XIV. APPENDICES

Appendix 1. Text of Statutory Provisions Involved

28 U.S. Code § 2101(c)

28 U.S. Code § 2101 – Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S. Code § 1331

28 U.S. Code § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S. Code § 12102 (1)

42 U.S. Code § 12102 - Definition of disability

(1) DISABILITY

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(3) Regarded as having such an impairment For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S. Code §12112

42 U.S. Code § 12112 –Discrimination

(a) General rule

No 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.

(b) CONSTRUCTION
As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(3) utilizing standards, criteria, or methods of administration—
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

(d) Medical examinations and inquiries
(1) In general:

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(4) Examination and inquiry
(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

42 U.S. Code § 12113-- Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

29 CFR Part 1630.2(g)

§ 1630.2 Definitions.
(g) ***Definition of "disability"*** —

(1) ***In general. Disability*** means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

29 CFR 1630.2(k)

§ 1630.2 Definitions.
(k) Has a record of such an impairment—(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

29 CFR 1630.2(l)

§ 1630.2 Definitions.
(l) "Is regarded as having such an impairment." The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental

impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

29 CFR 1630.9(d)

§ 1630.9 Not making reasonable accommodation.
(d) An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

Texas Health and Safety Code
Title 2 Health
SUBTITLE D. PREVENTION, CONTROL, AND REPORTS OF DISEASES; PUBLIC HEALTH DISASTERS AND EMERGENCIES

CHAPTER 81. COMMUNICABLE DISEASES; PUBLIC HEALTH DISASTERS; PUBLIC HEALTH EMERGENCIES
SUBCHAPTER A. GENERAL PROVISIONS
Sec. 81.001. SHORT TITLE. This chapter may be cited as the Communicable Disease Prevention and Control Act.

Sec. 81.083. APPLICATION OF CONTROL MEASURES TO INDIVIDUAL.
(a) Any person, including a physician, who examines or treats an individual who has a communicable disease shall instruct the individual about:

(1) measures for preventing reinfection and spread of the disease; and
(2) the necessity for treatment until the individual is cured or free from the infection.
(b) If the department or a health authority has reasonable cause to believe that an individual is ill with, has been exposed to, or is the carrier of a communicable disease, the department or health authority may order the individual, or the individual's parent, legal guardian, or managing conservator if the individual is a

minor, to implement control measures that are reasonable and necessary to prevent the introduction, transmission, and spread of the disease in this state.
(c) An order under this section must be in writing and be delivered personally or by registered or certified mail to the individual or to the individual's parent, legal guardian, or managing conservator if the individual is a minor.
(d) An order under this section is effective until the individual is no longer infected with a communicable disease or, in the case of a suspected disease, expiration of the longest usual incubation period for the disease.
(e) An individual may be subject to court orders under Subchapter G if the individual is infected or is reasonably suspected of being infected with a communicable disease that presents an immediate threat to the public health and:
(1) the individual, or the individual's parent, legal guardian, or managing conservator if the individual is a minor, does not comply with the written orders of the department or a health authority under this section; or
(2) a public health disaster exists, regardless of whether the department or health authority has issued a written order and the individual has indicated that the individual will not voluntarily comply with control measures.
(f) An individual who is the subject of court orders under Subchapter G shall pay the expense of the required medical care and treatment except as provided by Subsections (g)-(i).
(g) A county or hospital district shall pay the medical expenses of a resident of the county or hospital district who is:
(1) indigent and without the financial means to pay for part or all of the required medical care or treatment; and
(2) not eligible for benefits under an insurance contract, group policy, or prepaid health plan, or benefits provided by a federal, state, county, or municipal medical assistance program or facility.
(h) The state may pay the medical expenses of a nonresident individual who is:
(1) indigent and without the financial means to pay for part or all of the required medical care and treatment; and
(2) not eligible for benefits under an insurance contract, group policy, or prepaid health plan, or benefits provided by a federal, state, county, or municipal medical assistance program.
(i) The provider of the medical care and treatment under Subsection (h) shall certify the reasonable amount of the required medical care to the comptroller. The comptroller shall issue a warrant to the provider of the medical care and treatment for the certified amount.
(j) The department may:
(1) return a nonresident individual involuntarily hospitalized in this state to the program agency in the state in which the individual resides; and
(2) enter into reciprocal agreements with the proper agencies of other states to facilitate the return of individuals involuntarily hospitalized in this state.
(k) If the department or a health authority has reasonable cause to believe that a group of five or more individuals has been exposed to or infected with a

communicable disease, the department or health authority may order the members of the group to implement control measures that are reasonable and necessary to prevent the introduction, transmission, and spread of the disease in this state. If the department or health authority adopts control measures under this subsection, each member of the group is subject to the requirements of this section.

(l) An order under Subsection (k) must be in writing and be delivered personally or by registered or certified mail to each member of the group, or the member's parent, legal guardian, or managing conservator if the member is a minor. If the name, address, and county of residence of any member of the group is unknown at the time the order is issued, the department or health authority must publish notice in a newspaper of general circulation in the county that includes the area of the suspected exposure and any other county in which the department or health authority suspects a member of the group resides. The notice must contain the following information:

(1) that the department or health authority has reasonable cause to believe that a group of individuals is ill with, has been exposed to, or is the carrier of a communicable disease;

(2) the suspected time and place of exposure to the disease;

(3) a copy of any orders under Subsection (k);

(4) instructions to an individual to provide the individual's name, address, and county of residence to the department or health authority if the individual knows or reasonably suspects that the individual was at the place of the suspected exposure at the time of the suspected exposure;

(5) that the department or health authority may request that an application for court orders under Subchapter G be filed for the group, if applicable; and

(6) that a criminal penalty applies to an individual who:

(A) is a member of the group; and

(B) knowingly refuses to perform or allow the performance of the control measures in the order.

(m) A peace officer, including a sheriff or constable, may use reasonable force to:

(1) secure the members of a group subject to an order issued under Subsection (k); and

(2) except as directed by the department or health authority, prevent the members from leaving the group or other individuals from joining the group.

SUBCHAPTER G. COURT ORDERS FOR MANAGEMENT OF PERSONS WITH COMMUNICABLE DISEASES

Sec. 81.151. APPLICATION FOR COURT ORDER. (a) At the request of the health authority, a municipal, county, or district attorney shall file a sworn written application for a court order for the management of a person with a communicable disease. At the request of the department, the attorney general shall file a sworn written application for a court order for the management of a person with a communicable disease.

(b) The application must be filed with the district court in the county in which the person:
(1) resides;
(2) is found; or
(3) is receiving court-ordered health services.
(c) If the application is not filed in the county in which the person resides, the court may, on request of the person or the person's attorney and if good cause is shown, transfer the application to that county.
(d) A copy of written orders made under Section 81.083, if applicable, and a medical evaluation must be filed with the application, except that a copy of the written orders need not be filed with an application for outpatient treatment.
(e) A single application may be filed for a group if:
(1) the department or health authority reasonably suspects that a group of five or more persons has been exposed to or infected with a communicable disease; and
(2) each person in the group meets the criteria of this chapter for court orders for the management of a person with a communicable disease.

Sec. 81.1511. APPLICABILITY OF SUBCHAPTER TO GROUP. To the extent possible, and except as otherwise provided, if a group application is filed under Section 81.151(e), the provisions of this subchapter apply to the group in the same manner as they apply to an individual, except that:
(1) except as provided by Subdivision (2), any statement or determination regarding the conduct or status of a person must be made in regard to the majority of the members of the group;
(2) any finding or statement related to compliance with orders under Section 81.083 must be made for the entire group;
(3) any notice required to be provided to a person must:
(A) in addition to being sent to each individual in the group for whom the department or health authority has an address, be published in a newspaper of general circulation in the county that includes the area of the suspected contamination and any other county in which the department or health authority suspects a member of the group resides;
(B) state that the group is appointed an attorney but that a member of the group is entitled to the member's own attorney on request; and
(C) include instructions for any person who reasonably suspects that the person was at the place of the suspected exposure at the time of the suspected exposure to provide the person's name, address, and county of residence to the department or health authority; and
(4) an affidavit of medical evaluation for the group may be based on evaluation of one or more members of the group if the physician reasonably believes that the condition of the individual or individuals represents the condition of the majority of the members of the group.
Added by Acts 2007, 80th Leg., R.S., Ch. 258 (S.B. 11), Sec. 14.04, eff. September 1, 2007.

Sec. 81.152. FORM OF APPLICATION. (a) An application for a court order for the management of a person with a communicable disease must be styled using the person's initials and not the person's full name.

(b) The application must state whether the application is for temporary or extended management of a person with a communicable disease.

(c) Any application must contain the following information according to the applicant's information and belief:

(1) the person's name and address;

(2) the person's county of residence in this state;

(3) a statement that the person is infected with or is reasonably suspected of being infected with a communicable disease that presents a threat to public health and that the person meets the criteria of this chapter for court orders for the management of a person with a communicable disease; and

(4) a statement, to be included only in an application for inpatient treatment, that the person fails or refuses to comply with written orders of the department or health authority under Section 81.083, if applicable.

(d) A group application must contain the following information according to the applicant's information and belief:

(1) a description of the group and the location where the members of the group may be found;

(2) a narrative of how the group has been exposed or infected;

(3) an estimate of how many persons are included in the group;

(4) to the extent known, a list containing the name, address, and county of residence in this state of each member of the group;

(5) if the applicant is unable to obtain the name and address of each member of the group:

(A) a statement that the applicant has sought each of the unknown names and addresses; and

(B) the reason that the names and addresses are unavailable; and

(6) a statement, to be included only in an application for inpatient treatment, that the members of the group fail or refuse to comply with written orders of the department or health authority under Section 81.083, if applicable.

In the United States District Court for the Southern District of Texas

GALVESTON DIVISION

No. 3:22-cv-34

BRIAN CHANCEY, PLAINTIFF,

v.

BASF CORPORATION, DEFENDANT.

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, UNITED STATES DISTRICT JUDGE:

Before the court is the defendant BASF Corporation's motion to dismiss Chancey's amended complaint under Rule 12(b)(6). Dkt. 9. The court grants the motion.

I. BACKGROUND [1]

This is an employment-discrimination suit arising under the Americans with Disability Act (ADA). Dkt. 6.

The plaintiff, Brian Chancey, has worked for BASF since June 2020. Id. at 3. Chancey alleges that on August 10, 2021, BASF began demonstrating by its COVID-19 policies and practices that it regarded him "as having a disability of an impaired immune system and impaired respiratory system, and began responding to [him] as

[1] When hearing a motion to dismiss under Rule 12(b)(6), factual allegations in the complaint must be taken as true and construed favorably to the plaintiff. Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993). The "facts" in this section are taken from the plaintiff's pleadings.

if he had a contagious disease." Id. Chancey alleges BASF never conducted an individualized assessment to determine whether he was a direct threat. Id.

Chancey states he notified BASF that he was claiming protection under the ADA because BASF was treating him as disabled. Id. In response, Chancey alleges, BASF offered a series of accommodations that he declined. Id. at 5. BASF "continued without cessation to harass the plaintiff based upon disability by sending him numerous communications coercing him to accept various accommodations or suffer adverse employment actions." Id.

Further, Chancey alleges BASF imposed upon him accommodations which included isolation and segregation: demanding he remain 6 feet away from co-workers; refusing him access to the work space, his office, the staff room, and rest rooms; making him work remotely; limiting room occupancy; segregating Chancey to a part of the work space; and implementing first- contact protocols and quarantine without due process. Id. at 6. Chancey alleges BASF has classified him as "unvaccinated," is widely sharing this information with other employees without regard to confidentiality, and encourages employees to harass him with repetitive emails, intimidating interactions, and threats of termination. Id.

Chancey alleges BASF requires unvaccinated employees such as him to submit to weekly accommodations such as medical tests at his own expense,enhanced quarantine measures based upon "close contact," and masking. Id. BASF also falsely classified Chancey as a "safety hazard" without assessment in

a written safety violation and threatened to accuse him of abandoning his job despite BASF preventing him access to the job site. Id. at 7.

Chancey alleges that after he accused BASF of discriminating against him under the ADA, his managers and supervisors began to "unceasingly retaliat[e]" against him. Id. at 12. Chancey lists the following as adverse employment actions taken against him: BASF created false employment records stating that Chancey was a "safety hazard"; BASF threatened to accuse him of abandoning his job while preventing him access to the job site; he was threatened with termination on several occasions and given deadlines for termination; he was refused access to the job site, his office, the break room, and rest rooms; he was repeatedly coerced by management to undertake accommodations for a "perceived yet undiagnosed disability"; BASF threatened him with incurring extra costs for weekly antigen testing; and BASF's ADA compliance officer refused to mitigate the retaliation or aid and encourage him in enjoying rights protected under the ADA. Id. at 14.

Chancey alleges three causes of action under the ADA: (1) disability discrimination; (2) improper medical exams and inquiries; and (3) retaliation.

BASF has moved to dismiss. Dkt. 9.

II. LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The claim is facially plausible when the well-pleaded facts allow the

court to reasonably infer that the defendant is liable for the alleged conduct. Id. "The court does not 'strain to find inferences favorable to the plaintiffs' or 'accept conclusory allegations, unwarranted deductions, or legal conclusions.'" Vanskiver v. City of Seabrook, Tex., No. CV H-17-3365, 2018 WL 560231, at *2 (S.D. Tex. Jan. 24, 2018) (quoting Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353, 361 (5th Cir. 2004)).

Naked assertions and formulaic recitals of the elements of the cause of action will not suffice. Iqbal, 556 U.S. at 678. Even if the facts are well-pleaded, the court must still determine plausibility. Id. at 679. Where a party's asserted claim arises out of "statutes under which as a matter of law [the party] d[oes] not have a viable claim," the claim must be dismissed. Kiper v. BAC Home Loans Servicing, LP, No. 4:11-CV-3008, 2012 WL 5456105, at *1 (S.D. Tex. Nov. 6, 2012).

III. ANALYSIS

A. Disability Discrimination

The ADA is a federal antidiscrimination statute designed to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without a disability. See 42 U.S.C. §§ 12101–12113; PGA Tour, Inc. v. Martin, 532 U.S. 661, 674–75 (2001); EEOC v. LHC Grp., Inc., 773 F.3d 688, 696 (5th Cir. 2014). To state a claim for employment discrimination under Title I of the ADA, the plaintiff must allege that: (1) he has a "disability" or was "regarded as disabled"; (2) he was qualified for the

position; and (3) he was subject to an adverse employment action because of his disability. Nall v. BNSF Ry. Co., 917 F.3d 335, 341 (5th Cir. 2019).

The ADA defines a disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1); Delaval v. PTech Drilling Tubulars, L.L.C., 824 F.3d 476, 479 n.2 (5th Cir. 2016); 29 C.F.R. § 1630.2(g)(2) (describing these as the "actual disability," "record of," and "regarded as" prongs). To state a viable claim under the "regarded as" prong, a plaintiff must allege "[]he has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 230 (5th Cir. 2015) (quoting 42 U.S.C. § 12102(3)(A)).

"This 'whether or not' language was enacted as part of the ADA Amendments Act of 2008 [("ADAAA")]." Mendoza v. City of Palacios, 962 F. Supp. 2d 868, 871 (S.D. Tex. 2013). "The ADAAA overrules prior authority 'requiring a plaintiff to show that the employer regarded him or her as being substantially limited in a major life activity.'" Burton, 798 F.3d at 230 (quoting Dube v. Tex. Health & Human Servs. Comm'n, No. SA–11–CV–354–XR, 2012 WL 2397566, at *3 (W.D. Tex. June 25, 2012)); see also Neely v. PSEG Texas, Ltd. P'ship, 735 F.3d 242, 245 (5th Cir.2013).

BASF argues that Chancey fails to satisfy the essential elements of a discrimination claim because he cannot show BASF believed his impairment substantially limited one or more major live activities. Dkt. 9 at 4. However, BASF relies on outdated authority, Kemp v. Holder, 610 F.3d 231, 237 (5th Cir. 2010), in arguing that Chancey is required to show BASF regarded him as substantially limited in a major life activity. Chancey need only plausibly allege his "employer perceived him as having an impairment" and that it discriminated against him on that basis. Mendoza, 962 F. Supp. 2d at 871. Chancey has alleged BASF regarded him "as having a disability of an impaired immune system and impaired respiratory system, and began responding to the plaintiff as if he had a contagious disease." Dkt. 6 at 3.

A number of district courts within this circuit have held that similar allegations are insufficient to state a claim under the ADA.[2] So, too, have courts outside of this circuit.[3] "Just because [BASF] followed the relevant public health

[2] McKnight v. Renasant Bank, No. 121CV00139GHDDAS, 2022 WL 1342649, at *6 (N.D. Miss. May 3, 2022) (holding a minor case of COVID-19 did not qualify for protection under the ADA because it met the exception for temporary illnesses for which no limitations resulted); Milteer v. Navarro Cnty., Texas, No. 3:21-CV-2941-D, 2022 WL 1321555, at *9 (N.D. Tex. May 3, 2022) (holding that plaintiff's age and "health," as pleaded related to COVID-19 pandemic, did not constitute a disability protected under the ADA or Rehabilitation Act); Alvarado v. ValCap Grp., LLC, No. 3:21-CV-1830-D, 2022 WL 19686, at *7 (N.D. Tex. Jan. 3, 2022) (holding plaintiff failed to plausibly plead her employer perceived her as disabled merely because of her possible exposure to COVID-19 through a co-worker).

[3] See Champion v. Mannington Mills, Inc., 538 F. Supp. 3d 1344, 1348 (M.D. Ga. 2021) (holding plaintiff's brother's COVID-19 infection was not a "disability" within the meaning of the ADA); Payne v. Woods Servs., Inc., 520 F. Supp. 3D 670, 679 (E.D. Pa. 2021) (holding the plaintiff failed to allege any facts regarding his symptoms or impairments as a result of COVID-19 infection that supported contention his employer regarded him as disabled); Rice v. Guardian Asset Mgmt., Inc., No. 3:21-CV-00693-AKK, 2021 WL 4354183, at *3 (N.D. Ala. Aug. 19, 2021) (holding employee failed to meet pleading standard showing employer regarded her as disabled where it was merely following public health protocols concerning COVID-19); Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *6 (M.D. Fla. Sept. 16, 2011) (holding the undisputed evidence demonstrated plaintiff diagnosed with H1N1 virus fell into transitory and minor exception to ADA coverage for impairment); Patrick v. S. Co. Servs., 910 F. Supp. 566, 569 (N.D. Ala. 1996)

guidance" regarding COVID-19 in its actions towards Chancey "does not mean [it] regarded him as disabled." Champion, 538 F. Supp. 3D at 1350. "To hold otherwise would mean that every person in the United States who was (or who may be) sent home" or quarantined from other co-workers for refusing to be vaccinated, or asked to accept other testing and masking requirements, "would be disabled for the purposes of the ADA and every such employer covered by the ADA potentially liable." Id. "The [c]ourt soundly and easily rejects this position." Id.

Accordingly, Chancey's discrimination claim is dismissed with prejudice.

B. Unlawful Medical Exams and Inquiries

Section 12112(d)(4)(A) of the ADA provides that "[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112. "Section 12112(d)(4)(A) prohibits employers from using medical exams as a pretext to harass employees or to fish for nonwork-related medical issues and the attendant 'unwanted exposure of the employee's disability and the stigma it may carry.'" Brownfield v. City of Yakima, 612 F.3d 1140, 1140 (9th Cir. 2010) (citing EEOC v. Prevo's Fam. Mkt., Inc., 135 F.3d 1089, 1094 n. 8 (6th Cir. 1998)).

The provision does not prohibit all medical inquires, but only those "as to whether such employee is an individual with a disability or as to the nature or

("The fact that a contagious disease is an impairment does not automatically mean it is a disability.").

severity of the disability." Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 94 (2d Cir.2003) (quoting 42 U.S.C. § 12112). When interpreting this provision, the Fifth Circuit looks to the U.S. Equal Employment Opportunity Commission ("EEOC") Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000), 2000 WL 33407181 ("Enforcement Guidance"). See Delaval, 824 F.3d at 482; Diggs v. Burlington N. & Santa Fe Ry. Co., 742 F. App'x 1, 4 (5th Cir. 2018).

Under the Enforcement Guidance, the first step is to determine whether an employer's question is a "disability-related inquiry" or whether the test or procedure is a "medical examination." 2000 WL 33407181, at *2. A "disability-related inquiry" "is a question (or series of questions) that is likely to elicit information about a disability." Id. at *3. A "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health." Id.

In this case, Chancey has not alleged that BASF undertook any action that meets the definitions of a disability-related inquiry or medical examination. All BASF actions, as alleged by the plaintiff, are consistent with recent EEOC guidance specifically related to the COVID-19 pandemic. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO, EEOC (Mar. 14, 2022).[4]

Simply put, Chancey's amended complaint fails to identify any action allegedly taken by BASF that constitutes a disability-related inquiry or medical

[4]Available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited July 2, 2022).

examination. Indeed, everything BASF is alleged to have done is expressly authorized by the EEOC. Accordingly, Chancey's unlawful medical exams or inquiries cause of action must be dismissed.

C. Retaliation

To allege a plausible claim of retaliation under the ADA, a plaintiff must contend that (1) he participated in an activity protected under the statute; (2) his employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse action. Feist v. La., Dep't of Justice, Office of the Att'y Gen., 730 F.3d 450, 454 (5th Cir. 2013). To prove the second element—an adverse employment action—a plaintiff must demonstrate that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Dehart v. Baker Hughes Oilfield Operations, Inc., 214 F. App'x 437, 442 (5th Cir. 2007) (per curiam).

In his amended complaint, Chancey lists the following alleged "adverse actions:"

> [D]efendant created false employment records stating that plaintiff was "a safety hazard" without assessment via a written safety violation warning; defendant threatened to accuse plaintiff of "abandoning his job" while preventing him access to the job site; plaintiff was threatened with termination on several occasions and given deadlines for termination such as January 4, 2022 and February 1, 2022; plaintiff was refused access to job site, his office, the break room and rest rooms; plaintiff was repeatedly coerced by management to undertake accommodations for a perceived, yet undiagnosed disability; defendant continued to harass plaintiff despite plaintiff claiming protected opposition status by filing an EEOC Charge; defendant threatened plaintiff with incurring extra costs for weekly "antigen testing" at his own expense that other employees did not incur;

> and defendant's ADA compliance officer refused to mitigate the retaliation or aid and encourage the plaintiff in enjoying rights protected under the ADA.

Dkt. 6 at 14.

Chancey's allegations, if proven, are nothing more than petty slights or minor annoyances that do not rise to the level of an adverse employment action. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) ("We speak of material adversity because we believe it is important to separate significant from trivial harms."); see also King v. Louisiana, 294 F. App'x 77, 85 (5th Cir. 2008) (holding that "allegations of unpleasant work meetings, verbal reprimands, improper work requests and unfair treatment do not constitute adverse employment actions as . . . retaliation"); Grice v. FMC Techs., Inc., 216 F. App'x 401, 407 (5th Cir. 2007) (holding that allegedly falsified reprimands are considered "trivial" and not materially adverse in the retaliation context); DeHart, 214 F. App'x at 442 (holding that a written disciplinary warning for insubordination and being argumentative would not have "dissuaded a reasonable worker from making or supporting a charge of discrimination").

Moreover, as is evident by the hundreds of pages of records attached to Chancey's pleadings, none of the above actions actually dissuaded him from submitting to BASF management repeated objections to BASF's COVID-19 policies or filing a charge of discrimination. Burlington N. & Santa Fe Ry. Co., 548 U.S. at 68. Simply put, Chancey's alleged adverse employment actions, if proven, amount to

nothing more than trivial slights that cannot support a retaliation claim under the ADA. Therefore, his retaliation claim must be dismissed.

* * *

For the reasons stated above, BASF's motion to dismiss is granted. Dkt. 9. Chancey's claims are dismissed with prejudice.

Final judgment to issue separately.

Signed on Galveston Island this 29th day of December, 2022.

__s/ Jeff Brown_____
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

United States Court
of Appeals
FILED
October 10, 2023
Lyle W. Cayce, Clerk

No. 23-40032

Brian Chancey,

Plaintiff—Appellant,

versus

BASF,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:22-CV-34

Before King, Willett, and Douglas, *Circuit Judges.*

Per Curiam:[5]

Plaintiff Brian Chancey asserts various claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., alleging that his current employer, BASF Corporation, discriminated against him while enforcing a workplace COVID-19 policy. The district court dismissed Chancey's claims with prejudice. We AFFIRM.

I

Chancey has worked as an "I/E engineer" for BASF in Freeport, Texas, since June 2020. He alleges that, in August 2021, BASF began enforcing a COVID-19 policy in compliance with EEOC guidance. The policy entailed masking requirements, inquiries about vaccine status, social distancing, handwashing, and

[5]This opinion is not designated for publication. See 5th Cir. R. 47.5.

temperature checks. Believing these measures to be ineffective, Chancey declined to abide by them and requested that he be able to continue to work on site. Chancey also expressed concerns about the policy to multiple supervisors and BASF's human resources department, questioning how BASF could impose "a medical intervention" on him and inquiring whether alternative protective measures were available. BASF opened an investigation into Chancey's complaints and separated him from other employees for the duration of that investigation.

According to Chancey, once BASF completed its investigation, it instituted a number of "accommodations," including "demanding [he] remain 6 feet away from co-workers; refusing him access to the work space, his office, the staff room, and rest rooms; making him work remotely; limiting room occupancy; segregating [him] to a part of the work space; [and] implementing 'first contact protocols' and 'quarantine' without due process." Chancey also alleges that BASF began treating him as a "safety hazard" and "direct threat" due to his vaccination status, requesting that he submit to weekly COVID testing at his own expense and endure "enhanced quarantine measures."

Based on these and other allegations, Chancey sued BASF for disability discrimination under the ADA, accusing BASF of regarding him as if he had an "impaired immune system and an impaired respiratory system." See 42 U.S.C. § 12102(1)(C) (defining disability as "being regarded as having" a physical or mental impairment). BASF moved to dismiss Chancey's claims under 12(b)(6) of the Federal