

App. 1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD L. GREEN,
Plaintiff-Appellant,

v.

STEVEN T. MNUCHIN,*
Secretary, Department of
the Treasury,
Defendant-Appellee.

No. 14-17233

D.C. No. 2:13-cv-
00740-KJD-VCF

MEMORANDUM**

(Filed Jul. 5, 2017)

Appeal from the United States District Court
for the District of Nevada

Kent J. Dawson, District Judge, Presiding

Submitted June 26, 2017***

Before: PAEZ, BEA, and MURGUIA, Circuit Judges.

Ronald L. Green appeals pro se from the district court's summary judgment in his employment action alleging discrimination and retaliation claims under Title VII and the Rehabilitation Act. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Cotton*

* Steven Mnuchin has been substituted for his predecessor, Jack Lew, as Secretary of the Treasury under Fed. R. App. 43(c)(2).

** 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).

App. 2

v. City of Alameda, 812 F.2d 1245, 1247 (9th Cir. 1987). We affirm.

The district court properly granted summary judgment on Green's racial discrimination claim relating to an unfilled position because Green failed to raise a genuine dispute of material fact as to whether, "after his rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The district court properly granted summary judgment on Green's racial and disability discrimination claims arising from allegations other than the unfilled position because Green failed to raise a genuine dispute of material fact as to whether defendant's asserted nondiscriminatory reasons for its actions were pretextual. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1155-56 (9th Cir. 2010) (providing framework for analyzing a discrimination claim under Title VII); *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (elements of a disability discrimination claim under the Rehabilitation Act); *see also Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066, 1068-69 (9th Cir. 2004) (circumstantial evidence of pretext must be specific and substantial).

The district court properly granted summary judgment on Green's retaliation claims because Green failed to raise a genuine dispute of material fact as to whether defendant's asserted non-retaliatory reasons for its actions were pretextual. *See Surrell v. Cal. Water*

App. 3

Serv. Co., 518 F.3d 1097, 1108 (9th Cir. 2008) (elements of a retaliation claim under Title VII); *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004) (setting forth burden shifting test for evaluating a retaliation claim under the Rehabilitation Act); *see also Stegall* at 1066, 1068-69.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal, including any due process claim relating to accrued sick leave. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

RONALD L. GREEN,
Plaintiff,

v.

JACOB J. LEW, Secretary,
Department of Treasury,
Defendant,

Case No.
2:13-cv-00740-KJD-VCF

ORDER

Presently before the Court is Plaintiff Ronald L. Green's Motion for Summary Judgment (#11). Defendant Jacob J. Lew filed a response in opposition (#18) to which Plaintiff replied (#23). Also before the Court is Defendant's Motion for Summary Judgment (#19). Plaintiff filed a response in opposition (#24) to which Defendant replied (#31). Also before the Court is Plaintiff's Motion to Strike (#22). Defendant filed a response in opposition (#25) to which Plaintiff replied (#26). Finally before the Court is Defendant's Motion to Extend Time (#13). Plaintiff filed a response in opposition (#14) to which Defendant replied (#16).

I. Background

Plaintiff is an African-American male who suffers from Dysthymic Disorder. Plaintiff worked for the Internal Revenue Service ("IRS") in Las Vegas, Nevada, as a GS-11 Revenue Agent. While working for the IRS, Plaintiff applied for a GS-12 Anti-Money Laundering

App. 5

Examiner position on or about July 5, 2005. There were two vacancies available for the GS-12 Examiner position. Once all applications were received, a "Best Qualified" list was created for the vacancies. The applicants on the "Best Qualified" list were Caucasian, Hispanic, and African-American. There was no data on one applicant's race. Plaintiff was tied for second on the "Best Qualified" list. Michael Sells ("Sells"), a Caucasian male who was at the top of the "Best Qualified" list, was selected for one of the vacancies on or about October 31, 2005. The remaining vacancy was not filled. Plaintiff filed an Equal Employment Opportunity ("EEO") complaint on December 12, 2005 after he was not selected for the position.

However, Plaintiff was promoted to a different position under the supervision of Herm Moeller ("Moeller") on January 8, 2006. On January 10, 2006, while under Moeller's supervision, Plaintiff requested 478 hours of sick leave. Plaintiff's request for sick leave contained a letter from his physician. When Plaintiff filed the request for sick leave, he was absent from work, so Moeller began to approve Plaintiff's absence on a day-to-day basis. Upon receiving the request, Moeller wrote Plaintiff and requested that he sign a Federal Occupational Health Authorization for Disclosure of Information ("FOH-32") release. Plaintiff did not sign the FOH-32 release or provide additional medical information at that time.

As a result, Moeller sent Plaintiff a Directive to Return to Duty and informed Plaintiff that, because he had not provided additional medical information, he

App. 6

must return to work or be charged absence without leave. In response, Plaintiff submitted the FOH-32 release. After receiving the form, Moeller asked Plaintiff to provide additional information to the FOH doctor. Moeller also informed Plaintiff that he would correct Plaintiff's time records to reflect Plaintiff's sick leave. Moeller then approved Plaintiff's sick leave on March 17, 2006.

While Moeller was processing Plaintiff's request, Moeller sent a management directive on February 2, 2006 ordering Plaintiff to cooperate with the IRS tax examiner who was conducting an audit of Plaintiff's tax returns. The directive also contained an instruction to consent to an extension of the statute of limitations ("Instruction to Consent"). Cindee Droge, the president of the local union chapter, responded to the directive on Plaintiff's behalf and asked Moeller to clarify or withdraw the directive. Moeller's supervisor answered Droge's questions and withdrew the Instruction to Consent on March 20, 2006.

Also during this time, Plaintiff received his annual performance appraisal on February 27, 2006, for the period of October 31, 2004 to October 31, 2005, from his previous supervisor Shirley Snider ("Snider"). In his self-evaluation, Plaintiff gave himself a perfect score. Snider, however, gave him the second-highest overall rating of "exceeds fully successful[.]" Plaintiff told Snider that he disagreed with his performance appraisal and wished to have it changed. Snider declined to change Plaintiff's score, but told Plaintiff that he could write a rebuttal. Snider instructed Plaintiff to

App. 7

talk to Moeller, his new supervisor, about writing a rebuttal. Snider directed Plaintiff to meet with Moeller instead of herself because Plaintiff had been recently promoted and Moeller had all of Plaintiff's documentation.

Also during this time, Snider informed Plaintiff that he may qualify for a temporary promotion for completing higher graded work. Snider asked Plaintiff to calculate the time he spent on higher graded work and submit his calculations to her. Snider forwarded Plaintiff's calculations to an IRS Labor Relations Specialist. Snider also calculated Plaintiff's time spent on higher graded work using Plaintiff's time sheets. According to Snider's calculations, Plaintiff did not qualify for the temporary promotion. As a result, Plaintiff did not receive the temporary promotion at that time. During Plaintiff's EEO proceedings, Defendant acknowledged that miscalculations may have occurred qualifying Plaintiff for the temporary 120-day promotion.

II. Standard for Summary Judgment

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment may be granted if the pleadings, depositions, affidavits, and other materials in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c);

App. 8

see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Uncorroborated and self-serving testimony, without more, will not create a genuine issue of material fact. See *Villiarimo v. Aloha Island Air Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Conclusory or speculative testimony is also insufficient to raise a genuine issue of fact. *Anheuser Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 345 (9th Cir. 1995).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See *Celotex*, 477 U.S. at 323. Once that burden is met, the nonmoving party then has the burden of setting forth specific facts demonstrating that a genuine issue exists. See *Matsushita*, 475 U.S. at 587; FED. R. CIV. P. 56(e). If the nonmoving party fails to make a sufficient showing of an essential element for which it bears the burden of proof, the moving party is entitled to summary judgment. See *Celotex*, 477 U.S. at 322-23.

III. Analysis

Plaintiff filed his documents *pro se*. Therefore, the Court must construe Plaintiff's pleadings liberally. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Additionally, the Court holds Plaintiff to less stringent standards than the formal pleadings drafted by lawyers. *Id.*

In the present case, there are four motions before the Court: (1) Plaintiff's motion for summary judgment; (2) Defendant's motion for summary judgment; (3) Defendant's motion for an extension of time; and (4) Plaintiff's motion to strike Defendant's combined response and motion for summary judgment.

A. Motions for Summary Judgment

Both Plaintiff's and Defendant's motions raise two issues. The first is whether Plaintiff has established a prima facie case for each of his claims. The second is whether Plaintiff has adduced evidence sufficient to establish that Defendant's legitimate reasons for his actions are merely a pretext for discrimination.

1. Plaintiff's Race Discrimination Claims

In his complaint, Plaintiff alleges that Defendant engaged in race discrimination when Plaintiff was not selected for the G-12 Examiner position. Plaintiff also alleges that Defendant engaged in race discrimination when Moeller processed Plaintiff's request for sick leave, Snider appraised Plaintiff's performance, and Plaintiff did not receive compensation for his higher-grade work. Both parties have moved for summary judgment in their favor on these claims.

a. Legal Standard

To establish a prima facie case of race discrimination in a non-selection, or failure to promote, claim, a plaintiff must show that (1) he belongs to a protected class, (2) he was qualified for the position to which he wished to be promoted, (3) he was denied a promotion to that position, and (4) the job went to someone outside the protected class. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005).

The requirements to establish a prima facie case for other discrimination claims are: (1) the plaintiff belongs to a protected class; (2) the plaintiff was performing according to the employer's legitimate expectations; (3) the plaintiff suffered an adverse employment action; and (4) other employees with qualifications similar to the plaintiff's own were treated more favorably. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003).

An employer's action is an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity. *Id.* at 646. The standard is partly subjective, because it determines whether the action deterred the plaintiff, and partly objective, because it determines whether the action was reasonably likely to deter protected activity. *Id.* Another employee has similar qualifications to a plaintiff when he or she displays similar conduct or has a similar job. *Id.* at 641.

The threshold for establishing a prima facie case is minimal and does not rise to the level of a preponderance of the evidence. *Villiarimo v. Aloha Island Air*,

Inc., 281 F.3d 1054, 1062 (9th Cir. 2002). If the plaintiff's burden is met, the defendant must then show that he had a legitimate, nondiscriminatory reason for the adverse employment action. *Coghlan*, 413 F.3d at 1094.

Once the defendant has met his burden, the plaintiff must establish that the defendant's reasons are merely a pretext for discrimination. *Id.* The plaintiff may satisfy this burden by relying on direct or circumstantial evidence. *Id.* at 1094-1095. Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer while circumstantial evidence requires an additional inferential step to demonstrate discrimination. *Id.* at 1095. Circumstantial evidence may be shown affirmatively through information that sufficiently shows bias, or negatively through information that shows that an employer's proffered explanation is unworthy of credence. *Id.* If a plaintiff seeks to establish pretext through circumstantial evidence, the evidence must be specific and substantial. *Villiarimo*, 281 F.3d at 1062.

b. Plaintiff's Non-selection for Promotion

Plaintiff brings a single claim against Defendant for his non-selection to the G-12 Examiner position. There were two vacancies for this particular G-12 Examiner position; the first was filled by Sells, a Caucasian male, while the second remained vacant. In light of Plaintiff's *pro se* status, the Court will consider both vacancies in its analysis of Plaintiff's non-selection

claim. Therefore, the Court first looks to see if Plaintiff established a prima facie case for each G-12 Examiner position vacancy.

Plaintiff has not established a prima facie case of discrimination for the second vacancy. Plaintiff's claim fails the fourth *Coghlan* element because the position did not go to someone outside of Plaintiff's protected class. Instead, that particular G-12 Examiner position remained vacant. The Court, therefore, finds that Plaintiff has not established a prima facie case for the second examiner position.

Plaintiff, however, has established a prima facie case for the first examiner position: (1) Plaintiff is African-American, which is a protected class; (2) Plaintiff was likely qualified for the position, because he tied for second on the "Best Qualified" list; (3) Plaintiff was denied the position; and (4) the job went to Sells, who is outside Plaintiff's protected class.

Because Plaintiff has established a prima facie case for the first GS-12 Examiner position, the burden now shifts to Defendant to show that Plaintiff was not selected for legitimate, nondiscriminatory reasons. Defendant asserts that Plaintiff was not selected because Sells was ranked highest on the "Best Qualified" list (#19, Ex. A-5). The hiring official selected the top candidate on the "Best Qualified" list to ensure objectivity (#19, Ex. A-2). Defendant further asserts that Plaintiff was not selected because he was under investigation for misusing his government-issued credit card. (#19, Ex D, pp. 229:14-230:1-12). Facially, Defendant's

App. 13

reasons appear legitimate and nondiscriminatory. Plaintiff must show, therefore, that Defendant's cited reasons are a mere pretext for discrimination.

Plaintiff's response fails to raise direct or sufficient circumstantial evidence that Defendant's reasons are a pretext for discrimination. Most of Plaintiff's response contains mere conclusory statements with little to no authority and analysis. Additionally, Plaintiff's response focuses on disputing semantics and immaterial discrepancies in Defendant's motion (e.g. how many numerical evaluations contributed to the "Best Qualified" calculation).

Plaintiff does not offer direct evidence of discrimination. Instead, Plaintiff asserts that Defendant's explanation that it picked the highest rated candidate is unworthy of credence, because in the previous job posting that Plaintiff applied for, the second highest rated candidate was selected, not the first. However, Plaintiff almost completely ignores Defendant's second and overriding explanation: the hiring official knew that Plaintiff was being investigated for alleged misuse of his credit card. Plaintiff neither argues that he was not under investigation nor that the hiring official did not actually believe he was under investigation.

Instead, Plaintiff argues that evidence of the investigation would be inadmissible hearsay and therefore, no evidence of the non-discriminatory reason exists. However, the issue is whether the proffered reason is a pretext for actual discrimination. Whether the hiring official was aware of the investigation and

whether the investigation influenced his decision not to hire or promote Plaintiff becomes the crucial issue when examining Plaintiff's claim of discrimination. Here, Plaintiff has not offered direct or circumstantial evidence that Defendant's reason is a pretext for actual discrimination. Plaintiff has not denied that there was an investigation or that the hiring official knew about the investigation. The Court finds that Plaintiff did not raise a genuine issue requiring a fact finder to determine whether or not the legitimate non-discriminatory reason proffered for failing to hire Plaintiff was a pretext for actual discrimination. Therefore, the Court grants summary judgment to Defendant on these claims.

c. Plaintiff's Sick Leave Request

Plaintiff alleges that Defendant engaged in race discrimination when Moeller processed Plaintiff's request for sick leave. Plaintiff fails to establish a prima facie case of race discrimination because he does not identify another employee with similar qualifications who was treated more fairly. Additionally, even if the Court were to find that Plaintiff met his burden of establishing a prima facie case, Plaintiff fails to show how Defendant's reasons are a pretext for discrimination. Furthermore, considering that Plaintiff's leave request was ultimately granted, he failed to show that he suffered an adverse employment action.

Plaintiff has the burden of showing that there was a similarly situated employee that was treated more

favorably. *See Vasquez*, 349 F.3d at 640. Plaintiff may meet this burden by producing evidence that an employee who is outside of Plaintiff's protected class and who filed a request for extended sick leave was treated more favorably than Plaintiff. *See Id.* at 641.

Plaintiff asserts that Joan King ("King"), a Caucasian female with no prior EEO activity, is similarly situated to Plaintiff because she requested more than three consecutive sick days (#11, p. 9). Plaintiff argues that, according to his handbook, sick leave requests that are more than three consecutive days must be processed in the same manner. *Id.* Plaintiff finally asserts that King was treated more favorably than Plaintiff when her request was processed. *Id.*

The IRS handbook guidelines do not necessarily establish that King was similarly situated to Plaintiff. Both Plaintiff and Defendant merely assert that King requested sick leave for more than three consecutive days, but neither party informs the Court how long that absence actually was (#11, p. 9, #19, p. 18). This ambiguous block of time could either be very similar to, or very different from, Plaintiff's twelve week request. Thus, Plaintiff has not met his burden in demonstrating that King was similarly situated.

Furthermore, Plaintiff has not shown how King was treated differently than Plaintiff in the present case. Plaintiff asserts: "Moeller did not require King to comply with any of the requirements he imposed on the Plaintiff." (#11, p. 9). However, the evidence in the record does not support Plaintiff's assertion. The

evidence states that King used three or more consecutive sick days (#11, PE-01, PE-02). It also states that there were no other employees that requested extended sick leave (#11, US00300). Plaintiff fails to show the Court how King had similar qualities to Plaintiff and how King was treated differently than Plaintiff. Therefore, Plaintiff fails to establish a prima facie case of discrimination for the treatment of his sick leave request.

Additionally, even if the Court were to find that Plaintiff established a prima facie case of discrimination, Plaintiff fails to show how Defendant's legitimate reasons for Moeller's actions are a mere pretext for discrimination. Moeller explained that he had never encountered a sick leave request that was as lengthy as Plaintiff's request. In an effort to make an informed decision, Moeller turned to the Labor Relations Division and an FOH doctor for guidance on how to proceed. From that point on, Moeller merely followed the guidance of the Labor Relations Division and an FOH doctor in processing Plaintiff's request. Moeller's deposition and related evidence supports Defendant's proffered legitimate, nondiscriminatory reason. (#19, Ex. E).

Plaintiff's response (#24), however, does not argue that Defendant's legitimate reasons are a pretext for discrimination. Instead, Plaintiff's response, once again, mostly focuses on semantics and immaterial discrepancies (e.g. Plaintiff did not "refuse" to sign the FOH-32 form, but "respectfully declined").

Plaintiff does argue that, according to the IRS handbook, he should not have filled out the FOH-32 form. However, Plaintiff's argument is not supported by the evidence. The handbook portion that Plaintiff submitted to the Court states that "[a]bsences of more than 3 workdays will be supported by a medical certificate or other administratively acceptable evidence" (#11, US00551). Plaintiff does not explain to the Court why the FOH-32 form could not be utilized as "administratively acceptable evidence." Plaintiff's argument is conclusory.

Plaintiff fails to establish a prima facie case of discrimination. Plaintiff has not demonstrated an adverse employment action because he ultimately prevailed in his request for twelve (12) weeks of sick leave. Additionally, even if Plaintiff were to establish a prima facie case, Plaintiff has not shown the Court why Defendant's reasons are a pretext for discrimination. The Court, therefore, grants Defendant's motion for summary judgment on all claims of discrimination surrounding Defendant's request for extended sick leave.

d. Plaintiff's Performance Evaluation

Plaintiff alleges that Defendant engaged in race discrimination when Snider gave him a less favorable evaluation rating. However, Plaintiff fails to establish a prima facie case of discrimination because Plaintiff does not show how his performance rating constitutes an adverse employment action. Furthermore, Plaintiff fails to establish that Defendant's reasons for

providing Plaintiff's evaluation score are a pretext for discrimination.

Mediocre performance evaluations, by themselves, do not constitute an adverse employment action. *See Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002). A plaintiff must show that the evaluation gave rise to further negative employment action. *See Id.* In the present case, Plaintiff received the second highest overall performance rating possible (#19). However, Plaintiff does not show how the evaluation gave rise to further negative employment action. Therefore, Plaintiff fails to show how his evaluation constitutes an adverse employment action.

Additionally, even if the Court were to find that Plaintiff's performance evaluation constituted an adverse employment action, Plaintiff has not shown the Court why Defendant's reasons are a pretext for discrimination. Snider felt that Plaintiff's evaluation was fair and accurate. Plaintiff has failed to offer direct or circumstantial evidence showing that Snider's opinion of Defendant's job performance was a pretext for discrimination. Therefore, the Court rejects Plaintiff's claims involving his performance evaluation.

Plaintiff also alleges that Defendant engaged in race discrimination when Snider declined to meet with Plaintiff to discuss his performance evaluation. However, Plaintiff has not identified any similarly situated employee that was treated differently. Plaintiff received a performance evaluation from Snider that he did not like, and then was promoted to a different

position (#19, Ex. E, pp. 99:20-100:4). Plaintiff has not identified another similarly situated employee who met with Snider. Thus, Plaintiff fails to establish a prima facie case for his claim regarding Snider's refusal to meet with Plaintiff.

Additionally, even if the Court were to find that Plaintiff established a prima facie case of discrimination, Plaintiff has not shown the Court why Defendant's reason for not meeting with Plaintiff was a pretext for discrimination. After Snider gave Plaintiff his performance review, Plaintiff was promoted to a new position under Moeller, a new supervisor. Plaintiff's files and documents were transferred to Moeller as a part of this process. Defendant's proffered explanation is supported by the evidence (#11, US00320, US00321). Therefore, Plaintiff has the burden of showing that this reason is a mere pretext for discrimination.

Plaintiff's response (#24), however, does not address this issue. Instead, it primarily focuses on how Plaintiff received a lower evaluation score than three other Caucasian and Hispanic employees in his group.¹ Plaintiff asserts that Snider also refused to meet with another African-American, Jacqueline Wyatt ("Wyatt"). According to Plaintiff, Wyatt also received a poor performance evaluation score. Plaintiff also asserts

¹ Plaintiff conveniently overlooks that his performance evaluation was still quite good, that his score was only slightly lower than the three Caucasian and Hispanic employees, and that he received the exact same score as two other Caucasian employees in his group (#11, US00227, US00228).

that when Wyatt asked to meet with Snider, Snider refused. However, this argument is not properly supported by the evidence. The only evidence supporting Plaintiff's assertion is a single page taken from an unidentified, unauthenticated document (#11, US00057). The origin of the document, as well as its purpose and author, are unclear because the document contains no identifying information or explanation. Furthermore, Plaintiff's argument is conclusory and not supported by any authority or analysis. Therefore, the Court finds that Plaintiff has not met his burden in producing direct or circumstantial evidence that Defendant's reasons are a pretext for discrimination. The Court grants Defendant's motion for summary judgment on Plaintiff's claims surrounding the performance evaluation.

e. Plaintiff did not receive compensation
for his higher-grade work

Plaintiff alleges that Defendant engaged in race discrimination when Plaintiff was not compensated for his higher-grade work ("the temporary promotion") at the time of his request. However, Plaintiff fails to establish a prima facie case because he does not make any effort to identify a similarly situated employee that was treated differently than Plaintiff.

Additionally, even if the Court were to find that Plaintiff established a prima facie case, Plaintiff fails to show why Defendant's reasons for initially denying Plaintiff's compensation for the temporary promotion are a mere pretext for discrimination. Snider rejected

Plaintiff's request because her analysis of Defendant's time sheet suggested that Plaintiff did not qualify for the higher grade work (#19, Ex. E, p. 108:1-18). Plaintiff argues that this is a pretext for discrimination because it was later determined that Snider was incorrect (#11, PE-03). However, Snider's calculation error, by itself, does not show that Defendant's reason was a pretext for discrimination. Thus, the Court grants Defendant's motion for summary judgment for the initial failure to approve the compensation or temporary promotion.

2. Disability Discrimination

In his complaint and motion, Plaintiff alleges that Defendant engaged in disability discrimination when Moeller processed Plaintiff's request for sick leave, Snider appraised Plaintiff's performance, and Plaintiff did not receive a temporary promotion for his higher-grade work.

a. Legal Standard

To establish a disability discrimination claim under the Americans with Disabilities Act or the Rehabilitation Act, a plaintiff must show that (1) the plaintiff is disabled within the meaning of the Act; (2) the plaintiff is "otherwise qualified" to perform the essential functions of the job, either with or without reasonable accommodations; (3) the plaintiff was subject to discrimination solely because of the disability. *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th

Cir. 1999); *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1174 (9th Cir. 1998).

An individual has a disability if he has a physical or mental impairment which substantially limits one or more major life activities, a record of such impairment, or is regarded as having such an impairment. *Mustafa*, 157 F.3d at 1174; 29 C.F.R. § 1630.2(g). In deciding whether an impairment is substantially limiting, courts must consider the nature and severity of the impairment, the duration or expected duration of the impairment, as well as the permanent or long term impact of the impairment. *Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850, 858 (9th Cir. 2009). At the summary judgment stage, Plaintiff is not required to use comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity; rather, a plaintiff's testimony may suffice to establish a genuine issue of material fact. *Id.* at 858-859. However, to survive summary judgment, an affidavit supporting the existence of a disability must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment. *Id.* at 859.

If a plaintiff establishes a prima facie case, then the defendant must articulate a legitimate, nondiscriminatory reason for the employment action at issue. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001). If the defendant articulates legitimate, nondiscriminatory reason, the plaintiff must show that the employer's reason is a pretext for discrimination. *Id.*

b. Plaintiff's Claims

Plaintiff meets the first two requirements of a disability discrimination claim. However, Plaintiff fails to establish a prima facie case of disability discrimination because he fails to show that he was subject to discrimination solely because of his disability.

Plaintiff alleges that he is disabled with severe depression (#1; #19, Ex. B-2). Plaintiff has included a doctor's letter describing his condition (#11, US00263) as well as his own affidavits (#11). For the purposes of surviving summary judgment, Plaintiff has sufficient evidence to establish a genuine issue of material fact as to whether Plaintiff is disabled within the meaning of the Disabilities Act or the Rehabilitation Act. Plaintiff's evaluation review (#11, US00076) also suggests that Plaintiff is able to perform the essential functions of his job. However, Plaintiff fails to show, for any of his disability discrimination claims, that he was subject to discrimination solely because of his disability. Plaintiff, therefore, fails to establish prima facie cases of disability discrimination for his claims. Furthermore, even if Plaintiff had established prima facie cases, he fails to offer any direct or circumstantial evidence that Defendant's reasons are a mere pretext for discrimination. Therefore, the Court grants Defendant's motion for summary judgment on Plaintiff's disability discrimination.

3. Retaliation

In his complaint, Plaintiff alleges that Defendant engaged in retaliation for EEO protected activity when Plaintiff was not selected for the G-12 Examiner position. Plaintiff also alleges that Defendant engaged in retaliation for EEO protected activity when Moeller processed Plaintiff's request for sick leave, Snider appraised Plaintiff's performance, and Plaintiff did not receive compensation for his higher-grade work.

a. Legal Standard

To establish a prima facie case of retaliation, a plaintiff must establish that (1) he undertook a protected activity under Title VII of the Civil Rights Act, (2) his employer subjected him to an adverse employment action, and (3) the plaintiff was subjected to an adverse employment action because of his participation in the protected activity of the adverse employment action would not have occurred but for that participation. *U. of Texas S.W. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532-34 (2013); *Vasquez*, 349 F.3d at 646. Title VII retaliation claims require proof that the desire to retaliate was the "but-for cause" of the challenged employment action. *Nassar*, 133 S. Ct. at 2534. "This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.* at 2533.

If a plaintiff establishes a prima facie case, then the defendant must articulate a legitimate, nondiscriminatory reason for the employment action at issue.

See Vasquez, 349 F.3d at 640. If the defendant articulates legitimate, nondiscriminatory reason, the plaintiff must show that the employer's reason is a pretext for discrimination. *Id.*

b. Protected Activity and the Causal Connection

Plaintiff's allegations fail to establish prima facie cases of retaliation because they do not establish a causal connection between Plaintiff's protected activity and Defendant's actions. Plaintiff asserts that his protected activity was chairing the IRS' Mountain States Diversity and Equal Employment Opportunity Advisory Committee ("DEEOAC") which was specifically listed on his application for promotion in Vacancy 889. However, Plaintiff has not adduced facts that establish that he undertook a protected activity.

Specifically, 42 U.S.C. § 2000e-3 provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

With regard to protected activity, § 2000e-3 contains both an "opposition clause" and "participation clause." *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988). The opposition clause makes it "unlawful . . . for

an employer to discriminate against any . . . employee . . . because he has opposed any practice made . . . unlawful . . . by this subchapter. 42 U.S.C. § 2000e-3(a). Plaintiff's chairmanship of the IRS' DEEOAC, by itself, does not constitute opposition. Plaintiff cites no specific action as chair of the DEEOAC that constitutes opposition or participation. In fact, the only action that Plaintiff cites is his placement of the chairmanship upon his application. There is nothing in the record to suggest that through Plaintiff's chairmanship of the DEEOAC, he was opposing any employment action of the IRS rendered unlawful by Title VII, i.e., discrimination against an individual "because of such individual's race, color, religion, sex, or national origin." *Id.* Further, as to this claim, Plaintiff cites no action Plaintiff took to utilize "the tools provided by Congress to protect his rights." *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). Therefore, Plaintiff has failed to establish a prima facie case of retaliation because he failed to adduce evidence showing that he engaged in protected activity.

Further, Plaintiff has failed to show a causal connection between his service as the chairperson of the DEEOAC and the decision to deny him a promotion. Plaintiff has adduced no evidence, circumstantial or direct, showing that "but for" his service as the chairperson of the DEEOAC he would have been promoted. Plaintiff has shown no evidence that would require a fact finder to determine if a causal connection existed. Even if the hiring official was aware of his service, Plaintiff has not adduced evidence from which a fact

finder could determine that was the motivation for the hiring decision. Even if there were, Plaintiff has failed to show that the hiring official's legitimate, non-discriminatory reason for the decision, the investigation of alleged wrongdoing by Plaintiff, was a mere pretext for discrimination. Accordingly, the Court grants Defendant's motion for summary judgment on his retaliation claims and denies Plaintiff's motion.

B. Defendant's Motion for Extension of Time

Defendant's motion (#13) requests an eighteen-day extension to file a dispositive motion. Plaintiff, however, asks the Court to deny Defendant's motion. Plaintiff argues that Defendant failed to timely file his Motion under the Nevada Local Rules. Plaintiff then discusses Defendant's conduct during discovery.

This is Defendant's first request for an extension. Defendant's motion is also timely.² Furthermore, Defendant's request would not cause any undue delay, since Defendant's new deadline would coincide with his response due date to Plaintiff's motion for summary judgment. Thus, the Court grants Defendant's motion for an extension of time.

² Plaintiff argues that it is not timely because Defendant's motion was filed on January 27, 2014 and Defendant's due date was January 26, 2014. January 26, 2014, however, was a Sunday. Defendant's motion, therefore, was timely because his due date carried over to the next day.

C. Plaintiff's Motion to Strike

Plaintiff filed a motion to strike Defendant's combined motion for summary judgment and opposition (#22). In his motion, Plaintiff contends that, under Federal Rule of Civil Procedure ("Rule") 12(f), Defendant's motion should be stricken from the record because: (1) it is time-barred; (2) fails to comply with Federal Rules of Civil Procedure 56(c) and (e); (3) contains immaterial and scandalous matter that misrepresents the facts; (4) is prejudicial to Plaintiff; and (5) was filed in bad faith.

Rule 12(f) allows the Court to strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from a pleading. FED. R. CIV. P. 12(f). Rule 12(f) only applies to pleadings. See *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). The purpose of this Rule is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. *Id.*

Plaintiff seeks to strike Defendant's motion for summary judgment and opposition to Plaintiff's motion for summary judgment. Neither of these filings are pleadings. Therefore, it would be inappropriate for the Court to strike either filing under Rule 12(f).

Furthermore, Plaintiff's first, second, fourth, and fifth arguments are not a motion to strike, but an opposition to Defendant's motion for summary judgment. Because Plaintiff already filed an opposition to Defendant's motion for summary judgment (#24), the

Court would be justified if it chose not to consider these arguments. However, in an effort to construe Plaintiff's *pro se* filings liberally, the Court will consider Plaintiff's arguments not dealt with in resolving the motions for summary judgment.

1. Defendant's Deadline

Defendant filed and served its combined motion and opposition on February 14, 2014. Plaintiff argues that Defendant's motion is three days late. He contends that Defendant was properly served on January 21, 2014 through the Case Management/Electronic Case Filing System ("CM/ECF") and was required to file his opposition by February 11, 2014. He also contends that FED. R. CIV. P. 6(d) does not apply when a party is served by CM/ECF.

Plaintiff is incorrect. Rule 6(d) adds three days to a deadline if a document is served "by electronic means." See FED. R. CIV. P. 6(d); FED. R. CIV. P. 5(b)(2)(E). CM/ECF, a computer-based filing system, is an "electronic means". Furthermore, even if Defendant's filing were late, that alone may not be enough to strike Defendant's entire motion and opposition under Rule 12(f) given the Court's preference for resolving cases on the merits. See *Gibson v. Household Intern., Inc.*, 151 Fed. Appx. 529, 530 (9th Cir. 2005). Therefore, the Court rejects Plaintiff's deadline argument.

2. Immaterial and Scandalous Matter

Plaintiff argues that Defendant's assertion that Plaintiff misused his government issued credit card should be stricken under Rule 12(f). Plaintiff's argument, however, is simply a conclusory statement and lacks any supporting law or analysis.

Plaintiff cannot have an entire motion, response, or argument stricken simply because it contains something he does not like. Additionally, the IRS investigation of Plaintiff is material because it relates to whether Defendant's actions were a mere pretext for discrimination. The Court, therefore, rejects Plaintiff's argument that the motion contains immaterial or scandalous material.

3. Bad Faith

Plaintiff finally argues that Defendant demonstrated bad faith. Plaintiff cites Rule 11(b), outlines his experience with Defendant during discovery, and argues that Defendant "has made a concerted effort to exploit the vulnerabilities of this pro se Plaintiff and his diagnosed emotional disability, to unnecessarily increase his financial and other costs of litigation and has therefore acted in bad faith."

Rule 11(b) does not apply to discovery. FED. R. CIV. P. 11(d). Additionally, Plaintiff's argument, even when construed liberally, does not show the Court why Defendant's motion should be stricken. Instead, it contains a laundry list of perceived transgressions that

occurred during discovery. The Court, therefore, rejects Plaintiff's bad faith argument. Plaintiff fails to cite adequate grounds for striking Defendant's motion and opposition. Consequently, the Court denies Plaintiff's motion to strike.

IV. Conclusion

Accordingly, it is **HEREBY ORDERED** that Plaintiff Ronald L. Green's Motion for Summary Judgment (#11) is **DENIED**;

IT IS FURTHER ORDERED that Defendant Jacob J. Lew's Motion to Extend Time (#13) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant Jacob J. Lew's Motion for Summary Judgment (#19) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff Ronald L. Green's Motion to Strike (#22) is **DENIED**;

IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendant and against Plaintiff.

DATED this 10th day of September 2014.

/s/ Kent J. Dawson

Kent J. Dawson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD L. GREEN,
Plaintiff-Appellant,
v.
STEVEN T. MNUCHIN,
Secretary, Department
of the Treasury,
Defendant-Appellee.

No. 14-17233
D.C. No.
2:13-cv-00740-KJD-VCF
District of Nevada,
Las Vegas
ORDER
(Filed Jan. 16, 2018)

Before: PAEZ, BEA, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

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

Green's petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos. 24, 25) are denied.

No further filings will be entertained in this closed case.

RONALD L. GREEN
2709 Prism Cavern Court
Henderson, NV 89052
Telephone: (702) 435-4584

Plaintiff, *In Pro Se*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RONALD L. GREEN,	)	
Plaintiff,	)	
	)	
v.	)	
JACOB J. LEW, SECRETARY,	)	Civil Action No.
DEPARTMENT OF	)	2:13-cv-00740-KJD-VCF
THE TREASURY,	)	
Defendant.	)	
_____	)	

**PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

(Filed Jan. 21, 2014)

COMES NOW, Plaintiff Ronald L. Green (hereinafter "Plaintiff"), *In Pro Se*, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to respectfully move for summary judgment as to all causes of action in Plaintiff's complaint.

Having exhausted his administrative remedies before the Equal Employment Opportunity Commission ("EEOC"), the Memorandum of Points and Authorities that follows provides the indisputable facts

App. 34

and controlling law in support of the instant motion such that Plaintiff is entitled to judgment as a matter of law and the Motion for Summary Judgment in favor of the Plaintiff should be Granted.

RESPECTFULLY SUBMITTED this 21st day of January, 2014.

/s/ Ronald L. Green
Ronald L. Green,
Plaintiff, *In Pro Se*

**MEMORANDUM OF
POINTS AND AUTHORITIES**

I.

STATEMENT OF THE CASE

A. Nature of the Case.

1. Background and Course of Proceedings.

While serving as an Internal Revenue Agent at the Internal Revenue Service ("IRS") facility in Las Vegas, Nevada, the Plaintiff was not selected for promotion in IRS Vacancy Announcement Number 50-14-SP50889B (hereafter "Vacancy 889"). IRS officials repeatedly stated that the Plaintiff was not selected in Vacancy 889 solely because he was not the top ranked candidate on the "Best-Qualified" ("BQ") List.

However, there were two positions available in Vacancy 889, the Plaintiff was listed second on the BQ List, but he was not selected to fill the second vacancy.

The Plaintiff filed a formal Equal Employment Opportunity ("EEO") complaint on December 12, 2005 regarding the non-selection.

IRS EEO officials developed an Investigative File ("IF") regarding the Plaintiff's non-selection in Vacancy 889. However, after a series of additional adverse and harassing actions occurred against the Plaintiff while the non-selection issue was being investigated, the complaint was amended and a Supplemental Investigative File ("SIF") was also developed. Administrative remedies were exhausted, including an EEO hearing and appeal to the EROC, and the Plaintiff received a "Right to Sue" letter on or about January 31, 2013. This *de novo* review follows.

B. Issues for Review.

Was the Plaintiff discriminated against on the basis of race (African-American) and in reprisal for his prior EEO protected activity when:

1. On or about November 1, 2005, he was not selected for the position of Internal Revenue Agent (AML Examiner), GS-0512-12, advertised under the Agency's Vacancy Announcement Number 50-14-SP50889B;

Was the Plaintiff discriminated against on the bases of race (African-American), disability (Dysthymic Disorder) and/or in reprisal for his prior EEO protected activities when:

App. 36

2. On or about January 10, 2006, his request for 478 hours of sick leave was not approved, despite the fact that he provided medical documentation with his request;
3. On January 18, 2006, his supervisor issued a memorandum advising him that he would have to sign the "Federal Occupational Health Authorization for Disclosure of Information ("FOHA")," so that his sick leave request could be processed;
4. On February 2, 2006, his supervisor directed him to waive his statutory rights and to fully comply with the instructions issued by the examiner who was conducting an examination of his tax returns;
5. On February 23, 2006, his supervisor directed him to report for duty on Monday, February 27, 2006, or be charged absence (sic) without leave (AWOL), if he did not provide "acceptable medical documentation" and did not sign the attached FOHA;
6. On or about February 27 and March 14, 2006, his prior supervisor refused to meet with him to discuss his performance appraisal;
7. On February 28, 2006, his supervisor directed him to provide confidential medical information and documentation by March 10, 2006;
8. Also, on February 28, 2006, his supervisor reclassified his time and attendance records to reflect all sick leave, instead of the combination of sick leave, direct and indirect time charged and approved since January 9, 2006,

App. 37

including official time he spent on the instant EEO complaint;

9. On or about March 9, 2006, his prior supervisor issued him an inaccurate performance appraisal;
10. On March 17, 2006, his supervisor directed him to submit written requests for approval prior to any time and attendance changes to his sick leave status;
11. Also, on March 17, 2006, his supervisor refused to direct his communications and directives to his National Treasury Employee's Union ("NTEU") representative or his physician and requested) he provide him with his EEO contact point; and
12. On May 3, 2006, his prior supervisor denied his request to be compensated for higher-graded duties he performed in 2004 and 2005.

C. Statement of the Undisputed Facts Relevant for Summary Judgment.

The Plaintiff's Non-Selection in Vacancy 889

1) The Plaintiff; an African-American male and a preference eligible veteran with service-connected disabilities, was hired by the IRS for the position of Internal Revenue Agent, GS-0512-09, in Las Vegas, NV in June of 2001 and later reassigned to the position of Anti-Money Laundering ("AML") Examiner, GS-0512-11, in August 2003 to the Bank Secrecy Act ("BSA")

Group. (Plaintiff's Declaration dated 02/24/2006, attached as US00034).

2) In April 2005, the Plaintiff applied for a promotion to AML Examiner, GS-051212, in IRS Vacancy Announcement Number 50-52-SP50119B ("Vacancy 119") which had one position available. No interviews were conducted. (*Id.* at US00035).

3) Even though the Plaintiff was the top candidate on the BQ List for Vacancy 119, co-worker Tom Ryan, a white male with no prior EEO activity was selected for the promotion. (Comparative Data, attached as US00009; Promotion Certificate No. 50-52-SP50119B dated 04/22/2005, attached as US00614).

4) The Plaintiff's supervisor, BSA Group Manager Shirley Snider ("Snider"), a white female, stated she promoted Tom Ryan "because of his past qualifications to perform the duties and what he had written on his application" and Snider's supervisor, BSA Territory Manager Theodore K. Armstrong ("Armstrong"), a white male, concurred. (EEO Counseling Report, attached as US00020).

5) In July 2005, the AML Examiner GS-0512-12 position was posted again in IRS Vacancy 889 and two positions were available. Plaintiff reapplied. No interviews were conducted. (Promotion Certificate No. 50-14-SP50889B dated 09/22/2005, attached as US00072).

6) On November 1, 2005 Snider told the Plaintiff that she selected Michael Sells ("Sells") for promotion in Vacancy 889 because he was the top-ranked

candidate on the BQ List. (Plaintiff's Declaration dated 02/24/2006, attached as US00035). Sells is also a white male with no prior EEO activity and the Plaintiff was listed second on the BQ List just under Sells but the Plaintiff was not selected for the second available position. (*Id.*; Comparative Data, attached as US00008).

7) As noted on his applications for promotion, the Plaintiff served as Chairman of the IRS' Mountain States Diversity and Equal Employment Opportunity Advisory Committee ("DEEOAC") to identify and address Service-wide diversity and EEO issues. (Plaintiff's Merit Promotion Questionnaire ("MPQ") in Vacancy 119 dated 02/21/2005, attached as US00634; Plaintiff's MPQ in IRS Vacancy 889 dated 07/18/2005, attached as US00082).

8) On November 7, 2005, Plaintiff contacted the IRS EEO office via telephone and requested EEO counseling. (EEO Counseling Report, attached as US00014).

9) On November 8, 2005, the EEO Intake Specialist contacted Snider and told her that the Plaintiff had requested EEO counseling regarding his non-selection in Vacancy 889. Snider was visibly upset when the Plaintiff saw her shortly after she spoke to the Intake Specialist. (Plaintiff's Declaration dated 07/20/2006, attached as US00258).

10) On November 9, 2005, Snider acknowledged to the Plaintiff that she was indeed very angry when she was told about his request for EEO counseling. She

stated she expected him to file an EEO but she was not prepared when it happened. (*Id.*).

11) On December 12, 2005, Plaintiff filed a formal complaint of discrimination alleging he was subjected to unlawful discrimination when he was not selected for promotion in Vacancy 889 and the issue was investigated up until May 10, 2006. (Individual Complaint of Employment Discrimination, attached as US00010).

12) On February 3, 2006, Armstrong prepared his Declaration regarding the Plaintiff's non-selection in Vacancy 889. (Armstrong's Declaration dated 02/03/2006, attached as US00049).

13) In his Declaration, Armstrong stated under oath that he, and not Snider, had in fact selected Ryan for promotion in Vacancy 119 and he also selected Sells for Vacancy 889. (*Id.* at US00046 and US00049).

14) According to Armstrong, he selected Sells for promotion "in order to assure objectivity" because Sells was "the top ranked candidate." (*Id.* at US00046).

15) However, when specifically asked why he did not select the Plaintiff for promotion when he was the top ranked candidate in Vacancy 119, Armstrong only stated, "I do not remember that package." (*Id.* at US00049).

16) Armstrong admitted during cross-examination at the EEO hearing that he and Snider knew who he would promote even before a vacancy announcement was posted, and that occurred when both Ryan and

Sells were selected for promotion and the Plaintiff was not. (Armstrong's Hearing Testimony, Hearing Transcript dated 03/06/2008 ("HT1"), page 243, Line 4 through page 246, Line 23, hereinafter formatted as 243:4-246:23, attached as US00982-US00985).

17) The Plaintiff, along with co-workers Sells and Jacqueline Wyatt ("Wyatt"), provided undisputed testimony that three white males in the BSA group, including Ryan and Sells, received preferential treatment when they were allowed to attend a classification detail that was not offered to others just prior to the vacancy announcements where each white male in turn was selected for promotion. (Plaintiff's Hearing Testimony, HT1, 31:7-15, 35:8-37:22, 51:15-22, attached as US00772, US00776 US00778 and US00792; Sells' Hearing Testimony, HT1, 173:4-17, attached as US00912, Wyatt's Hearing Testimony, HT1, 178:21-182:10, attached as US00917-US00921).

18) Wyatt also provided testimony that was confirmed by Sells that he went on the detail specifically because Snider called him at home when he was about to go on vacation and she told him "if he wanted to get promoted," he had to go on the classification detail. (Wyatt's Hearing Testimony, HT1, 178:21-25, attached as US00917; Sells' Hearing Testimony, HT1, 173:4-10, attached as US00912).

19) Without any supporting evidence and contrary to the Plaintiff's Performance Appraisal for the period, Armstrong alleged for the first time at the EEO hearing that the Plaintiff falsified his time report for

an unspecified day by claiming he was working in Las Vegas while he was really in New Orleans, Louisiana and this alleged falsification of time was the reason he did not select the Plaintiff for promotion in Vacancy 119 or in Vacancy 889. (Plaintiff's Performance Appraisal, attached as US00343-US00350; Armstrong's Hearing Testimony, HT1, 230:6-235-18, attached as US00969 through US00974).

20) From May 11, 2006 until October 5, 2006, the Treasury Complaint Mega Center ("TCMC") investigated eleven additional actions alleging race and disability discrimination and reprisal against Plaintiff for his prior EEO protected activity.

Moeller's Additional Demands for Processing Plaintiff's Sick Leave Request

21) Plaintiff suffers from Dysthymic Disorder (a.k.a. chronic depression) and he has been treated by the Department of Veterans' Affairs ("VA") for that condition for many years. (Plaintiff's Declaration dated 07/20/2006, attached as US00243).

22) As a result of his Dysthymic Disorder, the Plaintiff suffers with irritability and quick to anger, feelings of sadness and hopelessness, loss of interest in normal activities, trouble concentrating accompanied with some memory loss, trouble getting enough sleep, lack of energy and frequent pain and aches in his neck, back and shoulders. As a result of his disability, it is extremely difficult for the Plaintiff to concentrate and to stay focused and on task. His attendance also suffers

because he is unable to work for extended periods of time. (*Id.*).

23) On January 9, 2006, Plaintiff's treating physician at the VA, Dr. Sean Zielinski, certified by letter that the Plaintiff was being treated for Dysthymic Disorder at the VA for many years and the Plaintiff was "currently incapacitated for duty as an Internal Revenue Agent" and his "incapacitation will cease in approximately three months." (Dr. Zielinski's Medical Certification dated 01/09/2006, attached as US00263).

24) To request sick leave exceeding 3 days, IRS regulations simply require employees to submit a Standard Form ("SF") -71, "Request for Leave or Approved Absence," and a medical certification that they are incapacitated, which is exactly what the Plaintiff did on January 10, 2006 when he sent Dr. Zielinski's medical certification along with a completed SF-71 to Snider. (IRS Employee Personnel Resource Guide ("Guide"), attached as US00547 and US00548; IRS Time and Leave Handbook, attached as US00551; National Agreement, Article 34, Section 3, attached as US00560-US00562; Plaintiff's Declaration dated 07/20/2006, attached as US00244; SF-71 dated 01/10/2006, attached as US00262; Dr. Zielinski's Medical Certification dated 01/09/2006, attached as US00263).

25) There is no separate classification for "extended sick leave" and the Plaintiff never received a copy of his SF-71 back indicating whether his request for sick leave was approved or disapproved, which is the normal practice at the IRS. (*Id.*).

26) After the Plaintiff received a promotion to GS-0512-12 in General Programs on or about January 8, 2006 under Group Manager, Herman Moeller ("Moeller"), and Territory Manager Debra Thompson ("Thompson"), the Plaintiff received a letter dated January 18, 2006 from Moeller indicating the Plaintiff was required to complete and return the FOHA within five (5) business days "in order to process (his) sick leave request." (Plaintiff's Declaration dated 07/20/2006, attached as US00243; Moeller's Memo to Plaintiff dated 01/18/2006, attached as US00264).

27) Plaintiff responded with an email to Moeller on January 20, 2006 indicating he believed Dr. Zielinski's medical certification was sufficient to justify his sick leave request and that he did not want to sign the *voluntary* FOHA for privacy reasons. (Plaintiff's email to Moeller dated 01/20/2006, attached as US00265).

28) Moeller called the Plaintiff on January 24, 2006 and told him he would only approve his sick leave request on a "day by day" basis until Moeller received word back from "IRS medical" after he had faxed Plaintiff's "complete package" to them. Moeller told Plaintiff his declining to sign the FOHA was "no big deal." (Plaintiff's Declaration dated 07/20/2006, attached as US00245).

29) However, by letter dated February 23, 2006, and under threat of possible termination, Moeller directed the Plaintiff to return to duty on February 27, 2006 or be charged AWOL because the Plaintiff allegedly had not cooperated with management's efforts to

process his request for sick leave since he did not sign and return the FOHA. (Moeller's Memo to Plaintiff dated 02/23/2006, attached as US00267 and US00268).

30) Moeller falsely stated, "To approve sick leave for more than three days, acceptable medical documentation is . . . **outlined in 339.104 of Part 5 of the Code of Federal Regulations**" and he restated parts of the definition of "medical documentation or documentation of a medical condition," as those terms apply in Part 339. (*Id.*) (emphasis added).

31) In a letter dated February 28, 2006, Moeller directed the Plaintiff to turn over his confidential medical information and documentation to Moeller by March 10, 2006, including the items enumerated in items "a" through "g" in 5 C.F.R. § 339.104. (Moeller's Memo to Plaintiff dated 02/28/2006, attached as US00277). On March 10th, Plaintiff complied.

32) Previously, Moeller approved sick leave exceeding 3 days for Joan King ("King"), a white female with no prior EEO activity, but Moeller did not require King to comply with the any of the requirements he imposed on the Plaintiff (Agency Supplemental Response to Complainant's Discovery Request, attached as Plaintiff's Exhibit ("PE") -01 and PE-02; Moeller's Declaration dated 08/15/2006, attached as US00308; Moeller's Email to the EEO Investigator dated 08/29/2006, attached as US00300).

33) Moeller also informed the Plaintiff on February 28, 2006 that he would reclassify the Plaintiff's prior time and attendance records to reflect all sick

leave, instead of the combination of sick leave, direct and indirect time charged and approved since January 9, 2006, including official time he spent on the instant EEO complaint. (Moeller's Memo to Plaintiff dated 02/28/2006, attached as US00277).

34) In a Memorandum dated March 15, 2006, the Plaintiff advised Moeller:

My doctor has advised me that the continuing exchanges between you and I is not conducive to my treatment plan and eventual recovery from my current medical condition. Therefore, I respectfully request that you provide any future directives or communications to my authorized representatives at Chapter 85 of the NTEU and/or my doctor at the Department of Veterans' Affairs.

(Plaintiff's Memo to Moeller dated 03/15/2006, attached as US00285 and US00286).

35) Nevertheless, on March 17, 2006, again under threat of possible termination, Moeller directed the Plaintiff to submit written requests for approval prior to any time and attendance changes to his sick leave status. (Moeller's Memo to Plaintiff dated 03/17/2006, attached as US00287).

36) Also on March 17, 2006, Moeller refused to comply with the Plaintiff's treating physician's recommendation to direct his communications and directives to him or to the Plaintiff's NTEU representative and Moeller requested Plaintiff provide him with his EEO contact point. (*Id.*).

37) In a letter dated April 6, 2006, IRS Occupational Medical Consultant Dr. Thomas P. Anderson advised Dr. Zielinski that it appeared the Plaintiff's "disability is permanent" and he recommended that the Plaintiff "see what his options are for retirement." (Dr. Anderson's Letter to Dr. Zielinski dated 04/06/2006, attached as US00617).

38) In a medical report dated October 27, 2006, Dr. Zielinski reported:

Mr. Green continues to suffer from severe, chronic depression, anxiety, labile mood swings, disillusionment, and job related stress at the IRS, *due to perceived racial discrimination and perceived unfair administrative actions against him.* I have reviewed the Incidents and Circumstances listed in the letter dated (May) 11, 2006, from the (TCMC). Those incidents and circumstances were previously discussed during multiple psychotherapy sessions with Mr. Green. *It is my professional opinion that those factors "caused, aggravated, and accelerated" Mr. Green's Dysthymic Disorder and current mental health condition.*

(Dr. Zielinski's Medical Report dated 10/27/2006, attached as US00638 and US00639) (emphasis added).

39) On January 17, 2007, the Office of Personnel Management ("OPM") found the Plaintiff permanently disabled for his position at the IRS due to Dysthymic Disorder. (OPM Letter to the Plaintiff dated 01/17/2007, attached as US00641).

Moeller's Interference with the Plaintiff Employee Audit

40) On February 2, 2006, under threat of possible termination, Moeller directed the Plaintiff to waive his statutory rights and to fully comply with the instructions issued by the examiner who was conducting an examination of the Plaintiff's personal tax returns. (Moeller's Directive to Plaintiff dated 02/02/2006, attached as US00290).

41) However, after the NTEU protested, Moeller's directive was withdrawn by Thompson. (Thompson's Retraction dated 03/20/2006, attached as US00292).

Snider's Disputed Performance Appraisal and Response

42) On January 9, 2006, the Plaintiff emailed Snider a self-assessment for his performance appraisal that suggested he receive an overall rating of "5". (Plaintiff's Declaration dated 07/20/2006, attached as US00250 and US00251).

43) On or about February 27, and later, on March 14, 2006, Snider refused to meet with the Plaintiff to discuss his performance appraisal. (Plaintiff's Declaration dated 07/20/2006, attached as US00252; Snider's Declaration dated 07/20/2006, attached as US00320; Email Exchange between Snider and the Plaintiff dated 02/27/2006, attached as US00591-US00592).

44) However, according to Snider, she met with all other employees to discuss their performance

appraisals, however, Wyatt, an African-American female in Snider's group with prior EEO protected activity, testified that Snider did not meet with her. (Snider's Declaration dated 07/20/2006, attached as US00321; Wyatt's Declaration dated 02/28/2006, attached as US00057).

45) On or about March 9, 2006, Plaintiff received his performance appraisal from Snider with an overall rating of "4.2" and marked "Exceeds Fully Successful" but showing no improvement since June 2004. (Plaintiff's Declaration dated 07/20/2006, attached as US00250-US00251; Plaintiff's Performance Appraisal, attached as US00343).

Snider's Denial of Higher-Graded Pay for the Plaintiff's Higher-Graded Duties

46) On November 9, 2005, following his non-selection for promotion in Vacancy 889, Snider suggested the Plaintiff analyze the time he had spent on higher-grade cases to see if he was entitled to higher-graded pay under the National Agreement. (Plaintiff's Declaration dated 07/20/2006, attached as US00258 and US00259). Under Article 16 of the National Agreement, an employee is entitled to higher-graded pay when he or she has performed higher-graded duties for 25% or more of their direct time during the preceding four months. (National Agreement, Article 16, attached as US00558).

47) On or about November 17, 2005, Plaintiff completed the analysis in accordance with the

National Agreement and provided it to Snider and the NTEU. According to the analysis, the Plaintiff was entitled to higher-graded pay for the entire period from March 29, 2004 through November 8, 2005 and Snider agreed to pay him accordingly. (Plaintiff's Declaration dated 07/2012006, attached as US00258 and US00259).

48) On January 11, 2006, Snider asked IRS Labor Relations to process a request for back pay for the Plaintiff because he "was a grade 11 Revenue Agent but performed work at the grade 12 level during 2004 and 2005." To support her statement, Snider attached the same spreadsheets the Plaintiff developed in his analysis. (Snider's Memo to Nghe dated 01/11/2006, attached as US00293-US00299).

49) On *March* 2, 2006, Snider prepared her first Declaration for the investigative file in the Plaintiff's EEO complaint regarding his non-selection. (Snider's Declaration dated 03/02/2006, attached as US00055).

50) On May 3, 2006, Snider advised NTEU representatives that she was no longer willing to compensate Plaintiff for the higher-graded duties he performed in 2004 and 2005. (Snider's Email to NTEU dated 05/03/2006, attached as US00612). However, the IRS later conceded Snider "miscalculated" and the Plaintiff had in fact performed higher-graded duties from May 2004 through June 2005 but never paid. (Agency Representative's Hearing Testimony, Hearing Transcript dated 03/07/2008 ("HT2"), 170:5-13, attached as US01208).

D. The Relevant and Controlling Law.

SUMMARY JUDGMENT

Summary judgment should be granted “when the pleadings, depositions, . . . together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” (Fed. R. Civ. P. 56(c)). An issue of material fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. (*Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982)).

When a movant demonstrates facts that support the entry of a judgment in its favor, judgment should be granted forthwith unless the non-movant provides evidence establishing a genuine issue of material fact. (*Celotex Corp. v. Catreer*, 477 U.S. 317, 332 (1986)). To meet this burden, the non-moving party must do more than “show that there is some metaphysical doubt as to the material facts . . . the non-moving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’” (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1987) (quoting Fed. R. Civ. P. 56(e) (emphasis added))).

DISCRIMINATION SUITS

Under the *McDonnell Douglas* burden-shifting test, a plaintiff alleging discrimination must first establish a *prima facie* case by demonstrating that he is a member of a protected class and he was treated differently from others not in the protected class.

(*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)).

To establish a *prima facie* case of reprisal for prior EEO protected activity, the Plaintiff need only show 1) he engaged in protected activity, 2) the agency was aware of the protected activity, 3) he was subjected to adverse treatment by the agency, and 4) there exists a nexus between the protected activity and the adverse action. (*Ivy v. Dep't of the Air Force*, E.EOC Appeal No. 01A14559 (2002)).

Upon the establishment of a *prima facie* case, the burden of production shifts to the agency to articulate a legitimate nondiscriminatory reason for the action complained of. (*Id.*). After such an articulation, the burden shifts back to the complainant to provide evidence that the agency's articulated reasons are undeserving of credibility and are a pretext for discrimination. ((*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)).

If the agency fails to meet its burden to articulate a legitimate nondiscriminatory reason for the alleged discriminatory acts, judgment will be awarded to the plaintiff as a matter of law. (*St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)).

AGENCY RESPONSIBILITY

And finally, and perhaps most importantly, the United States Supreme Court has long held that federal agencies like the IRS must follow their own rules

and regulations when the rights of individuals are concerned. (*Accardi v. Shaughnessy*, 347 U.S. 260, 267-268 (1954); *Service v. Dulles, et. al.*, 354 U.S. 363, 388-389 (1957)). In addition, the Commission has also held that when agencies act inconsistent with their own rules, it is evidence of pretext. (*Harrison v. Department of Justice*, EEOC Appeal No. 01A03948 (July 30, 2003)).

II.

ANALYSIS

A. Summary of the Argument

The complaint raises twelve (12) issues. The first issue involves the Plaintiffs non-selection for promotion to GS-0512-12 in Vacancy 889. After the Plaintiff filed a formal complaint regarding the non-selection on December 12, 2005, and while it was under investigation, his superiors took eleven (11) other adverse, hostile and harassing actions against him such that his preexisting Dysthymic Disorder worsened and he could no longer work.

Seven of the other issues concern questionable demands and actions taken by Moeller in response to the Plaintiff's request for sick leave. Another involves Moeller's interference in what should have been a confidential audit of the Plaintiff's personal tax returns. Two issues concern the Plaintiff's annual performance appraisal and Snider's refusal to meet with him to discuss it. And, the final issue involves Snider's refusal to properly compensate the Plaintiff for the

higher-graded duties he performed from May 2004 through November 2005.

With credible, reliable, and indisputable evidence, the Plaintiff established a *prima facie* case of race and disability discrimination and/or reprisal for the adverse actions taken by the IRS against him. However, the *agency's* articulated reasons were not legitimate, changed over time, were based on false statements and/or violated the agency's own rules and regulations and other controlling laws. Thus, the agency's articulated reasons are undeserving of credibility, discriminatory per se and are mere pretext, designed to mask actual discrimination.

B. The Argument

1. The Plaintiff's Non-Selection for Vacancy 889

The Plaintiff was not selected for Vacancy 889 even though he was listed second on the BQ List, there were two positions available, and the person who ranked first on the BQ List was selected "to ensure objectivity."

Plaintiff's Prima Facie Case of Race Discrimination and Reprisal: Plaintiff established a *prima facie* case of race discrimination in his non-selection for Vacancy 889 because he demonstrated that he is African-American and he was qualified for the position since he was listed second on the BQ List for Vacancy 889 and the selectee, Sells, who ranked first, was

Caucasian. (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)).

The Plaintiff also established a *prima facie* case of reprisal because he demonstrated that he engaged in prior EEO protected activity when he chaired the IRS' Mountain States DEEOAC. The agency was aware that the Plaintiff served on its DEEOAC and the selecting official was also aware of this protected activity because the Plaintiff's Chairmanship of the Mountain States DEEOAC was specifically listed on his application for promotion in Vacancy 889 when he was not selected for promotion. (*Ivy v. Dep't of the Air Force*, EEOC Appeal No. 01A14559 (2002)).

There was a nexus between the Plaintiffs service on the IRS' DEEOAC and the non-selection because the Plaintiff's Chairmanship was listed on his application for promotion in Vacancy 889. (Plaintiff's MPQ in IRS Vacancy 889 dated 07/18/2005, attached as US00082).

Defendant's Articulated Reason: Initially, the IRS indicated, "(t)he agency's proffered legitimate nondiscriminatory reason for its selection of Michael Sells for the position of Internal Revenue Agent (AML Examiner) is simply that it chose the top-ranked individual on the promotion certificate (for Vacancy 889) . . . to insure objectivity." (Agency's Motion for Summary Judgment dated 03/20/2007 at page 5, attached as US00467).

However, after the Plaintiff successfully refuted their initial reason by pointing out there were two

positions available in Vacancy 889, IRS officials suggested another reason for not selecting the Plaintiff in Vacancy 889. For the first time at the EEO hearing, the selecting official alleged that the Plaintiff had engaged in misconduct by claiming ten hours of work on IRS time in Las Vegas when he was actually in or around New Orleans, Louisiana. (Armstrong's Hearing Testimony, HT1, 230:2-5, attached as US00969).

Evidence of Pretext:

Both of the IRS' articulated reasons are void of credibility. Regarding the initial reason, there were two positions available in Vacancy 889. Michael Sells placed first on the BQ List and the Plaintiff was listed second. Therefore, as stated in its motion for summary judgment, "to insure objectivity," because Sells was promoted to the first available position, the agency and the selecting official should have but initially failed to provide a reason why the Plaintiff was not selected for the second available position.

It is also worthy to note that a few weeks prior, the Plaintiff was the top-ranked candidate in Vacancy 119 but he was not selected, a white male with no prior protected activity was listed second and he, not the top-ranked Plaintiff, was selected for Vacancy 119.

After the Plaintiff pointed out that Vacancy 889 allowed for two positions and the Plaintiff as the second-listed candidate should have been selected to the second position, Armstrong alleged the Plaintiff was not selected in Vacancy 889 because of alleged

misconduct. However, the alleged misconduct never occurred.

Although, at the final hour, the selecting official alleged that the Plaintiff falsified his time report to show he was working in Las Vegas when he allegedly was in New Orleans, Louisiana, Armstrong failed to present the alleged falsified time report or any supporting evidence to demonstrate that the Plaintiff was actually in New Orleans at the same time.

Accordingly, based on these facts, the Plaintiff established a *prima facie* case of race discrimination and reprisal for prior EEO protected activity but the agency failed to articulate a legitimate nondiscriminatory reason for not selecting the Plaintiff in Vacancy 889. Selecting the top-ranked candidate for promotion to one position did not explain why the Plaintiff as the second-ranked candidate was not selected for the second available position. In addition, there is no evidence whatsoever that the Plaintiff falsely claimed 10 hours of IRS time as alleged.

Therefore, under *St. Mary's Honor Center*, because the agency failed to articulate a legitimate nondiscriminatory reason for not selecting the Plaintiff for promotion in Vacancy 889, he is entitled to judgment on the non-selection issue as a matter of law. In the alternative, the foregoing facts indicate the agency's articulated reasons are undeserving of credibility and pretextual, designed to mask actual discrimination and the Plaintiff is entitled to judgment as a matter of law on this basis as well.

2. Moeller's Additional Demands for Processing Plaintiff's Sick Leave Request

After receiving the Plaintiff's SF-71 "Request for Leave or Approved Absence" on or about January 10, 2006 along with his physician's medical certification that the Plaintiff was incapacitated due to Dysthymic Disorder and he would return to duty in approximately 3 months, instead of processing and approving the Plaintiff's request to use his earned and accrued sick leave, the Moeller, with the threat of termination, demanded that the Plaintiff:

- a. complete and sign the FOHA that gave the IRS unrestricted access to the Plaintiff's medical records and his treating physicians;
- b. have his treating physician complete and *sign* the Family and Medical Leave Act ("FMLA") Form WH-380, "Certification of Health Care Provider," even though Plaintiff did not request leave under the FMLA;
- c. report for duty on Monday, February 27, 2006 in spite of his serious medical condition or be charged AWOL if he did not provide "acceptable medical documentation" and did not sign the attached FOHA;
- d. provide extensive confidential medical information directly to Moeller by March 10, 2006;
- e. had to remain accessible to Moeller despite his serious medical condition and the recommendation of his treating physician; and

f. use sick leave for periods he was previously told to perform official duties and for which he did not request sick leave.

Prima Facie Case of Race and Disability Discrimination and Reprisal:

The Plaintiff, an African-American, established a *prima facie* case of race discrimination when his request for sick leave exceeding 3 days was not approved even though Moeller approved sick leave exceeding 3 days for Joan King, a white female with no prior EEO activity and he did not require King to comply with the same requirements he imposed on the Plaintiff. (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); Agency Supplemental Response to Complainant's Discovery Request, attached as PE-01 and PE-02; Moeller's Declaration dated 08/15/2006, attached as US00308; Moeller's Email Message to the EEO Investigator dated 08/29/2006, attached as US00300).

The Plaintiff established a *prima facie* case under the Rehabilitation Act of 1973 by showing that he was a qualified individual with a disability because he suffered with Dysthymic Disorder from the time he was employed by the IRS but he nevertheless could perform the essential functions of his position as demonstrated by his being rated as "Exceeds Fully Successful" in his most recent performance appraisal, yet his medically certified request for sick leave exceeding 3 days was not approved. (*Walton v. United States Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir.

2007); Plaintiff's Performance Appraisal dated 01/11/2006, attached as US00343).

The Plaintiff also established a *prima facie* case of reprisal because he engaged in protected activity when he filed a formal EEO complaint on December 12, 2005 and it was under investigation by the agency when his January 10, 2006 request for sick leave was not approved. (*Ivy v. Dep't of the Air Force*, EEOC Appeal No. 01A14559 (2002)).

Moreover, as reflected in Plaintiff's memo to Moeller dated February 26, 2006, "On December 12, 2005, I filed a formal complaint of discrimination with the IRS. In the two months that have followed, you have twice threatened me with the possibility of 'disciplinary action up to and including removal from the Service' only because I chose to exercise my right and not consent to what I considered to be intrusive and inappropriate inquiries by the IRS. (Plaintiff's Memo to Moeller dated 02/26/2006, attached as US00274).

Defendant's Articulated Reasons:

The first time he demanded that the Plaintiff provide his confidential medical information, Moeller stated, "*To approve sick leave for more than three days, acceptable medical documentation is required as . . . outlined in 339.104 of Part 5 of the Code of Federal Regulations.*" (Moeller's Memo to the Plaintiff dated 02/23/2006, attached as US00267-US00268) (emphasis added).

Later, during the EEO investigation, Moeller alleged that because the Plaintiff requested *extended sick leave*, the Federal Occupational Health (“FOH”) doctor needed to evaluate the “reasonableness” of the Plaintiff’s request and allegedly the Plaintiff could not be approved for *extended sick leave* without a determination from the FOH doctor. (Moeller’s Declaration dated 08/15/2006, attached as US00312) (emphasis added).

However, it is worthy to note that the FOH doctor’s conclusion was that the Plaintiff “likely has a serious medical condition that meets Family Medical Leave Act criteria,” *not* extended sick leave. (Gottschling Declaration dated 09/15/2006, attached as US00336).

Moreover, in its motion for summary judgment, the agency stated Moeller “was simply trying to gather the required ‘acceptable medical documentation’ to substantiate and approve” a request for *advanced sick leave*. (Agency’s Motion for Summary Judgment dated 03/20/2007, attached as US00468) (emphasis added).

And finally, at the EEO hearing, Moeller testified that he did not immediately approve the Plaintiff’s request for sick leave because the amount of sick leave requested by the Plaintiff needed to be verified by the FOH doctor. (Moeller’s Hearing Testimony, HT2, 55:6-57:4, attached as US01093 through US01095).

Evidence of Pretext and Discrimination
Per Se:

Moeller's multiple demands for access to the Plaintiff's physicians and the Plaintiff's medical records were impermissible disability-related inquiries because they were likely and/or intended to elicit information about the Plaintiffs disability and the only purpose for Moeller's disability-related inquiries was to allow IRS doctors to determine the nature and severity of the Plaintiffs disability in order to confirm the "reasonableness" of his sick leave request.

However, *under the* Rehabilitation Act of 1973, as well as Americans with Disabilities Act ("ADA"), whose standards are applied the same by the courts, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity. (*Walton v. United States Marshals Serv.*, 492 F.3d 998, 1003 n.1 (9th Cir. 2007); 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. § 1630.14(c)).

A "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. (*Id.* at 4, 8 FEP at 405:7192). Furthermore, the restrictions on disability-related inquiries and medical examinations apply to individuals both with and without disabilities at all three stages: pre-offer, post-offer, and during employment. (*Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595, 8 AD Cas.1249, 1252 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 1455, 9 AD Cas. 416 (1999) (a job applicant without a disability can sue

under the Rehabilitation Act or the ADA regarding medical history questions).

A disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." (EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 15, 8 FEP Manual (BNA) 405:7468-69 (1997)).

Accordingly, Moeller's disability-related inquiries were not "job-related and consistent with business necessity" because being on sick leave, the Plaintiff's ability to perform essential job functions was not at issue and he did not pose a direct threat to anyone while home on sick leave.

Because the agency failed to claim and/or to demonstrate that its disability-related inquiries were job-related and consistent with business necessity, the Plaintiff is entitled to judgment on the sick leave issues as a matter of law.

Nevertheless, it is also "unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regards to . . . leaves of absence, sick leave, or any other leave." (See 29 C.F.R. § 1630.4(e), Discrimination Prohibited, attached as US00568) (emphasis added).

App. 64

When requesting sick leave exceeding 3 days, the IRS Employee Personnel Resource Guide ("Guide") only requires employees to "Give your manager a completed leave request (SF-71) . . . and "a medical certificate signed by your physician or practitioner for any time you are absent for sickness for more than three days." (IRS Guide, p. 20-21, attached as US00547-US00548).

The National Agreement with the NTEU requires the IRS to implement sick leave consistent with 5 C.F.R. 630, not 339. (National Agreement, Article 34, Section 7, attached as US00562). Under 5 C.F.R. § 630.201(b), a "(m)edical certificate means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the disability while the patient was receiving professional treatment." (5 C.F.R. § 630.201(b), attached hereto US00566 and US00567).

On January 9, 2006, the Plaintiff's treating physician at the VA, Dr. Sean Zielinski, certified on VA letterhead that the Plaintiff had received treatment for Dysthymic Disorder at the VA for many years and the Plaintiff was "currently incapacitated for duty as an Internal Revenue Agent" and his "incapacitation will cease in approximately three months." (Dr. Zielinski's Medical Certification dated 01/09/2006, attached as US00263).

On January 10, 2006, the Plaintiff fully complied with the IRS' requirements for requesting sick leave

exceeding 3 days when he sent Dr. Zielinski's medical certification along with a completed SF-71 leave request to Snider.

Contrary to Moeller's misrepresentation, 5 C.F.R. § 339.104 merely defines the term "medical documentation" as it is used in Part 339 . . . *to determine the nature of a medical condition which may affect safe and efficient performance.*" but not sick leave. (Plaintiff's Memo to Moeller dated 02/26/2006, attached as US00272; 5 C.F.R. § 339.102) (emphasis added).

In addition, the Plaintiff's SF-71 leave request clearly shows that he requested to use only his accrued sick leave and the Defendant now admits the Plaintiff never requested advance sick leave or leave under the FMLA as alleged which would have warranted additional inquiries.

Moeller's demands for unrestricted access to the Plaintiffs physicians and his medical history and the nature and severity of the Plaintiff's medical condition through the expansive requirements of 5 C.F.R. § 339.104 are a direct violation of 5 C.F.R. § 1630.13(b)'s prohibitions against disability-related inquiries that are not job-related or consistent with business necessity.

In addition, because qualified individuals with disabilities are more likely than others to use sick leave, Moeller's impermissible inquiries are disability discrimination per se because, under the disparate impact analysis for disability discrimination, it is only necessary to show that a stated personnel practice

disadvantages persons with disabilities. (29 C.F.R. § 1630.10).

And finally, when Moeller reclassified the Plaintiff's time and attendance records to reflect only sick leave, he acted inconsistent with the Plaintiff's specific sick leave request that indicated the Plaintiff would be performing other duties when he was able to do so and he penalized the Plaintiff for following Snider's instructions when she advised the Plaintiff that Moeller "will work with you and me regarding your cases and whether to complete them or reassign them." (SF-71 dated 01/10/2006, attached as US00262; Snider's Email Message to Plaintiff dated 01/09/2006, attached as US00599; Statement of Earnings and Leave, attached as US00600). Thus, he provided a windfall for the IRS with the benefit of Plaintiff's work without providing him with just and proper compensation.

Therefore, because Moeller's disability-related inquiries were only required to second-guess the Plaintiff's treating physician's proper medical certification for his sick leave and were not job-related and consistent with business necessity, and because Moeller acted inconsistent with the IRS' own rules and regulations, Moeller's actions were discriminatory per se, undeserving of credibility and pretextual, designed to mask actual discrimination.

3. Moeller's Interference with the Plaintiff's Employee Audit

In his directive dated February 2, 2006, and under threat of possible termination, Moeller directed the Plaintiff to waive his statutory rights and to fully comply with the instructions issued by the examiner who was conducting an examination of his personal tax returns. (Moeller's Directive to Plaintiff dated 02/02/2006, attached as US00290).

Prima Facie Case of Reprisal:

The Plaintiff established a *prima facie* case of reprisal because he engaged in protected activity when he filed a formal EEO complaint on December 12, 2005. Moeller was aware of the complaint and it was under investigation when he issued his directive on February 2, 2006. (*Ivy v. Dep't of the Air Force*, EEOC Appeal No. 01A14559 (2002)).

Defendant's Articulated Reason:

The Defendant contends Moeller was merely "requesting that (the Plaintiff) cooperate in the examination and reminding him of his obligations under the Code of Conduct." (Agency Discovery Response, attached as US00653).

Evidence of Pretext:

Moeller's directive was improper as demonstrated by the fact that the directive was withdrawn by

Moeller's supervisor on March 20, 2006. In her retraction, Thompson acknowledged that the Plaintiff "(a)s an employee and a taxpayer," has the same rights as the "taxpaying public" to "sign an unconditional consent, to negotiate consent terms, and to refuse to sign the consent." (Thompson's Retraction dated 03/20/2006, attached as US00292).

Moreover, under Internal Revenue Manual Section 4.8.4.2.4.3, "Key points for review of employee audits . . . **confidentiality must be strictly observed.**" (IRM § 4.8.4.2.4.3, attached as US00578) (emphasis added).

Clearly, Moeller violated the strict confidentiality requirements of the Plaintiffs employee audit and he compounded the harm by erroneously demanding that the Plaintiff waive his statutory rights for the audit or suffer possible termination.

Thus, under the IRS' own rules, Moeller should not have even been aware of the Plaintiff's confidential employee audit and he did not have the authority to request or demand that the Plaintiff "cooperate" in the manner he directed or to remind him of his obligations under the Code of Conduct pertaining thereto.

Accordingly, the Defendant's articulated reason for Moeller's February 2, 2006 directive and the resulting interference in the Plaintiff's employee audit is undeserving of credibility and pretextual, designed to mask actual discrimination, and the Plaintiff is entitled to judgment on this issue as a matter of law.

4. Snider's Disputed Performance Appraisal and Response:

The Plaintiff further complains that Snider issued him an inaccurate performance appraisal and refused to meet with him to discuss it.

Prima Facie Case of Race Discrimination and Reprisal:

The Plaintiff established a *prima facie* case of race discrimination because Snider gave him a less favorable rating on his performance appraisal than she gave a white male with no EEO activity even though she indicated that she herself could not distinguish any differences in their performance and because she met with all employees in her group except the African-Americans to discuss their appraisals. (Snider's Declaration dated 03/02/2006, attached as US00052; Snider's Declaration dated 07/06/2006, attached as US00321).

The Plaintiff also established a *prima facie* case of reprisal because he engaged in protected activity *when* he requested EEO counseling on November 7, 2005 and Snider was made aware of the request by the EEO Intake Specialist on November 8, 2005, before she prepared the performance appraisal. (*Ivy v. Dep't of the Air Force*, EEOC Appeal No. 01A14559 (2002)).

Defendant's Articulated Reason:

The Defendant maintains that Snider "believed the appraisal accurately represented his performance

during the rating period and Ms. Snider gave the (Plaintiff) the opportunity to provide a written rebuttal." (Agency's Motion for Summary Judgment dated March 20, 2007, p. 7, attached as US00469).

Evidence of Pretext:

Snider's reasons for refusing to meet with Plaintiff are not credible. Snider states she met with all other employees to deliver and discuss their performance appraisals. (Snider's Declaration dated 07/06/2006, attached as US00321; Summary of EEO Investigation, attached as US00228). Any reasonable person would conclude Snider believed the appraisals she prepared for all her other assigned employees "accurately represented (their) performance during the rating period" at the time she agreed to meet with them, and she had a contractual duty to do so.

Under Article 12, Section 4, Item B(6) and F of the National Agreement, "(i)f the supervisor rejects an employee's self-assessment, the supervisor will meet with the employee and explain his or her reason . . . Supervisors will discuss employees' annual or revalidated appraisals at the time such appraisals are issued to employees. (National Agreement, Article 12, Item B(6) and (F), attached as US00554 and US00555, respectively).

Moreover, Snider *did not* give the Plaintiff "the opportunity to provide a rebuttal." That option is available to any employee who disagrees with their

appraisal. (National Agreement, Article 12(G), attached as US00555).

Nevertheless, the Plaintiff was not the only African-American in Snider's group with whom she did not meet. Jacqueline Wyatt, an African-American with prior EEO protected activity and a disability, testified that Snider also did not meet with her. (Wyatt's Declaration dated 02/28/2006, attached as US00057; Comparative Data, attached as US00228).

In regards to the appraisal itself, according to Snider's own testimony, "Mike Sells and (the Plaintiff) have both been good employees. They both work hard to meet Territory and group goals. And they both do quality work. I would have been hard pressed to explain to the one not selected why he was not selected so I based the decision solely on the ranking scores." (Snider's Declaration dated 03/02/2006, attached as US00052).

However, when it came to their performance appraisals, Snider gave Michael Sells, a white male with no prior EEO activity, an overall rating of "4.4," but she only gave the Plaintiff, an African-American male with prior EEO protected activity, a rating of "4.2." (Interim Rankings, attached as US00111 and US00076, respectively). Also, Snider only gave the "4.4" rating to white and Hispanic employees. (Comparative Data, attached as US00227).

Based on these facts, the Plaintiff was subjected to discriminatory treatment when Snider gave him a less favorable rating on his performance appraisal than she

gave a white male with no EEO activity even though she indicated that she herself could not distinguish any differences in their performance.

Accordingly, based on Snider's own statements and the uncontroverted testimony of Jacqueline Wyatt, Snider's articulated reason for not giving the Plaintiff a higher rating on his performance appraisal and her reason for not meeting with him to discuss it are undeserving of credibility and pretextual, designed to mask actual discrimination. Accordingly, the Plaintiff is entitled to judgment as a matter of law on the issues involving the performance appraisal.

5. Snider's Denial of Higher-Graded Pay for Plaintiff's Higher-Graded Duties:

Only after the Plaintiff was not selected for the promotion to AML Examiner a second time in Vacancy 889 and he requested EEO counseling did Snider indicate she would be willing to properly compensate him for the higher-graded duties he performed on higher-graded cases. (The Plaintiff's Declaration dated 07/20/2006, attached as US00258).

Prima Facie Case of Reprisal:

The Plaintiff demonstrated a *prima facie* case of reprisal by showing Snider recommended that he be compensated for the higher-graded duties he performed in 2004 and 2005. (Snider's Memo to Nghe dated 01/11/2006, attached as US00293). However,

after the Plaintiff filed his formal EEO complaint and Snider prepared her first Unsworn Declaration on March 2, 2006, Snider denied higher-graded pay for the Plaintiff performing higher-graded duties in 2004 and 2005. (Snider's Email to NTEU dated 05/03/2006, attached as US00612).

Defendant's Articulated Reason:

During pre-hearing discovery and at the EEO hearing itself, the agency alleged that Snider "miscalculated" and the agency stipulated that the Plaintiff "did, in fact, meet the time requirement for higher-graded duties from May 2004 through June 2005." (Agency's Response dated 12/12/2007, attached as PE-03 and PE-04; Agency Representative's Testimony, HT2, 170:5-13, attached as US01208). However, the Plaintiff has yet to be paid for any of the higher-graded duties he performed.

For the period of July 2005 through November 2005, Snider stated the Plaintiff "was working on a case that had a National Team Lead who directed his work at all times. The Team Lead continually reviewed and directed (the Plaintiff's) work. (The Plaintiff) worked as a Team Member and worked at his grade level." (Snider's Declaration dated 07/20/2006, attached as US00321).

Evidence of Pretext:

According to Snider, she conducted a "thorough review" and determined the Plaintiff had not worked on higher-grade duties for the required time during 2004 or 2005 to qualify for higher-grade pay. (*Id.*) However, the IRS admitted that the Plaintiff meet the time requirement for higher-graded duties from May 2004 through June 2005 and alleged Snider "miscalculated." (Agency's Response dated 12/12/2007, attached as PE-03 and PE-04; Agency Representative's Testimony, HT2, 170:5-13, attached as US01208).

In regards to the remaining higher-graded cases the Plaintiff worked on from July 2005 through November 2005, Snider admitted during cross-examination that the case grading sheets for all the relevant cases the Plaintiff listed as higher-grade did in fact indicate that they were grade 12 cases when he was only a grade 11 agent. (Snider's Hearing Testimony, HT2, 130:21-131:10, attached as US01168 and US01169).

In addition, in an email dated November 3, 2005, Snider acknowledged the cases with the National Team Lead were in fact "overgrade" and she was "reluctant to ask (the Plaintiff) to continue with overgrade work since (he) did not get the grade 12 promotion." (Snider's Email to the Plaintiff dated 11/03/2005, attached as PE-05; Snider's Hearing Testimony, HT2, 158:17-160:13, attached as US01196-US01198).

The Defendant denied higher-graded pay for the higher-graded duties the Plaintiff performed from

March 29, 2004 through November 8, 2005. The Defendant's reasons are undeserving of credibility and pretextual, designed to mask actual discrimination because, even though the Defendant acknowledged the Plaintiff performed higher-graded duties from May 2004 through June 2005, to date, the Plaintiff has not been properly compensated.

In addition, the agency's own relevant and credible documents and Snider's own email indicate the Plaintiff worked on higher-graded cases but he was not properly compensated. For these reasons, the Plaintiff is entitled to judgment as a matter of law on the issue of the denial of higher-graded pay for performing higher-graded duties.

III. CONCLUSION

The Plaintiff established a *prima facie* case of race and disability discrimination and/or reprisal for his prior EEO protected activities for the twelve adverse actions taken against him. However, the Defendant's articulated reasons were lacking, changed over time, were based on false and inconsistent statements and violated its own rules and regulations and other controlling laws. Thus, the agency's articulated reasons are undeserving of credibility and are mere pretext for actual discrimination and the Plaintiff is entitled to judgment as a matter of law as to all causes of action and the motion for summary judgment in favor of the Plaintiff should be Granted.

App. 76

RESPECTFULLY SUBMITTED this 21st day of
January, 2014.

/s/ Ronald L. Green
Ronald L. Green,
Plaintiff, *In Pro Se*

[Certificate Of Service Omitted]

[Exhibits Omitted]

App. 77

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RONALD L. GREEN,	)	Case No.: 2:13-cv-00740-
Plaintiff,	)	KJD-VCF
	)	
v.	)	COMBINED
	)	MOTION FOR
JACOB J. LEW,	)	SUMMARY JUDGMENT
Secretary, Department	)	
of Treasury,	)	AND
	)	OPPOSITION TO
Defendant.	)	PLAINTIFF'S MOTION
	)	FOR SUMMARY
	)	JUDGMENT
	)	
	)	

Federal Defendant, Jacob J. Lew, in his official capacity as the Secretary of the Department of the Treasury, moves for summary judgment against the Plaintiff, Ronald L. Green ("Green" or "Plaintiff") on his claims for employment discrimination (race and

App. 78

disability) and retaliation. This brief also serves as an opposition to Plaintiffs Motion for Summary Judgment (ECF No. 11). This brief is based on the Memorandum of Points and Authorities below, as well as all papers and pleadings on file.

Dated: February 14, 2014.

DANIEL G. BOGDEN
United States Attorney

/s/ Patrick A. Rose
PATRICK A. ROSE
Assistant United States Attorney

**MEMORANDUM OF
POINTS AND AUTHORITIES**

I. INTRODUCTION

Green, a former employee of the Internal Revenue Service ("IRS"), presents in this lawsuit a long list of gripes. Many are trivial harms, if that; they are not the kind of adverse employment actions at which the employment discrimination laws are aimed. The complained of incidents occurred between November 1, 2005 and May 3, 2006. *See* Compl. ¶¶ III-XVI. The complained of actions or decisions were made by three different supervisory employees. In broad and conclusory fashion, Plaintiff attempts to paint all the supervisors as illegal discriminators and/or retaliators.

Plaintiff has specific causes of action with specific elements, and Plaintiff bears the burden of proof.

However, Plaintiff side steps his burden and confuses the issues with assertions that an act is improper according to such things as a union agreement, a personnel regulation, or the IRS's employment guide. Plaintiff cannot substitute, for any element of his statutory claims of discrimination and retaliation, some putative deviation from a standard or requirement set forth in such a union agreement, personnel regulation, or employment guide. General notions of wrongful or improper, as well as those based in the minutia of personnel procedures, will not do.¹

As shown below, Plaintiff does not meet the prima facie elements for many of the complained of incidents. Furthermore, Plaintiff does not have sufficient evidence to establish that Federal Defendant's reasons were pretext, masking actions or decisions that were actually based on the prohibited criteria of race, disability, or past-protected activities. As no reasonable trier of fact could find in favor of Plaintiff, Federal Defendant is entitled to judgment as a matter of law.

¹ Federal employees can challenge various personnel actions through the Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.* ("CSRA"), which is a comprehensive, remedial scheme of administrative and judicial review remedies. *See Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008) (citations omitted); *see also, Bush v. Lucas*, 462 U.S. 367, 387 nn. 33 & 35 (1983) (explaining CSRA's procedures for appeal of final personnel action to the Merit Systems Protection Board and thereafter to the United States Court of Appeals for the Federal Circuit).

**II. STATEMENT OF MATERIAL FACTS THAT
ARE NOT GENUINELY IN DISPUTE**

Incident No. 1 (Compl. ¶¶ III-IV. ECF No.

1): On or about November 1, 2005, Plaintiff was not selected for the position of Internal Revenue Agent (AML Examiner), GS-0512-12, advertised under Internal Revenue Service Vacancy Announcement Number 50-14-SP50889B.

1. In July 2005, Plaintiff, an African-American male, was employed with the IRS in its Las Vegas, Nevada office as a GS-11 Revenue Agent. *See* Ex. A at US00002; Ex. A-1 at US00010.²

2. On July 5, 2005, two vacancies for positions as an Internal Revenue Agent, Anti-Money Laundering (AML) Examiner, GS-0512-12, opened up in Las Vegas, Nevada. *See* Ex. A-3 at US00061; Ex. A-5 at US00070.

3. Five of Defendant's employees made the "best qualified" list for these vacancies: Michael Sells (white), Plaintiff (African-American), Rudolph Munoz (Hispanic), Michael Cronin (white), and Jesse Walker (unknown). *Id.*; Ex. A at US00008.

4. The applicants on the best qualified list were ranked on a point scale, which was the sum of two different numerical evaluations. *See* Ex. A-7 at US00077.

² Plaintiff does not dispute the authenticity of these exhibits, which were taken from the EEO investigative file and EEOC proceedings. *See* Plf's Initial Disclosures 3, ECF No. 9 (identifying such documents and indicating that they are in the possession of each party).

5. The first evaluation was a score based on the applicants' most recent performance appraisal, and required only a mechanical calculation to determine. *See, e.g.,* Ex. A-7 at US00076.

6. The second evaluation, made by Agency Ranking Official Catherine Jarvis, was a rank based on the applicants' potential to perform the critical elements of the vacant position. *See* Ex. A-4 at US00064; Ex. A-8 at US00078-79.

7. Ms. Jarvis' rankings resulted in Michael Sells being ranked first, with a score of 43.4. *See* Ex. A-5 at US00070.

8. Plaintiff and Rudolph Munoz were tied for second, with a score of 41.2. *Id.*

9. Michael Cronin and Jesse Walker were fourth and fifth on the list, with scores of 36.4. *Id.*

10. The Agency official that made the final decision on the selectees for the positions was Theodore K. Armstrong. *See* Ex. A-2 at US00046.

11. Armstrong took into consideration the score each applicant received on the "best qualified" list, and also took into consideration other factors, such as conduct, his opinion about their performance, and the method by which the applicant received their score on the list. *See* Ex. D, p. 227:7-19 (US00966).

12. Armstrong selected Michael Sells for one of the AML Examiner vacancies on October 31, 2005, because Sells was the No. 1 ranked applicant, but did not

fill the second vacancy. *See* Ex. A-2 at US00046; Ex. A-6 at US00073.

13. Armstrong did not select Plaintiff for the AML Examiner position because Sells was the No. 1 ranked applicant and because at that time Plaintiff was under investigation by the Treasury Inspector General for Tax Administration (TIGTA) for misuse of a government issued credit card. *See* Ex. A-2 at US00046; Ex. D, pp. 229:16-22 & 230:2-5 (US00968-969).

14. At the time of the selection for the AML Examiner position, TIGTA was investigating Plaintiff for several independent allegations of misconduct, one of which was Plaintiff allegedly misusing his government issued Citbank credit card to make personal purchases during the period of July 30, 2003, through December 5, 2004. *Id.*

15. Although TIGTA's investigation covered several independent allegations of misconduct on the part of Plaintiff, Armstrong only knew about the allegations of Plaintiff misusing his government issued credit card. *See* Ex. D, pp. 229:23-230:5 (US00968-969).

16. Armstrong stated that he could not promote Plaintiff because, "[T]here was an active TIGTA investigation on [Plaintiff] at that time, and it was clear that there was some significant conduct issues relative to [Plaintiff] that would prohibit [him] from selecting [Plaintiff] for any position." *See* Ex. D, p. 229:16-22 (US00968).

17. Plaintiff admits that Sells was qualified for the AML Examiner position. *Id.*, p. 85:16-20 (US00826).

18. At the time that Armstrong promoted Sells he had not been disciplined for any misconduct or had given Armstrong any reason to distrust him. *Id.*, pp. 167:21-168:2 & 232:10-16 (US906-907, 971).

19. Plaintiff submitted an EEO complaint for the non-selection on December 12, 2005. *See* Ex. A-1 at US00010.

Incident No. 2 (Compl. ¶ V-VI, ECF No. 1):

On or about January 10, 2006, Plaintiff's request for 478 hours of sick leave was not approved.

Incident No. 3 (Compl. ¶ VII, ECF No. 1):

On or about January 18, 2006, Plaintiff's supervisor issued him a Memorandum advising him that he would have to sign the "Federal Occupational Health Authorization for Disclosure of Information" so that his sick leave request could be processed.

Incident No. 4 (Compl. ¶ VIII, ECF No. 1):

On February 2, 2006, Plaintiff's supervisor directed him to fully comply with the instructions issued by the examiner who was conducting an examination of his personal tax returns.

Incident No. 5 (Compl. ¶ IX, ECF No. 1):

On February 23, 2006, Plaintiff's supervisor directed him to report for duty on Monday, February 27, 2006, or be charged absent

without leave, if he did not provide acceptable medical documentation substantiating his leave request.

Incident No. 7 (Compl. ¶ XI, ECF No. 1):

On February 28, 2006, Plaintiff's supervisor directed him to provide medical information and documentation by March 10, 2006.

Incident No. 8 (Compl. ¶ XII, ECF No. 1):

On February 28, 2006, Plaintiffs supervisor reclassified his time and attendance records to reflect all sick leave.

Incident No. 10 (Compl. ¶ XIV, ECF No. 1):

On or about March 17, 2006, Plaintiff's supervisor directed him to submit written requests for approval prior to any time and attendance changes to his sick leave status.

Incident No. 11 (Compl. ¶ XV, ECF No. 1):

On or about March 17, 2006, Plaintiff's supervisor refused to direct his communications and directives to his National Treasury Employees Union (NTEU) representative or his physician and requested he provide him with his EEO contact point.

20. On January 8, 2006, Defendant promoted Plaintiff to an Internal Revenue Agent position with Small Business/Self Employed Examination, Western Examination. *See* Ex. F at US01494.

21. Plaintiffs first level supervisor in his new position was Herm Moeller. *See* Ex. D, p. 55:1014 (US00796).

22. When Plaintiff was assigned to Moeller, he was already on sick leave on a day-to-day basis. *See* Ex. E, p. 10:7-12 (US01048).

23. On January 10, 2006, Plaintiff submitted Standard Form 71, "Request for Leave or Approved Absence," to Shirley Snider, whom he thought was still his first level supervisor. This form was then routed from Snider to Moeller. *See* Ex. D, p. 55:22-25 (US00796); Ex. B-1 at US00262; Ex. B-3 at US00264.

24. With this form, Plaintiff requested the use of 478 hours of sick leave, beginning January 10, 2006, through April 7, 2006. *See* Ex. B-1 at US00262; Ex. D, p. 57:9-18 (US00798).

25. Plaintiff included a short letter from Sean Zielinski, Ph.D., dated January 9, 2006. *See* Ex. B-2 at US00263; Ex. D, p. 57:19-25 (US00798).

26. This letter stated that Plaintiff was suffering from Dysthymic Disorder, that he was incapacitated and unable to perform the duties of his position, and that he would be incapacitated for three months. *See* Ex. B-2 at US00263.

27. Moeller had never been involved with such an extensive sick leave request before, so he contacted a labor relations specialist, Karl Gottschling, and asked for his direction on what steps to take. *See* Ex. E, p. 10:14-18 (US01048).

28. Moeller explained Plaintiff's request to Gottschling in an email on January 13, 2006, and requested

assistance on how to properly process the request. *See* Ex. E-1 at p. 1; Ex. E, p. 10:19-24 (US01048).

29. Gottschling replied to Moeller and provided him forms for Green to fill out to help management process his sick leave request. *See* Ex. E-2 at pp. 1-6; Ex. E, pp. 11:21-13:8 (US01049-1051).

30. On January 18, 2006, Moeller wrote back to Plaintiff, requesting that Plaintiff provide a Federal Occupational Health ("FOH") Authorization for Disclosure of Information ("FOH-32") release. *See* Ex. B-3 at US00264; Ex. E, pp. 13:15-14:3 (US01051-1052).

31. Moeller requested that Plaintiff provide this release because Moeller wanted an FOH doctor to provide him a recommendation on whether to approve the leave request. *See* Ex. E, p. 14:8-16 (US01052).

32. Moeller spoke with Plaintiff on the phone and informed Plaintiff that filling out the form was not a "big deal" and that he would not make a final determination until he heard back from FOH. *See* Ex. D, p. 59:19-22 (US00800).

33. Although Moeller did not yet make a decision on approving the 478 hours of sick leave for Plaintiff, Moeller did approve sick leave for Plaintiff on a day to day basis until the larger request was resolved. *See* Ex. D, p. 58:17-19 (US00799); Ex. E, p. 23:14-23 (US01061).

34. On January 20, 2006, Plaintiff responded to Moeller's January 18, 2006 letter. *See* Ex. B-4 at US00265; Ex. E, p. 15:2-6 (US01053).

35. Plaintiff refused to sign the FOH-32 medical information release form and refused to provide additional medical information. *See* Ex. B-4 at US00265; Ex. E, p. 15:2-6 (US01053).

36. Mr. Moeller forwarded the sick leave request and the letter from Dr. Zielinski to the FOH doctor, requesting advice on how to proceed. *See* Ex. E, p. 15:8-25 (US01053).

37. Thomas P. Anderson, M.D., Occupational Medical Consultant, FOH, responded to Moeller on February 8, 2006, stating that Plaintiff likely had a serious medical condition, but that additional information was needed to determine the duration of time the condition would continue. *See* Ex. E-4 at p. 1; Ex. E, p. 16:10-20 (US01054).

38. On February 23, 2006, Moeller sent Plaintiff another letter with the subject, "Directive to Return to Duty." *See* Ex. B-5 at US00267; Ex. E, pp. 16-19 (US01054-1057) (document verification).

39. In that February 23, 2006 letter, Moeller informed Plaintiff that, since he had not provided additional medical information or the requested medical release, he was ordered to return to duty as of February 27, 2006, or would be charged absence without leave (AWOL). *See* Ex. B-5 at US00267.

40. Moeller issued the letter because he believed that he was unable to further process the leave request without further medical documentation. *See* Ex. E, p. 21:2-11 (US01059).

41. Plaintiff submitted the FOH-32 medical release form on February 27, 2006. *See* Ex. B-6 at US00276; Ex. E-3 at p. 1; Ex. E, p. 21:17-19 (US01059).

42. In a February 28, 2006 memorandum, Moeller requested that Plaintiff provide additional information to the FOH doctor. *See* Ex. B-7 at US00277.

43. In that February 28, 2006 memorandum, Moeller also informed Plaintiff that his charging of work time to activities other than sick leave was inappropriate, and that he would be correcting Plaintiff's time records to reflect that he was on sick leave since January 9, 2006. *Id.*; Ex. E, p. 23:2-7 (US01061).

44. Moeller received no notification from Plaintiff since January 9, 2006, that there was any change in Plaintiff's activity – case work, EEO activity, or otherwise – so Moeller believed that sick leave was the only appropriate time code to be using. *See* Ex. E, p. 24:10-16 (US01062).

45. On March 9, 2006, Moeller informed Plaintiff that the medical documentation should only be forwarded to the FOH doctor and that if Plaintiff wanted to adjust his time records he should submit the authorization for the change. *See* Ex. B-8 at US00284; Ex. E, pp. 26:19-27:19 (US01064-1065).

46. On March 17, 2006, Moeller sent Plaintiff a letter with the subject, "Directive: Sick leave, and approval of time and attendance." *See* Ex. B-9 at US00287.

47. In that letter Moeller informed Plaintiff that his extended sick leave request was approved, that any change to his sick leave status must receive prior approval from management, and that further communications would not be routed through the National Treasury Employees Union (NTEU) or his physician. *Id.*

48. Moeller sent Plaintiff this memorandum because he wanted to know if Plaintiff was going to be coming off of sick leave and he did not want to accidentally disclose medical information to NTEU. *See* Ex. E, p. 30:1-10 (US01068).

49. On February 2, 2006, Moeller issued a memorandum to Plaintiff. *See* Ex. B-10 at US00290. This memorandum was a management directive ordering Plaintiff to cooperate with the IRS tax examiner that was then conducting an audit of Plaintiffs income tax returns for tax years 2000, 2001, 2002, and 2003. *Id.* The directive also instructed Plaintiff to consent to an extension of the statute of limitations for all tax years as requested by the examiner. *Id.*

50. On March 9, 2006, Cindee Droge, President of NTEU Chapter 85, issued a response to Moeller on Plaintiffs behalf. *See* Ex. B-11 at US00291. This response questioned the directive and asked for it to either be withdrawn or clarified. *Id.*

51. On March 20, 2006, Debra Thompson, who was Moeller's supervisor and Territory Manager of SB/SE, Western Area Examination, responded to Droge's letter. *See* Ex. B-12 at US00292. That letter

answered Droge's questions and withdrew the request that Plaintiff consent to an extension of the statute of limitations. *Id.*

Incident No. 6 (Compl. ¶ X, ECF No. 1): On or about February 27 and March 14, 2006, Plaintiff's prior supervisor refused to meet with him to discuss his performance appraisal.

Incident No. 9 (Compl. ¶ XIII, ECF No. 1): On or about March 9, 2006, Plaintiff's prior supervisor issued him an inaccurate performance appraisal.

52. On February 27, 2006, Snider gave Plaintiff his annual performance appraisal for the period of October 31, 2004, to October 31, 2005. *See* Ex. B-14 at US00343; Ex. E, p. 97:7-14 (US01135).

53. Snider prepared this appraisal on January 11, 2006, and it was signed by Armstrong on January 25, 2006. *See* Ex. B-14 at US00343; Ex. E, p. 97:7-14 (US01135).

54. Snider gave Plaintiff an overall rating of "exceeds fully successful," with an average score of 4.2 on a 5-point scale. *See* Ex. B-14 at US00343.

55. On February 15, 2006, Plaintiff told Snider that he was willing to come in and sign his 2005 performance appraisal. *See* Ex. C-2 at US00592.

56. On February 27, 2006, Snider told Plaintiff that she gave his files to Moeller so he should, "... get with [Moeller] about [his] appraisal." *Id.*

57. In mid-March 2006, Plaintiff emailed Snider that he disagreed with his performance appraisal and wished to speak with her and have it changed. *See* Ex. C-1 at US00590-591.

58. In response Snider stated: "I am not open to changing the rating numbers. I gave consideration to the ratings as I was preparing the appraisal and they are fair . . ." and, "If you do not agree with the ratings I gave you on your appraisal, talk to [Moeller] about writing a rebuttal." *Id.*

59. Snider forwarded Plaintiff to Moeller because, since Plaintiff was just recently promoted, Moeller was Plaintiff's supervisor and had all of his documentation. *See* Ex. E, pp. 99:20-100:4 (US01137-1138).

60. Plaintiff believes his appraisal is inaccurate because Snider did not increase it after she told him that his good work would be reflected in his appraisal and because one of his coworkers complimented his work. *See* Ex. D, p. 80:14-25 (US00821).

Incident No. 12 (Compl. ¶ XVI, ECF No. 1):

On or about May 3, 2006, Plaintiff's former supervisor denied his request to be compensated for higher graded duties performed in 2004 and 2005.

61. In late 2005, Snider and Plaintiff had a meeting in which Snider told Plaintiff that he might qualify for a temporary promotion for completing work at a higher graded level. *See* Ex. D, p. 39:7-22 (US00780).

62. Prior to that meeting, Plaintiff had not considered whether he was entitled to a temporary promotion for completing higher graded work. *See* Ex. D, p. 40:5-8 (US00781).

63. Under the 2006 National Agreement between NTEU and the IRS (2006 National Agreement), Article 16, § 1B2, Plaintiff would qualify for a temporary promotion if he could show that he performed higher graded duties for 25% or more of his direct time during a four month period. *See* Ex. B-15 at US00449-451.

64. Snider did not have time to complete the computations to determine whether Plaintiff qualified for a temporary promotion, so she requested that Plaintiff provide a write up substantiating his requests. *See* Ex. E, p. 105:11-16 (US01143).

65. Plaintiff provided Snider the requested write up and, on January 11, 2006, Snider forwarded it to Trang Nghe, a Labor Relations Specialist, for processing. *See* Ex. B-13 at US00293-299; Ex. D, p. 42:9-24 (US00783).

66. Plaintiff did not receive a temporary promotion for his higher graded work from labor relations. *See* Ex. E, p. 107:7-10 (US01145).

67. NTEU then filed a complaint with the Treasury Inspector General for Tax Administration (TIGTA), alleging that Snider had committed illegal activity in keeping Plaintiff on higher graded cases

without a promotion. *See* Ex. E, p. 107:18-24 (US01145).

68. Snider filed a response to the TIGTA complaint, stating that Plaintiff did not qualify for a temporary promotion and provided her own calculations of the grade level of Plaintiffs work. *See* Ex. E, p. 108:1-18 (US01146).

69. During EEOC proceedings, counsel acknowledged some miscalculation on the grade level issue and some mutual understanding that Plaintiff should receive a single, 120-day temporary promotion/higher grade pay. *See* Ex. E, p. 113:7-12 (US01151).³

III. LEGAL STANDARDS AND BURDENS IN EMPLOYMENT CASES

A. SUMMARY JUDGMENT

Summary judgment shall be granted when “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party has the initial burden of showing the absence of a genuine issue of material fact, with the court viewing the facts and reasonable inferences in the light most favorable to the non-moving party. *See Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing version of

³ Citations below to these statements of material fact will appear as “SMF No. ____.”

events. See *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1237, 1239 (D. Nev. 1994) (citations omitted). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); accord *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Supreme Court's 1986 trilogy of cases, cited above, establish that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Pioneer Chlor Alkali*, 863 F. Supp. at 1240 (quoting *Celotex*, 477 U.S. at 327) (quoting Fed. R. Civ. P. 1).

B. SUMMARY JUDGMENT IN THE EMPLOYMENT CONTEXT

In the present context, a plaintiff must provide initial evidence giving rise to an inference of discrimination or retaliation, typically by satisfying the elements

of a prima facie case. See *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003); *Wallis v. JR. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).⁴ If the plaintiff establishes a prima facie case, then a burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action at issue. See *Vasquez*, 349 F.3d at 640; *Wallis*, 26 F.3d at 889 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). If the defendant articulates such a reason, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination. See *Vasquez*, 349 F.3d at 640 (citation omitted); see also *Cohen v. Fred Meyer, Inc.* 686 F.2d 793, 796-97 (9th Cir. 1982) (applying *McDonnell Douglas* allocation of proof to retaliation claim); cf. *Wallis*, 26 F.3d at 889 (after the defendant satisfies its burden of production, the *McDonnell Douglas* presumption of unlawful discrimination drops out of the picture, and the court looks to see whether a genuine issue of material fact has been presented for trial) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)); see also *Smith v. Barton*, 914 F.2d 1330, 1339-40 (9th Cir. 1990) (applying Title VII's *McDonnell Douglas/Burdine* framework to disability claim arising under Rehabilitation Act). A plaintiff must show that a rational trier of fact could, based on the evidence, find that the employer's action was taken for impermissibly discriminatory reasons. See *Wallis*, 26 F.3d at 889. At

⁴ The elements of a prima facie case for each particular type of alleged discrimination are set forth below in the first applicable section of the Argument.

all times, the ultimate burden of persuasion that the defendant intentionally discriminated or retaliated against the plaintiff remains with the plaintiff. *See Cohen*, 686 F.2d at 796-97 (retaliation claim) (citing *Burdine*, 450 U.S. at 253) (discrimination claim).

IV. ARGUMENT

A. INCIDENT NOS. 1: ARMSTRONG'S NOVEMBER 1, 2005 SELECTION OF MICHAEL SELLS OVER PLAINTIFF AND FOUR OTHER APPLICANTS FOR JOB VACANCY #50-14-SP50889B.⁵

1. Plaintiff Cannot Show Race Discrimination.⁶

The prima facie elements for a non-selection claim as follows: (1) plaintiff belongs to a protected class; (2) plaintiff was qualified for the position he held (or to which he wished to be promoted); (3) plaintiff was terminated or demoted from (or denied promotion to) the position at issue; and (4) the position went to someone outside of the plaintiffs protected class. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005).

Two positions were mentioned in job vacancy #50-14-SP50889B. SMF No. 2. Plaintiff does not meet the fourth element of a prima facie case for the unfilled position because the position was unfilled. SMF No. 12.

⁵ In his Motion, Plaintiff also refers to an April 2005 job vacancy, which is not a subject of his Complaint.

⁶ Plaintiff does not allege disability discrimination for the non-selection incident. *Compare* Compl. ¶¶ III, IV with ¶ V.

In addition to not selecting Plaintiff, who was tied with Munoz in being ranked no. 2, Armstrong also did not select Munoz (Hispanic), Cronin (white), and Walker (race information not available). SMF Nos. 3, 8. Of the remaining applicants, none of whom was selected, at least two differed in race from Plaintiff, and one shared the same race as the selectee. SMF No. 3. The second white applicant did not obtain the second vacancy position; no one did. SMF Nos. 3, 12. Plaintiff fails to meet the prima facie elements; these facts do not give rise to a reasonable inference of racial discrimination as to the unfilled vacancy.

Defendant does not dispute, for present purposes, satisfaction of the prima facie elements as to the selection of Sells for the other position under job vacancy #50-14-SP50889B. Still, Federal Defendant is entitled to judgment as a matter of law because there is no evidence showing the Federal Defendant's stated legitimate reasons (the selectee, Sells, was ranked number one and had no overhanging cloud of conduct issues like the then-pending Inspector General's investigation about possible misuse of a government credit card by Plaintiff), see SMF Nos. 7, 11-18, to be a pretext for a selection decision that was actually based on the prohibited criteria of race, see *Vasquez*, 349 F.3d at 641 ("Vasquez's claim fails because, even assuming (which we do not decide) that he can make out a prima facie case . . . he cannot establish that the County's articulated non-discriminatory reason for his transfer is pretextual."); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062-63 (9th Cir. 2002) ("even if Villiarimo made

out her prima facie case, she has not demonstrated that Aloha's explanations for her termination . . . are pretextual."); *accord Wallis*, 26 F.3d at 892 (affirming summary judgment against a plaintiff who made out a prima facie case). As also indicated above, there was another white applicant who was not selected for the second position. SMF Nos. 3, 12.

From all this, Plaintiff was not treated differently than three other unsuccessful applicants – with differing races, Munoz (Hispanic), Cronin (white), and Walker (race information not available) – one of which was tied with Plaintiff in being ranked number 2. SMF Nos. 3, 8, 12. Pretext can be negated by a showing that similarly situated employees were treated in a like manner to the plaintiff. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001) (concluding that similar treatment negated any showing of pretext) *cited with approval in Vasquez*, 349 F.3d at 641 n.14; *Sanders v. Culinary Workers Union Local No. 226*, 804 F. Supp. 86, 92-93, 102 (D. Nev. 1992) (granting summary judgment for employer where it had terminated other employees, like plaintiff, for violating safety policies); *cf. Burdine*, 450 U.S. at 258. ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.") (citing *McDonnell Douglas*, 411 U.S. at 804). Plaintiff cannot establish pretext.

"Title VII does not ensure the best will be selected – only that the selection process will be free from impermissible discrimination." *Casillas v. US. Navy*, 735 F.2d 338, 344 (9th Cir. 1984); *see also Peters v.*

Shamrock Foods Co., 262 Fed. Appx. 30, 33 (2007 WL 4553528) (9th Cir. 2007) (“That Shamrock made unwise business decisions does not support an inference of discrimination.”) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000)); *Coleman*, 232 F.3d at 1285 (“That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age.”) (citations omitted); *see also* 8th Cir. Jury Inst. § 5.11 (2013) (“You may not return a verdict for the plaintiff just because you might disagree with the defendant’s (decision) or believe it to be harsh or unreasonable.”). This is because federal courts do not sit as super-personnel departments to second-guess the business decisions of employers. *See Mason v. Avaya Commc’ns, Inc.* 357 F.3d 1114, 1122 (10th Cir. 2004); *Dorsey v. Pinnacle Automat’n Co.*, 278 F.3d 830, 837 (8th Cir. 2002); *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029, 1035 (7th Cir. 1999); *Fischbach v. Dist. of Columbia Dep’t of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996); *Green v. Maricopa County Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) (“The focus of a pretext inquiry is whether the employer’s stated reason was honest, not whether it was accurate, wise, or well-considered. We do not sit as a super personnel department that reexamines an entity’s business decision and reviews the propriety of the decision.”) (internal quotation marks and citation omitted); *cf. Aguilera v. Baca*, 510 F.3d 1161, 1171 (9th Cir. 2007) (in civil rights case brought by employees of county sheriff’s department, court explained that it will not act as a “super-personnel board to

micromanage the employment actions of law enforcement professionals.”).

As also explained by the Ninth Circuit, “the district court’s conclusions must be based on factual findings grounded in the record, and not on vague, impressionistic notions that [defendant] must have discriminated against [plaintiff] because he is deserving of a better job.” *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993). Pretext does not mean unwise or objectively false; pretext means pretext for discrimination, see *St. Mary’s Honor Ctr.*, 509 U.S. at 515-516; see also *Snider v. Greater Nev., LLC*, No. 3:07-cv-00583-RCJ-RAM, 2009 WL 3319802, at *7 (D. Nev. Oct. 14, 2009) (“the plaintiff must demonstrate that the employer’s alleged reason for the adverse employment decision is a pretext for another motive that is discriminatory”) (quoting *Wallis*, 26 F.3d at 889), *aff’d*, 426 Fed. Appx. 493 (2011 WL 1302231) (9th Cir. 2011). Plaintiff’s disagreement with Mr. Armstrong’s selection decision is insufficient to survive summary judgment.

2. Plaintiff Cannot Show Retaliation.

The prima facie elements of a retaliation claim are as follows: (1) the plaintiff engaged in a protected activity; (2) the plaintiff suffered an adverse employment action; and (3) there is a causal link between the first two elements. See *Vasquez*, 349 F.3d at 646 (citing

Kortan v. Cal. Youth Auth., 217 F.3d 1104, 1112 (9th Cir. 2000)); *Cohen*, 686 F.2d at 796.⁷

Plaintiff does not claim to have filed an earlier EEO complaint in general nor one directed at Armstrong in particular. Plaintiff refers only to his application's notation about serving on a diversity and EEO advisory committee. There is no evidence that Armstrong paid any attention to that notation, much less that he harbored animosity toward Plaintiff because of the committee membership. Indeed, Armstrong did not recall the notation, for he testified that he was unaware of Plaintiff's membership. Ex. E, p. 9:1-4 (US01047). Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in protected activity." *Cohen*, 686 F.2d at 796; *see also Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133, 148 (2000) (the "strength of the plaintiff's prima facie case" is a factor in deciding whether judgment as a matter of law is warranted).

For the same reasons stated in the preceding subsection, Plaintiff does not have "specific and substantial" circumstantial evidence of pretext. *Villiarimo*, 281 F.3d at 1062 (citation omitted). "Merely denying the credibility of the employer's proffered reasons is insufficient to withstand summary judgment." *Munoz v. Mabus*, 630 F.3d 856, 865 (9th Cir. 2010) (citation

⁷ For Title VII retaliation cases, the Supreme Court has recently rejected the motivating-factor test, and required proof of but-for causation for the adverse employment action. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517, 2531 (2013).

omitted); *see also* *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (“To avoid summary judgment, Bradley ‘must do more than establish a prima facie case and deny the credibility of the [defendant’s] witnesses. She must produce specific, substantial evidence of pretext.”) (quoting *Wallis*, 26 F.3d at 890).

**B. INCIDENT NOS. 2-5, 7-8, 10-11: MOELLER’S
PROCESSING OF PLAINTIFF’S REQUEST
FOR 478 HOURS (12 WEEKS) OF SICK
LEAVE**

**1. Plaintiff Cannot Show That He Was
Disabled and Qualified.**

The prima facie elements for a claim of disability discrimination in the federal employment context are as follows: (1) plaintiff was disabled within the meaning of the Rehabilitation Act; (2) plaintiff was a qualified individual able to perform the essential functions of the job, either with or without reasonable accommodations; (3) the employer acted adversely against the plaintiff solely because of the disability. *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999); 29 U.S.C. § 794(a).

A disability is a physical or mental impairment that substantially limits one or more major life activities. *See Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1174 (9th Cir. 1998); 29 C.F.R. § 1630.2(g). “Substantially limits” means the inability to perform a major life activity as compared to the average person in the general population, or a significant restriction as

to the condition, manner, or duration under which an individual can perform the particular activity. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002) (citing 29 C.F.R. § 1630.2(j)), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. EEOC guidelines define major life activities as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1614.203(a)(3). With respect to working, a plaintiff must show that, because of an impairment, he is unable to work in a broad category of jobs, not just his particular job. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. UPS, Inc.* 527 U.S. 516, 523 (1999); *Coons v. Sec’y of Treas.*, 383 F.3d 879, 855 n.1 (9th Cir. 2004).

The evidence does not establish that Plaintiff was disabled at the time of the events at issue in. The letter from Plaintiff’s doctor indicated merely that Plaintiff would be temporarily incapacitated from his particular job for three months. SMF Nos. 25-26. That letter did not establish that Plaintiff was unable to work in a broad category of jobs or for a duration of more than a few months, *see Conkle v. Postmaster Gen’l*, EEOC Appeal No. 01981545 (2001) (an employee is not substantially limited by a temporary condition that lasts only a few months).

Even if Plaintiff were disabled as of this early 2006 time frame, he has not shown that he was capable

of performing his job at the IRS, with or without reasonable accommodation.⁸

2. Plaintiff Cannot Show Discrimination.

For an incident other than a failure to hire or promote, the prima facie elements for discrimination have been articulated as follows: (1) plaintiff belongs to a protected class; (2) plaintiff was performing according to the employer's legitimate expectations; (3) plaintiff suffered an adverse employment action; and (4) other employees with qualifications similar to plaintiff's own were treated more favorably. *Vasquez*, 349 F.3d at 640 n.5 (citations omitted).⁹

To be similar, the plaintiff and the alleged comparator must have "similar jobs" and "display similar conduct." *Vasquez*, 349 F.3d at 641. There were no

⁸ To the extent that Plaintiff relies on subsequent evidence relating to a disability-retirement, it suggests he was not capable of performing his job, with or without a reasonable accommodation.

⁹ More favorable treatment of similarly situated employees outside of a plaintiff protected class can also be probative of pretext, see *Vasquez*, 349 F.3d at 641, while pretext can be negated by a showing that similarly situated employees were treated in a like manner to the plaintiff, see *Snead*, 237 F.3d at 1094 (concluding that similar treatment negated any showing of pretext) cited with approval in *Vasquez*, 349 F.3d at 641 n.14; *Sanders*, 804 F. Supp. at 92-93, 102 (granting summary judgment for employer where it had terminated other employees, like plaintiff, for violating safety policies); cf. *Burdine*, 450 U.S. at 258 ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.") (citing *McDonnell Douglas*, 411 U.S. at 804)).

similarly situated employees to Plaintiff. Moeller had not previously had an employee request 478 hours of sick leave. SMF No. 27. Plaintiff offers up as a comparator an employee with the last name of King. However, King's request for a little more than three days of sick leave is not the same as Plaintiff's request for 478 hours (twelve weeks).¹⁰ They do not become the same, for purposes of reasonably establishing a prima facie inference or pretext of illegal discrimination, merely because a union contract happens to make a demarcation at three days of sick leave. It is illegal discrimination, not an arguable deviation from contractual or personnel procedures, that Plaintiff must show. *See Look v. Donahoe*, 456 Fed. Appx. 695, 696 (2011 WL 5148584) (9th Cir. 2011); *Peters v. Shamrock Foods Co.*, 262 Fed. Appx. 30, 34 (2007 WL 4553528) (9th Cir. 2007); *cf. St. Mary's Honor Ctr.*, 509 U.S. at 514-515 (explaining that the Court has no authority to impose liability for unlawful discrimination based on some substitute-criterion).

Furthermore, none of the incidents involving this sick leave issue constitute an adverse employment action. There is no dispute that Plaintiff received day-to-day leave, pending Moeller's efforts to have Plaintiff supply additional information to the agency's FOH doctor for consideration and advice regarding the *in toto* request for 478 hours of sick leave. Making an informed decision, based on adequate information, is

¹⁰ Plaintiff's extensive request also came as his first act upon being assigned to Moeller's group; Plaintiff never actually reported to the office and worked under Moeller. SMF Nos. 20-23.

desirable, if not required. *Cf. Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (“[T]he employer has a duty to ‘gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are *necessary* to enable the applicant to perform the job. . . .” (ellipses in original) (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985)); *Humphrey v. Memorial Hosps. Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (“The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process.”) (citation omitted); *Barnett v. US. Air, Inc.*, 228 F.3d 1105, 1114-15 (9th Cir. 2000) (“Both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process.”) (citation omitted); *Martinez v. Shinseki*, No. 2:09-cv-01354-RLH-RJJ, 2012 WL 32961, at *4, 6 (D. Nev. Jan. 6, 2012) (granting summary judgment to employer in a case where plaintiff did not provide sufficient medical information about disability), *aff’d*, 2013 WL 6659164 (9th Cir. Dec. 18, 2013); *accord Reza v. IGT*, 2008 WL 2048357, at *4 (D. Nev. May 12, 2008) (granting summary judgment to employer where plaintiff did not provide sufficient information about disability), *aff’d*, 2009 WL 3497740 (9th Cir. 2009). During the period of, and because of, Plaintiffs non-cooperation, Moeller advised Plaintiff to report to work on February 27, 2006 or be charged absent without leave. That did not result, and threats do not necessarily constitute an adverse employment action, *cf. Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir.

1998) (holding that mere threats were not an adverse employment action for a police officer alleging First Amendment retaliation).

Because Moeller had not previously encountered a situation like Plaintiff's, and because Moeller was seeking guidance from a labor specialist and an FOH doctor, Moeller made the various requests including for Plaintiff to supply information, complete a form that would facilitate information to the FOH doctor, and/or report to work if information would not be forthcoming. There is no evidence that, in taking these steps, Moeller was motivated by Plaintiff's race. There is no evidence of intentional racial discrimination.

3. Plaintiff Cannot Show Retaliation.

In *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Court interpreted from Title VII a distinction between adverse actions for purposes of discrimination (disparate treatment) and for purposes of retaliation. The Court broadened the types of actions, which could be adverse for retaliation purposes, to acts outside of the work place. *See White*, 548 U.S. at 63-67. The Court also held that, for a retaliation claim, an action could be "materially adverse," from an objective standard, without necessarily affecting the terms and conditions of employment. *See id.* at 68-70.¹¹ For

¹¹ The "substantive" anti-discrimination provisions of Title VII focus on the work place, forbidding, for example, discrimination "with respect to" "compensation, terms, conditions, or privileges of employment" because of race, color, religion, sex, or

retaliation, an adverse action is one that could well “dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 68. Still, this is not protection from all notions of retaliation; the retaliation must produce real “injury or harm.” *Id.* at 67. Title VII does not redress “trivial harms”; it is not a “a general civility code for the American workplace.” *Id.* at 68 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)), cited in *Bishop v. Potter*, No. 2:08-cv-00726-RLH-GWF, 2010 WL 3910063, at *6 (D. Nev. Oct. 1, 2010).

Here, Plaintiff suffered no injury or harm – nothing that was materially adverse from an objective standard. He simply complains about the process including requests for him to cooperate and provide, or allow his doctor to provide, additional information.

Furthermore, Plaintiff cannot establish that but for his protected activity, Moeller would have immediately approved the request for 478 hours of sick leave. SMF No. 27. Again, Moeller had not previously encountered such a situation. He sought and took guidance from a labor specialist and an FOH doctor, SMF Nos. 27-32, 37, 40, neither of whom are even alleged to have had retaliatory animus.

national origin. See *White*, 548 U.S. at 62 (quoting Section 703(a)(1) of Title VII).

C. INCIDENT NOS. 6, 9: SNIDER'S APPRAISAL OF PLAINTIFF'S PERFORMANCE AS "EXCEEDS FULLY SUCCESSFUL" AND HER DECLINATION TO MEET WITH PLAINTIFF TO REVISIT SUCH APPRAISAL

1. Plaintiff Cannot Show That He Was Disabled and Qualified.

Defendant incorporates by this reference the discussion at Part IV.B.1, *supra*. Plaintiff has not shown that he was disabled within the meaning of the Rehabilitation Act and able to perform the essential functions of his job, with or without reasonable accommodations.

2. Plaintiff Cannot Show Discrimination.

Plaintiff's subjective view, that his performance appraisal was inaccurate, does not constitute an adverse employment action. Even mediocre performance evaluations alone do not constitute adverse employment actions. *See Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002). Here, Plaintiff received the second highest overall rating: "Exceeds Fully Successful." SMF No. 54. His average categorical score was 4.2 on a 5-point scale. SMF No. 54.

Likewise, Snider's declination to meet with Plaintiff and revisit a performance appraisal of "Exceeds Fully Successful" is not an adverse employment action.

Furthermore, there is also no evidence that race motivated Snider's non-adverse appraisal of Plaintiffs performance or her declination to meet with him and revisit the appraisal. There is no evidence that a qualified disability was the sole cause of Snider's decisions.

3. Plaintiff Cannot Show Retaliation.

Even under *White's* retaliation standard, Snider's actions are not "materially adverse," from an objective standard. *See White*, 548 U.S. at 68. Plaintiff suffered no "injury or harm." *Id.* at 67. Plaintiff received a positive rating of "Exceeds Fully Successful." SMF No. 54.

Additionally, Plaintiff has no evidence to establish that but, for his protected activity, Snider would have rated him higher than "Exceeds Fully Successful" or met with him to revisit her appraisal.

D. INCIDENT NO. 12: SNIDER'S PROCESSING OF PLAINTIFF'S MAY 3, 2006 REQUEST TO BE PAID AT A HIGHER GS-WAGE FOR WORK PERFORMED IN 2004

1. Plaintiff Cannot Show That He Was Disabled and Qualified.

Defendant incorporates by this reference the discussion at Part IV.B.1, *supra*. Plaintiff has not shown that he was disabled within the meaning of the Rehabilitation Act and able to perform the essential

functions of his job, with or without reasonable accommodations.

2. Plaintiff Cannot Show Discrimination or Retaliation.

The last incident involves a difficult, tedious assessment, per a union agreement, about whether Plaintiff had performed duties at a GS-wage level higher than his position for at least 25% of his work time during a four month period. Reasonable minds can differ in making such an assessment about past work, and the agency revisited that issue during the EEOC proceedings, SMF 61-69. Plaintiff has not identified a comparator who was treated differently based on race, disability, or protected activity.

Plaintiff has not shown that race was a motive, that disability was the sole cause, or that protected activity was the but-for cause of Snider's interactions with Plaintiff on this issue. As stated earlier, Plaintiff cannot substitute a miscalculation, or a deviation from contractual or labor procedures, for a requisite illegal reason. Neither can one element (an adverse action, given that pay was involved) serve to satisfy a separate, different element (that of causation or reason for the action). In short, any entitlement per a union agreement to certain compensation does not equate to liability for illegal discrimination.

V. CONCLUSION

From the material facts that are not genuinely in dispute, no reasonable trier of fact could find in Plaintiffs favor. Federal Defendant is entitled to judgment as a matter of law.

Dated: February 14, 2014.

DANIEL G. BOGDEN
United States Attorney

/s/ Patrick A. Rose
PATRICK A. ROSE
Assistant United States Attorney

[Proof Of Service Omitted]
