APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANA GARCIA, Plaintiff - Appellant, v. WYOMING DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant - Appellee.	No. 20-8052 (D.C. No. 2:19-CV-00159-SWS) (D. Wyo.)

ORDER AND JUDGMENT*

(Filed Oct. 18, 2021)

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **MATHESON**, Circuit Judge.

Jana Garcia worked as a public health nurse for the Wyoming Department of Health (the "Department"). She clashed with her supervisors when they sought to resolve mistakes she was making at work. The Department placed her on administrative leave pending a fitness-for-duty evaluation. When the evaluation

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

concluded she was incapable of performing her job, the Department fired her. Ms. Garcia then sued the Department, alleging that the Department fired her based on her disability, religion, and race. The district court granted the Department's motion for summary judgment.

Ms. Garcia appeals the district court's ruling on her disability-and religious-discrimination claims.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

The district court provided a detailed account of the facts. We provide a summary of the facts relevant to this appeal.

Ms. Garcia has been diagnosed with anxiety and post-traumatic stress disorder. She worked as a public health nurse for the Department in Glenrock, Converse County, from March 2016 until the termination of her employment in February 2018. For the bulk of this time, she was the only nurse in the Glenrock office. She had no blemishes on her record during the first 18 months of her employment. In two instances, Ms. Garcia, who practiced Messianic Judaism, was asked to participate in two Christian holiday events.[2] She also

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[1] Ms. Garcia does not appeal the dismissal of her race-discrimination claim.

[2] The parties dispute whether attendance at these events was mandatory. Ms. Garcia attended one of the events.

alleged that her colleagues called her "not normal." App., Vol 4 at 36.

In September 2017, one of Ms. Garcia's colleagues asked her to reconcile the vaccine inventory in the Glenrock office. Although she agreed, she responded negatively to the request. Over the next month, she failed to input her time and tasks in the Department's system, missed scheduled trainings and workdays, and failed to follow safety protocols regarding the disposal of used needles during a flu vaccine clinic. After the flu clinic incident, her supervisor removed her from patient-care services but allowed her to perform administrative work. When her supervisor explained that this step was taken to avoid her making an error with a patient, Ms. Garcia asked whether the supervisor had considered that this decision might cause Ms. Garcia to harm herself.

A few days later, Ms. Garcia and her supervisors exchanged several text messages. When her supervisors failed to respond for a few hours, Ms. Garcia sent another message berating them for failing to respond, accusing them of differential treatment because she is "a Hispanic middle eastern Jewish woman with a medical condition," and telling them she would "be contacting a civil rights attorney." App., Vol. 1 at 118-19. That day, Ms. Garcia also received a completed physician certification form requesting that she be permitted to close her office door to accommodate her disabilities. She sent the form to human resources.

Two days later, after concluding that Ms. Garcia's behavior posed a risk to patient safety, the senior administrator of Ms. Garcia's division and a human resources administrator placed her on administrative leave pending a fitness-for-duty evaluation by a physician.

In December 2018, Dr. Gerald Post, the physician who examined Ms. Garcia, submitted his evaluation to the Department. He concluded she was not fit to perform her job duties. Dr. Post wrote that Ms. Garcia could not satisfy "[b]asic minimum standards of abilities and behaviors in order to perform employment in almost any setting." App., Vol. 3 at 178-79. He concluded that "it appeared to be unlikely that Ms. Garcia[ ] would quickly recover from her condition" in part because "[s]he clearly underestimated the impact of her symptoms on her ability to perform her job." *Id.* at 179.

In January 2018, the director of the Department sent Ms. Garcia a notice of intent to dismiss her based on Dr. Post's evaluation. The notice offered Ms. Garcia an opportunity to respond and to dispute the evaluation. In her response, she failed to address the evaluation and instead accused her coworkers and supervisors of discriminating against her. After considering her response, the director terminated her employment.

Ms. Garcia filed this action alleging disability, race, and religious discrimination. The first paragraph of her complaint cited the Rehabilitation Act of 1973,

but the cause of action alleging disability discrimination cited only the Americans with Disabilities Act of 1990 (the "ADA"). She also brought retaliation and discrimination claims under Title VII of the Civil Rights Act of 1964.

The Department moved for summary judgment, which the district court granted. The court determined the Department was entitled to sovereign immunity as to the ADA claim. Even though the court concluded that Ms. Garcia did not plead a Rehabilitation Act claim, it analyzed Ms. Garcia's disability discrimination claim anyway. It held that she failed to establish a prima facie case and failed to show that the Department's nondiscriminatory reason for firing her was pretext. Turning to the Title VII claims, the court held Ms. Garcia had failed to show pretext for her retaliation claim. Finally, the court ruled in the Department's favor on the religious discrimination claim after it held that Ms. Garcia failed to make out a prima facie case or establish pretext.

Ms. Garcia timely appealed.

II. **DISCUSSION**

A. ***Standard of Review***

We review a district court's grant of summary judgment de novo, applying the same standards as the district court under Federal Rule of Civil Procedure 56(a). *See Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020). We draw all reasonable

inferences and resolve factual disputes in favor of Ms. Garcia. *See Yousuf v. Cohlmia*, 741 F.3d 31, 37 (10th Cir. 2014). We will affirm "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

B. ***Ms. Garcia's ADA Claim***

Ms. Garcia brought a disability discrimination claim under the ADA. We agree with the district court that the Department is entitled to sovereign immunity.

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). This guarantee is subject to three exceptions, *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012), but the only relevant exception here is whether the State has waived its sovereign immunity under the ADA.

Ms. Garcia argues the State waived its sovereign immunity under the ADA when it accepted Rehabilitation Act funds. But we rejected this argument in *Levy v. Kansas Department of Social and Rehabilitation Services*, 789 F.3d 1164, 1170-71 (10th Cir. 2015). We explained that, despite the close link between the ADA and the Rehabilitation Act, "the close relationship between the two statutes is not sufficient to conclude that the Rehabilitation Act's waiver provisions apply by implication to the ADA." *Id.* at 1170; *see also Edelman v.*

Jordan, 415 U.S. 651, 673 (1974) ("[W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." (quotations omitted)). The Department is therefore entitled to sovereign immunity on Ms. Garcia's ADA claim.[3]

C. ***Ms. Garcia's Title VII Claims***

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "on the basis of race, color, religion, sex, or national origin." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). Employers cannot discriminate "in hiring, firing, salary structure, promotion and the like." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013). Nor can they retaliate against employees "on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination." *Id.*

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[3] Ms. Garcia argues that her complaint also alleged a Rehabilitation Act claim. But her one claim of disability discrimination cites only the ADA and does not mention the Rehabilitation Act. App., Vol. 1 at 12-13. We agree with the district court that Ms. Garcia "did not base any of her causes of actions on" the Rehabilitation Act, even though she mentioned it in the opening paragraph of her complaint. App, Vol. 5 at 61 n.6. On appeal, Ms. Garcia does not address the district court's conclusion that she did not plead a Rehabilitation Act claim, so she waived this argument.

Even assuming Ms. Garcia pled a claim under the Rehabilitation Act, we agree with the district court's analysis of that claim and would likewise affirm.

Ms. Garcia alleged two Title VII violations—that the Department (1) retaliated when it placed her on administrative leave after she told her supervisors that she would contact a civil rights attorney, and (2) discriminated when it fired her because of her religion.

We apply the *McDonnell Douglas* burden-shifting framework to Ms. Garcia's Title VII claims. *See Ibrahim v. Alliance for Sustainable Energy, LLC*, 994 F.3d 1193, 1196 (10th Cir. 2021); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). First, Ms. Garcia must establish a prima facie case of discrimination by showing that (1) she belongs to a protected class, (2) she suffered an adverse employment action, and (3) the challenged action took place under circumstances giving rise to an inference of discrimination. *EEOC v. PVNF, LLC*, 487 F.3d 790, 800 (10th Cir. 2007). Once she makes this showing, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action." *Id.* If the Department makes this showing, the burden shifts back to Ms. Garcia, who must "show that there is a genuine issue of material fact as to whether the employer's proffered reasons are pretextual." *Id.*

1. **Retaliation Claim**

Ms. Garcia appears to base her retaliation claim on her text message to her supervisors accusing them of differential treatment because she was "a Hispanic middle eastern Jewish woman with a medical

condition," and telling them that she would "be contacting a civil rights attorney." App., Vol. 1 at 118-19. She argues the Department retaliated against her by removing her from patient services shortly after receiving this message.

The district court granted the Department's motion for summary judgment because she failed to show pretext. The court assumed she had made out a prima facie case. It determined that the Department's proffered reason for putting her on administrative leave—patient safety—was nondiscriminatory.[4] The court then held that Ms. Garcia failed to show the proffered reason was pretextual. We agree.

The Department placed Ms. Garcia on administrative leave after it determined that she posed a safety risk to her patients. By failing to point to any portion of the record to suggest pretext, she inadequately briefed this issue and has thus waived her argument. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019). In any event, Ms. Garcia has not demonstrated that this reason was pretextual. She fails to direct us to "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Fye v.*

[4] For retaliation claims, an adverse employment action "is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

Oklahoma Corp. Com'n, 516 F.3d 1217, 1228 (10th Cir. 2008) (quotations omitted).

2. **Religious Discrimination Claim**

The district court granted summary judgment to the Department on Ms. Garcia's religious discrimination claim. It concluded that, for the purposes of this claim, Ms. Garcia's firing was the only adverse employment action. The court determined that Ms. Garcia did not make out a prima facie case because she failed to link the alleged discrimination—the Department's request that she participate in Christian holiday events—with the termination of her employment. The court also held she failed to establish pretext.

Ms. Garcia argues she satisfied her burden to make a prima facie case of discrimination. But even if that were true, she has failed to show that the Department's nondiscriminatory justification for her firing—that Dr. Post found her not fit for duty—was pretextual. The only evidence Ms. Garcia musters is her testimony that (1) her supervisors allegedly forced her to participate in Christian holiday events and (2) her colleagues called her "not normal."

In evaluating pretext, we "look at the facts as they appear to the person making the decision to terminate." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000). The decisionmaker here—the director of the Department—was unaware of the alleged behavior of Ms. Garcia's supervisors and colleagues. He was not made aware of Ms. Garcia's

religion until she responded to the notice of intent. We thus do not see a triable issue regarding whether his proffered reason for the termination of her employment was pretextual.

III. **CONCLUSION**

We affirm.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

JANA GARCIA, Plaintiff, v. STATE OF WYOMING, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant.	Case No. 19-CV-159-SWS

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Aug. 25, 2020)

This matter comes before the Court on the Defendant's Motion for Summary Judgment (Doc. 25) and the Plaintiff's Motion for Partial Summary Judgment (Doc. 28). The parties filed responses (Docs. 30, 40), and the Court heard oral arguments on August 12, 2020 (Doc. 41). Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court finds and concludes the Defendant's motion should be granted and the Plaintiff's motion denied.

INTRODUCTION

Plaintiff Jana Garcia worked as a public health nurse in Glenrock, Converse County, Wyoming, from March 2016 until she was involuntarily terminated in February 2018. Her employer was the Wyoming Department of Health, Public Health Division. She contends the Department discriminated against her on the basis of race, religion, and disability, created a hostile work environment, and then retaliated against her for her opposition to the discrimination. She cites Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 in her complaint as the vehicles for her claims. (Compl. ¶ 1.) Ms. Garcia seeks partial summary judgment holding the Department liable for disability discrimination. The Department seeks summary judgment on all issues.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (internal quotation marks omitted). Testimony "grounded on speculation does not suffice to

create a genuine issue of material fact to withstand summary judgment." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

In considering a summary judgment motion, the Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment. *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Trust*, 744 F.3d 623, 628 (10th Cir. 2014). "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another" *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979)

The moving party has "both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2003)). If the moving party carries this initial burden, the nonmoving party may not rest on its pleadings, but must bring forward specific facts showing a genuine dispute for trial as to those dispositive matters for which it carries the burden of proof. *Id.* (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)).

FACTS[1]

Ms. Garcia started as the public health nurse in Glenrock, Converse County, Wyoming, on March 1, 2016. (Doc. 32-1 ¶ 1.) Her employer was Defendant State of Wyoming, Department of Health and Social Services ("the Department"). She is Hispanic, a practicing Jew, and she qualifies as an individual with a disability under the ADA due to Post-Traumatic Stress Disorder (PTSD) from her childhood, which manifests as an anxiety disorder. (Compl. ¶¶ 6-7.) She has been a registered nurse since 2004. (Doc. 32-1 ¶ 2.) From Ms. Garcia's hire until September 2017, she received positive performance reviews and met her employment expectations. (Ohnstad Depo. 8:3-17.)[2] For the bulk of her employment, she was the lone public health nurse in Glenrock, Wyoming, as the other Converse County public health nurses worked in the Douglas, Wyoming, public health office. (Garcia Depo. 72:5-73:8.)

The hiring committee for Nurse Manager

On the same day Ms. Garcia started working for the Department, Melissa Ohnstad was promoted from Nurse Manager to Regional Supervisor. (Ohnstad

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[1] Unless otherwise noted, these facts are uncontested. There are many additional incidents that both sides complain about and remain disputed, but the Court finds those incidents immaterial to the summary-judgment decision at hand.

[2] The complete transcripts for the four depositions cited in this Order (for Ms. Garcia, Matthew Nix, Melissa Ohnstad, and Kristal Skiles) are found in the record at Documents 32-6 through 32-9.

Depo. 6:9-12.) The Nurse Manager is the direct supervisor of the public health nurses within a county. (Ohnstad Depo. 6:4-16.) The Regional Supervisor oversees several counties in one quadrant of the state. (Ohnstad Depo. 4:18-22.) It took a while to hire a new Nurse Manager to replace Melissa Ohnstad, so Ohnstad essentially performed double duty for over a year. (Ohnstad Depo. 17:9-18:4.) A team of five people comprised the hiring committee for hiring a new Nurse Manager: Ohnstad, Lindsay Huse (Ohnstad's supervisor), a Converse County Commissioner, and two staff nurses with seniority. (Ohnstad Depo. 17:11-21, 18:13-15.) When the position was first opened, Ms. Garcia applied for the job. (Ohnstad Depo. 18:5-15; Garcia Aff. ¶ 4.) An applicant was hired for the Nurse Manager position in Summer 2016, but that person stayed only a short time before leaving. (Ohnstad 17:22-18:3.) When opening the position back up, Melissa Ohnstad kept the same hiring committee. (Ohnstad Depo. 18:5-13.) Eventually, Kristal Skiles was hired to become the new Nurse Manager, and she started in September 2017. (Ohnstad 16:25-17:8; Skiles Depo. 5:21-24.)

September 21, 2017 email exchange with Jennifer Ullery

Workplace problems began to grow with a September 21, 2017 email exchange between Ms. Garcia and Jennifer Ullery. Jennifer Ullery, a nurse in the Douglas office and the vaccine/immunization coordinator for Converse County, emailed Ms. Garcia asking her to reconcile the vaccine inventory in the Glenrock office

so that Ullery could order the necessary stock for the county. (Doc. 26-1 p. 33; Ohnstad Depo. 8:19-9:5.) Ms. Garcia says this email "was not a 'routine request' this was workplace harassment. The task Ullery was asking me to do was solely her responsibility." (Garcia Aff. ¶ 9; *see* Garcia Depo. 102:6-18.) Melissa Ohnstad testified that reconciling the vaccines in Glenrock was indeed part of Ms. Garcia's job because she was the sole nurse in that office (Ohnstad Depo. 70:9-71:1, 71:6-15), but this dispute is not material to Ms. Garcia's claims of discrimination. What is material is Ms. Garcia's response to Ullery's email, where Ms. Garcia answered the vaccine-related inquiries and then wrote the following:

> I find your email to be very negative and it portrays me as a very ignorant person. Just last month I emailed and addressed with you personally your very rude demeanor towards me when I called the Douglas office. It took you two or three days to message me back, yet you messaged Nick who was in my office all day long, so I know you are capable of communication when it suits you.

(Doc. 26-1 p. 34; Garcia Depo. 107:11-108:17.) Melissa Ohnstad and Kristal Skiles were copied on this email exchange and felt Ms. Garcia was unprofessionally "snapping back" at Jennifer Ullery. (Garcia Depo. 108:17-22.) Also, within her response, Ms. Garcia notes, "With the volume of patients and client that I have in Glenrock it[']s not an easy load to carry. I would appreciate a little understanding and support from

you." (Doc. 26-1 p. 34.) The topic of Ms. Garcia's workload would surface again soon.

September 22, 2017 first meeting with Kristal Skiles

On September 22, 2017, Melissa Ohnstad and Kristal Skiles met with Ms. Garcia. (Doc. 26-1 p. 40.) It was Ms. Skiles' first time meeting with Ms. Garcia in person. (*Id.*) Among other things, they spoke about how Ms. Garcia was feeling overwhelmed by her workload. (*Id.*) Kristal Skiles agreed to start working two days per week in the Glenrock office to give Ms. Garcia some additional support. (*Id.*) Ms. Garcia would soon come to resent her direct supervisor's presence at the Glenrock office, though, believing Skiles had been "put on duty to watch" Ms. Garcia (Garcia Depo. 92:24-93:10, 94:16-95:6; Garcia Aff. ¶ 11), which caused Ms. Garcia "to feel uncomfortable and have anxiety attacks" (Compl. ¶ 8).

September 25-26, 2017 email exchange with Kristal Skiles

On September 25, 2017, Kristal Skiles sent an email to Ms. Garcia informing her she was not in compliance with inputting her time and tasks into the "PHNI" program in a timely manner, as required by policy. (Doc. 26-1 p. 38.) PHNI stands for "Public Health Nurse Informatics" and it is the statewide electronic system that public health nurses use to record, track, and code their time. (Ohnstad Depo. 10:15-23,

28:8-10; Garcia Depo. 112:7-13.) Per state policy, the Department's public health nurses have 72 hours (3 days) to input their activities into the PHNI system (Skiles Depo. 26:24-27:6), and timely and accurate documentation of nursing activities is one of the essential job duties for a public health nurse (Doc. 26-5 p. 23). After informing Ms. Garcia she was out of compliance, Kristal Skiles' email asked her to rectify the matter "and be diligent in the future about getting this done. Also if there is a barrier that is preventing you from being in compliant [sic] let me know." (Doc. 26-1 p. 38.) Kristal Skiles and Melissa Ohnstad then followed up with Ms. Garcia that day over the phone where they "gave her some tips for time management and offer[ed] support for her to be able to be successful." (Doc. 26-1 p. 40.)

Ms. Garcia responded via email that day, agreeing she was a day behind on her PHNI reporting. (Doc. 26-1 p. 38.) She also noted several "barriers" to her timely PHNI reporting, including "the volume of patients" and "not having a full time administrative assistant in the Glenrock office" or a "cleaning person to complete daily housekeeping." (*Id.* (sic).) She noted, though, that she is generally "able to overcome those barriers without incident." (*Id.*)

Ms. Garcia followed up the next morning (September 26, 2017) on the same subject via email to both Melissa Ohnstad and Kristal Skiles. (Doc. 26-1 p. 36.) She started by asserting that she would not be attending a training that was scheduled in Laramie, Wyoming, for that day, nor would she be at work in the

Glenrock office because she was not feeling well. (*Id.*) She then addressed Skiles' email more directly, stating, "I really have a problem with how this PHNI situation was addressed with me." (*Id.*) She also discussed her heavy workload in the Glenrock office and then noted:

> Reading [Skiles'] email makes me feel horrible or better yet explained, non compliant, non diligent, and questioned about barriers the we all spoke about just last Friday (after Jen's email, that also degraded me to feel like I left my immunization supply in dire straights, unable to collaborate a private Hep A booster and so on and so forth). . . .
>
> Ufortunately, I feel pretty let down, unappreciated and devalued. I realize this is a compliance issue that has to be reported. I'm not minimizing that at all. Sometimes, situations should be looked at individually and personalized approach to improve the situation can make all the difference in the world.

(*Id.* (sic throughout).)

September 27, 2017 Text Messages to Melissa Ohnstad

Ms. Garcia texted Melissa Ohnstad on the morning of September 27, 2017 to complain about Kristal Skiles. (Doc. 26-2 p. 4.) She stated in part:

> Melissa . . . I need to get this off my chest. I hoped to tell you in person or over the phone. Im not going to be able to work for someone who corrects me with persecution. I will be in

> panic mode daily and that makes me unwell. . . . I agree i needed corrected about my phni, but you don't tell the most diligent phn [public health nurse] Glenrock has ever had that she needs to be "diligent". Glenrock didnt even know public health existed until i got out there and promoted their health. That's not gloating Thats the truth. I have an anxiety disorder because of that, I need a positive supportive (glass is half full) leader or I will fail and thats not an option to me.

(*Id.* (sic throughout).)

Melissa Ohnstad responded via text message later in the day, saying she and Kristal Skiles would be meeting with Ms. Garcia on the following Monday morning, October 2, 2017, "to discuss the situation." (Doc. 26-2 p. 6.)

October 2, 2017 meeting with Melissa Ohnstad and Kristal Skiles

The October 2, 2017 meeting underlies many of Ms. Garcia's complaints. That morning, Melissa Ohnstad and Kristal Skiles drove to the Glenrock public health office to meet with Ms. Garcia. Skiles and Ohnstad met with Ms. Garcia to address: (1) the Glenrock workload; (2) reports from the building administrator that Ms. Garcia was entering and leaving the building sporadically at odd, non-working hours; (3) reports from another employee that Ms. Garcia would leave the office often during the day and not return for long periods, though no out-of-office appointments were

scheduled for those times; and (4) Ms. Garcia's daughter and granddaughter spent a lot of time at the office, even for "hours at a time." (Doc. 26-1 p. 40.) Ms. Garcia describes this meeting as "the red flag interrogation." (Garcia Depo. 130:8-9.) She testified this meeting "was confrontational. It was not a meeting that was dignified, not even an informal counseling." (Garcia Depo. 97:14-15.) Of significance to this case, Ms. Garcia alleges Melissa Ohnstad told Ms. Garcia she was "not normal" compared to her co-workers and "unstable." (Garcia Depo. 89:18-90:6, 95:13-19.)[3]

In a follow-up email that same day, Kristal Skiles wrote to Ms. Garcia, "After reviewing our discussion this morning about your anxiety disorder, I would like to see if there are any accommodations we can offer to assist you?" (Doc. 26-3 p. 7.) If Ms. Garcia responded to Skiles' question, the response does not appear in the record. Ms. Garcia may have filed a complaint with the Equal Employment Opportunity Commission (EEOC) on or about October 3, 2017, claiming discrimination.[4] (Garcia Aff. ¶ 21.) That EEOC complaint also does not

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[3] Ms. Garcia testified this meeting occurred on October 9, 2017, but it appears she later amended it to occurring on October 2, 2017. (Garcia Depo. 124:14-21, 130:23-131:8.) Other documents in the record suggest it in fact occurred on October 2, 2017. (Garcia Aff. ¶ 14; Doc. 26-4 p. 2; Skiles Depo. 8:23-9:3.)

[4] Ms. Garcia's deposition suggests she actually complained to the EEOC after she was taken off direct patient care several days later or she may have complained on October 13, 2017 (Garcia Depo. 91:16-92:3, 183:16-23; 282:14-22), but the record remains unclear on the timing of this complaint.

appear in the record, but the Department has not contested it.

Ms. Garcia's flu vaccination clinic on October 5, 2017

Kristal Skiles observed and recorded Ms. Garcia's work for the entire day on October 5, 2017 (a Thursday). They attended an off-site flu clinic for a local company. (Skiles Aff. ¶ 16; Doc. 26-3 pp. 12-13; Garcia Aff. ¶ 17.[5]) Ms. Garcia forgot to bring a "sharps container" (a plastic, lockable container that holds used hypodermic needles) to the clinic for the safe storage of the used needles, which she agreed could be a safety issue. (Garcia Depo. 140:12-20.) She placed the used needles in cardboard box but testified she would not want to repeat the practice. (Garcia Depo. 140:21-141:12.) Kristal Skiles documented this matter (Doc. 26-3 p. 13) and reported it to Melissa Ohnstad (Ohnstad Depo. 10:2-8).

It is disputed whether Kristal Skiles gave any flu shots at that clinic and whether she also used the cardboard box to dispose of used needles (*compare* Garcia Aff. ¶ 17 *with* Skiles Depo. 24:8-16), but this dispute is not material to Ms. Garcia's claims of discrimination. It is also disputed whether Ms. Garcia failed to sanitize a person's arm with alcohol before giving a flu shot on

[5] Ms. Garcia's affidavit alleges this flu clinic occurred on October 6, 2017. (Garcia Aff. ¶ 17.) Other records reflect it occurred a day earlier. (Doc. 26-3; Skiles Aff. ¶ 16.) Additionally, Kristal Skiles was also at the flu clinic and she worked in Glenrock on Tuesdays and Thursdays, so it appears this flu clinic was on Thursday, October 5, 2017.

this same day (*compare* Doc. 26-3 p. 12 *with* Garcia Depo. 138:7-19), but again this dispute is not material to the summary-judgment analysis.

Ms. Garcia is taken off direct patient care

On October 6, 2017, Kristal Skiles called Ms. Garcia and informed her she would be taken off direct patient care services for the time being "for patient safety reasons," but she would remain on administrative-type duties. (Garcia Depo. 145:3-15; Doc. 26-3 p. 15.) Kristal Skiles told Ms. Garcia she "had concerns about [Ms. Garcia's] emotional state yesterday and the possibility of making an error with a patient." (Doc. 26-3 p. 15.) Skiles reported that during the October 6, 2017 phone call, Ms. Garcia said that "although we are concerned that she may harm a patient have we ever thought she amy harm herself because of our approach to her." (Doc. 26-3 p. 15 (sic); *see also* Garcia Depo. 146:11-16 (Garcia admitting she did make this self-harm comment).)

Melissa Ohnstad was part of the decision to remove Ms. Garcia from direct patient care, and testified that "when [Ms. Garcia] discussed that she was not feeling well, not thinking clearly, not sleeping and having anxiety, we pulled her off of patient care so that it would be at the best interest of her and the patient." (Ohnstad Depo. 55:6-9; *see also* Garcia Depo. 146:8 ("I was having problems sleeping."); Doc. 26-3 p. 18 (Ohnstad's contemporaneous notes of an October 10, 2017 phone call where Ms. Garcia "stated several times

that she is not her normal self and had been off her meds for 22 days").) In an October 13, 2017 text message from Ms. Garcia to Skiles and Ohnstad, Ms. Garcia asserted her physician thinks Ms. Garcia's "memory loss is from the flexeril." (Doc. 26-2 p. 8.)

Ms. Garcia's October 13, 2017 text message

Throughout the day of October 13, 2017, Ms. Garcia sent a number of text messages to Skiles and Ohnstad. (Doc. 26-2 pp. 7-17.) Most of those messages attempted to account for her entries and exits from the building at odd, non-work hours, which was a topic at the October 2, 2017 meeting. However, later that evening, it appears Ms. Garcia became upset at Ohnstad's lack of response:

> Melissa . . . never in 19 months has there been a time you didn't text me back. Isnt their a chain of command? Being i cant get any answers how do i get ahold of Lindsey [Lindsay Huse, Ohnstad's supervisor]? What is going on?? You asked me of my whereabouts and I'm researching everything and doing my best to provide you answers. Isnt that what you wanted?? I have an account of every questionable [flag emoji] now with proof of my whereabouts. Pat Reiter [the predecessor public health nurse in Glenrock and then a nurse at a Glenrock retirement center] lied about me and so did Nick [Larramendy]. But I guess their word means more than mine. Why? I can't fathom in my head the lies about me or even why my integrity was questioned, or

> what made it okay to intetigate me. what is it about "me" thay really threw up a [flag emoji]??? I've never done anything to have my integrity questioned and nobody wants to give me answers. The only thing that makes me different is that I'm a Hispanic middle eastern Jewish woman with a medical condition. It is NOT OKAY to pick on that group of people or tell them they throw up red flags. Shame on you for your participation. I will be contacting a civil rights attorney. This is not okay.

(Doc. 26-2 pp. 15-16 (sic throughout).) Ms. Garcia alleges this text message comprises her protected opposition to discrimination for which she was retaliated against. (Garcia Depo. 182:16-183:3.) Melissa Ohnstad responded by text: "Jana please put all of your information in writing and email it to Kristal [Skiles] and I. I will send it to Lindsay [Huse], following proper chain of command. Thank you." (Doc. 26-2 p. 16.)

October 16, 2017 email to Skiles and Ohnstad

Ms. Garcia emailed Kristal Skiles and Melissa Ohnstad on October 16, 2017, stating, "In regards to the recent mobbing that I endured involving my coworkers, I would like to respectfully request that Nick [Larramendy] no longer work in the Glenrock office." (Doc. 26-3 p. 21.) Ms. Garcia testified that the "recent mobbing" was in reference to all her complaints, the "whole thing." (Garcia Depo. 151:17-153:3.) Melissa Ohnstad felt Ms. Garcia's recent remarks and behavior had been inappropriate, so she forwarded this email to

her supervisor, Lindsay Huse, and sought guidance on how to address the situation. (Doc. 23-3 p. 21.)

Ms. Garcia's request for a reasonable accommodation under the ADA

On October 13, 2017, Ms. Garcia's physician, Dr. Casey Starks, completed a "Physician Certification" form. (Doc. 26-3 pp. 26-33.) Dr. Starks stated in part,

> Jana is currently suffering from an exacerbation of her anxiety disorder. I think it is reasonable to allow her to close her office door & de-escalate in the event of a panic attack. As she works with her counselor & we adjust her medical management this should become less often.

(Doc. 26-3 p. 28.) Ms. Garcia faxed this completed form to the Human Resources Department in the afternoon of October 17, 2017. (Doc. 26-3 p. 33.)

October 19, 2017 placement on paid administrative leave

Stephanie Pyle, the Senior Administrator for the Public Health Division in Wyoming, learned from Kristal Skiles and Melissa Ohnstad about the issues concerning Ms. Garcia. (Pyle Aff. ¶ 5.) Pyle and the Department's Human Resources Administrator "decided a fitness for duty examination for Ms. Garcia would be appropriate." (*Id.*) On October 19, 2017, Ms. Garcia was placed on paid administrative leave pending the fitness-for-duty evaluation. (Doc. 26-3 pp. 34-35.) "Given

the timing of Garcia's placement on administrative review leave . . . , the Department did not continue the interactive accommodation process regarding Garcia's request to shut her door." (Pyle Aff. ¶ 25; *see also* Nix Depo. 23:9-21 (noting that Ms. Garcia's request to close her door in the event of a panic attack became "a moot point" because "she was no longer in the office").)

Human Resources' investigation into Ms. Garcia's complaints

After being placed on paid administrative leave, Ms. Garcia submitted a series of letters to Matthew Nix, the Human Resources Manager for the Department, which detailed her side of the events and alleged many complaints against her supervisors and coworkers. (Doc. 26-4 pp. 11-45.) Nix conducted an investigation into the human-resources-related complaints contained in Ms. Garcia's letters, but found those complaints could not be verified. (Doc. 26-4 pp. 1-7.) In his "Other Findings," though, Nix said,

> It should be noted that there were many inconsistencies recognized in Ms. [Garcia's] letters to the Human Resources Office. It is also noted that in her letters to the Human Resources office, Ms. [Garcia] admits to several instances of poor work performance and misconduct. Ms. [Garcia] also admits to using her work computer for personal use and being in the office outside of normal business hours.

(Doc. 26-4 p. 7.) In her affidavit, Ms. Garcia repeatedly asserts Nix's investigation was inadequate. (*See* Doc. 32-1.)

Fitness-for-duty evaluation by Dr. Post

The Department hired Dr. Gerald Post, a licensed psychologist, to conduct the fitness-for-duty evaluation for Ms. Garcia. (Nix Depo. 14:11-16.) Dr. Post conducted a clinical interview of Ms. Garcia on November 2, 2017. (Doc. 14-1 p. 3.) Additionally, Dr. Post and/or Dr. Nathanael Taylor (a resident in psychology working under Dr. Post's supervision) interviewed Kristal Skiles and Melissa Ohnstad. (*Id.*) Dr. Post also administered several psychological tests to Ms. Garcia, some general and at least one specific to PTSD, and reviewed several records provided to him. (*Id.*) In a report dated December 6, 2017, Dr. Post concluded Ms. Garcia was unable to perform several of her employment duties "on a consistent basis due to the symptoms and features of PTSD, with Panic Attacks that were persistently present." (Doc. 14-1 p. 10.) Consequently, he determined she was, at that time, not fit for duty as a public health nurse and "it appeared to be unlikely that Ms. [Garcia] would quickly recover from her condition." (*Id.* p. 11.) Dr. Post found Ms. Garcia "clearly underestimated the impact of her symptoms on her ability to perform her job" and opined that "it would be reasonable to expect an indefinite period of similar functioning." (*Id.*) Ms. Garcia strongly disagrees with Dr. Post's report and contends his "conclusion was

influenced by Ohnstad and Skyles [sic] unfounded allegations." (Garcia Aff. ¶ 22.)

Ms. Garcia's employment termination

Dr. Post's report and various other documents were provided to Thomas Forslund, the Director of the Wyoming Department of Health. (Nix Depo. 14:23-15:2; Pyle Aff. ¶¶ 13-14.) Director Forslund considered the matter and issued a letter dated January 5, 2018, to Ms. Garcia advising her of his intent to terminate her employment based on Dr. Post's finding that she was unfit for duty. (Doc. 26-5 pp. 1-2.) He also informed Ms. Garcia that she could have Dr. Post's report sent to another mental health professional to have it interpreted and could provide her own written response to the matter. (*Id.* p. 2.)

Ms. Garcia did not request Dr. Post's report be sent to another mental health professional, but she did submit a written response to Director Forslund that included some character reference letters. (Doc. 26-5 pp. 4-10; Nix Depo. 15:12-14.) Significantly, though, the Department found Ms. Garcia's response did not rebut Dr. Post's expert conclusion. (Pyle Aff. ¶¶ 17-20; Nix Depo. 15:16-19.)

Director Forslund considered Ms. Garcia's written response but decided to follow through with the employment termination. (Doc. 26-5 pp. 11-12; Pyle Aff. ¶¶ 22-24; Nix Depo. 56:15-57:19, 58:17-24.) She was dismissed from her employment with the Department effective February 13, 2018. (Doc. 26-5 p. 11.)

Post-termination proceedings

Ms. Garcia administratively appealed her termination, alleging the Department failed to comply with relevant procedural requirements and she was not terminated for cause. (Doc. 32-4.) In February 2019, an administrative law judge determined the Department had indeed complied with all procedural requirements and good cause for her termination existed due to Dr. Post's conclusion that she was unfit for duty. (Doc. 32-4 pp. 3, 6.) The administrative law judge found the Department "made a series of thoughtful, deliberate and difficult decisions that were supported by extensive investigations and documentation, including input from both sides, and its determinations were reasonable under the circumstances." (Doc. 32-4 p. 9.)

Lindsay Huse (statewide Program Manager for the Public Health Division) was required to report Dr. Post's determination of unfitness to the Wyoming State Board of Nursing. (Garcia Depo. 298:9-14, 301:16-22.) The Board initiated a disciplinary action against Ms. Garcia, and she ended up voluntarily surrendering her Wyoming nursing license in May 2019. (Doc. 32-2.)

Ms. Garcia left Wyoming and moved to Arizona in 2019, where she applied for a nursing license within a short time of moving. (Garcia Depo. 9:1-10, 28:2-12.) She was required to undergo a new fitness-for-duty psychological evaluation, which she underwent in June 2019 with a licensed psychologist in Arizona. (Garcia Depo. 28:15-29:3.) Ms. Garcia says moving to Arizona "really deescalated" her anxiety a lot and, with

the help of counseling, she began weening off medication, last taking any anti-anxiety medication in March 2020. (Garcia Depo. 52:13-56:8.) She was found to be fit for duty in June 2019 and consequently received a provisional (probationary) nursing license for Arizona in late 2019. (Garcia Depo. 29:4-7, 199:25-202:12.) She started working as a registered nurse in Arizona in April 2020. (Garcia Depo. 14:17-24, 29:15-17.)

DISCUSSION

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).

1. The Department is protected by Eleventh Amendment sovereign immunity against Ms. Garcia's disability discrimination claim brought under Title I of the ADA.

Well before her employment with the Department, Ms. Garcia was diagnosed with "an anxiety disorder related to Post Traumatic Stress Disorder," which she disclosed to Melissa Ohnstad, her regional supervisor, at the time of hire. (Doc. 32-1 p. 1, Garcia Aff. ¶ 2.) She contends she suffered employment discrimination on the basis of her mental health disorder and never received a reasonable accommodation, all in violation of Title I of the Americans with Disabilities Act (ADA). (*See* Compl. ¶¶ 11, 18-21 (citing 42 U.S.C. § 12117(a), which is part of Title I of the ADA)); *see also Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1309 (10th Cir. 2012) ("Title I [of the

ADA], not Title II, is the proper tool for pursuing employment discrimination claims.").

The Department argues it is afforded sovereign immunity by the Eleventh Amendment against Ms. Garcia's cause of action brought under Title I of the ADA (identified in her complaint as her "Second Claim for Relief"). Generally, states and state agencies, such as the Department here, "are protected from suit by sovereign immunity as guaranteed by the Eleventh Amendment." *Levy v. Kansas Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1168 (10th Cir. 2015). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). The three exceptions to sovereign immunity are:

> First, a state may consent to suit in federal court. Second, Congress may abrogate a state's sovereign immunity by appropriate legislation when it acts under Section 5 of the Fourteenth Amendment. Finally, under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.

Levy, 789 F.3d at 1169 (quoting *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) (internal citations omitted and altered)).

Ms. Garcia does not seek prospective relief to remedy an ongoing violation. (*See generally* Compl.) And "[i]n *Garrett*, the Supreme Court held that Congress did not validly abrogate sovereign immunity for employment discrimination claims made against states under Title I of the ADA." *Levy*, 789 F.3d at 1169 (citing *Garrett*, 531 U.S. at 374, 121 S.Ct. 955); *see also Elwell*, 693 F.3d at 1310 ("the Supreme Court has held that states enjoy Eleventh Amendment immunity from suit under Title I, presenting an even bigger obstacle for public employees seeking to bring employment discrimination claims"). Thus, the question is whether the Department (through the State of Wyoming) has voluntarily waived its sovereign immunity and consented to be sued in federal court on Title I causes of action. In short, Ms. Garcia has identified no such waiver and consent.

In the Rehabilitation Act, Congress expressly stated:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). Wyoming accepted federal Rehabilitation Act funding and thereby waived its sovereign immunity against claims brought under § 504 of the Rehabilitation Act (29 U.S.C. § 794). *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1168

(10th Cir. 2003). Ms. Garcia essentially contends that because the "standards used to evaluate a claim under the Rehabilitation Act are the same as those applied to Title I claims under the ADA," and Wyoming already consented to being sued under the Rehabilitation Act, the State has necessarily also consented to being sued under Title I of the ADA. (Doc. 32 pp. 11-12.) However, this "waiver-under-the-Rehabilitation-Act-equals-waiver-under-the-ADA" argument was already rejected in *Levy*, where the Tenth Circuit stated in part:

- [T]he close relationship between the two statutes is not sufficient to conclude that the Rehabilitation Act's waiver provisions apply by implication to the ADA.
- For a waiver of sovereign immunity to be "knowing and voluntary," it cannot be hidden in another statute and only applied to the ADA through implication.
- Moreover, no court has concluded that the Rehabilitation Act's waiver provisions apply to the ADA.
- In the absence of clear evidence that Congress intended for states to waive their immunity under the ADA by accepting federal funds, we will not stretch the language of the Rehabilitation Act to conclude that [a state agency] has made a clear and voluntary waiver of its sovereign immunity for ADA claims.

Levy, 789 F.3d at 1171.

Ms. Garcia has not shown that Wyoming clearly and voluntarily waived its Eleventh Amendment sovereign immunity against claims brought under Title I of the ADA. Consequently, summary judgment must be granted in the Department's favor against Ms. Garcia's disability discrimination claims brought under Title I of the ADA.

2. Ms. Garcia's employment-discrimination claims based on disability, race, and religion fail because she has presented no admissible evidence to suggest she was terminated for discriminatory reasons and, in any event, she has not shown the Department's reasons for terminating her were pretext.

The Court will analyze these claims together because they all share a common element—they all require Ms. Garcia to present evidence from which a reasonable jury could find that she suffered an adverse employment action based on, or because of, some discriminatory animus.[6] She has not done so, and

[6] Ms. Garcia named the Rehabilitation Act of 1973 in the first paragraph of her complaint, but she did not base any of her causes of action on it. (Compl. ¶¶ 16-23 (relying on only the Civil Rights Act of 1964 and the ADA for her three claims for relief).) For purposes of this section of the discussion, though, the Court will assume arguendo that she based her disability-discrimination on the Rehabilitation Act or the Department was not immune to a claim under Title I of the ADA.

therefore the Department is entitled to summary judgment in its favor on these claims.

2.1 The elements of Ms. Garcia's disparate-treatment claims

Ms. Garcia has not presented any direct evidence of discrimination, "e.g., a defendant's oral statements demonstrating her discriminatory motive," *Stover v. Martinez*, 382 F.3d 1064, 1075 (10th Cir. 2004). (*See* Garcia Depo. 99:8-100:21, 178:22-24 (stating that her coworkers did not make any negative comments to her about her religion, race, or disability).) Therefore, her claims of disparate treatment based on race, religion, and disability are all analyzed under the McDonnell Douglas burden-shifting framework first set forth in *McDonnellDouglas Corp v. Green*, 411 U.S. 792 (1973). *See Stover*, 382 F.3d at 1070, 1075-76, 1077 (as to Title VII claims involving race and religion); *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1141 (10th Cir. 2011) (as to ADA discrimination claims); *see also Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009) ("Because the ADA and Rehabilitation Act 'involve the same substantive standards, [courts] analyze them together.' "). The three-step framework is:

> At the first step of the analysis, a plaintiff must establish a prima facie case of [employment] discrimination. If the plaintiff succeeds, the burden of production then shifts to the employer to identify a legitimate, nondiscriminatory reason for the adverse employment

> action. Once the employer advances such a reason, the burden shifts back to the plaintiff to prove the employer's proffered reason was pretextual.

Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1056 (10th Cir. 2020) (internal citations and quotation marks omitted).

The three elements required for establishing a prima facie case of employment discrimination based on disability under the ADA or Rehabilitation Act require the plaintiff to

> show that he (1) was disabled; (2) was qualified, that is, could perform the essential functions of the job in question, with or without accommodation; and (3) suffered adverse employment action because of the disability.

Mathews v. Denver Post, 263 F.3d 1164, 1167 (10th Cir. 2001).

Similarly, a prima facie case under Title VII of the Civil Rights Act of 1964 for discrimination based on race or religion

> generally requires a plaintiff to show, by a preponderance of the evidence, that she is a member of a protected class, she suffered an adverse employment action, and the challenged action occurred under circumstances giving rise to an inference of discrimination.

Bennett v. Windstream Commc'ns, Inc., 792 F.3d 1261, 1266 (10th Cir. 2015).

The Tenth Circuit has explained that the "critical prima facie inquiry" in all discrimination claims is the causal nexus, the "because of," element connecting the adverse employment action to the alleged discrimination. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1227 (10th Cir. 2000). "As the very name 'prima facie case' suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption." *Id.* (quoting *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996)).

2.2 The only legally-actionable adverse employment action at issue in Ms. Garcia's disparate-treatment claims is her termination.

At oral argument, Ms. Garcia's counsel highlighted the fact that she was informed she was being placed on paid administrative leave pending the fitness-for-duty evaluation and was escorted out of the building at the time. This does not amount to an actionable adverse employment action, though.

In the context of a disparate-treatment claim, an adverse employment action consists of a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007). The Tenth Circuit has not

expressly decided whether paid administrative leave constitutes an actionable adverse employment action. *See Lincoln v. Maketa*, 880 F.3d 533, 542 (10th Cir. 2018) ("To date, our own court has not issued a precedential opinion on whether paid administrative leave constitutes an adverse employment action."). Instead, the Tenth Circuit says the matter must be considered on a case-by-case basis. *Lincoln*, 880 F.3d at 542.

Here, Ms. Garcia was on paid administrative leave from October 19, 2017 (Doc. 26-3 pp. 34-35), until her termination on February 13, 2018 (Doc. 26-5 pp. 11-12), a period of nearly four months. While this time appears a bit excessive at first blush, the Court finds it reasonable under these circumstances. The chain of events was:

- Ms. Garcia's fitness-for-duty evaluation was completed by Dr. Gerald Post on December 6, 2017 (Doc. 14-1 p. 2);
- The Department's Director, Thomas Forslund, then issued the Notice of Intent to Dismiss letter on January 5, 2018 (Doc. 26-5 pp. 1-2);
- Ms. Garcia's time to respond to the intent to terminate was extended at her request to February 5, 2018 (Doc. 26-5 p. 11);
- Ms. Garcia submitted a written response on or about January 29, 2018 (Doc. 26-5 pp. 4-11); and
- Then Director Forslund issued the Final Dismissal on February 13, 2018 (Doc. 26-5 pp. 11-12).

Further, Ms. Garcia has offered no evidence to suggest her pay or benefits were altered during the administrative leave or that the Department changed her employment conditions to be more arduous. *See McGowan v. City of Eufala*, 472 F.3d 736, 743 (10th Cir. 2006) (an employment action that "offered no differences in pay and benefits" and did not require work that was "more arduous" was not materially adverse). Considering the totality of the circumstances, including Ms. Garcia's own extension request, placement on paid administrative leave did not amount to a materially-adverse employment action, at least not for her disparate-treatment claims. *See Gerald v. Locksley*, 785 F. Supp. 2d 1074, 1117 (D.N.M. 2011) (collecting cases holding that placement on paid leave was not an actionable adverse employment action).

Similarly, requiring Ms. Garcia undergo a fitness-for-duty evaluation also does not constitute an adverse employment action. "The Tenth Circuit has made it clear that subjecting an employee to a psychological examination can be vital for understanding an employer's ADA obligations to that employee." *Paystrup v. Benson*, No. 2:13CV00016-DB, 2015 WL 506682, at *9 (D. Utah Feb. 6, 2015) (unpublished) (citing *McKenzie v.Dovala*, 242 F.3d 967 (10th Cir. 2001)). Additionally, Ms. Garcia's statements in her deposition and text messages to her supervisors demonstrate an objectively legitimate concern as to whether she could perform all the essential duties of her job in October 2017, thus warranting a fitness-for-duty evaluation. In her deposition:

- Ms. Garcia admitted she was having problems sleeping due to her anxiety (Garcia Depo. 146:5-10);
- She said her direct supervisor, Kristal Skiles, "was afraid [Ms. Garcia] was going to harm a patient" (Garcia Depo. 146:17-23);
- She agreed that her late charting in the computer system was "a violation of state policy or agency policy" and that timely charting was one of her essential job duties (Garcia Depo. 156:18-157:22);
- She admitted she was "struggling" with the essential job requirement of "[m]ental focus and concentration needed for a variety of nursing duties" (Garcia Depo. 163:25-164:10); and
- She admitted she told her direct supervisor that although they were concerned she may harm a patient, had they "every thought she may harm herself because of" her supervisors' actions. (Garcia Depo. 146:11-16.)

And in a group text message to both her direct supervisor (Kristal Skiles) and the Regional Supervisor (Melissa Ohnstad), Ms. Garcia noted that her treating physician "thinks [Ms. Garcia's] memory loss is from the flexeril," a prescription muscle relaxant. (Doc. 26-2 p. 8.) Perhaps if an employee is required to undergo a fitness-for-duty evaluation for no identifiable reason, it could constitute an actionable adverse employment action. "An employer's request that an employee undergo a medical examination [including a fitness-for-duty evaluation] must be supported by evidence that would

'cause a reasonable person to inquire as to whether an employee is still capable of performing his[/her] job.'" *Conrad v. Bd. of Johnson Cty. Comm'rs*, 237 F. Supp. 2d 1204, 1230 (D. Kan. 2002) (quoting *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999)). That is not the case here, though. Here, Ms. Garcia's own statements and admissions show there was more than enough evidence for the Department to objectively question whether Ms. Garcia was still capable of performing her job.

Ms. Garcia's placement on paid administrative leave pending a fitness-for-duty evaluation did not constitute a materially-adverse employment action capable of supporting a claim for race, religion, or disability discrimination. Consequently, the only adverse employment action supporting her claims of discrimination is her final discharge from employment.

2.3 Ms. Garcia has not stated a prima facie case of discrimination based on race, religion, or disability because there is no evidence to connect her termination to a discriminatory animus.

In her deposition, Ms. Garcia thrice agreed Director Forslund terminated her employment because the fitness-for-duty evaluation concluded she was unfit for duty. (Garcia Depo. 155:25-156:7, 163:3-7, 185:25-186:2.) And while it is clear that Ms. Garcia takes issue with the adequacy of Dr. Post's fitness-for-duty evaluation, at oral argument, the Court asked Ms.

Garcia's counsel whether Director Forslund had any information before him that would suggest Dr. Post's fitness-for-duty evaluation was inadequate, and Plaintiff's counsel answered "No." Moreover, Ms. Garcia has not pointed to any evidence in the record to suggest that Director Forslund had any reason or basis to question the validity and reliability of the fitness-for-duty evaluation at the time he terminated Ms. Garcia's employment. Most significantly, Ms. Garcia has not identified a scintilla of evidence to suggest Director Forslund, the decision-maker, was motivated in any manner by unlawful discrimination when he decided to discharge Ms. Garcia. Therefore, Ms. Garcia has not set forth the necessary element of causal connection—she has not established any nexus between the alleged discrimination and Director Forslund's decision to terminate her employment. There is no discriminatory animus shown to be driving Director Forslund's action. Ms. Garcia has not stated a prima facie case of disparate treatment based on race, religion, or disability discrimination, and summary judgment on these claims must be granted in the Department's favor on these claims.

2.4 Alternatively, Ms. Garcia has not presented any evidence to show the Department's proffered reason for her termination was pretext for discrimination.

Even assuming arguendo that Ms. Garcia could make out a prima facie case of unlawful discrimination,

she has not rebutted the Department's proffered non-discriminatory reason for her termination. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1289 (10th Cir. 2013) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). Importantly, though, when considering whether the proffered reason was pretextual, the Court must "examine the facts as they appear to the person making the decision[,] not the plaintiff's subjective evaluation of the situation." *Id.* (quoting *Luster v. Vilsack*, 667 F.3d 1089, 1093 (10th Cir. 2011)). The examination asks "not whether the employer's proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." *Id.* (quoting *Luster*, 667 F.3d at 1094).

The facts as they appeared to Director Forslund showed that an independent psychologist had evaluated Ms. Garcia and concluded she was unfit for duty as a public health nurse because she was unable to meet several essential job duties "on a consistent basis due to the symptoms and features of PTSD, with Panic Attacks that were persistently present" (Doc. 14-1 p. 10), and Ms. Garcia had not introduced any basis for Director Forslund to question the fitness-for-duty evaluation in her response (*see* Doc. 25-5 pp. 4-10), both of

which Director Forslund expressly considered when deciding whether to terminate Ms. Garcia's employment. Ms. Garcia has not pointed to any evidence that would suggest Director Forslund did not honestly believe the fitness-for-duty evaluation or that he did not act in good faith upon those beliefs.[7]

The Department proffered the fitness-for-duty evaluation and Director Forslund's reliance thereon as a legitimate, nondiscriminatory reason for Ms. Garcia's discharge. Ms. Garcia has not carried her burden under the McDonnell Douglas burden-shifting framework of showing the Department's proffered reason was pretextual. Thus, the Department is entitled to summary judgment in its favor against Ms. Garcia's employment-discrimination claims based on race, religion, and disability.

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[7] To be sure, Ms. Garcia alleges several people other than the relevant decision-makers in this case, some employed by the State and others not, all conspired against her to get her fired due to racial and religious discrimination. (*See*, *e.g.*, Garcia Depo. 118:5-119:12, 150:20-25.) As she herself concedes, though, these allegations are her beliefs and thoughts. (*Id.* 118:13-14, 118:24-25, 119:11-12.) However, "[m]ere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Bekkem v. Wilkie*, 915 F.3d 1258, 1268 (10th Cir. 2019) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

3. Ms. Garcia's Title VII retaliation claim also fails because she has not shown the Department's reasons for terminating her were pretextual.

To state a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964,

> a plaintiff must show "(1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged [employment] action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action."

Khalik v. United Air Lines, 671 F.3d 1188, 1193 (10th Cir. 2012) (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 998 (10th Cir. 2011)). Retaliation claims are also subject to the McDonnell Douglas burden-shifting framework when there is no direct evidence of retaliation. *See Stover*, 382 F.3d at 1070-71.

For this retaliation claim only, the Court will assume without deciding that (1) Ms. Garcia's placement on paid administrative leave pending a fitness-for-duty evaluation constituted an adverse employment action, and (2) a causal connection exists based on temporal proximity alone between her alleged opposition to discrimination and the adverse employment action. *See Burlington v. Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 64 (2006) (noting that Title VII's "antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment"); *but see*

Freelain v. Village of Oak Park, 888 F.3d 895, 903-04 (7th Cir. 2018) (requiring a police officer to undergo a fitness-for-duty psychological evaluation after taking several weeks off due to stress-related medical symptoms was not a materially-adverse employment action supporting a retaliation claim when the evaluation was "used to determine a worker's ability to perform work functions safely").

Ms. Garcia contends she engaged in protected opposition to discrimination in a group text message sent to Kristal Skiles and Melissa Ohnstad, and specifically directed at Ohnstad, on October 13, 2017, which said in part,

> I've never done anything to have my integrity questioned and nobody wants to give me answers. The only thing that makes me different is that I'm a Hispanic middle eastern Jewish woman with a medical condition. It is NOT OKAY to pick on that group of people or tell them they throw up red flags. Shame on you for your participation. I will be contacting a civil rights attorney. This is not okay.

(Doc. 26-2 pp. 15-16; *see also* Garcia Depo. 182:16-25 (describing this October 13, 2017 text message as her protected opposition to discrimination).) She was then placed on administrative leave pending a fitness-for-duty evaluation less than a week later. (Doc. 32-2 pp. 40-41.) Thus, for Ms. Garcia's Title VII retaliation claim only, the Court assumes without deciding that she has stated a valid prima facie case sufficient to shift the burden to the Department to proffer a

legitimate, nondiscriminatory reason for the adverse employment action.

As discussed above, nondiscriminatory objective reasons support the Department's decision to place Ms. Garcia on paid administrative leave pending a fitness-for-duty evaluation and to eventually terminate her employment. Specifically, her own admissions to sleeping problems, memory problems, her untimely charting, her lack of mental focus and concentration, and her direct supervisor's concern that Ms. Garcia may harm a patient due to her mental state (Garcia Depo. 146:5-10, 146:17-23, 156:18-157:22, 163:25-164:10; Doc. 26-2 p. 8) together constitute ample legitimate and nondiscriminatory support for the Department's decision to put her on paid administrative leave and require a fitness-for-duty evaluation. Ms. Garcia's statements and admissions were more than enough evidence for the Department to question her ability to perform her job and require a fitness-for-duty evaluation. And in terminating her, Director Forslund relied on Dr. Post's unrebutted fitness-for-duty evaluation, which concluded Ms. Garcia was unfit for duty as a public health nurse at that time and "it appeared to be unlikely that [Ms. Garcia] would quickly recover from her condition" (Doc. 14-1 p. 11). These are legitimate, nondiscriminatory reasons supporting the Department's decisions.

Also as discussed above, Ms. Garcia has not provided any evidence at this summary-judgment stage to suggest the Department's proffered reasons for these adverse employment actions are unworthy of belief.

That is, Ms. Garcia has not carried her burden under the McDonnell Douglas burden-shifting framework of showing the Department's proffered reasons were pretextual. Accordingly, the Department is entitled to summary judgment in its favor on Ms. Garcia's claim of retaliation under Title VII.

4. Ms. Garcia's failure-to-accommodate claim under the ADA does not survive summary judgment.

Though her complaint is not a model of clarity, the Court assumes Ms. Garcia intended to assert a failure-to-accommodate claim, in addition to a disparate-treatment claim, within her "Second Claim for Relief" (*See* Compl. ¶ 18-21.) Assuming she meant to set forth a failure-to-accommodate claim under the ADA, and assuming arguendo the Department is not entitled to Eleventh Amendment sovereign immunity (see earlier discussion), the Department is entitled to summary judgment in its favor on the claim because Ms. Garcia has not come forward with any admissible evidence from which a reasonable jury could find the Department failed or refused to accommodate her.

"[B]efore an employer's duty to provide reasonable accommodations—or even to participate in the 'interactive process'—is triggered under the ADA, the employee must make an adequate request, thereby putting the employer on notice." *Koessel v. Sublette Cty. Sheriff's Dep't*, 717 F.3d 736, 744 (10th Cir. 2013) (quoting *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049

(10th Cir. 2011)). It is undisputed that Ms. Garcia's treating physician completed the disability certification form on October 13, 2017, which stated in relevant part:

> Jana is currently suffering from an exacerbation of her anxiety disorder. I think it is reasonable to allow her to close her office door & de-escalate in the event of a panic attack.

(Doc. 28-1 p. 28.) It is also undisputed that Ms. Garcia faxed this completed form to the Department's Human Resources Office in the afternoon of October 17, 2017. (Doc. 26-3 pp. 26-33.) However, she was placed on paid administrative leave pending a fitness-for-duty evaluation on the morning of October 19, 2017, not even two full days later.[8] (Doc. 26-3 pp. 34-35; Garcia Depo. 177:12-16.) The uncontroverted testimony from Matthew Nix, Human Resources Manager for the Department at the time, demonstrates that Ms. Garcia was put on administrative leave (and never returned to work) before the human resources unit had an opportunity to meet with her to proceed with the interactive process. (Nix Depo. 4:6-7, 21:2-13.) He testified that had she returned to work from paid administrative leave, "we would have gone through that interactive process with her to discuss reasonable accommodations that

[8] As the Court discussed earlier, the evidence presented here demonstrates the fitness-for-duty evaluation was ordered based on the Department's objectively-legitimate concerns with Ms. Garcia's ability to safely do her job; no reasonable jury could conclude the required fitness-for-duty evaluation was motivated by discriminatory or retaliatory reasons.

wouldn't create an undue hardship on the Department." (Nix Depo. 21:9-13.) The only accommodation Ms. Garcia requested was the ability to close her office door and de-escalate in the event of a panic attack. (Doc. 28-1 p. 28.) Nix said the accommodation request "was a moot point" during the administrative leave "because the only request was to close her door at the office, and she was no longer in the office." (Nix Depo. 23:9-16.) He noted that had Ms. Garcia returned from administrative leave, "we would have gone through the interactive process at that point. But we never got there." (Nix Depo. 23:19-21.) And Melissa Ohnstad's uncontested testimony was that she and Matthew Nix had discussed how to best accommodate Ms. Garcia's request to close her door while also keeping the Glenrock public health office open to customers (Ohnstad Depo. 47:12-22), but, again, Ms. Garcia never returned to duty. Moreover, Ms. Garcia admitted the ability to close her office door would not resolve several of the problems she was having at work, including "forgetting a sharps container or issues with timely charting or recording of charting." (Garcia Depo. 177:3-11.)

In short, the unrebutted evidence establishes the Department never failed or refused to accommodate Ms. Garcia's ADA request. Instead, the duty to engage in the interactive process with her arose not even a full two days before she was placed on paid administrative leave pending a fitness-for-duty evaluation, and her requested accommodation to close her door in the event of a panic attack became moot unless and until she returned to work, and she didn't. There is no reasonable

argument that the Department failed to accommodate in a timely manner or dragged its feet in processing Ms. Garcia's accommodation request. Based on the undisputed evidence, no reasonable jury could conclude the Department acted unreasonably in not completing the interactive process for Ms. Garcia's accommodation request in less than two days and then placing the interactive process on hold when she went on paid administrative leave. Assuming Ms. Garcia intended to assert a failure-to-accommodate claim under the ADA, the Department is entitled to summary judgment in its favor on such a claim.

5. <u>If Ms. Garcia intended to state a claim for hostile work environment, it does not survive summary judgment.</u>

Ms. Garcia did not set forth a cause of action alleging hostile work environment in her complaint. (*See* Compl. ¶¶ 16-23.) However, in the "Facts" section of her complaint, she alleged:

> 8. The plaintiff, while an employee of the defendant State of Wyoming as a public health nurse in Converse County was subjected to harassing conduct by co-employees based upon her race, religion, and disability, to wit:
>
> a. In October 2017Meliessa Ohnstad, Regional manager, Kristal Skiles, Nurse manager, said she was not normal compared to her co-workers.

> b. In October 2017 Ms. Skiles shadowed me that caused me to feel uncomfortable and have anxiety attacks.
>
> c. Ms. Ohnstad told me I was unstable.
>
> d. My co-workers would bring pork to the Tuesday meetings knowing that I was unable to eat pork because of my religion.
>
> e. I was expected to participate in Christmas exchanges and Easter Egg hunts.
>
> f. I was excluded from the interview process of Ms. Skiles.
>
> 9. The harassment was pervasive and affected a term, condition or privilege of employment which altered the employment conditions and created an abusive work environment.

(Compl. ¶¶ 8-9 (sic throughout).) In an abundance of caution, the Court will examine whether a claim for hostile work environment survives summary judgment.[9]

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[9] Ms. Garcia is represented by counsel and is therefore not entitled to the liberal construction generally afforded a pro se party, but the Court has attempted to give her (and her counsel) the benefit of the doubt, despite the rather unfocused, shotgun approach to her pleadings and briefing.

The familiar three-part McDonnell Douglas framework applies to a claim of hostile work environment. *See Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1221-24 (10th Cir. 2015) (applying the McDonnell Douglas test to the plaintiff's claim of racially hostile work environment); *see also West v. Norton*, 376 F. Supp. 2d 1105, 1120 (D.N.M. 2004) ("In the absence of direct evidence, claims of age, race, national origin, gender discrimination, hostile work environment, and retaliation are all subject to the burden shifting framework that the Supreme Court established in *McDonnell Douglas Corp. v. Green*. . . .").

> [T]o avoid summary judgment at the prima facie stage, a plaintiff must present evidence that creates a genuine dispute of material fact as to whether "the workplace is permeated with discriminatory intimidation, ridicule, and insult[ ] that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 851 (10th Cir. 2007) (quoting *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998)).

Lounds, 812 F.3d at 1222. To establish a prima facie claim of hostile work environment, Ms. Garcia must identify specific evidence from which a reasonable jury could find four elements:

> (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on [a legally-protected status]; and (4) [due to the harassment's severity or pervasiveness], the

> harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment.

Id. (second alteration in original) (quoting *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007)). "Whether an environment is hostile or abusive 'can be determined only by looking at all the circumstances . . . [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Glover v. NMC Homecare, Inc.*, 106 F. Supp. 2d 1151, 1167–68 (D. Kan. 2000), *aff'd*, 13 F. App'x 896 (10th Cir. 2001) (quoting *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998)). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Ms. Garcia has failed to carry her burden of showing a prima facie claim for hostile work environment exists. Specifically, as to Ms. Garcia's first allegation, the unrebutted evidence demonstrates that Melissa Ohnstad (the Regional Supervisor) stated Ms. Garcia was "not normal compared to her co-workers" with regard to her odd or late hours at the public health office and shutting the main office door. (Garcia Depo. 269:20-272:11.) There is no evidence the comment was motivated by or even directed at Ms. Garcia's race,

religion, or disability. *See Hall v. U.S. Dept. of Labor, Admin. Review Bd.*, 476 F.3d 847, 851 (10th Cir. 2007) (a hostile work environment actionable under Title VII exists where "the workplace is permeated with **discriminatory** intimidation, ridicule, and insult") (emphasis added) (quoting *Davis*, 142 F.3d at 1341). Title VII of the Civil Rights Act is intended to protect employees from discrimination; it "does not establish a general civility code for the workplace." *Morris v. City of Colo. Springs*, 666 F.3d 654, 663-64 (10th Cir. 2012). Title VII does not protect employees from unenjoyable work experiences that are not based on discrimination. *See Lounds*, 812 F.3d at 1222 (the third element of a hostile work environment claim under Title VII requires the harassment to be "based on" the plaintiff's membership in a protected class). Comparing Ms. Garcia's many entrances into and exits from the public health office during non-working (and often very late or very early) hours against those of her co-workers is not discrimination protected by Title VII.

The same holds true for Kristal Skiles' "shadowing" of Ms. Garcia in October 2017. A reasonable jury could not find such conduct hostile or abusive. Kristal Skiles was Ms. Garcia's direct supervisor at the time, and, as Ms. Garcia admitted, she was behind on her charting in violation of state policy and "struggling" with her mental focus and concentration (Garcia Depo. 156:18-157:22, 163:25-164:10). Not only is it acceptable for a direct supervisor to "shadow" a subordinate employee, but it was particularly appropriate in this case due to Ms. Garcia's admitted job-performance

problems. And the same analysis applies to Ms. Ohnstad allegedly telling Ms. Garcia she was "unstable." Ms. Garcia's admissions demonstrate her job performance and her emotional state were unstable at that time. There is zero evidence suggesting these actions and comments were driven by a discriminatory motive or animus. Not every unenjoyable work experience is based on illegal discrimination.

The unrebutted evidence also shows Ms. Garcia was excluded from the hiring committee for the County Manager position (which Kristal Skiles was hired for) because Ms. Garcia initially applied for the position, which obviously disqualified her from being part of the hiring committee. (Ohnstad Depo. 17:9-18:15.) When Ms. Garcia applied in the Summer of 2016, a nurse from Colorado was hired, but that person only worked as the Nurse Manager for a very short time. (Ohnstad Depo. 18:1-3) (noting the initial hire "only stayed for four days"). Because the Department was forced to restart the hiring process almost immediately, Melissa Ohnstad (Regional Supervisor) kept the hiring committee the same. (Ohnstad Depo. 18:5-15.) Again, Ms. Garcia has not come forward with any admissible evidence that would intimate any discriminatory reason for her exclusion from that hiring committee, even if Ms. Garcia did not like it or agree with it.

That leaves the monthly breakfast meetings[10] where her co-workers allegedly brought pork dishes

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[10] Despite the complaint's suggestion that these meetings occurred every Tuesday, Ms. Garcia's deposition testimony shows

while knowing, because she is Jewish, she doesn't eat pork accompanied with her "expected" participation in Christmas exchanges and Easter Egg hunts. It was disputed whether Ms. Garcia's pork-free diet was ever accommodated at any of the breakfast meetings and whether any employee was actually "expected" to participate in the Christmas exchange or the 2016 Easter Egg hunt (there was no 2017 Easter Egg hunt). (*See* Ohnstad Depo. 79:2-9 (pork-free breakfasts were offered several times), 61:18-63:3, 77:15-78:20 (participation in holiday-based activities was voluntary).) Resolving that dispute in Ms. Garcia's favor for purposes of summary judgment, though, monthly breakfast meals containing pork and an expectation that she participate in two holiday-themed activities over the period of her 18-month active employment are nowhere near severe or pervasive enough to constitute a discriminatory change in her terms and conditions of employment. *See Morris v. City of Colorado Springs*, 666 F.3d 654, 667-68 (10th Cir. 2012) (when viewed in context, juvenile, unprofessional, and even independently tortious conduct did not objectively alter terms and conditions of employment). As Ms. Garcia testified, she does not believe she would have or could have been disciplined if she had chosen not to participate in the gift exchange. (Garcia Depo. 170:13-171:1 (saying she didn't think she could be disciplined for her non-involvement but would have felt excluded), 241:23-242:4 (noting Melissa Ohnstad "approved" Ms.

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the breakfast meetings occurred one Friday morning per month in Douglas, Wyoming. (Garcia Depo. 79:20-80:7.)

Garcia's non-attendance at the county Christmas party).) Further, there is no evidence to suggest Ms. Garcia was ever threatened or humiliated concerning these holiday activities and monthly breakfasts, or that the pork dishes and expectation of participation unreasonably interfered with Ms. Garcia's work. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (noting the totality of circumstances to consider may include whether the discriminatory conduct is "physically threatening or humiliating" and whether it "unreasonably interferes with an employee's work performance"). "On balance, there is simply insufficient evidence for a jury to find that the alleged harassment was pervasive." *Morris v. City of Colo. Springs*, 666 F.3d 654, 666 (10th Cir. 2012). And any claim of a discriminatorily abusive work environment based on Ms. Garcia's religion is also particularly weak because she testified she considered her co-worker's questions about her religion to be genuine inquiries (Garcia Depo. 246:23-25 ("But it was just a lot of questions. I really didn't think a lot about them. I didn't – ")), and her co-workers never made negative comments about her Jewish faith (Garcia Depo. 99:8-12).

Moreover, even if Ms. Garcia could state a prima facie claim based on the pork dishes and "expectation" of participation in the two holiday activities, she has not rebutted the evidence showing a lack of any discriminatory motive. (*See*, *e.g.*, Ohnstad Depo. 60:17-61:4 (employees rotated on who provided breakfast each month, it was up to that employee what to bring, and "nobody had to eat. Food was available. If they

wanted to eat it, they could."), 79:2-13 (Ohnstad and at least one other employee provided pork-free options or dishes for Ms. Garcia, though Ms. Garcia never formally requested such an accommodation), 61:23-62:63:3 (an employee's participation in a gift exchange, holiday party, or Easter Egg hunt was completely optional and voluntary, not expected).)

Construing the facts in the light most favorable to Ms. Garcia, there is not enough evidence for a reasonable jury to conclude that she was subjected to harassment based on illegal discrimination of such pervasiveness that it objectively altered the terms, conditions, or privileges of her employment with the Department. If Ms. Garcia intended to set forth a cause of action for hostile work environment (and the Court does not believe she did because she specifically mentioned it only in the "Facts" section of her complaint and not as one of her "Claims for Relief"), the Department would be entitled to summary judgment in its favor on such a claim.

6. <u>Ms. Garcia's request for partial summary judgment must be denied.</u>

In her competing motion, Ms. Garcia seeks partial summary judgment "on the issue of liability for disability discrimination" under the ADA. (Doc. 28 p. 1.) As noted above, the Department is entitled to Eleventh Amendment sovereign immunity against Ms. Garcia's ADA claim(s). Alternatively, if sovereign immunity was not available, a disparate-treatment claim fails because, as set forth above, she has not shown any

evidence of discriminatory motive or animus by the Department for its actions and she has not shown the Department's reasons for terminating her to be pretext for disability discrimination. Finally, a failure-to-accommodate claim fails because she has not shown any evidence the Department failed or refused to accommodate her request; instead, her placement on paid administrative leave mooted and stayed her accommodation request. Consequently, Ms. Garcia's motion for partial summary judgment must be denied.

CONCLUSION AND ORDER

The Department is entitled to summary judgment in its favor on all claims for the various reasons described herein, and Ms. Garcia's motion for partial summary judgment must be denied because she is not entitled to the relief requested therein.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. 25) is hereby **GRANTED**, and Plaintiff's Motion for Partial Summary Judgment (Doc. 28) is **DENIED**. Summary judgment is granted on all claims in the Department's favor. The Clerk of Court's Office shall enter judgment in Defendant's favor and close this case.

DATED: August 25th, 2020.

/s/ Scott W. Skavdahl
Scott W. Skavdahl
United States District Judge