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DANIEL PALACIOS, Plaintiff, v. CONTINENTAL AIRLINES, INC., Defendant.

CIVIL ACTION NO. H-11-3085

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

2013 U.S. Dist. LEXIS 17881*; *20 Wage & Hour Cas. 2d (BNA) 489

February 11, 2013, Decided
February 11, 2013, Filed

COUNSEL: [*1] For Daniel Palacios, Plaintiff: Peter Costea, LEAD ATTORNEY, Attorney at Law, Houston, TX.

For Continental Airlines, Inc., Defendant: Michael D. Mitchell, Ogletree Deakins et al, Houston, TX.

JUDGES: EWING WERLEIN, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: EWING WERLEIN, JR.

OPINION

MEMORANDUM AND ORDER

Pending in this employment discrimination suit is Continental Airlines, Inc.'s Motion for Summary Judgment (Document No. 17). After carefully considering the motion, response, reply, and applicable law, the Court concludes for the reasons that follow that the motion should be granted.

I. Background

Plaintiff Daniel Palacios ("Plaintiff"), who was terminated as a sales agent for Defendant Continental Airlines, Inc. ("Defendant"), initially alleged discrimination under the Americans with Disability Act ("ADA") and discrimination and retaliation under the Family and Medical Leave Act ("FMLA"). [1] Plaintiff testified that he suffers from depression, which began in 2005 when his mother was diagnosed with cancer. [2] His condition worsened when his mother died and his wife and child left him in 2006 and continued to deteriorate in 2009 when he filed for bankruptcy. [3] Plaintiff received medical treatment from several doctors [*2] and took medication for depression over this period of time. [4] Plaintiff took FMLA leave from June 24, 2009 through August 17, 2009, as recommended by Dr. Leonardo Espitia, to address his depression and insomnia. [5]

1 Document No. 1, ex. D (Orig. Pet.).
2 Document No. 19, ex. 1 at 47 (Palacios depo.).
3 Id., ex. 1 at 48-50, 58-59.
4 Id., ex. 1 at 8-10, 51-57.
5 Document No. 19, ex. 1 at 62-63; ex. 10.

On November 3, 2009, Plaintiff was called into a meeting with Assistant Director of Customer Service Malcolm Gearing, Human Resource Manager Karen Rodarmel, Manager of Technical Investigations Elizabeth Condon, Technical Investigator Richard Stepanski, and Employee Involvement Team Representative Irene Mosqueda, where he was questioned about alleged violations of Defendant's policies on conflicts of interest and benefits. [6] Plaintiff was asked about changing a ticket for his son's girlfriend without collecting the required fee, changing tickets for two other friends without collecting the required fee, and for allowing eighteen of his buddy passes to be used for international travel in which Plaintiff did not accompany the user of the pass. [7] Defendant regarded all of these activities to violate [*3] its policies, including its Friends and Family Policy. Approximately seven weeks later and after concluding its investigation, Defendant terminated Plaintiff's employment because of Plaintiff's violations of company policy. [8] Plaintiff appealed the decision through the three-step appeal process set out in company policy, and the decision to terminate Plaintiff's employment was upheld at every level. [9]

6 Document No. 17, ex. 13.
7 Id.
8 Document No. 17, ex. 14.
9 Document No. 17, exs. 16-19, 23, 28-29.

Defendant argues that Plaintiff has not made a prima facie case for discrimination under the ADA or retaliation under the FMLA, and further that it has articulated a legitimate, nondiscriminatory reason for firing Plaintiff. In response to the motion for summary judgment, Plaintiff offers no evidence and advances no argument to raise so much as a genuine issue of material fact on his FMLA retaliation claim, which will therefore be dismissed. Plaintiff's remaining claim is that he was discriminated against when Defendant failed to accommodate his disability of depression during the meeting with Defendant's representatives on November 3, 2009. [10] Specifically, Plaintiff argues that his disability [*4] affects his memory, and that at the meeting he requested (1) a pen and paper to take notes, (2) more time to answer questions, and (3) access to Passenger Name Records regarding his alleged violations of policy. [11] Defendant's representatives granted Plaintiff's request for a pen and paper, but Plaintiff asserts that his other two requests were not granted.

10 Document No. 19 at 15-16. In his response to Defendant's motion, Plaintiff argues that he has a disability discrimination claim and a failure to accommodate claim. These are the same claim, however. Failure to accommodate is a type of discrimination, *see 42 U.S.C. § 12112(b)(5)(A)*, and is the only discrimination Plaintiff argues occurred in this case.
11 Document No. 19 at 18, ex. 1 at 164-65.

II. Discussion

A. Summary Judgment Standard

Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(a)*. Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998)*. [*5] A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. Id. "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." Id. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . .; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *FED. R. CIV. P. 56(c)(1)*. "The court need consider only the cited materials, but it may consider other materials in the record." Id. *56(c)(3)*.

In considering a motion for summary judgment, the district court must view the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986)*. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*. [*6] "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993)*. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." Id. Even if the standards of *Rule 56* are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson, 106 S. Ct. at 2513*.

B. The Americans with Disabilities Act

1. Failure to Accommodate

The ADA prohibits discrimination against employees on the basis of a disability. *42 U.S.C. § 12101 et seq.* To "discriminate against a qualified individual on the basis of disability," as prohibited in the statute, 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 of such covered entity." *42 U.S.C. § 12112*. "An employee who needs an accommodation because of a [*7] disability has the responsibility of informing her employer." *E.E.O.C. v. Chevron Phillips Chem. Co., 570 F.3d 606, 621 (5th Cir. 2009)*. "When a qualified individual with a disability requests a reasonable accommodation, the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation." *E.E.O.C. v. Agro Distrib., LLC, 555 F.3d 462, 471 (5th Cir. 2009)*. "The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation." Id. "When an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the

employer violates the ADA." *Griffin v. United Parcel Serv., Inc., 661 F.3d 216, 224 (5th Cir. 2011)* (quoting *Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999)).*

2. ADA Framework

A plaintiff may establish a claim under the ADA by producing either direct or indirect evidence of discrimination. *Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995).* If a plaintiff relies on indirect evidence, the claim is analyzed using the burden shifting framework set out in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).* [*8] *Daigle, 70 F.3d at 396.* Under this framework, a plaintiff must make a prima facie case of discrimination by showing that: (1) he suffers from a disability; (2) he was qualified for the job; (3) he was subjected to an adverse employment action; and (4) he was replaced by a non-disabled person or was treated less favorably than non-disabled employees. Id. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action, producing some evidence in support thereof. Id. The defendant's burden is satisfied if it "produces any evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." Id. (citation and quotation marks omitted). "If the defendant meets its burden, the presumption of discrimination created by the prima facie case disappears, and the plaintiff is left with the ultimate burden of proving discrimination." *Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2002).* "[T]he plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus [*9] or the falsity of the employer's legitimate nondiscriminatory explanation." Id.

C. Analysis

1. Plaintiff's Prima Facie Case

Defendant does not challenge Plaintiff's qualification for his job as sales agent, a job Plaintiff had performed for a number of years. Furthermore, it is undisputed that Plaintiff was terminated from his position as a sales agent, which was an adverse employment action. Inasmuch as Plaintiff has no direct evidence that he was discharged because of his depression, Plaintiff relies on the McDonnell Douglas burden shifting framework to raise a prima facie case. Defendant argues, however, that Plaintiff has not made a prima facie case because he has not presented evidence (1) to show he was disabled and (2) to show he was replaced by a non-disabled person or was treated less favorably than non-disabled employees.

The term "disability" is defined under the ADA as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." *42 U.S.C. § 12102(1).* "[M]ajor life activities include, but are not limited [*10] to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *42 U.S.C. § 12102(2)(A).* "[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Id. *§ 10102(2)(B).*

The alleged discrimination occurred after the effective date of the ADA Amendments Act of 2008 ("ADAAA"), and hence the amended ADA applies. Pub. L. No. 110-325, 122 Stat. 3553 (2008); *see also Garner v. Chevron Phillips Chem. Co., L.P., 834 F. Supp. 2d 528, 538 (S.D. Tex. 2011)* (Harmon, J.). The ADAAA, among other things, broadened the standard for qualifying as disabled. *See* Pub. L. No. 110-325, 122 Stat. 3553 § 2 (2008). The regulations issued under the ADAAA state: "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be [*11] a demanding standard." *29 C.F.R. 1630.2(j).*

Plaintiff testified that his depression affected his ability to sleep and eat over a period of several years, that sometimes he slept too much, one time for almost two days, and at other times he could not sleep, that sometimes he didn't eat, and that sometimes he just sat in his living room and did not do anything, "just . . . blank." [12] Plaintiff testified that prior to taking his FMLA leave, he chose to allow others to work many of his hours, which company policy allowed, and that due to his depression he did not really care about potentially losing his house or making car payments or paying other accounts. [13] Plaintiff testified that it took a lot of effort to get out of bed and take care of himself. [14] Plaintiff did not testify that his disability adversely affected his job performance as a sales agent, and Defendant makes no claim that it did. Nonetheless, the self-described severity of Plaintiff's depression and its adverse effects on his desire to work, his sleeping, his eating, and his attention to ordinary care of himself, supported by some medical evidence Plaintiff presents, would appear sufficient under the more lenient standard [*12] of the ADAAA at least to raise a fact issue that Plaintiff had a disability under the ADA. *See 29 C.F.R. § 1630.2(j)* ("The primary

object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."); *Naber v. Dover Healthcare Assocs., Inc., 765 F. Supp. 2d 622, 643-47 (D. Del. 2011)* (finding plaintiff's depression, which limited her ability to sleep, eat, and concentrate constituted a disability under the amended ADA); *Estate of Murray v. UHS of Fairmount, Inc., Civ. A. No. 10-2561, 2011 U.S. Dist. LEXIS 130199, 2011 WL 5449364, at *6-8 (E.D. Pa. Nov. 10, 2011)* (applying the amended ADA and declining to grant summary judgment based on a lack of disability when some facts are alleged regarding plaintiff's depression and anxiety and summary judgment is appropriate on other grounds); *Karr v. Napolitano, No. C 11-02207 LB, 2012 U.S. Dist. LEXIS 137529, 2012 WL 4462919, at *9 (N.D. Cal. Sept. 25, 2012)* (finding plaintiff's sleep [*13] apnea was sufficient to constitute a disability under more lenient standard enacted by the ADAAA even though it did not affect his ability to do his job).

12 Document No. 19, ex. 1 at 65.
13 Id., ex. 1 at 61-65.
14 Id., ex. 1 at 65.

As for the remaining element required to make a prima facie case under the burden shifting framework, Plaintiff offers no proof that he was replaced by a person without a disability, or even that he was replaced by *anyone.* Likewise, Plaintiff presents no evidence that he was treated less favorably than any non-disabled employee, and does not compare himself to *any* other employee, and therefore fails to satisfy this required element to raise a prima facie case of ADA discrimination.

2. Legitimate, Nondiscriminatory Reason

Assuming, however, that Plaintiff were able to make a prima facie case, Defendant additionally presents summary judgment evidence that it had a legitimate, nondiscriminatory reason for terminating Plaintiff's employment, namely Plaintiff's violation of Defendant's corporate policies. Defendant stated the results of its investigation and specified Plaintiff's violations of company policies that were the basis for Plaintiff's termination in its December [*14] 21, 2009 termination letter to Plaintiff: changing a ticket for his son's girlfriend without collecting a fee, modifying other tickets without collecting applicable change fees or other associated charges, and eighteen instances of unaccompanied international buddy pass use. [15] The investigation included the interview with Plaintiff on November 3, 2009, when Defendant's representatives confronted Plaintiff with their initial findings and gave him an opportunity to respond. Plaintiff at that time admitted some violations, denied others, and stated he could not remember the details on others, such as the identities of several of the individuals who had used Plaintiff's buddy passes. The letter summarized:

> We have concluded from this investigation your actions resulted in a conflict of interest and violated the Friends and Family Policy. Additionally, your actions have violated the company's pass travel policies. As stated in the Working Together Guidelines Continental expects employees:
>
> > o to protect Company property as well as the property of fellow employees, customers and others against theft or damage;
> >
> > o to be truthful in all communications;
> >
> > o to avoid conflicts of interest or the appearance [*15] of such a conflict;
> >
> > o to use good judgment and open communication in all decisions.
>
> You have not met these expectations. Based upon the results of our investigation, we have decided to terminate your employment with Continental, effective today. [16]

15 Document No. 17, ex 14.
16 Document No. 17, ex. 14.

Defendant's evidence fully satisfies its burden of producing evidence of a legitimate, nondiscriminatory reason for firing Plaintiff.

3. Pretext

Plaintiff asserts that Defendant's non-discriminatory reason is pretextual because (1) changing his son's girlfriend's ticket was not a violation of the Friends and

Family policy because she was not Plaintiff's friend, (2) Plaintiff presented proof to Defendant's representative Malcolm Gearing after the initial November 3, 2009 meeting that he had collected fees from the two friends whose tickets he changed, and (3) Plaintiff did accompany his "buddies" on international flights. [17]

17 Document No. 19 at 17.

The Friends and Family Policy defines "Friend," in relevant part, as "someone with whom the employee has a personal relationship (e.g., a college roommate or neighbor), or someone with whom the employee has a professional relationship (e.g., landscaper, [*16] doctor, bank teller), or a co-worker." [18] Plaintiff argues that his son's girlfriend does not fit within that definition, testifying that "I had only met her once." He acknowledged in his sworn testimony that his own son had "some type of military issue, he had to travel for the military," and therefore he changed the girlfriend's ticket without collecting the fee. To waive the fee, he admitted, required approval by a member of management, which Plaintiff did not obtain. Asked directly if that would violate the Family and Friends Policy, Plaintiff replied, "Correct." Plaintiff on this record has raised no issue of fact that Defendant did not genuinely believe Plaintiff had violated the company's Family and Friends Policy, one of the declared reasons for his discharge.

18 Document No. 17, ex. 7 at 12.

Plaintiff further contends that, in fact, he did charge fees for changing two friends' flights, and stated that he collected the fees with a credit card over the phone. He testified in his deposition that when he was told that company records did not show the fees were collected, he replied, "You know what? If it's not in the record, then I didn't. But I came back and I did that. I collected [*17] a fee." Defendant in its discharge letter to Plaintiff recounted the back and forth that had transpired on whether the fees had been charged, Plaintiff's initial response that he could not remember, his subsequent claim that he had taken payment by a credit card over the telephone, the company's display of documentation that the fees had been waived, and Plaintiff's reply that "We have all sorts of waivers." Viewed in the light most favorable to Plaintiff that he *did* collect the fees, regardless of anything else he said in the shifting discourse between the parties, there is no evidence that Defendant's belief to the contrary--based on documentation in its records--was a pretextual reason for Defendant to discharge Plaintiff. *See Laxton v. Gap Inc., 333 F.3d 572, 579 (5th Cir. 2003)* ("Our inquiry is whether [Gap's] perception of [the employee's] performance, accurate or not, was the real reason for her termination. . . . It is not whether Gap's proffered reason was an incorrect reason for her discharge.") (quotation marks and citations omitted).

Finally, Plaintiff argues that he did accompany his "buddies" on the international portion of flights but failed properly to downgrade them for [*18] the domestic segments of the flights. [19] Plaintiff's argument ignores some key admissions made by Plaintiff in his deposition. Thus, after testifying that on one flight, "I did travel with them from Columbia to Houston; and then I forgot to change the pass classification from Houston to Dallas, and that was six of them," he was asked to account for the other twelve violations. Plaintiff did not do so, replying only that he did not see 18 names on the list, but only 17. Plaintiff further testified it was true that in his November 3 meeting with Defendant's representatives that he admitted he had violated "company pass policy by allowing his Buddy Pass riders to travel unaccompanied to and from international destinations and giving passes to people he did not know." Given Plaintiff's confirmations that he had in fact admitted to violations of company policy during the investigation of his misconduct, Plaintiff has raised no fact issue that Defendant was engaged in pretext when it stated that it was discharging Plaintiff for committing those very violations.

19 Document No. 19 at 17.

Plaintiff also contends, as observed above, that he was denied reasonable accommodations at the November [*19] 3 meeting when he requested (1) pen and paper; (2) more time to answer questions; and (3) access to company documents, all to accommodate his poor memory caused by his disability of depression. The summary judgment evidence shows, and Plaintiff concedes, that he was granted the request for pen and paper in the November 3 meeting. Whatever his sense of having been given inadequate time to answer questions in the November 3 meeting, moreover, was fully alleviated by the span of seven additional weeks after November 3 in which he was able to jog his memory at leisure and clarify or expand on his answers during his additional two or three meetings with Defendant's representatives before his discharge. [20] Finally, now having had the opportunity to examine the company's documents during pretrial discovery in this case, Plaintiff still has not pointed to any documents that would have facilitated or changed his answers in the November 3 meeting or that would have led Defendant to absolve Plaintiff of violating the listed company policies. In fact, in his oral deposition given in this case, Plaintiff continued to admit many of the same violations identified in Defendant's termination letter. [*20] In sum, Plaintiff has failed to present evidence to raise a genuine issue of material fact that Defendant's declared reasons for discharging him were pretextual, or that Defendant did not genuinely be-

lieve--after a multi-week investigation during which Plaintiff admitted numerous violations--that Plaintiff had in fact violated company policies and that such warranted his discharge.

20 Document No. 19, ex. 1 at 115.

III. Order

For the foregoing reasons, it is

ORDERED that Defendant Continental Airlines, Inc.'s Motion for Summary Judgment (Document No. 17) is GRANTED and Plaintiff Daniel Palacios's claims against Defendant are DISMISSED WITH PREJUDICE.

The Clerk will enter this Order and provide a correct copy to all parties.

SIGNED at Houston, Texas, on this 11th day of February, 2013.

/s/ Ewing Werlein, Jr.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

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MICHELLE THOMAS, Plaintiff, v. MICHAEL J. ASTRUE, Defendant.

C.A. 11-449-RGA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2012 U.S. Dist. LEXIS 170850

November 30, 2012, Decided
November 30, 2012, Filed

PRIOR HISTORY: *Thomas v. Astrue, 2012 U.S. Dist. LEXIS 53028 (D. Del., Apr. 16, 2012)*

COUNSEL: [*1] Gary W. Aber, Esq., Wilmington, DE, Attorney for Plaintiff.

Lauren M. McEvoy, Assistant U.S. Attorney, Wilmington, DE, Attorney for Defendant.

JUDGES: Richard G. Andrews, United States District Judge.

OPINION BY: Richard G. Andrews

OPINION

MEMORANDUM OPINION

/s/ Richard G. Andrews
ANDREWS, United States District Judge:

Before the Court is the defendant's motion to dismiss for failure to state a claim. (D.I. 22). In considering this motion, I take as true the plaintiff's factual allegations in her Second Amended Complaint. (D.I. 20).

Plaintiff is an employee of the Social Security Administration. Her office is in Philadelphia. She lives in Dover, Delaware. It is a long commute -- 75 miles -- by car from her home to the office, and it takes her roughly three hours each way. Public transportation is inconvenient and unreliable. Plaintiff is a good employee. She suffers from "benign paroxysmal vertigo, chronic lumbar pain, [] fibroid cystic and diplopia (double vision)." (D.I. 20, ¶ 34). The Social Security Administration also has field offices in Dover, Georgetown, and Wilmington, all of which are closer to where she lives, and the Dover office is within walking distance. She has done a temporary detail in the Georgetown [*2] office as a "temporary reasonable accommodation" for her vertigo and fibroid cystic. (*Id.*, ¶15). She asked that she receive the accommodation of being transferred to a job in one of the Delaware offices.

The Second Amended Complaint alleges two causes of action. The first alleges a claim under the Rehabilitation Act of 1973 (RHA), which references the American with Disabilities Act (ADA). The second alleges a Title VII claim for retaliation.

A claim under the RHA (or ADA) requires four allegations: "(1) that the employee is subject to the statute under which the claim is brought, (2) that she is an individual with a disability within the meaning of the statute in question, (3) that, with or without reasonable accommodation, she could perform the essential functions of the job, and (4) that the employer had notice of the plaintiff's disability and failed to provide such accommodation." *Lyons v. Legal Aid Society, 68 F.3d 1512, 1515 (2d Cir. 1995).*

The issue is whether she has alleged that "she is an individual with a disability within the meaning of the statute." The parties agree that the relevant statute is *42 U.S.C. § 12102(1)(A)*, which defines a disability to be "a physical or mental [*3] impairment that substantially limits one or more major life activities of [the] individual." Major life activities are:

> (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking,

> communicating, and working. (B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2). Further, "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." *42 U.S.C. § 12102(4)(A)*.

The defendant asserts that plaintiff does not suffer from a disability, since the allegation is that the vertigo and back pain limits her driving, but is not alleged to limit anything else. The [*4] defendant also asserts that plaintiff's fibroid cystic could qualify under the statute for the major life activity of normal cell growth, but defendant already made a reasonable accommodation for that disability. Further, defendant argues, if plaintiff is requesting another reasonable accommodation for the fibroid cystic, she must first exhaust all administrative remedies before bringing the claim to this Court.

Plaintiff's first Amended Complaint's disability claim was dismissed without prejudice. (D.I. 17). The parties argued the case law, which made clear that "driving" was not a major life activity. I followed the case law. I also noted that the definition of disability was modified subsequent to the case law by amendments to the ADA, effective January 1, 2009. (D.I. 17).

Plaintiff now argues that the amendments mean that she is now covered under the statute for her vertigo and back pain. I do not think so, because she has not alleged that these ailments do anything other than affect her ability to drive. Thus, the question remains, is driving a major life activity?

The amendments to the ADA were made in response to two Supreme Court cases: *Sutton v. United States Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999)*, [*5] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002)*. The legislative history noted that *Sutton* and *Toyota* had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

In *Sutton*, the petitioners brought a claim under the ADA when they were not considered for employment due to their condition of severe myopia. *Sutton, 527 U.S. at 475*. The Court found that the petitioners were not disabled. *Id.* In its amendments, Congress sought to overturn two of the Court's holdings in *Sutton*. The first was to "reject the requirement . . . that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The second was to "reject the . . . reasoning . . . with regard to coverage under the third prong of the definition of disability," which defines a disability as "being regarded as having such an impairment." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; [*6] *42 U.S.C. § 12102(1)(C)*.

Congress' attempt to remedy the shortcomings it saw in *Sutton* does not assist plaintiff. The plaintiff's case does not involve any mitigating measure to correct her condition. Additionally, both parties agree that plaintiff's complaint is premised on the first prong of disability, "a physical or mental impairment that substantially limits one or more major life activities," not the third prong. *42 U.S.C. § 12102(1)(A)*. Thus, changing the law in reaction to *Sutton* provides no basis to interpret the amendments in a way that is applicable to the issue in this case.

In *Toyota*, an employee brought a claim under the ADA for not being granted an accommodation for her carpal tunnel syndrome. *Toyota 534 U.S. at 187*. In the ADA amendments, Congress sought to overturn two of the Court's holdings in *Toyota*. They are (1) to "reject the standards . . . that the terms "substantially" and "major" in the definition of disability under the ADA need to be interpreted strictly to create a demanding standard for qualifying as disabled," and (2) "that to be substantially limited in performing a major life activity under the ADA an individual must have an impairment that prevents or [*7] severely restricts the individual from doing activities that are of central importance to most people's daily lives." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

Congress' disapproval of *Toyota* is more closely related to the issue in this case than is its disapproval of *Sutton*. In the end, I do not think the amendments changed anything that was essential to the existing "driving" case law, and I do not think the rejection of *Toyota* undercuts the bases on which the "driving" case law was decided. The issue here is not the degree to which a major life activity is impacted; it is whether a major life activity is impacted at all.

There are multiple appellate decisions that support the defendant's argument that "driving" is not a "major

life activity." See *Ramos-Echevarría v. Pichis, Inc. 659 F.3d 182, 188 (1st Cir. 2011)*; *Winsley v. Cook County, 563 F.3d 598, 603 (7th Cir. 2009)*; *Kellogg v. Energy Safety Services Inc., 544 F.3d 1121, 1126 (10th Cir. 2008)*; *Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329-30 (11th Cir. 2001)*; *Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2nd Cir. 1998)*.

Although several of these cases cite to *Toyota* for the proposition [*8] that driving is not a major life activity because "it is not of central importance to most people's daily lives," *Toyota 534 U.S. at 187*, they did not need *Toyota* to come to the conclusion that driving was not a major life activity.

In *Chenoweth*, the Court did not use *Toyota*. Instead, it used logic and the principles of statutory interpretation to conclude that driving is not a major life activity. I agree with that Court. "Although [the statute] is not exhaustive, driving is not only absent from the list [of major life activities] but is conspicuously different in character from the activities that are listed." *Chenoweth, 250 F.3d at 1329*. "It would at the least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure." *Id.* "We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn." *Id. at 1329-30*.

In addition, when driving is compared to other [*9] acknowledged "major life activities," what is noteworthy is the major life activities are generally not foregone by choice, and are independent of where one lives.

As Congress stated, "whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. I hold that driving is not a major life activity. Concluding this "does not demand extensive analysis."

Plaintiff did not originally argue that the 2009 amendments were of any significance. The plaintiff now does so, citing three recent district court cases. (D.I. 23). *See Hoffman v. Carefirst of Fort Wayne, Inc., 737 F.Supp.2d 976 (D.N.D. 2010)*; *Feldman v. Law Enforcement Associates Corp., 779 F.Supp.2d 472 (E.D.N.C 2011)*; *Estate of Murray v. UHS of Fairmount, Inc., 2011 U.S. Dist. LEXIS 130199, 2011 WL 5449364 (E.D.Pa. Nov. 10, 2011)*.

While each of these cases acknowledge that the amendments were designed to expand the reach of the ADA, none of the cases actually involved allegations at all similar to those in this case. *Hoffman* involved stage III renal cancer, and the issue was whether the cancer being in remission removed it from being a disability. *Feldman* also [*10] involved an issue of remission for a plaintiff with multiple sclerosis, and for a second plaintiff who had had a "mini-stroke" that affected his ability to work. *Murray* involved depression which had affected three specified major life activities. Thus, none of the three cases has any specific analysis which is persuasive or even informative on the issue in this case.

Plaintiff cannot base her complaint on her condition of fibroid cystic. While it is undoubtedly true that fibroid cystic qualifies as a disability, since it involves a major life activity, that is, the operation of normal cell growth, that is not the end of the analysis. Defendant moves to dismiss based on the argument that the plaintiff has not exhausted her administrative remedies. [1] This Court cannot determine plaintiff's request for a reasonable accommodation because plaintiff does not allege that she exhausted her administrative remedies for her fibroid cystic. "The purpose of requiring exhaustion is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court." *Antol v. Perry, 82 F.3d 1291, 1296 (3rd Cir. 1996)*. It is clear that plaintiff [*11] cannot allege exhaustion of remedies in regard to the fibroid cystic. Count I will therefore be dismissed with prejudice.

1 There is also no allegation that the fibroid cystic requires any accommodation.

Defendant argues that Count II fails to state a claim for retaliation. Count II does not make clear what is supposed to be the retaliatory act, and what the act is in retaliation for. It mostly concerns another employee who was granted a transfer from Delaware to Florida in May 2011. (D.I. 20, ¶¶60-61). It mentions the specific date of October 30, 2010 (*id.*, ¶59), but I cannot figure out the significance of the date from either the rest of the count or the rest of the complaint, since I do not see that date anywhere else in the lengthy complaint. The earliest date in the complaint that seems to involve an allegation of protected activity is April 12, 2010, when the plaintiff requested EEO counseling. (*Id.*, ¶33). There is also a reference to the denial of the hardship transfer to Dover on June 10, 2010. (*Id.*, ¶35). My best guess is that this is supposed to be the retaliatory activity. In my earlier opinion, I allowed the plaintiff an opportunity to amend the retaliation count to connect [*12] the protected activity and the retaliatory activity by alleging that the person who denied the transfer knew about the EEO counseling. Plaintiff has not done so. I have to assume this is because plaintiff cannot do so. For that reason, I will now dismiss Count II with prejudice.

AQILA THOMAS, Petitioner, v. BALA NURSING & RETIREMENT CENTER, Respondents.

CIVIL ACTION NO. 11-5771

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 91920; 26 Am. Disabilities Cas. (BNA) 1374

July 3, 2012, Decided
July 3, 2012, Filed

PRIOR HISTORY: *Thomas v. Bala Nursing & Ret. Ctr., Ltd. P'ship, 2012 U.S. Dist. LEXIS 64444 (E.D. Pa., May 7, 2012)*

COUNSEL: [*1] For AQILA THOMAS, Plaintiff: CHRISTINE E. REILLY, LEAD ATTORNEY, AMY Y. KARPF, KARPF KARPF & CERUTTI, BENSALEM, PA; ARI RISSON KARPF, KARPF & KARPF, BENSALEM, PA.

For BALA NURSING & RETIREMENT CENTER, LIMITED PARTNERSHIP, Defendant: LARRY J. RAPPOPORT, STEVENS & LEE, KING OF PRUSSIA, PA; LISA MARIE SCIDURLO, KING OF PRUSSIA, PA.

JUDGES: DAVID R. STRAWBRIDGE, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: DAVID R. STRAWBRIDGE

OPINION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

I. INTRODUCTION

Plaintiff Aqila Thomas ("Plaintiff" or "Thomas"), a nurse practitioner and former employee of Defendant Bala Nursing & Retirement Center, Limited Partnership ("Defendant" or "Bala"), brought this employment discrimination action against Bala on September 14, 2011. Thomas seeks equitable and monetary relief relating to her termination by asserting violations of the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA").

Presently before the Court is Bala's Motion for Summary Judgment ("Def. Mot.") (Doc. No. 34) and accompanying Memorandum ("Def. Mem.") (Doc. No. 35), Plaintiff's Counter Statement of Material and Disputed Facts ("Pl. Statement") and accompanying Memorandum of Law ("Pl. Mem.") (Doc. [*2] No. 36) with attached deposition testimony and other exhibits ("Pl. Statement Ex."), and Defendant's reply ("Def. Reply") (Doc. No. 40). By this motion, Defendant asserts that on the record before us there are no genuine issues of material fact and that Bala is "entitled to judgment as a matter of law" on all of its claims.

Upon consideration of that record, and the extensive oral argument held on June 20, 2012 ("Oral Arg.") (Doc. No. 42), and with full appreciation of the well constructed arguments set out by Defendant, we conclude, based principally upon the deposition testimony of Plaintiff, that there are indeed genuine issues of material fact. Accordingly, we deny Defendant's motion.

II. FACTUAL HISTORY

1. Plaintiff's Employment History

It is uncontested that Plaintiff was hired by Defendant in 2007 as a Licensed Nurse Practitioner ("LPN") and charge nurse. (Pl. Statement Ex. A at 16, 23.) [1] In this capacity, her duties included administering medication, ensuring resident safety, directing the certified nursing assistants, doing treatments and assessments, and resolving problems with residents' families. (*Id.* Ex. B at 16-17.) [2] On February 22, 2011, Plaintiff was terminated

by Defendant. [*3] (*Id.* Ex. S.) [3] Following her termination, on March 4, 2011, she participated in a grievance hearing held regarding her termination. (Thomas Dep. at 142-143.)

1 Hereinafter, Exhibit A of Plaintiff's Statement, or Aqila Thomas' deposition testimony, will be referred to as"Thomas Dep."

2 Hereinafter, Exhibit B of Plaintiff's Statement, or Brenda Williams' deposition testimony, will be referred to as"Williams Dep."

3 Hereinafter, Exhibit S of Plaintiff's Statement, or Thomas's termination paperwork, will be referred to as"Term. Notice."

Plaintiff was directly supervised by Brenda Williams from November 29, 2010 until her termination. (Williams Dep. at 14.) Ms. Williams reported to Judith Sherman, the Director of Nursing ("DON"), and Connie Singletary, the Assistant Director of Nursing ("ADON"). (*Id.* at Ex. Cat 17-18, Ex. D at 14-15.) [4] Marjorie Zeigler was the Nursing Home Administrator. (Pl. Statement Ex. E at 12.) [5]

4 Hereinafter, Exhibit C of Plaintiff's Statement, or Connie Singletary's deposition testimony, will be referred to as "Singletary Dep.," and Exhibit D of Plaintiff's Statement, or Judith Sherman's deposition testimony, will be referred to as "Sherman Dep."

5 Hereinafter, Exhibit E [*4] of Plaintiff's Statement, or Marjorie Ziegler's deposition testimony, will be referred to as "Ziegler Dep."

Both parties agree that tardiness factored into Bala's decision to terminate Thomas. [6] (Term. Notice.) Indeed, the question of tardiness is central to this case. At the time of Thomas's hire, Bala had in place a tardiness policy that allowed for a seven minute "grace period," by which an employee would not be counted as tardy so long as she arrived within seven minutes of her scheduled start time. (Ziegler Dep. at 19.) Bala asserts that it instituted a new tardiness policy in April 2010. (*Id.*) This new policy effectively eliminated the seven minute grace period. (*Id.*) Bala contends that notices were placed around the office regarding the change. (*Id.* at 20; Sherman Dep. at 92.) Plaintiff, claiming to rely upon an office memorandum, asserts that the grace period was not removed until January 5, 2011, just six weeks prior to her termination. (Pl. Statement Ex. U) (Memorandum stating "[t]his is a *reminder* to all Employees of Bala Nursing & Retirement Center's Attendance policy.") (emphasis added). Thomas contends that there is a factual dispute as to when the new tardiness policy [*5] was instituted.

6 While the parties agree that tardiness factored into the decision to terminate, they diverge on whether the tardiness should be excused due to Plaintiff's anemia. Furthermore, Plaintiff alleges that FMLA qualified absences were taken into account by the Defendant in its decision to terminate. (Ziegler Dep. at 40.) Defendant says it considered only the unexcused tardiness. (Singletary Dep. at 26.)

It is uncontested that Plaintiff often arrived late for her shift, which began at 11:00 p.m. (Thomas Dep. at 22), although her tardiness was usually for fewer than ten minutes. (*Id.* at 84-89.) The reason for this tardiness is highly contested. Defendant asserts that Plaintiff has offered no plausible justifiable excuse. (*Id.* at 42-43.) Plaintiff asserts, to the contrary, that every tardy she received was due to her anemia. (*Id.* at 35.)

2. Plaintiff's Anemia

The parties agree that Plaintiff was diagnosed with iron deficiency anemia in August of 2008. (*Id.* Ex. W.) From that date through February 24, 2011, she was treated for the anemia by Dr. Ingrid Kohut, a hemotologist. (Thomas Dep. at 25.) Dr. Kohut administered intravenous ("IV") iron infusions to Plaintiff on an outpatient [*6] basis some thirteen times between April 23, 2008, and February 24, 2011. (Pl. Statement Ex. I at 13.) [7]

7 Hereinafter, Exhibit I of Plaintiff's Statement, or Dr. Ingrid Kohut's deposition testimony, will be referred to as "Kohut Dep."

Plaintiff contends that her anemia affected her ability to stand for a long period of time, occasionally limited her ability to think or concentrate, caused shortness of breath when she would walk fast or run, and caused her to sleep up to twelve hours per day. (Thomas Dep. at 68, 71, 187.) Dr. Kohut has testified that a person with iron deficiency anemia could suffer from fatigue. (Kohut Dep. at 36.) Defendant in turn highlights Dr. Kohut's testimony that Plaintiff would only get tired towards the end of the day. (*Id.* at 39.)

Plaintiff asserts that in her last few months of employment with Bala, her anemia-related fatigue worsened. (Thomas Dep. at 70.) Bala refutes this assertion, noting that Plaintiff had scheduled no appointments with Dr. Kohut during this time period. (Def. Reply at 15-16.) Further, Bala argues that Plaintiff worked multiple double shifts and overtimes during the relevant time period, which would not typically be indicative of extreme [*7] fatigue. (Thomas Dep. at 16.)

In December 2010, Plaintiff requested and received a transfer to the night shift due to the fact that she had

more seniority than other applicants. (*See, e.g.*, Sherman Dep. at 27-28.) Plaintiff asserts that this was and should be considered an "accommodation" under the ADA and was due to the fatigue brought on by her anemia. (Thomas Dep. at 30-31.) Defendant contends that there is no evidence to support Plaintiff's assertion that this request was made seeking an "accommodation," but rather that Plaintiff simply signed up for a different shift change that was listed for all employees, and that the only reason she requested the change was because the work is less strenuous. (*Id.* at 68-69.)

It is uncontested that February 24, 2011, after being terminated, Plaintiff complained to Dr. Kohut that she was having difficulty performing her job duties. (Kohut Dep. at 29.) Defendant argues, however, that Plaintiff had not complained of fatigue to Dr. Kohut between her April 2010 treatment and her February 2011 termination. (*Id.* at 26-31.)

3. Defendant's Notice of Plaintiff's Condition

Thomas alleges that she repeatedly informed Ms. Williams, Ms. Sherman, and Ms. Singletary [*8] that she had anemia. (Thomas Dep. at 28-29, 66-67, 195-199.) This is a highly disputed fact as Defendant states that Plaintiff never informed any of her supervisors of this condition. (Williams Dep. at 24; Singletary Dep. at 34-35; Sherman Dep. at 22.)

The parties agree that Bala maintains a written policy for employee leave under the FMLA. (Pl. Statement Ex. G.) Under this policy, employees can request leave from supervisors, the administrator, or the DON. (Sherman Dep. at 12.) Plaintiff alleges that she told Ms. Sherman about her anemia, and Ms. Sherman did not inform her of her FMLA rights. (Thomas Dep. at 198.) In December 2010, however, Plaintiff requested and received FMLA paperwork from Bala's Human Resources Department. (*Id.* at 124.)

The parties also agree that from January 3 to 12, 2011, Plaintiff was on medical leave. [8] (Thomas Dep. at 36, 129.) She asserts that she was on leave due to the flu and her anemia. (*Id.*) Defendant, however, asserts that the leave was strictly for the flu, was unrelated to Plaintiff's anemia, and therefore not FMLA qualified. (*Id.* at 58, 122.) Plaintiff testified that during this leave, she informed Ms. Sherman during a telephone call that she would [*9] provide the FMLA paperwork when she returned to work on January 13, 2011. (*Id.* at 58.) Although this is not directly articulated, Defendant seems to state that there was no discussion about the FMLA while Plaintiff was on leave. It is uncontested, however, that the FMLA paperwork was signed by Dr. Kohut's office on January 7, 2011. (Pl. Statement Ex. M.) [9]

8 Defendant's Memorandum states that Plaintiff was on leave "in January 2011," but does not provide specific dates. Defendant, however, cites only to Plaintiff's deposition, which makes clear that these are the dates during which Plaintiff was on leave.

9 Hereinafter, Exhibit M of Plaintiff's Statement, or the FMLA paperwork turned in by Plaintiff, will be referred to as "FMLA Cert."

Plaintiff alleges that she placed the FMLA Certification form in Ms. Sherman's mailbox in the reception area at Bala when she returned to work on January 13, 2011. (Thomas Dep. at 129-130.) Ms. Sherman testified that she checks her mailbox at least a couple of times per day, that no FMLA forms were found in the mailbox, and that the first time they were seen by anyone at Bala was at the March 4, 2011 grievance hearing. (Sherman Dep. at 66-73; Ziegler Dep. [*10] at 62-64.) Furthermore, Defendant argues that the FMLA paperwork asked only for intermittent leave in connection with IV treatments Plaintiff required for her anemia, and that it made no mention of a need for tardiness or any other such accommodation. (FMLA Cert.) Plaintiff's counsel concedes that the forms ask only for intermittent leave, but asserts that intermittent leave includes arriving to work late. (Oral Arg.)

Plaintiff further testified that in January 2011, she requested from Ms. Sherman and staffing coordinator Lamia Johnson that her hours be reduced from 80 hours to 64 hours per week, and that this request was denied. (Thomas Dep. at 48, 50-51, 172-173, 181.) Plaintiff also asserts that she verbally requested medical leave in January 2011, due to her anemia, but Ms. Sherman denied that request and told her that she would have to wait until April. (*Id.* at 30, 52-55, 181-182.) These contested assertions are supported principally by Plaintiff's own testimony.

Prior to terminating Plaintiff, Ms. Sherman, Ms. Singletary, and Ms. Ziegler reviewed Plaintiff's personnel file, which Plaintiff contends typically would contain doctor's notes and FMLA paperwork. (*Id.* at 113-114.) Plaintiff [*11] also contends that absences were taken into account when determining whether to terminate her, and that the decision was based upon more than tardiness. [10] (Term. Notice.) Finally, Plaintiff asserts that her job performance was consistently compromised by the fatigue she experienced as a result of her anemia, which caused her to feel more tired than would the average individual. (Kohut Dep. at 38-39.) Defendant states, however, that until the March grievance hearing after her termination, only Plaintiff's tardiness was reviewed, and that Bala had no knowledge of her FMLA paperwork. (Ziegler Dep. at 62, 64; Sherman Dep. at 66-68; Singletary Dep. at 62.) Defendant also makes it clear that

Plaintiff had no performance related issues and it was only tardiness that led to her termination. (Def. Reply at 7.)

10 Plaintiff asserts several, if not all of, the absences taken into account were FMLA qualifying. For instance, Plaintiff alleges that on January 19, 2011, she received a verbal counseling for absenteeism on dates for which she was on FMLA-qualified leave for the flu and anemia. (Pl. Statement Ex. Q.)

4. Tardiness History

To enforce its tardiness policy, Bala maintains a process of gradual [*12] discipline that is invoked when an employee is tardy three times within a pay period. (Thomas Dep. at 23.) Plaintiff asserts that she received her first disciplinary sanction, a verbal counseling, on August 5, 2010. (Pl. Statement Ex. N.) Defendant asserts that the verbal warning occurred in July 2010. (Thomas Dep. at 75.) It is uncontested that the second step in the disciplinary process for tardiness, a written counseling, was given to Plaintiff on December 6, 2010. (Pl. Statement Ex. O.) Despite its policy, Plaintiff was given a second written warning for tardiness on January 6, 2011. [11] (*Id.* at Ex. P.) On January 25, 2011, the third step in the disciplinary process, a one-day unpaid suspension, was issued to Plaintiff. (*Id.* Ex. R.)

11 Defendant's policy states that employees are to be given only one written counseling. The disciplinary action also falls during the time Plaintiff claims to have been on medical leave for the flu and anemia.

Defendant alleges that upon receipt of these disciplinary actions, Plaintiff never asked her supervisors to excuse her lateness due to her anemia, nor did she submit medical documents indicating that it should be excused. [12] (Thomas Dep. at 29, 47.) [*13] Defendant claims that Plaintiff refused to speak to Ms. Sherman about any medical problems that may have been causing her to be late. (*Id.* at 80-81; Singletary Dep. at 31-32; Sherman Dep. at 40-41.) Thomas, on the other hand, alleges that she repeatedly informed Ms. Williams, Ms. Sherman, and Ms. Singletary that she had anemia, and that she was late to work as a result. (Thomas Dep. at 28-29, 66-67, 195-199.) Plaintiff also asserts that she specifically requested to be permitted to arrive late to work occasionally due to her anemia. [13] The record thus demonstrates a significant factual dispute over what communications took place between Plaintiff and her supervisors as well as when they may have occurred.

12 Defendant specifically claims that Plaintiff did not tell Williams about her anemia when she received her written counseling on January 6, 2011. (Williams Dep. at 33-36.)

13 After reading the deposition transcript, specifically the portions cited by Plaintiff's counsel that allegedly support this contention, we observe that Thomas noted on her EEOC form that she "occasionally would need to arrive to work late." (Pl. Statement Ex. J.) When questioned directly as to her memory of requesting [*14] an accommodation, however, she stated, "I don't remember." (Thomas Dep. at 179.) Thomas also stated she *believed* she should be excused from latenesses because anemia is "a health condition and [she] should be accommodated." (*Id.* at 77.)

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue is "genuine" if the evidence is such that, if accepted, "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)*. A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

In a summary judgment analysis, "[t]he moving party has the initial burden of demonstrating that no genuine issue of material fact exists." *Josey v. John R. Hollingsworth, Corp., 996 F.2d 632, 637 (3d Cir. 1993)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*). After the initial burden is met, "the burden shifts to the [*15] nonmoving party to present evidence that there is a genuine issue for trial." *Id.* (citing *Celotex Corp., 477 U.S. at 324*). When deciding whether there is a genuine issue for trial, "the inferences drawn from the underlying facts in the materials must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*. While the inferences are viewed in "the light most favorable" to the nonmoving party, they "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. However, where "reasonable minds can differ as to the import of proffered evidence that speaks to an issue of material fact, summary judgment should not be granted." *Gelover v. Lockheed Martin, 971 F.Supp. 180, 181 (E.D. Pa. 1997)*.

IV. DISCUSSION

1. ADA Discrimination and PHRA Claims

Plaintiff has alleged discrimination under both the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"). In order to establish a *prima facie* case of discrimination under the ADA, a plaintiff must show that: (1) she is a disabled person within the meaning [*16] of the ADA; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) she has suffered an adverse employment decision as a result of the discrimination. *Gaul v. Lucent Techs., 134 F.3d 576, 580 (3d Cir. 1998)*. The PHRA is "basically the same as the ADA in all relevant aspects." *Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002)* (citing *Kelly v. Drexel Univ., 94 F.3d 102, 106 (3d Cir. 1996)*). Our disposition of Plaintiff's ADA claim therefore applies with equal force to her PHRA claim.

Furthermore, the *McDonnell Douglas* burden shifting framework applies to ADA discrimination claims. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See also Walton v. Mental Health Ass'n. of Southeastern Pennsylvania, 168 F.3d 661 (3d Cir. 1999)*. Under the *McDonnell Douglas* framework, after a plaintiff proves a *prima facie* case of discrimination by demonstrating the first three factors, the burden shifts to the defendant to show a nondiscriminatory reason for the termination, or other adverse employment decision. *Id. at 668*. After the defendant articulates a nondiscriminatory reason, "the plaintiff [*17] must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Gelover, 971 F.Supp. at 184* (citing *Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)*).

Both parties agree that there was an adverse employment decision in the form of Plaintiff's termination from employment. Similarly, there is no serious question about whether she was "otherwise qualified to perform the essential functions" of her job. Defendant asserts, however, that she was not in fact disabled and that even if she was, she did not properly provide Defendant with notice such as to trigger Defendant's obligations under either the ADA or FMLA. Bala also asserts that it had a legitimate rationale for Thomas's termination predicated upon her excessive tardiness, which it alleges that Plaintiff cannot show is pretextual.

a. Disabled Person Under ADA

A plaintiff qualifies as disabled for the purposes of the ADA if she: "(1) has a physical or mental impairment that substantially limits [*18] one or more of h[er] major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." *Keyes v. Catholic Charities of the Archdiocese of Phila., 415 Fed.Appx. 405, 409 (3d Cir. 2011)* (citing *42 U.S.C. § 12102(2)*).

Defendant concedes that Plaintiff has a physical impairment in the form of anemia, and therefore we must determine only whether it substantially limited a major life activity. For purposes of this motion, we conclude that Plaintiff has set out testimony in her deposition that is sufficient to demonstrate a substantial limitation to a major life activity caused by her physical impairment. In that we conclude that for purposes of summary judgment Plaintiff is substantially limited in a major life activity, we need not consider the alternate argument that she is "regarded as having such an impairment."

This Court recognizes the mandate to expand ADA coverage that was codified under the ADA Amendments Act of 2008 ("ADAAA"). In enacting the ADAAA, Congress expressly rejected the standard that had been embraced by courts stating that "the terms 'substantially' and 'major' in the definition of the ADA 'need to be interpreted strictly [*19] to create a demanding standard for qualifying as disabled.'" Pub. L. 110-325 § 2(b)(4). Congress stated that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* at § 2(b)(5).

Plaintiff alleges that she is substantially limited in: (1) standing; (2) walking; (3) concentrating; (4) sleeping; and (5) breathing. (Pl. Mem. at 27.) Plaintiff testified that her fatigue limited her ability to stand for a long period of time, and that it would cause shortness of breath or fast breathing when she walked quickly. (Thomas Dep. at 68, 71.) Plaintiff also testified that she slept for twelve hours per day. (*Id.* at 187.)

We acknowledge Defendant's argument that occasional fatigue does not substantially limit a major life activity. The cases that Defendant cites as support, however, all take place before the ADAAA, and therefore apply a more rigorous interpretation of what counts as a "substantial limitation." *See Estate of Murray v. UHS of Fairmount, Inc., Civ. A. No. 10-2561, 2011 U.S. Dist. LEXIS 130199, 2011 WL 5449364, *8 (E.D. Pa. Nov. 10, 2011)* (acknowledging an "incredibly sparse" record as to whether the employee's impairment substantially limited her [*20] major life activities but declining to grant summary judgment in light of the ADAAA). Since we must take into consideration the lesser threshold announced by the ADAAA, we cannot grant summary

judgment based on Plaintiff being substantially limited in a major life activity. [14]

> 14 We acknowledge Defendant's contention at oral argument that the major life activity should be characterized as "waking up" instead of "sleeping," and that sleeping longer than the average individual is hardly a substantial *limitation* for sleeping. (Oral Arg.) However, at this time we cannot say as a matter of law that "waking up" is not a major life activity. The Third Circuit has characterized a major life activity as one that is "inescapably central to anyone's life." *Taylor v. Phoenixville School Dist., 184 F.3d 296, 307 (3d Cir. 1999)* (finding "thinking" to be a major life activity because it is "inescapably central to anyone's life"). If sleeping meets this standard, then it is hard to see how the opposite (waking up) would fail to. Furthermore, even if we were to classify the major life activity as "waking up," we could not say that it was not substantially limited for the same reasons given for "sleeping."

b. [*21] Otherwise Qualified for the Job

An individual is otherwise qualified if she, "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)*. Defendant maintains that tardiness was the sole reason for Plaintiff's termination, and that there were not any performance related issues. (Def. Reply at 7.) Defendant does not challenge whether Plaintiff was otherwise qualified for the job. Therefore, this element does not provide a basis for granting summary judgment.

c. Adverse Employment Action

It is not disputed that Plaintiff suffered an adverse employment action in the form of her termination on February 22, 2011.

d. Pretext

ADA discrimination claims are subject to the *McDonnell Douglas* burden-shifting framework. *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania, 168 F.3d 661 (3d Cir. 1999)*. Here, Defendant asserts that it terminated Plaintiff exclusively for tardiness, a legitimate business reason. At oral argument, counsel for Plaintiff did not dispute that Thomas was fired for tardiness. She claims, however, that Plaintiff had informed her supervisors prior to her termination [*22] that she suffered from anemia, which caused her lateness. (Thomas Dep. at 28-29, 66-67, 195-196, 197-199.) Viewing Plaintiff's deposition testimony in the light most favorable to her, as we must for summary judgment purposes, a factfinder could reasonably conclude that the graduated discipline imposed on Plaintiff for tardiness, culminating in her termination, after she had informed Defendant she was tardy due to her anemia, demonstrates that tardiness was used as a pretext for discriminating against her on the basis of her anemia.

We note that counsel for Defendant vigorously advocated in his filings and at oral argument that the discipline began before Plaintiff asked for a reasonable accommodation or turned in her FMLA paperwork. This argument, however, ignores Plaintiff's testimony that she told her supervisor about her anemia immediately upon its diagnosis, and that the anemia brought on fatigue leading directly to her tardiness. (*Id.* at 28-29.) Thus, we are left to conclude that there is a genuine issue of material fact on this central question. Plaintiff's ADA discrimination claim survives summary judgment.

2. Plaintiff's Failure to Accommodate Claim

In addition to her claim that [*23] her termination was discriminatory, Plaintiff also presents a failure to accommodate claim. An employer commits unlawful discrimination under the ADA if it does "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." *42 U.S.C. § 12112(b)(5)(A)*. A "reasonable accommodation" may involve an ""employer's reasonable efforts to assist the employee and to communicate with the employee in good faith...."" *Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010)*; *See also Taylor v. Phoenixville School Dist., 184 F.3d 296, 311 (3d Cir. 1999)* (quoting *29 C.F.R. § 1630.2(o)(3)* for the proposition that ""[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those [*24] limitations.'").

Both parties agree that no such interactive process occurred in this case, and that Defendants did not attempt to engage in developing or providing a reasonable accommodation. [15] For the purpose of determining whether this aspect of Plaintiff's ADA claim survives summary judgment, it is relevant only that Defendant did not, in fact, provide such an accommodation. Accordingly, we proceed to address whether Defendant was put on sufficient notice to have initiated the interactive process.

15 Although Plaintiff did receive the switch she requested to the night shift, both parties seem to agree that this was not an accommodation, but rather reflected an employee's request for an alternative work schedule that was granted based on seniority.

a. Notice of Necessity of Accommodation

In the Third Circuit, an employer need only "know of both the disability and the employee's desire for accommodations for that disability" in order to be on notice that the employee seeks a reasonable accommodation. *Taylor, 184 F.3d at 313*. In other words,

> [w]hat matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides [*25] the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.

Id. Plaintiff alleges that she told all of her supervisors about her anemia and that it caused her to be late to work. (Thomas Dep. at 28-29, 66-67, 195-196, 197-199.) Defendant alleges that no such request for a reasonable accommodation was ever explicitly, or even implicitly made.

We appreciate Defendant's contention that while there may be some evidence in the record that Plaintiff made a request for a reasonable accommodation, that request was neither clearly nor consistently articulated. (*See* Oral Arg.) Specifically, we take note of Defendant's position that Plaintiff herself never made an explicit request that she be allowed to arrive at work late to accommodate her anemia, [16] that Plaintiff failed to provide medical evidence that she required such an accommodation, and that habitual lateness by a few minutes would not in and of itself provide constructive notice that illness-related fatigue was at the root of the issue (as might, for example, consistent lateness of the magnitude of an hour or two). (*Id.*) We specifically [*26] note Defendant's citation to Dr. Kohut's testimony stating that she did not tell Thomas to go into work late. (Kohut Dep. at 40.)

16 At the June 20 oral argument, defense counsel characterized Plaintiff's deposition testimony to be that she "could not remember" whether she had ever discussed with her supervisors that her anemia required her to arrive late to work, whereas several supervisors testified clearly and unequivocally that no such discussion ever occurred, or that no such request was ever made. (Oral Arg.) Our review of the deposition transcripts, however, reveals that Plaintiff states that she "explained [her] health condition [to Brenda Williams]. . . and [said] that was the reason why [she] was late." (Thomas Dep. at 109-110.)

At her deposition, however, Plaintiff testified that in reference to a disciplinary warning she "explained [her] health condition, that [she] was fatigued and that was the reason why [she] was late." (Thomas Dep. at 109-110.) Furthermore, Plaintiff testified that she informed her supervisors about her condition and that it was causing her to be late to work on multiple occasions. (*Id.* at 28-29, 66-67, 195-199.) Viewing the evidence in the light most [*27] favorable to Plaintiff, as the summary judgment standard requires us to do, we conclude that there is a genuine issue of material fact as to whether Defendant was put on notice of Plaintiff's need for an accommodation.

b. Reasonableness of Accommodation

An employer need not accommodate an employee if it "can demonstrate that the accommodation would impose an undue hardship on [its] operation of the business." *Turner v. Hershey Chocolate USA, 440 F.3d 604, 608 (3d Cir. 2006)* (citing *42 U.S.C. § 12112(b)(5)(A)*). We conclude that it is a question of fact whether accommodating Plaintiff would impose an undue hardship on Defendant, and therefore summary judgment cannot be granted based on the accommodation being unreasonable.

We acknowledge Defendant's position that, even if it had appreciated that Plaintiff was communicating a connection between her anemia and her tardiness, that constructing a reasonable accommodation for tardiness at a nursing home would be problematic. In *Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1235 (9th Cir. 2012)*, the plaintiff, Samper, was a nurse at a neonatal intensive care unit ("NICU") who was diagnosed with fibromyalgia. Samper asked for an accommodation [*28] that would allow for her to have an unspecified amount of unplanned absences. *Id.* The Ninth Circuit found that it would be an unreasonable accommodation to allow an employee to "simply miss work whenever she felt she needed to and apparently for so long as she felt she needed to." *Id. at 1240* (quoting *Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999)*. We appreciate that there may be some similarity with that case in that both arise from the health field. We would be hard pressed, however, to equate a nurse in a neonatal intensive care unit with an LPN at a nursing home. [17] More importantly, in the case before us, the interactive process

never took place so we simply do not know what might have emerged from it. [18]

> 17 The *Samper* opinion notes specifically that "NICU nurses require special training such that the universe of nurses that can be called in at the last minute is limited." *675 F.3d at 1235*. We have not been given any similar information about how Bala would be burdened by accommodating Plaintiff's condition.
>
> 18 Samper [*29] was asking to have all of her unplanned absences accommodated, whereas Thomas asked only that her tardiness, usually consisting of a few minutes, be accommodated.

While the record does not seem to indicate that Plaintiff asked for a specific accommodation, we are unable to conclude that one might not exist where no interactive process was ever engaged in to determine what such an accommodation would be. We therefore conclude that it is a question of fact whether forgiving Plaintiff's tardiness would be a reasonable accommodation.

3. ADA Retaliation Claim

Thomas's final claim under the ADA is that she was retaliated against for seeking an ADA accommodation. To establish a prima facie case of retaliation under the ADA, a plaintiff must show: (1) engagement by the employee in protected activity; (2) adverse action taken by the employer either after, or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action. *Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997)*. As discussed above, there is no dispute as to whether Plaintiff suffered an adverse action taken by Defendant in [*30] the form of her termination. Furthermore, the pretext analysis we engaged in above to decide Plaintiff's ADA discrimination claim applies with equal force to her ADA retaliation claim. Therefore, we limit our review of this claim to determining whether Plaintiff engaged in a protected activity and whether there was a causal relationship between that activity and her termination.

In that we must view the record before us in the light most favorable to Plaintiff, there is certainly some evidence that suggests that she engaged in the protected activity of requesting an accommodation and we are unable to conclude as a matter of law that there is no causal connection between the protected activity and her termination. Accordingly, the ADA retaliation claim survives summary judgment.

a. Protected Activity

Requesting a reasonable accommodation for a disability constitutes a protected employee activity for the purposes of an ADA retaliation claim. *See Williams v. Phila. Housing Auth. Police Dept., 380 F.3d 751, 761 (3d Cir. 2004)* (holding that Plaintiff had failed to make out a *prima facie* case of retaliation due to insufficient causal link between protected activity of requesting accommodation [*31] and his termination). Furthermore, a plaintiff need not be "disabled" within the meaning of the ADA to make a claim of retaliation for seeking an accommodation, but instead must show only that "she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested." *Id. at 759 n.2*.

Plaintiff testified at her deposition that she asked to reduce her hours from eighty to sixty-four hours per week. (Thomas Dep. at 48, 50-51, 172-173, 181.) Plaintiff also stated that she had repeatedly told her supervisors about her anemia and that it was causing her to be late to work. (*Id.* at 28-29, 66-67, 195-199.) Finally, she testified that on January 13, 2011 she turned in FMLA paperwork requesting intermittent leave due to her anemia. (*Id.* at 129-130.) We conclude that the record, without considering the credibility of its sources, is sufficient to create a genuine issue of material fact as to whether Plaintiff engaged in a protected activity in the form of requesting an accommodation.

b. Causal Link

In order to establish a claim for ADA retaliation, a plaintiff must be able to show a linkage between the protected activity and the adverse employment decision. [*32] Typically a causal link can be demonstrated through either temporal proximity or ongoing antagonism. *Krouse v. American Sterilizer Co., 126 F.3d 494, 503-504 (3d Cir. 1997)* (stating that "[w]hen temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to intervening period for other evidence of retaliatory conduct"). Where a plaintiff seeks to establish a causal link through temporal proximity, "the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." *Krouse, 126 F.3d at 503*; *see also Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183 (3d Cir. 2003)*. The cases do not, however, establish a specific bright line test as to what amount of time may pass between the protected activity and the retaliation. *Compare Shellenberger, 318 F.3d at 188-189* (finding that termination two months after EEOC complaint was sufficient to establish causal connection for summary judgment when supervisor made comments related to legal action ten days before termination) and *Williams, 380 F.3d at 760* (finding that two months between request for accommodation and termi-

nation was [*33] not close enough to establish causal link). Ultimately, "our cases set no parameters but were decided in the context of the particular circumstances before us." *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997)* (concerning a causal connection analysis in a Title VII case).

Here, Plaintiff testified at her deposition that she had asked for a reasonable accommodation in the form of a reduced work schedule in January 2011, roughly one month before she was terminated. (Thomas Dep. at 48, 50-51, 172-173, 181.) Additionally, a relatively short period of time--some forty days--passed between when she testified that she turned in her FMLA paperwork on January 13, 2011, and her termination. Lastly, Plaintiff stated that she told Defendant that she was late because of her illness, which arguably put Defendant on notice of a need to initiate a discussion with Plaintiff about accommodation. (*Id.* at 28-29, 66-67, 195-196, 197-199.)

In the light most favorable to Plaintiff, the evidence demonstrates that she performed at least one ADA protected act in January 2011, requesting a reduced schedule, [19] which is less than two months before she was terminated on February 22, 2011. Mindful [*34] of the summary judgment standard, we are unable to conclude that a jury could not find the time frame to be sufficiently abbreviated as to infer a causal connection. In light of this conclusion, we need not consider whether there was ongoing antagonism. [20] Therefore, Plaintiff's ADA retaliation claim survives summary judgment.

19 Plaintiff's deposition does not give a specific date for when she requested a change in hours, so we do not know when in January this request was made.

20 Although not dispositive to our analysis, we observe that the only example of "antagonism" offered by Thomas is that at some point one of her supervisors made a comment "while grinning at her and speaking in a disparaging tone [. . .,] that 'people need to arrive at work on time, especially a nurse.'" (Thomas Dep. at 177.) Assuming that the comment is an example of antagonism, it hardly demonstrates *ongoing* antagonism. Instead, it shows only one isolated instance with no direct reference to a requested accommodation.

c. Pretext

An ADA retaliation claim is subject to the *McDonnell Douglas* burden-shifting framework. *See, supra, Krouse, 126 F.3d 494*. The pretext analysis under an ADA retaliation claim is essentially [*35] the same as that for an ADA discrimination claim, which we have outlined above. As we have discussed in the context of the discrimination claim, we conclude that there is a genuine issue of material fact that precludes summary judgment.

4. FMLA Interference

In addition to her ADA claims, Plaintiff has brought claims for interference and retaliation under the FMLA. To make out an FMLA interference claim, [21] an employee need only show that she was entitled to benefits and that she was denied them. *See Callison v. Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005)*. Specifically, a plaintiff must show that: (1) she was an eligible employee under the FMLA; (2) the defendant was an employer subject to the FMLA's requirements; (3) she was entitled to FMLA leave; (4) she gave notice to the employer of her intention to take FMLA leave; and (5) she was denied benefits to which she was entitled under the FMLA. *Atchison v. Sears, 666 F.Supp.2d 477, 488 (E.D. Pa. 2009)*.

21 The Third Circuit has held that when a plaintiff argues interference when her employer took an adverse employment action because of requested FMLA leave, the interference claim should be examined as a retaliation claim only. *Conoshenti v. Pub Serv. Elec. & Gas Co., 364 F.3d 135 (3d Cir. 2004)*; [*36] *See also Atchison v. Sears, 666 F.Supp.2d 477, 489 (E.D. Pa. 2009)*. The court was concerned that analyzing the claim as FMLA interference would allow a plaintiff to sidestep the *McDonnell Douglas* burden-shifting framework. *Id.*

We note at the outset that it is uncontested that (1) Plaintiff is an eligible employee, [22] that (2) Defendant is an employer subject to FMLA requirements, [23] and that (3) Plaintiff was entitled to take FMLA leave due to a serious health condition (anemia). [24] Therefore, it is necessary to determine only whether Plaintiff gave notice to Defendant of her intention to take FMLA leave, and whether she was denied benefits to which she was entitled. As we set out below and with respect to the question of interference, we consider Plaintiff's testimony that she asked for FMLA leave in January 2011, and that she was told she would have to wait until April. (Thomas Dep. at 30, 52-53, 181-182.) When the record is viewed in the light most favorable to Plaintiff, we conclude that there is a genuine issue of material fact in dispute and that dismissal of the claim would be inappropriate. [25]

22 *29 U.S.C. § 2611(2)(A)* states that an eligible employee is one who "has been employed [*37] (i) for at least 12 months by the employer. . . and (ii) for at least 1,250 hours of service with such employer during the previous twelve month period." At the time of her termination, Plaintiff

had been employed by Defendant for over twelve months, and had at least 1,250 hours of service during the previous twelve month period, thereby satisfying the statutory requirements.

23 *29 U.S.C. § 2611(4)(A)(i)* states that an employer is subject to FMLA requirements if it "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." Defendant has stated that it employs two-hundred individuals, which is above the number of employees required.

24 *29 U.S.C. § 2611(11)* states that a "serious health condition" includes an illness "that involves (A) inpatient care. . . or (B) continuing treatment by a health care provider." From April 2008 through February 2011, Plaintiff was treated for anemia on a continuing basis by Dr. Kohut, which is sufficient to satisfy the requirements of "continuous treatment."

25 Plaintiff also alleges failure to advise and interference by counting the "FMLA-qualifying" tardiness against her. We need [*38] not address these allegations as we conclude that Plaintiff has sufficiently made out an FMLA interference claim to withstand summary judgment with regards to her request for leave in January.

a. Notice of Request for FMLA Leave

In providing notice to an employer of a need for FMLA leave, an "employee need not use any magic words." *Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398, 402 (3d Cir. 2011)*. It is not necessary that an employee "give his employer a formal written request for anticipated leave, [because] [s]imple verbal notification is sufficient." *Id.* Furthermore, "[a]n employee who does not cite to the FMLA or provide the exact dates or duration of the leave requested nonetheless may have provided his employer with reasonably adequate information under the circumstances." *Id.*

Plaintiff testified at her deposition that in January 2011, she requested to take medical leave due to her anemia. [26] (Thomas Dep. at 30, 52-56, 181-182.) She stated that she made this request to Ms. Sherman. (*Id.*) Plaintiff further testified that, during a hallway conversation at Bala, she did not tell Ms. Sherman how long she would need to be on leave. (*Id.* at 55.) Even though Plaintiff testified [*39] that she did not include a specific duration for the verbal medical leave request, we conclude that a jury could find that sufficient "reasonably adequate" information had been provided by Plaintiff to put Defendant on notice of her request for FMLA leave. *See Sarnowski, 510 F.3d at 402*; *see also 29 C.F.R. § 825.300(b)(1)* (stating "[w]hen an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances). Accordingly, we cannot say that Plaintiff's FMLA interference claim fails as a matter of law due to lack of notice of requested FMLA leave.

26 Plaintiff claims that this request was separate from the week off she requested, and received, for treatment of the flu.

b. Denied Benefit

An employer is prohibited from "interfer[ing] with, restrain[ing], or deny[ing] the exercise or the attempt to exercise [FMLA rights]." *29 U.S.C. § 2615(a)(1)*. There is support for the proposition that telling an employee to take leave at a different time than was requested constitutes interference [*40] with FMLA protected rights. [27] *See Williams v. Shenango, Inc., 986 F.Supp. 309, 320-321 (W.D. Pa. 1997)* (finding that the denial of an FMLA qualifying leave and suggestion that it be taken a week later could be construed as interference).

27 We note that the FMLA certification form that Plaintiff allegedly submitted on January 13, 2011, does not appear to request "intermittent leave" in the form of tardiness. When the form is viewed as a whole, it seems to merely request that Plaintiff be excused on days where she required IV infusions. Since Plaintiff had no appointments with Dr. Kohut for IV infusions between the submission of the form on January 13, 2011 and her termination on February 22, 2011, we would find it difficult to conclude that the rights sought in this request had been abridged. This does not speak to the benefit Plaintiff claims she requested when she had conversations with her supervisors.

Plaintiff testified at her deposition that when she requested medical leave for her anemia in January 2011, she was told that she would have to wait until April. (Thomas Dep. at 54.) Viewing the facts in the light most favorable to Plaintiff, as we must for purposes of summary judgment, [*41] we conclude that a reasonable jury could find that a denial of medical leave and suggestion that it could only be used three months later could be construed as "interfering with" her FMLA rights. Accordingly, we are unable to grant summary judgment on the FMLA interference claim.

5. Plaintiff's FMLA Retaliation Claim

To make out a successful FMLA retaliation claim, a plaintiff must show that 1) she took or requested to take FMLA leave; 2) she suffered an adverse employment decision; and 3) the adverse employment decision was causally related to her FMLA leave. *Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 146 (3d Cir. 2004). See also Erdman v. Nationwide Ins. Co., 582 F.3d 500, 509 (3d Cir. 2009).* Where there is only indirect evidence of a violation of FMLA, the *McDonnell Douglas* burden-shifting framework applies. *Atchison v. Sears, 666 F.Supp.2d 477, 490 (E.D. Pa. 2009).*

The question here is whether there is sufficient evidence that Plaintiff sought FMLA leave, [28] and whether the evidence supports a causal link between such a request and her termination. In that we determine that Plaintiff has presented enough evidence to get to a jury on these questions, and that we have already [*42] determined that Bala has met its burden of presenting a legitimate business reason for her termination with the proffered justification of Plaintiff's tardiness, we next must also decide whether Plaintff could demonstrate that this rationale was merely pretext. For purposes of this summary judgment analysis, and based on the reasoning we set out below, we are unwilling to conclude at this time that a reasonable jury could not find that Plaintiff was retaliated against for seeking FMLA leave. Thus, Plaintiff's FMLA retaliation claim survives summary judgment.

> 28 Here, as in our "FMLA Interference" discussion, we look at the leave Plaintiff requested in January 2011, and not at her documented request for intermittent leave.

a. FMLA Leave Sought

The Third Circuit has made clear that "firing an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights *as well as* retaliation against the employee." *Erdman v. Nationwide Ins. Co., 582 F.3d 500, 509 (3d Cir. 2009)* (emphasis added). Therefore, Plaintiff must show only that she requested FMLA leave--she need not show that she actually took the requested leave. *See id.* ("we interpret the requirement that [*43] an employee 'take' FMLA leave to connote invocation of FMLA rights, not actual commencement of leave.")

Plaintiff alleges that she turned in her FMLA paperwork on January 13, 2011, prior to her termination, that at another point in January 2011 she verbally requested medical leave from her supervisors, and that she also requested a modified work schedule at a later date in January 2011. (Thomas Dep. 50-55, 129-130.) Defendant claims that it had a practice of granting FMLA leave requests, and that there is no reason why a properly presented request would not have been granted. (Oral Arg. *See also* Sherman Dep. at 88.) While we appreciate Defendant's contention that it would have been customary for Bala to have granted Plaintiff's requested FMLA leave had she actually asked for it, we are unable to conclude that there are no genuine issues of material fact regarding whether Plaintiff sought FMLA leave when she alleges that her FMLA forms were turned in before her termination, that she made a separate verbal request for medical leave in January 2011, and that she requested a reduced work schedule in January 2011. In that we have already concluded that a jury could find that Plaintiff provided [*44] Defendant with "reasonably adequate" information sufficient to constitute notice of Plaintiff's request for FMLA leave in the context of her interference claim, we apply the same conclusion to this retaliation analysis. Thus, we also conclude that there is sufficient evidence upon which a reasonable jury could find that Plaintiff sought FMLA leave, which prevents us from granting summary judgment on this part of her retaliation claim. [29]

> 29 We note that Plaintiff's submitted FMLA paperwork alone, and in conjunction with Dr. Kohut's deposition, does not appear to support Plaintiff's argument in that the form requests intermittent leave to secure periodic IV treatments to treat her anemia. We recognize, however, that Plaintiff alleges that she performed an FMLA protected act in submitting the paperwork and that it was, according to Plaintiff, submitted before her termination. (Thomas Dep. at 129-130.) For purposes of this section, we conclude that there is a genuine issue of material fact even if we consider only Plaintiff's testimony that she verbally requested FMLA leave.

b. Adverse Employment Decision

The parties are in agreement that Plaintiff was terminated on February 22, 2011. (Pl. [*45] Statement Ex. S.) Therefore, Plaintiff satisfies this prong of her FMLA retaliation claim.

c. Causal Connection

Defendant alleges that Plaintiff's termination resulted exclusively from her late arrivals to work, and that there was no causal connection between any request for FMLA leave and the termination. Specifically, Defendant contends that "[e]ven assuming that Ms. Thomas submitted her FMLA forms prior to her discharge[...], and that she was receiving treatment at the time causing her to be late for work[...], her next scheduled appointment that would arguably be FMLA covered was not until February (after her discharge)." (Def. Mem. at 32.)

Accordingly, in that Defendant lacked any knowledge of even her attempt to exercise FMLA rights, Defendant could not have retaliated against Plaintiff under the FMLA.

By contrast, Plaintiff alleges that she was terminated not just as a result of her submission of her written request for FMLA leave, but also based upon her verbal requests for leave and for a reduced work schedule, all of which occurred in January 2011. We take note of case law cited by Defendant in support of the contention that the temporal proximity in this case may not be not [*46] enough to support an inference of a causal connection. Specifically, in *Capilli v. Whitesell Const. Co., 271 Fed. Appx. 261, 2008 WL 857628, 4 (3d Cir. 2008)*, the Third Circuit found that being terminated a period of three weeks after returning from FMLA leave, and a day after requesting further leave, was not enough to establish an inference of causation. We note, however, that in *Capilli* the plaintiff had displayed performance related deficiencies completely unrelated to her condition (problems interacting with co-workers) prior to requesting and taking leave. *Id.* In contrast, the only performance-related deficiencies exhibited by Thomas, her tardiness, could be linked to her anemia.

As pointed out in the above "ADA Retaliation" section, with regard to the question of temporal proximity sufficient to demonstrate a causal connection, "our cases set no parameters but were decided in the context of the particular circumstances before us." *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997)* (concerning a causal connection analysis in a Title VII case). The Third Circuit found in *Kachmar* that a four month period between a protected act and termination could support an inference of [*47] retaliation. *Id.* When the record is viewed in the light most favorable to Plaintiff, we conclude that there is sufficient evidence to support her position that the submission of these requests were sufficiently connected to her termination to support an FMLA retaliation claim. We are unwilling to say that the retaliation claim should be precluded as a matter of law based on this evidence.

d. Pretext

To demonstrate pretext, "the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Atchison, 666 F.Supp.2d at 494* (citing *Fuentes, 32 F.3d at 764*). For substantially the same reasons discussed under the pretext analysis of Plaintiff's ADA retaliation claim, we conclude that a jury could reasonably believe that Defendant had a discriminatory reason that motivated the decision to terminate her.

V. CONCLUSION

For the reasons set out above, we conclude that Defendant's assertions do not warrant granting summary judgment, as there are genuine [*48] disputes of material fact regarding each of Plaintiff's claims.

An appropriate order follows.

ORDER

AND NOW, this 3rd day of July, 2012, upon consideration of Bala Nursing & Retirement Center, Limited Partnership's Motion for Summary Judgment (Doc. No. 34) and accompanying Memorandum (Doc. No. 35), Plaintiff's Counter Statement of Material and Disputed Facts and accompanying Memorandum of Law (Doc. No. 36) with attached deposition testimony and other exhibits, and Defendant's reply (Doc. No. 40), as well as the extensive oral argument held on June 20, 2012 (Doc. No. 42), and for the reasons set forth in the Memorandum Opinion filed on this same date, it is hereby **ORDERED** that Defendant's motion is **DENIED.**

BY THE COURT:

/s/ David R. Strawbridge USMJ

DAVID R. STRAWBRIDGE

UNITED STATES MAGISTRATE JUDGE

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MARIE PIERRE DESERNE v. MADLYN AND LEONARD ABRAMSON CENTER FOR JEWISH LIFE, INC.

CIVIL ACTION NO. 10-03694

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 68852

May 17, 2012, Decided
May 17, 2012, Filed

PRIOR HISTORY: *Deserne v. Madlyn & Leonard Abramson Ctr. for Jewish Life, Inc., 2011 U.S. Dist. LEXIS 15377 (E.D. Pa., Feb. 16, 2011)*

COUNSEL: [*1] For MARIE PIERRE DESERNE, Plaintiff: PETER GEORGE MYLONAS, LEAD ATTORNEY, LAW OFFICE OF PETER GEORGE MYLONAS PC, BROOMALL, PA.

For MADLYN AND LEONARD ABRAMSON CENTER FOR JEWISH LIFE, INC., Defendant: BARRY R. ELSON, LEAD ATTORNEY, THORP REED & ARMSTRONG LLP, PHILADELPHIA, PA; HEATHER J. AUSTIN, THORP REED & ARMSTRONG, PHILADELPHIA, PA.

JUDGES: THOMAS N. O'NEILL, JR., J.

OPINION BY: THOMAS N. O'NEILL, JR.

OPINION

MEMORANDUM

Now before me is a motion for summary judgment filed by defendant Madlyn and Leonard Abramson Center for Jewish Life, Inc. For the reasons that follow, I will grant defendant's motion.

BACKGROUND

Plaintiff Marie Pierre Deserne claims that defendant, her former employer, discriminated against her. Counts III and IV of plaintiff's complaint alleging claims based on disability discrimination are all that remain in this action. I previously dismissed plaintiff's race-based discrimination claims. [1] In Count III, plaintiff asserts a claim under the Pennsylvania Human Relations Act, *43 P.S. § 951, et seq.* She asserts that her "protected class is disability -- facial disfigurement being Black and ethnically, a West African National from the Country of Haiti and Plaintiff was subjected to intentional discrimination [*2] solely because of her facial disfigurement -- disability." Compl. ¶ 54. In Count IV, she asserts a claim under Title VII of the Civil Rights Act of 1964. She alleges that her "protected class is disability -- facial disfigurement and Plaintiff was subjected to intentional discrimination solely because of her facial disfigurement -- disability." Compl. ¶ 69.

> 1 Although I dismissed plaintiff's race-based discrimination claims, her response to defendant's motion for summary judgment appears to raise issues of race-based discrimination. See, e.g. Dkt. No. 32 at 13 (asserting claims of discrimination and wrongful termination based upon her "race and ethnic Haitian heritage of African descent"); id. at 17 (arguing that "plaintiff has plead [sic] both race discrimination and hostile work environment under Title VII and PHRA"). Those arguments are without merit.

Plaintiff claims that she was disabled because she developed a skin condition identified as "exogenous ochronisis" in or about 2006. Compl. ¶ 10. Two of her treating physicians were deposed. One, Dr. Christina Chung, testified that plaintiff had a condition identified as exogenous ochronosis. Def's Ex. 4 at 45:1-46:1; Def.'s Ex. 4b. The [*3] other, Dr. Toby Shaw, testified that plaintiff had a condition known as seborrheic dermatitis

with Litchenfield plaques. Def.'s Ex. 5 at 11:13-12:23. Regardless of her diagnosis, each of plaintiff's treating physicians concluded that "[h]er skin condition does not preclude her from participating in any work or activity," Def.'s Ex. 4 at 21:20-22; Def's Ex. 4a at 1, and that she was not "physically limited" as a result of her condition. Def.'s Ex. 5 at 14:16-17. Indeed, plaintiff acknowledges that her skin condition "does not preclude [her] from physically participating in any work or activity, whatsoever." Compl. ¶ 10. She has admitted that she could perform the essential functions of her job. Compl. ¶ 16; Def.'s Ex. 4 at 21-23; Def's Ex. 7 at 33:16-21. At her deposition, plaintiff conceded that the only impact of her skin condition was that she was itchy. Def's Ex. 7 at 33:24-34:15.

Defendant hired plaintiff in 2002 as a Certified Nursing Assistant. [2] Compl. ¶ 7. Her job duties included assisting nursing home residents with personal care; rendering assistance with bathing, personal hygiene, dressing, feeding and recreational activities; interacting with and observing assigned residents; [*4] and reporting notable changes regarding the residents. Compl. ¶ 13, Def's Ex. 2 at 1-2.

> 2 The parties have also referred to the title for this position as Registered Nursing Assistant or Resident Care Associate.

In April 2009, plaintiff was told that her job performance was "not good." Def.'s Ex. 7 at 64:11-24, 66:13-14. In June 2009, a number of residents who were under plaintiff's care asked that she not be their Certified Nursing Assistant. Def.'s Ex. 10 at DEF0292. At the time, defendant noted that "[w]e cannot continue to re-arrange assignments because residents refuse to allow Marie to care for them." Id. According to defendant's discipline report for plaintiff, residents complained "regarding [plaintiff's] poor communication skills and/or poor care." Def.'s Ex. 10 at DEF0292. Plaintiff testified that the residents did not complain that she was not doing her job, but complained about her face; that her "face is ugly." Pl.'s Ex. 3 at 40:5-13. Millie Steur, one of plaintiff's supervisors, testified, however, that "[t]here was no discussion from Marie at any time with [Steur] about any resident or any family harassing her or complaining about her face." Def.'s Ex. 11 at 22:20-23.

Defendant [*5] took steps to respond to concerns about plaintiff's performance. The June 2009 discipline report noted that plaintiff had "already received one-on-one coaching twice with educator and trainer. Received 2 videos and one self study on communication. Completed one month performance improvement plan with supervisor. Referred to ESL classes." Id. Despite this training, in July 2009, a floor nurse working with the residents to whom plaintiff was assigned wrote a note to her supervisor complaining that plaintiff "continues to tell [a resident] to move her legs and we both know that [the resident] has [multiple sclerosis] and cannot move her legs. I have to continually re-educate Marie on [the resident's] disease process and that she is unable to move her legs on her own but she insists on telling [the resident] to move her legs on the footrest of the lift." Def.'s Ex. 13.

Plaintiff was terminated in July 2009. Compl. ¶ 24. When asked why she was terminated, plaintiff responded that defendant said she was being fired because a resident complained that her face was "ugly." Def.'s Ex. 7 at 88:15-89:8. Plaintiff testified that she was told she was "going to be fired because the residents complain [*6] for me my face is ugly" [sic] and because a resident had complained that the resident had "lost a purse." Pl.'s Ex. 3 at 96:15-17; see also ; Pl.'s Ex. 3 at 117:4-7, 123:15-16. Defendant contends that it "terminated plaintiff for cause, based on poor performance," Dkt. No. 17, 16th Affirmative Defense, and that she "was not qualified to perform the essential duties of her job, or more accurately, she was not receptive to opportunities provided to help her to improve her performance." Dkt. No. 31-2 at 21.

STANDARD OF REVIEW

The party moving for summary judgment has the burden of demonstrating that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; see *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the movant sustains its burden, the nonmovant must set forth facts demonstrating the existence of a genuine dispute. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute as to a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A fact is "material" if it might affect the outcome of the case under governing [*7] law. Id. The "existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against" the movant. *Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978)* (citations and quotation marks omitted).

To establish "that a fact cannot be or is genuinely disputed," a party must:

> (A) cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes

> of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The adverse party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)*. Summary judgment will be granted "against a party who fails to make [*8] 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*.

DISCUSSION

I. Count III

In count III of her complaint, plaintiff claims that defendant "violated *Section 5(a)* of the Pennsylvania Human Relations Act[,] *43 P.S. 951-53*," Compl. ¶ 61, because she "was subjected to intentional discrimination solely because of her facial disfigurement -- disability." Compl. ¶ 53. Claims for disability discrimination under the PHRA are generally interpreted in accord with claims brought under parallel provisions in the Americans with Disabilities Act, *42 U.S.C. § 12101, et seq.* See *Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)*, citing *Harrisburg Sch. Dist. v. Pa. Human Relations Comm'n, 77 Pa. Commw. 594, 466 A.2d 760, 763 (Pa. Commw. Ct. 1983)*. When a plaintiff claims that she was treated differently based on her disability under the ADA or the PHRA courts apply the three-step, burden shifting analysis set forth in *McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. See *Gourley v. Home Depot, No. 99-5728, 2001 U.S. Dist. LEXIS 9089, 2001 WL 755102, at *2 (E.D. Pa. June 29, 2001)* ("Plaintiff relies [*9] on the McDonnell Douglas burden-shifting framework, applicable to claims for disability discrimination under the ADA and PHRA.").

Plaintiff first bears the burden of making a prima facie case of discrimination and must show that "(1) [s]he is a disabled person within the meaning of the [PHRA]; (2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) [s]he suffered an otherwise adverse employment decision as a result of discrimination." *Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000)*. The PHRA defines a disability as (i) "a physical or mental impairment which substantially limits one or more of such person's major life activities"; (ii) "a record of having such an impairment"; or (iii) "being regarded as having such an impairment." *43 P.S. § 954 (p.1)*. [3] Defendant contends that plaintiff's claim cannot withstand its motion for summary judgment because plaintiff has not set forth sufficient facts to establish that she is a disabled person within the meaning of the PHRA. I agree.

> 3 The ADA Amendments Act of 2008, which went into effect on January 1, 2009 and prior to plaintiff's termination, "made [*10] it easier for plaintiffs to prove that they are 'disabled' within the meaning of the ADA." *Estate of Murray v. UHS of Fairmount, Inc., No. 10-2561, 2011 U.S. Dist. LEXIS 130199, 2011 WL 5449364, at *5 (E.D. Pa. Nov. 10, 2011)*. Plaintiff's claim, however, is brought under the PHRA and not under the ADA. To date, Pennsylvania has not made parallel amendments to the PHRA or the regulations implementing the PHRA.

1. Substantially Limiting Physical Impairment

Plaintiff has not set forth sufficient evidence to show that her skin condition constitutes an impairment that substantially limits a major life activity. Nor has she set forth evidence of a record of having such an impairment. A physical impairment is defined as "a physiological disorder or condition, cosmetic disfigurement . . . affecting . . . body systems [including] skin." *16 Pa. Code § 44.4*. "'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Id. To determine whether a plaintiff is "substantially limited" in performing a major life activity, courts consider: "(i) [t]he nature and severity of the impairment; (ii)[t]he duration or expected duration [*11] of the impairment; and (iii)[t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Namako v. Acme Mkts., Inc., No. 08-3255, 2010 U.S. Dist. LEXIS 23182, 2010 WL 891144, at *4 (E.D. Pa. Mar. 11, 2010)*.

Plaintiff has not identified a single life activity that has been limited by her skin condition. She has admitted that her skin condition does not limit her ability to perform the essential functions of her job. Compl. ¶¶ 10, 16; Def.'s Ex. 4 at 21-23; Def.'s Ex. 7 at 33:16-21. Instead, at her deposition plaintiff claimed that the only impact of her skin condition was that she was "itchy." Def.'s Ex. 7 at 33:24-34:15. The record evidence would not allow for a reasonable jury to conclude that plaintiff has a physical

impairment which substantially limits one or more of her major life activities. Cf. *Kennedy v. Glen Mills Sch., Inc., No. 10-7450, 2011 U.S. Dist. LEXIS 131441, 2011 WL 5552865, at *4 (E.D. Pa. Nov. 15, 2011)* (granting summary judgment where there was no record evidence from which a reasonable factfinder could conclude that any of the plaintiff's major life activities had been affected by his claimed disability).

2. Regarded As Disabled

In response to defendant's motion [*12] for summary judgment, plaintiff contends that she is a disabled person because defendant regarded her as disabled. Plaintiff's complaint does not clearly assert a "regarded-as" disabled claim, alleging only that "defendant knew about plaintiff's facial disfigurement impairment disability because it is apparent." [4] Compl. ¶ 14. To the extent that this allegation can be construed as having raised a claim that defendant regarded her as disabled, I find that plaintiff has not made a sufficient factual showing to establish such a claim.

> 4 "A plaintiff may not amend [her] complaint through arguments in [her] brief in opposition to a motion for summary judgment." *Bell v. City of Phila., 275 F. App'x 157, 160 (3d Cir. 2008)* (citations and internal quotation omitted); see also *DeCastro v. Lahood, No. 04- 2129, 2009 U.S. Dist. LEXIS 33389, 2009 WL 1067030, at *8 (E.D.N.Y. Apr. 21, 2009)* (finding that the defendant "did not have an opportunity to fashion discovery toward defense of" the plaintiff's regarded as claim which was raised for the first time in opposition to summary judgment).

To show that defendant regarded her as disabled under the regulations implementing the PHRA, plaintiff must show that she

> has a physical or [*13] mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or has none of the impairments defined in subparagraph (i)(A) but is treated by an employer or owner, operator or provider of a public accommodation as having an impairment.

16 Pa. Code. § 44.4. [5] Defendant was aware that certain residents made complaints about plaintiff's face. But even if plaintiff's evidence establishes that defendant had knowledge of her skin condition, this alone is insufficient to establish that defendant regarded her as disabled under the definition set forth in the regulations implementing the PHRA. Cf. *Davis v. Davis Auto, Inc., No. 10-3105, 2011 U.S. Dist. LEXIS 135186, 2011 WL 5902220, at *9 (E.D. Pa. Nov. 22, 2011)* (applying the parallel standard set forth in the pre-ADAAA regulations implementing the ADA to find that the defendants' knowledge of plaintiff's health conditions without more was "not enough to suggest that any of the Defendants perceived [*14] Plaintiff as incapable of or substantially limited in performing her job because of her health"). "Plaintiff has not provided any evidence that her employers perceived her as unable to work in general, or in performing a large range of jobs" and thus has not raised a question of material fact as to whether defendant regarded her as disabled. *Davis, 2011 U.S. Dist. LEXIS 135186, 2011 WL 590550, at *9.*

> 5 Following the ADAAA, the regulations implementing the ADA were revised. As revised, a plaintiff bringing a "regarded-as" claim of disability discrimination under the ADA need only demonstrate that she was subjected to an adverse action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *42 U.S.C. § 12102(3)(A).* Plaintiff points to this standard in her response in opposition to defendant's motion. Dkt. No. 32 at 36. Plaintiff's claim, however, is brought under the PHRA and its unamended implementing regulations and I need not decide whether plaintiff can meet the more lenient standard set forth in the ADA regulations.

Because plaintiff has not set forth sufficient facts to establish that she is a disabled person within [*15] the meaning of the PHRA, I will grant defendant's motion for summary judgment with respect to count III of plaintiff's complaint.

II. Count IV

In count IV of her complaint, plaintiff claims that defendant "violated Title VII of the Civil Rights Act of 1964, *42 U.S.C. Section 2000e, et seq.*," compl. ¶ 75, because she "was subjected to intentional discrimination solely because of her facial disfigurement -- disability." Id. ¶ 69. "Title VII, of course, creates a cause of action for discrimination based on an individual's 'race, color, religion, sex or national origin.' Disability is not among the enumerated bases for a Title VII suit, and therefore a

claim for disability discrimination brought under Title VII cannot survive." *Diep v. Southwark Metal Mfg. Co., No. 00-6136, 2001 U.S. Dist. LEXIS 2953, 2001 WL 283146, at *2 (E.D. Pa. March 19, 2001)*; see also *Warner v. Montgomery Twp., No. 01-3309, 2002 U.S. Dist. LEXIS 13257, l2002 WL 1623774, at *7 (E.D. Pa. July 22, 2002)* (same).

An appropriate Order follows.

ORDER

AND NOW, this 17th day of May, 2011, upon consideration of defendant's motion for summary judgment, plaintiff's response and defendants' reply, it is ORDERED that the motion is GRANTED and judgment is ENTERED in the above action in favor [*16] of defendant Madlyn and Leonard Abramson Center for Jewish Life, Inc and against plaintiff Marie Pierre Deserne.

/s/ Thomas N. O'Neill, Jr.

THOMAS N. O'NEILL, JR., J.

MICHAEL DAVIS, Plaintiff, v. STATE OF VERMONT, DEPARTMENT OF CORRECTIONS, Defendant.

Case No. 2:11-cv-164

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

868 F. Supp. 2d 313; 2012 U.S. Dist. LEXIS 52772; 114 Fair Empl. Prac. Cas. (BNA) 1623; 26 Am. Disabilities Cas. (BNA) 735

April 16, 2012, Decided
April 16, 2012, Filed

COUNSEL: [**1] For Michael Davis, Plaintiff: Daniela Nanau, Esq., PRO HAC VICE, Joshua Friedman, Esq., PRO HAC VICE, Rebecca Houlding, Esq., PRO HAC VICE, Law Offices of Joshua Friedman, Larchmont, NY; Herbert G. Ogden, Ogden Law Offices, P.C., Danby, VT.

For State of Vermont Department of Corrections, Defendant: David R. McLean, Esq., LEAD ATTORNEY, Vermont Office of the Attorney General, Department of Corrections, Waterbury, VT.

JUDGES: William K. Sessions III, U.S. District Court Judge.

OPINION BY: William K. Sessions III

OPINION

[*320] **Memorandum Opinion and Order: Defendant's Motion to Dismiss**

Plaintiff Michael Davis alleges that he was subjected to a hostile work environment based on sex, gender stereotyping, and disability, and that he was retaliated against when he complained of the harassment. Defendant DOC has filed a motion to dismiss all counts of Plaintiff's complaint pursuant to *Rule 12(b)(6)*.

Before the Court are Defendant's Motion to Dismiss and Defendant's Supplemental Motion to Dismiss. For the reasons stated below, the Court grants Defendants Motion to Dismiss count seven alleging retaliation under the Americans With Disabilities Act ("ADA") and counts two, three, nine, and ten alleging sexual harassment on the basis [**2] of sex in violation of the Civil Rights Act of 1964 and the Vermont Fair Employment Practices Act ("VFEPA").

The Court denies Defendant's Motion to Dismiss counts four and eleven alleging harassment on the basis of gender stereotyping in violation of the Civil Rights Act of 1964 and the VFEPA; counts one and eight alleging harassment on the basis of disability in violation of the Rehabilitation Act and the VFEPA; and counts five, six, and twelve alleging retaliation in violation of the Civil Rights Act of 1964, the Rehabilitation Act, and the VFEPA.

BACKGROUND

For purposes of addressing a motion to dismiss, the Court accepts as true all allegations set forth in the Complaint. *Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)*. Plaintiff worked for the Vermont Department of Corrections ("DOC") as a guard from December 2005 until September 2010.

In December 2008, Davis missed two weeks of work due to pain that he was experiencing in his groin and testicles from a work-related injury. In January 2009, [*321] after he returned to work, he received from supervisors two offensive emails including objectionable photos referencing his groin. One of the emails contained a picture of an individual with [**3] his testicles showing with Davis's face superimposed on the individual. Staff received copies of these emails and inmates

In February 2009, Davis had hernia surgery and was out of work for four weeks. While on leave, Davis com-

plained of the emails and conduct to his union representative and sought treatment for emotional stress due to his supervisors' harassment. Defendant subsequently investigated his supervisors' behavior.

When he returned to work, Davis's co-workers and supervisors were unfriendly toward him. Two weeks after the conclusion of the investigation of his supervisors, Davis received an anonymous note in his work mailbox stating "How's your nuts / kill yourself / your done." In addition, several times a week inmates ridiculed Davis, grabbing their testicles, making comments such as "good luck making kids with that package," winking, and laughing. Davis reported these incidents but no investigation resulted.

Shortly after, a co-worker copied Davis on an email that included a cartoon of an individual with a gun to his head with the caption "kill yourself." In addition, inmate taunts continued after Davis was reassigned to a higher security area where inmates could only have [**4] become aware of Davis's medical condition from staff. Davis again filled out an incident report and complained about the inmate harassment, but defendant did not investigate or remediate the situation. In May 2009, a doctor restricted Davis from working in his position due to the excessive anxiety related to the harassment.

In September 2009, Davis was injured at work during "use of force" training due to improper supervision of the training by one of the supervisors who had sent one of the offensive emails to Davis. Davis went on worker's compensation leave for the resulting shoulder injury for over a year, at which time he received a medical reduction in force. While on leave, Davis was followed by a private investigator, who Davis believes Defendant hired.

After receiving a right to sue notice from the Equal Employment Opportunity Commission ("EEOC"), Davis filed this suit in June 2011, bringing claims under the Civil Rights Act of 1964 and the ADA. After Defendant filed its Motion to Dismiss in October, Plaintiff filed two amended complaints. The Second Amended Complaint filed in December 2011 contains additional claims under the Rehabilitation Act and the VFEPA based on essentially [**5] on the same alleged facts as the original complaint. Defendant subsequently filed a Supplemental Motion to Dismiss, which extends its arguments related to the Civil Rights Act and the ADA to Plaintiff's claims under the Rehabilitation Act and the VFEPA.

DISCUSSION

I. Standard of Review

This Court recently articulated the standard for reviewing a motion to dismiss pursuant to *Rule 12(b)(6)*:

> In *Ashcroft v. Iqbal*, the Supreme Court set forth a "two-pronged" approach for analyzing a Rule 12(b)(6) motion to dismiss. *556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. First, a court must accept a plaintiff's factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor. This assumption of truth, however, does not apply to legal conclusions, and threadbare recitals of [*322] the elements of a cause of action, supported by mere conclusory statements, do not suffice.
>
> Second, a court must determine whether the complaint's well-pleaded factual allegations . . . plausibly give rise to an entitlement to relief. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. [**6] The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that the defendant acted unlawfully.

Gadreault v. Grearson, No. 2:11-cv-63, 2011 U.S. Dist. LEXIS 119391 (D. Vt. Oct. 14, 2011) (internal quotations and citations omitted).

II. *Eleventh Amendment* Immunity

In his original complaint, Plaintiff alleged violations of the ADA pursuant to both Title I, prohibiting discrimination in employment, and Title V, prohibiting retaliation. Defendant moved for dismissal of these claims, asserting that they are barred by the *Eleventh Amendment*. Plaintiff subsequently voluntarily dropped his Title I claim, but continues with his Title V claim in his Second Amended Complaint. Defendant's briefing of the matter focuses on the Title I claim, although it urges that the conclusion should extend to the Title V claim as well.

The *Eleventh Amendment* bars a private suit against a state and entities considered arms of the state unless the state unequivocally consents to being sued or Congress "unequivocally express[es] its intent" to abrogate the state's sovereign immunity. *In re Deposit Ins. Agency, 482 F.3d 612, 617 (2d Cir. 2007)* (quoting *Tennessee v. Lane, 541 U.S. 509, 517, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)*); [**7] *Clissuras v. City Univ. of N.Y., 359 F.3d 79, 81 (2d Cir. 2004)*. It is clear that Title I claims against a state are barred by the *Eleventh Amendment*.

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). As for Title V, the district courts in the Second Circuit that have addressed the issue have all concluded that Title V claims are barred by the *Eleventh Amendment.* Until now, this issue has remained open in this district. *See Bain v. Gorczyk, 2010 U.S. Dist. LEXIS 137825, *11 (Dist. Vt. Dec. 3, 2010).* The Court resolves this issue, following the reasoning in *Chiesa v. N.Y. State Dept. of Labor* that, "[i]f a state is immune from underlying discrimination, then it follows that the state must be immune from claims alleging retaliation for protesting against discrimination." *638 F.Supp.2d 316, 323 (N.D.N.Y. 2009).* Title V of the ADA prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by this Act . . ." *42 U.S.C. 12203(a).* Here, Davis's ADA retaliation claim must be based on acts that are unlawful under Title I, the exclusive remedy for employment discrimination claims under the ADA, even when the employer [**8] is a public entity. *Emmons v. City University of NY, 715 F. Supp. 2d 394, 408 (E.D.N.Y. 2010).* Because Defendant is immune from Plaintiff's underlying ADA claim of employment discrimination under Title I, it should likewise be immune to his Title V retaliation claim that is grounded in acts that are unlawful under Title I.

Accordingly, the Court grants Defendant's Motion and Supplemental Motion to Dismiss count seven of the Second Amended Complaint alleging a violation of Title V of the ADA.

[*323] **III. Hostile Work Environment**

Plaintiff alleges six counts of sexual harassment due to a hostile work environment, three in violation of Title VII of the Civil Rights Act of 1964 and three in violation of the VFEPA. Under Title VII, it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex." *42 U.S.C. §2000e-2(a)(1).* Sexual harassment in the form of a hostile work environment constitutes sex discrimination. *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).* "[V]FEPA is patterned on Title VII of the Civil Rights Act of 1964, and the standards and burdens of proof under [V]FEPA are [**9] identical to those under Title VII." *Hodgdon v. Mt. Mansfield Co., Inc., 160 Vt. 150, 624 A.2d 1122, 1128 (Vt. 1992).*

Plaintiff also alleges two counts of discrimination due to a hostile work environment on the basis of disability, one count alleging violations of *Section 504* of the Rehabilitation Act and one count alleging violations of the VFEPA. The reach and standards applied to cases brought pursuant to the Rehabilitation Act are identical to those of the Americans with Disabilities Act. *Weixel v. Bd. Of Educ. Of N.Y., 287 F.3d 138, 146 n.5 (2d Cir. 2002).* Courts analyze hostile work environment claims under the ADA, and therefore the Rehabilitation Act, using the same standard applied in Title VII hostile work environment claims. *Behringer v. Lavelle School for the Blind, 2010 U.S. Dist. Lexis 134440 (S.D.N.Y. Dec. 17, 2010), citing Schiano v. Quality Payroll Sys., Inc. 445 F.3d 597, 609 (2d Cir. 2006).* "[V]FEPA's handicap discrimination provisions are modeled on federal legislation, and therefore federal case law and regulations provide guidance in construing them." *Lowell v. IBM, 955 F.Supp. 300 (Dist. Vt. 1997).*

To maintain a claim of hostile work environment, Plaintiff must [**10] show that: (1) "he . . . was subjected to harassment because of his . . . membership in a protected class," (2) the harassment "was so severe or pervasive as to alter the conditions of his . . . employment," and (3) "there is a specific basis for imputing the harassment to the defendant." *Little v. Nat'l Broad. Co., Inc., 210 F.Supp.2d 330, 388 (S.D.N.Y. 2002)*(citations omitted); *see also Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002).*

A. Harassment Because of Membership in a Protected Class Under Title VII

Sexual harassment between individuals of the same sex is actionable under Title VII to the extent it occurs "because of" the plaintiff's sex. *Oncale v. Sundowner Offshore Services, 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).* In *Oncale*, the Court explained three ways in which a plaintiff in such a case can show harassment based on sex: the harasser (1) was motivated by sexual desire, (2) was "motivated by general hostility to the presence" of males in the workplace, or (3) treated members of the opposite sex disparately. *Id. at 80-81.* These are nonexclusive evidentiary routes that courts have recognized for proving that "conduct at issue was not merely tinged with offensive sexual connotations, [**11] but actually constituted '*discrimination* . . . because of . . . sex.'" *Id. at 81.* A plaintiff can also sustain an allegation of sex discrimination in violation of Title VII based on gender stereotyping. *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).*

[*324] Plaintiff claims that Defendant engaged in discrimination in violation of Title VII by creating a hostile work environment because of Plaintiff's male sex. The hostile environment was allegedly created in three ways: (1) as a result of DOC employee and inmate harassment motivated by sexual desire (counts two under Title VII and nine under the VFEPA), (2) through DOC employee and inmate use of sex-specific and derogatory words as well as images focused on Plaintiff's male sex

organs (counts three and ten), and (3) based on Defendant's and inmates' perception that Plaintiff failed to conform to male gender stereotypes (counts four and eleven).

As to the first evidentiary route, Plaintiff has failed to plead any factual allegations that allow the Court to draw a reasonable inference that the alleged harassment was due to sexual desire. Neither the emails nor verbal comments made to Plaintiff suggest in any manner that Defendant's employees [**12] or the inmates were so motivated. Accordingly, the Court dismisses counts two and nine of the Second Amended Complaint.

As to the second evidentiary route, Defendant does not dispute the allegations that images sent to Plaintiff in emails referred to genitalia. Further, one may reasonably infer from the allegations that inmates grabbing their crotches were referring to Plaintiff's genitalia. One also can plausibly infer that these emails and the gestures were derogatory. Although the conduct may have been tinged with offensive sexual connotations, however, there is no support for the conclusion that they constituted discrimination because of sex. Contrary to Plaintiff's assertion, his allegations do not parallel any of the evidentiary routes described in *Oncale*, nor does Plaintiff suggest another evidentiary route that his facts support. No inference can be drawn from the alleged facts that the conduct was due to general hostility to the presence of males in the workplace or that they were due to disparate treatment of members of the opposite sex. For this reason, the Court dismisses counts three and ten of the Second Amended Complaint.

Plaintiff also claims that a hostile work environment [**13] was created based on harassing conduct that suggested Plaintiff failed to conform to gender stereotypes. "Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n. 4 (1st Cir. 1999)* (citing *Price Waterhouse, 490 U.S. at 250-51*); *Bibby v. Philadelphia Coca Cola Bottling, 260 F.3d 257, 264 (3d Cir. 2001)*.

The facts alleged allow the Court to reasonably infer that abuse directed at Plaintiff reflected the harassers' belief that he did not act in conformity with his co-workers' gender norms. Plaintiff alleges that his supervisor sent him an email stating "[w]ay to milk it buddy," referring to the time he took off due to his injury. Second Amended Complaint ¶ 21. This allegation provides a plausible basis for the inference that it went against expected masculine behavior at the DOC to seek medical treatment for, and take time off due to, a testicular injury. The inmate statement "good luck making [**14] kids with that package" (*id.* ¶ 38) also supports the reasonable inference that the abuse was motivated by a perception that Davis was not conforming to gender stereotypes at the DOC of how a man should act. The [*325] Court concludes that these two specific allegations are sufficient at this stage of the case to support the allegations of counts four and eleven that Plaintiff was a member of a protected class under Title VII of the Civil Rights Act of 1964.

B. Harassment Because of Membership in a Protected Class Under the Rehabilitation Act

The ADA defines "disability" as (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment." *42 U.S.C. §12102(1)*. The ADA Amendments Act of 2008 ("ADAAA") made it easier for plaintiffs to prove they are "disabled" under the ADA, providing that a disability "shall be construed in favor of broad coverage of individuals" and that a finding of disability "should not demand extensive analysis." *42 U.S.C. §12102(4)(A)*; *29 C.F.R. §1630.1(c)(4)*.

The first alternative of the definition of disability constitutes a finding [**15] of "actual disability." The post-ADAAA EEOC regulations provide that, to create a disability under this definition, an impairment need only "substantially limit[] the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *29 C.F.R. §1630.2(j)(1)(ii)*. Further, "substantially limits" is "not meant to be a demanding standard" and "shall be construed broadly in favor of expansive coverage." *29 C.F.R. §1630.2(j), (k)*. "Major life activities" that must be substantially limited include, but are not limited to, "performing manual tasks, . . . reaching, lifting . . . and working" or "[t]he operation of major bodily function, including . . . reproductive functions." *29 C.F.R. §1630.2(i)(1)(i)-(iii)*.

In his Second Amended Complaint, Plaintiff alleges that, after he returned from work from a two-week medical leave and before he underwent hernia surgery, "[a]s a result of the ongoing medical problem involving his testicles, Mr. Davis was substantially limited in his abilities [**16] to, *inter alia*, engage in sexual intercourse, and to perform manual tasks such as lifting and pulling." Second Amended Complaint ¶ 15. Further, due to his impairment, Davis was "out of work for approximately four or more weeks." *Id.* ¶ 27. Although he does not specifically state the duration of the foregoing substantial limitations, from the face of the Second Amended Com-

plaint it appears that they existed from at least December 2008 to March 2009, when Davis returned from hernia surgery. Plaintiff also alleges that, thereafter, due to the harassment, he suffered from emotional distress and excessive anxiety, *id.* ¶¶ 30, 34, 39, 48, 49, and that he suffered from "ongoing intermittent genital pain," *id.* ¶ 56. But he does not allege that these latter problems of emotional distress, excessive anxiety or ongoing pain substantially limited any major life activity.

Reading the Second Amended Complaint in a light most favorable to Plaintiff, his allegations that he was unable to perform manual tasks such as lifting and pulling or engage in sexual intercourse are sufficient under the lenient standards of the ADAAA to establish an actual disability. In January 2009, at the time Davis's supervisors [**17] sent the emails precipitating the alleged hostile work environment, Davis met the definition for having an actual disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual." [*326] *42 U.S.C. §12102(1); 29 C.F.R. §1630.2(j).* Plaintiff's allegations may not support a finding that the limitation of a major life activity continued after Davis's hernia surgery and return to work. Nevertheless, the initial harassing conduct focused on Davis's actual disability and cascaded into a pattern of taunts, ridicule, and jibes from co-workers and inmates that, left unchecked, constituted the alleged ongoing hostile work environment.

Even if the actual disability ended while the harassment continued, Davis could still show that he was a member of a protected class due to disability under the second alternative of the ADAAA definition of a disability: a record of an impairment that substantially limits one or more of the individual's major life activities. *29 C.F.R. §§1630.2(g)(1)(ii), (k)(1).* This provision is intended to "ensure that people are not discriminated against because of a history of disability." *29 C.F.R. Part 1630 Appendix*; see [**18] *Brandon v. O'Mara, 2011 U.S. Dist. LEXIS 112314, *18 (S.D.N.Y. Sept. 28, 2011); Heneghan v. NY City Admin., 2006 U.S. Dist. LEXIS 64849, *16 (E.D.N.Y. Sept. 11, 2006)* ("Defendant is wrong to the extent it suggests that since plaintiff no longer had a disability at the time he applied for reinstatement, he cannot state a claim under the ADA.").

Plaintiff does not specifically rely on this alternative definition, nor has he explicitly pointed to records of the impairment. Nevertheless, he has pled sufficient facts for the Court to draw the reasonable inference that such records exist. The Court can reasonably infer that employment or medical records exist from Plaintiff's allegations related to his medical absence from work in December 2008 (Second Amended Complaint ¶ 13), his hernia surgery (*id.* ¶ 27), and his complaint about emails that Defendant investigated (*id.* ¶¶ 29, 31). "[G]enerally a complaint that gives full notice of the circumstances giving rise to the plaintiff's claim for relief need not also correctly plead the legal theory or theories and statutory basis supporting the claim." *Marbury Management, Inc. v. Kohn, 629 F.2d 705, 712 n.4 (2d Cir. 1980).* Here, Plaintiff's Second [**19] Amended Complaint gives sufficient notice of the circumstances of his claim for relief to support the legal theory that there is a record of an impairment for establishing disability.

Plaintiff also alleges that he meets the third alternative of the definition of disability - that he is "regarded as having" an impairment. *29 C.F.R. §1630.2(g)(1)(iii).* A person can satisfy the "regarded as" definition of disability if he "has been subjected to an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *42 U.S.C. §12102(3)(A).* Under this alternative, the question is not about Plaintiff's actual condition, but rather about how his employer perceived his condition, including the "reactions and perceptions of the persons interacting or working with him." *Estate of Murray v. UHS of Fairmount, Inc., 2011 U.S. Dist. LEXIS 130199 (E.D. Pa Nov. 9, 2011)* (quoting *Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996).*

Plaintiff asserts that the perception that he was impaired is shown in the reactions of his supervisors, co-workers, and the inmates related to his medical condition. Even though, arguably, his employer [**20] no longer held that perception by May of 2009, when Davis was included in "use of force" training, inmates appeared to continue to have this perception. Davis's supervisors and co-workers had established this perception, and it continued unabated among the inmates. The facts [*327] that Plaintiff alleges plausibly support a conclusion that he was regarded as having a disability.

Defendant argues that any perceived impairment was both transitory and minor, which is a defense to an individual's charge of discrimination based on coverage under the "regarded as" alternative of the definition of disability. *29 C.F.R. §1630.15(f).* To defeat "regarded as" coverage, Defendant "must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, 'transitory' is defined as lasting six months or less." *Id.*; *42 U.S.C. §12102(3)(B).* To the extent that this defense is apparent from the face of the complaint, it would be an appropriate basis for dismissing the claim that Plaintiff was regarded as having an impairment. *Dube v. Texas Health and Human Services, 2011 U.S. Dist. LEXIS 99680, *12 (W.D. Tex. Sept. 6, 2011).* [**21] Defendant has failed, however, to show on the basis of the Second Amended Complaint alone that the perceived impairment was transitory. Indeed, the allegations suggest that the perceived

impairment, if not the actual impairment, lasted longer than six months. The perception that Davis was impaired started with Davis's supervisors in January and persisted through the perceptions of the inmates until September, when Davis left on workers compensation. In addition, Defendant is unable to show from the face of the Second Amended Complaint that the impairment was minor. Accordingly, Defendant at this stage of the case cannot sustain the defense that the perceived impairment is both transitory and minor.

The Court concludes that Plaintiff has pled sufficient facts to support a reasonable inference that he is a member of a protected class under the Rehabilitation Act and the VFEPA due to his disability.

C. Severe and Pervasive Harassment

Plaintiff must also show that the harassment was sufficiently severe or pervasive, which requires proof that Plaintiff "*subjectively* perceived the environment to be abusive [and] that the environment was *objectively* hostile and abusive." *Demoret v. Zegarelli, 451 F.3d 140, 149 (2d. Cir. 2006)* [**22] (emphasis added). Because there is no dispute that Davis subjectively perceived his environment to be hostile and abusive, the Court need only consider whether the environment was objectively hostile.

To determine whether the employment environment was "objectively hostile," Plaintiff must allege facts showing that "the environment was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Little, 210 F. Supp.2d at 388.* "The Supreme Court has emphasized that the standard for judging whether a work environment is objectively hostile must be sufficiently demanding so as to prevent Title VII from becoming a general civility code." *Id. (citing Oncale, 523 U.S. at 80).* "Courts must distinguish between merely offensive and boorish conduct and conduct that is sufficiently severe or pervasive as to alter the conditions of employment." *Id.* (internal quotation marks omitted).

To determine if the environment was sufficiently hostile or abusive to violate Title VII or the ADA, the Court should consider "all the circumstances," including the "frequency [**23] of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a [*328] mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); see also Oncale, 523 U.S. at 81-82* (The "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."). The required level of seriousness or severity "varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).* "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)* (internal quotation marks and citations omitted). The "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale, 523 U.S. at 81.*

Davis has sufficiently pled [**24] facts that would allow a reasonable inference that his supervisors' harassment and the inmates' more sustained and unchecked campaign of taunts directed at Davis and designed to humiliate or anger him was sufficiently severe and pervasive to alter the terms and conditions of his employment.

The alleged harassment commenced with two emails sent on consecutive days from Davis's supervisors. These emails contained explicit references to Plaintiff's genital pain. In and of themselves, the emails are likely insufficient to form the basis of Plaintiff's claim. But Plaintiff also alleges that these "emails were circulated to other staff, and were hung in the mail room where employees (both male and female), and inmates could see them." Second Amended Complaint ¶ 24. Both coworkers and inmates became aware of the emails and of Davis's medical condition and the fact that he had taken time off due to his condition. *Id.* ¶¶ 24-26, 28, 36-37. One may reasonably infer that the distribution of these emails led to the ongoing harassment that Davis endured after he returned from hernia surgery.

After his return, Davis received a threating note in his mailbox that stated "How's your nuts / kill yourself [**25] / your done." *Id.* ¶ 33. Defendant asserts that there is no basis to conclude that this threatening note was from an employee of the Department of Corrections. But this is beside the point. The note supports the inference that Davis's supervisors had poisoned the atmosphere in which Davis worked by making his medical condition known and by giving the sense that it was acceptable to harass him due to that condition and due to his taking time off because of the condition. Three months later Davis was copied on an email containing a cartoon drawing of someone with a gun to his head with the caption "Kill Yourself." This email similarly supports an inference that Defendant had created a work environment hostile to Davis.

Although these particular communications were sporadic, they were sufficiently severe to alter the conditions of employment. The initial emails that were distributed within the work place were humiliating. The latter "kill yourself" note and email were physically threatening. The alleged facts support the plausible inference that these communications were "physically threating or humiliating [and not] mere offensive utterance[s]." *Harris, 510 U.S. at 23.*

[*329] Moreover, Plaintiff's [**26] allegations of ongoing and frequent inmate ridicule and insult allow the reasonable conclusion that the harassment was also pervasive. Inmates became aware of Davis's condition from the actions of Defendant's employees. The inmate harassment can be directly attributed to Davis's supervisors, who had sent the initial emails that were then circulated in a manner such that the inmates became aware of Davis's condition. Plaintiff alleges that inmates would ridicule him on a regular basis by grabbing their testicles, making comments such as "good luck making kids with that package," and winking and laughing at him. Second Amended Complaint ¶ 38. The inmate taunts continued after Davis was transferred to a higher security area, where inmates could only have become aware of Davis's medical condition from staff. *Id.* ¶¶ 42-43. Plaintiff alleges that the inmate harassment went on for months. *Id.* ¶ 51.

Although the actual inmate taunts may not seem egregious in themselves, Plaintiff sufficiently alleges that they were due to his disability and to gender stereotyping and that they impacted his ability to safely and effectively do his job. ¶ 40. Plaintiff also contends that the impact on his ability [**27] to do his job was particularly adverse in the context of a correctional facility, where "harassment could impair relationships needed in life threatening circumstances." Plf.'s Mem. at 18, *citing Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000).*

Defendant has a different take on the prison context of the alleged harassment. It notes that "[c]ourts repeatedly decline to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates," and that "[i]t is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates - people who have been deemed unsuited to live in normal society." Def.'s Reply at 2, *quoting Powell v. Morris, 37 F.Supp.2d 1011, 1017 (S.D. Ohio 1999).* Plaintiff has the better position at this stage of the case. The behavior of the inmates based on Davis's medical condition and on gender stereotyping plausibly give rise to an entitlement to relief as it is reasonable to infer that they adversely affected his conditions of employment as a prison guard.

Considering all of the circumstances, Davis's allegations are sufficient to survive a motion to dismiss his claim that the harassment [**28] was severe and pervasive.

D. Defendant's Liability for the Harassment

It is clear that Defendant can be held vicariously liable for harassment by a supervisor, subject to potential affirmative defenses that have not been advanced here. *See Faragher, 524 U.S. at 780*; *Drew v. Plaza Constr. Corp., 688 F. Supp. 2d 270, 280 (S.D.N.Y. 2010)* ("When a supervisor participates in the conduct creating a hostile work environment, liability may be imputed to the employer.").

In this case, most of the conduct constituting the harassment is attributable to either co-workers (the "kill yourself" note and "kill yourself" email) or inmates. Notably, however, the conduct of the co-workers and inmates can be imputed to Davis's supervisors. It was they who initiated the ridicule, taunts, and derision constituting the severe and pervasive harassment. It is reasonable to infer that but for the initial offensive emails that they sent, which were circulated such that co-workers and inmates became aware of Davis's impairment and the time off he took due to his impairment, the hostile work environment would not have materialized.

[*330] In any event, it is well-established that employers may be held liable for harassment [**29] by third parties when that conduct creates a hostile work environment. See, e.g., *Beckford v. Florida Dep't of Corr., 605 F.3d 951, 958 (11th Cir. 2010)*; *Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605 (7th Cir. 2006)*; *Galdamez v. Potter, 415 F.3d 1015, 1022 (9th Cir. 2005)*; *Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001)*; *Weston v. Pennsylvania, 251 F.3d 420, 427 (3d Cir. 2001)*; *Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 677 (6th Cir. 2000)*; *Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-74 (10th Cir. 1998)*; *Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 854 (1st Cir. 1998)*; *Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108 (8th Cir. 1997).* Courts have also held that an employer may be found liable for the harassing conduct of inmates. *See Erickson, 469 F.3d at 605-06*; *Freitag v. Ayers, 468 F.3d 528, 538-39 (9th Cir. 2006)*; *Weston, 251 F.3d at 427*; *Slayton, 206 F.3d at 677*; *see also Garrett v. Dep't of Corr., 589 F.Supp.2d 1289, 1297-98 (M.D. Fla. 2007).* "Although some harassment by inmates cannot be reasonably avoided, the Department, on the other hand, cannot refuse to adopt reasonable measures to curtail harassment by inmates." *Beckford, 605 F.3d at 959.*

For [**30] liability to attach to the conduct of co-workers or inmates, Plaintiff must allege that his em-

ployer knew or reasonably should have known about the harassment and failed to take reasonable remedial action. *Petrosino v. Bell Atlantic, 385 F.3d 210, 225 (2d Cir. 2004)*; *Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995)* ("An employer who has notice of a discriminatorily abusive environment in the workplace has a duty to take reasonable steps to eliminate it.").

Plaintiff has pled facts allowing the Court to draw a reasonable inference that Defendant knew of the harassment and failed to take reasonable remedial action. Plaintiff filed two incident reports raising the issue of inmate harassment. Second Amended Complaint ¶¶ 40, 45. After filing the first incident report, Davis was reassigned to a higher security area for inmates. *Id.* ¶ 42. Plaintiff does not state that this reassignment was in response to his complaints of harassment, and for purposes of the 12(b)(6) motion, the Court need not deem that this was a remedial step. In any event, the inmate harassment continued, prompting Davis to file his second incident report. *Id.* ¶ 45-46. Plaintiff alleges that "[n]othing [**31] was done to investigate or remediate the inmate harassment" after he filed the second incident report. In addition, Plaintiff alleges that a letter addressing the effects of the harassment was sent from Davis's health center to the Superintendent of the correctional facility. Plaintiff alleges that the inmate harassment continued after this letter was sent.

Defendant argues that Davis should have done more to address the inmate harassment by writing up each inmate for a disciplinary rule violation. Def.'s Reply at 3. Perhaps, but at this stage of the proceedings, Plaintiff has sufficiently pled facts allowing the reasonable inference that Defendant was or should have been aware of the hostile work environment and did not undertake appropriate remedial measures.

Plaintiff's allegations plausibly give rise to an entitlement for relief. Accordingly, and for the foregoing reasons, the Court denies Defendant's Motion and Supplemental Motion to Dismiss counts four and eleven of the Second Amended Complaint alleging discrimination on the basis of gender stereotyping in violation of Title VII of [*331] the Civil Rights Act of 1964 and counts one and eight alleging discrimination on the basis of disability [**32] in violation of the Rehabilitation Act and the VFEPA.

IV. Retaliation Claims

Plaintiff brings counts alleging retaliation in violation of Title VII of the Civil Rights Act, the Rehabilitation Act, the ADA, [1] and the VFEPA. To establish a prima facie case of retaliation, Davis must allege facts that allow the reasonable inference that (1) he participated in a protected activity, (2) his employer knew of his participation in the protected activity, (3) thereafter his employer subjected him to a materially adverse employment action, and (4) there "was a causal connection between the protected activity and the adverse employment action." *Kaytor v. Electric Boat Corp., 609 F.3d 537, 552-53 (2d Cir. 2010)* (Standard under Title VII); *Weixel v. Bd. Of Educ. Of N.Y., 287 F.3d 138, 148 (2d Cir. 2002)* (Standard under Rehabilitation Act); *Lowell v. IBM, 955 F.Supp. 300, 304 (D. Vt. 1997)* (Standard under the VFEPA).

1 As explained above, the Court dismisses Plaintiff's ADA retaliation claim due to lack of subject matter jurisdiction.

The parties do not dispute for purposes of the 12(b)(6) motion that Davis's complaint to his union representative about the emails he received from his supervisors in January [**33] 2009 is a protected activity. That complaint led to an investigation of Davis's supervisors, so it is also clear that the second part of the prima facie case - that the employer knew of his participation - has also been met.

The parties disagree as to whether Davis was subjected to a materially adverse employment action. Plaintiff must show that a reasonable employee would have found the employment action "materially adverse," meaning that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)*. The anti-retaliation provision of Title VII "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id. at 64*. It appears on the face of the Second Amended Complaint that incidents connected to Davis's reporting of harassment, both the initial complaint to the union representative and subsequent incident reports, can plausibly support a conclusion that they would dissuade a reasonable worker from making or supporting a charge of discrimination.

Shortly after the investigation of Davis's supervisors that was prompted by the complaint to the union [**34] representative, Davis received in his work mailbox the note stating "how's your nuts / kill yourself / your done." Second Amended Complaint ¶ 33. Even though the note was anonymous, the timing and content of the note certainly would allow a reasonable inference that it was given to Davis in retaliation for his participation in the protected activity.

Davis reported the receipt of the note. In the same incident report, he complained of continuing harassment by inmates. *Id.* ¶¶ 35, 40. This additional reporting could also be considered participation in protected activity.

Shortly after, he was copied on an email between two coworkers that included a cartoon of someone with a gun to their head with the caption "kill yourself." *Id.* ¶ 41. Moreover, at approximately the same time, he was assigned to a higher security area for prisoners, yet [*332] the inmate harassment of Davis continued. *Id.* ¶ 42-43. One may reasonably infer from Plaintiff's alleged facts that these secluded inmates learned of his medical condition from Defendant's employees. *Id.* ¶¶ 44-45. One may also reasonably infer that the employees informed the inmates of Davis's condition in order to perpetuate the harassment in retaliation [**35] for Davis's reporting of earlier harassment.

Plaintiff's allegations provide a plausible basis for a finding that Defendant's creation and perpetuation of a hostile work environment was itself actionable retaliation. The Second Circuit follows the view that "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action" satisfying the third prong of the retaliation *prima facie* case. *Richardson v. NY Dept. of Correctional Serviced, 180 F.3d 426, 446 (2d Cir. 1999).* "Just as an employer will be liable in negligence for a racially or sexually hostile work environment created by a victim's co-workers if the employer knows about (or reasonably should know about) that harassment but fails to take appropriately remedial action, so too will an employer be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it." *Id.* Plaintiff has alleged facts supporting a conclusion that Defendant knew about the ongoing harassment and failed to take sufficient remedial measures to stop it. Further, one may readily infer that the retaliatory harassment would dissuade a reasonable worker [**36] from making or supporting a charge of discrimination.

Plaintiff also alleges facts sufficient to support an inference that the foregoing protected activities and the adverse employment actions were causally connected. The proof of a causal connection can be established "indirectly by showing that the protected activity was followed closely by discriminatory treatment . . ." *De Cintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir. 1987).* Plaintiff's facts support an inference that his co-workers were motivated by retaliatory animus when they sent messages suggesting he should kill himself and when they informed secluded inmates in the higher security area of his medical condition thus opening Davis to their taunts and ridicule. The messages and the continued harassment by inmates occurred on the heels of Davis's participation in protected activity.

The causal link between the protected activities and three other employment actions are more tenuous. These actions include the unsupervised "use of force" training, being followed by a private investigator, and the medical reduction in force. Each of these could be considered materially adverse employment actions in that that [**37] they could dissuade a reasonable worker from making or supporting a charge of discrimination. These actions, however, occurred several months after Plaintiff's participation in protected activity. Nevertheless, the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship. . ." *Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 554 (2d Cir. 2001).* Because Plaintiff has alleged sufficient facts related to ongoing retaliatory harassment by coworkers to survive the 12(b)(6) motion, he should have the opportunity to develop through discovery the connection between these other materially adverse employment actions and his participation in protected activity.

The Court denies Defendant's Motion and Supplemental Motion to Dismiss counts five, six and twelve of the Second Amended Complaint alleging retaliation [*333] under Title VII of the Civil Rights Act of 1964, the Rehabilitation Act and the VFEPA.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendant's Motion to Dismiss and Supplemental Motion to Dismiss.

Dated at Burlington, in the District of Vermont, [**38] this 16th day of April, 2012.

/s/ William K. Sessions III

William K. Sessions III

U.S. District Court Judge

CAN JURORS SELF-DIAGNOSE BIAS?

TWO RANDOMIZED CONTROLLED TRIALS

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Draft as of October 26, 2012

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ABSTRACT

Litigants are guaranteed the right to an impartial jury, one that bases its judgment on the evidence presented in the courtroom, untainted by affiliations with the parties, racial animus, or media coverage that may include inadmissible evidence, a one-sided portrayal, and naked opinion. The Supreme Court has instructed courts to rely on a simple method to determine whether any individual juror is biased: ask him or her. Prior studies have shown that jurors' self-diagnoses of their biases are the single most important factor for the trial court's decision about whether to seat a juror.

To test the reliability of these self-diagnoses, we fielded two randomized controlled trials, in which we exposed 248 mock jurors to news articles that were either prejudicial to the defendant (in one condition) or irrelevant (in the other condition). We then gave jurors the admonitions and questions endorsed by the Supreme Court for the purpose of identifying biased jurors, prior to all of them watching a 32-minute condensed video of a civil trial, rendering binary judgments, and awarding damages

We found that jurors were simply unable to diagnose their own biases. Even after we excluded those jurors who said that they would be unable to be fair and impartial (or were unsure), the remaining jurors were significantly more likely (odds ratio 2.4, $p = .004$) to rule against the defendant and those that did so also awarded eight-times larger damages on the median ($p=.01$), than those in the control condition.

Juror self-assessments were not related to actual bias, nor were they associated with demographic variables or cognitive scales (Need for Cognition and Cognitive Reflection Test). The jurors' self-diagnoses appear to be random, and thus about as useful to the courts as coin-flipping.

These experiments suggest that the courts' current method of policing jury bias is ineffective, since the data they rely upon lack diagnosticity. Instead courts should consider adopting the same standard for juror disqualification that they currently use for judge disqualification – simply excluding all whose impartiality could be reasonably questioned. The courts should not attempt to decide whether jurors are actually biased, because the courts currently lack a reliable basis for doing so.

I. BACKGROUND

In late August 2012, a jury in Silicon Valley, California was deliberating to decide the fate of a billion dollar patent dispute between two industry giants, Apple and Samsung. The foreman of that jury, Velvin Hogan, was himself an inventor and holder of a patent, which had been in litigation. During voir dire, some of these facts were revealed in response to the trial judge's questioning, and Mr. Hogan later told the media that, on the basis of that extrajudicial experience, he "expected to be dismissed from the jury."[1] Nonetheless, the trial judge asked Mr. Hogan what trial attorneys call 'the magic question:' "will you be able to decide this case based solely on the evidence that's admitted during the trial?"[2] Mr. Hogan answered affirmatively, and was seated in the jury. A few weeks later, Mr. Hogan led the jury towards a billion dollar judgment against Samsung, one of the largest in the history of patent law cases, and laying the predicate for a potential trebling of damages, at the discretion of the trial judge. In a series of media interviews, Mr. Hogan said that, he wanted the verdict "to send a message to the industry at large that patent infringing is not the right thing to do" and "make sure the message we sent was not just a slap on the wrist."[3]

Likewise in the extensively-publicized criminal prosecution of Gerry Sandusky, a former football coach for Pennsylvania State University, the prosecution moved to change the venue of the trial, in light of the particularly extensive attention to the case in Centre County, where the University is based. The trial court judge denied the motion, siding with the defendant, holding that "the answer to whether a juror can be fair and impartial, despite the myriad of influences to which he or she may be exposed, cannot be known until the juror is actually asked."[4]

This paper investigates the accuracy and effectiveness of this ubiquitous procedure of asking jurors whether they can be fair and impartial, and then using that response to decide whether the juror should be dismissed for cause. Does this colloquy provide useful information to the litigants and judge, who are together tasked with impaneling an impartial jury?

A. The Courts' Approach to Jury Bias

In both criminal and civil trials, in both federal and state courts, potential jurors are selected through a process of asking them whether they have any feelings or opinions about the litigants, attorneys, facts, or law of the case. As Suggs and Sales explain, "if the juror admits that he has formed an opinion about the case, it is standard procedure to ask if he

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[1] Case5:11-cv-01846-LHK Document2013-9, Filed 10/02/12 (Page 3).
[2] Case5:11-cv-01846-LHK Document1991-1, Filed 09/21/12 (Page 22).
[3] Case5:11-cv-01846-LHK Document2013, Filed 10/02/12 (Page14) (quoting multiple exhibits).
[4] *Com. of Pennsylvania v. Sandusky*, 2012 WL 428480 (Pa.Com.Pl.) (Trial Order) (Feb 13, 2012).

can set aside that opinion and decide the case on the basis of the evidence to be presented" and the law as instructed.[5]

Courts, and litigants, appear to rely heavily upon the answer to that question. "[I]t is clear that the juror's self-assessment about fairness is the strongest factor in judicial decision-making in challenges for cause."[6] In one recent study of California cases, once a potential source of bias was identified, if a juror said that he or she could be fair, it made her 71% less likely to be dismissed for cause, all other things being equal.[7] And once the trial judge has made the determination that a juror can be fair, it is virtually unreviewable.[8] On the other hand, some courts have derided this "magic question," emphasizing that the juror's self-professions of fairness should not be determinative, though they may be useful to the trial court nonetheless.[9]

1. The Fair Trial Guarantee

In the criminal realm, the Sixth Amendment of the United States Constitution provides that "the accused shall enjoy the right to ... trial by an impartial jury," and the guarantee of

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[5] David Suggs and Bruce Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 IND. L.J. 245, 246 (1980-1981). *See also* 27 PAULA L. HANNAFORD-AGOR, AND NICOLE L WATERS, ADMINISTRATIVE OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, EXAMINING VOIR DIRE IN CALIFORNIA, 27 (2004) (in a review of trials in California: "Usually, although not always, an affirmative response from any juror (to questions about her relationship to the parties, personal experience with the criminal charges, etc.] would be followed by a question as to the juror's ability to be fair and impartial given the affirmative response.") For examples of this dynamic, see cases discussed in Part I.A infra. *See also e.g., Magna Trust Co. v. Illinois Cent. R. Co.*, 313 Ill. App. 3d 375, 390, 728 N.E.2d 797, 810 (2000)(emphasizing that a juror "repeatedly stated that she could be fair and impartial"); *State v. Addison*, 160 N.H. 493, 500, 8 A.3d 53, 58 (2010) cert. denied, 131 S. Ct. 1494, 179 L. Ed. 2d 324 (U.S. 2011) (rejecting the argument that their method "relies too heavily on jurors' assurances that they can be fair.")

[6] Hannaford-Agor and Waters supra note 5 at 38. *See also* Mary R. Rose and Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW AND SOCIETY REVIEW 513 (2008) (showing empirically that "small changes in jurors' self-reported confidence in their ability to be fair affected judge's decisions about bias but did not affect the judgments of either attorneys or jurors.")

[7] See Hannaford-Agor and Waters supra note 5 at 37, Table 4.11 (reporting the 71% likelihood figure). More particularly, the authors show in Table 4.3 that in a dataset of 58 such jurors who reported that they were crime victims, the six jurors who said that they could not be fair were all excused, while of the 40 jurors who said they could be fair, only 1 was excused (2.5%). In Table 4.7 (p. 34), for jurors who had views about the case facts, all nine of those who said that they could not be fair were excused, while none of the 10 who said they could be fair or likely could be fair were excused. At p. 31 the authors note that, "at least in the category of previous victimization, this [juror self-assessment of fairness] appears to be a fairly strong basis for the judge's decision."

[8] Id., at 4.

[9] *See e.g., Montgomery v. Com.*, 819 S.W.2d 713 9 (Ky.,1991) ("There is no "magic" in the "magic question." It is just another question where the answer *may* have some bearing on deciding whether a particular juror is disqualified by bias or prejudice, from whatever source, including pretrial publicity."); and *Black v. CSX Transp., Inc.*, 220 W. Va. 623, 629, 648 S.E.2d 610, 616 (2007) (criticizing the idea that there is a "magic question.")

impartiality applies equally in the civil context.[10] "The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[11] The presence of even one biased juror on the jury is a structural error requiring a new trial.[12]

Notwithstanding these concerns, the U.S. Supreme Court has held that "a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials."[13] This axiom has been the rule for jury selection in criminal, as well as civil, trials, as "the process of voir dire is designed to help impanel a fair and impartial jury, not a favorable one."[14]

Jury bias can arise from all sorts of causes, such as the juror having an affiliation with one of the parties or attorneys, or the juror having personal experience with the type of crime alleged, or the juror being motivated by racial animus.[15] The Seventh Circuit recently held that "[w]here racial or ethnic bias may be an issue in a case and the defendant requests voir dire on the subject, it is an abuse of discretion to refuse the request."[16] Elsewhere,

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[10] Several criminal cases are reviewed below. For examples of the dynamic in civil contexts, *see e.g., McDonald Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), *Sawyer v. Southwest Airlines Co.*, 145 Fed.Appx. 238, 240-241 (10th Cir. 2005) ("During voir dire, these prospective jurors stated that they could follow the court's instructions and render a fair verdict."); *Moran v. Clarke*, 443 F.3d 646, 650-651 (8th Cir. 2006); *Kelley v. Wegman's Food Markets, Inc.*, 98 Fed.Appx. 102 (3rd Cir. 2004).

[11] *Skilling v. United States*, --- U.S. ----, ----, 130 S.Ct. 2896, 2913, 177 L.Ed.2d 619 (2010).

[12] *Ross v. Oklahoma*, 487 US 81, 85 (1980) ("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. Had Huling (the biased juror) sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned.") (citations removed); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977) ("If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel.") (citing *Tillman v. United States*, 406 F.2d 930, 937 (5th Cir.), vacated on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969) and *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940)).

[13] *McDonald Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (internal quotation omitted).

[14] *Id.*

[15] *See generally*, Hannaford-Agor & Waters supra note 5 at 27 (listing eight bases for exclusion observed in California trials). The Supreme Court has held that due process requires inquiry into potential racial bias if "under all the circumstances presented there [is] a constitutionally significant likelihood, absent questioning about racial prejudice, the jurors would be as indifferent as they stand unsworne [sic]." *Ristaino v. Ross*, 424 U.S. 589, 596 (1976). However, it is unclear exactly when this protection becomes necessary. *See e.g., Rosales-Lopez v. U.S.*, 452 U.S. 182, 189 (1981) ("Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion. Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions.")

[16] *U.S. v. Hosseini*, 679 F.3d 544 (7th Cir. 2012).

courts have stated that "a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case."[17]

Concerns about juror bias also arise in criminal cases where prosecutors seek the death penalty and seek to remove (for cause) any jurors who express moral reservations about imposing the death penalty.[18] Jurors are instructed that, "the jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"[19] If the juror says that she will "will consider and decide the facts impartially and conscientiously apply the law as charged by the court," she can be seated notwithstanding her moral concerns.[20]

Notably, across these many different contexts, jurors' self-diagnoses and assurances are a primary tool used by the courts to identify the sorts of biases that violate the Constitution's fair trial guarantee. The Ninth Circuit has stated that "[a]ctual bias is found where a prospective juror states that he cannot be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view."[21]

2. The History of Supreme Court Doctrine on Publicity

Of the various potential sources of jury bias, we focus on bias due to publicity for methodological reasons – i.e., that it can be manipulated in a randomized controlled trial. Pretrial publicity is also, naturally, most problematic in the most highly publicized trials, and thus this particular problem can disproportionately impact perceptions of judicial legitimacy. Furthermore, social media and the 24-hour news cycle may now exacerbate this problem.[22]

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[17] *U.S. v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000).

[18] *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[19] *Scott v. Mitchell*, 209 F.3d 854, 878 (6th Cir. 2000)

[20] *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). *See also Williams v. State*, 622 S.W.2d 116, 118 (Tex. Crim. App. 1981) (applying Adams), and id., at 121 (J. Teague dissenting ("I don't believe that is a proper test to disqualify a prospective juror under Adams and Witherspoon merely because that juror answers a "magic question" correctly, at least not where that same juror has also stated just the opposite in response to previous questioning.")

[21] *U.S. v. Mitchell*, 568 F.3d 1147, 1150 (9th Cir. 2009). In contrast, implied bias occurs "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." The court added, however, "that bias should be presumed only in 'extreme' or 'extraordinary' cases."

[22] *See generally*, Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L. J. 1579 (2011) (discussing jurors' use of an access to legal and factual information on the internet).

Still, the right to challenge jurors for bias has a long history, going back to Chief Justice John Marshall and the trial of Aaron Burr.[23] "The media of the day described the feud between Jefferson and Burr in detail, the citizenry chose sides, and the difficulties in selecting an impartial jury increased."[24] Marshall analogized the problem of a juror having preconceived notions about the case to the problem of a juror being related to a party.

> The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.[25]

Notably, Justice Marshall recognized that the pretrial publicity created a "suspicion" of prejudice or "bias", an empirical claim that must be resolved by the judge.[26] Marshall said that, the trial court should question such jurors to decide whether they are "capable of hearing fairly, and of deciding impartially, on the testimony which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce."[27] Nonetheless, Marshall himself expressed some doubt about the value of such a colloquy, since there may be prejudice even where the juror "declares that he feels" none. Marshall's opinion was extremely influential for both the state and federal courts, who adopted the practice of questioning jurors, a practice that did not and still does not exist across the Atlantic.[28]

The Supreme Court ruled on the pretrial publicity issue in the 1878 case of *Reynolds v. United States*.[29] Two seated jurors admitted to having formed an opinion on the guilt of the accused from newspaper accounts they had read.[30] Both jurors, however, stated that they

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[23] See Jon Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS. CONST. L.Q. 65, 68 (1975-1976) (discussing *United States v. Burr*, 25 F. Cas. 49 (No. 14,692(g)) (C.C.D. Va. 1807)).

[24] Id.

[25] Burr, 25 F. Cas. at 50.

[26] Further, see id. ("It is admitted that where there are strong personal prejudices, the person entertaining them is incapacitated as a juror . . . Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on [h]is mind which will prevent an impartial decision of the case according to the testimony. ")

[27] *Id.*, at 51.

[28] Dyke supra note 23 at 69.

[29] *Reynolds v. United States*, 98 U.S. 145 (1878). Generally, there are two lines of cases about trial publicity: those that focus on publicity that occurred prior to trial and those that focus on publicity during the trial itself, including disruptions in the trial atmosphere. For our purposes, they can be treated together.

[30] *Id.* at 148-50.

believed they could still be impartial when assessing the facts of the case.[31] The trial judge took these jurors at their words, and the Supreme Court found that these jurors were seated properly.[32] The Court stated that jurors ought to be disqualified only when their partiality is so strong that it "leave[s] nothing to the 'conscience or discretion' of the triers."[33] The Court also put a very high standard for overturning a trial judge who allows a juror with preexisting notions to be seated, stating that to warrant reversal, the trial judge must have committed "manifest error".[34]

The *Reynolds* court noted that trial judges are wise to be suspicious of juror self-assessment of bias. But the Court reasoned that this is because jurors are likely to overstate their biases in order to dodge jury duty.[35] The errors in jury self-diagnoses – if any – are supposed to be the harmless sort.

Two cases address the publicity at trial itself.[36] Initially, in *Marshall v. United States*, the trial judge refused a motion from the prosecution that would have admitted the defendant's prior criminal record into evidence.[37] However, that same information was published in the newspapers, and a "substantial number" of jurors read that information in the newspapers while the case was at trial.[38] The U.S. Supreme Court overturned the conviction.[39]

In *Irvin v. Dowd*, the Court addressed potential juror bias derived from pervasive pretrial publicity.[40] The case was subject to a deluge of media about the upcoming trial, overwhelmingly negative about the defendant.[41] In the end, the community was so biased against the defendant that 268 of 430 potential jurors were dismissed for cause because of their fixed belief in the guilt of the accused.[42] Nonetheless 8 of the 12 jurors seated believed

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[31] *Id.*

[32] *Id.* at 156.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 156 ("In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently [sic] seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists").

[36] Other cases focus more generally on the atmosphere of the trial. *See e.g., Estes v. Texas*, 381 U.S. 532, 536 (1965). ("[T]he trial "was not one of that judicial serenity and calm to which petitioner was entitled: ...at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and other were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and the news photographers led to considerable disruption of the hearings.")

[37] *Marshall v. United States*, 360 U.S. 310 (1959).

[38] *Id.* at 311.

[39] *Id.* at 312.

[40] *Irvin v. Dowd*, 366 U.S. 717 (1961).

[41] *Id.* at 725-7.

[42] *Id.* (103 potential jurors were excused for conscientious objection to the death penalty, 20 were peremptorily challenged, and the rest were excused on personal grounds).

the defendant was guilty before the trial even began.[43] Irvin was convicted and sentenced to death. On review, the Supreme Court overturned the conviction, citing jury bias, but offered little criteria by which to judge future cases.[44] The Court wrote that on these facts, the jurors' "statement of impartiality can be given little weight."[45]

Likewise in *Rideau v. Louisiana*, the defendant's confession was broadcast over television, and rerun over several days, eventually reaching 150,000 residents.[46] Rideau was tried and convicted three weeks later, with three of the seated jurors admitting that they had seen the broadcast confession.[47] The Court overturned Rideau's conviction, referring to the proceedings as a "kangaroo court," and stating that the case should have been transferred to an unbiased venue.[48]

In *Sheppard v. Maxwell*, the defendant was subject to an "editorial artillery" of unfavorable publicity, before and during trial.[49] The Court said that, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."[50] *Sheppard* is the apex of cases that display a serious concern about the potential impact of publicity, and the Court's demand that trial courts take appropriate precautions, when necessary to ensure a fair trial.

In 1975, the Court affirmed the conviction in *Murphy v. Florida*.[51] Murphy had gained notoriety for a jewel heist in 1964, years before being arrested for robbery in Dade County, Florida, in 1970.[52] Murphy had also been convicted of one count of murder and had pled guilty to a federal conspiracy charge, all of it receiving extensive media coverage.[53] At voir dire for the robbery charge, Murphy unsuccessfully moved to dismiss jurors for having learned of any of his previous convictions.[54] The Supreme Court upheld his conviction and cited the passage of time since the most extensive news coverage of the earlier trials.[55] Since the trial court did not have to dismiss more than 20 out of 78 jurors for having prejudged the defendant, the Court found that juror bias did not rise to the level required for change of venue.[56] In dissent, Justice Brennan questioned the ability of jurors to self-

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[43] *Id.* at 727
[44] *Id.* at 728-9.
[45] *Id.*, at 728.
[46] 373 U.S. 723 (1963).
[47] *Id.* at 726.
[48] *Id.*
[49] *Sheppard v. Maxwell*, 384 U.S. 333, 339 (1966).
[50] *Id.* at 363.
[51] *Murphy v. Florida*, 421 U.S. 794 (1975).
[52] *Id.* at 795.
[53] *Id.* at 796.
[54] *Id.*
[55] *Id.* at 802-3, and fn. 1. (the press coverage for Murphy's earlier convictions occurred mostly from May 1968 to March 1969. Jury selection on the robbery charge began August 1970).
[56] *Id.*

assess bias derived from pretrial publicity: "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."[57]

In 1984, the Court upheld a conviction for murder in *Patton v. Yount*.[58] The Pennsylvania Supreme Court had overturned the defendant's conviction over a violation of *Miranda v. Arizona*.[59] The confessions were reported widely in the local newspapers. The defendant was tried again and convicted.[60] Although the venire panel at the second trial appeared to be highly biased against the defendant,[61] the Court focused on the passage of four years time since the media exposure.[62] The Court expressed trust in the ability of voir dire to produce neutral juries: "[i]t is fair to assume that the method we have relied on since the beginning ... usually identifies bias."[63]

In 1991, the Supreme Court upheld the conviction of Dawud Mu'Min for a murder he committed as an escapee from a prison work detail.[64] Local media had covered the events leading up to the trial, including Mu'Min's criminal history.[65] Mu'Min moved for a change of venue, was denied, and was ultimately convicted.[66] On appeal, the Court rejected his jury bias claim, again holding that jurors' professed neutrality, when found credible by the trial judge, could be a basis for overruling the defendant's objection.[67]

3. The *Skilling* Test for Bias: Jurors' Self-Diagnoses

Recently, the Court took up this question again in the case of former Enron executive Jeffrey Skilling, who was tried in Houston, the city where his company was headquartered and where several thousand people had lost their jobs and fortunes, as a result of its

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[57] *Id.* at 808. (quoting Irvin, 366 U.S., at 728).

[58] *Patton v. Yount*, 467 U.S. 1025 (1984).

[59] *Id.* at 1027.

[60] *Id.*

[61] *Id.* at 1029 (161 out of 163 potential jurors had heard of the defendant's previous case, 126 out of 163 admitted preexisting opinions of the case, 8 out of 14 seated jurors admitted they had formed an opinion of the defendant's guilt).

[62] *Id.* at 1032-5 ("it is true that a number of jurors and veniremen testified that at one time they had held opinions, for many, time had weakened or eliminated any conviction they had had").

[63] *Id.* at 1038. See also *id.* at 1038-40 for the deference given to trial judges to determine juror credibility ("[j]urors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge property may choose to believe those statements that were most fully articulated or that appeared to have been least influenced by leading.").

[64] *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

[65] *Id.* at 418.

[66] *Id.* at 418-21.

[67] *Id.* at 431.

collapse.[68] "Pointing to 'the community passion aroused by Enron's collapse and the vitriolic media treatment' aimed at him, Skilling argue[d] that his trial 'never should have proceeded in Houston.[69]" And even if it had been possible to select impartial jurors in Houston, '[t]he truncated voir dire ... did almost nothing to weed out prejudices,' he contend[ed], so '[f]ar from rebutting the presumption of prejudice, the record below affirmatively confirmed it.'"[70]

The voir dire in Skilling's trial was extensive, but led by the judge himself, who refused to allow the attorneys to question the jurors themselves.[71] The trial judge had solemnly instructed the potential jurors that, "The bottom line is that we want . . . jurors who . . . will faithfully, conscientiously and impartially serve if selected."[72] Further, "[E]ach of you," the court explained, "needs to be absolutely sure that your decisions concerning the facts will be based only on the evidence that you hear and read in this courtroom."[73] In all, two potential jurors were excused after stating they could not be impartial, one out of five was removed for cause at the government's request, and three out of nine were removed for cause at the defendant's request.[74] Skilling was convicted of 19 counts and acquitted of 9 counts.[75]

The Fifth Circuit reversed the conviction, holding that the "magnitude and negative tone of media attention directed at Enron" created a presumption of bias.[76] The Supreme Court reinstated the convictions, holding that Skilling was not denied a fair trial and that he did not prove that the jury was biased.[77]

On the question of whether the jury was in fact biased by pretrial publicity, the Court expressed great deference for the trial court's determination, which was itself based on the juror's own self-assessments and assurances of impartiality. As the Supreme Court emphasized, "in response to the question whether 'any opinion [they] may have formed regarding Enron or [Skilling] [would] prevent' their impartial consideration of the evidence at trial, every juror—despite options to mark 'yes' or 'unsure'—instead checked 'no.'"[78] When rebutting Justice Sotomayor's dissent, the *Skilling* majority again cited back to these

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[68] *Skilling v. United States*, 130 S. Ct. 2896 (2010).
[69] *Id.* at 2912.
[70] *Id.* at 2912.
[71] *Id.* at 2910. The attorneys were permitted to ask follow-up questions.
[72] *Id.* at 2910.
[73] *Id.* at 2911.
[74] *Id.*
[75] *Id.* at 2911.
[76] *Id.* at 2916.
[77] The majority opinion cited four criteria when a change of motion should be granted to ensure a fair trial: (1) the size of the community in which the trial takes place; (2) the content of the trial coverage, whether or not any confessions or other "blatantly prejudicial information" is in the news; (3) the amount of time between the trial and the initial news coverage of the crime; and (4) whether or not the jury convicted the defendant of all counts against him. *Id.* at 2915-6.
[78] *Id.* at 2921.

juror self-diagnoses.[79] A third time, the majority relied on the idea that, "all of Skilling's jurors had already affirmed on their questionnaires that they would have no trouble basing a verdict only on the evidence at trial," and emphasized that the trial court had nonetheless removed one such juror, who said he could 'abide by the law.'[80]

One particular juror "stated that 'greed on Enron's part' triggered the company's bankruptcy and that corporate executives, driven by avarice, 'walk a line that stretches sometimes the legality of something.'"[81] The Supreme Court nonetheless found it appropriate for the juror to be seated because "he also asserted that he could be fair and require the government to prove its case" and because the trial judge had "looked [Juror 11] in the eye and ... heard all his [answers], [and the trial judge] found his assertions of impartiality credible."[82]

The *Skilling* case makes clear that, going forward, courts are to give considerable weight to the self-professed neutrality of jurors, but sometimes disregard professions if a stern "look in the eye" suggests that they are not credible. State courts likewise follow the procedure endorsed by *Skilling*, and some have statutes that require that "a judge must inquire whether a prospective juror has expressed or formed an opinion on a case or is aware of any bias or prejudice."[83]

B. The Science on Jury Bias

1. The Biasing Effects of Pretrial Publicity

There is an extensive literature linking pretrial publicity to juror prejudice.[84] Some studies suggest that greater exposure to media coverage produces greater prejudice among jurors. Costantini and King surveyed potential jurors in a single jurisdiction in which three different crimes were committed, publicized, and prosecuted.[85] They found that, among various factors that predicted a juror's likeliness to convict, exposure to pretrial publicity

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[79] *Id.* at 2922 ("See supra, at 2919–2921 (noting, inter alia, that none of Skilling's jurors answered 'yes' when asked if they 'ha[d] an opinion about ... Skilling')").

[80] *Id.* at 2922-2923, and n.30.

[81] *Id.* at 2924.

[82] *Id.* at 2924.

[83] *Com. v. Entwistle*, 463 Mass. 205, --- N.E.2d ----, 2012 WL 3264384, *13 (Mass.,2012) (citing Mass. G.L. c. 234, § 28)

[84] For summaries, see John S. Carroll, Norbert L. Kerr, James J. Alfini, Frances M. Weaver, Robert J. MacCoun, and Valerie Feldman, *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW AND HUMAN BEHAVIOR, no. 3, 187 (1986);, Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero, and Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW AND HUMAN BEHAVIOR, no. 2, 219 (1999); and Christina A. Studebaker, and Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOLOGY, PUBLIC POLICY, AND LAW 428 (1997).

[85] Edmond Costantini and Joel King. *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW AND SOCIETY REVIEW 9 (1980-1981). See page 12. The most highly publicized of the cases was ultimately transferred to a new venue in order to ensure a neutral jury.

was by far the strongest indicator of a likelihood of conviction.[86] Their study also found that higher levels of media consumption correlated with stronger feelings of defendant guilt.[87]

Moran and Cutler surveyed potential jurors about actual criminal cases about to be tried within their jurisdictions.[88] They found that potential jurors who had consumed more media coverage believed there to be more actual evidence against the defendant, conflating news coverage with admissible evidence.[89]

Furthermore, Ruva et al. found that pretrial publicity that paints the defendant in a positive light tends to bias jurors in favor of the defendant when compared to neutral publicity.[90] Their study also found that pretrial publicity that included prejudicial information about the defendant biased jurors against the defendant.[91]

2. The Efficacy of *Voir Dire* for Removing that Bias

There is another body of research that investigates the efficacy of procedural safeguards against juror bias. Several studies cast doubt on the effectiveness of voir dire in producing a neutral jury. Kerr et al. ran a mock voir dire using jurors who had been biased against a defendant through pretrial publicity and jurors who had not been exposed to biasing publicity.[92] The experienced judges, prosecutors, and defense attorneys participating in the study were unable to select a jury with significantly lower conviction rates than a jury not subjected to voir dire.[93] In other words, voir dire failed to detect and eliminate biased jurors.

Dexter et al. tested the effects of an extensive voir dire against a brief voir dire in their ability to persuade jurors to disregard prejudicial information they obtained through pretrial media consumption.[94] The Dexter study did not dismiss jurors for bias, but only tested for a reduction in bias after exposure to the voir dire process.[95] The extensive voir

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[86] *Id.* at 35.

[87] *Id.*

[88] Gary Moran and Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity,* 21 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 345 (1991).

[89] *Id.* at 354.

[90] Christine Ruva, Christina C. Guenther, and Angela Yarbrough, *Positive and Negative Pretrial Publicity: the Roles of Impression Formation, Emotion, and Predecisional Distortion*, 38 CRIMINAL JUSTICE AND BEHAVIOR 511 (2011).

[91] *Id.* at 527.

[92] Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll, and James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AMERICAN UNIVERSITY LAW REVIEW 665 (1991).

[93] *Id.* at 700.

[94] Hedy Red Dexter, Brian L. Cutler, and Gary Moran,. *A Test of Voir Dire as a Remedy for the Prejudical Effects of Pretrial Publicity,* JOURNAL OF APPLIED PSYCHOLOGY pp. 819-32 (1992)

[95] *Id.* at 823-5.

dire was no more effective in reducing the propensity of jurors to convict than the brief voir dire.[96]

A study by Kramer. et al suggests that neither limiting instructions, juror deliberation, nor continuance succeeds in mitigating the effect of juror bias derived from pretrial publicity.[97] There is one exception, however. Their study measured for the effects of pretrial publicity that was biasing for its factual content and pretrial publicity that was biasing for its emotional content. Continuance proved effective in reducing the bias from factual pretrial publicity but not emotional pretrial publicity.[98] Judicial instructions were ineffective at reducing bias.[99] And jury deliberation might have actually enhanced the bias from pretrial publicity.[100]

Little work has been done on jury bias derived from pretrial publicity in civil cases. Kline and Jess did a study in which student mock jurors were exposed to pretrial publicity then instructed to disregard the prejudicial information when deliberating.[101] Of the four juries in the study, one of them referred to the prejudicial information contrary to the judge's orders.[102] Tanford and Cox did a study in which jurors exposed to limited-use evidence, used to impeach the defendant, were biased by that evidence against the defendant despite the judge's limiting instruction.[103] In an unpublished study, Otto et al. exposed jurors to pretrial publicity in a civil case.[104] Studebaker and Penrod noted that "[t]he pretrial publicity influenced not only the judgments of negligence, but also impressions of the parties, memory, and inferences from the trial."[105] Other than a few studies, however, the bulk of the research on pretrial publicity has been focused on the criminal context.

A few studies have broached whether jurors are capable of accurately self-assessing bias derived from pretrial publicity. Sue et al. conducted a brief study of university students that suggested that mock jurors were not capable of self-assessing their bias after exposure to pretrial publicity.[106] In their study, jurors exposed to prejudicial publicity convicted at

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[96] *Id.* at 829-30.

[97] Geoffrey P. Kramer, Norbert L. Kerr, and John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW AND HUMAN BEHAVIOR, no. 5, 409 (1990).

[98] *Id.* at 431-3.

[99] *Id.* at 430.

[100] *Id.* at 431.

[101] F. G. Kline, and P. H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 JOURNALISM QUARTERLY 113 (1966) (we are relying on the summary in Studebaker and Penrod, note 84 *supra*, at 438).

[102] *Id.*

[103] Sarah Tanford and Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW AND HUMAN BEHAVIOR 477 (1988).

[104] A. Otto,, S. Penrod, and E. Hirt, *The Influence of Pretrial Publicity on Juror Judgments in a Civil Case*, Unpublished. See Studebaker and Penrod, note 1, *supra*, at 438.

[105] *Id.*

[106] Stanley Sue, Ronald E. Smith, and George Pedroza,. *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors.* 37 PSYCHOLOGICAL REPORTS 1299 (1975).

significantly higher rates than control jurors, even after many of those with bias professed they were able to be unbiased in their judgment of the case.[107]

Kerr et al. had a similar result in their study of the effectiveness of voir dire. They found that jurors overestimated their ability to be unbiased and set prejudicial pretrial publicity aside when rendering a verdict.[108]

Vidmar performed an extensive survey of various jurisdictions in preparation for the John Walker Lindh terrorism trial.[109] Vidmar found that potential jurors with more exposure to pretrial publicity were more predisposed to finding guilt in the defendant. But he also found that about 35% of jurors who claimed they were able to be impartial had also expressed a presumption of Lindh's guilt in the survey, raising doubts about the jurors' ability to self-assess their own bias.[110]

A study by Rose and Diamond showed that trial judges are more likely to believe a juror is capable of putting pretrial publicity aside when the juror expresses that belief with more confidence.[111] Although judges tended to give juror self-assessments of bias great weight, attorneys and laypersons were not as likely to believe the self-assessments.[112]

In summary, the research has shown that exposure to pretrial publicity prejudices jury pools. However, the research also shows that the mechanisms in place to ensure a fair trial for defendants may be ineffective at eliminating, or even reducing, the bias jurors derive from pretrial publicity. Many questions remain open however.[113]

Nonetheless, judges still rely heavily on juror self-assessment of bias when seeking an impartial jury. The experiments reported here test whether jurors are able to accurately self-diagnose bias due to pretrial publicity, and thus whether judicial reliance on self-assessment is an adequate solution to the widely documented problem of pretrial publicity biasing.

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[107] *Id.* at 1301.

[108] *Id.* at 700-1.

[109] Neil Vidmar, *When All of Us are Victims: Juror Prejudice and 'Terrorist' Trials*, 78 CHICAGO-KENT LAW REVIEW 1143 (2003).

[110] *Id.* at 1163. Vidmar's study, however, did not have the benefit of subjecting the potential jurors to an actual or mock trial and acquiring a verdict from the jurors.

[111] See Rose and Diamond, supra note 6.

[112] *Id.* at 542.

[113] See Hannaford-Agor and Waters, supra note 5 at 4 ("A review of the literature shows a paucity of recent, systematic scientific research on the mechanics of voir dire.")

II. EXPERIMENTS

A. Design and Materials

We conducted two experiments, one with a sample of law students and a second with a larger and more diverse national sample online. Both experiments used the same design, stimuli, and instrument. In particular, we used a 2 x 1 between-subjects experimental design, wherein subjects were exposed to either irrelevant or prejudicial pretrial publicity concerning the defendant, respectively, in the control or treatment conditions. We then screened jurors out, following an operationalized version of the voir dire questioning and exclusions for cause endorsed by the Supreme Court.

1. Analytical Framework for Hypothesis Tests

The courts have long understood that the Constitutional guarantee of an "impartial" jury includes a guarantee that no juror is infected by "actual prejudice," a term that they use interchangeably with "bias."[114] As Justice Marshall said, "the great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be **uninfluenced** by an undue **bias** of the mind."[115] The Court has recognized that this is an empirical question: whether "the method we have relied on since the beginning . . . usually identifies bias."[116]

To test that assumption, we must specify a counterfactual for the null hypothesis. We ask whether the juror whose impartiality has been questioned due to some allegedly biasing factor can nonetheless decide the case the same as she would have decided the case without such a biasing factor. We do not require the juror to be ignorant of potentially biasing factors, but ask whether she can set aside those factors and decide the case in an unbiased way, similarly to those who are ignorant.[117]

Thus, we first create a bias (the treatment group), to compare against a non-biased control group. We conceived the control condition as the gold standard of an "uninfluenced" fair trial, which the *Skilling* protocol seeks to replicate after jurors have been exposed to a biasing factor. Thus, if 30% of jurors impose liability in the control condition, and 50% impose liability in the treatment condition, then the *Skilling* protocol will succeed in its goal of providing a fair trial if the screened treatment condition replicates the 30% conviction rate, having thus neutralized the biasing influence. Likewise, if the *Skilling* protocol succeeds, damages awards should be indistinguishable in the control condition and the *Skilling*-screened treatment condition. In that way, we try to answer Justice Marshall's

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[114] *See e.g., Skilling*, 130 S.Ct. at 2917 (referring to "actual prejudice") and id., at 2919 (referring to "bias").

[115] *Burr*, 25 F. Cas. at 50 (emphasis added).

[116] *Patton*, 467 U.S. at 1038 (citing *Burr*).

[117] *Skilling*, 130 S.Ct. at 2902 ("juror impartiality does not require ignorance."). Id., at 2925 (jurors "need not enter the box with empty heads in order to determine the facts impartially.")

question of whether the potentially biasing factor will "have a real influence on the verdict to be rendered."[118] We can observe empirically whether we have achieved "this mental attitude of appropriate indifference," that the *Skilling* court says is "impartiality."[119]

We presume that the biasing factor will not infect 100% of the human subjects, but rather impact some on the margins. The remainder will decide the case just the same as if they had not been so exposed. Thus, amongst those exposed, we conceive the task as one of "diagnosis" – i.e., a sorting function to determine which ones were causally impacted by the biasing factor. If the diagnosis succeeds, we can remove those biased jurors. If the sorting function is instead indiscriminate (or perverse) then the treatment condition will remain worse for the defendant than the control condition.

2. Biasing Stimuli

The pretrial publicity stimuli were based on either of two abridged articles from the Kansas City Star, each about 1300 words in length.[120] The control article discussed employer incentive programs for preventative health maintenance, information which was irrelevant to the trial. The treatment article was modified to actually name the defendant in the trial, Dr. John Dennis, and discussed a prior case of medical malpractice, a history of prior malpractice claims and settlements much higher than the national average, and the effects of the malpractice on the other injured patients – all thereby painting him in a negative light. The article suggested that most medical malpractice is due to a few bad doctors, who need to be taken out of the system.[121]

The purpose of the Rules of Evidence is, of course, to carefully delimit the information available to jurors, so as to ensure that they base their decision only on proper evidence. The article used as "pretrial publicity" in the treatment condition included numerous things that the Rules of Evidence would preclude in a trial, making it thus prejudicial to the defendant. The information regarding Dr. Dennis' prior incidents of malpractice would be

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[118] *Burr*, 25 F. Cas. at 51.

[119] *Skilling*, 130 S. Ct. at 2917 (quoting *United States v. Wood*, 299 U.S. 123, 145–146, (1936)).

[120] The study materials are available upon request. The original articles are: Alan Bavley, *Bad Medicine: Doctors with Many Malpractice Payments Keep Clean Licenses*, KC STAR, Sept. 4, 2011 available at: http://www.kansascity.com/2011/09/04/3362970/bad-medicine.html#storylink=cpyhttp://www.kansascity.com/2011/09/04/3362970/bad-medicine.html; and Diane Stafford, *Value of Preventive Health Initiatives at the Office Proves Hard to Tally*, KC Star, June 14, 2011, available at http://www.gazettenet.com/2011/06/14/but-does-it-work-the-value-of-preventive-health-initiatives-at-the-office-proves-hard-to-tally

[121] *See* Bavley, supra note 120 at __ ("Nationwide, fewer than 2 percent of doctors have accounted for half the reported $67 billion paid out for malpractice claims in the United States since 1990, according to a study by Robert Oshel, a former analyst for the National Practitioner Data Bank. 'Taking that 2 percent of physicians out of practice would certainly make quite a difference,' Oshel said.")

inadmissible pursuant to Rule 404.[122] The statements made by those who had previously sued Dr. Dennis would most likely be irrelevant under Rule 401 and are hearsay under Rule 801, and also excludable in a criminal trial under the Confrontation Clause. The statistics quoted in the article are hearsay. Thus, since this stimulus would be properly excluded from trial, if it nonetheless effects jurors' decisions, we label that behavior "biased."

3. Operationalizing the Supreme Court's Voir Dire Protocol

Subjects in both conditions were given written admonitions from a mock judge about the need to be impartial, and they were asked a series of questions about whether they could be impartial, based on the judge-juror colloquy affirmed in *Skilling v. U.S.* Specifically, the stimulus provided:

> You are called into jury duty. After waiting in the jury commissioner's office, you are ushered into the courtroom. The judge calls you to the bench individually, and he says:
>
> "You have been called to potentially be a juror in a medical malpractice case involving Mr. Andrew Stevens, as the plaintiff, suing Dr. John Dennis as the defendant. It is important for Mr. Stevens, Dr. Dennis, and for our legal system that the jurors be fair and impartial. Jurors must decide the case based only on the evidence presented during the trial, and not based on any prejudices, biases, preconceived ideas, or extraneous information.
>
> "The bottom line is that we want jurors who will faithfully, conscientiously, and impartially serve if selected. Each of you needs to be absolutely sure that your decisions concerning the facts will be based only on the evidence that you hear and read in this courtroom.
>
> "Unfortunately, I understand that some of you may have seen some news items about one or more of the parties in this case, or may have negative opinions about doctors, patients who sue, or the healthcare system at large. This fact alone does not automatically disqualify you from hearing this case however. You have a duty to perform your civic duty as a juror, if you can be fair and impartial in doing so.
>
> Therefore, I am going to ask you a few questions. And, there are no right or wrong answers to the questions."

Subjects then answered the following questions, with potential answers of "yes," "no," or "unsure":

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[122] Rule 404(b) provides that, "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

1. "Did you read a news article about Dr. John Dennis?"
2. "Do you have an opinion about Dr. John Dennis?"
3. "Would any opinion you have prevent your impartial consideration of the evidence at trial?"; and
4. "Could you base a verdict only on the evidence at trial?"

The first question was just a manipulation check. To simulate the screening process endorsed by the Supreme Court in *Skilling*, we used questions #3 and #4 for analysis. A subject answering "yes" or "unsure" to #3, saying that her opinions would or may prevent impartial consideration of the evidence, would be disqualified. And a juror answering "no" or "unsure" to #4, saying she could not base a verdict only on the evidence at trial, would be excluded from the jury. We understand that this is the test endorsed by the Supreme Court in *Skilling*, in accordance with prior cases going back to Justice Marshall's opinion in *Burr*.[123]

4. The Trial Stimulus and Dependent Variables

The foregoing screens were done merely for analytical purposes. Regardless of how they answered these questions, all subjects watched a 32-minute medical malpractice trial video that included opening statements from the plaintiff's and defendant's attorneys, testimony from expert witnesses about the standard of care in the case, cross-examination of both experts, and closing statements from the plaintiff's and defendant's attorneys. This video was developed by real physicians serving as writers of the medical scenario and serving as actors for the expert witnesses, along with an experienced arbitrator consulting on the jury instructions and serving as the judge. Two of the co-authors served as attorneys. Thus, although condensed, the video had a high degree of verisimilitude.

The scenario in the video concerned the failure of a primary care physician to diagnose a possible case of lumbar radiculopathy and refer the patient to imaging, which allegedly would have allowed timely surgery and avoidance of the permanent disability that the patient now suffers. The primary dispute concerned whether the physician-defendant met the standard of care when, instead of ordering imaging, he simply instructed the patient to take over-the-counter medications and return if the pain got worse. An actor posing as a judge provided jury instructions, based on the standard templates used in Arizona medical malpractice cases.

Subjects rendered individual judgments, responding "yes" or "no" to the prompt: "Based on the instructions provided by the judge in the video, do you believe that the Plaintiff has proved, by the greater weight of the evidence, that the Defendant committed medical negligence?" They also made Likert ratings on a one to six scale of whether this

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[123] For these purposes, we also treated "unsure" as a disqualifying answer. *See* text accompanying note 78, supra (quoting the *Skilling* decision on this point). Robustness checks revealed that allowing "unsure" respondents to remain does not improve the accuracy of jury-self diagnosis.

case was "certainly not medical negligence" (1) or "certainly medical negligence" (6). The jurors who found negligence also awarded non-economic damages for "pain and suffering," which had been defined by the judge's instructions.[124] In Experiment 2, conducted with a national sample of 174 subjects, we also administered a demographic questionnaire, the "cognitive reflection test," and the "need for cognition" instrument.[125]

B. Experiment 1: Convenience Sample

The first of our two experiments involved a convenience sample first year law students at the University of Arizona. Subjects were randomly assigned to unequal control (n = 30) and treatment (n = 44) groups. Demographic variables were not collected.

1. Successful Manipulation of Bias

Referring to the first major row of Table 1 (all jurors), only 13% (4 of 30) of the jurors in the control group voted against the defendant. Of the jurors who received negative pretrial publicity in the treatment condition, on the other hand, 32% (14 of 44) voted against the defendant. This 19% increase in verdicts against the defendant indicates that, as hypothesized, exposure to pretrial publicity biases jurors. The effect is substantial; with an odds ratio of 3.03, exposure to prejudicial publicity more than doubled the odds of a verdict against the defendant. Statistically speaking the result is marginally significant χ^2 (1) = 3.31, p = .07, likely the result of insufficient sample size.[126]

The effect on awarded damages would be the real variable of real interest to players in civil litigation. On this point, we find a clear, significant effect: jurors in the treatment ("exposed") condition imposed nearly nine times as much damages for pain and suffering as the jurors in the control condition (mean and 5% trimmed mean scores, respectively, of $98,500 and $81,286 versus $10,600 and $10,600; U = 832, z = 2.42, p = .015). Defense verdicts were counted as having damage awards of zero dollars, and since a preponderance of verdicts were for the defense, the median award in both conditions was zero. However, even when defense verdicts are excluded, we still see a robust shift in median damages

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[124] Economic damages were not awarded, because the abridged trial did not include evidence thereof. We assumed they might be stipulated by the parties. Finally, we asked jurors to "in a sentence or two explain your answers."

[125] *See* S. Frederick *Cognitive Reflection and Decision Making*, JOURNAL OF ECONOMIC PERSPECTIVES, 19(4), 25-42 (2005), doi: 10.1257/089533005775196732; and J. T. Cacioppo and R. E. Petty, *The Need for Cognition*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, Vol. 42, No.1, (January 1982), pp. 116-131.

[126] Textbook statistics generally recommend that all cell sizes within a chi-square test contain at least 5 observations. The reason is that estimates of the chi-square distribution rely on large-sample theory, an assumption which is possibly violated when cells are smaller than 5. There is, however, debate about whether and when small cell sizes undermine the chi-square test. *See e.g.* G. D. Ruxton, and M. Neuhauser, *Good Practice in Testing for an Association in Contingency Tables,* BEHAV. ECOL. SOCIOBIOL 64: 1505-1513 (2010). For our purposes with this initial pilot study, the p = .069 statement is suggestive enough to motivate the second experiment, without need to delve into this chi-square debate.

awards, $33,000 in the control condition versus $300,000 in the treatment condition (p = .05). Thus, based on these findings, we concluded that our intervention succeeded in creating a bias.

2. The Ineffectiveness of Juror Self-Diagnosis

The more interesting question is whether the courts can use juror self-assessments to eliminate that bias, and thus secure the defendant's right to a fair trial. Of the 44 respondents in the treatment group, five (11%) thought that they could *not* be impartial, 15 (34%) indicated that they were unsure, and 24 (55%) indicated that they could be impartial. Suppose that all those who thought the pretrial information would prevent them from being impartial, or were unsure about that point, were removed from the jury, which is the criterion suggested by *Skilling*.[127] If the *Skilling* procedure is effective, then the remaining jurors (which we label "self-screened") should vote similarly as do those in the control condition.

Of this allegedly impartial subgroup of the treatment condition (n = 24), seven (29%) voted against the defendant. Compared with the control group (n = 24), where only three (13%) voted against the defendant, it seems that the *Skilling* protocol failed – subjects exposed to prejudicial information, despite claiming not to be affected by it, were 2.88 times as likely to adjudicate that malpractice occurred than were subjects exposed only to irrelevant information. As before a problem of small sample size appears likely – indeed it is exacerbated by the *Skilling* exclusions of subjects – with this difference failing to achieve traditional statistical difference, χ^2 (1) = 2.02, p = .16.

Examination of pain and suffering awards, where mean and 5% trimmed mean scores awards of $87,542 versus $15,000 were observed for the treatment and control conditions, respectively, now shows a failure to reach traditional significance, U = 341.5, z = 1.55, p = .12. But this too likely reflects a problem with sample size, given that the mean award in the treatment condition was over six times as large as that within the control condition. Even excluding zeros, we see a quintupling of median damages awarded, from $60,000 to $300,000 (p = .27), though well short of statistical significance on this small sample.

Results on the 6-point scale as to the "certainty" of negligence (not shown) mimicked the above results. Treatment subjects exposed to prejudicial publicity were significantly more certain than those in the control condition exposed to irrelevant publicity (3.3 vs. 2.8, respectively), t(72) = -2.47, p = .02. And this remained true (albeit marginally, by traditional significance standards) even when excluding those who admitted or were

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[127] For our experimental purposes, we will exclude such jurors from both the control and treatment conditions, since jurors may have other bases for doubting their own partiality (e.g., a personal experience with malpractice), which we did not explore in our truncated voir dire. In a real trial, jurors may not be asked such a question with particularity, unless there were prima facie concerns about bias (which do not arise in our control condition). *See e.g.*, *Mu'Min*, 500 U.S. at 420 (discussing trial judge's questioning procedure).

unsure of bias as *Skilling* prescribes (for that subsample, scores were 3.2 vs. 2.8, respectively, $t(46) = -1.93$, $p = .06$). These suggestive results motivated a second study with greater statistical power, and a more representative sample.

Table 1: Convenience Sample. In a randomized experiment with 74 law students, those exposed to a news article that negatively portrayed the defendant voted against him more often ("liability votes"), and awarded higher damages (even after excluding zeros). Prior to viewing the trial, jurors were asked, "Would any opinion you have prevent your impartial consideration of the evidence at trial?" and "Could you base a verdict only on the evidence at trial?" Exclusion of jurors who said 'no' or 'unsure' (the "self- screen") failed to remove this bias. Statistical power was limited however.

Jurors	N	Condition	N	Can be Impartial	Screened Out		Liability Votes	Bias Gap	*p*	Odds Ratio (.95CI)	Mean Damages	5% Trim	SD	Nonzero Median	*p*
					Unsure	Unable									
All	74	Unexposed	30	24 (80%)	6 (20%)	0 (0%)	4 (13%)	19%	.07	3.03 (0.9–10)	$11k	$11k	$47k	$33k	.05
		Exposed	44	24 (55%)	15 (34%)	5 (11%)	14 (32%)				$99k	$82k	$175k	$300k	
Self-screened	48	Unexposed	24	24 (100%)	0 (0%)	0 (0%)	3 (13%)	16%	.16	2.88 (0.7–12)	$15k	$15k	$54k	$60k	.27
		Exposed	24	24 (100%)	0 (0%)	0 (0%)	7 (29%)				$88	$88k	$172	$300k	

Table 2: National Sample. In a randomized experiment 174 jury-eligible persons recruited online, those exposed to a news article that negatively portrayed the defendant voted against him more often ("liability votes"), and awarded higher damages (even after excluding zeros). Prior to viewing the trial, jurors were asked, "Would any opinion you have prevent your impartial consideration of the evidence at trial?" and "Could you base a verdict only on the evidence at trial?" Exclusion of jurors who said 'no' or 'unsure' (the "self- screen") failed to remove this bias.

Jurors	N	Condition	N	Can be Impartial	Screened Out		Liability Votes	Bias Gap	*p*	Odds Ratio (.95CI)	Mean Damages	5% Trim	SD	Nonzero Median	*p*
					Unsure	Unable									
All	174	unexposed	65	59 (91%)	6 (9%)	0 (0%)	23 (35%)	17%	.03	2.00 (1.1–3.8)	$293k	$72k	$1,303k	$150k	.02
		exposed	109	95 (87%)	9 (8%)	5 (5%)	57 (52%)				$438k	$345k	$711k	$500k	
Self-screened	154	unexposed	59	59 (100%)	0 (0%)	0 (0%)	20 (34%)	19%	.02	2.17 (1.1–4.3)	$309k	$76k	$1,366k	$100k	.03
		exposed	95	95 (100%)	0 (0%)	0 (0%)	50 (53%)				$442k	$442k	$729k	$500k	

C. *Experiment 2: National Sample*

We recruited subjects from the national population of workers on Amazon Mechanical Turk ("Mturk") in May and July 2012. Subjects were paid four dollars each to complete the experiment online, with an opportunity of bonus pay for respondents who scored highest on tests of recall (to incentivize attention and effort within the experimental task, given that subjects might otherwise cheat). The experiment was identical to that described above for the law school sample, although demographic information and cognitive scales were also collected for this Mturk sample. All subjects consented in accordance with IRB requirements.

1. The Sample

We recruited 264 persons who proceeded past the informed consent webpage into the experiment. Sixty-four persons exited the study before completion, constituting an attrition rate of 24%. An additional 26 persons were excluded for failure to comply with the task – they finished the experiment, which entails a 32 minute video and several pages of questions, in the impossibly fast time of 34 minutes or less.[128] The final sample thus includes 174 subjects. Demographic variables of sex, age, education, and gender were examined to explore whether characteristics of the person predicted whether he or she dropped out or cheated. None had predictive power; the excluded group demographically resembled the final sample.

As can be seen in Table 3, the overall sample roughly resembled U.S. Census data, although our subjects were on average more educated and younger, regression analyses (not reported here) showed that neither demographic significantly affected verdict. Especially relative to jury research using convenience college samples, our sample constitutes a respectable level of representativeness, and allows reasonable inferences about the jury pool at large.

Demographic variations were fairly well distributed across the experimental conditions, showing that randomization succeeded. Subsequent analyses thus proceed using condition-splits, proportions, and central tendencies for ease of communication.

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[128] The length of the video – 32 minutes – is an obvious and objective threshold for exclusion. Setting a threshold of greater length requires an estimate of how quickly it would be possible to read and answer the task materials, which in turn requires a judgment that risks the possibility of a false positive (wrongly excluding a subject who happens to work quickly). Examination of the data revealed a sharp gap, with two distributions. Those labeled a "cheater" almost all finished under the 32-minute mark; only two persons took longer, and each were below 34 minutes. The tail of the other distribution, which represents the quickest "non-cheating" score, was 44 minutes.

Table 3. Demographics by condition. The overall sample from Amazon Mechanical Turk roughly resembled U.S. census data, although it was on average younger and more educated. The control and treatment conditions were relatively similar in their demographic distributions.

Education	Control (n = 65)	Treatment (n = 109)	Total (N = 174)	U.S. Census
< HS Diploma/GED	3%	1%	2%	18%
HS Diploma/GED	15%	9%	12%	30%
Some College/Assoc.	49%	48%	48%	27%
College Grad	25%	30%	28%	17%
Graduate Degree	8%	12%	10%	10%
Gender				
Male	42%	45%	44%	49%
Female	58%	55%	56%	51%
Age Groups				
18-24	17%	28%	23%	13%
25-34	54%	31%	40%	18%
35-44	17%	20%	19%	19%
45-59	11%	18%	15%	27%
60+	1%	3%	3%	23%
Race				
White	80%	77%	78%	74%
Non-White	20%	23%	22%	26%

2. Biasing Effect of Prejudicial Pretrial Publicity

As with the pilot experiment, our analyses proceeded in two steps. We first asked whether pretrial publicity has a biasing effect by examining if, as hypothesized, subjects exposed to relevant publicity were more likely to find that medical malpractice occurred, to award larger monetary damages, and to be more certain of their verdict than those subjects exposed to irrelevant publicity. Second, we examined whether, as hypothesized, the screen proposed by the Supreme Court, most recently in *Skilling*, was sufficient to remove the biasing effect of prejudicial publicity observed in the first step.

Exposure to prejudicial pretrial publicity did, as hypothesized, significantly bias jurors. As seen in Table 2 ("all jurors" row), only 35% of jurors in the control condition found medical negligence, but this percentage significantly increased to 52% amongst those jurors exposed to prejudicial publicity, χ^2 (1) = 4.687, p = .030, ϕ = .16. This amounts to an odds ratio of 2.00, meaning that exposure to prejudicial pretrial publicity doubled the odds of a verdict against the defendant. It is worth emphasizing that the trial stimulus itself was exactly identical across conditions, and thus a strong inference can be made that the prejudicial publicity was the casual source of this change in verdict rates.

The effect on pain and suffering damages, the ultimate variable of interest to practicing litigators, was more dramatic. The median and 5% trimmed mean awards in the control condition were $0 and $71,943, respectively (SD = $1,302,768).[129] But when the taint of prejudicial pretrial publicity was introduced (in the treatment condition), median and 5% trimmed mean awards increased to $50,000 and $345,178, respectively (SD = $710,960). This is highly significant with a medium effect size, $U = 4{,}505$, $Z = 3.127$, $p = .002$, $r = .24$. Even when defense verdicts are excluded, the median damages award increased, more than tripling, from $150,000 to $500,000, p=.02.

Interestingly, the biasing effect of pretrial publicity was not as clearly reflected in certainty scores (not shown). The mean rating, from 1 ("certainly not medical negligence") to 6 ("certainly medical negligence") was 3.23 in the control condition, and only increased to 3.61 in the treatment condition – a trending but non-significant result, $t(172) = -1.581$, $p = .116$. Although one might assume that binary verdicts can be directly inferred by splitting the scale in half (i.e., those finding for the defendant rate the case from 1-3, while those finding against the defendant provide a 4-6 rating), that is apparently not the case for all subjects. Just under 5% (4 of 94) of those ruling in favor of the defendant nonetheless gave a rating of 4 or higher; a similar number (3 of 80) of those against the defendant nonetheless gave a rating of 3 or lower.

3. The Failure of Jurors' Self-Diagnoses

If, as *Skilling* prescribes, jurors who admit bias or are unsure of bias are removed, do the effects of pretrial publicity disappear? No, the *Skilling* protocol failed; very few people admitted bias in the first place, and of those who did, they were equally likely to impose liability. Referencing Table 2, the vast majority of jurors denied bias and instead expressed a sureness that they would be able to impartially consider only the evidence presented at trial (91% and 87% in the control and treatment conditions, respectively).[130] Notably, comparing those who deny bias against those who are either unsure or admit bias across conditions, we find no significant difference, $\chi^2 (1) = 0.523$, $p = .470$; that is, subjects were equally likely to admit bias regardless of whether they read irrelevant or prejudicial pretrial materials.

Excluding pursuant to the *Skilling* protocol, we are left with 59 and 95 subjects in the control and treatment conditions, respectively. As shown in Table 2 (self-screened row), this self-diagnosing protocol completely failed. The verdict rates remained unchanged almost to the digit: before screening, 35% and 52% of control and treatment subjects found against the defendant; after screening, the rates were 34% and 53%. The 34% versus 53%

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[129] Given the high variability of damages awards, particularly the presence of a handful of extreme outliers, the mean can be misleading. Here, for example, the mean for the control condition ($292,540) is over $220,000 larger than the trimmed mean of $71,942, and this difference is driven by a single outlying score of $10,000,000.

[130] For the *Skilling* criteria used, see section II.A.3 supra.

difference continues to be both significant and meaningful, χ^2 (1) = 5.152, p = .023, ϕ = .18; this amounts to an odds ratio of 2.17, or in other words, a more than doubling of the odds of a verdict against the defendant, given exposure to prejudicial pretrial publicity.

The failure of the *Skilling* protocol is again on dramatic display in the pain and suffering awards. (See Table 2, self-screened row). The median and trimmed mean awards in the control condition remained about the same as they were prior to applying the *Skilling* screen: $0 and $70,536, respectively (SD = $1,366,095). But application of the *Skilling* protocol did not cure the taint of prejudicial pretrial publicity as hoped in the treatment condition; rather, the median and trimmed mean awards remained higher than in the control condition, at $90,000 and $345,404, respectively (SD = $729,406). This difference across conditions continues to be highly significant with a medium effect size, U = 3,553, Z = 2.930, p = .003, r = .24 Even when defense verdicts are excluded, median damages awards quintupled, from $100,000 to $500,000, p=.03.

Again we find that the biasing effect of pretrial publicity was not as clearly reflected in certainty scores. The mean rating, from 1 ("certainly not medical negligence") to 6 ("certainly medical negligence") was 3.22 in the control condition, and only increased to 3.58 in the treatment condition, t(152) = -1.427, p = .156.

4. Does Juror Self-Diagnosis Help At All?

So, far we have compared the exposed group to the unexposed group, after imposing a screen on the basis of juror self-diagnosis. For the reasons explained in Part II.A.1 above, we have defined success as the screened exposed group performing similarly to the screened unexposed group, as this would show that self-diagnoses screens create an "impartial" jury, as the Constitution guarantees. However, even if self-diagnosis does not achieve the gold standard of an impartial screen, it might still be better than nothing. For that purpose, one might simply examine the exposed condition before and after screening.

Our data fails to support the hypothesis that juror self-diagnoses help at all. As shown in Table 2, examining the verdict rates within the treatment condition for unscreened, self-diagnosis screened jury pools, the observed verdict rates against the defendant *increase* from 52% to 53%. Although provocative, in the present data, this difference is far from statistically significance.[131] Nonzero median damages remain unchanged. Thus, our data do not support the hypothesis that asking jurors whether they can be impartial is at all diagnostic of partiality versus impartiality.

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[131] The self-diagnosis screened and unscreened jury pools adjudicated the case similarly, with 53% and 50% finding against the defendant, respectively, χ^2 (1) = 0.034, p = .854; and similar results obtained for the opinion-eligible versus opinion-ineligible jury pools, with 56% and 51% against the defendant, respectively, χ^2 (1) = 0.255, p = .614.

5. Opinion-Screening as an Alternative to the *Skilling* Protocol

Recall that in *Skilling,* the Supreme Court again endorsed the protocol of judges first asking jurors whether they have any opinion about the case or the parties, then a pair of questions about whether jurors can overcome any opinions and thus base a verdict on only the evidence at trial. The latter two questions then become the basis for screening under the *Skilling* protocol, and in our experiments described herein.

The juror's task of introspecting to identify an existing opinion (the first question) is a different cognitive task from assessing one's ability to overcome that opinion (the second and third questions). Thus a subject might fail the latter but nonetheless be proficient at the former.

One reason that the answers to the latter questions turn out to be unreliable may be "social desirability" bias.[132] A juror, despite accurately self-diagnosing that he or she cannot overcome a lingering bias, might nonetheless publicly insist that he or she will act impartially. The latter questions essentially ask whether a juror will adhere to the social norms of being a good and fair person – whether he or she will uphold a civic responsibility as any decent person would. Thus there is pressure to respond consistently with the norm, least one appear to be a social deviant, one with the undesirable trait of being uncontrollably swayed by bias.[133]

These considerations suggest a modification to the Supreme Court's questioning protocol to achieve greater diagnosticity. If courts were to exclude anyone who admits or is unsure of even *having* an **opinion** about the case, the response might be more useful than the *Skilling* protocol for constructing the fair and impartial jury required by the Constitution.

To assess the possible efficacy of such a revised protocol, we compared the verdict rates of the pre-*Skilling* protocol jury pool to a jury pool from which we excluded anyone who even admitted (or was unsure about) *having* an **opinion** about the defendant. Out of 95 jurors that insisted that they could be fair and impartial in the treatment condition, 61 had admitted (or were unsure about) having an opinion about the defendant, but believed that they could suppress that opinion and focus solely on the evidence at trial. That left 34 who stated they had no opinion whatsoever about the defendant, and thus were eligible under our proposed opinion-eligibility standard.

Despite such an aggressive exclusion protocol, juror bias remains rampant. Prior to the *Skilling* screen, 35% and 52% of control and treatment subjects, respectively, found against the defendant, a bias gap of 17%. After the more stringent screen based on mere opinion,

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[132] *See e.g.*, R. Tourangeau and T. Yan, *Sensitive Questions in Surveys*, PSYCH. BULLETIN., 133 (5): 859-883, 860.

[133] *Id.* (providing example of social desirability bias in a different civic responsibility setting, that of voting in presidential elections).

the rates were 33% and 56%, a bias gap of 23%. This difference across control and treatment conditions continues to be both significant and meaningful, χ^2 (1) = 4.452, p = .035, ϕ = .21; odds ratio = 2.53. The bias gap got worse, not better. The failure of the aggressive opinion-screening protocol is again reflected in the damages awards. The trimmed mean awards in the control condition remained about the same as the bias-screened jurors at $75,898 (SD = $1,389,038) versus $442,320 (SD = $781,066) in the exposed condition. The six-times disparity in damages caused by exposure to publicity remained, regardless of the more aggressive screening protocol.

6. The Unexplained Behavior of Fair Jurors Disqualifying Themselves

If the juror's actual bias does is not what causes her to say she is biased, then what *does* cause some jurors to answer the *Skilling* questions differently than other jurors? We hypothesized that perhaps the most earnest and thoughtful jurors may be more likely to admit concerns about their own impartiality.

Need for Cognition (NFC) and Cognitive Reflection Test (CRT) scales were administered to explore individual differences in the ability to self-diagnosis bias.[134] NFC is a personality variable reflecting the extent to which people engage in and enjoy exerting cognitive effort. We hypothesized that those higher in Need for Cognition would be more motivated to fully consider the Supreme Court's prescreening questions, and thus be more likely to self-diagnose bias caused by exposure to the pretrial article about the defendant.

The CRT is designed to assess the degree to which individuals suppress an intuitive and spontaneous wrong answer in favor of a reflective and deliberative right answer. We hypothesized that those performing more highly on the Cognitive Reflection Test would be more likely to stop and think carefully about the *Skilling* prescreening questions, rather than relying on a quick intuitive assessment of being unbiased, and thus be more likely to self-diagnose bias caused by exposure to the pretrial article about the defendant.

To test the above possibilities, we fitted a binary logistic regression model predicting *Skilling* eligibility from NFC, CRT, and demographic variables on data from the treatment condition.[135] The model itself (not shown) was far from significant, and contrary to our hypotheses, neither NFC nor CRT nor any of the demographic variables predicted which jurors would disqualify themselves as *Skilling* ineligible (χ^2 (9) = 3.904, p = .918.)[136] It remains a mystery as to what causes some jurors to disqualify themselves for potential

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[134] For reference articles on the CRT and NFC, see note 125 supra.

[135] The control condition was not included because, without knowledge of what biased opinions a juror might or might not harbor, it is impossible to predict the effect of NFC and CRT. In the treatment condition, in contrast, we assume jurors harbor the pretrial publicity bias that we experimentally induced, and thus can articulate hypotheses regarding the ability to self-diagnose that bias.

bias, even when it turns out that they were just as likely to rule against the defendant as the other jurors.

D. Overall Analysis

It is notable that our two experiments involved very different populations, who had very different base rates for imposing liability, and very different levels of confidence in their own ability to be fair and impartial. (Compare Table 1 and Table 2.) In the control condition 13% of the law students imposed liability, while 35% of the respondents in the national sample imposed liability. We also saw very different rates of self-diagnoses, with 45% of law students saying that they were unable to be fair and impartial (or unsure), versus only 9% of the respondents in the online national sample. Notwithstanding these differences, we saw similar effects of pretrial publicity and a similar failure of our screening protocol to remove that bias. This finding should enhance readers' confidence in the external validity of our studies; they do not seem to be driven by peculiarities about a particular subject pool.

Figure 1 displays the combined data from the 248 subjects in Experiments 1 and 2, including verdicts, damages awarded, and whether the juror was screened based on their self-diagnoses as to whether they could be fair and impartial (the Supreme Court's "*Skilling* protocol", as we have called it). This graphic depicts the upwards skew of awards in the exposed condition, compared to the unexposed condition. For the *Skilling* protocol to successfully remove bias, it would need to edit the distribution on the right to make it appear like the distribution on the left. However, the paucity and improper distribution of juror self-diagnoses shows the failure of this protocol to correct for the induced bias.

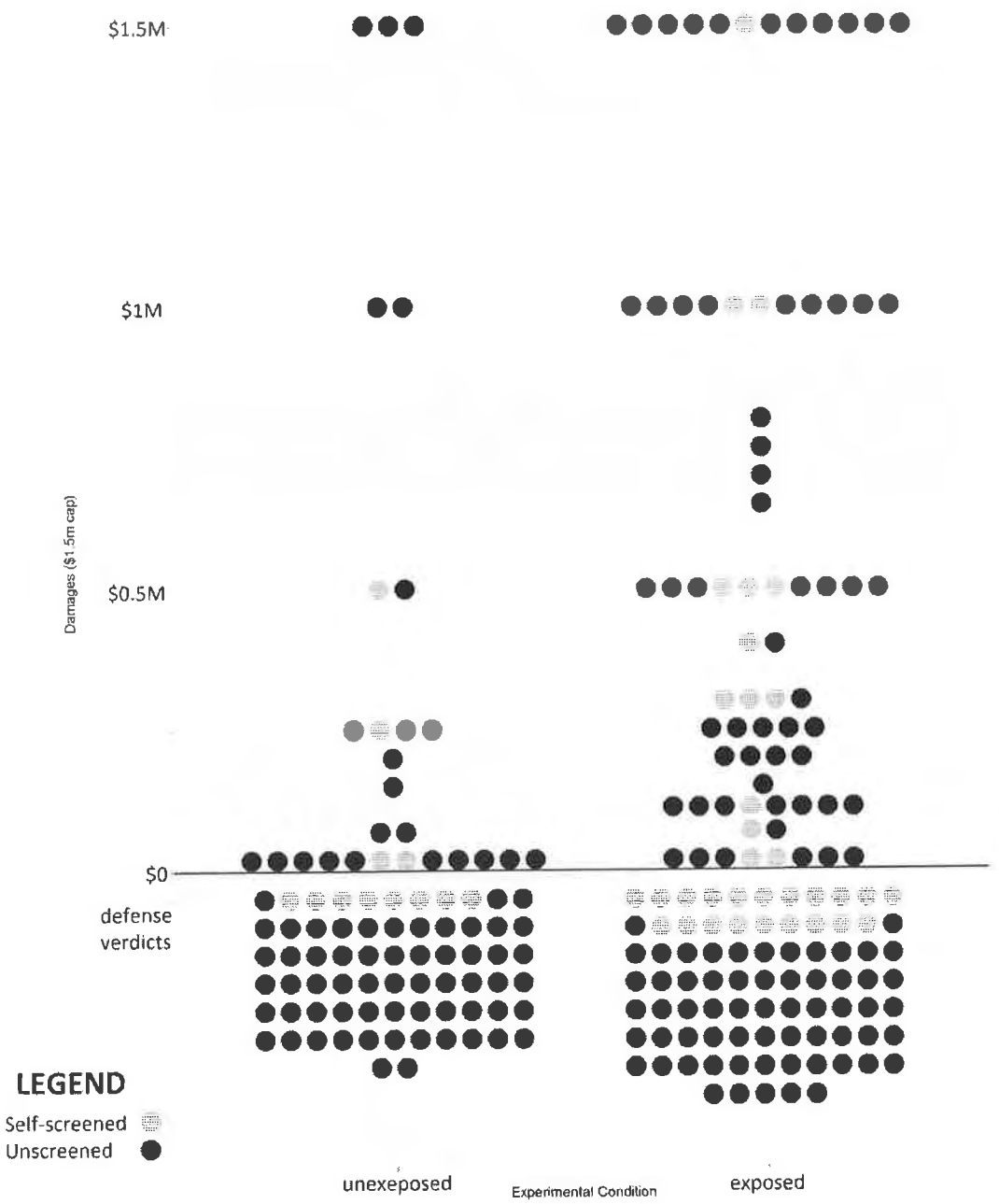
Examining verdict rates across both the convenience and national samples, 27 of 95 (28%) unexposed persons found negligence, while 71 of 152 (47%) exposed persons found negligence. This is significantly different as predicted, $\chi 2$ (1) = 7.931, p = .005, odds ratio = 2.181, and indicates successful induction of a pretrial publicity bias. The Supreme Court's method of excluding jurors – those who thought themselves to be unable to be fair or impartial or unsure -- failed to correct this doubling of the odds of a liability verdict. The difference remained highly significant, $\chi 2$ (1) = 8.332, p = .004, odds ratio = 2.398.

Examining monetary awards (including $0 verdicts), the 95 unexposed persons had a median and mean (SD) award of $0 and $95,374 ($304,077). The 152 exposed persons had a median and mean (SD) award of $0 and $275,739 ($460,700). This tripling of mean damages awards across conditions is highly significant, U = 8,872, Z = 3.331, p = .001. Screening out the jurors based on their self-diagnoses failed to cure this bias, U = 6,117, Z = 3.290, p = .001.

Examining monetary awards conditional on a finding of negligence, the 27 unexposed persons who found negligence had a median and mean (SD) award of $60,000 and $339,092 ($498,817). The 71 exposed persons who found negligence had a median and mean (SD)

award of $500,000 and $594,197 ($518,597). With median damages awards eight times higher in the exposed condition, this difference across conditions is highly significant, U = 1,324, Z = 2.920, p = .004, and indicates that pretrial publicity has an effect above and beyond the impact on verdicts. The application of a self-diagnosis screen again failed to cure, U = 897, Z = 2.581, p = .010.

Figure 1 – Plot of Combined data from Experiments 1 & 2 by Condition with Verdict, Damages (Capped at $1.5M), and Self-Screen – Each dot represents a single juror (n=248), with defense verdicts shown in a block on the bottom and plaintiffs' verdicts shown by amount of damages awarded, as a dot-histogram with $50,000 bins. Jurors who said they were unable to be fair and impartial or were unsure (the "self-screened") are shown as yellow-striped. Removal of those jurors would not cure the upwards skew (bias) in the condition where subjects were "exposed" to pretrial publicity adverse to the defendant.



E. Limitations

Our study had several limitations. First, we tested a particular type of juror bias –the bias due to pretrial publicity. This particular source of bias is amenable to manipulation and thus randomized experimentation, unlike other sources of biases, such as personal acquaintance with the parties or racial animus. Whether and to what extent jurors are biased from other sources, and whether they may be better able to self-diagnose those biases, are open questions. We are unaware, however, of any empirical evidence that would suggest that jurors are better able to self-diagnose in these other domains.

Second we should emphasize that we have not calibrated the degree of bias observed in our mock jurors with the amount of bias that may or may not have infected any particular juror in any particular case. (Nor could we.) It is possible that none of the jurors in the *Skilling* case were biased at all, or that they were collectively more biased than the mock jurors in our study. Relatedly, our data cannot say whether the amount of bias shown in our study (a more than doubling of odds of imposing liability on the defendant) is "too much" bias to be Constitutionally tolerable.[137] Maybe a court would say that a doubling of odds is "good enough impartiality," noting that nearly half of the jurors still exonerated the defendant even with the publicity.[138] Regardless of such line drawing problems, our experiment instead focuses on the epistemic device that the courts use to assess bias. In this sense, our study does suggest that if courts use this device to reassure themselves that jurors were in fact unbiased— below whatever threshold for too much bias they select -- then the courts' conclusions are unwarranted on that basis.

Third, we used a 32-minute abridged civil trial for our experimental stimulus. The condensed stimulus allowed us to utilize a randomized controlled trial experimental design, which is the gold-standard for scientific research. Still, there are reasonable concerns about external validity. Specifically, ours was a civil trial, but pretrial publicity problems often arise in a criminal context instead. We are unaware of any evidence that jurors called for criminal trials are somehow better able to diagnose their own biases than jurors called for civil trials. The length of our stimulus also raises the question the possibility that in a real trial, which may last for days or even weeks and where biasing factors are less proximate, jurors would more heavily weigh the evidence presented therein, and thus be less subject to

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[137] Presumably, a small amount of partiality is permissible. *See e.g., Skilling*, 130 S.Ct. at 2914 (describing prior cases as ones where the "trial atmosphere was utterly corrupted by press coverage"); *id.*, at 2913 (asking whether there was "extraordinary local prejudice"), *id.*, at 2922 (describing the "deep and bitter prejudice" in a prior case). Notably, however, some of these refer to the distinct legal question of whether prejudice should be presumed, as distinct from the question of whether a particular juror suffered from actual prejudice. *See id.*, at 2917 (making this transition in two different analyses).

[138] On the other hand, courts have held that a single biased juror on the panel of twelve is too much. See sources cited at note 12, supra.

pretrial publicity biases at all.[139] These limitations apply more to the question of whether jurors are biased, as opposed to whether they are able to self-diagnose that bias, the question studied here.

Fourth, the experiments were conducted with a convenience sample of law students and a national sample of human subjects online, who reached individual judgments rather than collective jury verdicts after deliberation. It is possible that real jurors in real courthouses are somehow better able to diagnose their own biases.[140] Prior research has shown that "the population of Mechanical Turk is at least as representative of the U.S. population as traditional subject pools."[141] Known experimental results have been replicated using the Mturk population.[142] Still, it is likely that Mturkers may be more easily distracted from the trial compared to real jurors, and may even provide junk responses. Although we paid respondents rather generous bonuses contingent on their measurable performance on attention tasks, such problems could increase noise in the data. It may be that real jurors are more earnest in their efforts to diagnose their own biases. On the other hand, real jurors may have other motivations for saying that they are unbiased (if they have an axe to grind against the defendant, or the social pressure of answering in public) or biased (if they would prefer not to serve on the jury), which would further reduce the diagnosticity of the questioning.

Fifth, we merely tested whether jurors could diagnose their own biases, and thereby provide reliable information to the judge tasked with deciding whether to exclude the juror, or change the venue. It is possible that "by looking the juror in the eye," as the Supreme Court suggests, judges are able to ascertain whether he or she can be impartial in a more

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[139] In fact, we observed some heterogeneity even within our sample as to who people react to pretrial publicity. At least in terms of binary verdicts, many subjects voted the same way as they would have in the unexposed condition, since the exposure only created a 19% bias gap on the margin in the national sample. Indeed, we used this same stimulus with another convenience sample of law students and found an insignificant biasing effect, which thus prevented us from testing whether subjects could self-diagnose those biases in that sample. The experiments reported herein presume the existence of a biasing factor.

[140] *But see* Suggs and Sales supra, note 5 (arguing that courtrooms are particularly bad contexts for elucidating candid responses, given modes of questioning, interaction distance, and formality, which potentially makes real world voir dire practices even worse than the experimental procedures employed here) and Rose and Diamond supra, note 6 at 516 (reviewing evidence that trial judges browbeat jurors into saying that they can be fair and will do their duty, thus likely reducing the sensitivity of their self-diagnoses). *See also* Maureen O'Connor, Terry Connolly, Bruce D. Sales, and John Davis, *Pre-Voir Dire Instruction of the Jury Pool: A Natural Experiment*, 30 CRIMINAL LAW BULLETIN 518 (1994) (showing that instructing jurors on the law prior to conducting voir dire had no effect on the jurors' responses).

[141] G. Paolacci, J. Chandler and P. G. Ipeirotis, *Running experiments on Amazon Mechanical Turk*, JUDGMENT AND DECISION MAKING 5 (5), 411-419 (2010). *Available at:* SSRN: http://ssrn.com/abstract=1626226.

[142] Adam Berinsky, J. Gregory, A. Huber and Gabriel S. Lenz, *Using Mechanical Turk as a Subject Recruitment Tool for Experimental Research*, POLITICAL ANALYSIS (forthcoming). *Available at:* http://dl.dropbox.com/u/7536991/Mechanical Turk.pdf.

holistic way.[143] Attorneys may also use such a holistic approach and their limited number of peremptory challenges to exclude jurors.[144] Our study merely suggests that, in making that holistic assessment, courts and attorneys should give no weight to the content of the juror's own professions of impartiality or lack thereof.

III. DISCUSSION

The courts of appeal say that they will defer to trial court determinations as to whether a juror can be fair, as long as those determinations are based on "substantial evidence."[145] This study has shown that the juror's responses are not substantial evidence as to their actual impartiality. These experiments show that jurors' self-diagnoses simply do not provide the courts with a reliable basis for sorting biased jurors from unbiased jurors. Trial courts should not rely upon such unreliable answers.

The data further suggest that courts' reliance on such unreliable self-diagnoses to seat biased jurors may be a cause of wrongful convictions and wrongful impositions of civil liability. The concern is not just with trial outcomes but also with plea bargains and civil settlements. "Indeed," as justice Frankfurter said, "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury." [146] Defendants may be settling or pleading guilty out of a fear that they will be unable to get a fair trial under current doctrine. That fear appears to be warranted.

A. The Cognitive Limitations of Self-Diagnosis

Why does the *Skilling* method of diagnosing juror bias fail? The self-diagnosis task can be usefully analyzed as part of a more general problem that psychologists refer to as "mental contamination."[147] Wilson & Brekke, for example, define mental contamination as "the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable."[148]

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[143] *Skilling*, 130 S. Ct. at 2924.

[144] *See e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). Although this procedure may satisfy the Sixth Amendment, it is not a panacea for fairness, because the other side in litigation will be using their preemptory challenges for discretionary purposes to shape the jury affirmatively, rather than trying to remediate problems of pretrial publicity.

[145] *See e.g., California v. Boyette*, 58 P.3d 391, 414 (Cal. 2002). *See also* Hannaford-Agor and Waters supra note 113 at 3 ("As a practical matter ... all U.S. jurisdictions give substantial discretion to trial judges with respect to these decisions.")

[146] Irwin, 366 U.S. at 730 (Frankfurter, J. concurring).

[147] T. D. Wilson and N. Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations,* PSYCHOLOGICAL BULLETIN *116*(1): 117-142 (1994).

[148] *Id.* at 117.

The Wilson and Brekke model outlines at least four separate actions a person must consciously undertake to debias mental contamination.[149] Removal of mental contamination requires that a person: (1) be aware that mental contamination exists; (2) be motivated to correct the bias; (3) be aware of the direction and magnitude of the bias; and (4) be able to adjust his or her response. In the context of the present study, for example, a potential juror must first realize that exposure to pretrial publicity has affected judgment. Second, this realization must trigger a desire to counteract the influence of pretrial publicity. Third, the juror must know the direction of the effect (either more or less likely to convict) and its magnitude (e.g., 5% or 85% shift). Finally, the juror must be able to make the necessary correction (e.g., deliberately lower the estimate of guilt by 5% to compensate for a biased 5% increase).

A juror responding to *Skilling* screening questions might fail at step (1), and not be aware that the condemning article about the defendant has increased the odds of adjudicating the defendant as guilty.[150] Dan Simon has also reviewed evidence showing that people generally can clearly access declarative types of knowledge with clarity, but have difficulty knowing how they arrived at that information.[151] Simon notes that "people habitually insist on their introspective abilities, and when asked about the reasons for their decisions and behaviors, they readily provide spurious explanations." Simon cites various studies indicating that people are generally poorly equipped to identify their biases and reluctant to admit them, creating an "illusion of objectivity."[152]

A step (2) motivating failure would occur if the juror were too distracted to care or simply disagreed with the judicial instructions that pretrial publicity constitutes a bias worth eradication. A large body of psychological research demonstrates that awareness of

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[149] *See also* T. D. Wilson, D. B. Centerbar and N. Brekke, "Mental Contamination and the Debiasing Problem." In T. Gilovich, D. Griffin, and D. Kahneman. (eds.), HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENTS, Cambridge: Cambridge University Press (2002) pp. 185-200.

[150] Alternatively, it may be possible to use other tools of modern psychology to identify bias, such as the "implicit attitudes test," which measures reaction times of subjects presented with various stimuli, to assess whether subjects are implicitly biased for or against certain races, people, or ideas, even when the subjects are not consciously aware of such biases. *See* Dale K. Larson, *A Fair And Implicitly Impartial Jury: An Argument For Administering The Implicit Association Test During Voir Dire*, 3 DEPAUL JOURNAL FOR SOCIAL JUSTICE 139 (2010)(proposing such use).

[151] Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, LAW AND CONTEMPORARY PROBLEMS, Vol. 75, No. 2 at 167 (2012). *See also*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARVARD LAW & POLICY REVIEW 149 (2010) ("I have come to the conclusion that present methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias. Specifically, judge dominated voir dire and the Batson challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish.")

[152] *Id.*, at 186.

mental contamination can be surprisingly difficult to achieve, since people are generally ignorant of the processes by which they form their judgments.[153]

Even if aware and motivated, it is unlikely that a juror would have any insight into how much bias the pretrial exposure caused (a step (3) failure). Subjects usually under or over correct, as opposed to reaching judgments similar to those not exposed to such information. Consider the extensively studied anchoring effect, wherein a numerical judgment is biased by previous consideration of an uninformative number. In the classic study by Kahneman and Tversky, for example, subjects were asked to estimate the number of African countries in the United Nations; their answers were highly correlated with whatever number was first randomly generated from a wheel of fortune.[154] Wilson et al. explicitly warned subjects that anchors would bias their judgments, provided an example, and admonished them to "please be careful not to have this contamination effect happen to you."[155] Clearly aware of the possibility of bias, subjects rendered slightly different judgments in the direction required for correction, but not nearly enough – indeed the differences were not even statistically significant.[156]

Given what we know about the limits of human cognition, it should be unsurprising that jurors fail the task of self-diagnosing their own biases. This self-diagnosis task poses to the juror a question, i.e., *will the exposure cause you to change your decision from what it would have been had you not been exposed to the biasing factor?* Analytically, that is a lot to ask. Indeed, it becomes doubtful whether jurors are even doing **that** predictive-counterfactual-comparison task, or if they are instead reporting an **aspiration** to fulfill their civic duty to serve and serve fairly.[157]

B. A Way Forward: Borrowing the Method Used for Judge Bias

The law takes a different approach for potentially biased judges than it does for potentially biased jurors. This rule for judge disqualification may be a better model for juror disqualification as well.

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[153] R. E. Nisbett and T. D. Wilson, T. D, *Telling More Than We Can Know: Verbal Reports on Mental Processes,* PSYCHOLOGY REVIEW 84, 231-259 (1977).

[154] A. Tversky and D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases,* SCIENCE*185,* 1124-1131 (1974).

[155] T. D. Wilson, C. E. Houston, K. M. Etling and N. Brekke, *A New Look at Anchoring Effects: Basic Anchoring and its Antecedents,* JOURNAL OF EXPERIMENTAL PSYCHOLOGY: GENERAL 125 (4): 387-402 (Study 5) (1996).

[156] *Id.* at 397-398.

[157] "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.... No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father...." *Irvin v. Dowd,* 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751, 759 (1961).

Federal laws require that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[158] Our experiments suggest that it may not be wise for judges to make the decision about whether to disqualify themselves. It may be more sensible to allow a different judge to resolve the threshold question, based on an objective review of the circumstances (i.e., potentially biasing factors).

Substantively however, regardless of who makes the decision, the judge-disqualification question is different than the one posed for jurors. It is not whether the judge can be impartial, but rather whether her "impartiality might reasonably be questioned."[159] In principle, this would seem to be an objective and higher standard that would require disqualification more often. As the Supreme Court said in *Caperton*,

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review.[160]

Chief Justice Marshall recognized this difficulty in the jury context, writing that ""[The juror] may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice."[161]

Likewise, our experiments show that Chief Justice Marshall was correct in his skepticism. Since we in fact lack a reliable method for the law to answer the question of whether a particular juror is actually biased, we should thus resort to the more fundamental question of whether the juror's impartiality can be reasonably questioned at all. The American Bar Association has suggested such an approach.[162] On that basis, courts should simply remove all jurors that have been exposed to substantial pretrial publicity or other biasing factors, delaying trial or changing venue if necessary.

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[158] 28 USC §455. *See also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) (applying the due process clause itself to the failure of a state court judge to recuse himself).

[159] *See Merritt v Hunter*, 575 P2d 623, 624 (Okla, 1978) ("Even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt as to his partiality, bias or prejudice'.").

[160] 556 U.S. at 883.

[161] *Burr*, 25 F.Cass at 50.

[162] *See* AMERICAN BAR ASSOCIATION, PREAMBLE, PRINCIPLES FOR JURIES AND JURY TRIALS 14 (Aug. 2005), available at www.abanet.org/juryprojectstandards/principles.pdf. ("[i]n ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a **reasonable doubt** that the juror can be fair and impartial, then the court should excuse him or her from the trial.")(emphasis added).

In sum, these findings challenge a longstanding and ubiquitous practice of the state and federal courts, used in both civil and criminal trials. Nearly 30 years ago, the Supreme Court said that, "[i]t is fair to assume that the method we have relied on since the beginning . . . usually identifies bias."[163] Our study undermines that assumption. Although further research is warranted, it may now be fair to put the burden on those who rely upon this particular method of diagnosing bias to show that such reliance is reasonable. One can no longer simply "assume" that it is.

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[163] *Patton*, 467 U.S. at 1038 (citing *Burr*).

Justin Dart, Jr. - On Disability, Employment, Empowerment and Productivity

(Remarks delivered to the Canadian Council on Rehabilitation and Work – February, 1992)

Colleagues, our culture and our movement stands at an historic crossroads. People throughout the world have lost patience with decades of unkept promises that they would be included in the good life potential of science and democracy. These angry people have overthrown the Soviet empire. They are dismantling communism and traditional authoritarian regimes everywhere. In America they have sent us a powerful message through the polls and the ballot box. Decisive, responsible solutions are demanded... now. Radical change will continue to occur. We of the disability community have never had a better opportunity to lead, and we of the disability community have never been in greater danger of being trampled underfoot by the opportunistic demagogues of reaction.

It is in this context that we meet today to consider strengthening partnerships for responsible solutions. I propose that we form one grand, global partnership between all members of the international disability community – to initiate strong civil rights laws and comprehensive empowerment-oriented policy that will enable people with disabilities in every nation to achieve their productive potential. The empowerment of people to exercise their fundamental human rights is the one issue that leaps the boundaries of all disabilities, classes and cultures. It is the one vision that can be communicated into the minds and hearts of all people now... preparing the way for more complex understandings that must occur over time.

Comprehensive civil rights protection is the one specific objective with the universality and the power to be a solid foundation for the unity and growth of strong national and international disability rights partnerships. It is the one absolutely essential platform for advocating those services and rights which are appropriate for particular people in particular places at particular times. It is the one argument to secure, for progressive Canadian rehabilitation, the greatly increased supports that your magnificent results command. Now we have made a good start. There has been outstanding progress in many European nations. The upcoming UN report on human rights and disabilities is very positive.

You in Canada are leading the way in many areas Canadian people are supporting Disabled Persons International. Your healthcare system is a cutting edge experiment that has received favorable comment throughout the world. You have enacted the Charter of Human Rights. You have required proportional representation of people with disabilities in employment. You of Canadian rehabilitation, business, labor and government are making a truly responsible effort to meet the challenges of a geographically vast and culturally diverse nation.

In my country, the Americans with Disabilities Act (ADA) of 1990 is a landmark breakthrough. People with disabilities have been granted full, legally-enforceable, equality by one of the world's most influential nations. Significant leaders in many countries have expressed the intention to pursue similar legislation. The ADA is an absolutely essential legal and educational tool to achieve equality and to achieve employment. But the ADA is not equality and it is not employment. ADA is a promise to be kept.

And what is that promise? For whatever the law says legally, the clear promise of the ADA is that all people with disabilities will be fully equal, fully productive, fully prosperous, and fully welcome participants in the mainstream. Keeping the promise of the ADA is not going to be easy.

Civil rights laws have been successful in America. Millions of African Americans, women and Hispanics have moved into the mainstream. But millions have not. Twenty-seven years after the Civil Rights Act of 1964, we still have black, brown, and white ghettos in the United States. There has been a miracle of progress for people with disabilities in America, but the magnificent programs of the last few decades have not been implemented on a society-wide basis. The employment rate among disabled people today in America is about 33% - down... that is *down* from 40% in 1970. Employment has increased in absolute numbers and certainly in quality but has not kept pace with the population explosion caused by advances in modern medicine and by changes in the nature of work. 43 million Americans with disabilities are still the poorest of the poor and they are getting further behind every year.

Colleagues, the time has come to face a hard reality. In today's society of exploding change and complexity we are not going to solve the massive problems of minority employment, poverty and budget-busting welfare simply by implementing the legal requirements of civil rights laws and by conducting business, politics and advocacy as usual. Real solutions are going to require expanding the definition and the process of civil rights and, indeed, of our movement and of democracy itself... to include as their focus a concept of empowerment, a policy of empowerment, and a science of empowerment.

Concept: the legitimate purpose of civil rights, of human society and its governments, is not simply to guarantee equal opportunity to pursue life, liberty and happiness; but to empower all people to make those free choices and to take those concrete actions that actually produce lives of quality. Empowerment - quality of life potential fulfilled - must be the clearly-focused goal and the final measurement of civil rights, of government, of our movement, and of all human activities. They must be the definition of productivity.

Example: "Employment". Protection from job discrimination means little, if you are not empowered to get a good job, to do a good job, and to compete successfully for a good future. There is no excuse for unemployment in a responsible modern democracy.

Example: "Productivity". It is self-evidently irrational to say that creating one million dollars worth of lethal cigarettes is productivity in the same sense as creating one million dollars worth of empowerment through automated farm machinery or quality health care. In a responsible democracy there is no excuse for blatant misuse of productive power.

"Empowerment"... what is it? *Empowerment* is when we who have disabilities reject stereotyped roles of eternal childhood, failure and subservience... when we say "no" to the big lie that we can trust paternalistic authority to give us equality and the good life.

Empowerment is when we are enabled to take control of our own lives and to participate as equals in controlling government and the programs that affect us. *Empowerment* is when we take full responsibility to utilize all of our abilities to produce a life of quality for ourselves, for our families, and for our communities.

Empowerment is when the rehabilitation counselor, the teacher, the employer, takes the approach of a good coach or of a good attorney – working in partnership with each

individual client to create a customized program designed to enable that individual to achieve what that individual wants to achieve.

Empowerment is what we do for top company executives, national leaders, soldiers and doctors when we really need those people to protect our money, our liberty, and our lives. Colleagues, the empowerment society will not occur until we understand that the responsible leaders are all of us – that the disabled can be any of us – and that the productivity and quality of life of the person with mental illness or deafness, are just as important to our pocketbooks and to our happiness as the productivity of the President of Coca Cola and the quarterback of the Washington Redskins.

Now make no mistake about it. I am not talking about the same old empty bottles with new labels. I am talking about massive reallocations of the human and economic resources of society. I am talking about massive investments in this society-wide utilization of the very successful experiments in free enterprise empowerment that you and others have developed in Canadian rehabilitation, independent living, business, sports, space travel, technology, and other areas.

I am talking about developing a comprehensive, long range policy for empowerment that will give purpose, direction and coherence to the strategies and initiatives of our movement, our government, and our citizens. Lifelong education for empowerment, Lifelong services and community support, including rehabilitation, independent living, transition, supported employment, transportation, communication, and personal assistance services for empowerment. Business and finance for empowerment. Families that empower. Full legal services for empowerment. Technology for empowerment. Incentives for productivity rather than disincentives. Housing as a base for empowerment. Aggressive prevention, quality, affordable insurance, and health care for all.

Colleagues, our effort to protect to protect basic human rights, and to create an empowerment society will give rise to the familiar traditional objections. "Too expensive." "Politically impossible." And people will say in other countries, "Our country can't afford food, shelter and basic services. How can we even talk about full equality and massive programs of empowerment?" They will say, "Our movement is not strong enough. We don't want to risk losing what we already have." And they'll say, "Our culture is different. Equality for people with disabilities is not appropriate." We've heard all of that before, and to all of that, I say "Bull feathers!"

If we accept these tired excuses, people with disabilities will still be second class humans in the year 3000, and Canadian Rehabilitation will still be vastly under-funded. Now other cultures where legal equality and empowerment are inappropriate, that barbarian argument was dispatched at Nuremburg, in South Africa, and by the U. N. on many occasions. Other nations where our movement is not strong enough to advocate equality, where we should not risk losing what we already have.

Colleagues, are we fearful to lose the world's worst poverty and death rate? Timid movements have never gained anything. The Christian and the Chinese Revolutions were both started by meetings of thirteen impoverished individuals in open fields. Now, is equality and empowerment politically impossible? Impossible? Isn't that what they told us in America about democracy in 1776? Isn't that what the Soviet bureaucrats told the Russian people about two years ago? I know that's what they said about the ADA just three or four years ago in America. Are there nations too poor to afford equality and empowerment for people with disabilities? We who have disabilities are not asking for more

than other people. We simply demand our unalienable rights as human beings to share equally in resources and in responsibilities. A government that refuses to recognize its responsibility to the quality of life and the survival of 15% of its population does not deserve to govern!

Too expensive? On the contrary, President Bush in our country, has estimated the economic cost of excluding two-thirds of Americans with disabilities from the mainstream to be about 200 billion dollars cash, annually, in public and private payments - $300 billion when you include lost taxes and lost productivity. Our irresponsible status quo, the failure to invest in the empowerment of people to be productive is the cause of economic problems in rich nations and poor alike. Humanity is losing hundreds of billions of dollars by keeping human beings isolated from the productive mainstream of culture.

Money is not the basic problem. Advocacy, government and business as usual, is not the solution. What is required is courageous, unifying leadership for empowerment. Government at all levels must be held absolutely responsible to provide leadership for the creation of an empowerment society. Equally important, the private sector, business, religion, non-profit service providers, labor, the public media, families, individuals, must take full responsibility to provide leadership, money and hard work for empowerment. Most important of all, is dynamic leadership by the disability community, by us, to empower ourselves and to communicate empowerment into the mind and the action of the world. Because no paternalistic status quo ever voluntarily empowered its subjects. We of the disability community will empower ourselves or we will not be empowered.

How will we do it? Now I have spoken to hundreds of leaders in each of the fifty United States and from many nations and I will briefly give you my thoughts, and certainly I would like to know yours.

First, last, and always, united advocacy is the key to empowerment. We must unite and greatly expand our Canadian and American disability rights movements. We must empower more rights advocates with disabilities as advisers, professionals, and leaders in rehabilitation. Of all professions, rehabilitation must be a model of empowerment in action! And we must reach out aggressively, beyond our movement, to create new coalitions for empowerment that include not only all people with disabilities, but non-disabled advocates, service providers, and traditional minorities, but business, labor, religion and the elderly, and all people sharing in the sincere desire to have a just and productive society.

Where we are thousands, we must become millions. We of Canada and the United States must join together with other independence-oriented nations to strengthen and enlarge Disabled People's International, Rehabilitation International, and all of the credible international organizations. We must be the catalysts to further unite our international movement and to expand it one hundred fold and more. We must support the creation and growth of authentic disability rights organizations and united cross-disability community coalitions in every nation, with thousands of new leaders, millions of activist members, and state of the art offices and technology. We must create, advocate, and implement comprehensive civil rights and empowerment policy. We must master the politics of equals at the local, national, and international levels. Millions of us!

And we must become far more effective communicators. Because we will not become truly equal until we communicate the message of our equality into the consciousness of more than 5 billion humans who will never read any law or any U.N. declaration, but whose

thoughts and actions will define our humanity every hour of every day. And we must learn to communicate through the awesome power of the public media. Through media we create, and especially, person to person.

And colleagues, we must transcend the impotent clichés of officialdom and the popular media. We must speak directly to the heart and conscience of the world with the simple truth, the naked rationality, the principal action, and the overwhelming love for humanity that is the only effective force for lasting progress. Our movement does not yet have a Gandhi or a Martin Luther King. But each one of us can be a truly powerful advocate for human rights every day, in every place, in our homes, in our schools, in our offices, our churches, and our clubs.

Now colleagues, the gravity of the challenges we face, the magnitude of our opportunity, and of our responsibility, is almost beyond comprehension. There is a public passion for profound cultural change that is unprecedented in all human history. This historic window of opportunity will not remain open long. Our aggressive leadership can create a dynamic momentum for civil rights and empowerment in every nation. Our inaction, simply pursuing advocacy and rehabilitation as usual, could condemn hundreds of millions of 21st century humans to continued isolation, poverty, and early death.

Now, many of us are tired after long years of struggle. I am tired. But I think of my daughter Betsy, with three children and no job, deserted by her husband three days after she was diagnosed as having Multiple Sclerosis. I think of my brother Peter, who three years ago chose death rather than dependency and discrimination when he was faced with the possibility, with the probability, of having to be in a wheelchair like mine. He looked at that chair and he said, "I would rather be dead than dependent." And we didn't take it seriously in our family. And four days later, my brother was dead.

I think of people in prison, in the institutions and back rooms of Moscow and Beijing, and I think of the people sleeping, and begging, and dying on the streets of Washington D. C., of Bombay, and Rio de Janeiro. And, colleagues, I think of the 14. 5 million children in the world who die every year for lack of the most basic necessities of human life. How many of those 14.5 million children are disabled? Three? Five? Eight? Nobody bothers to count! How many of the millions who survive are newly-disabled by the ordeal, destined to live short lives of Hell on earth? Nobody bothers to count! Holocaust. Holocaust, 1992, beyond words, and beyond tears. We are responsible to generations of children yet unborn, in every nation, who have the right to live lives of quality. We must unite. We must struggle. We must love.

Canada, the public media shows great hockey players, politicians, stars of entertainment, and mountains of incredible beauty. But my colleagues, you, in your quiet dedication to enlarging the quality of human beings, you are the profound beauty of Canada! I respect you, I believe in you, and I love you. Together, we shall overcome!

Disability & Employment
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accommodation
affiliations
career
customers
job development
for job seekers
legal issues
recruiting
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Justin Dart, Jr.

August 29, 1930 - June 22, 2002

Hear from Justin Dart* yourself!
Listen to Audio File - Transcript in Word format

* Speech delivered to Canadian Council on Rehabilitation and Work, 1991.

Justin Dart, An Obituary

June 22, 2002

By Fred Fay and Fred Pelka, written at Justin Dart's request.
Source: Justice for All

Justin Dart, Jr., a leader of the international disability rights movement and a renowned human rights activist, died last night at his home in Washington D.C. Widely recognized as "the father of the Americans with Disabilities Act" and "the godfather of the disability rights movement," Dart had for the past several years struggled with the complications of post-polio syndrome and congestive heart failure. He was seventy-one years old. He is survived by his wife Yoshiko, their extended family of foster children, his many friends and colleagues, and millions of disability and human rights activists all over the world.

Dart was a leader in the disability rights movement for three decades, and an advocate for the rights of women, people of color, and gays and lesbians. The recipient of five presidential appointments and numerous honors, including the Hubert Humphrey Award of the Leadership Conference on Civil Rights, Dart was on the podium on the White House lawn when President George H. Bush signed the ADA into law in July 1990. Dart was also a highly successful entrepreneur, using his personal wealth to further his human rights agenda by generously contributing to organizations, candidates, and individuals, becoming what he called "a little PAC for empowerment."

In 1998 Dart received the Presidential Medal of Freedom, the nation's highest civilian award. "Justin Dart," said President Clinton in 1996, "in his own way has the most Olympian spirit I believe I have ever come across."

Until the end, Dart remained dedicated to his vision of a "revolution of

Justin Dart urging Congress to pass the ADA. Washington, DC, March 1990

"To the critics who complain that ADA has not achieved total justice ...

I say what about the Bill of Rights and the Ten Commandments? Have they achieved total justice?

The vision of justice is an eternal long march to the Promised Land of the good life for all."

empowerment." This would be, he said, "a revolution that confronts and eliminates obsolete thoughts and systems, that focuses the full power of science and free-enterprise democracy on the systematic empowerment of every person to live his or her God-given potential." Dart never hesitated to emphasize the assistance he received from those working with him, most especially his wife of more than thirty years, Yoshiko Saji. "She is," he often said, "quite simply the most magnificent human being I have ever met."

Time and again Dart stressed that his achievements were only possible with the help of hundreds of activists, colleagues, and friends. "There is nothing I have achieved, and no addiction I have overcome, without the love and support of specific individuals who reached out to empower me... There is nothing I have accomplished without reaching out to empower others." Dart protested the fact that he and only three other disability activists were on the podium when President Bush signed the ADA, believing that "hundreds of others should have been there as well."

After receiving the Presidential Medal of Freedom, Dart sent out replicas of the award to hundreds of disability rights activists across the country, writing that, "this award belongs to you."

Justin Dart, Jr., was born on August 29, 1930, into a wealthy and prominent family. His grandfather was the founder of the Walgreen Drugstore chain, his father a successful business executive, his mother a matron of the American avant garde. Dart would later describe how he became "a super loser" as a way of establishing his own identity in this family of "super winners." He attended seven high schools, not graduating from any of them, and broke Humphrey Bogart's all-time record for the number of demerits earned by a student at elite Andover prep. "People didn't like me. I didn't like myself."

Dart contracted polio in 1948. With doctors saying he had less than three days to live, he was admitted into the Seventh Day Adventist Medical University in Los Angeles. "For the first time in my life I was surrounded by people who were openly expressing love for each other, and for me, even though I was hostile to them. And so I started smiling at people, and saying nice things to them. And they responded, treating me even better. It felt so good!" Three days turned into forty years, but Dart never forgot this lesson. Polio left Dart a wheelchair user, but he never grieved about this. "I count the good days in my life from the time I got polio. These beautiful people not only saved my life, they made it worth saving."

Another turning point was Dart's discovery in 1949 of the philosophy of Mohandas K. Gandhi. Dart defined Gandhi's message as, "Find your own truth, and then live it." This theme too would stay with him for the rest of his life.

Dart attended the University of Houston from 1951 to 1954, earning his bachelor's and master's degrees in political science

- Justin Dart, Jr.

Disability Rights Hero, Justin Dart, Jr., Completes His Mission

June 22, 2002 Source: Justice for All

In an uncharacteristically quiet moment, Justin Dart, Jr., died this morning with his wife and partner, Yoshiko Dart, at his side. Best known as the father of the Americans with Disabilities Act and often called the Martin Luther King of the disability civil rights movement, he thought of himself in much more humble terms - simply as a soldier of justice. After nearly 50 years of advocacy for the civil rights of oppressed people in America and around the world, Mr. Dart spent his final days at home completing his manifesto. His tenacious impatience and unwavering voice of empowerment will continue in the hearts and minds of all who fight for justice.

"Death is not a tragedy," wrote Mr. Dart before he died. "It is not an evil from which we must escape. Death is as natural as birth. Like childbirth, death is often a time of fear and pain, but also of profound beauty, of celebration of the mystery and majesty which is life pushing its horizons toward oneness with the truth of Mother Universe. The days of dying carry a special responsibility. There is a great potential to communicate values in a uniquely powerful way - the person who dies demonstrating for civil rights.

"I call for solidarity among all who love justice, all who love life, to create a revolution that will empower every single human being to govern his or her life, to govern the society and to be fully productive of life quality for self and for all."

Justin Dart, Jr. (right) at the signing of the Americans With Disabilities Act
July 26, 1990

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and history. He wanted to be a teacher, but the university withheld his teaching certificate because he was a wheelchair user. During his time in college, Dart organized his first human rights group -- a pro-integration student group at what was then a whites-only institution.

Dart went into business in 1956, building several successful companies in Mexico and Japan. He started Japan Tupperware with three employees in 1963, and by 1965 it had expanded to some 25,000. Dart used his businesses to provide work for women and people with disabilities. In Japan, for example, he took severely disabled people out of institutions, gave them paying jobs within his company, and organized some of them into Japan's first wheelchair basketball team. It was during this time he met his wife, Yoshiko.

The final turning point in Dart's life came during a visit to Vietnam in 1966, to investigate the status of rehabilitation in that war-torn country. Visiting a "rehabilitation center" for children with polio, Dart instead found squalid conditions where disabled children were left on concrete floors to starve. One child, a young girl dying there before him, took his hand and looked into his eyes. "That scene," he would later write, "is burned forever in my soul. For the first time in my life I understood the reality of evil, and that I was a part of that reality."

The Darts returned to Japan, but terminated their business interests. After a period of meditation in a dilapidated farmhouse, the two decided to dedicate themselves entirely to the cause of human and disability rights. They moved to Texas in 1974, and immersed themselves in local disability activism. From 1980 to 1985, Dart was a member, and then chair, of the Texas Governor's Committee for Persons with Disabilities. His work in Texas became a pattern for what was to follow: extensive meetings with the grassroots, followed by a call for the radical empowerment of people with disabilities, followed by tireless advocacy until victory was won.

In 1981, President Ronald Reagan appointed Dart to be the vice-chair of the National Council on Disability. The Darts embarked on a nationwide tour, at their own expense, meeting with activists in every state. Dart and others on the Council drafted a national policy that called for national civil rights legislation to end the centuries old discrimination of people with disabilities – what would eventually become the Americans with Disabilities Act of 1990.

In 1986, Dart was appointed to head the Rehabilitation Services Administration, a $3 billion federal agency that oversees a vast array of programs for disabled people. Dart called for radical changes, and for including people with disabilities in every aspect of designing, implementing, and monitoring rehabilitation programs. Resisted by the bureaucracy, Dart dropped a bombshell when he testified at a public hearing before Congress that the RSA was "a vast, inflexible federal system which, like the society it represents, still contains a significant portion of individuals who have not yet overcome obsolete,

Justin and Yoshiko Dart
on Independence Day - July 4, 1999

America at the Cross Roads

From Justin and Yoshiko Dart on Inauguration 2001 (Excerpt)

We must take up the passionate struggle for the rights and empowerment of all that is our priceless heritage - from Washington, Jefferson and Lincoln to FDR, King and Clinton.

The time has come to go beyond the grand words of campaigns and inaugurations, and unite in everyday action to perform society's most fundamental obligation: to enable all people to live their God given potential.

The time has come to create a culture that focuses the full force of science and free enterprise democracy on the individualized empowerment of every person, with or without disabilities.

The time has come to provide each person with the individualized tools to achieve full personal potential to govern self and all, to produce the best life for self and for all, and to enjoy the security of a life of dignity.

Photo by Tari Susan Hartman
Justin Dart (right) at ADA Anniversary March - New York City, 1993

"Get into politics
as if your lives depended on it,
because they do."

- Justin Dart, Jr.

paternalistic attitudes about disability." Dart was asked to resign his position, but remained a supporter of both Presidents Reagan and Bush.

In 1989, Dart was appointed chair of the President's Committee on the Employment of People with Disabilities, shifting its focus from its traditional stance of urging business to "hire the handicapped" to advocating for full civil rights for people with disabilities.

Dart is best known for his work in passing the Americans with Disabilities Act. In 1988, he was appointed, along with parents' advocate Elizabeth Boggs, to chair the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities. The Darts again toured the country at their own expense, visiting every state, Puerto Rico, Guam, and the District of Columbia, holding public forums attended by more than 30,000 people.

Everywhere he went, Dart touted the ADA as "the civil rights act of the future." Dart also met extensively with members of Congress and staff, as well as President Bush, Vice President Quayle, and members of the Cabinet. At one point, seeing Dart at a White House reception, President Bush introduced him as "the ADA man." The ADA was signed into law on July 26, 1990, an anniversary that is celebrated each year by "disability pride" events all across the country.

While taking pride in passage of the ADA, Dart was always quick to list all the others who shared in the struggle: Robert Silverstein and Robert Burgdorf, Patrisha Wright and Tony Coelho, Fred Fay and Judith Heumann, among many others. And Dart never wavered in his commitment to disability solidarity, insisting that all people with disabilities be protected by the law and included in the coalition to pass it -- including mentally ill "psychiatric survivors" and people with HIV/AIDS. Dart called this his "politics of inclusion," a companion to his "politics of principle, solidarity, and love."

After passage of the ADA, Dart threw his energy into the fight for universal health care, again campaigning across the country, and often speaking from the same podium as President and Mrs. Clinton. With the defeat of universal health care, Dart was among the first to identify the coming backlash against disability rights. He resigned all his positions to become "a full-time citizen soldier in the trenches of justice."

Photo by Ira Schwartz

"I AM WITH YOU. I LOVE YOU. LEAD ON."

(Justin Dart's final written message, June, 2002. Source: Justice for All)

Dearly Beloved:

Listen to the heart of this old soldier. As with all of us the time comes when body and mind are battered and weary.

But I do not go quietly into the night. I do not give up struggling to be a responsible contributor to the sacred continuum of human life. I do not give up struggling to overcome my weakness, to conform my life - and that part of my life called death - to the great values of the human dream.

Death is not a tragedy. It is not an evil from which we must escape. Death is as natural as birth. Like childbirth, death is often a time of fear and pain, but also of profound beauty, of celebration of the mystery and majesty which is life pushing its horizons toward oneness with the truth of mother universe. The days of dying carry a special responsibility. There is a great potential to communicate values in a uniquely powerful way - the person who dies demonstrating for civil rights.

Let my final actions thunder of love, solidarity, protest - of empowerment.

I adamantly protest the richest culture in the history of the world, a culture which has the obvious potential to create a golden age of science and democracy dedicated to