APPENDIX TO THE PETITION FOR A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ian Gage,

Plaintiff,

v.

Midwestern University,

Defendant.

No. CV-19-02745-PHX-DLR

ORDER

Before the Court is Plaintiff's "Request for Court Investigation of Attorney's Misconduct." (Doc. 56.) Plaintiff requests the Court to investigate "actions perpetrated by the defendant's attorney in this court case and in instances under this court's authority." (Id. at 1.) Plaintiff is concerned about the investigation conducted by defense counsel wherein he obtained Plaintiff's official job description, allegedly lied to the Court about how he obtained access to Plaintiff's medical records, the attorney's efforts to obtain medical records after the Court purportedly denied his request for access to the records, and his putting the allegedly illegally accessed records into the record. The Court considers the motion as a request to conduct a contempt hearing.

The information supplied in the motion does not show that defense attorney lied as alleged or committed any act of contempt that would

warrant a hearing. The accusations alone do not establish contempt of court and the attachments to the motion are not evidence of contempt of court. To support the accusations made in the motion Plaintiff would need to show a written court order or a transcript of a proceeding and present evidence that counsel was untruthful or

acted in violation of the written order or the oral orders or instructions of the Court contained in the transcript. No such showing has been made.

The Court notes, however, that the fact that defense counsel obtained a job description from an employer, especially when that employer is his client, does not suggest unethical conduct. Such a document is not privileged and there is no protection against contacting an employer to seek it. Likewise, it is not unusual or unethical for an attorney to obtain medical records in a case involving claims of injuries. When the case involves questions of injuries, disability and causation, it has long been the law in Arizona that the person who holds the medical record privilege has impliedly waived that privilege regarding that particular medical condition. Throop v. F.E. Young & Co., 382 P.2d 560 (1963).

IT IS ORDERED that Plaintiff's "Request for Court Investigation of Attorney's Misconduct" (Doc. 56) is DENIED.

Dated this 18th day of January, 2022.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ian Gage,

Plaintiff,

v.

Midwestern University,

Defendant.

No. CV-19-02745-PHX-DLR

ORDER

Before the Court is Defendant Midwestern University's ("University") Motion for Summary Judgment (Doc. 44). The motion is fully briefed and for reasons set forth herein is granted.

Preliminarily, Plaintiff Ian Gage's 34-page response far exceeds the Court's page limit and contains many irrelevant and duplicative allegations and facts. The Court notes the University's request to strike but in its discretion denies the request. Some of the exhibits attached to the response are not shown to be made on personal knowledge and/or do not set out facts that would be admissible in evidence, as required by Federal Rule of Civil Procedure 56(c)(4). However, there has been no objection to them. Despite the University's representation that the motion is supported by undisputed facts, there are facts that Gage disputes. The Court has construed the facts in the light most favorable to Gage.

I. Background

Gage was hired effective July 17, 2017 as a Pathology Case Coordinator at the

Diagnostic Pathology Center ("DPC") in the University's College of Veterinary Medicine. As the Pathology Case Coordinator, Gage's job description provided in this case by the University included bagging fixed tissue, cleaning the laboratory, and handling formalin. (Doc. 44-1 at 12-14; Doc. 44-3 at 2-3.) Gage disagrees with that job description because the job description he reviewed online before he was hired stated the duties pertaining to necropsy and histopathology as "'duties requiring minimal technical skill' in that the plaintiff will be cross 'trained' to do some of these duties." (Doc. 54 at 4.) Gage's Declaration (Doc. 54-1 at 2-7) does not indicate this, but he argues in his response that he understood that the on-line job description indicated he should have received "advanced training to handle formaldehyde, which he did not." (Id.) Gage was provided access to the DPC safety manual, training, and personal protective equipment. (Doc. 44-1 at 27-35; Doc. 44-3 at 2-3.)

Gage's supervisor, assigning tasks and providing day-to-day instruction, was Dr. Brower. (Doc. 54 at 2; Doc. 54-1 at 2-3.) Gage accompanied Dr. Brower to the Arizona Cattleman's Association and was told to dress like a "white male conservative . . . like you have been dressing since starting here." Gage was given an office hit by the direct sun light and assigned by Dr. Brower to receive and move animals and to perform the necropsies, specifically decapitating the animals and removing the brains. Dr. Brower had him order, receive, and set up her lunches. (Doc. 54-1.) During a group meeting, Dr. Brower dismissed Gage's complaints about Mr. Griffin's alleged attendance issues by changing the subject and saying, "men do not know how to communicate" and "[I do] not know how the world got this far with men in control." (Id.)

On October 30, 2017, Gage requested a meeting with the University's Human Resources ("HR") department. At this meeting, he presented an 11-page "Safety Complaint." (Doc. 44-4 at 2-3; Doc. 44-5.) Gage later orally presented his safety concerns to several members of management, including Dr. Brower and her supervisors. Gage's "main concerns" included a lack of safety in the DPC that he felt exposed everyone to hazards, the University's resistance to complying with laws concerning safety and

"chemical waste disposal," the requirement that he perform tasks belonging to others, and an unfair evaluation. (Doc.44-5.) Other concerns expressed in his Safety Complaint included a lack of safety protocols and procedures for handling formaldehyde and his general disapproval of DPC operations. (Id.) The Safety Complaint did not indicate that Gage had suffered ill effects from exposure to formaldehyde. (Doc. 44-5.)

Gage's Safety Complaint also criticized Dr. Brower. (Id. at 7.) The University met with Gage on November 8, 2017. (Doc. 44-4 at 2-3.) The University placed Gage on paid administrative leave effective that same day. (Id.) Gage was escorted to his car from the meeting room and not allowed access to his desk before leaving. (Doc. 54 at 8.) The University indicated it would conduct an internal investigation concerning the concerns set out in Gage's Safety Complaint. During administrative leave, Gage was paid his regular pay and elected benefits and otherwise maintained all terms and conditions of his employment including a pay increase. (Id.; Doc. 44-7.)

On December 4, 2017, the University hired a safety expert to evaluate the DPC. (Doc. 44-1 at 5-6; Doc. 44-2; Doc. 44-4.) The safety expert's report would be finalized on February 7, 2018. During that period, Gage requested updates and consistently reasserted his concerns about safety requesting another opportunity to present his Safety Complaint.

On December 19, 2017, Gage disclosed the ill effects he suffered from exposure to formaldehyde. "As a result of this and multiple other disregards [sic], I experienced overexposure to formaldehyde which has led to multiple hospital stays and long-

term health effects." (Doc. 44-2 2-3; Doc. 44-4 Ex. 42-4.) After completing the safety reviews, the University concluded Gage's concerns were unsubstantiated and the DPC was a safe work environment. (Doc. 44-1 1 at 7-9; Doc 44-2 2 at 2-3; Doc. 44-4 at 3-5.) Gage, however, disagreed with that finding. (Doc. 54 at 10.)

The University HR, represented by Amy Gibson, Director, met with Gage on February 23, 2018, to inform him that the DPC was safe, discuss his Safety Complaint, and plan his return to work. (Doc. 44-2 at 4; Doc. 44-4 at 1-3.) Gage alleged that the internal investigation was illegitimate and re-stated his concerns identified in the Safety Complaint.

(Id.) Ms. Gibson provided Gage with information concerning his insurance coverage for the medical evaluation. (Doc. 44-2 at 2-3.) Gage was provided information on filing a workers' compensation claim. (Id.; Doc. 44-4 at 2-3.) Gage did not get the tests but continued to express his concerns about safety. (Doc. 44-2 at 4-5.)

On March 13, 2018, the Arizona Division of Occupational Safety ("ADOSH") issued a citation and a $1625.00 penalty to the University regarding an inspection conducted on January 3, 2018 for a "Serious" violation regarding the requirement to identify all employees who may be exposed at or above the action level or at or above the short-term exposure limit ("STEL") for formaldehyde.

Ms. Gibson and Ms. Reed met with Gage on March 16, 2018, to again discuss his return to work. Gage reiterated his concerns about safety and how he believed the DPC was unsafe. (Doc. 44-2 at 2-4; Doc. 44-4 at 5.) Gage provided a doctor's note dated January 23, 2018, which stated that "Mr. Gage should not work with formaldehyde at all." It provided no information as to why. The meeting ended with no resolution as to when Gage would return to work. Gage continued to send the University emails about his safety concerns.

In a March 22, 2018, communication, Ms. Gibson explained to Gage the type of information needed to substantiate a disability—especially since Gage had claimed a long list of ailments such as headaches and impairment with his lungs, liver, vision, and back—and the required accommodations to perform the essential functions of his job. (Id.) She also attached a copy of his job description to assist Gage in procuring the required information. (Id.) Ms. Gibson reminded Gage that the purpose of his paid administrative leave had ended, and he was expected to cooperate with the disability-related inquiry. (Id.) Ms. Gibson also informed Gage that the safety investigation had ended and the University could not extend his paid administrative leave indefinitely. (Id.)

The University placed Plaintiff on unpaid administrative leave effective at the close of business March 23, 2018. The University requested Gage submit the requested paperwork so he could return to work. (Id.) Gage then provided the University with a

doctor's letter dated April 2, 2018, stating that he had been seen for "symptoms of coughing, wheezing, eye irritation, rash and fatigue." (Doc. 44-2 at 8-9.) Ms. Gibson told Gage that the letter was insufficient because it only identified symptoms. The letter did not state the nature, severity, or duration of his condition and omitted information about his impairment limits, how it would affect his job, or what accommodations were required. (Id.) Ms. Gibson informed Gage of the March 22, 2018, communication which provided further explanation and guidance. (Id.) Ms. Gibson told Gage that the University could not engage in the interactive process without the requested information. (Id.)

Gage's medical records show that he told his medical providers of an occupational exposure to formaldehyde and having chemical sensitivity. (Doc. 44-8.) Gage's medical records show that there is no method to test for formaldehyde exposure, and that a determination that Gage suffered from formaldehyde overexposure is based on his complaints and the history he provided his doctors. Gage's medical records do not indicate that he suffers from chemical sensitivity. (Id.)

Instead of providing the University with the information it requested to support his claims of sensitivity or overexposure to formaldehyde, Gage continued to respond as before but also added a demand for proof that the DPC was safe. (Ex. 44-2 at 9-10.) That was consistent with his past behavior, where during his employment with the University Gage made repeated complaints of exposure to formaldehyde and requests for accommodation for working with formaldehyde including closed containers, PPE, monitors, and training from August 22, 2017, right up to the day he was terminated, April 10, 2018. (Doc. 44-99 at 11-29.) He stated that he would construe the University's failure to provide him such proof as an unlawful act of discrimination because the University was refusing to engage in an interactive process allegedly required by Occupational Safety and Health Administration ("OSHA") regulations. (Id.; Doc. 44-9.) Thereafter, the University terminated Gage effective April 10, 2018. (Doc. 44-2 at 10.)

II. Legal Standard

Summary judgment is appropriate when there is no genuine dispute as to any

material fact and, viewing those facts in a light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could find for the nonmoving party based on the competing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Summary judgment may also be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. The burden then shifts to the non-movant to establish the existence of a genuine and material factual dispute. Id. at 324. The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts[,]" and instead "come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal quotation and citation omitted).

III. Discussion

Gage's complaint alleges one count of sex discrimination in violation of Title VII and one count of disability discrimination in violation of the American with Disabilities Act ("ADA"). (Doc. 1.) The factual allegations in the complaint, however, go further than the counts alleged in the complaint. They include a claim of sex-based harassment and a claim of retaliation. Gage seeks $200,000 in damages "for emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life." (Id.) He also seeks "treble punitive damages" along with equitable relief. (Id.)

A. Sex Discrimination

To prove a Title VII claim of sex discrimination, a plaintiff must prove that he (1)

belongs to a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Moran v. Selig, 447 F.3d 748, 753 (9th Cir. 2006). A prima facie case does not require proof by a preponderance of the evidence. Minimal evidence of discriminatory intent will suffice so long as it is evidence that "give[s] rise to an inference of unlawful discrimination," either through the framework set forth in McDonnel Douglas . . . or with direct circumstantial evidence of discriminatory intent." Vasquez v. Cnty. of L.A., 349 F.3d 634, 640 (9th Cir. 2004) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

Once a plaintiff establishes a prima facie case, "the burden of production, but not persuasion, then shifts to" the defendant to offer a legitimate non-discriminatory reason for the adverse employment action. Chuang v. Univ. of Cal.-Davis, Bd. of Trs., 225 F.3d 1115, 1123-24 (9th Cir. 2000). If the defendant can show a non-discriminatory reason for its action, the burden shifts back to the plaintiff to "show that [the] stated reason for [the challenged action] was in fact pretext." McDonnell Douglas, 411 U.S. at 804. "Uncorroborated and self-serving" testimony does not create a genuine issue of fact. See Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996).

The University concedes that Gage has established the first two McDonnel Douglas. factors. Gage is a member of a protected class and was qualified for his position. The sex discrimination claim turns on whether there is evidence that Gage was subject to an adverse employment action, whether there is evidence that the termination was the result of sexual animus, and whether there is evidence of discriminatory intent.

Gage's evidence is contained in the arguments of his response. Other than the uncorroborated and self-serving statements contained in his affidavit (Doc. 54-1), Gage has offered no evidence that supports his claim that similarly situated individuals outside his protected class were treated more favorably. His dissatisfaction with the type of tasks he was assigned does not show that similarly situated individuals outside his protected class

were treated more favorably.

Gage's evidence of the tasks he was assigned, the office he was given, and his recollection of what Dr. Brower allegedly said during meetings ("men do not know how to communicate" and "[I do] not know how the world got this far with men in control") are not evidence of a discriminatory intent because there is no nexus between the remarks, the job assignments, and the decision to terminate Gage. See Vasquez, 349 F.3d at 640. The University is entitled to summary judgment on this claim.

B. Hostile Work Environment

To prove a Title VII claim of hostile work environment, a plaintiff must prove that he (1) was subjected to verbal or physical conduct because of his sex, (2) the conduct was unwelcomed and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. Mannatt v. Bank of Am., N.A., 339 F.3d 792, 798 (9th Cir. 2003). When determining whether the conduct is sufficiently abusive to prove the claim, courts look to "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998)

Plaintiff argues that the evidence of a hostile environment is the "very nature of the tasks [assigned him]." He claims they "were aimed at humiliation and had the ultimate intent of physically causing injury.... assigning more time handling toxic chemicals among other tasks he should have never been assigned." (Doc. 54 at 26.) He asserts that Dr. Brower knew "of his disapproval [of the tasks he was assigned] and that the conduct [presumably the sexist comments Gage attributed to Dr. Brower about men in general] was unwelcomed." (Id.)

Plaintiff's job duties included bagging fixed tissue, cleaning the laboratory, and handling formalin. He was also tasked with ordering lunches and scheduling Dr. Brower's lunches. That he was expected to perform duties arguably outside his job description does not establish that he was given that job assignment because of his sex or to humiliate or

demean him.

The alleged comment by Dr. Brower was not threatening or humiliating and did not interfere with Gage's work performance. The "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code." Faragher, 524 U.S. at 788. The alleged comments are not objectively offensive and are not so unreasonable to create conditions in the workplace that pollute or alter the conditions of employment. Manatt, 339 F.3d at 798; see also Brooks v. City of San Mateo, 229 F.3d 917, 926 (9th Cir. 2000) ("If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe."). The alleged incident of these comments cannot, even assuming the facts in the light most favorable to Gage, be determined to be "extremely severe." The University is entitled to summary judgment on this claim.

C. ADA Discrimination

"The ADA prohibits an employer from discriminating against a qualified individual

with a disability 'because of the disability.'" Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999) (quoting 42 U.S.C. § 12112(a)). To prove a claim of disability discrimination a plaintiff must show that (1) he is disabled within the meaning of the ADA, (2) that he is qualified, with or without an accommodation, to perform the essential functions of the job, and (3) that his employer denied a reasonable accommodation for his disability or subjected him to an adverse employment decision solely because he is disabled. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270-71 (9th Cir. 1996). When an employee alleges failure to accommodate, the employee maintains the burden of proving the reasonableness of an accommodation and the employer bears the burden of proving undue hardship. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002). "If the employer disclaims any reliance on the employee's disability in having taken the employment action, McDonnell Douglas Title VII" burden-shifting analysis applies. Mustafa v. Clark Cnty. Sch. Dist., 157 F.3d 1169, 1175-76 (9th Cir. 1998). With respect to the first prong, a "disabled person" is defined by the ADA as an

individual who has "a physical or mental impairment that substantially limits one or more of the individual's major life activities." Coons v. Sec'y of U.S. Dep't of Treasury, 383 F.3d 879, 884 (9th Cir. 2004). "An impairment covered under the ADA includes any physiological disorder," Id., and "major life activities" includes "standing," "sitting," and "lifting," 29 C.F.R. § 1630.2. "Substantially limited" means that a person is "significantly restricted as to condition, manner or duration under

which [she] can perform [the] particular major life activity as compared to . . . [an] average person in the general population." Coons, 383 F.3d at 885. "Temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities." Wilmarth v. City of Santa Rosa, 945 F.Supp. 1271, 1276 (N.D. Cal. 1996).

Gage's ADA claim relies on a doctor's note dated January 23, 2018 provided to the University in March 2018 and a doctor's note dated April 2, 2018. (Doc. 54-2 at 31.) The January note says, "Mr. Gage should not work with formaldehyde at all." The April 2, 2018 note provides that Mr. Gage was seen "for symptoms of coughing, wheezing, eye irritation, rash and fatigue. . . . Symptoms have somewhat improved after he stopped working with Formaldehyde. The above symptoms are classic with exposure to Formaldehyde. Under no circumstances, Mr. Gage should have continuous exposure to this chemical. There is no specific test that shows this connection except history of symptoms[.]" (Id.)

The doctors' notes do not establish that Gage is disabled within the meaning of the ADA. Neither note states that Gage has a physical or mental impairment. The April 2018 letter talks of symptoms that appear to have involved the respiratory system. The ADA covers any disorder or condition affecting body systems such as the respiratory systems. 29 C.F.R. § 1630.2(H). However, the letters do not indicate that the symptoms of which Gage complained were anything more than temporary. Neither note states that his complaints about his reaction to formaldehyde is disabling or permanent. In fact, the April 2, 2018 note states that his symptoms improved after he stopped working with

formaldehyde.

The doctors' notes do not state that Gage's exposure to formaldehyde and his transient respiratory symptoms resulted in substantially limiting a major life activity, as required by the ADA. A major life activity is a function "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(J). To have a record of an impairment that substantially limits a major life activity means to have a history of "a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). "The record must be of an impairment that substantially limits a major life activity." Heisler v. Metro. Council, 339 F.3d 622, 630 (8th Cir. 2003).

Gage has not argued or presented evidence that the University mistakenly regarded him as having a physical impairment limiting any major life activities. A person may be regarded as disabled under the ADA if "a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major activities[.]" 29 C.F.R. § 1630.2(l)(1). The evidence in the record shows that the University did not consider him impaired but was seeking further information to understand the state of Gage's condition. The University was seeking information

on a diagnosis and the basis of Gage's claim that he was disabled. The employer is entitled to obtain information about the alleged disability. See, e.g., Collings v. Longview Fibre Co., 63 F.3d 828, 833-35 (9th Cir. 1995). The doctor's notes expressing the symptoms based on Gage's subjective complaints and history do not, in and of themselves, amount to a notice of disability and there is no evidence that the University considered it as notice. Gage is not a disabled person under the ADA. The University is entitled to summary judgment on this claim.

D. Retaliation

A finding that Gage is not disabled under the ADA does not exclude the possibility that he could have been subjected to retaliation for pursuing an accommodation pursuant to the ADA. "[T]he ADA prohibits an employer from retaliating against an employee who seeks an accommodation in good faith." Heisler, 339 F.3d at 630 n. 5.

To make a prima facie case of retaliation, a plaintiff must present evidence showing: "(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two." Brown v. City of Tucson, 336 F.3d 1181, 1187 (9th Cir.2003) (citation and quotation marks omitted). A plaintiff must offer "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (emphasis modified) (citation and internal punctuation omitted). Retaliation claims require a "causation in fact," or a "but-for" standard. University of Tex. Sw. Med. Ctr. v. Nassar 570 U.S. 338, 362 (2013); see also Murray v. Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019) (finding that plaintiff bringing claim under the ADA had to show the adverse employment action would not have occurred but for disability). Requesting an accommodation in good faith is a protected activity. To make his prima facie case Gage needs evidence of a link between a request for reasonable accommodation and his termination. If Gage establishes a prima facie case, then the burden shifts to the University to "present legitimate reasons for the adverse employment action." Brooks, 229 F.3d at 928. If the University carries this burden, and Gage demonstrates a genuine issue of material fact as to whether the reason advanced by the employer was a pretext, then the retaliation case proceeds beyond the summary judgment stage. Id. "Circumstantial evidence of pretext must be specific and substantial." Bergene v. Salt River Agric. Improvement & Power Dist., 272 F.3d 1136, 1142 (9th Cir.2001). The record shows that Gage was well informed about the risks of working with formaldehyde and measures available to eliminate or minimize those risks. Although Gage mistakenly believed that his formaldehyde exposure amounted to disability under the ADA, there is no evidence that his requests for changes in the University's methods of handling formaldehyde were not made in good faith The record shows that Gage made repeated complaints regarding the handling of formaldehyde. Well before he claimed an over-exposure to formaldehyde and before

he claimed an ADA disability, on August 22, 2017, Gage requested closed formaldehyde

containers with a spigot. (Doc. 44-9 at 11.) Other requests included a request for PPE on August 29, 2017 and formaldehyde monitors on September 13, 2017. Although he had been seeking modifications of the methods of handling formaldehyde at the University since August 22, 2017, there was no formal request for an accommodation. For purposes of this motion, the Court will consider Gage's first request for ADA accommodation to have occurred when he submitted the Safety Complaint to the University on October 30, 2017, followed by an email alluding to Title VII discrimination and/or harassment. (Doc. 44-4 at 2-3.) In a November 1, 2017, meeting with Dr. Patterson, Associate Dean for Clinical Education, Gage explained that he believed "Dr. Brower was intentionally subjecting" him to unsafe work conditions. (Id. at 12). Because Gage expressed concerns about feeling unsafe at work, the University offered, and he agreed, to administrative leave with pay while the University investigated his safety concerns. Later, on November 30, 2017, Gage notified the University of his formaldehyde overexposure diagnosis and on December 19, 2017, began the interactive process and his request for disability. Id. at 12-13. On January 12, 2018, Richard Jackson, the Industrial Hygienist from ADOSH, sent an email to Dr. Brower discussing the results of a recent ADOSH inspection, stating: "There will not be any apparent violations noted during our inspection. Your facility is state-of-the-art! And your policies, procedures and staff are top notch! I was literally blown away with the ventilation engineering that went into the construction and design of your necropsy facility. It was awesome!" (Doc. 44-1 at 52.) The safety expert employed by the University to evaluate the DPC came back with a report on February 7, 2018, that did not substantiate Gage's safety concerns, finding the "facility is a low-risk operation." (Doc. 44-2 at 28-29.) The November 8, 2017, agreed-upon administrative leave with pay while the University investigated Gage's safety concerns was not an adverse employment action. The adverse action occurred when Gage was terminated on April 10, 2018. It was not unreasonable for the University to seek information about Gage's claim

of disability and ask Gage to provide further information, including the duration of the alleged disability, impact on his ability to do his assigned tasks, the needs for accommodations, and, if such a need existed, what those accommodations would be. The University's inquiry was not a pretext. In compliance with the EEOC's Enforcement Guidance on Disability-Related Inquiries, the University needed to determine if Gage was able to perform the essential functions of his job in light of his alleged impairment. The University's requests for Gage to provide additional medical information was consistent with that requirement. When Gage refused to cooperate, the University was not able to make the determination whether there were necessary accommodations and whether he was able to perform the essential job functions. Gage has not shown by specific or substantial circumstantial evidence

that the reasons given by the University for his firing are a pretext. Gage has not shown a causal connection between his termination and his Safety Complaint. The adverse action did not occur contemporaneously with or soon after Gage's protected activity. His termination occurred almost five months after he submitted his Safety Complaint. The record shows that the results of the University's and ADOSH's investigations did not support Gage's safety concerns. The record supports the University's contention that it reasonably sought information about Gage's alleged disability and that Gage refused to cooperate in that reasonable and necessary inquiry. No reasonable juror would find that the University's explanation for Gage's termination is a pretext.

IT IS ORDERED that the University's Motion for Summary Judgment (Doc. 44) is GRANTED. The Clerk is directed to enter judgment accordingly and terminate this case.

Dated this 18th day of January, 2022.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IAN GAGE,
Plaintiff-Appellant,
v.
MIDWESTERN UNIVERSITY,
Defendant-Appellee.
No. 22-15227
D.C. No. 2:19-cv-02745-DLR
MEMORANDUM*
Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding
Submitted October 13, 2022**
San Francisco, California

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.
Ian Gage appeals pro se from the district court's summary judgment on his claims of sex and disability discrimination. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review summary judgment de novo. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1072 (9th Cir. 2018). We affirm in part, vacate in
* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).
The district court properly granted summary judgment on Gage's Title VII claims. First, Gage failed to establish his *prima facie* case of sex discrimination, as Gage did not produce evidence—other than his unsupported testimony—that similarly situated individuals outside his protected class were treated more favorably. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010). Second, Gage failed to establish his *prima facie* case of a hostile work environment, as the occasional use of gender-related jokes is not sufficiently severe or pervasive to trigger Title VII. *See Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 648 (9th Cir. 2021). Moreover, Gage did not produce evidence to prove that the assignment of his duties was "because of" his sex. *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003).The district court also properly granted summary judgment on Gage's claimof retaliation under the Americans with Disabilities Act. As nearly five monthspassed between Gage's safety complaint and his termination, Gage failed to establish
a "causal link" between any protected activity and an adverse employment action. *See Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 802 (9th Cir. 2003) (holding that a causal link's temporal proximity must be "very close" and that a "three-month and

four-month time lapse is insufficient to infer causation"), *discussing Clark Cnty. Sch.*
Dist. v. Breeden, 532 U.S. 268, 273 (2001). Moreover, even if Gage met his *prima facie* burden, he failed to show that the University's proffered explanation for his termination was pretextual. *See Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 747 (9th Cir. 2011).
The district court did not abuse its discretion when it denied Gage's motion for contempt, as Gage did not produce clear and convincing evidence that the University's counsel lied to a court or otherwise disobeyed a court order. *See Lab./Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115,1123 (9th Cir. 2009).
However, the district court erred in its analysis of Gage's disability discrimination claim. To establish a claim under 42 U.S.C. § 12112, a plaintiff must prove that (1) she is disabled under the ADA; (2) she, "with or without reasonable accommodation, can perform the essential functions" of the job; and (3) she was"discriminated against because of her disability." *Smith v. Clark Cnty. Sch. Dist.*,727 F.3d 950, 955 (9th Cir. 2013). An individual is disabled under the ADA if she meets any one of three definitions: (1) "a physical or mental impairment that substantially limits one or more of the individual's major life activities," (2) a "record of such an impairment," or (3) "being regarded as having such an impairment." *Fraser v. Goodale*, 342 F.3d 1032, 1037–38 (9th Cir. 2003), *quoting* 42 U.S.C. § 12102(1)(A)–(C).
The district court concluded that Gage was not disabled under section 12102(1) as his alleged symptoms were not "permanent" and not "anything more than temporary." However, as this court recently stated in *Shields* (which was decided after the district court made its ruling), the definition of disability under sections 12102(1)(A) and 12102(1)(B) does not require a permanent impairment. *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1223–25 (9th Cir. 2022) (holding that "the ADA and its implementing EEOC regulations make clear that the actual impairment
prong of the definition of 'disability' in [the ADA] is not subject to any categorical temporal limitation"). Rather, the temporal duration of an impairment is merely "one factor" to be considered. *Id.* at 1225, *quoting* 29 C.F.R. Pt. 1630, App. Therefore, the district court erred in concluding that Gage is not disabled under the ADA solely because his alleged impairments were not permanent.
For the reasons above, we affirm in part, vacate in part, and remand to the district court. On remand, the district court must consider whether Gage is disabled under sections 12102(1)(A) and 12102(1)(B) and whether he has provided sufficient evidence to carry his summary judgment burden on that claim. All pending motions and petitions are denied. Each side shall bear its own costs.
AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

No. 22-15227

The United States Court of Appeals for the Ninth Circuit

IAN GAGE,
Petitioner,
United States Court of Appeals for the Ninth Circuit,
Respondent
On Appeal from the United States District Court for the District of Arizona No. 2:19-cv-02745-DLR Hon. Rayes, Douglas L.

IAN GAGE'S PETITION FOR PANEL REHEARING

INTRODUCTION

While this is a case of sex-based discrimination, disability discrimination and ADA retaliation, it ended up in an appeals court due to an abundance of attorney misconduct and the District Court not only allowing that misconduct, but favoring its linked prevarications over Mr. Gage's presented material evidence and direct listings to matters of law. Mr. Gage recognizes and appreciates the time and efforts of this court in their filed Memorandum Disposition; however, it fails to address the specifically identified misconduct as a matter of cited law and is similarly overlooking Mr. Gage's presented material and legal evidences that applies all of his claims to the legal prerequisites/qualifications that left a "genuine dispute" of the evidence. The District Court then favored a side of that "dispute" in order to issue its Summary Judgement directly against FRCP Rule 56(a).

If this court is supporting the upholding of Summary Judgement on the claims, then that action has to occur by specifically and individually invalidating Mr. Gage's presented material facts during Summary Judgment in which the District Court overlooked, argued, improperly referenced and/or overstepped authority by superseding Federal Regulations and Laws. As a matter of Federal Rules of Civil Procedure Rule 56, Mr. Gage is presenting material facts that qualify all of his claims; however, the courts are not invalidating the facts but rather arguing a few small facts while ignoring the majority, including key facts.

DISABILITY DISCRIMINATION

The 9th Circuit is remanding the disability claim back to the District Court under a single claim that a disability does not need to be permanent by Shields v. Credit One Bank . Additionally, the 9th Circuit is claiming that the District Court still needs to consider whether Mr. Gage is disabled under sections 42 U.S. Code 12102(1)(A)&(B) because of the 'temporary disability' argument. This ruling does not address the direct legal infractions of the court nor the material evidence overlooked by the District Court when they granted Summary Judgment.

Mr. Gage already submitted a plethora of material evidence and laws that superfluously detailed a record of legal disability per 42 U.S. Code

12102(1)(A),(B) & (C) that the District Court is overlooking or simply siding with the defenses "genuine disputes" of the records which is not allowed per FRCP Rule 56 (A). The overlooked, argued as well as genuinely disputed evidences are the following:

1) A primary physician's "diagnosis" of toxic effect of formaldehyde overexposure (2-ER-53). This evidence applies as Application to 42 U.S. Code 12102(1)(A),(B) & (C). The District Court invalidated the record of the listed "diagnosis" by allowing the defenses unfounded conspiracy theory that Mr. Gage simply told his medical providers that he had a diagnosis (1-ER-6). The defense never talked to the doctors to gain this defaming theory. The actual records do not covey that Mr. Gage stated these things. In fact, they only listed that the doctor, himself, came to the conclusion. Overall, this is "genuine dispute" of the material fact directly against FRCP Rule 56 (a) that should bar Summary Judgment and proceed to trail.

2) A specialty physician's 2nd opinion confirming the diagnosis and listing affected body systems including lungs and Mr. Gage's ability to breathe (2-ER-54). This evidence applies as application to 42 U.S. Code
12102(1)(A),(B) & (C). The courts invalidated this record under the same claims of Point 1; however, they also extended to argue that the record doesn't state the longevity of the disability and could be temporary (1-
ER-11, 12) and is not proof of chemical sensitivity (1-ER-6). The courts' opinions are not only wrong, but they are directly against all OSHA findings and direct written law such as 29 C.F.R.
Overall, this is a "genuine dispute" of the material facts directly against FRCP Rule 56 (a) that should bar Summary Judgment and proceed to
trail.

3) The overlooked key exhibit in this case that the defense nor the court will address is an email to the University's attorney and additional email
to risk management director detailing the disability superfluously
meeting all legal requirements per 42 U.S. Code & (C)
including its longevity as expected to be permanent (2-ER-46,47,48). This star exhibit was ignored by the district court under the defense claiming they never received it which is another lie against the exhibit itself where the defense acknowledged receipt. Overall, this is a "genuine dispute" of the material facts and directly against FRCP Rule 56 (a) that should bar Summary Judgment and proceed to trail.

4) An email conversation in which the University discusses that they received the diagnosis but hoped to find a different diagnosis (2-ER55,56). This evidence not only admits the defenses knowledge of the disability per 42 U.S. Code 12102(1)(B) & (C) but establishes direct intent to seek other diagnosis after being informed and aware of a current diagnosis which in itself is legally defined ADA discrimination under 42
U.S. Code 12112(d)(4) — and prohibited in medical inquires specially with formaldehyde overexposure per 29 C.F.R. 1910.1048(1). Overall, this evidence is

qualified ADA discrimination under the above mentioned two direct federal laws and abates Summary Judgement.
While the District Court is siding on the defense's side of the "genuine dispute" of the material evidences, it does not negate from the fact that they overly apply to 42 U.S. Code 12102(l)(A),(B) & (C). If the defense would like to substantiate their side of the dispute, that is an action for trial, not Summary Judgement. In addition, the District Court is the main actor in the inaccurate claim that formaldehyde overexposure is temporary, where the University's defense was that Mr. Gage was never injured, exposed or ever truly had the diagnosis which the records prove as inaccurate. It is not the position of the court to argue a standing medical record or entertain unfounded theories on its origins. Given both, the District Court and the defenses improper disputes on the evidences, Summary Judgment cannot stand.
SEX-BASED DISCRIMINATION
This court agreed with the District Court's issuance of Summary Judgment by overlooking and not addressing Mr. Gage's direct matters of law and material evidence on this claim.
First, this court agrees with the District Court that Mr. Gage did not produce evidence other than his testimony. This is an incorrect statement as the record shows that Mr. Gage presented:
1. His job description which gives him a clerical desk job far from lethal chemical work that was used in the sex-based discrimination (2-ER-
3 1 ,32). This evidence constitutes application to legal qualification of McDonnell Douglas factor 3: that the plaintiff suffered an adverse employment action by assigning him dangerous jobs outside of his job description. The District Court made the vital and incorrect statement that the job description contained " "included bagging fixed tissue, cleaning laboratory and handling formalin" " (1-ER-3) that appeared nowhere on the document and used that improper reference to supersede all federal safety regulations in 29 C.F.R. 1910.1048. Even if the description included the task (it did not), it does not supersede federal safety regulations that barred Mr. Gage from the task. Overall, the argument if Mr. Gage should have been given the assignment per his job description is denied by direct federal regulation and to any other point is a "genuine dispute" of the material facts against FRCP Rule 56 (a) that should bar Summary Judgment and proceed to trail.
2. Mr. Gage's supervisor's written declaration that included an admittance that she believed his position was that of clerical, not of handling lethal concentrations of a federally-regulated chemical that she assigned him (2ER-22). This evidence constitutes application to McDonnell Douglas factor 3: that the plaintiff suffered an adverse employment action by his superior who knowingly assigning him dangerous jobs outside of his job description. This admittance is undisputed and should proceed to trial.
3. Two other female employees' job descriptions and trainings that directly aligned with handling of lethal concentrations of the federally-regulated chemical (2-ER-67,68,69,70). This evidence constitutes application to McDonnell Douglas

factor 4: that plaintiff was treated different than someone outside of his protected class. This material evidence is overlooked by the court and undisputed by the defense and should proceed to trial.

4. The direct listings of multiple Federal Regulations in 29 C.F.R. 1910.1048 that make the chemical assignment to Mr. Gage illegal as a federal matter of law before, and especially after, Mr. Gage's disability (Opening Brief -31 ,32). This evidence constitutes application to McDonnell Douglas factor 3: that the plaintiff suffered an adverse employment action by assigning him a job he legally could not do because of potential danger. The defense, the District Court, and the 9th Circuit are all overlooking the 29 C.F.R. 1910.1048 "Formaldehyde Standard" which presents tailor-made federal laws directly classifying that Mr. Gage's assignment, without the appropriate training and safety precautions, was heinously adverse.

5. Various submitted chemical handling protocols that show alterations to safety and were distributed by sex (2-ER-61 This evidence constitutes application to McDonnell Douglas factors 3 and 4 in the fact that male employees were given a protocol that adversely subjected them to more danger and females (outside of the protected class) were given a safer "more favorable" protocol.

6. The University's new case changing admittance in this court: that they not only assigned Mr. Gage to the dangerous formaldehyde tasks over months, but they are now claiming Dr. Brower assigned the only other male under her supervision to the task with Mr. Gage while both were not trained to handle the chemical or given proper precautions unlike her female staff (Answering brief-4,5). This admittance constitutes application to McDonnell Douglas factors 3 and 4 in the fact that Dr. Brower subjected all her male employees to this dangerous-adverse task which the female staff had listed in their job descriptions, were trained on and given other favorable precautions to handle the task.

While the District Court and the 9th Circuit are overlooking all of the above material evidence for the standing of Summary Judgement, the material facts cover all of the McDonnell Douglas factors that the Defense disputed which makes the sex discrimination claim stand and puts any arguments under "genuine dispute" in line with FRCP Rule 56 (a) that should bar Summary Judgment and proceed to trail.

Second, this court claims that hostile work environment is not established by occasional use of gender-related jokes. Mr. Gage used the referenced comments as one of multiple presented patterns of gender-related issues and bias from a supervisor who proudly and publicly proclaimed a single gender favoring ideology, hierarchy and overall prejudice against males — to the point of poorly-disguised misandry. While Mr. Gage's supervisor is entitled to those beliefs, they should not spill over into her work life and be aimed at those she has power over. Mr. Gage established a hostile work environment by the actions of Dr. Brower assigning the only two males under her supervision to dangerous chemical tasks that required multiple federally-regulated safety precautions that Dr. Brower provided to her female staff but not the males. The defense admitted in this court to assigning Mr.

Gage and the other males the task over months, which was previously denied by them and stated they didn't even have the chemical. While the sex-based comments help establish a prejudice that the court is only focusing on, the sex based actions are being overlooked.

Third, this court claims that Mr. Gage's assignment of his duties was not linked because of sex. The aforementioned points well establish that there was a number of actions and material evidences to show a causal relationship between sex and exposure to danger.

ADA RETALIATION

This court agrees with the District Court's decision to grant Summary Judgment by overlooking the material evidence and now new admittances of what occurred during a 5-month period in which the University forcibly removed Mr. Gage from campus before firing him. This court is stating a need for a causal link between any protected activity and an adverse employment action before a "three month and four-month time lapse" per Manatt v. Bank ofam. The court is overlooking that during this timelapse, there was the interactive process in which the University was refusing to engage against 29 C.F.R. 1910.1048 to provide Mr. Gage with healthcare to obstruct a record. The material evidence dated during this timelapse shows that the University was receiving numerous injury, exposure and disability reports that they were spoiling amidst a serious OSHA investigation regarding Mr. Gage's injuries during that time (Emergency Motion — 1-5).

Additionally, as shown by email, the University was made aware of the disability but was also blackmailing Mr. Gage (during this time) to get other tests where they hoped would lead to a different diagnosis directly against 42 U.S. Code & 29 C.F.R. 1910.1048 (1) (Opening brief- 33-35). Overall, a litany of crime sprees occurring during this 5-month period aimed at covering up that a discriminatory sex-based assignment occurred that resulted in injury/disability (casually linked), constitutes retaliation in itself— not an affirmative defense that this court is making it out to be.

This court states that Mr. Gage failed to show that the termination was pretextual by overlooking the fact that Mr. Gage's termination was listed as not returning to work with formaldehyde specifically after his disability of formaldehyde overexposure and its federally-defined chemical sensitivity per C.F.R. The termination letter specifically stated they were also doing the action because Mr. Gage would not get additional diagnostic testing after he informed them of diagnosis which is directly listed as ADA discrimination: prohibited examinations and inquiries under 42 U.S. Code 12112(d)(4) as well as directly against 29 C.F.R. 1910.1048 (I) - Formaldehyde Medical examinations. Even to the extent of the 9th circuit's tightening of ADA retaliation application in employment terminations as having to be directly tied to the disability (Murray V. Mayo Clinic), the employer directly listed Mr. Gage's refusing (per his disability, job description and law) to work with formaldehyde as the reason for termination.

ATTORNEY MISCONDUCT/CONTEMPT

This court agrees with the District Court that there is no evidence of contempt or misconduct. In direct line with the District Court, this court is also overlooking all of the material facts on record as well as new admittances the defense made to the 9th circuit:

1. Attorney Manual H. Cairo's email (2-ER-35) and court transcript (2-ER36-42) demanding to remove words on a HIPPA release form.
2. Attorney Manual H. Cairo was denied verbally on the transcript and by written order (2-ER-21) for the exact words not be to be removed.
3. A altered HIPPA privacy form was retrieved from the medical records company showing that Mr. Cairo altered the signed form exactly as he was ordered not to do and submitted it to the records company and informed no one of the actions (2-ER-72) .
4. The original HIPPA form provided to Attorney Manual H. Cairo that shows he removed the exact words he fought to get removed and was denied (2-ER-71
5. Manual H. Cairo submitted the stolen record as irrelevant but irrelevant medical records should be proof of no disability.
6. Manual H. Cairo admitted his reasons for going against court order and fabricating the HIPPA release, to this court by claiming Mr. Gage would not remove the words that the court ordered to stay (Answering Brief— 16). The 9th circuit is now overlooking the evidence and this admittance to allow the misconduct/contempt to stand.

As a matter of emphasized importance, this court is overlooking and not commenting on the District Court overstepping their power and exonerating attorney Manual H. Cairo after he illegally broke into the federally-protected record by altering a signed form, withheld telling any of his actions, and then submitted the illegally-obtained documents proving he did all of it. The District Court boldly took it a step further allowing illegally accessed records as admissible in court and useable in Summary Judgment, stating that the records were irrelevant and non-related medical records should be able to constitute proof of no disability in the ADA case, even when there is a valid disability record available. (2-ER33,34)

This court overlooked an Emergency Motion after Attorney Manual H. Cairo accidently stated the truth that he received injury, exposure and disability records while Mr. Gage was employed(Answering Brief 7,8, 10) (negating the entire need for badgering the court with a litany of HIPPA requests at the claim he had no idea of Mr. Gage's injury or exposure or disability). The cited and overlooked evidence (2-ER-57,58) shows Mr. Cairo not only spoiled the records and reported they never existed but the university fabricated a false study to show they didn't have the chemical capable of disabling Mr. Gage to begin with; all in order to obstruct a government investigation, serious safety citation, and allow the defense that no disability was ever reported while obstructing Mr. Gage from a record that would allow him health coverage.

CONCLUSION

We all know this is a hearing that has ran astray by blatant attorney misconduct that the courts would rather run from than address head on. Attorney Manual H. Cairo is so aware of this judicial blind eye that he has made it his main strategy in a defense to prey on the systems' weakness and has shown success. With all due respect, this court knows exactly of the misconduct that is occurring and rather than working to a solution, they are perpetuating the problem; they are allowing the misconduct to stand by overlooking it and are only going to set a precedence for more lawyers to employ this strategy.

If this court wants to allow Attorney Manual H. Cairo to play this nefarious charade of a strategy game, then there is nothing much more Mr. Gage can do but simply and continually seek justice in the courts through transparency and truth.

As stated before, in light of the plethora of issues here, Mr. Gage is willing to put in the effort and redo this entire case from the beginning if he is allowed a fair trial. To meet this mutualistic resolution, this court would need to simply label a mistrial and rehearing, remove Attorney Manual H. Cairo so he cannot continue his misconduct, and allow for a fair trial to occur with a more honorable attorney. Attorney Manual H. Cairo is not going to dispute a mistrial for his misconduct as it is blatant, a matter of material evidence - direct law, a matter of his own admittances, and if pursued to the full extent of the law, holds millions of dollars in fines and decades of prison time. Mr. Gage is willing to move past all of these issues with Mr. Cairo and the District Court if he is simply allowed a fair trial.

Signed this 24th day of October, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IAN GAGE, Plaintiff-Appellant, v. MIDWESTERN UNIVERSITY, Defendant-Appellee.
No. 22-15227 D.C. No. 2:19-cv-02745-DLR District of Arizona, Phoenix ORDER
Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.

Appellant's petition for rehearing is DENIED.