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APPENDIX A

NOT FOR PUBLICATION

FILED

APR 27 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSEMARY GARITY, Plaintiff-Appellant, v. MEGAN J. BRENNAN, U.S Postmaster General, Defendant-Appellee.	No. 20-15588 D.C. No. 2:11-cv-01805-RFB-CWH MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Submitted April 23, 2021**

Before: GOODWIN, SILVERMAN, and BRESS, Circuit Judges.
Concurrence by Judge BRESS

Rosemary Garity, proceeding pro se, appeals the district court's judgment and its order awarding back pay following a bench trial in Garity's suit alleging that the United States Postal Service, her former employer, discriminated against

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

her because of her disabilities and race in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's conclusions of law and for clear error its findings of fact and computation of damages. *Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1024 (9th Cir. 1999). We affirm.

Garity has not shown clear error in the district court's computation of back pay on her discrimination claim under the Rehabilitation Act. *See Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 850 (9th Cir. 2004) (following a bench trial, "[w]e will not disturb an award of damages unless it is clearly unsupported by the evidence, or it shocks the conscience" (citation and internal quotation marks omitted)).

The district court properly denied Garity's request for front pay because she failed to show that she did not voluntarily withdraw from the workforce by accepting disability retirement. *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1020-21 (9th Cir. 2000) (front pay was not warranted where a plaintiff failed to show that her withdrawal from the workforce was not voluntary).

The district court properly denied Garity's request for punitive damages because punitive damages are not recoverable in this action. *See* 42 U.S.C. §§ 1981a(a)(2) & (b)(1) (setting out damages remedies for violations of Title VII

and the Rehabilitation Act and stating that punitive damages are not available against a government agency).

The district court properly denied Garity's request for attorney's fees because "[p]ro se plaintiffs . . . are not entitled to attorney's fees." *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007).

Garity's award of back pay renders moot her arguments on appeal concerning her other claims, which seek back pay for the same time period. *See Jerron W., Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1336 (9th Cir. 1997) ("A controversy is moot if effective relief cannot be granted."); *see also Gen. Tel. Co. of the Nw., Inc., v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 333 (1980) ("It . . . goes without saying that the courts can and should preclude double recovery by an individual.").

The district court's exclusion of Garity's emotional distress evidence as a sanction for violating the Rule 35 order lacks support in the record. *See* Fed. R. Civ. P. 35(a)(1) ("The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination[.]"); Fed. R. Civ. P. 37(b)(2)(A)(ii) (providing that if a party fails to obey an order under Rule 35, the court may "prohibit[] the disobedient party from . . . introducing designated matters in evidence"). The Rule 35 order required defendant to disclose the names of the tests given in the Independent Medical

Examination but included no prohibition on preparing for them, and the record contains minimal support for the district court's finding that Garity was otherwise aware that she should not prepare for them. However, any error was harmless because the district court acted within its discretion in excluding the evidence on the alternate ground that its probative value was substantially outweighed by the danger of unfair prejudice and confusing the issues. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir. 2014) (standard of review; explaining that a showing of prejudice is required for reversal of evidentiary rulings, including discovery sanctions).

The district court properly determined that a bench trial was warranted because only equitable damages remained. *See Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1067-69 (9th Cir. 2005) (holding that there is no right to a jury trial on a claim for back pay under Title VII or the Rehabilitation Act).

AFFIRMED.

Garity v. Brennan, No. 20-15588

BRESS, Circuit Judge, concurring:

I concur in the Court's disposition, except for its determination that the district court lacked a sufficient basis for excluding Garity's emotional distress evidence as a sanction for her violation of a Rule 35 Order. Because we correctly conclude that any error in excluding the evidence on this ground was harmless, the discussion of whether the district court erred is unnecessary.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROSEMARY GARITY,

Plaintiff,

v.

PATRICK DONAHOE; MEGAN J. BRENNAN,

Defendants.

Case No. 2:11-cv-01805-RFB-CWH

ORDER

Findings of Fact and Conclusions of Law After Court Trial

I. INTRODUCTION

This case is a race and disability discrimination action. Plaintiff Rosemary Garity worked at the Pahrump Post Office and alleges adverse employment action from her supervisors on the basis of (a) her Caucasian race and (b) her medically documented disabilities, which require minimal reasonable accommodation. The Court held a six-day bench trial in this case from January 16, 2018 through February 8, 2018.

Based on the following findings of fact and conclusions of law, the Court rules in favor of Defendant as to Plaintiff's race discrimination action pursuant to Title VII of the Civil Rights Act of 1964. The Court rules in favor of Plaintiff as to Plaintiff's disability discrimination action pursuant to the Rehabilitation Act of 1973.

II. PROCEDURAL BACKGROUND

Plaintiff filed the original Complaint against the Postmaster General of the United States Postal Service[1] on November 9, 2011. ECF No. 1. Defendant filed a Motion to Dismiss on January

[1] Plaintiff filed her complaint against then-Postmaster General Patrick Donahoe. On February 1, 2015, Megan J. Brennan became the Postmaster General of the United States Postal

18, 2012. ECF No. 7. Plaintiff filed an Amended Complaint on February 6, 2012. ECF No. 12. Defendant filed a Motion to Dismiss the Amended Complaint on March 8, 2012. ECF No. 20.

The Court granted the Motion to Dismiss, and Plaintiff filed a Second Amended Complaint on June 11, 2012. ECF Nos. 28, 30. Defendant filed a Motion to Dismiss the Second Amended Complaint on June 25, 2012. ECF No. 31.

The Court granted in part and denied in part the Motion to Dismiss. ECF No. 40. Plaintiff filed the Third Amended Complaint on February 28, 2013, which is the operative complaint in this matter. ECF No. 43. Plaintiff alleged race discrimination, disability discrimination, retaliation, hostile work environment, and failure to accommodate in violation of Title VII of the Civil Rights Act of 1964. Defendant filed an Answer on March 21, 2013 and an Amended Answer on April 11, 2013. ECF Nos. 45, 47.

The Court entered a scheduling order on April 29, 2013. ECF No. 50. Discovery concluded on October 6, 2014. ECF Nos. 182, 196.

On February 23, 2015, Defendant filed a Motion to Dismiss and Motion for Summary Judgment. ECF Nos. 259, 260. The Court denied the Motion to Dismiss on April 16, 2015. ECF No. 279.

On March 30, 2016, the Court granted in part and denied in part the Motion for Summary Judgment. ECF No. 315. The Court denied the Motion as to Plaintiff's race discrimination and disability discrimination claims, and granted the Motion as to Plaintiff's retaliation, hostile work environment, and failure to accommodate claim. ECF No. 316.

Bench trial that took place on January 16, 17, 18, 19, 24 and February 8, 2018. ECF Nos. 429, 432, 433, 434, 439, 452. On January 25, 2018, Defendant filed the instant Motion for Judgment on Partial Findings. ECF No. 436.

On April 26, 2018, Plaintiff filed the instant Motion to Remedy Trial Deficiencies. ECF No. 470. On July 10, 2018, Plaintiff filed the instant Motion for Ruling on Outstanding Motions. ECF No. 473. On January 9, 2019, Plaintiff filed the instant Motion for Status Conference on Trial Conclusion.

Service and was automatically substituted for Patrick Donahoe as Defendant pursuant to Fed. R. Civ. P. 23(d).

III. JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as the action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*

Venue is proper because the incident from which this dispute arose occurred within Nye County, Nevada.

IV. FINDINGS OF FACT

Federal Rule of Civil Procedure 52(a)(1) requires the Court to "find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). The court must make findings sufficient to indicate the factual basis for its ultimate conclusion. Kelley v. Everglades Drainage District, 319 U.S. 415, 422 (1943). The findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir.), cert. denied, 464 U.S. 863 (1983) (citations omitted).

Accordingly, following the bench trial and having reviewed all of the evidence and observed all of the witnesses, the Court makes the following findings of fact in this case.

A. Background Factual Findings

1. Plaintiff Rosemary Garity was hired by the United States Postal Service ("USPS") on approximately November 3, 2001. Over the course of her first five years with USPS, Plaintiff worked at various locations in Las Vegas, Nevada.
2. On December 8, 2008, Plaintiff transferred stations and began working for the USPS at the Pahrump, Nevada post office as a part-time flexible clerk. Plaintiff was employed at the Pahrump, Nevada post office until approximately December 1, 2011, at which time Plaintiff no longer worked at the USPS.
3. From 2008 though August 26, 2011, Plaintiff was a part-time flexible clerk. Duties of a part-time flexible clerk included sales and customer services at a retail window, distributing primary and one or more secondary schemes of incoming and outgoing

mail, performing collections of mail from post office mailboxes located in the community, and performing bulk mail entry unit work. A part-time flexible clerk was not guaranteed a certain number of hours.

4. Effective August 27, 2011, the Pahrump Post Office no longer provided a part-time flexible clerk position, and Plaintiff and the other two part-time flexible clerks became non-traditional full-time clerks. A non-traditional full-time clerk performed the same functions as a part-time flexible clerk. However, a non-traditional full-time clerk was guaranteed at least approximately 34.5 hours per week if work was available within the employee's work restrictions.
5. Plaintiff is Caucasian.
6. Maria Albertini and Anne Lindsey each held the same position as Plaintiff throughout the relevant time period (part time flexible law clerk prior to August 27, 2011 and non-traditional full-time clerk on and after August 27, 2011). Albertini is Hispanic. Lindsey is Caucasian.
7. Elias Armendariz was Plaintiff's immediate supervisor throughout 2011. He is Hispanic.
8. Debra Blankenship was the Postmaster, Armendariz's supervisor, and Plaintiff's indirect supervisor throughout 2011. She is Caucasian.

B. Plaintiff's Job Duties & Performance

9. Part-time flexible clerks were responsible for overflow work that exceeded the capacity of the full-time clerks and for substituting in for full-time clerks during breaks or absences. Part-time flexible clerks were trained on all tasks assigned to full-time clerks but were assigned to tasks on a daily as-needed basis.
10. Pursuant to office policy, work duties could not be taken away from full-time clerks and given to part-time clerks.
11. Plaintiff was qualified for her job as a part-time flexible clerk and was performing satisfactorily. During the relevant time period, no supervisor ever communicated to Plaintiff that her work was unsatisfactory in any way.

C. Plaintiff's Medical Restrictions

12. Plaintiff was disabled throughout the relevant time period. Plaintiff had a major depressive disorder, a panic disorder, a generalized anxiety disorder, and an adjustment disorder with anxiety and depression. Plaintiff also had heel spurs, heart valve regurgitation, and labial cancer. Plaintiff experienced frequent chest pain and heel pain.
13. Plaintiff was medically restricted to work no more than five days per work week.
14. Plaintiff was medically restricted to stand no more than four hours per day and walk no more than four hours per day. Plaintiff was medically restricted to be on her feet no more than one hour continuously with fifteen-minute breaks.
15. Plaintiff was medically restricted to driving no more than two hours in a day, up to thirty minutes continuously.
16. Plaintiff was medically restricted to lift no more than twenty pounds.
17. Plaintiff was not medically restricted from performing any clerk duties except for collections, which required driving beyond Plaintiff's physical capacity.
18. Collections was not an essential function of Plaintiff's position.
19. Plaintiff was qualified for, and physically capable of performing, every other duty available at the Pahrump Post Office with minimal accommodations.
20. Plaintiff consistently was able to perform all of the essential functions of her job with minimal accommodation at all times, including throughout 2011.

D. Preferential Treatment

1. At the Pahrump Post Office, work became available for clerks beginning at 7:00 AM, when the mail truck arrived every day. At that time, one or more clerks would unload the truck and distribute the mail.
2. Albertini was provided the earliest start time of 6:50 AM, just before the 7:00 AM mail trucks arrived. This start time was preferred by Plaintiff and repeatedly denied to her.
3. Albertini was not trained on collections for the first approximately six months of her employment, from September 2010 through early 2011. Only Plaintiff and Lindsey were required to do collections in that period. Collections is a less preferred task.

4. As of March 2011, Albertini was trained in collections and Plaintiff was no longer performing collections due to medical preclusion from the task. Lindsey performed the majority of collections work even after Albertini was trained.
5. Throughout 2011, Plaintiff was repeatedly scheduled to work fewer hours than Albertini and Lindsey despite Plaintiff's requests to work more hours.
6. In 2011, Albertini worked 1,875.20 hours. Lindsey worked 1,800.07 hours. Plaintiff worked 375.82 hours.
7. Blankenship and Armendariz restricted Plaintiff's hours due to her disability, allegedly because Plaintiff was not medically capable of additional work. However, Plaintiff's documented medical restrictions did not restrict her from successfully working full-time with minimal, reasonable accommodations.
8. Generally, there was not a shortage of work available for part-time flexible clerks. Carriers would sometimes participate in distribution, a task assigned to clerks and not carriers, in the mornings. Overtime hours were often available and were regularly worked by Albertini and Lindsey.

E. American Postal Workers Union

9. Through 2011, Plaintiff was a member of the American Postal Workers Union.
10. The collective bargaining agreement between the union and the USPS permitted the union to file grievances with the USPS on behalf of its members.
11. The union had the authority and discretion to withdraw or settle any grievance, even without the affected member's consent or over the affected member's objection.
12. Shortly after she began working for the Pahrump Post Office, Plaintiff was appointed as the shop steward. In this role she represented her coworkers as a union member in disability-related and other matters.
13. In January 2011, union president Katherine Poulus replaced Plaintiff as shop steward for the Pahrump Post Office because union members represented by Plaintiff had complained. Poulus remained in this role until August 2011.

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F. Timeline of Adverse Employment Actions and Grievances

14. In a Pahrump Post Office Climate Survey conducted from November 2 to November 4, 2010, about 45% of Pahrump Post Office employees complained about Plaintiff.
15. In late 2010, Plaintiff applied for disability retirement.
16. On January 6, 2011, Plaintiff faxed medical records detailing her disabilities to Jan Richardson, the nurse at the USPS district office in Las Vegas. These records included documentation of heel spurs, anxiety, and depression.
17. On January 6, 2011, Plaintiff asked for accommodations for her mental and physical conditions. She requested that she be provided light duty when available and that she receive an early start time. She asked to be scheduled five days a week rather than two to three days per week.
18. On January 20, 2011, a request for a Fitness for Duty Examination was submitted as to Plaintiff, noting concern about Plaintiff's welfare and safety to herself and to other employees.
19. On January 26, 2011, Plaintiff attended a Fitness for Duty examination.
20. On January 28, 2011, Plaintiff's Fitness for Duty results indicated that she was fit for duty, capable of working with coworkers, capable of responding appropriately to supervision, and not a risk to self or others.
21. On March 3, 2011, Plaintiff requested change in schedule to begin her shifts at 7:00 AM. On March 4, 2011 Plaintiff's request was disapproved with a note that no operations need to start at 7:00 AM.
22. On March 7, 2011, Plaintiff faxed a medical note to Jan Richardson stating the following medical restrictions:
    a. Plaintiff could be on her feet for one hour continuously and four hours intermittently.
    b. Plaintiff may drive up to thirty minutes continuously.
23. On March 10, 2011, Plaintiff and Blankenship discussed a job offer for light duty that included collections as one of the duties. Plaintiff stated that she needed her doctor to

review the offer and that she could not perform collections. She would not sign the job offer and was therefore sent home from work.

24. On March 30, 2011, Plaintiff accepted a job offer with the following physical requirements: (1) standing continuously for up to one hour, (2) standing intermittently for up to four hours, and (3) driving continuously for up to thirty minutes.

25. On April 16, 2011, Plaintiff worked overtime for approximately 40 minutes.

26. On April 20, 2011, Plaintiff refused to report to the conference room alone with Armendariz for an investigative interview regarding the overtime work after being addressed in an aggressive and confrontational manner.

    a. Armendariz insisted that she do so. Plaintiff expressed that she would not enter a room with Armendariz alone and would not participate in the interview without a steward.

    b. Plaintiff had a right pursuant to contract to halt the investigative interview until she had a steward present. The shop steward, Poulos, was present in the building. Plaintiff had a pending sexual harassment grievance against Armendariz at the time.

    c. Both Armendariz and Plaintiff used raised voices and disrupted the workroom with their argument.

    d. After this verbal altercation, Plaintiff, Armendariz, Blankenship, and Poulos gathered in the conference room.

    e. Plaintiff asked to be represented by the other union steward, Ron Czechorosky, as she had pending complaints against Poulos.

    f. The meeting did not proceed.

27. On April 26, 2011, Plaintiff received notice of a thirty-day suspension based on the April 16 and April 20 incidents.

28. Pursuant to Plaintiff's contract, discipline must be corrective and not punitive.

29. Plaintiff reached out to Jerald Bevens, who was the shop steward for Las Vegas at the time. Though he represented a different geographic area, Bevens agreed to get involved

on Plaintiff's behalf based his perception that the discipline was unusually severe.

30. On May 5, 2011, Bevens filed a grievance on Plaintiff's behalf regarding the thirty-day suspension (grievance number JB745).
    a. Bevens argued that a thirty-day suspension was not progressive discipline and was unwarranted for Plaintiff's first offense.
    b. On September 26, 2011, Plaintiff's thirty-day suspension based on the April 16 and April 20 incidents was reduced to a seven-day suspension.
    c. In subsequent 2012 arbitration regarding grievance number JB745, the arbiter determined that the thirty-day suspension was appropriate. However, Plaintiff had left the post office by this time. Plaintiff never served either the thirty-day suspension nor the seven-day suspension.
31. On approximately May 9, 2011, Plaintiff received notice of removal based on the April 20 incident, effective June 1, 2011.
    a. This discipline was cumulative; it related to the same conduct for which Plaintiff had received a thirty-day suspension two weeks earlier.
32. On May 25, 2011, Bevens filed grievance number JB749A on Plaintiff's behalf to overturn Plaintiff's removal.
    a. On September 26, 2011, the USPS decided to withdraw Plaintiff's termination, reinstate Plaintiff, impose instead a fourteen-day suspension, and offer backpay to the Plaintiff for the period she was off work.
    b. Plaintiff never served the fourteen-day suspension and was never actually terminated.
    c. In 2012 the union abandoned the grievance and it never continued to arbitration.
33. Plaintiff was denied work at the post office, without pay, from mid-June 2011 through early- or mid-October 2011, approximately 18 weeks total.
    a. On March 29, 2012, as a result of the settlement of JB749A, Plaintiff was back-paid approximately $12,222.87 for this period for a total of 405 hours. If

Plaintiff had worked full-time over the 18 weeks, Plaintiff would have worked 720 hours.

b. Bevens filed a grievance on Plaintiff's behalf seeking the additional 315 hours of back pay (grievance number JB749B). On July 12, 2012, the grievance settled and Plaintiff was awarded an additional $2,500 in back pay, which equaled 60 overtime hours (or 90 regular hours) plus interest.

34. On October 3, 2011, Blankenship sent a letter to Plaintiff informing her that per the grievance procedure she was back on the employment roll. Blankenship invited her to return to the Post Office on October 5, 2011 to discuss what jobs Plaintiff could do and to make a job offer.

35. On October 6, 2011, Plaintiff was offered a job for collections via a form completed by Armendariz. Plaintiff had already explained to Blankenship on March 10, 2011 that she could not perform collections due to her documented physical restrictions.

36. Plaintiff obtained a doctor's review dated October 13, 2011 indicating that the collections job was medically unsuitable for Plaintiff.

37. Plaintiff did not work from October 6, 2011 through October 17, 2011.

38. On October 17, 2011, Plaintiff was given a different job offer, which limited her duties to four hours of box mail and forty minutes of second notices certified mail per day. The job offer therefore restricted her to just over 23 hours of work per week.

a. Plaintiff asserted that this job was not appropriate and noted this objection in writing when she signed the offer. However, she took the position due to her financial need to return to work.

b. Plaintiff was capable, within her medical restrictions, of working an eight-hour work day. More work was available for Plaintiff.

39. On October 18, 2011, Bevens filed grievance number JB811A on Plaintiff's behalf on the alleged basis of discrimination, a hostile work environment, and the denial of work hours.

~~a. On July 20, 2012, the union settled grievance number JB811A and awarded~~

Plaintiff backpay of $1,900.00 for hours denied to Plaintiff during October and November 2011.

40. On November 29, 2011, Plaintiff requested that her start time change from 12:10 PM to 7:00 AM. The request was disapproved.

41. Plaintiff returned to work on December 1, 2011 and was ordered to leave by Armendariz. He did not give her date for her return. Plaintiff did not return to work after this date.

42. On December 13, 2011, Plaintiff again requested that her start time change from 12:10 PM to 7:00 AM. The request was disapproved in a letter from Blankenship discussing the unavailability of sufficient work at 7:00 AM and the need for work in the early afternoon. Blankenship noted that the request was made for purported medical reasons but that it lacked supporting documentation.

43. In late December 2011 or early January 2012, Plaintiff was notified that she was granted disability retirement.

44. In November 2012, Labor Relations Specialists conducted an investigation at the Pahrump Post Office in response to a letter sent by Plaintiff. The findings stated that Blankenship exhibited unacceptable behavior and poor judgment. Corrective action against Blankenship was recommended. There are no findings of any race-based or disability-based discrimination toward Plaintiff or any other individual.

V. CONCLUSIONS OF LAW

As a preliminary matter, the Court denies Plaintiff's Motion to Remedy Trial Deficiencies. Plaintiff argues that trial testimony and evidence was unfairly limited and requests the opportunity to make a closing argument. The Court finds Plaintiff's arguments to be duplicative of objections made on the record and incorporates its reasoning from the trial record denying Plaintiff's requests. The Court does not find that it abused its broad discretion in managing time and providing time warnings throughout trial. The Court finds that where it limited Plaintiff's presentation of evidence, such evidence was irrelevant to Plaintiff's two remaining claims at trial. The Court finds

it admitted and received all the evidence necessary to fairly decide the claims before it and does not find that it favored Defendant over Plaintiff at trial. The Court also finds that it reasonably exercised its discretion to request post-trial briefs rather than oral closing arguments.

A. Waiver

In its Motion for Judgment on Partial Findings, Defendant argues that Plaintiff waived her race and disability discrimination claims because she reached settlement agreements regarding her grievances. Defendant argues that three of Plaintiff's grievances – JB749A (termination, reduced to 14-day suspension never served), JB749B (additional backpay), and JB811A (hostile environment and reduced hours) – were settled in their entirety and were not pursued to arbitration, therefore constituting a complete waiver of discrimination claims arising from the facts alleged in those grievances. A fourth grievance, JB745, was partially settled, and Plaintiff never served the seven-day suspension that remained at issue.

Employees may not waive the "comprehensive statutory rights, remedies and procedural protections" of Title VII without "at least a knowing agreement to arbitrate employment disputes." Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994). "Just as a knowing agreement to arbitrate disputes covered by the act is required by Title VII, so too a knowing agreement is required under the ADA." Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 761 (9th Cir. 1997). In both the Title VII and ADA contexts, "the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question." Kummetz v. Tech Mold, Inc., 152 F.3d 1153, 1155 (9th Cir. 1998) (quoting Nelson, 119 F.3d at 762 and citing Lai, 42 F.3d at 1304–05). Merely submitting a grievance to the arbitration process does not constitute a waiver of these statutory protections. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974). Similarly, a settlement agreement does not constitute a waiver unless "expressly conditioned on a waiver of petitioner's cause of action." See id. at 52 n.15. Unions may be empowered on behalf of employees to conclusively bind employees to a settlement agreement's terms. Mahon v. N.L.R.B., 808 F.2d 1342, 1345 (9th Cir. 1987).

The Court finds that the settlements reached in these administrative cases do not constitute knowing, express agreements to release federal claims. Defendant asserts that each settlement

included a "voluntary, deliberate, and informed" waiver of federal claims, but Defendant cites only to evidence in the record of monies paid. While it is clear that Plaintiff accepted monies in exchange for the administrative closure of her claims, the Court does not find that there was any written agreement or any other evidence to show that either Plaintiff, or the union on Plaintiff's behalf, explicitly agreed to waive the right to pursue Plaintiff's statutory claims in federal court. The Court does not find that Plaintiff has waived the statutory protections of Title VII or the Rehabilitation Act. The Defendant's Motion is therefore denied.

B. Race Discrimination

Plaintiff alleges that her supervisors at the Pahrump Post Office discriminated against her because of her Caucasian race in violation of Title VII. She alleges that Armendariz, a Hispanic male, gave preferential treatment to Albertini, a Hispanic female, as compared to his treatment of Plaintiff and of her Caucasian co-worker Lindsey.

To establish a prima facie case for discrimination under Title VII, a plaintiff must demonstrate that: (1) she belongs to a protected class, (2) she was qualified for her job, (3) she suffered an adverse employment action, and (4) similarly situated individuals outside the protected class were treated more favorably, or other circumstances surrounding the adverse employment action lead to an inference of discrimination. Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 847 (9th Cir. 2004). An employment action is adverse if it "materially affects the compensation, terms, conditions or privileges of employment." Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008).

Once a prima facie case is established, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). A plaintiff may demonstrate a defendant's reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003) (internal quotations and citations omitted). "To make this showing of pretext, [a plaintiff] may rely on the evidence proffered in support of his prima facie case. A factfinder may infer the

ultimate fact of retaliation without proof of a discriminatory reason if it rejects a proffered nondiscriminatory reason as unbelievable." Id. "An inference of discrimination can be established . . . by showing that others not in [one's] protected class were treated more favorably." Diaz v. Eagle Produce Ltd. P'ship, 521 F.3d 1201, 1207 (9th Cir. 2008).

A plaintiff need not make a showing of but-for causation to demonstrate race-based discrimination. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013). "It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." Id.

The Court finds that Plaintiff has not shown that similarly situated individuals outside the protected class were treated more favorably. Albertini and Lindsey were similarly situated to Plaintiff and worked as part-time flexible clerks alongside Plaintiff through August 2011. Albertini is Hispanic (outside the protected class), and Lindsey is Caucasian (inside the protected class). The Court finds that Albertini and Lindsey were *both* treated more favorably than Plaintiff. Albertini and Lindsey worked similar hours over the course of 2011: Albertini worked 1,875.20 and Lindsey worked 1,800.07. These hours represent nearly full-time work. Plaintiff, by contrast, worked only 375.82 hours. The Court does find that Albertini was scheduled for the early shift, which Plaintiff preferred and repeatedly requested. But Plaintiff presents no evidence that Lindsey preferred or was disfavored for this shift, only that Plaintiff was. The Court does not find evidence sufficient to support Plaintiff's other allegations of preferential treatment of Albertini.

The Court also finds no other circumstances surrounding the adverse employment actions experienced by Plaintiff support a findings or inference of racial discrimination. As discussed below, the Court does find that the adverse employment action experienced by Plaintiff was a result of Plaintiff's disability. But the Court does not find circumstances suggesting that Plaintiff's Caucasian race motivated Plaintiff's supervisors, in whole or in part, in reducing Plaintiff's scheduling and in seeking her suspension and termination.

C. Disability Discrimination

Plaintiff separately alleges that her supervisors at the Pahrump Post Office discriminated

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against her on the basis of her disabilities. Plaintiff brings this claim pursuant to Section 501 of the Rehabilitation Act of 1973.

"Section 501 of the [Rehabilitation Act] announces a federal government policy to prevent discrimination against the disabled in employment decisions, and expressly encourages federal government employers to employ individuals with disabilities." Lopez v. Johnson, 333 F.3d 959, 961 (9th Cir. 2003). The Ninth Circuit looks to the standards applied under the ADA to determine whether a violation of the Rehabilitation Act occurred in the federal employment context. See id. To establish a prima facie case under the ADA, a plaintiff must first demonstrate that: "(1) he is disabled within the meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012) (citing Allen v. Pac. Bell, 348 F.3d 1113, 1114 (9th Cir. 2003).

The Ninth Circuit has previously adopted the "motivating factor" standard for causation in the ADA context. Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065 (9th Cir. 2005). The Ninth Circuit observed the ADA's use of causal language ("because of, "by reason of," and "because") absent any "solely" qualifier and concluded that a motivating factor causation standard was consistent with the ADA's plain language and legislative history. Id. at 1063–65.

However, Ninth Circuit law does not control where the Supreme Court has since "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003). Subsequent to the Ninth Circuit's decision in Head, Supreme Court has held that a but-for causation standard, not a motivating factor standard, applies in the context of the Age Discrimination in Employment Act ("ADEA"). Gross v. FBL Financial Servs., 557 U.S. 167, 180 (2009). Like the ADA, the ADEA uses "because of" language absent a "solely" qualifier. See 29 U.S.C. § 623. Absent "any meaningful textual difference between the text[s]" of the ADEA and the ADA, the Court believes it likely that the Supreme Court's reasoning in Gross applies equally to the ADA context, imposing a "but for" causation standard. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013) (relying on Gross to apply a but-for standard to Title VII's antiretaliation provision). The Court

therefore proceeds based on its holding that the higher but-for causation standard applies here. The Court notes that the Gross analysis does not impact the motivating factor standard applied above in the race discrimination context, as that standard is codified by the applicable statute. See Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013); 42 U.S.C. § 2000e-2(m).

The Court finds that Plaintiff prevails on her disability discrimination claim. First, Plaintiff is disabled within the meaning of the ADA. Because of her physical disabilities and her anxiety, she required reasonable accommodations of which Defendant was on notice throughout the relevant period, at least as of January 6, 2011.

Second, Plaintiff is able to perform the essential functions of her job with reasonable accommodations. Plaintiff's limitations were entirely consistent with her role as a part-time flexible clerk with the exception of the collections task, which required driving beyond her physical capacity but which was a non-essential component of her work. Plaintiff was qualified for her job. The record contains an absence of complaints about Plaintiff's performance at her assigned tasks, and Blankenship's testimony confirms that Plaintiff's job performance was satisfactory throughout the relevant period.

Third, Plaintiff suffered adverse employment actions because of her disability. The Court finds that Plaintiff was scheduled for substantially fewer hours than her coworkers because of her disabilities. While the other two part-time flexible clerks often worked forty hours a week plus frequent overtime, Plaintiff was regularly scheduled far fewer than forty hours a week, despite her repeated requests to be scheduled at or near five eight-hour days. Plaintiff could perform every aspect of the job except collections, a task that Albertini also did not perform from September 2010 through early 2011 and rarely performed after. The Court finds that this limited schedule was imposed on Plaintiff because her supervisors perceived her to be too disabled to take on more hours. However, Plaintiff's documented medical restrictions permitted a full-time work week, Plaintiff successfully performed her tasks when scheduled, and Plaintiff persistently sought additional hours. It was unreasonable and discriminatory for Plaintiff's supervisors to repeatedly restrict her working hours.

///

The Court further finds that Armendariz and Blankenship's response to the April 16, 2011 incident was disproportionate and contrary to typical post office policy. On April 16, 2011, Plaintiff worked approximately 40 minutes of overtime by failing to take a lunch. Plaintiff believes this additional time was authorized and her supervisors allege it was not, but the Court finds that this fact is not material. Regardless of whether the time was authorized, it was unreasonable and punitive for Plaintiff's supervisors to aggressively attempt to force Plaintiff into a conference room alone with Armendariz, against whom Plaintiff had a pending sexual harassment complaint. The Court finds that this response was specifically designed to exacerbate Plaintiff's anxiety, which was medically documented and well-known to Plaintiff's supervisors. The Court finds that this was done wrongfully to provoke a response from Plaintiff based upon her known mental health issues related to high stress and pressure environments. The Court further finds that Plaintiff was pressured in this way to create a response based upon her disability that could be used to justify reducing her work hours and ultimately terminating her or removing her from the workplace.

Plaintiff's supervisors' subsequent decision to suspend and then remove Plaintiff constituted harsh, over-punitive consequences for the 40 minutes of overtime. The Court finds that Plaintiff's supervisors were motived by their desire to remove an employee whom they generally disliked and perceived to be overly difficult due to her disabilities.

D. Damages

Plaintiff was wrongfully under-scheduled and over-punished as a direct but-for result of her disabilities. The Court finds that, absent Defendant's discrimination, Plaintiff could have successfully worked hours comparable to those worked by her coworkers Albertini and Lindsey beginning on at least January 6, 2011. The Court finds that Plaintiff could have worked these hours up until the date that Plaintiff received disability retirement, which was near the very end of December 2011 or early January 2012. The Court finds that Plaintiff would have worked approximately 1,837.6 hours in 2011, the approximate average of Albertini's and Lindsey's hours worked in 2011. Because Plaintiff in fact worked 375.82 hours, the Court finds that Plaintiff would have earned income for an additional 1,461.78 hours of work at Plaintiff's regular pay rate of $25 per hour, a total of $36,544.50. The Court subtracts the ~~$12,222.87, $2,500.00, and $1,900.00~~

payments Plaintiff already recovered for unworked hours. The Court therefore awards backpay in the amount of $19,921.63, as well as pre-judgment interest.

Compensatory damages for non-economic injuries are generally also available under the Rehabilitation Act. However, the Court had previously issued an order (ECF No. 418) granting Defendant's Motion to Exclude (ECF No. 338) compensatory damages. Thus, Plaintiff will not awarded any compensatory damages in this case.

VI. JUDGMENT

IT IS ORDERED that [436] Defendant's Motion for Judgment on Partial Findings is DENIED.

IT IS FURTHER ORDERED that [470] Plaintiff's Motion to Remedy Trial Deficiencies is DENIED.

IT IS FURTHER ORDERED that [473] Motion for Ruling on Outstanding Motions and [477] Motion for Status Conference on Trial Conclusion are DENIED as moot.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment for Defendant Megan J. Brennan as to the Title VII race discrimination claim.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment for Plaintiff Rosemary Garity as to the Rehabilitation Act disability discrimination claim.

IT IS FURTHER ORDERED that Plaintiff is awarded equitable damages in the amount of $19,921.63. The parties are directed to file with the Court their estimation of pre-judgment interest by April 12, 2019.

DATED: March 31, 2019.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSEMARY GARITY, Plaintiff-Appellant, v. MEGAN J. BRENNAN, U.S Postmaster General, Defendant-Appellee.	No. 20-15588 D.C. No. 2:11-cv-01805-RFB-CWH District of Nevada, Las Vegas ORDER

Before: GOODWIN, SILVERMAN, and BRESS, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judge Bress has voted to deny the petition for rehearing en banc, and Judges Goodwin and Silverman have so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing is DENIED and the petition for rehearing en banc is DENIED.

No further filings will be entertained in this closed case.

APPENDIX D

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United States District Court

District of Nevada

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Case Name: Garity v. Donahoe
Case Number: 2:11-cv-01805-RFB-CWH
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Document Number: 279(No document attached)

Docket Text:
MINUTES OF PROCEEDINGS - Motion Hearing held on 4/16/2015 before the Honorable Richard F. Boulware, II. Crtrm Administrator: *Blanca Lenzi*; Pla Counsel: *Rosemary Garity, Appearing Pro SE*; Def Counsel: *Justin Pingel, Esq.*; Court Reporter/FTR #: *Patty Ganci*; Time of Hearing: *11:13 AM - 12:07 PM*; Courtroom: *7C.*

Plainfiff Rosemary Garity is present and appearing *pro se.* The Court makes preliminary statements regarding the various motions to be addressed. For the reasons stated on the record at this hearing, IT IS ORDERED that [259] Motion to Dismiss re: [43] *Third Amended Complaint* is DENIED without prejudice. Defendants may file a motion for evidentiary sanctions.

IT IS FURTHER ORDERED that Plaintiff's [262] Motion to Allow Evidence re: [260] Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that the Plaintiff shall have three weeks from this day to file her response to the Defendant's [260] Motion for Summary Judgment. IT IS FURTHER ORDERED that the Defendant shall have 14 days from the date of the filed response to reply.

IT IS FURTHER ORDERED that Plaintiff's [266] & [267] Motions for Sanctions are DENIED.

IT IS FURTHER ORDERED that Plaintiff's [277] Motion to Supplement the Record is DENIED as moot.

IT IS FURTHER ORDERED that the transcript of this proceeding will serve as the Opinion and Order of this Court.

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District of Nevada

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The following transaction was entered on 12/26/2017 at 7:19 PM PST and filed on 11/27/2017
Case Name: Garity v. Donahoe
Case Number: 2:11-cv-01805-RFB-CWH
Filer:
Document Number: 418(No document attached)

Docket Text:
MINUTES OF PROCEEDINGS - Pretrial Conference held on 11/27/2017 before the Honorable Richard F. Boulware, II. Crtrm Administrator: *Blanca Lenzi*; Pla Counsel: *Rosemary Garity, Pro Se*; Def Counsel: *Roger Wenthe, AUSA, Kystal Rosse, AUSA*; Court Reporter: *Patty Ganci*; Time of Hearing: *2:14 PM - 3:01 PM*; Courtroom: *7D.*

***Pro se* Plaintiff Rosemary Garity is present. The Court makes preliminary statements and hears representation of the parties regarding the motions pending before the Court.**

For the reasons stated on the record at the hearing, IT IS ORDERED that [338] MOTION in Limine to Exclude Compensatory Damages Evidence and Strike Jury Demand is GRANTED. As the only remaining forms of damages that are available to Plaintiff are equitable, the Court finds that Plaintiff is not entitled to a jury trial in this case. The case shall proceed as a bench trial on January 16, 2018 at 9:30 AM.

IT IS FURTHER ORDERED that plaintiff shall identify 14 witnesses, right, not including plaintifff, and three rebuttal witnesses. Those witnesses will all be made available either through the production of the defendant if they are under their control or by request of subpoena if not previously approved by the Court. The Court will allow Dr. Brown to testify; Dr. Brown is included as one of the 14 witnesses; if Dr. Brown is excluded, plaintiff shall be allowed 13 witnesses. Plaintiff is directed to provide to the defendants, a

list of names of the witnesses, due one week from this day, as well as file with the Court, your request for issuance of subpoenas should it be necessary.

The Court directs Plaintiff to file her motion to stay due within one week; the Court will issue its Order as it relates to the motion.

IT IS FURTHER ORDERED that the parties shall have two weeks from this day to make their final changes to exhibit and witness lists and supplemental briefings. The parties are directed to provide a thumb drive/usb drive or dvd of electronic copies of the exhibits to the courtroom deputy. Jury instructions as to what the elements of the offense to be shall be due two weeks from this day. The Court will consider the previous filings regarding witnesses, exhibits and trial briefs if no new documents are filed.

The court will set a pretrial conference one to two weeks prior to the bench trial.

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APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROSEMARY GARITY,

Plaintiff,

v.

USPS PMG MEGAN J. BRENNAN,

Defendant.

Case No. 2:11-cv-01805-RFB-CWH

ORDER

Defendant's Motion for Summary Judgment (ECF No. 260)

I. INTRODUCTION

This case is before the Court on Defendant's Motion for Summary Judgment (ECF No. 260). Plaintiff Rosemary Garity claims that she suffered multiple violations of her constitutional rights while employed at the United States Postal Service. In her Third Amended Complaint (ECF No. 43), Plaintiff alleges that Defendant discriminated against her because of her race and disability. Plaintiff also claims that Defendant retaliated against her for engaging in protected activities. Plaintiff further claims Defendant created a hostile work environment. Finally, Plaintiff claims that the Defendant failed to provide reasonable accommodations for her disabilities.

Defendants filed a Motion for Summary Judgment, which makes several arguments as to why Plaintiff's case should not proceed. For the reasons stated below, the Court grants the Motion in part and denies it in part.

II. BACKGROUND

Plaintiff filed her Complaint in this Court on November 9, 2011. ECF No. 1. Plaintiff filed her most recent, Third Amended Complaint on February 28, 2013. ECF No. 43. Plaintiff alleges the following five causes of action:

i. Plaintiff's Title VII claim in Count I alleges that she was racially discriminated against by her Hispanic supervisor, based on her Caucasian race.
ii. Plaintiff's Title VII claim Count II alleges retaliation against Plaintiff based on her protected activities.
iii. Plaintiff's Title VII Count III alleges Federal Defendant created a hostile work environment
iv. Plaintiff's Rehabilitation Act claim in Count I asserts that the Federal Defendant discriminated against her by failing to accommodate her alleged disabilities.
v. Plaintiff's Rehabilitation Act claim in Count II asserts discrimination on the basis of her disabilities.

Defendant filed a Motion to Dismiss on February 23, 2015. ECF No. 259. The Court denied this Motion on April 16, 2015. ECF No. 279.

Defendant filed a Motion for Summary Judgment on February 23, 2015. ECF No. 259.

III. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the propriety of summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014). If the movant has carried its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine

issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks omitted).

IV. Undisputed and Disputed Facts

A. Undisputed Facts

The Court finds the following facts to be undisputed. The USPS hired Plaintiff, a Caucasian female, on approximately November 3, 2001. Over the course of her first five years as a USPS employee, Plaintiff worked at various locations in Las Vegas, Nevada.

On December 8, 2008, as part of a settlement of a previous discrimination lawsuit against the USPS, Plaintiff transferred stations and began working for the USPS at the Pahrump, Nevada post office. Plaintiff was employed in Pahrump as a Part-Time Flexible Clerk, until approximately December 1, 2011, at which time Plaintiff no longer worked at the USPS.

Mr. Armendariz and Maria Albertini, Plaintiff's former coworker and fellow part-time flexible clerk, are Hispanic. Ms. Albertini was allowed to use her cell phone while working.

Plaintiff was heavily involved in protected activities such as filing EEO complaints and representation of others on the same, filing complaints sent by letter to management, and filing grievances. She was involved in these activities on a continual basis beginning in 2009 up until she no longer worked at the USPS.

In April 2011, Plaintiff was given a thirty (30) day suspension and removal, which was subsequently reduced, through the grievance process.

In early May 2011,[1] the Pahrump Post Office was put on lockdown due to purported threats by the Plaintiff. Plaintiff was not scheduled to work that day.

In October 2011, several of Plaintiff's coworkers signed a letter to USPS management expressing concerns about the Plaintiff and her behavior in the workplace. The letter requested that Plaintiff no longer work at the Pahrump office. The letter further indicated that Plaintiff was potentially dangerous and murderous.

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[1] Plaintiff claims the date of the lockdown was May 3, 2011 (See Opp'n, ECF No. 282 at 5); Defendant maintains it was May 4, 4011 (See Mot. Summ. J., ECF No. 260 at 5).

B. Disputed Facts

The parties dispute a number of facts, including the following:

1. Time Leading up to Plaintiff's Constructive Discharge or Retirement

After the May 2011 lockdown, Plaintiff was reinstated but was denied work she was entitled to, given reduced hours, subjected to official group discussions and investigative interviews, threatened with firing on multiple occasions, refused requests for rescheduling, interviewed about off duty activities, and sent home against her guaranteed hours.

Plaintiff returned to work on November 14, 2011 and was subjected to an investigation. She became upset and physically sick and left work.

Plaintiff returned to work on December 1, 2011 and was ordered to leave. Plaintiff alleges that she was constructively discharged at this time.

2. Preferential Treatment

Albertini, Plaintiff's female Hispanic coworker, was given preferential treatment over Plaintiff, who is Caucasian. For example, Albertini was not required to do a less preferred task called "collections," was provided the preferred, earliest start time, and was given preferential assignments over two non-Hispanic senior employees, including Garity. Further, Plaintiff, a senior employee, was given less desirable shifts, in comparison with the junior employees.

3. Conspiracy Against Plaintiff

Plaintiff maintains that she received information from numerous sources that the management was intent upon firing her, and was frustrated by her filing Equal Employment Opportunity ("EEO") complaints.

4. Disability

The parties' dispute whether Plaintiff provided the necessary medical documentation of her claimed disabilities, which Plaintiff alleges include: depression, cancer, anxiety, heel spurs, and a heart condition. Defendant argues that it provided accommodation for Plaintiff's heart condition and heel spurs.

V. Defendant's Motion for Summary Judgment

Defendant argues that each of Plaintiff's five causes of action should be dismissed. The Court addresses each cause of action separately.

A. Title VII, Count I – Race Discrimination

1. No Prima Facie Case

First, Defendant argues that Plaintiff has not established a prima facie case for race discrimination under Title VII, because the ability to use a cell phone while working cannot be fairly characterized as an adverse employment action.

A plaintiff may establish a *prima facie* of discrimination under Title VII by showing that: (1) she belongs to a protected class; (2) she was performing according to her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) other employees with qualifications similar to her own were treated more favorably. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). An employment action is adverse if it "materially affects the compensation, terms, conditions or privileges of employment." Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008).

In response, Plaintiff points out that inability to use her cell phone was just one of the ways in which she was discriminated against. For example, Plaintiff argues that she was demoted from her assignment to level 7 bulk mailing; assigned the least preferred duties, particularly "collections;" assigned later and fewer hours; and that Defendants refused re-schedule her. See Opp'n, Ex. 7, Sanford Decl. at 3.

The Court therefore finds that Plaintiff has established a prima facie case of race discrimination by the Defendant. The Court finds that in particular, Plaintiff's demotion establishes that material facts remain as to whether or not she suffered adverse employment action, because these actions materially affected the terms, conditions, and privileges of her employment. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (finding that in the Title VII context, adverse employment action includes "undesirable reassignment.").

2. Non-Discriminatory Reasons Explain Changes to Plaintiff's Hours and Assignments

Defendant argues that there were various legitimate, nondiscriminatory reasons for

changes to Plaintiff's hours and assignments. First, changes to Plaintiff's hours, duties, and end tours, were related to the operational needs of the Pahrump post office. Second, as a part-time flexible clerk, Plaintiff was not guaranteed any certain number of hours or a particular schedule of hours, nor was the fact that she may have been able to perform certain duties determinative of whether she would get those assignments. Finally, other than Plaintiff's own self-serving testimony, there is no evidence that Plaintiff was singled out for denial of the use of her cell phone during work hours.

While the Court acknowledges the Defendants' assertion of nondiscriminatory reasons for its adverse action to Plaintiff, this is not the end of the inquiry. Plaintiff may show that the employer's reasons were pretextual. See McDonnell Douglas, 411 U.S. at 802-03.

A plaintiff may demonstrate a defendant's reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003) (internal quotations and citations omitted). "To make this showing of pretext, [a plaintiff] may rely on the evidence proffered in support of his prima facie case. A factfinder may infer the ultimate fact of retaliation without proof of a discriminatory reason if it rejects a proffered nondiscriminatory reason as unbelievable." Id.

Plaintiff has shown that a reasonable juror could find that Defendant's reasons were pretextual, because the Defendant regularly preferred Hispanic employees over Caucasian ones. Specifically, Plaintiff argues that "[r]ace more likely motivated the employer and the proffered explanation is unworthy of credence. If racial discrimination was not the more likely motivation then Albertini would not have been treated preferentially without exception in relation to Sanford, Lindsey and the plaintiff while being similarly situated in each case."

Therefore, the Court DENIES Defendant's Motion for Summary Judgment as to the Title VII racial discrimination claim.

B. Title VII, Count II – Retaliation

~~To prevail on her retaliation claim, Plaintiff must demonstrate: (1) that she engaged in a~~

protected activity; (2) that she suffered an adverse employment action; and (3) that there is a causal a causal link between the protected activity and the adverse employment action. Dawson v. Entek Intern, 630 F.3d 928, 936 (9th Cir. 2011). But-for causation is required to satisfy the third prong. "This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Texas Southwestern Med. Ctr. V. Nassar, 133 S.Ct. 2517, 2533 (2013).

Protected activities under Title VII include opposing allegedly discriminatory acts by one's employer. Id.; 42 U.S.C. 2000e-3(a). They also include making informal complaints to one's supervisor. Ray v. Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000). "When an employee protests the actions of a supervisor such opposition is a protected activity." Trent v. Valley Elec. Ass'n Inc., 41 F.3d 524, 526 (9th Cir. 1994). Further, if an employee communicates to his employer a reasonable belief the employer has engaged in a form of employment discrimination, that communication constitutes opposition to the activity. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 276 (2009).

Defendant argues that Plaintiff has not made a prima facie showing of retaliation because she cannot show that but for her protected activities, any of the numerous actions alleged in her retaliation count would have occurred. In support of this argument, Defendant again asserts its allegedly legitimate reasons for its decisions, which resulted in adverse employment action. For example, Defendant argues that Plaintiff was not guaranteed any particular hours, schedule or job assignments because she was a part-time flexible clerk.

Plaintiff argues that her hours were never cut prior to her engaging in protected activity, which triggered the adverse employment action just two weeks later. As the Ninth Circuit has explained, "[t]emporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1069 (9th Cir. 2003), as amended (Jan. 6, 2004) (internal citation and quotation omitted).

However, Plaintiff does not contest that from 2009 to 2011, she repeatedly engaged in various forms of protected activity and filed numerous complaints with EEO. She also does not

contest that, in some instances, Defendant addressed these complaints by, for example, transferring her to another office. Rather, Plaintiff alleges that there is temporal proximity between her latest EEO complaint, and the adverse employment action. The Court is unpersuaded by this argument and does not find that the temporal proximity between Plaintiff's latest protected action in a series of such actions, and the subsequent adverse employment action, establishes the "but for" causation required to establish a retaliation claim under Title VII.

Finding that Plaintiff has failed to establish "but for" causation, the Court does not address Defendant's last argument, that Plaintiff failed to provide "specific and substantial" circumstantial evidence of pretext with regard to her given hours, her preferred work schedule, or her specific job assignments. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002). However, the Court notes that it is unpersuaded by this argument, as Villiarimo itself states that a plaintiff need only show that "either a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (internal quotation and citation omitted).

The Court, finding that Plaintiff has failed to allege a prima facie case for a Title VII retaliation claim, GRANTS Defendant's summary judgment as to Plaintiff's retaliation claim.

C. Title VII Count III – Hostile Work Environment

"To prevail on a hostile workplace claim premised on either race or sex, a plaintiff must show: (1) that he was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." Vasquez v. Cty. of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003), as amended (Jan. 2, 2004). To demonstrate the third factor, a plaintiff must show that her work environment was both subjectively and objectively hostile. Galdamez v. Potter, 415 F.3d 1015, 1023 (9th Cir. 2005).

Defendant argues that Plaintiff's claims do not make clear what characteristic were the basis for the alleged hostile work environment in the final count of her Complaint. The Court disagrees. Plaintiff's Third Amended Complaint clearly states the basis for her hostile work

environment claim is "based on retaliation and country of ancestry and sexually harassing environment."

However, upon review of the record, the Court does not find that Plaintiff has established that she was subjected to verbal or physical conduct of a racial or sexual nature. While Plaintiff alleges she was harassed in retaliation for her EEO activity and that coworkers wrote and spoke negatively about her, she fails to provide evidence supporting her claim that she was subjected to behavior that is racial and sexual in nature. Rather, Plaintiff simply states that "the environment was sexually charged and included racial discrimination." Opp'n at 23. This is distinct from and insufficient to showing that Plaintiff herself was subject to verbal or physical conduct of a racial or sexual nature, as required to prove a Title VII hostile work environment claim. The single instance of purported sexual conduct alleged in her Opposition brief occurred by way of a coworker who allegedly exposed her belly ring, tattoo "across her butt," thong underwear, and breasts not to Plaintiff, but to her supervisor.[2]

Plaintiff argues that this incident demonstrates her employer's acquiescence to inappropriate sexual conduct by third parties, and cites to Freitag v. Ayers to support her argument that such a claim is actionable under Title VII. 468 F.3d 528, 538-540 (9th Cir. 2006). Freitag, however, held that the employer—in that case, the Department of Corrections—could be held liable under Title VII for failure to implement policies to protect its female corrections officers from sexual harassment by male prisoners. Id. Plaintiff does not allege that the employee in question sexually harassed her. Rather, Plaintiff appears to allege that her coworker obtained beneficial treatment on the basis of alleged sexual behavior towards her supervisor.

The Court therefore finds that Plaintiff has failed to produce evidence in support of her Title VII Hostile Work Environment claim on the basis of race and sex.

Defendant also argues that Plaintiff cannot establish that she endured a hostile work environment because of her protected traits. Because the Court does not find that Plaintiff has met

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[2] In support of this statement, Plaintiff cites to former coworker Sanford's Declaration, Opp'n, Ex. 7 at para 12. However, Sanford simply states that "[o]ne of the benefits Bennett received for showing her body was unlimited phone use throughout the day." And does not allege the specific details Plaintiff claims in her Opposition brief.

the first requirement of a Title VII hostile work environment claim, the Court does not reach this argument.

The Court GRANTS Defendant's Motion for Summary Judgment as to Plaintiff's hostile work environment claim.

D. Rehabilitation Act, Count I – Failure to Accommodate

"Section 501 of the [Rehabilitation Act] RHA announces a federal government policy to prevent discrimination against the disabled in employment decisions, and expressly encourages federal government employers to employ individuals with disabilities." Lopez v. Johnson, 333 F.3d 959, 961 (9th Cir. 2003). The Ninth Circuit looks to the standards applied under the ADA to determine whether a violation of the Rehabilitation Act ("RHA") occurred in the federal employment context. See Lopez v. Johnson, 333 F.3d 959, 961 (9th Cir. 2003). To establish a prima facie case under the Americans with Disabilities Act ("ADA"), a plaintiff must first demonstrate that: "(1) he is disabled within the meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012) (citing Allen v. Pac. Bell, 348 F.3d 1113, 1114 (9th Cir. 2003).

Defendant argues that accommodations were made for two of Plaintiff's disabilities: heel spurs and her heart condition. The Defendant further avers that Plaintiff did not provide the necessary medical documentation to prove she was disabled, and because of that, Defendant argues that no reasonable accommodation could have been made. The Court first addresses the disabilities that were allegedly unsupported by medical documentation, and then the accommodations that were made.

In the Ninth Circuit, employers and employees alike are required to engage in an "interactive process" in making reasonable accommodations for disabled employees. The Court explains: "the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In

circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process." Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000) vacated sub nom. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). "[T]he employee's participation is equally important because he or she generally knows more about his or her capabilities, and holds essential information for the assessment of the type of reasonable accommodation which would be most effective." Goos v. Shell Oil Co., 451 F. App'x 700, 702 (9th Cir. 2011) (internal quotations omitted). As a part of the interactive process, the Court noted that "[e]mployers should meet with the employee who requests an accommodation, *request information about the condition* and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome." Id. at 1115 (internal citations omitted) (emphasis added).

The Ninth Circuit has granted summary judgment for employers where employees failed to engage in the interactive process. See, e.g., Dep't of Fair Employment & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 743 (9th Cir. 2011) (where an can cannot prevail on summary judgment on a claim of failure to reasonably accommodate where the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."); Allen v. Pac. Bell, 348 F.3d 1113, 1115 (9th Cir. 2003) ("Because Allen was requested, but failed, to submit additional medical evidence that would serve to modify his doctor's prior report, Pacific Bell's determination... was appropriate. Pacific Bell did not have a duty under the ADA or California law to engage in further interactive processes...in the absence of any such information.").

In this case, Defendant argues that while Plaintiff provided medical documentation for two disabilities—heel spurs and her heart condition. Defendant argues that she failed to provide any medical documentation for her other claimed disabilities, which, according to her Third Amended Complaint, include: depression, cancer, and anxiety. Instead, Defendant argues that Plaintiff simply stated that she suffered from these disabilities and requested specific accommodations. Defendant argues that it engaged in the interactive process by asking her to provide medical

documentation of those disabilities, but Plaintiff refused to engage in the process by failing to provide such documentation.

In her declaration, attached to her Opposition, Plaintiff claims that she did provide medical documentation of her disabilities. Opp'n, Ex. 4, Garity Decl at ¶ 13 ("I put in multiple requests asking for accommodation and provided medical documentation of my depression, anxiety, heart condition, sleep disturbance, heel spurs, cancer and muscle spasms on January 6 and 7 and February 1, 2011. The documentation is stamped with U.S.P.S. OHNA (Occupational Health Nurse) stamp on those dates and noted received.") Having reviewed the accommodation requests, the Court finds that the requests were a series of handwritten and typed notes from Plaintiff without any accompanying medical documentation supporting her claimed disabilities. ECF No. 30, Second Am. Compl., Ex. 4, "Accommodation Requests"). USPS employee Debi Blankenship's subsequent denial of Plaintiff's accommodations reflect the lack of medical documentation: "you have advised me...that the premise for requesting this schedule is due to 'medical reasons'...[I]f you were to provide me medical basis or documentated [sic] request supported by your physician to establish your 'medical' reason for having these work hours, I would be more than happy to forward this request to the DRAC as an accommodation request which they may be able to act upon."). Id., Ex. 5.

Additionally, while Plaintiff cites to the deposition of USPS employee James Davey to stand for the proposition that USPS had the requisite medical documentation, Davey's testimony is consistent with the Defendant's position: that while Plaintiff provided medical documentation for her heel spurs and cardiovascular condition, which Defendant in turn accommodated, Plaintiff failed to provide documentation of her other alleged disabilities. ECF No. 260, Ex. D, Davey Depo.

Plaintiff further asserts that the accommodations for her heel spur and cardiovascular issues were ineffective as she states that "[t]he requested accommodation was to stop the harassment/retaliation/abuse to stop the pain from occurring." Opp'n, Ex. 4, Garity Decl. at ¶ 13. The Ninth Circuit has held that "[a]n *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations. Ineffective modifications therefore are not accommodations." U.S. E.E.O.C. v. UPS Supply Chain Sols., 620 F.3d 1103, 1110 (9th Cir. 2010)

(internal quotations omitted). "Reasonable accommodations may include: 'job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.'" Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 803 (1999) (citing 42 U.S.C. § 12111(9)(B)). Notably, "[a]n employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." U.S. E.E.O.C. v. UPS Supply Chain Sols., 620 F.3d 1103, 1110-11 (9th Cir. 2010) (internal citation omitted).

In this case, Plaintiff's request for USPS to "stop the harassment/retaliation/abuse" does not constitute a reasonable accommodation under the ADA and, by extension, the RHA. In reviewing Plaintiff's requests for accommodation, the Court notes that Plaintiff also requested to be given an "early start," which the Court understands to mean earlier shifts. However, this request was in connection with Plaintiff's mental disability, rather than for her heel spurs or heart condition, for which she had not presented medical documentation.

The Court finds that the record indicates that Plaintiff failed to engage in the requisite interactive process by failing to provide medical documentation of her disabilities, and that Plaintiff failed to demonstrate how the accommodations made for her documented disabilities were ineffective.

The Court therefore GRANTS summary judgment in favor of the Defendant on Plaintiff's Failure to Accommodate claim.

E. Rehabilitation Act, Count II– Disability Discrimination

Defendant argues that Plaintiff cannot show that she was disabled or qualified with or without reasonable accommodations because she did not participate in the interactive process that would allow the USPS to determine the extent of her purported disabilities. While this argument is compelling in the context of a failure to accommodate claim, the Court does not find that it applies with regard to Plaintiff's discrimination claim.

In her discrimination claim, Plaintiff argues that she was disparately treated based upon her disabilities—namely, her psychological disabilities. Third Amended Complaint, ECF No. 43 at 5. Such a claim does not require the interactive process, which is used where employers and employees work together to reach a reasonable accommodation for an employee's disability. Indeed, a plaintiff could demonstrate that she is disabled under the ADA by demonstrating that she was "regarded as" disabled by her employer, which would not necessarily require the interactive process.

Defendant then argues that Plaintiff cannot show discrimination where there were no similarly situated employees to Plaintiff. In defining "similarly situated," Defendant argues that the office had not previously had a part-time flexible clerk with the disabilities that Plaintiff alleges.

However, Plaintiff need not show that other *disabled* part-time clerks were treated differently. Rather, the requirement is that "employees with *qualifications* similar to her own were treated more favorably." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998), as amended (Aug. 11, 1998) (emphasis added); See also Vasquez v. Cty. of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003), as amended (Jan. 2, 2004) ("A showing that the County treated similarly situated employees outside Vasquez's protected class more favorably would be probative of pretext...[I]ndividuals are similarly situated when they have similar jobs and display similar conduct."); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 417, 122 S. Ct. 1516, 1531, 152 L. Ed. 2d 589 (2002) "(iii) [m]odifications or adjustments *that enable* a covered entity's employee with a disability *to enjoy equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities." 29 CFR § 1630.2(o) (2001) (emphasis added). In this case, Plaintiff alleges that her fellow part-time clerks were given significantly more hours than she. Defendant does not dispute this, but rather argues that the nature of Plaintiff's job as a part-time flexible clerk does not guarantee Plaintiff a certain number of hours of work.

The Court therefore DENIES Defendant's Motion for Summary Judgment as to Plaintiff's discrimination claim.

VI. CONCLUSION

Accordingly, Defendant's Motion for Summary Judgment (ECF No. 260) is granted in part and denied in part:

- **Title VII, Count I – Race Discrimination.** The Court DENIES Defendant's Motion as to Plaintiff's discrimination claim.
- **Title VII, Count II – Retaliation.** The Court GRANTS Defendant's Motion as to Plaintiff's retaliation claim.
- **Title VII Count III – Hostile Work Environment.** The Court GRANTS Defendant's Motion as to Plaintiff's hostile work environment claim.
- **Rehabilitation Act, Count I– Failure to Accommodate.** The Court GRANTS Defendant's Motion as to Plaintiff's failure to accommodate claim.
- **Rehabilitation Act, Count II– Disability Discrimination.** The Court DENIES Defendant's Motion as to Plaintiff's discrimination claim.

DATED September 13, 2016.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX F

Activity in Case 2:11-cv-01805-RFB-CWH Garity v. Donahoe Order on Motion for Recusal of District Judge

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Notice of Electronic Filing

The following transaction was entered on 1/16/2018 at 6:51 AM PST and filed on 1/16/2018
Case Name: Garity v. Donahoe
Case Number: 2:11-cv-01805-RFB-CWH
Filer:
Document Number: 428

Docket Text:
ORDER denying [403] Motion for Recusal of District Judge. Signed by Judge Richard F. Boulware, II on 1/16/2018.

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2:11-cv-01805-RFB-CWH Notice has been delivered by other means to:

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Document description: Main Document
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] [a071b52bcae72dc22b0b17b18ef7feec951b82ac88928c120ceb0e7a85a2e4901dc
9fce3aa11bf5b0e730ef1db97bb9434297b398a5ba38971c81b5a2db1e47c]]

APPENDIX G

Activity in Case 2:11-cv-01805-RFB-CWH Garity v. Donahoe Order on Motion to Compel

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United States District Court

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The following transaction was entered on 9/25/2014 at 11:51 AM PDT and filed on 9/25/2014

Case Name: Garity v. Donahoe
Case Number: 2:11-cv-01805-RFB-CWH
Filer:
Document Number: 230(No document attached)

Docket Text:
MINUTES OF PROCEEDINGS - Motions Hearing held on 9/25/2014 before Magistrate Judge Carl W. Hoffman. Crtrm Administrator: *Donna Smith*; Pla Counsel: *pro se: Rosemary Garity*; Def Counsel: *Justin Pingel, Krystal Gallagher*; Court Reporter/FTR #: *9:59-11:17*; Time of Hearing: *10 AM*; Courtroom: *3C*;
The Court makes preliminary remarks and hears the representations of the parties.
The Court makes its Findings on the record. For the reasons stated by the Court on the record, Plaintiff's [195] motion to compel is granted in part and denied in part, and Defendant's [223] motion to modify 30(b)(6) subpoena is denied.
Regarding Plaintiff's [220] motion for ruling on conditions of court forced psychiatric examination, the Court adopts Defendant's [206] proposed order with the revision that the Independent Medical Examination (IME) shall be conducted on October 16, 2014, and October 17, 2014. Mr. Pingel shall furnish a copy of the IME report to Ms. Garity by November 17, 2014. Per her request, Ms. Garity may respond to the Defendant regarding the IME report by December 1, 2014.
The dispositive motions deadline is extended to January 9, 2015.

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APPENDIX H

Activity in Case 2:11-cv-01805-RFB-CWH Garity v. Donahoe Order on Motion

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United States District Court

District of Nevada

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The following transaction was entered on 1/22/2016 at 3:37 PM PST and filed on 1/20/2016

Case Name: Garity v. Donahoe
Case Number: 2:11-cv-01805-RFB-CWH
Filer:
Document Number: 313(No document attached)

Docket Text:
MINUTES OF PROCEEDINGS - Motion Hearing held on 1/20/2016 before the Honorable Richard F. Boulware, II. Crtrm Administrator: *Blanca Lenzi*; Pla Counsel: *Rosemary Garity, Pro Se*; Def Counsel: *Krystal Rosse, AUSA, Lindsy Roberts, AUSA*; Court Reporter/FTR #: *Patty Ganci*; Time of Hearing: *3:22 - 4:23 PM*; Courtroom: *7C.*

Plaintiff Rosemary Garity is present and appearing *pro se*. Defense counsel is present. The Court makes preliminary statements regarding the various motions to be addressed. For the reasons stated on the record at this hearing,

IT IS ORDERED that Plaintiff's: [280] Motion for Reconsideration [279] *Order* [281] Motion for Certificate of Appealability;[289] Motion to Strike Response; and [300] Motion to Remove DOJ/Constitution are DENIED.

IT IS FURTHER ORDERED that the Court takes the [260] Motion for Summary Judgment under submission.

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