APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-3304
NATALIE MCDANIEL, Plaintiff-Appellant
v.
ROBERT WILKIE, Secretary of Department of Veterans Affairs, Defendant-Appellee
DEPARTMENT OF VETERANS AFFAIRS, et al, Defendants

FILED January 31, 2020
DEBORAH S. HUNT, Clerk
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
NOT RECOMMENDED FOR PUBLICATION

ORDER

Before: GUY, GRIFFEN, and KETHLEDGE, Circuit Judges.

Natalie A. McDaniel, a pro se Ohio litigant, appeals the district court's judgment dismissing her civil suit against the Department of Veterans Affairs (the "VA"), its Secretary, and several of its employees. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

McDaniel is an African American woman who was employed by the VA as a Veterans Service Representative and then a Rating Veterans Service Representative from 2007 until she resigned in July 2015. According to her amended complaint, the

defendants, during her employment, "engaged in a pattern of harassing conduct that, viewed in total, was severe and pervasive and created a hostile work environment." "This pattern included inappropriate touching, comments, subjective evaluations, workplace sabotage, false accusations of misconduct, failure to promote, failure to grant her reasonable accommodation[,] and the removal of the assets/tools necessary for her to perform her job." McDaniel specified that "supervisors inquired whether certain females were in a relationship with other females; leered at [her] looking her up and down; stated that [she] was too pretty to get a job; accused [her] of being bad when she was young; referred to [her] as a bitch; and stroked [her] hair."

In December 2013, McDaniel began teleworking from her home four days per week. She alleged that she suffered from a disability. In June 2014, she was diagnosed with Post Traumatic Stress Disorder, major depressive disorder, and severe anxiety disorder, all of which she alleged "was caused by the pattern of harassing conduct set forth" in her pleading. Because of her diagnoses, McDaniel requested an accommodation to telework from her home five days per week "so that [she] would not be exposed to the individuals that harassed her previously and created a hostile work environment that contributed to her disability." McDaniel alleged that, in July 2015, before answering her request for accommodation, the defendants revoked her teleworking privileges for productivity reasons and ordered her to report to the office five days per week. McDaniel maintains that the proffered reason was pretextual and that the defendants revoked her privileges in retaliation for her complaints about the harassment she endured at work. McDaniel resigned from her job because "her

disability [made her] unable . . . to work from the office 5 days per week." She alleged claims of race and sex discrimination under Title VII of the Civil Rights Act of 1964; disability discrimination for failure to provide a reasonable accommodation, in violation of the Rehabilitation Act of 1973; hostile work environment, retaliation, and constructive discharge under both statutes; and intentional infliction of emotional distress.

The defendants moved to dismiss McDaniel's amended complaint, and the district court granted it in part and denied it in part. *McDaniel v. Shulkin*, No. 1:17-CV-00091, 2017 WL 4574549, *7 (N.D. Ohio Oct. 13, 2017). The district court dismissed all of McDaniel's claims except those against the Secretary of the VA for hostile work environment, failure to accommodate her disability, and constructive discharge.

After the parties engaged in discovery, the Secretary of the VA moved for summary judgment. The district court granted that motion, finding that McDaniel could not show that she faced a hostile work environment, that she is disabled, that the VA failed to provide her an accommodation, or that her working conditions were objectively intolerable, as required to establish constructive discharge. *McDaniel v. Wilkie*, No. 1:17-CV-00091, 2019 WL 626547, *4–7 (N.D. Ohio Feb. 14, 2019).

McDaniel now appeals, but she restricts her arguments to the district court's summary- judgment ruling, arguing only that the court erred in dismissing her hostile-work-environment, failure-to-accommodate, and constructive-discharge claims. Thus, she has waived review of the district court's dismissal of her other claims in its motion-to-dismiss ruling. *See Grinter v. Knight*, 532 F.3d 567, 574 n.4 (6th Cir. 2008). McDaniel also argues that the

district court erred in not ruling on her motion to compel discovery before the court granted summary judgment.

We review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In resolving a motion for summary judgment, we view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

McDaniel first argues that the district court erred in granting summary judgment on her hostile-work-environment claim. Title VII prohibits an employer from discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To establish a hostile-work-environment claim under these statutes for sex, race, and disability discrimination, a plaintiff must prove that: (1) she was a member of the protected class or was disabled; (2) she faced unwelcome harassment based on her sex, race, or disability; (3) the harassment had the effect of unreasonably interfering with her work performance and created an objectively intimidating, hostile, or offensive work

environment; and (4) her employer is liable. *See Warf v. U.S. Dep't of Veterans Affairs*, 713 F.3d 874, 878 (6th Cir. 2013) (Title VII claims); *Plautz v. Potter*, 156 F. App'x 812, 818 (6th Cir. 2005) (Rehabilitation Act claims). These statutes' prohibitions against hostile work environments protect employees "from a 'workplace [] 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 working environment . . . .'" *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (omissions in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

The district court noted that McDaniel alleged that, "a few times," her supervisor "looked at her inappropriately and commented on her appearance," which she did not report to the VA. *McDaniel*, 2019 WL 626547, at *3. She claimed that the supervisor "look[ed her] up and down" two different times. McDaniel Dep. at 41. He also once made a comment about her looks and another time about her sexuality. The district court also noted that McDaniel alleged that another supervisor, who was female, "'micromanaged' her work, and was allegedly hostile because 'she was very interested in what [McDaniel] was doing, [and] how [she] was doing it . . . instead of taking [McDaniel's] word for it.'" *Id.* at *4. McDaniel also alleged that the female supervisor "commented on her hair a few times and touched her hair once," which McDaniel believed she did because McDaniel is biracial. *Id.* The district court held that "[t]hese few, isolated incidents" did not establish an objectively intimidating, hostile, or offensive work environment. *Id.* The court further held that, even if they did, McDaniel could not prove that the VA knew or should have known about it

because she testified that she did not report any of the incidents to management. *Id.*

McDaniel argues that the district court's decision was erroneous. But she does not point to record evidence that could establish that there is a genuine dispute that she proved the third element of a hostile-work-environment claim: that she was harassed based on her sex, race, and disability so much so that it unreasonably interfered with her work performance and created an objectively intimidating, hostile, or offensive work environment. Even viewed in the best light for her case, the events that McDaniel alleged do not show an environment "that a reasonable person would find hostile or abusive," because "'simple teasing,' . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to" a hostile work environment, *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

McDaniel argues that the district court failed to apply the burden-shifting framework for discrimination claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). But the district court held that McDaniel had not established a prima facie case of hostile work discrimination, *McDaniel*, 2019 WL 626547, at *3–4, and that is the first step in the *McDonnell Douglas* analysis. *See Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 703 (6th Cir. 2007). McDaniel further asserts that the court made credibility judgments at the summary-judgment stage by remarking that her assertions were unsubstantiated and that the district court disregarded background evidence about her workplace. But the district court's analysis of her claim and the record was in accordance with the applicable standards on summary judgment. See

Fed. R. Civ. P. 56. McDaniel also asserts that the district court erred in finding that the VA did not know about the allegedly hostile work environment, pointing to a letter that her attorney wrote to VA management in 2014. She is correct, yet because she failed to establish that a hostile work environment existed, proof that she informed her employer does not save her claim. In sum, the district court did not err in granting summary judgment and dismissing her hostile-work-environment claim.

McDaniel next argues that the district court erred in denying her disability-discrimination claim for failure to accommodate. To establish a prima facie case of disability discrimination under the Rehabilitation Act, a plaintiff must show that: "(1) she is a disabled person under the Act; (2) she is otherwise qualified; and (3) she was denied a reasonable accommodation solely by reason of her disability." *Peltier v. United States*, 388 F.3d 984, 989 (6th Cir. 2004)

The district court determined that McDaniel failed to point to evidence that could establish either that she had a disability or that the VA denied her request for an accommodation solely because of her disability. *McDaniel*, 2019 WL 626547, at *4–5. McDaniel maintains that both determinations are erroneous. The VA, however, does not argue on appeal that McDaniel was not disabled. Instead, the VA maintains that it did not fail to provide a reasonable accommodation to McDaniel because her requested accommodation was not reasonable and that McDaniel's claim failed because she resigned before the informal, interactive process for accommodation requests concluded.

The district court ruled that McDaniel's proposed accommodation to telework five days a

week was not reasonable because "[t]he record shows that when the [VA] allowed [her] to telework four days per week, her productivity decreased." *Id.* at *4. Thus, the district court held that "it was not unreasonable for the [VA] to refuse increasing her telework to five days per week, because there was evidence that [she] was not 'able to satisfactorily perform her duties within that accommodation' request." *Id.* (citing *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763 (6th Cir. 2015) (en banc)). McDaniel argues that her output had fallen below the required level but that she had fully mitigated the issue. Yet, the record evidence shows that McDaniel was repeatedly given poor marks for her productivity. Thus, the district court did not err in finding no genuine dispute that McDaniel's requested accommodation was unreasonable. And this makes the district court's alternative ruling that McDaniel failed to engage in the interactive process unnecessary.

McDaniel next argues that the district court erred in granting summary judgment on her constructive-discharge claim. To the extent that McDaniel's constructive-discharge claim relied on the VA having a hostile work environment, because there is no genuine dispute that she failed to establish the latter claim, the same holds for the former. *See Pennsylvania. State Police v. Suders*, 542 U.S. 129, 147 (2004) ("A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign."). And to the extent that McDaniel claimed that the denial of her accommodation request created a constructive discharge, that too is insufficient. "[T]he denial of an accommodation, by itself, is not

sufficient to prove that an employer constructively discharged an employee." *Gleed v. AT & T Mobility Servs., LLC*, 613 F. App'x 535, 540 (6th Cir. 2015) (citing *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1109 (6th Cir. 2008)). Because McDaniel cannot prove that her working conditions were intolerable, the district court did not err in denying her constructive-discharge claim. *See Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999).

Finally, McDaniel argues that the district court erred by not ruling on her motion to compel discovery before it granted the Secretary's motion for summary judgment. But McDaniel does not explain how the district court's inaction harmed her case, and the record shows that discovery was substantial. Thus, the district court did not abuse its discretion in granting summary judgment before ruling on McDaniel's motion to compel.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 17CV91
NATALIE MCDANIEL, Plaintiff
v.
DAVID SHULKIN, Secretary of Department of Veterans Affairs, et al, Defendants

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon a Motion for Summary Judgment filed by Defendant, Robert Wilkie, Secretary of the Department of Veterans Affairs (hereafter "Secretary Wilkie"). (ECF # 40). Plaintiff, Natalie McDaniel (hereafter "Ms. McDaniel") filed a Memorandum in Opposition, (ECF #58-1), and Secretary Wilkie filed a Reply Brief on February 11, 2019. (ECF #61). For the reasons more fully set forth herein, Secretary Wilkie's Motion for Summary Judgment is GRANTED.

I. Factual and Procedural Background

Ms. McDaniel is a 39-year old, African-American woman who was employed by the Department of Veterans Affairs ("the Agency") from July 2007 until she resigned on July 2, 2015. (See ECF # 12, ,¶¶7 and 15). At all times relevant herein, Ms. McDaniel worked as a Rating Veterans Service Representative, GS-12. Ms. McDaniel alleges that employees at the Agency engaged in conduct, including "inappropriate touching, comments, subjective evaluations, workplace sabotage, false

accusations of misconduct, failure to promote, failure to grant her reasonable accommodation and the removal of the assets/tools necessary to perform her job," that, viewed in total, was severe and pervasive and created a hostile work environment." (ECF #12, ¶¶16-17).

In December 2013, Ms. McDaniel began teleworking from her home 4 days per week. (ECF #12, ¶25). Ms. McDaniel alleges that in June 2014, she was diagnosed with Post Traumatic Stress Disorder, major depressive disorder, and severe anxiety disorder, all of which she claims were caused by the alleged harassing conduct during her employment with the Agency. (ECF #12, ¶19). On June 1, 2015, Ms. McDaniel's supervisor told her that her productivity from home needed to improve, or he would suspend her teleworking privileges and she would be required to work in the office full-time. One week later, Ms. McDaniel requested full-time telework as an accommodation for her alleged disability and to avoid alleged harassers and the hostile work environment. (See ECF # 12-8, Final Agency Decision, hereafter "FAD").

On July 1, 2015, the Agency revoked Ms. McDaniel's teleworking privileges and ordered her to report to work in the Agency's offices full-time beginning on July 6, 2015. (See FAD, p. 3). Ms. McDaniel alleges that because of her disability, she was unable to return to full-time office work, and, on July 2, 2015, was forced to resign from the Agency. (See ECF #12, ¶27). On July 14, 2015, Ms. McDaniel contacted an EEO Counselor within the Agency, but the matter was not resolved. On September 1, 2015, Ms. McDaniel filed a Formal Complaint with the Agency, alleging she was discriminated and retaliated against when she lost her telework privileges and that she was subjected to harassment that created a

hostile work environment. (ECF #12, , ¶¶36-39). A Final Agency Decision ("FAD") was issued on October 13, 2016, concluding that Ms. McDaniel had failed to establish that she was subjected to discrimination. (ECF #12-8).

On April 28, 2017, Ms. McDaniel filed her First Amended Complaint. (ECF #12). This Court has previously dismissed Ms. Mclzaniel's claims of race and sex discrimination, retaliatio and emotional distress, and has also dismissed the claims against the Agency and the individually named Agency employees. (See ECF #22). The surviving claims against Secretary Wilkie[1] are hostile work environment, disability discrimination and constructive discharge.

On October 31, 2018, Secretary Wilkie filed his Motion for Summary Judgment, arguing that Ms. McDaniel cannot show she was subject to a hostile work environment, and furthermore, cannot show that the VA knew or should have known of any alleged harassment. (ECF #40-1, pp. 5-8). Secretary Wilkie also argues that Ms. McDaniel has not proven she is considered disabled under the law, nor has she proven that the Agency failed to provide an accommodation. (Id. at pp. 9-13). Finally, Secretary Wilkie argues that Ms. Mcfraniel's constructive discharge claim fails because she has not proven that her working conditions were "objectively intolerable" before she resigned from her employment. (Id. at pp. 13-15).

II. Standard of Review

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[1] Ms. McDaniel named VA Secretary David Shulkin as a Defendant in her Amended Complaint. Robert Wilkie is the current Secretary of the Department of Veteran Affairs, and therefore, pursuant to Fed. R. Civ. P. 25(d), Robert Wilkie is automatically substituted for former Secretary David Shulkin in this suit.

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citations omitted).

A fact is "material" only if its resolution will affect the outcome of the lawsuit *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing

Anderson, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omitted).

In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the non-mover. The non-moving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep 't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). Evidence may be presented by citing to particular parts of the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Fed. R. Civ. P. 56(c). In lieu of presenting evidence, Fed. R. Civ. P. 56(c) also allows that a party may show that the opposing party' s evidence does "not establish the presence of a genuine dispute" or that the adverse party "cannot produce admissible evidence to support the fact."

According to Fed. R. Civ. P. 56(e),

> [i]f a party fails to properly support an assertion of fact, or fails to properly address

another party's assertion of fact as required by Rule 56(c), the court may:
(1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials - including the facts considered undisputed - show that the movant is entitled to it; or
(4) issue any other appropriate order

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

III. Analysis

A. Hostile Work Environment

Ms. McDaniel alleges that she was subject to unwelcome physical contact and intimidation, offensive verbal comments, workplace sabotage, false accusations of misconduct, and threats of unwarranted discipline from employees at the VA, based on her gender and race. Ms. McDaniel claims that this alleged harassment unreasonably interfered with her work performance and created an intimidating, hostile, and offensive environment, and that the VA knew or should have known about the harassment and failed to take adequate action, all in violation of Title VII and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (hereafter the "Rehabilitation Act").

In order to establish a prima facie case of hostile work environment harassment based on the conduct of coworkers, a plaintiff must show that (1) she was a member of a protected class; (2) she was

subjected to unwelcome harassment; (3) the harassment was based upon the employee's protected status; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known about the harassing conduct but failed to take any corrective or preventative actions. *Woods v. FacilitySource, LLC*, 640 Fed. Appx. 478, 490 (6th Cir. 2016).

In order to prevail, Ms. McDaniel must show that the working environment at the Agency "was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe o pervasive to alter the conditions of her employment and create an abusive working environment. *Id;* citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367 (1993). The hostile conduct must be more than "a mere offensive utterance," it must be severe and pervasive to rise to the level of an objectively hostile work environment. *Ault v. Oberlin Coll.*, 620 F.App'x 395, 399-400 (6th Cir. 2015). Isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir. 2000).

Ms. McDaniel makes subjective and unsubstantiated claims that a few times, her Supervisor, Charles Moore, looked at her inappropriately and commented on her appearance. Ms. McDaniel did not report these alleged incidents to the Agency, nor did any of the alleged witnesses to the incidents. (See Ms. McDaniel Depo. pp. 36-43; 49-53). Ms. McDaniel makes no claim that these isolated events would also offend the sense of an ordinary, reasonable person. *See Harris, supra*, 510 U.S. at 24. As Secretary Wilkie points out in his Reply Brief, "Plaintiff herself acknowledges that she relies on her own, subjective interpretation of these

events." (ECF #61 p. 2 (citing to Ms. McDaniel's deposition)).

Ms. McDaniel also complains that another Supervisor, Vinka Lasic, ("Ms. Lasik") "micromanaged" her work, and was allegedly hostile because "she was very interested in what I was doing, [and] how I was doing it .. .instead of taking my word for it." (McDaniel Deposition at 171-72). Ms. McDaniel alleges that Ms. Lasic also commented on her hair a few times and touched her hair once. These incidents occurred over the course of several years.

These few, isolated incidents of alleged harassment do not create a hostile work environment, as they do not create a workplace atmosphere that is "both objectively and subjectively offensive." *Lovelace v. BP Products North America,* 252 Fed.App. 33, 41 (6th Cir. 2007). Despite McDaniel's subjective belief that she was a victim of workplace harassment, "the record is devoid of competent summary judgment evidence of discrimination that is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive." *Wiley v. Slater,* 20 F.App'x 404, 406 (6th Cir. 2001).

Even if Ms. McDaniel had proven that a hostile work environment existed at the Agency, Ms. McDaniel cannot prove that the Agency knew or should have known about the alleged harassment as required as a matter oflaw. See *Woods v. Facilitysource,* LLC, 640 F. App'x 478, 490 (6th Cir. 2016). Ms. McDaniel testified she did not report any of the alleged incidents to Agency management. Since an employer's actual or constructive knowledge is a prerequisite to a hostile work environment claim, and Ms. McDaniel did not report these incidents,

Secretary Wilke is entitled to judgment as a matter of law.

B. Disability Discrimination

To establish a prima facie case of failure to accommodate under the Americans with Disabilities Act ("'ADA"), 42 U.S.C. § 12112(a) and the Rehabilitation Act, Ms. McDaniel must show that (1) she has a disability; (2) she was qualified for the position; (3) the agency was aware of her disability; (4) an accommodation was needed; and (5) the Agency failed to provide then modification. *Willard v. Potter*, 264 Fed.Appx. 485, 487 (6th Cir. Mich. 2008)(citations omitted). Ms. McDaniel argues that she suffered from a disability, anxiety and depression, and that the Agency failed to provide a reasonably accommodation by refusing to allow her to work from home five days per week. (ECF # 12, 11 51-61).

First, Ms. McDaniel has not sufficiently shown that her diagnoses constituted disabilities. There is no evidence indicating that "one or more major life activity" was substantially limited, nor has Ms. McDaniel explained how her anxiety and depression have substantially limited her daily activities. *See, e.g., Penny v. UPS*, 128 F.3d 408, 415 (6th Cir. 1997). A medical diagnosis alone is not enough to demonstrate a disability under the ADA. *See McNeil v. Wayne County*, 300 Fed.Appx. 358, 361 (6th Cir. 2008)(citing *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002). Similarly, merely stating a claim that these conditions were made worse while working a the VA is not sufficient to prove a disability. Ms. McDaniel must prove that the condition caused an "inability to work" under present conditions. *See Myers v. Cuyahoga Cty.*, 183 F.App'x 510, 516 (6th Cir. 2006). Without such evidence, Ms. McDaniel cannot prove she was disabled while employed with the Agency.

In addition, there is no evidence to suggest that the Agency failed to provide a reasonable accommodation to Ms. McDaniel. The record shows that when the Agency allowed Ms.McDaniel to telework four days per week, her productivity decreased. Therefore, it was not unreasonable for the Agency to refuse increasing her telework to five days per week, because there was evidence that Ms. McDaniel was not "able to satisfactorily perform her duties within that accommodation" request. *See EEOC v. Ford Motor Co.*. 782 F.3d 753, 763 (6th Cir. 2015).

Furthermore, Ms. McDaniel resigned from the Agency before any discussion regarding other potential reasonable accommodations. Ms. McDaniel also admitted that she "refused to sign a medical release" so that the Agency could request medical information regarding her alleged disabilities. (ECF #58-1, p. 23). When a plaintiff does not participate in this shared "interactive process" in good faith, and resigns while the process is ongoing, an employer cannot be found liable of disability discrimination. *See Kleiber v. Honda of America Mfg., Inc.*, 420 F.Supp.2d 809 (S.D. Ohio 2006). Therefore, the Agency cannot be found liable for failure to accommodate Ms. McDaniel when she failed to engage in this process to find alternative accommodations. See *Gleed v. AT&T Mobility Services, LLC*, 613 Fed.Appx. 535, 539 (6th Cir. 2015).

For these reasons, Ms. McDaniel's claim that the Agency failed to provide a reasonable accommodation fails, and Secretary Wilke is entitled to judgment as a matter of law.

C. Constructive Discharge

Ms. McDaniel alleges that when she was told to return to the Agency offices full-time, she was

forced to resign rather than face the hostile and intolerable working conditions.

"To constitute constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d I 073, I 080 (6th Cir. 1999). When faced with similar hostile-environment constructive discharge claims, plaintiffs must present evidence proving not only harassment, but they are required to show activity "so intolerable that a reasonable person would be forced to quit." *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004).

The allegations presented by Ms. McDaniel do not show that anyone at the Agency acted intentionally to make her quit. In fact, Ms. McDaniel did not depose any employee at the Agency, and therefore, cannot begin to address the seven factors used to assess an employer's intent: demotion, salary reduction, job responsibility reduction, reassignment to less desirable work, reassignment to work under a younger supervisor, harassment by the employer for the purpose of forcing plaintiff to quit, or an offer to continue working but on less favorable terms. *See Presley v. Ohio Dept. of Rehab. and Corr.*, 675 Fed.Appx 507, 515 (6th Cir. 2017)(*citing Logan v. Denny's, Inc.*, 259 F.3d 558, 569 (6th Cir. 2001). As Secretary Wilkie points out, Ms. McDaniel does not claim that her salary or benefits were ever reduced, rather, she "merely alleges unpleasant working conditions and the revocation of her telework privileges, both of which are insufficient to support her constructive discharge claim." (ECF #61, p. 7). Moreover, Ms. McDaniel testified that any changes to her workload and job responsibilities were primarily

due to staffing considerations. (See McDaniel Dep. at pp. 80-100).

Considering these seven factors, Ms. McDaniel has failed to show sufficient support for her claim of deliberate, objectively intolerable working conditions, and therefore, her constructive discharge claim fails as a matter of law.

IV. Conclusion

For the reasons set forth herein, Secretary Wilkie's Motion for Summary Judgment is

GRANTED.

IT lS SO ORDERED.

s/Donald C. Nugent

Donald C. Nugent
United States District Court
Date: February 13, 2019

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:17 CV 91
NATALIE MCDANIEL, Plaintiff
v.
DAVID SHULKIN, Secretary of Department of Veterans Affairs, et al, Defendants

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JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendants, David Shulkin, Secretary of the Department of Veterans Affairs; the Department of Veterans Affairs; Charles L. Moore, Jr.; Todd John Webber; Vinka M. Lasic; and, Jessica R. Minnich. (Docket #18.) Defendants ask the Court to dismiss all claims raised against them by Plaintiff, Natalie McDaniel.

I. Factual and Procedural Background.

Ms. McDaniel is a 38-year-old, African American woman who was employed by the Department of Veterans Affairs ("the Agency") from July 2007 until she resigned on July 2, 2015. (First Amended Complaint at Paragraph 7 and 15.) At all times relevant, Ms. McDaniel worked as a Rating Veterans Service Representative, GS-12. Ms. Mc Daniel alleges that during her employment with the Agency, Defendants engaged in conduct, including "inappropriate touching, comments, subjective evaluations, workplace sabotage, false accusations of

misconduct, failure to promote, failure to grant her reasonable accommodation and the removal of the assets/tools necessary to perform her job" that, viewed in total, was severe and pervasive and created a hostile work environment. (Id. at Paragraphs 16-17.) Ms. McDaniel alleges that "supervisors inquired whether certain females were in a relationship with other females; leered at Plaintiff looking her up and down; stated that Plaintiff was too pretty to get a job; accused Plaintiff of being bad when she was young; referred to Plaintiff as a bitch; and stroked Plaintiff's hair." (Id. at Paragraph 17.) Ms. McDaniel alleges she complained to the Agency that she was being subject to a hostile work environment and filed various grievances and complaints regarding the same. (Id. at Paragraph 18.)

In December 2013, Ms. McDaniel began teleworking from her home 4 days per week. (Id. at Paragraph 25.) Ms. McDaniel states that in June 2014, she was diagnosed with Post Traumatic Stress Disorder, major depressive disorder, and severe anxiety disorder her alleged disability for which she still attends therapy and all of which she claims was caused by the alleged harassing conduct during her employment with the Agency. (Id. at Paragraph 19.)

On June 1, 2015, Ms. McDaniel's supervisor told her that her productivity from home needed to improve or he would suspend her telework privileges and she would be required to work in the office full-time. (Final Agency Decision at p. 3.) On June 8, 2015, Ms. McDaniel requested full-time telework as an accommodation for her alleged disability. (First Amended Complaint at Paragraph 22.) Ms. McDaniel states that she communicated to Defendants that she suffered from a disability; asked

to telework 5 days per week from home so she would not be exposed to the alleged harassers and hostile work environment which contributed to her disability; and, provided medical documentation to the Agency corroborating the same. (Id. at-2 Paragraphs 22-25.)[2]

Ms. McDaniel asserts that on July 1, 2015, before a decision was made regarding the requested accommodation, Defendants revoked her teleworking privileges and ordered her to report to work in the office full-time beginning July 6, 2015. (First Amended Complaint at Paragraph 27; Final Agency Decision at p. 3.) Ms. McDaniel alleges that because of her disability, she was unable to return to full-time office work on and, on July 2, 2015, was forced to resign due to the revocation of her teleworking privileges. (First Amended Complaint at Paragraph 35.)

Ms. McDaniel alleges Defendants "maliciously engaged in a pattern of harassment that included the adverse action of revoking her teleworking privileges due to alleged productivity issues prior to concluding the interactive process" because she had previously complained about the alleged harassment and hostile work environment; requested an accommodation for her disability; and, filed grievances and complaints. (Id. at Paragraph 27.) Ms. McDaniel asserts that the decision to revoke her teleworking privileges was arbitrary; not consistent with the past practices of the Agency; and, that the Agency's proffered reasons

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[2] The Final Agency Decision states that Ms. McDaniel did not provide sufficient documentation from a medical provider regarding her functional limitations or the need to telework and that the Agency requested Ms. McDaniel sign a limited release of medical information, but she refused. (Final Agency Decision at p. 10.)

were a pretext for harassment and retaliatory conduct designed to force her to resign. (Id. at Paragraphs 28 and 29.) Ms. McDaniel alleges that Defendants' revocation of her teleworking privileges and rejection of her request for an interim accommodation demonstrate that they were disinterested in addressing her request for an accommodation and that Defendants failed to participate in the interactive process-in good faith. (Id. at Paragraph 33.)

On July 14, 2015, Ms. McDaniel contacted an EEO Counselor with the Agency's Office of Resolution Management. (Id. at Paragraph 36.) Informal counseling failed to resolve the matter and, on September 1, 2015, Ms. McDaniel filed a Formal Complaint with the Agency. The EEO Office investigated Ms. McDaniel's claims that she was discriminated and retaliated against when she lost her telework privileges and that she was subject to harassment that created a hostile work environment. (Id. at Paragraphs 37-39.) A Final Agency Decision was issued on October 13, 2016, concluding that Ms. McDaniel had not established she was subject to discrimination. (Docket #18, Exhibit 2.)

On January 12, 2017, Ms. McDaniel filed her Complaint in this Court against Defendants. On April 28, 2017, Ms. McDaniel filed her First Amended Complaint. (Docket #12.) Ms. McDaniel raises claims for Race and Sex Discrimination (First Cause of Action); Hostile Work Environment (Second Cause of Action); Violation of the Rehabilitation Act (Third Cause of Action); Retaliation (Fourth Cause of Action); Emotional Distress (Fifth Cause of Action); and, Constructive Discharge (Sixth Cause of Action).

On May 30, 2017, Defendants filed their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Docket #18.) Defendants

argue that the individually named Defendants and the "Department of Veterans Affairs" are not proper parties to an employment discrimination action and should be dismissed. Further, Defendants argue that the Ms. McDaniel's emotional distress claim is preempted by the Federal Employee Compensation Act and barred by the failure to exhaust her administrative remedies; that Ms. McDaniel's constructive discharge claim is barred by the failure to exhaust her administrative remedies; and, that Ms. McDaniel has failed to alleged facts sufficient to support her claims for disparate treatment, hostile work environment, retaliation and the failure to accommodate arising under Title VII and/or the Rehabilitation Act. On June 29, 2017, Ms. McDaniel filed her Memorandum in Opposition and on July 13, 2017, Defendants filed their Reply Brief. (Docket #19.)

II. Standard of Review

A motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) allows a defendant to test the legal sufficiency of a complaint, in this case whether the Court has subject matter jurisdiction over the claims raised by Plaintiffs, without being subject to discovery. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. Ohio 2003). In evaluating the motion to dismiss, the court must construe the complaint in the light most favorable to plaintiffs, accept its factual allegations as true, and draw reasonable inferences in favor of the plaintiffs. *See Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. Ky. 2007).

Where the Defendant asks the Court to dismiss the Plaintiff's claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court need only determine whether it has jurisdiction over the Plaintiff's claims. The Sixth

Circuit has adopted two standards of dismissal under Rule 12(b)(1), depending upon whether the movant makes a facial or factual attack on the Plaintiff's Complaint. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. Ohio 1990). A facial attack merely questions the sufficiency of the pleadings. In reviewing a facial attack, the Court must apply the same standard applicable to Rule 12(b)(6) motions. On the other hand, where a District Court reviews a Plaintiff's Complaint under a factual attack, the Court does not presume that the Plaintiff's allegations are true. In such cases, the Court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts. *See Id.; see also Tennessee Protection & Advocacy, Inc. v. Board of Educ.*, 24 F. Supp. 2d 808, 812-13 (M.D. Tenn. 1998). The instant Motion involves both facial and factual attacks on the sufficiency of the Complaint.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) allows a defendant to test the legal sufficiency of a complaint without being subject to discovery. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. Ohio 2003). In evaluating a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept its factual allegations as true, and draw reasonable inferences in favorable of the plaintiff. *See Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. Ky. 2007). The court will not, however, accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *See Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. Tenn. 2000).

In order to survive a motion to dismiss, a complaint must provide the grounds of the entitlement to relief, which requires more than

labels, conclusions, and a formulaic recitation of the elements of a cause of action. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (internal citation omitted); *see Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545 548, at *2 (6th Cir. Ohio Sept. 25, 2007) (recognizing that the Supreme Court "disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957)"). Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable. *See Twombly*, 127 S. Ct. at 1974.

On a motion brought under Rule 12(b)(6), the court's inquiry is limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *See Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. Ohio 2001). It is with this standard in mind that the instant Motion must be decided.

III. Discussion

A. Individual Defendants and the Department.

Ms. McDaniel's claims against individual Defendants, Charles L. Moore, Jr.; Todd John Weber; Vinka M. Lasic; Jessica R. Minnich; and, the Department of Veterans Affairs fail as a matter of law. Ms. McDaniel raises no specific allegations regarding any individual Defendant; said Defendants are not proper Parties under Title VII or the Rehabilitation Act; and, as set forth below, this Court does not have subject matter jurisdiction over Ms.

McDaniel's intentional infliction of emotional distress claim. 42 U.S.C. § 2000e-16(c); *Hancock v. Eggers*, 848 F.2d 87, 88-89 (6th Cir. Mich. 1988).

Accordingly, Ms. McDaniel's First through Six Causes of Action against individual Defendants, Charles L. Moore, Jr.; Todd John Weber; Vinka M. Lasic; Jessica R. Minnich; and, the Department of Veterans Affairs, are hereby DISMISSED WITH PREJUDICE.

B. Analysis of Individual Claims.

The only remaining Defendant in this case is the Secretary of the Department of Veterans Affairs, David Shulkin.

Race/Sex Discrimination.

In her First Cause of Action, Ms. McDaniel alleges she was subjected to different terms and conditions of employment than her male and/or white counterparts, in violation of Title VII. of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* In order to establish a *prima facie* case under Title VII for disparate treatment, Ms. McDaniel must show that she was (1) a member of a protected class; (2) subject to an adverse employment action; (3) she was qualified for the position; and, (4) similarly situated employees outside the protected class were treated more favorably. *Clayton v. Meijer*, 281 F.3d 605, 609 (6th Cir. Mich. 2002).

Ms. McDaniel alleges that she was denied a reasonable accommodation; required to return to work while her request for an accommodation was pending; stripped of the tools/assets necessary to perform her job; and, evaluated under subjective criteria. However, there are no facts alleged in the First Amended Complaint that establish or suggest that male and/or white similarly situated employees were treated more favorably. Accordingly, Ms. McDaniel has failed to satisfy a *prima facie* case of

race/sex discrimination under Title VII and Defendants' Motion to Dismiss is hereby granted as to Ms. McDaniel's First Cause of Action.

Hostile Work Environment

Ms. McDaniel asserts that she was subject to unwelcome physical contact and intimidation, offensive verbal comments, workplace sabotage, false accusations of misconduct, and threats of unwanted discipline from Defendants, based on her gender and race; that the alleged harassment unreasonably interfered with her work performance and created an intimidating, hostile, and offensive environment; and, that Defendants knew or should have known that Ms. McDaniel was being harassed and failed to take adequate action, all in violation of Title VII and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* In order to establish a *prima facie* case for hostile work environment harassment based on the conduct of coworkers, a plaintiff must show that (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based upon the employee's protected status; (4) the harassment affected a term, condition or privilege of employment; and, (5) the employer knew or should have known about the harassing conduct but failed to take any corrective or preventive actions. *Woods v. FacilitySource,* LLC, 640 Fed. Appx. 478, 490 (6th Cir. 2016).

Ms. McDaniel has sufficiently pled a claim for hostile work environment harassment. Accordingly, Defendants Motion to Dismiss is hereby denied as to Ms. McDaniel's Second Cause of Action.

Rehabilitation Act

Ms. McDaniel alleges she suffered from a disability "that was significantly cause by Defendants [sic] pattern of hostile harassing that included unwelcome physical contact and intimidation,

offensive verbal comments, workplace sabotage, false accusations of misconduct, and threats of unwarranted discipline that prevented her from continuing to work;" that she was otherwise qualified to perform the essential functions of her job; that Defendants were aware of her disability and could have easily accommodated her needs by permitting her to telework; that Defendants did not, in good faith, enter into the "interactive process" with Ms. McDaniel or provide a reasonable accommodation; and, that Defendants discriminated against her by denying her reasonable accommodation for her disabilities, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

"Claims brought under the Rehabilitation Act are generally reviewed under the same standards that govern ADA claims." *Shaikh v. Lincoln Mem. Univ.*, 608 F. App'x 349, 353 (6th Cir. Tenn. 2015) (citing *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201 (6th Cir. Ohio 2010)). To establish a *prima facie* case of failure to accommodate under the Rehabilitation Act, a plaintiff must show that (1) she has a disability; (2) she was qualified for the position; (3) the agency was aware of her disability; (4) an accommodation was needed, "i.e., a causal relationship existed between the disability and the request for accommodation;" and, (5) the agency failed to provide the accommodation. *Gaines v. Runyon*, 107 F.3d 1171, 1175 (6th Cir. Ky. 1997).

As alleged by Ms. McDaniel, the Agency required Ms. McDaniel stop teleworking and return to work even though it knew of her alleged disability and the alleged hostile work environment that caused and/or exacerbated her disability prior to making a decision on her accommodation, which she claims forced her resignation. While there are questions regarding the nature of the alleged hostile

work environment, Ms. McDaniel's disability, Ms. McDaniel's performance, whether medical documentation requested by the Agency was provided by Ms. McDaniel and, the Agency's response to Ms. McDaniel's request for an accommodation, Ms. McDaniel has sufficiently pled a *prima facie* case for failure to accommodate under the Rehabilitation Act. Accordingly, Defendants are not entitled to dismissal of Ms. McDaniel's Third Cause of Action.

Retaliation

Ms. McDaniel alleges Defendants intentionally and maliciously retaliated against her for reporting the alleged severe and pervasive hostile environment that existed at her workplace; for requesting a reasonable accommodation for her disability; and, that she was treated differently than comparable employees who did not complain of the hostile environment, request an accommodation, or file a grievance, all in violation of Title VII and the Rehabilitation Act. To establish a *prima facie* case of retaliation, a plaintiff must show that: (1) she engaged in protected activity; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 544 (6th Cir. Ohio 2008).

Ms. McDaniel has failed to sufficiently allege a causal connection between the alleged protected activities and the alleged adverse employment action. As set forth in the First Amended Complaint, Ms. McDaniel complained about her work environment in June 2014, but her telework privileges were not withdrawn for over a year; Ms. McDaniel does not dispute that she asked for an accommodation *after* Defendants told her that her telework privileges may be revoked; and, there are no other facts pled which

support a claim that Ms. McDaniel was retaliated against for complaining about a hostile work environment, requesting an accommodation or filing a grievance. Accordingly, under the *Twombly* standard, Defendants are entitled to dismissal of Ms. McDaniel's retaliation claim, her Fourth Cause of Action.

Intentional Infliction of Emotional Distress.

The Federal Employee Compensation Act ("FECA"), 5 U.S.C. § 8102, provides a comprehensive administrative scheme for federal employees to recover if injured while performing their employment duties. "Intentional infliction of emotional distress claims raised by federal employees, regardless of whether they are brought under state tort law or the FTCA [Federal Tort Claims Act], fall within the purview of FECA and therefore are preempted by the statute." *Batuyong v. Sec'y of DOD*, Case No. 1:07 CV 944, 2008 U.S. Dist. LEXIS 7967, *26-27 (N.D. Ohio Feb. 4, 2008)(citing *Saltsman v. United States*, 104 F.3d 787, 790 (6th Cir. Ky. 1997); *Lockett v. Potter*, 2007 U.S. Dist. LEXIS 9867, 2007 WL 496361, at *1-2 (N.D. Ohio 2007)). "The fact that the Plaintiff's emotional distress claim arises in an employment discrimination context does not render the claim beyond FECA's coverage." *Id.* (citing *Figueroa v. U.S. Postal Service*, 422 F. Supp. 2d 866, 878 (N.D. Ohio 2006) (noting that the "Sixth Circuit has made clear that FECA provides the only remedy for an employee disabled by work-related stress. . . Accordingly, mental distress FTCA claims predicated on a supervisor's workplace conduct are preempted by FECA") (internal citations omitted)). Accordingly, this Court lacks subject matter jurisdiction over Ms. McDaniel's emotional distress claim and her Fifth Cause of Action is dismissed without prejudice.

Constructive Discharge.

Ms. McDaniel alleges that she was subject to constant and extreme harassing conduct by Defendants creating a hostile work environment and contributing to her disability; that she complained to Defendants regarding the same; that despite her complaints, Defendants did nothing to remedy the hostile work environment; and, that Defendants ordered her to return to working conditions so intolerable that she was forced to resign from her employment. Defendants argue Ms. McDaniel failed to raise her Constructive Discharge claim with the EEOC and, therefore, that she is barred from raising it in this Court.

The failure to explicitly state a potential claim in an EEOC complaint does not always equate to a failure to exhaust administrative remedies with respect to that claim. *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. Mich. 2004). The exhaustion requirement "is not meant to be overly rigid, nor should it 'result in the restriction of subsequent complaints based on procedural technicalities or the failure of the charges to contain the exact wording which might be required in a judicial pleading.' . . . As a result, the EEOC complaint should be liberally construed to encompass all claims 'reasonably expected to grow out of the charge of discrimination.'" *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 732 (6th Cir. Ohio 2006)(quoting *EEOC v. McCall Printing Co.*, 633 F.2d 1232, 1235 (6th Cir. Ohio 1980); *Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir. Ohio 1992)). Furthermore, a plaintiff will not be barred from raising an uncharged claim in court simply because the EEOC failed to investigate an uncharged claim that reasonably grew out of claims in the complaint. *Dixon*, 392 F.3d at 219.

Based on the language of the Final Agency Decision, Ms. McDaniel's constructive discharge

claim could reasonably expected to grow out of the charge of discrimination. Accordingly, Ms. McDaniel is not barred from raising her constructive discharge claim before this Court.

"To constitute constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. Mich. 1999) (discussing the issue in the context of Title VII). Ms. McDaniel claims Defendants withdrew here telework privileges, knowing she was unable to return to work in the office due to her disability which was caused and/or exacerbated by a hostile work environment of which Defendants had knowledge, so she had no choice but to resign. Based on the allegations set forth in the First Amended Complaint, Ms. McDaniel has sufficiently pled a claim for constructive discharge and Defendants' Motion to Dismiss is denied as to Ms. McDaniel's Sixth Cause of Action.

IV. Conclusion

For the reasons stated above, the Motion to Dismiss filed the Defendants is hereby GRANTED IN PART AND DENIED IN PART.

All of Ms. McDaniel's claims against individual Defendants, Charles L. Moore, Jr.; Todd John Weber; Vinka M. Lasic; Jessica R. Minnich; and, the Department of Veterans Affairs are hereby DISMISSED WITH PREJUDICE. The only remaining Defendant is the Secretary of the Department of Veterans Affairs, David Shulkin.

Ms. McDaniel's First and Fifth Causes of Action are hereby DISMISSED WITH PREJUDICE.

Ms. McDaniel's Fourth Cause of Action is hereby DISMISSED WITHOUT PREJUDICE.

Defendants' Motion to Dismiss is hereby DENIED as to Ms. McDaniel's Second, Third, and Sixth Causes of Action.

IT IS SO ORDERED.

s/Donald C. Nugent

DONALD C. NUGENT

Senior United States District Judge

DATED: October 13, 2017

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-3304
NATALIE MCDANIEL, Plaintiff-Appellant
v.
ROBERT WILKIE, Secretary of Department of Veterans Affairs, Defendant-Appellee
DEPARTMENT OF VETERANS AFFAIRS, et al, Defendants

FILED April 15, 2020
DEBORAH S. HUNT, Clerk

ORDER

Before: GUY, GRIFFEN, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt

Deborah S. Hunt, Clerk