NOT FOR PUBLICATION

FILED

OCT 17 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IAN GAGE, Plaintiff-Appellant, v. MIDWESTERN UNIVERSITY, Defendant-Appellee.	No. 22-15227 D.C. No. 2:19-cv-02745-DLR MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted October 13, 2022[**]
San Francisco, California

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges.

Ian Gage appeals pro se from the district court's summary judgment on his claims of sex and disability discrimination. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review summary judgment de novo. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1072 (9th Cir. 2018). We affirm in part, vacate in

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

part, and remand.

The district court properly granted summary judgment on Gage's Title VII claims. First, Gage failed to establish his *prima facie* case of sex discrimination, as Gage did not produce evidence—other than his unsupported testimony—that similarly situated individuals outside his protected class were treated more favorably. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010). Second, Gage failed to establish his *prima facie* case of a hostile work environment, as the occasional use of gender-related jokes is not sufficiently severe or pervasive to trigger Title VII. *See Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 648 (9th Cir. 2021). Moreover, Gage did not produce evidence to prove that the assignment of his duties was "because of" his sex. *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003).

The district court also properly granted summary judgment on Gage's claim of retaliation under the Americans with Disabilities Act. As nearly five months passed between Gage's safety complaint and his termination, Gage failed to establish a "causal link" between any protected activity and an adverse employment action. *See Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 802 (9th Cir. 2003) (holding that a causal link's temporal proximity must be "very close" and that a "three-month and four-month time lapse is insufficient to infer causation"), *discussing Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Moreover, even if Gage met his *prima*

facie burden, he failed to show that the University's proffered explanation for his termination was pretextual. *See Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 747 (9th Cir. 2011).

The district court did not abuse its discretion when it denied Gage's motion for contempt, as Gage did not produce clear and convincing evidence that the University's counsel lied to a court or otherwise disobeyed a court order. *See Lab./Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1123 (9th Cir. 2009).

However, the district court erred in its analysis of Gage's disability discrimination claim. To establish a claim under 42 U.S.C. § 12112, a plaintiff must prove that (1) she is disabled under the ADA; (2) she, "with or without reasonable accommodation, can perform the essential functions" of the job; and (3) she was "discriminated against because of her disability." *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). An individual is disabled under the ADA if she meets any one of three definitions: (1) "a physical or mental impairment that substantially limits one or more of the individual's major life activities," (2) a "record of such an impairment," or (3) "being regarded as having such an impairment." *Fraser v. Goodale*, 342 F.3d 1032, 1037–38 (9th Cir. 2003), *quoting* 42 U.S.C. § 12102(1)(A)–(C).

The district court concluded that Gage was not disabled under

section 12102(1) as his alleged symptoms were not "permanent" and not "anything more than temporary." However, as this court recently stated in *Shields* (which was decided after the district court made its ruling), the definition of disability under sections 12102(1)(A) and 12102(1)(B) does not require a permanent impairment. *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1223–25 (9th Cir. 2022) (holding that "the ADA and its implementing EEOC regulations make clear that the actual-impairment prong of the definition of 'disability' in [the ADA] is not subject to any categorical temporal limitation"). Rather, the temporal duration of an impairment is merely "one factor" to be considered. *Id.* at 1225, *quoting* 29 C.F.R. Pt. 1630, App. Therefore, the district court erred in concluding that Gage is not disabled under the ADA solely because his alleged impairments were not permanent.

For the reasons above, we affirm in part, vacate in part, and remand to the district court. On remand, the district court must consider whether Gage is disabled under sections 12102(1)(A) and 12102(1)(B) and whether he has provided sufficient evidence to carry his summary judgment burden on that claim. All pending motions and petitions are denied. Each side shall bear its own costs.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.