APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1382

JEFFREY B. ISRAELITT,
Plaintiff-Appellant,
v.
ENTERPRISE SERVICES, LLC,
Defendant-Appellee,
and
HEWLETT PACKARD; HEWLETT-PACKARD COMPANY; HEWLETT PACKARD ENTERPRISE COMPANY; HP INC.; DXC TECHNOLOGY COMPANY; DXC TECHNOLOGY SERVICES LLC; NETIQ CORPORATION, trading as Micro Focus,
Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Argued: March 9, 2023 Decided: August 16, 2023

Before KING and RICHARDSON, Circuit Judges, and Joseph DAWSON III, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge King and Judge Dawson joined.

ARGUED: Levi S. Zaslow, HIJAZI, ZASLOW & CARROLL, P.A., Bowie, Maryland, for Appellant. James P. Driscoll-MacEachron, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Phoenix, Arizona, for Amicus Curiae. Heather Folsom Crow, KULLMAN LAWFIRM, Tallahassee, Florida, for Appellee. **ON BRIEF:** Allison A. Fish, KULLMAN LAW FIRM, New Orleans, Louisiana, for Appellee. Gwendolyn Young Reams, Acting General Counsel, Jennifer S. Goldstein, Associate General Counsel, Anne Noel Occhialino, Acting Assistant General Counsel, Appellate Litigation Services, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

RICHARDSON, Circuit Judge:

While working an IT position at Enterprise Services LLC, Jeffrey Israelitt says he was discriminated against because he has disability—an arthritic big toe. It's true that his brief stint at the company was mired with issues. The company says the issues arose because Israelitt didn't work well with others, and actually, didn't work much at all. Israelitt says the issues arose because of his alleged disability. After he was fired, he brought claims

under the Americans with Disabilities Act asserting that Enterprise Services discriminated against him because of his toe and retaliated against him for seeking toe-related accommodations.

Those claims failed at various stages before the district court. At the summary judgment stage, the district court held that Israelitt does not have a "disability," and so it rejected every claim except retaliation. For the retaliation claim, the district court held that Enterprise Services's only potentially retaliatory act was firing Israelitt and allowed him to take that claim to trial. But Enterprise Services moved to strike Israelitt's jury-trial demand. And, after reasoning that the Seventh Amendment does not guarantee a jury trial for ADA-retaliation plaintiffs, the district court granted the motion. Following the bench trial, the district court entered judgment for Enterprise Services on the remaining claim because Israelitt failed to prove he was fired because he asked for disability accommodations.

Israelitt primarily raises three issues on appeal. First, he says that the district court misinterpreted the ADA when holding he is not "disabled" by relying on an outdated EEOC Second, he says that the district court misstated the level of harm required for a retaliatory adverse action. Not so. *Burlington Northern*—which the district court applied—makes clear that a retaliation plaintiff must suffer "significant" harm, which comes from a "materially adverse" action. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Third, he relies on a convoluted theory of statutory interpretation to argue that ADA-retaliation plaintiffs are guaranteed a jury trial by the Seventh Amendment. To the contrary, a

straightforward reading of 42 U.S.C. § 1981a(a)(2) says otherwise. So we affirm the district court.

I. Background

Enterprise Services[1] hired Israelitt as a Senior Information Systems Security Architect, or in plain English, a high-level IT worker focused on cybersecurity. He had two main tasks: (1) conduct risk assessments for a product Enterprise Services was pitching to the Department of Homeland Security and (2) prepare a technology roadmap reviewing products in Enterprise Services's market space. But things did not go well during Israelitt's seven-month stint at the company.

The first major issue involved a customer-focused conference hosted by the company. The conference was a platform for Enterprise Services to showcase its products to customers. Customers attended for free. Employees, on the other hand, only attended if needed, in which case they were given passes or allocated funding to pay the registration fees. Israelitt's team—the Cybersecurity Solutions Group—requested that several members, including Israelitt, attend. While that was in the works, an employee working on the event sent Israelitt and a few co-workers a customer code, allowing them to register for free.

After he was registered, Israelitt decided he wanted to stay at the event venue—a downtown D.C. hotel—rather than commute from his home in Glen

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[1] Enterprise Services LLC was spun off from Hewlett Packard during litigation. Because the corporate restructuring is complicated and unimportant for purposes of this appeal, we refer to the defendant as Enterprise Services.

Burnie, Maryland. He thought commuting risked aggravating his toe condition. So he tried to reserve a room, but the hotel was fully booked. He then contacted event staff and obtained a hotel room reserved for handicapped patrons. Around the same time—and possibly because the communications stirred a closer review of his registration—event staff flagged that Israelitt had improperly registered using a code reserved for customers.

This created issues for the employees who used the customer code, as they would "likely [ ] be turned down" from attending the event. J.A. 782. In the fallout, there was a scramble to determine whether the employees could still attend. During that time, Israelitt became adamant about going and began pestering his supervisor, George Romas. There was confusion about how the situation would resolve, and even when it appeared that the co-workers were cleared for attendance, questions remained about Israelitt. Israelitt was not happy, and he escalated things. He leveled accusations that his "medical/disability info" was the reason he could not attend. J.A. 780. But the Enterprise Services employee working on the event told a different story: Israelitt had feigned a disability for preferential treatment from the hotel. *See* J.A. 779 (claiming that Israelitt himself said he "really isn't handicapped but has a sore toe that he feels he can claim as a handicap"). Eventually, Romas stepped in. Although the exact resolution reached is unclear, by the end of a forty-five-minute phone call, Israelitt agreed to not attend the conference and "keep his mouth shut." J.A. 778.

Israelitt's issues didn't end with the conference. He also had more mundane, interpersonal issues. He

often hijacked a daily team call to air his grievances. He would then follow up on those grievances in lengthy emails to Romas. What's worse, he wasn't productive. Romas did his best to account for these shortcomings. He removed Israelitt from the daily calls, which Israelitt had "[n]o problem with." And he transitioned Israelitt to focusing on the technology roadmap, a longer-term project that he could work on under the tutelage of a more senior co-worker.

Things got a bit better, and Israelitt received a decent performance review. Still, interpersonal problems remained. As the review itself noted: Israelitt "has had a challenge adjusting" and "can be aggressive" so he "will be mentored and counseled on more diplomatic ways to communicate." J.A. 745. And his productivity didn't see a massive turnaround either. When Israelitt presented his progress on the technology roadmap a month later, he didn't have much to show.

While Israelitt kept working on the roadmap, a second major issue occurred. This one involved a company trip to Florida. The trip was intended to be a team-building trip for the Cybersecurity Solutions Group and was paid for by billing to the Department of Homeland Security account. During the planning stages, Israelitt became concerned over the amount of walking the trip involved. So—without indicating why in the request—he asked to be listed as an additional driver on the rental vehicle. Soon after, Israelitt was effectively removed from the Department of Homeland Security project (when he was told to no longer bill to that client). Then, he was told that he would no longer go to Florida.

A month later, Romas sent Israelitt a formal performance warning. It gave Israelitt thirty days to "demonstrate immediate and sustained improvement by successfully completing" the technology roadmap. J.A. 623. At the end of the thirty-day period, Israelitt had made no meaningful progress and was fired.

He then sued under the ADA, demanding a jury trial to resolve his claims of discrimination, wrongful discharge, denial of reasonable accommodations, hostile work environment, and retaliation. His complaint describes his disability as "musculoskeletal issues" generally. J.A. 15. Yet the only impairment really at issue is his toe condition. To be precise, Israelitt has hallux rigiditis, which causes "degenerative changes at the metatarsophalangeal joint" and "calcaneal bone spurs" in his right big toe. J.A. 517. Nearly two decades before his employment at Enterprise Services, he twice had surgery to remove bone spurs from the toe. The condition can be painful, and Israelitt used shoe inserts and had a State of Maryland disability parking pass. But aside from the parking pass[2] and shoe inserts, the evidence that Israelitt was impaired by his toe condition was remarkably limited. He offered no evidence of medical care for the condition for over a decade. And he did not use any assistive device to walk. To the contrary, he walked unassisted for exercise several times a week, up to 30 to 45 minutes each time.

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[2] Israelitt's own doctor said that "by strict interpretation of criteria, [Israelitt] does not qualify" for the parking pass. J.A. 831. In any event, we have no reason to think the meaning of disability under the ADA and Maryland law governing the issuance of disability parking passes are coextensive, so neither the parking pass nor the doctor's comment are determinative for purposes of our analysis.

Following discovery, Enterprise Services moved for summary judgment. The district court determined that Israelitt did not have a "disability" under the ADA, so it granted summary judgment on the discrimination, wrongful discharge, failure to accommodate, and hostile work environment claims. This left only the retaliation claim. For that claim, Israelitt alleged four retaliatory, adverse actions: (1) denial of the opportunity to attend the conference; (2) removal from the daily team calls; (3) denial of the opportunity to attend the team-building trip to Florida; and (4) termination. The district court held the non-termination actions were not sufficiently harmful. So those were out. But the district court allowed the claim to survive on the termination adverse action, even though she questioned causation.

With only the retaliation claim remaining, Enterprise Services asked to strike the jury-trial demand. Reasoning that an ADA-retaliation plaintiff has no right to a jury trial, the district court granted that request. After the bench trial, the district court found there was no evidence—aside from the temporal proximity—that the termination was retaliatory. So the district court entered judgment for Enterprise Services on the retaliation claim. Israelitt appealed, and we have jurisdiction.

II. Discussion

The ADA prohibits employers from discriminating "on the basis of disability." 42 U.S.C. § 12112(a). Israelitt brought claims of discrimination, wrongful discharge, failure to accommodate, hostile work environment, and retaliation under the ADA. All of them, except the retaliation claim, require

Israelitt to show that he has a "disability." *See Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015) (discrimination); *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 702 (4th Cir. 2001) (wrongful discharge); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (failure to accommodate); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 177 (4th Cir. 2001) (hostile work environment). Since Israelitt does not have a disability, the court was right to grant summary judgment on every claim except retaliation.

The district court also properly granted judgment on the retaliation claim, but it takes more work to explain why. First, the district court applied the correct level of harm for a retaliatory adverse action to dismiss the retaliation claims based on the conference, the team calls, and the team-building trip. That left only the termination. And, having correctly held that an ADA-retaliation plaintiff has no right to a jury trial, the district court properly found after a bench trial that Israelitt failed to prove that Enterprise Services fired him because he engaged in protected activity.

A. Israelitt does not have a "disability" under the ADA.

The ADA defines "disability" as "a physical or mental impairment that *substantially limits* one or more major life activities."[3] 42 U.S.C. § 12102(1)(A) (emphasis added). And, relevant here, it defines

[3] It includes other definitions as well, *see* § 12102(1)(A); *see also Miller v. Md. Dep't of Nat. Res.*, 813 F. App'x 869, 874 (4th Cir. 2020), but they aren't at issue here.

"major life activities" to "include . . . walking."[4] § 12102(2)(A). The district court held that Israelitt did not have a "disability" under the ADA. Israelitt objects. He argues that the district court—in deciding his toe condition wasn't a disability—applied the wrong standard by citing an outdated EEOC regulation requiring a "significant restriction" on walking. You might wonder whether there is a meaningful distinction between a "significant restriction" and the statute's "substantial limitation." But even to the extent that there is a meaningful distinction, it makes no difference here. We review de novo and under any reasonable interpretation of "disability" under the ADA, Israelitt doesn't have one.

We begin, of course, with the text. A disability requires (1) "a physical or mental impairment" (2) "that substantially limits" (3) "one or more major life activities." § 12102(1)(A). Beginning in 1999, the Supreme Court—in accord with EEOC regulations—narrowly interpreted this statutory text in several ways. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999). One way was by reading "substantially limited" to require that in "performing . . . tasks, an individual must have an impairment that prevents or *severely restricts* the individual from doing [major life] activities." *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (emphasis added). This reading was required, the Supreme Court explained, because the statutory terms "need

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[4] The statute's list of "major life activities" is long. *See* § 12102(2). But the parties—and the district court—focused on whether Israelitt's toe condition substantially limited his ability to walk, so we similarly limit our analysis.

to be interpreted strictly" given the ADA's legislative findings and purposes. *Id.* at 197. This interpretation also tracked an existing EEOC regulation that explained that "substantially limits" meant "significantly restrict[s]" a major life activity. 29 C.F.R. § 1630.2(j)(l)(ii) (2000).

Congress, however, disagreed. Upset by these Supreme Court cases, similar lower court decisions, and the EEOC's regulations, Congress responded. It amended the ADA in 2008. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). Among other changes that are not at issue here, Congress addressed what it means to have an impairment that "substantially limits" an activity. But it did not change the actual statutory language defining "disability" (that is, it kept "substantially limits"). Instead, Congress added a background rule of construction: "substantially limits" should be interpreted in its full breadth. *See* § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."), (B) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.").

You may think this is an odd way to amend a statute. After all, Congress could have changed the operative language defining the term. But just as Congress may define terms, so too may it provide background rules of construction. *See, e.g.*, The Dictionary Act, 1 U.S.C. §§ 1–8 (instructing courts to apply certain rules of grammatical construction to all federal statutes "unless context indicates otherwise"). And Congress exercised that authority here. It

directed, contrary to the Supreme Court's "strict" construction, that we should construe the term "disability" in favor of broad coverage. Yet Congress made coverage broad, not universal. It placed a floor: interpret "disability" only to the "extent permitted by the terms." § 12102(4)(A).

How broad do the terms permit us to go? We haven't decided.[5] But we can find instruction from the Supreme Court. Before adopting the "strict"-construction principle, the Supreme Court reminded us that when interpreting "disability" we are "guided first and foremost by the words of the disability definition itself." *Toyota Motor Mfg.*, 534 U.S. at 196. And it explained that the term "substantially," as used in "substantially limits," suggests the impairment must be "considerable" or "to a large degree." *Id.* at 196–97 (citing Webster's Third New International Dictionary 2280 (1976) & 17 Oxford English Dictionary 66–67 (2d ed. 1989)). This suggestion, the Court explained, "clearly precludes impairments that interfere in only a minor way." *Id.* at 197.

This part of the Court's analysis stands. How could it not? Yes, Congress did away with the *Toyota* Court's insistence that a disability "severely restrict"

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[5] While our Court has applied the ADA's definition of "disability" with its new congressional rule of construction, we have avoided drawing any precise lines. *See Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 330–32 (4th Cir. 2014); *Jacobs*, 780 F.3d at 572–74. We do the same here. Given that Israelitt's toe condition is not a "disability" no matter where the line is, we avoid attempting to draw it with precision. *See Miller*, 813 F. App'x at 875 (finding on appeal that plaintiff was not disabled even where district court looked for an impairment that "significantly restricted").

the plaintiff. *See* § 12101 (Findings and Purposes of Pub. L. 110–325); *see also Summers*, 740 F.3d at 329. But it did not change the statutory requirement that a disability "substantially limit" the plaintiff. Indeed, it reaffirmed our duty to apply that term as written. *See* § 12102(4)(A). And no interpreter looks at the word "substantial" and reasonably concludes it means "minor." So Congress's amendment did not abrogate *Toyota*'s observation that a "minor" limitation is definitionally not a "substantial" one.[6]

And that observation disposes of this case. Because one thing is for sure: Israelitt's impairment is minor, not substantial. He has an arthritic toe joint. His toe might be painful. And, on different facts, an arthritic toe joint might substantially limit *someone's* mobility. But it doesn't substantially limit Israelitt's. *Cf. Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1231 (2023) (Jackson, J., concurring) ("Other cases presenting different allegations and different records may lead to different conclusions."). There is no evidence that Israelitt's toe condition impacts his walking in any non-minor way. In fact, the record reveals quite the opposite: Israelitt often walked at length—unassisted—for both business and pleasure.

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[6] Much of the EEOC's argument rests on its regulation interpreting the amended ADA. That regulation says that "substantially limits" does *not* mean the "disability" must "prevent, or significantly or severely restrict, the individual from performing a major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). It thus requires that there be a meaningful difference between "substantially limits" and "significantly restricts." Whether the EEOC's regulation is reasonable—and thus eligible for deference—is irrelevant here. We decide this case on a premise that the EEOC does not—and could not reasonably—contest: substantial does not mean minor.

So Israelitt does not have a "disability" within the meaning of the ADA. Thus, despite citing an outdated regulation requiring a "significant restriction," the district court was right to reject Israelitt's discrimination, wrongful discharge, failure to accommodate, and hostile work environment claims at summary judgment.

B. Israelitt's only "materially adverse" consequence was his termination.

This leaves only Israelitt's retaliation claim. Employers violate the ADA by retaliating against an employee for engaging in an ADA protected activity. *See* 42 U.S.C. § 12203; *see also Jacobs*, 780 F.3d at 577. Israelitt claims Enterprise Services retaliated against him in several ways for requesting disability accommodations.[7] The district court first held that his requests plausibly constitute protected activity. It then held that most of Enterprise Services's allegedly retaliatory actions—specifically, removing Israelitt from the daily calls and excluding him from the D.C. conference and Florida trip—were not adverse enough to qualify as unlawful retaliation since they did not cause significant harm. Because retaliatory adverse actions must cause significant harm to be actionable, *Burlington N.*, 548 U.S. at 68, the district court properly rejected those adverse actions.[8]

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[7] He cites two alleged accommodation requests: (1) for a hotel room at the D.C. conference and (2) to be listed as a driver for the Florida trip.

[8] *Burlington Northern* dealt with Title VII, rather than ADA, retaliation claims. But "we treat the Title VII context as being 'analogous' to the ADA for this purpose." *Laird v. Fairfax Cnty.,* 978 F.3d 887, 893 n.5 (4th Cir. 2020) (quoting *Adams v.*

The EEOC disagrees. It argues the district court applied the wrong standard. Retaliation claims require showing that a plaintiff suffered a "materially adverse" action. *Id.* The district court did not use the word "material" in its opinion. Nor did it expressly discuss whether Enterprise Services's actions would have "dissuaded a reasonable worker" from taking a protected action—the Supreme Court's standard for a materially adverse action. *Id.* Rather, its analysis "center[ed]" on whether Enterprise Services's conduct created "significant detrimental effects." J.A. 45. And that language, "significant detrimental effect," has more often been used to describe what is required to establish an adverse action in substantive discrimination claims rather than retaliatory discrimination claims. *See, e.g.*, *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007). Since what counts as an adverse action "differs slightly" between those two types of claims, the EEOC argues that the district court erred. *See Laird*, 978 F.3d at 893.

But the district court was correct that Israelitt's discrimination claims failed absent a showing that Enterprise Services's actions caused him some significant detriment. *See Laird*, 978 F.3d at 893. We have been clear that, whatever the differences in the adverse action standards for substantive and retaliation claims, "both claims share a common element: an adverse action, meaning some action that results in some significant detriment to the employee." *Id.* (cleaned up). So if Israelitt could not show that any of the challenged actions resulted in

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Anne Arundel Cnty. Pub. Sch., 789 F.3d 422, 431 (4th Cir. 2015)).

significant harm, he could not make out either type of claim and the district court was justified in merging the analysis. *See* J.A. 45 ("As outlined above in [the substantive discrimination section] Plaintiff has failed to demonstrate that [the challenged actions] are adverse actions.").

And *Laird*'s holding that both claims require showing a significant harm was not, as the EEOC implies, drawn from thin air. It is firmly rooted in *Burlington Northern*, which makes plain that—while the standard for retaliatory and substantive adverse actions differ—retaliatory adverse actions must cause significant harm. In that case, the Court answered two questions about retaliation claims: (1) Is "actionable retaliation [confined] to activity that affects the terms and conditions of employment?" and (2) "[H]ow harmful must the adverse actions be[ ]?" *Burlington N.*, 548 U.S. at 57. On the first question, the answer is no; this answer distinguishes retaliation claims from substantive ones. On the second, more relevant question, the answer is it must cause a "significant" harm to the employee; this answer connects the two claims. *See id.* at 68; *Laird*, 978 F.3d at 893.

True, the Supreme Court placed the significant-harm requirement in the broader package of the "materially adverse" standard. It required that the retaliatory action be *materially* adverse. *Burlington N.*, 548 U.S. at 57. And it then explained that "materially adverse" means adverse actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.*

But how harmful is an action that would "dissuade a reasonable worker"? "[P]etty slights,

minor annoyances, and simple lack of good manners" won't do it. *Id.* at 68. Instead—according to the Supreme Court—the action must cause objectively "significant" harm. *See id.* at 68 ("We speak of *material* adversity . . . to separate significant from trivial harms."). So, whatever you call the "materiality" standard, it requires significant harm.[9]

The district court recognized all this. It did not require the harm to affect a condition of employment. J.A. 45 ("What qualifies as an adverse action *differs slightly* in the retaliation and unlawful

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[9] The EEOC responds by citing several Fourth Circuit cases adopting the "materially adverse" standard. *See* EEOC Br. at 13–15 (citing *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 n.2 (4th Cir. 2007); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 342–43 (4th Cir. 2008); *Perkins v. Int'l Paper Co.*, 936 F.3d 196, 213 (4th Cir. 2019); *Scurlock-Ferguson v. City of Durham*, 154 F. App'x 390 (4th Cir. 2015)). Fair enough, those cases *do* apply the "materially adverse" standard. But, crucially, those cases don't say that the "materially adverse" standard does not require "significant" harm. And they couldn't say that under the plain meaning of *Burlington Northern*.

The EEOC tried again in a Rule 28(j) letter citing *Laurent-Workman v. Wormuth*, 54 F.4th 201, 212–18 (4th Cir. 2022). It argues *Laurent-Workman* "illustrates that, after *Burlington Northern*, the adverse action standards for retaliation claims and discrimination claims are different." Again, true, but *Laurent-Workman*—like *Lettieri*, *Darveau*, and *Schurlock-Ferguson*—does not say the new "materially adverse" standard does not require "significant" harm. To the contrary, *Laurent-Workman* acknowledges the significance requirement. *See* 54 F.4th at 213 (noting that the "materially adverse" standard "separates minor harms from those that threaten to chill employees from opposing unlawful discrimination"); *see also id.* at 217 ("The severity and frequency of hostility are important factors to consider when determining whether the circumstances would dissuade a reasonable employee from opposing discrimination . . . .").

discrimination contexts . . . in terms of the *scope of actions covered* (i.e. whether the acts and harm occurred in the workplace or not)." (emphasis added)) But—consistent with *Burlington Northern* and after citing *Laird*—the district court did require "significant" harm. J.A. 45. It may not have specifically used the term "materially adverse." But by looking for "significant" harm that could have existed beyond the scope of the workplace, the district court stayed true to the "materially adverse" standard. Because Israelitt could not show significant harm resulting from the nontermination actions, those bases for the retaliation claim failed.[10]

C. Israelitt did not have a jury-trial right for his ADA-retaliation claim.

All that remains is the retaliation claim based on Israelitt's termination. Israelitt wanted to present this claim to a jury. The right to a jury trial can stem from a statute itself. But the ADA itself provides no right to a jury trial. That, however, doesn't end the question. When the statute provides no such right,

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[10] While the EEOC only challenges the standard applied, Israelitt also argues that under the proper standard, his alleged adverse actions were sufficiently adverse. *See* Appellant's Br. at 52–53. Again, those adverse actions include (1) denial of the opportunity to attend the D.C. conference; (2) removal from the daily calls; and (3) denial of the opportunity to go on the trip to Florida. Would these actions dissuade a reasonable worker from making a charge of discrimination? No. Israelitt himself was content with being removed from the daily call when Romas proposed it. And while he may have genuinely been upset about missing the D.C. conference and Florida trip, that's the wrong question. We review the harm from an objective standard. *Burlington N.*, 548 U.S. at 68–69. Viewed objectively, missing the work conference and trip did not cause Israelitt "significant" harm.

the Seventh Amendment might: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Seventh Amendment's guarantee has been extended "to all suits, whether at common law or arising under federal legislation, where *legal* rights are involved." *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 828 (4th Cir. 1994). To determine whether the Seventh Amendment provides a jury trial, we conduct a two-part inquiry that first compares "the nature of the issues involved and the statutory action" "to 18th–century actions prior to the merger of the courts of law and equity," and then, "more importantly," considers whether "the remedy available" is "legal or equitable in nature." *Id.* at 829 (citing *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990)).

The Fourth Circuit has held that similar statutory actions are of the "nature" that "could be brought in either courts of law or courts of equity." *See id.* (reviewing disability-discrimination claims under the Rehabilitation Act for a jury-trial right). So the first inquiry is inconclusive. *See id.*; *Terry*, 494 U.S. at 570. That means the right to a jury trial turns on the answer to the second, "more important[ ]" question: whether legal remedies are available. *See Pandazides*, 13 F.3d at 829; *Terry*, 494 U.S. at 570, 573–74. Every circuit court to answer that question, including our circuit in unpublished opinions, has held that they are not. *See Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1269–70 (9th Cir. 2009); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 966 (7th Cir. 2004); *Tucker v. Shulkin*, No. 20-1317(L), 2020 WL 4664805, at *1 (3d. Cir. July 24, 2020); *Rhoads v. F.D.I.C.*, 94 F. App'x 187, 188 (4th

Cir. 2004); *Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889, 890 (4th Cir. 2004). Still, Israelitt and the EEOC argue that legal damages are available. To understand their argument, we must wade through the tangle of statutes that decides what remedies are available to ADA-retaliation plaintiffs.

We start with § 12203(c). It gives the ADA's remedies for retaliatory conduct. But it doesn't actually list remedies. Instead, for retaliation in the employment context, it refers readers to remedies "available under" 42 U.S.C. § 12117. *See* § 12203(c). Section 12117 is the remedies provision for 42 U.S.C. § 12112, which prohibits substantive ADA discrimination in employment. But while § 12117 mentions remedies, it doesn't actually provide them; it instead points to the remedies "set forth" in 42 U.S.C. § 2000e-5. *See* § 12117(a). Section 2000e-5 is the remedies provision for Title VII discrimination claims. Section 2000e-5 does, at last, list remedies, but only equitable ones. *See* § 2000e-5(g)(1). So, at the end of this statutory chain, ADA-retaliation plaintiffs are entitled to equitable remedies.

That's a lot to swallow. Walk through it again, step by step, with the statutory language:

1. Section 12203(a)—the ADA's antiretaliation section—provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." § 12203(a). But

§ 12203 does not give remedies, instead: "The remedies and procedures available under section 12117 . . . of this title shall be available . . . ." § 12203(c).

2. Section 12117 doesn't give us remedies either; it's a passthrough, which provides: "The powers, remedies, and procedures set forth in section[ ] . . . 2000e-5 . . . of this title shall be the powers, remedies, and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment." § 12117(a).

3. Section 2000e-5 finally gives real answers: "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." § 2000e-5(g)(1).

Again, the statutory chain bottoms out in the equitable remedies listed in § 2000e-5.

But that isn't the end of our story. We must also consider 42 U.S.C. § 1981a. Section 1981a expands remedies for certain "Civil rights" and "Disability" plaintiffs, including some Title VII and ADA plaintiffs. Those plaintiffs—the statute says—"may recover compensatory and punitive damages." § 1981a(a)(1), (2). But legal damages are not available to ADA-retaliation plaintiffs under § 1981a

either. Section 1981a(a)(2)—in listing the types of "Disability" plaintiffs entitled to legal damages—does not list ADA-retaliation actions. *See* § 1981a(a)(2). Instead, the statute says that an ADA plaintiff "may recover compensatory and punitive damages" for certain substantive discrimination and failure to accommodate claims. *See id.* ("In an action brought by a complaining party under . . . [§ 12117(a)] . . . against a respondent who engaged in unlawful intentional discrimination . . . , or who violated the requirements of [§ 12112(b)(5)] concerning the provision of a reasonable accommodation, . . . the complaining party may recover compensatory and punitive damages . . . ."); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (In § 1981a "Congress provided for additional remedies . . . for *certain classes* of Title VII and ADA violations." (emphasis added)).

Yet Israelitt and the EEOC try a different argument. They rely on a strained theory of statutory interpretation to say that—even though it does not list retaliation claims—§ 1981a(a)(2) still provides legal damages for ADA-retaliation plaintiffs. How so? Recall that § 12203 refers readers to remedies "available under" § 12117 and, in turn, those "set forth" in § 2000e-5. And § 1981a allows for § 12117 plaintiffs to recover legal damages. So, Israelitt and the EEOC argue, the right to recover legal damages meanders its way back through the statutory chain to ADA-retaliation plaintiffs.

What about the fact that § 1981a(a)(2) does not list ADA-retaliation plaintiffs—those asserting claims under § 12203—as among the ADA plaintiffs who may receive legal damages? Israelitt and the EEOC say that's no problem. In their view, it is "of no

consequence when § 1981[a] is read in conjunction with the relevant provisions of the ADA." *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005). That's because, they argue, "the remedies available for retaliation under the ADA are commensurate with those available under [§ 12117]," so "it was unnecessary for Congress to separately mention retaliation in § 1981[a]." *Id.*; *see also Rumler v. Dep't of Corr.,* 546 F. Supp. 2d 1334, 1343 (M.D. Fla. 2008) ("When Congress expanded the relief available under § 12117 to include legal damages, it also expanded the relief available under § 12203 by reference."). In other words, it "would have been redundant" for Congress to list § 12203 in § 1981a(a)(2) because § 12203 plaintiffs "could avail themselves of the same remedies as plaintiffs claiming discrimination under [§ 12117]." *Rumler*, 546 F. Supp. 2d at 1343.

We reject Israelitt and the EEOC's argument. Their logic gets it backwards. ADA-retaliation plaintiffs get the remedies "available under" § 12117. Yet compensatory and punitive damages are not a remedy "under" § 12117. Substantive-discrimination plaintiffs suing under § 12117 can get legal damages. But that is only because § 1981a(a)(2) makes compensatory and punitive damages available to them. Conversely, since § 1981a(a)(2) does not list ADA-retaliation plaintiffs, they cannot get legal damages under that section.

True, § 2000e-5 also says that the equitable remedies provided in subsection (g)(1) are available "[i]n addition to any relief authorized by section 1981a." § 2000e-5(e)(3)(B). But, read in its proper context, subsection (e)(3)(B) does not "set forth" remedies at all. And, even if subsection (e)(3)(B) did

"set forth" remedies, that would require we ask: What "relief [is] authorized" by § 1981a? The answer to that question is § 1981a authorizes compensatory and punitive damages for "certain classes" of disability plaintiffs. *See Kolstad*, 527 U.S. at 534. Namely, ADA plaintiffs suing for either substantive discrimination or a failure to accommodate. § 1981a(a)(2). To look past the statutory silence and inject legal damages into § 12203 requires a statutory sleight of hand that "contravenes the basic tenets of statutory construction." *Alvarado*, 588 F.3d at 1268. There's simply no way around it: § 1981a(a)(2) provides legal damages only for specific ADA claims. And "ADA retaliation is not on the list." *Id.* at 1270.

Our holding that ADA-retaliation plaintiffs cannot recover legal damages places us in good company. The circuit courts (where they've spoken) have unanimously rejected Israelitt and the EEOC's reading. *See Alvarado*, 588 F.3d at 1270; *Kramer*, 355 F.3d at 965 (noting that "a meticulous tracing of the language of this tangle of interrelated statutes reveals no basis for plaintiff's claim of compensatory and punitive damages in his ADA retaliation claim" (quoting *Brown v. City of Lee's Summit*, No. 98-0438-CV-W-2, 1999 WL 827768, at *3 (W.D. Mo. June 1, 1999))). Likewise, we've reached the same reading in unpublished opinions. *See Rhoads*, 94 F. App'x at 188; *Bowles*, 100 F. App'x at 890. We now adopt our reading in *Rhoads* and *Bowles* in a published opinion. ADA-retaliation plaintiffs are not entitled to legal damages. That means, under the inquiry from *Terry*, ADA-retaliation plaintiffs are not guaranteed a jury trial by the Seventh Amendment. *Cf.* 494 U.S. at 573–74. And the ADA itself doesn't provide that right

either. Accordingly, Israelitt had no right to present his retaliation claim to a jury.

D. Israelitt did not prove causation at trial.

Israelitt makes one last-ditch effort: The district court erred in holding that he did not prove causation at trial. His challenge boils down to an argument that the district court improperly considered an exhibit that was not admitted into evidence during trial. This challenge fails.

Israelitt says the district court, in its final order following the bench trial, improperly relied on a performance review that Romas prepared. According to him, the district court used the performance review, which was included on Enterprise Services's exhibit list but never admitted into evidence, "to bolster its conclusion that Mr. Israelitt was a poor performer." Appellant's Br. at 53. Further, he says that performance review could not have been admitted into evidence because "it could not be authenticated or shepherded into evidence." *Id.* at 54.

In the final order, the district court determined that even if Israelitt engaged in protected activity, there was no causation. To the district court, the facts elicited at trial "unquestionably demonstrate[d] that his requests for accommodation had nothing to do with" his exclusion from the D.C. conference, the Florida trip, or the daily calls. Instead, the evidence "unequivocally" showed that Israelitt was "terminated because he was an incompatible teammate" who "failed to make any meaningful progress on tasks that were assigned to him." J.A. 77. Those factual findings receive clear-error review. *See* Fed. Rule Civ. P. 52(a). While it's true the district court cited an exhibit that was not admitted at trial,

that was one of many pieces of evidence the district court relied on in reaching its determination. Even if the performance review was inadmissible evidence the court should not have considered, we cannot say that the district court clearly erred in holding that Israelitt could not establish causation.

* * *

Israelitt's claims fail. First, while the district court did cite an outdated EEOC regulation when determining he is not disabled within the meaning of the ADA, he is not disabled under any reasonable reading of the ADA. So that disposes of every claim except retaliation. Second, *Burlington Northern* makes clear that only "significant" harm to an employee constitutes retaliatory adverse action. And only his termination met that threshold. Third, a straightforward reading of § 1981a(a)(2) shows that an ADA-retaliation plaintiff is not entitled to legal damages and therefore not guaranteed a jury trial by the Seventh Amendment. To close it out, the district court got it right at the bench trial. Israelitt's termination was not in retaliation for any protected activity. Accordingly, the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFFREY ISRAELITT, Plaintiff, v. ENTERPRISE SERVICES LLC, Defendant.	Civil Case No. 18-cv-01454-SAG [Filed: 3/7/2022]

MEMORANDUM OF DECISION

Plaintiff Jeffrey B. Israelitt ("Plaintiff") claims that his former employer, Enterprise Services LLC ("Defendant" or "Enterprise"), retaliated against him for requesting several accommodations for his claimed disability in violation of the Americans with Disabilities Act ("ADA"). This Court held a bench trial on February 14 and 15, 2022.

This Court has heard and considered all the evidence, both testimonial and documentary. For the following reasons, that evidence does not support Plaintiff's claim of unlawful retaliation. Accordingly, this Court finds in favor of Defendant.

I. Findings of Fact

This Court finds the facts stated herein based on its evaluation of the evidence, including the credibility of the witnesses, and the inferences that the Court has found reasonable to draw from the evidence.

1. Mr. Israelitt was employed by Hewlett Packard ("HP"), a predecessor entity of Enterprise, from August 5, 2013, until his separation on February 14, 2014. ECF 99 ¶ 1 (Stipulation of Facts).

2. George Romas, HP's Chief Engineer and Technical Director of the Cybersecurity practice for the U.S. Public Sector, interviewed and hired Mr. Israelitt for the position of Senior Information Systems Security Architect V. *Id.* ¶ 2.

3. Mr. Israelitt held that position throughout his employment and earned an annual salary of $180,000, a monthly salary of $15,000, and a semi-monthly salary of $7,500. *Id.* ¶ 3.

4. Mr. Romas was his assigned manager throughout his employment. *Id.* ¶ 2.

a. Mr. Israelitt's Medical Condition

5. Mr. Israelitt suffers from a medical condition called hallux rigiditis, marked by degenerative changes in his right first metatarsophalangeal joint and right great toe. Pl's Trial Ex. 5 at 3 (Medical Records and Disability Placards).

6. This condition limits Mr. Israelitt's range of motion in his great right toe and, at times, causes him significant pain. *Id.*; Israelitt Testimony, Feb. 14, 2022.

7. Driving—especially in stop-and-go city traffic—can cause Mr. Israelitt significant pain. Israelitt Testimony, Feb. 14, 2022.

8. Mr. Israelitt has State of Maryland disability placards because of his condition. Pl's Trial Ex. 5 at 4-9 (Medical Records and Disability Placards).

b. Mr. Israelitt's Interview with HP

9. During Mr. Romas's telephonic interview of Mr. Israelitt, Mr. Romas did not inquire about any disability or medical conditions. Romas Testimony, Feb. 15, 2022.

10. Mr. Israelitt also told Mr. Romas that he was not familiar with many of HP's products and services. Israelitt Testimony, Feb. 14, 2022.

11. Mr. Romas suggested that Mr. Israelitt could attend the HP Protect conference, where he could gain a better understanding of HP's product offerings. *Id.*

12. HP hired Mr. Israelitt, and he started on August 5, 2022. Pl's Trial Ex. 2 (Offer Letter).

c. Mr. Israelitt's Employment at HP

13. Throughout his employment at HP, Mr. Israelitt worked remotely from his home, which is located in Glen Burnie, Maryland. ECF 99 ¶ 4 (Stipulation of Facts).

14. Mr. Israelitt was part of the Cybersecurity Solutions Group ("CSG") and worked on CSG's Engineering and Architecture team. Israelitt Testimony, Feb. 14, 2022.

15. Specifically, Mr. Israelitt was an Enterprise Architect working on the Department of Homeland Security's ("DHS") Continuous

Diagnostics and Mitigation ("CDM") offering. *Id.*

16. Upon his hiring, Mr. Israelitt was assigned to two main projects.

17. First, Mr. Israelitt was assigned to work on a "Requirements Traceability Matrix" ("RTM") to provide a risk management framework related to DHS's cybersecurity requirements. Romas Testimony, Feb. 15, 2022.

18. Second, Mr. Israelitt was assigned to work on a review of different cybersecurity products that HP customers were using so that the team could be better prepared to bid on the DHS CDM project. *Id.*

19. The second project was referred to as a "Technology Roadmap." *Id.*

d. HP Protect Conference

20. Near the end of August, 2013, HP began determining which of its employees would attend a conference called HP Protect 2013. Israelitt Testimony, Feb. 14, 2022; Pl's Trial Ex. 10 (Aug. 30, 2013 Email Chain).

21. After initial confusion about how many CSG members would be able to attend the conference, Todd Helfrich sent Mr. Israelitt and other team members a registration code to complete their registrations, but the code was one that had been reserved for HP customers, not employees. Pl's Trial Ex. 15 (Sept. 10-13, 2013 Email Chain).

22. Mr. Israelitt registered to attend the conference using the code he received from Mr. Helfrich. Pl's Trial Ex. 13 (HP Protect 2013 Registration).

23. Mr. Israelitt also arranged to stay at the event hotel in Washington, DC, so that he would not have to commute from his house in Glen Burnie, Maryland and risk severe toe pain due to the drive each day. Israelitt Testimony, Feb. 14, 2022; Pl's Trial Ex. 14 (Sept. 6, 2013 Email); Pl's Trial Ex. 16 (Sept. 13, 2013 Email).

24. Mr. Israelitt requested a room for persons with disabilities and coordinated with HP Protect event staff to reserve one. *Id.*

25. Mr. Israelitt used his personal credit card to reserve the room and was intending to pay for it with his own money. Israelitt Testimony, Feb. 14, 2022; Pl's Trial Ex. 15 (Sept. 10-13, 2013 Email Chain).

26. On September 10, 2013, Mr. Israelitt received an email that his conference registration was invalid because he had used a customer registration code but was an HP employee. Pl's Trial Ex. 15 (Sept. 10-13, 2013 Email Chain).

27. Mr. Israelitt sent this email to Kevin Doty, a business consultant on the CSG team, who then forwarded the message to Todd Helfrich an Enterprise Account Executive. *Id.*

28. Mr. Helfrich responded that "[a]nyone who used the code and registered with their HP

email address likely will be turned down. I have some damage control that I need to do. Gail, George and Anil should be good." *Id.*

29. After Mr. Israelitt requested clarification from Mr. Doty on Mr. Helfrich's response, Mr. Doty suggested that Mr. Israelitt coordinate with Mr. Romas regarding his registration issues. *Id.*

30. Mr. Israelitt responded stating, in part, that "it appears that this information (medical/disability info that I asked you not to share with anyone) which you and I discussed found its way to Todd, and has in itself become the reason I can't go now." *Id.*

31. Mr. Doty forwarded this response to Mr. Romas, who responded "after about a 45 minute conversation with [Mr. Israelitt] at around 7pm last night, he said he would 'keep his mouth shut' about this, not attend HP Protect, and hoped that the rest of us would not have any trouble attending." *Id.*

32. Plaintiff ultimately did not attend HP Protect 2013. Israelitt Testimony, Feb. 14, 2022.

e. Mr. Israelitt's Performance and Compatibility Issues

33. Throughout September 2013, Mr. Israelitt began to have significant performance and interpersonal issues. Romas Testimony, Feb. 15, 2022.

34. Mr. Israelitt immediately struggled to adjust to the "agile method" employed by the CSG team. *Id.*

35. The agile method is a "fail fast" method of making incremental progress on a project and solving problems "as you go" rather than all at once. *Id.*

36. As part of the agile method, teams would conduct daily "scrum" calls designed to last 15-30 minutes to discuss short-term "sprint" projects on which they were working. *Id.*

37. Mr. Israelitt had experience with the agile method from prior employment. Israelitt Testimony, Feb. 14, 2002.

38. However, Mr. Romas began to receive complaints from coworkers that Mr. Israelitt was "appropriating" scrum meetings and extending them well beyond the allotted 15-30 minutes, often unnecessarily causing them to last for up to an hour. Romas Testimony, Feb. 15, 2022.

39. Moreover, Mr. Romas testified that Mr. Israelitt had frequent conflicts with his co-workers. *Id.*

40. Those conflicts were documented by contemporaneous emails. For example, on September 6, 2013, just about a month after starting his employment, Mr. Israelitt emailed Mr. Romas complaining that other team members were acting in a way that was "unprofessional, demeaning, humiliating, and dismissive" and asking Mr. Romas to help "put an end to the negative manner in which Gail and Shaundrae treat others[.]" Def's Trial Ex. 14 (Sept. 6, 2013 Email Chain).

41. Mr. Romas testified that Mr. Israelitt frequently raised these kinds of complaints. Romas Testimony, Feb. 15, 2022.

42. On September 25, 2013, Mr. Israelitt again emailedMr. Romas saying, "Jess is beating up on Michael F. and me about what appears to be a lack of common understanding about DC2 strategy an[d] more on the team call[.]" Def's Trial Ex. 23 (Sept. 25, 2013 Email).

43. On September 29, 2013, Mr. Israelitt emailed Mr. Romas with two pages' worth of complaints about his colleagues and, ultimately, asked Mr. Romas to "assist here to help put an end to the negative manner in which Jess and Kevin treat others." Def's Trial Ex. 25 (Sept. 29, 2013 Email).

44. Mr. Romas testified that he spoke to other team members about Mr. Israelitt's complaints and that they disagreed with Mr. Israelitt's characterizations. Romas Testimony, Feb. 15, 2022.

45. Mr. Romas also testified that he had managed the team for more than two years before Mr. Israelitt was hired and that there were no personnel or compatibility issues before Mr. Israelitt joined the team. *Id.*

46. In late September 2013, Mr. Romas suggested that Mr. Israelitt not attend the daily scrum calls and that he focus exclusively on the RTM project. Def's Trial Ex. 27 (Sept. 30, 2013 Email Chain).

47. Mr. Romas testified that Mr. Israelitt was removed from the scrum calls so that he could focus on a single project and avoid getting bogged down and distracted by the daily calls. Romas Testimony, Feb. 15, 2022; *see* Def's Trial Ex. 27 (Sept. 30, 2013 Email Chain).

48. According to Mr. Israelitt, however, he was removed from the scrum calls because he attempted to attend the HP Protect conference and intended to stay in a handicap accessible room during it. Israelitt Testimony, Feb. 14, 2022.

49. Mr. Romas also asked Jeff Kalibjian, a Distinguished Technologist at HP, to mentor Mr. Israelitt. Romas Testimony, Feb. 15, 2022.

50. According to Mr. Romas, Mr. Israelitt's removal from the daily scrum calls substantially improved the efficiency of the meetings. *Id.*

51. In October 2013, Mr. Israelitt received a performance review from Mr. Romas. Def's Trial Ex. 2 (Performance Review).

52. Although the numerical scores Mr. Israelitt received ranged from average to above average, Mr. Romas's comments clearly indicated that Mr. Israelitt was not interacting with his colleagues in a respectful or professional manner. *Id.*

53. Mr. Romas wrote, "Jeff has had a challenge adjusting to the rapid Agile Integration pace of the team, so there has been some

disruption and miscommunication between Jeff and our extended team[;]" "Jeff can be aggressive, like some of the other team members, but I think it is perceived as being confrontational. He will be mentored and counciled [sic] on more diplomatic ways to communicate, and recommended to attend effective communications training." *Id.*

54. Mr. Romas also made clear that Mr. Israelitt's difficulties with his coworkers were impacting his productivity: "he's been slow to adapt to the pace of the team, so has not been as productive in achieving goals." *Id.*

55. Mr. Romas testified that Mr. Israelitt's performance did not meet Mr. Romas's expectations but that he gave Mr. Israelitt decent scores in order to try to motivate him to improve. Romas Testimony, Feb. 15, 2022.

56. Although Mr. Israelitt's RTM project was a long-term project, Mr. Romas asked him to provide weekly progress reports. Def's Trial Ex. 27 (Sept. 30, 2013 Email Chain).

57. In late-October, Mr. Israelitt presented on his progress in a scrum meeting. Romas Testimony, Feb. 15, 2022; Def's Trial Ex. 30 (Oct. 17, 2013 Email Chain).

58. Mr. Romas did not attend, but he testified that he spoke to others in attendance and reviewed Mr. Israelitt's slides. According to Mr. Romas, the presentation revealed that Mr. Israelitt had made little or no substantive progress on the project and was

merely restating materials that were publicly available on the Department of Defense website, rather than providing any substantive analysis or recommendations. Romas Testimony, Feb. 15, 2022.

59. Mr. Doty also questioned how Mr. Israelitt's presentation "related to the analysis for the Task areas 5-15 requirements" and asked that he "explain what you have planned for the actual task 5-15 requirements analysis." Def's Trial Ex. 43 (Oct. 22, 2014 Email Chain).

60. Notwithstanding Mr. Israelitt's performance issues, Mr. Romas recognized him on November 22, 2013 for his "Achievement & Contribution" as part of a group commendation praising the team's hard work and diligence.[1] Pl's Trial Ex. 29 (Nov. 22, 2013 Recognition).

61. On December 3, 2013, Mr. Israelitt sent Mr. Romas a "draft write-up on the Technology Roadmap task." Def's Trial Ex. 33 (Dec. 3, 2013 Email).

62. According to Mr. Israelitt, however, this document was not a "draft" but a "Project Initiation Document" discussing the project's large scope. Israelitt Testimony, Feb. 14, 2022.

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[1] On September 6, 2013, Jess May, the CSG practice lead in charge of leading CSG development initiatives, had issued a similar team-focused recognition in the category of "Trust & Respect." Pl's Trial Ex. 12 (Sept. 5, 2013 Recognition).

63. Mr. Romas responded that he was looking for more "meat" and that the document was not sufficient. Romas Testimony, Feb. 15, 2022.

64. Mr. Romas testified that he spoke with Mr. Israelitt several times and told him that in the roadmap he was looking for a "quick analysis" of products and their positive or negative ratings to provide a general idea of products in the market to use once the task orders came out. *Id.*

65. Mr. Kalibjian also emailed Mr. Romas on December 20, 2013, attempting to clarify the scope of the project to make sure he and Mr. Israelitt were not "over analyzing or confusing what you want here." Def's Trial Ex. 45 (Dec. 20-21, 2013 Email).

66. Mr. Kalibjian wrote, "I think what you want is: 'an examination of current products in 5-15 with quick analysis on capabilities /requirements and future features (i.e. where market is going) with strategy on how/when we introduce into the HP CDM Solution Offering[.]'" *Id.*

67. 67. Mr. Romas responded, "Yes, that's a good clarification![,]" and Mr. Kalibjian forwarded the email chain to Mr. Israelitt the following day. *Id.*

f. Florida Team-Building Meeting

68. Around the same time, the CSG team was planning a strategic development and team-building meeting in St. Augustine, Florida,

scheduled for early January 2014. Israelitt Testimony, Feb. 14, 2022.

69. Mr. Israelitt grew concerned about the amount of walking required on the trip after Ms. May provided maps of the city and the locations at which events and activities were to take place. *Id.*

70. He raised these concerns with Mr. Romas in mid-December. *Id.*

71. As a solution, Mr. Israelitt told Mr. Romas that he wanted to be listed as an additional driver on one of the rental vehicles. *Id.*

72. Mr. Romas told Mr. Israelitt he would inquire about this request but did not affirmatively suggest any alternative solutions. *Id.*

73. On December 19, 2013, Ms. May told Mr. Israelitt to stop billing his time to the DHS account code. Def's. Trial Ex. 35 (Dec. 19, 2013 Email).

74. Mr. Romas testified that this decision was Ms. May's, not his. Romas Testimony, Feb. 15, 2022.

75. Accordingly, Mr. Romas told Mr. Israelitt that he would no longer attend the trip. Israelitt Testimony, Feb. 14, 2022.

76. Mr. Israelitt interpreted his exclusion from the trip as retaliation for his request to be listed as an alternative driver. *Id.*

g. Performance Warning and Termination

77. On January 5, 2014, Mr. Romas filled out a Performance Coaching Template. Def's Trial Ex. 36 (Performance Coaching Template).

78. In it, Mr. Romas discussed Mr. Israelitt's inability to adapt to the "2-week integration sprint[]" format, and his issues related to the HP Protect conference. *Id.*

79. With respect to the HP Protect conference, Mr. Romas wrote: "[Mr. Israelitt], and others on the team, had trouble registering for this event. He spent a lot of wasted time with several team members, including myself, complaining about the process. He also attempted to get a hotel room with an unsubstantiated handicapped status (concerning an injured toe), which led to additional wasted time spent arguing with hotel and HP Protect planning personnel. At this time (2 days before the conference started) directed [sic] him not to attend because it was unsure whether he was registered or if he would be reimbursed for a hotel room . . . . Jeff has not been able to get over this issue, and still brings it up periodically." *Id.*

80. He also explained that, "In an attempt to make Jeff a collaborative and productive member of the team, I assigned him several tasks to either work on his own or work with other teammates . . . In every case, he provided little to no value, either not producing deliverables (which had to then be

assigned to other team members), or producing irrelevant deliverables[.]" *Id.*

81. With respect to the Technology Roadmap specifically, Mr. Romas explained: "After several explanations reiterating what I expected from this roadmap task, Jeff still did not understand what to do. On [December 15, 2013], I provided him explicit instructions in an email, but a month later he still has not produced any deliverables. He claims that he is continually researching the issue, but I have seen no evidence of his work. For the past 3 months, I have also had weekly meetings with Jeff and my two other senior architects/engineers with the hope that my management and their mentoring would help Jeff become a productive team member, to no avail." *Id.*

82. On January 13, 2014, the first business day after the end of the Florida trip, Mr. Romas sent a performance warning to Mr. Israelitt. Pl's Trial Ex. 35 (Performance Warning).

83. The performance warning stated that Mr. Israelitt was "failing to meet what is expected" of his position in the areas of "productivity, initiative and teamwork." *Id.*

84. More specifically, it noted Mr. Israelitt's "[r]efusal to accept tasking from the Scrum Master[;] [f]ail[ure] to produce a requirements Traceability Matrix (RTM) for the DHS CDM program[;] [f]ail[ure] to provide the research and analysis of Network Access Control (NAC) products[;] and [failure

to] produce a Technology Roadmap for DHS CDM Task Areas 5 through 15[.]" *Id.*

85. The performance warning also stated that: "For the next 30 days, from January 13, 2014 through February 12, 2014, you are required to demonstrate immediate and sustained improvement by successfully completing the Technology Roadmap for Task Areas 5 through 15." *Id.*

86. Mr. Romas spoke with Mr. Israelitt about the warning, and, according to Mr. Romas, Mr. Israelitt disagreed with it, was very upset about it, and refused to sign it. Romas Testimony, Feb. 15, 2022; Def's Trial Ex. 39 (Jan. 16, 2014 Email Chain).

87. Mr. Israelitt also asked for help completing the Technology Roadmap, but Mr. Romas told him that he needed to work on the project himself and that he could use Mr. Kalibjian for peer review. Romas Testimony, Feb. 15, 2022; Def's Trial Ex. 39 (Jan. 16, 2014 Email Chain).

88. Mr. Israelitt viewed this as an impossible task, designed to set him up for failure. Israelitt Testimony, Feb. 14, 2022.

89. In Mr. Israelitt's view, Mr. Romas was asking for a comprehensive review of hundreds of products (which meant the deliverable Mr. Romas was asking for was, in fact, a "Products Roadmap" not a "Technology Roadmap") which would have taken a group of people several months and was simply

impossible for one person to complete in a single month. Israelitt Testimony, Feb. 14, 2022.

90. Mr. Romas assured Mr. Israelitt, however, that he was only looking for an outline of "the top 3-5 vendors/products within each task area." Def's Trial Ex. 37 (Technology Roadmap Task).

91. Mr. Romas even prepared a document for Mr. Israelitt specifically describing the deliverable he was looking for. *Id.*

92. That document stated: "Each vendor/product should have a description of the offering and how it applies to the specific task area. Independent evaluations . . . should be included, in general describing pros and cons and comparisons of products within the same task area." *Id.*

93. The document also stated: "I previously had sent you a PowerPoint deck that shows which HP products fit into the components in the graphic above. I am also sending you an Excel file, also previously sent to you, that shows various ways to map and compare these task areas to products and applicable security standards (standards mapping not needed for this particular task). If time permits, I'd like to see a proposed schedule for doing a more detailed evaluation of products, based on technical merits as well as querying the accounts for existing licenses. By COB Wednesday, 1/15/1[4], I'd like to see your 30-

day schedule and what we'll be reviewing at each weekly milestone meeting." *Id.*

94. Over the month that followed, Mr. Romas took contemporaneous notes on Mr. Israelitt's progress. Def's Trial Ex. 1 (Notes on Jeffrey B. Israelitt PW Performance).

95. The notes reveal that, in Mr. Romas's view, Mr. Israelitt was not making progress on the roadmap assignment, that he was asking other team members for help on it, and that he was not taking seriously his obligation to make progress on the assignment. *Id.*; Romas Testimony, Feb. 15, 2022.

96. On February 14, 2014, Mr. Romas made the decision to terminate Mr. Israelitt due to his lack of progress on the roadmap assignment. Def's Trial Ex. 40 (Termination Letter).

97. Mr. Romas testified that if Mr. Israelitt had made any progress, he would not have been terminated and that Mr. Israelitt's accommodation requests had nothing to do with his termination. Romas Testimony, Feb. 15, 2022.

II. Conclusions of Law

As summarized by the Fourth Circuit, the ADA retaliation standard is as follows:

> Under 42 U.S.C. § 12203, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice *made unlawful by this chapter* or because such individual made a charge, testified, assisted, or participated in any

> manner in an investigation, proceeding, or hearing under this chapter." (emphasis added). In order to establish a prima facie case of retaliation, a plaintiff must allege (1) that she has engaged in conduct protected by the ADA; (2) that she suffered an adverse action subsequent to engaging in the protected conduct; and (3) that there was a causal link between the protected activity and the adverse action. *Rhoads v. FDIC*, 257 F.3d 373, 392 (4th Cir. 2001). In reviewing retaliation claims, courts recognize the need to balance the desire to encourage employees to oppose unlawful discrimination, with "an employer's interest in maintaining a harmonious, productive and loyal workforce." *Fitch v. Solipsys Corp.*, 94 F. Supp. 2d 670, 678 (D. Md. 2000).

Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 216 (4th Cir. 2002). Significantly, the ADA does not require proof of a disability to mount a retaliation claim, so this Court's prior conclusion that Plaintiff failed to demonstrate a disability as a matter of law does not preclude his ability to prevail on his retaliation claim. ECF 63 at 10-12; *Rhoads*, 257 F.3d at 380. Put differently, Plaintiff does not have to "prove the conduct he opposed was actually an ADA violation. Rather, he must show he had a 'good faith belief' the conduct violated the ADA." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012). A requested disability accommodation can constitute "conduct protected by the ADA." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 577 (4th Cir. 2015). Moreover, to establish a causal

connection between the termination and his accommodation requests, Plaintiff must prove "but-for" causation. *Gentry v. East West Partners Club Mgmt. Co., Inc.*, 816 F.3d 228, 235-36 (4th Cir. 2016) ("The only remaining question is whether the ADA's text calls for a 'but-for' causation standard. We hold that it does."). Temporal proximity alone is insufficient to prove causation, *id.*, as is merely showing that the adverse action occurred after Plaintiff's accommodation requests. *Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 182 (4th Cir. 1998).

Accordingly, to prevail, Mr. Israelitt must show that (1) he engaged in conduct protected by the ADA by asking to stay in a handicap accessible room at the HP Protect conference and/or by asking to be listed as an alternate driver during the Florida trip, (2) he suffered an adverse action subsequent to those requests,[2] and (3) that his requests for accommodation were the "but-for" cause of his termination. Mr. Israelitt has not come close to meeting his burden.

There is no dispute that Mr. Israelitt's termination constitutes an adverse action. This Court is left, then, to evaluate whether Mr. Israelitt has shown that he engaged in protected conduct and, if

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[2] This Court previously held that his exclusion from the HP Protect conference, the Florida trip, and the daily scrum calls did not constitute adverse employment actions. ECF 63 at 13. The facts elicited at trial support these conclusions but, even if they could be considered adverse actions, the facts unquestionably demonstrate that his requests for accommodation had nothing to do with any of these actions.

he did, whether that protected conduct was the "but-for" cause of his termination. Assuming Mr. Israelitt engaged in protected conduct,[3] that conduct was not the "but-for" cause of his termination.

The evidence elicited at trial—both documentary and testimonial—unequivocally demonstrates that Mr. Israelitt was terminated because he was an incompatible teammate who failed to take directions from his superiors, and, most significantly, failed to make any meaningful progress on the tasks that were assigned to him. Shortly after beginning work at HP, Mr. Israelitt began derailing team meetings and frequently emailing Mr. Romas and others with vociferous complaints about his colleagues. Romas Testimony, Feb. 15, 2022; Def's Trial Exs. 14, 23, 25. Within less than two months of starting at HP, Mr. Israelitt had to be separated from the rest of the team and forced to work on discrete tasks essentially by himself because he was unable to get along with his co-workers and unable to participate productively on the daily scrum calls. Romas Testimony, Feb. 15, 2022; Def's Trial Ex. 27. And when he was given those discrete tasks, the unrefuted evidence

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[3] Defendant argues that Mr. Israelitt did not engage in protected conduct because neither of his requests for accommodation was supported by a "'reasonable, good faith belief' that he needed an accommodation to perform the essential functions of his job on account of his alleged disability," given the one-off, non-mandatory nature of the HP Protect conference and the Florida trip. ECF 102-1 at 3 (quoting *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 759 n.2 (3d Cir. 2004)). Defendant's arguments are well-taken, but this Court need not resolve this question since the lack of causation is so clear.

demonstrates that he failed to make any meaningful progress on them—even when he was given one final chance. Romas Testimony, Feb. 15, 2022; Def's Trial Ex. 36; Pl's Trial Ex. 35. Mr. Israelitt may have believed that the Technology Roadmap task was impossible to complete by himself in a month—indeed, it is abundantly clear that Mr. Israelitt's understanding of what a "technology roadmap" *should be* is different from what Mr. Romas was seeking. Israelitt Testimony, Feb. 14, 2022; Romas Testimony, Feb. 15, 2022. But the productive response to that concern would have been to seek clarity on the project's scope and to work as hard as he could to make whatever progress was possible in the time allotted on the product his supervisor wanted. Instead, he made no discernable progress, even after Mr. Romas's affirmative efforts to explain the deliverable he envisioned and to encourage Mr. Israelitt to make some progress toward that goal. Romas Testimony, Feb. 15, 2022; Def's Trial Exs. 1, 36; Pl's Trial Ex. 35.

Regardless, even if the project were as impossible as Mr. Israelitt contends, he has presented no evidence that could connect his requests to stay in an accessible hotel room or to be an alternate driver on a rental car application to his termination. Mr. Israelitt did not present any evidence that anyone at HP cared one way or the other about either of these requests, let alone that they fired him because of them. Instead, Mr. Israelitt relies on his own testimony that his relationships with his colleagues were like "night and day" before and after the HP Protect conference, culminating in his removal from the scrum meetings shortly after the conference. Israelitt

Testimony, Feb. 14, 2022. Mr. Israelitt was also told not to bill to the DHS account code shortly after he requested to be listed as an alternate driver during the Florida trip, and he was given a performance warning on the first business day after his colleagues came back from the trip. Def's Trial Ex. 35; Pl's Trial Ex. 35. But Mr. Israelitt has not presented any evidence that any of these decisions were in any way related to his benign requests for accommodations that HP never opposed. To conclude otherwise would be to ignore the mountain of evidence that Mr. Israelitt was fired simply because he was an incompatible and unproductive employee.

Mr. Israelitt argues that Mr. Romas assigned him the Technology Roadmap assignment knowing it would be impossible for him to complete and, thus, set him up for failure so that he could be terminated.[4] This argument is both incredible and unsupported. First, the evidence suggests Mr. Romas gave Mr. Israelitt every opportunity to succeed rather than to fail by: removing him from uncomfortable interactions with colleagues; assigning him his own projects so that he could add value; assigning him a senior mentor; going out of his way to describe the deliverables he was looking for; and staying in frequent communication with Mr. Israelitt to try to

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[4] It is worth noting that an employer is within its rights to assign an at-will employee a difficult or even impossible task and to fire the employee for failure to complete that task, so long as the employer is not motivated by a discriminatory or retaliatory purpose prohibited by law. However, the problem in this case appears to be a basic misunderstanding between Mr. Israelitt and Mr. Romas about the scope of the technology roadmap task.

monitor his progress and encourage him to focus on his assignments. Romas Testimony, Feb. 15, 2022; Def's Trial Exs. 1, 27, 37, 39. Second, it defies common sense to think that Mr. Romas would engage in a months-long endeavor designed to terminate Mr. Israelitt because he booked a handicap accessible hotel room and asked to be listed as an alternative driver on a rental car application. Again, Mr. Romas credibly testified that he did not have any objection to either of these accommodation requests, and Mr. Israelitt has given this Court no reason to question that testimony.

Instead, Mr. Israelitt relies almost exclusively on the alleged temporal proximity between his requests and subsequent events that he viewed as retaliatory. But it is well established that temporal proximity alone is not sufficient to establish the causation element of a retaliation claim. *Gibson*, 160 F.3d at 182 ("'*Post hoc ergo propter hoc* is not enough to support a finding of retaliation' . . . [Plaintiff] needed, and failed, to offer evidence that his [protected conduct] in some way triggered [the adverse action].") (quoting *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998)). Accordingly, this Court finds that Mr. Israelitt was terminated because of his compatibility and performance related issues. In other words, Mr. Israelitt's requests for accommodation were not the "but for" cause of—indeed, this Court finds they were unrelated to—his termination. Mr. Israelitt has, therefore, failed to prove his retaliation claim.

III. Conclusion

For the foregoing reasons, this Court finds that Plaintiff has failed to meet his burden to prove that Enterprise retaliated against him. Therefore, judgment will be entered in favor of Enterprise and against Mr. Israelitt. A separate order follows.

Dated: March 7, 2022

/s/
Stephanie A. Gallagher
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFFREY ISRAELITT, Plaintiff, v. ENTERPRISE SERVICES LLC, Defendant.	Civil Case No. 18-cv-01454-SAG [Filed: 1/7/2022]

MEMORANDUM OPINION

On December 22, 2021, Enterprise Services LLC ("Defendant") filed a letter arguing that Mr. Israelitt's ("Plaintiff") sole remaining claim—an Americans with Disabilities Act ("ADA") retaliation claim—does not entitle him to a jury trial. ECF 70. The same day, this Court held a teleconference with the parties and directed Plaintiff to file any response by January 5, 2022. ECF 71. On January 5, 2022, Plaintiff filed such a response, ECF 73, and Defendant filed additional correspondence highlighting supplemental authority in support of its December 22nd letter. ECF 72. Primarily, Plaintiff argues that Defendant previously consented to a jury trial and, correspondingly, has waived any objection to one. ECF 73 at 1-3. Even if not, however, Plaintiff argues that his retaliation claim is, in fact, triable by a jury. ECF 73 at 3-9. Finally, again in the alternative, Plaintiff argues that this Court should empanel an advisory jury to which Plaintiff could try his claim. *Id.* at 10. This Court has thoroughly

reviewed the parties' submissions on these issues, along with the cases cited therein. For the following reasons, this Court agrees with Defendant and will try this case as a bench trial.

ANALYSIS

I. Consent and Waiver

As an initial matter, this Court is not persuaded by Plaintiff's waiver or consent arguments. There is no doubt that everyone involved in this litigation—this Court included—has proceeded until Defendant's recent filing under the expectation that this case would result in a jury trial. That does not mean, however, that Defendant expressly consented to a jury trial or waived its right to object to one. Even if Defendant had actually consented to a jury trial on Plaintiff's retaliation claim, persuasive authority establishes that a defendant may revoke that consent at any time prior to trial. *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961, 968 (7th Cir. 2004) ("[T]here is no restraint in the text of Rule 39 on the ability of a party to withdraw its consent to a jury trial that is not of right. . . . [T]o the extent [the defendant] did consent to a jury trial, it withdrew that consent with its motion to strike [the plaintiff's] jury demand."); *FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1089-90 (11th Cir. 2016); *see Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 226-27 (3d Cir. 2007); *see also Mowbray v. Zumot*, 536 F. Supp. 2d 617, 621 (D. Md. 2008); *Demastes v. Midwest Diversified Mgmt. Corp.*, No. 319CV00065RJCDCK, 2020 WL 1490741, at *4 (W.D.N.C. Mar. 24, 2020). As these cases demonstrate, the fact that a defendant can revoke its

consent to a jury trial at any time before trial also demonstrates that Plaintiff's waiver argument lacks merit. After all, if a defendant can revoke consent prior to trial, it follows, then, that such consent, by itself, does not waive the defendant's ability to object prior to trial. Thus, to the extent Defendant ever consented to a jury trial on Plaintiff's retaliation claim, it has now validly revoked such consent.

Plaintiff cites *Rhoads v. F.D.I.C.* for the proposition that a party may impliedly consent to a jury trial. 286 F. Supp. 2d 532, 538 (D. Md. 2003), *aff'd*, 94 F. App'x 187 (4th Cir. 2004). But he cites no authority that contradicts the cases above which hold that, *even if a defendant consents*, the defendant is free to revoke that consent prior to trial.

Regardless, notwithstanding Plaintiff's waiver and consent arguments, Federal Rule of Civil Procedure 39 expressly allows this Court, "on motion or on its own," to designate a trial as a bench trial if it "finds that on some or all of th[e] issues there is no federal right to a jury trial." Fed. R. Civ. P. 39(a)(2). There is no time limit or deadline in Rule 39, and "it is well-established that a party (or the Court on its own initiative) may move to strike a jury demand at any time, even on the eve of trial." *Mowbray*, 536 F. Supp. 2d at 621.

Finally, the Plaintiff will not suffer any prejudice by converting this trial to a bench trial. Trial is more than five weeks away, and the parties have not yet submitted pretrial filings. There is no doubt that it would have saved the parties and this Court time and

resources if Defendant had raised this issue sooner.[1] But the Court's job at this juncture is to arrive at the correct legal result, and the law simply does not support Plaintiff's consent or waiver arguments.

II. Right to a Jury Trial

Plaintiff argues that he has a right to a jury trial on his retaliation claim under the ADA, 42 U.S.C. § 12203. At bottom, this issue turns on the type of relief available to Plaintiff on that claim. Where relief is limited to equitable remedies, as opposed to legal remedies, the Seventh Amendment does not guarantee a plaintiff the right to a jury trial. *See Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S558, 564-65 (1990). The question here, then, is whether the ADA permits Plaintiff to recover legal remedies, namely compensatory or punitive damages, for his retaliation-based claim.

As the parties' briefing demonstrates, this is a disputed question of statutory interpretation. However, in an unpublished opinion, the Fourth Circuit has squarely held that a plaintiff is not entitled to a jury trial on a retaliation claim under 42 U.S.C. § 12203. *Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889, 890 (4th Cir. 2004). In another unpublished case, the Fourth Circuit held that

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[1] That said, while not impacting this Court's decision, this case may be tried sooner if it is converted to a bench trial because the latest surge in COVID-19 infections has caused the postponement of jury trials that may well be extended past February 14th. *See In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, 1:00-mc-00308, ECF 142, Standing Order 2021-15 (D. Md. Dec. 22, 2021) (postponing jury trials through January 24, 2022).

neither compensatory nor punitive damages are available in an ADA retaliation claim. *Rhoads v. F.D.I.C.*, 94 F. App'x 187 (4th Cir. 2004). Both cases cite to the Seventh Circuit's decision in *Kramer v. Banc of America Securities, LLC* as support for those conclusions. 355 F.3d 961 (7th Cir. 2004). Since *Bowles*, *Rhoads*, and *Kramer*, the Ninth Circuit has ruled similarly. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) ("[W]e hold, as did the Seventh Circuit in *Kramer*, that the plain and unambiguous provisions of 42 U.S.C. § 1981a limit the availability of compensatory and punitive damages to those specific ADA claims listed. ADA retaliation is not on the list. Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.").

Because *Bowles* and *Rhoads* are unpublished, they are not binding. However, in the years since they were issued, numerous district courts within the Fourth Circuit have adopted their holdings. Neither the parties nor this Court has found a single district court decision from within the Fourth Circuit (since *Bowles* and *Rhoads*) that has ruled the other way. *See, e.g.*, *Cannon v. Wal-Mart Associates, Inc.*, No. 5:19-CV-373-D, 2021 WL 4164075, at *6 (E.D.N.C. Sept. 10, 2021); *Williams v. Quality Technology, Inc.*, No. 1:19-cv-106 (LMB/MSN), 2020 WL 807526, at *3 (E.D. Va. Feb. 18, 2020); *Dalton v. Lewis-Gale Medical Center, LLC*, No. 7:19-cv-00204, 2019 WL 4394757, at *1-3 (W.D. Va. Sept. 13, 2019) (noting that "there does not appear to be a substantial difference of opinion on this issue within the Fourth Circuit."); *Via v. Communications Corp. of Am., Inc.*, 311 F. Supp. 3d 812, 821-22 (W.D. Va. 2018); *Akbar-*

Hussain v. ACCA, Inc., No. 1:16-cv-1323, 2017 WL 176596, at *4-5 (E.D. Va. Jan. 17, 2017); *Counts v. Norton Community Hospital/Mountain States Health Alliance*, No. 2:13cv00012, 2013 WL 4255743, at *2 (W.D. Va. Aug. 15, 2013).

Plaintiff cites three cases from within the Fourth Circuit as support for his position. First, he cites Judge Blake's pre-trial decision in *Rhoads*, which found that "compensatory damages are available to Rhoads on her ADA retaliation claim" and, therefore, that the plaintiff had a right to a jury trial on that claim. No. CCB-94-1548, 2002 WL 31755427, at *2 (D. Md. Nov. 7, 2002). That district court decision, however, was issued two years before the Fourth Circuit came to the opposite conclusion in *Bowles* and, ironically, in *Rhoads* itself. The Plaintiff misrepresents the subsequent procedural history of the *Rhoads* case. There, although the case proceeded to a jury trial, Judge Blake granted the defendant's post-trial motion for judgment as a matter of law on the issue of compensatory damages "on the grounds that Rhoads did not present any evidence whatsoever supporting her claim for such damages." *Rhoads*, 286 F. Supp. 2d at 537. Moreover, on appeal, the Fourth Circuit held that "Rhoads' claim that she was entitled to recover compensatory and punitive damages in her trial for violation of the ADA's anti-retaliation provision fails *because such relief is unavailable*." *Rhoads*, 94 F. App'x at 187 (citing *Kramer*, 355 F.3d at 965) (emphasis added). Just two months later, the Fourth Circuit reaffirmed that view in *Bowles*. Second, and similarly, the Fourth Circuit's published decision in *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999), which broadly stated that Title VII

remedies are available to plaintiffs under the ADA's antiretaliation provisions, was issued five years before *Bowles* and *Rhoads*. Third, Plaintiff cites *Evans v. Larchmont Baptist Church Infant Care Ctr., Inc.*, which acknowledged the disputed nature of this issue and then explained that, *even assuming* (without holding) that compensatory and punitive damages would have been available to the plaintiff, she was not entitled to them. 956 F. Supp. 2d 695, 707 (E.D. Va. 2013) ("[*E*]*ven if* such damages are available for [an ADA retaliation] claim, the Court finds that they are unwarranted here.") (emphasis added). Thus, none of these cases provides Plaintiff any support for his contention that the law within the Fourth Circuit supports his entitlement to legal remedies or to a jury trial.

To be sure, Plaintiff cites several out-of-circuit cases holding that compensatory and punitive damages are available for ADA retaliation claims. However, the overwhelming weight of authority in this Circuit holds otherwise, and the Fourth Circuit has, twice, expressed its clear preference for that conclusion. Accordingly, this Court adopts the reasoning in those cases and holds that neither compensatory nor punitive damages are available under the ADA's antiretaliation provisions, and, therefore, that Plaintiff is not entitled to a jury trial on his retaliation claim. *Bowles*, 100 F. App'x at 890; *Rhoads*, 94 F. App'x at 187; *Kramer*, 355 F.3d at 965; *Alvarado*, 588 F.3d at 1269-70.

III. Advisory Jury

In the alternative, Plaintiff asks this Court to exercise its discretion to empanel an advisory jury, which it is entitled to do under Fed. R. Civ. P. 39(c)(1). This Court is currently facing a backlog of jury trials due to the COVID-19 pandemic and has been forced, yet again, to postpone jury trials due to the latest surge in infections. *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, 1:00-mc-00308, ECF 142, Standing Order 2021-15 (D. Md. Dec. 22, 2021) (postponing jury trials through January 24, 2022). Grave public health concerns starkly limit the number of prospective jurors that can safely enter the courthouse on any given day. This Court, therefore, declines to enlist an advisory jury to informally recommend a disposition of Plaintiff's claim.

In any event, this Court is not persuaded that an advisory jury would be helpful in its adjudication. Even if an advisory jury rendered an advisory verdict, this Court would need to reach its own conclusion about the merits. To avoid that substantial waste of time and resources, which would include unnecessarily subjecting potential jurors to the current health risks associated with jury service, the Court believes it far more appropriate to proceed with a traditional bench trial.

CONCLUSION

For the reasons set forth above, this Court finds that Plaintiff is not entitled to a jury trial on his ADA retaliation claim, and this case will be tried by bench trial beginning on February 14, 2022. A separate order follows.

Dated: January 7, 2022

/s/
Stephanie A. Gallagher
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFFREY ISRAELITT, Plaintiff, v. ENTERPRISE SERVICES LLC, Defendant.	Civil Case No. 18-cv-01454-SAG [Filed: 3/2/2021]

MEMORANDUM OPINION

Plaintiff Jeffrey Israelitt ("Plaintiff") filed a Second Amended Complaint against his former employer, Enterprise Services LLC ("Defendant"), alleging discrimination on the basis of disability, wrongful discharge, denial of reasonable accommodations, retaliation, and a hostile work environment.[1] ECF 13. Discovery is now concluded. Defendant filed a motion for summary judgment, ECF 48, which I have reviewed along with the relevant exhibits, opposition, and reply. ECF 53, 54. Defendant also filed a motion to reopen discovery, ECF 55, which I have also reviewed along with the relevant exhibits, opposition, and reply. ECF 58, 62. Lastly, Plaintiff filed a motion for leave to file a surreply, ECF 56, which I have reviewed along with the relevant exhibits, opposition, and reply. ECF 57,

[1] Plaintiff's Second Amended Complaint only includes three Counts, but the legal theories listed appear to be encapsulated within those Counts.

59. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the reasons that follow, I will grant Defendant's Motion for Summary Judgment in part and deny it in part, deny Plaintiff's Motion for Leave to File a Surreply, and deny Defendant's Motion to Reopen Discovery.

I. FACTUAL BACKGROUND

The facts contained herein are taken in the light most favorable to Plaintiff, the non-moving party. Defendant hired Plaintiff, an Army Veteran, as a senior architect in 2013. He was interviewed by George Romas, who reviewed his resume and conducted a telephonic interview. ECF 53-1 at 2. Romas did not inquire about any disability or medical conditions during the interview. ECF 53-3 at 24-25. Plaintiff was ultimately hired to be a member of HP's Cybersecurity Solutions Group ("CSG"). When he started on August 5, 2013, Plaintiff's job duties included formulating architectural decisions on information systems for government customers and researching innovative technologies to see how they could be used to "create a discriminator for HP in order to win business." *Id.* at 24. Plaintiff's position was "a senior role," *id.*, and he worked remotely. ECF 48-3 at 96.

Plaintiff has long suffered from a medical condition called hallux rigiditis, marked by degenerative changes in his right first metatarsophalangeal joint and right great toe. ECF 53-8. He had cheilectomies in 1993 and 1997. *Id.* In 2005 and 2018, radiologists examined his foot and found degenerative changes in the metatarsophalangeal joint. *Id.* at 1-2. A podiatrist,

examining Plaintiff in 2006, stated that he has 'limited range of motion' in his toe. *Id.* at 3. Plaintiff told the podiatrist at that visit that his pain level is 2/10 and "mild." *Id.* Plaintiff has also State of Maryland disability placards as a result of his condition. *Id.* at 4-9.

Plaintiff reports that, at times, he "can barely walk" because of pain. ECF 53-2 at 22. Plaintiff walks for physical exercise "a couple of times a week." *Id.* at 24-25. As an example, he walks inside a store like Costco for 30-45 minutes, sometimes starting and stopping frequently due to his medical problems. *Id.*

Near the end of August, 2013, HP began determining which of its employees would attend a conference called HP Protect 2013. Initially, Plaintiff was slated to attend the conference, though securing the requisite passes proved less than straightforward. Kevin Doty, a business consultant on the CSG team, told Todd Helfrich, an account executive who offered to secure passes for CSG's hopeful attendees, that his group had three people they would like to attend the conference, including Plaintiff. ECF 53-11 at 2. Helfrich later notified the group that they had eight CSG employees who requested passes and that there would thus be a need "to prioritize attendance." *Id.* at 1. The campaign marketing manager observed that they were "scrambling to find the funds to pay for George [Romas] and one of his engineers to attend the event." ECF 53-10 at 1. Gail Stevens, the capture manager, told the campaign marketing manager, "We would like to have George Romas (CyberSecurity Engineering Lead) and Jeff Israelitt (Lead Architect

for our CDM Offering and the Task Orders) attend, and I would like to attend, and I think we might have 1 other person." *Id.*

Eventually, Helfrich sent Plaintiff a code to attend the conference, however the registration code he sent was one otherwise reserved for customers. ECF 53-13. Plaintiff promptly registered to attend. However, he sought to stay at the event hotel in Washington, DC, rather than to commute or stay at a nearby location. ECF 53-2 at 113. He asked for a hotel room for persons with disabilities. *Id.* at 115. Though there were no hotel rooms available initially, Plaintiff worked with HP Protect event staff and eventually secured a room reservation. *Id.* at 115-116. However, on September 10, 2013 he was informed that his conference registration was invalid, because he had used a customer registration code but was an HP employee. ECF 53-13 at 8. Plaintiff reported the situation to Doty, and Doty in turn relayed the message to Helfrich. *Id.* at 7. Helfrich responded, "Anyone who used the code and registered with their HP email address likely will be turned down. I have some damage control that I need to do. Gail, George and Anil should be good." *Id.* at 6. In the email exchange that followed, Plaintiff requested clarification of the status of his registration from Helfrich and, when that was not forthcoming, followed up with Doty about Helfrich's unresponsiveness. *Id.* at 5-6. Doty suggested that Plaintiff coordinate with Romas directly, to which Plaintiff responded referencing several conversations he claimed to have had with Romas regarding the HP Protect conference and his difficulties registering for it. *Id.* at 3. Plaintiff told Doty that Romas had "heard

that [Plaintiff's difficulty registering] was as a result of [his] asking the registration team questions," and that Plaintiff told Romas that "the only question I asked involved disability accommodation for lodging." *Id.* Plaintiff then stated that "it appears that this information (medical/disability info that I asked you not to share with anyone) . . . has in itself become the reason I can't go now." *Id.*

Doty forwarded Plaintiff's email to Romas outlining at length his concerns about Plaintiff's behavior, including alleged statements Plaintiff had made to him about faking his disability and manufacturing lawsuits. *Id.* at 2. Romas, in response, said, "after about a 45 minute conversation with [Plaintiff] at around 7pm last night [September 12, 2013], he said he would 'keep his mouth shut' about this, not attend HP Protect, and hoped that the rest of us would not have any trouble attending." *Id.* at 1. Separately during this same time period, Plaintiff and Romas exchanged several emails between September 13 and 15 regarding Plaintiff's registration difficulties, in which Plaintiff suggested that Doty, Helfrich, and others thought that his disability accommodation request had "created a problem" by drawing attention to their registrations. ECF 53-16 at 2. Plaintiff ultimately did not attend HP Protect. Plaintiff suggests that his failure to attend had a detrimental impact on his job by virtue of him missing out on the opportunity to "get familiar with HP's line of products and maybe some services" as well as "networking opportunities." ECF 53-2 at 137.

Roughly two weeks later, on or around September 30, 2013, Romas reassigned Plaintiff from the two-

week sprint teams he had originally been staffed on to longer-term assignments, including working on a project called the "Technology Roadmap." ECF 48-4 at 6. He was assigned to work on the Technology Roadmap with another senior team member, Jeff Kalibjian. ECF 53-3 at 15. Around that same time, Romas told Plaintiff to stop attending the daily "scrum" meetings, because those meetings were part of the two-week sprint "agile" methodology projects on which Plaintiff was no longer working due to his reassignment. ECF 48-4 at 23. Plaintiff responded that there was "[n]o problem with that from [his] viewpoint." *Id.*

Romas gave Plaintiff a performance review in October, 2013. In the review, Romas stated that Plaintiff had a difficult time with the "agile" methodology as previously noted, but that those "issues have been mostly resolved" due to his role being adjusted. *Id.* at 24. The evaluation also noted Plaintiff's confrontational approach, before ultimately giving him average or above average marks in every category. *Id.* The notes next to his numerical grades indicated that Plaintiff "has had some issues communicating with the team, but is showing some improvement," and "he's been slow to adapt to the pace of the team, so has not been as productive in achieving his goals." *Id.* Later that month, Plaintiff received additional feedback from Doty, again indicating that he was not providing the sort of work product expected of him. *Id.* at 27. Specifically, Doty questioned how Plaintiff's presentation "related to the analysis for the Task areas 5-15 requirements" and asked that Plaintiff "explain what you have planned for the actual task 5-15 requirements

analysis." *Id.* On November 22, 2013, Romas recognized Plaintiff in the category of Achievement & Contribution as part of a group commendation praising the team's hard work and diligence. *Id.* at 25.

In December, 2013, members of the CSG team began planning a strategic development and team-building meeting in St. Augustine, Florida, scheduled for early January. ECF 53-3 at 9-10. The team had a small budget for the trip drawn from HP's Department of Homeland Security ("DHS") account, which required attendees to share accommodations and vehicles. *Id.* Plaintiff told Romas that he wanted to be listed as an additional driver on one of the vehicles. ECF 53-2 at 212. Jess May, the CSG practice lead in charge of managing the CSG development process, including budget and timely progression, informed Plaintiff shortly thereafter that he was not to charge the DHS account anymore and that he would no longer be traveling to Florida. ECF 53-2 at 212. Plaintiff was not the only CSG team member who did not attend—Kalibjian did not attend either, for personal reasons. ECF 53-30 at 1-2. Plaintiff stated that his absence "created the impression to a lot of people . . . that it looked like I wasn't participating in team events for some reason . . . [which was] open to interpretation by a number of people." ECF 53-2 at 226.

On January 13, 2014, the first business day after the end of the Florida trip, Romas sent a performance warning to Plaintiff advising that he was failing to meet expectations in the areas of "productivity, initiative and teamwork." ECF 48-4 at 38. The warning listed three specific work products that

Plaintiff had failed to turn in, including the "Technology Roadmap for DHS CDM Task Areas 5 through 15." *Id.* The warning specified, "For the next 30 days, from January 13, 2014 through February 12, 2014, you are required to demonstrate immediate and sustained improvement by successfully completing the Technology Roadmap for Task Areas 5 through 15." Israelitt refused to sign the warning. *Id.* When Plaintiff did not produce the Technology Roadmap for Task Areas 5 through 15 by February 12, 2014, Romas terminated Plaintiff's employment. *Id.* at 11.

II. LEGAL STANDARD

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate only "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." The moving party bears the burden of showing that there is no genuine dispute of material facts. *See Casey v. Geek Squad*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). If the moving party establishes that there is no evidence to support the non-moving party's case, the burden then shifts to the non-moving party to proffer specific facts to show a genuine issue exists for trial. *Id.* The non-moving party must provide enough admissible evidence to "carry the burden of proof in [its] claim at trial." *Id.* at 349 (quoting *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993)). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find in

its favor. *Id.* at 348 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Moreover, a genuine issue of material fact cannot rest on "mere speculation, or building one inference upon another." *Id.* at 349 (quoting *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D. Md. 1999)).

Additionally, summary judgment shall be warranted if the non-moving party fails to provide evidence that establishes an essential element of the case. *Id.* at 352. The non-moving party "must produce competent evidence on each element of [its] claim." *Id.* at 348-49 (quoting *Miskin*, 107 F. Supp. 2d at 671). If the non-moving party fails to do so, "there can be no genuine issue as to any material fact," because the failure to prove an essential element of the case "necessarily renders all other facts immaterial." *Id.* at 352 (quoting *Coleman v. United States*, 369 F. App'x 459, 461 (4th Cir. 2010) (unpublished)). In ruling on a motion for summary judgment, a court must view all of the facts, including reasonable inferences to be drawn from them, "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. ANALYSIS

Plaintiff's Second Amended Complaint can be read to contain claims of discrimination, wrongful discharge, retaliation, failure to accommodate, and hostile work environment under the Americans with Disabilities Act ("ADA"). Each claim is addressed below.

"When a plaintiff alleges that her employer unlawfully discriminated or retaliated against her in violation of the ADA, she can prove her claim through direct and indirect evidence . . . [or] otherwise . . . may proceed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973)." *Laird v. Fairfax Cty., Virginia*, 978 F.3d 887, 892 (4th Cir. 2020). ADA wrongful discharge claims lacking direct evidence are similarly evaluated via the *McDonnell Douglas* framework, *Messick v. Bd. of Educ. of Wicomico Cty.*, No. CIV.A. GLR-14-2690, 2014 WL 7357554, at *5 (D. Md. Dec. 19, 2014), as are hostile work environment claims, *see Kaszynski v. Thompson*, 83 F. App'x 526, 527-28 (4th Cir. 2003). Plaintiff has not provided any direct or indirect evidence pertaining to these claims here. *See Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006) (defining direct evidence as evidence that "reflect[s] directly the alleged discriminatory attitude" and "bear[s] directly on the contested employment decision" (quoting *Taylor v. Va. Union Univ.*, 193 F.3[d] 219, 232 (4th Cir. 1999) (en banc))). Thus, the Court must engage in the *McDonnell Douglas* analysis for each.[2]

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[2] Precedent is not particularly clear as to whether the *McDonnell Douglas* burden-shifting framework applies to ADA failure to accommodate claims. *Compare Evans v. Banks Const. Co.*, No. 2:11-CV-2526-CWH, 2013 WL 5437639, at *7 (D.S.C. Sept. 27, 2013), *with Jacobs v. N.C. Admin. Office of the Courts*, No. 7:11-CV-169-BO, 2013 WL 4736171, at *3 (E.D.N.C. Sept. 3, 2013), *aff'd in part, rev'd in part*, 780 F.3d 562 (4th Cir. 2015). Since Defendant's intent is not at issue in the failure to accommodate context, assessment of Defendant's legitimate explanation for its conduct and whether that explanation is pretextual would appear somewhat misplaced. Regardless, the

The Fourth Circuit has described the mechanics of *McDonnell Douglas* as follows:

> Under the *McDonnell Douglas* proof scheme, the plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. If the defendant meets this burden of production, the presumption created by the prima facie case "drops out of the picture," and the plaintiff bears the ultimate burden of proving that she has been the victim of intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (holding that prima facie case plus disbelief of employer's asserted justification for employment action is not necessarily sufficient to establish violation; summary judgment appropriate unless plaintiff presents adequate evidence that employer unlawfully discriminated).

Fourth Circuit unambiguously requires a plaintiff on summary judgment to provide facts sufficient to support a prima facie failure to accommodate case, just as *McDonnell Douglas* requires. *See Wilson v. Dollar General Corp.*, 717 F.3d 337, 345 (4th Cir. 2013). The Court's analysis of Plaintiff's prima facie case here is sufficient to dispose of the issue without reaching next steps of *McDonnell Douglas*, were it to be applicable.

Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995), as amended (June 9, 1995), as amended (Mar. 14, 2008).

A. Discrimination

"To establish a claim for disability discrimination under the ADA, a plaintiff must prove '(1) that she has a disability, (2) that she is a 'qualified individual' for the employment in question, and (3) that [her employer] discharged her (or took other adverse employment action) because of her disability.'" *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015) (quoting *EEOC v. Stowe–Pharr Mills, Inc.*, 216 F.3d 373, 377 (4th Cir. 2000)). Plaintiff's discrimination claims fail on the first and third prongs of this analysis.

The ADA defines a "disability" to include "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). "An individual is disabled under the ADA . . . if he or she: (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." *Davis v. University of North Carolina*, 263 F.3d 95, 99 (4th Cir. 2001) (citations omitted). "Substantially limits" is defined as "significantly restricted as to the condition, manner or duration to the condition, manner, or duration under which the average person in the general population can perform that some major life activity," or the inability "to perform a major life activity that the average person in the general population can perform." 29 C.F.R. § 1630.2(j)(l)(ii). "Examples of

'major life activities' are 'caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.* Ultimately, "[t]he determination of whether a person is disabled is an individualized inquiry, particular to the facts of each case." *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001) (citations omitted).

Even viewing the facts in the light most favorable to Plaintiff, he has not established a genuine dispute of material fact that he was significantly restricted in his ability to walk (or perform any other major life activity) during his period of employment. His extremely sparse medical records, many of which are drawn from doctor visits well outside the period of time relevant to this lawsuit, demonstrate a longstanding diagnosis of hallux rigiditis, but contain no indication that he is significantly impaired in his ability to function.[3] *See* ECF 53-8 (referencing a limited range of motion but low reported pain level,

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[3] Defendant argues that Plaintiff should not be allowed to rely upon a number of pieces of evidence he puts forward, perhaps most significantly portions of several medical records that Plaintiff sought to keep Defendant from accessing during discovery. ECF 54 at 3-4. This prompted Defendant to file a Motion to Reopen Discovery, ECF 55, seeking to explore those medical records further. Plaintiff, meanwhile, sought the opportunity to respond to Defendant's arguments regarding Plaintiff's alleged improper reliance on medical records and other evidence. ECF 56. Re-opening discovery is unnecessary here because, even when considering the evidence to which Defendant objects and without the benefit of the additional medical records it seeks, Plaintiff has failed to establish a disability. Similarly, consideration of Plaintiff's surreply is unnecessary because the Court has considered the evidence to which Defendant objects. Both motions will therefore be denied.

and generally containing no mention of any lifestyle limitations, significant or otherwise). While Plaintiff's deposition testimony references occasional severe pain, particularly when cold, that is not enough to constitute *significant* impairment of life activities either, as evidenced by the fact that his physical exercise of choice is walking and he is able to walk for up to 30-45 minutes at times, even taking into account starting and stopping. ECF 53-2 at 22-25. The testimony of one coworker, meanwhile, suggests that on a trip to Texas shortly before the HP Protect conference, Plaintiff walked extensively with no apparent issues and never mentioned an impairment. ECF 48-6 at 17. Indeed, by his own admission, Plaintiff did not require any disability accommodations during the Texas trip despite staying at a hotel. ECF 53-2 at 62. Thus, while Plaintiff has certainly provided evidence that he feels severe pain in his foot at times due to his condition, he has failed to establish a question of material fact as to whether that pain substantially limits his major life activities.

The conclusion that Plaintiff has not sufficiently established that he is disabled within the meaning of the ADA is bolstered by a wide body of case law regarding similar toe and foot injuries. "[S]ome limitation in walking [in certain circumstances] . . . do[es] not equate to a substantial limitation in [the] ability to walk." *Frogge v. Fox*, No. 1:17CV155, 2019 WL 2418749, at *6 (N.D.W. Va. June 10, 2019); *see also Fink v. Richmond*, 405 Fed. App'x 719 (4th Cir. 2010) (finding no genuine dispute of material fact and no disability when a plaintiff was only limited in walking quickly); *Stewart v. Weast*, 228 F. Supp. 2d

660 (D. Md. 2002) (deeming plaintiff to not be disabled because she failed to sufficiently specify the extent to which her walking was disabled); *Harmon v. Sprint United Management Corp.*, 264 F. Supp. 2d 964 (D. Kan. 2003) (plaintiff who could walk half a mile, sit for up to five hours, lift up to 100 pounds, and only had physician restrictions preventing "prolonged" walking, sitting, or standing was not disabled); *Miller v. Wells Dairy, Inc.*, 252 F. Supp. 2d 799 (N.D. Iowa 2003) (plaintiff who could walk well on level surface, but was limited in ability to walk the same distance as previously, walk at the same pace as previously, and walk up three steps was not disabled); *Zuppardo v. Suffolk County Vanderbilt Museum*, 19 F. Supp. 2d 52 (E.D.N.Y. 1998) (plaintiff who could walk more than 1/8th of a mile without stopping was not disabled within the definition of the ADA); *Banks v. Hit or Miss, Inc.*, 996 F. Supp. 802 (N.D. Ill. 1998) (plaintiff who could walk unassisted without use of cane or crutch, has no medical restrictions, and failed to provide any other evidence of substantial limitation in walking was not disabled). Plaintiff, therefore, has not made the requisite showing that he was a qualified individual with a disability in order to survive summary judgment on his ADA discrimination claim.

Even assuming that Plaintiff had been able to establish that he were a qualified individual with a disability, he would then have to show that he was subjected to an adverse employment action, which adversely "affect[ed] employment or alter[ed] the conditions of the workplace." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). The adverse action must result in "some *significant*

detrimental effect." *Laird*, 978 F.3d at 893 (internal citations omitted). Plaintiff alleges that the actions taken against him were (1) denial of the opportunity to attend the HP Protect conference; (2) his removal from the daily scrum call team meetings, (3) denial of the opportunity to attend the planning and team-building trip to Florida; and (4) his ultimate termination. ECF 53 at 23-25. Of that list, only the termination affected Plaintiff's employment. The conference and the trip were one-time, non-mandatory events with no bearing on Plaintiff's ability to perform his work duties. In his deposition, Plaintiff could only articulate benefits he would have received from attending HP Protect, ECF 53-2 at 137, and raise speculative concerns about how his coworkers interpreted his absence from the Florida trip, *id.* at 226. While such testimony makes clear that Plaintiff would have liked to attend both events, it does not demonstrate any concrete detrimental impact on his job or workplace environment, let alone a significant one. *See Johnson v. Balt. City Police Dep't*, No. 12-2519, 2014 WL 1281602, at *17 (D. Md. Mar. 27, 2014) ("[N]ot everything that makes an employee unhappy is an actionable adverse action."). Regarding his removal from team meetings, meanwhile, Plaintiff himself stated in an email at the time the removal occurred that there was "[n]o problem with that from [his] viewpoint," ECF 48-4 at 23, foreclosing any possibility that the removal could be considered adverse.

While the termination is certainly an adverse action, Plaintiff fails to establish that he was terminated *because of* his alleged disability. To demonstrate discrimination under the ADA, Plaintiff

must meet the "but for" standard of causation. *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235 (4th Cir. 2016). Put simply, nothing in the record even begins to suggest that Romas, the employee who ultimately made the decision to fire Plaintiff, possessed a discriminatory animus linked to Plaintiff's medical condition. Plaintiff has not shown that Romas made any disparaging remarks about Plaintiff's disability or, indeed, ever made comments about or otherwise addressed the disability *at all*. Romas did undoubtedly engage with Plaintiff on multiple occasions regarding Plaintiff's accommodation requests, but while those requests referenced Plaintiff's assertion of a disability, the emails and deposition testimony regarding those conversations gives no indication that Plaintiff's underlying medical condition itself was ever discussed or at issue. Put differently, Romas's interactions with Plaintiff centered on his accommodations requests, not the claimed disability underlying them. Plaintiff's claims are therefore better suited to consideration in the retaliation context. Given the distinct lack of links between Romas and Plaintiff's alleged disability, "but for" causation cannot be established for the purposes of the summary judgment analysis. Thus, for all of the foregoing reasons, summary judgment will be granted for Defendant on Plaintiff's ADA discrimination claim.

B. Wrongful Discharge

To establish a claim for wrongful discharge under the ADA, Plaintiff must demonstrate that: (1) he is within the ADA's protected class; (2) he was discharged; (3) at the time of his discharge, he was

performing the job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 702-03 (4th Cir. 2001). An individual is "within the ADA's protected class" if they are "a qualified individual with a disability" under the ADA. *Id.*

As outlined above in Section III(A), Plaintiff has not established that he was an individual with a disability. Thus, his wrongful discharge claim fails from the start. Similarly, for all of the same reasons why Plaintiff has failed to show a "but for" causal link between his disability and his termination in the preceding section, he fails here too to show that his circumstances raised a reasonable inference of unlawful discrimination. There simply is no evidence linking the individual who terminated Plaintiff, Romas, to some sort of discriminatory animus targeting his underlying disability. As such, Plaintiff has failed to prove that his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Summary judgment on his wrongful discharge claim will be granted for Defendant.

C. Retaliation

Plaintiff's next claim alleges that Defendant retaliated against him for requesting accommodations for his claimed disability on several occasions. As summarized by the Fourth Circuit, the ADA retaliation standard is as follows:

> Under 42 U.S.C. § 12203, "[n]o person shall discriminate against any individual because

> such individual has opposed any act or practice *made unlawful by this chapter* or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." (emphasis added). In order to establish a prima facie case of retaliation, a plaintiff must allege (1) that she has engaged in conduct protected by the ADA; (2) that she suffered an adverse action subsequent to engaging in the protected conduct; and (3) that there was a causal link between the protected activity and the adverse action. *Rhoads v. FDIC*, 257 F.3d 373, 392 (4th Cir. 2001). In reviewing retaliation claims, courts recognize the need to balance the desire to encourage employees to oppose unlawful discrimination, with "an employer's interest in maintaining a harmonious, productive and loyal workforce." *Fitch v. Solipsys Corp.*, 94 F. Supp. 2d 670, 678 (D. Md. 2000).

Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 216 (4th Cir. 2002). Significantly, the ADA does not require proof of disability to mount a retaliation claim, so the Court's conclusion that Plaintiff has failed to demonstrate a disability as a matter of law is not relevant. *Rhoads*, 257 F.3d at 380. Indeed, Plaintiff does not even have to "prove the conduct he opposed was actually an ADA violation. Rather, he must show he had a 'good faith belief' the conduct violated the ADA." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012).

A requested accommodation can constitute "conduct protected by the ADA." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 577 (4th Cir. 2015). While there is some question as to whether Plaintiff's requests for a hotel room at the HP Protect conference and to be a driver on the trip in Florida were made explicitly as accommodation requests for a disability as opposed to just general requests, Plaintiff has established a dispute of material fact to this end. ECF 53-13 (email from Plaintiff to Doty describing his request as one for "disability accommodation"); ECF 53-2 at 17-18 (Plaintiff's testimony that when he requested to be a driver on the Florida trip, he referenced his disability). Thus, viewing the facts in the light most favorable to Plaintiff, he has satisfied the first prong of the retaliation analysis by requesting accommodation. The second prong of the analysis is whether Plaintiff suffered an adverse action. As outlined above in Section III(A), Plaintiff has failed to demonstrate that denial of the opportunity to attend the HP Protect conference, denial of the request to be a driver on the trip to Florida, and his agreed-upon removal from team calls are adverse actions.[4] That leaves only his termination as an adverse action that

[4] What qualifies as an adverse action differs slightly in the retaliation and unlawful discrimination contexts, but only in terms of the scope of actions covered (i.e. whether the acts and harm occurred in the workplace or not) and not in terms of "the required *effect* or adversity from such actions." *Laird*, 978 F.3d at 893. Since the Court's adverse action analysis in this case centers on the fact that several of Plaintiff's claimed adverse acts did not create significant detrimental effects, the result is substantively the same in both retaliation and discrimination contexts.

could constitute retaliation. Thus, to satisfy the final prong of the retaliation analysis, he must show a genuine issue of material fact as to the causal link between his accommodation requests and his termination.

To establish a causal connection between the termination and his accommodation requests, Plaintiff must prove "but-for" causation. Gentry, 816 F.3d at 235-36 ("The only remaining question is whether the ADA's text calls for a 'but-for' causation standard. We hold that it does."). Temporal proximity alone is insufficient to prove causation, id., as is merely showing that the adverse action occurred subsequent to Plaintiff's accommodation requests, Gibson v. Old Town Trolley Tours of Washington, D.C., Inc., 160 F.3d 177, 182 (4th Cir. 1998). As an initial matter, the relevant events are not particularly proximate in time. The HP Protect conference hotel accommodation request and related discussions occurred around September 13, 2013, while the Florida accommodation request occurred around December 19, 2013, roughly three months later. Plaintiff was not terminated until February 14, 2014, an additional two months after his Florida request. Additionally, his accommodation requests and the alleged retaliatory acts arising out of them involved a range of different HP employees, some of whom are not even alleged to have known about his disability. *See, e.g.*, ECF 53-2 at 18-19 (discussing whether Jess May, the HP employee who removed Plaintiff from the Florida trip, knew about Plaintiff's disability). Against this backdrop, Plaintiff may have difficulty meeting his burden to prove causation at trial.

That said, the summary judgment standard is a lower bar than the standard of proof at trial, and Plaintiff's retaliation claim narrowly clears it here—he has established the existence of a question of fact as to whether his accommodation requests were a "but for" cause of his termination. The relevant causal chain is as follows: Romas received notice of Plaintiff's accommodation request at the HP Protect conference in mid-September 2013, culminating in a number of emails between the two, plus at least one phone call. Romas also engaged in a side conversation with Doty in which Doty expressed his growing frustration with Plaintiff and questioned the veracity of his disability claims, to which Romas replied "[t]hanks for keeping me informed. . . ." ECF 53-13 at 1-2. Just a few weeks later, Romas began giving Plaintiff negative performance evaluations intermixed with some indicators of positive performance. Then, shortly after receiving Plaintiff's accommodation request to be a driver on the Florida trip and immediately upon conclusion of said trip, Romas issued Plaintiff a performance warning and assigned the strict Technology Roadmap deadline that led to Plaintiff's ultimate termination. While temporal proximity and sequencing of events are not enough alone to establish a question of fact, the decisive difference here is that this pattern of 1) accommodation request followed by 2) Romas cracking down on Plaintiff's job performance happened twice in relatively quick succession. Plaintiff's requests, followed shortly by Romas taking negative actions against Plaintiff ultimately leading

to his termination, narrowly clear the "genuine dispute of material fact" bar.[5]

Since Plaintiff has established the existence of a genuine dispute of material fact as to whether he can make a prima facie case of ADA retaliation, the final *McDonnell Douglas* step is to determine whether Defendant's proffered legal justification for terminating Plaintiff is mere pretext. Defendant claims that it terminated Plaintiff because he failed to complete the area 5-15 Technology Roadmap, which he had been assigned to work on since September, 2013. ECF 48-4 at 11. In response, Plaintiff asserts that this explanation is pretextual because it was unrealistic to expect Plaintiff to complete that assigned portion of the Technology Roadmap in the time allotted him. Its scope, Plaintiff suggests, required a much greater amount of time than the one month he was ultimately given to finish

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[5] This analysis is substantively different than the causation analysis in Section III(A) addressing ADA discrimination. That discrimination analysis centered on the fact that the evidence is entirely devoid of any connection between Romas and Plaintiff's disability—Romas never mentions the disability at all, participated in an email exchange in which another employee expressed skepticism of its existence, and, at best, is only established to have been tangentially aware of it insofar as it is underlying the accommodation requests with which he is dealing. Here, on the other hand, the record firmly establishes that Romas was not only aware of the accommodation requests, but was intimately involved with handling their fallout. He spoke at length with Plaintiff about the HP Protect hotel request, with the result of that conversation being that Plaintiff would "keep his mouth shut" about the issue. ECF 53-13 at 1. Regarding the Florida trip, meanwhile, Plaintiff made the car driver accommodation request directly to Romas. ECF 53-2 at 212.

it once the performance warning was handed down. ECF 53 at 24. While Defendant points to a document entitled "Continuous Monitoring–Technology Roadmap task" that outlines precisely what deliverables Plaintiff was expected to complete during the January 13, 2014-February 12, 2014 timeframe, ECF 48-4 at 42-43, that document does not resolve the dispute because the Court has no way of knowing how long it would take for a reasonably diligent employee "to work within Task Areas 5-15 and demonstrate the 'top 3-5 vendors/products within each task area' with a 'description of the offering and how it applies to the specific task area,'" ECF 54 at 12-13. Additionally, it appears the initial deadline for the project was late 2014 and that Plaintiff originally had been assigned a teammate to help with completion of the project, though it is not clear if that deadline and the co-worker assistance provided were meant for the entire Technology Roadmap and, if so, how that overarching Roadmap compared in size to Plaintiff's assigned area 5-15 Technology Roadmap subsection. ECF 53-33; 53-34 at 6-7. While the Court has no doubt that such issues can be readily determined at trial, the record as it currently stands does not contain a clear indication of how long that portion of the roadmap would ordinarily take. There thus exists a question of material fact as to whether Defendant's reason for terminating Plaintiff was pretextual. As such, Plaintiff's ADA retaliation claim survives summary judgment, specifically with regard to his allegations that he was terminated due to his accommodation requests.

D. Failure to Accommodate

Plaintiff's next claim alleges that Defendant denied him reasonable accommodation for his disability. "A reasonable accommodation is one that (1) 'enables [a qualified] individual with a disability . . . to perform the essential functions of [a] position,' 29 C.F.R. § 1630.2(o)(1)(ii); or (2) 'enable[s] [an] employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by . . . other similarly situated employees without disabilities,' *id.* § 1630.2(o)(1)(iii)." *Hamel v. Bd. of Educ. of Harford Cty.*, JKB-16-2876, 2018 WL 1453335, at *10 (D. Md. Mar. 23, 2018). To establish a prima facie case for failure to accommodate, a plaintiff must demonstrate (1) that the employee was an individual with a disability within the meaning of the ADA; (2) that the employer had notice of the disability; (3) that with reasonable accommodation, the employee could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. *Rhoads v. FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2001); *see also Stephenson v. Pfizer*, 641 F. App'x 214, 219 (4th Cir. 2016) (per curiam); *Jacobs*, 780 F.3d at 579; *Wilson v. Dollar Gen. Corp.*, 717 F.3d at 345.

Once again, this claim fails because of Plaintiff's failure to demonstrate facts permitting a reasonable jury to conclude that he is an individual with a disability within the meaning of the ADA. In addition to that deficiency, however, Plaintiff's "reasonable accommodation" claim essentially tries to force a square peg into a round hole. Plaintiff did not request any reasonable accommodation to allow him to perform the essential functions of his position. At

best, he requested reasonable accommodations in the form of (1) an accessible hotel room for the HP Protect conference, and (2) a listing as a driver for a vehicle to attend the Florida trip. Even assuming that his employer denied those accommodations (which is not at all clear from the record for a variety of reasons), neither of those two unique events constituted essential functions of his position.[6] Attendance was not mandatory and, as outlined in Section III(A), Plaintiff did not suffer any job-related harm as a result of his inability to attend. Plaintiff's testimony suggests that attendance at the HP Protect conference would have been helpful, and that he worried his colleagues would think he was not a team player if he did not attend the Florida trip—but such concerns about possible upsides and speculative harms cannot be mistaken for descriptions of essential job functions.

Ultimately, Plaintiff has not established that he is disabled within the meaning of the ADA or that he ever requested a reasonable accommodation to allow him to perform the essential functions of his position. Summary judgment is therefore warranted on his reasonable accommodation claim.

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[6] Plaintiff eventually obtained the hotel reservation he sought for the conference but was denied admission to the conference because he had sought to use a customer code for entry as an employee. His use of an improper customer code was unrelated to his assertion of need for an accessible hotel room. ECF 53-13 at 8. As to the Florida trip and his driver accommodation request, it is unclear whether the HP employee who ultimately removed him from the trip even knew he was disabled to begin with, let alone knew anything about his accommodation request. ECF 53-2 at 18-19.

E. Hostile Work Environment

In Count Three, Plaintiff alleges that Defendant violated the ADA by subjecting him to a hostile work environment. The Fourth Circuit has ruled that such a claim can be cognizable under particular circumstances:

Appropriately modifying the parallel Title VII methodology, an ADA plaintiff must prove the following to establish a hostile work environment claim: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer. *See Brown v. Perry*, 184 F.3d 388, 393 (4th Cir. 1999) (stating elements of a sexual harassment hostile work environment claim).

Fox v. General Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001). As discussed above, because Plaintiff has not shown that he is a qualified individual with a disability, his ADA hostile work environment claim fails at its inception. However, even if he had been able to establish that initial prong, he has not adduced sufficient evidence to meet his burden as to at least two other prongs: that the harassment was based on his disability or that the harassment was sufficiently severe or pervasive to alter a term, condition or privilege of his employment.

Plaintiff does not allege many specific comments relating to his toe in the workplace. He generally alleges that he was subjected to disrespectful

treatment in his exclusion from meetings, and that his inability to attend the Florida trip caused others to view him negatively. However, simple mistreatment or rude conduct does not suffice to support a hostile work environment claim. *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315-16 (4th Cir. 2008) (explaining "complaints premised on nothing more than 'rude treatment by [coworkers],' 'callous behavior by [one's] superiors,' or 'a routine difference of opinion and personality conflict with [one's] supervisor'" do not suffice (alterations in original) (citations omitted)); *see also Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (finding a workplace dispute and "some perhaps callous behavior by her superiors" insufficient for a plaintiff to establish severe or pervasive activity, even at the Rule 12(b)(6) stage); *Khoury v. Meserve*, 268 F. Supp. 2d 600, 614 (D. Md. 2003) (determining that "disrespectful, frustrating, critical, and unpleasant" workplace interactions do not create a hostile work environment). Other than his unsubstantiated perception that the personality conflict was attributable to his assertion of disability, Plaintiff offers no evidence linking any unpleasant behavior he faced to his medical condition.

Additionally, the few disability-related comments Plaintiff does specifically identify are not sufficiently "severe" or "pervasive" to make a prima facie case of hostile work environment. The email correspondence between supervisors in which at least one individual suggested Plaintiff was faking his disability and was a serial plaintiff, ECF 53-13 at 2, was not even known to him at the time he was employed at HP and thus cannot be deemed to have contributed to his

work environment. To the extent he alleges some comments were made in person, he does not allege the dates or frequency of such comments, or any particular concentration over a limited time frame, sufficient to meet the "high bar in order to satisfy the severe or pervasive test." *Sunbelt Rentals, Inc.*, 521 F.3d at 315; *see also Dangerfield v. Johns Hopkins Bayview Med. Ctr., Inc.*, Civil No. JKB-19-155, 2019 WL 6130947, at *3 (D. Md. Nov. 19, 2019) (stating, with respect to general allegations of consistent "condescending and abusive language and behavior," "[w]ithout details about the nature of the remarks and behavior at issue, it is impossible for the Court to determine whether the behavior she complains of would be seen as objectively hostile by a 'reasonable person'"); *Lenoir v. Roll Coater, Inc.*, 841 F. Supp. 1457, 1462 (N.D. Ind. 1992) (finding plaintiff's allegations of being reprimanded more severely than co-workers, without reference to exact dates, to be insufficient to support a harassment claim), *aff'd*, 13 F.3d 1130 (7th Cir. 1994). Summary judgment for Defendant is thus also appropriate as to the hostile work environment claim.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment, ECF 48, will be GRANTED as to Counts I, II, and III, except insofar as Counts I and II include claims of ADA retaliation. Plaintiff's Motion for Leave to File Surreply, ECF 56, will be DENIED. Defendant's Motion to Reopen Discovery, ECF 55, will be DENIED. A separate Order follows.

Dated: March 2, 2021

/s/
Stephanie A. Gallagher
United States District Judge

APPENDIX E

FILED: September 12, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1382
1:18-CV-01454-SAG

JEFFREY B. ISRAELITT,
Plaintiff-Appellant,
v.
ENTERPRISE SERVICES, LLC,
Defendant-Appellee,
and
HEWLETT PACKARD; HEWLETT-PACKARD COMPANY; HEWLETT PACKARD ENTERPRISE COMPANY; HP INC.; DXC TECHNOLOGY COMPANY; DXC TECHNOLOGY SERVICES LLC; NETIQ CORPORATION, trading as Micro Focus,
Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Supporting Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Red. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX F

TITLE 42. THE PUBLIC HEALTH AND WELFARE

* * *

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791

of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b) (5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to Identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in

each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the

Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990.

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

* * *

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on

disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities

in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto

upon receiving notice thereof, no charge may be filed under subsection (a) 1 by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the

first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a

seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the

Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the

court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the

judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * *

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely

affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship

on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

* * *

42 U.S.C. § 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973

shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * *

42 U.S.C. § 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.