

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

TIMOTHY J. KNUTSON,

Plaintiff,

vs.

AG PROCESSING, INC.,

Defendant.

No. C01-3015-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

A. Procedural Background

On February 21, 2001, plaintiff Timothy J. Knutson filed a complaint against his former employer, defendant Ag Processing, Inc. (“APG”), seeking damages resulting from his termination on March 13, 2000. In his complaint, Knutson alleges three causes of action: a claim of disability discrimination pursuant to the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, a similar claim under Iowa Code Chapter 216 *et seq.*, and a state common law claim for retaliatory discharge in violation of public policy. With respect to his state common law claim, plaintiff Knutson asserts that he was fired in retaliation for seeking workers’ compensation benefits. Defendant APG answered Knutson’s complaint on May 11, 2001, denying Knutson’s claims and asserting various defenses.

On September 4, 2002, defendant APG filed a Motion for Summary Judgment on all of Knutson’s claims. First, in its motion, defendant APG claims that Knutson is not “disabled” within the meaning of either the ADA, or Chapter 216 of the Iowa Code. Specifically, defendant APG asserts that Knutson does not have a physical impairment that substantially limits one or more of his major life activities. Second, APG claims that Knutson’s claim that APG failed to accommodate his disability is not relevant because it did not discharge him because of any physical limitations but for violating APG policy by conducting unauthorized videotaping in APG’s plant. Third, APG asserts that Knutson

cannot establish the necessary elements for his claim of retaliatory discharge. Specifically, APG claims that Knutson cannot establish a causal connection between the protected activity and the adverse employment action. APG also asserts that Knutson cannot demonstrate that its stated reason for terminating Knutson's employment was pretextual. On September 30, 2002, Knutson resisted APG's Motion for Summary Judgment, arguing that there are genuine issues of material facts in dispute regarding all of his claims.

On October 22, 2002, the court heard telephonic oral arguments on APG's Motion for Summary Judgment. Plaintiff Knutson was represented by Blake Parker of Blake Parker Law Office, Fort Dodge Iowa. Defendant APG was represented by Becky S. Knutson of Davis, Brown, Koehn, Shors & Robert, P.C., Des Moines, Iowa. Before discussing the standards for APG's Motion for Summary Judgment, however, the court will first examine the factual background of this case.

B. Factual Background

The summary judgment record reveals that the following facts are undisputed.

Ag Processing, Inc. is an Iowa Corporation with its corporate headquarters located in Omaha, Nebraska. APG's primary business is soybean crushing, producing crude soybean oil and soybean meal. APG has eight soybean crushing plants located in Iowa, Nebraska, Minnesota, and Missouri, including one located in Eagle Grove, Iowa. APG's Eagle Grove plant is a non-union plant.

Plaintiff Knutson started work at APG's Eagle Grove plant on June 24, 1988. He was hired as a "Utility I" in the general plant department. On February 18, 1991, he was transferred from the general department to the preparation department. On September 16, 1991, Knutson was transferred from a utility position with the preparation department to a process operator position with the energy/power department. On October 15, 1991, he was transferred to general clean up in the energy center.

On September 27, 1992, Knutson suffered a back injury while opening a valve at the APG plant. He received medical treatment through June 14, 1993, when his physician, Dr. McGuire released him from his care. During the period of September 27, 1992 through June 14, 1993, Knutson worked at the APG plant with a lifting restriction.

From October 1993, through June 25, 1997, plaintiff Knutson worked at the APG plant without incident. On June 25, 1997, Knutson was injured in a boating accident. He was released by his doctor to go back to work on June 30, 1997, with a lifting restriction that lasted for four days. Knutson then worked without restriction until October 5, 1998. At that time, Knutson was admitted to the hospital for surgical repair of a hernia. He was released to return to work on November 9, 1998.

During November of 1998, Knutson called Janet Schmitz, an APG employee in Omaha, Nebraska, who handled worker's compensation issues for APG. Knutson raised the issue of having surgery on his back connected to his 1992 injury. He also complained of shoulder pain. Schmitz requested records to analyze the claim. Schmitz denied coverage due to the expiration of the statute of limitations on the six year old accident. Knutson received short-term disability benefits beginning on December 14, 1998, for a left shoulder impingement and a spinal degeneration.

Plaintiff Knutson returned to work on February 10, 1999, with work restrictions that limited him to no lifting over 25 pounds and no overhead work. These limitations were considered by Knutson's physician to be temporary and it was anticipated that he could return to full duty in 3 weeks. On March 2, 1999, Knutson's restrictions were modified to permit him heavier duty. He was limited to no lifting over 45 pounds, no overhead work and no repetitive pushing or pulling. On March 29, 1999, Knutson was released for full duty.

On May 18, 1999, another work restriction was placed on Knutson as a result of his prior hernia operation. Knutson was restricted from raking out the ash beds. On June 14, 1999, Knutson was told to continue on restricted duty. He was to be rechecked in six

weeks. On July 8, 1999, Knutson filed his original petition with the Iowa Worker's Compensation Commissioner. He claimed that pain on his right side was a new condition. He subsequently stated that he had been experiencing the pain since May.

On July 23, 1999, Knutson reported calcium deposits from repetitive motion dating back to December 13, 1998. He completed a first report of injury claiming left shoulder pain. He claimed that this was a new injury. On August 10, 1999, Knutson received six more weeks of light duty with the same restrictions.

On October 13, 1999, Knutson's lifting was restricted to 20 pounds due to injury and treatment of his back and left shoulder, and for post-operative care for his hernia. On October 15, 1999, in order to work with these restrictions, Plant Manager Carl Parker assigned Knutson to report to the energy center at the plant. Knutson was transferred from his boiler job to general clean up in the energy center. Knutson's title and rate of pay did not change.

On October 18, 1999, Dr. Crighton, from Trimark Corporate health Services, issued a status report in which it was noted that the diagnosis of low back pain was not work related. He indicated permanent restrictions concerning Knutson's left arm, noting "no work c L arm outstretched @ shoulder level more than occasionally." Defendant's App. at 34. Dr. Crighton also recommended that Knutson avoid lifting 15 pounds from floor to waist level, lifting 25 pounds from waist level to shoulder level, and to pushing or pulling 75 pounds. These later restrictions were designated as "temporary until surgical correction can be performed." Defendant's App. at 35. Knutson remained employed in the same position, receiving the same pay, until he requested leave for surgery.

On November 26, 1999, APG received a video in the course of discovery in the worker's compensation action. APG became aware for the first time that Knutson had taken videotape of another worker and inside the APG plant. APG believed this to be a violation of its policies and began an investigation into the circumstances surrounding the creation and

release of the videotape.

On December 21, 1999, Knutson went back on short-term disability for back surgery. The condition and treatment were not work related. As a result, Knutson was required to use his own individual health insurance benefits to cover the costs of the surgery. As of January 6, 2000, Knutson was not yet released to return to work. On February 4, 2000, Knutson's physician continued to refuse to release Knutson to return to work. On March 8, 2000, Knutson was released to return to work with a restriction that he refrain from lifting, carrying, or pushing over 35 pounds more than 25 feet.

In order to deal with the restrictions placed on Knutson in 1999, APG assigned the regular turbine operator to perform the job duties that Knutson was unable to do. This resulted in the loss of regular duty time by the turbine operator. Because of transfers out of the work area by personnel, the boiler department was left with no qualified, trained boiler operators to fill the vacancies in the department. A new trainee was hired, and was assigned to Knutson's shift to relieve the turbine operator of the additional duties so that he could focus on his responsibilities. Knutson's work restrictions required other boiler operators to cover Knutson's job duties with overtime. The operators were scheduled to work on their days off and had to reschedule vacation days and family time to accommodate the situation. Work morale suffered and other employee transfers out of the department appeared to be imminent.

On November 26, 1999, Rina Degland, APG's Benefits Administrator, received a videotape in the mail. The videotape came from Joseph Andres, APG's legal counsel in Knutson's pending worker's compensation claim. The videotape was not authorized by anyone at APG. The tape showed an employee working in the energy center in APG's Eagle Grove plant. A copy of the tape was sent to Carl Parker, Plant Manger in the Eagle Grove plant, to review. He reviewed the tape and identified Ed Askvig as the employee in the videotape.

Parker and Degland determined that an internal investigation should take place regarding the circumstances of the making of the videotape. Plant rules state that the taking of photographs or videotaping, without the permission of management, is prohibited. Violation was considered a serious offense which could result in termination of employment.¹

When initially questioned by Parker, Askvig denied any knowledge of the videotape. He later recanted and told Parker that he knew that he was being videotaped by Knutson. Shortly after the videotaping had occurred, Askvig asked Knutson why he was videotaping. Knutson told him that he had made the videotape for his doctor. Knutson was aware of the company policy against cameras or other recording devices in the plant. He signed an acknowledgment sheet denoting his receipt and knowledge of the plant rules.

By the time the investigation had concluded, Knutson had entered the hospital for surgery. APG decided to wait for Knutson to recover from his surgery and to come back to work before administering discipline for his videotaping in the APG plant in order to allow Knutson to have insurance during his surgery and recovery. The day after Knutson was released to return to work, Carl Parker advised Knutson that he was terminated for breach of security and violation of the plant work rules by making the videotape inside the APG plant and providing it to individuals outside of APG.

¹The court notes that APG has supported its motion for summary judgment with the affidavit of Carl Parker, the plant manager at APG's Eagle Grove plant. Although Parker attests in his affidavit that an investigation was conducted regarding the making of the videotape, APG has not offered any documentary evidence which would substantiate Parker's averments. Specifically, APG has offered no documentation regarding the internal investigation conducted regarding Knutson's violation of APG's work rule on videotaping at the plant. Also, Parker's affidavit is entirely silent on the sanction imposed on Askvig, and APG has offered no other materials.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 531 U.S. 820 (2000); *Tralon Corp. v. CedarAPGds, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firststar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar RAPGds Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). The essentials of these standards for present purposes are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part, as follows:

Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and

determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is “material,” the Supreme Court has explained, “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394.

2. The parties’ burdens

Procedurally, the moving party bears “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also Rose-Maston*, 133 F.3d at 1107; *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). “When a moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. Rather, the party opposing summary judgment is required under *Rule 56(e)* to go beyond the pleadings, and by affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is “entitled to judgment as a

matter of law.” *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. See *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same).

3. Summary judgment in employment discrimination cases

Because this is an employment discrimination case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that “summary judgment should seldom be used in employment-discrimination cases.” *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc’y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989)); see also *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) (“We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases,” citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) (“summary judgments should only be used sparingly in employment discrimination cases,” citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases only in “those rare instances where there is no dispute of fact and where there exists only one conclusion.” *Johnson*, 931 F.2d at 1244; see also *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be

granted unless the evidence could not support any reasonable inference for the nonmovant.” *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 (“Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant,” citing *Crawford*); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

However, the Eighth Circuit Court of Appeals also observed that, “[a]lthough summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff’s evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant’s action.” *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.) (observing that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied*, 528 U.S. 818 (1999). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court reiterated that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Reeves*, 530 U.S. at 142 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).² Thus, what the plaintiff’s evidence must show, to avoid summary

²In *Reeves*, the Supreme Court was considering a motion for judgment as a matter of law *after* a jury trial, but the Supreme Court also reiterated that “the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that ‘the inquiry under each is the same.’” *Reeves*, 530 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). Therefore, the standards articulated in
(continued...)

judgment or judgment as a matter of law, is “‘1, that the stated reasons were not the real reasons for [the plaintiff’s] discharge; and 2, that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff’s] discharge.” *Id.* at 153 (quoting the district court’s jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that, to meet this burden, “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated.” *Id.* at 148 (emphasis added).

The court will apply these standards to defendant APG’s motion for summary judgment.

B. Elements of an ADA claim

This court has described the analytical framework for an ADA disability claim as follows:

To qualify for relief under the ADA, a plaintiff must establish the following: (1) that he or she is a disabled person within the meaning of the ADA; (2) that he or she is qualified[;] that is, with or without reasonable accommodation (which the plaintiff must describe), he or she is able to perform the essential functions of the job; *and* (3) that the employer terminated the plaintiff, or subjected the employee to an adverse decision, “because of” the plaintiff’s disability.

Walsted v. Woodbury County, 113 F.3d 1318, 1326 (N.D. Iowa 2000) (emphasis added); see *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000).³

²(...continued)

Reeves are applicable to the present motion for summary judgment.

³The court notes that in considering Knutson’s disability discrimination claims it will
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“If a plaintiff in an ADA employment discrimination case can establish these three elements, then the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); (other citations omitted). Once such a reason is proffered, the burden shifts back to the plaintiff to show that the employer’s stated reason is pre-textual.” *Walsted*, 113 F.3d at 1326-27.

Under the ADA, a “disabled person” either (1) has a “physical or mental impairment that substantially limits one or more of the [person’s] major life activities[,]” (2) has “a record of such an impairment,” or (3) is “regarded as having such an impairment.” 42 U.S.C. § 12102(2)(A), (B), (C). An employer is prohibited from discriminating against a qualified employee solely on the basis of a disability. 42 U.S.C. § 12112(a). The ADA

³(...continued)

not distinguish between his claims under the ADA and comparable disability discrimination claims under the IRCA. This is appropriate because the Iowa Supreme Court has recognized that federal precedent is applicable to discrimination claims under the ICRA. *See Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998) (recognizing that Chapter 216's prohibition on disability discrimination is the state-law "counterpart" to the ADA, and that, "[i]n considering a disability discrimination claim brought under Iowa Code chapter 216, we look to the ADA and cases interpreting its language. We also consider the underlying federal regulations established by the Equal Employment Opportunity Commission (hereinafter 'EEOC'), the agency responsible for enforcing the ADA.") (internal citations omitted); *cf. Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act). Iowa courts, therefore, traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983). While federal law is not controlling and courts should not substitute the language of the federal statutes for the clear words of the ICRA, Iowa courts do look to the analytical framework utilized by the federal courts in assessing federal law. *Hulme v. Barrett*, 449 N.W.2d 629, 631 (Iowa 1989); *accord Board of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998) ("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668, 677-79 (1973)).

defines discrimination to include the failure to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

C. Does Knutson Have A Claim Under the ADA?

1. Knutson's actual disability claim

Defendant APG initially asserts that Knutson cannot establish a *prima facie* case of disability discrimination because he cannot demonstrate that he is disabled. Thus, in considering whether Knutson can make out a *prima facie* case of discrimination under the ADA, the court must first determine whether Knutson is “disabled” as defined by the ADA; that is, whether he has a physical or mental impairment that substantially limits one or more of his major life activities. 42 U.S.C. § 12102(2)(A); see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999) (requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability). “Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.” *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, ___, 122 S. Ct. 681, 690 (2002).

At the time Knutson was released to return to work, he had limitations of no lifting, carrying, or pushing over 35 pounds for a distance of 25 feet. APG contends that these limitations do not meet the criterion of substantially limiting one or more of Knutson’s major life activities. In response, Knutson does not argue that he is limited in the major life activity of lifting.⁴ Instead, Knutson avers that he is limited in the following ways:

⁴Even if plaintiff Knutson contended otherwise, the court could not determine that he has presented a genuine issue of material fact as to whether his lifting restriction substantially limits a major life activity. In *Wheaton*, this court explained when a lifting
(continued...)

2. I am severely limited in the time I can enjoy during a day. In other words, if I spend a period of time, such as an eight hour day at work, I can no longer participate with family or do any other activities for the remainder of that 24 hour day. I cannot go to school activities for my children, I cannot [sic] recreational activities with my family. I can pretty much do nothing other than rest and recuperate.

3. I am also restricted with respect to having an enjoyable sexual relationship with my wife. I am limited both

⁴(...continued)

restriction meets this criterion:

The Eighth Circuit Court of Appeals recently concluded that “a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA.” *Snow [v. Ridgeview Med. Ctr.]*, 128 F.3d [1201,] 1207 [(8th Cir. 1997)]. However, this is not a *per se* rule regarding all lifting restrictions; rather, it is a *per se* [rule] regarding 25 pound lifting restrictions. In *Snow*, the physician imposed a 25 pound lifting restriction. The court held that this lifting restriction, without additional evidence, did not demonstrate that the plaintiff was substantially limited in the major life activity of lifting, and therefore, the lifting restriction was insufficient to constitute a disability within the meaning of the ADA. In reaching its conclusion, the Eighth Circuit Court of Appeals relied on *Aucutt*, which similarly held that a 25 pound lifting restriction, without additional evidence, did not constitute a disability within the meaning of the ADA. *Snow*, 128 F.3d at 1207. Thus, the Eighth Circuit Court of Appeals has clearly indicated that a 25 pound lifting restriction will not, by itself, be sufficient to constitute a disability within the meaning of the ADA. . . .

Wheaton, 66 F. Supp. 2d 1062-63. It is indisputable that if a 25-pound lifting restriction, without more, is insufficient to constitute a disability within the meaning of the ADA, Knutson’s 35-pound lifting restriction similarly could not pass muster for this purpose.

with respect to the hernia repair that I had in the past and with respect to limitations of pain related to prior back injuries. Although on occasion I can successfully have intercourse with my wife. It is extremely rare and interrupted either due to pain or actual inability to perform. Largely sexual activity with my wife is unsuccessful.

4. In the past hunting played an extremely important part in my life. Now I have a total inability to hunt for two different reasons. I am not capable of walking to get to a hunting site and I can no longer use my left arm to lift a gun to be able to shoot.

5. I have a substantial limitation with respect to being able to do anything outdoors. Waling is severely impaired due to limitations created by pain stemming from my prior back injuries. I can no longer do house repairs. I cannot do any sports or other active activities with my son. I have no opportunity for recreation. I am relegated to doing only those things outdoors that require very sedentary activities. For instance, I can get into a boat and sit, at least for a short period of time and can fish if the boat is trolling. I am able to fish from the bank of a stream but have to provide a chair to sit in, if I stand it is for short periods of time.

Knutson Aff. at ¶¶ 2-5.

In seeking to define the term “substantially limits” under the ADA, the Eighth Circuit Court of Appeals looks to the regulations implementing the ADA:

[T]he EEOC regulations state that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment, (ii) its duration or expected duration, and (iii) its actual or expected long-term impact. 29 C.F.R. § 1630.2(j)(2).

Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (citations omitted); see *Toyota Motor*, 122 S. Ct. at 690. ADA regulations, as well as ADA interpretive guidance, make clear that temporary, minor injuries do not “substantially limit”

a person's major life activities. 29 C.F.R. § 1630.2(j), 29 C.F.R. pt. 1630, App. § 1630.2(j). In addition, the Supreme Court has held that the determination of whether an individual is substantially limited in a major life activity "is an individualized inquiry" that must take into account mitigating measures such as medicines and assistive devices. *Sutton*, 527 U.S. at 483-84.

Because the ADA does not define "major life activities," the Eighth Circuit has been guided by the definition provided in 29 C.F.R. § 1630.2 of the EEOC regulations implementing Title I of the ADA. *See Aucutt*, 85 F.3d at 1319. As the court observed in *Aucutt*:

As defined in 29 C.F.R. § 1630.2(I), the phrase "major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Aucutt, 85 F.3d at 1319; *Webber v. Strippit, Inc.*, 186 F.3d 907, 910 (8th Cir. 1999). Under the EEOC's interpretations of the ADA,

"Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

29 C.F.R. pt. 1630, App. § 1630.2(I) (citation omitted). The Eighth Circuit also has considered major life activities to include sitting, standing, lifting, and reaching. *See Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 946 (8th Cir. 1999).

The EEOC's Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, App. § 1630.2(j), provides:

[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as

compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

29 C.F.R. pt. 1630, app., 1630.2(j); see *Walsted*, 113 F. Supp. 2d at 1327-28.

In *Toyota Motor*, the United States Supreme Court addressed the question of "what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks." *Toyota Motor*, 122 S. Ct. at 691. After analyzing the terms "substantial" and "major," the Court held "that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." *Id.* Moreover, "[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.'" *Id.* at 691-92 (quoting *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999)). This definition "makes clear that Congress intended the existence of a disability to be determined in such a case-by-case manner." *Id.* at 692. "An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Id.*

Using these standards, the court must determine whether Knutson has presented a genuine issue of material fact as to whether his back condition and hernia substantially limits him in a major life activity. Knutson contends that his physical impairments have

impaired his ability to have sexual relations with his wife.⁵ The court notes that a number of courts have had little trouble finding that "sexual relations" is a major life activity. See *McAldin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that "engaging in sexual relations, just like procreation, is a major life activity. . . . [S]exuality is important in how 'we define ourselves and how we are perceived by others' and is a fundamental part of how we bond in intimate relationships.") (quoting *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999)); *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 959 (E.D. Mo. 2002) (holding that "[r]eproduction and sexual relations are major life activities. . ."); *Praseuth v. Newell-Rubbermaid, Inc.*, ___ F. Supp. 2d ___, 2002 WL 1586392, at *25 (D. Kan. Jul. 18, 2002) (noting that "sexual intercourse and reproduction are recognized as major life activities."); *Keller v. Board of Educ. of the City of Albuquerque*, 182 F. Supp.2d 1148, 1155 (D.N.M. 2001) (finding that "[s]exual intercourse and reproduction are recognized as major life activities."); *Hiller v. Runyon*, 95 F. Supp. 2d 1016, 1021 (S.D. Iowa 2000) (holding that plaintiff's cancer-related condition's long-term effects limited the major life activities of sexual relations and reproduction); *Saunders v. Webber Oil Co.*, No. 99-246, 2000 WL 1781835, at *6 (D. Me. November 17, 2000) (holding that sexual relations is a major life activity and noting, "[t]hat engaging in normal sexual relations is of relatively great importance to the vast majority of

⁵Knutson also asserts in his affidavit that he is no longer able to hunt and suffers from physical fatigue after working an eight hour shift. Hunting does not qualify as a major life activity. See *Barnard v. ADM Milling Co.*, 987 F. Supp. 1337, 1342 (D. Kan. 1997) (holding that recreational activities such as "fishing competitively" and "bow hunting" are not major life activities); cf. *Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999) (holding that shoveling snow, gardening, mowing the lawn, playing tennis, fishing, and hiking did not qualify as major life activities). Knutson's allegations of fatigue fail to disclose what specific major life activities are impaired by that condition. The court therefore concludes that these other allegations in Knutson's affidavit do not reveal a major life activity which is impaired by his physical infirmities.

the population requires only the application of common sense.”); *Cornman v. N.P. Dodge Mgmt. Co.*, 43 F. Supp.2d 1066, 1072 (D. Minn. 1999) (holding that “an impairment which impedes, limits, or otherwise negatively affects a person's sexual relations in a substantial way may be considered a disability under the ADA.”); *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 775 n.24 (E.D. Tex. 1996) (holding that AIDS impairs the major life activity of "engag[ing] in intimate sexual relationships"); *cf. Contreras v. Suncast Corp.*, 237 F.3d 756, 764 (7th Cir. 2001) (noting that although the court of appeals had not decided question of whether sexual relations are a major life activity, it would assume so for purposes of the case); *Runnebaum v. NationsBank*, 123 F.3d 156, 170-71 (4th Cir. 1997) (en banc) (same); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992) (holding that "sexual contact" is a major life activity under the Rehabilitation Act of 1973).

Thus, Knutson’s affidavit would appear to generate a genuine issue of material fact regarding whether his physical impairments have impaired a major life activity. AGP counters that Knutson did not mention sexual dysfunction, recreational limitations, or post-work fatigue in his answers to interrogatories.⁶ Consequently, Knutson’s affidavit also raises the issue of whether an affidavit that is in direct contradiction to prior interrogatory

⁶In part a of Interrogatory No. 14, AGP asked Knutson the following:

With regard to your claim that you have been discriminated against based upon your disability, set forth:

- a. All facts supporting your claim that you are disabled.

Defendant’s Interrogatory 14, Defendant’s Supp. App. 2. Knutson’s sworn response to this portion of interrogatory 14 stated: “See medical documentation contained in Plaintiff’s workers compensation file.” *Id.* The medical records provided by the parties are entirely silent on the question of Knutson’s sexual dysfunction.

answers is permitted to raise an issue of material fact.⁷ The Eighth Circuit Court of Appeals has held that a party cannot avoid summary judgment by contradicting his own earlier testimony. *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir. 1988); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983).⁸ As the court explained in *Wilson*:

a party should not be allowed to create issues of credibility by contradicting his own earlier testimony. Ambiguities and even conflicts in a deponent's testimony are generally matters for the jury to sort out, but a district court may grant summary judgment where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before. Otherwise, any party could head off a summary judgment motion by supplanting previous depositions ad hoc with a new affidavit, and no case would ever be appropriate for summary judgment.

Wilson, 838 F.2d at 289 (internal citations and quotation marks omitted).

⁷The court notes that AGP did not request relief such as a delay in ruling on the motion for summary judgment so that discovery could be reopened for the limited purpose of conducting discovery on Knutson's claim of sexual dysfunction.

⁸This court is no stranger to either the Eighth Circuit's decision in *Camfield* nor its application. This court has applied the *Camfield* decision in several of its prior published decisions. See generally *Waitek v. Dalkon Shield Claimants Trust*, 908 F. Supp. 672 (N.D. Iowa 1995) (holding that physician's affidavit created genuine issue of material fact even though it directly contradicted his prior deposition testimony where physician offered a plausible explanation for the change in his testimony); *Kunzman v. Enron Corp.*, 902 F. Supp. 882 (N.D. Iowa 1995) (holding that affidavits of two former co-workers would be considered and allowed to create a genuine or substantial factual issue, even though the plaintiff stated in his deposition that he was unaware of co-workers' knowledge, where the co-workers' affidavits specifically referred to a statement made in their presence and which the defendants had not challenged in any other manner); *Rowson v. Kawasaki Heavy Indus., Inc.*, 866 F. Supp. 1221 (N.D. Iowa 1994) (holding that belated affidavit could be considered where affiant's memory was recently refreshed by photographs which he had not been shown during deposition).

In explaining its rationale for its holding in *Camfield Tires*, the Eighth Circuit Court of Appeals observed:

The very purpose of summary judgment under Rule 56 is to prevent "the assertion of unfounded claims or the interposition of specious denials or sham defenses. . . ." 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (1983). If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. . . .

We emphasize that the strong remedy of summary judgment is to be reserved for those cases in which there is no genuine material issue of fact for determination. It is a procedure that is of great value in eliminating the sham and frivolous case. If testimony under oath, however, can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment. A party should not be allowed to create issues of credibility by contradicting his own earlier testimony.

Camfield Tires, 719 F.2d at 1365-66. The Eighth Circuit Court of Appeals has recognized a narrow exception to the rule established in *Camfield Tires*. A party's contradictory affidavit can raise a legitimate factual issue only if (1) "the alleged inconsistency created by the affidavit existed within the deposition itself" and (2) the contradictory affidavit adequately explains why the deposition testimony is in conflict with the affidavit. *Camfield Tires*, 719 F.2d at 1364; see *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 402 (8th Cir. 1995). Here, Knutson has offered no explanation in his affidavit for why he failed to mention his sexual dysfunction when responding to AGP's interrogatories.

The *Wilson* and *Camfield Tires* decisions, however, involved different situations from the one posed by the case before the court. In both the *Wilson* and *Camfield Tires* cases the plaintiffs sought to create a triable issue by submitting an affidavit contradicting their own

earlier testimony. *Wilson*, 838 F.2d at 289; *Camfield Tires*, 719 F.2d at 1365. Here, in contrast, Knutson seeks to create a triable issue by submitting an affidavit which supplements the response given to an interrogatory in this case. Because AGP's interrogatory did not specifically ask what major life activities were effected by Knutson's physical infirmities, Knutson's affidavit does not explicitly contradict his prior interrogatory answer. This is particularly true here where the interrogatory only sought general information regarding Knutson's disability claim and did not ask specifically about what major life activities were impacted by his physical infirmities. Knutson's affidavit contains additional information not contained in his answer to AGP's interrogatory. Thus, the court concludes that the principles underscoring the *Wilson* and *Camfield Tires* decisions should not be extended to the facts of this case where the plaintiff has proffered an affidavit that contains additional information not previously disclosed in his sworn answers to interrogatories. The court concludes that that this situation is better dealt with through the Rules of Evidence, which allow the use of interrogatory answers for impeachment purposes. Consequently, the court concludes that Knutson has presented sufficient evidence to generate a material question of fact as to whether the nature, duration, and long-term impact of his medical problems caused him to be substantially limited in a major life activity. More specifically, the court concludes that Knutson has generated a genuine issue of material fact that he is substantially limited in the major life activity of sexual relations.⁹ Therefore, the court concludes that AGP is not entitled to summary judgment on the ground that Knutson was not substantially limited in any major life activities.

⁹The court further concludes that while it seriously questions whether defendant APG has met its burden, as a moving party under Rule 56(c), of sufficiently raising the issue of pretext at the third-stage of the *McDonnell Douglas* burden-shifting analysis, it nevertheless finds that Knutson has met his burden of producing sufficient evidence to generate a material question of fact as to whether AGP's proffered reason for its employment action was merely a pretext for discrimination.

2. Knutson's record of disability claim

AGP also contends that Knutson does not have a record of impairment sufficient to qualify him as disabled for the purposes of the ADA. "The ADA does proscribe discrimination based upon a documented history of having a physical or mental impairment that substantially limits one or more of the major life activities." *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 794 (2000). AGP argues that Knutson's work restrictions were temporary and given only to permit him to recuperate from his back surgery. A temporary disability while recuperating from surgery is generally not considered a disability under the ADA. *Gutridge v. Clure*, 153 F.3d 898, 901- 902 (8th Cir. 1998) (holding that disability under the ADA requires permanent or long-term impairments, and impairments while recovering from surgery are not evidence of a permanent disability), *cert. denied sub nom. Gutridge v. Midland Computer, Inc.*, 526 U.S. 1113 (1999); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (holding that plaintiff who suffered from temporary back injury was not disabled for purposes of the ADA because "it is evident that the term 'disability' does not include temporary medical conditions"); *McDonald v. Pennsylvania, Dep't of Public Welfare*, 62 F.3d 92, 96-97 (3rd Cir. 1995) (holding that recuperation after abdominal surgery not disability); *Evans v. City of Dallas*, 861 F.2d 846, 852-53 (5th Cir. 1988) (holding that knee injury that required surgery not disability). Rather, the Eighth Circuit Court of Appeals has held that, "[i]n order to have a record of disability under the ADA, a plaintiff's medical documentation must show that [s]he has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities." *Weber*, 186 F.3d at 915; *see also Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000). While Knutson's back injuries "are evidence of a history of an impairment, they are not evidence of a history of a disability." *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999) (concluding plaintiff's allergy did not substantially limit her ability to eat or breathe--major life

activities) (quoting *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996)). The medical records that Knutson directs the court's attention to are devoid of any mention that Knutson's physical infirmities were causing him sexual dysfunction. The court, therefore, concludes that Knutson has failed to demonstrate that defendant AGP was under the belief, based upon any medical records or reports made known to it, that Knutson was "disabled" within the meaning of the ADA. Therefore, his claim of disability must fail on this ground. The court concludes that AGP is entitled to summary judgment on Knutson's claim that he was discriminated against based upon a record of disability. The court turns next to an analysis of Knutson's perceived disability discrimination claims.

3. *Knutson's perceived disability claim*

Plaintiff Knutson also alleges a claim of perceived disability discrimination under 42 U.S.C. § 12102(2)(C). The Supreme Court has interpreted this section of the ADA as follows:

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Sutton v. United Air Lines, 527 U.S. 471, 489 (1999).

Although AGP requested summary judgment, in its motion for summary judgment, on Knutson's claim of perceived disability discrimination, AGP did not brief this issue in its brief filed in support of its motion. Rather, AGP first addressed this issue in its reply brief. As a result, the court concludes that AGP has failed to meet its burden as the moving

party under Rule 56(c) “of informing the district court of the basis for [its] motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323); *see also Rose-Maston*, 133 F.3d at 1107; *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). Therefore, the court concludes that AGP is not entitled to summary judgment on Knutson’s perceived disability discrimination claims. The court turns next to an analysis of Knutson’s claim of retaliatory discharge in violation of public policy under Iowa law.

D. Retaliatory Discharge In Violation Of Public Policy

1. Analytical framework

AGP also moves for summary judgment on Knutson’s claim that AGP wrongfully discharged him in violation of public policy as a result of his filing a claim for workers’ compensation benefits. In *Springer v. Weeks & Law Enforcement Officer Co.*, 429 N.W.2d 558 (Iowa 1988) (“*Springer I*”), the Iowa Supreme Court “recognized a common law tort action for retaliatory discharge based on the filing of a workers’ compensation claim by an at-will employee.” *Conaway v. Webster City Prods. Co.*, 431 N.W.2d 795, 796 (Iowa 1988) (citing *Springer I*, 429 N.W.2d at 560); *see also Niblo v. Parr Mfg.*, 445 N.W.2d 351, 352-53 (Iowa 1989); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 455 (Iowa 1989) (retaliatory discharge creates liability in tort when the discharge is against public policy); *Engstrom v. State*, 461 N.W.2d 309, 314 (Iowa 1990) (same); *French v. Foods, Inc.*, 495 N.W.2d 768, 771 (Iowa 1993) (recognizing retaliatory discharge as a common-law tort). “A claim of retaliatory discharge under Iowa law requires a prima facie showing that (1) the employee engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse action.” *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001) (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998)).

Although the Iowa Supreme Court has not squarely addressed this issue, it appears to this court that a common-law retaliatory discharge claim is subject to a burden-shifting analysis.¹⁰ See *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998) (affirming jury verdict in favor of plaintiff on wrongful discharge claim in violation of public policy and stating that the plaintiff countered the defendant’s legitimate reason for dismissal with evidence of pretext). This conclusion is logical because the elements of claims for termination in violation of public-policy and for statutory retaliatory discharge are nearly identical, differing only in the source of the protected activity, *i.e.*, common-law versus statutory. The Iowa Supreme Court clearly applies the burden-shifting analysis to statutory retaliation discharge claims, and, therefore, it is highly likely the court would apply this same analysis to common-law retaliatory discharge claims. Compare *Fitzgerald*, 613 N.W.2d at 281 (elements of discharge in violation of public policy are: “(1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge”) (citing *Teachout*, 584 N.W.2d at 299), with *City of Hampton v. Iowa Civil Rights Comm’n*, 554 N.W.2d 532, 536 (Iowa 1996) (applying burden-shifting analysis to retaliatory discharge

¹⁰In *Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978, 1007 (N.D. Iowa 2001), this court stated that “the Iowa Supreme Court has explained that a common-law claim of retaliation is . . . subject to a burden-shifting analysis.” However, upon further review, the court recognizes that it may have overstated the holdings of the Iowa Supreme Court decisions cited in support of this proposition. Those cases dealt with claims of statutory retaliation, and the Iowa Supreme Court has, in fact, not ruled directly on the question of whether common-law retaliation claims are subject to the *McDonnell Douglas* burden-shifting paradigm. See *City of Hampton*, 554 N.W.2d at 536 (holding discharge in retaliation for filing sex discrimination claim in violation of Iowa law is subject to burden-shifting analysis); *Yockey*, 540 N.W.2d at 422 (citing *Hulme I* and describing application of burden-shifting analysis to age discrimination claims but declining to rule on its application to common-law retaliation claims); *Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989) (*Hulme I*) (applying burden-shifting analysis to retaliation claim for filing age discrimination complaint).

claim and outlining elements as: “(1) involvement in statutorily protected activity, (2) adverse employment action, and (3) a causal connection between the two”) (citing *Hulme v. Barrett*, 480 N.W.2d 40, 42 (Iowa 1992) (*Hulme II*)).

Furthermore, the Iowa Supreme Court has consistently sought guidance in its common-law retaliatory discharge cases from its decisions involving claims of statutory retaliation, which further demonstrates that the Iowa Supreme Court would analyze these distinct causes of action in a similar manner. *See generally Teachout*, 584 N.W.2d at 299, 301, 302 (citing *Hulme II* in support of elements of claim and for proposition that causation standard in common-law retaliatory discharge case is high and stating *City of Hampton* was helpful in analyzing causation element). What is more, Iowa district courts have also applied the burden-shifting analysis to common-law retaliatory discharge claims. *See e.g., Motta v Olsten Staffing Servs.*, 1996 WL 766793 (Iowa Dist. Nov. 20, 1996).

Under this burden-shifting analysis, the plaintiff has the burden to establish a *prima facie* case of discrimination. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). If the plaintiff carries this burden, a presumption of retaliation arises, and the burden of production then shifts to the defendant to come forward with a legitimate, lawful reason for its action. *See id.* If the defendant, in turn, meets this burden, the plaintiff, who at all times retains the burden of proving the elements of the claim, then has the burden to prove the employer’s proffered reason is pretextual. *See id.*; *accord Richards v. Farner-Bocken*, 145 F. Supp. 2d 978, 1007 (N.D. Iowa 2001) (applying burden-shifting analysis to wrongful discharge in violation of public policy claim); *Fitzgerald*, 613 N.W.2d at 282 (describing elements of wrongful discharge claim and stating “to withstand summary judgment a plaintiff must not only satisfy the court on the public policy and jeopardy elements of the tort, but offer adequate evidence from which a lack of justification for termination can be inferred”).

2. Protected activity

Iowa law recognizes a common-law exception to the general rule of at-will employment when an employee's discharge is in clear violation of a well-established and well-defined public policy. *See, e.g., Fitzgerald*, 613 N.W.2d at 281 (outlining history of at-will employment doctrine and exceptions recognized in Iowa) (citing *French v. Foods, Inc.*, 495 N.W.2d 768, 769-71 (Iowa 1993) (employee handbook may create unilateral contract); *Springer*, 429 N.W.2d at 560 (narrow public policy exception adopted); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454,455 (Iowa 1978) (first recognizing the possibility of public policy exception). In this case, it is undisputed that Knutson made a claim for workers' compensation benefits in connection with his alleged work-related injury, which is protected activity under *Springer* and its progeny. *See Springer*, 429 N.W.2d at 560; *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990); *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 353 (Iowa 1989). Thus, there is no dispute as to the existence of the first element of Knutson's discharge in violation of public policy claim.

3. Adverse employment action

The next element of Knutson's *prima facie* case of retaliatory discharge is also undisputed: that his employment with AGP was terminated. However, a plaintiff who alleges retaliatory discharge in violation of public policy must not only have engaged in protected conduct and have been terminated; his discharge must be causally connected to his participation in a protected activity. *E.g., Fitzgerald*, 613 N.W.2d at 289. The crux of the factual issue in this case is whether Knutson has generated a genuine issue of material fact with respect to the third prong of his *prima facie* case of wrongful discharge. Accordingly, the court will turn its attention to this last element.

4. Causal connection

As stated, the final element of a *prima facie* case of wrongful discharge in violation of public policy is a showing that the protected conduct, here, Knutson's filing of a workers' compensation claim, caused AGP to terminate his employment. *See id.* "The protected

conduct must be the determinative factor in the decision to terminate the employee.” *Id.* (citing *Teachout*, 584 N.W.2d at 300-01). “A factor is determinative if it is the reason that ‘tips the scales decisively one way or the other,’ even if it is not the predominant reason behind the employer’s decision.” *Teachout*, 584 N.W.2d at 302 (quoting *Smith v. Smithway Motor Xpress Inc.*, 464 N.W.2d at 686); *see also Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 412 (Iowa 1995) (“An essential element of the claim is a showing concerning the employer’s specific motivation in firing; it must appear that the discharge was prompted by the filing of the workers’ compensation claim.”). While the causation standard is high, it generally “presents a question of fact. Thus, if there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute.” *Fitzgerald*, 613 N.W.2d at 289 (citing 2 HENRY H. PERRIT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.21, at 54 (4th ed. 1998)). Further, in ruling on a motion for summary judgment, the court’s role is not to determine whether the plaintiff will prevail at trial; the court merely must ascertain whether the plaintiff has generated genuine issues of material fact. *Cf. Quick*, 90 F.3d at 1376-77; *Johnson*, 906 F.2d at 1237.

Knutson argues there are genuine issues of material fact concerning whether AGP’s decision to terminate him was because he filed a claim for workers’ compensation benefits. Knutson’s argument, however, centers on whether he has cast doubt on AGP’s stated reason for dismissing him. This argument, although well articulated, is misplaced, because without a showing of causation, which is an element of Knutson’s *prima facie* case, the “pretext” phase of the burden-shifting analysis is not implicated. Yet, Knutson seeks to establish causation precisely by showing pretext. The only other evidence, other than pretext, that Knutson presents to show causation is that the timing of Knutson’s discharge is suspect. The parties do not dispute that Knutson was terminated on the day he returned from being off for back surgery. Standing alone, this temporal component of Knutson’s evidence would be insufficient to establish causation at trial. Moreover, because Knutson

was not terminated until March 8, 2000, some eight months after filing his final workers' compensation claim, the court does not view the adverse employment action here to be so closely on the heels of protected activity as to constitute a significant factor in generating a genuine issue of material fact on the plaintiff's *prima facie* case of wrongful discharge in violation of public policy. *Cf. Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978, 1007 (N.D. Iowa 2001) (requiring "something more" beyond temporal proximity to generate a genuine issue of material fact on causal element of claim of wrongful discharge but finding that evidence of pretext qualified as that "something more") (citing *Webner v. Titan Distrib., Inc.*, 101 F. Supp. 2d 1215, 1230 (N.D. Iowa 2000), which held that five days between protected activity and adverse action was sufficient to establish a causal connection for purposes of a *prima facie* case of wrongful discharge, *aff'd in part, rev'd in part and remanded by*, 267 F.3d 828 (8th Cir. 2001); and *Hansen v. Sioux By-Prods.*, 988 F. Supp. 1255, 1257-58 (N.D. Iowa 1997), which held that termination the same day that the plaintiff was injured at work and reported the injury satisfied the requirements of the *prima facie* case).

The circumstances surrounding Knutson's termination does not lend itself to an inference of retaliatory motive, which is the "something more" than temporal proximity that Knutson has offered to generate a genuine issue of material fact on the causal element of his claim of retaliatory discharge. *Cf. Clarey v. K-Products, Inc.*, 514 N.W.2d 900, 903 (Iowa 1994) (evidence of employer's harassment of other employees who filed workers' compensation claims admissible to show motive). On the present record, therefore, the court concludes that Knutson has failed to generate a genuine issue of material fact on whether his workers' compensation claim was the determinative factor in AGP's decision to dismiss him, in violation of Iowa public policy. Because Knutson has failed to generate a genuine issue of material fact on his *prima facie* case of wrongful discharge, the court grants AGP's motion for summary judgment on Knutson's claim of retaliatory discharge.

III. CONCLUSION

Initially, because the court concludes that Knutson has generated genuine issues of material fact as to whether he suffers from a qualifying disability within the meaning of the ADA and the ICRA, the court denies AGP's Motion For Summary Judgment on Knutson's claim that he was discriminated against because of an actual disability. In addition, because AGP has failed to meet its burden as the moving party under Rule 56(c) of informing the court of the basis for its motion with respect to Knutson's perceived disability discrimination claims, the court denies AGP's Motion for Summary Judgment as to Knutson's perceived disability discrimination claim. Because the court has concluded as a matter of law that Knutson does not have a record of a qualifying disability, the court grants AGP's Motion For Summary Judgment on Knutson's claim that he was discriminated against based upon a record of having a disability. Finally, the court concludes that Knutson has not generated genuine issues of material fact on his claim that he was discharged in violation of public policy. Therefore, the court grants AGP's Motion For Summary Judgment on Knutson's claim that he was discharged in violation of public policy.

IT IS SO ORDERED.

DATED this 29th day of October, 2002.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA