ORAL ARGUMENT SCHEDULED FOR FEBRUARY 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5043
(C.A. No. 16-0482)

HENRY GETER, Appellant,

v.

UNITED STATES GOVERMENT
PUBLISHING OFFICE, Appellee.

FINAL BRIEF FOR APPELLEE

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

MATTHEW M. GRAVES
United States Attorney

R. CRAIG LAWRENCE
JANE M. LYONS
Assistant United States Attorneys

DOUGLAS C. DREIER
Assistant United States Attorney
555 Fourth Street, NW
Washington, D.C. 20530
Douglas.Dreier@usdoj.gov
(202) 252-2551

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Appellee files this certificate as to parties, rulings, and related cases.

Parties and Amici

Appellant is Henry Geter, plaintiff in the District Court. Appellee is the United States Government Publishing Office, defendant in the District Court. Pursuant to the Court's July 27, 2021 Order, Scott Ballenger was appointed as *amicus curiae* to present argument in support of Appellant's position. Appellant has adopted *amicus curiae*'s brief without submitting a brief of his own.

Rulings Under Review

At issue is the Honorable Rudolph Contreras's January 31, 2020 Order and Memorandum Opinion granting the Appellee's Motion for Summary Judgment.

Related Cases

This case has not been before this Court previously, and counsel for Appellee are unaware of any related cases currently pending before this Court or any other Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

Other

GLOSSARY

ADA	Americans with Disabilities Act
Aplt. Br.	Brief for the Appellant
EEO	Equal Employment Opportunity
GPO	U.S. Government Publishing Office
Memo. Op.	District Court Opinion

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. JA 242–63. Plaintiff filed a timely notice of appeal on February 27, 2020. JA 264. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether summary judgment in favor of GPO was warranted on the failure to accommodate claim when Mr. Geter failed to demonstrate the existence of a suitable vacancy at the relevant time and instead argued that he had proffered sufficient evidence to charge the agency with an "implied vacancy" for employees like him seeking accommodation without supporting medical documentation or identification of his qualifications for the implied position.

II. Whether the District Court correctly granted summary judgment in favor of GPO on the retaliation claim based on Mr. Geter's failure to identify sufficient evidence from which a reasonable juror could infer a retaliatory motive in GPO's decision to terminate his employment for failure to maintain a commercial driver's license necessary for his position.

PERTINENT STATUTES AND REGULATIONS

42 U.S.C. § 12111

(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.

42 U.S.C. § 12112

(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—. . .

> (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[.]

COUNTERSTATEMENT OF THE CASE

Mr. Geter filed his initial Complaint in this action on March 11, 2016. *See* JA 2. After several amendments to that Complaint and a round of briefing on GPO's Motion to Dismiss, Mr. Geter's Second Amended Complaint advances two claims: (1) GPO violated the ADA by denying his requests to transfer to a desk job as a reasonable accommodation for his back injury; and (2) GPO violated the ADA by removing him in retaliation for protected activity, including requesting accommodations, filing an EEO complaint, and filing a complaint in a previous civil action against GPO, *Geter v. GPO*, Civ. A. No. 13-0916 (RC), 2016 WL 3526909 (D.D.C. June 23, 2016) ("*Geter I*"). *See* JA 54.

I. Factual Background

Mr. Geter began working at GPO in 2002. *Geter I*, 2016 WL 3526909, at *1. After initially working as a helper to the motor vehicle operator, Mr. Geter worked as a motor vehicle operator, which required him to maintain a valid commercial driver's license. *Id.* at *2. As a motor vehicle operator, Mr. Geter would deliver GPO's printed product to Congressional and Federal agency customers. JA 57–58.

A. Back Injuries in 2009 and 2010

From February 16, 2008, through April 3, 2009, Mr. Geter's commercial driver's license was suspended for unpaid tickets, yet he continued to operate vehicles during that time and did not notify GPO of his suspension, in violation of

GPO policy. JA 85; *see also* JA 104 (Mr. Geter testifying that his license was suspended for failure to pay "over $4200" in tickets). Toward the end of that period, in March 2009, Mr. Geter reported injuring his back on the job and unfortunately was unable to work until he returned in August 2010. *Geter I*, 2016 WL 3526909, at *2–3. He began receiving worker's compensation payments in March 2009. JA 60. Mr. Geter's commercial driver's license was suspended again from April 20, 2009, through November 24, 2009, for failure to comply with a physical exam requirement for his license. JA 85. In June 2010, GPO provided Mr. Geter a job offer for a "motor vehicle operator [position] with restriction of not lifting more than 45 lbs. for six months." JA 60. Mr. Geter declined that offer, so his worker's compensation payments were terminated in mid-2010. *Id.* In August 2010, Mr. Geter returned to work. JA 61.

Mr. Geter's previous lawsuit against GPO (*Geter I*) arose out of events that transpired shortly after his August 2010 return. Specifically, upon his return to work, Mr. Geter's supervisor directed him to drive a truck, but Mr. Geter responded that he could not do so because that would violate a lifting restriction imposed after his 2009 injury. *Geter I*, 2016 WL 3526909, at *3. Mr. Geter claimed that driving a GPO truck required him to lift himself into the GPO truck, which, according to Mr. Geter, violated the lifting restriction because his body weight exceeded the lifting restriction. *Id.*

Mr. Geter ultimately elected to get into the GPO truck on August 17, 2010, and thereafter claimed that doing so caused another back injury. *Id.* at *3–4. Subsequently, Mr. Geter refused to drive and urged that doing so would violate medical restrictions imposed in the wake of his 2009 injury. Memo. Op. at 2. On October 31, 2011, GPO proposed terminating Mr. Geter's employment and did so on April 13, 2012, after considering Mr. Geter's response to the proposal. JA 62.

As noted, this removal led to the claims in *Geter I*, including claims of race and age discrimination, intentional infliction of mental harm, retaliatory hostile work environment, failure to accommodate, and retaliatory discrimination. *See* Memo. Op. at 2. The District Court dismissed many of those claims due to Mr. Geter's failure to exhaust required administrative remedies. *See Geter I*, 2016 WL 3526909, at *6–16. For the remaining claims, the District Court entered summary judgment in GPO's favor due to Mr. Geter's failure to identify sufficient evidence to survive summary judgment. *Id.* Thereafter, for reasons not relevant to the instant matter—specifically, GPO had relied in part on Mr. Geter's past disciplinary record in its removal decision, which was not listed as a factor in the notice of proposal to remove—the Merit Systems Protection Board ordered Mr. Geter reinstated. *See* Memo. Op. at 3; JA 183. Upon reinstatement, GPO placed Mr. Geter in a period of paid administrative leave because he claimed that he still was unable to work as

driver due to his back injury and because of his failure to maintain the commercial driver's license necessary for driving. *See* Memo. Op. at 3.

B. 2013 Return to Work

On November 21, 2013, GPO sent Mr. Geter a letter recalling him from administrative leave and instructing him to report to work on November 25, 2013, "ready, willing and able to perform all of the duties and responsibilities of your position." JA 100. Additionally, the letter stated that Mr. Geter would "need to bring with [him] . . . [a] valid commercial driver's license." *Id.* As directed, Mr. Geter reported for work on November 25, 2013, but without a valid commercial driver's license. *See* JA 238. According to Mr. Geter, he still was unable to obtain a valid license because a doctor would not clear him due to his continued use of prescription drugs to treat pain purportedly related to the previous back injury. JA 63; JA 238. At that time, Mr. Geter asked his supervisor, Gregory Robinson, to transfer him "to a desk position until his doctor cleared him with no restrictions and he was able to obtain a CDL [commercial driver's license]." JA 238; JA 64. In light of Mr. Geter's lack of a commercial driver's license, GPO continued to place Mr. Geter on paid administrative leave. *See* JA 64.

On December 16, 2013, GPO sent Mr. Geter another letter directing him to return to work by January 2, 2014, "ready and able to work with a valid [commercial driver's license] in your possession." JA 119. Additionally, this letter stated that

"[i]f it is in fact your desire to seek a reasonable accommodation, you need to inform me [Mr. Robinson] specifically what accommodation/s you are seeking." *Id.* The letter further stated that if "you are not able to perform the functions of your position with your valid CDL [commercial driver's license], and you have not submitted a valid documented request for reasonable accommodation by [January 2, 2014], I will 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." JA 120. GPO sent this letter to Mr. Geter's residential address, which he had identified on multiple prior occasions, and separately to the address of Mr. Geter's attorney at J.B. Dorsey & Associates. *See* JA 157–60 (proofs of service); JA 241 (detailing examples of Mr. Geter using the same residential address to which GPO sent the December 16 letter). Mr. Geter's mother signed for the letter and acknowledged receipt, *see* JA 73–74, as did Mr. Geter's attorney, *see* JA 159–60. Mr. Geter, however, later stated that he did not receive GPO's December 16, 2013 letter. *See* JA 233.

On December 23, 2013, Mr. Geter called Mr. Robinson to discuss his return to GPO. *See* JA 239. According to Mr. Geter, he reiterated his request for a transfer to a desk job during this call. *See id.*

C. 2014 Unsuccessful Return to Work and Subsequent Removal

On January 3, 2014, Mr. Geter returned to work as directed, still without a valid commercial driver's license.[1] JA 65. Once again, GPO sent Mr. Geter home on paid administrative leave for failing to possess a valid license required for his duties. *See id.* According to Mr. Geter, he again requested a transfer to a desk job at this time. JA 234. Mr. Geter did not provide any medical documentation supporting his request. *Id.* Mr. Geter contended below that the only medical documentation GPO had was from well more than a year before: September 2012. *Id.*

That September 2012 documentation was a report by Dr. David Dorin. *See generally* JA 91–98. Dr. Dorin's report concluded that "the original sprain and muscular spasm of his lower back, given the examination and assessment of [Mr. Geter's] [then-]current condition, healed a long time ago." JA 96. Dr. Dorin concluded, in September 2012, that Mr. Geter "is able to drive a truck" and is "able to manage the hydraulic or electric jack which does not require him to handle or lift any heavy loads of items." JA 97. Dr. Dorin found that Mr. Geter's "disability has ceased as of the time of this examination on September 14, 2012." *Id.*

[1] Mr. Geter originally returned on January 2, 2014, but he was unable to access the building due to an "administrative oversight." JA 116.

With the only relevant medical documentation indicating that Mr. Geter's disability had ceased and that Mr. Geter "is able to drive a truck," JA 96–97, Mr. Robinson proposed removing Mr. Geter on January 29, 2014, for "failure to possess a valid Commercial Driver's License and . . . failure to perform the essential functions of your position." JA 115. Mr. Geter provided an oral reply to the proposal on March 10, 2014. *See generally* JA 134–43. Without referring to Dr. Dorin by name, Mr. Geter discussed Dr. Dorin's September 2012 report. JA 141–42. Mr. Geter claimed that there was a different report that provided further support to his claims, but he did not bring it with him. JA 140–41. When asked if there was anything he wished to submit other than his oral reply, he declined and noted that he "wish[ed] he had brought" additional documentation with him. JA 141. When a GPO Human Capital Specialist pointed out that Mr. Geter agreed that "it would have been advantageous for" him to bring his medical documentation with him, Mr. Geter's only response was that he "did try to bring them today," but did not do so. *Id.* The Human Capital Specialist then added that he would "like to be clear" on whether there "is any more documentation for [the deciding management official] to review at this time." *Id.* Mr. Geter's response was: "No. No." JA 142. He then again discussed Dr. Dorin's September 2012 report. *Id.*

GPO considered the scant information that Mr. Geter had provided and then terminated Mr. Geter's employment on April 10, 2014. *See* JA 146–47. GPO even

considered for its merits an untimely written reply, which Mr. Geter provided on March 19, 2014. JA 146. The written reply did not provide further medical documentation. *See id.*

In the removal decision, GPO noted that Mr. Geter's "actions have prohibited [him] from performing the essential functions of [his] position because [he] do[es] not possess a valid Commercial Driver's License." JA 147. GPO explained that it had "carefully reviewed the case file in its entirety to include the proposal with supporting documentation, the oral reply, [his] written reply, and [his] submitted documents." *Id.* Based on that review and the lack of any supporting medical documentation that would indicate that Mr. Geter could not drive a truck, GPO decided to remove Mr. Geter from the Federal service. *Id.*

II. Procedural Background

After his removal, Mr. Geter initiated this civil action, claiming initially that GPO violated Title VII of the Civil Rights Act of 1964 by discriminating and retaliating against him. *See* JA 2. Mr. Geter also initially claimed that GPO violated the Rehabilitation Act and the ADA by failing to accommodate him. *See id.* Mr. Geter subsequently amended his Complaint to allege only violations of the Rehabilitation Act and Title VII. *See id.* GPO then moved to dismiss Mr. Geter's First Amended Complaint, arguing that the Rehabilitation Act claims failed because GPO is not covered by the Rehabilitation Act, but rather is covered by the ADA.

See JA 4. GPO also argued that Mr. Geter's claims were barred by collateral estoppel based on *Geter I*. *See id.* In response, Mr. Geter amended his Complaint again, this time clarifying that his claims were brought under the ADA. *See* JA 6. The District Court ultimately denied GPO's Motion to Dismiss, concluding that the Second Amended Complaint properly brought claims under the ADA and that collateral estoppel did not bar Mr. Geter's claims. *See Geter v. GPO*, 268 F. Supp. 3d 34, 39–40 (D.D.C. 2017).

After discovery closed, GPO moved for summary judgment, *see* JA 9, which the District Court granted on January 31, 2020, *see* Memo. Op. This appeal followed.

SUMMARY OF ARGUMENT

The District Court correctly held that GPO was not required to create a new position to accommodate Mr. Geter's disability and that there was not enough evidence for a jury to disbelieve GPO's stated reason for Mr. Geter's termination—*i.e.,* his prolonged lack of a valid commercial driver's license needed for his position.

First, this Court has previously explained that "[a]n employee need not be reassigned if no vacant position exists." *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc). Mr. Geter argues not that a vacant position existed, but that a vacant position *could* have existed because GPO was able to create positions in response to other GPO employees' requests for accommodation. That

is not the law. *See id.* In a further attempt to dispute the District Court's well-reasoned opinion, Mr. Geter now advances a series of arguments that were not raised below and are accordingly waived.

Second, the District Court correctly determined that the fact that Mr. Geter failed to present sufficient evidence of pretext to support his claim for retaliation. Because GPO presented evidence that it terminated Mr. Geter due to his failure to maintain a commercial driver's license, "the central question at the summary judgment stage bec[ame] whether the employee has 'produced sufficient evidence for a reasonable jury to find that the employer's asserted non-retaliatory reason was not the actual reason' and that the employer fired the employee as retaliation." *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1099 (D.C. Cir. 2017). In an effort to establish pretext, Mr. Geter previously relied upon several arguments that he has now abandoned on appeal. His focus is instead now on the District Court's analysis of certain "comparator" employees who received reassignments. Memo. Op. at 18–22. But as the District Court explained, "[i]f anything, that Mr. Geter's coworkers were accommodated—even after, in some cases, engaging in protected activities like requesting accommodations and filing EEO complaints—undercuts rather supports a retaliatory theory." *Id.* at 21. Accordingly, the District Court properly granted summary judgment to GPO.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment and dismissal for failure to state a claim *de novo*. *See Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1031 (D.C. Cir. 2007); *Kaspersky Lab, Inc. v. Dep't of Homeland Sec.*, 909 F.3d 446, 453 (D.C. Cir. 2018).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON MR. GETER'S FAILURE TO ACCOMMODATE CLAIM

A. Mr. Geter Failed to Meet His Burden of Establishing the Existence of a Suitable Vacancy

In rejecting Mr. Geter's failure to accommodate claim, the District Court held that "because Mr. Geter cannot . . . meet his burden of establishing the existence of a suitable vacancy, his reasonable accommodation claim fails." Memo. Op. at 13. To argue against this conclusion, Mr. Geter primarily relies upon out-of-Circuit case law from a smattering of district courts and invites this Court to create a circuit split where none currently exists. Aplt. Br. at 30–31. The Court should decline this invitation.

Under the ADA, a covered employer discriminates against an employee if it fails to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Such an accommodation can include "reassignment to a vacant

position." *Id.* § 12111(9)(B). But an employee is not automatically entitled to reassignment as an accommodation; "[a]n employee need not be reassigned if no vacant position exists." *Aka*, 156 F.3d at 1305. In other words, "employers are not required . . . to create a new position" to accommodate an employee. *Id.*; *see also* H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("The Committee also wishes to make clear the reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required.").

As noted, Mr. Geter worked at GPO as a motor vehicle operator, delivering GPO's printed product to Congressional and Federal agency customers. *See* Memo. Op. at 2; JA 57–58. He claimed that various work-related back injuries prevented him from operating a GPO truck because he was unable to lift himself into the truck without injury, and because the injuries and continued use of prescription drugs prevented him from obtaining a valid commercial driver's license. *See* Memo. Op. at 2–3. Although Mr. Geter requested a transfer to a desk position (*see* JA 238; JA 64), no such positions were vacant at the time of Mr. Geter's request. *See infra*. As this Court has held, the ADA did not require GPO to "create a new position" to accommodate this request. *See Aka*, 156 F.3d at 1305. Applying this standard, the District Court concluded that Mr. Geter failed to demonstrate that there were any vacant positions to which he could have been assigned. *See* Memo. Op. at 13.

The record fully supports the District Court's decision. In fact, "the parties agree that there were no formal or official vacancies" for positions to which GPO could have reassigned Mr. Geter. Memo. Op. at 10. Rather, Mr. Geter relied exclusively on an "implied vacancy" argument, contending that Mr. Robinson could have created a position for him as Mr. Geter suggested Mr. Robinson had done in the past for others. JA 165. In other words, Mr. Geter argued that GPO had an affirmative obligation to reassign him because he believed there were "*de facto* vacancies" for any disabled GPO employee who wished to transfer to a desk job as an accommodation. Memo. Op. at 10. And while the record contains evidence that Mr. Robinson had on occasion accommodated employees by assigning them to "clerical duties," notwithstanding that "there were no vacant positions," the District Court correctly concluded that this fact did not support Mr. Geter's claim. *Id.* Rather, as noted above, Mr. Geter was required to "demonstrate that there existed some vacant position to which he could have been assigned." *Aka*, 156 F.3d at 1304 n.27.

The District Court's rejection of Mr. Geter's "implied vacancy" argument is consistent with this Court's decisions. Memo. Op. at 11. As this Court has explained, "[t]he word 'vacant' has no 'specialized meaning' in the ADA." *McFadden v. Ballard Spahr Andrews & Ingersoll, LLC*, 611 F.3d 1, 5 (D.C. Cir. 2010) (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 399 (2002)). "Its meaning

'in ordinary English' is 'not held, filled, or occupied, as a position or office.'" *Id.* (quoting Webster's New Twentieth Century Dictionary 2014 (2d ed. 1983)). In *McFadden*, the plaintiff requested reassignment to a receptionist position when the permanent receptionist was on leave and a temporary employee was filling in as the law firm's receptionist. *Id.* Due in part to "the firm's failure to hire a permanent receptionist" while the receptionist was out on leave, the plaintiff could not demonstrate that the position was vacant. *Id.*

Applying *McFadden*, the District Court concluded that "it is difficult to see room for Mr. Geter's constructive approach" to the term "vacancy." Memo. Op. at 11. The District Court noted that another Circuit has rejected this "implied vacancy" theory, holding that "a position is 'vacant' for the purposes of the ADA's reassignment duty when that position would have been available for similarly-situated nondisabled employees to apply for and obtain." *Id.* (quoting *Duvall v. Ga.-Pac. Consumer Prod.*, 607 F.3d 1255, 1264 (10th Cir. 2010)). In *Duvall*, the Tenth Circuit held "that a position is 'vacant' with respect to a disabled employee for the purposes of the ADA if it would be available for a similarly-situated non-disabled employee to apply for and obtain." 607 F.3d at 1262. The Tenth Circuit explained that a contrary definition of "vacant" "would effectively require employers to create new positions," which "the ADA does not require." *Id.* at 1263; *see also* H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345

(emphasizing that "creat[ing] a vacancy is not required" under the ADA).[2] An employer is not required to create a vacancy, regardless of whether the request is for a permanent reassignment or a temporary one. *See* 42 U.S.C. § 12111(9)(B) (discussing "reassignment to a vacant position," without distinguishing the two).

The Tenth Circuit stands in good company in holding that employers need not create new temporary or permanent positions. *See, e.g.*, *Meade v. AT&T Corp.*, 657 F. App'x 391, 396 (6th Cir. 2016) ("BellSouth's obligation to transfer [plaintiff] to a vacant position for which he was qualified did not require it 'to create new jobs[.]'") (quoting *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 869 (6th Cir. 2007)); *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 187 (2d Cir. 2006) ("[T]he ADA does not require creating a new position for a disabled employee[.]"); *Buskirk v. Apollo Metals*, 307 F.3d 160, 169 (3d Cir. 2002) ("The ADA does not require an employer to create a new position to accommodate an employee with a disability."); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997) ("[Defendant] had no contractual or statutory obligation to create a new job for [plaintiff.]"). This Court

---

[2] Mr. Geter appears to suggest that this Court has already split from the Tenth Circuit. Aplt. Br. at 30–31 (citing *Aka*, 156 F.3d at 1304). This is wrong. In *Aka*, this Court indicated that it was not "deviat[ing] from the construction of the statute by other circuits." 156 F.3d at 1304. *Aka* confirms that "creat[ing] a vacancy is not required." *Id.* (quoting H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345). *Aka* simply notes that "the reassignment obligation means something more than treating a disabled employee like any other job applicant," and "decline[d] to decide the precise contours of an employer's reassignment obligations." *Id.* at 1304–05.

agrees. *See Aka*, 124 F.3d at 1305 ("[E]mployers are not required to 'bump' an employee, or to create a new position.").

On five occasions in his brief, Mr. Geter now relies on an out-of-context footnote from *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 289 n.19 (1987). *See, e.g.*, Aplt. Br. at 4, 20, 23, 24, 29. *Arline* "present[ed] the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a 'handicapped individual' within the meaning of § 504 of the [Rehabilitation] Act, and, if so, whether such an individual is 'otherwise qualified' to teach elementary school." 480 U.S. at 275. It does not in any way address the question here, which is whether "reassignment to a vacant position," as used at 42 U.S.C. § 12111(9)(B), may include the creation of a new position based on the employer's past accommodations of other similarly situated individuals. In any event, nothing in that footnote can be read to indicate that an employer who went above and beyond its obligations by creating a new position in the past must do so in perpetuity. *See Arline*, 480 U.S. at 289 n.19 ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they 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."). Mr. Geter's contrary reading would incentivize employers to provide

fewer accommodations to the disabled and would contravene the purpose of the ADA. *See* 42 U.S.C. § 12101(b) ("It is the purpose of [the ADA]—(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"). This Court should incentivize employers to go above and beyond their obligations, rather than penalize them in a future case for their past decision on a different individual.

Aside from the inapt footnote, Mr. Geter primarily relies upon a handful of district court cases, such as *Johnson v. Brown*, 26 F. Supp. 2d 147 (D.D.C. 1998), and *Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488 (M.D. Ala. 1994), both of which were thoughtfully considered by the District Court below. Memo. Op. at 11–12; *see also* Aplt. Br. at 26–27. As the District Court explained, *Johnson*'s "reasonably available under the employer's existing policies" test to define "vacancy" simply "reframe[s] the same basic issue in different terms" and does not explain *when* a vacancy is reasonably available under the employer's existing policies. Memo. Op. at 11. The phrase could mean simply that there must have been "a written reassignment policy or formal vacancies." *Id.* The District Court noted in fact that in *Johnson* "there *was* an available light duty assignment that was ultimately awarded to a different employee." *Id.* (emphasis in original); *see also Johnson*, 26 F. Supp. 2d at 152 ("Drawing all justifiable inferences in favor of the plaintiff, a reasonable fact finder could conclude that the Medical Center terminated

[plaintiff] so that another employee, slightly less disabled than [him], could work in the light duty assignment in the pack room.").

The District Court acknowledged that *Howell*, a 1994 case from the Middle District of Alabama, "supports Mr. Geter's position more directly," but the District Court had understandable concerns about *Howell*'s improper focus on "the employer's capacity to create a new vacancy—rather than existence of the vacancy itself." Memo. Op. at 12; *see also Howell*, 860 F. Supp. at 1493 ("[A] factfinder could conclude that Michelin does have the ability to find new, less strenuous positions for disabled workers, whether or not it formally classifies the work as 'light duty.'"). The statutory language does not discuss the "creation" of a new position or the employer's ability to create such a position; rather, it addresses "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B).

The remaining decisions upon which Mr. Geter now relies fare no better. In *Gatlin v. Village of Summit*, 150 F. Supp. 3d 984 (N.D. Ill. 2015), the employer formally had a "light duty program" that included "a pool of temporary jobs designed to allow injured employees to work while they return to good health." *Id.* at 993. The district court's denial of summary judgment was based on the fact that these temporary positions were vacant and the employer "had no way of knowing whether [plaintiff's] injury was temporary or not" at the time of the denial. *Id.* at 993–94. Similarly, in *Gibson v. Milwaukee County*, 95 F. Supp. 3d 1061 (E.D. Wis. 2015),

the employer had vacant light-duty assignments. "[T]he question presented [wa]s whether the ADA requires the Sheriff's Department to make its light-duty program available to persons with disabilities that are not associated with an on-the-job injury or a pregnancy." *Id.* at 1071. Likewise, Mr. Geter's reliance on *Woodman v. Runyon*, 132 F.3d 1330 (10th Cir. 1997), is misplaced. In *Woodman*, the defendant failed to "assist [plaintiff] in locating other jobs she might do," and the court ruled against the defendant because it failed to fulfill its "oblig[ation] to assist her in the effort to identify an available job." *Id.* at 1345.

As a backup argument, Mr. Geter now asserts that a reasonable jury could have found that a temporary light-duty vacancy was available. Aplt. Br. at 31–34. Mr. Geter, who was represented by counsel at the time, did not advance that argument below, and it is waived. *See Kassman v. Am. Univ.*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam) ("Litigative theories not pursued in the trial court ordinarily will not be entertained in the appellate tribunal"); *see also MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 666 n.4 (D.C. Cir. 2017) ("Nor may amici expand an appeal's scope to sweep in issues that a party has waived."). He repeatedly argued that his supervisor was required to "create" a position for him. *See* JA 165 (urging that "Robinson created the vacancies within his office to accommodate injured drivers or drivers that lost their [commercial driver's] licenses – except for Geter"); JA 167 (urging that the evidence demonstrates that "Robinson

reassigned employees to different positions within the office as accommodations – not depending on an 'open vacancy'"). That is not the law. *See supra*.

In 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. Mr. Geter is arguing that because GPO created positions in the past, it could create positions again, and therefore there must have been at least a constructive vacancy. But this logic, if accepted, would transform the inquiry from focusing on whether a vacancy *exists* to whether a vacancy *could exist*. That is not the law. *See Graves*, 457 F.3d at 187 ("[T]he ADA does not require creating a new position for a disabled employee[.]"); *see also Meade*, 657 F. App'x at 396; *Kleiber*, 485 F.3d at 869; *Buskirk*, 307 F.3d at 169; *Aka*, 156 F.3d at 1305; *Still*, 120 F.3d at 53. As the District Court recognized, changing the inquiry from the concrete to the hypothetical would "create difficult line-drawing problems—what amount of prior reassignment is enough to create a *de facto* vacancy?" Memo. Op. at 13. For instance, Mr. Geter discusses a handful of individuals who received accommodations informally or as a result of requests for accommodation, and then claims without citation that "[o]bviously, informal vacancies remained," Aplt. Br at 33, but just because an employer has had certain employees in certain positions in the past does not mean that the employer has an infinite number of those possible positions. Mr. Geter wholly failed to proffer evidence indicating that there was a

vacant position for which he was qualified when he spoke with Mr. Robinson on December 23, 2013. *See* JA 72.

Mr. Geter has already testified that Mr. Robinson told him that there were no vacant positions when they spoke on December 23, 2013. *See id.* (Mr. Geter testifying that "I asked Greg [Robinson] could I go on light duty. He told me there [were] no positions"). Similarly, GPO's Chief Human Capital Officer, Dan Mielke, confirmed that there were no vacant positions at that time. JA 150. Putting aside whether the positions were vacant, Mr. Robinson confirmed that, from January 2010 to December 2014, there were only ever "two clerical positions" in the Delivery Section in which Mr. Geter worked. JA 153. One of those was held by Sammy Arthur until 2012, when he retired. *Id.* That clerical position was eliminated in 2012 upon Mr. Arthur's retirement. *Id.* The other clerical position was held by Phillis McKelvin, until her retirement in 2015. *Id.* This clerical position was also eliminated upon Ms. McKelvin's retirement. *Id.* Accordingly, during the time of Mr. Geter's alleged request for a transfer, there were no vacant positions, and Mr. Geter has not contested whether there was an actual vacant position. *See* Aplt. Br. at 21 (not disputing whether there was "an official, posted vacancy").

The District Court correctly concluded that there was no vacancy to which GPO could have assigned Mr. Geter. Any other conclusion "would create tension with the settled rule that employers do not have to create new positions in order to

facilitate reassignment." Memo. Op. at 12 (citing *Aka*, 156 F.3d at 1305). Mr. Geter's argument, if accepted, would cause a split with the Tenth Circuit, *see Duvall*, 607 F.3d at 1263, and would be inconsistent with the statutory language, 42 U.S.C. § 12111(9)(B), and Congressional intent, H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345. This Court thus should affirm the District Court's conclusion that "it was not the GPO's obligation to create a new position for Mr. Geter," and his failure to identify a vacant position was fatal to his ADA claim. *Id.* at 13.

B. Mr. Geter Did Not Previously Argue that GPO's Purported Failure to Adequately Engage in the Interactive Process Warrants the Denial of Summary Judgment, Nor Does it

In the alternative, Mr. Geter argues that GPO failed to engage in the interactive process. Aplt. Br. at 35–41. Notably, Mr. Geter does not appear to contend that this is an independent basis to reverse; rather, he contends that this argument matters only "[t]o the extent that there is any doubt" on Mr. Geter's primary argument regarding the failure to accommodate claim. *Id.* at 35. Independent basis or not, the argument that denial of summary judgment would have been appropriate based on GPO's purported failure to engage in the interactive process was waived because it "was not briefed" before the District Court. Memo. Op. at 13 n.5. It would be doubly improper to consider that argument now. *See Kassman*, 546 F.2d at 1032 ("Litigative theories not pursued in the trial court

ordinarily will not be entertained in the appellate tribunal"); *see also MetLife*, 865 F.3d at 666 n.4 ("Nor may amici expand an appeal's scope to sweep in issues that a party has waived.").

Mr. Geter urges that the District Court's ruling as to waiver, while perhaps not improper, was "unfair." Aplt. Br. at 40. It was nothing of the sort. Mr. Geter never claimed that GPO's purported failure to engage in the interactive process should warrant the denial of summary judgment; instead, he argued only that his own failure to engage in the interactive process should not warrant the entry of summary judgment. *See id.* (acknowledging that "he briefed the issue defensively"); *see also* JA 174 ("[T]he Agency has not proved *Geter's* abandonment of the process.") (emphasis added). It would be especially inappropriate for this Court to weigh in on a matter on which, according to Mr. Geter, "[t]he Circuits appear to be divided," Aplt. Br. at 35, when this issue was not preserved below.

In any event, it was Mr. Geter who failed to engage in the interactive process. Where, as here, an employer makes a reasonable request for further documentation substantiating the disability or need for accommodation, then the employee must respond appropriately. *See Ward v. McDonald*, 762 F.3d 24, 34 (D.C. Cir. 2014) ("No reasonable juror could have found that the BVA denied [plaintiff's] request for an accommodation, then, because [she] abandoned the interactive process before the BVA had the information it needed to determine the appropriate accommodation.");

Ali v. Pruitt, 727 F. App'x 692, 696 (D.C. Cir. 2018) (per curiam) (affirming summary judgment in favor of defendant because plaintiff "never submitted the additional information requested" by the agency). Yet, by Mr. Geter's own admission, that is precisely what he failed to do; GPO requested information from him, and he did not provide it, thereby ending the interactive process. JA 103; *see also Ward*, 762 F.3d at 35 (holding that the employee ended the interactive process by failing to provide the requested documents).

According to Mr. Geter, he requested an accommodation during a meeting with Gregory Robinson on November 25, 2013. Aplt. Br. at 9. As of December 16, 2013, GPO was unclear, though, whether Mr. Geter was, in fact, intending to request an accommodation. *See* JA 119 ("If it is in fact your desire to seek a reasonable accommodation, you need to inform me specifically what accommodation/s you are seeking," and "you must provide medical documentation detailing your condition to [GPO's] Chief Medical Offer by Friday, December 27, 2013."). To support this request, GPO's December 16, 2013 letter (JA 119–30) included a copy of GPO's reasonable accommodation procedures for Mr. Geter's reference. *See* JA 121–30. It is undisputed that Mr. Geter did not provide the requested materials. JA 103.

The parties dispute whether Mr. Geter actually received this letter. Aplt. Br. at 37. Below, GPO argued that Mr. Geter had testified that he was aware that his mother signed for the letter and that his attorney at the time had also received a copy

of the letter. JA 59; *see also* JA 157–60 (both UPS proofs of delivery). Because Mr. Geter's attorney received the letter, Mr. Geter is deemed to have constructively received it. *See Rao v. Baker*, 898 F.2d 191, 196–97 (D.C. Cir. 1990). As *Rao* notes, "the sufficiency of notice to a person's lawyer is so ingrained that we should expect Congress to say so if it intends a different rule." *Id.* at 196 (quoting *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1094 (5th Cir. 1989)). Indeed in *Rao*, much like this case, the agency sent a document to the plaintiff at two different addresses: his attorney's address and the plaintiff's friend's residential address, which was the address designated by the plaintiff (with the friend acknowledging receipt when the plaintiff was out of the country). *Id.* at 196–97. This Court held that "[i]f a claimant could simply fail to acknowledge receipt of a registered letter at the address provided to the agency, or ignore the fact that his attorney of record had properly received notice, that claimant could, as the district court feared, . . . create an unworkable administrative scheme." *Id.* at 197. Accordingly, the Court charged the plaintiff with receipt, and the same conclusion follows here. *See id.* at 198.

Below, the District Court did not make a conclusion on receipt one way or the other because it granted summary judgment to GPO based on Mr. Geter's failure to meet his burden of establishing the existence of a suitable vacancy, which obviated any need to rule alternatively on GPO's argument that Mr. Geter failed to engage in the interactive process. Memo. Op. at 13 & n.5. Again, Mr. Geter did not

affirmatively argue that *GPO's* failure to engage in the interactive process warranted denial of summary judgment, so there was no need to address that issue. *See* Aplt. Br. at 40.

In any event, Mr. Geter's argument that he should not have needed to provide the further medical documentation requested in the December 16, 2013 letter because "GPO already had the September 2012 letter from Dr. Dorin explaining Mr. Geter's condition and lifting restrictions" is without merit. Aplt. Br. at 39. Dr. Dorin's letter, which was written well more than a year prior, concludes by noting that Plaintiff's "disability has ceased as of the time of this examination on September 14, 2012" and that Mr. Geter "is able to drive a truck." JA 97. It is therefore unsurprising that GPO requested updated medical documentation fourteen months later, especially when the existing medical documentation did not support Mr. Geter's claim that he was unable to drive the truck. Moreover, when Mr. Geter provided his oral reply to his notice of removal on March 10, 2014, he again had an opportunity to provide supporting medical documentation, but he did not do so. JA 141–42 (responding "[n]o" to the question as to whether there was "any more documentation" that GPO should review). Even when Mr. Geter provided an untimely written reply on March 19, 2014 (which GPO nevertheless considered for its merits), he did not provide further medical documentation. JA 146. A plaintiff's "failure to provide updated medical information when reasonably requested is fatal

to his failure to accommodate claim." *Gard v. Dep't of Educ.*, No. 11-5020, 2011 WL 2148585, at *1 (D.C. Cir. May 25, 2011) (per curiam).

Accordingly, "[n]o reasonable juror could have found that [GPO] denied [Mr. Geter's] request for an accommodation, then, because [Mr. Geter] abandoned the interactive process before [GPO] had the information it needed to determine the appropriate accommodation." *Ward*, 762 F.3d at 34. If necessary, this Court should affirm the District Court's decision that GPO was entitled to judgment in its favor on the failure to accommodate claim based on the alternative ground that GPO believed in good faith that Mr. Geter had abandoned the interactive process by failing to submit updated medical information reasonably requested.

II. The District Court Correctly Rejected Mr. Geter's Retaliation Claim

The District Court also correctly rejected Mr. Geter's claim that his removal was retaliatory, concluding that Mr. Geter had not identified sufficient evidence from which a reasonable juror could infer a retaliatory motive behind the removal. *See* Memo. Op. at 13–22. While Mr. Geter raised a host of unsupported arguments, the District Court focused largely on Mr. Geter's assertion that GPO treated other similarly situated employees without prior protected activity differently. The District Court held "that no reasonable juror could infer a retaliatory motive from the comparative treatment of Mr. Geter's coworkers." *Id.* at 22. In reaching this

determination, the District Court properly relied upon and applied this Court's case law.

The ADA prohibits employers from retaliating against an employee who has engaged in protected activity. *See* 42 U.S.C. § 12203(a). ADA retaliation claims are analyzed under the *McDonnell Douglas* burden-shifting framework. *See Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005). Under that framework, a plaintiff must first establish the *prima facie* elements of a retaliation claim: (i) that he engaged in protected activity; (ii) that his employer subjected him to an adverse action; and (iii) that there is a causal connection between the protected activity and an adverse action. *See id.* After a plaintiff makes such a showing, the burden shifts to the employer to identify a legitimate, non-retaliatory reason for its decision. *See id.* If the employer does so, "the central question at the summary judgment stage becomes whether the employee has 'produced sufficient evidence for a reasonable jury to find that the employer's asserted non-retaliatory reason was not the actual reason.'" *Johnson*, 849 F.3d at 1099 (quoting *Hernandez v. Pritzker*, 741 F.3d 129, 133 (D.C. Cir. 2013)). One way an employee can "support an inference of . . . pretext[]" is by showing "the employer's better treatment of similarly situated employees outside the plaintiff's protected group." *Walker v. Johnson*, 798 F.3d 1085, 1092 (D.C. Cir. 2015).

Here, Mr. Geter claimed that GPO removed him as retaliation for engaging in protected activity. Specifically, Mr. Geter identified three categories of protected activity: requesting accommodations, filing an EEO complaint, and initiating *Geter I*.[3] *See* JA 54. In response, GPO explained that it had removed Mr. Geter due to him lacking the commercial driver's license "required for his position." Memo. Op. at 15 (citing JA 146–47). While Mr. Geter acknowledged that he lacked a commercial driver's license and that the license was required for his position, he argued that GPO used his lack of a license as a pretext to retaliate against him for prior protected activity. *See id.*

Mr. Geter advanced several arguments attempting to show pretext. None was supported by evidence in the record, and many have now been abandoned on appeal. The 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. *See* Memo. Op. at 17–22. Specifically, Mr. Geter stated that GPO "had previously accommodated other [commercial driver's license] drivers with desk positions." JA 177. According to Mr. Geter, by not providing him with the same

[3] As the District Court explained, Mr. Geter did not address the EEO complaints in opposing GPO's summary judgment motion. *See* Memo. Op. at 13–14; *see also* JA 164–78. Thus, at this stage he has waived any arguments relying upon them. *See MetLife*, 865 F.3d at 666 n.4; *Kassman*, 546 F.2d at 1032.

accommodation, GPO must have been retaliating against him. As the District Court concluded, however, the evidence suggests the opposite.

"To substantiate such a theory, . . . Mr. Geter [must] identify employees, otherwise similarly situated, who had not engaged in protected activities but were, in fact, accommodated." Memo. Op. at 18. Indeed, this Court has previously explained that one way to discredit an employer's justification is to show that "similarly situated employees of a different [protected classification] received more favorable treatment." *Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 145 (D.C. Cir. 2008). The plaintiff must show "that 'all of the relevant aspects of [his] employment were "nearly identical" to those of' his replacement"—*i.e.,* to the similarly situated employees. *Id.* (alteration in original) (quoting *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995)); *see also Neuren*, 43 F.3d at 1514 ("In order to show that she was similarly situated to the male employee, Neuren was required to demonstrate that all of the relevant aspects of her employment situation were 'nearly identical' to those of the male associate. Neuren offered no evidence to demonstrate *identity* of their situations.") (emphasis in original) (citation omitted).

For instance, in *Neuren*, the Court considered the following factors in assessing whether the female plaintiff-appellant had demonstrated that she and a similarly situated male employee were treated differently: (1) their differing abilities

to get along with coworkers; (2) the comparative seniority levels between the two; and (3) the severity of the differences in the problems raised in their performance evaluations. 43 F.3d at 1514. After considering the differences between the two, the Court found that the plaintiff had failed to demonstrate that the two individuals were similarly situated. *Id.*; *see also Royall*, 548 F.3d at 146 (affirming summary judgment because plaintiff "was a new, at-will hire," whereas the comparator employee "was previously employed by [defendant]").

Mr. Geter failed to demonstrate that the individuals were nearly identical. Mr. Geter's affirmative evidence consisted of vague affidavits, which failed to satisfy his burden of identifying any "nearly identical" GPO employees. Memo. Op. at 19 (citing Declaration of Bobby Graham (JA 189–90), and Affidavit of Sammie L. Arthur (JA 191–92)). The hand-written Graham Declaration, which was not made under penalty of perjury, is inadmissible as evidence. *See Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) ("An affidavit like this, consisting entirely of inadmissible hearsay, is not sufficient to defeat summary judgment."); 28 U.S.C. § 1746 (requiring declarants make their statements "under penalty of perjury"). Even if the Graham Declaration could be considered, it provides zero details to identify whether the two employees discussed therein (Mr. Graham himself and an individual named "Rober[t] Courtney") had provided medical documentation to support their injuries, requested accommodations, filed

EEO complaints, or initiated civil actions and, therefore, does not demonstrate pretext. The Graham Declaration states only that Mr. Graham lost his commercial driver's license and was permitted to work on the loading dock around or after 2015 (*i.e.,* after Mr. Geter had been removed). *See* JA 189. The Declaration's allegations regarding Mr. Courtney are even vaguer. *See* JA 190 ("Another employee, Rober[t] Courtney, didn't recertify his [commercial driver's license] and was permitted to continue working in the section (not driving trucks) for approximately seven months."). It does not provide any insight into Mr. Courtney's facts and circumstances. *See id.*

Similarly, the Arthur Affidavit provides no details regarding the individuals in question (*i.e.,* Brandon Debrew and Monique Jones) beyond that they drove trucks, "were injured on or off the job," and performed light duty office work at an unstated time. *See* JA 191. It does not indicate whether Mr. Debrew or Ms. Jones provided medical documentation to support their injuries, requested accommodations, filed EEO complaints, or initiated civil actions and, therefore, does not demonstrate pretext. *See id.* Moreover, given that the only dates provided in the Arthur Affidavit are that Mr. Arthur worked as a clerk in the delivery section from August 1996 through November 2011, it provides no reason to believe that GPO had a policy in 2013 or 2014, when Mr. Geter's removal was proposed, to create vacancies for injured truckers. *See id.*

Recognizing the deficiencies in Mr. Geter's submissions, the District Court noted that "the most information about potential comparators" comes not from Mr. Geter's evidence, but from GPO's evidence. Memo. Op. at 20 (citing JA 152–55); *see also* Fed. R. Civ. P. 56(c)(3) (permitting courts to "consider other materials in the record" when addressing motions for summary judgment). The District Court discussed that evidence in detail. Memo. Op. at 20–21. That evidence does not demonstrate that GPO was willing to provide accommodations to other motor vehicle operators who failed to submit appropriate medical documentation, nor does it demonstrate whether the accommodated individuals were similarly situated to Mr. Geter vis-à-vis filing EEO complaints or initiating civil actions. *See* JA 152–53. It simply mentions that four employees received accommodations for unspecified injuries in unspecified circumstances. *See id.* Accordingly, Mr. Geter failed to show "that 'all of the relevant aspects of [his] employment were "nearly identical" to those of'" the similarly situated employees. *Royall*, 548 F.3d at 145; *see also Holcomb v. Powell*, 433 F.3d 889, 899–900 (D.C. Cir. 2006) (affirming summary judgment as to discrimination claim where plaintiff alleged that other employees had made similar complaints of discrimination but "nothing more is known about the nature, merit, or outcome of those complaints" that would allow them to "be used as a proxy to establish . . . discriminatory animus").

In addition to those individuals, Mr. Geter also argued more generally that Mr. Robinson had "previously created positions for drivers and transferred them to such positions when drivers request reasonable accommodations and/or are without a [commercial driver's license]." JA 238. Mr. Geter's argument confirms that GPO was willing to grant accommodation requests for transfer to desk positions. As the District Court noted, the fact that "Mr. Geter's coworkers were accommodated—even after, in some cases, engaging in protected activities like requesting accommodations and filing EEO complaints—undercuts rather [than] supports a retaliatory theory." Memo. Op. at 21. "That is, that other employees in a protected group analogous to Mr. Geter's were treated well suggests that his protected activities were not the reason for his firing here." *Id.*; *see also Walker*, 798 F.3d at 1092, 1096 (affirming summary judgment in favor of defendant when the African American plaintiff's "African American coworkers were not subjected to the kinds of action that she challenges as racially discriminatory").

On appeal, Mr. Geter contends that the District Court misunderstood the record because supposedly "the EEO complaints lodged by those other employees [*i.e.,* Mr. Graham, Mr. Jones, Mr. Courtney, and Ms. Jones] actually happened long *after* they were accommodated and Mr. Geter was fired." Aplt. Br. at 43 (emphasis in original). To support that argument, Mr. Geter refers to a document that he admits was "not clear[ly] . . . in the district court record." *Id.* at 43 n.5. Mr. Geter's

admission highlights a greater problem here: he did not raise this argument before the District Court and thus waived it. *See* JA 174–78. Accordingly, the Court should not consider this argument now on appeal. *See MetLife*, 865 F.3d at 666 n.4; *Kassman*, 546 F.2d at 1032. It was Mr. Geter's burden to demonstrate that his comparators were similarly situated, and Mr. Geter's failure to argue this point before the District Court precludes him from raising this argument now. *See Royall*, 548 F.3d at 144 ("A plaintiff, who retains the burden of persuasion throughout, may show pretext in a number of ways, including by offering evidence of more favorable treatment of similarly situated persons who are not members of the protected class[.]") (citation omitted).

Even were the Court to consider this argument, Mr. Geter's assertion is divorced from the factual record. There can be no dispute that Ms. Jones filed an EEO complaint before receiving the accommodation. *Compare* JA 153 ("Monique Jones filed an EEO complaint in 2002."), *with* JA 152 ("Monique Jones was accommodated periodically between 2010 and 2012."). As for Mr. Graham, he filed an EEO complaint in 2016 and was subsequently approved for disability retirement on July 6, 2018. JA 152–53; *see also* JA 152 (noting that he was accommodated from, among other periods, February 24, 2017, to July 6, 2018). As for Mr. Jones, he filed an EEO complaint in 2016 and subsequently was "accommodated from 5/30/2017 to the present." JA 152–53. As for Mr. Courtney, he filed an EEO

complaint in 2017 and was accommodated up to January 12, 2017. *Id.* Thus, the only individual who arguably was not accommodated after he filed an EEO complaint was Mr. Courtney, but Mr. Courtney was reassigned to a separate division in January 2017, which means there was not an opportunity to accommodate him after his reassignment. JA 152.

Mr. Geter's next argument on appeal is that there was no evidence that these comparator employees, "with the possible exception of Ms. Jones," engaged in protected activity similar to Mr. Geter's. Aplt. Br. at 43. Mr. Geter's concession as to Ms. Jones is fatal to this argument, but in any event, as the District Court explained, "the point is that, without knowing exactly what protected activities they did or [did] not undertake, it is difficult for the Court to evaluate their value as comparators." Memo. Op. at 19 n.8. Moreover, it is impossible to determine whether these individuals, unlike Mr. Geter, submitted appropriate medical documentation to support their requests. It was Mr. Geter's burden to "demonstrate that all of the relevant aspects of her employment situation were nearly identical to those of the comparator in order to show they were similarly situated." *Marks v. Westphal*, No. 01-5300, 2002 WL 335510, at *1 (D.C. Cir. Jan. 25, 2002) (per curiam) (citing *Neuren*, 43 F.3d at 1514). Mr. Geter failed to do so: he did not argue before the District Court that he had engaged in "more annoying" protected activity than his comparators did. *See* Aplt. Br. at 43. He cannot argue that now for the first

time on appeal, nor can he argue for the first time on appeal that "it is far from clear that those [comparator] employees engaged in actual protective activity at all." Aplt. Br. at 44; *see also MetLife*, 865 F.3d at 666 n.4; *Kassman*, 546 F.2d at 1032.

Next, Mr. Geter rehashes his argument from earlier in his brief that GPO failed to engage in the interactive process. Aplt. Br. at 48–49. Again, he did not argue that GPO's own purported failure to engage in the interactive process supported the denial of summary judgment; rather, he argued defensively that his own activity did not justify summary judgment on his failure to accommodate claim. *Id.* at 40; *see also* JA 174. He certainly did not argue that GPO's purported failure to engage in the interactive process also supported the denial of summary judgment on his retaliation claim. Aplt. Br. at 40; *see also* JA 164, 174 (addressing the interactive process in the section of the brief regarding the failure to accommodate claim). Thus, the Court should not consider this argument, which would fail on the merits for the reasons described *supra*.

Further, Mr. Geter makes a new argument complaining of GPO's purported "repeated violation of its own procedures." Aplt. Br. at 48. This argument was not raised before the District Court, *see generally* JA 164–78, and, due to waiver, the Court should not consider it. *See MetLife*, 865 F.3d at 666 n.4; *Kassman*, 546 F.2d at 1032. If the Court were nevertheless to consider it, the argument would still fail. Mr. Geter cannot demonstrate that GPO violated its own procedures. Mr. Geter

argues that GPO failed to permit him to make an oral request for accommodation and failed to conduct its own medical exam in the event of a medical dispute or uncertainty. Aplt. Br. at 39, 48. This is incorrect.

First, GPO did not fail to permit Mr. Geter to make an oral request for accommodation. The issue was that GPO was unsure whether Mr. Geter had made an oral request for accommodation, and if so, the scope of his request, which led to the mailing of the December 16, 2013 letter. *See* JA 119 ("If it is in fact your desire to seek a reasonable accommodation, you need to inform me specifically what accommodation/s you are seeking."). As GPO explained above, Mr. Geter needed to provide supplemental medical documentation to support any request for a reasonable accommodation, and it is undisputed that he failed to do so. *See supra*. He did not do so when he gave his oral reply on March 10, 2014, *see generally* JA 134–44, nor did he do so when he gave his written reply on March 19, 2014, *see* JA 146. Because Mr. Geter failed to provide the requested medical documentation, he failed to engage in the interactive process. *Gard*, 2011 WL 2148585, at *1 (confirming that the "failure to provide updated medical information when reasonably requested is fatal to [plaintiff's] failure to accommodate claim").

Second, GPO did not violate its procedures by failing to conduct its own medical exam. Mr. Geter contends that GPO should have "initiate[d] the Form 838 process." Aplt. Br. at 39 (citing JA 126). While this argument was not pressed in

the District Court or administratively and so the record as to what the "Form 838 process" would look like is undeveloped, it is Mr. Geter who would have been the one to fill out Form 838. *See* JA 126 ("[T]he *employee* (or job applicant) should be given the opportunity to complete GPO Form 838[.]") (emphasis added). The December 16, 2013 letter GPO sent to Mr. Geter informed him where he could locate the form and to whom he should submit it. *Id.* While this argument was not raised either in Mr. Geter's response to the notice of proposed removal or in the District Court below, there is no dispute that Mr. Geter did not fill out Form 838 to request a medical examination. *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.").

Mr. Geter's new arguments today cannot cure his failings from yesterday. Because Mr. Geter relied on evidence showing that GPO (and Mr. Robinson specifically) had granted accommodation requests for injured motor vehicle operators, the District Court correctly concluded that he had not identified any evidence from which a reasonable jury could infer that he was treated differently based on his own protected activity. Accordingly, the District Court properly granted summary judgment in favor of GPO on the retaliation claim.

CONCLUSION

Appellee respectfully requests that the judgment of the District Court be affirmed.

MATTHEW M. GRAVES
United States Attorney

R. CRAIG LAWRENCE
JANE M. LYONS
Assistant United States Attorneys

/s/ Douglas C. Dreier
DOUGLAS C. DREIER
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2551
douglas.dreier@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify on this 19th day of January, 2022, the foregoing Final Appellee's Brief has been served by the Court's CM/ECF system.

/s/ Douglas C. Dreier
DOUGLAS C. DREIER
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,066 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Cir. Rule 32(e), according to the count of Microsoft Word.

/s/ Douglas C. Dreier
DOUGLAS C. DREIER
Assistant United States Attorney