IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02304-RM-STV

ETHAN WEST-HELMLE,

Plaintiff,

v.

DENVER DISTRICT ATTORNEYS OFFICE,
DENVER COUNTY JUDICIARY,
UNIVERSITY OF DENVER,
DUSTIN HEARD,
CHRISTINE WASHBURN,
JESSIE DUBOIS,
THOMAS RUSSELL,
VIVA MOFFAT, and
ALEXI FREEMAN,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter is before the Court on the following four motions to dismiss: (1) the Motion to Dismiss Plaintiff's Third Amended Complaint [ECF 108] from DA Defendants, filed by the Denver District Attorney's Office, Christine Washburn, Dustin Heard, and Jessie Dubois (the "DA Motion") [#109]; (2) the Motion to Dismiss Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), filed by the Denver County Judiciary (the "DCJ Motion") [#111]; (3) Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint, filed by the University of Denver, Viva Moffat, and Alexi Freeman (the "DU Motion") [#113]; and (4) Defendant Professor Thomas Russell's Motion to Dismiss Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the "Russell

Motion") [#114] (collectively, the "Motions"). The Motions have been referred to this Court. [##110, 115] This Court has carefully considered the Motions and related briefing, the case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motions. For the following reasons, the Court respectfully **RECOMMENDS** that the DA's Office's Motion, the DU Motion and the Russell Motion be **GRANTED** and the DCJ Motion be **GRANTED in part** and **DENIED in part**.

I. BACKGROUND[1]

Plaintiff Ethan West-Helmle began attending the University of Denver Sturm College of Law ("DU") in May 2015 and anticipated graduating with his Juris Doctorate degree in December 2017. [#108 at ¶ 11] On December 31, 2016, Plaintiff suffered an ischemic stroke after a food poisoning episode, causing him to tear his carotid artery. [*Id.* at ¶ 12] Plaintiff underwent emergency surgery, but extensive brain trauma has left Plaintiff with lasting impairments. [*Id.* at ¶ 13]

In July 2017, Plaintiff spoke with Defendant Alexi Freeman, a DU professor, about his stroke and his unusual, antisocial feelings while participating in his summer externship. [*Id.* at ¶¶ 15-16] Professor Freeman encouraged Plaintiff to attempt to overcome those barriers at his fall externship with the Denver District Attorney's ("DA's") Office. [*Id.* at ¶ 16] When Plaintiff interviewed with the DA's Office, Plaintiff informed the interviewers that he had suffered a stroke, and the parties agreed that if there were any issues, they could work together to find a solution. [*Id.* at ¶¶ 17, 19]

[1] The facts are drawn from the allegations in Plaintiff's Third Amended Complaint [#108], which must be taken as true when considering a motion to dismiss. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

Plaintiff began his externship at the DA's Office in August 2017.[2] [*Id.* at ¶ 20] The staff that Plaintiff had interviewed with were no longer extern supervisors. [*Id.*] Plaintiff apparently worked primarily with DA's Office employees Dustin Heard, Christine Washburn, and Jessie Dubois (the "DA's Office Defendants"). [*See generally* #108] The externs were assigned to work in Courtroom 4C, where Magistrate Melissa Trollinger Annis presided. [*Id.* at ¶¶ 9, 21-23]

On September 4, 2017, Plaintiff was the notetaker for the afternoon session in Courtroom 4C, and was working with Ms. Dubois. [*Id.* at ¶ 23] Ms. Dubois made fun of Plaintiff's typing abilities in front of another extern and two court clerks. [*Id.* at ¶ 24] Plaintiff later informed Ms. Dubois that he has struggled with typing since his stroke. [*Id.* at ¶ 25]

On September 21, 2017, Mr. Heard sent a memorandum to the externs saying that none of them were performing well. [*Id.* at ¶ 26] This memorandum was apparently sent in response to a communication from Magistrate Annis to Ms. Washburn in which Magistrate Annis asked Ms. Washburn to fix problems with the externs, but also asked Ms. Washburn not to share with the externs the substance of Magistrate Annis' complaints. [*Id.* at ¶ 27] Magistrate Annis had frequently complained about the externs to Ms. Washburn. [*Id.* at ¶ 29]

Later that day, Ms. Washburn called a meeting with the externs. [*Id.*] Ms. Washburn asked the externs to tell "their side of the story." [*Id.* (quotation omitted)] Plaintiff informed Ms. Washburn that Mr. Heard had been disrespectful to the externs

[2] Plaintiff had previously had a successful externship at the Adams County District Attorney's Office. [*Id.* at ¶ 15]

when he wrote a memorandum "fixing" all of the extern issues. [*Id.*] A few days later, Ms. Washburn submitted a mid-semester review for Plaintiff that appeared to be largely copied from another extern's review, and implied that Plaintiff would not be approved to conduct trials and motions hearings. [*Id.* at ¶ 32]

On September 28, 2017, Ms. Washburn informed Magistrate Annis that Plaintiff was disabled and dissatisfied. [*Id.* at ¶ 35] Ms. Washburn told Magistrate Annis that "they should accommodate [Plaintiff] or can affirmatively fire him." [*Id.*] On several occasions, during meetings between Mr. Heard and Magistrate Annis's chambers staff, Mr. Heard complained about Plaintiff's incompetency. [*Id.* at ¶¶ 36-37]

On September 29, 2017, Plaintiff offered a plea deal to a defendant. [*Id.* at ¶ 38] The defendant accepted the offer. [*Id.*] Mr. Heard reviewed the defendant's file and then falsely accused Plaintiff of using an incorrect Department of Motor Vehicles ("DMV") report to formulate the plea offer. [*Id.*] Mr. Heard directed the defendant to go to Mr. Heard's trial division where Mr. Heard ultimately dismissed the case. [*Id.*] "On Information and belief, [Mr. Heard's] undermining of [Plaintiff's] work was done at the direction of [Ms. Washburn]." [*Id.* at ¶ 39]

On October 2, 2017, Plaintiff met with Mr. Heard and another DA's Office employee for his mid-semester review. [*Id.* at ¶ 42] Mr. Heard informed Plaintiff that he would be held back from performing motions hearings because Plaintiff had reached a plea deal with a defendant despite the fact that the defendant's name was not on the DMV report.[3]

[3] Presumably this refers to the plea agreement that Mr. Heard had been upset about, as detailed in the previous paragraph.

[*Id.*] Plaintiff states this reason was "a blatant lie." [*Id.*] According to Plaintiff, all other similarly situated externs were allowed to conduct motions hearings. [*Id.* at ¶ 43]

On October 13, 2017, Plaintiff asked Magistrate Annis a question about a hearing after it had concluded, which sent Magistrate Annis "into an outrage." [*Id.* at ¶ 46] Ms. Dubois again made fun of Plaintiff's typing abilities, this time in front of Magistrate Annis, another extern, and court clerks. [*Id.* at ¶ 47] Later that day, Magistrate Annis inundated Ms. Washburn and Mr. Heard with negative emails about Plaintiff. [*Id.* at ¶ 48] Magistrate Annis told Ms. Washburn that Plaintiff was incompetent and too cumbersome to accommodate and she therefore banned Plaintiff from her courtroom.[4] [*Id.* at ¶ 49] When Mr. Heard asked Magistrate Annis what he should tell Plaintiff, Magistrate Annis said to tell Plaintiff that the court has rules. [*Id.* at ¶¶ 50-51]

Plaintiff alleges several derogatory or unprofessional comments made by the DA's Office staff in the weeks that followed. On October 24, 2017, Ms. Dubois, with Mr. Heard present, informed Plaintiff that if he does not give the police great deference, he is not the right fit for the DA's Office. [*Id.* at ¶ 66] Two days later, on October 26, 2017, Plaintiff noticed two unprofessional and hurtful comments that Mr. Heard had written on the docket. [*Id.* at ¶ 67] That same day, Mr. Heard fired Plaintiff. [*Id.* at ¶¶ 68-69] On

[4] Similarly, in May 2018, Magistrate Annis sent an email communication indicating that Plaintiff was too incompetent for her courtroom and that he should not receive a passing grade for his externship. [*Id.* at ¶ 95] Magistrate Annis acknowledged a failure to accommodate Plaintiff's disability, stating that Plaintiff's disability would not improve. [*Id.* at ¶ 96]

December 2, 2017, Mr. Heard submitted a final review of Plaintiff, recommending a failing grade and misrepresenting Plaintiff's performance.[5] [*Id.* at ¶ 78]

Various staff members from the DA's Office, including Ms. Dubois, promised to serve as a reference for Plaintiff when he sought other opportunities. [*Id.* at ¶ 56] Plaintiff believes that in actuality these staff members informed Plaintiff's potential employers of his disability and recommended that Plaintiff not be hired. [*Id.* at ¶¶ 57-58] Similarly, Plaintiff believes that Ms. Washburn and Mr. Heard contacted all district attorney's offices in the area in order to deter Plaintiff from finding a similar position in a different county.[6] [*Id.* at ¶ 73]

On December 18, 2017, Plaintiff met with Professor Moffat. [*Id.* at ¶ 79] Professor Moffat stated that there was nothing she could do about Plaintiff's costs for the externship credit with the DA's Office. [*Id.*] A few days later, Plaintiff emailed Professor Freeman and another DU staff member, asking if they could accommodate him, rather than give him a failing grade for the externship with the DA's Office. [*Id.* at ¶ 80] Professor Freeman responded, directing Plaintiff to complete two unfinished assignments in order to put him in the best position to pass, though Plaintiff believes she already had plans to fail Plaintiff. [*Id.* at ¶ 81]

On January 6, 2017, Professor Freeman imposed Plaintiff's failing grade, stating that she was unable to pass Plaintiff because she needed to maintain a positive

[5] At some point prior to submitting Plaintiff's final review, the DA's Office apparently asked Professor Freeman if they could fail Plaintiff even though he was disabled. [*Id.* at ¶ 74] Professor Freeman consulted with Defendant Viva Moffat, another DU professor, who agreed with the DA's Office that Plaintiff was incompetent. [*Id.* at ¶ 75; *see also id.* at ¶ 8] Professor Freeman emailed Professor Moffat's thoughts to Ms. Washburn. [*Id.* at ¶ 75]

[6] Plaintiff alleges that Ms. Washburn, Mr. Heard and Ms. Dubois later extended this blacklisting to areas outside of Colorado. [*Id.* at ¶¶ 105-08]

relationship with the DA's Office. [*Id.* at ¶ 84] According to DU's externship handbook, a failing grade is not supposed to affect a student's grade point average ("GPA"). [*Id.* at ¶ 83] Nonetheless, Professors Moffat and Freeman instructed the DU Registrar Administrator to factor Plaintiff's failing grade into his GPA. [*Id.*] The Registrar Administrator complied with this request. [*Id.*] Later that month, Plaintiff was hospitalized after suffering a double pulmonary embolism. [*Id.* at ¶ 87]

Plaintiff appealed the cost of his externship to DU's Chancellor's Office, but Professor Moffat influenced the decision to reject Plaintiff's appeal without consideration. [*Id.* at ¶ 89] Plaintiff also appealed his failing grade with the law school administration. [*Id.* at ¶ 90] Defendant Professor Thomas Russell, the chairman of the Examinations, Standing, and Readmission Committee, did not speak with Plaintiff. [*Id*. at ¶¶ 90, 93] Professor Russell took considerable time to offer a decision on Plaintiff's appeal. [*Id.* at ¶ 90] Professor Russell waited until the other Committee members left town for summer break, and then on May 18, 2018, issued his decision upholding Plaintiff's failing grade. [*Id.* at ¶¶ 97-98] In his decision, Professor Russell wrote: "[W]e agree with [Professor Freeman . . . .] As committee chair, I sense that your goal is to punish the [DA's Office and] I will not permit my Committee to serve this function for you." [*Id.* at ¶ 100]

Plaintiff believes that Professor Russell was influenced by his deference to Professor Freeman and that, in turn, Professor Moffat directed the actions of Professor Freeman and Professor Russell. [*Id.* at ¶¶ 97, 99] Plaintiff further alleges that the DA's Office told Professor Russell that by overturning Plaintiff's failing grade Professor Russell would be providing Plaintiff with proof of the DA's Office's wrongdoing, thereby harming the DA Office's reputation. [*Id.* at ¶ 102] Professor Russell agreed to help the DA's Office

and did not overturn Plaintiff's failing grade. [*Id.* at ¶ 103] Plaintiff ultimately graduated a year late, earning his degree in December 2018 after making up the credit hours from the DA's Office.[7] [*Id.* at ¶ 104]

Plaintiff, proceeding pro se, initiated the instant action on August 13, 2019. [#1] The Court directed Plaintiff to file an amended complaint to address several deficiencies [#4] and Plaintiff did so on September 11, 2019 [#6]. After Defendants filed several motions to dismiss, Plaintiff filed a motion to amend his complaint in January 2020. [#50] This Court granted the motion to amend [#60] and Plaintiff filed a Second Amended Complaint on February 12, 2020 [#61].

On May 29, 2020, this Court issued a Recommendation that most of Plaintiff's claims in the Second Amended Complaint be dismissed. [#84] On September 9, 2020, United States District Judge Raymond P. Moore entered an Order adopting the Recommendation as modified. [#90] Thereafter, on September 22, 2020, Plaintiff filed a motion for leave to file a Third Amended Complaint [#92], which this Court granted on November 17, 2020 [##106-07].

Plaintiff asserts six causes of action in the Third Amended Complaint. [#108] In Claims One through Three, Plaintiff alleges violations of his rights under the ADA against the DCJ and the DA's Office. [*Id.* at 17-19] Claim One asserts disability discrimination in violation of the ADA, Claim Two is an ADA retaliation claim, and Claim Three alleges that the DCJ and the DA's Office failed to provide a reasonable accommodation for Plaintiff's

[7] Prior to graduating, Plaintiff attempted to leave Colorado and complete his education with an externship in Multnomah County, Oregon. [*Id.* at ¶¶ 105-106] Professor Freeman said that she would not honor an out-of-state externship for Plaintiff, despite having other students engaged in out-of-state externships. [*Id.* at ¶ 105]

disability under the ADA. [*Id.*] Claim Four alleges that the DCJ, the DA's Office, and DU denied Plaintiff equal access to educational services, retaliated against Plaintiff, and subjected Plaintiff to a hostile work environment in violation of Section 504 of the Rehabilitation Act. [*Id.* at 19-21] In Claim Five, Plaintiff asserts a breach of contract claim against Defendants Washburn, Heard, Dubois, Freeman, Moffat and Russell. [*Id.* at 21-23] In Claim Six, Plaintiff alleges that Professors Russell, Moffat, and Freeman engaged in a conspiracy to uphold Plaintiff's failing grade. [*Id.* at 23-24]

The instant Motions were filed on December 4, 2020, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [*See generally* ##109, 111, 113, 114] The Motions collectively seek dismissal of all of Plaintiff's claims, with the exception of the Rehabilitation Act claim asserted against DU (Claim Four). [*See id.*] Plaintiff has filed a consolidated Response in opposition to the Motions [#119], and Defendants have replied [##120-23].

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Cassanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath or conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id*. (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The

Haines rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

IV. ANALYSIS

Plaintiff asserts six causes of action in the Second Amended Complaint. [*See generally* #108] The instant Motions collectively seek dismissal of all of Plaintiff's claims, with the exception of the Rehabilitation Act claim asserted against DU (Claim Four). [*See generally* ##109, 111, 113, 114]

The Court generally addresses Plaintiff's claims in the order that they appear in the Third Amended Complaint, with some exceptions. The Court first addresses the DCJ's argument that it is judicially immune from suit. Second, the Court discusses Plaintiff's Claims One through Four, all arising under the ADA and the Rehabilitation Act. Third, the Court considers Plaintiff's breach of contract claim, including whether Plaintiff gave proper notice under the Colorado Governmental Immunity Act ("CGIA") of his state law claims against the DA's Office Defendants. Finally, the Court discusses Plaintiff's conspiracy claim.

A. The DCJ's Judicial Immunity

Plaintiff asserts both ADA and Rehabilitation Act claims against the DCJ. [*See* #108 at 17-21] The DCJ argues, in part, that it is judicially immune from suit. [#111 at 6-8]

It is well established that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v.*

Sparkman, 435 U.S. 349, 355-56 (1978) (quotation omitted). That same immunity applies even if the judge's "exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 359. The Supreme Court has emphasized that a judge's immunity from civil liability "is overcome in only two sets of circumstances." *Mireles v. Waco,* 502 U.S. 9, 11-12 (1991) (citations omitted). "First, a judge is not immune from liability for nonjudicial acts, *i.e.,* actions not taken in the judge's judicial capacity." *Id.* An action is judicial if it is a function normally performed by the judge and if the complaining party was interacting with the judge in her judicial capacity. *Stump*, 435 U.S. at 362. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles,* 502 U.S. at 11-12 (citations omitted).

As explained in this Court's last Recommendation, Plaintiff's former claims against Magistrate Annis arose out of Magistrate Annis losing her temper with Plaintiff after he asked her a question, and then banning Plaintiff from her courtroom. [#84 at 11-12] Judges have the authority to control their own courtrooms, and courts have held that a judge who orders an individual removed or barred from her courtroom is performing an act in her judicial capacity. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) ("[T]he courtroom and courthouse premises are subject to the control of the court."); *Stevens v. Osuna*, 877 F.3d 1293, 1305-06 (11th Cir. 2017) (finding judge's barring of an attorney from the courtroom and courthouse constituted a judicial act (collecting cases)); *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir. 1994) (holding that barring admittance to the courtroom was a judicial act, even if the action arose out of personal hostility); *Montana v. Connor*, 817 F. Supp. 2d 440, 447-48 (D.N.J. 2011) (noting overwhelming authority holding that a judge's exercise of control over his or her courtroom falls within judicial

immunity). Thus, because Magistrate Annis was exercising her judicial authority to ban Plaintiff from her courtroom, she is judicially immune from suit. [#84 at 11-12] Plaintiff appears to have recognized this fact and does not name Magistrate Annis as a Defendant in his Third Amended Complaint.

The DCJ nonetheless argues that it is entitled to absolute immunity because Plaintiff's claims against the DCJ all arise from Magistrate Annis' judicial actions and that quasi-judicial immunity would extend to other DCJ employees. [#111 at 6-8] Here, the Court agrees with the DCJ that Plaintiff's claims all appear to stem from Magistrate Annis' judicial actions. As Plaintiff points out, however, courts have held that absolute immunity does not extend beyond claims against the individuals protected by that immunity. *Smith v. Krieger*, 643 F. Supp. 2d 1274, 1294 (D. Colo. 2009); *Prakel v. Indiana*, 100 F.Supp.3d 661, 677 (S.D. Ind. 2015); *Reed v. Illinois*, 119 F.Supp.3d 879, 883 n.1 (N.D. Ill. 2015); *Williamson v. City of Pekin Fire Dep't*, No. 13-1436, 2015 WL 128071, at * 2 (C.D. Ill. Jan. 8, 2015) (collecting cases). Thus, Magistrate Annis' judicial immunity would not extend to the DCJ. Accordingly, the Court respectfully RECOMMENDS that the DCJ Motion [#111] be DENIED to the extent it seeks dismissal of Plaintiff's ADA and Rehabilitation Act claims based upon absolute judicial immunity.[8]

[8] In a footnote, the DCJ also argues that Plaintiff's claims are barred by Eleventh Amendment sovereign immunity. [#111 at 8 n.1] And the DCJ correctly notes that this Court's earlier Recommendation relied upon sovereign immunity as an alternate basis for recommending dismissal of the claims against the DCJ in the Second Amended Complaint. [#84 at 13] But, in the Third Amended Complaint, Plaintiff has limited his claims against the DCJ to claims premised upon Title II of the ADA and the Rehabilitation Act. [#108] With respect to Plaintiff's Title II claims, the Supreme Court has held that Title II validly abrogated a state's sovereign immunity "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." *United States v. Georgia*, 546 U.S. 151, 159 (2006) (emphasis in original). Given that the DCJ has not addressed as part of this argument whether

B. ADA and Rehabilitation Act Claims

In Claims One through Three, Plaintiff alleges violations of his rights under the ADA against the DCJ and the DA's Office. [#108 at 17-19] Claim One asserts disability discrimination in violation of the ADA, Claim Two is an ADA retaliation claim, and Claim Three alleges that the DCJ and the DA's Office failed to provide a reasonable accommodation for Plaintiff's disability under the ADA. [*Id.*] Claim Four is a Rehabilitation Act claim against the DCJ, the DA's Office, and DU alleging that these Defendants denied Plaintiff equal access to educational services, retaliated against Plaintiff, and subjected Plaintiff to a hostile work environment in violation of Section 504 of the Rehabilitation Act. [*Id.* at 19-21]

In addition to the immunity argument addressed above, the DCJ also argues that Plaintiff fails to state either an ADA or Rehabilitation Act claim against it. [#111 at 9-11] The DA's Office likewise argues that Plaintiff fails to state either an ADA or Rehabilitation Act claim against it. [#109 at 3-9] DU has not challenged the Rehabilitation Act claim against it. [#113]

Title II of the ADA states, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Analysis of a claim under Title II

Plaintiff's allegations, if true, would violate the Fourteenth Amendment, the Court cannot conclude at this stage that the DCJ is entitled to sovereign immunity on Plaintiff's Title II claims. With respect to Plaintiff's Rehabilitation Act claim, Plaintiff alleges that DCJ receives federal funding [#108 at ¶ 133] and "by accepting federal financial assistance as specified in 42 U.S.C. § 2000d–7, states and state entities waive sovereign immunity from suit." *Arbogast v. Kansas, Dep't of Lab.*, 789 F.3d 1174, 1182 (10th Cir. 2015).

of the ADA is identical to an analysis under the Rehabilitation Act." *Kimble v. Douglas Cty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176, 1182 (D. Colo. 2013) (citing *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 n.7 (10th Cir. 1998); *see also Anderson v. Colo. Dep't of Corr.*, 848 F. Supp. 2d 1291, 1300 n.2 (D. Colo. 2012) ("The Rehabilitation Act is materially identical to and the model for the ADA[—]the elements are the same except the Rehabilitation Act requires that defendant receive federal funds." (quotations omitted)). Accordingly, the Court analyzes the Title II claims and the Rehabilitation Act claim together.

1. Discrimination and Failure to Accommodate Claims

Both the DCJ and the DA's Office argue that Plaintiff has failed to state a Title II claim because he has not pleaded any discrimination on the basis of his disability. [#109 at 4; #111 at 10-11] "To state a claim under Title II, the plaintiff must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007). "Courts have recognized three ways to establish a discrimination claim under the second prong: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." *J.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1295 (10th Cir. 2016). In Claim One, Plaintiff appears to allege intentional discrimination by the DCJ and the DA's Office, in Claim Three Plaintiff appears to allege that the DCJ and the DA's Office failed to make a reasonable accommodation, and in Claim Four

Plaintiff appears to assert both intentional discrimination and a failure to accommodate.[9] [#108 at 17-21] The DCJ challenges all three elements of Plaintiff's discrimination claims [#111 at 9-11], whereas the DA's Office challenges only the third element [#109 at 3-5].

a. Qualified Individual with a Disability

The DCJ argues that Plaintiff has failed to plausibly plead that he was a qualified individual with a disability. [#109 at 9-10] The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131. The term "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[10] 42 U.S.C. § 12102.

Here, Plaintiff alleges that an ischemic stroke caused him to tear his carotid artery. [#108 at ¶ 12] This resulted in "extensive brain trauma" that has left Plaintiff "with impairments from [that] day forward such as slowed reading comprehension" and "poor

[9] To the extent Plaintiff seeks to bring a Title I hostile environment claim, that claim fails for the reasons previously articulated in the Court's earlier Recommendation. [#84 at 15-20] Specifically, Plaintiff did not exhaust his administrative remedies or plausibly plead an employment relationship with either the DCJ or the DA's Office. [*Id.*]

[10] Plaintiff's Response focuses on the "physical or mental impairment that substantially limits one or more major life activities" prong and does not argue that either of the other two prongs of this definition applies. [#119 at 8] The Court thus does not address the other two possible methods of establishing disability.

circulatory function." [*Id.* at ¶¶ 12, 110] Plaintiff also has "unusual, antisocial feelings." [*Id.* at ¶ 16]

In addition to these allegations, Plaintiff has attached six pages of medical records to his Third Amended Complaint.[11] According to these medical records, Plaintiff's "test results [we]re notable for multiple strengths and a handful of weaknesses in cognition." [#108-1 at 2] With respect to the weaknesses, "mild impairments were observed in simple auditory attention, speeded mental flexibility and novel problem solving (aspects of executive functioning), and [a]spects of language abilities." [*Id.*] Plaintiff also "exhibited mild impairment for the recall of structured verbal material (i.e. short stories), which is likely related to his observed deficits in language functioning. [*Id.* at 2-3] Plaintiff's lowest test scores fell within the "mildly impaired" range. [*Id.* at 4-5] The records noted that Plaintiff's daily use of marijuana may be contributing to those mild impairments. [*Id.* at 3]

Neither the allegations contained within the Third Amended Complaint nor the attached medical records plausibly allege "a physical or mental impairment that substantially limits one or more major life activities of [Plaintiff]." 42 U.S.C. § 12102. The Third Amended Complaint fails to identify any major life activity that has been impaired by Plaintiff's mild impairments. As a result, Plaintiff has failed to plausibly allege that he has a disability as defined by the ADA, and therefore has failed to plausibly plead that he is a qualified individual with a disability. *Glueck v. Nat'l Conf. of Bar Examiners*, No. SA-17-CV-451-XR, 2018 WL 3977891, at *5 (W.D. Tex. Aug. 20, 2018) ("The evaluations

[11] "A written document that is attached to the complaint as an exhibit is considered part of the complaint and may be considered in a Rule 12(b)(6) dismissal." *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991). In contrast, the Court does not consider documents attached to Plaintiff's Response that were neither attached to the Third Amended Complaint nor referenced in the Third Amended Complaint.

show that Plaintiff performs in the 'low average' range in certain areas of mental functioning, and the evaluators' conclusions indicate that these present some challenges for Plaintiff, but Plaintiff fails to show that he is substantially limited as compared to the general population."); *see also Kahler v. Leggitt*, No. 18-CV-03162-WJM-KMT, 2019 WL 5104775, at *7 (D. Colo. May 3, 2019), *report and recommendation adopted*, No. 18-CV-3162-WJM-KMT, 2019 WL 3928622 (D. Colo. Aug. 20, 2019) (dismissing ADA claim, in part, because the plaintiff failed to allege how her alleged disabilities impacted her daily life activities); *Baker v. Nw. Med. Lake Forest Hosp.*, No. 16-CV-05669, 2017 WL 2908766, at *5 (N.D. Ill. July 7, 2017) ("[Plaintiff] has not alleged or explained, however, how either of these diseases substantially limits any major life activity. . . . This alone is sufficient to dismiss her disability discrimination claims."); *Mabry v. Neighborhood Defender Serv.*, 769 F. Supp. 2d 381, 401 (S.D.N.Y. 2011) (dismissing ADA claim because complaint alleged "no facts tending to show that [plaintiff's] medical condition limits, let alone substantially limits," any major life activity). Accordingly, the Court respectfully RECOMMENDS that the DCJ's Motion be GRANTED to the extent is seeks to dismiss Plaintiff's discrimination and failure to accommodate claims against the DCJ—Claims One, Three, and the discrimination and failure to accommodate components of Claim Four.[12] Because this is the Third Amended Complaint and the Court has previously identified this deficiency in its earlier Recommendation, the Court respectfully RECOMMENDS that these claims be DISMISSED WITH PREJUDICE. *S.D. v. Lajeunesse*, No. 15-CV-02404-WJM-CBS, 2017 WL 262692, at *4 (D. Colo. Jan. 20,

[12] This same rationale would apply to the discrimination and failure to accommodate claims made against the DA's Office and DU, but neither of those entities raised this argument.

2017) ("By the time of a second amended complaint"—and certainly by the time of a Third Amended Complaint—"it is often the case that pleading deficiencies such as those evident here may be deemed irreparable, and the complaint will be dismissed with prejudice.").

b. Discrimination by Reason of a Disability

The DA's Office argues that Plaintiff has failed to plausibly plead discrimination by reason of a disability for either his intentional discrimination or failure to accommodate claims.[13] [#109 at 3-5] The Court agrees.

Intentional discrimination does not require proof of "personal animosity or ill will." *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). Instead, "intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Id.* at 1153. Put another way, "[t]he test for deliberate indifference in the context of intentional discrimination comprises two prongs: (1) knowledge that a harm to a federally protected right is substantially likely, . . . and (2) a failure to act upon that . . . likelihood." *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009) (citation omitted). "[F]ailure to act is a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* (citation omitted).

[13] The DCJ also challenges this element of Plaintiff's intentional discrimination and failure to accommodate claims. [#111 at 10-11] Because the Court has recommended dismissal of the claims against the DCJ on other grounds, the Court does not address this argument.

Here, Plaintiff alleges that the DA's Office discriminated against him by "intentionally exclud[ing] [Plaintiff] from participating in his in-court apprenticeship program." [#108, ¶¶ 112-13] It is clear from the Third Amended Complaint, however, that it was Magistrate Annis' decision to exclude Plaintiff from the courtroom. [*Id.* at ¶ 49 ("Courtroom 4C told [the DCJ that Plaintiff] can no longer be tolerated in the Courtroom by Courtroom 4C employees."); ¶ 60 (Mr. Heard informed Plaintiff that "he was barred, banned from the courtroom" because Magistrate Annis had declared: "This is my COURT, MY ROOM, MYYYYY RULES!!"). Thus, the DA's Office did not intentionally exclude Plaintiff from the courtroom or act with deliberate indifference in excluding him from the courtroom—Magistrate Annis excluded Plaintiff from the courtroom and the DA's Office simply complied with Magistrate Annis' order. Accordingly, because Plaintiff has failed to plausibly allege intentional discrimination on the part of the DA's Office, the Court respectfully RECOMMENDS that Claim One be DISMISSED as it pertains to the DA's Office and Claim Four be DISMISSED as it pertains to intentional discrimination by the DA's Office. Because this is the Third Amended Complaint and the Court has previously identified deficiencies in its earlier Recommendation, the Court respectfully RECOMMENDS that these claims be DISMISSED WITH PREJUDICE. *Lajeunesse*, 2017 WL 262692, at *4.

For similar reasons, Plaintiff's failure to accommodate claims against the DA's Office likewise fails. As the Tenth Circuit has instructed, the ADA "requires more than physical access to public entities: it requires public entities to provide *meaningful* access to their programs and services." *Robertson*, 500 F.3d at 1195 (emphasis in original) (quotations omitted). To effectuate Title II's mandate, Department of Justice "regulations

require public entities to 'make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.'" *Id.* (quoting 28 C.F.R. § 35.130(b)(7)). "A public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and requires an accommodation of some kind to participate in or receive the benefits of its services." *J.V.*, 813 F.3d at 1299 (quotation omitted). "[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation." *J.V.*, 813 F.3d at 1299 (quotation omitted); *see also Robertson*, 500 F.3d at 1197 ("When a disabled individual's need for an accommodation is obvious, the individual's failure to expressly 'request' one is not fatal to the ADA claim."). "[T]he critical component of the entity's knowledge is that it is aware not just that the individual is disabled, but that the individual's disability affects his ability to receive the benefits of the entity's services." *Robertson*, 500 F.3d at 1197 n.10.

Here, Plaintiff informed DA's Office interviewers that he had had a stroke, and he told Ms. Dubois that he struggled with typing since his stroke [*id.* at ¶¶ 19, 25], but Plaintiff does not allege that he requested an accommodation from the DA's Office, nor can the Court discern from the Third Amended Complaint that a need for a particular accommodation was "obvious." Indeed, it is unclear what accommodation the DA's Office could have provided that would allow Plaintiff to complete his in-court apprenticeship program given that Magistrate Annis barred Plaintiff from her courtroom. Nor is it clear from the Third Amended Complaint that Plaintiff's actions that caused Magistrate Annis to bar Plaintiff from her courtroom are in any way attributable to Plaintiff's stroke or the

consequences of that stroke. [#108 at ¶¶ 46, 49, 60 (indicating that Magistrate Annis became upset and ultimately barred Plaintiff from her courtroom because Plaintiff questioned Magistrate Annis' characterization of a fleeing defendant's conduct as de minimis)]. Accordingly, the Court concludes that Plaintiff has failed to plausibly plead a failure to accommodate claim against the DA's Office and respectfully RECOMMENDS that Claim Three be dismissed as it pertains to the DA's Office and Claim Four be dismissed as it pertains to a failure to accommodate by the DA's Office. Because this is the Third Amended Complaint and the Court has previously identified deficiencies in its earlier Recommendation, the Court respectfully RECOMMENDS that these claims be DISMISSED WITH PREJUDICE. *Lajeunesse*, 2017 WL 262692, at *4.

2. Retaliation Claims

Claim Two is an ADA retaliation claim asserted against the DA's Office and the DCJ and Claim Four is a Rehabilitation Act claim that incorporates allegations of retaliation.[14] "To state a prima facie case for retaliation [under either Title II of the ADA or the Rehabilitation Act], plaintiffs must show '(1) that [they] engaged in protected activity; (2) that [they] suffered a materially adverse action . . . either after or contemporaneous with [their] protected activity; and (3) a causal connection between the protected activity and the adverse action.'" *Glenn v. Davis Sch. Dist.*, No. 1:19-CV-00008-DAK, 2019 WL 5423728, at *4 (D. Utah Oct. 23, 2019) (*quoting Reinhardt v. Albuquerque Pub. Sch. Bd.*

[14] The fact that Plaintiff has not plausibly pled an actual disability does not end the analysis for Plaintiff's retaliation claim. "A plaintiff may proceed with an ADA retaliation claim, even if not disabled under the ADA, if the plaintiff has a reasonable good faith belief that he had a disability." *Russell v. Phillips 66 Co.*, 184 F. Supp. 3d 1258, 1272 (N.D. Okla. 2016), *aff'd*, 687 F. App'x 748 (10th Cir. 2017) (citing *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1265 (10th Cir.2001)). Defendants have not challenged whether Plaintiff had a reasonable good faith belief that he was disabled.

of Educ., 595 F.3d 1126, 1131 (10th Cir. 2010)). The DA's office challenges the first and third elements of Plaintiff's retaliation claim.[15] [#109 at 5-7]

Initially, the DA's Office challenges whether Plaintiff engaged in protected activity. [#109 at 5-6] Specifically, the DA's Office argues that Plaintiff's Notice of Claim does not mention the ADA and purports only to invoke state law.[16] [*Id.* (citing #46-2)] But, the Tenth Circuit has made clear that "magic words are [not] required" and to qualify as protected opposition the individual raising discrimination concerns need only convey to the entity his or her concern that the entity has engaged in a practice made unlawful by the statute. *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008). Here, Plaintiff's Notice of Claim specifically asserted that Plaintiff believed he was discriminated against because of his stroke. [#46-2] It likewise details specific instances of alleged discrimination. [*Id.*] The Court concludes that the complaints contained within

[15] Beyond a footnote, the DCJ does not analyze Plaintiff's retaliation claim. [*See generally* #111] The footnote that mentions the retaliation claim appears to assume that the second and third elements of a retaliation claim mirror those of a discrimination claim. [*Id.* at 9 n.2] As set forth herein, the elements are not the same. Accordingly, because the DCJ does not develop any argument for dismissal of the retaliation claim against it, the Court respectfully RECOMMENDS that the DCJ Motion be DENIED to the extent it seeks to dismiss Plaintiff's ADA retaliation claim and the retaliation component of Plaintiff's Rehabilitation Act claim. *See Petrella v. Brownback*, 787 F.3d 1242, 1260 (10th Cir. 2015) ("When issues are not adequately briefed, they are deemed waived."); *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.").

[16] Plaintiff's Third Amended Complaint refers to the Notice of Claim and the Notice of Claim is central to Plaintiff's retaliation claim. [#108 at ¶ 92] As a result, the Court may consider the Notice of Claim without converting the DA's Motion into a motion for summary judgment. *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011) ("In evaluating a motion to dismiss, [the court] may consider not only the complaint, but also the attached exhibits and documents incorporated into the complaint by reference.").

the Notice of Claim constitute protected activity and satisfy the first element of Plaintiff's retaliation claim.

The DA's Office also argues that Plaintiff has failed to plausibly allege the third element. [#109 at 6-7] As for that element, "[c]ausal connection may be established by producing evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Reinhardt*, 595 F.3d at 1134 (quotation omitted). The Court agrees with the DA's Office that Plaintiff has failed to plausibly plead such a causal connection.

The Third Amended Complaint alleges that the DA's Office retaliated against Plaintiff by "slander[ing] [Plaintiff] to various prospective employers." [#108 at ¶ 118] The alleged slander occurred in June 2018 and March 2019, three months and one year, respectively, after Plaintiff submitted his Notice of Claim. [*Id.* at ¶¶ 92, 105, 107] A three month time gap is insufficient, on its own, to give rise to a causal inference of retaliation. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (stating that a three-month period, standing alone, was too long for a fact-finder to infer causation); *see also Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007) ("[f]our months is too large a time gap to establish a causal connection"). Beyond the temporal proximity, there is nothing in the Third Amended Complaint that could plausibly lead to a conclusion that the DA's Office retaliated against Plaintiff for his filing of the Notice of Claim. Indeed, beyond conclusory statements that the allegedly slanderous statements were made in retaliation for Plaintiff filing a Notice of Claim, there are no facts alleged that could support such a conclusion. [#108 at ¶¶ 106, 107, 119 (conclusory allegation that DA's Office's "slandering of [Plaintiff] to prospective employers was in response to, and directly caused

by, [Plaintiff's] filing a complaint with the Attorney General")] Accordingly, the Court respectfully RECOMMENDS that the DA's Office's Motion be GRANTED to the extent it seeks to dismiss Plaintiff's ADA retaliation claim and the portion of the Rehabilitation Act claim that is premised upon alleged retaliation. Because this is Plaintiff's Third Amended Complaint, the Court respectfully RECOMMENDS that these claims be DISMISSED WITH PREJUDICE. *Lajeunesse*, 2017 WL 262692, at *4.

3. Conclusion

For the reasons articulated above, the Court respectfully RECOMMENDS that: (1) the DCJ Motion be GRANTED to the extent it seeks to dismiss Counts One and Three, as well as the intentional discrimination, failure to accommodate, and hostile work environment components of Claim Four, but DENIED to the extent it seeks to dismiss Claim Two or the retaliation component of Claim Four, and (2) the DA's Office's Motion be GRANTED to the extent it seeks to dismiss Counts One, Two, Three and Four.

C. Breach of Contract Claim

Claim Five asserts a breach of contract claim against three DA's Office Employees—Defendants Washburn, Heard, and Dubois—and against three DU employees—Defendants Freeman, Moffat and Russell. [#108 at 21-23] Each of these Defendants have moved to dismiss this claim. [#109 at 9-19; #113 at 4-7; #114 at 4-7] The Court addresses Defendants' arguments below.

1. THE CGIA

The DA's Office Defendants contend that the breach of contract claim against them must be dismissed for lack of jurisdiction because Plaintiff has failed to comply with the notice requirements of the CGIA. [#109 at 9-13] The CGIA includes a notice provision

that requires any person claiming to have suffered an injury by a public entity to file a written notice within 182 days after the date of the discovery of the injury as a jurisdictional prerequisite to filing suit. *See* Colo. Rev. Stat. § 24–10–109(1).[17] "Colorado courts consistently hold that a plaintiff must plead compliance with the CGIA's notice provisions in the complaint to avoid dismissal." *Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 840 (10th Cir. 2003) (collecting cases). The CGIA applies such that the state or public entity is "immune from liability in all claims for injury which lie in tort or could lie in tort unless the injury is among those for which immunity has been expressly waived." *Berg v. State Bd. of Agric.*, 919 P.2d 254, 258 (Colo. 1996) (citing Colo. Rev. Stat. § 24-10-108). "The act was not intended to apply to actions grounded in contracts." *Id.* (citing cases).

"If the claim is against the state or any employee thereof," the plaintiff must file notice with the attorney general. Colo. Rev. Stat. § 24-10-109(3)(a). If, on the other hand, "the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity." *Id.* A public entity includes "the judicial department of the state, any county, city and county, municipality, . . . and every other kind of district, agency, instrumentality, or

[17] Section 24-10-109(1) states in full:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty-two days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

political subdivision thereof." *Id.* § 24-10-103(5). Consistent with this definition, this District has treated a judicial district, and its district attorney and deputy district attorneys, as a public entity other than the state, and employees of that public entity, for the purposes of the CGIA notice requirements. *See, e.g.*, *Fey v. Washington*, No. 16-cv-03103-WJM-MEH, 2017 WL 1344451, at *10 (D. Colo. Apr. 12, 2017); *see also* Colo. Rev. Stat. § 20-1-102(1) ("Every district attorney shall appear in behalf of the state and the several counties of his or her district."); *id.* § 20-1-110 ("Every district attorney has the power to authorize and approve the participation of his judicial district in intergovernmental cooperative relationships concerning criminal prosecution.").

Courts must determine whether a plaintiff has exercised "substantial compliance"—rather than "strict compliance"—with the CGIA notice provision. *Finnie v. Jefferson Cty. Sch. Dist. R1*, 79 P.3d 1253, 1258 (Colo. 2003). In determining whether the plaintiff has substantially complied with the notice requirement, the Court "must consider principles of equity, whether the notice was provided to an agent of the proper party, whether the agency misled the claimant as to where to file[,] and whether the notice provided actually satisfied the underlying purposes of the statute"—namely, "avoiding prejudice to the governmental entity, encouraging settlement and providing public entities the opportunity to investigate claims, remedy conditions and prepare defense of claims." *Anderson v. Bd. of Comm'rs*, No. 06-cv-1492-LTB-BNB, 2006 WL 3355166, at *2 (D. Colo. Nov. 17, 2006) (second quoting *Finnie*, 79 P.3d at 1258).

Here, Plaintiff contends that he provided notice to the Attorney General's Office [#108 at ¶ 92] and the notice itself is addressed to the Denver Mayor [#46-2]. But, as discussed above, the DA's Office is a public entity other than the state, and the DA's

Office Defendants are employees of that public entity. Accordingly, Plaintiff needed to file the notice with "the governing body" of the DA's office, or the attorney representing the DA's Office. *See* Colo. Rev. Stat. § 24-10-109(3)(a). Plaintiff does not allege, in the Third Amended Complaint or the Response, that he provided notice to those entities, and his purported notice to the Attorney General and Mayor's offices was not sufficient. *See Univ. of Colo. v. Booth*, 78 P.3d 1098, 1101-03 (Colo. 2003) (recognizing CGIA's distinction between the state and the University of Colorado, "which [wa]s treated as a 'public entity other than the state' for [C]GIA notice of claim purposes"); *Villalpando v. Denver Health & Hosp. Auth.*, 181 P.3d 357, 362 (Colo. App. 2007) (finding notice filed with the Denver City Attorney, rather than the Board of Regents for the University of Colorado, University counsel, and the Attorney General, did not comply with the CGIA's notice requirement, despite plaintiff's research efforts).

Moreover, Defendants have submitted evidence confirming that Plaintiff did not comply with the notice requirement.[18] Defendants have filed affidavits from Robert Russell, Acting Custodian of Records for the Denver District Attorney's Office, Andrew Ringel, an attorney with Hall & Evans, L.L.C. who has represented the DA's Office for many years, Patricia Thill, the Executive Assistant to the Denver City Attorney, and Cesiah Gomez, the Executive Assistant to Denver Mayor Michael Hancock. [##109-2-109-5] Mr. Russell attests that he has no memory and no record of any notice of claim

[18] When the moving party challenges the facts providing the basis for the Court's subject matter jurisdiction, the Court may not presume the truthfulness of the complaint's allegations. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Instead, the Court must make its own findings of fact and the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* Relying on evidence outside the pleadings does not convert a motion to dismiss pursuant to Rule 12(b)(1) into a motion for summary judgment. *Id.*

being filed with the DA's Office as to the instant litigation. [#109-2 at ¶ 5] Mr. Russell also states that he is unaware of the Attorney General's office acting as the DA's Office's agent for receiving CGIA notice, and even if the Attorney General's office could receive notice on behalf of the DA's Office, he is unaware of any such notice provided to the Attorney General's office. [*Id.* at ¶ 7] Mr. Ringel similarly affirms that he has received no notice of claim from Plaintiff regarding the claims in this case [#109-3 at ¶ 7], and he also has not received from the Attorney General's office a notice of claim under the CGIA which included intended claims against the DA's Office [*id.* at ¶ 8]. Ms. Thill confirms that she has no records of a notice of claim filed by Plaintiff in this matter and that she has not been notified by the Attorney General's office of any receipt by that office of a notice of claim regarding the instant litigation. [#109-4 at ¶ 5] Finally, Ms. Gomez has no notice of claim in her records filed by Plaintiff in this matter and likewise has not been notified by the Attorney General's office of any such notice. [#109-5 at ¶¶ 9-10] Plaintiff does not produce any affidavits or other evidence to the contrary, and indeed did not even respond to this argument. [#119]

The Court cannot conclude that notice was provided to an agent of the DA's Office, or that any entity misled Plaintiff as to where to file the notice. Moreover, the foregoing affidavits make clear any purported notice by Plaintiff did not satisfy the underlying purposes of the statute because the DA's Office Defendants were not made aware of the notice, such that they could look into the claims, potentially pursue settlement, or offer other remedies. *See Anderson*, 2006 WL 3355166, at *2. Because Plaintiff has not alleged compliance with the CGIA's notice provisions, the Court lacks jurisdiction over any claim against the DA's Office Defendants that is grounded in tort. *See Weise v. Colo.*

Springs, 421 F. Supp. 3d 1019, 1049-50 (D. Colo. 2019) (dismissing plaintiff's claims for defamation, IIED, and abuse of process where "plaintiff's complaint d[id] not include any allegations that she complied with the notice provisions of the CGIA" and she "ha[d] therefore failed to demonstrate that the Court ha[d] jurisdiction over her state-law claims"); *Rose v. City & Cty. of Denver*, No. 17-CV-2263-MSK-STV, 2018 WL 1744723, at *3 (D. Colo. Apr. 11, 2018) (dismissing IIED claim for failure to comply with CGIA's notice provision).

The question, therefore, is whether Plaintiff's breach of contract claim against the DA's Office Defendants is grounded in tort or contract. The CGIA "was not intended to apply to actions grounded in contracts." *Berg*, 919 P.2d at 258 (citing cases). Instead, "[a] central legislative purpose of the CGIA is to limit the potential liability of public entities for compensatory money damages in tort." *City of Colo. Springs. v. Conners*, 993 P.2d 1167, 1172 (Colo. 2000) (citing Colo. Rev. Stat. § 24-10-102). "However, the form of the complaint does not determine whether the claim is based in tort or contract." *Carothers v. Archuleta Cnty. Sheriff*, 159 P.3d 647, 655 (Colo. App. 2006). "Rather, the dispositive question in determining whether the CGIA bars a plaintiff's claim is whether the claim is a tort claim or *could* be a tort claim." *Id.* (emphasis added).

Here, Plaintiff's breach of contract claim is essentially a discrimination claim, couched in contract terms. [#108 at ¶¶ 141-57] The Colorado Supreme Court recently addressed whether claims brought under the Colorado Anti-Discrimination Act ("CADA") are barred by the CGIA. *Elder v. Williams*, 477 P.3d 694 (Colo. 2020). In *Elder*, the Colorado Supreme Court concluded that CADA claims for compensatory damages "derive from statutory duties designed to implement the broad policy of eliminating

intentional discriminatory or unfair employment practices, rather than to compensate an individual for personal injuries." *Id.* at 699. As a result, the *Elder* Court concluded that these claims "do not and could not lie in tort" and therefore "[we]re not barred by the CIGA." *Id.*

This same rationale applies to Plaintiff's breach of contract claim against the DA's Office Defendants. The breach of contract claim against these Defendants seeks compensatory damages and is primarily premised upon the DA's Office Employee Handbook and Policy Manual, which prohibits discrimination on the basis of disability. [#108 at ¶¶ 142-43] To the extent this policy reflects a broader goal of compliance with the ADA or CADA, it stems from the policy of eliminating discriminatory practices, rather than to compensate an individual for personal injuries. As a result, the claim does not and could not lie in tort. Accordingly, the Court concludes that the CGIA does not bar Plaintiff's breach of contract claim against the DA's Office Defendants and that the Court has subject matter jurisdiction over that claim.

2. Plausibility

Each of the individual Defendants argue that Plaintiff has not plausibly alleged a breach of contract claim. [##109 at 15-18; 113 at 4-7; 114 at 4-7] Plaintiff alleges that he was the intended third-party beneficiary of: (1) the equal opportunity policy in the DA's Office Employee Handbook and Policy Manual ("DA's Manual") [#108 at ¶ 144]; (2) the externship agreement between Ms. Washburn and DU [*id.* at ¶ 148]; and (3) the employment contracts between DU and Professors Moffat, Freeman, and Russell [*id.* at ¶¶ 152-53].

"Generally, an individual who is not a party to a contract may not assert a claim for breach of that contract." *Sauter v. State Farm Fire & Cas. Co.*, No. 2017CV033275, 2018 WL 5732595, at *3 (Colo. Dist. Ct. July 2, 2018). "An exception to the general rule is the case of third-part[y] beneficiaries." *Id.* "A third-party beneficiary may enforce a contract only if the parties to that contract intended to confer a benefit on the third party when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to the third party." *Id.* (quoting *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo. App. 1996)). "While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both." *Id.* (quoting *Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994)). "To determine the intent of the parties, the court should give effect to the plain and generally accepted meaning of the contractual language." *Copper Mountain Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009).

Here, besides conclusory statements, there is nothing in the Third Amended Complaint that would suggest that Plaintiff was a third-party beneficiary of the various agreements. Specifically, there is nothing in the DA's Manual,[19] Ms. Washburn's

[19] Arguably, the DA's Manual does not create any contract, let alone a contract that benefits Plaintiff. Under Colorado law, an employee manual does not create contractual rights when the manual contains a clear and conspicuous disclaimer of any such rights. *Tonello v. City of Grand Junction*, No. 19-cv-0694-WJM-NYW, 2020 WL 5760465, at *10 (D. Colo. Sept. 28, 2020) (collecting cases). Here, the DA's Manual states on the first page: "Nothing in this handbook or any verbal statement should be construed as creating any type of employment contract, either express or implied." [#109-6 at 4] The Court need not determine whether this disclaimer was sufficiently clear and conspicuous as to disclaim any contract rights because, as explained herein, Plaintiff has not plausibly pled any facts to suggest that he was a third-party beneficiary of the DA's Manual or of any of the contracts upon which he relies.

externship agreement, or the professors' employment contracts that demonstrates any intent on the part of the contracting parties to convey a benefit upon Plaintiff. And other courts have held that students are not third-party beneficiaries to contracts between professors and a university, or teachers and a school district, simply because they might incidentally benefit from the terms of such contracts. *See, e.g.*, *Verni v. Cleveland Chiropractic Coll.*, 212 S.W.3d 150, 153 (Mo. 2007) (holding a student at the defendant college was not a third party beneficiary of an employment contract between the college and a faculty member, under which the faculty member was required to treat students with courtesy, respect, fairness, and professionalism; students were at most intended to be incidentally benefited, and the terms of the contract did not directly and clearly express an intent to benefit the students); *Schilling by Foy v. Employers Mut. Cas. Co.*, 569 N.W.2d 776, 781 (Wis. Ct. App. 1997) (finding students were not third party beneficiaries of the employment contract between a teacher and the school district, because there was no evidence the contract was entered into "directly and primarily for the benefit of students," but rather the contract encompassed "how teachers [we]re to carry out their responsibilities to the district"). As the Wisconsin Court of Appeals explained, while employment contracts with "provisions regarding teachers' responsibilities for supervision of students," nearly always incidentally benefit students, "this does not satisfy the burden of showing that [a] teacher and [a] school board entered into [a] contract primarily and directly for the benefit of students." *Schilling*, 569 N.W.2d. at 781. "No case . . . suggest[s] that the test for a third party beneficiary can be so easily satisfied." *Id.*

Because Plaintiff has not plausibly pleaded that he was an intended third-party beneficiary of the DA's Manual or any of the contracts upon which Plaintiff relies, Plaintiff's

Claim Five for breach of contract must be dismissed. Accordingly, the Court respectfully RECOMMENDS that the DA Motion, the DU Motion, and the Russell Motion be GRANTED to the extent those Motions seek dismissal of the breach of contract claim (Claim Five). Because this is the Third Amended Complaint and the Court has previously identified deficiencies in its earlier Recommendation, the Court respectfully RECOMMENDS that this claim be DISMISSED WITH PREJUDICE. *Lajeunesse*, 2017 WL 262692, at *4.

D. Civil Conspiracy Claim

In Claim Six, Plaintiff alleges that Professors Moffat, Freeman, and Russell conspired to uphold Plaintiff's failing grade in an effort to discriminate against him on the basis of his disability. [#108 at 23-24] To state a claim for civil conspiracy under Colorado law, a plaintiff must allege: "(1) two or more persons . . . ; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 387 F. Supp. 2d 1130, 1153 (D. Colo. 2005) (citing *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989)). Conclusory allegations merely reciting the elements of the claim are insufficient. *See, e.g.*, *Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989); *Sieverding v. Colo. Bar Ass'n,* No. Civ. A.02-M-1950(OES), 2003 WL 22400218, at *18 (D. Colo. Oct. 14, 2003). Rather, Plaintiff "must allege *specific facts* showing agreement and concerted action among the defendants." *McDaniel v. Denver Lending Grp., Inc.*, No. 08-cv-02617-PAB-KLM, 2009 WL 1873581, at *12 (D. Colo. June 30, 2009) (quotation omitted). Moreover, "[i]f the acts alleged to constitute the underlying wrong" do not give rise to a cause of action, the conspiracy claim also fails. *Double Oak*

Const., L.L.C. v. Cornerstone Development Int'l, L.L.C., 97 P.3d 140, 146 (Colo. App. 2003).

Applied here, Plaintiff's allegations in the Third Amended Complaint fail to state a conspiracy claim against the individual DU Defendants. Plaintiff does not point to any "unlawful overt acts" by the individual DU Defendants. Though Plaintiff alleges that Freeman sought advice from Moffat concerning their ability to fail Plaintiff [#108 at ¶ 74], there is nothing to suggest that such an inquiry constituted unlawful activity. And while the Third Amended Complaint also contains allegations that the individual DU Defendants were involved in failing Plaintiff and upholding that failing grade [*id.* at ¶¶ 84, 89, 98], there is nothing unlawful about a university deciding to assign a student a failing grade.

In his response, Plaintiff claims that the unlawful act involved conspiring with the DA's Office to retaliate against Plaintiff. [#119 at 18] But, as detailed above, Plaintiff failed to plausibly allege retaliation by the DA's Office, and "[i]f the acts alleged to constitute the underlying wrong" do not give rise to a cause of action, the conspiracy claim also fails. *Double Oak Const.*, 97 P.3d at 146. Accordingly, for the foregoing reasons, the Court respectfully RECOMMENDS that the DU Motion be GRANTED to the extent it seeks to dismiss the civil conspiracy claim and that the Russell Motion be GRANTED to the extent it seeks to dismiss the conspiracy claim. Because this is Plaintiff's Third Amended Complaint and the Court has previously identified this deficiency, the Court respectfully RECOMMENDS and that the conspiracy claim be DISMISSED WITH PREJUDICE. *Lajeunesse*, 2017 WL 262692, at *4.

IV. CONCLUSION

For the reasons stated above, the Court respectfully **RECOMMENDS** as follows:

(1) The DA's Office's Motion [#109] be **GRANTED** and all claims against the DA's Office Defendants be **DISMISSED WITH PREJUDICE**.

(2) The DCJ Motion [#111] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the DCJ Motion be: (a) **GRANTED** to the extent it seeks to dismiss Counts One and Three, as well as the intentional discrimination, failure to accommodate, and hostile work environment components of Claim Four, and that those claims be **DISMISSED WITH PREJUDICE**; but (b) **DENIED** to the extent it seeks to dismiss Claim Two or the retaliation component of Claim Four.

(3) The DU Motion [#113] be **GRANTED** and that the claims against Defendants Moffat and Freeman be **DISMISSED WITH PREJUDICE**.

(4) The Russell Motion [#114] be **GRANTED** and that the claims against Defendant Russell be **DISMISSED WITH PREJUDICE**.

If the foregoing recommendations are adopted, the only claims remaining in this matter will be Plaintiff's Title II ADA retaliation claim (Claim Two) asserted against the DCJ, and the Rehabilitation Act claim (Claim Four) asserted against DU and the portion of that claim alleging retaliation asserted against the DCJ.[20]

[20] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73

DATED: May 3, 2021

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).