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United States Court of Appeals
Tenth Circuit

October 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICHARD GREEN,

Plaintiff - Appellant,

v.

U.S. ANESTHESIA PARTNERS OF COLORADO, INC.; U.S. ANESTHESIA PARTNERS, INC.,

Defendants - Appellees.

No. 22-1319
(D.C. No. 1:18-CV-02206-MSK-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **ROSSMAN**, **KELLY**, and **BRISCOE**, Circuit Judges.

Plaintiff-Appellant Dr. Richard Green appeals from the district court's order granting summary judgment in favor of Defendant-Appellees U.S. Anesthesia Partners of Colorado, Inc. and U.S. Anesthesia Partners, Inc. (collectively "USAP") on his disability discrimination, failure to accommodate, and retaliation claims. Green v. U.S. Anesthesia Partners of Colorado, 624 F. Supp. 3d 1201 (D. Colo. 2022). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Background

Dr. Green is an anesthesiologist who began practicing at USAP and its predecessor entities in 1992.[1] USAP is a physician group that contracts with licensed physicians to administer anesthesia and pain-management services at medical facilities throughout Colorado. To work at a particular facility, a USAP physician must obtain admitting privileges at that facility, and the decision to admit a physician ultimately rests with the facility, not with USAP.

Dr. Green has been diagnosed with an autism disorder and struggled with alcohol addiction throughout his time at USAP. In 2008, Dr. Green self-reported his alcohol addiction to the Colorado Physician Health Program (CPHP), which suspended his medical license and required him to attend a rehabilitation program. Dr. Green completed the program and returned to practice, and in 2011 entered into an agreement with CPHP to abstain from alcohol and all addictive substances. Since then, Dr. Green experienced three recorded relapses — in December 2012, Dr. Green was charged with driving while ability impaired; in May 2015, Dr. Green tested positive for alcohol use after a volunteer trip to Vietnam; and in October 2015, Dr. Green again tested positive for alcohol use. Dr. Green took a medical leave of absence from October 2015 to March 2016. The CPHP initially suspended his medical license in November 2015, but then

[1] We adopt the approach taken by the district court regarding periodic changes in ownership of the practice and assume USAP was Dr. Green's employer for all relevant time periods.

reinstated his license five days later after Dr. Green agreed to a five-year probationary period in which he would abstain from alcohol and receive treatment, testing, and monitoring from the CPHP.

The CPHP suspension affected Dr. Green's service privileges at medical facilities, and therefore his employment status with USAP. In February 2015 (before the suspension), during a merger, Dr. Green signed a five-year Physician-Partner Employment Agreement (the "Employment Agreement") under which he agreed to provide anesthesia services as a full-time, full-call physician-partner. As part of the transaction, he would receive the maximum possible equity in USAP after five years; the stock would not vest until he completed five years as a physician-partner.

Dr. Green understood that the position required him to be on call to respond to emergency requests from multiple medical facilities and to maintain staff privileges at the facilities where he provided service. The Employment Agreement included these requirements. While not all USAP partners were required to take call, full-time, full-call partners were required to take call.

However, after the CPHP suspension many facilities where he previously worked revoked his privileges, limiting his on-call ability. Before the November 2015 suspension, Dr. Green regularly provided anesthesia services and covered call at six hospitals, while also maintaining privileges at other medical facilities. But due to the suspension, many hospitals terminated Dr. Green's admitting privileges. When Dr. Green returned from leave in March 2016, USAP welcomed him back on a "limited, probationary" basis and reminded him of the requirement that he maintain his medical

license, and USAP's expectation that he reapply for privileges at "most, if not all the hospitals in which [USAP] provides anesthesia services." 1 Sealed App. 1094–95. Despite his efforts over the next five months, Dr. Green was unable to regain privileges at the hospitals where he previously performed around 95% of his cases. Dr. Green could not take on-call shifts at facilities where he lacked privileges.

In August 2016, USAP voted to remove Dr. Green from the partnership for failing to "successfully apply for and maintain in good standing provisional or active medical staff privileges" at the USAP-serviced facilities, resulting in the forfeiture of his stock. 1 Sealed App. 1101. But USAP kept Dr. Green on as an employee and reassigned him to an hourly position in which he was not on call but could work at hospitals where he still had privileges. Dr. Green subsequently communicated his alcoholism and autism diagnoses to USAP[2] and requested what he believed to be a "reasonable accommodation" — that he be reinstated as a physician-partner, retain his stock, and be allowed to practice at the facilities where he presently had privileges. USAP replied that it had already accommodated Dr. Green by retaining him as an employee working reduced hours. Further, USAP stated that allowing Dr. Green to retain the compensation and benefits of partnership when he was unable to fulfill the essential obligations of the role — namely, access to medical facilities and taking full call — was unreasonable. In May 2017, Dr. Green filed a discrimination charge with the Colorado civil rights division and EEOC.

[2] Dr. Green submitted his diagnoses in order to apply for long-term disability insurance benefits, which would have prevented the forfeiture of his stock. Cigna did not grant Dr. Green long-term disability benefits.

Subsequent discussions between Dr. Green and USAP regarding a possible track to return to partnership were unsuccessful.

In April 2018, Dr. Green regained privileges at several hospitals including The Medical Center of Aurora (TMCA). A nurse there filed a sexual harassment complaint against him. She alleged Dr. Green massaged her shoulders and made inappropriate comments regarding his marital status, making her uncomfortable. Dr. Green admitted to touching her shoulders but denied that the gesture was meant to be sexual, and suggested his autism inhibited his understanding of the nurse's perspective. Following a temporary suspension and investigation, TMCA rescinded Dr. Green's privileges at one of its campuses. USAP began discussing terminating Dr. Green in July 2018, and formally terminated Dr. Green in September 2018, based on the violation of its code of conduct regarding sexual harassment and the further reduction in his privileges.

Dr. Green filed this action on August 27, 2018, approximately two weeks before his termination. Dr. Green alleged claims of: (1) disability discrimination, (2) failure to accommodate, and (3) retaliation, all in violation of the Americans with Disabilities Act, the Colorado Anti-Discrimination Act, and the Rehabilitation Act of 1973.[3] Dr. Green argued: (1) he was discriminatorily removed from partnership and terminated because of his alcoholism and autism, (2) USAP failed to reasonably accommodate his disabilities, and (3) the protected activities of filing an EEOC charge and then a lawsuit led to his termination. He sought declaratory and injunctive relief including reinstatement as

[3] The district court declined to exercise supplemental jurisdiction over Dr. Green's state-law contract claim, and Dr. Green refiled this claim in state court.

physician-partner, front and back pay, and compensatory and punitive damages. The district court granted summary judgment to USAP on all claims.

On appeal, Dr. Green contends that the district court misapplied the summary judgment standard by resolving or ignoring genuine disputes of material fact regarding his claims. According to Dr. Green, the district court made credibility determinations regarding his disability claims, considered inadmissible evidence, and failed to afford Dr. Green favorable inferences.

Discussion

We review de novo a district court's grant of summary judgment. EEOC v. C.R. England, Inc., 644 F.3d 1028, 1037 (10th Cir. 2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of showing an absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant carries its initial burden "by producing affirmative evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial." Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 979 (10th Cir. 2002).

If the movant makes this showing, the burden shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "[W]e view the evidence in the light most favorable to the non-moving party" at summary judgment. Garrett v. Hewlett-Packard Co., 305 F.3d

1210, 1213 (10th Cir. 2002). However, the nonmovant needs more than "[t]he mere existence of a scintilla of evidence in support of [its] position . . . there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson, 477 U.S. at 252. "If the [nonmovant's] evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." Id. at 249–50 (emphasis added). In addition, given the factual context, the inferences that the nonmovant urges the court to make must be plausible. See Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 586–88 (1986).

A. Disparate Treatment

Most disparate treatment claims under the ADA, CADA, and Rehabilitation Act employ the same burden-shifting framework and therefore we analyze them together.[4] Aubrey v. Koppes, 975 F.3d 995, 1004 & n.4 (10th Cir. 2020). "[T]o establish a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate that he '(1) is a disabled person as defined by the ADA; (2) is qualified . . . to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.'" C.R. England, 644 F.3d at 1037–38 (quoting Just. v. Crown Cork & Seal Co., 527 F.3d 1080, 1086 (10th Cir. 2008)). Under the McDonnell-Douglas burden-shifting framework, [5] if the plaintiff

[4] As we discuss below, the McDonnell-Douglas framework is altered for failure to accommodate claims. Punt v. Kelly Servs., 862 F.3d 1040, 1050 (10th Cir. 2017).

[5] We utilize the McDonnell-Douglas burden-shifting framework because there is no direct evidence of discrimination on the record, i.e. "the employer admits that the disability played a prominent part in the decision[.]" Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 n.3 (10th Cir. 1997).

establishes a prima facie case, the burden of production shifts to the defendant "to articulate a legitimate, nondiscriminatory reason for its actions." Id. at 1038. If the defendant does so, the burden of production shifts back to the plaintiff to establish that the defendant's stated reason is pretextual by "showing the defendant's proffered non-discriminatory explanations for its actions are 'so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude [they are] unworthy of belief.'" Id. at 1038–39 (quoting Johnson v. Weld Cnty., 594 F.3d 1202, 1211 (10th Cir. 2010)). Because different facts surround (1) Dr. Green's removal from partnership, and (2) his termination from employment, we analyze each situation separately.

1. Demotion from partnership

Dr. Green argues that the district court erred in not recognizing a triable issue of fact concerning whether he could perform two essential functions of a physician-partner: (1) maintaining admission privileges at most USAP-serviced facilities, and (2) participating in on-call rotations. He further argues that the court incorrectly placed the burden on him to demonstrate that on call was not an essential function of the job. According to Dr. Green, he also demonstrated pretext because USAP required him to reapply and obtain admission privileges only after his substance abuse disorder disclosure and a medical leave of absence, and then terminated him four months later.

We agree with the district court that Dr. Green fails to satisfy the second element of a prima facie discrimination case given his inability to perform these two essential job functions of physician-partner. We also agree that even if Dr. Green could establish a prima facie case, summary judgment would be appropriate at the pretext stage.

Whether a job requirement is "essential" is a factual inquiry, and the court considers "the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8); Unrein v. PHC-Fort Morgan, Inc., 993 F.3d 873, 877 (10th Cir. 2021). While the employee must show he can perform an essential job function, [6] the employer bears the burden of demonstrating that a certain job function is essential. Unrein, 993 F.3d at 877. A requirement does not become essential "simply because the [employer] says so," Brown v. Austin, 13 F.4th 1079, 1086 (10th Cir. 2021), but the employer's description is presumed correct if it is "job-related, uniformly enforced, and consistent with business necessity." Mason v. Avaya Comms., Inc., 357 F.3d 1114, 1119 (10th Cir. 2004). If the employer sufficiently demonstrates a job function is essential, the employee must dispute that evidence or show that the function is nonessential. Kilcrease v. Domenico Transp. Co., 828 F.3d 1214, 1222 (10th Cir. 2016).

a. Essential function: admission to most USAP-serviced hospitals

Maintaining privileges at facilities where USAP offered services was essential to the physician-partner role, and Dr. Green was not able to fulfill this job function. Section 2.4(ii) of the Employment Agreement states "Physician covenants that at all times . . . [he] shall . . . successfully apply for and maintain in good standing provisional or active medical staff privileges at the Facility or Facilities[7] to which Physician is assigned by

[6] While the employer in an indirect case has the burden of production as to whether a job function is essential, "the burden of persuasion at all times falls to the plaintiff." Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877, 893 (10th Cir. 2015). Dr. Green's argument to the contrary is misplaced.

[7] "Facilities" is defined as "[a]ll facilities with which [USAP] has a contract to supply Providers who provide Anesthesiology and Pain Management Services at any

[USAP]." 1 Sealed App. 1054. The Plan Regarding Compensation for Services (cross-referenced in the employment agreement; effective December 31, 2015) sets out "Physician-Partner Criteria" as including "[c]redentialing at all locations required by the Clinical Governance Board[.]" 2 Sealed App. 1308. The requirement of maintaining credentials at USAP-serviced facilities is clearly consistent with USAP's business needs, because without credentials, physicians cannot enter the facility to provide service.

Dr. Green's loss of credentials after his CPHP suspension exemplified this necessity — he was no longer able to work at most hospitals and facilities he previously serviced. Dr. Green estimated he lost privileges at the facilities where he previously performed 95% of his cases, rendering him unable to fulfill the schedule required of a partner receiving a large share of equity. Dr. Green contends that maintaining privileges at most USAP-serviced facilities was nonessential because he was not explicitly "assigned" to them. Aplt. Br. at 27–28. However, Dr. Green stated in his deposition that he understood he was "supposed to maintain the staff privileges [he] had at the facilities that [he] regularly worked at[,]" and that this was a "requirement under the contract[.]" I App. 219. To the extent that Dr. Green maintains he did not understand his responsibility to maintain privileges, the March 15, 2016 letter from USAP clarified that he was

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time during the Term [of the contract] or during the preceding twelve months, facilities at which Providers have provided Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, and facilities with which [USAP] has had active negotiations to supply Providers who provide Anesthesiology and Pain Management Services during the Term or during the preceding twelve months[.]" 1 Sealed App. 1051. Dr. Green is a Provider under the Partner Agreement.

expected to "reapply for privileges at most, if not all the hospitals in which [USAP] provides anesthesia services." 1 Sealed App. 1094–95. Moreover, given the economic reality of a service business, the inference that USAP would require reapplication with no regard to its success is not a reasonable inference. See Matsushita, 475 U.S. at 586–88. USAP sufficiently established that maintaining privileges is an "essential function" of the physician-partner role, and Dr. Green failed to offer evidence tending to disprove that assertion or demonstrating his compliance.

b. Essential function: participation in on call

Being "on call" also was an essential function of the physician-partner role. Section 2.1(ii) of the Employment Agreement mandated "participation in on-call rotation for afterhours coverage . . . if applicable," I Sealed App. 1052, the physician-partner criteria included "[f]ull call availability in the scheduling rotation[,]" 2 Sealed App. 1308, and the GCA-USAP Transaction Guidelines stated that "[f]ull call . . . position in the scheduling rotation" was required for USAP shareholders like Dr. Green. 1 Sealed App. 1097. A physician-partner needs credentials at hospitals to provide on-call service. Dr. Green stated in his deposition that as a "full-time partner" he was required to, and did, participate in the on-call rotation, I App. 217–18, and when he subsequently lost his hospital credentials, he lost the ability to take call.

Dr. Green argues that: (1) on call was not essential because of the "if applicable" language in § 2.1(ii) of the Employment Agreement, and (2) on call was not essential because not all partners were required to be on call. First, Dr. Green's own testimony, and the agreement he signed, sufficiently demonstrates that the on-call requirement was

applicable to him. Second, different tiers of partnership existed at USAP — full-equity partners were expected to take full call; other partners who received less than full equity were not expected to take full call. Dr. Green has never claimed he was less than a full partner and nonetheless understood that the full-call requirement applied to him. USAP sufficiently established that on-call participation was an essential function of the full partner position, and Dr. Green failed to demonstrate otherwise or show his fulfillment of the job requirement.

c. Pretext

Dr. Green also fails to sufficiently prove that USAP's reasons for his demotion — lack of privileges and inability to take call — were pretextual. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" Riggs v. AirTran Airways, Inc., 497 F.3d 1108, 1118 (10th Cir. 2007) (quoting Rivera v. City & Cnty. of Denver, 365 F.3d 912, 925 (10th Cir. 2004)). USAP's stated reasons for demoting Dr. Green are not inconsistent or contradictory. The Employment Agreement outlines the requirement to retain privileges at USAP-serviced facilities and take call, as acknowledged by Dr. Green.

Dr. Green relies upon the nature and timing of various events to prove pretext. He speculates that USAP prevented him from regaining prompt admission to certain hospitals or failed to assist him in doing so, and points to informal meeting minutes that

referred to him as an "offender" (along with two other doctors, with no other information), II App. 540. But the record indicates others at USAP were either ambivalent or supportive[8] of Dr. Green's efforts to regain admission at facilities, and surely the time for regaining admission privileges was not infinite. Moreover, the fact that USAP kept Dr. Green on as a partner for over a year and did not immediately demote him after his third recorded alcohol relapse cuts against the inference that USAP's nondiscriminatory reasons for demotion were pretextual. Dr. Green's showing here simply does not undermine the stated basis for USAP's actions.

2. Termination from Employment

To meet the third element of a prima facie discrimination claim, Dr. Green must show that he "suffered discrimination by an employer or prospective employer because of that disability." Crown Cork & Seal Co., 527 F.3d at 1086. He can meet this element by demonstrating he was terminated "under circumstances which give rise to an inference that the termination was based on [his] disability" with "affirmative evidence that disability was a determining factor in the employer's decision." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (emphasis added).

This analysis overlaps with pretext under the McDonnell-Douglas burden-shifting framework: evidence supporting an inference of discrimination may include more favorable treatment of similarly situated employees, conduct or comments by decisionmakers that could be viewed as "reflecting a discriminatory animus[,]" or the

[8] The record includes USAP doctors reaching out to facilities on behalf of Dr. Green to help him regain privileges.

chronology of events leading to the employee's termination. Plotke v. White, 405 F.3d 1092, 1101 (10th Cir. 2005). But "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions[,]" and there must exist "a nexus . . . between [] allegedly discriminatory statements and the [employer's] decision to terminate [an employee]." Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994).

The district court found that Dr. Green failed to sufficiently demonstrate "circumstances giving rise to an inference of discrimination" for a prima facie case based on his termination from employment. IV App. 1020, 1027. We assume that Dr. Green established a prima facie case but conclude that summary judgment is appropriate for USAP at the pretext stage.[9]

a. Determining factor: alcoholism and/or autism

Dr. Green contends he was terminated because of his alcoholism and/or autism, while USAP explains that a credible sexual harassment complaint by a TMCA nurse, combined with a further reduction in Dr. Green's privileges, supported his termination.

Dr. Green cites various statements made by USAP employees to argue his disabilities were a "determining factor" in his termination. Dr. Allen, when asked if there were any patient safety issues regarding Dr. Green, replied: "Not that I am aware of —

[9] The district court based this finding on its analysis of Dr. Green's alleged comparators. We instead analyze comparators, and also affirm, at the pretext stage. See Roberts v. Barreras, 484 F.3d 1236, 1244 (10th Cir. 2007) ("We may affirm on alternative grounds . . . when those grounds are dispositive, indisputable and appear clearly in the record." (internal quotation marks omitted)).

other than, if there is an alcohol abuse disorder, the concern is always the potential that they are impaired at some time." 1 Sealed App. 1188. USAP argues that acknowledging a physician with an alcohol abuse disorder could possibly be impaired does not demonstrate alcoholism was a factor in the employment action here. This statement was also made after the decision to terminate Dr. Green and arguably lacked a nexus with the termination decision. See Howard v. Garage Door Grp., Inc., 136 F. App'x 108, 112 (10th Cir. 2005). Likewise, USAP argues that isolated statements about "protecting the reputation of the practice" or that Dr. Green had "too many problems to continue" are insufficient alone to prove he was fired because of his alcoholism or autism — his "problems" included a credible sexual harassment complaint and his continuing loss of privileges at USAP-serviced facilities. III App. 702, 727.

However, Dr. Allen also testified that while Dr. Green's autism was never considered during his termination, it did not matter because she had been told "USAP is a no-accommodation entity," and she recounted other situations where USAP would not accommodate. 1 Sealed App. 1186–87. From this, Dr. Green argues that USAP had a "per se discrimination no-accommodation policy for physicians with disabilities." Aplt. Br. at 34. Dr. Green fails to cite any evidence that his autism diagnosis played a direct role in his termination. Furthermore, USAP did accommodate Dr. Green's alcoholism for over two years by allowing him to remain as an hourly anesthesiologist, and USAP argues that Dr. Allen's statements about USAP's "policy" pertained to other situations involving operating-room accommodations for physical limitations, i.e., lift restrictions or reduction in work hours. But we recognize that a general policy against

accommodating for disability may support an inference of discriminatory animus in this case. See Herrmann v. Salt Lake City Corp., 21 F.4th 666, 678 (10th Cir. 2021). Viewing the evidence here in the light most favorable to the non-moving party, see Garrett, 305 F.3d at 1213, we assume Dr. Green demonstrated a prima facie discrimination claim based on his termination from employment.

b. Pretext and the district court's consideration of new evidence without allowing a surreply

Dr. Green then contends he submitted evidence demonstrating that other physicians without a disability were treated more favorably than him, thereby demonstrating pretext. Assuming Dr. Green made a prima facie case, we find summary judgment is proper for USAP at the pretext stage.

If the plaintiff establishes a prima facie case, and the defendant "articulate[s] a legitimate, non-discriminatory reason"[10] for termination, the plaintiff has the burden to show the reason is pretextual, or "so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude [it is] unworthy of belief." Johnson, 594 F.3d at 1211 (citation omitted). "We do not ask whether the employer's reasons were wise, fair or correct; the relevant inquiry is whether the employer honestly believed its reasons and acted in good faith upon them." Riggs, 497 F.3d at 1118–19. A plaintiff can demonstrate

[10] USAP's nondiscriminatory reasons for terminating Dr. Green's employment were the sexual harassment violation and the "further reduction of the facilities where he could work." Aplee. Br. at 37. Dr. Allen explained that Dr. Green's reduction in privileges, even as an hourly anesthesiologist, was still problematic as it created scheduling issues by limiting case selection for other doctors because his service was limited to only a few facilities.

pretext with "evidence that he was treated differently from other similarly-situated, nonprotected employees who violated work rules of comparable seriousness." Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1232 (10th Cir. 2000). "A court should also compare the relevant employment circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees[.]" Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997).

As a preliminary matter, Dr. Green contests the district court's consideration of new evidence regarding comparators that was attached to USAP's reply brief on summary judgment, and the court's denial of Dr. Green's motion to strike or for leave to file a surreply. The challenged evidence relevant to pretext is an affidavit from USAP's human resources director providing additional information and context about Dr. Green's alleged comparators.[11]

A court's consideration of a reply on summary judgment and denial of a surreply is reviewed for abuse of discretion. Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1164 (10th Cir. 1998). "[W]hen a moving party advances in a reply new reasons and evidence . . . the nonmoving party should be granted an opportunity to respond." Id. (emphasis added). If a moving party includes new evidence in a reply, the court can either "permit[] a surreply or, in granting summary judgment for the movant . . . refrain[] from relying on any new material contained in the reply brief." Id.

[11] While Tillie Handy's January 2022 affidavit was not previously produced by USAP, Ms. Handy's November 2021 deposition (Exhibit UU), relied on by the district court, was produced in discovery and is not new evidence.

While the better practice would have been to allow a surreply or disregard the new evidence, we are convinced that even without considering the new evidence, Dr. Green failed to establish pretext through his alleged comparators, and Dr. Green was not prejudiced by the district court's denial of his motion to strike or leave to file a surreply.

Dr. Green cannot point to a comparator that violated a rule of "comparable seriousness" and shared Dr. Green's "work history[.]" Kendrick, 220 F.3d at 1232. The two closest comparators analyzed by the district court and highlighted by Dr. Green in his brief are: (1) a doctor "accused of assault . . . for an action . . . in the operating room" who remained a partner, and (2) a doctor who made sexist comments but was not disciplined. IV App. 1021–22.[12] The first comparator was accused of — not found to have committed — misconduct, there is no indication on the record that the assault was sexual in nature, and "assault" is a broad category that includes a wide array of conduct.[13] The second comparator's conduct — making sexist comments — is not of "comparable seriousness" to a credible complaint of physical touching and flirtation, and the record does not show the second comparator lost privileges. Finally, the comparator analysis contemplates "work history" and there is no evidence that any alleged comparator shared

[12] The district court also analyzed two other comparators: a doctor who admitted to assaulting a nurse and then resigned to avoid termination and a doctor who was terminated after a nurse complained he was watching pornography during surgery. We agree with the district court that these doctors are not comparable to Dr. Green because both were either terminated or chose to resign instead of being terminated. Dr. Green has never requested relief in the form of resignation instead of termination.

[13] In fact, Ms. Tilly's affidavit reveals that the accusation of assault here concerned whether a patient had given adequate consent to the type of block the doctor used during anesthesia.

Dr. Green's history of suspension, probation, and loss of privileges alongside a credible allegation of sexual harassment. Even without considering the new affidavit attached to USAP's reply brief, Dr. Green cannot demonstrate he was treated differently than similarly situated, nondisabled employees to show pretext. Thus, the district court did not commit reversible error in denying the motion to strike or leave to file a surreply.

B. Failure to Accommodate

Dr. Green contends that the district court overlooked issues of material fact in granting summary judgment to USAP on his failure to accommodate claim. For such a claim, an employee must show "(1) he was disabled; (2) he was otherwise qualified; (3) he requested a plausibly reasonable accommodation; and (4) [the employer] refused to accommodate his disability." Dansie v. Union Pac. R.R. Co., 42 F.4th 1184, 1192 (10th Cir. 2022).[14] Once the employee has established a prima facie case, the burden of production shifts to the employer to present evidence that either (1) conclusively rebuts one or more elements of plaintiff's prima facie case or (2) establishes an affirmative defense, such as undue hardship or one of the other affirmative defenses that are available to the employer. Aubrey, 975 F.3d at 1005. Summary judgment for the employer is appropriate unless the employee presents evidence indicative of a genuine dispute concerning the challenged elements of the prima facie case or the affirmative defenses relied upon by the employer. Id. at 1005–06.

[14] The district court applied this framework to Dr. Green's failure to accommodate claims under the ADA, CADA and Rehabilitation Act. Dr. Green does not dispute this application on appeal.

The ADA lists reasonable accommodations that may be required of an employer, such as "job restructuring," "part-time or modified work schedules," or "reassignment to a vacant position[.]" 42 U.S.C. § 12111(9)(B). A reasonable accommodation includes altering an employee's existing job or reassigning that employee to another position for which she is qualified. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1162–63 (10th Cir. 1999). An employer need not remove essential job functions to accommodate an employee. Hennagir v. Utah Dept. of Corrs., 587 F.3d 1255, 1264 (10th Cir. 2009).

Following his demotion from partnership, Dr. Green's attorney requested that he be reinstated as a partner, retain his stock, and be allowed to practice as a partner at the facilities where he then had privileges. This request would have required USAP to waive the privileges and on-call requirements of the partnership position (essential job functions), and therefore would not constitute a reasonable accommodation. See Hennagir, 587 F.3d at 1264. Furthermore, as noted, USAP did reasonably accommodate Dr. Green by allowing him to work a reduced hourly schedule at facilities where he had privileges. Dr. Green's first request to return to partnership, despite his inability to perform the essential functions of the role, was not a reasonable request.

In opposing summary judgment and on appeal, a recurring theme of Dr. Green's argument is that his USAP colleagues had a responsibility, either as an obligation or reasonable accommodation, to successfully advocate on his behalf so that he might regain his credentials at third-party hospitals that revoked his privileges.[15] But unlike ADA

[15] At oral argument, counsel characterized Dr. Green's plausibly reasonable accommodation request as continuing to work at all the facilities where he still had

accommodations, which concern internal changes made by an employer, Dr. Green's request for others to advocate on his behalf is more attenuated. It involves efforts to convince third-party facilities to grant privileges to Dr. Green. Cf. 42 U.S.C. § 12111(9)(B). We doubt such advocacy is a reasonable accommodation under the ADA, but regardless, any result is purely speculative — the facilities themselves controlled credentialing, not USAP. Neither Dr. Green's request for immediate reinstatement as partner after his demotion, or for advocacy on his behalf by colleagues to third parties, satisfy the third element of a prima facie failure to accommodate case.[16]

C. Retaliation

Dr. Green alleges he was terminated from employment in retaliation for filing this lawsuit as well as a May 2017 EEOC charge. He challenges the district court's decision rejecting his retaliation claim on lack of pretext grounds. USAP contends that there is no link between any protected activity and his termination. We may affirm on any basis supported by the record, and we hold that the claim fails for lack of a prima facie case. See Roberts v. Barreras, 484 F.3d 1236, 1244 (10th Cir. 2007).

Dr. Green filed this action on August 27, 2017, and was fired 15 days thereafter.

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privileges. Understanding this request to mean Dr. Green would continue working as an hourly employee, this accommodation request first appears at oral argument and was not raised in Dr. Green's amended complaint, motion for summary judgment response, or appellate briefs. It is therefore waived. United States v. Leffler, 942 F.3d 1192, 1196 (10th Cir. 2019).

[16] The district court appeared to agree with Dr. Green that he had requested a reasonable accommodation for USAP's help regaining privileges but found under element four that Dr. Green had not shown USAP failed to help him. Nevertheless, we affirm under element three because we do not find he sought a reasonable accommodation. See Roberts, 484 F.3d at 1244.

"To establish a prima facie case of retaliation, a plaintiff 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." Hennagir, 587 F.3d at 1265 (alteration and internal quotation marks omitted). The record shows that USAP began preparing to terminate Dr. Green in July 2018, about two months prior to this lawsuit, in response to learning TMCA would revoke Dr. Green's privileges. On August 16, 2018, the USAP Board decided to terminate Dr. Green after TMCA barred him from practicing at one of its locations. While the board did not formalize the termination until September 11, 2018, its decision to terminate Dr. Green was made before he filed this lawsuit. "[T]emporal proximity alone is insufficient to raise a genuine issue of material fact concerning pretext," DePaula v. Easter Seals El Mirador, 859 F.3d 957, 976 (10th Cir. 2017) (citation omitted), and Dr. Green has failed to establish a causal connection between his filing of the lawsuit and termination.[17]

Dr. Green also fails to make out a prima facie retaliation claim with respect to his EEOC complaint on May 30, 2017. First, without more evidence, the 15-month gap between the EEOC complaint and Dr. Green's termination does not sufficiently establish a temporal connection. See Piercy v. Maketa, 480 F.3d 1192, 1198 (10th Cir. 2007). Second, an action must be "materially adverse" to the "reasonable employee," and we do not find that USAP's offer of a return-to-partner-track agreement in January 2018, or the

[17] We disagree with the district court that Dr. Green established a prima facie retaliation case and therefore do not reach pretext here. See Roberts, 484 F.3d at 1244.

handling of the sexual harassment complaint in April 2018, meets this standard under the second element. There is no evidence that Dr. Green's protected actions of filing an EEOC complaint or this lawsuit led to materially adverse action, and therefore his prima facie case fails.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge