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CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

George W. Fallar,  
 Plaintiff,  
 vs.  
 Compuware Corporation, a Michigan  
 Corporation,  
 Defendant.

No. CV 00-1650-PHX-ROS  
**ORDER**

**I. INTRODUCTION**

The following motions are pending before the Court: Defendant Compuware Corporation's Motion to Dismiss (Doc. #17); Plaintiff's Response to Motion to Dismiss Alternatively, Motion to File an Amended Complaint (Doc. #27); Defendant's Motion for Summary Judgment (Doc. #41); and Defendant's Motion to Strike Plaintiff's Statement of Facts in Support of His Response to Defendant's Motion for Summary Judgment (Doc. #52).

**II. BACKGROUND**

Plaintiff brought this action alleging wrongful termination of his employment in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1201 *et seq.*, and the Arizona Civil Rights Act ("ACRA"), A.R.S. § 41-1461 *et seq.* In addition, Plaintiff seeks damages as a result of Defendant's alleged breach of the employment contract that led to the

(54)

1 denial of long-term disability benefits, as well as tort damages based on the alleged bad faith  
2 of Defendant in terminating Plaintiff's employment.<sup>1</sup>

3 **A. Factual History**

4 In March 1997, Compuware ("Defendant") hired George Fallar ("Plaintiff") when it  
5 purchased Plaintiff's former employer MC2. (Def.'s Statement of Facts ("SOF") ¶ 1). After  
6 the acquisition of MC2, Plaintiff maintained his position and duties as a systems analyst for  
7 Defendant, reviewing clients' computer programs and testing them for performance. (Pl.'s  
8 SOF ¶ 16; Def.'s SOF ¶ 2). At the time of Plaintiff's hiring, Defendant knew that Plaintiff  
9 suffered from muscular dystrophy. (Pl.'s SOF ¶ 18; Def.'s SOF ¶ 5). In the fall of 1997,  
10 Plaintiff was assigned to the Allied Signal client account and was authorized to telecommute  
11 from home. (Def.'s SOF ¶ 7). Defendant paid Plaintiff hourly for work performed on active  
12 client accounts and issued him full employee benefits regardless of the number of hours  
13 actually worked. (Def.'s SOF ¶ 4).

14 After completion of the Allied Signal project, Plaintiff could no longer access client  
15 accounts from home due to Defendant's routine practice of changing access passwords.  
16 (Pl.'s SOF ¶ 17; Def.'s SOF, Ex. 1 at 11). However, Plaintiff was still able to access his  
17 work email account from home. (*Id.*) Plaintiff was not assigned and did not actively work  
18 on a client account after completion of the Allied Signal project in 1997. (Pl.'s SOF ¶ 19;  
19 Def.'s SOF, Ex. 1 at 19). Plaintiff was informed by Bonnie Parker, an employee of  
20 Defendant, that the reason no assignments were given to Plaintiff was that Defendant had no  
21 available work. (Def.'s SOF ¶ 11, Ex. 1 at 19). As a result, Plaintiff remained classified by  
22 Defendant as an inactive employee after 1997. (Def.'s SOF ¶ 16).

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25 <sup>1</sup> Because Plaintiff exhausted all administrative remedies available under statute, the  
26 Court has subject matter jurisdiction over Plaintiff's ADA claims. *See* 28 U.S.C. § 1331; 42  
27 U.S.C. § 12117; 29 U.S.C. § 1132(e). Pursuant to 28 U.S.C. § 1367, the Court also has  
28 supplemental jurisdiction over Plaintiff's claims arising under Arizona law. (*See* Amend.  
29 Compl. ¶¶ 3-5).

1 Citing the need to cut costs by eliminating inactive employees, Darrell Williams,  
2 Defendant's Director of Resources, terminated Plaintiff's employment with Compuware in  
3 December 1998 based on Plaintiff's lack of recent productivity and revenue generation.  
4 (Def.'s SOF ¶ 12). Plaintiff, however, never received notice of his 1998 termination from  
5 Defendant. (Def.'s SOF ¶ 16). On June 11, 1999, Plaintiff obtained a neurological  
6 examination at Barrows Neurological Institute, Muscular Dystrophy Clinic, and made a claim  
7 under Defendant's medical insurance benefit plan. (Def.'s SOF, Ex. 1 at 53). After the  
8 insurance company denied Plaintiff's claim, Plaintiff contacted Defendant and was informed  
9 that he had been terminated due to his inactive status. (Def.'s SOF ¶ 16). At that time,  
10 Plaintiff told Darrell Williams that he had not received notice of his 1998 termination. (*Id.*)  
11 Therefore, Defendant agreed to reinstate Plaintiff's employment and to provide retroactive  
12 benefits to cover Plaintiff's medical insurance claim. (Def.'s SOF ¶ 16). In addition,  
13 Defendant notified Plaintiff that "[n]ew client assignment opportunities for your skills may  
14 become available in the next thirty days," but if Plaintiff failed to be "successfully placed on  
15 a client account" within those thirty days his employment would once again be terminated.  
16 (Def.'s SOF, Ex. 4). Defendant rehired Plaintiff in June 1999 with full knowledge of his  
17 disability. (Def.'s SOF ¶ 16).

18 Shortly after his reinstatement, Plaintiff applied for and received short-term disability  
19 benefits under Defendant's medical insurance plan administered by UNUM Life Insurance  
20 Company ("UNUM"). (Def.'s SOF ¶ 18). The terms of the short-term disability insurance  
21 plan stated that "an employee is eligible for coverage if (s)he is an active, full-time salaried  
22 Employee who works, a minimum of 40 hours per week and has completed 90 days of full-  
23 time employment." (Def.'s SOF, Ex. 7). Defendant paid Plaintiff \$14,504.96 in short-term  
24 disability benefits under the plan in 1999. (Def.'s SOF, Ex. 1 at 41).

25 On August 5, 1999, after Plaintiff failed to receive any new client assignments  
26 following his reinstatement in June 1999, Darrell Williams once again terminated Plaintiff's  
27 employment. (Def.'s SOF ¶ 19). Subsequent to his second termination, Plaintiff filed a  
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1 claim for long-term disability benefits under Defendant's medical insurance plan also  
2 administered by UNUM. (Def.'s SOF ¶ 22). The provisions of the long-term plan set forth  
3 the following eligibility requirements:

4 All full-time United States employees working at least 30 hours per  
5 week in active employment.

6 ACTIVE EMPLOYMENT means you are working for your  
7 employer for earnings paid regularly and that you are performing the  
8 material and substantial duties of your occupation. You must be  
9 working at least the minimum number of hours as described under  
10 Eligible Group(s) in each plan.

11 (Def.'s SOF, Ex. 9). UNUM denied Plaintiff's long-term disability claim, stating that he did  
12 not meet eligibility criteria because "[b]y [his] own admission [he] had not worked for  
13 Compuware, since November or December 1998." (*Id.*)

#### 14 **B. Procedural History**

15 On August 28, 2000, Plaintiff filed a Complaint with this Court alleging the following  
16 four causes of action under the ADA, ACRA, and the common law of Arizona:

17 First Cause of Action: Defendant "violated the ADA when it refused to  
18 undertake reasonable accommodations to allow plaintiff to engage in gainful  
19 employment."

20 Second Cause of Action: Defendant "discriminated against the plaintiff in  
21 violation of [ACRA]."

22 Third Cause of Action: "Defendant breached the agreement to provide employment  
23 and related benefits to plaintiff."

24 Fourth Cause of Action: Defendant "acted in bad faith" and "for [its] own self  
25 interest and [for the] intentional deprivation of the interests of the plaintiff."

26 (Compl. ¶¶ 26-38) (Doc. #1). Plaintiff subsequently filed an Amended Complaint on  
27 December 26, 2000 that changed neither the form nor the substance of the original Complaint  
28 (Doc. #3). Defendant filed a Motion to Dismiss Counts III and IV of the Amended  
Complaint on April 3, 2001 based on Plaintiff's failure to state viable causes of action (Doc.  
#17). Plaintiff filed a Response to Motion to Dismiss Alternatively, Motion to File an  
Amended Complaint (Doc. #27). On October 19, 2001, Defendant filed a Motion for

1 Summary Judgment on all four causes of action (Doc. #41). After Plaintiff filed a Response  
2 to Defendant's Motion for Summary Judgment (Doc. #48), Defendant filed a Motion to  
3 Strike Plaintiff's Separate Statement of Facts in Support of His Response to Defendant's  
4 Motion for Summary Judgment on December 12, 2001 (Doc. #52). On March 8, 2002, the  
5 Court heard oral arguments on all the pending motions ("Hearing").

6 Defendant filed the Motion to Dismiss Counts III and IV of the Complaint prior to  
7 filing a Motion for Summary Judgment. Accordingly, the Court will first address the Motion  
8 to Dismiss based on the pleadings and the concomitant Motion for Leave to File an Amended  
9 Complaint before addressing the merits of the Motion for Summary Judgment.<sup>2</sup>

### 10 **III. MOTION TO DISMISS**

#### 11 **A. Standard of Review**

12 A court should not grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) unless  
13 there is no set of facts that a plaintiff could prove upon which relief could be granted. Conley  
14 v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Financial Corp. v. Federal Home Loan Bank  
15 of San Francisco, 792 F.2d 1432, 1435 (9th Cir.1986). In ruling on a motion to dismiss, a  
16 court must take all material allegations in the complaint as true and construe all facts in the  
17 light most favorable to the plaintiff. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th  
18 Cir.1986).

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24 <sup>2</sup> Whenever a district court looks beyond the pleadings in evaluating a motion to  
25 dismiss, the motion must be treated as one for summary judgment under Rule 56. See Fed.  
26 R. Civ. P. 12(b); see also Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir.  
27 1984) (citing Portland Retail Druggists Assoc. v. Kaiser Found. Health Plan, 662 F.2d 641,  
645 (9th Cir. 1981)). Therefore, the Court will address only the pleadings in evaluating the  
28 Motion to Dismiss.

1           **B. Discussion**

2                   **1. Employee Retirement Income Security Act preemption**  
3                   **of Plaintiff's claim for breach of the agreement to pay medical**  
4                   **benefits**

5           Where an employee alleges that the employer wrongfully terminated or breached the  
6 employment agreement to avoid paying long-term disability benefits, the Employee  
7 Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), preempts the claim.  
8 Campbell v. Aerospace Corp., 123 F.3d 1308, 1313 (9th Cir. 1997).

9           In Campbell, the Ninth Circuit discussed ERISA preemption of state law claims against  
10 employers for wrongful termination. Id. After being terminated from his employment with  
11 Aerospace, the plaintiff filed suit in California state court alleging, among other things, that  
12 he was wrongfully discharged in violation of public policy for "blowing the whistle" on  
13 Aerospace. Id. at 1310. In his claim for wrongful discharge the plaintiff stated that  
14 "defendants knew that terminating plaintiff after long years of service would . . . require  
15 plaintiff to be without certain benefits." Id. Reviewing the district court's determination that  
16 ERISA applied to the plaintiff's wrongful termination claim, the Ninth Circuit stated:

17           In determining whether ERISA preempts state common law causes of action for  
18 wrongful discharge, both the Supreme Court and the Ninth Circuit have focused on the  
19 employer's alleged motivation in terminating the employee, concluding that a claim is  
20 preempted when the complaint alleges that "the employer had a pension-defeating  
21 motive in terminating the employment."

22           Id. at 1312 (quoting Ingersoll-Rand v. McClendon, 498 U.S. 133, 140 (1990)). The Ninth  
23 Circuit noted a distinction between claims alleging that the employer's motive in discharge  
24 was to deny benefits, and those simply alleging the loss of benefits as a consequence of the  
25 tortious discharge. Id. Therefore, the court concluded: "we have held that where the  
26 plaintiff's claim or theory alleged that the employer terminated the employee to avoid paying  
27 benefits or sought to prevent the employee from obtaining benefits, ERISA preempted the  
28 claim." Id. at 1313 (citing Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir.  
1992); Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991); Sorosky v. Burroughs Corp.,  
826 F.2d 794 (9th Cir. 1987)). However, because the "substance of [the plaintiff's] claim

1 was wrongful termination in retaliation for whistle-blowing activities” and not for the  
2 deprivation of benefits per se, the court held that ERISA did not preempt the plaintiff’s  
3 claims. Campbell, 123 F.3d at 1314.

4 Similarly, in Sorosky, the Ninth Circuit held that ERISA preempted a plaintiff’s breach  
5 of contract and wrongful discharge claims because plaintiff alleged that the employer agreed  
6 to provide benefits and then terminated him to avoid paying those benefits. 826 F.2d at 800.  
7 In so holding, the court stated that the plaintiff’s claims were preempted “to the extent that  
8 [the claims] refer to an employee benefit plan” but not “to the extent [the claims rely] on  
9 theories independent of the benefit plan.” Id.

10 The third and fourth causes of action alleged in Plaintiff’s Complaint make no reference  
11 to Defendant’s motivation to avoid paying benefits to Plaintiff. (Compl. at 5-6). Therefore,  
12 Plaintiff’s causes of action would survive Defendant’s Motion to Dismiss on the basis of  
13 ERISA preemption under Campbell. See Campbell, 123 F.3d at 1313.

14 Although Plaintiff can withstand a motion to dismiss, his subsequent pleadings allege  
15 that the third and fourth causes of action are based on Defendant’s breach of the employment  
16 agreement “based in part on the failure to . . . pay benefits,” and for wrongful termination in  
17 bad faith “premised on the failure of the defendant to provide the employment benefits due  
18 and contracted for, namely, disability benefits.” (Pl.’s Resp. to Mot. to Dismiss at 1, 3).  
19 Further, in Plaintiff’s Statement of Facts in Support of His Response to Defendant’s Motion  
20 for Summary Judgment, Plaintiff acknowledges that one of Defendant’s motives in  
21 terminating him was to avoid paying him disability benefits. (Pl.’s SOF ¶ 11). These alleged  
22 motives elucidate precisely the types of claims the Ninth Circuit has found to be related to  
23 employment benefit plans under ERISA because they allege that Defendant’s conduct was  
24 motivated by a desire to avoid paying Plaintiff long-term disability benefits. See Campbell,  
25 123 F.3d at 1313; Sorosky, 826 F.2d at 800. Because Defendant also moved for summary  
26 judgment on ERISA preemption, Plaintiff’s claims for breach of contract and bad faith are  
27 preempted to the extent the claims rely on Defendant’s motive in avoiding the payment of

1 benefits under an ERISA plan. Therefore, Defendant is entitled to summary judgment on  
2 Plaintiff's third and fourth causes of action under state law because, looking beyond the  
3 pleadings, the actions are preempted by ERISA. See Fed. R. Civ. P. 12(b); see also Grove  
4 v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir. 1984) (holding that whenever a  
5 court looks beyond the pleadings in evaluating a motion to dismiss, the motion should be  
6 treated as a motion for summary judgment under Rule 56).

7 **2. The Arizona Employment Protection Act preemption of**  
8 **Plaintiff's tort claim for bad faith based on a violation of public**  
9 **policy**

9 Plaintiff asserts that his tort claim for bad faith is premised on two theories: bad faith  
10 in terminating Plaintiff to avoid paying him disability benefits; and bad faith in terminating  
11 Plaintiff in violation of public policy based on his disability. (Pl.'s Resp. to Mot. to Dismiss  
12 at 3). Because Plaintiff's first theory of bad faith is preempted by ERISA,<sup>3</sup> the Court will  
13 address the second theory of bad faith liability as it pertains to the Arizona Employment  
14 Protection Act ("EPA"), A.R.S. § 23-1501.

15 Arizona does not recognize a "general" tort claim based on bad faith in employment  
16 termination cases. Nelson v. Phoenix Resort Corp., 888 P.2d 1375, 1384 (Ariz. Ct. App.  
17 1995). However, the Arizona Supreme Court has recognized exceptions to the general at-  
18 will doctrine of employment. Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1031-  
19 41 (Ariz. 1985), superseded in part by A.R.S. § 23-1501. Determining that an at-will  
20 employee "may be fired for good cause or for no cause, but not for bad cause," the Arizona  
21 Supreme Court established three exceptions to the at-will employment doctrine that allow an  
22 employee to sue his employer based on the discharge: (1) the public policy exception;  
23 (2) the personnel policy manual exception; and (3) the good faith and fair dealing exception.  
24 Wagenseller, 710 P.2d at 1031-41. Addressing the public policy exception, the court  
25 concluded that the exception allows an employee to sue his employer if his discharge violates

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26  
27 <sup>3</sup> See supra section III (B)(1).



1 In Cronin, the Arizona Supreme Court held that the EPA's exclusive remedies  
2 provision was constitutional. 991 P.2d at 242. In addressing petitioners' ACRA-based  
3 claims for tortious wrongful termination, the court stated:

4 Importantly, the EPA does not preclude recovery of compensatory damages under  
5 federal law within parameters authorized by Title VII[,] nor does it preclude wrongfully  
6 terminated employees from pursuing collateral common law tort claims related to  
7 discharge from employment, including intentional infliction of emotional distress[,]  
8 negligent infliction of emotional distress[,] interference with contractual relations[,] or  
9 defamation . . . .

10 In sum, while the EPA precludes petitioners' ACRA-based claims for compensatory  
11 and punitive damages for tortious wrongful discharge, a panalopy of constitutionally  
12 protected common law tort remedies remains undisturbed as fully beyond the scope of  
13 the EPA.

14 Id. at 241.

15 Plaintiff concedes that the EPA limits his claims to the extent that "they pertain to the  
16 wrongful discharge to the remedies provided by the Federal and State civil rights act  
17 violations." (Pl.'s Resp. to Mot. Dismiss at 3). Plaintiff's only remedies, therefore, are those  
18 available under the ADA and ACRA for disability discrimination, not in tort for bad faith.  
19 See A.R.S. § 23-1501(3)(b). In addition, though bad faith claims may apply to contractual  
20 damages, there is no general tort for bad faith arising out of the termination of employment  
21 contracts recognized under Arizona law. See Nelson, 888 P.2d at 1384. However, even  
22 assuming Wagenseller recognized a general tort for bad faith (as Plaintiff argues), Plaintiff's  
23 claim fails because it is based on prospective long-term disability benefits rather than on  
24 benefits already earned. See Wagenseller, 710 P.2d at 1038 (rejecting claims for prospective  
25 benefits based on the at-will employment relationship). Therefore, because Plaintiff's bad  
26 faith claim is not cognizable under Arizona law, it must be dismissed. Fed. R. Civ. P.  
27 12(b)(6).  
28

1                   **3.       Effect of the statute of limitations on breach of employment**  
2                   **agreement**

3                   Actions under Arizona law for breach of a written employment contract must be  
4 brought within one year from the time of breach. A.R.S. § 12-541(3); see Angus Medical  
5 Co. v. Digital Equip. Corp., 840 P.2d 1024 (Ariz. Ct. App. 1992).

6                   Defendant Compuware terminated Plaintiff on August 5, 1999. (Def.'s SOF ¶ 19).  
7 Plaintiff filed his Complaint on August 28, 2000, one year and twenty-three days after his  
8 termination. Plaintiff has neither produced evidence to support, nor even alleged, that  
9 Defendant breached a contract other than the implied employment-at-will contract, which  
10 terminated at the moment Plaintiff was discharged. Therefore, even if the Court determined  
11 that Plaintiff's claims were not preempted by ERISA, his state claim for breach of an  
12 employment contract under the third cause of action is barred by the one year statute of  
13 limitations under A.R.S. § 12-541(3) and must be dismissed. Fed. R. Civ. P. 12(b).

14 **IV.       MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT**

15                   **A.       Standard of Review**

16                   Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).  
17 Yet despite the liberal policy favoring amendments, if amending the complaint would not  
18 correct the deficiencies or would otherwise be futile, amendment should be denied. See  
19 Barber v. Hawaii, 42 F.3d 1185, 1197-98 (9th Cir. 1994) (finding that a futile amendment  
20 was properly denied despite the liberal policy allowing amendments). Accordingly, the Court  
21 must assess the appropriateness of Plaintiff's Motion to File an Amended Complaint in light  
22 of its discussion of Defendant's Motion to Dismiss. See supra section III(B)(1)-(3).

23                   **B.       Discussion**

24                   In addition to filing a Response to Defendant's Motion to Dismiss, Plaintiff filed  
25 "Alternatively, Motion to File an Amended Complaint" (Doc. #27). Plaintiff asked the Court  
26 "for leave to file an amended complaint specifying the contract breached by the defendant  
27 [under the third cause of action]." (Pl.'s Resp. to Def.'s Mot. to Dismiss, Alternatively Mot.

1 to File an Amend. Compl. at 1). The Court concluded that Plaintiff's claims under breach  
2 of contract for Defendant's failure to pay benefits are both preempted by ERISA<sup>4</sup> and limited  
3 by the EPA.<sup>5</sup> Moreover, any additional breach of an employment contract claim is barred  
4 by the one year statute of limitations under Arizona law.<sup>6</sup> During the Hearing, counsel for  
5 Defendant raised several additional futility arguments in opposition to Plaintiff's Motion for  
6 Leave to Amend the Complaint: exhaustion of administrative remedies; statute of limitations  
7 for an ERISA action; and factual futility based on Plaintiff's failure to qualify for long-term  
8 disability benefits. (Hr'g Tr. at 3-6). Defendant's counsel also addressed the potential  
9 prejudicial effect to Defendant if Plaintiff were permitted to amend the Complaint to state  
10 a cause of action under ERISA. (Id. at 6-7).

11 In light of the foregoing, the Court will grant Plaintiff's Motion for Leave to Amend  
12 the Complaint to attempt to state a nonfrivolous cause of action under ERISA. However, in  
13 determining whether to file an amended complaint, Plaintiff *must* consider, before filing the  
14 motion, the issues set forth above and raised during the Hearing, including: ERISA statute  
15 of limitations; factual futility, exhaustion of administrative remedies; and potential prejudice  
16 to Defendant.

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<sup>4</sup> See supra section III(B)(1).

<sup>5</sup> See supra section III(B)(2).

<sup>6</sup> See supra section III(B)(3).

1 **V. MOTION TO STRIKE<sup>7</sup>**

2 Defendant asserts several grounds for striking Plaintiff's Statement of Facts in the  
3 Motion to Strike. The Court will address each reason separately.

4 **A. Inconsistent statements**

5 In reviewing a motion for summary judgment, a court must take the non-movant's  
6 evidence as true, and all inferences are to be drawn in the light most favorable to the  
7 non-movant. Eisenberg, 815 F.2d at 1289. However, a party cannot avoid summary  
8 judgment by creating a sham issue of fact – one that directly contradicts prior testimony.  
9 Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 265 (9th Cir. 1991). A party is bound by  
10 major inconsistencies in fact only if they remain unexplained. Leslie v. Groupo ICA, 198  
11 F.3d 1152, 1157 (9th Cir. 1999). Because Defendant alleges that Plaintiff's affidavit  
12 constitutes a sham issue of fact, in ruling on Defendant's Motion to strike the Court must  
13 consider whether the inconsistency is major or minor, the result of an honest mistake or  
14 discrepancy, or the result of newly discovered evidence. See id. at 1158.

15 Defendant has moved to strike the following facts from Plaintiff's Statement of Facts  
16 in Support of Response to Defendant's Motion for Summary Judgment:

17 Plaintiff was aware of jobs which he was qualified for that were offered by  
18 Compuware. (Pl.'s SOF ¶ 20);

19 Based on his qualifications and the positions advertised there was work which was  
20 available at Compuware but was not offered to plaintiff. (Pl.'s SOF ¶ 23);

21 A copy of web page advertising "web developer" positions at Compuware. (Pl.'s  
22 SOF, Ex. 3);

23 Thereafter, I received no other assignments from Compuware. No telecommuting  
24 connections were installed. Limited, if any, communication was initiated by

25 <sup>7</sup> After reviewing Defendant's Motion to Strike, the Court is inclined to grant the  
26 motion and strike portions of Plaintiff's statement of facts. See infra section V. However,  
27 because the Court concludes that Defendant is entitled to summary judgment on all counts  
28 regardless of the matters at issue in the Motion to Strike, the Court will deny the Motion to  
Strike as moot. See infra section VI. Therefore, the Court will only briefly discuss issues  
raised in the Motion to Strike.

1 Compuware. In December 1998, I was told by letter from Bob Baverman of  
2 Compuware that I had been assigned to team and that Bonnie Foster would be my  
3 new team leader as of January 1, 1999. A copy of the letter is attached as exhibit  
4 1 to my declaration. (Pl.'s SOF, Ex. 1 at ¶ 8);

5 I then talked to Bonnie Foster and advised her that I was ready and wanted work  
6 assigned as soon as possible. We discussed my physical limitations as well as  
7 alternative manners to meet with her and her team. I detailed the means by which  
8 I had worked with mc2 and their accommodations of my disability and  
9 telecommuting while still providing a good product to their clients. (Pl.'s SOF,  
10 Ex. 1 at ¶ 10).

11 (Def.'s Mot. to Strike at 7-10). Defendant argues that these statements are inconsistent with  
12 Plaintiff's prior sworn testimony at his deposition. In particular, Defendant challenges  
13 Plaintiff's statements regarding alternative positions and work available at the time of his  
14 termination, which Plaintiff repeatedly denied knowledge of during his deposition. (See  
15 Def.'s SOF, Ex. 1 ("Pl.'s Dep.") at 19, ll. 18-24, 25, ll. 8-12).

16 In reviewing a motion for summary judgment the Court's focus is on whether material  
17 issues of fact exist that warrant a trial. Anderson, 477 U.S. at 250. "Credibility  
18 determinations . . . are jury functions, not those of a judge[.] The evidence of the non-  
19 movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at  
20 255. While the content of Plaintiff's enumerated facts certainly raise credibility questions  
21 in light of Plaintiff's deposition, the Court finds that they do not rise to the level of the major  
22 and material inconsistencies necessary to create sham issues of fact. See Groupo, 198 F.3d  
23 at 1159. Moreover, it is not appropriate for the Court to reject Plaintiff's evidence simply  
24 on the basis of disbelief – such disbelief will not support granting a motion for summary  
25 judgment. See id. The credibility of Plaintiff's purportedly inconsistent statements may be  
26 properly challenged at trial; however, during summary judgment they are entitled to a  
27 presumption of truth. Id. at 1158. Therefore, Defendant's Motion to Strike based on  
28 inconsistent facts should be denied. See Kennedy, 952 F.2d at 265.

### 25 **B. Evidence Produced after the Close of Discovery**

26 In opposing a motion for summary judgment a party may not rely on evidence produced  
27 after the close of discovery. Fed. R. Civ. P. 37(c). A district court shall sanction a party who

1 violates a discovery order, and may exercise its discretion to impose the following sanctions:  
2 requiring the delinquent party to pay the reasonable fees incurred by the opposing party as  
3 a result of the failure to comply with the order; striking portions of submitted pleadings;  
4 establishing facts or precluding evidence on certain issues; or rendering a default judgment  
5 against the non-complying party. United States v. Sumitomo Marine & Fire Ins. Co., 617  
6 F.2d 1365, 1369 (9th Cir. 1980).

7 In response to Defendant's Motion for Summary Judgment on the issue of reasonable  
8 accommodations under the ADA, Plaintiff produced a copy of a web-site advertising other  
9 positions available at Compuware for which he was allegedly qualified. (Pl.'s SOF, Ex. 3).  
10 Defendant argues that Plaintiff's web-site evidence should be stricken because it was  
11 produced after the close of discovery and in violation of the Court's Rule 16 Scheduling  
12 Order setting forth discovery deadlines and potential penalties for violations. (Order at 2)  
13 (Doc. #16). Plaintiff conceded at the Hearing that the evidence was neither disclosed nor  
14 produced during discovery, but stated "I don't think it's real material" after noting that the  
15 web-site was maintained by Defendant. (Hr'g Tr. at p. 29).<sup>8</sup>

16 The Court concludes that Plaintiff's evidence, clearly and admittedly produced after the  
17 close of discovery, should be stricken in accordance with Fed. R. Civ. P. 37(c) and the  
18 Court's Rule 16 Order for violations of discovery. Accordingly, Plaintiff should not be  
19 allowed to rely on Exhibit 3 of his Statement of Facts to overcome Defendant's Motion for  
20 Summary Judgment.

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23 <sup>8</sup> In addition, at the Hearing Plaintiff argued that the evidence in question would have  
24 to be produced in Arizona state court, but not in federal court. (Hr'g Tr. at 29). Although  
25 the Federal Rules of Civil Procedure may differ from the Arizona Rules of Civil Procedure,  
26 the parties are bound by the Federal Rules and Court's Rule 16 Order, which requires that  
27 all evidence that counsel intends to rely on must be provided at the close of discovery.  
(Order at 2) (Doc. #16). Therefore, counsel's argument is unavailing as applied to this case.  
See Chambers v. NASCO, Inc., 501 U.S. 32, 62 (1991) (stating that a district court may  
sanction a party for violating a court order regarding discovery).

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1           **C.       Imputation of Respondeat Superior Liability**

2           An employer may be held vicariously liable for the unlawful acts of one employee  
3 against another if the acting employee has supervisory authority and the unlawful act leads  
4 to an adverse employment action. See Burlington Industries v. Ellerth, 524 U.S. 742, 763-64  
5 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); Burrell v. Star  
6 Nursery, Inc., 170 F.3d 951, 955-56 (9th Cir. 1999); see also Hogan v. Henderson, 102 F.  
7 Supp. 2d 1180, 1188 (D. Ariz. 2000) (applying Burrell to a racial discrimination case).

8           In Burrell, the Ninth Circuit discussed the employer's liability for a supervisory  
9 employee who created a "hostile work environment" in violation of Title VII. Id. at 955.  
10 Applying the rule articulated by the United States Supreme Court in Burlington, the court  
11 stated:

12           the new rule focuses on whether the harasser has immediate or successively higher  
13 authority over the victim of harassment, not on whether the employee knew about the  
14 harassment. Thus, if the harassment is actionable and the harasser has supervisory  
15 authority over the victim, we presume that the employer is vicariously liable for the  
16 harassment.

17 Id. at 956 (citations omitted).

18           Defendant argues that the Court should strike portions of Plaintiff's facts that attempt  
19 to impute liability to Compuware based on Plaintiff's conversations with Bonnie Foster,  
20 because he "did not believe Ms. Foster had any supervisory authority." (Mot. to Strike at 9).  
21 It is unclear, under Ninth Circuit law, whether the supervisory authority rule for vicarious  
22 liability applies to claims of disability discrimination under the ADA. However, the Ninth  
23 Circuit generally applies Title VII discrimination law to claims arising under the ADA  
24 because both statutes have similar enforcement schemes. See, e.g., Snead v. Metro. Prop.  
25 & Cas. Ins. Co., 237 F.3d 1080, 1093 (9th Cir. 2001) (applying Title VII analysis to an ADA  
26 claim); Nunes v. Wal-mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) (applying Title VII  
27 burdens to a disability discrimination claim under the ADA). Therefore, it is likely that the  
28 supervisory rule under Burrell would apply to Plaintiff's ADA claim. Accordingly,  
Plaintiff's conversations with Bonnie Foster would be insufficient to impute vicarious

1 liability to Compuware because Plaintiff did not believe that she had supervisory authority  
2 and has not offered evidence suggesting that Ms. Foster actually did have supervisory  
3 authority. (Pl.'s Dep. at 17-18). Paragraphs 8 and 10 of Plaintiff's affidavit should therefore  
4 be stricken.

5 **D. Relevance**

6 Evidence that tends to prove or disprove the existence of consequential facts is relevant.  
7 Fed. R. Evid. 401. Only relevant evidence is admissible at trial, and also, therefore, during  
8 a motion for summary judgment. Fed. R. Evid. 402; Anderson v. Liberty Lobby, Inc., 477  
9 U.S. 242, 252 (1986).

10 To support his claim that Defendant failed to reasonably accommodate his disability,  
11 Plaintiff offered a copy of a web-site advertising a position for web-designers as evidence  
12 in support of his contention that Defendant had other jobs to which Plaintiff could have been  
13 reassigned. (Pl.'s SOF, Ex. 3). However, the web-site is dated November 18, 1999, more  
14 than three months after Plaintiff's termination. (Id.) Because there is no direct evidence  
15 indicating that this position was available at the time of his discharge, Defendant argues that  
16 the evidence is irrelevant, inadmissible, and has "no evidentiary weight [] because it doesn't  
17 establish that there were positions open when he was working for us." (Hr'g Tr. at 26).

18 Whether evidence is relevant is a matter left to a trial court's discretion. United States  
19 v. Komisaruk, 885 F.2d 490 (9th Cir. 1989). In this instance, the Court concludes that the  
20 evidence, though questionable, is relevant to prove the existence of open positions in  
21 Compuware because a jury could conclude that it is more probable than not that positions  
22 were available at the time of Plaintiff's discharge. Although the evidence may not be  
23 sufficient to persuade a trier of fact that there were positions open at the time of Plaintiff's  
24 discharge, assigning weight to evidence is reserved for the jury not the Court. See Reeves  
25 v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); Anderson, 477 U.S. at 254.  
26 Therefore, the web-site evidence would not be stricken as irrelevant for the purpose of  
27 opposing the Motion for Summary Judgment.

1 **VI. MOTION FOR SUMMARY JUDGMENT**

2 **A. Standard of Review**

3 Summary judgment is appropriate where no genuine issue exists as to any material fact  
4 and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
5 The moving party has the burden of establishing that there is no genuine issue of material  
6 fact. Id.; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). After the moving party  
7 makes a properly supported motion, the non-moving party has the burden of presenting  
8 specific facts showing that contradiction is possible. British Airways Bd. v. Boeing Co., 585  
9 F.2d 946, 950-52 (9th Cir. 1978). It is not enough for the non-moving party to point to the  
10 mere allegations or denials contained in the pleadings; instead, it must set forth, by  
11 admissible evidence, specific facts demonstrating the existence of an actual issue for trial,  
12 and that the trier of fact could reasonably find for the non-moving party. Anderson, 477 U.S.  
13 at 252. In reviewing a motion for summary judgment, a court must take the non-movant's  
14 evidence as true, and all inferences are to be drawn in the light most favorable to the  
15 non-movant. Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir. 1987).

16 Defendant, having moved for summary judgment, bears the burden of "com[ing]  
17 forward with evidence which would entitle it to a directed verdict if the evidence went  
18 uncontroverted at trial." Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (citation  
19 and quotations omitted). Once the moving party comes forward with sufficient evidence, "the  
20 burden then moves to the opposing party, who must present significant probative evidence  
21 tending to support its claim or defense." Intel Corp. v. Hartford Accident & Indem. Co., 952  
22 F.2d 1551, 1558 (9th Cir. 1991) (citation omitted).

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1           **B. Discussion**

2           1.       **Plaintiff's disability discrimination claim under the ADA and**  
3                    **ACRA<sup>9</sup>**

4                    **a. Disparate treatment**

5           A plaintiff carries the initial burden of proving a prima facie case of disparate treatment  
6           under the ADA by either direct or circumstantial evidence. See McDonnell Douglas Corp.  
7           v. Green, 411 U.S. 792 (1973) (articulating the burden-shifting analysis in discrimination  
8           cases); Snead, 237 F.3d at 1093 (applying Title VII analysis to an ADA claim); Nunes, 164  
9           F.3d at 1246 (applying McDonnell Douglas to analyze a claim under the ADA). A plaintiff  
10          having no direct evidence of discrimination must prove the following: (1) that he is an  
11          individual with a disability; (2) that he was qualified to perform the essential functions of his  
12          position with or without accommodations; and (3) that he was discharged because of his  
13          disability. See Nunes, 164 F.3d at 1246. Once a plaintiff proves a prima facie case of  
14          discrimination, the burden shifts to the defendant to rebut by offering a non-discriminatory  
15          reason for the termination. See id. at 1247 (applying the burden-shifting analysis to the  
16          ADA). If the defendant offers a non-discriminatory reason, then the "presumption of  
17          discrimination 'simply drops out of the picture.'" Bradley v. Harcourt, Brace & Co., 104  
18          F.3d 267, 270 (9th Cir. 1996) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511  
19          (1993)). The burden then shifts back to the plaintiff to demonstrate that the non-  
20          discriminatory reason offered by the defendant was merely a pretext for unlawful disability  
21          discrimination either by direct evidence of a discriminatory motive or by circumstantial  
22          evidence that is specific and substantial. See Godwin v. Hunt Wesson Inc., 150 F.3d 1217,

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24                    <sup>9</sup> Because ACRA is modeled after and virtually identical to the ADA, the Court will  
25                    combine its analysis of these statutes. See Ransom v. State Bd. of Regents, 983 F. Supp.  
26                    895, 899 n. 3 (D. Ariz. 1997) (citing Arizona cases that recognize the virtually identical  
27                    scope and purpose of the ACRA and ADA and therefore apply ADA cases as highly  
28                    persuasive).

1 1222 (9th Cir. 1998); Bradley, 104 F.3d at 270 (citing Wallis v. J.R. Simplot Co., 26 F.3d  
2 885, 890 (9th Cir. 1994)).

3 In Godwin, the Ninth Circuit clarified the applicable burden-shifting standards required  
4 in a disparate treatment case under Title VII. 150 F.3d at 1219. Applying the burden shifting  
5 standards of McDonnell Douglas, the court concluded that in order to prove that an  
6 articulated legitimate reason was merely a pretext for discrimination a plaintiff must come  
7 forward with direct evidence of discriminatory motive or “circumstantial evidence that tends  
8 to show that the employer’s proffered motives were not the actual motives because they are  
9 inconsistent or otherwise not believable.” Id. at 1221-22. When a plaintiff comes forward  
10 with direct evidence, the court stated, “it need be very little.” Id. at 1221. However, a  
11 plaintiff relying on circumstantial evidence must come forward with “‘specific’ and  
12 ‘substantial’ [evidence] in order to create a triable issue with respect to whether the employer  
13 intended to discriminate.” Id. at 1222.

14 It is undisputed that Plaintiff was both disabled and qualified, and that Defendant knew  
15 of Plaintiff’s disability during both the initial and rehiring process. (Pl.’s SOF ¶ 18; Def.’s  
16 SOF ¶¶ 5, 16). In addition, Plaintiff has presented evidence of other available jobs as well  
17 as statistics concerning Compuware’s financial viability to support his claim for disability  
18 discrimination. (Pl.’s SOF ¶ 27, Ex. 3). This evidence, though circumstantial, satisfies  
19 Plaintiff’s minimal burden to establish a prima facie case that the “employment decision was  
20 based on a discriminatory criterion.” Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1361 (9th Cir.  
21 1985). Defendant, in order to satisfy its shifting burden, asserts that Plaintiff was terminated  
22 pursuant to the terms of his reinstatement because Plaintiff received no work assignments.  
23 (Def.’s SOF ¶¶ 11-12). Plaintiff has not provided any evidence in rebuttal to show that he  
24 lost his job because of his disability, nor has he proved that the lay-off was merely a pretext  
25 for discrimination under the ADA. In fact, Plaintiff concedes that there is no real issue of  
26 disparate treatment; rather, he asserts that the real issue “is [Defendant’s] lack of any  
27 accommodation of the plaintiff’s muscular dystrophy.” (Pl.’s Resp. to Def.’s Mot. for Sum.

1 J. at 2). Therefore, to the extent that the Complaint alleges a disparate treatment claim,  
2 Defendant is entitled to summary judgment.<sup>10</sup> Moreover, Plaintiff has not met his burden of  
3 proving that Defendant's termination rationale was merely a pretext for discrimination. See  
4 Godwin, 150 F.3d at 1221-22. Plaintiff has produced no direct evidence of discrimination  
5 and no circumstantial evidence that is either specific or substantial. See id. In addition,  
6 because Mr. Williams was in charge of both the hiring and firing of Plaintiff, Defendant is  
7 entitled to a strong inference of a non-discriminatory motive. See Coleman v. Quaker Oats  
8 Co., 232 F.3d 1272, 1286 (9th Cir. 2000). Plaintiff has failed to overcome the Defendant's  
9 evidence and legal presumptions that justify Plaintiff's termination for legitimate reasons.  
10 Therefore, Defendant is entitled to summary judgment on Plaintiff's claim of disparate  
11 treatment on the basis of his disability. Fed. R. Civ. P. 56(c).

12 **b. Reasonable Accommodations**

13 The ADA prohibits employers from discriminating against employees by "not making  
14 reasonable accommodations to the known [limitations of an employee]." 42 U.S.C.  
15 § 12112(b)(5)(A); see also EEOC Regulations to Implement the Equal Employment  
16 Provisions of the ADA, 29 C.F.R. § 1630.9.<sup>11</sup> "[A plaintiff] bears the initial burden of  
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18 <sup>10</sup> Plaintiff initially referenced a claim for disparate treatment in the Complaint by  
19 asserting that Defendant's reasons for his termination were merely a pretext for  
20 discrimination and by providing evidence of Compuware's financial status. However,  
21 Plaintiff has abandoned any disparate treatment argument in his Response by stating that  
22 disparate treatment is not the issue in this case, and by clearly addressing only the reasonable  
23 accommodations claim during the Hearing. (Pl.'s Resp. to Def.'s Mot. for Sum. J. at 2; Hr'g  
24 Tr. at 16-19).

25 <sup>11</sup> Considerable weight should be given to an agency's interpretation of a statute. See  
26 Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc., 460 U.S. 837, 844 (1984). Under  
27 Ninth Circuit law, deference is given to an agency's interpretation of a statute that Congress  
28 has entrusted it to administer. See Trustees of Calif. State Univ. v. Riley, 74 F.3d 960, 964  
(9th Cir. 1996). Therefore, the Court should only reject the EEOC's guidelines if they are  
contrary to the clear intent of Congress in enacting the ADA, or if they frustrate the ADA's  
purpose. See id.

1 showing that “the suggested accommodation would, more probably than not, have resulted  
2 in his ability to perform the essential functions of his job.” Mustafa v. Clark County Sch.  
3 Dist., 157 F.3d 1169, 1176 (9th Cir. 1998) (citing Buckingham v. United States, 998 F.2d  
4 735, 742 (9th Cir. 1993)).<sup>12</sup> Once plaintiff satisfies his burden by demonstrating a viable  
5 accommodation the burden shifts to the employer to demonstrate that the suggested  
6 accommodation is unreasonable. Mustafa, 157 F.3d at 1176. Assessing the potential  
7 accommodation of a disabled employee may, in certain circumstances, require the employer  
8 to initiate “an informal, interactive process with the qualified individual.” 29 C.F.R.  
9 § 1630.2(o)(3). This is especially true where the employer knows that the employee is  
10 experiencing difficulty in the workplace as a result of his disability. Barnett v. U.S. Air,  
11 Inc., 228 F.3d 1105, 1112 (9th Cir. 2000); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188  
12 (9th Cir. 2001). The interactive process is “a mandatory rather than a permissive obligation  
13 on the part of employers under the ADA . . . and is triggered by an employee or an  
14 employee’s representative *giving notice of the employee’s disability and the desire for*  
15 *accommodation.*” Barnett, 228 F.3d at 1114 (emphasis added). Appropriate reasonable  
16 accommodations may include “job restructuring, part-time or modified work schedule,  
17 reassignment to a vacant position, acquisition or modification of equipment or devices,” as  
18 well as “modifications or adjustments that enable [the disabled employee] to enjoy equal  
19 benefits and privileges of employment as are enjoyed by its other similarly situated  
20 employees without disabilities.” 29 C.F.R. § 1630.2(o); see also 42 U.S.C. § 12111(9)(B).

21 In Barnett, the Ninth Circuit discussed when an employer is obligated to initiate the  
22 interactive process without an employee’s request for accommodation. 228 F.3d at 1109.  
23 After reviewing the legislative history of the ADA, the EEOC’s enforcement guidelines, and  
24 case law from other circuits, the court concluded that in some circumstances the employer

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26 <sup>12</sup> Although both cited cases are based on claims under the Rehabilitation Act of  
27 1973, 29 U.S.C. § 794, “[i]nterpretations of the ADA are guided by Rehabilitation Act  
precedent.” Nunes, 164 F.3d at 1248 n.2.

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1 should initiate the interactive process without a request from the employee. Id. at 1112.

2 Therefore the court stated that the employer must initiate interaction if the employer:

3 (1) Knows that the employee has a disability, (2) knows, or has reason to know, that the  
4 employee is experiencing workplace problems because of the disability, *and (3) knows,*  
5 *or has reason to know, that the disability prevents the employee from requesting a*  
6 *reasonable accommodation.*

6 Id. (emphasis added).

7 In Lucky, the Ninth Circuit applied Barnett and denied a plaintiff's claims that her  
8 employer violated the ADA by not initiating the interactive process. Lucky, 246 F.3d at  
9 1187. Based on the plaintiff's failure to request an accommodation, the defendant's lack of  
10 knowledge that the plaintiff was experiencing problems at work, and the absence of proof  
11 that plaintiff was unable to make a request, the court concluded that "Lucky stores had no  
12 duty to provide an accommodation for [the plaintiff]." Id. at 1188-89.

13 Plaintiff must first prove that Defendant denied him reasonable accommodations that  
14 would have otherwise allowed him to perform the essential functions of his job. See  
15 Mustafa, 157 F.3d at 1176. Plaintiff alleges that Defendant failed to reasonably  
16 accommodate him by neglecting to upgrade his telecommuting device, reassign him to other  
17 vacant positions in the company, and engage in the interactive process. (Pl.'s Resp. to Def.'s  
18 Mot. for Sum. J. at 2-4 ). However, Plaintiff has not alleged that any of these failures would  
19 have allowed him to receive work, perform the essential functions of his job, and prevent his  
20 inactive status. Insofar as Plaintiff claims that he was not receiving work because of his  
21 disability he has the burden of proving that, with the suggested accommodations, he would  
22 have received work. See Mustafa, 157 F.3d at 1176; Barnett, 228 F.2d at 1111. Plaintiff has  
23 not met this burden. Plaintiff has produced no evidence that there was work available for  
24 Defendant to assign him and that the denial of his suggested accommodations prevented him  
25 from performing the available work. In fact, Defendant acknowledges that Plaintiff was both  
26 qualified and able to perform his job in his current condition, but that there was simply no  
27 work available for Defendant to assign. (See Def.'s Mot. Sum. J. at 5; Def.'s SOF ¶ 11). In

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1 addition, Defendant informed Plaintiff that no work was available and rehired him with  
2 retroactive benefits on the condition that if he did not receive work within thirty days he  
3 would be terminated again. (Def.'s SOF ¶¶ 10, 28). Therefore, Plaintiff cannot establish a  
4 viable claim for reasonable accommodations because he has not met his initial burden of  
5 proving that the suggested accommodations would have resulted in his ability to perform the  
6 essential functions of his position. See Mustafa, 157 F.3d at 1176.

7 Even if the Court were to conclude that Plaintiff established the availability of  
8 reasonable accommodations under the Mustafa burden, Defendant was not obligated in this  
9 case to initiate the informal process because there is no evidence that Defendant “[knew] or  
10 [had] reason to know, that the disability [prevented Plaintiff] from requesting a reasonable  
11 accommodation.” Barnett, 228 F.3d at 1112. Plaintiff’s claim for failure to reasonably  
12 accommodate would still fail because it is undisputed that he never requested an  
13 accommodation, and therefore never gave Defendant “notice of the employee’s disability and  
14 the desire for accommodation” as is required to invoke the employer’s obligations under  
15 Barnett. Id. at 1114. Therefore, Defendant is entitled to summary judgment on Plaintiff’s  
16 reasonable accommodation claim. Fed. R. Civ. P. 56(c).

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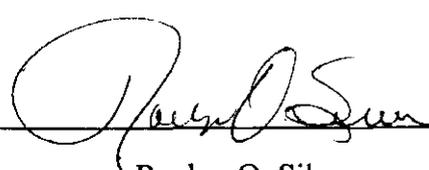
**IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss (Doc. #17) is **DENIED AS MOOT**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to File an Amended Complaint (Doc. #27) is **GRANTED**. Plaintiff shall have **FIFTEEN (15) DAYS** from the entry of the Order to file a second amended complaint.

**IT IS FURTHER ORDERED** that Defendant's Motion to Strike Plaintiff's Statement of Facts in Support of His Response to Defendant's Motion for Summary Judgment (Doc. #52) is **DENIED AS MOOT**.

**IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment (Doc. #41) is **GRANTED**.

DATED this 30th day of March, 2002.

  
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Roslyn O. Silver  
United States District Judge