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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Kevin Glass,

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No. CV-06-1404-PHX-MHM

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Plaintiff,

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**ORDER**

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vs.

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Intel Corporation,

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Defendant.

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Currently pending before the Court are Defendant Intel’s Motion to Dismiss the Case Pursuant to Fed. R. Civ. P. 16(f) and 37(d) (Dkt.56.), and Motion for Summary Judgment. (Dkt.#74.) After reviewing the pleadings and determining oral argument unnecessary, the Court issues the following Order.

21

**I. Background and Procedural History**

22

In 1995, Plaintiff Kevin Glass was hired as by the Intel Corporation (“Intel”) as a senior staff engineer. During the course of his employment, Glass filed eight charges of discrimination with the Equal Opportunity Commission (“EEOC”) and three lawsuits in federal court against Intel. The instant lawsuit concerns events surrounding Glass’s return from a medical leave of absence in May 2005, through the date of his receipt of an email message from his supervisor at Intel, Hamid Rangchi, on November 3, 2005. Events

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1 occurring prior to this time frame are the subject of CV-06-0671-PHX-MHM. Events taking  
2 place after the November 3, 2005 email are the subject of another suit, CV-07-1835-PHX-  
3 MHM.

4 Sometime around 1998 or 1999, Glass began treatment with a psychologist and a  
5 psychiatrist for depression and anxiety, which he claims was triggered by a stressful work  
6 environment and long work hours. In November 1998, Glass received an internal  
7 performance rating from his then manager, Alan Moore, which rated him as “Improvement  
8 Required.” The report noted that Glass had missed several meetings without providing  
9 adequate notice, that he had been frequently delinquent in transmitting weekly reports, that  
10 he demonstrated poor clarity and had problems communicating with co-workers, and that he  
11 had “several issues” regarding the quality of his work. Thereafter Glass took a one year  
12 medical leave of absence from his position. Intel approved the medical leave.

13 Around April 2001, Glass received a performance review from another manager at  
14 Intel, Ameet Bhansali, in which Glass received a trend of “slower” than his peers and was  
15 ranked 6 of 6. This performance review noted that “[r]elative to his peers, Kevin’s lack of  
16 leadership and inability to plan are clearly reflected.” The 2001 review further noted that  
17 Glass’ “key shortcomings is the ability to plan,” and that he “needs to focus on basic  
18 planning items like generating deliverables which can be measured, timeliness, resource  
19 needs, etc.”

20 In April 2002, Glass was again reviewed, and this time his performance was rated as  
21 “successful.” The report did however note that Glass “should improve his organizational,  
22 planning and presentation skills (such as design reviews),” “better structure and execute his  
23 projects and design flows,” and keep better design development records. Glass was also  
24 “strongly encouraged to take project management classes to improve his efficiency and  
25 effectiveness.” Likewise, on April 4, 2003, Glass’s performance was reviewed by another  
26 supervisor, Bobby Nikjou, who rated his performance as “Below Expectations,” placing him  
27 in the bottom third of his work group. Ten days later, on April 14, 2003, Glass filed the first  
28 of what would be eight discrimination charges with the EEOC.

1           In June 2004, two months after receiving another performance review of “Below  
2 Expectations,” Glass took a second paid medical leave of absence from Intel. Glass’s second  
3 leave of absence ran from June 21, 2004 through May 5, 2005. The undisputed facts also  
4 show that when Glass returned to work his only medical restriction was not to work over 50  
5 hours per week, or five days at ten hours of work per day.

6           In late 2004, while Glass was on medical leave, his work group—the Radio Frequency  
7 Organization (“RFO”)—was disbanded. Upon Glass’s return, he, like his colleagues, was  
8 afforded a “transition” period, during which time Intel would continue to pay him while he  
9 sought out employment opportunities within the company. On May 3, 2005, two days  
10 before Glass returned from medical leave, he was contacted by a project architect, Mark  
11 Schuelein, regarding a job opportunity in Intel’s Strategic Design Automation and  
12 Collaterals/Strategic Design Engineering Group (“SDE Group”). On May 16, 2005, Glass  
13 received a formal job offer for placement in the SDE Group. There is some disagreement  
14 between the parties regarding the nature of the job offer in the SDE Group: Glass argues that  
15 the position was not a positive step in his career, and that the position paid approximately  
16 \$1000 per year less than his former position in the RFO; Intel contends that the SDE Group  
17 position paid Glass more than his previous position. In any event, Glass did not immediately  
18 accept the SDE Group position, preferring instead to apply for other work groups that he  
19 considered more desirable. Glass did not receive any such offers, and on June 6, 2005, he  
20 accepted employment within Intel’s SDE Group. Glass alleges that whenever any of the  
21 managers in the work groups that he was attempting to secure employment with spoke to his  
22 former supervisor, Bobby Nikjou, they became less interested in hiring him. Indeed, in his  
23 deposition, Glass claimed that the “hiring party had heard that there were a lot of issues” with  
24 him.

25           Nevertheless, on June 6, 2005, Glass began working in his new position with the SDE  
26 Group. The SDE Group was responsible for a novel circuit design and implementation of  
27 a Network on a Chip concept, and Glass’s primary responsibilities included the circuit design  
28 of a TBCU functional block. At some point, Hamid Rangchi became manager of the SDE

1 Group. Rangchi was physically located in Folsom, California, and he managed the SDE  
2 Group, which had members in Chandler, Arizona, Santa Clara, California, and Hillsboro,  
3 Oregon. Shortly after taking over the SDE Group, Rangchi allegedly observed that Glass  
4 was having difficulty responding to requests, routinely postponed or missed group meetings,  
5 was unable to consistently meet project deadlines, and failed to adequately communicate with  
6 other employees about critical aspects of his assigned projects.

7 In August 2005, Rangchi requested and received copies of Glass's past performance  
8 reviews. Rangchi noticed that the performance problems raised in these previous reviews  
9 were similar to problems that Glass was exhibiting in the SDE Group. Rangchi also  
10 contacted Glass's former supervisor, Bobby Nijou, regarding Glass's performance.

11 Between August and November 2005, Glass allegedly continued to demonstrate  
12 performance deficiencies, such as failing to efficiently organize assignments and prioritize  
13 them according to relative importance, failed to effectively communicate to other SDE Group  
14 members, and could not meet critical group deadlines.

15 In September 2005, Rangchi held a one on one meeting with Glass to discuss various  
16 issues related to Glass's performance. At the meeting, Rangchi told Glass that he was  
17 expected to be prepared at future group meetings, that he needed to have his oral presentation  
18 prepared in writing before he attempted to present it to the group, and that Glass was to  
19 provide Rangchi with weekly updates regarding his progress towards certain performance  
20 benchmarks. Rangchi also reminded Glass that he had ignored two requests to move his  
21 cubicle to the second floor, where Glass would be seated closer to other SDE Group  
22 members. Following the meeting, Glass emailed Rangchi, stating that he had just returned  
23 from long term medical leave and his physician had placed a work restriction that limited him  
24 to no more than 50 hours per week or 10 hours per day, 5 days per week.

25 On November 3, 2005, Rangchi again emailed Glass to take issue with his  
26 performance. The email contained a detailed structured work plan that Rangchi had  
27 developed for Glass to finish within the following five weeks. Rangchi also noted that Glass  
28 should read through the plan, because it was to be discussed at a meeting between the two

1 men on the following day, November 4, 2005. The next day, Glass emailed Ragnchi to  
2 criticize the suggestions contained in the five week work plan. Glass accused Rangchi of  
3 making significant misrepresentations regarding his performance. Rangchi responded to the  
4 email, reminding Glass that they would be discussing the plan during their afternoon  
5 meeting. Shortly thereafter, Glass canceled the meeting. On the following Monday, Glass  
6 filed his fifth charge of discrimination with the EEOC, challenging Ranchi's November 5,  
7 2005 email, among other things. The instant lawsuit followed.

8 Following the November 3, 2005 incident, Glass remained employed by Intel at his  
9 then current pay, benefits, grade level and job responsibilities. In addition, Intel permitted  
10 Glass to take vacation between December 19, 2005 and January 6, 2006. In February 2006,  
11 Glass began what would be his third medical leave of absence from Intel.

## 12 **II. Legal Standard**

13 Typically, a motion for summary judgment may be granted if the evidence shows “that  
14 there is no genuine issue of material fact and that the moving party is entitled to judgment  
15 as a matter of law.” Fed. R. Civ. P. 56(c). To defeat the motion, the non-moving party must  
16 show that there are genuine factual issues “that properly can be resolved only by a finder of  
17 fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty  
18 Lobby, Inc., 477 U.S. 242, 250 (1986). The Court views the evidence in the light most  
19 favorable to the non-moving party and draws any reasonable inferences in the non-moving  
20 party's favor. Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995, cert. denied, 516  
21 U.S. 1171 (1996).

22 “As a general matter, the plaintiff in an employment discrimination action need  
23 produce very little evidence in order to overcome an employer's motion for summary  
24 judgment. This is because the ultimate question is one that can only be resolved through a  
25 searching inquiry—one that is most appropriately conducted by the trier of fact, upon a full  
26 record.” Chuang v. Univ. of Cal. Davis, Board of Trustees, 225 F.3d 1115, 1123 (9<sup>th</sup> Cir.  
27 2000) (quoting Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9<sup>th</sup> Cir. 1996)  
28 (internal quotations omitted)).

1 **III. Glass’s Discrimination Claims Under the ADA and ADEA**

2 **A. Direct Evidence of Discrimination**

3 Glass contends that the familiar burden shifting framework of McDonnell Douglas  
4 Corp. v. Green, 411 U.S. 792 (1973) does not apply to the instant case. As the Supreme  
5 Court has noted, the McDonnell Douglas framework “is inapplicable where the plaintiff  
6 presents direct evidence of discrimination.” Trans World Airlines, Inc. v. Thurston, 469 U.S.  
7 111, 121 (1985); see also AARP v. Farmers Group, Inc., 943 F.2d 996, 1000 n.7 (9th Cir.  
8 1991) (“[W]hen there is direct evidence of discrimination . . . the prima facie case analysis  
9 is inapplicable.”). Direct of evidence of discrimination is defined as “evidence of conduct  
10 or statements by persons involved in the decision making process that may be viewed as  
11 directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact finder  
12 to infer that that attitude was more likely than not a motivating factor in the employer’s  
13 decision.” Enlow v. Yellow Cab Co., Inc., 371 F.3d 645, 650 (9th Cir. 2004) (quoting  
14 Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999)).

15 Glass argues that he has presented a sufficient amount of direct evidence from which  
16 a rationale jury could infer discrimination on the part of Intel, thereby foreclosing the  
17 McDonnell Douglas framework. To this end, Glass points to a single statement allegedly  
18 made by Rangchi, stating that he “could get someone younger and with no issues” to replace  
19 Glass in the SDE Group. Glass contends that the statement constitutes direct evidence of age  
20 and disability discrimination, and that by making such a statement, a jury could find that  
21 Rangchi’s actions were motivated by an improper bias against Glass. Intel responds by  
22 arguing that even if Rangchi were to have made such a statement—a fact which Intel  
23 contests—his comment can be characterized as no more than a stray remark. See Hopkins  
24 v. Elec. Data Sys. Corp., 196 F.3d 655, 658 (6th Cir. 1999) (finding that a supervisor’s  
25 isolated reference to plaintiff as “the mentally ill guy on Prozac that is going to shoot the  
26 place up” was not direct evidence of discrimination); Nidds v. Schindler Elevator Corp., 113  
27 F.3d 912, 918-19 (9th Cir. 1996) (holding that an employer’s use of the phrase “old timers”  
28 did not support inference of discriminatory motive). Intel points to the Ninth Circuit case of

1 Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993), which Glass also favorably cited.  
2 In Nesbit, the plaintiff’s supervisor informed him that the company did not “necessarily like  
3 grey hair.” Id. at 705. Noting that the remark was “uttered in an ambivalent manner and was  
4 not tied directly to [plaintiff’s] termination, when taken together with all of the evidence  
5 presented by plaintiff, the statement “fell short of creating an inference of age  
6 discrimination.” Id.

7 As Intel argues, Rangchi’s comment cannot be construed as direct evidence of either  
8 disability or age discrimination. With respect to disability discrimination, it is not clear that  
9 Rangchi’s use of the word “issues” refers to any specific medical problem associated with  
10 Glass’s alleged disability. Indeed, the word may just as aptly refer to the kind of workplace  
11 performance related “issues” that Rangchi and several of Glass’s preceding supervisors had  
12 raised with Glass, all of which are well documented and uncontroverted. With respect to age  
13 discrimination, Glass has not shown, nor has he even attempted to argue, that Rangchi’s  
14 alleged reference to replacing him with a “younger” worker was related to any type of  
15 personnel “decision making process” on the part of Intel. See Enlow, 371 F.3d at 650. The  
16 Ninth Circuit has stated that “remarks . . . when unrelated to the decisional process, are  
17 insufficient to demonstrate that the employer relied on illegitimate criteria, even when such  
18 statements are made by the decision maker in issue.” Merrick v. Farmers Ins. Group, 892  
19 F.2d 1434, 1438 (9th Cir. 1990). As such, Glass has not created an inference of  
20 discrimination based on direct evidence and the Court will apply the McDonnell Douglas  
21 burden shifting framework.

22 **B. The McDonnell Douglas Burden Shifting Framework**

23 The McDonnell Douglas analysis applies equally to claims brought under the ADA  
24 and ADEA. See Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1093 (9th Cir. 2003)  
25 (ADA); Diaz v. Eagle Produce Ltd., 521 F.3d 1201, 1207 (9th Cir. 2008) (ADEA). Under  
26 the burden shifting framework, the employee must first establish a prima facie case of  
27 discrimination. If the employee has adequately established a presumption of discrimination,  
28 the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason

1 for its adverse employment action. If the employer satisfies its burden, the employee must  
2 then prove that the reason advanced by the employer constitutes mere pretext. See Aragon  
3 v. Republic Silver State Disposal, Inc., 292 F.3d 654, 659 (9th Cir. 2002); Wallis v. J.R.  
4 Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

### 5 **1. Prima Facie Case under the ADA**

6 In order to establish a prima facie case of discrimination under the ADA, Glass needs  
7 to show that (1) he is disabled under the Act; (2) he is qualified to perform essential functions  
8 of his job; and (3) that he suffered an adverse employment action because of his disability.  
9 See Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1353 (9th Cir. 1996). That Glass was  
10 qualified to perform his job is not in dispute. Instead, Intel is challenging whether Glass is  
11 disabled under the Act and whether he has suffered an adverse employment action.

12 Under the ADA, a person is disabled when they have (1) a physical or mental  
13 impairment that substantially limits one or more major life activities; (2) a record of such  
14 impairment; or (3) is regarded as having such an impairment. See 42 U.S.C. § 12102(2).  
15 With respect to the instant case, Glass is attempting to proceed under two theories of  
16 disability. In his Complaint, Glass alleged that Intel discriminated against him based on a  
17 “perceived mental disability.” Yet, in his brief in opposition to Intel’s summary judgment  
18 motion, Glass apparently changed his argument to include a claim that he was actually  
19 disabled..

20 Glass bears the burden of establishing that he has an actual disability within the  
21 meaning of the ADA. See Thorton v. McClatchy Newspapers, Inc., 261 F.3d 789, 794 (9th  
22 Cir. 2001). Mental conditions, such as stress and depression, may be considered impairments  
23 covered by the ADA, “depending on whether these conditions result from a documented  
24 physiological or mental disorder.” Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 n.3 (9th  
25 Cir. 1996). Here, Glass has not presented the Court with any testimony from his psychiatrist  
26 or psychologist— whether it be in the form of deposition, affidavit or otherwise—to support  
27 a claim of actual disability. In fact, besides the bare bones assertions contained in several of  
28 his own declarations, Glass has not presented any medical evidence. “It is well settled that

1 only admissible evidence may be considered by the trial court in ruling on a motion for  
2 summary judgment.” Beyene v. Coleman Sec. Serv., Inc., 854 F.2d 1179, 1181 (9th Cir.  
3 1988). Therefore, Glass’s own statements about what his treating physician told him  
4 regarding the severity of his depression and stress may not be properly considered by the  
5 Court, since they constitute inadmissible hearsay. Fed. R. Civ. P. 801 and 802. When faced  
6 with a total absence of admissible medical evidence to support his claim of suffering from  
7 a mental disability, the Court must conclude that Glass was not disabled for purposes of the  
8 ADA.

9 Furthermore, even if Glass could support his actual disability claim with admissible  
10 evidence, it would still fail because Glass cannot demonstrate that his mental ailments  
11 “substantially limit[] one or more major life activities.” See 42 U.S.C. § 12102(2). This is  
12 because the single life activity that Glass claims to have been limited in is that of working.  
13 Yet by Glass’s own admission, the only limitation that was placed upon his ability to work  
14 at Intel after he returned from medical leave in May 2005 was that he could not work for over  
15 50 hours per week or 10 hours per day for 5 days. Glass’s undisputed ability to work more  
16 than 40 hours per week between May and November 2005 defeats his claim of being  
17 substantially limited during the relevant time period. See e.g. Kellogg v. Union Pac. R. Co.,  
18 233 F.3d 1083, 1087-88 (8th Cir. 2000) (holding that an employee who had been diagnosed  
19 with major depression and anxiety, and who had taken a resulting leave of absence, was not  
20 disabled under the ADA when his work schedule was restricted to “forty-hour, daylight only  
21 work week”); Brennan v. Nat’l Tel. Directory Corp., 850 F. Supp. 331, 343 (E.D. Pa. 1994)  
22 (“Obviously, anyone who can work 40 hours a week as a limitation of their abilities is not  
23 suffering a substantial impairment of . . . the ability to work.”); Overton v. Tar Heel Farm  
24 Credit, 942 F. Supp. 1066, 1070 (E.D.N.C. 1996) (finding that employee suffering from  
25 anxiety and depression who could work up to 45 hours per week failed to state a cognizable  
26 ADA claim.).

27 With respect to Glass’s perceived disability claim, a person is regarded as disabled  
28 when a covered entity, such as Intel, “mistakenly believes that a person has a physical [or

1 mental] impairment” or “mistakenly believes that an actual, nonlimiting impairment  
2 substantially limits one or more major life activities.” Sutton v. United Airlines, Inc., 527  
3 U.S. 471, 489 (1999). Here, Glass has failed to adequately demonstrate how Intel could have  
4 possibly regarded him as being “significantly restricted in the ability to perform either a class  
5 of jobs or a broad range of jobs in various classes as compared to the average person having  
6 comparable training, skills, and abilities.” 29 C.F.R. § 1630.2(j)(3)(i). The undisputed facts  
7 in the record show that Glass’s supervisor at Intel, Hamid Rangchi, did not consider Glass  
8 to be more limited than any other member of the SDE Group.

9 In addition, the Ninth Circuit has held that a plaintiff claiming to have been regarded  
10 as substantially limited in the major life activity of working “must present specific evidence  
11 about relevant labor markets to defeat summary judgment” and “identify what requirements  
12 posed by the class of . . . jobs . . . were problematic in light of the limitations imposed.”  
13 Walton v. U.S. Marshals Serv., 492 F.3d 998, 1009 (9th Cir. 2007) (quoting Thornton, 261  
14 F.3d at 795-96). Because Glass has not presented **any** evidence concerning the class of jobs  
15 from which he was allegedly perceived to be disqualified from or from which he was  
16 significantly restricted in his ability to perform, Intel is entitled to summary judgment on this  
17 basis alone. See Thornton, 261 F.3d at 795-96 (“Under the law of our circuit, a plaintiff must  
18 present specific evidence about relevant labor markets to defeat summary judgment on a  
19 claim of substantial limitation of ‘working.’”).

20 Even if this Court were to assume that Glass could carry his burden regarding an ADA  
21 qualified disability, Glass would still need to demonstrate that he suffered adverse  
22 employment action based on that actual or perceived disability. As Intel notes, there are only  
23 two possible adverse actions that Glass may have been subjected to: (1) the negative reaction  
24 that various Intel managers had to Glass’s internal employment application upon his return  
25 to work in 2005; and (2) the November 3, 2005 email from Rangchi and the initiation of a  
26 timing specific 5 week work plan that Glass was to expected to abide by. With respect to  
27 adverse actions that Glass allegedly suffered after returning to Intel in May 2005, Intel argues  
28 that Glass claims that various hiring managers had heard “rumors” or “negative things” about

1 him, however, when deposed, Glass failed to identify the content or source of even a single  
2 rumor. Intel contends that this precisely the kind of “mere speculation, conjecture, or  
3 fantasy” that courts have held will not defeat a motion for summary judgment. See Harrison  
4 v. Howmedica Osteonics Corp., CV-06-0745-PHX-RCB, 2008 WL 906585, at \*26 (D. Ariz.  
5 March 31, 2008) (internal citations omitted). This Court agrees.

6 In addition, even if there were proof that this kind of criticism or badmouthing  
7 occurred, Glass has still failed to prove that such conduct amounted to an adverse  
8 employment action. As Intel notes, any negative remarks made by Intel employees did not  
9 alter Glass’s pay, benefits, grade level or job responsibility. Indeed, once the RFO work  
10 group was terminated, Glass received a formal job offer only eleven days after returning from  
11 medical leave. Also, his newly acquired position in the SDE Group was—in any measurable  
12 sense—comparable to his previous position within Intel.

13 Similarly, Rangchi’s November 3, 2005 email cannot be considered adverse  
14 employment action, since the email was in essence no more than a proposed five week  
15 schedule for Glass to complete various tasks that had already been assigned to him and were  
16 undisputably part of his normal job requirements. As Intel notes, even performance  
17 management tools that are significantly more formal than those used by Rangchi in his  
18 November 3, 2005 email do not generally rise to the level of an adverse action, unless  
19 accompanied by a demotion, pay change, shift in responsibilities, or some other tangible  
20 negative action on the part of the employer. See Haynes v. Lelv 3 Comm., LLC, 456 F.3d  
21 1215, 1225 (10th Cir. 2006).

## 22 **2. Prima Facie Case under the ADEA**

23 Under the ADEA, a plaintiff can establish a prima facie case of age discrimination by  
24 demonstrating that he was (1) at least 40 years old; (2) performing his job satisfactorily; (3)  
25 was subject to an adverse employment action; and (4) was either replaced by or treated less  
26 favorably than similarly situated individuals outside the protected class. Coleman v. Quaker  
27 Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000).

1 With respect to whether Glass was subject to an adverse employment action, his  
2 ADEA discrimination claim must fail for the same reason that his ADA claim fails—Glass  
3 cannot show that he suffered a change in position, salary, benefits, title or job duties. See  
4 Galabaya v. New York City Bd. of Educ., 202 F.3d 636, 641 (2d Cir. 2000) (noting that  
5 summary judgment is appropriate where an employee “failed to create a genuine issue of  
6 material fact on the issue of whether [he suffered] an adverse employment action.”).

7 With respect to whether Intel treated Glass less favorably than similarly situated  
8 individuals outside his protected class, the Court has not been made aware whether any  
9 evidence exists, whether admissible or otherwise, that would allow the Court to infer that a  
10 younger Intel employee was treated more favorably than Glass during the relevant time  
11 period. See Ohton v. City of Phoenix, CV-360-PHX-MHM, 2007 WL 4405006, at \*6 (D.  
12 Ariz. Dec. 13, 2007). Where a party “fails to make a showing sufficient to establish the  
13 existence of an element essential to that party’s case,” it is not possible to survive summary  
14 judgment, “since a complete failure of proof concerning an essential element of the  
15 nonmoving party’s case necessarily renders all other facts immaterial.” Celotex Corp. v.  
16 Catrett, 477 U.S. 317, 322-23 (1986).

#### 17 **IV. Glass’s Retaliation Claims Under the ADA and ADEA**

18 For Glass to succeed on a theory of retaliation, he must first establish a prima facie  
19 claim. A prima facie claim of retaliation is met when the employee demonstrates that (1) he  
20 is engaged in a statutorily protected activity; (2) his employer subjected him to adverse  
21 employment action; and (3) there was a casual link between the protected activity and the  
22 adverse employment action. See Bergene v. Salt River Project Agricultural Improvement  
23 & Power Dist., 272 F.3d 1136, 1140-41 (9th Cir. 2001). Intel challenges whether Glass can  
24 meet the second and third elements. Unfortunately, in his opposition brief, Glass failed to  
25 discuss the relevant elements that make up a prima facie retaliation claim under either the  
26 ADA or ADE, and the Court has therefore been forced to analyze the merits of Defendant’s  
27 argument without the benefit of an adequate response from Plaintiff.

28

1 In order to establish the requisite adverse employment action, Glass must show that  
2 “a reasonable employee would have found the challenged action materially adverse . . .”  
3 Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415 (2006).  
4 Materially adverse actions are those actions that would “dissuade [] a reasonable worker from  
5 making or supporting a charge of discrimination.” Id. The Supreme Court has emphasized  
6 that “trivial harms” do not rise to the level of actionable retaliation, and that individuals are  
7 only protected from the kind of retaliatory action that “produces an injury or harm.” Id. at  
8 2414-15. As is the case with his ADA and ADEA discrimination claims, Glass cannot show  
9 that he has suffered an adverse employment action. Indeed, Glass did not experience a  
10 decrease in pay or job responsibilities after returning to Intel in May 2005. Nor is there  
11 evidence demonstrating that Glass experienced material adversity following the November  
12 3, 2005 email from Rangchi. As Intel points out, a reasonable worker in Glass’s position  
13 would not have been dissuaded from making a discrimination charge, as Glass himself filed  
14 his fifth charge of discrimination with the EEOC only days after the November 3, 2005 email  
15 from Ragnchi. See DeHart v. Baker Hughes Oilfield Operations, Inc., No. 05-21087, 2007  
16 WL 126081, at \*3 (5th Cir. Jan. 19, 2007) (noting that where a plaintiff in fact made a  
17 discrimination claim after “several weeks” later, there was no adverse employment action).  
18 To the extent that Glass was unsettled by the performance reviews that he received from his  
19 supervisors, the perceived lack of success that he experienced while searching for a new  
20 position within the company in May 2005, or the work plan devised by Rangchi around  
21 November 2005, those offenses can at best be characterized as the kind of “trivial harms”  
22 that are not actionable under a retaliation theory. Because Glass has failed to establish at  
23 least one of the essential elements of his claim, it is unnecessary for the Court to engage in  
24 any further analysis on this issue. See generally Celotex Corp., 477 U.S. at 322-23

25 **Accordingly,**

26 **IT IS HEREBY ORDERED** granting Defendant’s Motion for Summary Judgment.

27 (Dkt.#74.)

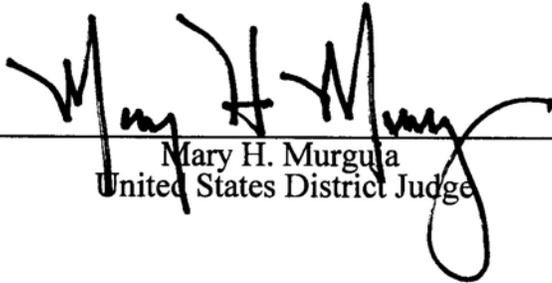
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**IT IS FURTHER ORDERED** denying as moot Defendant's Motion to Dismiss the Case Pursuant to Fed. R. Civ. P. 16(f) and 37(d). (Dkt.#56.)

**IT IS FURTHER ORDERED** directing the Clerk to enter judgment accordingly.

DATED this 11<sup>th</sup> day of March, 2009.



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Mary H. Murgula  
United States District Judge