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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRANDON LAU, Plaintiff - Appellant, v. MARKWAYNE MULLIN, Secretary of Department of Homeland Security, Defendant - Appellee.	No. 25-1937 D.C. No. 3:21-cv-04756-TLT MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Trina L. Thompson, District Judge, Presiding

Submitted June 26, 2026**

Before: GOULD, FRIEDLAND, and MENDOZA, JR., Circuit Judges.

Plaintiff Brandon Lau worked for United States Customs and Border Protection ("CBP"), an agency within the U.S. Department of Homeland Security, from 2014 until his resignation in 2016. During his mandatory federal law

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

enforcement training, Lau suffered shin splints on his left leg and a cyst on his right foot. Lau never completed the mandatory training, and, over the following two years, spent the majority of his employment with CBP either on leave without pay, light duty status, or absent from work. Lau later sued CBP. As relevant here, Lau alleged that the agency discriminated and retaliated against him for having a disability, thereby violating Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791.[1] The district court granted the agency's motion for summary judgment, denied Lau's cross-motion for summary judgment, and denied Lau's motion for discovery sanctions. Proceeding pro se, Lau now appeals those rulings. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We "review[] a district court's grant of summary judgment of a Rehabilitation Act claim *de novo*," *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004), and a district court's decision regarding discovery sanctions for abuse of discretion, *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 766 (9th Cir. 2015).

[1] After the district court granted the agency's partial motion to dismiss Lau's third amended complaint, the parties stipulated that only Lau's disability discrimination and retaliation claims, which include his failure-to-accommodate claim, were at issue in the case. Because the district court did not rule on Lau's hostile work environment or constructive discharge claims, and because Lau does not argue that the district court erred in declining to do so, we do not reach those additional claims.

1. By failing to raise the argument in his opening brief, Lau forfeited any challenge to the district court's conclusion that his claims arising from discrete acts before February 6, 2015, are time-barred. *See Vasquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013) ("[W]e do not consider issues raised for the first time in reply briefs.").

2. We apply the *McDonnell Douglas* burden-shifting framework to Rehabilitation Act discrimination claims. *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1174–76 (9th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). "Under this framework, a plaintiff must make a prima facie case establishing that (1) he is a person with a disability; (2) otherwise qualified for employment; and (3) suffered discrimination because of his disability." *Mattioda v. Nelson*, 98 F.4th 1164, 1178 (9th Cir. 2024). After a plaintiff establishes a prima facie case, the burden shifts to the employer to provide a non-discriminatory reason for the adverse action. *Opara v. Yellen*, 57 F.4th 709, 723 (9th Cir. 2023). If the employer meets that burden, then the employee must show that the employer's reason is pretextual. *Id.*

Many of the actions Lau challenges do not rise to the level of harm necessary to support a discrimination claim. *Cf. Muldrow v. City of St. Louis*, 601 U.S. 346, 354–55 (2024) ("To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of

employment."); *Mattioda*, 98 F.4th at 1174 (recognizing the application of Title VII standards to the Rehabilitation Act). That includes CBP's requests for medical documentation during Lau's extended absence, which were expressly authorized by regulation, 20 C.F.R. § 10.506; CBP's provisional light duty job offer, which preserved Lau's title and pay in full, and the minor scheduling adjustment based on companywide policy that affected only the timing of Lau's break periods. Further, neither administrative mistakes in processing Lau's disability pay forms, which were subsequently remedied, nor requiring Lau to return to work after his physicians cleared him for modified duty, constitute adverse actions sufficient to support a claim of discrimination. *See Muldrow*, 601 U.S. at 354 ("The words 'discriminate against,' we have explained, refer to 'differences in treatment that injure' employees." (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 681 (2020))); 20 C.F.R. § 10.500(b) (stating that federal employees are required to return to work when medically able).

Although CBP's twice denying Lau a promotion could be sufficient to support a claim, *Lyons v. England*, 307 F.3d 1092, 1113 (9th Cir. 2002) (recognizing that the denial of a promotion constitutes an adverse action), Lau has nonetheless failed to establish that the denial of a promotion was "because of his disability," *Mattioda*, 98 F.4th at 1178. CBP provided legitimate, non-discriminatory reasons for withholding a promotion: Lau's failure to complete

mandatory law-enforcement training, his extended period on leave without pay, and his performance of little work at his employment level. *Opara*, 57 F.4th at 723. Lau conceded in the district court that he proffered no direct evidence to demonstrate a genuine issue of material fact as to CBP's legitimate reason for denying a promotion.

3. Lau also failed to establish discrimination based on a failure to accommodate because the record evidence demonstrates that CBP accommodated Lau's medical restrictions. *See U.S. E.E.O.C. v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010) (recognizing that accommodations must be "reasonable and effective"). Lau's failure-to-accommodate claim focuses on the window of time between March 12, 2015, and March 26, 2015, during which he worked two half-days. During that time, CBP assigned Lau duties consistent with his then-operative medical restrictions and sent him home early upon complaints of pain. Lau was never ordered to work in violation of medical restrictions. CBP's provisional light-duty offer provided purely sedentary work and did not affect Lau's title or pay, and his own treating physician ultimately confirmed light duty was appropriate for his restrictions, so that offer does not reflect a failure to accommodate.

4. Lau's retaliation claim fares no better. To establish a prima facie retaliation claim under the Rehabilitation Act, Lau must show: (1) that he engaged

in protected activity; (2) that he suffered an adverse employment action; and (3) a causal nexus between the activity and the action. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1034–35 (9th Cir. 2006). Lau argues that CBP retaliated against him after he filed requests for disability accommodations and an EEOC report. *See Coons*, 383 F.3d at 887 (explaining that a request for accommodation is a protected activity); *Ray v. Henderson*, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000) ("[F]iling a complaint with the EEOC is a protected activity."). For retaliation purposes, an adverse action must be "material" and "significant" such that it would dissuade a reasonable worker from making or supporting a charge of discrimination. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) ("We speak of *material* adversity because we believe it is important to separate significant from trivial harms."). As with the discrimination claim, CBP's provisional light-duty job offer and requirement that Lau return to work do not constitute materially adverse actions. *See id.*

Although the denial of a promotion could support a retaliation claim, *Lyons*, 307 F.3d at 1113 (recognizing a denial of a promotion as an adverse action), as discussed above, CBP explained that the denials of the promotions were not caused by Lau's protected activity but rather by the fact that Lau was not qualified for advancement. The only specific piece of evidence Lau cites to demonstrate his qualification is a one-page investigative report cover sheet that does not discuss his

specific circumstance. Because Lau cannot point to admissible evidence demonstrating that he was otherwise qualified for the promotions, or that CBP's proffered reason was untrue, he cannot survive summary judgment. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (explaining that an employer is "entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision").

5. The district court did not err in denying Lau's motion for discovery sanctions. Lau argues that the Government "altered, destroyed, and omitted . . . subpoenaed evidence" from Lau's subsequent employer, the San Francisco Parks and Recreation Department ("SFPRD"). But Lau points to no evidence indicating destruction, alteration, or removal of any document by CBP. Rather, he identifies discrepancies between documents CBP received from SFPRD and the documents that SFPRD provided to Lau. The district court reasonably concluded that any discrepancies are a result of SFPRD's actions, rather than of any action by CBP. Accordingly, the district court did not abuse its discretion in denying Lau's request for sanctions. *See, e.g.*, *Ryan*, 786 F.3d at 766 (stating that the party seeking sanctions for "spoliation of evidence" has the burden of establishing that the other party "destroyed documents and had some notice that the documents were potentially relevant to the litigation before they were destroyed" (citation modified)).

AFFIRMED.