No. _____

In The Supreme Court of the United States

ERIC KATZ,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1528

ERIC KATZ,
Plaintiff - Appellant,
v.

MERRICK GARLAND, U.S. Attorney General, U.S. Department of Justice,
Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, Senior District Judge. (1:20-cv-00554-TSE-JFA)

Submitted: January 30, 2024
Decided: February 2, 2024

Before KING, AGEE, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Eric Katz, Appellant Pro Se. Elizabeth A. Spavins, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Eric Katz appeals the district court's order granting Defendant summary judgment on Katz's discrimination and retaliation claims, brought pursuant to the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 to 796*l*, and on his constructive discharge claim. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Katz v. Garland*, No. 1:20-cv-00554-TSE-JFA (E.D. Va. Mar. 16, 2023). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:20-cv-554

ERIC KATZ,
Plaintiff,

v.

MERRICK GARLAND, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,
Defendant.

SEALED MEMORANDUM OPINION

This employment discrimination case is before the Court on Defendant's Motion for Summary Judgment. Oral argument on this matter was heard on January 19, 2023, and the parties have extensively briefed the Motion, including the submission of supplemental briefs. Thus, this matter is now ripe for disposition.

I.

On August 26, 2021, a Memorandum Opinion and Order issued granting in part and denying in part defendant's First Motion to Dismiss the Complaint. *See Katz v. Dep't of Justice*, 2021 WL 3809034 (E.D. Va. Aug 26, 2021) (Memorandum Opinion) (Dkt. 50). Specifically, pursuant to Rule 12(b)(6), Fed. R. Civ. P., the claims for (i) Improper Collection, Use, and Maintenance of Protected

Medical Information under the Rehabilitation Act; (ii) Improper Demand for Medical Documentation and Examination under the Rehabilitation Act; and (iii) Hostile Work Environment under the Rehabilitation Act were dismissed for failure to state a claim upon which relief could be granted. *Id.* The Order and Memorandum Opinion did, however, grant the plaintiff leave to amend with respect to his hostile work environment claim. But the Order and Memorandum Opinion denied the First Motion to Dismiss with respect to the following counts:

- Failure to Accommodate under the Rehabilitation Act;
- Retaliation under the Rehabilitation Act;[1] and
- Constructive Retaliatory Discharge.

Plaintiff timely filed a Second Amended Complaint ("SAC") on September 22, 2021, and defendant thereafter moved to dismiss the SAC with respect to the amended hostile work environment claim. A Memorandum Opinion and Order dated June 30, 2022 granted the Motion to Dismiss the hostile work environment claim. *See Katz v. Dep't of Justice*, 2022 WL 2375162 (E.D. Va. Jun. 30, 2022) (Memorandum Opinion) (Dkt. 66). Thus, the matter proceeded to discovery only on plaintiff's claims for (i) failure to accommodate, (ii) retaliation, and (iii)

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[1] The August 26, 2021 Memorandum Opinion and Order permitted the retaliation claim to proceed *only* with respect to allegations concerning plaintiff's job transfer to Arlington, Virginia and defendant's corresponding alleged failure to accommodate. The claim was dismissed with respect to all other allegations, including the removal of plaintiff's job duties. *See Katz v. Dep't of Justice*, 2021 WL 3809034 at *1.

constructive retaliatory discharge. Defendant now moves for summary judgment on all three remaining counts.

II.

To facilitate consideration of motions for summary judgment, Rule 56, Fed. R. Civ. P., and Local Rule 56 require that the movant include a specifically captioned section enumerating all material facts for which the moving party contends there is no genuine issue. The rules also require that the movant cite parts of the record to support each fact. Rule 56, Fed. R. Civ. P., and Local Rule 56 next require that the non-movant include a specifically captioned section enumerating material facts for which the non-movant contends a genuine issue exists; these rules also require that the non-movant cite to the record in support of each fact.

Here, defendant, in compliance with the rules, set forth a statement of material facts in separate enumerated paragraphs that defendant contends are undisputed. Next, plaintiff complied with the rules in part. Plaintiff responded to defendant's enumerated statement of material facts by disputing in enumerated paragraphs certain facts asserted by defendant and, at least in some instances, supporting any alleged disputes of fact with admissible evidence. But plaintiff, in several instances, stated that he denied a fact asserted as undisputed by defendant without pointing to supporting record evidence. Such denials are not effective to create a disputed issue of fact, as Local Rule 56 requires that the non-movant dispute facts by pointing to admissible evidence. Thus, where

facts were denied but not supported with record evidence, the defendant's asserted undisputed fact is deemed admitted. Moreover, plaintiff, at several places, asserted supplemental facts. Neither the Federal Rules nor the Local Rules invite or permit plaintiff, or any non-movant, from setting forth such supplemental facts. In any event, defendant responded to plaintiff's supplemental facts and each of plaintiff's proposed facts has been taken into account in the analysis. Finally, after supplemental briefing was ordered regarding a new *legal* argument that plaintiff raised at oral argument, plaintiff submitted a brief containing a section entitled "background," which asserted various facts. This background section is interpreted as just a background section, and not as adding any further disputes of fact, because plaintiff did not seek or receive permission to add new facts to the record. In any event, a careful review of plaintiff's supplemental brief reveals no disputes of material facts.

Accordingly, the following statement of facts is derived from a careful review of defendant's statement of undisputed facts, plaintiff's response as well as plaintiff's supplemental facts, and the record as a whole.

• The Drug Enforcement Administration ("DEA") hires Special Agents, who plan and conduct investigations relating to suspected violations of federal narcotics and dangerous drug laws. Special Agents frequently work irregular, unscheduled hours and assume personal risks.

- The DEA's Personnel Manual notes that, because of the nature of a DEA Special Agent's work, applicants and employees must meet certain physical requirements which are reassessed periodically.

- DEA Special Agents all sign a mobility agreement, which states that the Special Agent may be subject to frequent changes in posts of duty and that mobility is a condition of the Special Agent's employment.

- The DEA had in place, during the relevant time period, a reasonable accommodation policy. DEA's policy stated that the reasonable accommodation process "must be a cooperative, interactive process" that involves the requesting individual, the person responsible for making decisions concerning accommodations (typically the employee's direct supervisor), and an Accommodation Coordinator specified by Headquarters ("HQ").

- In accordance with the DEA's policy then in effect, the interactive process should include a discussion of all relevant issues, including which accommodations are appropriate and do not pose undue hardship on the DEA. As part of the interactive process, the decisionmaker is entitled to documentation sufficient to determine whether the individual has a disability and whether the individual requires a reasonable accommodation. If the documentation is insufficient, the DEA's policy makes clear that the decisionmaker may request supplemental documentation and may deny the request for reasonable accommodation if such supplemental documentation is not received.

- DEA's reasonable accommodation policy also notes that reassignment as an accommodation will be considered only when an employee cannot perform the essential functions of his or her current position and no accommodation is possible in that position.

Plaintiff's Tenure at DEA

- Plaintiff, Eric Katz, began working at the DEA as a Special Agent in 1996. In 2011, Plaintiff conceived of the concept for the Cellular Abduction Tracking System Program ("CATS Program"). Plaintiff developed the CATS Program at DEA's HQ in Arlington, Virginia.

- In 2015, DEA began considering moving the CATS Program from HQ to a different location and ultimately decided to move the program and the corresponding then-unfilled Staff Coordinator position to the Army's Fort Bragg base in North Carolina.

- Plaintiff and his then-supervisor believed that plaintiff should have automatically received the Staff Coordinator position for the CATS Program. But Michael DellaCorte, the then- Deputy Chief of Operations in the Office of Operations Management, advertised the Staff Coordinator position to the public. The Staff Coordinator Position was advertised as a nonenforcement HQ position, meaning that the position would not include physical exertion or the potential for physical confrontation. At this time, plaintiff did not receive the Staff Coordinator Position.

- In the first half of 2017, plaintiff applied for a Special Agent position in DEA's Charlotte, North Carolina District Office. Then, in June 2017, plaintiff was diagnosed with a right vestibular schwannoma—a benign brain tumor—after experiencing hearing loss, tinnitus, and vertigo.[2]

- After his diagnosis, plaintiff requested a medical accommodation transfer on September 9, 2017. Specifically, plaintiff, in his request, (i) stated that he was withdrawing from consideration for the Special Agent position in the DEA's Charlotte office and (ii) requested a medical accommodation transfer to the Raleigh area, specifically by submitting his name for consideration for the Staff Coordinator position for the CATS Program in Fort Bragg, to be, as he stated, in close proximity to Duke University Medical Center ("Duke Medical Center"), where plaintiff had located a specialist who treated his particular tumor. Plaintiff completed the requisite paperwork, and his request for accommodation was approved on October 3, 2017. As a result of this accommodation approval, plaintiff became the Staff Coordinator for the CATS Program located in Fort Bragg. Then, on October 30, 2017, plaintiff submitted another accommodation request seeking to work from home in North Carolina as needed. This accommodation request was approved the very next day.

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[2] Although the parties never submitted a description of a vestibular schwannoma, an article from Duke Health confirms that vestibular schwannomas are noncancerous growths. *See* Duke Health, *Acoustic Neuroma, Vestibular Schwannoma* (last visited Mar. 16, 2023), https://www.dukehealth.org/treatments/ear-nose-and-throat/acousticneuroma.

• Also in September 2017, plaintiff contacted DEA's Health Services Unit—which monitors whether Special Agents meet the physical requirements for duty—to provide medical records about his tumor. Based upon a review of those records, DEA issued a medical advisory for plaintiff on October 2, 2017, which concluded that plaintiff did not meet the physical standard for law enforcement positions as a DEA agent.

Evaluation of the CATS Program in 2018-2019

• Approximately a year later, in November 2018, plaintiff was assigned a new supervisor, Luke McGuire. McGuire was tasked by his supervisor—Michael DellaCorte—with reviewing all programs under McGuire's supervision, including the CATS Program for which plaintiff was now the Staff Coordinator.

• Beginning in December 2018, McGuire had concerns with the management and operation of the CATS Program in Fort Bragg and with plaintiff's effectiveness as the Staff Coordinator of the CATS Program. Specifically, one responsibility of plaintiff in his role as Staff Coordinator of the CATS Program in Fort Bragg was to serve as a task monitor for contractors working in connection with the CATS Program. Yet, in this regard, McGuire could not find record of any work performed by two of the CATS Program's three contractors who were subject to plaintiff's supervision as Staff Coordinator.

• Adding to McGuire's concerns about the management of the CATS Program, McGuire

learned from plaintiff on January 30, 2019 that the DEA had no formal agreement with the Army permitting the DEA to occupy space at Fort Bragg. Because of the lack of formal agreement, McGuire began to consider relocating the CATS Program to or near DEA HQ in Arlington, VA.

- In early February 2019, the contracting officer representative for the CATS Program, Mina Hunter, informed McGuire that plaintiff had not yet completed a certain training module which McGuire believed contractor task monitors—such as plaintiff—were required to complete.[3] Thereafter, on February 5, 2019, McGuire removed plaintiff's task monitor responsibilities.

- On March 14, 2019, McGuire visited the CATS Program at Fort Bragg. Based on his visit, McGuire was not satisfied with the status of the CATS Program nor with how it was being operated and supervised.[4]

- Eventually, in March 2019, a decision was made—either by McGuire or by McGuire's supervisor, Michael DellaCorte, on McGuire's recommendation—to relocate the CATS Program to or near DEA HQ in Arlington, VA. Given that this

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[3] Plaintiff disputes the defendant's assertion that plaintiff was required to complete this task module. Thus, the undisputed fact has been updated to reflect that *McGuire believed* that plaintiff was required to complete the module, a fact plaintiff does not dispute. In any event, this dispute is not material.

[4] Plaintiff and defendant disagree regarding McGuire's motive for visiting the CATS Program in person on March 14, 2019, so no reference to motive is included in the undisputed fact.

relocation would impact plaintiff because plaintiff because plaintiff could not complete many of his tasks remotely, McGuire reached out to several other HQ sections and employees in the DEA to ask if they had any remote work that plaintiff could perform, but there were no such opportunities.[5]

· Around the same time, at some point in March or April 2019, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") regarding the fact that McGuire had relieved plaintiff of some job responsibilities.[6]

Plaintiff's Communications with Derek Orr[7]

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[5] It is undisputed that, in March 2019, McGuire knew of the accommodations that plaintiff had been granted. What is disputed, however, is when McGuire *first* learned of the accommodations: March 2019, as defendant contends, or November 2018, as plaintiff contends. It is also undisputed that the decision to relocate the CATS Program was made either by McGuire or by DellaCorte, although it is not clear which one of the two actually made the decision. In any event, the disputes about when McGuire knew of the accommodations and who made the decision to relocate the CATS Program are immaterial to the summary judgment analysis. Accordingly, the statement of facts has been modified to reflect the disputes, though none of the disputes are material.

[6] This fact was asserted by plaintiff and not by defendant. But the record makes clear that this fact cannot be disputed.

[7] Plaintiff disputes each of the facts relating to his communications with Derek Orr as incomplete and instead points to the actual communications between plaintiff and Orr. Thus, the facts listed here reflect the actual communications between plaintiff and Orr as evidenced by the undisputed factual record.

- The decision to relocate the CATS Program to Northern Virginia was formally communicated to plaintiff in a memorandum that McGuire wrote to plaintiff on April 23, 2019. In that memorandum, McGuire instructed plaintiff to contact Derek Orr, the Disability Employment Program Manager at the DEA, for the purpose of engaging in an interactive process to assess whether and how plaintiff could be reasonably accommodated notwithstanding the move of the CATS Program to or near DEA HQ in Arlington, VA.

- Pursuant to McGuire's instructions, plaintiff contacted Orr on May 2, 2019 to discuss possible accommodations. Specifically, plaintiff expressed interest in a *law enforcement* position in Greensboro, NC. Orr informed Plaintiff that, because of the accommodations plaintiff was granted in October of 2017, Orr needed updated medical documentation to determine whether plaintiff was physically qualified to perform the essential functions of *law enforcement* positions, as opposed to the *non-enforcement* position in which plaintiff was employed as Staff Coordinator of the CATS Program.

- Plaintiff, via counsel, refused Orr's request for updated medical documentation. Throughout May 2019, Orr continued to seek updated medical documentation, explaining the need for such information, namely, to determine whether plaintiff was qualified for the *law enforcement* position that plaintiff was seeking in Greensboro, despite the October 2, 2017 advisory which concluded that plaintiff did not meet the physical standard for law

enforcement positions. Plaintiff initially refused to provide any medical documentation.

- Eventually, in late May 2019, Orr received a letter from Dr. Steven Chang at Stanford University, which stated that plaintiff was a patient at Stanford from September 8 through 13, 2017, and that plaintiff would need future periodic scans and would need a specialist familiar with plaintiff's specific tumor type. Orr forwarded Dr. Chang's letter to Deborah Lary, the then-head of the Health Services Unit of the DEA, to assist the DEA in determining next steps with regard to plaintiff's request to be placed in a law enforcement role.

- On June 12, 2019, based upon the Health Services Unit's review of Dr. Chang's letter, the DEA requested additional information from plaintiff. Specifically, the DEA requested that plaintiff's treating physician complete a Special Agents Functional Capabilities Questionnaire. The DEA also requested that plaintiff's treating physician identify any activities that plaintiff should not perform.

- Dr. Chang's office returned the Special Agents Functional Capabilities Questionnaire on June 28, 2019, noting no functional limitations. Dr. Chang's assessment was based on a 2017 examination. *See* Def's Mot. Summ. J., Ex. 32.

- On July 3, 2019, based upon the Questionnaire completed by Dr. Chang, the DEA terminated Plaintiff's existing medical advisory and cleared plaintiff for full law enforcement duty.

- On July 11, 2019, Gregory Cherundolo, then-Chief of Operations, reassigned plaintiff to a Staff Coordinator position in the Confidential Source Section, Office of Operations Management; this position was located in Arlington, Virginia at HQ. Pending funding for his permanent change of station, plaintiff was ordered to report to the Raleigh District Office during regular business hours and to receive assignments remotely from the Chief of the Confidential Source Section. Plaintiff was expected to report on July 21, 2019.

- Also on July 11, 2019, Orr emailed plaintiff stating that, based on the DEA's termination of plaintiff's medical advisory which was based on Dr. Chang's completed questionnaire, Orr believed that plaintiff no longer required an accommodation. Plaintiff replied that he still required the accommodations of being close to Duke Medical Center and working remotely as needed.

- On July 25, 2019, plaintiff sent Orr a letter from Dr. Michael Gertner, a family friend who never physically examined plaintiff.[8] In that letter, Dr. Gertner stated that plaintiff should continue to have access to Duke Medical Center. The letter also stated that with reasonable accommodations—such as telework when needed—plaintiff was able to perform the essential functions of a law enforcement position.

- Thereafter, on August 1, 2019, Orr wrote to plaintiff stating that additional medical

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[8] *See* Def's Mot. Summ. J., Ex. 4 at 102 (plaintiff acknowledging that Dr. Gertner never physically examined plaintiff).

documentation was needed to support plaintiff's reasonable accommodation request. Specifically, Orr attached a list of questions for Dr. Chang, and asked plaintiff to send the questions to Dr. Chang or to allow Orr to send the questions to Dr. Chang.

- In response, plaintiff informed Orr that plaintiff would designate a single point of contact for all medical inquiries: Dr. Gertner. Orr then re-sent the same list of questions, addressed this time to Dr. Gertner.

- Dr. Gertner responded with a letter that did not answer all of the questions Orr had asked. Specifically, Orr asked Dr. Gertner to provide the frequency of plaintiff's treatment at Duke Medical Center, but Dr. Gertner nowhere provided such information. And Orr also asked Dr. Gertner to provide information regarding the type of treatment that plaintiff received at Duke Medical Center, but Dr. Gertner also did not provide that information.[9]

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[9] Dr. Gertner never explained the reason that plaintiff had to be treated *at the Duke Medical Center* rather than at any of the major medical centers reasonably near DEA HQ in Arlington, Virginia. Specifically, Johns Hopkins Hospital, Howard University Hospital, George Washington University Hospital, Georgetown University Medical Center, Virginia Commonwealth University Medical Center at Richmond, and the University of Virginia Health System, among others, are all close to DEA HQ in Arlington, Virginia. There is no evidence that any of these medical centers lack the ability to treat right vestibular schwannomas. And most of these hospitals are closer to DEA Headquarters than the approximately 80 miles between Fort Bragg and Duke Medical Center. It is thus worth noting that the premise of plaintiff's claim—that he must remain close to Duke—strains credulity.

Plaintiff's Departure from DEA

- In the fall of 2019, plaintiff requested Family Medical Leave Act ("FMLA") leave, from October 28, 2019 through March 31, 2020, to care for his mother. Plaintiff's leave request was granted.

- On March 31, 2020, plaintiff retired from the DEA.[10]

III.

The standard for summary judgment is too well-settled to require extensive elaboration here. Summary judgment is appropriate when there is "no genuine dispute as to any material fact" and based on those undisputed facts the moving party "is entitled to judgment as a matter of law." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). To serve as a bar to summary judgment, disputes of fact must be "material," which means that they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Importantly, at the summary judgment stage, courts must "view the evidence in the light most favorable to . . . the non[-]movant." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

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[10] Plaintiff states he retired, but defendant claims plaintiff simply resigned. This dispute is not material to the summary judgment analysis in which plaintiff claims he was constructively discharged. The analysis here thus proceeds on this assumption as well.

IV.

A.

Plaintiff's first claim is that the DEA, in violation of the Rehabilitation Act, failed to provide him with a reasonable accommodation, namely allowing him to remain close to Duke Medical Center in North Carolina indefinitely while he served as Staff Coordinator of the CATS Program, notwithstanding the fact that the CATS Program was being moved to Arlington, Virginia.[11]

To establish a *prima facie* case of failure to accommodate under the Rehabilitation Act, plaintiff must prove (1) that he qualifies as an "individual with a disability" as defined by statute; (2) that the DEA had notice of his disability; (3) that with reasonable accommodation plaintiff could perform the essential functions of his job; and (4) that the DEA refused to make such reasonable accommodations. *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 414 (4th Cir. 2015). If plaintiff establishes a *prima facie* case, then the defendant may still lawfully deny an accommodation if that accommodation would pose an "undue hardship" to the employer. *Id.*

For purposes of summary judgment, defendant does not dispute that plaintiff has satisfied the first and second elements of a *prima facie* case, namely that plaintiff is an individual with a disability as defined by statute and that the DEA had notice of

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[11] Specifically, plaintiff argues that he should have been allowed to serve as Staff Coordinator of the CATS Program remotely.

plaintiff's disability.[12] But defendant argues that plaintiff has not satisfied the third and fourth elements, namely that he could perform the essential functions of his job with *reasonable* accommodation and that the DEA refused to make such accommodations. Defendant is correct; plaintiff has failed to establish the third and fourth elements of a *prima facie* case for failure to accommodate.

With respect to the third element, which requires that plaintiff demonstrate he could perform the essential functions of his job as Staff Coordinator of the CATS Program with the reasonable accommodation of working from North Carolina, the Fourth Circuit has made clear that plaintiff bears (i) the "burden of identifying an accommodation that would allow a qualified individual to perform the job" and (ii) "the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Lamb v. Qualex, Inc.*, 33 F. App'x 49, 59 (4th Cir. 2002) (citing *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 197 (4th Cir. 1997)). Plaintiff here has not established that his request to remain close to Duke Medical Center indefinitely, irrespective of DEA's operational needs, was reasonable. In this regard, the Fourth Circuit's decision in *Smith v. CSRA*, 12 F.4th 396 (4th Cir. 2021) is instructive. There, the plaintiff argued that the Rehabilitation Act required her employer, coincidentally also the DEA, to allow her to work remotely. The Fourth Circuit rejected that argument, concluding instead that the "DEA was not required to offer [the plaintiff] a remote work

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[12] The parties have assumed, for purposes of summary judgment analysis, that plaintiff's right vestibular schwannoma qualifies as a disability.

accommodation and its failure to do so was not a refusal to accommodate." 12 F.4th at 415. In so concluding, the Fourth Circuit recognized that the DEA possessed a "legitimate expectation" that the plaintiff there would report to "DEA headquarters for work daily." *Id.* This analysis applies here. Plaintiff, here, sought an accommodation allowing him to work remotely from North Carolina, away from the physical site of the CATS Program. As the Fourth Circuit recognized in *Smith*, the DEA is not required to grant such an accommodation and has a legitimate interest in expecting that the plaintiff arrive to work in-person at DEA HQ every day. Moreover, it is worth noting that at the same time plaintiff claimed he needed an accommodation, plaintiff was seeking a law enforcement position and thus submitted documentation from Dr. Chang clearing plaintiff for full law enforcement duty, a conclusion which itself undermines plaintiff's need for an accommodation. Thus, plaintiff has not demonstrated that the accommodation he sought was reasonable and plaintiff has not satisfied the third element necessary to state a claim for failure to accommodate under the Rehabilitation Act.[13]

Seeking to avoid this conclusion, plaintiff argues that DEA had previously granted the accommodation sought by plaintiff, and that it was therefore unreasonable for the DEA to withdraw that accommodation. But this is not the law, as the Fourth Circuit has made clear that an employer is *not* required to provide a particular accommodation in perpetuity merely because the accommodation

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[13] As noted *supra*, n.9, it is far from clear why plaintiff required treatment at Duke Medical Center rather than the numerous major medical centers near DEA HQ in Arlington, Virginia.

was once granted. *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004, 1013 (4th Cir. 2020) (accommodations need not be extended "indefinitely"). Indeed, in *Smith*, the Fourth Circuit concluded that the DEA was not required to grant the plaintiff there the requested work-from-home accommodation notwithstanding the fact that DEA had granted that accommodation in the past. *See Smith*, 12 F.4th at 415. Moreover, it is clear from the undisputed record that the circumstances had changed. Specifically, the CATS Program was being moved from Fort Bragg in North Carolina to Arlington, Virginia, making it far more difficult for plaintiff to perform his role as staff coordinator from North Carolina. Accordingly, plaintiff's argument that the DEA is not allowed to remove accommodations once they have been given runs counter to clear Fourth Circuit precedent.

Additionally, the undisputed facts demonstrate that plaintiff has not satisfied the fourth element of a *prima facie* case for failure to accommodate, namely that the DEA failed to grant a reasonable accommodation. In this regard, the Fourth Circuit has held that "implicit in the fourth element" is that the employer and employee engage in an "interactive process" to identify a reasonable accommodation that can meet the genuine needs of both the employee and the employer. *Haneke v. Mid-Atlantic Capital Mgmt.*, 131 F. App'x 399, 400 (4th Cir. 2005). When an employee claims that he requires a special accommodation due to an illness or disability, the employer may require that the employee furnish medical documentation demonstrating that the accommodation is required. *Delaval v. PTech Drilling Tubulars, LLC*, 824 F.3d 476, 482 (5th Cir.

2016). If the employee refuses to furnish the requested documentation, then the employee "causes a breakdown in the interactive process" that precludes an employer's liability. *Id.*

Precisely this happened here, as plaintiff failed to provide documentation requested by the DEA, causing a breakdown in the interactive process which thereby precludes the DEA's liability. The DEA requested medical records to verify plaintiff's medical need to remain close to Duke Medical Center, but plaintiff for weeks refused to provide any such medical documentation. And when plaintiff eventually submitted a short, vague letter from a doctor whom plaintiff had not seen since 2017, the DEA determined it needed more detailed and more updated information and thus requested that plaintiff's treating physician complete a Special Agents Functional Capabilities Questionnaire. To be sure, plaintiff's doctor—the same doctor who had not physically examined plaintiff since 2017—completed the Questionnaire, noting no functional limitations. Based on that completed Questionnaire, the DEA concluded that plaintiff did not need an accommodation. Unhappy with that result, plaintiff submitted a letter from another doctor—Dr. Gertner, a family friend—stating that plaintiff needed continual access to Duke Medical Center. DEA engaged interactively and in good faith by requesting additional medical documentation to verify Dr. Gertner's opinion. Specifically, DEA sought answers to a list of questions, including whether plaintiff actually visited Duke Medical Center for treatment and the frequency of plaintiff's treatment at Duke Medical Center. Dr. Gertner, who never physically examined plaintiff, replied with a

five-page letter. But Dr. Gertner did not answer all of the questions that the DEA had asked. Specifically, despite the DEA requesting information regarding the frequency and type of treatment that plaintiff received at Duke Medical Center, Dr. Gertner did not provide that information. *See* Def's Mot. Summ. J., Ex. 40, 41. Thus, plaintiff, through his doctor, failed to respond to the DEA's legitimate inquiries and thereby caused a breakdown in the interactive process, precluding defendant's liability.

At oral argument, plaintiff argued that it was the DEA, not plaintiff, that caused a breakdown in the interactive process by not following its own internal procedures. Specifically, plaintiff contends that DOJ Instruction 1100.01.01 requires the issuance of a specific form—Form 100C—when an agency such as the DEA revokes an accommodation. But, as the government responded, DEA did not violate DOJ Instruction 1100.01.01. This is so because DOJ Instruction 1100.01.01 did not exist during the relevant time period, and, in any event, that Instruction requires only that the DEA notify plaintiff of the accommodation withdrawal in writing, not that the DEA use specifically Form 100C. And even had the DEA failed to comply with its own procedures, district courts have concluded that an agency's failure to comply with its own policies does not violate the Rehabilitation Act. *See, e.g.*, *Williams v. Avnet, Inc.*, 910 F. Supp. 1124, 1135 (E.D.N.C. 1995), *aff'd*, 101 F.3d 346 (4th Cir. 1996); *Johnson v. Austin*, 2022 WL 4783293, at *6 (E.D. Va. June 24, 2022) (holding, in a case alleging, *inter alia*, disability discrimination, that the Department of Defense's violation of its own policy, without more, "does not prove discriminatory intent"). Plaintiff's

argument is thus meritless given that (i) DOJ Instruction 1100.01.01 was not in force at the relevant time period; (ii) even had the Instruction been in effect, the DEA complied with the Instruction; and (iii) even assuming that the DEA had not complied with Instruction 1100.01.01, that failure to comply does not preclude summary judgment here.

Plaintiff next argues that summary judgment is inappropriate because the DEA never informed plaintiff that his requested accommodation posed an undue hardship to DEA. But there is no requirement that the agency use the specific words "undue hardship" when revoking an accommodation, and the DEA did convey to plaintiff the reason the accommodation was being revoked. Specifically, the DEA told plaintiff that his accommodation needed to be re-evaluated in light of the fact that the CATS Program was leaving North Carolina, making plaintiff's accommodation of living in North Carolina burdensome, and because plaintiff was applying for an enforcement position, suggesting that plaintiff did not require his existing accommodations. As the Fourth Circuit has noted, an agency is not required to grant a remote work accommodation, as it has a legitimate expectation that its employees will report in-person daily. *CSRA*, 12 F.4th at 415. In any event, plaintiff's argument is incorrect as a matter of law, because the "undue hardship" analysis is relevant only *after* a plaintiff establishes a *prima facie* case; an employer may refuse an accommodation, even if the employee has established a *prima facie* case of failure to accommodate, if the plaintiff's "requested accommodation imposes an undue hardship on the employer." *Reyazuddin*, 789 F.3d at 416. But here,

as noted above, plaintiff has failed to establish the third and fourth required elements for a prima facie case of failure to accommodate. Thus, plaintiff's argument that summary judgment is prevented by the DEA's failure to inform plaintiff that his requested accommodation posed an undue hardship is incorrect as a matter of fact and as a matter of law.

In sum, summary judgment is appropriate on the failure to accommodate claim because plaintiff has not satisfied two elements of a *prima facie* case for failure to accommodate. First, plaintiff has not demonstrated that his requested accommodation was reasonable, and second, the record reflects that plaintiff caused a breakdown in the reasonable accommodation interactive process, thereby precluding his claim for failure to accommodate.

B.

Plaintiff's next claim is that the DEA retaliated against plaintiff by transferring plaintiff to or near DEA HQ in Arlington, Virginia.[14] A plaintiff may

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[14] In his supplemental brief, plaintiff also asserts that he was retaliated against when McGuire told plaintiff that he could be placed on a performance improvement plan. But the August 26, 2021 Order and Memorandum Opinion granting in part defendant's Motion to Dismiss permitted plaintiff to pursue a retaliation claim *only* with respect to allegations concerning plaintiff's job transfer to Arlington, Virginia and defendant's corresponding failure to accommodate. The claim was dismissed with respect to all other allegations, including the removal of plaintiff's job duties. *See Katz v. Dep't of Justice*, 2021 WL 3809034 (E.D. Va. Aug 26, 2021) (Dkt. 50). In any event, several circuits have concluded that a performance improvement plan does not qualify as an adverse action. *See, e.g., Fields v. Bd. of Educ. of Chicago*, 928 F.3d 622, 626 (7th

prove a retaliation claim either through direct evidence of retaliatory animus or via the application of the *McDonnell Douglas* burdenshifting framework. *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 122 (4th Cir. 2021). Here, plaintiff has chosen the *McDonnell Douglas* framework.

Under that framework, a plaintiff must first establish a *prima facie* case of retaliation by showing (1) that he engaged in a protected activity; (2) that his employer took an adverse action against him; and (3) that a causal connection existed between the protected activity and the asserted adverse action. *See King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003). If a plaintiff establishes a *prima facie* case, the burden shifts to the employer to show that it took the alleged adverse action "for a legitimate non-retaliatory reason." *Roberts*, 998 F.3d at 122. If the employer makes that showing, then the burden shifts back to the plaintiff "to rebut the employer's evidence by demonstrating the employer's purported non-retaliatory reasons were pretext for discrimination." *Id.* Although, at this stage, there may be enough evidence in the record to conclude that plaintiff has established a genuine dispute of material fact with regard to a *prima facie* case of retaliation, the DEA has demonstrated that it transferred plaintiff for non-retaliatory reasons, and plaintiff here has not shown any pretext to rebut the DEA's showing.

First, defendant contends that plaintiff has failed to establish a *prima facie* case of retaliation

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Cir. 2019); *Payan v. United Parcel Servs.*, 905 F.3d 1162, 1173-74 (10th Cir. 2018). Thus, plaintiff's argument raised in his supplemental brief was rejected at the Motion to Dismiss stage and is likely meritless in any event.

because plaintiff has not demonstrated a causal connection between the protected activity—here, submitting an EEOC complaint[15]—and the alleged retaliatory adverse action: the decision to relocate the CATS Program and plaintiff's Staff Coordinator position to DEA HQ in Arlington, VA. This is so, in defendant's view, because the decision to relocate the CATS Program occurred before plaintiff submitted an EEO complaint, which occurred at some point between March 6, 2019 and March 15, 2019. Although defendant may be correct in this regard, the record reveals that there may be a genuine dispute of material fact regarding the date on which the decision was made to relocate the CATS Program from North Carolina to or near DEA HQ in Arlington, VA. Specifically, some evidence suggests that the decision to relocate the CATS Program to or near DEA HQ in Arlington, Virginia was made in February 2019. *See* Def's Mot. Summ. J., Ex. 4 at 119 (plaintiff testifying that he first learned of the decision to relocate the CATS Program in February 2019). But other evidence indicates that, in February 2019, plaintiff's supervisor—McGuire—was only *considering* relocating the CATS Program, and that a final decision was not made until March 21, 2019. *See* Plf's Opp'n, Ex. 4 at 179 (McGuire testifying that he only made a final decision to relocate the CATS Program after his visit to Fort Bragg on March 14, 2019). Because there may be a genuine dispute of fact regarding the date on which the decision was made to relocate the CATS Program and plaintiff's position to Arlington, Virginia, plaintiff has shown

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[15] Submission of an EEOC complaint is protected activity under the Rehabilitation Act. *See* 42 U.S.C. § 12203.

enough for a *prima facie* case of retaliation at this stage under the *McDonnell Douglas* framework.

But even assuming that there is a factual dispute on the *prima facie* case, plaintiff's retaliation claim still fails. This is so because the burden then shifts to the defendant to proffer that it took the alleged adverse action of moving the CATS Program to or near DEA HQ in Arlington, Virginia "for a legitimate non-retaliatory reason." *Roberts*, 998 F.3d at 122. Here, defendant has no trouble meeting this burden. As discussed *supra* with respect to the failure to accommodate claim, there is ample evidence in the record that defendant had a legitimate business reason for transferring the CATS Program, and plaintiff, to or near DEA HQ in Arlington, Virginia. To begin with, the Fourth Circuit has concluded that the DEA possesses a legitimate business interest in requesting that employees work at headquarters, which is exactly what happened here. *See Smith v. CRSA*, 12 F. 4th 396, 415 (4th Cir. 2021). In any event, the record here reflects that McGuire possessed concerns about the management and supervision of the CATS Program in Fort Bragg, further justifying the relocation to or near DEA HQ in Arlington, Virginia. Defendant has thus demonstrated that the DEA took the alleged adverse action—the relocation of the CATS Program—for a legitimate non-retaliatory reason.

The burden then shifts back to plaintiff to attempt to "rebut the employer's evidence by demonstrating the employer's purported non-retaliatory reasons were [a] pretext for discrimination." *Roberts*, 998 F.3d at 122. To demonstrate pretext, the Fourth Circuit has held

that a plaintiff is required to demonstrate "both that the employer's reason was false" and that the adverse action would not have taken place "but for [the] employer's retaliatory animus." *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 246 (4th Cir. 2020). Put simply, plaintiff here is required to demonstrate a dispute of material fact such that a jury could conclude that DEA's discriminatory motives were the but-for cause of DEA's decision to move the CATS Program back to or near DEA HQ in Arlington, Virginia. *Id.* Here, plaintiff has not demonstrated that DEA's discriminatory motives were the but-for cause of DEA's decision to move the CATS Program to Arlington, Virginia. This is so because the undisputed record reflects that, even if the DEA had not finalized its decision, it was giving serious consideration to relocating the CATS Program in February 2019, one month before plaintiff performed the protected activity of filing his EEO complaint. This is notable because the Fourth Circuit has held that where, as here, an employer began considering taking the alleged adverse action before the plaintiff conducts the protected activity, a plaintiff cannot meet his burden of demonstrating pretext. *See id.* at 248 ("an employer proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatsoever of causality." (internal quotation marks and citation omitted)). And plaintiff has put forward no evidence in the record suggesting that the defendant's proffered non-retaliatory reason was false. Thus, plaintiff has not met his burden of demonstrating that the DEA's purported non-retaliatory reasons were pretext for discrimination. Accordingly, because plaintiff has failed to establish pretext, it is

appropriate to grant summary judgment to the defendant with respect to plaintiff's retaliation claim.

C.

Defendant next moves for summary judgment on plaintiff's claim that he was constructively discharged in retaliation for filing an EEOC Complaint. Specifically, plaintiff argues that he was constructively discharged when he was given little or no work to perform between March 15, 2019 and July 20, 2019. In this regard, the *prima facie* elements of a retaliatory constructive discharge claim are the same as a retaliation claim such that a plaintiff must demonstrate (1) that he engaged in a protected activity; (2) that his employer took an adverse action against him that amounted to a constructive discharge; and (3) that a causal connection existed between the protected activity and the asserted adverse action. *See King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003).

In this case, plaintiff has not satisfied the second element of a *prima facie* case; he has not shown, as required, that his working conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). In this regard, the Fourth Circuit has held that dissatisfaction with work assignments, a feeling of being unfairly criticized, and difficult and unpleasant working conditions are "not so intolerable as to compel a reasonable person to resign." *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004). But all that plaintiff here points

to in support of his constructive discharge claim is that he had little to no work to perform; plaintiff has not pointed to any record of intolerable working conditions. This dissatisfaction with work assignments—or lack thereof—does not demonstrate that the DEA took an adverse action. Thus, plaintiff has failed to satisfy the second element of a *prima facie* case for constructive discharge.

Even assuming, *arguendo*, that plaintiff had satisfied the second element of a *prima facie* case, plaintiff's constructive retaliatory discharge claim would still fail because plaintiff did not resign soon after the alleged retaliation. In this respect, the Fourth Circuit has held that a claim for constructive discharge fails where a plaintiff does not resign, and instead chooses to remain employed. *Jones v. UnitedHealth Grp., Inc.*, 802 F. App'x 780, 783 (4th Cir. 2020) (per curiam) (citing *Green v. Brennan*, 578 U.S. 547, 555 (2016)). And the Fourth Circuit has also held that even where a plaintiff resigns, the resignation must be temporally linked to the alleged retaliatory conduct. *See Munday v. Waste Mgmt. of N.A., Inc.*, 126 F.3d 239, 244 (4th Cir. 1997). This temporal link is necessary to ensure that the resignation was caused by the retaliatory conduct. *Id.* Thus, the Fourth Circuit has concluded that a plaintiff who resigned three months after alleged retaliation failed to establish a claim for constructive discharge, because the resignation was not temporally linked to the retaliation. *See Nye v. Roberts*, 145 F. App'x 1, 4 n.1 (4th Cir. 2005). Here, as all parties agree, the alleged retaliatory conduct that forms the basis for plaintiff's claim of constructive discharge ended in July 2019, when plaintiff took FMLA leave. But plaintiff did not

resign from the DEA until March 2020, eight months after the alleged retaliatory conduct of being given little to no work ceased. Indeed, had plaintiff returned to work after his FMLA leave rather than retire, he may have been given more-substantial work assignments. In any event, because the Fourth Circuit has concluded that a three-month gap between retaliatory conduct and resignation precludes a constructive discharge claim, an eight-month gap must, *a fortiori*, preclude a constructive discharge claim. Accordingly, because the timing of plaintiff's resignation does not allow for a constructive discharge claim here, plaintiff's constructive discharge claim fails.

Thus, plaintiff's constructive discharge claim fails for two independent reasons. First, plaintiff's dissatisfaction with work assignments is insufficient to satisfy the second element of a *prima facie* case for constructive discharge-an adverse action-as a matter of law. Second, plaintiff did not resign soon after the retaliation, thereby demonstrc1ting that his resignation was not caused by the retaliation. Accordingly, it is appropriate to grant defendant's Motion for Summary Judgment with respect to the constructive discharge claim.

V.

In sum, it is appropriate to grant defendant's Motion for Summary Judgment in its entirety. Plaintiff's failure to accommodate claim fails because plaintiff has not demonstrated that his request to remain close to Duke Medical Center was reasonable, and in any event, plaintiff caused a breakdown in the interactive process. Plaintiff's

retaliation claim fails because the DEA had a legitimate business reason to move plaintiff back to DEA HQ, and plaintiff has not demonstrated that DEA was acting with pretext. And plaintiff's constructive retaliatory discharge claim fails because plaintiff has not demonstrated that he suffered an adverse action, and in any event, plaintiff's resignation was not temporally linked to the alleged retaliatory conduct. Thus, summary judgment on all remaining counts is appropriate.

An appropriate Order will issue.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

Alexandria, Virginia
March 16, 2023

/s/T.S. Ellis, III
United States District Judge

FILED: April 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1528
(1:20-cv-00554-TSE-JFA)

ERIC KATZ

Plaintiff – Appellant

v.

MERRICK GARLAND, U.S. Attorney General,
U.S. Department of Justice

Defendant – Appellee

O R D E R

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

For the Court

/s/ Nwamaka Anowi, Clerk