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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER TOM, Plaintiff-Appellant, v. MARTIN O'MALLEY,* Commissioner of Social Security, Defendant-Appellee.	No. 22-16977 D.C. No. 4:19-cv-06322-JST MEMORANDUM* *

FILED

MAY 2 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court for the
Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted April 30, 2024***

* Martin O'Malley is substituted for his predecessor Kilolo Kijakazi, Acting Commissioner of the Social Security Administration, as Commissioner of the Social Security Administration, pursuant to Federal Rule of Appellate Procedure 43(c).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: BENNETT, BADE, and COLLINS, Circuit Judges.

Plaintiff Jennifer Tom, a former Benefit Authorizer at the Social Security Administration ("SSA"), alleged several employment-related claims against the SSA arising from her alleged perfume sensitivity. Because we assume the parties' familiarity with the facts, we recount them here only as necessary. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we AFFIRM the district court's order granting partial summary judgment to the SSA and the district court's bench trial determinations in favor of the SSA.

1. We review the district court's grant of summary judgment de novo. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021).

A. The district court correctly granted summary

judgment on Tom's disability discrimination claims because Tom failed to demonstrate that she suffered illegal discrimination because of her disability. *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007) (citation omitted).

Tom requested that she be allowed to telework full-time, and that she be given a fourth laptop, after she complained that the previous three laptops assigned to her were contaminated. The district court concluded that Tom failed to show that her requested accommodations were "reasonable on [their] face," that is, "ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 401-02 (2002). We agree, as the SSA was "not obligated to provide an employee the accommodation he requests or prefers"—it need "only provide some reasonable accommodation."

Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002) (citation omitted).

Throughout Tom's employment, the SSA provided multiple, reasonable accommodations in response to her requests. Tom did not dispute the accommodations and instead claimed that they did not "enable[] [her] to return to work full time." But Tom has failed to show that her request to telework full-time, considering the many accommodations provided to her by the SSA, was "reasonable on its face" or "ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401-02. We thus affirm the district court's grant of summary judgment on Tom's disability discrimination claims.

B. The district court correctly granted summary judgment on Tom's claim that her termination was retaliatory. The district court concluded that, even

assuming Tom made out a prima facie retaliation case, *Coons v. Sec 'y of U.S. Dep't of Treasury,* 383 F.3d 879, 887 (9th Cir. 2004), 1) the SSA presented unrebutted legitimate reasons for her termination; and 2) Tom failed to show the proffered reasons for her termination were pretext. The SSA offered evidence that Tom was Absent Without Leave (AWOL) on more than 70 occasions. Tom did not dispute this evidence. Nor did Tom proffer any evidence showing her termination for being AWOL was pretextual.

C. The district court also correctly granted summary judgment as to Tom's disparate treatment claims. *Peterson v. Hewlett-Packard Co.,* 358 F.3d 599, 603 (9th Cir. 2004). The district court concluded that Tom had not presented evidence that "similarly situated individuals outside [her]

protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson,* 358 F.3d at 603. Tom has failed to identify any evidence that the SSA subjected her to disparate treatment when deciding to remove her for being AWOL.

2. The district court correctly entered judgment for the SSA on Tom's hostile work environment claims. This court recently joined a number of circuit courts to hold that hostile work environment claims are cognizable under both the Americans with Disabilities Act and the Rehabilitation Act. *Mattioda v. Nelson,* --F.4th ----, 2024 WL 1710665, at *7 (9th Cir. Apr. 22, 2024) (discussing and endorsing the Fifth Circuit's decision in *Flowers v. S. Reg 'l Physician Servs. Inc.,* 247 F.3d 229 (5th

Cir. 2001)). Tom alleges a hostile work environment based on actions by her co-workers and her supervisor Tammie Doan. "An employer's liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 (9th Cir. 2004).

A. The district court correctly granted the SSA summary judgment as to Tom's co-workers' alleged harassing behaviors. The district court correctly determined that Tom failed to present evidence that SSA failed to take "prompt remedial action" in response to Tom's several complaints.

B. As to supervisor Doan's actions, the district court initially determined that Tom had created a triable issue as to supervisor harassment. After a bench trial, the district court found in favor of the

SSA. In reviewing a judgment following a bench trial, we review the district court's findings of fact for clear error and its legal conclusions de novo. *See Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 970 (9th Cir. 1994).

Tom needed to establish a "pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 871 (9th Cir. 2001) (quoting *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998)); *see also Mattioda*, 2024 WL 1710665 at *8. This required her to prove that her "workplace was 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [she] in fact did perceive to be so.'" *Nichols*, 256 F.3d at 871-72 (quoting *Faragher v. City of Boca Raton*,

524 U.S. 775, 787 (1998)); *see also Mattioda,* 2024 WL 1710665 at *9.

Tom accused Doan of five instances of harassment. The district court carefully evaluated the five alleged instances and concluded that a reasonable person would not find the encounters between Tom and Doan severe or pervasive enough to alter the conditions of Tom's employment and create an abusive working environment. Because we find no clear error in the district court's findings, we affirm its bench trial determinations.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER TOM, Plaintiff, v. KILOLO KIJAKAZI, Defendant,	Case No. 19-cv-06322-JST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried before the Court on February 22-24, 2022. Plaintiff Jennifer Tom represented herself. Defendant Kilolo Kijakazi was represented by attorneys Wendy Garbers and J. Wesley Samples. Having considered the evidence, the arguments of the parties, and the record in this action, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

A. Relationship Background Between Tom and Tammie Doan

1. From August 17, 2008, through August 15, 2018, Tom was employed as a Benefit Authorizer within Module 10 at the Social Security Administration's ("SSA") Western Program Service Center ("WNPSC").

2. Tammie Doan has worked for the SSA from 2009 until the present. During that time, she has held the positions of Authorizer, Management Analyst, Assistant Module Manager, Management Program Analyst, Program Specialist, Program Expert, and Management Program Analyst. From October 2011 through October 2013, Doan was employed as an Assistant Module Manager who supervised Claims Authorizers within Module 10 at SSA's WNPSC.

3. Doan left for approximately six months of maternity leave beginning in late October 2013.

4. When Doan returned from maternity leave in April 2014, she became the Assistant Module Manager who supervised Benefit Authorizers within Module 10 at SSA's WNPSC.[1] She served as Assistant Module Manager and Tom's first-line supervisor from April 13, 2014, through July 25, 2014.

5. Tom was selected to perform a special project, which took her away from Module 10 for proximately three weeks during the time she was being supervised by Doan. During this three-week period, Tom sat on floor three, instead of floor five, where Module 10 was housed.

6. On July 26, 2014, Doan was promoted

[1]"Claims Authorizers" and "Benefits Authorizers" are different positions within the SSA.

to the position of Management and Program Analyst within SSA's Regional Center for Automation and no longer worked with Tom.

B. Tom's Perfume Sensitivity and Doan's Actions

7. Tom is allergic to perfumes, colognes, and other fragrances.

8. In December 2013, Tom complained to her then-manager, Mireille Hanft, that a coworker, Aretha Colston, was using perfume on her body and also spraying it around her cubicle area, and that Colston's perfume was triggering Tom's allergy. Hanft spoke to Colston, who agreed to stop using perfume or cologne.

9. In fact, Colston's use of perfume continued. In May 2014, Tom approached Doan, her new manager, and said that Colston was using a perfume that triggered Tom's fragrance allergy. Doan responded

that she would talk to Colston to determine if there was any way of resolving Tom's complaint. Doan also spoke with Hanft.

10. On May 30, 2014, Doan met separately with Tom and Colston to discuss Colston's use of perfume and its effect on Tom. During Doan's meeting with Tom, Tom stated that the perfume worn by Colston was causing her to have an allergic reaction. Tom further indicated that other employees also wore perfume, but that those other persons' perfumes were not strong enough to trigger Tom's allergy. Doan informed Tom that she wanted to find an accommodation for Tom, such as working at a cubicle away from Colston, which would permit Tom to comfortably perform her job duties.

11. During Doan's separate meeting with Colston, Colston told Doan that, based on a conversation with

a prior manager, she had ceased spraying perfume around her cubicle area and only wore it on her body. She also stated that she would be willing to move her cubicle, so that she would no longer be sitting so close to Tom, if that would address Tom's concerns.

12. On June 2, 2014, Doan sent Tom an email summarizing the discussion they had at their May 30 meeting:

> I understand from our conversation that the fragrances worn by Aretha is [sic] causing you to have an allergic reaction (skin rashes and a burning sensation in your lungs).
>
> You said that you have been around other people using perfume, but they are not strong to the point of triggering your allergy. You have to take Benadryl to tone down the symptoms. In addition you have to drink caffeinated drinks to keep you awake. You also have a fan running in the background to flush the air.
>
> As I stated in our meeting, I want to accommodate you and provide you with option [sic] such as a working cubicle that is distant from the source of your allergy so you can comfortably perform your

> duties. You temporarily moved to Lara's cubicle on May 30, 2014. I have provided you with the options to move to different cubicles in the unit temporarily, but you refused this idea and wanted to see your union representative. You said that even if you move to another cubicle, Aretha's fragrances is [sic] so strong that it is still affecting you. You were sitting in Lara's previous cubicle on Friday and it was still affecting you. Today, you requested to sit in Lara's cubicle. If you are okay with that cubicle, it is available to you until July 11, 2014. We also have several other cubicles in the unit available for you to use temporarily. If you are open to this idea, please come see me.

The Court finds that Doan's email accurately summarizes her May 30 meeting with Tom.

13. Tom sent her own summary of the May 30 meeting to Doan on June 2, 2014. In it, Tom acknowledged that, during the May 30, 2014 meeting, Doan explained that (1) since Tom was the individual with the sensitivity, management would temporarily relocate her workstation; (2) pursuant to an agreement with the union,

"management needs to open up bidding for personal relocation to new cubical [sic] locations within the modules"; and (3) the cubicle relocation would be temporary until the bidding process concluded. Tom also acknowledged that, at the May 30, 2014 meeting, she and Doan discussed other accommodations that might assist Tom, including telework.

14. At the time, Tom did not say that her having to move to a different cubicle, instead of Colston having to move, was unfair, harassing, or inappropriate. She wrote in an email, "Personally I am more than happy to relocate to [a co-worker's] old desk until Aretha is allowed to move to her cubicle of choice."

15. On June 3, 2014, Tom responded to Doan's email summary of the May 30 meeting. Tom did not rebut or challenge Doan's observation that, "You said

that you have been around other people using perfume, but they are not strong to the point of triggering your allergy." Tom's June 3, 2014 email reiterated that it was Colston's "large dose" of perfume that was "strong enough to cause [her] allergies to act up."

16. On June 2 or 3, 2014, Doan and Tom toured the office to find a different cubicle for Tom that would place her further away from Colston. Doan was wearing perfume that day. Tom informed Doan that Doan's perfume was bothering her, but she also said that if she maintained adequate distance from Doan, the perfume no longer bothered her.

17. On or about June 3, 2014, Tom provided Doan with a written reasonable accommodation request for an air purifier, which Doan submitted to SSA's Civil Rights and Equal Opportunity office ("CREO") for

further processing. Tom indicated that she was making the request because "a fellow employee's perfume fills the air." Doan's request to bring in an air purifier was granted.

18. Doan also undertook numerous other efforts to address Tom's concerns. This order does not list those efforts in detail because the Court disposed of Tom's reasonable accommodation claims at summary judgment and they are no longer part of this litigation.

19. On July 23, 2014, Tom provided Doan with another written reasonable accommodation request, this time seeking a scent-free work environment. Doan promptly provided this request to CREO for further processing. In this request, Tom described her need for an accommodation differently. Instead of just referring to a single co-worker's perfume, Tom

referred, for the first time, to multiple "co-workers[']
perfumes" "throughout different locations within the
building." Doan was not Tom's supervisor when a
decision was made on this reasonable accommodation
request because she had started a new position on
July 26, 2014.

C. Tom's Harassment Claims Against Doan

20. In this litigation, Tom has accused Doan of four instances of harassment:

(a) Wearing perfume in Tom's presence during a June 3, 2014 meeting;
(b) Laughing at Tom during a June 27, 2014 Benefit Authorizers' meeting;

(c) Requesting that Plaintiff stand next to Ms. Colston's new cubicle on July 8, 2014;
(d) Following Tom into the elevator while wearing perfume on July 10, 2014; and

(e) Generally harassing her on unspecified occasions.

21. Tom first accused Doan of harassment in a July 9, 2014 email, which Tom sent in response to Doan's June 20, 2014 email informing Tom that she could bring an air purifier to work for her personal use. Prior to this time, Tom had only referred to Colston as her "harasser."

22.On June 3, 2014, Doan and Tom walked around the module work area to identify a cubicle for Tom's use that was located away from any triggering perfumes. After completing their walk, Doan invited Tom to sit in her cubicle to continue their discussion. Tom informed Doan that she could not sit in the cubicle because Doan was wearing perfume. Doan asked Tom if she was "okay," and Tom confirmed she was "okay" because Doan was wearing a light perfume. Tom did not ask to leave the meeting, and the parties continued their discussion with Doan

inside the cubicle and Tom standing outside the partition.

23.Prior to that time, Tom had only complained of Colston's perfume and had indicated that she was only bothered by "strong" perfume. She had never informed Doan that she was bothered by Doan's perfume.

24.The record regarding when and to what extent Doan wore perfume in the office was contradictory. For example, Tom's allegations were the subject of prior proceedings before the Equal Employment Opportunity Commission. During those proceedings, Tom acknowledged that, after she told Doan of her sensitivity to Doan's perfume during the June 3, 2014 meeting, "Ms. Doan did not wear perfume in my presence." Tom also acknowledged that prior to the June 3, 2014 meeting, "Ms. Doan did not wear

perfume in my presence." At trial, however, she stated that there were times when Doan's perfume affected her disability. Doan's testimony was that it was "not uncommon" for her to wear perfume to the office. She also testified that she had no reason to believe that her perfume was bothering Tom, because she wore a "light" amount and because Tom did not complain about Doan's perfume use. The Court finds that, to the extent Tom's allegations of harassment depend on Doan's having intentionally worn perfume in Tom's presence for the purpose of harassing her, there is a failure of proof.

25. On June 27, 2014, Doan held a staff meeting for Module 10 employees in the open space located among cubicles. Tom returned from her special project on another floor to attend the meeting. Doan asked her staff to gather close. The

instruction was not directed to a particular employee, but rather to the entire group so everyone could hear. Tom alleges that Doan directed her to sit next to Colston and then laughed, apparently finding humor in directing Tom to sit next to her harasser. Doan credibly testified that, although she may have laughed for other reasons in the course of beginning the meeting, she did not laugh at Tom specifically and did not "make fun" of her. Doan also testified that she never purposely asked Tom to stand next to Ms. Colston or her cubicle in order to trigger her perfume allergy. Notably, there were apparently several people present for this meeting, but no other witness besides Tom and Doan testified about it. The Court also notes that Doan's written communications with Tom were uniformly

appropriate and professional. The Court finds that Tom has not established that it is more likely than not that this incident occurred as she alleges.

26. Doan also credibly denied purposely following Tom onto the elevator, although she acknowledged that they may have ridden the elevator together, as they worked in the same building, used the same bank of elevators, and had similar break schedules. The Court finds that Tom has failed to establish that Doan harassed her in this way.

27. In an email dated July 15, 2014, to EEO Counselor Officer Veronica Toledo, "to update [her] on continued harassment," Tom describes the alleged harassment by Doan as Doan "spending more time in my area and making a point of talking to me" and "coming over to me and make small talk," but does not claim that Doan wore perfume while talking to or

walking by her. No reasonable person would conclude that Doan's actions in making small talk were harassing, and the Court concludes they were not harassing.

28. Tom did not testify regarding her allegations that Doan harassed her on July 8, 2022. Because there was no evidence at trial this incident occurred, the Court finds that it did not occur.

29. On July 10, 2014, Tom was having a conversation with a co-worker during a morning break. Doan walked past Tom and her co-worker and wished them a good morning. In an email to herself written later that day, which was entered into evidence, Tom characterized the incident as an episode of harassment. Doan's conduct was not harassing.

II. CONCLUSIONS OF LAW

A. Legal Standard

30. The only remaining claim in this case is Tom's harassment and hostile work environment claim as it pertains to Doan's actions. Because Tom is a former federal employee, her claim arises under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791. *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 413 (9th Cir. 1985). "The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act (`ADA')." *Coons v. Sec 'y of U.S. Dep't of Treasury,* 383 F.3d 879, 884 (9th Cir. 2004).

31. Although "the Ninth Circuit has not decided whether a hostile work environment claim exists under the ADA, and it is not clear whether such a claim exists under the Rehabilitation Act," other

courts have held that such claims are cognizable. *Anello v. Berryhill,* No. 18-cv-00070-DMR, 2020 WL 137109, at *10 (N.D. Cal. Jan. 13, 2020) (citing *Flowers v. S. Reg'l Physician Servs. Inc.,* 247 F.3d 229, 235-236 (5th Cir. 2001); *Lanman v. Johnson Cnty.,* 393 F.3d 1151, 1155 (10th Cir. 2004); *Shaver v. Independent Stave Co.,* 350 F.3d 716, 720-22 (8th Cir. 2003); *Fox v. Gen. Motors Corp.,* 247 F.3d 169, 175-76 (4th Cir. 2001)); *see also Ford v. Marion Cnty. Sheriffs Off,* 942 F.3d 839, 852 (7th Cir. 2019) (citing same, and *Fox v. Costco Wholesale Corp.,* 918 F.3d 65, 74 (2d Cir. 2019), in becoming the sixth circuit to hold that hostile work environment claims are cognizable under the ADA). "No circuit has held to the contrary," *Ford, 942 F.*3d at 852, and Kijakazi does not argue that Tom's hostile work environment claim is not cognizable.

32. To prevail on that claim, Tom must prove:

> (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.

Anello, 2020 WL 137109, at *10 (quoting *Flowers,* 247 F.3d at 235-36). She must establish a "pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 871 (9th Cir. 2001) (quoting *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1108 (9th Cir. 1998)). This requires proving that her "workplace was 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [she] in fact did

perceive to be so.'" *Id.* at 871-72 (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998)). "Factors that bear on whether a work environment is abusive include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Anello,* 2020 WL 137109, at *10 (quotation marks and citation omitted). Allegations of a hostile work environment "must be assessed from the perspective of a reasonable person belonging to the [protected] group of the plaintiff," *McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1115 (9th Cir. 2004), "considering all the circumstances." *Oncale v. Sundowner Offshore*

Servs., Inc., 523 U.S. 75, 81 (1998) (quotation marks and citation omitted).

33. It is not disputed that Tom is disabled. Kijakazi disputes, however, whether any harassment occurred.

B. Analysis

34. The frequency of the alleged harassing conduct in this case is limited to a handful of instances between June 3, 2014 and July 26, 2014. For three weeks of this roughly eight-week period, Tom worked on a special project in a work unit located on a completely different floor from her alleged harasser, Doan.

35. During their May 30, 2014 meeting regarding Colston's perfume, Tom informed Doan that she had "been around other people using perfume, but they [were] not strong to the point of triggering [her]

allergy." Thus, Doan had no reason to think that her personal perfume was an issue. Also, as previously noted, the record was unclear regarding the frequency of Doan's perfume use prior to June 3.

36. Doan first became aware of Tom's sensitivity to her own personal perfume during their June 3, 2014 meeting. Since Tom had previously only identified Colston's perfume as problematic and denied that others' perfumes triggered her sensitivities, it is reasonable for Doan to have asked Tom to sit down in Doan's cubicle to continue their conversation. When Tom told Doan that she could not sit down because of Doan's perfume, Doan asked Tom if she was "okay," and Tom confirmed that she was. They then continued their discussion with Doan inside the cubicle and Tom standing outside the partition. The record does not support the conclusion that Doan's

perfume continued to bother Tom once she created distance between herself and Doan. Even if Doan's perfume did bother Tom, however, there is no evidence that Doan was aware of this. A reasonable person would not find this encounter sufficiently severe or pervasive to alter the conditions of Tom's employment and create an abusive working environment.

37. Since Tom acknowledges that Doan stopped wearing perfume after the June 3, 2014, meeting and because Doan had no knowledge of Tom's sensitivity to her perfume prior to the June 3 meeting, a reasonable person would not find Doan's actions as a manager, including walking the floor, speaking to Tom, and riding the elevator with Tom to be hostile or abusive conduct.

38. As to the June 27, 2014 meeting, Doan reasonably requested that all staff gather closer so that they could hear her and did not specifically instruct Tom to get closer to Colston. The Court does not find that Doan intentionally laughed at Tom.

39. Tom may have experienced isolated instances in which she was made uncomfortable by other employees' use of fragrance. These instances did not constitute harassment because their use of perfume in her presence was neither pervasive nor severe.

40. Tom has not proven that a reasonable person with her disability would have considered Doan's conduct to be hostile, offensive, or abusive.

CONCLUSION

For the foregoing reasons, the Court finds in favor of Defendant Kilolo Kijakazi and against Plaintiff

Jennifer Tom. Defendant shall file a proposed judgment within ten days of this order.

IT IS SO ORDERED.

Dated: November 28, 2022

JON S. TIGAR
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER TOM, Plaintiff, v. KILOLO KIJAKAZI, Defendant,	Case No. 19-cv-06322-JST ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Re: ECF No. 103

Before the Court is Defendant Kilolo Kijakazi's motion for summary judgment. ECF No. 103. The Court will grant the motion in part and deny it in part.

I. BACKGROUND

Plaintiff Jennifer Tom was formerly employed by the United States Social Security Administration ("SSA") as a Benefit Authorizer. She contends that she was disabled because she has a sensitivity to fragrances and other chemicals and also suffers from

migraines with aura and vertigo. She argues that the SSA failed to reasonably accommodate her disabilities because it did not allow her to work from home full-time, and that her removal as a Benefit Authorizer, effective August 15, 2018, was unlawfully discriminatory and retaliatory. She also asserts that she was subjected to a hostile work environment because, for example:

i) Since December 2013, Plaintiff's co-workers continued to spray perfume in the office despite having knowledge of her allergic reactions to scents;

ii) On May 30, 2014, management informed the Plaintiff that she had to move her desk, but did not take any action to prevent her co-worker from spraying perfume in Plaintiff's presence;

iii) On June 3, 2014, Plaintiff's manager willingly wore perfume during a meeting, which caused Plaintiff to have an allergic reaction;

iv) On July 23, 2014, Plaintiff was forced to move to another location due to irritants emanating from the floor and permeating the room.

ECF No. 114 at 4.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

III. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if there is sufficient evidence "such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material only if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, the court must draw "all justifiable inferences" in the nonmoving party's favor and may not weigh evidence

or make credibility determinations. *Id.* at 255.

Where the party moving for summary judgment would bear the burden of proof at trial, that party "has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies its initial burden of production, the nonmoving party must produce

admissible evidence to show that a genuine issue of material fact exists. *Id.* at 1102-03. It is not the court's duty "to scour the record in search of a genuine issue of triable fact"; instead, the nonmoving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (citation omitted). If the nonmoving party fails to make the required showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

IV. DISCUSSION

Because Tom is a former federal employee, her disability discrimination claims arise under Section 501 of the Rehabilitation Act. *Boyd v. U.S. PostalServ.,* 752 F.2d 410, 413 (9th Cir. 1985). "The standards used to determine whether an act of

discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act ('ADA')." *Coons v. Sec 'y of U.S. Dep't of Treasury,* 383 F.3d 879, 884 (9th Cir. 2004).

> To state a prima facie case under the Rehabilitation Act, a plaintiff must demonstrate that (1) she is a person with a disability, (2) who is otherwise qualified for employment, and (3) suffered discrimination because of her disability. The Americans with Disabilities Act, whose standards of substantive liability are incorporated in the Rehabilitation Act, defines "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment.

Walton v. U.S. Marshals Serv., 492 F.3d 998, 1005 (9th Cir. 2007) (citation omitted), *superseded by statute on other grounds,* 42 U.S.C. § 12102(3)(A), *as recognized in Nunies v. HIE Holdings, Inc.,* 908 F.3d 428, 434 (9th Cir. 2018). "A 'qualified individual' is an individual with a disability who, with or without

reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 'Essential functions' are fundamental job duties of the employment position not including the marginal functions of the position." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 989 (9th Cir. 2007) (quotation and alteration marks, emphasis, and citations omitted). "If a disabled person cannot perform a job's 'essential functions' (even with a reasonable accommodation), then the ADA's employment protections do not apply." *Cripe v. City of San Jose*, 261 F.3d 877, 884 (9th Cir. 2001). The plaintiff bears "the burden of showing the existence of a reasonable accommodation that would have enabled him to perform the essential functions of an available job." *Dark v. Curry County*, 451 F.3d 1078, 1088 (9th Cir. 2006). To defeat summary judgment, the plaintiff

"need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case- specific) circumstances that demonstrate undue hardship in the particular circumstances." *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 401-02 (2002).

In this case, Tom does not contend that the SSA failed to provide any accommodations. She acknowledges in her opposition that the agency offered multiple accommodations in response to her requests and the recommendations of her treating physicians:

> but not limited to moving over 26 times to both cubicles and rooms on all six floors of the Richmond, California Western Program Center, masks, [being] excused from answering the Agency's 800 number, gloves, laptop replacements, draft guards, liberal leave, communication with co-workers electronically/ telephonically, [and] a home air purifier.

ECF No. 114 at 5. Her complaint is that the SSA knew that it could not provide a workplace completely free of fragrances or chemicals and that it was therefore required to allow her to telework full-time. However, "[a]n employer is not obligated to provide an employee the accommodation he requests or prefers[;] the employer need only provide some reasonable accommodation." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (quotation marks and citation omitted). Thus, for example, "[a]n employer is not required by the ADA to create a wholly isolated work space for an employee that is free from numerous possible irritants, and to provide an unlimited absentee policy." *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (finding no ADA violation where employer prohibited use of nail polish, moved

plaintiff to "a work station in another room with better ventilation," and set up a system "whereby if [the plaintiff] was sensing an irritant he could sign off his phone, notify his supervisor, and wait until the problem was remedied"). Tom has presented no medical evidence that the SSA's accommodations, including a private, enclosed office space with an air purifier and draft guards and limiting in-person interactions with co-workers, were insufficient. Tom also refused the agency's offers to try offices in federal buildings located in two different cities or for her supervisor to look for jobs to which Tom might be reassigned.

More fundamentally, Tom has not presented evidence to demonstrate that she could perform the essential functions of the job even with her requested accommodation. First, she does not dispute that she

requires an employer-provided laptop to perform the essential functions of the job, or that she has been unable to work on three different agency-provided laptops, the second two of which were provided to her after she complained of contamination. The third laptop was assigned by a particular systems employee selected by Tom, and Tom was allowed to take the laptop home with her each day. Tom's request for a fourth laptop was denied, but she has presented no evidence that working with a fourth agency-provided laptop would produce a different outcome.

Second, even if a fourth laptop would be successful at not provoking her fragrance or chemical sensitivities, Tom has also been found to be disabled - and awarded disability retirement as a result - "due to Migraine with Aura and Vertigo." ECF No. 113 at 219. Tom has not presented any evidence that she would

be able to perform the job of a Benefit Authorizer even if she were permitted to work from home and given a laptop that were acceptable to her. To the contrary, her deposition testimony confirms that she would be unable to work due to her migraines. For example, she testified that, in the last month before her deposition, she was unable to read for eight or nine days due to her migraines and that, when that happens, she takes medication and falls asleep for the rest of the day. *Id.* at 21-22. She agreed that she is "incapacitated" on those days, and that the month in which she had eight or nine days was "lighter," and that she has sometimes been incapacitated for "three weeks straight." *Id.* at 38. She described her "average day" as: "I wake up with a migraine, take medication, try not to run into anything, and just rest as much as possible." *Id.* at 55. She receives Botox injections approximately every

three months to help with her migraines, and those are effective for one to two weeks. But "for the rest of the three-month period it's cold compresses and dark rooms." *Id.* at 56; *see also id.* at 55-56 (describing her headaches as "very painful," and stating that it is "hard to do anything when it feels like that other than lay down and just put a cold compress on"). Based on her own testimony, Tom cannot meet her burden of demonstrating that she would be able to perform the essential functions of the job even with the accommodation she requested.

Tom has also failed to present evidence creating a genuine dispute of material fact over whether her termination was unlawfully retaliatory.

A *prima facie* case of retaliation requires a plaintiff to show:

(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the

two. The plaintiff must present evidence adequate to create an inference that an employment decision was *based on* an illegal discriminatory criterion. . . . Once the plaintiff establishes a *prima facie* case, the employer has the burden to present legitimate reasons for the adverse employment action. If the employer carries this burden, and plaintiff demonstrates a genuine issue of material fact as to whether the reason advanced by the employer was a pretext, then the retaliation case proceeds beyond the summary judgment stage.

Coons, 383 F.3d at 887 (quotation marks and citations omitted). Even assuming that Tom has made out a prima facie case, the SSA has presented evidence that Tom was terminated for being absent without leave on over 70 occasions. Tom does not dispute that she was absent on those dates or present any evidence that this reason for her termination was pretextual.

Nor can Tom's disparate treatment claim survive summary judgment. She has not presented evidence that "similarly situated individuals outside [her] protected class were treated more favorably, or other

circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004). The closest she comes is a statement in her opposition that "Defendant . . . allowed a [non-] disabled benefit authorizer to work full time virtually during the pilot program who was not designated a disable[d] employee." ECF No. 114 at 7. However, she cites no evidence to support that statement. In addition, allowing full-time telework during a pilot program is not equivalent to allowing permanent full-time telework.

The Court next considers Tom's claims of harassment and hostile work environment. Although "the Ninth Circuit has not decided whether a hostile work environment claim exists under the ADA, and it is not clear whether such a claim exists under the

Rehabilitation Act," other courts have held that such claims are cognizable, *Anello v. Berryhill,* No. 18-cv-00070-DMR, 2020 WL 137109, at *10 (N.D. Cal. Jan. 13, 2020), and Kijakazi does not argue otherwise here, ECF No. 103 at 32 (motion papers discussing standard for a hostile work environment claim). To prevail on such a claim, a plaintiff must prove:

> (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action. The disability-based harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment. Factors that bear on whether a work environment is abusive include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance

Id. (quotation and alteration marks and citations

omitted) (quoting *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235-36 (5th Cir. 2001)). Allegations of a hostile work environment "must be assessed from the perspective of a reasonable person belonging to the [protected] group of the plaintiff." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004).

As to allegedly harassing behavior by her co-workers, Tom's claim cannot withstand summary judgment because she has failed to present evidence creating a material dispute over whether the SSA failed to take prompt remedial action. The agency responded to Tom's initial complaints about the use of perfume by Ms. Colston, one of Tom's co-workers, by talking to Colston and receiving her assurance that she would stop wearing perfume to work. When Tom complained a few months later that Colston had resumed wearing perfume, Tom's supervisor met with

both employees, arranged for workstation moves to allow physical separation between Tom and Colston, allowed Tom to use an air purifier at work, and provided information regarding medical documentation required to request a reasonable accommodation. Similarly, when a different co-worker inappropriately referred to Tom's timesheets in a Skype message to other employees, the agency "took immediate action to remove his timekeeping duties, thereby rendering him without any reason to have contact with Ms. Tom or knowledge of her absences." ECF No. 104 ^ 18. Tom also complained that unknown co-workers were contaminating her workstations with chemicals and fragrances. Management responded by filing requests for building facilities and the Office of Environmental Health and Occupational Safety to investigate, which they did in part by performing air

quality tests, and the agency ultimately provided Tom with a private, enclosed, locked office. Management also reminded employees that some people are sensitive to smell, asked them to refrain from using perfume, and provided training on hidden disabilities, including sensitivity to smells. No reasonable jury could return a verdict for Tom on her claims of co-worker harassment.

Regarding the incident on July 23, 2014, when Tom contends that she "was forced to move to another location due to irritants emanating from the floor and permeating the room," ECF No. 114 at 4, the only evidence in the record concerning that date is a statement from Tom that she "was moved to another location due to the strong scent of burning rubber and exhaust" and "was told by facilities that nothing could be done to prevent the smells from the construction

from permeating the floor." ECF No. 114-1 at 10. Instead of substantiating Tom's claims of a hostile work environment, this demonstrates that the agency was responsive to Tom's concerns: After she complained of strong scents, the agency moved her out of the allegedly contaminated area.

Finally, Tom asserts that the actions of her supervisor, Tammie Doan, created a hostile work environment. "An employer's liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker. An employer is vicariously liable for a hostile environment created by a supervisor, although such liability is subject to an affirmative defense." *McGinest,* 360 F.3d at 1119 (citation omitted). Kijakazi does not dispute that Doan was Tom's supervisor, nor does she raise an affirmative defense in moving for summary judgment.

She argues only that, as a matter of law, Doan's alleged actions were not severe or pervasive enough to state a claim for harassment or hostile work environment.

The Court disagrees and concludes that Tom has raised a disputed issue of fact on this question. A jury who believed Tom's version of events could conclude that Doan engaged in a pattern of harassing behavior that a reasonable disabled person would find to be severe and pervasive, rather than concluding, as Kijakazi suggests, that Doan's behavior, while perhaps rude or distasteful, was not actionable because it was simply part of "the ordinary tribulations of the workplace." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998) (citations omitted). Tom presents evidence of the following: On June 3, 2014, Doan wore perfume during her meeting

with Tom - to discuss Tom's complaints of sensitivity to a co-worker's perfume - although Doan did not normally wear perfume. Tom tried to keep her distance, but Doan kept moving closer to her. Tom wanted to leave the meeting but stayed because Doan told her she had to make a decision about her workstation location before she left. During a June 27, 2014 staff meeting, Doan asked Tom to move next to Colston, whose use of perfume gave rise to Tom's initial complaints. Tom "told her that I was all right where I was and she laughed and repeated what I said. All the other Benefit Authorizer's [sic] were confused and Ms. Colston was visibly upset." ECF No. 114-1 at 19. On July 8, 2014, Doan asked Tom to stand next to Colston's new cubicle when Tom was on her way out at the end of the day. Although Tom told Doan that she would not do so because of the smell of

perfume, Doan repeated the request. When Doan realized that Tom was not going to move closer to Colston's cubicle, Doan finally told Tom she could go home. On July 10, 2014, Doan followed Tom as Tom was leaving for the day:

> We're on the fifth floor. She followed me from somewhere in between the sign-in desk, sign-in sheet, which is in the middle of - more or less the middle of the unit all the way to the elevator. She got on the elevator with me while wearing perfume, rode the elevator all the way down from the fifth floor to the first floor with me and just as the elevators were shutting, she tried to keep me in the elevator to have a conversation with her.
>
> I told her I know you are wearing perfume. It's the end of the day. I have the right to go home un-harassed. She just kind of looked at me and rode the elevator back up by herself. She would do that during break. She would follow me and do the same thing during meetings.

ECF No. 105-11 at 61. Additionally:

> [Doan] would during break come and harass me while I was working or - yeah, I would work during breaks. I didn't have anywhere else to go. She would come and harass me, you know, kind of joke about the situation

and how funny she thought it was. She would call me into meetings when she was wearing perfume.

Id. at 59-60. Crediting this evidence, a jury could conclude that Doan's behavior was more than an isolated incident and was, instead, sufficiently severe or pervasive to alter the conditions of Tom's employment. Summary judgment on this claim is therefore denied.

CONCLUSION

Kijakazi's motion for summary judgment is granted in part and denied in part. The motion is denied as to Tom's hostile work environment claim based on her allegations regarding Doan's behavior. The motion is granted in all other respects.

IT IS SO ORDERED.

Dated:

December 13, 2021

JON S. TIGAR
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

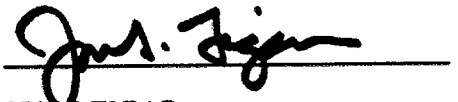
JENNIFER TOM, Plaintiff, v. KILOLO KIJAKAZI, Defendant,	Case No. 19-cv-06322-JST ~~[PROPOSED]~~ JUDGEMENT

ORDERED, ADJUDGED, AND DEGREED THAT

on November 28, 2022, the court announced Amended

Findings of Facts and Conclusion of Law (Dkt. No. 156) pursuant to Federal Rules of Civil Procedure 52. Pursuant to Federal Rule of Civil Procedure 58, the court hereby enters judgment in favor of Defendant and against Plaintiff. Accordingly, the Clerk is hereby directed to enter Judgment forthwith. Pursuant to Civil Local Rule 54, no later than 14 days after the entry of this judgment, the Defendant must file a bill of costs, if any.

DATED: December 13, 2022



JON S TIGAR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER TOM, Plaintiff-Appellant, v. MARTIN O'MALLEY,* Commissioner of Social Security, Defendant-Appellee.	No. 22-16977 D.C. No. 4:19-cv-06322-JST Northern District of California, Oakland ORDER

FILED

JUN 18 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Before: BENNETT, BADE, and COLLINS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

The petition for panel rehearing is DENIED.

Additional material from this filing is available in the Clerk's Office.