APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSEMARY GARITY, Plaintiff-Appellant, v. APWU NATIONAL LABOR ORGANIZATION, Defendant-Appellee, NEVADA POSTAL WORKERS UNION, Intervenor.	No. 18-15633 D.C. No. 2:11-cv-01109-APG-CWH MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted November 20, 2020
Pasadena, California

Before: PAEZ and OWENS, Circuit Judges, and ENGLAND,** Senior District Judge.

Rosemary Garity ("Garity") appeals the district court's grant of summary

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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 Morrison C. England, Jr., Senior United States District Judge for the Eastern District of California, sitting by designation.

judgement to Defendant American Postal Workers Union, AFL-CIO ("the National") on Garity's claims for disparate treatment, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. We have jurisdiction under 28 U.S.C. § 1291. Reviewing *de novo*, we affirm. *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994).

1. Garity originally filed suit against both American Postal Workers Union, Local 7156 ("the Local") and the National. When the Local dissolved, the district court dismissed it from the suit, leaving the National as the sole defendant. Although the Local no longer exists, Garity argues that the National is vicariously liable for the Local's violations of the ADA.[1] There are two theories under which the National can be liable for the Local's wrongful actions. The district court correctly held that Garity cannot prevail under either.

A national union can be liable for the actions of a local under common law

[1] We are not persuaded that we should adopt the vicarious liability standard advocated by Garity in her Supplemental Opening Brief. Garity also argues that the National should be judicially estopped from denying that it is the Local's successor. Garity, however, did not raise this argument in the district court. Generally, arguments not raised before the district court are waived on appeal. *See Manta v. Chertoff*, 518 F.3d 1134, 1144 (9th Cir. 2008). While there are narrow exceptions to this practice, they do not apply to Garity's judicial estoppel argument. *United States v. Flores-Montano,* 424 F.3d 1044, 1047 (9th Cir. 2005) (stating that a court may exercise its discretion to review newly presented issues when there are exceptional circumstances, due to a change in law while appeal was pending, or when the issue is a pure issue of law and the opposing party will suffer no prejudice). As a result, this argument is waived.

agency principles. *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216-17 (1979). In determining whether an agency relationship exists, both the terms of the entities' governing documents and the "actual relationship" between the entities are relevant. *Laughon v. Int'l All. Of Theatrical Stage Emps., Moving Picture Technicians, Artists & Allied Crafts of the U.S. & Can.*, 248 F.3d 931, 935 (9th Cir. 2001). The Local was not an agent of the National. The National's Constitution and Bylaws explicitly state that locals are "fully autonomous." Further, the now-dissolved Local had its own constitution and bylaws, governing its day-to-day procedures and logistics. The "actual relationship" between the two entities also confirms that the Local was autonomous and not an agent of the National. The Local had its own bank account, appointed its own shop stewards, and held its own elections without the National's involvement.

Garity contends that the National acquiesced in the Local's discriminatory actions because Scoggins and Ybarra, National Business Agents ("NBAs"), gave Poulos guidance for handling Garity's grievances and failed to investigate several of her complaints. Although the NBAs provided guidance to Poulos, there is no evidence that they controlled or directed her decisions. Indeed, Poulos testified that all decisions concerning Garity's grievances were her own. Garity has not presented sufficient evidence to raise a genuine factual dispute over the role of the NBAs in the grievance process.

Alternatively, a national can be held liable for the actions of a local if the national "instigated, supported, ratified or encouraged the Local's activities . . . ." *Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers*, 989 F.2d 1534, 1543 (9th Cir. 1993). Here, however, the record evidence at most shows that the National had constructive knowledge of the Local's actions. "[C]onstructive knowledge of the Local's possibly illegal activity does not impose on the [National] a legal duty to intervene." *Id.* Even assuming that Garity complied with the National's complaint procedures, Garity does not identify any impermissible actions by the National. Instead, she alleges actions by officers and members of the Local. Poulos testified that she independently removed Garity as shop steward. And Raydell Moore, a former member of the Local, retired from the National in 2000, over eleven years prior to Garity's lawsuit. The evidence does not show that any of Moore's alleged actions or inactions had anything to do with the National during the relevant period. As the record shows, the NBAs acted without supervision from the National.

Garity has not presented sufficient evidence to raise a genuine factual dispute that either the Local was acting as an agent of the National, or that the National instigated, ratified, or encouraged the Local's alleged discriminatory actions. On this record, the district court did not err in concluding that the National cannot be held vicariously liable for the actions of the Local.

2. The district court also properly granted summary judgment in favor of the National on Garity's ADA claims. Garity contends that the National discriminated against her because of her disability, failed to accommodate her disabilities, and retaliated against her for engaging in protected activity. To "establish a prima facie case of discrimination under the ADA [the plaintiff] must show that she: (1) is disabled; (2) is qualified; and (3) suffered an adverse employment action because of her disability." 42 U.S.C. § 12101, et seq.; *see Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).

Garity's disparate treatment claim fails at step three because she cannot show either direct evidence of discrimination by the union or evidence that the union treated her less favorably than non-disabled, similarly situated individuals. *See Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 882 (9th Cir. 2007). To the contrary, the National took steps to ensure that Garity was provided with the grievance representatives that she wanted, and her complaints related to actions by the United States Postal Service ("USPS") or actions by NBAs who were not agents of the National.

The prima facia elements of a failure to accommodate claim are similar to a disparate treatment claim, except at step three, the employee must show that "[she] is a qualified individual [who is] able to perform the essential functions of the job with reasonable accommodation." *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th

Cir. 2003). Garity's failure to accommodate claim fails because she cannot show that the National caused or attempted to cause the USPS to fail to provide a reasonable accommodation. *See* 42 U.S.C. § 2000e-2(c)(3). Only USPS officers participated in Garity's accommodation hearing before the District Reasonable Accommodation Committee ("DRAC"), and there is no evidence that the National "prevented or obstructed" the USPS from providing her with an accommodation. Instead, DRAC independently determined that no "reasonable accommodation" was available to allow Garity to perform her essential job duties because her requested accommodations would cause "undue hardship" to the USPS and/or violate the CBA. Further, Garity provided no evidence that she requested the National to address any accommodation issues.

"To establish a prima facie case of retaliation under the ADA, an employee must show that: 1) [she] engaged in a protected activity; 2) suffered an adverse employment action; and 3) there was a causal link between the two." *Pardi v. Kaiser Found. Hospitals*, 389 F.3d 840, 849 (9th Cir. 2004). Garity's claim fails because she cannot satisfy the second and third elements. While Garity alleges that several statements by Scoggins and certain events were retaliatory, she does not articulate how these statements or events were intended to punish or discourage her from pursuing ADA-protected rights. Further, the record evidence is insufficient to attribute the alleged retaliatory statements and events to the

National, as opposed to the USPS, NBAs, or the Local.

For the foregoing reasons, there is no genuine issue of material fact as to whether the National took adverse actions against Garity because of her alleged disability or participation in protected activity in violation of the ADA. The district court correctly determined, as a matter of law, that the National was entitled to summary judgment on Garity's ADA claims.

3. Finally, Garity argues that the district court erred by dismissing the Local and by not establishing which entity was the Local's successor. Generally, arguments that were not raised in the district court are waived. *See Mantra*, 518 F.3d at 1144. We have recognized three narrow exceptions to this general rule. *Flores-Montano,* 424 F.3d at 1047. These exceptions, however, do not apply here. As such, both arguments are waived.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROSEMARY GARITY,

Plaintiff,

v.

APWU-AFL-CIO, et al.,

Defendants.

Case No. 2:11-cv-01109-APG-CWH

ORDER (1) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; (2) DENYING PLAINTIFF'S MOTION TO STRIKE; AND (3) DENYING DEFENDANT'S MOTION TO STRIKE

(ECF Nos. 182, 188, 204)

In 2011, plaintiff Rosemary Garity sued defendants APWU National Labor Organization (APWU) and its local affiliate, APWU Local #7156, for various causes of action under federal and state law based on her experiences working for the United States Postal Service (USPS) at the Pahrump post office. In 2012, the local dissolved and was dismissed from the case, leaving APWU as the lone defendant. Seven years and two trips to the Ninth Circuit later, only three claims remain: disparate treatment, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*

APWU now moves for summary judgment, arguing that Garity cannot establish a prima facie case for any of her claims. APWU contends that it is not liable for the actions of the local, and that there is no evidence that any of the actions taken by the national union or its agents were motivated by Garity's alleged disability or protected activity. Garity responds that APWU took adverse actions against her, primarily its inaction in response to actions by the local and USPS. She also contends that APWU is liable for the actions of the local, and those actions (including the handling of union grievances and disciplinary actions) were discriminatory and retaliatory based on her disability and pursuit of her rights under the ADA.

The parties are familiar with the facts of the case and I will not repeat them here except where necessary. The local union was not acting as an agent of APWU, nor did APWU instigate

or ratify the local's actions such that APWU can be held vicariously liable for them. To the extent any of the APWU's actions can be understood as adverse, Garity has not shown that they were motivated by her disability or protected activity. Therefore, I grant summary judgment to APWU on all of Garity's claims. I also deny both parties' motions to strike each other's filings.

I. ANALYSIS

A. Garity's Motion to Strike (ECF No. 188)

Before filing her opposition to APWU's motion for summary judgment, Garity moved to strike the summary judgment motion and objected to APWU's evidence. This motion primarily consists of arguments that belong in an opposition. ECF No. 188. I granted Garity the ability to file an opposition 15 pages over the typical page limit. ECF No. 185. She did not request, nor did she receive, permission to file what is essentially a second brief in opposition to the defendant's motion. Garity's motion, which goes nearly line-by-line through the motion for summary judgment, primarily contains legal argument about issues in the case and disputes as to APWU's interpretation of the facts.

Under Federal Rule of Civil Procedure 12(f), I "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Under Rule 56(c)(2), a party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Even considering the arguments that might be properly brought in this motion, I do not find them convincing.

Garity does not argue that the motion for summary judgment is redundant, immaterial, impertinent, or scandalous. She first argues that any testimony relied on by APWU that contradicts the testimony of APWU's Rule 30(b)(6) witness must be stricken, relying on the sham affidavit rule. Under that rule, "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). However, Garity does not identify any contradictory testimony that should be stricken, instead pointing to legal argument and citations to documents in the record, none of which Garity argues were not produced or are inadmissible in any other way. Moreover, the contradictions that

Garity believes exist between the motion and the deposition testimony appear to be primarily a function of her presenting to the court out-of-context portions of the transcript or her interpretation of the testimony. This is not sufficient reason to strike every part of the summary judgment motion that Garity believes is not supported by the deposition testimony.

Garity next argues that APWU's counsel should be sanctioned under 28 U.S.C. § 1927 for misrepresenting facts and misstating the law. Under that statute, attorneys "who so multiply the proceedings in any case unreasonably and vexatiously" may be liable for costs and fees. To the extent that Garity contends APWU's counsel has perpetrated a fraud on the court, she must show "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1168 (9th Cir. 2017). Garity produces no evidence (nor does she argue) that APWU's counsel has unreasonably or vexatiously multiplied the proceedings. Nor does she produce evidence of a plan or scheme to defraud the court. Instead, she disputes APWU's interpretation of the evidence and applicable law. These are arguments that belong in her opposition and are insufficient to impose sanctions or find fraud on the court.

Finally, Garity argues that certain documents cited by APWU, including a workplace climate survey and a letter recounting a USPS meeting about possible workplace accommodations, include hearsay and should be stricken. I do not rely on these documents for my rulings, so striking them is unnecessary. Thus, Garity's evidentiary objections are unavailing, and I deny her motion.

B. APWU's Motion for Summary Judgment (ECF No. 182)

Summary judgment is appropriate if the pleadings, discovery responses, and affidavits demonstrate "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), (c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine 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 record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and draw reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenck, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

1. National APWU's Liability for the Actions of the Local Union

Garity claims that the national is responsible for the actions of its local affiliate. APWU responds that there is no evidence showing that the local acted as the national's agent or that the national instigated, supported, ratified, or encouraged the local's alleged violations of the ADA such that the national could be liable for these violations.

APWU can be held liable for alleged violations of the ADA by the local union in two ways. The first is under common law agency principles. *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216–17 (1979). "[I]f the local engages in illegal conduct in furtherance of its role as an agent of the [national], the [national] will be liable for the local's actions." *Laughon v. Int'l All. of Theatrical Stage Emps., Moving Picture Technicians, Artists & Allied Crafts of the U.S. & Can.*, 248 F.3d 931, 935 (9th Cir. 2001). On the other hand, "if the local exercises considerable autonomy in conducting its affairs, it cannot be regarded as an agent of the [national], and the [national] accordingly cannot be held liable under an agency theory for the local's actions." *Id.* In determining whether an agency relationship exists, I look both to the national's constitution as well as the actual relationship between the local and the national. *Id.* "To analyze the actual relationship, [I] consider the local's election of its own officers, ability to hire and fire its own employees, maintenance of its own treasury and independent conduct of its daily business as determinative factors." *Id.*

The national also may be liable for the actions of the local if the national "instigated, supported, ratified or encouraged the Local's activities . . . ." *Moore v. Local Union 569 of Int'l*

Bhd. of Elec. Workers, 989 F.2d 1534, 1543 (9th Cir. 1993). "[C]onstructive knowledge of the Local's possibly illegal activity does not impose on the [national] a legal duty to intervene." *Id.*

a. Law of the Case

Garity points out that, in ruling on an earlier motion to dismiss, Judge Pro found that she had sufficiently pleaded facts showing APWU was vicariously liable for the local's actions.[1] ECF No. 76 at 21. Garity argues that APWU's vicarious liability is thus no longer in issue. APWU responds that Judge Pro's finding meant only that Garity survived the motion to dismiss, not that she had proven APWU's vicarious liability as a matter of law. I agree.

The law of the case doctrine "generally precludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case." *Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012). "The issue in question must have been decided explicitly or by necessary implication in the previous disposition," and application of the doctrine is discretionary. *Id.*

Judge Pro found that Garity pleaded sufficient facts that, if they were taken as true, would prove APWU was vicariously liable for the actions of the local. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) ("On a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party."). He did not find that Garity had proven APWU was vicariously liable for the local's actions, but rather that claims based on vicarious liability survived dismissal at that stage of the case. In a subsequent order, Judge Pro dismissed Garity's ADA claims based on issue preclusion. ECF No. 126. Garity appealed this order, and the Ninth Circuit reversed and remanded. *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848 (9th Cir. 2016). In its opinion, the Ninth Circuit specifically stated that it was not addressing the merits of Garity's claims. *Id.* at

[1] This argument is nearly identical to an argument Garity makes in her motion to strike. *See* ECF No. 188 at 2–7. It is better addressed here in the context of her opposition to the motion for summary judgment.

864. Thus, the issue of whether APWU is vicariously liable for the local's actions has not been decided either by the district or appellate court.[2] I am not precluded from considering the issue.

b. Common Law Agency

The APWU constitution states that each "chartered subordinate body shall be fully autonomous." ECF No. 182-27 at 2. The now-dissolved local had its own constitution and bylaws, which governed membership, elections, meetings, fees, and fiscal policy. ECF No. 182-13. In addition, minutes from the local's meetings show it governed its own affairs without oversight from the national. ECF No. 182-12. The local also decided on its own to dissolve without being forced to do so by the national. ECF No. 182-33. This evidence tends to show that both as a matter of the union's constitution and the actual relationship between the local and national, the local exercised considerable autonomy.

Most of Garity's arguments in response, including that the national exerted a high degree of control over the local and that the national was involved in the local's dissolution, are not supported by evidence in the record. She points to the fact that National Business Agents (NBAs)—who are officers of the national—have jurisdiction over grievances at the third stage of the process and that certain NBAs were involved to some extent in the grievance process for many of her grievances. ECF Nos. 197-62 at 25; 197-65 at 4; 197-21 at 11, 103. However, the evidence Garity points to does not show the national controlled the local's activity. With regard to the withdrawal of grievances by former local president Kathi Poulos, multiple witnesses testified that the NBAs acted in a purely advisory role. *See* ECF Nos. 197-21 at 11, 38–39; 182-20 at 8; 182-28 at 3. Moreover, the fact that the union's grievance structure included eventual involvement by the national does not show that the local union acted as the national's agent. Even making all reasonable inferences in favor of Garity, she has not pointed to evidence that

[2] Nor did APWU waive this argument by not raising it at the appellate level. Garity appealed the first dismissal, which was upheld in its entirety. *Garity v. APWU Nat'l Labor Org.*, 655 Fed. App'x 523 (9th Cir. 2016). The court's finding regarding vicarious liability was not at issue in that appeal. It was also not at issue in the appeal of the second dismissal based on issue preclusion.

raises a material issue of fact as to whether the local was acting as APWU's agent under common law agency principles. It was not.

c. Instigate, Support, Ratify, Encourage

APWU contends that there is no evidence that it instigated, supported, ratified, or encouraged any violations of the ADA by the local. It relies primarily on two cases holding that inaction by a national or international in response to notifications from local members about alleged abuses does not meet this test. *See Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1289 (3d Cir. 1991); *Rodonich v. House Wreckers Union Local 95 of Laborers' Int'l Union*, 817 F.2d 967, 973–74 (2d Cir. 1987). In *Brenner*, the Third Circuit held the plaintiffs had not shown encouragement or ratification because receiving letters with allegations of fact shows at most constructive knowledge that is insufficient to impose a legal duty upon the international union to intervene in a local's affairs. 927 F.2d at 1289. In *Rodonich*, the Second Circuit held that ratification required full knowledge of the alleged violations, and upheld a jury instruction stating that the "mere fact that the International had oral or written statements . . . does not establish full knowledge . . . of the facts asserted in those statements and letters." 817 F.2d at 973 (internal quotation and citation omitted); *see also id.* at 974 (upholding a jury instruction making clear that the international had no independent duty to intervene in the local's affairs).

APWU contends that the internal charges Garity attempted to appeal to the national dealt primarily with charges unrelated to disability discrimination. ECF Nos. 182-34; 182-35. The first appeal letter, dated February 7, 2011, asserts charges against Poulos regarding union issues, as well as an additional charge of "Title VII discrimination on the basis of retaliation for EEO activity by being a part of the decision to remove me as shop steward to deny me the right of experienced representation denying me due process." ECF No. 182-34 at 2. The second letter, dated April 9, 2012,[3] asserts various charges unrelated to discrimination, as well as discrimination against someone other than Garity. ECF No. 182-35 at 2–3. Even construing these letters

[3] The handwritten date on the letter is "04-09-12" but the letter refers repeatedly to April 2011.

generously, the receipt of either by APWU is insufficient to impose on it a duty to intervene in the local's affairs. *See Brenner*, 927 F.2d at 1289; *Rodonich*, 817 F.2d at 973–74. At most, the letters would give the national constructive knowledge of the local's actions, which does not rise to the level of instigation, support, ratification, or encouragement.

Garity contends that her communications to APWU regarding the local's actions—and APWU's inaction in response—are sufficient to hold the national liable. In support of this argument, Garity cites to a 111-page exhibit comprised of emails from Garity to national officials, grievances Garity filed, handwritten notes, grievance settlements and withdrawals, NLRB charges against the local union, appeals of internal charges to the national, email chains among USPS officials and national officials, and letters from Garity to APWU's president. ECF No. 197-54. These documents do not specifically address the local's alleged disability discrimination and retaliation. Even if Garity's emails and grievance appeals to APWU officials show that APWU had constructive knowledge of the alleged ADA violations, Garity has not pointed to any evidence showing that APWU affirmatively instigated, encouraged, supported, or ratified these actions.

Garity also produces a letter from Cliff Guffey, the APWU president, in which he writes that he is assigning Omar Gonzalez (APWU Regional Coordinator) "to investigate and for a response." ECF No. 197-89. This letter is dated October 3, 2011, and does not specify what Gonzalez is to be investigating. Nor does Garity produce evidence that Gonzalez did not in fact investigate whatever he was assigned to investigate.[4] *Cf. Brenner*, 927 F.2d at 1289 (finding that the international union was not required to credit as true the plaintiff's allegations in letters, and noting that the international had conducted investigations in response to some of the letters). The Guffey letter does not show support or ratification of any action by the local, or even inaction by the national.

[4] Indeed, Garity produced emails from her to Gonzalez that support an inference that he did take steps to investigate or at least reach out to her. *See* ECF No. 54 at 3–4.

In sum, Garity has failed to demonstrate a genuine issue of material fact as to whether APWU is liable for the local's actions. It is not. Therefore, to the extent that Garity's claims rely on actions taken only by members of the local union, I grant summary judgment to APWU.

2. Disability Discrimination

a. Disparate Treatment

To "establish a prima facie case of discrimination under the ADA [the plaintiff] must show that she: (1) is disabled; (2) is qualified; and (3) suffered an adverse employment action because of her disability." *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001). As applied to a discrimination claim against a union, the plaintiff must show either direct evidence of discrimination by the union or evidence that the union treated her less favorably than non-disabled, similarly situated individuals. *See Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 882 (9th Cir. 2007) (holding a union member can make out a prima facie claim of discrimination under Title VII if it "deliberately declines to pursue a member's claim" because of her protected class or treats her less favorably than others similarly situated);[5] *Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745*, 660 F.3d 211, 214 (5th Cir. 2011).

The parties dispute the causation standard for proving disability discrimination. APWU contends that but-for causation is required, relying on *Gross v. FBL Financial Services*, 557 U.S. 167 (2009). In *Gross*, the Supreme Court held that the text of the Age Discrimination in Employment Act (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 amended Title VII" to change the causation standard to a motivating factor. *Id.* at 174. APWU argues that because the ADA—like the ADEA—was not amended as Title VII was, the plaintiff must show but-for causation. Garity contends that her disability must be a motivating factor, rather than the but-for cause of any adverse actions. *See Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (applying the motivating

[5] Courts "generally use Title VII precedent to interpret ADA claims." *Garity*, 828 F.3d at 858 n.9.

factor standard), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360–62 (2013) (holding Title VII retaliation claims must be proved applying a but-for causation standard); *see also Phillips v. Victor Cmty. Support Servs., Inc.*, 692 Fed. App'x 920, 921 (9th Cir. 2017) (finding the district court correctly applied the motivating factor standard). I need not decide this issue, because even applying the more generous standard advocated by Garity, I still find that she has not shown a genuine issue of material fact that her disability was the motivating factor behind any APWU action. *Cf. Bukiri v. Lynch*, 648 Fed. App'x 729, 731 n.1 (9th Cir. 2016) (noting that other circuits have "retreated from the motivating factor standard in ADA cases" but declining to decide the correct standard because it did not affect the outcome of the case).

APWU argues that the national did not take any adverse actions against Garity. It notes that resolving grievances in a manner unfavorable to Garity does not mean that she was treated adversely. APWU points to two non-disability-related grievances settled by NBA Gilbert Ybarra, one finding a violation (ruling in favor of Garity) and the other finding no evidence of a violation. ECF Nos. 182-37; 182-38. APWU also reiterates its argument that Garity's communications to the national did not impose on it an affirmative duty to intervene in the local such that its inaction could be considered an adverse action. Finally, APWU contends there is no evidence that it failed to properly represent Garity in her grievances or treated her any differently than similarly situated individuals.

In her opposition, Garity lists over twenty actions she considers to be adverse. However, the majority of those actions were taken by USPS or local union officials. For example, Garity argues that her hours were cut, she was accused of murder, and she was not allowed to perform certain duties at the post office. Because APWU is not liable for the actions of the local or USPS, these actions cannot form the basis of Garity's claim. With respect to actions involving APWU, Garity contends that certain of her grievances were withdrawn or settled, she was without valid representation, she was given a six-day work assignment in violation of her medical restrictions,

NBA Shirley Taylor tried to prevent her from receiving back pay, and the national did not take action upon Garity notifying it of discrimination.[6]

However, even assuming that the evidence shows these actions occurred, Garity produces no evidence that APWU took any of them because of her disability or that she was treated differently than similarly situated union members. The one adverse action Garity points to involving similarly situated individuals is that her hours were cut in comparison to other part-time flex and non-traditional full-time employees. However, these actions were taken by USPS, and the only evidence Garity offers in support are work hour reports and a USPS calendar without any context or explanation as to how they show that she was treated differently than similarly situated individuals because of her disability. ECF No. 182-35. Therefore, Garity has not raised a genuine issue of material fact regarding her disparate treatment claim. I grant summary judgment for APWU on this claim.

b. Failure to Accommodate

The prima facie case for a failure to accommodate claim is very similar to that of a disparate treatment claim. A plaintiff must demonstrate "(1) [she] is disabled within the meaning of the ADA; (2) [she] is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and (3) [she] suffered an adverse employment action because of [her] disability." *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003). Generally, such a claim is made against an employer, who has "a duty to engage in an interactive process to consider whether" an accommodation is possible. *Id.* at 1115. In the context of a claim against a union, a plaintiff must show that the union caused or attempted to cause the employer to fail to provide a reasonable accommodation. *See* 42 U.S.C. § 2000e-2(c)(3); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42 (8th Cir. 1975) ("[A] union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the

[6] APWU argues in its motion that I should consider only actions occurring before May 7, 2011, as that is the last date included in Garity's Equal Opportunity Employment Commission (EEOC) charge that forms the basis of her complaint. Because I am granting summary judgment on all claims even considering actions occurring after that date, I find it unnecessary to address this argument.

employer so as to cause the employer to discriminate."), *rev'd on other grounds*, 432 U.S. 63 (1977).

APWU argues that Garity never requested an accommodation from the national, and neither it nor the local participated in USPS's interactive accommodation process. *See* ECF No. 182-35. APWU contends it had no knowledge of any requests for accommodation, and that Garity has no evidence to show that any of its actions were motivated by her disability. Garity does not differentiate the adverse actions she considers to have been disparate treatment from those she considers to be a failure to accommodate. Therefore, I interpret this claim to rely on the withdrawal or handling of Garity's grievances, the six-day work assignment, her lack of union representation during early 2011, Taylor's handling of Garity's suspension grievance, and APWU's inaction in the face of notification by Garity as to a lack of accommodation.

Garity's failure to produce evidence showing that her disability was a motivating factor in any of these actions is fatal to her claim. As to the grievance handling, Garity points only to testimony by Poulos that NBAs James Scoggins and Ybarra gave Poulos advice on how to handle the grievances. *See, e.g.*, ECF No. 197-21 at 11 ("Did I consult them? Yes. The decisions were mine."). APWU has produced testimony from both Scoggins and Ybarra that they were unaware of Garity's medical conditions. *See* ECF Nos. 182-24 at 5 (Scoggins testifying at his deposition that he had no knowledge of Garity's restrictions or disabilities); 182-31 at 3 (Ybarra testifying no one discussed Garity's medical conditions with him and he was unaware of any attempts by Poulos to accommodate her disabilities). Garity has produced no evidence to rebut this showing or to show that Scoggins and Ybarra were motivated by her disability in advising Poulos regarding whether to withdraw grievances, or in their handling of her grievances on appeal.

Scoggins' lack of knowledge as to Garity's disability also negates any claim based on his involvement in the local's decision about six-day bids. The evidence Garity produced shows only that Scoggins worked with the local on such bids, not that he was involved in a particular decision as to Garity's work schedule. *See* ECF Nos. 182-41 at 103–04. Garity has produced no evidence

showing that Scoggins was motivated by her disability when advising the local union regarding six-day bids.

Garity also claims that she was without union representation from January through August 2011. In support, she produces documentation that Poulos and Raydell Moore, a local union member, were the local clerk shop stewards at the time, and that in May, Las Vegas local president Jerry Bevens was certified to act as her shop steward with regard to all discipline issues. ECF No. 197-81 at 2; 6–7; *see also* ECF No. 197-40 at 58 (Bevens' deposition testimony stating he was only designated to handle Garity's discipline grievances). *But see* ECF No. 182-50 at 2 (Bevens' declaration that he "effectively became Ms. Garity's designated shop steward"). Garity also points to Poulos' deposition testimony that once Bevens was appointed, Poulos understood that she was to no longer handle Garity's grievances. ECF No. 197-21 at 45–46; 66. This evidence shows there was confusion about the extent of Bevens' representation of Garity. But the fact that Bevens might not have been her designated representative for all possible grievances does not show that Garity was without representation. *See, e.g.*, ECF No. 182-50 (Bevens' understanding he was appointed because Garity did not want to be represented by anyone at the Pahrump local or had brought charges against possible representatives); ECF No. 197-21 at 43–45 (Poulos' testimony she was Garity's representative until Bevens was appointed). Garity has not produced evidence showing a lack of representation during the relevant time period, that APWU was involved in any decision to withhold representation, or that any decision regarding representation was motivated by her disability.

Next, Garity points to Taylor's attempt to address her disciplinary suspension. *See* ECF No. 197-65 at 4 (email written by Taylor detailing her experience with Garity). As part of Taylor's representation of Garity, Garity sent her an email in which she reiterated that they had discussed the fact that Garity had applied for disability retirement and was in need of accommodations from USPS. ECF No. 197-54 at 94. However, neither Taylor's email explaining her involvement with Garity nor Garity's email shows that Taylor's attempt to resolve Garity's

grievance—assuming this is an adverse action—was motivated by Garity's disability. Garity offers no other evidence to support such an inference.

Finally, Garity contends that APWU took no action even though she requested assistance in being accommodated, citing again to the 111-page exhibit containing many different kinds of documents. *See* ECF No. 197-54. While these documents show that Garity was in touch with national officials, they do not mention specific instances of a failure by USPS or the local to accommodate Garity's disabilities. In fact, most of these documents deal with Garity's myriad other grievances about her workplace. Garity has not produced any evidence showing that APWU was involved in any accommodation decision, nor has she produced any evidence showing that she asked APWU to specifically address any accommodations issues. Garity has also not produced any evidence showing that APWU's inaction was motivated by her disability.

Garity has failed to show a genuine issue of material fact regarding whether APWU caused USPS to fail to reasonably accommodate her disabilities. APWU did not do so, so I grant summary judgment for APWU on this claim.

3. Retaliation

"To establish a prima facie case of retaliation under the ADA, an employee must show that: (1) he or she engaged in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link between the two." *Pardi v. Kaiser Found. Hospitals*, 389 F.3d 840, 849 (9th Cir. 2004). "Pursuing one's rights under the ADA constitutes a protected activity." *Id.* at 850. "An adverse employment action is any action reasonably likely to deter employees from engaging in protected activity." *Id.* (internal quotation omitted). When adverse actions "closely follow complaints of discrimination, retaliatory intent may be inferred." *Id.* The standard for the "causal link is but-for causation." *T.B. ex rel Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015).

APWU argues it did not take any adverse actions against Garity, and that any adverse actions taken were not caused by her ADA-protected activity. APWU contends that NBAs are given broad discretion to resolve grievances, and Garity has not produced any evidence that any

of her grievances was settled, withdrawn, or remanded as a result of her protected activity. APWU also argues that to the extent Garity's retaliation claim is based on her National Labor Relations Board (NLRB) charge against the local union, there is no evidence APWU knew about that charge. APWU contends that to the extent the claim is based on her EEOC charges, the only responsive action from the national was to appoint Bevens as Garity's representative, which is not an adverse action. To the extent the claim is based on Garity's appeals of internal charges, APWU contends its response was to inform her of the proper procedure to bring those charges. Moreover, APWU argues that there is no evidence in the record showing that Garity's pursuit of her rights under the ADA was the but-for cause of any of its action.

Garity argues that her protected activity included three EEOC charges, three NLRB charges, appeals of internal union charges, and emails and letters to national officials. Many of the adverse actions she lists were taken by USPS or local union officials, for which APWU cannot be held liable. For example, Garity refers to reduced hours at work, her suspension, and Poulos's handling of her grievances.

As for actions attributable to APWU and its officers, Garity has failed to show either that they are adverse or that they were caused by her protected activity. Four of these allegations involve Scoggins. First, Garity refers to a telephonic statement by Scoggins to Poulos about Garity's rights at work that was apparently made within 30 days of her filing one of her EEOC charges. *See* ECF No. 197–21 at 98–99. The statement was that Garity needed to find out the purpose of a meeting with USPS management before invoking her right to union representation. *Id.* Garity has not shown that she knew about this statement until Poulos mentioned it in her deposition, and therefore she has not shown that the statement reasonably deterred her from protected activity. Nor has Garity shown that this statement was made because of her pursuit of ADA-protected rights. Second, Garity alleges Scoggins agreed to a six-day work bid for Garity even though she was on a five-day work restriction. However, as discussed above, the evidence cited by Garity shows at most that Scoggins worked with the local union and management on six-day bids and told local officials that such bids were in place in California. *See* ECF No. 197-41 at

103. This evidence does not show that Scoggins was involved with any decision to make Garity work for six days or that such a decision would have been caused by Garity's protected activity.

Third, Garity points to an email Scoggins sent to Rob Strunk (who is not identified but is presumably an APWU official) in which he details his and other NBAs' experiences with Garity. ECF No. 197-54 at 103. Again, Garity does not show that she knew about this email before this litigation, nor does she explain how, without knowing about it, this email could have deterred her from engaging in protected activity.

Fourth, Garity points to Scoggins' handling of one of her grievances from September 2010. *See* ECF No. 197-54 at 5–12. The grievance addressed many issues at the Pahrump post office, most of which did not relate to disability discrimination. The only mention of discrimination was vague and without supporting detail or factual allegations. *See id.* at 8–9 ("Retaliation Title VII An employer may not 'retaliate' against. ADA protects intimidation, threats, harassment in exercise of rights. . . . Failure to accommodate & discrimination are also occurring."). Scoggins' response was to let Garity know that APWU attempted to go through the grievance process but USPS maintained that the grievance had not been properly appealed. *Id.* at 12. He requested proof of Garity's proper appeal so that the matter could be dealt with further. *Id.* Rather than showing an adverse action by APWU, this evidence shows that Scoggins attempted to engage in the grievance process on Garity's behalf. Garity does not explain how the APWU's attempt to make sure it had the proper documentation so that it could pursue her grievance would deter her from engaging in protected activity.

Next, Garity points to APWU's motion in a separate case opposing Garity's motion to vacate an arbitration award regarding her grievance over her suspension. ECF No. 197-58. Garity has not provided any evidence that APWU's litigation strategy is causally linked to any of her EEOC, NLRB, or internal charges and communications regarding disability discrimination. Garity also argues that Taylor retaliated against her by "formulating an agreement to provide back pay of *4 hours a day because of Garity's disabilities* while she was able to work full hours within two months of the lawsuit." ECF No. 197 at 26 (emphasis in original). In an email written by

Taylor explaining how she handled Garity's grievance about her suspension, Taylor noted that Garity would not accept a resolution that did not address disability retirement, which was not possible because Garity "was not disciplined for anything concerning disability." ECF No. 197-65. Garity did not want to settle, so Taylor appealed the suspension to arbitration. *Id.* Again, rather than taking adverse action, Taylor attempted to help Garity fight her suspension, and rather than make a unilateral decision and accept a settlement, Taylor rejected the settlement and appealed USPS's actions to arbitration. That Taylor was not able to get the exact outcome Garity desired does not mean that she took adverse action against her. Furthermore, Garity has offered no evidence to show that her protected activity was the but-for cause of Taylor's actions.

Finally, Garity argues that APWU's inaction in the face of numerous communications and appeals was a form of retaliation. Even if such inaction could be considered adverse action that would reasonably deter an employee from protected activity, Garity has not produced any evidence showing that APWU purposefully took no action because of her protected activity. Any temporal proximity arises from how often Garity engaged in protected activity rather than giving rise to an inference of retaliatory intent.

Garity has failed to show a prima facie case of retaliation under the ADA against APWU. I grant summary judgment to APWU on this claim.

II. CONCLUSION

IT IS THEREFORE ORDERED that defendant APWU National Labor Organization's motion for summary judgment **(ECF No. 182) is GRANTED.** The clerk of court shall enter judgment in favor of APWU National Labor Organization and against Rosemary Garity.

IT IS FURTHER ORDERED that plaintiff Rosemary Garity's motion to strike **(ECF No. 188) is DENIED.**

IT IS FURTHER ORDERED that APWU's motion to strike **(ECF No. 204) is DENIED as moot.**

DATED this 14th day of March, 2018.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Rosemary Garity

Plaintiff,

v.

APWU-AFl-CIO ,et al

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 2:11-cv-01109-APG-CWH

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Defendant APWU National Labor Organization and against Plaintiff Rosemary Garity.

3/15/2018
Date

DEBRA K. KEMPI
Clerk

/s/ S. Denson
Deputy Clerk

APPENDIX C

FILED

FEB 24 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSEMARY GARITY,

Plaintiff-Appellant,

v.

APWU NATIONAL LABOR ORGANIZATION,

Defendant-Appellee,

NEVADA POSTAL WORKERS UNION,

Intervenor.

No. 18-15633

D.C. No.
2:11-cv-01109-APG-CWH
District of Nevada,
Las Vegas

ORDER

Before: PAEZ and OWENS, Circuit Judges, and ENGLAND,* District Judge.

The panel has unanimously voted to deny the Appellant's petition for rehearing.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Morrison C. England, Jr., United States Senior District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROSEMARY GARITY, Plaintiff, v. APWU NATIONAL AFL-CIO and APWU LOCAL #7156, Defendants.	2:11-CV-01109-PMP-CWH ORDER

Presently before the Court is Defendant APWU Local #7156's Motion to Dismiss Amended Complaint (Doc. #57) and Defendant APWU National AFL-CIO's Motion to Dismiss Amended Complaint (Doc. #60), both filed on December 6, 2011. Plaintiff Rosemary Garity filed an Opposition (Doc. #69) on December 19, 2011. Defendants filed a Joint Reply (Doc. #70) on January 6, 2012.

I. BACKGROUND

The following factual recitation is derived from Plaintiff Rosemary Garity's Amended Complaint. For purposes of Defendants' motions to dismiss, the Court accepts Plaintiff's factual allegations as true. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A. Plaintiff's Employment and Impairments

Plaintiff Rosemary Garity is employed by the American Postal Worker's Union ("the National APWU") as vice-president of the southern district of Nevada. (Am. Compl. (Doc #54) at 4:18.) Plaintiff was also employed by APWU Local #7156 ("the Local

APWU") as a shop steward between January 2008 and January 12, 2011. (Id. at 4:19-20.) Plaintiff was a member of the Local APWU at all times relevant to this action. (Id. at 4:20.) Plaintiff suffers from mental and physical impairments including: heel spurs, chest pains, chronic fatigue, sleep disturbance, myalgia, muscle spasms, osteoporosis, major depressive disorder, anxiety disorder, panic attacks, and cancer. (Id. at 4:26-5:1.)

In September 2010, Debra Blankenship ("Blankenship") became the new Postmaster. (Id. at 22:26-23:2.) After Blankenship's arrival, Plaintiff began to observe favoritism and disparate treatment in the office and decided to address it through the grievance system. (Id. at 23:1-2.) On November 10, 2010, Kathi Poulos ("Poulos"), the newly-elected president of the Local APWU, arrived after being voted in by a group whom Plaintiff labels the "favorite employees." (Id. at 23:6-8.) On December 29, 2010, Poulos entered into an agreement with the United States Post Office management in Pahrump, Nevada ("Management") to cut Plaintiff's hours. (Id. at 23:11-13.) From December 2010 through January 2011, Poulos secretly met with others to discuss removing Plaintiff from her position as shop steward because Plaintiff had begun to file grievances to address the favoritism and disparate treatment. (Id. at 23:14-24.)

On January 11, 2011, Plaintiff missed a grievance meeting in Las Vegas "due to [her] legs and feet locking up severely." (Id. at 6:8-10.) That same day, Poulos informed Management that Poulos planned to remove Plaintiff from her position as shop steward for the Local APWU. (Id. at 24:15-17.) Management sent Plaintiff home early. (Id. at 24:16.) The next day, Poulos told Plaintiff "after that stunt you pulled yesterday" she was removing Plaintiff as shop steward for the Local APWU and appointing herself to fill the position. (Id. at 6:10-12, 24:19-20.)

B. Plaintiff's Grievances

Plaintiff asked APWU officials to file dozens of grievances on her behalf. Poulos and other officials refused to investigate and file many of these grievances. (Id. at

14:22-19:12.) Of the grievances filed, Poulos assured Plaintiff that all the grievances were valid, but Poulos later withdrew over forty of these grievances. (Id. at 20:2-22:20.) In one instance, on January 22, 2011, Poulos told Plaintiff that another employee wanted Poulos to withdraw Plaintiff's grievances regarding discrimination and retaliation, which Poulos did. (Id. at 26:3-19.) Poulos was openly hostile towards Plaintiff every time she requested that Poulos file a grievance on Plaintiff's behalf, and Poulos told Plaintiff that she was the only one having problems. (Id. at 11:6-8.) Poulos also refused to address Management's "continual and constant mental abuse/harassment" of Plaintiff. (Id. at 11:1-2.) On February 1, 2011, Plaintiff approached the alternate shop steward, Al Weyen ("Weyen"), to file multiple grievances but he refused to investigate and the time limits on the grievances lapsed. (Id. at 27:19-23.) Furthermore, the National APWU business agents James Scoggins ("Scoggins") and Gilbert Ybarra ("Ybarra") withdrew grievances, settled grievances in favor of Management, and advised Poulos to withdraw and not file grievances on Plaintiff's behalf. (Id. at 5:8-11, 10:9-11.)

Many of Plaintiff's grievances related to adverse scheduling. Plaintiff repeatedly filed grievances relating to the cutting of her hours and the "criminal delay" of mail. (See, e.g., id. at 15:8-20.) Poulos and Management scheduled Plaintiff to work irregular hours. (See, e.g., id. at 28:2-3.) During a discussion between Poulos and Plaintiff on March 23, 2011, Poulos stated that Plaintiff was restricted to working four hours a day, four days a week; Plaintiff disagreed. (Id. at 30:23-27.) Poulos also stated that it was better for Plaintiff's chronic fatigue and sleep apnea to start work later in the day, but Plaintiff argued that it was actually better for her condition if she started work earlier in the day. (Id. at 31:1-3.) Poulos indicated that Plaintiff's work restrictions kept changing based on Management's instructions to Poulos. (Id. at 30:28-31:1.)

Plaintiff also grieved the quality of the representation she received from Defendants and requested alternative representation. (See, e.g., id. at 36:1-2.) On April 21,

2011, Management refused to sign Plaintiff's request for representation. (Id. at 33:1-2.) On May 2, 2011, the regional coordinator assigned Jerry Bevens ("Bevens"), President of APWU Local #761, as Plaintiff's new representative for disciplinary grievances. (Id. at 33:27-28, 34:24.)

C. Plaintiff's Discipline

On April 20, 2011, Poulos wrote a three-page statement to Management regarding Plaintiff. (Id. at 32:23-25.) Management used this letter in its decision to suspend Plaintiff for thirty days. (Id. at 32:25-26.) Plaintiff received her thirty day suspension letter on April 28, 2011. (Id. at 33:17-18.) On May 9, 2011, Plaintiff received a notice of removal. (Id. at 34:7-9.) On May 30, 2011, Bevens wrote a letter stating that Plaintiff had "no chance of surviving the discipline without outside representation" and that Poulos and Raydell Moore, ex-regional coordinator and technical advisor to the Local APWU, were refusing to cooperate with the investigation and were working with Blankenship and Management instead of the APWU. (Id. at 34:24-28.) On June 11, 2011, Plaintiff was removed from the Postal Service. (Id. at 35:10.) Plaintiff claims she was disciplined for requesting alternative representation from the APWU, time off, and schedule changes; Poulos's statements to Management; and Plaintiff's disabilities. (Id. at 33:1-5, 8:22-24, 32:23-26.)

After Plaintiff's removal, National APWU business agent Shirley Taylor ("Taylor") negotiated a settlement on Plaintiff's behalf wherein Plaintiff would be paid for four hours a day from June 25, 2011 through September, 2011. (Id. at 7:26-27.) Plaintiff asked Taylor if she would be removed, reinstated, or retired, and Taylor responded no. (Id. at 7:28-8:1.) Taylor told Plaintiff she could not return to work because Plaintiff had applied for disability retirement. (Id. at 8:12-13.) Taylor also told Plaintiff that her doctor stated Plaintiff could not work. (Id. at 8:15-16.) Plaintiff alleges that many employees apply for disability retirement and keep working until approved, her doctor did not state

that she could not work, she could perform her job duties if properly accommodated, and Plaintiff's grievance had nothing to do with her restrictions but instead her grievance relates to Plaintiff's unjust removal. (Id. at 8:13-22.)

On August 10, 2011, Poulos and Danielle Bennett ("Bennett"), another shop steward, announced that they had agreed to new work restrictions for Plaintiff: fewer than forty hours a week, six days a week. (Id. at 2:4-5, 35:24-25.) Plaintiff requested Bennett file a grievance regarding the new restrictions, but Bennett told Plaintiff that she was not Plaintiff's shop steward. (Id. at 35:26-27.) Plaintiff asked Poulos to file a grievance regarding these restrictions, but Poulos refused as well. (Id. at 35:28-36:2.) In August 2011, National APWU business agent Scoggins agreed to the six-day a week assignment for Plaintiff. (Id. at 4:6-8, 36:5-6.) Plaintiff was not happy with this new assignment because it was contrary to a prior position taken by the National APWU and all but one person at the August union meeting viewed this new assignment as undesirable. (Id. at 4:6-12, 36:6-7.) The Postal Service reinstated Plaintiff on September 27, 2011. (Id. at 36:13.)

After Plaintiff's reinstatement, on October 18, 2011, a shop steward bullied Plaintiff, and in response, Plaintiff called threat assessment because she was crying uncontrollably. (Id. at 36:17-20.) On October 21, 2011, Plaintiff had a mental breakdown because she was unable to handle any more abuse. (Id. at 36:21.) From the end of October to the beginning of November 2011, Plaintiff took vacation time, sick leave, and leave under the Family and Medical Leave Act ("FMLA") to remove herself from the environment. (Id. at 36:22-23.)

D. History of the Present Action

On February 17, 2011, Plaintiff filed an Equal Employment Opportunity ("EEO") complaint against the APWU. (Id. at 28:21.) On March 18, 2011, Plaintiff filed charges with the Equal Employment Opportunity Commission ("EEOC"). (Id. at 30:16.) However, the APWU refused to mediate the EEOC grievances. (Id. at 33:25.) On June 23,

2011, the EEOC issued Plaintiff a Notice of Right to Sue letter. (Id. at 35:11; Mot. for Leave (Doc. #74).)

On July 6, 2011, Plaintiff filed a Complaint (Doc. #1) in this Court against Defendants, which this Court dismissed without prejudice for insufficient service of process and failure to state a claim. (Order (Doc #53).) The Court ordered Plaintiff to effect proper service by November 28, 2011. (Id.) Plaintiff then filed an Amended Complaint (Doc. #54) on November 15, 2011. Plaintiff filed proof of service on the National APWU on December 5, 2011 and the Local APWU on December 9, 2011. (Proof of Serv. (Doc. #56); Proof of Serv. (Doc. #67).) Plaintiff's Amended Complaint asserts violations of 42 U.S.C. §§ 2000e-2, 2000e-3 ("Title VII"); the Americans with Disabilities Act of 1990 ("ADA"); the Americans with Disabilities Act Amendments Act ("ADAAA"); and the Rehabilitation Act of 1973 ("Rehab Act"). Specifically, Plaintiff alleges: disability discrimination in violation of Title VII (counts I, IV, and V); retaliation in violation of Title VII (count II); hostile work environment in violation of Title VII (count III); intentional infliction of emotional distress (count VI); negligent retention (count VI)[1]; and conspiracy to violate her civil rights under 42 U.S.C. §§ 1981, 1983, 1985, 1986 (count VII).

Defendants now move to dismiss Plaintiff's Amended Complaint. Defendants argue Plaintiff fails to state a claim upon which relief may be granted. In addition, the National APWU argues Plaintiff failed to exhaust her administrative remedies, and the National APWU is not vicariously liable for the Local APWU's conduct. The Local APWU asserts that Plaintiff has not filed proof of service on the Local APWU. Plaintiff responds that she has sufficiently pled facts, if found to be true, to establish a prima facie case for each of her causes of action. Plaintiff also argues she exhausted her administrative

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[1] Plaintiff erroneously labels two claims as Count VI.

remedies, but does not respond to the Local APWU's proof of service argument.[2]

II. DISCUSSION

A. Procedural Grounds for Dismissal

1. Proof of Service

The Local APWU argues that Plaintiff has not filed proof of service upon the Local APWU in compliance with Federal Rule of Civil Procedure 4, and thus the Court must dismiss all claims against the Local APWU. Plaintiff does not respond.

Federal Rule of Civil Procedure 4(m) requires that a plaintiff serve a defendant "within 120 days after the complaint is filed." Rule 4(l)(1) provides that "[u]nless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit."

Here, Plaintiff filed the Amended Complaint on November 15, 2011. (Am. Compl. (Doc. #54).) On December 5, 2011, Plaintiff filed proof of service of the Amended Complaint on the National APWU, including an affidavit by the process server, stating that he served the National APWU on November 22, 2011. (Proof of Serv. (Doc. #56).) Although Plaintiff did not file proof of service on the Local APWU prior to the Local APWU filing its Motion to Dismiss, on December 9, 2011, Plaintiff filed proof of service on the Local APWU, including a statement by the server that he served the Local APWU on December 7, 2011. (Proof of Serv. (Doc. #67).) December 5 and 9, 2011fall within the 120 day time period for service under Rule 4(m). Therefore, the Court will deny the Local APWU's Motion to Dismiss for improper service.

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[2] Plaintiff attaches four letters to her Opposition. Federal Rule of Civil Procedure 12(d) "gives courts the discretion to accept and consider extrinsic materials offered in connection with [a motion to dismiss], and to convert the motion to one for summary judgment." Hamilton Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1207 (9th Cir. 2007). The Court declines to consider the evidence presented by Plaintiff and will not convert Defendants' motions to dismiss to motions for summary judgment.

2. Exhaustion Requirement

The National APWU argues that Plaintiff did not exhaust her administrative remedies with respect to any claim against the National APWU because she did not name the National APWU in her EEOC complaint. Plaintiff responds that she filed a charge against both Defendants, and even so, the claims against the National APWU were reasonably expected to grow out of the allegations presented to the EEOC.

To bring an ADA claim for disability discrimination,[3] a plaintiff must first exhaust her administrative remedies. 42 U.S.C. §§ 2000e-5, 12117(a) (incorporating the Title VII exhaustion requirement into Title I of the ADA); Sommatino v. United States, 255 F.3d 704, 707 (9th Cir. 2001). To illustrate, a federal employee must notify an EEO counselor of the discrimination within forty-five days of the alleged conduct, and if the matter remains unresolved, the employee may file a formal complaint with the EEOC. Sommatino, 255 F.3d at 708. This exhaustion requirement is statutory rather than jurisdictional. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). But,

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[3] Title VII prohibits discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. Plaintiff describes her claims as Title VII claims for discrimination based on disability, but disability is not a protected class under Title VII. However, at the beginning of her Amended Complaint, Plaintiff also alleges that Defendants violated her rights under the ADA. The ADA prohibits discrimination against employees with disabilities by certain employers. 42 U.S.C. §§ 12111(5), 12112(a). The Court will liberally construe Plaintiff's Title VII claims (counts I to V) as ADA claims. Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987) ("The Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants." (quotation omitted)).

Plaintiff also alleges Defendants violated her rights under the Rehab Act, which prohibits discrimination against employees with disabilities by federal employers, federal contractors, and recipients of federal financial assistance. 29 U.S.C. §§ 791, 793, 794; Oliver v. Ralphs Grocery Co., 654 F.3d 903, 910 n.10 (9th Cir. 2011). Plaintiff has not alleged that Defendants are federal employers, federal contractors, or recipients of federal financial assistance. As such, the Court will not construe Plaintiff's Title VII claims as Rehab Act claims. Likewise, Plaintiff alleges Defendants violated her rights under the ADAAA; however, the ADAAA merely expanded the definition of "disability" under the ADA. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 853 (9th Cir. 2009). Therefore, the Court will not construe Plaintiff's Title VII claims as ADAAA claims.

substantial compliance with the presentment requirements of a discrimination complaint is a jurisdictional prerequisite. Sommatino, 255 F.3d at 708.

The district court's jurisdiction is limited to the scope of the EEOC charge and investigation, claims that are "'like or reasonably related' to the allegations made in the EEOC charge," and claims that "can reasonably be expected to grow out of" the EEOC charge and investigation. Deppe v. United Airlines, 217 F.3d 1262, 1267 (9th Cir. 2000) (quotations omitted). More specifically, district courts have jurisdiction over claims against parties named in the EEOC charge, parties involved in the conduct giving rise to the EEOC charge, and parties that should have anticipated that the plaintiff would bring suit against them. Sosa v. Hiraoka, 920 F.2d 1451, 1458-59 (9th Cir. 1990) (quotations omitted).

Here, Plaintiff uses the generic term "APWU" in her EEOC Charge of Discrimination. (Decl. of Anton Hajjar in Supp. of Defs.' Motions to Dismiss (Doc. #13), Ex. 1.) Likewise, in her Amended Complaint, Plaintiff alleges that she filed an "EEO complaint against the APWU" and "EEOC charges [] against [the] APWU." (Am. Compl. at 28:21, 30:16.) . Plaintiff does not specify in her Amended Complaint whether her EEO complaint and EEOC charges were against the National APWU, the Local APWU, or both. Construing Plaintiff's pro se Amended Complaint liberally, the Court finds that Plaintiff filed an EEO complaint and EEOC charges against both Defendants.

But even assuming Plaintiff did not name the National APWU in her EEO complaint and EEOC charges, the National APWU was involved in the acts giving rise to the EEOC claims and should have anticipated that Plaintiff would bring suit against it. For example, National APWU business agents Scoggins and Ybarra withdrew grievances, settled grievances in favor of Management, and advised Poulos to withdraw and not file grievances on Plaintiff's behalf. (Id. at 5:8-11, 10:9-11.) Accordingly, the Court has jurisdiction over Plaintiff's claims against Defendants, and thus, the Court will deny the National APWU's Motion to Dismiss for failure to exhaust administrative remedies.

B. Substantive Grounds for Dismissal

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move the Court for the dismissal of a complaint based upon its "failure to state a claim upon which relief can be granted." In considering whether the complaint is sufficient to state a claim, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship v. Turner Broad. Sys. Inc., 135 F.3d 658, 661 (9th Cir. 1998). To succeed on such a motion, the defendant must show the plaintiff does not make sufficient factual allegations to establish a plausible entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 570). Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. "In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis omitted).

"A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal citation and quotation marks omitted). Thus, the court "must afford plaintiff the benefit of any doubt" in construing a pro se complaint. Karim-Panahi v. L.A. Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988).

1. Disability Discrimination—Counts I, IV, and V

Defendants contend Plaintiff's Amended Complaint does not allege facts establishing that the alleged discriminatory conduct was because of Plaintiff's disability. The National APWU in particular argues that Plaintiff does not allege facts tying the National APWU to the alleged discriminatory conduct. Both Defendants argue they were

under no affirmative duty to combat discrimination. Even so, Defendants contend they have not taken adverse action or any type of action that would dissuade a reasonable employee from engaging in a protected activity. In response, Plaintiff argues that she (1) suffers from a disability because her physical and mental impairments substantially limit her major life activities and Defendants knew about these impairments; (2) was qualified for and satisfied the requirements of her position; (3) requested an accommodation; and (4) suffered adverse employment actions because of her disability.

The ADA provides, in relevant part, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . [the] discharge of employees." 42 U.S.C. § 12112(a). The ADA defines discrimination as "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." Id. § 12112(b)(5)(A). To state a prima facie case under the ADA, a plaintiff must demonstrate (1) she is disabled within the meaning of the ADA, (2) she is a qualified individual, and (3) she suffered an adverse employment action because of her disability. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999). Here, Defendants do not dispute that Plaintiff is disabled within the meaning of the ADA and a qualified individual. However, Defendants dispute whether Plaintiff suffered an adverse employment action because of her disability.

a. Adverse Employment Action

The United States Court of Appeals for the Ninth Circuit has not specifically defined "adverse employment action" for purposes of an ADA discrimination claim. But, "[i]t is beyond challenge that a person's termination is considered an adverse employment action." Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1089 (9th Cir. 2001). Likewise, disciplinary suspension is an adverse employment action giving rise to a

disability discrimination claim. See Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1196 (9th Cir. 2003). Adverse employment actions also include "refusing to make reasonable accommodations for a plaintiff's disabilities." Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010) (quotation omitted). Specifically, an employer discriminates by "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." 42 U.S.C. § 12112(b)(5)(A).

Unions shall not "cause or attempt to cause an employer to discriminate against an individual in violation of [Title VII]." 42 U.S.C. § 2000e-2(c)(3). More specifically, unions may be liable for refusing to file grievances concerning discrimination. Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987), superceded by statute on other grounds as recognized in Johnson v. Lucent Technologies Inc., 653 F.3d 1000, 1005-06 (9th Cir. 2011)). Unions also may be liable for acquiescing or joining in an employer's discriminatory practices. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1304 (9th Cir. 1982). The United States Supreme Court has applied these rules of union liability to other federal anti-discrimination laws. 14 Penn Plaza L.L.C. v. Pyett, 556 U.S. 247, 272 (2009) (discussing union liability generally under federal anti-discrimination laws and applying these rules specifically to the Age Discrimination in Employment Act ("ADEA")).

In her Amended Complaint, Plaintiff alleges that Defendants took adverse employment action against Plaintiff by refusing to file grievances alleging discrimination and by joining in Management's discriminatory practices. (Am. Compl. at 4:15-17, 9:13-23, 10:9-11.) Plaintiff alleges the following constitute adverse employment actions taken by Management: cut hours, adverse scheduling, failure to accommodate, constructive suspension, suspension, removal, and breach of grievance settlements. (Id. at 4:24-25,

9:13-23.) Viewing the facts in the light most favorable to Plaintiff, Plaintiff has alleged sufficient facts to support a claim of adverse employment action. Management refused to accommodate Plaintiff, suspended Plaintiff, and ultimately removed Plaintiff, all of which constitute adverse employment actions. Similarly, Plaintiff has pled sufficient facts to support a claim that Defendants are liable for Management's discriminatory practices. Defendants refused to file grievances and joined in Management's discriminatory practices. For example, Poulos communicated with Plaintiff regarding adverse scheduling and work restrictions and wrote a three-page statement to Management, which Plaintiff alleges Management used in making its decision to suspend and remove Plaintiff.

b. "Because of" Plaintiff's Disability

An employer takes an adverse action "because of" the plaintiff's disability if the action was motivated, even in part, by animus towards the plaintiff's disability or request for accommodation. Dark v. Curry Cnty., 451 F.3d 1078, 1084-85 (9th Cir. 2006). Thus, the ADA applies when the plaintiff's "disability is one factor, but not the only factor, motivating an adverse employment action." Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065 n.63 (9th Cir. 2005) (quotation omitted). But a decision motivated by factors merely related to the plaintiff's disability is not prohibited by the ADA. See Lopez v. Pac. Mar. Ass'n, 657 F.3d 762, 764 (9th Cir. 2011).

Here, viewing the facts alleged in the light most favorable to Plaintiff, Plaintiff has alleged sufficient facts to support a claim that Defendants' refusals to file grievances and involvement in Management's discriminatory practices were motivated, at least in part, by animus towards Plaintiff's disabilities or requests for accommodation. In particular, Poulos removed Plaintiff as shop steward the day after Plaintiff did not attend a grievance meeting because Plaintiff's legs and feet locked up severely. (Am. Compl. at 6:8-12, 24:15-17, 19-20.) Poulos referred to Plaintiff's condition as a "stunt." (Id. at 6:10-12.) Poulos, Scoggins, and Ybarra withdrew grievances, some of which alleged discrimination.

(Id. at 10:9-11, 26:5-9, 17.) Plaintiff requested an accommodation due to her medical conditions, and on the same day Weyen refused to file grievances. (Id. at 27:16-23.) Poulos stated that the work restrictions imposed by Management were due to Plaintiff's medical conditions and Poulos refused to file grievances opposing these work restrictions. (Id. at 30:23-28, 31:1-8.) Accordingly, Plaintiff has alleged sufficient facts to support a plausible disability discrimination claim under the ADA. The Court will deny Defendants' motions to dismiss Plaintiff's disability discrimination claims.

2. Retaliation—Count II

To state a prima facie case of retaliation under the ADA, the plaintiff must demonstrate "(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two." Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1269 (9th Cir. 2009). A plaintiff engages in a protected activity by pursuing her rights under the ADA, for example, by filing union grievances and EEOC charges. Pardi v. Kaiser Found. Hosps., 389 F.3d 840, 850 (9th Cir. 2004). For purposes of an ADA retaliation claim, an action constitutes an adverse employment action if it is "reasonably likely to deter employees from engaging in protected activity." Id. (quotation omitted). Lastly, a casual link can be inferred from circumstantial evidence, such as an employer's knowledge and temporal proximity between the protected activity and the adverse employment action. Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (employer was aware of the plaintiff's EEOC complaint and took adverse employment action within three months of filing); see also Bell v. Clackamas Cnty., 341 F.3d 858, 865 (9th Cir. 2003) (noting that temporal proximity alone can be sufficient).

Plaintiff has pled sufficient facts to support a claim that she engaged in protected activity by filing union grievances and EEOC charges. As discussed above, Plaintiff also has alleged sufficient facts to support a claim that Management took adverse employment action against Plaintiff and Defendants are liable for Management's actions because

Defendants refused to file grievances on Plaintiff's behalf and joined in Management's discriminatory practices. Lastly, Plaintiff has pled sufficient facts to infer a causal link between Plaintiff's protected activity and the adverse employment action because Defendants were aware of Plaintiff's EEOC charges and Management removed Plaintiff fewer than three months after she filed EEOC charges. Accordingly, Plaintiff has alleged sufficient facts to support a plausible retaliation claim under the ADA. The Court will deny Defendants' motions to dismiss Plaintiff's retaliation claim.

3. Hostile Work Environment—Count III

It is unsettled whether a cause of action for a hostile work environment claim exists under the ADA. Brown v. City of Tucson, 336 F.3d 1181, 1190 (9th Cir. 2003). Assuming without deciding that such a claim exists, courts would likely apply Title VII law. See McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998). Consequently, if such a claim exists, a plaintiff must prove:

> (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.

Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235-236 (5th Cir. 2001) (quotation omitted). An "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998). The Court considers the totality of the circumstances in determining whether conduct is sufficiently severe or pervasive. Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000). The Court considers "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." Faragher,

524 U.S. at 787-88 (quotation omitted). However, anti-discrimination laws are not a general civility code, therefore, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Id. at 788 (internal citation and quotation marks omitted).

In her Amended Complaint, Plaintiff alleges that Poulos was openly hostile towards Plaintiff every time she requested that Poulos file a grievance on her behalf, and Poulos told Plaintiff that she was the only one having problems. (Am. Compl. at 11:6-8.) Plaintiff has not alleged sufficient facts to demonstrate that this was more than an offensive utterance. Plaintiff also alleges Poulos refused to address Management's "continual and constant mental abuse/harassment." (Id. at 11:1-2.) After her reinstatement, Plaintiff called threat assessment to report bullying from the APWU shop steward and a co-worker. (Id. at 36:17-20.) Three days later, Plaintiff alleges she had a mental breakdown because of the abuse, after which she took vacation and sick leave to remove herself from the environment. (Id. at 36:21-22.) Although Plaintiff alleges sufficient facts to demonstrate that she subjectively found her work environment hostile and abusive, Plaintiff does not allege specific incidents of mental abuse, harassment, or bullying sufficient for the Court to evaluate whether a reasonable person would find the work environment hostile and abusive. Furthermore, Plaintiff has not alleged that the mental abuse, harassment, or bullying was based on her disability. Accordingly, Plaintiff has failed to plead sufficient facts to support a hostile work environment claim, and the Court will grant Defendants' motions to dismiss Plaintiff's hostile work environment claim.

4. Intentional Infliction of Emotional Distress—Count VI

Defendants argue Plaintiff's intentional infliction of emotional distress ("IIED") claim does not amount to an intentional infliction tort and is preempted by § 301 of the Labor Management Relations Act ("LMRA"). Plaintiff responds that Defendants' conduct was extreme and outrageous—namely, the extinguishment of her rights, collusion with

Management to suspend and remove Plaintiff, and refusal to mediate at the EEOC—and such conduct caused emotional distress, evidenced by Plaintiff's psychological care and medication. Plaintiff also argues that the Court need not interpret the Collective Bargaining Agreement ("CBA") to evaluate whether Defendant extinguished Plaintiff's rights and colluded with Management.

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." Star v. Rabello, 625 P.2d 90, 91-92 (Nev. 1981). Extreme and outrageous conduct exceeds "all bounds of decency" and is "utterly intolerable in a civilized community." Maduike v. Agency Rent-A-Car, 953 P.2d 24, 26 (Nev. 1998) (quotation omitted). Persons must be expected and required to tolerate occasional acts, which are inconsiderate and unkind. Id. "Liability for emotional distress will not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" Candelore v. Clark Cnty. Sanitation Dist., 975 F.2d 588, 591 (9th Cir. 1992) (quoting Restatement (Second) of Torts § 46 cmt. d).

Plaintiff argues that the same conduct that gives rise to her discrimination claims forms the basis of her IIED claim. These acts, although arguably offensive, inconsiderate, and unkind, do not rise to the level of extreme and outrageous such that they exceed "all bounds of decency." "Discriminatory employment practices are wrong and federal law makes such conduct unlawful and provides for relief; however, the tort of intentional infliction of emotional distress is not intended to reach every discrimination claim." Alam v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993). Therefore, the Court will grant Defendants' motions to dismiss Plaintiff's IIED claim.

5. Negligent Retention—Count VI

Defendants contend that because APWU officials are elected, they cannot be

negligently retained by the APWU. Plaintiff responds that the National APWU was negligent in failing to investigate national and local officials' discriminatory conduct of which the National APWU was aware, failing to suspend officials for such conduct, and retaining officials despite such conduct.

An employer has a general duty to use reasonable care in the retention of employees to ensure that employees are fit for their positions. Hall v. SSF, Inc., 930 P.2d 94, 99 (Nev. 1996). The employer breaches this duty when the employer hires or retains an employee that the employer knew or should have known might cause harm to others. See id. at 98-99; see also Chavez v. Thomas & Betts Corp., 396 F.3d 1088, 1099 (10th Cir. 2005), overruled on other grounds by Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

Here, Plaintiff alleges that Defendants retained national and local officials despite being aware that such officials were discriminating and otherwise causing harm to Plaintiff. As such, Plaintiff has pled sufficient facts to state a claim for negligent retention. Defendants have not offered support for their contention that an employer cannot negligently retain an elected official. Accordingly, the Court will deny Defendants' motions to dismiss Plaintiff's negligent retention claim.

7. Conspiracy to Violate Civil Rights—Count VII

Defendants argue that Plaintiff's conspiracy claim under 42 U.S.C. § 1985 should be dismissed because § 1985 is unavailable as a remedy for Title VII violations. Plaintiff does not respond to this position; rather, Plaintiff argues that she has established a prima facie case of conspiracy under § 1985 by circumstantial evidence.

Section 1985(3) provides a remedy for certain types of conspiracies as described within the statute;[4] it does not provide a remedy for a claim of conspiracy to violate Title

[4] To state a claim for relief under § 1985(3) a plaintiff must establish that the defendant did

VII. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372-78 (1979), superseded by statute on other grounds as recognized in Alexander v. Gerhardt Enters., Inc., 40 F.3d 187, 191-92 (7th Cir. 1994). Title VII remedies are not available to a plaintiff unless that plaintiff exhausts her administrative remedies. Id. at 372-73. For example, as discussed above, a plaintiff must file a claim with the EEOC before bringing suit for discrimination. If a plaintiff could assert a Title VII violation through § 1985, then the plaintiff could circumvent the administrative requirements set forth in Title VII. Id. at 375-76. Thus, "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." Id. at 378.

Because the same administrative requirements set forth in Title VII apply to the ADA under 42 U.S.C. § 12117(a), the Supreme Court's reasoning in Novotny applies to a claim of conspiracy to violate the ADA. Adler v. I & M Rail Link, L.L.C., 13 F. Supp. 2d 912, 941-43 (N.D. Iowa 1998) (applying Novotny to claims of conspiracy to violate the ADA and ADEA), abrogated on other grounds by Cossette v. Minn. Power & Light, 188 F.3d 964, 970 n.4 (8th Cir. 1999); Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 738 F. Supp. 937, 940-41 (W.D. Pa. 1989), aff'd, 897 F.2d 522 (3d Cir.), cert. denied, 498 U.S. 811 (1990) (applying Novotny to a claim of conspiracy to violate the ADEA); Brownfield v. Yellow Freight Sys., No. 98-15775, 1999 WL 439310, at *1 (9th Cir. June 17, 1999) (applying Novotny to claims of conspiracy to violate Title VII and the ADA). Therefore, § 1985(3) does not provide a remedy for a claim of conspiracy to violate the ADA, and the Court will grant Defendants' motions to dismiss Plaintiff's § 1985 claim.

> (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of (the) conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'

Griffin v. Breckenridege, 403 U.S. 88, 102-103 (1971).

Section 1986 imposes liability on persons who have knowledge of an impending violation of § 1985 and have power to prevent the violation but neglect or refuse to do so.[5] Karim-Panahi, 839 F.2d at 626. "A claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985." Id. Because Plaintiff fails to state a valid claim under § 1985, the Court will grant Defendants' motions to dismiss Plaintiff's § 1986 claim.[6]

8. Vicarious Liability

Defendants argue the National APWU is not vicariously liable for the Local APWU's conduct simply by virtue of their affiliation, and Plaintiff's general statements that the National APWU business agents were agents of the Local APWU are insufficient to state a claim of vicarious liability. Plaintiff responds that she has alleged facts that demonstrate that the National APWU was making decisions for the Local APWU. For example, the National APWU regularly advised the Local APWU officials, the National APWU colluded with the Local APWU officials, and the National APWU withdrew grievances.

Courts use principles of common-law agency to determine whether an international union is vicariously liable for the actions of its local subsidiary. Carbon Fuel Co. v. United Mine Workers of Am., 444 U.S. 212, 216-217 (1979).

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[5] 42 U.S.C. § 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented . . . .

[6] Plaintiff also alleges that Defendants violated 42 U.S.C. § 1981 and § 1983; however, neither statute applies to this action. Section 1981 prohibits race discrimination in the making and enforcing of contracts. Section 1983 prohibits violations of rights secured by the Constitution by persons acting under color of law. Plaintiff does not allege race discrimination, nor does Plaintiff allege Defendants acted under color of law. The Court will construe Plaintiff's conspiracy claim as a claim for violations of § 1985 and § 1986 only.

> Thus, if the local engages in illegal conduct in furtherance of its role as an agent of the international, the international will be liable for the local's actions. . . . However, if the local exercises considerable autonomy in conducting its affairs, it cannot be regarded as an agent of the international, and the international accordingly cannot be held liable under an agency theory for the local's actions.

Laughon v. Int'l Alliance of Theatrical Stage Emps., 248 F.3d 931, 935 (9th Cir. 2001). An international union may be liable for a local subsidiary if the international union "instigated, supported, ratified or encouraged the [l]ocal's activities." Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1543 (9th Cir. 1993).

Plaintiff has sufficiently pled facts that show the National APWU instigated, supported, ratified, or encouraged the Local APWU's activities. As discussed above, the National APWU was involved in withdrawing grievances, refusing to file grievances, and disciplining Plaintiff. Therefore, the Court will deny the National APWU's Motion to Dismiss Plaintiff's vicarious liability claim.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant APWU National AFL-CIO's Motion to Dismiss Amended Complaint (Doc. #60) and Defendant Local APWU #7156's Motion to Dismiss Amended Complaint (Doc. #57) are hereby GRANTED in part and DENIED in part. The Motions are GRANTED as to Plaintiff's claims of hostile work environment, intentional infliction of emotional distress, and violations of 42 U.S.C. § 1985 and § 1986. The Motions are DENIED in all other respects.

DATED: June 18, 2012

Philip M. Pro

PHILIP M. PRO
United States District Judge