ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 20-5043

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

Henry Geter,

Plaintiff - Appellant,

v.

United States Government Publishing Office,

Respondent - Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE APPOINTED BY THE COURT IN SUPPORT OF APPELLANT FOR REVERSAL

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No. 20-5043

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENRY GETER,

Appellant,

v.

UNITED STATES GOVERNMENT PUBLISHING OFFICE

Appellee.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to the Court's order of February 27, 2020, and D.C. Circuit Rule 28(a)(l).

A. Parties

Appellant

Henry Geter

Appellee

United States Government Publishing Office.

There was no amicus curiae.

B. Rulings Under Review

The ruling under review is the final order entered in case 16-cv-482 by Judge Rudolph Contreras on January 31, 2020, granting Appellee's Motion for Summary Judgment.

C. Related Cases

There are no related cases.

Respectfully Submitted,

/s/ J. Scott Ballenger
J. Scott Ballenger
Appointed Amicus Curiae

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this action brought under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, under 28 U.S.C. § 1331. The district court entered final judgment on all of plaintiff's claims on January 31, 2020. Dkt-63. Plaintiff filed a timely notice of appeal on February 27, 2020. Dkt-64. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The issues presented are:

1. Did the district court err in holding that Appellant's employer had no obligation to accommodate him with a temporary light-duty assignment, despite strong evidence that similarly-situated employees had been given such an accommodation, simply because temporary light-duty vacancies were not formally posted as job openings?

2. Did the district court err in granting summary judgment on Appellant's retaliation claims because the record does not foreclose the possibility that some or all of the past employees that he claims received better treatment may have themselves engaged in similar protected conduct?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted and provided in the addendum bound under separate cover and filed with this brief.

STATEMENT OF THE CASE

Appellant Henry Geter was employed by the United States Government Publishing Office ("GPO") for more than a decade before the termination at the center of this suit. During that time, the parties had a series of contentious disputes about injuries that Mr. Geter suffered on the job, and the accommodations necessary for him to resume work as a driver. GPO terminated Mr. Geter in April 2012, but the Merit System Protection Board reversed that decision and ordered his reinstatement. After leaving him on administrative leave for another 11 months, GPO recalled Mr. Geter to full duty in November 2013 and swiftly initiated proceedings to fire him because he no longer had a commercial driver's license. This case is about whether GPO complied with the reasonable accommodation and non-retaliation requirements of the Americans with Disabilities Act ("ADA") when it terminated Mr. Geter in April of 2014. Appointed *amicus curiae* respectfully submits that the district court erred in several important respects, and that the case should be remanded for trial.[1]

First, when he was summoned back to work Mr. Geter asked GPO for a temporary light-duty or desk work assignment until he could secure medical authorization to restore his commercial driver's license. Viewing the record in the

[1] Mr. Geter has authorized undersigned counsel to represent that he joins this brief and does not intend to file a separate Appellant's brief.

light most favorable to Mr. Geter, GPO essentially ignored that request. But GPO has defended its actions by arguing that it had no vacant clerical jobs, and that the ADA does not require employers to create new positions as an accommodation. The district court recognized that "[t]here is undeniably strong evidence for . . . a practice" at GPO of creating "*de facto* vacancies" for light-duty work when other drivers were injured and temporarily unable to drive. The court also acknowledged the precedent holding that employers must consider reassignment if it "is 'reasonably available under the employer's existing policies.'" Dkt-63/10-11 (citation omitted). Nonetheless the court embraced a rigid rule—which it derived from Tenth Circuit precedent—that an employer has no obligation to consider even temporary light-duty assignments unless there is a "formal or official" vacancy, reflected in an "agency job posting or the like," for a permanent light-duty job that any non-disabled employee could apply for. Dkt-63/10-12 (citations omitted).

This Court should reject that holding. In a case where an employee sought *permanent* reassignment to light-duty work, the principle that employers have no duty to create new positions might justify some skepticism about claims that implicit or "*de facto*" vacancies exist. But when (as here) the employee seeks a *temporary* light-duty assignment, it makes no sense to go looking for "formal" vacancies. Dkt-63/10. It is extremely common for employers to make temporary light-duty work available to employees who are injured or sick. Those

opportunities are rarely if ever posted as formal job vacancies, because they are temporary and generally are not available to any employee or outsider. When a disabled employee seeks temporary light-duty work as an accommodation, the only sensible rule is the one articulated by the Supreme Court in *School Board of Nassau County, Fla. v. Arline*: that although employers "are not required to find another job for an employee who is not qualified for the job he or she was doing," they "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 480 U.S. 273, 289 n. 19 (1987). The district court acknowledged that there is "undeniably strong evidence" for a practice at GPO of accommodating injured drivers with temporary light-duty work. Dkt-63/10.

Summary judgment for GPO also should have been precluded by GPO's failure to engage in the interactive back-and-forth the ADA requires. When Mr. Geter explained that it was medically impossible for him to produce a commercial driver's license immediately and asked to talk about temporary light-duty work, GPO's representatives responded that they were not there to talk about accommodations and sent him home. GPO ignored two more requests by Mr. Geter to discuss reasonable accommodations, and fired him without ever discussing what might have been possible. The case law recognizes that summary

judgment is inappropriate when there is evidence that the employer did not approach the interactive process in good faith.

Finally, the district court also erred in dismissing Mr. Geter's retaliation claims. Mr. Geter sued GPO in the summer of 2013, while he was on a lengthy administrative leave that GPO itself had imposed. Within months, GPO peremptorily summoned him back to work and fired him, ostensibly for not possessing the commercial driver's license that Mr. Geter explained he could not obtain for medical reasons. But the record shows that in recent years GPO has accommodated several drivers who became unable to drive—and even lost their commercial driver's license—with temporary light-duty work. The district court reasoned that no inference of pretext could be drawn from that differential treatment because there was evidence that some of those employees also had engaged in protected activity, and because Mr. Geter failed to prove that those employees had not previously sued GPO as he had.

The district court misunderstood the testimony, which indicates that some of those employees filed EEO complaints years *after* they received accommodations. The district court also misunderstood the plaintiff's burden on summary judgment—which is to come forward with sufficient evidence from which a reasonable jury could infer pretext, not to preemptively negate all other possibilities. Juries can apply common sense and make reasonable inferences.

They are not required to assume that every fact not in evidence would be adverse to the party bearing the burden of proof.

The district court also unfairly focused on the issue of how GPO treated other employees, in isolation from all of the other evidence. A reasonable jury could infer pretext from the parties' long and contentious history, from GPO's failure to engage in good faith with the interactive accommodations process, and from GPO's violations of its own policies and procedures.

STATEMENT OF THE FACTS

Because the district court granted summary judgment to GPO, the following summarizes the facts and reasonable inferences therefrom in the light most favorable to Mr. Geter. Some of the history is drawn from the district court's opinion in prior litigation between the parties, *Geter v. Government Publishing Office*, No. 13-916, 2016 WL 3526909 (D.D.C. 2016) (*Geter I*).

1. Mr. Geter's Employment History with GPO and *Geter I*

Mr. Geter began working at GPO in 2002 and was eventually promoted to motor vehicle operator. *See Geter I*, 2016 WL 3526909, at *2. In that position, he was required to have a valid CDL and the ability to lift loads of up to 50 pounds. *Id*. In March 2009, Mr. Geter injured his back at work and his physician confirmed that he could no longer satisfy the 50-pound lifting requirement. *Id*. After some

negotiations and disputes with GPO, he eventually returned to work in August 2010. *Id.* at *2–3.

The events giving rise to the *Geter I* litigation took place shortly after Mr. Geter's return to duty. *Id.* at *3. Mr. Geter's supervisor asked him to drive a truck, even though he believed that doing so would violate medical restrictions imposed as a result of his 2009 injury. *Id.* Mr. Geter ultimately complied and suffered an injury as he was lifting himself into his vehicle. *Id.* at *3–4. On August 23, 2010, after refusing to drive due to his injury, Mr. Geter was sent home. *Id.* at *4. Mr. Geter sought counseling with GPO's equal employment opportunity office and filed an EEO complaint. *Id.* at *4–5.

Mr. Geter was examined by two doctors, who confirmed that he had been disabled from performing his job duties until at least mid-to-late September 2010. *Id.* at *2-4; Dkt-55-7/2; Dkt-55-8/2.

GPO initiated proceedings to fire Mr. Geter in October 2011, and ultimately fired him on April 13, 2012. Dkt-58-3/2. Mr. Geter appealed that firing to the Merit Systems Protection Board. *Id*. at 1.

While Mr. Geter was challenging his removal, and as part of the ongoing medical dispute about his entitlement to workers' compensation, Mr. Geter saw Dr. David Dorin for an independent medical examination. Dkt-55-11/1. Dr. Dorin's evaluation from September 14, 2012, reported to the Department of Labor,

concluded that Mr. Geter was unable to lift weights heavier than 30 pounds and that he would need a helper to do any heavy lifting. Dkt-55-11/8-9.

On December 6, 2012 the Merit Systems Protection Board reversed GPO's termination decision and found that GPO and Mr. Geter's supervisor Gregory Robinson had violated Mr. Geter's due process rights. Dkt-58-3/5-6. The Board ordered GPO to "cancel the removal and to retroactively restore [Mr. Geter]" to his position "effective April 13, 2012." *Id*. at 6.

GPO paid Mr. Geter the back wages he was owed. Rather than reinstating him, however, GPO placed Mr. Geter on administrative leave for approximately ten months—presumably because of Dr. Dorin's medical conclusions from a few months before. Dkt-58-25/1; Dkt-55-11/8-9.

Mr. Geter filed the *Geter I* complaint on June 18, 2013. He asserted a variety of claims in that litigation, including race and age discrimination, intentional infliction of mental harm, creation of a retaliatory hostile work environment, failure to accommodate, and retaliatory discrimination. Many of these claims, the district court ultimately found, were not viable because Mr. Geter had failed to exhaust the relevant administrative remedies. *See Geter I*, 2016 WL 3526909, at *6–7. As to the remaining counts, the district court held that Mr. Geter had failed to set forth evidence sufficient to survive summary judgment. *Id.* at *7–16. Mr. Geter did not appeal the district court's decision in *Geter I*.

2. The November 25 Meeting

In a November 21, 2013 letter, the GPO recalled Mr. Geter from leave and instructed him to report to work four days later, on November 25, "ready, willing and able to perform all of the duties and responsibilities of your position." Dkt-55-14/2. The letter added that "you will need to bring with you when you report your valid commercial driver's license (CDL)." *Id*. Mr. Geter reported to work as instructed—though without a valid CDL. Dkt-55-15/51; Dkt-55-16/1.

On November 25, Mr. Geter met with Mr. Robinson and Dennis F. Boyd, a GPO Human Capital Specialist. During the meeting, Mr. Geter explained that he was prevented from obtaining a CDL due to continuing medical restrictions related to his use of painkillers to treat the pain in his back. Dkt-58-23/2. He further requested that Mr. Robinson transfer him temporarily to a desk position, until he could obtain the medical clearance necessary to seek reinstatement of his CDL. *See* Dkt-58-10/1. At this meeting, Mr. Geter requested "to be transferred to a desk position" as a reasonable accommodation." Dkt-55-16/3. GPO acknowledged Mr. Geter's request to be "transferred to another section." Dkt-58-4/2.

Mr. Robinson and Mr. Boyd responded by informing Mr. Geter that they would not discuss his disability or any potential accommodations during the meeting. Mr. Boyd stated that he "clarified for Mr. Geter that our discussion today was only to address his return to duty and his ability to perform the duties and

function of the position for which he is employed." *See* Dkt-58-4/1. Mr. Robinson told Mr. Geter that "we aren't here to talk about your reasonable accommodation." Dkt-58-10/5.

GPO asserts that Mr. Robinson explained to Mr. Geter during this meeting that there were no vacant light-duty positions. But GPO made clear that it was unwilling to discuss his disability or accommodations at that time. *See* Dkt-58-4/1; Dkt-58-10/1.

3. The December 16 Letter

On December 16, Mr. Robinson sent Mr. Geter a letter. Dkt-55-19. The parties dispute whether Mr. Geter ever saw that letter, which was delivered to the home of his elderly mother. *See* Dkt-58-23/1.

The letter began by acknowledging that Mr. Geter had returned to duty on November 25, though without a valid CDL. *See* Dkt-55-19/2. It asserted that Mr. Geter had "affirmed in the meeting" that he could obtain both a CDL and a Virginia driver's license "in 3-5 days," and directed him to report to work by January 2, 2014, "ready and able to work with a valid CDL in your possession." *Id*. The letter also stated that "in your return to duty meeting you alleged that you had suffered injury to your back and also that you would like to request a transfer." *Id.* Mr. Robinson stated that "[i]f it is in fact your desire to seek a reasonable accommodation, you need to inform me specifically what accommodation/s you

are seeking," and "provide medical documentation detailing your condition to the Agency's Chief Medical Officer by Friday, December 27, 2013." *Id.* The letter warned that if Geter could not produce a "valid CDL" by January 2, 2014, Mr. Robinson would "be forced to propose your removal from Federal service for your inability to perform the essential functions of your position due to the loss of your CDL." *Id*. at 2. It also invited Mr. Geter to call Mr. Robinson with any questions, and provided a phone number. *Id.*

Mr. Robinson's letter attached a copy of GPO's reasonable accommodation policy. That policy does not require that employees initiate a request for accommodations in writing. To the contrary, it states that "the employee should first explain to their immediate supervisor that they have a physical or mental impairment that requires an accommodation," and that the employee need not use "any special words, such as 'reasonable accommodation,' 'disability,' or 'ADA.'" Dkt-55-19/9. If the request is unclear, the supervisor should seek clarification. *Id*. The supervisor is required to respond within ten days, and any denial of a requested accommodation must be in writing. *Id.* at 9, 11. And if the supervisor is unsure or is not inclined to grant the accommodation, "the employee … should be given the opportunity to complete GPO Form 838, Request for Reasonable Accommodation" and to submit that form to the Office of Equal Employment Opportunity—which would then coordinate any necessary independent medical

evaluations with the Chief of the Occupational Health Division. Dkt-55-19/9-10. "If any additional medical information is needed, the Occupational Health Division will request it before making a final determination as to whether this is a qualified individual with a disability." Dkt-55-19/10. If the answer is affirmative, "the Reasonable Accommodation Panel will meet with appropriate parties to discuss the accommodation requested" and "[i]f the specific accommodation cannot be granted, the parties will explore reasonable alternatives." *Id.* All decisions of that Panel "will be in writing," and any "denial of a request for reasonable accommodation must be in writing and specify the reason(s) for the denial." Dkt-55-19/11.

4. The December 23 Phone Call

On December 23, 2014, Mr. Geter called Mr. Robinson to discuss his return to duty. Dkt-58-23/1. During this phone call, Mr. Geter again told Mr. Robinson that he "wanted to be transferred to a desk position until [his] doctor cleared [Mr. Geter] for full duty and [he] was able to obtain a CDL." Dkt-58-10/2.

GPO alleges that Mr. Geter did not request an accommodation during this call, relying on a memorandum that Mr. Robinson drafted on January 8, 2014—over a full two weeks after the call took place. *See* Dkt-55-20. In that recounting of his conversation with Mr. Geter, Mr. Robinson claims that Mr. Geter said that "I'm not going to put in for it [reasonable accommodations] all I want is a chair." *Id*; *see*

also Dkt-58-15/1. Robinson claims to have verbally acknowledged Mr. Geter's request for "a chair" during the call. *Id.*

5. The January 3 Meeting

On January 3, 2014, Mr. Geter again reported to Mr. Robinson for duty. Mr. Geter provided documentation from his doctor indicating that he was not yet medically cleared to seek reinstatement of his CDL. Dkt-55-5/5; Dkt-58-15/1. At this meeting, Mr. Geter reiterated (now for the third time) his request for an accommodation. He told Mr. Robinson that he "still had lifting restrictions, could not return to full duty and could not obtain a CDL. . . ." Dkt-55-16/3. Mr. Robinson declined, yet again, to respond. Mr. Geter indicated that he was taking steps to obtain a CDL. Dkt-58-15/1. Once again, the GPO sent Mr. Geter home to stay on administrative leave. *Id.*

6. GPO's Termination of Mr. Geter's Employment

Mr. Robinson initiated a proposal for Mr. Geter's removal on January 16, and on January 29 GPO sent Mr. Geter the formal proposal to remove. Dkt-55-18. The proposal cited, as justification, Mr. Geter's "inability to perform the essential functions of [his] position because [he] do[es] not possess a valid Commercial Driver's License." Dkt-55-18/1. Mr. Geter objected to the proposed removal on March 10, but GPO ultimately decided to accept the proposal on April 10. Dkt-55-26/3. The final removal decision stated that "[y]our actions have prohibited you

from performing the essential functions of your position because you do not possess a valid Commercial Driver's License." Dkt-55-26/2. GPO claims that it had given Mr. Geter "multiple opportunities" to obtain a CDL in the previous four and a half months. Dkt-58-18/1-2.

By that point, Mr. Geter actually had obtained medical clearance to seek reinstatement of his CDL. Dkt-55-15/59. He filed an application for his CDL on March 11, and obtained that license in November. *Id*. at 45, 31.

GPO has, in the past, rated Mr. Geter's job performance as "outstanding." Dkt-55-26/3. GPO's removal decision also noted that Mr. Geter lacks any prior disciplinary history in his total of over 11 years of service. *See id*. GPO characterized Mr. Geter's medical inability to obtain a CDL as impacting the "confidence and trust required by [his] supervisor," and stated that "your prolonged and repeated failure to comply with the requirements of your position is inappropriate and reflects poorly on the GPO." *Id*. Mr. Geter challenged his removal administratively, but the MSPB and EEOC both affirmed the GPO's decision. *See* Dkt-16-7/2; Dkt-16-8/1.

7. GPO's History of Providing Accommodation for Other Employees in Similar Circumstances

The record shows that GPO provided temporary desk assignments for four injured drivers between 2010 and 2018. Robinson admitted that "[f]our Delivery Section employees, Monique Jones, Robert Courtney, Bobby Graham, and Marvin

Jones have been accommodated between 2010 and 2018 in administrative or clerical positions . . . assisting primarily with clerical duties," including "answering phones, filing, and preparing vehicle manifests" and "[o]ccasionally . . . load[ing] or unload[ing] vehicles by forklift." Dkt-58-13/1. Robinson states that "[t]here were no vacant positions that were filled and no temporary positions created for these employees." *Id.* Chief Human Capital Officer Mielke similarly testified that "[f]rom January 2010 to December 2014, there were no vacant clerical or administrative positions in the Delivery section office." Dkt-58-14/1.

STATEMENT OF PROCEDURAL HISTORY

Mr. Geter sued GPO under the ADA, alleging both a failure to reasonably accommodate his disability and retaliation for protected activity. The district court denied a motion to dismiss filed by GPO, holding that the present claims are not barred by res judicata from the *Geter I* litigation. Dkt-39/9-11. After discovery, the district court granted GPO's motion for summary judgment on both claims.

Failure to accommodate. The district court noted the "long and contentious relationship" between Mr. Geter and GPO, and summarized the facts underlying the *Geter I* dispute. Dkt-63/1-2. Turning to the present case, the court acknowledged that at the November 25, 2013 meeting Mr. Geter had explained to Mr. Robinson that he could not obtain a CDL immediately "due to continuing medical restrictions" and had "requested that Mr. Robinson transfer him 'to a desk

position until his doctor cleared him with no restrictions and he was able to obtain a CDL.'" Dkt-63/3 (citations omitted). The district court also acknowledged Mr. Geter's testimony that he "renewed his request for an accommodation" in his December 23 phone call to Mr. Robinson and then again when he reported to work on January 3. Dkt-63/5.

The district court understood Mr. Geter's claim to be "that the GPO violated its duty to accommodate by ignoring his repeated requests (on November 23, December 23, and January 3) for a temporary reassignment to a desk position." Dkt-63/8. The court acknowledged that "reassignment to a vacant position" can be a reasonable accommodation, but cited this Court's decision in *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998), for the proposition that "'[a]n employee need not be reassigned if no vacant position exists'—that is, 'employers are not required … to create a new position' in order to accommodate an employee." Dkt-63/8-9. The district court recognized that employers "have a duty to help identify suitable vacancies as part of the overall accommodation process," but held that "once a case reaches litigation" the plaintiff bears the burden to prove the existence of a suitable vacancy. Dkt-63/9.

The court noted the parties' agreement "that there were no formal or official vacancies—no agency job posting or the like," but also recognized that the record contains "undeniably strong evidence" that there were "*de facto* vacancies,"

regularly created by Mr. Robinson "regardless of whether there was an official 'vacancy,'" for employees to temporarily perform "'light duty' or 'office work' when they were injured." Dkt-63/10. Indeed, Robinson conceded that he had accommodated several injured employees in that way, without the need for any formal vacancy. *Id.* So the district court recognized that the "key question" is whether Mr. Geter could prove the existence of a temporary light-duty "vacancy" "by pointing to the GPO's past practice of creating temporary positions." *Id.*

The district court noted that "[s]ome existing authority suggests that the idea of an implied or presumptive vacancy is a nonstarter," citing this Court's prior statement that "[t]he word 'vacant' has no 'specialized meaning' in the ADA" and just means "'not held, filled, or occupied,'" Dkt-63/11 (quoting *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 5 (D.C. Cir. 2010) (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 399 (2002)), and the Tenth Circuit's holding that a position is "vacant" when it "would have been available for similarly-situated non-disabled employees to apply for and obtain," Dkt-63/11 (quoting *Duvall v. Georgia-Pac. Consumer Prod., L.P.*, 607 F.3d 1255, 1264 (10th Cir. 2010)). But the court acknowledged that "[t]here are, however, cases that tilt the other way" and hold instead that the issue is whether temporary reassignment is "reasonably available under the employer's existing policies." Dkt-63/12 (citations omitted).

The district court held that,"in the absence of stronger authority, the Court is hesitant to recognize an implied vacancy rule." Dkt-63/12. The court reasoned that recognizing the existence of "implied" vacancies would "create difficult line-drawing problems" and "create tension with the settled rule that employers do not have to create new positions in order to facilitate reassignment." Dkt-63/12-13. The court held, therefore, that GPO's "failure to reassign Mr. Geter to temporary desk work" could not support a reasonable accommodation claim, "regardless of GPO's past practice as to other employees," in the absence of a formal job vacancy reflected in an "agency job posting or the like." Dkt-63/13, 10.

Retaliation. The district court also granted summary judgment to GPO on Mr. Geter's retaliation claim.

The court reasoned that the "temporal proximity" between Mr. Geter's lawsuit and his firing was not alone sufficient to support an inference of pretext at summary judgment. Dkt-63/15-16 (citing *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 574 (D.C. Cir. 2019)). It also held that the "'manner in which [he] was terminated'" did not support an inference of retaliation, reasoning that Mr. Geter "was given ample notice of his need to acquire a CDL and of his proposed termination." Dkt-63/17. The court acknowledged that GPO's final decision committed an error of law in stating that Mr. Geter was removed for failure to "possess a CDL and a valid state driver's license," because CDL holders cannot

have a separate state driver's license. Dkt-63/17. But the court held that "no reasonable juror could infer retaliatory animus from this single imprecise reference." *Id.*

Finally, the district court acknowledged Mr. Geter's argument "that his unequal treatment—essentially, having every request for a temporary desk assignment met with delay, obfuscation, or a request for further documentation, while others similarly situated were accommodated without question—could suggest to a jury that the GPO was acting with a retaliatory motive." Dkt-63/18. But the court reasoned that "[t]o substantiate such a theory," Mr. Geter "needs to identify employees, otherwise similarly situated, who had not engaged in protected activities but were, in fact, accommodated." Dkt-63/18. The court observed that the record does not clearly establish that the prior employees who were accommodated *had not* engaged in protected activity. Dkt-63/19-21. The court also cited Mr. Robinson's testimony that "each of the four" employees he had accommodated "had filed an EEO complaint." Dkt-63/20. The district court missed the fact that each of those EEO complaints was filed several years *after* the employees in question were accommodated. Dkt-58-13/1.

The district court characterized Mr. Geter's "best argument" as that those prior employees may have engaged in some protected activity but "had not specifically filed 'a federal district court lawsuit alleging Title VII and ADA

violations and an MSPB litigation making similar complaints.'" Dkt-63/21 (citation omitted). But, the court reasoned, "the record is actually silent in that regard" and "it is possible that some of the proposed comparators pursued litigation." *Id.* The district court concluded that Mr. Geter therefore failed to satisfy his "burden to provide support for an inference of pretext" and that "no reasonable juror could infer a retaliatory motive from the comparative treatment of Mr. Geter's coworkers." Dkt-63/21-22.

Mr. Geter timely appealed, and this Court appointed undersigned counsel as *amicus curiae.*

SUMMARY OF THE ARGUMENT

The district court erred in holding that the absence of a formally posted light-duty job vacancy eliminated any triable issue about whether Mr. Geter could be accommodated. A disabled employee is entitled to an accommodation, including temporary light-duty work, that is "reasonably under the employer's existing policies." *Arline*, 480 U.S. at 289 n. 19. Whether a light-duty "vacancy" exists or will soon exist under the employer's own policies is a question of fact. Formal job postings are relevant, but so are the employer's actual practices.

The district court particularly confused apples and oranges in treating the absence of a posted opening for a *permanent* light-duty job as dispositive, when Mr. Geter requested a *temporary* light-duty accommodation. Most employers

accommodate temporarily injured or sick employees with light-duty assignments, and those "vacancies" are rarely posted as formal job openings because they are inherently temporary and become available only when an employee needs them. The district court correctly recognized that there is "undeniably strong evidence" that GPO routinely accommodated employees just like Mr. Geter with temporary light-duty assignments when they became injured. A reasonable trier of fact could infer that a similar vacancy was reasonably available to Mr. Geter. The district court's holding that Mr. Geter must identify an official, posted vacancy in a *permanent* light-duty job is dramatically out of step with actual employer practice and would leave disabled employees with no right to claim accommodations that are, as a practical matter, available to their non-disabled coworkers.

Summary judgment also was inappropriate because the evidence supports an inference that GPO did not engage in the interactive process in good faith. GPO ignored Mr. Geter's repeated verbal requests to discuss accommodations, sent him a letter making demands that GPO's own policies do not support, and fired him without ever having the conversations that might have produced a reasonable solution for both sides.

Finally, the district court erred in dismissing Mr. Geter's retaliation claim. The fact that Mr. Geter's "every request for a temporary desk assignment [was] met with delay, obfuscation, or a request for further documentation, while others

similarly situated were accommodated without question" certainly "could suggest to a jury that the GPO was acting with a retaliatory motive." Dkt-63/18. Mr. Geter satisfied his burden to produce evidence supporting a reasonable inference that those prior employees were similarly situated. The district court essentially held that a jury could not infer retaliation unless the record forecloses any possibility that those comparators had engaged in protected conduct just like Mr. Geter. That is not the law. A reasonable trier of fact also could infer pretext from the parties' history, from GPO's failure to engage in the interactive process, and from GPO's violation of its own policies.

STANDARD OF REVIEW

Summary judgment is proper when "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 "material" fact is one capable of affecting the substantive outcome of the litigation, while a dispute is "genuine" if there is enough evidence for a reasonable finder of fact to decide in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007).

In considering a motion for summary judgment, a court must "eschew making credibility determinations or weighing the evidence[,]" and all underlying facts and reasonable inferences therefrom must be analyzed in the light most

favorable to the non-movant. *Czekalski v. Peters*, 475 F.3d 360, 363 (D.C. Cir. 2007); *Anderson*, 477 U.S. at 255.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING MR. GETER'S FAILURE TO ACCOMMODATE CLAIM

A. The District Court Incorrectly Held That The Absence Of A Formal, Posted Vacancy Is Fatal To Mr. Geter's Claim

The ADA requires that employers provide "reasonable accommodations" for individuals with disabilities. 42 U.S.C. § 12112(b)(5)(A). Those accommodations "may include" "job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). The district court erred by adopting a formalistic rule that employers never have an obligation to consider reassigning employees to temporary light duty, unless the employer has formally "posted" a light-duty vacancy.

As the Supreme Court explained in *Arline*, although employers "are not required to find another job for an employee who is not qualified for the job he or she was doing," they "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 480 U.S. at 289 n.19. This Court has recognized that "[a]n employee need not be reassigned if no vacant position exists," *Aka*, 156 F.3d at 1305, but also that "[t]he

word 'vacant' has no 'specialized meaning' in the ADA" and simply means "not held, filled, or occupied," *McFadden*, 611 F.3d at 5 (citation omitted). In *McFadden* this Court considered whether the employer had "posted a job listing[] *or* had otherwise acted as though it considered the position vacant." *Id.* (emphasis added). If a light-duty assignment is "reasonably available" to the plaintiff "under the employer's existing policies," *Arline*, 480 U.S. at 289 n.19, then it is "vacant" as a matter of plain language. There is no justification for the district court's additional requirements that the light-duty vacancy must *also* be reflected in a "formal . . . agency job posting or the like," and that it must be available to any "nondisabled GPO employee." Dkt-63/10-11.

That is particularly true when an employee seeks a *temporary* reassignment to light duty. Virtually all employers offer light-duty assignments to employees (disabled or not) who are temporarily unable to perform all of the essential functions of their job. Indeed, the Office of Personnel Management—of which GPO is a part—acknowledges that reasonable accommodations to "help[] injured and ill employees return to work" include "temporary light duty assignments." Office of Personnel Management, Disability Employment: Retention, *available at* https://www.opm.gov/policy-data-oversight/disability-employment/retention/.

Temporary light-duty "vacancies" are rarely posted on a formal job listing because they are not intended for uninjured employees or outsiders.[2]

This issue is almost never litigated, both because temporary light-duty assignments are so widely available and because, at least prior to statutory changes in 2008, workers who had only short-term injuries could not satisfy the ADA's disability definition. *See, e.g.*, *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1348 (2015) (noting 2008 amendments); *Hodges v. District of Columbia*, 959 F. Supp.2d 148, 154 (D.D.C. 2013) (noting that Congress has rejected the prior judicial interpretation that impairments lasting less than a year are not disabilities). Litigation has happened only when the employer's patience for temporary light-duty accommodations runs out, and the employee seeks an extension beyond what the employer's policies permit or to convert a temporary light-duty position into a permanent one. *See, e.g.*, *Woodman v. Runyon*, 132 F.3d 1330, 1335-37 (10th Cir. 1997) (employee reassigned to temporary light-duty positions multiple times, and sued when employer refused to create a permanent light-duty position); *Hendricks-*

[2] *See, e.g.*, *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 680 (7th Cir. 1998) (temporary light-duty assignments were "only available for those employees (disabled or otherwise) who are recovering from recent injuries and whose disabilities are temporary."); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 698 (7th Cir. 1998) ("An employer can take the least strenuous of its jobs, put them in a pool for temporary light-duty work, and use them so its employees can get back on their feet"); *see also, e.g.*, *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, 1996 WL 33161338, at *11-13 (Sept. 3, 1996) (discussing implementation of temporary light-duty policies).

Robinson, 154 F.3d at 693 ("The plaintiffs have no complaint about the way [their employer] treated them during their recuperation period, when they were given light-duty jobs."). The case law generally recognizes that the employer has no duty to create a permanent light-duty position that would not otherwise be available. *See, e.g.*, *Dalton*, 141 F.3d at 680. But the case law also recognizes that the availability of *temporary* light-duty assignments should be assessed by reference to the employer's existing practices, and that employers cannot refuse to give a disabled employee access to temporary light-duty work that it routinely makes available to other similarly-situated employees.

In *Johnson v. Brown*, for example, an employee was accommodated with temporary light duty after injuring his back. 26 F. Supp. 2d 147, 148 (D.D.C. 1998). Johnson requested permanent light duty and was told there were "no appropriate vacancies." *Id.* The district court nonetheless held that there was a factual dispute about whether a vacancy was available. *Id.* at 152. It noted that "[t]here [were] no policies that explicitly prohibit how long an employee can remain on a light duty assignment," that "[t]he [employer] has allowed another employee to continue indefinitely on a light duty assignment" and that "two other employees began working in the pack room on light duty assignments … [and one was] on light duty for over a year." *Id.* at 148, 152. The court concluded that "a genuine dispute of material fact exists" about whether a longer-term or even

indefinite light-duty assignment would be "reasonably available under the employer's existing policies." *Id.* at 152. Other D.D.C. cases have also found this standard persuasive. *Grist v. Frank*, No. 88-2129, 1990 WL 503647, at *7 (D.D.C. Dec. 24, 1990), *aff'd*, No. 91-5137, 1993 WL 78881 (D.C. Cir. Mar. 11, 1993); *Carroll v. England*, 321 F. Supp. 2d 58, 69 (D.D.C. 2004) ("Persuasive authority indicates that employers need only provide alternative employment opportunities reasonably available under the employer's existing policies.") (internal quotations omitted).

In *Howell v. Michelin Tire Corp.*, the plaintiff was forced to take disability leave because his employer limited "temporary light-duty rotation[s]" to 13 weeks. 860 F. Supp. 1488, 1490 (M.D. Ala. 1994). The district court acknowledged the principle that "an employer need not convert a temporary job into a permanent one." *Id.* at 1492. Nonetheless the court held that Michelin was not entitled to summary judgment because Howell provided evidence that its actual past practices were inconsistent with its claim that it enforced a 13 week limit on light duty work. *Id.* at 1492-93. Indeed, "despite Michelin's apparent limit of 13 weeks for temporary light-duty assignments, the company has accommodated other employees by reassigning them to light-duty tasks for much longer periods" including two employees who were permitted to remain on light duty for "in one case eleven months and in the other two years." *Id.*

Similarly, in *Gatlin v. Village of Summit* the Summit Police Department had a "light duty program" consisting of "temporary jobs designed to allow injured employees to work while they returned to good health." 150 F. Supp. 3d 984, 993 (N.D. Ill. 2015). The plaintiff sought a temporary light-duty accommodation after returning from surgery, and the Police Department refused on the ground that there were no vacancies. *Id.* The district court denied summary judgment because "the record reveals conflicting testimony on this point," in the form of testimony from other employees that "there is always stuff to do" for employees who need temporary light-duty assignments. *Id.* at 994.

And in *Gibson v. Milwaukee County*, the district court held that while the Sheriff's Office "was not required to create a permanent light-duty position" for the plaintiff, there was no apparent "reason why she could not have remained on temporary light duty while she worked . . . to find a permanent position," in light of evidence that over the past two years the Sheriff's Office had "placed six corrections officers in light-duty assignments" because of their temporary inability to interact with inmates. 95 F. Supp. 3d 1061, 1071-73 (E.D. Wis. 2015).

In *Woodman*, the Tenth Circuit even held that a Postal Service employee may have been entitled to a *permanent* light-duty position in consumer affairs, despite the employer's claim "that the consumer affairs job Ms. Woodman now performs is, in fact, 'nonexistent' because it was created solely as a temporary

measure to provide Ms. Woodman with some work duties while awaiting reassignment elsewhere." 132 F.3d at 1346. Noting that it "is well established in the case law that regardless of any explicit statutory duty to reassign" an employer "'cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies,'" the Tenth Circuit stressed that Ms. Woodman had "demonstrated a factual dispute . . . by providing evidence that USPS has accommodated another employee in a situation similar to her own by assigning her to a permanent position in consumer affairs." *Id.* (quoting *Arline*, 480 U.S. at 289 n.19, and collecting cases).

In other cases, plaintiffs have lost because the evidence failed to support the existence of any temporary light-duty policy or practice that encompassed the plaintiff's situation. But those cases recognize that the issue is whether temporary light-duty work is reasonably available under the employer's existing policies and practices, and that evidence about the past treatment of similarly-situated employees is relevant.[3]

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[3] *See, e.g.*, *Lai Ming Chui v. Donahoe*, 580 F. App'x 430, 436-37 (6th Cir. 2014) (citing *Woodman*, 132 F.3d at 1340) ("[The employee has not] identified another limited-duty employee who was offered an accommodation she was not offered."); *Hudson v. W. New York Bics Div.*, 73 F. App'x 525, 529 (2d Cir. 2003) (light-duty policy not adopted until a year later); *Evans v. Gen. Motors Corp.*, 107 F.3d 1 (2d Cir. 1997) ("[The employee] made no showing that he was entitled to a job transfer under … any personnel policy [of the employer]."); *Clark v. Cent. Cartage Co.*, 73 F.3d 361, at *3 n.2 (6th Cir. 1995) ("[T]here is no evidence that any permanent alternative employment was available to [the employee] under the [employer's]

The district court acknowledged some of this precedent but instead adopted a rigid rule that reassignment to light duty, even temporarily, is required only when the employer has a "formal or official vacanc[y]" as reflected in an "agency job posting or the like." Dkt-63/10. The court attributed that rule to the Tenth Circuit's opinion in *Duvall*, which defined a vacancy as a formal position that "would have been available for similarly-situated nondisabled employees to apply for and obtain." *Duvall*, 607 F.3d at 1264. But Mr. Duvall sought a permanent transfer to a job that, under the employer's existing policy, was only available to contract workers. *Id.* The Tenth Circuit's point was that Georgia Pacific was not required to violate its existing policies to accommodate Duvall. Its analysis is consistent with the principle that temporary light-duty work must be offered to a disabled worker if it *is* reasonably available under the employer's existing policies. Indeed, Duvall was offered such a temporary light-duty position, and refused it. *Id.* at 1259.

The Tenth Circuit had no occasion to consider or reject the extensive case law, discussed above, that addresses temporary light-duty assignments that are available only to injured or sick employees. The Tenth Circuit's statement that disabled employees cannot claim an entitlement to a vacant job unless that job would be "available for similarly-situated nondisabled employees to apply for and

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employment policies.") (emphasis omitted); *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) ("The [employer] does not normally assign permanent light duty to an employee who has served for less than five years.").

obtain" also was based on a concern about giving disabled employees preferential treatment. *Id.* at 1262-64. But this Court specifically rejected that reasoning in *Aka*. This Court explained that "[a]lthough the ADA's legislative history does warn against 'preferences' for disabled *applicants*, it also makes clear that reasonable accommodations for existing *employees* who become disabled on the job do not fall within that ban." *Aka,* 156 F.3d at 1304 (citations omitted).

The district court was concerned that any entitlement to light duty reassignment would be in tension with the principles that employers have no obligation to create new jobs or to "restructure an existing job to remove some of its essential functions." Dkt-63/12-13 (citing *Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78, 90 (D.D.C. 2007)) (citing *Hancock v. Washington Hosp. Ctr.*, 13 F. Supp. 3d 1, 6 (D.D.C. 2014), *aff'd*, 618 F. App'x 4 (D.C. Cir. 2015)). But the rule that employers only have to offer temporary light-duty assignments that are reasonably available under their existing policies takes care of those concerns. If temporary light duty work is already available under the employer's existing policies, then providing that opportunity to disabled employees does not require the employer to create or restructure anything.

B. A Reasonable Jury Could Find That A Temporary Light-Duty Vacancy Was Available

As in the cases discussed above, Mr. Geter put forward a triable case that temporary light-duty assignments are reasonably available under existing GPO

policy and practice to drivers who become temporarily unable to drive. The district court correctly recognized that there is "undeniably strong evidence for such a practice at the GPO." Dkt-63/10.

In particular, Mr. Geter proved—and GPO essentially concedes—that Monique Jones, Robert Courtney, Bobby Graham, Marvin Jones, and Brandon Debrew were reassigned to temporary light-duty between 2010 to 2018. Dkt-58-12/1; Dkt-58-13/1. At least four of these employees were reassigned to temporary light duty by Mr. Geter's direct supervisor. Dkt-58-13/1. Monique Jones was accommodated with light-duty work periodically between 2010 and 2012. *Id.* Robert Courtney was accommodated for approximately 267 days between 2016 and 2017. *Id.* Bobby Graham was accommodated on three occasions, totaling approximately 679 days, between 2013 and 2018. *Id.* Marvin Jones had been accommodated for at least 422 days as of July 26th, 2018. *Id.* Like Mr. Geter, these employees temporarily lost their ability to drive. Bobby Graham was temporarily reassigned to light duty after he began taking insulin and lost his CDL. Dkt-58-11/1. Robert Courtney was temporarily reassigned after he did not recertify his CDL. *Id.* at 2. Monique Jones and Brandon Debrew were temporarily reassigned after an injury. Dkt-58-12/1.

Mr. Robinson took the position that there were no official vacancies at the time of those accommodations, and that he was "not assigning [his subordinates]"

to new or different light-duty jobs but simply "put[ting] them on a temporary duty" within the confines of their existing jobs. Dkt-58-19/24. But that just proves the point that the reasonable availability (i.e., *vacancy*) of temporary light-duty assignments for injured drivers at GPO had nothing to do with whether there was a "formal or official vacanc[y]" as illustrated by an "agency job posting or the like." Dkt-63/10. If, as GPO asserts, there were "no vacant clerical or administrative positions" in the office from 2010 to 2014, Dkt-58-14/1, how was it that Bobby Graham was accommodated with clerical duties in 2013, Monique Jones was accommodated between 2010 and 2012, and Marvin Jones was accommodated for well over a year? Obviously, informal vacancies remained. Robinson declares that all clerical or administration positions in the Delivery section were eliminated in 2015. Dkt-58-13/2. But GPO did not run out of clerical work. It had no need to formally advertise new permanent clerical positions because it was doing that work with a rotating pool of temporarily injured drivers—exactly the sort of temporary light-duty program considered in the cases discussed *supra* at 26-29.

Nothing of substance turns on whether GPO has a policy of reassigning injured drivers to distinct light-duty *positions*, or a policy under which it considers temporary assignment to clerical tasks to be encompassed within drivers' existing jobs. Either way, a reasonable trier of fact could infer that temporary light-duty assignments for injured drivers were reasonably available under GPO's existing

policies. Surely GPO's position under the ADA is not enhanced by arguing that temporary light-duty assignments were encompassed within Mr. Geter's job as a driver. And the principle that employers have no obligation to "restructure" a disabled employee's job to eliminate essential functions was developed in the context of employees seeking *permanent* restructurings. *See, e.g.*, *Jones*, 505 F. Supp. 2d at 89-90; *Hancock*, 13 F. Supp. 3d at 7. That principle cannot sensibly be applied to an employee's *temporary* inability to perform some essential function. Few employees can perform all of the essential functions of their job every single day, or need to. Ordinarily an employee can catch up on their paperwork if they are too ill to clean out the storeroom, without significant hardship to the employer. If that sort of routine accommodation stretches out to the point of becoming unduly burdensome, the employer need not provide it. But a rule under which employers do not even have to *consider* whether it would be reasonable or unduly burdensome to let a disabled employee temporarily perform some of his assigned job functions rather than others would be punitively out of step with ordinary employment practices. And when the employer's own practices make such opportunities reasonably available to non-disabled employees, the ADA's fundamental non-discrimination principle is also at stake.

C. GPO's Failure to Adequately Engage in the Interactive Process Further Supports Mr. Geter's Failure to Accommodate Claim

To the extent that there is any doubt, it should be resolved on summary judgment by GPO's failure to engage in good faith in the interactive process.

As this Court explained in *Ward v. McDonald*, the ADA requires "'a flexible give-and-take' between employer and employee 'so that together they can determine what accommodation would enable the employee to continue working.'" 762 F.3d 24, 32 (D.C. Cir. 2014) (citation omitted). GPO's own official policy on requesting reasonable accommodations confirms that the process is meant to be flexible and ongoing. Dkt-55-19/9. Among other things, the employer must assist the employee in identifying potential current or future vacancies or other accommodations that might allow the employee to stay in their job. *See generally* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, U.S. Equal Employment Opportunity Commission (Oct. 17, 2002) (EEOC Guidance).[4]

The Circuits appear to be divided about whether a failure to engage in the interactive process in good faith can be an independent basis of liability for an employer, in circumstances where no reasonable accommodation was actually possible. *See, e.g.*, *Fjellestad v. Pizza Hut of America, Inc.* 188 F.3d 944, 951 (8th

[4] Available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

Cir. 1999) (noting split). But there is broad agreement that "summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations." *Id.* at 953. That is because, in determining whether "the employee would have been entitled to perform the job with accommodations," the jury "is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317-18 (3d Cir. 1999). Courts should be "especially wary" of underestimating at the summary judgment stage "how much the employer's bad faith may have hindered the process of finding accommodations," or *post hoc* arguments that accommodation was impossible "would effectively eliminate the requirement that employers must participate in the interactive process." *Id.* at 318.

Considering the facts and reasonable inferences in the light most favorable to Mr. Geter, GPO did not engage in any good faith interactive process here. GPO simply ignored his repeated requests (on November 25, December 23, and January 3) for temporary reassignment to a desk position until he could get medical clearance to pursue the reinstatement of his CDL. At the November 25 meeting, Mr. Geter was explicitly told that GPO was not here to "talk about your reasonable accommodation." Dkt-58-10/1. Mr. Geter's renewed oral requests on December 23

and January 3 were disregarded. Mr. Robinson testified that on December 23 Mr. Geter disclaimed any request for a reasonable accommodation and requested only "a chair." Dkt-58-22/1. Mr. Geter explicitly denies that, and in this posture his testimony must be credited. Dkt-58-10/1. Given the contentious multi-year dispute between the parties, Robinson's testimony also is not credible on its face. Mr. Robinson does not explain why an employee that had gone so far as to file a federal district court lawsuit regarding a previous reasonable accommodation request, a Merit Systems Protection Board complaint and several EEOC charges would, in a phone conversation, suddenly withdraw his request for a transfer to a desk position as a reasonable accommodation and ask for a "chair" without a job that could be performed from that chair.

Rather than engage with Mr. Geter's plea for accommodations in an interactive and flexible spirit, GPO adopted the maximally-confrontational stance of refusing to speak with him and instead sending him the December 16 letter. The parties dispute whether Mr. Geter ever received that letter, which was sent to the home of his elderly mother. Dkt-63/5. Regardless, GPO's demand that Mr. Geter respond in a particular way and before an arbitrary deadline violated GPO's own official policy on reasonable accommodations—which, ironically, was attached to the December 16 letter. Dkt-55-19/4. GPO's policy makes clear that the interactive process is flexible, ongoing, and not bound by a particular time frame. *Id*. at 9. It

also makes crystal clear that employees are entitled to raise a request for accommodations with their supervisors orally, as Mr. Geter repeatedly did; that supervisors are required to respond to such requests within ten days; and that if the supervisor is inclined to deny the request they must do so in writing and initiate a specific process involving the Chief of the Occupational Health Division and the Reasonable Accommodations Panel. *See* Dkt-55-19/6-8; *supra*, at 10-12. None of that happened here.

This Court recognized in *Ward* that "[c]ases in which our sister circuits have found genuine issues of fact regarding the responsibility for the breakdown of the interactive process typically include evidence that the employer was in some way unresponsive to the plaintiff's requests for accommodation." 762 F.3d at 34. And this Court placed significant weight on the fact that Ward's supervisors "promptly responded to her request for an accommodation, met with her on several occasions to discuss the request and sought more information from her physician to help them determine an appropriate accommodation" and that "within days of receiving the physician's letter—Ward's supervisors twice met with her to discuss her request." 762 F.3d at 34. Viewing the record in the light most favorable to Mr. Geter, GPO was completely unresponsive to his requests. Other circuits have held that summary judgment was inappropriate when the employer was responsible for a breakdown in the interactive process, on similar or less egregious facts. *See, e.g.*,

Fjellestad, 188 F.3d at 952-53 (employer did not discuss possible accommodations with employee); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 808 (7th Cir. 2005) (concluding that "a reasonable jury could conclude that Sears [the employer] caused the breakdown in the interactive process by failing to engage in a meaningful way despite Keane's repeated requests"); *Taylor*, 184 F.3d at 312–15 (school district employer failed to assist employee in finding a reasonable accommodation despite the employee's repeated requests for an accommodation).

GPO blames Mr. Geter for failing to send further medical documentation in response to the December 16 letter. But GPO already had the September 2012 letter from Dr. Dorin explaining Mr. Geter's condition and lifting restrictions, which was sent just prior to GPO's decision to put him on administrative leave from December 2012 to November 2013. Dkt-55-11; Dkt-58-10/2. Mr. Geter referenced Dr. Dorin's conclusions in the November 25 meeting and had no reason to believe that GPO considered them insufficient. Dkt-58-4/2. Furthermore, GPO's policy says that in the event of a medical dispute or uncertainty the supervisor must initiate the Form 838 process for the agency to conduct its own medical exam. *See* Dkt-55-19/9. If there was confusion regarding the 2012 Dr. Dorin letter, GPO should have—but did not—initiate the Form 838 process.

A jury would be entitled to consider GPO's unresponsiveness when evaluating GPO's contention that there were no temporary light-duty work

opportunities or vacancies that Mr. Geter might have been eligible for. A Google search indicates that GPO employs 1700 people, and a reasonable jury could be skeptical that there was no light-duty or clerical work (or even current or imminent official vacancies) anywhere in the organization. *See* EEOC Guidance, *supra at* 35, at question 27 (employer's "obligation to offer reassignment to a vacant position" is not limited to vacancies "within an employee's office, branch, agency, department, [or] facility"). A jury also could consider whether a genuine interactive process might have revealed other reasonable accommodations, such as continued administrative leave. It does not matter that Mr. Geter may not have specifically requested continued leave. In *Taylor*, the Third Circuit explained that an employer "cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation." 184 F.3d 296 at 312-15.

The district court's suggestion that Mr. Geter waived any argument based on GPO's obligations in the interactive process, *see* Dkt-63/13 n.5, is unfair. Although he briefed the issue defensively, in response to GPO's argument that he abandoned the interactive process himself, Mr. Geter clearly argued below that GPO failed to engage in that process in good faith. *See generally* Dkt-58-1/15-21; *see, e.g.*, Dkt-58-1/20 ("It's not a reasonable engagement in the interactive process to send one letter, which Plaintiff denied receiving, and call it a day."). Those arguments made

a material dispute about the interactive process obvious, and the district court should have recognized that the jury would be entitled to draw reasonable inferences from that dispute when assessing Mr. Geter's reasonable accommodation claim. A district court should not grant summary judgment when a dispute of material fact is apparent on the record.

II. THE DISTRICT COURT ERRED IN REJECTING MR. GETER'S RETALIATION CLAIM

The district court also erred in granting summary judgment on Mr. Geter's retaliation claim. The court imposed an unjustified burden of proof on Mr. Geter's proposed inference of retaliatory intent from GPO's treatment of other employees. Regardless, this record would support a reasonable inference of retaliatory intent even without those comparators.

A. A Reasonable Trier of Fact Could Infer Retaliation from The Fact That GPO Accommodated Other Drivers When They Temporarily Became Unable To Drive Or Lost Their CDL

As the district court explained, Mr. Geter's retaliation case is based in part on the glaring fact of "his unequal treatment—essentially, having every request for a temporary desk assignment met with delay, obfuscation, or a request for further documentation, while others similarly situated were accommodated without question." Dkt-63/18. The inference of pretext from that difference in treatment is quite strong on this record.

GPO claims that it terminated Mr. Geter because he lacked a CDL. Dkt-55-26/2-3. However, the district court acknowledged the "undeniably strong evidence" in the record that GPO regularly accommodated other injured drivers with temporary light-duty work. *Id.* Mr. Robinson admitted to accommodating Monique Jones, Marvin Jones, Bobby Graham, and Robert Courtney. Dkt-58-13/1. Another employee, Brandon Debrew, testified that he had been placed on light duty after he was injured instead of being forced to drive through the injury. Dkt-58-20/15-16. Notably, two of these people, Bobby Graham and Robert Courtney, were accommodated even though their CDLs had lapsed. In his affidavit, Graham noted that Robinson allowed him to work on the loading dock for a year and a half after he lost his CDL due to his insulin prescription. Dkt-58-11/1. In the same affidavit, Graham noted that Robert Courtney, a fellow employee, was also temporarily moved to another section when his CDL lapsed. Dkt-58-11/2.

The district court nonetheless held that "no reasonable juror could infer a retaliatory motive from the comparative treatment of Mr. Geter's coworkers" because there was some evidence that those coworkers also engaged in protected activity and the record does not show, conclusively, that they did not engage in protected activity just like Mr. Geter's. Dkt-63/20-22. The district court's reasoning is flawed in three respects, and should be reversed.

First, the district court's reasoning rested in part on a misunderstanding of the record. The district court noted Robinson's testimony that "each of the four" employees he accommodated "had filed an EEO complaint," and the court then reasoned that "[i]f anything," the fact "that Mr. Geter's coworkers were accommodated—even after, in some cases, engaging protected activities like requesting accommodation and filing EEO complaints—undercuts rather than supports a retaliatory theory." Dkt-63/20-21. But the EEO complaints lodged by those other employees actually happened long *after* they were accommodated and Mr. Geter was fired.[5] Mr. Robinson testified that Mr. Graham, Mr. Jones, and Mr. Courtney filed EEO complaints in, respectively, 2016, 2016, and 2017. Dkt-58-13/2. Obviously, the fact that they filed EEO complaints years after they were accommodated does not make their more-favorable treatment years earlier irrelevant to Mr. Geter's retaliation claim, unless GPO can see the future.

Second, there is no evidence that those employees (with the possible exception of Ms. Jones) engaged in protected activity anything like Mr. Geter's. Even if their requests for accommodation technically counted as protected activity, it is self-evident that some protected activities are more annoying to supervisors,

[5] An exhibit attached to Mr. Geter's motion for summary reversal in this Court indicates that Monique Jones filed a sex discrimination lawsuit in 2005, prior to Robinson's tenure as Delivery Section Chief. It is not clear to *amicus curiae* whether that information was in the district court record. Regardless, she was just one of several comparators offered by Mr. Geter.

and therefore more likely to provoke retaliation, than others. Mr. Geter had filed multiple administrative complaints and a federal lawsuit against GPO. He had *prevailed* in a Merit System Protection Board challenge to GPO's attempt to fire him, after which GPO put him on administrative leave for nearly a year. The fact that GPO may have been willing to accommodate employees who engaged in some modest protected activity does not undermine the inference of retaliation from GPO's less-favorable treatment of Mr. Geter, after his far more confrontational and dramatic protected activity. Also, it is far from clear that those employees engaged in actual protected activity at all. Robinson testified that none of them currently had a disability, Dkt-58-19/12, so their informal requests for accommodation may not have been protected by the ADA. *See, e.g.*, *Pardi v. Kaiser Found. Hosps*., 389 F.3d 840, 850 (9th Cir. 2004) (citing *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238 (9th Cir. 1999) (defining protected activity as "vigorously asserting [one's] rights under the ADA and other state and federal discrimination laws.")); 29 C.F.R. §1630.2(g)(1)-(2) (only those with actual disabilities, with records of disabilities, or regarded as disabled are covered).

Finally, the district court improperly heightened Mr. Geter's burden by essentially demanding that he disprove the possibility that these employees may have engaged in protected activity comparable to his. The plaintiff's burden at summary judgment is to produce "evidence sufficient for a reasonable jury to find

that the employer's stated reason was not the actual reason." *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008). Mr. Geter provided evidence that GPO repeatedly (indeed, routinely) accommodated drivers who temporarily lost their CDLs, while taking the position in his case that losing a CDL called for immediate termination. That difference in treatment is suspicious on its face, and a reasonable jury would be entitled to infer that it is quite unlikely that those other employees had a complaint and litigation history with GPO anything like Mr. Geter's. The fact that Mr. Robinson pointed to EEO complaints filed by several of them years later itself strongly supports an inference that they had not filed complaints—let alone federal litigation—*prior to* their accommodations. If they had, Mr. Robinson (and GPO) would be saying so.

By emphasizing that "it is possible that some of the proposed comparators pursued litigation" but that "the record is actually silent in that regard," Dkt-63/21, the district court essentially held that any fact not conclusively established by the record must be assumed against the party bearing the burden of proof. That is not the law. Juries are entitled to draw reasonable inferences from the evidence and from common sense, and courts are required to give the non-moving party the benefit of those reasonable inferences. This Court has repeatedly emphasized that pretext can be proved in many ways, and that the plaintiff's proof need not follow any rigid formula. *See, e.g.*, *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109,

1115 (D.C. Cir. 2016); *Nurriddin v. Bolden*, 818 F.3d 751, 758–59 (D.C. Cir. 2016). And the "question of whether employees are similarly situated in order to show pretext ordinarily presents a question of fact for the jury." *Wheeler*, 812 F.3d at 1115. Summary judgment is appropriate only where the "plaintiff has created only a weak issue of material fact as to whether the employer's explanation is untrue, and there is abundant independent evidence in the record that no discrimination has occurred." *Aka*, 156 F.3d at 1291. The district court's holding that no reasonable jury could infer pretext from a seemingly stark difference in treatment unless the plaintiff affirmatively disproves unlikely possibilities (possibilities the defendant obviously would have advanced if they were true) significantly understates the jury's right to draw reasonable inferences.

B. Geter's Case For Pretext Is Much Broader Than The Comparative Treatment Evidence

The district court also erred by focusing on the strength of the inference from differential treatment in isolation. This Court's precedents make clear that pretext should be evaluated "in light of the total circumstances of the case." *Nurriddin*, 818 F.3d at 758–59. Even if this Court's decisions preclude an inference of retaliation "from timing alone" (Dkt-63/16 (citing *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 574 (D.C. Cir. 2019)), there is plenty of other evidence in this record from which a reasonable jury could infer pretext and retaliation.

A reasonable jury would start with the parties' long and contentious history, starting with Mr. Geter's 2009 injury and GPO's failure to accommodate that injury in 2010. Geter had a lengthy dispute with GPO and with the Department of Labor's Office of Worker's Compensation Programs about the extent of his lifting restrictions, and about his then-supervisor Gerald Simms's insistence that he drive despite those restrictions. *See generally Geter I*, 2016 WL 3526909 at *2-4. That dispute culminated in a formal EEO complaint, and later the *Geter I* lawsuit. GPO actually fired Mr. Geter, and then was overruled the Merit System Protection Board—which found that Mr. Robinson had violated Mr. Geter's due process rights and ordered his reinstatement. But rather than reinstate Mr. Geter, GPO elected to pay him backpay and put him on administrative leave status for approximately ten months. *See* Dkt-58-25/1.

On November 21, 2013 GPO peremptorily summoned Mr. Geter to return to work in four days with a CDL. *Id.* GPO knew about Mr. Geter's ongoing medical treatment and the restrictions imposed by Dr. Dorin, Dkt-58-5/1; *see also* Dkt-58-19/25-26, and Mr. Geter had filed the *Geter I* complaint in June. But GPO's representatives did not come to the November 25 meeting prepared to discuss accommodations. Dkt-58-4/1; *see also* Dkt-58-10/1. Instead, when Mr. Geter explained that he could not get his CDL reinstated immediately because no doctor

would clear him (*id*; *see also* Dkt-55-17/2), GPO flatly refused to discuss his medical situation or potential accommodations and sent him home, Dkt-58-10/1.

GPO then disregarded its own policies, which allow employees to request accommodations orally and require supervisors to respond to such requests within ten days. Dkt-55-19/9. Instead, Mr. Robinson waited more than twenty days and mailed Mr. Geter a letter on December 16 demanding that he repeat his request and provide additional, unspecified, medical documentation by December 27. Dkt-55-19/2. Although he disputes receiving that letter, Mr. Geter actually complied by making additional oral requests for temporary accommodations to Mr. Robinson on December 23 and January 3. Dkt-58-15/1; Dkt-55-16/3. Nonetheless, Mr. Robinson again ignored those requests and GPO ultimately fired Mr. Geter (again) in April 2014 without ever discussing the possibility of accommodations with him. Dkt-55-26/3.

A reasonable jury could infer pretext from GPO's obvious hostility to Mr. Geter, from its failure to engage in the interactive process, and from its repeated violation of its own procedures.

Numerous cases have recognized that a failure to engage in the interactive process suggests bad faith. *See, e.g.*, *Fjellestad*, 188 F.3d 944 at 952 ("for purposes of summary judgment, the failure of an employer to engage in an interactive process . . . is prima facie evidence that the employer may be acting in bad faith.");

Buboltz v. Residential Advantages, Inc., 523 F.3d 864, 870 (8th Cir. 2008), abrogated on other grounds by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) ("When an employer fails to engage in an interactive process, that is *prima facie* evidence of bad faith"); *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith"). The case law also permits an inference of discriminatory animus. *See, e.g.*, *Sheng v. M&T Bank,* 848 F.3d 78, 86 (2d Cir. 2017); *Valentine v. American Home Shield Corporation,* 939 F. Supp. 1376, 1401-02 (N.D. Iowa 1996); *see also Winter v. Loc. Union No. 639, Affiliated With Int'l Bhd. Of Teamsters*, 569 F.2d 146, 149 (D.C. Cir. 1977) (animus can be inferred from bad faith). A reasonable jury could find that GPO's failure to engage in a good faith dialogue about possible accommodations supports an inference that GPO's stated reasons for firing Mr. Geter were not the true reasons.

A reasonable jury could draw similar inferences from GPO's failure to follow its own procedures. *See Walker v. Johnson*, 798 F.3d 1085, 1092 (D.C. Cir. 2015) ("deviation from established procedures or criteria" can indicate a proffered justification is pretextual); *Allen v. Johnson*, 795 F.3d 34, 40 (D.C. Cir. 2015) (noting that an employer's failure to follow established procedures or criteria can support an inference of invidious motive). In *Saunders v. Mills*, for example, the plaintiff argued that her employer's failure to award her performance standards, a

performance appraisal, and a performance award for certain fiscal years, in violation of its own policies, supported an inference of retaliatory intent. 172 F. Supp. 3d 74, 90-91 (D.D.C. 2016). The court held that summary judgment was inappropriate because "apparent deviation from such established procedures calls into question the legitimacy of its proffered reasons." *Id.* at 91. Similarly, in this case, a reasonable jury crediting Mr. Geter's testimony could find that GPO conspicuously and suspiciously failed to follow its own procedures for evaluating and ruling on a request for medical accommodations.

CONCLUSION

The district court's grant of summary judgment to GPO should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

1. This Opening Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 11,574 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

Dated: November 8, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger
Appointed Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day, of November, 2021, I electronically filed the foregoing pleading through this Court's Court Management/Electronic Court Filing system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ J. Scott Ballenger
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Appointed Amicus Curiae

ADDENDUM

ADDENDUM TABLE OF CONTENTS

42 U.S.C. § 12112. Discrimination.

(a) General rule
No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
(b) Construction
As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
(3) utilizing standards, criteria, or methods of administration--
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

42 USC 12111(8)-(10)

(8) Qualified individual

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term “reasonable accommodation” may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

29 C.F.R. § 1630.2(g)(1)-(2)

(g) Definition of "disability"—
(1) In general. Disability means, with respect to an individual—
(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(ii) A record of such an impairment; or
(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."
(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.