

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JAMIE L. GRELL,

Plaintiff,

vs.

UPRR RAILROAD COMPANY,

Defendant.

**8:16CV534**

**MEMORANDUM AND ORDER**

This matter is before the court on Defendant UPRR Railroad’s (UPRR) Amended Motion for Summary Judgment. ([Filing No. 45](#)) For the reasons explained below, the motion will be granted.

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## STANDARD OF REVIEW

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#) (Rev. 2018). In ruling on a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. [Dancy v. Hyster Co., 127 F.3d 649, 652-53 \(8th Cir. 1997\)](#). It is not the court’s function to weigh evidence in the summary judgment record to determine the truth of any factual issue; the court merely determines whether the evidence creates a genuine issue for trial. [Bell v. Conopco, Inc., 186 F.3d 1099, 1101 \(8th Cir. 1999\)](#).

The moving party bears the burden of showing there are no genuine issues of material fact. [See Celotex Corp. v. Catrett, 477 U.S. 317, 322 \(1986\)](#). However, “a party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.’” [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 \(1986\)](#) (quoting [First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 \(1968\)](#)) (internal marks omitted). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor.” [Anderson, 477 U.S. at 251-52](#) (internal citations omitted).

## STATEMENT OF FACTS

Unless otherwise indicated, the following facts in the parties’ briefs are supported by pinpoint citations to admissible evidence in the record. See NECivR

56.1<sup>1</sup>. The undisputed facts, and those which are considered undisputed for the purpose of this motion only, are as follows:

In 2006, Grell began her employment as a claims analyst for UPRR in Omaha, Nebraska, and in 2012, she was promoted to the position of a risk management representative in Cheyenne, Wyoming.

UPRR has implemented an equal employment opportunity ("EEO") policy and mandatory complaint procedure to ensure all UPRR employees benefit from a discrimination-free, harassment-free, and retaliation-free environment. Grell was trained on UPRR's policy, and she knew that EEO violations were to be reported to UPRR's EEO group or to her superiors.

At all times relevant to this action, Mary Broad was Grell's direct supervisor; Broad reported to regional director Bryan Foxx. During Grell's employment in Cheyenne, Broad supervised three male senior risk management representatives; two male risk management representatives; Grell, a female risk management representative; and a part-time female administrative analyst located in North Platte. Broad's office was physically located in Denver, Colorado; Grell and a male risk management representative worked from an office located in Cheyenne, Wyoming.

When she began her employment at UPRR, Grell was trained by the risk management representative in Cheyenne because he was physically present and

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<sup>1</sup> The party opposing a summary judgment motion should include in its brief a concise response to the moving party's statement of material facts. The response should address each numbered paragraph in the movant's statement and, in the case of any disagreement, contain pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies. Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response. NECivR 56.1(b)(1).

had been working as a risk management representative for several years. As of 2012, this employee had more than ten years' experience as a UPRR risk management representative.

Grell was not present in UPRR's other offices on a day-to-day basis. Grell would see Broad in person once every two weeks, and Grell's primary means of communicating with Broad was via telephone. During Grell's employment under Broad's supervision, Grell was never demoted, and she received raises and bonuses once a year.

In 2013, Grell contacted Foxx and complained that Broad was micromanaging her work. Prior to this complaint, others had also complained to Foxx about Broad's micromanagement. Foxx investigated Grell's complaint by interviewing all of Broad's subordinates – including Grell, and the UPRR division employees in the Cheyenne, Denver, and North Platte offices. Foxx asked if anyone had witnessed Broad treating Grell differently. The employees told Foxx that Broad was demanding on everyone, and Grell was treated no differently than anyone else.

Based on his investigation, Foxx concluded Broad was micromanaging her team, requiring extra and unnecessary work, and creating frustration among her subordinates. But he found no evidence of discrimination against Grell. When the investigation was complete, Foxx informed Grell that Broad would receive additional employee management training.

In November 2013, Broad printed two drafts of Grell's year-end employee evaluation, known as a total performance tracker ("TPT") to the Cheyenne-office copier. Those documents were not intended to be delivered to Grell or otherwise made available to the Cheyenne office personnel. Grell read the contents of the

two draft-TPTs. The TPTs had different scores for Grell, with one draft reflecting a 2013 year-end score lower than Grell's mid-year score.

In December 2013, Broad sent Grell an email that contained exchanges between Broad and Foxx. The email contained the TPT ratings, and a discussion of the performance of Broad's direct reports. Broad revised her rating of Grell from a 2 minus to a 3 plus after her conversation with Foxx.

Broad held a meeting with Grell to discuss Grell's final 2013 TPT. Grell earned a bonus and raise following the TPT review. Following this meeting, Grell spoke with regional director Foxx regarding the multiple drafts of Plaintiff's TPTs, and Grell reported difficulties she was having with Broad, stating she believed Broad was treating her differently than her male co-workers because of her gender. Grell knew that female employees who worked with Broad, but who were not Broad's direct subordinates, had expressed concern about mistreatment by Broad and had discussed the issue with Foxx.

Foxx told Grell that he agreed with the rating assigned to her by Broad. At the conclusion of their December 2013 discussion, Foxx instructed Grell to write her concerns in the comments section of the TPT. In turn, Grell included everything that she felt was important and wanted to express to her supervisors. She did not mention micromanagement, harassment, or discriminatory actions by Broad in her comments.

In late January 2014, Grell included her responses to Broad's review in her TPT. Grell's TPT comments focused primarily on the inadvertent disclosure of the TPT-draft documents. It also included an implication that Foxx had questioned and ultimately lowered Grell's proposed performance rating because she was female. The TPT comments made no reference or mention of any sex-based mistreatment by Broad.

UPRR's human resources director saw Grell's comments alleging Foxx's discriminatory actions and forwarded them to Foxx. After Foxx was informed of Grell's comments, he confirmed with Grell that she was accusing him of discrimination. Pursuant to UPRR's zero-tolerance discrimination policy, Foxx self-reported Grell's accusation by filing a Values Line complaint on January 29, 2014.

UPRR's EEO department commenced an investigation of Foxx' self-reported Values Line complaint. It sent a letter to Foxx on February 19, 2014 indicating the complaint had been received and reminding him that UPRR prohibits retaliation against any person who has made a good faith report of an alleged EEO violation. During the EEO investigation, multiple employees were interviewed. Grell provided her TPT comments and the Broad-Foxx email that had been mistakenly forwarded to Grell. In April 2014, the EEO department completed its investigation and concluded Grell's discrimination complaint was not substantiated.

In April 2014, Grell began receiving psychological counseling. She was diagnosed with depression, post-traumatic stress disorder, and anxiety and was prescribed medication. In May of 2014, Grell told Foxx that she was receiving counseling through UPRR's health department.

In preparation for Grell's mid-2014 TPT review, Broad prepared drafts of an outline or script to assist her in communicating with Grell during the performance review. Foxx and Rick Rivera, Assistant Vice President of Risk Management for UPRR, collaborated with Broad to prepare the scripts, and Broad conducted Grell's mid-year TPT review. Although the script contained Grell's alleged negative behaviors dating back to 2010, this information was not included in the mid-2014 TPT.

During Broad's mid-year evaluation of Grell's job performance, Grell informed Broad that Grell was seeking counseling due to Broad's supervisory behavior. But Grell's comments within the mid-2014 written TPT raised no issues or concerns regarding Broad's or Foxx's treatment of or conduct toward Grell. Grell had no further health-related communications with Broad following their discussion during the mid-2014 TPT review.

In October 2014, Grell sent UPRR a three-sentence email stating her doctor had taken her off work immediately and indefinitely. Grell never returned to work at UPRR after October 6, 2014.

On October 18, 2014, Grell submitted a report of personal injury or occupational illness to Foxx, alleging she has "difficulty sleeping, anxiety, hives, depression and panic attacks, PTSD." The report indicated that Grell was suffering from on-going stress related to Broad's supervision of Grell. The report did not address or otherwise reference allegations of sex discrimination.

On November 5, 2014, Grell requested an FMLA leave of absence. UPRR granted her request on November 7, 2014, and informed Grell that her FMLA leave would expire on December 29, 2014.

Grell was eventually approved for a short-term disability ("STD") leave of absence. In early-January 2015, MetLife, UPRR's STD administrator, denied Grell's request for continued STD benefits and her appeal of that adverse decision. On January 12, 2015, Foxx issued – and Grell received – a letter confirming (a) the expiration of Grell's FMLA leave on December 29th, and (b) MetLife's denial of Grell's appeal regarding her request for STD benefits. Based thereon, UPRR expected Grell to return to her position on January 19, 2015, and Foxx asked Grell to contact Broad on or before January 15, 2015 to discuss Grell's return-to-work logistics. Foxx's letter requested that Grell notify UPRR if she needed reasonable

accommodations to return to work. The letter also stated that absent contacting Broad as instructed, UPRR would consider Grell as resigned and would terminate her employment effective January 15, 2015.

On January 14, 2015, Grell emailed Foxx and requested additional leave. Foxx granted this request, advising Grell that on or before January 22, 2015, she needed to provide a firm return-to-work date and written confirmation from her treating physician that Grell's condition would indeed permit her to return by that date.

Between January 20 and 22, 2015, Foxx exchanged a series of emails with Grell's treating physician, who suggested a return-to-work date of March 2, 2015. But the treating physician also stated Grell's return to her risk management position would exacerbate symptoms and compromise Grell's mental and physical health. Grell proposed no other return-to-work date, and her doctor offered no confirmation that Grell's health would in fact allow her to return to work.

UPRR posted Grell's position on its job board in January 2015, and someone was hired to fill the position. Since Grell had failed to either return to work or substantiate the medical necessity of her absence, Grell's employment with UPRR was terminated by UPRR's human resources department on February 2, 2015.

On February 12, 2015, Grell submitted a second-level appeal of MetLife's denial of her STD benefit claim, and after a review of the claim and documents provided, UPRR concluded Grell was entitled to STD benefits from October 7, 2014 through January 31, 2015. This March 2015 approval of Grell's STD benefits effectively reinstated Grell's employment with UPRR. MetLife thereafter re-approved Grell's STD benefits for February 1, 2015 through April 6, 2015.

On April 2, 2015, Grell filed a charge of discrimination with the Nebraska Equal Opportunity Commission ("NEOC"), alleging specific incidents of sex discrimination, disability discrimination, and retaliation between August 1, 2014 and February 2, 2015. The April 2, 2015 charge did not use the words "failure to engage in the interactive process" or allege that Grell was subject to continuing action.

In May 2015, Grell submitted a retroactive claim for long-term disability ("LTD") benefits to commence after April 6, 2015. This claim was approved.

On July 16, 2015, Grell filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission, incorporating the April 2, 2015 NEOC charge and alleging sex discrimination, disability discrimination, and retaliation. ([Filing No. 55-1 at CM/ECF pp. 61-64](#)) The July 16, 2015 charge did not use the words "failure to engage in the interactive process" or allege that Grell was subject to continuing action.

On October 13, 2015, Grell's physician cleared her to return to work. Grell's LTD benefit payments ceased upon receipt of this notice. However, Grell's physician further stated that Grell should not return to a position in the risk management department. On November 3, 2015, Grell informed UPRR that she had been released to work, and she requested accommodations "to be placed in any position that was not under [Broad]."

In early November, UPRR's human resources department informed Grell that "We do not conclude that not working in a particular department or for a particular manager is a 'disability' to be accommodated." ([Filing No. 55-1 at CM/ECF p. 68](#)). UPRR further informed Grell that her unpaid status would continue through November 30, 2015 so that she could apply for other internal job postings, at which time her benefits and employment would terminate if she did not

find another position within the company. Grell responded that she was “trying to understand that if UPRR Railroad is not recognizing my doctor’s recommendations as a restriction then why can’t I be placed back into the Law Department?” ([Filing No. 55-1 at CM/ECF p. 69](#))

After Grell was released to return to work, all conversations between UPRR’s HR director and Grell were by email and all conversations are documented in Exhibit 11. Grell’s November 2015 email with Pam Lammers, UPRR’s Director of HR Customer Service – Finance & Law, is the only evidence offered to support Grell’s claim that she was dismissed for requesting an accommodation or complaining of disability discrimination, and after November 13, 2015, Grell did not request any other accommodation.

Between September 8, 2015 and December 11, 2015, Grell applied for seven positions within UPRR. She was not selected for any of them. Her employment was terminated on December 1, 2015.

Plaintiff’s ADA/NFEPA retaliation claims are based on only the February 2015 and December 2015 terminations. ([Filing No. 38-1 at CM/ECF p. 32](#))

In February 2016, Grell amended her 2015 NEOC and EEOC charges. ([Filing No. 55-5 at CM/ECF p. 9](#)) The amended charges alleged discrimination and retaliation, but did not specifically allege failure to engage in the “interactive process.” ([Filing No. 55-5 at CM/ECF p. 13-14](#)). In February 2016, Grell filed an OSHA complaint asserting Broad retaliated against her for reporting a personal injury in October of 2014. ([Filing No. 38-1 at CM/ECF pp. 34, 106](#)).

## ANALYSIS

### I. Grell's Claims at Issue.

As a preliminary matter, in her brief opposing UPRR's amended motion for summary judgment, Grell waived her "claim for retaliation based upon her opposition to an employment practice that violated the ADA pursuant to [42 U.S.C. § 12203](#) and [Neb. Rev. Stat. § 48-1114](#), as set forth in Counts III and IV of her Amended Complaint," (see [Filing No. 13](#), [Filing No. 54 at CM/ECF p. 29](#)), and her "claim for harassment pursuant to [42 U.S.C. § 2000e](#) et seq. set forth in Count V in her Amended Complaint." ([Filing No. 54 at CM/ECF p. 23](#). See [Filing No. 13](#)). These claims and the associated arguments from Sections C and D of UPRR's brief will therefore not be addressed or considered.

Grell's remaining claims are for discrimination in violation of the ADA and NFEPA (Counts I and II of the Amended Complaint), and retaliation in violation of Title VII, NFEPA, and FRSA (Counts VI, VII, and VIII, respectively, of the Amended Complaint).

### II. UPRR's Arguments.

UPRR asserts that the pleadings, depositions, and admissions on file, together with the declarations, show that there is no genuine issue as to any material fact, and that UPRR is entitled to judgment as a matter of law on all claims asserted in Grell's amended complaint. ([Filing No. 45 at CM/ECF p. 1](#)). Specifically, UPRR asserts<sup>2</sup>:

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<sup>2</sup> UPRR's brief argues that UPRR did not subject Grell to sex-based harassment, and that UPRR did not retaliate against Grell, in violation of the ADA and the Nebraska Fair Employment Practice Act (NFEPA), [Neb. Rev. Stat. § 48-1104](#). However, as these claims have been waived, they will not be addressed.

- Grell did not exhaust her remedies under the Americans with Disabilities Act (ADA), [42 U.S.C. §§12101](#) et seq., and Title VII of the Civil Rights Act of 1964 (Title VII), [42 U.S.C. § 2000e](#) et seq;
- UPRR did not subject Grell to disability discrimination;
- UPRR did not retaliate against Grell in violation of Title VII and [Neb. Rev. Stat. § 48-1114](#);
- UPRR did not retaliate against Grell, in violation of Federal Railroad Safety Act (FRSA) 49 U.S.C, § 20109.

Each argument will be addressed in turn.

- A. Counts I and II: Disability Discrimination
  1. Failure to Exhaust Administrative Remedies.

UPRR asserts Grell did not exhaust her remedies under the ADA and Title VII. Specifically, UPRR asserts that Grell’s 2015 and 2016 EEOC and NEOC filings did not allege that UPRR failed to make a good faith effort to engage in the interactive process before terminating her employment in either February 2015 or December 2015. As such, UPRR argues it is entitled to judgment as a matter of law on Counts I and II of the amended complaint. (See [Filing No. 46 at CM/ECF p. 17](#)).

There is a “long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” [Harris v. P.A.M. Transp., Inc.](#), 339 F.3d 635, 638 (8th Cir. 2003), citing, [Myers v. Bethlehem Shipbuilding Corp.](#), 303 U.S. 41, 50–51 (1938). To exhaust administrative remedies for alleged employment discrimination, an individual must: (1) timely file a charge of

discrimination with the EEOC setting forth the facts and nature of the charge and (2) receive notice of the right to sue.<sup>3</sup> 42 U.S.C. § 2000e–5(b), (c), (e). [Rush v. State Arkansas DWS](#), 876 F.3d 1123, 1125 (8th Cir. 2017). This exhaustion requirement affords the EEOC an initial opportunity to investigate allegations of employment discrimination and work with the parties toward voluntary compliance and conciliation. [Moses v. Dassault Falcon Jet-Wilmington Corp.](#), 894 F.3d 911, 920 (8th Cir. 2018).

The proper exhaustion of administrative remedies gives the plaintiff a green light to bring [his or] her employment-discrimination claim, along with allegations that are ‘like or reasonably related’ to that claim, in federal court. Although we have often stated that we will liberally construe an administrative charge for exhaustion of remedies purposes, we also recognize that ‘there is a difference between liberally reading a claim which lacks specificity, and inventing, ex nihilo, a claim which simply was not made.’ The claims of employment discrimination in the complaint may be as broad as the scope of the EEOC investigation which reasonably could be expected to result from the administrative charge.

[Parisi v. Boeing Co.](#), 400 F.3d 583, 585 (8th Cir. 2005) (internal quotation marks and citation omitted)

Grell acknowledges that she did not explicitly include the words “failure to engage in the interactive process” in her EEOC charges. ([Filing No. 54 at CM/ECF p. 33](#), citing Exhibits J, K, L). However, she argues that despite the lack of certain verbiage, her claims should be construed as administratively exhausted. Citing [Dittemore v. Transit Auth. of the City of Omaha](#), No. 8:16-CV-23, 2016 WL

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<sup>3</sup> UPRR’s arguments are focused on the facts and nature of the charge, and do not address or contest the receipt of the notice of the right to sue. Grell’s amended complaint asserted that she received “a Dismissal and Notice of Rights from the EEOC” but the document was not attached to the complaint. UPRR does not dispute that the letter was received, so the court will assume this is true. Receipt of a right-to-sue notice is a condition precedent to the filing of a Title VII claim, curable after the action has commenced. See [Jones v. American State Bank](#), 857 F.2d 494 (8th Cir. 1988).

3945154, at \*4 (D. Neb. July 19, 2016), Grell argues a court may “deem administrative remedies exhausted as to all incidents of discrimination that are like or reasonably related to the allegations of the administrative charge.”

Grell’s 2015 EEOC/NEOC charges included assertions that she “requested a reasonable accommodation which was denied,” and that she requested “the reasonable accommodation of placement into a different position which was denied.” ([Filing No. 55-5 at CM/ECF p. 9](#)). Affording the liberal construction required under Parisi, the court finds Grell’s 2015 EEOC/NEOC charges assert UPRR failed to make a good faith effort to engage in the interactive process before terminating her employment in February 2015.

Grell’s 2016 EEOC/NEOC charge indicates that she requested to be reassigned to a new position that reported to a different supervisor. ([Filing No. 55-5 at CM/ECF p. 13](#)). She alleged that Lammers informed her that the request for reassignment was not recognized as “reasonable,” and Grell was encouraged to apply for alternate positions within the company. Again, affording a liberal construction, the court finds Grell’s 2016 EEOC/NEOC charge includes an allegation that although reasonable requests for accommodation were made, UPRR failed to engage in good faith in the interactive process.

UPRR’s request for judgment in its favor on Counts I and II because Grell failed to exhaust administrative remedies will be denied. Grell’s claims will be considered on the merits.

## 2. Disability Discrimination.

The ADA prohibits employers from discriminating “against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” [42 U.S.C. §](#)

[12112\(a\)](#). This includes “not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” [42 U.S.C. § 12112\(b\)\(5\)\(A\)](#). “The term ‘qualified individual’ means 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.A. § 12111\(8\)](#).

Grell must establish both a prima facie case of discrimination based on disability and a failure to accommodate it. To establish a prima facie case of discrimination based on disability, Grell must show that she “(1) is disabled within the meaning of the ADA; (2) is a qualified individual under the ADA; and (3) has suffered an adverse employment decision because of the disability.” [Schaffhauser v. United Parcel Service, Inc.](#), 794 F. 3d 899 (8th Cir. 2015). UPRR’s brief addresses only the second and third prongs of this test. ([Filing No. 46 at CM/ECF p. 18-25](#)).

- a. Implicit Waiver of Claim
  - i. February 2015 Termination.

UPRR asserts that as to the February 2015 termination, Grell cannot prove a prima facie case of disability discrimination because she never requested a reasonable accommodation prior to her discharge, and even if she had, she did not suffer an adverse employment decision—she was reinstated shortly after her February 2015 termination. ([Filing No. 46 at CM/ECF pp. 2](#), 19-21). In [Jackson v. United Parcel Service, Inc.](#), 548 F.3d 1137 (8th Cir. 2008), the Eighth Circuit found that the employee did not establish a prima facie case for discrimination where the employer recognized its mistake and took corrective action in a timely manner. The

Eighth Circuit noted that rescinding a prior employment action will not *always* shield an employer from liability, but under the circumstances, the adverse employment action did not produce a *material* employment disadvantage. [Id at 1142.](#)

Grell's brief opposing summary judgment addresses only UPRR's alleged failure to accommodate her requests after she was released to work in October 2015. It does not address UPRR's arguments regarding Grell's ADA claims for termination in February 2015. The court therefore finds Plaintiff has implicitly waived any ADA claim alleging termination in February 2015 was an adverse employment action. See, [Satcher v. University of Arkansas at Pine Bluff Bd. Of Trustees, 558 F.3d 731 \(8th Cir. 2009\)](#) (failure to oppose a basis for summary judgment constitutes waiver of that argument).

ii. Failure to Accommodate.

UPRR argues that Grell's opposition brief does not address or respond to UPRR's argument on failure to accommodate Grell's disability. However, Grell argues UPRR failed to engage in the interactive process by failing to take reasonable steps to accommodate her requested accommodations. Grell's claim for failure to accommodate was not implicitly waived.

b. Merits of Disability Claims.

UPRR does not dispute that it knew of Grell's alleged disability. It does not address the veracity of Grell's claims of post-traumatic stress disorder (PTSD). ([Filing No. 46 at CM/ECF p. 2](#)). Rather, UPRR argues that Grell could not perform the essential functions of her job, with or without reasonable accommodation, she was treated no differently than other employees, she did not request a *reasonable* accommodation, and she was dismissed solely based upon her failure to return to work.

UPRR argues that as to the December 2015 termination, Grell cannot prove an essential element of her prima facie case: that she is a “qualified individual with a disability.” In deciding this issue, a court must consider whether “the individual satisfies the prerequisites for the position” and “whether or not the individual can perform the essential job functions, with or without reasonable accommodation.” [Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011, 1016 \(8th Cir. 2000\)](#).

“To determine whether an accommodation for the employee is necessary, and if so, what that accommodation might be, it is necessary for the employer and employee to engage in an ‘interactive process.’” [Schaffhauser](#), supra, citing [Peyton v. Fred’s Stores of Ark., Inc., 561 F. 3d 900, 902 \(8th Cir. 2009\)](#). This interactive, accommodation-seeking process must be initiated by the disabled employee, who must alert her employer to the need for accommodation and provide relevant details of her disability. [EEOC v. Convergys Customer Mgmt. Grp., 491 F. 3d 790, 795 \(8th Cir. 2007\)](#). To establish that an employer failed to participate in an interactive process, a disabled employee must prove:

- 1) the employer knew about the employee's disability;
- 2) the employee requested accommodation or assistance for his or her disability;
- 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and
- 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

[Peyton](#), supra.

Grell’s physician cleared her to return to work on October 13, 2015, but he also stated Grell should not return to a position in the risk management department. ([Filing No. 55-5 at CM/ECF pp 16-21](#)). The doctor wrote to Foxx:

My recommendation that Ms. Grell should be able to return to work March 2, 2015, is predicated on the condition that she be employed in a department different from that of her previous position.

Ms. Grell's tenure at UPRR demonstrates her progress in increasing responsibilities and contributions to the company. However, prolonged difficulty with her direct supervisor, and management's failure to intercede, has resulted in a toxic work environment and symptoms of both post traumatic stress disorder and major depressive disorder. A return to this environment (either in Cheyenne or another location) will exacerbate symptoms and compromise her mental and physical health.

[Filing No. 55-2 at CM/ECF p. 40.](#)

Based on the foregoing information from her doctor, Grell notified UPRR that she had been released to work, and she requested accommodations; specifically, not to be placed in any position as a subordinate of Broad. ([Filing No. 55-5 at CM/ECF p. 13](#)) UPRR sent Grell a letter acknowledging Grell's request and informing her "We do not conclude that not working in a particular department or for a particular manager is a 'disability' to be accommodated." ([Filing No. 55-1 at CM/ECF p. 83](#)). Grell is claiming placement in a vacant position which would not report to Broad is a reasonable accommodation.

Numerous courts have held as a matter of law that a request for a different supervisor is not a request for "reasonable accommodation." [Quinn v. St. Louis Cty.](#), No. CV 09-1372 ADM/RLE, 2009 WL 10678554, at \*3-4 (D. Minn. Nov. 9, 2009) See [Gaul v. Lucent Technologies, Inc.](#), 134 F.3d 576, 581 (3d Cir. 1998) (holding that a request to be transferred away from a supervisor who was causing a plaintiff stress was unreasonable as a matter of law under the ADA); [Weiler v. Household Fin. Corp.](#), 101 F.3d 519, 526 (7th Cir. 1996) (affirming a district court's grant of summary judgment for the defendant and holding that the defendant's

denial of the plaintiff's request to be assigned to a different supervisor because her current supervisor caused her anxiety and depression by yelling at her did not constitute a failure to grant a "reasonable accommodation"); [Lewis v. Zilog, Inc.](#), 908 F. Supp. 931, 940–42, 48 (N.D. Ga. 1995) (holding that a request by a plaintiff who suffered from bipolar and mood disorder to be transferred to a different supervisor in a different location because working for her current supervisor was causing her stress was not a reasonable accommodation under the ADA as a matter of law). The rationale for the rule is that a request to work for a different supervisor "essentially ask[s] [the courts] to establish the conditions of employment," and "[n]othing in the ADA allows this shift in responsibility." [Gaul](#), 134 F.3d at 581 (quoting [Weiler](#), 101 F.3d at 526). "[N]othing in the law [supports the conclusion] that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organization hierarchy." [Id.](#)

The parties have not cited and the court has not found an Eighth Circuit case expressly deciding the issue, but the Eighth Circuit has affirmed a district court's dismissal of a disability discrimination claim under the ADA where, as one of the its reasons for granting judgment as a matter of law, the district court found that a "request for a different supervisor was not a reasonable accommodation request." See [Freese v. Hawkeye Community. College](#), 149 F. App'x 540, 542 (8th Cir. 2005).

The court concludes that Grell's request to be assigned to a different department or to a different supervisor was not, as a matter of law, a request for reasonable accommodation. Under the circumstances, UPRR's denial of Grell's accommodation request does not demonstrate a "lack of good faith," where the accommodation she requested was not reasonable. Grell cannot meet her burden of proving that she "could have been reasonably accommodated but for the

employer's lack of good faith." Therefore, her assertion that UPRR failed to engage in the interactive process must fail.

Based on her treatment provider's statement, Grell was released to work "with the restrictions that [she] could not return to work in the law/risk management department." ([Filing No. 55-5 at CM/ECF p. 19](#)). Grell cannot establish that she could perform the essential job functions of her position with or without reasonable accommodation, therefore she is unable to meet her burden of proof as to at least one of the elements of her prima facie case of discrimination based on disability. See [Schaffhauser, supra](#). UPRR's motion for summary judgment is granted as to Counts I and II alleging disability discrimination.

#### B. Counts VI and VII: Retaliation

Counts VI and VII of Plaintiff's complaint allege UPRR retaliated against Grell for reporting sex discrimination and sexual harassment in violation of Title VII and [Neb. Rev. Stat. § 48-1114](#).<sup>4</sup> UPRR moves for summary judgment on these claims.

Title VII forbids an employer from discriminating against an employee for opposing any practice made unlawful employment under Title VII, or because the employee has made a charge, testified, assisted, or participated in any manner in a Title VII investigation, proceeding, or hearing. [Liles v. C.S. McCrossan, Inc.](#), 851 F.3d 810, 818 (8th Cir. 2017) (quoting 42 U.S.C. § 2000e-3(a)). "To survive a motion for summary judgment on a [Title VII] retaliation claim a plaintiff must offer direct evidence of retaliation or create an inference of retaliation under the *McDonnell Douglas* burden-shifting framework." [Donathan v. Oakley Grain, Inc.](#),

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<sup>4</sup> Claims for retaliation under Title VII and under Nebraska's NFEPA are governed under the same standard. [Al-Zubaidy v. TEK Industries, Inc.](#), 406 F.3d 1030, 1039 (8th Cir. 2005).

861 F.3d 735, 739 (8th Cir. 2017) (quoting [Hutton v. Maynard](#), 812 F.3d 679, 683 (8th Cir. 2016)). Under that framework, “the plaintiff bears the initial burden to establish a *prima facie* case.” [Donathan](#), 861 F.3d at 740. “[T]he burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action.” [Id.](#) (citing [Torgerson](#), 643 F.3d at 1046). “If the employer articulates a legitimate reason for the adverse employment action, the plaintiff may create a triable question as to retaliation by showing the employer’s articulated reason was not the true reason for the adverse action,” *i.e.*, the employer’s articulated reason for the adverse employment action was a pretext for unlawful retaliation. [Id.](#)

“To establish a *prima facie* case of retaliation, [Grell] must show (1) she engaged in protected conduct, (2) she suffered a materially adverse employment act, and (3) the adverse act was causally linked to the protected conduct.” [Bunch v. Univ. of Ark. Bd. Of Trs.](#), 863 F.3d 1062, 1069 (8th Cir. 2017) (quoting [Guimaraes v. SuperValu, Inc.](#), 674 F.3d 962, 978 (8th Cir. 2012)).

Grell asserts she engaged in protected conduct by opposing and complaining about the treatment she received from Broad ([Filing No. 13](#) at CM/ECF p. 7, ¶ 60); opposing and complaining about Broad’s behavior ([Id.](#) at ¶ 61); opposing and reporting her complaints about Broad’s behavior to UPRR ([Id.](#) at ¶ 62); and filing a charge of discrimination and retaliation with the EEOC/NEOC. ([Id.](#) at ¶ 63). Grell asserts she suffered adverse employment actions by being disciplined and terminated, and that a causal link exists between her protected activity and the adverse employment actions. ([Id.](#) at ¶ 65–66).

As UPRR notes in its brief, as a matter of mere chronology, there can be no causal link to any retaliatory conduct following the 2016 NEOC/EEOC charge: Grell was no longer working for UPRR at that point.

UPRR further argues no causal link exists between the 2015 NEOC and EEOC charges and the termination of her employment, and Grell has not argued to the contrary. Thus, as it relates to the 2015 NEOC/EEOC filing, any claim for retaliation under Title VII is waived. See, [Satcher, Pine Bluff Bd. Of Trustees, 558 F.3d at 731](#). See, also, [Anderson v. Liberty Lobby Inc., 477 U.S. 242, \(1986\)](#) (a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials..., but must set forth specific facts showing that there is a genuine issue for trial.)

The court's analysis on Counts VI and VII is therefore limited to the allegations of retaliation following Grell's complaints to management in 2013, and with regard to those complaints, Grell's claims of adverse employment actions under Title VII are further limited to discipline and termination, as pleaded in her amended complaint.

An "adverse employment action is action that 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" [AuBuchon v. Geitner, 743 F.3d 638, 643-44 \(8th Cir. 2014\)](#) (quoting [Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 \(2006\)](#)). Under this standard, the "employment action must be material, not trivial[.]" [Id. at 644](#), and "[t]o avoid the triviality pitfall, the retaliation must produce some 'injury or harm[.]'" [AuBuchon, 743 F.3d at 644](#) (quoting [Littleton v. Pilot Travel Ctrs., 568 F.3d 641, 644 \(8th Cir. 2009\)](#)). Thus, "[c]ontext matters." [Burlington N., 548 U.S. at 69](#). Title VII is not a "civility code for the American workplace[.]" and, "[r]eporting discriminatory behavior 'cannot immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience.'" [Id. at 68](#). "Title VII retaliation claims must be proved according to traditional principles of but-for causation[.]" [Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360](#)

(2013). “This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Id.*

1. Discipline

In her complaint, Grell alleged that she suffered an adverse employment action when she was disciplined, and that a causal connection exists between her protected activity (opposing Broad, and complaining about her to UPRR), and the alleged discipline. ([Filing No. 13](#) at CM/ECF p. 7). Grell claims she was verbally disciplined – that Broad was telling her “what not to do or what to do.” *Id.* But in addition to the testimony cited by UPRR, Grell also testified:

[Broad] would tell me that I should not have turned this in to [Foxx]. I should not have turned this in to EEO. I’m ruining people’s careers. I’m—she even went so far as that she said she felt I was trying to get her terminated, and I said, That’s not it at all. All I want is respect.

[Filing No. 55-1 at CM/ECF p. 22](#). Grell argues this retaliation began almost immediately after she reported Broad’s conduct and continued throughout her employment. ([Filing No. 54 at CM/ECF p. 26](#)). While UPRR argues Grell’s retaliation claim is based upon a mischaracterization of a series of events from December 2013 to November 2015 and based on allegations beyond her amended complaint, Grell incorporated paragraphs 1 through 59 of her amended complaint in Counts VI and VII by reference.

Grell’s argument in her opposition brief ties her complaints to Foxx about Broad’s alleged discrimination on the basis of sex to the decline of the working relationship she had with Broad. Grell’s argument includes allegations of negative performance evaluations, Broad’s complaints to Grell that she was behaving unprofessionally, and Broad’s distribution of Grell’s personal information to other staff members. Grell argues that “retaliatory treatment started almost immediately” following her initial complaint about Broad, and she was “directly reprimanded” for

filing an EEO complaint. ([Filing No. 54 at CM/ECF p. 29](#)). Grell's version of the circumstances which occurred between December 2013 and November 2015 were pled in her complaint, in paragraphs 13 to 19.

Although Grell characterizes Broad's verbal statements as "disciplinary" in nature, there is no evidence in the record that Grell's position, pay, or opportunities for advancement were impacted by Broad's alleged statements. Based on the evidence before the court, Grell was not subjected to written discipline or warnings, she was not demoted, and she received raises and bonuses once a year during her tenure under Broad. ([Filing No. 38-1 at CM/ECF p. 29](#); [Filing No. 46 at CM/ECF p. 4](#)).

Generally, a criticism of an employee without additional negative ramifications is not considered to be an adverse employment action. [Weeks v. New York State \(Div. of Parole\)](#), 273 F.3d 76 (2nd Cir. 2001). Ostracism and disrespect by supervisors does not rise to the level of an adverse employment action. [Manning v. Metropolitan Life Ins. Co.](#), 127 F. 3d 686, at 692-93, (8th Cir. 1997). See [Wu v. Thomas](#), 996 F.2d 271, 273 n. 3 (11th Cir.1993) ("we cannot find any case that clearly established that retaliatory harassment, as opposed to sexual or racial harassment, could violate Title VII where the employer caused the employee no tangible harm, such as loss of salary, benefits or position"), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994); [Miller v. Aluminum Co. of America](#), 679 F.Supp. at 505 (plaintiff must show more than occasional unkind words, snubs and perceived slights by defendant's agents to prove adverse employment action).

Without evidence of a more tangible change in duties or working conditions that constitute a material employment disadvantage, general allegations that Broad verbally disciplined Grell are not sufficient to rise to the level of an adverse employment action for purposes of Title VII. See [Scusa v. Nestle U.S.A. C., Inc.](#),

[181 F.3d 958 \(8th Cir. 1999\)](#). Grell has, therefore, failed to establish a prima facie case that she was subject to retaliatory discipline in violation of Title VII and [Neb. Rev. Stat. § 48-1114](#).

## 2. Termination

In her complaint, Grell alleged that she suffered an adverse employment action when she was terminated, and that a causal connection exists between her protected activity (opposing Broad, and complaining about her to UPRR), and her termination. ([Filing No. 13](#) at CM/ECF p. 7)

UPRR's brief stated the decision to terminate Grell's employment on February 2, 2015 "was made by UPRR's human resources department and it was based on Grell's failure to return to work and failure to substantiate the medical necessity of her absence." ([Filing No. 46](#) at CM/ECF p. 12). The record supports this allegation, and Grell admitted this allegation in her brief in opposition. ([Filing No. 54](#) at CM/ECF p. 8) Even assuming Grell made a prima facie case of retaliation, UPRR has produced evidence showing a non-retaliatory basis for its termination decision. The burden is on Plaintiff to show that UPRR's reason was a pretext for unlawful retaliation, and she has not met this burden as to her termination in February 2015.

The basic facts as they relate to Grell's December 2015 termination are undisputed. She was cleared by UPRR's medical department to work without restrictions in November 2015. ([Filing No. 55-5](#) at CM/ECF p. 19) She requested to be placed "in any position" that was not under Broad, and her doctor released her to work, subject to the restriction that she "not return to work in the law/risk management department." ([Filing No. 38-1](#) at CM/ECF p. 31; [Filing No. 55-5](#) at CM/ECF p. 19). UPRR determined that this request was not reasonable and advised her to apply for internal job postings. She was also advised that if she did

not secure a position before the end of the month, her employment would be terminated. Grell applied for certain vacancies, but she did not secure employment in a different department and she was terminated. As explained above, Grell's request for a different supervisor was not reasonable, and UPRR was not required to accommodate her request to transfer to a different department.

Even if Grell has shown that she engaged in protected conduct and that she suffered a materially adverse employment act, she cannot show that the adverse act was causally linked to the protected conduct. See [Bunch v. Univ. of Ark. Bd. Of Trs.](#), 863 F.3d 1062, 1069 (8th Cir. 2017) There is no direct evidence that Grell's termination in December 2015 is related to her complaints to Foxx about Broad in December 2013. Further, "the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" [Clark County School Dist. v. Breeden](#), 532 U.S. 268 (2001). No such temporal proximity exists in this case. Grell's allegation that a causal connection exists between her "protected activity and the adverse employment action" (i.e. between her complaint in December 2013 and her termination in December 2015) is not supported by the evidence. She has, therefore, failed to establish a prima facie case that her termination in December 2015 was retaliatory and in violation of Title VII and [Neb. Rev. Stat. § 48-1114](#).

C. Count VII: Retaliation as prohibited by FRSA

Count VIII of Plaintiff's operative complaint alleges Grell was retaliated against in violation of Federal Railroad Safety Act (FRSA) 49 U.S.C, § 20109. Grell alleges she had engaged in protected activity when "she notified her employer of her work related injury about the treatment by Ms. Broad[,]" and that she suffered

adverse employment actions by being disciplined and terminated. ([Filing No. 13 at CM/ECF p. 8](#)). UPRR argues that Grell cannot meet her prima facie burden, and, even if she could, she “cannot escape the fact that she would have been discharged whether or not she notified UPRR of her health condition.” ([Filing No. 46 at CM/ECF p. 40](#)).

The FRSA prohibits a railroad carrier from “discharging, demoting, suspending, reprimanding, or discriminating” against an employee for engaging in certain protected activities. [49 U.S.C. § 20109](#). To establish a prima facie case of retaliation under the FRSA, Grell must show: (1) She engaged in protected activity; (2) UPRR knew or suspected, actually or constructively, that she engaged in the protected activity; (3) she suffered an adverse action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action. [Kuduk v. BNSF Ry. Co., 768 F.3d 786 \(8th Cir. 2014\)](#). If a plaintiff meets that burden, an employer may avoid liability if it “demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [the employee’s protected activity].” [BNSF Railway Company v. United States Department of Labor Administrative Review Board, 867 F.3d 942 \(8th Cir. 2017\)](#).

Grell’s “Report of Personal Injury or Occupational Illness” is dated October 2014. ([Filing No. 55-1 at CM/ECF p. 77](#)). Grell testified that she was verbally disciplined in August 2014 – before the personal injury report was filed-- thus there can be no inference that the report was a contributing factor leading to the discipline.

It is undisputed that Grell reported a personal injury in October 2014; UPRR knew the report was made; and Grell suffered an adverse action – termination. Two issues remain: Is there evidence to support Grell’s claim that filing a personal

injury report was a contributing factor in her termination, and if so, can UPRR prove it would have terminated her even absent the personal injury report?

In an FRSA retaliation case, a “gap in time between the protected activity and the adverse employment action weakens an inference of retaliatory motive.” BNSF, supra.

To determine whether the circumstances raise an inference of retaliatory motive in the absence of direct evidence, we consider circumstantial evidence such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence of intervening events that independently justify discharge.

Loos v. BNSF Railway Company, 865 F.3d 1106 (8th Cir. 2017).

There is no direct evidence that Grell’s termination was caused by the personal injury reporting, and the gaps in time between Grell’s report of personal injury in October 2014 and her terminations in February 2015 and December 2015 weaken her argument. Further, UPRR made employment and benefit decisions which were favorable to Grell following her report, including granting her request for FMLA in November 2014, shortly after her report of injury. ([Filing No. 55-1 at CM/ECF p. 26](#)). UPRR notified her, in writing, when her FMLA expired and that she had been denied STD at that time. ([Filing No. 55-1 at CM/ECF p. 79](#)). After providing her a return-to-work date, UPRR engaged in discussions with her in January 2015 regarding moving the date of her return and granted extensions to allow her to communicate with her physician. Ultimately, she did not return to work. Further, Grell’s OSHA complaint alleges Broad was the person responsible for the retaliatory conduct, but Grell has presented no evidence that Broad was responsible for the employment decisions related to her termination in either February 2015 or December 2015.

In her brief in opposition to summary judgment, Grell asserts that UPRR “failed to investigate the report, failed to extend benefits and services normally provided to injured employees, created negative performance report at the end of the year 2014.” ([Filing No. 54 at CM/ECF p. 38](#)). Even assuming these argued acts and omissions were adverse employment actions, and that they were performed in retaliation for submitting a personal injury report, these allegations were not raised in Grell’s amended complaint and they will not be considered. See [Northern States Power Co. v. Federal Transit Admin.](#), 358 F.3d 1050, 1057 (8th Cir. 2004) (“while we recognize that the pleading requirements under the Federal Rules are relatively permissive, they do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment.”).

The evidence of record does not raise a genuine issue of material fact supporting Grell’s claim that she was terminated in retaliation for filing a personal injury report. Summary judgment will be granted as to Grell’s complaints under the FRSA.

Having parsed through the complex set of facts presented and applied them to the relevant law, the court finds Defendant is entitled to judgment as a matter of law as to all claims alleged. Accordingly,

IT IS ORDERED:

- 1) Defendant’s motion for summary judgment, ([Filing No. 45](#)), is granted.
- 2) Judgment in favor of Defendant on all claims will be separately entered.

January 4, 2019.

BY THE COURT:

s/ Cheryl R. Zwart  
United States Magistrate Judge