SUPREME COURT COPY

No. S196568

**IN THE SUPREME COURT OF CALIFORNIA**



VICENTE SALAS,
*Plaintiff and Appellant,*
v.
SIERRA CHEMICAL CO.,
*Defendant and Appellee.*

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# APPELLANT'S SUPPLEMENTAL BRIEF

**(CALIFORNIA RULES OF COURT, RULE 8.520(d))**

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Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

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## INTRODUCTION

Pursuant to Rule 8.520(d) of the California Rules of Court, Plaintiff and Appellant Vicente Salas submits this supplemental brief concerning authorities that were not available in time to be included in his prior briefing.

Plaintiff-Appellant's reply brief on the merits was filed on August 15, 2012, and his response to the brief of *amicus curiae* Employers Group was filed on December 21, 2012. In accordance with the Court's order of February 27, 2013, Plaintiff-Appellant's responsive supplemental brief on the question of whether federal immigration law preempts the state law rights asserted herein was filed on June 11, 2013. The following supplemental briefing will address authorities that postdated Plaintiff-Appellant's prior briefing on the above matters.

## DISCUSSION

### I. THE OPERATION OF SIERRA'S AFFIRMATIVE DEFENSES IS LIMITED WHERE CIVIL RIGHTS ARE AT ISSUE

This appeal is premised upon Sierra's audacious contention that its affirmative defenses not only deprive Salas of all remedies for its violations of the Fair Employment and Housing Act but, indeed, effectively absolve Sierra of any liability whatsoever for those violations. As previously explained, however, these arguments rest on inapplicable precedent and *dicta* and, moreover, on Sierra's failure to

recognize the limitations imposed upon its defenses by the paramount public policy against employment discrimination.[1]

Since Plaintiff-Appellant last briefed these issues, numerous courts have reaffirmed the holding of *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352 that in the civil rights context, the after-acquired evidence and unclean hands doctrines do not operate as a complete defense to liability. *See, e.g., Zisumbo v. Ogden Regional Medical Center* (N.D. Utah Nov. 22, 2013, No. 1:10-CV-73 TS) 2013 WL 6162992, *5 (holding, in Title VII race discrimination case, that after-acquired evidence of plaintiff's presentation of false letters concerning prior employment did not relieve an employer of liability for wrongful termination); *Miranda v. Deloitte LLP* (D. P.R. Aug. 23, 2013, Civil No. 12-1271 (FAB)) ___ F.Supp.2d ___, 2013 WL 4478695, *5 (stating, in sex and age discrimination case, that "after-acquired evidence of an employee's wrongdoing is not relevant for the purposes of employer liability", because "'[the employer] could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason'.") (citations omitted); *Hallmon v. Advance Auto Parts, Inc.* (D. Colo. 2013) 921 F.Supp.2d 1110, 1121 (observing, in Title VII race discrimination and retaliation case, that after-acquired evidence "does not bar the employee from all relief", and rejecting employer claim that it was entitled to summary judgment based on evidence that

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[1] *See, e.g.,* Appellant's Opening Brief ("AOB") at 20-32; Appellant's Reply Brief ("ARB") at 12-17; Answer to Brief of Amicus Curiae Employers Group at 2-17.

plaintiff had falsified his educational qualifications on his job application).

Intervening decisions also affirm that even if an after-acquired evidence defense were to be proven up in a civil rights case, it would only bar awarding any backpay that accrued after the relevant conduct was discovered. *See, e.g., Rhodes v. Arc of Madison County, Inc.* (N.D. Ala. 2013) 920 F.Supp.2d 1202, 1245-46 (affirming, in FMLA wrongful termination case, entitlement of plaintiff to backpay up until date of discovery of her concealment of a prior criminal conviction, notwithstanding that the concealment occurred when she applied for her job); *Peterson v. National Security Technologies, LLC* (E.D. Wash. Apr. 24, 2013, No. 12-CV-5025-TOR) 2013 WL 1758857, *10 (stating, in 42 U.S.C. § 1981 retaliation case, that after-acquired evidence doctrine "'limits a plaintiff's recovery to 'backpay from the date of the unlawful discharge to the date the information was discovered.'") (citing *McKennon*); *Zisumbo*, 2013 WL 6162992, *5 (same).

Most recently, in *Ambrose v. J.B. Hunt Transport, Inc.* (D. Or. Feb. 13, 2014, No. 3:12-cv-01740-HU) 2014 WL 585376, a disability discrimination case arising under Oregon law, the court refused to enter summary judgment against the plaintiff, who had misrepresented his medical history to the Oregon Department of Transportation in the course of obtaining a federally-mandated medical certification that was required for him to legally work as a commercial truck driver. Even though this misrepresentation went to the plaintiff's ability to satisfy governmentally-imposed requirements to hold his job, the court concluded "that the doctrine of after-acquired defense does not

act as a complete bar to recovery, nor does it entitle Defendant to summary judgment on all claims." (*Id.* at *24 (citing *Seegert v. Monson Trucking, Inc.* (D. Minn. 2010) 717 F.Supp.2d 863 (involving similar misrepresentation of medical history by commercial truck driver) and quoting with approval *Burkhart v. Intuit, Inc.* (D. Ariz. Mar. 2, 2009, No. CV-07-675-TUC-CKJ) 2009 WL 528603 ("the use of after-acquired evidence of wrongdoing to [completely] bar relief for an employer's act of discrimination is . . . inconsistent with the purpose of the ADA.")). (*Compare Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 639.)

With respect to the unclean hands defense, the intervening California decisions only reiterate the well-established proposition that the defense cannot be invoked where, as here, the act sought to be enjoined is against public policy. *See, e.g., Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 938.

## II. DEFENDANT'S DECLARATIONS DID NOT, IN ANY EVENT, PROVE UP ITS AFFIRMATIVE DEFENSES

The Court of Appeal based its outright dismissal of Salas' claims on just two pieces of evidence proffered by Sierra. One was the declaration of Kelly R. Tenney, the ostensible North Carolina declarant who stated, without the benefit of any evidence or detail, that the Social Security number used by Salas belonged to himself or herself. The other was also a declaration, this time of Stanley Kinder, Sierra's president, in which he unsurprisingly declared that Sierra would have terminated Salas had it believed that he was undocumented. The court below found that these declarations

conclusively established the factual predicates for the after-acquired evidence and unclean hands doctrines, and that no material triable facts remained.

The inadequacy of these declarations to serve as a factual basis for the disputed grant of summary judgment has been previously discussed.[2] Subsequent authority underscores, in particular, the insufficiency of Kinder's self-serving declaration to prove that Sierra would have fired Salas.[3] For example, the court in *Miranda, supra,* refused to credit the defendant's claim that had it known that the plaintiff's alleged actions had violated ethical standards governing certified public accountants, it would have terminated her. Instead, the court properly found the truth of that unexamined assertion to be a question for the jury:

> Because "employers often say that they will discharge employees for certain misconduct while in practice they do not," an employer must establish by a preponderance of the evidence "not only that it *could* have fired an employee for the later-discovered misconduct, that it *would* in fact have done so."

(*Id.,* 2013 WL 4478695, at *4-5 (emphasis in original); *see also Peterson, supra,* 2013 WL 1758857, *10 (same)). Likewise, in *Lalowski v. Corinthian Schools, Inc.* (N.D. Ill. Apr. 26, 2013, No. 10 C 1928) 2013 WL 1788353, a Title IX discriminatory termination case, the court gave no weight to a declaration from the school's vice

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2 AOB at 32-42; ARB at 17-19.

3 Plaintiff-Appellant has elsewhere argued that a strict construal of Kinder's declaration would demonstrate its infirmity for summary judgment purposes. (AOB at 39-41; ARB at 18-19.)

president that it would have terminated the plaintiff had it known of his résumé fraud:

> Defendants here do nothing more than assert Lalowski would have been fired after they discovered he failed to include all his employers on his resume. They fail to present any evidence that in the past they have fired other employees for such conduct. In fact, the only evidence Defendants provide is the aforementioned declaration. . . . As such, the Court rejects Defendants [sic] after-acquired evidence defense and finds reinstatement appropriate.

(*Id.*, 2013 WL 1788353, *9.)

Two other after-acquired evidence decisions underscore the scant value of the Kinder declaration. In one, the court found a plaintiff's denial that he would in fact have been fired for résumé fraud sufficient to rebut the employer's claim that it would have done so, defeating summary judgment and raising a genuine question of fact for a jury to decide. (*Hallmon, supra*, 2013 WL 328941, *8.)[4] In the second case, the court barred the employer from asserting the after-acquired evidence defense where the employer had known that the plaintiff had copied and disclosed confidential payroll documents, and claimed that it would have terminated the plaintiff in response but for its fear of a retaliation claim. (*Johnson v. Federal Express Corp.* (M.D. Pa. Feb. 28, 2014, No. 1:12-CV-444) 2014 WL 805995 ("a potential retaliation claim does not excuse the failure to take an adverse employment action.").)

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[4] In this case, by contrast, Plaintiff-Appellant does not simply deny that Sierra would have fired him had it learned of his alleged undocumented status; he has also provided specific facts to substantiate his belief that it would not have done so. (AOB at 41 (citing to AA, Vol. 2, ¶¶ 8-9).)

## III. NOTHING IN FEDERAL IMMIGRATION LAW COUNSELS AGAINST A FINDING OF LIABILITY AND DAMAGES

Misapprehending federal immigration law, Sierra has asserted that any finding of liability or damages against it in this matter would undermine the purposes of the Immigration Reform and Control Act of 1986 ("IRCA"), as well as the policies discerned in IRCA by *Hoffman Plastic Compounds, Inc. v NLRB* (2002) 535 U.S. 137. Since Plaintiff-Appellant's last briefing on the subject, however, at least two more state appellate courts have found otherwise.

In *Staff Management v. Jimenez* (2013) 839 N.W.2d 640, in which an employer challenged an undocumented employee's workers' compensation claim, the Iowa Supreme Court rejected the employer's assertion that the claim was preempted by IRCA. The court observed that "[t]he goal of the IRCA was to inhibit employment of undocumented workers and to punish the employers who offered jobs to these workers", not "to preempt labor protections under existing law". (839 N.W.2d at 650.) Adopting the reasoning of the Connecticut Supreme Court, *Staff Management* noted that absent the entitlement of undocumented employees to workers' compensation, "employers would have a financial incentive to hire undocumented workers because the employers could avoid liability under [the workers' compensation law]." (*Id.*, quoting *Dowling v. Slotnik* (1998) 244 Conn. 781, 810 [712 A.2d 396].) Likewise, the *Staff Management* court rejected the argument that *Hoffman* supported a finding of state law preemption. (839 N.W.2d at 652-53.)

And in *Ayala v. Lee*, a negligence action brought by undocumented plaintiffs based on injuries they sustained in a traffic accident, the Maryland Court of Special Appeals concluded that neither IRCA nor *Hoffman* required a denial to the plaintiffs of lost wages, loss of future earning capacity, or awards of medical expenses. In so doing, the court followed its Supreme Court in rejecting the argument "that Congress intended [IRCA] to preempt state laws whenever state laws operate to benefit undocumented aliens." (*Ayala v. Lee* (2013) 215 Md.App. 457, 476-77 [81 A.3d 584], quoting *Design Kitchen & Baths v. Lagos* (2005) 388 Md. 718, 738 [882 A.2d 817].) In so concluding, *Ayala* pointed out that "IRCA and its enforcement policies typically penalize employers rather than employees," and further observed that *Hoffman*'s backpay holding only applied within the National Labor Relations Act context. (215 Md.App. at 475.)

## IV. THIS COURT'S OPINION IN *HARRIS* SUPPORTS A FINDING OF LIABILITY, AND IS CONSISTENT WITH THE AVAILABILITY OF ALL REMEDIES

Finally, since Plaintiff-Appellant filed his reply brief on the merits, this Court has recognized the important public policy goals that counsel for findings of liability in FEHA actions where discriminatory intent substantially motivated a termination, even though the employer would have taken the same action absent the unlawful motive. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 229-31.) Plaintiff-Appellant submits that the same policy goals – the prevention and deterrence of discriminatory employment practices – similarly operate here to preclude immunizing employers from

liability for their civil rights violations due to factors having nothing to do with the discrimination alleged and that in no way excuse the employer's unlawful motives. As the Court observed, it "would tend to defeat the purposes of the FEHA" if employers were allowed to evade accountability for their discriminatory actions, and it "would breed discord and resentment in the workplace if [such actions were] allowed to be committed with impunity." (*Id.* at 230.)

In contrast to mixed-motive, same-decision cases where the employer would have fired the employee even absent discrimination, however, the concerns this Court articulated in *Harris* relating to the availability of remedies are not implicated here. In cases such as that at bar, where the plaintiff would have continued in his employment absent the discrimination, awards of noneconomic damages would neither amount to a windfall to the employee, nor would they limit the freedom of employers to make legitimate employment decisions. The same is true with respect to orders of reinstatement and backpay where the alleged employee wrongdoing was not discovered until after the employment relationship ended; neither would place the plaintiff in a better position than he would have been in absent the discrimination. To the contrary: the availability of all remedies (consistent with *McKennon*'s limitations on backpay) would not only address the harms caused to the plaintiff by the discrimination; it would also serve the FEHA's important goals of prevention and deterrence, and thereby further California's "fundamental public interest in a workplace free from the pernicious influence of [discrimination]." (*Id.* at 224 (quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 90.)

## CONCLUSION

These intervening decisions only reinforce that Sierra's asserted affirmative defenses cannot be invoked to support the wholesale dismissal of Salas's claims; that the Court of Appeal's affirmance of summary judgment usurped the role of the jury to determine critical facts that its two declarations failed to establish; and that neither IRCA nor *Hoffman* can be used by Sierra to justify a denial to Salas of his ability to hold it accountable for its discrimination against him, or to obtain meaningful remedies against Sierra should he prevail at trial. Moreover, this Court's decision in *Harris* to hold lawbreaking employers accountable for their actions despite assertedly nullifying factors counsels strongly in favor of denying such employers the windfall of being able to benefit from the labor of employees whom they can exploit, and then terminate, without the fear of any consequences whatsoever under the law.

Plaintiff and Appellant Vicente Salas respectfully requests that the Court reverse the decision of the court below, and remand this matter to the Superior Court for trial on the merits.

Dated: March 21, 2014

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(d)(2) of the California Rules of Court, I certify that this Appellant's Supplemental Brief contains 2,414 words, exclusive of the caption page, tables of contents and authorities, signature blocks, this Certificate and that appearing on the page following, and the attachments hereto.

Dated: March 21, 2014

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, RUBY PONCE, declare:

I am a citizen of the United States, over 18 years of age, employed in the City and County of San Francisco, and not a party to or interested in the within-entitled action. I am employed by THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, California 94104.

On March 21, 2014, I served the within

**APPELLANT'S SUPPLEMENTAL BRIEF**
**(CALIFORNIA RULES OF COURT, RULE 8.520(d))**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Certificate of Service was executed at San Francisco, California on March 21, 2014.

RUBY PONCE

Slip Copy, 2014 WL 585376 (D.Or.)
**(Cite as: 2014 WL 585376 (D.Or.))**

Only the Westlaw citation is currently available.

United States District Court, D. Oregon.
Lee AMBROSE, Plaintiff,
v.
J.B. HUNT TRANSPORT, INC., a foreign corporation, Defendant.

No. 3:12–cv–01740–HU.
Feb. 13, 2014.

Larry L. Linder, John D. Burgess, The Law Office of Larry L. Linder, LLC, Salem, OR, for Plaintiff.

Michael T. Garone, Jean Ohman Back, Stephanie P. Berntsen, Schwabe, Williamson & Wyatt, P.C., Portland, OR, for Defendant.

**OPINION AND ORDER**

HUBEL, Magistrate Judge:

*1 This case arises out of an employment dispute between Plaintiff Lee Ambrose ("Plaintiff") and his former employer, Defendant J.B. Hunt Transport, Inc. ("Defendant"). Defendant now moves, pursuant to Federal Rule of Civil Procedure ("Rule") 56(c), for summary judgment on Plaintiff's exclusively state law claims for violation of the Oregon Family Leave Act ("OFLA"), disability discrimination, failure to engage in interactive process, and workers' compensation discrimination. For the reasons that follow, Defendant's motion (Docket No. 32) for summary judgment is granted in part and denied in part.

**I. FACTS AND PROCEDURAL HISTORY**

Sometime in 2005, Plaintiff was driving a commercial truck for Vic West Steel, when he began to experience an accelerated heart rate, excessive sweating and nausea ("the 2005 incident"). Plaintiff received a clean bill of health after being examined by a cardiologist and his own physician. In early to mid–2006, Plaintiff had a similar episode while driving, where he experienced an accelerated heart rate, excessive sweating and shortness of breath ("the 2006 incident"). Plaintiff's dispatcher once again told him to consult with a doctor to determine the root cause of these episodes. Plaintiff did so and ultimately underwent a catheter ablation in May of 2006.[FN1]

FN1. As Defendant's counsel explained during oral argument, "a catheter ablation is where ... a catheter is inserted in the groin, goes up through the artery, into the heart, and then the surgeon ... kills a part of the heart muscle in order to eliminate [an arrhythmia issue] that a person may have." (Mot. Summ. J. Hr'g Tr. 3, Nov. 19, 2013.)

Plaintiff was hired by Defendant effective May 2, 2011, to work as a commercial truck driver. Defendant requires its drivers to comply with applicable Department of Transportation ("DOT") regulations. Possessing a valid DOT medical certificate is a prerequisite to being employed as one of Defendant's drivers. Defendant's policies state that obtaining a DOT medical certificate under false pretenses would be grounds for automatic termination. (Kreider Decl. ¶ 11; Ohman Back Decl. Ex. B at 15.) "[F]alsification of an application or any work, personnel, or other J.B. Hunt records" would also be grounds for automatic termination. (Kreider Decl. ¶ 11; Ohman Back Decl Ex. B at 15.)

Plaintiff understood that his position was contingent upon successfully passing a DOT examination and possessing a valid DOT medical certificate. As part of the hiring process, Plaintiff completed and signed a "Medical Examination Report For Commercial Driver Fitness Determination." (Ohman Back Decl. Ex. B at 2.) Under the health history section,

Plaintiff answered: (1) "no" to having "any illness or injury in the last 5 years," (2) "no" to prior "cardiovascular conditions," (3) "no" prior "heart surgery" or any "surgery," and (4) "no" prior "loss of or altered consciousness" or "fainting, dizziness." [FN2] (Ohman Back Decl. Ex. B at 2.) Plaintiff certified that he provided complete and accurate information, and he acknowledged that "inaccurate, *false, or missing* information may invalidate the [DOT] examination and [his] Medical Examiner's Certificate." (Ohman Back Decl. Ex. B at 2) (emphasis added).

> FN2. The Court notes that only the first question on the Medical Examination Report was limited to a five-year time period.

Plaintiff claims that he verbally informed Operations Supervisor, Mario Nucci ("Nucci"), and the DOT medical examiner, Stephanie Toman ("Toman"), M.D., about the 2005 incident, the 2006 incident and his May 2006 catheter ablation procedure. (Ambrose Dep. 54:19–55:6, 122:1–123:16, Jan. 25, 2013.) Plaintiff does not dispute, however, that he provided false information on the medical history form used by the DOT to evaluate his fitness to work as a commercial truck driver. (Ambrose Dep. 51:6–15, 52:1–9, 67:16–21.) Nor can Plaintiff dispute whether pertinent information regarding his medical history was missing from the Medical Examination Report.

***2** On December 29, 2011, Plaintiff began to suffer from cold symptoms while driving a semi-truck for Defendant from Portland, Oregon, to Weed, California, and back. After arriving in Weed at approximately 4:45 p.m. on December 29, 2011 (Ambrose Tr. 4:10–25, Dec. 30, 2011), Plaintiff took a dose of DayQuil to treat his chest cold symptoms (Ambrose Dep. 142:3–14). Plaintiff went to bed around 8:00 p.m. that evening. (Ambrose Tr. 17:21–25.) Plaintiff took another dose of DayQuil at approximately 3:00 a.m. on December 30, 2011 (Ambrose Tr. 17:5–10; Ambrose Dep. 142:16–17), and departed for Portland about six minutes later (Ambrose Tr. 3:22–4:1).

At approximately 6:00 a.m., thirty miles north of Grants Pass, Oregon, Plaintiff began to cough incessantly after extinguishing a cigarette and blacked out behind the wheel. (Ambrose Tr. 10:1–11:24; Ambrose Dep. 150:13–151:5.) The semi-truck careened across the median and several oncoming traffic lanes, through a guardrail, overturned on an embankment, and eventually came to rest underneath an overpass after narrowly missing the concrete support column. (Burgess Decl. Ex. 6 at 2; Ambrose Dep. 151:6–20, 152:11–153:7.) When Plaintiff regained consciousness, he was hanging upside down by his seat belt and needed assistance from a good Samaritan to get out of the cab. (Ambrose Dep. 151:22–152:1, 154:3–4.) Miraculously, no other vehicles were involved in the accident. (Ambrose Dep. 153:21–25; Burgess Decl. Ex. 6 at 3.)

Plaintiff immediately reported the accident to his direct supervisor, Account Manager Brad Kreider ("Kreider"), and then went by ambulance to the Three Rivers Community Hospital in Grants Pass, where he received treatment for a chest contusion (bruised chest) and fainting episode (syncope). The treatment notes prepared by the emergency room doctor, Douglas Howard ("Howard"), M.D., on the morning of the accident state:

> The patient appears uninjured other than some seat belt tenderness. It is not clear why he had a syncopal episode. I do not believe that simple coughing should cause syncope. *My query would be recurrence of his dysrythmia.* He has remained stable here. His plan is to return to Salem. *I have advised him absolutely no driving until he is further cleared by Cardiology.* He declines offer of analgesia, [so] all we will give is Tylenol and/or Ibuprofen for discomfort. He will follow up with Cardiology and his own physician when he returns to Salem.

(Ohman Back Decl. Ex. B at 22) (emphasis add-

ed).

Plaintiff was sitting on an emergency room bed when he was approached by Defendant's casualty investigator, David LaLande ("LaLande"). (Burgess Decl. Ex. 6 at 1–2.) Defendant had asked LaLande to obtain photographs of the accident scene and a recorded statement from Plaintiff.[FN3] (Burgess Decl. Ex. 6 at 1.) Plaintiff consented to have his statement tape-recorded by LaLande and certified that "the statements [ he] made [we]re true to the best of [his] knowledge." (Ambrose Tr. 20:22–21:1.) During the interview with LaLande, Plaintiff discussed his medical history, including a number of heart-related issues, in great detail. Also of note is that Plaintiff corrected himself after initially stating he had taken NyQuil, as opposed to DayQuil, at 3:00 a.m. that morning.[FN4] (Ambrose Tr. 17:5–10.)

FN3. LaLande received the assignment from Defendant at 6:30 a.m. (Burgess Decl. Ex. 6 at 1.) When he arrived at the accident scene, however, Plaintiff had already been transported to the hospital and LaLande was unable to obtain the necessary photographs due to lowlight conditions and the fact that the semi-truck needed to be pulled upright. (Burgess Decl. Ex. 6 at 1.)

FN4. Dr. Howard's emergency room record appears to be the only other place where a pre-termination reference to NyQuil can be found. (Ohman Back Decl. Ex. B at 21.) And the record does not indicate that Plaintiff made such a statement to one of Defendant's employees prior to being terminated.

***3** While at the hospital, an unnamed representative of Defendant asked LaLande to transport Plaintiff "to Asante Occupational Health Clinic for a blood test once he was discharged from the hospital." (Burgess Decl. Ex. 6 at 2.) LaLande escorted Plaintiff to the clinic at approximately 12:29 p.m. (Burgess Decl. Ex. 6 at 2, Ex. 9 at 1) and then returned to the scene of the accident, roughly thirty miles north of Grants Pass, to photograph the interior of the cab and look for any contraband, medications or alcohol (Burgess Decl. Ex. 6 at 2, Ex. 9 at 1). At 12:36 p.m., while at the clinic, Plaintiff notified Defendant's safety department that he needed to be cleared by a cardiologist before he could operate a vehicle. (Burgess Decl. Ex. 9 at 1.) At 1:03 p.m., Plaintiff notified Defendant's safety department that he completed the blood test. (Burgess Decl. Ex. 9 at 1.) At 1:29 p.m., LaLande completed his review and photographs of the accident scene.[FN5] (Burgess Decl. Ex. 9 at 1.)

FN5. The Court notes that the safety department records from the day of the accident reference that LaLande (the adjuster or ADJ) "called in," but the only callers that appear to be listed are Plaintiff (the driver or "V1") and Kreider (the account manager or "A/M"). (Burgess Decl. Ex. 9 at 1.)

That same day, presumably around the same time, Kreider began filling out a Safety Event Review. The true and correct copy of the three-page Safety Event Review is attached as Exhibit E to defense counsel's declaration. (Ohman Back Decl. ¶ 6.) When Kreider was deposed on May 7, 2013, he initially claimed that the entire Safety Event Review was drafted during a telephonic meeting held on January 4, 2012, even though the review date is listed as December 30, 2011. (Kreider Dep. 22:1–11, 34:12–35:3, May 7, 2013.) After taking a nine-minute break, Kreider asked to correct himself and proceeded to explain that he initiated the Safety Event Review on the day of the accident by typing in "the alpha code" and that "it was a collision," but he "didn't actually input any of the facts and information in there until ... the [telephonic meeting on January 4, 2012]." (Kreider Dep. 41:15–22, 42:15–24.) On September 2, 2013, Kreider submitted a declaration to the Court indicating that he prepared the Safety Event Review "at or near the time

of [the] Safety Event Review Meeting." (Kreider Decl. ¶ 7.) Kreider's testimony on this matter should be evaluated by a jury.

Under the section entitled "Conclusion of Review," the Safety Event Review states, among other things: (1) the safety department "is setting up a drug screen," (2) the "root cause" of the accident was improper rest and improper recognition of illness, (3) Plaintiff should "[a]lways report illness to management and never operate a truck with inadequate rest, breaks, or proper health," and (4) "[a]ny future safety events could lead to disciplinary actions up to and including termination of employment." (Ohman Back Decl. Ex. E at 1.) The second page of the Safety Event Review, however, indicates that Plaintiff had been terminated and that Kreider's electronic signature was affixed on January 4, 2012. (Ohman Back Decl. Ex. E at 2.)

In the afternoon or evening of December 30, LaLande submitted his investigative report to Defendant. The report is addressed to Defendant and dated December 30, 2011, the specified "loss date." (Burgess Decl. Ex. 6 at 1.) The report clearly states that LaLande enclosed a copy of Plaintiff's recorded statement (detailing his medical history and mistaken reference to NyQuil), a self-described "complete summary" of Plaintiff's statement, and the Oregon State Police Crash report. (Burgess Decl. Ex. 6 at 1–2.)

***4** Four days later, on January 3, 2012, Kreider called Plaintiff to let him know that a Safety Event Review would be conducted. (Ambrose Dep. 202:17–203:4.) Plaintiff informed Kreider that he would not be able to attend in person since he was not cleared to operate a vehicle. (Ambrose Dep. 203:6–9; *see also* Kreider Decl. ¶ 7.)

Plaintiff attended a telephonic Safety Event Review on January 4, 2012, before Kreider, Area Risk Manager Keith Phillips ("Phillips"), and General Manager of Delivery Services Mike Nicholson ("Nicholson") (collectively, "the safety review team"). (Nicholson Decl. ¶ 2; Phillips Decl. ¶ 2; Kreider Decl. ¶ 7.) During that teleconference, Kreider prepared a portion of the "Conclusion of Review" section based on Plaintiff's description of the accident *and* the Oregon State Police Crash Report. (Kreider Decl. ¶ 8; Kreider Dep. 22:1–11, 42:16–24.) When Plaintiff mentioned that he had taken DayQuil, Kreider asked for and received a picture message of the bottle because he "wanted to make sure that what [Plaintiff] was saying was accurate, that he was [actually] taking DayQuil" (Kreider 24:12–22), as opposed to, for example, NyQuil (Kreider Dep. 24:23–25:1).

By this time, Kreider and Nicholson both knew that "the physicians at the hospital wanted [Plaintiff] to be checked out again before he could drive." (Nicholson Decl. ¶ 2; Kreider Decl. ¶ 7.) Nevertheless, the safety review team apparently all agreed that improper rest and improper recognition of illness was the root cause of the accident (Kreider Decl. ¶ 7; Phillips Decl. ¶ 2), and that the accident was therefore preventable (Kreider Decl. ¶ 7; Phillips Decl. ¶ 2; Nicholson Decl. ¶ 3). Later that day, a Driver Status Change was prepared indicating that Plaintiff had been terminated for violating DOT regulations. [FN6] (Burgess Decl. Ex. 7 at 4–5.)

> FN6. *See* 49 C.F.R. § 392.3 (prohibiting drivers from operating commercial motor vehicles "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.")

Prior to being informed of his termination, Plaintiff claims that he "orally requested that he be returned to work upon his doctor's release, and that if possible he be employed in some other work in the interim."

(Second Am. Compl. ¶ 15; Ambrose Decl. ¶ 10.) On January 5, 2012, Plaintiff called Kreider to report an upcoming appointment with a cardiologist and was told that he had been fired. (Ambrose Dep. 215:1–22.) Sometime in April of 2012, Plaintiff was diagnosed with a heart condition necessitating a pacemaker. It was not until about the third week of April 2012 that Plaintiff was able to return to work as a commercial truck driver. Plaintiff continued to suffer from severe heart-related problems and had a stent implanted on May 16, 2012.

In early September 2012, Plaintiff commenced the present action against Defendant in Multnomah County Circuit Court, alleging state law claims for violation of the OFLA, disability discrimination, failure to engage in interactive process and wrongful discharge, along with a federal claim for violation of the Family and Medical Leave Act ("FMLA"). On September 26, 2012, Defendant removed the action to federal court on the basis of diversity and federal question jurisdiction. 28 U.S.C. §§ 1331, 1332. Following the grant of an unopposed motion for leave pursuant to Rule 15(a)(2), Plaintiff filed an amended complaint on October 18, 2012, alleging only state law claims for violation of OFLA, disability discrimination, failure to engage in interactive process, and workers' compensation discrimination.

## II. LEGAL STANDARD

***5** Summary judgment is appropriate "if pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). Summary judgment is not proper if factual issues exist for trial. *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir.1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U .S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Med., Inc.,* 343 F.3d 1107, 1112 (9th Cir.2003). Thus, summary judgment should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322.

At the outset, it must be noted that, for purposes of the pending motion only, Defendant "relies upon Plaintiff's allegations and admissions to demonstrate that, even if true, no genuine issue of material fact exists to defeat summary judgment on all claims." (Def.'s Mem. Supp. at 2.) "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment." *Barnett v. PA Consulting Group, Inc.,* 715 F.3d 354, 358 (D.C.Cir.2013) (citation omitted).

The court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.,* 669 F.2d 1278, 1284 (9th Cir.1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens,* 533 F.2d 429, 432 (9th Cir.1976). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.,* 638 F.2d 136, 140 (9th Cir.1981). However, deference to the nonmoving party has limits. The nonmoving party must set forth "specific facts showing a genuine issue for trial." FED.R.CIV.P. 56(e). The "mere existence of a scintilla of evidence in support of plaintiff's positions [is] insufficient." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine

issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

## III. EVIDENTIARY RULINGS

### A. Motion One

***6** At page eight of its memorandum in support, Defendant notes that its safety review team felt that "the December 30, 2011 *potentially deadly,* rollover accident was preventable." (Def.'s Mem. Supp. at 8) (emphasis added). Plaintiff moves to strike the emphasized language on the ground that it is irrelevant under Federal Rule of Evidence ("FRE") 401.

While the Court is mindful of the fact that "[d]efects in evidence submitted in opposition to a motion for summary judgment are waived absent a motion to strike or other objection," *FDIC v. N. H. Ins. Co.*, 953 F.2d 478, 484 (9th Cir.1991) (citing *Scharf v. U.S. Att'y Gen.*, 597 F.2d 1240, 1243 (9th Cir.1979)), not all "objections are necessary, or even useful, given the nature of summary judgment motions in general," *Burch v. Regents of the Univ. of Cal.*, 433 F.Supp.2d 1110, 1119 (E.D.Cal.2006). Indeed, "objecti[ng] to evidence on the ground that it is irrelevant ... [is] duplicative of the summary judgment standard itself." *Id.* Courts "can award summary judgment only when there is no genuine dispute of material fact." *Id.*

The Court is capable of determining which facts are relevant to Defendant's motion for summary judgment and disregarding extraneous or improper factual statements. The adjectives Defendant chooses to use in describing the accident in this case are not facts, but are properly treated as argument. No part of the Court's decision on this motion is based on the language objected to and therefore the motion is denied as moot.

### B. Motion Two

At page fourteen and fifteen of its memorandum in support, Defendant states: "*In a transparent attempt* to avoid the consequences of [Defendant's] after-acquired evidence and create a material issue of fact, Plaintiff subsequently testified he told his ... supervisor, Mario Nucci, and the [DOT] Medical Examiner that he had a catheter ablation in 2006 on or about April 27, 2011." (Def.'s Mem. Supp. at 14–15) (emphasis added). Here, Defendant is alluding to its assertion that, prior to being hired, Plaintiff made material misrepresentations to Defendant and the DOT medical examiner about his past medical history. Plaintiff moves to strike the emphasized language on the ground it is "inappropriate" and irrelevant under FRE 401.

The Court denies Plaintiff's motion to strike Defendant's counsel's use of the language "[i]n a transparent attempt," because it is not a factual statement. It is permissible legal argument, although not helpful.

### C. Motion Three

At page three of its memorandum in support, Defendant references that "*Plaintiff never advised ... the DOT* medical examiner, or J.B. Hunt, that he had lost consciousness while driving before he was hired or before the December 30, 2011 accident—and, in fact, now denies he ever lost consciousness before this accident despite his unambiguous admissions to the contrary." (Def.'s Mem. Supp. at 3.) Plaintiff moves to strike the emphasized language on the grounds that it is inaccurate and that Defendant lacks personal knowledge of that which it declares.

***7** Whether Defendant's statement in its argument is correct or not that Plaintiff has provided inconsistent reports and testimony on the subject of whether he had lost consciousness while driving prior to December 30, 2011, is not a basis to strike the argument. The motion is denied.

### D. Motion Four

At page four of its memorandum in support, Defendant states that:

> Plaintiff also reported his health history on the [DOT] Medical Examination Report. Again Plaintiff answered 'no' to having 'any illness or injury in the last 5 years,' 'no' prior 'heart surgery' or any 'surgery,' and 'no' prior 'loss of or altered consciousness' or 'fainting, dizziness.' Plaintiff certified that he provided 'complete and true' information. He acknowledged that 'inaccurate, false, or missing information may invalidate the examination and [his DOT] Medical Examiner's Certificate.' *Plaintiff denied all other prior medical history to the DOT medical examiner.*

(Def.'s Mem. Supp. at 4) (internal citations omitted) (emphasis added). Plaintiff moves to strike the emphasized language on the ground that the DOT medical examiner, Toman, "does not have any recollection concerning Plaintiff's DOT medical examination [and thus] cannot give testimony concerning matters about which she has no personal knowledge." (Pl.'s Resp. at 7–8.)

Again, this is defense counsel's argument of what the record evidence means. It is not an effort by counsel to "supplement" the record. Therefore, the motion is denied.

Of interest, having denied the motion, the Court notes that Toman concedes that she cannot specifically recall Plaintiff or his examination. (Toman Dep. 27:18–28:7, July 15, 2013.) Toman did, however, provide the following testimony regarding the notes she transcribed on Plaintiff's report during his examination:

> Q. Okay. And what do your notes say [on Plaintiff's DOT Medical Examination Report]?
>
> A. It looks like a little bit of, maybe, the date there is cut off, but I read (quoted): '18/2011, {left} heel injury—followed by podiatrist—no limitations,' and denies any other past medical history. Denies hospitalization. No medications.
>
> Q. Okay. Does it say anything about a catheter ablation [Plaintiff underwent in May 2006]?
>
> A. No.
>
> Q. If he had told you that he'd had a catheter ablation, is that something you would have written down?
>
> A. Yes.
>
> Q. Now, Mr. Ambrose has testified that he told you he had a catheter ablation but had no subsequent issues, and [that] you stated (quoted as read): 'All right. Then don't worry about it.' Do you recall any such conversation?
>
> A. No.
>
> Q. If you had that discussion, is that something you would have made note of?
>
> A. Absolutely.
>
> Q. And why is that?
>
> A. Because that's significant past medical history for someone that is going to be driving [semi-trucks].
>
> Q. Would you have made a note of it anywhere else in his records, or would it have been under this section [on the medical examination report entitled 'Medical Examiner's Comments on Health History']
>
> ***8** A. It would have been under that ... section ... and sometimes, if I ran out of room [in that section], I

> would have to write down the side [on the same page of the report].
>
> (Toman Dep. 13:12–14:18.)
>
> This is the record before the Court.

**E. Motion Five**

At page eight of its memorandum in support, Defendant states: "At the time of his December 30, 2011 accident, *Plaintiff did not know he had a medical condition,* which he subsequently believed caused the incident." (Def.'s Mem. Supp. at 8.) Plaintiff moves to strike the emphasized language on the ground that it is inaccurate. As Plaintiff goes on to explain, the passage of his deposition testimony cited by Defendant does not support this assertion because Plaintiff "testified he had been informed he had a heart attack by the ER physician." (Pl.'s Resp. at 8.)

Pure common sense and simple logic demonstrates Plaintiff's motion to strike lacks merit. Plaintiff did not visit the emergency room until after his December 30, 2011 accident. Defendant prefaced its statement regarding Plaintiff being unaware of a medical condition by stating "[a]t the time of his December 30, 2011 accident." If Plaintiff received information regarding a potential medical condition after the accident occurred, Defendant's counsel's statement is accurate. Plaintiff's counsel ignores Plaintiff's testimony that he "had a medical condition unknown to [him] at the time that caused [the December 30, 2011] accident." (Ambrose Dep. 245:21–22.) Motion denied.

**F. Motion Six**

At page eight of its memorandum in support, Defendant states:

> At the time of his termination [on January 5, 2012], Plaintiff had not been released to drive by a physician.
>
> While disputed, Plaintiff alleges that Mr. Kreider advised him that J.B. Hunt did not have any work for him, but once he was cleared to drive to let them know 'to see if ... we could get reviewed and possibly rehired.' *Plaintiff could not perform the essential functions* of the driving position, with or without reasonable accommodation. Plaintiff, however, was not aware of any open, light duty (non-driving) positions at J.B. Hunt at the time of his termination.

(Def.'s Mem. Supp. at 8) (emphasis added). Plaintiff moves to strike the emphasized language on the ground that it is an "[i]nappropriate legal conclusion unsupported by the cited material ." (Pl.'s Resp. at 8.)

Once again, Defendant's counsel is presenting an argument about whether the record raises a material issue of fact. Whether the record raises a question about Plaintiff's ability to perform the essential functions of the commercial truck driver position is addressed below in evaluating Plaintiff's disability discrimination claim. Motion denied.

**G. Motion Seven**

At page thirteen of its memorandum in support, Defendant states: "In sum, Plaintiff did not disclose *(1) the 1999 syncope;* (2) the 2006 catheter ablation ...; and (3) the 2009 syncope while driving to either J.B. Hunt or the DOT Medical Examiner prior to his employment." (Def.'s Mem. Supp. at 13) (emphasis added). Plaintiff moves to strike the emphasized language on the ground that "Defendant has offered no expert testimony as foundation for the assertion that any prior incident was a 'syncope.' " (Pl.'s Resp. at 8.)

***9** Whether Defendant correctly characterizes the 1999 event (or any other alleged syncopal event, for that matter) moved against, or not, is not a question the Court must resolve on this summary judgment motion.

As with many of the motions to strike, this is argument of counsel not factual evidence. Therefore the motion to strike is denied.

## IV. DISCUSSION

### A. OFLA Interference

Defendant argues that it is entitled to summary judgment on Plaintiff's OFLA interference claim on two grounds. First, Defendant contends that "Plaintiff could not have returned to work within twelve weeks after the incident and, therefore, OFLA would not protect Plaintiff as a matter of law." (Def.'s Mem. Supp. at 16.) Second, Defendant contends that "Plaintiff never qualified for OFLA because, prior to his termination, he did not establish that he suffered from a 'serious health condition.' " (Def.'s Mem. Supp. at 16.)

To the extent possible, OFLA is to be construed in a manner that is consistent with any similar provisions of the FMLA. OR.REV.STAT. § 659A.186(2). "Consistent with this legislative declared intent, the Oregon courts have looked to federal law when interpreting OFLA." *Sanders v. City of Newport,* 657 F.3d 772, 783 (9th Cir.2011). "FMLA and OFLA allow eligible employees to take twelve workweeks of leave per year to care for their own or a family member's serious health condition," *Lawson v. Walgreen Co.,* No. CV. 07–1884–AC, 2009 WL 742680, at *5 (D.Or. Mar. 20, 2009), and "[e]mployers are not allowed to deny or in any way interfere with an employee's right to take leave under either FMLA or OFLA," *id.*

Under his first cause of action, Plaintiff alleges that "Defendant interfered with his OFLA rights by terminating him before he was able to exercise such rights, and discharged [him] because he took medical leave." (Second Am. Compl. ¶ 18.) Plaintiff's first cause of action, as plead, is appropriately considered an interference claim. *See* 29 U.S.C. § 2615(a)(1). Indeed, as the Ninth Circuit explained in *Bachelder v. American West Airlines, Inc.,* 259 F.3d 1112 (9th Cir.2001): "By their plain meaning, the anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because he has used FMLA leave. Such action is, instead, covered under § 2615(a)(1), the provision governing '[i]nterference [with the] [e]xercise of rights.' " *Id.* at 1124 (citations omitted); *Hall–Hood v. Target Corp.,* No. 2:12–cv–01458–APG, 2013 WL 3030477, at *3 (D. Nev. June 14, 2013) (citing *Bachelder* for the same proposition).

Defendant's memorandum in support and Plaintiff's opposition brief correctly address Plaintiff's first cause of action as an interference claim brought pursuant to § 2615(a)(1). At page eight of its reply brief, however, Defendant characterized Plaintiff's allegation that Defendant "discharged [him] because he took medical leave" as a retaliation claim brought pursuant to § 2615(a)(2). *See Sanders,* 657 F.3d at 777 ("An allegation of a violation of [§ 2615(a)(2) ] is known as a 'discrimination' or 'retaliation' claim .") That is incorrect.

***10** Some circuits have invoked § 2615(a)(2) in cases where the employee "was subjected to an adverse employment action for taking FMLA protected leave." *Xin Liu v. Amway Corp.,* 347 F.3d 1125, 1133 n. 7 (9th Cir.2003). The Ninth Circuit, however, has "clearly determined that § 2615(a)(2) applies only to employees who *oppose* employer practices made unlawful by FMLA, whereas, § 2615(a)(1) applies to employees who simply take FMLA leave and as a consequence are subjected to unlawful actions by the employer." *Id.; see also Flores v. Merced Irrigation Dist.,* 758 F.Supp.2d 986, 996 (E.D.Cal.2010) (discharge constitutes an unlawful or adverse employment action under the FMLA).

Clarifying the appropriate characterization of Plaintiff's first cause of action is critical for two reasons. The first is that the Ninth Circuit does not apply the burden-shifting framework delineated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792

(1973), to interference claims. *Sanders,* 657 F.3d at 778. Instead, an employee can prove an interference "claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both." *Bachelder,* 259 F.3d at 1125. The second is that "the employer's intent is irrelevant to a determination of liability" in an interference case. *Sanders,* 657 F.3d at 778. Therefore, in evaluating the motion against the OFLA interference claim, the Court will not consider the motive of Defendant nor apply the *McDonnell Douglas* burden-shifting framework.

Because Oregon applies case law interpreting FMLA to OFLA claims, the discussion below is of FMLA case law. The elements of a prima facie OFLA interference claim are: (1) the employee was eligible for OFLA's protections, (2) the employer was covered by the OFLA, (3) the employee was entitled to leave under the OFLA, (4) the employee provided sufficient notice of her intent to take leave, and (5) the employer denied the employee OFLA benefits to which she was entitled. *See Perez–Denison v. Kaiser Found. Health Plan of the Nw.,* 868 F.Supp.2d 1065, 1080 (D.Or.2012); *see also Burnett v. LFW Inc.,* 472 F.3d 471, 477 (7th Cir.2006).

The Court begins by addressing Plaintiff's claim that "Defendant admits [that] it failed to inform [him] of the availability of OFLA leave." (Pl.'s Resp. at 13.) "[T] he employer is responsible, having been notified of the reason for an employee's absence [or having been notified that leave is needed], for being aware that the absence may qualify for FMLA protection." *Bachelder,* 259 F.3d at 1131; 29 C.F.R. § 825.302(c) (employees only need to "state that leave is needed.") Once such notice is given, "[i]t is the employer's responsibility to determine when FMLA [or in this case OFLA] leave is appropriate, to inquire as to specific facts to make that determination, and to inform the employee of his or her entitlements." *Amway Corp.,* 347 F.3d at 1134.

The record does suggest that Defendant received notice that a potential FMLA-qualifying absence was forthcoming. Specifically, on December 30, 2011, at 12:36 p.m., Defendant's safety department received a call from Plaintiff, indicating that he had to see a cardiologist before the emergency room doctor would clear him to drive. (Burgess Decl. Ex. 9 at 1.) That call to the safety department raises a material issue of fact as to whether Defendant was on notice that Plaintiff was in need of FMLA/ OFLA leave. *Cf. Cooper v. Gulfcoast Jewish Family Servs., Inc.,* No. 8:09–cv–787–T–30TBM, 2010 WL 2136505, at *7 (M.D.Fla. May 27, 2010) (denying motion for summary judgment on employee's interference claim because an "e-mail from [the employee] stating that her physician had referred her for further treatment and additional information would be forthcoming, create[d] a material disputed fact as to whether [the employer] was on notice that Plaintiff was requesting additional FMLA leave.")

***11** The problem for Plaintiff is that " 'an actionable 'interference' in violation of § 2615(a)' exists [only] when the plaintiff 'is able to show prejudice as a result of that violation.' " *Stewart v. Sears, Roebuck & Co.,* No. CV–04–428–HU, 2005 WL 545359, at * 11 (D.Or. Mar. 7, 2005) (citation omitted). Guided by that principle, judges from this district have disposed of interference claims at the summary judgment stage when, for example, the employee indisputably could not return to work within twelve weeks of being discharged. *See Santrizos v. Evergreen Fed. Sav. & Loan Ass'n,* Civ. No. 06–886–PA, 2007 WL 3544211, at *5–6 (D.Or. Nov. 14, 2007) (employee suffered no harm since he could not return to work within twelve weeks of the effective termination date); *Nelson v. Unified Grocers, Inc.,* No. 3:10–cv–00531–PK, 2012 WL 113742, at *1 (D.Or. Jan. 12, 2012) (Mosman, J.) (reversing recommendation to deny summary judgment on § 2615(a)(1) claims, stating, among other things, that "even assuming [the] discharge was retaliatory, there is no material dispute that [the employee] was unable to work for at least several months post-discharge.")

*Santrizos* and *Nelson* are consistent with the understanding that the right to reinstatement "is the linchpin of the [interference] theory [since] 'the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation that an employee will return to work after the leave ends.' " *Sanders,* 657 F.3d at 778 (quoting *Edgar v. JAC Prods., Inc.,* 443 F.3d 501, 507 (6th Cir.2006)). They are also consistent with the understanding that § 2615(a)(1) "is not a strict liability statute." *Grimes v. Fox & Hound Rest. Group,* No. 12–CV–1229–JAR, 2013 WL 6179292, at *10 (D.Kan. Nov. 25, 2013); *see also Throneberry v. McGehee Desha County Hosp.,* 403 F.3d 972, 979–80 (8th Cir.2005) ("Logic also dictates we interpret the FMLA to preclude the imposition of strict liability whenever an employer interferes with an employee's right to take FMLA leave"); *Edgar,* 443 F.3d at 508 ("By the same token, the FMLA is not a strict-liability statute.")

Without giving due consideration to the declared legislative intent of the OFLA and the Oregon appellate court decisions that have looked to federal law when interpreting the OFLA, *see, e.g., Yeager v. Providence Health Sys. Or.,* 195 Or.App. 134, 140 (2004), Plaintiff attempts to avoid the *Santrizos* line of cases by arguing that "they are federal cases interpreting FMLA rather than OFLA and thus are not controlling precedent." (Pl.'s Resp. at 13.) The Court is not persuaded by this argument and will look to federal law when interpreting the OFLA.

The Court is similarly unpersuaded by Plaintiff's argument that, "under Defendant's handbook, [he] was entitled to six weeks of personal leave, placing [his] release date (the third week in April) within the time permitted for [statutory] leave." (Pl.'s Resp. at 14.) Plaintiff cites no authority in support of this aggregation theory, and in the Court's view, such a theory has no place in the interference context.

***12** Employers are not liable under an interference theory if they "discharge a person who fails to return to work at the expiration of the twelve week period, even if [the employee] cannot return to work for medical reasons." *Kleinmark v. St. Catherine's Care Ctr .,* 585 F.Supp.2d 961, 963 (N.D.Ohio 2008). That is so regardless of whether the medical evidence revealing the employee's inability to return to work was discovered post-discharge, *Edgar,* 443 F.3d at 513, or even pertained to the same physical or mental condition "that forced the employee to take a medical leave in the first place," *id.* at 516, and regardless of whether the employee's ability to return twelve weeks after being discharged was due to a condition exacerbated by the decision to terminate, *Santrizos,* 2007 WL 3544211, at *7–8. The case law simply does not suggest, as Plaintiff posits, that employees can use personal leave to extend the twelve-week statutory leave period in order to revive an expired right to reinstatement and impose liability on their employer under the FMLA. Were that not the case, the twelve-week statutory leave period would become a sword, rather than a shield.

Defendant terminated Plaintiff's employment effective January 5, 2012. During his deposition, Plaintiff testified that he was not cleared to "drive a truck" until "about the third week of April" 2012, which would have been between 100 and 107 days after he was discharged. (Ambrose Dep. 243:19–244:9; 254:8–12.) Plaintiff has also made the following statement: "I was unable to work driving a vehicle until I had a pacemaker implanted and a right coronary st[e] nt [implanted on May 16, 2012]." (Ambrose Decl. ¶ 7; Ambrose Dep. 279:8–24; Pl.'s Resp. at 17.) Clearly Plaintiff was not capable of resuming his duties as a commercial truck driver within the FMLA-leave period of eighty-four days. *See generally Edgar,* 443 F.3d at 512 ("[T]he court is charged with resolving the objective question of whether the employee was capable of resuming his or her duties within the FMLA-leave period.") Defendant is therefore entitled to summary judgment on Plaintiff's in-

terference claim.

**B. Disability Discrimination**

Defendant argues that it is entitled to summary judgment on Plaintiff's disability discrimination claim because Plaintiff has failed to show that: (1) he was a "qualified individual" with a disability; (2) he suffered an adverse employment action because of his disability; and (3) Defendant's legitimate, nondiscriminatory reason for terminating his employment was mere pretext for disability discrimination.[FN7]

> FN7. Under his second cause of action, Plaintiff alleges that Defendant violated Oregon's disability discrimination statute, ORS 659A.112, when it "terminated [him] in substantial part either because of [his heart condition], or in the alternative, because Defendant perceived Plaintiff as being disabled." (Second Am. Compl. ¶ 23.) Plaintiff also alleges that Defendant discriminated against him in violation of ORS 659A.112 by failing to "attempt to accommodate [his] known disability." (Second Am. Compl. ¶¶ 15, 20.)

Oregon's disability discrimination statute "makes it an unlawful employment practice for an employer to refuse to hire or promote, to bar or discharge from employment, or to discriminate in the terms, conditions, or privileges of employment on the basis of an otherwise qualified person's disability." *Mayo v. PCC Structurals, Inc.*, No. 3:12–CV–00145–KI, 2013 WL 3333055, at *3 (D.Or. July 1, 2013) (citing ORS 659A.112(1)). The statute specifies that an employer discriminates by, *inter alia,* not making "reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability who is a[n] ... employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employee." OR.REV.STAT. § 659A.112(2)(e).

**1. The Prima Facie Case**

***13** Consistent with the legislative declared intent, ORS 659A.112 is to be construed to the extent possible in a manner that is consistent with any similar provisions in the Americans with Disabilities Act of 1990 ("ADA"). *See* OR.REV.STAT. § 659A.139. In order to establish a prima facie case of disability discrimination under the ADA, "a plaintiff must show that he: (1) is a disabled or perceived as such; (2) is a qualified individual, meaning he is capable of performing the essential functions of the job; and (3) suffered an adverse employment action because of his disability." [FN8] *Shepard v. City of Portland,* 829 F.Supp.2d 940, 963 (D.Or.2011); *Snead v. Metro. Prop. & Cas. Ins. Co.,* 237 F.3d 1080, 1087 (9th Cir.2001) ("The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law.")

> FN8. Plaintiff's second cause of action is entitled "disability/perceived disability discrimination," yet he presents arguments in support of claims for retaliation and simple failure to accommodate. In addition to failing to plead such claims, Plaintiff fails to recognize that they are distinct causes of action. *See Carvajal v. Pride Indus., Inc.,* No. 10–cv–2319–GPC, 2013 WL 1728273, at *6 (S.D.Cal. Apr. 22, 2013) (discrimination distinct from a cause of action for retaliation under the ADA); *Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1139 (9th Cir.2001) ("Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability.") The Court declines to consider any simple failure to accommodate claim or retaliation claim at this stage in the proceedings. *See Wasco Prods. v. Southwall Techs., Inc.,* 435 F.3d 989, 992 (9th Cir.2006) ("[S]ummary judgment is not a procedural second chance to

> flesh out inadequate pleadings"); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 665 (7th Cir.1997) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")

**a. Prong One: Disability**

The first prong requires the plaintiff to demonstrate that he is disabled within the meaning of the ADA. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). As should be clear from that definition, to establish a "regarded as" claim under the ADA, "the plaintiff must present evidence that the defendant [perceived him] as having a physical or mental impairment that substantially limits a major life activity." *Echols v. Lokan & Assocs., Inc.*, No. CV–06–293–ST, 2007 WL 756691, at *10 (D.Or. Mar. 7, 2007); *see also Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir.2000) ("To establish a 'regarded as' claim under the ADA, [plaintiff] must show that [defendant] perceived him as actually disabled.")

Plaintiff proceeds under alternative theories with respect to the first prong of the prima facie case, namely that he is disabled "by virtue of his heart condition," or alternatively, that "Defendant perceived [him] as being disabled" based on the December 30, 2011 accident.[FN9] (Second Am. Compl. ¶¶ 21–23.) Although Defendant disputes whether it had any knowledge or perception that Plaintiff was disabled, "for the purposes of this motion only, [Defendant] assumes Plaintiff may have had an actual disability at the time of his January 5, 2012 termination." (Def.'s Mem. Supp. at 21.) Because the ADA defines disability in the disjunctive, Defendant's concession is sufficient to create a genuine issue of material fact as to the first prong of Plaintiff's prima facie case of discrimination. *See Walsh v. Bank of Am.*, 320 F. App'x 131, 132–33 (3d Cir.2009) ("Because the ADA lists the three subcategories in the disjunctive, a plaintiff must only show that he is disabled under one of the three subparts to establish the first element of a prima facie disability discrimination case.")

> FN9. That Court notes that, in order prove a record of disability under § 12102(1)(B) of the ADA, the documentary record must indicate that the plaintiff is "actually disabled" under § 12102(1)(A); that is, he has an impairment that substantially limits one or more of his major life activities. *Miller v. Winco Holdings, Inc.*, No. CV 04–476–S–MHW, 2006 WL 1471263, at *6 n. 4 (D.Idaho May 22, 2006).

**b. Prong Two: Qualified Individual**

***14** In addition to showing that he is disabled under ADA, Plaintiff must also show that he is a "qualified individual." *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir.1996) (plaintiff bears burden of demonstrating that he is a qualified individual). A "qualified individual" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Despite Plaintiff's suggestion to the contrary, summary judgment is appropriate if no reasonable trier of fact could conclude that he is a "qualified individual." *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1230 n. 4 (9th Cir.2003); *see also Kellogg*, 233 F.3d at 1086 (failure to establish any element of a prima facie ADA case warrants summary judgment).

Determining whether Plaintiff is a "qualified individual" requires the Court to consider whether Plaintiff was able to perform the essential functions of the commercial truck driver position at the time of his termination *without* accommodation, and then, if he cannot, whether he was able to do so *with* reasonable accommodation. *See Dark v. Curry County*, 451 F.3d 1078, 1086 (9th Cir.2006), *cert. denied*, 549 U.S. 1205

(2007); *see also Kaplan,* 323 F.3d at 1231. If Plaintiff cannot perform the commercial truck driver position's essential functions even with a reasonable accommodation, then the ADA's employment protections do not apply. *Cripe v. City of San Jose,* 261 F.3d 877, 884–85 (9th Cir.2001).

The Court first addresses whether Plaintiff could perform the essential job functions of the commercial truck driver position *without* accommodation. Plaintiff argues that he is a "qualified individual" because he "performed the essential functions of a driver, i.e., driving truck, before and after the accident." (Pl.'s Resp. at 19.) Plaintiff's argument misses the mark. The question is whether Plaintiff could operate a vehicle at the time of his termination. An illustrative example is the Ninth Circuit's decision in *Curry County.*

In *Curry County,* the plaintiff did not dispute whether the operation of heavy machinery was an essential function of the position, choosing instead to dispute whether he was qualified to perform such function. *Curry County,* 451 F.3d at 1087. The Ninth Circuit concluded that there was no genuine issue of fact with respect to the plaintiff's qualifications *without* reasonable accommodation, stating:

> Had [plaintiff]'s treating physicians opined that [he] was fit to operate heavy machinery at the time of his firing, this perhaps would have given rise to a genuine issue of material fact as to his qualifications *without reasonable accommodation.* But the physicians actually recommended [plaintiff]'s return to work following a period of observation during which he could adjust to the change in his medication. [Plaintiff] provides no evidence that his seizures were under control at the time of his termination.
>
> ***15** *Id.* (internal citation omitted).

Because the undisputed facts in the record in this case indicate that Plaintiff was not cleared to operate a vehicle at time of his January 5 termination, no reasonable juror could conclude that he was able to perform the essential functions of the commercial truck driver position *without* accommodation. That conclusion flows logically from Plaintiff's own statements and from evidence presented by Defendant on what would appear to be an otherwise obvious and undisputed fact (namely, the essential functions of the commercial truck driving position). *See generally Bates v. United Parcel Serv., Inc.,* 511 F.3d 974, 991 (9th Cir.2007) ("[A]n employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions.")

The next issue is whether Plaintiff was able to perform the essential functions of the position *with* reasonable accommodation. The Ninth Circuit's decision in *Kaplan* demonstrates that Defendant is entitled to summary judgment to the extent Plaintiff proceeds on a theory that Defendant regarded him as disabled. In *Kaplan,* there was no issue of fact as to whether the employee could perform the essential job functions without accommodation, as is the case here. *Kaplan,* 323 F.3d at 1230–31. The Ninth Circuit held that there is no duty to accommodate an employee in an "as regarded" case. *Id.* at 1233. To the extent Plaintiff is bringing a "regarded as" case, the Court grants Defendant's motion for summary judgment in accordance with *Kaplan.* The disability discrimination claim rises or falls on the actual disability theory.

The remaining question, then, is whether, under a theory of actual disability, Plaintiff was able to perform the essential functions of the position *with* reasonable accommodation. Generally speaking, "[w]here an employee suffers from an actual disability (i.e., an impairment that substantially limits a major life activity), the employer cannot terminate the employee on account of the disability without first making reasonable accommodations that would enable the employee to continue performing the essential func-

tions of his job." *Weber v. Strippit, Inc.,* 186 F.3d 907, 916 (8th Cir.1999). The ADA's definition of discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A).

Plaintiff bears the burden of demonstrating that he could perform the essential functions of the position *with* reasonable accommodation. *See Kennedy, Inc.,* 90 F.3d at 1481. Reasonable accommodations may include, for example, reassignment to a vacant position or an allowance of time for medical care or treatment. *Taylor v. Pepsi–Cola Co.,* 196 F.3d 1106, 1109–10 (10th Cir.1999). But reasonableness is not a constant; rather, "what is reasonable in a particular situation may not be reasonable in a different situation—even if the situational differences are relatively slight." *Zukle v. Regents of Univ. of Cal.,* 166 F.3d 1041, 1048 (9th Cir.1999). That is why courts "must evaluate [a plaintiff's] requests in light of the totality of h[is] circumstances." *Id.; see also Nunes v. Wal–Mart Stores, Inc.,* 164 F.3d 1243, 1247 (9th Cir.1999) (assessing reasonableness of proposed accommodation "requires a fact-specific, individualized inquiry.")

***16** When viewed in the light most favorable to him, the record indicates that Plaintiff requested accommodation through either (1) reassignment to a vacant position or (2) an allowance of time (*e.g .,* time created by the use of medical leave, unpaid leave, an aggregation of leave, or an extension of an existing leave period) for medical care or treatment.

Indeed, with respect to the first accommodation, Plaintiff alleges that he requested to "be employed in some other work in the interim." (Second Am. Compl. ¶ 15.) Plaintiff also claims that, prior to being terminated, he requested reasonable accommodation of "modified duties." (Ambrose Decl. ¶ 10.) Plaintiff's declaration together with his deposition testimony makes clear that he sought an available position that would not conflict with his driving restrictions. (Ambrose Dep. 219:19–23; Second Am. Compl. ¶ 14.) In other words, Plaintiff requested accommodation through reassignment to a vacant position.

With respect to the second accommodation, Plaintiff alleges that Defendant refused his request to "be returned to work upon his doctor's release." (Second Am. Compl. ¶ 15.) Plaintiff also claims that, prior to being terminated, he informed Defendant the he "needed to see a cardiologist regarding possible heart conditions before being cleared to drive" and "requested [the] reasonable accommodation of time off of work." (Ambrose Decl. ¶¶ 9–10.) Because Plaintiff claims that he didn't "know [exactly] what was wrong with [him]" or "what [ his] medical condition was" at the time of his termination (Ambrose Dep. 246:9–23, 247:25–248:3), the Court construes Plaintiff's request for "time off work," or to "be returned to work upon his doctor's release," as a request for an allowance of time for medical care or treatment.

With respect to Plaintiff's request to be reassigned, an employee is a qualified individual under the ADA if he can "perform the essential functions of a reassignment position, with or without reasonable accommodation, even if [he] cannot perform the essential functions of the current position." *Hutton v. Elf Atochem N. Am., Inc.,* 273 F.3d 884, 892 (9th Cir.2001); *see also* 42 U.S .C. § 12111(9) (noting that reasonable accommodation may include reassignment to a vacant position). In order "[t]o survive summary judgment, Plaintiff must establish that he was qualified to perform an appropriate vacant job which he must specifically identify and show was available within the company at or about the time he requested reassignment." *Taylor,* 196 F.3d at 1110.

Plaintiff identifies no such vacant jobs within Defendant's company. Plaintiff presents no evidence

whatsoever demonstrating that appropriate vacant positions were available or would have become available within a reasonable time period. (Ambrose Dep. 276:7–14) ("[A]t or about the time you asked, do you have any facts that would lead you to believe that there were such openings at that time for light-duty positions? A. I don't know enough about this company to make a comment. So—Q. Okay. A.—no.") The sole record for the Court to consider is Plaintiff's statement that he was not "offer[ed] any light duty work" and Kreider's statement that "[Defendant] did not have any vacant and suitable positions for which [Plaintiff] was qualified at any time after the December 30, 2011 accident." (Kreider Decl. ¶ 10; Pl's Opp'n at 24.) Accordingly, there simply is no genuine issue of fact as to whether Plaintiff could have been accommodated through reassignment.

***17** Plaintiff also argues that his impairment ultimately proved to be remediable and Defendant failed to reasonably accommodate him by refusing to provide an allowance of time for medical care and treatment. "An allowance of time for medical care or treatment may constitute a reasonable accommodation." *Taylor,* 196 F.3d at 1110 (citation omitted). But "[a]n indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment." *Id.; see also Wynes v. Kaiser Permanente Hosps.,* 936 F.Supp.2d 1171, 1184 (E.D.Cal.2013) ( "[R]easonable accommodation is ... that which presently, or in the immediate future, enables the employee to perform the essential functions of the [position] in question.... [R]easonable accommodation does not require [an employer] to wait indefinitely for [the employee's] medical conditions to be corrected ." (quoting *Myers v. Hose,* 50 F.3d 278, 283 (4th Cir.1995))).

In *Hudson v. MCI Telecommunications Corp.,* 87 F.3d 1167 (10th Cir.1996), for example, the employee's duties required her to spend approximately six hours per day on the phone and at the keyboard. *Id.* at 1168. About fourteen months after being hired on January 6, 1993, the employee complained to her supervisor that she was experiencing pain in her hands and arms. *Id.* Over the course of the next three months, the employee was diagnosed with carpal tunnel syndrome; her treating physician issued restrictions providing that she was to take fifteen minutes off for each hour of repetitive, digital activity; the physician issued new restrictions on April 13, 1994, prohibiting typing and keyboard activity, thereby necessitating the performance of other tasks; and lastly, she was terminated on May 24, 1994. *Id.* Two months posttermination, in July of 1994, the employee underwent nerve decompression surgery, and she was ultimately released from her physician's care with no specific work restrictions in October of 1994 (*e.g.,* between 130 and 160 days after being discharged). *See id.*

On appeal, the employee in *Hudson* challenged the district court's conclusion, at the summary judgment stage, "that she failed to create a genuine issue of material fact concerning her status as a qualified individual under the ADA." *Id.* Because the employee conceded that she was unable to perform the essential functions of the position without accommodation, the *Hudson* court focused on the second part of the qualified individual analysis, namely "whether any reasonable accommodation by the employer would enable h[er] to perform [the essential] functions." *Id.* (citation omitted). The employee emphasized that "her impairment was clearly remediable and that [the employer] failed to reasonably accommodate her by refusing to provide unpaid leave while she sought necessary treatment." *Id.* at 1169. The Tenth Circuit rejected her argument and affirmed the judgment of the district court, stating:

> ***18** [A] reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation. In this case, however, plaintiff has failed to present any evidence of the expected duration of her impairment as of the date of her termination. The physicians' reports upon which plaintiff relies indicate only that

> permanent impairment was not anticipated at the time the reports were prepared. The forms provide no indication, however, of when plaintiff could expect to resume her regular duties at [the company]. Moreover, [plaintiff's doctor]'s notes through the date of her termination underscore the uncertainty of her prognosis. Under these circumstances, it makes no difference that [defendant] had the option of removing her from the payroll and paying the cost of her disability benefits. [Defendant] was not required to wait indefinitely for her recovery, whether it maintained her on its payroll or elected to pay the cost of her disability benefits. Accordingly, [plaintiff] has failed to present evidence from which a reasonable jury could find that the accommodation she urges, unpaid leave of indefinite duration, was reasonable.

*Id.; see also Larson v. United Natural Foods W. Inc.,* 518 F. App'x 589, 591 (9th Cir.2013) ("for a requested accommodation to be reasonable, the plaintiff must present evidence of the impairment's expected duration, and not the duration of the leave request" (citing *Hudson,* 87 F.3d at 1169).

As the Tenth Circuit explained in *Cisneros v. Wilson,* 226 F.3d 1113 (10th Cir.2000), *overruled on other grounds, Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356 (2001), they have distinguished *Hudson* and a found a request for leave to seek medical treatment constituted a reasonable accommodation, where the employee "submitted evidence from his doctor [indicating] that the expected duration of his treatment was four months and his prognosis for recovery was 'good.' " *Id.* at 1130 (citation omitted).

The Eleventh Circuit's decision in *Wood v. Green,* 323 F.3d 1309 (11th Cir.2003), *cert. denied,* 540 U.S. 982 (2003), is similarly illustrative. In that case, the jury returned a verdict in favor of the employee on his ADA discrimination claim after an eight-day trial. *Id.* at 1311–12. Shortly thereafter, the district court denied the employer's renewed motion for judgement as a matter of law—which required the court to view the evidence in the light most favorable to the employee—finding that the employee's requested accommodation for a leave of absence was not indefinite since he had demonstrated an ability to return to work within "a month or two" of experiencing cluster headaches. *Id.* at 1312.

On appeal, the Eleventh Circuit reversed the district court's order denying the employer's motion for judgment as a matter of law—applying the same standards as the district court—stating:

> While a leave of absence might be a reasonable accommodation in some cases, [plaintiff] was requesting an indefinite leave of absence. [Plaintiff] might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. [Plaintiff] was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future—at some indefinite time.... [Our prior case law demonstrates] that an accommodation is unreasonable if it does not allow psomeone to perform his or her job duties in the present or in the immediate future.

***19** *Id.* at 1314 (internal citations omitted). The Eleventh Circuit did acknowledge, however, that a prior decision had "parenthetically noted that more compelling facts might lead to a different result." *Id.* That decision provided the following hypothetical example: "[T]he ADA might be violated 'if an employee was terminated immediately upon becoming disabled without a chance to use his leave to recover.' " *Id.* (citation omitted).

Plaintiff was terminated six days after reporting a possible heart condition, arguably before he had a reasonable chance to determine if he was able to be cleared to drive by a cardiologist with or without

further treatment. This is materially different from the situation in *Hudson* where the plaintiff had been allowed months to determine what the medical issue was, what limitations were imposed by the doctor, and what treatment was suggested, but nonetheless was not able to present the employer with information by the time of termination about how long it would be before she could perform the essential functions with the accommodation of leave to seek medical treatment.

Likewise, this is distinguishable from the situation in *Wood* where the plaintiff had been given extensive leave over the course of many years to treat the medical condition. It is not clear that no reasonable juror could find on the facts of the present case that the employer was moving forward as fast as possible to a termination decision before the employee could obtain a medical evaluation of what his condition was and how soon he could perform the essential functions of his position if given the reasonable accommodation of leave for medical treatment. Thus, the "more compelling facts" dicta referenced in *Wood* are presented by this case. Accordingly, there is a genuine issue of fact as to whether Plaintiff could have been accommodated through an allowance of time for medical care and treatment.

**c. Prong Three: Causation**

The third and final prong of a prima facie case requires Plaintiff to show that he suffered an adverse employment action because of his disability. The parties do not dispute whether Plaintiff's termination would be considered an adverse employment action, but they do dispute whether an adverse action was taken because of Plaintiff's disability. "In Oregon, '[e]vidence that permits an inference of discrimination' is sufficient for a plaintiff to make a prima facie case that she was discriminated against because of her disability." *Snead,* 237 F.3d at 1089 (quoting *Henderson v. Jantzen, Inc.,* 79 Or.App. 654, 657 (1986)); *see also Head v. Glacier Nw. Inc.,* 413 F.3d 1053, 1065 (9th Cir.2005) ("[T]he ADA outlaws adverse employment decisions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation—a motivating factor standard.")

Plaintiff has met his burden of proffering evidence which permits an inference of discrimination. Defendant's only argument to the contrary is based on Plaintiff's testimony that neither he, nor Defendant, had any knowledge regarding "what was wrong with [him]" at the time of his termination. (Ambrose Dep. 246:9–247:1.) Plaintiff's testimony does not foreclose the possibility that Defendant knew about Plaintiff's disability. At the very minimum, the record suggests that: (1) Plaintiff was involved in an accident on December 30, 2011; (2) the casualty investigator contacted Defendant after he interviewed Plaintiff at the hospital and elicited information related to Plaintiff's history of heart-related issues; (3) Defendant was informed that Plaintiff could not drive until he was cleared by a cardiologist; and (4) Defendant terminated Plaintiff's employment six days later. The timing of these events, coupled with the information that was received, permits an inference of discrimination. That is sufficient to raise a genuine issue of fact as to the third and final element of Plaintiff's prima facie case of disability discrimination.

**2. Beyond the Prima Facie Case: Burden–Shifting**

***20** The Ninth Circuit applies the *McDonnell Douglas* burden-shifting framework to disability discrimination claims under the ADA. *Weaving v. City of Hillsboro,* No. 10–CV–1432–HZ, 2012 WL 526425, at *4 (D.Or. Feb. 16, 2012). Under that framework, once the employee establishes a prima facie case of disability discrimination, the burden shifts to the employer to provide some legitimate, nondiscriminatory reason for its allegedly discriminatory actions. *Shepard,* 829 F.Supp.2d at 963. If the employer does so, the burden shifts back to the employee to demonstrate that the reason was pretext for discrimination. *Weaving,* 2012 WL 526425, at *4.

Because Plaintiff has established a prima facie

case of disability discrimination, Defendant must proffer a legitimate, nondiscriminatory explanation for terminating his employment, "i.e., one that 'disclaims any reliance on the employee's disability in having taken the employment action.' " *Curry County,* 451 F.3d at 1084 (quoting *Snead,* 237 F.3d at 1093). Defendant's safety review team determined that Plaintiff's improper rest and improper recognition of illness was the root cause of the accident, making it "preventable" and in violation of DOT regulations. The safety review team emphasizes that they were "aware that Plaintiff's cold was so bad that, even after twice taking over-the counter medication, he coughed so hard that he passed out and lost control of his truck." (Def.'s Mem. Supp. at 27.)

The evidence in the record that raises a material issue of fact that Defendant's proffered non-discriminatory reason is a pretext includes the evidence referred to above at page forty-one, lines ten through nineteen. The evidence of discrimination can also serve to rebut the legitimate non-discriminatory reason for termination offered by Defendant. Who the jury believes is a classic material issue of fact here.

In addition, the emergency room doctor did "not believe that simple coughing should cause syncope" and questioned whether Plaintiff experienced a "recurrence of his dysrythmia." (Ohman Back Decl. Ex. B at 22.) The evidence in the record suggests this information was available to Defendant at the time of termination.

Absent a "few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Id.* (quoting *Humphrey,* 239 F.3d at 1139–40). "The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability." *Humphrey,* 239 F.3d at 1140.

The Ninth Circuit has, for example, "found that there was a sufficient causal connection between the employee's disability and termination where the employee was discharged for excessive absenteeism caused by migraine-related absences." *Id.* (citing *Kimbro v. Atl. Richfield Co.,* 889 F.2d 869, 875 (9th Cir.1989)). Similarly, the Ninth Circuit has found that there was a sufficient causal connection between the employee's disability and termination where the employee was discharged for absenteeism and tardiness caused by obsessive compulsive disorder. *See id.* (holding that "a jury could reasonably find the requisite causal link between a disability of OCD and [the employee]'s absenteeism and conclude that [the employer] fired [the employee] because of her disability.")

***21** Along similar lines, the employer in *Curry County* appeared to argue that the employee's "misconduct, if not resulting from his disability, stemmed from his failure to take proper precautions in light of his [epilepsy]." *Curry County,* 451 F.3d at 1084 n. 4. The Ninth Circuit was not persuaded by such an argument: "[A]n employer could just as easily say that excessive absenteeism was caused by an employee's failure to arrive at work regardless of his migraine headaches, or regardless of his obsessive compulsive disorder. Thus, we think that the case law does not sustain this distinction." *Id.* (internal citations omitted).

If the finder of fact determines Plaintiff's accident resulted from his disability, as the emergency room doctor's report suggests, Defendant's explanation would, as a matter of law, fail to qualify as a legitimate, nondiscriminatory explanation for Plaintiff's discharge. *See Curry,* 451 F.3d at 1084. Accordingly, the Court denies Defendant's motion for summary judgment on Plaintiff's disability discrimination claim.

**3. Interactive Process**

Ninth Circuit case law makes clear that employers bear "an affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation that would permit [an employee] to retain his employment." *Id.* at 1088. "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." *Humphrey,* 239 F.3d at 1137. When an employer fails to "engage in any such process, summary judgment is available only if a reasonable finder of fact must conclude that there would in any event have been no reasonable accommodation available.' " *Curry County,* 451 F.3d at 1088 (citation omitted).

Defendant does appear to claim that it engaged in any interactive process, good faith or otherwise. Under these circumstances, and in light of the rulings described above, summary judgment would be inappropriate since a reasonable jury could conclude the interactive process should have been used and could also conclude that process would have found a reasonable accommodation was available.[FN10]

> FN10. Plaintiff erroneously brought an independent cause of action for failure to engage in interactive process. In *Kramer v. Tosco Corp.,* 233 F. App'x 593 (9th Cir.2007), the employee appealed an unfavorable jury verdict in his action alleging disability discrimination under the ADA and Oregon law. *Id.* at 595. In rejecting one of the employee's assignments of error, the Ninth Circuit stated: "[Plaintiff]'s proposed instruction would have misled the jury into erroneously believing that there existed an independent cause of action for failing to engage in the interactive process. [Plaintiff's employer] is not liable because, as the jury found, [he] was not a qualified individual, with or without reasonable accommodation." *Id.* at 596.

**C. Workers' Compensation Discrimination**

Defendant moves for summary judgment on Plaintiff's claim for workers' compensation discrimination on the grounds that: (1) Plaintiff did not invoke the workers' compensation system, which in turn defeats Plaintiff's ability to show a causal link between his use of the system and an adverse employment action; and (2) Plaintiff cannot establish that Defendant's reason for terminating his employment was pretext for discrimination.

Under ORS 659A.040, "[i]t is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has ... invoked or utilized the procedures provided for in ORS chapter 656." OR.REV.STAT. § 659A.040. "To establish a prima facie case of injured worker discrimination, a plaintiff must show that (1) he invoked the workers' compensation system; (2) he was discriminated against in the tenure, terms or conditions of his employment; and (3) the discrimination was caused by the employee's invocation of workers' compensation." *Shepard,* 829 F.Supp.2d at 962. The *McDonnell Douglas* burden-shifting framework applies if the plaintiff establishes a prima facie case of workers' compensation discrimination. *Id.* (citing *Snead,* 237 F.3d at 1092–93).

***22** Defendant's first argument—which challenges the first and third elements of Plaintiff's prima facie case—is easily resolved. Under Oregon law, a claimant is not required to provide a formal written notice of an injury or disease; rather, the workers' compensation system can be invoked by "a worker's reporting of an on-the-job injury or a perception by the employer that the worker has been injured on the job or will report an injury." *Herbert v. Altimeter, Inc.,* 230 Or.App. 715, 726 (2009). When viewed in the light most favorable to Plaintiff, the record suggests that his December 30, 2011 telephone call to Defendant's safety department satisfies the *Herbert*

standard.

Plaintiff's phone call December 30th and the report Defendant received from its investigator LaLande shows Defendant knew (1) there had been a serious accident, (2) Plaintiff had ridden in an ambulance to the hospital for which there would be a "medical bill," (3) Plaintiff had been examined at the hospital and had some injury due to the seatbelt, again with an anticipated medical bill from the emergency room visit, and (4) Plaintiff would be off work unable to drive until he was checked out by a cardiologist suggesting possible time loss.

To extent Defendant suggests that a compensable injury is a prerequisite to invoking the workers' compensation system, the Court is not persuaded by the argument. As a general matter, the Oregon Workers' Compensation Board "routinely addresses questions regarding the compensability of workplace injuries," *Panpat v. Owens–Brockway Glass Container, Inc.*, 334 Or. 342, 347 (2002), and in some instances, courts must address whether a workers' compensation case requires the invocation of the doctrine of "primary jurisdiction," *see id.* The doctrine of "primary jurisdiction" provides that, "where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or. 185, 191 n. 8 (1997). Neither parties' briefing adequately discuss these matters.

Moreover, the Oregon Court of Appeals' decision in *Parker v. Fred Meyer, Inc.*, 152 Or.App. 652 (1998), suggests that ORS 659A.040 would not condition an employer's liability for workers' compensation discrimination on a prior determination of compensability. In *Parker*, the employee appealed the grant of his employer's motion for summary judgment on workers' compensation retaliation and disability discrimination claims, arguing that the trial court erroneously gave issue preclusive effect to statements made by an administrative law judge ("ALJ") in the course of evaluating whether his injury was compensable. *Id.* at 654–55. In the rejecting the employer's argument, the Oregon Court of Appeals stated:

> [T]here is nothing inconsistent in an employer reasonably believing that a worker has not suffered an injury and also terminating the worker for having filed a workers' compensation claim. In other words, an employer may be motivated to fire a worker because the worker intends to file a valid claim or because the worker intends to file an invalid claim. Either action would violate ORS 659.410[, now renumbered as ORS 659A.109].

***23** *Id.* at 1274.[FN11]

> FN11. ORS 659A.109 uses language quite similar to that of ORS 659A.040. *See* OR.REV.STAT. § 659A.109 ("It is an unlawful employment practice for an employer to discriminate against an individual with respect to hire or tenure or any term or condition of employment because the individual has applied for benefits or invoked or used the procedures provided for in ORS 659A.103 to 659A.145.")

Defendant next argues that, "[a]s with Plaintiff's disability discrimination theory, he cannot establish that [Defendant]'s legitimate, nondiscriminatory reason for his termination [was pretext for discrimination]." (Def.'s Mem. Supp. at 34.) As discussed above, the Court has concluded that there is a genuine issue of fact as to whether Defendant's explanation constituted a valid nondiscriminatory explanation, which obviated Plaintiff's need to demonstrate that Defendant's explanation was mere pretext. Absent an explanation or argument as to why that conclusion should not apply with equal force here, Defendant is not entitled to summary judgment on Plaintiff's claim for workers' compensation discrimination. *See Mihailescu v.*

*Marysville Nursing Home,* No. CV 06–1187–HU, 2007 WL 4270751, at *15 (D.Or. Dec. 3, 2007) (concluding that the court's ADA analysis "applie[d] equally to the worker's compensation claim.")

**D. After–Acquired Evidence**

Defendant argues that the doctrine of after-acquired evidence is a complete bar to recovery and thus it is entitled to summary judgment on all of Plaintiff's claims. (Def.'s Mem. Supp. at 15.) Alternatively, Defendant argues that Plaintiff cannot recover damages after September 7, 2012, when it discovered that Plaintiff made material misrepresentations to Defendant and the DOT medical examiner regarding his past medical history.

Defendant is not entitled to summary judgment on the basis of after-acquired evidence. In *Schnidrig v. Columbia Machine, Inc.,* 80 F.3d 1406 (9th Cir.1996), the employee appealed the district court's grant of summary judgment on his action under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 1408. The employer argued that, even assuming there was a genuine issue of fact as to whether it discriminated on the basis of age, summary judgment was still appropriate based on after-acquired evidence. *Id.* at 1412. The Ninth Circuit rejected the employer's argument:

> The Supreme Court [has] held that the use of after-acquired evidence of wrongdoing by an employee that would have resulted in their termination as a bar to all relief for an employer's earlier act of discrimination is inconsistent with the purpose of the ADEA.... Therefore, although [the employer]'s discovery of after-acquired evidence may bear upon the specific remedy to be ordered, it does not warrant the granting of summary judgment.

*Id.* (internal citations omitted); *see also Rooney v. Koch Air, LLC,* 410 F.3d 376, 382 (7th Cir.2005) (seeing no distinction between ADEA and ADA claims for the purposes of the after-acquired evidence doctrine); *Burkhart v. Intuit, Inc.,* No. CV–07–675–TUC–CKJ, 2009 WL 528603, at *12 (D.Ariz. Mar. 2, 2009) (stating that "the use of after-acquired evidence of wrongdoing to [completely] bar relief for an employer's act of discrimination is ... inconsistent with the purpose of the ADA.")

Similarly, in *Seegert v. Monson Trucking, Inc.,* 717 F.Supp.2d 863 (D.Minn.2010), the employer argued that after-acquired evidence of material misrepresentations on the employee's DOT health history form rendered him unqualified for the commercial truck driver position and thus acted as a complete bar to his recovery. *Id.* at 867. The *Monson* court concluded that such an argument had been rejected by the Supreme Court. *Id.* at 868 (citing *McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 358 (1995)). As *Monson* explained:

> ***24** Although *McKennon* dealt with only [on-the-job misconduct], each Circuit that has confronted the issue has extended *McKennon's* holding to include ... cases in which the after-acquired evidence concerns an employee's alleged misrepresentation in the job application process.... While the Eighth Circuit has not expressly ruled on this issue, Defendant provides no authority ... and the Court is aware of none, in support of departing from the holdings of the other circuits.
>
> Therefore, misconduct by [the employee], which [the employer] learned of post-termination, does not act as a complete bar to his [ADA and FMLA] claims or [Minnesota Human Rights Act] claim but may be used to limit [his] remedy.

*Id.* at 868–69 (citations omitted). *Monson* went on to reject the employer's contention that the after-acquired evidence could support summary judgment in its favor on the employee's ADA claim. *Id.* at 870.

Consistent with *Schnidrig* and *Monson,* the Court concludes that the doctrine of after-acquired evidence does not operate as a complete bar to recovery, nor does it entitle Defendant to summary judgment on all claims.

Defendant is correct, however, that Plaintiff's remedy can be limited under the doctrine:

> [A]fter-acquired evidence of wrongdoing generally limits an employee's remedy in three significant ways. If an employer discovers that the plaintiff committed an act of wrongdoing and can establish that the 'wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge,' the employer does not have to offer reinstatement or provide front pay, and only has to provide backpay 'from the date of the unlawful discharge to the date the new information was discovered.'

*O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 759 (9th Cir.1996) (citation omitted). In order to impose such limitations, an employer must: "(1) present after-acquired evidence of an employee's misconduct; and (2) prove by a preponderance of the evidence that it would have [in fact] fired the employee for that misconduct." *Wilken v. Cascadia Behavioral Healthcare, Inc.,* No. CV 06–195–ST, 2008 WL 44648, at *4 (D.Or. Jan. 2, 2008).

For the purposes of the pending motion, Defendant relies on Plaintiff's allegations and admissions, which includes, *inter alia,* claims that Plaintiff informed Nucci of the 2005 incident, the 2006 incident and the catheter ablation procedure. This raises a material issue of fact as to whether Defendant would have in fact fired Plaintiff. *See O'Day,* 79 F.3d at 759 (recognizing the inquiry "reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not.") This issue should be decided by the jury. Thus, Defendant's motion on after-acquired evidence should be denied and left for trial.

## V. CONCLUSION

***25** For the reasons stated, Defendant's motion (Docket No. 32) for summary judgment is granted in part and denied in part.

IT IS SO ORDERED.

D.Or.,2014.
Ambrose v. J.B. Hunt Transport, Inc.
Slip Copy, 2014 WL 585376 (D.Or.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 528603 (D.Ariz.)
**(Cite as: 2009 WL 528603 (D.Ariz.))**

**C**

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.
Daniel J. BURKHART, Plaintiff,
v.
INTUIT, INC. et. al, Defendant.

No. CV–07–675–TUC–CKJ.
March 2, 2009.

West KeySummary**Stipulations 363 ⚿14(6)**

363 Stipulations
363k14 Construction and Operation in General
363k14(6) k. Stipulations for dismissal or discontinuance. Most Cited Cases

Former employee was bound by his stipulation dismissing individual employees of his former employer with prejudice in an action alleging violations of the Americans with Disabilities Act ("ADA"). He had attempted to reinstate the individual employees by bringing conspiracy claims against them. To permit the former employee to assert a conspiracy claim against the individual employees for alleged ADA violations would effectively permit him to circumvent the remedies of the ADA and the congressional intent to limit liability for ADA violations to employers only. 42 U.S.C.A. § 1985(3); Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

Daniel Burkhart, Tucson, AZ, pro se.

Erin Ogletree Simpson, Lewis & Roca LLP, Tucson, AZ, Mary Ellen Simonson, Lewis & Roca LLP, Phoenix, AZ, for Intuit Inc.

**ORDER**

CINDY K. JORGENSON, District Judge.

***1** Pending before the Court is Defendant's Opposition to Plaintiff's First Amended Complaint or, in the Alternative, Motion to Strike Plaintiff's First Amended Complaint ("DMTS") [Doc. # 45], Plaintiff's Motion for Partial Summary Judgment on the Issue of ADA Qualification ("PMSJ") [Doc. # 67], and Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment on the Issues of ADA Qualification and Cross Motion for Summary Judgment ("DMSJ") [Doc. # 69]. For the reasons set forth below, Defendant's Motion to Strike Plaintiff's First Amended Complaint and Cross Motion for Summary Judgment are granted. Plaintiff's Motion for Partial Summary Judgment on the Issue of ADA Qualification is denied.

## I. FACTS AND PROCEDURAL BACKGROUND

### *A. Plaintiff's Employment at Defendant*

Plaintiff Daniel J. Burkhart ("Plaintiff") was an employee of Defendant Intuit, Inc. ("Defendant"), in the position of Sales Agent, from March 21, 2005 to December 16, 2005, when Defendant terminated Plaintiff's employment. [FN1] Prior to beginning his employment, Plaintiff, a Vietnam War veteran, was diagnosed with Post Traumatic Stress Disorder ("PTSD") by the Department of Veterans Affairs ("Veterans Administration") and was assessed with a 30% disability rating by the Veterans Administration.

FN1. Unless otherwise noted, the statement of facts is taken from Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment on the Issue of ADA Qualification and Cross Motion for Summary Judgment ("DMSJ"). [Doc. # 69]. These facts are uncontroverted by the Plaintiff.

Plaintiff applied for the position of Sales Agent in March 2005 by submitting an electronic application. One question on the application was "Have you ever plead 'guilty' or 'no contest' to, or been convicted of a crime?" Plaintiff responded "N," indicating that he had never plead "guilty" or "no contest" to a crime, nor had he been convicted of a crime. Pursuant to Defendant's pre-employment screening policies, Defendant conducted a limited background check in March 2005, which requested information going back seven or eight years. The limited background check did not reveal any convictions during that time period. Plaintiff had, however, been convicted of numerous felonies for financial crimes in the 1990s, and had served time in prison as a result. Defendant was not made aware of Plaintiff's criminal history until discovery in this case, when Plaintiff revealed during deposition that he had been convicted in the late 1980s for "aiding and abetting" and other crimes that he did not recall. Following Plaintiff's admission, in June 2008, Defendant conducted a background check that was not limited in time, which revealed that Plaintiff had numerous felony convictions in 1990 for financial crimes, including conspiracy, aiding and abetting, wire fraud, and securities fraud. Pursuant to Defendant's pre-employment screening policies and procedures, knowledge of Plaintiff's convictions would have presumptively disqualified him from employment at Defendant. Moreover, had Plaintiff responded truthfully on his employment application, Defendant would have conducted an unlimited background check to determine the nature of Plaintiff's convictions.

***2** Lacking knowledge of Plaintiff's convictions and misleading resume, Defendant hired Plaintiff for the position of Sales Agent and Plaintiff began work on March 21, 2005. Pursuant to Defendant's procedure in 2005, on the first day of training during "New Hire Orientation," Defendant provided new-hires with information regarding Defendant's employment policies and procedures and how to access those policies and procedures on the Intranet, including information regarding the ADA. In a Policy Review Confirmation Form ("PRC"), Plaintiff checked the box "Americans with Disabilities Act Policy," indicating he was made aware of Defendant's ADA policy. The PRC provides that in signing the form new-hires acknowledge they understand it is their responsibility to go to Defendant's Intranet site and familiarize themselves with the company's policies and procedures, and they should contact the Human Resources Manager should they have any questions regarding those policies or procedures. Plaintiff signed the PRC and dated it March 21, 2005.

In addition to providing new-hires with information regarding important company policies and procedures, Defendant's "Talent Acquisition" provides new-hires with two confidential forms, an Equal Employment Opportunity Form ("EEO") and a Post–Offer Enrollment Form ("POE"). New-hires are informed that completion of these forms is entirely voluntary. If the forms are completed and submitted, Talent Acquisition transfers them to Defendant's HR Data Services department for entry into Defendant's employee tracking software, PeopleSoft. Per Defendant's confidentiality policy, once the data is entered into PeopleSoft, the HR Data Services Department shreds the completed forms. Only if an employee has voluntarily completed a POE form and requested accommodation for a disability does Data Services notify Human Resources and/or the ADA coordinator. The POE form explicitly provides "[i]nformation you submit will be kept confidential, except that (1) supervisors and manager *may* be informed regarding restrictions on the work or duties of individuals with disabilities or special disabled veterans, and regarding necessary accommodations ...." (emphasis added). PMSJ Exh. 7 [Doc. # 67]. In his pleadings, Plaintiff asserts that "it was the implicit understanding of [the POE form] that this information would be shared with supervisors and managers, upon gathering of full information on the disability at a later date." Pl.'s Reply in Support of Mot. for Partial Summ. J. ("Pl.'s Reply") at 9:11–13 [Doc. # 72].

Pursuant to Defendant's shredding policy, Defendant's records do not contain Plaintiff's EEO or POE, assuming he completed and submitted both forms. In deposition, however, Plaintiff asserted he retained a copy of his completed POE for his records following orientation. On the POE copy, Plaintiff checked two black spaces, identifying himself as a "Vietnam-era Veteran" and a "Disabled Veteran." PMSJ Exh. 7 [Doc. # 67]. Defendant's PeopleSoft history indicates only that Plaintiff identified himself as a Vietnam-era Veteran.

*3 Although Plaintiff's POE copy identifies Plaintiff as a "Disabled Veteran," it also reveals that Plaintiff answered "No" in response to the form's question: "[d]o you require a reasonable accommodation to perform the essential functions for which you have been hired?" and left blank the space provided for the follow-up question, "If yes, describe the accommodation required to perform the essential requirements for which you have been hired." PMSJ Exh. 7 [Doc. # 67]. At no time during Plaintiff's employment did Plaintiff inform Defendant, either verbally or in writing, that Plaintiff suffered from PTSD. Although Plaintiff commented to co-workers and training supervisors that he suffered from a "mental disability" or a "stress related disability," at no time did he affirmatively inform Defendant that he suffered from PTSD. Notably, Plaintiff also failed to access Defendant's Intranet site to retrieve information regarding how to inform Defendant about his disability and request an accommodation, and failed to contact Defendant's ADA coordinator. In Plaintiff's pleadings to the Court, Plaintiff confirms that he did not require any accommodation on March 21, 2005, his date of hire, and asserts only that his PTSD was exacerbated as "stress conditions mounted" during his last twenty (20) days of employment. Pl.'s Reply at 9:27–28 [Doc. # 72]. During this time, however, Plaintiff was placed on a Performance Improvement Plan for poor performance and a Final Performance Improvement Plan when his performance did not improve. Plaintiff was placed on the Performance Improvement Plan on November 30, 2005, and was placed on the Final Performance Improvement Plan on December 9, 2005.[FN2] Notably, in his pleadings, Plaintiff admits he had difficulty mastering a sales technique employed by Defendant known as "Spin Spelling," because "[Plaintiff's] direct sales experience from prior sales activities did not require such rigid question and response matrix." Pl.'s Reply at 4:20–21 [Doc. # 72]. Plaintiff's employment was terminated on December 16, 2005, for failing to meet performance objectives.

FN2. Although irrelevant, the Court acknowledges Plaintiff's assertion that Defendant terminated Plaintiff in part as a result of it's reduction in sales force. Plaintiff asserts that Defendant asked Plaintiff to increase performance at the same time that Defendant was rerouting work to a call-center in India thereby rendering it impossible for Plaintiff to increase sales as Defendant requested. Pl.'s Reply at 10:8–27 [Doc. # 72]. Assuming their truth, these facts standing alone do not give rise to an ADA claim.

Plaintiff asserts that he met with Human Resource Manager, Chris Hopkins, merely six days before his termination, on December 12, 2005, "regarding a reassignment as an accommodation," and specifically a reassignment to the position of Talent Acquisition Coordinator. PMSJ SOF ¶ 5 [Doc. # 67]. Hopkins, however, per affidavit, has no recollection of meeting with Plaintiff, nor is there evidence suggesting that Plaintiff informed Hopkins that he suffered from PTSD and that the "reassignment" was requested specifically as an accommodation for his PTSD. The record does reveal, however, that Defendant advertised the position of Talent Acquisition Coordinator, that the position opened up on November 29, 2005, and that Plaintiff submitted a "Job Interest Form" applying for the position. PMSJ Exh. 6 [Doc. # 67]. At no place on the Job Interest Form did Plaintiff indicate

that he suffered from PTSD and was requesting the position as an accommodation. Rather, in the space provided to answer the "Specific Reason for Desire to Change," Plaintiff answered "I have the knowledge skills & ability to do this job. This position would build upon the skills that I possess." PMSJ Exh. 6 [Doc. # 67]. Plaintiff attached his resume to his pleadings, thus implying that he submitted this resume with his application for the Talent Acquisition Coordinator position. *Id.* Plaintiff testified at deposition, however, that his resume misrepresented his relevant work experience. Pursuant to Defendant's pre-employment screening procedures, knowledge of the omission of information or the placement of misleading or false information on an employment application would have also presumptively disqualified Plaintiff from any position at Defendant.

*B. Veterans Administration Disability Assessment*

***4** It is undisputed that prior to his employment at Defendant, Plaintiff was diagnosed with PTSD by Veterans Administration for rating purposes on September 8, 2004 and was assessed with a 30% disability rating. The 30% disability rating was assessed as a result of Plaintiff's appeal from a previous rating of 10% disabled. In assessing Plaintiff's disability at 30%, the Veterans Administrated noted that "[a]lthough the examiner commented you [Plaintiff] do not meet the criteria for the post traumatic stress disorder diagnosis on this current exam, since it is a well established diagnosis in the previous and ongoing treatment records, the diagnosis is continued for rating purposes at this time ...." PMSJ Exh. 1–B [Doc. # 67]. As an example of the well-established diagnosis of PTSD, Plaintiff submits a December 2002 letter from an adjudication officer from the Department of Veterans Affairs that explains: "At this time [Plaintiff's] sleep is disturbed by nightmare quality dreams on a weekly basis. He has been experiencing dissociative flashback type episodes on a weekly basis. This re-experiencing of war zone imagery has left him anxious and exhausted." PMSJ Exh. 4 [Doc. # 67]. The Veterans Administration retroactively applied the 30% disability rating such that the rating was assigned on March 24, 2004. PMSJ Exh 1–B [Doc. # 67]. Pursuant to the Veterans Administration's diagnosis, an evaluation of 30 percent disability is granted whenever there is:

> [O]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self care and conversation normal) due to system symptoms as: depressed mood, anxiety, suspiciousness, panic attacks, chronic sleep impairment, [and] mild memory loss ....
>
> *Id.*

Plaintiff emphasizes that his PTSD results in chronic sleep impairment, but admits that his sleep interruptions are controlled by the medication Trazodone. Although the medication does not "cure" Plaintiff's PTSD, or his sleep deprivation, Plaintiff asserts the medication was prescribed to be taken on an "as needed" basis. PMSJ at 7:7–10; PMSJ SOF ¶ 3 [Doc. # 67]. In his affidavit, he asserts:

> 4. My symptoms recognized as part of the claim for PTSD include, but were not limited to, the interruption of my major life activity of sleep. I suffer from an insomnia condition related to the flashbacks of war, and highlighted by current stressful conditions. This interruption of a major life activity has resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of my inability to perform occupational tasks. The sleep interruption has been control led by the use of the prescribed medication Trazodone, HCL, 50MG, taken nightly.
>
> PMSJ Aff. ¶ 4.

Plaintiff further emphasizes that his PTSD results

in mood impairments that affect his work, although Plaintiff also admits that his mood is stabilized by the medication Flouxetine, which permits an individual to function with normal occupational and social relationships. In his affidavit, he asserts:

> ***5** 5. Additional symptoms of PTSD that manifest in my case are depression, anxiety, cynicism and distrust of authority, anger, psychiatric or emotional numbing, reaction under stress with survival tactics, negative self-image, memory impairment, emotional distance in intimate relationships, survivor guilt, avoidance of activities that arouse memories of the war, and flashbacks to combat experience. I have undergone individual and group therapy, and I am currently taking the prescription medication Flouoxetine HCL 20MG, daily, to stabilize my mood, and allow normal occupational and social relationships in spite of the above mentioned symptoms.
>
> PMSJ Aff. ¶ 5.

In deposition, Plaintiff testified that the affect his PTSD has on his sleep is interrelated to the affect his PTSD has on his work. Plaintiff noted that his PTSD displays "as a sleep disorder, and I have medication to get to sleep. But without the medication I have a serious sleep disorder which affects everything else in my life, working, being able to be around crowds." DMSJ Exh. D 192:16–19 [Doc. # 69]. Plaintiff has successfully held jobs following employment at Defendant, specifically Plaintiff has been employed as a tax assistant for two accounting firms. Plaintiff's employment with the accounting firms was temporary and terminated at the end of the tax season.

*C. The Current Litigation*

On July 20, 2007, Plaintiff filed a complaint ("Initial Complaint") in pro se against Defendant, ten "Doe Corporations," five named individual defendants and fifty unnamed "John Doe" defendants (collectively "Individual Defendants"), in the United States District Court for the Northern District of California. Pl.'s Initial Complaint [Doc. # 23]. Plaintiff alleged that Defendant and the Individual Defendants violated Plaintiff's rights under the Americans with Disabilities Act of 1990 ("ADA"). Specifically, Plaintiff alleged that Defendant "[failed] to acknowledge the [Plaintiff's] mental disability following [his] written and verbal notification of such disability," thereby engaging in: (1) wrongful termination, (2) gross negligence, and (3) willful infliction of emotional harm. Pl.'s Initial Complaint at 3:24–26. Against the Individual Defendants specifically, Plaintiff alleged they engaged in "aiding and abetting in denyal [sic] of [his] civil rights" by assisting "one-another to facilitate denial of Plaintiff's acknowledged rights." Pl.'s Initial Complaint at 5:15–20.

Following the filing of his Initial Complaint, Defendant's counsel, Michael Aparicio ("Aparicio") sent a letter to Plaintiff, urging him to (1) transfer the case to the proper venue—the District Court in Tucson, and (2) dismiss the claims against the Individual Defendants pursuant to well-established Ninth Circuit precedent. Pl.'s Memo. in Opp. to Def.'s Mot. to Strike ("POMTS") Exh. 1 [Doc. # 52]. Specifically, Aparicio represented to Plaintiff that:

> [I]t is well-established in the Ninth Circuit that only an employer can be liable for violation of the Americans with Disabilities Act, not individual employees. *See Miller v. Maxwell's Int'l, Inc.,* 991 F.2d 583, 587 (9th Cir.1993); *Rohm v. Homer,* 367 F.Supp.2d 1278, 1284 (N.D.Cal.2005); *Coffin v. Safeway, Inc.,* 323 F.Supp.2d 997, 1002 (D.Ariz.2004).
>
> ***6** *Id.*

Following receipt of Aparicio's letter, Plaintiff entered into a Stipulation Agreement, agreeing to the

terms set forth in Aparicio's letter. Stipulation and Transfer [Doc. # 22]. Plaintiff stipulated to the following:

> Plaintiff and Defendant Intuit, Inc.... agree that there is no basis for asserting claims under or based upon alleged violations of the Americans with Disabilities Act, against the individual defendants named in this case, pursuant to established Ninth Circuit precedent. *See Miller v. Maxwell's Int'l, Inc.,* 991 F.2d 583, 587 (9th Cir.1993).
>
> *Id.* at 2:16–19.

Pursuant to this stipulation, the Northern District of California entered the parties' Proposed Order, which states:

> Individuals who are not the employer cannot, as a matter of law, be liable to Plaintiff for alleged violations of the Americans with Disabilities Act. Accordingly, Plaintiff's claims against [the Individual Defendants] are DISMISSED WITH PREJUDICE.
>
> *Id.* at 2:28–3:03.

Consequently, on December 17, 2007, the case was transferred to this Court, and the Individual Defendants were dismissed with prejudice.

On April 25, 2008, Plaintiff lodged his First Amended Complaint with the Court. Pl.'s First Amended Complaint [Doc. # 40]. The First Amended Complaint reinstates the Individual Defendants and brings a new conspiracy claim pursuant to 42 U.S.C. § 1985(3) against them. On May 12, 2008, Defendant filed its Opposition to Plaintiff's First Amended Complaint, or in the Alternative, Motion to Strike Plaintiff's First Amended Complaint, alleging that Plaintiff's amendments would be futile because the amended complaint is (1) barred by the doctrine of law of the case, (2) fails to state a claim, (3) is time-barred, and (4) is untimely pursuant to the Court's scheduling order. DMTS [Doc. # 45]. On May 29, 2008, Plaintiff filed his Response, alleging that Aparicio misrepresented the law to Plaintiff, and Plaintiff relied on those misrepresentations when he entered into the Stipulation Agreement. POMTS [Doc. # 52]. In Defendant's Reply, filed on June 6, 2008, Defendant contested Plaintiff's allegations, asserting that Aparicio did not misrepresent the law, and reasserting futility in amendment. Def.'s Reply in Support of Mot. to Strike ("DRMTS") [Doc. # 62].

## II. PLAINTIFF'S FIRST AMENDED COMPLAINT

### *A. Motion for Leave to Amend*

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a party may amend its pleadings once as a matter of course in the following time frames:

> A. Before being served with a responsive pleading, or
>
> B. Within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.
>
> Fed.R.Civ.P. 15(a)(1).

In all other cases, a party may amend its pleadings only with opposing party's written consent or the court's leave. Fed.R.Civ.P. 15(a)(2). The Court is instructed to freely give leave "when justice so requires." *Id.*

***7** Plaintiff filed his Initial Complaint [Doc. # 23] on June 1, 2006. The case was transferred to this Court on December 17, 2007. Defendant filed its Answer to Plaintiff's Initial Complaint ("Answer") [Doc. # 26] on January 3, 2008. Plaintiff lodged his First

Amended Complaint [Doc. # 40] on April 25, 2008, nearly four months after Defendant filed its Answer. Plaintiff failed to file an accompanying supporting motion to amend his Complaint. On May 12, 2008, Defendant filed its Motion to Strike Plaintiff's First Amended Complaint ("DMTS") [Doc. # 45].

Because Plaintiff's First Amended Complaint was lodged after Defendant's responsive pleading, Plaintiff may amend his Complaint only with the Court's leave. For the reason's set forth below, the Court finds that the interests of justice do not support Plaintiff filing an amended complaint. The Court, therefore, denies leave and grants Defendant's Motion to Strike Plaintiff's First Amended Complaint.

*A. Relief from Stipulation*

Whether Plaintiff may amend his complaint to assert a 1985(3) conspiracy claim against the Individual Defendants turns, in part, on whether Plaintiff is entitled to relief from his stipulation and the court order entered thereon by the district court in the Northern District of California.

Rule 60(b) of the Federal Rules of Civil Procedure permits, on motion and just terms, relief from a final judgment, order, or proceeding, upon a showing of, in relevant part, "fraud (whether previously called extrinsic or intrinsic), misrepresentation, or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3). Plaintiff did not make a Rule 60 motion to relieve himself from the order entered by the district court in the Northern District of California dismissing the Individual Defendants with prejudice. In Plaintiff's Response, however, he alleges that "through [Aparicio's] deceit and misrepresentations, [Plaintiff] was cajoled into signing a stipulation that [again] was misrepresented by Aparicio," and urges the Court to recognize that "[i]n the interest of justice, *this court cannot allow the defendant's misrepresentations to stand.*" POMTS at 2:11–12. [Doc. # 52]. Because courts construe pro se pleadings liberally, Plaintiff's allegations of misrepresentation are treated as a Rule 60(b) motion for relief from the Northern District of California district court's order entered pursuant to the parties' stipulation agreement.

Defendant asserts that Aparicio did not misrepresent the law, and that ADA violations cannot serve as a predicate for a conspiracy claim under § 1985(3).

Section 1985(3) in relevant part provides:

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

***8** 42 U.S.C. § 1985(3).

It is well-established that section1985(3) applies to non-racial bias claims only when it can be shown the conspiracy was motivated by a "class-based, invidiously discriminatory animus." *Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir.1985) (quotations omitted). The sort of "class" to which section 1985(3) speaks is one whose members have been determined to be a "suspect or quasi-suspect classification requiring more exacting scrutiny or [for whom] Congress has indicated through legislation that the class required special protection." *Id.*

Courts have explicitly held that disabled individuals do not constitute a "class" within the meaning of section 1985(3). *See, e.g., D'Amato v. Wis. Gas Co.,* 760 F.2d 1474, 1486–87 (7th Cir.1985) ("The legislative history of Section 1985(3) does not suggest a concern for the handicapped."); *Wilhelm v. Cont'l*

*Title Co.*, 720 F.2d 1173, 1176–77 (10th Cir.1983) ("[T]o hold that even if there could be here developed by further pleading a class of handicapped persons with sufficient conditions or factors in common derived from their *physical* condition to be ascertainable or identifiable, it could not come within the province of 42 U.S.C. § 1985(3)."); *see also Story v. Green*, 978 F.2d 60, 64 (2d Cir.1992) ("We note in passing that most authorities have not considered disability to be a suspect or quasi-suspect classification."); *Trautz v. Weisman*, 819 F.Supp. 282, 292 (S.D.N.Y.1993) (recognizing that "[o]ther courts have explicitly held that disabled individuals do not constitute a 'class' within the meaning of § 1985(3)" and citing *D'Amato, Wilhelm* and *Green* for that proposition).

Although at least one court has held that a class of individuals with disabilities *may* be protected under section 1985(3), it limited its reasoning to those claims arising outside of the employment context. *Trautz*, 819 F.Supp. at 293. That court noted "[a] valid distinction might exist for cases arising in the work setting where disability is sometimes related to a person's ability to perform a given task." *Id.*

Conversely, the Ninth Circuit has reasoned that even if disabled persons constitute a protected class under section 1985(3), section 1985(3) cannot serve to circumvent the remedial structure of the ADA. *Sauter v. State of Nevada*, 1998 WL 196630 (9th Cir.1998).[FN3] In *Sauter v. State of Nevada*, the Ninth Circuit addressed whether ADA violations can stand as a predicate to a conspiracy claim under 42 U.S.C. § 1985(3). *Id.* There, the plaintiff alleged that the defendant conspired to deprive him of his rights under the ADA. *See id.* at 1. The Ninth Circuit noted that the conspiracy claim implicated "an animus toward a congressionally protected class," but held that such a claim was not cognizable because section 1985(3) "cannot serve as a vehicle to enforce statutory rights when the statute in question has its own remedial structure." *Id.*

FN3. Because this case is unpublished, the Court analyzes *Sauter v. State of Nevada* only for its persuasive analysis, and not for precedential value.

***9** This Court finds the Ninth Circuit's reasoning in *Sauter* persuasive. The ADA clearly does not permit claims against individual employees. *Walsh v. Nevada Dept. of Human Res.*, 471 F.3d 1033, 1037–38 (9th Cir.2006). To permit an aggrieved plaintiff to assert a conspiracy claim against individual employees for alleged ADA violations would effectively permit a plaintiff to circumvent the remedies of the ADA and the congressional intent to limit liability for ADA violations to employers only.

Aparicio, therefore, did not misrepresent the relevant law to Plaintiff, and Plaintiff is therefore bound by his stipulation to dismiss the Individual Defendants with prejudice. Accordingly, Defendant's Motion to Strike Plaintiff's Lodged First Amended Complaint [Doc. # 45] is granted. Plaintiff's Lodged First Amended Complaint [Doc. # 40] is stricken.

*B. Plaintiff's Conspiracy Claim*

In addition to the procedural grounds discussed above, the Court finds that Plaintiff's conspiracy claim fails on the merits and thus amendment of his Complaint is not proper. Conspiracy claims must be alleged with factual specificity. *See Karim–Panahi v. Los Angeles Police Dept.*, 839 F.2d 621 (9th Cir.1988). The Ninth Circuit had stated that "[a] claim under [42 U.S.C. § 1985] must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Id.* at 626. A failure to plead with sufficient specificity is grounds for dismissal for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

In support of his conspiracy claim, Plaintiff alleges:

> The individual named defendants knew or should have know that mental disability constitutes a form of disability qualifying an employee to protections under the ADA. 42 USC 12101–12117 Disparate Treatment. Each of them assisted one-another to facilitate denial of Plaintiff's Civil Rights. The individual defendants were dismissed by stipulation on all causes of action, including Aiding and Abetting in the denial of Plaintiff's Civil Rights.
>
> Pursuant to Title 42 USC, Chapter 21, Section 1985(3), this amended complaint hereby states and clarifies that each individual is reinstated specifically in this NEW cause of action, and shall be held accountable, jointly and severally, to the full extent of the law. The reinstated individual defendants, each of them, is subject to personal damages in favor of Plaintiff under Title 42 USC, Chapter 21, Section 1986, as a Action For Neglect To Prevent the Denial of Civil Rights sustained by the Plaintiff during his employment.

Pl.'s First Amended Complaint at 6:01–13 [Doc. # 40].

Plaintiff's factual allegations are insufficient and lack the required specificity to state a claim. Assuming *arguendo* that Plaintiff is disabled within the meaning of the ADA, Plaintiff does not allege facts to support that the Individual Defendants were sufficiently aware of his disability. And even if the Individual Defendants were sufficiently apprised of Plaintiff's disability, Plaintiff does not allege facts to support evidence of a conspiracy. Plaintiff does not allege any facts to support that the Individual Defendants took specific actions in order to deny Plaintiff of his civil rights. Indeed, Plaintiff fails to specify what actions, if any, the Individual Defendants took in that regard. Instead, Plaintiff merely restates the conspiracy cause of action by alleging: "[e]ach of [the Individual Defendants] assisted one-another to facilitate denial of [Plaintiff's] Civil Rights." Pl.'s First Amended Complaint at 6:03–04 [Doc. # 40].

***10** Notably, this is not a case where the facts are undeveloped and additional discovery could cure the defects in Plaintiff's conspiracy count. Here, Plaintiff lodged his First Amended Complaint after the completion of discovery. There are no additional facts that reasonably could arise that would permit Plaintiff to plead his conspiracy claim with sufficient specificity.

The conspiracy claim alleged in Plaintiff's First Amended Complaint would not survive a motion to dismiss. Plaintiff's amended complaint is therefore futile. Even if ADA violations may serve as a predicate for civil rights violations under 42 U.S.C. § 1985(3), and Plaintiff has alleged a legally cognizable claim, Plaintiff has yet to state a claim upon which relief may be granted due to factual insufficiency. Defendant's Motion to strike Plaintiff's Lodged First Amended Complaint [Doc. # 45] is therefore granted, and Plaintiff's Lodged First Complaint [Doc. # 40] is stricken.

## III. DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

*A. Summary Judgment Standard*

A party moving for summary judgment has the initial burden to demonstrate, "with or without supporting affidavits[,]" the absence of a genuine issue of material fact and that judgment as a matter of law should be granted in the moving party's favor. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56). A material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts material in a specific case are to be determined by the substantive law controlling a given case

or issue. *Id.*

Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "set forth specific facts showing that there is a genuine [material] issue for trial." *Id.* (internal quotes omitted). In opposing summary judgment, Plaintiff is not entitled to rely on the allegations of his complaint, or upon conclusory allegations in affidavits. Fed.R.Civ.P. 56(e); *Cusson–Cobb v. O'Lessker,* 953 F.2d 1079, 1081 (7th Cir.1992). Further, "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kiddle & Co.,* 690 F.2d 1235, 1238 (9th Cir.1982). Because Plaintiff will bear the burden of proof at trial as to some of the elements essential to his case, Plaintiff can withstand Defendant's Cross–Motion for Summary Judgment only by making a showing sufficient to establish a genuine issue of fact regarding those elements and showing that the dispute properly may be resolved only by the fact-finder because it could reasonably be resolved in favor of either party. *Celotex,* 477 U.S. at 321. Plaintiff must present specific facts in support of his contentions and must support these facts by proper evidentiary material, which show that a fact-finder could reasonably find in Plaintiff's favor; Plaintiff cannot merely rest on his pleadings. Fed.R.Civ.P. 56(e). *See also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir.1987) (citations omitted).

***11** The Court is not to make credibility determinations with respect to the evidence offered and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.,* 809 F.2d at 630–31 (9th Cir.1987) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts[.]" *Hollingsworth Solderless Terminal Co. v. Turley,* 622 F.2d 1324 (9th Cir.1980). Where a response to a motion for summary judgment is not filed, it should nonetheless be denied "where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact." *See Henry v. Gill Indus., Inc.,* 983 F.2d 943 (9th Cir.1993); *see also* LRCiv. 7.2(I).

*B. Plaintiff's Claim under the Americans with Disabilities Act ("ADA")* [FN4]

FN4. The ADA was recently amended by the ADA Amendments Act of 2008 ("ADAAA"), which took effect on January 1, 2009. Pub.L. 110–325. In passing the ADAAA, Congress intended to "reinstate the broad scope of the protection to be available under the ADA," and explicitly overruled those cases that had "narrowed the broad scope of protection intended to be afforded by the ADA" and which had, as a result, "eliminat[ed] protection for many individuals whom Congress intended to protect." *Id.* Specifically, the ADAAA overrules cases cited in this Order, including *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), and *Toyota Motor Mfg., Ky. Inc. v. Williams,* 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).

On Feb. 13, 2009, the Ninth Circuit declined to determine whether the ADAAA applies retroactively. *Rohr v. Salt Riber Project Agricultural Imp. and Power Dist.,* 555 F.3d 850, 2009 WL 349798 at 1 (9th Cir. Feb.13, 2009). On January 15, 2009, however, the District Court for the Western District of Kentucky held that the ADAAA was not retroactively applicable. 2009 WL 111737 at 5–6 (D.Ky.2009). In so holding, the district court applied the United States Supreme Court's retroactivity analysis and reasoned that Congress's

> failure to address retroactivity explicitly in the terms of the ADAAA and the similar void in the congressional record evidenced "no clear congressional intent favoring retroactive application." *Id.* In addition, the district court emphasized that because the ADAAA "broadens the definition of 'disability' ... the amended Act would potentially increase [employers'] liability for past acts." *Id.* This Court finds that the ADAAA is not retroactively applicable and does not govern this matter.

The ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A disability, with respect to an individual, means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.
>
> 42 U.S.C. § 12102(2).

To establish a *prima facie* case under the ADA, a plaintiff must prove (1) he is disabled within the meaning of the ADA; (2) he is qualified to perform the essential functions of his job either with or without reasonable accommodation; and (3) he was terminated or subjected to an adverse employment action because of his disability. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir.1996). If a plaintiff has met this initial burden, the burden then shifts to defendant to put forward a legitimate, non-discriminatory reason for its actions. *Snead v. Metro. Prop. & Cas Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir.2001). If the defendant articulates a legitimate, non-discriminatory reason for its actions, the burden shifts again to the plaintiff to show that the defendant's stated reason is no more than a pretext for discrimination. *Id.*

*1. Qualified Individual*

The ADA defines a "qualified individual" as "an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such person holds or desires," 29 C.F.R. § 1630(m), and "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *see id.* Qualification standards include the "skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630(q).

***12** In some instances, employers discover evidence of employee misconduct after the alleged discriminatory discharge; misconduct that would have resulted in the employee's termination had the employer known of it. *See, e.g., McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). In *McKennon v. Nashville Banner Publishing Co.*, the United States Supreme Court held that to use "after-acquired evidence" of wrongdoing as an absolute bar to relief is inconsistent with the purpose of the ADEA. *Id.* at 361–63. Because the ADEA is a part of Title VII's statutory scheme to protect employees in the workplace nationwide, and the ADA is also a part of that scheme, the use of after-acquired evidence of wrongdoing to bar relief for an employer's act of discrimination is similarly inconsistent with the purpose of the ADA. *See id.* at 357; *see also Rooney v. Koch Air, LLC*, 410 F.3d 376, 382 (7th Cir.2005) ("We see no distinction for [the purpose of the after-acquired evidence doctrine] between

an age discrimination claim like the one in *McKennon* and an ADA claim."). Consequently, after-acquired evidence cannot stand as an affirmative defense to employment discrimination under the ADA. *Schmidt v. Safeway Inc.*, 864 F.Supp. 991, 994–95 (D.Or.1994) (holding that evidence acquired during the discovery process that employee had failed to disclose on his employment application a conviction that occurred 40 years prior did not bar plaintiff from all relief under the ADA, although it could limit damages).

If after-acquired evidence were sufficient, standing alone, to warrant the grant of partial summary judgment to a defendant on the issue of whether the plaintiff is a "qualified individual" under the ADA, the after-acquired evidence would effectively operate as an absolute bar to relief in the same way it would if it were a permissible affirmative defense. The grant of partial summary judgment solely on the basis of after-acquired evidence would, therefore, be in violation of the principles articulated in *McKennon*. It stands to reason then that after-acquired evidence is not a sufficient condition to warrant the grant of summary judgment for Defendant. Thus, Defendant has not shown an absence of a genuine issue of material fact with regard to whether Plaintiff is a "qualified individual" within the meaning of the ADA. Defendant asserts only that Plaintiff was presumptively disqualified for the Sales Agent position Plaintiff held and the Talent Acquisition Coordinator position he sought as a result of his felony convictions for fraud and misrepresentations on his resume. Both of these facts, however, were discovered after Defendant terminated Plaintiff's employment and are thus "after-acquired evidence" that cannot stand as a basis for summary judgment in favor of Defendant.

*2. Disability*

The term 'disability' under the ADA means "a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual" or "[a] record of such an impairment." 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). The term "substantially limited" suggests "considerable" or "to a large degree." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–97, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002). Thus, a plaintiff is "substantially limited" in a major life activity only if the plaintiff is "significantly restricted as to the condition, manner, or duration under which [he] can perform a major life activity" in comparison to an "average person in the general population." *Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir.2003) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

***13** The terms of the ADA are to be strictly construed to create a demanding standard for qualifying as disabled. *Toyota*, 534 U.S. at 197, 122 S.Ct. at 691. Determining whether an individual has a disability within the meaning of the ADA is, therefore, "an individualized inquiry." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 119 S.Ct. 2139, 2147, 144 L.Ed.2d 450 (1999). This requires the Court to consider the "nature, severity, duration, and impact" of the impairment. *Frasier*, 342 F.3d at 1039.

Sleep constitutes a major life activity. *Head v. Glacier N.W. Inc.*, 413 F.3d 1053, 1060 (9th Cir.2005); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir.1999). To establish a substantial limitation on the major life activity of sleeping for the purpose of defeating summary judgment, all that is required is testimony alleging great difficulty in sleeping. *Head*, 413 F.3d at 1060. Statements regarding sleep deprivation, however, may not be "merely self-serving and must contain sufficient detail to convey the existence of an impairment." *Id.* at 1059 (citing *Frasier*, 342 F.3d at 1043–44). Moreover, any impairment must be substantially limiting in light of any corrective or mitigating measures. *Sutton*, 527 U.S. at 982–83, 119 S.Ct. at 2146–47 ("A person whose physical or mental impairment is corrected by medical or other measures does not have an impairment that presently 'substantially limits' a major life activity.").

Here, Plaintiff has not provided sufficient detail to convey the existence of an impairment that causes Plaintiff to be substantially limited in the major life activity of sleep. Plaintiff states only that he suffers from an "insomnia condition" that has resulted in "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of my inability to perform occupational tasks." PMSJ Aff. ¶ 4 [Doc. # 67]. In addition, Plaintiff acknowledges that his sleep interruptions are "controlled by the use of the prescribed medication Trazodone, HCL, 50MG, taken nightly." *Id.* Notably, Plaintiff does not state with specificity how many hours each night he sleeps, nor how the deficiency in hours of sleep affects him. With regard to how his insomnia condition affects him, Plaintiff merely restates his diagnosis for PTSD, as defined by the Veterans Administration. And by Plaintiff's own admissions, his insomnia condition does not result in *substantial* limitation; rather, he states only that his PTSD results in *occasional* decrease in work efficiency and *intermittent* periods of inability to perform occupational tasks. Moreover, to the extent Plaintiff has demonstrated impairment by PTSD, the fact that his insomnia condition is "controlled" by medication renders his impairment not substantially limiting. Although Plaintiff emphasizes that "[t]he use of the medication Trazodone does not cure [his] sleep interruptions, it only allows [him] to compensate for the otherwise interrupted sleep," Plaintiff has still failed to allege any facts that would demonstrate that his insomnia condition is substantially limiting in light of the corrective measure of medication. PMSJ at 7:6–9 [Doc. # 67].

***14** As with sleep, work constitutes a major life activity. 29 C.F.R. 1630.2(j)(3) (addressing the "major life activity of working"); *see also Toyota* 534 U.S. at 197–98, 122 S.Ct. at 691 (assuming that the ability to perform manual tasks is major life activity); *EEOC v. United Parcel Serv., Inc.,* 306 F.3d 794, 802 (9th Cir.2002) (stating with regard to the major life activity of working "the Supreme Court has assumed, but has not decided, [working] is a major life activity"). The critical inquiry in determining whether an individual is substantially limited in the majority life activity of working is whether the claimant is unable to perform a variety of tasks that are of "central importance to most people's daily lives," not whether the claimant is unable to perform the tasks associated with his or her specific job. *See Toyota,* 534 U.S. at 197–98, 122 S.Ct. at 691. Thus, with respect to the major life activity of working, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and ability." 29 C.F.R. § 1630.2(j)(3)(I). Notably, "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* To establish a substantial limitation in the major life activity of working, it is insufficient for plaintiffs to merely submit evidence of a medical diagnosis in order to prove disability. *Toyota,* 534 U.S. at 197–98, 122 S.Ct. at 691. Rather, the ADA requires claimants "to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial." *Id.* at 197–98, 122 S.Ct. at 691–92 (citing *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 567, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999).

Here, Plaintiff had failed to put forth any facts to suggest that he is substantially limited in the major life activity of working. At deposition, Plaintiff testified that without medication his insomnia condition would affect his ability to work; for his PTSD displays "as a sleep disorder, and I have medication to get to sleep. But without the medication I have a serious sleep disorder which affects everything else in my life, working, being able to be around crowds." Plaintiff's assertions, however, are devoid of facts to indicate the extent of his limitation, if any, in terms of his own experience. In addition, because Plaintiff's insomnia condition is controlled by medication, Plaintiff is not substantially limited in the major life activity of sleep or work.

Interrelated to working as a major life activity, interacting with others also constitutes a major life activity. *Head,* 413 F.3d at 1060. To show substantial limitation in interacting with others a claimant must establish that "relations with others [are] characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." *Id.*

***15** Here, Plaintiff asserts generally that his PTSD manifests as "depression, anxiety, cynicism and distrust of authority, anger, psychiatric or emotional numbing, reaction under stress with survival tactics, negative self-image, memory impairment, emotional distance in intimate relationships, survivor guilt, avoidance of activities that arouse memories of the war, and flashbacks to combat experience." PMSJ Aff. ¶ 5 [Doc. # 67]. As with his insomnia condition, however, Plaintiff asserts that he is "currently taking the prescription medication Flouoxetine HCL 20MG, daily, to stabilize my mood, and allow normal occupational and social relationships in spite of the above mentioned symptoms." *Id.* Plaintiff fails to provide specific assertions regarding his personal experience with PTSD that would demonstrate that Plaintiff is substantially limited in the major life activity of interacting with others. And by Plaintiff's own admissions, his social impairments are mitigated by medication, thereby rendering his impairment not substantially limiting.

To the extent Plaintiff relies on his 30% disability rating by the Veterans Administration as evidence that he is disabled under the ADA, that reliance is misplaced. *See Thorn v. BAE Sys. Haw. Shipyards, Inc.,* 586 F.Supp.2d 1213, 1221 (D.Hawai'i 2008). Veterans Administration percent ratings attempt to quantify a decrease in a veteran's earning capacity. *See id.* The ratings "represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations." *Id* . (citing 38 C.F.R. § 4.1). The Veterans Administration percent ratings, therefore, are assessed pursuant to a standard entirely different from that imposed by the ADA, and are thus insufficient to create a genuine issue of fact that a plaintiff is disabled under the ADA. *Id.*

The ADA requires Plaintiff to establish that he suffers from an impairment that substantially limits a major life activity. Although Plaintiff may have demonstrated that he has a history of suffering from PTSD, an impairment, Plaintiff has not demonstrated that the impairment substantially limits any major life activity. Thus, Plaintiff has failed to demonstrate a genuine issue of material fact regarding whether he is "disabled" under the ADA, and summary judgment in Defendant's favor on this issue is warranted.

*3. Discrimination*

Under the ADA, no qualified individual with a disability "shall, by reason of such disability, be excluded from participation in or be denied the benefits of such services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. An employer's obligations under the ADA are triggered when "an employee or an employee's representative [gives] notice of the employee's disability *and the desire for accommodation." Downey v. Crowley Marine Serv., Inc.,* 236 F.3d 1019, 1023 n. 6 (9th Cir.2001) (*citing Barnett v. U.S. Air, Inc.,* 228 F.3d 1105, 1114 (en banc), *vacated in part on other grounds, U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002)) (emphasis added). Although Plaintiff emphasizes in his pleadings that an employer has a "common sense" duty to inquire as to the full extent of an employee's impairment, if the employee has admitted such an impairment, Plaintiff's reasoning is misguided. *See* Pl.'s Reply at 8:19–20. Under the ADA, an employer must engage in an interactive process with a disabled employee to determine an appropriate reasonable accommodation when "an employee requests an accommodation or an employer recognizes the employee needs an accommodation but the employee

cannot request it because of a disability." *Zivkovic v. S. Cal. Edison Co.,* 302 F.3d 1080, 1089 (9th Cir.2002) (citing *Barnett v. U.S. Air., Inc.,* 228 F.3d 1105, 1112 (9th Cir.2000) (en banc), *vacated in part on other grounds, U.S. Airways, Inc. v. Barnett,* 525 U.S. 391 (2002). Contrary to the implications of Plaintiff's assertion, the ADA does not require an employer to inquire into the extent of an employee's disability, and Plaintiff admits as much. Pl.'s Reply at 8 [Doc. # 72]. Not only is such an inquiry not required, but under some circumstances it may very well be impermissible. 42 U.S.C. § 12112(d)(4) ("A covered entity shall not [subject to certain exceptions] make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature of or severity of the disability ...."). Rather, an employer is only required to engage in an interactive process with an employee *regarding an accommodation,* if the employer is on notice that the employee suffers from a disability that substantially limits a major life activity and is in need of an accommodation.

***16** Here, Plaintiff failed to put Defendant on notice that Plaintiff suffered from an impairment that substantially limited a major life activity and necessitated accommodation. Notably, Plaintiff failed to inform Defendant that he suffered from PTSD, and only vaguely mentioned to co-workers and supervising trainers that he was dealing with a "mental disability" or a "stress related disability." Plaintiffs assertions to co-workers and supervising trainers were insufficient to trigger Defendant's obligations under the ADA to begin an interactive process with Plaintiff to find a reasonable accommodation. Although it is disputed whether Plaintiff put Defendant on notice that he was a "Disabled Veteran," even assuming that Plaintiff did put Defendant on notice to this fact, this alone is insufficient to trigger Defendant's duties under the ADA. Although Plaintiff may have checked the box "Disabled Veteran" on his POE, he also expressly stated that he did not require any form of accommodation.

Notably, this is not a case where Plaintiff's disability, if any, rendered Plaintiff unable to notify Defendant of his disability and the need for an accommodation. Plaintiff was informed at the New Hire Orientation how to access Defendant's intranet site, and acknowledged in a signed form that it was his responsibility to access that site to find out more about Defendant's policies and procedures, including Defendant's ADA policy. Plaintiff failed to access Defendant's intranet, which would have provided Defendant with information on how to inform Defendant of his disability, if any, and the need for an accommodation.

Finally, even if Plaintiff's POE were sufficient to notify Defendant of its obligations under the ADA, Plaintiff acknowledges that he was not in need of an accommodation until the final 20 days of his employment, at which time he had already been put on Defendant's Performance Improvement Plan. Consequently, by Plaintiff's own admissions, Plaintiff's performance, and not his disability, caused Plaintiff to be placed on Defendant's Performance Improvement Plan. Defendant, therefore, has demonstrated the lack of genuine issue of material fact with regard to whether Plaintiff was discriminated against on the basis of his disability, if any, and Plaintiff has failed to rebut this showing. Thus, summary judgment in Defendant's favor on this issue is warranted.

*C. Plaintiff's Claims for Gross Negligence, Concurrent Negligence and Willful Infliction of Emotional Harm*

Plaintiff's gross negligence, concurrent negligence, and willful infliction of emotion harm causes of action are predicated upon his ADA claim. With regard to the gross and concurrent negligence counts, Plaintiff asserts in his Initial Complaint that "Defendant ... knew or should have know that [its] failure to comply with state and federal employment regulations would result in disparate treatment by the unacknowledged class of employees under their direct control, of which Plaintiff was a member ...." Pl.'s

Initial Complaint at 4:12–16 [Doc. # 23]. Plaintiff further asserts in his pleadings that Defendant handled his POE negligently by failing to enter that Plaintiff identified himself as a "Disabled Veteran." Pl.'s Reply [Doc. # 72]. With regard to the willful infliction of emotional harm cause of action, Plaintiff asserts in his Initial Complaint "[t]he defendant knowingly increased the job stress level on [Plaintiff] by decreasing the telephone-call volume to ensure his failure to comply with sales goals preset by the defendants ...." Pl.'s Initial Complaint at 5:06–08 [Doc. # 23].

***17** Because Plaintiff's gross negligence, concurrent negligence, and willful infliction of emotion harm causes of action are predicated upon his ADA claim, and summary judgment in Defendant's favor is warranted on the issues of "disability" and "discrimination" under the ADA, Plaintiff's gross negligence, concurrent negligence, and willful infliction of emotion harm causes of action are also without merit. Thus, summary judgment in Defendant's favor on these causes of action is also justified.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Defendant's Motion to Strike Plaintiff's First Amended Complaint [Doc. # 45] is GRANTED.

2. Plaintiff's Motion for Partial Summary Judgment on the Issue of ADA Qualification [Doc. # 67] is DENIED.

3. Defendant's Cross–Motion for Summary Judgment [Doc. # 69] is GRANTED.

4. All other outstanding motions are DENIED AS MOOT.

5. The Clerk of the Court shall enter judgment accordingly and shall then close its file in this matter.

DATED this 26th day of February, 2009.

D.Ariz.,2009.
Burkhart v. Intuit, Inc.
Not Reported in F.Supp.2d, 2009 WL 528603 (D.Ariz.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2013 WL 1788353 (N.D.Ill.)
**(Cite as: 2013 WL 1788353 (N.D.Ill.))**

**H**

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Daniel LALOWSKI, Plaintiff,
v.
CORINTHIAN SCHOOLS, INC. and Corinthian Colleges, Inc., Defendants.

No. 10 C 1928.
April 26, 2013.

Sarah Marguerite Baum, Timothy Huizenga, Legal Assistance Foundation of Met. Chicago, Chicago, IL, for Plaintiff.

Brian K. Lafratta, Huck Bouma PC, Wheaton, IL, Jeffrey Kenneth Brown, Payne & Fears LLP, Irvine, CA, for Defendants.

***MEMORANDUM OPINION AND ORDER***

HARRY D. LEINENWEBER, District Judge.

*1 Before the Court is the Plaintiff's Motion for Summary Judgment with respect to Post–Verdict relief. For the reasons stated herein, the Court grants in part and denies in part Plaintiff's Motion.

## I. *BACKGROUND*

After a two-day trial, a jury returned a verdict in favor of Plaintiff Daniel Lalowski (hereinafter, the "Plaintiff" or "Lalowski") on his Title IX retaliation claim against Defendants Corinthian Schools, Inc. and Corinthian Colleges, Inc. (hereinafter, collectively, the "Defendants" or "Corinthian"). Specifically, the jury determined that Defendants retaliated against Lalowski by terminating his employment shortly after he notified Defendants' President that his supervisor was engaging in sexually inappropriate behavior with students. As a result of the termination, the jury found Lalowski suffered mental and emotional distress and awarded the sum of $25,000 in damages.

At the conclusion of the trial, the Court directed the parties to file Motions for Post–Verdict Relief. On September 26, 2012, Plaintiff filed his Motion, styled as a Motion for Summary Judgment. In the Motion, Plaintiff requests that the Court award him economic damages for back pay and lost benefits. In addition, he asks to be reinstated in a position with Defendants or alternatively, to receive front pay.

## II. *LEGAL STANDARD*

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is "genuine" if the evidence would permit a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is material if it could affect the outcome of the case. *Id.* If the moving party satisfies its burden, the non-movant must present facts to show a genuine dispute exists to avoid summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To establish a genuine issue of fact, the non-moving party "must do more than show that there is some metaphysical doubt as the material facts." *Sarver v. Experian Info. Sys.*, 390 F.3d 969, 970 (7th Cir.2004).

## III. *DISCUSSION*

Lalowski prevailed on his Title IX retaliation claim against Defendants. The Seventh Circuit applies the same framework for retaliation claims under Title IX as retaliation claims under Title VII. *See, Milligan v. Bd. of Trustees of S. Illinois Univ.*, 686 F.3d 378, 388 (7th Cir.2012). While Title VII forbids an em-

ployer from discriminating against an employee who opposed any practice protected by Title VII, Title IX prohibits discrimination "on the basis of sex" and covers "retaliat[ion] against a person *because* he complains of sex discrimination." *Id.* citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (emphasis in original).

Prior to the Civil Rights Act of 1991, a prevailing party in a Title VII or IX action was limited to equitable relief—compensatory damages were unavailable. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir.2004). However, after the Civil Rights Act of 1991 was passed, prevailing plaintiffs became entitled to compensatory damages. *See, Hildebrandt v. Illinois Dept. of Natural Res.*, 347 F.3d 1014, 1031 (7th Cir.2003). Generally, compensatory damages are subject to limitations based on the size of the employer. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

***2** Back pay and front pay are available damages for plaintiffs who prevail in Title IX retaliation claims. These damages are considered equitable and therefore are not subject to the statutory limitations. *See* 42 U.S.C. §§ 1981a(b)(2), 2000e–5(g); *see also, Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001).

Reinstatement is another equitable remedy available to a prevailing party in a Title IX retaliation case. *Hicks v. Forest Preserve Dist. of Cook County Ill.*, 677 F.3d 781, 792 (7th Cir.2012). The Seventh Circuit has held that reinstatement is "the preferred remedy for victims of discrimination and the court should award it when feasible." *Bruso v. United Airlines*, 239 F.3d 848, 862 (7th Cir.2001). When such an award is not feasible, courts may award front pay in lieu of reinstatement. *See Shick v. IDHS*, 307 F.3d 605, 614 (7th Cir.2002).

Lalowski seeks back pay and reinstatement from Defendants. He alternatively requests front pay if the Court determines reinstatement impractical.

**A. Back Pay**

Lalowski seeks $214,638.00 in back pay. He claims he is entitled to this amount of money because he was reasonably diligent in his job search after being terminated, but was unable to find comparable employment and because he lost 401(k) benefits as a result of Defendants' unlawful termination. Defendants oppose such an award. They claim Lalowski is not entitled to any back pay because he failed to mitigate his damages and rejected an offer of comparable employment after being terminated.

"Title VII triggers a rebuttable presumption that a claimant is entitled to an award of back pay." *E.E.O.C. v. Gurnee Inn Corp.*, 914 F.2d 815, 817 (7th Cir.1990). After a prevailing party establishes an amount of damages, the employer must demonstrate an affirmative defense such as, failure to mitigate in order to reduce the amount or prevent an award entirely. *Id.* at 818.

Back pay is calculated by "measuring the difference between actual earnings for the period and those which ... [Plaintiff] would have earned absent the discrimination by the defendant." *U .S. E.E.O.C. v. Custom Companies, Inc.*, 02 C 3768, 2007 WL 734395 at *12 (N.D.Ill. Mar.8, 2007). Generally, back pay "begins to accrue when the plaintiff first loses wages due to the discrimination [or retaliation] at issue, and [ ] ends on the date of judgment." *Molino v. Bast Servs.*, No. 08–C–4399, 2011 WL 841891 at *3 (N.D.Ill. Mar.7, 2011). In order to recover back pay, a prevailing plaintiff must mitigate his damages by exercising reasonable diligence in finding new employment. *Gaffney v. Riverboat Servs. of Ind.*, 451 F.3d 424, 460 (7th Cir.2006). Failure to mitigate is an affirmative defense that a defendant must prove to

rebut a plaintiff's claim for back pay. *Id.*

In order to prove Lalowski failed to mitigate his damages, Defendants must prove that (1) Lalowski failed to exercise reasonable diligence to mitigate his damages; and (2) there was a reasonable likelihood that Lalowski would have found comparable work by exercising such diligence. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir.1994).

***1. Failure to Exercise Reasonable Diligence***

***3** Lalowski admits he "did not actively seek work for about three to six months due to the depression and stress he suffered ..." as a result of his termination. Pl.'s Mem. in Supp. of his Mot. for Summ. J. to Post–Verdict Relief at 3, ECF No. 89, Page ID # 1057. Defendants contend this admission illustrates Lalowski's failure to mitigate and necessitates a reduction in back pay. Plaintiff argues his initial period of inactivity was excused because of the distress he suffered as a result of Defendants. Plaintiff relies on *Gurnee Inn Corporation* as support. The Court finds Plaintiff's reliance misplaced.

In *Gurnee Inn,* the Seventh Circuit found a defendant could not establish a failure to mitigate defense notwithstanding the fact the plaintiff admitted she waited a period of time prior to seeking new employment. *Id.* at 818, n. 4. The plaintiff in *Gurnee Inn* was a 15–year–old high school student who was sexually harassed by her employer. *Id.* In light of the plaintiff's age and lack of work experience, the Seventh Circuit determined it was not "unreasonable under the circumstances" for her to "wait some period before again looking for work." *Id.*

The facts in *Gurnee Inn* are distinguishable from those here. First, it is undisputed Lalowski is an adult who graduated from high school in 1996. Def.'s Resp. to Pl.'s Statement of Uncontested Material Facts at 2. Next, unlike the plaintiff in *Gurnee Inn* who personally suffered sexual harassment, Lalowski did not. Instead, he reported his supervisor for engaging in inappropriate sexual conduct with students. *Id.* at 7. While the Court does not intend to minimize the mental and psychological stress that corresponds with reporting a colleague of such conduct, the Court does not consider this circumstance analogous to a teenager who was sexually harassed at her place of employment. Accordingly, the Court finds Defendants have met their burden in establishing Lalowski failed to exercise reasonable diligence for the first six months after his termination.

After these initial six months, however, Lalowski has provided sufficient evidence to demonstrate he has engaged in reasonable efforts to secure employment. Specifically, Lalowski submitted work search records from the Illinois Department of Employment Security from August 2, 2010 to December 17, 2010. He claims he also had multiple interviews for various positions at the end of 2009 and the beginning of 2010. Additionally, he provided employment records which reflect employment as a car salesman beginning in February 2011. Lalowski states he remained employed as a car dealer until he resigned so he could begin working in his current job. *Id.* at 13. His current employer is a college advisory service company that provides consultative advice on degree programs over the telephone. *Id.*

In light of the evidence Lalowski presented, the Court finds Defendants cannot establish Lalowski failed to exercise reasonable diligence in his search for employment after his initial six months of inactivity.

***2. Reasonable Likelihood of Finding Comparable Employment***

***4** In order to prevent an award of back pay, Defendants also must demonstrate there was a reasonable likelihood that Lalowski would have found comparable work if he exercised reasonable diligence in his job search. *Hutchison,* 42 F.3d at 1044.

Defendants claim they can satisfy this requirement because Lalowski rejected an offer of comparable employment approximately one year after his termination. Lalowski argues the job offer he received was for substantially less pay than his position with Defendants and thus cannot be construed as comparable employment.

Prior to his termination, Lalowski was employed as an admissions representative with Defendants. Since he began his employment with Defendants, Lalowski received a number of awards and increases in pay. It is undisputed that in January 2009 (when Defendants terminated Lalowski) he earned an annual salary of $64,260. Def.'s Resp. to Pl.'s Statement of Uncontested Material Facts at 6, ECF No. 95, Page ID# 1272.

Lalowski admits that in approximately January 2010, he had a job interview for a position as an admissions representative at another college similar to Defendants. Lalowski recollects receiving a verbal offer of employment from this college, but is unaware if the school was Illinois Institute of Technology ("ITT") or Westwood College. Lalowski claims he rejected the offer because the job only paid $45,000 per year.

The only evidence Lalowski has produced regarding the amount of this offer is his own affidavit. Because of this, Defendants argue its evidence of Westwood College's records "constitute the strongest evidence of the amount of the job offer." Defs.' Mem. in Opp. to Pl.'s Mot. for Summ. J. to Post–Verdict Relief at 6 n. 4.

However, even if the Court assumes Defendants are correct and the offer was in fact from Westwood College and not ITT, the evidence Defendants present make it clear that a newly-hired admissions representative at Westwood College receives a base salary between "$28,000 to $49,500 ..." Defs.' App. of Ex. in Supp. of Defs.' Opp. to Pl.'s Mot. Tab 4 at 2. It goes without saying this salary is well below that which Lalowski earned with Defendants.

Despite this difference, Defendants contend the Westwood College offer was an offer of comparable employment. They argue Plaintiff had an obligation to reduce his salary demands after he failed to find comparable employment after attempting to do so for a few months. Defendants cite *Hutchinson* as support for this obligation. The Court finds Defendants' support misguided.

In *Hutchinson,* the Seventh Circuit affirmed a district court's conclusion that it was appropriate for a jury to exclude the above market compensation a plaintiff received when analyzing Plaintiff's reasonable efforts to find comparable employment. *Hutchinson,* 42 F.3d at 1045. *Hutchinson* does not stand for the proposition that a plaintiff has an affirmative duty to lower his salary demands when he received an above average salary from a former employer who discriminated against him. Instead, *Hutchinson* amounts to the Seventh Circuit's finding that district courts do not abuse their discretion if they give a jury instruction that allows for consideration of a plaintiff's above market compensation to determine whether the plaintiff has mitigated damages. *Id.* As such, the Court does not find *Hutchinson* persuasive with respect to Defendants' argument and thus does not find Defendants have demonstrated Lalowski would have obtained comparable employment.

***5** Additional support for this finding lies in the definition of comparable employment. *See Ward v. Tipton County Sheriff Dept.,* 937 F.Supp. 791, 797 (S.D.Ind.1996). In reference to mitigation of damages, comparable employment is defined as a position that affords the prevailing party "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status" as their previous position. *Id.*

In this case, Defendants failed to present evidence that there was a reasonable likelihood that Lalowski would have found comparable work if he exercised reasonable diligence. The fact that Lalowski initially accepted employment as a car salesman suggests that making such a showing in the current job market is perhaps easier said than done. Regardless, the Court finds Defendants cannot demonstrate the affirmative defense of failure to mitigate. Therefore, Lalowski is entitled to back pay.

***3. Calculating Back Pay***

Lalowski claims he is entitled to $214,638.00 in back pay. Lalowski's calculations are for the time period of Lalowski's termination through the date judgment was entered and include an annual salary increase of five percent.

Lalowski argues an annual five percent salary increase is appropriate because his salary had increased twenty-five percent for two years. The Court finds this increase speculative and finds the evidence Defendants presented regarding the fact that Lalowski was earning "nearly the maximum salary budgeted for his position in 2009[,]" persuasive. Defs.' Statements of Add. Facts in Opp. to Pl .'s Mot. at 8. Accordingly, the Court declines to apply this five percent increase.

The Court also declines to award Plaintiff back pay for the first six months after his termination. During this time, Lalowski admitted "he was not able to look for a job due to his depression and 'shell shock.' " Pl.'s Statement of Uncontested Facts at 4, ECF No. 90, Page ID # 1068. While he argues that this period of time should be excused because Defendants inflicted severe distress on him, the Court does not find the circumstances of this case justify Lalowski's conduct, (or lack thereof). *See, Payne v. Security Sav. & Loan Ass'n, F.A.*, 924 F.2d 109, 111 (7th Cir.1991) (upholding reduction of plaintiff's back pay award for period during which his job search efforts consisted of spending merely "[a] few hours a week, maybe a month" looking for employment).

Defendants claim if Plaintiff is entitled to back pay, he should only receive $34,970. Defendants argue this amount excludes (1) the first six months Plaintiff admitted he did not seek employment; (2) the time Plaintiff was unemployed after he refused the alleged comparable offer from Westwood College; and (3) the time after Defendants closed the campus Lalowski worked.

The Court agrees with Defendants with respect to the first six months after Lalowski was terminated. However, the Court finds Defendants' other contentions belie the purposes of discrimination and retaliation claims under Titles VII and IX. In these cases, the Seventh Circuit has repeatedly held that if a plaintiff proves discrimination or retaliation, back pay may only be denied "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination ... and making persons whole." *E.E.O.C. v. O & G Spring and Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir.1994). Because the Westwood College offer was not an offer of comparable employment, the Court refuses to cut off Lalowski's back pay after he rejected the offer.

***6** The Court is equally unconvinced with Defendants' argument regarding the closure of the campus where Lalowski was employed. While it is undisputed Defendants closed the admissions department of the campus at which Lalowski worked in January 2012, it is also undisputed that Defendants own at least six other college campuses in the Chicagoland area. Defs.' Statement of Additional Facts in Opp. to Pl.'s Mot. for Summ. J. at 8. In light of this fact, Lalowski argues it is plausible he would have been transferred to another campus to work as an admissions representative. *See* Pl.'s Reply Memo. at 10, ECF No. 97, Page ID # 1308. As support, he presents evidence of another admissions representative who was transferred to a different campus to work as

an admissions representative after Defendants closed the one Lalowski worked. Lalowski also provides evidence that Defendants transferred a president from one of its older campuses to become the first president of its new Melrose Park campus.

Given these facts, the Court does not find this to be a scenario where Defendants can definitively know Lalowski would have been laid off after the campus he worked at closed. *See Richardson v. Rest. Mktg. Assocs., Inc.*, 527 F.Supp. 690, 696 n. 1 (N.D.Cal. Nov.17, 1981) (stating that if plaintiffs failed to present evidence that they "would have been able to transfer to other RMAmanaged facilities after its San Francisco operation closed, and [failed to present evidence that they] would have been willing to relocate for that period after RMA ceased to operate in San Francisco" then the court would have refused to award back pay). Here, Lalowski presents sufficient evidence that transfer was possible and he would have been willing to relocate. Thus, the Court finds back pay for this period of time appropriate.

Accordingly, the Court awards Plaintiff $30,546 for the year 2009 (his base salary minus his earnings from Defendants for January 1, 2009 through January 9, 2009 (his termination date) and minus the first six months after his termination when he admitted he did not look for other employment); $64,260 for 2010 and 2011 (his full base salary at the time of termination); and $41,501.25 for 2012 (his base salary for January 1, 2012 through August 22, 2012, the date judgment was entered). The Court subtracts $34,250 from this total, as this is the amount Lalowski claims he earned from his other jobs for this period of time. Def.'s Resp. to Pl.'s Statement of Uncontested Material Facts at 13, ECF No. 95, Page ID# 1279. As such, the Court awards Lalowski $166,317.25 in back pay.

#### *4. 401(k) Contributions*

In addition to his back pay request, Plaintiff also seeks to be reimbursed $6,222.22 in 401(k) contributions. Lalowski states Defendants matched contributions up to 2.5%. He avers that if he remained employed with Defendants, he would have made the maximum contributions. However, the only evidence Lalowski submits to support this statement is a pay stub from 2008. *See* ECF No. 91–4, Page ID# 1107. The pay stub indicates Lalowski had grossed $58,760.76 as of December 28, 2008 and contributed $885.98 to his 401(k). This constitutes a 1.5% contribution. Accordingly, the Court awards Plaintiff $2,494.76. This amount reflects 1.5% of $166,317.25, Plaintiff's back pay award. *See Custom Companies, Inc.*, 2007 WL 734395 at *13–14 (awarding 401(k) contributions as back pay where the plaintiff presented sufficient evidence of prior contribution).

#### *5. Pre–Judgment Interest*

*7 Plaintiff also seeks prejudgment interest on his back pay award. He claims he is entitled to interest at a rate of 3.25%. The Court agrees.

Parties who prevail on their Title VII or Title IX retaliation claims are entitled to prejudgment interest on their back pay award. *See Fine v. Ryan Int'l Airlines,* 305 F.3d 746, 757 (7th Cir.2002). When calculating prejudgment interest, the Seventh Circuit directs courts to use the prime rate. *Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 820 (7th Cir.2002). The current prime rate is 3.25%. Applying this rate to Lalowski's back pay award of $166,317.25, yields a total of $5,405.30. The Court awards this amount in prejudgment interest.

### B. Reinstatement

Lalowski also seeks reinstatement. He requests to be reinstated to one of the six campuses Defendants own in the Chicagoland area. Lalowski submits computer printouts of job openings for admissions representatives at some of these campuses and states that Defendants have posted two of these openings in the past two years. Defendants respond reinstatement is not feasible since they closed the campus Lalowski worked.

The intent of Title VII (and in this case, Title IX) is to restore a plaintiff to the situation he would have been in had no retaliation occurred. *Gaddy v. Abex Corp.,* 884 F.2d 312, 319 (7th Cir.1989). Because of this, reinstatement is the preferred remedy for prevailing parties in employment discrimination or retaliation cases. *See Bruso,* 239 F.3d at 861. Indeed, the Seventh Circuit has held "reinstatement is warranted absent exceptional circumstances demonstrating that the position is no longer available ..." *Stephenson v. Aluminum Co. of America,* 915 F.Supp. 39, 56 (S.D.Ind.1995) (citing *Gaddy,* 884 F.2d at 319). That being said, reinstatement is not always required. *Hutchison,* 42 F.3d at 1046. Generally, reinstatement is not granted "where the result would be undue friction and controversy." *Hutchison,* 42 F.3d at 1046; *McKnight v. General Motors Corp.,* 908 F.2d 104, 115 (7th Cir.1990) ( *"McKnight I"* ). However, employer hostility developed during litigation cannot alone defeat reinstatement. *Hutchison,* 42 F.3d at 1046; *McKnight I,* 908 F.2d at 116.

When determining whether or not reinstatement is appropriate, courts in this Circuit examine various factors. Such factors include (1) the hostility of the employer; (2) the lack of available positions; and (3) the employer's dissatisfaction with the employee's job performance. *See McKnight v. General Motors Corp.,* 973 F.2d 1366, 1370 (7th Cir.1992) ( *"McKnight II"* ). In *McKnight II,* the Seventh Circuit affirmed a district court's decision not to reinstate because the employee asked for "a completely different job and to be relocated in a new city," and there was no basis to conclude that the employee was qualified to perform the job he requested or that a position was even available. *Id.* at 1370–71.

***8** The same is not true here. In this case, Lalowski seeks to be reinstated in the exact same position held prior to his termination. Moreover, Lalowski has presented evidence that there are at least two openings for admissions representatives at one of Defendants' campuses in the Chicago area. *See* ECF No. 91–15. In addition to this, Defendants admit all of the individuals involved in Lalowski's termination are no longer employed with Defendants. *See* Defs.' Resp. to Pl.'s Statement of Uncontested Material Facts at 19. Taking these facts into account, the Court finds reinstatement appropriate and grants Lalowski's request.

Defendants also claim reinstatement should be denied because at his deposition Plaintiff admitted he did not list all of his former employers on his resume. Apparently one of the employers that were not listed was a retail store that terminated Plaintiff. Defendants claim they would have terminated Lalowski had they discovered this while he was employed. They state it is their policy to terminate an employee when they discover the employee was dishonest on his resume. As support, Defendants provide the declaration of their Vice President of Human Resources. *See* ECF No. 94–3.

A defendant in an employment discrimination or retaliation case can assert an after-acquired evidence defense. *See generally McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 361–62, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). Under this defense, an employer may use evidence of the employee's misconduct it acquired after the case was filed to limit damages. *Sheehan v. Donlen Corp.,* 173 F.3d 1039, 1047 (7th Cir.1999). When an employer asserts this defense, it must establish, by a preponderance of the evidence, the after-acquired evidence would have led to the employee's termination. *Id.* at 1047–48.

The Court finds Defendants have failed to meet this burden. In fact, their argument is nearly identical to one this Court rejected in *U.S. E.E.O.C. v. Custom Companies,* 2007 WL 734395 at *15. In that case, the employer argued the employee's damages should have been limited because it discovered the employee lied on her resume about her relevant work experience. *Id.* As support, the employer presented a copy of their application that stated misrepresentations were "cause

for termination." *Id.* This Court did not find such evidence sufficient to prove the employee would in fact have been fired. Instead, the Court noted "[i]n order to carry their burden, Defendants must do more than merely reiterate their policy." *Id.* The Court determined the employer needed to establish that their decision to terminate not only would have been justified, but also would have occurred. *Id.; see also Sheehan,* 173 F.3d at 1048 ("the inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not").

***9** Like the employer in *Custom Companies,* Defendants here do nothing more than assert Lalowski would have been fired after they discovered he failed to include all his employers on his resume. Defendants fail to present any evidence that in the past they have fired other employees for such conduct. In fact, the only evidence Defendants provide is the aforementioned declaration. The Court finds this falls short of a preponderance of evidence. As such, the Court rejects Defendants after-acquired evidence defense and finds reinstatement appropriate.

### C. Front Pay

Lalowski requested front pay in the event the Court denied reinstatement. In light of the Court's grant of reinstatement, the Court denies an award of front pay. *See Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 852, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001) (front pay is appropriate in lieu of reinstatement).

## IV. *CONCLUSION*

For the reasons stated herein, the Court grants in part and denies in part Plaintiff's Motion for Summary Judgment. The Court awards Plaintiff: (1) $166,317.25 in back pay; (2) $1,638.00 in 401(k) contributions; (3) $5,405.31 in prejudgment interest; and (4) reinstatement.

**IT IS SO ORDERED.**

N.D.Ill.,2013.
Lalowski v. Corinthian Schools, Inc.
Not Reported in F.Supp.2d, 2013 WL 1788353 (N.D.Ill.)

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--- F.Supp.2d ----, 2013 WL 4478695 (D.Puerto Rico)
**(Cite as: 2013 WL 4478695 (D.Puerto Rico))**

**H**

Only the Westlaw citation is currently available.

United States District Court,
D. Puerto Rico.
Wanda G. MIRANDA, Plaintiff,
v.
DELOITTE LLP, Deloitte Tax LLP, Deloitte & Touche LLP, Deloitte Services LLP, Francisco A. Castillo–Penne, Ricardo Villate–Prieto, Michelle Corretjer–Catalan, John Doe, Richard Doe, ABC, DEF Insurance Companies, Defendants.

Civil No. 12–1271 (FAB).
Aug. 23, 2013.

**Background:** Employee brought action against her employer, supervisor, and coworkers, alleging sexual discrimination, harassment, and retaliation pursuant to Title VII, age discrimination pursuant to Age Discrimination in Employment Act (ADEA), and retaliation under Puerto Rico law. After employee's motion to compel and for discovery sanctions was denied, employee moved for reconsideration. Defendants moved to announce an expert witness.

**Holdings:** The District Court, Besosa, J., held that:
(1) reconsideration of order denying employee's motion to compel employer to produce time reports of its upper managers was not warranted;
(2) compelling employer to produce documents which contained its policies for preparation and submission of billings was not warranted; but
(3) compelling employer to produce various individuals' performance evaluations was warranted;
(4) reconsideration of order denying employee's motion to compel employer to produce documents which contained its code of ethics and professional conduct was not warranted;
(5) testimony of expert who specialized in the field of tax law and tax return procedures was not admissible; and
(6) District Court would allow defendants additional 30-day period in which to respond to employee's requests for admission.

Ordered accordingly.

West Headnotes

**[1] Federal Civil Procedure 170A 613.1**

170A Federal Civil Procedure
170AVI Motions and Orders
170AVI(C) Reconsideration
170Ak613.1 k. In General. Most Cited Cases

Generally, the legal standards of rule governing motions to alter or amend a judgment will be applied to motions for reconsideration of interlocutory orders. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

**[2] Federal Civil Procedure 170A 613.1**

170A Federal Civil Procedure
170AVI Motions and Orders
170AVI(C) Reconsideration
170Ak613.1 k. In General. Most Cited Cases

The rule governing motions to alter or amend a judgment does not apply to motions for reconsideration of interlocutory orders from which no immediate appeal may be taken. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

--- F.Supp.2d ----, 2013 WL 4478695 (D.Puerto Rico)
**(Cite as: 2013 WL 4478695 (D.Puerto Rico))**

**[3] Federal Civil Procedure 170A 1271**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases

A discovery order is an interlocutory order in the course of proceedings that is not appealable, and, thus, a motion for reconsideration of a discovery order cannot be evaluated under the legal standards of rule governing motions to alter or amend a judgment; instead, the decision whether to reconsider a discovery order falls squarely within the plenary power of the court that issued the initial ruling. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

**[4] Federal Civil Procedure 170A 1271**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases

The inherent power of a court to reconsider its earlier discovery order is not governed by rule or statute and takes root in the court's equitable power to process litigation to a just and equitable conclusion.

**[5] Federal Civil Procedure 170A 613.8**

170A Federal Civil Procedure
170AVI Motions and Orders
170AVI(C) Reconsideration
170Ak613.6 Grounds and Factors
170Ak613.8 k. Justice; Prevention of Injustice. Most Cited Cases

Ordinarily, when reconsideration of an earlier ruling is requested, the district court should place great emphasis upon the interests of justice.

**[6] Federal Civil Procedure 170A 1624**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1624 k. Order. Most Cited Cases

Reconsideration of District Court's earlier discovery order in employment discrimination case, denying employee's motion to compel employer to produce time reports of its upper managers, was not warranted, where employee advanced same factual arguments in her motion for reconsideration as she had in her original motion to compel.

**[7] Federal Civil Procedure 170A 1624**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1624 k. Order. Most Cited Cases

Reconsideration of District Court's earlier discovery order in employment discrimination case, denying employee's motion to compel employer to produce specific documents, was not warranted, where documents sought fell within more generalized requests for production of documents, pursuant to which employer produced all responsive documents in its possession.

**[8] Federal Civil Procedure 170A 1624**

170A Federal Civil Procedure

170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1624 k. Order. Most Cited Cases

Reconsideration of District Court's earlier discovery order in employment discrimination case, denying employee's motion to compel employer to produce documents which contained its policies for preparation and submission of billings, was not warranted, where employer represented that it produced all responsive documents in its possession.

**[9] Federal Civil Procedure 170A 1624**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1624 k. Order. Most Cited Cases

Reconsideration of District Court's earlier discovery order in employment discrimination case, denying employee's motion to compel employer to produce various individuals' mid-year and year-end performance evaluations for three years, was warranted, where the District Court had initially denied the request for failure to establish relevance of the reports, and employee offered sufficient support in its motion for reconsideration to support conclusion that requested evaluations pertained to employees who were similarly situated to her.

**[10] Federal Civil Procedure 170A 1624**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1624 k. Order. Most Cited Cases

Reconsideration of District Court's earlier discovery order in employment discrimination case, denying employee's motion to compel employer to produce documents which contained its code of ethics and professional conduct, was not warranted, where employer already fully complied with employee's request.

**[11] Evidence 157 508**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

Testimony of expert who specialized in the field of tax law and tax return procedures was not admissible to establish after-acquired evidence so as to limit damages in an employment discrimination action, absent any alleged misconduct on part of employee that occurred on the job, or any employment policy indicating that an employee's individual tax return preparation and submission were relevant to or somehow affected his or her job security.

**[12] Civil Rights 78 1529**

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1529 k. Defenses in General. Most Cited Cases

**Civil Rights 78 1560**

78 Civil Rights
78IV Remedies Under Federal Employment Dis-

crimination Statutes
78k1559 Relief
78k1560 k. In General. Most Cited Cases

Although after-acquired evidence of an employee's wrongdoing is not relevant for the purposes of employer liability, it may be considered when ascertaining a proper remedy in an employment discrimination case.

**[13] Civil Rights 78 ⚿1570**

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1569 Monetary Relief; Restitution
78k1570 k. In General. Most Cited Cases

To rely upon the after-acquired evidence doctrine to limit damages in an employment discrimination case, an employer must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge; a court must look to the employer's actual employment practices and not merely the standards articulated in its manuals when evaluating whether the employee in fact would have suffered the adverse employment action.

**[14] Civil Rights 78 ⚿1570**

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1569 Monetary Relief; Restitution
78k1570 k. In General. Most Cited Cases

Because employers often say they will discharge employees for certain misconduct while in practice they do not, an employer seeking to rely upon the after-acquired evidence doctrine to limit damages in an employment discrimination case must establish by a preponderance of the evidence not only that it could have fired an employee for the later-discovered misconduct, but that it would in fact have done so.

**[15] Federal Civil Procedure 170A ⚿1680**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(G) Admissions on Request
170Ak1679 Time for Response
170Ak1680 k. Allowance of Additional Time. Most Cited Cases

District Court would allow defendants in employment discrimination case additional 30-day period in which to respond to employee's requests for admission, after it denied their motion for a protective order, where defendants claimed to be diligently working on the responses. Fed.Rules Civ.Proc.Rule 36(a)(3), 28 U.S.C.A.

Maria I. Santos–Rivera, Maria I. Santos Law Office, San Juan, PR, for Plaintiff.

Carl E. Schuster, Mariela Rexach–Rexach, Ana Beatriz Rivera–Beltran, Schuster & Aguilo LLP, San Juan, PR, for Defendants.

**MEMORANDUM AND ORDER**

BESOSA, District Judge.

***1** Before the Court are:

1. Plaintiff Wanda G. Miranda ("Miranda")'s motion for reconsideration of the Court's Order at Docket 118, (Docket 151); the motion in opposition filed by defendant Deloitte Tax LLP, (Docket 175); plaintiff Miranda's reply, (Docket 181); and defendant's motion to strike plaintiff's reply, (Docket 183);

2. the motion for leave to announce an expert witness filed by all defendants, (Docket 146); plaintiff

Miranda's opposition, (Docket 147); and the briefs in compliance with the Court's July 23, 2013 Order filed by defendants and plaintiff Miranda, (Dockets 165 and 167, respectively); and

3. plaintiff's motion to deem her requests for admission admitted, (Docket 184); and defendants' opposition, (Docket 185).

Having considered all documents referenced above, the Court **DENIES IN PART AND GRANTS IN PART** plaintiff's motion for reconsideration, (Docket 151); **DENIES** defendants' motion to strike plaintiff's reply, (Docket 183); **DENIES** defendants' motion to announce an expert witness, (Docket 146); and **DENIES** plaintiff's motion to deem admitted all matters included in her requests for admissions, (Docket 184).

## I. MOTION FOR RECONSIDERATION

On February 28, 2013, plaintiff Miranda served defendant Deloitte Tax, LLP with a second production request, which defendant Deloitte Tax answered on April 6, 2013. (Docket 79 at 1.) In good faith, pursuant to Local Rule 26, the parties conferred to discuss plaintiff's objections to the defendant's answers. They were unable to resolve their issues, however, and plaintiff subsequently submitted a motion to compel with six requests. (Docket 79.) On July 8, 2013, the Court entered an order denying the motion to compel and sanctioning plaintiff $500. (Docket 118.) Plaintiff has filed a motion for reconsideration of the Court's order. (Docket 151.)

[1][2][3][4][5] Defendant Deloitte Tax LLP argues that plaintiff's motion for reconsideration is brought pursuant to Fed.R.Civ.P. 59(e).[FN1] "Generally, Rule 59(e)'s legal standards will be applied to motions for reconsideration of interlocutory orders." *Sanchez–Medina v. UNICCO Serv. Co.,* 265 F.R.D. 29, 32 (D.P.R.2010) (Arenas, J.) (internal quotations and citations omitted). The First Circuit Court of Appeals has held, however, that "Rule 59(e) does not apply to motions for reconsideration of interlocutory orders **from which no immediate appeal may be taken.**" *Nieves–Luciano v. Hernandez–Torres,* 397 F.3d 1, 4 (1st Cir.2005) (emphasis added). "A discovery order is[ ] ... an interlocutory order in the course of proceedings [that] is not appealable." 8 The Late Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2006 (3d ed. 2010). Accordingly, plaintiff's motion cannot be evaluated under Rule 59(e)'s standard. Instead, "the decision as to whether or not to reconsider [the Court's previous order regarding discovery] ... falls squarely within the plenary power of the court that issued the initial ruling, this Court." *Portugues–Santa v. B. Fernandez Hermanos, Inc.,* 614 F.Supp.2d 221, 226 (D.P.R.2009) (Besosa, J.) (citing *Campos v. P.R. Sun Oil Co.,* 536 F.2d 970, 972 n. 6 (1st Cir.1976)). That inherent power is not governed by rule or statute and takes root in the court's equitable power to "process litigation to a just and equitable conclusion." *In re Villa Marina Yacht Harbor, Inc.,* 984 F.2d 546, 548 (1st Cir.1993). Ordinarily, "when reconsideration of an earlier ruling is requested, the district court should place great emphasis upon the 'interests of justice.' " *United States v. Roberts,* 978 F.2d 17, 21 (1st Cir.1992).[FN2]

### A. Plaintiff's Duplicative Discovery Requests

***2** Throughout the discovery phase, the defendants have consistently argued that plaintiff's discovery requests are repetitive. The Court has already agreed and has sanctioned plaintiff $600 for "continuing to insist that the discovery be answered when [it] already has been," (Docket 80 at 2), in addition to the $500 in sanctions that plaintiff moves to reconsider today for "insisting on the[ ] production [of five requests] even though they have been previously produced," (Docket 118 at 1). Once again, the Court finds many of plaintiff's requests for reconsideration to be duplicative and **DENIES** her motion with regard to those requests:

[6] First, "request no. 1" advances the same fac-

tual arguments regarding plaintiff's reasons for desiring the April 21, 2011 time reports of Deloitte Tax LLP's upper managers as her arguments contained in the original motion to compel. (*See* Docket Nos. 79 & 151.) From plaintiff's submission, the Court can glean no additional reason why its initial decision should be changed. Plaintiff's motion to reconsider as to request no. 1, therefore, is **DENIED.**

[7] Second, plaintiff's arguments regarding "requests no. 5, 6, and 8" also merely echo the same contentions from her motion to compel. (*See* Dockets 79, 151, & 181.) Defendant Deloitte Tax LLP has explained to plaintiff that it believes the documents produced in response to requests no. 11, 12 and 13 of plaintiff's first request for production of documents "[are] also responsive to Request for Production of Documents Nos. 5, 6, and 8." (Docket 98–1 at 2.) After consulting the wording of those discovery requests, the Court agrees that the documents sought in plaintiff's "requests no. 5, 6, and 8" of the motion to compel do fall within the more generalized "requests no. 11, 12, and 13" from her requests for production of documents. (*See* Docket 181 at 4–5.) Thus, the documents produced in response to requests no. 11, 12, and 13 are the responsive documents to plaintiff's requests no. 5, 6, and 8. Defendant Deloitte Tax LLP guarantees that it has turned over all documentation in its possession that are responsive to plaintiff's requests. (Docket 98–1 at 2) ("[A]s has been repeatedly indicated by counsel ... the documentation already provided is the documentation that we have available."). The Court takes this time to remind defendants of their continuing duty to supplement their responses to plaintiff's discovery requests. Fed.R.Civ.P. 26(e). In light of that rule, plaintiff may rest assured that defendants have a continuing duty to produce (1) any communication between Mrs. Maria Vilorio and Mr. Francisco Castillo from January 1, 2010 through May 25, 2011 regarding plaintiff's performance or lack of performance; (2) any response by Mr. Francisco Castillo to the email sent by Maria Vilorio to Mr. Francisco Castillo on October 5, 2010; and (3) any communication between Tere Pascual and Maria Vilorio from January 1, 2010 and May 25, 2011 regarding plaintiff's performance or lack of performance. Fed.R.Civ.P. 26(e). A defendant's failure to disclose or supplement its responses to discovery requests will result in sanctions against it. *See* Fed.R.Civ.P. 37(c). Accordingly, the Court **DENIES** plaintiff's motion as to requests no. 5, 6 and 8.

***3** [8] Third, in her "request no. 10," plaintiff seeks "the policies or Administrative Policy Releases ('APRs')" applicable to 2009, 2010, and 2011 which contain Deloitte's guidelines or policies for preparation and submission of billings. Defendant Deloitte Tax LLP claims that the request is "vague and unintelligible," but nonetheless directs plaintiff to a previously produced document bates-stamped 2342–2344, which it claims pertains to "the matter of billings." (Docket 98 at 10.) In her motion for reconsideration, plaintiff again demands the APRs and states that the documents bate-stamped 2342–2344 do not constitute APRs. Like plaintiff, the Court finds plaintiff's request for the production of "APRs pertaining to fiscal years 2009, 2010 and 2011" to be clearly drafted. By producing the mere documents bates-stamped 2342–2344 in response to that request, however, defendant Deloitte Tax LLP has represented both to her and to the Court that those documents are the only responsive documents in their possession.[FN3] As a result of defendant's representation, the Court stands by its previous finding that the information plaintiff requests has been previously produced. Accordingly, plaintiff's motion reconsider request no. 10 is **DENIED.**

**B. Reconsideration of Plaintiff's Requests No. 3 and 14**

[9] Plaintiff seeks various individuals' mid-year and year-end performance evaluations for 2009, 2010 and 2011 in her "request no. 3." Defendant Deloitte Tax LLP objected to the request as overbroad and irrelevant, and the Court initially denied the request for failure to establish the reports' relevance. (Docket

118 at 1.) Plaintiff's motion for reconsideration, however, offers sufficient support for the Court to conclude now that the requested evaluations pertain to employees who are or were similarly situated to plaintiff. Plaintiff represents that the testimony of Maria Vilorio demonstrates that those employees were the managers and senior managers at Deloitte Tax LLP who "did, on a daily basis, the same type of work as Mrs. Miranda did[,] they were evaluated under the same procedures[,] and us[ed] the same forms and ratings." (Docket 151 at 4.) Taken together, that the employees worked at the same time as plaintiff; that they held similar positions to plaintiff; and that they were subjected to the same review procedures as plaintiff, all substantiate plaintiff's contention that they are sufficiently similarly situated for the purpose of finding their evaluations relevant [FN4] to plaintiff's employment discrimination and retaliation claims. Accordingly, plaintiff's motion for reconsideration as to request no. 3 is **GRANTED** and the sanction for that request is **VACATED.** Defendant Deloitte Tax LLP is **ORDERED** to produce all documents responsive to plaintiff's request no. 3.

[10] Plaintiff's "request no. 14" is for Deloitte Tax LLP's Code of Ethics and Professional Conduct for fiscal years 2009, 2010, and 2011. Defendant's response referenced previously submitted documents bates-stamped 2409–2433 as the only responsive documents to that request. (Docket 98 at 10–11.) Plaintiff's motion to compel argued, however, that defendant's response was incomplete due to an outstanding APR 205 issued on February 2010 that "was not produced." (Docket 79 at 8.) In its opposition, defendant Deloitte Tax LLP directly responded to plaintiff's concern by referencing three versions of APR 205 Code of Ethics and Professional Conduct, and by explaining that "the document produced at bates numbers 2411–2412 is APR 205 issued on February 2010, which was what plaintiff sought through her objections." (Docket 98 at 11.) In her motion for reconsideration, plaintiff continues to claim that defendants "have a link to obtain the APR 205 issued on February 2010 ... but the document was not produced." (Docket 151 at 7.) Upon review of the record before it, the Court finds that defendant Deloitte Tax LLP has fully complied with plaintiff's request no. 14. Not only did it submit a copy of the Code of Ethics and Professional Conduct for Deloitte Tax LLP, (bates-stamp 2415), but it also produced the APR 205 issued on February 2010, (bates-stamp 2411), which is the sole document upon which plaintiff's objection was grounded. Moreover, the defendant has explained that a document plaintiff now seeks—a document that was referenced in APR 205 and titled "Code of Ethics and Professional Conduct for Deloitte Tax LLP"—"**was already produced** to plaintiff at bates numbers 2415–2433." (Dockets 175 at 8–10; 98 at 11; 153–2 at 1–2.) Defendant also explains that plaintiff is mistaken in believing that the Code of Ethics document was revised in February 2010 and that a separate document exists but has not yet been produced:

> *4 APR 205 and the Code of Ethics are two separate documents. The fact that APR 205 refers to a document does not mean that said document was also revised on that same date. As such, the fact that the Code of Ethics is referenced to in APR 205 does not mean that they were both revised at that time. Here, APR 205 dated February 2010 simply refers to a Code of Ethics, which, in turn, indicates that it was revised on May 2008.

(Docket 175 at 9.) As stated above, defendant Deloitte Tax LLP makes such representations subject to Fed.R.Civ.P. 26(e) and 37. The Court understands why confusion might have arisen that another outstanding document possibly existed, however, given that the two separate documents share the same title—"Code of Ethics and Professional Conduct"—and one indicates a revision date of February 2010. (*See* Dockets 153–1 and 153–2.) Accordingly, the Court **GRANTS** plaintiff's motion as to request no. 14 and **VACATES** the corresponding sanction.

**II. REQUEST FOR EXPERT WITNESS**

On June 19, 2013, the Court granted defendants' motion to compel plaintiff's complete tax returns for 2007 through 2011. (Docket 80.) Upon reviewing the documents which plaintiff eventually—albeit belatedly—produced, the defendants claim to have "c[o]me across evidence, not previously known to them, that suggests that plaintiff reported false information to the Puerto Rico tax authorities." (Docket 146 at 1.) Defendants claim that "[p]laintiff's conduct, beyond constituting perjury, was in violation of defendants' Code of Ethics and Professional Conduct and against established guidelines regulating Certified Public Accountant ("CPA") professionals." *Id.* at 1–2. Alleging that "[h]ad this information been available to defendants at the time of the events alleged in the Complaint, it would have been sufficient grounds to justify plaintiff's termination," the defendants amended their complaint to invoke an "after-acquired evidence" defense.[FN5] *Id.* at 2; Docket 119.

[11] At plaintiff's second deposition, she allegedly testified "that she completed her tax returns in accordance with her 'understanding' of the Puerto Rico Tax Code and her experience as a tax professional." (Docket 146 at 2.) With the intention of proving "that plaintiff's 'understanding' of the Puerto Rico Tax Code is grossly inadequate and that her conduct was dishonest and in violation of established professional standards," defendants move for leave to announce an expert witness who is specialized in the field of tax law, tax return procedures and accepted standards of the CPA profession. (Docket 146.) Plaintiff opposed defendants' motion, arguing that the defendants fail to establish (1) plaintiff's alleged dishonest conduct; (2) the relevance of her personal income tax returns; and (3) any employment policy that supports the conclusion that an employee like plaintiff Miranda could have been terminated for issues related to the filing of an individual tax return. (Docket 147; 167.)

***5** [12] The Supreme Court has held that after-acquired evidence of an employee's wrongdoing is not relevant for the purposes of employer liability. *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 362–63, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) (finding that when an employee's misconduct "was not discovered until after she had been fired[,] ... [the employer] could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason"). After-acquired evidence may be considered, however, when ascertaining a proper dy. *Nieves–Villanueva v. Soto–Rivera,* 133 F.3d 92, 101 (1st Cir.1997) ("[A]fter-acquired evidence is normally admissible only as to remedy, and not on liability."). Accordingly, any after-acquired evidence defendants seek to admit in this case would be limited to the purpose of calculating the remedy to plaintiff—it is inadmissible as evidence regarding employer liability.

[13][14] In order to rely upon the after-acquired evidence doctrine, an employer "must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon,* 513 U.S. at 362–63, 115 S.Ct. 879. A court must look to "the employer's actual employment practices and not merely the standards articulated in its manuals" when evaluating whether the employee in fact would have suffered the adverse employment action. *Sellers v. Mineta,* 358 F.3d 1058, 1064 (8th Cir.2004). Because "employers often say they will discharge employees for certain misconduct while in practice they do not," *Palmquist v. Shinseki,* 729 F.Supp.2d 425, 429–30 (D.Me.2010) (internal citation omitted), an employer must establish by a preponderance of the evidence "not only that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so." *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 759 (9th Cir.1996) (emphasis in original); *Id.* at 762 ("This does not mean that employers can prevail based only on bald assertions that

an employee would have been discharged for the later-discovered misconduct."); *see also Adams v. City of Gretna,* 2009 WL 2883038 at *7, 2009 U.S. Dist. LEXIS 79014 at *21 (E.D.La. Sept. 2, 2009) ("An employer must demonstrate, by a preponderance of the evidence, that its actual employment practices would have led to the employee's termination, not simply that the employee's conduct was in contravention of the employer's stated policies.").

The issues of whether plaintiff Miranda engaged in misconduct and whether the conduct was so severe that defendants would have terminated plaintiff are questions of fact to be resolved by the jury. *See Palmquist,* 729 F.Supp.2d at 430 (citing *Davidson v. Mac Equip., Inc.,* 1995 WL 151736, *3, 1995 U.S. Dist. LEXIS 4711, *8 (D.Kan. Mar. 6, 1995) (questions of fact remain regarding whether the plaintiff actually engaged in misconduct); *Roalson v. Wal–Mart Stores,* 10 F.Supp.2d 1234, 1236 (D.Kan.1998) (questions of fact remain regarding whether alleged behavior was serious enough to preclude plaintiff's hire); *Wehr v. Ryan's Family Steak Houses,* 1996 WL 585892, *2–3, 1996 U.S.App. LEXIS 26766, *8–9 (6th Cir.1996) (stating whether employer satisfied its burden under *McKennon* is a question of fact); *Femidaramola v. Lextron Corp.,* 2006 WL 2669065, *6–7, 2006 U.S. Dist. LEXIS 67047, *21–22 (S.D.Miss. Sept. 18, 2006) (stating that the after-acquired evidence doctrine involves question of fact)). Nonetheless, defendant Deloitte Tax LLP itself admits that "[t]he discovery rules are not intended as a broad license to mount serial fishing expeditions," (Docket 98 at 3) (citing *Aponte–Torres v. Univ. of P.R.,* 445 F.3d 50, 59 (1st Cir.2006)), and the Supreme Court acknowledges a serious limitation of the after-acquired evidence doctrine: an employer might "undertake extensive discovery into an employee's background or performance on the job to resist claims...." *McKennon,* 513 U.S. at 362–63, 115 S.Ct. 879. The Court regards the defendants' scrutiny of plaintiff's individual tax returns and subsequent request to announce a tax law expert as precisely the type of suspect "fishing expedition" against which courts caution. Defendants admit that their intent "is for the expert to explain that, in light of her preparation and her expertise, her conduct as it relates to her tax returns violates the[ ] codes which regulate[ ] her profession." Given that the defendants have not named any alleged misconduct that occurred on the job, or any employment policy indicating that an employee's individual tax return preparation and submission are relevant to or somehow affect his or her job security at Deloitte, the need for an expert witness appears tenuous at best. At this time, therefore, the Court **DENIES** defendants' motion to announce an expert witness, (Docket 146).

## III. MOTION TO ADMIT

*6 [15] On May 31, 2013, plaintiff served individual requests for admission to defendants Deloitte Tax LLP, Deloitte Services LP, Deloitte & Touche LLP, and Francisco Castillo. The parties conferred to discuss defendants' objections to the requests and agreed to stay the running of the 30–day period to respond until July 2, 2013. (Docket 184.) On July 2, 2013, plaintiff served Deloitte Tax LLP with a revised request for admission. She did not amend or withdraw her requests to the other defendants. All defendants filed a joint motion for protective order on July 17, 2013, (Docket 134), and the Court denied the motion on July 26, 2013, (Docket 180). Both parties acknowledge that as of the date of this Memorandum and Order, none of the defendants has answered plaintiffs' requests for admission. (Docket 184 & 185.) Claiming that the allotted 30–day period to submit defendants' answers pursuant to Fed.R.Civ.P. 36 ("Rule 36") has expired, plaintiff moves for the Court to deem admitted all matters included in the requests. (Docket 184.)

Rule 36(a)(1) states that "[a] party may serve on any other party a written request to admit ... the truth of any matters[sic] within the scope of Rule 26(b)(1)...." A party may respond to the request for admission by serving upon the requesting party a

written answer or objection within 30 days after being served. Fed.R.Civ.P. 36(a)(3). If the party fails to submit answers or objections within that time, the matter is deemed admitted. *Id.*

Defendants claim that by filing their motion for a protective order on July 17, 2013, they tolled the original 30–day period to answer plaintiff's requests to admit. (Docket 185.) They point out that the Court "did not set forth a deadline to provide the responses to the requests for admission" in the July 26, 2013 Order. *Id.* at 2. "Absent a specific order from this Court regarding the time to respond ... and having successfully tolled the original 30–day period," the defendants argue, "[the] said period began to run again from day 1 on the date that this Court denied defendants' [m]otion for [p]rotective [o]rder." *Id.* The defendants cite no legal authority for their contention.

Although pursuant to Rule 36(a)(3) the Court *could* have ordered the parties to respond in a shorter or longer time, it did not.[FN6] In the Court's own independent review of legal authority, however, it found at least one case in which a court awarded defendants a fresh 30–day period to answer requests to admit after the court denied the defendants' motion for a protective order. *See Duncan v. Santaniello,* 1996 WL 121730 at *3, 1996 U.S. Dist. LEXIS 3860 at *8 (D.Mass.1996) ("Defendants shall have an additional thirty days from the date hereof to respond to Plaintiff's requests, if they so wish.").[FN7] Given that defendants claim to be "diligently working on the responses ... and will timely provide the same to plaintiff with[in] the 30–day period"—which it believes to be August 26, 2013—the Court **GRANTS** all defendants until 5:00 p.m. on August 26, 2013 to file their responses to plaintiff's requests. Defendants are **ORDERED** to comply fully with Rule 36(a)(4) by only admitting or denying each matter, as separately stated. Having considered defendants' motion for a protective order as an "objection" pursuant to Rule 36(a)(5) that complied with Rule 36(a)(3), the Court will not allow any further objection.

## IV. CONCLUSION

*7 Plaintiff's motion for reconsideration, (Docket 151), is **DENIED IN PART AND GRANTED IN PART.** The Court **DENIES** plaintiff's requests no. 1, 5, 6, 8, and 10, and **GRANTS** plaintiff's requests no. 3 and 14. Sanctions against plaintiff regarding her requests no. 3 and 14 are **VACATED.** Defendants' motion to strike plaintiff's reply, (Docket 183), is **DENIED.** Defendants' motion to announce an expert witness, (Docket 146), is **DENIED** at this time. Plaintiff's motion requesting an order to deem admitted all matters included in her requests for admissions, (Docket 184), is **DENIED.** The Court **GRANTS** all defendants until **5:00 p.m. on August 26, 2013** to either admit or deny plaintiff's requests for admissions.

**IT IS SO ORDERED.**

FN1. Pursuant to Rule 59(e), a party moving for reconsideration of a court order "must either clearly establish a manifest error of law or must present newly discovered evidence" in order to prevail. *Markel Am. Ins. Co. v. Diaz–Santiago,* 674 F.3d 21, 32 (1st Cir.2012) (internal quotations and citation omitted); *see also Marie v. Allied Home Mortg. Corp.,* 402 F.3d 1, 7 n. 2 (1st Cir.2005) (recognizing that the four reasons for granting a Rule 59(e) motion are: "manifest errors of law or fact, newly discovered or previously unavailable evidence, manifest injustice, and an intervening change in controlling law") (internal citation omitted).

FN2. Similarly, pursuant to Fed.R.Civ.P. 54(b), a district court enjoys the power to afford relief from interlocutory orders "as justice requires." *Greene v. Union Mut. Life Ins. Co. of Am.,* 764 F.2d 19, 22 (1st Cir.1985) (citations omitted).

FN3. The Court reiterates that pursuant to Fed.R.Civ.P. 26(e) and 37(c), the defendant retains a continuing duty to supplement all documents responsive to plaintiff's request.

FN4. Information need only "appear[ ] reasonably calculated to lead to the discovery of admissible evidence" to be relevant for discovery purposes. Fed.R.Civ.P. 26(b)(1).

FN5. The defendants amended their answer by adding the following affirmative defense:

> Subsequent to Plaintiff's termination, Defendants acquired evidence of dishonest misconduct on the part of Plaintiff which would have justified her termination under Defendants' Code of Ethics and Professional Conduct. Accordingly, in the event Plaintiff prevails in her claims, she is not entitled to reinstatement or other equitable relief, and the calculation of damages should be limited as appropriate.
>
> (Docket 119 at 22.)

FN6. Caution and common sense thus should have led defendants to the conclusion that only 15 days remained to respond to plaintiff's requests. Instead, defendants assumed—without any kind of legal authority to support their assumption—that they were automatically entitled to an entirely new period of 30 days. The Court warns the defendants against further engaging in any such bold presumptions.

FN7. A legal treatise also provides that objecting "discharges the duty to respond." 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 36.

D.Puerto Rico,2013.
Miranda v. Deloitte LLP
--- F.Supp.2d ----, 2013 WL 4478695 (D.Puerto Rico)

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**(Cite as: 2013 WL 1758857 (E.D.Wash.))**

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Washington.
Albert O. PETERSON, Plaintiff,
v.
NATIONAL SECURITY TECHNOLOGIES, LLC, Defendant.

No. 12–CV–5025–TOR.
April 24, 2013.

Jeffrey L. Needle, Law Office of Jeffrey Needle, Seattle, WA, for Plaintiff.

James Michael Kalamon, Shamus T. O'Doherty, Paine Hamblen Coffin Brooke & Miller, LLP, Spokane, WA, for Defendant.

ORDER ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

THOMAS O. RICE, District Judge.

***1** BEFORE THE COURT are the following motions: Plaintiff's Motion For Summary Judgment (ECF No. 67); Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defenses (ECF No. 71); and Defendant's Motion for Summary Judgment (ECF No. 75). These matters were heard with oral argument on April 19, 2013. Plaintiff was represented by Jeffrey L. Needle. Defendant was represented by James M. Kalamon and Shamus T. O' Doherty. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

The parties have filed cross-motions for summary judgment on Plaintiff's retaliation claims under 42 U.S.C. § 1981 and the Washington Law Against Discrimination ("WLAD"). Plaintiff also seeks summary judgment on Defendant's after-acquired evidence affirmative defense. Finding that genuine issues of material fact preclude summary judgment in favor of either party, the Court will deny all three motions.

FACTS

Plaintiff Albert Ole Peterson ("Plaintiff") is a former course instructor for Defendant National Security Technologies, LLC. ("Defendant"). In his role as a course instructor, Plaintiff traveled throughout the western United States teaching law enforcement and first responders how to respond to a major terrorist attack. Because of his rigorous travel schedule, Plaintiff was permitted to reside in Richland, Washington, and periodically commute to Defendant's corporate headquarters near Las Vegas, Nevada.

On September 20, 2011, Plaintiff was teaching a course with several fellow instructors in Nevada. During a break, one of Plaintiff's colleagues, Mario Guerrero ("Guerrero") stopped to check his email messages. As he read his messages, Guerrero came across a racist email sent by a fellow employee, Richard Folle ("Folle"). ECF No. 69–4 at 4–9. Guerrero commented on the email and showed it to Plaintiff and another instructor, Curt Wargo. All three agreed that the email was racist and that Folle could be disciplined for having sent it.

Later that day, Peterson called one of his subordinates, Frank Christian ("Christian") and told him about the email. Christian, who is black, was offended. Peterson and Christian purportedly agreed that Folle's behavior was inappropriate and that it needed to stop. To that end, Christian agreed to formally report the email to management. In Plaintiff's estimation, having Christian report the email "would carry greater weight than if he reported it directly." ECF No. 68 at ¶ 28.

Upon receiving the complaint, one of Defendant's human resources managers, Fannie Bell ("Bell"), opened a formal investigation. Bell contacted Christian, spoke to him about the email, and asked him to obtain a copy. Peterson subsequently obtained a printed copy of the email and provided it to Christian, [FN1] who in turn provided it to Bell. Shortly thereafter, Folle resigned his employment in lieu of being terminated.

> FN1. How Peterson obtained a copy of the email is disputed. Peterson asserts that Guerrero provided him a copy. Guerrero insists that Peterson printed a copy from his computer after he refused to provide one.

Approximately one month later, Guerrero met with one of his supervisors, Bruce Chisholm ("Chisholm"), to discuss the fallout from the email. During this meeting, Guerrero expressed concern that Plaintiff may have reported the email with the ulterior motive of increasing his own job security. In Guerrero's view, Plaintiff's objective in reporting the email was to eliminate a competitor for future advancement opportunities and/or to minimize his chances of being laid off during a future force reduction. Guerrero also informed Chisholm that Plaintiff routinely left training sessions early and billed the company for time that he did not actually work. Chisholm promptly forwarded these concerns to Bell for investigation.

***2** Over the next several days, Bell interviewed Plaintiff, Christian and Guerrero about how the email came to be reported. Plaintiff denied having any ulterior motive, explaining that he had chosen to involve Christian because he believed that the email would be "swept under the rug" if he reported it to management directly. Christian generally corroborated this account. Guerrero, on the other hand, accused Plaintiff of making statements to the effect that his job was now more secure with Folle out of the picture. Guerrero further reiterated that Plaintiff was cheating the company by submitting hours in excess of what he had actually worked. He also stated that he had witnessed Plaintiff coaching one of his subordinates, Tyler Bello ("Bello") on how to submit fraudulent timecards and expense reports. ECF No. 72 at ¶ 17.

Ultimately, Bell concluded that Plaintiff had reported the email for the express purpose of getting Folle fired. In her final report, Bell wrote:

> Based on [my] investigation, Peterson had selfish and unethical motives for giving the email to Christian. The ulterior motive was for Folle to lose his job therefore creating job security for Peterson as the only Course Director in the West. The email was so inappropriate that had it surfaced by any other means, it would no doubt have had the same result for Folle. Therefore, Peterson deliberately took advantage of an unfortunate situation and used the email in an effort to accelerate his coworker's departure from the company. Peterson's actions are more despicable than the email. The email lacked normal intelligence. Peterson was ruthless. He insidiously undermined the trust and confidence placed upon him by his management and team members while degrading the spirit of the team. [The Employee Relations Department] recommends termination.

ECF No. 69–5 at 9.

On November 17, 2011, Defendant's Discipline Action Review Board ("Board") met to discuss potential discipline. After reviewing the results of Bell's investigation, the Board concluded that Plaintiff's report of the racist email warranted termination. In its view, this conduct had caused management "to lose trust and faith in Peterson." ECF No. 65–5 at 16–17. Because the investigation into the timecard-related allegations was still ongoing, the Board did not consider those allegations in reaching its decision. Defendant subsequently offered Plaintiff an opportunity to resign in lieu of being terminated, which Plaintiff

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accepted. This lawsuit followed.

DISCUSSION

Summary judgment may be granted upon a showing by the moving party "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to identify specific genuine issues of material fact which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

*3 For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any such fact is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* In ruling on a summary judgment motion, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris,* 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Finally, the court may only consider admissible evidence. *Orr v. Bank of America, NT & SA,* 285 F.3d 764 (9th Cir.2002).

**A. *McDonnell Douglas* Burden Shifting vs. "Motivating Factor" Model**

As a threshold matter, the Court must decide whether Plaintiff's retaliation claims should be evaluated under the familiar *McDonnell Douglas* burden shifting framework or the so-called "motivating factor" model used in mixed-motive cases. Plaintiff maintains that he is entitled to use the motivating factor model, while Defendant contends that the *McDonnell Douglas* analysis must be used.

As the Ninth Circuit explained in *Metoyer v. Chassman,* the plaintiff in a race discrimination case need not rely upon the presumption of discrimination arising under *McDonnell Douglas.*[FN2] 504 F.3d 919, 931 (9th Cir.2007). Instead, the plaintiff may forego the *McDonnell Douglas* presumption altogether and offer *direct proof* of discrimination:

> FN2. Under the *McDonnell Douglas* framework, a plaintiff who establishes a prima facie case of discrimination is entitled to a presumption that the employer acted with discriminatory intent. The employer may rebut the presumption by articulating a legitimate, non-discriminatory reason for the plaintiff's termination. Once the presumption has been rebutted, the parties are back on "equal footing." Because the plaintiff bears the ultimate burden of proof at trial, however, he must further demonstrate that the employer's proffered reason was a mere pretext for discrimination in order to survive summary judgment. *See generally Cornwell v. Electra Cent. Credit Union,* 439 F.3d 1018, 1028 (9th Cir.2006).

> Typically, we apply the burden-shifting framework established in *McDonnell Douglas* [to race discrimination claims under § 1981]. But [while] the *McDonnell Douglas* burden shifting framework is a useful tool to assist at the summary judgment stage[,] nothing compels the parties to invoke the *McDonnell Douglas* presumption. Instead, when responding to a summary judgment motion[,] the plaintiff may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the employer.

*Id.* at 930–31 (internal quotations and citations omitted); *see also Costa v. Desert Palace, Inc.,* 299

F.3d 838, 856 (9th Cir.2002) (en banc) ("It is important to emphasize ... that nothing compels the parties to invoke the *McDonnell Douglas* presumption. Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence—direct or circumstantial—of discriminatory intent."). This approach may be used in either "single motive" or "mixed-motive" discrimination cases. *See Costa,* 299 F.3d at 855 ("[A]lthough *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case.").

Here, Plaintiff has elected to forego the *McDonnell Douglas* presumption. ECF No. 67 at 5. Accordingly, Plaintiff's burden on summary judgment is simply to produce "direct or circumstantial evidence" of unlawful retaliation. *Metoyer,* 504 F.3d at 931. Because the *McDonnell Douglas* burden shifting framework need not apply, Plaintiff is not required to establish a "prima facie case" or demonstrate that any "legitimate, non-discriminatory reasons" proffered by Defendant are mere pretexts for retaliation.

**B. Section 1981 Retaliation Claim**

***4** Plaintiff claims that Defendant retaliated against him for opposing a racially discriminatory employment practice in violation of 42 U.S.C. § 1981. To prevail on this claim, Plaintiff must prove that (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal connection between his protected activity and the adverse employment action. *Surrell v. California Water Svc. Co.,* 518 F.3d 1097, 1108 (9th Cir.2008); *see also CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 451, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) (holding that § 1981 provides a cause of action for retaliation).

In the instant motion, Defendant contends that Plaintiff cannot prevail on the protected activity element of his claim because he lacked an objectively reasonable belief that a single offensive email from one employee to another amounted to an unlawful "employment practice." Defendant further challenges Plaintiff's ability to prove the causation element of his claim, arguing that (1) retaliatory animus was not a "motivating factor" in its decision to terminate Plaintiff's employment; and (2) to the extent that retaliatory animus *was* a motivating factor, it would have made the same termination decision even in the absence of an impermissible retaliatory motive (the so-called "same decision" affirmative defense).

Plaintiff, for his part, asserts that Defendant's same decision defense fails as a matter of undisputed material fact. Specifically, Plaintiff argues that the conduct upon which Defendant relies—the manner in which Plaintiff opposed the email—was not so disruptive as to render his conduct unprotected under the rationale first articulated in *Hochstadt v. Worcester Found. For Experimental Biology,* 545 F.2d 222 (1st Cir.1976). According to Plaintiff, no rational jury could find that his act of reporting of the email "down the chain" to a subordinate rather than "up the chain" to a superior was sufficiently egregious to provide Defendant with an independent lawful basis for termination. The Court will address each of these issues below.

1. *Was Plaintiff Engaged in Protected Activity?*

Defendant challenges Plaintiff's ability to prove that he was engaged in protected activity on the ground that Plaintiff lacked an objectively reasonable belief that the discrimination which he opposed—a single racially offensive email sent by one employee to another—qualified as an unlawful employment practice. ECF No. 75 at 6–9. As the parties correctly note, the protection afforded by § 1981 is not limited to plaintiffs who oppose an employment practice that *actually* violates the law. Rather, the statute's protection extends to those who *reasonably believe* that the employer's actions violate the law. *See Trent Valley Elec. Ass'n, Inc.,* 41 F.3d 524, 526 (9th Cir.1994) (to establish protected activity for purposes of a retaliation claim, "a plaintiff does not need to prove that the

employment practice at issue was in fact unlawful;" rather, the plaintiff "must only show that [he] had a 'reasonable belief' that the employment practice [he] protested was prohibited"); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir.1983) ("It is not necessary ... that the practice be demonstrably unlawful; opposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice."). The plaintiff's belief that the opposed practice is unlawful must be both objectively and subjectively reasonable. *Moyo v. Gomez,* 40 F.3d 982, 984–85 (9th Cir.1994) (noting that a plaintiff's belief must be both objectively reasonable and held in good faith).

***5** Here, there is a triable issue of fact as to whether Plaintiff was engaged in protected opposition activity. Contrary to Defendant's assertions, a rational jury could find that Plaintiff reasonably believed that the racist email violated § 1981. Notably, there is evidence that the sender of the email, Richard Folle, had been the subject of at least one prior racial discrimination complaint lodged by Frank Christian. ECF No. 79 at ¶¶ 1–2. There is also evidence that Folle routinely made racially insensitive remarks in the workplace—some of which were reported to management, but none of which resulted in discipline. ECF No. 68 at ¶¶ 10–12. According to Plaintiff, "everybody complained about Folle at times, and nothing seemed to change." ECF No. 68 at ¶ 12.

When viewed in the light most favorable to Plaintiff, this evidence lends credibility to Plaintiff's explanation that he reported the email "in a way that would carry the most weight." ECF No. 76 at ¶ 20. This evidence is also sufficient to distinguish the instant case from *Little v. United Techs.,* 103 F.3d 956 (11th Cir.1997). Unlike the single statement at issue in *Little,* the email in this case was preceded by several complaints to management about the offending employee. In light of these prior complaints, the Court cannot conclude as a matter of law that Plaintiff lacked an objectively reasonable belief that Folle's email amounted to an unlawful employment practice. Thus, Defendant is not entitled to summary judgment on this issue.

Conversely, there is ample evidence from which a jury could find that Plaintiff lacked a reasonable belief that he was engaging in protected opposition activity. While Plaintiff claims to have provided the email to Christian with the expectation that Christian would report it to management, a rational jury could find that Plaintiff merely intended to "stir the pot" and did not care whether the email was actually reported. The fact that Plaintiff went out-of-process to provide the email to Christian—a black employee with a history of filing race discrimination complaints against Folle—would seem to support such a finding. Moreover, a rational jury could also find that Plaintiff did not subjectively believe that Folle's email amounted to a discriminatory "employment practice." As Defendant correctly notes, there is reason to question whether a reasonable person would view a single private email sent from one employee to another as an act of corporate discrimination. Accordingly, the Court will deny Plaintiff summary judgment on this issue.

2. *Was Plaintiff's Protected Activity a "Motivating Factor" in Defendant's Termination Decision?*

Plaintiff has advanced a "mixed-motive" theory of liability, arguing that he was terminated for both retaliatory and non-retaliatory reasons. Specifically, Plaintiff contends that he was terminated because he opposed a racially offensive email and was found to have done so with the ulterior motive of increasing his own job security and in a manner which violated Defendant's reporting policy. In order to satisfy the third element of his retaliation claim under such a theory, Plaintiff must prove that his opposition to the racially offensive email was a "motivating factor" in Defendant's decision to terminate his employment. *Metoyer,* 504 F.3d at 939.

***6** The Court finds that there is sufficient evi-

dence to support a finding that Plaintiff's opposition to the email was a motivating factor in Defendant's termination decision. Indeed, when viewed in the light most favorable to Plaintiff, the evidence suggests this was the only factor which prompted the termination; had Plaintiff not reported the email, he would not have been fired. Although Defendant maintains that Plaintiff was terminated solely because of the *manner* in which he reported the email—rather than the *fact* that he had reported it—a rational jury could conclude that the fact of reporting played a role in Defendant's decision.

On the other hand, a rational jury could find Defendant's explanation fully credible. When viewed in the light most favorable to Defendant, the evidence suggests that Plaintiff was fired not because he chose to report the email in the first instance, but because of the highly unorthodox manner in which he chose to report it. Defendant's witnesses have indicated that Plaintiff would not have been terminated (or subjected to any other adverse employment action) had he simply followed company policy by reporting the email "up the chain" to his superiors and/or Defendant's human resources department rather than "down the chain" to a subordinate employee. If a jury finds this explanation credible, Plaintiff will likely not be able to establish that retaliatory animus was a motivating factor in the termination decision. At bottom, the causal relationship between Plaintiff's protected activity and Defendant's adverse employment action is an issue which must be decided by the trier of fact.

3. *Would Defendant Have Made the Same Decision to Terminate Plaintiff Absent a Retaliatory Motive?*

As noted above, the parties have raised two issues relevant to Defendant's same decision affirmative defense: (1) whether Defendant can prove that it would have terminated Plaintiff's employment even in the absence of an impermissible retaliatory motive (*i.e.,* whether there is an independent "but for" cause of Plaintiff's termination); and (2) whether the independent conduct relied upon by Defendant—the manner in which Plaintiff reported the email—was sufficiently disruptive to render Plaintiff's opposition activity unprotected. The Court will address each of these issues in turn.

a. *Can Defendant Demonstrate an Independent, Non-retaliatory "But For" Cause For Termination?*

In advancing a "mixed-motive" theory of liability, Plaintiff has opened the door to the so-called "same decision" affirmative defense: that the employer would have taken the same adverse employment action even in the absence of a discriminatory motive. *Costa,* 299 F.3d at 848. In the context of a retaliation claim, this defense acts as a complete bar to liability; if the employer can prove by a preponderance of the evidence that retaliatory animus was not a "but for" cause of the adverse employment action, the employer is entitled to judgment in its favor. *Costa,* 299 F.3d at 862–63; *Metoyer,* 504 F.3d at 934.

*7 The parties dispute whether Defendant can prevail on this defense at trial. Plaintiff asserts that his alleged ulterior motive in reporting the email was not a "but for" cause of his termination because "Defendant's witnesses have repeatedly admitted that, *regardless of Plaintiff's motive* for reporting the email, he would not have been terminated from employment if he had delivered the email directly to Human Resources instead of Frank Christian." ECF No. 67 at 12 (emphasis added). In other words, Plaintiff contends that his motivation in reporting the email did not factor into Defendant's decision because he would not have been terminated—regardless of his ulterior motives—had he simply reported the email through the proper channels. According to Plaintiff, this evidence proves that it was his *act of reporting* the email, rather than his reasons for doing so, which was the "but for" cause of his termination.

Defendant counters that Plaintiff's act of reporting the email and his reasons for doing so must be considered together as a single "but for" cause of his termination. ECF No. 78 at 7–8. Under its theory of

the case, Plaintiff was terminated because Defendant's senior leadership had lost trust in Plaintiff's ability to manage others. This loss of trust was not simply the result of Plaintiff *either* acting in his own best interest *or* of reporting discrimination out of process; rather the loss of trust was the result of Plaintiff acting in his own best interest *by* reporting discrimination out of process. This overall loss of trust, Defendant argues, is the only "but for" cause of Plaintiff's termination.

The Court finds Defendant's argument problematic in that it necessarily relies upon Plaintiff's subjective motivation for reporting the email. As Plaintiff notes, there is reason to question whether an employee's subjective motivation for engaging in otherwise protected activity can deprive the employee of protection from retaliation. Indeed, allowing an employer to defend against a retaliation claim on the ground that the employee acted with an "ulterior motive" would open the floodgates to litigation of this issue in virtually every case. The reality of the modern workplace is that an employee who formally complains about another employee's conduct often stands to benefit, either directly or indirectly, from any resulting discipline. *See E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir.1983) ("Almost every form of "opposition to an unlawful employment practice" is in some sense "disloyal" to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies."). In the context of a retaliation claim, requiring an employee to demonstrate that he or she could not have personally benefitted from the protected activity makes little sense. There is no such requirement in the text of the applicable statutes, and the Court can discern no other reason for imposing one.

***8** Despite this apparent deficiency, however, the Court finds that Defendant has presented sufficient evidence to withstand summary judgment. As Defendant correctly notes, "[t]he mixed-motive inquiry is an intensely factual one." *Metoyer,* 504 F.3d at 940 (quotation and citation omitted). For that reason, "same decision" defenses in mixed-motive cases "are generally for the jury to decide." *Id.* As discussed above, there are genuine issues of material fact concerning whether Defendant was motivated by retaliatory animus or whether it simply viewed Plaintiff's reporting of the email "down the chain" as an unacceptable violation of company policy. Accordingly, a jury must decide the "but for" cause of Plaintiff's termination. The parties' cross-motions for summary judgment on this issue are denied.

b. *Is there an Issue of Material Fact Concerning the Disruptiveness of Plaintiff's Opposition Activity?*

Plaintiff's final argument on summary judgment is that the manner in which he opposed the racist email was not sufficiently disruptive to render his conduct unprotected. In support of this argument, Plaintiff relies primarily upon *E.E.O.C. v. Crown Zellerbach Corp.* for the proposition that an employee may not be disciplined for engaging in protected activity unless the employee's actions "significantly disrupted the workplace and sometimes directly hindered his or her job performance." 720 F.2d 1008, 1015 (9th Cir.1983) (citing *Hochstadt v. Worcester Found. For Experimental Biology,* 545 F.2d 222 (1st Cir.1976)). According to Plaintiff, no rational jury could find that Plaintiff's act of reporting the email "down the chain" to a subordinate rather than "up the chain" to a superior satisfies this standard. ECF No. 67 at 13–19; ECF No. 81 at 9–11.

As an initial matter, the Court must address Plaintiff's argument that a termination due to significant disruption of the workplace is an affirmative defense which must be specifically pled pursuant to Federal Rule of Civil Procedure 8(c). Having reviewed Plaintiff's authorities, the Court finds nothing to suggest that this is an "affirmative defense" within the province of Rule 8(c). Rather, these cases uniformly treat significant workplace disruption as an issue which an employer may raise as a "legitimate, non-discriminatory reason" in the context of the *McDonnell Douglas* burden shifting analysis. *See,*

*e.g., Crown Zellerbach Corp.,* 720 F.2d at 1014; *Wrighten v. Metro. Hosps., Inc.,* 726 F.2d 1346, 1354–56 (9th Cir.1984). Plaintiff does not suggest that a defendant must affirmatively plead each and every legitimate, non-discriminatory reason it intends to offer in response to a discrimination claim, and the Court has been unable to locate any authority for such a requirement. In any event, the Court finds that Plaintiff has been on adequate notice of Defendant's intent to pursue this issue and therefore has not been unduly prejudiced by its omission from Defendant's answer.

***9** With regard to Plaintiff's substantive arguments, the Court finds that summary judgment is inappropriate for two reasons. First, the "significant workplace disruption" doctrine first articulated in *Hochstadt* is not as narrow as Plaintiff contends. Although *Crown Zellerbach Corp.* cites "interference with job performance" as the touchstone of significant workplace disruption, several other cases have taken a broader view. Specifically, the Ninth Circuit has consistently cited *Hochstadt* for the proposition that "[a]n employee's opposition activity is protected only if it is 'reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.' " *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 763 (9th Cir.1996) (citing *Silver v. KCA, Inc.,* 586 F.2d 138, 141 (9th Cir.1978)); *see also Wrighten,* 726 F.2d at 1356 n. 6 (same). These cases clearly illustrate that impaired job performance is not the only measure of unreasonable opposition. *See O'Day,* 79 F.2d at 763 (manner of opposition unreasonable where employee "committed a serious breach of trust ... [by] rummaging through his supervisor's office for confidential documents [and later] showing them to a co-worker"); *Unt v. Aerospace Corp.,* 765 F.2d 1440, 1446 (9th Cir.1985) (manner of opposition unreasonable where employee's complaint to a third party "violated an explicit company directive [and] contained false allegations of misconduct"). Hence, the absence of an adverse impact on Plaintiff's job performance is not dispositive.

Moreover, at least two Ninth Circuit cases applying *Hochstadt* have held that an employee may not use his or her participation in protected activity as an excuse to violate corporate policy. *See O'Day,* 79 F.3d at 763–64 ("The opposition clause protects reasonable attempts to contest an employer's discriminatory practices; it is not an insurance policy, *a license to flaunt company rules* or an invitation to dishonest behavior.") (emphasis added); *Unt,* 765 F.2d at 1446 ("An employee is not protected by Title VII when he *violates legitimate company rules,* knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals.") (emphasis added). As discussed above, it is undisputed that Plaintiff violated Defendant's discrimination reporting policies by reporting the email "down the chain" to a subordinate rather than "up the chain" to a superior. It is further undisputed that the subordinate to whom Plaintiff reported the email had previously complained to Defendant about the sender engaging in inappropriate racist behavior. A jury must decide whether this admitted violation of corporate policy was "reasonable in view of [Defendant's] interest in maintaining a harmonious and efficient operation." *O'Day,* 79 F.3d at 763 (quotation and citation omitted). Accordingly, Plaintiff's motion for summary judgment on this issue is denied.

**C. WLAD Retaliation Claim**

***10** Plaintiff's retaliation claim under the WLAD is identical in all material respects to his § 1981 claim, with two exceptions: (1) Plaintiff must prove that his protected activity was a "substantial factor" (as opposed to a "motivating factor") in Defendant's adverse employment action; and (2) the "same decision" affirmative defense is not available to Defendant. *See Allison v. Hous. Auth. of City of Seattle,* 118 Wash.2d 79, 85–96, 821 P.2d 34 (1991) (adopting "substantial factor" standard and explaining plaintiff in retaliation case need not prove that his protected activity was the "but for" cause of the adverse employment action).

For the reasons discussed in conjunction with Plaintiff's § 1981 claim, the Court concludes that Plaintiff's WLAD claim must be decided by a jury. Neither party is entitled to summary judgment on this claim.

**D. After–Acquired Evidence Affirmative Defense**

Plaintiff has moved for summary judgment on Defendant's after-acquired evidence affirmative defense. The after-acquired evidence defense is an equitable doctrine which limits a plaintiff's remedies for wrongful discharge when an employer discovers that the plaintiff committed an act of wrongdoing prior to being terminated and that the "wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nas hville Banner Publ'g Co.,* 513 U.S. 352, 361–62, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). "[T]he employer must establish not only that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so." *O'Day,* 79 F.3d at 759. If successfully proven, this defense limits a plaintiff's recovery to "backpay from the date of the unlawful discharge to the date the new information was discovered." *McKennon,* 513 U.S. at 362.

Plaintiff asserts that Defendant cannot prevail on its after-acquired evidence defense because (1) it knew of the alleged wrongdoing prior to the date on which he was terminated; and (2) its investigators never interviewed him about the alleged wrongdoing. Neither argument is persuasive. Contrary to Plaintiff's assertions, Defendant did not "know" that Plaintiff had engaged in the alleged wrongdoing prior to his termination. Rather, Defendant had merely been presented with *allegations* that Plaintiff had coached a subordinate employee on how to falsify time records and submit bogus expense reports. These allegations, which were made in late October 2011, prompted Defendant's human resources department to open an investigation into the matter. This investigation was still ongoing when Plaintiff resigned in lieu of termination on November 17, 2011.

The fact that Plaintiff was being investigated for independent wrongdoing when he was terminated does not preclude Defendant from asserting the after-acquired evidence defense. As Defendant correctly notes, the defense is grounded in equitable principles. *McKennon,* 513 U.S. at 360–61. Specifically, when presented with an after-acquired evidence defense, a court must "balance[ ] the public policy interest in eliminating unlawful discrimination against the equitable principle that an employer should not be held liable for damages when the employee invokes the aid of the court with unclean hands." *Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1071 (9th Cir.2004).

***11** Here, equity clearly favors Defendant. To the extent that Plaintiff did in fact teach a subordinate how to falsify time records and submit false expense reports, he comes into court with unclean hands. If this misconduct can be substantiated, Plaintiff must not be permitted to hide it from the fact finder simply because Defendant terminated him for an unrelated reason while its investigation was still ongoing. Defendant began its investigation promptly upon learning of the alleged misconduct and completed it within a reasonable time. Accordingly, this is not a case in which Defendant had "reason to know" of the independent misconduct and simply failed to take action until after the plaintiff was fired. *Cf. McLaughlin v. Innovative Logistics Grp., Inc.,* 2007 WL 313531 at * 11 (E.D.Mich.2007) (unpublished) (denying summary judgment on after-acquired evidence defense where employer knew of employee's positive drug test three years prior to her termination and never pursued the matter).

With regard to the merits of the defense, there are genuine issues of material fact which preclude summary judgment in Plaintiff's favor. As noted above, Defendant has the burden of proving by a preponderance of the evidence that it would have terminated Plaintiff for having coached a subordinate to falsify

time records and submit false expense reports had it not previously terminated him for the reasons at issue in this case. This is an inherently fact-sensitive inquiry, and Defendant has presented sufficient evidence from which a jury could find that Plaintiff engaged in the alleged wrongdoing and that Defendant would, in fact, have terminated him for it.

Contrary to Plaintiff's assertions, the fact that he was never interviewed about these allegations does not preclude Defendant from satisfying its burden. Indeed, it is reasonable to assume that the vast majority of employers in Defendant's position never interview the terminated employee because the employee is no longer around to be interviewed. If Plaintiff believes that his version of events would have carried the day, he may make that argument to the jury. The fact that Plaintiff was never interviewed, however, does not estop Defendant from arguing that he *would* have been terminated for reasons independent of those for which he was actually terminated. Accordingly, Plaintiff's motion for summary judgment on this affirmative defense is denied.

**E. Mitigation of Damages**

Plaintiff has moved for summary judgment on the issue of mitigation of damages. Defense counsel conceded at the hearing that Defendant would not be pursuing a mitigation of damages defense. Accordingly, Plaintiff is entitled to summary judgment on this issue.

**IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment (ECF No. 67) is **DENIED.**

2. Plaintiff's Motion for Summary Judgment on Affirmative Defenses (ECF No. 71) is **GRANTED** as it pertains to the issue of mitigation of damages only. The motion is **DENIED** in all other respects.

***12** 3. Defendant's Motion for Summary Judgment (ECF No. 75) is **DENIED.**

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Northern Division.
Raymond L. ZISUMBO, Plaintiff,
v.
OGDEN REGIONAL MEDICAL CENTER, Defendant.

No. 1:10–CV–73 TS.
Nov. 22, 2013.

April L. Hollingsworth, Hollingsworth Law Office LLC, Salt Lake City, UT, Matt W. Harrison, Sandy, UT, for Plaintiff.

J. Angus Edwards, Mark D. Tolman, Michael P. O'Brien, Jones Waldo Holbrook & McDonough, Salt Lake City, UT, Defendant.

MEMORANDUM DECISION AND ORDER ON PENDING MOTIONS

TED STEWART, District Judge.

***1** This matter is before the Court on Defendant Ogden Regional Medical Center's ("Ogden Regional") Motion for Judgment as a Matter of Law, Plaintiff Raymond Zisumbo's ("Zisumbo") Motion to Strike, and Plaintiff's post-trial Motion for Equitable Relief. For the reasons discussed below, the Court will deny both Defendant's Motion for Judgment as a Matter of Law and Plaintiff's Motion to Strike, but will grant in part and deny in part Plaintiff's Motion for Equitable Relief.

## I. BACKGROUND

Zisumbo is a Hispanic man who worked as a computer tomography ("CT") technician at Ogden Regional from April 2005 until October 8, 2009. On August 3, 2009, in order to curb office gossip that Zisumbo had been fired from previous jobs he had held, Zisumbo submitted to his supervisor employment verification letters from St. Mark's Hospital and the University of Utah. Ogden Regional alleges that Zisumbo submitted an additional employment verification letter from McKay–Dee Hospital at the same time. Ogden Regional alleges that the St. Mark's letter and the McKay–Dee letter were both fraudulent.

On September 18, 2009, Zisumbo filed an initial complaint with the Utah Labor Commission alleging Ogden Regional had discriminated against him based on his race. On October 8, 2009, Zisumbo's supervisor Mr. Rodebush ("Rodebush") brought the letters to the attention of the Director of Human Resources at Ogden Regional, Christine Bissenden ("Bissenden"). Bissenden terminated Zisumbo's employment, purportedly because one or more of the letters Zisumbo provided was fraudulent.

Zisumbo filed a lawsuit alleging discrimination and retaliation under Title VII. On August 2, 2013, a jury found in favor of Zisumbo on his unlawful retaliation claim and against Zisumbo on his race discrimination claim. Defendant moves for judgment as a matter of law. Plaintiff moves to strike Defendant's Rule 50(a) Motion and seeks equitable relief.

## II. STANDARD OF REVIEW

Rule 50(a) of the Federal Rules of Civil Procedure provides,

> (1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B)grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.[FN1]

FN1. Fed.R.Civ.P. 50(a).

In reviewing a Rule 50 Motion, the Court should review all of the evidence in the record.[FN2] However, all reasonable inferences are drawn in favor of the nonmoving party and the Court does "not make credibility determinations or weigh the evidence." [FN3] Judgment as a matter of law is appropriate "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." [FN4] A judgment as a matter of law is appropriate "[i]f there is no legally sufficient evidentiary basis ... with respect to a claim or defense ... under the controlling law." [FN5]

FN2. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

FN3. *Id.*

FN4. *Finley v. United States,* 82 F.3d 966, 968 (10th Cir.1996).

FN5. *Baty v. Willamette Indus., Inc.,* 172 F.3d 1232, 1241 (10th Cir.1999).

III. DISCUSSION

A. MOTION TO STRIKE

***2** During trial, Ogden Regional filed a Motion for Judgment as a Matter of Law. Counsel for Zisumbo was directed to respond, but failed to do so. The Court did not rule on Ogden Regional's Motion. After trial, Ogden Regional submitted a request that the Court rule on its Motion. In response to Ogden Regional's request, Zisumbo filed a Motion to Strike, arguing that because Defendant moved the court pursuant to Rule 50(a) during trial, and because the Court did not rule on Ogden Regional's Motion and the action was submitted to the jury, Defendant cannot now renew its Rule 50(a) Motion.

Rule 50 expressly contemplates that a court may reserve its decision on the legal issues presented by a Rule 50(a) motion until after a jury has reached a verdict.[FN6] For this reason, the Court will deny Plaintiff's Motion to Strike. Even so, the Court will deny Ogden Regional's Motion for the reasons set forth below.

FN6. Fed.R.Civ.P. 50(b) ("If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal issues raised by the motion.").

A. JUDGMENT AS A MATTER OF LAW

At the close of Zisumbo's case, Ogden Regional moved for judgment as a matter of law, arguing that the evidence submitted was not sufficient to show that (1) Zisumbo was denied a promotion to the CT Coordinator position because of his race, (2) he was issued a written warning in retaliation for making a complaint of discrimination, and (3) his termination of employment was based on discrimination or retaliation. Subsequent to the filing of the instant Motion, Plaintiff agreed to proceed only on his discrimination and retaliation claims arising out of his termination .[FN7] The Court will therefore consider the Motion for Judgment as a Matter of Law only as it relates to Plaintiff's claims based on his termination.

FN7. Docket No. 156, at 17.

*1. Discrimination*

Zisumbo claims that Ogden Regional discriminated against him because of his race when it termi-

nated his employment. Zisumbo must prove that Ogden Regional intentionally discriminated against him.[FN8] The jury may, but is not required to, infer that Defendant intentionally discriminated against Plaintiff if Plaintiff shows that Defendant's proffered nondiscriminatory reasons for its decisions are pretextual.[FN9] Zisumbo need only prove that race was a motivating factor in Defendant's decisions.[FN10]

> FN8. *Adamson v. Multi Cmty. Diversified Servs. Inc.,* 514 F.3d 1136, 1145 (10th Cir.2008) ("Plaintiff has the ultimate burden of proving, either directly or indirectly, that defendant intentionally discriminated against him.").
>
> FN9. *Id.* at 1144–45 ("While we agree a trier of fact may infer discriminatory intent from facts that also support a finding of pretext, we reject the reverse assertion that evidence of 'pretext,' i.e. that an employer's stated reasons for employment decisions are inaccurate or untrue, compels it.").
>
> FN10. *See id.* at 1146 ("The plaintiff does not have the burden of proving a defendant's proffered reasons were false, or that a discriminatory factor was the 'sole' motivating factor in the employment decision. Instead, the employee must show that the unlawful intent was a 'determining factor' and that the decision violates the statute.") (citations omitted).

Plaintiff did not provide any direct evidence that Defendant's decision to terminate him was based on his race. Defendant stated that Plaintiff was terminated for providing a fraudulent letter from St. Mark's. Defendant also presented evidence that Plaintiff provided Ogden Regional a fraudulent letter from McKay–Dee, though Ogden Regional did not make the determination that the McKay–Dee letter was fraudulent until after Ogden Regional terminated Zisumbo's employment.

Viewing the evidence in the light most favorable to Plaintiff, as the Court must, the Court concludes that Plaintiff provided evidence from which a jury could find that Defendant's stated reasons for terminating Plaintiff were pretextual. Specifically, Plaintiff presented evidence that he did not create the documents that were provided to Ogden Regional. Plaintiff presented the testimony of Plaintiff's wife, Melany Zisumbo ("Mrs.Zisumbo") wherein she explained that she obtained the St. Mark's letter directly from the hospital. Mrs. Zisumbo further testified that the documents were prepared by an employee of St. Mark's that does not normally prepare this type of letter, and was only willing to prepare it under pressure. Mrs. Zisumbo further testified that she called Rodebush, Zisumbo's supervisor, immediately after Plaintiff's termination to explain the origin of the documents. Finally, Plaintiff testified that he did not provide the McKay–Dee letter to Defendant.

*3 Additionally, Plaintiff testified that he was a highly skilled technician, perhaps the best employed at Ogden Regional. Plaintiff provided evidence that he received positive performance reviews and was highly rated by his previous supervisors.

A reasonable jury could conclude that Plaintiff did not provide fraudulent letters to Defendant and that Defendant did not adequately investigate the origin of the documents. From this evidence, a reasonable jury could determine that Defendant was looking for a way to terminate Plaintiff and that Defendant's stated reasons for terminating Plaintiff are pretextual. As a reasonable jury could conclude that Defendant's stated reasons are pretextual, they could infer that the true reason Plaintiff was terminated was based on his race.

*2. Retaliation*

Zisumbo also alleged that Defendant intentionally retaliated against him for opposing a practice made unlawful by Title VII. To establish a claim of retaliation, Zisumbo must show by a preponderance of the evidence that (1) he engaged in protected activity in opposition to discrimination, (2) Ogden Regional took an employment action against him that a reasonable employee would have considered materially adverse, and (3) there was a causal connection between his protected opposition and any materially adverse actions.[FN11]

FN11. *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 638 (10th Cir.2012).

*a. Protected Activities*

Protected activities include making a charge of discrimination, harassment or retaliation, or testifying, assisting or otherwise participating in any manner in one's own charge of discrimination or harassment, investigation, proceeding or hearing under Title VII.[FN12]

FN12. 42 U.S.C. § 2000e–3 (2012).

Plaintiff presented evidence that he filed a complaint with the Utah Labor Commission. Plaintiff also presented evidence that he filed a complaint with Ogden Regional's ethics line. Although the written record of the ethics line complaint does not include any allegations of discrimination, Plaintiff testified that he alleged racial discrimination when he called the ethics line. Furthermore, Plaintiff testified that, after a company pizza party, he accused Rodebush of discriminating against him based on race, and that he was told not to play the "race card." Additionally, Plaintiff testified that he called the ethics line shortly after he accused Rodebush of racial discrimination, after Rodebush told him to call the ethics line if thought he was being discriminated against because of his race. Plaintiff testified that he specifically alleged he was being racially discriminated against when he made his ethics line complaint. Finally, Plaintiff testified that, in an interview with Rodebush, Plaintiff was questioned about having made a complaint of racial discrimination

From this evidence, a reasonable jury could conclude that Plaintiff engaged in protected activities in opposition to discrimination.

*b. Materially Adverse Actions*

An employment action is considered materially adverse if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " [FN13]

FN13. *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales,* 438 F.3d 1211, 1219 (D.C.Cir.2006)).

***4** In this case, Mr. Zisumbo claims that Ogden Regional took an adverse employment action against him when Ogden Regional terminated his employment.

A reasonable jury could conclude that termination would be likely to dissuade a reasonable worker from making a complaint of discrimination.

*c. Causal Connection*

Finally, Zisumbo must show that there was a causal connection between his protected activity and any materially adverse actions taken by Ogden Regional. To do so, Zisumbo must prove by a preponderance of the evidence that Ogden Regional would not have taken the challenged employment decision but for his protected activity.[FN14] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of Ogden Regional.[FN15] The jury may infer that Defendant intentionally retaliated against Plaintiff if Plaintiff shows that Defendant's proffered nondis-

criminatory reasons for its decisions are pretextual.[FN16]

FN14. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2533 (2013).

FN15. *Id.*

FN16. *Reynolds v. Sch. Dist. No. 1, Denver Colo.,* 69 F.3d 1523, 1533 (10th Cir.1995) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801–05 (1973)).

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that a reasonable jury could find that Plaintiff would not have been terminated but for his complaints of discrimination.

As discussed earlier, Plaintiff has provided sufficient evidence from which a reasonable jury could conclude that Defendant's stated reasons for terminating Plaintiff were pretextual. Thus, the jury could infer that the real reason Plaintiff was fired was because he had complained about discrimination. In addition, Zisumbo testified that shortly before he was fired, he spoke with Rodebush and another employee about the fact that Zisumbo had filed complaints of racial discrimination. The timing of these events could lead a reasonable jury to conclude that Plaintiff would not have been terminated but for his complaints about discrimination.

Viewing the facts presented at trial in the light most favorable to Plaintiff, the Court finds that a reasonable jury could find in favor of Plaintiff on both his discrimination and retaliation claims. Therefore, the Court denies Defendant's Rule 50 Motion.

C. MOTION FOR EQUITABLE RELIEF

Zisumbo seeks equitable relief in the form of back pay and reinstatement, or in the alternative, back pay and front pay. Ogden Regional argues that the after-acquired evidence doctrine bars all equitable relief. Alternately, Ogden Regional contends that evidence of post-termination misconduct makes Zisumbo ineligible for rehire, and therefore limits his claim for back pay and precludes his claim for front pay/reinstatement.

"[C]onsiderable discretion is vested in the district court when devising remedies for Title VII violations." [FN17] However, the Court's "exercise of discretion in awarding back pay must be 'measured against the purposes which inform Title VII.' " [FN18] These purposes include fashioning a remedy that "both provides an incentive to employers to avoid discriminatory practices, and makes persons whole for injuries suffered on account of unlawful employment discrimination." [FN19] Typically, "[t]he relevant time period for calculating an award of back pay begins with wrongful termination and ends at the time of trial." [FN20] If a district court declines to award back pay, "it must carefully articulate its reasons, so as to enable the court of appeals to test them against the purposes of Title VII." [FN21] Finally, "[u]nder Title VII, prejudgment interest is an element of complete compensation in back pay awards." [FN22]

FN17. *Estate of Pitre v. W. Elec. Co., Inc.,* 975 F.2d 700, 704 (10th Cir.1992).

FN18. *Id.* (quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417–18 (1975)).

FN19. *Id.* (citation and internal quotation marks omitted).

FN20. *Wulf v. Wichita,* 883 F.2d 842, 871 (10th Cir.2009).

FN21. *Pitre,* 975 F.2d at 706 (citations omitted).

FN22. *Reed v. Mineta,* 438 F.3d 1063, 1066

(10th Cir.2006).

*5 Front pay is an equitable remedy and the district court has discretion to decide whether such an award is appropriate.[FN23] "Front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." [FN24] Although reinstatement is the preferred remedy under Title VII, reinstatement may not be practical when "a productive and amicable working relationship would be impossible." [FN25] The amount of front pay is "set in the court's discretion." [FN26] In calculating front pay, the court will look to several factors including work life expectancy, salary and benefits at the time of termination, and possible salary increases.[FN27]

FN23. *Whittington v. Nordam Grp., Inc.*, 429 F.3d 986, 1000 (10th Cir.2005).

FN24. *Abuan v. Level 3 Commc'n, Inc.*, 353 F.3d 1158, 1176 (10th Cir.2003).

FN25. *EEOC v. Prudential Fed. Savs. & Loan Ass'n,* 763 F.2d 1166, 1172 (10th Cir.1985).

FN26. *Whittington,* 429 F.3d at 1000.

FN27. *Id.* at 1000–01.

*1. After–Acquired Evidence*

Ogden Regional contends that Zisumbo's pre-termination misconduct bars front pay or reinstatement and limits back pay to the period of time between Zisumbo's termination and the date of the after-acquired evidence.

After-acquired evidence is "evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it." [FN28] Once an employer establishes that after-acquired evidence would have justified termination of employment, a plaintiff's claim for back pay is limited "from the date of the unlawful discharge to the date the new information was discovered." [FN29] The United States Supreme Court determined in *McKennon v. Nashville Banner Publishing Co.,* that when an employer uncovers evidence of a former employee's misconduct during the time of employment, that evidence, while not relieving the employer of liability for a wrongful termination, may be relevant to the issue of damages.[FN30]

FN28. *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 362 (1995).

FN29. *Id.*

FN30. *Id.* at 354.

In applying *McKennon,* the Tenth Circuit has established a two-step process. [FN31] First, the employer must establish that the employee's wrongdoing was so severe the employee "would have been terminated on those grounds alone if the employer had known of the wrongdoing at the time of the discharge." [FN32] Second, and only after establishing the first step, can the after-acquired evidence be considered to limit the damages remedy available to the wrongfully terminated employee.[FN33]

FN31. *Perkins v. Silver Mountain Sports Club & Spa, LLC,* 557 F.3d 1141, 1145 (10th Cir.2009).

FN32. *Id.* (citing *McKennon,* 513 U.S. at 362–63).

FN33. *Id.* (citing *McKennon,* 513 U.S. at 362).

*McKennon* applies to wrongdoing that occurred pre-termination. "When an employer has reason to

know of the wrongful conduct prior to the date of termination, the alleged conduct cannot be utilized as after-acquired evidence." [FN34] After-acquired evidence is "evidence of employee misconduct, such as criminal behavior, employer rule infractions, malpractice and the like, of which the employer became *aware* only *after* the employee's termination." [FN35]

FN34. *McLaughlin v. Innovative Logistics Grp., Inc.*, No. 05–72305, 2007 WL 313531, at *12 (E.D.Mich. Jan. 30, 2007) (citing *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 205 (3d Cir.1996)).

FN35. *Ahing v. Lehman Bros.*, No. 94–CV–9027, 2000 WL 460443, at *11 (S.D.N.Y. April 18, 2000) (emphasis in original) (citing *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 147 n. 17 (2d Cir.1999)).

Ogden Regional first argues that Zisumbo's claim for back pay should be limited to the one day period between when Zisumbo was terminated—October 8, 2009—and the date Ogden Regional verified the McKay–Dee letter was fake—October 9, 2009.

There are several problems with this argument. First, Zisumbo admits he submitted letters from the University of Utah and St. Mark's but contends that he did not submit a letter from McKay–Dee. Second, evidence was presented at trial that Zisumbo was terminated because of both the St. Mark's and the McKay–Dee letters. Third, Ogden Regional claims it began to question the authenticity of the St. Mark's letter prior to Zisumbo's termination and therefore Bissenden attempted to verify the provenance of both letters. Bissenden proceeded to terminate Zisumbo before the entire investigation was complete. At the time Zisumbo was terminated, the McKay–Dee letter was in Ogden Regional's possession, Bissenden believed the letter looked odd, and she was in the process of attempting to authenticate it. Ultimately, because Ogden Regional was aware of the McKay–Dee letter on October 8, 2009, and had doubts about its authenticity on that date, the letter does not constitute after-acquired evidence.

***6** Ogden Regional next argues that Zisumbo's claim for back pay should be limited to the same one day period because Ogden Regional acquired additional evidence concerning deception regarding the St. Mark's letter on October 9, 2009. Bissenden claims she was contacted by Zisumbo's attorney, who reportedly gave Bissenden inaccurate information about the authenticity of the St. Mark's letter. Bissenden then contacted human resources at St. Mark's and received information that Mrs. Zisumbo had contacted St. Mark's. Defendant argues that deception on the part of both Mrs. Zisumbo and Zisumbo's attorney should be attributed to Zisumbo to limit his back pay.

There are several problems with this argument as well. First, there may be hearsay problems in considering this information for its truth, but even disregarding hearsay considerations, this new information cannot be used to limit back pay to Zisumbo. Second, the jury heard conflicting evidence at trial as to how the letter was obtained by Zisumbo. Third, this deception, if it is deception, cannot be attributed to Zisumbo. At best, this additional information shows deception on the part of Mrs. Zisumbo and/or Zisumbo's attorney. These additional details do not constitute after-acquired evidence sufficient to bar back pay for Zisumbo.

Finally, Ogden Regional argues that once it verified that both letters were fake, Ogden Regional would have been justified in terminating Zisumbo on October 9, 2009, because Zisumbo would have submitted two falsified letters. This argument fails for many of the same reasons listed above. Regardless, the jury heard evidence about both letters yet found Zisumbo's firing was unlawful retaliation. The after-acquired evidence doctrine applies to pre-termination miscon-

duct that was discovered post-termination. The letters were discovered pre-termination therefore this doctrine does not preclude equitable relief for Zisumbo.

*2. Failure to Mitigate*

On August 22, 2010, Zisumbo was arrested on a misdemeanor assault charge. On September 15, 2010, Zisumbo pleaded guilty to the charge. Defendant argues that Plaintiff's back pay award should be limited to the period of time between his termination and the date he was arrested for assault because he failed to mitigate his damages when he obtained a criminal record for assault.

"Employees claiming entitlement to back pay and benefits are required to make reasonable efforts to mitigate damages." [FN36] Otherwise, "amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." [FN37] To satisfy its burden that a plaintiff failed to mitigate his damages, an employer must establish (1) that "there were suitable positions which the claimant[ ] could have discovered and for which [he was] qualified" [FN38] and (2) that the claimant "failed to use reasonable care and diligence in seeking such a position." [FN39] Failure to mitigate can negate or reduce a claim for back pay or front pay.[FN40]

FN36. *Aguinaga v. United Food & Commercial Workers Int'l Union,* 993 F.2d 1463 (10th Cir.1993).

FN37. 42 U.S.C. § 2000e–5(g) (2006).

FN38. *Aguinaga,* 993 F.2d at 1474.

FN39. *Id.*

FN40. *Dilley v. SuperValu, Inc.,* 296 F.3d 958, 967–68 (10th Cir.2002).

***7** Defendant must first show that suitable positions were available to Zisumbo. A position might not have been available to Zisumbo after September 2010 because at least some hospitals do not hire applicants for patient-care positions when the applicant has a recent criminal record.[FN41] Although there were positions available to Zisumbo prior to September 2010, it appears Zisumbo used reasonable diligence in seeking such positions. Evidence submitted in this case shows that since his termination at Ogden Regional, Zisumbo applied to more than twenty-five positions at Intermountain Health Care alone. [FN42] Plaintiff's assault does not establish a failure to mitigate. However, the Court turns next to post-termination misconduct.

FN41. Docket No. 162 Ex. K, at 3 & Ex O, at 2.

FN42. Docket No. 162 Ex. O–A.

*3. Post–Termination Misconduct*

Defendant next argues that Zisumbo's assault conviction constitutes post-termination misconduct and makes him ineligible for rehire at Ogden Regional. Defendant claims that Zisumbo's back pay should be limited to the period of time between his wrongful termination and his assault charge, and that he is precluded from being reinstatement or receiving front pay in lieu of reinstatement.

Ogden Regional's background check policy provides that a "[c]onviction of a felony or misdemeanor offense" may make a person ineligible for rehire. [FN43] Further, to "ensure the safety of its patients, [Ogden Regional] does not hire job applicants for any patient-care position who have a criminal record for violent behavior." [FN44]

FN43. Docket No. 162 Ex. K–1, at 9.

FN44. *Id.* Ex. K, at 2.

The Tenth Circuit in *Medlock v. Ortho Biotech,*

*Inc.,*[FN45] addressed the issue of whether post-termination misconduct can serve to limit or bar equitable relief. Although the court did not definitively hold that post-employment misconduct can limit equitable relief, the court held out the possibility.[FN46] The court indicated that on proper facts not present in that case, post-termination misconduct could serve to limit front pay and reinstatement and possibly back pay.[FN47]

FN45. 164 F.3d 545 (10th Cir.1999).

FN46. *Id.* at 555.

FN47. *See id.*

In *Medlock,* an employee was allegedly terminated in retaliation for filing a claim of race-based discrimination.[FN48] At his unemployment benefits compensation hearing, Medlock cursed at and verbally abused defendant's counsel [FN49] The defendant sought to limit front pay and reinstatement because of Medlock's conduct at the hearing, reasoning that he would have been fired for that conduct alone.[FN50] The defendant argued that the district court erred by not instructing the jury that Medlock's post-termination conduct could serve to limit damages.[FN51]

FN48. *Id.* at 548.

FN49. *Id.* at 555.

FN50. *Id.*

FN51. *Id.* at 554.

The Tenth Circuit reasoned that *McKennon* "states as a general rule that front pay and reinstatement are not appropriate remedies where there is after-acquired evidence of pre-termination wrongdoing" [FN52] but the court could "not foreclose the possibility that in appropriate circumstances the logic of *McKennon* may permit certain limitations on relief based on post-termination conduct." [FN53] The court noted that "cases in which the alleged misconduct arises as a direct result of retaliatory termination, the necessary balancing of the equities hardly mandates a *McKennon*-type instruction on after-occurring evidence." [FN54] The court determined that the former employee's conduct at an unemployment benefits compensation hearing was directly related to the termination and declined to limit equitable relief in that case.

FN52. *Id.* at 555.

FN53. *Id.*

FN54. *Id.*

***8** While the unemployment benefits hearing at issue in *Medlock* arose as a direct result of retaliatory termination, no such argument can be effectively made here. The facts of this case appear to be the appropriate circumstance which the court in *Medlock* chose not to foreclose. Zisumbo's assault arrest was unrelated to his termination from Ogden Regional. Zisumbo's arrest involved an assault of his daughter and occurred more than ten months after he was terminated from Ogden Regional. While Zisumbo has attempted to tie his criminal conviction to his termination, such a connection is too tenuous to be supported. Because Zisumbo's misconduct is not a direct result of his termination, Zisumbo's post-termination misconduct limits the equitable relief available to him.

The Court finds the Eighth Circuit case of *Sellers v. Mineta*[FN55] instructive. In *Sellers,* the court determined that post-termination conduct does not yield to a bright line rule because *McKennon* instructed lower courts to "treat each case on a case by case basis considering all the 'factual permutations and the equitable considerations they raise.' " [FN56] In *Sellers,* a jury

awarded damages to a woman who was terminated from employment with the Federal Aviation Administration ("FAA") because of gender discrimination and retaliation for filing a sexual harassment complaint. [FN57] She later went to work at Bank of America where she was fired for attempting to process an unauthorized loan application.[FN58]

FN55. 358 F.3d 1058 (8th Cir.2004).

FN56. *Id.* at 1063 (quoting *McKennon,* 513 U.S. at 361).

FN57. *Id.* at 1059.

FN58. *Id.* at 1060.

The defendant argued that her post-termination conduct at Bank of America made her unsuitable for reinstatement with the FAA.[FN59] The trial court awarded Sellers more than $600,000 in front pay.[FN60] On appeal, the Eight Circuit vacated the award and remanded the case to the district court, determining that "post-termination misconduct of a type that renders an employee actually unable to be reinstated or ineligible for reinstatement should also be one of the factual permutations which is relevant in determining whether a front pay award is appropriate." [FN61] In doing so, the court noted that "[i]t would be inequitable for a plaintiff to avail herself of the disfavored and exceptional remedy of front pay where her own misconduct precludes her from availing herself of the favored and more traditional remedy of reinstatement." [FN62]

FN59. *Id.*

FN60. *Id.* at 1059.

FN61. *Id.* at 1064.

FN62. *Id.*

The *Sellers* court determined that in order to establish that a plaintiff's claim to reinstatement or front pay be limited by post-termination conduct, "the defendant must convince the court by a preponderance of the evidence that [the plaintiff's] post-termination conduct renders [him] ineligible for reinstatement under the [employer's] employment regulations, policies, and actual employment practices." [FN63] In determining whether the employer has met this burden the court "must look to the employer's actual employment practices and not merely the standards articulated in its employment manuals." [FN64]

FN63. *Id.* at 1065.

FN64. *Id.* at 1064.

***9** Zisumbo is not eligible for rehire because Ogden Regional conducts background checks on all applicants.[FN65] Ogden Regional receives its accreditation through the Joint Commission, which requires hospitals to ensure patient safety.[FN66] Under Ogden Regional's written policy, applicants for rehire may be refused employment if they have a conviction of a felony or misdemeanor offense.[FN67] Further, "the purpose of Ogden Regional's background check policy is to ensure the safety of its patients, [therefore] Ogden Regional does not hire job applicants for any patient-care position who have a criminal record for violent behavior." [FN68]

FN65. Docket No. 162 Ex. K, at 2.

FN66. *Id.*

FN67. *Id.* Ex. K–1, at 9.

FN68. *Id.* Ex. K, at 2.

While the policy does not establish that current employees are subjected to ongoing background checks, evidence was introduced that when Ogden Regional becomes aware of a possible criminal violation, it follows up with an investigation, and would terminate a current employee based on a criminal record acquired after the employee was hired.[FN69] According to both the written policies and testimony about how the policies are implemented, [FN70] the Court finds Zisumbo's criminal record for assault makes him ineligible for hire in a patient position at Ogden Regional.

FN69. Docket No. 183, at 60–61.

FN70. *Id.*

*Sellers* barred only front pay and reinstatement, although *Medlock* itself lends support to the premise that post-termination misconduct can limit back pay as well.[FN71] The *Medlock* court relied on a *UMKC Law Review* article [FN72] in refusing to foreclose the logic of *McKennon* in appropriate post-termination misconduct cases. That article concluded that "where post-termination misconduct is egregious, such conduct should bar reinstatement and curtail backpay, absent strong indications to the contrary." [FN73] The Court finds that Zisumbo's conviction for assault qualifies as egregious post-termination misconduct sufficient to curtail back pay and bar reinstatement or front pay.

FN71. *Medlock,* 164 F.3d at 555.

FN72. Christine Neylon O'Brien, *The Law of After–Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer's Burden, Remedial Guidance, and the Enigma of Post–Termination Misconduct,* 65 UVIKC L.Rev. 159 (1996).

FN73. *Id.* at 174 (emphasis added).

While Defendant argues that Zisumbo's back pay should be cut off as of the date of his arrest for assault, the Court finds that Ogden Regional's practice is to keep individuals with a criminal record out of patient care positions. The date Zisumbo pleaded guilty to assault is therefore the date to which back pay should be limited. Back pay will be limited to the period of time between Zisumbo's termination (October 8, 2009) and his guilty plea for assault (September 15, 2010).

Plaintiff argues that Zisumbo's 2009 W–2 statement shows he earned $56,103.25 in 2009, and therefore asks the Court to determine Zisumbo's weekly wage from the W–2 numbers. The Court declines to do so because the W–2 numbers may reflect a payout of all paid time off Zisumbo had accrued at the time of his termination. The Court finds Zisumbo's hourly wage to be a better indicator of what he would have earned the last twelve weeks of 2009.

Zisumbo's daily rate of pay at the time of his termination was $26.46. Using Zisumbo's hourly rate, Zisumbo is entitled to 2009 back pay in the amount of $15,801.06. This reflects his hourly wage of $12,700.80 for the twelve weeks of 2009 after Zisumbo's termination, plus $466.75 in overtime wages, plus $2,633.51 in benefits.[FN74] Based on Bissenden's testimony, the Court finds that on January 1, 2010, Zisumbo would have been eligible for a 2% salary increase.[FN75] Zisumbo's back pay in 2010, from the start of the year until September 15, 2010, is $49,426.98. This includes $39,729 .28 in wages, plus $1,459.87 in overtime wages, plus $8,237.83 in benefits. Accordingly, Zisumbo is entitled to the jury award of $7,500, back pay in the amount of $65,228.04, and 10% prejudgment interest.

FN74. The parties agree that Zisumbo's back pay should include 20% of his salary as benefits.

FN75. Zisumbo's hourly rate would have increased to $26.99 on January 1, 2010.

III. CONCLUSION

***10** It is therefore

ORDERED that Defendant's Motion for Judgment as a Matter of Law (Docket No. 150) is DENIED. It is further

ORDERED that Plaintiff's Motion to Strike Defendant's Request to Submit for Decision on Defendant's Motion for Judgment as a Matter of Law (Docket No. 165) is DENIED. It is further

ORDERED that Plaintiff's Motion for Equitable Relief of Back Pay and Reinstatement (Docket No. 159) is GRANTED IN PART AND DENIED IN PART.

The Clerk of the Court is directed to enter judgment in favor of Plaintiff in the amount of $72,728.04 plus prejudgment interest at 10%, and close this case forthwith.

D.Utah,2013.
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Not Reported in F.Supp.2d, 2013 WL 6162992 (D.Utah)

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