# APPENDIX

# APPENDIX

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## APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Case Nos. 21-3730/3733**

**[Filed: March 15, 2022]**

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| KEITH KRESZOWSKI, | ) |
| | ) |
| Plaintiff - Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| FCA US, LLC (21-3730/3733); UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 12, REGION 2B (21-3730), | ) |
| | ) |
| Defendants - Appellees. | ) |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: BATCHELDER, GIBBONS, and GRIFFIN, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Keith Kreszowski was employed by FCA US, LLC ("FCA") in its Toledo, Ohio automotive manufacturing facility, where he was a member of the Local 12 Region 2B United Automobile, Aerospace and Agricultural Implement Workers of America (the "Union"). Following an incident at work, FCA required Kreszowski to undergo a fitness-for-duty examination and placed him on leave, and the Union did not object. In 2017, Kreszowski sued FCA and the Union, alleging disability discrimination and retaliation. The district court granted summary judgment to FCA and the Union on both claims. In 2019, Kreszowski filed a second suit against FCA, with claims following chronologically from the facts of the 2017 suit. The district court consolidated his cases, then denied Kreszowski's motion for a discovery continuance and granted summary judgment to FCA. Because Kreszowski has not offered evidence establishing that FCA or the Union illegally discriminated or retaliated against him, we affirm.

## I

Keith Kreszowski began working for FCA in its Toledo, Ohio automotive manufacturing facility in July 2013 and was a member of the Union.[1] On September 30, 2016, Kreszowski hit the "abort" button to shut

[1] Because Kreszowski has two cases before us, the appellate and district court dockets are referred to by their respective numbers. "The 2017 case" refers to district court case number 3:17-cv-2371, which is 21-3730 on the appellate docket. "The 2019 case" refers to district court case number 3:19-cv-2989, which is 21-3733 on the appellate docket.

down an alignment machine when he perceived that his coworker Ken Sukalo had created a safety hazard by walking away from the machine. This caused production throughout the assembly line to shut down for ten to fifteen minutes. Kreszowski's supervisor, Nichole Banks, spoke to his coworkers about the incident and then issued him a verbal warning for failing to follow safety procedures.

In the conversation with Banks, Kreszowski was admittedly "upset," acknowledging that he had reacted with a "certain level of emotion." 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 184–85. He stated that he did not yell or scream, but that he raised his voice to be "firm" and probably used hand gestures. *Id.* at 185. Kreszowski felt the discipline was unwarranted and was frustrated Banks had spoken to other coworkers about the machine shutdown rather than asking for his "side of the story." *Id.* He told Banks he would contact the Occupational Safety and Health Administration ("OSHA"), stating "with all the safety issues we got here . . . I could call OSHA up; they could come out here today and shut the plant down." *Id.* at 186. In addition to communicating this sentiment to Banks, Kreszowski spoke to the Union Safety Coordinator Rex Maze and team leader Dianna Kurth about his intention to contact OSHA.

Kreszowski requested and was granted a day off on October 7, 2016, so he could file an OSHA complaint. At 4:10 a.m., Kreszowski sent a text message to Kurth asking for Nichole Banks's last name for his OSHA complaint. Kreszowski then sent multiple text messages at 5:00 a.m. to another plant manager

expressing that he was scared to return to work because he felt his health and safety were compromised at FCA and thought that Sukalo was dangerous. Kreszowski filed an OSHA retaliation charge claiming that he was disciplined and harassed because he made an internal complaint about alleged safety issues. OSHA investigated the complaint and ultimately dismissed it without action.

An FCA human resources manager contacted FCA's Corporate Labor Relations Department and reported that Kreszowski exhibited certain concerning behaviors for the facility. Accordingly, the Local Response Team ("LRT"), a group of individuals from FCA and Union leadership, was called to meet. The LRT is a trained group designed to allow management and the Union to work together to address concerns or troubling incidents; it also identifies and refers employees having problems to the Employee Assistance Program ("EAP"). The LRT met with Kreszowski on October 10, 2016, and Kreszowski presented a document outlining concerns about his safety if he returned to work under Banks's supervision and alongside Sukalo. Kreszowski also expressed concern about being subject to retaliation and a hostile work environment. During the meeting, Kreszowski was "excited" and "[a] little nervous," and he recalled using hand gestures and speaking faster and louder. Union representative and LRT member Mark Epley described Kreszowski as "very agitated" and noted he "was slamming his fist on the table [and] seemed almost out of control." 3:17-cv-2371, DE 50-12, Mark Epley Decl., Page ID 633.

At this meeting, Epley asked FCA human resources representative Connie Rubin to remove the discipline from Kreszowski's record, and Rubin agreed to do so. At the end of the meeting, Rubin said that Kreszowski could return to work. However, Kreszowski informed the LRT that he was not confident about returning to the workplace because he was concerned about Banks and Sukalo creating an abusive work environment. FCA accordingly excused him for the rest of his shift. That evening, Kreszowski contacted Epley and reiterated his concerns about returning to work; he requested an additional vacation day and asked to meet again with the LRT. On October 13, 2016, Kreszowski and the LRT met again. Again, Kreszowski expressed safety concerns with Sukalo that he felt had not been fully investigated and frustration that he had been disciplined while Sukalo had not. He provided the LRT with another document of his concerns, in which he requested relocation to another job assignment and stated, "[t]he frustrations and repetitive actions that have occurred within the group has put myself in [an] emotional state that is detrimental, and I am attempting to eliminate[] that state of mind due to the environmental conditions that exist. I cannot have that continue." 3:17-cv-2371, DE 49-3, Kreszowski October 13, 2016 Letter, Page ID 250–51.

When a member of the LRT asked Kreszowski if he could guarantee that he would not harm someone if he returned to work, Kreszowski "never said [he] would harm anybody," but said he was concerned about the disciplinary repercussions of shutting down a machine and consequently "could end up harming myself or somebody else." 3:17-cv-2371, DE 49, Kreszowski Dep.,

Page ID 198. Epley stopped Kreszowski and told him to choose his words carefully. Kreszowski asked to take a few more days off before returning to work, and the meeting participants verbally agreed that he would go on a personal leave of absence with a return-to-work date of October 24, 2016. That evening, Epley called Kreszowski and notified him that there were concerns about Kreszowski's responses to certain questions during the LRT meeting. The following day, Tonya Tooson (a Union member of the LRT and EAP representative) called Kreszowski and informed him he would need to complete a fitness-for-duty examination before returning to work.

Kreszowski attended a psychological assessment with Dr. James Knowles on October 19, 2016. Dr. Knowles told Kreszowski that he wanted to see him further before giving him permission to return to work. Kreszowski texted Tooson about his returning to work on October 24, but she called him and informed that he could not return until he had been approved as fit for duty and that he would be on personal leave. Kreszowski disagreed with the characterization of the leave as "personal," as opposed to disciplinary or medical, describing it as a nonconsensual "forced" leave of absence. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 200–01, 204–05. Meanwhile, FCA entered an absence code to protect his seniority under the collective bargaining agreement.

On October 25, 2016, Kreszowski filed a charge of disability discrimination with the Ohio Civil Rights Commission ("OCRC"). He alleged that FCA discriminated against him because of a perceived

disability by disciplining him and subjecting him to different employment terms and conditions by giving him a "forced personal leave of absence" and a "denial of medical leave." 3:17-cv-2371, DE 49-4, OCRC Charge, Page ID 252.

Dr. Knowles and Kreszowski met three more times between October 26 and November 22, 2016. On November 28, 2016, Dr. Knowles sent a final assessment to Jo'Lena Brown, FCA's Corporate Union Relations Specialist, in which he released Kreszowski to return to work and recommended that Kreszowski engage in appropriate treatment and complete anger management classes. Dr. Knowles noted that Kreszowski denied any intention of harming anyone, and that he interacted appropriately for three of their sessions but was uncooperative during the fourth and final appointment. Kreszowski stated his relationship with Dr. Knowles "was adversarial from day one" because he believed the doctor was deceitful. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 203–04.

Brown notified Kreszowski that he had been reinstated, and Kreszowski returned to work at FCA on November 30, 2016. Problems arose within six hours of his return: Kreszowski complained to human resources and Brown that he was experiencing a hostile work environment created by Sukalo and other coworkers. Kreszowski continued to worry that there could be retaliatory actions or hostile work conditions directed toward him, and he felt harassed by Sukalo, who ignored him in one instance, and by another coworker who seemed "upset and angry" with him. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 208–10. Kreszowski

continued to raise complaints to both local and corporate FCA management and human resources between December 2016 and February 2017. The complaints escalated into a charge of discrimination against the Union, which Kreszowski filed with the OCRC on February 8, 2017. Kreszowski alleged the Union had denied him representation on "October 13, 2016 and continuing" because of a perceived disability.[2] 3:17-cv-2371, DE 23-3, OCRC 2017 Charge, Page ID 107.

After Kreszowski sent repeated emails to FCA Group's Chief Executive Officer and FCA North America's Chief Human Resources Officer referring to "continued bias" against him, FCA's Equal Employment Opportunity Investigation Compliance Coordinator, Vicki Patterson, contacted Kreszowski to address his concerns. 3:17-cv-2371, DE 54-3, Patterson Decl., Page ID 919. Patterson stated that Kreszowski sent her multiple lengthy emails detailing numerous complaints about the LRT's actions, his Union representation, and matters addressed in OSHA and OCRC complaints. Patterson explained to Kreszowski that her investigation would be limited to Kreszowski's claim that his supervisor had harassed him in violation of FCA policy. Kreszowski accused Patterson and her office of bias, describing "widespread chronic abuse from your management and union officials within the Toledo Assembly Complex and beyond." 3:17-cv-2371,

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[2] The OCRC investigation culminated in a Letter of Determination finding "no credible information supporting [Kreszowski's] allegation of unlawful activity," and dismissing the matter. 3:17-cv-2371, DE 51-6, OCRC 2017 Letter, Page ID 673.

DE 49-8, Patterson Emails, Page ID 341. Patterson interviewed Kreszowski for more than three hours; she also interviewed Sukalo, Tooson, each member of the LRT, and additional coworkers. Sukalo informed Patterson he had considered retiring from FCA "because of the continued harassment to which Kreszowski subjects him." 3:17-cv-2371, DE 54-3, Patterson Decl., Page ID 921.[3]

In April 2017, FCA laid off Kreszowski and other employees as part of a plant-wide retooling. During this layoff, Kreszowski sent "a couple dozen" emails to FCA officials.[4] The plant was scheduled to resume operation and return employees from layoff in October 2017. However, the volume of Kreszowski's emails and management's ongoing concerns about Kreszowski's behavior culminated in a meeting with corporate human resources managers and FCA's chief medical officer, who determined that a meeting with Kreszowski should be held before he returned to work. Roy Richie, a labor relations manager, met with Kreszowski on October 16, 2017, at the local Union

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[3] Patterson conducted her interviews from February to August 2017. On September 6, 2017, she sent a closing letter to Kreszowski informing there had been no violation of FCA's policy. In response, Kreszowski sent multiple emails to Patterson and various FCA and Union officials and executives at the local and corporate levels describing his perceived deficiencies in the investigation.

[4] FCA arranged for Kreszowski's emails to be rerouted to one human resource employee. After he discovered this, Kreszowski began changing email addresses to "get around everything going to Connie Rubin" and continue contacting FCA executives. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 230.

hall. At this meeting, Kreszowski raised concerns about his 2016 leave of absence and perceived safety issues; Kreszowski's OSHA and OCRC complaints were also discussed. Kreszowski stated that he believed various human resources employees and Union members had "evil intentions" toward him and that their employment should be terminated before he could return to work as a productive employee. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 225.

Following this meeting, Richie determined that Kreszowski could not return to work until he completed another fitness-for-duty examination. FCA placed Kreszowski on "company-paid business," a payroll code that ensured his pay would not be interrupted. Richie stated Kreszowski "did not receive that information well." 3:17-cv-2371, DE 52, Roy Richie Dep., Page ID 816. Kreszowski met with Dr. Craig Lemmen on October 30, 2017 for his examination. Dr. Lemmen opined that Kreszowski did "not pose a significant risk of harm to himself or others at the workplace." 3:17-cv-2371, DE 54-2, Lemmen Report, Page ID 915. He also opined, however, that Kreszowski had "a psychiatric problem which interferes with his ability to positively interact with co-workers and supervisors." *Id.* at 916. Dr. Lemmen noted that time off from work would be helpful for Kreszowski to engage in psychotherapy treatment to reduce problematic interactions. *Id.* at 916–17.

On November 13, 2017, Kreszowski filed a second OCRC charge against FCA. He alleged FCA denied him recall from the layoff, forced him onto sickness and disability pay, and forced him to cooperate with the

October 2017 fitness-for-duty examination as retaliation for his October 25, 2016 OCRC charge. He formally withdrew the charge in January 2018 to pursue litigation instead.

In accordance with Dr. Lemmen's recommendation, Kreszowski made an appointment with Dr. Kettlie Daniels, who provided certification to FCA so Kreszowski would be covered by the appropriate medical leave plan. Kreszowski's relationship with Dr. Daniels was not a constructive one; he was under the impression Dr. Lemmen had given Dr. Daniels a treatment plan for him, while she believed she was to conduct a medical evaluation. Kreszowski did not trust Dr. Daniels and believed she was colluding with FCA by "start[ing] a treatment plan with falsehoods." 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 229. Dr. Daniels diagnosed Kreszowski with an adjustment disorder and provided certification for medical leave. Following the diagnosis, their relationship deteriorated. Kreszowski accused Dr. Daniels of participating in an FCA conspiracy meant to "project hostility and hardship upon [him]" and called her "an incompetent professional that is doing harm." 3:17-cv-2371, DE 49-16, Kreszowski Emails, Page ID 419. Dr. Daniels terminated treatment and the doctor-patient relationship in April 2018.

In July 2018, FCA contacted Kreszowski to inform him his medical certification had been valid only through May 1, 2018, and since then he had been absent without medical substantiation. FCA sent a list of potential physicians and resources, and it directed him to make an appointment by the end of the month

in order to continue his sickness and accident benefits. Kreszowski made an appointment to be evaluated at Harbor Behavioral Health ("Harbor") and submitted details of the appointment to FCA. Because he provided details of the upcoming appointment to FCA, his sickness and accident benefits were reinstated and paid through August 13, 2018. Kreszowski attended the intake assessment at Harbor but informed them that he did not want treatment. Kreszowski did not submit his Harbor assessment to FCA. He submitted no documentation stating he was able to return to work in compliance with the fitness examination, nor did he provide documentation by a licensed psychiatrist to substantiate continued entitlement to benefits under FCA's sickness and accident plan. He did not submit any substantiation for his absence to FCA after July 25, 2018.

On October 22, 2018, Kreszowski filed his third OCRC complaint against FCA alleging disability discrimination and retaliation. He asserted that FCA "would not accept Harbor Health's diagnostic and assessment that there was no need for future psychiatric services." 3:19-cv-2989, DE 1-1, OCRC 2018 Charge, Page ID 13.

Kreszowski did not return to work at FCA, and on March 18, 2019, FCA sent Kreszowski a letter explaining that he had been absent from work since October 27, 2017, and the reason for his absence no longer had current justification. The letter from FCA is known as a "five-day letter" requiring "satisfactory evidence as to the reason for your absence" pursuant to the collective bargaining agreement. 3:19-cv-2989, DE

16-8, Price Decl., Page ID 103. For an employee to provide satisfactory evidence, he must submit a dated medical statement signed by his physician that details a statement of the disability, the diagnosis, the dates of treatment, and the physician's contact information. FCA offers a form to employees that includes a list of all required information. On March 22, 2019, within the five-day period specified by FCA's letter, Kreszowski appeared at FCA's employment office with the assessment from Harbor. Kreszowski made multiple phone calls that morning to various FCA employees and Union members to attempt to present medical records. Larry Price and Mark Epley met Kreszowski at the employment office window; Price rejected the offered medical records and Kreszowski was asked to leave the property. Price reviewed the Harbor assessment and determined that it did not contain the information required for an employee to be reinstated and would not be accepted as satisfactory evidence as to the reason for Kreszowski's absence.

On March 26, 2019, FCA sent Kreszowski a letter stating that "[a]s a result of [his] failure to return to work when called, as instructed in our previous letter, [his] seniority is terminated as of 03/25/2019." 3:19-cv-2989, DE 16-8, Price Decl., Page ID 109. The letter explained the reason for termination was because FCA did not receive satisfactory evidence as to the reason for Kreszowski's absence.

Kreszowski sued FCA and the Union in November 2017, alleging unlawful termination, disability discrimination, and retaliation in violation of federal and state law. In July 2019, the Union and FCA moved

for summary judgment. The district court held Kreszowski did not establish a prima facie case of disability discrimination by either FCA or the Union. The district court also rejected Kreszowski's claim that FCA retaliated against him, holding that Kreszowski could not establish a causal connection between his protected activity and the purported adverse actions. The court granted FCA's and the Union's motions for summary judgment.

Kreszowski sued FCA again in December 2019, alleging unlawful termination, disability discrimination, and retaliation in violation of federal and state law. In June 2020, FCA moved for summary judgment. Kreszowski then filed a motion pursuant to Federal Rule of Civil Procedure 56(d) requesting a continuance to conduct discovery before the court ruled on the motion for summary judgment. The district court denied Kreszowski's motion.[5] The court granted FCA's summary judgment motion in July 2021, finding that Kreszowski did not establish a prima facie case of disability discrimination by FCA. The court also rejected Kreszowski's retaliation claim, holding that Kreszowski could not establish a causal connection between his protected activity and the purported adverse actions. Kreszowski appeals the district court's

[5] Kreszowski filed three lawsuits against FCA, in 2017, 2019, and 2020. He named the Union as a defendant in the 2017 and 2020 cases, but not in the 2019 case. The 2017 and 2019 cases were ultimately consolidated. In its order denying Kreszowski's motion for a continuance, the district court also granted FCA's Rule 12(b)(6) motion to dismiss in the 2020 case. This did not affect FCA's motion for summary judgment in the 2019 case.

denial of his discovery motion and its grants of summary judgment to FCA and the Union.

## II

We review a district court's grant of summary judgment de novo. *Equitable Life Assurance Soc'y of the United States v. Poe*, 143 F.3d 1013, 1015 (6th Cir. 1998). Summary judgment for FCA and the Union is appropriate if, after drawing all reasonable inferences in favor of Kreszowski, "there is no genuine dispute as to any material fact and [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "A genuine issue of material fact exists when there are 'disputes over facts that might affect the outcome of the suit under the governing law.'" *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 465 (6th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party]." *Anderson*, 477 U.S. at 252.

We review "a district court's decision on a Rule 56(d) motion for discovery for an 'abuse of discretion.'" *Doe v. City of Memphis*, 928 F.3d 481, 486 (6th Cir. 2019) (quoting *In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Practices Litig.*, 752 F.3d 1065, 1074 (6th Cir. 2014)). An abuse of discretion occurs when we are "left with the definite and firm conviction that the trial court committed a clear error of judgment." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d

611, 623 (6th Cir. 2014) (quoting *United States v. Hunt*, 521 F.3d 636, 648 (6th Cir. 2008)). To reverse, we must find that the district court's "ruling was arbitrary, unjustifiable, or clearly unreasonable." *Id*.

**III**

In both his 2017 and 2019 cases, Kreszowski alleges disability discrimination under the Americans with Disabilities Act ("ADA") and Ohio's Revised Code, which prohibit an employer from discriminating on the basis of disability. 42 U.S.C. § 12112(a); Ohio Rev. Code Ann. § 4112.02. Pursuant to the ADA, "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C § 12112(a). Ohio law similarly prohibits "any employer, because of the . . . disability . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code Ann. § 4112.02(A). As the statutes are similar, we "consider the ADA and state law claims simultaneously by looking to the cases and regulations that interpret the ADA." *Talley v. Fam. Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1104 n.3 (6th Cir. 2008).

Under the ADA, in the absence of direct evidence of disability discrimination, a plaintiff may establish a prima facie case of discrimination through indirect evidence. *See Sullivan v. River Valley Sch. Dist.*, 197

F.3d 804, 810 (6th Cir. 1999). Once established, the familiar *McDonnell Douglas* framework shifts the burden to the defendants to offer a "legitimate, nondiscriminatory reason" for its action. *Id.*; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the defendants articulate such a reason, the plaintiff must show that the reason given is pretext for discrimination in order to prevail. *Sullivan*, 197 F.3d at 810.

**A**

To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show that he (1) is "a disabled person within the meaning of the Act"; (2) is "otherwise qualified to perform the essential functions of his job with or without reasonable accommodation"; and (3) "suffered an adverse employment decision due to his disability." *Sullivan*, 197 F.3d at 810. An individual is considered "disabled" under the ADA if he (1) "has a physical or mental impairment that substantially limits one or more" of his major life activities; (2) "has a record of such impairment," or (3) "is regarded by [his] employer as having such an impairment." *Gruener v. Ohio Cas. Ins. Co.*, 510 F.3d 661, 664 (6th Cir. 2008) (quoting *Sullivan*, 197 F.3d at 810). Accordingly, an employee may be "regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001).

**1**

Kreszowski argues he has presented sufficient evidence to establish a prima facie case of discrimination. The district court disagreed, finding he had not established that FCA regarded him as disabled. On appeal, Kreszowski argues that the required medical examinations show FCA regarded him as disabled.

Under the ADA, an employer is permitted to require medical examination only when it is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). We have recognized that, because employers must "be able to determine the cause of an employee's aberrant behavior," requesting an employee to undergo a fitness for duty examination "is not tantamount to regarding that employee as disabled." *Sullivan*, 197 F.3d at 810. Requesting an employee obtain a medical examination cannot, by itself, prove perception of a disability. *Id.* Further, an examination ordered for valid reasons is not an adverse job action and does not prove discrimination. *Id.* at 813; *see also Pena v. City of Flushing*, 651 F. App'x 415, 422 (6th Cir. 2016). A medical examination is job-related and consistent with business necessity when: "(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others." *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014) (quoting *Denman v. Davey Tree Expert Co.*, 266 F. App'x 377, 379 (6th Cir. 2007)).

Kreszowski argues none of these valid reasons apply here. He asserts his behavior was "not indicative of a threat to the safety of himself, or any others at the workplace." 21-3730, CA6 R. 17, Appellant Br., at 22. But the record contains significant evidence to support that both the 2016 and 2017 fitness examinations were job-related and consistent with business necessity. For example, after the October 10, 2016 meeting, although FCA management said Kreszowski could return to work, he informed the LRT that he was not confident about returning to the workplace. Kreszowski indicated he was in a detrimental emotional state and had concerns about his health and safety at work. He felt that his supervisor and coworkers were coordinating against him and were likely to do so again in the future. After the October 2016 meetings, in which Kreszowski stated he might not take otherwise-appropriate safety actions in fear of discipline, which might result in harm to himself or coworkers, members of the LRT were concerned he could threaten workplace safety.

Kreszowski's behavior is similar to other situations in which we have found a medical examination to be appropriately job-related and consistent with business necessity. In *Barnum v. Ohio State University Medical Center*, 642 F. App'x 525 (6th Cir. 2016), an employer required a psychological evaluation after an employee made concerning comments and appeared unable to concentrate on relatively straightforward routine job tasks. *Id.* at 527–28. We held that the employer did not regard the employee as disabled, despite ordering the medical examination, because the request was job-related and consistent with business necessity. *Id.* at 532–33. Because there were "numerous concerns

expressed about [the employee's] inability to concentrate and at least one instance where she could not perform a routine task," there was "significant evidence that would cause a reasonable person to inquire whether the employee is still capable of performing her job." *Id.* (citing *Sullivan*, 197 F.3d at 808, 812–13). Similarly, even viewing the facts in the light most favorable to Kreszowski, his behavior warranted an inquiry about his capability to perform his job. During the course of multiple meetings, the LRT observed Kreszowski in an upset state, using an escalated tone and expressing concerns about his ability to safely return to work. In light of Kreszowski's behavior and the LRT's reasonable concerns, the 2016 request for a fitness-for-duty examination was job-related and consistent with business necessity.

While on leave, Kreszowski sent a multitude of text messages and emails that reasonably prompted further concerns about whether he was able to perform his job. In *Brown v. Lexington-Fayette Urban County Government*, 549 F. App'x 366 (6th Cir. 2013), an employee sent emails regarding her mental state and work to various coworkers and supervisors that "devolved from coherent, if somewhat odd," to concerning. *Id.* at 368. We held that the employer's decision "to refer [the employee] for a fitness-for-duty assessment that led to her being placed on leave was legitimate and non-retaliatory given the tone and substance" of her emails. *Id.* at 370. The tone, substance, and frequency of Kreszowski's emails to local and corporate FCA employees similarly were sufficient to warrant the 2017 request for a second fitness-for-duty examination. For example, Kreszowski

sent an email to eighteen FCA employees, including Rubin, Richie, Patterson, and Epley, on October 24, 2017, in which he complained about a pay-raise issue "due to the abusive and adverse conditions that I am experiencing with Human Resource Management within FCA." 3:17-cv-2371, DE 49-22, Kreszowski Emails, Page ID 466. Kreszowski continued that the issue was "[c]learly absolutely 100 percent retaliatory, hostile, abusive actions are occurring against me at this moment in time and prior to this latest event." *Id.* He ended his email: "I declare 'CEASE TREATING ME IN THIS MANNER THAT CAUSES HARM AND DAMAGES THAT INCLUDE FINANCIAL HARM AND EMOTION[AL] DISTRESS THAT HAS NO PURPOSE EXCEPT SPECIFICALLY CAUSING HARM WITH INTENT TOWARDS ME WHICH CAUSES THAT HARM AND DAMAGE TO OCCUR.'" *Id.* (emphasis in original). This email was one of dozens received by FCA employees. Consistent with *Brown*, here too Kreszowski's email correspondences sufficiently prompted FCA's 2017 request for a fitness-for-duty examination as job-related and consistent with business necessity.

Even viewing the facts in the light most favorable to Kreszowski, FCA's 2016 and 2017 requests for a medical evaluation were job-related and consistent with business necessity under the ADA. Further, FCA's request that Kreszowski obtain a fitness-for-duty examination does not itself prove a perception of disability. *Sullivan*, 197 F.3d at 810; *see also Johnson v. Univ. Hosps. Physician Servs.*, 617 F. App'x 487, 491 (6th Cir. 2015) (noting that deteriorating employee

performance could be unrelated to disability and instead linked to motivation or other reasons).

Kreszowski failed to present any other evidence that FCA regarded him as disabled. We affirm the district court's holding that Kreszowski did not establish a prima facie case of disability discrimination at to FCA and therefore FCA is entitled to summary judgment.[6]

**2**

Kreszowski argues "[t]he Union perceived him as disabled when it did not object to FCA's decision to require a fitness-for-duty exam" in 2016 and when it failed to file a grievance regarding Kreszowski's issues with FCA's payment to him during his leave of absence.[7] 21-3730, CA6 R. 17, Appellant Br., at 25.

The Union asserts it did not object to FCA's request that Kreszowski submit to a medical examination because "FCA was within its established right" to make such a request. 21-3730, CA6 R. 20, Union Br., at 27. The Union states that "Kreszowski's demeanor, his own words, and his continued requests for more time

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[6] FCA also argues there was no adverse employment action because of a perceived disability. The district court found that Kreszowski faced an adverse employment action. We need not reach this issue because Kreszowski failed to establish that he was regarded as disabled by FCA.

[7] A prima facie case of discrimination on the basis of a perceived disability does not require Kreszowski to demonstrate that the Union breached its duty of fair representation. *Peeples v. City of Detroit*, 891 F.3d 622, 638 (6th Cir. 2018).

off, gave the employer and the Local Response Team cause to send [him] for a fitness-for-duty examination [and the Union] had no basis to object to the request as being fully within FCA's established rights." *Id.* at 30. As discussed above, FCA's 2016 request for a psychological evaluation was "job-related and consistent with business necessity" under the ADA. Therefore, the Union's failure to object is not evidence that the Union perceived him as disabled.

Kreszowski also argues that Union representative and LRT member Epley commented that Kreszowski needed to "get better and follow the doctor's instructions," which he asserts is proof the Union regarded him as disabled. 21-3730, CA6 R. 17, Appellant Br., at 25. But a "perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled." *Sullivan*, 197 F.3d at 810. Kreszowski asserts the Union's failure to object could not have been because they perceived him to have a health problem, rather than a disability, because "there was no health problem (as opined by two medical professionals)." 21-3730, CA6 R. 17, Appellant Br., at 25–26. But that reasoning is circular: without the requested medical evaluations, the Union did not know the source of Kreszowski's aberrant behavior.

Kreszowski next argues the Union perceived him as disabled when it failed to file a grievance regarding FCA's failure to pay him overtime pay or make 401(k) contributions during his leave of absence. However, Kreszowski never requested that the Union file a grievance on either of these matters. The Union argues

that it "vigorously advocate[d] on Kreszowski's behalf," including by successfully having FCA void the discipline for the September 30, 2016 incident; assisting him in obtaining requested time off; saving him from negative attendance points; and obtaining hours of pay while he was away from work. 21-3730, CA6 R. 20, Union Br., at 32–33. In light of the Union's actions on Kreszowski's behalf and Kreszowski's failure to request the Union file a grievance regarding pay, Kreszowski failed to provide sufficient evidence for a reasonable juror to find that the Union regarded Kreszowski as disabled. We affirm the district court's holding that the Union is entitled to summary judgment on Kreszowski's discrimination claims.

Kreszowski does not identify any additional evidence in his 2019 case alleging disability discrimination beyond the assertions in his 2017 case. His repetition of the same arguments from the earlier case must fail here. Kreszowski has identified no evidence to support his latest allegation that FCA regarded him as disabled and therefore the district court appropriately held that Kreszowski did not establish a prima facie case of disability discrimination by FCA. We affirm. And "[b]ecause [Kreszowski] has not established a prima facie case of . . . discrimination, under the *McDonnell Douglas* burden shifting procedure the court's analysis is over and there is no need to address the question of pretext." *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).

**B**

Kreszowski argues the district court erred in both cases by holding that he did not establish a prima facie case of retaliation. Kreszowski alleged intentional retaliation in violation of Title VII of the Civil Rights Act and Ohio law. 42 U.S.C. § 2000e; Ohio Rev. Code Ann. § 4112.02. Both statutes protect employees from retaliation after opposing an employer's unlawful actions. 42 U.S.C. § 2000e-3(a); Ohio Rev. Code Ann. § 4112.02(I). The federal and state law claims are analyzed under the same framework. *See Smith v. City of Toledo, Ohio*, 13 F.4th 508, 514 (6th Cir. 2021). Without direct evidence of retaliation, the *McDonnell Douglas* burden-shifting framework governs claims of retaliation. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523 (6th Cir. 2008). To establish a prima facie case of retaliation, Kreszowski must show "(1) that [he] engaged in a protected activity; (2) that the defendant had knowledge of [his] protected conduct; (3) that the defendant took an adverse employment action towards [him]; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Id.* (citation omitted).

Protected activity under Title VII includes "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; [and] refusing to obey an order because the worker thinks it is unlawful under Title VII." *Jackson v. Genesee Cnty. Rd. Comm'n*, 999 F.3d 333, 344–45 (6th Cir. 2021) (quoting *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008)). Title VII protects "not only the filing of formal discrimination

charges with the EEOC, but also . . . less formal protests of discriminatory employment practices." *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014). Kreszowski complained frequently about perceived safety issues to management in FCA and the Union. However, these complaints did not allege any potential violation of Title VII.

In his 2017 case, the only complaint in the record that meets the standard of Title VII protected activity is Kreszowski's 2016 OCRC charge, in which he alleged that FCA discriminated against him because of a perceived disability by disciplining him and subjecting him to different employment terms and conditions by giving him a "forced personal leave of absence" and a "denial of medical leave." 3:17-cv-2371, DE 49-4, OCRC Charge, Page ID 252. The district court acknowledged that Kreszowski's 2016 OCRC charge constituted protected activity. However, it found that Kreszowski had not established a causal connection between the protected activity (filing the 2016 OCRC charge) and the alleged adverse employment action (the October 2017 fitness-for-duty examination request and "forced leave").

In his 2019 case, the complaint in the record that meets the standard of Title VII protected activity is Kreszowski's 2018 OCRC charge, in which he alleged that FCA discriminated against him because of a perceived disability by denying approval for him to return to work and requiring him to attend a psychiatry appointment. 3:19-cv-2989, DE 1-1, OCRC 2018 Charge, Page ID 13. The district court again acknowledged that Kreszowski's 2018 OCRC charge

constituted protected activity. It found again that Kreszowski had not established a causal connection between the protected activity and the alleged adverse employment action.

To establish the causal prong of a prima facie Title VII retaliation claim, courts use the "traditional principles of but-for causation," which "require[] proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Laster*, 746 F.3d at 731 (citation omitted). This court has "rarely found a retaliatory motive based only on temporal proximity." *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 401 (6th Cir. 2010). In *Vereecke*, this court referred to a passage of eight months between incidents as "little more than coincidence, which is insufficient on its own to show causation." *Id.*

Kreszowski argues that the "timing of the two events" is proof of a causal connection between his October 2016 OCRC charge and the 2017 fitness-for-duty examination request. 21-3730, CA6 R. 17, Appellant Br., at 31. Although a year passed between these events, Kreszowski contends that "during those months, [he] was continually complaining about the discrimination and retaliation he suffered." *Id.* Therefore, he argues, "[a] reasonable person could determine that FCA was tired of [his] complaints about the discrimination and retaliation [he] suffered from, and thus decided to keep him off work as a result." *Id.* at 32. However, there is no indication that *but for* the filing of the OCRC complaint, FCA would not have requested a second

psychological evaluation. Rather, the record shows that Kreszowski sent a large volume of concerning emails throughout the spring and fall of 2017 and had a fraught meeting with labor relations manager Richie on October 16, 2017. Following this meeting, where Kreszowski stated he believed FCA employees and Union members had "evil intentions" toward him, Richie determined that Kreszowski could not return to work until he completed a fitness examination. 3:17-cv-2371, DE 49, Kreszowski Dep., Page ID 225. Kreszowski has not presented evidence from which one could infer that FCA only subjected him to this requirement because of his engagement in protected activity. Because Kreszowski could not establish a causal connection between his protected activity and the alleged adverse action, the district court properly held he had not established a prima facie case of retaliation.

Similarly, the five months between his October 2018 OCRC charge and the March 2019 termination of his seniority is "little more than coincidence, which is insufficient on its own to show causation." *Vereecke*, 609 F.3d at 401. There is again no indication that *but for* the filing of the OCRC complaint, FCA would have maintained Kreszowski's seniority. Rather, the record indicates that FCA's reinstatement process requires employees to submit medical documents signed by a physician. Here, the Harbor assessment that Kreszowski relied upon did not satisfy FCA's stated requirements. Because Kreszowski did not establish a causal connection between his protected activity and the alleged adverse action, the district court properly

held he had not established a prima facie case of retaliation.

**C**

Finally, Kreszowski asserts that the district court improperly denied his Rule 56 motion for a continuance to conduct discovery in his 2019 case. To determine whether a district court abused its discretion in granting or denying a Rule 56 motion, applicable factors include:

> (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period had lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests.

*CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) (citation omitted). When parties have not had an opportunity for discovery, it is likely an abuse of discretion to deny a Rule 56(f) motion and rule on a summary judgment motion. *Id.* (citing *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004)). This circuit has "affirmed the denial of Rule 56(f) motions when the parties were given insufficient time for discovery if 'further discovery would not have changed the legal and factual deficiencies.'" *Id.* (quoting *Maki v. Laakko*, 88 F.3d 361, 367 (6th Cir. 1996)); *see also Allen v. Collins*, 529 F. App'x 576, 584 (6th Cir. 2013).

In his motion for a discovery continuance, Kreszowski sought to depose witnesses and conduct

discovery on the following topics: (1) his sickness and accident benefits; (2) Dr. Daniels's medical evaluation; (3) his attempt to provide medical evidence to FCA on March 22, 2019; (4) Harbor's assessment not identifying a disability; (5) Price's refusal to accept the Harbor evaluation; and (6) his appearance at the employment office on March 22, 2019. The district court noted that while no discovery had yet occurred in the 2019 case, there was a unique posture because "the 2019 case was filed on the heels of a full discovery period in the 2017 case" and Kreszowski had the same theories of recovery. 3:19-cv-2989, DE 23, Order, Page ID 166. The court held that the topics Kreszowski identified as needing further discovery "reflect[ed] the limited universe of events not covered by discovery in the 2017 case." *Id.* However, the court went through each of the six topics and determined that either Kreszowski already possessed relevant documents and had the necessary facts, or he did not show that additional discovery could affect the issues.

The district court's denial of additional discovery came after Kreszowski had "a full opportunity to conduct discovery" in his 2017 case, which was consolidated with his 2019 case. *Ball*, 385 F.3d at 719. Although this case involves developments after the events in his 2017 complaint, the topics Kreszowski identified as needing further discovery did not identify a genuine issue of material fact precluding summary judgment. *See CenTra*, 538 F.3d at 420–21. This is not akin to a case in which there has been no opportunity for any discovery, such that denial of a Rule 56 motion would be an abuse of discretion. *E.g., Thomason v. Amalgamated Loc. No. 863*, 438 F. App'x 358, 361 (6th

Cir. 2011) (in which "the district court permitted no discovery whatsoever"); *Vance By and Through Hammons v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996) (same). The district court's ruling was not arbitrary, unjustifiable, or clearly unreasonable. *E.M.A. Nationwide*, 767 F.3d at 623. Therefore, we affirm the denial of Kreszowski's Rule 56(d) motion.

## IV

We affirm the district court in full in both the 2017 and 2019 cases.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 3:17-cv-2371**

**[Filed: July 27, 2021]**

| | |
|---|---|
| Keith Kreszowski, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| FCA US LLC, *et al.*, | ) |
| | ) |
| Defendants. | ) |
| | ) |

MEMORANDUM OPINION AND ORDER

### I. INTRODUCTION

Defendant United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12 (the "Union"), and Defendant FCA US LLC have filed separate motions for summary judgment on all claims asserted by Plaintiff Keith Kreszowski. (Doc. Nos. 50 and 54). Kreszowski filed briefs in opposition to both motions. (Doc. Nos. 59 and 58). Defendants filed briefs in reply. (Doc. Nos. 60 and 61). For the reasons stated below, I grant Defendants' motions.

## II. BACKGROUND

Kreszowski began working on FCA's production line in July 2013. He became a member of the Union at the same time. One of Kreszowski's coworkers on the afternoon shift was Ken Sukalo. In late September 2016, Kreszowski submitted a safety complaint against Sukalo, asserting Sukalo had committed a safety violation by manually disabling a stop pole on the assembly line. (Doc. No. 49 at 11-12). According to Kreszowski, Sukalo's action came without warning and created a risk that Kreszowski could have been hit by a vehicle moving down the assembly line. (*Id.*).

A few days later, on September 30, 2016, Kreszowski shut down production on the line after witnessing Sukalo walk away from his workstation. (*Id.* at 13). The line was down for approximately 10-15 minutes, until workers in the skilled trades department were able to come to that portion of the plant and restart the line. (*Id.*). Kreszowski submitted another safety complaint to Dianna Kurth, the team leader in his part of the assembly line, and to Mike McGee, his union steward. (*Id.*).

On October 6, Kreszowski received a verbal warning from his supervisor, Nichole Banks, for failing to follow safety procedures when he shut down the line. Kreszowski was upset Banks disciplined him based upon what Kurth and Sukalo had told her, and without talking to him first. (*Id.* at 14-15). Kreszowski acknowledged raising his voice, speaking quickly, and using hand gestures, but denied yelling or screaming while talking to Banks. (*Id.* at 15). Kreszowski asserted he commonly speaks quickly and uses hand gestures

during conversation. (*Id.*). He stated he was "being firm" in order to communicate his disagreement with Banks disciplining him without first getting his side of the story. (*Id.*).

Kreszowski left the meeting with Banks and went to talk to Rex Maze, the UAW Safety Coordinator. About 10 or 15 minutes later, Kurth came to Maze's office to talk to Kreszowski. After Kurth denied telling Banks anything about the September 30 incident, Kreszowski said he was thinking about calling the Occupational Safety and Health Administration ("OSHA") and stated that, if OSHA came to the plant, "with all the safety issues and hazards they got, they'd shut down the plant in reference to safety." (Doc. No. 49 at 17). Kreszowski repeated the same statement to Brian Sims, a UAW representative. (*Id.*).

While he was in Maze's office, Kreszowski requested and received permission to take the next day off of work, with the intention of going to the OSHA office to file a complaint. (*Id.* at 18). After some further discussions with Maze, Sims, and others, Kreszowski left the plant and went home. After he left, he sent a text message to Kurth asking for Banks' last name, so he could include it in his whistle blower complaint. (*Id.* at 17). At some point during their conversations on the night of October 6-7, Kreszowski said something that Kurth interpreted as a threat. (*Id.* at 18-19). Kurth reported this development to Banks. (*Id.*).

Kreszowski took October 7 off, as scheduled, and filed a complaint with OSHA. (*Id.* at 20). He also sent a text message to Larry Maurer, the plant Operations Manager, indicating he thought his health and safety

were being compromised at FCA, and that Sukalo was dangerous. (*Id.*).

On October 10, Kreszowski met with a joint FCA-Union group known as a Local Response Team ("LRT"). The LRT is a collectively-bargained committee made up of designated individuals from both entities, including FCA management and members of the Union leadership, security and medical officers, and a representative from the Union's Employee Assistance Program. The LRT is intended to prevent "troubling situations from worsening." (Doc. No. 50-12 at 2).

During the October 10 meeting, Kreszowski provided a two-page summary of the October 6 incident and his specific concerns about Sukalo's actions. (Doc. No. 49 at 21; Doc. No. 49-2 at 1-2). Kreszowski also indicated he was concerned about whether he would be safe working under Banks' supervision in the future, because she had disciplined him and not Sukalo. (Doc. No. 49 at 21).

The parties disagree about Kreszowski's conduct during the meeting. Mark Epley, a Union representative and a participant in the October 10 meeting, states "Kreszowski was very agitated during this meeting and was slamming his fist on the table. He seemed almost out of control." (Doc. No. 50-12 at 3). Connie Rubin, a human resources department employee and participant in the October 10 meeting, later reported that, when she reached out her hand to touch Kreszowski's arm, he "glared at her and said, 'You don't want to do that.'" (Doc. No. 54-3 at 9). Kreszowski denied pounding his fists or hands on the table or being out of control. (Doc. No. 49 at 22). He

described himself during the meeting as "[p]robably excited . . . [and a] little nervous." (*Id.*).

During the meeting, Epley requested that Kreszowski's October 6 disciplinary notice be removed from his record. (Doc. No. 50-12 at 3). FCA agreed to the request and the discipline was voided. (*Id.*; Doc. No. 49-6). At the conclusion of the meeting, the LRT told Kreszowski he could return to his workstation. (Doc. No. 49 at 24). Kreszowski, feeling "a little threatened" by what he viewed as "hostile and retaliatory circumstances," asked for the rest of the day off. (*Id.* at 23-24). After leaving work, Kreszowski still had reservations about returning to work. He then received permission to take the next two days – October 11 and 12 – off as well. (*Id.* at 24-25).

Kreszowski returned to FCA on October 13 for another meeting with the LRT. Kreszowski presented some additional written concerns during that meeting. (Doc. No. 49-3). He expressed concern for his safety and welfare, as well as concern that Banks and Sukalo would retaliate against him. (*Id.* at 1). He requested a transfer to another job assignment, stating "[t]he frustrations and repetitive actions that have occurred within the group has put myself in a[n] emotional state that is detrimental, and I am attempting to eliminate[] that state of mind due to the environmental conditions that exist." (*Id.*). He asserted the Union and FCA had failed to assist him with the safety concerns he previously had raised about his work environment and concluded by saying he would "continue to sort matters of concern[] and any repercussions that may occur in the future to the best of my ability and determine what

resources are available to assist me with the unforeseen circumstances." (*Id.* at 2). Kreszowski believed Sukalo, Kurth, and Banks coordinated to discipline him for the September 30 incident and that there was a "strong likelihood" they would engage in similar behavior in the future. (Doc. No. 49 at 26).

During the meeting, one of the LRT members, Charlene Hutchinson, asked Kreszowski if he could guarantee he wouldn't harm someone when he returned to work. (*Id.* at 28). Kreszowski denied he would harm anyone, but stated he may not take otherwise-appropriate actions (like shutting down the line again) because he was afraid of being disciplined again and that such a situation might result in harm to himself or a coworker. (*Id.*). Epley, concerned Kreszowski was implying "he did not know if he would be safe and cause no harm if he returned to work," interrupted Kreszowski and told him to choose his words carefully. (Doc. No. 50-12 at 3). Kreszowski thought this was a misinterpretation of what he was saying, though he admits he was under a fair amount of stress during the October 13 meeting due to his worries about his work environment. (Doc. No. 49 at 28). Epley recalled that Kreszowski "became very upset . . . [and] kept talking about feeling unsafe and unsure." (Doc. No. 50-12 at 3).

At the end of the meeting, Kreszowski requested additional time off work, with a return to work date of October 24, 2016. (Doc. No. 49 at 28). FCA approved his request as a personal leave of absence. (*Id.*). After the meeting, Epley called Kreszowski to tell him FCA had "a little bit of concern" about the way he answered

Hutchinson's question. (*Id.* at 29). The next day, Tonya Tooson, an FCA human resources employee and an LRT member, called Kreszowski to tell him FCA was requiring him to undergo a fitness-for-duty exam before he could return to work due to the way he responded to Hutchinson's question. (*Id.*).

While Kreszowski disagreed with FCA's decision to continue his time off work as a personal leave of absence because his time off work was not voluntary, (*id.*), both Tooson and Epley described this characterization as the standard practice. (*Id.*; Doc. No. 50-12 at 4). Epley told Kreszowski he could go on medical leave if he saw the plant doctor and that a personal leave of absence was "actually more beneficial" because he received full pay rather than a reduced pay rate under the Sickness and Accident policy.[1] (*Id.*).

On October 19, Kreszowski attended a psychological appointment Tooson scheduled with Dr. James Knowles, a Licensed Clinical Psychologist. Kreszowski described this meeting as short and indicated he did not learn until after the appointment that he could not return to work unless Dr. Knowles cleared him. (*Id.* at 29-30). Dr. Knowles did not clear Kreszowski after the initial appointment because he wanted to perform a more comprehensive evaluation, including administering the Minnesota Multiphasic Personality Inventory-2. (Doc. No. 53-3 at 1). FCA extended Kreszowski's leave of absence beyond October 24, which led Kreszowski to

[1] Kreszowski disputes this, asserting a personal leave of absence is uncompensated. (Doc. No. 49 at 32).

file a charge of discrimination against FCA on October 25, 2016. (Doc. No. 49-4). Kreszowski alleged FCA discriminated against him based upon a perceived disability by requiring him to complete the fitness-for-duty exam before returning to work. (*Id.* at 1). In February 2017, Kreszowski also filed a charge of discrimination against the UAW, alleging the Union had failed to advocate on his behalf because of a perceived disability. (Doc. No. 51-4).

Kreszowski ultimately had a total of four sessions with Dr. Knowles. On November 28, 2016, after the fourth session, Dr. Knowles approved Kreszowski to return to work but recommended he attend anger management classes and substance abuse counseling; and that he participate in cognitive-behavioral therapy to assist with stress management and anxiety reduction and support. (Doc. No. 53-3 at 1-3).

Jo'Lena Brown, an FCA labor relations specialist, approved Kreszowski's request to return to work on November 30, 2016, and informed him he would be made "whole for all lost time from October 10th to date." (Doc. No. 53-2 at 1). Further, Brown reiterated that Kreszowski was required to attend anger management classes after coordinating with a Union EAP representative. (*Id.*). Kreszowski contends he was not made whole, because he "did not receive time and a half he should have received, nor did he receive compensation towards his 401(k) for approximately a seven week period of time." (Doc. No. 58 at 10); (*see also* Doc. No. 49 at 36).

Kreszowski had another meeting with the LRT upon his return to work. He again expressed concerns

that Sukalo and Banks would create a hostile environment for him because FCA and the Union did not investigate the incident leading Banks to issue Kreszowski a verbal disciplinary warning on October 6. (Doc. No. 49 at 36-37). Kreszowski returned to his previous work assignment where, he asserts, he was subjected to a hostile environment by Sukalo and others. (*Id.* at 37).

During his shift, Kreszowski had another employee call the skilled trades department to come down and fix a piece of equipment. (*Id.*) The skilled trades employee came down, along with Banks and several people from FCA management and the Union. (*Id.* at 38). Kreszowski contends Sukalo told people that Kreszowski had intentionally sabotaged the equipment and sought to harass him by making the incident into a larger situation. (*Id.* at 39-40). He also contends Sukalo and another employer, Cheri Hauser, were working together to intimidate and harass him for complaining to the HR department about the actions and conduct of some of his coworkers. (*Id.* at 40-41).

In the ensuing months, Kreszowski raised complaints regarding a variety of workplace incidents and interactions. (*Id.* at 42-47). Frustrated with what he viewed as lack of concern for these incidents, Kreszowski began contacting individuals in higher level management positions in FCA and the Union, including the then-CEO of FCA Group (Sergio Marchionne) and the Chief Human Resources Officer for FCA North America (Linda Knoll). On February 8, 2017, Kreszowski emailed Knoll, Brown, Epley, and another FCA employee named Christopher Capoldo to

raise concerns that Banks was harassing him and retaliating against him because she "always questions" whether repairs or service Kreszowski requested were "necessary." (Doc. No. 49-8 at 4). Kreszowski believed this was a continuation of the issues about which he had raised complaints in the fall of 2016. (*Id.*).

In response, Vicki Patterson, an attorney and investigator in FCA's corporate office of Equal Employment Opportunity Compliance and Governance, initiated an investigation and contacted Kreszowski to discuss his concerns. (Doc. No. 54-3). While Kreszowski initially expressed interest in talking with Patterson, (Doc. No. 49-8 at 3-4), he subsequently told Patterson he felt she would "not respond in a balanced non biased manner," even if she concluded Banks, Sukalo, and the LRT members had acted hostilely toward him. (*Id.* at 1-2).

Kreszowski also took issue with the scope of Patterson's investigation. Patterson told Kreszowski she would investigate whether Bank had harassed, discriminated against him, or retaliated against him in violation of FCA's policies. (*Id.* at 11). She indicated, however, it was not her role to consider his OCRC charge, Brown's response to Kreszowski's claims he was owed money from his leave of absence, or whether the Union fairly represented him. (*Id.*). Kreszowski believed all of the incidents and occurrences about which he had complained were connected and related to the LRT's decision to require him to undergo a fitness-for-duty exam, and if Patterson was not willing to "revisit those issues and others[,] then certainly you, your office, and FCA [have] no concern or focus on

eliminating corporate cultures and attitudes that foster and condone discrimination, intolerance, harassment, and the barrier that prevent equal opportunities." (*Id.* at 10-11).

While continuing to correspond with Kreszowski by email, Patterson also arranged for interviews with Kreszowski and others. In late March and early April 2017, Patterson interviewed Kreszowski, Sukalo, Tooson, Rubin, and Epley, among others. (Doc. No. 54-3 at 2-3, 5-12). Kreszowski continued to email Patterson with details of the alleged discrimination and harassment, and to take issue with the limited scope of her investigation. (Doc. No. 49-8 at 39-45). In particular, Kreszowski continued to accuse Patterson of having predetermined the outcome of her investigation in order to protect management officials at FCA and the Union. (*See, e.g., id.* at 39).

At some time in April 2017, Kreszowski and other employees were laid off as part of a shutdown for a plant-wide retooling. (Doc. No. 49 at 49-50). During the lay-off, Kreszowski learned that in October 2016, Keith Carr, a human resources representative, had filled out and signed a leave of absence form on Kreszowski's behalf. (Doc. No. 49-9). Kreszowski considered the document to be fraudulently submitted, because he did not know about it or authorize it before it was submitted. (Doc. No. 49 at 51). Roy Richie, FCA's Director of Labor Relations, indicated it is "not uncommon for an HR person to . . . fill out the form and subsequently approve it." (Doc. No. 52 at 4).

Over the next few months, the investigations into Kreszowski's allegations came to a close. On June 29,

2017, the OCRC issued a no-probable-cause decision with regard to Kreszowski's charge against FCA. The OCRC concluded there was no credible evidence to support Kreszowski's claim that he had been unlawfully discriminated against because FCA had "reason to believe [Kreszowski] needed to be placed on leave for safety reasons," he received paid time off, and his discipline was voided. (Doc. No. 49-5 at 1). Then, by a letter dated August 14, 2017, Patterson notified Kreszowski she had completed her investigation and determined there had not been a violation of FCA's discrimination and harassment prevention policy. (Doc. No. 49-10). Finally, on September 28, 2017, the OCRC dismissed Kreszowski's charge against the Union, concluding the Union had represented him and there was no evidence to support an inference of discrimination. (Doc. No. 51-6 at 1).

Kreszowski continued to raise his concerns about how he had been treated by sending emails to a variety of FCA and Union officials. By Kreszowski's estimate, he sent "a couple dozen" emails to Marchionne and Knoll alone. (Doc. No. 49 at 52-53). At one point, Brown requested that Kreszowski stop sending emails to Knoll, though Kreszowski continued to do so.[2] (*Id.* at 53).

The lay-off was scheduled to end in October 2017. Prior to the end of the lay-off, Richie met with

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[2] By November 2017, FCA had taken action to intercept Kreszowski's emails. Any email Kreszowski sent to an FCA email address was rerouted to Rubin. (Doc. No. 49 at 60). Kreszowski began changing his email address in order "to get around everything going to Connie Rubin." (*Id.* at 60-61).

Kreszowski, Bruce Baumhower, (the UAW Local 12 President), and Harvey Hawkins (a UAW International representative) to discuss Kreszowski's concerns, as well as some concerns plant personnel had raised regarding Kreszowski. (Doc. No. 52 at 5). Though Richie was concerned by some of Kreszowski's "references to some of the folks at the plant," he assured Kreszowski that he would look into the leave-pay issue from October 2016, as well as Kreszowski's safety concerns. (*Id.*).

Kreszowski, however, sought more drastic assurances, indicating to Richie that he could not come back to work and be productive unless Richie terminated "a number of HR professional and unions reps in the plant." (*Id.*). Kreszowski believed Rubin, Tooson, and Epley had engaged in deceptive actions with "evil intentions" and should be terminated because of that and in connection with the leave of absence form Carr signed and approved. (Doc. No. 49 at 55).

Following the meeting, Richie told Kreszowski he would need to complete another fitness-for-duty exam before returning to work. Richie states he expressed to Kreszowski that

> based upon the meeting that we had with Mr. Hawkins and Mr. Baumhower present, references that he made to professionals in the plant, union reps being evil and having evil intentions along with the fact when I asked Mr. Kreszowski what would it take for him to return to work and be a productive member of the plant, his response was that certain individuals

> in the HR department and the UAW would have to be terminated in order for that to happen.

(Doc. No. 52 at 7).

Richie then placed Kreszowski on a company-paid leave for a few weeks before he transitioned to a medical leave. (*Id.* at 8-9). According to Richie, Kreszowski "did not receive that information well." (*Id.* at 7). Kreszowski again raised concerns about how he would be paid. He argued he should receive overtime pay for the days when his group worked more than 8 hours. (Doc. No. 49 at 55). Richie rejected this position because the Collective Bargaining Agreement entitled hourly employees to 40 hours per week, with any overtime hours being "at the discretion of management." (Doc. No. 52 at 7).

On October 30, 2017, Kreszowski met with Dr. Craig Lemmen, a psychiatrist, for an interview for his second fitness-for-duty exam. Dr. Lemmen concluded that, while Kreszowski was not at an increased risk of causing significant harm to himself or others and could adequately perform specific job tasks, he did have "a psychiatric problem which interferes with his ability to positively interact with co-workers and supervisors." (Doc. No. 54-2 at 3-4). Dr. Lemmen recommended FCA provide Kreszowski with time off from work so that he could participate in psychotherapy to assist him in reducing problematic interactions with his co-workers and supervisors. (*Id.* at 4-5).

Pursuant to Dr. Lemmen's recommendations, FCA instructed Kreszowski to schedule an appointment with a psychiatrist, and to see a psychologist while

waiting for his psychiatry appointment. (Doc. No. 49-15). The record is unclear as to whether Kreszowski saw a psychologist before he subsequently began seeing a psychiatrist, Dr. Kettlie Daniels, in January 2018. According to Kreszowski, his relationship with Dr. Daniels got off to a rocky start. He believed he was required by FCA to see Dr. Daniels for a treatment plan provided by Dr. Lemmen, while Dr. Daniels thought she was supposed to perform an evaluation and assessment. (Doc. No. 49 at 58). Kreszowski eventually signed a consent form allowing Dr. Daniels to talk with Richie to get additional information, but then came to believe that Dr. Daniels would not be able to implement a useful treatment plan because she "accepted Roy Richie's version of events as the facts" and based his treatment plan on "falsehoods that [were] injected into the circumstances." (*Id.* at 59).

Dr. Daniels diagnosed Kreszowski with an adjustment disorder, indicated he was not cleared to return to work, and provided a certification for his medical leave. (*Id.*). She also proposed a treatment plan and recommended Kreszowski take certain medications as part of his treatment. (*Id.*). Kreszowski ultimately refused to take the medications or to participate in Dr. Daniels' recommended treatment plan, believing she was not objective and tended to believe FCA's explanations over his own. (*Id.* at 59-60). Dr. Daniels eventually terminated the doctor/patient relationship in April 2018. (*Id.*; Doc. No. 49-16 at 25).

Kreszowski filed a second charge against FCA with the OCRC in November 2017, alleging FCA was retaliating against him for filing his previous OCRC

charge by prohibiting him from returning to work following the lay-off, requiring him to undergo a second fitness-for-duty exam, and placing him on paid leave. (Doc. No. 49-13). Kreszowski initiated this litigation shortly before he filed the second charge against FCA. He formally withdrew that charge on January 30, 2018, in order to pursue the allegations under the charge in litigation. (Doc. No. 49-14). After obtaining leave, he subsequently filed his First Supplemental Complaint to add facts and claims related to the second OCRC charge. (Doc. No. 23).

## III. STANDARD

Summary judgment is appropriate if the movant demonstrates there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). All evidence must be viewed in the light most favorable to the nonmovant, *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 390 (6th Cir. 2008), and all reasonable inferences are drawn in the nonmovant's favor. *Rose v. State Farm Fire & Cas. Co.*, 766 F.3d 532, 535 (6th Cir. 2014). A factual dispute is genuine if a reasonable jury could resolve the dispute and return a verdict in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A disputed fact is material only if its resolution might affect the outcome of the case under the governing substantive law. *Rogers v. O'Donnell*, 737 F.3d 1026, 1030 (6th Cir. 2013).

## IV. ANALYSIS

Kreszowski asserts claims under the Americans with Disabilities Act and Ohio Revised Code § 4112.02,

alleging both Defendants discriminated against him on the basis of a perceived disability and that FCA retaliated against him after he filed his first OCRC charge.[3] Both Defendants argue there is no genuine dispute of material fact as to any of Kreszowski's claims and, therefore, they are entitled to judgment as a matter of law.

### A. DISABILITY DISCRIMINATION

Kreszowski contends the Defendants violated the ADA when they required him to take personal leaves of absence from work, refused to permit him to return to work, and failed to file grievances or otherwise advocate for him, because they perceived him as disabled. An employee may be "regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001).

Kreszowski first must put forward a prima facie case of disability discrimination by showing: Defendants (a) "treated him as having an impairment that substantially limits one or more of his major life activities"; (b) he was otherwise qualified for his

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[3] As the parties note, federal caselaw interpreting federal employment discrimination statutes applies to employment discrimination claims under Ohio law. *See, e.g., Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1115 (6th Cir. 2001); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 418 (6th Cir. 2004); *Muir v. Chrysler LLC*, 563 F. Supp. 2d 783, 788 (N.D. Ohio 2008) (citing *City of Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204 (Ohio 1998)).

position; and (c) FCA took adverse employment actions, and the Union failed to adequately represent him, because each of them regarded him as disabled. *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 810 (6th Cir. 1999).

If Kreszowski establishes a prima facie case, the burden of production shifts to the Defendants to provide a legitimate, nondiscriminatory reason for their actions. *Id.* at 813. If they do so, Kreszowski must show "the reason was pretextual and that discrimination against his [perceived] disability was the real motivation" for Defendants' actions. *Id.* Kreszowski could do so by showing "the reasons (1) have no basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action." *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 858 (6th Cir. 2018) (citations and internal quotation marks omitted). Ultimately, Kreszowski "must produce 'sufficient evidence from which a jury could reasonably reject'" Defendants' explanation for their conduct. *Brown v. Kelsey-Hayes Co.*, 814 F. App'x 72, 80 (6th Cir. 2020) (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009)).

**1. FCA**

To satisfy his initial burden, Kreszowski argues that though he was qualified for his position, FCA regarded him as disabled and took adverse actions against him in the fall of 2016 when they kept him off work, required him to undergo a fitness-for-duty exam without justification, and failed to give him overtime pay or make contributions to his 401(k) during his forced leave of absence. (Doc. No. 58 at 18-20).

FCA contends Kreszowski cannot show FCA regarded him as disabled because Kreszowski's comments and behaviors raised justifiable concerns about his ability to perform his job duties. FCA also argues Kreszowski was not qualified for his position because Dr. Knowles did not clear him to return to work until November 29, 2016. Finally, FCA asserts Kreszowski cannot establish an adverse employment action because FCA was permitted to require him to undergo the fitness-for-duty examination.

Kreszowski can establish the last two portions of his prima facie case. The second element considers whether Kreszowski was otherwise qualified – that is, whether he could be capable of performing his job duties outside of the issue in dispute between the parties. FCA has not identified evidence to suggest there was a reason (other than his comments and behaviors and the resulting exam requirement) which disqualified Kreszowski from performing his job functions.

Kreszowski also identifies an adverse employment action. FCA has not presented evidence to dispute Kreszowski's claim that he was compensated differently while on leave. *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . employee compensation . . . and other terms, conditions, and privileges of employment.").

Kreszowski's discrimination claims fall short, however, because he has not established FCA treated him as having an impairment that substantially limited one or more major life activities. An employer's

need "to be able to determine the cause of an employee's aberrant behavior . . . is not enough to suggest that the employee is regarded as mentally disabled." *Sullivan*, 197 F.3d at 810; *see also Mitchell v. United States Postal Serv.*, 738 F. App'x 838, 845 (6th Cir. 2018) ("[A]n employer's concern about workplace safety is a legitimate, nondiscriminatory reason for requesting a medical examination consistent with a business necessity.").

An employer may require an employee to undergo an examination by a medical professional if the examination is "'job-related and consistent with business necessity,'" and there is "significant evidence that could cause a reasonable person to inquire as to whether [the] employee is still capable of performing his job." *Sullivan*, 197 F.3d at 811 (quoting 42 U.S.C. § 12112(d)(4)(A)). The Sixth Circuit has identified three types of circumstances which show the employer's request is necessary and job-related: "(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others." *Denman v. Davey Tree Expert Co.*, 266 F. App'x 377, 379 (6th Cir. 2007).

Kreszowski acknowledges he: (a) indicated he thought his health and safety were being compromised at FCA, and that Sukalo was dangerous; (b) was concerned about whether he would be safe working under Banks' supervision in the future, because she had disciplined him and not Sukalo; (c) asked for permission to take off the remainder of his October 10 shift, and later October 11 and 12, because he felt "a

little threatened" by what he viewed as "hostile and retaliatory circumstances"; (d) believed Sukalo, Kurth, and Banks coordinated to discipline him for the October 6 incident and that there was a "strong likelihood" they would engage in similar behavior in the future; (e) stated he may not take otherwise-appropriate actions (like shutting down the line again) because he was afraid of being disciplined again and that the situation might result in harm to himself or a coworker. (Doc. No. 49 at 20, 21, 23-26, and 28). These admissions constitute "'significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.'" *Denman*, 266 F. App'x at 380 (quoting *Sullivan*, 197 F.3d at 811)).

There is "no need to address the question of pretext" where the plaintiff has not established a prima facie case. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998). Even if I assume Kreszowski could establish a prima facie case, he is unable to demonstrate that FCA's proffered reason is a pretext for discrimination.

FCA asserts it placed Kreszowski on leave because of Dr. Knowles requested time to perform a more comprehensive evaluation before making a recommendation as to whether he would clear Kreszowski to return to work.[4] (*See* Doc. No. 53-3 at 1). Kreszowski contends Dr. Knowles' request did not

[4] Kreszowski himself had requested leave from October 10 through October 24, 2016, the period of time within which he first met with Dr. Knowles. (Doc. No. 49 at 28).

actually motivate FCA's decision because the fitness-for-duty examination was not consistent with business necessity and because FCA suggested Kreszowski utilize EAP services rather than address his safety concerns. (Doc. No. 58 at 20-21).

I already have rejected Kreszowski's first argument. The record evidence plainly establishes FCA was legally permitted to require Kreszowski to undergo a fitness-for-duty examination before returning to work. His second argument fares no better. When viewed against the significant evidence supporting FCA's exam directive and subsequent imposition of leave, the fact that it was suggested that Kreszowski contact an EAP representative falls far short of demonstrating that "the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

I conclude FCA is entitled to summary judgment on Kreszowski's discrimination claims.

**2. The Union**

Kreszowski asserts the Union perceived him as disabled when it did not object to FCA's decision to require a fitness-for-duty exam and by failing to file a grievance regarding FCA's failure to pay him overtime pay or make 401(k) contributions during his leave of absence. (Doc. No. 59 at 17-19).

The Union argues it did not perceive Kreszowski as disabled and did not challenge FCA's examination requirement because "Kreszowski's own words

referencing his detrimental emotional state, his requests for more time off, and his concerns about not being able to work safely created an issue about whether Kreszowski could perform the essential functions of the job, which could only be resolved through a fitness for duty exam." (Doc. No. 60 at 2).

As I concluded above, FCA was legally permitted to require Kreszowski to undergo the fitness-for-duty exam. Kreszowski contends Epley's comment that Kreszowski needed to "get better and follow the doctor's instructions" is proof that the Union did not object to this requirement because it regarded him as disabled. (Doc. No. 59 at 18). This argument is not persuasive, as the "perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled." *Sullivan*, 197 F.3d at 810.

Kreszowski does not identify any other evidence which might create a genuine dispute of material fact as to whether the Union regarded him as disabled. Therefore, he cannot establish a prima facie case. I conclude the Union is entitled to summary judgment on Kreszowski's discrimination claims.

**B. RETALIATION**

Kreszowski also claims FCA retaliated against him for filing his October 2016 Charge of Discrimination with the OCRC. Kreszowski, for this claim, "must show: '(1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action.'" *Sullivan*, 197 F.3d at

814 (quoting *Penny v. United Parcel Serv.,* 128 F.3d 408, 417 (6th Cir. 1997)).

Kreszowski claims Richie retaliated against him by requiring him to undergo a second fitness-for-duty examination before he would be permitted to return from the facility-wide lay-off and that he also suffered an adverse employment action when he was placed on medical leave at a reduced percentage of his normal earnings. (Doc. No. 58 at 21-22). The parties disagree regarding whether Richie knew about Kreszowski's OCRC charge and whether the second fitness-for-duty exam and the Sickness and Accident pay constitute adverse employment actions. I need not resolve those disputes, however, because Kreszowski cannot establish a causal connection between his protected activity and the purported adverse actions.

Kreszowski first suggests there is a causal connection between the filing of his first OCRC charge against FCA in October 2016 and Richie's imposition of the fitness-for-duty exam requirement in October 2017 based upon "the timing of the two events." (*Id.* at 23 (citation and quotation marks omitted)). Kreszowski implicitly concedes this argument is on shaky ground, (*id.*), as courts "have rarely found a retaliatory motive based only on temporal proximity." *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 401 (6th Cir. 2010) (noting the consistent requirement that plaintiff offer additional evidence). In *Vereecke*, the Sixth Circuit referred to the passage of a shorter period of time (eight months) as proof of "little more than coincidence." *Id.*

Kreszowski then seeks to tie the two events together by noting he was kept off work after discussing his charge with Richie and through reference to the fact he was "continually complaining about the discrimination and retaliation he suffered." (Doc. No. 58 at 23). As to his first point, Kreszowski does not identify any case law which would permit him to reset the clock in this manner, particularly in light of the fact he also argues FCA already had knowledge of his OCRC charge because Brown knew he had filed it and she participated in the meeting with Riche. (*Id.* at 21).

Moreover, Kreszowski's intervening complaints do not create an inference of retaliation. While the record is clear that Kreszowski raised frequent concerns about retaliation, the alleged retaliation – by his own characterization – arose from Kreszowski's complaints about unsafe work practices and what he viewed as FCA's subsequent failure to take his complaints seriously. (*See, e.g.,* Doc. No. 49 at 36-37, 42-47). "The ADA is not . . . a catchall statute creating a cause of action for any workplace retaliation, but protects individuals only from retaliation for engaging in, or aiding another who engages in, activity covered by the ADA." *Rorrer v. City of Stow*, 743 F.3d 1025, 1046 (6th Cir. 2014) (citing 42 U.S.C. § 12203(a)); *see also id.* ("'Protected activity typically refers to action taken to protest or oppose a statutorily prohibited discrimination.'" (quoting *Goonan v. Fed. Reserve Bank of New York*, 916 F. Supp. 2d 470, 484-85 (S.D.N.Y. 2013) (further citation omitted))). While the ADA prohibits an employer from taking adverse actions in response to an employee's charge of discrimination, it

does not apply to Kreszowski's safety-related complaints or FCA's acts or omissions in response to his complaints about safety. Therefore, he cannot use those unprotected actions to create a causal connection between his first OCRC charge and the second fitness-for-duty exam.

Kreszowski does not point to any evidence that he complained to FCA about alleged discrimination regarding a perceived disability or about retaliation for his OCRC charge in the nearly 12 full months between the date he filed his first OCRC charge and his meeting with Richie. Even when viewed in the light most favorable to Kreszowski, the record evidence does not support an inference of a causal connection between his 2016 OCRC charge and FCA's decision to require him to undergo a second fitness-for-duty examination or his subsequent placement on medical leave. Kreszowski fails to show a jury reasonably could find in his favor on his retaliation claims and, therefore, FCA is entitled to summary judgment.

## V. CONCLUSION

I conclude a reasonable jury could not find in Kreszowski's favor on either his discrimination or his retaliation claims. Therefore, and for the reasons stated above, I grant the motions of the Union, (Doc. No. 50), and FCA, (Doc. No. 54), for summary judgment.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 3:17-cv-2371**

**[Filed: July 27, 2021]**

Keith Kreszowski,

Plaintiff,

v.

FCA US LLC, *et al.*,

Defendants.

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I grant the motions for summary judgment filed by Defendant United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12, (Doc. No. 50), and Defendant FCA US LLC. (Doc. No. 54).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 3:19-cv-2989**

**[Filed: July 27, 2021]**

Keith Kreszowski, )
)
Plaintiff, )
)
v. )
)
FCA US LLC, )
)
Defendant. )

MEMORANDUM OPINION AND ORDER

### I. INTRODUCTION

Defendant FCA US LLC seeks summary judgment on all claims asserted by Plaintiff Keith Kreszowski. (Doc. No. 16). Kreszowski opposes FCA's motion, (Doc. No. 25), and FCA filed a brief in reply. (Doc. No. 26). After obtaining leave, Kreszowski filed a sur-reply brief. (Doc. No. 29). FCA moves to strike Kreszowski's sur-reply or, in the alternative, to file a response to the sur-reply. (Doc. No. 31). Kreszowski opposes the motion to strike. (Doc. No. 32). For the reasons stated below, I

deny FCA's motion to strike and grant its motions for leave to file a response and for summary judgment.

## II. BACKGROUND

This case follows an earlier case Kreszowski filed against FCA and his union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12. *See* Case No. 3:17-cv-2371. Kreszowski asserts claims for disability discrimination and retaliation allegedly arising from factual circumstances which occurred after the events at issue in the 2017 case. (Doc. No. 1). The parties' arguments in this case depend upon the facts developed in the 2017 case. (Doc. No. 16-1 at 6; Doc. No. 25 at 9). Therefore, I incorporate relevant portions of the factual background from the 2017 case below. The documents cited in this recitation refer to documents filed in the 2017 case.

> Kreszowski began working on FCA's production line in July 2013. . . . One of Kreszowski's coworkers on the afternoon shift was Ken Sukalo. In late September 2016, Kreszowski submitted a safety complaint against Sukalo, asserting Sukalo had committed a safety violation by manually disabling a stop pole on the assembly line. (Doc. No. 49 at 11-12). According to Kreszowski, Sukalo's action came without warning and created a risk that Kreszowski could have been hit by a vehicle moving down the assembly line. (*Id.*).
>
> A few days later, on September 30, 2016, Kreszowski shut down production on the line

after witnessing Sukalo walk away from his workstation. (*Id.* at 13). The line was down for approximately 10-15 minutes, until workers in the skilled trades department were able to come to that portion of the plant and restart the line. (*Id.*). Kreszowski submitted another safety complaint to Dianna Kurth, the team leader in his part of the assembly line . . . . (*Id.*).

On October 6, Kreszowski received a verbal warning from his supervisor, Nichole Banks, for failing to follow safety procedures when he shut down the line. Kreszowski was upset Banks disciplined him based upon what Kurth and Sukalo had told her, and without talking to him first. (*Id.* at 14-15). Kreszowski acknowledged raising his voice, speaking quickly, and using hand gestures, but denied yelling or screaming while talking to Banks. (*Id.* at 15). Kreszowski asserted he commonly speaks quickly and uses hand gestures during conversation. (*Id.*). He stated he was "being firm" in order to communicate his disagreement with Banks disciplining him without first getting his side of the story. (*Id.*).

Kreszowski left the meeting with Banks and went to talk to Rex Maze, the UAW Safety Coordinator. About 10 or 15 minutes later, Kurth came to Maze's office to talk to Kreszowski. After Kurth denied telling Banks anything about the September 30 incident, Kreszowski said he was thinking about calling the Occupational Safety and Health

Administration ("OSHA") and stated that, if OSHA came to the plant, "with all the safety issues and hazards they got, they'd shut down the plant in reference to safety." (Doc. No. 49 at 17). Kreszowski repeated the same statement to Brian Sims, a UAW representative. (*Id.*).

While he was in Maze's office, Kreszowski requested and received permission to take the next day off of work, with the intention of going to the OSHA office to file a complaint. (*Id.* at 18). After some further discussions with Maze, Sims, and others, Kreszowski left the plant and went home. After he left, he sent a text message to Kurth asking for Banks' last name, so he could include it in his whistle blower complaint. (*Id.* at 17). At some point during their conversations on the night of October 6-7, Kreszowski said something that Kurth interpreted as a threat. (*Id.* at 18-19). Kurth reported this development to Banks. (*Id.*).

Kreszowski took October 7 off, as scheduled, and filed a complaint with OSHA. (*Id.* at 20). He also sent a text message to Larry Maurer, the plant Operations Manager, indicating he thought his health and safety were being compromised at FCA, and that Sukalo was dangerous. (*Id.*).

On October 10, Kreszowski met with a joint FCA-Union group known as a Local Response Team ("LRT"). The LRT is a collectively-bargained committee made up of designated individuals from both entities, including FCA management and members of the

Union leadership, security and medical officers, and a representative from the Union's Employee Assistance Program. The LRT is intended to prevent "troubling situations from worsening." (Doc. No. 50-12 at 2).

During the October 10 meeting, Kreszowski provided a two-page summary of the October 6 incident and his specific concerns about Sukalo's actions. (Doc. No. 49 at 21; Doc. No. 49-2 at 1-2). Kreszowski also indicated he was concerned about whether he would be safe working under Banks' supervision in the future, because she had disciplined him and not Sukalo. (Doc. No. 49 at 21).

The parties disagree about Kreszowski's conduct during the meeting. Mark Epley, a Union representative and a participant in the October 10 meeting, states "Kreszowski was very agitated during this meeting and was slamming his fist on the table. He seemed almost out of control." (Doc. No. 50-12 at 3). Connie Rubin, a human resources department employee and participant in the October 10 meeting, later reported that, when she reached out her hand to touch Kreszowski's arm, he "glared at her and said, 'You don't want to do that.'" (Doc. No. 54-3 at 9). Kreszowski denied pounding his fists or hands on the table or being out of control. (Doc. No. 49 at 22). He described himself during the meeting as "[p]robably excited . . . [and a] little nervous." (*Id.*).

During the meeting, Epley requested that Kreszowski's October 6 disciplinary notice be removed from his record. (Doc. No. 50-12 at 3). FCA agreed to the request and the discipline was voided. (*Id.*; Doc. No. 49-6). At the conclusion of the meeting, the LRT told Kreszowski he could return to his workstation. (Doc. No. 49 at 24). Kreszowski, feeling "a little threatened" by what he viewed as "hostile and retaliatory circumstances," asked for the rest of the day off. (*Id.* at 23-24). After leaving work, Kreszowski still had reservations about returning to work. He then received permission to take the next two days – October 11 and 12 – off as well. (*Id.* at 24-25).

Kreszowski returned to FCA on October 13 for another meeting with the LRT. Kreszowski presented some additional written concerns during that meeting. (Doc. No. 49-3). He expressed concern for his safety and welfare, as well as concern that Banks and Sukalo would retaliate against him. (*Id.* at 1). He requested a transfer to another job assignment, stating "[t]he frustrations and repetitive actions that have occurred within the group has put myself in a[n] emotional state that is detrimental, and I am attempting to eliminate[] that state of mind due to the environmental conditions that exist." (*Id.*). He asserted the Union and FCA had failed to assist him with the safety concerns he previously had raised about his work environment and concluded by saying he would "continue to sort matters of concern[] and any

repercussions that may occur in the future to the best of my ability and determine what resources are available to assist me with the unforeseen circumstances." (*Id.* at 2). Kreszowski believed Sukalo, Kurth, and Banks coordinated to discipline him for the September 30 incident and that there was a "strong likelihood" they would engage in similar behavior in the future. (Doc. No. 49 at 26).

During the meeting, one of the LRT members, Charlene Hutchinson, asked Kreszowski if he could guarantee he wouldn't harm someone when he returned to work. (*Id.* at 28). Kreszowski denied he would harm anyone, but stated he may not take otherwise-appropriate actions (like shutting down the line again) because he was afraid of being disciplined again and that such a situation might result in harm to himself or a coworker. (*Id.*). Epley, concerned Kreszowski was implying "he did not know if he would be safe and cause no harm if he returned to work," interrupted Kreszowski and told him to choose his words carefully. (Doc. No. 50-12 at 3). Kreszowski thought this was a misinterpretation of what he was saying, though he admits he was under a fair amount of stress during the October 13 meeting due to his worries about his work environment. (Doc. No. 49 at 28). Epley recalled that Kreszowski "became very upset . . . [and] kept talking about feeling unsafe and unsure." (Doc. No. 50-12 at 3).

At the end of the meeting, Kreszowski requested additional time off work, with a return to work date of October 24, 2016. (Doc. No. 49 at 28). FCA approved his request as a personal leave of absence. (*Id.*). After the meeting, Epley called Kreszowski to tell him FCA had "a little bit of concern" about the way he answered Hutchinson's question. (*Id.* at 29). The next day, Tonya Tooson, an FCA human resources employee and an LRT member, called Kreszowski to tell him FCA was requiring him to undergo a fitness-for-duty exam before he could return to work due to the way he responded to Hutchinson's question. (*Id.*).

While Kreszowski disagreed with FCA's decision to continue his time off work as a personal leave of absence because his time off work was not voluntary, (*id.*), both Tooson and Epley described this characterization as the standard practice. (*Id.*; Doc. No. 50-12 at 4). Epley told Kreszowski he could go on medical leave if he saw the plant doctor and that a personal leave of absence was "actually more beneficial" because he received full pay rather than a reduced pay rate under the Sickness and Accident policy. (*Id.*). . . .

On October 19, Kreszowski attended a psychological appointment Tooson scheduled with Dr. James Knowles, a Licensed Clinical Psychologist. Kreszowski described this meeting as short and indicated he did not learn until after the appointment that he could not return to work unless Dr. Knowles cleared him. (*Id.* at

29-30). Dr. Knowles did not clear Kreszowski after the initial appointment because he wanted to perform a more comprehensive evaluation, including administering the Minnesota Multiphasic Personality Inventory-2. (Doc. No. 53-3 at 1). FCA extended Kreszowski's leave of absence beyond October 24, which led Kreszowski to file a charge of discrimination against FCA on October 25, 2016. (Doc. No. 49-4). Kreszowski alleged FCA discriminated against him based upon a perceived disability by requiring him to complete the fitness-for-duty exam before returning to work. (*Id.* at 1). In February 2017, Kreszowski also filed a charge of discrimination against the UAW, alleging the Union had failed to advocate on his behalf because of a perceived disability. (Doc. No. 51-4).

Kreszowski ultimately had a total of four sessions with Dr. Knowles. On November 28, 2016, after the fourth session, Dr. Knowles approved Kreszowski to return to work but recommended he attend anger management classes and substance abuse counseling; and that he participate in cognitive-behavioral therapy to assist with stress management and anxiety reduction and support. (Doc. No. 53-3 at 1-3).

Jo'Lena Brown, an FCA labor relations specialist, approved Kreszowski's request to return to work on November 30, 2016, and informed him he would be made "whole for all lost time from October 10th to date." (Doc. No.

53-2 at 1). Further, Brown reiterated that Kreszowski was required to attend anger management classes after coordinating with a Union EAP representative. (*Id.*). Kreszowski contends he was not made whole, because he "did not receive time and a half he should have received, nor did he receive compensation towards his 401(k) for approximately a seven week period of time." (Doc. No. 58 at 10); (*see also* Doc. No. 49 at 36).

Kreszowski had another meeting with the LRT upon his return to work. He again expressed concerns that Sukalo and Banks would create a hostile environment for him because FCA and the Union did not investigate the incident leading Banks to issue Kreszowski a verbal disciplinary warning on October 6. (Doc. No. 49 at 36-37). Kreszowski returned to his previous work assignment where, he asserts, he was subjected to a hostile environment by Sukalo and others. (*Id.* at 37). During his shift, Kreszowski had another employee call the skilled trades department to come down and fix a piece of equipment. (*Id.*) The skilled trades employee came down, along with Banks and several people from FCA management and the Union. (*Id.* at 38). Kreszowski contends Sukalo told people that Kreszowski had intentionally sabotaged the equipment and sought to harass him by making the incident into a larger situation. (*Id.* at 39-40). He also contends Sukalo and another employer, Cheri Hauser, were working together to intimidate and harass him

for complaining to the HR department about the actions and conduct of some of his coworkers. (*Id.* at 40-41).

In the ensuing months, Kreszowski raised complaints regarding a variety of workplace incidents and interactions. (*Id.* at 42-47). Frustrated with what he viewed as lack of concern for these incidents, Kreszowski began contacting individuals in higher level management positions in FCA and the Union, including the then-CEO of FCA Group (Sergio Marchionne) and the Chief Human Resources Officer for FCA North America (Linda Knoll). On February 8, 2017, Kreszowski emailed Knoll, Brown, Epley, and another FCA employee named Christopher Capoldo to raise concerns that Banks was harassing him and retaliating against him because she "always questions" whether repairs or service Kreszowski requested were "necessary." (Doc. No. 49-8 at 4). Kreszowski believed this was a continuation of the issues about which he had raised complaints in the fall of 2016. (*Id.*).

In response, Vicki Patterson, an attorney and investigator in FCA's corporate office of Equal Employment Opportunity Compliance and Governance, initiated an investigation and contacted Kreszowski to discuss his concerns. (Doc. No. 54-3). While Kreszowski initially expressed interest in talking with Patterson, (Doc. No. 498 at 3-4), he subsequently told Patterson he felt she would "not respond in a

balanced non biased manner," even if she concluded Banks, Sukalo, and the LRT members had acted hostilely toward him. (*Id.* at 1-2).

Kreszowski also took issue with the scope of Patterson's investigation. Patterson told Kreszowski she would investigate whether Bank had harassed, discriminated against him, or retaliated against him in violation of FCA's policies. (*Id.* at 11). She indicated, however, it was not her role to consider his OCRC charge, Brown's response to Kreszowski's claims he was owed money from his leave of absence, or whether the Union fairly represented him. (*Id.*). Kreszowski believed all of the incidents and occurrences about which he had complained were connected and related to the LRT's decision to require him to undergo a fitness-for-duty exam, and if Patterson was not willing to "revisit those issues and others[,] then certainly you, your office, and FCA [have] no concern or focus on eliminating corporate cultures and attitudes that foster and condone discrimination, intolerance, harassment, and the barrier that prevent equal opportunities." (*Id.* at 10-11).

While continuing to correspond with Kreszowski by email, Patterson also arranged for interviews with Kreszowski and others. In late March and early April 2017, Patterson interviewed Kreszowski, Sukalo, Tooson, Rubin, and Epley, among others. (Doc. No. 54-3 at 2-3, 5-12). Kreszowski continued to email Patterson with details of the alleged discrimination and

harassment, and to take issue with the limited scope of her investigation. (Doc. No. 49-8 at 39-45). In particular, Kreszowski continued to accuse Patterson of having predetermined the outcome of her investigation in order to protect management officials at FCA and the Union. (*See, e.g., id.* at 39).

At some time in April 2017, Kreszowski and other employees were laid off as part of a shutdown for a plant-wide retooling. (Doc. No. 49 at 49-50). During the lay-off, Kreszowski learned that in October 2016, Keith Carr, a human resources representative, had filled out and signed a leave of absence form on Kreszowski's behalf. (Doc. No. 49-9). Kreszowski considered the document to be fraudulently submitted, because he did not know about it or authorize it before it was submitted. (Doc. No. 49 at 51). Roy Richie, FCA's Director of Labor Relations, indicated it is "not uncommon for an HR person to . . . fill out the form and subsequently approve it." (Doc. No. 52 at 4).

Over the next few months, the investigations into Kreszowski's allegations came to a close. On June 29, 2017, the OCRC issued a no-probable-cause decision with regard to Kreszowski's charge against FCA. The OCRC concluded there was no credible evidence to support Kreszowski's claim that he had been unlawfully discriminated against because FCA had "reason to believe [Kreszowski] needed to be placed on leave for safety reasons," he received

paid time off, and his discipline was voided. (Doc. No. 49-5 at 1). Then, by a letter dated August 14, 2017, Patterson notified Kreszowski she had completed her investigation and determined there had not been a violation of FCA's discrimination and harassment prevention policy. (Doc. No. 49-10). . . .

Kreszowski continued to raise his concerns about how he had been treated by sending emails to a variety of FCA and Union officials. By Kreszowski's estimate, he sent "a couple dozen" emails to Marchionne and Knoll alone. (Doc. No. 49 at 52-53). At one point, Brown requested that Kreszowski stop sending emails to Knoll, though Kreszowski continued to do so.[1] (*Id.* at 53).

The lay-off was scheduled to end in October 2017. Prior to the end of the lay-off, Richie met with Kreszowski, Bruce Baumhower, (the UAW Local 12 President), and Harvey Hawkins (a UAW International representative) to discuss Kreszowski's concerns, as well as some concerns plant personnel had raised regarding Kreszowski. (Doc. No. 52 at 5). Though Richie was concerned by some of Kreszowski's "references to some of the folks at the plant," he assured Kreszowski that he would look into the

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[1] By November 2017, FCA had taken action to intercept Kreszowski's emails. Any email Kreszowski sent to an FCA email address was rerouted to Rubin. (Doc. No. 49 at 60). Kreszowski began changing his email address in order "to get around everything going to Connie Rubin." (*Id.* at 60-61).

leave-pay issue from October 2016, as well as Kreszowski's safety concerns. (*Id.*). Kreszowski, however, sought more drastic assurances, indicating to Richie that he could not come back to work and be productive unless Richie terminated "a number of HR professional and unions reps in the plant." (*Id.*). Kreszowski believed Rubin, Tooson, and Epley had engaged in deceptive actions with "evil intentions" and should be terminated because of that and in connection with the leave of absence form Carr signed and approved. (Doc. No. 49 at 55).

Following the meeting, Richie told Kreszowski he would need to complete another fitness-for-duty exam before returning to work. Richie states he expressed to Kreszowski that

> based upon the meeting that we had with Mr. Hawkins and Mr. Baumhower present, references that he made to professionals in the plant, union reps being evil and having evil intentions along with the fact when I asked Mr. Kreszowski what would it take for him to return to work and be a productive member of the plant, his response was that certain individuals in the HR department and the UAW would have to be terminated in order for that to happen. (Doc. No. 52 at 7).

Richie then placed Kreszowski on a company-paid leave for a few weeks before he transitioned to a medical leave. (*Id.* at 8-9).

According to Richie, Kreszowski "did not receive that information well." (*Id.* at 7). Kreszowski again raised concerns about how he would be paid. He argued he should receive overtime pay for the days when his group worked more than 8 hours. (Doc. No. 49 at 55). Richie rejected this position because the Collective Bargaining Agreement entitled hourly employees to 40 hours per week, with any overtime hours being "at the discretion of management." (Doc. No. 52 at 7).

On October 30, 2017, Kreszowski met with Dr. Craig Lemmen, a psychiatrist, for an interview for his second fitness-for-duty exam. Dr. Lemmen concluded that, while Kreszowski was not at an increased risk of causing significant harm to himself or others and could adequately perform specific job tasks, he did have "a psychiatric problem which interferes with his ability to positively interact with co-workers and supervisors." (Doc. No. 54-2 at 3-4). Dr. Lemmen recommended FCA provide Kreszowski with time off from work so that he could participate in psychotherapy to assist him in reducing problematic interactions with his co-workers and supervisors. (*Id.* at 4-5).

Pursuant to Dr. Lemmen's recommendations, FCA instructed Kreszowski to schedule an appointment with a psychiatrist, and to see a psychologist while waiting for his psychiatry appointment. (Doc. No. 49-15). The record is unclear as to whether Kreszowski saw a

psychologist before he subsequently began seeing a psychiatrist, Dr. Kettlie Daniels, in January 2018. According to Kreszowski, his relationship with Dr. Daniels got off to a rocky start. He believed he was required by FCA to see Dr. Daniels for a treatment plan provided by Dr. Lemmen, while Dr. Daniels thought she was supposed to perform an evaluation and assessment. (Doc. No. 49 at 58). Kreszowski eventually signed a consent form allowing Dr. Daniels to talk with Richie to get additional information, but then came to believe that Dr. Daniels would not be able to implement a useful treatment plan because she "accepted Roy Richie's version of events as the facts" and based his treatment plan on "falsehoods that [were] injected into the circumstances." (*Id.* at 59).

Dr. Daniels diagnosed Kreszowski with an adjustment disorder, indicated he was not cleared to return to work, and provided a certification for his medical leave. (*Id.*). She also proposed a treatment plan and recommended Kreszowski take certain medications as part of his treatment. (*Id.*). Kreszowski ultimately refused to take the medications or to participate in Dr. Daniels' recommended treatment plan, believing she was not objective and tended to believe FCA's explanations over his own. (*Id.* at 59-60). Dr. Daniels eventually terminated the doctor/patient relationship in April 2018. (*Id.*; Doc. No. 49-16 at 25).

> Kreszowski filed a second charge against FCA with the OCRC in November 2017, alleging FCA was retaliating against him for filing his previous OCRC charge by prohibiting him from returning to work following the lay-off, requiring him to undergo a second fitness-for-duty exam, and placing him on paid leave. (Doc. No. 49-13).

(Case No. 3:17-cv-2371, Doc. No. 65 at 1-12)

In July 2018, FCA contacted Kreszowski to notify him that his certification for his medical leave had expired and instructed him to submit an updated certification to its third-party administrator, Sedgwick, by the end of that month. (Case No. 3:17-cv-2371, Doc. No. 49 at 61-62). Kreszowski did so. Sedgwick then instructed him to provide a certification from a licensed psychiatrist. (Case No. 3:17-cv-2371, Doc. No. 49-19). Kreszowski subsequently attended an appointment with a psychiatrist at Harbor Behavioral Health. (Case No. 3:17-cv-2371, Doc. No. 49 at 63). He admits he did not provide the requested documentation at that time. (*Id.*).

On October 22, 2018, Kreszowski filed a third charge of discrimination against FCA, asserting FCA "would not accept" the assessment he obtained from Harbor. (Doc. No. 1-1).

On March 18, 2019, FCA sent Kreszowski a "five-day letter," which indicated his absence from work was not currently justified and directed him to report to work on or before March 25, 2019, or have his seniority terminated pursuant to the Collective Bargaining Agreement. The parties disagree about

what happened next. FCA contends Kreszowski did not appear as directed or contact the plant and that, therefore, FCA terminated his seniority. (Doc. No. 16-1 at 5). Kreszowski contends he appeared at the plant on March 22, 2019, and he attempted to provide a copy of his evaluation from the Harbor psychiatrist. (Doc. No. 25-1 at 1). He asserts FCA refused to accept his documents or allow him to enter the plant. (*Id.* at 1-2).

## III. STANDARD

Summary judgment is appropriate if the movant demonstrates there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). All evidence must be viewed in the light most favorable to the nonmovant, *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 390 (6th Cir. 2008), and all reasonable inferences are drawn in the nonmovant's favor. *Rose v. State Farm Fire & Cas. Co.*, 766 F.3d 532, 535 (6th Cir. 2014). A factual dispute is genuine if a reasonable jury could resolve the dispute and return a verdict in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A disputed fact is material only if its resolution might affect the outcome of the case under the governing substantive law. *Rogers v. O'Donnell*, 737 F.3d 1026, 1030 (6th Cir. 2013).

## IV. ANALYSIS

Kreszowski contends FCA discriminated against him based upon a perceived disability when it refused to allow him to return to work and retaliated against him for filing charges of discrimination with the Ohio Civil Rights Commission in October 2016 and

November 2017. (Doc. No. 1 at 5-11). He asserts claims under the Americans with Disabilities Act and Ohio Revised Code § 4112.02. Federal caselaw interpreting federal employment discrimination statutes applies to employment discrimination claims under Ohio law. *See, e.g., Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1115 (6th Cir. 2001); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 418 (6th Cir. 2004); *Muir v. Chrysler LLC*, 563 F. Supp. 2d 783, 788 (N.D. Ohio 2008) (citing *City of Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204 (Ohio 1998)).

**A. DISABILITY DISCRIMINATION**

As I noted in my Memorandum Opinion and Order in the 2017 case, an employee may be "regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001).

FCA is entitled to summary judgment on Kreszowski's discrimination claims because Kreszowski fails to show FCA regarded him as disabled. Kreszowski does not identify any new evidence to support this required showing but relies solely on "the evidence and arguments set forth in his opposition to Defendant's Motion for Summary Judgment" in the 2017 case. (Doc. No. 25 at 9). I already have rejected his arguments in the 2017 case. (Case No. 3:17-cv-2371, Doc. No. 65 at 13-17). Therefore, Kreszowski has not carried his burden of establishing a prima facie case of disability discrimination. *Sullivan v. River Valley Sch.*

*Dist.*, 197 F.3d 804, 810 (6th Cir. 1999). There is "no need to address the question of pretext" where the plaintiff has not established a prima facie case. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).

**B. RETALIATION**

In order to prove FCA retaliated against him for filing Charges of Discrimination with the OCRC, Kreszowski "must show: '(1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action.'" *Sullivan*, 197 F.3d at 814 (quoting *Penny v. United Parcel Serv.,* 128 F.3d 408, 417 (6th Cir. 1997)).

Kreszowski's claim falls short because he has not established a causal connection between any of his OCRC charges and FCA's decision to terminate his seniority. As I stated in the 2017 case, courts "have rarely found a retaliatory motive based only on temporal proximity." *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 401 (6th Cir. 2010) (noting the consistent requirement that plaintiff offer additional evidence).

As Kreszowski concedes, five months passed between his October 2018 charge and the March 2019 termination of his seniority. Kreszowski offers only speculation that these two events are connected. Such speculation is insufficient to show his protected activity was "a but-for cause of [FCA's] alleged adverse action." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013).

## V. CONCLUSION

I conclude a reasonable jury could not find in Kreszowski's favor on either his discrimination or his retaliation claims. Therefore, and for the reasons stated above, I deny FCA's motion to strike, grant its motion for leave to file a response to the sur-reply brief, (Doc. No. 31), and grant its motion for summary judgment. (Doc. No. 16).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 3:19-cv-2989**

**[Filed: July 27, 2021]**

| | |
|---|---|
| Keith Kreszowski, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| FCA US LLC, | ) |
| | ) |
| Defendant. | ) |
| | ) |

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I grant the motion for summary judgment filed by Defendant FCA US LLC. (Doc. No. 16). I deny FCA's motion to strike, but grant its motion for leave to file a response to the sur-reply brief. (Doc. No. 31).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

## APPENDIX F

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Nos. 21-3730/3733**

**[Filed: April 21, 2022]**

| | |
|---|---|
| KEITH KRESZOWSKI, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| FCA US, LLC (21-3730/3733); UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 12, REGION 2B (21-3730), | ) |
| | ) |
| Defendants-Appellees. | ) |

O R D E R

**BEFORE:** BATCHELDER, GIBBONS, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then

was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**/s/ Deborah S. Hunt**
**Deborah S. Hunt, Clerk**

[*] Judge Kethledge recused himself from participation in this ruling.