Skerce v. Torgeson Electric Company

2019 | Cited 0 times | D. Kansas | August 13, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS STEVE F. SKERCE, Plaintiff, v. TORGESON ELECTRIC COMPANY, Defendant.

Case No. 2:18-cv-02040-HLT

MEMORANDUM AND ORDER Plaintiff Steve F. Skerce brings this action against his former employer, Defendant Torgeson Electric Company, asserting a litany of employment-related claims under federal and state law, including: (1) interference with his right to leave and retaliation under the Family

ADA 12101, et seq. (Count II); (3) disability discrimination under the ADA (Count III); (4) retaliation under the ADA -1001, et seq. (Count IV); and (5) age discrimination under the Age Discrimination in Employm §§ §§ 44-1111, et seq. (Count V). Doc. 37. Defendant moves for summary judgment on each claim.

Doc. 38.

For the following reasons, the Court grants Defendants request for summary judgment on Plaintiffs claims for FMLA and ADA/KAAD retaliation, ADA failure to accommodate, ADA disability discrimination (except as it pertains to Plaintiffs diabetes), and age discrimination under the ADEA and KADEA. But the Court denies Defendants motion with respect to Plaintiffs claims for FMLA interference and ADA disability discrimination based on his diabetes.

I. BACKGROUND 1

A. Plaintiff s Employment Defendant hired Plaintiff in October Doc. 37 at 2. As a J1, Plaintiffs essential job duties with Defendant included assembling,

installing, and running wires or other electrical components to construct functional electrical systems, inspecting electrical systems for defects and to ensure compliance with applicable codes and regulations, and performing such work from ladders, scaffolds, and roofs. Doc. 39 at 4 ¶ 12; Doc. 49 at 7 ¶ 12.

Defendant assigned Plaintiff to during his employment. Projects are overseen by a foreman and the general superintendent. Doc. 39 at 5 ¶¶ 16-17; Doc. 49 at 8 ¶¶ 16- 17. A foreman is assigned to one jobsite and is the immediate supervisor of the employees at that site. Doc. 39 at 5 ¶ 16; Doc. 49 at 8 ¶ 16. The general superintendent is above the foreman and oversees multiple jobsites, assisting the foreman at each jobsite by helping him run each site smoothly. Doc. 39 at 5 ¶ 17; Doc. 49 at 8 ¶ 17.

In 2014, Defendant assigned Plaintiff to perform general electrical work on the remodel of the Academy Sports and Orscheln stores in Topeka, Kansas. Doc. 39 at 5 ¶ 14; Doc. 49 at 7 ¶ 14. During the course of the remodel, the assigned foreman Todd Vandervelde reported various issues related to Plaintiffs performance to Defendants general superintendent, Brian Mack. Vandervelde told Mack on more than one occasion that Plaintiff would not perform tasks as

1 As an initial matter, the resolution of this motion was significantly complicated by the sheer volume and breadth

of the facts asserted in this action, many of which were neither discussed nor analyzed in any meaningful way, and by the number of unsupported and improper objections to those facts. The vague and unsupported objections repeatedly misapply the rules regarding hearsay to attack several of the asserted facts that were properly supported by affidavits, deposition testimony, and other admissible evidence, as expressly provided by Rule 56. In many instances, one party also attempts to controvert facts with citations to nonresponsive portions of the record. The Court does not address each objection indeed, there are many but notes that it has carefully analyzed the summary judgment record and considers only those uncontroverted facts required to reach its decision and construes those facts in the light most favorable to Plaintiff as the nonmoving party.

instructed and that, if he wired something wrong, Plaintiff would either claim he did not do the work or that he had done what he was told. Doc. 39 at 6 ¶ 24.

Defendant later assigned Plaintiff to work on the remodel of a Dillons store in Topeka under the supervision of foreman Jose Zesati. Doc. 39 at 6 ¶ 26; Doc. 49 at 12 ¶ 26. On two or three occasions, Zesati likewise complained to Mack about Plaintiffs work performance. Doc. 39 at 6 ¶ 27. And, on September 11, 2014, Plaintiff was written up for cursing on the jobsite. Doc. 37 at 2. Plaintiff subsequently admitted to Mack that he had cursed inside the store while working. Doc. 39 at 7 ¶ 30; Doc. 49 at 13 ¶ 30.

Following this incident, Mack reassigned Plaintiff to a project at the building in Topeka. Id. Plaintiff began working at the KBI jobsite in mid-September 2014 under foreman Greg Franken. Doc. 39 at 7 ¶ 33; Doc. 49 at 14 ¶ 33. Shortly after his reassignment, on September 17, 2014, Defendant promoted position. Doc. 37 at 2; Doc. 39 at 7 ¶ 34; Doc. 49 at 14 ¶ 34. Between October 2014 and January 2015, several other employees told Franken that Plaintiffs production and the quality of . Doc. 39 at 8 ¶ 36. Franken relayed those concerns to Mack. Id. at 8-9 ¶ 42.

Despite the above-detailed complaints regarding his work performance, during the course of his employment Plaintiff never received a written performance evaluation from Defendant. Doc. 37 at 2. The only discipline Plaintiff received during his employment was for cursing on the Dillons jobsite. Id.

B. Plaintiff s Health Issues In this case, Plaintiff raises allegations regarding a number of medical conditions including diabetes, high blood pressure, knee and back pain, and depression for which he

requested time off during his employment.

On or around July 3, 2014, while working on the Academy Sports/Orscheln remodel, Plaintiff asked the project foreman (Vandervelde) if he could leave work early because his diabetes medication, combined with the heat, was making him feel light-headed and dizzy. Doc. 39 at 17- 18 ¶ 101; Doc. 49 at 41 ¶ 101. Vandervelde allowed Plaintiff to leave work early and did not require him to provide a doctors note justifying his leave. Doc. 39 at 18 ¶ 102; Doc. 49 at 41 ¶ 102. Plaintiff left work early on at least one other occasion in the summer of 2014 due to the interaction of the heat and his diabetes medication. Doc. 39 at 18 ¶¶ 103, 105; Doc. 49 at 41-42 ¶¶ 103, 105. Again, Vandervelde allowed the early departure and did not require Plaintiff to submit any medical paperwork related to the request. Doc. 39 at 18 ¶ 106; Doc. 49 at 42 ¶ 106.

While assigned to the KBI project, Plaintiff again complained of health issues this time, high blood pressure. Doc. 39 at 18 ¶ 107; Doc. 49 at 42 ¶ 107. The foreman of the KBI jobsite, Franken, allowed Plaintiff to leave early but told him that he would need to submit a doctors note to return to work. Id. Plaintiff produced a doctors note upon his return the next day. Id. On or about December 15, 2014, while still at the KBI jobsite, Plaintiff told Franken he was having issues with high blood pressure, diabetes, joint pain, and depression. Doc. 39 at 18-19 ¶ 108; Doc. 49 at 42 ¶ 108. Plaintiff further explained that the cold temperatures were affecting his knees and back, causing him difficulty climbing up and down ladders and stairs. Id. Franken told Plaintiff he 49 at 42-43

Franken advised Plaintiff to speak with Darla Hamilton, who handled human resources for Defendant. Id.; Doc. 49 at 47 ¶ 133; Doc. 53 at 13 ¶ 133.

Plaintiff subsequently met with Hamilton. Plaintiff asked Hamilton whether Defendant had [him] for [his] Doc. 39 at 19 ¶ 110. that there was nothing

that time off, that 39 at 19

¶ 112; Doc. 49 at 43 ¶ 112. Hamilton asked Plaintiff how much time off he was thinking of taking, and Plaintiff replied that he did not know and would need to speak to his doctor. Doc. 39 at 19 ¶ 113; Doc. 49 at 43 ¶ 113. Plaintiff asked Hamilton about the FMLA but Hamilton told Plaintiff that Defendant did not provide that and, further, t how much -20 ¶¶ 114-115; Doc. 49 at 43-44 ¶¶ 114-115.

In late 2014 or early January 2015, Plaintiff took some days off work due to his diabetes, knee and back pain, and depression. Doc. 39 at 20 ¶ 117; Doc. 49 at 44 ¶ 117. Plaintiff provided a doctors note to Franken to cover the days off and Franken accepted the note as justification. Id. Plaintiff did not submit a request for FMLA leave and Defendant did not designate any of Plaintiffs time off as FMLA leave. Doc. 39 at 20 ¶¶ 118-119; Doc. 49 at 44-45 ¶¶ 118-119.

C. Plaintiff s Elbow Injury After this time off, on January 29, 2015, Plaintiff injured his left elbow at work. Doc. 37 at 2; Doc. 39 at 9 ¶ 47; Doc. 49 at 22 ¶ 47. Plaintiff was diagnosed with a contusion and a ruptured bursa sac on his left elbow and was instructed to keep his arm in a sling. Doc. 39 at 10 ¶ 49; Doc. 49 at 22 ¶ 49. Sometime after his injury, Plaintiff met with Hamilton to discuss his elbow injury and

workers compensation claim. Doc. 39 at 11 ¶ 56; Doc. 49 at 24 ¶ 56. Defendant maintains an FMLA policy, which provides that eligible employees may take up to 12 weeks of unpaid leave

49 at 5 ¶ 6. However, although Plaintiff was eligible to take FMLA leave due to his elbow injury, Hamilton did not advise Plaintiff either verbally or in writing that he was eligible for FMLA leave or any other unpaid time off. Doc. 39 at 11 ¶ 58; Doc. 49 at 24 ¶ 58.

Following his injury, Plaintiffs health care provider imposed various work restrictions. Doc. 39 at 10 ¶ 50; Doc. 49 at 22 ¶ 50. Defendant accommodated those restrictions by having Plaintiff do light duty work, such as sweeping, cleaning up, and moving ladders and spools of wire, among other tasks. Doc. 39 at 10, 12 ¶¶ 54, 65; Doc. 49 at 23, 26 ¶¶ 54, 65. Defendant paid Plaintiff on days when light duty work was available. Doc. 39 at 10-11 ¶ 55; Doc. 49 at 23-24 ¶ 55. When no light duty work was available, the workers compensation insurer paid Plaintiffs compensation. Id. On April 21, 2015, Plaintiffs doctor released him to return to full duty. Doc. 37 at 2.

D. Plaintiff s Termination After his April 21, 2015 doctors appointment, Plaintiff left Hamilton a voice message advising her that he was cleared to return to full duty. Doc. 39 at 14 ¶ 78; Doc. 49 at 29 ¶ 78. The next day, Plaintiff was told that [him] on, to wait and see what they ha 49 at 29 ¶ 79. But on April 23, 2015 just two days after he was cleared to return Hamilton called Plaintiff to notify him that Defendant was terminating his employment. Doc. 37 at 2; Doc. 39 at 14 ¶ 80; Doc. 49 at 29 ¶ 80. Plaintiff did not receive any prior notice that he would be terminated. Doc. 37 at 3. Defendant maintains that Plaintiff was terminated as part of a reduction in force ,

implemented due to a work slowdown and reduced manpower needs, based on him being identified as a substandard employee. Doc. 39 at 14-15 ¶¶ 82-83.

Following his termination, on August 13, 2015, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity 1-1. The EEOC issued Plaintiff a notice of right to sue letter on October 26, 2017, and Plaintiff filed this action on January 24, 2018, asserting claims for interference

with his right to medical leave, failure to accommodate, disability and age discrimination, and retaliation. Doc. 1; Doc. 1-2; Doc. 37 at 12. Defendant now moves for summary judgment. Doc. 38. II. STANDARD

FED. R. CIV. P. 56(a). In applying

this standard, courts must view the facts and any reasonable inferences that might be drawn therefrom in the light most favorable to the non-moving party. Henderson v. Inter-Chem Coal Co., There is no genuine issue of material fact unless the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non- Bones v. Honeywell Int l, Inc., 366 F.3d 869, 875 (10th Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). III. ANALYSIS

A. Count I (FMLA) Count I asserts two alternate claims under the FMLA: (1) that Defendant interfered with Plaintiffs right to take FMLA leave, in violation of 29 U.S.C. § 2615(a)(1); and (2) that Defendant retaliated against Plaintiff for attempting to avail himself of that right, in violation of 29 U.S.C. § 2615(a)(2). Doc. 37 at 12. The Tenth Circuit recognizes that these two theories of recovery the

interference theory under § 2615(a)(1) and the retaliation theory under § 2615(a)(2) are separate and distinct. Dalpiaz v. Carbon Cty., Utah, 760 F.3d 1126, 1131 (10th Cir. 2014). The Court first addresses Plaintiffs interference claim.

1. FMLA Interference

restrain[ing], FMLA. In this lawsuit, Plaintiff argues that Defendant interfered with his right to FMLA leave by failing to advise him of his eligibility for FMLA leave. Doc. 37 at 8. To establish an interference claim, the plaintiff must show (1) that he is entitled to FMLA leave, (2) that some adverse action by the employer interfered with his right to take FMLA leave, and (3) that the employers action was related to the exercise or attempted exercise of his FMLA rights. Sabourin v. Univ. of Utah, 676 F.3d 950, 958 (10th Cir. 2012). Once a plaintiff proves his employer has interfered with his right to FMLA leave, the employer bears the burden of proving that the plaintiff would have been dismissed regardless of his request for, or taking of, FMLA leave. Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1289 (10th Cir. 2007).

Defendant makes three arguments in support of its summary judgment motion. First, Defendant argues Plaintiff cannot establish a prima facie case because Plaintiff fails to show that Defendant interfered with his FMLA rights. Doc. 39 at 22. Second, Defendant argues that Plaintiff cannot survive summary judgment (even if he shows a prima facie case) because Defendant would have terminated him regardless of any exercise or attempted exercise of his FMLA rights. Id. at 23. Third, and finally, Defendant argues Plaintiffs interference claim is barred by the applicable statute of limitations. Id. at 29.

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For the following reasons, the Court finds that summary judgment is not warranted on Plaintiffs FMLA interference claim. On the first issue, [i]f [an] employer is on notice that [an] employee might qualify for FMLA benefits, the employer has a duty to notify the employee that Moss v. Bluecross, Blue Shield of Kan., Inc., 534 F. Supp. 2d 1190, 1200 (D. Kan. 2008); see also Crites v. City of Haysville, Kan., 2018 WL 2236855, at *8 (D. Kan. 2018) eligibility and rights, notice of how leave is designated and treated, any requirement for providing

a certificate validating a health condition, and any fitness-for-duty certification required as a ments may constitute an interference with an employee Crites, 2018 WL 2236855, at *8 (citing 29 C.F.R. § 825.300(e)). would have acted differently had he kno Lujan v. Exide

Techs., 2012 WL 380270, at *15 (D. Kan. 2012).

The parties do not dispute that Plaintiff was eligible to take FMLA leave due to his work- related elbow injury. Doc. 39 at 11 ¶ 58; Doc. 49 at 24 ¶ 58. And it is similarly undisputed that Defendants HR representative, Hamilton, did not advise Plaintiff, either verbally or in writing, that he was eligible for FMLA leave. Id. And Plaintiff was not prejudiced at 27) based on the record before the Court, there is an issue of material fact regarding whether

Plaintiff was prejudiced by Hamiltons failure to notify him of his FMLA rights.

On the second issue, the Court also finds a genuine issue of material fact regarding whether Plaintiffs dismissal would have nonetheless occurred. When an employer defends an FMLA interference claim on the ground that it would have terminated the plaintiff anyway, courts place the burden of persuasion on the employer to prove that defense. 2

Sabourin, 676 F.3d at 962. Although Defendant argues that Plaintiff was terminated as part of a RIF after being identified as a substandard employee who would be terminated when manpower needs reduced, given the timing of Plaintiffs termination two days after he returned from leave for his elbow injury the Court finds that there is a genuine dispute that Plaintiffs dismissal would have occurred regardless of the attempted exercise of his rights. Indeed, Hamilton previously advised Plaintiff that he

-20 ¶ 115; Doc. 49 at 44 ¶ 115.

On the third issue, the Court again finds a genuine issue of material fact regarding which statute of limitations applies. FMLA claims are generally subject to a two-year limitations period, -year statute of limitations. See 29 U.S.C. § 2617(c)(1)-(2). Willful FMLA or are taken in reckless disregard of the FMLA Ramsey v. Advance Stores Co., 2015 WL 3948119, at *5 (D. Kan. 2015) (citing Bass v. Potter, 522 F.3d 1098, 1103-04 (10th Cir. 2008)). The parties do outside the two-year limitations period but within the three-year limitations period. Thus, Defendant argues it is entitled to summary judgment on

ims are time-barred under the two-year statute of limitations.

2 Unlike claims for FMLA retaliation, see infra Part III.A.2, FMLA interference claims are not analyzed under the

McDonnell Douglas burden-shifting scheme. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 963 (10th Cir. 2002).

But the Court finds , precluding summary judgment on this basis prove willful conduct at trial, on the record before the Court, the statute-of-limitations issue is

simply too fact intensive and involves too many disputes to resolve at this juncture. For all of these reasons, the Court denies Defendants motion for summary judgment as it pertains to Plaintiffs claim for FMLA interference.

2. Retaliation In addition to its prohibition on interference, the FMLA also forbids employers from 29 U.S.C. § 2615(a)(2). Plaintiff asserts a claim for FMLA

retaliation, arguing that Defendant unlawfully retaliated against him by terminating him after he took non-FMLA leave from January to April 2015. Doc. 49 at 92. Defendant argues Plaintiffs retaliation claim fails because he did not engage in any protected activity necessary to establish his prima facie case i.e., he neither requested FMLA leave nor availed himself of any FMLA rights or benefits. 3

Doc. 39 at 27. FMLA retaliation claims are subject to the McDonnell Douglas burden-shifting analysis. 4 Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1170 (10th Cir. 2006); see generally

3 Defendant argues that summary judgment is warranted for two additional reasons: (1) even if Plaintiff could make

a prima facie case, he cannot show that Defendant s articulated reasons for his termination are pretextual (Doc. 39 at 28); -barred (id. at 29) 4 The Court notes that McDonnell Douglas s burden-shifting scheme applies only where there is no direct evidence

of retaliation. Nealey v. Water Dist. No. 1 of Johnson Cty., Kan., 324 F. App x 744, 748 (10th Cir. 2009) (where the plaintiff lacks direct evidence of retaliation, claim is properly analyzed under the McDonnell Douglas framework). Neither party appears to dispute the applicability of the McDonnell Douglas framework to Plaintiffs FMLA retaliation claim and, regardless, the Court finds that Plaintiff has not presented any direct evidence of retaliation so as to justify deviating from that framework.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The first prong of the McDonnell Douglas framework requires the plaintiff to establish a prima facie case. Metzler, 464 F.3d at 1170. To establish a claim for FMLA retaliation, the plaintiff must show (1) he engaged in a protected activity, (2) the employer took an action that a reasonable employee would have found materially adverse, and (3) there exists a causal connection between the protected activity and the adverse employment action. Id. at 1171. Second, once a prima facie case has been established, the employer has the burden of producing evidence of a legitimate, non-retaliatory reason for the adverse action. Id. at 1170. This burden is one of production, not persuasion; it involves no credibility assessment. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (applying McDonnell Douglas framework in the context of an ADEA action). Third, provided the employer satisfies the second step, the plaintiff bears the burden of demonstrating that the employers proffered reason is pretext for retaliatory motive. Metzler, 464 F.3d at 1170. In analyzing a plaintiffs claim of pretext, courts examine the facts as they appear to the individual making the termination decision; the courts role s business judgment. Dewitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 1307 (10th Cir. 2017); see Young v. Dillon Cos., 468 F.3d 1243, 1250 (10th Cir. 2006) super personnel department, second guessing employers Nor is the courts role to ask whether the decision was wise, fair, or correct. Dewitt, 845 F.3d at 1307. Rather, the court must determine whether the employer honestly believed the legitimate, non-retaliatory reason it gave for its conduct and acted in good faith on that belief. Id. Mere conjecture that the employers explanation is pretext is not enough to justify denial of summary judgment. Id.

Here, the uncontroverted evidence does not show that Plaintiff engaged in any protected activity sufficient to establish a prima facie case. There is no evidence that Plaintiff ever requested FMLA leave during his employment with Defendant. Plaintiff has not produced any evidence that he asserted his FMLA rights by submitting the paperwork necessary to take such leave. Indeed, Plaintiff has presented neither originals nor copies of any FMLA paperwork, nor has he produced any records indicating he requested his doctor complete any FMLA paperwork and that any FMLA paperwork was completed and submitted to Defendant. And although the parties agree at least for purposes of this motion that Plaintiff qualified for FMLA leave due to his work-related elbow injury, and that Hamilton did not inform him of his entitlement to such leave, this is not enough. Doc. 39 at 11 ¶ 58; Doc. 49 at 24 ¶ 58. Simply qualifying for FMLA leave is insufficient to establish protected activity for purposes of an FMLA retaliation claim. Ney v. City of Hoisington, Kan., 508 F. Supp. 2d 877, 887 (D. Kan. 2007). Id. Plaintiff did not do so. Because Plaintiff has

not carried his burden of establishing a prima facie case, the Court need not proceed with the remainder of the McDonnell Douglas analysis. The Court accordingly finds that summary judgment is proper on Plaintiffs claim for retaliation in violation of the FMLA. B. Counts II-IV (ADA and KAAD)

The ADA with disabilities i.e., those can

perform the essential functions of the employment position that such individual hol 42 U.S.C. §

12111(8). Counts II and III of the complaint allege Defendant violated the ADA by

failing to accommodate Plaintiffs disability (Count II) and discriminating against Plaintiff on the

basis of that disability (Count III). Doc. 37 at 12. Count IV alleges a claim of retaliation against Defendant under both the ADA and its Kansas-state-law counterpart, the KAAD. Id.

Before the Court addresses the parties arguments as to each of Plaintiffs claims, however, the Court first addresses meaning of the ADA. In this action, Plaintiff identifies a number of mental and physical

, including high blood pressure, diabetes, depression, chronic back pain, chronic knee pain, joint pain, and a work- related elbow injury. Doc. 49 at 99.

substantially limits one or m . To satisfy this definition, a plaintiff must (1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one or more of those activities. Holt v. Grand Lake Mental Health Ctr., 443 F.3d 762, 765 (10th Cir. 2006). The term broadly and the determination of whether an impairment 29 C.F.R. § 1630.2(j)(1)(i); Vannattan v. VendTech-SGI, LLC, 2017 WL 2021475, at *3 (D. Kan. 2017). The question of whether a plaintiff has a recognized impairment and identifies one or more major life activities are questions of law for the court, and the question of whether an impairment substantially limits a major life activity is generally a question of fact for the jury. Carter v. Pathfinder Energy Servs., Inc., 662 F.3d 1134, 1142 (10th Cir. 2011). The Court further notes that of particular import in this case emporary conditions. Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1290 (10th Cir. 2000).

The majority of the health conditions identified by Plaintiff in this case do not qualify as disabilities under the ADA. Plaintiffs work-related elbow injury was merely a temporary condition his doctor cleared him to return to full duty work after less than three months and thus does not qualify as a disability under the ADA. Id. And, as to the majority of Plaintiffs other ailments specifically, his alleged high blood pressure, depression, chronic back pain, chronic knee pain, and joint pain there is no record evidence indicating that those were anything but temporary conditions or that they otherwise constitute physical or mental impairments that substantially limit one or more major life activities.

But the Court finds there is a genuine issue of fact regarding whether Plaintiffs diabetes qualifies as a disability under the ADA. Plaintiff . See Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850, 858 (9th Cir. 2009) (in ADA disability discrimination case involving diabetic plaintiff, holding that the plaintiff because the condition affected the plaintiffs digestive, hemic, and endocrine systems); 29 C.F.R.

§ [a]ny physiological disorder or condition . . . affecting one or more body systems, such as . . . digestive . . . hemic . . . and endocrine Plaintiff identifies at least one major life activity affected by his diabetes due to the interaction of the heat and his diabetes medication, Plaintiff complained of feeling light-headed and dizzy, which caused him trouble working. See 29 C.F.R. § 1630.2(i)(1)(i) (defining major life activities). And broadly construing , the Court finds there is a

question of fact regarding whether Plaintiffs diabetes substantially limits a major life activity.

In sum, the Court finds that the majority of the ailments identified by Plaintiff are not ADA-qualifying disabilities, with the exception of his diabetes. The Court therefore addresses each of Plaintiffs ADA claims only within the context of his diabetes.

1. Failure to Accommodate The ADA provides a cause of action for disabled employees whose employers fail to reasonably accommodate them. 42 U.S.C. § 12112(b)(5)(A). Failure to accommodate claims are not analyzed under the McDonnell Douglas framework; rather, the Tenth Circuit has developed a modified burden-shifting framework under which courts are to assess such claims. Punt v. Kelly Servs., 862 F.3d 1040, 1050 (10th Cir. 2017). Under this modified framework, the plaintiff must first establish a prima facie case: (1) that he is disabled under the ADA Id. Once the plaintiff makes this showing, the burden

shifts to the employer to present evidence either rebutting one or more elements of the prima facie case or establishing an affirmative defense. Id. If the employer does either of these things, summary judgment is appropriate unless the plaintiff can produce evidence establishing a genuine dispute regarding the affirmative defenses or rehabilitates any of the challenged elements of his prima facie case. Id.

With respect to the most part, [Defendant] accommodated Plaintiff

Id. Nonetheless Plaintiff maintains Defen Id.

means nothing if an employee is terminated for exercising [that] accommodation. Id. This appears to be the crux of Plaintiffs failure to accommodate claim: that Defendant failed to accommodate his alleged disabilities when it terminated him after he returned from leave for his elbow injury. Defendant contends it is entitled to summary judgment on this claim because Plaintiff did not request any plausibly reasonable accommodation for any alleged disability, and, further, even if he did, Defendant accommodated those requests. 5

Doc. 39 at 34. The Court agrees with Defendant. The record establishes two occasions upon which it could be construed that Plaintiff requested accommodation related to his diabetes: (1) his meeting with Hamilton during which he inquired about potential accommodations for his health issues, and (2) when he requested that he be permitted to leave work early due to complications arising from his

diabetes medication. The Court first addresses Plaintiffs meeting with Hamilton and finds that Plaintiffs inquiries during that meeting did not constitute a request for a plausibly reasonable accommodation. First, during the meeting, Plaintiff asked Hamilton whether Defendant had in other words, Plaintiff inquired about the availability of paid leave. Doc. 39 at 19 ¶ 110.

However, the EEOCs guidance suggests that a request for paid leave not otherwise offered by the employer is not considered a plausibly reasonable accommodation under the ADA. See EEOC Enforcement Guidance, 2002 WL 31994335, at *14 (ermitting the use of accrued paid leave . . . is a form of reasonable accommodation when necessitated by an employees beyond that which is provided to similarly-

5 Defendant also argues Plaintiff has not shown he suffers from an ADA-qualifying disability. Doc. 39 at 31.

Having already addressed that argument above, however, the Court does not address it again here.

Second, during the meeting, Hamilton inquired about the duration of Plaintiffs potential leave and Plaintiff replied that he did not know and would need to speak to his doctor. Doc. 39 at 19 ¶ 113; Doc. 49 at 43 ¶ 113. But cannot determine whether an employee will be able to perform the essential functions of the job

in the near future and therefore whether the leave request is a reasonable Cisneros v. Wilson, 226 F.3d 1113, 1130 (10th Cir. 2000), overruled on other grounds by Bd. of

Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); see also Punt, 862 F.3d at 1051 (finding plaintiff did not request a reasonable accommodation where plaintiff did not inform her employer of the expected duration of her impairment . . .).

Plaintiffs requests that he be permitted to leave work early on occasion due to complications arising from his diabetes likewise fail to establish a request for reasonable accommodation. Again, such vague, non-specific requests do not qualify as requests for plausibly reasonable accommodation. See Punt, 862 F.3d at 1051. And, regardless, Defendant accommodated those requests. The uncontroverted evidence shows that, on multiple occasions between mid-2014 and early 2015, Plaintiff requested and was granted time off due to complications related to his diabetes. Doc. 39 at 17-18, 20 ¶¶ 101-103, 105-106, 117; Doc. 49 at 41-42, 44 ¶¶ 101-103, 105-106, 117. For these reasons, summary judgment is warranted on Plaintiffs claim for failure to accommodate.

2. Disability Discrimination Plaintiff next claims Defendant unlawfully discriminated against him on the basis of disability. The ADA 12112(a).

ADA discrimination claims are analyzed under the McDonnell Douglas burden-shifting scheme.

Williams v. FedEx Corp. Servs., 849 F.3d 889, 896 (10th Cir. 2017).

Again, under McDonnell Douglass three-part analysis, a plaintiff must first establish his prima facie case. To establish a prima facie case of ADA disability discrimination, the plaintiff must show: (1) he is a disabled (or perceived as disabled) person as defined by the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of his job; and (3) he suffered discrimination as a result of his disability. Id. The plaintiff endures action because of his disability. Id. If the plaintiff establishes a prima facie case of discrimination,

the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Id. If the employer does so, the burden shifts back to the plaintiff to show that the employers stated reasons for its actions are mere pretext for discrimination. Id.

As set forth above, the Court finds that Plaintiff can meet the first element of his prima facie case (that he is a disabled person under the ADA) with respect to his diabetes. And, at least for purposes of summary judgment, Defendant concedes that Plaintiff was qualified to perform the essential functions of his position, establishing the second element. Doc. 39 at 31. The Court therefore proceeds to the third element of Plaintiffs prima facie case: whether he suffered discrimination as a result of his disability.

In its motion for summary judgment, Defendant argues Plaintiff cannot show it discriminated against him on the basis of any disability. Id. at 33. The Court disagrees. The evidence shows that Plaintiff notified his supervisors multiple times from mid-2014 to early 2015 that he was experiencing difficulties stemming from his diabetes medication. Doc. 39 at 17-19 ¶¶ 101-103, 105-106, 108; Doc. 49 at 41-42 ¶¶ 101-103, 105-106, 108. Plaintiff took time off on

several occasions due to these complications. Id. When Plaintiff met with Hamilton to discuss potential accommodations, Hamilton told him that there

-20 ¶¶ 112, 115; Doc. 49 at 43-44 ¶¶ 112, 115. Several months later, and just two days after returning from leave for an unrelated injury, Plaintiff was terminated. Doc. 37 at 2; Doc. 39 at 14 ¶ 80; Doc. 49 at 29 ¶ 80. The Court finds there is enough in the record to establish a genuine issue of material fact regarding whether Plaintiff suffered discrimination as a result of his diabetes.

The Court therefore turns to Defendants next argument in favor of summary judgment that, even if Plaintiff could make a prima facie case, he cannot show that Defendants reasons for

his termination were mere pretext for discrimination. Defendant maintains Plaintiff was terminated as part of a RIF, implemented due to a work slowdown and reduced manpower needs, based on Plaintiff being identified as a substandard employee. Doc. 39 at 14-15 ¶¶ 82-83. The uncontroverted evidence shows that, during his employment, multiple employees reported concerns related to

Plaintiffs attitude and work performance. Id. at 6 ¶¶ 24, 27. During his work on the KBI project, several employees reported that Plaintiffs production and the quality of his Id. at 8 ¶ 36.

However, the Court finds a genuine issue of material fact exists regarding whether Defendants reasons for terminating Plaintiff were pretext for discriminatory intent. First, Plaintiff was terminated just two days after he returned from his non-FMLA leave. On April 21, 2015, Plaintiff notified Defendant that he was cleared to return to full duty work. Doc. 39 at 14 ¶ 78; 39 at 14 ¶ 79; Doc. 49 at 29 ¶ 79. But on April 23, 2015, Plaintiff was notified that Defendant was terminating his employment. Doc. 37 at 2; Doc. 39 at 14 ¶ 80; Doc. 49 at 29 ¶ 80.

Although temporal proximity alone is not sufficient to defeat summary judgment, temporal proximity plus circumstantial evidence can be sufficient to establish pretext. See Pinkerton v. Colo. Dept. of Transp., 563 F.3d 1052, 1066 (10th Cir. 2009); Peterson v. Exide Techs., 2011 WL 677150, at *8 (D. Kan. 2011). The Court finds enough circumstantial evidence here to create a fact issue for trial. When Plaintiff met with Hamilton to discuss potential accommodations for his health issues (including his diabetes), Hamilton advised Plaintiff that if he ble and

Doc. 39 at 19-20 ¶¶ 112, 115; Doc. 49 at 43-44 ¶¶ 112, 115. The Court also notes that, despite the complaints regarding his work performance, Plaintiff never received a written performance evaluation during his employment with Defendant, and, in fact, the only discipline Plaintiff received was for cursing on the Dillons jobsite in September 2014, seven months prior to his termination. Doc. 37 at 2.

For these reasons, the Court finds Defendant has not established that it is entitled to summary judgment on this claim. The Court therefore denies request for summary judgment on Plaintiffs ADA discrimination claim as it pertains to his diabetes.

3. Retaliation Plaintiff also argues Defendant unlawfully retaliated against him in violation of both the ADA and its Kansas counterpart, the KAAD. Doc. 49 at 104-106. In response, Defendant argues Plaintiff cannot establish a prima facie case of retaliation because he fails to show that he engaged

in any protected activity or that any purported protected activity was the cause of his termination. Doc. 39 at 36-37. And, even if Plaintiff can establish a prima facie case, Defendant contends it is still entitled to summary judgment because Plaintiff cannot show that its asserted reason for his termination was mere pretext. Id. at 38. The ADA and the KAAD prohibit employers from discharging an employee who opposes any of the acts of discrimination prohibited by the statute. See 42 U.S.C. § 12203(a); K.S.A. § 44- 1009(a)(4); see also Land v. Midwest Office Tech., Inc., 114 F. Supp. 2d 1121, 1140 (D. Kan. 2000). To establish a prima facie case of retaliation under either the ADA or the KAAD, a plaintiff must show: (1) he engaged in protected opposition to discrimination; (2) he suffered an adverse employment action during or after his protected activity, which a reasonable employee would have found materially adverse; and (3) there was a causal connection between the

protected activity and the adverse action. Nyanjom v. Hawker Beechcraft Corp., 641 F. Appx 795, 799 (10th Cir. 2016) (analyzing retaliation claims under the ADA and the KAAD together). Plaintiffs claim for retaliation is subject to the McDonnell Douglas burden-shifting framework. 6

See Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1209 (10th Cir. 2018) (applying McDonnell Douglas burden- shifting approach to ADA retaliation claim); Redmond v. Mirror, Inc., 2017 WL 3873730, at *11 (D. Kan. 2017) (analyzing KAAD retaliation claim using McDonnell Douglas framework). Therefore, the Court first considers whether Plaintiff has established his prima facie case. The Court finds that Plaintiff is unable to establish his prima facie case and, therefore, summary judgment is appropriate. First, the Court agrees with Defendants argument that Plaintiff does not clearly identify any protected activity in which he engaged. In his opposition, Plaintiff

6 The parties do not appear to dispute the applicability of the McDonnell Douglas framework to Plaintiffs ADA

retaliation claim.

appears to argue that he engaged in protected activity when he purportedly requested reasonable accommodations for his alleged disabilities. Doc. 49 at 104-106. However, this is far from clear. In the absence of any allegations of protected activity, Plaintiffs retaliation claim necessarily fails. See Coleman v. Blue Cross Blue Shield of Kan., 487 F. Supp. 2d 1225, 1253 (D. Kan. 2007) (plainti in part because she failed to identify in the pretrial order or her response brief

Second, to the extent Plaintiff attempts to premise his retaliation claim on any request for reasonable accommodation, as established above, Plaintiff did not request any reasonable accommodation with respect to his diabetes. Therefore, this cannot serve as the protected activity necessary to sustain his claim. In the absence of any protected activity, Plaintiff cannot establish his prima facie case of retaliation. Because Plaintiff has not carried this initial burden, the Court need not proceed with the remainder of the McDonnell Douglas analysis. The Court finds that summary judgment is proper on Plaintiffs claim for retaliation under the ADA and the KAAD.

C. Count V (ADEA and KADEA) Finally, Count V alleges Defendant discriminated against Plaintiff on the basis of his age (54) in violation of the ADEA and its state-law counterpart, the KADEA. Doc. 37 at 12. Both the ADEA and the KADEA prohibit discrimination on the basis of age in employment decisions; protection extends to individuals age 40 and older. See 29 U.S.C. §§ 623(a)(1), 631(a); K.S.A. §§ 44-1112(a), 44-1113(a)(1). The analysis for claims of age discrimination is the same under both statutes. Linnebur v. United Tel. Ass n, 2013 WL 3815865, at *3 (D. Kan. 2013). In the absence of any direct evidence of discrimination, the Court again turns to the McDonnell Douglas

framework. 7

Montoya v. Jacobs Tech. Inc., 764 F. Appx 830, 833-34 (10th Cir. 2019) (applying McDonnell Douglas in the ADEA context); Strauthers v. Kellogg Sales Co., 2018 WL 623606, at *6 (D. Kan. 2018) (applying McDonnell Douglas framework to claims under the KADEA). Again, the first step under McDonell Douglas is to determine whether Plaintiff has established his prima facie case. See Montoya, 764 F. Appx at 834. In this case, Defendant contends Plaintiff was terminated as part of a RIF. The Tenth Circuit has held that, to establish a prima facie case of age discrimination in the context of a RIF, the plaintiff must show: (1) that he was within the protected age group when he was discharged; (2) that he was doing satisfactory work; (3) that he was discharged; and (4) the presence of some evidence that the employer intended to discriminate against him in reaching its RIF decision. 8

Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir. 1998). Here, Defendant concedes Plaintiff can meet the first and third elements of his prima facie case (that Plaintiff was in the protected age group at the time of his discharge and that he was, in fact, discharged). Doc. 39 at 38. But Defendant argues Plaintiff cannot satisfy the remaining elements of his prima facie case. Id. The Court finds, however, that Plaintiff can establish his prima facie case. Indeed, the burden at this stage is not onerous, and only a minimal showing is necessary. See Tabor v. Hilti, Inc., 703 F.3d 1206, 1216 (10th Cir. 2013); Bauer v. Albemarle Corp., 169 F.3d 962, 967 (1999). Given this light burden, the Court finds that Plaintiff can establish he was doing satisfactory work

7 As with Plaintiffs other claims, the parties do not appear to dispute the applicability of the McDonnell Douglas

framework to Plaintiff s age discrimination claim. 8 The Court notes that the fourth element of a plaintiffs prima facie case for age discrimination is modified in the

RIF context. At points in their briefing, both Plaintiff and Defendant identify the fourth element as requiring that 38; Doc. 49 at 106. But n [RIF] cases, plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee . . . courts have modified the fourth prima facie element by requiring the plaintiff to produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988). Therefore, the briefing on this issue whether Plaintiff was in fact replaced by a younger employee is not discussed in significant detail.

so as to satisfy the second element of his case. Despite the complaints regarding his performance, Plaintiff never received a written performance evaluation and the only discipline Plaintiff received was for cursing on the Dillons jobsite seven months prior to his termination. Doc. 37 at 2. The Court likewise finds Plaintiff can meet the fourth element of his case. This may be established through circumstantial evidence that the plaintiff was treated less favorably than Beaird, 145 F.3d at 1165 (internal quotations omitted). but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for

its decision Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988) (emphasis added). In his opposition, Plaintiff points to fifteen employees who, at the time he was terminated, were working in Kansas, under the age of 40, and retained. Doc. 49 at 107-108. Although, as established by Defendant in its reply, many of the employees were not journeyman electricians, Defendant concedes the other identified employees were electricians. Doc. 53 at 38-39. Because there is evidence that Defendant, despite terminating Plaintiff, nonetheless retained younger employees in similar positions, Plaintiff can meet the fourth element. See Beaird, 145 F.3d at RIF and who held

But, although Plaintiff can satisfy the light burden at the prima facie stage, turning to the remainder of the McDonnell Douglas analysis, the Court finds that on the record before the Court no reasonable jury could conclude that Defendants articulated reason for Plaintiffs termination (the RIF) was pretext for age discrimination. 9

In his opposition, Plaintiff points to

9 The Court notes that it previously held that there was a genuine issue of material fact regarding whether the purported RIF was merely pretext for

discrimination on the basis of diabetes. See supra Part III.B.2. However, there are several distinguishing Defendant fired Plaintiff a mere two days after

circumstantial evidence regarding the employees hired by Defendant before and after his termination. Doc. 49 at 106-108. But, as discussed above, many of the fifteen employees identified by Plaintiff were not electricians. Doc. 53 at 26-28 ¶ 128. And many of the identified employees did not even log Id. To make a comparison demonstrating discrimination, a plaintiff must show that the employees were similarly situate that is, reporting to the same supervisor, held to the same standards, , 733 F.3d 1306, 1310 (10th Cir. 2013). Here, Plaintiff fails to present any credible evidence on the issue of pretext with respect to his age discrimination claim, and mere conjecture that explanation is pretext is not enough to justify denial of summary judgment. Therefore, the Court finds summary judgment is proper laim for age discrimination. IV. CONCLUSION

THE COURT THEREFORE ORDERS that Defendants Motion for Summary Judgment (Doc. 38) is GRANTED IN PART and DENIED IN PART as set forth in Part III, supra. IT IS SO ORDERED. Dated: August 13, 2019 /s/ Holly L. Teeter

HOLLY L. TEETER UNITED STATES DISTRICT JUDGE

he returned from non-FMLA leave related to an injury. Second, wit Hamilton, regarding potential ramifications if Plaintiff were to take too much time off for his health issues. With respect to his age discrimination claim, however, Plaintiff has not come forward with any credible evidence age.