19 Jan 2022

Application to Extend the Time to File Petition for Writ of Certiorari

To Whom it May Concern,

I am respectfully requesting a 60 day extension to file a Writ of Certiorari on Case no. 20-12476. The opinion of the Eleventh Circuit of Appeals has been included as directed by the Clerk.

There has been illness in my family and self prohibiting timely filing. I recieved the packet from the Court late on Dec 23, 2021. Also, I am having computer/printer issues I'm working on correcting.

Thank You for your time and considerations.

Ellen T. Thatcher

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[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 20-12476

Non-Argument Calendar

ELLEN T. THATCHER,

Plaintiff-Appellant,

versus

DEPARTMENT OF VETERANS AFFAIRS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:17-cv-03061-AEP

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an appellant fails to identify a particular issue in her brief before us or fails sufficiently to argue the merits of her position on an identified issue, she is deemed to have abandoned it. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012). When a district court rests its decision on multiple, independent grounds, an appellant must show that each stated ground is erroneous. *Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680 (11th Cir. 2014). "When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, [s]he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Id.*

As an initial matter, Thatcher has arguably abandoned any claim of legal error by the district by failing to expressly identify and argue such error before us. Rather than challenge the district court's conclusions concerning her claims of refusal to accommodate, failure to engage in an interactive process, and retaliation, Thatcher alleges that the witnesses on whose testimony the VA relied in its motion for summary judgment perjured themselves, a claim she did not raise below. However, liberally construed, an allegation of perjury is essentially an argument that there is a genuine dispute of fact, because at bottom it is a claim that proffered evidence is false. Read in this light, Thatcher's *pro se* brief implicitly preserves a general challenge to the district court's conclusion that no genuine issue of material fact exists. But, as we explain below, even assuming she has implicitly preserved such a challenge, it is meritless.

jected to unlawful discrimination as a result of her disability. *Boyle v. City of Pell City*, 866 F.3d 1280, 1288 (11th Cir. 2017).

A person with a disability is "otherwise qualified" if she is able to perform the essential functions of a specific job with or without a reasonable accommodation. *Id.* An individual who, even with a reasonable accommodation, would be unable to perform the functions of the position, is not "otherwise qualified" and thus cannot establish a *prima facie* case of discrimination. *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1305 (11th Cir. 2000).

An employer unlawfully discriminates against an otherwise qualified person by failing to provide a reasonable accommodation for the disability, unless doing so would impose an undue hardship on the employer. *Boyle*, 866 F.3d at 1289. The plaintiff bears the burden of identifying an accommodation and showing that it would allow her to perform the essential functions of the position. *Id.* What constitutes a reasonable accommodation depends on the circumstances, but it may include job restructuring and part-time or modified work schedules, among other things. *Frazier-White*, 818 F.3d at 1255 (quoting 42 U.S.C. § 12111(9)). Further, though the Rehabilitation Act does not require an employer to create a new position for an employee with a disability, it may obligate them to reassign the employee to an existing, vacant position if the employee is otherwise qualified for that position. *Boyle*, 866 F.3d at 1289. But an employer is not obligated to promote an employee or remove another employee from their position in order to accommodate an employee's disability. *Id.*

Here, Thatcher failed to make out a *prima facie* case of discrimination under the Rehabilitation Act. A VA fitness for duty

Here, the district court found that Thatcher's "interactive process" claim failed because such a claim cannot be independently maintained absent a plaintiff's identification of a reasonable accommodation. Because Thatcher failed to identify a reasonable accommodation as described above, the court did not err in granting summary judgment to the VA on this issue. *See Frazier-White*, 818 F.3d at 1257-58.

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The Rehabilitation Act also prohibits an employer from retaliating against individuals for initiating or participating in activity protected by the Act. 42 U.S.C. § 12203(a); *see also* 29 U.S.C. § 791(f) (incorporating the anti-retaliation provision of the Americans with Disabilities Acts into the Rehabilitation Act). Claims of retaliation based on circumstantial evidence can be analyzed under the *McDonnell Douglas* framework. *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 (11th Cir. 1999). Thus, to make out a *prima facie* case, Thatcher bore the burden of showing that (1) she engaged in activity protected under the Rehabilitation Act, (2) she suffered an adverse action, and (3) the adverse action and the protected activity were "causally connected." *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 507 F.3d 1306, 1315-16 (11th Cir. 2007). For an action to be adverse, it must result in "some tangible, negative effect" on employment. *Lucas v. W. W. Grainger*, 257 F.3d 1249, 1261 (11th Cir. 2001). For an action and protected activity to be causally connected, a plaintiff must show that retaliation for protected activity was the "but-for" cause of an adverse action. *Frazier-White*, 818 F.3d at 1258.

If the plaintiff makes out a *prima facie* case, the burden shifts to the defendant to produce evidence of a non-retaliatory

that resulted from the VA official's request, the action was not adverse.

The two remaining acts of alleged retaliation—the VA official's failure to return Thatcher to Bay Pines after the fact-finding investigation and ordering her to undergo a fitness for duty examination—occurred after Thatcher's protected activity, but she did not show that they were causally connected to it. With respect to the first act, Thatcher stated that back surgery had "put [her] in a weakened state" and that this new weakness provided the VA official and those with whom he had conspired an opportunity to push her out of her position. But this is mere speculation, not based on personal knowledge, and is insufficient to create a genuine issue of fact. *Cordoba*, 419 F.3d at 1181. Likewise, with respect to the second act, Thatcher offered only speculation as to the motivation for ordering her to undergo a fitness for duty examination.

Regardless of whether Thatcher's evidence established a *prima facie* case of retaliation for the remaining acts, the VA offered legitimate, non-retaliatory reasons to support both actions. As to the decision not to return her to Bay Pines, the VA official testified that she "wouldn't be able to come back until Human Resources formulated a disciplinary action" in response to the fact-finding investigation. The VA official also testified that Human Resources delayed taking any action because Thatcher's request for disability retirement was pending. In opposition to summary judgment, Thatcher argued that the VA's reasons for keeping her at Largo "lack[ed] credibility." But she provided no evidence to indicate that those reasons were false or that retaliation was the true reason, as was her burden. *See Brooks*, 446 F.3d at 1163.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 22, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12476-BB
Case Style: Ellen Thatcher v. Department of Veterans Affairs
District Court Docket No: 8:17-cv-03061-AEP

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.