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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SALLY MERRITT, an individual,)	3:11-cv-00312-HDM-WGC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
HARRAH'S ENTERTAINMENT, INC., a)	
Nevada corporation,)	
)	
Defendant.)	
)	

Before the court is the defendant's motion for summary judgment (#15). Plaintiff filed a complaint in the Second Judicial District Court for the State Nevada in and for Washoe County, alleging violations of the Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act ("ADEA"), interference with the Family Medical Leave Act ("FMLA"), breach of implied covenant of good faith and fair dealing in contract and tortious breach of good faith and fair dealing in contract against the defendant. (#1 Ex. A). Defendant removed the action to this court based on federal question jurisdiction (#1). Defendant moved for summary judgment on all claims (#15), plaintiff opposed (#19) and defendant replied (#21). For the reasons set forth below, the defendant's

1 motion for summary judgment on plaintiff's ADA, ADEA and tortious
2 breach of contract claims shall be **GRANTED**. Defendant's motion for
3 summary judgment on plaintiff's interference with FMLA and ordinary
4 breach of contract claims shall be **DENIED**.

5 **I. Facts**

6 Plaintiff, Sally Merritt ("Merritt"), is a 63 year-old former
7 employee of defendant Harrah's Entertainment, Inc. ("Harrah's").
8 (Def.'s Mot. Summ. J., Decl. Susan Heaney Hilden ("Hilden Decl.")
9 Ex. 1 ("Pl.'s Dep."), 8:12-20). Merritt was hired by Harrah's as
10 a casino host in July 2004 when she was 54 years old. (Pl.'s Dep.
11 8:16-20). Merritt suffers from lupus, chronic Epstein Barr,
12 asthma, joint problems and feet problems. (Pl.'s Dep. 76:24-77:1).
13 At times, her health problems caused her to be away from work.
14 When Merritt was hired, she informed Harrah's that she suffered
15 from lupus and foot problems and that her lupus was likely going to
16 get worse. (Pl.'s Dep. 52:5-12). Moreover, Merritt informed
17 Harrah's that when her lupus flares-up, it incapacitates her and
18 she could not predict how often she would have to take leave.
19 (*Id.*). Thus, Harrah's was aware that Merritt would likely need to
20 take unpredictable periods of medical leave.

21 In addition to the statutorily required FMLA leave, Harrah's
22 leave policy outlines two other avenues for employees to take
23 medical leave. (Hilden Decl. Ex. 2). These policies are found in
24 Harrahs' employee handbook, which was provided to Merritt. (Pl.'s
25 Dep. 36:4-11). The policy provides for twelve weeks of FMLA leave
26 per twelve-month period. (Hilden Decl. Ex. 2). After five years
27 of employment, Harrahs' employees are entitled to up to fourteen
28 weeks of Harrah's Medical Leave ("HML-5"). (*Id.*). And, Harrahs'

1 employees may apply for up to six weeks of personal leave. (*Id.*).
2 Significantly, the decision to grant personal leave is based on
3 business demands and must be approved by both the department head
4 and human resources—a distinguishing characteristic from FMLA and
5 HML-5. (*Id.*). This dual-approval requirement is clearly stated in
6 the employee handbook, personal leave form and accompanying policy.
7 (*Id.*; Hilden Decl. Ex. 14).

8 In March of 2005, Merritt was promoted to executive casino
9 host (“ECH”), which is the position she occupied until her
10 termination from Harrah’s. (Pl.’s Dep. 8:21-22). The ECH position
11 involved meeting and greeting guests, making telephone contacts
12 with guests, working on programs to bring guests into the casino,
13 and running various guest special events in the casino. (Pl.’s
14 Dep. 11:15-20). Furthermore, the position required Merritt to be
15 on her feet most of the day. See (Pl.’s Dep. 46:12-14, 50:1-8).
16 As such, Merritt contends she could not work when her foot problems
17 were aggravated.

18 On May 26, 2006, Merritt submitted a request for FMLA leave
19 from August 1, 2006 to September 1, 2006, along with documentation
20 from her orthopedic surgeon, stating that she would need to take
21 leave for four to six weeks due to foot pain and surgery. (Pl.’s
22 Dep. 12:11-13:4; Hilden Decl. Exs. 3-5). Harrah’s granted this
23 request for leave. (Pl.’s Dep. 12:8-10). Merritt did not return
24 to work until four months later, in late November 2006, due to
25 continued foot problems. (Pl.’s Dep. 14:11-17; Hilden Decl. Ex.
26 6).

27 Merritt again requested leave from February 6, 2007 to March
28 19, 2007, due to continued foot problems and surgery. (Pl.’s Dep.

1 15:15-18; Hilden Decl. Exs. 7-8). Harrah's granted this leave
2 request. (Pl.'s Dep. 15:16-20). Merritt subsequently extended her
3 request until May 1, 2007 because her foot was not healing. (Pl.'s
4 Dep. 16:3-11). Harrah's granted this request as well. (Pl.'s Dep.
5 16:12-13).

6 In 2008, Merritt submitted a request for intermittent leave.
7 (Pl.'s Dep. 16:17-17:5; Hilden Decl. Ex. 9). This request was
8 granted. (Pl.'s Dep. 17:8-9).

9 Merritt requested further FMLA leave from July 2 to July 15,
10 2009, to recover from yet another surgery. (Pl.'s Dep. 18:8-19:11;
11 Hilden Decl. Exs. 10-11). Merritt later requested an extension
12 until December 8, 2009. (Pl.'s Dep. 25:10-18). Harrah's granted
13 this request. (Pl.'s Dep. 25:13-18). Upon Merritt's return from
14 leave in 2009, she took a number of sick days. (Pl.'s Dep. 27:14-
15 18).

16 On April 25, 2010, Merritt emailed her manager, Stacey Wagner
17 ("Wagner"), informing him that she was suffering from foot pain
18 again, that she had difficulty walking, and she was going to need
19 to take some time off to visit the doctor. (Pl.'s Dep. 27:23-
20 28:13). The following day, Merritt spoke by telephone with Amilia
21 Culpepper ("Culpepper"), a member of Harrah's Risk Management
22 department and informed Culpepper that she was directed by her
23 doctor to stay off work. (Pl.'s Dep. 28:22-29:3). Culpepper
24 authorized the leave. (Pl.'s Dep. 28:22-29:6). A subsequent note
25 from Merritt's doctor, submitted by Merritt, stated that she had
26 continued foot problems and she would be able to return to work
27 without restrictions on May 3, 2010. (Pl.'s Dep. 29:11-24; Hilden
28 Decl. Ex. 12). Merritt was granted this leave. (Pl.'s Dep. 29:25-

1 30:2).

2 On May 3, 2010, Merritt telephoned Culpepper and left a
3 message that stated she needed to be away from work a few more
4 days, and should be released to work on May 6, 2010. (Pl.'s Dep.
5 30:14-21).

6 On May 5, 2010, Merritt submitted a request to extend her
7 leave until May 17, 2010 because she continued to have severe foot
8 pain. (Pl.'s Dep. 31:2-12). Harrah's granted this request.
9 (Pl.'s Dep. 31:13-14).

10 On May 12, 2010, Merritt contacted her doctor for a note
11 extending her leave until May 31, 2010. (Pl.'s Dep. 32:15-19).
12 That same day, Merritt left a message with Culpepper stating that
13 she may be out until the end of the month for medical reasons.
14 (Pl.'s Dep. 32:20-23). Later that day, Culpepper informed Merritt
15 that she had exhausted her FMLA leave, and in two weeks she would
16 exhaust all of her HML-5 leave. (Pl.'s Dep. 32:24-33:6).
17 Culpepper informed Merritt that she could apply for an additional
18 six weeks of personal leave and she would send her a personal leave
19 request form to complete. (Pl.'s Dep. 33:7-9). Merritt told
20 Culpepper that she was unsure if she could continue to perform her
21 job duties and wondered if the department would just buy out her
22 contract. (Pl.'s Dep. 33:10-13). Merritt felt that because of her
23 lupus and increasing problems, she could not perform her job and it
24 may be best if she just left her employment. (Pl.'s Dep. 33:14-
25 19).

26 Culpepper's May 12, 2010 letter stated that Merritt had
27 exhausted her FMLA leave and would soon exhaust her additional HML-

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1 5 leave.¹ (Pl.'s Dep. 37:7-39:9; Hilden Decl. Ex. 13).
2 Additionally, the letter stated that Merritt might be eligible for
3 personal leave. (Hilden Decl. Ex. 13). A Personal Leave of
4 Absence policy and form was included, which stated that personal
5 leave was granted at the discretion of the department manager and
6 human resources and was based on business demands. (Pl.'s Dep.
7 38:15-22; Hilden Decl. Ex. 14). The policy states that there is no
8 guarantee leave will be granted and Merritt understood that.
9 (Hilden Decl. Ex. 14; Pl.'s Dep. 38:2-10).

10 Merritt submitted her request for personal leave on
11 approximately May 18 or 19, 2010. (Hilden Decl. Ex. 15).
12 Merritt's request stated that she needed the personal leave for
13 medical reasons, however, she did not include an anticipated date
14 of return.² (Pl.'s Dep. 39:12-40:9; Hilden Decl. Ex. 15). Merritt
15 spoke with Culpepper on May 21, 2010 and informed Culpepper that
16 she had submitted her Personal Leave Request. (Pl.'s Dep. 41:15-
17 21). Merritt inquired if her job was in jeopardy. (*Id.*). Merritt
18 stated that she had requested a severance package, but she was
19 still waiting to hear back from the department. (Pl.'s Dep. 41:22-
20 25). Culpepper told Merritt that severance was discretionary with
21 the department and any issues should be brought to the department's
22 attention. (Pl.'s Dep. 42:1-4).

23 According to Harrah's, Vice President of Human Resources and
24 Risk Management, Matt Krystofiak ("Krystofiak") spoke with Wagner

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26 ¹ Documents provided by Harrah's show that Merritt took her first FMLA leave
27 of the year on July 2, 2009 and exhausted it by September 28, 2009. Merritt took
28 her first HML-5 leave on September 29, 2009 and exhausted it as of May 23, 2010.
(Def.'s Mot. Summ. J., Decl. Matt Krystofiak ("Krystofiak Decl.") Ex. A).

² Merritt's exact response was: "?/to be determined." (Hilden Decl. Ex. 15).

1 regarding the business needs of his department to determine whether
2 to grant Merritt her personal leave request. (Krystofiak Decl. ¶
3 4). Wagner allegedly indicated that his department was entering
4 the busy season and could not be without a casino host much
5 longer.³ (*Id.*).

6 On May 24, 2010, Merritt's podiatrist provided documentation
7 indicating that he had evaluated Merritt for foot pain that day and
8 was restricting her from work at least until June 30, 2010.
9 (Hilden Decl. Ex. 16; Pl.'s Dep. 47:10-48:3). On June 30th,
10 Merritt's podiatrist would reevaluate her to see if she could
11 return to work. (*Id.*).

12 Harrah's Manager of Risk Management, Chris Hill ("Hill"),
13 discussed Merritt's personal leave request with Krystofiak.
14 (Def.'s Mot. Summ. J., Decl. Chris Hill ("Hill Decl.") ¶¶ 2, 4).
15 Hill allegedly indicated that Merritt had used all FMLA and
16 Harrah's medical leave and was requesting additional personal
17 leave. (Hill Decl. ¶ 4). Krystofiak allegedly told Hill that
18 since Merritt's department was entering a very busy period,
19 Harrah's could not grant the personal leave request. (Krystofiak
20 Decl. ¶ 5; Hill Decl. ¶ 4). Krystofiak allegedly told Hill that
21 Merritt would need to return to work or provide information from
22 her doctor with her specific restrictions and seek an accommodation
23 to return to work with restrictions. (*Id.*).

24 On May 25, 2010, Hill called Merritt to tell her that her
25 request for personal leave had been denied based on the business
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27 ³ In her opposition(#19), Merritt claims that this conversation is hearsay.
28 The court disagrees. The conversation is offered to prove the conversation took
place, not whether the department was actually busy. See FRE 801(c).

1 demands of the department and her employment with Harrah's would be
2 severed. (Pl.'s Dep. 48:15-49:4; Hill Decl. ¶ 5). Merritt
3 disputes that Hill told her that her personal leave request was
4 denied and adds that Hill gave her no reason for her termination.
5 (Pl.'s Compl.; Pl.'s Opp'n Def.'s Mot. Summ. J., Decl. Sally
6 Merritt ("Merritt Decl."), 2; Pl.'s Dep. 48:20-49:7). Merritt
7 allegedly advised Hill that she could not return to work. (Hill
8 Decl. ¶ 5). Hill claims that he explained to Merritt that she had
9 exhausted all of her available leave time and this would be
10 confirmed by letter. (*Id.*).

11 A May 25, 2010 letter from Hill to Merritt memorialized
12 Harrah's decision. (Pl.'s Dep. 51:2-13; Hilden Decl. Ex. 17; Hill
13 Decl. ¶ 6). The letter states that because Merritt had exhausted
14 all of her FMLA and HML-5 leave and had not been released to work
15 with or without an accommodation, her employment was being
16 separated effective May 24, 2010. (Pl.'s Dep. 51:2-11; Hilden
17 Decl. Ex. 17; Hill Decl. ¶ 6). The letter did not state that
18 Merritt's request for personal leave was denied. See (Hilden Decl.
19 Ex. 17). It is Harrah's position that at no point during Merritt's
20 conversation with Hill, or in a subsequent conversation with Hill
21 and Krystofiak, did Merritt seek an accommodation. (Krystofiak
22 Decl. ¶ 6; Hill Decl. ¶ 7). Merritt disputes this and asserts that
23 Harrah's never offered to engage her in the accommodation process.
24 (Merritt Decl., 2).

25 In a telephone conversation with Krystofiak on or about May 26
26 or 27, 2010, Merritt discussed her termination and her request for
27 severance pay. (Pl.'s Dep. 43:14-44:7). During this conversation,
28 Merritt indicated that she was in severe pain and could not work

1 and was requesting a severance package. (Pl.'s Dep. 43:14-44:1).
2 Krystofiak told Merritt that she was not entitled to severance pay.
3 (Pl.'s Dep. 44:8-10). In a conference call between Merritt, Hill
4 and Krystofiak, however, Merritt claims she did ask if there was
5 another position within Harrah's where she would not be required to
6 be constantly on her feet. (Pl.'s Dep. 49:9-50:8). Hill and
7 Krystofiak deny that Merritt made this request. (Hill Decl. ¶ 7;
8 Krystofiak Decl. ¶ 6). They claim that Merritt indicated that she
9 was in severe pain and could not work and was seeking a severance
10 package. (Hill Decl. ¶ 7).

11 In a telephone conversation with Wagner, Merritt reiterated
12 her request for severance pay. (Pl.'s Dep. 44:22-45:10). Wagner
13 told Merritt that he would discuss the request with his boss.
14 (Pl.'s Dep. 45:16-17). Merritt also asked if Wagner would look
15 into a position in the sales department. (Pl.'s Dep. 53:3-20).
16 Merritt never applied for the position, although she claims it was
17 because Wagner told her he didn't think she would be qualified due
18 to her absenteeism. (Pl.'s Dep. 53:21-24).

19 Thereafter, Merritt and Wagner participated in a conference
20 call with Wagner's boss, Anne Chen ("Chen"). Chen reiterated
21 Krystofiak's statement that Merritt was not entitled to severance
22 pay. (Pl.'s Dep. 45:24-46:10). Merritt requested Chen to go
23 through her contract with her, but Chen told Merritt that she did
24 not have the contract in front of her. (*Id.*). Furthermore, Chen
25 explained that since Harrah's was not eliminating Merritt's
26 position, she was not eligible for severance pay. (*Id.*). Merritt
27 then asked if they could find her another position with Harrah's
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1 where she would not be on her feet all day. (Pl.'s Dep. 46:12-15).
2 Wagner stated he would look into it. (*Id.*). Merritt followed up
3 by leaving Wagner a telephone message, but did not take any further
4 action. (Pl.'s Dep. 46:16-25).

5 On March 29, 2011, Merritt applied for Social Security
6 Disability Insurance Benefits ("SSDI"), claiming that she had
7 become disabled and unable to work on April 26, 2010 and that she
8 remains unable to work. (Hilden Decl. Ex. 18).

9 On April 4, 2011, this lawsuit was filed. (#1 Ex. A).

10 **II. Summary Judgment Standard**

11 Summary judgment "shall be rendered if the pleadings, the
12 discovery and disclosure materials on file, and any affidavits show
13 that there is no genuine issue as to any material fact and that the
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.
15 P. 56(c). The burden of demonstrating the absence of a genuine
16 issue of material fact lies with the moving party, and for this
17 purpose, the material lodged by the moving party must be viewed in
18 the light most favorable to the nonmoving party. *Adickes v. S.H.*
19 *Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los*
20 *Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of
21 fact is one that affects the outcome of the litigation and requires
22 a trial to resolve the differing versions of the truth. *Lynn v.*
23 *Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir.
24 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
25 1982).

26 Once the moving party presents evidence that would call for
27 judgment as a matter of law at trial if left uncontroverted, the
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1 respondent must show by specific facts the existence of a genuine
2 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
3 250 (1986). “[T]here is no issue for trial unless there is
4 sufficient evidence favoring the nonmoving party for a jury to
5 return a verdict for that party. If the evidence is merely
6 colorable, or is not significantly probative, summary judgment may
7 be granted.” *Id.* at 249-50 (citations omitted). “A mere scintilla
8 of evidence will not do, for a jury is permitted to draw only those
9 inferences of which the evidence is reasonably susceptible; it may
10 not resort to speculation.” *British Airways Board v. Boeing Co.*,
11 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
12 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (“[I]n the event
13 the trial court concludes that the scintilla of evidence presented
14 supporting a position is insufficient to allow a reasonable juror
15 to conclude that the position more likely than not is true, the
16 court remains free . . . to grant summary judgment.”). Moreover,
17 “[i]f the factual context makes the non-moving party’s claim of a
18 disputed fact implausible, then that party must come forward with
19 more persuasive evidence than otherwise would be necessary to show
20 there is a genuine issue for trial.” *Blue Ridge Insurance Co. v.*
21 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
22 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*,
23 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that
24 are unsupported by factual data cannot defeat a motion for summary
25 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

26 Finally, if the nonmoving party fails to present an adequate
27 opposition to a summary judgment motion, the court need not search
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1 the entire record for evidence that demonstrates the existence of a
2 genuine issue of fact. See *Carmen v. San Francisco Unified Sch.*
3 *Dist.*, 237 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the
4 district court may determine whether there is a genuine issue of
5 fact, on summary judgment, based on the papers submitted on the
6 motion and such other papers as may be on file and specifically
7 referred to and facts therein set forth in the motion papers").
8 The district court need not "scour the record in search of a
9 genuine issue of triable fact," but rather must "rely on the
10 nonmoving party to identify with reasonable particularity the
11 evidence that precludes summary judgment." *Keenan v. Allan*, 91
12 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins.*
13 *Co.*, 55 F.3d 247, 251 (7th Cir.1995)). "[The nonmoving party's]
14 burden to respond is really an opportunity to assist the court in
15 understanding the facts. But if the nonmoving party fails to
16 discharge that burden—for example by remaining silent—its
17 opportunity is waived and its case wagered." *Guarino v. Brookfield*
18 *Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992).

19 **III. Discussion**

20 **A. Disability Discrimination**

21 Merritt's ADA claim fails as a matter of law. The ADA
22 prohibits an employer from discriminating against a "qualified
23 individual" on the basis of a disability with regards to discharge
24 or failure to make reasonable accommodations to the known physical
25 limitations of that otherwise "qualified individual." 42 U.S.C.A.
26 § 12112(a), (b) (5) (A). In order to make a prima facie case under
27 the ADA, a plaintiff must prove: 1) she is disabled; 2) she is

1 qualified; and 3) she suffered an adverse employment action because
2 of her disability. *Snead v. Metro. Prop. & Cas. Ins., Co.*, 237
3 F.3d 1080, 1087 (9th Cir. 2001). Merritt has not met her prima
4 facie burden because she failed to show she is a "qualified
5 individual" with a disability.

6 Merritt is a disabled person under the ADA. A person is
7 disabled under the ADA if she suffers "a physical or mental
8 impairment that substantially limits one or more major life
9 activities" of her person. § 12102(1)(A). Standing and walking
10 are major life activities. § 12102(2)(A).

11 [S]ubstantially limits means . . . [s]ignificantly
12 restricted as to the condition, manner, or duration under
13 which an individual can perform a major life activity as
14 compared to the condition, manner, or duration under which
15 the average person in the general population can perform
16 that same major life activity.

17 29 C.F.R § 1630.2(j)(ii). Merritt's foot problems and lupus
18 constitute a disability because she could not stand or walk for
19 long periods of time, she required multiple foot surgeries and was
20 absent from work for substantial periods during her recovery.

21 Merritt, however, was not a "qualified individual" under the
22 ADA. A "qualified individual" under the ADA is "an individual with
23 a disability who, with or without reasonable accommodation, can
24 perform the essential functions of the employment position that
25 such individual holds or desires." 42 U.S.C. § 12111(8).

26 Essential functions are "the fundamental job duties of the
27 employment position the individual with a disability holds or
28 desires." 29 C.F.R. § 1630.2(n)(1). Factors to be considered
include, but are not limited to: the employer's judgment about

1 which functions are essential, the work experience of past
2 incumbents in the job and/or current work experience of incumbents
3 in similar jobs. § 1630.2(n)(3).

4 Merritt has failed to show that she was a "qualified
5 individual" because she could not attend work, and she therefore
6 could not perform an essential function of her position. Regular
7 attendance may be an essential job function. See *Nesser v. Trans*
8 *World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998); *Hypes v.*
9 *First Commerce Corp.*, 134 F.3d 721, 726 (5th Cir. 1998); *Rogers v.*
10 *Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996).
11 Merritt understood that attendance was a essential function of her
12 position at Harrah's. (Pl.'s Dep. 35:9-12). As of May 24, 2010,
13 Merritt's doctor had not released her to return to work until at
14 least June 30, 2010 and Merritt was not entitled to any further
15 leave. (Pl.'s Dep. 48:9-14; Krystofiak Decl. Ex. A). In fact,
16 Merritt requested a severance package because she admittedly could
17 no longer work.⁴ See (Pl.'s Dep. 33:10-13).

18 Additionally, Merritt filed an application for SSDI benefits,
19 claiming she had been unable to work because of her disability
20 since at least April 26, 2010. (Hilden Decl. Ex. 18). Merritt's
21 SSDI application is a factor in considering whether she was a
22 "qualified individual" under the ADA. *Cleveland v. Policy*
23 *Management Systems, Corp.*, 526 U.S. 795, 802-03 (1999).

24 An ADA plaintiff bears the burden of proving that she is
25 a "qualified individual with a disability" And a

26 ⁴ Merritt "felt that because of [her] lupus and the increasing problems [she]
27 had, [she] felt bad that [she] wasn't there to do [her] job, and [she] said maybe
28 it would be best if [she] just [left]." (Pl.'s Dep. 33:15-18).

1 plaintiff's sworn assertion in an application for
2 disability benefits that is, for example, "unable to
3 work" will appear to negate an essential element of her
4 ADA case—at least if she does not offer a sufficient
5 explanation. For that reason, we hold that an ADA
6 plaintiff cannot simply ignore the apparent contradiction
7 that arises out of the earlier SSDI total disability
8 claim. Rather she must proffer a sufficient explanation.

9 *Id.* at 806. Merritt has offered little explanation for her SSDI
10 application, except to state that "[p]laintiff's SSDI application
11 is not dispositive, but is a factor to be considered by the jury"
12 (Pl.'s Opp'n Def.'s Mot. Summ. J., 4 (citing *Cleveland*, 526 U.S.
13 795)). While partially accurate, Merritt's explanation does not
14 create a genuine issue of material fact on whether she was a
15 "qualified individual" with a disability. Her sworn application
16 stated that she was unable to work because of her disability at the
17 time of her termination.

18 Furthermore, personal leave was not a reasonable accommodation
19 because attendance was an essential function of Merritt's position.
20 Merritt could not be absent while at the same time perform the
21 essential functions of her position.

22 Therefore, there is insufficient evidence to support a finding
23 that a material issue of fact exists that would establish that
24 Merritt was a qualified individual with a disability.

25 **B. Age Discrimination**

26 Merritt's age discrimination claim also fails as a matter of
27 law. The ADEA makes it "unlawful for an employer . . . to
28 discharge any individual . . . because of such individual's age."
29 U.S.C.A. § 623(a). This prohibition is "limited to individuals
30 who are at least 40 years of age." § 631(a). The *McDonnell*

1 Douglas test framework applies to ADEA claims at the summary
2 judgment stage. *Shelley v. Geren*, 666 F.3d 599, 607 (9th Cir.
3 2012).⁵ “[T]o survive summary judgment on [her] claim for a
4 violation of the ADEA, [plaintiff] must first establish a prima
5 facie case of age discrimination.” *Id.* at 608 (citing *Coleman v.*
6 *Quaker Oats Co.*, 232 F.3d 1271, 1280-81 (9th Cir. 2000). To make a
7 prima facie case using circumstantial evidence, a plaintiff must
8 demonstrate that she was: 1) over 40 years old; 2) performing her
9 job satisfactorily; 3) discharged; and 4) replaced by a
10 substantially younger person. *Coleman*, 232 F.3d at 1281 (citing
11 *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir.
12 1997). “The requisite degree of proof necessary to establish a
13 prima facie case for . . . ADEA claims on summary judgment is
14 minimal.” *Coleman*, 232 F.3d at 1281 (quoting *Wallis v. J.R.*
15 *Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Once a plaintiff
16 establishes a prima facie case of age discrimination, the burden
17 then shifts to defendant to articulate a legitimate
18 nondiscriminatory reason for its employment decision. *Id.* Then,
19 plaintiff must demonstrate that the defendant’s alleged reason for
20 termination was a pretext for another motive, which is
21 discriminatory. *Id.* Merritt fails to raise a genuine issue of
22 material fact as to whether she was terminated based on her age.

23 First, it is undisputed that Merritt is a member of a
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25 ⁵ Defendant asserts in its motion for summary judgment (#15) that plaintiff
26 must prove that her age was the “but-for” cause for her termination. *Gross v. FBL*
27 *Financial*, 129 S. Ct. 2343, 2351 (2009). The Ninth Circuit, however, recently
28 declined to extend *Gross* to summary judgment motions such as the one before this
court. *Shelley*, 566 F.3d at 607.

1 protected class. She was 61 years old when she was terminated from
2 Harrah's. (Pl.'s Compl., 1). Second, by all accounts, she was
3 performing her job satisfactorily. (*Id.*). Third, Merritt was
4 discharged on May 24, 2010. (Hilden Decl. Ex. 17).

5 To support the fourth element of her prima facie case, Merritt
6 cites to a number of instances where she claims Harrah's
7 discriminated against her because of her age. First, Merritt
8 states that younger employees were given more assignments than she
9 received. Particularly, she states that "older workers[']" duties
10 were absorbed by younger persons." (Pl.'s Opp'n Def.'s Mot. Summ.
11 J., 5; Pl.'s Dep. 80:20-22). Second, Merritt states that when
12 older employees left, the new persons who were brought in were much
13 younger. (Pl.'s Dep. 79:9-80:6). While Merritt does not point to
14 anybody in particular who replaced her, there is sufficient
15 evidence to satisfy her prima facie burden.

16 Harrah's counters Merritt's prima facie case with legitimate
17 nondiscriminatory reasons for her termination: 1) Merritt's
18 absences were placing a strain on her department; 2) she could not
19 predict when she would return; 3) her authorized leave was
20 exhausted; and 4) her work required her presence. (Def.'s Mot.
21 Summ. J.). The burden shifts to Merritt to establish pretext.

22 Merritt states that her supervisor, Wagner, made comments
23 about her age. (Pl.'s Dep. 80:25-81:6) These comments included:
24 "[y]ou're getting up there, Sal," and "[y]ou're getting older."
25 (Pl.'s Dep. 81:3-11). This was allegedly repeated several times.
26 (*Id.*). Merritt states that she complained to Wagner that the
27 younger hosts were get more assignments sometime in February

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1 2010-only a few months before she was terminated. (Pl.'s Dep.
2 80:25-82:20). Isolated comments, however, are insufficient to
3 establish discrimination. See *Merrick v. Farmers Ins. Group*, 892
4 F.2d 1424, 1438 (9th Cir. 1990).

5 Merritt has presented insufficient evidence of age
6 discrimination to show that Harrahs' legitimate reasons for
7 terminating her were pretextual.

8 **C. Interference with FMLA**

9 Merritt's claim for interference with FMLA rights survives
10 Harrah's motion for summary judgment. The FMLA entitles eligible
11 employees up to twelve weeks of absences for personal or family
12 illnesses each year. 29 U.S.C. § 2612. The FMLA prohibits a
13 covered employer from using FMLA leave as a negative factor in its
14 employment decisions. 29 C.F.R. § 825.220(c).

15 The regulation promulgated by the Department of Labor, 29
16 C.F.R. 825.220(c) plainly prohibits the use of FMLA-
17 protected leave as a negative factor in an employment
18 decision. In order to prevail on her claim, therefore,
19 [plaintiff] need only prove by a preponderance of the
20 evidence that her taking of FMLA-protected leave
constituted a negative factor in the decision to
terminate her. She can prove this claim . . . by using
direct or circumstantial evidence, or both No
scheme shifting the burden of production back and forth
is required.

21 *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th
22 Cir. 2001). Merritt claims Harrah's used her past FMLA leave as a
23 "negative factor" in its decision to terminate her.⁶ (Pl.'s Opp'n
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25 ⁶ Merritt also claims that her termination occurred before her return from
26 medical leave. (Merritt Decl., 1). Merritt's assertion is incorrect. First,
27 Merritt used up all of her FMLA leave as of September 28, 2009. (Krystofiak Decl.
28 Ex. A). Second, Merritt's termination came on the heels of her exhaustion of HML-5
leave. (*Id.*). This was exhausted on May 23, 2010. (*Id.*).

1 Def.'s Mot. Summ. J., 5).

2 Merritt asserts that temporal proximity may create an
3 inference that Merritt's FMLA leave was a negative factor in
4 denying her personal leave and thus her termination. (Pl.'s Opp'n
5 Def.'s Mot. Summ. J., 5). Considering all the evidence in favor of
6 Merritt, a reasonable inference can be drawn that Harrah's
7 considered Merritt's past FMLA leaves in making its decision to
8 terminate her.

9 Harrah's motion for summary judgment cites repeated FMLA
10 approved absences over the years. While these citations support
11 the fact that Harrah's continually granted Merritt's FMLA requests
12 and did not discourage her from taking these leaves, they also
13 reflect that Merritt was terminated soon after her approved
14 absences expired. A reasonable inference can be drawn that
15 Harrah's took into account Merritt's past FMLA leaves in its
16 determination to terminate her employment and that this constitutes
17 a negative factor in Harrah's decision to terminate Merritt.

18 Therefore, a genuine issue of material fact remains as to
19 whether Merritt's previous FMLA absences were a negative factor in
20 her termination on May 24, 2010.

21 **D. Breach of Contract**

22 For the same reasons that Harrah's motion for summary judgment
23 on Merritt's FMLA claim is denied, so must defendant's motion for
24 summary judgment on Merritt's breach of contract claim be denied.
25 Merritt asserts that Harrah's breached her employment contract
26 because she was terminated without cause and did not receive 26
27 weeks of severance pay. Merritt's contractual period ran from
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1 April 31, 2009 to March 31, 2011. (Pl.'s Dep. 34:3-25).

2 Therefore, she was under contract when she was terminated.

3 Section 6(d) of Merritt's contract provides that an employee
4 who is terminated without cause shall receive 26 weeks of salary.
5 (Hilden Decl. Ex. 19). Section 5(b)(viii) of the contract provides
6 that "a breach by Employee of any material provision of this
7 Agreement . . . or of the rules contained in the Company's Employee
8 Handbook . . ." shall be considered a separation for cause. (*Id.*).
9 Harrah's has presented evidence that Harrah's attendance policy
10 required employees to attend work unless their absence was
11 approved. (Pl.'s Dep. 35:21-36:9). This policy is part of the
12 Employee Handbook and Merritt was aware that attendance was a
13 requirement of her position. (Pl.'s Dep. 35:9-16). Merritt missed
14 one or two days following her HML-5 leave because she did not come
15 to work. See e.g. (Hilden Decl. Ex. 17). Additionally, both she
16 and her podiatrist indicated that she could not return until at
17 least June 30, 2010. (Pl.'s Dep. 47:14-48:14).

18 Harrah's also claims that Merritt did not give her best
19 efforts pursuant to section 3 of the employment agreement and this
20 constituted a material breach of the agreement. See (Hilden Decl.
21 Ex. 19). However, issues of material fact exist as to whether
22 Merritt gave her best efforts under section 3 of the agreement.

23 On the current record, a reasonable jury could infer that
24 Merritt was terminated without cause.

25 **E. Tortious Breach of Implied Covenant of Good Faith and Fair**
26 **Dealing**

27 To prevail on Merritt's tortious breach of the implied
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1 covenant of good faith and fair dealing, plaintiff must prove: 1)
2 contractual rights of continued employment with the defendant; 2) a
3 relationship of trust, reliance and dependency with the defendant;
4 3) justified expectations of the contract that were denied; and 4)
5 damages. See *Hilton Hotels v. Butch Lewis Productions*, 107 Nev.
6 226, 232-33, 808 P.2d 919 (1991); *D'Angelo v. Gardner*, 107 Nev.
7 704, 712-13, 819 P.2d 206 (1991).

8 Merritt has provided evidence she was entitled to continued
9 employment. She was not an at will employee. Merritt was a party
10 to an employment agreement with Harrah's, extending from April 30,
11 2009 to March 31, 2011. (Pl.'s Dep. 34:3-25). She was terminated
12 on May 24, 2010. *E.g.* (Hilden Decl. Ex. 17). This evidence may
13 support a reasonable conclusion her termination was without cause.

14 However, Merritt failed to establish she has a special
15 fiduciary relationship with Harrah's. "A special relationship of
16 reliance and dependency is not automatically deemed to exist in an
17 employment relationship." *Alam v. Reno Hilton, Corp.*, 819 F.Supp.
18 905, 910 (D. Nev. 1993). She has presented no evidence to support
19 this element of her claim.

20 Therefore, the court does not need to consider the other
21 elements of her good faith and fair dealing claim. Accordingly,
22 summary judgment is appropriate on this claim.

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1 **IV. Conclusion**

2 Harrahs' motion for summary judgment (#15) is **GRANTED in part**
3 and **DENIED in part**. Harrahs' motion for summary judgment on
4 Merritt's ADA, ADEA and tortious breach of contract claims is
5 **GRANTED**. Harrahs' motion for summary judgment on Merritt's claim
6 for interference with FMLA and breach of contract claims is **DENIED**.

7 **IT IS SO ORDERED.**

8 DATED: This 26th day of July, 2012.

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11 UNITED STATES DISTRICT JUDGE

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