operating room table, place their monitors, EKG, blood pressure, oxygen monitors, administer several different medications, a medication like Valium called midazolam, Fentanyl.

Q. Dr. Murray, let me interrupt you. Could you spell those for the court reporter?

A. Oh, midazolam, M-I-D-A-Z-O-L-A-M. A medication called Fentanyl, F-E-N-T-A-N-Y-L. Most of people have heard of that because of Prince. And what most people are afraid of is propofol. I'd say one in five patients asks, is it safe? And I go through a lengthy explanation of why it's safe the way we're going to give it.

Q. And this is a—this is an interaction that you have with every patient or just on that day?

A. Oh, every patient.

Q. Okay. Please continue.

A. So, the day starts, I have two rooms, OR 6, which we'll hear about, and OR 17, I have a really difficult case. It's—the case is going to go 12 hours, it's going to be someone with a cancer in the neck and they're going to dissect out or cut out of tumor. There's going to be a lot of blood loss, we're going to be transfusing. And my room 6, the cases weren't as difficult. Though I understand as a patient whenever you have anesthesia it's a stressful situation. And that's why we spend time.

And then I get the patient's—or obtain the patient's consent for anesthesia. And I am the pilot, I'm the capital of the ship. In that consent it says that I will be the person responsible for their anesthetic care. And also other people may be involved. And there's a process for doing that. If I were to have to use the restroom or something, and someone were to take over for me, or at the end of the day if I had to go home for an emergency, we do what's called a handoff. That person, another anesthesiologist, another pilot, would come into the room, discuss the case with me, during the safe portions of the procedure. I would turn it over, and we would transfer electronically the responsibility for that case from one anesthesiologist to another.

But because I was the flight commander that day I was going to be there until after 6:00 p.m. at night, I knew.

Q. And at what time did you begin—excuse me.

At what time did you begin your work in OR 6, operating room 6?

A. For the patient in question or the—

Q. For the case in question.

A. Fast forward now to 2:00 o'clock in the afternoon. The patient in room 17, still bleeding. I think at that point in time we had hung two units of blood, we're hanging a third unit. And I had seen the patient who is going into OR 6, my third patient of the day.

And about that time as the flight commander I spoke to another anesthesiologist, Dr. Chien. And I said, I am going to relieve you of your patients. And he had two patients in rooms 21 and 22. I'm not sure, I thought it was—it could have been 22, 23, but one of the rooms they're just bringing the patient out. They closed that room, and I took over. We had a handoff, he showed me everything in the room. And to the best of my knowledge he went home for the day, and I went back to room 17, because the patient was bleeding.

And then we have a light system, it's on the wall, you have to know what the numbers mean, but a light flashes, 6 A. They need the anesthesiologist, the pilot, in room 6.

So I walk through the door—and you're going to see pictures of room 6, I believe.

Q. And, Dr. Murray, could you describe the room as you walk in just so the jury understands?

A. So it's about one sixth the size of this room here. Ceiling's obviously not as tall. And in the middle of the room is the operating room table.

And so to put things in perspective, if the back wall were maybe six feet behind here, the patient would be here with her feet up against that door on the table. And she's lying here. Her head is here. (Indicating.) And there's a nurse anesthetist, Miss Warner, who we'll be talking about. And she's administering oxygen.

Now it's a confined space by design, because whereas I may have a six-foot wing span, most people don't. So she has to be able to reach to the anesthesia machine and control the oxygen that's flowing to the patient, and eventually some anesthetic gases, like ether that are going to be administered.

Q. And, Dr. Murray, when you talk about the confined space, are you talking about the whole room or the area in which she is working?

A. The area in which she is working. And to continue the analogy, it's like a cockpit. There's not a lot of room, there can't be, you have to be able to reach all the instruments. And behind her on this side here (indicating) is a Craftsman cart that's got several drawers with the oxygen masks that we talked about, it's got needles for starting I.V.s, it's got in the bottom drawer those tubes, those LMAs, the laryngeal mask airway that will be discussed, there are tracheal tubes for putting a tube through the voice box.

So the first thing I did is walk up and assure her. And I'm wearing a mask, so unless she remembers that I'm really tall, hi, I'm Dr. Murray, we're going to get you off to sleep, things look good.

So I'm standing here, (Indicating.) I can see—

THE COURT: I'm sorry, Dr. Murray.

Mr. Blaney, every time your witness makes a gesture for the record, if you could describe what he's doing that would be helpful.

MR. BLANEY: Yes, Your Honor.

For the record, Dr. Murray just reached off to the back of the room as he was describing it, which would be the patient's left side.

BY MR. BLANEY:

Q. Is that correct, Dr. Murray?

A. That is correct.

Q. Okay. So for the record, you're saying that when you walked in you walked up to the patient's left side; correct?

A. Yes, sir.

Q. Okay. Please continue. I'm going to interrupt you several times to—so the jury—so the record is clear.

A. Would you prefer that I do that or do you do it?

Q. If you can, that would be great. We'll see how it goes.

A. I reassured the patient. I can look up on this monitor that's here. (Indicating.)

Q. And "here" being off to your right?

A. Off—I'm standing to the patient's left. Off to the patient's right and maybe two feet above the patient's head I can see the monitor.

And I can tell that her heart rate is stable. I can see her blood pressure measurement. There's a little blue squiggle across the screen that shows the amount of oxygen that she has in her circulation. It's called the pulse oximeter.

And just as in an airplane, all this information is being recorded second by second. We can go back, just as in an airplane if there's a mishap, black box warning, we can find out if there was any problem.

But everything looked good. I assured her. I nodded to Miss Warner. I was standing there, she's standing here. (Indicating.)

Q. By "there" you mean the patient's left side?

A. Yes. You're right, you're going to have to keep interrupting me. That's all right.

She starts administering the propofol. And normally we're pretty—we try to be patient friendly in every circumstance. We put the I.V. in the hand opposite of the blood pressure cuff, because when the blood pressure cuff inflates—and I'm holding my left arm with the blood pressure cuff on here—when it inflates, circulation in the arm stops. Everyone's had their blood pressure checked.

Well, propofol is extremely irritating, and so we normally would put the IV in the opposite arm. We try to stay away from the right arm if the patient writes with the right hand or vice versa. But in this case we couldn't because the patient

was undergoing a resection reduction removal of her left breast, a mastectomy.

So we started to administer the propofol. And I would have to look at the record to know exactly how much. But we've already told you that propofol is an incredibly potent drug. And I think on that day we would have given three tablespoons of propofol. We don't measure it in tablespoons, we measure it in milliliters. But that's what it took to get her to sleep.

Q. And, Dr. Murray, when you say that propofol is a very potent drug, what do you mean?

A. It doesn't take much. It's how Michael Jackson died. Everyone is aware of it.

And it will eventually cause her to quit breathing. And as I'll explain here in a moment, that was our ultimate goal, and I'll explain why.

Q. I'm sorry, the ultimate goal was?

A. To get her to quit breathing.

Q. Please continue.

A. I'm sorry.

So the propofol is going in, and I'm thinking she probably had about seven cc's of propofol. And it's got to come up the arm into the heart, go out through the lungs, come back, go up to the brain. When you fall asleep, for those of you who've have had it, you think it's ten seconds. It's more like 30 seconds.

But just because you fall asleep, you're not anesthetized. I've got to wait another 60 seconds for that to happen.

And Miss Warner is continuing to give more medication. And the reason we have to get you to quit breathing is, when we put that device in, you saw it yesterday, it's huge. But those of you who have a gag reflex, if you gag and you vomit, end of story.

We had a report where I currently work in June where someone did that and the patient wasn't deep enough, the patient vomited and died.

So it's a critical portion. It's why I've already explained to the patient, takeoff and landing I'm going to be there. But I've got to wait another 60 seconds.

And I've also got to let the computer know that I'm in the room. The current system I work with I can backtrack it. The system Mayo had, I had to log into the computer system.

Q. And, Dr. Murray, let me interrupt you right there.

While this is happening, what is everybody else in the operating room doing?

A. Well, there were multiple people in the operating room, as was alluded. There were three people down in the far corner. There's a desk that falls out of the wall. And they were the surgical resident, someone who's in training to be a surgeon, I think a medical student, maybe an intern.

There's a certified surgical tech who's helping. And there's multiple things that happen. We put little devices on your calves to squeeze the calves while you're asleep. There's blankets, there's an arm board to secure your arms while you're asleep.

There are a lot of things that that's his responsibility.

Over on the other side of the patient on the right-hand side of the patient maybe four feet away is a huge table, probably the size of our table that Mr. Blaney and I are sitting on, and that's got all of the surgical instruments. You wouldn't think it would take much, but there's trays and trays and trays of instruments.

Q. Excuse me. And for the record, the table that Dr. Murray pointed to is approximately four feet by eight feet.

A. And so I think in the room at that time there was a minimum of five people, maybe six people, plus the patient, plus Miss Warner and me; nine, ten people in the room.

And all I did is I stepped from the left side of the patient over here, over to here, (indicating) because in this position there's a computer screen, a keyboard, and I can type in seven letters MJ Murray, and six numbers, my password.

Q. And, Dr. Murray, when you said you "stepped over here," where is that in relation to the patient, for the record?

A. The patient—if the patient were here—

Q. I'm sorry, the "here" isn't going to come through on the record.

A. At the patient's head, I was probably three—three feet away from the patient. I think that's about right. I was here. (Indicating.) The anesthesia machine is 42 inches wide, it's sitting here.

(Indicating.) The keyboard is on a table or a little platform, and I typed in the seven letters, MJ Murray—eight.

So then all of a sudden someone pushes in between me and Miss Warner. Now, it was Dr. Chien. He had already been relieved for day.

I'm sorry, I have to backtrack.

The propofol was still going in, I'm typing the eight letters. The blood pressure cuff inflated as the propofol was being administered. Now, as I said, you can still have your gag reflex and be asleep. She was asleep, but she had a reflex in her arm where her arm came up, she moaned. I turned as Miss Warner said "Dr. Murray," and I went to push a button as she said turn off the cuff. And I pushed the button—and it would be on the anesthesia machine, which I've already indicated, and you'll see pictures of it. And pushed the button that reset the cuff to go off in 45 more seconds.

Q. And why did you do that, Dr. Murray?

A. We monitor blood pressure—where is my wife when I need her—continuously, and the heart and your oxygen levels continuously. So every heart-beat shows up. But the blood pressure is only displayed every two-and-a-half minutes.

So now rather than getting a blood pressure at two-and-a-half minutes after the previous one, it's going to be three hour—three minutes and 15 seconds after the previous one. And it will keep cycling through the case. And people who

have had their—been in a hospital understand, because the cuff keeps inflating periodically.

So it was at that point in time that Dr. Chien stepped in.

Q. And what happened first when Dr. Chien stepped in? Describe, if you could.

A. I had already—I turned off—or reset the cuff, stepped back to type, and all of a sudden there's someone between me and Miss Warner who was there without invitation, without acknowledgement, without permission.

Q. And how close was this person to the patient at that time?

A. Well, if I'm three feet away, two foot shoulders, he's within a foot of the patient and practically touching my left shoulder and Miss Warner's right shoulder.

And for anyone just—it would be like—how I felt, if I would were a pilot on a plane, to continue this analogy, we're taking off. That's what I've told the patient. During takeoff and landing I will be there. If someone from the back of the plane, a pilot who is just hitching a ride, walked into the cockpit and stepped in between the copilot and the pilot, would the pilot be alarmed? I haven't asked anyone to be there. I know everything is working correctly.

And so I did what I think anyone else would do, what the American Society of Anesthesiology recommends, there shouldn't be interruptions, there shouldn't be distractions. What are you doing here?

Q. Before you go any further, Dr. Murray, what was in your mind in this precise second?

A. I thought my patient was being threatened.

Q. And why is that?

A. Well, it's never happened to me before that someone would come into that confined work space without invitation, without permission, without saying why they're there. Hey, Dr. Murray, there's an emergency next door. Or, hey, Dr. Murray, something's not working.

But he just showed up. And I knew there was no reason for him to be there.

Q. And if somebody were there to try and tell you that there's an emergency next door, would they tell you that from inside the confined space where you and the nurse are working?

A. They'd probably just come in the door and yell, hey, Murray, we need you next door. And then I have to attend until the takeoff, until we're in the air, I'm staying there, they're going to have to get someone else.

But Dr. Chien didn't respond.

Q. What was Dr. Chien doing when he pushed in there?

A. He started to reach up to the anesthesia machine here. And that same box that I think you're going to see a picture of, he started to attempt to touch the instruments. And I had no idea what he was doing. Like a pilot, I didn't know if he was shutting down the throttle, if he was adjusting the flaps on the plane.

I said, stop that. And I don't have a soft voice. I know he would have heard me. But he continued to put his hand up. And so I did what I would hope the pilot would do on a plane if someone was attempting to tamper with the instruments during takeoff. I'm standing to the right of the anesthesia machine. Dr. Chien is standing in front of the anesthesia machine. And Miss Warner and the patient are at 90 degree angles from us.

And so I put up my hand to block him from adjusting the machine. He hit me. He batted away, and continued to put his hand up and put his hand on the monitor.

Q. What was he saying to you at this point, Dr. Murray?

A. He wasn't saying anything. It was so unusual. And I've never had a situation.

And so I did—I complied with what I thought Mayo's Mission Statement was, the needs of the patient come first. Figure it out later, take care of the patient.

And I forgot about signing in on the keyboard. I stepped behind him and I pulled him away. And as I was doing it I said, no one touches that machine. No one touches my machine. No one touches my airplane during takeoff. I didn't say that, but.

Q. And when you said that, Dr. Murray, and you say that you pulled him away, can you tell us in a—more directly, where did you move him from and where did you move him to?

A. Sufficient force that as I pulled him away, he ended up to the—almost where I had been standing, and to the patient's—the left side of the patient's head, and beside Jenn Warner. And the force of my pulling him away, he backed into the I.V. pole. And then he came back towards me.

The I.V. pole—

Q. I'm sorry. Continue, please.

What did he say to you at this point?

A. He didn't say anything. And the entire episode, 30, 40 seconds in the operating room, he never said a word.

Q. Okay. So when you pulled Dr. Chien away, what happened next?

A. Well, he just kind of stared at me. He's got a mask on. All I can see are his eyes. And there was no reaction. He just stood there. And at this point in time it would be if we were in the cockpit and I've pulled that other pilot out of the cockpit, the door opens in the cockpit, now everyone in the back of the plane can see what's happening.

And the other people in the room were paying attention. I mean, the people in the corner who were doing their paperwork, they hear a commotion. Jenn Warner had her back to the entire confrontation. But they hear me, get out of my room, we'll talk about this later.

And because no one has ever seen me do anything like this, and no one has ever heard me do anything like this, in the 45 years before or since, they thought I was joking.

But then Chien wouldn't move. And I've got to get back to where he's standing for when Miss Warner's going to put in that breathing device.

I yell at—

Q. I'm sorry. What was your major concern at this point, Dr. Murray?

A. The patient is still at risk. We're still in takeoff. The airway isn't in. I'm supposed to be helping Miss Warner put the airway in. And if she gets into problems, do everything I have to do to secure the patient's airway, the patient who will not be breathing, and to make sure we get that airway in so we can help the patient breathe until she starts breathing again on her own.

So for a third time—and this time I'm emotional, I'll admit it, I'll own it—I screamed at him, get out of this room, we'll talk about it later. And he left the room without saying a word during the entire encounter.

So I stepped beside Miss Warner. She inserted that breathing device, the LMA. I listened to the patient's neck and chest to make sure that we were adequately ventilating her, looked at the blood pressure cuff. All that information—the blood pressure cuff now is getting ready to go off again because it's been 45 seconds.

Miss Warner turned on the medication, like ether that we were going to keep the patient asleep with. I completed logging—typed in my password. Stepped back to Miss Warner, looked around the room, and I said, are you okay? And she said, yes.

And so we're in the air, things are looking good, the patient's anesthetized. We turn the patient over to the surgical team, and then they will start scrubbing the chest wall with antiseptic so they can make an incision with the scalpel and perform the surgery.

Q. And just to be clear, you said there's a surgical team and there's medical personnel that are working in the operating room; correct?

A. Yes.

Q. And was Dr. Chien assigned to that operating room?

A. No.

Q. Was Dr. Chien a part of that surgical team?

A. No.

Q. How quickly did everything happen—from the time that Dr. Chien pushed between you and the patient, and the time that he finally left the room, how much time had passed?

A. Thirty, 40 seconds max. It couldn't have been, because the propofol had been administered, we still hadn't—still hadn't put the LMA in. So about 30 to 40 seconds.

Q. So the condition that the patient was in at that point when Dr. Chien pushed between the patient and you, is a patient in that state capable of defending herself?

A. No. She's so deeply anesthetized she can't even breath.

Q. Is a patient in that state able to tell you, I can't breath? [sic]

A. No. We're monitoring it. That mask that we have hooks up to another device we have on the machine that will tell us how much carbon dioxide she's breathing.

When we breathe in, we breath in oxygen. When we breath out, we breath out carbon dioxide. And it will tell us that we are delivering adequate breaths in frequency and in depth of the breath, i.e. a cup, two cups, ah versus ooh.

It measures everything for us. Modern technology is phenomenal. But it still takes people to fly the plane, it still takes people to take care of the patient.

Q. And, Dr. Murray, during the course of this event, the 30 to 40 seconds you were just discussing, did you know what Dr. Chien's intentions were?

A. I never had any clue. He never said a word.

Q. Did somebody later tell you that he was just trying to help you with the machine?

MR. LOMAX: Objection.

[. . .]

. . . my patient.

And Dr. Rosenfeld said, I believe, serious matter, we're going to put you on administrative leave. I said, what do I do? Sit in your office. I said, I've got three patients. We'll take care of it.

So I went, closed my door, and sat in my office from—by that time maybe ten to 7:00, 7:00 o'clock, until 3:30 in the afternoon.

Q. Okay. At some point—or what happened at 3:30 in the afternoon?

A. I went home.

Q. All right. At some point did you receive a phone call from anybody at Mayo Clinic Arizona?

A. Yes. Dr. Rosenfeld called me, and he said, Mike, I'm with Dr. Krahn, she wants to speak with you.

And I'm paraphrasing the conversation, but in essence, we are investigating what happened in the OR yesterday. I can't meet with you now. You are on administrative leave for now. This is a serious matter.

That's all I remember her saying.

Q. Okay. And after your conversation with Dr. Rosenfeld and Dr. Krahn, what did you do next?

A. I was already pretty distraught.

Q. Why?

A. Two or three people came into my office that day and told . . .

[. . .]

. . . and leaving a voicemail?

A. Yes. I saw Dr. Bright, who my wife found because on the Mayo website it said that he specialized in PTSD. I saw him Friday, and he indicated it might be best to go back and see another psych-

iatrist, Dr. Grove, who I had once seen in 2011, 2010, a couple years prior.

And so we made arrangements for me to see Dr. Grove on Monday.

Q. Okay. And after your meeting with Dr. Grove, what happened?

A. He is the one who placed me on the family—on medical leave in compliance with the Family Medical Leave Act.

Q. So when you say "in compliance with the Family Medical Leave Act," is this commonly referred to as FMLA leave?

A. Yes.

Q. Just to keep the record clear.

What kind of feelings were you having at this point that put you on—that made you seek out FMLA leave?

A. I was sad, I was depressed, I was having nightmares again, and I was suicidal.

Q. Okay. How soon did—do you know how soon your wife notified Mayo Clinic that you needed medical leave?

Let me withdraw that.

Do you know how soon Dr. Grove contacted Mayo Clinic Arizona and requested medical leave?

A. I thought he called Occupational Health that afternoon when I was in his private office. Dr. Grove has two offices, one at Mayo Clinic and one east of the Mayo Clinic on Shea Boulevard, off of Shea. It's not east, west. Getting my directions confused.

Q. And—I'm sorry.

A. I saw him in his private office. And he said, we'll put you on medical leave and get you some help. And made a referral for me to the Banner mental—or Behavioral Health facility off of the 101.

Q. Okay. And do you know if Mayo Clinic Arizona, in fact, placed you on FMLA leave?

A. Yes.

Q. Okay. And how do you know?

A. I—e-mails.

Q. Do you have a specific e-mail in mind?

A. He told me I was on Family Medical Leave Act—that I was on medical leave. And I knew that I had this investigation ongoing. That was the source of all my mental health issues.

So I called the Sleep Medicine Department where Dr. Krahn works to let her know. And however it worked out, no one answered the phone, and so I left a message, just that, Dr. Krahn, I'm on medical leave. And I believe the next day I received e-mail confirmation.

Q. And who did that e-mail come from?

A. I thought it came from Dr. Trentman. Maybe both Dr. Trentman and Dr. Krahn, we know you're on Family Medical Leave Act.

Q. Okay. Bear with me for a minute, Doctor.

MR. BLANEY: For the record I'm showing opposing counsel what's been previously marked Exhibit 20. It's been stipulated to and already admitted, Your Honor.

THE COURT: You may publish.

MR. BLANEY: Thank you, Your Honor.

BY MR. BLANEY:

Q. Dr. Murray, you'll see on your screen in front of you a document. I think you also have the physical document in front of you, if that's easier. It would be Exhibit 20.

A. Yes, sir.

Q. Okay. If you would turn to the second page of this document, Dr. Murray. You'll see at the bottom where it says, provider's name and business address?

A. Yes.

Q. Do you see where it was Gary Grove, M.D.?

A. Yes, sir.

Q. And is that the Dr. Grove that you were just speaking about?

A. Yes, sir.

Q. If you could turn to the next page, please. I want you to go down to line number 10.

A. Yes, sir.

Q. Okay. And that states as follows, quote, Dr. Murray suffers from bipolar II, and then it says, D.O. Which do you take that as "disorder"?

A. Yes.

Q. Is that how in the medical field you would write "disorder"?

A. I believe so.

Q. Okay. It continues, quote, with elements of PTSD. He will require long-term outpatient treatment.

Did I read that correctly?

A. Yes, sir.

Q. If you go up to number 9 above it, it states, quote, problems with anger outbursts, concentration, close quote.

Did I read that correctly?

A. Yes, sir.

Q. Dr. Murray, this is your FMLA paperwork from the event you were just describing, the medical leave in the 2014 time frame.

Prior to—prior to your termination in May of 2014, had you ever seen this paperwork?

A. No.

Q. Prior to filing this lawsuit against defendants, had you ever seen this paperwork?

A. No, sir.

Q. Thank you.

[. . .]

A. Everything that I recounted today.

Q. Did you tell them why you did what you did?

A. I was protecting my patient. I was afraid for my patient. I said, someone was trying to tamper with the anesthesia machine.

Q. And what happened next?

A. Well, Dr. Trentman said "tamper" is too strong a word. I didn't reply.

He said, you lied in your e-mail to me in September of 2013.

Q. Did you ever find out what he—do you know—let me back up.

What was said next?

A. Well, then he said, you lied on your credentialing packet in September of 2013.

This was when I was at Fort Bliss getting cleared from the Warrior Transition Unit and was returning to Mayo Clinic.

Q. Did the subject of your FMLA come up at all?

A. Eventually it did.

Q. Okay. And what was said about FMLA?

A. Well, in the conversation you lied on your e-mail, you lied on your credentialing packet, the next statement was, you have anger management and concentration issues.

And that—

Q. And then what happened next?

PLAINTIFF'S CLOSING ARGUMENT
REPORTER'S TRANSCRIPT OF PROCEEDINGS,
JURY TRIAL DAY 5, EXCERPT
(AUGUST 22, 2017)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY,

Plaintiff,

v.

MAYO CLINIC, ET AL.,

Defendants.

No. CV-14-1314-PHX-SPL

Before: Honorable Steven P. LOGAN,
United States District Judge.

[August 22, 2017 Transcript, p. 953]

This doctor, as I mentioned, was also a soldier and he had just returned from his seventh deployment back to his position as an anesthesiologist at Mayo Clinic. He was happy to be back, happy to be back with his colleagues, happy to be back working for the only employer he ever really knew in over 30 years.

He thought he was doing the right thing in protecting his patient. But when his supervisors

found out that he potentially had PTSD, bipolar, with some symptoms of this anger management and concentration difficulties, they fired him. And they claimed that it was based upon what he had done in the operating room that day.

Now Dr. Michael Murray is an anesthesiologist. He's a doctor. He's a husband. And he's a father.

The last position that Dr. Murray held, of course, was as an anesthesiologist for Mayo Clinic Arizona. Put prior to that, in the over 30 years that he was with Mayo Clinic, he wore every hat they asked him to wear, from doctor, anesthesiologist, public relations, public affairs officer, administrator. He was even a professor of medicine at the Mayo Clinic College of Medicine. He wore every hat they asked him to wear, and he wore it proudly. And he served with distinction throughout those years with Mayo Clinic.

Dr. Murray's also a soldier—or was also a soldier until he retired last year after more than 30 years with the U.S. Army. He retired at the rank of colonel.

During his 30 years he served seven deployments, as I mentioned, in combat zones from Iraq to Afghanistan to Kuwait. Dr. Murray loved serving the Army just like he loved serving Mayo Clinic. And his last deployment, his final deployment many was from early 2012 until 2013 when he returned to Mayo Clinic.

Now the first three months after Dr. Murray returned from his military deployment to Mayo Clinic went pretty smoothly. Again, he was happy to be back with his colleagues, he was happy to

be back at Mayo Clinic. He lived and breathed Mayo Clinic. Happy, of course, to be back from a war zone.

Again, Mayo Clinic was the only employer that Dr. Murray really ever knew in his professional career. He started his career there as a young intern, and he wanted to finish his career there, retire from Mayo Clinic one day, some day when he was—50 years after receiving his medical degree.

But Dr. Murray's world changed on February 19th of 2014. And you've heard a lot of discussion about it during the course of this litigation.

This is a diagram of the operating room, operating room 6.

Now as I mentioned to you last week, Dr. Murray arrived early in the morning on February 19th, 2014, began his normal rounds, did his normal routine. And he was assigned as . . .

FIRST AMENDED COMPLAINT
(JURY TRIAL REQUESTED)
(AUGUST 29, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL J. MURRAY, M.D., a Married Man,

Plaintiff,

v.

MAYO CLINIC, a Minnesota Nonprofit Corporation; MAYO CLINIC ARIZONA, an Arizona Nonprofit Corporation; WYATT DECKER, M.D. and GEORGIANNA DECKER, Husband and Wife; LOIS KRAHN, M.D. and ERIC GORDON, M.D., Husband and Wife; TERRENCE TRENTMAN, M.D. and LARALEE TRENTMAN, Husband and Wife; WILLIAM STONE, M.D. and MAREE STONE; Husband and Wife; DAVID ROSENFELD, M.D. and MELISSA ROSENFELD, M.D., Husband and Wife; ROSHANAK DIDEHBON, a Single Woman,

Defendants.

Case No. CV-2:14-01314-PHX-SPL

For his First Amended Complaint, Plaintiff Michael Murray, M.D., Ph.D., by and through counsel, alleges:

Nature of the Action

1. This action is brought pursuant to the Unformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, *et seq.* ("USERRA"). The purpose of USERRA is to encourage noncareer service in the military by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service. The law "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of need."[1]

2. This action is further brought pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA"), both of which became relevant as a result of the Post Traumatic Stress Disorder ("PTSD") and other service-related disabilities that Dr. Murray incurred and/or aggravated during his most recent military deployment.

3. Specifically, this is an action involving a decorated military veteran—Dr. Michael Murray—who, upon returning from his most recent military deployment to his civilian employment as a physician, was unlawfully and callously terminated by his employer, Mayo Clinic.

Jurisdiction and Venue

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b)(3).

5. Venue of this matter is proper in the District of Arizona pursuant to 28 U.S.C. § 1391(b) because a

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[1] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

substantial part of the events and omissions giving rise to the claims occurred in Maricopa County in the District of Arizona. Venue of this matter is also proper in the District of Arizona pursuant to 38 U.S.C. § 4323 (c)(2) because Defendant Mayo Clinic is a private employer that maintains a place of business in the District of Arizona. Each of the Individual Defendants is a resident of Arizona and each has taken actions in violation of USERRA, the consequences of which have affected Dr. Murray in Arizona.

6. Dr. Murray filed a timely charge of discrimination with the Equal Employment Opportunity Commission and has met all administrative prerequisites for the bringing of this action. The EEOC issued a "right-to-sue" letter to Dr. Murray on August 26, 2014.

The Parties

7. At all relevant times, Mayo Clinic was a Minnesota nonprofit corporation, authorized to conduct business, and engaged in business, in the State of Arizona. Upon information and belief, Mayo Clinic Arizona is an Arizona nonprofit corporation domiciled in Arizona and is a subsidiary of Mayo Clinic.

8. Both Mayo Clinic and Mayo Clinic Arizona were, at all relevant times, engaged in an industry affecting commerce and employed more than fifty (50) regular employees at their respective sites for each working day during each of twenty (20) or more calendar weeks in each calendar year. Further, both Mayo Clinic and Mayo Clinic Arizona were, and continue to be, entities that pay salary or wages for work performed, and are therefore "employers" pursuant to § 4303(4)(A) of USERRA.

9. Mayo Clinic, through its Board of Governors/ Executive Committee of Board of Trustees ("MCBOG"), is deeply involved in the personnel activities of Mayo Clinic in Arizona. As just one example, Mayo Clinic in its Bylaws expressly reserves to itself: (1) responsibility for Mayo Clinic Arizona's compensation and benefit policies; (2) final approval authority for all new appointments to the Mayo Clinic Staff at Mayo Clinic Arizona; and (3) oversight of any transfer of assets other than in the ordinary course of business. At all relevant times, Dr. Murray was employed by both Mayo Clinic and Mayo Clinic Arizona. Both entities are herein jointly referred to as "Mayo."

10. Upon information and belief, Defendant Wyatt Decker, M.D. served as Chief Executive Officer of Mayo Clinic Arizona and on Mayo's Executive Operations Committee at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA. Defendant Decker and Georgianna Decker are husband and wife and at all relevant times Defendant Decker acted for the benefit of his marital community. Georgianna Decker is named in this action solely for purposes of stating a claim against the community assets of Wyatt Decker's marital community and she is not an employer under USERRA.

11. Upon information and belief, Defendant Lois Krahn, M.D. served as Chair of Mayo's Personnel Committee at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA and the FMLA. Defendant Krahn and Eric Gordon are husband and wife and at all relevant times Defendant Krahn acted for the benefit of her marital community. Eric Gordon is

named in this action solely for purposes of stating a claim against the community assets of Lois Krahn's marital community and he is not an employer under USERRA or the FMLA.

12. Upon information and belief, Defendant Terrence Trentman, M.D. served as Chair of the Department of Anesthesiology at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA. Defendant Trentman and Laralee Trentman are husband and wife and at all relevant times Defendant Trentman acted for the benefit of his marital community. Laralee Trentman is named in this action solely for purposes of stating a claim against the community assets of Terrence Trentman's marital community and she is not an employer under USERRA.

13. Upon information and belief, Defendant William Stone, M.D. served as a member of Mayo's Executive Operations Committee at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA. Defendant Stone and Maree Stone are husband and wife and at all relevant times Defendant Stone acted for the benefit of his marital community. Maree Stone is named in this action solely for purposes of stating a claim against the community assets of William Stone's marital community and she is not an employer under USERRA.

14. Upon information and belief, Defendant David Rosenfeld, M.D. served as Vice-Chair of the Department of Anesthesiology at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA. Defendant Rosenfeld and Melissa Rosenfeld are husband and wife and at

all relevant times Defendant Rosenfeld acted for the benefit of his marital community. Melissa Rosenfeld is named in this action solely for purposes of stating a claim against the community assets of David Rosenfeld's marital community and she is not an employer under USERRA.

15. Upon information and belief, Defendant Roshanak Didehbon served as the Administrator for the Department of Anesthesiology at Mayo at all relevant times and played an active and material role in Mayo's termination of Dr. Murray in violation of USERRA.

16. At all relevant times, Defendants Decker, Krahn, Trentman, Stone, Rosenfeld, and Didehbon (the "Individual Defendants") were persons to whom Mayo had delegated the performance of employment-related responsibilities. Defendants Decker, Krahn, Trentman, Stone, Rosenfeld, and Didehbon are therefore liable as "employers" pursuant to § 4303(4)(A)(i) of USERRA.[2]

17. At all times herein relevant, Dr. Murray was a member of the United States Army Reserve and an employee of Mayo.

Allegations Common to All Causes of Action

18. Mayo is a nonprofit medical practice and medical research group based in Rochester, Minnesota. Mayo effectively dominates the field and is the largest integrated nonprofit medical group practice in the

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[2] It is believed that Mayo delegated similar authority to other individuals within Mayo, such as members of Mayo's Personnel Committee and its Executive Operations Committee. As other individuals are identified through discovery, Dr. Murray will seek leave to amend this Complaint to add the additional individual defendants.

world. Its research funding alone exceeds $600,000,000 and is derived from such sources as governmental grants, industry, multiple foundations, and benefactor gifts. Mayo's total revenue from current activities is approximately $8,000,000,000.

19. Dr. Murray is a physician, husband, and father who proudly began his medical tenure with Mayo 38 years ago as an intern in the Mayo Clinic in Rochester, Minnesota. Since being appointed to the staff in 1986 he has served with distinction at Mayo in a variety of capacities in Rochester, Jacksonville, and in Arizona.

20. At the time of his termination, Dr. Murray was serving as a Consultant in the Division of Cardiovascular and Thoracic Anesthesia within the Department of Anesthesiology. He was also a Professor of Anesthesiology at the Mayo Clinic College of Medicine and held teaching and examining privileges in Molecular Pharmacology and Experimental Therapeutics with the Mayo Graduate School.[3]

21. Dr. Murray has received numerous professional honors and accolades throughout his career, including but not limited to "Clinician of the Year" at Mayo Clinic Rochester, "Researcher of the Year" from the American Society of Parenteral and Enteral Nutrition, and "Benedictine College Alumnus of the Year." Dr. Murray is certified through the American Board of Anesthesiology, the American Board of

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[3] Dr. Murray meets the FMLA's statutory requirement of having worked 1250 hours in the 12 months preceding his request for FMLA leave, as discussed below, when his time spent working at Mayo upon his return from military duty is coupled with his time spent on military duty.

Internal Medicine, the American Heart Association, and the National Board of Medical Examiners. He is a respected author, having written the number one selling anesthesia textbook in the world, and frequent public speaker here in the United States and overseas.

22. Dr. Murray routinely has and continues to volunteer his time to community and charitable organizations. For example, Dr. Murray and his wife Cate have served as foster parents and as sponsors to multiple refugees seeking asylum in the United States. Dr. Murray has also served as a youth mentor and in volunteer and leadership roles with the Boy Scouts of America, Big Brothers/Big Sisters, and multiple religious organizations. He has even volunteered his time as a member of the church choir.

23. Dr. Murray is also a soldier; a decorated military veteran who has honorably served his country throughout the world, including in combat zones in Iraq, Kuwait, and Afghanistan. Dr. Murray has been a member of the U.S. military for approximately 30 years.

24. Dr. Murray was called to active duty for his most recent military deployment in March of 2012 and timely informed Mayo of his upcoming military obligation. He spent this tour providing care in the intensive care unit and operating theaters to critically wounded soldiers in the immediate hours after they were evacuated from the battlefields of Afghanistan.

25. Dr. Murray's military orders originally identified a six-month tour but the military extended his tour for several additional months to handle the large volume of critically wounded United States soldiers.

26. Unfortunately, by fall of 2012, the constant daily influx of critically wounded and dying young soldiers took a heavy toll on Dr. Murray and he was diagnosed by the military with Post Traumatic Stress Disorder ("PTSD"), chronic depression, chronic anxiety disorder, and Attention Deficit Hyperactivity Disorder ("ADHD"). While Dr. Murray had struggled at times with depression and anxiety prior to the deployment, he had always been able to successfully manage his symptoms so that he could perform his job a high level. But the symptoms of depression and anxiety were aggravated during this latest deployment by attending to wave after wave of disfigured and dying young American soldiers.

27. Over the next several months, Dr. Murray's symptoms improved dramatically with professional counseling, medication, and personal stress relieving techniques. On or about October 10, 2013, he passed his exit physical and was honorably discharged from active duty in the military. Rather than taking his full statutory 90-day rest period after his release from active duty, Dr. Murray agreed to return to Mayo early. Thus, instead of returning to Mayo in January of 2014, he agreed to return to his medical practice at Mayo in November of 2013.

28. Dr. Murray's military obligations and time away inconvenienced Mayo and some of his coworkers. Mayo's leadership began to think that Dr. Murray's military status–in particular his most recent, unex-

pectedly extended deployment–negatively impacted his appropriateness for the positions he held with Mayo.[4]

29. Strangely, although Dr. Murray had been permitted to devote one day each workweek to research administration prior to his military deployment, Mayo scheduled him to be in the operating room ("OR") all five days each work week after he returned from his deployment.

30. On February 19, 2014, Dr. Murray was covering Operating Room 6 ("OR 6") at Mayo Hospital in Phoenix, in which a patient was to be anesthetized before undergoing an operation. Dr. Murray entered OR 6 and assumed his usual position to the immediate left of the head of the patient in a confined space between two IV poles, the anesthesia machine and monitoring equipment, and the certified registered nurse anesthetist.

31. The nurse anesthetist began administering a powerful sedative to the patient while Dr. Murray monitored the patient's vital signs and entered information into the computer. While still semi-conscious, the patient complained of a burning sensation in her arm and the nurse therefore asked Dr. Murray to turn off the blood pressure cuff. Dr. Murray calculated the time necessary for the sedative to clear the intravenous tubing and pressed the "reset" button on the anesthesia monitoring equipment, which controlled the computerized blood pressure cuff, to stop the inflation of the cuff for 45 seconds.

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[4] The cumulative length of Dr. Murray's nonexempt periods of military service, however, including his most recent deployment, did not exceed five years.

32. Suddenly and inexplicably, a Senior Associate Consultant named Dr. James Chien, who had previously entered the operating room unannounced and had been standing inside the double doors approximately 10-12 feet from the patient, squeezed into the small space in which Dr. Murray was working, and began attempting to manipulate the anesthesia monitoring equipment. Startled, Dr. Murray asked "What are you doing?" and directed Dr. Chien to stop immediately. When Dr. Murray received no response, he reached up to attempt to block Dr. Chien's hand from the machine to prevent his continued tampering with the equipment. Without saying anything, Dr. Chien batted Dr. Murray's hand away.

33. Concerned about the safety of his patient and alarmed by Dr. Chien's actions at this critical juncture in the medical procedure, Dr. Murray pulled Dr. Chien away from the patient. Dr. Chien then stood between Dr. Murray and his patient in this very confined space. Dr. Murray instructed him to move but Dr. Chien did not move and did not speak. To gain access to and to ensure the safety of his patient, Dr. Murray attempted to push Dr. Chien out of the way and toward the door, stating "Get out of this room. We will talk about this later!" Dr. Murray repeated his request two more times before Dr. Chien ultimately left, as quickly as he had appeared, without saying a word. The entire event took less than a minute.

34. About 30 minutes later, Dr. Chien approached Dr. Murray and apologized for the earlier incident. After Dr. Murray accepted his apology they walked into the recovery room to a patient that Dr. Chien had taken out of the OR and had to re-intubate. Dr.

Chien intended to turn the patient's care over to Dr. Murray and explained that the patient had a smaller than normal tracheal tube inserted for an orthopedic operation because of her pre-existing spasmodic dysphonia of her vocal cords. According to Dr. Chien, when Dr. Chien attempted to re-intubate the patient, she had swelling of her vocal cords.

35. Given the patient's underlying medical condition and based upon Dr. Murray's experience, swelling of the vocal cords did not make sense physiologically and Dr. Murray relayed that fact to Dr. Chien. Dr. Murray then asked Dr. Chien if he had already arranged for the patient to go to the ICU. Dr. Chien responded that he had not. Dr. Murray told Dr. Chien that he would take care of the patient and Dr. Chien departed.

36. When Dr. Murray arrived at Mayo Hospital the next day, he was interviewed by Dr. David Rosenfeld and Ms. Roshanak Didehbon. Dr. Murray thought at the time that Mayo was planning to discipline Dr. Chien because of Dr. Chien's mistakes on the previous day. Therefore, Dr. Murray told Dr. Rosenfeld and Ms. Didehbon that Dr. Chien had already apologized and that, in his mind, the situation was resolved. But these individuals were not investigating Dr. Chien's errors; instead, Mayo placed Dr. Murray on administrative leave pending disciplinary action.

37. After sitting for a few days on administrative leave without any information regarding Mayo's intentions, Dr. Murray began to struggle with some of the symptoms that he used to experience from his PTSD and other military-service-related disabilities. He therefore requested to be placed on medical leave under the Family Medical Leave Act ("FMLA") in order to

seek medical treatment for the symptoms. Mayo granted his request and placed him on FMLA leave so that he could seek and receive treatment. Still shocked by the turn of events, he sent an email on February 26, 2014, to Dr. Lois Krahn, who was Chair of the Personnel Committee, asking when he would be permitted to tell his side of the story.

38. Mayo saw this incident as an opportunity to terminate Dr. Murray, whose PTSD, other service-related disabilities and their symptoms concerned some of the Mayo leadership and whose military obligations had become burdensome and inconvenient to Mayo.

39. On April 16, 2014, Dr. Krahn and Dr. Terry Trentman, Chair of the Department of Anesthesiology, finally met with Dr. Murray to discuss his employment status. Dr. Murray tried to explain that his actions on February 19, 2014 were meant to protect a vulnerable patient under his care from what Dr. Murray perceived at the time to be an imminent threat—at least until he could determine why Dr. Chien was manipulating the anesthesia machine at the same time that Dr. Murray's patient was receiving a dangerous sedative.[5]

40. But despite his explanation and the underlying circumstances, Dr. Murray was accused of violating Mayo's "Mutual Respect" policy. Mayo's decision was all the more peculiar to Dr. Murray because Mayo

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[5] Notably, Dr. Murray had previously served as an expert witness in litigation involving the federal Anti-Tampering Act (18 U.S.C. § 1365), which makes it a crime to tamper with any drug or medical device with reckless disregard for the risk that another person will be placed in danger of bodily injury or death.

states that its "Primary Value" is: "The needs of the patient come first," and Dr. Murray was simply trying to protect a Mayo patient under his care.

41. Dr. Krahn's and Dr. Trentman's accusations during the meeting were not limited to the events of February 19, 2014, however. Dr. Krahn also brought up Dr. Murray's FMLA leave and the medical basis for the leave, stating: "'Anger management and concentration difficulties,' we cannot have someone like that in the operating room or on staff" or words to that effect.

42. Dr. Trentman accused Dr. Murray during the same meeting of being dishonest on his medical re-credentialing application when he returned from his latest military deployment because he did not disclose the symptoms of the service-related disabilities that Dr. Murray incurred or aggravated during his military deployment. Dr. Murray responded by saying that he did not disclose the PTSD from his military deployment because his symptoms were under control, he was able to perform his job without difficulty, and he was not seeking an accommodation at that time.

43. Dr. Krahn then told Dr. Murray that he would remain on administrative leave indefinitely and that Dr. Krahn would contact him about a follow-up meeting. It was clear to Dr. Murray at this point that Mayo was trying to find any reason to terminate him.

44. The follow-up meeting occurred on April 24, 2014. At this meeting, Dr. Krahn accused Dr. Murray of additional policy violations based upon the February 19, 2014 incident. This time, Dr. Krahn accused Dr. Murray of violating Mayo's "Workplace Violence" and "Unacceptable Conduct and Disruptive Behavior" policies. Dr. Krahn then presented Dr. Murray with

an ultimatum; he must either voluntarily resign from his 30+-year-long employment with Mayo, or Mayo would terminate his employment. Dr. Krahn also threatened to report Dr. Murray to the Arizona Board of Medical Practice if he did not voluntarily resign.

45. Thus, Mayo's stated reasons for terminating Dr. Murray changed over time, including: (1) Dr. Trentman's accusations during the April 16, 2014 meeting that Dr. Murray was dishonest on his re-credentialing application upon his return from military duty because he did not disclose his PTSD or other service-related disabilities; (2) Dr. Krahn's statements during the same meeting that someone with Dr. Murray's medical condition and/or symptoms could not be on Mayo's staff; (3) Dr. Krahn's claim during the same meeting that Dr. Murray violated Mayo's "Mutual Respect" policy; and finally (4) accusations during the April 24, 2014 meeting that Dr. Murray violated Mayo's "Workplace Violence" and "Unacceptable Conduct and Disruptive Behavior" policies.

46. On May 9, 2014, while Dr. Murray was still employed by Mayo, Dr. Murray's legal counsel sent a letter to Nancy Cummings, General Counsel for Mayo, which detailed the specific sections of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") that Mayo's proposed action would violate. The letter also detailed precisely how Mayo's proposed actions would violate those sections of USERRA. Following an in-depth factual and legal analysis, the letter stated:

> [T]his letter is meant to put Mayo on notice that its threatened termination of Dr. Murray is prohibited by USERRA's strict mandates

> and further, to memorialize that Mayo is/was on notice. Thus, after reviewing this letter, Mayo and the individual decision makers will proceed at their own peril if Mayo terminates Dr. Murray.

47. It appears that Mayo made no further inquiry into the law's application to the facts after receiving the cautionary letter. Instead, Mayo ignored the facts and legal analysis in the letter, disregarded the cautionary language, and terminated Dr. Murray effective May 19, 2014.

48. Mayo's termination of Dr. Murray was formalized in a letter signed by Defendants Trentman and Krahn, in which they claimed that Mayo terminated Dr. Murray's employment based upon Dr. Murray's actions in the OR on February 19th, as well as the tone Dr. Murray used in his subsequent conversation with Dr. Chien outside the OR (an entirely new basis for the termination). Mayo claimed in the termination letter that Dr. Murray's actions on February 19th violated Mayo's Mutual Respect policy, its Workplace Violence policy, and its Unacceptable Conduct and Disruptive Behavior policy. Specifically, the letter claimed that the termination was based upon, *inter alia*, the fact that Dr. Murray "lost [his] temper" and because of his "display of workplace anger and hostility."

49. Mayo's termination of Dr. Murray's employment was in fact motivated by Dr. Murray's military status and/or military activities, as well as his military service-related PTSD, other service-related disabilities, and their symptoms.

50. Upon information and belief, each of the individual defendants materially contributed to and/or

facilitated Dr. Murray's termination and the actions of each of the individual defendants were motivated in part by Dr. Murray's military status, military activities, and/or his military service-related disabilities.

51. As stated above, Mayo dominates the medical field. Since Mayo terminated his employment, Dr. Murray has tried unsuccessfully to find new employment despite his impressive credentials and extensive experience.

52. As a result of Defendants' conduct, Dr. Murray has suffered and continues to suffer lost income, lost benefits, mental anguish, emotional distress, pain and suffering, humiliation, inconvenience, harm to reputation, and loss of enjoyment of life.

COUNT 1
(Wrongful Discharge in Violation of § 4311(a) of USERRA) Against All Defendants

53. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

54. USERRA prohibits employers from discriminating against or retaliating against soldiers based upon their military status, military obligations, or service in the military. Defendants violated Dr. Murray's USERRA rights by discharging him motivated in part by his military status, military obligations, and/or his service in the military.

55. Discriminatory motive can be inferred from the circumstances surrounding Mayo's termination of Dr. Murray, including but not limited to: (1) Mayo began its efforts to terminate Dr. Murray a mere three months after his return from military duty; (2)

Mayo's stated reasons for disciplining and ultimately terminating Dr. Murray continued to change over time; (3) Dr. Krahn's and Dr. Trentman's negative statements regarding the PTSD and other military-service-related disabilities that Dr. Murray incurred and/or aggravated during his most recent military deployment; and (4) the unexplained change in Dr. Murray's work schedule upon his return from military service.

56. Mayo's actions were willful. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

COUNT II
(Wrongful Discharge in Violation of § 4316(c) of USERRA) Against All Defendants

57. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

58. Dr. Murray returned to Mayo from his military deployment in November of 2013. USERRA expressly prohibited Defendants from discharging Dr. Murray for a period of one year after he returned from his military deployment, unless Defendants could prove that they had sufficient cause to support the termination.

59. USERRA further requires Defendants to prove that the purported cause for the termination was reasonable under the circumstances. It was not reasonable for Mayo to discharge Dr. Murray for taking actions that he thought were immediately

necessary to protect a vulnerable patient under his care, particularly when Mayo's Primary Value is "The needs of the patient come first."

60. Mayo's actions were willful. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

COUNT III
(Failure to Make Reasonable Efforts to Accommodate Service-Connected Disability in Violation of § 4313(a)(3)–(4) of USERRA) Against All Defendants

61. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

62. Dr. Murray was entitled to reemployment (and was, in fact, reemployed) upon completion of his most recent military deployment because he met all applicable criteria for reemployment.

63. Mayo was thereafter required pursuant to USERRA to make reasonable efforts to accommodate Dr. Murray's PTSD and other service-related disabilities once Mayo learned of them so as to enable Dr. Murray to perform the essential tasks of his position. If no such reasonable accommodation could be found, Mayo was required to offer Dr. Murray an equivalent or substantially equivalent position that he could perform with his service-related disabilities.

64. Dr. Murray's actions in the operating room on February 19, 2014 were not misconduct. They were the reasonable actions of an experienced physician,

acting on impulse to protect his vulnerable patient from a perceived threat. But even if Mayo truly considered Dr. Murray's actions inappropriate and that he lost his temper, anxiety and anger management issues were two symptoms of (or conduct resulting from) the PTSD and service-related disabilities that Dr. Murray incurred or aggravated during his most recent military deployment.

65. Mayo was aware before terminating Dr. Murray, and likely before the February 19, 2014 incident, that Dr. Murray had incurred or aggravated his PTSD and other service-related disabilities while on his most recent military deployment. Dr. Murray's supervisors even cited to his service-related disabilities, their symptoms, and/or conduct resulting from his disabilities before making the decision to terminate him. His supervisors again cited to his disabilities, their symptoms, and/or conduct resulting from the disabilities in his termination letter.

66. Mayo did not make reasonable efforts to accommodate Dr. Murray's PTSD and other service-related disabilities and did not offer him an equivalent or substantially equivalent position. Instead, Mayo terminated him based upon his PTSD and other service-related disabilities.

67. Mayo's actions were willful. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

COUNT IV
(Discriminatory Termination in Violation of the FMLA) Against Mayo Clinic, Mayo Clinic in Arizona, & Dr. Krahn

68. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

69. As detailed above, Dr. Murray met all requirements as an eligible employee for job-protected leave pursuant to the FMLA. Dr. Murray requested FMLA leave for a qualifying reason and Mayo in fact granted the request and placed Dr. Murray on FMLA leave.

70. Mayo is a covered employer under the FMLA. Dr. Krahn acted in the interest of Mayo and exercised authority over Dr. Murray in her official position. Dr. Krahn was responsible in whole or in part for Dr. Murray's termination in violation of the FMLA.

71. Dr. Krahn, as Chair of Mayo's Personnel Committee, cited to the medical basis for Dr. Murray's FMLA leave during the April 16, 2014 meeting and stated that an individual with those symptoms could not continue to serve on the staff at Mayo. Mayo terminated Dr. Murray in a letter signed by Dr. Krahn just one month after the April 16, 2014 meeting and within two months of Dr. Murray's request for FMLA leave.

72. Mayo based its termination of Dr. Murray on his use of or request for FMLA leave. Mayo's termination of Dr. Murray was therefore in violation of the FMLA.

73. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

COUNT V
(Failure to Reasonably Accommodate in Violation of the ADA) Against Mayo Clinic and Mayo Clinic in Arizona

74. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

75. Dr. Murray is an individual with a disability within the meaning of the Americans with Disabilities Act ("ADA") in that he has, or at relevant times had, a mental or physical impairment that substantially limits one or more of his major life activities, a record of such impairment, and/or was regarded by Mayo as having such an impairment.

76. Mayo knew of Dr. Murray's service-related disabilities prior to terminating him and, upon information and belief, knew about it before the February 19, 2014 incident.

77. Dr. Murray was qualified for his position, was competently performing the essential tasks of his position, and with reasonable accommodation could have continued to perform the essential tasks of his position.

78. Mayo was aware before terminating him that Dr. Murray likely required a reasonable accommodation because of his PTSD and other service-related

disabilities but failed to engage in the interactive process to identify a reasonable accommodation.

79. Mayo did not make reasonable efforts to accommodate Dr. Murray's PTSD and other service-related disabilities. Instead, Mayo terminated him based upon his PTSD and other service-related disabilities.

80. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

COUNT VI
(Unlawful Termination in Violation of the ADA) Against Mayo Clinic and Mayo Clinic in Arizona

81. Dr. Murray hereby incorporates and re-alleges all allegations set forth above as if fully set forth herein.

82. Dr. Murray is an individual with a disability within the meaning of the Americans with Disabilities Act ("ADA") in that he has, or at relevant times had, a mental or physical impairment that substantially limits one or more of his major life activities, a record of such impairment, and/or was regarded by Mayo as having such an impairment.

83. Dr. Murray was qualified for his position, was competently performing the essential tasks of his position, and with reasonable accommodation could have continued to perform the essential tasks of his position.

84. Mayo knew of Dr. Murray's service-related disabilities, or at least regarded him as disabled, prior

to terminating him and likely before the February 19, 2014 incident. Dr. Krahn and Dr. Trentman both cited to Dr. Murray's PTSD and service-related disabilities, their symptoms, and/or conduct resulting from those disabilities during the April 16, 2014 meeting as a basis for possible discipline and/or termination. This meeting occurred prior to Mayo's decision to terminate Dr. Murray. Mayo's termination letter also cited to symptoms of Dr. Murray's PTSD and other service-related disabilities.

85. Mayo terminated the employment of Dr. Murray in violation of the ADA because of his actual and/or perceived PTSD and other service-related disabilities, the symptoms of those disabilities, and/or conduct resulting from those disabilities.

86. Mayo engaged in these actions toward Dr. Murray with malice or reckless indifference to Dr. Murray's federally protected rights. As a direct result of Defendants' actions, Dr. Murray has suffered damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays that this Court enter judgment against Defendants as follows:

A. for an award of economic damages in an amount sufficient to make Dr. Murray whole for past lost income and benefits, and other economic losses suffered by Dr. Murray resulting from Defendants' conduct;

B. reinstatement to his former position of employment or, in the alternative, for damages in such sum as will compensate him for his loss of front pay and benefits;

C. for an award of compensatory damages for mental anguish, emotional distress, pain and suffering, humiliation, inconvenience, harm to reputation, loss of enjoyment of life, and other losses incurred by Dr. Murray as a result of Defendants' conduct;

D. for an award of liquidated damages in an amount equal to his economic damages (including his front pay and benefits) and his compensatory damages;

E. for an award of punitive damages;

F. for an order declaring that Dr. Murray's actions to protect his patient on February 19, 2014 were reasonable under the circumstances;

G. for all interest allowed by law, attorneys' fees and litigation expenses, and such other and further relief as the Court shall deem proper.

Demand for Jury Trial

Dr. Murray hereby respectfully demands a jury trial on all claims asserted in this First Amended Complaint.

DATED this 29th day of August, 2014.

Blaney Law PLLC

By: /s/ Scott A. Blaney
7220 N. 16th Street, Suite J
Phoenix, Arizona 85020
Attorneys for Plaintiff

MEMO LETTER TO DR. MURRAY (MAY 19, 2014)

To: Michael 3. Murray, M.D., Ph.D

From: Terrence Trentman, M.D.
Chair, Department of Anesthesiology

Lois Krahn, M.D.
Chair, Personnel Committee

Re: Termination of Employment

On February 19, 2014 around 3:00 p.m., you were involved in a serious physical confrontation with a coworker while working in Operating Room #6. This event resulted in several concerns about your conduct. In my role as Chair of the Department of Anesthesiology, it is my responsibility to investigate and address concerns that relate to our Department Consultant Staff. Due to the severity of this matter, I partnered with the Personnel Committee Choir and we investigated and reviewed the circumstances together.

A summary of the investigation findings are attached. Conclusions from the investigation are that your February 19 actions towards Dr. Chien were intentional, hostile, intimidating, excessive for the circumstances, verbally demeaning, and physically threatening. In the OR, you lost your temper, yelled, and made very aggressive physical contact with Dr. Chien while anesthesia induction was being performed by the CRNA a few feet away. Your sudden, extreme conduct temporarily distracted and alarmed those in the OR, created safety risk for the patient, and created lingering anxiety for some who remained in the OR with you. After the OR event, you continued to be disrespectful to Dr. Chien as he communicated

to you airway concerns about a PACU patient. Later, in interviews, you defended your extreme action more than you acknowledged it, and you continue to blame Dr. Chien for your display of workplace anger and hostility. Regretfully, you have not demonstrated acceptance of responsibility for your conduct.

Your conduct violated several Mayo policies. Specifically, the Mayo Mutual Respect policy, Workplace Violence policy and Unacceptable Conduct and Disruptive Behavior policy were violated. Also Mayo Clinic's Commitment to Safety standards were violated. Those standards expect communication that is respectful, nonjudgmental and non-intimidating; a responsive and receptive attitude towards others; and management of emotions. As a Mayo Consultant, you have been notified of these policies.

We recognize that you have provided decades of service to Mayo, and you have served as a past leader in Mayo Anesthesiology. However, your conduct on February 19 was extreme and completely unacceptable in the Mayo workplace. Based on the findings in the investigation of this matter, your conduct constitutes cause for termination. After careful thought, Mayo has determined that termination of your employment is reasonable and appropriate for the circumstances. Your final day of Mayo employment is May 19, 2014.

/s/Terrence Trentman, M.D.
Chair, Department of Anesthesiology

/s/ Lois Krahn, M.D.
Chair, Personnel Committee

Attachments:

1. Summary of Investigation Findings
2. Mutual Respect Policy
3. Unacceptable Conduct and Disruptive Behavior Policy
4. Workplace Violence Policy
5. Corrective Action Policy
6. Appeal Policy
7. Mayo's Commitment to Safety