APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 18-5746

Filed: March 30, 2020

ANTHONY T. GROSE, SR.

Plaintiff - Appellant

v.

STEVEN TERNER MNUCHIN, Secretary of the United States Department of the Treasury

Defendant - Appellee

MANDATE

Pursuant to the court's disposition that was filed 09/27/2019 the mandate for this case hereby issues today.

COSTS: None

APPENDIX A
EXHIBIT (1)

No. 18-5746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 20, 2020
DEBORAH S. HUNT, Clerk

ANTHONY T. GROSE, SR.,

Plaintiff-Appellant,

v.

STEVEN TERNER MNUCHIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant-Appellee.

ORDER

BEFORE: ROGERS, WHITE, and STRANCH, 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

Deborah S. Hunt, Clerk

APPENDIX B
EXHIBIT (3)
APP B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
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Filed: March 20, 2020

Mr. Anthony T. Grose Sr.
4192 Sable Drive
Memphis, TN 38128

Re: Case No. 18-5746, *Anthony Grose, Sr. v. Steven Mnuchin*
Originating Case No.: 2:16-cv-02043

Dear Mr. Grose,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Monica M. Simmons-Jones

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: September 27, 2019

Mr. Anthony T. Grose Sr.
4192 Sable Drive
Memphis, TN 38128

Ms. Monica M. Simmons-Jones
Office of the U.S. Attorney
Western District of Tennessee
167 N. Main Street
Suite 800
Memphis, TN 38103

Re: Case No. 18-5746, *Anthony Grose, Sr. v. Steven Mnuchin*
Originating Case No. : 2:16-cv-02043

Mr. Grose and Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. Thomas M. Gould

Enclosure

Mandate to issue

APPENDIX C

EXHIBIT (B)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 27, 2019
DEBORAH S. HUNT, Clerk

ANTHONY T. GROSE, SR.,

Plaintiff-Appellant,

v.

STEVEN TERNER MNUCHIN, Secretary of the United States Department of the Treasury,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: ROGERS, WHITE, and STRANCH, Circuit Judges.

Anthony T. Grose, Sr., proceeding pro se, appeals a district court judgment dismissing his employment discrimination action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623; the Rehabilitation Act (RA), 29 U.S.C. § 794(a); and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a). 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).

Grose filed a complaint against the Secretary of the United States Department of the Treasury (Secretary), alleging employment discrimination. A magistrate judge granted the Secretary's motion for a more definite statement and Grose's motion to amend and supplement his pleadings, and denied the Secretary's motion to dismiss the complaint for failure to state a claim for relief. In an amended complaint filed against the Secretary, Grose asserted that he began his employment with the Internal Revenue Service (IRS) in 1998. He asserted that he "is an African-

APPENDIX C
EXHIBIT (3)
APP - 3

American, Light complexion male" who is over the age of forty and "suffers from myopia and presbyopia, . . . physical impairment[s] that substantially limit[] his vision." He received a "Fully Successful" performance appraisal for the review period of July 1, 2004 to June 30, 2005. But after he participated in Equal Employment Opportunity (EEO) activity in 2005, he received "a failing appraisal" in his performance reviews.

Grose asserted that his optometrist, Dr. Leroy Norton, Jr., opined that he suffered eye strain due to computer use, completed the documentation necessary to support his request for reasonable accommodation of "two flat screen monitors and a document magnification system," and recommended bifocal eyeglasses. The IRS denied Grose's request for reasonable accommodation and his request for reconsideration. Grose submitted a second request for reconsideration supported with documentation from optometrist Dr. Ira Davis, Jr., who opined that Grose "suffered from 'computer vision syndrome' (CVS)." Grose indicated that CVS caused various issues including blurry vision, nausea, and "slow refocusing" but that "his prescribed bifocals did correct the impairment to his vision." Grose resigned from his position at the IRS due to "retaliation, harassments, [and] hostile work conditions."

Grose asserted that he was discriminated against during his employment on the bases of retaliation for participating in EEO activity (count I); "disability (vision)" (counts II and V); age (count III); and gender (count IV). He sought declaratory and monetary relief.

The Secretary filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted or, in the alternative, a Federal Rule of Civil Procedure 56(a) motion for summary judgment. Grose filed a response in opposition to the Secretary's motion and alternatively sought summary judgment under Rule 56(a). The magistrate judge recommended granting the Secretary's motion and dismissing Grose's Title VII and ADEA claims under Rule 12(b)(6) as barred by res judicata and dismissing his ADA and RA claims under Rule 56(a). Over Grose's objections, the district court adopted the magistrate judge's report and recommendation, granted the Secretary's motion to dismiss and for summary judgment, and dismissed Grose's case. Grose filed a timely appeal and requests oral argument in his appellate brief. He has also filed motions "to provide a digital CD of a telephone message recording" from

the district court clerk to him concerning a motion hearing recording, and to reconsider the denial of his "motion to compel" production of the same motion hearing recording.

I. MOTION TO DISMISS

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim for relief. *Shuler v. Garrett*, 743 F.3d 170, 172 (6th Cir. 2014).

Grose challenges the district court's dismissal of his Title VII and ADEA claims. The district court concluded that Grose's Title VII and ADEA claims were barred by res judicata. The Secretary contends that Grose has waived appellate review of the district court's decision in that regard by failing to "directly address the *res judicata* issue" in the argument portion of his appellate brief. It is true that the argument portion of Grose's appellate brief lacks any meaningful discussion of the dismissal of his Title VII and ADEA claims on res judicata grounds. However, as noted by the Secretary, Grose does discuss the res judicata issue, and challenge the district court's dismissal of his Title VII and ADEA claims on that basis, in the summary of argument portion of his appellate brief. Thus, in light of the liberal construction afforded to pro se pleadings, *see Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004), we opt to address the dismissal of Grose's Title VII and ADEA claims on res judicata grounds.

Res judicata bars a subsequent action between the same "parties or their privies" based on the same claims or causes of action "that were or could have been raised" in a prior action that was resolved "on the merits." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). It encompasses both issue preclusion, which precludes relitigation of issues that were raised and resolved in a prior action, and claim preclusion, which precludes litigation of issues that should have been raised in a prior action but were not. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). Res judicata applies when there is: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Rawe v. Liberty Mut. Fire Ins.*, 462 F.3d 521, 528 (6th Cir. 2006) (quoting *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir.

1995)). The "district court's application of the doctrine of res judicata" is reviewed de novo. *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009).

In 2011, Grose filed an employment discrimination action against the Secretary, asserting hostile work environment, retaliation, constructive discharge, and discrimination based on race, gender, age, disabled-veteran status, and participation in protected activity. *See Grose v. Lew*, No. 15-5357, slip op. at 1 (6th Cir. Sept. 21, 2016) (unpublished). His claims were raised under Title VII, the ADEA, and the RA. *Id.* The district court concluded that Grose's claims were the subject of three EEO complaints and that Grose exhausted his administrative remedies as to the claims raised in one complaint (08-0166), but not the other two (06-0847, 07-1159). *Id.*, slip op. at 3. Consequently, the district court dismissed Grose's Title VII and ADEA claims arising from the unexhausted EEO complaints for failure to exhaust administrative remedies, which left a claim based on non-selection for a vacant position. *Id.*, slip op. at 3-4. The district court subsequently granted the Secretary's motion for summary judgment as to the non-selection claim and entered judgment in favor of the Secretary. *Id.* We affirmed. *Id.*, slip op. at 11.

The claims asserted in Grose's current complaint were the subject of another EEO complaint (07-0853). That complaint asserted discrimination on the bases of race, age, gender, and color, retaliation, and hostile work environment due to his participation in protected activity. The allegations in EEO complaint 07-0853 are the same as the allegations asserted in EEO complaint 07-1159.

Grose's current claims brought under Title VII and the ADEA are not barred by res judicata because those claims were not adjudicated on the merits in the prior action. *See id.*, slip op. at 3, 5. Instead, those claims were dismissed for failure to exhaust administrative remedies, which is not considered a ruling on the merits for res judicata purposes. *See Pearson v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers Local 140*, 99 F. App'x 46, 54-55 (6th Cir. 2004); *Smith v. Ky. State Univ.*, 97 F. App'x 22, 26 (6th Cir. 2004). Although Grose's Title VII and ADEA claims were erroneously dismissed under Rule 12(b)(6) for failure to state a claim for relief, we may affirm their dismissal "for any reason supported by the record, including on grounds different from those on which the district court relied." *Stein v. Regions Morgan Keegan Select*

High Income Fund, Inc., 821 F.3d 780, 786 (6th Cir. 2016). Because the Secretary moved, in the alternative, for summary judgment under Rule 56(a), this Court may affirm the district court's dismissal of Grose's Title VII and ADEA claims if the record shows that there were no genuine disputes as to any material fact and the Secretary was entitled to judgment as a matter of law on these claims. Fed. R. Civ. P. 56(a).

Grose asserted that he was subjected to retaliation for participating in EEO activity "[i]n late 2005" when

> 1) on August 16, 2006, he was placed on an employment plan (EIP); 2) on June 22, 2007, he received a lowered annual performance appraisal for the period ending May 31, 2007; 3) on July 31, 2007, management denied his reasonable accommodations request and, 4) on October 3, 2007, management denied his subsequent request for reconsideration of a reasonable accommodations request; and 5) on August 3, 2007, he was subjected to a humiliating and degrading training plan.

He also asserted discrimination on account of his age and gender.

To establish a discrimination claim under Title VII or the ADEA, a plaintiff must present either direct evidence of discrimination or circumstantial evidence permitting an inference of discriminatory treatment. *Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009) (ADEA); *Carter v. Univ. of Toledo*, 349 F.3d 269, 272-73 (6th Cir. 2003) (Title VII). Where, as here, there is no direct evidence of discrimination, the claim must be evaluated using the burden-shifting approach established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and later refined by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). *Geiger*, 579 F.3d at 622; *Carter*, 349 F.3d at 273. Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Carter*, 349 F.3d at 273. The establishment of a prima facie case creates a rebuttable presumption of discrimination, requiring the defendant to provide "a legitimate, nondiscriminatory reason" for taking the action being challenged. *Id.* If the defendant satisfies this burden, the plaintiff must then establish by a preponderance of the evidence that the proffered reason is, in fact, a pretext for unlawful discrimination. *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 804. "[T]he

burden of proof always remains with the plaintiff." *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996).

To establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in protected activity; (2) his employer knew of the protected activity; (3) he was subjected to an adverse employment action; and (4) the adverse action was causally related to the protected activity. *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 568 (6th Cir. 2019). A plaintiff establishes a prima facie case of age discrimination under the ADEA by showing that: "(1) he is a member of the protected class—i.e. he is at least forty years of age; (2) he was subjected to an adverse employment action; (3) he was qualified for the position; and (4) he was treated differently from similarly situated employees outside the protected class." *Hughey v. CVS Caremark Corp.*, 629 F. App'x 648, 651 (6th Cir. 2015) (citing *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181 (6th Cir. 2004)). A plaintiff can establish a prima facie case of gender discrimination under Title VII by showing that (1) he is a member of a protected class; (2) he was qualified for the job and satisfactorily performed it; (3) [he] suffered an adverse employment action; and (4) others, similarly situated and outside the protected class, were treated differently. *Redlin v. Grosse Pointe Pub. Sch. Sys.*, 921 F.3d 599, 607 (6th Cir. 2019).

Even assuming that Grose could establish prima facie cases of retaliation and age and gender discrimination based on his placement on an EIP, lowered performance appraisal, denial of a reasonable accommodation request and reconsideration of that denial, and placement on a training plan, he did not show that the Secretary's reasons for taking those employment actions were pretextual. An employee can establish pretext by demonstrating "(1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the employment action], or (3) that they were *insufficient* to motivate [the employment action]." *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 285 (6th Cir. 2012) (quoting *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 349 (6th Cir. 2012)).

Grose's supervisor, Mary Banks, testified that she placed him on an EIP due to a decline in his performance between his midyear and annual reviews. The EIP provided Grose an opportunity to identify his weaknesses and improve his job performance. Grose received a lower

annual performance appraisal for the period ending on May 31, 2007, because he received unsatisfactory ratings in the sub-categories of customer accuracy, compliance communication, and accuracy of input. His overall ratings in the broader categories of which those sub-categories were included were "minimally successful." Banks's ratings were supported by her personal knowledge of Grose's work and her review of a computer program that reviews employee calls for quality.

Department Manager Jacquelyne Yarbrough denied Grose's request for reasonable accommodation. Yarbrough's denial was based on a medical assessment prepared by Dr. James W. Allen, who opined that Grose had "no substantial limitations of a major life activity." Grose's request for reconsideration was denied by Operations Manager Carolyn J. Jackson because he did not submit "any additional medical documentation" for consideration. Grose's second request for reconsideration to which he did attach medical documentation was denied because in reviewing Grose's medical records, Dr. Allen found that Grose "has normal 20/20 visual acuity" when wearing bifocal glasses, making a reasonable accommodation unnecessary.

Banks approved Grose's request for training. Yarbrough confirmed that an agreement regarding training had been reached in a written memorandum dated August 3, 2007. The goal of the training was to improve Grose's overall performance and provided for three days of training with management evaluation of his work "for 30 days" to assess improvement. Yarbrough testified that, prior to the training, she suggested that an assessment be completed "to determine what training [Grose] needed" because he did not specify the areas in which he needed training. The assessment and three-day training were successfully completed.

Grose did not establish pretext by showing that the reasons proffered for the employment actions at issue lacked a factual basis, or did not actually, or were insufficient, to motivate the actions at issue. *See Blizzard*, 698 F.3d at 285. Because Grose's retaliation, gender, and age discrimination claims could not survive the Secretary's motion for summary judgment, we affirm the district court's dismissal of these claims on alternative grounds.

II. MOTION FOR SUMMARY JUDGMENT

We review de novo the "district court's grant of summary judgment." *Watson v. Cartee*, 817 F.3d 299, 302 (6th Cir. 2016). Summary judgment is proper when the evidence presented

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). "A fact is material if it 'might affect the outcome of the suit under the governing law[,]' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016) (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The district court properly granted summary judgment in favor of the Secretary as to Grose's ADA and RA claims based on his vision impairments. First, Grose's ADA claim failed because the RA "constitutes the exclusive remedy for a federal employee alleging disability-based discrimination." *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007).

Second, Grose's RA claim failed because he did not establish that he was disabled. A plaintiff alleging disability discrimination, must establish that he is disabled within the meaning of the ADA. *Id.* at 403. "[E]mployment discrimination complaints under the [RA] are governed by the standards of the [ADA]." *Mitchell v. U.S. Postal Serv.*, 738 F. App'x 838, 843 (6th Cir. 2018) (first alteration in original) (quoting *Spence v. Donahoe*, 515 F. App'x 561, 568 (6th Cir. 2013)); *see* 29 U.S.C. § 794(d). A "disability" is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," a "record of such an impairment," or being "regarded as having such an impairment." 29 C.F.R. § 1614.203(2); 29 C.F.R. § 1630.2(g). Seeing is considered a major life activity. 29 C.F.R. § 1630.2(i)(1)(i); 29 U.S.C. § 705(20)(B). Generally, a disability determination is made "without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4)(E)(i). However, with respect to individuals with vision impairments, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses" is taken into consideration when assessing disability. 42 U.S.C. § 12102(4)(E)(ii); *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999) (finding that "disabled" is "restricted to only those whose impairments are not mitigated by corrective measures" such as eyeglasses and contact lenses); *Verhoff v. Time Warner Cable, Inc.*, 299 F. App'x 488, 494 n.5 (6th Cir. 2008) ("However, while Congress overturned the Supreme Court's reasoning in *Sutton*, it nevertheless left its holding intact by ordering courts to consider the

'ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses.'" (quoting 42 U.S.C. § 12102(4)(E)(ii))).

Grose did not demonstrate that he is disabled within the meaning of the RA. Grose's treating optometrists opined that his vision impairments could be corrected with bifocal eyeglasses. Norton recommended that Grose wear bifocal lenses "full time," and Davis reported that Grose "has normal 20/20 visual acuity when refracted at both near and far distances" when wearing bifocal eyeglasses. Dr. James W. Allen, an independent medical examiner, reviewed reports from Norton and Davis and also spoke with both doctors directly. Allen opined that a reasonable accommodation was not necessary because Grose had "no substantial limitations of a major life activity." Allen further opined that other options were available for correcting Grose's vision impairments such as "computer glasses," computer "software that will enlarge specific text," and an ergonomic survey of his office. Because Grose did not demonstrate that he is disabled within the meaning of the RA, his RA claim could not survive the Secretary's motion for summary judgment.

III. REMAINING ARGUMENTS IN APPELLATE BRIEF

Grose's appellate brief lists ten issues for review. But his brief contains only six issues in the argument portion. To the extent that the issues for review are not properly briefed in either the summary of argument or argument portions of Grose's appellate brief, they are deemed abandoned. The "an appellant's failure to raise an argument in [an] appellant brief forfeits that issue on appeal." *United States v. White*, 920 F.3d 1109, 1114 (6th Cir. 2019).

IV. MOTIONS

Grose has filed a motion "to provide a digital CD of a telephone message recording" from the district court clerk as proof that a motion hearing conducted on November 30, 2017 before the magistrate judge was recorded. He also moves for reconsideration of the district court's effective denial of his motion to compel production of the same motion hearing recording. The magistrate judge held a hearing on November 30, 2017, regarding discovery motions that Grose had filed. Grose filed motions requesting a copy of the recording of that hearing. The district court denied Grose's motions and informed him that he could request a copy of the recording in accordance

with the court's local rules, administrative orders, and electronic case filing policies and procedures. Grose filed several additional motions requesting the same recording, and he paid the fee required for two CD copies of the recording to the district court clerk. Grose also filed a motion to compel production of a CD of the recording, which the district court effectively denied.

In response to Grose's motions, the district court ordered the court clerk to refund the fee that Grose had paid for the recording. The district court found that court staff had diligently searched for the recording but that it could not be located and that "Court staff discovered that the Magistrate Court did not record the hearing on November 30, 2017."

Grose contends that the district court clerk left him a voicemail message indicating that the motion hearing at issue was recorded, which confirms his claim that the recording exists and contradicts the district court's finding that the hearing was not recorded. However, the discovery motions addressed at the motion hearing at issue concerned Grose's requests to file certain documents under seal as exhibits to his summary-judgment motion, and Grose has failed to show that those motions have any bearing on the issues on appeal. Thus, whether or not the motion hearing at issue was recorded, Grose's motions are denied.

Accordingly, Grose's request for oral argument and pending motions are **DENIED**, and the district court's judgment is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANTHONY T. GROSE, SR.,	)	
	)	
Plaintiff,	)	
	)	No. 2:16-cv-02043-TLP-cgc
v.	)	
	)	
STEVEN T. MNUCHIN, Secretary of the United States Department of the Treasury,	)	JURY DEMAND
	)	
	)	
Defendant.	)	
	)	

JUDGMENT

JUDGMENT BY COURT. This action is before the Court on *pro se* Plaintiff Anthony Grose, Sr.'s ("Plaintiff") Amended Complaint, filed on May 31, 2016. (ECF No. 24.) In accordance with the Order Adopting the Report and Recommendation and Granting Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, entered on May 21, 2018 (ECF No. 82),

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant Steven T. Mnuchin, Secretary of the United States Department of Treasury ("Defendant"), and Plaintiff's claims are DISMISSED WITH PREJUDICE.

APPENDIX D
APP-D
EXHIBIT (4)

APPROVED:

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

May 21, 2018
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANTHONY T. GROSE, SR.,	)	
	)	
Plaintiff,	)	No. 2:16-cv-02043-TLP-cgc
	)	
v.	)	
	)	
STEVEN T. MNUCHIN, Secretary of the United States Department of the Treasury,	)	JURY DEMAND
	)	
Defendant.	)	

ORDER ADOPTING THE REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUGMENT

Under Western District of Tennessee Administrative Order 2013-05, the Magistrate Court considered Defendant's Motion to Dismiss or for Summary Judgment and issued a Report and Recommendation ("R&R"). (ECF No. 74 at PageID 2827.) The R&R recommends "that Defendant's Motion for Summary Judgment be GRANTED." (*Id.*) Plaintiff Anthony T. Grose, Sr. ("Plaintiff" or "Mr. Grose") timely objected to the R&R, (ECF No. 78), and Defendant Steven T. Mnuchin, Secretary of the United States Department of the Treasury ("Defendant," or "Secretary of Treasury")[1] responded to the objections. (ECF No. 79.)

For the following reasons, the Report and Recommendation is ADOPTED. Accordingly, Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is GRANTED, and Plaintiff's claims are DISMISSED WITH PREJUDICE.

[1] This case was originally styled *Anthony T. Grose, Sr. v. Jacob J. Lew*, with the then-acting Secretary of Treasury listed as the party Defendant.

F
APPENDIX A
EXHIBIT (5)
APP - 05

STANDARD OF REVIEW

The following standards of review apply in this matter.

I. *De novo* Review of the R&R

When reviewing a Report and Recommendation from the Magistrate Court,

> [a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b); *accord* Fed. R. Civ. P. 72(b)(3). After conducting a *de novo* review, a district court is not required to articulate all of the reasons it rejects a party's objections. *Tuggle v. Seabold*, 806 F.2d 87, 92 (6th Cir. 1986).

II. The Standard for a Rule 12(b)(6) Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this standard does not require "detailed factual allegations," it requires more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint's allegations by arguing that the allegations establish no claim for which relief can be granted. A court considering a motion to dismiss under Rule 12(b)(6) must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A court need not accept as true legal conclusions or unwarranted factual inferences.

Hananiya v. City of Memphis, 252 F. Supp. 2d 607, 610 (W.D. Tenn. 2003) (citing *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998)).

To survive a Motion to Dismiss, the complaint has to assert more than labels, conclusions, and formulaic recitations of the claim's elements. *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008) (citing *Twombly*, 550 U.S. at 555). "'[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Conclusory statements are not assumed to be true. *Id.* at 678–79.

III. The Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Chapman v. UAW Local 1005*, 670 F.3d 677, 680 (6th Cir. 2012). "A fact is material for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012) (internal quotation marks omitted). "A dispute over material facts is 'genuine' 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "When the non-moving party fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." *Chapman*, 670 F.3d at 680 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *accord Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 469 (6th Cir. 2012).

"The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp.*, 477 U.S. at 323). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." *Id.* at 448–49 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

To show that a fact is, or is not, genuinely disputed, both parties are required to either "cite[] to particular parts of materials in the record" or "show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Bruederle*, 687 F.3d at 776 (alterations in original) (quoting Fed. R. Civ. P. 56(c)(1)); *see also Mosholder*, 679 F.3d at 448 ("To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" (quoting *Celotex Corp.*, 477 U.S. at 325)).

"The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3); *see also Emerson v. Novartis Pharm. Corp.*, 446 F. App'x 733, 736 (6th Cir. 2011) ("'[J]udges are not like pigs, hunting for truffles' that might be buried in the record."); *Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 995 (6th Cir. 2007) ("A district court is not required to 'search the entire record to establish that it is bereft of a genuine issue of material fact.'").

"In considering a motion for summary judgment, [a court] must draw all reasonable inferences in favor of the nonmoving party." *Phelps v. State Farm Mut. Auto. Ins. Co.*, 680 F.3d 725, 730 (6th Cir. 2012) (citing *Matsushita*, 475 U.S. at 587). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so

one-sided that one party must prevail as a matter of law.'" *Id.* (quoting *Anderson*, 477 U.S. at 251–52). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in her favor." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 252).

ANALYSIS

Plaintiff's *pro se* Amended Complaint (ECF No. 24) alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* ("Title VII"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"), Sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, 791, *et seq.* ("Rehabilitation Act"), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12191, *et seq.* ("ADA"). Plaintiff alleges that Defendant, his former employer, discriminated against him on the basis of his alleged vision disability (Counts II and V), age (Count III), and gender, race, and color (Count IV). (ECF No. 24.)

Plaintiff further alleges that Defendant violated Title VII by retaliating against him for taking part in Equal Employment Opportunity ("EEO") activity (Count I), on the following instances: (1) on August 16, 2006, he was placed on an employment improvement plain ("EIP"); (2) on June 22, 2007, he received a lower annual performance rating for the period ending on May 31, 2007; (3) on July 31, 2007, management denied his request for reconsideration of an accommodation request; (4) on October 3, 2007, management denied his subsequent request for reconsideration of a reasonable accommodations request; and (5) on August 3, 2007, he was subjected to a "humiliating and degrading training plain." (ECF No. 24 at 3, 6–7.)

The R&R RECOMMENDS that Defendant's Motion be GRANTED and: (1) Plaintiff's Title VII and ADEA claims be DISMISSED under Fed. R. Civ. P. 12(b)(6) as barred by the doctrine of *res judicata* because they were or could have been raised in Plaintiff's previous action, *Anthony T. Grose, Sr. v. Jacob J. Lew*, No. 2:11-cv-02562-JDT-cgc (the "2011 case")[2] (ECF No. 74 at PageID 2837); and (2) that Plaintiff's ADA claim be DISMISSED as a matter of law because "[t]he Rehabilitation Act, not the [ADA], constitutes the exclusive remedy for a federal employee alleging disability-based discrimination[,]" *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007) (citing 42 U.S.C. § 12111(5)(B)(i) (*id.* at PageID 2839); and (3) that Plaintiff's Rehabilitation Act claim be DISMISSED under Fed. R. Civ. P. 56 because Plaintiff has failed to make a *prima facie* showing that he is disabled under the Rehabilitation Act. (*Id.* at PageID 2841.)

The Court discerns that Plaintiff objects on the grounds that: (1) he did not consent to "the Magistrate Judges to handle the entire case, and rule on the non-dispositive motion[;]" (2) the Magistrate judge misapplied the doctrine of *res judicata*; (3) the Magistrate Judge erred in denying his request for leave to file a sur-reply to Defendant's Motion and his request for an evidentiary hearing; (4) the Magistrate Judge erred in recommending dismissal of his ADA claim; and (5) the Magistrate Judge failed in finding that he failed to demonstrate that a genuine issue of material fact exists as to whether he is disabled under the Rehabilitation Act. (ECF No. 78.)

I. Findings of Fact

Plaintiff's objections to the Magistrate Court's Proposed Findings of Fact are irrelevant, as they object to findings that were not made, or Plaintiff attempts to introduce evidence that was

[2] The case was originally styled as *Anthony T. Grose, Sr., v. Timothy F. Geithner, et al.*

not before the Magistrate Court. For example, Plaintiff objects to the R&R because he claims it states that Dr. Norton recommended that Plaintiff return to him for computer spectacles when Dr. Allen was the one who made the recommendation. (*Id.* at PageID 2856.) Contrary to Plaintiff's assertion, the R&R accurately states that Dr. Allen "stated that computer glasses . . . may be of help." (ECF No. 74 at PageID 2833.) Plaintiff fails to create a genuine issue of material fact regarding the Magistrate Court's Proposed Findings of Fact based on the Court's review of the record. The Court accordingly ADOPTS the Proposed Findings of Fact.

The Court first addresses what it will call Plaintiff's "procedural objections," (objections (1), (3), *supra*) and then addresses the issues concerning *res judicata*, the ADA, and the Rehabilitation Act.

II. Plaintiff's Procedural Objections Are Unwarranted

Plaintiff's objections about the Magistrate Judge issuing the R&R and denying his requests for leave to file a sur-reply and for an evidentiary hearing are not well-taken. The Magistrate Judge did not, as he argues, "handle the entire case and rule on the non-dispositive motion." The Magistrate Judge managed this *pro se* non-prisoner Plaintiff's case under the authority granted by the Federal Magistrates Act, 28 U.S.C. §§ 636–639, and the Western District of Tennessee Administrative Order 2013-05. After the parties briefed Defendant's Motion, the Magistrate Judge issued proposed findings and recommendations in the R&R under 28 U.S.C. § 636(b)(1)(B). However, the Magistrate Court did not "rule" on Defendant's Motion.[3] This Court is "ruling" now.

Under Local Rule 7.2(d), the Court may order a hearing on a motion if it determines that one would be helpful or necessary. LR 7.2. Here, neither the Magistrate Court nor this Court

[3] *See* Report and Recommendation, *Black's Law Dictionary*, (10th ed. 2014) ("A written statement of findings and a proposed courts of action for consideration by another[.]")

determined that a hearing on Defendant's Motion is necessary, and this is not grounds for rejecting the R&R. Additionally, the Local Rules for the Western District of Tennessee do not provide the right to file sur-replies to Rule 12 or Rule 56 motions. *See id.*; *Cadence Bank, N.A. v. Latting Rd. Partners, LLC*, 699 F. Supp. 2d 1041, 1042 (W.D. Tenn. 2010).

The Court has reviewed Plaintiff's Motion to File a Sur-Reply (ECF No. 71) and agrees with the Magistrate Court that it merely reiterates Plaintiff's arguments in his previous filings in response to Defendant's Motion. For these reasons, Plaintiff's procedural arguments are not convincing. Thus, this Court will ADOPT the R&R in this respect.

III. Plaintiff's Claims, Other than His Vision Disability Claims, Are Barred Under *res judicata*

Plaintiff claims that the Magistrate Court erred "on a pure question of law and on the grounds contrary law" regarding the application of the doctrine of *res judicata*. (ECF No. 78 at PageID 2859 (internal quotation marks omitted).)

Under the doctrine of *res judicata*, "'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009) (quoting *Montana v. U.S.*, 440 U.S. 147, 153 (1979) (internal citations omitted)). The following elements must be present for *res judicata* to apply:

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies;" (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Id. (quoting *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 880 (6th Cir. 1997)).

A *de novo* review of the Magistrate Court's detailed comparison of the pleadings in Plaintiff's 2011 case and the present case shows that the elements of *res judicata* are satisfied, with the exception of Plaintiff's vision disability claim (Counts II and V). Both actions involve

identical parties: Plaintiff and the acting Secretary of the Treasury. Plaintiff's current action involves discrimination claims against his former employer which were, or could have been, raised in his 2011 case. Many of the very same discriminatory acts alleged in the 2011 Complaint are alleged in the present case. *Res judicata* bars not only re-litigating claims or issues that were actually litigated, but also those which could have been litigated in the prior action. *Bragg*, 570 F.3d at 777 (citation omitted). Finally, this Court previously addressed the merits of Plaintiff's discrimination claims, rendered summary judgment against him, and dismissed his case. The Sixth Circuit affirmed this Court's Judgment on September 21, 2016.

Plaintiff argues that in order for *res judicata* to apply, "the first cause of action must be dismissed 'on the merits.'" (ECF No. 78 at PageID 2859.) Plaintiff claims that this Court's grant of summary judgment in favor of the Defendant Secretary of Treasury, and the Sixth Circuit's affirmation of the Court's Judgment in the 2011 case, do not constitute a judgment "on the merits" under *res judicata*. As the Magistrate Court noted, a grant of summary judgment is considered an adjudication on the merits, so Plaintiff's argument fails. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).[4] Plaintiff's other objections—like his suggestion that the 2011 Case was limited to a claim of discrimination for a failure to promote, or that the parties were not the same because there are different secretaries of the Treasury named in each suit—are without merit. The Magistrate Judge rightly applied the doctrine of *res judicata* by identifying the same factual and legal allegations in the 2011 Case and this case and RECOMMENDED that the Court GRANT Defendant's Motion and DISMISS Plaintiff's Title

[4] The federal law on *res judicata* is analogous to the Tennessee authority the Magistrate Court cites in the R&R. *See Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812 816 (Tenn. Ct. App. 1995) (collecting cases) (stating that while denial of summary judgment is not adjudication on the merits, granting of summary judgment is deemed conclusive of all issues reached and decided by summary judgment).

VII and ADEA claims as barred by *res judicata*. The Court ADOPTS the R&R, and Plaintiff's Title VII and ADEA claims are DISMISSED WITH PREJUDICE.

IV. Plaintiff's ADA and Rehabilitation Act Claims Fail Under Rule 56

The Court also ADOPTS the R&R that Plaintiff's ADA claim fails as a matter of law. Plaintiff's objection that the ADA and the Rehabilitation Act contain the same standards regarding nondiscrimination is not a proper objection to the Magistrate Court's finding that the Rehabilitation Act is Plaintiff's exclusive remedy as a former federal employee. *See Jones*, 488 F.3d at 403; 42 U.S.C. § 12111(5)(B)(i) (excluding the United States from definition of employers covered by ADA). Therefore, Plaintiff's ADA claim is DISMISSED WITH PREJUDICE.

Plaintiff alleges that Defendant violated the Rehabilitation Act by discriminating against him on the basis of his alleged vision disability and denying his request for allegedly reasonable accommodations. (ECF No. 24 at 8–9.) Plaintiff fails to present direct evidence of discrimination, so the Magistrate Court correctly applied the three-step burden-shifting test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *Jones*, 488 F.3d at 404. "To do so, a plaintiff must establish each of the following five elements: (1) that he is disabled, (2) that he is otherwise qualified for the job, with or without reasonable accommodation, (3) that he suffered an adverse employment action, (4) that his employer knew or had reason to know of his disability, and (5) that, following the adverse employment action, either he was replaced by a nondisabled person or his position remained open." *Id.* (citations omitted). If the employee meets this *prima facie* burden, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the

challenged employment decision, *id.* (citation omitted), and if the employer meets that burden, then it once again falls on the plaintiff to prove by a preponderance of the evidence that the employer's proffered reason was pretextual. *Id.* A plaintiff can defeat summary judgment "only if his evidence is sufficient to create a genuine dispute at each stage of the McDonnell Douglas inquiry." *Id.* (internal quotation marks and citation omitted).

The R&R RECOMMENDS that Plaintiff fails to demonstrate that a genuine issue of material fact exits as to whether he is disabled under the Rehabilitation Act. Plaintiff disputes this by making conclusory statements and referring to evidence that was not before the Magistrate Court when considering Defendant's Motion. The Court declines to consider this evidence. *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). The Court has performed a *de novo* review of the R&R and the record to find that the evidence shows that Plaintiff's vision impairments during his employment with Defendant were correctable by the proper use of bifocal eyeglasses. (*See* ECF Nos. 45-12, 45-14, 45-19, 45-20 at 132–34, 45-27.)

As to whether Plaintiff is disabled, the Court ADOPTS the Magistrate Court's recommendation. The Magistrate Court found that the term "disabled" is "restricted to those whose impairments are not mitigated by corrective measures," quoting the Supreme Court's opinion in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). The Magistrate Court found that based on this definition, Plaintiff failed to establish a *prima facie* showing that he is disabled because the record indicates that he could have cured his vision impairment with 20/20 acuity if he used bifocal eyeglasses or sought computer eyeglasses to help him with vision in the intermediate range. (*See* ECF No. 74 at PageID 2841.)

While the Magistrate Court's ultimate conclusion is sound, this Court will provide some further explanation. Almost ten years after *Sutton*, Congress amended the ADA to overturn

certain aspects of the Supreme Court's ruling in that case and other ADA decisions. *See* Pub. L. No. 110–325. Following Congress's actions, the current determination of whether an individual is "disabled" within the meaning of the ADA and the Rehabilitation Act is to be made "without regard to the ameliorative effects of mitigating measures." 42 U.S.C. §12102(4)(E)(i). However, a determination "disability" still must factor "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses." 42 U.S.C. §12102(4)(E)(ii). Thus, the Supreme Court's ruling in *Sutton* that "disability" does not encompass vision impairments that are correctable with ordinary eyeglasses or contact lenses is still an accurate statement of the law. *Verhoff v. Time Warner Cable, Inc.*, No. 07–4265, 299 F. App'x 488, 494 n. 5 (6th Cir. Oct. 24, 2008) (unreported); (*Nali v. Michigan*, No. 10-10837, 2010 WL 1957214, at *1 n.1 (E.D. Mich. May 13, 2010). Thus, the Court ADOPTS the conclusion in the R&R regarding Plaintiff's disability claim under the Rehabilitation Act, as the conclusion is consistent under the current state of the law. The Court GRANTS Defendant's Motion as to that claim, and finds that Plaintiff fails to present a genuine issue of material fact to the evidence as to whether he is disabled. Accordingly, the Court DISMISSES Plaintiff's Rehabilitation Act Claim WITH PREJUDICE.

CONCLUSION

The Report and Recommendation is ADOPTED and Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is GRANTED. Plaintiff's claims are DISMISSED WITH PREJUDICE. A Judgment will follow entry of this Order.

SO ORDERED, this 21st day of May, 2018.

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANTHONY T. GROSE, SR.

Plaintiff,

v. **Case 2:16-cv-02043-SHL-cgc**

JACOB J. LEW, JR., Secretary, Department of the Treasury,

Defendant.

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Jacob J. Lew's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. (Docket Entry "D.E." #59). The instant motion has been referred for Report and Recommendation.[1] For the reasons set forth herein, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED.[2]

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[1] **Error! Main Document Only.**The instant case has been referred to the United States Magistrate Judge by Administrative Order 13-05 pursuant to the Federal Magistrates Act, 28 U.S.C. §§ 631-639. All pretrial matters within the Magistrate Judge's jurisdiction are referred pursuant to 28 U.S.C. § 636(b)(1)(A) for determination, and all other pretrial matters are referred pursuant to 28 U.S.C. § 636(b)(1)(B)-(C) for report and recommendation.

[2] Plaintiff additionally filed a "Leave-of-Court Motion" to File a Sur-Reply (D.E. #71) to Defendant's Response to his Second Motion to Strike (D.E. #68) and to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (D.E. #45). The Court reviewed Plaintiff's filing, which lists the filings Plaintiff has already made with the Court and reiterates Plaintiff's arguments therein, and finds no grounds for the sur-reply to be granted. Accordingly, Plaintiff's Leave of Court Motion is DENIED.

I. Introduction

On January 19, 2016, Plaintiff filed his *pro se* Complaint in this Court. (D.E. #1). On May 31, 2016, after obtaining leave of court, Plaintiff filed his *pro se* Amended Complaint. (D.E. #24). Plaintiff's Amended Complaint alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), Sections 501 and 504 the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* & § 791 *et seq.* ("Rehabilitation Act"), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Plaintiff alleges that Defendant, his former employer, discriminated against him on the basis of disability (vision) (Counts II & V), age (Count III), gender, race, and color (Count IV). (*Id.* ¶¶ 13, 32).

He further alleges that Defendant retaliated against him in violation of Title VII, 42 U.S.C. § 2000e-16(a), for taking part in prior Equal Employment Opportunity ("EEO") activity (Count I) on the following instances: (1) on August 16, 2006, he was placed on an employment improvement plan ("EIP"); (2) on June 22, 2007, he received a lower annual performance appraisal for the period ending May 31, 2007; (3) on July 31, 2007, management denied his request for reconsideration of an accommodation request; (4) on October 3, 2007, management denied his subsequent request for reconsideration of an accommodation; and, (5) on August 3, 2007, he was subjected to a "humiliating and degrading" training plan. (Am. Compl. ¶¶ 5, 25-27).

II. Proposed Findings of Fact

Plaintiff worked as a seasonal Customer Service Representative during the tax season at the Internal Revenue Service ("IRS") from 1999 until 2007. (Plaintiff's Deposition ("Pl.'s Dep."

at 18:14-23, 31:15-24; Mary Banks Deposition ("Banks Dep.") at 7:17-18). The branch manager was Teresa Webb-Patton, and Plaintiff's team manager was Mary Banks. (Pl's. Dep. at 31:2-7; Def.'s Exh. 6: Performance Appraisal 2004-2005 at PageID 275). From 2006 until 2007, Banks remembers "at least" two African American males on the team. (Banks Dep. at 8:1-8).

In Plaintiff's July 1, 2004 to June 30, 2005 performance appraisal, Plaintiff met or exceeded all of the criteria, was given an average Critical Job Elements ("CJE") score of 3.2, and he overall was rated "Fully Successful." (Def.'s Exh. 6: Performance Appraisal 2004-2005 at PageID 275). In his July 1, 2005 to December 31, 2005 progress review, Banks advised Plaintiff that he was failing in customer accuracy, accuracy of input, and timeliness/meeting deadlines. (Def.'s Exh. 8: Progress Review 7/1/2005 — 12/31/2005). In his July 1, 2005 to May 31, 2006 performance appraisal, Plaintiff met all the criteria except that he failed compliance communication, he was given an average CJE score of 2.8, and he overall was rated "Minimally Successful." (Def.'s Exh. 9: Performance Appraisal 2005-2006).

At some point in 2005 "before the evaluations," Plaintiff advised Banks that he had been having vision trouble affecting his performance. (Pl.'s Dep. at 203:1-205:24). Plaintiff does not recall Banks responding to him about his vision trouble or offering to assist him but did tell him to "go to the clinic" when he told her he had certain problems with his eyes or headaches. (*Id.* at 203:20-204:9). Plaintiff would also initiate his own visits to the clinic. (204:10-205:24).

On August 3, 2006, Banks provided Plaintiff with his EIP. (Def.'s Exh. 10: EIP). In the EIP memorandum, Banks stated that Plaintiff's 2005-2006 progress review was "not indicative of [his] performance" in the failing areas and that he was "informed during the mid-year of the decrease" and "some improvements were made." (*Id.*) Banks suggested further reliance on

checklists and tools and insured that she and the "lead" would work with him to improve his performance in the failing areas. (*Id.*) In Plaintiff's performance appraisal from June 1, 2006 to May 31, 2007, Banks gave Plaintiff a failing rating on customer accuracy, compliance communication, and accuracy of input, an average CJE score of 2.4, and an overall rating of "Minimally Successful." (Def.'s Exh. 11: 2006-2007 Performance Appraisal at PageID 290).

On June 25, 2007, Plaintiff obtained a note from Dr. Leroy Norton, Jr., O.D., who saw him in his office for an eye examination related to eye strain. (Def.'s Exh. 12: Letter from Dr. Norton). Dr. Norton recommended that Plaintiff's employer approve a request for two flat screen monitors and one document magnification system to relieve eye strain, that Plaintiff wear bifocal lenses full time, and that he return to the clinic in one year. (*Id.*) On July 5, 2007, Plaintiff submitted a Reasonable Accommodation Request stating that he had a disability of "low vision." (Def.'s Exh. 13: Reasonable Accommodation Request at PageID 297). He described his disability as "difficulty experience[d] in reading computer screens and paper work. Prescribed bifocal lenses being worn[ ]. Eye strain while using computer and reading documents." (*Id.*) Plaintiff requested two large flat screen monitors, one document magnification system, and any other systems that would enhance "low vision readability." (*Id.*) Plaintiff attached Dr. Norton's letter to the Reasonable Accommodation Request. (*Id.* at PageID 300).

On July 11, 2007, Plaintiff requested Banks provide him two days of on-the-job training with Lead Sherri Thompson, with eight hours of review and observation while the lead is on the telephone and eight hours of observation while Plaintiff is on the telephone, to enhance specific research tools. (Def.'s Exh. 14: Routing Slip dated July 11, 2007; Def.'s Exh. 15: Banks

Memorandum). Banks granted Plaintiff's request in a memorandum dated July 12, 2007. (Def.'s Exh. 15: Banks Memo). On July 26, 2007, Plaintiff informed Banks that he had completed two hours with the lead on the telephone and him observing and two hours with him on the telephone with the lead observing. (Def.'s Exh. 16: Routing Slip dated July 26, 2017). Plaintiff advised that he found the training to be "very much informative and very useful" and requested further training not strictly on the telephone but also "paper observation and training." (*Id.*)

On July 31, 2007, Jacquelyne Yarbrough, Department Manager, Memphis Accounts Management, notified Plaintiff in a memorandum that his accommodation requests of a "large flat-screen monitor, a document magnification system and any other system that would enhance low vision readability" was denied because Plaintiff was found to have no substantial limitations of a major life activity. (Def.'s Exh. 17: Yarbrough Denial Memo). Yarbrough further stated that the medical assessment dated July 24, 2007 and prepared by Federal Occupational Health ("FOH") stated that "the employee's physician recommended that [Plaintiff] return to the optometrist and request spectacles that will allow focus in the intermediate [field]." (*Id.* at PageID 306, 308) The FOH physician further stated that Plaintiff "may wish to inquire from computer specialists about software that will enlarge specific text." (*Id.* at PageID 308). The FOH physician stated that he spoke with Dr. Norton states that Dr. Norton only made his specific requests "based on [Plaintiff's] request that such equipment was available." (*Id.*; Def.'s Exh. 18: Administrative Hearing Transcript, Testimony of Dr. James Allen, July 29, 2010, at 120:3-12, 132:14-134:1).

On August 3, 2007, Yarbrough sent a memorandum to Plaintiff on the subject of "Training" confirming an agreement reached in a meeting held on August 1, 2007. (Def.'s Exh. 19: Training Letter dated 8/3/2007). Yarbrough advised Plaintiff of three days of training to assist him in improving his job knowledge technical skill to in turn improve his overall performance to an acceptable level. (*Id.*) The dates of the training were set on August 3, August 7, and August 8, 2007. (*Id.*) Plaintiff was advised that his manager would "conduct evaluative reviews" of his work for thirty days to monitor/assess his "performance for improvement." (*Id.*) He was advised that, if at that time he was performing at an acceptable level in all aspects of his job, he "may be allowed to work overtime." (*Id.*) He was further advised that, if he was not performing at an acceptable level, he would "be issued a formal letter advising" him of such. (*Id.*) He was instructed to "work cooperatively" with his manager to ensure his success. (*Id.*)

Yarbrough testified the extent of her understanding of what Plaintiff wanted from training and stated that she asked Plaintiff for specifics but was not provided any that she was not sure about precisely what he needed. (Def.'s Exh. 20: Yarbrough Deposition at 39:8-14, 40:8-10). Thus, Yarbrough suggested that they perform an assessment because Plaintiff did not provide any further information. (*Id.* at 41: 4-5). The training was held on August 3, 6, 7, and 9, 2007. (Def.'s Exh. 21: Additional Coaching Memorandum dated October 10, 2007; Def.'s Exh. 7: Banks Aff. At #14).

On August 10, 2007, Plaintiff requested reconsideration of the denial of his accommodation request. (Def.'s Exh. 22: Routing Slip dated 8/10/2007). At that time, he did not provide any additional documentation and only requested that Part II "Deciding Official Documentation" be completed. (*Id.*) Plaintiff then took eight weeks of Family Medical Leave

Act ("FMLA") leave. (Def.'s Exh. 4: Pl.'s Dep. at 85:23-86:24). By letter dated October 3, 2007, Carolyn Jackson denied Plaintiff's request for reconsideration because he failed to submit "any additional medical documentation to be considered." (Def.'s Exh. 23: Denial for Reconsideration of Reasonable Accommodation Request).

On or about October 9, 2007, Plaintiff submitted a second request for reconsideration. (Exh. 24: Second Reasonable Accommodation Request). Plaintiff attached medical documentation of Dr. Ira N. B. Davis, Jr. diagnosing him with "computer vision syndrome (CVS)" with the impacts manifest in "discomfort both visually and physically" and "inaccuracies resulting in errors in performance of his job." (*Id.* at PageID 352). Dr. Davis stated that this is a "chronic condition as long as his job consists of large amounts of computer use." (*Id.*) Dr. Davis also requested "large flat screen monitors," a "document magnification system," and any other systems that would enhance low vision readability. (*Id.* at PageID 350).

On October 12, 2007, Plaintiff resigned from his employment. (Def.'s Exh. 26: Plaintiff's Letter dated November 5, 2007 at PageID 359). On October 17, 2007, Dr. Allen reviewed Plaintiff's second accommodation request, including Dr. Davis's medical documentation, and found that Plaintiff "has normal 20/20 visual acuity" when wearing bifocal spectacles and that "the flat screen monitor and document magnification are not necessary." (Def.'s Exh. 25: Second Denial of Reasonable Accommodation, at PageID 357). Dr. Allen stated that computer glasses with focal distances of 25 to 30 inches, depending on the distance of the monitor to Plaintiff's seat, may be of help, as may an ergonomic survey of Plaintiff's office to ensure his computer equipment is all within distances that are ergonomically correct. (*Id.*) Dr. Allen also again concluded that Plaintiff did not have any substantial limitations of a major life activity.

(*Id.*) Plaintiff was sent Dr. Allen's conclusions by letter dated November 14, 2007. (*Id.* at PageID 356).

III. Proposed Conclusions of Law

a. Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a claim may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In addressing a motion to dismiss under Rule 12(b)(6), the court must construe the complaint in the light most favorable to plaintiff and accept all well-pled factual allegations as true. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). A plaintiff can support a claim "by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). This standard requires more than bare assertions of legal conclusions. *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001). "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Any claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . .claim is and the grounds upon which it rests." *Id.* (citing *Twombly*, 550 U.S. at 555).

Nonetheless, a complaint must contain sufficient facts "state a claim to relief that is plausible on its face'" to survive a motion to dismiss. *Twombly*, 550 U.S. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 US. 662, 678 (2009)

(citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). A plaintiff with no facts and "armed with nothing more than conclusions" cannot "unlock the doors of discovery." *Id.* at 678-79.

Defendant asserts that all of Plaintiff's claims except for those in Counts II and V alleging disability on the basis of his vision are barred under the doctrine of res judicata because they were or could have been raised in Plaintiff's previous case, *Anthony T. Grose, Sr. v. Jacob J. Lew*, No. 2:11-cv-02562-JDT-cgc. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). It "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)). Four elements must be present for res judicata to apply: (1) the underlying judgment must have been rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and, (4) the underlying judgment was on the merits. *Hutcherson v. Lauderdale County, Tennessee*, 326 F.3d 747, 758 (6th Cir. 2003) (quoting *Collins v. Greene Cty. Bank*, 916 S.W.2d 914, 915 (Tenn. Ct. App. 1995)).

In Plaintiff's 2011 case, he alleged that, in or about May 2007, he began to receive negative evaluations and repeated harassment from Banks as a result of his participation in a 2005 EEOC investigation that involved another employee's complaint of sexual harassment.

(2011 Am. Compl. ¶¶ 16-18). Plaintiff alleged that he "could not give an answer to assist Management's point of view or the EEO Representative's request but did [in] fact speak on behalf of the fellow employee in question." (*Id.* ¶ 17). Plaintiff alleged that, subsequently, he began to receive negative evaluations and repeated harassment from Banks, which led him to file his own EEO charges, EEODFS-06-0847-F and EEODFS-07-1159-M. (*Id.* ¶ 18; *see also* Def.'s Exh. 1: EEO Charge EEODFS-06-0847-F; Def.'s Exh. 2: EEO Charge EEO-DFS-07-1159-M). He alleged that also was placed on an employment improvement plan, received "degrading humiliating training," and was the subject of "words that [were] unwarranted." (2011 Am. Compl. ¶ 24). Plaintiff alleged that, in or about August 2007, he requested reconsideration of a prior reasonable accommodation request from Banks and Yarbrough, which was denied. (*Id.* ¶ 21). Plaintiff alleged that he was "being harassed so much" that his health was negatively affected and that he left his employment under what he deemed a "constructive discharge." (*Id.* ¶¶ 21, 25). Plaintiff raised claims of discrimination on account of race, age, and disability under Title VII, ADEA, and the Rehabilitation Act. (*Id.* ¶¶ 26-40).

As to whether res judicata bars the instant claims with the exception of Plaintiff's claims that he was discriminated against on the basis of his disability (vision), this Court entered its Order Adopting Report and Recommendation, Denying Plaintiff's Motion for Summary Judgment, and Granting Defendant's Motion for Summary Judgment on February 26, 2015. This Court entered its Judgement on March 3, 2015. Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's judgment on September 21, 2016. Additionally, Plaintiff Anthony T. Grose Sr. and Defendant, the Secretary of the Department of the Treasury, were the parties in both suits.

With respect to whether both suits involve the same cause of action, "the principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case." *Gerber v. Holcomb*, 219 S.W.3d 914, 918 (Tenn. Ct. App. Dec. 27, 2006) (quoting *Hutcheson v. Tenn. Valley Auth.*, 604 F. Supp. 543, 550 (M.D. Tenn. 1985)). Plaintiff alleges in both suits that he was retaliated against for participating in EEO activity relating to another employee. (2011 Am. Compl. ¶¶ 16-18, 21, 24; Am. Compl. ¶¶ 15-24). Plaintiff further alleges in both suits that he was discriminated against on the basis of his race, gender, and age. (*See Anthony T. Grose, Sr. v. Jacob J. Lew*, No. 15-5357, at 1 (6th Cir. Sept. 21, 2016); Am. Compl. ¶¶ 5, 13). Thus, Plaintiff could have raised these claims in his prior suit. Finally, the previous suit was resolved by summary judgment, which is considered adjudication on the merits for purposes of res judicata. *Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812, 816 (Tenn. Ct. App. Sept. 20, 1995) (citing *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. 1990)) ("[T]he granting of summary judgment is deemed conclusive of all issues reached and decided by such summary judgment."). Accordingly, it is RECOMMENDED that Plaintiff's Title VII and ADEA claims be GRANTED under Rule 12(b)(6) as barred by the doctrine of res judicata.

b. Rule 56 of the Federal Rules of Civil Procedure

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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(c). Although hearsay evidence may not be considered on a motion for summary judgment, *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th

Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Thaddeus-X v. Blatter*, 175 F.3d 378, 400 (6th Cir. 1999). The evidence and justifiable inferences based on facts must be viewed in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 460 (6th Cir. 2001).

Summary judgment may be granted "against a party who 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. The moving party can prove the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. *Id.* at 325. This may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the nonmoving party's evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., *Federal Practice and Procedure* § 2727 (2d ed. 1998).

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some

metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Plaintiff alleges disability on the basis of vision in violation of both Sections 501 and 504 of the Rehabilitation Act and the ADA. As an initial matter, it is undisputed that Plaintiff was employed by the IRS. Under federal law, "[t]he Rehabilitation Act, not the [ADA], constitutes the exclusive remedy for a federal employee alleging disability-based discrimination." *Jones v. Potter*, 488 F. 3d 397, 403 (6th Cir. 2007) (*see* 42 U.S.C. § 12111(5)(B)(i) (defining employers covered by the ADA, but excluding the United States). Thus, it is RECOMMENDED that Plaintiff's ADA claim fails as a matter of law.

As to Plaintiff's Rehabilitation Act claims, absent direct evidence of discrimination, courts apply the three-step burden-shifting framework originally articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The initial burden rests with the plaintiff to establish a prima facie case of discrimination. *Jones*, 488 F.3d at 404 (citing *Monette*, 90 F.3d at 1186). To establish a prima facie case under the Rehabilitation Act, a plaintiff must establish each of the following five elements: (1) that he is disabled; (2) that he is otherwise qualified for the job; (3) that he suffered an adverse employment action; (4) that his employer knew or had reason to know of his disability; and, (5) that, following the adverse employment action, either he was replaced by a nondisabled person or his position remained open. *Jones*, 488 F.3d at 404 (citing *Timm v. Wright State Univ.*, 375 F.3d 418, 423 (6th Cir. 2004).

If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. *Jones*,

499 F.3d at 404 (citing *Burdine*, 450 U.S. at 353). Should the employer carry this burden, then the burden returns to the plaintiff to prove by a preponderance of the evidence that the employer's proffered reason was in fact a pretext designed to mask illegal discrimination. *Id.* A plaintiff can defeat summary judgment only if his evidence is sufficient to "create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Jones*, 499 F.3d at 404 (citing *Macy v. Hopkins Cty. Sch. Bd. of Educ.* 484 F.3d 357, 364 (6th Cir. 2007).

"Disability" is defined, with respect to an individual, as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," a "record of such impairment," or being "regarded as having such an impairment . . . ." 20 C.F.R. 1614.203; 20 C.F.R. § 1630.2(g). A substantial limitation must limit the "ability of the individual to perform a major life activity as compared to most people in the general population." 20 C.F.R. 1614.203; 20 C.F.R. § 1630.2(j). "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Id.* "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted" and is "not meant to be a demanding standard," although "not every impairment will constitute a disability within the meaning of this section." *Id.* "Major life activities" include, but are not limited to, seeing, reading, communicating, interacting with others, and working. 20 C.F.R. 1614.203; 20 C.F.R § 1630.2(i)(1)(i).

With respect to whether a genuine issue of material fact exists as to whether Plaintiff is disabled under the Rehabilitation Act, the evidence shows that Dr. Norton, Dr. Allen, and Dr. Davis all opined that, although Plaintiff had diagnosed vision impairments, they would have

been corrected by the proper use of bifocal eyeglasses. Dr. Allen further found that Plaintiff's vision would be corrected to "normal 20/20 visual acuity when refracted at both near and far distances."

In considering vision impairments specifically, the United States Supreme Court concluded that "the number of people with vision impairments alone is 100 million," and "the finding that 43 million individuals are disabled gives content to . . . the term 'disability.'" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). Thus, it reasoned that the term "disabled" is "restricted to those whose impairments are not mitigated by corrective measures." *Id.* The record reflects that Plaintiff's impairment can be corrected by bifocal eyeglasses but contains no evidence that Plaintiff obtained bifocal eyeglasses or utilized them in an attempt to correct his vision impairments. The record also contains evidence that Plaintiff could have benefitted from "computer glasses," computer software to enlarge the text and ergonomic improvements in his workplace. There is no evidence that Plaintiff requested or obtained any of these but instead continued to request two flat-screen monitors and a document magnification system with no justification as to why these would be more helpful for improving his vision. On the contrary, the record reflects that Dr. Allen found them to be explicitly "not necessary" because his vision could be corrected to normal 20/20 visual acuity with bifocal eyeglasses.

Accordingly, it is RECOMMENDED that Plaintiff fails to demonstrate that a genuine issue of material fact exists as to whether he is disabled under the Rehabilitation Act. Thus, it is RECOMMENDED that Plaintiff has failed to meet his prima facie burden, and that Plaintiff's Rehabilitation Act claims must fail as a matter of law.

IV. Conclusion

For the reasons set forth herein, it is RECOMMENDED that Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment be GRANTED in that Plaintiff's Title VII and ADEA claims be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Plaintiff's ADA and Rehabilitation claims be dismissed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

DATED this 27th day of February, 2018.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.