

I

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the plaintiff on the summary judgment record, are as follows.

Brent Lockhart was hired by the Norton, Virginia, office of the federal Mine Safety and Health Administration (“MSHA”) on May 24, 1998, as an Industrial Hygienist, pay grade GS-9. Less than a year later, on April 1, 1999, while inspecting an underground coal mine as part of his duties, Lockhart injured his knee, requiring ACL surgery. His resulting impairment prevented him from inspecting underground coal mines and MSHA created a new position for him, entitled Industrial Hygienist/Special Investigator, allowing duties consistent with his physical limitations. The new position was at pay grade GS-11, but unlike the former job, did not have the potential for promotion to a grade GS-12.¹

Lockhart applied for disability retirement but his request was denied. He accepted the new position on November 20, 2000, but on December 20, 2000, he requested that he be allowed to continue in a Ph.D. program in toxicology at East Tennessee State University in Johnson City, Tennessee. In a letter to his supervisor,

¹ In 2000, following his injury, Lockhart had been promoted in his original job title to GS-11.

William H. Strength, Lockhart asked that he be allowed to change his work schedule in one of the following ways:

- 1). CO-OP Program - Work and attend classes during alternate semesters/summer
- 2). Temporary Leave of Absence - Mid-January through April
- 3). Alternate Work Schedule - Working 1 or 2 days per week.

(Pl.'s Resp. to Def.'s Mot. Summ. J. Ex. E.) Strength denied the request in writing on January 4, 2001, on the ground that Lockhart's position required "a full-time employee." (*Id.* Ex. F.) Strength also met with Lockhart that day and suggested that other jobs with MSHA with a promotion potential beyond GS-11 might be available in other locations, however, Lockhart did not wish to relocate because of his wife's current job. Lockhart did not return to regular work and his employment with MSHA was terminated effective October 5, 2001.

After exhausting his administrative remedies, Lockhart filed the present action pursuant to the Rehabilitation Act of 1973 ("Rehabilitation Act" or "Act"), 29 U.S.C.A. §§ 701-7961 (West 1999 & Supp. 2004). He contends that he is a qualified person with a disability and that MSHA failed to afford him a reasonable accommodation for his disability when the agency denied his request for an alternate

work schedule to allow him to pursue further education.² After discovery, the defendant moved for summary judgment, arguing that the plaintiff's impairment is not a covered disability and that the agency satisfied its duty to reasonably accommodate him. The motion for summary judgment has been briefed and argued and is ripe for decision.

II

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56. In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

² In his Complaint (Count II) Lockhart also asserts that the agency’s refusal to grant his request for medical leave on February 1, 2001, constituted a violation of the Act. The defendant asserts that this claim has not been administratively exhausted and should be dismissed without prejudice. Lockhart has not contested this assertion in his summary judgment response and does not rely on Count II. Accordingly, I will dismiss Count II without prejudice.

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327. It is “the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.” *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotation marks omitted).

The Rehabilitation Act affords federal employees protection from discrimination based on disability. *See* 29 U.S.C.A. §§ 791(b), 794(a). The Act “imposes a duty upon federal agencies to ‘make reasonable accommodation’ to the limitations of their handicapped employees unless they can show that to do so would impose ‘undue hardship’ on their operations.” *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) (citations omitted).³

³ The liability of a federal agency under the Rehabilitation Act is generally measured by the standards imposed on private employers by the Americans with Disabilities Act (“ADA”), 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 2004). *See Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

The parties have spent much of their written and oral argument on the preliminary question of whether Lockhart is a qualified person with a disability and thus entitled to protection under the Act. For simplicity's sake, however, I will assume, without deciding, that Lockhart is entitled to the statutory protection because of his medical condition, and reach the merits of his claim. In that regard, Lockhart first asserts that MSHA failed to comply with the Act when it did not engage in an interactive process to determine what, if any, reasonable accommodation he needed.

The applicable ADA regulations provide that “it may be necessary for the covered entity to initiate an informal, interactive process” in order to determine a reasonable accommodation for an employee with a disability. 29 C.F.R. § 1630.2(o)(3)(2004). This process is flexible, and “[no] hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purposes of either avoiding or inflicting liability.” *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). Instead of enforcing rigid guidelines regarding the interactive process, the goal of a court must be to look for evidence of a “failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary.” *Id.* In short, the emphasis must be on signs of bad faith, such as obstruction, delay, or failure to respond to interactive discussions. *Id.* Based on this

standard, an employer is not liable where it made “reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed.” *Id.* at 1137.

In his brief, the plaintiff cites *Woodman v. Runyon*, 132 F.3d 1330, 1345 (10th Cir. 1997), which held that in order for an employer to meet its obligation under the Act it “may not merely speculate that a suggested accommodation is not feasible.” Rather, the employer has a duty to “gather sufficient information” when an accommodation is required to enable the employee to perform the essential functions of the job. *Id.* (quoting *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993)). Of course, the key to gathering sufficient information is the determination of whether the proposed accommodation is necessary to enable the employee to perform the job. In the present case, the employee’s proposal was an alternative work schedule that would allow him to pursue a Ph.D.—an endeavor not necessary for his current or former job.

The facts in this case show that following his injury, MSHA created a new position for the plaintiff consistent with his physical limitations. The plaintiff then requested by the letter to his supervisor that he be allowed an alternative work schedule. Approximately two weeks later, the supervisor responded in writing, denying the request on the ground that the plaintiff’s position required a full-time

employee. In addition, the supervisor met with Lockhart that day and suggested that other jobs with MSHA with a promotion potential beyond GS-11 might be available in other locations. There is no evidence that MSHA acted in bad faith by obstructing, delaying, or failing to respond in these interactive discussions.

Moreover, even if an employer does not live up to its obligation to reasonably explore possible accommodations, “a plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process.” *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000); *see also Walter v. United Airlines, Inc.*, No. 99-2622, 2000 WL 1587489, at *4 (4th Cir. Oct. 25, 2000) (unpublished). Instead of merely asserting an employer’s failure in the interactive process, an employee must show that the breakdown of the process resulted in the failure to provide a reasonable accommodation. *Rehling*, 207 F.3d at 1016. Thus, MSHA’s alleged failings in the interactive process are of no consequence if it reasonably accommodated Lockhart’s disability.

The standard used to determine whether an accommodation is reasonable is well-established. The ADA provides that a reasonable accommodation may include “job restructuring” and “part-time or modified work schedules.” 42 U.S.C.A. § 12111(9)(B). An accommodation is reasonable “unless [the employer] can demonstrate that the accommodation would impose an undue hardship.” 42 U.S.C.A.

§ 12112(b)(5)(A). The burden of demonstrating that the essential functions of the job could be performed with a reasonable accommodation rests with the plaintiff, *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994), as does the burden of showing that such an accommodation “seems reasonable on its face.” *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). If such burdens are met by the plaintiff, the employer may show that the requested accommodation imposes an undue hardship. See 42 U.S.C.A. § 12112(b)(5)(A); *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-86 (11th Cir. 1997).

The Fourth Circuit has explained that the reasonable accommodation provision does not require “an employer to wait an indefinite period for an accommodation to achieve its intended effect.” *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995). Rather, a reasonable accommodation should be “construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.” *Id.* Furthermore, while additional job training might be a reasonable accommodation in certain circumstances, such an analysis is necessary only when the additional job training “would enable the employee to do the particular job.” *Woodman*, 132 F.3d at 1340.

The issue of whether an employee-proposed part-time schedule constitutes a reasonable accommodation has been addressed by several courts. In *Terrell v. USAir*,

132 F.3d 621, 626 (11th Cir. 1998), the court noted that part-time work is not necessarily a reasonable accommodation, particularly where the part-time position would have to be created. *See also Lamb v. Qualex, Inc.* 33 Fed.Appx. 49, 59 (4th Cir. 2002) (unpublished) (holding that “[w]here . . . an employer has no part-time jobs available, a request for part-time employment is not a reasonable one”).

Having thoroughly reviewed all the evidence in the summary judgment record and viewing all inferences in the light most favorable to the non-movant, I find that even if MSHA could have done more in its interactive discussions with the plaintiff, it is of no consequence because the plaintiff has not shown that any failings by MSHA in the interactive process prevented him from receiving a reasonable accommodation. In the present case, the plaintiff has failed to identify a reasonable accommodation. He merely argues that he should have been granted an alternative schedule so he could pursue a Ph.D. program. This does not carry his burden. The plaintiff’s proposed “accommodation” was not required to enable him to perform the essential functions of his job. Indeed, MSHA had already reasonably accommodated the plaintiff by creating a job within his physical restrictions,⁴ and the plaintiff’s

⁴ In *Guice-Mills v. Derwinski*, 967 F.2d 794, 798 (2nd Cir. 1992), the court stated “[w]hen an employer offers an employee an alternative position that does not require a significant reduction in pay and benefits, that offer is a ‘reasonable accommodation’ virtually as a matter of law.”

proposal would not help him to do his former job. While a reasonable accommodation may sometimes include part-time or modified work schedules or additional training, the sort of indefinite leave that the plaintiff sought was not reasonable, particularly because it did not relate to his disability. In short, there is no evidence that would allow a jury to find that the plaintiff was refused a reasonable accommodation, or that any failings on the part of the defendant prevented him from receiving a reasonable accommodation.

IV

For the foregoing reasons, I find that the plaintiff has failed to create a genuine issue of material fact as to whether he was refused a reasonable accommodation, or whether any failings on the part of the defendant prevented him from receiving a reasonable accommodation. Accordingly, summary judgment in favor of the defendant must be granted.

DATED: December 9, 2004

/s/ JAMES P. JONES
Chief United States District Judge