

1 . . . Delta was aware that the Plaintiff was suffering from HIV when
2 he was fired, and Delta was also aware that the primary motivation to
3 terminate Mr. Lewis was due to his disability-related absences on
4 August 11th and 12th of 2012. (Citations infra.) Once Delta was put
5 on notice that these absences were due to Plaintiff's HIV condition, a
6 search ensued for an alternate theory of termination rather than the
7 ADA-mandated employer led interaction to assist the Plaintiff in his
8 illness. Plaintiff believes that Delta counsel Giustina participated in
9 this needle-threading exercise to intentionally breach the law and
10 avoid ADA responsibility, and that her communications with the
11 individuals effectuating Plaintiff's termination should be non-
12 privileged as they were in furtherance of unlawful activity, the evasion
13 of a statutory duty and possible fraud – and as a result he was denied
14 his ADA protections and benefits Delta was obligated to honor as a
15 matter of law.

16 *Motion for In Camera Review (#41), pgs. 3-4.*

17 DISCUSSION

18 Plaintiff's claims for relief are primarily based on alleged violations of the Americans with
19 Disabilities Act ("ADA"), 42 U.S.C. § 12112. The Court will therefore apply federal common law
20 regarding the attorney-client privilege and the crime-fraud exception thereto. *See* Fed.R.Evid. 501
21 and *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625 (1989). The attorney-client
22 privilege has been recognized as “the oldest of the privileges known to the common law.” *Id.*,
23 quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981). The central
24 purpose of the privilege is “to encourage full and frank communication between attorneys and their
25 clients and thereby promote broader public interest in the observance of law and administration of
26 justice.” *Id.*, 491 U.S. at 562, 109 S.Ct. at 2625-26. Clients must be free to make full disclosure to
27 their attorneys in order to obtain competent legal advice. *Id.*, 491 U.S. at 562, 109 S.Ct. at 2626.
28 The attorney-client privilege is limited, however, by the crime-fraud exception which provides that
the privilege does not apply to communications “made for the purpose of getting advice for the
commission of a fraud’ or crime.” *Id.*, 491 U.S. at 563, 109 S.Ct. at 2626.

“A party seeking to vitiate the attorney-client privilege under the crime-fraud exception must
satisfy a two-part test. First, the party must show that the ‘client was engaged in or planning a
criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.’” *In re*
Napster, Inc. Copyright Litigation, 479 F.3d 1078, 1090 (9th Cir. 2007), quoting *In re Grand Jury*
Proceedings, 87 F.3d 377, 381 (9th Cir. 1988). “Second, it must demonstrate that the attorney-

1 client communications for which production is sought are ‘sufficiently related to’ and were made ‘*in*
2 *furtherance of* [the] intended, or present, continuing illegality.’” *Id.* The attorney need not have
3 been aware that the client harbored an improper purpose. *Id.* In civil actions, where outright
4 disclosure of the attorney-client communication is sought, the party asserting the crime-fraud
5 exception has the burden of proving that the exception applies by a preponderance of the evidence.
6 Both parties have the right to present evidence to the court with respect to application of the crime-
7 fraud exception. *Id.*, 479 F.3d at 1098.

8 A lower threshold showing applies where the party asserting the crime-fraud exception
9 initially requests only that the court conduct an *in camera* review of the allegedly privileged
10 communications to determine if the crime-fraud exception applies. In *Zolin*, the Supreme Court
11 stated that “disclosure of allegedly privileged materials to the district court for purposes of
12 determining the merits of a claim of privilege does not have the legal effect of terminating the
13 privilege.” 491 U.S. at 568, 109 S.Ct. at 2629. The Court declined, however, to adopt a blanket
14 rule that would allow a district court to conduct *in camera* review without any threshold showing
15 because such a rule “would place the policy of protecting open and legitimate disclosure between
16 attorneys and clients at undue risk” and would give rise to possible due process implications. The
17 Court also noted the burden that *in camera* review places on district courts if they are required to
18 evaluate large evidentiary records without open adversarial guidance by the parties. *Id.* The Court
19 therefore held that the moving party must show a factual basis adequate to support a good faith
20 belief by a reasonable person that *in camera* review of the materials may reveal evidence to
21 establish the claim that the crime-fraud exception applies. *Zolin*, 491 U.S. at 572, 109 S.Ct. at 2631.

22 Plaintiff relies on *Koch v. Specialized Care Services, Inc.*, 437 F.Supp.2d 362 (D.Md. 2005)
23 in arguing that the crime-fraud exception may be applied to the type of conduct alleged in this case.
24 In *Koch*, the plaintiffs sold their insurance business to the defendant company. Pursuant to a related
25 employment agreement, the principal plaintiff, “Koch,” agreed to remain with the company for an
26 additional three years unless terminated early. The employment agreement further provided that if
27 Koch was fired without cause prior to expiration of the three year period, the company would pay
28 him \$6.25 million. If Koch was fired for cause or voluntarily resigned, however, he would only be

1 paid \$1.00. Koch alleged that the defendants falsely claimed that he resigned during a meeting on
2 March 5, 2004 in order to avoid paying him the \$6.25 million. He sued the company for breach of
3 contract and sued individual officers of the company for tortious interference with his employment
4 agreement. Koch moved to compel disclosure of communications between defendants and the
5 company's in-house counsel relating to his termination and alleged resignation which he argued fell
6 within the crime-fraud exception.

7 The claims at issue in *Koch* were governed by state law and the court therefore applied
8 Maryland law with respect to the attorney-client privilege and the crime-fraud exception. The court
9 noted that in adopting the crime-fraud exception, the Maryland Court of Appeals cited with
10 approval Section 82, the Restatement (Third) of the Law Governing Lawyers (2000) which defines
11 the elements of the exception. The commentary to Section 82 "defines fraud 'for purposes of the
12 exception as requir[ing] a knowing or reckless misrepresentation . . . likely to injure another.'" 437
13 F.Supp.2d at 373. Under Maryland law, "[f]raud encompasses, among other things, theories of
14 fraudulent misrepresentation, fraudulent concealment and fraudulent inducement." *Id.* Although
15 Koch's complaint did not allege a cause of action for fraud, it pled "an intentional tort involving
16 misrepresentation, deception, and deceit [that] would appear to constitute fraud under the definitions
17 in the Restatement and Maryland law." *Id.* In holding that the crime-fraud exception could apply to
18 the conduct underlying plaintiff's tort cause of action, the court stated that "courts increasingly
19 focus on the conduct alleged. The determinant of the exception's applicability is the wrongfulness
20 of the conduct before the Court, not the form of its pleading." *Koch*, 437 F.Supp.2d at 373.

21 The court noted that comment d. to Section 82 of the Restatement (Third) Law Governing
22 Lawyers states:

23 The evidence codes and judicial decisions are divided on the
24 questions of extending the exception to other wrongs such as
25 intentional torts, which, although not criminal or fraudulent have
26 hallmarks of clear illegality and the threat of serious harm.
27 Legislatures and courts classify illegal acts as crimes and frauds for
28 purposes and policies different from those defining the scope of the
privilege. Thus, limiting the exception to crimes and frauds produces
an exception narrower than the principle and the policy would
otherwise indicate. Nonetheless, the prevailing view limits the
exception to crimes and frauds. . . .

1 *Koch*, 437 F.Supp.2d at 375.

2 The court stated that this narrow construction of the exception was no longer the prevailing
3 view. In addition to citing, 8 Wigmore, *Evidence* § 2298 (McNaughton rev. ed. 1961) and other
4 legal commentators in support of a broader scope for the exception, the court stated that:

5 A survey of case law demonstrates judicial willingness to expand the
6 exception to the kind of conduct alleged here. *See Rambus, Inc. v.*
7 *Infineon Technologies AG*, 222 F.R.D. 280, 288–89 (E.D.Va.2004)
8 (“... other courts, when confronted with a variety of untoward
9 conduct, have concluded that the exception is not confined to
10 circumstances of crime or fraud.”); *Cleveland Hair Clinic, Inc. v.*
11 *Puig*, 968 F.Supp. 1227, 1241 (N.D.Ill.1996) (extending crime fraud
12 exception to bad faith litigation misconduct); *Cooksey v. Hilton Int’l*
13 *Co.*, 863 F.Supp. 150, 151 (S.D.N.Y.1994) (finding that “intentional
14 torts moored in fraud can trigger the crime-fraud exception”); *Horizon*
15 *of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1, 5 (S.D. Ohio
16 1986) (extending crime-fraud exception to torts generally) (citing *In*
17 *Re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir.1984); *In Re Grand Jury*
18 *Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984); *In Re Grand Jury*
19 *Proceedings*, 689 F.2d 1351, 1352 (11th Cir.1982)); *United Services*
20 *Auto. Ass’n v. Werley*, 526 P.2d 28, 31 (Alaska 1974) (noting that
21 privilege will not apply when actions are in furtherance of a crime or
22 “other evil enterprise in concert with the attorney”); *Fellerman*
23 *v. Bradley*, 99 N.J. 493, 493 A.2d 1239, 1245 (1985) (reading “fraud”
24 expansively and “not limited to conventional notions of tortious
25 fraud” so as to include “fraud upon the court”); *Volcanic Gardens*
26 *Mgmt. Co., Inc. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct.App.1993)
27 (holding that fraud within meaning of crime-fraud exception to
28 attorney-client privilege is broader than common law or criminal
fraud and includes commission or attempted commission of fraud on
the court or on a third person).

18 *Koch*, 437 F.Supp.2d at 376.

19 Other courts have followed *Koch* in holding that the crime-fraud exception is not strictly
20 limited to cases alleging criminal violations or common law fraud. In *Safety Today, Inc. v. Roy*,
21 2013 WL 5597065 (S.D. Ohio 2013), the court, applying Ohio law, held that the exception could be
22 applied to conduct underlying claims for tortious interference with contract or prospective business
23 relations and defamation. The court cited other decisions which applied the exception in cases
24 alleging claims for breach of fiduciary duty-self dealing, and civil rights conspiracy. *Id.*, at *4,
25 citing *Euclid Retirement Village, Ltd. Partnership v. Griffin*, 2002 WL 12655570 (Cuyahoga
26 Co.App. June 6, 2002) and *Horizon of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1, 5 (S.D.
27 Ohio 1986). In *In re Heraeus Klzer GMBH for an Order Pursuant to 28 U.S.C. § 1782*, 2012 WL

1 1493883 (N.D. Ind. 2012), the court held that the crime-fraud exception could be applied in a case
2 alleging misappropriation of trade secrets.¹

3 This Court concludes that *Koch* and the cases cited therein represent the better view
4 regarding the scope of the crime-fraud exception in light of the principle and policy underlying both
5 the privilege and the exception. This view also appears to be consistent with *In re Napster, Inc.*
6 *Copyright Litigation*, 479 F.3d 1078 (9th Cir. 2007) which involved claims for copyright
7 infringement. The plaintiffs in *Napster* alleged as grounds for the crime-fraud exception that the
8 defendant committed “a fraud upon the court” by allegedly misrepresenting its relationship *vis a vis*
9 Napster as a lender rather than as an owner with control over the entity. Although the plaintiffs
10 failed to meet their burden of proving that the crime-fraud exception applied, the court treated their
11 allegations “of fraud upon the court” as the type of conduct that could support application of the
12 crime-fraud exception. *Id.*, at 1096-98.

13 In cases involving alleged employment discrimination under Title VII or the ADA, courts
14 follow the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S.
15 792, 93 S.Ct. 1817 (1973). *See Norton v. PHC-ELKO, Inc.*, 46 F.Supp.3d 1079, 1086 (D.Nev.
16 2014). Under this framework, the plaintiff is first required to establish a *prima facie* case of
17 discrimination. With respect to an ADA claim, the plaintiff must show that (1) he is a disabled
18 person within the meaning of the ADA, (2) that he was qualified, with or without reasonable
19 accommodation, to perform the essential elements of his job, and (3) that he suffered an adverse
20 employment decision because of his disability. *Id.* *See also Daniel v. Boeing Co.*, 764 F.Supp.2d
21 1233, 1241 (W.D.Wa. 2011), citing *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir.
22 1996). Once the plaintiff makes this *prima facie* showing, the burden of production shifts to the
23 employer to articulate some legitimate, nondiscriminatory reason for its decision. If the employer
24 presents a legitimate and nondiscriminatory reason for its decision, then the burden shifts back to

25
26 ¹ The District of Columbia Circuit has adopted a broader definition of the “crime-fraud” exception
27 than that announced by other courts of appeal. In *In Re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1984),
28 the court stated that communications otherwise protected by the attorney-client privilege are not protected if
the communications were made “in furtherance of a crime, fraud or other misconduct.” *See also In re*
Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982).

1 the plaintiff to show that the reason given by the employer is a pretext offered to conceal the
2 discriminatory purpose. *Norton*, 46 F.Supp.3d at 1086, citing *McDonnell Douglas*, 411 U.S. at 804,
3 93 S.Ct. 1817.

4 A plaintiff can meet his burden of showing pretext by either direct or circumstantial
5 evidence. “Direct evidence is evidence ‘which if believed, proves the fact [of discriminatory
6 animus] without inference or presumption.’” *Coghlan v. American Seafoods Co., LLC.*, 413 F.3d
7 1090, 1095 (9th Cir. 2005), quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir.
8 1998). Direct evidence typically consists of clearly discriminatory statements or actions of the
9 employer. Circumstantial evidence, by contrast, is evidence that requires an additional inferential
10 step to demonstrate discrimination. “Circumstantial evidence can take two forms. First, the
11 plaintiff can make an affirmative case that the employer is biased. For example, statistical evidence
12 is circumstantial evidence that could, if sufficiently probative, point to bias. (citation omitted.)
13 Second, plaintiff can make his case negatively, by showing that the employer’s proffered
14 explanation for the adverse action is ‘unworthy of credence.’ *Texas Dep’t of Community Affairs v.*
15 *Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1989).” *Coghlan*, 413 F.3d at 1095. Where the
16 plaintiff attacks the employer’s proffered explanation as “unworthy of credence,” the plaintiff
17 accuses the employer either explicitly or by implication of providing a false explanation for its
18 decision.

19 The allegation of “pretext” is fairly common in Title VII and ADA discrimination cases. It
20 is also not unusual for employers to obtain legal advice before taking adverse employment action.
21 Employers should be encouraged to do so because it tends to promote the observance of law and the
22 administration of justice. *Zolin*, 491 U.S. at 562, 109 S.Ct. at 2625-26. Legal consultation may
23 avert possible action that would be potentially unlawful. It is also appropriate for an employer to
24 consult with counsel regarding the legal risks of taking certain action. On the other hand, legal
25 advice might be obtained for the purpose of concealing the employer’s true discriminatory intent
26 and to make its decision appear legitimate. Although *in camera* review of attorney-client
27 communications should not be triggered by the mere allegation that the employer’s proffered reason
28 was pretextual, the threshold showing required under *Zolin* is relatively low. *In camera* review of

1 the subject attorney-client communications is appropriate where the factual circumstances
2 reasonably indicate that the attorney's advice *may* have been obtained or used to present a false
3 explanation for the employer's adverse employment action.

4 Although *Koch* did not involve a claim for employment discrimination under federal law, the
5 circumstances of that case are similar to those in which an employee claims that the employer's
6 decision was pretextual. In holding that the plaintiff had met his initial burden for *in camera* review
7 under *Zolin*, the court found that documents produced by defendants indicated that Koch's
8 termination was under serious consideration prior to the meeting at which defendants claimed he
9 resigned. These included a statement in an email that the defendants should have a locksmith
10 available when the meeting occurred and a statement by another defendant in response to an email
11 sent by Koch, stating: "I find this response to be highly insubordinate. What do we need to do next.
12 I want to escalate this." *Koch*, 437 F.Supp.2d at 377. In holding that these statements supported *in*
13 *camera* review of the attorney-client communications, the court stated:

14 Individually, these documents might not indicate any sinister or
15 wrongful intent on the part of the defendants. However, together they
16 indicate a hostile attitude toward Koch and a gathering plan to
17 terminate him in spite of what defendants suggest. The
18 documentation insinuates that defendants could have been engaging in
19 a plan to rid SCS of Koch. As such, the Court concludes that
20 plaintiffs have demonstrated an adequate factual basis to support a
21 good faith belief that *in camera* review of the documents withheld by
22 defendants on the basis of the privilege might reveal evidence to
23 establish the crime-fraud exception, depriving otherwise privileged
24 documents of their protection.

25 437 F.Supp.2d at 377-78.

26 The records submitted by the parties in this case show that Plaintiff was issued a final
27 warning by his supervisor on February 22, 2012 for unacceptable tardiness and absences from work.
28 *Opposition (#46), Exhibit 1*. Plaintiff subsequently went on FMLA leave during which he was
diagnosed with HIV in May 2012. He was given a return to work slip without restriction by his
doctor on July 5, 2012. *Id., Exhibit 2*. Although Plaintiff did not require any accommodation to
perform his job when he returned to work in July, he was allegedly denied a refill for one of his
prescriptions in late July 2012 which caused him to become ill in the following two week period.
On August 10, 2012, Plaintiff was reportedly late for work because he forgot his employee badge.

1 On August 11, 2012, Plaintiff arrived late to his work area and then remained in the bathroom until
2 he left with permission at 4:00 P.M. Plaintiff was also out of work due to sickness on August 12,
3 2012. On August 20, 2012, Plaintiff's manager Kirk Kozy told Defendant's HR employee Lisa
4 Todd that he wanted to hold Plaintiff accountable for his most recent absences. Ms. Todd thereafter
5 conferred with the EO manager JoAnne Guerrant. Ms. Todd sent an email to Guerrant on August
6 20, 2012 in which she stated that Kozy "continues to see the same pattern that has always existed
7 with [Plaintiff's] attendance and would like to progress him if appropriate. *Opposition (#46),*
8 *Exhibit 1 to Exhibit B.* In a follow-up email a few minutes later, Ms. Todd stated: "One more thing
9 JoAnne. For his tardy on 8/6, he was 30 to 45 minutes late and while he explained to his lead he
10 was going to be late, he signed in as though he arrived on time. He (sic) leader said the expectation
11 on this are clear, if you arrive late, you sign in when you arrive, not when you should have. He has
12 had a history of this type of behavior in 2010 and this was addressed by his leader at the time." *Id.*
13 Ms. Todd testified that based on her communications with Ms. Guerrant, it was determined that
14 Plaintiff's August 2012 absences would not be a factor in any disciplinary action against him. After
15 conferring with Defendant's in-house counsel Kelly Giustina through emails between August 28
16 and September 11, 2012, the decision was made to terminate Plaintiff based on his providing false
17 information as to when he "clocked-in" to work. On September 14, 2012, Ms. Todd informed
18 Plaintiff's supervisor Kirk Kozy by email as follows:

19 It has been determined that the employee should be asked to resign
20 specifically because he recorded and was paid for time that he did not
21 actually work and for failure to be forthcoming during the
22 investigation. If the employee refuses to resign, their employment
23 should be terminated.

24 *Opposition (#46), Exhibit 2 to Exhibit B.*

25 Plaintiff argues that the foregoing reason for terminating his employment was pretextual and
26 that Defendant's true reason for firing him was his HIV disability and Defendant's unwillingness to
27 provide accommodation for that condition. As evidence that Defendant's true motive was to fire
28 Plaintiff for his HIV related absences, Plaintiff cites Kirk Kozy's August 23, 2012 email to Lisa
Todd in which he stated: "Take a look at the questionnaire and see what you think. I want to ask
something about the two days he used sick leave but don't know how to do it with out digging too

1 deep. If you come up with something around that I'd like to add it. Whatever you think is
2 appropriate." *Motion (#41), Exhibit G*. In addition to the specific facts of this case, Plaintiff argues
3 that Defendant has a track record of discriminating against its customers, employees or job
4 applicants because of disability or HIV status. *See Reply (#47), Exhibit A*. Plaintiff's summary of
5 prior instances of discrimination, with the exception of two reported cases, is not documented or
6 verified. The Court therefore accords this information no weight in deciding whether to grant *in*
7 *camera* review.

8 **CONCLUSION**

9 The Court finds that Plaintiff has raised a sufficient factual issue regarding whether the
10 Defendant's announced reason for terminating Plaintiff's employment was false such as to justify *in*
11 *camera* review of the communications between Defendant's employees and Defendant's in-house
12 counsel between August 28 and September 11, 2012. To be clear, the record presently before the
13 Court does not support a finding of fraud or wrongful conduct by Defendant by a preponderance of
14 the evidence. The Court therefore makes no determination in advance of *in camera* review as to
15 whether the attorney-client communications should be disclosed to Plaintiff based on the crime-
16 fraud exception. Accordingly,

17 **IT IS HEREBY ORDERED** that Plaintiff's Motion Requesting an In Camera Review of
18 Select Items From Defendant's Privilege Log (#41) is **granted**. On or before **January 4, 2016**,
19 Defendant shall deliver to the Court's chambers for *in camera* review, the email communications
20 between Defendant's employees and its in-house counsel, Kelly Giustina, relating to the
21 Defendant's termination that occurred from August 28, 2012 and September 11, 2012.

22 DATED this 23rd day of December 2015.

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24 
25 GEORGE FOLEY, JR.
26 United States Magistrate Judge
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