APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 21, 2019
Lyle W. Cayce
Clerk

No. 18-11279

JOHN STANCU,

Plaintiff - Appellant

v.

HYATT CORPORATION/HYATT REGENCY DALLAS,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:17-CV-675
3:17-CV-2918

Before OWEN, Chief Judge, and JONES and SMITH, Circuit Judges.

PER CURIAM:*

John Stancu works as a shift engineer at the Hyatt Regency Dallas ("Hyatt"). Having filed about twenty lawsuits in the past thirty years, he is also a prolific *pro se* litigant. Hyatt is his latest target. In the instant action, Stancu asserts a variety of employment discrimination claims. Hyatt moved for summary judgment on all claims, and the magistrate judge recommended that the motion be granted and the action dismissed. The district court

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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accepted that recommendation. Stancu now appeals to this court. He challenges the summary judgment on three of his claims as well as three interlocutory orders: a consolidation order, an order denying a motion to compel, and a sanction order. Finding no reversible error of law or fact in these rulings, we AFFIRM.

BACKGROUND

Stancu accepted an entry-level, shift engineer position at Hyatt in October 2015. About a month after Stancu started the job, several of his co-workers told him that Hyatt was discriminating against them and asked him for advice. He directed them to some literature from the Equal Employment Opportunity Commission ("EEOC"), which explained how to file discrimination charges. Word of Stancu's conduct somehow made its way up to management. When management learned that Stancu was distributing EEOC literature, they allegedly began discriminating against him. The alleged discrimination took a variety of forms: breaking Stancu's tool cart and stealing his tools, refusing to place him on the work schedule, assigning him to jobs that were beyond his training, leaving derogatory notes in his tool cart, denying him an opportunity for promotion to the position of chief engineer, refusing to provide supplies needed for the job and his safety, impeding his medical treatment during leave, directing workers to harass him, sending thousands of work orders to his personal email, subjecting him to a "vicious move" that caused him to become ill, and assigning him to work inside "unventilated rooms infested with toxic and poisonous gases." This pattern of discrimination allegedly persisted until Stancu sued Hyatt.

Stancu filed his first lawsuit against Hyatt on March 8, 2017. A few months later, he moved to amend the complaint. That motion, however, failed to comply with the court's standing order on non-dispositive motions and was

accordingly stricken. Stancu filed a second lawsuit against Hyatt on October 23, 2017. Around the same time, he renewed his motion to amend the complaint in his first lawsuit. The facts and claims in Stancu's proposed amended complaint were substantially similar to the facts and claims raised in the second lawsuit. The district court consolidated the two cases and designated Stancu's proposed amended complaint as the consolidated complaint. The consolidated complaint raised claims of unlawful discrimination under the Age Discrimination in Employment Act ("ADEA"), unlawful retaliation, violation of the Family and Medical Leave Act ("FMLA"), creation of a hostile work environment under the ADEA, breach of contract, and pattern-and-practice discrimination.

The case was assigned to a magistrate judge and proceeded to discovery. Believing that Hyatt was withholding documents, Stancu filed a motion to compel. The magistrate judge denied that motion and asked Stancu to explain why he should not be sanctioned for abusing the discovery process. Stancu failed to respond, and the magistrate judge ordered him to pay Hyatt $3,535.30 in attorney fees.

Hyatt eventually moved for summary judgment on each of Stancu's claims. The magistrate judge recommended that Hyatt's motion be granted and the action dismissed with prejudice. Stancu filed few objections to that recommendation. The objections he did file were aimed less at the magistrate judge's legal conclusions and more at correcting what he perceived to be the judge's "twisting" of the facts to fit a "biased" legal standard. The district court rejected Stancu's objections and accepted the magistrate judge's recommendation. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate only if the record demonstrates 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. PRO. 56(a). This court generally reviews a district court's grant of summary judgment *de novo*. *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009), *abrogated on other grounds by Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018). This standard of review, however, is altered when a party fails to object to a magistrate judge's legal conclusions and those conclusions are accepted by the district court. In such a situation, a party is barred, "except upon grounds of plain error, from attacking on appeal the unobjected-to proposed . . . legal conclusions accepted by the district court, provided that the party [w]as . . . served with notice that such consequences w[ould] result from a failure to object." *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (footnote omitted), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1).

The magistrate judge warned Stancu that "[f]ailure to file specific written objections w[ould] bar [him] from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except on grounds of plain error." Stancu nonetheless objected to only the following conclusions: (1) that he failed to raise allegations that could support a failure-to-promote claim; (2) that he failed to present evidence establishing a cognizable retaliation claim; and (3) that he failed to raise a genuine issue of fact that Hyatt's stated reasons for various employment actions were pretextual. The court reviews these issues *de novo*. All other issues pertaining to the district court's acceptance of the magistrate judge's findings of fact and conclusions of law are reviewed for plain error. Under this standard, the court has "discretion to correct unobjected-to . . . errors that are

plain . . . and affect substantial rights." *Id.* at 1424 (emphasis removed). "In exercising that discretion, [the court] 'should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 1779 (1993)).

The district court's consolidation order is reviewed for abuse of discretion, *Alley v. Chrysler Credit Corp.*, 767 F.2d 138, 140 (5th Cir. 1985), as are the magistrate judge's orders denying Stancu's motion to compel and imposing sanctions, *see United States v. $49,000 Currency*, 330 F.3d 371, 376 (5th Cir. 2003) (sanctions); *Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000) (discovery rulings).

DISCUSSION

Stancu's rambling and conclusory briefing appears to contend that the district court erroneously granted Hyatt's motion for summary judgment, and he challenges three interlocutory orders and asserts, in broad-sweeping terms, that he was deprived of his constitutional rights. Each of these arguments is considered in turn.

I

The magistrate judge liberally construed Stancu's complaint to assert six claims: (1) age discrimination under the ADEA; (2) unlawful retaliation under unspecified statutes; (3) hostile work environment under the ADEA; (4) violations of the FMLA; (5) breach of contract under Texas state law; and (6) pattern-and-practice discrimination. Stancu addresses only the first three of these claims on appeal, and we need not review the others. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004) ("Issues not raised or inadequately briefed on appeal are waived.").

A

Stancu argues that Hyatt violated the ADEA by unfairly denying him the opportunity to apply for promotion to a vacant chief engineer position. The district court dismissed this claim because, among other reasons, Stancu failed to establish a *prima facie* case of age discrimination.

To survive summary judgment in a failure-to-promote, age discrimination case, an "employee must raise a genuine issue of material fact as to each element of his *prima facie* case." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680 (5th Cir. 2001) (emphasis added). "[T]he employee must demonstrate that 1) he belongs to the protected class, 2) he applied to and was qualified for a position for which applicants were being sought, 3) he was rejected, and 4) another applicant not belonging to the protected class was hired." *Id.* at 680–81. A plaintiff's burden of demonstrating that he was qualified for the position for which he was not promoted is not onerous. He must simply provide evidence that he met the objective qualifications for the position. *Id.* at 681. Stancu fails to present such evidence.

Hyatt offered affidavit evidence describing the qualifications for the position of chief engineer. It is a management position four levels above Stancu's entry-level position of shift engineer, and as a matter of policy and practice, "a shift engineer at Hyatt is not eligible or qualified for a promotion directly to chief engineer." To qualify for the position of chief engineer, an employee must have worked his way through the progression of promotions or have equivalent experience at another hotel. Stancu neither disputes factually that these are Hyatt's objective requirements, nor has he shown that he meets the requirements. Accordingly, he cannot claim to have created a genuine issue of material fact as to this critical qualification element of his *prima facie* case. Summary judgment in Hyatt's favor was therefore appropriate.

B

Stancu next raises a claim of retaliation (under no specific statute). The district court dismissed this claim because regardless whether the claim arose pursuant to Title VII, the ADEA, or the FMLA, Stancu failed to establish a *prima facie* case of retaliation.

Retaliation claims under each of these statutes are analyzed using the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25 (1973). The plaintiff first bears the burden of proving a *prima facie* case of retaliation. To establish a *prima facie* case, a plaintiff must demonstrate that (1) he engaged in a protected activity pursuant to one of the statutes, (2) an adverse employment action occurred, and (3) a causal link exists between the protected activity and the adverse employment action. *See Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702, 705 (5th Cir. 2016) (FMLA and Title VII); *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 259 (5th Cir. 2001) (ADEA). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse action. *See Wheat*, 811 F.3d at 710. The plaintiff then bears the burden of showing that the employer's stated reason was a pretext for retaliation. *See id.* at 715.

The district court concluded that Stancu failed to carry his burden of demonstrating that he suffered an adverse employment action. This conclusion was based on the court's recitation that to qualify as "adverse," the employment action must be "an 'ultimate employment decision' or its factual equivalent." Taken alone, this statement represents an outdated and mistaken understanding of the law[1] because, as the Supreme Court explained in the

[1] The EEOC makes this point in its amicus brief. Hyatt argues that the EEOC's brief "expands the scope of the appeal" and thus should be disregarded. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006). This court, however, reviews Stancu's

context of retaliation claims, an adverse employment action is any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006). Yet when we review Stancu's allegations under the *Burlington* lens, Stancu still fails to create a material issue of fact that would preclude summary judgment.

Most of Stancu's allegations fall well below the level of any kind of adverse employment action. His allegation, for instance, that work orders were sent to his personal e-mail address comes nowhere close to qualifying as an adverse employment action. *See, e.g., Cabral v. Brennan*, 853 F.3d 763, 767 (5th Cir. 2017) (concluding that a two-day suspension from work exacted no "physical, emotional, or economic toll" and thus did not qualify as an adverse employment action); *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 485–86 (5th Cir. 2008) (being treated "poorly" and denied break times do not qualify as adverse employment actions). The same can be said of his complaints that he was the target of derogatory notes, subjected to extra scrutiny at work, received an unfair job performance rating, and was given repeated verbal warnings. *See, e.g., Cabral*, 853 F.3d at 767; *Aryain*, 534 F.3d at 485–86.

Some of Stancu's allegations perhaps could constitute materially adverse employment actions but for their conclusory nature. He claims, for instance, that he was assigned to "work inside unventilated rooms infested with toxic and poisonous gases," but he does not present evidence to show that this type of work assignment was atypical or unauthorized for shift engineers. The same goes for his assertions that he was assigned job duties for which he was not trained, deprived of supplies needed for the job, and subjected to a "vicious"

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retaliation claim *de novo* and must apply the law correctly, giving no deference to the district court. That said, it is not likely that the magistrate judge misapplied *Burlington,* since he cited several post-*Burlington* cases and the Supreme Court decision itself.

move. These allegations are simply too conclusory. They fail to provide the detail necessary to create a genuine issue of material fact that Stancu was the target of an adverse action that would have dissuaded a reasonable worker from lodging discrimination charges. *See Wheat*, 811 F.3d at 707 (concluding that "bare-bone" allegations, without contextual detail, are insufficient to qualify as materially adverse actions).

Stancu also avers that Hyatt purposefully left him off the work schedule, but Hyatt's evidence explains this was done by mistake, the scheduling problem was immediately corrected, and it has not been repeated. Stancu fails to carry his burden of producing evidence that shows that Hyatt's stated reason was a pretext for retaliation.[2] *See Septimus v. Univ. of Houston*, 399 F.3d 601, 607 (5th Cir. 2005). The district court's grant of summary judgment on Stancu's retaliation claim was correct.

C

Stancu also argues that he was subjected to a hostile work environment. He did not, however, object to the magistrate judge's recommendation that this claim be resolved on summary judgment. This court therefore is limited to reviewing the district court's judgment for plain error. *See Douglass*, 79 F.3d at 1417.

To establish a hostile work environment claim under the ADEA, an employee must show that "(1) he was over the age of 40; (2) [he] was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on

[2] Although the district court did not rule on this basis, we may affirm on any issue raised below that is supported by the record. *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank*, 754 F.3d 272, 276 (5th Cir. 2014).

the part of the employer." *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441 (5th Cir. 2011).

The magistrate judge reasoned that the "only age-based harassment that Mr. Stancu offer[ed] evidence of [consists of] the notes that contained insults about his age." Stancu admitted that he had no suspicions as to who left the notes and did not ask anyone in Hyatt's management if they were responsible for them. This admission, the magistrate judge concluded, negates Stancu's ability to establish that "there exists some basis for liability on the part of the employer." *Id.* Stancu asserts that he "report[ed] [the notes] to management, and they didn't stop" them from coming. But Stancu fails to specify how many notes were reported, the contents of those notes, and, perhaps most importantly, the frequency or content of any notes that he received after he reported the problem. It would be sheer speculation to conclude that "there exists some basis for liability on the part of the employer." *Id.* We thus cannot say that the district court plainly erred.

II

Stancu's failure-to-promote, retaliation, and hostile work environment claims occupy a small portion of his opening brief. Most of it is dedicated to detailing the "malicious actions" of the magistrate judge and the district court. These "malicious actions" primarily take the form of three interlocutory orders: a consolidation order, a discovery order, and a sanction order. Having reviewed these orders, the court concludes that neither the magistrate judge nor the district court abused its discretion

A

Stancu first takes aim at the district court's consolidation order. That order, he argues, effectively denied him the "right" to amend his pleadings. Stancu is mistaken. Because his amended complaint became the designated

complaint when his two cases were consolidated, Stancu is simply wrong when he suggests that he was somehow prevented from ever amending his complaint. Setting this point aside, "[c]onsolidating actions is proper when two or more district court cases involve common questions of law and fact and the district judge finds that consolidation would avoid unnecessary costs or delay." *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 761–62 (5th Cir. 1989); *see also* FED. R. CIV. PRO. 42(a). These conditions are present here. The decision to consolidate the two cases was plainly correct.

B

Stancu next argues that the magistrate judge erred when he denied Stancu's motion to compel. "A trial court's discovery ruling should be reversed only in an unusual and exceptional case." *N. Cypress Med. Ctr. Operating Co. v. Aetna Life Ins. Co.*, 898 F.3d 461, 481 (5th Cir. 2018) (quoting *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 499 (5th Cir. 1985)) (internal quotation marks omitted). This is not such a case. The magistrate judge amply explained why Stancu's discovery requests were not relevant, not proportional, or otherwise objectionable. For the reasons he provided, the magistrate judge did not abuse his discretion when he denied Stancu's motion to compel.

C

Stancu also contests the sanction order imposed by the magistrate judge. A party, however, "may not assign as error a defect in [a nondispositive] order not timely objected to." FED. R. CIV. PRO. 72(a). Stancu did not object to the magistrate judge's nondispositive sanction order. This issue is therefore not preserved, and we do not address it. *See Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1137 (5th Cir. 1987) ("[P]retrial matters referred by a trial judge to a magistrate [judge] must be appealed first to the district court.").

III

Stancu's final claim of error is that his constitutional rights "were arbitrarily taken away" from him. But precisely what these rights are and how he was deprived of them are questions that Stancu fails to answer. Stancu makes passing reference to the Fifth, Seventh, and Fourteenth Amendments. But he fails to explain how he was deprived of the rights these amendments guarantee. "Although pro se briefs are afforded liberal construction, even pro se litigants must brief arguments in order to preserve them." *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008) (citation omitted). And for an argument to be adequately briefed, a party must do more than offer conclusory statements and general citations to constitutional amendments. *See Nichols v. Scott*, 69 F.3d 1255, 1287 n.67 (5th Cir. 1995). Yet this is all Stancu has done—provide conclusory allegations and perfunctory references. His constitutional arguments, whatever they may be, are thus not preserved, and we do not address them.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B

John Stancu
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Dallas, Texas 75313
(202) 689-9233

Via Certified Mail, No. 7016 2710 0000 3933 7409

November 21, 2019

Mrs. Lyle W. Cayce, Clerk
U.S. Court of Appeals, Fifth Circuit
Office of the Clerk
600 S. Maestri Place
New Orleans, LA 70130

RE: Case No. 18-11279
John Stancu v. Hyatt Corp./Hyatt Regency Dallas

Dear Mrs. Cayce,

I am the appellant in the above referenced case, which I filed prose and I have no access to your website.
This letter is my third request for a copy of the ruling that was made by your court on October 21, 2019, and was never mailed to me. During this time frame of over one month I spoke with two of your deputy clerks and each time I was told that a copy will be "re-mailed". As of today November 21, 2019, I still did not received anything.
Since here is no postal error, and all of your other less important correspondence arrived within 3-4 days of delivery, the only logic conclusion is that this is a slick obstruction maneuver to impede my appeal to the U.S. Supreme Court.

Please mail the copy of the ruling and the mandate in the enclosed SASE Priority Mail envelope.

Sincerely,

John Stancu

John Stancu
Appellant

APPENDIX B

APPENDIX C

No. 18-11279

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BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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APPENDIX C

No. 18-11279

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Table of Authorities

Cases

Statute and Rule

Statement of Interest

Congress charged the Equal Employment Opportunity Commission ("EEOC") with interpreting, administering, and enforcing the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.* The district court in this case adopted the magistrate's flawed analysis in full, conflating the adverse action standard for a retaliation claim with the more stringent adverse action standard for a substantive discrimination claim. This approach violates both the Supreme Court's and this Court's precedent. The EEOC has a substantial interest in ensuring that district courts properly understand and apply the laws it enforces.

This case also raises important questions involving the quantity and quality of evidence required for a jury to find that a plaintiff was subjected to a hostile work environment, and the potential liability of an employer for harassment by anonymous individuals. Resolution of these issues is directly relevant to the EEOC's enforcement efforts. Accordingly, the EEOC files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

Statement of the Issues[1]

1. Should the district court have rejected the magistrate's conclusion that Stancu must show an "ultimate employment decision" for his retaliation claim

[1] The EEOC takes no position on any other issue in this case. We note that the Appellant has not requested oral argument. Given the importance of the issues

rather than simply an action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination?

2. Did the district court wrongly usurp the jury's fact-finding role by agreeing with the magistrate that the anonymous age-based notes on Stancu's tool cart were not objectively offensive as a matter of law, and by failing even to consider other evidence of an age-based hostile work environment?

3. Should the district court have rejected the magistrate's conclusion that Hyatt could not be liable for a hostile work environment based on anonymous notes that may have been left by coworkers?

Statement of the Case

The ADEA prohibits discrimination on the basis of age, including age-based hostile work environments. It also prohibits retaliation for opposing age-based discrimination. John Stancu, a pro se litigant, sued Hyatt for a hostile work environment and retaliation. The district court granted summary judgment on both claims.

A. Statement of Facts

Stancu began working for Hyatt as an entry-level engineer in October 2015. ROA.1547. He testified that approximately one month after he started his job,

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addressed in this brief, however, the EEOC would welcome the opportunity to present oral argument if this Court would find it helpful.

several coworkers told him that Hyatt was discriminating against them. The coworkers asked Stancu for advice, and he gave them EEOC literature explaining how to file discrimination charges. ROA.1548-49, 1679.

Stancu alleges that after management learned of this action, he was subjected to a hostile work environment because of his age and/or in retaliation for having advised his coworkers about employment discrimination. ROA.928. He testified that over the course of six months, he discovered a series of offensive and threatening notes on his tool cart. ROA.1632. One note said "Hyatt Retirement and Funeral Home—R.I.P. Mr. John," ROA.1006; another said "For Free Wheelchair and Diapers Call AARP 1-800-222-4357," ROA.1007; one had directions to the retirement office, ROA.1613; one said "Wellcome [sic] to Hell fucking old crook," ROA.1685; and one was a drawing of an old man in a wheelchair carrying his engineering tools, with a sign on the wheelchair saying "John, Unit 1," a reference to Stancu's work unit. ROA.1586, 1698. Stancu does not know who left the notes and did not ask anyone whether they were responsible. ROA.1576. He did, however, report the notes to the human resources director, who did nothing. ROA.1576-77, 1632.

Stancu also testified that an unknown person broke into his tool cart and stole his tools, ROA.1551, 1559, 1631, 1679-80, and that the chief engineer sent coworkers to check on his whereabouts every day. ROA.1582, 1632, 1635.

Moreover, he related, Hyatt omitted him from the work schedule for one week (but paid him for sick leave), ROA.1552, 1554, 1679-80, and Hyatt sent numerous emails to his personal email account rather than his Hyatt account. ROA.1574, 1679-80. Stancu further testified that management assigned him additional responsibilities for which he was not trained and then criticized him for falling behind, refused to provide supplies he needed for his job and his safety, assigned him to work in "unventilated rooms infested with toxic and poisonous gases," and effectively doubled his workload by transferring a coworker to another department and not replacing her for at least one year. ROA.1632, 1635, 1679-80. Finally, Stancu alleged, Hyatt refused to consider him for a promotion to chief engineer. He testified that the facilities manager told him not to bother applying for the promotion because "[t]hey're looking for somebody younger." ROA.1579-80.

Stancu never received any formal discipline, suspension, termination, or pay cuts in the period after he handed out EEOC literature. To the contrary, he received a raise of $2.00 per hour. ROA.1539.

B. District Court Order

The magistrate judge first recommended that the district court grant summary judgment on the retaliation claim. A prima facie case of retaliation, the magistrate observed, "requires a showing that (1) [Mr. Stancu] engaged in a protected activity pursuant to one of the statutes, (2) an adverse employment action

occurred, and (3) there exists a causal link connecting the protected activity to the adverse employment action." ROA.1865 (citation omitted). According to the magistrate, the adverse action prong "'require[s] an "ultimate employment decision" or its factual equivalent.'" *Id.* (citing *Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 396-97 (5th Cir. 2016) (per curiam)).

To show an "ultimate employment decision," the magistrate explained, Stancu had to show "'an employment decision that affects the terms and conditions of employment ... such as hiring, firing, demoting, promoting, granting leave, and compensating.'" *Id.* (quoting *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014) (ellipsis in original)). The magistrate also pointed to two additional authorities: a passage in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 62 (2006), stating that Title VII's anti-discrimination provision is limited to employment-related actions, and his own previous recommendation in a different case providing that adverse employment actions must be ultimate employment decisions. ROA.1865 (citing *Thomas v. Johnson*, No. 3:15-cv-1005-N-BN, 2015 WL 5326192, at *6 (N.D. Tex. Aug. 7, 2015)). Because Stancu had not made this showing, the magistrate concluded, he could not establish a prima facie case of retaliation. ROA.1866.

The magistrate also recommended that the district court grant summary judgment on the age-based hostile work environment claim. First, according to the

magistrate, "The only age-based harassment that Mr. Stancu offers evidence of are the notes that contained insults about his age that were left on his tool cart. And he has not shown that these age-based offenses considered alone are objectively offensive." ROA.1868 (citing *Hackett v. United Parcel Serv.*, 736 F. App'x 444 (5th Cir. 2018)).

The magistrate added that Stancu had not shown that Hyatt's management was responsible for the age-based notes. "Mr. Stancu … admitted at his deposition that he had no suspicions of who left the notes on his cart and did not ask anyone in Hyatt's management if they were responsible for the notes, thus negating the fourth prong [of the prima facie case]—that 'there exists some basis for liability on the part of the employer.'" *Id.* (brackets added) (citation omitted).

The district court accepted the magistrate's findings, conclusions, and recommendations without discussion. ROA.1948.

Summary of Argument

The district court erred by granting summary judgment on Stancu's retaliation claim based on the magistrate's conclusion that Stancu could not show an "ultimate employment decision." This Court applies the "ultimate employment decision" standard in the context of substantive discrimination claims, but not retaliation claims. The Supreme Court has held, and this Court has recognized, that a plaintiff may establish a retaliatory adverse action by showing only "that a

reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N.*, 548 U.S. at 68 (some internal quotation marks omitted) (citation omitted); *see also, e.g.*, *McCoy v. City of Shreveport*, 492 F.3d 551, 558 (5th Cir. 2007).

The court also erred by adopting the magistrate's conclusion that Stancu had introduced insufficient evidence of a hostile work environment. Without even describing the content of the notes that Stancu found on his tool cart, the magistrate determined as a matter of law that they were not objectively offensive—a conclusion that is insupportable based on what the notes actually said. Moreover, the magistrate characterized these notes as Stancu's sole evidence of a hostile work environment, refusing to consider his testimony of behavior that was not explicitly age-based but may have been discriminatory nonetheless.

Finally, the court wrongly accepted the magistrate's conclusion that Hyatt could not be responsible for a hostile work environment because Stancu could not identify his harasser(s) and did not ask management personnel if they were responsible for the offensive notes. An employer may be liable for a hostile work environment under the ADEA whether or not management perpetrates the harassment, and whether or not the harasser is anonymous. The controlling question is whether the employer knew or should have known of the harassment

and failed to take prompt remedial action. Stancu testified that he told Hyatt's human resources director about the harassment but that no one in management responded to his complaints. This testimony, if credited by a factfinder, is sufficient to support employer liability.

Argument

A. In erroneously applying the "ultimate employment action" standard, the district court failed to apply controlling precedent of the Supreme Court and this Court holding that an adverse action in the retaliation context is one that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."

In agreeing with the magistrate that a retaliatory adverse action must be an "ultimate employment decision," the district court wrongly failed to apply the standard for retaliation claims, applying instead this Court's adverse-action standard for substantive discrimination claims. *See Stroy v. Gibson on behalf of Dep't of Veterans Affairs*, 896 F.3d 693, 699 (5th Cir. 2018) (substantive discrimination standard). Prior to 2006, this Court did apply the "ultimate employment decision" standard to retaliation claims. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997). However, the Supreme Court expressly overruled *Mattern* in *Burlington Northern*. 548 U.S. at 60, 67.

In *Burlington Northern*, the Supreme Court relied on differences in statutory language to interpret the "adverse action" standard of Title VII's anti-retaliation provision more broadly than the "adverse action" standard applicable to the

substantive prohibition on discrimination. In the retaliation context, the Court held, a plaintiff must show "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (citations and some internal quotation marks omitted).

Although the anti-retaliation provision "cannot immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience," the Court said, it "prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC.'" *Id.* at 68 (citation omitted). "[T]he significance of any given act of retaliation will often depend upon the particular circumstances," the Court explained. *Id.* at 69. "[An] act that would be immaterial in some situations is material in others." *Id.* (citation and internal quotation marks omitted).

In announcing this new standard, the *Burlington Northern* Court expressly repudiated this Court's "ultimate employment decision" requirement in the retaliation context. The Court explained, "We ... reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called 'ultimate employment decisions.'" *Id.* at 67.

This Court has acknowledged that *Burlington Northern* changed circuit law. *See McCoy*, 492 F.3d at 559 ("In the recent case of *Burlington Northern* … the Supreme Court abrogated our approach in the *retaliation* context in favor of the standard used in the Seventh and D.C. Circuits, which defines an adverse employment action as any action that 'might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (emphasis in original); *see also Donaldson v. CDB Inc.*, 335 F. App'x 494, 507 (5th Cir. 2009) ("While pre-*Burlington Northern*, our court rejected the notion that retaliatory harassment could be sufficiently adverse to be considered actionable, the new, *Burlington Northern* standard makes clear that a genuine issue of material fact exists for whether the conduct against Donaldson … was such that it 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (citations omitted).

The magistrate here cited *Burlington Northern* but ignored the case's central holding distinguishing between anti-discrimination and anti-retaliation claims. ROA.1865. The magistrate also cited *Brooks*, 640 F. App'x at 396-97, for the proposition that an adverse employment action "require[s] an 'ultimate employment decision' or its factual equivalent," but ignored that it is a discrimination case, not a retaliation case. ROA.1865. Finally, the magistrate quoted his own prior opinion in *Thomas*, 2015 WL 5326192, at *6, for the

proposition that "[t]hreats, reprimands, and warnings, because they do not constitute ultimate decisions, do not suffice as adverse employment actions." ROA.1865. The magistrate ignored, however, that this portion of *Thomas* related to a discrimination claim, not a retaliation claim.

The magistrate was plainly confused about the difference between adverse actions vis-à-vis retaliation claims versus substantive discrimination claims. Although this Court has already explained the import of *Burlington Northern, see, e.g., McCoy*, 492 F.3d at 558, the EEOC urges the Court once again to explain that a retaliatory adverse action need not constitute an ultimate employment decision. All that is required is that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N.*, 548 U.S. at 68 (citation omitted).

The EEOC takes no position on whether Stancu adduced sufficient evidence to satisfy this standard, but we note that at least some of Stancu's allegations are of the type that would qualify as sufficiently adverse if adequately substantiated. If a plaintiff could show that his employer set him up to fail by assigning him jobs for which he was not trained, made him work in unsafe conditions, effectively doubled his workload by transferring a coworker and not replacing her, or refused to consider him for a promotion (for which he was eligible), *see supra* at 3-4, any or all of these would constitute an adverse action under *Burlington Northern*. *See,*

e.g., *Rochon v. Gonzales*, 438 F.3d 1211, 1219-20 (D.C. Cir. 2006) (failure to investigate death threat made against FBI agent by federal prison inmate is retaliatory adverse action under Title VII); *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 319-20 (5th Cir. 2004) (denying promotions after retaliatory modification of promotion criteria so as to exclude plaintiffs from consideration constitutes adverse action for purposes of Title VII retaliation claim); *Ray v. Henderson*, 217 F.3d 1234, 1243-44 (9th Cir. 2000) (decreasing amount of time employee has to complete same amount of work constitutes retaliatory adverse action); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 924 (3d Cir. 1997) (under Title VII, "engag[ing] in a pattern of antagonistic behavior against Woodson after his complaints, setting him up to fail in a poorly performing division and then terminating him through a 'sham' ranking procedure" could constitute illegal retaliation).

B. The district court wrongly discounted most of Stancu's evidence of age-based harassment and did not consider the totality of the circumstances in assessing Stancu's hostile work environment claim.

The magistrate disregarded well-established law regarding hostile work environment claims under the ADEA. As this Court has explained, a plaintiff alleging an age-based hostile work environment must show that "(1) he was over the age of 40; (2) [he] was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an

objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer." *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441 (5th Cir. 2011). Whether a work environment is "objectively intimidating, hostile, or offensive," *id.*, depends on whether the harassment is "severe or pervasive," which "can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

"Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable [hostile work environment] claim as well as a continuous pattern of much less severe incidents of harassment." *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007) (Title VII). Thus, "a regular pattern of frequent verbal ridicule or insults sustained over time can constitute severe or pervasive harassment sufficient to violate Title VII." *Id.*

Here, the magistrate made several errors. First, he improperly minimized the impact of the notes Stancu found on his tool cart. Rather than describing their actual contents, the magistrate referred to the notes only in vague terms. ROA.1868. The notes, however, reflect obvious animosity based on Stancu's age, or at least a jury could so find. They say:

(1) "Hyatt Retirement and Funeral Home—R.I.P. Mr. John." ROA.1006.

(2) "For Free Wheelchair and Diapers Call AARP 1-800-222-4357." ROA.1007.

(3) "Wellcome [sic] to Hell fucking old crook." ROA.1685.

(4) A drawing of an old man in a wheelchair carrying his engineering tools, with a sign on the wheelchair saying "John, Unit 1." ROA.1698.

(5) Directions to the retirement office. ROA.1613.

The magistrate erred by concluding as a matter of law that these notes were not objectively offensive. ROA.1868. It is difficult to imagine how a reasonable employee in Stancu's position would not be offended by notes referring to him as a "fucking old crook" or suggesting that he needs a wheelchair and diapers because of his advanced age, let alone pointing him to a "retirement and funeral home" with instructions to "R.I.P." The sole case that the magistrate cited to support his conclusion that the notes were not objectively offensive involved another question entirely: whether the plaintiff had alleged sufficient incidents over the span of seven years to show severe or pervasive harassment. *Id.* (citing *Hackett*, 736 F. App'x at 450). That case said nothing about what would or would not constitute an objectively offensive remark.

Moreover, the magistrate ignored other evidence of harassment. Stancu alleged that, among other things, his tools were sabotaged, his work schedule was reduced, and he was forced to work in unventilated rooms filled with toxic gas. ROA.1679-80. The magistrate characterized this sworn testimony as insufficiently detailed and "conclusory," ROA.1866, but a jury might well disagree. Affidavits

are "conclusory" only when their allegations are speculative or vague. *See, e.g.*, *D'Onofrio v. Vacation Pubs., Inc.*, 888 F.3d 197, 208 (5th Cir. 2018) (allegations are speculative if not based on personal knowledge); *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702, 707 (5th Cir. 2016) (inadequate to allege that "assignment of janitorial duties was a retaliatory, materially adverse action" without describing the janitorial duties).

Stancu's affidavit was neither speculative nor vague. He relied on personal knowledge and testified about specific incidents of negative treatment. His lack of details might render his testimony less believable, but credibility determinations are for a jury. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Decorte v. Jordan*, 497 F.3d 433, 438 (5th Cir. 2007).

The conduct that Stancu described in his affidavit was not overtly discriminatory based on age, but a reasonable jury could conclude that the age animus revealed in the notes also tainted the conduct that was not explicitly age-based. *See, e.g.*, *WC&M Enters.*, 496 F.3d at 400 (in light of explicit verbal abuse based on national origin, jury could conclude that harasser's banging on employee's glass partition was also motivated by the same animus); *Raniola v. Bratton*, 243 F.3d 610, 621 (2d Cir. 2001) ("To demonstrate that all of the alleged abuse was on account of sex, [employee] may … show that the sex-based verbal abuse indicated that other adverse treatment was also suffered on account of

sex ...."); *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006) (motivation for facially neutral conduct may be unclear when viewed in isolation, but previous statements may show that later conduct resulted from illegitimate motives), *overruled in part on other grounds*, *Burlington N.*, 548 U.S. at 67-68. This is why the totality of the circumstances test requires courts to consider evidence of abusive conduct that is not explicitly age-based as part of the hostile work environment at issue. *See, e.g., Harris*, 510 U.S. at 23.

C. The district court wrongly held that Hyatt could not be liable for a hostile work environment because Stancu did not know who had left him anonymous, age-related notes and did not ask management personnel if they were responsible.

Contrary to the magistrate's apparent reasoning, ROA.1868, an employer may be liable for a hostile work environment whether or not management is behind the harassment. If an employer "knew or should have known about the hostile work environment yet allowed it to persist," it may be held liable for harassment by coworkers or even by third parties. *Gardner v. Pascagoula, L.L.C.*, 915 F.3d 320, 321-22 (5th Cir. 2019) (third parties); *Pullen v. Caddo Parish Sch. Bd.*, 830 F.3d 205, 213 (5th Cir. 2016) (coworkers).

It does not matter that Stancu did not know who left the notes on his cart and did not ask anyone in management if they were responsible. *See* ROA.1576-77. "An employer is not subject to a lesser standard simply because an anonymous actor is responsible for the offensive conduct." *Pryor v. United Air Lines, Inc.*, 791

F.3d 488, 498 (4th Cir. 2015); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 951 (7th Cir. 2005) (plaintiff's "inability to verify the authorship of the racist graffiti poses no obstacle to his establishing that this graffiti produced or contributed to a hostile work environment"). Nor does the difficulty of identifying an anonymous actor necessarily relieve an employer of the obligation to try to do so. *See Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1149 (10th Cir. 2008) (possible responses to complaints of anonymous harassment include collecting handwriting samples to compare with handwriting on graffiti or interviewing employees); *cf. Hirras v. Nat'l R.R. Passenger Corp.*, 95 F.3d 396, 399-400 (5th Cir. 1996) (employer responded appropriately by taking complaints seriously and investigating anonymous telephone calls and notes). "Although there may be difficulties with investigating anonymous acts of harassment, those difficulties at most present factual questions about the reasonableness of [an employer's] response; they are not sufficient to support a finding that [an employer] acted reasonably as a matter of law." *Tademy*, 614 F.3d at 1149.

Here, a reasonable jury could readily find that Hyatt knew or should have known of the harassment but failed to take prompt remedial action. Stancu testified, "I report[ed] [the notes] to the management, and they didn't stop it .... I told the HR director what happened, and he said that he's going to get to the bottom of it. He seemed ... to be real. [But] [w]hat he did ...amounts to ...

nothing." ROA.1576-77. This testimony, if credited by a trier of fact, is sufficient to support employer liability.

Conclusion

The district court erred in accepting the magistrate's findings, conclusions, and recommendation. The magistrate first misunderstood the law governing retaliatory adverse actions. Then, with regard to the substantive hostile work environment claim, the magistrate minimized the impact of the explicitly age-based notes left on Stancu's tool cart, failed to consider the totality of the circumstances, and usurped the jury's role in making credibility determinations. Finally, the magistrate wrongly said that Hyatt could not be liable for a hostile work environment because Stancu did not know who had left him anonymous, age-related notes and did not ask management personnel if they were responsible. For all of these reasons, the EEOC respectfully urges this Court to reverse the award of summary judgment and remand for further proceedings.

Respectfully submitted,

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Certificate of Service

I, Gail S. Coleman, certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system this 1st day of March, 2019.

I certify that I served the following counsel of record, who has consented to electronic service, with the foregoing brief via the appellate CM/ECF system this 1st day of March, 2019:

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I certify that I served the following pro se litigant with two paper copies of the foregoing brief this 1st day of March, 2019, via U.S. mail, postage pre-paid:

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 4,056 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: March 1, 2019

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHN STANCU,	§	
	§	
Plaintiff,	§	
	§	
V.	§	No. 3:17-cv-675-S
	§	
HYATT CORPORATION/HYATT REGENCY, DALLAS,	§	(Consolidated with: No. 3:17-cv-2918-L)
	§	
Defendant.	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. An objection was filed by Plaintiff. The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

SO ORDERED this 18th day of September, 2018.

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHN STANCU, Plaintiff, V. HYATT CORPORATION/HYATT REGENCY, DALLAS, Defendant.	§ § § § § § § § § §	No. 3:17-cv-675-S (Consolidated with: No. 3:17-cv-2918-L)

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, it is ORDERED, ADJUDGED, and DECREED that Defendant Hyatt Corporation's motion for summary judgment [Dkt. No. 82] is GRANTED and this action is DISMISSED with prejudice.

SIGNED this 18th day of September, 2018.

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHN STANCU, Plaintiff, V. HYATT CORPORATION/HYATT REGENCY, DALLAS, Defendant.	§ § § § § § § § § §	No. 3:17-cv-675-S-BN (Consolidated with: No. 3:17-cv-2918-L)

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This single-party action filed by a plaintiff proceeding *pro se* raising claims of employment discrimination has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b). *See* Dkt. Nos. 9 & 86.

Defendant Hyatt Corporation moves for summary judgment on Plaintiff John Stancu's claims. *See* Dkt. Nos. 82, 83, & 84. Mr. Stancu filed a response. *See* Dkt. Nos. 87, 88, & 89. And Hyatt filed a reply brief. *See* Dkt. No. 95.

The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should grant the motion for summary judgment and dismiss this action with prejudice.

Applicable Background

Mr. Stancu was hired as a shift engineer at the Hyatt Regency Dallas in October of 2015, *see* Dkt. No. 89 at 4; Dkt. No. 84-1 at 1, and was still so employed at least at

the time Hyatt moved for summary judgment, *see* Dkt. No. 84-1 at 1. As a shift engineer – the entry-level position in the engineering position – Mr. Stancu's duties are to conduct repairs on guest rooms. *See id.*

And Mr. Stancu states in the affidavit that he made in response to the summary judgment motion that

> [a]bout one month after I started my job, several of my co-workers told me that Hyat is discriminating against them and asked me for advise. I gave them EEOC literature containing information about how to stand up to workplace discriminations.
>
> Hyatt found out about my distribution of EEOC antidiscrimination brochures in their hotel and immediately engaged in an onslaught of retaliations against me. The retaliations escalated daily under various forms: breaking the tools cart and stealing all the tools, one week suspension by not scheduling me to work, assigning me to jobs that were not part of my job duties or to jobs that I was not trained for, inserting derogatory and threatening notes in my tools cart (notes that contained insults about my age and death threats), denying any opportunity for promotion, repeated verbal warnings under false pretenses by chief engineer Arif Khan, extra scrutinity by following me even to the restroom, refusal to buy supplies needed for my job and my safety, using the work schedule as a retaliatory tool, impeding my doctors' appointments and medical treatment during my FMLA status, unfairly rating my job performance, harassing me even when I was off work by sending thousands of work orders to my personal e-mail address, assigning me to do work inside unventilated rooms infested with toxic and poisonous gases, a vicious move that caused ilness and tens of thousands of dollars in medical bills, directing workers from other departments to harass me, and too many other adverse actions to list here.
>
> Hyatt's campaign of discriminations and retaliations against me ceased about two months ago, but only after I filed two lawsuits.

Dkt. No. 89 at 4-5 (no alteration to original).

Despite these sworn allegations, Mr. Stancu does not controvert Hyatt's evidence showing that he has received a raise since starting his position and has never received

nor been subjected to a formal discipline, warning, demotion, suspension, or termination. *See, e.g.*, Dkt. No. 84-1 at 1.

Although Mr. Stancu has pleaded his legal claims in a somewhat confusing manner, those claims are liberally construed to allege that Hyatt (1) violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"); (2) unlawfully retaliated against Mr. Stancu; (3) unlawfully created a hostile workplace under the ADEA; and (4) violated his rights under the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA"). *See* Dkt. Nos. 38 & 88. He further alleges (5) a breach-of-contract claim and (6) a pattern-and-practice claim. *See id.*

The undersigned will discuss each claim below.

Legal Standards and Analysis

I. Summary Judgment Standards

Under Federal Rule of Civil Procedure 56, summary judgment is proper "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). A factual "issue is material if its resolution could affect the outcome of the action." *Weeks Marine, Inc. v. Fireman's Fund Ins. Co.*, 340 F.3d 233, 235 (5th Cir. 2003). "A factual dispute is 'genuine,' if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997).

If the moving party seeks summary judgment as to his opponent's claims or defenses, "[t]he moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence of

a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Props., Inc. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998). "Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which it will bear the burden of proof at trial. If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503, 511 (5th Cir. 2014) (internal quotation marks and footnote omitted).

"Once the moving party meets this burden, the nonmoving party must set forth" – and submit evidence of – "specific facts showing a genuine issue for trial and not rest upon the allegations or denials contained in its pleadings." *Lynch Props.*, 140 F.3d at 625; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); *accord Pioneer Expl.*, 767 F.3d at 511 ("[T]he nonmovant cannot rely on the allegations in the pleadings alone" but rather "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." (internal quotation marks and footnotes omitted)).

The Court is required to consider all evidence and view all facts and draw all reasonable inferences in the light most favorable to the nonmoving party and resolve all disputed factual controversies in favor of the nonmoving party – but only if the summary judgment evidence shows that an actual controversy exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Pioneer Expl.*, 767 F.3d at 511; *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005); *Lynch Props.*, 140 F.3d at

625. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor. While the court must disregard evidence favorable to the moving party that the jury is not required to believe, it gives credence to evidence supporting the moving party that is uncontradicted and unimpeached if that evidence comes from disinterested witnesses." *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 942-43 (5th Cir. 2015) (internal quotation marks and footnotes omitted). And "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment," *Brown v. City of Houston,* 337 F.3d 539, 541 (5th Cir. 2003), and neither will "only a scintilla of evidence" meet the nonmovant's burden, *Little*, 37 F.3d at 1075; *accord Pioneer Expl.*, 767 F.3d at 511 ("Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." (internal quotation marks and footnote omitted)).

Rather, the non-moving party must "set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). And "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Pioneer Expl.*, 767 F.3d at 511 (internal quotation marks and footnote omitted).

"After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be

granted." *DIRECTV, Inc. v. Minor*, 420 F.3d 546, 549 (5th Cir. 2005) (footnote and internal quotation marks omitted).

The Court will not assume "in the absence of any proof ... that the nonmoving party could or would prove the necessary facts" and will grant summary judgment "in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Little*, 37 F.3d at 1075. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment," and "[a] failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists." *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006) (internal quotation marks omitted).

II. Employment Discrimination Claims at Summary Judgment

"In the employment discrimination arena, the 'salutary function of summary judgment' is that it 'allows patently meritless cases to be nipped in the bud.'" *Molden v. East Baton Rouge Sch. Bd.*, 715 F. App'x 310, 313 (5th Cir. 2017) (per curiam) (quoting *Caldwell v. KHOU-TV*, 850 F.3d 237, 241 (5th Cir. 2017)).

And, in the absence of direct evidence, claims of employment discrimination and retaliation are analyzed under the framework set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), under which a plaintiff must first establish a prima facie case of discrimination or retaliation before the case may proceed. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir.

2007); *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216, 219 (5th Cir. 2016).

> If the plaintiff makes a prima facie showing, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory or nonretaliatory reason for its employment action. The employer's burden is only one of production, not persuasion, and involves no credibility assessment. If the employer meets its burden of production, the plaintiff then bears the ultimate burden of proving that the employer's proffered reason is not true but instead is a pretext for the real discriminatory or retaliatory purpose. To carry this burden, the plaintiff must rebut each nondiscriminatory or nonretaliatory reason articulated by the employer.

McCoy, 492 F.3d at 557 (footnotes omitted); *see, e.g., Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822, 827-28 (5th Cir. 2015) (affirming the district court's recognition that, even where a plaintiff establishes a prima facie case, an employer "would nevertheless be entitled to summary judgment if it 'articulated a legitimate, nondiscriminatory ... reason for its employment action' and [the plaintiff] could not show a triable issue of fact as to whether 'the employer's proffered reason is not true but instead is a pretext' for a discriminatory purpose" (quoting *McCoy*, 492 F.3d at 557; original brackets omitted)); *see also Tratree v. BP N. Am. Pipelines, Inc.*, 277 F. App'x 390, 395 (5th Cir. 2008) (per curiam) (holding that the same framework is applicable to non-direct evidence claims under the ADEA); *Caldwell*, 850 F.3d at 245 (holding that the same framework is applicable to non-direct evidence claims under the FMLA).

Furthermore, "the traditional leniency afforded to a pro se plaintiff does not excuse [Mr. Stancu] from [his] burden of opposing summary judgment through the use of competent summary judgment evidence." *Malcolm v. Vicksburg Warren Sch. Dist. Bd. of Trs.*, 709 F. App'x 243, 246 (5th Cir. 2017) (per curiam) (citing *Davis v. Fernandez*, 798 F.3d 290, 293 (5th Cir. 2015) ("[T]his is not to say that pro se plaintiffs

don't have to submit competent evidence to avoid summary judgment, because they do.")); *see also Love v. Child Protective Servs.*, No. 3:16-cv-1973-B-BN, 2018 WL 704716, at *4 (N.D. Tex. Jan. 5, 2018) ("While *pro se* litigants ... 'are not held to the same standards of compliance with formal or technical pleading rules applied to attorneys, the [United States Court of Appeals for the] Fifth Circuit ... has never allowed *pro se* litigants, or any other type of litigants, to oppose summary judgments by the use of unsworn materials.'" (quoting *Burroughs v. Shared Housing Ctr.*, No. 3:15-cv-333-N-BN, 2017 WL 876333, at *3 (N.D. Tex. Jan. 31, 2017) (quoting, in turn, *Rodriguez v. Bexar Cty. Hosp. Dist.*, No. SA-14-CA-861-OG, 2015 WL 7760209, at *20 (W.D. Tex. Nov. 30, 2015) (collecting cases)), *rec. accepted*, 2017 WL 875853 (N.D. Tex. Mar. 3, 2017); internal quotation marks omitted)), *rec. accepted*, 2018 WL 708358 (N.D. Tex. Feb. 2, 2018).

III. Failure to Promote

Mr. Stancu alleges that he is over 40 and that Hyatt violated the ADEA "by unfairly denying him even the opportunity to apply for promotion to the vacant Chief Engineer position." Dkt. No. 38 at 30. Mr. Stancu more specifically alleges:

> For more than six months during the first part of 2016, defendant had an opening for the Chief Engineer job. This position was vacant for a prolonged period of time and sometime during that job opening I informed Facilities Manager Brandon Murrell that I am interested in applying for it, and I also asked him about the qualification requirements. Mr. Murrell told me that, quote: "Unfortunately, the higherups are looking for someone from outside who can best connect with our guests." When I asked him about the meaning of that corporate speak, he said "This means younger." At that point it was very clear for plaintiff that the promotion door for him was permanently shut.
>
> Few weeks after the above mentioned conversation, defendant did

> indeed hired someone much younger than plaintiff, and with less hotel engineering experience in United States than plaintiff: Mr. Arif Khan.

Id. at 13-14 (no alteration to original).

"The ADEA makes it unlawful to 'discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age.'" *Tratree*, 277 F. App'x at 395 (quoting 29 U.S.C. § 623(a)(1)). And, for a plaintiff to establish a prima facie case of failure to promote in violation of the ADEA, he "must show: (1) he was over forty, (2) was qualified for the position sought, (3) was not promoted, and (4) the position was filled by someone younger or the failure to promote was due to his age." *Id.* (citing *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998)).

An ADEA failure-to-promote-claim must also be timely, which here means that Mr. Stancu "was required to file an EEOC charge of discrimination within 300 days 'after the alleged unlawful employment practice occurred.'" *Drechsel v. Liberty Mut. Ins. Co.*, 695 F. App'x 793, 796-97 (5th Cir. 2017) (per curiam) (quoting 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(1)(A)-(B)). Thus, if an applicable charge was not filed within 300 days after Mr. Khan was hired as the Chief Engineer, this claim is not timely. *See id.* ("The purpose of requiring a plaintiff to show a younger comparator who was promoted is that said showing is a necessary component of establishing discrimination in the first instance. If no employees whatsoever are promoted to the position at issue in the applicable time frame, then that tends to undermine the argument that a specific employee was not promoted for discriminatory reasons. [A

plaintiff] cannot establish that he was not promoted for discriminatory reasons simply because a younger employee was promoted years before the timeframe covered by his complaint." (footnote omitted)).

Mr. Khan was hired as Chief Engineer on August 30, 2016. *See* Dkt. No. 84-1 at 2. While Mr. Stancu filed his first EEOC charge in December of 2016, that otherwise detailed charge, *see, e.g.*, Dkt. No. 84-1 at 93-94 (Stancu's affidavit), failed to include allegations that could support a failure-to-promote claim, *see id.* at 74-95; *see also Anderson v. Venture Express*, 694 F. App'x 243, 247 (5th Cir. 2017) (per curiam) ("While a cause of action may be based on 'any kind of discrimination like or related to the charge's allegations' it is 'limited ... by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges.'" (quoting *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993) (quoting, in turn, *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 451 (5th Cir. 1983)))).

And, although Mr. Stancu's second EEOC charge did mention that he was "den[ied] any opportunity for promotion," Dkt. No. 84-1 at 98, it was not filed until July 31, 2017, *see id.* – outside the 300-day window that opened when Mr. Khan was hired, which closed on June 26, 2017.

In sum, then, "in the absence of any evidence that a younger similarly situated [Hyatt] employee was promoted in the applicable time frame," Mr. Stancu's ADEA failure-to-promote claim is time-barred. *Drechsel*, 695 F. App'x at 797; *see also Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir. 2013) ("Under the continuing violations doctrine, a plaintiff may complain of otherwise time-barred discriminatory acts if it can

be shown that the discrimination manifested itself over time, rather than in a series of discrete acts." But "discrete actions, such as [failure to promote], are not entitled to the shelter of the continuing violation doctrine." (citing *Huckabay v. Moore*, 142 F.3d 233, 238-40 (5th Cir. 1998))); *Mack v. John L. Wortham & Son, L.P.*, 541 F. App'x 348, 356-57 (5th Cir. 2013) (per curiam) ("[W]here the employee complains of 'separate and varied acts and decisions that occurred at different times,' and the record does not confirm 'an organized or continuing effort to discriminate,' [the Fifth Circuit] has declined to apply the continuing violations doctrine." (quoting *Frank*, 347 F.3d at 136)).

Even if this claim is timely, Mr. Stancu has not shown a prima facie case by coming forward with evidence to show that he was qualified for the Chief Engineer position.

"At the prima facie stage, [Mr. Stancu's] burden regarding establishment of qualification is not onerous; [he] simply must provide evidence that [he] met the objective qualifications for the position, although [he] need not show that [he] was better qualified than the individual selected." *Hamlett v. Gonzales*, No. 3:03-cv-2202-BH, 2005 WL 1500819, at *16 n.15 (N.D. Tex. June 15, 2005) (citing *Medina v. Ramsey Steel*, 238 F.3d 674, 681 (5th Cir. 2001) ("[I]t is inappropriate to decide as a matter of law that an employee is unqualified because he has failed to meet entirely subjective hiring criteria. Instead, an employee must demonstrate that he meets objective hiring criteria at the prima facie case stage, and the issue of whether he meets subjective hiring criteria is dealt with at the later stages of the analysis." (citations omitted))).

Here, Mr. Stancu "has failed to meet [his] summary judgment burden of pointing

to specific evidence in the record establishing that [he] was qualified" to be Chief Engineer. *Id.*; *see also* Dkt. No. 84-1 at 1 (Aff. of Mark Spinelli, Hyatt Regency Dallas Director of Human Resources, explaining that "[a] shift engineer is an entry-level position in the engineering department. The progression of promotions for a shift engineer is as follows: mechanic, then engineering lead/supervisor, then assistant director of engineering, and then chief engineer."); *Dashtgoli v. Experience Works, Inc.*, No. A-05-CA-1034-RP, 2007 WL 9701567, at *5 (W.D. Tex. Sept. 19, 2007) ("The undisputed summary judgment evidence establishes that Plaintiff cannot be considered qualified for a position that he was not eligible to hold.").

Mr. Stancu has therefore not shown a prima facie case of failure to promote under the ADEA.

But, to the extent that Mr. Murrell's purported statement to Mr. Stancu can be considered direct evidence of age discrimination, Hyatt "bears the burden of proving 'that it would have taken the same action[– hiring Mr. Khan as opposed to allowing Mr. Stancu to leapfrog from an entry-level position to Chief Engineer –]regardless of discriminatory animus.'" *Maestas v. Apple, Inc.*, 546 F. App'x 422, 425 (5th Cir. 2013) (per curiam) (quoting *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002)). And, here, Hyatt meets that burden through Mr. Spinelli's unchallenged affidavit.

IV. Retaliation

"Title VII, the ADEA, ... and the FMLA" – among other statutes – "all contain provisions prohibiting retaliation for asserting the rights or enjoying the benefits under

those statutes." *Munoz v. Seton Healthcare, Inc.*, 557 F. App'x 314, 321 (5th Cir. 2014) (per curiam) (citing, as applicable here, *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007) (Title VII); *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 259 (5th Cir. 2001) (ADEA); *Mauder v. Metro. Transit Auth. of Harris Cty., Tex.*, 446 F.3d 574, 583 (5th Cir. 2006) (FMLA)).

"In the retaliation context, a prima facie case requires a showing that (1) [Mr. Stancu] engaged in a protected activity pursuant to one of the statutes, (2) an adverse employment action occurred, and (3) there exists a causal link connecting the protected activity to the adverse employment action." *Id.* (citation omitted).

And the adverse-employment-action prong "require[s] an 'ultimate employment decision' or its factual equivalent." *Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 396-97 (5th Cir. 2016) (per curiam) (citing *McCoy*, 492 F.3d at 560; *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014)). This "judicially-coined term refer[s] to an employment decision that affects the terms and conditions of employment ... such as hiring, firing, demoting, promoting, granting leave, and compensating." *Thompson*, 764 F.3d at 503 (citations omitted); *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (holding that the anti-discrimination provision of Title VII "explicitly limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace"); *see also Thomas v. Johnson*, No. 3:15-cv-1005-N-BN, 2015 WL 5326192, at *6 (N.D. Tex. Aug. 7, 2015) ("Threats, reprimands, and warnings, because they do not constitute ultimate decisions, do not suffice as adverse employment actions." (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th

Cir. 1997))), *rec. accepted*, 2015 WL 5397802 (N.D. Tex. Sept. 14, 2015).

To support this prong, Mr. Stancu offers an affidavit in his opposition to summary judgment alleging – but not asserting detailed facts to support – Hyatt's "onslaught of retaliations against" him, including stealing his tools; not scheduling him to work for one week; assigning him to jobs outside his job duties or training; verbally warning him; and sending work orders to his personal email address. Dkt. No. 89 at 4-5.

First, Mr. Stancu's evidence (his affidavit) is concluory.

> "[U]nsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). "The party opposing summary judgment must come forward with specific facts showing that there is a genuine issue for trial. Conclusory statements in an affidavit do not provide facts that will counter summary judgment evidence, and testimony based on conjecture alone is insufficient to raise an issue to defeat summary judgment." *Lechuga v. Southern Pacific Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992).

Richardson v. Monitronics Int'l, Inc., No. 3:02-cv-2338-N, 2004 WL 287730, at *6 (N.D. Tex. Jan. 27, 2004); *see also, e.g.*, *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702, 707 (5th Cir. 2016) ("A bare-bones allegation that an assignment of janitorial duties is a materially adverse action is only an unsupported conclusory claim. Such a bare allegation fails to provide the contextual detail that is required for materially adverse actions." (citation omitted)).

And Mr. Stancu offers no evidence that any of the alleged retaliatory acts were either intentionally taken by Hyatt or ultimate employment decisions. For example,

as to his being left off the work schedule for one week, he testified at his deposition that, during that week, he called in sick, received sick pay, and was placed back on the schedule the next week. *See* Dkt. No. 84-1 at 14-19; *cf. Cabral v. Brennan*, 853 F.3d 763, 767 (5th Cir. 2017) (holding "that a suspension without pay *could* constitute a materially adverse action, depending on the circumstances," but not where a plaintiff "has not shown that his suspension exacted a physical, emotional, or economic toll" and instead only "offers conclusional statements attesting to the emotional or psychological harm he suffered because of the ... suspension" and "provides no documentation of any alleged harm" (applying *White*, 548 U.S. at 70-73; citation omitted; emphasis in original)).

Mr. Stancu has therefore not shown a prima facie case of retaliation.

V. Hostile Work Environment

Mr. Stancu next advances a hostile-work-environment claim under the ADEA, the prima-facie elements of which are that

> (1) he was over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.

Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 441 (5th Cir. 2011) (citing *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834-35 (6th Cir. 1996)).

Critically, to satisfy the third prong here, "the complained-of conduct" must be based on age and also

> must be both objectively and subjectively offensive. This means that not

> only must a plaintiff perceive the environment to be hostile, but it must appear hostile or abusive to a reasonable person. To determine whether conduct is objectively offensive, the totality of the circumstances is considered, including: "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance."

Id. (citing and quoting *EEOC v. WC&M Enters.*, 496 F.3d 393, 399 (5th Cir. 2007)).

The only age-based harassment that Mr. Stancu offers evidence of are the notes that contained insults about his age that were left on his tool cart. And he has not shown that these age-based offenses considered alone are objectively offensive. *Cf. Hackett v. United Parcel Serv.*, ___ F. App'x ____, No. 17-20581, 2018 WL 2750297, at *4 (5th Cir. June 6, 2018) (per curiam) (even crediting a plaintiff with some of the various acts that he "denied ... were motivated by his national origin, race, or age," finding that he failed "to establish the sort of 'severe or pervasive' harassment that is required for a hostile work environment claim" (quoting *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012))).

Mr. Stancu also admitted at his deposition that he had no suspicions of who left the notes on his cart and did not ask anyone in Hyatt's management if they were responsible for the notes, *see* Dkt. No. 84-1 at 38-39, thus negating the fourth prong – that "there exists some basis for liability on the part of the employer," *Dediol*, 655 F.3d at 441.

Mr. Stancu has therefore not shown a prima facie case of a hostile work environment under the ADEA.

VI. FMLA Interference

"The FMLA requires a covered employer to allow an eligible employee up to twelve weeks of unpaid leave if the employee suffers from 'a serious health condition that makes the employee unable to perform the functions of the position of such employee.'" *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 763 (5th Cir. 2001) (quoting 29 U.S.C. § 2612(a)(1)(D)), *abrogated on other grounds by Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702 (5th Cir. 2016). And, "[t]o ensure employees the right to take leave, the FMLA prohibits an employer from 'interfere[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right' provided by the Act." *Caldwell*, 850 F.3d at 245 (quoting 29 U.S.C. § 2615(a)(1)).

> To establish a prima facie case of interference under the FMLA, [Mr. Stancu] must show: (1) he was an eligible employee; (2) his employer was subject to FMLA requirements; (3) he was entitled to leave; (4) he gave proper notice of his intention to take FMLA leave; and (5) his employer denied him the benefits to which he was entitled under the FMLA.

Id. (citing *Lanier v. Univ. of Tex. Sw. Med. Ctr.*, 527 F. App'x 312, 316 (5th Cir. 2013) (per curiam) (citing, in turn, *Donald v. Sybra, Inc.*, 667 F.3d 757, 761 (6th Cir. 2012))).

Mr. Stancu may allege that Hyatt interfered with his taking leave under the FMLA. *See* Dkt. No. 28 at 22-29 & 39-42. But he fails to offer evidence to show that Hyatt "denied him the benefits to which he was entitled under the FMLA." *Caldwell*, 850 F.3d at 245. In fact, he admitted during his deposition that Hyatt has not denied him FMLA leave. *See* Dkt. No. 84-1 at 28-32 & 50-51; *see also id.* at 31 ("Q. So your complaint is not that you're being denied the time off, it's just that the procedure -- A. Makes it hard. Q. -- to take the time off is difficult? A. Yeah. They make it harder.").

Under the FMLA,

> [t]he difference between an interference and retaliation claim "is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1051 (8th Cir. 2006). "The lines between the two categories of FMLA claims is not hard and fast." *Id.* (citation and quotations omitted). However, "to prove an interference claim, a plaintiff 'must at least show that the defendant interfered with, restrained, or denied his exercise or attempt to exercise FMLA rights, and that the violation prejudiced him.'" *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017) (quoting *Bryant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 770 (5th Cir. 2015)).

Jiles v. Wright Med. Tech., Inc., 313 F. Supp. 3d 822, 844 (S.D. Tex. 2018) (citation modified; original brackets omitted); *see Downey v. Strain*, 510 F.3d 534, 539-40 (5th Cir. 2007) ("[T]he FMLA's remedial scheme ... requires an employee to prove prejudice as a result of an employer's noncompliance." (relying on *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002); *Lubke v. City of Arlington*, 455 F.3d 489 (5th Cir. 2006))); *see also Eaton-Stephens v. Grapevine Colleyville Indep. Sch. Dist.*, 715 F. App'x 351, 357 (5th Cir. 2017) (per curiam) ("Eaton-Stephens testified that Valamides discouraged her from taking FMLA leave and that her co-workers harassed her for taking leave, but does not testify that she took less leave because of these actions. Therefore, any error in concluding Eaton-Stephens failed to properly plead an FMLA claim would be harmless, because she did not meet her burden to produce evidence that there was actual interference with her FMLA rights."); *Richardson*, 2004 WL 287730, at *3 ("Richardson simply does not allege any days for which she required FMLA-eligible leave, was denied such leave, and reported to work. At the very least,

an employee requesting relief for violations of Section 2615 of the FMLA must allege interference with, restraint of, or denial of her exercise of FMLA rights. 'Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation.' In the instant matter, Richardson fails to allege in even a general manner that Monitronics denied her any intermittent leave – or any other benefit guaranteed by the FMLA – following her statement in July of 2001 that she would 'possibly need FMLA.' Accordingly, Richardson has not raised a genuine issue of material fact that she was denied leave following her July 2001 request." (citation omitted)); *Shields v. Boys Town La., Inc.*, 194 F. Supp. 3d 512, 527 (E.D. La. 2016) ("[A]s Shields has not identified any interference, restraint or denial of her FMLA rights, the Court grants summary judgment on Shields' interference claim.").

And, despite Mr. Stancu's testimony that could be construed as establishing that Hyatt's procedures for taking FMLA leave were onerous to him, "[a]n employer may [] require that an employee hew to the employer's usual and customary procedures for requesting FMLA leave." *Acker*, 853 F.3d at 789.

Mr. Stancu has therefore not shown a prima facie case of interference under the FMLA.

VII. Breach of Contract

Mr. Stancu further contends that Hyatt breached its employment contract with him by "coerc[ing him] into performing jobs that are not part of [their alleged oral employment] contract." Dkt. No. 38 at 43. But, as Mr. Stancu admitted he understands, Texas is an at-will employment state. *See* Dkt. No. 84-1 at 25-27 ("Q. And

when I'm saying at will employment, I just mean the concept -- A. Yeah, yeah, no. I know the concept. Q. -- that an employer or -- A. Yes. Q. -- an employee is free to terminate the employment relationship at any point. A. Oh, of course, yes. Q. And with that understanding, you are an at will employee of Hyatt, correct? A. Yeah, yeah, yeah.").

And, as the Texas Supreme Court has explained, in response to a certified question from the Fifth Circuit,

> "if the employer or employee can avoid performance of a promise by exercising a right to terminate the at-will relationship, which each is perfectly free to do with or without reason at any time, the promise is illusory and cannot support an enforceable agreement," nor support a cause of action for fraud or breach of contract.

Fred Loya Ins. Agency, Inc. v. Cohen, 446 S.W.3d 913, 929 (Tex. App. – El Paso 2014, pets. denied) (quoting *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396, 399 (Tex. 2014)).

As a consequence, Hyatt should be granted judgment as a matter of law on Mr. Stancu's breach-of-contract claim.

VIII. Pattern or Practice

Finally, to the extent that Mr. Stancu alleges a separate claim – under Title VII, for example – based on a "pattern or practice," *e.g.*, Dkt. No. 38 at 32-35,

> [a] pattern or practice case is not a separate and free-standing cause of action ... , but is really "merely another method by which disparate treatment can be shown," *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995). The typical pattern or practice discrimination case is brought either by the government or as a class action to establish "that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Int'l Bhd. of Teamsters v. United*

States, 431 U.S. 324, 360 (1977).

Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355 (5th Cir. 2001) (citation and quotation modified), *abrogated on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *see also id.* at 356 ("Given the nature and purpose of the pattern and practice method of proof, this Court's precedents, and the precedents of other circuits, the district court did not err in refusing to apply the *Teamsters* method of proof as an independent method of proof to the appellants' individual claims in lieu of the *McDonnell Douglas* method at the summary judgment stage.").

Hyatt should therefore be granted judgment as a matter of law on any pattern-and-practice claim made by Mr. Stancu.

Recommendation

The Court should grant Defendant Hyatt Corporation's motion for summary judgment [Dkt. No. 82] and dismiss this action with prejudice.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure

to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: August 28, 2018

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE