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United States Court of Appeals
Tenth Circuit

July 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MELISSA M. GOODSON,

Plaintiff - Appellant,

v.

LOUIS DEJOY, Postmaster General, United States Postal Service,

Defendant - Appellee.

No. 22-1338
(D.C. No. 1:19-CV-00301-CMA-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **TYMKOVICH**, and **MATHESON**, Circuit Judges.

Melissa M. Goodson, proceeding pro se,[1] appeals the district court's order granting Defendant Postmaster General Louis DeJoy's motion for summary judgment

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Ms. Goodson was represented by court-appointed, pro bono counsel in the district court, but she appears pro se on appeal. Because she appears here pro se, "we liberally construe [her] filings, but we will not act as [her] advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

on her employment claims for (1) failure to accommodate, (2) disparate treatment, (3) retaliation, and (4) hostile work environment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Ms. Goodson, an African American, began working for the United States Postal Service ("USPS") in 1997. In 2000, she injured her shoulder while on the job and returned to work with temporary medical restrictions—no reaching or lifting above the shoulders—which became permanent in early 2005.

In March 2005, Ms. Goodson successfully bid on a permanent position as a mail processing clerk.[2] USPS then informed her that she could take the job only if she requested and obtained reasonable accommodations or provided medical certification that she could perform the job without restrictions. In response, Ms. Goodson sought accommodations from USPS's District Reasonable Accommodation Committee ("Committee"), and also filed a complaint with the Equal Employment Opportunity division of USPS ("EEO") alleging disability discrimination.

In June 2005, Committee coordinator Charmaine Ehrenshaft informed Ms. Goodson that she was "not a qualified individual within the meaning of the

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[2] The parties use the terms "unassigned regulars" and "bid positions." We understand from the collective bargaining agreement, Ms. Ehrenshaft's deposition, and the undisputed facts presented at summary judgment that (1) unassigned regulars are USPS employees who do not hold a bid position, (2) a bid position is a job that is obtained through a USPS employee's written request for assignment to a job, and (3) full-time USPS employees, including unassigned regulars, may be eligible to bid on certain positions. (ROA, Vol I at 559-60; 626-27; 958-59.)

Rehabilitation Act" because she did not have "a physical or mental impairment that substantially limit[ed] a major life activity." ROA, Vol. I at 921.[3] Nevertheless, Ms. Ehrenshaft offered Ms. Goodson a "limited duty assignment" that "adhere[d] to" her permanent restrictions with the same pay, hours, and days off as the job she bid on. *Id.* Ms. Goodson refused the offer and appealed the Committee's decision to the Human Resources manager, who denied her request for reconsideration.

In 2007, Ms. Goodson settled her EEO complaint. As part of the settlement, she accepted a permanent Tour III modified clerk position from 1:30 p.m. to 10:00 p.m.,[4] which she performed for the next three years.

On January 12, 2010, USPS removed Ms. Goodson from her modified clerk position through its National Reassessment Process,[5] which determined that her duties were no longer necessary. On the same day, USPS offered Ms. Goodson a position as a Tour III modified mail handler. Ms. Goodson responded she was

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[3] The Committee found that Ms. Goodson "did not indicate any substantial impacts to [her] daily routine. [Instead,] [she] indicated . . . some difficulty in scraping [her] windshield when iced; some difficulty in mowing the yard and that [she] had to limit the length of time [she] played sports." ROA, Vol. I at 921.

[4] We understand Tour III to refer to the afternoon/evening shift.

[5] In 2008, USPS initiated the National Reassessment Process, which is "a program developed to standardize the procedures for assigning work to injured-on-duty Postal Service employees." *Ruiz v. Brennan*, 851 F.3d 464, 466 (5th Cir. 2017). *See also Lai Ming Chui v. Donahoe*, 580 F. App'x 430, 433 (6th Cir. 2014) (unpublished) (explaining that the program was developed "to ensure that all employees were performing work that was necessary and productive, and to end the practice of keeping employees on the clock by creating prolonged work assignments for those injured on the job" (quotations omitted)).

"neither refusing or accepting [the] offer" and asked for "time to think about [it]." *Id.* at 796. Her supervisor told her no other jobs were available that fit her restrictions. He considered her lack of a response to be a refusal and placed her on leave-without-pay status.

On January 25, 2010, Ms. Goodson contacted an EEO counselor to initiate a disability discrimination complaint concerning her removal from the Tour III modified clerk position. On March 29, 2011, she filed a formal EEO complaint. USPS determined that some of her issues had to be appealed to the Merit Systems Protection Board ("MSPB").

In October 2011, while the EEO and MSPB proceedings were pending, USPS offered Ms. Goodson a Tour I mail distribution job (10:00 p.m. to 6:30 a.m.),[6] which she accepted. Shortly thereafter, she bid for and was awarded a markup clerk-automated position, but she was told that she needed to provide medical certification that she was able to fully perform all the duties of the bid position or request reasonable accommodations. Ms. Goodson again was unable to accept the job because her doctor said that she could not perform the job without accommodations and the Committee previously had determined she was not a qualified individual with a disability. She therefore she remained in the Tour I mail distribution job.

In May 2012, Ms. Goodson agreed to settle and dismiss her EEO and MSPB matters ("MSPB Settlement Agreement and Release"). According to Ms. Goodson as

[6] We understand Tour I to refer to the night shift.

stated in her opposition to summary judgment, during settlement discussions, USPS attorney Brian Odom and Ms. Ehrenshaft "convinced" her that the Tour III modified clerk position she held between 2007 and 2010 no longer existed because the duties were deemed unnecessary. *Id.* at 716. Further, they allegedly told her that the two employees who were performing some of her prior duties held bid positions to perform that work. As Ms. Goodson explained, "[t]his representation was material . . . because she knew that, pursuant to the union contract, [USPS] could not replace or 'bump' bid employees in order to provide her with a reasonable accommodation." *Id.* Based on these representations, Ms. Goodson decided to settle.[7]

On June 29, 2013, Ms. Goodson was still working in the Tour I mail distribution clerk position when her supervisor met with her to discuss several unscheduled absences. Ms. Goodson told the supervisor that she had "sicknes[s]" that could be cured by changing her work hours. *Id.* at 992 (quotations omitted). Later, in a deposition, she said that working the overnight shift made her anxious, moody, irritable, angry, frustrated, tired, and depressed. She received a warning letter for failure to be in regular attendance.

In opposing summary judgment, Ms. Goodson argued that on October 28, 2013, she discovered during the settlement negotiations in May 2012 that Mr. Odom

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[7] In exchange for the dismissal and release of her claims, USPS paid Ms. Goodson's attorney $2,500 for "attorney's fees" and Ms. Goodson $7,000 "in non-wage compensatory damages." ROA, Vol. I at 966.

and Ms. Ehrenshaft allegedly had concealed and misrepresented the facts regarding her Tour III modified clerk position during the May 2012 settlement negotiations. She maintained that USPS "falsely informed [her] that the employees performing her prior Tour III duties were doing so from bid positions when that was not the case." *Id.* at 717. USPS denied any misrepresentations and reiterated that the two pertinent employees held bid positions.

On November 1, 2013, Ms. Goodson contacted an EEO counselor regarding her belief that two employees lacked bid positions. She alleged discrimination, retaliation, and hostile work environment based, in part, on the June 2013 warning letter about her unscheduled absences.

Later in November 2013, Ms. Ehrenshaft, on behalf of USPS, and Lawanda Davis, on behalf of the local union, reviewed unassigned regulars (employees like Ms. Goodson who did not hold bid positions), their physical limitations, and the available job vacancies, and then assigned those workers to the vacancies. On November 20, 2013, a senior operations support specialist sent Ms. Goodson a letter reassigning her, pending qualification (passing a test), to a sales and service distribution associate position at the Stockyards Station ("Stockyards job"). The letter stated:

> You are currently an unassigned/unencumbered full-time regular. You have not successfully bid on a new assignment and are being assigned to a residual vacancy. After review of your restrictions, it has been determined that you are able to perform the duties of this assignment. This requirement to place unassigned/unencumbered employees is mandatory.

> This administrative action is taken due to the need of the service and in accordance with Article 37.4 of the APWU National Agreement.

Id. at 780.[8] USPS sent nearly identical letters to five other employees.

Ms. Goodson prepared for the test by attending five eight-hour days of classroom training. Three individuals (Ms. Goodson, another woman, and a man) failed the test; two others (a man and a woman) passed. Because she failed the test, Ms. Goodson was not placed in the Stockyards job and returned to the Tour I mail distribution clerk job with the same salary, benefits, and hours.

On February 15, 2014, Ms. Goodson filed a formal EEO complaint. While it was pending, she asked Ms. Ehrenshaft and another USPS employee to reassign her to a job working from 1:30 p.m. to 10:00 p.m. as a reasonable accommodation. But before they could respond, Ms. Goodson bid on and was awarded a Tour III position as a markup clerk, working from 1:30 p.m. to 10:00 p.m. On February 23, 2015, she presented a letter from her doctor stating that she "has medical diagnoses of hypertension and prior Stephens-Johnson's. I have recommended that she work day or swing shifts for her health. I believe that working evening/night shifts contributes to her hypertension." *Id.* at 902. USPS placed Ms. Goodson in the bid position after Ms. Ehrenshaft approved the documentation from her doctor.

[8] Ms. Goodson promptly notified the EEO to include the November 20, 2013, letter of reassignment as part of her claim.

In April 2017, an administrative law judge entered summary judgment in favor of USPS on Ms. Goodson's 2014 EEO complaint. That decision was affirmed on appeal in June 2018, and Ms. Goodson's motion for reconsideration was also denied. She timely filed suit in February 2019. Ms. Goodson appeals from the district court's grant of summary judgment.

II. **STANDARD OF REVIEW**

We review de novo a grant of summary judgment and apply the same standard as the district court. *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 994 (10th Cir. 2019). "In doing so, we consider the evidence in the light most favorable to the non-moving party." *Id.* (quotations omitted).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *DeWitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1306 (10th Cir. 2017) (quotations omitted).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1261 (10th Cir. 2008) (quotations omitted). "Unsubstantiated allegations carry no probative weight in summary

judgment proceedings." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004); *see also* Fed. R. Civ. P. 56(c)(1)(A)-(B) (requiring support for asserted facts). "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones*, 366 F.3d at 875.

"The party moving for summary judgment bears the initial burden of showing an absence of any issues of material fact." *Tesone*, 942 F.3d at 994. Because the burden of persuasion at trial would be on Ms. Goodson, USPS, as the moving party, "may carry its initial burden by providing affirmative evidence that negates an essential element of [Ms. Goodson's] claim[s] or by demonstrating . . . that . . . [Ms. Goodson's] evidence is insufficient to establish an essential element of [her] claim[s]." *Id.* (brackets and quotations omitted).

"If [USPS] makes this showing, the burden . . . shifts to [Ms. Goodson] to set forth specific facts showing that there is a genuine issue for trial. If [Ms. Goodson] fails to make a showing sufficient to establish the existence of an element, [Rule 56(a)] mandate[s] the entry of summary judgment." *Id.* (citation and quotations omitted).

III. DISCUSSION

A. *Failure to Accommodate*

1. Legal Framework

"[T]he Rehabilitation Act imposes a duty on federal employers to provide reasonable accommodations to disabled employees." *Sanchez v. U.S. Dep't of Energy*, 870 F.3d 1185, 1195 (10th Cir. 2017) (quotations omitted); *see also* 29 U.S.C. § 794(a). Similarly, the Americans with Disabilities Act ("ADA") makes it unlawful for an employer to discriminate against an employee by failing to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A); *see also EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1048 (10th Cir. 2011). Precedent from cases interpreting the Rehabilitation Act or the ADA apply to failure-to-accommodate claims under either statute. *See Sanchez*, 870 F.3d at 1195 n.3. To prevail on a "failure-to-accommodate claim [Ms. Goodson] must [establish] that [s]he: (1) is disabled; (2) is otherwise qualified; and (3) requested a plausibly reasonable accommodation." *Id.* at 1195 (quotations omitted).

"Federal employees alleging discrimination or retaliation prohibited by . . . the Rehabilitation Act must comply with specific administrative complaint procedures in order to exhaust their administrative remedies." *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020) (quotations omitted); *see also* 29 C.F.R. § 1614.105(a)(1) (providing that a federal employee "must initiate contact with a[n

EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, with 45 days of the effective date of the action"). Administrative remedies generally must be exhausted as to each discrete instance of alleged failure to accommodate. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1181 (10th Cir. 2018). Failure to exhaust administrative remedies is an affirmative defense against Rehabilitation Act and ADA claims. *Id.* at 1185.

2. **Analysis**

Ms. Goodson based her failure-to-accommodate claim on USPS's removing her from her Tour I modified clerk job in January 2010. According to Ms. Goodson, when she learned on January 12, 2010, that she was being removed from this job, she contacted an EEO counselor less than two weeks later and timely filed a formal EEO complaint in March 2011.

In response to USPS's summary judgment motion, Ms. Goodson acknowledged that she agreed in the MSPB Settlement Agreement and Release to dismiss her claims concerning her removal from the Tour I job. But she argued that the doctrine of equitable estoppel barred USPS from enforcing the agreement because Mr. Odom and Ms. Ehrenshaft fraudulently induced her to settle by "concealing facts material to [her] . . . claim—namely, whether two employees who were performing some of the duties of her Tour III modified clerk position had bid positions as expeditors." ROA, Vol. I at 1000 (quotations omitted).

The district court, citing the "plain language" in the MSPB Settlement Agreement and Release, *id.* at 1001, determined that Ms. Goodson was barred from relitigating her 2010 failure-to-accommodate claim because she "agreed . . . [not to] re-litigate in any forum, judicial or administrative, any claims arising out of the facts which comprise and/or relate to the Appeal, including the Equal Employment Opportunity Commission," *id.* at 1000 (boldface and quotations omitted). The court further determined that, although "the time period for filing a discrimination charge with the EEO[] 'is subject to equitable doctrines such as tolling or estoppel,'" *id.* at 1001 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)), Ms. Goodson failed to present evidence that Mr. Odom or Ms. Ehrenshaft concealed or misrepresented the facts. Based on our review of the summary judgment record, we agree with the court's disposition.

Not only did Ms. Goodson fail to present evidence to support her allegations, but USPS's uncontroverted evidence on summary judgment established that the two employees did in fact hold bid positions. Summary judgment was therefore proper on Ms. Goodson's failure-to-accommodate claim. *See Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 989 (10th Cir. 2021) (declining to apply equitable tolling where the record did not support "active deception" (quotations omitted)); *see also Bones*, 366 F.3d at 875 (stating that

"[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings").[9]

B. *Disparate Treatment Based on Disability, Gender, and/or Race*

1. Legal Framework

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1)-(2), prohibits discrimination on the grounds of race and gender. Similarly, the ADA makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

In a case like Ms. Goodson's, where she "cannot produce any direct evidence of discrimination . . . the burden-shifting [three-step] framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 . . . (1972), applies." *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 627 (10th Cir. 2012). "Under this framework, [at step one the] plaintiff must first establish a prima facie case of discrimination by showing (1) membership in a protected class and (2) an adverse

[9] Ms. Goodson also advances a one-sentence argument that she revived her failure-to-accommodate claim and timely exhausted her remedies on her because she contacted an EEO counselor within days after learning of the alleged settlement fraud on October 28, 2013. Aplt. Opening Br. at 25; *see also* Aplt. Reply Br. at 13. But this does not overcome her failure to provide evidence of the alleged misrepresentations, and her cursory "revived" theory is otherwise inadequately briefed.

employment action (3) that took place under circumstances giving rise to an inference of discrimination." *Id.*

> Although the articulation of the plaintiff's prima facie test might vary somewhat depending on the context of the claim, the critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination.

DePaula v. Easter Seals El Mirador, 859 F.3d 957, 969-70 (10th Cir. 2017) (brackets and quotations omitted).

If the plaintiff sets out a prima facie case, then at step two the employer must "assert a legitimate nondiscriminatory reason for its actions." *Daniels*, 701 F.3d at 627. An employer's burden at this stage is "exceedingly light, . . . as its stated reasons need only be legitimate and non-discriminatory on their face." *DePaula*, 859 F.3d at 970 (quotations omitted).

If the employer meets its burden, at step three the plaintiff must "introduce evidence that the stated nondiscriminatory reason is merely a pretext for discriminatory intent." *Daniels*, 701 F.3d at 627. "A plaintiff may show pretext by demonstrating the proffered reason is factually false, or that discrimination was a primary factor in the employer's decision." *DePaula*, 859 F.3d at 970 (quotations omitted). "This is often accomplished by revealing weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered reason, such that a reasonable fact finder could deem the employer's reason unworthy of credence." *Id.* (quotations omitted). *See also Ford v. Jackson Nat'l Life Ins. Co.*,

45 F.4th 1202, 1216 (10th Cir. 2022). "A plaintiff may also show pretext by demonstrating the defendant acted contrary to a written company policy, an unwritten company policy, or a company practice when making the adverse employment decision affecting the plaintiff." *DePaula*, 859 F.3d at 970 (quotations omitted).

2. **Analysis**

Ms. Goodson's disparate treatment claims were based on USPS's (1) January 2010 decision to remove her from her Tour III modified clerk position under its National Reassessment Process and (2) its November 20, 2013 letter, which informed her that she was being placed, pending qualification, in the Stockyards job. The district court determined that the MSPB Settlement Agreement and Release barred claims related to the 2010 events. Because Ms. Goodson does not challenge this determination on appeal, we consider only the November 20, 2013 letter as the sole basis for her claims.[10]

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[10] In the district court, Ms. Goodson "agree[d] her disparate treatment claim pertains to the January 2010 decision removing her from her Permanent Modified Job on Tour III and to the November 2013 letter ordering her involuntary reassignment." ROA, Vol. I at 727 (boldface omitted). For the first time on appeal, Ms. Goodson now suggests that her claim is also premised on USPS's failure to place her in bid positions because of her medical restrictions. *See* Aplt. Opening Br. at 29. Ms. Goodson forfeited this argument because she failed to raise it in district court, and she does not argue plain error on appeal, so it is waived. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument for reversal [that was] not first presented to the district court.").

The district court determined that Ms. Goodson satisfied the first prong of a prima facie case—that she was the member of two protected classes (race and gender) and had a disability for purposes of a discrimination claim under the ADA. But the court found that she failed to satisfy the third prong—that the letter raised an inference of discrimination. Further, the court determined that, assuming Ms. Goodson established a prima facie case, USPS provided a legitimate and nondiscriminatory reason for its actions, and Ms. Goodson failed to present evidence of pretext. We agree with the court's disposition.

a. *Ms. Goodson failed to establish a prima facie case*

The November 20, 2013, letter informed Ms. Goodson that she was being placed, pending qualification, in the Stockyards job—a job that was consistent with her restrictions. Five other employees received nearly identical letters, dated the same day. Three of those assignments were also made pending qualification. Ms. Ehrenshaft testified at her deposition that UPS sent these letters based on its *legal obligation* under the American Postal Workers Union labor contract ("labor contract"). Ms. Goodson argues for an inference of discrimination based on two alleged violations of the labor contract, but she presents no evidence of any contract violations.

First, she relies first on § 4.A of the labor contract, which provides that "[a] primary principle in effecting reassignments will be that dislocation and inconvenience to employees in the regular work force shall be kept to a minimum,

consistent with the needs of the service." ROA, Vol. I at 969. The November 20, 2013, letter stated that the reassignment was "due to the need[s] of the service," *id.* at 651, Ms. Goodson presented no evidence to the contrary, and she thus has not shown a violation of § 4.A.

Second, Ms. Goodson points to § 4.C.5 of the labor contract, which states that where an unencumbered employee "is qualified on two or more residual duty assignments, the employee will be given an option and be awarded their choice based on seniority." *Id.* at 972. Because nothing in the record shows there were other vacant positions that met Ms. Goodson's restrictions or that she had seniority over the other unassigned regulars, she again has not shown a violation of the labor contract.

The district court properly determined that Ms. Goodson failed to demonstrate a prima facie case. *See Bones*, 366 F.3d at 875.

b. *No evidence of pretext at step three*

Even assuming Ms. Goodson satisfied the first step of the *McDonnell Douglas* framework, we agree with the district court that she failed to present evidence to establish a genuine issue of material fact as to whether USPS's reasons for the November 20, 2013 letter were pretext for discrimination. There is no dispute that USPS met its burden at step two to provide a legitimate and nondiscriminatory reason for its actions—the labor contract required USPS to place unassigned regular employees like Ms. Goodson in available jobs.

To show pretext, Ms. Goodson relies on (1) the same alleged violations of the labor contract discussed above, and (2) alleged inconsistencies between Ms. Ehrenshaft's investigative affidavits in earlier EEO proceedings and her deposition testimony in Ms. Goodson's federal court litigation. We determined above that Ms. Goodson has presented no evidence of any contract violations, so we turn to the alleged inconsistencies.

First, Ms. Goodson points to several alleged inconsistencies concerning the January 2010 removal from her Tour I modified clerk job under the National Reassessment Process. But any such inconsistencies would be irrelevant to the November 20, 2013, reassignment letter.

Second, Ms. Goodson points to an alleged inconsistency between Ms. Ehrenshaft's May 2014 investigative affidavit, which stated she had "no knowledge" of the November 20, 2013, letter, ROA, Vol. I at 865, and a later affidavit that explained the process she and Ms. Davis undertook to evaluate and place unassigned regulars in USPS's residual job vacancies, *see id.* at 869. Like the district court, we conclude that a rational factfinder could not conclude that the foregoing rendered USPS's rationale for sending the letter unworthy of belief. *See, e.g.*, *Conroy v. Vilsack*, 707 F.3d 1163, 1175 (10th Cir. 2013) (stating that "minor [discrepancies] are insufficient to demonstrate pretext").

Ms. Goodson relatedly points to Ms. Ehrenshaft's testimony at her deposition in June 2021 that she did not remember the letter or Ms. Goodson's particular

employment situation. But once her eight-year-old memory was refreshed with the letter and her 2014 affidavit, Ms. Ehrenshaft was able to explain why the letters were sent. Again, a reasonable jury could not conclude that this made USPS's reason for its action unworthy of belief. *See id.*

Third, Ms. Goodson compares Ms. Ehrenshaft's first deposition, in which she said she was not tasked with placing unassigned regular employees into residual vacancies, and her second deposition, in which she said she did perform this task. The district court found, and we agree, "that this answer does not show[] inconsistencies, incoherencies, or contradictions such that a reasonable factfinder could rationally find her testimony unworthy of credence and infer pretext. ROA, Vol. I at 1011-12 (quotations omitted). This is so because any initial failure to recall her role in the job placements does not make USPS's rationale for making the placements—that the labor contract required it—unworthy of belief. *See, e.g.*, *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006) ("Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it.").

Fourth, we reject Ms. Goodson's contention that the district court made an impermissible credibility determination when it accepted Ms. Ehrenshaft's testimony. To the contrary, the court's order granting summary judgment contains no credibility

analysis. It determined that the alleged inconsistencies were immaterial, and no reasonable factfinder could find USPS's rationale for the November 20, 2013, letter unworthy of belief. *See* ROA, Vol. I at 1011-12.

We agree with the district court that Ms. Goodson failed to demonstrate pretext and that USPS was entitled to summary judgment on the disparate treatment claims. *See Daniels*, 701 F.3d at 627 (to survive summary judgment, the plaintiff must "introduce evidence [at step three] that the stated nondiscriminatory reason is merely a pretext for discriminatory intent").

C. ***Retaliation***

1. **Legal Framework**

Retaliation claims based on indirect evidence are also analyzed under the *McDonnell Douglas* burden-shifting framework. *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004). To establish a prima facie case, Ms. Goodson must demonstrate "(1) she engaged in protected opposition to discrimination; (2) [USPS] took an adverse employment action against her; and (3) there exists a causal connection between the protected activity and the adverse action." *Id.* at 1071.

2. **Analysis**

The parties agree that Ms. Goodson satisfied the first and second prongs of a retaliation claim—she contacted an EEO counselor on November 1, 2013 (protected activity) and received a reassignment letter shortly thereafter (adverse employment action). Further, the district court determined that the proximity in time between the

EEO contact and the reassignment letter (three weeks) was sufficient to create a presumption of causation. But the district court said that even if she showed a prima facie case, Ms. Goodson failed to demonstrate a genuine issue of fact that USPS's proffered reasons for the November 20, 2013, reassignment letter were pretextual. We agree.

As we explained previously, the reassignment letter did not violate the labor contract, and any inconsistencies in Ms. Ehrenshaft's testimony were immaterial. Thus, no reasonable factfinder could find USPS's rationale for the reassignment letter was unworthy of belief. Summary judgment on the retaliation claim was proper.

D. ***Hostile Work Environment***

1. **Legal Framework**

Hostile work environment ("HWE") claims are actionable under both Title VII and the ADA. *See Lanman v. Johnson Cnty.*, 393 F.3d 1151, 1155-56 (10th Cir. 2004), *overruled on other grounds by statute as stated in EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 924 (9th Cir. 2018). To sustain such a claim, the plaintiff must show (1) the employer discriminated against the employee because of her membership in a protected class, and (2) "the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and created an abusive working environment." *Ford*, 45 F.4th at 1227 (brackets and quotations omitted). Factors relevant to severity include whether the behavior is "physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes

with an employee's work performance." *Id.* at 1228 (quotations omitted). "We have found conduct sufficiently severe to overcome summary judgment in only particularly threatening or humiliating circumstances." *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1255 (10th Cir. 2021). Pervasiveness pertains to the frequency of the conduct. *See Ford*, 45 F.4th at 1228.

HWE claims are based on a series of individual acts that, considered together, "constitute one unlawful employment practice." *Hansen v. SkyWest Airlines*, 844 F.3d 914, 923 (10th Cir. 2016) (quotations omitted).

> Consequently, it does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. (brackets and quotations omitted).

"To delimit [an HWE] claim we must define the scope of the alleged hostile work environment. We begin by examining the acts in the filing period and determining what acts outside of the filing period are related by type, frequency, and perpetrator." *Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1309 (10th Cir. 2005); *see also Hansen*, 844 F.3d at 923 (recognizing "several non-exclusive factors to guide the analysis[,]" including "whether the pre- and post-limitations period acts were related by type, frequency, and perpetrator" (quotations omitted)).

"The entire range of related acts constitutes the hostile work environment underlying [the] claim. We then determine whether this range of acts creates a genuine issue of material fact whether the [employer] is liable for the alleged hostile work environment." *Duncan*, 397 F.3d at 1309. "To show a genuine issue, [the plaintiff] must demonstrate that the acts were sufficient to create a pervasively discriminatory hostile environment, and . . . must [further] show that the [employer] failed to meet the standard of adequate employer response." *Id.*

2. Analysis

In the district court, Ms. Goodson identified twelve acts comprising her HWE claim, beginning with the events surrounding the January 2010 removal from her job as Tour III modified clerk and ending in February 2015 when she was denied a request for reassignment to a Tour III job as a reasonable accommodation.[11] In determining the scope of her claim, the district court found that the November 20, 2013, reassignment letter was the only relevant act within the 45-day filing period and excluded all the other acts except USPS's failure in November 2011 to place Ms. Goodson in her awarded bid position and its initial failure in February 2015 to place Ms. Goodson in her awarded bid job.[12] We affirm the district court's determination

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[11] The district court assumed without deciding that an employee could base an HWE claim solely on an employer's failure or refusal to provide an employee a reasonable accommodation. *See* ROA, Vol. I at 1016-17.

[12] As noted earlier, Ms. Goodson was eventually placed in a Tour III job when she presented a letter from her doctor concerning her high blood pressure.

as to the proper scope of Ms. Goodson's hostile work environment claim for substantially the same reasons explained in its well-reasoned order. *See* ROA, Vol. I at 1017-21.

Turning to the merits, the district court found that "Ms. Goodson has not established (1) that she was discriminated against because of her disability and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and created an abusive working environment." *Id.* at 1021 (brackets and quotations omitted). We agree.

After Ms. Goodson failed the qualifying examination for the Stockyards job, she was returned to her previous Tour I modified clerk job with no change in salary, benefits, or hours. We agree with the district court that this "does not explain how this act constituted severe or pervasive harassment or how the reassignment (and return to her prior position) resulted in a failure to accommodate." *Id.* More to the point, the rationale behind the letter had nothing to do with Ms. Goodson's disability—the terms of the labor contract required it.

We further agree with the district court that with respect to the 2011 and 2015 bid positions, "the undisputed evidence shows that USPS advised [Ms. Goodson], in each instance, in writing, that she could either request reasonable accommodations through the [Committee] or provide medical certification that she was able to perform the job[s] in question[,]" and there is no evidence that Ms. Goodson

"requested a reasonable accommodation and that USPS failed to accommodate her in either instance." *Id.*

No reasonable jury could find that the November 20, 2013 reassignment letter or USPS's conduct surrounding the 2011 or 2015 bids was sufficiently severe or pervasive to overcome summary judgment. *See Ford*, 45 F.4th at 1227. Summary judgment was proper on Ms. Goodson's hostile work environment claim.

IV. **CONCLUSION**

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge