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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

DOUG KERKERING, HANNAH THIBODO, and WANDA ROZWADOWSKA,

Plaintiffs,

vs.

NIKE, INC.,

Defendant.

Case No. 3:22-cv-01790-YY

Hon. Youlee Yim You

PLAINTIFFS' OPPOSITION TO NIKE'S MOTION TO DISMISS AMENDED COMPLAINT

Complaint filed: November 15, 2022

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Plaintiffs Doug Kerkering, Hannah Thibodo and Wanda Rozwadowska ("Plaintiffs") oppose the motion to dismiss filed by Defendant NIKE, Inc., their former employer.

INTRODUCTION

Plaintiffs are former NIKE employees. They worked at NIKE's Corporate Headquarters in Beaverton. They were fired because they did not have the COVID-19 shot in their body. They were denied reasonable accommodations, including remote work (despite working remotely since March 2020) and were repeatedly pressured to get the shot, against their will (and, in the case of Ms. Rozwadowska, her religious beliefs).

Plaintiffs brought this case to challenge NIKE's actions under federal law. NIKE's motion to dismiss the case should be denied for three reasons.

First, Plaintiffs alleged facts which, accepted as true and liberally construed in their favor, suggest that NIKE viewed unvaccinated employees as having a perceived disability: inferior protection against the virus that causes COVID-19. That is a physiological condition that, under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act, can qualify for protection in the workplace.

Plaintiffs also alleged that, regardless of their physiological condition, they could perform the essential functions of their jobs with or without a reasonable accommodation. That is all that matters at this early stage of litigation. NIKE's arguments focus on the merits, including affirmative defenses like the bona fide occupational qualification rule, which it must plead and prove. Those arguments are not proper at this stage.

Second, Ms. Thibodo also alleged that she has an actual disability, an underlying physiological condition, that prevented her from taking the COVID-19 shots. NIKE knew about that condition (indeed, NIKE had placed Ms. Thibodo on disability leave because of her condition) but NIKE made no effort to accommodate her. Thus, the amended complaint also states a claim for discrimination based on an actual disability for Ms. Thibodo.

Third, Ms. Rozwadowska alleged facts sufficient to state a claim for religious discrimination

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under Title VII. It does not matter that she eventually took the COVID-19 shot, under duress because she needed to save her job, or that NIKE belatedly granted her request for a religious accommodation. NIKE denied Ms. Rozwadowska's request for an accommodation twice. It denied her request despite granting similar requests from similarly situated employees. It denied her request despite knowing the stress those denials put on Ms. Rozwadowska, who could not afford to lose her job and who waited until the last minute (literally) to get the COVID shot. Under settled law, those facts state a plausible claim for religious discrimination under a failure to accommodate and disparate treatment theories.

NIKE rescinded its COVID vaccination policy last fall, less than a year after announcing it. It never required that its employees get the COVID booster shots. And it chose not to enforce the vaccine policy on wide swaths of its workforce, including NIKE distribution in and outside Oregon, manufacturing offices and retail stores. That only makes this situation worse. All NIKE had to do was allow Plaintiffs to continue working remotely for a few more months until the "mandate" debate passed, as it did during the Fall of 2022. If NIKE had done that, Plaintiffs would still be gainfully employed. Instead, they lost their jobs, their careers, including decades of experience and goodwill they had earned at the company.

This case should proceed to discovery and be decided on the merits. NIKE's motion should be denied.

ALLEGATIONS IN THE AMENDED COMPLAINT

Plaintiffs previously worked for NIKE, at its Corporate Headquarters in Beaverton. Amended Complaint ("Am. Compl."), ¶ 7. Collectively, they spent decades working for the company. *Id.*

Until the COVID-19 pandemic, Plaintiffs were highly successful employees who served in senior roles at NIKE and earned six-figure salaries. *Id.*, ¶ 8. They had no record of discipline. *Id.* But two of them, Mr. Kerkering and Ms. Thibodo, were fired because they did not comply with NIKE's mandatory COVID-19 vaccine policy. *Id.*, ¶¶ 18, 25. Ms. Rozwadowska was twice denied an accommodation for her sincerely held religious objection to vaccination—an accommodation she

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was entitled to—and was threatened with the same fate of termination. *Id.*, ¶¶ 16, 34. Under duress and against her will, at the last minute and while facing imminent termination, she got the COVID shot. *Id.*, ¶ 34. Only after that did NIKE belatedly acknowledge its duty to accommodate her religious beliefs. *Id*.

At this point, not much is known about NIKE's decision to adopt and enforce the mandatory COVID vaccination policy. During the summer of 2021, some employers, including Google, Walmart and The Walt Disney Company, required that their employees take one of the COVID-19 vaccines developed by Pfizer, Moderna and Johnson & Johnson. *Id.*, ¶ 9. Some government employers also ordered that their employees get one of the shots. *Id.* They did so because, at the time, public health officials said the vaccines would prevent people from being infected with, or spreading, COVID-19. *Id.* President Joe Biden made that especially clear when he said in a July 2021 town hall: "You're not going to get COVID if you have these vaccinations." *Id.*

NIKE did not fall into this group. It issued its mandatory COVID vaccination policy on October 9, 2021. *Id.*, ¶ 12. By that point, it was clear that the COVID-19 vaccines did not prevent people from contracting or spreading the virus. In fact, the head of the Centers for Disease Control admitted during an August 2021 interview that the vaccinated could contract and spread COVID-19. *Id.*, ¶ 10. Many did. Thus, by the Fall of 2021, the message had changed. Getting the vaccine would not prevent people from contracting or spreading COVID-19 but it might protect them from severe illness or death. *Id.*, ¶ 11.

That is what NIKE knew when it issued its mandatory COVID vaccine policy. The policy itself, which NIKE attached to its motion, stated only that NIKE was "committed to maintaining a safe and healthy workplace." ECF 19-2. Although the policy stated that NIKE was only requiring vaccination for those employees "whose roles require they report to an Office" the company defined the term "office" broadly to include virtually every inch of real estate occupied by NIKE. *Id.* It also stated that employees "who have a remote-only arrangement must comply with, and are covered by, this Policy." *Id.*

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NIKE's COVID vaccine policy was unprecedented. NIKE had never required that individuals get a shot as a requirement for employment. Am. Compl., ¶ 12. It never even inquired about such private medical information before the COVID-19 pandemic. *Id.* And it only enforced the policy at its Beaverton headquarters, allowing thousands of unvaccinated employees to continue working at other NIKE facilities, including some in Oregon. *Id.*, ¶ 14.

The amended complaint alleges that NIKE adopted the vaccine policy in response to political pressure, including pressure from some employees at its corporate headquarters in Beaverton who viewed COVID vaccination as a sign of one's political views. *Id.*, ¶ 13. The policy itself supports that view, as it references only "public health guidance" for its justification.

This political pressure was further reflected in the way NIKE implemented the vaccine policy. For example, it demanded nearly universal vaccination at the Beaverton headquarters but it did not apply the policy at all in nearby distribution and manufacturing offices or in its retail stores. *Id.*, ¶ 14. It refused to accommodate religious and medical accommodations for people who worked at the Beaverton headquarters—even people who had been working remotely and could have continued to do so—while liberally granting them for people who worked outside the main campus. *Id.*

NIKE pledged to fulfill its duty to accommodate employees with sincerely held religious objections and other reasons for not taking the COVID-19 shots. But, as a practical matter, that did not happen. For example, NIKE denied Ms. Rozwadowska's request for a religious accommodation twice. *Id.*, ¶ 16. It did so without making any effort to determine whether it could accommodate her religious objection to vaccination without undue burden (it could have). *Id.*

That was just part of the problem, though. By the Fall of 2021, NIKE's mandatory vaccination policy was nonsensical on its face. Having an injection inside one's body had no bearing on the tasks that Plaintiffs performed for the company. *Id.*, ¶ 17. And since the COVID shots do not prevent infection or transmission, NIKE could not plausibly claim that unvaccinated employees pose a direct threat to their co-workers. *Id.*

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Essentially, NIKE viewed its un-vaccinated employees as having inferior immune systems. *Id.*, ¶ 18. They did not protect themselves as well as their vaccinated colleagues and thus might have gotten sicker if they got infected with the COVID virus, a perceived physical disability protected from discrimination. *Id.*

Meanwhile, Ms. Thibodo had an actual disability, an immune condition, that prevented her from taking the COVID shot. *Id.* NIKE was aware of that disability; in fact, it placed Ms. Thibodo on a form of disability leave which included her working reduced hours through June 15, 2022. *Id.* But NIKE made no effort to accommodate her disability as it related to her inability to take the COVID-19 shot and it fired her to avoid having to accommodate her condition. *Id.*

Plaintiffs exhausted their administrative remedies. *Id.*, ¶ 20. During that process, as they and others complained to the Equal Employment Opportunity Commission ("EEOC"), NIKE backtracked. It rescinded the vaccine policy in October 2022. *Id.*, ¶ 19. This action followed.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

This is a low standard. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court does not weigh the evidence but must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). The goal is to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

This is especially important in civil rights and employment cases. A district court weighing a

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motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* at 563. If there is any doubt, leave to amend should be granted. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

ARGUMENT

NIKE's motion should be denied because, accepting its allegations as true, the amended complaint states a claim for relief under federal law.

A. The Complaint Alleges that NIKE Perceived the Plaintiffs as Having a Disability That Prevented Them from Doing Their Jobs.

The first claim seeks relief under the ADA for all Plaintiffs. It alleges, in part, that NIKE treated their lack of COVID vaccination as a disability that prevented them from working for the company.

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). "To state a prima facie case of employment discrimination under § 12112, a plaintiff must allege that (1) she is 'disabled' as defined by the ADA, (2) she is a 'qualified individual' as defined by the ADA, and (3) she suffered an adverse employment action on the basis of her disability." *Garcia v. Durham & Bates Agencies, Inc.*, No. 3:14-CV-00220-SI, 2014 WL 3746521, at *3 (D. Or. July 29, 2014). A "disability" is defined by the ADA as "a physical or mental impairment that substantially limits one or more major life activities ... a record of such an impairment ... or ... being regarded as having such an impairment." 42 U.S.C. §§ 12102(1)(A)-(C). A "qualified individual," meanwhile, is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The amended complaint alleges the three elements necessary to plead this claim, plus facts that explain why NIKE viewed them as having a disability and how they could perform the essential functions of their jobs with or without reasonable accommodation. Am. Compl., ¶¶ 23-26. NIKE does not contend otherwise. Instead, it argues that not having the COVID-19 vaccine in one's body

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cannot constitute a disability.

That argument misconstrues the facts as they were alleged in the amended complaint, and which must be accepted as true at this stage. Plaintiffs do not contend that being unvaccinated is an actual disability. They contend that NIKE *viewed* the unvaccinated as having a disability. It viewed them as having inferior protection against the COVID virus—inferior protection that, in NIKE's view, made them less healthy and thus unable to work at NIKE. *Id.*, ¶¶ 23-26.

NIKE did not argue otherwise in its motion. It can't. After all, if NIKE did not view the unvaccinated as having a physical impairment that prevented them from doing their jobs, why did it issue the vaccine policy? Why did it fire people who did not comply with the policy?

NIKE's argument also misconstrues the law, although there may be a good reason for that. "Prior to 2008," most federal courts "held that an employer 'regarded' an employee as disabled if '(1) the employer mistakenly believed that the employee had a physical impairment that substantially limit[ed] one or more major life activities, or (2) the employer mistakenly believed that an actual, nonlimiting impairment substantially limited one or more major life activities.'" *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 318 (6th Cir. 2019) (cleaned up) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)). Congress disagreed. Therefore, in 2008, it "amended the ADA to overturn *Sutton*" and eliminated its heightened pleading requirement. *Id.* "Congress took this action because it believed that *Sutton* (among other Supreme Court decisions) unduly narrowed the broad scope of protection intended to be afforded by the ADA, and thereby eliminated protection for many individuals whom Congress intended to protect." *Id.*

The new pleading standard reflects this broadening of perceived disability claims by allowing a plaintiff to state a claim "if the [employee] establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (emphasis added). The sole question is whether the employer treated the employee as having a physical or mental impairment "as that term is defined in federal regulations."

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Babb, 942 F.3d at 319.[1]

NIKE did treat Plaintiffs as having a physical or mental impairment. The ADA does not define the terms "physical or mental impairment" but the EEOC has interpreted that language broadly to mean "[a]ny physiological disorder or condition," including an "immune" condition. 29 C.F.R. § 1630.2(h). *Any* condition means *any* condition. There is no reason that having inferior immunity to the COVID-19 virus—or being perceived to have inferior protection—cannot qualify as a physiological condition under that broad definition.

It does not matter that no court has yet construed the lack of COVID vaccination to be an actual or perceived disability under the ADA. After all, the ADA's "regarded as" prong was developed with the understanding that "society's accumulated myths and fears about disability and disease are as handicapping as are the ... limitations that flow from actual impairment." *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987). Fears about what will happen to people who do not get the COVID shots fall squarely within this understanding, especially given the politicization of the issue (with, for example, the president blaming unvaccinated people for the continuation of the pandemic). Am. Compl., ¶¶ 8, 13-14.

The Ninth Circuit has not addressed this issue. NIKE cited three cases that rejected similar perceived disability claims brought during the COVID pandemic. One was brought by a *pro se* plaintiff who the district court found had "not plausibly alleged an actual disability, that Health Systems misclassified her as having a disability nor plausibly alleged that the Company regarded her as having a disability …." *Speaks v. Health Sys. Mgmt., Inc.*, No. 522CV00077KDBDCK, 2022 WL 3448649, at *6 (W.D.N.C. Aug. 17, 2022). Notably, the court explained that "Speaks specifically disclaims making any allegation that the Company 'regarded' her as being especially vulnerable to COVID-19 or likely to develop COVID-19 in the future." *Id.* at *5 n.7. Plaintiffs did allege such

[1] The employee also must prove that the employer terminated his or her employment because of the perceived impairment. NIKE did not challenge that element though. Nor could it, as Plaintiffs' failure to take the COVID-19 shot was the only reason it gave for terminating their employment. Am. Compl.,¶¶ 18, 25, 34.

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facts. Am. Compl., ¶¶ 23-26. Another case arose early in the pandemic and the plaintiff stated, only "in conclusory terms" that his employer "'considered [him] disabled and overly susceptible to the COVID-19 virus,' without any factual basis for this claim other than that Defendants replaced Plaintiff with a younger employee." *Hice v. Mazzella Lifting Techs., Inc.*, 589 F. Supp. 3d 539, 550 (E.D. Va. 2022). And while the Eleventh Circuit concluded that an employer's fear that an employee might contract Ebola on a trip to Africa did not amount to a perception of disability sufficient to violate Title VII, it did so only "where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future due to the voluntary conduct of overseas travel." *Equal Emp. Opportunity Comm'n v. STME, LLC*, 938 F.3d 1305, 1315 (11th Cir. 2019).[2]

The *STME* decision can be distinguished in several ways. Most importantly, the Eleventh Circuit emphasized that the plaintiff did not have the condition she was suing over (possible Ebola infection), whereas Plaintiffs do (they do not have the COVID vaccine in their bodies while others do). That comports with what the Ninth Circuit has said about the employer needing to "have regarded [the employee] as having a current impairment," a reading that "comports ... with the statutory text, which prohibits discrimination on the basis of an 'actual or perceived impairment' in the present tense …." *Equal Emp. Opportunity Comm'n v. BNSF Ry. Co.*, 902 F.3d 916, 923 (9th Cir. 2018).

NIKE also compares unvaccinated people to people who were infected with the COVID virus and sought relief under the ADA. Courts have rejected such claims because "having COVID-19 is generally 'transitory' and therefore not a disability under the ADA." *Lundstrom v. Contra Costa Health Services*, No. 22-CV-06227-CRB, 2022 WL 17330842, at *5 (N.D. Cal. Nov. 29, 2022). There is a good reason for that. A "transitory" impairment means one "with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). Not having the COVID-19 vaccine inside one's body is not temporary. It is a permanent condition, albeit a condition based on a

[2] The other case NIKE cited, *Parker v. Cenlar FSB*, No. CV 20-02175, 2021 WL 22828, at *6 (E.D. Pa. Jan. 4, 2021), contained no analysis of this issue.

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negative (*not* having something). More importantly, the "transitory and minor" exception is an affirmative defense that NIKE must plead and prove at trial. *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 435 (9th Cir. 2018). It cannot be decided at the pleading stage.

NIKE may also argue that COVID vaccination is a qualification standard, a basic safety requirement that everybody must meet. But discrimination under the ADA includes the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Moreover, the ADA "does not require that a person meet each of an employer's established 'qualification standards,' … indeed, it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly cannot meet because of his disability and that forms the very basis of his discrimination challenge." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 990 (9th Cir. 2007).

In any event, this argument is part of an affirmative defense that NIKE must plead and prove. *Id.* at 994-95. To do so, it "must show that [the qualification standard] substantially promotes the business's needs." *Id.* at 996 (cleaned up). This "standard is quite high, and is not to be confused with mere expediency." *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001) (cleaned up). "Even when 'physical fitness' is a selection criterion that is related to an essential function of the job … it 'may not be used to exclude an individual with a disability if that individual could satisfy the criterion with the provision of a reasonable accommodation." *Hendricks-Robinson v. Excel Corp*, 154 F.3d 685, 699 (7th Cir. 1998) (quoting 29 C.F.R. § 1630.7) (cleaned up).

Most importantly, this is a factual issue usually left to the jury to decide, even when the employer relies on a government issued safety standard. *Bates*, 511 F.3d at 998; *see also Equal Employment Opportunity Comm'n v. CTI, Inc.*, No. CV-13-1279-TUC-DCB, 2015 WL 11120707, at *10 (D. Az. May 8, 2015).

Finally, it makes no difference that millions of people have chosen not to take the COVID-19

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shots. A physiological condition does not lose legal protection simply because many people have it. After all, more than forty percent of Americans are obese, and many of those are morbidly obese. Centers for Disease Control, Adult Obesity Facts, https://www.cdc.gov/obesity/data/adult.html (last visited Jan. 25, 2023). But courts have concluded that obesity is a physiological condition that can be protected against discrimination in the workplace. *See Taylor v. Burlington Railroad Holdings, Inc.*, 801 F. App'x 477, 479-80 (9th Cir, 2020) (concluding that "a reasonable jury could find that Taylor's perceived disability (obesity) was a substantial factor in BNSF's hiring decision").[3] More than a million Americans are living with HIV. Kaiser Family Foundation, The HIV/AIDS Epidemic in the United States: The Basics, https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/ (June 7, 2021). But HIV is a physiological condition that can be protected against discrimination in the workplace. *Bollinger v. State Ins. Fund*, 44 F. Supp. 2d 467, 479 (N.D.N.Y. 1999).

Congress enacted the ADA to ensure that *any* person who can perform the essential functions of a job has the right to do so. Plaintiffs alleged that they could do that—indeed, they were doing that throughout the COVID pandemic. Am. Compl., ¶¶ 24, 26. Therefore, this claim should be decided on the merits.

B. NIKE Knew Why Ms. Thibodo Could Not Take the Covid Shot.

Ms. Thibodo could not take the COVID-19 shot due to an underlying physical condition, an actual disability that requires additional protection under the ADA. Am. Compl., ¶ 26. NIKE argued that this claim fails because Ms. Thibodo did not plead that she told NIKE about her condition. That is wrong. The amended complaint alleges specifically that "Ms. Thibodo had an actual disability, an immune condition, that prevented her from taking the COVID shot. NIKE was aware of that disability; in fact, it placed Ms. Thibodo on a form of disability leave which included her working

[3] Some courts have held that "claimants under the ADA must show that their severe obesity is caused by an underlying physiological disorder or condition [as opposed to just eating too much]." *Richardson v. Chicago Transit Authority*, 292 F. Supp. 3d 810. 818 (N.D. Ill. 2017). They did this over the EEOC's objection and despite guidance issued during the Obama Administration that said otherwise.

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reduced hours through June 15, 2022." Am. Compl., ¶ 18. The complaint also alleges that NIKE "made no effort to accommodate [Ms. Thibodo's] disability as it related to her inability to take the COVID-19 shot and it fired her to avoid having to accommodate her condition." *Id.*

Nothing more is required. "Rule 8(a) does not require Plaintiff to set forth specific allegations or evidentiary facts. All that is required is a 'short and plain statement' of Plaintiff's claim for relief." *Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp. 918, 937 (C.D. Cal. 1996). The amended complaint satisfies that standard.

Furthermore, although an individual with a disability must first tell her employer about her condition, and request an accommodation, to be protected by the ADA, "[o]nce such a request has been made, the appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the qualified individual with a disability." *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 112 (5th Cir. 2005) (cleaned up) (quotations omitted). And "when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA." *Id.* That is the case here. This claim should also be decided on the merits.

C. Ms. Rozwadowska Adequately Alleged a Religious Discrimination Claim.

There is also no merit to NIKE's argument that Ms. Rozwadowska did not adequately plead the elements of a religious discrimination claim.

The complaint seeks relief under two theories. To plead a religious discrimination claim based on a failure to accommodate theory, the plaintiff must allege: "(1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). The plaintiff does not have to allege that the employer failed to engage in the interactive process. Rather, after the plaintiff proves her prima facie case, the burden shifts and the "employer must establish that it initiated good faith efforts to accommodate the

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employee's religious practices." *Id.*; *see also Am. Postal Workers Union, San Francisco Loc. v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (noting that "burden" rests on employer "to prove that it met its obligation under Title VII to accommodate" employee's religious beliefs).

The amended complaint alleges facts sufficient to establish the three elements of this prima facie case. Am. Compl., ¶¶ 32-34. NIKE does not contend otherwise. Instead, it argues that Ms. Rozwadowska cannot assert a religious discrimination claim based on a failure to accommodate theory because NIKE did not fire or otherwise subject her to an adverse employment action. That is not the standard in a failure to accommodate case (though it is in a disparate treatment case). All that matters under the failure to accommodate theory is that the employer "*threatened* [the employee] with … discriminatory treatment … because of [his or her] inability to fulfill the job requirements." *Heller*, 8 F.3d at 1438 (emphasis added). Thus, in *Berry v. Department of Social Services*, 447 F.3d 642, 655 (9th Cir. 2006), the Ninth Circuit held, on summary judgment, that the plaintiff had proved a prima facie case under a failure to accommodate theory where his "employer, at least implicitly, threatened some adverse action by formally instructing him not to pray with or proselytize to clients." Similarly, in *Atwood v. Oregon Department of Transportation*, No. CV-06-1726-ST, 2008 WL 803020, at *3 (D. Or. Mar. 20, 2008), this Court held that the plaintiff met his burden of proof in a failure to accommodate case when he showed that he "informed his employer of his religious belief that made him unavailable to work on Sunday and, as a result, was denied union representation and threatened." Notably, in *Atwood*, the court rejected the employer's (Spaeth) argument that his actions were necessary, finding that "factfinder could reasonably conclude that Spaeth's conduct at the December 30, 2004, meeting was not neutral and accommodating, but instead was intimidating and threatening." *Id.* at *4.

This broader standard exists under the failure to accommodate theory because, when it comes to religious accommodations, Title VII "imposes a *duty* of reasonable accommodation on employers." *Opuku–Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir.1996) (emphasis added). It would be nonsensical—and contrary to Congress' intent—to let employers off the hook for shirking

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that duty if they merely threaten to fire or punish the affected employee.

That is exactly what happened here. Ms. Rozwadowska alleged that she sought a religious accommodation to NIKE's COVID vaccine policy, that NIKE wrongfully refused to accommodate her and then threatened to fire her if she did not comply with the policy. Am. Compl., ¶¶ 32-34. She alleged that she suffered harm because of that behavior. *Id.*, ¶ 35. Rule 8 does not require anything more. Indeed, it requires far less than the detailed factual allegations contained in the amended complaint.

The amended complaint also states a claim under a disparate treatment theory. To plead a claim under this theory, the plaintiff must allege that "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry*, 447 F.3d at 656. Religion is a protected class. 42 U.S.C. § 2000e(j).

The amended complaint alleges facts establishing these elements. Am. Compl., ¶¶ 39-42. That includes allegations that NIKE treated people who belonged to other religions more favorably than the way it treated Ms. Rozwadowska's Catholic faith. *Id.*, ¶¶ 40, 42. NIKE does not argue otherwise. Again, it contends that Ms. Rozwadowska cannot make out a claim because she did not suffer an adverse employment action. Again, it is wrong.

An "adverse employment action is one that materially affect[s] the compensation, terms, conditions, or privileges ... of employment." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (quotations omitted). This term is construed broadly and "there is no exhaustive list of what constitutes an adverse employment action ….." *Little v. Nat'l Broad. Co.*, 210 F. Supp. 2d 330, 384 (S.D.N.Y. 2002). It includes virtually any non-trivial action by an employer that has an impact on a person's employment, including unfair criticism, undeserved performance ratings, denial of work opportunities and denial of access to an office. *See Lelaind v. City & Cnty. of San Francisco*, 576 F. Supp. 2d 1079, 1098-99 (N.D. Cal. 2008) (describing various types of such actions). It also includes "reduction in pay [ ] and reprimand …." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). And

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the "denial of a requested employment accommodation" can qualify as an adverse employment action. *Brooks-Mills v. Lexington Med. Center*, No. 3:17-cv-01849-JMC, 2020 WL 5810518, at *9 (D. S.C. Sept. 30, 2020); *see also Lindroos v. Bernhardt*, No. 20-cv-06897-EMC, 2021 WL 2322367, at *6 (N.D. Cal. June 7, 2021) (same). Whether a given action is serious enough to qualify is a factual issue for the jury to decide. *Davis*, 520 F.3d at 1099. Thus, it is rarely decided even on summary judgment, much less on the pleadings.

Of course, "'mere offensive utterances' or 'social slights' are generally trivial and cannot be viewed as serious enough to give rise to an adverse employment action." *Id.* at 1098 (citations omitted). For example, "[a] supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight …." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). "[E]ven a pattern of social slights ... cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment." *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1054 (2005). That is not what Ms. Rozwadowska alleged, though. She alleged that NIKE refused to give her employment benefits, including a reasonable accommodation, that it gave similarly situated employees who belong to other religions and reprimanded her for asserting her religious beliefs. Am. Compl., ¶ 34, 40, 42. That can constitute an adverse employment action, at least at the pleading stage. *See Bayonne v. Pitney Bowes, Inc.*, No. 3:03-CV-712, 2004 WL 213168, at *2 (D. Conn. 2004) (denying motion to dismiss for this reason).

Of course, the jury will have to decide whether NIKE's actions were serious enough to violate Title VII. But that is a disputed factual question that requires the gathering and presentation of evidence. It cannot be decided on the pleadings.

Moreover, contrary to NIKE's arguments, Ms. Rozwadowska did allege facts that, construed broadly and drawing inferences in her favor, allege an adverse employment action. In fact, she alleged that NIKE's actions, which included repeatedly denying her request for a reasonable accommodation and threatening to fire her if she did not get the COVID-19 shot against her will and faith by an arbitrary (and predetermined) deadline, caused her such distress that it amounted to a

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constructive discharge. Am. Compl,. ¶ 34. NIKE disagrees. But "an employer's actions or statements which induce the involuntary resignation, either alone or in combination with other adverse conditions, can constitute intolerable working conditions for the purposes of establishing constructive discharge." *Madray v. Long Island Univ.*, 789 F. Supp. 2d 403, 410 (E.D.N.Y. 2011). That is exactly what Ms. Rozwadowska has alleged.

And while NIKE disputes whether the stress that Ms. Rozwadowska endured amounted to a constructive discharge, that is a factual question that cannot be decided now. *See Borrero v. Am. Express Bank*, 533 F. Supp. 2d 429, 441 (S.D.N.Y. 2008) (denying summary judgment motion where plaintiff presented facts that could allow jury to decide that his termination was "a foregone conclusion" and thus amounted to a constructive discharge); *McCalla v. SUNY Downstate Med. Ctr.*, No. 03–CV–2633, 2006 WL 1662635, at *5 (E.D.N.Y. June 8, 2006) (denying a motion to dismiss a Title VII claim because the plaintiff plausibly alleged constructive discharge by presenting evidence that he was forced to resign after he was told that "he would be fired no matter what happened"). All that matters is that Ms. Rozwadowska alleged facts that, accepted as true and construed liberally in her favor, plead such harm. She did.

The fact that NIKE eventually changed its mind and granted Ms. Rozwadowska's request for an accommodation does not change this analysis as she had already suffered harm because of NIKE's actions. A plaintiff can recover monetary damages for emotional distress caused by discrimination in the workplace, though any award must be "capped at $300,000." *Saber v. New York State Dep't of Fin. Servs.*, No. 15 CIV. 5944 (LGS), 2018 WL 3491695, at *12 (S.D.N.Y. July 20, 2018) (citing 42 U.S.C. § 1981a(b)(3)(D)). The amended complaint alleges that Ms. Rozwadowska suffered such harm because of NIKE's actions and before it belatedly granted her request for a religious accommodation. Am. Compl., ¶¶ 34-35

Furthermore, a plaintiff can also recover punitive damages in a Title VII case (again, in a case involving a large employer, up to the $300,000 cap). 42 U.S.C. § 1981a(b)(3)(D). Punitive damages are recoverable even if the plaintiff otherwise only recovers nominal damages, so long as

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the plaintiff proves that the employer "acted with malice or willfulness or with callous and reckless indifference to the rights of the plaintiffs to be free from discrimination …." *Abner v. Kansas City S. R. Co.*, 513 F.3d 154, 163 (5th Cir. 2008) (quotations omitted). The Ninth Circuit has followed *Abner* in upholding a Title VII verdict that awarded just $1 to the plaintiff and, after remittitur, $300,000 in punitive damages because the plaintiff met that high standard. *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1058-60 (9th Cir. 2014).

Ms. Rozwadowska intends to meet that standard, too. She has already alleged facts that raise an inference of malice or willfulness on NIKE's part, including its decision to grant requests for religious accommodations that mentioned the politically sensitive issue of using fetal cell lines in developing the COVID vaccines. Am. Coml., ¶ 42. NIKE's failure to respond to Ms. Rozwadowska's repeated requests for reconsideration, and its belated decision to grant her the accommodation, after the deadline and after she had received the shots, against her conscience and under duress, provide further support for her argument that NIKE acted with at least reckless indifference to her rights. *See, e.g., Buhmeyer v. Case New Holland, Inc.*, 446 F. Supp. 2d 1035, 1048–49 (S.D. Iowa 2006) (finding sufficient evidence to uphold punitive damages verdict where employer "had reason to know that there was no reasonable basis for denying [plaintiff's] claim and "had reason to know that [he] was financially vulnerable").

Indeed, the evidence of NIKE's bad faith is compelling even at this early stage of litigation. It repeatedly denied Ms. Rozwadowska an accommodation that it knew it had to give her, and which it gave to other similarly situated people, and waited until a few hours after the deadline to reverse its decision. It knew she was her family's primary wage earner and thus financially vulnerable and easily pressured into getting the COVID shot against her will and conscience, as she eventually did. Therefore, this claim should also proceed to discovery.

D. At Minimum, the Court Should Grant Leave to Amend.

If the Court has any doubt about the sufficiency of the Amended Complaint, it should grant leave to amend. Such requests are liberally granted and should be honored "unless [the Court]

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determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quotations omitted). Plaintiffs would couple the filing of an amended complaint with a new complaint being filed by additional NIKE employees who were discriminated against in connection with NIKE's enforcement of the mandatory COVID vaccination policy.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motion and let this case proceed to discovery and a decision on the merits.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 6,397 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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CERTIFICATE OF SERVICE

Doug Kerkering, et al. v. Nike, Inc.
U.S. District of Oregon, Case No. 3:22-cv-01790-YY

At the time of service, I was over 18 years of age and not a party to this action. I am employed by JW Howard/Attorneys, LTD. in the County of San Diego, State of California. My business address is 600 West Broadway, Suite 1400, San Diego, California 92101.

On February 1, 2023, I caused **PLAINTIFFS' OPPOSITION TO NIKE'S MOTION TO DISMISS AMENDED COMPLAINT** to be filed and served via the Court's Electronic Service upon the parties listed on the Court's service list for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 1, 2023 at San Diego, California.

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