

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
10

11 TIMOTHY SHEPARD,) 3:12-cv-00554-HDM-VPC
12 Plaintiff,)
13 vs.) ORDER
14)
15 ERIC K. SHINSEKI, SECRETARY,)
16 DEPARTMENT OF VETERAN AFFAIRS,)
Defendant.)
_____)

17 Before the court are the plaintiff's motion for partial
18 summary judgment as to liability (#64) and the defendant's motion
19 for summary judgment (#67, #68). The defendant has opposed the
20 plaintiff's motion for partial summary judgment (#67, #68) and the
21 plaintiff has replied (#72). The plaintiff has opposed the
22 defendant's motion for summary judgment (#73) and the defendant has
23 replied (#79).

24 Plaintiff Shepard was an employee at the Department of Veteran
25 Affairs ("VA") in Reno, Nevada, and worked as a Veteran Service
26 Representative ("VSR") Public Contact. (See First Am. Complaint
27
28

1 1.¹) In 2010, the leadership at the Reno Veterans Affairs Regional
2 Office made the decision to move the Public Contact VSR team to a
3 different VSR team, the Predetermination team. (See Def. Mot. 3-
4 4.²) This decision was based upon an "adjust[ment to] the workload
5 of certain jobs so that the agency could run more efficiently and
6 save money." (Def. Mot. 3.) Plaintiff Shepard suffers from the
7 disabilities of dyslexia and dysgraphia, and alleges that while he
8 was able to perform effectively in his position on the VSR Public
9 Contact team despite his disabilities, his disabilities made it
10 impossible for him to carry out his job responsibilities on the VSR
11 Predetermination team, even with accommodations. (See First Am.
12 Compl. 1-2; P. Mot. 6.) Plaintiff Shepard notified the VA of his
13 disabilities when he was informed of the impending transfer. (See
14 First Am. Compl. 5.) Plaintiff Shepard repeatedly requested that
15 he be allowed to remain on the VSR Public Contact team. (See
16 First. Am. Compl. 3-6; P. Mot. 3; D. Mot. 6.) The defendant denied
17 these requests, but asserts that the VA provided numerous other
18 reasonable accommodations to the plaintiff. (See Def. Mot. 6-7.)
19 Ultimately, the VA offered the plaintiff a position back on the
20 Public Contact team, but as a Claims Assistant/Intake Specialist at
21 lower pay rate from his job as a VSR. (See Def. Mot. 7.) The
22 plaintiff accepted this position, but then resigned prior to
23 beginning his new job. (*Id.*) The plaintiff alleges that he was

24
25 ¹ For all documents in the record to which the court cites, page
26 numbers refer to ECF page numbers, rather than to any page numbers on the
documents themselves.

27 ² Because the defendant filed a single document to serve as both its
28 motion for summary judgment and its opposition to the plaintiff's motion for
partial summary judgment (see ECF Docs. # 67, #68), the court will
hereinafter cite to both the defendant's motion and the defendant's
opposition to the plaintiff's motion as "Def. Mot."

1 "forced" to "quit his employment" due to discriminatory treatment.
2 (See First Am. Compl. 3-4.) Prior to his resignation, and during
3 the course of the events already enumerated, the plaintiff
4 initiated various administrative claims at the VA, which he pursued
5 to varying degrees. (See Def. Mot. Dismiss 2-3; Def. Reply Mot.
6 Dismiss Maraian Dec. 2.)

7 On October 15, 2012, the Plaintiff filed suit under the
8 Rehabilitation Act, alleging disability discrimination based upon
9 lack of a reasonable accommodation. (See Compl. 3-6.) On July 3,
10 2012, the plaintiff filed an amended complaint that added a
11 retaliation claim under the Rehabilitation Act. (See First. Am.
12 Compl. 7-8).

13 On August 19, 2013, the defendants filed a motion to dismiss
14 (#53). On February 19, the court granted the motion in part and
15 denied it in part, dismissing various claims, grounds of claims,
16 and defendants from the action. (See ECF Doc. #71) Following the
17 court's order regarding the defendant's motion to dismiss, only one
18 claim remains before this court: that the VA failed to provide
19 plaintiff Shepard with a reasonable accommodation from November 4,
20 2010 to July 18, 2012, forcing him to quit his job. (*Id.*) The
21 court also dismissed defendants Russell and Bittler from the suit,
22 so that only defendant Shinseki remains. (*Id.*)

23 On December 11, 2013, the plaintiff filed a motion for partial
24 summary judgment on liability (#64), which is presently before the
25 court. On January 6, 2014, the defendant filed a motion for
26 summary judgment and opposition to the plaintiff's motion for
27 summary judgment (#67, 68). The defendant's motion for summary
28 judgment is also before the court. The plaintiff replied to the

1 defendant's opposition to his motion for summary judgment (#72) and
2 opposed the defendant's motion for summary judgment (#73) on
3 February 26, 2014. The defendant replied to the plaintiff's
4 opposition to the defendant's motion for summary judgment (#79) on
5 April 17, 2014.

6 **STANDARD:**

7 Summary judgment shall be granted "if the movant shows that
8 there is no genuine issue as to any material fact and the movant is
9 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
10 The burden of demonstrating the absence of a genuine issue of
11 material fact lies with the moving party, and for this purpose, the
12 material lodged by the moving party must be viewed in the light
13 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*
14 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141
15 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one
16 that affects the outcome of the litigation and requires a trial to
17 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
18 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
19 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

20 Once the moving party presents evidence that would call for
21 judgment as a matter of law at trial if left uncontroverted, the
22 respondent must show by specific facts the existence of a genuine
23 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
24 250 (1986). "[T]here is no issue for trial unless there is
25 sufficient evidence favoring the nonmoving party for a jury to
26 return a verdict for that party. If the evidence is merely
27 colorable, or is not significantly probative, summary judgment may
28 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla

1 of evidence will not do, for a jury is permitted to draw only those
2 inferences of which the evidence is reasonably susceptible; it may
3 not resort to speculation." *British Airways Board v. Boeing Co.*,
4 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
5 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event
6 the trial court concludes that the scintilla of evidence presented
7 supporting a position is insufficient to allow a reasonable juror
8 to conclude that the position more likely than not is true, the
9 court remains free . . . to grant summary judgment."). Moreover,
10 "[i]f the factual context makes the non-moving party's claim of a
11 disputed fact implausible, then that party must come forward with
12 more persuasive evidence than otherwise would be necessary to show
13 there is a genuine issue for trial." *Blue Ridge Insurance Co. v.*
14 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
15 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*,
16 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that
17 are unsupported by factual data cannot defeat a motion for summary
18 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

19 If the parties file cross-motions for summary judgment, the
20 court must consider each party's motion separately and determine
21 whether that party is entitled to a judgment under Rule 56. In
22 making these determinations, the court must evaluate the evidence
23 offered in support of each cross-motion. *Fair Housing Council of*
24 *Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-37
25 (9th Cir. 2001).

1 **ANALYSIS:**

2 **I. Consideration of Exhibits Attached to Plaintiff's Motion**

3 The defendant argues in opposition to the plaintiff's motion
4 for partial summary judgment that several of the exhibits offered
5 by the plaintiff in his motion "have not been authenticated, and .
6 . . contain or constitute hearsay." (Def. Mot. 20.) Specifically,
7 the defendant objects to plaintiff's Exhibits 2, 4 (last two
8 pages), 6, 7, 8,³ and 11. The defendant claims that because these
9 exhibits are not properly authenticated, they are inadmissible and
10 should be disregarded by the court. (*Id.*) The defendant cites
11 Fed.R.Evid. 801 (defining hearsay) and 802 (precluding admission of
12 hearsay), as well as to *Hal Roach Studios, Inc. v. Richard Feiner &*
13 *Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989), for the proposition
14 that "[i]t is well established that unauthenticated documents
15 cannot be considered on a motion for summary judgment." (*Id.*) The
16 defendant also argues that the plaintiff's declaration (P. Mot. Ex.
17 12) "is inadmissible because it does not comply with 28 U.S.C. §
18 1746, which requires that a declaration be signed." (Def. Mot.
19 20.) The court addresses this evidentiary issue before addressing
20 the other arguments in the cross-motions for summary judgment, as
21 it has a bearing on which evidence is available to the court in
22 ruling on the motions.

23 "It is well settled that only admissible evidence may be
24 considered by the trial court in ruling on a motion for summary
25 judgment." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179,
26 1181-82 (9th Cir. 1988). However, Ninth Circuit case law much more

27 ³ The defendant claims that the "[p]laintiff has included two Exhibit
28 8s and Defendant[s] object[s] to both sets," but the court has only been
able to locate one plaintiff's Exhibit 8. (Def. Mot. 20.)

1 recent than *Hal Roach* makes clear that "we do not focus on the
2 admissibility of the evidence's form. We instead focus on the
3 admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032,
4 1036 (9th Cir. 2003). The court looks not at whether the evidence
5 is currently presented in an admissible form, but instead at
6 whether it "'could be presented in an admissible form at trial.'" *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 846
7 (quoting *Fraser*, 342 F.3d at 1037; citing *U.S. Bancorp v. Fraser*,
8 541 U.S. 937 (2004)). Evidence presented at the motion for summary
9 judgment stage can contain hearsay, for example, yet still be
10 appropriately considered by the court if it can be presented at
11 trial in an admissible format (for example, with testimony). See,
12 e.g., *Fraser*, 343 F.3d at 1037; *Fonseca*, 374 F.3d at 846.
13 Moreover, the multiple means to authentication permitted by the
14 Fed.R.Evid. 901(b) and 902 may also be considered by the court.
15 See *Orr v. Bank of America*, 285 F.3d 764, 777-778, 777 n.22-23, 778
16 n.24 (9th Cir. 1997).

17
18 While it is possible that some or all of the plaintiff's
19 Exhibits 2, 4, 6, 7, 8, and 11 may be appropriately excluded from
20 consideration at this juncture based on inadmissibility at the
21 trial stage or lack of authentication, the defendants have not
22 articulated which exhibits should be excluded for which reasons.
23 (See Def. Mot. 20.) The exhibits to which the defendant objects
24 include letters, emails, excerpts from manuals and job
25 descriptions, and deposition testimony, all different types of
26 evidence that may be authenticated in different ways and to which
27 different rules of evidence and different case law may apply. See,
28 e.g., *Orr*, 285 F.3d at 773-79; P. Mot. Ex. 2, 4, 6, 7, 8, 11.

1 However, the defendant has articulated no standards this court
2 should employ in determining the admissibility of the exhibits to
3 which he objects, and has not offered arguments as to why any
4 individual exhibit should be excluded. (See Def. Mot. 20.) The
5 defendant must articulate appropriate objections to evidence it
6 seeks to exclude. The court will therefore consider the
7 plaintiff's exhibits 2, 4, 6, 7, 8, and 11 in making its ruling.

8 However, the defendant has appropriately objected to the
9 consideration of the plaintiff's declaration. The defendant is
10 correct that the plaintiff's declaration does not comply with 28
11 U.S.C. § 1746, which requires that an unsworn declaration, if
12 executed within the United States, must include language, "in
13 substantially the following form:" "I declare . . . under penalty
14 of perjury that the foregoing is true and correct. Executed on
15 (date). (Signature)." 28 U.S.C § 1756(2). While a declaration
16 need only "'substantially' comply with the statute's suggested
17 language" (*Commodity Futures Trading Com'n v. Topworth Intern.,*
18 *Ltd.*, 205 F.3d 1107 (9th Cir. 1999)), the plaintiff's declaration
19 has no signature at all and no language stating that the
20 declaration is made under penalty of perjury (see P. Mot. Ex. 12).
21 Accordingly, the court will not consider the plaintiff's
22 declaration in making its determination. See *Tearfie v. Whittlesea*
23 *Blue Cab Co.*, 176 F.3d 485, at *1 n.4 (9th Cir. 1999) (in reviewing
24 a grant of summary judgment *de novo*, the court "d[id] not consider
25 the four statements and one affidavit submitted . . . because they
26 were not made under the penalty of perjury as required by 28 U.S.C.
27 § 1746").

1 **II. Proper Format of Defendant's Motion and Opposition**

2 The plaintiff objects to the defendant's filing of his
3 opposition to the plaintiff's motion for partial summary judgment
4 and his motion for summary judgment as a single document. (See P.
5 Opp'n 2, 15; D. Reply 3-4.) The plaintiff claims that "no such
6 procedure is allowed by law." (P. Opp'n 2.)

7 The plaintiff specifically stipulated, as part of a joint
8 stipulation for an extension of time, that the "[d]efendants
9 anticipate filing their Motion for Summary Judgment and their
10 Opposition to Plaintiff's Motion for Summary Judgment as one
11 document." (ECF Doc. #66; see also P. Reply. 3-4.) The plaintiff
12 therefore had notice that the defendant would be filing in this
13 manner, and agreed to such an approach in advance of his filing.

14 The court therefore finds no defect in the defendant's filing
15 of both his motion for summary judgment and his opposition to the
16 plaintiff's motion for partial summary judgment as a single
17 document.

18 **III. Disability Discrimination Based on Reasonable Accommodation**

19 Following the court's order (#71) granting in part and denying
20 in part the defendant's motion to dismiss (#53), the plaintiff's
21 only remaining claim is for disability discrimination under § 501
22 of the Rehabilitation Act, which is codified as 29 U.S.C. § 791,
23 based upon the VA's alleged failure to make a reasonable
24 accommodation for his disabilities, forcing him to resign. (See
25 First. Am. Compl. 3; ECF Doc. # 71 at 26-27.)

26 A distinction exists between § 501 of the Rehabilitation Act
27 of 1973, 29 U.S.C. § 791 . . . and § 504, 29 U.S.C.A. § 794 .
28 . . Both prohibit discrimination on the basis of handicap.
Section 791(b) obligates federal employers to provide
reasonable accommodation for the handicapped and to develop

1 and implement affirmative action plans for handicapped
2 employees . . . Section 794, in contrast, prohibits the
3 exclusion of "otherwise qualified individuals" from government
4 activities or programs receiving federal funds "solely by
5 reason of their handicap." *Mantolete v. Bolger*, 767 F.2d 1416,
6 1421 (9th Cir.1985).

7 *Johnston v. Horne*, 875 F.2d 1415, 1418 (9th Cir. 1989), overruled
8 on other grounds by *Irwin v. Department of Veterans Affairs*, 498
9 U.S. 89 (1990). Section 501 requires that the federal government
10 serve as a "model employer" (29 U.S.C. § 791), and the duty imposed
11 on the federal government and its agencies by § 501 is "the
12 affirmative obligation to accommodate," a mandate that "goes beyond
13 mere nondiscrimination" (*Buckingham v. United States*, 998 F.2d 735,
14 739 (9th Cir. 1993) (internal quotation marks and citations
15 removed)). Because plaintiff Shepard was a federal employee at the
16 VA, he has a private cause of action under § 501, but not under §
17 504, of the Rehabilitation Act. *Johnston*, 875 F.2d at 1418.

18 "[T]he same standards are used to determine whether unlawful
19 discrimination has occurred" under both the Rehabilitation Act and
20 the Americans with Disabilities Act ("ADA"). *Livingston v. Fred
21 Meyer Stores, Inc.*, 388 F. App'x 738, 741 (9th Cir. 2010) (citing
22 *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th Cir.2000) ("analyzing a
23 Rehabilitation Act accommodation claim under the same standard as
24 the ADA")). The federal regulations regarding the Rehabilitation
25 Act specifically state that "the standards used to determine
26 whether section 501 of the Rehabilitation Act . . . has been
27 violated . . . shall be the standards applied under . . . the
28 Americans with Disabilities Act." 29 C.F.R. § 1614.203. These
standards are set forth in the ADA regulations at 29 C.F.R. § 1630.
Id.; 29 C.F.R. § 1630.

1 Under 29 C.F.R § 1630.2(o)(4), a covered entity "is required,
2 absent undue hardship, to provide a reasonable accommodation to an
3 otherwise qualified individual." There are therefore three
4 elements to reasonable accommodation under § 501 of the
5 Rehabilitation Act: "(1) plaintiff must be a "qualified"
6 handicapped individual; (2) the agency must make "reasonable
7 accommodation" to the handicap; and (3) the accommodation need not
8 be made if it would impose an "undue hardship.""⁴ *Bateman v. U.S.*
9 *Postal Serv.*, 32 F. App'x 915, 917 (9th Cir. 2002) (quoting *Fuller*
10 *v. Frank*, 916 F.2d 558, 560 (9th Cir.1990)); see also *Pickens v.*
11 *Astrue*, 252 F. App'x 795, 796 (9th Cir. 2007).

12 The plaintiff bears the burden of showing that he is qualified
13 to perform the essential functions of the job, and the employer
14 bears the burden of proving inability to accommodate. *Mantolete*,
15 767 F.2d at 423-24. "Once the employer presents credible evidence
16 that accommodation would not reasonably be possible, the plaintiff
17 has the burden of coming forward with evidence concerning her
18 individual capabilities and suggestions for possible accommodations
19 to rebut the employer's evidence." *Id.* at 424.

20 The plaintiff, in his motion, has not articulated a clear test
21 or standard for analyzing his claims. (See generally P. Mot.) The
22

23 ⁴ *Bateman* and *Fuller* discuss the content of the former 29 C.F.R. §
24 1614.203, which was the relevant regulation promulgated under § 501 of the
25 Rehabilitation Act at the time of those decisions. "In 2002, 29 C.F.R. §
26 1614.203 was amended to simply provide that the rehabilitation act uses the
27 standards for employment discrimination provided by the ADA." *Scott v. City*
28 *of Yuba City*, No. CIV. S-08-873 LKK/GGH, 2009 WL 4895549, at *11 n. 14 (E.D.
Cal. Dec. 11, 2009). However, the explanation of reasonable accommodation
under the former 29 C.F.R. § 1614.203 contained the same three elements that
the current explanation of reasonable accommodation under 29 C.F.R. §
1630.02 contains, so case law involving the former regulatory language is
still applicable to the case at hand. See *Bateman*, 32 F. App'x 915, 916,
for a discussion of the former text of 29 C.F.R. § 1614.203.

1 defendant, on the other hand, has articulated a test that is used
2 to analyze certain disability discrimination claims, but is not the
3 correct test for disability discrimination claims under the
4 Rehabilitation Act based on lack of reasonable accommodation. See
5 D. Mot. 8; *Bateman*, 32 Fed.Appx. at 916-17. In particular, the
6 plaintiff need not, as the defendant argues, show that an adverse
7 employment decision was taken against him. *Id.* Instead, the
8 court must examine whether the employer provided reasonable
9 accommodation and, if it did not, whether it failed to do so
10 because of undue hardship. *Bateman*, 32 Fed.Appx. at 19-17; *Fuller*
11 916 F.2d at 560; *Pickens*, 252 F. App'x at 796.

12 Nevertheless the court finds that the defendant has presented
13 evidence showing that "there is no genuine issue as to any material
14 fact and the [defendant] is entitled to judgment as a matter of
15 law." Fed. R. Civ. P. 56(a). The plaintiff, on the other hand,
16 has failed to demonstrate the same.

17 *a. Qualified Individual*

18 The defendant concedes that the plaintiff is disabled within
19 the meaning of the Rehabilitation Act. (See D. Mot. 9.) However,
20 the defendant argues that the plaintiff is not a "qualified
21 individual" because he has, on multiple occasions, conceded that he
22 could not perform the essential functions of a VSR on the
23 Predetermination team, "with or without accommodation." (See,
24 e.g., D. Mot. 9-10; D. Mot., Vance Decl, Ex. P (Shepard Dep.) 12-
25 13.; First Am. Compl. 5-6.)

26 Under the ADA, and consequently under the Rehabilitation Act,
27 a "qualified" individual with a disability is an individual who
28 "satisfies the requisite skill, experience, education and other

1 job-related requirements of the employment position such individual
2 holds or desires and, with or without reasonable accommodation, can
3 perform the essential functions of such position." 29 C.F.R. §
4 1630.2(m). "This definition 'includes individuals who could
5 perform the essential functions of a reassignment position, with or
6 without reasonable accommodation, even if they cannot perform the
7 essential functions of the current position.'" *Hutton v. Elf*
8 *Atochem N. Am., Inc.*, 273 F.3d 884, 892 (9th Cir. 2001) (quoting
9 *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000),
10 *vacated on other grounds sub nom. U.S. Airways, Inc. v. Barnett*,
11 535 U.S. 391 (2002)). Moreover, "[t]he plaintiff bears the burden
12 of proving that he is qualified." *Weyer v. Twentieth Century Fox*
13 *Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000).

14 Based on plaintiff's admissions that he could not perform the
15 essential functions of a VSR on the predetermination team, with or
16 without accommodation, the plaintiff was clearly not qualified for
17 his position as a VSR on the Predetermination team. See 29 C.F.R.
18 § 1630.2(m). However, the plaintiff asserts that he "is a
19 qualified individual under the Rehabilitation Act, who can perform
20 the essential job functions of a VSR in Public Contact even if he
21 cannot perform the work in Pedetermination." (D. Mot. 9.) The
22 defendant maintains that the plaintiff must have been able to
23 perform the essential elements of the position he *currently* held at
24 the time of suit in order to meet the definition of a "qualified
25 individual" (P. Mot. 10), but the plaintiff need actually only have
26 been able to perform the essential functions of his current
27 position or of a reassignment position." 29 C.F.R. § 1630.2 (m);
28 *Hutton*, 273 F.3d at 892.

1 Ultimately, the VA offered, and the plaintiff accepted, a
2 reassignment to the position of a lower-paid Intake Specialist on
3 the Public Contact team as a reasonable accommodation. (Def. Mot.
4 7.) By definition, the position of Intake Specialist on the Public
5 Contact team is therefore a "reassignment position" under *Hutton*.
6 *Hutton*, 273 F.3d at 892. Though the plaintiff resigned before
7 starting his new position (Def. Mot. 7), neither party has alleged
8 that he would have been unable to perform the essential functions
9 of the position with or without reasonable accommodation. See
10 generally D. Mot.; P. Mot; 29 C.F.R. 1630.2(m). In fact, the
11 plaintiff asserts that he performed similar work without issue for
12 seven years as a VSR Public Contact, and the defendant does not
13 dispute this claim. (See, e.g., P. Mot. 9; see generally D. Mot.)

14 The plaintiff has therefore shown that there is no genuine
15 issue of material fact that he is a qualified individual with a
16 disability under the Rehabilitation Act.

17 *b. Reasonable Accommodation*

18 It is undisputed that, although the defendant did not grant
19 the plaintiff's request to be placed back in his former position as
20 a VSR Public Contact, the defendant did participate in the
21 "interactive process" as required by the Rehabilitation Act in
22 order to "identify, if possible, a reasonable accommodation that
23 would permit [plaintiff Shepard] to retain his employment." *Dark*
24 *v. Curry Cnty.*, 451 F.3d 1078, 1088 (9th Cir. 2006) (citing *Allen*
25 *v. Pacific Bell*, 348 F.3d 1113, 1115 (9th Cir. 2003); 29 C.F.R.
26 1630.2(o)(3). The defendant engaged in extensive correspondence
27 with the plaintiff in an attempt to identify potential and further
28 accommodations. (See, e.g., Def. Mot. Bittler Decl. Ex. F, H; Def.

1 Mot. Duran Decl. Ex. C, D, E, G.) In fact, the defendant provided
2 the plaintiff with a litany of assistive technology devices and
3 software, regular breaks, one-on-one training, a mentor, and other
4 accommodations, seemingly in line with the recommendations provided
5 by Dr. JoAnne Krumpe, a psychologist who evaluated the plaintiff.
6 (D. Mot. 6-7; D. Mot. Duran Decl. Ex. D; D. Mot. Bittler Decl. Ex.
7 R at 9-10; P. Mot. 9.)

8 Ultimately, after all these attempted reasonable
9 accommodations failed, the defendant offered the plaintiff the
10 position of Intake Specialist back on the Public Contact team. (D.
11 Mot. 7.) This position was at a GS-7 pay rate, whereas the
12 plaintiff's position as a VSR was at a G-11 pay rate. (P. Mot. 5;
13 D. Mot. 7, 13.) The plaintiff accepted this position, but then
14 resigned before the transfer occurred. (D. Mot. 7.)

15 Throughout the accommodation process, the plaintiff continued
16 to insist that he could not adequately perform his job
17 responsibilities and continued to request transfer back into the
18 VSR Public Contact position. (See Def. Mot. 11-12 (citing to a
19 large volume of exhibits all evidencing plaintiff Shepard's
20 repeated requests to be transferred back to his VSR Public Contact
21 position.)) The plaintiff acknowledged during the administrative
22 proceedings that the *only* accommodation he requested was re-
23 assignment back to the Public Contact team as a VSR. (D. Mot 12;
24 D. Mot. Steinmetz Decl. Ex. N at 20.) In fact, the plaintiff's
25 entire remaining claim for relief and all his arguments in support
26 thereof are based not on the VA's failure to reasonably accommodate
27 him at all, but instead on the VA's failure to reasonably
28 accommodate him specifically by declining to reinstate him back to

1 his former position as a VSR Public Contact. (See generally P.
2 Mot; P. Mot. 10; First. Am. Compl. 3-6.) Thus, the only question
3 before the court in determining whether the defendant provided a
4 reasonable accommodation to the plaintiff is whether transferring
5 the plaintiff back to his former position as a VSR Public Contact
6 was a reasonable accommodation. See 29 C.F.R. § 1630.2 (m);
7 *Fuller*, 916 F.2d at 560.

8 "A "reasonable accommodation" under the ADA and the
9 Rehabilitation Act may include "job restructuring ... reassignment
10 to a vacant position ... and other similar accommodations." 29
11 C.F.R. 1630.2(o)(2)(ii). The EEOC's interpretive guidance
12 regarding the ADA's employment provisions advises that reassignment
13 as a reasonable accommodation should, "[i]n general . . . be
14 considered only when accommodation within the individual's current
15 position would pose an undue hardship." 29 C.F.R. § 1630 App.
16 Furthermore, reassignment should be "to an equivalent position, in
17 terms of pay, status, etc.," but can be to a "lower graded
18 position, if there are no accommodations that would enable the
19 employee to remain in the current position and there are no vacant
20 equivalent positions for which the individual is qualified with or
21 without reasonable accommodation." *Id.*

22 Importantly,

23 A "reasonable accommodation" has not, however, been held to
24 include creation of a new job. To the contrary . . . the ADA
25 does not impose a duty to create a new position to accommodate
26 a disabled employee. See *Willis v. Pacific Maritime Ass'n*, 162
27 F.3d 561, 567 (9th Cir.1998) ("In order for reassignment to a
28 vacant position to be reasonable, an existing position must be
vacant: there is no duty to create a new position for the
disabled employee.").

Wellington v. Lyon Cnty. Sch. Dist., 187 F.3d 1150, 1155 (9th Cir.

1 1999). Moreover, "[a]lthough [an employer is] not required to find
2 another job for an employee who is not qualified for the job he or
3 she was doing, [it] cannot deny an employee alternative employment
4 opportunities reasonably available under the employer's existing
5 policies." *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273,
6 289 n.19 (1987).

7 Though the plaintiff continues to claim that his former
8 position as a VSR on the Public Contact team remained "vacant" and
9 "still available" (D. Mot. 4, 6, 8, 10), the plaintiff has greatly
10 mischaracterized deposition testimony from Mr. Bittler⁵ and Mr.
11 Duran⁶ in making this argument. The evidence shows that due to a
12 workload adjustment at the VA, leadership at the VA in Reno
13 transferred the VSRs in Public Contact to the Predetermination team
14 and put lower-salaried Intake Specialists in the Public Contact
15 positions as a cost-saving measure.⁷ (D. Mot. 3-4, 12-15; D. Mot.

16 ⁵ Compare P. Mot. 4 (asserting that Mr. Bittler admitted in his
17 deposition that the "[p]laintiff's position as a VSR in Public Contact still
18 existed and essentially was vacant") with P. Ex. 5 at 13 (cited to portion
19 of Mr. Bittler's deposition, in which Mr. Bittler explains that the VSR
20 position still existed, and public contact positions still existed, but the
VSR Public Contact position no longer existed). See also D. Mot. 12-14
(discussing various other places in Mr. Bittler's deposition in which he
clarifies that the VSR Public Contact position no longer existed).

21 ⁶ Compare P. Mot. 6, 8 (asserting that Mr. Duran stated that the VSR
22 Public Contact position in Reno was essentially vacant or unfilled) with P.
23 Ex. 10 at 3-4 (cited to portion of Mr. Duran's deposition, in which he
states that the VSR public contact position was not vacant or unfilled, but
that the position of "VSR," spread over various other teams, still existed).
See also D. Mot. 14-15 (discussing and quoting from Mr. Duran's deposition
testimony).

24 ⁷ The plaintiff expends a significant amount of effort in his motion,
25 opposition, and reply arguing that the VA leadership's decision to transfer
26 the VSR Public Contacts to the Predetermination team was somehow improper
27 and in violation of a federal directive. (See P. Mot. 8-10; P. Opp'n 8-14;
28 P. Reply 4-6, 12-13.) This line of argument is irrelevant to the case at
hand; even if the decision was somehow improper, such impropriety would not
show that the defendant failed to make a reasonable accommodation or that
the plaintiff's request to be transferred would not cause undue hardship
under the relevant legal standards. Accordingly, the court declines to
address the propriety or lack thereof of the Reno VA's internal

1 Bittler Decl. 2.) The position of VSR in Public Contact was simply
2 not available at the time of the plaintiff's requests because it
3 did not exist as a position at the VA in Reno anymore. *Id.*

4 Given that the VSR Public Contact position did not exist
5 anymore, the Rehabilitation Act "d[id] not impose a duty" on the
6 defendant to reassign the plaintiff to that position, as doing so
7 would have been "creat[ing] a new position to accommodate a
8 disabled employee." *Wellington*, 187 F.3d at 1155. While the VA
9 could not deny to plaintiff Shepard "alternative employment
10 opportunities reasonably available under the employer's existing
11 policies," the position plaintiff Shepard continued to request was
12 not reasonably available under the VA's existing policies. *Sch.*
13 *Bd. of Nassau Cnty.*, 480 U.S. at 289 n.19. Thus, the accommodation
14 requested by plaintiff Shepard was not reasonable. *See Willis*, 162
15 F.3d at 567 ("In order for reassignment to a vacant position to be
16 reasonable, an existing position must be vacant") (quoted by
17 *Wellington*, 187 F.3d at 1155).

18 As advised by the EEOC guidance, the defendant attempted to
19 accommodate the plaintiff in his current position, and then - when
20 a job that would satisfy him at his current pay grade was not
21 available - finally offered him a job at a lower pay grade. *See* 29
22 C.F.R. § 1630 App; Def. Mot. 7. The defendant has provided
23 substantial evidence that the plaintiff's requested position no
24 longer existed, and the defendant has provided no evidence to rebut
25 the defendant's assertions.⁸

26 _____
restructuring.

27 ⁸ *See supra* note 7. In response to the defendant's assertions, the
28 plaintiff has vigorously argued that VA's decision to remove the VSR Public
Contact position was somehow improper. *See* P. Mot. 8-10; P. Opp'n 8-14; P.
Reply 4-6, 12-13.) However, whether the VA's internal restructuring was

1 There is therefore no genuine issue of material fact that
2 plaintiff Shepard was not denied a reasonable accommodation when
3 the defendant refused to reinstate him in his former position as a
4 VSR Public Contact.

5 *b. Undue Hardship*

6 Because the accommodation requested by the plaintiff was not
7 in fact reasonable, an examination of the issue of "undue hardship"
8 is unnecessary. Under the Rehabilitation Act, an employer must
9 make a *reasonable* accommodation absent undue hardship, but has no
10 obligation whatsoever to make an *unreasonable* accommodation. See
11 29 C.F.R. § 1630.2(o)(4); *Bateman*, 32 F. App'x at 917) (quoting
12 *Fuller*, 916 F.2d at 560); see also *Pickens*, 252 F. App'x at 796.

13 Consequently, even when viewing the evidence as required "'in
14 the light most favorable to the party opposing the motion,'" the
15 court finds that plaintiff has failed to show that there is a
16 genuine issue of material fact as to whether the defendant
17 discriminated against him based upon his disability by failing to
18 provide him a reasonable accommodation as required by the
19 Rehabilitation Act. *Matsushita Elec. Indus Co. v. Zenith Radio*
20 *Corp.*, 475 U.S. 574, 587 (quoting *United States v. Diebold*, 369
21 U.S. 654, 655 (1962)). There is therefore "no genuine issue as to
22 any material fact and the [defendant] is entitled to judgment as a
23 matter of law." Fed. R. Civ. P. 56(a).

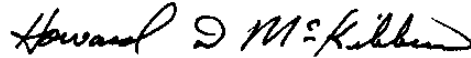
24
25
26 "proper" or not has no bearing on whether the position was available or not.
27 Additionally, while the plaintiff maintains that the deposition testimony
28 of Mr. Bittler and Mr. Duran supports his theory that the position was
actually existing and vacant, the deposition testimony in question clearly
supports the defendant's, rather than the plaintiff's, explanation of the
relevant events. See *supra* notes 5-6.

1 **CONCLUSION:**

2 In accordance with the foregoing the plaintiff's motion for
3 partial summary judgment on liability (#64) is **DENIED** and the
4 defendant's motion for summary judgment (#68) is **GRANTED**.

5 **IT IS SO ORDERED.**

6 DATED: This 30th day of June, 2014.

7 

8 UNITED STATES DISTRICT JUDGE