UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	§	
Plaintiff,	§	
versus	§	CIVIL ACTION NO. 1:18-CV-303
STEEL PAINTERS LLC *formerly known as* STEEL PAINTERS, INC.,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court is Defendant Steel Painters, LLC *formerly known as* Steel Painters, Inc.'s ("Steel Painters") Motion for Summary Judgment (#21) and Plaintiff Equal Employment Opportunity Commission's ("EEOC") Motion for Leave to File Response to Summary Judgment and Exhibits Late (#27). Having considered the pending motions, the submissions of the parties, and the applicable law, the court is of the opinion that the EEOC's motion for leave should be granted as unopposed and Steel Painters's Motion for Summary Judgment should be denied.

I. Background

This case arises from Steel Painters's termination of Matthew Kimball ("Kimball"). Kimball has been a certified industrial painter since 2005. In 2012, Kimball suffered an on-the-job injury and, as a result of his treatment for that injury, developed an addiction to opioid pain medication. In late 2013, Kimball enrolled in a medically supervised drug rehabilitation program. Since 2013, Kimball has been prescribed and taken methadone to treat his addiction. Despite his ongoing treatment for opioid addiction, Kimball has successfully worked as an industrial painter

and, prior to his experience with Steel Painters, had never been disciplined or discharged from any workplace because of a methadone or opioid-related accident.

In March 2016, Kimball was conditionally hired by Steel Painters. After accepting the offer, Kimball completed a "Medical History Summary" form and disclosed to Steel Painters that he took prescription methadone. Steel Painters never followed up with Kimball regarding the job offer. In September 2016, Doyle Menard ("Menard"), an operations manager at Steel Painters, recruited Kimball to work at a customer's facility in Silsbee, Texas.[1] On September 19, 2016, Kimball completed a "Medical History Summary" and, once again, disclosed that he used prescription methadone. That same day, Kimball underwent a drug screening and attended Steel Painters's safety orientation. Despite its constructive knowledge of Kimball's methadone use and not having received the results of his drug screening, Steel Painters put Kimball to work on September 20, 2016.

On September 26, 2016, the drug screening facility notified Steel Painters that Kimball had tested positive for methadone on his drug screening, and Kimball was removed from the jobsite. Later that day, Kimball provided the drug screening facility verification that he was taking prescription methadone. On September 27, 2016, the drug screening facility sent Steel Painters a final report indicating that Kimball's drug test results were "negative." That same morning, Steve Wycoff ("Wycoff"), Steel Painters's Safety Director, called Kimball and told him to report to work and meet him at the front gate because Kimball needed to complete some paperwork. Kimball met Wycoff who instructed him that he need to compete a two-page form titled "Safety

[1] It is unclear from the record whether Kimball was employed elsewhere during the period between March and September 2016. Steel Painters does not offer an explanation as to why it failed to follow up with Kimball in March 2016.

Sensitive Employee Medication Approval Form for Prescription Medication" ("Verification Form").

Steel Painters contends that its OTC/Rx Safety Sensitive Verification Policy ("SOP-57") requires that any employee performing a safety sensitive job while taking over-the-counter or prescription medication must have the Verification Form signed by his treating physician. Essentially, the Verification Form requires the physician to attest that the employee can safely perform safety sensitive duties while taking the prescription medication. Steel Painters issued SOP-57 and allegedly began implementing it in January 2016. According to Wycoff, however, the first time he asked any employee to complete the Verification Form was September 27, 2016, the date he requested Kimball to complete it. Steel Painters does not dispute that the first time it enforced SOP-57 was with regard to Kimball's termination.

According to Kimball, he met Wycoff at the jobsite and was given a copy of the Verification Form. Kimball informed Wycoff that he may have trouble getting his physician to sign the form. Kimball explained that he had previously experienced problems getting his doctor to sign off on a similar form provided by a former employer. Wycoff called Carla Weighmann ("Weighmann"), Steel Painters's administrative manager, who told Wycoff and Kimball that the form needed to be signed by a doctor but agreed that Kimball could wait and get it signed on September 29, 2016, at his next scheduled visit to the clinic. Kimball was then permitted to return to work. He worked from 9:00 a.m. to 5:00 p.m. that day. Upon returning home, Kimball completed the "Employee Section" of the Verification Form. On the Verification Form, Kimball indicated that his job required performing abrasive blasting and/or coating services at a customer's

worksite. According to Steel Painters, performing abrasive blasting and coating services at a customer's worksite is a safety sensitive work assignment and is covered by SOP-57.

At his deposition, Kimball testified that rather than waiting for his scheduled appointment, he decided to take the next day—September 28, 2016—off work and visit the treatment center and ask his doctor to sign the form. Kimball maintains that his doctor refused to do so because of the clinic's policy against medical personnel disclosing patient information to third parties. The clinic, however, provided Kimball with a letter verifying that it prescribed him methadone and listing a phone number that Steel Painters could call if it needed additional information. The following day, September 29, 2016, Kimball contacted Steel Painters and informed Weighmann that his doctor would not sign the form. Kimball requested that Weighmann send him to Steel Painters's company doctor for drug verification and clearance. According to Kimball, Weighmann refused the request and told him that Steel Painters's doctors would not clear him because Steel Painters does not normally hire people on methadone. The discussion between Kimball and Weighmann became heated and ended when Weighmann allegedly terminated Kimball's employment.

After his termination, Kimball filed a charge with the EEOC. On August 16, 2017, the EEOC issued Steel Painters a Letter of Determination finding reasonable cause to believe that it had violated the Americans with Disabilities Act ("ADA"). The EEOC and Steel Painters were unable to resolve the matter. On June 28, 2018, the EEOC filed the instant lawsuit. On August 16, 2019, Steel Painters filed its Motion for Summary Judgment. On September 7, 2019, the EEOC filed its Motion for Leave to File Response to Summary Judgment Late. Steel Painters has not filed a response to the EEOC's motion. Therefore, the court will treat the motion as unopposed. *See* Local Rule CV-7(d).

II. Analysis

A. Summary Judgment Standard

A party may move for summary judgment without regard to whether the movant is a claimant or a defending party. *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019); *Apache Corp. v. W&T Offshore, Inc.*, 626 F.3d 789, 793 (5th Cir. 2010); *CQ, Inc. v. TXU Mining Co., L.P.*, 565 F.3d 268, 272 (5th Cir. 2009). Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "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); *Parrish*, 917 F.3d at 378; *Hefren v. McDermott, Inc.*, 820 F.3d 767, 771 (5th Cir. 2016). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019); *Mabry v. Lee Cty.*, 849 F.3d 232, 234 (5th Cir. 2017); *Davis v. Fort Bend Cty.*, 765 F.3d 480, 484 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2804 (2015). To warrant judgment in its favor, the movant "must establish beyond peradventure *all* of the essential elements of the claim or defense." *Dewan v. M-I, L.L.C.*, 858 F.3d 331, 334 (5th Cir. 2017) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)); *accord Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 378 (5th Cir. 2011), *cert. denied*, 568 U.S. 1194 (2013).

"A fact issue is material if its resolution could affect the outcome of the action." *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct.

1715 (2016); *see Parrish*, 917 F.3d at 378; *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014). "Factual disputes that are irrelevant or unnecessary will not be counted." *Tiblier*, 743 F.3d at 1007 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue is '*genuine*' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Hudspeth v. City of Shreveport*, 270 F. App'x 332, 334 (5th Cir. 2008) (quoting *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001)); *see Nall v. BNSF Ry. Co.*, 917 F.3d 335, 340 (5th Cir. 2019). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Hefren*, 820 F.3d at 771 (quoting *Anderson*, 477 U.S. at 248); *Tiblier*, 743 F.3d at 1007; *accord Haverda v. Hays Cty.*, 723 F.3d 586, 591 (5th Cir. 2013). The moving party, however, "need not negate the elements of the nonmovant's case." *Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511 (5th Cir. 2014); *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010); *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings but must present affirmative evidence, setting forth specific facts, to demonstrate the existence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 322 n.3; *see Beard v. Banks*, 548 U.S. 521, 529 (2006) (quoting FED. R. CIV. P. 56(e)); *Hassen v. Ruston La. Hosp. Co., L.L.C.*, 932 F.3d 353, 356 (5th Cir. 2019); *Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc.*, 738 F.3d 703, 706 (5th Cir. 2013). The court "should review the record as a whole." *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 273 (5th Cir. 2011) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)); *see City of*

Alexandria v. Brown, 740 F.3d 339, 350 (5th Cir. 2014). All the evidence must be construed in the light most favorable to the nonmoving party, and the court will not weigh the evidence or evaluate its credibility. *Reeves*, 530 U.S. at 150; *Nall*, 917 F.3d at 340; *Tiblier*, 743 F.3d at 1007; *see Hefren*, 820 F.3d at 771. The evidence of the nonmovant is to be believed, with all justifiable inferences drawn and all reasonable doubts resolved in its favor. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (citing *Anderson*, 477 U.S. at 255); *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 167 (5th Cir. 2018); *Hemphill*, 805 F.3d at 538; *Pioneer Expl., L.L.C.*, 767 F.3d at 511. Moreover, summary judgment "generally is inappropriate when inferences parties seek to draw deal with questions of motive and intent." *Williams v. Upjohn Co.*, 153 F.R.D. 110, 116 (S.D. Tex. 1994); *see United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008) (stating that "we hesitate to grant summary judgment when a case turns on a state of mind determination"); *Pasco v. Knoblauch*, 223 F. App'x 319, 322 (5th Cir. 2007) ("[S]ummary judgment is rarely proper when an issue of intent is involved.").

B. Americans with Disabilities Act

The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without a disability. *See* 42 U.S.C. §§ 12101-12113; *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001); *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 696 (5th Cir. 2014); *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011), *cert. denied*, 565 U.S. 1200 (2012); 29 C.F.R. § 1630.1. The ADA was amended in 2008 by the ADA Amendments Act ("ADAAA"), which "primarily focuses on broadening the definition of 'disability.'" *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013); *see* ADA Amendments Act, Pub. L.

No. 110-325, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. §§ 12101-12117 (2012)); *Ball v. LeBlanc*, 792 F.3d 584, 598 (5th Cir. 2015). The ADA contains four codified titles: Employment (Title I), §§ 12111-12117; Public Services (Title II), §§ 12131-12134; Public Accommodations and Services Operated by Private Entities (Title III), §§ 12181-12189; and Miscellaneous Provisions (Title V), §§ 12201-12213.

Title I of the Act, which covers employment discrimination, provides that "[n]o covered entity shall discriminate 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); *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 179-80 (2012); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 46 (2003); *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 442 (5th Cir. 2017); *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 417 (5th Cir. 2017); *Milton v. Tex. Dep't of Crim. Justice*, 707 F.3d 570, 572 (5th Cir. 2013). "The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999) (citing 42 U.S.C. § 12101 (a)(8), (9)); *see Evans v. Tex. Dep't of Transp.*, 547 F. Supp. 2d 626, 638 (E.D. Tex. 2007). Employees asserting claims under Title I of the ADA are required to follow the procedures applicable to Title VII actions, including the timely filing of an EEOC charge. *See* 42 U.S.C. § 12117(a); *Melgar v. T.B. Butler Publ'g Co., Inc.*, 931 F.3d 375, 378 (5th Cir. 2019); *Patton*, 874 F.3d at 443.

To establish a *prima facie* case of employment discrimination under Title I of the ADA, the plaintiff must show that:

(1) he has a "disability" or was regarded as disabled;

(2) he was qualified for the position; and

(3) he was subject to an adverse employment action because of his disability.

Nall, 917 F.3d at 341; *Patton*, 874 F.3d at 442; *Moss*, 851 F.3d at 417; *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 680 (5th Cir. 2013). The plaintiff may present either direct evidence of disability discrimination or employ an indirect method of proof utilized in other types of employment discrimination cases. *Nall*, 917 F.3d at 340; *Patton*, 874 F.3d at 442; *Moss*, 851 F.3d at 417; *Caldwell v. KHOU-TV*, 850 F.3d 237, 241 (5th Cir. 2017); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

If the plaintiff succeeds in making this *prima facie* showing, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Caldwell*, 850 F.3d at 241; *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016). While the employer need not prove that its actions were motivated by the legitimate reason, it must produce some evidence in support of its proffered rationale. *Vincent v. Coll. of the Mainland*, 703 F. App'x 233, 237 (5th Cir. 2017) (quoting *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016)); *see EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 615 (5th Cir. 2009). The defendant's burden is merely one of production and not of persuasion. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257-58 (1981). To meet this burden, an employer must produce evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse

action." *Palacios v. City of Crystal City, Tex.*, 634 F. App'x 399, 402 (5th Cir. 2015) (quoting *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995)); *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 408 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 820 (2017).

If the employer meets its burden of production, the presumption is dissolved, and the burden shifts back to the plaintiff to demonstrate that the proffered reason is a pretext for discrimination—the defendant's alleged nondiscriminatory reason is false and the real reason for the adverse action is disability discrimination. *Rogers*, 827 F.3d at 409 (citing *Reeves*, 530 U.S. at 133); *Squyres v. Heico Cos., L.L.C.*, 782 F.3d 224, 231 (5th Cir. 2015) (quoting *Hicks*, 509 U.S. at 507). As with discrimination cases generally, the plaintiff at all times bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability. *Kittling v. Centennial Beauregard Cellular, L.L.C.*, 447 F. App'x 614, 616 (5th Cir. 2011) (quoting *Reeves*, 530 U.S. at 143); *see Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 235 (5th Cir. 2016); *Vaughn v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011) (quoting *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001), *cert. denied*, 535 U.S. 1078 (2002)). To prevail on an ADA claim, the plaintiff must prove that an adverse employment decision was made "because of his disability." *Neely*, 735 F.3d at 245 (citing *Atkins v. Salazar*, 677 F.3d 667, 675 (5th Cir. 2011)). The ADA does not prohibit adverse action due to a consequence of a disability, such as being unable to report to work regularly or to perform essential job duties as a result of an injury or illness. *See Credeur v. Louisiana*, 860 F.3d 785, 792 (5th Cir. 2017); *LHC Grp., Inc.*, 773 F.3d at 697; *Hypes on Behalf of Hypes v. First Commerce Corp.*, 134 F.3d 721, 726-27 (5th Cir. 1998) (citing 42 U.S.C. § 12112(a)).

1. Existence of Disability

The ADA defines a disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1); *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 479 n.2 (5th Cir. 2016); *Milton*, 707 F.3d at 573; 29 C.F.R. § 1630.2(g)(2) (describing these as the "actual disability," "record of," and "regarded as" prongs). "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. § 1630; *see Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (holding that alcoholism is not a disability *per se*), *cert. denied*, 522 U.S. 1084 (1998). "Thus, even a plaintiff who suffers from a condition such as alcoholism or drug addiction—or is perceived as suffering from such a condition—must demonstrate that the condition substantially limits, or is perceived by his employer as substantially limiting, his ability to perform a major life function." *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 860 (5th Cir. 1999). Furthermore, "[i]ndividuals who take medication or use corrective devices to lessen an impairment but still remain substantially limited as to one or more major life activities are still disabled under the ADA." *Chevron Phillips Chem. Co., LP*, 570 F.3d at 620; *see MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 339 (6th Cir. 2002) (holding the fact that methadone treatment ameliorated drug addiction as it was meant to did not deprive recovering drug addicts of the ADA's protection).

Here, the EEOC contends that it has established that Kimball has a record of a disability. To support its position, the EEOC relies on Kimball's affidavit and deposition testimony. Kimball

states that when he was using opioids, he lost his social skills, was extremely aggressive, easily agitated, short-tempered, and volatile. Kimball further contends that when he was using, his addiction prevented him from sleeping or eating. According to Kimball, when he attempted to stop using, he would become extremely sick from withdrawal and experience severe nausea, fever, and stomach pain. His withdrawal symptoms caused his body to ache all over, rendering him unable to work, eat, drink, focus, or sleep. Kimball admits that his use of methadone has ameliorated the effects of his addiction. Nevertheless, according to Kimball, his continued use of methadone in conjunction with counseling is necessary to avoid withdrawal symptoms and prevent a relapse. This evidence, alone, is sufficient to satisfy the EEOC's burden at the summary judgment stage. *See Williams v. Tarrant Cty. Coll. Dist.*, 717 F. App'x 440, 448 (5th Cir. 2018) ("[D]istrict courts within this circuit routinely consider a plaintiff's testimony, without more, sufficient to create a genuine dispute of material fact regarding substantial limitation.").

2. Qualified for the Position

The ADA defines a "qualified individual" as "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); *see Neely*, 735 F.3d at 245-46; *Shirley*, 726 F.3d at 680. "The ADA prohibits discrimination on the basis of disability 'to ensure that [such] individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.'" *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 574 (5th Cir. 2002) (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir. 1988)), *cert. denied*, 540 U.S. 810 (2003); *see Deas v. River West, L.P.*, 152 F.3d 471, 482 (5th Cir. 1998) (quoting *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987)), *cert. denied*, 527 U.S. 1035 (1999). Nevertheless,

"[t]he ADA is not read as 'requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled." *Allen v. Babcock & Wilcox Tech. Servs. Pantex, LLC*, No. 2:12-CV-00225-J, 2013 WL 5570192, at *8 (N.D. Tex. Oct. 9, 2013) (quoting *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996)); *accord Toronka v. Cont'l Airlines, Inc.*, 411 F. App'x 719, 726 n.7 (5th Cir. 2011); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998); *see Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) ("The law does not require affirmative action in favor of individuals with disabilities. It merely prohibits employment discrimination against qualified individuals with disabilities, no more and no less."). Indeed, there is no requirement that disabled persons be given priority in hiring over more qualified, non-disabled individuals. *Daugherty*, 56 F.3d at 700.

Hence, "[w]hile the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job." *Foreman*, 117 F.3d at 808 (citing 29 C.F.R. § 1630, App. Background); *see Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999); *Franklin v. City of Slidell*, 969 F. Supp. 2d 644, 655 (E.D. La. 2013); *Galvan v. City of Bryan*, 367 F. Supp. 2d 1081, 1090 (S.D. Tex. 2004). "To the contrary, the ADA is intended to enable disabled persons to compete in the work-place based on the same performance standards and requirements that employers expect of persons who are not disabled." *Foreman*, 117 F.3d at 808; *see Franklin*, 969 F. Supp. 2d at 655; *Galvan*, 367 F. Supp. 2d at 1090. "The determination of qualification is two-fold: (1) whether the individual meets the necessary prerequisites for the job, such as education, experience, skills, and the like;

and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation." *Foreman*, 117 F.3d at 810 n.14 (citing 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m)); *see Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 862 (7th Cir.), *cert. denied*, 546 U.S. 1033 (2005). Therefore, to be considered a qualified individual, the plaintiff must show that: (1) he can perform the essential functions of the job despite his disability; or (2) if he is unable to perform the essential functions of the job, that a reasonable accommodation by the employer would enable him to perform those functions. *Crossley v. CSC Applied Techs., L.L.C.*, 569 F. App'x 196, 198 (5th Cir. 2014) (citing *Turco*, 101 F.3d at 1093); *Gober v. Frankel Family Tr.*, 537 F. App'x 518, 520 (5th Cir. 2013); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 749 (5th Cir. 1996).

Here, it is undisputed that Kimball meets the necessary prerequisites for the job, such as education, experience, skills, and the like. Nevertheless, Steel Painters maintains that Kimball is not qualified to perform a safety sensitive position because he failed to get the Verification Form signed by his doctor. An employee is not "qualified" for a position if, in occupying that position, he would pose a direct threat to the heath and safety of himself or others that cannot be eliminated by reasonable accommodations. *See* 42 U.S.C. § 12111(3); *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007) ("The ADA does not protect an employee who poses a direct threat to the health and safety of herself or others in the workplace."). By regulation,

> [t]he determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. § 1630.2(r); *see Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002). "Whether an employer has properly determined that a person poses a direct threat depends on 'the objective reasonableness of [the employer's] actions.'" *Nall*, 917 F.3d at 342 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998)).

A dispute has arisen among the Circuit Courts of Appeals regarding which party bears the burden of proof on this issue. *See Branham v. Snow*, 392 F.3d 896, 907 (7th Cir. 2004) (observing the split); *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 n.5 (9th Cir. 2001) ("Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat."); *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) ("[I]t is the plaintiff's burden to show that he or she can perform the essential functions . . . and is therefore 'qualified.' Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others."). The Fifth Circuit has declined to address the issue. *See Nall*, 917 F.3d at 342 n.5 ("In *Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209 (5th Cir. 2000) (en banc), we declined to reach the question of which party bears the burden of establishing that an individual's disability poses a direct health or safety threat to the disabled employee or others. We do so again here.").

In this situation, the court need not address which party bears the burden of proof. Even if the EEOC has the burden of proving that Kimball was qualified to perform his job safely, it has presented sufficient evidence to satisfy its *prima facie* burden. The record reflects that Kimball has worked as an industrial painter while taking methadone since 2013 and has never been disciplined or discharged from any workplace because of a methadone-related accident. In his

affidavit, Kimball contends that, pursuant to his doctor's recommendation, he takes his methadone at night so that any side effects have dissipated by the time he arrives at work in the morning. Furthermore, Steel Painters had constructive knowledge that Kimball was prescribed methadone but cleared him to work on September 20, 21, 23, and 24, 2016, and had actual knowledge of the prescription yet cleared him to work on September 27, 2016. Indeed, Steel Painters's decision to permit Kimball to work on September 27, 2016, clearly demonstrates that, as far as Steel Painters was concerned on that day, Kimball was qualified to perform his job safely. Moreover, Kimball requested that company doctors perform an individualized assessment to determine whether he posed a direct threat. Steel Painters declined that request and also did not call the number provided by the clinic to obtain additional information. Viewing this evidence in the light most favorable to the EEOC, a reasonable jury could conclude that Kimball would not pose a risk to the health and safety of others by working as an industrial painter while taking prescription methadone.

3. Adverse Employment Action Because of Disability

Under the ADA, as under Title VII, adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, suspensions, and reprimands. *Chevron Philips Chem. Co.*, 570 F.3d at 622 (listing "the hiring, advancement, or discharge of employees"); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885-86 (6th Cir. 1996) (reassignment from nursing supervisor to unit RN not adverse employment action because no change in pay or benefits and no significant change in duties). Further, the plaintiff must prove that an adverse employment decision was made "because of his disability." *Nall*, 917 F.3d at 341; *Williams v. J.B. Hunt Transp., Inc.*, 826 F.3d 806, 811 (5th Cir. 2016).

Here, the evidence indicates that Weighmann made the final decision to terminate Kimball. According to Kimball's testimony, shortly before she terminated him, Weighmann stated that "we don't normally hire people on methadone." In her September 28, 2016, email, Weighmann acknowledged that she was aware that methadone is used to treat a disability covered by the ADA. Weighmann also had personal experience with a family member who used or uses methadone to treat addiction. In her email, Weighman states: "I told him yes I have heard that [methadone use is protected by the ADA] before too and that we spoke with our attorneys about that and were advised that if he worked in an office setting that would be one thing but working in a refinery, safety sensitive work, it is a different situation." A jury could reasonably infer from this statement a general discriminatory animus towards recovering drug addicts who are being treated with methadone as opposed to a true safety concern regarding his specific job duties. *See Rizzo*, 213 F.3d at 221 (Jones, J., dissenting) ("[W]e may have special cause for suspicion when an employer justifies discrimination not on the relatively concrete and more readily measurable basis of ability to perform a particular essential job function safely, but because of a proffered generalized concern about health and safety."). Viewing this evidence in the light most favorable to the EEOC, a jury could reasonably conclude that Kimball was terminated because of his disability.

C. Legitimate, Nondiscriminatory Reason

Because the EEOC has established a *prima facie* case of discrimination, to avoid liability, Steel Painters must set forth an adequate, nondiscriminatory reason for its decision to terminate Kimball. Once a plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Raytheon Co.*, 540 U.S. at 49 n.3; *Reeves*, 530 U.S. at 142; *Hicks*,

509 U.S. at 506-07; *Nall*, 917 F.3d at 341; *J.B. Hunt Transp., Inc.*, 826 F.3d at 811; *Cannon*, 813 F.3d at 590. "The purpose of this step is 'to force the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff founders on the difficulty of proving discriminatory intent.'" *Stratton v. Dep't for the Aging for the City of N.Y.*, 132 F.3d 869, 879 (2d Cir. 1997); *accord Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir.), *cert. denied*, 530 U.S. 1261 (2000). "The employer need not persuade the court that it was motivated by the reason it provides; rather, it must simply articulate an explanation that, if true, would connote lawful behavior." *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998); *see Burdine*, 450 U.S. at 255 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."); *accord Nasti v. CIBA Specialty Chems. Corp.*, 492 F.3d 589 (5th Cir. 2007). Hence, the defendant's burden is relatively light. *Greenway*, 143 F.3d at 52.

The EEOC contends that Steel Painters has not articulated a nondiscriminatory reason for discharging Kimball. The EEOC maintains that because SOP-57 is an unlawful qualification standard it is not a "nondiscriminatory" justification. *See* 42 U.S.C. § 12112(b)(6) (defining unlawful discrimination as including the use of "qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless . . . as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity"); *Atkins*, 677 F.3d at 682 ("To show a business necessity defense, a defendant must prove by a preponderance of the evidence that its qualification standards are: (1) uniformly applied; (2) job-related for the position in question; (3) consistent with business

necessity; and (4) cannot be met by a person with plaintiff's disability even with a reasonable accommodation."). Steel Painters avers that, because § 12112(b)(6) creates an independent cause of action under a "disparate impact" theory, the EEOC cannot raise it for the first time in response to Steel Painters's motion for summary judgment. *See Raytheon*, 540 U.S. at 53 (holding that, in a disparate treatment case, a court errs by considering the disparate impact factors when determining whether an employer has articulated a legitimate nondiscriminatory explanation for its actions). Having reviewed the EEOC's complaint, it is apparent that the EEOC has not pleaded a disparate impact claim and, therefore, cannot raise such a claim for the first time in response to Steel Painters's motion for summary judgment. Nevertheless, summary judgment is not appropriate if the EEOC can demonstrate that Steel Painters's reliance on SOP-57 was a pretext for unlawful discrimination. *See Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 569 (9th Cir. 2004) (holding, on remand from *Raytheon*, that an employer's reliance on its "neutral" policy was pretextual).

D. Pretext for Discrimination

Because Steel Painters has carried its burden of articulating a legitimate, nondiscriminatory reason for its actions, to prevail, the EEOC must "produce substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination . . . [and] must rebut each discrete reason proffered by the employer." *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 233 (5th Cir. 2015); *see Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 507-08; *McDonnell Douglas Corp.*, 411 U.S. at 804; *Vaughn*, 665 F.3d at 637. The EEOC may meet its burden "either through evidence of disparate treatment or by showing that the employer's explanation is false or unworthy of credence." *Delaval*, 824 F.3d at 480 (quoting *Laxton v. Gap*

Inc., 333 F.3d 572, 578 (5th Cir. 2003)); *see DeVoss v. S.W. Airlines Co.*, 903 F.3d 487, 492 (5th Cir. 2018); *Vaughn*, 665 F.3d at 637. The evidence must be of sufficient weight that "a jury could conclude that the employer's articulated reason is pretextual." *Caldwell*, 850 F.3d 237 at 242 (quoting *Chevron Phillips Chem. Co.*, 570 F.3d at 615); *see Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 575 n.5 (5th Cir. 2004) ("The plaintiff always bears the burden of 'persuading the trier of fact that the defendant intentionally discriminated' against [him]." (quoting *Reeves*, 530 U.S. at 143)). Thus, when an employee does not rely on evidence of disparate treatment of a similarly situated employee who is not a member of his protected class, he must produce "substantial evidence" that the employer's proffered reasons for its actions are false or unworthy of credence. *Delaval*, 824 F.3d at 480 (citing *Burton*, 798 F.3d at 233); *see Head v. City of Columbus Light & Water Dep't*, 746 F. App'x 389, 392 (5th Cir. 2018); *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016). "Evidence is substantial if it is of such quality and weight that reasonable and fair-minded men [or women] in the exercise of impartial judgment might reach different conclusions." *Wallace v. Seton Family of Hosps.*, 777 F. App'x 83, 89 (5th Cir. 2019) (quoting *Laxton v. Gap, Inc.*, 333 F.3d 572, 579 (5th Cir. 2003)).

While the employer's proffered non-discriminatory justification renders the presumption of discrimination no longer operative, "[e]vidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive." *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 365 n.10 (5th Cir. 2013); *see Reeves*, 530 U.S. at 147 ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation . . . ."). Indeed, when "the

evidence of pretext is substantial, the plaintiff may create a genuine issue of material fact without independent evidence that discrimination was the real reason for the adverse employment action." *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 903 (5th Cir. 2000) (citing *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir. 1997)); *see Reeves*, 530 U.S. at 143; *Burton*, 798 F.3d at 241. Nevertheless, "discrimination suits still require evidence of discrimination." *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001); *accord Kopszywa v. Home Depot USA, Inc.*, 620 F. App'x 275, 279 (5th Cir. 2015) ("[E]vidence of pretext will not always be sufficient to survive summary judgment."); *Churchill v. Tex. Dep't of Criminal Justice*, 539 F. App'x 315, 320 (5th Cir. 2013). "[T]he question for summary judgment is whether a rational fact finder could find that the employer discriminated against the plaintiff [because of his disability]." *Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir. 2001), *cert. denied*, 540 U.S. 1005 (2003) (citing *Hicks*, 509 U.S. at 511).

Here, the EEOC has presented sufficient evidence of pretext that, when considered in conjunction with its evidence of discriminatory intent and *prima facie* case, is sufficient to create a genuine issue of material fact. First, SOP-57 was promulgated by Steel Painters in January 2016 but was applied for the first time in September 2016 after Steel Painters received the results of Kimball's drug screening. Furthermore, it does not appear that Steel Painters complied with its own policy. Section 8.1 of the policy provides that when Steel Painters discovers that a safety sensitive employee is taking prescription medication without completing the Verification Form, such employee is to be removed from service immediately. Section 8.3 states that the employee in question "may not be returned to safety sensitive duties until evaluated and released by a physician." The undisputed evidence indicates that Weighmann approved Kimball to return to

work on September 27, 2016, although he had not been evaluated and released by a physician. This fact is especially telling given Weighmann's deposition testimony that she, in conjunction with Steel Painters's attorneys, drafted SOP-57. Section 5.4 provides that an employee will be medically disqualified from safety sensitive positions if his doctor indicates that he cannot perform such positions safely, and § 1 provides that an employee may be terminated for failing to disclose the use of prescription drugs to his supervisor. Yet, nothing in SOP-57 addresses Steel Painters's policy for cases, such as Kimball's, where the treating physician refuses to complete the Verification Form and fails to indicate whether the employee may or may not perform safety sensitive duties while taking the medication. The policy states, however, that the purpose of the Verification form is "so that, if needed, [Steel Painters] can allow qualified medical personnel to determine the medication's potential effects on employee performance." This language suggests that Kimball's request to be evaluated by Steel Painters's company doctors is consistent with Steel Painters's policy, but Steel Painters rebuffed his request.

In addition to Steel Painters's failure to follow its own policy, the EEOC points to various statements allegedly made by Weighmann. In a December 12, 2013, email sent to Judd Adams ("Adams"), the owner of Steel Painters, Weighmann discusses Chance Montgomery ("Montgomery"), a prospective hire who had disclosed that he was prescribed methadone. She states:

> [Attorney] called and if we moved people around and do not need the new hire anymore, we need to document that and stick with that and not worry about trying to follow thru [sic] with getting valid prescription for methadone signed by physician and not the director of the clinic and then sending him to Dr. Craig for evaluation of whether methadone impairs his ability to work in safety sensitive position

Based on this email, the jury could reasonably infer that Weighmann held negative views of recovering drug addicts who used methadone and that she was sufficiently familiar with federal employment law to discriminate without leading to repercussions. The EEOC also points to Weighmann's alleged statement that "we don't normally hire people on methadone." A reasonable jury could interpret this statement as evidence of discriminatory animus.

Finally, the EEOC identifies several instances where Weighmann feigned ignorance of the purpose for which methadone is prescribed. In her September 28, 2016, email discussing Kimball, Weighmann states: "[Kimball] then asked if I knew this drug was for a disability he has and that he is covered by the ADA. I told him yes I have heard that one before too . . . ." According to the EEOC, this statement implies that Weighmann is pretending not to know that methadone is, in some instances, used to treat a disability. Indeed, at her May 20, 2019, deposition, Weighmann testified that she still did not know the purpose for which methadone is prescribed. The EEOC maintains that Weighmann did, in fact, know that methadone is used to treat opioid addiction. To support its contention, the EEOC identifies Weighmann's admission that, in 2013, she was contacted by the doctor who was supervising Montgomery's methadone treatment. According to Weighmann's deposition testimony, the doctor told her that Steel Painters was violating the law by refusing to hire Montgomery and that methadone use was protected by the ADA. Following that conversation, Weighmann discussed the issue with an attorney and then sent the December 12, 2013, email to Adams. Moreover, according to her deposition testimony, a member of Weighmann's immediate family used or uses methadone to treat addiction. Weighmann admitted to knowing her relative took methadone but denied knowing it was used to treat addiction.

"In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. In this instance, viewing the evidence in the light most favorable to the EEOC, a reasonable jury could conclude that Weighmann's purported reliance on SOP-57 and her ostensible concerns regarding employee safety were a pretext to mask her discriminatory animus toward recovering drug addicts who use methadone. Accordingly, summary judgment is not warranted.

III. Conclusion

Consistent with the foregoing analysis, the EEOC's Motion for Leave to File Response to Summary Judgment (#27) is granted, and Steel Painters's Motion for Summary Judgment (#21) is denied.

SIGNED at Beaumont, Texas, this 14th day of January, 2020.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE