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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Steven D. Garber,) No. CV-01-746-PCT-PGR
)
Plaintiff,) **ORDER**
)
vs.)
)
Embry-Riddle Aeronautical)
University,)
)
Defendant.)
)
)

This action was filed pursuant to the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101 et seq. Steven Garber ("plaintiff") claims Embry-Riddle Aeronautical University ("defendant" or "University") retaliated against him for advocating on behalf of a disabled student. Pending before this Court are: (1) defendant's Motion for Summary Judgment (**doc. 52**); (2) plaintiff's Motion for Reconsideration (**doc. 55**); and (3) plaintiff's Motion for Summary Judgment (**doc. 59**).

FACTUAL HISTORY

In 1998, plaintiff was employed by defendant as an adjunct professor. He was later offered a promotion to the Chair of defendant's College of Arts and Sciences and Professor of Social

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1 Sciences for the 1999-2000 academic year. Plaintiff sought to
2 employ Anthony Godwin ("Godwin") as his computer work assistant
3 shortly after he began working at the University. Plaintiff
4 claims defendant resisted these efforts.

5 Godwin is a veteran with a service-connected knee
6 disability.¹ Godwin had protested some allegedly unsafe flight
7 practices undertaken by defendant. As a result, plaintiff
8 alleges defendant "put obstacles" in the way of hiring him.
9 Plaintiff claims that when he persisted in employing Godwin he
10 was demoted, his salary was reduced, he was relieved of his title
11 as the Director of the School of Arts and Sciences, and his
12 contract was not renewed.

13 From the time plaintiff was hired until he left the
14 University, plaintiff received numerous reprimands from defendant
15 for unprofessional conduct. Defendant decided not to renew
16 plaintiff's contract on February 18, 2000. On February 23,
17 2000, plaintiff's supervisor informed him that he was
18 "recommending a non-renewal" of his contract. Plaintiff was
19 notified of this, in writing, on February 25, 2000. Plaintiff's
20 contract was allowed to expire in May 2000.

21 **PROCEDURAL HISTORY**

22 Plaintiff filed his original Complaint on April 26, 2001.
23 The Complaint was amended on August 10, 2001. Essentially,
24 plaintiff claims that his contract was not renewed in retaliation
25 for advocating on behalf of a student with a disability and
26 because he threatened to contact environmental authorities to

27 _____
28 ¹ Specifically, plaintiff claims that Godwin suffers from a knee
injury/atrophied leg, gout, Hepatitis C, lung and gall bladder malfunction.

1 report the "illegal dumping" of fuel on the tarmac at Love
2 Field.²

3 The Amended Complaint contained causes of action for:
4 (1) retaliatory discharge for advocating on behalf of a disabled
5 individual under the ADA; (2) wrongful termination pursuant to
6 the Arizona whistle-blower statute, Ariz. Rev. Stat.
7 § 23-1501(3)(c)(ii); and (3) violations of the Racketeering
8 Influenced Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1961,
9 *et seq.*

10 Plaintiff's RICO count was dismissed for failure to state a
11 claim. The wrongful termination claim was dismissed for failing
12 to file within the one-year statute of limitations. Ariz. Rev.
13 Stat. § 12-541. The only remaining count is the retaliatory
14 discharge claim.

15 On April 26, 2002, defendant filed the pending Motion for
16 Summary Judgment detailing numerous legitimate
17 nondiscriminatory reasons for not renewing plaintiff's contract.
18 On November 4, 2002, plaintiff moved for reconsideration of the
19 Court's Order dismissing his wrongful termination claim. On
20 November 18, 2002, plaintiff also filed a Motion for Summary
21 Judgment. Oral arguments on the pending Motions were held on
22 March 24, 2003.

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27 ² As discussed at the oral argument on May 6, 2002, the "dumping" of fuel
28 consists of taking a small sample of fuel (approximately one to two ounces) to
make sure it does not contain any water or is not otherwise contaminated, then
disposing of the sample on the tarmac.

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DISCUSSION

A. Motion for Reconsideration

A motion for reconsideration must show two things to provide a valid ground for reconsideration. First, it must demonstrate a credible reason why the court should reconsider its prior decisions. *All Hawaii Tours Corp. v. Polynesia Cultural Ctr.*, 116 F.R.D. 645, 648-49 (D. Haw. 1987), *aff'd in part, rev'd in part on other grounds*, 855 F.2d 860 (9th Cir. 1988). Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *Id*; *In re Agric. Research & Tech. Group*, 916 F.2d 528, 542 (9th Cir. 1990).

Motions for reconsideration should not be used to ask the court "to rethink what the court had already thought through - rightly or wrongly" or to reiterate arguments previously raised. *In re Agric. Research & Tech. Group*, 916 F.2d at 542 ("Motions for reconsideration may properly be denied where the motion fails to state new law or facts").

Additionally, new arguments and new legal theories that could have been made at the time of the original motion may not be offered in a motion for reconsideration. Nor may the movant seek consideration of new evidence available before disposition of the matter. *Id.*

In dismissing the wrongful termination claim, this Court reasoned that plaintiff failed to comply with the one-year statute of limitations. Ariz. Rev. Stat. § 12-541. As argued in plaintiff's Motion, "[i]f that plaintiff filed a charge with the EEOC the day he is discharged and it takes more than one year for the EEOC to issue a right to sue letter, the plaintiff will

1 be unable to litigate his cause of action for employment
2 discrimination resulting in a wrongful discharge. . . ." In
3 essence, plaintiff now seeks reconsideration arguing that because
4 violations of the Arizona whistle-blower statute necessarily
5 implicate Title VII issues, and because Title VII requires an
6 EEOC right to sue letter which can take more than one year,
7 plaintiffs would be prohibited from litigating both Title VII and
8 wrongful termination claims under one Complaint.³

9 The Court need not reach the merits of plaintiff's argument.
10 First, this Court has already considered and rejected plaintiff's
11 argument. To the extent plaintiff raises a new argument, it
12 should have been raised at the time he responded to the Motion to
13 Dismiss.⁴

14 Second, plaintiff does not provide any legal argument as to
15 why reconsideration should be granted. Typically,
16 reconsideration is allowed where there is "(1) mistake,
17 inadvertence, surprise or excusable neglect; (2) newly discovered
18 evidence . . . (3) fraud . . . (6) or any other reason justifying
19 relief." Fed. R. Civ. P. 60(b). Plaintiff does not argue for
20 reconsideration on any of the aforementioned bases. Plaintiff
21 has not sustained his burden and reconsideration is denied.

22 **B. Defendant's Motion for Summary Judgment**

23 Summary judgment should be granted pursuant to Federal Rule
24 of Civil Procedure 56 only if no genuine issues of material fact
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26 ³ Plaintiff's Motion for Reconsideration is quite confusing. Nonetheless,
the Court reads the Motion to seek reconsideration on this basis.

27 ⁴ The Court believes that plaintiff raised this argument in responding to
28 the second Motion to Dismiss. As noted above, plaintiff's papers are rather
unclear and the Court cannot be sure.

1 exist and the moving party is entitled to judgment as a matter of
2 law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In
3 ruling upon a motion for summary judgment, the court must view
4 the evidence in the light most favorable to the nonmoving party.
5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
6 587 (1986).

7 Defendant asserts two principle arguments in support of
8 summary judgment. First, defendant argues that under no set of
9 facts can plaintiff establish a *prima facie* case of retaliation.
10 Second, defendant argues that it had legitimate nondiscriminatory
11 reasons for not renewing plaintiff's contract and that plaintiff
12 cannot show defendant's reasons were pretextual.

13 1. *Plaintiff's Prima Facie Case*

14 To successfully present a *prima facie* case of retaliation,
15 plaintiff must establish that he is engaged in an activity
16 protected by the statute, that he suffered an adverse employment
17 action, and that there was a causal connection between the
18 protected activity and the adverse action. *Barnett v. U.S. Air,*
19 *Inc.*, 228 F.3d 1105, 1121, (9th Cir. 2000) (en banc), *vacated on*
20 *other grounds, U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122
21 S.Ct. 1516 (2002). Here, the only elements at issue are whether
22 plaintiff engaged in a protected activity and whether there was a
23 causal connection between the activity and any adverse employment
24 action.

25 Plaintiff argues he was engaged in a statutorily protected
26 activity - advocating on behalf of a disabled student. Defendant
27 contends that plaintiff must show that "either he reasonably
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1 believed Godwin was disabled or that the University perceived him
2 to be disabled. . . ."

3 In assessing reasonableness, the Court looks to the ADA's
4 objective criteria. Therefore, in order for an impairment to be
5 protected, it must be one that substantially limits one or more
6 of the major life activities under the ADA. 42 U.S.C. §
7 12102(2)(A). Thus, defendant argues plaintiff "has failed to
8 articulate how or why he believed any of the alleged disabilities
9 suffered by Godwin limited his ability to perform a major life
10 activity."

11 The record before this Court reveals that plaintiff had a
12 reasonable basis to conclude Godwin was disabled under the ADA.
13 At a minimum, plaintiff has articulated a sufficiently reasonable
14 basis to withstand summary judgment. For instance, plaintiff was
15 aware that Godwin was attending the University on a vocational
16 rehabilitation program for disabled American veterans. Plaintiff
17 observed him exhibit significant difficulty walking, that when he
18 did walk he had a limp, and that one of his legs was atrophied.
19 In addition, plaintiff noticed Godwin had difficulty breathing,
20 suffered from frequent bouts of pneumonia, and took copious
21 amounts of pain medication.

22 While none of these symptoms necessarily results in the
23 finding of a disability, under the ADA, plaintiff's observations
24 clearly provide a reasonable basis for his conclusion that in
25 attempting to secure Godwin a position as his computer work
26 assistant he was advocating on behalf of someone with a
27 disability.

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1 Defendant also asserts that there are no genuine issues of
2 material fact which support a causal connection between
3 plaintiff's protected activity and the adverse employment action.
4 Specifically, defendant argues that the decision not to renew
5 plaintiff's contract was made on February 18, 2000, before
6 plaintiff "report[ed] defendant to the Arizona Department of
7 Environmental Quality (ADEQ) for alleged fuel dumping," the
8 allegedly protected activity. Plaintiff's letter threatening to
9 contact the ADEQ was not mailed to defendant until
10 February 23, 2000, and was received on February 25, 2000.

11 Defendant's argument in this regard is problematic.
12 Defendant seeks summary judgment on plaintiff's ADA retaliation
13 claim, the only cause of action remaining. Yet defendant relies
14 on irrelevant factual allegations in pointing out the lack of
15 causal connection between plaintiff's advocating for Godwin, his
16 demotion, and the decision not to renew his contract. For
17 instance, defendant argues that plaintiff has not established he
18 had a reasonable belief Godwin was disabled and therefore he
19 could not have engaged in a protected activity. Then, in an
20 attempt to demonstrate a lack of causation on that issue,
21 defendant jumps to other factual allegations related to dumping
22 fuel on the tarmac at Love Field. The threatened exposure to the
23 ADEQ, however, is only relevant to plaintiff's wrongful
24 termination claim under the Arizona whistle-blower statute. That
25 cause of action was dismissed. Therefore, defendant's argument
26 that there was no causal connection between plaintiff's
27 threatened exposure to the ADEQ and the failure to renew his
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1 contract is irrelevant to the remaining retaliation claim under
2 the ADA.

3 2. *Pretext*

4 Once the Court determines that plaintiff has sufficiently
5 set forth his *prima facie* case for retaliation, the burden shifts
6 to defendant to offer legitimate non-discriminatory reasons for
7 the adverse employment action. *Barnett*, 228 F.3d at 1121;
8 *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). After
9 defendant has set forth legitimate nondiscriminatory reasons for
10 the adverse employment action, the burden then shifts back to
11 plaintiff to raise genuine issues of material fact that
12 defendant's reasons are pretextual. *Barnett*, 228 F.3d at 1121.

13 Defendant provides a number of legitimate nondiscriminatory
14 reasons for any adverse employment action suffered by plaintiff:

- 15 1. While plaintiff was employed as Chairman of the
16 Arts and Sciences Department, he frequently missed
 weekly Department Chair meetings;
- 17 2. On a June 23, 1999 field trip plaintiff permitted
18 a student, under his supervision, to impale the
19 head of a dead prairie dog on a two foot wooden
 stick and attach it to the front of the University
 van;⁵
- 20 3. On another field trip plaintiff permitted a dog to
21 ride in the University van, contrary to express
 policy;
- 22 4. Plaintiff permitted students to take their own
23 vehicles on a field trip, contrary to express
 University policy;
- 24 5. Plaintiff permitted an offensive bumper sticker,
25 stating, "Get off my ass, or I'll flick a booger
26 on your windshield," to be prominently placed on a
 marked University van;

27 ⁵ The van was clearly identifiable as a University van by signage on the
28 exterior panels. Moreover, when plaintiff was confronted with the incident, he
admitted knowing about it but claimed to have forgotten to remove it.

- 1 6. While driving a University van on a field trip,
2 plaintiff took students to a saloon and consumed
3 alcoholic beverages with them;
- 4 7. At a weekly management meeting plaintiff verbally
5 attacked, ridiculed and berated faculty members,
6 some of whom were not in attendance;⁶
- 7 8. In February 2000, plaintiff permitted someone
8 unrelated to the University to use its logo,
9 without the University's knowledge or approval, in
10 relation to a private publication which was under
11 scrutiny for possible fraudulent activities;
- 12 9. Plaintiff repeatedly ignored work-related requests
13 from supervisors; and
- 14 10. Plaintiff asked a student to represent to the
15 University that the student had distributed,
16 collected, and delivered student evaluations, when
17 it was plaintiff that had done so.

18 Defendant has clearly set forth numerous legitimate
19 nondiscriminatory reasons for plaintiff's demotion and the
20 decision not to renew his contract. Accordingly, plaintiff must
21 now raise a genuine issue of material fact suggesting defendant's
22 reasons for the adverse employment actions were pretextual.
23 *Barnett*, 228 F.3d at 1121.

24 Despite this burden, plaintiff fails to provide any evidence
25 that there was any pretext involved. In fact, plaintiff does not
26 even argue pretext. Nevertheless, the Court has reviewed the
27 record for any indication that the defendant's actions were
28 pretextual and has been unable to find any such evidence. It is
 on this basis the Court concludes summary judgment in favor of
 defendant is appropriate.

⁶ These attacks included allegations of an extramarital affair between two
faculty members, that a former professor who had committed suicide was a
pedophile, that one faculty member wanted to fire another, and that the Associate
Director (who was present at the meeting) did not have the stomach for the job.

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C. Plaintiff's Motion for Summary Judgment

In his one paragraph Motion for Summary Judgment, plaintiff takes the position that summary judgment is warranted in his favor with respect to a very limited issue. Namely, that he had a reasonable belief that Godwin was disabled.

Notably, plaintiff's response to the defendant's Motion, concedes that the same issue presents questions of fact. The Court agrees that the issue of Godwin's alleged disability raises factual issues. However, because summary judgment is granted in favor of defendant on other grounds, the issue is moot.

IT IS ORDERED that defendant's Motion for Summary Judgment (**doc. 52**) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration (**doc. 55**) is DENIED.

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment (**doc. 59**) is DENIED.

IT IS FURTHER ORDERED that because this Order disposes of the Amended Complaint in its entirety, the Clerk of Court shall enter judgment accordingly.

DATED this 20th day of April, 2003.


Paul G. Rosenblatt
United States District Judge