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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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)  
KELLY M. STARK, )  
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)  
Plaintiff, )  
)  
vs. )  
)  
GNLV Corp., d.b.a. GOLDEN NUGGET LAS VEGAS, )  
)  
Defendant. )  
\_\_\_\_\_

2:15-cv-01311-RCJ-NJK

**ORDER**

This case arises out of an employer’s alleged violations of the Americans with Disabilities Act (“ADA”) and the Family Medical Leave Act (“FMLA”). Pending before the Court is a Motion to Dismiss (ECF No. 13). For the reasons given herein, the Court grants the motion in part and denies it in part.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Kelly Stark was hired by Defendant GNLV Corp. as a table games dealer at the Golden Nugget Casino in Las Vegas, Nevada on October 15, 1998. (Am. Compl. ¶¶ 6, 9, ECF No. 9). Defendant terminated Plaintiff on June 7, 2013 because of a medical episode she experienced while working on May 24, 2013. (*Id.* ¶ 9).

1 In approximately 2011, Plaintiff received a diagnosis of thyroidism. (*Id.* ¶ 10).<sup>1</sup>  
2 Symptoms of thyroidism include, but are not limited to, neuronal excitability, felling very hot or  
3 cold, sensory impairments, hypersensitivity to taste or smell, slow thought and movements,  
4 changes of speech, headaches, sleep disturbances, confusion (including delusions of  
5 hallucinations), impairment of memory and mental acuity (“brain fog”), and impaired vision and  
6 hearing. (*Id.* ¶ 11). Plaintiff underwent various therapies, including surgery, for her thyroidism.  
7 (*Id.* ¶ 13). Plaintiff was granted FMLA leave from July 19 to August 1, 2012 due to her surgery.  
8 (*Id.* ¶ 14). Plaintiff provided Defendant a copy of a doctor’s note dated January 14, 2103  
9 indicating her treatment for “adrenal fatigue, hypothyroidism, hormone insufficiency, and  
10 insomnia.” (*Id.* ¶ 15).

11 On May 24, 2013, Plaintiff was dealing cards at a “high [bet] limit” table to a mother and  
12 son, two regular players whom Plaintiff had known since 1998. (*Id.* ¶ 16). Plaintiff was affected  
13 by the mother’s strong perfume, which had never previously affected Plaintiff. (*Id.*). Plaintiff’s  
14 body reacted with heat, panic, and anxiety. (*Id.* ¶ 17). Plaintiff backed away from the table to  
15 collect herself for a moment, but the reaction continued when she returned. (*Id.*). Plaintiff then  
16 experienced “brain fog,” i.e., she became confused and could not function mentally. (*Id.* ¶ 18).  
17 Plaintiff notified her immediate supervisor, Jovalyn Del Rosario, who moved Plaintiff to another  
18 table, but the new table was still close enough to the first table that Plaintiff’s reaction to the  
19 perfume continued. (*Id.* ¶ 19). Plaintiff told Del Rosario that she needed to take a break because  
20 she was choking, and she backed away from the table waving her hands in front of her face. (*See*  
21 *id.*). Del Rosario notified another manager, Bryan Daigneault, of the situation. (*See id.* ¶ 20).

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23 1 Plaintiff refers to the condition variously as *hyper*thyroidism and *hypo*thyroidism. (*See id.*  
24 ¶¶ 10–13). It is clear that Plaintiff means to allege a thyroid condition, but since it is not clear  
whether “hyper” or “hypo” is a typographical error, the Court will use the term “thyroidism.”

1 Daigneault approached Plaintiff and asked if she needed to be removed from the pit, and Plaintiff  
2 said she did, explaining the situation to Daigneault. (*Id.*). During a break, Plaintiff was able to  
3 collect herself enough to finish her shift, but she was unable to return to the same pit. (*Id.* ¶ 21).  
4 Although Defendant was previously aware of Plaintiff’s condition, on May 26 Defendant  
5 suspended Plaintiff over the May 24 incident and later terminated her. (*Id.* ¶¶ 23–24).

6 Plaintiff sued Defendant in state court. Defendant removed. The Amended Complaint  
7 (“AC”) filed in this Court lists claims for: (1)–(2) discrimination under the ADA; (3) retaliation  
8 under the ADA; (4) interference under the FMLA; and (5) retaliation under the FMLA.

9 Defendant has moved to dismiss in part.

## 10 **II. LEGAL STANDARDS**

11 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
12 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of  
13 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47  
14 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
15 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule  
16 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720  
17 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for  
18 failure to state a claim, dismissal is appropriate only when the complaint does not give the  
19 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*  
20 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is  
21 sufficient to state a claim, the court will take all material allegations as true and construe them in  
22 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th  
23 Cir. 1986). The court, however, is not required to accept as true allegations that are merely  
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1 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
2 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

3 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a  
4 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just  
5 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)  
6 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
7 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,  
8 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a  
9 cognizable legal theory (*Conley* review), but also must allege the facts of his case so that the  
10 court can determine whether the plaintiff has any basis for relief under the legal theory he has  
11 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review). Put  
12 differently, *Conley* only required a plaintiff to identify a major premise (a legal theory) and  
13 conclude liability therefrom, but *Twombly-Iqbal* requires a plaintiff additionally to allege minor  
14 premises (facts of the plaintiff’s case) such that the syllogism showing liability is complete and  
15 that liability necessarily follows therefrom, assuming the allegations are true.

16 “Generally, a district court may not consider any material beyond the pleadings in ruling  
17 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the  
18 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*  
19 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents  
20 whose contents are alleged in a complaint and whose authenticity no party questions, but which  
21 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)  
22 motion to dismiss” without converting the motion to dismiss into a motion for summary  
23 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule  
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1 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*  
2 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court  
3 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for  
4 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.  
5 2001).

### 6 **III. ANALYSIS**

7 Defendant asks the Court to dismiss any claims under Title VII for failure to state a  
8 claim. The Court perceives no Title VII claims in the AC, and Plaintiff in her response has  
9 disclaimed any intent to bring such claims.

10 Next, Defendant argues that Plaintiff has failed to state claims for either interference or  
11 retaliation under the FMLA, and that the FMLA claims are barred by the statute of limitations.  
12 The Court agrees that it is clear on the face of the AC that the statute of limitations bars the  
13 FMLA claims in part, i.e., as to any non-willful violations. There is a two-year statute of  
14 limitations under the FMLA, unless a violation is “willful,” in which case the limitations period  
15 is three years. *See* 29 U.S.C. § 2617(c)(1)–(2). Plaintiff alleges she was terminated on June 7,  
16 2013. (*See* Am. Compl. ¶ 9). Plaintiff filed the Complaint in state court between two and three  
17 years later, on June 15, 2015. (*See* Compl., ECF No. 1-3). Therefore, Plaintiff may only bring  
18 claims of willful FMLA violations; any claims of non-willful violations are time-barred.

19 Defendant argues that Plaintiff has failed to plead facts making out claims of willful  
20 interference or retaliation under the FMLA. Because neither the Supreme Court nor the Court of  
21 Appeals has defined “willful” under the FMLA, other circuits and the district courts in this  
22 Circuit have looked to the Fair Labor Standards Act, which defines willfulness as knowledge or  
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1 reckless disregard for whether the conduct was prohibited. *Schultz v. Wells Fargo Bank, N.A.*,  
2 970 F. Supp. 2d 1039, 1053 (D. Or. 2013).

3 Plaintiff has alleged that Defendant knew of her thyroid condition and that she notified  
4 her supervisors of her need for leave during the incident by backing away from the table,  
5 indicating that she was choking from the perfume, and explaining the situation to the supervisors.  
6 (See Am. Compl. ¶¶ 19–20). Defendant had long been aware of Plaintiff’s condition. (See *id.*  
7 ¶¶ 14–15). The Court finds that Plaintiff has sufficiently alleged a request for an *accommodation*  
8 but not *leave* during the incident, that Defendant knew of Plaintiff’s condition, and that  
9 Defendant terminated her based on the incident. Plaintiff does not allege having requested to go  
10 home but only having requested to leave the particular table and/or pit. A request to leave work  
11 altogether is required for an FMLA claim as opposed to an ADA claim, which only requires a  
12 request for a reasonable accommodation, such as a break. The Court will therefore dismiss the  
13 FMLA claims, with leave to amend.

14 As Plaintiff notes, a request for leave under the FMLA need not be formal or invoke the  
15 FMLA by name. See *Bailey v. Sw. Gas Co.*, 275 F.3d 1181, 1185 (9th Cir. 2002) (“While  
16 employees must notify their employers in advance if they plan to take foreseeable leave for  
17 reasons covered by the Act, they need not expressly assert their FMLA rights or even mention  
18 the FMLA. Rather, the employer bears the responsibility of determining whether an employee’s  
19 leave request is covered by the Act and must notify the employee accordingly. If the employer  
20 lacks sufficient information to determine whether an employee’s leave (including leave taken in  
21 the form of a reduced schedule) qualifies under the FMLA, the employer should inquire further  
22 in order to ascertain whether the FMLA applies.” (citations omitted)). Also, a request for leave  
23 need only be made “as soon as practicable when absences are not foreseeable.” *Bachelder v. Am.*

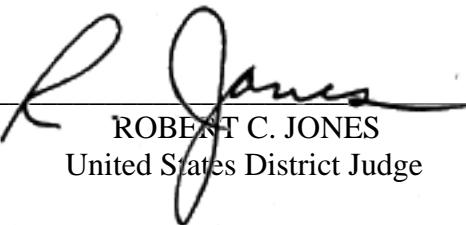
1 *West Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001) (citing 29 C.F.R. § 825.303(a)). Here,  
2 Plaintiff alleges experiencing a sudden attack such that she could not have anticipated having to  
3 make a request for leave before the attack began. Apart from the failure to allege a request to  
4 leave work altogether, which Plaintiff may amend to allege if she can, the Court finds that the  
5 FMLA claims are otherwise sufficiently pled, including the element of willfulness, given  
6 Defendant's prior knowledge of Plaintiff's thyroid condition.

7 **CONCLUSION**

8 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 13) is GRANTED IN  
9 PART and DENIED IN PART. No Title VII claims are pled. The FMLA claims are  
10 DISMISSED with prejudice as time-barred as to any non-willful violations but are DISMISSED  
11 with leave to amend as to willful violations.

12 IT IS SO ORDERED.

13 Dated this 25th day of September, 2015.

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16 ROBERT C. JONES  
17 United States District Judge  
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