

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

David Ruiz v. Frank Kendall

No. CV-23-00549-TUC-AMM (D. Ariz. Mar. 31, 2026) · No. No. CV-23-00549-TUC-AMM · Decided March 31, 2026

OPINION

1 WO 2 3 4 5 6 IN THE UNITED STATES DISTRICT COURT 7 FOR THE DISTRICT OF
ARIZONA 8 9 David Ruiz, No. CV-23-00549-TUC-AMM 10 Plaintiff, ORDER 11 v. 12 Frank
Kendall, 13 Defendant. 14 15 Pending before the Court is Defendant Troy Meink’s Motion for
Summary 16 Judgment.¹ (Doc. 50.)

The motion is fully briefed. (Docs. 50–51, 56–58, 60.) Also pending 17 is Plaintiff David Ruiz’s
Motion for Partial Summary Judgment. (Doc. 52.) The motion is 18 fully briefed. (Docs. 52–55,
59.) The Court held oral argument on the cross motions for 19 summary judgment on March 4,
2026. (Doc. 64.) 20 For the following reasons, the Court will grant Defendant’s Motion for
Summary 21 Judgment and deny Plaintiff’s Motion for Partial Summary Judgment.

22 I. Procedural History 23 Plaintiff initiated this action on December 6, 2023. (Doc. 1.) Plaintiff
subsequently 24 filed an Amended Complaint on May 16, 2024. (Doc. 15 at 11–13.) In Count
One, Plaintiff 25 alleges that Defendant (the “Air Force”) discriminated against Plaintiff because
of his 26 1 Troy Meink succeeded Frank Kendall as the Secretary of the United States Department
27 of the Air Force.

(Doc. 50 at 1.) He is automatically substituted as Defendant in this action 28 pursuant to Federal
Rule of Civil Procedure 25(d). The Court will direct the Clerk of Court to amend the caption to
reflect this substitution. 1 disability, and in violation of the Rehabilitation Act, “when it subjected
Plaintiff to adverse 2 employment actions including, but not limited to, generally worsening the
terms and 3 conditions of his employment, denying his request to convert annual and sick leave to
4 weather and safety leave, and/or by treating him less favorably than similarly situated 5
employees outside his protected class.” (Id. at 11–12.)

In Count Two, Plaintiff alleges that 6 Defendant violated the Rehabilitation Act by failing to
provide him with a reasonable 7 accommodation. (Id. at 12.) 8 On July 31, 2025, Defendant filed
a Motion for Summary Judgment as to both 9 counts of Plaintiff’s Amended Complaint. (Doc.
50.) Plaintiff thereafter filed a Motion for 10 Partial Summary Judgment as to Count Two.

(Doc. 52.) 11 II. Undisputed Relevant Facts 12 Plaintiff worked as a civilian, non-appropriated
fund (“NAF”) employee at Davis 13 Monthan Air Force Base (“DMAFB”) in Tucson, Arizona.
(Doc. 51 at 1–3; Doc. 53 at 1.) 14 In 2008, Daniel Baker, the Lodging Manager of an on-base

housing facility called “The Inn,” promoted Plaintiff to the position of Assistant Lodging Manager and served as Plaintiff’s supervisor.

(Doc. 51 at 1–3; Doc. 53 at 5.) Plaintiff was the Assistant Lodging Manager until September 30, 2022. (Doc. 53 at 5.) The job description provides that, among other duties, the Assistant Lodging Manager is responsible for “set[ting] long-range plans, goals, and objectives[,]” “[d]evelop[ing] policies and procedures, which result in competent and effective operation and utilization of all lodging assets[,]” and “[p]repar[ing] budget estimates and controls of disbursement of funds.” (Id. at 6.)

It further explains that Assistant Lodging Manager “[p]erforms or directs periodic or scheduled surveys, audits, and inspections to determine adequacy of lodging conditions, compliance with requirements, and to evaluate effectiveness of financial management/controls.” (Id.) Nonetheless, according to Plaintiff, he “strictly did operations.” (Doc.

51-14 at 8– 26 10.) He described his job as follows: Responsible for all civil engineers, work order requests, tracking of the work order requests, follow-up of the 1 work order request, responsible for contractors coming on to the base over to the site to do work. Supervised those 2 contractors. I was their escort in and out of the base. Managed 3 a maintenance team.

Issued work order tasks for any roommate instances that came up either reported through 4 guests, through housekeeping, through inspections. Followed 5 up and assured that the work tasks were completed. Worked with logistics to ensure that we had all the parts and the 6 supplies that we needed to get these tasks completed. 7 I was responsible for our fleet, our vehicle fleet, which 8 included some golf carts.

I was responsible for a scissor lift 9 for our warehouse, keeping it maintained, keeping the preventative maintenance up to date, replacing batteries as 10 needed. 11 I was responsible for the two electric pallet jacks that 12 we had up on site. Same thing. Responsible for the 13 preventative maintenance, changing out the batteries, what have you. 14 I was the safety rep. My responsibility was to make 15 sure that all our personnel was properly trained in safety.

16 I was the [point of contact] when wing safety would 17 come down and do their annual inspections. 18 (Id. at 8–9.) Plaintiff also averred that he did physical inspections of the premises “[d]aily” 19 and that his duties remained “pretty much the same.” (Id. at 9–11.) 20 a. Plaintiff’s Diagnosis and Pre-Pandemic Leave 21 In 2017, Plaintiff informed Baker that he was diagnosed with chronic ulcerative 22 colitis (“UC”).

(Doc. 51 at 3; Doc. 53 at 4.) Plaintiff received treatment for his condition, 23 including infusions that each lasted approximately 5 hours. (Doc. 51-14 at 24.) From 2017 24 to 2019, Plaintiff requested leave for the full workday on days when he received an 25 infusion, and he requested additional leave on days “when [he] wasn’t feeling good” due 26 to his UC.

(Id. at 25.) Baker approved the requests. (Id.) 27 On March 14, 2019, Plaintiff presented a doctor's note advising that he needed to 28 "leave early from work at 2:30pm as needed due to medical issues from now until 12/31/19." (Doc. 51 at 3.) Based on this doctor's note, from March 15, 2019 to January 6, 2020, Plaintiff submitted leave requests almost daily that used Accrued Annual Leave 3 ("AL") and Accrued Sick Leave ("SL") to leave work early or, sometimes, to be absent 4 from work the entire day.

(Doc. 51-1 at 41–55; Docs. 51-2–51-5; Doc. 51-6 at 1–19.) Baker 5 continued to approve Plaintiff's leave requests. (Doc. 51-1 at 41–55; Docs. 51-2–51-5; 6 Doc. 51-6 at 1–19.) 7 On January 6, 2020, Plaintiff presented another doctor's note advising that he 8 needed "to work from 7:30am–2:30pm Monday through Friday due to medical conditions." 9 (Doc. 51 at 3–4.)

Consequently, from January 7, 2020 to March 20, 2020, Plaintiff 10 submitted—and Baker approved—daily leave requests that allowed Plaintiff to leave at 11 approximately 2:30 p.m. or earlier. (Doc. 51-6 at 24–26; Doc. 51-7; Doc. 51-8 at 1–16.) 12 Plaintiff's leave requests during this period used AL, SL, or a combination of both types 13 of leave in a day. (Doc.

51-6 at 24–26; Doc. 51-7; Doc. 51-8 at 1–16.) 14 b. Air Force Leave Guidelines During the Pandemic On March 13, 2020, the Air Force issued NAF-HR Directive 20-010 "Telework and 15 Coronavirus Fact Sheet for [Air Force] NAF Employees." (Doc. 51-8 at 18–24.)

The 16 directive stated, in relevant part, that Weather and Safety Leave ("WSL") "may [be] 17 authorize[d]... when an asymptomatic employee... is subject to movement restrictions 18 (quarantine or isolation) under the direction of public health authorities due to a significant 19 risk of exposure to a quarantinable communicable disease, such as 2019-nCoV." 20 (Id. at 20 20.)

It further explained: 21 Use of [WSL] would supersede the use of [SL] as would have 22 otherwise been allowed in these circumstances under OPM's 23 [SL] regulations at 5 C.F.R. § 630.401(a)(5). 24 Use of [WSL] would be subject to the normal conditions—for example, 25 [WSL] may be granted only if an employee is not able to 26 WSL is discretionary paid leave that may be granted if an employee "is prevented from 27 safely traveling to or performing work at an approved location...." 28 5 U.S.C. § 6329c(b).

3 5 C.F.R. § 630.401(a)(5) grants SL if an employee "[w]ould, as determined by the health 27 authorities having jurisdiction or by a health care provider, jeopardize the health of others 28 by his or her presence on the job because of exposure to a communicable disease...." 5 C.F.R. § 630.401(a)(5). 1 safely perform work at an approved location.

Thus, an employee who is not a telework program participant would 2 be granted [WSL] for quarantine periods based on potential 3 exposure. 4 (Id.) 5 Thereafter, on March 17, 2020, the Air Force issued NAF-HR Directive 20-012 6 "Updated Guidance on Telework Flexibilities" stating:

7 The guidance encourages agencies to maximize telework 8 flexibilities to eligible workers within the populations that the 9 CDC has identified as being at higher risk for COVID- 19....

10 11 Departments and agencies are further encouraged to approve leave for safety reasons to employees who are at 12 higher risk as identified by the CDC and not telework eligible 13.... Agencies may grant employees safety leave under 5 U.S.C. § 6329c(b) at the agencies [sic] discretion. 14 (Id. at 26–27.) 15 On March 20, 2020, the U.S. Department of Defense (“DOD”) issued a 16 memorandum that stated, in relevant part, that WSL “is not an entitlement” and that 17 “approval authority is the commander or head of activity unless further delegated.” (Doc.

18 51 at 5.) There is no dispute that Baker was the head of activity for lodging operations at 19 DMAFB, which never closed during the pandemic. (Id.; Doc. 58 at 4.) 20 On March 30, 2020, the DOD issued another memorandum with a matrix that 21 instructed, in relevant part, that if an employee of an open worksite was directed by a 22 medical professional to stay home, the “duty status options” were telework or WSL.

(Doc. 23 53-1 at 86.) The memorandum also stated, however, that “[e]mployees may telework if 24 they occupy a telework eligible positions and have a telework agreement” and that “[WSL] 25 is not an entitlement.” (Id.) 26 c. Plaintiff’s Pandemic Leave 27 1. March 23, 2020 to April 8, 2020 28 Upon the start of the pandemic, Plaintiff submitted leave requests for the week of 1 March 23, 2020 to March 27, 2020 using a combination of AL and SL.

(Doc. 51-8 at 51– 2 55; Doc. 51-9 at 1–2.) Baker approved the requests. (Doc. 51-8 at 51–55; Doc. 51-9 at 1– 3 2.) At this time, Plaintiff also began receiving some WSL. (Doc. 51-1 at 25.) 4 For the week of March 30, 2020 to April 3, 2020, Plaintiff submitted—and Baker 5 approved—leave requests that again used a combination of AL, SL, and WSL. (Doc. 51-9 6 at 4–7.)

Likewise, from April 6, 2020 to April 8, 2020, Plaintiff submitted—and Baker 7 approved—leave requests using a combination of AL, SL, and WSL. (Id. at 9–11.) 8 2. April 9, 2020 to September 5, 2020 9 On April 9, 2020, Plaintiff presented a doctor’s note dated March 30, 2020 that read: 10 “Patient has a compromised immune system due to his health issues. It may be prudent for 11 him to take some time off work to decrease his risk of COVID-19 exposure.” (Id. at 13.)

12 As a result of this note, Plaintiff did not return to work regularly until May 3, 2021. (Doc. 13 51 at 6, 11.) 14 Baker did not discuss teleworking with Plaintiff. (Doc. 51-12 at 17.) On some unspecified date, Baker met with “[t]he commander; deputy commander; human resources; 15 [and] civilian personnel director, [his] boss, Lieutenant Kaiser at the time” to discuss 16 Baker’s workload, which included some of Plaintiff’s duties while Plaintiff was on leave.

17 (Id.) The conversation then became about Plaintiff, and Baker was asked “why [Plaintiff] 18 wasn’t teleworking.” (Id.) Baker “explained that nobody in lodging [was] teleworking, and 19 as

far as [he] was concerned, no one could telework to do the job that [they were] supposed to do.” (Id. at 17–18.) 21 Plaintiff did not telework and took an extended absence.

(Doc. 51 at 6, 11.) Plaintiff 22 submitted—and Baker approved—16 leave requests in the five months between when he 23 submitted his doctor’s note on April 9, 2020 and September 5, 2020. (Doc. 51-9 at 15–30.) 24 During this time, Plaintiff requested 1 hour of AL, 2 hours of SL, and 5 hours of WSL per 25 day.⁴ (Id.) Plaintiff’s signature was on each of these leave requests.

(Id.) 26 /// 27 28 4 Except that Plaintiff’s leave form for May 20, 2020 used 8 hours of SL. (Doc. 51-9 at 20.) 1 3. September 7, 2020 to March 19, 2021 2 Plaintiff inexplicably stopped submitting leave forms on Monday, September 7, 3 2020. (Doc. 51 at 8.) Rather than designate Plaintiff as Absent Without Leave (“AWOL”), 4 Baker began submitting leave forms on Plaintiff’s behalf that mirrored the daily use of 1 5 hour of AL, 2 hours of SL, and 5 hours of WSL.

(Doc. 51-10 at 17–31.) In place of 6 Plaintiff’s signature, Baker wrote, “UNABLE TO SIGN DUE TO COVID 19 7 RESTRICTION.” (Id.) Baker executed 14 leave forms for Plaintiff from September 6, 2020 8 to March 19, 2021. (Id.) 9 Although Plaintiff did not personally submit any leave requests for this period, he 10 did submit several doctor’s notes to the Air Force.

(Id. at 33, 35, 37.) The first doctor’s 11 note dated October 27, 2020 advised to extend Plaintiff’s leave until after his follow up 12 appointment on November 23, 2020. (Id. at 33.) On November 23, 2020, the Air Force 13 received another doctor’s note asking to extend Plaintiff’s leave again until his appointment 14 on January 11, 2021. (Id. at 35.)

Finally, on January 4, 2021, the Air Force received a doctor’s note “strongly recommending that [Plaintiff] stays off work until 2/1/2021 due to 15 worsening autoimmune disease and also the record number of COVID-19 cases.” (Id. at 16 37.) It further stated that Plaintiff “is at very high risk of contracting and dying from 17 COVID-19 if he is infected.” (Id.)

18 Plaintiff also communicated directly with DMAFB officials during this period. 19 (Doc. 51-1 at 16–17.) On December 9, 2020, Plaintiff emailed Baker; Ann Ulibarri, Human 20 Resources Officer; Gokcan Hart, Civil Personnel Officer; and Lisa Chamberlain, Chief of 21 Finance. (Id.; Doc. 51 at 9.) Plaintiff detailed his medical condition prior to the pandemic, 22 saying that “Mr.

Baker has been supportive and I used sick and annual leave when I request 23 to be excused from work.” 5 (Doc. 51-1 at 17.) Plaintiff then explained that “[his] doctor 24 said avoid work and protect [him]self” when the pandemic began. (Id.) Plaintiff then wrote, 25 in relevant part: 26 27 5 It is not clear why Baker did not inquire whether Plaintiff intended to continue using leave 28 if Baker was in touch with Plaintiff in December 2020 via this email.

It also is not clear what happened as a result of this email. 1 I had a talk with Mr. Baker about this and again he was supportive and with a doctor’s note and the original guidelines 2 that came out I

was covered. Of course this was all new to all 3 of us so there was some bumps early on on what was allowed and what wasn't. Once these bumps got ironed out I was 4 okayed for what we now call Weather and Safety leave.

5 The only thing that was talked about with Mr. Baker and 6 myself was that I would be required to continue to use Sick and 7 Annual leave because that's what I was doing prior to this horrible Covid.... I had no issues because I had a lot of both 8 and didn't in my wildest dreams think we still be dealing with 9 this. 10 This was a concern because now I had a question about 11 my leave balance.

It then when it came to the fore front that I shouldn't have been getting charged any leave during this time 12 unless it was for medical appointments or any scheduled 13 annual leave.... 14 The target date to return is January 11, 2021. I understand that Weather and Safety leave expires on December 15 31, 2020. If I can get a balance of my sick and annual leave I 16 will request the additional time.

17 (Id. at 17–18.) 18 In her deposition, Ulibarri stated that, after this email, she “[d]iscussed with Mr. 19 Baker if he was looking into reasonable accommodations to bring [Plaintiff] back to work 20 and keep him safe.” (Doc. 53-2 at 54.) Ulibarri said she “[j]ust [gave] him the options on 21 what he could do to have [Plaintiff] come to work and still work basically.” (Id.)

The 22 options were “[t]elework, have him work in an office, enclosed office by himself while he 23 was at work, minimize his contact with people, wear a mask....” (Id. at 55.) In the 24 discussion, Baker responded that “[h]aving him work back in the building was 25 sufficient... because [Plaintiff] needed to be present....” (Id.) Ulibarri clarified that she 26 only suggested those as options to Baker and she did not know or recall Baker's response.

27 (Id.) Ulibarri stated that, if any options were to be presented to Plaintiff, it would have been 28 Baker's role to do so, but she did not know if any such conversation happened between 1 Baker and Plaintiff. (Id. at 56.) 2 On December 18, 2020, Ulibarri sent an email to several supervisors, including 3 Baker, stating that the Air Force was ending WSL on December 31, 2020.

(Doc. 53-3 at 4 65–66.) Nonetheless, on January 4, 2021, Baker told Ulibarri that he received a doctor's 5 note extending Plaintiff's leave until February 1, 2021. (Id. at 65.) When Baker asked 6 whether he was permitted to grant Plaintiff additional WSL after December 31, 2020, 7 Ulibarri confirmed that Plaintiff was still eligible for WSL based on his most recent 8 doctor's note.

(Id. at 64–65.) Ulibarri also explained to Baker: 9 In the meantime, you should consider discussing with [Plaintiff] whether he needs any flexibilities or reasonable 10 accommodation to return to the workplace at the expiration 11 of his Drs note, i.e. telework, social distancing by minimizing his contact with people, limit his in-person contact with 12 people, provide masks,

face shield, hand sanitizer, gloves, 13 Lysol, etc. Please let me know if you would like to explore the reasonable accommodations process.

14 (Id. at 64.) Baker forwarded the email to Plaintiff on January 7, 2021 informing Plaintiff 15 that he was “eligible to continue using WSL based upon [his] Doctor’s excuse.” (Id. at 63.) 16 On January 26, 2021, Baker again wrote Ulibarri, stating: 17 I have been very supportive and patient with the 18 medical situation we find ourselves in with [Plaintiff].

It is 19 very unfortunate that [Plaintiff’s] medical condition has not improved with several different treatment plans and the 20 current Pandemic. He has not been able to work since March 21 2020 due to his compromised immune system/illness/COVID 19. Also, [he has been] unable to 22 completely perform his daily duties since April 2018 working only partial days (33%) due [to] his illness.

I am requesting a 23 fit for duty examination to determine his long term ability to 24 perform his assigned duties here at lodging. Lodging has always been open (24/7) and has never reduced/limited hours 25 even during the pandemic, there’s no ability to perform 26 teleworking and we have major concerns with providing safe reasonable accommodations in the work place.

27 28 (Doc. 53-2 at 33.) 1 On January 27, 2021, Baker directed Plaintiff to undergo a medical examination, 2 stating in a memorandum that Baker was “concerned about [Plaintiff’s] current medical 3 condition, which has prevented [him] from performing the full range of the duties of [his] 4 permanently assigned position as Assistant Lodging Manager.” (Doc. 51-10 at 43.)

5 On February 2, 2021, Plaintiff’s doctor conducted the examination and concluded 6 that Plaintiff was “medical qualified – if restrictions [were] accommodated” including 7 “allow[ing] [Plaintiff] to work from home to avoid exposure to Covid.” (Id. at 46.) 8 However, on March 1, 2021, Plaintiff’s doctor faxed a note recommending that Plaintiff 9 “wait to return to work in person until he receives the COVID-19 vaccine.” (Doc.

53-1 at 10 34.) The note further stated that Plaintiff would “need the two-shot vaccine series[.]” (Id.) 11 There is no indication that Plaintiff received the vaccine. 12 d. Plaintiff Ordered to Return to Work 13 On March 19, 2021, Baker emailed Plaintiff notifying him that he was “required to 14 report back to work on Monday, 22 March 2021 at 0800 hrs.” (Id. at 49.)

To reduce Plaintiff’s exposure to COVID-19, Baker outlined certain accommodations including a 15 private office, face mask, face shield, and disinfecting cleaners.⁶ (Id.) Baker notified 16 Plaintiff that if he did not report as required, he would be marked AWOL. (Id.) 17 Plaintiff did not return to work on March 22, 2021. (Id. at 51.) Instead, he submitted 18 a leave form requesting 16 hours of SL for March 22, 2021 and March 23, 2021 because 19 his father was in the hospital.

(Id.) Baker approved the request. (Id.) 20 Plaintiff returned to work on March 24, 2021 and worked a full day in person. (Doc. 21 51 at 10.) The next day, Plaintiff submitted a request to use AL to leave at 2:00 p.m. because 22 he was not feeling well after a treatment for his UC. (Doc. 51-10 at 52.) Plaintiff indicated 23 on the form that the requested leave was “NOT COVID related.” (Id.)

Baker approved the 24 request. (Id.) The following day, on March 26, 2021, Plaintiff submitted—and Baker 25 approved—a request to use 8 hours of SL because his father was again in the hospital. (Id. 26 27 6 As addressed infra, Defendant asserts that the essential functions of Plaintiff’s position 28 were in-person and could not be accomplished via telework.

(Doc. 50 at 12–13; Doc. 54 at 10; Doc. 60 at 2.) 1 at 53.) 2 Plaintiff then submitted a leave form requesting 40 hours of SL for the week of 3 March 29, 2021 to April 2, 2021. (Id. at 54.) The remarks stated that Plaintiff had a 4 “[f]ollow up with GI Specialist.” (Id.) Baker approved the request. (Id.) 5 On March 29, 2021, the Air Force received a doctor’s note stating Plaintiff was not 6 permitted to return to work until May 3, 2021.

(Id. at 56.) Baker approved SL for Plaintiff 7 through April 30, 2021. (Doc. 51 at 11.) 8 Plaintiff returned to work on May 3, 2021. (Id.) 9 e. Plaintiff Requests Retroactive Leave Conversion 10 At some point after his return to work, Plaintiff requested that his used AL and SL 11 from September 6, 2020 to May 1, 2021 be retroactively converted to WSL.⁷ (See id. at 12; 12 Doc.

51-20 at 5; Doc. 51-21 at 5; Doc. 57 at 3–4; Doc. 57-1 at 73–74, 80, 171.) Baker’s 13 supervisors informed him that “Air Force San Antonio and legal” were “putting a package 14 together” and “trying to get [Plaintiff’s] leave back.” (Doc. 57-1 at 171.) Baker relayed this information to Plaintiff. (Id.) 15 On October 12, 2021, NAF Financial Analyst (“NAFFA”) Alicia Solorio issued a 16 memorandum regarding a “Special Review of Lodging Leave Records.” (Doc.

51-20 at 5.) 17 18 7 It is unclear when and how Plaintiff first made this request. It is also unclear why Plaintiff 19 selected these specific dates. Plaintiff argues that he is entitled to convert his AL and SL because Defendant failed to engage in the interactive process as soon as it learned that 20 Plaintiff could not work a full 8-hour day because of his disability.

(Doc. 56 at 11.) 21 However, Plaintiff only seeks conversion of leave used from September 6, 2020 to May 1, 2021. Puzzlingly, this timeframe does not start on January 6, 2020 when Plaintiff first 22 submitted his doctor’s note informing Defendant that he could not work a full day because 23 of his disability. Nor does he seek conversion of the AL and SL that he personally requested from April 9, 2020 to September 5, 2020 after he submitted a third doctor’s note informing 24 Defendant of his disability-related need to take time off work, which, by Plaintiff’s argument, would also trigger the duty to engage in the interactive process.

The Court, 25 therefore, can only assume that Plaintiff targets the period between September 6, 2020 and 26 May 1, 2021 because September 6, 2020 is when Baker began submitting leave requests on Plaintiff's behalf. However, to the extent that Plaintiff seeks relief only for the leave 27 that he did not personally request, it remains unclear why he then includes leave used after 28 March 19, 2021 when Baker stopped submitting Plaintiff's leave forms and Plaintiff resumed submitting them himself.

1 She stated in part that "[a]t the request of the FSS Resource Management Flight Chief, 2 from 22 Sep – 12 Oct 2021, the NAFFA conducted a special review of Lodging leave 3 records from 1 Sep 20 through 8 May 21. The NAFFA conducted a review of one employee 4 (Employee A) specifically and five other employees (randomly selected)."8 (Id.) Solorio 5 wrote that her "understanding is Employee A has requested converting annual and sick 6 leave from 6 Sep 20 – 3 May 21 to WSL.

This is approximately 615+ hours... valued at 7 approximately \$21K." (Id.) 8 Although Solorio noted that Plaintiff did not sign most of the leave forms from 9 September 6, 2020 to May 1, 2021, she nonetheless recommended that Plaintiff's "leave 10 hours not be converted to WSL." (Id.) Solorio reasoned that (1) Plaintiff never requested 8 11 hours of WSL; (2) Plaintiff used an average of 3 hours of AL and SL per day for the 6 12 months before the pandemic; (3) Plaintiff never provided a doctor's note that stated he 13 could return to a full workday; (4) at the start of the pandemic around "13 Apr 20, [Plaintiff] 14 had no regular hours and had a clear history of 1 hour [AL], 2 hours [SL] [,] and 5 hours WSL"; and (5) "[i]f [Plaintiff] is claiming he did not request leave between 6 Sep 20 – 1 15 May 21 and this leave was approved without his consent, then he should be considered 16 AWOL." (Id. at 5–6.)

17 Around November 2021, Plaintiff and Baker met and discussed Plaintiff's leave 18 during the pandemic. (Doc. 51 at 12.) In his deposition, Plaintiff averred that Baker told 19 him, "Yeah, I think there was a mistake. Yeah, don't worry about it.

We're going to take 20 care of it. We're going to restore it." (Doc. 51-16 at 5.) However, according to Baker's 21 deposition, he "didn't make a mistake" and instead "did what [he] understood the guidance 22 provided to [him], coordinated through payroll, coordinated through HR, that [he] was 23 doing the right thing." (Doc. 51-13 at 16.) 24 After his meeting with Plaintiff, Baker sought guidance from his superior, Lt.

Col. 25 Terrell Tillery. (Doc. 51 at 12; Doc. 51-1 at 10.) It is not clear what Baker specifically 26 asked Lt. Col. Tillery or what Lt. Col. Tillery did with that information. (Doc. 51-1 at 10; 27 28 8 Plaintiff avows without objection that he is Employee A. (Doc. 57 at 4.) 1 Doc. 58 at 9.) 2 On March 16, 2022, NAF Human Resources Officer Khalilah Huddleston wrote a 3 memorandum titled "Special Audit – David Ruiz."9 (Doc.

57-1 at 80.) Huddleston 4 recommended crediting back to Plaintiff 127 hours of AL and 406 hours of SL and 5 retroactively converting those 533 hours to WSL. (Id.) These hours account for the AL and 6 SL that Baker requested on Plaintiff's behalf in leave forms covering the period from 7 September 6, 2020 to March 19, 2021. (Id.) 8 Huddleston stated that her recommendation was "based on the fact[] that although 9 Mr. Baker knew the process regarding the receipt and approval of the [leave forms] [,] he 10 did not follow them." (Id.)

Specifically, Baker submitted leave forms without Plaintiff's 11 signature. (Id.) Huddleston further commented that the March 30, 2020 Air Force 12 guidelines for COVID-19 stated, "if an employee is directed by a medical professional... 13 to stay home[,] and the employee i[s] telework ineligible[,] then WSL applies." (Id.) 14 Huddleston explained that Baker said telework was not available for lodging operations.

(Id.) Finally, Huddleston opined that Plaintiff's position as Assistant Lodging Manager 15 "does contain a majority of duties that are primarily administrative in nature which would 16 have enabled him to telework." (Id. at 81.) 17 Ultimately, Huddleston found that Plaintiff should have been granted 533 hours of 18 WSL because he was instructed to stay home by a medical professional and, per Baker's 19 statement, lodging did not offer telework.

(Id.) 20 On July 22, 2022, Wilma Hall, Operations Branch Chief for the Air Force Services 21 Center ("AFSVC"), told Huddleston that she disagreed with Huddleston's 22 recommendation and agreed instead with Solorio's recommendation to deny Plaintiff's 23 conversion request. (Doc. 51-10 at 61.) 24 Although Baker obtained recommendations, it was ultimately his decision as the 25 first line supervisor whether to grant Plaintiff's request for leave conversion.

(Id. at 59–60; 26 Doc. 51 at 13.) On August 2, 2022, Huddleston instructed Baker to communicate his 27 28 9 It is not clear what triggered Huddleston to conduct her review. 1 official decision to deny Plaintiff's conversion request in writing. (Doc. 51-10 at 58.) 2 On August 5, 2022, Baker wrote a memorandum to Plaintiff that stated in full: 3 "Request for Annual and Sick leave to be restored and credited to Weather and Safety 4 Leave is disapproved.

Request was reviewed/coordinated with Davis Monthan Human 5 Resources, [355th Force Support Squadron]/Leadership, AF Lodging and 6 AFSVC/VBLO." (Id. at 63.) Plaintiff acknowledged receipt of the memorandum decision 7 via his signature on August 5, 2022. (Id.) 8 f. Plaintiff Appeals Through the Administrative Grievance Process 9 DMAFB has a three-step administrative grievance process whereby employees can 10 request review of supervisor decisions.

(Doc. 51-21 at 2.) Step One requires a written 11 grievance. (Id.) If the employee is not satisfied with the reviewing supervisor's decision at 12 Step One, the employee may submit a written grievance "to the next, higher level 13 supervisor (at Step Two)." (Id.)

The employee may repeat this process once more at Step 14 Three. (Id.) On August 22, 2022, Plaintiff filed a grievance at Step One regarding “the 15 disapproval of returning 127 hours of annual and 406 hours of sick leave from the period 16 of April 2020 thru May of 2021 for a total of 533 hours with no explanation issued on 17 Friday August 5, 2022.” (Id. at 5.)

Plaintiff claimed that “NAF HR had made a 18 recommendation that [his] leave be restored based on there wasn’t any SF71 leave forms 19 with [his] signature authorizing deduction of annual and sick leave for the periods 20 mentioned.” (Id.) 21 Baker’s supervisor, Capt. Michael Asuncion, reviewed and denied Plaintiff’s Step 22 One grievance. (Id. at 2–3.)

In so doing, Capt. Asuncion considered Plaintiff’s use of AL 23 and SL before the pandemic to cover 3 hours of the workday, and he considered Solorio’s 24 recommendation to deny leave conversion. (Id. at 3.) 25 On September 14, 2022, Plaintiff submitted a Step Two grievance. (Doc. 51-23 at 26 5.) Lt. Col. Tillery denied the request at Step Two. (Id. at 2–3.)

In so doing, Lt. Col. Tillery 27 also considered Plaintiff’s use of AL and SL before the pandemic as well as Solorio’s 28 recommendation. (Id. at 3.) However, Lt. Col. Tillery offered to return the AL and SL to 1 Plaintiff “and substitute Absence Without Leave (‘AWOL’) in its place, since Plaintiff was 2 contending that he had no agreement with Mr. Baker regarding his leave use while he was 3 absent from work during that timeframe.” (Id.)

4 On November 1, 2022, Plaintiff submitted a final grievance at Step Three. (Doc. 51- 5 25 at 5.) On November 8, 2022, Col. Casey Bartholomew denied the request at Step Three. 6 (Id. at 2–3.) Col. Bartholomew considered Plaintiff’s use of AL and SL before the 7 pandemic and considered Solorio’s recommendation. (Id. at 3.) He also offered to return 8 the leave and substitute AWOL.

(Id.) There is no indication that Plaintiff responded to 9 either offer to convert his leave to AWOL. 10 g. Plaintiff Complains Through the Equal Employment Opportunity Process 11 On November 16, 2022, Plaintiff contacted Equal Employment Opportunity 12 (“EEO”) Director Ricky Collins. (Doc. 51-26 at 2, 5.)

On December 15, 2022, Plaintiff 13 filed an Informal EEO Complaint against Baker. (Id. at 5.) The “Civilian Pre-Complaint 14 Intake Form” stated that Plaintiff’s “Claim Type” was “Other: Not restoring leave for 15 disability (c[h]ronic ulcerative colitis).” (Id. at 6.) Plaintiff marked the incident date as 16 November 2, 2022, although Plaintiff could not explain in his deposition why he chose 17 November 2, 2022.

(Id.; Doc. 51 at 15.) 18 In his “Narrative of the Incident,” Plaintiff wrote: “Wouldn’t restore leave taken 19 with no authorization.” (Doc. 51-26 at 7.) Plaintiff stated that the issue was: “Whether the 20 complainant, Mr. David Ruiz[,] was discriminated against based on disability, Chronic 21 Ultracolitis [sic] (physical) when on 2 November 2022, Mr. Dan Baker, Lodging Manager, 22 355

FSS/FSVL, did not reinstate 127 hours of Annual Leave and 406 hours of Sick 23 Leave.”¹⁰ (Id. at 10.)

24 On January 23, 2023, Plaintiff filed a Formal EEO Complaint. (Id. at 12–13.) He 25 26 10 Plaintiff did not specify the date range the for these hours in his Informal EEO 27 Complaint, but these are the exact amounts of leave addressed by Huddleston that covered 28 the period from September 6, 2020 to March 19, 2021 when Baker submitted leave forms on Plaintiff’s behalf.

(Doc. 57-1 at 80.) 1 alleged that Baker, Capt. Asuncion, Lt. Col. Tillery, and Col. Bartholomew discriminated 2 against him based on disability. (Id. at 12.) Plaintiff articulated the issue as follows: 3 Whether Complainant David Ruiz was discriminated against based on his disability, Chronic Ulcerative Colitis 4 (physical) when: 5 1.

On or about 5 August 2022, Lodging Manager Don 6 [sic] Baker, 355 FSS/FSVL, denied my request to 7 reinstate 127 hours of Annual Leave; and 8 2. On or about 5 August 2022, Lodging Manager Don 9 [sic] Baker, 355 FSS/FSVL, denied my request to reinstate 406 hours of Sick Leave; and 10 11 3.

On or about 8 November 2022, Col. Casey J. Bartholomew denied my Step 3 Grievance seeking 12 reinstatement of 127 hours of Annual Leave and 406 13 hours of Sick Leave. 14 (Id.) 15 On February 3, 2023, EEO Director Collins issued a “Notice of Acceptance of 16 Formal EEO Complaint” notifying Plaintiff that the 355th Wing Equal Opportunity Office 17 at DMAFB would investigate his claim of: 18 Whether the complainant, Mr. David Ruiz[,] was discriminated against based on disability, Chronic 19 Ultracolitis [sic] (physical) when on 2 November 2022, Mr. 20 Dan Baker, Lodging Manager, 355 FSS/FSVL, did not reinstate 127 hours of Annual Leave and 406 hours of Sick 21 Leave.

22 (Id. at 16.) 23 On September 4, 2023, Plaintiff’s EEO Complaint was denied by Final Agency 24 Decision. (Id. at 2–3.) Plaintiff subsequently filed the present action on December 6, 2023. 25 (Doc. 1.) 26 /// 27 /// 28 /// 1 III. Standard of Review 2 The Court grants summary judgment if the pleadings and supporting documents, 3 viewed in the light most favorable to the non-moving party, “show[] that there is no genuine 4 issue as to any material fact and that the moving party is entitled to judgment as a matter 5 of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed.

R. Civ. P. 56(a), 6 (c)). An issue is genuine when a reasonable jury could resolve the disputed facts in favor 7 of either party. See *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004) (citing 8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250–51 (1986)). A disputed fact is 9 material if it “might affect the outcome of the suit under the governing law.” *Anderson*, 10 477 U.S. at 248.

11 The moving party bears the initial burden of establishing there is no genuine issue 12 of material fact. *Celotex Corp.*, 477 U.S. at 323. Under Federal Rule of Civil Procedure 56: 13 (1) A

party asserting that a fact cannot be or is genuinely 14 disputed must support that assertion by: 15 (A) citing to particular parts of materials in the 16 record, including depositions, documents, electronically stored information, affidavits, 17 or declarations, stipulations[,],...

18 admissions, interrogatory answers, or other materials; or 19 20 (B) showing that the materials cited do not establish the absence or presence of a genuine 21 dispute, or that an adverse party cannot produce admissible evidence to support the 22 fact. 23 Fed. R. Civ. P. 56(c)(1)(A)–(B). 24 The burden then shifts to the non-movant to “come forward with ‘specific facts 25 showing that there is a genuine issue for trial.’” *Matsushita Elec.*

Indus. Co. v. Zenith Radio 26 Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-movant “must 27 do more than simply show that there is some metaphysical doubt as to the material facts.” 28 *Id.* at 586–87.

The non-movant’s bare assertions, standing alone, are insufficient to create 1 a material issue of fact and defeat a motion for summary judgment. *Anderson*, 477 U.S. at 2 247–48. Thus, summary judgment is mandated “against a party who fails to make a 3 showing sufficient to establish the existence of an element essential to that party’s case, 4 and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 5 322.

6 The Court’s role at the summary judgment stage is to determine whether there is a 7 genuine issue for trial. See *Anderson*, 477 U.S. at 249–50. “[T]here is no issue for trial 8 unless there is sufficient evidence favoring the nonmoving party for a jury to return a 9 verdict for that party.” *Id.* at 249 (citing *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 10 U.S. 253, 288–89 (1968)). “If the evidence is merely colorable, or is not significantly 11 probative, summary judgment may be granted.” *Id.* at 249–50 (citations omitted).

12 On cross motions for summary judgment, the Court “review[s] each motion... 13 separately, giving the nonmoving party for each motion the benefit of all reasonable 14 inferences.” *Brunozzi v. Cable Commc’ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017), cert. denied, 138 S. Ct. 167 (2017).

The Court may consider either party’s evidence in the 15 opposing party’s motion when deciding whether to grant either summary judgment motion. 16 See *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136–37 (9th Cir. 2001). 17 18 IV. Cross Motions for Summary Judgment 19 a. Count One: Disability Discrimination 20 The Court finds that there is no genuine dispute of material fact, and Defendant is 21 entitled to judgment as a matter of law, as to Count One.

The Court applies the two-step 22 framework from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) to 23 discrimination claims under the Rehabilitation Act. *Mattioda v. Nelson*, 98 F.4th 1164, 24 1178 (9th Cir. 2024). “Under this framework, a plaintiff must make a prima facie case 25 establishing that (1) he is a person with a disability; (2) otherwise qualified for 26 employment; and (3) suffered discrimination because of his disability.”11 *Id.* Upon this 27 28 11

For purposes of this motion, Defendant does not contest that Plaintiff can satisfy the first element of a prima facie case by showing that he is disabled.

(Doc. 50 at 12 n.1.) 1 prima facie showing, the burden shifts to the employer to establish legitimate, non- 2 discriminatory reasons for the challenged adverse action. *Id.* (citing *Coghlan v. Am. 3 Seafoods Co.*, 413 F.3d 1090, 1094 (9th Cir. 2005)).

The burden then shifts back to the 4 plaintiff to demonstrate that the employer's alleged reasons were merely a pretext for 5 discrimination. *Id.* 6 1. Qualified Individual 7 A qualified individual is "an individual who, with or without reasonable 8 accommodation, can perform the essential functions of the employment position that such 9 individual holds or desires." 42 U.S.C. § 12111(8); *Cummings v. DeJoy*, 700 F. Supp. 3d 10 801, 805 (D.

Ariz. 2023); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 11 (9th Cir. 2012). "Essential functions are the fundamental duties of the relevant position." 12 *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998). 13 There appears to be a genuine factual dispute that Plaintiff was a qualified 14 individual, which turns on whether Plaintiff could have performed all the essential 15 functions of Assistant Lodging Manager by teleworking.

The official job description 16 conflicts with Plaintiff's explanation of his duties. Specifically, while the job description 17 outlines primarily administrative duties, Plaintiff described daily inspections, overseeing 18 and escorting contractors on site, and other in-person tasks.

Moreover, Plaintiff proffered 19 *Huddleston's* finding that Plaintiff could have performed the functions of Assistant 20 Lodging Manager remotely. It is, therefore, in dispute to what extent Assistant Lodging 21 Manager requires functions that could only be performed in person. 22 2. Causation 23 Nevertheless, the Court finds that summary judgment is warranted because, 24 assuming without deciding that Plaintiff was a qualified individual, he has not shown that 25 he suffered discrimination because of his disability.

26 The Rehabilitation Act requires strict but for causation. *Chadwick v. Universidad 27 Interamericana de Puerto Rico Inc.*, No. CV-18-00377-TUC-RM, 2018 WL 4492286, at 28 *4 (D. Ariz. Sept. 19, 2018). Therefore, the plaintiff must show that he suffered an adverse 1 action "solely by reason of' [his] disability." *Id.* (quoting *Martin v. Cal. Dep't of Veterans 2 Affairs*, 560 F.3d 1042, 1049 (9th Cir.

2009)). The Court is mindful that "[w]hile a private 3 plaintiff must show intentional discrimination under the statutes modeled after Title VI, 4 [the Ninth Circuit] interpret[s] this requirement 'somewhat more broadly' for 5 Rehabilitation Act claims in light of that statute's purpose." *Schmitt v. Kaiser Found. 6 Health Plan of Wash.*, 965 F.3d 945, 954 (9th Cir.

2020) (quoting *Mark H. v. Lemahieu*, 751 F.3d 922, 937 (9th Cir. 2008)).¹² With the Rehabilitation Act, Congress observed that disability discrimination is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference.” *Id.* at 954 n.5 (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)).¹¹ Plaintiff conflates the causation element of his discrimination claim in Count One with his claim in Count Two that Defendant failed to accommodate his disability.

His theory of causation is that Defendant knew about his disability but did not initiate the interactive accommodation process. (Doc. 56 at 8–10.)¹⁵ The party from whom an accommodation is sought has an affirmative obligation to engage in an “interactive process” triggered by notice of disability and desire for accommodation. *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir.

2002) (discussing the mandatory interactive process in the employment discrimination context); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112–14 (9th Cir. 2000), vacated on other grounds, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (“The interactive process is triggered either by a request for accommodation by a disabled employee or by the employer’s recognition of the need for such an accommodation....”).

Plaintiff identifies two distinct time periods during which he asserts Defendant was required to engage in the interactive process and failed to do so. The first of these begins on January 6, 2020 when Plaintiff presented his initial doctor’s note requiring him to leave work early due to his UC. (Doc. 56 at 11.) Plaintiff contends that this note triggered the interactive process. The Court notes, however, that Plaintiff “must prove a mens rea of ‘intentional discrimination’... by showing ‘deliberate indifference’ [or] ‘discriminatory animus’” to recover monetary damages.

Schmitt, 965 F.3d at 954 (quoting *Lemahieu*, 513 F.3d at 938).¹ Defendant’s duty to consider reasonable accommodations. (*Id.*) Plaintiff later asserts that he “clearly notified Defendant of his need for accommodation after the COVID-19 pandemic started” when, on April 9, 2020, Plaintiff submitted a third doctor’s note stating “[i]t may be prudent for him to take some time off work to decrease his risk of COVID-19 exposure” because his immune system was compromised due to his disability.

(*Id.* at 16.)⁶ Plaintiff fails to establish a genuine dispute regarding causation. First, there is no standalone claim for failing to engage in the interactive process itself—discrimination results only from denying an available and reasonable accommodation. *Gipaya v. Dept. of Air Force*, 345 F. Supp. 3d 1286, 1299 (D. Haw. 2018) (quoting *Snapp v. United Transp.*

Union, 889 F.3d 1088, 1095 (9th Cir. 2018)).¹¹ Second, Plaintiff alleges discrimination during two periods for which he did not seek relief. Plaintiff never sought to convert the leave used

from January 6, 2020 to April 13 8, 2020. Nor did he ever seek to convert the leave used from April 9, 2020 to September 6, 14 2020.

As the Court previously emphasized, Plaintiff only seeks to convert the 533 hours 15 used from September 6, 2020 to March 19, 2021. 16 Third, Plaintiff's focus is misplaced. He identifies the adverse action underlying his 17 discrimination claim as Defendant's "denial of leave reinstatement and conversion."13 18 (Doc. 56 at 8.)

In other words, Count One arises out of Defendant's refusal to retroactively 19 convert Plaintiff's used leave. Yet, in his briefings, Plaintiff focuses on a different adverse 20 action—Defendant's failure to proactively initiate the interactive process or to offer him 21 the accommodation of either telework or full time WSL.

For example, Plaintiff cites the 22 DOD matrix prescribing telework or WSL. But this matrix—to the extent it was applicable, 23 comprehensive, and binding—guides prospective action, not a request to retroactively 24 25 13 For purposes of summary judgment, Defendants do not challenge that the denial of 26 Plaintiff's leave conversion request constitutes an adverse employment action.

Marrazzo v. Leavitt, 719 F. Supp. 2d 1297, 1309 (D. Or. 2010) ("For purposes of a disability 27 discrimination claim [under the Rehabilitation Act], an adverse employment action is one 28 that 'materially affect[s] the compensation, terms, conditions, or privileges of... employment.'" (quoting *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008))). 1 convert leave.14 2 The proper question before the Court is whether Plaintiff has put forth specific facts 3 showing there is a genuine dispute that Defendant discriminated against him solely because 4 of his disability when it denied Plaintiff's request to convert and reinstate his leave.

The 5 Court finds that Plaintiff has not. 6 Plaintiff names four non-disabled employees who received full time WSL when 7 they contracted COVID-19, arguing that Defendant treated him less favorably. (Id. at 9– 8 10.) This argument is a red herring.

The situations are not comparable because Plaintiff 9 never contracted COVID-19. The argument is also irrelevant to the challenged adverse 10 action because none of the alleged comparators ever requested to retroactively convert their 11 leave.15 12 Plaintiff also cites the recommendation from Huddleston that Defendant reinstate 13 Plaintiff's leave.

The Court is unclear why Plaintiff asserts that memorandum is evidence 14 of discrimination. Huddleston did not conclude or even suggest that Defendant denied 15 Plaintiff's request because of his disability. She merely reasoned that Baker failed to adhere 16 to procedure when he executed leave forms without Plaintiff's signature, rather than 17 marking him AWOL.

As the Court previously observed, a supervisor's failure to follow 18 policy does not automatically default to discrimination. 19 In short, Plaintiff has not presented any evidence that, but for his disability, 20 Defendant would have retroactively converted his leave. Indeed, he neither alleges that 21 14 Moreover, even if a reasonable jury could conclude that Baker did not follow the newly 22 issued pandemic leave guidelines, there is nothing to suggest Baker "forced [Plaintiff] to 23 deplete his sick and annual leave" solely because of his disability.

(Doc. 56 at 8–9.) The Court recognizes that Baker may have violated policy by executing leave forms on 24 Plaintiff's behalf; however, those efforts could not reasonably be found to be discriminatory considering the alternative would have been that Plaintiff would have been 25 AWOL due to his own lapse in adherence to policy.

In other words, for better or worse, 26 Baker appears to have been attempting to help Plaintiff by submitting his leave slips on his behalf after Plaintiff abandoned even the most basic of his job responsibilities. 27 15 Plaintiff argues that an adverse inference should apply because Defendant allegedly 28 withheld OPM71s for the named comparators. (Doc. 56 at 13.)

The Court disagrees. The OPM71s for the named comparators are irrelevant for the reasons stated above. 1 Defendant's denial was based on discriminatory animus nor offers support that it was a 2 result, more broadly, of "thoughtlessness and indifference." Schmitt, 965 F.3d at 954 n.5. 3 Plaintiff's bare assertions, standing alone, are not sufficient to create a genuine dispute of 4 material fact to defeat summary judgment.

Anderson, 477 U.S. at 247–48. 5 Similarly, to the extent any such analysis is necessary, there is no evidence that 6 shows that Defendant refused to proactively offer Plaintiff telework or full time WSL 7 solely because of his disability.

On the contrary, Defendant had in place an accommodation 8 at Plaintiff's request that Plaintiff work a reduced schedule for medical reasons. Plaintiff 9 never withdrew that accommodation request by informing his employer he was now 10 medically cleared to work full time. Absent such information, even under a broad but-for 11 analysis, no reasonable jury could find that Defendant discriminated against Plaintiff when 12 it did not assume that Plaintiff could work a full 8-hour day and offer means to 13 accommodate that.16 The Court, therefore, finds that Defendant is entitled to summary 14 judgment as to Count One.

15 3. Pretext 16 Assuming *arguendo* that Plaintiff established his *prima facie* case, he nonetheless 17 fails to present any disputed facts showing that Defendant's actions were a pretext for 18 discrimination. To show pretext, Plaintiff must show that his employer's proffered 19 explanation was unworthy of credence or that unlawful discrimination more likely 20 motivated the employer.

Lyons v. England, 307 F.3d 1092, 1113 (9th Cir. 2002) (citing 21 Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)). The evidence must 22 be specific and substantial. Bradley

v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 23 1996) (citing Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994)). 24 Plaintiff argues that “Defendant unilaterally imposed a pre-pandemic leave 25 distribution formula... without individualized consideration” and “deviated from 26 established leave policies by charging Plaintiff with sick and annual leave for periods when 27 16 The Court notes that the fact that Plaintiff returned for one full day on March 24, 2021 28 does not change this analysis because the dates relevant to the alleged discrimination are September 6, 2020 to March 19, 2021.

1 it did not receive Plaintiff’s OPM 71s.” (Doc. 56 at 11.) This is neither specific nor 2 substantial evidence of pretext. 3 When Plaintiff inexplicably stopped submitting leave forms, Defendant replicated 4 a pattern of use of AL and SL that Plaintiff had personally requested before and after the 5 start of the pandemic.

The fact that Baker did not comply with policy when he submitted 6 these forms without Plaintiff’s signature is not evidence by itself of discrimination. As the 7 Court previously observed, the alternative would have been to designate Plaintiff as AWOL 8 making him subject to disciplinary action. 9 Accordingly, even if Plaintiff had come forth with evidence showing a genuine 10 dispute as to his prima facie case, he fails to show any proof of pretext that would survive 11 summary judgment.

Therefore, the Court’s finding that Defendant is entitled to summary 12 judgment as to Count One stands. 13 b. Count Two: Failure to Accommodate 14 The Court further finds that Defendant is entitled to summary judgment as to Count 15 Two of Plaintiff’s Amended Complaint. 16 1. Administrative Exhaustion 17 As a threshold matter, Plaintiff is required to exhaust his administrative remedies 18 before filing a Rehabilitation Act claim in federal court.

EEOC v. Farmer Bros. Co., 31 19 F.3d 891, 899 (9th Cir. 1994); Simpson v. DeJoy, No. CV-20-00495-PHX-DWL, 2021 WL 20 2416831, at *4 (D. Ariz. June 14, 2021) (citing Cherosky v. Henderson, 330 F.3d 1243, 21 1245 (9th Cir. 2003)).

To do so, he must notify an Equal Employment Opportunity 22 (“EEO”) counselor within 45 days of the alleged discriminatory conduct, and, if the matter 23 is not informally resolved, the employee may file a formal administrative complaint. 29 24 C.F.R. § 1614.105(a); Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001)). 25 “The jurisdictional scope of the plaintiff’s court action depends on the scope of the EEOC 26 charge and investigation.” Leong v. Potter, 347 F.3d 1117, 1122 (9th Cir.

2003). 27 Ordinarily, a court only has jurisdiction over claims that were presented to the EEOC. Id. 28 “However, the district court has jurisdiction over any charges of discrimination that are 1 ‘like or reasonably related to’ the allegations made before the EEOC, as well as charges 2 that are

within the scope of an EEOC investigation that reasonably could be expected to grow out of the allegations.” *Id.* (quoting *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir.

4 1990)). 5 The Court “construe[s] charges filed before the EEOC... liberally.” *Josephs v. Pac. Bell*, 443 F.3d 1050, 1061 (9th Cir. 2006). Nonetheless, “there is a limit to such judicial 7 tolerance when principles of notice and fair play are involved.” *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (citation and internal quotation marks 9 omitted).

Accordingly, “[t]he rule of liberal construction does not suggest that a plaintiff 10 sufficiently exhausts his administrative remedies under Title VII by merely mentioning the 11 word ‘discrimination’ in his or her EEOC administrative charge.” *Id.* at 637. Rather, the 12 relevant focus is on “the factual allegations made in the charge itself, describing the 13 discriminatory conduct about which a plaintiff is grieving.” *Id.* 14 In determining whether Plaintiff has exhausted allegations that he did not specify in 15 his administrative complaint, the Court considers: (1) the “alleged basis of the 16 discrimination;” (2) “dates of discriminatory acts specified in the charge;” (3) “perpetrators 17 of discrimination named in the charge;” and (4) “any locations at which discrimination is 18 alleged to have occurred.” *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100 (citation 19 omitted), abrogated on other grounds by *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541 20 (2019).

21 Here, Plaintiff did not exhaust his administrative remedies before filing Count Two 22 of his Amended Complaint. Plaintiff did not include any allegation that Defendant failed 23 to accommodate his disability in either his Informal EEO Complaint or his Formal EEO 24 Complaint. Instead, Plaintiff repeatedly noticed the following claim: 25 Whether the complainant, Mr. David Ruiz[,] was 26 discriminated against based on disability, Chronic Ulcerative Colitis [sic] (physical) when on 2 November 2022, Mr. 27 Dan Baker, Lodging Manager, 355 FSS/FSVL, did not 28 reinstate 127 hours of Annual Leave and 406 hours of Sick Leave.

1 (Doc. 51-26 at 12, 16.) Throughout the administrative remedies process, Plaintiff 2 specifically identified the challenged action as Defendant’s discrimination in refusing to 3 convert and reinstate his leave. 4 Moreover, Plaintiff’s unnoticed claim that Defendant did not accommodate his 5 disability is not like or reasonably related to his noticed discrimination claim.

The noticed 6 claim centers on different actions and a different timeline. Specifically, Defendant would 7 have only known that Plaintiff challenged its action refusing to retroactively convert his 8 leave in November 2022. This is nearly two years after Defendant allegedly failed to 9 accommodate Plaintiff’s disability in 2020 and 2021. Even construed liberally, nothing in 10 Plaintiff’s Informal EEO Complaint or his Formal EEO Complaint would have put 11 Defendant on notice that Plaintiff intended to assert a failure to accommodate claim.

To 12 find otherwise would run afoul of the principle of fair play. 13 Finally, even if Plaintiff's failure to accommodate claim were sufficiently related to 14 his discrimination claim, Plaintiff did not contact an EEO counselor until November 16, 2022. Any claims based on actions prior to approximately October 1, 2022 fall outside of 15 the 45-day reporting deadline.

Plaintiff argues that Defendant failed to accommodate him 16 after learning about his disability on January 6, 2020 and after being notified that Plaintiff 17 needed to take time off of work due to COVID-19 on April 9, 2020. (See Doc. 56 at 11, 18 16.) Both these triggering events occurred more than 45 days before Plaintiff ever 19 contacted an EEO counselor. "[A]bsent waiver, estoppel, or equitable tolling, 'failure to 20 comply with this regulation is... fatal to a federal employee's discrimination claim' in 21 federal court." *Kraus v. Presidio Trust Facilities Div./Residential Mgmt.*

Branch, 572 F.3d 22 1039, 1043 (9th Cir. 2009) (quoting *Lyons*, 307 F.3d at 1105); see also *Gipaya*, 345 F. 23 Supp. 3d at 1296 ("To the extent Plaintiff asserts claims for failure to reasonably 24 accommodate his disability based on these incidents, those fail to state plausible claims for 25 relief because Plaintiff fails to allege he contacted an EEO counselor within forty-five days 26 of the respective incidents.

Those claims must therefore be dismissed."). Plaintiff has not 27 argued waiver, estoppel, or equitable tolling. Therefore, allowing his claim to proceed 28 would improperly invalidate the regulatory reporting requirement. 1 For these reasons, the Court finds that Defendant is entitled to summary judgment 2 on Count Two because Plaintiff did not exhaust his claim that Defendant failed to 3 reasonably accommodate his disability.

4 2. Merits 5 In an abundance of caution, the Court will nonetheless assess the merits of 6 Plaintiff's failure to accommodate claim. 7 Plaintiff did not specify what accommodation he believes Defendant failed to 8 provide at Plaintiff's request.

The only denied accommodation that falls within the 45-day 9 period before Plaintiff contacted an EEO counselor was Defendant's refusal to convert and 10 reinstate his leave. That claim fails because an accommodation cannot be retroactive. 11 *Chandler v. DeJoy*, No. CV-20-00924-PHX-DWL, 2024 WL 359469, at *14 (D. Ariz. Jan. 12 31, 2024) ("Since reasonable accommodation is always prospective, an employer is not 13 required to excuse past misconduct even if it is the result of the individual's disability." 14 (quoting U.S. Equal Employment Opportunity Comm'n, No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with 15 Disabilities Act 36 (2002))); see also *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 65 (1st 16 Cir.

2020) ("Even though reasonableness necessarily depends on the circumstances of a 17 given case, some general principles apply. For instance, a requested accommodation that 18 simply excuses

past misconduct is unreasonable as a matter of law.

After all, the ADA does not oblige an employer to accommodate an employee's disability retroactively.”). However, Plaintiff seems to argue that Defendant should have offered him the accommodation of telework. If Plaintiff had noticed this claim—which he did not—and if it fell within the 45-day notice period—which it does not—Plaintiff still cannot show a genuine dispute of material fact exists that Defendant received adequate notice of his need to telework.

A failure to accommodate claim requires the plaintiff to show (1) he was a qualified individual, (2) the employer received adequate notice of the need for an accommodation, and (3) a reasonable accommodation was available that would not place an undue hardship on the employer's business. Snapp, 889 F.3d at 1095. “[N]otifying an employer of a need for an accommodation triggers a duty to engage in an ‘interactive process[.]’” Id. However, “[t]he employer's duty to provide an accommodation is not triggered unless the employee ‘provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.’” Marquez v. Glendale Union High Sch.

Dist., No. CV-16-03351-PHX- 6 JAT, 2018 WL 4899603, at *19 (D. Ariz. Oct. 9, 2018) (quoting Taylor v. Phoenixville 7 Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999)) (emphasis added). 8 For purposes of this analysis, the Court will presume that there is a genuine dispute 9 as to whether Plaintiff was a qualified individual. See supra Section IV(a)(1).

However, 10 Plaintiff has not shown a dispute regarding the second element of his claim. Although 11 Defendant knew about Plaintiff's disability, Plaintiff never told Defendant he needed any 12 accommodation other than to leave work early or not come to work at all. 13 Prior to the pandemic, Plaintiff submitted two doctor's notes that required Plaintiff 14 to leave work early.

There was no mention that Plaintiff sought to complete his hours from home, or even that he was medically able to do so. Then, from March 2020 to February 15 2021, Plaintiff submitted four notes from his doctor stating that Plaintiff needed to take 16 time off work due to the pandemic. Again, there was no mention that Plaintiff was 17 medically able to work from home, let alone any suggestion that Plaintiff desired the option 18 to telework.

The only accommodation that Plaintiff asked for was the accommodation he 19 repeatedly received—to leave work early or take an extended absence. 20 It was not until the note dated February 2, 2021 that Defendant could arguably have 21 received any notice of the need for a different accommodation. Plaintiff's doctor stated he 22 was “medical qualified – if restrictions [were] accommodated” including “allow[ing] 23 [Plaintiff] to work from home to avoid exposure to Covid.” (Doc.

51-10 at 46 (emphasis 24 added).) At this time, Defendant did not engage in discussions with Plaintiff about 25 teleworking, but shortly thereafter, on March 29, 2021, Plaintiff submitted another note 26 again stating he was not permitted to return to work at all until May 3, 2021. (Id. at 56.) 27 That note did not indicate Plaintiff would be able to work from home nor that he wanted 28 to.

Thus, Plaintiff fails to present sufficient disputed facts that create a triable issue 1) regarding the second element of his failure to accommodate claim. The Court need not 2|| assess the third element of whether Plaintiff's accommodation presents an undue hardship to Defendant.

Accordingly, Defendant is entitled to summary judgment as to Count Two. 4 V. Conclusion > For the foregoing reasons, the Court finds that summary judgment in favor of 6 Defendant on Plaintiff's Amended Complaint is appropriate.

The pleadings and supporting 7 documents, even viewed in the light most favorable to Plaintiff, "show[] that there is no 8 genuine issue as to any material fact and [Defendant] is entitled to judgment as a matter of? law." Celotex, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(a), (c)). 10 Accordingly, i IT IS ORDERED: (1) Defendant's Motion for Summary Judgment is GRANTED.

(Doc. 50.) 13 (2) Plaintiff's Motion for Partial Summary Judgment is DENIED. (Doc. 52.) (3) | The Clerk of Court shall enter judgment in favor of Defendant and close the Is file in this matter. 16 Dated this 31st day of March, 2026. 17 18 n ~ ☐☐ 20 United States District Judge 21 22 23 24 25 26 27 28