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

Mark Starling, M.D.,  
  
Plaintiff,  
  
v.  
  
Banner Health, an Arizona corporation;  
Marjorie Bessel, M.D.; Julie Nunley; Cindy  
Helmich; and Lori Davis-Hill,  
  
Defendants.

No. CV-16-00708-PHX-NVW

**ORDER**

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1 Before the Court is Defendants Banner Health, Marjorie Bessel, M.D., Julie  
2 Nunley, Cindy Helmich, and Lori Davis-Hill’s Motion for Summary Judgment (Doc.  
3 218), the Response, and the Reply. Also before the Court is Plaintiff’s Motion Pursuant  
4 to Federal Rule of Civil Procedure 56(d) (Doc. 243), the Response, and the Reply. For  
5 the reasons below, Defendants’ motion will be granted in part and denied in part, and  
6 Plaintiff’s motion will be denied.

7 **I. SUMMARY JUDGMENT STANDARD**

8 A motion for summary judgment tests whether the opposing party has sufficient  
9 evidence to merit a trial. Summary judgment should be granted if the evidence reveals no  
10 genuine dispute about any material fact and the moving party is entitled to judgment as a  
11 matter of law. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome  
12 of the suit under the governing law, and a factual dispute is genuine “if the evidence is  
13 such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*  
14 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15 It is the moving party’s burden to show there are no genuine disputes of material fact.  
16 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon such a showing, however, the  
17 burden shifts to the non-moving party, who must then “set forth specific facts showing that  
18 there is a genuine issue for trial” without simply resting on the pleadings. *Anderson*, 477  
19 U.S. at 256. To carry this burden, the nonmoving party must do more than simply show  
20 there is “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v.*  
21 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record, taken as a whole, could  
22 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for  
23 trial. *Id.* at 587. “A court must view the evidence ‘in the light most favorable to the [non-  
24 moving] party.’” *Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1866 (2014) (quoting  
25 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). “A ‘judge’s function’ at summary  
26 judgment is not ‘to weigh the evidence and determine the truth of the matter but to determine  
27 whether there is a genuine issue for trial.’” *Id.* (quoting *Anderson*, 477 U.S. at 249).

28

1       **II.     FACTUAL BACKGROUND**

2             The following facts are construed in the light most favorable to the plaintiff, the  
3 non-moving party.

4             **A.     Starling’s First Decade at Banner**

5             In October 2004, Banner Health (“Banner”) hired Dr. Mark Starling (“Starling”)  
6 to serve as the Medical Director of Banner Baywood Heart Hospital. (Doc. 219 at ¶ 1.)  
7 He was 56 years old and had previously been a tenured professor of medicine at the  
8 University of Michigan. (Id. at ¶ 2; Doc. 210 at ¶ 2.)

9             Dr. John Hensing supervised Starling during his time as Medical Director. (Doc.  
10 219 at ¶ 3.) Starling’s performance, in Hensing’s eyes, “exceed[ed] or frequently  
11 exceed[ed]” expectations. (Id. at ¶ 4.) In 2006, Starling was promoted to Chief Medical  
12 Officer. (Id. at ¶ 5.)

13             Dr. Marjorie Bessel (“Bessel”) became Starling’s direct supervisor in 2010. (Id. at  
14 ¶ 6.) She was 47. (Id., Ex. B at ¶ 4.) Overall, Starling continued to receive positive  
15 performance reviews. (Doc. 219 at ¶ 7.) But in October 2012, Bessel and the Hospital’s  
16 then-CEO, Laura Robertson, placed Starling on a performance improvement plan, which  
17 Robertson emailed to him. (Id., Ex. C at Ex. 2.) Starling was expected to become more  
18 involved in clinical aspects at the Hospital; to improve his “communication in delivery  
19 and accuracy of information,” including avoiding “[v]isible signs of exacerbation [sic]”  
20 such as throwing his hands up; to delegate more effectively; and to “[a]ctively engage as  
21 a senior leader.” (Id.) Robertson says that she delivered the document during a meeting.  
22 (Doc. 219, Ex. C at 52:5-8.) Starling claims he never received any sort of performance  
23 improvement plan or any similar document in 2012. (Doc. 267, Ex. 2 at ¶ 16.) He  
24 admits only that Robertson expressed concern about Starling’s outside speaking  
25 engagements affecting his obligations to the hospital. (Id. at ¶ 17.) Regardless of  
26 whether Starling was aware of the plan, Defendants contend that Starling made  
27 “sufficient progress” to end it. (Doc. 219 at ¶ 10.) Robertson also recalls several  
28 accusations of bias against Starling. (Doc. 267, Ex. 6 at 207:4-23; 211:19-212:7.)

1           Otherwise, Robertson appears to have been quite satisfied with Starling’s  
2 performance. Robertson says that Starling was, more than once, responsive to the  
3 concerns she expressed. (Id. at 109:18-110:4; 134:18-135:8.) On June 5, 2014,  
4 Robertson texted Starling, “Thanks so much for your help. I truly appreciate your  
5 courageous leadership and doing the right thing! You are a great partner!!” (Id. at  
6 151:23-152:18.) On October 21, 2014, she provided Starling with positive comments at a  
7 budget review and, later that day, responded to his grateful text with this message: “You  
8 are a great leader and it’s a privilege to work with you.” (Id. at 156:22-157:23.)  
9 Plaintiffs attach as exhibits seven notes of encouragement and gratitude, most of which  
10 were handwritten, from Robertson to Starling. (See id. at Exs. 12-18.) The dates are  
11 sometimes unclear, but Robertson contests the veracity of none. In fact, she  
12 acknowledges in her deposition that she found Starling to be a great leader and partner.  
13 (Doc. 267, Ex. 6 at 169:6-12.)

14           Robertson was not the only one who appreciated Starling’s work. Each year,  
15 Banner gives certain employees the Guardian Award. Those who best embody Banner’s  
16 virtues—“wisdom, warmth, strength, integrity and gentleness”—receive the honor. (Doc.  
17 267, Ex. 16.) There is a competitive selection and interview process. Starling was  
18 nominated “multiple times” throughout his time at Banner and won the award in  
19 November 2014. (Doc. 267, Ex. 2 at ¶ 15.)

20           **B. Allegations Mount Against Starling**

21           In March of 2015, Julie Nunley (“Nunley”) became the Hospital’s CEO. (Doc.  
22 219 at ¶ 11.) Shortly thereafter, Dr. Joseph Chatham, the Hospital’s Chief of Staff, met  
23 with Nunley. The parties dispute who approached whom. Chatham accused Starling of  
24 being uncollaborative, dictating his own agenda without input, playing favorites with  
25 staff members, and sending physicians’ cases to peer review selectively. (Id. at ¶ 12.)  
26 Starling believes that Chatham was biased against him because of a dispute the two had  
27 regarding the (negligent, according to Starling) credentialing of Chatham’s son, also a  
28

1 doctor, for a particular procedure. Starling ultimately won that fight, as Banner took his  
2 side. (Doc. 267, Ex. 2 at ¶¶ 172-203.)

3 For her part, Nunley also claims that she saw Starling “slam his fist down on a  
4 table” at a medical staff meeting. (Doc. 219, Ex. D at ¶ 3.) Starling denies this, but he  
5 does so only insofar as to deny he slammed his fist at a meeting with the Chief of  
6 Anesthesiology, Dr. George Scott Gieszl, Jr. (Doc. 267, Ex. 20 at 10-11.) Starling  
7 suggests that this is the only candidate for Nunley’s supposed misremembrance.

8 Perhaps the fist-slamming accusation stems back to Robertson. Robertson kept  
9 notes during her tenure as CEO. On one occasion, she noted that Starling “scream[ed] at  
10 Giesle [sic] in the hallway.” (Doc. 267, Ex. 6 at 87:23-88:3.) She says Gieszl heard  
11 Starling screaming in the hallway. (Id. at 88:8-12.) Yet Gieszl swears in a declaration  
12 that in his ten years of working with Starling, he never “saw him act inappropriately” or  
13 “unprofessionally.” (Doc. 267, Ex. 7 at ¶¶ 8-9.) During a disagreement over peer review  
14 for anesthesiologists, Gieszl felt all involved conducted themselves properly at all times.  
15 (Id. at ¶¶ 11-15.)

16 Starling also made a habit of sending what Defendants describe as unprofessional  
17 emails. (Doc. 218 at 3.) For example, on October 12, 2014, Starling sent an email to  
18 Banner Health’s Vice President of Operations for the Arizona Region: “Why are you  
19 interfering in our process in the [ ] transfer process. You . . . are delaying care.” The  
20 Vice President responded, “I don’t have any idea what you’re talking about and I don’t  
21 appreciate getting a note like this. If you have specific concerns, I’d like to know what  
22 they are and have them addressed in a collaborative, constructive manner.” (Doc. 219 at  
23 ¶ 15.) Starling admits that the email “doesn’t invite collaboration.” (Doc. 219, Ex. A at  
24 192:18-21.) He later explained his specific concerns in a follow-up email. (Doc. 219,  
25 Ex. A, Ex. 13.) Further, he claims to have communicated those concerns in a meeting  
26 prior to sending the email. (Doc. 267, Ex. 2 at ¶¶ 22-23.)

27 Another exchange occurred on December 31, 2014, when Banner’s Peer Review  
28 Quality Director emailed Starling to ask about system-wide changes, including new

1 software, that the company was making to the peer-review process. She noted that she  
2 had an invitation on her “calendar for a peer review meeting on January 7th,” and she  
3 wanted to be “prepared to support [Starling’s] team and the peer review process at [the  
4 Hospital].” (Id., Ex. B at Ex. G.) Starling replied, “You need to watch and learn on the  
5 7th how a true [Peer Review Council] functions. This activity will remain untouched.”  
6 (Id.) After noting that he was dissatisfied with the changes and tersely demanding  
7 training resources, he concluded, “Why this had to be made so difficult is beyond me at  
8 this point. Happy New Year.” (Id.) The Quality Director’s supervisor later forwarded  
9 the email to Bessel, expressing concern: “Given Dr. Starling’s response below, I am  
10 uncertain if he was able to garner support from the local team. I am concerned this will  
11 undermine the process.” (Id.)

12 In addition, Defendants assert that Starling failed to attend several meetings.  
13 Throughout the year of 2014, they claim, Starling attended only two of the eleven Chief  
14 Medical Officer/Chief of Staff system peer review council meetings. (Doc. 219 at ¶ 18.)  
15 He also missed a physician succession meeting with Robertson. Yet Starling claims that  
16 he did attend more than two meetings—sometimes dialing in via phone, in which case his  
17 attendance would not be recorded. (Doc. 267, Ex. 2 at ¶ 224.) Starling’s assistant avers  
18 that during the two years she worked for him, he “always communicated very well . . .  
19 about his ability, or inability, to attend meetings for which he was scheduled.” (Doc. 267,  
20 Ex. 12 at ¶ 7.)

21 Bessel accuses Starling of having been often unprepared to discuss items at the  
22 meetings he did attend. (Doc. 219 at ¶ 22.) Starling disputes this last point, asserting that  
23 he “always made a good-faith effort to be prepared for [his] meetings.” (Doc. 267, Ex. 2  
24 at ¶ 232.) He vigorously contests one particular instance in which Bessel accused him of  
25 being unprepared to discuss a lab project. (Doc. 267, Ex. 21 at 19-21 (written statement  
26 supplied to Banner as part of its later investigation into Starling’s claims of age  
27 discrimination).)

28

1 Bessel and Starling had regularly monthly meetings. Some of these meetings  
2 occurred on January 27, 2015, February 11, 2015, and May 29, 2015. (Doc. 219 at ¶ 23.)  
3 During these meetings, the two discussed what Bessel felt was the inappropriate tone of  
4 the emails above. Starling claims that he apologized to the persons to whom he sent the  
5 messages, but he contends that “Bessel acted as if the [emails] were minor issues.” (Doc.  
6 267, Ex. 2 at ¶ 35.) He also does not believe the tone of the emails was inappropriate.  
7 (Doc. 267, Ex. 21 at 5-9.)

8 At a June 4, 2015 meeting with Chatham and Nunley, Chatham told Starling that  
9 he did not believe Starling was objective. (Doc. 267, Ex. 2 at ¶ 217; Doc. 219 at ¶ 25.)  
10 Nunley became concerned that Starling had a fractured relationship with the medical  
11 staff. (Doc. 219 at ¶ 25.) Starling responds now by pointing to declarations from three  
12 colleagues of many years, all of whom swear to his professionalism and decorum. (See  
13 Doc. 267 at Exs. 9-11.) And again, he casts aspersions on Chatham, insinuating that  
14 Chatham disliked Starling because of the dispute with Chatham’s son. (Doc. 267 at ¶ 25  
15 (citing various places in the record).)

### 16 **C. Starling Accuses Banner of Discrimination**

17 As early as June 9, 2015, Bessel was investigating whether Starling’s  
18 investment/retirement plan had vested and planning for a “soft landing” package—though  
19 Defendants do not explain what this package entailed. (Doc. 267, Ex. 5 at Ex. 8; Doc.  
20 267, Ex. 5 at 111:6-21; Doc. 267, Ex. 34; Doc. 291 at 7.) On or around the day before,  
21 June 8, 2015, Starling met with Bessel and Nunley to discuss his performance issues.  
22 Defendants assert that Bessel told Starling he would be placed on a “non-disciplinary”  
23 Performance Improvement Plan (“PIP”). (Doc. 219 at ¶ 27.) Starling claims that the  
24 conversation was actually quite hostile, with Bessel saying, “We have no confidence that  
25 you can meet our expectations as [Chief Medical Officer].” (Doc. 267, Ex. 2 at ¶ 55.)  
26 According to Starling, Bessel continued: “One more mistake and you’re fired.” (Id. at  
27 ¶ 56.) Starling says the conversation “frightened [him] into retaining legal counsel that  
28 same day.” (Id. at ¶ 61.)

1 On June 16, 2015, Starling met with Banner’s General Counsel to file an internal  
2 complaint of discrimination as a result of the meetings with Bessel and Nunley. (Doc.  
3 267, Ex. 2 at ¶ 68.) He claims that Bessel and Nunley immediately began to treat him  
4 with hostility, ignoring his salutations, walking away from him, and excluding him from  
5 meetings. Both appeared to be angry, at least as he saw it, when they did talk to him.  
6 (Id. at ¶¶ 74-78.)

7 Nine days after the June 8 meeting, on June 17, 2015, Starling’s counsel sent  
8 Banner a letter accusing it of attempting to force Starling into retirement. (Doc. 219 at  
9 ¶ 28.) Banner investigated the allegation internally, and its Senior Director of Human  
10 Resources concluded that there was no evidence of harassment or discrimination. (Id. at  
11 ¶ 29.) Starling contests the internal investigation procedures, alleging that the  
12 investigator asked only leading questions and cherrypicked witnesses and facts. (Doc.  
13 267, Ex. 2 at ¶¶ 79-84.)

14 On October 28, 2015, after Banner’s investigation concluded, the PIP went into  
15 effect. Defendants claim that the PIP “was neither a disciplinary measure nor ‘corrective  
16 action.’” (Doc. 219 at ¶ 30.) Starling told Bessel that he thought the PIP “was age  
17 discrimination and retaliation.” (Doc. 267, Ex. 2 at ¶¶ 85-89.) Around November 10,  
18 2015, Starling’s counsel sent notice of intent to file suit. (See Doc. 267, Ex. 26.)

#### 19 **D. The Holiday Party and Starling’s Termination**

20 Banner held its annual employee recognition holiday function at Banner Baywood  
21 Medical Center on December 15, 2015. There were multiple meals served so that Banner  
22 employees who worked later in the day could partake in the festivities.

23 Defendants assert that, as Chief Medical Officer, Starling “was required to work”  
24 at the function. (Doc. 219 at ¶ 31.) Nunley’s assistant had emailed members of Hospital  
25 management, including Starling, and stated, “All c-suite will be attending and assisting  
26 with [the] meals please [sic] sign up for the best times that will work for you.” (Id. at  
27 ¶ 32.) Starling asserts that he attended the function of his own accord and did not view it  
28 as work/an obligation. (Doc. 267, Ex. 2 at ¶ 137-40.) He further notes that he had

1 declined many times to work the event in the past and “was never disciplined or  
2 otherwise admonished in any way.” (Id. at ¶ 146-47.) In his words, “No one ever told  
3 me I was required to attend the holiday meal. Nothing ever led me to believe that my  
4 attendance was required at the holiday meal.” (Id. at ¶ 148.) Starling’s assistant swears  
5 that “no one ever told [her that Starling] was required to attend the holiday meal and  
6 serve meals to staff.” She always had the impression that doing so was optional. (Doc.  
7 267, Ex. 12 at ¶¶ 14-15.)

8 On the evening of the holiday party, Starling had three eight-ounce glasses of wine  
9 between 6:00 pm and 8:00 pm. (Doc. 219 at ¶ 36.) Starling emphasizes that he  
10 consumed two of these glasses while eating his dinner, “a healthy portion of chicken,  
11 rice, and vegetables.” (Doc. 267, Ex. 2 at ¶ 93.) He also had “two cups of coffee and ate  
12 dessert.” (Id. at ¶ 95.) He further points out that, at the time, he weighed approximately  
13 190 lbs. and “would typically drink 1-2 glasses of wine with dinner, 2-5 times per week.”  
14 (Id. at ¶¶ 148-49.) He thus believes that the wine did not in any way affect him. (Doc.  
15 219, Ex. A at 20:9-21.)

16 In any case, at around 10:30 pm, Starling drove himself to the party, arriving at  
17 about 11:00 pm. (Doc. 219 at ¶ 37.) Alcohol was not being served at the event. (Id. at  
18 ¶ 38.) Again, Starling never signed up for a shift and decided, apparently spontaneously,  
19 to attend. (Doc. 267, Ex. 1 at Ex. 3; Doc. 267, Ex. 28 at 5.) He also points out that he  
20 had been up since 5:00 am. (Doc. 267, Ex. 2 at ¶ 90.)

21 From this point, the stories diverge wildly. Cindy Helmich (“Helmich”), Chief  
22 Nursing Officer at Banner Baywood Medical Center, went to say hello to Starling. She  
23 says she could smell alcohol on Starling’s breath. His speech cadence was off, and his  
24 words were unclear. Further, his arms were “swaying back and forth” more than normal,  
25 he was stepping back and forth, and he was “very animated.” (Doc. 267, Ex. 3 at 77:6-  
26 78:18.) Otherwise, Helmich remembers almost nothing about it. (See id. at 75:23-  
27 86:25.) Some time passed, less than an hour but maybe more than a half-hour, before  
28 Helmich reported this to Nunley. (Id. at 84:12-20.) Lori Davis-Hill (“Davis-Hill”), the

1 Hospital's Chief Human Resources Officer, spoke to Starling at Nunley's request. Davis-  
2 Hill "observed that there was an odor that could be the odor of alcohol." She further  
3 explained that "the cadence of [Starling's] speech was not what [she was] used to hearing  
4 from him. . . . [W]hen he was speaking, he would lose track of his thought and pause, and  
5 then come back into the conversation." He did not, however, slur his speech. (Doc. 219,  
6 Ex. F at 75:1-76:23.)

7 Starling tells a different tale. He insists he was sober. Apart from the other  
8 administrators and staff members he talked to at the event who apparently did not notice  
9 his tipsiness, Starling points out that at one point he performed a feat that would be  
10 almost impossible if he were intoxicated. Erin Leuthold, Director of the Cardiac  
11 Progressive Care Unit, suggested that they take some meals to staff members who were  
12 unable to make it over to the cafeteria. Leuthold "obtained a very large serving platter"  
13 upon which she placed four meals. The meals were on plates, with other plates turned  
14 upside down to cover them. Starling took the tray over to the dessert table and balanced  
15 desserts on top of the upside-down plates. As Starling and Leuthold were leaving, Davis-  
16 Hill asked if she could join. Starling carried the tray to an elevator, exited the elevator,  
17 walked down "a long hallway," got on another elevator, and then "walked the entire B  
18 and C units of the 4th floor." In Starling's words, "During this entire time, I carried the  
19 heavy platter with four meals on it balancing desserts on top of those meals. At no time  
20 did I ever stumble or display anything that can be viewed as any kind of impairment."  
21 He recalls that the whole process took about 45 minutes before he returned to the  
22 cafeteria. (Doc. 267, Ex. 2 at ¶¶ 90-104.) Davis-Hill acknowledges that she walked with  
23 Starling, but she does not recall how much he carried. (Doc. 267, Ex. 4 at 85:14-16.)  
24 She says he did stumble, but she cannot say it was from having been drinking. (See *id.* at  
25 89:23-90:8.) Finally, Starling emphasizes that he spoke to at least four other persons, in  
26 addition to those to whom he served food, who did not complain about his demeanor at  
27 the holiday party. (Doc. 267, Ex. 2 at ¶ 99.)

28

1           Whichever story is correct, at around 1:00 am, Helmich and Davis-Hill  
2 approached Starling and told him to accompany them to an empty conference room.  
3 (Doc. 219 at ¶ 43.) On the way, when Starling asked why he had been pulled aside,  
4 Helmich responded that someone claimed to have smelled alcohol on his breath. (Doc.  
5 267, Ex. 2 at ¶¶ 106-07.) Starling says that, prior to the technician arriving, no one asked  
6 him for his consent. (Id. at ¶ 112.) The non-Banner-affiliated technician arrived around  
7 2:30 am and administered a breathalyzer test, which showed a blood-alcohol content of  
8 .043. (Doc. 219 at ¶ 50.) According to Starling, the technician also asked for a urine  
9 sample while he recalibrated the breathalyzer to run the test again. (Doc. 267, Ex. 2 at  
10 ¶¶ 117-18.) Defendants claim, without adequate citation, that Starling consented to the  
11 testing before it began. (Doc. 219 at ¶ 46.) The result of the second breathalyzer test was  
12 almost identical to the first. (Doc. 267, Ex. 2 at ¶ 121.) Starling claims that the  
13 technician asked him to sign a piece of paper confirming that his blood-alcohol content  
14 exceeded .02, the cutoff point for a violation of Banner’s policy. (Id.) That paper  
15 included an indemnity provision, in which the signor agrees to “hold harmless, the  
16 laboratory, collection facility, above named company, and their agents or representatives  
17 from any and all liability arising from this testing and any decision made concerning . . .  
18 continued employment based upon the results of these tests.” (Doc. 219, Ex. A at Ex. 5.)  
19 Starling further claims that the technician would not allow him to leave unless he signed  
20 the paper, which is the sole reason he signed it. (Doc. 267, Ex. 2 at ¶ 121.) The  
21 technician did not ask him to explain why his blood-alcohol content might have been  
22 elevated. Alternative explanations include, according to Starling, medications, lip balm,  
23 and mouthwash with alcohol content. The technician also did not offer alternative testing  
24 procedures. (Id. at ¶ 122.)

25           Banner had itself served alcohol at various work-related functions in the past. For  
26 example, alcohol was sometimes served at the Guardian Award ceremony. (Doc. 267,  
27 Ex. 6 at 27:6-8.) Part of former-CEO Robertson’s job was to speak at the ceremony. (Id.  
28 at 27:14-18.) She consumed alcohol when attending and was never disciplined for doing

1 so. (Id. at 27:23-28:7.) Nor did she have to submit to a drug and alcohol test. (Id. at  
2 30:4-6.) Further, she was unaware of other attendees at the ceremony or at meetings  
3 where alcohol was served who were disciplined or had to submit to testing as a result of  
4 the drinking. (Id. at 30:17-31:15.) Jill Patterson, Vice President of Human Resources,  
5 admits that Banner served alcohol to its employees at an annual leadership conference  
6 and an event honoring hospital donors. (Doc. 267, Ex. 5 at 131:18-133:13.) Helmich  
7 also recalls alcohol being served at certain Banner events. (See Doc. 267, Ex 3 at 183-  
8 86.)

9         Nevertheless, on December 17, 2015, Banner terminated Starling’s employment.  
10 (Doc. 219 at ¶ 56.) Defendants claim that “[p]er Banner’s Employee Drug and Alcohol  
11 Policy, an employee with a blood alcohol content of .02 or greater is in violation of the  
12 policy and immediate termination is required.” (Id. at ¶ 55.) Starling was 67 at the time  
13 he was terminated. (Id. at ¶ 56.) He was replaced by Dr. Paul Hurst, a 60 year-old  
14 physician. (Id. at ¶ 57.)

#### 15         **E.     The Report to the Medical Board**

16         On December 28, 2015, Bessel sent to the Arizona State Board of Medical  
17 Examiners (“Board”) a letter detailing the incident at the holiday party. (Doc. 267, Ex. 5  
18 at Ex. 10.) She prefaced the letter by explaining that an Arizona statute requires hospitals  
19 to report “any information that appears to show that a physician is or may be unable to  
20 engage safely in the practice of medicine.” (Id.) The relevant factual portion stated as  
21 follows: “During the night shift meal on 12/14/15, Dr. Starling was reported to have  
22 smelled of alcohol and to have stumbled. His speech differed from its normal pattern.  
23 Per policy, Dr. Starling was required to undergo, and did complete, testing. The testing  
24 was positive for alcohol above Banner’s acceptable level.” (Id.) She specifically  
25 requested that the Board maintain confidentiality in the matter. (Id.) The Board  
26 eventually informed Starling that it determined that he had not violated the Arizona  
27 Medical Practice Act and dismissed the case.

28

1           **F.     This Action**

2           Starling filed a charge of discrimination with the Equal Opportunity Employment  
3 Commission on January 4, 2016. (Doc. 216 at ¶ 168.) He filed this suit on March 15,  
4 2016. On April 25, 2016, the EEOC issued a Notice of Right to Sue Letter. (Id. at  
5 ¶ 171.)

6           **III.    ANALYSIS: SUMMARY JUDGMENT**

7           In evaluating the discrimination claims in this case, the Court bears in mind the  
8 following guidance from the Ninth Circuit:

9           A plaintiff alleging employment discrimination need produce very little evidence  
10 in order to overcome an employer’s motion for summary judgment. This is  
11 because the ultimate question is one that can only be resolved through a searching  
12 inquiry—one that is most appropriately conducted by a factfinder, upon a full  
13 record. In evaluating motions for summary judgment in the context of  
14 employment discrimination, we have emphasized the importance of zealously  
15 guarding an employee’s right to a full trial, since discrimination claims are  
16 frequently difficult to prove without a full airing of the evidence and an  
17 opportunity to evaluate the credibility of the witnesses.

18           Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008) (internal quotation  
19 marks and citations omitted).

20           **A.    Count I (Banner): Violation of ADEA – Age Discrimination –**  
21           **Termination of Employment**

22           Starling claims that he was terminated because of his age. (Doc. 210 at ¶ 220.)  
23 The Age Discrimination in Employment Act of 1967, as amended (“ADEA”), prohibits  
24 an employer from discriminating against an individual because of the individual’s age.  
25 29 U.S.C. § 623(a). ADEA claims proceed under the McDonnell Douglas Corp. v.  
26 Green, 411 U.S. 792 (1973), burden-shifting framework. First, a plaintiff must establish  
27 a prima facie case of discrimination. If he does so, the burden shifts to the defendants to  
28 articulate a legitimate, nondiscriminatory reason for their conduct. Should the defendants  
succeed, the burden shifts back to the plaintiff to demonstrate that the proffered  
nondiscriminatory reason is a pretext for discrimination. Wallis v. J.R. Simplot Co., 26  
F.3d 885, 888-89 (9th Cir. 1994).

1                                   **1.     Starling’s Prima Facie Case**

2                   “The requisite degree of proof necessary to establish a prima facie case for . . .  
3 ADEA claims on summary judgment is minimal and does not even need to rise to the  
4 level of a preponderance of the evidence.” Id. at 889. “To establish a prima facie case  
5 using circumstantial evidence, [ ] employees must demonstrate that they were  
6 (1) members of the protected class (at least age 40); (2) performing their jobs  
7 satisfactorily; (3) discharged; and (4) replaced by substantially younger employees with  
8 equal or inferior qualifications.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th  
9 Cir. 2000).

10                   Starling has established a prima facie case. He was 67 at the time he was  
11 terminated and was thus a member of the protected class. He was performing his job  
12 satisfactorily. His own positive assessment of his performance is relevant in so  
13 determining. See *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th  
14 Cir. 2002) (“[A]t the prima facie stage, [ ] self-assessment of [ ] performance is  
15 relevant.”). Further, his official performance reviews from Banner were always  
16 satisfactory or better.

17                   That is not to say there were no problems. The tangled web of facts in this case  
18 indicates a clash of strong personalities. But Defendants routinely emphasize throughout  
19 their briefing that the improvement plans were non-disciplinary. As discussed below,  
20 they do so to show that there is no evidence of retaliation against Starling. But the lack  
21 of disciplinary proceedings might show, in addition or in the alternative, that Starling’s  
22 performance as an employee was so strong that nothing he had done warranted discipline.  
23 A reasonable juror could so conclude. Being told about areas for improvement is a  
24 reality of professional life. If Starling were truly a troublesome employee, Banner could  
25 have disciplined him. Instead, its agents consistently gave him very good reviews.  
26 Defendants cannot have it both ways. If improvement plans are not adverse employment  
27 actions, they cannot be evidence that Starling was a poor employee.

1 Defendants also fail to demonstrate that Starling’s demeanor had changed over  
2 time. Starling claims, for example, that the tone of his emails was consistent throughout  
3 his employment. (Doc. 267, Ex. 2 at ¶¶ 25, 32.) Davis-Hill also admits that members of  
4 the independent medical staff never complained to her, the Chief Human Resources  
5 Officer, about Starling in any way. (Doc. 267, Ex. 4 at 40:23-41:1.)

6 Starling satisfies the other elements of the prima facie case as well. He was  
7 discharged and replaced by a younger employee—although arguably not a substantially  
8 younger one, as Starling was 67 and Hurst, his replacement, was 60. But that is not the  
9 end of the inquiry. In *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981), the court  
10 found the plaintiff “proved that he was a member of the protected class, was discharged,  
11 and was replaced by a person five years younger than he. Further, he produced  
12 substantial evidence of satisfactory job performance. This was sufficient to establish a  
13 prima facie case and shift the burden . . . .” *Id.* at 533. The Court finds Starling’s  
14 circumstances are similar enough to end the prima facie inquiry. In addition, few persons  
15 qualified for Starling’s job—overseeing other doctors—are going to be young. It is  
16 plausible that Banner preferred a Chief Medical Officer who likely had ten years before  
17 retirement as opposed to three.

18 Contrary to Defendants’ argument, this holding does not conflict with *France v.*  
19 *Johnson*, 795 F.3d 1170 (9th Cir. 2015), in which the circuit adopted a “rebuttable  
20 presumption” approach: “We hold that an average age difference of ten years or more  
21 between the plaintiff and the replacements will be presumptively substantial, whereas an  
22 average age difference of less than ten years will be presumptively insubstantial.” *Id.* at  
23 1174 (emphases added). *France* was a case, as the preceding sentence demonstrates,  
24 about a slew of new promotions and the average age of the promotees. It does not draw a  
25 bright-line rule about age in the run-of-the-mill, single termination case. And even if it  
26 did, the analysis did not end there: the court examined additional evidence, direct and  
27 circumstantial, that the employer considered the employee’s “age to be significant.” *Id.*

28

1 Defendants tacitly concede that Starling was one of the two oldest Chief Medical  
2 Officers reporting to Bessel. (Doc. 218 at 9 (noting that the two oldest employees,  
3 including Starling, were 67).) To be sure, Starling admits that no defendant ever made  
4 any explicitly ageist remark to him. (Doc. 219, Ex. A at 155:23-157:24.) Bessel also  
5 says she did not know Starling’s age until his attorneys sent the June 17, 2015 letter  
6 “claiming that he was being discriminated against because of his age.” (Doc. 219, Ex. B  
7 at ¶ 32.) Nunley, too, claims she did not know “Starling’s age prior to his  
8 termination.” (Doc. 219, Ex. D at ¶ 12.) Yet Bessel and Nunley’s statements do not hold  
9 as a matter of law: “[O]n-the-job contact is sufficient to warrant an inference of an  
10 employer’s knowledge of age,” especially when viewing the facts in the light most  
11 favorable to the plaintiff on summary judgment. *Diaz v. Eagle Produce Ltd. P’Ship*, 523  
12 F.3d 1201, 1210 (9th Cir. 2008) (citing *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 80  
13 (2d Cir. 2005)).

14 Bessel and Nunley further acknowledge that they more than once asked Starling  
15 about succession planning. Such conversations are normally innocuous, but Starling  
16 points out that he made clear in March of 2014 he did not plan to retire for at least three  
17 to five years. Nevertheless, Bessel asked about his retirement plans again the following  
18 March, which is when Nunley became the new CEO. (Doc. 284 at 4.) As a matter of  
19 course, this was fine. But Starling’s June 8, 2015 conversation with Bessel and Nunley  
20 was serious enough to prompt him to file an internal discrimination complaint and to  
21 retain counsel. According to Starling, the two were aggressive and threatening “and  
22 invited him to find another job.” (Doc. 284 at 16.) Unbeknownst to Starling, various  
23 Banner executives were, at this time, discussing a “soft landing” package for him, despite  
24 his stated plans not to retire. (Doc. 267, Ex. 34.) They did not present the package,  
25 whatever it was, once Starling filed his internal discrimination complaint. Considered in  
26 total, these circumstances are enough to satisfy the lenient standard on summary  
27 judgment.

28

1 As emphasized above, the standard of proof is very low at this stage, particularly  
2 for summary judgment. Because he has made a prima facie case, the burden shifts to  
3 Banner to provide a nondiscriminatory basis for Starling’s termination.

4 **2. Banner’s Proffered Nondiscriminatory Rationale**

5 Banner fired Starling for allegedly failing to comply with its Employee Drug and  
6 Alcohol Testing Policy. Both parties agree that this suffices as a nondiscriminatory basis  
7 for his termination. The burden shifts back to Starling to demonstrate that this basis was  
8 a pretext.

9 **3. Starling’s Argument for Pretext**

10 “[A] plaintiff can prove pretext in two ways: (1) indirectly, by showing that the  
11 employer’s proffered explanation is ‘unworthy of credence’ because it is internally  
12 inconsistent or otherwise not believable, or (2) directly, by showing that unlawful  
13 discrimination more likely motivated the employer.” *Chuang v. Univ. of Cal. Davis, Bd.*  
14 *of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000).

15 Banner’s Employee Drug and Alcohol Testing Policy allows for drug/alcohol  
16 testing “[w]hen a manager and or supervisor has reasonable suspicion/just cause to  
17 suspect an employee of being impaired during work hours.” (Doc. 219, Ex. B at Ex. D at  
18 1.) It is unclear whether the holiday party counted as “work hours” for Starling. Starling  
19 never signed up for a shift and attended of his own accord. Further, the email subject for  
20 the reminder email was “FINAL REQUEST - HOLIDAY MEAL SERVING.” (Doc.  
21 267, Ex. 1 at Ex. 3 at 1 (emphasis added).) Starling had not attended in prior years and  
22 had never been disciplined for failing to do so. Helmich, the Chief Nursing Officer,  
23 never checked to make sure that the nursing directors who served under her signed up for  
24 shifts or showed up to serve food. (Doc. 267, Ex. 3 at 150:10-23.) Davis-Hill could not  
25 say whether she, as a C-Suite member, was required to work at the holiday party—only  
26 that it was “expected” of her. (Doc. 267, Ex. 4 at 68:1-22.)

27 Starling acknowledges that part of his job was to boost morale among the  
28 Hospital’s staff and that being at the holiday party was one way to do that. (See Doc.

1 267, Ex. 1 at 44.) Yet if that counts as “work hours,” surely so do the Hospital events  
2 where alcohol was actually served. After all, those were designed to advance similarly  
3 abstract Hospital goals, such as boosting morale or recognizing achievement.

4 Nor is it clear, given the conflicting reports of Starling’s behavior at the party, that  
5 Starling was “impaired” or that it was reasonable to suspect that he was. Even assuming  
6 he appeared to be, a reasonable juror could find that he was simply tired (he had been up  
7 since 5:00 am) or that he was in a festive mood. Starling swears under penalty of perjury  
8 and based on personal knowledge that the accounts of his behavior at the party are false.  
9 That creates a genuine dispute.

10 Whether Starling was working or impaired are both open questions. A reasonable  
11 juror could find that Banner’s Alcohol Policy was arbitrarily enforced against one of  
12 Banner’s oldest executive employees—and, therefore, that it was a pretext. The Court  
13 will deny summary judgment on the ADEA termination claim.

14 **B. Counts II, VI, and X (Banner): Violation of ADEA – Retaliation**

15 The ADEA contains an anti-retaliation provision. See 29 U.S.C. § 623(d). The  
16 provision “makes it unlawful for an employer to retaliate against an employee for  
17 opposing the employer’s discriminatory practices or participating in any investigation or  
18 proceeding under the ADEA.” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d  
19 756, 763 (9th Cir. 1996). “To make out a [prima facie] claim of retaliation, an employee  
20 must establish three things: first, that he engaged in statutorily protected activity; second,  
21 that he was discharged or suffered some other adverse employment decision; and third,  
22 that there is a causal connection between the two.” *Id.* “[T]he causation element . . .  
23 requires the plaintiff to show by a preponderance [sic] of the evidence that engaging in  
24 the protected activity was one of the reasons for the firing and that but for such activity  
25 the plaintiff would not have been fired.” *Ruggles v. Cal. Polytechnic State Univ.*, 797  
26 F.2d 782, 785 (9th Cir. 1982) (internal quotation marks omitted). If the employee makes  
27 the prima facie case, the McDonnell Douglas burden-shifting framework applies.  
28

1 Internal complaints of harassment are a statutorily protected activity under Title  
2 VII. See Villiarimo, 281 F.3d 1054, 1064 (9th Cir. 2002). This reasoning extends to  
3 ADEA cases. Cf. Wallis, 26 F.3d at 888-89 (“We combine the Title VII and ADEA  
4 claims for analysis because the burdens of proof and persuasion are the same.”).

5 Starling believes that Banner retaliated against him for his internal complaints of  
6 discrimination and his notice of intent to sue. He alleges that three of Banner’s acts were  
7 retaliation: (1) the termination; (2) the performance improvement plan; and (3) the letter  
8 Bessel sent to the Medical Board. Starling’s complaints are a protected activity under  
9 Villiarimo. The issues, then, turn on the adverse-employment-action and causation  
10 elements.

### 11 **1. Count II: Termination of Employment**

12 Termination is plainly an adverse employment action. Thus, Starling must prove  
13 causation. He must show that but for his discrimination complaint, Banner would not  
14 have terminated his employment.

15 “[I]n some cases, causation can be inferred from timing alone where an adverse  
16 employment action follows on the heels of protected activity.” Villiarimo, 281 F.3d at  
17 1065. “[E]vidence based on timing can be sufficient to let the issue go to the jury, even  
18 in the face of alternative reasons proffered by the defendant.” *Passantino v. Johnson &*  
19 *Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000). The Ninth Circuit  
20 has held that being laid off within 59 days of filing an EEOC complaint is sufficient to  
21 establish a prima facie case of causation. *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498,  
22 505 (9th Cir. 1989).

23 Defendants focus exclusively on Starling’s first internal complaint, which he made  
24 in June. The gap between that complaint and his termination would be too long to  
25 support a causation inference. See Villiarimo, 281 F.3d at 1065 (citing *Filipovic v. K & R*  
26 *Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir. 1999)). Yet Starling also complained  
27 in November and December. His lawyers sent notice of intent to sue on or around  
28 November 10, 2015. (Doc. 267, Ex. 26.) Starling points out that Banner decided to test

1 him for the first time a month after he gave notice of his intent to sue—even though he  
2 had consumed wine at Banner-related events in the past. (Doc. 210 at ¶ 16.) Viewed in  
3 the light most favorable to Starling, Banner’s decision to test and terminate Starling could  
4 have been the result of his later complaints and his announced intent to sue.

5 Starling has therefore met his prima facie case on Count II. The McDonnell  
6 Douglas burden-shifting analysis now applies. As explained above, Banner had a facially  
7 nondiscriminatory reason for firing Starling. But a reasonable juror could find that the  
8 reason was pretextual. In the retaliation context, such a juror could conclude that  
9 Starling’s supervisors were irritated that he was asserting his rights under the ADEA—  
10 forcing the company to investigate and defend against his allegations. Whether those  
11 allegations were true is a question for the jury, as is whether Banner arbitrarily enforced  
12 its Alcohol Policy against a complaining employee. Therefore, the Court will deny  
13 summary judgment on Count II.

## 14 **2. Count VI: Performance Improvement Plan**

15 First, the PIP was not an adverse employment action. As discussed (and was  
16 crucial to the ADEA termination holding) above, it was non-disciplinary and spelled out  
17 the manner in which Banner expected Starling to improve. Also, it did not explicitly  
18 form the basis for any adverse employment action. See *James v. C-Tran*, 130 Fed. Appx.  
19 156, 157 (9th Cir. 2005). The PIP itself had no effect other than to point out areas on  
20 which Banner expected Starling to improve. Such a course of action is perfectly  
21 reasonable for any employer. Although Starling denies having received it, he had been  
22 placed on a PIP several years before the one in question (when Robertson was CEO) and  
23 had, according to Defendants, made enough progress to end it.

24 Starling argues that Banner penalized him by withdrawing its secret “soft landing”  
25 plan and placing him on the PIP. Starling’s argument is akin to saying that Banner  
26 retaliated against him by not terminating his employment. This contention makes little  
27 sense.

28

1 Further, Starling must also prove causation. He must show that but for his  
2 discrimination complaint, Banner would not have placed him on the PIP. But Bessel  
3 discussed the PIP with Starling on June 8, 2015—before any of Starling’s complaints.  
4 Thus, it is illogical to assert that any of his complaints caused the PIP. Count VI fails as  
5 a matter of law.

6 **3. Count X: Complaint to the Arizona Medical Board**

7 Starling must show that but for his discrimination complaint(s), Bessel would not  
8 have sent the letter to the Medical Board. Toward that end, Starling argues only that the  
9 timing of the report to the Board suggests that his complaints caused Bessel (and Banner  
10 by extension) to send the letter. Yet unlike Starling’s termination, it makes no sense to  
11 infer anything based on the timing of the letter. A.R.S. § 32-1451(A) requires health care  
12 institutions to report, in good faith, any basis they have to believe a physician is unable to  
13 engage safely in the practice of medicine. Banner’s statutory obligation to report Starling  
14 would have arisen as soon as it was aware of that duty. Even if Banner did discriminate  
15 in administering the test and in firing Starling, given the positive test results, its statutory  
16 duty to report him would have immediately applied. In the defamation discussion below,  
17 the Court explains that Starling has failed to prove that Banner acted in bad faith in  
18 sending the letter. Therefore, summary judgment will be granted on Count X.

19 **C. Count III (Banner): Violation of ADA – Disability Discrimination –**  
20 **Termination of Employment**

21 A prima facie case under the Americans with Disabilities Act (“ADA”) requires  
22 the plaintiff to demonstrate that: “(1) he is disabled within the meaning of the ADA;  
23 (2) he is a qualified individual able to perform the essential functions of the job with  
24 reasonable accommodation; and (3) he suffered an adverse employment action because of  
25 his disability.” *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003). 42 U.S.C.  
26 § 12102(3)(A) says that an individual is “regarded as” being disabled if he establishes  
27 that he “has been subjected to an action prohibited under this chapter because of an actual  
28 or perceived physical or mental impairment whether or not the impairment limits or is

1 perceived to limit a major life activity.” If the plaintiff establishes his prima facie case,  
2 the McDonnell Douglas burden-shifting analysis applies.

3 Starling contends that Banner violated the ADA by terminating him when it  
4 regarded him “as having a physical or mental impairment.” (Doc. 210 at ¶ 241.) He does  
5 not claim to be an alcoholic or to have requested an accommodation. His only proof that  
6 Banner regarded him as an alcoholic is Bessel’s letter to the Medical Board. On its face,  
7 the letter states only the exact facts as Banner received them; it recounts the events of the  
8 holiday party. Yet there is a subtext: a concern that Starling’s behavior rendered him  
9 unfit to practice medicine. After all, the letter begins by announcing the duty to report on  
10 “any information that appears to show that a physician is or may be unable to engage  
11 safely in the practice of medicine.” (Doc. 267, Ex. 5 at Ex. 10.) Starling points out the  
12 “conundrum” the letter presents: either Bessel had reason to believe, at least in some way,  
13 that Starling had a substance abuse issue that rendered him unable to engage in the  
14 practice of medicine, or she lied to the Board. (Doc. 284 at 17.)

15 But Starling has not demonstrated that he was terminated as a pretext for his  
16 perceived disability of alcoholism. There is enough evidence in the record for a  
17 reasonable juror to conclude that age played a role in his firing. But there is no evidence  
18 at all that Banner was aware of Starling’s supposed alcoholism prior to the holiday party  
19 or that it wanted him fired for it. Starling thinks the letter alone is enough to demonstrate  
20 that he was regarded as an alcoholic. Allowing such a threadbare case to proceed at the  
21 summary judgment stage would discourage physicians’ employers from ever reporting  
22 them after even an isolated incident. For these reasons, and those discussed in the  
23 defamation analysis below, Starling’s claim must fail on Count III.

24 **D. Count IV (Banner, Bessel, and Nunley): Violation of AEPA –**  
25 **Retaliation – Termination of Employment**

26 The Arizona Employment Protection Act (“AEPA”) prohibits retaliatory  
27 termination in certain circumstances. A plaintiff must show that: “(1) [he] had  
28 information or a reasonable belief that [his] employer or another employee had violated  
an Arizona statute or constitutional provision; (2) [he] disclosed the information or belief

1 to an employer or a representative of the employer whom [he] reasonably believed was in  
2 a managerial or supervisory position and had the authority to investigate the information  
3 and take action to prevent further violations of the Arizona constitution or statutes; and  
4 (3) [he] was terminated because of the first two steps.” *Revit v. First Advantage Tax*  
5 *Consulting Servs., LLC*, 2012 WL 1230841, at \*2 (D. Ariz. April 12, 2012) (citing A.R.S.  
6 § 23-1501(3)(c)).

7 Starling’s complaint alleges that he “opposed decisions by Banner Health  
8 executive that he believed . . . would substantially harm patient care in violation of  
9 [A.R.S.] § 36-405 and the accompanying rules . . . .” (Id. at ¶ 254.)<sup>1</sup> In other words,  
10 Banner retaliated against him because he advocated for better patient care. Starling bases  
11 this peculiar claim on the conflict he had with Chatham over credentialing standards and  
12 “Chatham’s attempts to negligently credential his son.” (Doc. 210 at ¶ 252.) The idea  
13 seems to be that that Chatham accused him of being biased and that this poisoned Nunley  
14 against him. (See Doc. 267, Ex. 2 at ¶¶ 216-18.) In that light, Starling suggests that the  
15 “soft landing” package—which never came to fruition—was based in part on Chatham’s  
16 accusations. (Doc. 284 at 18.)

17 There is no evidence to support this theory. Banner ultimately agreed with  
18 Starling’s position and did not lower the credentialing standards. (Doc. 267 at ¶ 76.)  
19 Starling brought a potential problem to Banner’s attention, and in the end Banner sided  
20 with him. There is no evidence this played any significant role—or any role at all—in his  
21 termination. Even viewed in the light most favorable to Starling, this claim must fail.

22 **E. Count V (Banner, Bessel, and Nunley): Violation of AEPA –**  
23 **Retaliation – Termination of Employment**

24 Starling alleges that Banner violated another section of AEPA: A.R.S. § 23-  
25 1501(A)(3)(b). That portion supplies a cause of action when “[t]he employer has  
26 terminated the employment relationship of an employee in violation of a statute of this

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27  
28 <sup>1</sup> A.R.S. § 36-405 deals with the duties of the Director of the Department of Health Services. The Court assumes without deciding that the statute has at least some relevance to Starling’s claim.

1 state.” The provision further provides that where a statute provides a remedy, that  
2 remedy is exclusive.

3 Starling points to no state statute that his termination violated. Instead, he  
4 separately argues that Banner violated Article 18, Section 6 of the Arizona Constitution,  
5 which says, “The right of action to recover damages for injuries shall never be abrogated,  
6 and the amount recovered shall not be subject to any statutory limitation . . . .” He  
7 contends that he was terminated for pursuing his age discrimination lawsuit.

8 The Arizona Supreme Court has explained that Article 18, Section 6 was designed  
9 to “preserv[e] the ability to invoke judicial remedies for those wrongs traditionally  
10 recognized at common law.” *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 9, 17, 730 P.2d  
11 186, 195 (1986). Starling cannot point to a common law action that the Legislature has  
12 abrogated in violation of Article 18, Section 6, and the constitutional provision does not  
13 itself supply a cause of action or remedy. Instead, Starling looks to two Ohio cases  
14 interpreting completely different language in a completely different state’s constitution.  
15 (Doc. 284 at 18.) That strategy is wholly unpersuasive.

16 As noted above, a separate section of the AEPA contemplates both the State  
17 Constitution and its statutes. Here, by *expressio unius*, the relevant portion was intended  
18 to target only statutory violations. With no Arizona statute to which Starling can cite,  
19 summary judgment is appropriate on Count V.

20 **F. Count IX (Banner, Bessel, Nunley, Davis-Hill, and Helmich): Invasion**  
21 **of Privacy – Intrusion Upon Seclusion**

22 Arizona courts have adopted the Restatement (Second) of Torts to define the tort  
23 of intrusion upon seclusion. “One who intentionally intrudes, physically or otherwise,  
24 upon the solitude or seclusion of another or his private affairs or concerns, is subject to  
25 liability to the other for invasion of his privacy, if the intrusion would be highly offensive  
26 to a reasonable person.” *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 279, 947 P.2d 846,  
27 853 (Ct. App. 1997) (quoting Restatement (Second) of Torts § 652B). The comments to  
28 the Restatement, which the Hart court found controlling, make clear that the plaintiff  
must have intentionally secluded himself in a private place, such as his home. A

1 defendant is liable if he forces himself into the home; uses aids, such as wiretaps or  
2 binoculars, to invade the plaintiff's privacy; or rifles through the plaintiff's personal and  
3 confidential documents. *Id.* (quoting Restatement (Second) of Torts § 652B, cmts. b-c).

4 In *Hart*, the plaintiffs were employees subject to drug testing at any time. *Id.* at  
5 274-75, 848-49. They were required to get into a van and taken off site for drug testing.  
6 *Id.* at 257, 849. As the court put it, the plaintiffs "fail[ed] to explain how [their  
7 employer's] demand that they take a drug test was an invasion of their seclusion, and  
8 instead [ ] merely enumerate the inconveniences they experienced. [Their] 'evidence'  
9 clearly does not even approach establishing the tort set forth by the Restatement." *Id.* at  
10 279-80, 853-54. In another case, the Arizona Court of Appeals cited approvingly a case  
11 from Colorado in which unauthorized testing, performed on a blood sample taken for  
12 another purpose, was sufficient to state a claim for intrusion upon seclusion. *Havasupai*  
13 *Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 227, 204 P.3d  
14 1063, 1076 (Ct. App. 2008) (citing *Doe v. High-Tech Institute*, 972 P.2d 1060, 1064  
15 (Colo. App. 1998)). That appears to be the extent of the published case law on the tort in  
16 Arizona.

17 Starling alleges that Defendants intruded upon his seclusion when they required  
18 him to undergo the drug and alcohol testing. (Doc. 210 at ¶¶ 305-08.) As Defendants  
19 point out, Starling was on Banner property when he was tested. Starling counters by  
20 arguing that "[b]y testing [ ] Starling without cause while on his own personal time,  
21 Defendants intruded on his privacy." (Doc. 284 at 19.)

22 Unlike as in *Hart*, it is ambiguous whether Starling was working. By statute  
23 employers who establish a policy of drug or alcohol testing are immune from liability if  
24 they have a "good faith belief that an employee had an impairment while working while  
25 on the employer's premises or during hours of employment." A.R.S. § 23-493.06(A)(6).  
26 It may well be that a good faith belief that Starling was on duty suffices for this defense.  
27 But the Court need not decide this because the claim fails before even reaching this  
28 defense.

1 Irrespective of whether Starling was working, Banner did not intrude upon his  
2 seclusion. He voluntarily entered Banner’s premises. He was free to leave, and the  
3 testing procedure, a simple breathalyzer and urine sample, was not “highly offensive to a  
4 reasonable person.” The reasons for the test were known to Starling; Defendants did not  
5 lie about those reasons. He was willing to take the breathalyzer twice and to provide a  
6 urine sample, which was obtained in private. Count IX fails as a matter of law.

7 **G. Counts VII and VIII (Banner, Bessel, and Nunley): Defamation – False**  
8 **Statements Regarding Job Performance**

9 Starling does not defend these claims. He complains that he has been hindered in  
10 gathering evidence. (See Doc. 284 at 18.) He also points to his Controverting Statement  
11 of Facts, an impermissible place to make a legal argument. The Court considers the  
12 claims abandoned, especially in light of its ruling below on Starling’s Rule 56(d) motion.

13 **H. Count XI (Banner and Bessel): Defamation – False Statements in**  
14 **Complaint to the Arizona Medical Board**

15 Starling alleges that Bessel and Banner defamed him by sending Bessel’s letter to  
16 the Medical Board.

17 **1. Defamation Generally**

18 “One who publishes a false and defamatory communication concerning a private  
19 person . . . is subject to liability, if, but only if, he (a) knows that the statement is false  
20 and it defames the other, (b) acts in reckless disregard of these matters, or (c) acts  
21 negligently in failing to ascertain them.” Rowland v. Union Hills Country Club, 157  
22 Ariz. 301, 306, 757 P.2d 105, 111 (Ct. App. 1988) (quoting Restatement (Second) of  
23 Torts § 580(B)) (emphasis removed). “To be defamatory, a publication must be false and  
24 must bring the defamed person into disrepute, contempt, or ridicule, or must impeach  
25 plaintiff’s honesty, integrity, virtue, or reputation.” Godbehere v. Phx. Newspapers, Inc.,  
162 Ariz. 335, 341, 783 P.2d 781, 787 (1989).

26 **2. The Duty to Report and Qualified Privilege**

27 The Arizona State Board of Medical Examiners regulates the practice of medicine  
28 in Arizona. A.R.S. § 32-1451(A) requires medical doctors and health care institutions to

1 “report to the [Board] any information that appears to show that a doctor of medicine is  
2 or may be medically incompetent, is or may be guilty of unprofessional conduct[,] or is  
3 or may be mentally or physically unable to safely engage in the practice of medicine.”  
4 The statute further provides, “Any person or entity that reports or provides information to  
5 the [Board] in good faith is not subject to an action for civil damages.” *Id.* In fact, “[i]t  
6 is an act of unprofessional conduct for any doctor of medicine to fail to report as  
7 required” by the statute. *Id.*

8 Yet there is no absolute privilege in reporting. The statute, with its emphasis on  
9 good faith, “abrogate[s] the common law absolute privilege in the context of reports  
10 involving medical malfeasance.” *Advanced Cardiac Specialists, Chartered v. Tri-City*  
11 *Cardiology Consultants, P.C.*, 222 Ariz. 383, 386, 214 P.3d 1024, 1027 (Ct. App. 2009).  
12 Arizona law instead provides a qualified privilege to defendants in these cases. “To  
13 avoid summary judgment pursuant to the qualified privilege that protects such reports,  
14 plaintiffs must produce clear and convincing evidence” that the reporting party abused  
15 the privilege. *Id.* at 387, 1028. “[T]he plaintiff may [ ] prove an abuse of [the] privilege  
16 either by proving publication with ‘actual malice’ or by demonstrating excessive  
17 publication.” *Green Acres Trust v. London*, 141 Ariz. 609, 616, 688 P.2d 617, 624  
18 (1984). “An abuse through ‘actual malice’ occurs when the defendant makes a statement  
19 knowing its falsity or actually entertaining doubts about its truth.” *Id.* “Abuse through  
20 excessive publication results from publication to an unprivileged recipient not reasonably  
21 necessary to protect the interest upon which the privilege is grounded.” *Id.* The burden  
22 is on the plaintiff to prove that the defendant abused the privilege—in this case, “actually  
23 entertain[ing] serious doubt about the truth of [the] statement” or knowing it is probably  
24 false. *Advanced Cardiac*, 222 Ariz. at 388, 214 P.3d at 1029.

### 25 **3. Bessel’s Letter to the Board**

26 “Substantial truth is a complete defense to an action for defamation.” *Morris v.*  
27 *Warner*, 160 Ariz. 55, 63, 770 P.2d 359, 367 (Ct. App. 1988). Yet as the Ninth Circuit  
28 has explained, “Statements, although perhaps ‘true’ when viewed in isolation, may create

1 an overall false impression when considered in context.” *Van Buskirk v. Cable News*  
2 *Network, Inc.*, 284 F.3d 977, 984 (9th Cir. 2002).

3 Under Arizona law, Starling bears the burden of proving by clear and convincing  
4 evidence that Bessel abused her qualified privilege—i.e., that she acted with actual  
5 malice or published the statement excessively. The private letter to the Board was not  
6 excessive publication. Thus, a reasonable juror must be able to find clear and convincing  
7 evidence that Bessel actually entertained serious doubts about the truth of her letter or  
8 knew it was, on the whole, probably false.

9 All Bessel did was report on exactly what happened at the events of the holiday  
10 party, as she may have been legally obligated to do. Her letter refers to A.R.S. § 32-  
11 1451(A) and Banner’s duty “to report to the Board any information that appears to show  
12 that a physician is or may be unable to engage safely in the practice of medicine.” (Doc.  
13 267, Ex. 5 at Ex. 10.) The letter draws no conclusions from the bare clinical facts recited.  
14 Everything Bessel reported to the Board was true.

15 Starling believes that Bessel impliedly accused him of being an alcoholic in her  
16 report to the Board. (Doc. 219, Ex. A at 414:18-415:5.) He asserts that there was no  
17 basis to believe that he had a “substance abuse problem,” which he admits would have  
18 required a report to the Board.

19 The reporting statute draws a fine line. It is professional misconduct for a doctor  
20 or hospital to fail to report incompetent physicians, but the reporting party still must have  
21 a good-faith basis for the report. Under *Advanced Cardiac*, the employer gets the benefit  
22 of any doubt. Consider a different case, where it is undisputed that the physician was  
23 inebriated—but only once—while performing surgery. An employer in such a case  
24 might be unwilling to report that physician, even after firing him, if Arizona law exposed  
25 employers to potential liability for reporting solitary cases. Such policy would plainly be  
26 unwise and has no basis in either the reporting statute or the Arizona courts’ qualified-  
27 privilege jurisprudence. The fact that Bessel’s was a report based on a single, factually  
28

1 correct incident is a matter for the Medical Board to consider—which it did, dismissing  
2 the case against Starling. Count XI must fail.

#### 3 **IV. STARLING’S RULE 56(D) MOTION**

4 Federal Rule of Civil Procedure 56(d) provides as follows: “If a nonmovant shows  
5 by affidavit or declaration that, for specified reasons, it cannot present facts essential to  
6 justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow  
7 time to obtain affidavits or declarations or to take discovery; or (3) issue any other  
8 appropriate order.”

9 Starling’s motion rehashes the following discovery arguments that the Court has  
10 already addressed and ruled on.

##### 11 **A. Comparator Discovery**

12 Starling argues that the Court was too restrictive in “limiting [comparator  
13 discovery] to the two decision-makers,” Bessel and Nunley. (Doc. 243 at 13.) He cites  
14 *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151 (9th Cir. 2010), for the  
15 proposition that it is error to impose a strict “same supervisor” requirement. *Id.* at 1157.  
16 What the *Hawn* court actually found was as follows: “Similarity between two persons or  
17 groups of people is a question of fact that cannot be mechanically resolved by  
18 determining whether they had the same supervisor without attention to the underlying  
19 issues.” *Id.* at 1158. Further, the court did “not exclude the possibility that the presence  
20 or absence of a shared supervisor might be relevant in some cases.” *Id.* at 1157. Here,  
21 the Court gave attention to the underlying issues, as *Hawn* requires. Starling seeks  
22 discovery on the entire company, when an employee similarly situated to Starling would  
23 have to be an executive physician in a position to effect change in company policy. The  
24 Court allowed comparator discovery concerning the supervisors of such employees.  
25 (Doc. 171.)

26 Starling also points to *Garrett v. City & County of San Francisco*, 818 F.2d 1515  
27 (9th Cir. 1987), a case in which the court actually made clear that “a trial court’s exercise  
28 of discretion will rarely be disturbed.” *Id.* at 1518. But in that case, the district court

1 failed to exercise any discretion; it denied the motion as moot after having granted  
2 summary judgment. *Id.* Further, the information the plaintiff sought in that case was not  
3 overly broad. See *id.* at 1518-19. In this case, the Court specifically exercised its  
4 discretion in finding that the comparators plaintiffs sought were “wildly over-broad and  
5 burdensome.” (Doc. 171 at 1.)

6 Starling claims that the discovery he seeks is “essential to opposing summary  
7 judgment.” (Doc. 243 at 13.) Apparently not, since he prevailed on the age  
8 discrimination issue. The Court stands by what it said when Starling last complained  
9 about the lack of comparator discovery: “Defendants have complied literally with the  
10 limited discovery ordered. Moreover, extrapolation to matters about which the people in  
11 question had only peripheral information is the kind of sweeping, burdensome, and  
12 attenuated discovery the Court found improper.” (Doc. 294 at 1.)

### 13 **B. Depositions of Decision-Makers**

14 Starling argues that discovery should reopen because he did not get to depose  
15 Bessel or Nunley. Starling once again cites *Noyes v. Kelly Services*, 488 F.3d 1163 (9th  
16 Cir. 2007), contending that the Ninth Circuit has found that a plaintiff is diligent any time  
17 he notices a deposition prior to the cutoff of discovery. (Doc. 285 at 5.) In reality, the  
18 *Noyes* court found it an abuse of discretion not to modify a scheduling order when there  
19 were no unusual circumstances and the defendant had repeatedly requested to delay the  
20 deposition. 488 F.3d at 1174. “Rule 16(b)’s ‘good cause’ standard primarily considers  
21 the diligence of the party seeking the amendment” of a scheduling order. *Johnson v.*  
22 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

23 In this case, there were plenty of unusual circumstances and a complete lack of  
24 diligence from Starling. Following a July 29, 2016 Scheduling Conference, the Court set  
25 a discovery deadline of May 26, 2017. (Doc. 45 at 2.) The Court subsequently granted,  
26 after lengthy oral argument, Defendants’ Motion for Protective Order (Doc. 158) to  
27 prevent Starling’s late-noticed depositions. It found that Starling failed “for nearly ten  
28 months to schedule the depositions of the Banner defendants, who are physicians or

1 senior managers, despite repeated requests to do so.” (Doc. 224 at 1.) Yet “[o]n the eve  
2 of the discovery cutoff, [Starling] unilaterally noticed the deposition.” (Id.) He did not  
3 notify opposing counsel, and the witnesses were unavailable. This case is not at all like  
4 Noyes: Starling was not diligent, despite Banner’s outreach. So egregious was the  
5 unprofessionalism that the Court assessed fees under Rule 37(a)(5)(A)(ii). (Doc. 224 at  
6 2.)

7 **C. Waiver of Privilege**

8 Starling seeks discovery on various documents that Defendants claim are  
9 privileged. Starling’s Reply does not even attempt to defend this issue, other than to note  
10 he is preserving it for appeal purposes. (Doc. 285 at 3.) Defendants point out that, in an  
11 order following oral argument (Doc. 193), the Court rejected Starling’s privilege  
12 arguments. Starling conceded this point in his motion (Doc. 243 at 10), and he offers no  
13 reason whatsoever to revisit the Court’s holding. (See Doc. 243 at 16.)

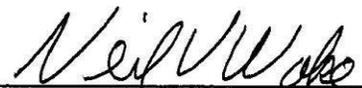
14 **V. CONCLUSION**

15 No claims remain against Bessel, Nunley, Helmich, or Davis-Hill. Only  
16 Starling’s ADEA age discrimination and ADEA retaliatory discrimination case against  
17 Banner will proceed. A final pretrial conference will be set by separate order.

18 IT IS THEREFORE ORDERED that Defendants Banner Health, Marjorie Bessel,  
19 M.D., Julie Nunley, Cindy Helmich, and Lori Davis-Hill’s Motion for Summary  
20 Judgment (Doc. 218) is granted regarding Counts III, IV, V, VI, VII, VIII, IX, X, and XI  
21 and denied regarding Counts I and II.

22 IT IS FURTHER ORDERED that Plaintiff’s Motion Pursuant to Federal Rule of  
23 Civil Procedure 56(d) (Doc. 243) is denied.

24 Dated this 11th day of January, 2018.

25 

26 \_\_\_\_\_  
27 Neil V. Wake  
28 Senior United States District Judge