**NOT FOR PUBLICATION**

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| KIRK SKINNER,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>NEWMONT USA LIMITED,<br><br>Defendant-Appellee. | No. 21-15623<br><br>D.C. No.<br>3:19-cv-00453-KJD-WGC<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted September 19, 2022
San Francisco, California

Before: GRABER, FRIEDLAND, and KOH, Circuit Judges.
Dissent by Judge KOH.

Plaintiff Kirk Skinner sued Defendant Newmont USA Limited under the Americans with Disabilities Act ("ADA"), alleging that Newmont unlawfully failed to accommodate the lifting restrictions caused by his chronic back injury, discriminated against him, and retaliated against him. Skinner appeals from the

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

district court's orders dismissing his retaliation claim under Federal Rule of Civil Procedure 12(b)(6) and granting summary judgment to Newmont on his failure to accommodate and discrimination claims. Reviewing de novo, *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1166 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 337 (2021), we affirm.

1. Skinner's complaint failed to state a claim of retaliation under the ADA. Even assuming that the district court erred in concluding that Skinner pleaded himself out of the retaliation claim because the ambiguous allegation on which the district court relied should have been construed in his favor, the complaint did not state a prima facie case of retaliation. The alleged adverse employment action was too distant in time from his alleged request for accommodation to raise an inference of but-for causation, *see Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (citing affirmatively cases from other circuits holding that four months was too long to raise an inference of but-for causation), and Skinner did not plead an alternative theory of causation.

Skinner argues in his reply brief on appeal that the district court erred in declining to grant leave to amend the retaliation claim, contending that he could have added allegations of additional requests for accommodation closer in time to his employment termination. Even assuming that the district court erred by not granting leave to amend, Skinner forfeited this error by failing to raise it in his

opening brief. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–14 (9th Cir. 2020).

2. The district court correctly granted summary judgment on Skinner's failure-to-accommodate claim because Skinner did not sufficiently explain the conflict between his statements of total disability on his disability benefits applications and his testimony in this case. To prevail on his accommodation claim, Skinner had to demonstrate that he was "a qualified individual able to perform the essential functions of the job with reasonable accommodation." *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003). Yet Skinner stated in his disability benefits applications that he was completely unable to work, as needed to qualify for the Social Security benefits for which he applied. *See* 42 U.S.C. § 423(d)(2)(A) (defining an individual to be disabled if he is "not only unable to do his previous work," but also unable to "engage in any other kind of substantial gainful work which exists in the national economy").

Such an apparent contradiction is not inherently fatal to an ADA plaintiff's claim. *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999). To survive summary judgment despite these statements, however, Skinner needed to "proffer a sufficient explanation . . . to warrant a reasonable juror's concluding that, assuming the truth of, or [his] good-faith belief in, the earlier statement [of total inability to work], [he] could nonetheless 'perform the essential functions' of [his]

job, with or without 'reasonable accommodation.'" *Id.* at 806–07. Although this is "not an exceedingly demanding" standard, *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 958 (9th Cir. 2013), it does place a minimal burden on a plaintiff to address directly any inconsistencies.

Because Skinner's accommodation claim alleges that he needed assistance only with lifting over 50 pounds, and lifting over 50 pounds is not a requirement of many jobs, taking his ADA allegations as true implies that his statement of total inability to work could not have been truthful, even accounting for the fact that the disability benefit criteria did not consider reasonable accommodations. *Contra Cleveland*, 526 U.S. at 807; *Smith*, 727 F.3d at 959. Nor, given that many jobs do not require anyone to lift over 50 pounds, did Skinner explain why his statements of total disability on his benefits applications were nonetheless made in good faith. *Contra Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999) (observing that the plaintiff explained that she thought her statements of total disability "mean[t] that she could not engage in her regular occupation at that time"). He therefore did not show that he was a qualified individual under the ADA, causing his failure-to-accommodate claim to fail.

3. To the extent that Skinner stated a discrimination claim based on a theory other than failure to accommodate, the district court did not err in granting Newmont summary judgment, because any other discrimination claim would

likewise require Skinner to demonstrate that he is a qualified individual. *See Smith*, 727 F.3d at 955.

**AFFIRMED.**

*Skinner v. Newmont*, 21-15623

KOH, Circuit Judge, dissenting:

Kirk Skinner was hired by Newmont as an underground mine mechanic despite disclosing the fact that he had a back injury and could not lift more than 50 pounds. Skinner then successfully worked for nine years with a de facto accommodation. Yet when Skinner sought help from Newmont for pain management, Newmont placed him on disability leave against the advice of its own contracted-for medical professionals. Over the course of a year Skinner requested on at least eight occasions to be allowed to return to work with the accommodation. But Newmont never provided the accommodation or allowed Skinner to return to work. At the expiration of Skinner's disability benefits, his employment with Newmont ended. Skinner then brought this ADA action. Throughout this litigation Skinner has filed only one complaint and was never granted a single leave to amend. Yet the district court granted Newmont's motion to dismiss the retaliation claim with prejudice and granted Newmont's motion for summary judgment on the discrimination claim. The majority affirms. I respectfully dissent.

The district court erred in dismissing Skinner's retaliation claim. The district court and majority hold that a nine month period is too long to raise an inference of causation. But the sole authority they cite held only that an 18 month period was

too long, by itself, to raise an inference of causation. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002).[1] We have never previously held that a nine month period is per se too long, by itself, to raise an inference of causation. Moreover, our caselaw is clear that "a specified time period cannot be a mechanically applied criterion" and we have "cautioned against analyzing temporal proximity 'without regard to its factual setting.'" *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003)). Here, the district court and majority failed to consider the nine month period in context. Moreover, read in the light most favorable to Skinner, as required on a motion to dismiss, the complaint suggests that Newmont waited until the expiration of its disability benefits to terminate Skinner to disguise its retaliatory motive.

Moreover, even if Skinner's sole complaint failed to adequately state a retaliation claim, the district court erred by dismissing the claim with prejudice.

[1] To support its finding, the *Villiarimo* court provided a string cite to four out of circuit cases indicating that shorter periods could also be too long. 281 F.3d at 1065. The majority here cites this string cite. However, the *Villiarimo* court never held, in dicta or otherwise, that any period less than 18 months was too long. Moreover, the Ninth Circuit previously held that a roughly three month period was sufficient to raise an inference of causation and approvingly cited a First Circuit case finding that a six month period was sufficient to raise such an inference. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (citing *Hochstadt v. Worcester Found. For Experimental Biology, Inc.*, 425 F. Supp 318, 324–25 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976)).

The majority holds that Skinner forfeited this argument because he did not raise it in his opening brief. But we have discretion to review an issue if "the failure to raise the issue properly d[oes] not prejudice the defense of the opposing party." *Koerner v. Grigas*, 328 F.3d 1039, 1049 (9th Cir. 2003). Given that Skinner properly challenged the merits of the dismissal in this appeal, Newmont would not be prejudiced by our consideration of Skinner's argument that he should have been granted leave to amend.[2] Thus, I would exercise that discretion here.

The district court also erred in granting Newmont summary judgment on the discrimination claim. After his employment ended but before he filed this ADA lawsuit, Skinner applied for Social Security Disability Insurance ("SSDI") benefits, which required him to represent that he was unable to work in any job. *See* 43 U.S.C. § 423(d)(2)(A). To defeat summary judgment despite his SSDI application, Skinner had to provide an explanation for the apparent inconsistency "sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'" *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 807 (1999). "*Cleveland*'s sufficient-explanation standard is not an exceedingly demanding

[2] Moreover, Skinner had asked for leave in his opposition to Newmont's motion to dismiss, prompting Newmont to argue in its reply brief that amendment would have been futile.

one," *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 958 (9th Cir. 2013). Indeed, "[i]t gives ADA plaintiffs wide latitude to overcome apparent conflicts between their disability applications and their ADA claims." *Id.* (internal quotation marks omitted).

Skinner provided a sufficient explanation: he understood his application for disability benefits to indicate only that he could not work at his mechanic job without a reasonable accommodation. In applying for Newmont's disability leave, Skinner testified, "I was not totally disabled but signed the form[s] because Newmont was refusing to accommodate my disability." Skinner explained that it was only "after it was clear that Newmont was not going to accommodate [his] disability" in his mechanic job that Skinner applied for other disability benefits, including SSDI. To determine whether he could apply for SSDI, Skinner "relied on" the evaluations of medical professionals who determined that he "could not perform the [mechanic] *job at Newmont*."[3] As Skinner explained in his opposition to summary judgment, he understood that "[n]one of the applications [submitted] . . .

[3] Skinner's application for benefits from the Arizona Department of Economic Security confirms this understanding. As part of his application, Skinner submitted a form filled out by a medical professional that stated the medical professional's belief that Skinner "will be able to work as of NEVER" but simultaneously recommended that Skinner "[c]hange occupations." By submitting this medical form with his application, Skinner indicated that he understood his application represented only that he could not perform his mechanic duties without accommodation and therefore had to change occupations, not that he could not perform any work at all.

stated that [he] was unable to work even with reasonable accommodations." Thus, Skinner affirmatively explained that he understood his SSDI application to only ask whether he could perform his mechanic job without a reasonable accommodation. He has, therefore, "proffer[ed] a sufficient explanation" that would allow a reasonable jury to square his SSDI application with his ADA claim. *Cleveland*, 526 U.S. at 806.

Skinner's explanation is entirely consistent with *Cleveland* and our caselaw. Like the plaintiff in *Cleveland*, Skinner's disability statements were made in an application for SSDI benefits, "which does not consider the effect that reasonable workplace accommodations would have on the ability to work." 526 U.S. at 807 (quoting petitioner's brief). The Supreme Court deemed a plaintiff's explanation to that effect sufficient to allow her case to proceed. *Id.* In *Norris v. Sysco Corp.* 191 F.3d 1043 (9th Cir. 1999), our circuit's first post-*Cleveland* decision, the plaintiff's benefits application forms indicated she "was disabled from doing her own job and any other job." *Id.* at 1047. She and her physician "explained that they took all of that to mean that she could not engage in her regular occupation at that time." *Id.* The panel found that explanation sufficient. *Id.* at 1049. More recently, in *Smith*, we once again found an explanation similar to Skinner's sufficient. 727 F.3d at 958. There, like here, the plaintiff misunderstood a disability benefits application to only be asking about her ability to work in her current job without accommodations. *Id.*

Skinner's explanation is also sufficient under our pre-*Cleveland* decisions, in which we applied a mode of analysis similar to *Cleveland*. *See Lujan v. Pac. Mar. Ass'n*, 165 F.3d 738, 739 (9th Cir. 1999) ("[Plaintiff]'s statement that he is 'unable to work' [for purposes of SSDI] is more readily construed as an assertion that he is eligible for total disability benefits than as an 'unconditional representation' that he is 'completely disabled for all work-related purposes'"); *Johnson v. State, Oregon Dep't of Hum. Res., Rehab. Div.*, 141 F.3d 1361, 1370 (9th Cir. 1998) (plaintiff's explanation that "she needed to support herself and every agency seemed to have its own definition of disability" and that if she was found eligible for long-term disability benefits, which required "disability from all occupations," "I accepted it . . . I agreed that I was unable to go back without accommodation" was sufficient).

To conclude that Skinner's explanation did not satisfy *Cleveland*, the majority construes Skinner's testimony against him—contrary to what is required on a motion for summary judgment—and fails to give Skinner "wide latitude" to explain his applications for disability benefits. *Smith*, 727 F.3d at 958. In doing so, the majority erroneously heightens *Cleveland*'s "not exceedingly demanding" standard, *id.*, implicitly overrules our prior decisions in *Lujan* and *Johnson*, and creates tension with our post-*Cleveland* decisions in *Norris* and *Smith.*

For these reasons, I respectfully dissent.