In The
Supreme Court of the United States

SAIED EMAMI,

Petitioner,

V.

JIM BRIDENSTINE, Administrator of the National Aeronautics and Space Administration (NASA),

and KENNETH ROCK, Individually; UNITED STATES OF AMERICA

Respondents.

On Petition for the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

Dr. Saied Emami, Pro Se
103 LakePoint Place
Yorktown, VA 23692
(757) 509-0451
kaandm@aol.com

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1806

SAIED EMAMI,
Plaintiff - Appellant,

v.

JIM BRIDENSTINE, Administrator of the National Aeronautics and Space Administration,
Defendant - Appellee,
and
KENNETH E. ROCK, Individually; UNITED STATES OF AMERICA,
Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. Gibney, Jr., District Judge. (2:15-cv-00034-JAG-DEM)

Submitted: November 15, 2018 Decided: November 19, 2018

Before MOTZ and HARRIS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Saied Emami, Appellant Pro Se. Virginia Lynn Van Valkenburg, Assistant United States Attorney,

OFFICE OF THE UNITED STATES ATTORNEY, Norfolk Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Saied Emami appeals the district court's order construing his untimely amended Fed. R. Civ. P. 59(e) motion as a Fed. R. Civ. P. 60(b) motion and denying it for failure to establish a reason for reconsideration. On appeal, we confine our review to the issues raised in Emami's brief. *See* 4th Cir. R. 34(b). Because Emami's informal brief does not challenge the basis for the district court's disposition, he has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: November 19, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1806
(2:15-cv-00034-JAG-DEM)

SAIED EMAMI,
Plaintiff - Appellant
v.
JIM BRIDENSTINE, Administrator of the National Aeronautics and Space Administration
Defendant - Appellee
and
KENNETH E. ROCK, Individually; UNITED STATES OF AMERICA
Defendants

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed. This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 2:15-cv-34-JAG

SAIED EMAMI,
Plaintiff,
v.
ROBERT M. LIGHTFOOT, JR., in his official capacity as Acting Administrator, National Aeronautics and Space Administration,
Defendant.

OPINION

The plaintiff, Dr. Saied Emami, a former aerospace engineer for the National Aeronautics & Space Administration ("NASA"), brought this case under Title VII of the Civil Rights Act of 1964. After two days of a jury trial, the Court granted the defendant's n1otion for judgment as a matter of law after the close of the plaintiffs evidence. Emami now moves the Court to amend that judgment or grant a new trial under Rule 59. The Court denies the motion because Emami failed to file it within the time limits imposed by the Federal Rules of Appellate Procedure. The Court instead interprets the motion as one under Rule 60(b), and denies that notion on the merits.

I. BACKGROUND

Emami filed his original complaint against NASA on January 23, 2015, with the help of counsel,

under Title VII of the Civil Rights Act of 1964. He claims that NASA placed him on a performance improvement plan ("PIP") in his position as an Aerospace Engineer, and then terminated him, based on his religion and national origin.

Before trial, the Court entered a Rule 16(b) Scheduling Order setting cut of dates for discovery, and deadlines to file witness and exhibit lists and other documents relevant to trial. The Rule 16(b) Order also set a Final Pretrial Conference on October 21, 2016, and the trial on November 1, 2016. (Dk. No. 36.) After discovery, both parties timely submitted all pretrial disclosures. The defendant filed a second motion for summary judgment[1] along with other motions, causing the Court to remove the case from the trial calendar pending resolution of those motions. (Dk. No. 80.)

After denying the motion for summary judgment on March 10, 2017, the Court amended the Rule 16(b) Scheduling Order and rescheduled the Final Pretrial Conference for July 14, 2017, and the trial for August 1, 2017. (Dk. Nos. 95, 96.) On June 6, 2017, the Court granted Emami's lawyers' motion to withdraw. (Dk. No. 101.) Moving forward pro se, Emami made multiple attempts to supplement discovery and disclosures for trial. The Court made clear, however, that setting the supplemental Final Pretrial Conference did not reset discovery deadlines and repeatedly denied Emami's attempts to supplement discovery disclosures. (Dk. Nos. 107, 108, 131, 140.)

A jury trial commenced on August 1, 2017. On the first day, the plaintiff called his retained expert,

---

[1] The Court had earlier denied a defense motion for summary judgment as premature.

Dr. Farid Miandoab, as a witness. Later, the Court denied Emami's attempt to call Dr. Jose Goity, a second expert witness, because the Court deemed the testimony cumulative and duplicative of Dr. Miandoab's testimony. At the close of the plaintiffs evidence on August 2, 2017, the Court granted the defendant's motion for judgment as a matter of law because Emami had failed to set out facts to make a prima facie case of discrimination based on either religion or national origin. The Court entered judgment on August 3, 2018. (Dk. No. 138.)

Emami then moved the Court to alter or amend its judgment and for a new trial in a 77- page motion on September 1, 2018. The Court allowed Emami to amend the motion, which he did on October 23, 20I7. (Dk. No. 149.) The Court denies the motion because Emami filed his initial motion outside of the time frame permitted by the Federal Rules of Civil Procedure Rule 59 and because, even interpreting his untimely Rule 59 motion as a timely Rule 60(b) motion, his arguments fail on the merits.

II. DISCUSSION

The Court liberally construes Emami's motion as one for both a new trial under Rule 59(a) and an altered or an1ended judgment under Rule 59(e). The Court denies the motion on both grounds because the motion falls outside of the mandatory 28-day time period. The Court instead treats the motion as one under Rule 60(b) of the Federal Rules of Civil Procedure, and denies that motion because none of his concerns warrant relief under that rule.

A. Emami Filed his Rule 59 Motion Out of Time

Rule 59 (b) and (e) in1pose strict 28-day time limits on motions for a new trial and to alter or amend a judgment. Fed. R. Civ. P. 6(b)(2); *Goodman v. Everett,* 388 F. App'x 269, 270 (4th Cir. 2010) ("[T]he district court is without jurisdiction to extend this time period.') The three-day extension granted to pro se litigants served by mail does not apply to Rule 59. *Rozzelle v. University of North Carolina at Charlotte, et al.,* No. 3-15CV00050MOCDSC, 2015 WL 12911716, at * 1 (W.D.N.C. Dec. 7, 2015), aff'd sub nom. *Rozzelle v. University of North Carolina,* 646 F. App'x 336 (4th Cir. 2016)).

In this case, the Court entered its final judgment on August 3, 2017. The deadline to file a Rule 59 motion was August 31, 2017. Emami filed his initial Rule 59 motion one day late on September 1, 2017. The Court cannot grant even a one day extension, and his motion fails.

B. Rule 60(b) Motion

"Where a Rule 59(e) motion is untimely, courts routinely interpret the untimely Rule 59(e) motion to be a timely Rule 60(b) motion for relief from a final judgment." *Id.* (citing *Mt. Graham Red Squirrel v. Madigan,* 954 F.2d 1441, 1463 n. 35 (9th Cir. 1992)). A Court may relieve a party from a final order under Federal Rule of Civil Procedure 60(b) for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other

reason that justifies relief. Rule 60, however, "does not authorize a motion merely for reconsideration of a legal issue." *CNF Constructors, Inc.* v. *Donohoe Const. Co.*, 57 F.3d 395, 400 (4th Cir. 1995) (quoting *United States* v. *Williams*, 674 F.2d 310, 312 (4th Cir.1982)). None of Emami's grounds warrant relief in this case.

Emami identifies six errors made by the Court that he believes warrant relief. First, he claims that because he survived summary judgment the Court could not grant judgment as a matter of law at the close of trial. This argument has no merit: Emami does not present any new facts and instead merely challenges the sufficiency of this Court's ruling. Errors two, three, four, and six relate to Emami's already-litigated concerns about supplementing discovery and disclosures. The Court has repeatedly addressed those issues, and Emami presents no basis on a Rule 60(b) motion to grant him relief. Finally, error five asserts that the Court erred when it excluded Emami's technical expert Dr. Jose Goity, but this again challenges prior ruling and the Court does not address it through a Rule 60 motion.

IV. Conclusion

The Court denies Emami's motion under Rule 59 because he failed to file it within the time limit proscribed by the Federal Rules of Civil Procedure. Further, reading Emami s motion as one under Rule 60(b), the Court denies the motion because he seeks reconsideration of legal decisions and therefore fails to show that he warrants relief.

The Court will enter an appropriate Order.

Let the Clerk send a copy of this Opinion to all counsel of record.

/s/ John A. Gibney, Jr.
United States District Judge

Date: June 19, 2018
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 2: 15-cv-34-JAG

SAIED EMAMI,
Plaintiff,
v.
ROBERT M. LIGHTFOOT, JR., in his official capacity as Acting Administrator, National Aeronautics and Space Administration,
Defendant.

ORDER

This matter comes before the Court on the pro se plaintiff's amended motion to alter or amend the Court's judgment. (Dk. No. 148.) For the reasons stated in the accompanying Opinion, the Court DENIES the plaintiff's motion.

Should the plaintiff wish to appeal this Order, he must file written notice of appeal with the Clerk of Court within thirty (30) days of the date of entry. Failure to file a notice of appeal within that period may result in the loss of the right to appeal.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record and to the prose plaintiff via U.S. mail.

/s/ John A. Gibney, Jr.
United States District Judge

Date: June 19, 2018
Richmond, VA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:15cv34

SAIED EMAMI,
Plaintiff,

V.

CHARLES F. BOLDEN, JR.,
In his official capacity as Administrator, National Aeronautics and Space Administration,
Defendant.

OPINION

This matter comes before the court on three separate motions. First, on September 29, 2016, the Defendant, Charles F. Bolden, Jr. ("the Defendant"), filed a Motion for Summary Judgment and accompanying Memorandum in Support. ECF Nos. 60, 61. On October 12, 2016, the Plaintiff, Saied Emami ("the Plaintiff"), filed a Response, ECF No. 72, and on October 17, 2016, the Defendant filed a Reply. ECF No. 78.

Second, on October 6, 2016, the Defendant filed a Motion to Exclude Plaintiff's Experts and accompanying Memorandum in Support. ECF Nos. 65, 66. On October 20, 2016, the Plaintiff filed a Response, ECF No. 79, and on October 26, 2016, the Defendant filed a Reply. ECF No. 84.

Third, on October 12, 2016, the Defendant filed a Motion in Limine and accompanying Memorandum

in Support. ECF Nos. 69, 70. The Plaintiff filed a Response on October 25, 2016, ECF No. 83, and on October 31, 2016, the Defendant filed a Reply. ECF No. 86.

On October 24, 2016, this court referred the above motions to a United States Magistrate Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct hearings, including evidentiary hearings, if necessary, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the motions. ECF No. 81.

Having conducted hearings on the above motions on October 31, 2016, ECF No. 87, the Magistrate Judge filed a Report and Recommendation ("R&R") on December 20, 2016, addressing the Motion for Summary Judgment and the Motion in Limine, ECF No. 89 (hereinafter "First R&R"), and then filed another R&R, addressing the Motion to Exclude Plaintiff's Experts, on the same day. ECF No. 90 (hereinafter "Second R&R"). In the First R&R, the Magistrate Judge recommended granting in part and denying in part the Motion for Summary Judgment, granting summary judgment on the Plaintiff's retaliation claim, and directing the parties to proceed to trial on the Plaintiff's claims of intentional discrimination. First R&R at 28-29. The Magistrate Judge also recommended denying in part the Motion in Liraine, "to exclude evidence of comparator employees, and consider further objections to comparator evidence at trial." Id. at 29. In the Second R&R, the Magistrate Judge recommended

denying the Motion to Exclude Plaintiff's Experts. Second R&R at 26.

By copy of both R&Rs, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge. See First R&R at 29-30/ Second R&R at 26-27. On January 3, 2017, the Plaintiff filed an objection to the First R&R. ECF No. 91. On the same day, the Defendant also filed an objection to the First R&R. ECF No. 92. On January 17, 2017, the Plaintiff filed a Response to the Defendant's Objection, ECF No. 93, and then the Defendant filed a Response to the Plaintiff's Objection. ECF No. 94. Neither party objected to the Second R&R. Accordingly, these matters have been fully briefed and are ripe for review.

For the reasons discussed herein, the court ADOPTS Parts I, II, and III.A of the First R&R; the court REJECTS IN PART and MODIFIES Part III.B of the First R&R; and the court ADOPTS the Second R&R in full. Accordingly, the Motion for Summary Judgment and the Motion to Exclude Plaintiff's Experts are DENIED. For the reasons provided in Part III.C of this Opinion, the Defendant's Motion in Limine is also DENIED.

I. FACTUAL AND PROCEDURAL HISTORY

This matter arises from the Plaintiff's claims of employment discrimination and retaliation iinder Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), against Charles F. Bolden, Jr. ("the Defendant")/ in his official capacity as Administrator of the National Aeronautics

and Space Administration ("NASA").[1]

The Plaintiff is an engineer who began working for NASA in 2002. Amend. Compl. ¶ 38.[2] Through 2012, he received ratings of "Meets or Exceeds Expectations" or "Fully Successful," including "Exceeds Expectations" and "Significantly Exceeds Expectations" for certain job elements. Id. ¶¶ 43-57. In 2012, he was placed on a performance plan, to which he objected. Id. ¶¶ 93-96. The Plaintiff worked under this plan and claims that he "performed all of the tasks assigned to him to the fullest extent possible" during the performance year of 2012-13. Id. ¶ 97. On January 18, 2013, citing unacceptable performance. Rock and another supervisor placed the Plaintiff on a Performance Improvement Plan ("PIP"), requiring the Plaintiff to submit quarterly reports on certain aspects of his work. Id. ¶¶ 119-20. The Plaintiff submitted quarterly reports on February 15, 2013, and February 28, 2013. Id. ¶ 134. On March 8, 2013, the Plaintiff also gave Rock further submissions in an effort to comply with the PIP. Id. ¶ 139.

On April 12, 2013, claiming that the Plaintiff's work under the PIP was unacceptable. Rock issued a Notice of Proposed Removal to the Plaintiff. Id. ¶¶ 25, 150. On June 21, 2013, Deputy Director

---

[1] These claims were initially brought, as well, against the United States, and additional state tort claims were initially brought against the Plaintiff's former supervisor at NASA, Kenneth Rock. However, both parties have been dismissed from this case. See Memorandum Order of March 30, 2016. ECF No. 33.

[2] The facts recited here come from the Amended Complaint. However, these recitations are not presumed to be tixie for the sake of the court's ruling on the Defendant's Motion for Summary Judgment. See infra Section II.B.

Damador Ambur ("Ambur") affirmed the Plaintiff's termination. Id. ¶¶ 25, 178. The Plaintiff appealed his termination to the Merit Systems Protection Board ("MSPB"), alleging discrimination based on national origin and religion, and retaliation, under Title VII. Id. ¶ 25. The MSPB ruled against the Plaintiff on November 20, 2014, and its decision became final on December 25, 2014. Id. The Plaintiff timely filed a Complaint in this court within thirty (30) days of that finalized decision. ECF No. 1. The Plaintiff filed an Amended Complaint on April 1, 2015. ECF No. 4.

II. LEGAL STANDARDS

A. Review of Magistrate Judge's R&Rs

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which a party has specifically objected. Fed. R. Civ. P. 72(b). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

B. Motion for Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of

law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. A court should grant summary judgment, if the nonmoving party, after adequate time for discovery, has failed to establish the existence of an essential element of that party's case, on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In essence, the nonmovant must present "evidence on which the [trier of fact] could reasonably find" for the nonmoving party. Anderson, 477 U.S. at 252.

To defeat a motion for summary judgment, the nonmoving party must go beyond the facts alleged in the pleadings, and rely instead on affidavits, depositions, or other evidence to show a genuine issue for trial. See Celotex, 477 U.S. at 324; see also M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1993) ("A motion for summary judgment may not be defeated by evidence that is 'merely colorable' or 'is not sufficiently probative.'" (quoting Anderson, 477 U.S. at 249-50)). Conclusory statements, without specific evidentiary support, do not suffice, Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998), nor does "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position." Anderson, 477 U.S. at 252. Rather, "there must be evidence on which the jury could reasonably find for the plaintiff." Id.

C. Plaintiff's Intentional Discrimination Claims

1. General Standards

Title VII prohibits an employer from "discharg[ing] any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To succeed on a claim of wrongful termination due to intentional discrimination under Title VII, a plaintiff must carry his burden under the framework established in McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). Texas Dep't of Comm. Affs. V. Burdine, 450 U.S. 248, 252-53 (1981). This framework requires, initially, that a plaintiff prove by a preponderance of the evidence a prima facie case for intentional discrimination. Id. at 252-53. For wrongful termination, the prima facie case requires such proof of the following:"(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." Coleman v. Md. Ct. App., 626 F.3d 187, 190 (4th Cir. 2010) (citing White v. BFI Waste Servs., LLC, 375 F.3d 288, 295 (4th Cir. 2004)).

Should a plaintiff demonstrate a prima facie case, a defendant must then "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. If a defendant provides a sufficient rebuttal, a plaintiff, who "retains the burden of persuasion," must then "have the opportunity to demonstrate that the proffered reason was not the

true reason for the employment decision." Id. at 256. At this final stage, a plaintiff may ultimately succeed in proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256 (citing McDonnell Douglas, 411 U.S. at 804-805).

2. Standard for Comparator Evidence

"Plaintiffs are not required as a matter of law to point to a similarly situated comparator to succeed on a discrimination claim." Haywood v. Locke, 387 F. App'x 355, 359 (4th Cir. 2010) (citing Bryant v. Aiken Reg'l Med. Ctrs., 333 F.3d 536, 545 (4th Cir. 2003)). Should a plaintiff rely upon comparators, however, the given comparators must be "similar in all relevant respects." Id. (citing Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994) (citing Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989))). Haywood provides that a showing of similarity to comparators "would include evidence that the employees 'dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" 387 F. App'x at 359 (quoting Mitchell, 964 F.2d at 583). Comparators need not be identical; rather, they must be similar in all relevant aspects, "such as conduct, performance, and qualifications." Rayyan v. Virginia Dep't of Transportation, No. I:15cv01681,

2017 WL 123442, at *3 (E.D. Va. Jan. 12, 2017) (citing Haywood, 387 F. App'x at 359).

D. Plaintiff's Retaliation Claim

Title VII prohibits an employer from discriminating against an employee [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The first clause is known as the "opposition clause," and the second is known as the "participation clause." Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tn., 555 U.S. 271, 274 (2009). To succeed on a claim of retaliation brought under either clause, a plaintiff must carry his burden under the McDonnell Douglas framework. E.E.O.C. v. Navy Fed. Credit Union, 424 F.3d 397, 405 (2005) (citing Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998)). Under that framework, "a plaintiff bears the initial burden of establishing a prima facie case of retaliation." Id. (citing Laughlin, 149 F.3d at 258).

For retaliation claims, a plaintiff's prima facie case entails proof of the following elements: (1) the plaintiff "engaged in a protected activity"; (2) "the employer took a materially adverse action against" the plaintiff; and (3) a causal link "between the protected activity and the adverse action." Mascone v. Am. Physical Soc'y, Inc., 4 04 F. App'x 762, 765 (4th Cir. 2010). "Protected activity" is that which falls under the participation or opposition clauses of

Title VII's retaliation provision. Laughlin, 149 F.3d at 259.

A materially adverse action is one that "'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Mascone, 404 F. App'x at 765 (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006)). "This objective standard is phrased 'in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.'" Shetty V. Hampton Univ., No. 4:12cvl58, 2014 WL 280448, at *13 (E.D. Va. Jan. 24, 2014) (Smith, J.) (quoting Burlington, 548 U.S. at 69).

Temporal proximity can show a causal link, but only if an employer's knowledge of protected activity and the adverse employment action that follows are very closely related in time. Pettis V. Nottoway Cty. Sch. Bd., 592 F. App'x 158, 161 (4th Cir. 2014). For example, a time period of three to four months is too great to establish a causal link through temporal proximity alone. See Pascual v. Lowe's Home Centers, Inc., 193 F. App'x 229, 233 (4th Cir. 2006). A ten-week time period can be sufficient to establish a prima facie case of retaliation. Silva v. Bowie State Univ., 172 F. App'x 476, 478 (4th Cir. 2006). Temporal proximity alone is not enough to show that protected activity was a "but for" cause of adverse employment action. Staley v. Gruenberg, 575 F. App'x 153, 156 (4th Cir. 2014). But see Simard v. Unify, Inc., No. I;15cvl649, 2016 WL 3854451, at *7 n.3 (E.D. Va. July 15, 2016). However, for purposes of the "less onerous burden" imposed by the third element of the prima facie case, adverse action

occurring shortly after the protected activity is sufficient. Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998); see also Foster v. Univ. of Maryland-Eastern Shore, 787 F.3d 243, 250-51 (4th Cir. 2015) (explaining that causation standards for establishing pretext and establishing a prima facie case are different). Close temporal proximity is not necessary to show a causal connection, however; other relevant evidence, if sufficient, can be used to show a causal link. Lettieri v. Equant Inc., 478 F.3d 640, 650 (4th Cir. 2007). An employer's inconsistency in its reasons for termination can establish a causal link. Mohammed v. Cent. Driving Mini Storage, Inc., 128 F. Supp. 3d 932, 951 (E.D. Va. 2015).

Should a plaintiff demonstrate a prima facie case, the burden shifts to a defendant "to rebut the presumption of retaliation by articulating a non-retaliatory reason for its action." Laughlin, 149 F.3d. at 258. If a defendant carries this burden, a plaintiff then "bears the ultimate burden of proving that [the plaintiff] has been the victim of retaliation." Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-11 (1993)).

E. Motion to Exclude and Motion in Limine

Generally, relevant evidence is admissible. Fed. R. Evid. 402. Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence," so long as "the fact is of consequence in determining the action." Fed. R. Evid. 401. A court can exclude otherwise relevant evidence, "if its probative value is substantially outweighed" by the risk of unfair

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or unnecessarily presenting cumulative evidence. Fed. R. Evid. 403.

"A motion in limine to exclude evidence . . . should be granted only when the evidence is clearly inadmissible on all potential grounds." United States v. Verges, No. I:13cr222, 2014 WL 559573, at *3 (E.D. Va. Feb. 12, 2014); see also Intelligent Verification Sys., LLC v. Microsoft Corp., No. 2:12cv525, 2015 WL 1518099, at *9 (E.D. Va. Mar. 31, 2015), aff'd sub nom. Intelligent Verification Sys., LLC v. Majesco Entm't Co., 628 F. App'x 767 (Fed. Cir. 2016).

III. ANALYSIS

A. Plaintiff's Objection to the First R&R

The Plaintiff objects to the Magistrate Judge's recommendation in the First R&R to dismiss his retaliation claim on the basis that the Magistrate Judge improperly relied on a credibility determination. Pl.'s Obj. at 1-2. The Plaintiff argues instead that "[a] genuine issue of fact in this matter is whether Dr. Emami's assertions and discussions with the EEO Office constitute protected activity." Id. at 2. The Plaintiff also objects to the Magistrate Judge's conclusion that there is no evidence of a causal connection between the Plaintiff's protected activity and the adverse action taken against him. Id. at 2-6.

1. Protected Activity

To the extent that the Plaintiff alleges the Magistrate Judge did not find in his favor regarding protected activity, the Plaintiff's first part of the Objection is moot. The Magistrate Judge specifically found that "a reasonable juror might conclude [the Plaintiff] had engaged in protected activities by complaining to NASA's EEOC officials about Rock's treatment of him." First R&R at 27. Thus, the Magistrate Judge found m favor of the Plaintiff on this issue, determining that the Plaintiff has satisfied the first prong of his prima facie case by demonstrating that he engaged in protected activity. See id. In doing so, the Magistrate Judge made no credibility determination in favor of the Defendant, having wholly resolved the first prong in the Plaintiff's favor.

However, the Plaintiff also objects that the Magistrate Judge "either overlooked or ignored" particular instances of protected activity. Pl.'s Obj. at 2. These instances of allegedly protected activity merit discussion because they share a closer temporal relationship with the alleged adverse employment actions discussed below in Part III.A.3, thus impacting the causation analysis. The Plaintiff identifies "two crucial pieces of evidence that were submitted to Rock prior to his placement on the PIP and his termination." Pl.'s Obj, at 3 (citing Pl.'s Exs. 28, 53). The first piece of evidence is Exhibit 28 to the Plaintiff's Response to the Motion for Summary Judgment, which contains an email from the Plaintiff to Nicole Smith, a human resources specialist, with a copy to Andrea Bynum, an EEO specialist, forwarding an email exchange between

the Plaintiff and Rock. See Pl.'s Ex. 28, ECF No. 72-28. The second piece of evidence is an email exchange between Rock and the Plaintiff, wherein Rock denies the Plaintiff's request for the presence of an EEO representative at a performance evaluation meeting. See Pl.'s Ex. 53, ECF No. 72-53. The Plaintiff alleges that these email exchanges constitute protected activity. Each of these email exchanges will be addressed in turn.

The content of the first email between the Plaintiff and Rock includes the following language from the Plaintiff, via an attached statement to Rock:

> However, the Laws of Equal Employment Opportunity (EEO) protecting an individual could be violated when the foregoing promotion standards/methods are used selectively to promote the interest of all employees in the branch while at the same time excluding another employee from the same standard of promotion.

Pl.'s Ex. 28, ECF No. 72-28, at 2. In that same statement, the Plaintiff also writes to Rock that "an unknown promotion standard of topsy-turvy and amorphous nature has been applied to me as compared to others, inflicting great harm to my career over past many years." Id.

The Plaintiff argues that the statement in the email demonstrates he was "clearly opposing a violation of the EEO laws, providing specific examples of employees not being treated in a similar way," and that it constitutes protected activity under Title VII. Pl.'s Obj. at 4. Moreover, the Plaintiff

argues that this protected activity, falling within six months of his placement on a Performance Improvement Plan ("PIP"), is temporally proximate enough to an adverse employment action for survival of the Defendant's Motion for Summary Judgment. Id. The email to Rock is dated July 12, 2012, and that forwarded email to Smith and Bynum is dated August 1, 2012. ECF No. 72-28, at 1, The Plaintiff was placed on his first PIP on January 18, 2013. See Compl. ¶¶ 118-22; Pl.'s Ex. No. 15, Resp. to Mot. for Summ. J., ECF No. 72-15. Based on this temporal proximity, the Plaintiff argues that "[t]he court incorrectly claims . . . that there was at least a year between Dr. Emami's complaints and his changes to his performance plan or termination." Pl.'s Obj. at 4 (citing First R&R at 28).

The second piece of evidence, Exhibit 53 to the Plaintiff's Response to the Motion for Summary Judgment, is an email exchange between the Plaintiff and Rock involving the Plaintiff's request for "two additional people to participate" in a discussion between the Plaintiff and Rock regarding performance review. See Pl.'s Ex. 53, ECF No. 72-53. In the request, which was sent on January 14, 2013, the Plaintiff specifically asks for an EEO representative to be one of these participants. Id.

Neither email was referenced in the First R&R. The first question the emails present is whether they include "protected activity" under the first prong of Emami's prima facie case. "Protected activity" is that which falls under the participation or opposition clauses of Title VII's retaliation provision. Lauqhlin, 149 F.3d at 259. In this case, the conduct would have to satisfy the opposition clause, under which "behavior need not rise to the level of formal charges

of discrimination." Armstrong v. Index Journal Co., 647 F.2d 441, 448 (4th Cir. 1981) (citing Sias v. City Demonstration Agency, 588 F.2d 692, 694-96 (9th Cir. 1978)). On the contrary, "[t]he opposition clause has been held to encompass informal protests, such as voicing complaints to employers or using an employer's grievance procedures." Id.

The Plaintiff's first email invokes equal employment opportunity laws in the most general sense. See Pl.'s Ex. 28, ECF No. 72-28, at 2. However, while there is no specific reference to discrimination based on religion or national origin, the Plaintiff's reference to anti-discrimination laws in general, especially in the context of the whole statement, would place a reasonable reader on notice that the Plaintiff was concerned that his employer could be discriminating against him, in violation of anti-discrimination laws. Therefore, the statement in the email constitutes "protected activity" under the first prong of the Plaintiff's prima facie case.[3]

The second email, viewed in the context of the situation, also invokes equal employment laws. The Plaintiff requested that an EEO representative participate in the Research Directorate. Pl.'s Ex. 53, ECF No. 72-53. Also noteworthy is the Plaintiff's statement at the conclusion of the email: "Further, I

---

[3] Although the Plaintiff states that Rock was aware of the entire protected communication, see Pl.'s Obj. at 4, the exhibit reveals that Rock was not necessarily aware of the Plaintiff's subsequent forwarding of the email exchange to human resources staff, as Smith and Bynum were the only recipients of the forwarded message. See Pl.'s Ex. 28, ECF No. 72-28. Regardless, the exhibit does show that Rock himself was aware of the statement, which suffices for the first prong of the Plaintiff's prima facie case.

affirmatively waive my *Right of Privacy' for the aforementioned event." Id. This is significant because an EEO Specialist had informed the Plaintiff that, in order to move forward in the EEO process, he needed to waive his right to anonymity. Bynum Dep., ECF No. 72-26, at 15:11-17. This email would also place a reasonable reader on notice that the Plaintiff was concerned that his employer could be unlawfully discriminating against him.

A reasonable juror might conclude that the Plaintiff engaged in protected activity when he sent the July 12, 2012 and January 14, 2013 emails. Accordingly, the court will consider these emails for purposes of evaluating the alleged causal link between the protected activity and the adverse employment action. The Plaintiff's Objection that the aforementioned emails were instances of protected activity is SUSTAINED.

2. Materially Adverse Action

Additionally, because the temporal proximity of the materially adverse action to protected activity is an essential matter for resolving the third prong of the Plaintiff's prima facie case—which was the basis for the Magistrate Judge's recommendation to dismiss the retaliation claim, as well as the subject of the Plaintiff's Objection—the court must determine when the Plaintiff first suffered a materially adverse action in this case. The general fulfillment of the second prong of the Plaintiff's prima facie case is not in dispute, because the parties agree that the Plaintiff was terminated. See First R&R at 27. Nevertheless, the parties do contest

when the Plaintiff first suffered a materially adverse action.[4]

Some of this disagreement may stem from a misunderstanding of the controlling standard for retaliation claims. Numerous courts have incorrectly stated "adverse employment action," rather than "materially adverse action," as the controlling standard for the second prong of the retaliation prima face case.[5] See Hinton v. Virginia Union Univ., 185 F. Supp. 3d 807, 827-28 (E.D. Va. 2016), motion to certify appeal denied. No. 3:15CV569, 2016 WL 3922053 (E.D. Va. July 20, 2016). The Defendant cites "adverse employment action" as the controlling standard. Mem. in Supp., ECF No. 61, at 23. The Defendant did not address the PIP as an adverse action in responding to the Plaintiff's Objection, instead focusing only on the Plaintiff's termination.[6] The Plaintiff contends that the PIP is sufficient for satisfying the second prong. Thus, the distinction between "adverse employment action" and "materially adverse action" is important here. If the PIP did not alter the terms or conditions of employment, it could not be considered an "adverse employment action"; however, the PIP can be considered "a materially adverse action" even if it

---

[4] Because Emami raises only termination and the PIP as materially adverse actions, the court will only address these actions.

[5] Because Emami raises only termination and the PIP as materially adverse actions, the court will only address these actions.

[6] However, in a Memorandum for a previous motion, the Defendant stated that placement on a PIP "cannot be considered an adverse employment action." Mem. in Supp. of First Mot. for Summ. J., ECF No. 12, at 18 n.8. This is not a correct statement of law, as the court explains below.

does not alter the terms or conditions of employment. See Hinton, 185 F. Supp. 3d at 830-31 (citing Burlington, 548 U.S. at 64-65).

The Supreme Court has not resolved the issue of whether a negative performance plan or placement on a PIP constitutes a materially adverse action. Moreover, the Fourth Circuit has not categorically held that a negative performance plan or placement on a PIP constitutes, or fails to constitute, a materially adverse action. The Fourth Circuit recently held that a plaintiff failed to state a plausible discrimination claim because the PIP in question did not permit the court to "reasonably infer" an adverse employment action, where the plaintiff had pled no facts showing harm. Jensen-Graf v. Chesapeake Employers' Ins. Co., 616 F. App'x 596, 598 (4th Cir. 2015). In that case, the plaintiff's "complaints about additional requirements being placed on her as a result of the PIP amount[ed] to nothing more than 'dissatisfaction with this or that aspect of [her] work' that fail[ed] to allege an actionable adverse action." Id. (citing James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377 (4th Cir. 2004)). An Eastern District of Virginia court has held that a "rescinded, unimplemented performance improvement plan" did not constitute a materially adverse action. Hill v. Panetta, No. I:12cv350, 2012 WL 12871178, at *15 (E.D. Va. Oct. 4, 2012), aff'd sub nom. Hill V. Hagel, 561 F. App'x 264 (4th Cir. 2014). However, there is no authority in the Fourth Circuit that holds that a PIP cannot be a materially adverse action.

The Magistrate Judge stated that the Plaintiff "was first disciplined and eventually terminated," and that," [i]f related to his complaints of

discrimination, either of these might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' and are thus materially adverse actions." First R&R at 27 (quoting Burlington, 548 U.S. at 68). In so finding, the Magistrate Judge implied that the PIP constituted a materially adverse action. The Defendant did not object to this finding.

The court agrees with the Magistrate Judge that the Plaintiff's being "first disciplined" could constitute a materially adverse action, satisfying the second prong of the Plaintiff's prima facie case of retaliation. Id. at 27. However, the point deserves further explanation. A negative performance review, alone, or a placement on a PIP, alone, does not constitute a materially adverse action. Here, the Plaintiff's PIP was actually implemented, and it imposed conditions with which his failure to comply ultimately led to termination of employment. See Def.'s Reply to Pl.'s Resp., ECF No. 78, at 7-8. Indeed, on its face, the PIP imposed a requirement that the Plaintiff meet the "Needs Improvement" level in order to keep his job. PIP and Position Description, ECF No. 61-1, at 1. Further, by virtue of the Plaintiff's placement on the PIP, he became "subject to reduction in grade or removal action without being afforded another PIP." Id. These conditions, particularly in light of the requirements imposed by the PIP, could dissuade a reasonable employee from making a charge of discrimination. Resolving all factual disputes in the Plaintiff's favor, he has presented sufficient evidence for a reasonable juror to conclude that his placement on the PIP was a materially adverse action.

3. Causal Connection

The Plaintiff's objection also challenges the Magistrate Judge's finding that the Plaintiff's retaliation claim fails on the third prong of his prima facie case, regarding a causal connection between the first two prongs of engagement in protected activity and a materially adverse action. Pl.'s Obj. at 3-6. On this third prong, the Magistrate Judge concluded that the Plaintiff "has not produced any evidence from which jurors could conclude the first two elements were causally connected." First R&R at 27. The Magistrate Judge further found that, "[e]ven accepting [the Plaintiff's] statements that he complained of discrimination to NASA's H.R. staff, there is no evidence that Rock knew of such complaints at the time he modified Emami's performance plan, or recommended his termination." Id. (citing Bynum Dep. 18:10-19, ECF No. 61-18). The Magistrate Judge ultimately found that "[a]lthough Emami's complaints generally preceded his termination, their temporal proximity alone is insufficient to meet Emami's burden on summary judgment." Id. at 27-28 (citing Jones v. Constellation Energy Proj. & Servs. Grp., Inc., 629 F. App'x 466, 469-70 (4th Cir. 2015)). The Magistrate Judge noted, additionally, that beyond Rock's allegedly hostile statements at least one year prior to the Plaintiff's termination, the Plaintiff "has not identified any other evidence of discriminatory animus by Rock after his alleged reporting to Bynum which might sustain his burden to show a retaliatory motive despite this passage of time." Id. at 28 (citing Lettieri v. Equant, Inc., 478 F.3d 640, 650 (4th Cir. 2007)).

The Plaintiff raises only two materially adverse actions for the court to consider in evaluating any causal link: his placement on the PIP and his termination of employment. In his Objection, the Plaintiff points out that the July 12, 2012 email was sent six months prior to his placement on the PIP. Pl.'s Obj. at 4. While the Plaintiff is correct that six months is a shorter time period than the year-long period discussed in the First R&R, six months is still insufficient, on its own, to infer a causal link based on temporal proximity. See supra Part II.D. However, the Plaintiff further objects that only four days elapsed between the January 14, 2013 email and his placement on the PIP. Id. This time period is short enough that a reasonable juror could infer a causal link between an instance of protected activity and a materially adverse employment action based on temporal proximity. Accordingly, the Plaintiff's Objection that the January 14, 2013 email was temporally proximate enough to his placement on the PIP to infer a causal link is SUSTAINED. The Plaintiff's Objection that the July 12, 2012 email was sufficiently temporally proximate to his placement on the PIP to infer a causal link is OVERRULED.

4. Non-retaliatory Reason for Materially Adverse Action

The Defendant does not specifically raise a legitimate reason for the Plaintiff's placement on the PIP, having relied on the assumption that the only adverse employment action that has taken place is the Plaintiff's ultimate termination. Def.'s Resp. to Pl.'s Obj., ECF No. 94, at 3. Still, the Defendant makes apparent that the rationale for placing the

Plaintiff on the PIP is the same as the rationale for termination: allegedly poor performance. Mem. in Supp. of Summ. J., ECF No.61, at 2, 5, 9. Rock clearly communicated to the Plaintiff that he was being placed on the PIP because his "performance was failing to meet" expectations. PIP and Position Description, ECF No. 61-1, at 1. Additionally, the declarations of both Rock and Ferlemann indicate that poor performance was the reason for Emami's placement on the PIP. Rock Decl., ECF No. 61-3, ¶¶ 8-11; Ferlemann Decl., ECF No. 61-4, ¶ 7. Accordingly, the Defendant has rebutted the presumption of retaliation by articulating a non-retaliatory reason for the materially adverse action.

5. Pretext

Because the Defendant has met his burden of articulating a non-retaliatory reason for the materially adverse action, the burden shifts to Plaintiff to show that the reason proffered by the Defendant is pretext. See supra Part II.D. The Plaintiff argues that Rock "set Emami up to fail" by making demands with which the Plaintiff could not possibly comply, such as that he must produce publishable, peer-reviewable work from data that was compromised. Pl.'s Resp., ECF No. 72, at 31. According to the Plaintiff, he was placed on the PIP after he failed to meet requirements that could not have been met. See id. Having reviewed the portion to which the Plaintiff objected de novo, the court finds that a reasonable juror could conclude that retaliation was the actual reason for the Plaintiff's termination. The court REJECTS IN PART AND

MODIFIES Part III.B of the First R&R as discussed herein and DENIES the Defendant's Motion for Summary Judgment on the Plaintiff's retaliation claim.

B. Defendant's Objection to the First R&R

The Defendant objected to the First R&R, arguing that NASA employee Troy Middleton should not be deemed a comparator and requesting the court "to exclude the comparison of Middleton's work product, performance plans, and performance evaluations, to those of the Plaintiff." Def.'s Obj., ECF No. 92, at 1.

If a plaintiff's discrimination claim hinges on comparator evidence, the validity of that plaintiff's prima facie case hinges on "whether those comparators are in fact similarly situated." Perrin v. Fennell, No. I:10cv810, 2011 WL 837008, at *9 (E.D. Va. Mar. 2, 2011). Accordingly, such a plaintiff should show "that the comparators 'engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" Id. (quoting Haywood, 387 F. App'x at 359).

Haywood is often cited for its explanation of comparators. Notably, this frequently relied upon statement from Haywood is a quotation from a Sixth Circuit case, Mitchell. See Haywood, 387 F. App'x at 359 (quoting Mitchell, 964 F.2d at 583), The Sixth Circuit later clarified the standard set out in Mitchell, explaining that the comparator factors were neither inflexible nor automatically applicable. See McMillan v. Castro, 405 F.3d 405, 413-14 (6th Cir. 2005). Additionally, as the Sixth Circuit has

noted, a "common misapplication" of McDonnell Douglas "is the tendency to push all of the evidence into the prima facie stage and ignore the purpose for and application of the three stages." Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 813 (6th Cir. 2011). Accordingly, courts applying McDonnell Douglas should be aware of the danger that, in the summary judgment context, "the burden-shifting analysis can obfuscate the appropriate question—whether there exists a genuine issue of material fact." Id. "[W]hether the comparators presented are similarly situated in all relevant respects" is, at least after the prima facie stage, a question for the fact finder to determine. Garrett v. Woody, No. 3:07cv286, 2008 WL 1902488, at *5 (E.D. Va. Mar. 21, 2008), report and recommendation adopted in part, No, 3:07cv286, 2008 WL 1766760 (E.D. Va. Apr. 17, 2008).

Viewing the facts in the light most favorable to the Plaintiff, a reasonable juror could conclude that Middleton and the Plaintiff engaged in the same conduct without the sort of differentiating circumstances that would justify the differential treatment of them. The court agrees with the Magistrate Judge's statement that, for summary judgment purposes, the Plaintiff's supported identification of "at least one comparator" is sufficient. First R&R at 20-21. Having reviewed the portion to which the Defendant objected de novo, the court ADOPTS Part III. A of the R&R and DENIES the Defendant's Motion for Summary Judgment on the Plaintiff's Intentional Discrimination claim.

C. Hotion in Limine

1. Troy Middleton

As discussed above in Part III.B of this Opinion, having reviewed the portion to which the Defendant objected de novo, the court agrees with the Magistrate Judge's conclusion that Middleton is an appropriate comparator. Thus, the court ADOPTS the Magistrate Judge's recommendation in the First R&R, with regard thereto, and DENIES the Motion in Limine as to Troy Middleton.

2. Robert Baurle, Jeffrey Balla, and David Witte

The Magistrate Judge did not evaluate the admissibility of additional comparator evidence, and instead left the matter for the trial judge, noting that considerations of cumulative proof may be "best evaluated at trial." First R&R at 21, n.7. Accordingly, the additional comparator evidence related to Robert Baurle, Jeffrey Balla, and David Witte must be addressed.

The issue before the court, for purposes of the Defendant's Motion in Limine, is whether "the work product, performance plans, performance evaluations, and any testimony relevant to those documents as to NASA employees Jeff Balla, Robert Baurle, Troy Middleton, and David Witte" are clearly inadmissible. See Mot. in Limine, ECF No. 69, at 1. The Defendant moves to exclude this evidence because "these individuals are not comparators, by law, and this information should therefore not be

before the jury." See Mem. in Supp. of Mot. in Limine, ECF No. 70, at 1.

There is no rule that would exclude evidence of other employees simply because the Plaintiff has not proven that they qualify as comparators under McDonnell Douglas. Indeed, "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules." Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008). As the Fourth Circuit has acknowledged, "other employee evidence 'is neither per se admissible nor per se inadmissible.'" Calobrisi v. Booz Allen Hamilton, Inc., 660 F. App'x 207, 209 (4th Cir. 2016) (quoting Mendelsohn, 552 U.S. at 381), Generally, the way other employees have been treated by a defendant in an employment discrimination case "'is relevant to the issue of the employer's discriminatory intent.'" Id. at 210 (quoting Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990)).

If adverse treatment of employees that share the same protected class as the plaintiff would be relevant under Mendelsohn and Calobrisi, it follows that better treatment of employees who do not share that protected class would also be relevant. After all, "the very term 'discrimination' invokes the notion of treating two persons differently on the basis of a certain characteristic that only one possesses." Laing v. Fed. Exp. Corp., 703 F.3d 713, 719 (4th Cir. 2013). Simply put, logic demands consideration of differently treated persons in a discrimination case.

The Fourth Circuit clarified "the significance of comparator evidence" when it reiterated that evidence of more favorably-treated, similarly

situated employees would be "'especially relevant'" to a showing of pretext. Id. (quoting McDonnell Douglas, 411 U.S. at 804). It is worthwhile to examine the place from which this "especially relevant" language came: it was used to describe would-be evidence showing "that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired." McDonnell Douglas, 411 U.S. at 804. Notably, the Court described such evidence as "especially relevant"; that language does not lend itself to an interpretation that such a similarly-situated status is necessary to be relevant at all.

There is nothing before the court indicating that the evidence Defendant has moved to exclude would be inadmissible. On the contrary, there are numerous factors that point to its relevance. The Plaintiff worked "as an Aerospace Engineer in the Hypersonic Air-Breathing Propulsion Branch ("Branch") within the Research Directorate ("Directorate") at the Langley Air Force Base in Hampton, Virginia." Pl.'s Resp. to Mot. in Limine, ECF 83, at 2. Baurle, Balla, and Witte are all listed as members of the same Isolator Dynamics Research Lab ("IDRL") Research Team as the Plaintiff and Middleton. Research Team, ECF No. 72-7. On this list, the names of Baurle, Witte, Middleton, and the Plaintiff are all marked with an asterisk, indicating membership in the Hypersonic Airbreathing Propulsion Branch.[7] Id. Further, Baurle's, Witte's, and Middleton's performance plans, which were filed under seal, indicate that all of them shared the job

[7] Balla's name is marked indicating membership in the Advance Sensing & Optical Measurements Branch. Research Team, ECF No. 72-7, at 1.

title of aerospace engineer and that all were part of the Hypersonic Airbreathing Propulsion Branch. The Defendant points out that Balla was not supervised by Rock. Reply to Resp. to Mot. in Limine, ECF No. 86, at 1. Still, during his deposition. Rock indicated that Baurle, Balla, Witte, and Middleton worked with the Plaintiff, and that he would have asked each of them, as his subordinates, how they liked working with the Plaintiff. Rock Dep., ECF No. 72-4, at 78:5-22. Balla described himself as an experimentalist, and he acknowledged that he worked in the IDRL. Balla Dep., ECF No. 51-3, at 15:15-16:12. Rock also indicated that Balla was a researcher. Rock Dep., ECF No. 72-4, at 83:7-10.

The Defendant focuses on the distinction between supervisory and reporting requirements of the Plaintiff, who was a GS-13 employee, and the proposed comparators, who held higher ranks of GS-14 and GS-15, comparing the differences between a GS-13 and a GS-14 to those "between a legal assistant and a senior attorney." ECF No. 51 at 6.[8] The Defendant also compares the differences between GS-13 and GS-15 Research Aerospace Engineers to the differences between an Assistant United States Attorney and the United States Attorney General. Id. at 9. These analogies strain credulity. Although the Defendant repeatedly mentions the requirement that the comparators be "similarly situated," the Defendant's argument appears to be based on the assumption that the

---

[8] The Defendant incorporated its Opposition to Plaintiff's Motion to Compel Production of Documents Relevant to Comparator Job Performance, ECF No. 51, into its Memorandum in Support of Defendant's Motion in Limine. ECF No. 70 at 2.

comparators must be identical not only in order to be considered comparators for purposes of McDonnell Douglas, but also to be considered admissible evidence. If there were an employee who had the same exact GS rating, responsibilities, and supervisor as the Plaintiff, that employee would be identical, not merely similar.

Moreover, some evidence indicates that the duties and requirements of GS-13 and GS-14 researchers were not very different. Diego Capriotti, a NASA employee who had worked on a project with the Plaintiff, testified that "[a] GS-13 or 14 researcher would have the same reporting requirements." See Capriotti Dep., ECF No. 72-9, at 31:1-2. Baurle testified that he had no supervisory duties of any sort as a GS-14, nor did he have any job duties that were distinct from those of a GS-13 researcher. Baurle Dep., ECF No. 51-4, at 23:8-14. Middleton indicated that he was unsure he could tell the difference between the duties of a GS-13 aerospace engineer and a GS-14 aerospace engineer and stated that the work would be similar. Middleton Dep., ECF No. 72-40, at 70:17-71:1. The Defendant states that the allowance of evidence related to these individuals "will only serve to confuse and mislead the jury, creating mini-trials within the trial and needlessly consume the time and resources of the [c]ourt." Mem. in Supp. of Mot. in Limine, ECF No. 70, at 3. The Defendant does not explain how such evidence would confuse or mislead the jury, let alone how it would be so confusing that it would substantially outweigh the probative value of the information.

The comparator issue in this case is exceedingly complex and peppered with factual disputes, and to

rule on it now would require factual findings best reserved for a jury. Accordingly, at this juncture, the court DENIES the Defendant's Motion in Limine. If it later becomes apparent that comparator evidence would be irrelevant, cumulative, confusing, or misleading, the issue can be revisited at that time.

D. Motion to Exclude

There were no objections to the Second R&R. The court hereby ADOPTS the Second R&R in full and DENIES the Defendant's Motion to Exclude.

IV. CONCLUSION

The court ADOPTS Parts I, II, and III.A of the First R&R, REJECTS IN PART and MODIFIES Part III.B of the First R&R, and ADOPTS the Second R&R in full. Accordingly, the Motion for Summary Judgment, ECF No. 60, the Motion to Exclude Plaintiff's Experts, ECF No. 65, and the Motion in Limine, ECF No. 69, are DENIED.

The Clerk is DIRECTED to send a copy of this Opinion to counsel for the parties.

IT IS SO ORDERED.

/s/
REBECCA BEACH SMITH
CHIEF JUDGE

March 10, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No: 2:15cv34

SAIED EMAMI,
Plaintiff,

v.

CHARLES F. BOLDEN, JR.,
In his official capacity as Administrator,
National Aeronautics and Space Administration,
Defendant.

AMENDED RULE 16(b) SCHEDULING ORDER

After consulting with counsel on April 6, 2017, the Court established the following trial schedule.

1. Trial shall commence on August 11 20171 at 11:00 a.m. at Norfolk. Unless otherwise ordered by the court, the party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered, and indexed, and the original and two (2) copies shall be delivered to the Clerk, with copies in the same form to the opposing party, one (1) business day before the trial. The submitting party may substitute photographs for demonstrative or sensitive exhibits.

2. An attorneys' conference is scheduled in the office of counsel for plaintiff or, if the plaintiff is unrepresented, at the office of counsel for the defendant whose office is located closest to the courthouse at Norfolk on July 7, 2017, at 2:00 p.m. Counsel and unrepresented parties shall meet in person and confer for the purpose of reviewing the pretrial disclosure required by Rule 26 (a) (3), preparing stipulations, and marking the exhibits to be included in the final pretrial order outlined in

paragraph 3. With the exception of rebuttal or impeachment, any information required by Rule 26(a)(3) not timely disclosed, delivered, and incorporated in the proposed final pretrial order shall result in the exclusion of the witnesses, depositions, and exhibits which are the subject of such default.

3. A final pretrial conference shall be conducted on July 14, 2017, at 11:00 a.m., at the courthouse in Norfolk, at which time trial counsel and unrepresented parties shall appear and be prepared to present for entry the proposed final pretrial order setting forth: (1) a stipulation of undisputed facts; (2) identification of documents, summaries of other evidence, and other exhibits in accordance with Rule 26(a)(3)(A)(iii) to which the parties agree; (3) identification of Rule 26(a)(3)(A)(iii) materials sought to be introduced by each party to which there are unresolved objections, stating the particular grounds for each objection, and arranging for the presence of any such materials at this conference; (4) identification of witnesses in accordance with Rule 26(a)(3)(A)(i) indicating any unresolved objections to the use of a particular witness and the grounds therefor, and designating those witnesses expected to testify by deposition in accordance with Rule 26(a)(3)(A)(ii); (5) the factual contentions of each party; and (6) the triable issues as contended by each party. While preparation of the final pretrial order shall be the responsibility of all counsel and unrepresented parties, counsel for the plaintiff, or if the plaintiff is unrepresented, counsel for the first-named defendant, shall distribute a proposed final draft to all other counsel and unrepresented parties on or before July 12, 2017. Unresolved objections shall be noted in the proposed final pretrial order, but disagreements concerning the content of the final draft shall be resolved before the final pretrial conference, at which time the parties shall present a complete and endorsed proposed draft of the final pretrial order.

Failure to comply with the requirements of this paragraph may result in the imposition of sanctions pursuant to Rule 16(f).

4. Trial by jury has been demanded. Proposed voir dire and jury instructions shall be electronically filed. Proposed voir dire and typewritten jury instructions with authorities in support thereof, shall be delivered to the Clerk on or before July 25, 2017. Jury instructions are to be submitted in duplicate. All instructions in one copy must be individually titled, numbered, and include authorities. The other copy must be submitted without titles, numbers, or authorities. In addition to these two copies, a back-up computer disc may be submitted.

/s/ Rebecca Beach Smith
Chief Judge

Date: April 6, 2017

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ACTION NO. 2:15cv34

SAIED EMAMI,
Plaintiff,

V.

CHARLES F. BOLDEN, JR.,
In his official capacity as Administrator, National Aeronautics and Space Administration,
Defendant.

REPORT AND RECOMMENDATION

This matter arises from an employment discrimination suit filed by Plaintiff, Dr. Saied Emami ("Emami"), a scientist and former employee of the National Aeronautics and Space Administration ("NASA"). On October 6, 2016, Defendant Charles F. Bolden, Jr. ("Bolden"), Administrator of NASA, filed a Motion to Exclude Plaintiff's Experts (ECF No. 65). Bolden argues that Emami's experts should be excluded because they are not qualified, their opinions are unreliable, and their testimony would not be helpful to the jury. See Def.'s Mem. Supp. Mot. to Exclude Pl.'s Experts (ECF No. 66). The matter was referred to the undersigned United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b) (1) (B) and Rule 72(b) of the Federal Rules of Civil Procedure. Having considered the pleadings

and arguments presented, for the reasons stated below, the undersigned RECOMMENDS the district court DENY Defendant's Motion.

I. BACKGROUND

The asserted relevance of expert testimony in this employment dispute depends on the technical nature of Emami's work. He was employed as an Aerospace Engineer (GS-13) from 2002 to 2013 in NASA's Hypersonic Airbreathing Propulsion Branch ("HAPB"), a subdivision of the Research Directorate of the NASA Langley Research Center. Emami worked in the Isolator Dynamics Research Lab ("IDRL"), a testing apparatus constructed by NASA to improve the efficiency of hypersonic engines. Kenneth Rock ("Rock"), Head of the HAPB, was Emami's direct supervisor.

For most of his time at NASA, Emami had received positive annual reviews, but Rock claimed that his work began to fall below acceptable standards in the 2011-12 performance year.[1] Specifically, he asserts that Emami did not communicate or document his research well and had failed to provide requested updates on his progress. See Pl.'s 2011-12 Performance Plan & Appraisal (ECF No. 61-2). As a result. Rock added two additional requirements to Emami's 2012-13 Performance Plan and Appraisal[2]: (1) "[c]ommunicate progress and plans to branch

---

[1] NASA's performance cycles run from May 1 to April 30, of each year.

[2] A Performance Plan and Appraisal is drafted every year to establish a researcher's specific duties and responsibilities

management via weekly email update that summarizes progress & accomplishments from the previous week and plans & goals for the upcoming week," and (2) " [d]evelop a quarterly report, in the format of Power Point charts or written text supported by figures, that communicates research results and findings." Notice of Unacceptable Performance and Opportunity to Improve (ECF No. 61-1); see also Kenneth Rock Dec. ¶ 4 (ECF No. 61-3).

By the mid-point of the 2012-13 performance year, Rock claimed that Emami had failed to satisfy the new reporting requirements outlined in his Performance Plan. See Rock Dec. ¶ 10 (ECF No. 61-3). Rock consulted with Human Resources and made a decision to place Emami on a Performance Improvement Plan ("PIP") beginning January 18, 2013. Id. at ¶ 9. Similar to Emami's Performance Plan, the PIP required him to: (1) submit a weekly update to management detailing the tasks [Emami] was performing, and (2) provide a quarterly report of research results and findings containing "enough input/information to cover the first and second quarters [of the performance cycle] and contain[ing] documentation of the experimental set-up, approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives." See Notice of Unacceptable Performance and Opportunity to Improve, at 3 (ECF No. 61-1).

After Emami submitted three reports under the PIP, Rock concluded that he failed to meet an acceptable level of performance because he did not

---

within the Research Directorate and evaluate their work from the previous performance cycle.

comply with the PIP's requirements of communicating research results and findings from the first two quarters through "documentation of experimental set-up approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives." See id.; see also Rock Dec. ¶¶ 17-20 (ECF No. 61-3). As a result, Rock determined Emami was unable to handle critical aspects of his job at NASA and proposed that Emami be removed from federal service. See Notice of Proposed Removal, at 5 (ECF No. 61-12). Emami's proposed removal was referred to the Deputy Director of NASA's Research Directorate, Damodar Ambur ("Ambur"), who ultimately approved Rock's recommendation for removal. See Notice of Decision, at 1-3 (ECF No. 61-17). Emami was terminated from his position at NASA effective June 25, 2013. See id. at 3.

Emami intends to prove that Rock's purported reason for the termination was pretextual - that he was actually scrutinized closely, and eventually terminated because of his religion (Islam) and national origin (Iranian). Emami alleges that "[a]n objective review of [his] quarterly reports" shows that he complied with all the requirements of the PIP and that his job performance was substantially similar or even superior to other Aerospace Engineers working in the IDRL under Rock. See Pl.'s Mem. Opp. Def.'s Mot. to Exclude at 3 (ECF No. 79). To support his claims, Emami retained two expert witnesses, Dr. Jose L. Goity ("Goity") and Dr. Farid H. Miandoab ("Miandoab") , to testify as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially

similar to that of his comparator employees." Id. at 2.

Goity has a PhD in Physics and is a research scientist at the Jefferson Laboratory in Newport News, Virginia. See Dr. Jose Goity CV (ECF No. 66-2). Goity also works as a physics professor at Hampton University and has published over eighty scientific papers and reports in his career. Id. Miandoab has a PhD in Mechanical Engineering emphasizing Aerodynamics, and works as an engineering manager for Jamison/HCR Air Door Products Manufacturing. Dr. Farid Miandoab CV (ECF No. 66-1). Miandoab also worked as a NASA contractor, where he managed four engineering services groups and oversaw "systems analysis, performance modeling, conceptual and preliminary design studies, and engineering and safety support." See id. Emami argues that both experts are qualified and will provide relevant testimony as to whether his work at NASA would be considered objectively acceptable in the scientific community, and how his reporting to Rock compared to the work of his fellow researchers.

NASA argues that Emami's experts should be excluded because they are not qualified by "knowledge, skill, experience, training, or education" to testify about Emami's work at NASA; their opinions are not reliable; and their opinions will not be helpful to the jury. See Def.'s Mem. Supp. Mot. to Exclude (ECF No. 66). NASA also argues that the experts did not properly disclose the information relied upon to form portions of their opinions pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) and thus, the entirety of their testimony should be excluded under Rule 37(c)(1), Id.

After considering the parties' briefs and hearing argument on the motion, the undersigned finds Emami's experts qualified, and that portions of their disclosed testimony may be helpful to the jury. To the extent any of the factual basis for their opinions was not accurately reflected in their initial disclosures, the omission was harmless, and not a basis to preclude them from testifying.

II. STANDARD OF REVIEW

> Rule 7 02 of the Federal Rules of Evidence provides that
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "A district court considering the admissibility of expert testimony exercises a gate keeping function to assess whether the proffered evidence is sufficiently reliable and relevant."

Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999). The "gatekeeping role" serves to ensure that the jury hears what the Federal Rules of Evidence allow in order "for the particularized resolution of legal disputes" in light of the persuasive effect expert testimony may have on jurors. Daubert, 509 U.S. at 597. The relevant inquiry is "'a flexible one' focusing on the 'principles and methodology' employed by the expert, not on the conclusions reached." Westberry, 178 F.3d at 261 (quoting Daubert, 509 U.S. at 594-95). "Neither FRE 702 nor case law establish a mechanistic test for determining the reliability of an expert's proffered testimony." Pugh v. Louisville Ladder, Inc., 361 F. App'x 448, 452 (4th Cir. 2010) (unpublished). As the Fourth Circuit has noted, "the court should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence." Id. (citing Cavallo v. Star Enter., 100 F.3d 1150, 1158-59 (4th Cir. 1996)). Importantly, expert testimony, like all other admissible evidence, is subject to being tested by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." Id. (quoting Daubert, 509 U.S. at 596).

III. ANALYSIS

Both Goity and Miandoab should be able testify at trial, pursuant to Federal Rule of Evidence ("FRE") 702, because they are qualified to opine on the objective substance of Emami's work product as it relates to the requirements imposed on him by NASA, and how his work compares to the work product of his comparator co-workers. Such

testimony is reliable and will be helpful to the trier of fact. Further, the expert reports do not contravene Federal Rule of Civil Procedure ("FRCP") 26(a)(2)(B) such that exclusion of the testimony under Rule 37(c)(1) is warranted. For the reasons stated below, the undersigned recommends that the district court DENY Defendant's Motion to Exclude Plaintiff's Experts(ECF No. 65).

A. Admissibility under Federal Rule of Evidence 702

1. Qualifications of the Experts

An expert must be qualified by knowledge, skill, experience, training, and/or education before offering testimony at trial. See Fed. R. Evid. 702; see also Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989). In this case, Emami has offered Goity and Miandoab as experts to testify as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially similar to that of his comparator employees." Pl.'s Mem. Opp. Def.'s Mot. to Exclude at 2 (ECF No. 79). The court finds that Goity and Miandoab possess satisfactory knowledge, skill, experience, training, and education that qualify them to opine on these issues.

Goity has a PhD in Physics and over thirty years of experience conducting research and analyzing scientific data. See Dr. Jose Goity CV (ECF No. 66-2). In that time, he has published over eighty scientific papers and reports, which would make him intimately familiar with the scientific community's research standards and practices. Id. The quality of

his work - and its conformance to scientific research and reporting norms - is evidenced by the fact that he has been cited over 2,600 times. Id. at 8. Moreover, Goity works at the nationally renowned Jefferson Laboratory as a Senior Staff Scientist and as a Professor of Physics at Hampton University. In both these roles he would necessarily be required to produce or analyze scientific research on a regular basis.

Although Goity's research and experimental work may not be identical to the work performed in the IDRL - a fact Defendant says disqualifies him from testifying - his experience and knowledge in physics and laboratory experimentation is sufficient to allow him to understand, analyze, and offer an opinion on the objective quality of Emami's reporting. To that end, the court believes Goity is qualified by knowledge, experience, skill, training, and education to opine on whether Emami's work product met the prevailing standards for scientific research and to compare Emami's work against that of his comparator co-workers.

Similarly, Miandoab's knowledge and experience qualify him to offer testimony on whether Emami's work product met the standards adhered to in the scientific community. Miandoab was a NASA contractor who served in a supervisory role that oversaw four teams of engineers - a position similar to Rock's. At least one of the engineering teams he oversaw performed "[s]ubsonic/[s]upersonic/ [h]ypersonic vehicle configuration development; [a]erodynamic and structural analysis; and [a]erothermodynamics and thermal loads analysis." Miandoab CV at 3 (ECF No. 66-1). By supervising such work for NASA, Miandoab would be

particularly familiar with the research and reporting practices of NASA scientists. And while this specialized familiarity with NASA is not necessary to offer an opinion on the issues identified by Emami, it does make Miandoab particularly qualified to assess whether the research and reporting standards of the scientific community at large are different than what would reasonably be expected at NASA.

Defendant seeks to distinguish Miandoab's experience at NASA by emphasizing that he oversaw task orders in NASA's Engineering and Safety Center. See Def.'s Mem. Supp. Mot. to Exclude at 8, n. 1 (ECF No. 66). However, Defendant has not identified how this makes Miandoab less qualified to testify about the research and reporting standards of the scientific community. And in any event, Miandoab's CV explains that he also oversaw the work performed pursuant to the task orders. Id. at 2. In other words, the implication by Defendant that Miandoab's position may have been purely logistical is not supported by the evidence. Further, while Miandoab's publication history is less voluminous than Goity's, his experience over the past thirty years appears to be directly related to the preparation, analysis, review, and management of research proposals and experimental reports. This experience - in addition to his knowledge, skills, training, and education - qualifies him as an expert on the issues identified by Emami.

Again, Emami's experts are qualified to testify as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially similar to that of his comparator

employees, "Pl.'s Mem. Opp. Def.'s Mot. to Exclude at 2 (ECF No. 79). It is important to note that neither expert is being offered to testify about the subjective quality or scientific value of Emami's work. They do not purport to be experts in aerospace engineering. Rather, their testimony seeks to identify the objective standards observed in scientific research and reporting, whether Emami's reporting - both before and after the PIP - adhered to those standards under the circumstances alleged by Plaintiff, and how Emami's work compares to that of his comparator co-workers. To the extent that their reports go beyond those issues or offer conclusions reserved for the jury, their testimony may be limited at trial by appropriate contemporaneous objection. But, because they have sufficient knowledge, skill, experience, training, and education in scientific research and reporting, Emami's proffered experts are qualified under PRE 702 to testify on the issues identified by Plaintiff and quoted above.

2. Reliability of the Experts' Testimony

To be admissible at trial, expert testimony must be reliable. See Daubert, 509 U.S. at 589. To be reliable, testimony must be based upon sufficient facts or data, and be the product of reliable principles and methods applied to the facts of the case. See Fed. R. Evid. 702 (b) - (d). In this case, both Goity and Miandoab's testimony about whether Emami's reporting conformed to the prevailing standards for research and reporting in the scientific community and how it compared to the work of his comparator co-workers is reliable because their objective conclusions are based on sufficient factual

information, and they have properly applied their experience and knowledge in assessing that information.

To begin with, NASA's purported reasons for terminating Emami are relevant to an inquiry into whether Plaintiff's experts utilized sufficient factual information to produce their opinions. Concerning Emami's termination, the Agency wrote:

> NASA terminated Plaintiff for his failure – after repeated attempts - to comply with the PIP's requirement that he provide quarterly report of research results and findings containing "enough input/information to cover the first and second quarters [of the performance cycle] and contain[ing] documentation of the experimental set-up, approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives."

Notice of Unacceptable Performance and Opportunity to Improve, at 3 (ECF No. 61-1) (alteration in original).

As stated, these requirements were contained in Emami's Performance Plan, and amplified in the PIP. His failure to comply with the PIP, NASA claims, led to Emami's termination. Defendant argues that Plaintiff's experts did not rely on the correct information that would allow them to conclude Emami met these requirements.

Before detailing the information that Emami's experts did review and why it allowed them to produce reliable conclusions, it is important to note

that Emami's argument of employment discrimination - and by extension the purpose of his experts' testimony - is broader than the argument NASA makes in its motion. Emami contends that at all times relevant to his complaint, his work product and reporting met the reasonable standards of the scientific community and was substantially similar to, or surpassed the quality of his comparator coworkers' work. See Pl.'s Mem. Opp, Def.'s Mot. at 3 (ECF No. 79). In other words, Emami contends that he should never have been on a PIP, and that placing him on one was just one step in a series of discriminatory actions by Rock.

Emami argues that his experts can support this claim by testifying as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially similar to that of his comparator employees." Pl.'s Mem. Opp. Def.'s Mot. to Exclude at 2 (ECF No. 79). To address these issues, Goity and Miandoab reviewed "(1) Emami's Performance Plan – which described his job duties for the 2012-2013 performance year; (2) Emami's reports for the 2 012-2013 performance period; (3) Middleton's reports; and (4) one of Witte's reports." Id. at 3-4. Miandoab also reviewed more reports from Emami's proffered comparators after NASA was ordered to produce those documents, and supplemented his report via affidavit. Id. at 4.

Defendant argues that the experts' conclusions are unreliable because they failed to review Emami's position description, the PIP issued by Rock, the notice of proposed removal, and Ambur's notice of decision to approve Emami's removal from federal service. Without these materials, Defendant claims

that Emami's experts could not form an adequate foundation concerning "(1) the basic requirements of Plaintiff's job; (2) the agency's reasoning for placing Plaintiff of the PIP; (3) the specific requirements of the PIP; and (4) the agency's reason for concluding that Plaintiff failed to satisfy the PIP'S requirements and should be removed from his position." Def.'s Mem. Supp. Mot. to Exclude at 10 (ECF No. 66). Defendant also claims that the experts improperly relied on conversations with Emami to form subjective opinions about his ability to perform work in the IDRL and that they erroneously rely on their general experience with scientific reporting to assess Emami's work.

The crux of Defendant's argument is that Emami was terminated for failing to comply with the PIP and thus, this is the proffered non-discriminatory reason Emami must rebut. But Emami's claims, and the purpose of his experts' testimony, are not limited to the narrow timeframe or parameters of the PIP. Emami maintains that being placed on a PIP itself was merely one step in a sequence of discrimination aimed at removing him from NASA. As Emami argues in his opposition to this motion, a full description of Emami's job duties for the 2012-13 performance year as well as the reporting and substantive requirements that Defendant claims Emami failed to meet were included in Emami's 2 012-13 Performance Plan. Importantly, it was Emami's alleged failure to satisfy the requirements laid out in his Performance Plan that ultimately led to Rock placing him on a PIP – a decision that Emami alleges was pretext for discrimination. Emami, through his experts, asserts that he did in fact meet the objective standards of scientific

reporting throughout the 2012-13 performance year, which he claims is proof that he should not have been on the PIP at all. Nevertheless, he also claims to complied with the requirements in the PIP as well. See Goity Report at 6-7, 7-8, 9 (ECF No. 66-2); Miandoab Report at 8, 9 (ECF No. 9).

While the information identified by Defendant may have been helpful to the experts, their objective conclusions that Emami's work met the accepted standards of scientific reporting and that his work was comparable or superior to that of his co-workers are not unreliable in the absence of that additional information identified by Defendant, Moreover, the underlying requirements by which Emami's performance was assessed after being placed on the PIP were already included in the documents that the experts reviewed. By comparing Emami's work product (i.e., his Research Plan, Test Plan, and reports) with that of his comparators, the experts could reliably opine on how the two bodies of work compared to one another. Finally, to the extent the absence of specific materials bears on the weight due to the experts' testimony, those shortcomings may be fully exploited by vigorous cross-examination.

In regard to the subjective conclusions that the experts included in their reports - namely that Rock's expectations were intentionally "unrealistic" or "set [Emami] up to fail" because of the status of the IDRL - the experts' testimony should be limited. Emami concedes this fact. See Pl.'s Mem. Opp. Def.'s Mot. at 8-9 (ECF No. 79). Whether the standards imposed on Emami were intentionally unrealistic, in light of the commonly accepted standards for reporting in the scientific community and the operational status of the IDRL, is a question for the

trier of fact to resolve. Notwithstanding that limitation, Emami's experts should be able to testify whether, given the operational status of the IDRL at the time, Emami could reasonably be expected to collect data and produce accompanying reports. See King V. Rumsfeld, 328 F.3d 145, 149-50 (4th Cir. 2005) (Title VII plaintiff may offer expert testimony as to his employer's legitimate expectations and his performance in light of those expectations).

With respect to the experts' alleged reliance on conversations with Emami regarding the IDRL's status, Defendant's argument does not accurately represent both expert reports. Contrary to Defendant's claim, Miandoab cites sworn testimony and other evidence related to the status of the IDRL during Emami's tenure that was not solely obtained though conversations with him. See Miandoab Report at 5-6 (ECF No. 66-1). Although Goity may only recite Emami's representations as the source for the IDRL's operational status, the objective fact that the IDRL was not fully operational - which may be shown without expert testimony - still allows Goity to opine whether an experimental researcher would be able to collect data and produce reports under such conditions. In short, Emami did not misrepresent the status of the IDRL and the fact that his expert relied on his representation is not relevant to the objective conclusions the expert reached based on this undisputed operational fact.

In sum, the experts' objective conclusions as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially similar to that of his comparator employees" are reliable because they are based upon sufficient

factual information identified in their reports. As discussed in the preceding section, Goity and Miandoab are qualified to opine on the prevailing standards of reporting in the scientific community and to objectively assess whether Emami's work product met those standards. To that end, they used reliable methods of analysis by applying their knowledge and experience to the information reviewed and reached objective conclusions that comply with FRE 702's reliability standards.

3. Helpfulness of the Experts' Testimony

Finally under FRE 702, expert testimony must be helpful to the trier of fact as they seek to understand the evidence or determine a fact in issue. See Fed. R. Evid. 702(a). In order to be helpful, the testimony must be relevant. Daubert, 509 U.S. at 591. In this case, Goity and Miandoab's testimony complies with the "helpfulness" requirement because it will assist the trier of fact in understanding how the highly technical and scientific portions of Emami's reporting and work product conform, where possible, to both the requirements imposed by his Performance Plan, the PIP, and the prevailing standards of research and reporting in the scientific community.

Defendant argues that the experts' opinions are not helpful or relevant because they offer subjective opinions on reporting requirements imposed by Rock; rely on information not relevant to an assessment under the PIP; and that jurors are able to independently assess whether Emami's reports complied with the PIP requirements. See Def.'s Mem. Supp. Mot. to Exclude at 15-18 (ECF No. 66).

Emami claims that the testimony will be helpful because it will assist the jury in understanding how the substantive portions of Emami's work product comply with Rock's requirements and in assessing whether Rock's stated reasons for recommending termination were genuine. See Pl.'s Mem. Opp. Mot. to Exclude at 11 (ECF No. 79).

The undersigned finds that the experts' testimony is relevant because it would be helpful in assisting the jury understand how the complex scientific information and narratives in Emami's work complied with the applicable standards of reporting. The average juror is not presumed to be able to comprehend and analyze the adequacy of reporting on – for example - "[h]igh frequency pressure Kulites XTL-140-50A model sensors [that] were submitted for calibration in preparation to measure phenomenological physics of the unsteady (time accurate) pressure rise caused by shock boundary layer interaction in the isolator section. . . ."[3] Absent a degree or experience in a field of scientific study, it is reasonable to believe that a juror (or a judge) may find it difficult to understand whether the above quoted information pertained to the setup, approach, procedures, methodologies, or analyses of Emami's work. The proffered reason for NASA's termination - Emami's alleged failure to report these parameters - is not a matter of common knowledge. Moreover, Emami's self-interested testimony that he believes he complied with the reporting requirements may be insufficient, without expert testimony, to create a question of fact on the

[3] The quoted text was excerpted from one of Emami's quarterly reports cited in his opposition to this motion. See Pl.'s Mem. Opp. Mot. to Exclude at 12 (ECF No. 79).

subject. See King, 328 F. 3d at 149. As evidenced by their breakdown of Emami's reports - particularly the chart compiled by Goity - these two experts will be able to explain how the information in Emami's work fits into each element of his reporting requirements, both before and after the PIP. See, e.g., Goity Report, Table 1.0 (ECF No. 66-2).

With respect to Defendant's claim that the experts' reliance on Emami's collective work product is irrelevant because it considers information that was not part of the decision to terminate Emami, Defendant once again relies on its own narrowed scope of the issues in this case. While NASA may argue that it was purely Emami's objective failure to comply with the PIP that led to removal, he has alleged a much broader claim of discrimination. He argues the PIP itself was discriminatory because his work product met all reasonable standards of scientific research and reporting - and that Rock's decision to place him on a PIP was one step towards achieving a discriminatory goal. To that end, his experts opine, in part, on whether Emami's work product as a whole complied with the job duties and reporting requirements laid out in the 2012-13 Performance Plan. It appears undisputed that Rock relied heavily on Emami's alleged failure to comply with his Performance Plan as justification to place him on a PIP, and that the same reporting requirements featured in the Performance Plan were incorporated into the PIP after that decision was made. If Rock's motives are at issue, a complete review of Emami's work product during the 2012-13 performance cycle – like the one conducted by his experts - would be relevant to the issues in this case.

Finally, as stated in the preceding sections, Defendant's argument that Emami's experts should not offer subjective assessments of Rock's requirements is sustained. And Emami has conceded that such testimony would not be proper. But again, the experts may testify whether, given the operational status of the IDRL, Emami could have reasonably achieved all or some of the requirements established by Rock. Stated differently, they may opine on whether a scientist faced with an inoperable or suboptimal experimental platform could obtain data and conduct analysis that would have complied with the requirements imposed by Rock. If, as his experts claim, Emami could not do so, it will be for the jury to decide whether the requirements were intentionally unrealistic, and imposed out of discriminatory animus.

B. Exclusion under Federal Rule of Civil Procedure 26(a)(2)(B) & 37 (c) (1)

Federal Rule of Civil Procedure 26(a)(2)(B) requires that an expert report contain, among other things, "the facts or data considered by the witness in forming" their opinion. If a party's expert fails to comply with FRCP 26(a)(2)(B) , the court may exclude all or part of the expert's testimony, unless the failure was substantially justified or is harmless. See Fed. R. Civ. P. 37(c)(1); (c)(1)(C)/(b)(2)(A)(iii). A proper request for a Rule 37 sanction must be made with "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). In this case, not only

did Defendant fail to make any attempt to remedy the alleged Rule 26 violation in accordance with Rule 37(a)(1), the underlying argument itself is without merit.

Defendant argues that both experts failed to disclose information they relied on in formulating their conclusions, citing to portions of their reports describing information received by Emami regarding the functionality of the IDRL. See Def.'s Mem. Supp. Mot. to Exclude at 18-19 (ECF No. 66). Defendant argues the failure to disclose what information was provided by Emami warrants the exclusion of both experts entirely. The court disagrees.

First, at least one of the expert reports does identify the factual information that Defendant claims is missing. Miandoab's report explicitly identifies the information he relied upon in concluding that the IDRL was not properly functioning during the relevant times in this suit. Indeed, Miandoab states ". . . . I asked the Plaintiff for any factual evidence or testimonial to support his claims as to the IDRL facility "leakage" and functionality of the test apparatus. The Plaintiff submitted to me sworn testimonies of Mr, Diego Capriotti before Merit System Protection Board (MSPB) on May 15, 2014 [See EXHIBIT 14]." Miandoab Report at 5 (ECF No, 66-1), He goes on to detail how Cappriotti's testimony supports Emami's representations. Id, at 5-6, Miandoab further states, "[a] n examination of the scheduled research activities in the IDRL facility in the December 2010 - July 2013 period indicates "Milestone" slippage (See Troy Middleton's EXHIBITS 5, 6, 7, and 8)." Id, at 6. Thus, contrary to Defendant's assertion, Miandoab both identified and cited to the sources of

information that he based his conclusion upon. In fact, Miandoab's report indicates that he was critical of Emami's representations by requesting proof of what he was told. For Defendant to claim that this description is "sketchy" and "vague" is wholly without merit.

Second, although Goity's report does not explicitly identify the basis for his opinions concerning the IDRL's functionality, the omission is harmless. To begin, the conclusions that Defendant takes issue with - that Rock's requirements were intentionally "unrealistic" or "set [Emami] up to fail" - have been excluded in the preceding sections of this Report. The court, and Emami for that matter, agrees that the experts cannot offer argumentative conclusions about the requirements imposed by Rock. However, the underlying information relied upon to reach those (improper) conclusions - that the IDRL was not fully operational due to "leakage" - is an objective fact that may be proven without expert testimony. And there is no dispute that the IDRL was in fact experiencing functionality issues. Thus, Goity's opinion that a researcher, faced with a suboptimal experimental apparatus, would not be able to produce certain data or analysis is not undermined by his alleged reliance on Emami's statements as evidence of the equipment's operational status.

To conclude, the undersigned finds that Goity and Miandoab's expert testimony is admissible. Both experts are qualified by "knowledge, skill, experience, training, or education" to testify as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially

similar to that of his comparator employees." The experts' proffered testimony on these issues is reliable because they have applied their knowledge and expertise in the field of scientific research to the facts of the case in order to reach their conclusions. This testimony will also be helpful to the trier of fact because it is relevant to ultimate issue of whether Emami was terminated for discriminatory reasons or for failing to document and report his research as NASA alleges. Further, the exclusion of the experts under Federal Rule of Civil Procedure 37(c)(1) is not warranted because their reports did not violate the disclosure requirements of Rule 26(a)(2)(B).

IV. RECOMMENDATION

Because the experts' testimony complies with Federal Rule of Evidence 7 02 and exclusion is not otherwise warranted by the Federal Rules of Civil Procedure, the undersigned recommends that the Defendant's Motion to Exclude Plaintiff's Experts (ECF No. 65) be DENIED.

V. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C, § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this Report to the objecting party, 2 8 U.S.C. § 636(b)(1)(C) , computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. A party may respond to another party's

objections within fourteen (14) days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 P.2d 91 (4th Cir. 1984).

/s/ Douglas E. Miller
United States Magistrate Judge

December 20, 2016

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:15cv34

SAIED EMAMI,
Plaintiff,

V.

CHARLES F. BOLDEN, JR.,
In his official capacity as Administrator, National Aeronautics and Space Administration,
Defendant.

REPORT AND RECOMMENDATION

This matter arises from an employment discrimination suit filed by Plaintiff, Dr. Saied Emami ("Emami"), a scientist and former employee of the National Aeronautics and Space Administration ("NASA"). On September 29, 2016, Defendant Charles F. Bolden, Jr., in his official capacity as Administrator of NASA, filed a Motion for Summary Judgment (ECF No. 60). NASA argues that the evidence is insufficient to permit a reasonable juror to conclude Emami was terminated as a result of his religion or national origin as he has alleged. See Def.'s Mem. Supp. Mot. Summ. J. (ECF No. 61). The matter was referred to the undersigned United States Magistrate Judge for a report and recommendation pursuant to 2 8 U.S.C. § 636 (b)(1)(B) and Rule 72(b) of the Federal Rules of Civil Procedure.

After reviewing the depositions, expert opinions, and exhibits in the summary judgment record, this court concludes that Emami has produced sufficient evidence of a similarly situated comparator to establish a prima facie case, and to rebut NASA's proffered non-discriminatory reason for his termination. But the evidence is insufficient for a reasonable juror to conclude that Emami's different treatment was retaliation for complaints he made to NASA's EEOC officials regarding his immediate supervisor. Accordingly, the undersigned recommends that the district court GRANT IN PART and DENY IN PART Defendant's Motion for Summary Judgment (ECF No. 60).

I. BACKGROUND

A. Events leading to Emami's Termination

Emami was employed as an Aerospace Engineer (GS-13) from 2002 to 2013 in NASA's Hypersonic Airbreathing Propulsion Branch ("HAPB"), a subdivision of the Research Directorate of the NASA Langley Research Center.[1] He was born in Iran and is a follower of Islam. At NASA, Emami worked in the Isolator Dynamics Research Lab ("IDRL"), a testing apparatus constructed to improve the efficiency of hypersonic engines. Within the IDRL, Emami was responsible for analysis, research, design, testing, and evaluation of air-breathing propulsions systems for aerospace vehicles, including

[1] The recitation here views disputed facts in the light most favorable to Emami in accord with the appropriate standard of review. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

the integration of the propulsion system with the airframe. See Pl.'s Position Description (ECF No. 61-1, at 6). Kenneth Rock ("Rock"), Head of the HAPB, was Emami's direct supervisor from 2005 to 2013.

For most of his time at NASA, Emami had received positive annual reviews in his Performance Plan & Appraisals.[2] See Pl.'s 2005-12 Performance Plans & Appraisals (ECF No. 72-5). Specifically, he received at least a "Fully Successful" or "Meets Expectations"[3] rating on each criterion of his job performance up to April 2012. Id. His 2011-12 performance evaluation also included comments such as, "information is usually accurate and effectively presented;" and "[w]ritten materials generally follow NASA's prescribed standards and style and are infrequently returned for substantial revision." See Pl.'s 2011-12 Performance Plan & Appraisal (ECF No. 72-5, at 47). According to Emami's performance standards in 2011-12, he was required to report his research progress "to select branch members" through monthly informal-briefing.[4] See Pl.'s 2011-12 Performance Plan & Appraisal, Performance Standards (ECF No. 72-5, at

---

[2] A Performance Plan and Appraisal is drafted every year to establish a researcher's specific duties and responsibilities within the Research Directorate and is then used to evaluate their work in accordance with the plan at the end of the performance cycle. NASA's performance cycles run from May 1 to April 30, of each year.

[3] "Fully Successful" and "Meets Expectations" are the functional equivalent; NASA replaced the former with the latter in 2008.

[4] Rock had apparently asked Emami for more frequent updates via email, and stated in his evaluation that Emami failed to comply with multiple informal requests for these more frequent updates. See Pl.'s 2011-12 Performance Plan & Appraisal, Performance Narrative (ECF No. 72-5, at 52).

46). Despite rating Emami's level of communication as "Meets Expectations," Rock noted in Emami's 2011-12 performance evaluation that Emami did not communicate or document his research well, and had failed to provide requested updates on his progress. See Pl.'s 2011-12 Performance Plan & Appraisal, Performance Narrative (ECF No. 72-5, at 52).

These concerns led Rock to add two additional requirements to Emami's 2012-13 Performance Plan and Appraisal: (1) "[c]ommunicate progress and plans to branch management via weekly email update that summarizes progress & accomplishments from the previous week and plans & goals for the upcoming week," and (2) " [d]evelop a quarterly report, in the format of Power Point charts or written text supported by figures, that communicates research results and findings." Notice of Unacceptable Performance and Opportunity to Improve (ECF No. 61-1) ; see also Rock Dec. ¶ 4 (ECF No. 61-3). The "Critical Element" description of Emami's job in the IDRL was also modified to require that he "obtain a very highly resolved and highly accurate characterization of the isolator flow-field." 2012-13 Performance Plan (ECF No. 72-6). In response to these new requirements, Emami submitted a letter to Rock complaining that he was setting him up to fail. See Pl.'s Letter to Ken Rock (ECF No. 72-14). Specifically, he stated that "ownership of processes" was not under his control and that he could "promise in good faith only what I am capable to deliver." Id. It is undisputed that the IDRL was not fully operational during this time, which led one witness to opine "the IDRL ha[d] not produced any data worth looking at." Capriotti Dep. 14:18-22 (ECF No. 72-9).

Towards the end of the 2012-13 performance cycle, Rock notified Emami that he had failed to satisfy the new reporting requirements outlined in his Performance Plan. See Rock Dec. ¶ 10 (ECF No. 61-3). Specifically, Emami had failed to produce quarterly reports for the first two quarters of the 2012-13 performance cycle and failed to provide weekly updates on his progress. See Notice of Unacceptable Performance and Opportunity to Improve (ECF No. 61-1). Rock consulted with Human Resources and made a decision to place Emami on a Performance Improvement Plan ("PIP") beginning January 18, 2013 for no fewer than thirty days. Rock Dec. ¶ 9 (ECF No. 61-3). Similar to Emami's Performance Plan, the PIP required him to: (1) submit a weekly update to management detailing the tasks [Emami] was performing, and (2) provide a quarterly report of research results and findings containing "enough input/information to cover the first and second quarters [of the performance cycle] and contain[ing] documentation of the experimental set-up, approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives." See Notice of Unacceptable Performance and Opportunity to Improve, at 3 (ECF No. 61-1).

During the PIP, Emami submitted several reports. Although Rock found that none of the reports met acceptable standards, he extended the duration of the PIP twice to allow Emami to revise and improve his submissions. See Rock Dec. ¶ 19 (ECF No. 61-3). After Emami submitted his third report under the PIP, Rock concluded that he failed to meet an acceptable level of performance because he did not comply with the PIP's requirements of

communicating research results and findings from the first two quarters through "documentation of experimental set-up approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives." Notice of Proposed Removal (ECF No. 61-12); see also Rock Dec. ¶¶ 17-20 (ECF No. 61-3). In describing the reports' deficiencies. Rock claimed that the "content of the quarterly report (item !g) [sic] was not effectively presented in a clear, concise, and well-organized manner." Notice of Proposed Removal, at 4 (ECF No. 61-12). Rock also observed that the reports "reflected initial observations but did not show evidence of inspection, analysis, and insightful exploration expected for a quarterly report." Id. As a result, Rock determined Emami was unable to handle critical aspects of his job at NASA and proposed that Emami be removed from federal service. See id. at 5.

B. Emami's Termination from NASA

Emami's proposed removal was referred to then-Deputy Director of NASA's Research Directorate, Damodar Ambur ("Ambur"). See Notice of Decision, at 1-3 (ECF No. 61-17). As the director of the Research Directorate, Ambur was the official who would ultimately decide whether or not to terminate Emami. In reviewing Rock's proposed termination, Ambur also considered Emami's Resume, Position Description, the PIP, Rock's Notice of Proposed Termination, the three quarterly reports Emami submitted during the PIP, Emami's weekly communications with Rock, and a memo - prepared

by human resources and Rock - outlining the remaining deficiencies in Emami's work product. Ambur Dec. ¶ 6 (ECF No. 61-10).

Emami asserts that the copy of Emami's third and final quarterly report ("March 8 submission") Rock provided to Ambur, including schematics and Power Point slides attached to it, were barely legible. See Ambur Dep. 18:13-25, 19:1-8 (ECF No. 72-3). Ambur was not made aware that there were more legible copies of the documents available, although it does not appear he requested any. Id. Ambur was also not told about, or provided with a copy of Emami's Test Plan that he submitted to Rock on February 11, 2013, during the PIP. See id. at 17:18-20. Ambur did testify, however, that many of the elements demanded in Emami's PIP could have been satisfied by a well-written Test Plan. Id. at 39:7-12. And although Ambur stated that he did not have direct contact with Rock while reviewing the proposed removal, it appears that Rock worked with Human Resources to frame the standards under which Emami's work should be assessed. See Rock & Smith E-Mail Conversation (ECF No. 72-34). Specifically, when confronted by Human Resources with concerns that his assessment standards were beyond the scope of what the PIP required. Rock acknowledged that he did not explicitly identify the standards but that the standard of "technical excellence" should be implied. Id.

Ambur met with Emami and his attorney to hear objections to the proposed removal. And while Ambur acknowledged Emami's claims of Rock's discrimination and/or animus towards him, he dismissed them as unsupported by the evidence. See Notice of Decision (ECF No. 61-17). In reaching his

conclusion, Ambur did not review the work of any other engineers in the IDRL who were being supervised and assessed by Rock. See Ambur Dep. 71:8-21 (ECF No. 72-3). Ambur's decision was solely based on the information provided by Rock, which led him to find that Emami "[had] not consistently performed all of the duties of a Research Aerospace Engineer at a level that supports" his retention. See Notice of Decision, at 3 (ECF No. 61-17). He also noted that Emami's resume showed his research and technical work had decreased over the years. See Ambur Dec. 15 (ECF No. 61-10). Ultimately, Ambur accepted Rock's proposal and Emami was terminated from his position at NASA effective June 25, 2013. Id.

Emami first sought review of his termination before the Merit Systems Protection Board (MSPB). Following a hearing, the MSPB concluded that Emami's complaints of discrimination were not supported by the evidence he produced and affirmed his termination. As permitted by 5 U.S.C. § 7703(c), Emami timely commenced this action for review of his claims of discrimination.

C. Emami's Claims of Discrimination

Emami argues that Rock's purported reason for the termination was pretextual, and that he was actually unfairly scrutinized, and eventually terminated because of his religion (Islam) and national origin (Iranian). He testified that he visited the Equal Employment Opportunity ("EEO") office several times prior to being placed on the PIP, and complained that Rock was discriminating against him based on his national origin and religion. See

Emami Dep. 82:8-25, 83:1-9 (ECF No. 72-32). Andrea Bynum, an EEO counselor at the Langley Research Center, testified that she did not recall Emami ever mentioning his religion or national origin as the source of the discrimination he perceived. See Bynum Dep. 11:20-25, 12:1 (ECF No. 61-18). The EEO director at NASA also stated that Emami never initiated a formal complaint, and his informal conversations with the office did not assert claims of discrimination based on his protected classifications. Sellars Dec. ¶¶ 3-4 (EOF No. 61-14). But Emami stated that he told the EEO counselors that Rock had "questioned his patriotism by asking 'don't you like this country,' and had stated 'you people are combative'," statements he viewed as discriminatory.[5] Emami Dep. 74:17-25, 75:1-2; 78:16-22 (ECF No. 72-32). And both Bynum and Sellars acknowledged that Emami contacted the office frequently expressing a desire "to be heard," and proclaiming knowledge of his "rights." Sellars Dec. ¶ 3 (ECF No. 61-14); Bynum Dep. 11:3-18 (ECF No. 61-18).

Emami also points to the disparate treatment between himself and other scientists at NASA as evidence of Rock's discriminatory intent. Along with Emami, there were at least four additional aerospace engineers regularly working in the IDRL: Jeffrey Balla ("Balla"), Robert A. Baurle ("Baurle"), Troy F. Middleton ("Middleton")/ and David Witte ("Witte"). All four are natural born U.S. citizens and non-Muslims. Baurle, Middleton, and Witte were also supervised by, and reported to Rock. While they

---

[5] Emami's recollection of the "combative" statement is that it was in either 2011 or 2012. Emami Dep. 81:14-19 (ECF No. 72-32).

were all governed by the same NASA protocols for research (i.e., the requirement to have a research and/or test plan), Rock did not impose the same reporting requirements (i.e., frequency of updates) on Baurle, Middleton, or Witte as he did on Emami. Rock testified that none of these engineers were required to submit quarterly reports to him. See, e.g., Rock Dep. 46:10-15 (ECF No. 72-4). He stated that they did not need enhanced reporting requirements like Emami's because he (Rock) was getting the information he needed from them in other ways. See Rock Dep. 99:2-12 (ECF No. 72-4). Middleton, for example, did not provide information to Rock in the form of a report, but would share it orally or via e-mail. See id. at 46:10-25.

In addition to alleged direct-hostility and disparate treatment from Rock, Emami also argues that "[a]n objective review of [his] quarterly reports" shows that he complied with all the requirements of the PIP and that his job performance was substantially similar or even superior to other Aerospace Engineers working in the IDRL under Rock. See Pl.'s Mem. Opp. Def.'s Mot. to Exclude at 3 (ECF No. 79). To support his claims, Emami retained two expert witnesses. Dr. Jose L. Goity ("Goity") and Dr. Farid H. Miandoab ("Miandoab"), to testify as to "(1) whether Emami's work product was consistent with the standards of the scientific community; and (2) whether Emami's work product was substantially similar to that of his comparator employees." Id. at 2.

1. Objective Quality of Emami's Work Product

With respect to the objective quality of Emami's work, his experts concluded in their reports that Emami's work-product complied with the PIP's requirements - using their knowledge of the commonly-accepted standards for scientific research and reporting as a metric for assessment - especially in light of the operational status of the IDRL at the time. See Miandoab Report at 8 (ECF No. 66-1); Goity Report at 7-8 (ECF No. 66-2). Emami also argues that their conclusions show that he should never been placed on a PIP because his work was of an objectively acceptable quality during the 2012-13 performance cycle and before then.

Miandoab stated that, after reviewing Emami's quarterly reports, Test Plan, and Research Plan, he was "not able to find a single cause to justify as to why the manager claimed that in his opinion it would be 'impossible to gauge the Plaintiff's research efforts' based on the Plaintiff's Work Product." Miandoab Report at 9 (ECF No. 66-1). Miandoab further opined that the "research and test plans were organized in a very logical and comprehensive fashion," and that Emami clearly explained his plan and efforts to obtain test data in his quarterly reports. Id. Goity's analysis was more detailed, breaking down Rock's requirements into four categories and then labeling which of Emami's exhibits complied with the respective requirements. See Goity Report, Table 1.0 (ECF No. 66-2). For each element, Goity identified at least one document that was provided during the PIP period that complied with Rock's requirements. Id. Both experts concluded that, given the operational status of the

IDRL, Emami could not realistically be expected to produce data that complied with Critical Element 1 of his revised job requirements. See Goity Report at 6 (ECF No. 66-2); Miandoab Report at 6 (ECF No. 66-1).[6]

2. Comparator Co-Workers

Miandoab also compared Emami's work with that of Troy Middleton, who was the Research Project Lead for the IDRL. Middleton, like Emami, was required by NASA protocol LMS-OP-7831 to maintain a research and test plan. Middleton's Performance Plan and Appraisal also specified that he was required to, among other things, [m]aintain current research plan for the IDRL" and "[c]omplete IDRL description documenting lab set up and operations, including schematics/drawings/hookup sheets/etc." Middleton 2012-13 Performance Plan & Appraisal (ECF No. 74-11). While other scientists in the IDRL were also required to have research and/or test plans, only Middleton's was available to Miandoab when he prepared his report. See id. at 10.

After comparing Emami and Middleton's work, Miandoab concluded that Emami addressed and explained his research with much greater detail than Middleton. Id. He further commented that Emami's Test Plan "includes not only the relative installation and position of each sensor on the different walls of the test apparatus, but also a detailed description of his high frequency data

---

[6] NASA filed a separate motion seeking to exclude both experts on a variety of grounds. See Def.'s Mot. to Exclude (ECF No. 65). By a separate Report and Recommendation, the undersigned has recommended the court deny NASA's motion.

acquisition system." id. at 10-11. Conversely, Middleton's Test Plan lacked a description of instrumentation and data acquisition. Id. at 11. Miandoab described Emami's work product as "substantially better than his comparators." Id.

II. STANDARD OF REVIEW

Because Emami obtained initial review before the MSPB, NASA argues that his retaliation claim is subject to a more differential "arbitrary and capricious" standard under 5 U.S.C. § 7703 (c). See, Monk v. Potter, 723 F. Supp. 2d, 860, 872-73 (E.D. Va. 2010). But the statute cited specifically provides that claims of discrimination appealed from the MSPB are reviewed by the district court de novo, id. at 872, and the arbitrary and capricious standard applies only to nondiscrimination claims raised in the same complaint. Id. at 813. In this case, Emami's retaliation claim is a claim of discrimination subject to de novo review in this court, because the protected activity he is alleged to have engaged in related to complaints of discrimination under Title VII. Luther v. Guttierrez, 618 F. Supp. 2d 483, 490-91 (E.D. Va. 2009). As a result, this court owes no deference to the MSPB decision, but may consider facts developed in that administrative record in evaluating NASA's motion for summary judgment. Monk, 723 F. Supp. 2d at 872.

Federal Rule of Civil Procedure 56 requires the Court to grant a motion for summary judgment 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." Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).

"A material fact is one 'that might affect the outcome of the suit under the governing law.' A disputed fact presents a genuine issue 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Spriggs v. Diamond Auto Glass, 242 F.3d 179, 183 (4th Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

The party seeking summary judgment has the initial burden of informing the Court of the basis of its motion and identifying materials in the record it believes demonstrates the absence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c); Celotex Corp., 477 U.S. at 322-25. When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); s^ Anderson, 477 U.S. at 255. [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

III. ANALYSIS

A. Title VII Claims of Intentional Discrimination

To proceed to trial on his two Title VII claims, Emami must produce sufficient evidence from which a reasonable juror could conclude that NASA's decision to terminate him was impermissibly based upon his national origin or religion. Young v. Lehman, 748 F.2d 194, 196 (4th Cir. 1984). This evidence may be either direct or indirect. Direct evidence includes such things as discriminatory statements made by a relevant decision maker from which a jury could infer a discriminatory motive. Taylor v. Virginia Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (en banc). Indirect proof requires evidence on all of the elements of Plaintiff's prima facie case of discrimination. Under this theory, Emami has the burden to establish (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was performing his position at a level that met NASA's legitimate expectations, and (4) that similarly situated employees outside the protected class received more favorable treatment. Coleman v. Maryland Court of Appeals, 616 F.3d 187, 190 (4th Cir. 2010); Karpel v. Inova Health System Services, 134 F.3d 1222, 1228 (4th Cir. 1998).

If Emami succeeds in establishing a prima facie case of discrimination, the burden shifts to NASA to articulate a legitimate nondiscriminatory reason for his firing. Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 (4th Cir. 2004). If NASA meets this burden, Emami must then introduce sufficient evidence from which a jury could conclude that NASA's stated reason was merely a pretext for its intentional discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). "A plaintiff's prima facie case, combined with sufficient

evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000).

Emami's direct evidence of discrimination is scant. He testified that he spoke openly about his faith, and that he believed most of his co-workers knew he was a Muslim. Emami Dep., 88:18-24, 212:11 - 213:15. He also directly attributes two statements he considered explicitly hostile to his superior, Rock. Emami claims these statements demonstrate discriminatory animus. First, Rock asked Emami "Don't you like this country," a statement Emami perceived as critical of his national origin. Emami told Rock that he was offended by the statement. Emami Dep., 70:18, 70:7-22. In another exchange, Emami claims Rock told him "you people are combative," a reference, according to Emami, to stereotypical images of Muslims. Emami Dep., 74:13 - 76:10. Rock denies having made either of these statements, but even accepting them as true, they are likely insufficient - standing alone - to meet Emami's burden on summary judgment. Granting Emami all inferences in his favor, it is possible that a reasonable juror might conclude the statements related to his protected characteristics of religion and national origin, but the statements are not directly related either temporally or in substance to "the complained of adverse employment decision." Arthur v. Pet Dairy, 593 Fed. Appx. 211, 219 (4th Cir. 2015).

Although his direct evidence of discrimination by itself is insufficient to survive summary judgment, Emami has also produced indirect evidence of

discrimination by identifying several co-workers whom he identifies as similarly situated comparators outside his protected classifications. Emami contends these similarly situated scientists were evaluated less critically, and allowed to retain their positions despite reporting which was similar if not inferior to his own.

In order to proceed under the McDonnell Douglas burden shifting framework by relying on disparate treatment of co-employees, Emami is required to show that his comparators "are similar in all relevant respects." Haywood v. Locke, 387 Fed. Appx. 355, 359 (4th Cir. 2010). This requires showing that the comparators "dealt with the same supervisor, [were] subject to the same standards, and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id. (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992).

All four of Emami's alleged comparators, Baurle, Balla, Witte, and Middleton, were aerospace engineers who worked along with Emami in the IDRL as research scientists. All four were born in the United States and are non-Muslim. And although all four were research scientists, who were required to comply with a performance plan which included the design, implementation and documentation of research in the lab, none were required to make quarterly written reports to their supervisor, and none were placed on a PIP which required them to "obtain a very highly resolved and highly accurate characterization of the isolator flow field," or report to their supervisor "in the format of Power Point charts or written text supported by

figures, that communicates research results and findings." 2012-13 Performance Plan (ECF No. 72-6). In addition, none of the four were terminated or disciplined as a result of their research documentation.

NASA does not dispute that the four comparators were also engaged in research in the IRDL and that none were subject to the same reporting requirements or PIP, which eventually resulted in Emami's termination. But, the agency argues that none of the comparators are sufficiently comparable to Emami to provide evidence of discrimination. Primarily this is the result, NASA claims, of differences in their GS ratings, research specialty and reporting relationships. For purposes of summary judgment, however, it is sufficient to note that accepting the facts in the light most favorable to Emami, he has identified at least one comparator"[7] outside his protected class who shares "enough common features ... to allow [for] a meaningful comparison." Haywood, 387 Fed. Appx.

---

[7] By separate motion in limine (ECF No. 69), NASA sought to exclude all evidence of the four comparators. As set forth above, this Report concludes that Middleton is an appropriate comparator and therefore recommends the district court DENY IN PART the motion in limine. The other three comparators have significant differences which make their treatment by NASA less relevant as comparative evidence. Balla, for example, did not report to Rock, and Baurle and Witte are both GS-15s, and did not regularly conduct testing in the IDRL. See Brown Dec. HII 8(a), 8(b)-(d) (ECF No. 86-1). If the recommendation in the remainder of this report is adopted, Emami may present evidence of Middleton as a similarly situated comparator, but the undersigned leaves for the trial judge the admissibility of any additional comparator evidence in light of their cited dissimilarities and considerations of cumulative proof best evaluated at trial.

At 360 (quoting Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007).

Troy Middleton was a research scientist in the IDRL, which was a relatively small subgroup of researchers within NASA's research directorate. Like Emami, he was an aerospace engineer, charged with setting up experiments in the IDRL and reporting on his test plans and results as the lab became operational. Like Emami, Middleton also reported directly to Rock. The only documented differences which NASA relies on to distinguish Middleton are that he was a GS-14, whereas Emami was a GS-13, and that Middleton was designated as a project lead in the IDRL. Middleton himself testified, however, that this one-level rating distinction had no meaningful impact on the work researchers performed. See Middleton Dep. 70:17 - 71:17 (ECF No. 72-40).

It is also undisputed that Middleton was not required to prepare the same detailed reporting imposed as a requirement of Emami's 2012-13 performance plan. Throughout most of 2012-13, Middleton reported to Rock on a bi-weekly basis through emails of a short checklist he updated bi-weekly. Middleton emails, (ECF No. 52), Middleton Dep. 28:17 - 29:4 (ECF No. 40). Although Middleton did co-author an article for other researchers, most of his reporting to his supervisor. Rock, was contained in charts and working drafts. Emami's expert has criticized this reporting as inconsistent with the standards NASA purports to adhere to, separately opining that Emami's reporting was as good or better than the research documentation submitted by Middleton. Miandoab Report at 10-11 (ECF No. 66-1). As a result, Middleton was similarly

situated and accepting the facts in the light most favorable to Emami, he was also treated more favorably by NASA.

Emami's evidence is also sufficient to permit a reasonable juror to conclude that his work met the legitimate expectations of his employer. He has produced extensive documentation of his efforts to comply with the revised performance plan and the PIP. In addition to his submissions to Rock, he has produced two highly trained scientists - one with NASA experience - who are prepared to testify that his work met the standards articulated by NASA, given the resources available to Emami.

In assessing whether a claimant's work met legitimate expectations, "it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." Evans v. Technologies Applications & Serv. Co., 180 F.3d 954, 960-61 (4th Cir. 1996). But this does not mean that NASA's present claim that Emami's work was substandard is incapable of contradiction. Instead, as he has here, Emami may present evidence of a long history of consistently satisfactory evaluations under the same standards. In addition, he may present expert testimony regarding NASA's legitimate expectations, and his own performance in light of those expectations. See King v. Rumsfeld, 327 F.3d 145, 149-50 (4th Cir. 2003).

Emami's evidence must be evaluated in the context of his ten-year record of satisfactory performance. As recently as his 2011-12 performance evaluation, Emami's work was characterized by the Agency as "usually accurate and effectively presented." It appears that Rock may now testify that his earlier reviews were too generous - but his

history of positive evaluations, combined with the uniquely burdensome reporting requirements he imposed during a time when the testing apparatus was inoperable are sufficient for a reasonable juror to conclude that the extensive scrutiny purportedly underlying Emami's termination was not a legitimate expectation, or that his performance satisfied it to the degree made possible by the resources provided. When, as here, an employer asserts that job expectations have not been met, "nothing prohibits the employee from countering this assertion with evidence that demonstrates (or at least creates a question of fact) that the proffered 'expectation' is not, in fact, legitimate at all." Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 517 (4th Cir. 2006); King, 328 F.3d, at 149-50. Again, this report expresses no final opinion on whether NASA's requirements were in fact legitimate, or whether Emami's performance met them. But accepting the evidence on summary judgment in the light most favorable to Emami, he has created a question of fact on both issues.

Finally, the same evidence which would permit a reasonable juror to conclude Emami's work met legitimate expectations, would also establish that NASA's proffered reason for the termination - that he did not meet expectations - was pretextual. The only reason NASA offered for Emami's termination was his performance under the revised reporting requirements Rock imposed. His experts have opined that these requirements were either impossible to meet based on the operational status of the IDRL, or satisfied by Emami's reporting of his research efforts. In addition, contemporaneous emails between Rock and NASA's H.R. professionals

suggested that they were having difficulty documenting shortcomings in his performance given the lack of recognized standards for the evaluation of his research. Email, Rock to Smith (ECF No. 72-34).

Proof of a prima facie case, coupled with evidence that an employer's proffered reason for the termination is false, may be sufficient for a reasonable juror to conclude Emami's termination is discriminatory. Reeves, 53 0 U.S. at 14 8. Combined with Emami's evidence of Rock's comments to him, and his frequent complaints about his treatment, the direct and indirect evidence he has produced in response to NASA's motion for summary judgment is sufficient to create a jury question on his claims of intentional discrimination.

B. Title VII Retaliation Claims

In addition to prohibiting discrimination. Title VII's anti-retaliation provision was enacted to "prevent an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." Burlington N. & Santa Fe R.Y. Co. v. White, 54 0 U.S. 53, 63 (2006); 42 U.S.C. § 2000e-3 (a). To survive summary judgment on his retaliation claim, Emami must demonstrate three elements: (1) that he engaged in protected activity; (2) that his employer took an adverse employment action against him; and (3) that there was a causal link between these two events. Boyer - Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) banc). Protected activity includes activity which opposes any practice made unlawful under Title VII. DeMasters v. Carilion Clinic, 796 F.3d 409, 416 (4th

Cir. 2015), The Fourth Circuit takes an expansive view of opposition conduct. Thus, "[w]hen an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." DeMasters, 796 F.3d at 420 (quoting Crawford v. Metro Government of Nashville and Davidson Cty., 555 U.S. 271, 281-82 (2009) (Alito, J. concurring)).

In this case, even resolving disputes of fact in favor of Emami, he has not presented sufficient evidence to survive summary judgment on his retaliation claim. While it is undisputed that Emami regularly complained to NASA's EEOC representatives regarding his supervisor Rock, those officials described his complaints as more in the nature of unhappiness about his work and a desire to transfer to a position with more administrative responsibilities. Both EEOC representatives testified that Emami did not explicitly complain to them that Rock's treatment of him related to his religion or natural origin. Bynum Dep. 11:20-25; 12:1 (ECF No. 61-18); Sellars Dec. ¶ 3 (ECF No. 61-14). Emami, by contrast, testified that he specifically accused Rock of discriminating against him on the basis of his national origin and religion. See Emami Dep. 82:8-85:9. He also claims to have reported the hostile statements he attributes to Rock, which Emami felt impugned his national origin and religion. See id. at 74:17-75:2, 78:16-22. Thus, accepting his testimony, a reasonable juror might conclude he had engaged in protected activities by complaining to NASA's EEOC officials about Rock's treatment of him.

Emami also satisfies the second element of a prima facie retaliation claim. He was first disciplined and eventually terminated. If related to his complaints of discrimination, either of these might have "dissuaded a reasonable worker from making or supporting a charge of discrimination" and are thus materially adverse actions. Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006).

But Emami's retaliation claim founders on the third element of his prima facie case, because he has not produced any evidence from which jurors could conclude the first two elements were causally connected. Even accepting Emami's statements that he complained of discrimination to NASA's H.R. staff, there is no evidence that Rock knew of such complaints at the time he modified Emami's performance plan, or recommended his termination. Bynum Dep. 18:10-19 (ECF No. 61-18). Although Emami's complaints generally preceded his termination, their temporal proximity alone is insufficient to meet Emami's burden on summary judgment. Jones v. Constellation Energy Proj. & Servs. Grp., Inc., 629 Fed. Appx. 466, 469-70 (4th Cir. 2015) (holding that nine months lapse between internal complaints of discrimination and termination was insufficient to support retaliation claim). Emami's testimony about when he complained to EEOC officials is vague, but he described Rock's allegedly hostile statements as occurring at least a year prior to his termination. Emami Dep. 80:4-22/ 81:14-19 (ECF No. 72-32). In addition, he has not identified any other evidence of discriminatory animus by Rock after his alleged reporting to Bynum which might sustain his burden

to show a retaliatory motive despite this passage of time. See, Lettieri v. Equant, Inc., 478 F.3d 640, 650 (4th Cir. 2007) (reversing summary judgment on retaliation claim where claimant's evidence "could reasonably be viewed as exhibiting retaliatory animus" by terminating decision maker during seven-month period following protected activity). Accordingly, Emami's evidence of retaliation is insufficient to survive summary judgment and the court should grant in part NASA's motion and dismiss this claim.

IV. RECOMMENDATION

For the foregoing reasons this report recommends the court GRANT IN PART and DENY IN PART NASA's Motion for Summary Judgment (ECF NO. 60), DISMISS the retaliation claim and DIRECT the parties to proceed to trial on Emami's claim of intentional discrimination. Further, the court should DENY IN PART NASA's Motion in Limine (ECF No. 69) to exclude evidence of comparator employees, and consider further objections to comparator evidence at trial.

V. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this Report to the objecting party, 28 U.S.C. § 636(b)(1)(C), computed

pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made. The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

/s/ Douglas E. Miller
United States Magistrate Judge

December 20, 2016

FILED: February 5, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1806
(2:15-cv-00034-JAG-DEM)

SAIED EMAMI
Plaintiff - Appellant
v.
JIM BRIDENSTINE, Administrator of the National Aeronautics and Space Administration
Defendant - Appellee
and
KENNETH E. ROCK, Individually; UNITED STATES OF AMERICA
Defendants

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Harris, and Senior Judge Hamilton.

For the Court
/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richmond, Virginia

No. 18-1806
2:15-cv-00034 (JAG/DEM)

SAIED DR. EMAMI,
Plaintiff - Appellant,
v.

ROBERT M. LIGHTFOOT, JR.
Defendant – Appellee

KENNETH ROCK, Individually, and

UNITED STATES OF AMERICA

INFORMAL BRIEF

1. Comes now Plaintiff/Appellant, Dr. Saied Emami, *pro se*, (hereinafter "Dr. Emami") pursuant to Local Rule 34(b), stating that he is aggrieved by the disposition of his case in the lower District Court, and that a discrimination analysis should concentrate not on individual incidents, but on the overall scenario. Specifically, Dr. Emami contests the District Court's June 19, 2018 dismissal of his Rule 59(e) Motion which the Court construed as a 60(b) Motion.

I. Introduction

2. This is an appeal from a Title VII case which will underscore the importance of factual nuances and context in resolving cases alleging employment discrimination. Plaintiff /Appellant is a US Citizen who worked at NASA for ten years, and who refused to resign under what he asserts were attempts at a constructive discharge. When he would not resign even when subjected to a hostile work environment, disparate treatment, and retaliation by Defendant NASA and his supervisor, Kenneth Rock, he was terminated. Dr. Emami cites a panoply of evidence, including the use of wasteful and useless PIPs, retaliation for using the EEO open-door policy and ethnicity-and-creed-biased and discriminatory language by his supervisor, Kenneth Rock.

3. Name of court or agency from which review is sought: the US District Court, Eastern District of Virginia, Norfolk Division. Date of order or orders for which review is sought: June 19, 2018, October 3, 2017, and August 3, 2017.

4. This Court has jurisdiction because the court below is the US District Court, Eastern District of Virginia, Norfolk Division. This Court has jurisdiction over the claims asserted against NASA pursuant to 28 U.S.C. § 1331 because these claims arise under the laws of the United States of America, namely, 42 U.S.C. § 2000e-16(a), 42 U.S.C. § 2000e-16(c), and 42 U.S.C. § 2000e-5; pursuant to 28 U.S.C. § 1343 because Title VII is an "Act of Congress providing for the protection of civil rights;" and pursuant to 42 U.S.C. § 2000e-5(f)(3), which authorizes an aggrieved person to bring suit against the United States.

5. This Court has supplemental jurisdiction over the claims asserted against Defendant Kenneth E. Rock (hereinafter "Rock") under 28 U.S.C. § 1367(a) because they are related to Dr. Emami's Title VII claims because Dr. Emami's claims against NASA and his claims against Rock "form part of the same case or controversy under Article III of the United States Constitution."

6. Defendant NASA is subject to personal jurisdiction in this District because NASA operates facilities at the Langley Air Force base (hereinafter, "Langley") in Hampton, Virginia, and the adverse actions which are the subject of this Complaint took place at NASA's facilities at Langley.

7. Dr. Saied Emami, is a citizen of the United States of America, who at all times relevant to this Brief was employed by NASA as a GS-13 Aerospace Engineer at the Langley Research Center in Hampton, Virginia.

8. Defendant Robert M. Lightfoot (hereinafter, "Lightfoot") is the head of NASA, a federal agency charged with carrying out a set of programs in human space flight, aeronautics research, and scientific research. See 51 U.S.C. § 20301(a) (Lightfoot and NASA are referred to collectively herein as "NASA"). NASA is an "executive agency," and is therefore subject to Title VII. See 42 U.S.C. § 2000e-16(a).

9. Defendant Rock was the Head of NASA's Hypersonic Airbreathing Propulsion Branch at the Langley Air Force Base in Hampton, Virginia. Rock was directly responsible for the termination of Dr. Emami's employment.

10. Defendant Rock is subject to personal jurisdiction in this Court because he has purposefully established minimum contacts with the federal court located in the Eastern District of Virginia.

11. The unlawful employment practices alleged herein occurred within the Eastern District of Virginia, in the Norfolk Division. Venue is therefore proper pursuant to 28 U.S.C. § 1391(b)(2); 1391(e)(1); and 42 U.S.C. § 2000e-5(f)(3).

III. Background

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

12. Saied Emami immigrated to the United States when he was sixteen years old. He became fluent in English, and excelled as a student at Texas A&M where he received a bachelor's Degree, a master's Degree, and then a Ph.D. in Mechanical Engineering. Highly valued for his teaching skills he was immediately hired on as a faculty member of Texas A&M, where he was consistently recognized as an effective teacher and communicator. Dr. Emami became a United States Citizen in 1988 at the age of 28. Throughout his life, Saied Emami has openly practiced the Muslim religion, Islam.

13. Dr. Emami worked for General Dynamics from 1988 to 1991, supervising three employees and directing the operations of the Hypersonic Exhaust Propulsion System of General Dynamics' National Aerospace Hypersonic Program.

14. In 1991 Dr. Emami was hired by the Lockheed Martin Corporation, and by 1996, he was

the Principal Engineer and Section Supervisor for a group of seven engineers who were under contract with NASA's Langley Research Center. For more than eleven years, Dr. Emami assisted NASA with its hypersonic propulsion airbreathing systems, including research and testing related to NASA's advanced airbreathing dual-mode hydrogen fueled scramjet engines, and ultimately.

15. Dr. Emami was hired by NASA on October 7, 2002 to work as a GS-13 Aerospace Engineer in the Hypersonic Airbreathing Propulsion Branch Research Directorate. In every evaluation period from 2002 until 2012, Dr. Emami was rated either "Meets or Exceeds Expectations" or "Fully Successful" (the equivalent of "Meets or Exceeds Expectations" after NASA changed its rating system). His evaluations ranged from "Fully Successful," to "Exceeds Expectations," and even "Significantly Exceeds Expectations."

16. Dr. Emami was highly qualified for his job as a Research Aerospace Engineer and at all times during his employment with NASA, Dr. Emami's job performance met NASA's legitimate expectations, and from the date of his hire until January 2013, Dr. Emami was never subjected to any kind of disciplinary action. During each evaluation period from 2002 to 2012, Dr. Emami's evaluations reflected NASA's opinion that he collaborated well with other employees and maintained cooperative and respectful working relationships with them. Specifically noted were Dr. Emami's oral and written communication skills, and it was noted that he displayed an open, and honest sensitivity to individual and cultural differences. His evaluations

stated that the data, reports, and information he was required to produce was usually accurate and effectively presented, and that his written materials generally follow NASA's prescribed standards and style and were infrequently returned for revision.

17. Notably, every year, Dr. Emami received "step increases" in his compensation from NASA based on his excellent ratings NASA's satisfaction with his performance. During his ten years of employment with NASA.

IV. History of the Complaint Brought in the District Court Below

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

18. A plethora of evidence in the form of filed documents exists in the record for which Dr. Emami requests this Court take Judicial Notice. It is because of the magnitude of filed exhibits, documents, and other forms of evidence, that Dr. Emami had requested 5 days for his trial. His request was denied and he was granted only 2 days for his trial. Dr. Emami had only two days to quickly summarize a history of unwarranted abuse that our laws are in place to prevent, and he would have no way to show the jury all of the evidence to prove his case.

19. The evidence shows that in 2005, Defendant, Kenneth Rock was appointed as the Branch Head over Dr. Emami's Directorate and Dr. Emami began to immediately experience intense hostility from Rock. The hostility was of unknown origin other than that the "off-the-wall," and "off-color" comments were related to his Muslim alignment and his

Iranian ancestry. These comments from Rock were not related to the workplace and were only directed toward Dr. Emami. Dr. Emami was never made aware of any criticism regarding his manner of communication, and he worked well with all his colleagues and supervisors, except for Rock.

Issue 1 – Employment Discrimination.

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

20. Dr. Emami alleges employment discrimination based on national origin (Iranian) and religion (Islam) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seg. (hereinafter, "Title VII") against his former employer, NASA.

21. NASA discriminated against Dr. Emami by subjecting him to a Performance Improvement Plan (hereinafter, "PIP") and terminating his employment because of his national origin (Iranian) and his religion (Islam).

22. Rock claimed that he subjected Dr. Emami to the PIP and terminated his employment because he failed to satisfy one element of his 2012- 2013 Performance Plan. However, prior to the 2012-2013 year, Dr. Emami had never been accused of failing to meet NASA's expectations, and had obtained excellent ratings on each performance review.

23. An objective review of Dr. Emami's work product reveals that Dr. Emami's performance, including his performance during the 2012-2013 year, met or exceeded NASA's legitimate

expectations, and that Rock's claims regarding Dr. Emami's performance were a pretext intended to conceal discrimination and retaliation.

24. Rock made work very difficult for Dr. Emami by requiring Dr. Emami to accept responsibility for the functionality of the Isolator Dynamics Research Lab ("IDRL"), a new research facility that was not yet operational. Dr. Emami strongly objected to Rock's plan, because he would be working in an environment where "ownership of processes" would not be under his control. Dr. Emami met with Rock and attempted to explain to Rock that his Plan was not reasonable. Rock ignored Dr. Emami's objections, however, and compelled him to sign the Plan. So, even though the IDRL was not operational, Dr. Emami performed all the tasks assigned to him fullest extent possible knowing that he was doomed for failure.

25. Every employee knew that the functionality of the IDRL centered around the operational status of a Test Apparatus, and Troy Middleton, the Research Project Lead was responsible for the construction, operation, and configuration of the Test Apparatus. Other engineers and researchers who were responsible for substantial parts of the IDRL project included: Jeff Balla, Principal Investigator for Laser-Based Measurements; Rob Baurle, Principal Investigator for CFD Modeling; Lloyd Wilson, Technical Lead for Systems Integration; and Dave Witte, Lead for Experimental Techniques.

26. Middleton, Balla, Baurle, Wilson, and Witte were comparators, employed at the GS-14 level or higher, are all non-American-Iranians, and are all

non-Muslims. Because Dr. Emami's new Plan required him to "Support Research in the [IDRL] to obtain a very highly resolved and highly accurate characterization of the isolator flow-field," that meant that Dr. Emami's duty regarding the IDRL was therefore to "support" the operations of Middleton, Balla, Baurle, Wilson, and Witte. However, Dr. Emami's ability to perform his job was limited by the fact that the IDRL was never fully operational during his employment. Moreover, the IDRL was required to undergo global testing of all equipment to assure that it could function, prior to any research being performed. The IDRL was also required to undergo a Facility Systems Safety Analysis prior to any research being performed, but there had been no such analysis, nor could there be one accomplished before Dr. Emami's Plan's deadline. Plus, Dr. Emami's role as an Aerospace Engineer, (where he was responsible for only one of several aspects/parts of the research to be performed in the IDRL) conflicted with the fact that Dr. Emami was never responsible for the IDRL's operational status.

27. In other words, to complete his work, and to fully satisfy his supervisor, Dr. Emami needed the IDRL to be operational, and thus needed Middleton and Wilson to fulfill their duties. Regardless, Dr. Emami worked diligently in the IDRL to install sensors, configure files, set up technical parameters, and set up the computer system in the IDRL. He also ran a preliminary isolator test in the IDRL, and prepared clear, concise instructions and schematics that were accepted by the technicians in the IDRL.

28. Simultaneously, On January 18, 2013, Rock suddenly issued a memorandum to Dr. Emami, accusing him of "unacceptable performance." Rock then issued a memorandum to Dr. Emami, outlining a Performance Improvement Plan (PIP). In relevant part, the PIP required Dr. Emami to do the following:

- Under the standard "Develop a quarterly report," in the format of power point charts or written text supported by figures, that communicates research results and findings,
- You must provide a quarterly report. The quarterly report should provide enough information to cover the first and second quarters and contain documentation of the experimental set-up, approaches and procedures; the data acquisition and processing methodology, and the analysis conducted towards the research goals and objectives.

29. In the scientific context, the PIP's requirement that Dr. Emami provide "'results" was nonsensical, since the IDRL was not operational during the PIP period, and thus, no true "'results" could be obtained.

30. The PIP was the first discipline Dr. Emami ever received during his career. At no point prior to 2012 had Dr. Emami ever been rated as anything below "Meets Expectations" on any element of a performance review. In reviewing the PIP

memorandum Dr. Emami also noticed that Rock had altered the requirements of the "Needs Improvement" standard so that they were more difficult for Dr. Emami to satisfy than the requirements of the "'Meets Expectations" standard.

31. In general, Dr. Emami understood that through the PIP, Rock was subjecting him to a far more difficult standard than that applied to the other NASA employees under similar circumstances. Rock did not subject Middleton, Balla, Baurle, Wilson, or Witte to a PIP, even though they had not been able to complete their tasks on the IDRL in a manner that would allow research to proceed. Rock had designed the PIP in a way that would mean certain failure for Dr. Emami.

32. Dr. Emami contacted Nicole Smith in the OHCM and told her that he did not believe the PIP was issued "in good faith." Dr. Emami requested that Smith meet with Rock and himself in mediation to discuss the problems presented by the PIP. Rock and Smith both refused to engage in mediation with Dr. Emami or to otherwise discuss the contents of the PIP, and Rock took offense to an email Dr. Emami sent to Smith and chastised Dr. Emami for communicating with Smith.

33. Despite his objections to the PIP, Dr. Emami worked diligently to fully comply with its requirements. An objective review of Dr. Emami's quarterly reports reveals that they contained all the information required by the PIP, including documentation of his experimental setup, approach, and procedures, data acquisition and processing

methodology, and analyses conducted toward the research goals and objectives.

34. Federal policy prohibits managers from changing the requirements of a PIP during a PIP period. But, seeing Dr. Emami's resilience despite unreachable goals set up to work against him, Rock kept adding more and more requirements which were not in the original PIP. Rock constantly changed the standards by which Dr. Emami would be judged, and at one point during the PIP period, Rock humiliated Dr. Emami by feigning that he could not understand Dr. Emami's words because his accent was too thick. Rock then forced Dr. Emami to write down what he was trying to verbalize.

35. Even though Dr. Emami had fully complied with the PIP's requirements, Middleton and Wilson had not fulfilled their duties in a manner that would allow the IDRL to function properly, and on April 12, 2013, Rock issued a Notice of Removal to Dr. Emami Dr. Emami appealed Rock's decision to terminate his employment. The Decision Official who reviewed Dr. Emami's case on appeal was Deputy Director Damador Ambur. Ambur was fairly new to the Directorate in 2013, having started only 10 months prior, in June 2012. Ambur was not acquainted with Dr. Emami, and he therefore relied exclusively on Rock's representations of Dr. Emami's work and conduct in deciding whether to uphold his termination.

36. Rock withheld a "test plan" that Dr. Emami had presented to Rock as part of his quarterly reports, and told Ambur that Dr. Emami "did not have a test plan." Rock also claimed that Dr. Emami

had not presented any schematics, even though Dr. Emami had provided Rock with extensive, clear, and valid schematics on March 13, 2013. Notably, the test plan, research plan, schematics, and other documents that Dr. Emami had submitted with his quarterly reports were significantly more detailed, more accurate, and otherwise superior to those submitted by Middleton, Balla, Baurle, Wilson, or Witte.

37. Dr. Emami lodged informal complaints with the EEO Office in 2012, after Rock altered his Plan so that he would be subject to a far more difficult standard than that applied to other employees, including Middleton, Balla, Baurle, Wilson, and Witte. Finally, Dr. Emami lodged a formal complaint against Rock with the EEO Office in January 2013 and the EEO Office issued a Notice of Right to File a Formal Complaint.

38. Nicole K. Smith, in the Office of Human Capital Management, made it clear to Ken Rock on March 15, 2013, that Dr. Emami had complied with all of the requirements and obligations of Rock's PIP, still, it doesn't seem to have mattered.

(Discovery revealed evidence to substantiate this point such as the following email exchange)

To Kenneth E. Rock. and Shelly M. Frelemann,
sent on March 14, 2013
From Nicole Smith

Ken,

I've looked at your assessment and I've revised it a bit. As I was reviewing it I started think that the assessment of the content of the quarterly report was outside of what you required of Saied.

The [Performance Improvement Plan] memo states "under the standard "Develop a quarterly report, in the format of power point charts or written text supports by figures, that communicates research results and finding" you must provide a quarterly report. The quarterly report should provide enough input/information to cover the first and second quarters and contain documentation of the experimental set-up, approach and procedures; the data acquisition and processing methodology; and the analyses conducted toward the research goals and objectives."

To Nicole K. Smith and Shelly M. Frelemann
From Kenneth E. Rock, sent on March 15, 2013

I am comfortable with your revision and have attached a DRAFTv2 with very minor edits.

You are correct that I referred back to his Performance Plan for metrics regarding expected quality of the report. In hindsight, I wish I had included those metrics in the PIP but understand if I should not refer to them in the PIP Evaluation. Even so, I assume that there is an implied minimum level of "quality" and "technical excellence" even though specific

metrics are not defined If what is presented is not clear, concise, complete, etc., then I assume it is unacceptable. Is that a fair assumption?

I am teleworking this morning but am free for a phone call before 10 (need to be done by 10) and then I am free again from 11:30 to 12:30.

This is how I understand the process.

1. Finish PIP evaluation memo
2. Finish proposed removal memo
3. Ken & Nicole schedule meeting with employee
4. Hold meeting with employee, provide evaluation and proposed for the first time at meeting, place employee on administrative leave, escort employee to office to gather personal things, escort employee of the field and take badge. How do we escort him off the field, follow him in his car to the gate?

Is that a about how it goes?
Thanks,
Ken

Retaliation for Participating in Protected Activities

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

39. Dr. Emami alleges retaliation in violation of Title VII by NASA. NASA retaliated against Dr. Emami by subjecting him to a PIP, and terminating his employment because he engaged in protected activity when he complained to Rock about the PIP,

and then when he complained to Rock's supervisors, NASA's Equal Employment Opportunity Office (hereinafter, "EEO Office"), and the Office of Human Capital Management (hereinafter, "OHCM"), that Rock and therefore NASA were discriminating against him.

.40. A reasonable juror could debate that there is clear and convincing evidence that Rock was determined to terminate Dr. Emami not because of any perceived or realized sub-standard performance, but because of a personal animus and loathing of Dr. Emami's religion, and national origin, and in retaliation for his exercise of his protected activities in opposition to them.

41. Mr. Kenneth E. Rock's intention to terminate Emami's was not based upon the lack of adequate performance. Kenneth E. Rock, in a methodical manner, with nefarious intent, devised his illegal and unethical plan to unlawfully terminate Plaintiff beginning as far back as July of 2012, when he began his process of attempting to "manufacture consent" to terminate Dr. Emami as evidenced by the deposition of Rock during the Administrative Appeal before the Merit System Protection Board.

Tortious Interference

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

42. This Complaint also includes claims of tortious interference with contract and tortious interference with contract expectancy against Rock, individually, under Virginia's common law.

43. From January 18, 2013 until June 27, 2013, Rock made false and defamatory statements regarding Dr. Emami's performance, capabilities, and professionalism. Rock made these statements with malice. Prior to Rock's defamatory actions, Dr. Emami was employed by NASA, and was reasonably certain to maintain his employment. Rock's intentional, tortious, and otherwise improper conduct directly caused Dr. Emami's termination.

44. From October 7, 2002 to April 12, 2013, a valid contractual relationship existed between Dr. Emami and NASA. At all times relevant to this Complaint, Rock was aware of the valid contractual relationship that existed between Dr. Emami and NASA. Absent Rock's interference with Dr. Emami's contract, Dr. Emami was reasonably certain to remain employed by NASA beyond April 12, 2013, as demonstrated by his qualifications, accomplishments, performance ratings, and his cooperative relationships with other employees at NASA.

45. An Examinations of exhibits entered in the record in the court below will show that Rock began to devise various plans to terminate Dr. Emami's employment with NASA, and it can be surmised that Rock started to bring his plans to fruition around June 2012. Rock intentionally and maliciously interfered with Dr. Emami's contractual rights by publishing statements about Dr. Emami that were false and harmful to Dr. Emami's professional interests. Rock represented to NASA that Dr. Emami did not have an "approved IDP," even though Rock, himself, approved Dr. Emami's IDP.

46. Rock told Ambur and others at NASA that Dr. Emami did not submit a quarterly report when, in fact, Dr. Emami submitted two quarterly reports containing all the information required by the PIP, including documentation of his experimental setup, approach, and procedures, data acquisition and processing methodology, and analyses conducted toward the research goals and objectives.

47. Dr. Emami submitted his first quarterly report directly to Rock. Upon finding that Rock was continuing to subject him to undue hostility, Dr. Emami submitted his second quarterly report to Smith on March 14, 2013. Smith immediately forwarded Dr. Emami's quarterly report, which included five appendices explicitly setting forth Dr. Emami's work during the first two quarters of the 2012-2013 period. to Rock. Rock therefore knew that his statements regarding Dr. Emami's quarterly reports were false. Rock told Ambur and others at NASA that Dr. Emami did not satisfy the requirements of the PIP, knowing that Dr. Emami had, in fact satisfied the requirements of the PIP.

48. Rock repeatedly demonstrated his malice toward Dr. Emami by changing the requirements of the PIP after it was issued, and Rock told Ambur and others at NASA that Dr. Emami was responsible for making sure that the IDRL was operational, even though he knew that making the IDRL operational was never Dr. Emami's responsibility. Rock told Ambur and others at NASA that Dr. Emami "did not have a test plan," even though Dr. Emami had provided his test plan to Smith, who provided it to Rock on March 13, 2013.

49. Rock fabricated allegations that Dr. Emami was unable to maintain cooperative relations with other employees, and claimed that Dr. Emami made "disruptive, inflammatory, accusatory, and belligerent" statements during the PIP period. These allegations were false and themselves inflammatory. Throughout 2012 and 2013, Rock repeatedly made false statements to Ambur and others at NASA regarding Dr. Emami's job performance, qualifications, knowledge, and expertise.

50. Rock made the false statements described in the paragraphs above to deprive Dr. Emami of his employment with NASA. Rock's conduct toward Dr. Emami was independently tortious because it constituted defamation under Virginia common law. By defaming Dr. Emami, Rock engaged in "'improper methods," as defined by Virginia common law, to deprive Dr. Emami of his employment. Rock knew that his defamatory statements were false and harmful to Dr. Emami, and as such, he acted with malicious intent. Rock's intentional and tortious interference with Dr. Emami's contract caused Dr. Emami to be terminated, and thus to suffer severe economic harm, for which Rock is liable.

51. Rock and NASA took adverse action against Dr. Emami on January 18, 2013 by issuing him a PIP that was not warranted. Rock and NASA took further adverse action against Dr. Emami on April 12, 2013 through a Notice of Proposed Removal. Finally, NASA took adverse action against Dr. Emami by upholding his termination on June 27, 2013.

52. Through Rock and others, NASA intentionally retaliated against Dr. Emami in violation of Title VII of the Civil Rights Act of 1964, as amended, by terminating him because he engaged in protected activity. NASA's conduct has caused Dr. Emami to suffer financially, economically, professionally, socially, mentally, emotionally, and physically. This harm is ongoing. Because NASA violated Title VII by terminating Dr. Emami's employment because he engaged in protected activity, Dr. Emami is entitled to compensation for the harm he has suffered.

53. From October 7, 2002 to April 12, 2013, a valid contractual relationship existed between Dr. Emami and NASA. At all times relevant to this Complaint, Dr. Emami had a reasonable expectation of continued employment with NASA. At all times relevant to this Complaint, Rock was aware of the valid contractual relationship that existed between Dr. Emami and NASA, and of Dr. Emami's reasonable expectation of continued employment with NASA. Absent Rock's interference with Dr. Emami's contract, Dr. Emami was reasonably certain to remain employed by NASA beyond April 12, 2013, as demonstrated by his qualifications, accomplishments, performance ratings, and his cooperative relationships with other employees at NASA.

54. Rock told Ambur and others at NASA that Dr. Emami did not submit a quarterly report when, in fact, Dr. Emami submitted two quarterly reports containing all the information required by the PIP, including documentation of his experimental setup, approach, and procedures, data acquisition and

processing methodology, and analyses conducted toward the research goals and objectives. Dr. Emami submitted his first quarterly report directly to Rock.

55. Upon finding that Rock was continuing to subject him to undue hostility, Dr. Emami submitted his second quarterly report to Smith on March 14, 2013. Smith immediately forwarded Dr. Emami's quarterly report, which included five appendices explicitly setting forth Dr. Emami's work during the first two quarters of the 2012-2013 period, to Rock. Rock therefore knew that his statements regarding Dr. Emami's quarterly reports were false.

56. Rock told Ambur and others at NASA that Dr. Emami did not satisfy the requirements of the PIP, knowing that Dr. Emami had, in fact, satisfied the requirements of the PIP. Rock repeatedly demonstrated his malice toward Dr. Emami by changing the requirements of the PIP after it was issued.

57. Rock told Ambur and others at NASA that Dr. Emami was responsible for making sure that the IDRL was operational, even though he knew that making the IDRL operational was never Dr. Emami's responsibility. Rock fabricated allegations that Dr. Emami was unable to maintain cooperative relations with other employees, and claimed that Dr. Emami made "disruptive, inflammatory, accusatory, and belligerent" statements during the PIP period.

58. Dr. Emami's evidence placed into the record reveals that Defendant Rock subjected Plaintiff to rules that did not apply to other members of the

department, and that Rock ignored Dr. Emami, showed no respect or caring for him or anything he had to say, and wanted him fired. Following NASAs harassment and discrimination protocol, Dr. Emami frequently expressed concerns to EEO, Rock, and other superiors, but received inadequate responses or none at all. In fact, near the end of his time at NASA, Rock reprimanded Dr. Emami for carbon-copying the EEO office on emails he sent to Rock setting forth his concerns.

59. At first, Dr. Emami complained to Rock, explaining that Rock's dealings with him were humiliating, and frustrating his ability to work. Then when that didn't stop the nuisance, Dr. Emami advised Rock that he felt that Rock was discriminating against him because of his national origin and religion. Dr. Emami directed these complaints first to Rock, then to Rock's supervisors, to the Office of Human Capital Management (OHCM,) and finally to NASA's EEO Office.

60. For example, during a discussion with Dr. Emami on April 23, 2009, Rock became angry with Dr. Emami after Dr. Emami expressed disagreement with a statement made by Rock. Rock responded to Dr. Emami's disagreement by asking, "Don't you like this country?" As an expatriate who is highly devoted to the United States, Dr. Emami was greatly offended by Rock's comment. Similarly, in 2011, Rock retorted to Dr. Emami, "You people are combative!" Dr. Emami took offense to the generalization of Iranian people and Muslims.

61. Dr. Emami continued to withstand years of intolerable animosity, refusing to resign, and the

proof will show by clear and convincing evidence that Rock fabricated an unattainable performance based plan which attempted to disguise actual pretext to terminate Dr. Emami's employment.

62. Dr. Emami reported Rock's conduct to the EEO Office and OHCM on several occasions from 2009 to 2013. During his conversations with these offices, Dr. Emami informed the EEO Office and OHCM that he believed Rock was biased against him because of his national origin (Iran) and his religion (Islam). He also told the EEO Office and OHCM about Rock's offensive statements, but no actions were ever taken to address Rock's animosity toward Dr. Emami, and Rock continued to treat Dr. Emami in a hostile manner. In March 2012, Rock suddenly and inexplicably claimed that Dr. Emami did not have an "approved" Individual Development Plan ("IDP"). In truth, Rock himself had previously approved Dr. Emami's IDP. From 2009 to 2012, Rock cut the funding for several of Dr. Emami's projects and travel, but during the same period, Rock fully funded the projects and travel of the other researchers in the Branch.

63. Throughout his employment with NASA, Dr. Emami applied for numerous promotions, transfers, and details that would have benefitted his career. In each instance, NASA indicated that Dr. Emami was qualified for the promotions, transfers, and details for which he applied.

64. Dr. Emami was not selected for any of the promotions, transfers, or details for which he applied. Instead, those positions were given to less qualified employees who were not Iranian American

or Muslim. Rock claimed that Dr. Emami was "not a good fit" for the promotions, transfers, or details for which he applied because he "speak[s] with an accent" and has "communication problems." These statements were made directly to Dr. Emami, and to the individuals responsible for awarding the promotions, transfers, and details mentioned above.

65. Dr. Emami had requested a five-day trial to show the jury why the weekly and quarterly reports that Rock demanded were futile - there was nothing to report. Yet, after being precluded from introducing a five-day case, the Judge stated, "Let's take it one step at a time. As to religion, it doesn't seem to me that anybody over there even knew what your religion was. They knew you were Iranian, but I don't know that it's generally understood that Iranians are Muslim. Maybe it is. I don't know. But nobody over there knew about that, and it doesn't seem to have played any role in anything.

66. The Judge made it a point to mention that it was unfortunate that Dr. Emami was *pro se* when he stated, "Dr. Emami, I know you're disappointed. You seem like a decent man. I hope that your career moves along in a different direction and you do well. It's unfortunate you did not have a lawyer, it's just unfortunate, but I understand that those things happen."

67. The Judge himself decided in his own opinion that "As to religion and national origin, there is no evidence that anybody knew what his religion was. But as he kind of points out, I think perhaps people would understand that Iran is a predominantly Islamic nation. As to retaliation, whatever the

evidence establishes, it doesn't show that it was the cause of his termination. As to the national origin and religion, the only thing that we have that really seems to be a piece of strong evidence are two statements by Mr. Rock: One is, his question, do you like this country, and the other is, you people are overly aggressive, or something like that." But as early as 1973, the Supreme Court warned that "Title VII tolerates no racial discrimination, subtle or otherwise." McDonnell, 411 U.S. at 801, 93 S.Ct. 1817.

V. Issues For Review In This Court

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

A. Use of the Wrong Scheduling Order

68. The October 24, 2016 Scheduling order was the wrong Scheduling Order because it was superseded by the April 10, 2017 Scheduling Order, which required the Defense to meet with Dr. Emami on July 7, 2017. The Defense evaded Dr. Emami despite Dr. Emami's physical presence at the office of the Counsel for the defense. Every effort to make contact either in person or by phone was fruitless.

69. Dr. Emami was compelled to file a Rule 11 Motion for Sanctions against the Defense for refusing to meet with him to mark exhibits and prepare for trial as ordered. Dr. Emami complained that the Scheduling order used by the defense had been tampered-with, and even had hand-written changes, and at trial the District Court refused to allow evidence which the April 10, 2017 Scheduling Order had already given Dr. Emami permission to introduce. The

District Court denied the Rule 11 Motion.[1]

B. The Jury was Dismissed by the Judge

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

70. Against the constraints of Rule 50(1) Judgment as a Matter of Law, and Rule 303, Rules of Evidence, Dr. Emami, not being allowed the witnesses that the April 2017 had said he could call, he was not fully heard, before his jury was dismissed. Therefore, it was premature for the District Court Judge to find that a reasonable jury would not have a legally sufficient evidentiary basis to find for Dr. Emami on his issues. The Court below erred in dismissing the jury and resolving the issue against Dr. Emami despite numerous federal rules that do not allow such bias.

71. Permitting compensatory and punitive damages under Title VII Congress allows a "complaining party" to seek such damages, and Congress provided that "any party may demand a trial by jury"[2] in

---

[1] See Old Chief v. United States, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion.

[2] 20 Civil Rights Acts of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a(a)(1)).

order "[t]o protect the rights of all persons under the Seventh Amendment."[3]

72. Again, without the benefit of a written opinion, Dr. Emami must recollect from memory and recollect the Judge's statements and infer the Court's assumptions as to the Defendants' renewed motion for summary judgment which was made "on all claims." Dr. Emami recalls that the jury was dismissed and the District Court Judge surmised that Dr. Emami had not set forth a *prima facie* claim for discrimination, retaliation, hostile work environment and disparate treatment. Dr. Emami disagrees.

73. Rule 301of the Federal Rules of Evidence elaborates that the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. And because this rule does not shift the burden of persuasion, which remained on Dr. Emami, and even though Dr. Emami was cut short in his presentation even though material facts remained, Dr. Emami claims that reasonable jurors could debate that taken as a whole, with or without being allowed the time he had asked for (5 days) he did indeed present evidence of pretext, met his *prima facie* burdens -- suggesting that Defendants' conduct cannot be explained as simply a matter of office management.

74. The District Court Judge discharged the jury, electing instead to dismiss the entire case from the bench on procedural grounds. "It is, of course, not the responsibility of the judge *sua sponte* to ensure

---

[3] H.R. Rep. P. No. 102-40 at 29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 723.

that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.[4]

75. It is well established that under McDonnell Douglas, the plaintiff can establish a *prima facie* case by presenting evidence that he or she (1) is a member of a protected class; (2) is qualified for the job; (3) suffered an adverse employment decision; and (4) was treated differently than similarly-situated non-protected employees. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). But, also the Teamsters' bifurcated model of proof is an alternative to the McDonnell Douglas model. [5]

C. No Memorandum Opinion

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

---

[4] " See Huddleston v. United States, 485 U.S. 681, 690, n.7 (1988)

[5] See Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 358 (1977) (rejecting the argument that McDonnell Douglas is "the only means of establishing a prima facie case of individual discrimination"). The Teamsters Court relied on Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), a Section 706 class action case. Teamsters, 431 U.S. at 358-60. In Franks, the Court said the district court erred in requiring class members to individually prove discrimination where they had already shown "the existence of a discriminatory . . . pattern and practice." Franks, 424 U.S. at 772. The Court in Teamsters said Franks "illustrates another means by which a Title VII plaintiff's initial burden of proof can be met." Teamsters, 431 U.S. at 359. 27 Id. at 360. 28 Id. at 336 n.16 (quoting 110 Cong. Rec. 14270 (1964) (remarks of Sen. Humphrey)) Even though Dr. Emami is not a member of a class, to deny him the benefit of further examination of his case through the lens of the Teamsters ruling would be disparate treatment by the courts.

76. There has been no Memorandum Opinion issued addressing the merits of the case in the District Court below. Rule 59(e) allows no more than 28 days to file a Motion for Rehearing. Dr. Emami had no Judicial Opinion to go by to rebut the court's dismissal of his case. It was practically impossible to file a Rule 59(e) Motion when there was no Judicial findings to pinpoint his arguments, yet, Dr Emami attempted to do so nevertheless, and on September 1, 2017, Dr. Emami brought forward in his 59(e) as much as he could bring not knowing what specific disagreements he needed to counter. Being a non-CM/ECF filer, he only had until 5 O'clock p.m. EST to file instead of midnight like a CM/ECF filer has. Therefore, because of numerous problems on the highway to Richmond, VA, his Rule 59(e) Motion was one day late. Also, and again, because he wasn't sure what arguments to bring forward due to there being no memorandum, his filing was also twice as long as allowed.

77. When on October 3, 2017 the District Court filed an order denying his Rule 59(e) motion, yet allowing him to amend his 59(e) Motion. But what should he cut out? What were the exact disagreements to counter? With no Memorandum, who could know what needed to be cut out, left in, and shortened?

As Erwin Chemerinsky states in his book, Closing the Courthouse Doors,

> "The judicial method is a process of hearing arguments from the parties, reaching decisions based on those arguments, and justifying the results with a written opinion. Although neither the Constitution, nor any statutes compels a court to write and

> publish opinions, publicly stated reasons for these decisions are embedded in the American legal system. It has long been recognized that the traditional means of protecting the public from judicial *fiat* (judicial activism) are that judges give reasons for their results. For each ruling it hands down, the court must write an opinion demonstrating that its decision was not arbitrary; it must explain why the values it is protecting are worthy of constitutional status; how those values are embodied in legal principles, and how they are to be applied in a specific case. It must also explain why its decision is consistent with prior holdings; is legitimately distinguishable from precedence, or justifies overruling conflicting cases."

D. Ambiguous Disposition in the District Court

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

78. October 3, 2017's Ruling on Dr. Emami's Rule 59(e) Motion to Reconsider allowed Dr. Emami to amend his Rule 59(e) Motion which he did. Eight months passed before a final disposition was made as to Dr. Emami's Rule 59(e) Motion (ultimately construed as a 60(b) by the Court below)

VI. ISSUES FOR REVIEW
All of the previous Claims Above are Forwarded, In Addition to the Following:

A. No Final Disposition from the District Court

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein.

79. There being no Memorandum of Opinion, as a non-CM/ECF filer, Dr. Emami calculated his deadline for filing his Rule 59(e) Motion from the date of the Clerk's entry into the record on August 4, 2017, which determined the deadline to file a Rule 59(e) Motion to be September 1, 2017.

80. It can be debated that Dr. Emami filed a timely Rule 59(e) Motion on September 1, 2017, the court ruled on Dr. Emami's Rule 59(e) Motion on October 3, 2017, allowing Dr. Emami to amend his Rule 59(e) motion to conform with the number of pages allowed in the Motion. Dr. Emami amended his Rule 59(e) Motion to conform to the page number restriction and then waited for the District Court. And waited, for over 8 months. Finally, On June 19, 2018, an order was issued, but still addressed nothing as to the merits of the case at all.

B. Errors in the Court Below, to Include Structural Error

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein

Procedural History in the US District Court

81. **2015** Dr. Emami filed his Complaint in the US District Court on January 23, 2015

82. **2016** On January 29, 2016 the Defense's Motion to Dismiss for Failure to State a Claim was denied, as was the Defense's Motion for Summary Judgment.

83. Trial was scheduled for November 1, 2016, but was postponed

84. On December 20, 2016, the Magistrate Judge issued a Report and Recommendation stating in part:

> "...the same evidence which would permit a reasonable juror to conclude Emami's work met legitimate expectations, would also establish that NASA's proffered reason for the termination - that he did not meet expectations - was pretextual. The only reason NASA offered for Emami's termination was his performance under the revised reporting requirements Rock imposed. His experts have opined that these requirements were either impossible to meet based on the operational status of the IDRL, or satisfied by Emami's reporting of his research efforts. In addition, contemporaneous emails between Rock and NASA's H.R. professionals suggested that they were having difficulty documenting shortcomings in his performance given the lack of recognized standards for the evaluation of his research. Email, Rock to Smith {ECF No. 72-34).
>
> Proof of a prima facie case, coupled with evidence that an employer's proffered reason for the termination is false, may be sufficient for a reasonable juror to conclude Emami's termination is discriminatory. Reeves, 53 0

U.S. at 14 8. Combined with Emami's evidence of Rock's comments to him, and his frequent complaints about his treatment, the direct and indirect evidence he has produced in response to NASA's motion for summary judgment is sufficient to create a jury question on his claims of intentional discrimination.

"In addition to prohibiting discrimination. Title VII's anti-retaliation provision was enacted to "prevent an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." Burlington N. & Santa Fe R.Y. Co. v. White, 54 0 U.S. 53, 63 (2006); 42 U.S.C. § 2000e-3 (a). To survive summary judgment on his retaliation claim, Emami must demonstrate three elements: (1) that he engaged in protected activity; (2) that his employer took an adverse employment action against him; and (3) that there was a causal link between these two events. Boyer - Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) banc). Protected activity includes activity which opposes any practice made unlawful under Title VII. DeMasters v. Carilion Clinic, 796 F.3d 409, 416 (4th Cir. 2015),

The Fourth Circuit takes an expansive view of opposition conduct. Thus, "[w]hen an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes

> the employee's opposition to the activity." DeMasters, 796 F.3d at 420 (quoting Crawford v. Metro Government of Nashville and Davidson Cty., 555 U.S. 271, 281-82 (2009) (Alito, J. concurring)).

85. **2017** Chief Judge Beach filed a 36-page Memorandum Opinion, hereby incorporated by reference as if fully set forth herein. In that Memorandum, she states in part an issue which may be a matter of first impression and thus, of significant importance:

> "The Supreme Court has not resolved the issue of whether a negative performance plan or placement on a PIP constitutes a materially adverse action. Moreover, the Fourth Circuit has not categorically held that a negative performance plan or placement on a PIP constitutes, or fails to constitute, a materially adverse action. The Fourth Circuit recently held that a plaintiff failed to state a plausible discrimination claim because the PIP in question did not permit the court to "reasonably infer" an adverse employment action, where the plaintiff had pled no facts showing harm. Jensen-Graf v. 3.5.D. Chesapeake Employers' Ins. Co., 616 F. App'x 596, 598 (4th Cir. 2015). In that case, the plaintiff's "complaints about additional requirements being placed on her as a result of the PIP amount[ed] to nothing more than 'dissatisfaction with this or that aspect of [her] work' that fail[ed] to allege an actionable adverse action." Id. (citing James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377 (4th

Cir. 2004)). An Eastern District of Virginia court has held that a "rescinded, unimplemented performance improvement plan" did not constitute a materially adverse action. Hill v. Panetta, No. I:12cv350, 2012 WL 12871178, at *15 (E.D. Va. Oct. 4, 2012), aff'd sub nom. Hill V. Hagel, 561 F. App'x 264 (4th Cir. 2014). However, there is no authority in the Fourth Circuit that holds that a PIP cannot be a materially adverse action. The Magistrate Judge stated that the Plaintiff "was first disciplined and eventually terminated," and that, " [i]f related to his complaints of discrimination, either of these might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' and are thus materially adverse actions." First R&R at 27 (quoting Burlington, 548 U.S. at 68). In so finding, the Magistrate Judge implied that the PIP constituted a materially adverse action. The Defendant did not object to this finding."

"According to the Plaintiff, he was placed on the PIP after he failed to meet requirements that could not have been met. See id. Having reviewed the portion to which the Plaintiff objected de novo, the court finds that a reasonable juror could conclude that retaliation was the actual reason for the Plaintiff's termination. The court REJECTS IN PART AND MODIFIES Part III.B of the First R&R as discussed herein and DENIES the Defendant's Motion for Summary Judgment on the Plaintiff's retaliation claim."

86. On April 6th, 2017, Chief Judge Beach, also entered an Amended Rule 16(b) Scheduling Order, (ECF. #96) which was filed on April 10, 2017, as is hereby incorporated by reference. Paragraph 2 of Chief Judge Beach's Amended Rule 16(b) Scheduling Order, stated:

> 2. An attorneys' conference is scheduled in the office of counsel for Plaintiff or, if the Plaintiff is unrepresented, at the office of counsel for the defendant whose office is located closest to the courthouse at Norfolk on July 7, 2017, at 2;00 p.m. Counsel and unrepresented parties shall meet in person and confer for the purpose of reviewing the pretrial disclosure required by Rule 26(a)(3), preparing stipulations, and marking the exhibits to be included in the final pretrial order outlined in paragraph 3. With the exception of rebuttal or impeachment, any information required by Rule 26(a)(3) not timely disclosed, delivered, and incorporated in the proposed final pretrial order shall result in the exclusion of the witnesses, depositions, and exhibits which are the subject of such default.

87. On July 7, 2017, Dr. Emami obeyed Chief Judge Beach's Amended Rule 16(b) Scheduling Order, but it was not followed by the Defense, to-wit: Ms. Virginia Van Valkenburg, refused to meet with Dr. Emami.

88. On July 14, 2017, Dr. Emami filed a Motion and Memorandum for Imposition of Sanctions on the Defendant for not adhering to the April 6, 2017 Amended Rule 16(b) Scheduling Order. In his

Motion, Dr. Emami explained how he had appeared at the office of counsel for the defense as ordered, and with his exhibits to that Motion, how he had attempted to work with the defense in preparation for trial. Later that same day, July 14, 2017, and unbeknownst to Dr. Emami the old Final Pretrial Order (ECF # 107), that was drafted and prepared October 20, 2016, was refiled with the old date scratched out, and July 14, 2017 written on it. Even more suspect was that Dr. Emami's former attorney's signature was on this Final Pretrial Order and a handwritten note "objections to adverse rulings."

89. On July 18, 2017, Dr. Emami filed a Pleading invoking Federal Rule of Civil Procedure 72(A and/or B), appealing to the District Judge to correct the errors just mentioned in the previous paragraph above, but Dr. Emami got no help.

90. On July 25, 2017, Dr. Emami-filed a Motion and Memorandum for Procedural Protection for 5 Trial Days (ECF # 119), wherein he prayed for five (5) days to present his case which by now involved two and a half years of history in the district court. The night before trial, Dr. Emami received an email from the Judge's chambers telling him that basically the Court was requiring him to accomplish all of his case-in-chief in only one day:

> -----Original Message-----
> From: Greg_Crapanzano
> <Greg_Crapanzano@vaed.uscourts.gov>
> To: kaandm <kaandm@aol.com>
> Cc: virginia.vanvalkenburg
> <virginia.vanvalkenburg@usdoj.gov>; DShean
> <DShean@usa.doj.gov>

Sent: Mon, Jul 31, 2017 05:17 PM
Subject: Re: Honorable Judge John Gibney
Dr. Emami,

Judge Gibney has asked me to let you know that if you run out of witnesses tomorrow, meaning that there is still time in the day but you have asked the witnesses in attendance all of the questions you have and that Judge Gibney allows, then you will rest. This means that your case-in-chief will be deemed over, the defendant will then present the evidence it likes, and you will not have the opportunity to call any more witnesses at any point in the trial.

Please keep in mind that how long you think questioning of a witness may take might differ from how long you think it will take, and that the Judge may not allow you to pursue every avenue you wish based on a variety of reasons. Judge Gibney clearly instructed that you select seven witnesses for tomorrow.

I am ccing opposing counsel so that they are aware that I have informed you of this, and also so that you can get back to them immediately and inform them of any additional witnesses you may call tomorrow. Keep in mind that having them there tomorrow does not necessarily mean that you will get to them, and the Court instructed you to choose seven.

Please respond as soon as you possibly can to this email, ccing both attorneys for NASA,

informing them of additional witnesses so that they can try to make arrangements for these people to be there tomorrow on what is now very short notice after 5 p.m.

Dr. Emami, I am going to call you as soon as I send this to let you know and so that you can take action as soon as possible.

Greg

Greg Crapanzano
Law Clerk to the Honorable John A. Gibney, Jr.
United States District Court
Eastern District of Virginia
greg_crapanzano@vaed.uscourts.gov
(804) 916-2873

91. The jury was to have seen and heard evidence relative to an April 10, 2017 Scheduling Order allowing that evidence. Instead, an obsolete, and outdated scheduling order from October 20, 2016, manipulated by the court ruled the day and Dr. Emami's objections were ignored. Being restricted from bringing all of his case in chief, Dr. Emami was told his case was over, the jury was dismissed, then the Defense moved for judgment as a matter of law and the District Court Judge dismissed the case.

92. Because the discretion to discharge the jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances, Dr. Emami has been the victim of egregious actions

of unconstitutional proportions which have manifested injustice.

93. The Seventh Amendment to the US Constitution provided Dr. Emami a Constitutional Right to a Jury Trial, just as The Civil Rights Act of 1991 permits Title VII cases to be tried by jury, and this case was exactly that type of case. If the Seventh Amendment authorizes a Jury in a civil case, and being deprived of a jury is error, then reasonable jurors could debate as to whether or not discharging Dr. Emami's jury was an unfair Constitutional error, or whether a Constitutional error in a civil case creates a structural error, but to be certain, a biased Judge discharging a seated jury against the Title VII claimant's right to have that jury cannot be harmless error. But that is for this court to decide.

94. Dr. Emami claims that at trial he established a *prima facie* case of discrimination based on religion and national origin and thus proceeded to the ultimate issue of whether an unlawful animus or the proffered nondiscriminatory reason for Dr. Emami's termination constituted the genuine reason for the adverse action. Dr. Emami claims that he indeed established pretext. The jury was discharged, and this appeal now comes following a verbal dismissal from the bench.

95. Even though there was no ruling on the merits, Dr. Emami understands that this court typically doesn't concern itself with the vagaries of the *prima facie* case because subsequent to a trial in a Title VII action, the ultimate issue is one of discrimination *vel non*. In such a posture, the McDonnel Douglas paradigm of presumption created

by establishing a *prima facie* case drops from the case, and the factual inquiry proceeds to a new level of specificity. This new level of specificity refers to the fact that the inquiry now turns from the generalized factors that establish a *prima facie* case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced. This factual inquiry-the ultimate issue in a Title VII suit-is whether the defendants, Rock and subsequently NASA intentionally discriminated against Dr. Emami.

96. In resolving this inquiry, "the ultimate burden of persuading the court that Dr. Emami has been the victim of intentional discrimination rests with Dr. Emami. And Dr. Emami understands that the term "pretext" refers to "'pretext for discrimination" not whether Rock's and NASA's articulated reason for its challenged action is false, thereby rejecting Dr. Emami's contention that he prevails on the ultimate issue merely by demonstrating that the defendant's proffered explanation for the adverse action is not true.

97. Proceeding to join issue and narrow the inquiry at this point in the paradigm, the inquiry is further honed so that to establish that a proffered reason for the challenged action was pretext for discrimination, Dr. Emami must prove "both that the reason was false, and that discrimination was the real reason" for the challenged conduct. After elucidating how the issue of discrimination is sequentially narrowed, Dr. Emami would expect this Court to examine the credence of the Appellee/Defendants' proffered explanation for its challenged conduct. Dr. Emami is hopeful that this

court will be satisfied that he has demonstrated discrimination indirectly by showing that the employer's proffered explanation is unworthy of credence.

98. Dr. Emami expected that the fact-finder's rejection of the legitimate, nondiscriminatory reason proffered by the defendant, coupled with the elements of the *prima facie* case, would permit the fact-finder to infer the ultimate fact of invidious discrimination with no additional proof of discrimination. During the course of trial, the defendant was engaged in mischaracterization to mislead the court by playing a semantic game of language as if the requirements and elements in the plaintiff's "test plan" were different than elements in the "quarterly report". Elements in" quarterly plan" are same and synonymous to same elements in the "test plan".

99. Dr. Emami has understood all along that he was not automatically entitled to judgment just because the factfinder might have possibly determined that the defendants' challenged conduct was pretextual, but did not constitute invidious discrimination. Accordingly, rejection of the defendants' proffered reason, standing alone, would not compel the conclusion that the defendant unlawfully discriminated against the plaintiff, thus creating liability under Title VII, but rather this factor could enter the calculus for determining this conclusion.

100. In the District Court, Dr. Emami met his burden of demonstrating that he was the victim of invidious discrimination because he proved that

NASA's proffered reason for issuing the termination was unworthy of credence and was a pretext for discrimination. This court's examination of the record will be compelling and will allow the court to conclude that Dr. Emami satisfied his ultimate burden of proving he was the victim of invidious discrimination.

Conclusion

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein

101. Viewing Dr. Emami's evidence in the totality of the circumstances, reasonable jurors could disagree that as to Dr. Emami's discrimination claim, a fact finder could reasonably infer that religion and ethnicity was a substantial factor in the discrimination he experienced, and that the discrimination amounted to a change in the terms of his employment. [6] On his disparate treatment claim and his retaliation claim, likewise a jury could reasonably find that Dr. Emami was terminated after an attempt to constructively discharge him and that the Defendants' proffered reason — office management — was a fabricated justification for their conduct toward Dr. Emami. Defendants' motion is was therefore wrongfully granted as to those claims.

102. Based upon information and belief, the Defense's refusal on July 7, 2017 to carry out its responsibilities set forth in the April 6, 2017 Amended Rule 16(b) Scheduling Order, intentionally set in motion a scheme to interfere with the Court's

---

[6] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

ability to impartially choreograph pre-trial duties and requirements. By improperly influencing the Court and unfairly hampering the presentation of Dr. Emami's claims Dr. Emami claims that the defense perpetrated *inter alia* Fraud upon the Court.

103. Dr. Emami asserts that the district court's Order in this Case (EFC. #131, entered July 31, 2017, and the district court's order, (EFC # 138, entered August 3, 2017 are contrary to law, inconsistent with that facts, and lacking sufficient evidence to support them, and in the best interest of justice this court's intervention is necessary to correct the clear errors of law therein, as well as to prevent the manifest injustice that has occurred.

VII. Prayer for Relief

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein

104. Dr. Emami understands that the purpose of an appeal in this Court is not to relitigate on the merits, However, because there is no written opinion, and because a reasonable jury could debate that there are substantial material grounds as to how his case was dispensed with in the lower court, Dr. Emami respectfully requests a *de novo* review by this court. Please find in favor of a new trial, remanding back to the District Court, in the alternative, should this Court see fit, and as he has already claimed in the court below, Dr. Emami seeks a declaratory judgment, injunctive relief, back pay, reinstatement or front pay, compensatory damages, attorneys' fees, the costs of this action, and any other relief the Court may deem to be proper and just.

105. In his claims against Rock, Dr. Emami seeks actual damages, compensatory damages, punitive

damages, and any other relief the Court may deem to be proper and just.

106. Dr. Emami's prayer is for this Court's *de novo* review of the merits and acknowledgment of 1. structural error, 2. the violations of Dr. Emami's rights to work in an environment that is free of discrimination, disparate treatment, and fear of retaliation, and 3. The opportunity to have a jury decide for themselves whether or not Dr. Emami met his burden of persuasion on the matter of pretext, and the presumption thereof, and 4. that indeed a prima facie case was properly presented despite unfair judicial prejudice against the federal rule governing presumptions.

107. **WHEREFORE**, in light of the reasons stated above, Dr. Emami claims that the district court erred by *inter alia* dismissing his jury, stating that Dr. Emami had not proven pretext, interfering in his right to bring his complete *prima facie* case, ignoring Rule 301's rule of presumption, disregarding substantial evidence that would have militated a conclusion contrary to that reached, and using the fraudulently altered October 24, 2016 Scheduling Order, not addressing his dispute over the blatant disregard of the April 10, 2017 Scheduling Order, and the use of the outdated Scheduling order instead. Had his evidence been allowed, and the jury not discharged, the decision would have been much different than the decision from the bench which was contrary to the clear weight of the evidence considered considering the entire record.

VIII. Prior appeals

Dr. Emami hereby incorporates each of the above paragraphs as though fully set forth herein

108. Dr. Emami has filed one other case in this court which was directly related to the instant case.

The Fourth Circuit Case Number was: 17-2392, and the US District Court, Norfolk Division Case #: 2:15-cv-00034-JAG-DEM. Disposition: Dismissed by this Court May 29, 2018, but on June 2018 the District Court finally issued a ruling on Dr. Emami's Motion for Rehearing. No one knew or could not have known that the Court below would file a response and do so eight months later.

Certificate of Compliance

109. Dr. Emami hereby certifies that this Brief does not exceed 13,000 words, or 30 pages.

Respectfully Submitted,

/s/ Saied Emami
Plaintiff, *pro se*
103 Lakepoint Place
Yorktown, VA 23692
(757) 509-0451
s.emami@aol.com

VERIFICATION OF FACTS

Pursuant to 28 U.S.C. 1746, I, the undersigned declare, swear and affirm under penalty of perjury that the foregoing is true and correct, except as to those stated under information and belief, and as to those, I believe them to be true and correct.

Executed on September 4, 2018, at York County, Virginia

/s/ Saied Emami
Plaintiff, *pro se*
103 Lakepoint Place
Yorktown, VA 23692
(757) 509-0451
s.emami@aol.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richmond, Virginia

No. 18-1806
2:15-cv-00034 (JAG/DEM)

SAIED DR. EMAMI,
Plaintiff - Appellant,
v.
ROBERT M. LIGHTFOOT, JR.
Defendant – Appellee

KENNETH ROCK, Individually, and

UNITED STATES OF AMERICA

PETITION FOR REHEARING

Plaintiff/Appellant appeals from Court Opinion and Orders (ECFs # 163 and 164) under 60 (b) "Court's mistake. Appellant prays for the court's attention to take into account legal construing Appellant's Petition for Rehearing in accordance with the Supreme Court's *Haines v. Kerner* 404 U.S. (1972). Appellant also prays that the Court of Appeals will give the benefit of doubt that the Appellant are well aware of facts surrounding his case and he had educated himself in the legal contentions that circumscribe his Title VII case that includes retaliation, and discrimination based on national origin and religion, and State of Virginia

laws "Intentional Interference with Business Expectancy". During the trial that commenced on August 1, 2017, Appellant did not have any misapprehension that relevant substantive direct material evidences, which are available in the documented records in the lower District Court, show pretext, malice, and disparate treatment of the Appellant, and are in the heart of a Title VII that form the various swords and buckles in the trial in order to secure a verdict in the Appellant's favor before the jury. Appellant aimed to proceed only under the indirect method of proof set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Appellant further realizes that facts are neither questionable nor appealable. However, appellant contends when certain documented facts in the record that have high probative values are adduced by the appellant to satisfy the appellant's burden in satisfying an element of law and are ignored by the District Court and facts not carrying probative value are elevated in mind of a judge to make a questionable legal conclusion, the evaluation of that process is appealable to check if the Judge was wrong in misreading the moment. During Appellant's trial, Appellant contends that the trial judge– who did not possess any engineering and/or scientific knowledge –went askew and made error of law granting defendant 50(a) motion in a open-ended general broad cryptic short shrift without explaining anything on his thought process how he reached to his conclusion. Appellant contends that dismissal of the jury was contrary to substantive testimony of a technical-expert, comparators and witnesses throughout the two days trial. Additionally,

Defendant in a letter to the Court of Appeals, referred to the two days trial as "Plaintiff Case-in-Chief". This is not true! Evidence in the trial Transcript would show that Defendant went awry in cross-examination Plaintiff witnesses outside scope of Plaintiff's direct examination. Contrary to the Appellant's repeated objections to the trial judge, he wouldn't pay any attention.

The following issue was addressed in the Appellant's Informal Brief on Page 17 under Roman numeral V.

Issue 1 : Defendant did not comply with the instructions set forth in specific Scheduling Order FRCP Rule 16(b), causing Plaintiff/Appellant not to have two key witnesses, but also not able to enter direct evidences in trial to show Pretext that includes inconsistencies, shifting justifications/narratives of Appellant's termination, malice towards Appellant, lies purporting that Appellant did not have a Test Plan, and post hoc inventions of false narratives in his Title VII Discrimination and Retaliation case. Appellant calls defendant defiance to comport in accords with the Court Scheduling Order a "structural error" that prejudiced Appellant all the way throughout his trial (i.e, Appellant understand the due process violation guaranteed in our Constitution is a legal scholarly discussion- the issue discussed hereinafter maybe classified as violation of Appellant's due process).

Appellant, Dr. Saied Emami, Pro se, he contends that he is aggrieved by the disposition of his case by the lower District Court in which he contends that Defendant's counsels intentionally did not comply with any one of the instructions specified in the

Court's AMENDED RULE 16(b) SCHEDULING ORDER (ECF # 96). AMENDED RULE 16(b) SCHEDULING ORDER issued by the Chief Judge on April 10, 2017 in accords with her prior OPINION (ECF # 95) filed on March 10, 2017. After giving several opportunities via Emails and Appellant making himself available in the Defendant's counsel office for purpose of the Defendant compliance with the Chief Judge Scheduling Order, Appellant finally filed for sanctions and detailed his reasons for sanctions in a combined Motion and Memorandum and filed with the clerk office on July 14, 2017 (ECF # 106) pursuant to Rule 16(f) as specified on page 3 of 3 of Chief Judge scheduling Order (ECF # 96). Appellant incorporates the contents of ECFs' # 95, 96, and 106 each in its entirety by reference in this Petition for Rehearing. Appellant believe the contents of each ECF's # 95, 96, and 106 is self-explanatory. Appellant in his Motion and Memorandum for sanctions (ECF # 106) also documented his efforts that he had followed the detailed instructions specified in the Court Order (ECF # 96) point-by-point. On July 6 2017, Appellant sent the following email to the defendant counsel a day before his visit to her office to satisfy letter and spirit of the Rule 16(b) scheduling Order. The following email extracted and is part of District Court ECF #111-2 filed on July 18, 2017.

> "Civil Action No.: 2:15-cv-00034 - re. (12(A)(3) and 26(A)(3))
> From kaandm <kaandm@aol.com>
> To Virginia.vanvalkenburg <virginia.vanvaikenburg@usdoj.gov>
> Cc kaandm <kaandm@aol.com>
> Thu, Jul 06, 2017 01:20 pm Hide Details

Ms. Van Valkenburg,

On July 7. 2017, when We are planning to discuss 12(A)(3) and related 26(A)(3) in accords with the Court Order, I am planning to bring you a USB computer drive with all of my proposed pretrial exhibits on It in PDF format for the stipulation and your objections (FRE). I will also bring you a tabulated list (tables) that would briefly describe the each PDF file on the USB computer drive for your easy reference and entering your stipulation choice next to the file description (i.e, objection).

I can stay there as long as you wish and we go through your and my pretrial exhibits. Another alternative is that I leave the USB Drive and table for you to go through at your own time of choosing. If you choose the latter, you can copy, scan and send me your stipulation/objections through emails to me later on.

Please If you don't mind, I would like also to have PDF files of your trial exhibits either on readable uncryptic CD or USB drive with a table for my objections.

Regards.

Saied Emami (plaintiff - pro, se)"

Appellant reminded the District Court (ECF # 106) if Plaintiff is not allowed to introduce his direct substantive evidences that show the employer was dissembling by shifting its nondiscriminatory justifications for terminating Plaintiff's employment, plaintiff would be prejudiced in presenting his case. Plaintiff states in part the following verbatim excerpt from his Motion and Memorandum (ECF #106):

> "If the court does not interfere and stop the defendant from designing it own pretrial final conference disclosure, the plaintiff case would be nothing but a "Swiss Cheese" in which the plaintiff would look like a "fool" during the trial and before the jury. The plaintiff would be prevented to use in trial highly relevant factual evidences and witnesses.
>
> Plaintiff noticed that during the week of scheduling order, the defendant engaged in writing several official letters showing specious concerns while at the same time carefully disregarding the plaintiff's version of disclosure in the final draft.
>
> Plaintiff is well knowledge that during the trial, in addition to retaliation (i.e., time proximity, and several EEO contacts) he has to prove pretext, satisfying employer legitimated job expectations, and the plaintiff is similarly situated with respect to others individuals in the lab. Therefore, the plaintiff desperately needs his own recent version of the stipulated pretrial disclosure

exhibits and witnesses incorporated in the proposed final draft."

Plaintiff in the same document reminded the District Court in part that:

> "I beg the court does not reward the defendant violating the court April 10, 2017 Scheduling Rule 16 (b) Order, and that at the same time, the court award the defendant to force an outdated September 29, 2016 version of the "Plaintiff's Rule 26(a)(3) Pretrial Disclosures" on the plaintiff for the final pretrial conference today on July 14, 2017."

To give better perspective to the Court of Appeal, Appellant prays the Court of Appeals take Judicial Notice of the following events that caused by the Defendant the initial jury trial scheduled to commence on November 1, 2016 was postponed (District Court ECF # 80) and eventually caused fruition of District Court Chief Judge's OPINION (District Court Doc. ECF # 95) on March 10, 2017 and AMENDED RULE 16(b) SCHEDULING ORDER (ECF # 96) on April 10, 2017.

1. Plaintiff filed Second Motion to Compel *Answer and Production of Documents* and Memorandum in Support (District Court ECFs # 55 and 56) on September 21, 2016.

2. Defendant filed its second Motion for Summary Judgment and Memorandum in Support (ECFs # 60 and 61) on September 29, 2016. Plaintiff responded (ECF # 72) on October 12, 2016. Defendant replied (ECF # 78) on October 17, 2016.

3. Defendant filed Motion to Exclude Plaintiff's Expert Witnesses and Memorandum in Support (ECFs # 65 and 66) on October 6, 2016. Plaintiff Responded (ECF # 79) on October 20, 2016. Defendant replied (ECF # 84) on October 26, 2016.

4. Defendant filed Motion in Limine and Memorandum in Support (ECFs # 69 and 70) on October 12, 2016. Plaintiff Responded (ECF # 83) on October 25, 2016. Defendant replied (ECF # 86) on October 31, 2016.

5. Magistrate Judge's Report and Recommendations for second Summary Judgment Motion and Motion in Limine (ECF #89), and Magistrate Judge's Report and Recommendations for Motion to Exclude Plaintiff's technical experts (ECF # 90) on December 20, 2016.

The results of the objections and the responses between Plaintiff and Defendant from Magistrate Judge's Report and Recommendations (ECFs # 91, 92, 93, and 94) combined with Magistrate Judge's Report and Recommendations activities were referred to District Court Chief Judge for Decision. Chief Judge issued an OPINION (ECF # 95), and a Amended 16 (b) Schedule Order (ECF # 96). The foregoing numerated activities indicated that Plaintiff has a retaliation case, and a discrimination case which is based on disparate treatment.

It is notable that Court of Appeals to take judicial notice that, the defendant did not object to Magistrate Judge denying defendant Motion to exclude Plaintiff's expert witnesses. Furthermore, Defendant filed its first Summary Judgment Motion on June 15, 2015 (ECFs # 9 and 10). In response to Defendant's first Summary Judgment, District

Court's Chief Judge filed a MEMORANDUM ORDER on January 29, 2016 (ECF # 20) and on page 13, Chief Judge confirmed technical experts "testimony on the 'highly specialized, technical, and scientific nature'". Further Chief Judge in her MEMORANDUM_ORDER emphasized that plaintiff has also a Title VII retaliation case.

Issue 2: On July 14, 2017, Magistrate Judge abused his discretion ignoring to implement the letter and spirit of Chief Judge's OPINION (ECF # 95) and AMENDED RULE 16(b) SCHEDULING ORDER (ECF # 96) and ignored to impose sanctions on the defendant and to order the defendant to comply with OPINION and AMEMDED RULE 16(b).

Appellant complied with each instruction specified in AMENDED RULE 16(b) SCHEDULING ORDER and went to the Courthouse on July 14, 2017 for final pretrial conference. Before going to the chamber magistrate Judge for final pretrial conference, Appellant filed his Motion and Memorandum (ECF # 106) for imposition of sanctions on Defendant. During the pretrial conference I expressed my unhappiness with two of the defendant's counsels. Plaintiff stated his opinion not to engage with the plaintiff and implement Scheduling Order was an unethical act that is prejudicing the plaintiff not be able to present overt pretext evidences in his case. Plaintiff gave a copy of his motion and memorandum for sanctions (ECF # 106) to the Defendant lead counsel. Plaintiff mentioned to the magistrate judge that he filed his motion for sanctions in the Clerk office before he arrives to his chamber. Plaintiff brought a USB computer drive where all his direct evidences

showing pretext were stored on it as pdf files. I offered it to the magistrate Judge. Magistrate judge acted as if he had never seen a USB computer drive. Magistrate Judge asked for paper copies of all evidences. Magistrate Judge's chamber was not equipped with any kind of computer and printer. Magistrate Judge pulled out an old Final Pretrial Order (ECF # 107) in which plaintiff did not agree with and objected to. Page 48 of 48 of the outdated Final Pretrial Order was dated "This 20th day of October, 2016" that Magistrate Judge scratched off "20th day of October, 2016" and instead wrote "July 14, 2017". Plaintiff objected to the substantive contents of the outdated Final Pretrial Order, change of date by Magistrate Judge, and elimination of two key witnesses. The two key witnesses were Andrea Bynum representing Langley EEO office and Shelly Ferlemann, administrative assistant, who was working in close coordination and with Kenneth Rock, the proposing official, to secure plaintiff's termination. Once Plaintiff explained to the magistrate judge that she is a key witness that she had to question before jury the dissembling nature of her conduct as to why she never passed key document (i.e Test Plan- PIP material on it) to the Decision Official. Further, Shelly Ferlemann signed two affidavits under penalty of perjury claiming she had supervisory role during the plaintiff termination (ECF # 111-6). Affidavits were submitted to the District Court as part of the defendant's two Summary Judgment Motion throughout the litigation. Plaintiff brought solid evidence, and showed Magistrate Judge – evidences includes deposition testimony of Decision Official under oath (ECF # 111-9) that she was not a supervisor, and two

emails claiming that Ferlemann was not a supervisor (ECF # 111-7, and 111-8) which is Rule 11 Violation of Federal Civil Procedure.

Page 40 of 40 under "WE ASK FOR THIS:" of the outdated Final Pretrial Order (ECF # 107) was the name of Adam Harrison who served as counsel to the plaintiff only up to the latter part of October 2016. On July 14, 2017, Plaintiff was his own "pro se" counsel. Implementation of outdated "20th day of October, 2016 Final Pretrial Order is also dubious and nonsensical because Defendant filed its second Motion for Summary Judgment and Memorandum in Support (ECFs # 60 and 61) on September 29, 2016. Plaintiff responded (ECF # 72) on October 12, 2016. Defendant replied (ECF # 78) on October 17, 2016.

Plaintiff believes Magistrate Judge committed an error of law by not following Chief Judge Amended Rule 16(b) Scheduling Order and prejudicing the plaintiff by depriving him of key witnesses and direct evidence that show unequivocal pretext during the trial when plaintiff is trying to prove discrimination and retaliation.

Additionally, On July 18, 2017, Defendant filed a Pleading (ECF # 111) invoking Federal Rule of Civil Procedure 72(A and/or B), appealing to the District Judge who was newly assigned to the case in order to correct an error that Magistrate Judge committed, by not implementing Chief Judge Amended Rule 16(b) Scheduling Order in a new Final Pretrial Order, but Appellant got no help.

Issue 3: If Magistrate and newly assigned Trial Judge did not have any intention to implement Chief Judge Opinion and Amended Rule 16(b) Scheduling

Orders for purpose of benefiting the defendant; therefore, what was the purpose of this circuitous path (see, issue 1 numerated 1-4) that was exercised and was initiated by Defendant? This exercise did not change anything for the Appellant, except postponing a trial to 8 Months later, causing plaintiff enormous legal fees, wasting time and resources, and prejudicing the plaintiff case all the way to a preordain subjective vague judgment. Except Appellant, others who participated in this frivolous exercise were paid. This gamesmanship is contrary to Rule 1 and Rule 11.

Issue 4: On July 25, 2017, Appellant filed a Motion and Memorandum for Procedural Protection for 5 Trial Days (ECF # 119), wherein he prayed for five (5) days to present his case which by now involved two and a half years of history in the district court. The night before trial, Appellant received an email from the trial Judge's chambers basically telling him that the Court was requiring him to accomplish all of his case-in-chief in only one day.

-----Original Message-----
From: Greg_Crapanzano
<Greg_Crapanzano@vaed.uscourts.gov>
To: kaandm <kaandm@aol.com>
Cc: virginia.vanvalkenburg
<virginia.vanvalkenburg@usdoj.gov>;
DShean <DShean@usa.doj.gov>
Sent: Mon, Jul 31, 2017 05:17 PM
Subject: Re: Honorable Judge John Gibney
Dr. Emami,

Judge Gibney has asked me to let you know that if you run out of witnesses tomorrow, meaning that there is still time in the day but you have asked the witnesses in attendance all of the questions you have and that Judge Gibney allows, then you will rest. This means that your case-in-chief will be deemed over, the defendant will then present the evidence it likes, and you will not have the opportunity to call any more witnesses at any point in the trial.

Please keep in mind that how long you think questioning of a witness may take might differ from how long you think it will take, and that the Judge may not allow you to pursue every avenue you wish based on a variety of reasons. Judge Gibney clearly instructed that you select seven witnesses for tomorrow.

I am ccing opposing counsel so that they are aware that I have informed you of this, and also so that you can get back to them immediately and inform them of any additional witnesses you may call tomorrow. Keep in mind that having them there tomorrow does not necessarily mean that you will get to them, and the Court instructed you to choose seven.

Please respond as soon as you possibly can to this email, ccing both attorneys for NASA, informing them of additional witnesses so that they can try to make arrangements for

these people to be there tomorrow on what is now very short notice after 5 p.m.

Dr. Emami, I am going to call you as soon as I send this to let you know and so that you can take action as soon as possible.

Greg

Greg Crapanzano
Law Clerk to the Honorable John A. Gibney, Jr.
United States District Court
Eastern District of Virginia
greg_crapanzano@vaed.uscourts.gov
(804) 916-2873

Defendant, in her letter to the Court of Appeals, refers in error to "Plaintiff Case-in-Chief". It is an error because Defendant went awry outside the scope of Plaintiff's direct examination during cross-examination with allowance of the judge while the trial judge ignoring Plaintiff's repeated objection.

Issue 5: Plaintiff proved his case before Jury

Even though Plaintiff did not have his direct evidence that show unequivocally pretext (swords and buckles) in order to easily established his case of retaliation and discrimination, he had to rely on many records evidences that connect nuances, and Deposition testimony of Jeff Balla (Comparator), testimony of Witte, and other witnesses. The night before the trial plaintiff sent a list of available evidence in the record and over 68 questions the trial Judge ask me to answer (see ECF 146-5) to prove

disparate expectation. Plaintiff followed Chief judge opinion as template.

Prior Appeals

Appellant has filed one other case in this court directly related to the instant case.

The Fourth Circuit Case Number was: 17-2392. Disposition: Dismissed by this Court May 29, 2018, but on June 2018 the District Court finally issued a ruling on Dr. Emami's Motion for Rehearing. No one knew or could not have known that the Court below would file a response and do so eight months later. Appellant, thinking that the litigants who receive communication by mail, have 3 extra days for filing. Appellant was one day late because of traffic in order to correctly toll the time to appeal under Rule 59(e).

Certificate of Compliance

Dr. Emami hereby certifies that this Brief does not exceed 3500 words, or 15 pages.

Respectfully Submitted,

/s/ Saied Emami
Plaintiff, *pro se*
103 Lakepoint Place
Yorktown, VA 23692
(757) 509-0451
s.emami@aol.com

VERIFICATION OF FACTS

Pursuant to 28 U.S.C. 1746, I, the undersigned declare, swear and affirm under penalty of perjury that the foregoing is true and correct, except as to those stated under information and belief, and as to those, I believe them to be true and correct.

Executed January 3, 2018, at York County, Virginia

/s/ Saied Emami
Plaintiff, *pro se*
103 Lakepoint Place
Yorktown, VA 23692
(757) 509-0451
s.emami@aol.com