ORAL ARGUMENT SCHEDULED 2/24/2022

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

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

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INTRODUCTION

The district court held that in the absence of a "formal or official" vacancy, reflected in an "agency job posting or the like," employers have no obligation under the Americans with Disabilities Act ("ADA") to even *consider* temporary light-duty assignments as an accommodation for disabled employees. Dkt-63/10-12. That cannot be the law. Temporary light-duty assignments, even if reasonably available under the employer's existing policies and "vacant" in every sense that matters, will virtually never be posted as an official job listing. As commonly implemented at employers across the country, such assignments are available only to current employees and only on a temporary basis. The district court's analysis therefore confuses apples with oranges, and erects a rule that would categorically deny disabled workers any statutory right to consideration of a common accommodation enjoyed by injured employees in many modern workplaces.

The case law does not support an arbitrary rule that the availability of light-duty assignments can only be proved through written policies, but a reasonable jury could find that GPO had "light duty program" here if that were required. And recognizing that employers must consider accommodations that are reasonably available under the employer's existing policies is not punishing them for going above and beyond their obligations in the past; it is an expression of the basic non-

discrimination requirements of the ADA and of the obvious fact that an employer's own policies and practices are powerful evidence of what is reasonable.

GPO elevates semantics over substance by arguing that Mr. Geter waived any argument that a "vacancy" existed because he framed the legal argument somewhat differently in the district court. Like most of the waiver arguments in GPO's brief, that argument also is inconsistent with Rule 56 and this Court's decision *Winston & Strawn, LLP v. McLean*, 843 F.3d 503 (D.C. Cir. 2016). The 2010 amendments to Rule 56 make clear that district courts may treat *facts* as conceded if not properly contested, but that the court must determine for itself whether the facts reveal a triable claim under the law. This Court should reject GPO's argument that Mr. Geter waived any "affirmative" argument based on interactive process concerns for similar reasons.

This Court also should reject GPO's contention that Mr. Geter forfeited his rights under the ADA by failing to engage in the interactive process himself. The district court did not embrace that contention, with good reason. Mr. Geter knew that GPO already had his most recent medical evaluation, and that evaluation *did not* conclude, as GPO implies, that Mr. Geter's disability was entirely resolved and that he could drive a truck without accommodations. To the contrary, Dr. Dorin clearly stated 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. GPO never

clearly told Mr. Geter that Dr. Dorin's report was insufficient, and did not follow the procedures specified by its own policies if it thought an updated medical evaluation was necessary. *See, e.g.,* Dkt-55-19/9-11.

Addressing Mr. Geter's retaliation claims, GPO inexplicably claims that "[t]he only one of his arguments not abandoned on appeal is that a reasonable juror could infer pretext from the ways in which GPO treated other employees." GPO Br. at 32. Section II(B) of Mr. Geter's opening brief was titled "Geter's Case For Pretext Is Much Broader Than The Comparative Treatment Evidence," and it dedicated considerable attention to the other evidence of pretext.

GPO also advances a vision of what it would take to infer pretext from comparative treatment evidence that is not genuinely supported by this Court's cases and could never be satisfied. No two human beings are ever *identically* situated. GPO's stated justification for firing Mr. Geter was that he lacked a commercial driver's license ("CDL"). The record is full of evidence that GPO has not fired other drivers who were, in that respect, identically situated. The summary judgment question is whether Mr. Geter has a triable case that the explanation advanced for his firing is untrue, and pretextual. The record evidence in this case, taken as a whole, is sufficient to support that inference.

ARGUMENT

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

A. The Absence Of An "Official" Or "Posted" Vacancy Is Not Fatal

The ADA requires GPO to provide "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations for individuals with disabilities," unless doing so would impose an undue hardship. 42 U.S.C. § 12111(9)(B), (10).

This Court has held that "[t]he word vacant has no specialized meaning in the ADA." *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)). Vacant simply means "not held, filled, or occupied." *Id.* Applying this definition, this Court considered whether an employer had "posted a job listing[] *or* had otherwise acted as though it considered the position vacant." *Id.* (emphasis added). Yet the district court held, and GPO insists, that an employer need not consider temporary light duty as an accommodation unless it has a "formal or official" vacancy, as reflected in an "agency job posting or the like," that would be available to "similarly-situated nondisabled employees." GPO Br. 15-17, 24; Dkt-63/10-12.

Amicus curiae's opening brief explained that this gloss on the word "vacant" is entirely unjustifiable in this context. It insists on the sort of evidence that one might require as proof that a *permanent* light-duty position is vacant and available

to the employee, but that will virtually never exist for *temporary* light-duty assignments—no matter how firmly entrenched those assignments are in an employer's policies and practices.[1] And in doing so, it arbitrarily excludes from the ADA's coverage a common and appropriate accommodation that employers extend to injured workers, disabled and non-disabled, nationwide.

GPO criticizes Mr. Geter for relying on what it calls an "out-of-context footnote" in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 289 n.19 (1987). *See* GPO Br. at 18. But that footnote is the closest thing we have to guidance from the Supreme Court on the core question presented by this case, and the standard it articulates makes perfect sense. If temporary light duty assignments are an "alternative employment opportunit[y] reasonably available under the employer's existing policies," *Arline*, 480 U.S. at 289 n. 19, then such assignments are "vacant" in the ordinary sense of the word. The ADA clearly requires consideration of all sorts of accommodations that are closely related to temporary light duty, such as temporary leaves and modified work schedules. If providing a temporary light-duty assignment would be an undue hardship, an employer does not have to offer it. But there is no sound reason why employers should not even

[1] *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 recuperating 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.").

have to *consider* whether a temporary light-duty assignment would be a reasonable accommodation, if the employer routinely makes such assignments available to other employees.

GPO argues that "an employer who went above and beyond its obligations by creating a new position in the past" should not be obliged to do so forever. GPO Br. 18-19. We agree with the principle that employers should not be punished for going above and beyond their obligations. But it is inevitable that an employer's obligations to disabled workers under the ADA will be measured in some respects against how the employer treats employees generally. The ADA is a non-discrimination statute, and an employer's actual practices are powerful evidence of whether particular accommodations would impose undue hardships. Requiring employers to consider work assignments that are already reasonably available under the employer's existing policies should not be viewed as a "penal[ty]," GPO Br. 19, especially when the Federal Government is committed to being "a model employer of individuals with disabilities." 29 C.F.R. § 1614.203(c).

Amicus curiae' opening brief cited several cases from around the country that are inconsistent with the arbitrary limitation that GPO is urging this Court to adopt. GPO speculates that "there must have been 'a written reassignment policy or formal vacancies'" in those cases. GPO Br. 19-20 (quoting Dkt-63/11). There is no reason to insist that a work assignment can be "reasonably available" (or, stated

differently, "vacant") only if that fact is reflected in a written job listing or policy. The court in *Johnson v. Brown* specifically held that the absence of any "policies that explicitly prohibit how long an employee can remain on a light duty assignment in the pack room" *was not* dispositive. 26 F. Supp. 2d 147, 148 (D.D.C. 1998). The court in *Howell v. Michelin Tire* permitted the plaintiff to *challenge* a formal policy limiting light-duty work to 13 weeks with evidence that the company actually implemented a more generous informal policy. 860 F. Supp. 1488, 1492-93 (M.D. Ala. 1994). The court in *Gatlin v. Village of Summit* recognized a fact dispute about whether a vacancy existed, based on testimony that work was available. 150 F. Supp. 3d 984, 994 (N.D. Ill. 2015). And the Tenth Circuit held that a Postal Service employee may even have been entitled to a *permanent* light-duty position, based on "evidence that USPS has accommodated another employee in a situation similar to her own by assigning her to a permanent position in consumer affairs." *Woodman v. Runyon*, 132 F.3d 1330, 1346 (10th Cir. 1997) (quoting *Arline*, 480 U.S. at 289 n.19, and collecting cases). In other cases, employees have lost only because the evidence failed to support the existence of any temporary light-duty practice that encompassed their situation. *See* Opening Br. at 29 n.3.

The district court recognized that there is "undeniably strong evidence" that GPO has a practice of accommodating injured drivers with temporary light-duty

work. Dkt-63/10. The record suggests that there may even be formal policies. As the opening brief noted (at 24), the Office of Personnel Management's website clearly identifies temporary light duty assignments as a possible accommodation. Mr. Robinson also described a "light duty process," under which GPO would "provide what we call light duty" when employees present a "doctor's medical documentation, with restrictions of their duties." Dkt-58-19/29. Mr. Robinson did not describe light duty assignments as an unusual matter of grace, outside of GPO policy. He also testified that when Brandon Debrew was injured then-supervisor Marvin Verter explained to him "that because Mr. Debrew did not sustain an on-the-job injury, regulation states that the Agency could have him on light duty for 180 days" and no longer. Dkt-58-19/35-36. Those references to regulations suggest some sort of formal policy.

Mr. Geter's position does not "invite[] this Court to create a circuit split" with the Tenth Circuit. GPO Br. 13. The opening brief explained how GPO and the district court have misunderstood *Duvall v. Georgia-Pac. Consumer Prod., L.P.*, 607 F.3d 1255 (10th Cir. 2010). The plaintiff in *Duvall* first rejected a temporary position and then sought a *permanent* position that, under the employer's existing policy, was only available to contract workers. 607 F.3d at 1255, 1264. Against that backdrop, the Tenth Circuit appropriately held that Duvall had no right to a permanent position that would not "have been available for similarly-situated

nondisabled employees to apply for and obtain." *Id.* The Tenth Circuit had no occasion to consider the extensive case law, such as its own earlier decision in *Woodman*, examining when *temporary* light duty work is reasonably available to injured or sick employees.

GPO argues Mr. Geter waived any argument "that a reasonable jury could have found that a temporary light-duty vacancy was available" by not framing the question that way in the district court, and that "[i]n any event, there is no way to reinterpret Mr. Geter's request for accommodation as anything other than the creation of a new position based on the employer's past practices." GPO Br. 21-22. Mr. Geter's point has always been that GPO's own conduct demonstrates that temporary light-duty assignments have been made available whenever drivers needed them—and, therefore, presumably also were available when Mr. Geter needed them. The case law discussed above shows that it is extremely common for employers to preferentially assign injured workers to available light duty work. Nothing of substance turns on whether we say that such employers maintain light-duty "positions" that can be described as "vacant," or instead say that such employers treat temporary light-duty assignments as an accommodation within the employee's existing job, or that they have a policy of creating new temporary positions as needed.

Mr. Geter has described the core issue multiple ways, and so has GPO. At the time of his termination, Mr. Geter asked for reassignment to one of the "open and available desk positions." Dkt-58-10/2. In the district court he argued that he "did request reassignment to a vacant desk position," Dkt-58-1/11, but also that "Robinson admits in his declaration that the four employees he accommodated from 2010 to 2018 were not placed into vacant positions" and instead were transferred "regardless of whether there was a vacant position," Dkt-58-1/13. On GPO's side, Mr. Robinson's testimony has always been that no new positions were created, or needed to be created, when those former employees were given light duty assignments for a year or more. Dkt-58-19/24; Dkt-55-28/2 ("There were no vacant positions that were filled and no temporary positions created for these employees"). GPO cannot credibly contend that "there is no way to reinterpret Mr. Geter's request for accommodation as anything other than the creation of a new position," GPO Br. at 22, when Mr. Robinson testified that even extended light duty assignments do not require the creation of a new position. The district court chose to conceptualize this problem around the existence or non-existence of a "vacancy," so *amicus curiae* has attempted to respond on the court's terms. But issues of this importance should not turn on semantics.

GPO relies on the principle that "[l]itigative theories not pursued in the trial court ordinarily will not be entertained in the appellate tribunal." GPO Br. at 21

(quoting *Kassman v. American University*, 546 F.2d 1029, 1032 (D.C. Cir. 1976)). In that same sentence, *Kassman* explained that this ordinary principle "gives way to a preeminent interest of justice." *Id.* The interests of justice do not favor treating a litigant as having waived the heart of his case when he argued the basic points and all of the relevant facts, simply because he emphasized one of several possible ways to frame and think about the legal problem presented. Every important legal puzzle can be viewed through multiple lenses.

Even if that sort of waiver analysis were appropriate in other contexts, the 2010 amendments to Rule 56 require a different approach to summary judgment. This Court has held that under those amendments "a District Court must determine *for itself* that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law," and cannot treat the legal propriety of summary judgment as conceded even if the non-movant wholly fails to oppose the motion. *Winston & Strawn*, 843 F.3d at 508-09 (emphasis added). This Court endorsed Judge Griffith's reasoning in concurrence in *Grimes v. District of Columbia*, 794 F.3d 83, 97 (D.C. Cir. 2015) (Griffith, J., concurring). *See Winston & Strawn*, 843 F.3d at 505. In *Grimes*, the plaintiff opposed the District's summary judgment motions solely on the basis that the Attorney General had a conflict of interest, and the district court held that summary judgment was substantively conceded. This Court held that the district court should have considered the ethics

issue before summary judgment. But Judge Griffith concurred separately to emphasize that the district court also violated Rule 56 by deeming the propriety of summary judgment to be conceded merely because Ms. Grimes opposed it only on limited grounds. Judge Griffith emphasized that the "deemed admitted" provisions of Rule 56(e) "apply only to *facts*" and not to a "legal conclusion that required the court to apply law." *Id.* at 96-97 (Griffith, J., concurring). Judge Griffith further explained that "every circuit to have considered the question has concluded that failure to oppose a motion for summary judgment is no concession, regardless of what the local rules may provide." *Id.* at 97 (collecting cases).

Under those principles, a district court may deem facts to be admitted if they are not properly contested on summary judgment. But the court has an independent obligation to determine whether the facts of record show, under the law, that there is no triable case. That framework does not permit a district court to grant summary judgment on the ground that the *legal reasons* why the facts support a triable claim were not adequately explained. For the same reason, it does not permit this Court (reviewing *de novo*) to affirm summary judgment on the ground that Mr. Geter did not perfectly frame the legal issues for the court below.

To the extent that language in *Durant v. District of Columbia Government*, 875 F.3d 685, 695 (D.C. Cir. 2017), may suggest otherwise, we respectfully submit that it is inconsistent with *Winston & Strawn* and should not be followed.

B. Summary Judgment Was Inappropriate Because A Reasonable Jury Could Find That GPO Failed To Engage In Good Faith In The Interactive Process

Amicus curiae's opening brief explained that summary judgment also was inappropriate because a reasonable jury could draw inferences from GPO's failure to engage in good faith in the interactive process required by the ADA.

GPO contends that Mr. Geter waived any reliance on inferences from the interactive process by briefing the issue only "defensively" below. *See* GPO Br. at 25 (citing Dkt-63/13 n.5.). We have included the substance of Mr. Geter's opposition to summary judgment in the appendix, Dkt-58-1/1-3, 9, 12-25, and the Court will of course draw its own conclusions. It is true that Mr. Geter approached this issue defensively in the district court, since one of GPO's principal arguments was that Mr. Geter had abandoned the interactive process himself. But near the beginning of Mr. Geter's opposition to summary judgment he argued that "[t]he record evidence demonstrates that it was *Robinson*, not Geter that abandoned the interactive process - Geter having asked Robinson on three separate occasions for a transfer to a different position." Dkt-58-1/2-3. Heading "c" on page 15 was titled: "The evidence shows that it was Robinson that abandoned the interactive process, not Geter." Dkt 58-1/15. Mr. Geter's substantive argument to that effect then occupied more than five pages of his brief. He explicitly argued that "if there was any 'abandonment' of the interactive process, it was Robinson, not Geter, who

abandoned reasonable accommodation discussions." Dkt-58-1/15. He asserted that there is "no evidence that between January 3, 2014 and when Mr. Geter was terminated in April, 2014 – that Mr. Robinson or anyone at GPO continued to engage Mr. Geter in the interactive process or provided him with any more information about why Dr. Dorin's note was not sufficient for Mr. Robinson to make a reasonable accommodation decision . . . ." Dkt-58-1/19. Regarding the December 16 letter, Mr. Geter argued that: "It's not a reasonable engagement in the interactive process to send one letter, which Plaintiff denied receiving, and then call it a day." Dkt-58-1/20.

GPO contends that Mr. Geter presented these points only "defensively," in the context of arguing "that his own failure to engage in the interactive process should not warrant the entry of summary judgment." GPO Br. at 25. That is slicing the onion very finely. Mr. Geter argued that summary judgment should be denied because GPO's failure to engage in the interactive process negated any process failings on his part. He did not separately say that summary judgment also should be denied because GPO's failure to engage in the interactive process raises broader questions about GPO's case. But the district court clearly understood that Mr. Geter's interactive process arguments had broader legal implications for the propriety of summary judgment; it simply "decline[d] to address" those implications only because they "we[re] not briefed." *See* Dkt-63/13 n. 5. Enforcing

waivers at this level of specificity does not serve the interests of justice. For reasons discussed above, it also is inconsistent with the structure of Rule 56.

C. GPO Is Not Entitled To Summary Judgment On The Alternative Ground That Mr. Geter Abandoned The Interactive Process

Throughout its brief, GPO contends that Mr. Geter abandoned the interactive process by not presenting additional medical information documenting his disability. The district court was not persuaded by those arguments, and this Court should reject them as well.

From Mr. Geter's perspective, the independent medical examination conducted by Dr. Dorin in September 2012, immediately before GPO put him on administrative leave, clearly documented his need for accommodations. GPO repeatedly quotes language from Dr. Dorin's evaluation indicating that Mr. Geter's "disability has ceased" and that he "is able to drive a truck," *see* GPO Br. at 8-9 (quoting Dkt-55-11/7-8), while omitting Dr. Dorin's bottom-line conclusions that Mr. Geter had a "permanent" injury preventing him from "lifting more than 30 pounds," and that if his duties required him to lift heavier weights "it is my understanding that he has a helper assigned to him and that should do the heavy lifting." Dkt-55-11/8-9. It is undisputed that Mr. Geter's position as a CDL Driver required him to lift loads up to 50 pounds, without a helper. *See Geter v. Government Publishing Office*, No. 13-916, 2016 WL 3526909 at *2 (D.D.C. 2016) (*Geter I*). Dr. Dorin's evaluation therefore documented, on its face, that Mr.

Geter had a permanent injury that would require accommodations before he could return to work. Mr. Geter knew that GPO had that evaluation, and it would have been reasonable for him to believe that Dr. Dorin's conclusions were why GPO kept him on administrative leave throughout the bulk of 2013. GPO argues that by November 2013 Dr. Dorin's evaluation "was written well more than a year prior." GPO Br. at 28. But "permanent" lifting restrictions do not expire after a year.

GPO repeatedly tries to convey the impression that it demanded additional medical information from Mr. Geter. But it is undisputed that GPO entirely refused to discuss Mr. Geter's desire for accommodations at the November 25 meeting. Dkt-58-4/1; Dkt-58-10/2. Mr. Robinson testified that he did not request any medical information from Mr. Geter on January 3 either. *See* Dkt-58-19/61 ("When Mr. Geter returned, it was stated in the letter, that he had to return with a valid CDL, valid state CDL, which he did not. So, I did not ask him for any medical documentation at all.").

GPO's contention comes down, therefore, to the letter that Mr. Robinson sent to Mr. Geter on December 16. That letter stated that if Mr. Geter wanted to request an accommodation he needed "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 . . . consistent with GPO Instruction 650.16, *Procedures for Processing*

Requests for Reasonable Accommodations," which was attached. Dkt-55-19/2. Again, however, from Mr. Geter's perspective the agency's chief medical officer already *had* Dr. Dorin's evaluation detailing his condition, and there was nothing new to provide. And taking the evidence in the light most favorable to Mr. Geter, he complied with the request that he inform Mr. Robinson of the accommodations he sought by calling on December 23. Dkt-58-10/2.

The GPO policy referenced and enclosed in the December 16 letter does not say that all requests for accommodations must be in writing or formal. It says that "[t]he employee should first explain to their immediate supervisor that they have a physical or mental impairment that requires an accommodation so that they can more fully perform the essential duties of the job," and that the supervisor is required to "respond to the employee within 10 days." Dkt-55-19/9. Only if the supervisor "is not sure whether the impairment" qualifies as a disability or if he or she "is either unable or unwilling to provide the accommodation" is the employee then supposed to be "given the opportunity to complete GPO Form 838" and return it within 5 business days. *Id.* Mr. Robinson did not follow his part of that process, either on November 25 or on December 23 when Mr. Geter called him to, as the policy permits, make an oral request for accommodations. GPO's appellate position that a formal request on Form 838 is the only way to *initiate* a dialogue about reasonable accommodations is not consistent with the process outlined in its

own policy. GPO's policy also calls for "flexibility" and confirms that "[s]ince the duty to provide reasonable accommodations is an ongoing one, an individual is not required to make a request for reasonable accommodation in a particular time frame." *Id.* GPO contends that Mr. Geter waived any argument that GPO should have taken additional steps, by not raising that argument in his "response to the notice of proposed removal or in the District Court below." GPO Br. at 41. But GPO is relying on its policy statement to support an argument for affirmance on alternative grounds. Mr. Geter is entitled to point out, in response, that the policy does not say what GPO seems to think.

Finally, nothing in GPO's policy told Mr. Geter that a medical evaluation in the agency's possession would be insufficient, and needed to updated, simply because it was a year old. To the contrary, the policy specifically explains that "[i]f 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. And again, Mr. Robinson testified that he "did not ask [Mr. Geter] for any medical documentation at all." Dkt 58-19/61.

GPO's contention that '[n]o reasonable juror could have found that [GPO] denied [Mr. Geter's] request for an accommodation . . . because [Mr. Geter] abandoned the interactive process before [GPO] had the information it needed to determine the appropriate accommodation[,]" GPO Br. at 29 (citation omitted),

fails to credit Mr. Geter's testimony that he attempted to initiate a conversation about accommodations on at least three separate occasions. Crediting that testimony, as we must, GPO repeatedly ignored Mr. Geter's 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.

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

The district court also erred in ruling that Mr. Geter has no triable case for retaliation.

GPO states that "the only one of [Mr. Geter's] arguments not abandoned on appeal is that a reasonable juror could infer pretext from the ways in which GPO treated other employees." GPO Br. 32. We do not understand that assertion, since § II(B) of *amicus curiae*'s opening brief was captioned "Geter's Case For Pretext Is Much Broader Than The Comparative Treatment Evidence" and argued over more than four pages that the district court "erred by focusing on the strength from differential treatment in isolation." Opening Br. at 46-50. GPO also argues that Mr. Geter waived any inference of retaliation based on GPO's failure to engage in the interactive process by arguing GPO's interactive process failures only "defensively" in the district court. GPO Br. 39. But the district court clearly understood how Mr. Geter's critique of GPO's behavior supported retaliation

claim. The court summarized Mr. Geter's contention as "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. Presenting that point holistically was not a waiver of its constituent elements. And, as discussed above, Mr. Geter clearly argued *the facts* and Rule 56 requires no more.

GPO also contends that Mr. Geter never explicitly argued below that GPO failed to follow its own policies. Mr. Geter did argue that Mr. Robinson "was the appropriate person at the Agency to receive Mr. Geter's reasonable accommodation requests" and that Mr. Robinson ignored his requests rather than responding appropriately. *See* Dkt-58-1/16-20. Mr. Geter also argued that the "manner in which [he] was terminated" and "repeated denial of his requests for reasonable accommodations" supported an inference of pretext. Dkt 58-1/24. *Amicus curiae*'s effort to walk more explicitly through GPO's reasonable accommodation policy to explain what Mr. Robinson was supposed to do should, if nothing else, be encompassed by the principle that additional arguments in support of the same basic contention are always acceptable on appeal. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (holding that a *per se* Takings argument below preserved a regulatory Takings argument in the Supreme Court).

GPO argues that no reasonable jury could draw an inference of pretext from comparative treatment because Mr. Geter failed to prove that the other drivers accommodated by Mr. Robinson were "nearly identical" to him. GPO Br. 32-33. But GPO's stated reason for firing Mr. Geter was that his job absolutely required him to have a CDL and be able to drive a truck at all times. The plaintiff's burden at the summary judgment stage 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). To raise an inference that GPO's explanation is pretextual, Mr. Geter therefore just needed to show that those prior employees were identical *in the relevant respects*: that they had his same job, and were unable to drive a truck.

No two human beings have ever been "nearly identical" in every way, and the cases that GPO cites require nothing of the sort. Those cases involved professionals fired because of wide-ranging performance concerns, who urged an inference of pretext from evidence that other employees were treated more favorably. In *Royall v. National Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137 (D.C. Cir. 2008), an accounting manager was fired for abject inability to perform his job after six months, and argued an inference of race discrimination from the fact that his underperforming white replacement was allowed to voluntarily transfer back to his old job after two months. This Court pointed out that the two

obviously were differently situated because "Royall was a new, at-will hire" with no prior job at the union to return to. 548 F.3d at 145. And in *Neuren v. Adduci, Mastriani, Meeks & Schill*, a female senior associate was fired by her law firm because of "concerns over her difficulty in meeting deadlines and getting along with fellow employees." 43 F.3d 1507, 1509 (D.C. Cir. 1995). The "limited evidence" she presented in support of a pretext claim included evidence that a male associate had made racist comments and that his work evaluations included comments that "his writing skills needed some improvement and that he would occasionally take too much time on a project if he were not otherwise busy." *Id.* at 1510. The jury rejected her claim at trial. *Id.* at 1509. This Court concluded that an unrelated evidentiary error was harmless in part because the performance concerns about that male associate were "entirely different" from the concerns that led to Ms. Neuren's firing. *Id.* at 1514.

Both cases cited Sixth Circuit precedent for the proposition that comparators in discrimination cases should be "nearly identical," but this Court's substantive analysis focused on the characteristics directly relevant to the employer's stated reasons for the termination.[2] Unlike those cases, this is not a case involving complex and subjective justifications for a firing, in which nuanced differences

[2] *Marks v. Westphal*, No. 01-5300, 2002 WL 335510 (D.C. Cir. Jan 25. 2002), is unpublished and adds nothing of substance.

between the plaintiff and the comparators are critical to the probative value of comparator evidence. GPO says that it fired Mr. Geter because drivers must have a CDL and be able to drive a truck, period. Evidence that GPO did not fire other drivers who were temporarily unable to drive supports an inference of pretext, even if those persons differed from Mr. Geter (as they undoubtedly did) in less relevant ways. GPO's repeated argument that there is no evidence that these individuals "failed to submit appropriate medical documentation" or failed to request accommodations, *see, e.g.,* GPO Br. at 35, is beside the point. Mr. Geter was not fired for failing to submit medical information; he was fired for not having a CDL.

GPO argues that Mr. Geter's evidence was vague or inadmissible. It is not clear that there is any dispute about the *relevant* fact that GPO accommodated, rather than fired, CDL drivers when they became unable to drive. Mr. Robinson's declaration explains that Monique Jones, Robert Courtney, Bobby Graham, and Marvin Jones were all delivery section employees and were accommodated by him between 2010 and 2018. *See generally*, Dkt-55-28. At his deposition Mr. Robinson testified that Monique Jones "was a motor vehicle operator, CDL required" when she was put on light duty in the letter press office. Dkt-58-19/20-23. He also confirmed that Brandon Debrew was accommodated, *id.* at 33-35, and Debrew testified that he was a CDL driver at the time, Dkt-58-20/7-9, 11. GPO objects to the admissibility of Bobby Graham's statement, which was offered to prove that

Graham and Robert Courtney were not fired when they lost their CDLs, because Graham did not use "under penalty of perjury" language. *See* GPO Br. 33 (discussing Dkt-58-11). At the summary judgment stage, however, it is "sufficient if the contents of the [records] are admissible at trial, even if the [records themselves] may be inadmissible." *Bradford v. George Washington Univ*., 249 F. Supp. 3d 325, 333 (D.D.C. 2017) (cleaned up); *see also, e.g., Sandoval v. Cty. of San Diego,* 985 F.3d 657, 666 (9th Cir. 2021) ("If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony…—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment.")

Despite acknowledging the "undeniably strong evidence" that GPO regularly accommodated other injured drivers with temporary light-duty work, Dkt-63/18, the district court held that "no reasonable juror could infer a retaliatory motive from the comparative treatment of Mr. Geter's coworkers" because there was evidence that those coworkers were accommodated "even after, in some cases, engaging in protected activities." Dkt-63/20-22. *Amicus curiae* pointed out that the accommodations appeared to predate the protected activity. GPO responds, correctly, that Robinson's testimony suggests that certain accommodations both predated and postdated the protected activity. GPO Br. 37. We apologize for the

error, and for overstating the point.[3] But it is important not to lose the forest for the trees. To establish a triable case for pretext, Mr. Geter is not required to prove that GPO retaliates against every employee who files a grievance. He just has to support an inference that GPO's stated reason for firing him was not the actual reason. The fact that GPO accommodated these other drivers who became unable to drive strongly supports that inference, even if GPO's treatment of those drivers *also* suggests that GPO does not invariably fire everyone who complains.

A reasonable jury also could infer from the undisputed history that GPO had far greater reasons to retaliate against Mr. Geter than against any of these other employees. The fact that GPO was willing to continue accommodating certain employees even after they filed EEO complaints does not disprove, or even particularly undermine, an inference that GPO retaliated against Mr. Geter for filing a federal lawsuit.[4] A reasonable jury could infer that it is very unlikely that these comparators had a history with GPO anything like Mr. Geter's. A reasonable

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[3] GPO also argues (at 37) that Mr. Geter waived the argument that GPO's accommodations of the comparators mostly preceded their protected activity, by not arguing that to the district court. But the district court introduced this issue, by holding that the treatment of prior employees had no probative value because they were accommodated after engaging in protected activity. Dkt-63/21. Mr. Geter is entitled to explain why the district court's reasoning is unpersuasive.

[4] GPO misunderstands *amicus curiae*'s statement that the document evidencing Ms. Jones's lawsuit was not clearly in the district court record. GPO Br. at 37 (referencing the opening brief at 43 n.5). That document was not referenced "[t]o support" Mr. Geter's argument, but out of candor to the Court because it potentially *undermines* Mr. Geter's point that his complaint-and-litigation history with GPO differed from the other drivers.

jury could infer that fact simply from Mr. Robinson's testimony, since it would have been in GPO's interest to highlight such facts if they existed. Like the district court, GPO reasons that Mr. Geter bears the burden of proof and did not adduce evidence conclusively proving all of the potentially relevant circumstances. But summary judgment is inappropriate if the record reveals a *triable* case. A triable case can be based on reasonable inferences and does not have to anticipate and negate every possible counter that the defendant might present. The handful of cases from this Court suggesting that comparators must be "nearly identical" in discrimination cases should not be understood as transforming basic summary judgment principles in this way.

CONCLUSION

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

Respectfully submitted,

/s/ J. Scott Ballenger

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CERTIFICATE OF COMPLIANCE

1. This Brief 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 Brief contains 6,331 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: December 29, 2021

/s/ J. Scott Ballenger
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day, of December, 2021, I electronically filed the foregoing Brief 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.

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