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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALFRED BROWN,

Plaintiff - Appellant,

v.

LLOYD J. AUSTIN,* Secretary of Defense; U.S. DEPARTMENT OF DEFENSE,

Defendants - Appellees.

No. 20-1049

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CV-02004-RM-STV)

Marisa L. Williams of Williams & Rhodes, LLP, Englewood, Colorado (Madeline A. Collison of Sweeney & Bechtold, Denver, Colorado, with her on the briefs), for Plaintiff-Appellant.

Susan Prose, Assistant United States Attorney (Jason R. Dunn, United States Attorney, with her on the brief), Denver, Colorado, for Defendants-Appellees.

Before **MATHESON**, **EBEL**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

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* We substitute Lloyd J. Austin, Secretary of Defense, in place of his predecessor, Mark Esper. *See* Fed. R. App. P. 43(c)(2).

This appeal stems from Alfred Brown's lawsuit under the Rehabilitation Act, 29 U.S.C. §§ 701–796*l*, against his former employer, the federal Defense Health Agency. The district court granted summary judgment for the Agency, determining that there were no triable issues on Brown's claims that the Agency failed to accommodate his mental-health disabilities and discriminated against him based on those disabilities. Brown appeals, challenging the district court's rulings that (1) his requests for telework, weekend work, and a supervisor reassignment were not reasonable accommodations; and (2) he failed to establish material elements of his various discrimination claims.

We find no flaw in either ruling. Regarding Brown's failure-to-accommodate claims, granting Brown's telework and weekend-work requests would have eliminated essential functions of his job, making those requests unreasonable as a matter of law. Brown's reassignment request was also unreasonable, though for a different reason: Brown did not allege the limited circumstances in which the Agency would need to consider reassigning him despite the fact that he performed the essential functions of his position with other accommodations. And we decline Brown's invitation to expand those limited circumstances to include reassignments that allow an employee to live a "normal life." Aplt. Br. 13. Further, Brown has not alleged a prima facie case of retaliation, disparate treatment, or constructive discharge. For these reasons, we affirm summary judgment for the Agency.

Background

In April 2010, the Agency hired Brown as a healthcare fraud specialist (HCFS)

assigned to the Program Integrity Office (PIO) in Aurora, Colorado. As an HCFS, Brown coordinated with various law-enforcement agencies to investigate fraud in the military's healthcare system. Along with two other HCFSs, Brown served on a four-person team led by his immediate supervisor, Joseph O'Brien. Brown's other supervisor was the PIO Director, John Marchlowska.

Shortly after joining the Agency, Brown told his supervisors that he had been diagnosed with posttraumatic stress disorder and other panic and anxiety disorders related to his military service. Brown also told his supervisors that these conditions affect his ability to manage stress, concentrate, and communicate, and that stressful environments can aggravate his symptoms and sometimes cause panic attacks. Despite his disabilities, Brown received a satisfactory performance review each year he was with the Agency.

When Brown's symptoms worsened in September 2011, he was hospitalized and received in-patient treatment for one week. The Agency approved Brown's request for leave under the Family and Medical Leave Act (FMLA). It continued to approve FMLA leave after Brown returned to work, ultimately approving 12 weeks during Brown's first two years on the job.

In May 2012, Brown formally requested accommodations for his disabilities. Among other things, Brown wanted to work remotely twice a week and work weekends to make up time lost during the week. The Agency rejected those requests but did allow Brown to telework one day per week, even though office policy at the time permitted only one telework day every two weeks. The Agency also eliminated

Brown's air travel—a function which it deemed nonessential to his job. And it provided Brown with a noise-cancelling headset and sent employees an email reminding them to follow office etiquette and reduce noise levels around cubicles. Brown rejected other measures the Agency offered to reduce office-related stress, including moving his cubicle to a less-trafficked area, raising the walls on his cubicle, and allowing unpaid wellness breaks.[1]

During the accommodations process, Brown separately met with O'Brien to request a transfer to another supervisor's team. O'Brien denied the request because the supervisor that Brown preferred had no openings at the time. About a year later, Marchlowska denied another request for a supervisor swap, which Brown had sought after a dispute with O'Brien about Brown's progress on an online training course. Besides supervisor transfers, Brown sometimes showed interest in reassignment outside the PIO. Although O'Brien and Marchlowska encouraged Brown to apply for jobs outside the PIO, he never did.

During Brown's remaining time with the Agency, he continued performing his job duties but had a strained relationship with his supervisors. In September 2013, for example, Brown and O'Brien heatedly argued after O'Brien requested more work from Brown on a case investigation. According to Brown, O'Brien unfairly criticized Brown's work and yelled at Brown when Brown dropped a case file on O'Brien's

[1] All employees received three hours of paid wellness breaks per week. The Agency offered Brown "[a]dditional 15[-]minute unpaid breaks during the workday as needed." App. vol. 4, 1035.

desk. O'Brien maintained that Brown did the yelling and that Brown threw the folder at O'Brien. The Agency placed Brown on paid administrative leave while it investigated the incident. Marchlowska ultimately issued Brown a reprimand letter, and Brown returned to work.

Brown's strained relationship with his supervisors came to a head in July 2014. In an email, Brown expressed frustration that O'Brien had denied another supervisor-transfer request, a decision that Brown attributed to "bias and prejudicial motives." App. vol. 6, 1407. Responding a few hours later, O'Brien explained his decision, criticized Brown's poor attitude, and refuted Brown's allegation that bias or prejudice influenced the decision, encouraging Brown to speak with officials who investigate discrimination complaints—who would be available at Brown's workplace the following week—if he disagreed. Brown resigned nine days later, and then sued the Agency under the Rehabilitation Act for allegedly failing to accommodate his disabilities and discriminating against him based on his disabilities.[2] The district court granted summary judgment for the Agency on all Brown's claims, and Brown appeals.

Analysis

We review an order granting summary judgment de novo, applying the same standard as the district court. *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019). Under that standard, summary judgment is appropriate if "there is no genuine dispute

[2] Brown also asserted a claim under the Privacy Act, 5 U.S.C. § 552a, but he has abandoned that claim on appeal.

as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). Brown argues that the district court erred in granting summary judgment for the Agency because there are triable issues on his failure-to-accommodate and disability-discrimination claims. We address those issues in turn.

I. Failure to Accommodate

To state a claim for failure to accommodate under the Rehabilitation Act,[3] Brown must show that he "(1) is disabled; (2) is 'otherwise qualified'; and (3) requested a plausibly reasonable accommodation."[4] *Sanchez v. U.S. Dep't of Energy*, 870 F.3d 1185, 1195 (10th Cir. 2017) (quoting *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 (10th Cir. 2012)). If he makes this showing, the Agency may avoid liability by proving that the requested accommodation would impose an undue hardship on the Agency. *Id.* As in the district court, the parties only dispute the third

[3] The complaint also purports to bring claims under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213. Because that statute does not apply to federal employers, we treat Brown's claims as if brought solely under the Rehabilitation Act. *See* § 12111(5)(B)(i). Nevertheless, we may rely on ADA cases to assess those claims "[b]ecause the Rehabilitation Act incorporates standards from the ADA." *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 758 (10th Cir. 2020); *see also* 29 U.S.C. § 794(d). Brown warns that ADA cases may not capture the greater accommodation duties imposed on federal employers by the Rehabilitation Act. We address this concern in connection with Brown's claim about the reassignment accommodation. *See infra* n.8.

[4] Below, the Agency argued that Brown must also establish that an adverse employment action occurred. The district court granted summary judgment on other grounds and thus did not address that argument, and the Agency does not reassert it on appeal. We note, however, that we have since rejected the Agency's argument as applied to ADA claims. *Exby-Stolley v. Bd. of Cty. Comm'rs*, 979 F.3d 784, 788 (10th Cir. 2020) (en banc) (holding that "an adverse employment action is [not] a requisite element of a failure-to-accommodate claim under Title I of the [ADA]"), *cert. denied*, 2021 WL 2637869 (2021).

element of the prima facie test—whether Brown requested plausibly reasonable accommodations. Specifically, Brown focuses on three rejected accommodations that he says were plausibly reasonable: telework twice a week, weekend work, and reassignment to another supervisor.

A. Telework

We begin with Brown's request to telework twice a week. Brown argues that the district court treated this request as "per se unreasonable." Aplt. Br. 17 (italics omitted). In other words, Brown contends the district court erroneously concluded that the Rehabilitation Act takes such a request "off the table as a matter of law." *Id.* at 18. But as the Agency notes, that's not what the district court concluded. Instead, it determined the Agency had shown that granting Brown's request would require eliminating an essential function of his job—being in the office at least four days a week. *See Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004) (holding that employee's "physical attendance . . . was an essential function . . . because the position required supervision and teamwork"). Based on this determination, the district court concluded that the Rehabilitation Act did not require this accommodation. *See Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 873, 878 (10th Cir. 2021) ("[A]n employee's request to be relieved from an essential function of [his or] her position is not, as a matter of law, a reasonable or even plausible accommodation." (quoting *Punt v. Kelly Servs.*, 862 F.3d 1040, 1051 (10th Cir. 2017))); *see also Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1162 (10th Cir. 2014) (applying this rule to Rehabilitation Act claim). The issue, then, is whether Brown's

presence in the office at least four days a week constituted an essential function of his job.

And Brown fails to dispute the material facts establishing that being in the office at least four days a week was an essential function. Brown's supervisors explained that a core responsibility for an HCFS is conducting fraud investigations, which requires access to case files. At the time of Brown's employment, those files only existed in paper form; the Agency was in the process of digitizing the paper files when Brown resigned. The only way employees could remotely access case files was to scan them, a time-consuming task given the undisputed evidence that the files "could be anywhere from [two] inches . . . to [three] feet in thickness."[5] App. vol. 4, 978. And even if an HCFS took the time to scan a few case files before a remote-work day, the HCFS would be unprepared to assist law-enforcement partners with questions on cases for which files had not been scanned. Given these limitations, the Agency's policy permitted only one telework day every two weeks. And even then, HCFSs devoted most of their telework days to completing tasks like training and certification rather than conducting case investigations. Thus, the evidence shows

[5] Brown downplays this evidence by arguing that the Agency "had a contractor employee dedicated to . . . scanning paper files into electronic form." Aplt. Br. 31. But that employee, Amber Frazier-Howe, served the entire office and had additional duties beyond scanning case files. Further, according to an affidavit Brown cites, Frazier-Howe scanned files as part of the Agency's global effort to create a paperless filing system in which employees could eventually access all case files remotely from a shared drive. And critically, her affidavit does not allege that she ever interrupted this global digitization project to scan individual case files for an HCFS before a remote-work day.

that during Brown's employment, there was not enough remote work to occupy more than one day a week without compromising the Agency's mission.

To be sure, physical presence in the office does not become an essential function of Brown's job simply because the Agency says so. For instance, Brown could show that the Agency's view was not "job-related, uniformly enforced, [or] consistent with business necessity." *Mason*, 357 F.3d at 1119; *see also Hwang*, 753 F.3d at 1164 ("[I]f it turns out that an employer's supposedly inflexible . . . policy is really a sham and other employees are routinely granted dispensations that disabled employees are not, an inference of discrimination will naturally arise."). But without such evidence, we generally defer to an employer's judgment about whether a function is essential. *See Mason*, 357 F.3d at 1119.

Brown failed to produce such evidence here. His own belief that he could perform the essential functions of his job from home is not enough. *See id.* at 1121. And although Brown cites coworkers' statements about the feasibility of teleworking more than once a week, those statements describe remote-work capabilities after Brown had resigned and the Agency digitized its files.[6] The same problem arises with

[6] Only two coworkers mentioned remote-work capabilities during Brown's employment. Alison Coleman noted that employees *could* scan files but said nothing about the time and effort involved, given the size of those files. Eric King responded "[n]o" when asked if scanning took "a lot of time," but the remainder of his answer supports the Agency's position. App. vol. 4, 840. In particular, King said that to work remotely just once every two weeks, he had to prepare the day before by finding projects he could do at home. And even then, he added, "there would be an occasional time where you couldn't answer a [law-enforcement agent's] question right away" and had to wait until you were back in the office. *Id.* at 840–41. Neither

Brown's evidence that the Agency allowed others to telework twice a week: Brown cites fellow HCFS Tom Coufal's statement at a deposition taken years after the paperless transition that he was then working remotely twice a week, but nothing suggests that Coufal did so during Brown's tenure.

The only other evidence Brown relies on to question the Agency's judgment is the HCFS job description. He first faults the district court for relying on the description's statement that "[w]ork is performed in an office setting," noting that this phrase appears on the last page in a section that doesn't concern essential functions. App. vol. 1, 64. He further insists that no other language in the job description expressly requires working in the office. But under our precedent, the job description need not explicitly state that an HCFS must be present in the office. *See Mason*, 357 F.3d at 1121–22 (rejecting claim that "attendance, supervision, and teamwork" were nonessential functions because job description omitted them, as "commonsense suggests" employer thought those duties were "a given"). And even without the reference on the last page, the HCFS job description conveyed the essential nature of office work in other ways. In particular, the first few pages detail an HCFS's role in fraud investigations that require close cooperation with law-enforcement partners. Notably, Brown does not dispute that this investigative work was a key component of his job. And it was this investigative work that necessitated working in the office, to allow access to case files.

Coleman's nor King's testimony creates a triable issue on whether being present in the office was an essential function of Brown's job.

In short, the district court properly granted summary judgment for the Agency on Brown's telework failure-to-accommodate claim. Brown created no genuine dispute about whether working in the office four days a week was an essential function, so his request to eliminate that function was unreasonable. *See Unrein*, 993 F.3d at 878 (noting that accommodation request is unreasonable if it would eliminate essential function). This conclusion means that Brown "has not carried [his] burden of proving a prima facie case of disability discrimination." *Mason*, 357 F.3d at 1124 & n.4. As a result, "[w]e need not reach whether [the Agency] could prove the undue[-]hardship affirmative defense." *Id.* at 1124 n.4.

B. Working Weekends

We next consider Brown's request to work weekends to make up for missed time during the week, which the district court found unreasonable for the same reason as the telework request: it would eliminate an essential function of Brown's job. Brown's challenge to this ruling also fails.

The Agency produced evidence that being available in the office during the week was an essential function of an HCFS's job. To investigate fraud in the military healthcare system, HCFSs collaborate with law-enforcement partners who work "a standard 8–10 hour a day schedule," Monday through Friday. App. vol. 4, 1040. If an HCFS were to swap some weekdays for weekends, he or she could not provide timely support to those partners as needed. Plus, no supervisor (or any employee) worked weekends, so the Agency could not monitor any such weekend work. From this evidence, the district court properly concluded that weekday availability was an

essential function.

Brown responds that the Agency had allowed him and others to work weekends in the past. But all the evidence he cites involves requests for so-called credit hours. Under an overtime policy, employees could earn those hours for work performed "in excess of" an employee's "basic work requirement" during the week. App. vol. 1, 67, 69. As O'Brien explained, the Agency approved credit hours only for urgent periods when a law-enforcement partner required immediate assistance on a case. The statements from other HCFSs that Brown highlights only confirm this point—they all said that supervisors would sometimes approve *additional* hours for weekends or evenings during especially busy periods; none said that they ever worked weekends or evenings *instead of* their core hours. No evidence permits even an inference that the Agency allowed employees to work weekends regularly, rather than as overtime.

Even so, Brown contends, nothing prevented the Agency from allowing him to work weekends. His sole support is an email from an Agency attorney advising that, in responding to Brown's accommodations request, O'Brien could "go beyond" office policies and grant "a work schedule that d[id] not include work during all core periods." App. vol. 6, 1402. The district court's summary-judgment order did not mention this email, but neither did Brown's summary-judgment brief. In any event, the email does not create a genuine dispute about whether allowing Brown to work weekends would eliminate an essential function. Even if the Agency could change its policies and create a modified work schedule, the undisputed evidence discussed

above shows that doing so would limit Brown's availability on weekdays when law-enforcement partners needed his timely input on fraud investigations. That evidence is sufficient to show that Brown's request was not plausibly reasonable.

In sum, Brown's request to work weekends to make up for missed weekday work was not plausibly reasonable because granting it would require eliminating an essential function of his job. *See Unrein*, 993 F.3d at 878. For that reason, he failed to state a prima facie claim for failure to accommodate, and the district court properly granted summary judgment for the Agency. This conclusion makes it unnecessary to consider the Agency's undue-hardship defense. *Mason*, 357 F.3d at 1124 n.4.

C. Reassignment

Brown's last failure-to-accommodate claim focuses on his requests to be reassigned to another PIO supervisor's team.[7] The district court determined that this accommodation was unreasonable not because it would eliminate an essential function, but because Brown "ha[d] not presented evidence of circumstances

[7] Brown relatedly contends that the Agency had a duty to notify him of open positions outside the PIO once he showed a general interest in reassignment. But the cases he cites all involve employees who could not perform their current job without reassignment. *See Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (deciding whether employer violated Rehabilitation Act "by failing to reassign [employee] to a permanent position within her medical restrictions"); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1303–04 (D.C. Cir. 1998) (describing ADA claim based on employer not reassigning employee whose disability "rendered him unable to continue to work . . . unless he was reassigned to a new position"). No case imposed a notification duty when an employee showed an interest in reassignment but nevertheless performed the essential functions of his assigned job with other accommodations. We therefore decline to consider any failure-to-accommodate claim arising from the Agency's alleged failure to alert Brown about other open positions outside the PIO.

requiring reassignment." App. vol. 1, 279. Brown contends that the district court based that decision on a mistaken view of the Agency's heightened accommodation duties as a federal employer. The district court, Brown asserts, assumed that the Agency was required to grant only those accommodations that would enable him to perform the essential functions of his job. But according to Brown, the Rehabilitation Act sometimes requires federal employers to grant an accommodation even if a disabled employee can perform essential functions without it. As support, he points to *Sanchez v. Vilsack*, where we held that transferring an employee so that she could obtain medical treatment "may be a reasonable accommodation under the Rehabilitation Act" even if the employee could "perform the essential functions of her job without" a transfer. 695 F.3d at 1182. Accordingly, Brown argues, the district court erred in treating his reassignment request as unreasonable simply because he could do his job without it.[8]

This argument misreads the district court's decision. True, one reason the district court concluded that Brown had not alleged circumstances requiring reassignment was that he "ha[d] not shown that he could not perform the essential functions of the position he already held." App. vol. 1, 279. But that wasn't the only

[8] Brown also applies this heightened-duties argument to his other failure-to-accommodate claims. But as the district court observed, no case Brown cites imposes these greater duties on a federal employer when, as here, the accommodation requested "would have required . . . eliminating essential functions of [the] position." App. vol. 1, 275–76. So any failure on the district court's part to grasp the Agency's heightened accommodation duties could only have affected Brown's reassignment requests, which no one argues would have eliminated essential functions.

reason. In the next sentence, the district court added that Brown had also not raised a *Sanchez*-type argument "that reassignment would have better allowed him to treat his disabling conditions." *Id.* The implication, of course, is that if Brown had argued that reassignment would have allowed him to better treat his disabling conditions, then he might have been able to show that reassignment was a reasonable accommodation. Indeed, the district court said as much a few pages earlier, explaining that "[d]isabled employees who can perform their job functions may require reasonable accommodations to allow them to enjoy the same privileges and benefits of employment" as nondisabled employees or "to pursue therapy or treatment for their disabilities." *Id.* at 274 (citing *Sanchez*, 695 F.3d at 1181). These references show that the district court did not misunderstand the Agency's heightened accommodation duties under the Rehabilitation Act but instead simply found that Brown's request did not trigger those duties.

Brown also appears to dispute the district court's view that he had not requested reassignment for medical treatment, as the employee in *Sanchez* had. For instance, Brown points out that early in the accommodations process, his physician noted that "[Brown] m[ight] need to be reassigned to another position" if other accommodations he requested were "not sufficient to minimize his stress so that he is able to perform his duties." App. vol. 4, 1036. But Brown doesn't dispute that he performed his duties without reassignment. And importantly, no evidence shows that he ever requested a transfer for the reasons his physician identified; that is, he never framed his transfer requests in terms of medical necessity. Rather, the evidence

shows that he requested another supervisor based on complaints about how O'Brien had handled various conflicts between them. Because Brown was performing the essential functions of his job and did not request a supervisor transfer for medical reasons, the district court properly determined that he "ha[d] not presented evidence of circumstances requiring reassignment." App. vol. 1, 279.

Even if Brown had framed his transfer request to focus on minimizing stress, it would not have met the narrow circumstances in which we have said that a federal employer's heightened accommodation duty applies: when an employee seeks "a transfer accommodation *for medical care or treatment*." *Sanchez*, 695 F.3d at 1182 (emphasis added). In *Sanchez*, we found that the employee's requested transfer to another state—where the doctors "were qualified to provide [a] specialized therapy" for her disability—was "not per se unreasonable." *Id.* at 1176, 1182. In so doing, we relied in part on *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993). *Id.* at 1181. There, too, the Ninth Circuit held that it was not per se unreasonable for an employee to request an interstate transfer "to obtain better medical treatment for his disabling condition." *Buckingham*, 998 F.2d at 737; *see also Rascon v. U.S. W. Commc'ns, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998) (discussing employee's leave request to attend doctor-recommended "long-term in[]patient treatment" for posttraumatic stress disorder). Had Brown requested a transfer to reduce stress caused by a strained relationship with his supervisor, that request would patently differ from the medical-treatment requests in *Sanchez* and *Buckingham*.

Perhaps recognizing this reality, Brown urges us against "narrowly

constru[ing]" *Sanchez* as limited to transfers "for medical care" because "nothing in the decision indicates [that] the court intended" such a limit. Aplt. Br. 24 n.18. He suggests that *Sanchez* adopted the view that he is also entitled to accommodations that would have allowed him to live a "normal life." Aplt. Br. 13. Yet Brown's expansive interpretation of *Sanchez* ignores both the question presented and the holding in that case. There, we considered only "whether transfers for medical treatment also fall within the Rehabilitation Act's ambit," and we held "that transferring an employee for the purposes of treatment or therapy may be a reasonable accommodation under the Rehabilitation Act." *Sanchez*, 695 F.3d at 1180, 1182. Although *Sanchez* mentioned the Seventh Circuit's "mo[re] expansive" approach, which applies the heightened accommodation duty to circumstances beyond transfers for medical treatment, we did not adopt it. *Id.* at 1180; *see also McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) (applying heightened duty when accommodations will allow disabled employees to "lead normal lives"). And notably, aside from urging an expansive interpretation of *Sanchez*, Brown offers no argument or parameters for his suggestion that government employers must consider a subjective "normal life" standard in formulating accommodations under the Rehabilitation Act. Under these circumstances, we decline to expand *Sanchez* beyond its narrow holding.

To summarize, Brown performed the essential functions of his job without reassignment and alleged no circumstance that would have required the Agency to reassign him despite that fact. Accordingly, his last request for an accommodation—

like the first two—was not plausibly reasonable. *See Sanchez*, 695 F.3d at 1182. The district court properly granted summary judgment for the Agency on Brown's failure-to-accommodate claims.[9]

II. Disability Discrimination

Next, Brown challenges the district court's award of summary judgment to the Agency on his retaliation, disparate-treatment, and constructive-discharge claims.[10]

A. Retaliation

To state a claim for retaliation, Brown must show "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1051 (10th Cir. 2011) (quoting *Proctor v. UPS*, 502 F.3d 1200, 1208 (10th Cir. 2007)). Regarding the second element, an adverse action is generally one that causes a significant change in employment status or benefits. *See id.* at 1040. As explained below, we agree with the district court that each of Brown's four retaliation claims fails this second element.

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[9] Because we affirm the district court's stated reasons for granting summary judgment on the failure-to-accommodate claims, we need not address the Agency's alternative argument that Brown can't recover because he failed to participate in good faith in the interactive process.

[10] Brown's opening brief also devotes three short paragraphs to contesting the district court's ruling rejecting his hostile-workplace claim. Because those paragraphs include no record cites and fail to respond to the district court's analysis, we treat this argument as waived and decline to consider it. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

First, Brown asserts that the Agency retaliated against him by revoking his ability to work non-core hours. But even if revoking such a privilege would amount to a materially adverse action, Brown cites no evidence that he possessed this privilege to begin with. On this point, Brown recycles the same evidence from his failure-to-accommodate claim about credit hours, which all employees (including Brown) could earn for work performed beyond their regular work requirement. Yet no record evidence suggests that the Agency revoked Brown's ability to request these excess hours or that it ever allowed him to "work non-core hours for credit" to make up for missed core hours. Aplt. Br. 34. And without any evidence of a change in privileges, Brown has not shown that he experienced an adverse action at all, much less a materially adverse action.

Second, Brown asserts that O'Brien denied a supervisor transfer in July 2012 in retaliation for Brown filing a discrimination complaint. Yet as the Agency points out, Brown offered no evidence of an "objective advantage" in the supervisor transfer. Aplee. Br. 54. Rather, he offered only his subjective preference. And we have held that no reasonable employee would find it materially adverse for an employer to deny a request to transfer when the request is based solely on the employee's "personal preference" rather than on some "objective advantage" of the preferred position. *Semsroth v. City of Wichita*, 555 F.3d 1182, 1185 (10th Cir. 2009) (finding employee's subjective preference for transfer insufficient to show materially adverse action for Title VII claim); *McGowan v. City of Eufala*, 472 F.3d 736, 743 (10th Cir. 2006) (rejecting retaliation claim based on denial of shift change because

employee "identified no specific rationale for the transfer other than an undefined subjective preference for the change" and "the shifts offered no differences in pay and benefits" or responsibilities). As a result, the reassignment retaliation claim also fails the second element.[11]

Brown's third retaliation claim involves the September 2013 argument with O'Brien. Recall that after the argument, the Agency placed Brown on paid administrative leave and later issued a reprimand letter. Even though Brown lost no pay or benefits from these events, he argues that he can show material adversity under a line of cases involving conduct that "carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996). But those cases—in which employers subjected their employees to "necessarily public" events that would

[11] Alternatively, the reassignment retaliation claim fails the third element—causal connection between the protected conduct and the materially adverse action. In support of this claim, Brown points only to an email in which O'Brien explained that the other supervisor's team had no openings at the time. And Brown neither disputes that statement nor supports his assertion that the other supervisor had "an upcoming vacancy" with any other record evidence. Aplt. Br. 38. Thus, Brown cannot show that O'Brien's transfer denial was caused by anything other than the lack of a vacancy. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (explaining that to create inference of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), plaintiff must at least show that conduct "did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or *the absence of a vacancy in the job sought*" (emphasis added)). He therefore fails to show that the denial of a transfer was caused by discrimination. And although the district court did not address the causation element for this claim, we may affirm on any ground supported by the record. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018).

have an "obvious impact" on a person's reputation, such as a criminal trial—clearly have no application here. *Id.*; *see also Passer v. Am. Chem. Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding adverse action from employer's last-minute cancellation of "highly public" awards ceremony honoring employee, which "humiliated him before . . . his . . . peers from across the nation" and "made it more difficult for him to procure future employment"). Brown offers no explanation for his claim that the Agency's response to his argument with O'Brien is "precisely the type of materially adverse action[] described in" those cases. Aplt. Br. 42. Indeed, Brown does not allege that anyone outside his office even knew of the incident, nor does he otherwise explain how it affected his reputation. Brown has therefore failed to show that a reasonable employee would have found the September 2013 incident to be materially adverse.

Brown's fourth and final retaliation claim stems from the July 2014 email thread in which Brown accused O'Brien of denying a transfer request for discriminatory reasons. Brown characterizes O'Brien's response as "blatantly criticizing [Brown] for filing complaints and seeking accommodations." Aplt. Br. 45. But on the contrary, O'Brien's email merely denied Brown's accusation and encouraged him to speak with officials who investigate discrimination complaints if he disagreed. Nothing in O'Brien's response would "dissuade a[reasonable] employee from filing complaints or requesting accommodations." *Id.* In fact, it did not dissuade Brown, who followed O'Brien's suggestion and filed a new discrimination complaint a few days later. *See Somoza v. Univ. of Denver*, 513 F.3d

1206, 1214 (10th Cir. 2008) ("[T]he fact that an employee continues . . . undeterred in his or her pursuit of a remedy . . . may shed light [on] whether the actions are sufficiently material and adverse to be actionable."). As with Brown's other retaliation claims, a reasonable person could not find that O'Brien's July 2014 email was a materially adverse action. Thus, the district court properly granted summary judgment on all of Brown's retaliation claims.

B. Disparate Treatment

To create a jury issue on disparate treatment, Brown was required to show that he suffered an adverse employment action because of his disability. *See C.R. England*, 644 F.3d at 1037–38. An adverse employment action is one that causes a significant change in employment status or benefits. *Id.* at 1040. The district court determined that each of Brown's three disparate-treatment allegations did not constitute adverse action. We agree.

Two of Brown's disparate-treatment allegations also underlie his retaliation claims, and they fail for the same reasons as those claims fail. Brown first argues that the Agency took adverse action by revoking his privilege to work non-core hours for credit. But again, no evidence shows that he ever had such a privilege, so his employment status did not change when the Agency would not allow him to make up lost time on the weekends. The second overlapping allegation involves the September 2013 argument and the Agency's actions following it, which Brown found "very embarrassing and publicly humiliating." Aplt. Br. 48–49. As with the retaliation claim based on this incident, Brown does not explain why it caused reputational

damage of the kind that would significantly change his employment status. *Cf. Berry*, 74 F.3d at 986 (holding that employer's false allegations that led to criminal trial had obvious reputational impact). Brown has therefore failed to show that he was subjected to an adverse action for either of these claims.

The third allegation is unique to Brown's disparate-treatment theory. Brown alleges that an adverse action occurred in January 2014 when O'Brien sent Brown a letter reminding him to follow a policy requiring employees to request leave in advance and notify a supervisor before leaving the office. O'Brien sent the letter because Brown had twice in the previous month left the office without notifying a supervisor. As Brown describes it, the letter revoked his "privilege of taking emergency leave without first obtaining permission from [a] supervisor." Aplt. Br. 47. Yet the letter made clear that Brown need not obtain prior approval if "circumstances clearly show[ed] that a delay in requesting leave was unavoidable." App. vol. 6, 1432. Brown points to no instance in which the letter prevented him from taking leave under those circumstances or any other. All the same, Brown contends that the letter qualifies as adverse action because it could have affected his pay. But Brown acknowledges that any such effect was hypothetical and that it did not, in reality, do so—O'Brien considered an unpaid suspension but sent the letter instead, so Brown "did not ultimately lose any pay." Aplt. Br. 48 n.25. Indeed, O'Brien emphasized that the letter was "not a disciplinary action" and would not be placed in Brown's personnel file. App. vol. 6, 1433. Because Brown does not show that the letter significantly changed his employment status, the district court rightly

concluded that it was not an adverse action.

C. Constructive Discharge

Last, Brown argues that his constructive-discharge claim should have survived summary judgment. The district court held otherwise after finding Brown lacked evidence showing that working conditions were so intolerable that "a reasonable person in his position would have felt compelled to resign." *Rivero*, 950 F.3d at 761 (quoting *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016)). Brown's claim suffers from this same defect on appeal. He continues to assert that the Agency's actions "led [*him*] to believe that he had no choice but to resign." Aplt. Br. 52 (emphasis added). But his own subjective view is not sufficient; he must show that conditions were objectively unbearable, meaning any reasonable person in his position would have quit. *See Rivero*, 950 F.3d at 761. Although Brown may have found conditions "extremely difficult," his subjective experience does not establish that "objectively [the Agency's] actions left [him] no choice but to resign." *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 534 (10th Cir. 1998). For that reason, the district court properly determined that Brown had not shown a triable issue on his constructive-discharge claim.

Conclusion

Brown fails to establish a genuine dispute of material fact on his Rehabilitation Act claims. Regarding his failure-to-accommodate claims, we conclude that Brown's telework and weekend-work requests would have eliminated an essential function of his job—being present in the office at least four days per week—and were therefore

unreasonable accommodations. Further, we agree with the district court that Brown did not allege circumstances that would have required the Agency to consider reassignment as an accommodation, given that he was performing the essential functions of his current job with other accommodations. We have recognized such a heightened accommodation requirement only in the limited circumstance where an employee requested a transfer for medical care or treatment; we decline Brown's invitation to expand those circumstances to include reassignments that allow an employee to live a "normal life." Aplt. Br. 13. As for Brown's disability-discrimination claims, we hold that Brown has not alleged a prima facie case of retaliation or disparate treatment because none of the Agency's challenged conduct constitutes materially adverse action. Nor has he shown that a constructive discharge occurred, as he alleges no facts showing that working conditions at the Agency were objectively intolerable. For these reasons, we affirm the district court's order granting summary judgment for the Agency.

As a final matter, Brown's June 22, 2020 sealing motion is granted to the extent that volumes three through seven of the appendix filed on July 20, 2020, will remain under seal in light of the redacted versions of those same appendix volumes filed on March 12, 2020.