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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SCOTT JOHNSON,

 Plaintiff,

 v.

THOMAS W HARKER,

 Defendant.

CASE NO. 3:21-cv-05182-DGE

ORDER ON DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT

I INTRODUCTION

This matter comes before the Court on Defendant’s Motion for Summary Judgment. (Dkt. No. 11.) Having considered the briefing of the parties and the remainder of the record, the Court DENIES Defendants motion for the reasons discussed herein.

II BACKGROUND

Plaintiff Scott Johnson began working at the Puget Sound Naval Shipyard (PSNS) in August 2003. (Dkt. No. 12-3 at 7.) After working as a rigger helper for fourteen months, Plaintiff served the rest of his tenure as a Crane Operator in the Lifting and Handling

1 Department, Rigger and Equipment Operations Division (Code 740). (Dkt. No. 18-1 at 351–
2 352.) In this capacity, Plaintiff operated portal, floating, and bridge cranes. (Dkt. No. 12-2 at
3 53.) As a Crane Operator, Plaintiff had to climb vertical ladders up to 60 feet tall to access the
4 crane cab. Once inside, Plaintiff sat in a seat like a recliner with armrests and operated the crane
5 using joysticks on each side. (*Id.* at 54.)

6 On February 17, 2017, Plaintiff suffered an injury while at work. (Dkt. No. 12-3 at 7.)
7 As he threw trash away into a receptacle with a sliding lid, Plaintiff’s left hand and wrist were
8 crushed between the drawer handle and a stationary piece of steel. (*Id.* at 10.) Plaintiff
9 underwent two surgeries in May and December 2017. (Dkt. No. 12-18 at 3.) Several months
10 later, Plaintiff’s treating physician Margaret Jain, M.D. determined Plaintiff reached maximum
11 recovery but would suffer permanent limitations. (*Id.*) On June 19, 2018, Dr. Jain issued a
12 prognosis stating, “[i]t is my medical opinion that Mr. Johnson cannot do work which requires
13 forceful use of his left wrist, repetitive motion of the left wrist, use of grip strength more than 40
14 pounds at a given time, crawling, or [ladder] climbing.” (Dkt. No. 12-5 at 3.)

15 The Naval Branch Health Clinic Provider also issued Plaintiff a “Report of Work
16 Limitation” form on June 15, 2018. (Dkt. No. 12-7 at 2.) In general, in 2018, Defendant used
17 these forms to communicate an employee’s physical limitations to their supervisor. The
18 supervisor could then decide whether there is work available within the restrictions identified.
19 (Dkt. No. 18-1 at 260.) Plaintiff’s form included the following activity restrictions: no
20 lifting/carrying or pushing/pulling over ten pounds with the left hand; no climbing vertical
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1 ladders, scaffolds, or structures; no awkward left wrist positions; and seldom¹ use of the left
2 hand for sustained gripping and repetitive grasp/release. (*Id.* at 4.)

3 On June 26, 2018, Plaintiff completed a form entitled “Request for
4 Accommodation/Approval of Request for Accommodation.” (Dkt. No. 12-6 at 2–3.) On this
5 form, Plaintiff wrote he “can’t operate cranes because of [his physical] limitations” and
6 requested reassignment. (*Id.* at 2.) While Plaintiff sought accommodation, he performed a series
7 of temporary light-duty assignments through the Injured Worker Program. (Dkt. No. 12-18 at 3–
8 4.)

9 At some point in 2018, Plaintiff asked Dale Coyle, Superintendent Code 740, if he could
10 use an ariel work platform (AWP) to access the crane cab. (Dkt. No. 18-1 at 372–374.) Mr.
11 Coyle responded the Navy would be unable to do that but did not elaborate. (*Id.* at 374.)
12 Plaintiff also discussed using a lift with Ken Bourbolis, the Crane Operator Manager, who
13 similarly declined without elaboration. (*Id.* at 411.²)

14 For the last five years, Ms. Tahnee Orcutt has served as a Reasonable Accommodation
15 Specialist for Defendant. (Dkt. No. 12-2 at 10.) Although not involved directly with Plaintiff’s
16 case until May 2020 (Dkt. No. 18-1 at 270), Ms. Orcutt explained the Navy’s general process for
17 accommodations requests in 2018. Upon receiving a request for reassignment, an advisory team
18 including resource managers, a human resources specialist, and reasonable accommodation
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20 ¹ “Seldom” is listed on the Report of Work Limitation as “1-10%,” which Plaintiff characterizes
21 as 48 minutes total per day. (Dkt. No. 12-7 at 2.) As Plaintiff provides no explanation, the Court
presumes Plaintiff arrived at this figure by computing ten percent of eight hours.

22 ² The Court notes the record appears to be missing parts of Plaintiff’s deposition that are discussed
23 in Plaintiff’s response brief. Plaintiff cites Page 252 of his deposition in support of his assertion
24 that he spoke to Ken Bourbolis, Crane Operator Manager. (Dkt. No. 18 at 4.) But this page of the
deposition lacks Mr. Bourbolis’ first name or his title—such information is only included in
Plaintiff’s response brief. (*See* Dkt. No. 18-1 at 411.)

1 specialist would meet to discuss whether an employee could be accommodated in their current
2 position. (Dkt. No. 12-2 at 14.) This process reflected Defendant’s outlook towards
3 reassignment as an accommodation of last resort. Defendant tried to keep an employee
4 requesting accommodation in their position, if at all possible. (*Id.* at 13.)

5 In a memorandum dated July 27, 2018, Superintendent, Code 740, Dale Coyle informed
6 Plaintiff that an advisory team determined he could not perform all essential functions of the
7 Crane Operator role. The memorandum stated:

8 [A]fter assessing all of the information you have provided and using all resources
9 available to the accommodation team, it has been determined that you cannot be
10 accommodated in your current position at Puget Sound Naval Shipyard and
11 Intermediate Maintenance Facility.

12 (Dkt. No. 18-1 at 38–39.) The memorandum also informed Plaintiff of his option to be
13 considered for reassignment, which Plaintiff accepted on August 14, 2018. (Dkt. No. 12-8 at 2.)
14 Plaintiff requested reassignment within the local commuting area for PSNS. (*Id.*)

15 Ms. Ellen Lukkasson, an Internal Placement Program manager, conducted the internal
16 search for a position for Plaintiff, which continued from August 2018 to March 2020. (Dkt. No.
17 12-2 at 23–24, 34.) During this process, Ms. Lukkasson met with Plaintiff to review and
18 enhance his resume more than once. (Dkt. Nos. 12-2 at 37; 12-3 at 25.) In accordance with
19 PSNS policy, all open positions were sent to Ms. Lukkasson as an “admin request.” (Dkt. No.
20 12-10 at 6.) Ms. Lukkasson kept a record of the available positions and noted those for which
21 Plaintiff was qualified. (*Id.* at 7.) Ms. Lukkasson found Plaintiff qualified for the roles of
22 Forklift Operator and Rigging Worker (Forklift Operator), which were recruiting for multiple
23 vacancies.³ (Dkt. Nos. 12-11 at 2, 4; 18-1 at 125, 143, 151–152.)

24 ³ Ms. Lukkasson’s log shows three vacancies for the position of Forklift Operator opening on
December 10, 2018 in Shop 75, Ship Inactivation & Dismantling. (Dkt. No. 18-1 at 125.) The

1 Defendant did not inform Plaintiff about any of these positions. (Dkt. No. 18-1 at 393.)
2 Defendant decided Plaintiff could not perform the essential functions of either role and did not
3 contact Plaintiff about their openings.

4 The Forklift Operator position description did not list requirements that expressly
5 conflicted with Plaintiff's stated medical limitations (Dkt. No. 12-13 at 154–161), but the hiring
6 manager, Carmon Gausepohl stated Plaintiff could not be reassigned to the position because “all
7 of our workers are in and out of the dry-dock at times and climbing scaffolding and ladders
8 throughout the day as well as in tight confined spaces at any given time.” (*Id.* at 162.)

9 Defendant argues, because of Plaintiff's ladder climbing restriction, Plaintiff could not perform
10 all essential functions as a Forklift Operator. (Dkt. No. 19 at 3.) The Rigging Worker (Forklift
11 Operator) position required a worker to lift 100 pounds and occasionally carry equipment that
12 weighs up to 60 pounds as well as and perform work from ladders and platforms. (Dkt. No. 12-
13 13 at 129.) Defendant argues, because of Plaintiff's ladder climbing and lifting restrictions,
14 Plaintiff could not perform all essential functions as a Rigger Worker (Forklift Operator). (Dkt.
15 No. 19 at 4.)

16 Defendant also entered Plaintiff in an external search for positions outside the shipyard
17 but did not identify a position for which Plaintiff would be qualified. (Dkt. No. 12-18 at 5.)

18 On April 6, 2020, Plaintiff received a memorandum from Defendant notifying him that
19 his request for reasonable accommodation had been denied for lack of a vacant, funded position
20 to which he could be reassigned. (Dkt. No. 12-15 at 2–4.) On October 9, 2020, Mr. Kelvin

21 _____
22 log shows seven vacancies for the position of Rigging Worker (Forklift Operator) opening
23 February 5, 2020 and June 24, 2020, but Ms. Lukkasson did not find Plaintiff met the minimum
24 qualifications. (Dkt. No. 18-1 at 143, 151.) This finding conflicts with her later finding when
another vacancy for the same position opened on July 17, 2020, and Ms. Lukkasson found Plaintiff
did in fact meet the minimal qualifications. (*Id.* at 152.)

1 Perez wrote a memorandum explaining his decision to remove Plaintiff from his position with
2 PSNS. (Dkt. No. 12-16 at 2–5.) On October 13, 2020, Defendant terminated Plaintiff. (Dkt.
3 No. 12-18 at 5.)

4 Plaintiff sued Defendant alleging it violated the Rehabilitation Act of 1973, 29 U.S.C. §
5 701 *et seq.* (Dkt. No. 1 at 5.) Plaintiff alleged Defendant breached its duty by “[d]enying him a
6 reasonable accommodation of using a lift to reach the control booth of cranes;⁴ [f]ailing to
7 engage, in good faith, in interactive efforts to accommodate Plaintiff in his position of crane
8 operator; [f]ailing to make a good faith effort to accommodate Plaintiff by reassignment; [and]
9 [a]sserting [] the Defendant could not provide any reasonable accommodation in Plaintiff’s job
10 or in any position in the United States Navy that Plaintiff could have performed with or without
11 accommodations without having made sufficient good faith efforts to accommodate him.” (*Id.* at
12 5–6.)

13 III DISCUSSION

14 A. Legal Standard

15 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
16 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
17 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
18 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
19 showing on an essential element of a claim in the case on which the nonmoving party has the
20 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue

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22 ⁴ In Plaintiff’s deposition, he clarified that multiple allegations were untrue. Specifically, in the
23 Complaint, it states Plaintiff used a lift to reach the control booth before Defendant issued a safety
24 regulation prohibiting a worker from stepping from a lift onto another structure. (Dkt. No. 1 at 3.)
But this sentence is *not* accurate because Plaintiff never used a lift after his injury. (Dkt. No. 12-
3 at 17.)

1 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
2 for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
3 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
4 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
5 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
6 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
7 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809
8 F.2d 626, 630 (9th Cir. 1987).

9 The determination of the existence of a material fact is often a close question. The court
10 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
11 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
12 *Serv. Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of
13 the nonmoving party only when the facts specifically attested by that party contradict facts
14 specifically attested by the moving party. The nonmoving party may not merely state that it will
15 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
16 to support the claim. *T.W. Elect. Serv. Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
17 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not
18 be “presumed.” *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

19 **B. Exhaustion**

20 Before suing under the Rehabilitation Act (“the Act”), an employee must exhaust their
21 claim through an administrative proceeding. *Leno v. Dep't of Veterans Affs.*, 211 F. App'x 554,
22 556 (9th Cir. 2006). Federal employees may appeal to the Merit System Protection Board
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1 (MSPB), a quasi-judicial government agency authorized to review certain adverse agency actions
2 including removals. *Sloan v. West*, 140 F.3d 1255, 1258–59 (9th Cir. 1998).

3 MSPB also has pendent jurisdiction over discrimination claims related to the appealable
4 adverse action, which is known as a “mixed case appeal.” 29 C.F.R. § 1614.302. “A mixed case
5 appeal is an appeal filed with the MSPB that alleges that an appealable agency action was
6 effected, in whole or in part, because of discrimination on the basis of ... disability[.]” 29 C.F.R.
7 § 1614.302(a)(2). In mixed case appeals, the MSPB administrative law judge decides both the
8 adverse action and discrimination claims on the merits. *Silveria v. Wilkie*, No. 18-CV-07327-
9 EMC, 2020 WL 820377, at *5 (N.D. Cal. Feb. 19, 2020).

10 Plaintiff appealed his removal to the MSPB. On February 9, 2021, the ALJ held a
11 videoconference hearing and Plaintiff appeared pro se. (Dkt. No. 12-2 at 4.) In prehearing
12 submissions, Defendant and Plaintiff stipulated to several facts including “[Plaintiff’s] physical
13 limitations prevented him from safely and effectively performing all the essential functions of his
14 crane operator position.” (Dkt. No. 12-1 at 3; *see also* Dkt. No. 12-2 at 7.) The hearing
15 transcript reflects no mention of the possibility of accommodating Plaintiff through an aerial
16 work platform. (*See* Dkt. No. 12-2 at 2–81.) In his direct testimony, Plaintiff states, given his
17 experience, he “find[s] it really difficult that [Defendant] couldn’t find [him] any kind of
18 position” and because of his “disability limitations” and age, it “feel[s] like [he is] getting pushed
19 or forced into an earlier retirement than what [he] had planned.” (*Id.* at 68.)

20 The ALJ first considered whether Defendant established Plaintiff’s medical condition
21 prevented him from being able to safely and efficiently perform the core duties of his position
22 and whether a reasonable accommodation existed (apart from reassignment), which would
23 enable him to do so. (Dkt. No. 12-18 at 6.) The ALJ found not only that Plaintiff’s medical
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1 condition prevented him from performing his duties safely and efficiently but also that
2 Defendant “ha[d] established that there was no reasonable accommodation available that would
3 have allowed [Plaintiff] to safely and efficiently perform[ed] the core duties of the crane operator
4 position.” (*Id.* at 6–7.)

5 The ALJ next considered Plaintiff’s affirmative defense of disability discrimination. (*Id.*
6 at 9.) She found, “[Plaintiff] has not identified any reasonable accommodation that may have
7 permitted him to perform the essential functions of the crane operator position, and none is
8 apparent from my review of the record.” (*Id.* at 10.)

9 Defendant says Plaintiff failed to exhaust his reasonable accommodation claim for the
10 use of an AWP. Defendant argues “the [ALJ] did not consider whether a reasonable
11 accommodation could have been made to keep [Plaintiff] in his position as a crane operator”
12 because Plaintiff “never pursued a claim concerning an accommodation for the crane operator
13 position before the MSPB, which involved different facts and actors than his claim concerning
14 reassignment.” (Dkt. No. 19 at 7–8.) However, Defendant’s argument is not entirely accurate
15 because the ALJ specifically found Defendant “ha[d] established that there was no reasonable
16 accommodation available that would have allowed [Plaintiff] to safely and efficiently
17 perform[ed] the core duties of the crane operator position.” (Dkt. No. 12-18 at 7.)

18 On the one hand, Defendant’s position is tempting as it might be concluded Plaintiff
19 never explicitly argued the failure to accommodate claim before the MSPB. Despite this
20 temptation, however, the ALJ concluded the record raised sufficient facts about an alleged
21 failure to accommodate such that the ALJ felt it necessary to make a specific finding. In this
22 Court’s view, when viewing the entire record in the light most favorable to the Plaintiff, and
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1 considering the ALJ’s specific finding, Plaintiff exhausted the failure accommodate issue before
2 the ALJ and now appropriately challenges the ALJ’s finding.

3 Accordingly, Plaintiff may challenge the ALJ’s finding in his district court case even if
4 he did not explicitly state an AWP was a possible accommodation during the MSPB proceeding.
5 Plaintiff’s specific allegation that he could have been accommodated using a lift directly
6 challenges the ALJ’s finding that no reasonable accommodation was available for Plaintiff as a
7 crane operator and is properly before the district court at this time.

8 In addition, Plaintiff’s AWP reasonable accommodation claim is related enough to his
9 reassignment accommodation to fall within the district court’s jurisdiction. The Court uses
10 exhaustion through the EEOC as an analogous process to exhaustion via MSPB appeal as it is
11 unaware of, and Defendant does not provide, comparable MSPB cases. In the Ninth Circuit, the
12 district court’s jurisdiction is limited to claims like or reasonably related to the allegations in the
13 EEOC charge. *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). A court “must construe
14 the charge liberally” and “must inquire ‘whether the original EEOC investigation would have
15 encompassed the additional charges’ made in the court complaint but not included in the EEOC
16 charge itself.” *Id.* (quoting *Green v. Los Angeles Cnty. Superintendent of Sch.*, 883 F.2d 1472,
17 1476 (9th Cir. 1989)). In other words, jurisdiction extends to “the scope of an EEOC
18 investigation which *can reasonably be expected* to grow out of the charge of discrimination.” *Id.*
19 (internal quotation marks omitted).

20 *DeLaittre v. Berryhill* provides an example. No. C15-1905-RAJ, 2017 WL 6623059, at
21 *1 (W.D. Wash. Dec. 28, 2017). In *DeLaittre*, a blind plaintiff complained he was denied
22 reasonable accommodations to an assistant reader, a quiet office, and a parking pass, but the
23 EEOC charge contained only the plaintiff’s requests for an assistant reader and parking pass. *Id.*

1 at *7. The district court held the plaintiff’s claim for accommodation through a quiet office to be
2 related enough that it fell within the court’s jurisdiction. *Id.*

3 In this case, Plaintiff requested to use an AWP and to be reassigned in 2018 (Dkt. Nos.
4 12-6 at 2; 18-1 at 372–374, 411), after Plaintiff was diagnosed with a permanent disability in his
5 left wrist which precluded him from climbing ladders (Dkt. No. 12-5 at 23). The facts clearly
6 show Defendant considered reassignment only after considering accommodations for Plaintiff in
7 his crane operator position. (*See* Dkt. No. 12-2 at 13–14.) Accordingly, both fall within the
8 jurisdiction of the district court as Plaintiff properly exhausted his claims for reasonable
9 accommodation in his position and through reassignment to a new position.⁵

10 **C. Failure to Accommodate Under the Rehabilitation Act**

11 The Rehabilitation Act prohibits federal employers from discriminating against their
12 employees based on disability. *See* 29 U.S.C. § 791 *et seq.* The Rehabilitation Act⁶ “treats the
13 failure to provide a reasonable accommodation as an act of discrimination if the employee is a
14 ‘qualified individual,’ the employer receives adequate notice, and a reasonable accommodation
15 is available that would not place an undue hardship on the operation of the [employer].” *Snapp*

17 ⁵ The Court distinguishes this case from those cited by Defendant, *Leno*, 211 F. App'x at 556,
18 affirming *Leno v. Dep't of Veterans Affairs*, No. Civ. S-02-1460-FCD-PAN, 1 (E.D. Cal. Aug. 16,
19 2004). In *Leno*, the plaintiff alleged the Department of Veterans Affairs denied her reasonable
20 accommodations by not ending the use of cleaning product chemicals which caused her asthma
21 attacks and not reassigning her to a new location. The district court dismissed the plaintiff’s
22 allegation relating to the Department’s failure to stop its use of cleaning products because the
23 EEOC investigation did not mention the plaintiff’s request to end use of the cleaning process and
24 because it was untimely. This fact pattern differs from the instant case because the ALJ considered
whether Plaintiff could have been accommodated as a Crane Operator and found no reasonable
accommodation available. Thus, Plaintiff may challenge the ALJ’s finding even though the appeal
did not specifically address whether Plaintiff could use an AWP.

⁶ In determining whether a violation of the Rehabilitation Act has occurred, the standards of the
Americans with Disabilities Act apply. 29 U.S.C. § 791(g); *McLean v. Runyon*, 222 F.3d 1150,
1153 (9th Cir. 2000).

1 *v. United Transportation Union*, 889 F.3d 1088, 1095 (9th Cir. 2018). A qualified individual is a
2 person who with or without reasonable accommodation, can perform the essential functions of
3 the employment position that such individual holds or desires. 29 C.F.R. § 1630.2(m).

4 The parties do not dispute that Plaintiff is an individual with a disability nor do they
5 dispute the Navy had notice of Plaintiff's request for accommodation.

6 1. The Mandatory Interactive Process for Reasonable Accommodations

7 Once an employer learns of the need for accommodation, that employer has a mandatory
8 obligation to engage in an interactive process with the disabled employee to
9 identify reasonable accommodations. 29 C.F.R. § 1630.2(o)(3); *Barnett v. U.S. Air Inc.*, 228
10 F.3d 1105, 1114 (9th Cir.2000), *vacated on other grounds*, 535 U.S. 391, 122 S.Ct. 1516, 152
11 L.Ed.2d 589 (2002). "The interactive process requires: (1) direct communication between the
12 employer and employee to explore in good faith the possible accommodations; (2) consideration
13 of the employee's request; and (3) offering an accommodation that is reasonable and effective."
14 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002). The Ninth Circuit has
15 held that the duty to accommodate "is a continuing duty that is not exhausted by one
16 effort." *Id.* at 1138 (internal quotation marks omitted).

17 "Recognizing the importance of the interactive process, the Ninth Circuit also held that if
18 an employer fails to engage in good faith in the interactive process, the burden at the summary-
19 judgment phase shifts to the employer to prove the unavailability of a reasonable
20 accommodation." *Snapp*, 889 F.3d at 1095. Given the difficulty of proving a negative, it is
21 unlikely "an employer will be able to establish on summary judgment the absence of a disputed
22 fact as to this question." *Id.* at 1098–99 (quoting *Morton v. United Parcel Serv., Inc.*, 272 F.3d
23 1249, 1256 (9th Cir. 2001), *overruled on other grounds by Bates v. United Parcel Serv., Inc.*,

1 511 F.3d 974 (9th Cir. 2007)). Thus, summary judgment for the employer is inappropriate where
2 there is a genuine dispute that the employer engaged in the interactive process in good
3 faith. *Barnett*, 228 F.3d at 1116; *Morton*, 272 F.3d at 1257.

4 2. There is Genuine Dispute over Whether Defendant Conducted the Interactive Process
5 in Good Faith

6 The Court finds there is a genuine dispute over whether Defendant engaged in the
7 interactive process in good faith. Plaintiff testified he raised his request to use an AWP to both
8 Mr. Calfy and Mr. Bourbolis, but neither appear to have granted the idea consideration before
9 both responded such an accommodation would not be available. Defendant provides no
10 evidence to contradict Plaintiff's testimony beyond the fact that Plaintiff did not request an AWP
11 on his form submission. Thus, it is not clear that Defendant considered Plaintiff's proposal in
12 good faith under the Act.

13 The Court also finds there is a genuine dispute about whether Defendant conducted a
14 good faith interactive process for Plaintiff's request for reassignment. Even though Defendant
15 identified two types of vacant positions for which Plaintiff was qualified, Defendant never
16 informed Plaintiff about these positions nor discussed possible accommodations with him.

17 Plaintiff argues Defendant failed to complete an essential functions list or
18 accommodations hardship review for these vacant positions. In support of his argument,
19 Plaintiff cites the lack of documentation in Plaintiff's Reasonable Accommodations file. (Dkt.
20 No. 18 at 8) (citing Dkt. No. 18-1 at 29–30.) In reply, Defendant argues it “undertook the
21 interactive process with [Plaintiff] in good faith” and did conduct essential functions reviews for
22 the vacant positions, citing as support emails between Sal Calfy and Carmon Gausepohl (the
23 hiring manager for one of the forklift operator positions) and a “response” showing Plaintiff's
24 limitations conflicted with the job requirements. (Dkt. No. 19 at 3–4.) Specifically, Defendant

1 argues an essential function of the Forklift Operator position was climbing in and out of the
2 drydock and the Rigger Worker (Forklift Operator) position required lifting up to 100 pounds
3 and climbing vertical ladders. (*Id.*)

4 Although these documents show the vacant forklift positions contained duties Plaintiff
5 may be unable to perform without accommodation because of his disability, these documents do
6 not show any conversations occurred about possible accommodations nor do they show any
7 conversations with Plaintiff directly. There is therefore a genuine dispute on whether Defendant
8 explored possible accommodation through a good faith interactive process. As a result, to
9 prevail at the summary judgment stage, Defendant must establish no reasonable accommodation
10 would be possible.

11 3. Defendant Fails to Establish No Reasonable Accommodation Could Exist

12 Defendant argues “[t]he employer should prevail on summary judgment if no reasonable
13 accommodation was available, regardless of any deficiencies in the interactive process,” because
14 there is no stand alone claim for a failure to engage in an interactive process. (Dkt. No. 19 at 6)
15 (citing *Dark v. Curry Cnty.*, 451 F.3d 1078, 1088 (9th Cir. 2006)). Although there is no stand alone
16 claim, a consequence of failing to participate in the interactive process is that the burden shifts at
17 summary judgment. Defendant has not carried its burden to establish no reasonable accommodation
18 would be possible in this case.

19 *i. AWP Accommodation*

20 The parties dispute whether Plaintiff request to use an AWP constitutes a reasonable
21 accommodation. Defendant claims Plaintiff has not carried his burden to prove a lift would
22 enable him to perform essential functions of his position because he must use both hands to
23 operate the crane even after he reached the cab and Plaintiff does not show he could operate
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1 controls given his wrist movement limitations.⁷ (Dkt. No. 19 at 9.) In his deposition, Plaintiff
2 stated:

3 I believe that I more than likely would have [been able to continue using both hands
4 to operate the crane]. Until I tried it, I really cannot give you a true answer because
5 I don't know what the outcome would be. There's not that much wrist movement
involved. It's not like I've got levers that are [three] feet tall and I've got to push
them [three] feet forward and [three] feet back.

6 (Dkt. No. 12-3 at 13.)

7 Because neither party establishes whether Plaintiff could operate controls in the crane
8 booth, the Court considers the facts in a light most favorable to Plaintiff and finds a dispute of
9 fact as to whether Plaintiff could operate the controls once arriving in the booth via AWP.

10 Defendant argues Plaintiff's request was unreasonable because it would pose an undue
11 burden and direct threat given that "[s]tepping from a lift to a crane platform is prohibited at the
12 Shipyard" and Plaintiff's inability to use ladders would prevent him from accessing the escape
13 route. (Dkt. No. 11 at 12.) On the other hand, Plaintiff argues Defendant does not impose a
14 blanket prohibition on stepping from lifts to crane platforms because other workers in other
15 departments use AWP's and workers routinely use them to perform crane maintenance. (Dkt. No.
16 18 at 3) (citing Dkt. No. 18-1 at 375-377). Plaintiff further argues Defendant's concern for
17 emergency escape is the "kind of hypothetical excuse [that] has been soundly rejected by the
18 Court as a basis for an assertion of undue hardship" without a showing of reasonable probability
19 of substantial harm. (*Id.* at 13) (citing *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985),

21 ⁷ Defendant points to multiple points in the records where Plaintiff previously stipulated his
22 physical limitations prevented him from being a crane operator. (Dkt. No. 19 at 9) (citing Dkt.
23 Nos. 12-6 at 2; 12-1 at 3; 12-2 at 69). But the Court finds this evidence does not cancel out
24 Plaintiff's later statements because, while Plaintiff admits he cannot be a crane operator, one could
read such statements as meaning Plaintiff could not be a crane operator *without accommodation*.
Accordingly, his stipulations would not address whether he could serve as a crane operator, *with*
reasonable accommodation.

1 *as amended* (Aug. 27, 1985)). Although Defendant’s concern for safety raises a compelling
2 issue, the Court agrees the facts are in dispute about whether Defendant’s prohibition would
3 extend to Plaintiff and the level of risk posed by lack of access to an escape route.

4 Defendant also argues allowing Plaintiff to use a lift would pose an undue hardship
5 because it would require other employees to take time to operate the lift at the beginning and end
6 of Plaintiff’s shift. (Dkt. No. 19 at 8–9.) Plaintiff estimates the process would take five minutes
7 but admits it could take up to an hour. (Dkt. No. 18-1 at 377–379.) Because of this factual
8 discrepancy, the Court cannot determine, as a matter of law, whether asking another employee to
9 operate the lift constitutes an undue burden on operational efficiency.

10 *ii. Reassignment to a Vacant Position*

11 Plaintiff argues he should have been assigned to one of the vacant Forklift Operator or
12 Rigging Worker (Forklift Operator) jobs because the positions descriptions do not list any
13 functions that conflict with Plaintiff’s medical limitations. (Dkt. No. 18 at 19.)

14 On the other hand, Defendant argues,

15 While the [Forklift Operator] position description does not list anything specific
16 vis-à-vis [Plaintiff’s] stated medical limitations, such as how much weight an
17 operator must be able to lift or that the job requires climbing, the incumbent must
be able to take on work assignments other than just operating the forklift, including
aspects of ship dismantling.

18 (Dkt. No. 19 at 2–3.) Defendant points to an email from Carmon Gausepohl, the hiring manager,
19 which states Plaintiff could not be accommodated because he cannot climb ladders and the
20 “workers are in and out of the dry-dock at times and climbing scaffolding and ladders throughout
21 the day as well as in tight confined spaces at any given time.” (Dkt. No. 12-13 at 162.)

22 For the Rigging Worker (Forklift Operator) position, Defendant points out Plaintiff is
23 incorrect, and the job description conflicts with Plaintiff’s physical limitations. Indeed, the job
24


1 description says the worker “[m]ust be able to lift 100 lbs and occasionally carry equipment that
2 weighs up to 60 pounds. . . [and] climb vertical ladders[,]” both of which conflict with Plaintiff’s
3 medical limitations. (Dkt. No. 12-13 at 129.)

4 Notwithstanding this evidence, Defendant has not shown it considered but could not
5 identify any reasonable accommodation, which would have allowed Plaintiff to perform in either
6 vacancy. Thus, there is a dispute of fact as to whether Plaintiff would be unable to perform the
7 duties of the Forklift Operator and Rigging Worker (Forklift Operator) positions with reasonable
8 accommodation, and summary judgment is inappropriate at this point in the litigation.

9 **IV CONCLUSION**

10 Accordingly, and having considered Defendant’s motion, the briefing of the parties, and
11 the remainder of the record, the Court finds and ORDERS that Defendant’s Motion for Summary
12 Judgment (Dkt. No. 11) is DENIED.

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14 Dated this 28th day of October 2022.

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17 David G. Estudillo
18 United States District Judge
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