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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM HERRON,)	3:13-cv-00075-HDM-VPC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
PERI & SON'S FARMS, INC.,)	
)	
Defendant.)	
_____)	

Plaintiff William Herron ("plaintiff") has filed a complaint asserting disability discrimination and failure to accommodate against defendant Peri & Son's Farms ("defendant"). Before the court is the defendant's motion for summary judgment on plaintiff's claims (#31). Plaintiff has opposed (#37), and defendant has replied (#38).

Facts

On December 5, 2011, plaintiff applied for an open maintenance mechanic position with defendant. (See Def. Mot. Summ. J. Ex. 2). In applying for the position, plaintiff submitted a resume representing that he had a Certificate of Completion from the

1 Arizona Automotive Institute and that he was ASE certified in
2 engine repair, front-end alignment, and air-conditioning. (*Id.*)
3 Plaintiff was interviewed by Paul Giannotta, who would become his
4 supervisor. (*Id.* Ex. 3 (Giannotta Dep. 6)). During the interview
5 process, plaintiff represented that he was a "journeyman mechanic,"
6 which meant "he could fix just about everything." (*Id.* at 7).

7 Plaintiff was hired and began working for defendant on or
8 about December 8, 2011. (See Pl. Opp'n Ex. 1). Shortly after,
9 Giannotta began noticing that plaintiff was not as skilled as he
10 had represented himself to be; in his opinion, plaintiff took more
11 time than expected on routine jobs and declined or was unable to do
12 repair work he should have been able to do. (Def. Mot. Summ. J. Ex.
13 3 (Giannotta Dep. 7-8, 37, 40-41); *id.* Ex. 4 (Giannotta Decl. 1-
14 2)). For example, Giannotta asserts that plaintiff could not
15 change the oil on a skid steer and would sometimes take all day to
16 complete what was typically a one- to two-hour job. (Def. Mot.
17 Summ. J. Ex. 3 (Giannotta Dep. 7-8, 37)). In addition, Giannotta
18 claims that plaintiff would repeatedly try to send vehicles to the
19 Chevrolet dealership for costly repairs that Giannotta believed
20 plaintiff should have been able to diagnose and resolve himself.
21 (*Id.* at 40-41; *id.* Ex. 4 (Giannotta Decl. 2)). Finally, Giannotta
22 observed plaintiff making what Giannotta believed to be excessive
23 personal calls during work time.¹ (Def. Mot. Summ. J. Ex. 4
24 (Giannotta Decl. 2)).

25 Plaintiff asserts that he was not hired to service skid steers
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27 ¹ That plaintiff was actually making several personal phone calls
28 during work time appears to be supported by his telephone records. (See
Def. Mot. Summ. J. 6-8 (citing Exs. 3, 5 & 12)).

1 and that he was supposed to be trained on them when work was slow.
2 (Pl. Opp'n (Herron Decl. 2); see also Def. Mot. Summ. J. Ex. 5
3 (Herron Dep. 163-64)). He denies that it took him longer than
4 normal to perform work, but does not respond to the assertion that
5 he sent work to the Chevrolet dealership that he should have been
6 able to complete himself. (Pl. Opp'n (Herron Decl. 2)). Finally,
7 plaintiff explains his cell phone use by asserting that he had been
8 told to use his cell phone until the company issued him one, that
9 he used the cell phone to order parts, and that he used his hands-
10 free Bluetooth device to make personal calls so he could continue
11 working. (*Id.*)

12 In mid-January, Giannotta asked plaintiff to perform some
13 "dash work." (See Def. Mot. Summ. J. Ex. 5 (Herron Dep. 48); Pl.
14 Opp'n (Herron Decl. 1)). Plaintiff told Giannotta he could not do
15 the work because of his back. (Def. Mot. Summ. J. Ex. 5 (Herron
16 Dep. 60-61); Pl. Opp'n (Herron Decl. 1)). Giannotta said "okay"
17 and did not make plaintiff do the job. (Def. Mot. Summ. J. Ex. 5
18 (Herron Dep. 59-61)).

19 Two days later, on January 17, 2012, Giannotta terminated
20 plaintiff. (Def. Mot. Summ. J. Ex. 5 (Herron Dep. 62)). Plaintiff
21 claims that Giannotta told him he was being laid off because of
22 budget cuts. (Def. Mot. Summ. J. Ex. 5 (Herron Dep. 62); Pl. Opp'n
23 (Herron Decl. 2)). Giannotta denies this, saying he told plaintiff
24 he was being "let . . . go because it wasn't working out." (Def.
25 Mot. Summ. J. Ex. 3 (Giannotta Dep. 15)). Plaintiff concedes that
26 he was subject to a 90-day probationary period. (*Id.* Ex. 5 (Herron
27 Dep. 82)). At the time plaintiff was terminated, he was within the
28 probationary period.

1 A few weeks later, defendant posted an open mechanic position
2 on Craigslist. (*Id.* Ex. 5 (Herron Dep. 62); *id.* Ex. 14). Plaintiff
3 asserts the advertised position was his position, and that he was
4 replaced by someone who did not have a disability and who did not
5 request an accommodation.

6 After terminating plaintiff, defendant discovered that his
7 resume contained what it alleges to be several material
8 misrepresentations about his qualifications and work history.
9 First, while the resume stated that plaintiff had a Certificate of
10 Completion from the Arizona Automotive Institute after studying
11 there for a full year (Def. Mot. Summ. J. Ex. 2), plaintiff admits
12 he attended the Institute for only about four months and did not
13 receive any certificate of completion, (*id.* Ex. 5 (Herron Dep.
14 139)). Second, the resume stated plaintiff was ASE certified in
15 engine repair, front-end alignment, and air-conditioning (*id.* Ex.
16 2), but his engine and front-end certificates had, admittedly,
17 lapsed at the time he submitted his resume.² (*See id.* Ex. 6; *id.*
18 Ex. 5 (Herron Dep. 129-31)). Third, plaintiff excluded at least one
19 former employer from his resume because he thought the employer
20 would give him a bad reference. (Def. Mot. Summ. J. Ex. 5 (Herron
21 Dep. 144-45)). Finally, plaintiff misrepresented the time he spent
22 at some of his prior employers, thereby obscuring periods of
23 unemployment, time spent working for employers plaintiff chose not
24 to list, and time spent owning his own business. (*See id.* at 140-
25 45)).

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28 ² The evidence also strongly suggests that plaintiff did not have and
had never had any air-conditioning certificate.

1 **Standard**

2 "The court shall grant summary judgment if the movant shows
3 that there is no genuine issue as to any material fact and the
4 movant is entitled to judgment as a matter of law." Fed. R. Civ.
5 P. 56(a). The burden of demonstrating the absence of a genuine
6 issue of material fact lies with the moving party, and for this
7 purpose, the material lodged by the moving party must be viewed in
8 the light most favorable to the nonmoving party. *Adickes v. S.H.*
9 *Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los*
10 *Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of
11 fact is one that affects the outcome of the litigation and requires
12 a trial to resolve the differing versions of the truth. *Lynn v.*
13 *Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir.
14 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
15 1982).

16 Once the moving party presents evidence that would call for
17 judgment as a matter of law at trial if left uncontroverted, the
18 respondent must show by specific facts the existence of a genuine
19 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
20 250 (1986). "[T]here is no issue for trial unless there is
21 sufficient evidence favoring the nonmoving party for a jury to
22 return a verdict for that party. If the evidence is merely
23 colorable, or is not significantly probative, summary judgment may
24 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
25 of evidence will not do, for a jury is permitted to draw only those
26 inferences of which the evidence is reasonably susceptible; it may
27 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
28 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*

1 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (“[I]n the event
2 the trial court concludes that the scintilla of evidence presented
3 supporting a position is insufficient to allow a reasonable juror
4 to conclude that the position more likely than not is true, the
5 court remains free . . . to grant summary judgment.”). Moreover,
6 “[i]f the factual context makes the non-moving party’s claim of a
7 disputed fact implausible, then that party must come forward with
8 more persuasive evidence than otherwise would be necessary to show
9 there is a genuine issue for trial.” *Blue Ridge Ins. Co. v.*
10 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
11 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
12 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are
13 unsupported by factual data cannot defeat a motion for summary
14 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

15 If the nonmoving party fails to present an adequate opposition
16 to a summary judgment motion, the court need not search the entire
17 record for evidence that demonstrates the existence of a genuine
18 issue of fact. *See Carmen v. San Francisco Unified Sch. Dist.*, 237
19 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that “the district
20 court may determine whether there is a genuine issue of fact, on
21 summary judgment, based on the papers submitted on the motion and
22 such other papers as may be on file and specifically referred to
23 and facts therein set forth in the motion papers”). The district
24 court need not “scour the record in search of a genuine issue of
25 triable fact,” but rather must “rely on the nonmoving party to
26 identify with reasonable particularity the evidence that precludes
27 summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.
28 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th

1 Cir.1995)). “[The nonmoving party’s] burden to respond is really
2 an opportunity to assist the court in understanding the facts. But
3 if the nonmoving party fails to discharge that burden—for example
4 by remaining silent—its opportunity is waived and its case
5 wagered.” *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 405
6 (6th Cir. 1992).

7 **Analysis**

8 Plaintiff’s first amended complaint (#12) asserts two claims
9 under the Americans with Disabilities Act: (1) disability
10 discrimination; and (2) failure to provide a reasonable
11 accommodation.³ 42 U.S.C. § 12112.

12 Defendant moves for summary judgment on the following grounds:
13 (1) plaintiff cannot demonstrate he was a qualified individual with
14 a disability; (2) plaintiff cannot show he was terminated because
15 of his disability; (3) plaintiff cannot establish he was denied a
16 reasonable accommodation; and (4) plaintiff failed to exhaust his
17 administrative remedies with respect to his reasonable
18 accommodation claim.

19 Plaintiff asserts that he was a qualified individual with a
20 disability and that there is an issue of fact as to whether he was
21 terminated because of his disability. He does not in any way
22 oppose summary judgment on his failure to accommodate claim.

23 I. Disability Discrimination

24 Under the Americans with Disabilities Act, “[n]o covered
25 entity shall discriminate against a qualified individual on the
26 basis of disability in regard to job application procedures, the

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28 ³ Plaintiff’s claim of retaliation was stricken by the court’s order dated December 12, 2013 (Doc. #27).

1 hiring, advancement, or discharge of employees, employee
2 compensation, job training, and other terms, conditions, and
3 privileges of employment.” 42 U.S.C. § 12112. The *McDonnell-*
4 *Douglas* burden shifting framework applies in disability
5 discrimination cases. See *Snead v. Metro. Prop. & Cas. Ins. Co.*,
6 237 F.3d 1080, 1093 (9th Cir. 2001). Accordingly, the plaintiff
7 must first establish a prima facie case of discrimination. See *id.*
8 at 1090-93. Once he has done so, the burden shifts to the
9 plaintiff’s employer to provide a legitimate, nondiscriminatory
10 reason for the adverse employment action. See *id.* at 1093. If the
11 employer provides such a reason, the burden shifts back to the
12 plaintiff to show the employer’s stated reason is pretextual. *Id.*

13 A. Prima Facie Case

14 To establish a prima facie case of disability discrimination,
15 plaintiff must show: (1) he is disabled under the ADA; (2) he is a
16 “qualified individual with a disability”; and (3) he was
17 discriminated against “because of” the disability. *Bates v. United*
18 *Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007).

19 1. Disability

20 For the purposes of this motion, defendant does not challenge
21 plaintiff’s alleged disability. (See Def. Mot. Summ. J. 2 n.1).

22 2. Qualified Individual with Disability

23 To satisfy this prong, the plaintiff must show “he can perform
24 the job’s essential functions either [with or] without a reasonable
25 accommodation.” *Bates*, 511 F.3d at 994. The term “qualified”
26 means “that the individual satisfies the requisite skill,
27 experience, education and other job-related requirements of the
28 position” and “with or without reasonable accommodation can perform

1 the essential functions of such position." 29 C.F.R. § 1630.2(m).
2 "The determination of whether an individual with a disability is
3 qualified is to be made at the time of the employment decision."
4 *Id.* Pt. 1630, App. to § 1630.2(m). The defendant bears the burden
5 of production in establishing which job functions are essential.
6 *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237
7 (9th Cir. 2012).

8 Defendant argues that plaintiff cannot show he was qualified
9 for the position because he did not possess the skill, education,
10 or other job-related requirements of the position. In addition to
11 arguing that plaintiff could not adequately perform the job
12 consistent with its expectations, defendant asserts that plaintiff
13 did not have a "certificate of completion from a certified
14 technical school or equivalent" - a requirement of the job.⁴
15 Because plaintiff did not have the required certificate, defendant
16 argues, he was not qualified for the job. *See Johnson v. Bd. of*
17 *Trustees of Boundary County School Dist. No. 101*, 666 F.3d 561 (9th
18 Cir. 2011) (recognizing that a teacher whose teaching certificate
19 had lapsed was not qualified for the position she had held because
20 Idaho law required all teachers to have the proper certificate).⁵

21 There is no disputed issue of fact as to whether plaintiff had
22 a certificate of completion from a certified technical school.

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24 ⁴ While the job posting plaintiff responded to is not on the record,
25 plaintiff testified that the jobs posted by defendant after he was
26 terminated had the "same identical writeup" that he had responded to. (Def.
27 Mot. Summ. J. Ex. 5 (Herron Dep. 174-75)). Those jobs required a
28 certificate of completion from a certified technical school or equivalent.
(*See id.* Exs. 14 & 20).

29 ⁵ Although *Johnson* involved a failure to accommodate claim and not an
unlawful termination claim, the definition of "qualified" is the same for
both types of claims and thus *Johnson's* reasoning applies here.

1 Plaintiff admits he did not. (Def. Mot. Summ. J. Ex. 5 (Herron
2 Dep. 139). Plaintiff suggests he was qualified under the
3 "equivalent" option because he had ASE certificates. However, he
4 presents no evidence to support his counsel's conclusory assertion
5 that his ASE certificates might be equivalent to a certificate of
6 completion from a certified technical school. There is therefore
7 no triable issue of fact as to whether he was qualified under the
8 equivalent option.

9 Plaintiff appears to argue that because this job requirement
10 was not legally mandated as was the teaching certificate in
11 *Johnson*, it is not relevant in assessing whether he was qualified.
12 However, plaintiff has cited no authority in support of the
13 argument, and nothing in *Johnson* suggests that the teaching
14 certificate requirement was relevant only because it was legally
15 required. Rather, it was relevant because the legal authorization
16 to teach was made a job requirement by the state's Board of
17 Education. Nor does the EEOC Guidance on which *Johnson* relies
18 limit the phrase "job-related requirements" to legally mandated
19 requirements.

20 3. Discrimination Because of Disability

21 Defendant also argues that plaintiff cannot show he was
22 terminated because of his disability. Specifically, defendant
23 contends that Giannotta had legitimate reasons for terminating
24 plaintiff, that there is no evidence that he knew plaintiff had a
25 disability, and that plaintiff has no admissible evidence to rebut
26 Giannotta's assertions. While there is substantial evidence to
27 show that plaintiff was not terminated because of his disability,
28 the court does not need to decide this issue.

1 Because plaintiff has not satisfied all the elements of his
2 prima facie case, summary judgment is therefore appropriate. In
3 addition, even if plaintiff could show that issues of material fact
4 exist on his prima facie case, there are no issues of material fact
5 on whether defendant had a legitimate, nondiscriminatory reason for
6 terminating plaintiff.

7 B. Legitimate, Nondiscriminatory Reason

8 Giannotta asserts that he terminated plaintiff based on his
9 poor performance. (Def. Mot. Summ. J. Ex. 3 (Giannotta Dep. 17-
10 18)). Plaintiff could not perform tasks he was asked to do and
11 that he should have been able to do. Giannotta asserts that
12 plaintiff's back condition played no part in his decision to
13 terminate him. (Def. Mot. Summ. J. Ex. 3 (Giannotta Dep. 23-24);
14 *id.* Ex. 4 (Giannotta Decl. 10)). Plaintiff asserts that he could
15 and did perform the essential functions of his position and that
16 Giannotta told him he was doing a good job and never counseled him
17 about his performance. (Pl. Opp'n Herron Decl. 2). Giannotta
18 claims he told plaintiff "good job" only on isolated assignments
19 and that overall his performance was not good. (Def. Mot. Summ. J.
20 Ex. 3 (Giannotta Dep. 41-42)). Defendant further argues that its
21 failure to counsel plaintiff to improve his job performance does
22 not demonstrate that he was performing satisfactorily because
23 plaintiff was within the 90-day probationary period and as such
24 defendant was under no obligation to attempt to improve his
25 performance.

26 Defendant has provided a legitimate, nondiscriminatory reason
27 for plaintiff's termination. In the short time that plaintiff was
28 employed by defendant, he did not perform as required. Plaintiff

1 provides no evidence to rebut this assertion beyond his conclusory
2 and self-serving declaration. Defendant's reasons for termination
3 are compelling in this case in light of the undisputed evidence
4 that plaintiff's resume, which formed the basis for the decision to
5 hire him, misrepresented his qualifications and work history in
6 several material respects. Accordingly, even if plaintiff's prima
7 facie case had been met, defendant has provided a legitimate,
8 nondiscriminatory reason for its action. The burden is thus on the
9 plaintiff to produce evidence that the stated reason was pretext.

10 C. Pretext

11 Pretext may be shown either indirectly, by showing the
12 employer's proffered explanation is unworthy of credence because it
13 is internally inconsistent or otherwise not believable, or
14 directly, by showing that unlawful discrimination more likely
15 motivated the employer. *Lyons*, 307 F.3d at 1113. Circumstantial
16 evidence must be specific and substantial. *Id.*

17 Plaintiff appears to argue that pretext is evident from: (1)
18 the close temporal proximity between his claim of disability and
19 his termination; (2) his assertion that Giannotta told him he was
20 being laid off due to budget cuts but within weeks the position had
21 been re-posted; and (3) his replacement by a person without a
22 disability.

23 Even assuming all of plaintiff's allegations in this regard
24 are true, they do not constitute specific and substantial evidence
25 of pretext in the context of this case. Plaintiff was employed by
26 defendant for less than two months and was still on probation when
27 he was terminated. The close temporal proximity between
28 plaintiff's claimed assertion of disability and his termination is

1 therefore of limited probative value in this case and is not
2 specific or substantial evidence of pretext. Further, given the
3 essentially undisputed evidence that plaintiff was not performing
4 the tasks as required - and that he made frequent personal calls
5 during work time - defendant had a legitimate, nondiscriminatory
6 reasons for the decision to terminate plaintiff during his
7 probationary period. Again, the legitimacy of defendant's
8 assessment of plaintiff's skills is supported by the undisputed
9 fact that plaintiff misrepresented his qualifications and work
10 history in applying for the position. Plaintiff has failed to
11 present sufficient evidence to create an issue of material fact on
12 the issue of pretext. Accordingly, summary judgment will be
13 granted on plaintiff's claim of disability discrimination.

14 II. Failure to Accommodate

15 Under 42 U.S.C. § 12112(b)(5)(A), discrimination includes "not
16 making reasonable accommodations to the known physical or mental
17 limitations of an otherwise qualified individual with a disability
18 who is an applicant or employee, unless such covered entity can
19 demonstrate that the accommodation would impose an undue hardship
20 on the operation of the business of such covered entity." As with
21 disability discrimination, plaintiff must establish that he was a
22 qualified individual able to perform the essential functions of the
23 position with or without reasonable accommodation. See *Samper*, 675
24 F.3d at 1237. Because plaintiff has not established he was a
25 qualified individual, his failure to accommodate claim fails.
26 Furthermore, plaintiff essentially concedes in his opposition that
27 summary judgment should be granted when he admits he was given the
28 only accommodation he requested (Pl. Opp'n 4) and does not identify

1 any other accommodation that was requested and denied. Except
2 under circumstances not present here, an employer is not liable
3 where the employee has not requested a reasonable accommodation.
4 *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir.
5 2001). Accordingly, because plaintiff has not established he was a
6 qualified individual and has not identified any failure by
7 defendant to accommodate his alleged disability, summary judgment
8 will be granted on plaintiff's claim of failure to accommodate.⁶

9 **Conclusion**

10 The defendant's motion for summary judgment (#31) is **GRANTED**.
11 The clerk of the court shall enter judgment accordingly.

12 IT IS SO ORDERED.

13 DATED: This 13th day of May, 2014.

14 
15 UNITED STATES DISTRICT JUDGE

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28 ⁶ Because the court grants summary judgment on the merits, it does not reach defendant's argument that plaintiff failed to exhaust this claim.