United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 2018 Decided July 27, 2018

No. 15-7064

BRIEN O. HILL,
APPELLANT

v.

ASSOCIATES FOR RENEWAL IN EDUCATION, INC.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00823)

Yongo Ding, appointed by the court, argued the cause as *amicus curiae* in support of appellant. With him on the brief was *Anthony F. Shelley*, appointed by the court.

Brien O. Hill, pro se, filed the briefs for appellant.

Jiyoung Yoon argued the cause and filed the briefs for appellee.

11

Before: ROGERS, KAVANAUGH* and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Concurring Opinion filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: This is an Americans with Disabilities Act ("ADA") employment case. Plaintiff Brien Hill is a single-leg amputee who taught in defendant Associates for Renewal in Education's ("ARE's") afterschool program. The District Court granted partial summary judgment for ARE on two of Hill's claims, which he now appeals. Three other claims went to trial, where Hill was awarded damages for ARE's failure to accommodate his disability by refusing his request to teach on a lower floor. The primary issues on appeal are whether ARE also failed to reasonably accommodate Hill's disability by refusing his request for a classroom aide, and whether ARE's failures to accommodate Hill's disability created a hostile work environment. Hill proceeded *pro se* in the District Court and was represented by appointed counsel for this appeal.

We affirm the District Court's conclusion that Hill has not proffered sufficient undisputed facts for his hostile-work-environment claim to survive summary judgment. We reverse as to Hill's remaining failure-to-accommodate claim, however, because Hill's allegations present a triable issue of fact as to whether ARE violated the ADA when it refused his request for a classroom aide.

* Judge Kavanaugh was a member of the panel at the time the case was argued but did not participate in this opinion.

I.

A.

The following facts are taken from the parties' submissions on ARE's motion for summary judgment and are undisputed unless otherwise indicated. ARE is a non-profit that provides care and educational programs to underserved children and adults in Washington, D.C. It is located in a three-story building with no elevator, requiring teachers to climb up and down the stairs "for fire and emergency evacuation drills, supervised outdoor play and scheduled student lavatory breaks located on the basement floor." Supplemental Brief for Plaintiff ("Pl. Supp.") 3, *Hill v. Assoc. for Renewal in Educ.*, No. 12-cv-823, ECF No. 41. Hill, who wears a leg prosthesis, was employed by ARE in various capacities until his employment was terminated in December 2008. As an ARE teacher and program aide, Hill's duties included "instructing participants in the classroom, on field trips or outside activities; prepar[ing] and administer[ing] overall classroom management; counsel[ing] participants on academic and behavioral challenges, as well as, provid[ing] administrative and/or clerical support to the administrative personnel." Affidavit of La'Troy Bailey ("Bailey Aff.") ¶ 5, ECF No. 32-1. Prior to 2007, Hill requested and was granted several accommodations for his disability, including a request for assignment to a lower-level classroom.

In May 2007, Hill fell while walking across the ARE playground, "severely injur[ing his] amputated stump and damag[ing his] prosthesis." Declaration of Brien Hill ¶ 5, ECF No. 33. Upon returning to work, he requested a classroom aide for himself and his pregnant co-teacher. Hill also requested that he be able to continue holding class on the second floor of the building. These requests were granted until August 27,

2007, when Hill was reassigned to a classroom by himself on the third floor and without a classroom aide. Hill alleged that he "expressed [his] concerns" about this reassignment verbally on August 31, 2007; that he made a written request to be "repositioned back to the lower level" and have "the accommodation of having an Aide assigned to [his] classroom;" and that he followed up with "daily verbal request[s]" for these two accommodations throughout the school year. Declaration of Brien Hill ("Hill Decl.") ¶¶ 8-10, ECF No. 10. These accommodations were not provided. Hill was the only teacher in his program who was not assigned a classroom aide, and Hill taught more students than any of his colleagues.

Around the same period of time, Hill began to have disciplinary issues at work. On September 1, 2007, Hill's duties were changed to a part-time position due to a reduction in force and due to his "excessive tardiness and inconsistent call-ins." Bailey Aff. ¶ 4. His supervisor eventually recommended Hill's termination, and on that same day, Hill submitted a letter to ARE's Deputy Director of Education requesting review of the denial of his requests for a classroom aide and for assignment to a lower floor, among other issues. Hill was terminated effective December 15, 2008.

B.

Hill filed a *pro se* complaint against ARE asserting, among other things, a hostile work environment and several ADA claims, including failure to accommodate for denying his requests for a classroom aide and for denying his request to teach on a lower floor. Compl. ¶¶ 43-78, ECF No. 1. ARE moved for summary judgment on most of the ADA claims, arguing that Hill did not actually make the accommodation requests. ARE did not argue that the accommodations of a

lower floor or a classroom aide were unreasonable or unnecessary for Hill to perform the essential functions of his job, nor did ARE argue that Hill was unqualified for his position by being physically unable to perform the essential functions of his job with or without accommodation.

After receiving the parties' filings, the District Court issued an order *sua sponte* stating that "[t]he record contains no evidence (or argument) on the third element of plaintiff's reasonable accommodation claim," *i.e.*, "whether or not plaintiff could perform [his job's essential] functions with or without reasonable accommodation." Order, ECF No. 40, at 1. The order directed the parties "to supplement the record" and "advised [Hill] that he should (1) clearly describe the essential functions of the part-time job he held in September 2007 when he allegedly began requesting the accommodations at issue and (2) explain why he needed 'the accommodation of an Aide' and a relocation to a lower level room to perform the essential functions of the job.'" *Id.* at 2. Hill responded with a fifteen-page supplemental submission explaining that "his physical disability substantially limited his ability to walk for long distances, stand for long periods of time (as required given that he supervised his classroom alone), . . . [and] supervise[] outdoor play and scheduled student lavatory breaks on the basement floor . . . without the hazard of pain and bruises." Pl. Supp. 3. Hill's supplemental submission also stated that "he worked alone and suffered a gradual decline in strength and energy due to injury and fatigue from August '07 - December '08," *id.* at 4, and that he "performed all the DBA Program Aide job(s) . . . alone, from August '07 - December '08, and experienced grave hardships in doing so," *id.* at 12.

In response, ARE argued that Hill admitted he was able to perform the essential functions of his job without accommodation, "but not without pain." Supplemental Brief

for Defendant ("Def. Supp.") at 3, ECF No. 42. ARE's supplemental submission did not argue that Hill was unqualified for his position or that the requested accommodations would cause ARE undue hardship. ARE, which was counseled, argued only that Hill did not make the accommodation requests and that he did not need the accommodations of a lower floor or classroom aide because he could perform the essential functions of his position, just with "pain."

The District Court granted summary judgment for ARE on Hill's claims for hostile work environment and failure to accommodate by refusing to assign him a classroom aide, and denied summary judgment on Hill's claim for failure to accommodate by refusing to assign him to a lower floor. *Hill v. Assoc. for Renewal in Educ.*, 69 F. Supp. 3d 260, 267-68 (D.D.C. 2014). Regarding the claim for denial of a classroom aide, the District Court concluded Hill "ha[d] not adduced any evidence to show that an Aide would have been an effective means of addressing the limitations imposed by his amputated leg," and granted summary judgment because "when an employee seeks a workplace accommodation, the accommodation must be related to the limitation that rendered the person disabled." *Id.* at 268 (quoting *Adams v. Rice*, 531 F.3d 936, 944 (D.C. Cir. 2008)).

Three of Hill's ADA claims proceeded to trial. The jury found for Hill on his failure-to-accommodate claim for ARE's refusal to assign him to a classroom on a lower floor, awarding him compensatory and punitive damages. ARE and Hill both moved to set aside the verdict, and the District Court denied both motions. Hill now appeals the District Court's grant of summary judgment for ARE on his claims for hostile work environment and failure to accommodate by denying the request for a classroom aide.

II.

This Court reviews a grant of summary judgment *de novo*, viewing the "evidence in the light most favorable to the nonmoving party" and drawing all reasonable inferences in his or her favor. *Minter v. District of Columbia*, 809 F.3d 66, 68 (D.C. Cir. 2015) (quoting *Breen v. Dep't of Transp.*, 282 F.3d 839, 841 (D.C. Cir. 2002)). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law," meaning that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We follow the general principle that "[a] document filed *pro se* is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

A.

ARE did not raise whether a hostile-work-environment claim is available under the ADA, a question that this Court has not yet decided and that we do not reach here. *Cf. Lanman v. Johnson Cty.*, 393 F.3d 1151, 155-56 (10th Cir. 2004) (joining three other circuits in holding that the ADA's incorporation of language from Title VII shows Congress's intent to allow hostile-work-environment claims to proceed under the ADA). Even assuming that the ADA allows recovery for a hostile work environment, we affirm the entry of summary judgment for ARE on this claim. To prevail on a hostile-work-environment claim, "a plaintiff must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Baloch v. Kempthorne*, 550 F.3d

1191, 1201 (D.C. Cir. 2008) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). The work environment must be both objectively and subjectively hostile, meaning that a "reasonable person would find [it] hostile or abusive," and that the victim must "subjectively perceive the environment to be abusive." *Harris*, 510 U.S. at 21-22. The "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

We affirm the dismissal of Hill's hostile-work-environment claim because he has not shown that "his employer subjected him to 'discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment.'" *Baloch*, 550 F.3d at 1201. While a jury could find that assigning Hill to the third floor and denying him a classroom aide failed to reasonably accommodate his disability, these are not the kind of "extreme" conditions that this Court and the Supreme Court have found to constitute a hostile work environment. *See Faragher*, 524 U.S. at 788; *cf. Singletary v. District of Columbia*, 351 F.3d 519, 528 (D.C. Cir. 2003) (concluding that a reasonable factfinder could find a hostile work environment when the plaintiff was assigned to a storage room containing brooms and boxes of debris that lacked heat, ventilation, proper lighting, and a working phone, and to which plaintiff lacked keys so he was at risk of getting locked in). The District Court therefore correctly concluded that a reasonable jury could not return a verdict for Hill on his hostile-work-environment claim.

B.

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of

disability . . . [in the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Id.* § 12112(b)(5)(A). The ADA defines "reasonable accommodation" to include, among other things, "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," and "the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." *Id.* § 12111(9)(A), (B).

To prevail on a failure-to-accommodate claim, a plaintiff must show by a preponderance of the evidence (1) that he or she has a disability under the ADA; (2) that the employer had notice of the disability; (3) that the plaintiff could perform the essential functions of the position either with reasonable accommodation or without it; and (4) that the employer refused to make the accommodation. *See Solomon v. Vilsack*, 763 F.3d 1, 9 (D.C. Cir. 2014). The requested accommodation "must be related to the limitation that rendered the person disabled." *Adams*, 531 F.3d at 944 (quoting *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 848 (8th Cir. 2005)). A plaintiff "need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *U.S. Airways v. Barnett*, 535 U.S. 391, 401-02 (2002) (citations omitted).

We conclude Hill sufficiently alleged a connection between his disability and the assistance a classroom aide could provide while Hill supervised his students to present a triable issue of fact as to whether ARE's denial of an aide violated the

ADA. The ADA's purpose in requiring reasonable accommodations is reducing barriers to employment for persons with disabilities. Therefore, to be "reasonable" under the ADA, an accommodation must be related to the disability that creates the employment barrier and must address that barrier; the ADA does not make employers responsible for alleviating any and all challenges presented by an employee's disability. *See Nuzum*, 432 F.3d at 848 ("[T]here must be a causal connection between the major life activity that is limited and the accommodation sought."); *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003) ("Adverse effects of disabilities and adverse or side effects from the medical treatment of disabilities arise 'because of the disability.' However, other impairments not caused by the disability need not be accommodated."); EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (2016) ("[A]n employer [does not] have to provide as an accommodation any amenity or convenience that is not job-related" and "that is not provided to employees without disabilities."). Hill satisfied these requirements by alleging that he experienced a hazard of pain and bruising on his stump while standing for long periods of time, and by specifically connecting that hazard to supervising his class without assistance. Construing Hill's *pro se* submissions liberally and with all reasonable inferences drawn in his favor, a reasonable jury could find that if ARE provided Hill a classroom aide as it did for his colleagues, that aide could help Hill supervise students in the classroom and during outdoor activities, reducing his need for prolonged standing and mitigating the alleged "hazard of pain and bruising." Pl. Supp. 3.

ARE argues, for the first time on appeal, that a classroom aide would not be a reasonable accommodation. (Recall that ARE argued below that Hill did not request these

accommodations, a losing argument on summary judgment because Hill introduced documentary and testimonial evidence of the request). According to ARE, Hill feared only "falling while walking" or his prosthesis breaking while he was working, and provided "no evidence as to how an aide would alleviate this fear" once Hill was assigned to a lower floor. ARE Br. in Response to Amicus 10-11. ARE now asserts that "[i]t is unlikely an Aide could prevent a fall." *Id.* 11. ARE also emphasizes that an aide could not help with "problems arising from staircase climbing," and that in any event Hill "assured [his supervisor] that his disability did not affect him while he worked on the lower level of the facility and did not prevent him from performing essential job duties there." *Id.* 12. ARE uses some language from the complaint to suggest that Hill conceded that he did not need an aide if he was moved to a lower floor, ignoring that the complaint also alleged that Hill supplied ARE "with medical records attesting to his ability to perform the essential functions of his job with reasonable accommodation of his disability *(an aide assigned to his classroom).*" Compl. ¶ 32 (emphasis added).

ARE also fails to view the evidence in the light most favorable to Hill, as we must at this stage. *Keefe Co. v. Americable Int'l, Inc.*, 169 F.3d 34, 38 (D.C. Cir. 1999). Hill's evidence tended to show not only that he was at risk from falling while walking long distances or climbing stairs, but also that he would suffer "pain and bruises" from prolonged standing while supervising his classroom alone. Hill's submission in response to the District Court's order also stated that "he worked alone and suffered a gradual decline in strength and energy due to injury and fatigue from August '07 - December '08," Pl. Supp. 4, and that he "performed all the DBA Program Aide job(s) . . . alone, from August '07 - December '08, and experienced grave hardships in doing so," *id.* at 12. Hill's documentary evidence showed that he

requested an aide "to keep with [my] daily schedule, which requires both indoor and outdoor gross motor activities," Mem. from Brien Hill to Nykia Washington, ECF No. 22, at 22, thereby connecting the accommodation request to job functions that are made difficult and painful by his disability. Construing this evidence in the light most favorable to Hill, a reasonable jury could find that Hill's disability put him at risk of pain and bruises when standing for long periods of time, that he would have to stand for long periods of time while supervising his classroom or outdoor play without an aide to assist him, and that he did in fact suffer harm "due to injury and fatigue" during the time he was denied the accommodation of a classroom aide. *See Anderson*, 477 U.S. at 248. A reasonable jury could also conclude that Hill suffered from prolonged standing on his stump regardless of the floor on which he taught; therefore, contrary to ARE's assertions, moving Hill to a lower floor would not necessarily have resolved his classroom-aide request.

ARE's assertion that Hill did not need the accommodation of a classroom aide because he could perform the essential functions of his job without accommodation, "but not without pain," Def. Supp. at 3, is unavailing. A reasonable jury could conclude that forcing Hill to work with pain when that pain could be alleviated by his requested accommodation violates the ADA. *See Marshall v. Fed. Exp. Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997) ("We assume without deciding that if working conditions inflict pain or hardship on a disabled employee, the employer fails to modify the conditions upon the employee's demand, and the employee simply bears the conditions, this could amount to a denial of reasonable accommodation, despite there being no job loss, pay loss, transfer, demotion, denial of advancement, or other adverse personnel action."); *Gleed v. AT&T Mobility Servs., LLC*, 613 F. App'x 535, 538-39 (6th Cir. 2015) (rejecting an employer's

argument that providing a chair to an employee who experienced pain from prolonged standing was not a reasonable accommodation because "the ADA's implementing regulations require employers to provide reasonable accommodations not only to enable an employee to perform his job, but also to allow the employee to 'enjoy equal benefits and privileges of employment as are enjoyed by . . . similarly situated employees without disabilities." (quoting 29 C.F.R. § 1630.2(*o*)(1)(iii))).

To be clear, we do not decide that the classroom aide should have been provided as a reasonable accommodation for Hill's disability; rather, we conclude only that on this record, a reasonable jury could have concluded as much. We also note that this is not a case where Hill's request for an aide can be dismissed, as a matter of law, as a request to have someone else perform one or more essential job functions for him. *See, e.g.*, *Dark v. Curry Cty.*, 451 F.3d 1078, 1089 (9th Cir. 2006) ("The ADA does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees."); LARSON, EMPLOYMENT DISCRIMINATION § 154.04[1] (2d ed. 2007) ("[A]n employer is not required to provide an 'assistant' to help an employee with a disability to perform his or her job" if that assistant is simply "reassign[ed] essential functions of a job."). This is because an employer may be required to accommodate an employee's disability by "reallocating or redistributing nonessential, marginal job functions," or by providing an aide to *enable* the employee to perform an essential function without replacing the employee in performing that function. 29 C.F.R. Pt. 1630, App.; *see also* 42 U.S.C. § 12111(9)(B) (A reasonable accommodation may include "job restructuring," the "provision of qualified readers or interpreters," and "other similar accommodations for individuals with disabilities."); *see also Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d

Cir. 1995). Viewing the evidence regarding Hill's request for a classroom aide in the light most favorable to Hill, *Minter*, 809 F.3d at 68, we understand his request to be for assistance with class supervision so that he would not have to "stand for long periods of time (as required given that he supervised his classroom alone)," Pl. Supp. 3, not a request that an aide conduct all class supervision in Hill's stead, particularly since every teacher but Hill had a classroom aide and ARE had given Hill such an aide in the past.

* * *

We affirm the District Court's dismissal of Hill's hostile-work-environment claim, and we reverse, vacate, and remand the partial grant of summary judgment on the claim that Hill was denied the reasonable accommodation of a classroom aide for further proceedings consistent with this opinion.

So ordered.

1

WILKINS, *Circuit Judge*, concurring: I write separately to note my view that, although we find that the District Court erred when it granted partial summary judgment on the claim that Hill was denied the reasonable accommodation of a classroom aide, it is not absolutely clear that the proper remedy is to remand for trial.

As stated above, Hill's complaint alleged a single cause of action for failure to accommodate, asserting that ARE failed to accommodate his request to be placed on a lower floor *and* that ARE failed to accommodate his request for a teacher's aide. While the District Court granted summary judgment as to the teacher aide theory, it nonetheless gave Hill wide latitude during the trial to present evidence and argument to the jury about the failure to provide an aide. Hill, proceeding *pro se*, complained in both opening statement and closing argument about being placed on the third floor "with no assistance." Transcript of Plaintiff Opening Trial Statement at 3, *Hill v. Associates for Renewal in Educ.*, No. 12-cv-823 (D.D.C. 2015), ECF No. 95; Transcript of Jury Trial at 669, ECF No. 104. Hill also introduced testimony about the duties that aides provide, *id.* at 95-96, ECF No. 101, and suggesting that every teacher had an aide other than him during the 2007-2008 school year, *id.* at 288, 293, 318-19, 367-68, ECF No. 102; *id.* at 553, 556, ECF No. 103. When Hill testified about the pain and injury he allegedly suffered, he stated numerous times that it was due to "work[ing] unassisted on the third floor," *id.* at 589-90, so he repeatedly told the jury that the failure to provide him an aide contributed to his pain and suffering, *id.* at 562, 626-27.

In sum, although ARE was granted summary judgment with regard to the failure to provide an aide, the District Court was quite solicitous of Hill in allowing him to present evidence and argument at trial regarding his classroom-aide claim.

Under these circumstances, it seems quite plausible that in finding for Hill on the reasonable accommodation claim, the jury took into account any pain and injury Hill suffered due to the failure to provide him with an aide. Indeed, the jury was not instructed that the only accommodation request that it could consider was the failure to move Hill to a lower floor; rather, the jury was told simply to recompense Hill if it found in his favor on the failure to accommodate claim, without specifying which particular accommodation to consider. *Id.* at 719, 723-24, ECF No. 104. Further, the jury was instructed that it could award compensatory damages for "*any* physical pain or emotional distress . . . that the plaintiff has suffered in the past. . . [or] may suffer in the future," *id.* at 731 (emphasis added). Similarly, the jury was instructed that "[i]f you find for the plaintiff, then you must award the plaintiff a sum of money which will fairly and reasonably compensate him for *all* the damage which he experienced that was proximately caused by the defendant." *Id.* at 730 (emphasis added).

It is well settled that a party "cannot recover the same damages twice, even though the recovery is based on two different theories." *Medina v. District of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011) (citation omitted). Thus, even if the District Court erred in granting partial summary judgment, Hill is not entitled to a windfall of double damages from a second trial if the jury already compensated him for ARE's failure to provide him an aide in the damages award from the first trial. "[H]e should be made whole for his injuries, not enriched." *Id.*; *see also Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1306 (10th Cir. 2003); *Tompkins v. Cyr*, 202 F.3d 770, 785 (5th Cir. 2000); *Bender v. City of New York*, 78 F.3d 787, 794 (2d Cir. 1996). It is appropriate to leave it to the District Court to determine, in the first instance, the proper manner to proceed upon remand, including whether the remaining failure to accommodate theory should be dismissed because Hill "has already obtained

all the relief available to [him]." *Ridgell-Boltz v. Colvin*, 565 F. App'x 680, 684 (10th Cir. 2014).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7064 **September Term, 2017**
FILED ON: JULY 27, 2018

BRIEN O. HILL,
APPELLANT

v.

ASSOCIATES FOR RENEWAL IN EDUCATION, INC.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00823)

Before: ROGERS, KAVANAUGH* and WILKINS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed in part; be reversed, vacated, and remanded in part for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 27, 2018

Opinion for the court filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Wilkins.

* Judge Kavanaugh was a member of the panel at the time the case was argued but did not participate in this opinion.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-7064 **September Term, 2017**

1:12-cv-00823-JDB

Filed On: August 28, 2018

Brien O. Hill,

Appellant

v.

Associates for Renewal in Education, Inc.,

Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Kavanaugh*, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of pro se appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

* Circuit Judge Kavanaugh did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brien O. Hill,

Plaintiff,

v.

Associates for Renewal in Education, Inc.,

Defendant.

Civil Action No. 12-0823 (JDB)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that defendant's motion for summary judgment [Dkt. # 32] is **GRANTED** in part and **DENIED** in part; it is further

ORDERED that plaintiff's motion for summary judgment [Dkt. # 33] is **DENIED**; it is further

ORDERED that the parties shall appear for a status conference on **Friday, October 31, 2014, at 11 a.m.**, with regard to the surviving portion of plaintiff's Americans with Disabilities Act claim (lower-level relocation request for accommodation).

/s
JOHN D. BATES
United States District Judge

Dated: September 29, 2014

20

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brien O. Hill, **Plaintiff,** **v.** **Associates for Renewal in Education, Inc.,** **Defendant.**	**Civil Action No. 12-0823 (JDB)**

MEMORANDUM OPINION

Plaintiff, proceeding *pro se*, sues his former employer, Associates for Renewal in Education, Inc. ("ARE"), under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.* He claims that defendant (1) failed to accommodate his disability and (2) subjected him to a hostile work environment "based upon his disability and [] his exercise of protected FMLA rights." Complaint for Failure to Reasonably Accommodate a Known Disability and for Interference With FMLA Rights [Dkt. # 1] ¶ 2. The FMLA claim has been dismissed as time-barred. *See* Oct. 16, 2012 Mem. Op. and Order [Dkt. # 7].

Following a period of discovery, both parties have moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See* ARE's Mot. for Summ. J. [Dkt. # 32]; Pl.'s Not. of Mot. and Mot by Pl. for Summ. J. [Dkt. # 33]. Upon consideration of the parties' submissions and the relevant parts of the record, the Court will grant in part and deny in part

21

defendant's motion and will deny plaintiff's motion as non-compliant with the rules governing summary judgment motions.[1]

BACKGROUND[2]

ARE is a non-profit agency funded by a grant from the District of Columbia that works "primarily with at-risk and underserved" individuals "through intervention, education and employment skills training." ARE's Statement of Material Facts as to Which There is No Genuine Issue ("Def.'s Facts") ¶ 3. As a juvenile, plaintiff was among ARE's targeted population and was first hired by ARE in 1997. Plaintiff "held several intern, secretarial and receptionist positions before his official acceptance of the ARE Secretary to the Deputy of Education position." Pl.'s Opp'g Facts [Dkt. # 38] at 2 (responding to Def.'s Facts ¶ 1). In 1999, plaintiff underwent surgery that resulted in the amputation of his left leg below the knee and his use of a prosthesis. Def.'s Facts ¶ 4; Decl. of Pl. Brien O. Hill in Supp. of Default J. [Dkt. # 33] ¶ 2.

A. Plaintiff's Work History

At an unspecified time and for unspecified reasons, plaintiff left ARE. *See* Pl.'s Opp'g Facts at 2. He was rehired in 2003 as a Program Aide in ARE's Developmental Before and

[1] In addition to the motions and supporting memoranda, the Court has considered ARE's Response to Plaintiff's Motion for Summary Judgment [Dkt. # 35], Plaintiff's Amended Opposition to Defendant's Motion for Summary Judgment [Dkt. # 38], ARE's Reply to Plaintiff Brien O. Hill's Response to Its Motion for Summary Judgment and Cross Motion of Plaintiff Hill for Summary Judgment [Dkt. # 39], Plaintiff's Supplemental Brief for Third Element of Plaintiff's Reasonable Accommodation Claim [Dkt. # 41], and Defendant ARE's Response to Plaintiff's Brief and the Court's Order to Supplement the Record Regarding the Third Element of the Plaintiff's Reasonable Accommodation Claim [Dkt. # 42].

[2] The record is replete with information that is irrelevant to the two remaining claims of failure to accommodate and hostile work environment. The complaint has not been amended, and it is too late in the proceedings to permit an amendment. Hence, the Court will refer only to those facts and parts of the record deemed relevant to resolving the foregoing claims.

Aftercare Program ("DBA"). *Id.* In May 2007, plaintiff fell while working at ARE's "outdoor . . . play surface" and "severely injured [his] amputated stump and damaged [his] prosthesis." Hill Decl. ¶ 5. He "returned to work bruised" on May 22, 2007; he requested, and was granted, a "class assistant" on behalf of himself and his "fellow . . . Co-teacher" who was "in the final trimester of pregnancy." *Id.* ¶ 6.

On August 27, 2007, plaintiff "was reassigned back to the position of a Program Aide from that of . . . Head Start Lead Teacher and placed in a classroom located on the third floor of [ARE's] three story school and office complex." *Id.* ¶ 7. As a result of a reduction in force and staff reassignments, plaintiff's position became part-time as of September 1, 2007. Def.'s Ex. C (Aff. of La'Troy R. Bailey [Dkt. # 32-1] ¶ 3 & Attachs. 1, 2). At that time, plaintiff's immediate supervisor was La'Troy R. Bailey, who "is classified as a C5 quadriplegic, which means a portion of her body is partially paralyzed." Def.'s Facts ¶¶ 7-8. Both Bailey and plaintiff were located on the third floor of ARE's building, which had no elevator. Def.'s Facts ¶ 8.

Bailey avers that prior to assuming her supervisory duties over plaintiff in August 2007, she was told by the Human Resources Department ("HR") about plaintiff's conduct that had "raised concerns," and she was "instructed . . . to start counseling and implementing a progressive discipline program in accordance with ARE['s] Employee Handbook." Bailey Aff. ¶ 7. On March 21, 2008, Bailey suspended plaintiff for three days without pay "for misbehaviors that included absence from work without notification; leaving the work site without notification and [] failure to adhere to department sign-in/out policies." *Id.* & Attach. 3. Bailey avers that plaintiff's behavior did not improve after the suspension. Specifically, "he continued to be insubordinate, by failing to perform [requested] duties" despite "continual verbal counseling and documentation of his conduct through early December [] 2008." *Id.* ¶ 8.

Defendant's HR Manager avers that in "the Fall of 2008" she learned that plaintiff "was harassing and attempting to intimidate his supervisor . . . Bailey." Def.'s Ex. B (Aff. of Talya C. Holloman [Dkt. # 32-1] ¶ 5). On December 12, 2008, Bailey recommended plaintiff's termination. Following a meeting that day attended by plaintiff, Bailey, Holloman and ARE's executive director, plaintiff was fired effective December 15, 2008. *Id.* ¶ 5; Bailey Aff. ¶ 8. The termination letter lists a "pattern of infractions" consisting of "insubordination and disrespectful conduct, excessive tardiness, falsification of timekeeping records, and violation of DBA call-in policy." Bailey Aff., Attach. 5.

B. Plaintiff's Accommodation Requests

Plaintiff admits in deposition testimony that he received requested accommodations throughout his employment, *see* Def's Facts ¶ 10, but stresses that he was accommodated only "up until 9/07." Pl.'s Opp'g Facts at 8. The parties diverge on whether plaintiff requested an accommodation after August 2007.

According to plaintiff, he "expressed [his] concerns" about being on the third floor during a telephone call with Bailey on August 31, 2007, and she instructed him "to put all [his] grievances in writing and submit them to her for review." Hill Decl. ¶ 8. Plaintiff further avers that on September 3, 2007, he "submitted to . . . Bailey" a written request to be "repositioned back to the lower level . . . and the accommodation of having an Aide assigned to my classroom . . .," which was "denied, even though all other Program Aides [Teachers] were assigned classroom aids [sic]." *Id.* ¶ 9 (bracket in original); Pl.'s Ex. K [Dkt. # 38, p. 108]. Plaintiff avers that he "made daily verbal request[s]" to Bailey throughout the school year for the same accommodation but was denied. Hill Decl. ¶¶ 10, 13. Plaintiff states that he "disagreed with and refused to sign" his annual performance evaluation in March 2008 because Bailey "was fully

aware . . . of my inability to fulfill the duties listed in my . . . evaluation as negative areas in need of improving, directly because" his "first written request on September 3, 2007" to be repositioned to the facility's lower level and for "the accommodation of [a classroom] Aide" had been denied. *Id.* ¶ 12. Plaintiff states that he conveyed the foregoing information in a meeting with Bailey and ARE's Director of Education Faye Mays-Bester held following his March 2008 evaluation. *Id.*

According to defendant, "[a]t no time did [plaintiff] request from [Bailey] any accommodation or modification of his duties or work place," issues about which Bailey is "extremely sensitive" because of her own disability. Bailey Aff. ¶ 6. Similarly, HR Manager Holloman avers that while she was aware of plaintiff's disability and his assignment to the third floor, she never received a direct request from plaintiff for "any accommodation or assistance . . . or [a request] through his supervisors in carrying out his responsibilities." Holloman Aff. ¶ 4; *but see* Holloman Sept. 26, 2013 Depo. [Dkt. # 33-1] at 46 & Pl.'s Ex. K (responding "I don't recall" to plaintiff's question about receiving "on 10-6-2008" the September 3, 2007 accommodation request).

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by identifying those portions of "the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made

for purposes of motion only), admissions, interrogatory answers, or other materials," which it believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c)(1); *see also Celotex*, 477 U.S. at 323.

"The rule governing cross-motions for summary judgment . . . is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion." *McKenzie v. Sawyer*, 684 F.2d 62, 68 n. 3 (D.C. Cir. 1982), *abrogated on other grounds by Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111 (D.C. Cir. 1999). Plaintiff has disputed some of defendant's facts but has not set forth his own statement of material facts he considers not in genuine dispute. Hence, the Court will deny plaintiff's motion for summary judgment since it does not comply with the rules governing summary judgment.

Summary judgment is properly granted against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322-23. In determining whether there exists a genuine dispute of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all justifiable inferences in the non-movant's favor. *See Anderson*, 477 U.S. at 255. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. Moreover, "[i]f the evidence is

merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). Summary judgment, then, is appropriate here if plaintiff fails to offer "evidence on which the jury could reasonably find for [him]" on an essential element of his claim. *Id.* at 252; *see Celotex*, 477 U.S. at 322-23.

DISCUSSION

A. Failure to Accommodate Claim

The ADA bars a covered employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Failure to accommodate is one of four prohibited acts under the ADA. *See Floyd v. Lee*, 968 F. Supp. 2d 308, 315 (D.D.C. 2013) (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc)); *see also* 42 U.S.C. § 12112(b)(5)(A) (the term discriminate includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

To survive summary judgment on his failure to accommodate claim, plaintiff must point to evidence in the record from which a reasonable jury could find that (1) he had a disability within the meaning of the ADA; (2) his employer had notice of his disability; (3) he could perform the essential functions of the position with reasonable accommodation; and (4) his employer refused a reasonable request for accommodation. *See Hodges v. District of Columbia*, 959 F. Supp. 2d 148, 153-54 (D.D.C. 2013). Because "[t]he employer's motivation for refusing the accommodation plays no part in [this] analysis, reasonable-accommodation claims are 'not subject to analysis under [the familiar] *McDonnell–Douglas*' " framework utilized in assessing

most employment discrimination claims. *Floyd*, 968 F. Supp. 2d at 316 (quoting *Aka*, 156 F. 3d at 1288, citing *McDonnell–Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

The first and second elements of plaintiff's accommodation claim—whether he has a physical disability about which defendant was aware—are not in genuine dispute. As discussed next, the Court finds that summary judgment is defeated in part by the disputes surrounding the third and fourth elements of the claim, the latter of which will be addressed first.

1. The Disputed Fourth Element (Refusal of a Reasonable Request)

"An underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant-employer has denied." *Flemmings v. Howard Univ.*, 198 F. 3d 857, 861 (D.C. Cir. 1999). Upon an employer's receipt of a request for accommodation, "[t]he interactive process begins" and "both the employer and the employee have a duty to act in good faith" to "identify the precise limitations resulting from the disability and potential reasonable accommodations" that could overcome those limitations. *McNair v. District of Columbia*, --- F. Supp. 2d ---, 2014 WL 242913, at *5 (D.D.C. Jan. 23, 2014) (quoting 29 C.F.R. § 1630.2(o)(3); *Conneen v. MBNA Amer. Bank, N.A.*, 334 F.3d 318, 333 (3d Cir. 2003)) (internal quotation marks omitted). "[T]he absence of good faith, including unreasonable delays caused by the employer, can serve as evidence of an ADA violation." *Id.* Hence, "[t]o create an issue for the jury" on the fourth element of his claim, plaintiff must "produce sufficient evidence" that he requested an accommodation after "9/07," Pl.'s Opp'g Facts at 8, and "that, after the request, [defendant] refused to make an accommodation." *Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305, 1308 (D.C. Cir. 2010); *see Edwards v. U.S. EPA*, 456 F. Supp. 2d 72, 102 (D.D.C. 2006) ("[T]he dispositive issue is whether [plaintiff] requested and was denied an accommodation.").

Here, whether plaintiff actually made the request at issue is a credibility question that is not appropriately decided on summary judgment. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions[.]"). Plaintiff has produced his written request for accommodation dated September 3, 2007, Pl.'s Ex. K, which he states was "submitted to [his] immediate supervisor . . . Bailey" that same day. Pl.'s Decl. ¶ 9. Plaintiff also states that he "made daily verbal request[s] to . . . Bailey" throughout the 2007-2008 academic year. *Id.* ¶ 10. Both Bailey and defendant's HR manager, Holloman, have stated under oath that they received no request from plaintiff for an accommodation. *See* Bailey Aff. ¶ 6; Holloman Aff. ¶ 4. During deposition testimony, however, Holloman responded "I don't recall" to plaintiff's question about receiving "on 10-6-2008 [sic]" the September 3, 2007 accommodation request shown to her at the deposition. Holloman Sept. 26, 2013 Depo. [Dkt. # 33-1] at 46. Defendant contends that the September 2007 request appeared for the first time in proceedings before the Equal Employment Opportunity Commission ("EEOC") in 2009, *see* Hill Decl. ¶ 19, and questions the validity of the document. Def.'s Mem. [Dkt. # 32] at 9. On summary judgment, however, it is not the Court's role to resolve the posed question of "why not one person at ARE was aware or had seen [the request] prior to its submission in proceedings before the [EEOC]." *Id.*

As a general rule applicable here, "statements made by the party opposing summary judgment must be accepted as true for the purpose of ruling on that motion[.]" *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing cases). Hence, whether defendant received the proffered request for accommodation is a threshold question that a jury must decide before reaching the central question of whether defendant refused a reasonable request for accommodation. For if a jury is convinced from the evidence that defendant did not receive the

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request, the claim would fail as a matter of law. Conversely, if a jury is convinced from the evidence--including plaintiff's testimony about his written and verbal requests made throughout the school year--that defendant did receive the request, it could reasonably find for plaintiff on this element since (1) defendant has not produced any evidence to dispute the reasonableness of the request, and (2) the evidence in the record establishes that plaintiff's similar requests were granted "on each occasion" prior to September 2007. Def.'s Mem. at 9 (citing deposition testimony).

2. The Disputed Third Element (Performance of Essential Job Functions)

In response to the Court's July 2, 2014 Order to supplement the record on the third element of his accommodation claim, plaintiff provides an exhaustive list of job duties, including the following:

- Daily inspected each student for loose clothing and laces to prevent injury from falling.
- Logged and transported PM care students with an escort from their home school back to their assigned ARE DBA instructor.
- Daily reviewed and enforced in class and outdoor rules of safety.
- Practiced roll play for emergency and disaster readiness.
- Constructed plans for all aftercare outdoor play to be age appropriate ½ structured and ½ free play activities.
- Maintained daily attendance records and meal count sheets for my assigned classroom and completed then submitted all the monthly 3rd floor classroom's student attendance and meal count tallies to ARE administrative staff.
- Maintained . . . and distributed outdoor student equipment; balls, jump ropes, hula hoops . . . in the summer months.
- Daily modeled universal procedures for proper disposal of soiled tissues . . . .
- Ensured proper dress for outdoor play . . . .
- Daily practiced preventive measures to shield students from dehydration . . . .
- Constructed weekly lesson plan objectives . . . .

Pl.'s Supp. at 5-6. The list continues for five more pages. It is impossible to distill from plaintiff's laundry list of duties his "essential" functions, which are defined as "the fundamental

duties of the employment position the individual with a disability holds," exclusive of the "marginal functions of the position." *Baker v. Potter*, 294 F. Supp. 2d 33, 43 (D.D.C. 2003) (citations and internal quotation marks omitted). But plaintiff states that his physical disability "substantially limit[s] his ability [to] walk for long distances, stand for long periods of time (as required given that he supervised his classroom alone) and climb consecutive flights of stairs (as required for fire and emergency evacuation drills, supervised outdoor play and scheduled student lavatory breaks located on the basement floor . . . .) without the hazard of pain and bruises." Pl.'s Supp. at 3 (parentheses in original). Moreover, defendant has placed the written job description in the record, Def.'s Supp. Resp., Attach. A, which "shall be considered evidence of the essential functions of the job." *Dorchy v. WMATA*, 45 F. Supp. 2d 5, 12 (D.D.C. 1999) (quoting 42 U.S.C. § 12111(8)).

A reasonable jury could find from the evidence in the record that plaintiff's essential job functions required him to engage in physical activity with the students on a daily basis and that he had to "climb consecutive flights of stairs" to get to and from his third-floor office when he "supervised outdoor play and scheduled student lavatory breaks located on the basement floor." Pl.'s Supp. at 3. Plaintiff "attests" that he performed all of the listed job duties "alone" and "experienced grave hardships in doing so." Pl.'s Supp. at 12. In addition, plaintiff states that he refused to sign his annual performance evaluation in March 2008 because Bailey had given him a negative rating in unspecified areas of his job knowing that his September 3, 2007 accommodation request had not been granted.[3] Hill Decl ¶¶ 11-12.

[3] Plaintiff has not produced the unsigned performance evaluation, and the record shows that he refused to sign the March 21, 2008 Notice of Suspension. *See* Bailey Aff., Attach. 3 (containing handwritten notation of plaintiff's refusal to sign that document). On the other hand, defendant has not disputed plaintiff's statement or produced any contrary evidence, namely, the signed

Defendant counters that plaintiff could not perform the essential functions of his job with or without reasonable accommodation in large part because he was insubordinate toward his supervisor.[4] *See* Def.'s Supp. Resp. at 4-5. But evidence of plaintiff's insubordination is not significantly probative of the accommodation question. *See, e.g., Smith v. District of Columbia*, 271 F. Supp. 2d 165, 172 (D.D.C. 2003) (concluding that "alleged insubordination ha[d] nothing to do with whether [] home visits were an essential function of her job"). And, as previously explained, the validity of defendant's reasons for suspending and terminating plaintiff is not at issue. *See supra* at 7-8.

In his September 3, 2007 written request, plaintiff asked "to be reassigned back to the lower level of the facility where the kitchen and student lavatories are more assessable to me given my inability to regularly climb the several flights of stairs required to complete my daily scheduled student restroom, snack and water breaks." Pl.'s Ex. K. Plaintiff "declares" in his supplemental brief that when he returned to work on May 22, 2007, three days after his fall on May 19, 2007, he became "concern[ed] regarding the evacuation plans for the disable[d] employees . . . on the third floor in the untimely event of a fire or disaster." *Id.* He also feared from his fall the possibility "that the new untested prosthesis he'd be wearing [in] Fall 2007,

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performance evaluation. Hence, plaintiff's statement is accepted as fact for purposes of resolving the instant motion.

[4] Defendant also points to plaintiff's three-day suspension in March 2008 "for misbehaviors that included absence from work without notification [and] leaving the work site without notification," and concludes that plaintiff "could not possibly perform the essential duties of his position . . . because he was not available to perform his duties." Def.'s Supp. Resp. at 5. But defendant has not pointed to any evidence establishing the frequency and circumstances of plaintiff's absences--particularly from April 2008 until his firing in December 2008--and the record shows that plaintiff was disciplined and ultimately terminated for "insubordination and disrespectful conduct, excessive tardiness, falsification of timekeeping records, and violation of [the employer's] call-in policy," Bailey Aff., Attach. 5, instead of his job performance per se.

might too perhaps break unannounced and quite possibly do so on a staircase, landing with his students in front and behind him as . . . they climbed the many flights of stairs together[.]" *Id.* at 12. Plaintiff states that it was those concerns that "brought about . . the birth of [his] . . . reasonable accommodation requests." *Id.* Plaintiff also "affirms" that in August 2007, he was unable "to daily climb the 6-8 flight of stairs to and from his newly assigned 3rd floor classroom as required for him to perform his job duties as assigned." Pl.'s Supp. at 15. The Court finds that plaintiff has stated sufficient facts to create a triable issue on whether he could have performed the essential functions of his job if relocated to a lower-level room.

As for the request for an Aide, plaintiff repeats throughout the record that all other program aides were assigned classroom assistants. Even if true, this fact is immaterial to the accommodation question absent evidence connecting the assistance of an Aide with the limitations of plaintiff's disability. In *Edwards v. EPA*, this Court explained that "employers must make changes to their policies or practices so as to place disabled employees on the same footing as nondisabled ones," but it concluded that the plaintiff "ha[d] not presented objective evidence that bringing his untrained dog to work would have been an effective means of resolving his stress," 456 F. Supp. 2d 72, 100 (D.D.C. 2006) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400-01 (2002)) (internal quotation marks and other citations omitted). Similarly, the plaintiff in this case has not adduced any evidence to show that an Aide would have been an effective means of addressing the limitations imposed by his amputated leg, and "when an employee seeks a workplace accommodation, the 'accommodation must be related to the limitation that rendered the person disabled.' " *Adams v. Rice*, 531 F.3d 936, 944 (D.C. Cir. 2008) (quoting *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 848 (8th Cir. 2005)); *see id.* at 953 (quoting *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) ("[T]he

ADA requires employers to reasonably accommodate limitations, not disabilities."). Hence, summary judgment is warranted on this aspect of plaintiff's accommodation claim.

B. Hostile Work Environment Claim

A hostile work environment rises to the level of unlawful discrimination when the workplace "is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.' " *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)). The alleged conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—[one] that a reasonable person would find hostile or abusive." *Id.* at 21. In addition, "the victim [must] subjectively perceive the environment to be abusive" in order to show that the environment "actually altered the conditions of [his] employment." *Id.* at 21-22. In analyzing this claim, the Court must consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating . . . ; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Plaintiff alleges generally in the complaint that defendant subjected him to a hostile work environment "based upon his disability and [] his exercise of protected FMLA rights." Compl. ¶ 2. But plaintiff does not allege any facts about his working conditions that rise to the level of the foregoing standard and, most detrimental at this post-discovery summary judgment stage, he has not adduced any evidence of such conditions. Hence, to the extent that plaintiff's hostile work environment claim survives, summary judgment is warranted. *See Celotex*, 477 U.S. at 323-24.

CONCLUSION

For the foregoing reasons, the Court concludes that defendant is entitled to judgment as a matter of law on (1) the ADA reasonable accommodation claim based on plaintiff's alleged request for an Aide, and (2) the hostile work environment claim. The Court further concludes that a material factual dispute exists with regard to plaintiff's reasonable accommodation claim based on his alleged request to be relocated to a lower-level room. Hence, defendant's motion for summary judgment is GRANTED in part and DENIED in part. A separate order accompanies this Memorandum Opinion.

s/
JOHN D. BATES
United States District Judge

Date: September 29, 2014

Additional material from this filing is available in the Clerk's Office.