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Rosemary Garity, Plaintiff, v. APWU National AFL-CIO and APWU Local #7156, Defendants.

Judge Philip M. Pro

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Rosemary Garity, Plaintiff, v. APWU National AFL-CIO and APWU Local #7156, Defendants.

Keywords

Rosemary Garity, APWU National AFL-CIO, APWU Local #7156, 2:11-CV-01109-PMP-CWH, Summary Judgment, Disparate Treatment, Failure to Accommodate, Hostile Work Environment, Retaliation, Subjective Decision Making, Termination, Cancer, Other physical impairment disability, Depression, Other mental impairment disability, Service, Employment Law, ADA

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROSEMARY GARITY,
Plaintiff,

v.

APWU NATIONAL AFL-CIO and APWU
LOCAL #7156,
Defendants.

2:11-CV-01109-PMP-CWH
ORDER

Presently before the Court is Defendant APWU Local #7156’s Motion to Dismiss Amended Complaint (Doc. #57) and Defendant APWU National AFL-CIO’s Motion to Dismiss Amended Complaint (Doc. #60), both filed on December 6, 2011. Plaintiff Rosemary Garity filed an Opposition (Doc. #69) on December 19, 2011. Defendants filed a Joint Reply (Doc. #70) on January 6, 2012.

I. BACKGROUND

The following factual recitation is derived from Plaintiff Rosemary Garity’s Amended Complaint. For purposes of Defendants’ motions to dismiss, the Court accepts Plaintiff’s factual allegations as true. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A. Plaintiff’s Employment and Impairments

Plaintiff Rosemary Garity is employed by the American Postal Worker’s Union (“the National APWU”) as vice-president of the southern district of Nevada. (Am. Compl. (Doc #54) at 4:18.) Plaintiff was also employed by APWU Local #7156 (“the Local

1 APWU”) as a shop steward between January 2008 and January 12, 2011. (Id. at 4:19-20.)
2 Plaintiff was a member of the Local APWU at all times relevant to this action. (Id. at
3 4:20.) Plaintiff suffers from mental and physical impairments including: heel spurs, chest
4 pains, chronic fatigue, sleep disturbance, myalgia, muscle spasms, osteoporosis, major
5 depressive disorder, anxiety disorder, panic attacks, and cancer. (Id. at 4:26-5:1.)

6 In September 2010, Debra Blankenship (“Blankenship”) became the new
7 Postmaster. (Id. at 22:26-23:2.) After Blankenship’s arrival, Plaintiff began to observe
8 favoritism and disparate treatment in the office and decided to address it through the
9 grievance system. (Id. at 23:1-2.) On November 10, 2010, Kathi Poulos (“Poulos”), the
10 newly-elected president of the Local APWU, arrived after being voted in by a group whom
11 Plaintiff labels the “favorite employees.” (Id. at 23:6-8.) On December 29, 2010, Poulos
12 entered into an agreement with the United States Post Office management in Pahrump,
13 Nevada (“Management”) to cut Plaintiff’s hours. (Id. at 23:11-13.) From December 2010
14 through January 2011, Poulos secretly met with others to discuss removing Plaintiff from
15 her position as shop steward because Plaintiff had begun to file grievances to address the
16 favoritism and disparate treatment. (Id. at 23:14-24.)

17 On January 11, 2011, Plaintiff missed a grievance meeting in Las Vegas “due to
18 [her] legs and feet locking up severely.” (Id. at 6:8-10.) That same day, Poulos informed
19 Management that Poulos planned to remove Plaintiff from her position as shop steward for
20 the Local APWU. (Id. at 24:15-17.) Management sent Plaintiff home early. (Id. at 24:16.)
21 The next day, Poulos told Plaintiff “after that stunt you pulled yesterday” she was removing
22 Plaintiff as shop steward for the Local APWU and appointing herself to fill the position.
23 (Id. at 6:10-12, 24:19-20.)

24 **B. Plaintiff’s Grievances**

25 Plaintiff asked APWU officials to file dozens of grievances on her behalf.
26 Poulos and other officials refused to investigate and file many of these grievances. (Id. at

1 14:22-19:12.) Of the grievances filed, Poulos assured Plaintiff that all the grievances were
2 valid, but Poulos later withdrew over forty of these grievances. (Id. at 20:2-22:20.) In one
3 instance, on January 22, 2011, Poulos told Plaintiff that another employee wanted Poulos to
4 withdraw Plaintiff's grievances regarding discrimination and retaliation, which Poulos did.
5 (Id. at 26:3-19.) Poulos was openly hostile towards Plaintiff every time she requested that
6 Poulos file a grievance on Plaintiff's behalf, and Poulos told Plaintiff that she was the only
7 one having problems. (Id. at 11:6-8.) Poulos also refused to address Management's
8 "continual and constant mental abuse/harassment" of Plaintiff. (Id. at 11:1-2.) On
9 February 1, 2011, Plaintiff approached the alternate shop steward, Al Weyen ("Weyen"), to
10 file multiple grievances but he refused to investigate and the time limits on the grievances
11 lapsed. (Id. at 27:19-23.) Furthermore, the National APWU business agents James
12 Scoggins ("Scoggins") and Gilbert Ybarra ("Ybarra") withdrew grievances, settled
13 grievances in favor of Management, and advised Poulos to withdraw and not file
14 grievances on Plaintiff's behalf. (Id. at 5:8-11, 10:9-11.)

15 Many of Plaintiff's grievances related to adverse scheduling. Plaintiff repeatedly
16 filed grievances relating to the cutting of her hours and the "criminal delay" of mail. (See,
17 e.g., id. at 15:8-20.) Poulos and Management scheduled Plaintiff to work irregular hours.
18 (See, e.g., id. at 28:2-3.) During a discussion between Poulos and Plaintiff on March 23,
19 2011, Poulos stated that Plaintiff was restricted to working four hours a day, four days a
20 week; Plaintiff disagreed. (Id. at 30:23-27.) Poulos also stated that it was better for
21 Plaintiff's chronic fatigue and sleep apnea to start work later in the day, but Plaintiff argued
22 that it was actually better for her condition if she started work earlier in the day. (Id. at
23 31:1-3.) Poulos indicated that Plaintiff's work restrictions kept changing based on
24 Management's instructions to Poulos. (Id. at 30:28-31:1.)

25 Plaintiff also grieved the quality of the representation she received from
26 Defendants and requested alternative representation. (See, e.g., id. at 36:1-2.) On April 21,

1 2011, Management refused to sign Plaintiff's request for representation. (Id. at 33:1-2.)
2 On May 2, 2011, the regional coordinator assigned Jerry Bevens ("Bevens"), President of
3 APWU Local #761, as Plaintiff's new representative for disciplinary grievances. (Id. at
4 33:27-28, 34:24.)

5 **C. Plaintiff's Discipline**

6 On April 20, 2011, Poulos wrote a three-page statement to Management
7 regarding Plaintiff. (Id. at 32:23-25.) Management used this letter in its decision to
8 suspend Plaintiff for thirty days. (Id. at 32:25-26.) Plaintiff received her thirty day
9 suspension letter on April 28, 2011. (Id. at 33:17-18.) On May 9, 2011, Plaintiff received a
10 notice of removal. (Id. at 34:7-9.) On May 30, 2011, Bevens wrote a letter stating that
11 Plaintiff had "no chance of surviving the discipline without outside representation" and that
12 Poulos and Raydell Moore, ex-regional coordinator and technical advisor to the Local
13 APWU, were refusing to cooperate with the investigation and were working with
14 Blankenship and Management instead of the APWU. (Id. at 34:24-28.) On June 11, 2011,
15 Plaintiff was removed from the Postal Service. (Id. at 35:10.) Plaintiff claims she was
16 disciplined for requesting alternative representation from the APWU, time off, and
17 schedule changes; Poulos's statements to Management; and Plaintiff's disabilities. (Id. at
18 33:1-5, 8:22-24, 32:23-26.)

19 After Plaintiff's removal, National APWU business agent Shirley Taylor
20 ("Taylor") negotiated a settlement on Plaintiff's behalf wherein Plaintiff would be paid for
21 four hours a day from June 25, 2011 through September, 2011. (Id. at 7:26-27.) Plaintiff
22 asked Taylor if she would be removed, reinstated, or retired, and Taylor responded no. (Id.
23 at 7:28-8:1.) Taylor told Plaintiff she could not return to work because Plaintiff had
24 applied for disability retirement. (Id. at 8:12-13.) Taylor also told Plaintiff that her doctor
25 stated Plaintiff could not work. (Id. at 8:15-16.) Plaintiff alleges that many employees
26 apply for disability retirement and keep working until approved, her doctor did not state

1 that she could not work, she could perform her job duties if properly accommodated, and
2 Plaintiff's grievance had nothing to do with her restrictions but instead her grievance relates
3 to Plaintiff's unjust removal. (Id. at 8:13-22.)

4 On August 10, 2011, Poulos and Danielle Bennett ("Bennett"), another shop
5 steward, announced that they had agreed to new work restrictions for Plaintiff: fewer than
6 forty hours a week, six days a week. (Id. at 2:4-5, 35:24-25.) Plaintiff requested Bennett
7 file a grievance regarding the new restrictions, but Bennett told Plaintiff that she was not
8 Plaintiff's shop steward. (Id. at 35:26-27.) Plaintiff asked Poulos to file a grievance
9 regarding these restrictions, but Poulos refused as well. (Id. at 35:28-36:2.) In August
10 2011, National APWU business agent Scoggins agreed to the six-day a week assignment
11 for Plaintiff. (Id. at 4:6-8, 36:5-6.) Plaintiff was not happy with this new assignment
12 because it was contrary to a prior position taken by the National APWU and all but one
13 person at the August union meeting viewed this new assignment as undesirable. (Id. at 4:6-
14 12, 36:6-7.) The Postal Service reinstated Plaintiff on September 27, 2011. (Id. at 36:13.)

15 After Plaintiff's reinstatement, on October 18, 2011, a shop steward bullied
16 Plaintiff, and in response, Plaintiff called threat assessment because she was crying
17 uncontrollably. (Id. at 36:17-20.) On October 21, 2011, Plaintiff had a mental breakdown
18 because she was unable to handle any more abuse. (Id. at 36:21.) From the end of October
19 to the beginning of November 2011, Plaintiff took vacation time, sick leave, and leave
20 under the Family and Medical Leave Act ("FMLA") to remove herself from the
21 environment. (Id. at 36:22-23.)

22 **D. History of the Present Action**

23 On February 17, 2011, Plaintiff filed an Equal Employment Opportunity
24 ("EEO") complaint against the APWU. (Id. at 28:21.) On March 18, 2011, Plaintiff filed
25 charges with the Equal Employment Opportunity Commission ("EEOC"). (Id. at 30:16.)
26 However, the APWU refused to mediate the EEOC grievances. (Id. at 33:25.) On June 23,

1 2011, the EEOC issued Plaintiff a Notice of Right to Sue letter. (Id. at 35:11; Mot. for
2 Leave (Doc. #74).)

3 On July 6, 2011, Plaintiff filed a Complaint (Doc. #1) in this Court against
4 Defendants, which this Court dismissed without prejudice for insufficient service of
5 process and failure to state a claim. (Order (Doc #53).) The Court ordered Plaintiff to
6 effect proper service by November 28, 2011. (Id.) Plaintiff then filed an Amended
7 Complaint (Doc. #54) on November 15, 2011. Plaintiff filed proof of service on the
8 National APWU on December 5, 2011 and the Local APWU on December 9, 2011. (Proof
9 of Serv. (Doc. #56); Proof of Serv. (Doc. #67).) Plaintiff’s Amended Complaint asserts
10 violations of 42 U.S.C. §§ 2000e-2, 2000e-3 (“Title VII”); the Americans with Disabilities
11 Act of 1990 (“ADA”); the Americans with Disabilities Act Amendments Act (“ADAAA”);
12 and the Rehabilitation Act of 1973 (“Rehab Act”). Specifically, Plaintiff alleges: disability
13 discrimination in violation of Title VII (counts I, IV, and V); retaliation in violation of Title
14 VII (count II); hostile work environment in violation of Title VII (count III); intentional
15 infliction of emotional distress (count VI); negligent retention (count VI)¹; and conspiracy
16 to violate her civil rights under 42 U.S.C. §§ 1981, 1983, 1985, 1986 (count VII).

17 Defendants now move to dismiss Plaintiff’s Amended Complaint. Defendants
18 argue Plaintiff fails to state a claim upon which relief may be granted. In addition, the
19 National APWU argues Plaintiff failed to exhaust her administrative remedies, and the
20 National APWU is not vicariously liable for the Local APWU’s conduct. The Local
21 APWU asserts that Plaintiff has not filed proof of service on the Local APWU. Plaintiff
22 responds that she has sufficiently pled facts, if found to be true, to establish a prima facie
23 case for each of her causes of action. Plaintiff also argues she exhausted her administrative

24 ///

25
26 ¹ Plaintiff erroneously labels two claims as Count VI.

1 remedies, but does not respond to the Local APWU’s proof of service argument.²

2 **II. DISCUSSION**

3 **A. Procedural Grounds for Dismissal**

4 **1. Proof of Service**

5 The Local APWU argues that Plaintiff has not filed proof of service upon the
6 Local APWU in compliance with Federal Rule of Civil Procedure 4, and thus the Court
7 must dismiss all claims against the Local APWU. Plaintiff does not respond.

8 Federal Rule of Civil Procedure 4(m) requires that a plaintiff serve a defendant
9 “within 120 days after the complaint is filed.” Rule 4(l)(1) provides that “[u]nless service
10 is waived, proof of service must be made to the court. Except for service by a United
11 States marshal or deputy marshal, proof must be by the server’s affidavit.”

12 Here, Plaintiff filed the Amended Complaint on November 15, 2011. (Am.
13 Compl. (Doc. #54).) On December 5, 2011, Plaintiff filed proof of service of the Amended
14 Complaint on the National APWU, including an affidavit by the process server, stating that
15 he served the National APWU on November 22, 2011. (Proof of Serv. (Doc. #56).)
16 Although Plaintiff did not file proof of service on the Local APWU prior to the Local
17 APWU filing its Motion to Dismiss, on December 9, 2011, Plaintiff filed proof of service
18 on the Local APWU, including a statement by the server that he served the Local APWU
19 on December 7, 2011. (Proof of Serv. (Doc. #67).) December 5 and 9, 2011 fall within the
20 120 day time period for service under Rule 4(m). Therefore, the Court will deny the Local
21 APWU’s Motion to Dismiss for improper service.

22
23 ² Plaintiff attaches four letters to her Opposition. Federal Rule of Civil Procedure 12(d) “gives
24 courts the discretion to accept and consider extrinsic materials offered in connection with [a motion
25 to dismiss], and to convert the motion to one for summary judgment.” Hamilton Materials, Inc. v.
26 Dow Chem. Corp., 494 F.3d 1203, 1207 (9th Cir. 2007). The Court declines to consider the evidence
presented by Plaintiff and will not convert Defendants’ motions to dismiss to motions for summary
judgment.

1 2. Exhaustion Requirement

2 The National APWU argues that Plaintiff did not exhaust her administrative
3 remedies with respect to any claim against the National APWU because she did not name
4 the National APWU in her EEOC complaint. Plaintiff responds that she filed a charge
5 against both Defendants, and even so, the claims against the National APWU were
6 reasonably expected to grow out of the allegations presented to the EEOC.

7 To bring an ADA claim for disability discrimination,³ a plaintiff must first
8 exhaust her administrative remedies. 42 U.S.C. §§ 2000e-5, 12117(a) (incorporating the
9 Title VII exhaustion requirement into Title I of the ADA); Sommatino v. United States, 255
10 F.3d 704, 707 (9th Cir. 2001). To illustrate, a federal employee must notify an EEO
11 counselor of the discrimination within forty-five days of the alleged conduct, and if the
12 matter remains unresolved, the employee may file a formal complaint with the EEOC.
13 Sommatino, 255 F.3d at 708. This exhaustion requirement is statutory rather than
14 jurisdictional. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). But,

15
16 ³ Title VII prohibits discrimination based on race, color, religion, sex, and national origin.
17 42 U.S.C. § 2000e-2. Plaintiff describes her claims as Title VII claims for discrimination based on
18 disability, but disability is not a protected class under Title VII. However, at the beginning of her
19 Amended Complaint, Plaintiff also alleges that Defendants violated her rights under the ADA. The
20 ADA prohibits discrimination against employees with disabilities by certain employers. 42 U.S.C. §§
21 12111(5), 12112(a). The Court will liberally construe Plaintiff’s Title VII claims (counts I to V) as
22 ADA claims. Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987) (“The Supreme Court has
23 instructed the federal courts to liberally construe the ‘inartful pleading’ of pro se litigants.” (quotation
24 omitted)).

25 Plaintiff also alleges Defendants violated her rights under the Rehab Act, which prohibits
26 discrimination against employees with disabilities by federal employers, federal contractors, and
recipients of federal financial assistance. 29 U.S.C. §§ 791, 793, 794; Oliver v. Ralphs Grocery Co.,
654 F.3d 903, 910 n.10 (9th Cir. 2011). Plaintiff has not alleged that Defendants are federal
employers, federal contractors, or recipients of federal financial assistance. As such, the Court will
not construe Plaintiff’s Title VII claims as Rehab Act claims. Likewise, Plaintiff alleges Defendants
violated her rights under the ADAAA; however, the ADAAA merely expanded the definition of
“disability” under the ADA. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d
850, 853 (9th Cir. 2009). Therefore, the Court will not construe Plaintiff’s Title VII claims as
ADAAA claims.

1 substantial compliance with the presentment requirements of a discrimination complaint is
2 a jurisdictional prerequisite. Sommatino, 255 F.3d at 708.

3 The district court's jurisdiction is limited to the scope of the EEOC charge and
4 investigation, claims that are "'like or reasonably related' to the allegations made in the
5 EEOC charge," and claims that "can reasonably be expected to grow out of" the EEOC
6 charge and investigation. Deppe v. United Airlines, 217 F.3d 1262, 1267 (9th Cir. 2000)
7 (quotations omitted). More specifically, district courts have jurisdiction over claims against
8 parties named in the EEOC charge, parties involved in the conduct giving rise to the EEOC
9 charge, and parties that should have anticipated that the plaintiff would bring suit against
10 them. Sosa v. Hiraoka, 920 F.2d 1451, 1458-59 (9th Cir. 1990) (quotations omitted).

11 Here, Plaintiff uses the generic term "APWU" in her EEOC Charge of
12 Discrimination. (Decl. of Anton Hajjar in Supp. of Defs.' Motions to Dismiss (Doc. #13),
13 Ex. 1.) Likewise, in her Amended Complaint, Plaintiff alleges that she filed an "EEO
14 complaint against the APWU" and "EEOC charges [] against [the] APWU." (Am. Compl.
15 at 28:21, 30:16.) . Plaintiff does not specify in her Amended Complaint whether her EEO
16 complaint and EEOC charges were against the National APWU, the Local APWU, or both.
17 Construing Plaintiff's pro se Amended Complaint liberally, the Court finds that Plaintiff
18 filed an EEO complaint and EEOC charges against both Defendants.

19 But even assuming Plaintiff did not name the National APWU in her EEO
20 complaint and EEOC charges, the National APWU was involved in the acts giving rise to
21 the EEOC claims and should have anticipated that Plaintiff would bring suit against it. For
22 example, National APWU business agents Scoggins and Ybarra withdrew grievances,
23 settled grievances in favor of Management, and advised Poulos to withdraw and not file
24 grievances on Plaintiff's behalf. (Id. at 5:8-11, 10:9-11.) Accordingly, the Court has
25 jurisdiction over Plaintiff's claims against Defendants, and thus, the Court will deny the
26 National APWU's Motion to Dismiss for failure to exhaust administrative remedies.

1 **B. Substantive Grounds for Dismissal**

2 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move the
3 Court for the dismissal of a complaint based upon its “failure to state a claim upon which
4 relief can be granted.” In considering whether the complaint is sufficient to state a claim,
5 “all well-pleaded allegations of material fact are taken as true and construed in a light most
6 favorable to the non-moving party.” Wylter Summit P’ship v. Turner Broad. Sys. Inc., 135
7 F.3d 658, 661 (9th Cir. 1998). To succeed on such a motion, the defendant must show the
8 plaintiff does not make sufficient factual allegations to establish a plausible entitlement to
9 relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 570).
10 Such allegations must amount to “more than labels and conclusions, [or] a formulaic
11 recitation of the elements of a cause of action.” Twombly, 550 U.S. at 555. “In
12 determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the
13 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
14 defendant’s motion to dismiss.” Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1197 n.1
15 (9th Cir. 1998) (emphasis omitted).

16 “A document filed pro se is to be liberally construed, and a pro se complaint,
17 however inartfully pleaded, must be held to less stringent standards than formal pleadings
18 drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal citation and
19 quotation marks omitted). Thus, the court “must afford plaintiff the benefit of any doubt”
20 in construing a pro se complaint. Karim-Panahi v. L.A. Police Dep’t, 839 F.2d 621, 623
21 (9th Cir. 1988).

22 1. Disability Discrimination—Counts I, IV, and V

23 Defendants contend Plaintiff’s Amended Complaint does not allege facts
24 establishing that the alleged discriminatory conduct was because of Plaintiff’s disability.
25 The National APWU in particular argues that Plaintiff does not allege facts tying the
26 National APWU to the alleged discriminatory conduct. Both Defendants argue they were

1 under no affirmative duty to combat discrimination. Even so, Defendants contend they
2 have not taken adverse action or any type of action that would dissuade a reasonable
3 employee from engaging in a protected activity. In response, Plaintiff argues that she (1)
4 suffers from a disability because her physical and mental impairments substantially limit
5 her major life activities and Defendants knew about these impairments; (2) was qualified
6 for and satisfied the requirements of her position; (3) requested an accommodation; and (4)
7 suffered adverse employment actions because of her disability.

8 The ADA provides, in relevant part, “No covered entity shall discriminate
9 against a qualified individual on the basis of disability in regard to . . . [the] discharge of
10 employees.” 42 U.S.C. § 12112(a). The ADA defines discrimination as “not making
11 reasonable accommodations to the known physical or mental limitations of an otherwise
12 qualified individual with a disability who is an applicant or employee, unless such covered
13 entity can demonstrate that the accommodation would impose an undue hardship on the
14 operation of the business of such covered entity.” *Id.* § 12112(b)(5)(A). To state a prima
15 facie case under the ADA, a plaintiff must demonstrate (1) she is disabled within the
16 meaning of the ADA, (2) she is a qualified individual, and (3) she suffered an adverse
17 employment action because of her disability. Nunes v. Wal-Mart Stores, Inc., 164 F.3d
18 1243, 1246 (9th Cir. 1999). Here, Defendants do not dispute that Plaintiff is disabled
19 within the meaning of the ADA and a qualified individual. However, Defendants dispute
20 whether Plaintiff suffered an adverse employment action because of her disability.

21 *a. Adverse Employment Action*

22 The United States Court of Appeals for the Ninth Circuit has not specifically
23 defined “adverse employment action” for purposes of an ADA discrimination claim. But,
24 “[i]t is beyond challenge that a person’s termination is considered an adverse employment
25 action.” Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1089 (9th Cir. 2001).
26 Likewise, disciplinary suspension is an adverse employment action giving rise to a

1 disability discrimination claim. See Raad v. Fairbanks N. Star Borough Sch. Dist., 323
2 F.3d 1185, 1196 (9th Cir. 2003). Adverse employment actions also include “refusing to
3 make reasonable accommodations for a plaintiff’s disabilities.” Colwell v. Rite Aid Corp.,
4 602 F.3d 495, 504 (3d Cir. 2010) (quotation omitted). Specifically, an employer
5 discriminates by “not making reasonable accommodations to the known physical or mental
6 limitations of an otherwise qualified individual with a disability who is an applicant or
7 employee, unless such covered entity can demonstrate that the accommodation would
8 impose an undue hardship on the operation of the business of such covered entity.”
9 42 U.S.C. § 12112(b)(5)(A).

10 Unions shall not “cause or attempt to cause an employer to discriminate against
11 an individual in violation of [Title VII].” 42 U.S.C. § 2000e-2(c)(3). More specifically,
12 unions may be liable for refusing to file grievances concerning discrimination. Goodman v.
13 Lukens Steel Co., 482 U.S. 656, 669 (1987), superceded by statute on other grounds as
14 recognized in Johnson v. Lucent Technologies Inc., 653 F.3d 1000, 1005-06 (9th Cir.
15 2011)). Unions also may be liable for acquiescing or joining in an employer’s
16 discriminatory practices. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1304 (9th Cir.
17 1982). The United States Supreme Court has applied these rules of union liability to other
18 federal anti-discrimination laws. 14 Penn Plaza L.L.C. v. Pyett, 556 U.S. 247, 272 (2009)
19 (discussing union liability generally under federal anti-discrimination laws and applying
20 these rules specifically to the Age Discrimination in Employment Act (“ADEA”)).

21 In her Amended Complaint, Plaintiff alleges that Defendants took adverse
22 employment action against Plaintiff by refusing to file grievances alleging discrimination
23 and by joining in Management’s discriminatory practices. (Am. Compl. at 4:15-17, 9:13-
24 23, 10:9-11.) Plaintiff alleges the following constitute adverse employment actions taken
25 by Management: cut hours, adverse scheduling, failure to accommodate, constructive
26 suspension, suspension, removal, and breach of grievance settlements. (Id. at 4:24-25,

1 9:13-23.) Viewing the facts in the light most favorable to Plaintiff, Plaintiff has alleged
2 sufficient facts to support a claim of adverse employment action. Management refused to
3 accommodate Plaintiff, suspended Plaintiff, and ultimately removed Plaintiff, all of which
4 constitute adverse employment actions. Similarly, Plaintiff has pled sufficient facts to
5 support a claim that Defendants are liable for Management’s discriminatory practices.
6 Defendants refused to file grievances and joined in Management’s discriminatory practices.
7 For example, Poulos communicated with Plaintiff regarding adverse scheduling and work
8 restrictions and wrote a three-page statement to Management, which Plaintiff alleges
9 Management used in making its decision to suspend and remove Plaintiff.

10 *b. “Because of” Plaintiff’s Disability*

11 An employer takes an adverse action “because of” the plaintiff’s disability if the
12 action was motivated, even in part, by animus towards the plaintiff’s disability or request
13 for accommodation. Dark v. Curry Cnty., 451 F.3d 1078, 1084-85 (9th Cir. 2006). Thus,
14 the ADA applies when the plaintiff’s “disability is one factor, but not the only factor,
15 motivating an adverse employment action.” Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065
16 n.63 (9th Cir. 2005) (quotation omitted). But a decision motivated by factors merely
17 related to the plaintiff’s disability is not prohibited by the ADA. See Lopez v. Pac. Mar.
18 Ass’n, 657 F.3d 762, 764 (9th Cir. 2011).

19 Here, viewing the facts alleged in the light most favorable to Plaintiff, Plaintiff
20 has alleged sufficient facts to support a claim that Defendants’ refusals to file grievances
21 and involvement in Management’s discriminatory practices were motivated, at least in part,
22 by animus towards Plaintiff’s disabilities or requests for accommodation. In particular,
23 Poulos removed Plaintiff as shop steward the day after Plaintiff did not attend a grievance
24 meeting because Plaintiff’s legs and feet locked up severely. (Am. Compl. at 6:8-12,
25 24:15-17, 19-20.) Poulos referred to Plaintiff’s condition as a “stunt.” (Id. at 6:10-12.)
26 Poulos, Scoggins, and Ybarra withdrew grievances, some of which alleged discrimination.

1 (Id. at 10:9-11, 26:5-9, 17.) Plaintiff requested an accommodation due to her medical
2 conditions, and on the same day Weyen refused to file grievances. (Id. at 27:16-23.)
3 Poulos stated that the work restrictions imposed by Management were due to Plaintiff’s
4 medical conditions and Poulos refused to file grievances opposing these work restrictions.
5 (Id. at 30:23-28, 31:1-8.) Accordingly, Plaintiff has alleged sufficient facts to support a
6 plausible disability discrimination claim under the ADA. The Court will deny Defendants’
7 motions to dismiss Plaintiff’s disability discrimination claims.

8 2. Retaliation—Count II

9 To state a prima facie case of retaliation under the ADA, the plaintiff must
10 demonstrate “(1) involvement in a protected activity, (2) an adverse employment action and
11 (3) a causal link between the two.” Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1269
12 (9th Cir. 2009). A plaintiff engages in a protected activity by pursuing her rights under the
13 ADA, for example, by filing union grievances and EEOC charges. Pardi v. Kaiser Found.
14 Hosp., 389 F.3d 840, 850 (9th Cir. 2004). For purposes of an ADA retaliation claim, an
15 action constitutes an adverse employment action if it is “reasonably likely to deter
16 employees from engaging in protected activity.” Id. (quotation omitted). Lastly, a casual
17 link can be inferred from circumstantial evidence, such as an employer’s knowledge and
18 temporal proximity between the protected activity and the adverse employment action.
19 Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (employer was aware of the
20 plaintiff’s EEOC complaint and took adverse employment action within three months of
21 filing); see also Bell v. Clackamas Cnty., 341 F.3d 858, 865 (9th Cir. 2003) (noting that
22 temporal proximity alone can be sufficient).

23 Plaintiff has pled sufficient facts to support a claim that she engaged in protected
24 activity by filing union grievances and EEOC charges. As discussed above, Plaintiff also
25 has alleged sufficient facts to support a claim that Management took adverse employment
26 action against Plaintiff and Defendants are liable for Management’s actions because

1 Defendants refused to file grievances on Plaintiff's behalf and joined in Management's
2 discriminatory practices. Lastly, Plaintiff has pled sufficient facts to infer a causal link
3 between Plaintiff's protected activity and the adverse employment action because
4 Defendants were aware of Plaintiff's EEOC charges and Management removed Plaintiff
5 fewer than three months after she filed EEOC charges. Accordingly, Plaintiff has alleged
6 sufficient facts to support a plausible retaliation claim under the ADA. The Court will deny
7 Defendants' motions to dismiss Plaintiff's retaliation claim.

8 3. Hostile Work Environment—Count III

9 It is unsettled whether a cause of action for a hostile work environment claim
10 exists under the ADA. Brown v. City of Tucson, 336 F.3d 1181, 1190 (9th Cir. 2003).
11 Assuming without deciding that such a claim exists, courts would likely apply Title VII
12 law. See McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998).
13 Consequently, if such a claim exists, a plaintiff must prove:

14
15 (1) that she belongs to a protected group; (2) that she was subjected to
16 unwelcome harassment; (3) that the harassment complained of was
17 based on her disability or disabilities; (4) that the harassment
complained of affected a term, condition, or privilege of employment;
and (5) that the employer knew or should have known of the
harassment and failed to take prompt, remedial action.

18 Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235-236 (5th Cir. 2001) (quotation
19 omitted). An “objectionable environment must be both objectively and subjectively
20 offensive, one that a reasonable person would find hostile or abusive, and one that the
21 victim in fact did perceive to be so.” Fragher v. City of Boca Raton, 524 U.S. 775, 787
22 (1998). The Court considers the totality of the circumstances in determining whether
23 conduct is sufficiently severe or pervasive. Brooks v. City of San Mateo, 229 F.3d 917,
24 923 (9th Cir. 2000). The Court considers “frequency of the discriminatory conduct; its
25 severity; whether it is physically threatening or humiliating, or a mere offensive utterance;
26 and whether it unreasonably interferes with an employee's work performance.” Fragher,

1 524 U.S. at 787-88 (quotation omitted). However, anti-discrimination laws are not a
2 general civility code, therefore, “simple teasing, offhand comments, and isolated incidents
3 (unless extremely serious) will not amount to discriminatory changes in the terms and
4 conditions of employment.” Id. at 788 (internal citation and quotation marks omitted).

5 In her Amended Complaint, Plaintiff alleges that Poulos was openly hostile
6 towards Plaintiff every time she requested that Poulos file a grievance on her behalf, and
7 Poulos told Plaintiff that she was the only one having problems. (Am. Compl. at 11:6-8.)
8 Plaintiff has not alleged sufficient facts to demonstrate that this was more than an offensive
9 utterance. Plaintiff also alleges Poulos refused to address Management’s “continual and
10 constant mental abuse/harassment.” (Id. at 11:1-2.) After her reinstatement, Plaintiff called
11 threat assessment to report bullying from the APWU shop steward and a co-worker. (Id. at
12 36:17-20.) Three days later, Plaintiff alleges she had a mental breakdown because of the
13 abuse, after which she took vacation and sick leave to remove herself from the
14 environment. (Id. at 36:21-22.) Although Plaintiff alleges sufficient facts to demonstrate
15 that she subjectively found her work environment hostile and abusive, Plaintiff does not
16 allege specific incidents of mental abuse, harassment, or bullying sufficient for the Court to
17 evaluate whether a reasonable person would find the work environment hostile and abusive.
18 Furthermore, Plaintiff has not alleged that the mental abuse, harassment, or bullying was
19 based on her disability. Accordingly, Plaintiff has failed to plead sufficient facts to support
20 a hostile work environment claim, and the Court will grant Defendants’ motions to dismiss
21 Plaintiff’s hostile work environment claim.

22 4. Intentional Infliction of Emotional Distress—Count VI

23 Defendants argue Plaintiff’s intentional infliction of emotional distress (“IIED”)
24 claim does not amount to an intentional infliction tort and is preempted by § 301 of the
25 Labor Management Relations Act (“LMRA”). Plaintiff responds that Defendants’ conduct
26 was extreme and outrageous—namely, the extinguishment of her rights, collusion with

1 Management to suspend and remove Plaintiff, and refusal to mediate at the EEOC—and
2 such conduct caused emotional distress, evidenced by Plaintiff’s psychological care and
3 medication. Plaintiff also argues that the Court need not interpret the Collective Bargaining
4 Agreement (“CBA”) to evaluate whether Defendant extinguished Plaintiff’s rights and
5 colluded with Management.

6 To establish a claim for intentional infliction of emotional distress, a plaintiff
7 must prove: “(1) extreme and outrageous conduct with either the intention of, or reckless
8 disregard for, causing emotional distress, (2) the plaintiff’s having suffered severe or
9 extreme emotional distress and (3) actual or proximate causation.” Star v. Rabello, 625
10 P.2d 90, 91-92 (Nev. 1981). Extreme and outrageous conduct exceeds “all bounds of
11 decency” and is “utterly intolerable in a civilized community.” Maduik v. Agency Rent-
12 A-Car, 953 P.2d 24, 26 (Nev. 1998) (quotation omitted). Persons must be expected and
13 required to tolerate occasional acts, which are inconsiderate and unkind. Id. “Liability for
14 emotional distress will not extend to ‘mere insults, indignities, threats, annoyances, petty
15 oppressions, or other trivialities.’” Candelore v. Clark Cnty. Sanitation Dist., 975 F.2d 588,
16 591 (9th Cir. 1992) (quoting Restatement (Second) of Torts § 46 cmt. d).

17 Plaintiff argues that the same conduct that gives rise to her discrimination claims
18 forms the basis of her IIED claim. These acts, although arguably offensive, inconsiderate,
19 and unkind, do not rise to the level of extreme and outrageous such that they exceed “all
20 bounds of decency.” “Discriminatory employment practices are wrong and federal law
21 makes such conduct unlawful and provides for relief; however, the tort of intentional
22 infliction of emotional distress is not intended to reach every discrimination claim.” Alam
23 v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993). Therefore, the Court will
24 grant Defendants’ motions to dismiss Plaintiff’s IIED claim.

25 5. Negligent Retention—Count VI

26 Defendants contend that because APWU officials are elected, they cannot be

1 negligently retained by the APWU. Plaintiff responds that the National APWU was
2 negligent in failing to investigate national and local officials' discriminatory conduct of
3 which the National APWU was aware, failing to suspend officials for such conduct, and
4 retaining officials despite such conduct.

5 An employer has a general duty to use reasonable care in the retention of
6 employees to ensure that employees are fit for their positions. Hall v. SSF, Inc., 930 P.2d
7 94, 99 (Nev. 1996). The employer breaches this duty when the employer hires or retains an
8 employee that the employer knew or should have known might cause harm to others. See
9 id. at 98-99; see also Chavez v. Thomas & Betts Corp., 396 F.3d 1088, 1099 (10th Cir.
10 2005), overruled on other grounds by Metzler v. Fed. Home Loan Bank of Topeka, 464
11 F.3d 1164, 1171 n.2 (10th Cir. 2006).

12 Here, Plaintiff alleges that Defendants retained national and local officials
13 despite being aware that such officials were discriminating and otherwise causing harm to
14 Plaintiff. As such, Plaintiff has pled sufficient facts to state a claim for negligent retention.
15 Defendants have not offered support for their contention that an employer cannot
16 negligently retain an elected official. Accordingly, the Court will deny Defendants'
17 motions to dismiss Plaintiff's negligent retention claim.

18 7. Conspiracy to Violate Civil Rights—Count VII

19 Defendants argue that Plaintiff's conspiracy claim under 42 U.S.C. § 1985
20 should be dismissed because § 1985 is unavailable as a remedy for Title VII violations.
21 Plaintiff does not respond to this position; rather, Plaintiff argues that she has established a
22 prima facie case of conspiracy under § 1985 by circumstantial evidence.

23 Section 1985(3) provides a remedy for certain types of conspiracies as described
24 within the statute;⁴ it does not provide a remedy for a claim of conspiracy to violate Title

25
26 ⁴ To state a claim for relief under § 1985(3) a plaintiff must establish that the defendant did

1 VII. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372-78 (1979),
2 superseded by statute on other grounds as recognized in Alexander v. Gerhardt Enters.,
3 Inc., 40 F.3d 187, 191-92 (7th Cir. 1994). Title VII remedies are not available to a plaintiff
4 unless that plaintiff exhausts her administrative remedies. Id. at 372-73. For example, as
5 discussed above, a plaintiff must file a claim with the EEOC before bringing suit for
6 discrimination. If a plaintiff could assert a Title VII violation through § 1985, then the
7 plaintiff could circumvent the administrative requirements set forth in Title VII. Id. at 375-
8 76. Thus, “deprivation of a right created by Title VII cannot be the basis for a cause of
9 action under § 1985(3).” Id. at 378.

10 Because the same administrative requirements set forth in Title VII apply to the
11 ADA under 42 U.S.C. § 12117(a), the Supreme Court’s reasoning in Novotny applies to a
12 claim of conspiracy to violate the ADA. Adler v. I & M Rail Link, L.L.C., 13 F. Supp. 2d
13 912, 941-43 (N.D. Iowa 1998) (applying Novotny to claims of conspiracy to violate the
14 ADA and ADEA), abrogated on other grounds by Cossette v. Minn. Power & Light, 188
15 F.3d 964, 970 n.4 (8th Cir. 1999); Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 738
16 F. Supp. 937, 940-41 (W.D. Pa. 1989), aff’d, 897 F.2d 522 (3d Cir.), cert. denied, 498 U.S.
17 811 (1990) (applying Novotny to a claim of conspiracy to violate the ADEA); Brownfield
18 v. Yellow Freight Sys., No. 98-15775, 1999 WL 439310, at *1 (9th Cir. June 17, 1999)
19 (applying Novotny to claims of conspiracy to violate Title VII and the ADA). Therefore, §
20 1985(3) does not provide a remedy for a claim of conspiracy to violate the ADA, and the
21 Court will grant Defendants’ motions to dismiss Plaintiff’s § 1985 claim.

22 _____
23 (1) ‘conspire or go in disguise on the highway or on the premises of another’ (2) ‘for
24 the purpose of depriving, either directly or indirectly, any person or class of persons of
25 the equal protection of the laws, or of equal privileges and immunities under the laws.’
26 It must then assert that one or more of the conspirators (3) did, or caused to be done,
‘any act in furtherance of the object of (the) conspiracy,’ whereby another was (4a)
‘injured in his person or property’ or (4b) ‘deprived of having and exercising any right
or privilege of a citizen of the United States.’

Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971).

1 Section 1986 imposes liability on persons who have knowledge of an impending
2 violation of § 1985 and have power to prevent the violation but neglect or refuse to do so.⁵
3 Karim-Panahi, 839 F.2d at 626. “A claim can be stated under section 1986 only if the
4 complaint contains a valid claim under section 1985.” Id. Because Plaintiff fails to state a
5 valid claim under § 1985, the Court will grant Defendants’ motions to dismiss Plaintiff’s
6 § 1986 claim.⁶

7 8. Vicarious Liability

8 Defendants argue the National APWU is not vicariously liable for the Local
9 APWU’s conduct simply by virtue of their affiliation, and Plaintiff’s general statements
10 that the National APWU business agents were agents of the Local APWU are insufficient
11 to state a claim of vicarious liability. Plaintiff responds that she has alleged facts that
12 demonstrate that the National APWU was making decisions for the Local APWU. For
13 example, the National APWU regularly advised the Local APWU officials, the National
14 APWU colluded with the Local APWU officials, and the National APWU withdrew
15 grievances.

16 Courts use principles of common-law agency to determine whether an
17 international union is vicariously liable for the actions of its local subsidiary. Carbon Fuel
18 Co. v. United Mine Workers of Am., 444 U.S. 212, 216-217 (1979).

19
20 ⁵ 42 U.S.C. § 1986 provides:

21 Every person who, having knowledge that any of the wrongs conspired to be done, and
22 mentioned in section 1985 of this title, are about to be committed, and having power
23 to prevent or aid in preventing the commission of the same, neglects or refuses so to
do, if such wrongful act be committed, shall be liable to the party injured, or his legal
representatives, for all damages caused by such wrongful act, which such person by
reasonable diligence could have prevented

24 ⁶ Plaintiff also alleges that Defendants violated 42 U.S.C. § 1981 and § 1983; however,
25 neither statute applies to this action. Section 1981 prohibits race discrimination in the making and
26 enforcing of contracts. Section 1983 prohibits violations of rights secured by the Constitution by
persons acting under color of law. Plaintiff does not allege race discrimination, nor does Plaintiff
allege Defendants acted under color of law. The Court will construe Plaintiff’s conspiracy claim as
a claim for violations of § 1985 and § 1986 only.

1 Thus, if the local engages in illegal conduct in furtherance of its role as
2 an agent of the international, the international will be liable for the
3 local's actions. . . . However, if the local exercises considerable
4 autonomy in conducting its affairs, it cannot be regarded as an agent of
the international, and the international accordingly cannot be held
liable under an agency theory for the local's actions.

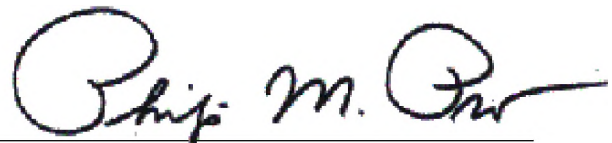
5 Laughon v. Int'l Alliance of Theatrical Stage Emps., 248 F.3d 931, 935 (9th Cir. 2001). An
6 international union may be liable for a local subsidiary if the international union
7 "instigated, supported, ratified or encouraged the [l]ocal's activities." Moore v. Local
8 Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1543 (9th Cir. 1993).

9 Plaintiff has sufficiently pled facts that show the National APWU instigated,
10 supported, ratified, or encouraged the Local APWU's activities. As discussed above, the
11 National APWU was involved in withdrawing grievances, refusing to file grievances, and
12 disciplining Plaintiff. Therefore, the Court will deny the National APWU's Motion to
13 Dismiss Plaintiff's vicarious liability claim.

14 **III. CONCLUSION**

15 IT IS THEREFORE ORDERED that Defendant APWU National AFL-CIO's
16 Motion to Dismiss Amended Complaint (Doc. #60) and Defendant Local APWU #7156's
17 Motion to Dismiss Amended Complaint (Doc. #57) are hereby GRANTED in part and
18 DENIED in part. The Motions are GRANTED as to Plaintiff's claims of hostile work
19 environment, intentional infliction of emotional distress, and violations of 42 U.S.C. § 1985
20 and § 1986. The Motions are DENIED in all other respects.

21
22 DATED: June 18, 2012



23
24 PHILIP M. PRO
United States District Judge