IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HERBERT HENDRICKS,	:	
	:	
Plaintiff,	:	
	:	CIVIL CASE NO.
v.	:	1:19-cv-05775-TCB-RGV
	:	
HENRY COUNTY, GEORGIA,	:	
	:	
Defendant.	:	

MAGISTRATE JUDGE'S FINAL
REPORT, RECOMMENDATION, AND ORDER

Plaintiff Herbert Hendricks ("Hendricks") brings this action against Henry County, Georgia ("Henry County"), alleging claims of discrimination in violation of the Americans with Disabilities Act ("ADA"), as amended by the ADA Amendments Act of 2008, 42 U.S.C. §§ 12101 et seq.; and the Rehabilitation Act, 29 U.S.C § 791 et seq. [Doc. 1].[1] Henry County has filed a motion for summary judgment, [Doc. 31], which Hendricks opposes, [Doc. 33], and Henry County has filed a reply in support of its motion, [Doc. 34]. Hendricks also filed a statement of additional facts, [Doc. 36], which Henry County moved to strike as untimely, [Doc. 37]. Hendricks has filed a response in opposition to Henry County's motion

[1] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF, except that citations to Hendricks' deposition transcript will also be cited according to the transcript page number.

to strike, [Doc. 38], as well as a motion for leave to file his statement of additional facts as supplemental material in response to Henry County's motion for summary judgment, [Doc. 39]. Henry County has not filed a response to Hendricks' motion, and it is therefore deemed to be unopposed. See LR 7.1(B), NDGa. For the reasons that follow, Hendricks' motion for leave to file, [Doc. 39], is **GRANTED** and Henry County's motion to strike, [Doc. 37], is **DENIED**, and it is **RECOMMENDED** that Henry County's motion for summary judgement, [Doc. 31], be **GRANTED**.

I. FACTUAL BACKGROUND

A. Preliminary Matters

"In this District, the process for separating disputed from undisputed material facts is governed by Local Rule 56.1(B)." Brandon v. Lockheed Martin Aeronautical Sys., 393 F. Supp. 2d 1341, 1347 (N.D. Ga. 2005), adopted at 1346.[2]

[2] Specifically, Local Rule 56.1(B)(1) requires the movant to include with its motion and brief "a separate, concise, numbered statement of the material facts to which [it] contends there is no genuine issue to be tried," and provides that the Court will not consider any fact that is "not supported by a citation to evidence (including page or paragraph number); [] supported by a citation to a pleading rather than to evidence; [] stated as an issue or legal conclusion; or [] set out only in the brief[.]" LR 56.1(B)(1), NDGa. In addition, Local Rule 56.1(B)(2) requires the non-moving party to include with the responsive brief "[a] response to the movant's statement of undisputed facts[] . . . [that] contain[s] individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." LR 56.1(B)(2)(a)(1), NDGa.; see also Williams v. Slack, 438 F. App'x 848, 849 (11th Cir. 2011) (per curiam) (unpublished) (citations omitted). If the non-moving party fails to respond to a material fact contained in the movant's statement by directly refuting the fact with concise responses supported by specific citations to evidence, stating a valid

Henry County, as movant, has filed a statement of undisputed material facts in compliance with Local Rule 56.1(B). [Doc. 31-1]. Henry County correctly points out, [Doc. 34 at 2-4], that although Hendricks "filed a response to the motion for summary judgment, [] he did not file a response to [Henry County's] statement of material facts," Parrish v. Chase Bankcard Servs., Inc., CIVIL ACTION FILE NO. 1:13-CV-01504-AT-JFK, 2014 WL 12572735, at *2 (N.D. Ga. June 10, 2014), adopted by 2014 WL 12575839, at *1 (N.D. Ga. July 17, 2014) (footnote omitted). "Therefore, [Henry County's] proffered material facts are deemed admitted to the extent that they are supported by the record[.]" Id.; see also [Doc. 31-1].

The Local Rules also require that the non-movant include with his responsive brief a "statement of additional facts which the respondent contends are material and present a genuine issue for trial" and which "meet[s] the requirements set out in [Local Rule] 56.1(B)(1)." LR 56.1(B)(2)(b), NDGa. While Hendricks' response brief contains a section titled "Statement of Facts," [Doc. 33 at 2 (all caps omitted)], he did not include "a separate, concise, numbered

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objection to the admissibility of the fact, pointing out that the movant's citation does not support the movant's fact, or showing that the movant's fact is not material or otherwise failed to comply with the requirements of Local Rule 56.1(B)(1), the fact will be deemed admitted. See LR 56.1(B)(2)(a)(2), NDGa.; BMU, Inc. v. Cumulus Media, Inc., 366 F. App'x 47, 49 (11th Cir. 2010) (per curiam) (unpublished) (citation omitted). Moreover, "[t]he Court will deem the movant's citations supportive of its facts unless the respondent specifically informs the Court to the contrary in the response." LR 56.1(B)(2)(a)(3), NDGa.

statement" of the additional facts that he contends are material and present a genuine issue of trial, LR 56.1(B)(1), (2)(b), NDGa., and the Court may "not consider any fact . . . set out only in the brief," LR 56.1(B)(1), NDGa. However, after Henry County filed its reply, [Doc. 34], Hendricks filed a statement of additional facts upon which there is a dispute, [Doc. 36]. Henry County then filed a motion to strike this statement as untimely. [Doc. 37]. Specifically, Henry County argued that the statement was untimely because Hendricks failed to file it "within twenty-one [] days from the date of service of the [m]otion for [s]ummary [j]udgment,"[3] and thus, it "should be disregarded in the Court's consideration of [Henry] County's [m]otion for [s]ummary [j]udgment." [Id. at 3]. Hendricks filed a response opposing the motion to strike, [Doc. 38], conceding that his statement was untimely and explaining that it "was an oversight . . . to not file the disputed facts in a separate pleading with numbered paragraphs as part of his response to

[3] Indeed, Local Rule 7.1 provides that a party opposing a motion "shall serve the party's response, responsive memorandum, affidavits, *and any other responsive material* not later than fourteen [] days after service of the motion, except that in cases of motion for summary judgment the time shall be twenty-one days [] after the service of the motion." LR 7.1(B), NDGa. (emphasis added); see also LR 56.1(B)(2)(b) (emphasis added) ("A respondent to a summary judgment motion shall include the following documents *with the responsive brief*: . . . [a] statement of additional facts which the respondent contends are material and present a genuine issue for trial."). Henry County filed its motion for summary judgment on November 5, 2020, [Doc. 31], and although Hendricks timely filed his response brief on November 16, 2020, [Doc. 33], he did not file his statement of additional facts until December 15, 2020, [Doc. 36], which was more than 21 days after Henry County served its motion and thus, it was untimely.

the [m]otion for [s]ummary [j]udgment," [id. at 2-3]. Hendricks also filed a motion for leave to file his statement of additional facts as supplemental material in response to Henry County's motion for summary judgment, [Doc. 39], arguing that Henry County would not be "prejudiced by granting the requested leave," since he had already argued in his response brief that "there was a dispute on the facts" and "the same facts listed in the responsive brief are in the [s]tatement of [a]dditional [f]acts[, s]o there is no surprise to [Henry County]," [id. at 3]. Since Henry County has not opposed Hendricks' motion for leave,[4] and "each fact was set forth in [Hendricks'] response brief with a proper citation to the record," the Court finds that Henry County would not be prejudiced by the filing of his statement of additional facts. Innotex Precision Ltd. v. Horei Image Prods., Inc., Civil Action File No. 1:09-CV-547-TWT, 2010 WL 5058640, at *1 (N.D. Ga. Dec. 6, 2010) (granting defendant's motion for leave to file a statement of additional facts). Accordingly, Hendricks' motion for leave to file his statement of additional facts, [Doc. 39], is **GRANTED**, and Henry County's motion to strike, [Doc. 37], is **DENIED**,[5] see Cruickshank v. Elbert Cty., No. 3:06-CV-101 (CDL), 2008 WL 2119912, at *1 (M.D. Ga. May 19, 2008).

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[4] As previously noted, because Henry County has not filed a response to Hendricks' motion for leave, it is deemed to be unopposed. See LR 7.1(B), NDGa.

[5] Moreover, "Federal Rule of Civil Procedure 12(f) governs motions to strike, and such motions are only appropriately addressed towards matters contained in the

What follows is a summary of facts as presented by Henry County in its statement of undisputed material facts, see [Doc. 33-1], and the Court will note those occasions in which Hendricks offers additional or conflicting factual statements that are supported by the evidence of record, see J.D.P. v. Cherokee Cty., Ga. Sch. Dist., 735 F. Supp. 2d 1348, 1350 (N.D. Ga. 2010); see also [Doc. 36]. The Court has also taken additional facts from the exhibits to the motion for summary judgment and response in order to fully describe Hendricks' allegations. See Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."); see also Tishcon Corp. v. Soundview Commc'ns, Inc., Civil Action No. 1:04-CV-524-JEC, 2005 WL 6038743, at *3 (N.D. Ga. Feb. 15, 2005) (citation omitted). And, as required on a motion for summary judgment, the Court construes the pertinent facts of this case in the light most favorable to Hendricks as the non-moving party. Jacomb v. BBVA Compass

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pleadings[.]" Sec. & Exch. Comm'n v. City of Miami, CASE NO. 13-CV-22600-ALTONAGA, 2016 WL 7188778, at *1 (S.D. Fla. June 21, 2016) (citation and internal marks omitted); see also Siegmund v. Xuelian, Case No. 12-62539-CIV-GAYLES/TURNOFF, 2016 WL 1444582, at *4 (S.D. Fla. Apr. 11, 2016), aff'd, 746 F. App'x 889 (11th Cir. 2018) (unpublished) (alteration in original) (citations and internal marks omitted) ("[N]umerous courts in the Eleventh Circuit, and elsewhere, have held that a motion to strike filings that are not pleadings (as defined by Rule 7(a)) is improper."). Since Hendricks' statement of additional facts is not a pleading, "Rule 12(f) is not an avenue for relief." Sec. & Exch. Comm'n, 2016 WL 7188778, at *1; see also Classic Harvest LLC v. Freshworks LLC, 1:15-cv-2988-WSD, 2017 WL 3971192, at *1 n.2 (N.D. Ga. Sept. 7, 2017) (explaining that the Local Rules do "not permit a motion to strike" a filing that does not comply with Local Rule 56.1).

Bank, 791 F. App'x 120, 121 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted).[6]

B. Statement of Facts

Hendricks was hired by Henry County as Equipment Operator II in the Department of Transportation on August 27, 2018. [Doc. 31-1 at 5; Doc. 31-3 (Cooper Decl.) ¶ 4; Doc. 31-4 (Barkley Decl.) ¶ 4].[7] He had been interviewed for the position by Johnny Barkley ("Barkley"), the Foreman in the Department of Transportation. [Doc. 31-4 ¶¶ 2-3; Doc. 32 at 4 pp. 11-12]. During that interview, Hendricks told Barkley that he could only operate a rear-load garbage truck and dump truck and a zero-turn lawn mower (hereinafter "Z lawn mower"). [Doc. 31-4 ¶ 9; Doc. 32 at 4 p. 13]. Hendricks testified that Barkley only mentioned that he

[6] "In determining whether evidence creates a factual dispute, [the Court] draw[s] reasonable inferences in favor of the nonmoving party, but inferences based upon speculation are not reasonable." Byrd v. UPS, 814 F. App'x 536, 537 (11th Cir. 2020) (per curiam) (unpublished) (citation omitted). Additionally, "[t]he substantive law will identify which facts are material, and material facts are those which are key to establishing a legal element of the substantive claim which might affect the outcome of the case." Campbell v. Shinseki, 546 F. App'x 874, 877 (11th Cir. 2013) (per curiam) (unpublished) (citation and internal marks omitted); see also Tucker v. State Farm Mut. Auto. Ins. Co., 109 F. Supp. 3d 1350, 1352 (N.D. Ga. 2015) (citation omitted) ("A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law."); First Benefits, Inc. v. Amalgamated Life Ins. Co., Civil Action No. 5:13-CV-37 (MTT), 2014 WL 6956693, at *3 (M.D. Ga. Dec. 8, 2014) ("[T]he Court will not rely on any fact that is not 'material' in order to determine whether summary judgment should be granted.").

[7] Hendricks had applied for the position on January 15, 2018. [Doc. 33-1 at 2; Doc. 32 (Pl.'s Dep.) at 4 p. 11].

would be operating a dump truck. [Doc. 32 at 4 p. 13]. However, the job description for the position provides, in pertinent part:

> **JOB SUMMARY**: The work of this position involves the operation of moderately heavy equipment such as a tandem axle dump truck, a paving roller, backhoe or other moderately complex equipment on a paving or construction crew. The incumbent often uses discretionary judgment in determining proper work methods, materials and tools necessary to perform assigned duties. The work of this position is important to the performance and acceptability of further work processes and activities in paving and construction projects. Duties performed are more complex and discretionary in nature than those performed by lower classified positions. Incumbents may be required to perform emergency call-back duty. Incumbent must operate heavy grading and paving equipment proficiently and on a regular basis to be eligible for promotion to Equipment Operator III.
>
> **ESSENTIAL JOB FUNCTIONS**:
>
> Operates a variety of moderately heavy equipment such as a rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe[.]
>
> May operate a truck-mounted pothole patcher and responds to service complaints and work orders in paving potholes on County roads.
>
> May operate heavy equipment such as a motor grader, pan, asphalt paver, tractor trailer or asphalt distributor on an occasional or substitution basis.
>
> Performs semi-skilled labor work such as asphalt looping, concrete or asphalt finishing work.
>
> Drives a tandem axle dump truck on a regular basis to deliver paving and road maintenance materials to all department crews.
>
> Loads asphalt and gravel at asphalt plants and signs invoices for all purchases.

Inspects dirt roads, flooded areas and other sites to determine necessary type and amount of gravel needed.

Coordinates with foreman on scheduling assigned truck for maintenance and repair work.

Serves as flagger on assigned projects.

Performs general laborer work such as shoveling materials, building bridges, storm drains or culverts.

Operates an air compressor, jack hammer and other power tools.

Performs daily servicing of assigned vehicles or equipment such as cleaning and checking fluid levels.

Performs related work as required.

MAJOR DUTIES:

Operates a variety of moderately heavy equipment such as a rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe[.]

May operate a truck-mounted pothole patcher and responds to service complaints and work orders in paving potholes on County roads.

May operate heavy equipment such as a motor grader, pan, asphalt paver, tractor trailer or asphalt distributor on an occasional or substitution basis.

Performs semi-skilled labor work such as asphalt looping, concrete or asphalt finishing work.

Drives a tandem axle dump truck on a regular basis to deliver paving and road maintenance materials to all department crews.

Loads asphalt and gravel at asphalt plants and signs invoices for all purchases.

Inspects dirt roads, flooded areas and other sites to determine necessary type and amount of gravel needed.

Coordinates with foreman on scheduling assigned truck for maintenance and repair work.

Serves as flagger on assigned projects.

Performs general laborer work such as shoveling materials, building bridges, storm drains or culverts.

Operates an air compressor, jack hammer and other power tools.

Performs daily servicing of assigned vehicles or equipment such as cleaning and checking fluid levels.

Performs related work as required.

KNOWLEDGE REQUIRED BY THE POSITION:

Knowledge of road maintenance and construction procedures and work methods of the Department.

Knowledge of the operation and servicing techniques of public works equipment.

Skill in the operation and application of hand and power tools.

Skill in performing heavy manual labor.

Skill in interpreting detailed instructions and carrying them out with minimal instruction.

Skill in safely and proficiently driving and operating assigned equipment and vehicles.

Skill in working well as a member of a crew.

. . . .

> **SCOPE AND EFFECT**: This position involves operating moderately heavy equipment or vehicles. The accuracy and thoroughness of work and the independent decisions made affect the final work product or future work steps to be performed by a crew. Work performed is a reflection of the quality of services provided by the Department.
>
> . . . .
>
> **PHYSICAL DEMANDS**: Work duties involve sitting, standing, stooping, bending and frequently lifting light or heavy objects. Work involves the use of tools, machinery and moving equipment which requires a high degree of dexterity. Work may require strenuous physical exertion when manual labor is performed.
>
> . . . .
>
> **MINIMUM QUALIFICATIONS**:
>
> High School diploma or G.E.D. required.
>
> Two [] years of experience in light grading, setting forms, and finishing concrete.
>
> Possession of a valid Georgia Commercial Driver's License.
>
> Combination of education and experience will be considered.

[Doc. 31-1 at 5-8]. This job description took effect in 2014 and remained in effect throughout Hendricks' employment with Henry County. [Doc. 31-3 ¶ 5; Doc. 31-4 ¶ 5]. Hendricks testified that while working as Equipment Operator II, he operated a pick-up truck, weed-eaters, and a blower as they were working on cleaning a right-of-way, and that he was never asked to operate any other equipment. [Doc. 32 at 5 pp. 14-15].

On September 6, 2018, Hendricks informed his direct supervisor, Clifford Sims ("Sims"), that he suffered from vision problems, including glaucoma, which impaired his ability to operate a motor vehicle at night.[8] [Id. at 5 pp. 14-16]; see also [Doc. 31-1 ¶ 5 (citation omitted)]. Hendricks testified that he told Sims this because he "wanted to be proactive" regarding working at night, since the hours he was working were from 7:30 a.m. to 4:00 p.m., when it was always daylight, but some hours started at 7:00 a.m. when it would still be dark out. [Doc. 32 at 5 p. 16]. Hendricks also testified that the following day he gave Sims paperwork to substantiate his visual impairments, which Sims then forwarded to Barkley, and later he was called into a meeting with the Assistant Director of Human Resources, Harold Cooper ("Cooper"), Barkley, and several others. [Doc. 31-3 ¶ 2; Doc. 32 at 5 pp. 16-17]; see also [Doc. 31-3 ¶ 7; Doc. 31-4 ¶ 7]. Hendricks explained that during that meeting, he was told they could not offer him light duty "because [he] signed up to be an equipment operator, and that's what [he] had to do,"[9] and then Cooper terminated him. [Doc. 32 at 5-6 pp. 17-18]. Cooper and Barkley attested

[8] Hendricks was diagnosed with glaucoma on September 21, 2016. [Doc. 32 at 6 p. 19]. He was told that he should not drive at night because his vision would be distorted. [Id. at 6 p. 20].

[9] Hendricks added that he tried to explain during this meeting that his only issue was driving at night and that there would be no problem if they modified his hours to 8:00 a.m. to 5:00 p.m., but it appeared that they had already made their decision about terminating him before the meeting began. [Doc. 32 at 8 p. 26].

that they made the decision to terminate Hendricks because he could not perform the essential functions of the job, regardless of his visual impairments, because "by his own admission" he was unable to: "[o]perate a variety of moderately heavy equipment such as rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe"; "[o]perate a truck mounted pothole patcher"; or "[o]perate a motor grader, pan asphalt paver, tractor trailer or asphalt distributor[.]" [Doc. 31-3 ¶¶ 9-10; Doc. 31-4 ¶¶ 10-11]. Hendricks' termination was effective September 13, 2018, [Doc. 31-3 ¶ 10; Doc. 31-4 ¶ 11], and the reason for his termination listed on the Personnel Action Form was "Failure to successfully complete probationary period," [Doc. 33-1 at 5].

Hendricks initiated this action against Henry County by filing a complaint on December 23, 2019, alleging claims of disability discrimination in violation of the ADA and the Rehabilitation Act. [Doc. 1]. Henry County moves for summary judgment, [Doc. 31], which Hendricks opposes, [Doc. 33], and Henry County has filed a reply in support of its motion, [Doc. 34]. The pending motion, having been fully briefed, is now ripe for ruling.

II. SUMMARY JUDGMENT STANDARD

"Summary judgment shall be granted 'if the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Daniels v. Felton, 823 F. App'x 787, 789 (11th Cir. 2020) (per curiam)

(unpublished) (quoting Fed. R. Civ. P. 56(a)); see also Mathews v. Wells Fargo, 758 F. App'x 842, 843 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted); Holmes v. Ga. ex rel. Strickland, 503 F. App'x 870, 872 (11th Cir. 2013) (per curiam) (unpublished) (citations omitted); Young v. FedEx Express, 432 F. App'x 915, 916 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). "When deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the non-moving party." Port Consol., Inc. v. Int'l Ins. Co. of Hannover, PLC, 826 F. App'x 822, 825 (11th Cir. 2020) (unpublished) (citation and internal marks omitted); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Gray v. City of Jacksonville, 492 F. App'x 1, 3 (11th Cir. 2012) (per curiam) (unpublished) (citations omitted); Cargo v. Ala., Bd. of Pardons & Parole Div., 391 F. App'x 753, 754 (11th Cir. 2010) (per curiam) (unpublished) (citation omitted); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003) (per curiam) (citation omitted).

"The party moving for summary judgment bears the initial burden of demonstrating, by reference to materials on the record, the absence of a genuine dispute of material fact," and "[i]f the moving party meets its burden, the non-moving party generally must set forth by affidavit or other evidence specific facts showing that there is a genuine issue for trial." First-Citizens Bank & Tr. Co. v. Brannon, 722 F. App'x 902, 904 (11th Cir. 2018) (per curiam) (unpublished)

(citations omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Bagwell v. Peachtree Doors & Windows, Inc., Civil Action File No. 2:08–CV–191–RWS–SSC, 2011 WL 1497831, at *10 (N.D. Ga. Feb. 8, 2011), adopted by 2011 WL 1497658, at *1 (N.D. Ga. Apr. 19, 2011) (citation omitted); Premier Assocs., Inc. v. EXL Polymers, Inc., No. 1:08-cv-3490-WSD, 2010 WL 2838497, at *8 (N.D. Ga. July 19, 2010), aff'd in part, 507 F. App'x 831 (11th Cir. 2013) (unpublished) (citations omitted). "An issue of fact is genuine if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." Mahoney v. Owens, 818 F. App'x 894, 897 (11th Cir. 2020) (per curiam) (unpublished) (citation and internal marks omitted). "The nonmoving party need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings." Miles v. Celadon Grp., Inc., 382 F. Supp. 3d 1246, 1248 (N.D. Ala. 2019) (citation omitted); see also Jackson v. B & L Disposal, Inc., 425 F. App'x 819, 820 (11th Cir. 2011) (per curiam) (unpublished) (alteration in original) (citation and internal marks omitted) ("[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.").

"Speculation or conjecture cannot create a genuine issue of material fact." Shuler v. Ingram & Assocs., 441 F. App'x 712, 715 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); see also Goodman v. Ga. Sw., 147 F. App'x 888,

891 (11th Cir. 2005) (per curiam) (unpublished) (citation and internal marks omitted) ("[A]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable."); Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005) (citation and internal marks omitted) ("Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment."). "Moreover, the non-moving party cannot create a genuine issue through evidence that is 'merely colorable' or 'not significantly probative.'" Morales v. Ga. Dep't of Human Res., 446 F. App'x 179, 181 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); see also Hall v. Dekalb Cty. Gov't, 503 F. App'x 781, 786 (11th Cir. 2013) (per curiam) (unpublished) (citation omitted) ("[M]ere conclusions, unsupported factual allegations, and statements that are based on belief, as opposed to personal knowledge, are insufficient to overcome a summary judgment motion.").

The "entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Sec. & Exch. Comm'n v. Almagarby, 479 F. Supp. 3d 1266, 1269 (S.D. Fla. 2020) (quoting Celotex Corp., 477 U.S. at 322). "To overcome a motion for summary judgment, the nonmoving party must present more than a scintilla of evidence

supporting his position—rather, there must be enough of a showing that the jury could reasonably find for that party." Siddiqui v. NetJets Aviation, Inc., 773 F. App'x 562, 563 (11th Cir. 2019) (per curiam) (unpublished) (citation and internal marks omitted); see also Wesley v. Austal USA, LLC, 776 F. App'x 638, 643 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted); Mazzola v. Davis, 776 F. App'x 607, 609 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted). But "[i]f a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant summary judgment." Allen v. Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306, 1315 (11th Cir. 2007) (citation omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[] whe[n] he is ruling on a motion for summary judgment[.]").

III. DISCUSSION

Hendricks alleges that Henry County violated the ADA and the Rehabilitation Act by terminating his employment due to his disability and by refusing to reasonably accommodate his disability. [Doc. 1 ¶¶ 1, 23-24]. Henry County moves for summary judgment, arguing that Hendricks' ADA and Rehabilitation Act claims fail because he was not a qualified individual, as

required to establish a prima facie case of discrimination under each of those statutes, since he could not perform the essential functions of the Equipment Operator II position either with or without an accommodation. [Doc. 31-2 at 3-9]. Henry County explains that Hendricks "has not identified any 'accommodation', reasonable or otherwise, that would allow him to perform the 'Essential Job Functions' as identified in the Job Description, specifically, the operation of a 'rubber tire roller', a 'vibratory roller', a 'front-end loader', a 'backhoe', a 'truck mounted pothole patcher' or any other heavy equipment." [Id. at 7]. In response, Hendricks argues that he was qualified despite the listing of those functions on the job description for the position, asserting that he "presented evidence that he was never asked to operate any of the listed heavy equipment during his time on the job"; that Barkley knew from his interview that Hendricks had no experience operating that equipment but hired him anyway; that "Henry County never stated any plans[] to train [him] to operate any of the listed heavy equipment after his hiring"; and that the job description itself merely stated that the employee "'may' operate the listed heavy equipment," without stating that "such skills [were] a mandatory requirement of the job," and thus, "operation of the listed heavy equipment was not essential." [Doc. 33 at 6-7 (citations omitted)]. He also asserts that "no one at Henry County raised the issue of [him] not performing any tasks involving heavy equipment until after he informed his supervisor of a vision

disability," and thus, "[a]ll the evidence suggests the argument of [him] not driving heavy equipment is just a pretext for his firing due to disability discrimination." [Id. at 8 (citations omitted)].

"The ADA prohibits an employer from discriminating against a 'qualified individual on the basis of disability.'" McCarroll v. Somerby of Mobile, LLC, 595 F. App'x 897, 899 (11th Cir. 2014) (per curiam) (unpublished) (quoting 42 U.S.C. § 12112(a)). Similarly, the "Rehabilitation Act prohibits recipients of federal financial assistance from discriminating against individuals with disabilities." Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 507 F.3d 1306, 1310 (11th Cir. 2007) (citation omitted). "Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases[.]" Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000) (citation omitted); see also Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) (per curiam) (citations omitted) ("The standard for determining liability under the Rehabilitation Act is the same as that under the [ADA]; thus, cases involving the ADA are precedent for those involving the Rehabilitation Act.").

Where, as here, there is no direct evidence of discrimination, the Court applies the McDonnell Douglas[10] burden shifting framework to disability

[10] See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

discrimination claims.[11] Howard v. Norfolk S. Corp., Case No. 2:17-cv-02163-RDP, 2020 WL 5569922, at *11 (N.D. Ala. Sept. 17, 2020); Berend v. Bloomin' Brands, Inc., Case No. 8:16-cv-1177-T-30AAS, 2017 WL 3087907, at *4 (M.D. Fla. July 20, 2017) (citation omitted). Under this framework, the initial burden is on Hendricks to establish a prima facie case of discrimination under the ADA and the Rehabilitation Act by showing that: (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. Boyle v. City of Pell City, 866 F.3d 1280, 1288 (11th Cir. 2017) (citation omitted); Mazzeo v. Color Resols. Int'l, LLC, 746 F.3d 1264, 1268 (11th Cir. 2014) (citation omitted); cf. Cappetta v. N. Fulton Eye Cty., CIVIL ACTION NO. 1:15-CV-3412-LMM-JSA, 2017 WL 5197207, at *25 (N.D. Ga. Feb. 1, 2017), adopted by 2017 WL 5443877, at *2 (N.D. Ga. Mar. 7, 2017), aff'd, 713 F. App'x 940 (11th Cir. 2017) (per curiam) (unpublished) (citations omitted) (laying out the elements required to establish a prima facie case of disability discrimination based on a failure to accommodate). If Hendricks can establish a prima facie case of

[11] However, as discussed hereinafter, the McDonnell Douglas burden-shifting framework does not apply to failure to accommodate claims. Hamilton v. Schneider Nat'l Carriers, Inc., CIVIL ACTION NO. 1:17-CV-3264-MHC-JSA, 2019 WL 11553744, at *9 (N.D. Ga. Jan. 24, 2019), adopted by 2019 WL 11553748, at *4 (N.D. Ga. Mar. 7, 2019) (citations omitted); Casas v. Sch. Dist. of Hillsborough Cty., No. 8:13-CV-599-T-17TBM, 2014 WL 2988059, at *7 (M.D. Fla. July 2, 2014) (citation omitted) ("A plaintiff alleging failure-to-accommodate does not have the burden to show disparate treatment, and the burden-shifting scheme does not apply to such claims.").

discriminatory termination and create a presumption of discrimination, the burden shifts to Henry County to rebut that presumption by articulating a legitimate, non-discriminatory reason for Hendricks' termination and, if it does so, Hendricks is left with the ultimate burden of showing that Henry County's reason is pretextual and that it intentionally discriminated against him because of his disability. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004) (citations omitted); Palermo v. Grunau Co., 220 F. Supp. 3d, 1300, 1306 (M.D. Fla. 2016) (citation omitted). However, on Hendricks's failure to accommodate claim, if he satisfies his burden of establishing a prima facie case, there are no "subsequent burdens on [Henry County] to show that it had any legitimate non-discriminatory reasons for terminating [Hendricks] or on [Hendricks] to establish that these reasons were pretextual," as "an employer's failure to reasonably accommodate a disabled individual *itself* constitutes discrimination under the ADA [and the Rehabilitation Act], so long as that individual is 'otherwise qualified,' and unless the employer can show undue hardship." Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1262 (11th Cir. 2007) (footnote, citation, and internal marks omitted); see also Nadler v. Harvey, No. 06-12692, 2007 WL 2404705, at *9 (11th Cir. Aug. 24, 2007) (unpublished) ("Once a plaintiff has shown that he is an otherwise qualified disabled individual . . . and that a defendant has not provided a reasonable accommodation, a defendant must

provide a reasonable accommodation unless [it] can assert an undue hardship as an affirmative defense.").

Henry County only challenges the second element of Hendricks' prima facie case: whether he was qualified for the position of Equipment Operator II. [Doc. 31-2 at 3-9; Doc. 34 at 5-9]. Specifically, Henry County argues that Hendricks was not qualified because he could not perform the essential functions of his position with or without reasonable accommodation, since he has admitted he could only operate a rear-load dump truck and Z lawn mower, whereas the job description for the position identified as essential job functions the operation of "a variety of moderately heavy equipment such as a rubber tire roller, vibratory roller, bulldozer, front-end loader or backhoe" and added that the individual may also "operate a truck mounted pothole patcher" and "operate heavy equipment such as a motor grader, pan, asphalt paver, tractor trailer or asphalt distributor on an occasional or substitution basis." [Doc. 31-2 at 7, 9 (citations and internal marks omitted)]. Hendricks responds that since he informed Barkley during his interview that he "had no experience operating the listed equipment," he "would not have been hired if[] operation of the listed equipment was essential." [Doc. 33 at 7 (citations omitted)]. Additionally, he points out that he "was never asked to operate any of the listed heavy equipment during his time on the job" and that "no one at Henry County raised the issue of [him] not performing any tasks involving

heavy equipment until after he informed his supervisor of a vision disability[.]" [Id. at 7-8 (citations omitted)].

A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds[.]" 42 U.S.C. § 12111(8) (internal marks omitted); cf. Boyle v. City of Pell City, 4:14-cv-01603-KOB, 2016 WL 4585926, at *7 n.2 (N.D. Ala. Sept. 2, 2016), aff'd, 866 F.3d at 1280 (citing 29 U.S.C. § 794(d)). Thus, "if [Hendricks] is unable to perform an essential function of [his] job, even with an accommodation, []he is, by definition, not a 'qualified individual[.]'" Calvo v. Walgreens Corp., 340 F. App'x 618, 622 (11th Cir. 2009) (per curiam) (unpublished) (citation omitted). "Whether a particular job function is essential is evaluated on a case-by-case basis by examining a number of factors." Samson v. Fed. Express Corp., 746 F.3d 1196, 1200-01 (11th Cir. 2014) (citations and internal marks omitted); see also Medearis v. CVS Pharmacy, Inc., 646 F. App'x 891, 895 (11th Cir. 2016) (per curiam) (unpublished) (citations omitted). The relevant factors include: "[t]he employer's judgment as to which functions are essential"; "[w]ritten job descriptions prepared before advertising or interviewing applicants for the job"; "[t]he amount of time spent on the job performing the function"; "[t]he consequences of not requiring the incumbent to perform the function"; "[t]he terms of a collective bargaining agreement"; "[t]he work experience of past

incumbents in the job"; and "[t]he current work experience of incumbents in similar jobs." 29 C.F.R. § 1630.2(n)(3). "In particular, [the Court] give[s] substantial weight to an employer's judgment as to which functions are essential." Bagwell v. Morgan Cty. Comm'n, 676 F. App'x 863, 866 (11th Cir. 2017) (per curiam) (unpublished) (citation omitted).[12]

Applying these factors to the instant case, the Court finds that operation of the identified equipment was an essential function of the position. The job description for Equipment Operator II, which was in effect throughout Hendricks' employment and had been since 2014, includes a job summary, providing that the "work of this position involves the operation of moderately heavy equipment such as a tandem axle dump truck, a paving roller, backhoe or other moderately complex equipment on a paving or construction crew." [Doc. 31-1 at 5; Doc. 31-3 ¶ 5; Doc. 31-4 ¶ 5]. The job description also lists "Essential Job Functions," including that the individual will "[o]perate[] a variety of moderately heavy equipment such as a rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe"; "[m]ay operate a truck-mounted pothole patcher and respond[] to service complaints and work orders in paving potholes on County roads"; and "[m]ay operate heavy equipment such as a motor grader, pan, asphalt paver,

[12] "Although the employer's judgment is entitled to substantial weight in the calculus, this factor alone is not conclusive." Samson, 746 F.3d at 1201 (citation and internal marks omitted).

tractor trailer or asphalt distributor on an occasional or substitution basis," among other functions. [Doc. 31-1 at 5-6 (emphasis and all caps omitted)]. The same functions are listed under "Major Duties," and the "Knowledge Required by the Position" includes "[k]knowledge of road maintenance and construction procedures and work methods of the Department[of Transportation]," "[k]knowledge of the operation and servicing techniques of public works equipment," and "[s]kill in safely and proficiently driving and operating assigned equipment and vehicles," among other skills. [Id. at 6-7 (emphasis and all caps omitted)]. "Because th[is] written description[is] evidence of [Henry County's] judgment regarding which functions of [the] job are essential, [the Court] must give [it] substantial weight." Medearis, 646 F. App'x at 896 (citations omitted). Additionally, if the individual employed as an Equipment Operator II does not operate the machinery in question, "it is reasonable to infer that there may be adverse consequences," Samson, 746 F.3d at 1201, such as the Department of Transportation not being able to complete certain essential projects, see Medearis, 646 F. App'x at 896 (citations omitted) ("An employer is required neither to create and fund a position as an accommodation nor to re-allocate job duties in order to change an essential function."). Indeed, the job description itself notes that the "work of this position is important to the performance and acceptability of further work processes and activities in paving and construction projects," and that the

"accuracy and thoroughness of the work and the independent decisions made affect the final work product or future work steps to be performed by a crew." [Doc. 31-1 at 5, 7].

A "function may be essential because the reason the position exists is to perform that function[.]" 29 C.F.R. § 1630.2(n)(2)(i); see also Samson, 746 F.3d at 1201 (citation omitted). In this case, the position at issue is called "Equipment Operator II," [Doc. 31-1 at 5 (emphasis omitted)], and Hendricks testified that during the meeting in which he was terminated, Cooper stated that they hired him to operate equipment and that was what they needed him to do and thus, they could not offer him a light duty accommodation that would not require him to operate the listed equipment, [Doc. 32 at 5 p. 17]. The evidence reflects that "[o]ne of the essential functions of . . . Equipment Operator [II] is, unsurprisingly, operating [] equipment[.]" Boyle, 2016 WL 4585926, at *11.

Hendricks relies on Calvo to argue that these functions were not essential, [Doc. 33 at 8 (citation omitted)], but Henry County contends that this case is distinguishable, see [Doc. 34 at 7-9], and the Court agrees. In Calvo, the parties disputed whether lifting and carrying items heavier than five pounds was an essential function of the plaintiff's job as an assistant manager. 340 F. App'x at 622. The Eleventh Circuit summarized the evidence showing that this was not an essential function, including that the job description cited by the employer

contained "a list of 23 functions, only one of which clearly involve[d] moving items heavier than [5] pounds," with most of the other functions involving "record keeping and customer service," and that after the plaintiff had an accident that prevented her from carrying items weighing more than 5 pounds, she continued to perform her job for 4 years, with her manager stating that her job performance was "fine" during that time. Id. at 623 (internal marks omitted). The Eleventh Circuit noted that "[i]f lifting and carrying were such an essential function of her job, it [was] surprising that [her] manager believed she was able to perform the job 'fine' for a period of four years," and concluded that, "[v]iewed in the light most favorable to [plaintiff], there [was] enough evidence to create a genuine issue of material fact about whether lifting, carrying, and pushing more than five pounds at a time [was] an 'essential function' of an assistant manager[.]" Id. (citation omitted).

In this case, unlike in Calvo, the job description for Equipment Operator II repeatedly identifies the operation of moderately heavy equipment as being part of the incumbent's responsibilities, including in the sections titled "Job Summary," "Major Duties," "Scope and Effect," and, importantly, "Essential Job Functions."[13]

[13] Hendricks argues that because the job description "states the employee 'may' operate the listed heavy equipment," but does "not say such skills are a mandatory requirement of the job," this is evidence that operating the listed equipment is not an essential skill. [Doc. 33 at 7]. However, while some parts of the job description list certain job functions that "may" be required, it unequivocally states that an

[Doc. 31-1 at 5-7 (emphasis and all caps omitted)]. It is undisputed that this job description had been in effect long before Hendricks began his employment with Henry County and that it remained in effect throughout his employment. [Doc. 31-3 ¶ 5; Doc. 31-4 ¶ 5]; see also [Doc. 31-1 ¶ 2 (citations omitted)]. Additionally, whereas the plaintiff in Calvo completed her work satisfactorily for four years without performing the function at issue, 340 F. App'x at 623, Hendricks only worked for Henry County for two weeks, [Doc. 32 at 7 p. 22], and although he never operated the disputed equipment during his employment, he testified that the project they were working on at that time involved clearing a right-of-way, which did not require the operation of the equipment at issue, see [id. at 5 pp. 14-15]; see also Khan v. S&C Elec. Co., No. 3:11-cv-03621-JCS, 2012 WL 4062811, at *9 (N.D. Cal. Sept. 14, 2012) (rejecting plaintiff's argument that "even if high voltage work [was] a requirement of his job, it [was] not an essential function because he never in fact performed any high voltage work during his tenure," explaining that the workflow of his projects would have eventually required him to conduct testing and analysis before projects were completed and thus, "under the circumstances, the fact [that] high voltage work was required of [him made] it an

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essential job function includes the operation of "a variety of moderately heavy equipment such as a rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe," without use of the word "may," and this function is listed in multiple locations on the job description. [Doc. 31-1 at 5-6]. Accordingly, Hendricks' argument is without merit.

essential function regardless of whether [he] had actually performed that function").

Hendricks also argues that the fact he was hired for the position even though Henry County knew he did not have experience with all of the equipment listed in the job description and "no one at Henry County raised the issue of [him] not performing any tasks involving heavy equipment until after he informed his supervisor of a vision disability," shows that these were not essential functions of the position. [Doc. 33 at 8 (citations omitted)]. During Hendricks' pre-employment interview, he informed Barkley that he knew how to operate a "rear-load garbage truck and dump truck and the Z lawn mower," and "specifically told [him]" that those were "the only two [he could] operate." [Doc. 32 at 4 p. 13]. Hendricks testified that when he said this, Barkley "just wrote something down on the paper," "talked to his . . . coworker, and [] asked [Hendricks] some more questions." [Id.]. However, this argument simply invites speculation since the record does not reveal why Barkley hired Hendricks in the first place,[14] but

[14] While Hendricks argues that his hiring indicates that operating a variety of moderately heavy equipment was not an essential function of the job since he told Barkley that he only knew how to operate a garbage truck, dump truck, and Z lawn mower, [Doc. 33 at 7-8 (citations omitted)], it is equally plausible that Barkley hired him because he needed an employee with the particular skills Hendricks possessed at that time and he believed Hendricks was capable of learning to operate other equipment while on the job, but absent supporting evidence, either scenario is just speculation.

speculation about why he was initially hired does not establish a genuine dispute of material fact regarding the essential functions of the position, see Lezama v. Clark Cty., 817 F. App'x 341, 345 (9th Cir. 2020) (unpublished) (citation omitted) ("[Plaintiff's] opinions and speculation about the essential functions of the position are insufficient to create a genuine issue of material fact[.]"); see also May v. City of Union Springs, CIVIL ACTION NO. 2:19cv173-MHT, 2021 WL 1425319, at *3 (M.D. Ala. Apr. 15, 2021) ("Speculation cannot substitute for evidence at summary judgment."); Carr v. U.S. Steel Corp., Case No.: 2:19-cv-00721-JHE, 2021 WL 961783, at *8 (N.D. Ala. Mar. 15, 2021) (finding no genuine dispute of material fact as to whether plaintiff was a qualified individual under the ADA and explaining that "speculation cannot defeat summary judgment"), particularly given the undisputed written job description and the substantial weight that must be afforded Henry County's judgment, see Medearis, 646 F. App'x at 896 (citations omitted); Holly, 492 F.3d at 1258 (citation omitted); see also 42 U.S.C. § 12111(8); [Doc. 31-1 at 5-8].

"Being qualified for the position includes having 'the requisite skill, experience, education and other job-related requirements of the employment position.'" Orzech v. Muhlenberg Twp., No. 5:18-cv-03938, 2019 WL 6310219, at *3 (E.D. Pa. Nov. 25, 2019) (quoting 29 C.F.R. § 1630.2(m)); cf. Frazier-White v. Gee, 818 F.3d 1249, 1256 (11th Cir. 2016) (citation and internal marks omitted) ("The

ADA covers people who can perform the essential functions of their jobs presently or in the immediate future."). Cooper and Barkley attested that they made the decision to terminate Hendricks because he could not perform the essential functions of the position, regardless of his visual impairments, because "by his own admission" he was unable to: "[o]perate a variety of moderately heavy equipment such as rubber tire roller, vibratory roller, bull dozer, front-end loader or backhoe"; "[o]perate a truck mounted pothole patcher"; or "[o]perate a motor grader, pan asphalt paver, tractor trailer or asphalt distributor[.]" [Doc. 31-3 ¶¶ 9-10; Doc. 31-4 ¶¶ 10-11]. Indeed, it is undisputed that Hendricks was only able to operate a rear-load garbage truck and dump truck and a Z lawn mower, and that he could not operate the other moderately heavy equipment identified in the job description. See [Doc. 31-1 ¶ 4 (citation omitted); Doc. 32 at 4 p. 13; Doc. 36 ¶ 4 (citation omitted)]; see also Mir v. L-3 Commc'ns Integrated Sys., L.P., Civil Action No. 3:15-CV-2766-L, 2017 WL 5177118, at *5-6 (N.D. Tex. Nov. 8, 2017) (citation omitted) (finding plaintiff failed to "establish a *prima facie* case of discrimination for his disability" where the "record establishe[d] that [he] did not meet [a] minimum requirement, as he conceded in his deposition that he had no experience with NC programming" and the job posting stated that the individual filling the position must have NC programming knowledge).

Moreover, Hendricks has not identified any accommodation that would enable him to perform those essential functions.[15] See [Doc. 33]. Accordingly, Hendricks "was not a qualified individual within the meaning of the ADA [and the Rehabilitation Act] because he was unable to perform the essential functions of [Equipment Operator II] with or without a reasonable accommodation" as he "has failed to create a disputed material issue of fact that the essential job functions do not include [operating the listed moderately heavy equipment]." Medearis, 646

[15] "An employer must provide reasonable accommodations for employees with known disabilities unless such accommodations would result in undue hardship to the employer." Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000) (per curiam) (citation omitted). "The burden of identifying an accommodation that would allow a qualified employee to perform the essential functions of [his] job rests with that employee, as does the ultimate burden of persuasion with respect to showing that such accommodation is reasonable." Id. at 1367 (citation omitted); see also Bagwell, 676 F. App'x at 866 (citation omitted) ("The employer's duty to provide a reasonable accommodation is not triggered unless the plaintiff makes a specific demand for an accommodation."). Henry County correctly notes that Hendricks "has not identified any 'accommodation', reasonable or otherwise, that would allow him to perform the 'Essential Job Functions' as identified in the Job Description[.]" [Doc. 31-2 at 7]. Although Hendricks provided evidence that he requested an accommodation of modified work hours due to his glaucoma and resulting inability to drive at night, see [Doc. 32 at 8 p. 26], he has not identified any accommodation that would have enabled him to perform the essential job functions at issue—operating moderately heavy equipment, including a rubber tire roller, vibratory roller, bull dozer, front-end loader, backhoe, etc., see [Doc. 33]; see also [Doc. 31-1 at 5-7]. "Based on these facts, [Hendricks] has not met [his] burden of identifying a reasonable accommodation." Earl, 207 F.3d at 1367; see also Boyle, 2016 WL 4585926, at *11 ("[Plaintiff's] failure to accommodate claim [] fails because [plaintiff] has failed to identify a reasonable accommodation that would have allowed him to perform the essential functions of his position as Heavy Equipment Operator.").

F. App'x at 896 (citation omitted) (concluding that plaintiff "failed to provide evidence sufficient to create a genuine dispute as to the material issue of fact that it [was] an essential function of a store manager's job to lift more than 10 pounds" where the evidence, such as the written job description, the plaintiff's testimony, and the employer's judgment as to which functions were essential, "consistently described the store manager position as one requiring the lifting of items from floor to shelf, including weighty items").[16] Therefore, Hendricks' ADA and Rehabilitation Act claims fail,[17] and it is **RECOMMENDED** that Henry County's motion for summary judgment, [Doc. 31], be **GRANTED**.

[16] The Court "need not address [Hendricks'] pretext argument because he failed to establish a prima facie ADA [or Rehabilitation Act] case." Crabtree v. J.M. Huber Corp., CIVIL ACTION FILE NO. 4:06-CV-204-HLM-WEJ, 2008 WL 11417306, at *13 (N.D. Ga. May 21, 2008), adopted by 2008 WL 11417394, at *9 (N.D. Ga. June 12, 2008) (citation omitted); see also [Doc. 33 at 8 (citation omitted)].

[17] Hendricks does not argue, nor does the Court find, that there is a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote, citations, and internal marks omitted); see also Hill v. Branch Banking & Tr. Co., 264 F. Supp. 3d 1247, 1263 (N.D. Ala. 2017) (citation and internal marks omitted) ("To the extent [plaintiff] relies on a mosaic of discrimination theory, he must present the tiles and create the mosaic instead of expecting the court to piece it together for him.").

IV. CONCLUSION

For the foregoing reasons, Hendricks' motion for leave to file his statement of additional facts, [Doc. 39], is **GRANTED** and Henry County's motion to strike, [Doc. 37], is **DENIED**, and it is **RECOMMENDED** that Henry County's motion for summary judgment, [Doc. 31], be **GRANTED**.

The Clerk is **DIRECTED** to terminate this reference.

IT IS SO ORDERED, RECOMMENDED, and **DIRECTED** this 11th day of June, 2021.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE