No.

IN THE

SUPREME COURT OF THE UNITED STATES

WEI-PING ZENG

Petitioner,

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO; PETER ROTWEIN; RICHARD LANGE; BEVERLEY COURT; REBECCA SALCIDO,

Respondents.

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

APPENDIX

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PRO SE PETITIONER

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
November 9, 2020

Lyle W. Cayce
Clerk

No. 20-50210
Summary Calendar

WEI-PING ZENG,

Plaintiff—Appellant,

versus

TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO;
PETER ROTWEIN; RICHARD A. LANGE;
BEVERLEY COURT; REBECCA SALCIDO,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 3:19-CV-99

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

Texas Tech University Health Science Center at El Paso ("Texas Tech") fired Dr. Wei-Ping Zeng when, for several months and without

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

proper authorization, he worked from his West Virginia home instead of the El Paso lab to which he was assigned. Zeng asserts that his termination was discriminatory, in violation of both Title VII and the Texas Commission on Human Rights Act ("TCHRA"), and that it violated his Fourteenth Amendment due process rights. In addition, Zeng puts forth defamation and tortious interference claims. The district court granted defendants' motion for summary judgment on all claims. We affirm.

I.

Zeng obtained his Ph.D. in immunology and cell pathology from the State University of New York at Buffalo, underwent post-doctoral training in immunology at Yale University, and then entered academia as a faculty member at the University of Rochester in 1999. In 2009, Zeng left Rochester to begin working as an associate professor at Marshall University in West Virginia, where he was denied tenure in 2016.

On the heels of that denial, Zeng filed a grievance against Marshall and applied for a research associate position at Texas Tech. He was offered that position, moved to Texas, and began working under Dr. Haoquon Wu in 2017. Although Zeng rented an El Paso apartment, he retained a house in West Virginia.

Soon after beginning work in El Paso, Zeng sued Marshall in federal court in West Virginia. There, as here, Zeng appeared *pro se*. Needing to be present for those legal proceedings, and believing that, in any event, he could work more effectively from home, Zeng asked Wu for permission to work from West Virginia instead of at the El Paso lab, and Wu acquiesced. At some point in the ensuing months, Zeng terminated his lease in El Paso and lived only in West Virginia. He did not tell Wu that he was terminating his El Paso lease, nor did he inform anyone else at Texas Tech that he was working from West Virginia in the first place.

Thus, solely on Wu's permission, Zeng worked primarily from West Virginia from early May until early December 2017. Under Texas Tech's work-from-home policy, that's problematic. Texas Tech's policy requires that, to work from home, an employee must attain a signed "Telecommuting Agreement," which "must have the approval of the employee's unit head, the Dean or Director, the appropriate Department's Vice President, Human Resources, and President before it can be implemented." Zeng does not contest that, although he received permission from Wu, his work-from-home arrangement was not approved by the other necessary parties. In the absence of such an agreement, Texas Tech requires that its employees work "only at the employee's regular place of business or assigned duty point unless the employee . . . has received prior written authorization of the President," Dr. Richard Lange, "or his/her designee."

In November and December 2017, Texas Tech audited the employees in Zeng's department, comparing an employee's timesheets with the number of times the employee used his or her access badge to enter the building. Given that Zeng was in West Virginia at the time, his reported hours worked did not match the number of times he accessed the building. Specifically, the audit revealed that, although Zeng recorded normal working hours, he did not access the building on 119 of the 142 days that he was employed from May to December. Because the department was not aware of Zeng's work-from-home arrangement, that discrepancy understandably raised eyebrows.

Beverly Court, senior director of Zeng's department, scheduled a December 19 meeting with Zeng "to discuss Timesheets." Apparently not understanding the nature of the meeting, Zeng did not respond to the meeting invitation and did not attend. On December 21, Dr. Peter Rotwein, the chair of Zeng's department, emailed Wu to inform him of the situation. Wu, who was visiting China at the time, responded on January 7, explaining that Zeng was involved in a lawsuit and that Wu had authorized him to "work at

home for a while."

On January 8, 2018, Court sent Zeng another meeting request and an email, this time requesting Zeng to "confirm [he] received [the] email and will be available to meet." Zeng replied, informing Court that he was "not in El Paso" but would "try to come back as soon as possible." Court responded the next day, asking when he "plan[ned] to be at work so [they could] meet." Zeng vaguely replied that he would let her know when he returned and told her that "[t]here is something I have to deal with now, but I will come back as soon as I can." Later that day Rotwein emailed Zeng, informing him of the discrepancies revealed in the audit, that he was in violation of Texas Tech's work-from-home policy, and requesting that he provide a record of the work performed when he was not in the office. Zeng sent Rotwein a summary of that work on January 11, as requested.

On January 12, Court emailed Zeng again, this time informing him that he was being placed on leave without pay. A week later, Rotwein sent Lange an email explaining the situation and "request[ing] termination of Dr. Zeng's appointment for cause." About a week after that, Court emailed Zeng with an attached letter informing him that his employment was terminated effective January 22.

Zeng sued in state court, and the defendants removed to federal court on the basis of federal question and supplemental jurisdiction. In his second amended complaint, Zeng alleged discrimination under Title VII, the TCHRA, and 42 U.S.C. § 1981, violation of his Fourteenth Amendment due process rights, tortious interference, and defamation. Both sides sought summary judgment. The district court granted defendants' motion for summary judgment in full and dismissed all claims. Zeng appeals. We affirm.

II.

A.

Zeng first asserts that his firing was discriminatory, in violation of both federal and state law.[1] As an initial matter, we disagree with the district court that Zeng's TCHRA claims are barred by sovereign immunity. "[A] State waives [sovereign] immunity when it removes a case from state court to federal court." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618–19, 624 (2002). This maxim is in "the context of state-law claims, in respect to which the State has explicitly waived sovereign immunity from state-court proceedings." *Id.* at 617.

To be sure, "the Constitution permits and protects a state's right to relinquish its immunity from suit while retaining its immunity from liability . . . ." *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005). Thus, a state may waive its immunity from suit through removal and simultaneously retain its immunity from liability.

But that is not the case here. The TCHRA waives Texas's sovereign immunity from state-court proceedings. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008). And although the TCHRA does not "waive sovereign immunity [from suit] in *federal* court,"[2] the defendants have done that through removal. *Lapides*, 535 U.S. at 624.

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[1] Zeng asserts claims under Title VII (race and nationality), 42 U.S.C. § 1981, and the TCHRA. "Because these three statutory bases are functionally identical for the purposes of [Zeng's] claims, it would be redundant to refer to all of them." *Shackleford v. Deloitte & Touche, LLP*, 190 F.3d 398, 403 n.2 (5th Cir. 1999). Thus, although we dismiss several claims on technical grounds, the substantive analysis would apply to all claims even if they remained viable.

[2] *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002); *see also Pequeno v. Univ. of Tex. at Brownsville*, 718 F. App'x 237, 241 (5th Cir. 2018) (applying *Perez* to the TCHRA).

Put another way, defendants do not enjoy "immunity from liability" because the TCHRA waived it. *Meyers*, 410 F.3d at 255. And defendants no longer enjoy "immunity from suit" because they waived it by removal. *Id.*; *see also Lapides*, 535 U.S. at 624. Thus, defendants waived sovereign immunity for the TCHRA claims in this case.[3]

Although there is no sovereign immunity, under the TCHRA only "*employers* may be liable for an unlawful employment practice. The Act does not create a cause of action against supervisors or individual employees." *Anderson v. Hous. Cmty. Coll. Sys.*, 458 S.W.3d 633 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (cleaned up). Similarly, although Congress abrogated sovereign immunity for state actors in Title VII, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976), a plaintiff cannot sue both an employer and its employees in their official capacity under Title VII. To do so would subject the employer to double liability, because "a Title VII suit against an employee is actually a suit against the corporation." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 262 (5th Cir. 1999). Thus, because Zeng opts to sue Texas Tech under Title VII and the TCHRA, he may not simultaneously sue the individual defendants.

So, where does that leave us? After we knock out the improper claims and revive the TCHRA claim, Zeng retains three operable discrimination

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[3] None of the cases on which the district court or defendants rely is in conflict with that conclusion. Those cases involve instances in which the (1) the plaintiff raised waiver-by-removal argument for the first time on appeal and thus waived the argument itself, *Perez*, 307 F.3d at 331–32, (2) the plaintiff sued in federal court in the first instance and there was no waiver-by-removal argument to be made, *Pequeno*, 718 F. App'x at 240–41, or (3) the plaintiff averred that "removal waives immunity entirely" and attempted to rely on removal alone to waive immunity from both suit and liability, *Skinner v. Gragg*, 650 F. App'x 214, 218 (5th Cir. 2016) (per curiam). *Meyers* did not reach the question of whether the state "retained a separate immunity from liability . . . according to [the] state's law." *Meyers*, 410 F.3d at 255.

causes of action. He asserts Title VII and TCHRA discrimination claims against Texas Tech. Additionally, he maintains § 1981 claims against the individual defendants. Because those "three statutory bases are functionally identical for the purposes of [Zeng's] claims," our analysis below is sufficient to dispose of all claims together. *Shackleford*, 190 F.3d at 403 n.2.

For cases of intentional discrimination based on circumstantial evidence, such as this one, we apply the familiar *McDonnell-Douglas* burden-shifting framework.[4] Under that framework, a plaintiff must first establish a *prima facie* case of discrimination, which requires him to show that "(1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances." *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009).

If the plaintiff establishes a *prima facie* case, the burden of production "shifts to the employer to articulate a legitimate, nondiscriminatory or non-retaliatory reason for its employment action." *McCoy*, 492 F.3d at 557. If the employer is able to do so, then the burden shifts back to the plaintiff to show "that the employer's proffered reason is not true but instead is a pretext for the real discriminatory or retaliatory purpose." *Id.* Because Zeng fails to make out a *prima facie* case of discrimination, we need not determine whether his violation of company policy provided a legitimate, nondiscriminatory reason for Texas Tech's employment decision.

Nobody contests that Zeng is a member of a protected class or that he

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[4] *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (per curiam); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

was the subject of an adverse employment action. Instead, defendants assert that Zeng fails to make his *prima facie* case because he fails to offer evidence demonstrating that he was qualified for the position, and, even if he was, he was not treated less favorably than others under nearly identical circumstances. We assume that Zeng, as a Ph.D. in immunology, was qualified for the research assistant position. Our focus is instead on the fourth *prima facie* requirement—whether Zeng was treated unfavorably because of his protected status. He wasn't.

Zeng's *prima facie* case turns on whether the other employees that he identifies as comparators were similarly situated to him. *Lee*, 574 F.3d at 259. We construe "similarly situated narrowly, requiring the employees' situations to be nearly identical." *West v. City of Hous.*, 960 F.3d 736, 740 (5th Cir. 2020) (quotation omitted). "[E]mployees who have different work responsibilities or who are subjected to adverse employment action for dissimilar violations are not similarly situated." *Lee*, 574 F.3d at 259–60. Moreover, "the conduct the employer points to as the reason for the firing must have been 'nearly identical' to 'that of the proffered comparator who allegedly drew dissimilar employment decisions.'" *Garcia v. Prof'l Contract Servs., Inc.*, 938 F.3d 236, 244 (5th Cir. 2019) (quoting *Lee*, 574 F.3d at 260).

Zeng points to three groups as comparators: (1) Alexa Montoya and Christopher Lopez; (2) eleven other "employees with serious policy violations [who] were not terminated"; and (3) a final group of employees, all of whom were terminated but, according to Zeng, received "multiple opportunities and assistance to correct their behaviors prior to termination." We address each in turn.

We begin with Montoya and Lopez. Both of them worked in Zeng's department and, like Zeng, reported work hours that did not match their access badge data. Montoya reported normal working hours on 83 days when

she did not use her badge to access the building, and Lopez reported normal working hours on 24 days when he did not use his badge to access the building. But that resemblance aside, those two are not similarly situated to Zeng.

As an initial matter, both Montoya and Lopez cooperated with Court and others at Texas Tech to resolve the issue once the discrepancies were brought to light. Zeng, on the other hand, was given multiple opportunities to meet with Court to discuss his situation. On each occasion, Zeng either declined the opportunity or failed to respond at all. Therefore, even if Montoya's or Lopez's initial violations were "nearly identical" to Zeng's, the totality of their conduct was not.[5]

In any event, the violations were not themselves "nearly identical." First, Montoya's and Lopez's absences were less severe than Zeng's 119-day absence. Additionally, those absences were based on conduct distinct from Zeng's. Montoya, for example, told her supervisor that she was unable to swipe her badge to enter the building because her badge was not authorized for the proper times. Instead, although her badge data did not reflect it, Montoya maintained that she was in the building at the reported times after being let in by others coming and going. Similarly, Lopez informed Court that he failed to swipe his badge on occasion because "he was often walking into work as people were leaving and did not need to use his card to gain access to the building."

Thus, the violations by Lopez and Montoya were not "nearly identical" to Zeng's. To be sure, the violations were discovered by the same pro-

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[5] *See Lee*, 574 F.3d at 260 ("If the 'difference between the plaintiff's conduct and that of those alleged to be similarly situated *accounts for* the difference in treatment received from the employer,' the employees are not similarly situated for the purposes of an employment discrimination analysis." (quoting *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001))).

cess: the internal audit. But the nature of the violations themselves—improper use of the access badge as distinguished from working remotely from West Virginia without proper authorization—is patently different.

Next, Zeng points to a group of employees that violated Texas Tech's policies but were not terminated. That collection of employees includes a billing associate, two clinical assistants, a senior medical secretary, a research administrator, and a mechanic (among other similarly disparate positions). The violations themselves are just as dissimilar, ranging from tardiness to sexual harassment. The only discernable commonalities in the group is that they worked for Texas Tech, were somewhere below Lange in the chain-of-command, violated some rule at some point during their employment, and were not fired for that violation. Zeng doesn't assert that they shared "the same job or responsibilities" or had "comparable violation histories." *West*, 960 F.3d at 740. Therefore, we agree with the district court that they were not similarly situated to Zeng.

Finally, Zeng offers a group of thirteen employees who were terminated under Lange but, unlike Zeng, "were offered multiple opportunities and assistance to correct their behaviors prior to termination." Like the previous group, this diverse bunch includes a wide array of positions, including a coding and reimbursement specialist, a patient services specialist, and a senior business assistant. And, again like the previous group, the violations range broadly. It is true that the employees on that list received multiple "strikes" before being fired. But because all of them had "different work responsibilities" and were "subjected to adverse employment action[s] for dissimilar violations," that is inapposite. *Lee*, 574 F.3d at 259–60.

Zeng fails to demonstrate that "he was treated less favorably because of his membership in [a] protected class than were other similarly situated employees who were not members of the protected class, under nearly iden-

tical circumstances." *Id.* at 259. Therefore, he fails to make his *prima facie* case of discrimination under the *McDonnell-Douglas* framework. We affirm summary judgment on the discrimination claims.

B.

Zeng asserts, under 42 U.S.C. § 1983, that defendants deprived him of a property and liberty interest without adequate procedure, violating his Fourteenth Amendment due process rights. But because Zeng was not deprived of a protected property or liberty interest, he was not owed any constitutional due process.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citations omitted). In the context of employment, a property interest arises "only when a legitimate right to continued employment exists." *McDonald v. City of Corinth*, 102 F.3d 152, 155 (5th Cir. 1996). A liberty interest arises "only when the employee is discharged in a manner that creates a false and defamatory impression about him." *Bledsoe v. City of Horn Lake*, 449 F.3d 650, 653 (5th Cir. 2006) (cleaned up). We address the two interests in turn.

1.

"State law controls the analysis of whether [an employee] has a property interest in his employment." *McDonald*, 102 F.3d at 155. In Texas, an at-will employment state, "employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). Therefore, to establish a property interest—"a legitimate right to continued employment"—an employee must show that the at-will presumption has

been altered. *McDonald*, 102 F.3d at 155; *see also Muncy v. City of Dall.*, 335 F.3d 394, 398 (5th Cir. 2003).

That presumption can be changed by "a specific agreement to the contrary." *Brown*, 965 S.W.2d at 502. To do so, "the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. . . . An employee who has no formal agreement with his employer cannot construct one out of indefinite comments, encouragements, or assurances." *Id.*

Zeng signed an "Employment Acknowledgment" form that explicitly stated "a contract was not being offered" and "all employment at the Texas Tech University Health Sciences Center is employment-at-will." To establish a property interest, then, that status must have been modified. To that end, Zeng asserts that he and Wu formed a "definitive understanding" that he "would have continued employment." We disagree.

To support his position, Zeng asserts little more than conclusory statements that an understanding existed. He points first to two discussions with Wu regarding the stability of the position based on research-grant funding. He then speculates that Wu did not intend to fire him and, therefore, there was an understanding between the two. None of these instances "unequivocally indicate[s] a definite intent to be bound not to terminate the employee except under clearly specified circumstances." *Brown*, 965 S.W.2d at 502.

As an initial matter, the first set of conversations on which Zeng relies took place in the interview phase, i.e., *before* he signed the employment acknowledgment that expressly stated his employment was at-will. Those discussions could not have modified an employment arrangement that did not yet exist.

Irrespective of when the conversations occurred, Zeng can point to no

"expressed" or "clear and specific" agreement to modify his employment from at-will. *El Expreso, Inc. v. Zendejas*, 193 S.W.3d 590, 594 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quotation omitted). The best he can do is state that Wu told him there was sufficient funding to sustain the position for several years. At most, Wu's statements regarding the stability of funding were "indefinite . . . assurances." *Brown*, 965 S.W.2d at 502.

Moreover, whether Wu intended to fire Zeng is irrelevant. That a supervisor does not intend to fire an employee does not compel the conclusion that he or she is "bound not to terminate the employee . . . ." *Brown*, 965 S.W.2d at 502. It shows only that the supervisor does not wish to do so, not that he or she could not do so if desired.

Zeng was hired as an at-will employee. Nothing changed that. He had no "legitimate right to continued employment" and, therefore, no protected Fourteenth Amendment property interest. *McDonald*, 102 F.3d at 155.

2.

Zeng asserts that his termination infringed on a liberty interest, which, like property interests, can trigger procedural due process rights. When "the government discharges an employee amidst allegations of misconduct, the employee may have a procedural due process right to notice and an opportunity to clear his name." *Bledsoe*, 449 F.3d at 653. Those rights are triggered "only when the employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities." *Id.* (quotation omitted).

We employ a seven-element "stigma-plus-infringement" test to determine whether a government employee is entitled to a remedy under § 1983. *Id.* Zeng must demonstrate that "(1) he was discharged; (2) stigmatizing charges were made against him in connection with the discharge; (3) the charges were false; (4) he was not provided notice or an opportunity

to be heard prior to the discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and (7) the employer denied the request." *Id.* He cannot do so.

To the extent that Zeng reasserts his argument made in the district court that Texas Tech infringed on his liberty interests by classifying his termination as for "misconduct," that claim fails here as it did there. It is undisputed that Zeng violated Texas Tech policy when he worked from West Virginia. He fails element three, then, because the "charges were [not] false." *Id.*

Zeng also claims that Texas Tech's determination to designate him as not eligible for rehire ("NEFR") was "both adverse and stigmatizing" and, therefore, infringed his liberty interest. That assertion fails for several reasons. The meaning of an NEFR designation is published in the Texas Tech University System regulations. There, it states the criteria for NEFR: "The individual engaged in behavior that constitutes serious misconduct including but not limited to fraud, theft, violence/threat of violence, alcohol/drug policy violation, moral turpitude, sexual misconduct, or other conduct demonstrating unfitness for employment." Because Zeng was fired for misconduct, he "engaged in . . . conduct demonstrating unfitness for employment," and it fails *Bledosoe*'s third element. *Id.*

Moreover, Zeng provides no evidence that the "the charges were made public." *Id.*[6] To be sure, the NEFR designation was disclosed to a reference-check company that was hired at Zeng's behest. But because "there is no liability when . . . the plaintiff cause[s] [the charges] to be made

[6] As described above, the meaning of an NEFR designation is publicly available. But Zeng's NEFR designation, not what that designation generally means, is what must have been "made public." *Bledsoe*, 449 F.3d at 653.

public," that is insufficient. *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000) (quotation omitted). Zeng can point to no other instances in which the NEFR designation was made public. Therefore, his assertion also fails *Bledsoe*'s fifth element. *Bledsoe*, 449 F.3d at 653.

Because Zeng did not have a property interest in continued employment, and because he cannot show that his termination infringed on a liberty interest, he was not deprived of any procedural due process rights. Therefore, we affirm summary judgment on his § 1983 claims.

C.

Zeng puts forth defamation and tortious interference claims under Texas tort law. He posits that the individual defendants defamed him by labelling him as terminated for misconduct and NEFR. He further contends that those labels were communicated to prospective employers, committing tortious interference with prospective employment.

These claims border on frivolity. Substantively, Zeng cannot show that Texas Tech published a false statement, which is a required element of defamation. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). As explained above, the alleged defamatory statements were not false, nor did Texas Tech make them public. Neither can Zeng demonstrate that Texas Tech's actions were "independently tortious or unlawful," an element of a tortious interference claim. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013). And, in any event, the claims are barred by sovereign immunity.

The Texas Tort Claims Act ("TTCA") provides a "limited waiver of [sovereign] immunity for certain suits." *Garcia*, 253 S.W.3d at 655. Recovery against a government employee is barred "when suit is filed against an employee whose conduct was within the scope of his or her employment and the suit could have been brought against the governmental unit." *Id.* at 657

(citing TEX. CIV. PRAC. & REM. CODE § 101.106(f)). Thus, Zeng seeks to avoid sovereign immunity by claiming that defendants' conduct was not within the scope of their employment or was otherwise *ultra vires*.

To be within the scope of employment, there must be "a connection between the employee's job duties and the alleged tortious conduct." *Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017). That connection may be satisfied "even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." *Id.* The district court found, and Zeng now seemingly concedes, that "there is a clear connection between the conduct at issue in [Zeng's] tort claims—essentially, how the Individual Defendants categorized and decided his termination—and the Individual Defendants' job duties as administrators of [his] workplace." We agree.

"To fall within th[e] *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Acting "without legal authority" means that the government actor must have "violated statutory or constitutional provisions." *Lazarides v. Farris*, 367 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Zeng alleges only violations of Texas Tech policy, not "statutory or constitutional provisions." *Id.*[7] Therefore, that assertion is insuffi-

[7] We recognize that because Texas Tech is a state university, some of its policies—those promulgated by the Board of Regents—may "have the same force as an enactment of the legislature" for purposes of waiving sovereign immunity. *Hall v. McRaven*, 508 S.W.3d 232, 235 (Tex. 2017). But not every university policy meets that criterion. *See Univ. of Hous. v. Barth*, 403 S.W.3d 851, 856 (Tex. 2013). Because Zeng provides "no evidence that the [relevant policy was] enacted by the Board of Regents," those policies are not "law" for purposes of the *ultra vires* or purely-ministerial-act exceptions to sovereign

cient to sustain a claim under the *ultra vires* exception.

Purely "[m]inisterial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quotation omitted). Again, Zeng asserts only duties imposed by Texas Tech policy, not law. Therefore, he can demonstrate no failure to perform purely ministerial acts on behalf of the defendants.

In sum, Zeng's tort claims are barred by sovereign immunity under the TTCA. Even if they weren't, his substantive arguments lack merit. We affirm the summary judgment in favor of the individual defendants on the tort claims.

D.

Zeng appeals the denial of his motion for supplemental discovery. Rule 56(d) of the Federal Rules of Civil Procedure states that, following a motion for summary judgment, if the nonmoving party "shows . . . that, for specified reasons, it cannot present facts essential to justify its opposition, the court may" permit additional discovery. FED. R. CIV. P. 56(d). "We review a district court's denial of a Rule 56(d) motion for abuse of discretion." *Am. Family Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (per curiam). We find none.

Motions for additional discovery under Rule 56(d) are "broadly favored and should be liberally granted because the rule is designed to safeguard nonmoving parties from summary judgment motions that they cannot

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immunity. *Id.* at 855–57.

adequately oppose." *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010) (quotation omitted). Even still, the nonmoving party must demonstrate "how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Biles*, 714 F.3d at 894 (quotation omitted). Therefore, "we generally assess whether the evidence requested would affect the outcome of a summary judgment motion." *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 423 (5th Cir. 2016).

Zeng sought to discover Montoya's and Lopez's "timesheets and the records of [their] access card use" for an additional period of time. According to Zeng, "[i]n order to assess the seriousness" of their violations for the purposes of establishing that he was similarly situated to them, it was "important to know how many claimed workdays without access card use" they had accrued.[8] As explained above, however, the number of claimed workdays without access card use—even if equal to or greater than Zeng's 119-day absence—would not make Montoya or Lopez similarly situated to him. The violations themselves are different. One is the improper use of an access badge; the other is working from another part of the country without proper authorization.

Because the additional discovery would not have "affect[ed] the outcome of [the] summary judgment motion," the district court did not abuse its discretion in denying the motion. *Id.*

E.

Zeng appeals the denial of his motion for sanctions for spoliation of

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[8] On appeal, Zeng recharacterizes the aims of his motion. He now intimates that additional discovery may somehow have uncovered that Montoya and Lopez were not working at all, rather than only failing to use their access badges. Because the additional discovery that Zeng sought would not have uncovered that information, we need not address its relevance.

evidence. He asserts that Texas Tech deleted his work email account history in violation of its duty to preserve evidence. The district court determined that the motion failed because Zeng could not make the requisite showing of bad faith. We review that decision for abuse of discretion. *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015). Once again, we find none.

"Spoliation of evidence is the destruction or the significant and meaningful alteration of evidence." *Id.* (quotation omitted). When that occurs, we permit an "adverse inference" against the offending party "only upon a showing of 'bad faith' or 'bad conduct.'" *Id.* (quoting *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005)). The duty to preserve evidence attaches only "when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant." *Id.*

It is uncontested that the emails were deleted on March 3, 2018.[9] The only evidence Zeng posits may have placed Texas Tech on notice of the litigation before that date is a complaint sent to Rotwein and an exchange of emails with Salcido and Lange. Zeng sent Rotwein a letter expressing his regret that he had been terminated, explaining the stain the termination would have on his "career record," stating that the decision would "reflect poorly on the university," and asking Rotwein to reconsider. He then forwarded that letter to Rebecca Salcido and Lange.

Nothing in that letter could be construed as placing Texas Tech on notice that Zeng would even file suit, much less that his emails would be relevant to that litigation. Never was there a mention of discrimination or

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[9] It appears that the emails were deleted per a general Texas Tech policy, under which emails are deleted ninety days after an employee is terminated. That factual assertion was uncontested until Zeng now claims that "no such policy was produced." Even if there was no policy in place, both sides agree that the emails were deleted on March 3.

procedural failures, nor the slightest intimation of further action. The district court did not abuse its discretion when it determined that Texas Tech did not act in bad faith when it deleted Zeng's emails.

* * *

Zeng broke the rules, his employer found out, and he got fired. That may be disappointing to him, but that doesn't make it illegal. The summary judgment is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 20-50210

WEI-PING ZENG,

Plaintiff—Appellant,

versus

TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO; PETER ROTWEIN; RICHARD A. LANGE; BEVERLEY COURT; REBECCA SALCIDO,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CV-99

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 2020 U.S. App. LEXIS 35309 (5th Cir. Nov. 9, 2020))

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:

The petition for rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35; 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 23, 2020

Ms. Jeannette Clack
Western District of Texas, El Paso
United States District Court
525 Magoffin Avenue
Room 108
El Paso, TX 79901-0000

No. 20-50210 Zeng v. TX Tech Univ Hlth Sci Ctr at E
USDC No. 3:19-CV-99

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

cc:
Ms. Rola Daaboul
Mr. Wei-Ping Zeng

United States Court of Appeals for the Fifth Circuit

No. 20-50210
Summary Calendar

WEI-PING ZENG,

Plaintiff—Appellant,

versus

TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO; PETER ROTWEIN; RICHARD A. LANGE; BEVERLEY COURT; REBECCA SALCIDO,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 3:19-CV-99

Before KING, SMITH, and WILSON, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

WEI-PING ZENG,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**EP-19-CV-99-KC**
	§	
TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO, PETER ROTWEIN, RICHARD A. LANGE, BEVERLEY COURT, and REBECCA SALCIDO,	§	
	§	
Defendants.	§	

ORDER

On this day, the Court considered Defendants Texas Tech University Health Science Center at El Paso ("TTUHSCEP") and Peter Rotwein, Richard Lange, Beverley Court, and Rebecca Salcido's ("Individual Defendants") Motion for Summary Judgment, ECF No. 108; Plaintiff Wei-Ping Zeng's Response in Opposition, ECF No. 121; and Defendants' Reply, ECF No. 125. The Court also considered Plaintiff's Motion for Summary Judgment, ECF No. 113; Defendants' Response in Opposition, ECF No. 122; and Plaintiff's Reply, ECF No. 133. For the reasons that follow, Defendants' Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

I. BACKGROUND

The following facts are undisputed,[1] unless otherwise noted.

[1] Pursuant to the Court's Standing Order Regarding Motions for Summary Judgment, the parties each submitted a list of "Proposed Undisputed Facts," setting forth the facts on which, they contend, there are no genuine issues to be tried. The parties also submitted, pursuant to the Standing Order, a "Response to Proposed Undisputed Facts." The responses must state whether each of the opposing party's proposed facts are admitted or denied, with any denials followed by a citation to specific evidence in the record that shows the fact is genuinely disputed. Plaintiff's Response "denies" many proposed undisputed facts as "irrelevant," or "to the extent that" Defendants rely on the fact to "suggest" various legal conclusions. *See* Pl.'s Resp. to Defs.' Proposed Undisputed Facts, ECF No. 121-1. The Court notes that, in the Background section, it relies on some facts which Plaintiff "denies" in this

Plaintiff brings this employment discrimination case pro se. Plaintiff, an immunologist, is of Asian race and Chinese nationality. Pl.'s Proposed Undisputed Facts in Support of Mot. for Summ. J. ("Plaintiff's PUF") ¶ 1, ECF No. 113-69; Defs.' Proposed Undisputed Facts in Support of Mot. for Summ. J. ("Defendants' PUF") ¶ 1, ECF No. 108-9.[2] Plaintiff first came to the United States as a Ph.D. student in 1991, and eventually obtained his doctorate, completed postdoctoral training, and began working in academia—becoming a naturalized U.S. citizen in 2007 along the way. Pl.'s PUF ¶¶ 1, 4. In 2009, Plaintiff began working as an associate professor at Marshall University in West Virginia. Def.'s PUF ¶ 4.

Plaintiff was eventually denied tenure at Marshall in 2016. *Id.* ¶ 6. Afterwards, in late 2016, Plaintiff applied for a position as a research associate for Dr. Haoquan Wu in TTUHSCEP's Center of Emphasis in Infectious Diseases, which operates within the Department of Biomedical Sciences. Pl.'s PUF ¶ 10; Defs.' PUF ¶¶ 8. Plaintiff was hired by Dr. Wu in January 2017, with a start date of March 1, 2017. Pl.'s PUF ¶ 11; Defs.' PUF ¶ 9. Plaintiff began working in Dr. Wu's lab on research projects concerning ZIKA, HIV, and EV71 viruses.

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manner without effectively establishing a genuine dispute. The Court does not rely on proposed facts which either party denies and shows to be genuinely disputed by a specific citation to evidence in the record.

[2] The parties raise objections to portions of the summary judgment evidence. Defendants object to some of Plaintiff's exhibits—spreadsheets, generated by Plaintiff, summarizing the evidence—as "not properly authenticated summaries of what Plaintiff purports them to be." Defs.' Resp. in Opposition to Pl.'s Mot. for Summ. J. ¶ 2, ECF No. 122. Defendants also object to several exhibits because "Plaintiff failed to produce them to Defendants prior to the close of discovery." *Id.* Because, even relying on this evidence, Defendants' Motion is granted, the objections are overruled as moot. Defendants further object to all of Plaintiff's exhibits as improperly authenticated under Federal Rules of Evidence Rule 901. *Id.* The Court overrules this objection.

Plaintiff also moves to strike portions of Defendants' summary judgment evidence. Pl.'s Mot. to Partially Strike Defs.' Affs. & Exs., ECF No. 140. Because Plaintiff's arguments ultimately go to the truthfulness and credibility of the evidence, as opposed to admissibility, *see* App. to Pl.'s Mot. to Strike, ECF No. 140-1, the Court denies Plaintiff's Motion. *See Weiss v. United States*, 122 F.2d 675, 692 (5th Cir. 1941) (distinguishing between "admissibility of evidence on the one hand, and its worth, weight, and sufficiency on the other; the former being for the court and the latter for the jury").

Pl.'s PUF ¶ 16. Plaintiff's research position was funded by federal research grants awarded to Dr. Wu by the National Institutes of Health ("NIH"). Defs.' PUF ¶ 17.

Upon starting his position, Plaintiff and Dr. Wu signed a "position description" form, delineating Plaintiff's job responsibilities. *See* Defs.' Mot. for Summ. J. Ex. D-1 ("Position Description"), ECF No. 108-5. The form "attempts to identify the 'major' areas of responsibility and is not all-inclusive." *Id.* It estimates that 70% of Plaintiff's activity would be "perform[ing] scientific research" using laboratory equipment. *Id.* Another 20% is estimated as "assist[ing] in the preparation of manuscripts, posters, [and] grant applications," with the remaining 10% coming from maintenance of the lab and working cooperatively with colleagues. *Id.*

Plaintiff worked from a desk in Dr. Wu's lab and alleges that he "was subject to serious distraction by the constant noises from lab instruments and chatters of other researchers" and "thought that he could work more effectively at home." Pl.'s PUF ¶ 22; Defs.' PUF ¶ 27. Plaintiff still maintained a residence in West Virginia from his time at Marshall University and requested Dr. Wu's approval to work from that home. Pl.'s PUF ¶ 22. Dr. Wu granted Plaintiff's request. *Id.* Defendants dispute that Plaintiff was truly distracted by the conditions in the lab, or at least that distraction was truly the motivation behind Plaintiff's request. *See* Defs.' Resp. to Pl.'s PUF ¶ 22, ECF No. 122-5; *but see* Pl.'s Resp. to Defs.' PUF ¶ 31, ECF No. 121-1 (contending that the "primary reason" Plaintiff sought to work from home was to "work more efficiently and achieve better quality of work").

An additional reason for Plaintiff's request was that he "had some legal matters to deal with back in West Virginia." Pl.'s PUF ¶ 22. Plaintiff filed an administrative grievance and federal lawsuit against Marshall University claiming the denial of his tenure was discriminatory. *See* Defs.' PUF ¶ 31; Defs.' Mot. for Summ. J. Ex. A ("Plaintiff's Deposition"), at 19:9–19:17,

ECF No. 108-1. One reason Plaintiff maintained his residence in West Virginia was that his pending proceedings against Marshall University could result in his reinstatement. *See* Pl.'s Dep. 22:8–22:21, 116:23–117:7. Plaintiff's grievance proceedings commenced in 2016, prior to his employment at TTUHSCEP. *Id.* at 23:1–23:4. Plaintiff filed his federal lawsuit against Marshall in May 2017, after beginning work at TTUHSCEP and around the same time that Plaintiff obtained Dr. Wu's permission to work from home in West Virginia.[3] *See id.* at 39:4–39:25, 174:3–174:9, 231:8–231:21; Defs.' Mot. for Summ. J. Ex. H, at 3–4, ECF No. 108-8.

In November 2017, the TTUHSCEP Department of Biomedical Sciences audited the work hours reported by its hourly employees. Pl.'s PUF ¶ 24; Defs.' PUF ¶ 38. The audit reviewed records of employees entering the workplace—based on their access badges—over the preceding six months. Pl.'s PUF ¶ 25; Defs.' PUF ¶ 39. The audit showed that Plaintiff did not use his badge to enter the building housing Dr. Wu's lab on 118 or 119 of the 142 days reviewed in the audit, including 90 consecutive workdays from June 7 to October 13, 2017.[4] *See* Pl.'s PUF ¶ 25; Defs.' PUF ¶ 40; Defs.' Mot. for Summ. J. Ex. D-2 ("Audit Report"), at 9–12, ECF No. 108-4. Plaintiff reported regular full-time hours across the audited time period, except for two weeks reported as vacation days. Defs.' PUF ¶ 42; Pl.'s Resp. to Defs.' PUF ¶ 42.

[3] The precise time that Plaintiff began residing in and working from West Virginia—and sought Dr. Wu's permission to do so—is unclear. Plaintiff's Complaint states that "[f]rom early May to early December of 2017, the plaintiff primarily worked from his home in West Virginia." First Am. Compl. ¶ 35, ECF No. 60. In Plaintiff's deposition, upon reviewing records of his accessing the TTUHSCEP lab building, Plaintiff states that he does not remember the precise date of the move, but, "I think it's the end of May." Pl.'s Dep. 172:2–172:6. It is undisputed that Plaintiff was working from West Virginia by June 2017. Pl.'s Dep. 174:3–174:12.

[4] Plaintiff asserts that Defendants' alleged total number of swipeless days—118 or 119, depending on the document—includes days which were not "workdays" because Plaintiff claimed vacation, such that the number of "claimed workdays without access card use" is "approximately fewer than 103 days after proper adjustments." *See* Pl.'s Resp. to Defs.' PUF ¶ 41; Pl.'s Mot. for Summ. J. 9. Defendants contend that, as an employee who began working in March 2017, Plaintiff had not yet accrued the twelve days of vacation time claimed during October 2017. *See* Defs.' PUF ¶ 42. Also, in general, Plaintiff argues the audit report numbers are not an accurate tally of the days Plaintiff worked from home "because on many occasions his co-workers gave him rides to work and he did not use his card to access the building." Pl.'s PUF ¶ 27. In light of this dispute, the Court refers to the number of days Plaintiff failed to access the building in Defendants' audit as 103–119 days.

Upon discovery of this discrepancy in the audit report, the Senior Director of the department, Beverley Court, emailed a meeting invitation to Plaintiff and the chair of the department, Dr. Peter Rotwein. *See* Defs.' PUF ¶ 43; Defs.' Mot. for Summ. J. Ex. D-3 ("Meeting Invite"), ECF No. 108-5. The meeting was scheduled for December 19, 2017. Meeting Invite. Defendants state that "Plaintiff failed to show up for the meeting and did not reply to the meeting invitation." Defs.' PUF ¶ 44. Plaintiff emphasizes that he believed the meeting was about improperly filed paperwork because the invitation stated only, "Meeting to discuss Timesheets." Meeting Invite; Pl.'s Resp. to Defs.' PUF ¶ 43. Plaintiff also states that after receiving the invite "he went to see Ms. Court but was told she was gone for the Christmas break," and that he did reply to the meeting invitation in an exchange with Ms. Court two weeks later. Pl.'s Resp. to Defs.' PUF ¶ 44. Ultimately, the proposed meeting did not take place. *See* Defs.' PUF ¶ 44; Pl.'s Resp. to Defs.' PUF ¶ 44.

The parties' next communication took place on January 3, 2018. *See* Defs' Mot. for Summ. J. Ex. D-4 ("Court and Zeng Emails"), at 1–3, ECF No. 108-4. Ms. Court sent an email to Plaintiff asking whether he mistakenly claimed work hours during an institutional holiday. *See id.* at 2–3. Plaintiff responded, on January 7, 2018, affirming that the claimed hours were a mistake. *Id.* at 2. Then, Ms. Court requested a meeting with Plaintiff the following day "to discuss your timesheets." *Id.* at 1. Plaintiff responded, "I am sorry. I am not in El Paso. I will try to come back as soon as possible. . . . I will let you know once I am back if you still need to meet with me." *Id.* Ms. Court replied, "When do you plan to be at work so we can meet?" *Id.* Plaintiff responded, in part, "I will let you once I am back [sic]. There is something I have to deal with now, but I will come back as soon as I can." *Id.*

Meanwhile, on December 21, 2017, Dr. Rotwein, the department chair, emailed Dr. Wu about the discovery of Plaintiff's absence from the lab. Pl.'s PUF ¶ 25; Defs.' PUF ¶ 47; Pl.'s Mot. for Summ. J. Ex. W12 ("Rotwein and Wu Emails"), at 1–2, ECF No. 113-12. Dr. Rotwein stated that "a small number of other employees" had discrepancies, "but none were at the level of Dr. Zeng." Rotwein and Wu Emails 2. And, "we have met with all of the other individuals," whereas "[w]e attempted to make an appointment with Dr. Zeng on December 19, 2017 to ask him about these issues, but he did not show up." *Id.* Dr. Rotwein concluded that, "[a]s you may surmise, this is a potentially very serious problem," and noted that Dr. Zeng's absence could violate state law, TTUHSCEP internal policy, and the NIH research grant. *Id.* Dr. Rotwein requested a response by December 28, 2017. *Id.*

Dr. Wu responded on January 7, 2018. Pl.'s PUF ¶ 25; Defs.' PUF ¶ 48. Dr. Wu was in China at the time of Dr. Rotwein's email, limiting Dr. Wu's internet access. Pl.'s PUF ¶ 25; *see* Rotwein and Wu Emails 1. Dr. Wu stated that "[Plaintiff] can't afford a lawyer so he has to be physically presenting himself . . . for a while in [West] Virginia," and "[o]ut of sympathy, I agreed that he can work at home for a while." Rotwein and Wu Emails 1. Dr. Wu then explained the tasks he assigned Plaintiff, stating, "[i]n the beginning, I thought it would be over in a short period but it appears that it will take much longer." *Id.* Dr. Wu wrote that he told Plaintiff to find a solution for returning to El Paso or else to resign his position. *Id.*

Dr. Wu copied Plaintiff on his reply to Dr. Rotwein. *See id.* Plaintiff states that this was the first time he learned of the audit and the nature of Defendants' concerns. Pl.'s PUF ¶ 27. On January 9, 2018, Dr. Rotwein emailed Plaintiff about the discrepancies discovered in the audit. Pl.'s PUF ¶ 28; Defs.' PUF ¶ 51. Dr. Rotwein stated, "I am sorry to learn that you have not been available in El Paso to meet with me regarding . . . your timesheets and building access during

May and through December of 2017." Pl.'s Mot. for Summ. J. Ex. W14-1 ("Rotwein and Zeng Emails"), at 1, ECF No. 113-14.[5] Dr. Rotwein also noted the delay in response time from Dr. Wu and the Plaintiff to Dr. Rotwein and Ms. Court's email inquiries. *Id.* Dr. Rotwein ultimately requested a detailed inventory of Plaintiff's work activities, noting that absence from the TTUHSCEP campus is against institutional policy. *Id.* at 2. Plaintiff responded the next day that he would send the requested information and disputed that he failed to respond to Ms. Court. *Id.*

The day after that, January 11, 2018, Plaintiff sent Dr. Rotwein a list summarizing his work activities. Pl.'s PUF ¶ 30; Defs.' PUF ¶ 58. On January 12, 2018, Ms. Court emailed Plaintiff that he was placed on unpaid leave effective January 2, 2018, for violating TTUHSCEP's telecommuting policy—Operating Policy ("OP") 70.57. Defs.' PUF ¶ 66. On January 19, 2018, Dr. Rotwein sent a memorandum to Dr. Richard Lange, TTUHSCEP president, recommending Plaintiff's termination for cause. *Id.* ¶ 67.

On January 29, 2018, Ms. Court emailed Plaintiff a letter from Dr. Rotwein informing Plaintiff of his termination, effective January 22, 2018. *Id.* ¶ 71. The letter cites Plaintiff's violation of TTUHSCEP's policy requiring the president's authorization for off-campus work—OP 70.06—as the basis for the termination. *Id.* ¶ 72. It also mentions the job description's estimation of Plaintiff's work activities as 80% laboratory-based. *Id.* ¶ 73. Ms. Court's email attached TTUHSCEP's "Separation or Termination of Employment Record" form. *Id.* ¶ 75. The form includes check-box options for "Type of Separation or Termination" in three columns: voluntary, administrative, or misconduct. Defs.' Mot. for Summ. J. Ex. D-7 ("Separation or Termination of Employment Record"), at 27, ECF No. 108-4. Under the misconduct column, the box listing "Other" is checked, with the space for an explanation filled in as "violation of OP

[5] For all unpaginated exhibits, the Court cites to the page number created by the Court's electronic docketing system.

70.06." *Id.* The form is signed by Dr. Rotwein, Rebecca Salcido—the assistant vice president for human resources—and Dr. Lange. *Id.* The form has a line for a signature from the employee's supervisor, which is filled in as "supervisor is not available." *Id.*

Plaintiff states that he returned to El Paso on January 26, 2018. Pl.'s PUF ¶ 32. Plaintiff also states that he attempted to go to work on the TTUHSCEP campus on Monday, January 29, 2018, but found his access badge deactivated. *Id.* ¶ 33. "A while later," Plaintiff saw Ms. Court's email informing him of his termination. *Id.* ¶ 34.

Dr. Wu returned to the United States on February 12, 2018. Defs.' Resp. to Pl.'s Mot. for Summ. J. Ex. 1 ("Rotwein Affidavit") ¶ 20(i), ECF No. 122-1. On February 14, 2018, Dr. Wu attended a meeting with Dr. Rotwein and the TTUHSCEP Vice President. *Id.* ¶ 20(j). Dr. Rotwein "recommended that Dr. Wu resign otherwise his termination would be recommended to President Lange," and "Dr. Wu refused to resign." *Id.* The same day, Dr. Rotwein submitted a memo to President Lange recommending Dr. Wu's termination. *Id.* ¶ 20(k). The recommendation of termination was based on several alleged TTUHSCEP policy violations arising out of the events which led to Plaintiff's termination. *Id.* ¶¶ 14–19. Dr. Wu eventually completed a mediation process with TTUHSCEP and reached a settlement agreement that included his voluntary resignation. *Id.* ¶ 22.

Plaintiff filed suit on March 18, 2019, in the 243rd Judicial District Court for El Paso County, Texas, and the case was removed to this Court on March 27, 2019. Notice of Removal, ECF No. 1; Pl.'s Original Pet., ECF No. 4-1. Defendants filed for summary judgment on December 18, 2019. Plaintiff filed for summary judgment on December 26, 2019.

II. DISCUSSION

A. Standard

1. 12(b)(1)

Federal courts are courts of limited jurisdiction. *Exxon Mobile Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005); *People's Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004). Without jurisdiction conferred by statute or the Constitution, federal courts lack the power to adjudicate claims. *Exxon Mobil*, 545 U.S. at 552; *People's Nat'l Bank*, 362 F.3d at 336. A party may challenge a district court's subject matter jurisdiction by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(b)(1).

A federal court must consider a motion to dismiss pursuant to Rule 12(b)(1) before any other challenge because a court must have subject matter jurisdiction before determining the validity of a claim. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). The party asserting jurisdiction constantly bears the burden of proof that the jurisdiction does in fact exist. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Where the motion to dismiss is based on the complaint alone, the court must decide whether the allegations in the complaint sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

2. Summary Judgment

A court must enter 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software, Inc.*, 232

F.3d 473, 477 (5th Cir. 2000) (per curiam)). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996).

"[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323; *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). To show the existence of a genuine dispute, the nonmoving party must support its position with citations to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials[,]" or show "that the materials cited [by the movant] do not establish the absence . . . of a genuine dispute, or that [the moving party] cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c).

The court resolves factual controversies in favor of the nonmoving party; however, factual controversies require more than "conclusory allegations," "unsubstantiated assertions," or "a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Further, when reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh evidence. *Man Roland, Inc. v. Kreitz Motor Express, Inc.*, 438 F.3d 476, 478–79 (5th Cir. 2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Thus, the ultimate inquiry in a summary judgment motion is "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

B. Analysis

Plaintiff claims that his termination by Defendants amounted to discrimination based on his race and nationality in violation of his rights under Title VII, 42 U.S.C. § 1981, and the Texas Commission on Human Rights Act (the "TCHRA"). Pl.'s Mot. for Summ. J. 4–11. Further, Plaintiff claims that he was deprived of sufficient notice and opportunity to be heard regarding his termination in violation of his procedural rights under the Due Process Clause of the Fourteenth Amendment. *Id.* at 11–16. Finally, Plaintiff claims under state tort law that the Defendants committed defamation and tortious interference in the course of his termination. *Id.* at 16–20. In his summary judgment motion, Plaintiff argues that the evidence entitles him to judgment as a matter of law on each of his claims.

Defendants argue there is insufficient evidence for Plaintiff to establish his discrimination claims. Defs.' Mot. for Summ. J. 17–24. They present non-discriminatory reasons for Plaintiff's termination and argue that Plaintiff fails to show those reasons are mere pretext for intentional discrimination. *Id.* Further, Defendants argue that Plaintiff's § 1981 claim, § 1983 claims, and tort claims are barred by sovereign immunity, qualified immunity, and immunity under the Texas Tort Claims Act ("TTCA"). *Id.* at 24–30. Even if some of these claims survive immunity, Defendants also argue that the evidence is insufficient to survive summary judgment. *Id.*

The Court first addresses a subject matter jurisdiction challenge raised by Defendants under Rule 12(b)(1). Then, the Court analyzes each set of claims in turn. Finally, the Court addresses Plaintiff's pending motions for supplemental discovery and sanctions for spoliation of evidence.

1. The Court's subject matter jurisdiction

Defendants incorporate the arguments raised in their First Amended Motion to Dismiss, ECF No. 70, to their Motion for Summary Judgment. Defs.' Mot. for Summ. J. ¶ 29. In the First Amended Motion to Dismiss, Defendants move under Rule 12(b)(1) to dismiss Plaintiff's § 1981, § 1983, and tort claims against Defendant TTUHSCEP and the Individual Defendants in their official capacities for lack of subject matter jurisdiction. First Am. Mot. to Dismiss 11–12, 23–24. Defendants argue that, as governmental entities,[6] these Defendants are entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution. *Id.*

If Defendants are protected by sovereign immunity, the Court does not have subject matter jurisdiction to hear this case because Defendants would be immune from suit. *See, e.g.*, *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996). However, by removing this case from state court to federal court, Defendants invoked federal jurisdiction and cannot now argue that federal jurisdiction does not extend to the case at hand. *See Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 619 (2002).[7] But, this does not mean that Defendants have waived their right to argue sovereign immunity from liability in this case. *See Skinner v. Gragg*, 650 F. App'x 214, 218 (5th Cir. 2016) (citing *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005)). It does mean, though, that Defendants waived their Eleventh Amendment immunity from suit; therefore, this Court has subject matter jurisdiction over Plaintiff's claims against the governmental defendants. *See Lapides*, 535 U.S. at 624.

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[6] TTUHSCEP is a product of the laws of Texas and benefits from Eleventh Amendment immunity to the same extent as the state of Texas. *See United States v. Tex. Tech. Univ.*, 171 F.3d 279, 289 n.14 (5th Cir. 1999). And, suits against government officials in their official capacities are treated as suits against the state. *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 320 (5th Cir. 2008).

[7] While *Lapides* concerned state-law claims, the Fifth Circuit has extended its holding to federal-law claims, including § 1983 claims. *See Spooner v. Jackson*, 251 F. App'x 919, 924 (5th Cir. 2007); *Meyers ex rel. Benzing v. Texas*, 410 F. 3d 236, 248 (5th Cir. 2005).

Furthermore, the Court's subject matter jurisdiction is not barred by the Eleventh Amendment to the extent that the *Ex Parte Young* exception applies. Plaintiff added claims for injunctive relief in his Second Amended Complaint. Second Am. Compl. ¶¶ 202(H)–(N). "[T]o avoid an Eleventh Amendment bar by means of *Ex parte Young*, 'a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Cantu Servs., Inc. v. Roberie*, 535 F. App'x 342, 344–45 (5th Cir. 2013) (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Claims for prospective relief from discriminatory firings allege ongoing violations of federal law. *See Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 323–24 (5th Cir. 2008); *Hays v. LaForge*, 113 F. Supp. 3d 883, 893 (N.D. Miss. 2015). And, Plaintiff's injunctive claims—including expungement of his personnel file and a prohibition on allegedly defamatory or stigmatizing statements about the Plaintiff—are properly characterized as prospective. *See e.g., Shah v. Univ. of Tex. Sw. Med. Sch.*, 129 F. Supp. 3d 480, 496–97 (N.D. Tex. 2015). Therefore, Plaintiff seeks prospective relief from an ongoing violation of federal law and, under *Ex Parte Young*, those claims against the governmental Defendants are not jurisdictionally barred by the Eleventh Amendment.

The Court has subject matter jurisdiction and Defendants' 12(b)(1) Motion is denied.

2. The discrimination claims

Plaintiff brings discrimination claims under Title VII and the TCHRA against TTUHSCEP and Defendants Rotwein, Lange, and Salcido in their official and individual

capacities. Plaintiff also brings § 1981 discrimination claims, pursuant to § 1983,[8] against Defendants Rotwein, Lange, and Salcido. Plaintiff argues the evidence entitles him to judgment as a matter of law on each of these claims. Defendants argue the § 1981 claims fail on immunity grounds and that the evidence is insufficient for any claim to survive summary judgment.

a. Threshold issues

At the outset, Plaintiff cannot maintain his Title VII and TCHRA claims against the Individual Defendants. Title VII permits plaintiffs to recover only from employers and from employees in their official—not individual—capacities because "a Title VII suit against an employee is actually a suit against the corporation." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 262 (5th Cir. 1999). Furthermore, a Title VII plaintiff cannot sue both an employer and its employees in their official capacities because doing so subjects the employer to double liability. *Id.* And, because TCHRA claims follow Title VII case law, these same rules govern those claims. *See In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010); *see, e.g.*, *Lloyd v. Birkman*, 127 F. Supp. 3d 725, 745–46 (W.D. Tex. 2015). Therefore, given that Plaintiff elects to sue TTUHSCEP itself, summary judgment is warranted for Defendants on Plaintiff's Title VII and TCHRA claims against TTUHSCEP employees—Rotwein, Lange, and Salcido—in their individual and official capacities. *See Indest*, 164 F.3d at 262.

Additionally, Plaintiff's TCHRA claim against Defendant TTUHSCEP fails on state immunity grounds. While Congress abrogated sovereign immunity under Title VII, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Texas waived damages and suit immunity under TCHRA only in

[8] Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 claims against state employees "must [ ] be pursued through the remedial provision of § 1983." *Felton v. Polles*, 315 F.3d 470, 482 (5th Cir. 2002), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Plaintiff has done so here by claiming "Defendants Rotwein, Lange and Salcido . . . violated 42 U.S.C. §§ 1981, 1983." *See Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 340 n.9 (5th Cir. 2003).

Texas courts, *Pequeño v. Univ. of Tex. at Brownsville*, 718 F. App'x 237, 241 (5th Cir. 2018) (citing *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326 (5th Cir. 2002)). And, as explained above, Defendants' waiver of sovereign immunity from suit by removing this case to federal court did not waive sovereign immunity defense as to liability. *See Skinner*, 650 F. App'x at 218 (citing *Meyers ex rel. Benzing*, 410 F.3d at 255). Therefore, Defendants are also entitled to summary judgment on Plaintiff's TCHRA claim against TTUHSCEP.

Plaintiff's surviving discrimination claims are a Title VII claim against TTUHSCEP and § 1981 claims against Defendants Rotwein, Lange, and Salcido. Employment discrimination claims under Title VII and § 1981 "require the same proof to establish liability." *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 403 n.2, 404 (5th Cir. 1999). Because Plaintiff alleges intentional discrimination based on circumstantial evidence, the Court analyzes the claims under the *McDonnell Douglas* burden-shifting framework. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under that framework, a plaintiff must first establish a prima facie case of discrimination. *Id.* If the plaintiff does so, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its treatment of the plaintiff. *Id.* at 557. Finally, if the employer meets this burden of production, the ultimate burden of persuasion reverts to the plaintiff to show the employer's proffered justification is a mere pretext for intentional discrimination. *Id.*

b. The prima facie case

To establish a prima facie case at the first step of the framework, the evidence must show that the plaintiff (1) is a member of a protected class; (2) is qualified for the position at issue; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class or treated differently than similarly situated employees outside the protected

class. *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003). More specifically, on the fourth element, "in work-rule violation cases, such as the instant case, a Title VII plaintiff may establish a prima facie case by showing either (1) that he did not violate the rule, or (2) that, if he did, [non-protected-class] employees who engaged in similar acts were not punished similarly." *See Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 892–93 (5th Cir. 2012).

Here, the parties dispute whether the evidence satisfies the second and fourth elements. *See* Pl.'s Mot. for Summ. J. 4–5; Defs.' Resp. to Pl.'s Mot. for Summ. J. 5–6. Even assuming that Plaintiff was qualified for the position, satisfying the second element, Plaintiff's prima facie case fails on the fourth element because the evidence shows he violated workplace rules and does not show disparate treatment.

i. The rules violations

Because Plaintiff's termination was based upon violations of workplace rules, Plaintiff can satisfy the fourth element of his prima facie case by showing he did not, in fact, violate the rules. *Turner*, 675 F.3d at 892–93; *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089–90 (5th Cir. 1995).

Plaintiff was terminated for working from his residence in West Virginia without the written authorization of TTUHSCEP President Dr. Lange, as required by TTUHSCEP OP 70.06, and without a signed telecommuting agreement, as required by TTUHSCEP OP 70.57.[9] The relevant provision of OP 70.06 provides:

[9] Plaintiff argues that only OP 70.06 can be considered as the basis for his termination because only OP 70.06 is cited on the formal record of termination. However, Defendants cited Plaintiff for violating multiple TTUHSCEP policies in other documents, such as Ms. Court's email notifying Plaintiff of his placement on unpaid leave for violating OP 70.57. *See* Unpaid Leave Notice Email, Defs.' Mot. for Summ. J. Ex. D-5, ECF No. 108-5. The Court's analysis may consider any of the alleged rule violations and is not constrained only to the violation cited in the formal termination record. *See, e.g.*, *Laxton*, 333 F.3d at 579–83 (analyzing each of the employer's alleged rule violations, including some "listed in the Final Written Warning" and some not cited in formal documentation); *Wallace*, 271 F.3d at 217–18, 220 (explaining, in the factual background, that the employer cited a single rule

> **Place of Duty.** An employee shall, during normal office hours, conduct TTUHSC El Paso business only at the employee's regular place of business or assigned duty point unless the employee is on travel status or has received prior written authorization from the President. In no event shall an employee's personal residence be deemed to be that employee's regular place of business or duty point without prior written authorization of the President or his/her designee.

Defs.' Mot. for Summ. J. Ex. E-1 ("OP 70.06"), at 3, ECF No. 108-5. Defendants state that TTUHSCEP OP 70.06 tracks with Texas state law, which provides:

> PLACE WHERE WORK PERFORMED. (a) An employee of a state agency shall, during normal office hours, conduct agency business only at the employee's regular or assigned temporary place of employment unless the employee: (1) is travelling; or (2) received prior written authorization from the administrative head of the employing state agency to perform work elsewhere. (b) The employee's personal residence may not be considered the employee's regular or assigned temporary place of employment without prior written authorization from the administrative head of the employing state agency.

See Rotwein Aff. ¶ 5; Tex. Gov't Code Ann. § 658.010 (West 2020).

Finally, when an employee does obtain permission to work from home—or, "telecommute"—OP 70.57 provides:

> All telecommuting must be performed pursuant to a Telecommuting Agreement . . . between the employee and supervisor. The Agreement shall comply with the requirements of this policy, be completed and signed by the employee and the employee's supervisor and must have the approval of the employee's unit head, the Dean or Director, the appropriate department's Vice President, Human Resources, and President before it can be implemented. Copies of approved Agreements must be filed with the Human Resources Department.

Defs' Resp. to Pl.'s Mot. for Summ. J. Ex. C ("OP 70.57") at 1, ECF No. 122-3.

Before starting at TTUHSCEP, Plaintiff signed an "Employee Acknowledgment" form. One provision of that form—"Select [TTUHSCEP] Operating Policies (OP) and Procedures—listed ten hyperlinks to selected TTUHSCEP policies that the employee agrees to faithfully access, review, and abide by. Defs. Mot. for Summ. J. Ex. B-2 ("Employee Acknowledgment"), at 9, ECF No. 108-2, Pl.'s Mot. for Summ. J. Ex. W26-1, at 6–7, ECF No. 113-47. The ten

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violation at the time of the plaintiff's termination, but analyzing multiple rule violations proffered as legitimate reasons for the firing under the *McDonnell Douglas* framework).

cataloged policies did not include OP 70.06 or OP 70.57. *See id.* The last provision of the form—"Employee Acknowledgment"—states in part:

> By signing below, I acknowledge I have received and reviewed the information provided on this form and understand that it is not intended to be all inclusive of [TTUHSCEP] Operating Policies and Procedures, the Board or Regents' Rules [sic], and the State Government Code. . . . I understand that it is my obligation to faithfully access the links to the policies provided and to review them in accordance with institutional requirements, and comply with [TTUHSCEP] Operating Policies and Procedures and the Board of Regents' Rules.

Id.

Plaintiff argues the conduct that gave rise to his termination did not, in fact, violate these rules for three reasons. First, "the plaintiff had his supervisor Dr. Wu's permission to work from home." Pl.'s Mot. for Summ. J. 5. Second, "based on Dr. Rotwein's own statement, according to the practice and the chain of authority/hierarchy of TTUHSCEP, it was the supervisor's responsibility to request approval from the president for the employee to work from home." *Id.* And third, "it was not the 'institutional requirements' to review all policies, specifically OP70.06." *Id.*

These arguments are unavailing. There is no question that the evidence shows Plaintiff's conduct was in violation of TTUHSCEP rules. First, OP 70.06 explicitly requires written authorization from the President for an employee to work from somewhere other than their assigned workplace. OP 70.06 at 3. And, it requires written authorization from the President or his designee for an employee to work from a personal residence. *Id.* There is no evidence that Dr. Wu was the designee of the TTUHSCEP President—Dr. Lange—for this purpose, nor that Plaintiff otherwise obtained the President's prior written authorization to work from home in West Virginia. Likewise, OP 70.57 expressly requires a written telecommuting agreement for an employee to work from home, signed by several administrative officials. OP 70.57 at 1. There

is no evidence that Plaintiff signed the requisite telecommuting agreement and obtained the proper approvals. While there is no dispute that Plaintiff sought and obtained Dr. Wu's permission to work from home in West Virginia, Dr. Wu's permission was insufficient under the policy. Plaintiff's conduct violated workplace rules.

Second, obtaining Dr. Wu's permission did not immunize Plaintiff and shift any further burden to comply exclusively upon Dr. Wu. Plaintiff points to two statements made by Dr. Rotwein to argue the contrary. First, in his email to Plaintiff about the violations, Dr. Rotwein states: "I also note that without prior written approval from the President of [TTUHSCEP], off-campus work by employees is not allowed according to our institutional policies. You did not have that approval, as your supervisor, Dr. Wu, never submitted such a request." Rotwein and Zeng Emails 2. Second, in his memo to TTUHSCEP President Dr. Lange, Dr. Rotwein states: "Dr. Zeng had not received written approval to work away from TTUHSC El Paso. To my knowledge, Dr. Wu, as his immediate supervisor, had never applied for such permission." Pl.'s Mot. for Summ. J. Ex. W18 ("Termination Recommendation Memo") at 2, ECF No. 113-19. These statements acknowledge that Plaintiff obtained Dr. Wu's permission. But, they affirm that Plaintiff's conduct still violated policy because Dr. Wu also did not obtain the requisite approvals. They do not mean that, as Plaintiff puts it, "it was the supervisor's responsibility to request approval." *See* Pl.'s Mot. for Summ. J. 5. Dr. Rotwein may have anticipated that presidential approval would have been obtained by the supervising faculty member, as opposed to the staff member. That does not relieve Plaintiff's obligation to comply with TTUHSCEP operating policies as written. Plaintiff's conduct remains a rule violation despite these statements.

Third, Plaintiff's lack of knowledge that his conduct was violative is irrelevant. Plaintiff states that "neither the plaintiff nor his supervisor Dr. Wu knew that it required the president's approval for the plaintiff to work from home." Pl.'s Mot. for Summ. J. 5. However, the undisputed evidence shows that Plaintiff had previously signed the Employee Acknowledgment averring that he understood his obligation to review and comply with all institutional policies and rules. Employee Acknowledgment 9.

Plaintiff refutes that the Employee Acknowledgment form put him on notice of, and bound him to compliance with, OPs 70.06 and 70.57. Plaintiff emphasizes that the agreement provided links to several policies but not OPs 70.06 or 70.57. Pl.'s PUF ¶ 40. And, that the form obliged the signatory only to "review [the policies] in accordance with institutional requirements." *Id.* Plaintiff concludes that the phrase "in accordance with institutional requirements" meant he was required only to review the documents expressly listed on the form. Pl.'s PUF ¶ 42. This line of reasoning completely ignores the portion of the acknowledgement, however, stating that Plaintiff agreed that "[b]y signing below, I acknowledge I . . . understand that [this form] is not intended to be all inclusive of [TTUHSCEP] Operating Policies and Procedures." Employee Acknowledgment 9. And, "that it is my obligation to access the links to the policies provided and to review them in accordance with institutional requirements, *and* comply with [TTUHSCEP] Operating Policies and Procedures." *Id.* (emphasis added) (hyperlinking the underlined portion to an online list of all TTUHSCEP policies). Plaintiff concludes that "this interpretation of the requirements is unreasonable because there are as many as 776 policies. No one could review and/or remember such [an] enormous number of policies." Pl.'s PUF ¶ 44. However, that is the obligation Plaintiff expressly agreed to when he signed the Employee Acknowledgment form as a precondition to his employment.

Therefore, Plaintiff agreed to comply with OPs 70.06 and 70.57 as a precondition to his employment. The evidence shows that Plaintiff was in violation of those policies, and Plaintiff's arguments fail to show otherwise. Plaintiff adds that his conduct "did not cause any damage to the property of TTUHSCEP, nor was it a security threat," and that "plaintiff's excellent job performance should be taken into consideration to mitigate the seriousness of the alleged violation." Pl.'s Mot. for Summ. J. 5. However, these facts are ultimately irrelevant to this inquiry. The reason that the fourth element of the prima facie case can be satisfied by showing that no rules violation took place is that a jury could infer that intentional discrimination was the true motivation for the firing. *See Turner v. Kan. City S. Ry. Co.*, 675 F.3d at 892–93, 895 n.7. If the evidence shows only that Plaintiff *unknowingly* violated the rules, a reasonable jury could not reach this inference. *See id.* at 895 n.7; *Mayberry*, 55 F.3d at 1089–90.

Plaintiff fails to establish that he did not, in fact, violate workplace policies. To satisfy the fourth element of his prima facie case, then, Plaintiff must show that employees outside of his protected class who engaged in similar acts were not punished similarly. *See Turner,* 675 F.3d at 892–93.

ii. Similarly situated comparators

To meet the fourth element, Plaintiff must identify "comparator" employees outside of his protected class who were "treated more favorably 'under nearly identical circumstances.'" *See Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 427 (5th Cir. 2017) (quoting *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)).

The "nearly identical circumstances" standard for comparators generally considers several factors to determine if co-workers are "similarly situated." *Lee*, 574 F.3d at 260–61. Courts look to whether the employees being compared held the same job or responsibilities, had

the same supervisor or the same person decide their disciplinary outcome, and had essentially comparable violation histories. *Id.* at 260. Most importantly, in rules-violation cases, the conduct at issue—the basis for the employer's adverse employment action against the plaintiff—must be "nearly identical" to that of the comparator who was allegedly treated more favorably. *Id.* "[P]ut another way, the conduct at issue is *not* nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated *accounts for* the difference in treatment received from the employer." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001) (emphases added). Near identicality does not require complete and total similarity, though. *Lee*, 574 F.3d at 260. For example, differences between the comparators' most immediate supervisors or the exact number of infractions in disciplinary records are not disqualifying. *Id.*

Here, the comparators Plaintiff identifies are not "similarly situated" to Plaintiff. First, Plaintiff points to nearly 200 instances of rules violations by predominantly non-Asian, non-Chinese TTUHSCEP employees from July 2014 to January 2018. *See* Pl.'s Mot. for Summ. J. Exs. W22-1–W22-20, ECF Nos. 113-23–113-42. Plaintiff argues the disciplinary records establish that TTUHSCEP has a practice of issuing multiple notices of rules violations, and both informal and formal corrective actions, prior to a termination—a practice that was not applied in his case. Pl.'s Mot. for Summ. J. 7–8. This kind of generalized evidence cannot be used to satisfy the fourth element of Plaintiff's prima facie case, however, because the evidence does not establish that the employees at issue are similarly situated to Plaintiff. *See, e.g.*, *Bouie v. Equistar Chems. LP*, 188 F. App'x 233, 237–38 (5th Cir. 2006) (finding that company-wide data tending to bolster the plaintiff's claim "does not speak to whether other similarly situated employees were treated more favorably"). The cases arose during a multi-year period, across

departments of TTUHSCEP, among employees with varying supervisors and job responsibilities. This evidence does not demonstrate the purported comparators were treated more favorably than Plaintiff under "nearly identical circumstances." *See Lee*, 574 F.3d at 260–61; *Wallace*, 271 F.3d at 221.

Next, Plaintiff specifically identifies thirteen non-Asian, non-Chinese employees whose disciplinary records resulted in termination. Pl.'s Mot. for Summ. J. Ex. W22-20. Plaintiff argues that—unlike in his case—each of these terminations involved multiple warnings and corrective actions, the approval of direct supervisors, and notice of termination prior to the effective date. Pl.'s Mot. for Summ. J. 8. However, these comparators cannot be used to show disparate treatment because they were not terminated under nearly identical circumstances. *See Lee*, 574 F.3d at 260–61; *Wallace*, 271 F.3d at 221. Rather, the evidence shows these employees worked in varied roles, including IT support, clinical assistance, editing, and patient services. *See* Pl.'s Mot. for Summ. J. Ex. W22-20. It does not appear that any had responsibilities similar to Plaintiff's in his research role in a laboratory setting. *See id.* Nor did they work in the same department or under the same supervisors as Plaintiff. *See id.* Finally, the conduct which ultimately resulted in their terminations—tardiness, harassment, failure to perform, unprofessional behavior—is not "nearly identical" to Plaintiff's rule violation—working from home for many months, in a laboratory-based position, without proper authorization. *See Lee*, 574 F.3d at 260. Thus, these comparators cannot be said to have been fired under nearly identical circumstances. *See id.*

Nonetheless, Plaintiff argues that the comparators are similarly situated because their rule violations are necessarily of "comparable seriousness" to his own, given that they were also punishable by termination. Pl.'s Mot. for Summ J. 2–3. Violations of comparable seriousness

may be regarded as nearly identical. *See Lee*, 574 F.3d at 261 (citing *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 283 n.11 (1976); *McDonnell Douglas*, 411 U.S. at 804). However, "comparable seriousness" refers to the "seriousness" of the employee's misconduct, not the punishment which may be available under the employer's policies. *See id.* (referring to the seriousness "of the offenses for which discipline was meted out" as opposed to "how a company codes an infraction under its rules and regulations"). Here, Defendants explicitly regarded Plaintiff's violation as being of the utmost seriousness. Defendants expressed concern that Plaintiff's conduct was violating state law governing TTUHSCEP employees and federal law governing the NIH grants funding the position. *See, e.g.*, Rotwein and Zeng Emails; Rotwein and Wu Emails. Indeed, Defendants went so far as to report the situation to the NIH and claim they returned $30,000 in federal funds to the NIH as a result. *See* NIH Letter, Defs.' Mot. for Summ. J. Ex. B-7, ECF No. 108-2; Defs.' PUF ¶ 114. While Plaintiff contends that his violation was regarded with such seriousness unfairly, "[t]he relevant perspective is that of the employer at the time of the adverse employment decision." *Lee*, 574 F.3d at 261 n.27.

Moreover, even if Plaintiff's violation is of comparable seriousness—and therefore "nearly identical"—to the comparators' violations, this factor alone would not establish that their terminations took place under nearly identical circumstances. It is true that the comparable seriousness factor is "critical" to the analysis. *See id.* at 260; *Wallace*, 271 F.3d at 221. However, the Fifth Circuit has made clear that the Supreme Court's instruction on "comparable seriousness" in *McDonald* does not reduce the "nearly identical circumstances" inquiry to this single factor. *See Perez v. Tex. Dep't of Criminal Justice, Institutional Div.*, 395 F.3d 206, 212–13 (5th Cir. 2004). Rather, "[the comparators'] circumstances, including their misconduct, must have been 'nearly identical.'" *Id.* Here, even if the misconduct was nearly identical, the

aforementioned differences in the comparators' positions means they are not similarly situated to Plaintiff. *See id.* at 215 (holding that, even if comparable seriousness were conceded, "other potentially significant distinctions between [the comparators'] respective circumstances" could determine the near-identicality analysis).

Finally, most specifically, Plaintiff identifies two comparators cited for rule violations arising out of the same audit as Plaintiff's violations. Pl.'s Mot. for Summ. J. 8–10. First, Alexa Montoya was a "Medical Research Tech" in TTUHSCEP's Center of Emphasis in Cancer, which operated in the same department as Plaintiff's lab, chaired by Dr. Rotwein and administrated by Ms. Court. *See* Pl.'s Summ. J. Mot. Ex. W29 ("Employee Records") at 2–11, ECF No. 113-52; Pl.'s PUF ¶ 73. Ms. Montoya's job responsibilities were comparable to Plaintiff's, contributing to academic research in a laboratory setting. *See* Employee Records 2–11 (describing Ms. Montoya's work in the "competencies summary" boxes). Ms. Montoya self-identified her race as "American Indian or Native Alaskan White." *Id.* at 1. Second, Plaintiff identifies Christopher Lopez. While relatively less evidence concerns Mr. Lopez, he also occupied a "Medical Research Tech" position in the same department and is of "Hispanic" race according to TTUHSCEP. *See id.* at 25–27.

Like Plaintiff, Ms. Montoya and Mr. Lopez were both discovered to have discrepancies between their reported working hours and their building access. Ms. Court investigated the discrepancies, as in Plaintiff's case. *See* Defs.' Resp. to Pl.'s Mot. for Summ. J. Ex. 3 ("Court Affidavit") ¶¶ 7–12, ECF No. 122-3. Ms. Montoya reported regular work hours on eighty-three days during which she did not use her badge to access the laboratory building. Employee Records 12. Mr. Lopez reported twenty-four workdays with regular hours but without building access. *Id.* at 27. While these discrepancies are less than the 103–119 day discrepancy alleged

against Plaintiff, they arise from the same time period and series of audits, in the same department, and were investigated by the same decisionmakers.

There are, however, two crucial distinctions in the cases of Ms. Montoya and Mr. Lopez that render them not "similarly situated" to the Plaintiff. First, Ms. Montoya and Mr. Lopez both met with department administrators—Defendants Rotwein, Court, and Salcido—when Ms. Court requested meetings regarding the discrepancies. *See* Court Aff. ¶ 4. At these meetings, these employees were notified of their alleged rule violations and granted the opportunity to explain the discrepancies. *See id.* Plaintiff, by contrast, did not respond to Ms. Court's meeting invitation until Ms. Court emailed again, roughly two weeks later. Even then, when Ms. Court again requested to meet, Plaintiff responded that he was unavailable and did not inquire about the issue or take further steps to reschedule. Thus, while Plaintiff argues he was offered comparatively less recourse for his rule violations, the comparators attended the meetings intended to provide recourse for their rule violations and Plaintiff did not. Because this distinction could "account[] for the difference in treatment received from the employer," it cannot be said that Ms. Montoya and Mr. Lopez received more favorable treatment under "nearly identical" circumstances as Plaintiff. *See Wallace*, 271 F.3d at 221.

Plaintiff responds that he was not adequately informed of the timing and purpose of the requested meetings. However, Ms. Montoya and Mr. Lopez were notified of meeting requests in the same manner as Plaintiff, via identical calendar invites. *See* Court Aff. ¶ 4. Only Plaintiff received a second meeting request two weeks later, to which he responded that he was unavailable, taking no further action to follow up. *See id.* ¶¶ 3–4. Given that Ms. Montoya and Mr. Lopez received identical notice, this evidence cannot support the inference that Defendants provided Plaintiff less of an opportunity to resolve the charges against him. Therefore, even

accepting as true Plaintiff's explanation for not meeting with Defendants—that he was unaware of Defendants' concerns and believed the meeting requests to be about routine paperwork issues—these facts cannot serve as circumstantial evidence of discriminatory intent by Defendants.

The next distinction, most critical to the analysis, is that the rule violations committed by Ms. Montoya and Mr. Lopez are not "nearly identical" to Plaintiff's. While their violations are similarly related to discrepancies between building access and claimed working hours, their violative conduct was distinct from Plaintiff's. Ms. Montoya's badge swipes did not align with her claimed workdays because "Ms. Montoya's assigned work hours were in the evenings and her badge access had been set up for normal working hours only." Court Aff. ¶¶ 7, 9. Ms. Montoya explained that "the campus police and security would let her into the building." *Id.* ¶ 10. Ms. Montoya's faculty supervisor confirmed that, during the evening hours, Ms. Montoya "was conducting bench top research and providing data in support of her claim for the hours she worked." *Id.* Ultimately, then, Ms. Montoya "was, in fact, at her assigned duty station on the days when the audit showed she had not used her badge to access" the lab building. *Id.* ¶ 7. Likewise, Mr. Lopez sometimes worked in the evening and "was often walking into work as people were leaving and did not need to use his card to gain access to the building." *Id.* ¶ 12. Both Ms. Montoya and Mr. Lopez faced disciplinary action for the rule violation of "not having and using [their] badge[s] appropriately." *Id.* ¶¶ 8, 12.

These rule violations are not of comparable seriousness to Plaintiff's and therefore are not nearly identical. Plaintiff's working from West Virginia without proper authorization was contrary to TTUHSCEP policy and state law. It meant that Plaintiff could not have been carrying out laboratory-based work as anticipated by his signed position description. Defendants

feared that this fact could amount to fraud or waste under the federal regulations underlying the NIH grant funding the position. Similar concerns are not raised by Ms. Montoya and Mr. Lopez's improper access badge practices. The violations are dissimilar enough that the difference likely "accounts for the difference in treatment received from the employer." *See Wallace*, 271 F.3d 212. Therefore, the comparators were not granted more favorable treatment under nearly identical circumstances and are not similarly situated to Plaintiff. *See id.*; *Lee*, 574 F.3d at 260–61.

Accordingly, Plaintiff's prima facie case of employment discrimination fails on the fourth element. There is insufficient evidence for a reasonable jury to find a prima facie case of intentional discrimination under Fifth Circuit law.

c. The legitimate justification and pretext analyses

Even if Plaintiff could establish a prima facie case, Defendants would be entitled to summary judgment on his discrimination claims under the remaining steps of the *McDonnell Douglas* framework. First, Defendants must proffer a legitimate basis for the termination, and then, Plaintiff must show that basis is mere pretext for intentional discrimination. *See McCoy*, 492 F.3d at 556.

i. The legitimate, non-discriminatory basis

First, Defendants have clearly met their burden to provide a legitimate, non-discriminatory justification for the termination. *See Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897–98 (5th Cir. 2002) (internal quotations omitted) (explaining that, because the burden is one of production, as opposed to persuasion, "it can involve no credibility assessment"). "The employer is not required to convince the Court that it was actually motivated by this reason; it

need only raise a genuine issue of fact as to whether or not it discriminated against the plaintiff." *Nasti v. CIBA Specialty Chems. Corp.*, 492 F.3d 589, 593 (5th Cir. 2007). Even an employer's incorrect, but good-faith, belief about an employee's performance can be a sufficient non-discriminatory basis for a termination. *Mayberry*, 55 F.3d at 1091 ("The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive.").

Here, Defendants proffer Plaintiff's rules violations as the legitimate, non-discriminatory basis for his termination. *See* Defs.' Mot. for Summ. J. 20–23. Those violations include working from home without proper authorizations; failing to complete laboratory work as anticipated by the signed position description; and, therefore, failing to comply with the terms and underlying regulations of the federal NIH grant funding the position. Dr. Rotwein cited these violations in his emails to Plaintiff and Dr. Wu about the situation, as well as in his memo to Dr. Lange recommending Plaintiff's termination. *See* Rotwein and Zeng Emails; Rotwein and Wu Emails; Termination Recommendation Memo. Ms. Court cited Plaintiff's lack of a telecommuting agreement when notifying Plaintiff of his placement on unpaid leave. *See* Defs' Mot. for Summ. J. Ex. D-5 ("Unpaid Leave Email"), ECF No. 108-4. And, the formal termination record categorizes the termination as "misconduct"-based, listing a violation of the policy requiring employees to work from their assigned workstations. *See* Separation or Termination of Employment Record 27. Thus, Defendants point to evidence in the record sufficient to meet their burden of production on this justification. *See Sandstad*, 309 F.3d at 897–98; *Nasti*, 492 F.3d at 593. And, it is well-established that violations of workplace rules are a legitimate and non-discriminatory business justification for terminating an employee. *See, e.g.*, *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 364 (5th Cir.

2013); *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378–79 (5th Cir. 2010); *Laxton*, 333 F.3d at 579; *Mayberry*, 55 F.3d at 1091.

Therefore, the ultimate burden of persuasion falls to Plaintiff to show that Defendants' proffered basis for the termination is a mere pretext for intentional discrimination.

ii. Pretext or motivating factor

Even assuming Plaintiff established a prima facie case, Defendants are still entitled to summary judgment because Plaintiff has not proffered sufficient evidence to raise a factual dispute as to whether intentional discrimination was Defendants' true motivation for firing Plaintiff.

A plaintiff can establish a genuine dispute of material fact as to intentional discrimination by showing the defendant's proffered reasons are merely pretextual, or else that discrimination was another motivating factor for the termination. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011). To establish pretext, the plaintiff must produce "substantial evidence" that the defendant intentionally discriminated against him because of his protected status. *Laxton*, 333 F.3d at 578. "Evidence is substantial if it is of such quality and weight that reasonable and fair-minded [people] in the exercise of impartial judgment might reach different conclusions." *Id.* at 579 (internal quotations omitted). The plaintiff must rebut each of the nondiscriminatory reasons proffered by the defendant, either through evidence of disparate treatment or evidence showing the reasons are false or unworthy of credence. *Vaughn*, 665 F.3d at 637; *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 480 (5th Cir. 2016). "An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action." *Laxton*, 333 F.3d at 578.

Here, there is no evidence that Plaintiff's race or national origin were motivating factors for his termination, and Plaintiff otherwise fails to show that Defendants' proffered justification is pretextual. *See Vaughn*, 665 F.3d at 636.

Plaintiff first attempts to establish pretext through evidence of treatment different from appropriate comparators. As explained above regarding Plaintiff's prima facie showing, the employees Plaintiff points to as receiving more favorable treatment were not "similarly situated" to Plaintiff. *See Lee*, 574 F.3d at 260–61; *Wallace*, 271 F.3d at 221. Therefore, that evidence also cannot be relied upon at the pretext stage to support the inference that intentional discrimination was the true motive for Defendants' treatment of Plaintiff. *See Vaughn*, 665 F.3d at 637; *Laxton*, 333 F.3d at 578–79.

Plaintiff argues more generally that there is evidence of disparate treatment because Defendants were generally "hostile" towards Asian employees and terminated other Asian staff members prior to Plaintiff. Pl.'s Mot. for Summ. J. 10–11. Plaintiff identifies the terminations of his faculty supervisor, Dr. Wu, along with two other faculty members terminated under Dr. Lange's tenure, Dr. Manjunath Narasimhaswamy and Dr. Premlata Shankar. *Id.* However, given that faculty members are hired and terminated under entirely different policies from staff members like Plaintiff, there is little question that these comparators are not similarly situated to Plaintiff. *See Lee*, 574 F.3d at 260–61; *Wallace*, 271 F.3d at 221. Plaintiff cannot otherwise show pretext by alleging a broader trend of disparate treatment involving comparators who are not similarly situated. *See Bouie*, 188 F. App'x at 237–38. And, even if he could, Defendants put forward evidence that Dr. Wu resigned following a faculty mediation process, and Dr. Narasimhaswamy and Dr. Shankar were both "terminated" pursuant to voluntary resignations, not involuntary terminations like Plaintiff's. *See* Rotwein Aff. ¶¶ 20–23. Aside from his

allegation, Plaintiff submits no evidence that these terminations were linked to the comparators' protected statuses. Thus, Plaintiff cannot show pretext through evidence of disparate treatment. *See Wallace*, 271 F.3d at 221–22.

Plaintiff also does not establish the Defendants' reasons for the termination are false or unworthy of credence. Plaintiff's evidence is insufficient to show that he did not, in fact, violate workplace rules. *See Manaway v. Med. Ctr. Of Southeast Tex.*, 430 F. App'x 317, 322 (5th Cir. 2011) (internal quotations and alterations omitted) ("[Plaintiff's] assertion of innocence alone does not create a factual issue as to the falsity of the employer's proffered reason."). In contrast, there is significant evidence that Defendants' concerns were sincerely held. Defendants conducted a department-wide audit into the building access practices of employees, investigating and disciplining every discrepancy discovered. *See* Audit Report 9–12. Defendants not only terminated Plaintiff, but also his faculty-member supervisor for enabling Plaintiff's rule violations. Rotwein Aff. ¶ 20. And, Defendants contacted NIH to preemptively disclose their concerns that Plaintiff's violations could amount to fraud or waste under the regulations governing the federal grant money. *See* Defs.' Mot. for Summ. J. Ex. B-7 ("NIH Letter"). Plaintiff points to no countervailing evidence tending to show that Defendants' concerns were "not the real reason for the adverse employment action." *See Laxton*, 333 F.3d at 578. Therefore, Plaintiff fails to show that Defendants' proffered justification is pretextual. *See Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir. 2001) ("[Plaintiff] cannot survive summary judgment merely because she disagrees with [the defendant's] characterization of her disciplinary history.").

Plaintiff does argue, however, that Defendants acted contrary to their own institutional policies in carrying out his termination. Pl.'s Mot. for Summ. J. 7. Evidence that an employer

did not adhere to internal rules in an adverse employment action can contribute to a pretext showing. *See EEOC v. Tex. Instruments Inc.*, 100 F.3d 1173, 1182 (5th Cir. 1996). Plaintiff contends that the TTUHSCEP policy governing terminations, OP 70.31, requires that an employee's supervisors initiate, or at least be involved in, "corrective actions," that termination not be the first "corrective action" taken, and that notice be given to the employee prior to the effective date of termination. Pl.'s Mot. for Summ. J. 7 (citing OP 70.31.4, 70.31.1G). Plaintiff argues that the evidence shows these requirements were not adhered to in his termination. *Id.*

These arguments ultimately fail, however, because Plaintiff misapplies OP 70.31. First, while the policy anticipates supervisors initiating corrective actions, not all terminations arise under the corrective action process. Rather, OP 70.31.1(K) defines "Termination for Misconduct" separately from OP 70.31.1(J)'s definition of "Formal corrective actions." Pl.'s Mot. for Summ. J. Ex. W20 ("OP 70.31"), at 2, ECF No. 113-21.[10] Defendants' evidence indicates that Plaintiff was not terminated for misconduct "that would be addressed in a corrective action," but that Plaintiff's "significant violation" resulted in an outright termination for misconduct. Court Affidavit ¶ 15. While the corrective action provision—OP 70.31.4—does anticipate that supervisors initiate corrective actions, the termination provision—OP 70.31.6—states that "supervisors and department officials" are authorized to "request the separation or termination of an employee." OP 70.31 at 5–8. Therefore, Dr. Rotwein's initiation of the

[10] Plaintiff raises an evidentiary objection to Defendants' submission of OP 70.31, and another TTUHSCEP policy, OP 70.01, attached as Exhibits E-2 and E-3 to Rebecca Salcido's affidavit in support of Defendants' Motion for Summary Judgment. *See* Pl.'s Mot. to Strike 5. Exhibit E-2 is a 2012 version of OP 70.31 that was replaced before Plaintiff was employed by TTUHSCEP and therefore never applied to Plaintiff. *See* Defs.' Mot. for Summ. J. Ex. E-2, ECF No. 108-5. Exhibit E-3 is a version of TTUHSCEP OP 70.01 that took effect in 2019, after Plaintiff was terminated, and therefore also never applied to Plaintiff. *See* Defs.' Mot. for Summ. J. Ex. E-3, ECF No. 108-5. The Court does not rely on OP 70.01, and Plaintiff included the proper version of OP 70.31 in his summary judgment evidence. And, Defendants sought leave to submit the proper policies in their Motion to Replace Summary Judgment Exhibits, ECF No. 143. Therefore, Plaintiff's objections are overruled as moot.

termination process as the department chair complied with the policy. Second, OP 70.31.7 provides that a "Termination for Misconduct" may be the "only" disciplinary action taken, "or it may be administered when other corrective actions have not proven effective." *See id* at 8. Thus, while "corrective actions" are a less-punitive option, they are not a prerequisite to a termination. *See id.* Lastly, Plaintiff quotes only 70.31.1(G), the definition section's definition of "Notice," in arguing that notice was required prior to his termination. However, in the substantive notice provision of the policy, OP 70.31.5, there is no requirement that notice be provided before a termination's effective date. *Id.* at 7. And, while notice was not required, Defendants did attempt to provide Plaintiff with further notice through an in-person meeting. Outright termination followed Plaintiff's failure to respond to their first invitation and his rejection of their second invitation. Thus, Plaintiff's objections do not identify actions contrary to policy.[11]

Based on the evidence, a reasonable jury could not find that Defendants' proffered justification for the termination is unworthy of credence or that Plaintiff's protected status was otherwise a motivating factor. Thus, even if Plaintiff had sufficiently established a prima facie case, he cannot raise a genuine dispute of material fact at the pretext stage of the *McDonell Douglas* framework. *See, e.g., Austen v. Weatherford Coll.*, 564 F. App'x 89, 93 (5th Cir. 2014) (finding the plaintiff's showing insufficient because "[s]he offers no competent summary-judgment evidence other than her own assertions that the stated reasons for termination were pretextual."). Accordingly, Defendant TTUHSCEP is entitled to summary judgment on

[11] Even if Plaintiff had identified an inconsistency on any of these points, such evidence alone would be insufficient to show pretext. There would need to be surrounding evidence linking the internal policy violations to Plaintiff's protected status, which remains lacking here. *See Tex. Instruments Inc.*, 100 F.3d at 1182 (internal quotations omitted) (noting that the employer's own internal policy violation "does not of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual" absent some "nexus" to protected status).

Plaintiff's Title VII discrimination claim and the Individual Defendants are entitled to summary judgment on Plaintiff's § 1981 claims.

3. The due process claims

Plaintiff claims, under 42 U.S.C. § 1983, that Defendants deprived him of property and liberty interests without adequate procedure, violating the Due Process Clause of the Fourteenth Amendment. Plaintiff argues the evidence entitles him to summary judgment as a matter of law on these claims. Defendants argue that Plaintiff's claims against the Individual Defendants in their individual capacities fail on qualified immunity grounds, and the claims against TTUHSCEP and the Individual Defendants in their official capacities fail on sovereign immunity grounds. They also argue that the evidence is insufficient for all claims to survive summary judgment. The Court addresses Plaintiff's due process claim with respect to each set of Defendants in turn.

a. The Individual Defendants in their individual capacities

The Individual Defendants argue they are entitled to summary judgment on Plaintiff's § 1983 claims, in their individual capacities, on qualified immunity grounds.

The doctrine of qualified immunity shields government officials from liability "so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lincoln v. Turner*, 874 F.3d 833, 847 (5th Cir. 2017) (quoting *Mullenix v. Luna*, 577 U.S. ----, 136 S. Ct. 305, 308 (2015)). When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate that the defense does not apply. *Id.* A plaintiff seeking to defeat qualified immunity must show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the

time of the challenged conduct." *Id.* at 847–48 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* at 848 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). This inquiry "does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *al-Kidd*, 563 U.S. at 741). The law can be clearly established despite "notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* (quoting *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)).

The Court first looks to whether the evidence raises a genuine dispute of material fact on whether the Individual Defendants violated Plaintiff's procedural due process rights, pursuant either to a property interest or a liberty interest.

i. Property interest

For the following reasons, Plaintiff fails to show he was deprived of a property interest when his TTUHSCEP employment was terminated.

To establish a procedural due process violation, Plaintiff must first show he was deprived of a protected interest. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 536 U.S. 40, 59 (1999). Protected property interests arise from legitimate claims of entitlement as defined "by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972); *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017) (requiring "more than a unilateral expectation" for a property interest to arise). In the employment context, because Texas is an "at-will" employment state, an employer may terminate employment "for

good cause, bad cause, or no cause at all." *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). Therefore, a property interest in employment only arises when the employer "abrogat[es] its right to terminate an employee without cause," modifying the at-will status of the employment relationship. *See Muncy v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003); *El Expreso, Inc. v. Zendejas*, 193 S.W.3d 590, 594 (Tex. App. 2006).

To modify at-will employment status, "[t]he critical factor . . . is whether an employer has unequivocally indicated a definite intent to be bound not to terminate the employee except under clearly specified circumstances." *El Expreso*, 193 S.W.3d at 594. General and indefinite statements are not enough; rather, there must be "an agreement to modify" which is "(1) expressed, rather than implied, and (2) clear and specific." *Id.* (internal quotations omitted). Oral statements alone are insufficient unless they include "a definite, stated intention" to modify at-will status. *Id.*

Here, Plaintiff argues he had a property interest in his employment at TTUHSCEP. Pl.'s Mot. for Summ. J. 12–13. However, there is no question that Plaintiff was hired at TTUHSCEP as an at-will employee. *See* Employee Acknowledgment 9 ("Unless otherwise specified, all employment at [TTUHSCEP] is employment-at-will"); OP 70.31 at 2 ("Employment at Texas Tech is governed by the employment at will doctrine. . . . and can be terminated at any time, with or without cause and with or without notice."). Therefore, to establish a deprivation of property, Plaintiff's at-will employment status must have been modified. *Muncy*, 335 F.3d at 398.

Plaintiff argues that he reached an agreement with Dr. Wu, his supervisor, to modify his at-will status. During his job interview, Plaintiff asked Dr. Wu about the grant funding underlying his prospective position. Pl.'s Mot. for Summ. J. Ex. W5 ("Wu Affidavit") ¶ 7, ECF No. 113-5. Dr. Wu states, "I told Dr. Zeng that his position would be supported by my existing .

. . grants for at least 2-3 years. This information was revealed to Dr. Zeng to ensure him the relative stability of his prospective employment." *Id.* Further, an additional two-year NIH grant linked to ZIKA virus research was awarded after Plaintiff began working with Dr. Wu, and Dr. Wu stated, "Dr. Zeng's position could be further supported by the ZIKA virus grant." *Id.* ¶ 11. From this, Plaintiff argues there was a "mutual agreement and understanding" that Plaintiff "would continue to have employment in Dr. Wu's lab so long as fund[ing] from Dr. Wu's pre-existing NIH grants and the new ZIKA grant (application written by the plaintiff) is available to support the plaintiff's position." Pl.'s Mot. for Summ. J. 13. "Such entitlement constituted the plaintiff's property interest." *Id.*

This evidence does not establish that Plaintiff's at-will employment status was modified. As Dr. Wu stated, the conversation—which took place prior to the start of Plaintiff's employment—was meant to inform Plaintiff about the relative stability of his prospective position. Such an assurance does not "unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances." *See El Expreso*, 193 S.W.3d at 594. It is not an express, clear, and specific agreement to modify the conditions under which Plaintiff could be terminated. *See id.* Moreover, given that the alleged agreement was formed via oral statements, it lacks the required "definite, stated intention" for the oral statements to be modifying the at-will status of Plaintiff's position. *Id.* That Plaintiff and Dr. Wu subsequently wrote and were awarded the ZIKA grant for two additional years of funding does not overcome these deficiencies. Mere knowledge that a position has enough funding to continue for a defined time period is not a binding agreement abrogating the employer's right to terminate the employee. *See Muncy*, 335 F.3d at 398. Therefore, there is insufficient evidence

to raise a genuine dispute of material fact on whether Plaintiff had a property interest in his employment with TTUHSCEP.

Accordingly, Plaintiff cannot claim a procedural due process violation grounded in the deprivation of a property interest. *See Roth*, 408 U.S. at 576; *Edionwe*, 860 F.3d at 292.

ii. Liberty interest

Liberty interests can also trigger procedural due process rights. *See Bledsoe v. City of Horn Lake*, 449 F.3d 650, 653 (5th Cir. 2006). For the following reasons, Plaintiff fails to show that a liberty interest arose in the course of his termination from TTUHSCEP.

A liberty interest may arise when a government employee is terminated "amidst allegations of misconduct," triggering the employee's procedural due process rights to notice and an opportunity to be heard. *Id.* Not all misconduct terminations of government employees trigger these procedural rights, however. *See id.* Rather, liberty interests are infringed "only when the employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities." *Id.* (internal quotations omitted); *Rayborn v. Bossier Par. Sch. Bd.*, 881 F.3d 409, 419 (5th Cir. 2018) (internal quotations omitted) ("[R]eputation alone is not a constitutionally protected interest."). To determine whether the circumstances surrounding a given termination meet this threshold, the Fifth Circuit relies on a seven-element "stigma-plus-infringement" test. *Bledsoe*, 449 F.3d at 653. A plaintiff must establish each of the following:

> (1) he was discharged; (2) stigmatizing charges were made against him in connection with the discharge; (3) the charges were false; (4) he was not provided notice or an opportunity to be heard prior to the discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and (7) the employer denied the request.

Id.

Here, the evidence of the circumstances surrounding Plaintiff's termination do not satisfy the stigma-plus-infringement test. Plaintiff first points to the formal termination record's classification of his firing as "misconduct"-based. Pl.'s Mot. for Summ. J. 14. This argument fails the test on multiple elements. First, the termination form identifies the "misconduct" at issue as a violation of OP 70.06, and the undisputed evidence clearly establishes that Plaintiff did, in fact, violate TTUHSCEP policy. No liberty interest can arise from this charge because it is true that Plaintiff committed and was terminated for "misconduct" under TTUHSCEP rules. *See Curtis v. Sowell*, 761 F. App'x 302, 306 (5th Cir. 2019) ("The district court did not err in dismissing [the plaintiff's] stigma-plus-infringement claim because the statement at issue was not false.").

Furthermore, there is no evidence that the termination record was ever made public. Plaintiff argues a liberty infringement nevertheless occured because "the defendants did not remove the misconduct stigma from the plaintiff's personnel file" and "the plaintiff must tell prospective employers that the reason for his separation from TTUHSCEP was misconduct." Pl.'s PUF ¶ 145. However, the Fifth Circuit has "expressly held that there is no liability when the agency has carefully kept the charges confidential and the plaintiff caused them to be made public." *Hausey v. City of McKinney*, 71 F. App'x 440, 440 (5th Cir. 2003) (internal quotations omitted). Thus, the termination record does not establish a liberty interest under the stigma-plus-infringement test because the charges were not false and were not publicized.

Plaintiff also points to TTUHSCEP's subsequent labelling of Plaintiff as "not eligible for rehire" ("NEFR") in response to a reference-check inquiry. Pl.'s Mot. for Summ. J. 14–15. The NEFR label fails the "stigmatizing charges" element of the test. Charges must be more than "merely adverse" to be stigmatizing. *Blackburn v. City of Marshall*, 42 F.3d 925, 936 (5th Cir.

1995). As this Court previously held, charges of NEFR status are not sufficiently adverse to give rise to a liberty interest. *See* August 30, 2019, Order 18–19, ECF No. 60 (granting Defendants' Motion to Dismiss in part). Moreover, this evidence also fails the publication element. Although the charges were shared with a third-party—the reference-checking service—Plaintiff himself requested the reference-check. *See* Pl.'s PUF ¶¶ 147–50; Defs.' Resp. to Pl.'s PUF ¶¶ 147–48, 150. Thus, Plaintiff also "caused" this charge to be made public, meaning a liberty interest cannot arise from any alleged stigmatization. *See Hausey*, 71 F. App'x at 440. Plaintiff cannot point to evidence which satisfies the stigma-plus-infringement test, and no liberty interest was infringed by the circumstances surrounding his termination. *See Rayborn*, 881 F.3d at 419; *Bledsoe*, 449 F.3d at 653.

Because Plaintiff had no property interest in his employment with TTUHSCEP, and because the termination did not infringe on any liberty interest, the evidence cannot establish a procedural due process violation. And, because Plaintiff does not show a constitutional violation, the Individual Defendants in their individual capacities are entitled to qualified immunity and, therefore, summary judgment. *See Lincoln*, 874 F.3d at 847–48.

b. TTUHSCEP and the Individual Defendants in their official capacities

Defendants argue that TTUHSCEP and the Individual Defendants in their official capacities are entitled to summary judgment on sovereign immunity grounds. The Eleventh Amendment shields states and their agencies from suits for retroactive monetary relief, unless immunity is abrogated by Congress or waived by the state. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). TTUHSCEP and its officials are entitled to this immunity to the same extent as the State of Texas. *See Nelson*, 535 F.3d at 320; *United States v. Tex. Tech. Univ.*, 171 F.3d 279,

289 n.14 (5th Cir. 1999). Congress has not abrogated sovereign immunity for § 1983 claims. *Clark v. Tarrant County*, 798 F.2d 736, 743 (5th Cir. 1986). And, while Defendants waived sovereign immunity from suit by removing to this Court, they have not waived their sovereign immunity defense against liability. *See Spooner v. Jackson*, 251 F. App'x 919, 924 (5th Cir. 2007); *Meyers ex rel. Benzing*, 410 F.3d at 248.

However, as explained above, Plaintiff's claims for prospective injunctive relief pursuant to *Ex Parte Young* are not foreclosed. *See, e.g., Hundall v. Univ. of Tex. at El Paso*, No. EP-13-CV-00365-DCG, 2014 WL 12496895, at *5–6 (W.D. Tex. Feb. 21, 2014) (discussing the defendants' waiver of sovereign immunity from suit via removal, then considering the plaintiff's *Ex Parte Young* argument for § 1983 liability against the defendants' sovereign immunity defense from liability). On the merits—as analyzed above regarding the Individual Defendants in their individual capacities—the evidence does not raise a genuine dispute of material fact as to whether Plaintiff's procedural due process rights were violated. Ultimately, then, TTUHSCEP and the Individual Defendants in their official capacities are entitled to summary judgment on Plaintiff's § 1983 claims.

4. The tort claims

Plaintiff brings defamation and tortious interference claims under Texas state tort law against the Individual Defendants. Plaintiff argues the Individual Defendants committed defamation by labelling him as terminated for misconduct and NEFR. Further, Plaintiff claims that the misconduct and NEFR labels were communicated to potential employers, amounting to tortious interference with prospective employment. Plaintiff concludes that the evidence entitles him to summary judgment as a matter of law on these claims. Defendants argue that Plaintiff's

claims are barred by immunity under the TTCA, and that the evidence is insufficient for all claims to survive summary judgment.

All tort claims against a governmental entity and its employees are assumed to arise under the TTCA. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008). Torts against government employees for conduct within the scope of their employment are regarded as official capacity claims only. *See Wilkerson v. Univ. of N. Tex. ex rel. Bd. of Regents*, 878 F.3d 147, 158–59 (5th Cir. 2017) (citing Tex. Civ. Prac. & Rem. Code § 101.106(f)). And, government employees in their official capacities are immune from liability because the TTCA "mandates plaintiffs to pursue lawsuits against governmental units rather than their employees." *Id.*

Plaintiff seeks to avoid TTCA immunity by arguing the Individual Defendants' conduct went beyond the scope of employment or otherwise was *ultra vires*. Conduct is within the scope of employment when there is "a connection between the employee's job duties and the alleged tortious conduct." *See id.* at 160 (internal quotations omitted). This remains true even "if the employee perform[ed] negligently or [was] motivated by ulterior motives or personal animus." *See id.* (internal quotations omitted). Here, there is a clear connection between the conduct at issue in Plaintiff's tort claims—essentially, how the Individual Defendants categorized and decided his termination—and the Individual Defendants' job duties as administrators of Plaintiff's workplace. Therefore, the conduct was within the scope of governmental employment and the Individual Defendants are entitled to immunity under the TTCA. *See id.* at 158–60.

As for the *ultra vires* exception, TTCA governmental immunity does not bar "suits to require state officials to comply with statutory or constitutional provisions." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). To fall within the exception, the evidence must

prove that the officer "has violate[d] statutory or constitutional provisions by acting without legal authority or by failing to perform a purely ministerial act." *Lazarides v. Farris*, 367 S.W.3d 788, 800 (Tex. App. 2012). Here, none of the evidence Plaintiff points to—purportedly showing that Defendants did not follow TTUHSCEP policy—shows that the Individual Defendants acted contrary to law or violated the Constitution. *See* Pl.'s Mot. for Summ. J. 17–18. The evidence does not establish violations of Title VII, § 1981, or the Due Process Clause by the Individual Defendants. Thus, there is no evidence that Defendants acted contrary to law or without legal authority when terminating Plaintiff. *See Heinrich*, 284 S.W.3d at 372; *Lazarides*, 367 S.W.3d at 800.

Plaintiff also argues the Individual Defendants "fail[ed] to perform a purely ministerial act" by refusing to remove Plaintiff's "misconduct" and "NEFR" classifications. Pl.'s Mot. for Summ. J. 18. Ministerial acts are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015). Plaintiff argues that because the Texas Workforce Commission determined that he was eligible for unemployment benefits—finding he did not commit "misconduct"—Defendants were obliged to remove the "misconduct" label from Plaintiff's record. Pl.'s Mot. for Summ. J. 18. However, the Texas Workforce Commission applies the Texas Unemployment Compensation Act—and its definition of "misconduct"—when determining benefits eligibility. *See, e.g.*, *Murray v. Tex. Workforce Comm'n*, 337 S.W.3d 522, 524 (Tex. App. 2011). The Commission's determination about "misconduct" under Texas law did not impose a legal obligation on Defendants to alter their own misconduct or NEFR determinations under TTUHSCEP policy. Plaintiff identifies no other legal obligations requiring Defendants to expunge Plaintiff's record. *See* Pl.'s Mot. for

Summ. J. 18. Therefore, Defendants' decisions to label Plaintiff as terminated for "misconduct" and NEFR, and their decisions not to remove those labels upon Plaintiff's request, were discretionary. Plaintiff cannot show they acted *ultra vires* by failing to perform a ministerial act. *See Heinrich*, 284 S.W.3d at 372 ("To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion.").

Ultimately, the allegedly tortious conduct at issue was within the scope of governmental employment and was not *ultra vires* and, therefore, TTCA immunity applies. *See Lazarides*, 367 S.W.3d at 800; *Heinrich*, 284 S.W.3d at 372; *Wilkerson*, 878 F.3d at 159–60. Defendants are entitled to summary judgment on Plaintiff's defamation and tortious interference claims.

5. Plaintiff's pending motions

i. Motion for supplemental discovery

On February 6, 2020, roughly six weeks after the parties each filed motions for summary judgment, Plaintiff filed a Motion for Supplement Discovery, ECF No. 142. Plaintiff seeks further discovery into Ms. Montoya's "timesheets and the records of her access card use for the time period from October 16, 2017 to February 28, 2018," and the same as for Mr. Lopez "from October 16, 2017 to August 31, 2018." *Id.* at 2. Plaintiff asserts that records for these periods were not included in the audit documents produced by Defendants. *Id.* He states that supplemental discovery is warranted because records from these time periods "are critical to assessing the seriousness of [the comparators'] alleged violation of university policy, which in turn is necessary for rebutting the defendants' argument that [the comparators] were not similarly situated employees." *Id.*

Rule 56(d) of the Federal Rules of Civil Procedure provides that when a nonmovant "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery." Fed. R. Civ. P. 56(d). Plaintiff attaches an affidavit attesting that the requested discovery "is critical to the assessment of the seriousness of [the comparators'] alleged violation[s] of university policy." Mot. for Suppl. Disc. Ex. W64, ECF No. 142-1. Plaintiff explains further, in his Reply, ECF No. 149, to Defendants' Response in Opposition to Supplemental Discovery, ECF No. 148, that the purpose of the additional discovery would be "to know the actual number of [the comparators'] claimed workdays without access card use," to compare to the seriousness of Plaintiff's violation. Pl.'s Reply to Defs.' Resp. to Pl.'s Mot. for Supp. Disc. 2–3.

To warrant supplemental discovery, the nonmovant must "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Am. Family Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (internal quotation marks omitted). The Fifth Circuit "has long recognized" that a nonmovant's "entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited, and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed . . . to withstand a motion for summary judgment." *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). Moreover, "[i]f the requesting party 'has not diligently pursued discovery . . . she is not entitled to relief' under Rule 56(d)." *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 700 (5th Cir. 2014).

Here, Plaintiff's affidavit specifies the evidence sought from supplemental discovery and what purpose that evidence would serve. *See Biles*, 714 F.3d at 894. However, by Plaintiff's

own representation, the requested discovery would, at most, show that Ms. Montoya and Mr. Lopez reported an even greater number of workdays without access badge use than was reflected in the audit report produced by Defendants. As explained above, even if Ms. Montoya and Mr. Lopez each had discrepancies equal to or greater than Plaintiff's 103–119 days, they would still not be similarly situated to Plaintiff because their underlying rule violations are not nearly identical. Ms. Montoya and Mr. Lopez's rule violations were "not having and using their badges appropriately," whereas Plaintiff was terminated for working from home without permission and failing to conduct any laboratory-based work for several months. Plaintiff has not requested supplemental discovery which could raise a factual dispute on the nature of the comparators' underlying violations; rather, he would dispute the duration of those violations. Therefore, the information requested is not likely to produce facts needed to withstand summary judgment. *See Washington*, 901 F.2d at 1285.

Furthermore, Plaintiff did not diligently pursue the requested information in the discovery period, which ran from May 29, 2019, to November 18, 2019. The audit reports about Ms. Montoya and Mr. Lopez were produced during that time period and Plaintiff relied on that evidence in his Motion for Summary Judgment, initially filed on December 20, 2019. Even if it was Defendants' Motion for Summary Judgment which caused Plaintiff to recognize his need for further discovery, that Motion was filed on December 18, 2019. Plaintiff did not file his Rule 56(d) motion until February 6, 2020. In the meantime, Plaintiff filed his Response in Opposition to Defendants' Motion for Summary Judgment—in which he attempted to rebut Defendants' arguments about his comparators not qualifying as similarly situated—on January 13, 2020. There is no reason the requested discovery would have been unattainable during the almost six-month period when discovery was open. Therefore, Plaintiff did not "diligently pursue" the

discovery he now seeks and relief under Rule 56(d) is not warranted. *See McKay*, 751 F.3d at 700. For these reasons, Plaintiff's motion for supplemental discovery is denied.

ii. Motion for sanctions

Additionally, Plaintiff moves for sanctions or an adverse inference against Defendants for alleged spoliation. Pl.'s Am. Mot. for Sanctions, ECF No. 124. Plaintiff claims Defendants deleted Plaintiff's work-email account history in violation of Defendants' duty to preserve evidence in reasonable anticipation of litigation. *Id.* at 1–2. In response, Defendants put forward evidence that Plaintiff's emails were deleted five weeks after his termination pursuant to TTUHSCEP policy. Defs.' Resp. to Pl.'s Am. Mot. for Sanctions 3, ECF No. 128. The deletion occurred several months before Defendants were put on notice of possible litigation by Plaintiff's EEOC charge. *See id.* at 2–3. Therefore, Plaintiff cannot make a showing of "bad faith" as required for sanctions or an adverse inference based on spoliation. *See Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015); *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 208 (5th Cir. 2007). Plaintiff's Motion for sanctions or an adverse inference is denied.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment, ECF No. 108, is **GRANTED**, and Plaintiff's Motion for Summary Judgment, ECF No. 113, is **DENIED**. Plaintiff's Motion for Sanctions, ECF No. 124, Plaintiff's Motion to Strike, ECF No. 140, and Plaintiff's Motion for Supplemental Discovery, ECF No. 142, are **DENIED**.

IT IS FURTHER ORDERED that all other pending motions are **DENIED** as moot.

The Clerk shall close the case.

SO ORDERED.

SIGNED this 4th day of March, 2020.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.