APPENDIX A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13021

CLEON BELGRAVE,

Plaintiff-Appellant,

versus

PUBLIX SUPER MARKET, INC.,

Defendant-Appellee,

PUBLIX ATLANTA BAKERY, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-02146-MHC

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before JORDAN, BRANCH, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13021

Non-Argument Calendar

CLEON BELGRAVE,

Plaintiff-Appellant,

versus

PUBLIX SUPER MARKET, INC.,

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Appeal from the United States District Court
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D.C. Docket No. 1:20-cv-02146-MHC

Before JORDAN, BRANCH, and MARCUS, Circuit Judges.

PER CURIAM:

Cleon Belgrave, proceeding *pro se*, appeals from the district court's order granting summary judgment in favor of his former employer, Publix Supermarkets, Inc. ("Publix"), in his lawsuit alleging violation of his rights under the Americans with Disabilities Act ("ADA"). On appeal, Belgrave argues that: (1) the district court erred when it determined that Publix was entitled to summary judgment based on his failure to exhaust his administrative remedies; and (2) the district court erred when it concluded that, even if the lack of exhaustion was disregarded, Publix was still entitled to summary judgment on his failure-to-accommodate, disability discrimination, and retaliation claims. After careful review we affirm.

I.

We review *de novo* the district court's grant of summary judgment, and, like the district court, we view all evidence and make all reasonable inferences in favor of the nonmoving party. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*). Summary judgment is appropriate if the evidence shows 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. *Id.* We

may affirm the district court's judgment "on any ground that finds support in the record." *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (quotations omitted).

While we "read briefs filed by *pro se* litigants liberally, issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (citation omitted). A party fails to adequately present an issue on appeal "when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to th[at] claim[]." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (quotations omitted).

II.

For starters, we are unpersuaded by Belgrave's argument that the district court erred in granting summary judgment to Publix on his ADA reasonable-accommodation claim.[1] The ADA

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[1] Because we conclude that all of Belgrave's claims fail on the merits, and because the parties and the district court addressed the merits, we do not consider whether he adequately exhausted his administrative remedies. *See Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1850–52 (2019) (holding that Title VII's exhaustion requirements are not jurisdictional); *see also* 42 U.S.C. § 12117(a) (incorporating for ADA actions Title VII's "powers, remedies, and procedures"). *Cf. Santiago-Lugo v. Warden*, 785 F.3d 467, 475 (11th Cir. 2015) (holding that because the exhaustion requirement under 28 U.S.C. § 2241 "is non-jurisdictional, even when the defense has been preserved and asserted by the respondent throughout the proceeding, a court may skip over the exhaustion issue if it is easier to deny (not grant, of course, but deny) the petition on the merits without reaching the exhaustion question").

provides that an employer shall not discriminate against a qualified employee based on that employee's disability. 42 U.S.C. § 12112(a). An employer's "failure to make reasonable accommodation for an otherwise qualified disabled employee constitutes discrimination under the ADA." *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1225–26 (11th Cir. 2005) (*citing* 42 U.S.C. § 12112(b)). To establish a *prima facie* case of discrimination based on an employer's failure to accommodate, an employee may show, in relevant part, that: (1) he has a disability; and (2) he is a "qualified individual." *See id.* at 1226. The ADA defines a "qualified individual" as someone with a disability who -- either with or without reasonable accommodation -- can perform the essential functions of his desired position. 42 U.S.C. § 12111(8); *Holly v. Clairson Ind., LLC*, 492 F.3d 1247, 1256 (11th Cir. 2007).

An accommodation is reasonable "only if it enables *the employee* to perform the essential functions of the job." *Holly*, 492 F.3d at 1256 (emphasis added). The burden of identifying a reasonable accommodation, and the "ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable," rests with the individual. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997). Reasonable accommodations may include: "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other

similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B).

Importantly, however, an employer is not required to re-allocate job duties in order to change the essential function of the job. *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000). Moreover, an employer is not obligated to "bump" another employee from a position to accommodate a disabled employee. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001). In addition, an individual seeking accommodation is not necessarily entitled to the accommodation of his choice, but rather, only a reasonable accommodation. *Stewart*, 117 F.3d at 1286.

Here, we assume *arguendo* that Belgrave properly preserved his arguments concerning his ADA claims in the district court and that he does so again on appeal.[2] Nevertheless, Belgrave's reasonable-accommodation claim fails as a matter of law, since he did not meet his burden of identifying and requesting a reasonable accommodation. As the record reveals, Belgrave's

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[2] While Belgrave did not file objections to the magistrate judge's R&R, he is proceeding *pro se* and, like the district court, we accept a later filing by him as sufficient to preserve his right to appeal this issue, as well as the others we'll address. *See Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1366 (11th Cir. 2007) (construing a *pro se* filing liberally to hold that the plaintiff had timely objected to the magistrate judge's R&R). *Cf.* 11th Cir. R. 3-1 (explaining that a party who fails to object to the magistrate judge's R&R waives the right to challenge unobjected-to factual and legal conclusions on appeal, but without an objection, we may review an issue on appeal for plain error "if necessary in the interests of justice").

duties at Publix included preparing and mixing pie dough -- which involved operating industrial mixers and manually opening and emptying ingredient containers -- and pushing mixed dough down a production line. In his request for an accommodation, Belgrave asked for one thing: a proposed "helper" to perform some or all of his job for him -- as he testified, to help him "open the boxes, lift, pull, whatever was needed for me to work, to do my job. Whatever they asked me to do on a daily basis."

But this request did not amount to an accommodation that allowed Belgrave to work the essential functions of his job by himself. *See Holly*, 492 F.3d at 1256; *see also Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983) (holding that an accommodation is not reasonable if "it would have been necessary for the [employer] to require other [employees] to perform many of plaintiff's duties"). And, even if Belgrave's request were construed as one to restructure his job, Publix was not obligated to do so, to the extent it would have entailed reallocating job duties or bumping another employee from their position to accommodate Belgrave. *See Earl*, 207 F.3d at 1365; *Lucas*, 257 F.3d at 1256.[3] In any event, regardless of whether Belgrave was unable to do his job with or without a

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[3] As for Belgrave's claim in the district court that he asked Publix to adjust the speed of the pie line equipment, he does not raise this issue in his brief on appeal, and, therefore, has abandoned it. *See Sapuppo*, 739 F.3d at 681; *Timson*, 518 F.3d at 874; *see also Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1280 n.41 (11th Cir. 2012) (deeming an argument waived that was not made in an appellant's brief, even if it was made in an amicus brief).

reasonable accommodation, he was not a qualified individual, as we'll explain next.

IV.

We likewise find no merit in Belgrave's argument that the district court erred in granting summary judgment to Publix on his claim of disability discrimination or disparate treatment. Where the plaintiff proffers circumstantial evidence to establish an ADA claim, we apply the burden-shifting framework originally developed for Title VII claims. *Earl*, 207 F.3d at 1365. To establish a *prima facie* case of disability discrimination under the ADA, the employee may show that, at the time of the adverse employment action, he (1) had a disability, (2) was a qualified individual, and (3) was subjected to unlawful discrimination because of his disability. *Batson v. Salvation Army*, 897 F.3d 1320, 1326 (11th Cir. 2018).

Under the ADA, a "disability" includes a physical or mental impairment that substantially limits a major life activity of the individual, a record of such impairment, and acknowledgment of having such an impairment. 42 U.S.C. § 12102(1). The plaintiff must show that the employer treated similarly situated individuals outside his protected class more favorably. *Lewis v. City of Union City*, 918 F.3d 1213, 1220–21 (11th Cir. 2019) (*en banc*) (*Lewis I*).

Under the ADA, it is unlawful for an employer to discriminate against a qualified individual based on a disability regarding the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). As we've noted, a "qualified individual" is someone

who can perform the essential functions of the position they hold with or without reasonable accommodation. *Id.* § 12111(8). Thus, an ADA plaintiff must show "either that he can perform the essential functions of his job without accommodation, or, . . . that he can perform the essential functions of his job with a reasonable accommodation." *D'Angelo*, 422 F.3d at 1229 (quotations omitted).

Here, Belgrave's claim of disability discrimination or disparate treatment was without merit because he was not a qualified individual within the meaning of the ADA. As the record shows, there was no issue of material fact concerning whether Belgrave could perform the essential functions of his job. *See* 42 U.S.C. § 12111(8); *Batson*, 897 F.3d at 1326. Specifically, the undisputed evidence in the record indicated that, while Belgrave was disabled, he was completely unable to work, something he testified to in his worker's compensation deposition. And there was nothing to suggest that his abilities at the time of this deposition were any different from his abilities at the time of his accommodation request; rather, at the deposition, he admitted that he was "*still* unable to work." Further, he never disputed Publix's claim that he said he was unable to work in June 2019. To the contrary, his 2019 request for a full-time helper to perform essential aspects of the job demonstrated that he was incapable of carrying out his duties in the dough room at the time of his request.

Therefore, on the undisputed record, when Publix fired Belgrave, he necessarily could not perform the dough room tasks of mixing and moving dough on the pie line. For a disparate

treatment claim, he further had to show that Publix treated him differently from similarly situated employees, but he offered no evidence below to demonstrate differential treatment. *Lewis*, 918 F.3d at 1221. Thus, this claim lacks merit as well.

V.

Finally, we are unconvinced by Belgrave's argument that the district court erred in granting summary judgment on his retaliation claim. Title I of the ADA prohibits discrimination against an individual on the basis that the individual "opposed any act or practice made unlawful by [the ADA]" or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" conducted under the statute. 42 U.S.C. § 12203(a).

We evaluate retaliation claims brought under the ADA under the same framework as applied to Title VII actions. *Todd v. Fayette Cnty. Sch. Dist.*, 998 F.3d 1203, 1219 (11th Cir. 2021). Thus, when a plaintiff alleges retaliation under the ADA without direct evidence of the employer's retaliatory intent, courts will apply the burden-shifting framework we've described above. *See Batson*, 897 F.3d at 1328–29. Under that framework, a plaintiff must first establish a *prima facie* case of retaliation. *Id.* at 1329. To do so under the ADA, the plaintiff may show that (1) he engaged in a statutorily protected expression, (2) he suffered an adverse action, and (3) there was a causal connection between the two. *See id.*

To establish the first element, "it is sufficient that an employee have a good faith, objectively reasonable belief that his

activity is protected by the [ADA]." *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53 (2006). An employee participates in a protected activity when he makes "a request for a reasonable accommodation." *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016).

If a plaintiff makes out *a prima facie* case under the burden-shifting framework, the employer must articulate a nondiscriminatory reason for the adverse action. *Batson,* 897 F.3d at 1329. If it does so, the employee must demonstrate that the employer's proffered reason was pretextual by presenting evidence sufficient to "permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse . . . decision." *Id.* (quotations omitted). "A reason is not pretext for retaliation unless it is shown both that the reason was false, and that retaliation was the real reason." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1136 (11th Cir. 2020) (quotations, emphases and brackets omitted).

Here, the district court properly found that Belgrave failed to make out a prima facie case of retaliation. First, Belgrave failed to show that he engaged in a statutorily protected activity. He essentially argued that Publix retaliated against him after he made a report to HR concerning his treatment at work following his injury, which included his request for a permanent helper. However, as we've explained, Belgrave did not show that his accommodation

request was reasonable, so he did not establish that he'd engaged in a protected activity. *See Frazier-White*, 818 F.3d at 1258.

Nor did Belgrave establish causation or pretext. Even if Publix fired him shortly after his last head injury, it identified legitimate, non-retaliatory reasons for doing so, which included a history of discipline for tardiness, poor job performance and insubordination. Belgrave did not refute those reasons "head on" or show that they were false and that the true motive was retaliatory. *See Chapman*, 229 F.3d at 1030. Nor is there support for his claim that Publix fired him only because he did not promptly fill out an acknowledgment form that he was supposed to submit after missing a safety meeting. Rather, the undisputed record indicates that Belgrave had a history of disciplinary issues, aside from this one form. Thus, even if Belgrave had engaged in protected conduct, he did not demonstrate the necessary level of causation or pretext.

AFFIRMED.

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

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May 16, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-13021-JJ
Case Style: Cleon Belgrave v. Publix Supermarket, Inc.
District Court Docket No: 1:20-cv-02146-MHC

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, 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 on the Court's website.
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.

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OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEON BELGRAVE,	
Plaintiff,	
v.	**CIVIL ACTION FILE**
	No. 1:20-CV-02146-MHC-JEM
PUBLIX SUPERMARKET, INC.,	
Defendant.	

UNITED STATES MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Cleon Belgrave submitted a *pro se* Amended Complaint pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Doc. 8.) The Court allowed Plaintiff to proceed against Defendant, Publix Supermarket, Inc., on claims of disparate treatment, failure to accommodate, and retaliation. (Doc. 14 at 2.) Currently before the Court is Defendant's Motion for Summary Judgment (Doc. 48), Plaintiff's Response in Opposition (Doc. 52, "Pl. Resp."), and Defendant's Reply (Doc. 53). For the reasons stated below, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED**.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issue as to any material fact is present, 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." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant bears the burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." *Rice-Lamar v. City of Ft. Lauderdale, Fla.*, 232 F.3d 836, 840 (11th Cir. 2000)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The movant may also meet its burden by identifying an absence of evidence to support an element of the case on which the nonmovant bears the burden of proof. *Celotex*, 477 U.S. at 325.

If the movant meets its burden, then the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant must "go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions, and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. The Court must view the evidence and factual inferences in the light most favorable to the nonmovant. *See United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991)(en banc). To the extent that material facts are genuinely in dispute, the Court must resolve the disputes in the nonmovant's favor. *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Vaughan v. Cox*, 343 F.3d 1323,

1326 n.1 (11th Cir. 2003). If the record does not blatantly contradict the nonmovant's version of events, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at 252; *accord EPL, Inc. v. USA Fed. Credit Union*, 173 F.3d 1356, 1362 (11th Cir. 1999).

II. FACTS

A. Preliminary Statement

The Court must accept as true those facts submitted by Defendant that are supported by citations to record evidence and to which Plaintiff has not expressly disputed with citations to record evidence. *See* LR 56.1(B)(2)(a)(2), NDGa ("This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1).").

Accordingly, for those facts submitted by Defendant that Plaintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true so long as the facts are supported by citations to record evidence, do not make credibility determinations, and do not involve legal conclusions. *See E.E.O.C. v. Atlanta Gastroenterology Assocs., LLC*, No. CIV. A. 1:05-CV-2504-TWT, 2007 WL 602212, at *3 n.2 (N.D. Ga. Feb. 16, 2007). The Court has nevertheless

viewed all evidence and factual inferences in the light most favorable to Plaintiff, as is required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

The Court has excluded any assertions of fact by either party that are clearly immaterial, or presented as arguments or legal conclusions, and has excluded any assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in a party's brief and not in its statement of facts. *See* LR 56.1(B)(1), NDGa; *see also* LR 56.1(B)(2)(b) (respondent's statement of facts must also comply with LR 56.1(B)(1)). Nevertheless, the Court includes certain facts that are not necessarily material, but which are helpful to present the context of the parties' arguments. The Court will not rule on each objection or dispute presented by the parties and will discuss those objections and disputes only when necessary to do so regarding a genuine dispute of a material issue of fact.

In support of its Motion for Summary Judgment, Defendant filed a Statement of Undisputed Material Facts (Doc. 48-2, "DSMF".) Plaintiff's Response includes a response to Defendant's statement of facts, (*see* Pl. Resp. at 3-10, "PRDF"), that only partly satisfies his obligation to (1) directly refute Defendant's facts with concise responses supported by specific citations to evidence, including page or paragraph number, (2) state valid objections to the admissibility of Defendant's facts, or (3) point out that Defendant's citations do

not support Defendant's facts or that those facts are not material, *see* N.D. Ga. R. 56.1(B)(2)(a)(2). For example, Plaintiff responded only to the first 44 of Defendant's 61 facts, and approximately 15 of Plaintiff's responses lack specific citations to evidence, including page or paragraph number. Therefore, to the extent that Plaintiff fails to satisfy this Court's Local Rule 56.1(B)(2)(a)(2), Defendant's facts are deemed admitted, and the undersigned determines that Defendant's record citations support Defendant's facts. *See Reese v. Herbert*, 527 F.3d 1253, 1269 (11th Cir. 2008). Plaintiff's Response also includes his Separate Statement of Undisputed Facts, (Doc. 52 at 11-17, "PSMF"), which Defendant properly disputes in its Response in Opposition to Plaintiff's Separate Statement of Undisputed Facts, (Doc. 54, "DRPF".) PSMF fails to comply with this Court's Local Rule 56.1(B)(1) and (2)(b) because his facts are unnumbered and many of them lack citations to supporting evidence, including page or paragraph number. The facts presented below are undisputed, except when explicitly noted.

B. Background

In 2014, Plaintiff began his employment as a "dough room production operator" on the "pie line" of Defendant's bakery. (DSMF ¶¶ 1-2; PRDF ¶ 2.) On approximately July 29, 2015, "Plaintiff allegedly hit his head on the freezer door in the dough room, causing injuries to his head and neck." (DSMF ¶ 25.) Defendant "provided accommodations to Plaintiff, including being placed on light duty." (*Id.* ¶ 26.) On approximately March 27, 2018, "Plaintiff was purportedly hit in the legs with a pallet by another employee who was operating an electric jack." (*Id.* ¶ 27.) Defendant "provided accommodations to [Plaintiff]

such as placing him on light duty for a period of three to six months, providing him with a stool or chair to sit on while working, and occasionally providing a helper to assist [him] in the dough room when there was an available extra employee." (*Id.* ¶ 28; PRDF ¶ 28.)

Between April 13, 2018, and May 21, 2019, Defendant disciplined Plaintiff approximately nine times for reasons including poor performance, tardiness, and noncompliance with administrative procedures. (DSMF ¶¶ 11-23; PRDF ¶ 12-17, 19-23.) Defendant states that Plaintiff subsequently "refused to review and acknowledge a written recap of a safety meeting he missed in mid-May [2019]," but Plaintiff states that he "reviewed and signed the form." (DSMF ¶ 38; PRDF ¶ 38.)

"On May 25, 2019, Plaintiff allegedly hit his head on an air hose pipe located above the pie line, resulting in injuries to his head and neck." (DSMF ¶ 30; PRDF ¶ 30.) Plaintiff "called out for his shifts" on the next four workdays. (DSMF ¶¶ 31-34; PRDF ¶¶ 31-33.) After Plaintiff returned to work on June 3, 2019, he spoke with Defendant's nurse regarding his alleged injury and requested a permanent full-time helper. (DSMF ¶¶ 35-36; PRDF. ¶¶ 35-36.) Plaintiff subsequently testified that he cannot work at all due to a disability. (DSMF ¶¶ 56-59.)

On June 7, 2019, Defendant terminated Plaintiff for "refusal and reluctance to comply with instructions of the person in charge." (*Id.* ¶ 39; PRDF ¶ 39.) According to Defendant, on February 10, 2020, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC),

alleging disability discrimination between May 21 and June 7, 2019. (DSMF ¶¶ 43-44.) Plaintiff, though, asserts that he "filed [an] EEOC form . . . on November 22, 2019." (PRDF. ¶¶ 43-44.) After receiving the EEOC's dismissal and notice of right to sue letter, Plaintiff filed the present case on May 19, 2020. (DSMF ¶ 52.)

III. DISCUSSION

A. Exhausting Administrative Remedies

To properly file an employment discrimination claim in federal court, a plaintiff must first file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act. *Coley v. Shaw Indus.*, No. 21-10545, 2021 U.S. App. LEXIS 29173, at *2 (11th Cir. Sep. 27, 2021); 29 C.F.R. § 1626.7(a). When the alleged discriminatory act is termination, the 180-day period begins to run "from the date the employee receives notice of termination." *Id.* In general, a plaintiff's failure to timely file a charge results in forfeiture of a claim based on the allegedly discriminatory conduct. *Id.* (finding that "the district court did not err in dismissing [the plaintiff's] complaint for failure to file a timely EEOC charge," which was filed more than 300 days after the alleged discriminatory act). Three exceptions to this general rule include waiver, estoppel, and equitable tolling. *Id.* at *3. "Absent one of these exceptions, however, we must strict[ly] adhere[] to the procedural requirements specified by the legislature, [...] and we cannot disregard a limitations period out of

sympathy for a litigant[.]" *Id.* at *4 (internal quotation marks and citations omitted).

Here, Plaintiff alleges that Defendant discriminated against him by failing to accommodate his disability and by terminating his employment because of his disability, and that Defendant retaliated against him by terminating his employment after requesting an accommodation for his disability. The most recent of these alleged discriminatory acts was Plaintiff's discharge, which occurred on June 7, 2019. Plaintiff filed his EEOC charge on February 10, 2020, which was 248 days after his termination. (DSMF ¶¶ 43-44; Doc. 48-2 at 93.) As Defendant points out, Plaintiff admitted that he knew about the 180-day deadline and that he knew he filed his EEOC charge late. (DSMF ¶¶ 47-48, 50; Doc. 53 at 2-3.) Plaintiff also makes no showing of waiver, estoppel, or equitable tolling such that his untimely charge should nevertheless be considered timely. (*See generally* Pl. Resp.)

Plaintiff attempts to salvage the timeliness of his claims by stating that he "filed [an] EEOC form . . . on November 22, 2019." (PRDF ¶¶ 43-44; Doc. 48-2 at 95-98.) However, that form was an intake questionnaire, (*see* Doc. 8 at 14-16), which is generally not equivalent to a charge, *Ogletree v. Necco*, No. 1:16-cv-01858-WSD-AJB, 2016 U.S. Dist. LEXIS 165566, at *21 (N.D. Ga. Nov. 9, 2016). An intake questionnaire may be considered a charge if, among other requirements, the document is verified, meaning it was "'sworn or affirmed before a notary public, designated representative

of the Commission, or other person duly authorized by law to administer oaths and take acknowledgments, or supported by an unsworn declaration in writing under penalty of perjury.'" *Pettiford v. Diversified Enters. of S. Ga., Inc.*, Civil Action No. 7:18-CV-105 (HL), 2019 U.S. Dist. LEXIS 24595, at *10 (M.D. Ga. Feb. 15, 2019) (quoting 29 C.F.R. § 1601.3(a)). Here, Plaintiff's intake questionnaire was not verified, (*see* Doc. 8 at 14-16), and it therefore cannot serve as a timely charge.

Accordingly, Plaintiff's claims are time-barred, and Defendant is entitled to summary judgment on this basis alone.[1]

B. Disability Discrimination

Still, even if Plaintiff's claims were not time-barred, they would also fail on the merits. Plaintiff first claims that he was discriminated against on the basis of a disability. A plaintiff asserting an employment discrimination claim can support the claim either by direct or circumstantial evidence. *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002). If direct evidence of intentional discrimination does not exist or is insufficient, the plaintiff may offer circumstantial evidence to support his claim. *Id.* When a plaintiff supports his claim with circumstantial evidence, the *McDonnell Douglas* burden-shifting framework governs the analysis of the claim. *See Anderson v. Embarq/Sprint*, 379 F. App'x 924, 927 (11th Cir. 2010) (*McDonnell Douglas* framework governs the

[1] In screening Plaintiff's Amended Complaint, the Court (1) noted that Plaintiff attached his questionnaire but not his Charge, and (2) assumed for the purpose of screening that his claims were timely if he filed his Charge on the same day as the questionnaire. (Doc. 10 at 10, 14.)

analysis of ADA discrimination claims); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case. *McDonnell Douglas*, 411 U.S. at 802; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). If a plaintiff establishes a prima facie case, then he has created an inference of discrimination, and the defendant has the burden of articulating a legitimate, non-discriminatory reason for its employment action. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). This burden is "exceedingly light," *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997), as the employer simply must introduce admissible evidence to support the challenged employment actions, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). If the defendant meets this light burden, then the inference of discrimination is erased, and the burden shifts back to the plaintiff "to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination." *Holifield*, 115 F.3d at 1565.

To establish a prima facie case of disability discrimination, a plaintiff must show that "(1) he is disabled, (2) he is a qualified individual, and (3) he was subjected to unlawful discrimination because of his disability." *See Embarq/Sprint*, 379 F. App'x at 927. Here, it is undisputed that Plaintiff is disabled. (DSMF ¶¶ 56-59.) To be a qualified individual, however, Plaintiff must be able to perform the essential functions of his job with or without a reasonable accommodation. *Thomas v. Cobb Cty. Sch. Dist.*, No. 21-11325, 2021 U.S. App. LEXIS 32602, at *2 (11th Cir. Nov. 2, 2021) (per curiam) (citing 42 U.S.C. §

12111(8)). Here, Plaintiff testified that he cannot work at all due to a disability. (DSMF ¶¶ 56-59.) Consequently, he is not a qualified individual under the ADA. *See Williams-Evans v. Advance Auto Parts*, 843 F. App'x 144, 147 (11th Cir. 2021) ("Because the ADA protects only individuals still able to perform the essential functions of their job, a plaintiff who is totally disabled and unable to work cannot sue for discrimination under the ADA.").

Assuming *arguendo* that Plaintiff was a qualified individual, he must also satisfy the third prong by demonstrating that Defendant engaged in disparate treatment or failed to make a reasonable accommodation. *See Porterfield v. SSA*, No. 20-10538, 2021 U.S. App. LEXIS 26129, at *10 (11th Cir. Aug. 30, 2021) (citing 42 U.S.C. § 12112(b)). Either way, Plaintiff must show "but for" causation. *See Porterfield*, 2021 U.S. App. LEXIS 26129, at *10; *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1263 n.17 (11th Cir. 2007) ("[The plaintiff] must show that his disability caused him to be late, so that [his employer's] failure to give him any leeway in its punctuality policy, leading to his termination, amounted to termination 'because of his disability.'").

Here, Plaintiff claims that Defendant both engaged in disparate treatment when it terminated his employment and failed to reasonably accommodate his disability. (DSMF ¶ 54; *see generally* Pl. Resp.) An employer engages in disparate treatment when it treats a non-disabled individual more favorably than a disabled individual. *Porterfield*, 2021 U.S. App. LEXIS 26129, at *10 (citing 42 U.S.C. § 12112(b)). Here, as Defendant points out, the record is devoid of any evidence that Plaintiff was treated differently than any non-disabled employee.

(Doc. 48-1, Defendant's Brief in Support of Motion for Summary Judgment, "Def. Brief," at 18; *see generally* Pl. Resp.) Accordingly, Plaintiff cannot establish his disparate treatment claim.

As for his failure to accommodate claim, Plaintiff carries the ultimate burden of identifying an accommodation that would have enabled him to do his job and "demonstrating that such an accommodation is reasonable[.]" *Thomas*, 2021 U.S. App. LEXIS 32602, at *3. "An accommodation is reasonable only if it enables the employee to perform the essential functions of the job." *Id.* Indeed, as Defendant argues, "the ADA does not require the employer to eliminate an essential function of the individual's job," *id.*, nor does it require an employer "to hire another employee to perform essential functions of the ADA plaintiff's job," *Medearis v. CVS Pharmacy*, 92 F. Supp. 3d 1294, 1308 (N.D. Ga. 2014) (internal quotation marks omitted). Here, the undisputed evidence shows that the accommodation Plaintiff requested was a permanent full-time helper. Under Eleventh Circuit precedent, such an accommodation is not reasonable.[2]

[2] Defendant argues that it was not "required to identify and implement an accommodation other than providing a full-time helper." (Def. Brief at 15.) Defendant is correct. *See Williams v. Hill*, No. 1:20-CV-0186-JPB-JSA, 2022 U.S. Dist. LEXIS 66048, at *83 (N.D. Ga. Jan. 31, 2022) ("[W]hen a plaintiff fails to demonstrate the existence of a reasonable accommodation, 'the employer's lack of investigation into reasonable accommodation is unimportant.'") (quoting *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000)). Thus, to the extent Plaintiff argues that Defendant should have done so, such argument is unavailing.

Based on the undisputed facts of this case, Plaintiff has not established his disparate treatment or failure to accommodate claims.[3] Accordingly, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** as to Plaintiff's disparate treatment and failure to accommodate claims.

C. **Retaliation**

Next, Plaintiff alleges that he was illegally retaliated against. To prove his ADA retaliation claim, Plaintiff must show that (1) he engaged in protected conduct, (2) he experienced an adverse employment action when or after he engaged in the protected conduct, and (3) his protected conduct was the but-for cause of the adverse employment action. *See Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1158 (11th Cir. 2005). Here, it is undisputed that Plaintiff asked for a full-time helper[4] and that his employment was terminated after he made this request. For this request to satisfy the first prong, however, Plaintiff must have "'had a good faith, objectively reasonable belief that he was entitled to [the requested] accommodations under the ADA.'" *Brown v. Delta Air Lines, Inc.*, No.

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[3] Because Plaintiff has failed to establish a prima facie case of both disability discrimination and failure to accommodate, this Court need not and will not address the remaining two steps in the *McDonnell Douglas* analysis.

[4] Plaintiff also states that he was discharged on the same day he complained to a manager about his "concerns with being discriminated against," that he was discharged "[b]ecause [he] asked for medical help at [the] time of his last injury and for assistance in the dough room," and that he was discharged "due to [his] last injury." (PSMF at 11.) As Defendant points out, however, Plaintiff provides no factual support for these contentions. (DRPF at 1-3.)

1:20-CV-4566-JPB-JSA, 2021 U.S. Dist. LEXIS 115735, at *49-50 (N.D. Ga. Mar. 9, 2021) (quoting *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998)). As this Court previously established, Plaintiff's request for a permanent full-time helper is not a reasonable request. *See* Section III.B., *supra*. Plaintiff also cannot establish the third prong because the undisputed facts indicate that Defendant terminated Plaintiff for insubordination.

Based on the undisputed facts of this case, Plaintiff has not established his retaliation claim. Accordingly, the undersigned **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** as to Plaintiff's retaliation claim.

IV. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment (Doc. 48) be **GRANTED**.

Because this matter presents no other issues referred to Magistrate Judges under Standing Order 18-01, the Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED and DIRECTED this 14th day of July 2022.

J. ELIZABETH McBATH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEON BELGRAVE, **Plaintiff,** **v.** **PUBLIX SUPERMARKET, INC.,** **Defendant.**	**CIVIL ACTION FILE** **NO. 1:20-CV-2146-MHC-JEM**

ORDER

Plaintiff Cleon Belgrave's pro se Amended Complaint is before the Court on the Final Report and Recommendation ("R&R") of the Magistrate Judge [Doc. 56] recommending that Defendant's Motion for Summary Judgment [Doc. 48] be granted. The Order for Service of the R&R [Doc. 57] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that Order. No objections to the R&R were filed within the permitted time period.[1]

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[1] Plaintiff filed a Notice of Appeal of the R&R on July 28, 2022 [Doc. 58]. A magistrate judge's report and recommendation that has not been adopted by the district court is not a final order that is immediately appealable. Perez-Priego v. Alachua Cnty. Clerk of Court, 148 F.3d 1272, 1273 (11th Cir. 1998); see also 28 U.S.C. § 1291 (providing for jurisdiction in the courts of appeals from final decisions of the district courts). Moreover, the district court's subsequent adoption

Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1). Based upon the absence of objections to the R&R, in accordance with 28 U.S.C. § 636(b)(1), the Court has reviewed the R&R for plain error. See United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983). The Court finds no plain error and that the R&R is supported by law.

The Court **APPROVES AND ADOPTS** the Final Report and Recommendation [Doc. 56] as the judgment of the Court. It is hereby **ORDERED** that Defendant's Motion for Summary Judgment [Doc. 48] is **GRANTED**.

The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 9th day of August, 2022.

Mark H. Cohen

MARK H. COHEN
United States District Judge

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of the report and recommendation does not cure the premature notice of appeal. Perez-Priego, 148 F.3d at 1273. Accordingly, the notice of appeal does not divest this Court of jurisdiction over the adoption of the R&R. To the extent Plaintiff's July 28, 2022, filing may pose objections under the guise of "Enumerations of Error" to the Eleventh Circuit, the Court has conducted a de novo review of those portions of the report to which those objections are made, and they are **OVERRULED**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEON BELGRAVE,
Plaintiff(s),

vs.

PUBLIX SUPERMARKET, INC.,
Defendant(s).

CIVIL ACTION FILE

NO. 1:20-CV-2146-MHC-JEM

AMENDED JUDGMENT

This action having come before the court, Honorable Mark H. Cohen, United States District Judge, for consideration of Defendant's Motion for Summary Judgment, and the court having GRANTED said motion, and the claims against the other defendants having been dismissed as frivolous, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant Publix Supermarket, Inc. recover its costs of this action, and the action be, and the same hereby is, **dismissed.**

Dated at Atlanta, Georgia, this 9th day of August, 2022.

KEVIN P. WEIMER
CLERK OF COURT

By: s/Jill Ayers
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 9, 2022
Kevin P. Weimer
Clerk of Court

By: s/Jill Ayers
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLEON BELGRAVE,
Plaintiff(s),

vs.

PUBLIX SUPERMARKET, INC.,
Defendant(s).

CIVIL ACTION FILE

NO. 1:20-CV-2146-MHC-JEM

JUDGMENT

This action having come before the court, Honorable Mark H. Cohen, United States District Judge, for consideration of Defendant's Motion for Summary Judgment, and the court having GRANTED said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby is, **dismissed.**

Dated at Atlanta, Georgia, this 9th day of August, 2022.

KEVIN P. WEIMER
CLERK OF COURT

By: s/Jill Ayers
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 9, 2022
Kevin P. Weimer
Clerk of Court

By: s/Jill Ayers
Deputy Clerk

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13021

CLEON BELGRAVE,

Plaintiff-Appellant,

versus

PUBLIX SUPER MARKET, INC.,

Defendant-Appellee,

PUBLIX ATLANTA BAKERY, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-02146-MHC

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 16, 2023

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: July 28, 2023