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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 BARON BEMENT,

Case No. 3:12-cv-00475-MMD-WGC

8 Plaintiffs,

ORDER

9 v.

10 JAMES G. COX, *et al.*,

11 Defendants.

12
13 **I. SUMMARY**

14 The Court previously granted summary judgment (“MSJ Order”) in favor of
15 Defendant State of Nevada *ex. rel.* Nevada Department of Corrections (“NDOC”). (ECF
16 No. 105.) The Ninth Circuit partially reversed and remanded with respect to Plaintiff’s
17 Rehabilitation Act claims (“the Claims”).¹ (ECF No. 113.) The Court later vacated part of
18 the MSJ Order and permitted the Claims to proceed to trial. (ECF No. 116 (the “Vacating
19 Order”).) Before the Court is Defendant’s (“NDOC”) motion for reconsideration (the
20 “Motion”) (ECF No. 117), arguing that the Court should consider all grounds raised in its
21 previous MSJ Motion. For the reasons explained below, the Court will grant the Motion,
22 consider the remaining arguments raised in the MSJ, and enter summary judgment on
23 some of the Claims.²

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25 ¹Plaintiff alleges claims for failure to accommodate and disability discrimination in
26 violation of the Rehabilitation Act, 29 U.S.C. § 794 (“the RA”). (ECF No. 70.) The MSJ
27 Order found that Plaintiff failed to show he has a qualified disability to satisfy the first
28 element of each of the Claims without addressing the remaining arguments raised in
Defendant’s motion for summary judgment (“MSJ”). (ECF No. 105 at 4-7.)

²The Court has reviewed Plaintiff’s response (ECF No. 120) and NDOC’s reply
(ECF No. 121.)

1 **II. BACKGROUND**

2 The Court incorporates by reference the background section in the MSJ Order (ECF
3 No. 105 at 1-3) and does not recite it here.

4 **III. MOTION FOR RECONSIDERATION**

5 A motion for reconsideration must set forth the following: (1) some valid reason why
6 the court should revisit its prior order; and (2) facts or law of a “strongly convincing nature”
7 in support of reversing the prior decision. *Frasure v. United States*, 256 F.Supp.2d 1180,
8 1183 (D. Nev. 2003).

9 NDOC argues that this Court clearly erred in failing to consider the remaining
10 elements of Plaintiff’s claims for discrimination and failure to accommodate, and in failing
11 to apply the correct legal standard for “regarded as” disability, as the Ninth Circuit
12 instructed. (ECF No. 117 at 7-8 (citing to ECF No. 113 at 3-4).) NDOC also insists that it
13 is still entitled to summary judgment. (*Id.* at 5.) Because the Court—and Plaintiff (ECF No.
14 120 at 1)—agrees with NDOC’s first argument, the Court grants the Motion and will
15 address the second argument.

16 **IV. MOTION FOR SUMMARY JUDGMENT**

17 For the reasons explained below, the Court will grant the MSJ only on Plaintiff’s
18 discrimination claim but will permit the claim for failure to accommodate to proceed to trial.

19 **A. Legal Standard**

20 “The purpose of summary judgment is to avoid unnecessary trials when there is no
21 dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
22 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
23 the discovery and disclosure materials on file, and any affidavits “show there is no genuine
24 issue as to any material fact and that the movant is entitled to judgment as a matter of
25 law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is “genuine” if there is
26 a sufficient evidentiary basis on which a reasonable fact-finder could find for the
27 nonmoving party and a dispute is “material” if it could affect the outcome of the suit under
28 the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where

1 reasonable minds could differ on the material facts at issue, however, summary judgment
2 is not appropriate. See *id.* at 250-51. “The amount of evidence necessary to raise a
3 genuine issue of material fact is enough ‘to require a jury or judge to resolve the parties’
4 differing versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th
5 Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In
6 evaluating a summary judgment motion, a court views all facts and draws all inferences in
7 the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach &*
8 *Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

9 The moving party bears the burden of showing that there are no genuine issues of
10 material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Where the
11 moving party does not have the ultimate burden of persuasion at trial, the party can meet
12 its burden of production by either producing evidence that negates an essential element
13 of the nonmoving party’s case or by showing that the nonmoving party does not have
14 enough evidence to meet an essential element of its claim or defense to carry its ultimate
15 burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210
16 F.3d 1099 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements, the
17 burden shifts to the party resisting the motion to “set forth specific facts showing that there
18 is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may not
19 rely on denials in the pleadings but must produce specific evidence, through affidavits or
20 admissible discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*,
21 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show that there is
22 some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783
23 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
24 586 (1986)).

25 **B. Discrimination**

26 To state a prima facie case for disability discrimination under the RA, a plaintiff must
27 establish that he or she is (1) an individual with a disability, (2) otherwise qualified and (3)
28 subjected to discrimination solely by reason of his or her disability, and (4) the defendant

1 receives federal financial assistance. See *Mustafa v. Clark Cty. Sch. Dist.*, 157 F.3d 1169,
2 1174 (9th Cir. 1998); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir.
3 1999). The Ninth Circuit has especially recognized that the third requirement is strict.
4 *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042, 1049 (9th Cir. 2009). If a
5 plaintiff can establish a prima facie case, the burden “then shifts to the employer to
6 articulate some legitimate, nondiscriminatory reason for the challenged action.” *Chuang*
7 *v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123-24 (9th Cir. 2000). “If the employer
8 does so, a plaintiff must then show that the articulated reason is pretextual.” *Id.* at 1124.

9 NDOC argues that Plaintiff has not satisfied the first or third element.³ (ECF No. 90
10 at 9, 15; see also ECF No. 103 (pointing out that nowhere in Plaintiff’s Opposition does he
11 address the third element).) The Court only agrees with NDOC’s second argument—no
12 reasonable jury can conclude that NDOC took any adverse action against Plaintiff solely
13 by reason of his disability.⁴ See *Morran v. Nevada Sys. of Higher Educ.*, 482 F. Supp. 2d
14 1202 (D. Nev. 2007) (granting summary judgment on discrimination claim where plaintiff’s
15

16 ³Plaintiff argues that he is disabled under the RA because he is “regarded as”
17 having a physical impairment. (ECF No. 100 at 13-14.) 42 U.S.C. § 12102(1)(C); see also
18 *id.* at §12102(3)(A) (clarifying that the actual or perceived impairment need not limit a
19 major life activity). NDOC counters that Plaintiff cannot satisfy the “regarded as” definition
20 of disability because Plaintiff’s physical impairment is at best “transitory and minor” with
21 “an actual or expected duration of 6 months or less.” (See ECF No. 90 at 12; ECF No. 103
22 at 11 (citing to 42 U.S.C. § 12102(3)(B)).) NDOC specifically points to evidence wherein
23 Plaintiff resolved a five-day abdominal pain, which was never mentioned again in medical
24 records. (ECF No. 90 at 12, 17.) But Plaintiff has offered sworn testimony that he “was
25 diagnosed with intestinal problems” (ECF No. 33-1 at 1) and he previously informed
26 Warden Mattice that Plaintiff had a “long-term [intestine] problem” that caused him to take
27 leave. (ECF No. 100 at 4 (emphasis added) (citing to ECF No. 100-1 at 10-12); see also
28 ECF No. 113 (holding that Plaintiff’s sworn testimony and testimony of his supervisors as
to what Plaintiff told them can be sufficient evidence regarding Plaintiff’s disability).) Plaintiff has therefore raised a genuine dispute of material fact regarding whether he was regarded as disabled and whether his physical impairment was transitory or minor.

⁴The parties dispute whether NDOC took any adverse action against Plaintiff (see ECF No. 90 at 12-15; ECF No. 100 at 15-18), and at times it is unclear which of these actions Plaintiff is relying on to assert his discrimination claim (see ECF No. 100 at 15-18). In fact, Plaintiff appears to have conceded that NDOC’s written reprimand to Plaintiff and its requirement that Plaintiff submit a doctor’s note for his sick leave (“proof status”) do not constitute adverse action. (See ECF No. 100 at 15.) However, in an abundance of caution, the Court will presume the following NDOC actions constitute adverse action and address them accordingly.

1 termination was motivated by a non-discriminatory reason). First, Plaintiff was placed on
2 proof status because Plaintiff had previously taken 24 days of sick leave frequently in
3 conjunction with his time off. (ECF No. 100 at 5 (citing to ECF No. 90-6).) Second, to the
4 extent Plaintiff claims he was denied paid sick leave (see *id.* at 16), it was due to the fact
5 that he failed to either timely submit a sick leave request (*id.* at 1 (citing to ECF No. 100-1
6 at 28)) or to submit the requisite doctor's note (*id.* (citing to ECF No. 100-1 at 4)). Third,
7 although NDOC sent Plaintiff a written reprimand on August 17, 2011, Plaintiff admits "[t]he
8 reprimand was for not providing proof of illness from a doctor." (*id.* at 6 (citing to ECF No.
9 90-11 at 12).) Fourth, Plaintiff concedes that he was suspended because he "repeatedly
10 exhausted all of his [s]ick [l]eave and now has a zero balance and has taken a substantial
11 amount of [l]eave [w]ith [o]ut [p]ay." (*id.* at 5, 15 (citing to ECF No. 32-14 at 7).) Fifth,
12 Plaintiff claims NDOC required him to submit for a fitness-duty evaluation and use his sick
13 leave for that time, but Plaintiff acknowledges NDOC did so because Plaintiff suffered
14 injuries when he hit a wild horse with his car. (*id.* at 6-7 (citing to ECF No. 33-1); see also
15 ECF No. 32-1 at 5.)

16 In sum, Plaintiff has failed to establish that he was subjected to any adverse
17 employment action solely by reason of his disability to support his disability discrimination
18 claim. The Court will therefore grant the MSJ as to Plaintiff's discrimination claim.⁵ See
19 *J.C. ex rel. W.P. v. Cambrian Sch. Dist.* ("J.C."), 648 F. App'x 652, 653 (9th Cir. 2016)
20 (affirming grant of summary judgment where plaintiff was denied admission to an
21 elementary school pursuant to a valid admissions policy and not solely due to plaintiff's
22 disability).⁶

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25 ⁵The Court previously found that Plaintiff's hostile work environment claim may
26 constitute an adverse employment action only for purposes of a retaliation claim (ECF No.
27 90 at 4 n.1), therefore the Court will not address it here (see ECF No. 100 at 15-17).

28 ⁶The Court finds *J.C.* persuasive and applies it here. Although not binding
precedent, unpublished decisions have persuasive value and may be relied on. See, e.g.,
In re Ocwen Loan Servicing LLC Litigaton, No. 3:16-cv-200-MMD-WGC, 2019 WL
690353, at *2 (D. Nev. Feb. 19, 2019); see also Ninth Cir. R. 36-3 ("Unpublished Ninth
Circuit decisions may be cited commencing with decisions issued in 2007.").

1 **C. Failure to Accommodate**

2 To state a prima facie case for failure to accommodate under the RA, a plaintiff
3 must show that: (1) he is a qualified disabled individual; (2) accommodation is required to
4 enable him to perform essential job functions; and (3) reasonable accommodation is
5 possible. *Buckingham v. U.S.*, 998 F.2d 735, 739-40 (9th Cir. 1993). An employer must
6 conduct an interactive process with the plaintiff to find a reasonable accommodation if the
7 employee requests one. *Ka'Anoi v. Dail*, Case No. CIVS07-2722JKSEFBPS, 2009 WL
8 3487083, at *10 (E.D. Cal. Oct. 23, 2009) (citing to *Hunphrey v. Mem'l Hosp. Ass'n*, 239
9 F.3d 1128 (9th Cir. 2001)).

10 NDOC argues that Plaintiff has not met any of three prima facie requirements (ECF
11 No. 90 at 16-19), but the evidence demonstrates a genuine dispute of material fact on
12 those issues. First, NDOC argues that Plaintiff is not disabled. (ECF No. 90 at 16.) But the
13 Ninth Circuit already found that Plaintiff presented sufficient evidence of his disability.
14 (ECF No. 113 at 2-3.)

15 Second, NDOC argues that accommodation is not required because: Plaintiff never
16 requested FMLA leave as a form of accommodation; NDOC never knew about the
17 intestinal issues; and Plaintiff's fitness-for-duty evaluation authorized Plaintiff to return to
18 his "full duties [with] no restrictions." (ECF No. 90 at 17.) Contrary to NDOC's assertions,
19 Plaintiff submitted an FMLA leave request, which NDOC rejected. (ECF No. 100-1 at 28.)
20 Furthermore, Plaintiff previously explained to NDOC that he cannot leave his house during
21 periods in which he has to "use the bathroom every [five] minutes" to "flush [his] guts out."
22 (ECF No. 100-1 at 30-31.) In fact, Warden Mattice knew that Plaintiff had a "long-term
23 [intestine] problem" that caused Plaintiff to take sick leave. (ECF No. 100-1 at 10-12.)
24 Drawing all inferences in the light most favorable to Plaintiff, a reasonable jury could find
25 that Plaintiff requested sick leave as reasonable accommodation for his intestine problem.

26 Third, NDOC argues that it was not possible to accommodate Plaintiff because his
27 intestinal pain resolved after five days of antibiotics, and such problem was never
28 mentioned again in Plaintiff's medical records. (ECF No. 90 at 17.) But that does not

1 preclude evidence that Plaintiff had to take sick leave to flush out his intestines. (ECF No.
2 100-1 at 10-12, 30-31.) See *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir.
3 1999) (holding that unpaid medical leave can be a reasonable accommodation under the
4 Americans with Disability Act (the “ADA”)); *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th
5 Cir.2000) (analyzing an RA accommodation claim under the same standard as the ADA).
6 A reasonable jury can therefore find that NDOC could have reasonably accommodated
7 Plaintiff by granting him sick leave.

8 In sum, the Court finds that Plaintiff has raised a genuine dispute of material fact
9 regarding NDOC’s failure to reasonably accommodate Plaintiff. The Court will therefore
10 deny the MSJ on that claim.

11 **V. CONCLUSION**

12 It is therefore ordered that the Defendant’s motion for reconsideration (ECF No.
13 117) is granted.

14 It is further ordered that Defendant’s motion for summary judgment (ECF No. 90)
15 is granted as to Plaintiff’s disability discrimination claim but is denied as to Plaintiff’s
16 reasonable accommodation claim.

17 The parties are directed to file a proposed joint trial order within 30 days.

18 DATED THIS 8th day of June 2020.

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21 MIRANDA M. DU
22 CHIEF UNITED STATES DISTRICT JUDGE
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