FILED
United States Court of Appeals
Tenth Circuit

August 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOWARD O. FORD,

Plaintiff - Appellant,

v.

MEGAN J. BRENNAN, Postmaster General, United States Postal Service,

Defendant - Appellee.

No. 21-4086
(D.C. No. 2:15-CV-00539-BSJ)
(D. Utah)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

I. Introduction

Howard Ford was employed as a United States Postal Service ("USPS") carrier in Cottonwood Heights, Utah, for over twenty-five years. Throughout much of his tenure, Ford was approved for leave under the Family and Medical Leave Act ("FMLA") to accommodate multiple health conditions. Ford also received additional workplace accommodations related to his disabilities and prior on-the-job injuries. In 2013, he was assigned new supervisors. Ford asserts his new bosses frequently harassed him regarding his disabilities and associated accommodations. In turn, Ford

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

brought several claims against USPS, including FMLA interference, disability discrimination, failure to accommodate, and retaliation. The district court granted summary judgment to USPS on all claims. We agree with this determination. Ford did not demonstrate he experienced a relevant adverse employment action required to support his FMLA interference, disability discrimination, and retaliation allegations. Further, Ford waived his failure to accommodate claim by not timely exhausting his administrative remedies. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, therefore, this court **affirms** the district court's judgment.

II. Background

a. Factual History

In 1987, Ford was hired by USPS as a city carrier in Cottonwood Heights, Utah. In 2007, he was hit by a runaway mail gurney and suffered a neck injury. As a result, he experienced enduring physical pain, depression, and anxiety. These symptoms were exacerbated by a second on-the-job neck injury in 2011. In response to these injuries and their lasting impacts, Ford received a permanent accommodation in 2012 limiting his workday to eight hours. Additionally, he negotiated an accommodation to use a small "u-cart" to load his vehicle, rather than a large parcel gurney. During his tenure, Ford also had three approved FMLA cases stemming from chronic kidney stones, sleep apnea, and his 2011 neck injury.

In April 2013, Ford was assigned new supervisors. Heidi Clark became his direct supervisor and Andrea Gunnarson became manager of customer service for the Cottonwood Heights station. Shortly after their appointment, Ford asserts his new

bosses began harassing him about his accommodations and FMLA status. In part due to the stress of these interactions, Ford took leave from April 16 to April 30, 2013, including several days of FMLA protected leave. Upon returning to work, Ford claims he continued to be unfairly scrutinized by Clark and Gunnarson. On May 2, Clark issued a letter of warning to Ford for failing to timely deliver an express item. After Ford filed a union grievance, the letter was purged from Ford's record. On June 7, 2013, Clark issued Ford another disciplinary letter for extending his break without authorization and failing to cooperate with a corresponding investigatory interview.

On July 16, 2013, Ford asserts Clark ordered him to use a large parcel gurney to load his truck, contravening his typical workplace restrictions. He attempted to communicate his accommodation to load mail using the smaller u-cart, but Clark insisted he use the gurney. As he completed loading, the gurney hit a joint in the floor and he experienced shooting pain in his neck. Ford reported he had suffered an on-the-job injury and left to see a doctor. He was cleared by his physician to return to work the following day with loading restrictions, but Clark delayed his return for several days due to his requested accommodations.

Upon his return to work on July 24, 2013, Ford alleges his supervisors dismissed the restrictions provided by his doctor and continued to harass him about his disabilities. Nonetheless, he was able to operate with his restrictions for several days without incident. On July 29th, Ford asserts he left work after a panic attack induced by Clark obstructing his ability to file a report about the events of July 16. He did not return. On September 14, 2013, Ford exhausted his FMLA protected leave

for the year. From September 15 to October 7, 2013, Ford took unscheduled sick leave to cover his absences. On October 8, he went into leave-without-pay status indefinitely. From July 29, 2013 to July 30, 2014, and again from October 22, 2014 to July 1, 2015, Ford submitted monthly or bi-monthly doctor's notes excusing his absences due to depression and anxiety. Each note expressly indicated Ford was unable to work due to his psychological condition. USPS issued multiple letters of warning to Ford regarding his unscheduled absences during this time, but the letters were later rescinded.

Ford was issued an administrative Notice of Separation on October 7, 2014, 365 days from the start of his leave-without-pay status. After Ford filed a grievance, the notice was rescinded on November 10, 2014. Despite this retraction, one section of Ford's employee file indicated his status as "Terminated" as of June 3, 2015. On October 22, 2014, the Department of Labor officially recognized Ford's July 16 injury and awarded him 45 days of continuation pay. On November 3, 2014, USPS offered Ford a modified job assignment which included loading and equipment use restrictions. Ford did not accept this offer because it did not cure the alleged defects in the work environment contributing to his depression and anxiety. Finally, on April 18, 2015, Ford received disability retirement.

b. Procedural History

Ford first sought Equal Employment Office ("EEO") counseling on September 4, 2013. He filed a formal EEO complaint on October 8, 2013, alleging sex, age, and disability discrimination. After meeting with an EEO officer again on October 24,

2014, he filed a second EEO complaint on December 9, 2014, which included retaliation and failure to accommodate claims. On April 30, 2015, Ford filed a motion to clarify his first EEO complaint as incorporating his failure to accommodate claim. This motion was denied, but he was allowed to file a corresponding motion to amend. Neither the EEO nor the presiding administrative law judge acted on Ford's new motion before he requested a final agency decision and "right to sue" letter on November 1, 2016. This request was granted on December 20, 2016.

Ford filed two complaints in district court, the first on July 29, 2015, and the second on March 10, 2017. Ford's complaints were consolidated for the purposes of this action. Prior to the district court's ruling, Ford conceded summary judgment on his allegations related to age, gender, and retaliatory action occurring after December 2014. His remaining claims included: (a) interference with his use of FMLA leave in violation of 29 U.S.C. § 2615(a)(1); (b) retaliation for his use of FMLA leave in violation of 29 U.S.C. § 2615(a)(2); (c) disability discrimination and failure to accommodate in violation of the Rehabilitation Act of 1973; and (d) retaliation for exercising his rights pursuant to the Rehabilitation Act.

USPS filed a motion for summary judgment on November 14, 2017. On August 27, 2018, the district court granted USPS summary judgment on all claims. The district court concluded Ford had not offered evidence that he suffered an adverse employment action as required to prevail on his FMLA, disability discrimination and retaliation claims. In its analysis, the court determined that, contrary to Ford's arguments, USPS never actually terminated his employment. The

district court also dismissed Ford's failure to accommodate claim because (a) USPS properly accommodated him when placed on notice of his disability, and (b) USPS was under no obligation to accommodate Ford's psychological disability when no such reasonable accommodation existed.[1]

III. Analysis

a. Standard of Review

We review a district court's grant of summary judgment de novo, applying the same standard as the district court. *D. K. v. United Behav. Health*, 67 F.4th 1224, 1235 (10th Cir. 2023). In conducting this analysis, this court considers the evidence in the light most favorable to the non-moving party. *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 994 (10th Cir. 2019). Summary judgment is proper if the movant shows there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. *Digital Ally, Inc. v. Z3 Tech., LLC*, 754 F.3d 802, 810 (10th Cir. 2014). Once the moving party demonstrates a lack of any issues of material fact, the burden shifts to the nonmoving party to offer specific facts showing a genuine issue for trial. *Tesone*, 942 F.3d at 994.[2] "To defeat a motion for summary

[1] Following the district court's judgment, Ford filed a motion on September 24, 2018, to alter the judgment pursuant to Rule 59. The district court denied the motion by reaffirming its adverse employment action analysis and rejecting Ford's request that the court consider the totality of the circumstances in evaluating his claims. Ford also appeals the denial of this motion.

[2] Ford argues the district court did not adhere to the proper summary judgment standard by viewing the facts in a light favorable to USPS. Our review is de novo, and therefore, this court will appropriately analyze the facts and need not reach the

judgment, evidence . . . must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

b. FMLA Interference

"The FMLA guarantees the substantive rights of up to twelve weeks of unpaid leave for eligible employees of covered employers for serious health conditions and reinstatement to the former position or an equivalent one upon return from that leave." *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1180 (10th Cir. 2006); *see also* 29 U.S.C. § 2612. The Act forbids an employer to "interfere with, restrain, or deny the exercise of or attempt to exercise" this protected leave. 29 U.S.C. § 2615(a)(1). To demonstrate a prima facie claim of FMLA interference, "a plaintiff must establish (1) that he was entitled to FMLA leave, (2) that some adverse action by the employer interfered with his right to take FMLA leave, and (3) that the employer's action was related to the exercise or attempted exercise of his FMLA rights." *Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1319 (10th Cir. 2005). To satisfy the second element of this claim, an "employee must show that she was prevented from taking the full 12 weeks' of leave guaranteed by the FMLA, denied reinstatement following leave, or denied initial permission to take leave." *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007).[3]

---

issue of whether the district court incorrectly weighed facts in this case. *See United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1047 (10th Cir. 2004).

[3] FMLA interference "is a violation regardless of the employer's intent," and therefore, "the *McDonnell Douglas* burden-shifting analysis does not apply." *Metzler*, 464 F.3d at 1180; s*ee also infra* n. 7, 10.

Ford fails to establish a prima facie case for FMLA interference because he does not assert an adverse employment action related to the exercise of his protected leave. He alleges several instances of potential interference, including letters of warning; his supervisors' harassment; and failure to reinstate after taking protected leave. As a threshold matter, the record does not illustrate Ford received any disciplinary letter concerning his FMLA leave. The letters he was issued either considered other matters, such as failing to deliver an express item or extending his break without authorization, or they related to Ford's absences *after* he exhausted his protected leave. Additionally, despite Ford's assertions that his supervisors harassed him about his FMLA use, the record plainly shows these comments do not qualify as an adverse action for purposes of FMLA interference. At no point was Ford prevented from taking his full 12 weeks of leave guaranteed by the FMLA or denied any rights pursuant to the Act.[4] While this court does not condone Gunnarson and Clark's criticism of Ford's FMLA use, our precedent indicates such comments, without more, do not amount to "an adverse employment decision [] made before the

[4] Ford repeatedly characterizes one email sent by Gunnarson to Clark as "threatening to treat his [FMLA] leave as AWOL." The email clearly appears to be a clarification of Ford's documentation obligations under the FMLA, not a threat. The email states: "Mr. Ford is required to provide documentation to address paid-leave absences of more than 3 days. He has failed to do so. Please make sure he understands that documentation, otherwise he runs the risk of the leave being charged to AWOL." Even if this language did constitute a targeted criticism of Ford's use of FMLA leave, it does not rise to the level of FMLA interference. No part of Gunnarson's message prevented Ford from taking leave, denied his reinstatement, or denied him permission to take leave. *See Campbell*, 478 F.3d at 1287.

employee has been allowed to take FMLA leave or while the employee is still on FMLA leave." *Dalpiaz v. Carbon Cty.*, 760 F.3d 1126, 1132 (10th Cir. 2014).[5]

Contrary to Ford's arguments, he was also not denied reinstatement after utilizing his FMLA leave. He was permitted to take all of his protected leave, and thereafter elected to remain on non-FMLA leave for nearly 600 days. USPS did not suspend or terminate Ford during this time. *Cf. DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 978 (10th Cir. 2017) (employee satisfied adverse action element when terminated before returning from FMLA leave); *Metzler*, 464 F.3d at 1180–81 (proper reinstatement prevented when employee was terminated before her allotted FMLA leave was completed); *Dalpiaz*, 760 F.3d at 1133 (adverse action element satisfied when employee was suspended while still exercising her FMLA rights). Further, the letter of separation issued by USPS did not represent an immediate termination and was fully rescinded prior to any such action being taken.[6] Even if the notice did act as a termination, however, it was made in regard to Ford's indefinite

[5] Ford further argues that FMLA interference claims can be supported by any conduct intended to discourage the use of protected leave. This contention is both contrary to this court's precedent and unsupported by any legal authority in Ford's briefing. *See Dalpiaz,* 760 F.3d at 1132; *Campbell*, 478 F.3d at 1287.

[6] Ford cites *Roberts v. Roadway Express, Inc.*, for the proposition that "[a]ctions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn." 149 F.3d 1098, 1104 (10th Cir. 1998). USPS, however, never actually terminated or suspended Ford. He offers evidence from his employee file stating that he was "Terminated" as of June 3, 2015. However, the record is clear that the letter of separation was fully rescinded. Additionally, other USPS personnel records properly indicate Ford's employment status as "Retirement-Disability" and state that Ford "has not been separated."

leave-without-pay status, not his use of FMLA leave. Thus, the notice cannot be construed as FMLA interference for a failure to reinstate. *See Campbell*, 478 F.3d at 1287 (adverse employment action must be related to the exercise of FMLA rights). Without evidence of a qualifying adverse action related to his FMLA use, Ford has failed to establish a prima facie case of FMLA interference.

c. Disability Discrimination

The Rehabilitation Act prohibits discrimination by federal agencies, including USPS, against employees based on a qualified disability. 29 U.S.C. § 791. "We apply the standards from the Americans with Disabilities Act in analyzing a Rehabilitation Act claim." *Wilkerson v. Shinseki*, 606 F.3d 1256, 1262 (10th Cir. 2010).[7] A prima facie case of discrimination under the Rehabilitation Act includes three elements, "(1) [the employee] is a handicapped person within the meaning of the Act; (2) she is

[7] Without direct evidence of discrimination, claims under the Rehabilitation Act are subject to the *McDonnell Douglas* burden-shifting framework. *Cummings v. Norton*, 393 F.3d 1186, 1189 (10th Cir. 2005). "Under *McDonnell Douglas*, a plaintiff must first make a prima facie case of discrimination, after which the burden shifts to the defendant to articulate a nondiscriminatory reason for its conduct. The plaintiff then must show that the defendant's stated reason is merely pretextual." *Id*. (citation omitted). Ford argues this framework is unnecessary to analyze his discrimination and retaliation claims because he offered direct evidence of discrimination from his supervisors. We note, however, that "[d]irect evidence of discriminatory animus is rare." *Herrmann v. Salt Lake City Corp.*, 21 F.4th 666, 678 (10th Cir. 2021). "Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847, 854 (10th Cir. 2007). Contrary to Ford's characterization of the evidence, and after careful review of the record, it cannot reasonably be argued that his supervisors' comments showed direct discriminatory motive based on his disability. *Herrmann*, 21 F.4th at 678.

otherwise qualified for the job; and (3) she was discriminated against because of the handicap." *Woodman v. Runyon*, 132 F.3d 1330, 1338 (10th Cir. 1997). To demonstrate such discrimination an employee is "required to show that he suffered an adverse employment action because of his disability." *Brown v. Austin*, 13 F.4th 1079, 1092 (10th Cir. 2021). "An adverse employment action is one that causes a significant change in employment status or benefits." *Id*. These changes typically include actions such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011).

Similar to his FMLA interference allegation, Ford has failed to identify a relevant adverse action as required for a prima facie case of disability discrimination. Ford argues his disciplinary letters and notice of separation are qualifying adverse actions. As previously discussed, however, these actions did not result in the alteration of Ford's employment status or benefits. *See supra* § III.b. The notice of separation did not effectuate a termination or suspension and was later rescinded. Similarly, the warning letters Ford received were all retracted or, if not withdrawn, they imputed minor disciplinary action and did not substantially impact Ford's employment.

In the alternative, Ford argues the totality of actions taken by USPS, and particularly harassment by his supervisors, support his disability discrimination claim. Ford relies on *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), for the proposition that such a pattern of harassment qualifies as an adverse action. While

such harassment can support certain discrimination claims, *Hicks* is distinguishable from the case at hand. There, this court considered a Title VII hostile work environment claim which applies an entirely different prima facie standard and adverse action requirement than disability discrimination claims under the Rehabilitation Act. *Id*. at 1412; *see also Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015) (requiring workplace "permeated with discriminatory intimidation, ridicule, and insult" for hostile work environment adverse action). Ford has not brought a hostile work environment claim here. Neither his complaints, nor his opposition to summary judgment raised the issue.[8] Disability discrimination claims under the Rehabilitation Act do not implicate the broad, totality-of-the-circumstances analysis required for hostile work environment claims. *Brown*, 13 F.4th at 1092. Rather, they require an adverse action with significant change in employment status or benefits. While his supervisors' behavior was perhaps aggressive, there is no evidence that their interactions with Ford constituted an adverse employment action. Ford remained employed at USPS with full access to the associated benefits until his

[8] On appeal, Ford argues various references in his EEO complaint and investigatory affidavit to USPS's "hostile work environment" render the claim incorporated into his pleadings. Ford's complaints had no reference to a hostile work environment claim and merely mentioning "hostile work environment" in his EEO documentation does not properly raise the claim. *See Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991) (claim not raised in complaint is not properly before the court).

disability retirement.[9] Accordingly, he has failed to demonstrate he experienced an adverse action related to his disability that satisfies the prima facie burden for discrimination under the Rehabilitation Act.

d. Retaliation

The standards used to prove a prima face claim of retaliation are similar for both the FMLA and Rehabilitation Act. *See Brown*, 13 F.4th at 1090; *Metzler*, 464 F.3d at 1171.[10] To demonstrate retaliation under both Acts an employee 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." *Brown*, 13 F.4th at 1090. Similar to a disability discrimination claim, a qualifying adverse action under the Rehabilitation Act "is generally one that causes a significant change in employment status or benefits." *Id*. In the FMLA context a materially adverse and retaliatory action is adopted from the Title VII standard, in which the action would likely "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*,

[9] The record indicates Ford temporarily lost access to his health and life insurance benefits after November 2014, thirteen months after he began his extended term of leave-without-pay. Federal employees, however, are not entitled to such benefits after one year of non-pay status. 5 C.F.R. § 890.303(e).

[10] Absent direct evidence, the *McDonnell Douglas* burden-shifting analysis applies in FMLA and Rehabilitation Act retaliation cases. *See, e.g.*, *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1209 (10th Cir. 2018); *Metzler*, 464 F.3d at 1170. Similar to his disability discrimination claim, *supra* n. 7, Ford does not rely on direct evidence for his retaliation claims, and therefore, the burden-shifting framework applies.

548 U.S. 53, 68 (2006) (quotation omitted); *Metzler*, 464 F.3d at 1171 n.2 ("[T]he FMLA's retaliation clause is derived from Title VII and is thus intended to be construed in the same manner." (quotation and alteration omitted)). "[M]ere inconvenience or an alteration of job responsibilities" do not typically satisfy these standards. *C.R. England, Inc.*, 644 F.3d at 1040.

As is the case with his FMLA interference and disability discrimination claims, Ford fails to meet his prima facie burden by not articulating a qualifying adverse action. As described above, *supra* § III.b, none of the evidence presented demonstrates Ford was ever disciplined for exercising his right to take FMLA leave. Ford was afforded his complete rights under the Act and was not "adversely affected by an employment action based on incidents post-dating [his] return to work." *Campbell*, 478 F.3d at 1287–88. The letters of discipline and notice of separation he received did not relate to his use of FMLA leave and, although his supervisors were critical of the amount of FMLA time Ford was using, at no point did they materially impede him from fully realizing his rights under the Act. Ford's Rehabilitation Act retaliation claim also fails. He offers the same evidence of retaliation as he does for his disability discrimination claim. As previously explained, *supra* § III.c, none of the actions taken by USPS amounted to a significant change in employment or

benefits. This analysis does not change merely because the type of claim is different.[11]

e. Failure to Accommodate

"To state a claim for failure to accommodate under the Rehabilitation Act, [the employee] must show that he '(1) is disabled; (2) is otherwise qualified; and (3) requested a plausibly reasonable accommodation.'" *Brown*, 13 F.4th at 1084–85 (quotation omitted).[12] Section 501 Rehabilitation Act claims, which include

[11] As outlined below, *infra* § III.e, employee claims under the Rehabilitation Act are subject to administrative exhaustion. *Woodman v. Runyon*, 132 F.3d 1330, 1341 (10th Cir. 1997). Ford did not first meet with an EEO officer about retaliation until October 24, 2014, and did not file his subsequent retaliation complaint until December 9, 2014. Given the requirement that employees must initiate contact with an EEO counselor within 45 days of an alleged discriminatory action, Ford's Rehabilitation Act retaliation claim may not implicate USPS actions prior to September 9, 2014. 29 C.F.R. § 1614.105(a)(1). This excludes a large majority of the evidence Ford submits to support his retaliation claim, including all alleged harassment by his supervisors. Contrary to Ford's argument, USPS clearly raised an affirmative defense for failure to exhaust retaliatory claims in its motion for summary judgment. *See Hickey v. Brennan*, 969 F.3d 1113, 1117 (10th Cir. 2020).

[12] The *McDonnell Douglas* burden-shifting framework does not apply in failure-to-accommodate cases. *Punt v. Kelly Servs.*, 862 F.3d 1040, 1050 (10th Cir. 2017). Instead, we use a modified framework which does not calculate "what inferences the jury can draw about the employer's intent." *Id*. Under this framework, "[o]nce the employee produces . . . her prima facie case, the burden of production shifts to the employer to present evidence either (1) conclusively rebutting one or more elements of plaintiff's prima facie case or (2) establishing an affirmative defense, such as undue hardship or one of the other affirmative defenses available to the employer." *Id*. (quotation omitted). If the employer satisfies this burden, "summary judgment will be appropriate for the employer unless the employee then presents evidence establishing a genuine dispute regarding the affirmative defenses and/or rehabilitates any challenged elements of . . . her prima face case sufficiently to establish at least a genuine dispute of material fact as to such challenged elements." *Id*. (quotation omitted).

allegations by employees of USPS, are subject to administrative exhaustion requirements. *Woodman*, 132 F.3d at 1341. Among other requirements, to exhaust their administrative remedies employees must "initiate contact with a[n EEO] counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1); *see also Hickey*, 969 F.3d at 1118. "This regulatory exhaustion requirement is not a jurisdictional prerequisite for suit but is a claims-processing rule that the employer may raise as an affirmative defense." *Hickey*, 969 F.3d at 1118. A court, therefore, must enforce the exhaustion requirement if properly raised. *Id*.

Despite Ford's arguments to the contrary, USPS properly raised an exhaustion affirmative defense in its motion for summary judgement. *See id*. at 1117.[13] Indeed, Ford did not properly exhaust his remedies for his failure to accommodate claim. He did not initiate contact with an EEO counselor regarding his failure to accommodate claim until October 24, 2014, and did not file a corresponding complaint until December 9, 2014. Under the 45-day contact rule, therefore, Ford is limited to denials of plausibly reasonable accommodations occurring after September 9, 2014. Ford's failure to accommodate allegations implicate actions associated with the

[13] Ford argues USPS's affirmative defense was not specific enough and it "never directly asserted that Ford did not timely initiate contact with an EEO counselor." USPS's motion, however, expressly stated that Ford did not "allege that he ever requested an accommodation that was denied in the 45 days prior to his first EEO contact." This language squarely implicates the 45-day rule.

events of July 16, 2013, and the following weeks.[14] This time period far precedes his EEO counselor meeting regarding failure to accommodate on October 24, 2014.[15] Ford was medically restricted from working at all after July 29, 2013, and USPS reasonably accommodated him until his disability retirement in 2015 by affording him leave-without-pay status.[16]

Ford argues he incorporated a failure to accommodate claim into his first EEO complaint based on his September 4, 2013, counselor meeting. Thus, Ford contends he properly exhausted his administrative remedies for all events occurring after July

[14] These instances include two doctor's notes on July 22 and August 7, 2013, regarding Ford's post-July 16 work restrictions; comments from Clark allegedly denying the same accommodations on July 24, 2013; and denial of advanced sick leave in September 2013. Further, Ford claims his attorney made a separate request for accommodation on August 28, 2014, which also falls outside the period set by the 45-day contact rule. Additional allegations for failure to accommodate that post-date September 9, 2014, implicate USPS's modified job offer and thus are not relevant to these allegations. The modified offer is treated *infra* n. 16.

[15] Ford argues USPS's retaliatory conduct was repeated and continuing, and therefore, actions taken outside the 45-day window should be considered when interpreting administrative exhaustion. *See Green v. Brennan*, 578 U.S. 547, 556 (2016). As described above, *supra* § III.c, such interpretations are typically reserved for systemic claims like hostile work environment, which is not alleged here. *See, e.g.*, *McFarland v. Henderson*, 307 F.3d 402, 408 (6th Cir. 2002). More practically, Ford waited until well over a year after the start of his leave-without-pay status to submit his failure to accommodate claim. The record does not indicate the retaliatory behavior Ford describes was ongoing throughout this timeframe.

[16] On November 3, 2014, USPS also offered Ford a modified work assignment which allowed for all the physical accommodations that he requested and assured that they would be followed. Ford declined to accept the position, in part because he did not feel like the modified position went far enough to accommodate his psychological disabilities. Based on the record, Ford has not identified a genuine issue of material fact indicating this modified position was not a reasonable accommodation.

21, 2013. Ford's own actions, however, do not support this interpretation. He recognized on two separate occasions that his first EEO complaint inadequately incorporated his failure to accommodate claim: first, when he filed a second complaint expressly articulating his failure to accommodate claim; and second, when he filed a motion to clarify his first complaint as inclusive of his failure to accommodate claim. Ford commenced this action prior to successfully amending his first complaint. Given that he failed to properly amend, we decline to grant Ford the substantial relief of retroactively including the content of his second complaint in his first complaint.[17] In turn, we conclude Ford failed to exhaust his administrative remedies.

IV. Conclusion

The judgment entered by the United States District Court for the District of Utah is hereby **affirmed**.

Entered for the Court

Michael R. Murphy
Circuit Judge

[17] Ford requests we toll the 45-day EEO counsel rule. We recognize, however, that "equitable doctrines such as tolling or estoppel . . . are to be applied sparingly" in the 45-day rule context. *Hickey*, 969 F.3d at 1118. Neither the record nor Ford's complaints indicate he was unfamiliar with his obligations; he faced conditions beyond his control in reporting his failure to accommodate claim; or the EEO or USPS interfered with his ability to make a timely claim. Certainly, Ford has not presented "particularly egregious circumstances" required for equitable tolling. *Brucks v. O'Neill*, 184 F. Supp. 2d 1103, 1111 (D. Kan. 2001).