Appendix "A"

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NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAULINA BUHAGIAR, Plaintiff-Appellant, v. WELLS FARGO BANK, N.A., Defendant-Appellee.	No. 22-16232 D.C. No. 2:19-cv-05761-JJT MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John Joseph Tuchi, District Judge, Presiding

Submitted June 11, 2024**

Before: WALLACE, FERNANDEZ, SILVERMAN, Circuit Judges,

Plaintiff-Appellant Paulina Buhagiar appeals pro se from the district court's order granting summary judgment to Wells Fargo Bank, N.A. (Wells Fargo) on her claims of discrimination and retaliation pursuant to (i) Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, (ii) 42 U.S.C. § 1981, and (iii)

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

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

the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, as well as her claim of intentional infliction of emotional distress (IIED).[1] We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's grant of summary judgment de novo "to determine whether, viewing all evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008).

As the parties are familiar with the factual and procedural history of this case, we need not recount it here. We affirm.

1. *Ineffective assistance of counsel.* On appeal, Buhagiar requests that

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[1] In her Notice of Appeal, Buhagiar indicated that she was also appealing Wells Fargo's original Bill of Costs. After Buhagiar filed her Notice of Appeal, the district court entered a Judgment on Taxation of Costs against Buhagiar for $1,931.15 based on Wells Fargo's *revised* Bill of Costs. Generally, "a party may demand judicial review of a cost award only if such party has filed a proper motion within the [seven]-day period specified in [Federal] Rule [of Civil Procedure] 54(d)(1)." *Walker v. California*, 200 F.3d 624, 626 (9th Cir. 1999). Buhagiar did not file a response or objections to either Bill of Costs. While this court has discretion to consider a challenge to the cost award notwithstanding the waiver, *see id.*, on appeal Buhagiar has not cited any authority or made any argument as to why the Judgment on Taxation of Costs is improper. Accordingly, we conclude this argument is waived. *See, e.g., United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) ("Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived."); Fed. R. App. P. 28(a)(8)(A) ("The appellant's brief must contain . . . the argument, which must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]").

the panel "review and set aside the judgment and ruling of the lower court based on the mishandling of [her] case by [her] previous lawyer." We understand Buhagiar to be making an ineffective assistance of counsel argument. "Generally, a plaintiff in a civil case has no right to effective assistance of counsel." *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985). "This rule is based on the presumption that, unless the indigent litigant may lose his physical liberty if he loses the litigation, there is generally no right to counsel in a civil case." *Id.* Accordingly, we conclude that Buhagiar is not entitled to reversal of the district court's summary judgment based on ineffective assistance of counsel grounds.

2. *Discrimination claims.* The district court properly granted summary judgment to Wells Fargo on Buhagiar's discrimination claims under Title VII, § 1981, and the ADA.

We first turn to the Title VII and § 1981 discrimination claims. Under Title VII, an employer may not "discriminate against an individual with respect to [her] . . . terms, conditions, or privileges of employment because of her race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Similarly, § 1981 prohibits racial discrimination in the "benefits, privileges, terms, and conditions" of employment. 42 U.S.C. § 1981(b). "When analyzing § 1981 claims, we apply the same legal principles as those applicable in a Title VII disparate treatment case." *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008)

(internal quotation marks and citation omitted).

"Typically, we apply the familiar *McDonnell Douglas* burden shifting framework for Title VII and § 1981 claims." *Id.* at 1105. Under the *McDonnell* burden-shifting framework, the plaintiff must show that "(1) the plaintiff belongs to a protected class, (2) he was performing according to his employer's legitimate expectations, (3) he suffered an adverse employment action, and (4) similarly situated employees were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 691 (9th Cir. 2017). "[W]hen the plaintiff demonstrates his prima facie case, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the adverse employment action." *Id.* "If the defendant meets this burden, then the plaintiff must then raise a triable issue of material fact as to whether the defendant's proffered reasons . . . are mere pretext for unlawful discrimination." *Id.* (internal quotation marks and citation omitted).

Since the parties do not dispute that Buhagiar is part of a protected class based on her race or that she suffered an adverse employment action when she was terminated, we focus our analysis on whether she was performing according to Wells Fargo's legitimate expectations. In arguing that she was performing her job adequately, Buhagiar relies on the fact that she advanced from Operations

Processor 2 to Operations Processor 3, which she refers to as a promotion to a higher-level position, and that she did not have any "poor performance write-ups" or issues with behavior or tardiness when she was in the role of Operations Processor 2. But such evidence has no bearing on how she was performing in her role as Operations Processor 3. Indeed, as the district court observed, fatal to Buhagiar's prima facie Title VII and § 1981 discrimination claims is that Badon, her former supervisor, testified that Buhagiar made substantial errors and failed to improve with instruction in her position as Operations Processor 3; Badon's log reflects Buhagiar's performance deficiencies. In light of Badon's log documenting Buhagiar's subpar performance, Buhagiar's belief that she was performing well is not sufficient to create a genuine dispute of material fact.[2] *See Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) ("However, an employee's subjective personal judgments of her competence alone do not raise a genuine issue of material fact."). Therefore, we conclude that the district court properly granted summary judgment to Wells Fargo on the Title VII and § 1981 discrimination claims.

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[2] Since Buhagiar fails to create a genuine dispute of fact as to whether she was performing satisfactorily in her role as Operation Processor 3, we need not consider whether her placement on "mail room duty" was an adverse action or whether the lack of assigning Buhagiar's coworker, who also exhibited performance issues, to "mail room duty" satisfied the "similarly situated" requirement.

Next, we turn to the ADA discrimination claim. "To set forth a prima facie disability discrimination claim [under the ADA], a plaintiff must establish that: (1) he is disabled within the meaning of the ADA; (2) he is qualified (i.e., able to perform the essential functions of the job with or without reasonable accommodation); and (3) the employer terminated him because of his disability." *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 433 (9th Cir. 2018), citing *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001). "Under the ADA an employee is considered disabled if he is regarded by his employer as having a physical or mental impairment that substantially limits one or more major life activities." *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006), citing 42 U.S.C. § 12102(1)(A) & (C).

Taking the evidence in the light most favorable to Buhagiar, we conclude that the record does not support an inference that Wells Fargo perceived Buhagiar as disabled under the ADA.[3] Buhagiar did not notify Wells Fargo of any disability or need for disability-related accommodations under the ADA. Although Buhagiar sent a Return to Work Release to Badon from the hospital, the Release provides no restrictions with respect to Buhagiar's return to work. When Badon asked how Buhagiar was feeling following the hospitalization, Buhagiar informed Badon that

[3] Given that we conclude that Wells Fargo did not perceive Buhagiar as disabled, we need not address whether Buhagiar is qualified to perform the job or whether she was terminated because of her alleged disability.

she was "still sick" and did not indicate that she may have a disability. Therefore, we conclude that the district court did not err in granting summary judgment to Wells Fargo on Buhagiar's ADA discrimination claim.

3. *Retaliation claims.* The district court properly granted summary judgment to Wells Fargo on Buhagiar's retaliation claims under Title VII, § 1981, and the ADA.

Title VII makes it unlawful "for an employer to discriminate against any of [its] employees . . . because [she] has opposed any practice." *Surrell*, 518 F.3d at 1107, quoting 42 U.S.C. § 2000e–3(a). Retaliation claims are also actionable under § 1981 and the ADA. *See Manatt v. Bank of Am., NA*, 339 F.3d 792, 795 (9th Cir. 2003) (section 1981 retaliation claims); *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (ADA retaliation claims). "To establish a prima facie case of retaliation, a plaintiff must prove (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two." *Surrell*, 518 F.3d at 1108. "The burdens of persuasion and proof are the same as those in *McDonnell*." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 784–85 (9th Cir. 1986).

The district court considered Buhagiar's assignment to mailroom duties and her termination, and concluded that Buhagiar's retaliation claims arising out of

she was "still sick" and did not indicate that she may have a disability. Therefore, we conclude that the district court did not err in granting summary judgment to Wells Fargo on Buhagiar's ADA discrimination claim.

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The district court considered Buhagiar's assignment to mailroom duties and her termination, and concluded that Buhagiar's retaliation claims arising out of

both adverse employment actions failed as a matter of law. For her Title VII and § 1981 retaliation claims arising out of assignment to mailroom duties, the district court determined that Buhagiar made a prima facie case of retaliation based on temporal proximity; she was assigned to mailroom duties within a day of complaining to Richardson. At the next stage of the *McDonell* framework, however, the district court properly concluded that Wells Fargo articulated a legitimate, non-discriminatory reason for assigning Buhagiar to process mail: she was making substantial errors when performing other job duties. Buhagiar failed to show that Wells Fargo's reason was pretextual. *See Curley v. City of N. Las Vegas*, 772 F.3d 629, 634 (9th Cir. 2014) ("The timing . . . does nothing to refute the [employer's] legitimate explanations for the adverse employment action, making summary judgment appropriate even if [plaintiff] has established a prima facie case."). As for Buhagiar's ADA retaliation claim arising out of assignment to mailroom duties, the district court properly determined that she could not make a prima facie case because her hospitalization occurred after she was assigned.

With respect to the second adverse employment action—Buhagiar's termination—the district court concluded that Buhagiar did not establish a prima facie Title VII or § 1981 retaliation claim because she could not show a causal nexus as Buhagiar was terminated roughly nine months after complaining to Richardson. The district court's determination that such a lapse of time, without

more, does not support an inference of retaliation is consistent with our precedent. *See Villiarimo*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("[I]n order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression." (internal quotation marks and citation omitted)). The district court further concluded that Buhagiar could not make a prima face ADA retaliation claim because she never requested accommodation from Wells Fargo for a disability or medical issue. As we already discussed, Buhagiar's allegation that she requested reasonable accommodations after her hospital visit is unsupported by the record. Without Buhagiar making a request under the ADA, it logically follows that Buhagiar cannot show that any subsequent action by Wells Fargo was in retaliation for protected activity under the ADA.

The district court's summary judgment to Wells Fargo on the Title VII, § 1981, and ADA retaliation claims was proper.

4. *IIED claim.* The district court properly granted summary judgment to Wells Fargo on Buhagiar's IIED claim. To prevail on a claim for IIED under Arizona law, a plaintiff must prove: (1) that the defendant committed "extreme" and "outrageous" conduct; (2) that the defendant intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct; and (3) that severe emotional distress occurred as a result of the defendant's conduct. *Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 110 (Ariz. 2005),

quoting *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (1987). "The trial court determines whether the acts at issue are sufficiently outrageous to state a claim for relief; however, if reasonable minds could differ about whether the conduct is sufficiently outrageous, the issue should be decided by a jury." *Johnson v. McDonald*, 3 P.3d 1075, 1080 (Ariz. Ct. App. 1999).

Buhagiar's IIED claim arises out of her allegations that (i) she was subject to humiliation from her co-workers and supervisor; (ii) she was demoted to mailroom duties after complaining; (iii) Wells Fargo ignored the adverse effects the working conditions were having on her and; (iv) she was not directed to the proper channels to receive accommodations after her hospitalization. "[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 905 P.2d 559, 563 (Ariz. Ct. App. 1995). Even accepting as true all of Buhagiar's allegations, it cannot be said Wells Fargo's conduct "go[es] beyond all possible bounds of decency, and [would] be regarded as atrocious and utterly intolerable in a civilized community." *Johnson*, 3 P.3d at 1080 (internal quotation marks and citation omitted).

Accordingly, the district court properly granted summary judgment to Wells Fargo on Buhagiar's IIED claim.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
  - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

Appendix "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Paulina Buhagiar, Plaintiff, v. Wells Fargo Bank NA, Defendant.	No. CV-19-05761-PHX-JJT **ORDER**

At issue is Defendant Wells Fargo Bank NA's ("Wells Fargo") Motion for Summary Judgment (Doc. 51, Mot.), to which Plaintiff Paulina Buhagiar ("Ms. Buhagiar") filed a Response[1] (Doc. 53, Resp.), and Defendant filed a Reply (Doc. 56, Reply). The Court has reviewed the parties' briefs and finds this matter appropriate for decision without oral argument. *See* LRCiv 7.2(f). For the reasons set forth below, the Court grants Defendant's Motion.

I. BACKGROUND

Plaintiff, who is Filipino, began working for Defendant in Tempe, Arizona, on May 1, 2017 as an Operations Processor 2 for Defendant's Repossession Administration

[1] Plaintiff's Response is 22 pages in length, in violation of the Court's Rule that "[u]nless otherwise permitted by the Court ... the response [to a motion] including its supporting memorandum, may not exceed seventeen (17) pages, exclusive of attachments and any required statement of facts." LRCiv 7.2(e)(1). Plaintiff did not obtain leave of Court to exceed the page limit. Non-compliance with the Rule "may be deemed a consent to the denial or granting of [a] motion and the Court may dispose of the motion summarily." LRCiv 7.2(i). The Court will not grant Defendant's Motion on this basis, but the Court will disregard pages 18 through 22 of Plaintiff's Response.

team. (Defendant's Separate Statement of Facts[2] ("SOF") ¶ 1, 31.) Less than a year later, Plaintiff requested to transfer to Salt Lake City, Utah. (SOF ¶ 2.) Plaintiff's transfer request was approved, and on September 13, 2018 she began working as an Account Resolution Specialist 2 for the Education Financial Services department at Defendant's Salt Lake City location. (SOF ¶ 2). Less than two months later, Plaintiff requested to transfer back to Arizona, which Defendant approved. (SOF ¶ 3-5.) On November 5, 2018, Plaintiff began working as an Operations Processor 3 in the Auto Loss Recovery Operations department at Defendant's Chandler, Arizona branch, where she reported to Annette Badon ("Ms. Badon"). (SOF ¶ 6-7.)

In her role as an Operations Processor 3, Plaintiff was tasked with entering transactions into a record system, balancing general ledger accounts, resolving complex customer issues, and processing returned mail.[3] (SOF ¶¶ 10, 21-22.) Defendant contends that Plaintiff exhibited performance issues in this role. (SOF ¶¶ 12-24; Resp. at 2-3.) In

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[2] Plaintiff did not file a Controverting Statement of Facts as required by Local Rule of Civil Procedure 56.1(b). The Rule sets the following parameters:

> (1) for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph and a reference to the specific admissible portion of the record supporting the party's position if the fact is disputed; and (2) any additional facts that establish a genuine issue of material fact or otherwise preclude judgment in favor of the moving party. Each additional fact must be set forth in a separately numbered paragraph and must refer to a specific admissible portion of the record where the fact finds support.

LRCiv 56.1(b). While Plaintiff failed to comply with this Rule, she nonetheless directed the Court to the facts she disputes in her Response. Thus, in its discretion, the Court will not order Plaintiff to submit a Controverting Statement of Facts. *See* LRCiv 56.1(g). But the Court notes that Plaintiff's counsel took an oath upon admission to practice in this Court to uphold and follow all applicable rules, including the Local Rules, and he did not do so here.

[3] Plaintiff takes inconsistent positions as to whether processing returned mail was one of her job functions. On the second page of Plaintiff's Response, she acknowledges that her job duties included "processing returned mail." (Resp. at 2.) However, on the fourth page, she writes that she was sent "to the mail room to process mail, which was not a function of her role." (Resp. at 4.) Plaintiff admitted during her deposition that she was never moved to a mail room, so it is unclear whether she is taking the position that processing mail in a mail room was not part of her role, or whether processing mail in general was not part of her role. (*See* SOF Ex. 11, Deposition of Paulina Buhagiar ("Buhagiar Dep.") 176:17-25.) Regardless, the Court can resolve the issues at hand without clarification from Plaintiff.

part, Defendant attributes Plaintiff's performance issues to the fact that she was working too quickly, and also that she was not taking notes during trainings. (SOF ¶¶ 15-17.) As a result, Defendant claims that Ms. Badon confronted Plaintiff about the quality of her work and told her to slow down. (SOF ¶¶ 18-19.) Plaintiff, on the other hand, denies that she was making errors or otherwise disrupting her department, and denies that she was confronted by Ms. Badon. (Resp. at 2.)

On January 9, 2019, following a January 8[4] meeting with Ms. Badon and her other team members, Plaintiff met with Randy Richardson ("Mr. Richardson"), her second level manager, to discuss her feelings of being "harassed, singled out, and chastised." (SOF ¶¶ 25-26; Resp. at 3.) Plaintiff alleges that after her complaint to Mr. Richardson, she was assigned to process mail. (Resp. at 3, Pl.'s Ex. 2 at 1.) That same day Plaintiff also filed an "eForm" requesting a consultation with Human Resources regarding "a concern with another team member or manager." (SOF ¶ 27.) On January 11, 2019, Plaintiff spoke with Wells Fargo HR Specialist James Bufford ("Mr. Bufford"), and alleged a harassing work environment, that her peers were upset because she was a fast worker, that her peers gossiped at work and ignored her, and that she had been demoted to mail duty by Ms. Badon, which she believed was in retaliation for her complaint to Mr. Richardson. (SOF ¶ 28; Resp. at 4.) Defendant investigated Plaintiff's concerns, concluded her allegations were unsubstantiated, and closed the investigation. (SOF ¶¶ 29-30, 32-33; Resp. at 4.)

On January 28, 2019, Plaintiff informed Ms. Badon that she was experiencing chest pain and having a hard time breathing. (SOF ¶ 34.) Ms. Badon called 9-1-1, and paramedics arrived and took Plaintiff to the Emergency Room. (SOF ¶ 34; Resp. at 4.) Plaintiff was treated for cardiac arrythmias and was prescribed medications. (Resp. at 5.) Plaintiff texted Ms. Badon a photograph of a Return to Work Release from the hospital, which identified her medical condition and stated that she could return to work once she was cleared by a

[4] The precise dates are unclear from the record. In her Response, Plaintiff alleges the team meeting took place on January 9, 2019, and she requested a meeting with Mr. Richardson following that meeting. (Resp. at 3.) However, when Plaintiff was deposed, she stated that she submitted her complaint to Mr. Richardson on January 8, right after the team meeting on that day. (Buhagiar Dep. 127:20-128:16.)

primary care doctor or cardiologist. (SOF ¶ 35; Resp. at 5.) Ms. Badon replied, "Ok no problem just get better." (SOF ¶ 35.) With her cardiologist's approval, Plaintiff returned to work on January 31, 2019. (SOF ¶ 36.) Plaintiff claims that she "immediately sought accommodation based on her medical condition," but was unaware of the process. (Resp. at 5.) When she asked Ms. Badon how to go about seeking accommodation, she claims that she was advised to "call the sick line every day she needed accommodation." (Resp. at 5.)

Defendant contends that on January 8, 2019, before her hospital visit, Plaintiff had requested a personal leave of absence from late March through early April to go to the Philippines and resolve some personal issues, which Ms. Badon approved. (SOF ¶¶ 40-41.) Subsequently, Plaintiff requested multiple changes to the start date of her leave, all of which Ms. Badon approved. (SOF ¶¶ 41, 45-48, 50-52, 55-56.) Ultimately, Ms. Badon approved a six-month leave of absence for Plaintiff. (SOF ¶ 51.) Plaintiff disputes Defendant's account and claims that Plaintiff requested a Family and Medical Leave Act ("FMLA") leave of absence to commence January 28, 2019, the same day she was taken to the Emergency Room. (Resp. at 5.) Plaintiff alleges that she received an FMLA leave of absence for six months, set to terminate on August 6, 2019. (Resp. at 6.) Plaintiff also completed intake with the EEOC on January 29, 2019, alleging discrimination by Defendant. (Resp. at 5.) On February 21, 2019, Plaintiff filed a Charge of Discrimination with the EEOC. (Resp. at 6, Pl.'s Ex. 3.)

On February 1, 2019, Ms. Badon transferred out of Plaintiff's department and Jami Butler ("Ms. Butler") was assigned as Plaintiff's new supervisor. (SOF ¶¶ 9, 54.) On February 4, 2019, Defendant claims that Plaintiff informed Ms. Butler that she was going on her leave of absence starting February 8, 2019. (SOF ¶ 55.) After February 4, 2019, Plaintiff did not return to work. (SOF ¶ 56.)

In March 2019, Plaintiff moved in with her daughter in Utah, where she worked for two other companies. (SOF ¶¶ 71-75.) Plaintiff contends that she sought employment elsewhere because her leave was unpaid, and she needed income to survive. (Resp. at 6.)

When Plaintiff's leave of absence concluded on August 6, 2019, she did not return to work. (SOF ¶ 61.) Beginning on August 15, 2019, Ms. Butler called Plaintiff multiple times to inquire whether she intended to return to work, and Defendant's leave administrator sent Plaintiff a letter informing her that her time away from work beyond August 6, 2019, was unapproved leave. (SOF ¶¶ 62-64.) Plaintiff explains that she mistakenly understood her FMLA letter to confirm that she was on leave through January 27, 2020. (Resp. at 6.) She was also waiting for a response from the EEOC before returning to work. (Resp. at 6.) On October 10, 2019, Defendant sent Plaintiff a letter explaining that as of that date, it had not received any information regarding her plans to return to work, resulting in the termination of her employment effective October 17, 2019. (SOF ¶ 66.)

The EEOC issued a Notice of Right to Sue on September 24, 2019. (Doc. 20, Plaintiff's Second Amended Complaint ("Compl.") ¶ 7.) On December 7, 2019, Plaintiff initiated the present action, alleging claims under Title VII, 42 U.S.C. § 1981, the Americans with Disabilities Act ("ADA"), the FMLA, and also intentional infliction of emotional distress. (Compl.) On August 4, 2020, Plaintiff's counsel stipulated to dismissal of the FMLA claims. (Doc. 29.) Defendants now move for summary judgment on all of Plaintiff's remaining claims.

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue"

of material fact arises only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

"A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Summary judgment must 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.'" *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

III. ANALYSIS

The parties have stipulated to dismiss Plaintiff's FMLA claims, so six causes of action alleged in Plaintiff's Second Amended Complaint remain: (1) national origin/race discrimination in violation of Title VII; (2) retaliation in violation of Title VII; (3) violation of 42 U.S.C. § 1981[5]; (4) disability discrimination in violation of the ADA; (5) retaliation

[5] Plaintiff alleges that Defendant denied her "the protections against race discrimination and retaliation provided by Section 1981," indicating that she brings both retaliation and discrimination claims under the statute. (Compl. ¶ 44.) However, in her Response, Plaintiff also suggests that she is bringing a harassment claim under 42 U.S.C. § 1981. (Resp. at 13-14.) Plaintiff may not raise a new claim for the first time in her Response, so the Court addresses it only here. Even if Plaintiff had appropriately pled a harassment claim on the face of her Complaint, it would fail. To state a 42 U.S.C. § 1981 claim of harassment based on a hostile work environment, Plaintiff must raise a triable issue of fact as to whether (1) Defendant subjected her to verbal or physical conduct based on her race; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. *v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008). Even if Plaintiff can meet the first and second factors, as a matter of law Plaintiff cannot show that the harassment was severe or pervasive enough to alter the conditions of her employment. *See, e.g., Kortan v. Cal. Youth*

in violation of the ADA; and (6) intentional infliction of emotional distress ("IIED"). (*See generally* Compl.) Plaintiff also seeks punitive damages.

A. Plaintiff's Discrimination Claims

Title VII prohibits employers from discriminating against an individual based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). Similarly, § 1981 prohibits discrimination in the "benefits, privileges, terms, and conditions of employment." 42 U.S.C. § 1981(b). The standards for analyzing § 1981 claims are the same as those applicable in Title VII disparate treatment cases. *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008). However, Title VII requires that the Plaintiff exhaust administrative remedies, such as filing a claim with the EEOC, before bringing a private action for damages, while § 1981 does not have the same requirement. *Id.*

Because Plaintiff asserts, and Defendants do not dispute, that she filed a charge with the EEOC on February 21, 2019, and the EEOC provided Plaintiff with a Notice of Right to Sue on September 24, 2019, the Court finds that Plaintiff meets the requirements of Title VII exhaustion. (*See* Compl. ¶ 7.) Accordingly, the Court moves forward to discuss the merits of Plaintiff's claims.

Plaintiff brings discrimination claims under both Title VII and 42 U.S.C. § 1981. The standards for a *prima facie* discrimination claim are the same under § 1981 and Title VII. *Surrell*, 518 F.3d at 1105 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Under Title VII, an employer may not "discriminate against an individual with respect to [her] . . . terms, conditions, or privileges of employment" because of her race, color, religion, sex, or national origin. 42 U.S.C. § 2000e–2(a). "This provision makes 'disparate treatment' based on [race, color, religion, sex, or national origin] a violation of federal law." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061–62 (9th Cir. 2002).

Auth., 217 F.3d 1104, 1111 (9th Cir. 2000) (no hostile work environment where on several

A plaintiff may present either direct or circumstantial evidence to prove her employment discrimination case. Direct evidence is "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 640 (9th Cir. 2006). If the plaintiff fails to produce direct evidence, the Court may evaluate circumstantial evidence using the burden-shifting framework that the Supreme Court established in *McDonnell Douglas Corp. v. Green*. 433 U.S. 792, 802–805 (1973). Under that framework, first, the plaintiff must establish a *prima facie* case of unlawful discrimination by showing that (1) she belongs to a protected class; (2) she was performing her job satisfactorily (or was qualified for a position for which she applied); (3) she was subjected to an adverse employment action; and (4) similarly situated [individuals outside her protected class] were treated more favorably." *Cozzi v. Cnty. of Marin*, 787 F. Supp. 2d 1047, 1057 (N.D. Cal. 2011) (citing *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1123 (9th Cir. 2000); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000)). The degree of proof necessary to establish a *prima facie* case for a Title VII claim on summary judgment "is minimal and does not even need to rise to the level of a preponderance of the evidence." *Id.* (internal citations and quotations omitted).

"If the plaintiff establishes a *prima facie* case, the burden of production—but not persuasion—then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action . . . . If the employer does so, the plaintiff must show that the articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Villiarimo*, 281 F.3d at 1062 (internal citations and quotations omitted). A plaintiff may rely on circumstantial evidence to demonstrate pretext, but such evidence must be both specific and substantial. *Id.*

The *McDonnell Douglas* burden-shifting framework may also be applied to Title VII retaliation claims. *See Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 784 (9th Cir. 1986.) A plaintiff may establish a *prima facie* case of retaliation by showing that (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Finally, the burden shifts back to the plaintiff to show that the defendant's proffered reason was pretext for a discriminatory motive. *Id.*

Defendant argues that Plaintiff's *prima facie* case fails because she cannot establish the requisite causal nexus. (Mot. at 8.) In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court decided that a plaintiff has a heightened standard for proving causation in retaliation claims—she must show that her engagement in a protected activity was a "but-for" cause of the defendant's imposition of an adverse employment action. 570 U.S. 338, 362 (2013).

According to Defendant, Plaintiff cannot show that her employment was terminated soon after any alleged protected activity. (Mot. at 8.) Plaintiff's complaint to Mr. Richardson was in January 2019, and she was not terminated until October 2019, roughly nine months after her complaint and eight months after she took her leave of absence. (Mot. at 8-9.) The Court agrees with Defendant that such a substantial time lapse between her complaint and termination indicates that Plaintiff cannot establish the requisite causal nexus. *See Coleman v. Home Health Resources Inc.*, 269 F. Supp. 3d 935, 945 (D. Ariz. 2017) ("An inference of retaliation is not plausible where eight months have elapsed.") (citations omitted).

On the other hand, Plaintiff, without citing a single case to support her argument, contends that her placement in the mail room constitutes a demotion that falls "within the

When Plaintiff's leave of absence concluded on August 6, 2019, she did not return to work. (SOF ¶ 61.) Beginning on August 15, 2019, Ms. Butler called Plaintiff multiple times to inquire whether she intended to return to work, and Defendant's leave administrator sent Plaintiff a letter informing her that her time away from work beyond August 6, 2019, was unapproved leave. (SOF ¶¶ 62-64.) Plaintiff explains that she mistakenly understood her FMLA letter to confirm that she was on leave through January 27, 2020. (Resp. at 6.) She was also waiting for a response from the EEOC before returning to work. (Resp. at 6.) On October 10, 2019, Defendant sent Plaintiff a letter explaining that as of that date, it had not received any information regarding her plans to return to work, resulting in the termination of her employment effective October 17, 2019. (SOF ¶ 66.)

The EEOC issued a Notice of Right to Sue on September 24, 2019. (Doc. 20, Plaintiff's Second Amended Complaint ("Compl.") ¶ 7.) On December 7, 2019, Plaintiff initiated the present action, alleging claims under Title VII, 42 U.S.C. § 1981, the Americans with Disabilities Act ("ADA"), the FMLA, and also intentional infliction of emotional distress. (Compl.) On August 4, 2020, Plaintiff's counsel stipulated to dismissal of the FMLA claims. (Doc. 29.) Defendants now move for summary judgment on all of Plaintiff's remaining claims.

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue"

1. Plaintiff Cannot Establish a *Prima Facie* Case of Title VII or 42 U.S.C. § 1981 Race or National Origin Discrimination

Under the *McDonnell Douglas* framework, "[t]he requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Chuang*, 225 F.3d at 1124 (citation omitted). The parties do not dispute that Plaintiff was part of a protected class based on her race and sex, or that she was subject to an adverse employment action when she was terminated. Defendant instead argues that Plaintiff cannot show that she was meeting its legitimate expectations. (Mot. at 6; Reply at 2.)

Defendant alleges that Plaintiff failed to meet its legitimate expectations when she refused to return to work after "an exceedingly generous 6 month leave of absence," and therefore cannot establish a *prima facie* case. (Mot. at 6; SOF ¶¶ 62-64.) Defendant notes that it did not hear from Plaintiff at all after her departure, and Plaintiff was "even reminded that her leave had expired." (Mot. at 6; SOF ¶¶ 62-64.)

Plaintiff argues that the evidence shows that she was performing to Defendant's legitimate expectations for the purposes of her *prima facie* case because she was advanced from Operations Processor 2 to Operations Processor 3. (Resp. at 8; Def.'s Exs. 1, 3.) This argument fails. The exhibits Plaintiff cites to support her claim do not contain any information with respect to her performance—they are simply Defendant's offer letters for the Operations Processor 2 and Operations Processor 3 positions. A plaintiff's bare assertion that she was meeting her employer's legitimate expectations is not sufficient to raise a genuine issue of material fact as to this prong. *See Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996) ("[A]n employee's subjective personal judgments of [her] competence alone do not raise a genuine issue of material fact."). Further, as Defendant points out, Ms. Badon, Plaintiff's former supervisor, not only testified that Plaintiff made substantial errors and failed to improve with instruction, but Ms. Badon's log also reflects that Plaintiff had numerous performance deficiencies. (Reply at 3; Def.'s Ex. 9, Declaration of Annette Badon ("Badon Dec.") ¶¶ 7-11; Def.'s Ex. 15.)

If I was not performing well in that position I'd more than 3 months was

Plaintiff requested to transfer to Salt Lake City, Utah. (SOF ¶ 2.) Plaintiff's transfer request was approved, and on September 13, 2018 she began working as an Account Resolution Specialist 2 for the Education Financial Services department at Defendant's Salt Lake City location. (SOF ¶ 2). Less than two months later, Plaintiff requested to transfer back to Arizona, which Defendant approved. (SOF ¶ 3-5.) On November 5, 2018, Plaintiff began working as an Operations Processor 3 in the Auto Loss Recovery Operations department at Defendant's Chandler, Arizona branch, where she reported to Annette Badon ("Ms. Badon"). (SOF ¶ 6-7.)

In her role as an Operations Processor 3, Plaintiff was tasked with entering transactions into a record system, balancing general ledger accounts, resolving complex customer issues, and processing returned mail.[3] (SOF ¶¶ 10, 21-22.) Defendant contends that Plaintiff exhibited performance issues in this role. (SOF ¶¶ 12-24; Resp. at 2-3.) In

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[2] Plaintiff did not file a Controverting Statement of Facts as required by Local Rule of Civil Procedure 56.1(b). The Rule sets the following parameters:

> (1) for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph and a reference to the specific admissible portion of the record supporting the party's position if the fact is disputed; and (2) any additional facts that establish a genuine issue of material fact or otherwise preclude judgment in favor of the moving party. Each additional fact must be set forth in a separately numbered paragraph and must refer to a specific admissible portion of the record where the fact finds support.

LRCiv 56.1(b). While Plaintiff failed to comply with this Rule, she nonetheless directed the Court to the facts she disputes in her Response. Thus, in its discretion, the Court will not order Plaintiff to submit a Controverting Statement of Facts. *See* LRCiv 56.1(g). But the Court notes that Plaintiff's counsel took an oath upon admission to practice in this Court to uphold and follow all applicable rules, including the Local Rules, and he did not do so here.

[3] Plaintiff takes inconsistent positions as to whether processing returned mail was one of her job functions. On the second page of Plaintiff's Response, she acknowledges that her job duties included "processing returned mail." (Resp. at 2.) However, on the fourth page, she writes that she was sent "to the mail room to process mail, which was not a function of her role." (Resp. at 4.) Plaintiff admitted during her deposition that she was never moved to a mail room, so it is unclear whether she is taking the position that processing mail in a mail room was not part of her role, or whether processing mail in general was not part of her role. (*See* SOF Ex. 11, Deposition of Paulina Buhagiar ("Buhagiar Dep.") 176:17-25.) Regardless, the Court can resolve the issues at hand without clarification from Plaintiff.

too quickly, and also that she was not taking notes during trainings. (SOF ¶¶ 15-17.) As a result, Defendant claims that Ms. Badon confronted Plaintiff about the quality of her work and told her to slow down. (SOF ¶¶ 18-19.) Plaintiff, on the other hand, denies that she was making errors or otherwise disrupting her department, and denies that she was confronted by Ms. Badon. (Resp. at 2.)

On January 9, 2019, following a January 8[4] meeting with Ms. Badon and her other team members, Plaintiff met with Randy Richardson ("Mr. Richardson"), her second level manager, to discuss her feelings of being "harassed, singled out, and chastised." (SOF ¶¶ 25-26; Resp. at 3.) Plaintiff alleges that after her complaint to Mr. Richardson, she was assigned to process mail. (Resp. at 3, Pl.'s Ex. 2 at 1.) That same day Plaintiff also filed an "eForm" requesting a consultation with Human Resources regarding "a concern with another team member or manager." (SOF ¶ 27.) On January 11, 2019, Plaintiff spoke with Wells Fargo HR Specialist James Bufford ("Mr. Bufford"), and alleged a harassing work environment, that her peers were upset because she was a fast worker, that her peers gossiped at work and ignored her, and that she had been demoted to mail duty by Ms. Badon, which she believed was in retaliation for her complaint to Mr. Richardson. (SOF ¶ 28; Resp. at 4.) Defendant investigated Plaintiff's concerns, concluded her allegations were unsubstantiated, and closed the investigation. (SOF ¶¶ 29-30, 32-33; Resp. at 4.)

On January 28, 2019, Plaintiff informed Ms. Badon that she was experiencing chest pain and having a hard time breathing. (SOF ¶ 34.) Ms. Badon called 9-1-1, and paramedics arrived and took Plaintiff to the Emergency Room. (SOF ¶ 34; Resp. at 4.) Plaintiff was treated for cardiac arrythmias and was prescribed medications. (Resp. at 5.) Plaintiff texted Ms. Badon a photograph of a Return to Work Release from the hospital, which identified her medical condition and stated that she could return to work once she was cleared by a

[4] The precise dates are unclear from the record. In her Response, Plaintiff alleges the team meeting took place on January 9, 2019, and she requested a meeting with Mr. Richardson following that meeting. (Resp. at 3.) However, when Plaintiff was deposed, she stated that she submitted her complaint to Mr. Richardson on January 8, right after the team meeting on that day. (Buhagiar Dep. 127:20-128:16.)

definition of an adverse employment action." (Resp. at 12.) Plaintiff observes that she complained to Mr. Richardson on January 9, 2019, and was moved to the mail room that same day.

Plaintiff stated in her deposition that while her desk was never actually moved to the mail room, she was taking mail out of the room back out to her desk. (Buhagiar Dep. 176:17-25.) Even though processing mail was one of Plaintiff's job duties, a reasonable jury could find that Plaintiff's relegation to mail processing was a retaliatory adverse action. *See Burlington*, 548 U.S. at 70-71 ("Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."). Because Plaintiff alleges that her complaint to Mr. Richardson took place either the same day or the day before she was asked to process mail, the Court finds sufficient temporal proximity to satisfy Plaintiff's burden at this stage.

2. Defendant Has Articulated a Legitimate, Non-Discriminatory Reason for the Adverse Employment Action and Plaintiff Has Not Shown that Defendant's Reason Could be Pretext

As discussed above, Defendant contends that Plaintiff was making substantial errors that were disrupting her department when performing other job duties, in part because she was working so quickly. (Badon Dec. ¶¶ 9-10.) Ms. Badon, Plaintiff's supervisor, determined that processing returned mail was a task that Plaintiff could "easily complete with speed and accuracy." (Badon Dec. ¶ 12.)

Because Defendant has articulated a legitimate, non-discriminatory reason for assigning Plaintiff to process mail, the burden shifts back to Plaintiff to show that Defendant's reason could be pretext. The Court applies the same standard for pretext to Plaintiff's retaliation claim that it used for her discrimination claim, discussed *supra*.

Plaintiff fails to draw the Court's attention to any evidence to rebut Defendant's proffered reasons for its adverse actions. In fact, Plaintiff does not address pretext at all in her Response. (*See* Resp. at 11-12.) Even if Plaintiff had raised arguments on pretext, however, they would fail. Defendant has produced substantial evidence to show that its reasons for moving Plaintiff to process mail were not internally inconsistent or unworthy of credence. As discussed above, Ms. Badon's log reflects that Plaintiff had numerous performance deficiencies. (Reply at 3; Badon Dec. ¶¶ 7-11; Def.'s Ex. 15.) Plaintiff has produced no evidence to the contrary. Accordingly, no genuine issues of material fact remain, and summary judgment is appropriate for Plaintiff's Title VII or 42 U.S.C. § 1981 retaliation claims.

C. Plaintiff Cannot Establish a *Prima Facie* Case of ADA Discrimination or Retaliation

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

To establish a *prima facie* case of disability discrimination, a plaintiff must show she (1) is disabled; (2) is a qualified individual; and (3) has suffered an adverse employment action because of her disability. *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015); *see* 42 U.S.C. § 12111(8). "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." 42 U.S.C. § 12102(1)(A)–(C); *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 433 (9th Cir. 2018). To trigger the employer's duty to engage in the ADA "interactive process," an employee must first notify its employer of the need for an accommodation. *Nunies*, 908 F.3d at 433. The employee "must make clear that the employee wants assistance for his or her disability." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir.1999).

Defendant argues that Plaintiff's ADA claims fail for several reasons. First, Defendant alleges that Plaintiff cannot show that she was disabled. Not only did Plaintiff fail to inform Defendant that she had a disability as defined by the ADA, meaning that its duty to engage in the "interactive process" was never triggered, but Plaintiff's Complaint also fails to identify the type of accommodation she requested. (Mot. at 13.) Because Plaintiff has not presented any evidence to this effect, Defendant argues she cannot prevail on her ADA discrimination claim. (Mot. at 13.)

Plaintiff may argue that in sending a photograph of her Return to Work Release from the hospital to Ms. Badon, she put Defendant on notice of her condition, triggering the ADA's interactive process. (SOF ¶ 35; Resp. at 5.) However, Plaintiff's actions were not sufficient to put Defendant on notice of her disability or her desire for accommodations. "In general ... it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." 29 CFR to Part 1630 Interpretive Guidance on Title I of the Americans With Disabilities Act (Code of Federal Regulations (2021 Edition)). Nor does the evidence indicate that Plaintiff's alleged disability was a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Further, the fact that Plaintiff worked for two separate companies in Utah during her leave of absence—and Plaintiff has presented no evidence to show that she requested or received any accommodations for either of these positions—militates against Plaintiff's position that she was disabled within the meaning of the ADA.

Second, Defendant alleges that Plaintiff cannot show she was qualified for her job because: (1) she refused to return to work, and (2) she showed an inability to perform the functions of her job. The only evidence Plaintiff cites anywhere in her Response to show that she was qualified is her offer letter for the Operations Processor 3 position. (*See* Def.'s Ex. 3.) Although the Court found the offer letter insufficient to show that Plaintiff was performing to Defendant's legitimate expectations, it could help support Plaintiff's argument that she was qualified for her position. However, other facts undercut Plaintiff's qualifications. Most obviously, Plaintiff's refusal to return to work, her move to Utah, and

her employment with two other companies during her leave of absence show that she was not qualified to work for Defendant. Plaintiff's proffered reasons for her failure to return to work are immaterial—a pending EEOC charge does not excuse her failure to return, nor did Plaintiff inform Defendant that she was refusing to return to work for this reason. (DSOF ¶ 63.)

As to Plaintiff's ADA retaliation claim, Plaintiff bears the initial burden of proving "that the desire to retaliate was the but-for cause of the challenged employment action." *Nassar*, 570 U.S. at 352. Defendant alleges that Plaintiff cannot establish the requisite causal connection because she has offered no evidence to support her claim that Defendant's adverse actions were driven by discriminatory or retaliatory motives. (Mot. at 13.) The Court agrees. Plaintiff was directed to process returned mail on January 9, 2019, but her hospital visit was not until January 28, 2019. (SOF ¶¶ 23, 34.) It is therefore impossible that Plaintiff's medical condition was the but-for cause of her assignment to process mail. Likewise, Plaintiff cannot show that her alleged disability was the but-for cause of her termination. Plaintiff never claimed that she needed additional leave to address her medical issues—as discussed in the preceding paragraph, she simply refused to return to work. Even viewing the facts in the light most favorable to Plaintiff, no reasonable jury could find Defendant's actions to be retaliatory. Plaintiff's ADA discrimination and retaliation claims fail as a matter of law.

D. Plaintiff's Intentional Infliction of Emotional Distress Claim

To prevail on a claim for IIED under Arizona law, a plaintiff must show: (1) that the defendant committed extreme and outrageous conduct; (2) that the defendant intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct; and (3) that severe emotional distress occurred as a result of the defendant's conduct. *Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 110 (Ariz. 2005). In Arizona, the trial court decides whether the alleged acts are sufficiently outrageous to state a claim for relief. *Johnson v. McDonald*, 3 P.3d 1075, 1080 (Ariz. Ct. App. 1999). A plaintiff must show that the defendant's conduct was "so outrageous in character, and so

Appendix "C"

FOR THE NINTH CIRCUIT

JUL 5 2024

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

PAULINA BUHAGIAR, Plaintiff-Appellant, v. WELLS FARGO BANK, N.A., Defendant-Appellee.	No. 22-16232 D.C. No. 2:19-cv-05761-JJT District of Arizona, Phoenix ORDER

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.

The panel has unanimously voted to deny Plaintiff-Appellant Paulina Buhagiar's petition for panel rehearing. Dkt. 19.

The petition for panel rehearing is **DENIED.**

Additional material from this filing is available in the Clerk's Office.