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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Kimberly A. O'Connor,

No. CV11-2264-PHX-JAT

10 Plaintiff,

ORDER

11 v.

12 Scottsdale Healthcare Corp; et al.,

13 Defendants.
14

15 Currently pending before the Court is Defendants' Motion to Dismiss (Doc. 9).
16 The Court now rules on the Motion.

17 **I. BACKGROUND**

18 The following are the facts alleged in the Complaint, which the Court must
19 presume true for purposes of resolving the Motion to Dismiss. Plaintiff Kimberly
20 O'Connor went to Scottsdale Healthcare Shea Medical Center on November 18, 2009 to
21 visit her mother, who had been admitted to the hospital for atrial fibrillation. Plaintiff
22 brought her service dog,¹ Peaches, with her. Peaches was on a leash and wearing a collar
23 and a blue cape with two patches reading "Service Dog."

24 Plaintiff and Peaches entered the hospital from a side entrance, south of the

25 ¹ The Code of Federal Regulations defines a service animal as "any guide dog, signal
26 dog, or other animal individually trained to do work or perform tasks for the benefit of an
27 individual with a disability . . ." 28 C.F.R. §36.104. Plaintiff has not alleged that
28 Peaches was individually trained to do work or perform tasks for Plaintiff, but the Court
will assume Peaches is a service animal for purposes of this Order.

1 emergency entrance. As they were walking in the corridor toward the north elevator,
2 they passed a security guard. When Plaintiff had gotten about ten feet beyond the
3 security guard, he stopped her.

4 The security guard asked Plaintiff if she had registered her dog. Plaintiff politely
5 informed the security guard that she had not and would not register Peaches because it
6 was not necessary for her to do so. The security guard reasserted that Plaintiff needed to
7 register Peaches and asked Plaintiff when Peaches was last groomed and vaccinated.
8 Plaintiff told the security guard that her dog's vaccinations were current.

9 The security guard continued to insist that Plaintiff register her dog. Plaintiff told
10 the guard that his demands were improper and illegal. The guard told her that he was
11 doing nothing illegal and that the registration of dogs was the policy of the Scottsdale
12 Healthcare legal department. Plaintiff asked to speak with a member of the legal
13 department, but no member was present at the Shea campus.

14 Plaintiff then withdrew a publication distributed by the Disability Rights Task
15 Force of the US Department of Justice and the National Association of Attorneys General
16 from the pocket of the dog's cape. The publication set forth the most commonly asked
17 questions regarding service dogs' access to public accommodations. Plaintiff read to the
18 guard a section from the publication discussing a disabled person's right to bring his or
19 her service animal with him to public accommodations.

20 The security guard nonetheless continued to ask Plaintiff to register her dog. He
21 became increasingly irritated with Plaintiff's refusal to comply with his orders and told
22 Plaintiff that he could call the police and have her arrested for trespassing if she did not
23 leave. Plaintiff told the guard that she knew the hospital policy was wrong because she
24 was an attorney and had read the applicable disability laws.

25 When Plaintiff continued to stand her ground, the security guard asked her to leave
26 by the door through which she had entered and to wait outside while he got his
27 supervisor. The guard then escorted Plaintiff out of the hospital. The guard asked her to
28 wait outside the hospital security office while he spoke with his supervisor.

1 The original security guard re-joined Plaintiff with two more security guards and a
2 man who identified himself as the head of security for Scottsdale Healthcare. The head
3 of security asked Plaintiff if she was disabled and if her dog was a service dog. When
4 she answered yes to both questions, the head of security immediately allowed Plaintiff to
5 enter the hospital with Peaches and without registering the dog.

6 When Plaintiff got to her mother's hospital room, Plaintiff was extremely agitated,
7 which her mother noted. Within a few minutes, Plaintiff noticed that her mother was
8 gazing out of the door of her room, not looking at Plaintiff. When Plaintiff asked her
9 mother why she was staring out the door, her mother was minimally responsive and
10 suddenly went blind in one eye. Tests later demonstrated that Plaintiff's mother had had
11 a stroke.

12 Plaintiff returned to the hospital in the afternoon of November 18 and on several
13 days thereafter until her mother was transferred. Although Plaintiff claims she felt afraid
14 a security guard would confront her again about Peaches, none ever did. She was never
15 again stopped from entering the hospital or asked to register Peaches.

16 On November 21, 2009, Plaintiff's mother indicated to Plaintiff that she was
17 having pain in her lower left quadrant. Unsure about her mother's ability to
18 communicate this symptom to the staff, Plaintiff told a nurse that her mother was
19 complaining of pain in her lower left quadrant. Plaintiff's mother continued to have pain
20 over the next few days.

21 On November 23, 2009, Plaintiff's mother was transferred to a long term care
22 nursing facility. Plaintiff's mother died there on December 22, 2009 from acute septic
23 shock as a result of Clostridium Difficile colitis. Plaintiff believes her mother contracted
24 Clostridium Difficile colitis at Scottsdale Health Care Shea Medical Center.

25 Plaintiff filed her Complaint in this Court against the hospital and related entities
26 on November 17, 2011. She alleges one federal cause of action for violation of the
27 Americans with Disabilities Act and seven state law claims for: violation of the
28 Arizonans with Disabilities Act; intentional infliction of emotional distress; negligent

1 infliction of emotional distress; assault; false imprisonment; wrongful death of her
2 mother; and negligence. Plaintiff seeks monetary damages and injunctive relief.

3 Defendants filed the pending Motion to Dismiss pursuant to Federal Rule of Civil
4 Procedure 12(b)(6) on February 22, 2012. (Doc. 9.) Defendants argue that Plaintiff
5 failed to plead sufficient facts to entitle her to the remedies she seeks. In her Response,
6 Plaintiff claims that she alleged facts sufficient to state a claim for all of her causes of
7 action, but seeks leave to amend if the Court finds she has failed to state a claim.

8 II. AMERICANS WITH DISABILITIES ACT

9 Defendants move pursuant to Rule 12(b)(6) to dismiss Plaintiff's Americans with
10 Disabilities Act (ADA) Count for failure to state a claim. The Court, however, will not
11 recite the Rule 12(b)(6) dismissal standard because the Court is dismissing the ADA
12 claim for lack of standing.

13 Federal courts must sua sponte examine jurisdictional issues such as standing.
14 *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011)(“Although Pier
15 One failed to move to dismiss under Federal Rule of Civil Procedure 12(b)(1), federal
16 courts are required sua sponte to examine jurisdictional issues such as standing.”)(internal
17 quotations omitted). Article III standing is not subject to waiver. *Id.* If the Court
18 determines at any time that it lacks jurisdiction, the Court must dismiss the action. *Id.*
19 (internal quotations omitted).

20 A disabled person claiming discrimination under the ADA must satisfy the case
21 and controversy requirement of Article III by demonstrating her standing at each stage of
22 the litigation. *Id.* To establish standing, Plaintiff must demonstrate that she suffered an
23 injury-in-fact, that the injury is traceable to the hospital's actions, and that the injury can
24 be redressed by a favorable decision. *Id.* In addition, to establish standing for injunctive
25 relief, which is the only relief available to private plaintiffs under Title III of the ADA,
26 Plaintiff must demonstrate a “real and immediate threat of repeated injury” in the future.
27 *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974)). The Court's standing
28 analysis must focus on the nature and source of Plaintiff's claim, discrimination under the

1 ADA.

2 Title III of the ADA provides that “no individual shall be discriminated against on
3 the basis of disability in the full and equal enjoyment of the goods, services, facilities,
4 privileges, advantages, or accommodations of any place of public accommodation.” *US*
5 *v. AMC Entertainment, Inc.*, 549 F.3d 760, 763 (9th Cir. 2008)(citing 42 U.S.C.
6 §12182(a)). “Discrimination” includes, among other things, “failure to make reasonable
7 modifications in policies, practices, or procedures, when such modifications are
8 necessary to afford such goods, services . . . or accommodations to individuals with
9 disabilities.” *Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th
10 Cir. 2004)(citing 42 U.S.C. §12182(b)(2)(A)(ii)). The Department of Justice has issued
11 regulations providing that a public accommodation generally must modify polices,
12 practices, or procedures to permit the use of a service animal by a disabled individual. *Id.*
13 (citing 28 C.F.R. §36.302(c)(1)).

14 To prevail on an ADA Title III discrimination claim, a plaintiff must demonstrate
15 that: 1) she is disabled within the meaning of the ADA; (2) the defendant is a private
16 entity that owns, leases, or operates a place of public accommodation; and 3) she was
17 denied public accommodations by the defendant because of her disability. *Molski v. M.J.*
18 *Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007)(citing 42 U.S.C. §12182). Plaintiff has no
19 trouble with the first two elements of her claim. The Court assumes, based on her
20 allegations, that Plaintiff is disabled within the meaning of the ADA, and Defendants do
21 not dispute that the hospital is a privately-owned facility open to the public. But
22 Plaintiff’s allegations do not demonstrate that she was denied public accommodations.

23 Although Plaintiff was momentarily delayed from visiting her mother in the
24 hospital because of her interaction with the security guard, ultimately, she was allowed to
25 enter the hospital with Peaches without registering the dog. The Court supposes that
26 some prolonged waits for accommodation might amount to constructive denial of
27 accommodation. But the Court finds that the minimal delay Plaintiff encountered at the
28 hospital did not constitute constructive denial of a public accommodation.

1 The Ninth Circuit Court of Appeals decision in *Skaff v. Meridien N. Am. Beverly*
2 *Hills, LLC*, 506 F.3d 832 (9th Cir. 2007) supports the Court’s finding. The plaintiff in
3 *Skaff* was a paraplegic who had to use a wheelchair for mobility. *Id.* at 835. About two
4 weeks before his visit to the defendant hotel, the plaintiff made a reservation and
5 specifically requested a wheelchair-accessible room with a roll-in shower. *Id.* at 835-36.

6 When he checked into the hotel, the plaintiff reiterated his need for an accessible
7 room with a roll-in shower, but the staff assigned him to a room with a bath tub. *Id.* at
8 836. The plaintiff immediately told the hotel staff about the problem, and, after an hour
9 delay, the hotel provided him with a room that had a roll-in shower. *Id.* But the new
10 room’s shower did not have a wall-hung shower chair, which prevented the plaintiff from
11 using the shower. *Id.* The plaintiff reported the problem to the staff and asked if the
12 hotel had a portable shower chair he could use. *Id.* The hotel staff eventually found a
13 portable shower chair he could use, and the plaintiff was able to take a shower the
14 following morning. *Id.* In addition to the problems with the shower, the plaintiff
15 generally alleged that during his stay at the hotel, he encountered numerous barriers to
16 disabled access including path of travel, guestroom, bathroom, telephone, elevator and
17 signage barriers to access. *Id.*

18 The *Skaff* plaintiff sued for injunctive relief under Title III of the ADA and for
19 damages under California’s state civil rights laws. *Id.* The district court found that the
20 plaintiff did not have standing to sue under the ADA. The Ninth Circuit Court of
21 Appeals reversed the district court with regard to the allegations of barriers to travel, but
22 affirmed the district court’s conclusion that the problems with the shower did not allege
23 an injury in fact sufficient to confer standing under the ADA. *Id.* at 839-40.

24 The court of appeals agreed that the initial mistake of assigning a room without a
25 roll-in shower did not cause the plaintiff any cognizable damage because the hotel
26 corrected that mistake within an hour by reassigning the plaintiff to a room with a roll-in
27 shower. *Id.* at 839. The appeals court further found that the initial absence of a shower
28 chair was promptly corrected and that the plaintiff had a shower he could use by the next

1 morning. *Id.* In reaching its conclusion that the plaintiff suffered no cognizable injury
2 concerning the shower problems, the appeals court stated:

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4 The ancient maxims of *de minimis non curat lex* and *lex non curat de*
5 *minimis* teach that the law cares not about trifles. This principle frequently
6 has been followed by the Supreme Court. The *mere delay* during
7 correction of the problem with the shower is too trifling of an injury to
8 support constitutional standing.

9 *Id.* at 839-40 (internal citations omitted)(emphasis added); *see also Anderson v. Ross*
10 *Stores, Inc.*, 2000 WL 1585269 *10 (N.D. Cal. October 10, 2000)(forty-five to sixty
11 minute delay in providing an accommodation at retail store did not constitute a denial of
12 access to accommodation).

13 Plaintiff here also suffered only a brief delay before the hospital allowed her to
14 enter without registering Peaches, her service dog. Although Plaintiff obviously found
15 her interaction with the security guard very unpleasant, the short delay caused by the
16 encounter was too minor an injury to confer standing under the ADA.

17 Further, even if the brief delay somehow did constitute a denial of
18 accommodation, the Court finds that Plaintiff does not have standing to sue for injunctive
19 relief. Monetary damages are not available in private Title III ADA suits. *Molski*, 481
20 F.3d at 730. Plaintiff therefore can seek only injunctive remedies for her ADA claim.

21 To establish standing to pursue injunctive relief, Plaintiff must demonstrate a “real
22 and immediate threat of repeated injury” in the future. *Chapman*, 631 F.3d at 946
23 (internal citations omitted). Moreover, it is the reality of the threat of repeated injury that
24 is relevant to standing, not Plaintiff’s subjective apprehensions. *City of Los Angeles v.*
Lyons, 461 U.S. 95, 107 n.8 (1983).

25 According to her own Complaint, Plaintiff returned to the hospital without
26 incident on several occasions during the days after the encounter with the security guard.
27 She never had another issue. Any subjective fears about returning to the hospital are
28 belied by the objective reality. Plaintiff’s unsubstantiated, subjective fear that she might,

1 at some point in the future, have another problem bringing Peaches to Defendant hospital
2 does not confer standing to pursue injunctive relief.

3 Because Plaintiff has not suffered an injury-in-fact under the ADA and because
4 her own allegations demonstrate that there is no real and immediate threat that she will
5 again be asked to register Peaches before entering Defendant hospital, Plaintiff lacks
6 standing to bring an ADA claim. Plaintiff's lack of Article III standing deprives this
7 Court of jurisdiction to entertain her ADA claim. The Court therefore must dismiss the
8 ADA claim.

9 Plaintiff seeks leave to amend her Complaint if the Court finds her allegations
10 insufficient. But the allegation of additional facts consistent with the facts alleged in the
11 Complaint - she was allowed to enter the hospital immediately after speaking with the
12 supervisor and she returned to the hospital several days afterward with no problem -
13 would do nothing to cure Plaintiff's lack of standing. *Hishon v. King & Spalding*, 467
14 U.S. 69, 73 (1984)(A court may dismiss a complaint if it is clear that relief could not be
15 granted under any facts consistent with the allegations). The Court does not have to give
16 leave to amend if amendment would be futile. *Cervantes v. Countrywide Home Loans,*
17 *Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). The Court therefore denies Plaintiff's request
18 to amend.

19 III. STATE LAW CLAIMS

20 The basis for subject matter jurisdiction in this case is federal question
21 jurisdiction. Plaintiff's ADA claim is the only federal claim alleged in the Complaint,
22 and the Court has dismissed that claim without leave to amend. When the Court
23 dismisses the sole federal claim in a case and only state law claims remain, the Court
24 should decline jurisdiction over the state claims and dismiss them without prejudice.
25 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). "[I]n the usual case in which
26 all federal-law claims are eliminated before trial, the balance of factors to be considered
27 under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and
28 comity-will point toward declining to exercise jurisdiction over the remaining state-law

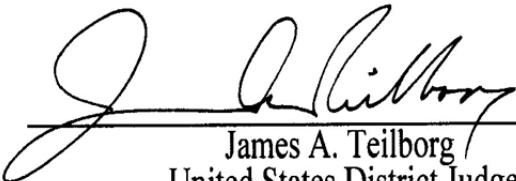
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claims.” *Id.* at 350 n.7. Given the early stage of the proceedings in this litigation, the Court finds no reason to exercise its discretion to decide the remaining state law claims. The Court therefore dismisses the state law claims without prejudice.

Accordingly,

IT IS ORDERED Granting Defendants’ Motion to Dismiss (Doc. 9). The Court dismisses the ADA claim for lack of jurisdiction and dismisses the remaining state law claims without prejudice. This case is dismissed in its entirety.

Dated this 15th day of May, 2012.



James A. Teilborg
United States District Judge