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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHELE BAKER,

Plaintiff,

v.

ROMAN CATHOLIC
ARCHDIOCESE OF SAN DIEGO;
ROMAN CATHOLIC
ARCHDIOCESE OF SAN DIEGO
dba CATHEDRAL CATHOLIC
HIGH SCHOOL; CATHEDRAL
CATHOLIC HIGH SCHOOL,

Defendants.

CASE NO. 14cv0800 JM(JMA)

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT IN FAVOR
OF DEFENDANTS AND AGAINST
PLAINTIFF

Defendant The Roman Catholic Bishop of San Diego (“RCBSD”), erroneously sued as Roman Catholic Archdiocese of San Diego, Roman Catholic Archdiocese of San Diego, dba Cathedral Catholic High School and Cathedral Catholic High School, moves for summary judgment on Plaintiff Michele Baker’s remaining claim for violation of the Americans with Disabilities Act (“ADA”). Plaintiff opposes the motion. For the reasons set forth below, the court grants the motion for summary judgment in favor of RCBSD and against Plaintiff. The Clerk of Court is instructed to enter judgment accordingly and to close the file.

BACKGROUND

On April 4, 2014, RCBSD removed this action from the Superior Court for the

1 State of California, County of San Diego, based upon federal question jurisdiction
2 under 28 U.S.C. §§1331, 1441, and 1446. The operative Second Amended Complaint
3 (“SAC”) alleges three claims for relief: (1) disability discrimination in violation of the
4 ADA, 42 U.S.C. §12112 et seq.; (2) retaliation and wrongful termination in violation
5 of California public policy; and (3) declaratory and injunctive relief. (Ct. Dkt. 22).
6 Following entry of this court’s March 23, 2015 Order Granting in Part and Denying in
7 Part Defendant’s Motion to Dismiss, the only remaining claim is the ADA claim.

8 The parties have now completed discovery and Defendant moves for summary
9 judgment on the remaining ADA claim. The following evidentiary record is largely
10 undisputed. Plaintiff, a 68 year old mathematics teacher, commenced her employment
11 with RCBSD in 2000. Plaintiff was employed via an annual employment contract that
12 would be renewed annually from 2000 through August 2013. The employment
13 contract contained the following provision:

14 The term of this EMPLOYMENT AGREEMENT shall be for one (1)
15 academic year commencing on September 1, 2000 and terminating on
16 June 30, 2001. . . . It is understood that . . . there is no obligation to offer
TEACHER another contract at the end of that term, notwithstanding the
fact that the contract may have been renewed in previous years. . . .

17 Teacher is familiar with and understands the importance of the teaching
18 of the Roman Catholic Church and agrees to give Christian witness in
19 his/her personal and professional life. By accepting this term of the
20 Agreement, Teacher agrees to respect and implement the policies and
regulations regarding Catholic Schools and Catholic education as issued
by the Holy See, the Bishop of San Diego, and his delegates, including the
Office of Schools, the President and the Principal of the School.

21 Pursuant to RCBSD’s policies, Plaintiff’s performance was formally evaluated
22 annually during the first three years of employment and subsequent teacher evaluations
23 were performed as needed. Consistent with the policy, six performance evaluations
24 were conducted throughout Plaintiff’s employment with RCBSD. The evaluations each
25 identify from 3 to 17 different areas in Plaintiff’s performance that needed
26 improvement. The evaluations noted several areas for improvement: For example,
27 “Need to clearly identify purpose, goals of each day’s lesson;” “Inadequate time for
28 homework assignment;” “Work more effectively with administrators;” “Prepare

1 lessons which reflect a strong understanding of the content;” and “Adhere to all school
2 policies, procedures and regulation.”

3 The school principal, Principal Deely since 2006, would determine which
4 employment contracts would be renewed. Principal Deely testified that he had received
5 both positive and negative comments concerning Plaintiff. While some people at the
6 school considered Plaintiff to be very nice and supportive of students, Principal Deely
7 also testified that he received concerns about Plaintiff’s effectiveness in teaching
8 mathematics, managing her classroom, and whether the students received the kind of
9 instruction needed. (Deely Decl. ¶¶9-10). These concerns were voiced by school
10 counselors and several administrative personnel. Assistant Principal Mauro also
11 testified that she received several complaints, or concerns, from teachers and parents
12 concerning Plaintiff’s performance.

13 On August 23, 2012, Plaintiff suffered a fall in the stairwell at work, and struck
14 her head on the concrete. Plaintiff was initially unable to get up and sat on the ground
15 for about ten minutes. Plaintiff then walked to her car, informed the school nurse of
16 the fall, drove home, spoke with Principal Deely, and then drove herself to the
17 emergency room at Sharp’s Hospital. Plaintiff underwent a CT scan of her head and
18 neck. She was diagnosed with a concussion. She received an anti-nausea medication
19 and stayed out of work for ten days.

20 On August 27, 2012, by email, Plaintiff informed Principal Deely that she
21 suffered a concussion and felt dizzy. Subsequently, Principal Deely “asked me
22 periodically if I - - how I was, and I always told him that I had headaches and dizziness,
23 and that was about the extent of it.” (AS 296:5-8). In their conversations, Principal
24 Deely expressed concern for her well-being and told Plaintiff to follow her doctor’s
25 advice. On September 3, 2012, Plaintiff was medically cleared to return to work.
26 Without providing necessary context as to frequency, severity, or duration, Plaintiff
27 represents that she suffers from double vision, blurred vision, memory issues, hearing
28 issues, dizziness, and nightmares. (AS 193:2012; Oppo. at p.9:6-7). Following the

1 incident, Plaintiff testified that she was able to competently carry out the duties of her
2 teaching position. (Exh. 1 338:1-342-19). At no time did a medical provider inform
3 her that she could not perform her duties as a teacher.

4 Shortly after returning to work, Plaintiff filed a worker's compensation claim.
5 From September 2012 through the spring of 2013, Plaintiff was seen by medical
6 personnel on multiple occasions (about once per month) concerning her complaints of
7 headaches and dizziness. Plaintiff requested, and received, time off from her employer
8 to attend doctor appointments. After each medical appointment, Plaintiff was cleared
9 for full duty without any limitations. During this time, Plaintiff was able continue
10 teaching without any accommodation or limitation.

11 During the first semester of the 2012-13 academic year, Principal Deely received
12 concerns about students and classroom management issues related to Plaintiff's classes.
13 Principal Deely observed Plaintiff on two or three occasions in January and February
14 2013. Principal Deely observed that Plaintiff did not begin class with a prayer as
15 required, incorrectly solved a math problem on the board and failed to correct the
16 answer when a student pointed out the problem, and did not manage her class well.
17 (Deely Decl. ¶18-19).

18 Based upon his observations, as well as input from students, parents, and
19 administrators, Principal Deely decided not to offer Plaintiff a new contract for the
20 2013-2014 academic year. On February 28, 2013, Plaintiff met with Principal Deely
21 and Vice Principal Mauro to discuss the evaluation. Principal Deely discussed the
22 performance evaluation and modified one of the comments in the evaluation. Plaintiff
23 signed the evaluation but disputed the motivation and content of the evaluation. (Exh.
24 19). Principal Deely informed Plaintiff at the February 28, 2013 meeting that she
25 would not receive a new contract for the upcoming academic year.

26 On March 18, 2013, Plaintiff contacted her physician and informed her of the
27 following:

28 I fell in August and continued to work. Although I have dizziness,
double-vision, and headaches, I felt I was doing a good job. I was told last

1 week that my contract would not be renewed. I am devastated and feel
2 unworthy at school. I cannot stop crying. Is it possible to get a note from
3 you to get the rest of the year off, so I can pull myself together and move
forward? Please help me. Sincerely, Michele Baker

4 The physician complied and provided her with a note excusing her from work from
5 April 8, 2013, to June 15, 2013, due to “medical illness.” Plaintiff’s request for leave
6 was approved and Plaintiff was paid for the remainder of her contract through August
7 2013.

8 DISCUSSION

9 Legal Standards

10 A motion for summary judgment shall be granted where “there is no genuine
11 issue as to any material fact and . . . the moving party is entitled to judgment as a matter
12 of law.” FED. R. CIV. P. 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th
13 Cir. 2005). The moving party bears the initial burden of informing the court of the
14 basis for its motion and identifying those portions of the file which it believes
15 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,
16 477 U.S. 317, 323 (1986). There is “no express or implied requirement in Rule 56 that
17 the moving party support its motion with affidavits or other similar materials negating
18 the opponent’s claim.” Id. (emphasis in original). The opposing party cannot rest on
19 the mere allegations or denials of a pleading, but must “go beyond the pleadings and
20 by [the party’s] own affidavits, or by the ‘depositions, answers to interrogatories, and
21 admissions on file’ designate ‘specific facts showing that there is a genuine issue for
22 trial.’” Id. at 324 (citation omitted). The opposing party also may not rely solely on
23 conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040,
24 1045 (9th Cir. 1989).

25 The court must examine the evidence in the light most favorable to the non-
26 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt
27 as to the existence of any issue of material fact requires denial of the motion. Anderson
28 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,

1 when “the moving party bears the burden of proof at trial, it must come forward with
2 evidence which would entitle it to a directed verdict if the evidence were
3 uncontroverted at trial.” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
4 (emphasis in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d
5 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

6 **The ADA Claim**

7 The basic theme of the ADA is that “[n]o covered entity shall discriminate
8 against a qualified individual on the basis of disability in regard to job application
9 procedures, the hiring, advancement, or discharge of employees, employee
10 compensation, job training, and other terms, conditions, and privileges of
11 employment.” 42 U.S.C. §12112(a) (2009). The elements of a disability
12 discrimination claim under the ADA are (1) the claimant has a disability (as defined in
13 42 U.S.C. §12102(2)), (2) the claimant is qualified to perform the essential function of
14 the job, (3) the claimant has suffered adverse employment action because of the
15 disability. Hutton v. Elf Atochem North America, Inc., 273 F.3d 884, 895 (9th Cir.
16 2001).

17 The ADA defines disability as “a physical or mental impairment that
18 substantially limits one or more major life activities of [the] individual [who claims the
19 disability],” or “a record of such an impairment,” or “being regarded as having such an
20 impairment.” 42 U.S.C. § 12102(1). “Major life activities” include “caring for oneself,
21 performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,
22 bending, speaking, breathing, learning, reading, concentrating, thinking,
23 communicating, and working.” 42 U.S.C. § 12102(2)(A). The Ninth Circuit in
24 Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014), recently articulated that
25 the term “disability” is to be construed broadly to accomplish the purposes of the ADA.

26 A 2008 amendment to the ADA provides, “The definition of disability in
27 this chapter shall be construed in favor of broad coverage of individuals
28 under this chapter, to the maximum extent permitted by the terms of this
chapter.” 42 U.S.C. § 12102(4)(A). “The term ‘substantially limits’ shall
be interpreted consistently with the findings and purposes of the ADA
Amendments Act of 2008.” Id. § 12102(4)(B). Those findings and

1 purposes specifically express Congress's view that prior Supreme Court
2 and lower court cases, as well as Equal Employment Opportunity
3 Commission ("EEOC") regulations, had given "substantially limits" an
4 unduly narrow construction. ADA Amendments Act of 2008, §2(a)(4)-(8),
5 Pub.L. No. 110-325, 122 Stat. 3553, 3553. "An impairment that
6 substantially limits one major life activity need not limit other major life
7 activities in order to be considered a disability." 42 U.S.C. §12102(4)(C).
8 According to post 2008 regulations promulgated by the EEOC,

9
10 An impairment is a disability ... if it substantially limits the
11 ability of an individual to perform a major life activity as
12 compared to most people in the general population. An
13 impairment need not prevent, or significantly or severely
14 restrict, the individual from performing a major life activity
15 in order to be considered substantially limiting.

16
17 29 C.F.R. § 1630.2(j)(1)(ii). Determining whether an impairment is
18 substantially limiting "requires an individualized assessment." Id.
19 §1630.2(j)(1)(iv).

20 Id. at 1112.

21 Once an employee establishes a prima facie case of disability discrimination
22 under the ADA, the burden shifts to the employer to articulate a legitimate,
23 nondiscriminatory reason for adverse employment action. The employee then bears the
24 burden of establishing that this proffered reason is a pretext for discrimination. See
25 Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 2996) (applying the
26 McDonnell-Douglas burden shifting analysis to ADA claims). The court analyzes the
27 elements of an ADA claim.

28 Disability

Plaintiff comes forward with evidence to show that, on August 23, 2012, she
suffered a concussion when she fell and struck her head on concrete. At that time,
Plaintiff also complained of dizziness, headaches, double vision, memory issues, and
blurred treatment. Her treating physician would not release Plaintiff to resume her
work schedule until September 3, 2012, about ten days after the incident. This
evidence is sufficient to establish a cognizable disability for purposes of the ADA: the
concussion and related symptoms led to Plaintiff's inability to carry out a major life
activity, working, for a period of at least ten days.

1 While Plaintiff was initially disabled for purposes of the ADA, the evidentiary
2 record demonstrates that, after her return to work, Plaintiff complained of suffering
3 from intermittent headaches and vision problems. However, the evidentiary record
4 fails to establish that Plaintiff's medical condition prevented her from engaging in
5 major life activities. RCBSD comes forward with evidence to show that, after Plaintiff
6 returned to work, she was able to perform the essential functions of her teaching
7 position without aid or assistance. After Plaintiff's return from medical leave on
8 September 3, 2012, Plaintiff testified that she was competently performing her work-
9 related duties including preparing lesson plans, grading homework and tests, meeting
10 with and supporting students, teaching her classes, effectively communicating with
11 students and coworkers, and driving herself to and from school. During this time,
12 Plaintiff testified that she was able to work around whatever unspecified vision and
13 hearing problems she may have had. She also testified that by mid-December 2012, her
14 headaches were no longer an issue and that, on October 11, 2012, Plaintiff informed
15 her treating physician that she experienced minimal symptoms and was functional.
16 (Exh. 1 at 349: 4-11). The October 11, 2012 physician's report noted:

17 Today, she complains of very intermittent dizziness, neck pain, and mild
18 headache in the afternoon, which she states is not debilitating. She denies
19 any prior head injuries although she reports a history of arthritis in her
20 neck. She denies any nausea, vomiting, fever, or chills. She denies any
numbness, tingling, weakness, or radiating symptoms. She denies any
feeling [of] fatigue or lethargic [sic]. She denies problems with
confusion. The patient denies any change in vision or hearing.

21 (Id.). Plaintiff also stated that she "has very minimal symptoms, and [] is functional."
22 Plaintiff was cleared for "full duty" without restrictions or limitations. Since
23 September 3, 2012, Plaintiff's treating physicians determined that Plaintiff was able to
24 perform her usual occupation.¹

25
26 ¹ The court has not considered medical records submitted by Plaintiff that were
27 not provided to RCBSD. These records are irrelevant to prove that RCBSD was aware
28 of Plaintiff's medical condition or symptoms because they were not provided to
RCBSD. (Exhs. U, Z, AB, AC, AE, AG, AH, and AI). The only medical notes
provided to RCBSD indicated that Plaintiff could return to full work duty. (Exh. 27,
Vol. 2, 365:2-366:12). The records are, however, relevant to Plaintiff's medical

1 On this record, the court concludes that there is no genuine dispute as to the
2 following and that, therefore, the evidentiary record establishes that (1) Plaintiff was
3 disabled, for purposes of the ADA, from the date of her fall, August 23, 2012, through
4 September 3, 2012; and, (2) after this date, the symptoms earlier suffered by Plaintiff
5 no longer prevented her from engaging in any major life activity as required by 42
6 U.S.C. § 12102(1). While Plaintiff argues that she suffered from night vision issues
7 during this time period, she does not quantify the degree or severity of the night vision
8 issue nor does she identify how that prevented her from engaging in a major life
9 activity (Plaintiff's treating physicians did not place any restrictions on Plaintiff's
10 activities and Plaintiff testified that she drove herself to and from work). Moreover,
11 after the initial 10 day leave period, there is no evidence that any physician suggested
12 that Plaintiff could not maintain the same daily activities as before the fall.

13 Finally, Plaintiff argues that even if she were not disabled, she was regarded as
14 disabled by her employer in violation of 42 U.S.C. § 12102(1). To be "regarded" as
15 disabled, Plaintiff must show the RCASD perceived her as having a "physical or mental
16 impairment." 42 U.S.C. §1202(3)(A). To meet her evidentiary burden, Plaintiff cites
17 the following evidence: she met with the Principal about every 7 to 10 days, (AS
18 p.45:9-19); she informed Principal Deely in either January, February or June 2013 that
19 she was suffering from double vision, (AS pp.196:18- 197:1); when asked by Principal
20 Deely, she always told him she suffered from headaches and dizziness and "that was
21 about the extent of it," (AS pp. 295:23 - 296:8). Plaintiff provides no evidence that
22 she informed anyone as to the frequency, severity, duration or any other characteristic
23 of the intermittent vision and headache issues and, therefore, fails to demonstrate that
24 these symptoms were disabling for purposes of the ADA. The evidentiary record also
25 shows that Principal Deely was concerned about Plaintiff's health following the fall,
26 he encouraged her to take the time off she needed to heal, and inquired into Plaintiff's
27 well-being from time to time. Plaintiff, at no time, informed any employee of RCBSD
28 _____
condition.

1 that she was disabled (except for the one week period following her fall) or that any
2 dizziness or headaches prevented her from engaging in any major life activity. To the
3 contrary, Plaintiff represents that she could, at all times except for the one week leave
4 period at the end of August 2012, perform the duties of her teaching position without
5 aid or assistance.

6 Plaintiff also repeatedly argues that she suffered from non-descript headaches
7 and vision issues. The generic claims of intermittent headaches and vision issues do
8 not satisfy Plaintiff's evidentiary burden to show that her employer regarded her as
9 disabled for purposes of 42 U.S.C. § 12102(1). That Plaintiff suffers from non-descript
10 headaches or vision issues (there is no evidence as to frequency, severity, duration, or
11 limitation) and informed RCBSD of these facts, fails to show that Plaintiff was
12 regarded as disabled. There is simply no evidence that RCBSD, or even Plaintiff's
13 treating physicians believed, or even considered, that Plaintiff was disabled and could
14 not engage in major life activities such as "caring for oneself, performing manual tasks,
15 seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking,
16 breathing, learning, reading, concentrating, thinking, communicating, and working."
17 42 U.S.C. §12102(2)(A). Principal Deely testified that, upon Plaintiff's return to work
18 on September 3, 2012, he was not aware of any restrictions in performing Plaintiff's
19 job as a teacher. Principal Deely further testified that he never observed "anything
20 about Plaintiff to believe that she was in anyway disabled or limited in her ability to do
21 her job or to function generally." (Deely Decl. ¶¶24-25). Moreover, Plaintiff's treating
22 physicians did not limit her availability to work and found, both implicitly and
23 explicitly, that Plaintiff could perform her work responsibilities. Finally, Plaintiff fails
24 to submit any evidence that she had a record of a disability or impairment. On this
25 record, the court concludes that Plaintiff fails to meet her initial evidentiary burden to
26 demonstrate that a genuine issue of material fact exists, with respect to whether her
27 employer regarded her as disabled for purposes of 42 U.S.C. §12102(1)(C).

28 In sum, the court concludes that Plaintiff was disabled from August 23, 2012

1 through September 3, 2012. After that date, the evidence is beyond material dispute
2 that Plaintiff was neither disabled nor regarded as disabled.

3 The Adverse Employment Decision Because of a “Disability”

4 Plaintiff has the initial burden of demonstrating that her employment contract
5 was not renewed because of a disability. She fails to meet this burden. The evidentiary
6 record demonstrates that Plaintiff remained under a disability from the date of the fall,
7 August 22, 2012, until September 3, 2012, the date Plaintiff returned to work.
8 Principal Deely made the decision in February 2013 not to renew Plaintiff’s contract
9 because of perceived performance issues. (Deely Decl. ¶¶10-20). The remoteness in
10 time between Plaintiff’s disability, and the decision to not renew the employment
11 contract, does not give rise to an inference that Plaintiff’s contract was not renewed
12 because of her disability. Further, there is no evidence in the record that Principal
13 Deely, nor any other RCBSD employee, considered or regarded Plaintiff as disabled.
14 If she was never considered or regarded as disabled, she could not have suffered an
15 adverse employment decision because of her disability.²

16 In sum, the record fails to identify evidence from which a reasonable jury could
17 conclude that Plaintiff did not have her contract renewed because of her disability.

18 Pretext

19 At the outset, the court notes that, under the terms of the employment contract,
20 the parties could renew or not renew the contract for any reason, other than a failure to
21 renew the contract because of a disability. Principal Deely testified that he received
22 concerns about Plaintiff’s performance and informed Plaintiff that he would be
23 observing several of her classes. Based upon his evaluation, the evidence shows that
24 Principal Deely made the decision not to renew Plaintiff’s employment contract
25 because he was not satisfied with Plaintiff’s performance. (Deely Decl. ¶¶15-19). In
26 light of this non-discriminatory reason, the burden shifts to Plaintiff to show that the
27

28 ² The court discusses Plaintiff’s arguments and evidence in context of the pretext
prong for ADA liability.

1 proffered reason was a pretext for disability discrimination.

2 Plaintiff contends that the non-renewal of the employment contract was more
3 likely than not the product of her disability (or the perception of her disability). As
4 concluded above, however, the evidence does not support that contention. First,
5 Plaintiff contends that RCBSD did not follow its policies with respect to performance
6 reviews and progressive discipline. While Plaintiff concedes that RCBSD complied
7 with its performance review policies (one performance review during each of the first
8 three years and then thereafter “as needed”), she argues that RCBSD had received
9 complaints for years about her performance but took no steps to conduct a performance
10 review until after she reported her disability. Similarly, Plaintiff contends that RCBSD
11 could have followed its progressive disciplinary policies, and she never received a
12 written warning before the non-renewal of the employment contract. These musings,
13 however, do not raise a genuine issue of material fact with respect to the legitimate
14 reasons behind the non-renewal of the employment contract.³

15 Plaintiff contends that RCBSD “failed to conduct performance review[s] to
16 address Plaintiff’s purported gross deficiencies.” (Oppo at p.20:8-9). The failure to
17 conduct more performance reviews, in light of the deficiencies identified in the earlier
18 performance reviews, Plaintiff concludes, is “evidence of Defendant’s discriminatory
19 animus.” (Oppo. at p.20:9). In a related argument, Plaintiff contends that RCBSD
20 “cannot explain why, notwithstanding the repeated complaints and poor performance,
21 it continually gave Plaintiff new employment contracts and annual raises and **only**
22 **after Plaintiff reported her disability**, did Defendant suddenly decide it was time to
23 end the employment relationship.” (Emphasis in original; Oppo. at p.20:20-24). The
24 difficulty with this argument is that Plaintiff draws a direct, but speculative, temporal
25 nexus between Plaintiff’s disability, which ended in early September 2012, and the
26

27 ³ In the context of non-renewal of an employment contract, the court highlights
28 that either RCBSD or Plaintiff could decide not to renew the contract for virtually any
reason, including arbitrary ones. The only limitation imposed by the ADA is that an
employee not suffer adverse employment decisions on account of the disability.

1 decision to not renew the employment contract on February 28, 2013. The passage of
2 five months time does not support a rational, evidentiary based temporal connection
3 that Plaintiff seeks to establish. This evidence fails to raise a genuine issue of material
4 fact on the question of pretext.

5 Next, Plaintiff contends that the absence of corroborating evidence, and the
6 treatment of similarly situated individuals by RCBSD, is evidence of pretext. As noted
7 above, RCBSD has met its evidentiary burden to establish a non-discriminatory reason
8 for the non-renewal of Plaintiff's employment contract. Plaintiff's burden is to raise
9 a genuine issue of material fact with respect to whether the reason proffered is a pretext
10 for disability discrimination. Plaintiff does not meet this burden by arguing that
11 RCBSD could have submitted additional evidence. The declarations submitted by
12 former employees, Radostina Zlatanov, Blanca Kressel, and Michael Fares, do not
13 establish that the proffered reasons for the non-renewal of the employment contract was
14 a pretext for discrimination.⁴ Ms. Zlatanov declares that she suffered a broken leg in
15 November 2011, required a wheelchair for mobility, "received glowing praise at work
16 from parents, students, as well as Principle [sic] Michael Deely" before she broke her
17 leg, was "subjected to increased scrutiny and criticism by Principle [sic] Deely" after
18 she required the use of a wheelchair, and in the Spring of 2011, she did not have her
19 employment contract renewed. Ms. Zlatanov "believe[s] [she] was wrongfully
20 terminated because [she] had an injury at work and required accommodations to do
21 [her] job." (Zlatanov Decl.). Mr. Kressel declares that in 2008/2009 he began
22 suffering from sciatica and hip pain, had difficulty walking and, on occasion, RCBSD
23 provided a golf cart to assist him in traveling long distances at the school campus. In

24
25 ⁴ RCBSD raises evidentiary objections to the declarations of Zlatanov and
26 Kressel, and Fares. RCBSD objects to the declarations on grounds that the
27 representations are not supported by documentary evidence, such as performance
28 reviews, and that the declarants never previously complained of any disability
discrimination nor ever filed any EEOC charges. The court overrules these specific
objections. These declarations establish, from the personal knowledge of the
declarants, their perceptions concerning circumstances related to the non-renewal of
their employment contracts.

1 the Spring of 2010, RCBSD did not renew Mr. Kressel’s employment contract.
2 Despite his good work performance and reviews, in the Spring of 2010, Principal Deely
3 informed Kressel that his contract would not be renewed. Notably, unlike Ms.
4 Zlatanov, Mr. Kressel does not state his beliefs regarding the reason for the non-
5 renewal of the contract.

6 The court concludes that these declarations fail to raise a genuine issue of
7 material fact with respect to the pretextual nature of the reason proffered for the non-
8 renewal of Plaintiff’s employment contract. Plaintiff, citing Goldsmith v. Bagby
9 Elevator Co., Inc., 513 F.3d 1261 (11th Cir. 2006), contends that the declarations are
10 “me too” evidence and demonstrate a discriminatory animus on the part of RCBSD.
11 The declarations establish that both Zlatanov and Kressel were obviously mobility
12 disabled at the time of the non-renewal of the contract. Zlatanov used a wheelchair for
13 mobility and Kressel, due to sciatica, could not walk significant distances. In the
14 present case, except for the initial week or two following Plaintiff’s fall and
15 concussion, the record does not establish that Plaintiff was disabled or regarded as
16 such. The fact that the non-renewal of Plaintiff’s employment contract did not occur
17 until about five months after Plaintiff was no longer disabled is markedly different from
18 the situation of either Zlatanov or Kressel. The non-renewal of the declarants’
19 employment contracts occurred at a time when they were obviously suffering from a
20 disability. The declarants’ temporal connection does not exist in the present case and,
21 in this sense, is not “me too” evidence. The court also notes that only Ms. Zlatanov
22 opines that the non-renewal of the contract was because of her disability. Mr. Kressel
23 expresses no opinion on this issue.⁵

24 Lastly, Plaintiff refers to the declaration of Mr. Fares for the apparent proposition
25 that Plaintiff did not have performance issues. Mr. Fares, a retired English teacher with
26 CCHS, declares that he substituted for Plaintiff and believed her to be a good teacher.

27
28 ⁵ To provide additional context to the declarations, RCBSD represents that several teachers a year (five teachers in 2013) are not offered contract renewals. (Ct. Dkt. 51-4, ¶15).

1 He also noted that Plaintiff was a “good educator” and her classes were well-organized
2 and operated very smoothly. (Fares Decl. ¶4). This declaration is insufficient to raise
3 a genuine issue of material fact with respect to Plaintiff’s performance. Mr. Fares, an
4 English teacher, and not a mathematics teacher, substituted for Plaintiff on a single
5 occasion in March 2013, after Plaintiff went out on medical leave. Mr. Fares did not
6 observe Plaintiff’s teaching performance. Rather, he taught a single course, in a field
7 not his own, at a time when Plaintiff had already been informed that her employment
8 contract would not be renewed. The Fares declaration is insufficient to raise a genuine
9 issue of material fact with respect to Plaintiff’s workplace performance.

10 Looking to the cumulative value of Plaintiff’s pretext evidence, the court
11 concludes that Plaintiff fails to raise a genuine issue of material fact with respect to the
12 legitimate reasons for the non-renewal of the employment contract. RCBSD is entitled
13 to summary judgment on the remaining ADA claim.

14 **The ADA Retaliation Claim**


15 To establish a prima facie case of retaliation under the ADA, Plaintiff must show
16 (1) she engaged in a protected activity; (2) an adverse employment action; and (3) there
17 was a but-for causal link between the protected activity and the adverse employment
18 decision. See Brown v. City of Tucson, 336 F.3d 1181, 1187 (9th Cir. 2003). To the
19 extent Plaintiff seeks to establish an ADA retaliation claim, such a claim suffers from
20 the same defects identified above: (1) a temporal disconnect between Plaintiff’s
21 disability in August/September and Principal Deely’s decision not to renew the
22 employment contract the following February; (2) the abundant evidence that Principal
23 Deely encouraged Plaintiff to take medical leave, stay out as long as necessary, and
24 make and keep all necessary medical appointments; (3) Principal Deely was constantly
25 solicitous of her injury; and (4) there is no evidence of any opposition to and/or
26 concern about Plaintiff missing work while attending medical appointments.
27 Accordingly, the court concludes that Plaintiff fails to raise a genuine issue of material
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1 fact with respect to the ADA retaliation claim.

2 In sum, the court grants summary judgment in favor of Defendant RCBSD, and
3 against Plaintiff, on the remaining ADA claims. The Clerk of Court is instructed to
4 enter judgment accordingly and to close the file.

5 **IT IS SO ORDERED.**

6 DATED: June 23, 2016

7 
8 Hon. Jeffrey T. Miller
United States District Judge

9 cc: All parties

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