UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENISE L. LENKIEWICZ, *Plaintiff*, v. **JULIÁN CASTRO**, Secretary, U.S. Department of Housing & Urban Development, *Defendant*.	Civil Action No. 13-0261 (RCL) **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT THAT DEFENDANT VIOLATED THE REHABILITATION ACT

Plaintiff Denise L. Lenkiewicz, by counsel, moves this Court under Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h) for an order granting summary judgment to Plaintiff on her Rehabilitation Act claim against Defendant Julián Castro, Secretary, U.S. Department of Housing & Urban Development. In support of this motion, Plaintiff submits a Memorandum of Law, a Statement of Undisputed Material Facts, the Declaration of J. Wells Harrell, and exhibits attached thereto. A proposed form of order is attached.

Respectfully submitted,

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Dated: March 4, 2015

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT THAT DEFENDANT VIOLATED THE REHABILITATION ACT

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PRELIMINARY STATEMENT

This case is about an employer that repeatedly ignored or denied a disabled employee's requests for reasonable accommodation and, in the process, violated best practices and its own procedures for handling such requests. When Plaintiff Denise Lenkiewicz's orthopedic and respiratory disabilities made it difficult for her to perform her job, she asked for accommodations that would have enabled her to continue working. Lenkiewicz's employer granted none of her requests and proposed no workable alternatives; it simply was uninterested in finding solutions to improve her productivity. Instead, her employer punished her for absences caused by the very disabilities for which she sought, but was denied, accommodation. Her employer's repeated failures to accommodate her disabilities and its failure to engage in a good-faith interactive process with her violated the Rehabilitation Act, as the undisputed facts establish.

Lenkiewicz's employer cannot contend that it did not know any better. Her employer was the U.S. Department of Housing and Urban Development ("HUD" or the "agency"). HUD is responsible for administering provisions of the Fair Housing Act of 1968 and other statutes that protect persons with disabilities from discrimination in housing.[1] The agency develops and enforces housing-safety standards.[2] And, like other federal agencies, it strives to be a "model employer" of disabled persons. Yet, in its own headquarters, HUD allowed toxic mold to propagate and then fired an employee whose breathing problems had become so severe, and whose pleas for reasonable accommodation had been dismissed for so long, that she could no longer bear working there. This record tragically illustrates how the hallmarks of dysfunctional bureaucracy—miscommunication, poor training, loopholes, lack of accountability, and

[1] *See* 42 U.S.C. § 3608.

[2] *See, e.g.*, 24 C.F.R. § 5.703.

indifference—can combine to work injustice on a disabled employee, even one who suffered to overcome severe medical problems and to contribute to the agency's mission.

One of HUD's reasonable accommodations specialists captured the essence of the agency's dysfunction in making this note about Lenkiewicz:

> Based on medical documentation, employee does have a disability but no major life activities were documented.

This perplexing comment—made over five months after Lenkiewicz had submitted her request and just before HUD "ceased processing" it—exemplifies why Lenkiewicz prevails on her Rehabilitation Act claim as a matter of law. Lenkiewicz was disabled. She submitted medical documentation to show it. She asked for four different accommodations on many occasions over several years. But rather than grant *any* of her accommodation requests, the agency either ignored or denied every one of them. This employee's comment illustrates how that came to pass. By definition, a disability limits one or more "major life activities," so one cannot "have a disability" without at least one major life activity being limited. Yet HUD refused to infer or ask which major life activities were limited by the physical impairments that—by HUD's admission elsewhere—Lenkiewicz had. This agency denied accommodations to an employee it believed was disabled because she did not speak certain magic words, HUD did not tell her what the magic words were, and HUD refused to speak those words itself. As the undisputed facts show, this "gotcha" illogic reflects a broader recalcitrance at HUD, which thwarted Lenkiewicz's multi-year efforts to obtain some form of accommodation for her disabilities.

Lenkiewicz wanted to work. HUD just wanted her gone. No trial is necessary to reach this inescapable conclusion: HUD is liable to Lenkiewicz for violating the Rehabilitation Act.

UNDISPUTED MATERIAL FACTS

A. Lenkiewicz Was Qualified for Her Position as a FOIA Specialist at HUD.

Lenkiewicz joined HUD as a FOIA Specialist in October 2008. (SoF ¶ 1; Answer ¶ 1 (ECF No. 21).)[3] As a FOIA Specialist, Lenkiewicz was responsible for analyzing the contents of HUD records to determine which of those records must be disclosed under the Freedom of Information Act of 1966 ("FOIA"). Lenkiewicz's tasks included reviewing incoming FOIA requests, assigning those requests to a responding office, and redacting responsive documents. (SoF ¶ 4; Answer ¶ 7 (ECF No. 21).)

Lenkiewicz was fully qualified for the FOIA Specialist position at HUD. Before joining HUD, Lenkiewicz had been a federal employee for more than 19 years, including more than 10 years as a Paralegal Specialist at the U.S. Department of Commerce. (SoF ¶ 3; Answer ¶ 9 (ECF No. 21).) According to vocational rehabilitation specialist Fredric K. Schroeder, Ph.D., who has 30 years of experience working with government agencies to accommodate disabled employees and served as Commissioner of the Rehabilitation Services Administration under President Clinton, Lenkiewicz "has the skills, experience, and expertise necessary to perform the essential functions of the FOIA Specialist position at HUD." (Ex. 12, Schroeder Rep. ¶¶ 12, 27, 29–30.)[4] Dr. Schroeder observed that Lenkiewicz's "career was typified by a steady progression of increasingly complex job duties" and that her "professional focus during much of her twenty-two years of government service was handling requests for information from the government under the Freedom of Information Act." (*Id.* ¶ 29.) HUD selected Lenkiewicz over other applicants

[3] As used in this memorandum, "SoF" refers to Plaintiff's Statement of Undisputed Material Facts in Support of her Motion for Summary Judgment, dated March 4, 2015.

[4] As used in this memorandum, "Ex." refers to an exhibit to the Declaration of J. Wells Harrell in Support of Plaintiff's Motion for Summary Judgment, dated March 4, 2015.

for the FOIA Specialist position because, according to her immediate supervisor Vicky Lewis, Lenkiewicz "appeared to be the best qualified at the time." (Ex. 16, Lewis Dep. 38:10–39:21; *see also* SoF ¶ 5.)

B. Throughout Her Employment at HUD, Lenkiewicz Suffered from Physical Impairments Substantially Limiting Many Major Life Activities.

At the time she joined HUD in October 2008, Lenkiewicz had been a long-time sufferer of chronic obstructive pulmonary disease ("COPD") with chronic bronchitis. (SoF ¶ 10.) According to pulmonary specialist Alan Schwartz, M.D., COPD "is a respiratory disease that makes breathing difficult." (Ex. 11, Schwartz Rep. ¶ 19.) Airflow in the lungs of COPD sufferers is "restricted" due to "inflammation and increased mucus production in the airways," "a loss of elasticity in the tissue forming the air sacs," and "degradation and destruction of the walls separating air sacs." (*Id.*) As a result, "COPD can cause not only physical symptoms such as coughing, wheezing, shortness of breath, and chest tightness, but also mental symptoms such as fatigue that result from reduced oxygenation of the brain and increased concentration of carbon dioxide in the bloodstream." (*Id.*) "[T]he leading cause of COPD is habitual cigarette smoking" (*id.*), and Lenkiewicz had "been smoking for a long time" (Ex. 18, Lenkiewicz Dep. 143:1–10). Unfortunately the disease is "progressive" and "is expected to worsen over time, especially without proper treatment." (*Id.* ¶ 19.) For these reasons, COPD is a "serious" and "life-threatening condition." (Ex. 15, Allen Dep. 157:22–158:11.)

Lenkiewicz's COPD symptoms were pronounced. Dr. Schwartz explains that symptoms such as shortness of breath and fatigue "can be particularly severe in overweight individuals" like Lenkiewicz, who "cannot breathe enough given their weight, severely limiting the level of physical activities their bodies can handle and worsening symptoms of COPD such as shortness of breath and fatigue." (Ex. 11, Schwartz Rep. ¶ 20.) As a result, "physical exertion that would

be considered light to moderate for healthy adults nonetheless strained Ms. Lenkiewicz's respiratory system" such that her respiratory impairments "would increase in severity after even short periods of physical exertion[.]" (*Id.* ¶ 23.) A simple test conducted by Dr. Schwartz during his examination of Lenkiewicz is illustrative:

> [W]hen I performed a pulse-oximetry on Ms. Lenkiewicz during my July 16 examination, her oxygen saturation level was only about 86 to 87%, which is well below the 95%-99% range that would be considered medically normal. … When I took another pulse-oximetry reading immediately following a brief walk on a level surface with Ms. Lenkiewicz for a few minutes, her oxygen saturation level had fallen even further and nadired at 79%, which represents a precipitous drop in oxygen level after only light physical activity for short intervals.

(*Id.* ¶ 21.) Dr. Schwartz added that Lenkiewicz's "lung function is so severely impaired that I have recommended that [she] receive supplemental oxygen to compensate for her diminished lung function and ensure that her body receives the necessary supply of oxygen." (*Id.*)

Lenkiewicz's COPD symptoms also were made worse by environmental factors. She was susceptible to lung infections. (SoF ¶ 11.) One of Lenkiewicz's treating pulmonary specialists, Dr. Moti Koul, noted that Lenkiewicz's COPD "probably" has an "underlying allergic component" that is "made worse by environmental pollutants." (Ex. 26, KOUL_0001.) Dr. Schwartz concurs that "airborne irritants such as mold can worsen symptoms of COPD." (Ex. 11, Schwartz Rep. ¶ 19.)

After Lenkiewicz joined HUD in October 2008, she suffered from worsening orthopedic impairments as well. (SoF ¶ 7.) These impairments include "degenerative joint disease of the lumbar spine and right knee[.]" (Ex. 28, SHA_0080.) According to orthopedist Eric Dawson, M.D., who has treated Lenkiewicz for years, "the tissues in Ms. Lenkiewicz's knee joints, around the heel of her foot, and along her spine have a tendency to become inflamed and thereby cause

her numbness, spasms, and pain." (Ex. 10, Dawson Rep. ¶ 16.) Additionally, "[d]egeneration of several ligaments in Ms. Lenkiewicz's knees [has] also introduced instability into the joint, making walking difficult." (*Id.*) Also, during her employment at HUD, Lenkiewicz suffered two serious orthopedic injuries: a broken foot in late summer 2009 and a torn meniscus tendon in early spring 2010. (SoF ¶ 8.)

HUD "does not dispute that Plaintiff had physical impairments[.]" (Ex. 1, Def.'s Resp. to Pl.'s Interrogatory No. 10.) More than that, the record establishes that Lenkiewicz's respiratory and orthopedic impairments substantially limited several major life activities. First, Lenkiewicz's pulmonary impairments (including COPD) "substantially limited her ability to breathe." (Ex. 11, Schwartz Rep. ¶ 9; *see also* SoF ¶ 10.) Second, Lenkiewicz's orthopedic impairments (including degenerative joint disease and injuries to her foot and knee) "substantially limited her ability to perform manual tasks, walk, stand, lift, bend, and engage in other physical activity." (Ex. 10, Dawson Rep. ¶ 8; SoF ¶ 9.) Third, the symptoms caused by Lenkiewicz's pulmonary and orthopedic impairments (including pain, fatigue, and shortness of breath) "limited her ability to concentrate and think." (Ex. 10, Dawson Rep. ¶ 8; Ex. 11, Schwartz Rep. ¶ 9; *see also* SoF ¶ 15.)

C. Lenkiewicz Requested Accommodations that Would Have Enabled Her to Perform the Essential Functions of Her Job.

When Lenkiewicz joined HUD as a FOIA Specialist in October 2008, her worksite was on the tenth floor of the HUD headquarters building in downtown Washington, DC. (SoF ¶ 2.) Her daily commute from her home in Maryland involved an extensive amount of walking to, from, and within the DC Metro rail system. (SoF ¶ 13.) Her daily routine at HUD headquarters involved walking between her workstation and other parts of the building to retrieve files, make copies, and attend meetings. (*Id.*) While Lenkiewicz was recovering from a broken right foot

and a torn meniscus in her right knee, Lenkiewicz had difficulty walking. (SoF ¶ 30.) But even when Lenkiewicz was not recovering from these injuries, the walking involved in her daily commute and work routine would often leave her fatigued, short of breath, and in pain, owing to her impairments. (SoF ¶ 13.)

Lenkiewicz's breathing impairments were made even worse by exposure to mold at her workplace. (SoF ¶ 14.) Air-quality testing performed on the tenth floor in June 2011 "did reveal the presence of mold." (Ex. 1, Def.'s Resp. to Pl.'s Interrogatory No. 8.) Lenkiewicz's "breathing-related symptoms are consistent with exposure to mold[.]" (Ex. 11, Schwartz Rep. ¶ 24.) On her very first day on the job at HUD headquarters in October 2008, Lenkiewicz "lost [her] voice" and "couldn't breathe." (Ex. 18, Lenkiewicz Dep. 57:24–58:5, 193:17–194:7.) On some days thereafter, Lenkiewicz "found herself unable to breathe in the office." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 1.) Her breathing-related symptoms worsened when she worked in the office, yet they improved when she was away from it. (SoF ¶ 14; Ex. 26, KOUL_0001.)

To overcome these obstacles and continue doing her job as a FOIA Specialist, Lenkiewicz requested reasonable accommodations multiple times over nearly two years. She requested four accommodations in total: (i) "a printer at her workstation," (ii) "a parking space," (iii) "relocat[ion] to the HUD office located in the portals building," and, on two separate occasions, (iv) the ability to work from home (or "telework"). (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶ 23.) Any of these accommodations would have reduced the level of physical activity associated with her commute and routine; relocation or telework would have allowed her to work away from the tenth floor of HUD headquarters, where mold was present. (SoF ¶ 24.) By improving Lenkiewicz's ability to breathe and reducing her pain and

fatigue, any of the reasonable accommodations Lenkiewicz requested would have enabled her to "perform[] the essential functions of the FOIA Specialist position[.]" (Ex. 12, Schroeder Rep. ¶ 34; *see also* SoF ¶ 25.) In addition, while other effective accommodations may have been available, HUD's RA Branch did not propose a single alternative. (SoF ¶¶ 79–80.)

D. Lenkiewicz's Request for a Printer at Her Workstation Was Denied

Lenkiewicz started small. After breaking a bone in her right foot in August 2009, Lenkiewicz requested that a spare, unused printer be moved to her workstation "because she could not comfortably walk back and forth to the printer." (Ex. 16, Lewis Dep. 58:14–18; *see also* SoF ¶¶ 27–28; Answer ¶ 17.) The accommodation of a printer at Lenkiewicz's workstation "would have allowed her to perform the essential functions of her position by reducing the physical strain and shortness of breath associated with making frequent trips to the printer." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶ 29.) Lenkiewicz made her request for a printer to her first-level supervisor, Vicky Lewis, who testified that, "[a]t the time, [Lenkiewicz] was using a scooter[.]" (Ex. 16, Lewis Dep. 58:19–59:4; *see also id.* 68:19–69:6.)

In connection with her request for a printer, Lenkiewicz sought assistance from Debbie Rizzo, who was then the head of the agency's Reasonable Accommodations Branch ("RA Branch"). (SoF ¶ 30.) Lenkiewicz emailed Rizzo on September 11, 2009, stating that she "has been out of work with a broken foot" and that "between back pain, foot pain and the wear and tear on my knees this foot is causing, I have no option but to leave a half day." (Ex. 21, DEF.EMAIL.0073.) After mentioning her failed attempt to obtain a spare, unused printer, Lenkiewicz asked Rizzo:

> ***How does one go about getting any accommodations when they're trying to come to work, without having to go through a long drawn out process which in the end makes the issue null and void?*** This is the first place in 20 years that while having an

> injury nobody has stepped forward to ask if I need anything and/or offered anything to make life easier.

(*Id.* (emphasis added).) Rizzo did not respond. Lenkiewicz emailed Rizzo eleven days later, once again pleading for help:

> I'm still in need of guidance as to reasonable accommodation options, and how to go about it. ***I figure by getting a printer to help with the problems of having to jump up and down on this broken foot would be a start.*** Normally by Wednesday it's all that I can bear as far as pain, in fact by Friday of last week it affected the syatic [*sic*] nerve on my left leg, and therefore I stayed home. ***The Wednesday before that I stopped to talk to Cynthia O'Conner with tears rolling down my face from pain.***

(*Id.* (emphasis added).) Again, Rizzo did not respond.

On December 7, 2009—about five months after Lenkiewicz had requested the printer—Lewis emailed Lenkiewicz informing her that her "request for a printer was denied." (Ex. 20, Def.00646; *see also* SoF ¶ 31.) The denial of a printer left Lenkiewicz "needing to exert herself physically in ways that worsened her breathing impairments and that caused her pain and fatigue." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 9.)

On or around December 2009, Lewis also suggested that Lenkiewicz ask a HUD contractor to retrieve print jobs. (SoF ¶ 33.) This suggestion struck Lenkiewicz as "cumbersome" because the contractor "had a multitude of things to do[.]" (Ex. 18, Lenkiewicz Dep. 113:12–20, 225:6–25.) Lenkiewicz would have been uncomfortable "interrupting [the contractor] for my needs" and considered it "kind of degrading to have to keep jumping up" to retrieve print jobs. (*Id.* 225:6–25; *see also* Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3.) This was the last time that Lewis or anyone else at HUD suggested any alternatives, workable or otherwise, to Lenkiewicz. (*See* SoF ¶ 79.)

E. Lenkiewicz's Request for a Parking Space at HUD Headquarters Was Denied.

After breaking her right foot in August 2009, Lenkiewicz also asked Lewis for a parking space at or near HUD headquarters "to minimize the distance she needed to walk to her workstation and reduce the physical strain associated with commuting to work." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶¶ 35–38.) At the time of Lenkiewicz's parking request, Lenkiewicz "was on crutches." (Ex. 18, Lenkiewicz Dep. 101:3–10.) Lenkiewicz told Lewis that "having a parking space could aid in … me not having to walk on my foot the way it was" and even showed Lewis "how [her leg] was swelling up … blowing up like that[.]" (*Id.*)

In support of her request for parking, Lenkiewicz submitted medical documentation to Lewis that included a note from Dr. Dawson, one of her treating orthopedists. (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 5; *see also* SoF ¶ 37.) Dr. Dawson's note explained that Lenkiewicz "has a delayed union and healing of a weightbearing fracture to her right 5th metatarsal that incapacitates her from walking or standing for prolonged periods." (Ex. 23, LENK_0782.) Dr. Dawson emphasized that "parking privileges" would "place her closer to the workplace and minimize standing or walking so that she may heal her injuries." (*Id.*) Finally, Dr. Dawson added that "[t]his injury has increased [Lenkiewicz's] pain and stress level and any modifications that keep this in mind are appreciated." (*Id.*)

In connection with her request for a parking space, Lenkiewicz again sought assistance from Rizzo in the RA Branch. Lenkiewicz told Rizzo in a December 7, 2009 email that she "needs to set up an appointment with you in addition to securing temporary handicap parking" and offered to send Rizzo "an updated doctor's note requesting parking and physical accommodations[.]" (Ex. 21, DEF.EMAIL.0077.) Lenkiewicz periodically sought updates from Rizzo on the status of the parking request. For example, on December 10, 2009, Lenkiewicz

emailed Rizzo stating that she "hadn't heard from anyone on the parking" and asking "is there a way I can check on the status?" (*Id.*, DEF.EMAIL.0078.) Rizzo did not respond. (*See id.*, DEF.EMAIL.0079; *see also* SoF ¶ 40.)

Lewis did not grant Lenkiewicz's request for a parking space. Instead, Lewis directed Lenkiewicz to request a parking space from HUD's Mail and Transportation Branch. (*See* Ex. 18, Lenkiewicz Dep. 102:3–11 ("Q … So is it your testimony that Ms. Lewis – when you made your requests for a parking space – that she told you, you need to go to the Parking Office to get the parking space? A Yes."); *see also* SoF ¶ 39.) Lenkiewicz told the Mail and Transportation Branch that she "had a broken foot, it was not healing, [she] was swelling," and that a parking space "would help aid getting to work and getting around" because she "couldn't walk on it any longer." (Ex. 18, Lenkiewicz Dep. 103:17–104:1.) In response, she was told that "[t]here are no parking spaces for your department" and "that there weren't any available." (*Id.*, Lenkiewicz Dep. 103:6–16.)

Not all HUD employees had such difficulty receiving a parking space as an accommodation. Lenkiewicz's second-level supervisor, Dr. Dolores Cole, was given a parking space promptly after she fell down the stairs in her home. Cole testified:

> ***Q. Are you aware of HUD granting reasonable accommodations for other employees who have had mobility problems?***
>
> ***A. I remember one and that would be me.*** I had an accident at home in January. I fell down the stairs, was off work for two to three weeks, and I had been using Metro. And I asked to get another -- to get a parking space again so that I could drive for a while…. ***I filled out a form for a parking space. I had to indicate that it was temporary medical and they allowed me to park temporarily on the street level without driving into the garage.***

(Ex. 17, Cole Dep. 80:13–81:7 (emphasis added).)

F. Lenkiewicz's Request for Relocation to a Different Building Was Ignored.

Sometime in 2009, Lenkiewicz asked Lewis for Lenkiewicz's workstation to be relocated to the HUD office located in the nearby "portals" building. (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶ 43.) Lenkiewicz said to Lewis: "I need to be moved out of that office space, can I get moved, can you move me somewhere, is there somewhere else that I can work." (Ex. 18, Lenkiewicz Dep. 130:18–25.) Lenkiewicz requested relocation because she was "experiencing over-and-over constant breathing problems" and "was convinced that there [was] something in that office making [her] sick." (*Id.*, Lenkiewicz Dep. 131:1–10.) Relocating Lenkiewicz's workstation away from the tenth floor of HUD headquarters, especially if "coupled with a parking space, would have allowed Plaintiff to perform the essential functions of her job by improving her ability to breathe and reducing the physical strain associated with commuting to work." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶¶ 13, 51.)

Lenkiewicz's request to have her workstation relocated to another building was ignored. (SoF ¶ 52.) As a result, for the remainder of her employment at HUD, Lenkiewicz was "left continuously exposed to toxic mold and airborne irritants that pervaded the 10th floor of HUD headquarters during working hours and worsened her breathing difficulties." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 9; *see also* SoF ¶¶ 14, 51.)

G. Lenkiewicz's First Requests for Telework Were Ignored.

While recovering from a broken foot in late 2009, Lenkiewicz "made a verbal request to Vicky Lewis that [she] be permitted to work from home in order to avoid rain damage to the scooter that [she] was renting." (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3; *see also* SoF ¶ 97.) Lenkiewicz also spoke with Rizzo about whether Lenkiewicz could "work from home during rain." (Ex. 18, Lenkiewicz Dep. 108:21–109:12.) With Rizzo's assistance, Lenkiewicz completed and submitted Form 1000 in which Lenkiewicz requested "three days a week to work

from home." (*Id.*, Lenkiewicz Dep. 108:25–109:12.) This Form 1000 apparently was misplaced; HUD could not locate it in response to Lenkiewicz's discovery requests and did not produce it. (*See* SoF ¶ 55; Ex. 8, Def.'s Second Supp. Resp. to Pl.'s Requests for Production at 2.) On January 19, 2010, Lenkiewicz asked Rizzo by email whether Rizzo had "heard anything about the work from home" considering that it had "been well over a month and [Lenkiewicz] hadn't heard from anyone." (Ex. 21, DEF.EMAIL.0079.) Rizzo did not respond. With that, Lenkiewicz's 2009 request for telework was ignored. (*See* Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 3.) As a result, Lenkiewicz "called in and took off, not paid" on rainy days. (Ex. 18, Lenkiewicz Dep. 111:9–11.)

H. In December 2010, Lenkiewicz Submitted One Last Written Request for Accommodation and Included Medical Documentation.

On December 22, 2010, Lenkiewicz submitted another written accommodation request using Form 1000. (Answer ¶ 26; *see also* SoF ¶ 56.) She sought accommodation for her "2 hindering disabilities" of "COPD with chronic bronchitis, and debilitating arthritis." (Ex. 22, LENK_0055.) Lenkiewicz noted that she was experiencing "dizziness, fatigue, joint pain w/ swelling, confusion which are made worse by workplace stresses" and has even "fallen int[o her] file cabinet at [her] workstation [on] 2 different occasions." (*Id.*) She asked HUD to "expedite [her] request" because of her "inability to keep up with work in [her] current situation." (*Id.*) Lenkiewicz's original Form 1000 did not ask for a specific accommodation, but "(telework)" was handwritten on a subsequent version of the form. (*Compare* Ex. 22, LENK_0055 *with* Ex. 20, Def.00263.) The records of RA Branch employee Yolanda Patterson confirm that Lenkiewicz "brought in [a] Hud 1000 form and medical doc[uments]" on December 22, 2010. (Ex. 20, Def.00261.)

Lenkiewicz submitted medical documentation in support of her December 22, 2010 request. (*See* Ex. 22, LENK_0056 – LENK_0059; *see also* SoF ¶ 57.) This documentation included a letter from Dr. Shammas, who wrote that "[b]ecause of her severe multi joint condition, I recommend for her, if at all possible, to work three days a week from home and also if possible to get her into a less stressful type of work." (Ex. 22, LENK_0057.) The documentation also included a "certificate of disability" in which Dr. Shammas diagnosed Lenkiewicz with "dizziness, fatigue, and multi joint pain" and recommended "light duty only due to fatigue and dizziness[.]" (*Id.*, LENK_0058.) Lenkiewicz submitted a release authorizing HUD to speak with Dr. Shammas. (*Id.*, LENK_0056.)

On or around January 5, 2011, Lenkiewicz submitted additional medical documentation, including a report from Imelda Cabalar, M.D. (Ex. 28, SHA_0079 – SHA_0080; *see also* Def.00265; SoF ¶ 57.) Dr. Cabalar's report notes that Lenkiewicz "states that she still has pain on her joints mainly on her knees," "complains of feeling tired all the time and having no energy," and "states that at times she feels like she has no strength." (Ex. 28, SHA_0079.) According to Dr. Cabalar's report, "X-rays of the lumbar spine showed focal degenerative changes" and that "x-rays of the right knee showed mild osteoarthritis[.]" (*Id.*) Dr. Cabalar's report confirmed the diagnoses of "COPD" with "chronic bronchitis" and "degenerative joint disease[.]" (*Id.*, SHA_0080.) Lenkiewicz also submitted a note from Dr. Michael Williams, whom Lenkiewicz had seen for the first time for endocrine issues on January 4, 2011, as well as a release authorizing HUD to speak with him. (Ex. 20, Def.00200, Def.00202, Def.00288; *see also* SoF ¶ 57.) Dr. Williams's note recommended that Lenkiewicz "start working from home immediately." (Ex. 20, Def.00202.)

I. Rather than Grant Lenkiewicz's December 2010 Request, Even Provisionally, HUD Subjected the Request to an Arbitrary and Ineffective Medical Review

In January 2011, HUD's RA Branch referred Lenkiewicz's December 2010 request to the Federal Occupational Health Service ("FOH"), asking FOH "to help … evaluate medical information for the purpose of determining if [Lenkiewicz] should be given an accommodation which would allow her to telework." (Ex. 20, Def.00195 – Def.00196; *see also* SoF ¶ 58.) HUD could have provided a provisional or temporary accommodation to improve Lenkiewicz's comfort and productivity on the job while her request underwent medical review. (*See* SoF ¶ 97.) But HUD did not grant Lenkiewicz a provisional or temporary accommodation, as it had done for other employees, including employees who had not submitted medical documentation. (Ex. 20, Def.00037, DEF.02954 – DEF.02968; Ex. 2, Pl.'s Resp. to Def.'s Interrogatory Nos. 1–3, 9; SoF ¶¶ 97–98.)

FOH assigned Dr. James Allen to consult with HUD's RA Branch on Lenkiewicz's request. (SoF ¶ 61.) But HUD failed to give Dr. Allen all of the information and direction necessary to make any medical evaluation meaningful. (SoF ¶¶ 63–66.) First, HUD never sent Lenkiewicz's Form 1000 to Dr. Allen, leaving him with no notice that Lenkiewicz sought reasonable accommodation based on her respiratory impairments (and not simply her orthopedic impairments). (*See* Ex. 15, Allen Dep. 137:16–138:4, 150:15–21; *see also* Ex. 20, Def.00265.) Second, HUD never provided Dr. Allen with a description of the FOIA Specialist position, foreclosing any evaluation of which accommodations would have helped Lenkiewicz perform the essential functions of the position. (*See* Ex. 13, Patterson Dep. 133:2–5; Ex. 15, Allen Dep. 150:18–21.) Third, HUD never provided Dr. Allen with the information about Lenkiewicz's medical conditions that her supervisors (especially Lewis) had accumulated during Lenkiewicz's employment at HUD. (*See* Ex. 15, Allen Dep. 150:18–21.) Finally, Dr. Allen was never given

FOH's treatment notes documenting Lenkiewicz's history of respiratory and orthopedic impairments and identifying pulmonary specialist Dr. Moti Koul, who treated Lenkiewicz for years. (*See id.*; *see also* Ex. 25, FOH_0001 – FOH_0011; Ex. 18, Lenkiewicz Dep. 146:17–22.)

Medical review is intended to help HUD's RA Branch to identify potential accommodations that may be appropriate for an employee, even for those who have requested a specific accommodation. (Ex. 14, Cumber Dep. 23:2–7.) But HUD's RA Branch narrowed Dr. Allen's normally open-ended medical review by posing specific questions about the "medical basis" for permitting Lenkiewicz to telework and seeking a recommendation as to whether telework should be granted. (Ex. 20, Def.00195; *see also* SoF ¶ 61.) The FOH consultants who participate in the medical review process are not "typically asked to recommend to grant [a] request" for reasonable accommodation. (Ex. 14, Cumber Dep. 40:11–22.) Rather, FOH consultants like Dr. Allen typically determine whether a disability creates a substantial limitation on a major life activity and explain that limitation, which, in turn, permits the agency to select the most appropriate accommodation. (*See* Ex. 15, Allen Dep. 33:9–15, 43:2–17.) Even though Dr. Allen is not specially trained in selecting accommodations, HUD's RA Branch sought his recommendation on the "medical basis" for telework as an accommodation. (*See id.*; Ex. 20, Def.00195.) "Medical basis" is not a term that Dr. Allen ever uses, but he adopted the term in responding that, in his opinion, there was "no medical basis for this employee's need for telework." (*See* Ex. 15, Allen Dep. 45:9–16; Ex. 20, Def.00177 – Def.00178.) It was a deviation from his typical practice for him to recommend to the RA Branch whether to deny the request. (Ex. 15, Allen Dep. 33:9–35:3.)

Without asking Lenkiewicz or HUD for additional information, considering whether accommodations would have improved Lenkiewicz's comfort or productivity, or even

acknowledging Dr. Shammas' recommendation that Lenkiewicz work from home, Dr. Allen recommended denying Lenkiewicz's request. (Ex. 20, Def.00266, Def.00264.) As Dr. Shammas testified, Lenkiewicz "had a lot of complaints of aches and pain in multiple joints, and so I thought that if she can be more productive on a lighter type of environment for work, she probably would be able to continue working." (Ex. 19, Shammas Dep. 13:20–14:3; *see also id.* 14:7–10 ("Q. In your opinion, did the aches and pains that she was suffering prevent her from being able to come to work at that time? A. To a certain point, yes.").) Yet Dr. Allen disregarded Dr. Shammas' determinations that "[t]ravel is difficult" for Lenkiewicz and that telework would improve her productivity given her "severe multi joint condition[.]" (Ex. 20, Def.00197, Def.00180.) Dr. Allen instead focused on his telephone conversations with Dr. Williams, notwithstanding that Lenkiewicz had "been seen by Dr. Shammas for many years and seen by Dr. Williams ***for the first time*** on Jan[uary] 4, 2011." (Ex. 20, Def.00288 (emphasis added).) Dr. Williams also was evaluating Lenkiewicz's possible endocrine issues, not the respiratory and orthopedic impairments that Lenkiewicz cited on her Form 1000. (*See* SoF ¶ 57.)

J. Lenkiewicz Would Have Given HUD the Information It Thought Was Needed, if only HUD Had Asked.

HUD "admits that [Lenkiewicz] submitted medical documentation of physical impairments" and "does not dispute that Plaintiff had physical impairments." (Ex. 1, Def.'s Resp. to Pl.'s Interrogatory No. 10.) Nonetheless, HUD maintains that the medical documentation did not "establish[] that her impairments substantially limited one or more major life activities." (*Id.*) HUD's position is based on Dr. Allen's belief that he had "no medical basis to identify the employee's functional limitations[.]" (Ex. 20, Def.00266.) Similarly, although Patterson acknowledged that, "[b]ased on medical documentation, [Lenkiewicz] does have a

disability," she accepted Dr. Allen's conclusion, writing that "no major life activities were documented." (*Id.*, Def.00288.)

Cumber acknowledged that an impairment, by definition, has to limit *something*. (Ex. 14, Cumber Dep. 54:9–13 (testifying that an impairment is "something that limits the functioning or limits your activities of daily living").) The major life activities limited by Lenkiewicz's impairments were inferable from the impairments themselves—severe arthritis and degenerative joint disease in the lower extremities limit the major life activities of performing manual tasks and walking (among others), and respiratory impairments like COPD with chronic bronchitis limit the major life activity of breathing. HUD refused to draw such inferences. (*See* SoF ¶ 70; Ex. 13, Patterson Dep. 35:11–16 ("Q. Does a request have to state precisely which major life activity is affected or can the Reasonable Accommodations Branch infer that based on documentation? … THE WITNESS: No. We don't – no."), *id.* 36:3–7 ("Q. When a major life activity is not identified in the documentation, does the Reasonable Accommodations Branch make any effort to identify it for themselves? A. No.").) Patterson testified that "joint pain with swelling" would have shown a limitation of a major life activity "[i]f [Lenkiewicz] had put walking there" on the Form 1000. (Ex. 13, Patterson Dep. 67:11–20.)

HUD never asked Lenkiewicz for the information it thought was missing. (SoF ¶¶ 71–72.) "HUD never asked Plaintiff to identify which major life activities were limited by her impairments." (Ex. 4, Pl.'s Request for Admission No. 10;[5] *see also* SoF ¶¶ 67, 69.) Patterson

[5] Defendant failed to serve a timely response to Plaintiff's requests for admission numbers 5–12, which therefore are deemed admitted under Fed. R. Civ. P. 36(a)(3). By motion on December 10, 2014, Defendant sought (1) permission to withdraw these admissions and (2) a *nunc pro tunc* extension of the deadline to serve its otherwise untimely responses. (ECF No. 47.) Plaintiff filed a memorandum in opposition to the motion on December 29, 2014. (ECF No. 48.) Defendant did not file a reply, and its motion remains pending.

did not recall "telling Ms. Lenkiewicz that she needed to identify major life activities[.]" (Ex. 13, Patterson Dep. 128:17–19; *see also* SoF ¶ 70.) The RA Branch's responses to Lenkiewicz's requests for a status update did not ask Lenkiewicz to identify any major life activities. (*See, e.g.*, Ex. 14, Cumber Dep. 80:5–81:18 ("Q. In your email, do you ask Ms. Lenkiewicz to identify any major life activities that are limited by any impairments? A. No.").) Nor did HUD ever "ask[] Plaintiff's physicians to identify which major life activities were limited by her impairments." (Ex. 4, Pl.'s Request for Admission No. 11.)[6] HUD also never asked Lenkiewicz to identify other treating physicians or sign releases to speak with those physicians. (SoF ¶ 67.)

At some point in the summer of 2011, HUD denied Lenkiewicz's December 2010 request by checking "Disapproved" on the HUD 1000. (Ex. 20, Def.00263.) Inexplicably, the denial was backdated to December 22, 2010—the date of her request. (SoF ¶ 83.) HUD never informed Lenkiewicz that her request had been denied, notwithstanding that Dr. Allen had recommended denying Lenkiewicz's request in mid-February. (*See* SoF ¶ 84; Ex. 20, Def.00301, Def.00306, Def.00264.)

Other HUD employees' requests for telework as a reasonable accommodation were not met with such skepticism. Of the 130 such requests received by HUD during Lenkiewicz's employment, 110 were granted, and 90 were granted *without any referral to FOH*. (SoF ¶ 60.) Those 90 requests for telework accommodations that did not involve medical review were granted with justifications bearing striking resemblance to Lenkiewicz's impairments, including asthma, respiratory issues, chronic fatigue syndrome, anxiety, and osteoarthritis. (*Id.*) HUD did not suggest a temporary or provisional accommodation while medical review was ongoing. (SoF ¶ 97.)

[6] *See supra* note 5.

K. HUD Procedures Intended to Ensure Meaningful Consideration of Accommodation Requests Were Misunderstood, Misapplied, or Violated.

It is no accident that each and every one of Lenkiewicz's requests for reasonable accommodation suffered the same fate. Lenkiewicz was denied accommodations because her supervisors refused to promote the decision of Lenkiewicz's requests in good faith and, along with RA Branch employees, violated HUD's procedures for processing requests for reasonable accommodation.

HUD's procedures are set forth in Handbook 7855.1, Procedures for Providing Reasonable Accommodation for Individuals with Disabilities dated April 2003 ("Procedures"). (*See* Ex. 20, Def.00001 – Def.00091; *see also* SOF ¶ 17.) The Procedures instruct, among other things, that supervisors like Cole and Lewis are "responsible for receiving and reviewing requests for reasonable accommodations, engaging in interactive communication, assessing essential job functions, requesting pertinent medical documentation, if appropriate, and whenever possible, approving reasonable accommodation requests." (Ex. 20, Def.00021, Def.00022; *see also* SoF ¶¶ 19–21.) The record shows that Cole and Lewis, as Lenkiewicz's supervisors, utterly failed to perform these and other duties set forth in HUD's Procedures.

First, in denying Lenkiewicz's request for a printer months after the request was made, Lewis suggested that Lenkiewicz renew her request "under reasonable accommodations guidelines" by submitting Form 1000. (Def.00646; *see also* SOF ¶ 31.) HUD's Procedures do not require an employee to submit this form in order for a verbal request to be considered "under reasonable accommodations guidelines." What they do require, however, is that the supervisor receiving the request complete and submit Form 1000 *on the employee's behalf* if the employee does not do so herself. (Ex. 20, Def.00027.) Lewis never submitted Form 1000 for Lenkiewicz. (*See* SoF ¶¶ 31, 90.)

Second, Lenkiewicz's supervisors ignored the procedure requiring them to give Lenkiewicz a written decision explaining why the request had been denied and to forward the decision up the chain for further review. For each request that was not granted, Lewis was required to "document, in writing, his/her reasons for not approving the request prior to forwarding it to the second-line supervisor," but Lewis never did so. (Ex. 20, Def.00021; *see* SoF ¶ 91.) On receiving a request that was not granted by the first-level supervisor, Cole, as second-level supervisor, was "responsible for notifying the individual, in writing, of the status of his/her request, and ensuring that all of the completed request forms, supporting documentation and decision are submitted to the POH [Principal Organization Head] within twelve (12) business days of the reasonable accommodation request." (Ex. 20, Def.00022.) This never occurred. Indeed, Cole denied that she had "any responsibilities with regard to handling a request for reasonable accommodation" and was not even aware that Lenkiewicz had submitted written accommodation requests. (Ex. 17, Cole Dep. 14:18–21; SoF ¶ 93.)

Third, HUD never scheduled a Reasonable Accommodations Committee ("RAC") to review Lenkiewicz's accommodation requests after they had been denied. (*See* Ex. 20, Def.00023 – Def.00024; SoF ¶¶ 34, 42, 53, 82.) A RAC serves as a final decision-maker on requests that are not granted. (*Id.*) Patterson testified that when Dr. Allen recommended denying Lenkiewicz's December 2010 request, "the Reasonable Accommodations Branch at that point was required to schedule a RAC." (Ex. 13, Patterson Dep. 117:4–7.) Despite internal communications suggesting a RAC would be convened, it was not. (Ex. 20, Def.00291.)

Fourth, Lenkiewicz's supervisors failed to communicate with her and others at HUD regarding Lenkiewicz's accommodation requests. (SoF ¶¶ 67–74.) The RA Branch had "problems trying to reach Ms. Lewis … to discuss the case" and "wasn't getting any return calls

or Emails from her." (Ex. 13, Patterson Dep. 160:21–161:9; *see also id.* 179:10–12 ("Q. To your recollection, was it difficult to get in touch with Ms. Lewis? A. Yes.").) Lewis and Cole also had information relevant to Lenkiewicz's requests for reasonable accommodation yet did not share that information with anyone in the RA Branch or in FOH. They failed to send RA Branch (i) a copy of Lewis's absence phone log, which documented the reasons for Lenkiewicz's absences, (ii) the numerous doctors' notes Lenkiewicz submitted in support of her requests for leave, (iii) contact information for Lenkiewicz's pulmonologists, or (iv) Lenkiewicz's position description. (*See* SoF ¶¶ 67–74.)

L. Flaws in HUD's Procedures for Reasonable Accommodation Caused Lenkiewicz's Requests to Languish.

Although many of the Procedures serve to ensure that accommodation requests are meaningfully considered and decided, there are several respects in which the Procedures set well-intentioned employees like Lenkiewicz up to fail, particularly where (as here) the employee's supervisors decline to engage in the process.

First, HUD does not ensure that employees are adequately trained on its Procedures. HUD leaves employees to "look for [their] own training" on handling reasonable accommodation requests. (Ex. 13, Patterson Dep. 203:3–204:2.) Neither Lewis nor Cole had even seen the Procedures before their respective depositions in this case. (Ex. 16, Lewis Dep. 29:1–5; Ex. 17, Cole Dep. 40:16–41:8.) Lewis mistakenly believed it was the RA Branch, and not supervisors like her, that was "responsible for having the appropriate knowledge of [HUD's policies] and counseling managers." (Ex. 16, Lewis Dep. 30:11–19.) As a result, HUD's employees misunderstand the agency's Procedures. For example, Patterson testified that supervisors receiving requests are "not required" to fill out a HUD 1000 if an employee verbally requests an accommodation (Ex. 13, Patterson Dep. 25:6–13), which is contrary to the

Procedure's directive that "[i]f the requesting individual fails to complete Form HUD-1000, the person who receives the request ***must*** complete the form based on information received, on behalf of the requesting individual." Def.00020 (emphasis added).) Lewis similarly misunderstood what HUD's Procedures required when an employee does not submit Form 1000. (*See* Ex. 16, Lewis Dep. 70:11–16 ("Q. Did you ever fill out a HUD 1000 form for her requesting a printer? A. No, I did not. Q. Why didn't you do that? A. I was not aware that it was my responsibility to do that.").)

Second, HUD leaves it to RA Branch employees like Patterson, who lack medical training, to determine whether a request and supporting documentation identify "major life activities" and whether to refer a request to FOH for medical review. (*See* Ex. 13, Patterson Dep. 33:16–20, 101:12–18.) These RA Branch employees are not qualified to evaluate medical evidence. (*See* Ex. 13, Patterson Dep. 135:8–14; *id.* 230:12–14.) HUD's Procedures do not even require a requesting employee to identify which major life activity is affected by a claimed disability when making a request. (Ex. 20, Def.00024 – Def.00027, Def.00068 – Def.00069.)

Third, although HUD's Procedures require processing requests and providing accommodations within a certain timeframe, the Procedures also include a delay-inducing exception that swallows that time limit whenever a request is referred to medical review. (*See* Ex. 20, Def.00037, Def.00039; Ex. 13, Patterson Dep. 36:11–13, 37:13–15.) HUD's Procedures set the "Maximum Time for Processing Request" at 30 days. (Ex. 20, Def.00037.) But this time limit can be suspended indefinitely when there are "extenuating circumstances." (*Id.*, Def.00037, Def.00039.) Under the Procedures, "extenuating circumstances" include pending medical review or evaluation of medical documentation. (*Id.*, Def.00039.) Thus, HUD's Procedures allow for indefinite delay whenever the RA Branch decides medical review is

warranted, and that delay can be triggered by the RA Branch failing to identify a major life activity on Form 1000. (*See* Ex. 13, Patterson Dep. 33:16–20.) Medical review typically takes "[a]nywhere from six to three, four months[,]" but there is no time limit for completing medical review. (*Id.* 36:11–13.)

Fourth, the process in HUD's Procedures dictating who must decide reasonable accommodation requests "was a little ambiguous[.]" (Ex. 14, Cumber Dep. 28:5–29:2, 42:21–43:9; *see* SoF ¶ 85.) HUD's Procedures state that the "decision-maker" for a reasonable accommodation request can be either the employee's supervisor (Cole or Lewis) or the Disability Program Manager (Cumber). (Ex. 20, Def.00037.) The Procedures lack any provision holding one of those individuals accountable for deciding a reasonable accommodation request. (*See* Ex. 13, Patterson Dep. 185:12–186:20.)

The lack of accountability resulting from this flaw in HUD's Procedures is exemplified by the agency's inability to identify *who* denied Lenkiewicz's December 2010 accommodation request. (*See* SoF ¶ 86.) The agency's position has changed throughout the case. First, in its Answer, HUD admitted "that Vicky Lewis denied this request." (Answer ¶ 26 (ECF No. 21).). Then, in its responses to Lenkiewicz's interrogatories, HUD stated that "that it mistakenly attributed to Vicky Lewis the denial of Plaintiff's formal request for a reasonable accommodation" and added that "the Reasonable Accommodation Office denied Plaintiff's request" without stating *who* in the RA Branch denied it. (Ex. 1, Def.'s Resp. to Pl.'s Interrogatory No. 6.) Next, Patterson testified during her deposition that it was FOH, and not the RA Branch, who denied the request. (*See* Ex. 13, Patterson Dep. 116:6–117:3 ("Q. Does that mean FOH is denying the telework request? … THE WITNESS: Yes."), *id.* 164:18–20 ("Q. … You said it was denied. Who denied it? A. FOH.").) Dr. Allen protested that FOH does not

"decide requests." (Ex. 15, Allen Dep. 35:11–16.) After Lenkiewicz served another interrogatory unambiguously asking HUD to "[i]dentify … the person(s) who denied the request," HUD failed to do so, instead responding by reiterating Dr. Allen's recommendation and adding that "Yolanda Patterson … closed Plaintiff's file and *ceased processing* her request on August 12, 2011." (Ex. 6, Def.'s Resp. to Pl.'s Interrogatory No. 20 (emphasis added).) The matter came full circle when Cumber testified that Lenkiewicz's request was denied by "the supervisor," *i.e.*, Vicky Lewis. (Ex. 14, Cumber Dep. 85:5–8.)

M. Lenkiewicz's Supervisors Knew She Was Disabled, Yet Fired Her for Absences Caused by Her Disabilities

HUD had notice that Lenkiewicz was disabled. Several HUD employees (including her supervisors) acknowledged that she was disabled. Rather than work with her to find a suitable accommodation, Lenkiewicz's supervisors terminated her.

Patterson wrote in a June 22, 2011 note to herself: "***Based on medical documentation, employee does have a disability*** but no major life activities were documented." (Ex. 20, Def.00288 (emphasis added).) In her deposition, Patterson clarified that, by writing "employee does have a disability," she was referring to the fact that Lenkiewicz "had a degenerative joint disease multijoint condition with thyroid." (Ex. 13, Patterson Dep. 180:18–181:9.) In acknowledging that Lenkiewicz "does have a disability," Patterson was "using the definition of disability listed under the ADA[.]" (*Id.*, Patterson Dep. 226:16–227:3.) The ADA defines disability as "a physical or mental impairment that substantially limits one or more *major life activities* of such individual." 42 U.S.C. § 12102(1) (emphasis added).

Lewis had firsthand knowledge of Lenkiewicz's disabilities. Lewis' phone logs reflect, among other things, that Lenkiewicz reported having to miss work on many occasions due to breathing and musculoskeletal problems, as well as doctor's appointments involving treatment of

those conditions. (Ex. 22, LENK_0345 – LENK_0350.) Lewis received no fewer than *six* FMLA requests from Lenkiewicz seeking time off due to lower extremity injuries. (*See* SoF ¶ 66.) Lewis also received a worker's compensation application in June 2011 in which Lenkiewicz stated that "[a]s a sufferer of chronic obstruction pulmonary disease COPD, when taken out of the office environment condition(s) improve significantly." (Ex. 22, LENK_0051.) Lewis suggested that Lenkiewicz "retire under disability[.]" (Ex. 9, Pl.'s Supp. Resp. to Def.'s Interrogatory No. 6; *see also* Ex. 18, Lenkiewicz Dep. 138:17–139:4; Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 2.) Lewis' suggestion of disability retirement is corroborated by her handwritten notes, where she wrote, in reference to Lenkiewicz, "Disab[ility] retirement. No end in sight." (Ex. 22, LENK_0630; *see also* Ex. 16, Lewis Dep. 153:4–154:1.)

In response to Lewis' denial of her request for approval of sick leave for December 10, 2010, Lenkiewicz emailed Lewis, quoting under the heading "Americans with Disabilities Act" two paragraphs from the U.S. Department of Justice's web page titled "A Guide to Disability Rights Laws." (*Compare* Ex. 22, LENK_0723 *with* U.S. Dep't of Justice, *A Guide to Disability Rights Laws* (July 2009), *available at* http://www.ada.gov/cguide.htm.) Lewis forwarded Lenkiewicz's email to Cole without comment. (Ex. 22, LENK_0723.)

Ultimately, the agency terminated Lenkiewicz due to her absences. (Ex. 17, Cole Dep. 21:13–17; 152:6–11; Ex. 16, Lewis Dep. 42:12–17.) In the letter finalizing Lenkiewicz's termination, Cole acknowledged that Lenkiewicz had "raised medical reasons that impact [her] ability to report and/or perform work" but suggested "disability retirement" in lieu of an accommodation. (Ex. 23, LENK_0922.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

to judgment as a matter of law." The movant bears the initial burden of showing the absence of genuine issues of material fact by "citing to particular materials in the record[.]" Fed. R. Civ. P. 56(c)(1)(A); *accord Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The non-movant cannot avoid summary judgment by adducing evidence that is "merely colorable" or "not significantly probative[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). Rather, the non-movant must demonstrate that "the evidence is such that a reasonable jury could return a verdict" for it. *Id.* at 248.

A motion for summary judgment also may be granted in part, thereby narrowing the issues for trial. Federal Rule of Civil Procedure 56(g) provides: "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact … that is not genuinely in dispute and treating the fact as established in the case."

ARGUMENT

Lenkiewicz brings a single claim against HUD under section 501 of the Rehabilitation Act of 1973, which mandates that "federal employers must act affirmatively on behalf of disabled individuals." *Loya v. Sebelius*, 840 F. Supp. 2d 245, 258 (D.D.C. 2012) (Lamberth, C.J.) (citing and summarizing 29 U.S.C. § 791(b)); *accord Barth v. Gelb*, 2 F.3d 1180, 1183 (D.C. Cir. 1993) ("Its basic tenet is that the Government must take reasonable affirmative steps to accommodate the handicapped, except where undue hardship would result."). Federal agencies like HUD must "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified … employee with a disability, unless [the agency] can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 29 C.F.R. § 1630.9(a); *accord Loya*, 840 F. Supp. 2d at 258.

The undisputed facts establish each element of Lenkiewicz's Rehabilitation Act claim. Moreover, the record leaves no room for dispute that HUD fell far short of its obligation to

engage in a good-faith interactive process to find suitable accommodations for Lenkiewicz's disabilities. Finally, HUD has failed even to plead, much less prove, the affirmative defense of undue hardship. For these reasons, Lenkiewicz is entitled to judgment as a matter of law on her claim that HUD violated the Rehabilitation Act.

I. The Undisputed Material Facts Establish Each Element of Plaintiff's Rehabilitation Act Claim as a Matter of Law.

It is settled in this district that, "[t]o establish a prima facie case of discrimination under the Rehabilitation Act for an employer's failure to reasonably accommodate a disability," a plaintiff must prove:

> (1) that [she] was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of [her] disability; (3) that with reasonable accommodation [she] could perform the essential functions of the position; and (4) that the employer refused to make the accommodation.

Mem. Op. & Order at 5, *Lenkiewicz v. Castro*, No. 13-cv-261 (D.D.C. Jan. 20, 2015) (ECF No. 49) (hereinafter "Jan. 20 Op.") (quoting *Loya*, 840 F. Supp. 2d at 258).[7] The uncontroverted evidence establishes each of these elements beyond dispute.

A. Lenkiewicz Was Disabled.

It is undisputed that, throughout her employment at HUD, Lenkiewicz was a "person with a disability" within the meaning of the Rehabilitation Act. (*See* SoF ¶¶ 6–16.) A "disability" is defined as a "physical or mental impairment that substantially limits one or more

[7] As this Court recognized in its January 20 Opinion, "the standards used in assessing a Rehabilitation Act claim are the same as those applicable to certain provisions of the ADA 'as [they] relate to employment.'" Jan. 20 Op. at 5 n.2 (quoting 29 U.S.C. § 794(d)). Consequently, "'[r]egulations drafted to determine an employer's liability under the … ADA likewise govern liability determinations in employment-discrimination suits under the Rehabilitation Act' applicable to federal agencies." *Id.* (quoting *Edwards v. EPA*, 456 F. Supp. 2d 72, 97 (D.D.C. 2006)).

of the major life activities of such individual[.]" 29 C.F.R. § 1630.2(g)(1)(i); *compare* 42 U.S.C. § 12102(1)(A) (nearly identical definition under ADA statute). In the wake of the ADA Amendments Act of 2008, the implementing regulations clarify that "'[s]ubstantially limits' is not meant to be a demanding standard" and "shall be *construed broadly* in favor of *expansive coverage*, to the maximum extent permitted by the terms of the ADA[.]" 29 C.F.R. § 1630.2(j)(1)(i) (emphasis added). Lenkiewicz was disabled for the following three reasons.

First, Lenkiewicz was disabled by reason of her chronic respiratory impairments. (*See* SoF ¶¶ 10–15.) Lenkiewicz's COPD with chronic bronchitis is a "physiological disorder or condition … affecting" her "respiratory" system. 29 C.F.R. § 1630.2(h)(1). This respiratory disorder substantially limits (i) the major life activity of "breathing" and (ii) the "operation" of her "respiratory" functions. *See* 29 C.F.R. § 1630.2(i)(ii). Dr. Schwartz confirmed Lenkiewicz's COPD diagnosis and explained that, "combined with her musculoskeletal impairments and her obesity, Ms. Lenkiewicz's respiratory impairments (namely her COPD) limited her ability to breathe." (Ex. 11, Schwartz Rep. ¶ 23.) Dr. Schwartz further stated that commuting by Metro to HUD headquarters, moving around the workplace, and being exposed to airborne irritants (including mold) worsened Lenkiewicz's breathing impairments. (*See id.* ¶¶ 19, 23–24.)

Second, Lenkiewicz was disabled by reason of her chronic orthopedic impairments. (*See* SoF ¶¶ 7, 9, 13.) Lenkiewicz's degenerative joint disease was a "physiological disorder or condition … affecting" her "musculoskeletal" system. *See* 29 C.F.R. § 1630.2(h)(1). This musculoskeletal disorder substantially limits the major life activities of "performing manual tasks," "walking," "lifting," and "bending," as well as the "operation" of her "musculoskeletal" functions. *See* 29 C.F.R. § 1630.2(*i*)(ii). Orthopedic specialist Dr. Eric Dawson explained that "Ms. Lenkiewicz's musculoskeletal impairments severely limited her ability to perform manual

tasks and even walk" and that "whenever she exerted herself physically beyond a certain threshold, Ms. Lenkiewicz would frequently experience pain, swelling, and spasms in her joints, which in turn limited her ability to concentrate and think." (Ex. 10, Dawson Rep. ¶ 18.)

Third, Lenkiewicz was disabled by reason of her temporary orthopedic injuries. (See SoF ¶¶ 8–9, 13, 15.) Lenkiewicz's broken right foot and torn right meniscus were each plainly a "physiological disorder or condition … affecting" her "musculoskeletal" system and substantially limiting the major life activities of performing manual tasks and walking. *See* 29 C.F.R. § 1630.2(h)(1).

HUD cannot point to any contrary evidence. HUD did not proffer a medical expert to dispute the amply supported opinions of Dr. Dawson and Dr. Schwartz that Lenkiewicz suffered from physical impairments substantially limiting many major life activities. HUD did not even take the depositions of Lenkiewicz's medical experts. Thus, the one-sided record in this case establishes that Lenkiewicz is a person with a disability within the meaning of the Rehabilitation Act. *See Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (affirming determination on summary judgment that ADA plaintiff was disabled based on undisputed evidence that her HIV substantially limited the major life activity of reproduction).

B. HUD Had Notice of Plaintiff's Disabilities.

It is undisputed that HUD had notice of each of these three types of disabilities.

First, HUD had notice of Lenkiewicz's chronic orthopedic disabilities. (*See* SoF ¶¶ 56–57, 66.) Lenkiewicz's December 2010 request cited "debilitating arthritis" as one of two "hindering disabilities." (Ex. 22, LENK_0055.) The medical documentation received by HUD in support of that request included a note diagnosing Lenkiewicz with "a severe multi joint condition[.]" (Ex. 20, Def.00197.) Dr. Shammas told Dr. Allen that "[t]ravel is difficult" for Lenkiewicz and that he "has seen [Lenkiewicz] for many years all related to complains of her

joint [*sic*] including elbow, knee, neck & low back." (Ex. 20, Def.00180.) Lenkiewicz reported needing to be excused from work on many occasions because of joint pain and swelling. (*See* Ex. 22, LENK_0347 – LENK_0350.)

Second, HUD had notice of Lenkiewicz's chronic respiratory disabilities. (*See* SoF ¶¶ 56, 65–66.) FOH's records of Lenkiewicz's treatment included a note from Dr. Koul diagnosing her with bronchitis and COPD. (*See* Ex. 25, FOH_0005.) During a visit to FOH in August 2010, Lenkiewicz's respiratory distress was so severe that, at FOH's urging, Lenkiewicz was hospitalized. (*See* Ex. 25, FOH_0003 – FOH_0004, FOH_0006.) She had also been hospitalized for breathing distress in early 2009, and she informed HUD of her hospitalization. (Ex. 18, Lenkiewicz Dep. 69:7–24, 120:4–8, 126:18–127:13.) Lenkiewicz described her "COPD with chronic bronchitis" as one of two "hindering disabilities" on the December 2010 Form 1000. (Ex. 22, LENK_0055.) She also submitted a report from Dr. Cabalar diagnosing her with "COPD" with "chronic bronchitis." (Ex. 28, SHA_0080.)

Lenkiewicz's supervisors had firsthand knowledge of Lenkiewicz's breathing difficulties. (*See* SoF ¶¶ 44, 66, 74, 79, 87.) Lenkiewicz told Lewis that she was concerned about toxic mold in HUD headquarters and was having breathing problems. (Ex. 18, Lenkiewicz Dep. 131:1–10.) Lewis received telephone messages and notes documenting Lenkiewicz's absences due to breathing problems. (*See* Ex. 22, LENK_0347 – LENK_0350.) Lenkiewicz sent Lewis a worker's compensation application where Lenkiewicz complained that "when returning to work I suffer from chronic bronchitis, respiratory infections, and the inability to breathe[.]" (Ex. 22, LENK_0049, LENK_0051.) Lewis even saw Lenkiewicz gasping for air and clutching her chest during a meeting where Lenkiewicz begged Lewis for an accommodation. (Ex. 2, Pl.'s Resp. to Def.'s Interrogatory No. 6.) In May 2011, Lenkiewicz told Lewis that she would not return to

the office until HUD did something to address her breathing problems. (*See* Ex. 18, Lenkiewicz Dep. 165:9–167:6.)

Third, HUD had notice of Lenkiewicz's temporary orthopedic injuries (*i.e.*, a broken foot and torn meniscus). (*See* SoF ¶¶ 30, 36–37, 40, 66.) Lenkiewicz submitted a note from Dr. Dawson indicating that her broken foot "incapacitates her from walking or standing for prolonged periods" and "has increased her pain and stress level[.]" (Ex. 23, LENK_0782.) Lenkiewicz's disabilities based on these injuries were obvious to others, including her supervisors. Lewis testified that Lenkiewicz "was using a scooter, so I believe that was during the time she had a knee injury." (Ex. 16, Lewis Dep. 58:19–59:4; *see also id.* 68:19–69:6.) Lewis acknowledged receiving FMLA request forms related to these disabilities; Lenkiewicz submitted no fewer than *six* of these forms requesting FMLA leave. (*See id*. 91:18–108:13.)

HUD acknowledged multiple times that Lenkiewicz was disabled before terminating her. (*See* SoF ¶¶ 16, 69, 72, 79, 88.) For example, Patterson believed that Lenkiewicz's "degenerative joint disease" and "multijoint condition" constituted a disability. (*See* Ex. 20, Def.00288, Ex. 13, Patterson Dep. 180:18–181:9.) Lewis suggested to Lenkiewicz that she could "retire under disability[.]" (Ex. 9, Pl.'s Supp. Resp. to Def.'s Interrogatory No. 6; *see also* Ex. 22, LENK_0630.) Also, Cole acknowledged that Lenkiewicz "raised medical reasons that impact [her] ability to report and/or perform work" and suggested "disability retirement" in lieu of an accommodation. (Ex. 23, LENK_0922.) HUD therefore cannot deny that it was aware of Lenkiewicz's disabilities. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (employer's awareness that the employee "was not performing her job to expectations" was evidence that the employer was "apprised" of disability).

C. With a Reasonable Accommodation, Plaintiff Could Have Performed the Essential Functions of a FOIA Specialist or Other Position at HUD.

The undisputed facts establish that a reasonable accommodation—if HUD had granted one—would have allowed Lenkiewicz to perform the essential functions of the FOIA Specialist position or any of the many other positions at HUD for which she was qualified.

In the uncontroverted opinion of vocational rehabilitation specialist Dr. Schroeder, Lenkiewicz "has the skills, experience, and expertise necessary to perform the essential functions of the FOIA Specialist position at HUD" and she "was and remains capable of performing those essential functions and was qualified for that position, notwithstanding her disabilities." (Ex. 12, Schroeder Rep. ¶ 27; *see also* SoF ¶ 3–5.)

Any of the reasonable accommodations Lenkiewicz requested—including a printer, a parking space, relocation, and telework—would have enabled her to perform the essential functions of the FOIA Specialist position. (*See* SoF ¶¶ 13, 24–25, 28, 38, 51.) The uncontroverted medical expert testimony confirms that accommodations reducing Lenkiewicz's physical activity or relocating her from HUD headquarters would have removed the barriers that made it difficult for her to do her job. Dr. Dawson explained that "accommodations that reduced Ms. Lenkiewicz's level of physical activity would have reduced the severity of her musculoskeletal impairments and therefore reduced her pain, spasms, and swelling, which in turn would have improved Ms. Lenkiewicz's ability to concentrate and think." (Ex. 10, Dawson Rep. ¶ 20.) With respect to her respiratory impairments, Dr. Schwartz explained that these sorts of accommodations would have "reduced the severity of her breathing impairments and improved her ability to breathe, which in turn would have made it easier for Ms. Lenkiewicz to concentrate and think." (Ex. 11, Schwartz Rep. ¶ 25.)

All four of the accommodations Lenkiewicz requested were reasonable as a matter of law. *See Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014) ("[I]t is rare that any particular type of accommodation will be unreasonable as a matter of law[.]"). One of the ways in which the Rehabilitation Act "demands a great deal from federal employers in the way of accommodation" is that the Act "in appropriate cases … requires an agency to consider work at home[.]" *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) (citing *Langon v. Dep't of Health & Human Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992)). The systems used by FOIA Specialists at HUD were conducive to telework at least as early as August 2011, when Lenkiewicz was still employed at HUD, and were capable of being used for reviewing documents, inputting redactions, tracking FOIA requests, and other functions related to a FOIA Specialist's work remotely by any authorized user with an Internet connection as early as 2009. (*See* SoF ¶ 78.)

Lenkiewicz could have been accommodated in other ways. (*See* SoF ¶ 81.) One possibility was reassignment to another position at HUD. *See Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998) ("If the employee is unable to perform his job, with or without accommodation, the employer must consider reassignment as one form of accommodation.").[8] Dr. Schroeder opined without contradiction that Lenkiewicz "was and remains qualified for a wide range of positions at HUD[.]" (Ex. 12, Schroeder Rep. ¶ 24.) Lenkiewicz's supervisors considered reassignment but refused to grant it. (*See* SoF ¶ 79.)

[8] *See also Cravens*, 214 F.3d at 1017, 1018 (collecting cases and holding that "the definition of 'qualified individual with a disability' includes a disabled employee who cannot do his or her current job, but who desires and can perform, with or without reasonable accommodation, the essential functions of a vacant job within the company to which he or she could be reassigned"); *accord Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc) ("An employee seeking reassignment to a vacant position is thus within the definition [of 'qualified individual with a disability'] if, with or without reasonable accommodation, she can perform the essential functions of the employment position to which she seeks reassignment.").

D. HUD Ignored or Denied *Every One* of Lenkiewicz's Accommodation Requests.

It is undisputed that HUD never granted *any* of Plaintiff's many requests for reasonable accommodation. (SoF ¶¶ 23, 31, 41, 52, 83.) Nor did HUD ever propose any viable alternative accommodations. The only alternative it ever suggested—that Lenkiewicz ask a HUD contractor to shuttle papers to and from a shared printer—was not workable. (SoF ¶ 33.) HUD ignored or denied every single one of Lenkiewicz's other requests for reasonable accommodations and never suggested viable alternatives to the accommodations Lenkiewicz proposed. Instead, after failing to accommodate her disabilities, HUD terminated Lenkiewicz due to absences and performance issues caused by those disabilities, which "amounts to a discharge solely because of the disabilities." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995).

II. The Undisputed Material Facts Establish that HUD Failed to Engage in a Good-Faith Interactive Process with Lenkiewicz to Find an Accommodation.

How can it be that an indisputably disabled employee who requested specific accommodations for years never received a single accommodation—or even a meaningful counteroffer? The answer is clear from the record: her supervisors had no interest in working with her in good faith to find an appropriate accommodation, and HUD's RA Branch employees simply failed to do their jobs. HUD failed to engage in the interactive process as a matter of law.

Once an employee requests accommodation for a disability, the agency must "initiate an informal, interactive process with the qualified individual with a disability in need of accommodation." 29 C.F.R. § 1630.2(*o*)(3), *quoted in Morris v. Jackson*, 994 F. Supp. 2d 38, 45 (D.D.C. 2013). "The interactive process is the key mechanism for facilitating the integration of disabled employees into the workplace." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000), *judgment vacated on other grounds*, 535 U.S. 391 (2002). "[A]n employer's participation in this process is mandatory, and that it is triggered by a disabled employee's request for a

reasonable accommodation." *EEOC v. Yellow Freight Sys.*, No. 98cv2270, 2002 WL 31011859, at *23 (S.D.N.Y. Sept. 9, 2002). The employer should "explore 'what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered [the] employee's request, and offer and discuss available alternatives when the request is too burdensome.'" *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002) (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) (en banc)). As part of the interactive process, the employer should adopt a "problem solving approach" by taking the following steps:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
>
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
>
> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

29 C.F.R. app. § 1630. "Employers who reject this core process must face liability when a reasonable accommodation would have been possible." *Barnett*, 228 F.3d at 1116.

A. HUD Was Required to Engage in a Good-Faith Interactive Process with Lenkiewicz.

As a matter of law, Lenkiewicz triggered HUD's obligation to engage in the interactive process by satisfying her "initial duty to inform [HUD] of a disability." *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803–04 (7th Cir. 2005). In 2009, Lenkiewicz suffered from the obvious disability of a broken foot when she requested a printer and a parking space. As the disabled

employee had done in *Sears*, Lenkiewicz submitted a "doctor's note[]" from Dr. Dawson "disclosing her diagnosis and limitations," and she "requested a specific accommodation" in the form of a parking space. *See id.* at 803. In addition, Lenkiewicz cited breathing difficulties in support of her request for relocation to the portals building. And, in requesting telework, Lenkiewicz clearly "indicate[d] to the employer that she has a disability and desires an accommodation" (*see id.*at 803–04) by submitting HUD's own form for requesting reasonable accommodations, including the December 2010 form citing "hindering disabilities" of "COPD with chronic bronchitis" and "debilitating arthritis" and attaching medical evidence of those impairments (*see* Ex. 22, LENK_0055 – LENK_0059).

Because each of Lenkiewicz's requests for reasonable accommodation "makes clear that [she] wants assistance for [] her disability," HUD was required to engage in the interactive process with respect to each of those requests. *Lee v. Dist. of Colum.*, 920 F. Supp. 2d 127, 136 (D.D.C. 2013) (citation omitted); *see also Cravens*, 214 F.3d at 1021 (employee's request for "assistance in locating an available position within the company" triggered obligation "to initiate an interactive process with her to determine the appropriate reasonable accommodation"); *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128, 1137 (9th Cir. 2001) ("Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations."); *Faison v. Vance-Cooks*, 896 F. Supp. 2d 37 at 62 (D.D.C. 2012) (same).

Even if HUD perceived some deficiency in the medical documentation accompanying Lenkiewicz's requests, it nonetheless had a continuing obligation to engage in the interactive process. HUD was required to "ask for clarification" if it did not have all of the information it

wanted. *Sears*, 417 F.3d at 804 ("[A]n employer cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark."); *accord Faison*, 896 F. Supp. 2d at 62–63 ("Even if the GPO reasonably believed that Faison's requests for limited hours and reassignment were unnecessary, the GPO was still required to engage in an interactive process with [Faison] to design an accommodation that was reasonable." (citation and quotation marks omitted)); *Woodruff v. LaHood*, 777 F. Supp. 2d 33, 41 (D.D.C. 2011) ("Once the employer knows of the disability and the employee's desire for accommodations, 'it makes sense to place the burden on the employer to request additional information that the employer believes it needs.'" (quoting *Taylor*, 184 F.3d at 315)).

B. Undisputed Evidence Establishes that HUD Acted in Bad Faith and Hindered the Interactive Process.

Once an employee triggers an employer's obligation to engage in the interactive process, the employer "must make a reasonable effort to explore the accommodation possibilities with the employee." *Hendricks-Robinson*, 154 F.3d at 693. Where, as here, "the interactive process breaks down, 'courts should attempt to isolate the cause of the breakdown and then assign responsibility' to the culpable party." *Woodruff*, 777 F. Supp. 2d at 42 (quoting *Rehling v. City of Chicago*, 207 F.3d 1009, 1015–16 (7th Cir. 2000)). An employer bears responsibility for "hinder[ing]" the interactive process when:

> the employer knows about the employee's disability; the employee requests accommodations or assistance; the employer does not in good faith assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer's lack of good faith.

Battle v. United Parcel Serv., Inc., 438 F.3d 856, 862–63 (8th Cir. 2006) (upholding jury verdict that employer failed to engage in the interactive process in good faith). Undisputed evidence establishes that this is exactly what happened here.

Consistent with the regulatory guidance, HUD should have followed a four-step process as part of a "problem-solving" approach. 29 C.F.R. app. § 1630. The agency should have "determine[d]" the essential functions of the FOIA Specialist position (step 1), "ascertain[ed]" how reasonable accommodation would help Lenkiewicz "overcome" her "job-related limitations" (step 2), "assess[ed] the effectiveness" of potential accommodations (step 3), and "select[ed] and implement[ed]" the "most appropriate" accommodation (step 4). *Id.* The agency never followed *any* of these steps. For Lenkiewicz's 2009 requests for relocation or telework, HUD simply ignored the request. For Lenkiewicz's requests for a printer and parking space, HUD refused the accommodation as unavailable without further explanation. And for Lenkiewicz's December 2010 accommodation request, HUD second-guessed Lenkiewicz's complaints of job-related limitations and treated her medical documentation to an unusual level of scrutiny. (*See* SoF ¶ 60.)

The hallmark of an employer's good-faith engagement in the interactive process is helping the employee find an accommodation that suits both parties. The closest HUD ever came to helping Lenkiewicz in this way—suggesting that she rely on a busy contractor to retrieve documents from a far-away printer months after Lenkiewicz had requested a printer—was still nowhere close enough. The uncontroverted evidence establishes that HUD did not help Lenkiewicz overcome her limitations and find effective accommodations. Worse, the uncontroverted evidence also establishes that the agency ignored procedures intended to facilitate interactive communication, dismissed obvious evidence of Lenkiewicz's job-related limitations, disbelieved Lenkiewicz's claims of disability, needlessly delayed decision on her requests, misled her about the status of her requests, denied her accommodations that had readily been granted to others, and terminated her for problems caused by her disabilities.

In at least nine different respects, HUD hindered the interactive process.

First, HUD violated its own Procedures in handling Lenkiewicz's reasonable accommodation requests. Lenkiewicz's supervisors failed to submit Form 1000 for requests for a printer, a parking space, or relocation, nor did they submit the necessary paperwork explaining why the requests were denied. (SoF ¶¶ 32, 34, 42, 53, 90, 92.) No RAC was ever held or even scheduled to review any of Lenkiewicz's requests. (SoF ¶¶ 34, 42, 53, 82.) HUD altogether ignored Lenkiewicz's request for relocation and her 2009 request for telework. (SoF ¶¶ 52, 55.) And it denied Lenkiewicz's December 2010 request without telling her. (SoF ¶ 84.) Her supervisors withheld critical information from the RA Branch, including Lenkiewicz's position description, phone logs and doctor's notes indicating her reasons for medically related absences, FMLA request forms signed by her doctors, and the fact that she had been out of the office since at least May 2011. (SoF ¶¶ 66, 74.) The RA Branch had difficulty getting in touch with Lenkiewicz's supervisors. (SoF ¶¶ 74, 87.) In these and other respects, as Dr. Schroeder opined, HUD failed to adhere to best practices for federal agencies for engagement in the interactive process with disabled employees. (SoF ¶¶ 7, 74–75.)

Second, HUD never evaluated the essential functions of the FOIA Specialist position, much less whether Lenkiewicz could have performed those essential functions with reasonable accommodation. *See Barnett*, 228 F.3d at 1115 ("The interactive process requires that employers analyze job functions to establish the essential and nonessential job tasks."). Neither Dr. Allen nor anyone in the RA Branch was ever provided with a description of the FOIA Specialist position or a list of the activities that could be performed from home. (*See* SoF ¶¶ 63, 73.)

Third, HUD arbitrarily insisted that Lenkiewicz's December 2010 request for accommodation in the form of telework be referred to FOH for medical review. HUD does not

require medical review for all, or even most, requests for reasonable accommodation in the form of telework. (SoF ¶ 30.) Of 130 such requests, 90 were granted *without* medical review; in many of these cases, the employees' conditions resembled Lenkiewicz's impairments. (*Id.*)

Fourth, HUD pigeonholed the medical review of Lenkiewicz's December 2010 telework request. HUD did not give Dr. Allen such relevant medical evidence as FOH's treatment notes, Lewis' phone logs, Lenkiewicz's FMLA forms, or contact information for her other physicians. (SoF ¶¶ 66, 74.) HUD followed Dr. Allen's recommendation based on whether there was "need for telework" (Ex. 20, Def.00266), notwithstanding that "the language of section 501 of the Rehabilitation Act and its implementing regulations do not require a showing of 'necessity.'" *Loya*, 840 F. Supp. 2d at 260.

Fifth, HUD adopted the nonsensical position that Lenkiewicz's documentation of "physical impairments" was somehow not enough to show limitation of a major life activity or to justify accommodating her. (*See* SoF ¶ 16.) HUD reasonably could have inferred, based on the documentation that it had, that Lenkiewicz's respiratory impairments limited the major life activity of breathing and that her orthopedic impairments limited the major life activities of performing manual tasks and walking. But HUD never drew such inferences or asked for the information it supposedly lacked. (SoF ¶¶ 69–72.) *See Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996) ("Another example of the breakdown in the interactive process is FWCS' failure simply to inquire of Bultemeyer or his psychiatrist about what he needed to be able to work."). In any event, there is no evidence that the outcome of the process would have been any different had Lenkiewicz submitted additional medical documentation.

Sixth, HUD never reconciled Dr. Allen's conclusion about the supposed lack of "medical basis" for telework with the fact that Lenkiewicz had indisputably documented "physical

impairments" and complained that health problems were interfering with her job performance. (*See* SoF ¶¶ 16, 61–62.) HUD refused to take Lenkiewicz's complaints at face value, and after Dr. Allen recommended denying her December 2010 request, HUD made no attempt to determine what prompted Lenkiewicz to seek reasonable accommodation or why Lenkiewicz was having problems at work. (*See* SoF ¶¶ 69, 71, 75–76.) HUD also did not press Dr. Allen to explain why he disregarded the recommendation of Dr. Shammas that Lenkiewicz be permitted to telework. *See Schmidt v. Solis*, 891 F. Supp. 2d 72, 90–91 (D.D.C. 2012) ("continued yet unwarranted skepticism of" employee was evidence of employer's bad faith).

Seventh, as weeks turned to months, HUD allowed FOH's medical review to drag on without giving Lenkiewicz a temporary accommodation. *See Schmidt*, 891 F. Supp. 2d at 90–91 (concluding that the employer's "delay in issuing [the employee] a workable accommodation constituted bad faith with regards to the interactive accommodation process"). Lenkiewicz did her part by periodically seeking updates from the RA Branch and reminding them of her immediate need for an accommodation. (*See* SoF ¶ 68.) She even asked if additional documentation was necessary. (*See id.*)

Eighth, HUD ignored or denied Lenkiewicz's requests for reasonable accommodations without proposing workable alternative accommodations. "An employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives." *Sears*, 417 F.3d at 806; *see also Barnett*, 228 F.3d at 1116 (reversing grant of summary judgment for employer who "rejected all three of [the employee's] proposed reasonable accommodations and offered no practical alternatives").[9]

[9] HUD should have proposed "reassignment in another position" as one of several "potential forms of accommodation[,]" but it never did. *Carr*, 23 F.3d at 530 (citing *Langon*, 959 F.2d at

Ninth, rather than accommodate her, HUD terminated Lenkiewicz based on absences that resulted from the agency's failure to reasonably accommodate her disabilities. (Ex. 23, LENK_0922; SoF ¶ 88.) *See Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) ("Failing to discuss a reasonable accommodation in a meeting in which the employer takes an adverse employment action against an injured employee may demonstrate a lack of good faith."); *Cutrera v. Bd. of Supervisors of La. St. Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) ("An employer may not stymie the interactive process … by preemptively terminating the employee before an accommodation can be considered or recommended."). HUD thereby "tried to take hasty advantage of what it saw as an opportunity to rid itself of a problem, a disabled employee." *Bultemeyer*, 100 F.3d at 1286.

In the end, a reasonable factfinder simply could not conclude that an employer engaged in a good-faith interactive process with an employee requesting reasonable accommodation where, as here, it is undisputed that the employer:

- Deviated from best practices for engagement in the interactive process;
- Failed to ask the employee for further information that could have remedied what the employer perceived as a deficiency in the employee's request;
- Adopted policies and procedures that do not hold decision-makers accountable and allow indefinite delay whenever medical review is involved;
- Repeatedly violated its own policies and procedures for handling reasonable accommodation requests;
- Insisted on a medical review process that was not required of all, or even most, employees who had requested the same accommodation the employee sought;

1060). Nor did HUD help Lenkiewicz find vacancies. *See Aka*, 156 F.3d at 1304 n.27 (an employer has a "corresponding obligation to help [an employee] identify appropriate job vacancies (since [an employee] can hardly be expected to hire detectives to look for vacancies)").

- Focused medical review narrowly on the need for the particular accommodation requested, not properly on what accommodations might help the employee;
- Withheld relevant information from the persons facilitating that medical review;
- Failed to grant or even to consider any temporary accommodations, even while medical review was ongoing;
- Never proposed alternative accommodations, except to suggest that the employee simply ask another employee for help;
- Failed to ensure that supervisors promptly and adequately communicate with others involved in handling reasonable accommodation requests;
- Refused to ask the employee or her physicians what might improve her productivity;
- Completely disregarded multiple, properly submitted verbal and written accommodation requests;
- Denied the remainder of the employee's accommodation requests, even when the employee's disabilities were obvious;
- Did not tell the employee that her last and final reasonable accommodation request was denied; and
- Terminated the employee for absences caused by the disabilities for which the employee sought reasonable accommodation.

Kafka could hardly have written it better. *See Schmidt*, 891 F. Supp. 2d at 91 ("Thus, the entire process to which Schmidt and the DOL itself were subjected was unnecessary, unjustified, and vindictive, rather being an interactive joint effort to find a reasonable accommodation.")

III. HUD Does Not Plead or Otherwise Assert that Accommodating Lenkiewicz Would Have Imposed an Undue Hardship.

Lenkiewicz is entitled to summary judgment that accommodating her would not have imposed an undue hardship on HUD. Undue hardship "is an affirmative defense" to a Rehabilitation Act claim. *Woodruff v. Peters*, 482 F.3d 521, 527 (D.C. Cir. 2007); *see* 29 C.F.R. § 1630.15. HUD does not plead this affirmative defense in its Answer, and nowhere in its discovery responses does HUD assert undue hardship as a reason why it refused to accommodate

Lenkiewicz. *See Howard v. Gray*, 821 F. Supp. 2d 155, 165 (D.D.C. 2011). There is no evidence that HUD has ever "considered," much less decided, *any* of the five factors involved in "determining whether an accommodation would impose an undue hardship." 29 C.F.R. § 1630.2(p)(2). HUD even admits that "it did not identify an undue hardship that would result from accommodating Plaintiff." (Answer ¶ 51 (ECF No. 21).) Because HUD has not asserted undue hardship as an affirmative defense, nothing stands in the way of granting summary judgment for Lenkiewicz on her Rehabilitation Act claim.

CONCLUSION

Plaintiff respectfully requests that this Court enter summary judgment in her favor and promptly hold a pretrial conference with the parties, at which a trial on compensatory damages and all appropriate equitable and injunctive relief will be scheduled.

ORAL ARGUMENT REQUESTED

Pursuant to Local Civil Rule 7(f), Plaintiff respectfully requests an oral hearing on her summary judgment motion.

Respectfully submitted,

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