APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 20-20505

MICHEL THOMAS,

Plaintiff—Appellant,

versus

GRUNDFOS, CBS; MADS NIPPER; HENRIK CHRISTANSEN; JONATHAN HAMP ADAM; HENRI BAEK; ASTRID NORGAARD FRIS; STEVE MARSHALL; BILLY BAXTER; TERRY JALUFKA; CHAU NGUYEN; PADDI RIOPELLE; LONNIE PADILLA; THOMAS BRAIN LARSEN; GRUNDFOS AMERICAS; GRUNDFOS,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-557

Before DAVIS, ELROD, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Michel Thomas, a former temporary employee assigned to a job with Defendant-Appellee Grundfos, CBS, filed a slew of employment claims

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

against fifteen defendants following his termination. Thomas asserted age, race, religion, sex discrimination, and retaliation claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 42 U.S.C. § 1981, and Chapter 21 of the Texas Labor Code against the corporate defendants. Thomas asserted claims of race discrimination and retaliation under § 1981 and a negligent supervision claim against twelve individually named defendants. The claims against the individual defendants were dismissed in three separate orders. The district court denied the motions to dismiss filed by the corporate defendants. The district court subsequently granted the corporate defendants' motion for summary judgment and entered final judgment dismissing all of Thomas's claims with prejudice.

In a rambling and conclusory brief, Thomas appears to argue three points of error on appeal. First, Thomas argues that the district court lacked subject matter jurisdiction to adjudicate his claims because the district court "violated the judicial oath of office." Thomas makes broad and conclusory assertions that the district court acted outside its authority. Rather than explain this assertion, Thomas merely repeats his arguments from his employment claims. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Thomas brought federal employment discrimination claims against the defendants.

Second, Thomas appears to argue that the district court erred by granting the corporate defendants' motion for summary judgment. Thomas claims that the district court did not properly weigh all inferences in his favor as the nonmovant and the district court improperly relied on hearsay. Thomas fails to brief this claim by merely repeating his arguments from his employment claims in a rambling and conclusory manner. Thomas did not clarify why the evidence constituted hearsay. He does not point to any evidence to raise a fact issue to defeat summary judgment, nor does he present an argument as to why the district court should not have relied on the

evidence in the record. "Although pro se briefs are afforded liberal construction, even pro se litigants must brief arguments in order to preserve them." *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008) (citation omitted). We hold that Thomas did not adequately brief this issue on appeal. Therefore, Thomas effectively forfeited the argument and we will not address this second point of error. *See United States v. Maes*, 961 F.3d 366, 377 (5th Cir. 2020) (noting that failure to adequately brief an argument forfeits the claim on appeal).

Finally, Thomas argues that the district court's orders and judgment are null and void for violating his procedural Fifth Amendment due process rights. By this argument, Thomas ignores the fact that he filed responses to each motion to dismiss filed by the defendants. Thomas received a favorable ruling on the corporate defendants' motion to dismiss. Thomas also filed a response to the corporate defendants' motion for summary judgment. Thomas does not clearly state how his Fifth Amendment due process rights were violated other than generally stating that the district court did not give him an opportunity to be heard. To adequately brief an argument, "a party must do more than offer conclusory statements and general citations to constitutional amendments." *Stancu v. Hyatt Corp./Hyatt Regency Dall.*, 791 F. App'x 446, 453 (5th Cir. 2019); *Nichols v. Scott*, 69 F.3d 1255, 1287 n.67 (5th Cir. 1995). We hold that Thomas did not adequately brief this issue on appeal. Therefore, Thomas effectively forfeited the argument and we will not address this third point of error. *See Maes*, 961 F.3d at 377.

* * *

Because Thomas did not adequately brief his arguments on appeal, he has forfeited them. We AFFIRM the district court.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Michael David Mitchell
Mr. Michel Thomas

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-18-557
	§	
GRUNDFOS, CBS, *et al.*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons stated in the Order Adopting Memorandum and Recommendation entered on this date, this case is dismissed with prejudice.

This is a final judgment.

SIGNED on June 17, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-18-557
	§	
GRUNDFOS, CBS, *et al.*,	§	
	§	
Defendants,	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

This court has reviewed the Memorandum and Recommendation of Judge Christina Bryan signed on May 27, 2020, and made a *de novo* determination. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Based on the record, the parties' briefs, and the applicable law, the court adopts the Memorandum and Recommendation as this court's Memorandum and Order. This court finds and concludes that: (1) Grundfos's motion for summary judgment was properly granted; and (2) the case is properly dismissed with prejudice.

Judge Bryan's recommendation to grant summary judgment is consistent with and supported by the applicable legal standards and the record evidence. For Thomas's age, race, and religious discrimination claims, the record does not support that Thomas suffered any adverse employment actions or that similarly situated employees outside his protected class were treated differently. As to Thomas's sexual harassment claims, the record shows no tangible employment action against Thomas, and it shows that Grundfos took prompt remedial actions to address Thomas's complaint, including firing Thomas's coworker. Nor has Thomas shown a genuine issue of material fact that the alleged harassment was based on Thomas's sex. For

Thomas's retaliation claim, he produced no evidence supporting an inference that the termination of his assignment resulted from protected activity.

Thomas filed lengthy objections that Judge Bryan lacked jurisdiction, and repeating his arguments on each claim. (Docket Entry No. 96). The objections do not change the analysis. This court has jurisdiction under 28 U.S.C. § 1331, and Judge Bryan properly granted summary judgment.

Grundfos's motion for summary judgment, (Docket Entry No. 85), is granted. Grundfos's motion to strike, (Docket Entry No. 91), is moot. Thomas's motion for leave to file a surreply, (Docket Entry No. 93), is moot. Final judgment dismissing this case with prejudice is entered by separate order.

SIGNED on June 17, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS, *Plaintiff,*	§	
V.	§	Civil Action No. 4:18-CV-0557
GRUNDFOS, CBS *et al.*, *Defendants.*	§	

MEMORANDUM AND RECOMMENDATION

This case is before the court on Defendants Grundfos CBS and Grundfos Americas Corporation's[1] (Grundfos's) Motion for Summary Judgment.[2] Dkt. 85. The Court recommends that the motion be granted and this case be dismissed with prejudice.[3]

I. Background

On or about December 14, 2014, Plaintiff Thomas was assigned by the temporary staffing agency that employed him, Link Staffing, to work at the Brookshire, Texas, location of Grundfos. Grundfos terminated his assignment on October 18, 2016.

Plaintiff's Second Amended Complaint (Dkt. 32) asserts claims against Grundfos under Title VII, 42 U.S.C. § 1981, the Age Discrimination in Employment Act (ADEA), and Chapter 21

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[1] Grundfos Americas Corporation is the corporate parent of Grundfos CBS, Inc. Thomas worked at Grundfos CBS, Inc. A parent corporation generally is not liable for the violation of anit-discrimination laws by a subsidiary. *Reilly v. TXU Corp.*, No. 3:05-CV-0081-M, 2009 WL 857598, at *2 (N.D. Tex. Mar. 31, 2009) ("In the Fifth Circuit, there is a strong presumption that a parent corporation is not the legal employer of its subsidiary's employees and thus, a parent company is ordinarily not liable for the discriminatory acts of its subsidiary."); *Tipton v. Northrup Grumman Corp.*, 242 F. App'x 187, 189 (5th Cir. 2007) ("The doctrine of limited liability creates a strong presumption that a parent corporation is not the employer of its subsidiary's employees."). There is no evidence that Grundfos Americas Corporation and Grundfos CBS are a single enterprise. *Id.* (setting out four factor test). Thus, Thomas's claims against Grundfos Americas Corporation should be dismissed for this additional reason.

[2] The District Court referred this case to this Magistrate Judge for Report and Recommendation. Dkt. 29.

[3] For purposes of this Memorandum and Recommendation, Defendants' Motion to Strike (Dkt. 91) is denied, Plaintiff's Motion for Leave to file Surreply (Dkt. 93) is granted, and Plaintiff's objections to the Declaration of Steve Marshall included in his Response (Dkt. 90) are overruled.

of the Texas Labor Code (TCHRA)[4] based on allegations that during Thomas's time at Grundfos he was discriminated against on the basis of his age, religion, and race;[5] was subjected to a hostile work environment on the basis of his religion and sex; and was retaliated against for complaining about discrimination and the hostile environment. Grundfos moves for summary judgment on all of Thomas's claims.[6]

II. Legal Standards

A. Summary Judgment Standards

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *Hyatt v. Thomas*, 843 F.3d 172, 177 (5th Cir. 2016). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). The court construes the evidence in the light

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[4] In a filing in a related case, *Thomas v. Link Staffing, et al.*, Civil Action No. 17-3902, Thomas conceded that his TCHRA claims are untimely, (17-3902, Dkt. 25 at 1), and such claims were dismissed with prejudice (17-3902, Dkt. 35 at 5; 43). The Court recommends the same result here, but in any event, the TCHRA claims fail for the same reasons as his other causes of action.

[5] Grundfos interprets the Second Amended Complaint as asserting a claim for sex discrimination. Dkt. 85 at 9. The Second Amended Complaint states: "this [lawsuit] is for the race, sex, age, and religious discrimination, as well as sexual harassment, and hostile work environment, and retaliation that was carr[ied] out on Plaintiff." Dkt. 32 at 2. But there is absolutely no assertion or suggestion, either in the Second Amended Complaint, or in Plaintiff's Summary Judgment Response and Affidavit, that he suffered an adverse employment action because he is male. Therefore, the Court construes the Second Amended Complaint to assert only a sex-based harassment/hostile work environment claim, not a sex-based discrimination claim. To the extent Thomas intended to assert a sex-based discrimination claim, Grundfos is entitled to summary judgment for the same reasons discussed with respect to his age and race discrimination claims, and because he has offered no evidence that Grundfos was motivated by Thomas's sex when making any adverse employment decision.

[6] All individual defendants have been dismissed. Dkts. 41, 53, 84.

most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *R.L. Inv. Prop., LLC v. Hamm*, 715 F.3d 145, 149 (5th Cir. 2013).

B. ***McDonnell Douglas* Burden-Shifting**

Thomas's claims are subject to the familiar *McDonnell Douglas* burden-shifting framework. *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 316–17 (5th Cir. 2004); *see also Lauderdale v. Texas Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157, 166 (5th Cir. 2007) ("the inquiry into intentional discrimination is essentially the same for individual actions brought under sections 1981 and 1983, and Title VII."); *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 196 (5th Cir. 2003) (ADEA); *Machinchick v.PB Power, Inc.*, 398 F.3d 345, 356 (5th Cir. 2005) (TCHRA); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 at n.2 (5th Cir. 1996) (§1981).

Pursuant to this framework, a plaintiff relying on circumstantial evidence must first present evidence of each element of a prima facie case of discrimination or retaliation. *Davis*, 383 F.3d at 317 (citing *Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 342 (5th Cir. 2002)). If a plaintiff meets this prima facie burden, a presumption of discrimination or retaliation arises, shifting the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. *Id.*; *Hernandez v. Metro. Transit Auth. of Harris Cty.*, 673 F. App'x 414, 417 (5th Cir. 2016). If the employer states a legitimate reason for its action, the inference of discrimination or retaliation disappears, and the burden shifts back to the plaintiff to present evidence that the employer's proffered reason is merely pretextual. *Id.* "In contrast to the minimal burden that a plaintiff bears when establishing his prima facie case, a plaintiff must produce 'substantial evidence of pretext.'" *Hernandez*, 673 F. App'x at 419 (quoting *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 402–03 (5th Cir. 2001)). The plaintiff always bears the

ultimate burden to prove discrimination. *Outley v. Luke & Assoc., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016).

III. Analysis

A. Age and Race Discrimination

To establish a prima facie case of age or race discrimination, a plaintiff must show: (1) he was in a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the employer promoted or hired someone outside of his protected class or otherwise treated him differently than other similarly situated employees outside his protected class under nearly identical circumstances. *McMullin v. Miss. Dep't of Pub. Safety*, 782 F.3d 251, 258 (5th Cir. 2015); *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 512–13 (5th Cir. 2001); *Autry v. Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 347 (5th Cir. 2013). An adverse employment action in the discrimination context refers to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Felton v. Polles*, 315 F.3d 470, 486 (5th Cir. 2002), *overruled on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Plaintiff is an African-American man over forty years old at the time of the events in question, and therefore is a member of a protected class under Title VII and the ADEA. *See* 29 U.S.C. §§ 631(a), 633a(a); *Leal v. McHugh*, 731 F.3d 405, 410–11 (5th Cir. 2013). However, Plaintiff's age and race discrimination claims fail because he has not demonstrated that he suffered an adverse employment action, a required element of a prima facie case of discrimination.[7]

[7] The Second Amended Complaint does not assert that Grundfos terminated Thomas's assignment in October 2016 due to his race, sex, or age. *See* Dkt. 32; *see also* Dkt. 90 (Affidavit) at 46-47. In fact, Thomas confirmed in his Surreply that "[a]t no time did I allege that I was discriminated based on race, sex, and age due to the defendants ending my assignment." Dkt. 94 at 5. Based on the lack of any allegation that his termination resulted from

A.1. Thomas has failed to meet his prima facie burden to show an adverse employment action based on denial of training.

Thomas claims he was denied training due to his age and race. In his Summary Judgment Affidavit Thomas states he was discriminated on the basis of his age because he was passed over for training as a Mechanical Assembler in favor of Jorge Sosa, Anthony Winston, Matthew Thompson, Chris Voss and Jonathan Lomack, all of whom are under the age of forty and had worked at Grundfos for a shorter period than Thomas. Dkt. 90 at 46. Thomas also states in his Summary Judgment Affidavit that because of his race, Grundfos trained Matthew Thompson and Chris Voss instead of him, but he does not identify Thompson's or Voss's race. Dkt. 90 at 47.

Adverse employment actions under ADEA "include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." *Ogden v. Brennan*, 657 F. App'x 232, 235 (5th Cir. 2016). Thomas alleges he suffered an adverse employment action when employees under the age of forty moved ahead of him in training. This conclusory allegation fails to satisfy Thomas's summary judgment burden because the denial of training does not constitute an "ultimate" employment decision or actionable adverse employment action. *See Pollak v. Law*, Civil Action No. H-11-2550, 2013 WL 1194848, *6 (S.D. Tex. Mar. 22, 2013) (Denial of training is not an actionable adverse employment action), *aff'd* 542 F. App'x 304 (5th Cir. 2013); *Brooks v. Firestone Polymers, LLC*, 70 F. Supp. 3d 816, 836 (E.D. Tex. 2014) ("Notably, the Fifth Circuit has consistently declined to find that a denial of training can constitute an actionable employment action."). Moreover, there is no evidence that lack of training led to any further consequences for Thomas because Grundfos has presented evidence

discrimination and on Thomas's own denial that he claims his termination resulted from discrimination, the Court will not include termination as an adverse employment action in deciding the summary judgment motion on Thomas's discrimination claims.

establishing that there was no sequential training program in place at the Brookshire location where Thomas worked. Marshall Affidavit, Dkt. 85-5 at ¶5.

A.2. Thomas has failed to meet his prima facie burden to show an adverse employment action based on failure to hire.

Thomas further contends that he was passed over for a full-time position in favor of Todd Kirchoff, Bernie Flores, Alex Silva, Rick Stephens, and John Kroll, all younger individuals who had worked at Grundfos for a shorter period than Thomas. Dkt. 90 at 46. Thomas contends that due to his race he was passed over for full-time positions in September 2015, when Grundfos hired John Kroll, a European-American; in December 2015, when Grundfos hired Rick Stephens, a European-American, and Bernie Flore, a Mexican-American; in January 2016 when two positions came open (although he does not identify who filled the positions); and in March or April 2016, when Grundfos hired Todd Kirchoff, a European-American and Alex Silva, a Mexican-American. Dkt. 90 at 46-47.

Despite the statements in his Affidavit, Thomas did not plead a claim for age discrimination based on his failure to be hired for a permanent position. *See* Dkt. 32 at 5. In any event, according to Grundfos Plant Director, Steve Marshall, job openings at the Brookshire Facility were posted and temporary workers were required to submit an application to be considered for a position. Dkt. 85-5 at ¶6. Thomas admitted in his deposition that he never applied for an open position or promotion at Grundfos. Thomas Dep., Dkt. 85-3 at 46, 58. In short, Thomas's claim fails due to the absence of evidence he applied for and was denied an available position.[8] *See Irons v. Aircraft Serv. Int'l, Inc.*, 392 F. App'x 305, 312 (5th Cir. 2010)

[8] In addition, to the extent Thomas alleges Grundfos failed to hire him after April 26, 2016 his claim fails because Grundfos' summary judgment evidence demonstrates a hiring freeze was in place from that date through the date his assignment ended. Thus, there were no open positions at the Brookshire facility for which he could have been hired from April 26, 2016 through his termination. Dkt. 85-5 at ¶ 7; Dkt. 85-14; Dkt. 85-15. *See Adams v. Groesbeck Indep. Sch. Dist.*, 475 F.3d 688, 691 (5th Cir. 2007) (there can be no claim for failure to hire where plaintiff does not show

(rejecting plaintiff's argument that he was denied opportunity to apply because employer picked who they wanted to fill positions).

A.3. Thomas has failed to meet his prima facie burden to show an adverse employment action based on denial of overtime.

Finally, Thomas asserts that he was denied overtime while Sosa, Winston, Lomack and Lou Harris, younger individuals who had worked at Grundfos for a shorter period than Thomas, were permitted overtime.[9] Dkt. 90 at 46. Despite statements in his Affidavit, Thomas did not plead a claim for age discrimination based on his failure to be allowed to work overtime. *See* Dkt. 32 at 5. In addition, Thomas has presented no evidence demonstrating he was denied overtime work based on his age. To the contrary, Thomas testified that he consistently worked at least 10 hours a week of overtime at Grundfos. Dkt. 85-3 at 26. Thomas has not met his summary judgment burden to show that he was denied overtime and thus has not satisfied his prima facie burden to show he suffered an actionable adverse employment action.

A.4. Thomas's failure to produce other evidence also requires the Court to grant summary judgment in favor of Grundfos.

Aside from the failure to establish an adverse employment action, Thomas's age and race discrimination claims suffer from additional deficiencies. Even if Thomas could meet the prima facie element of an adverse employment action based on lack of training and denial of overtime, he has not met his additional prima facie burden to show that other similarly situated employees outside his protected class were treated differently under nearly identical circumstances. *See Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) (The Fifth Circuit "require[s] that an employee who proffers a fellow employee as a comparator demonstrate that the employment actions at issue were *taken 'under nearly identical* circumstances.'"). Thomas has done nothing

there was an available position).

[9] Thomas does not allege he was denied overtime based on his race.

more than list names of younger, non-African-American individuals. He has presented no evidence of the individuals' job titles, qualifications, supervisors, or any other details beyond the conclusory and unsupported allegation that they were all outside of his protected class. Such conclusory allegations are not sufficient to survive summary judgment. *Gonzales v. Wells Fargo Bank, Nat'l Ass'n*, 733 F. App'x 795, 797 (5th Cir. 2018) ("To establish that a younger employee is "similarly situated," a plaintiff must show "nearly identical" circumstances." (internal citations omitted)). Thomas's Affidavit asserting nothing more than his subjective belief that he was discriminated against based on his age cannot save his claim. *Vasquez v. Nueces Cty., Tex.*, 551 F. App'x 91, 94 (5th Cir. 2013) ("[W]e have held that the subjective belief of a plaintiff is not sufficient to establish a *prima facie* case of discrimination under Title VII, the ADEA, or the TCHRA.").

In addition, even if Thomas could meet his prima facie burden to show an adverse employment action based on the failure to hire him in a permanent position, his claim cannot survive summary judgment. Defendant presented summary judgment evidence explaining that it did not hire Thomas as a permanent employee because Thomas did not apply for an available position. Thomas has not shown that that Defendant's explanation is false or that he was more qualified for a permanent position than the individuals he alleges were hired instead. *See Roberson-King v. Louisiana Workforce Comm'n*, 904 F.3d 377, 381 (5th Cir. 2018) ("A plaintiff can demonstrate pretext through evidence that she was clearly better qualified (as opposed to merely better or as qualified) than the chosen employee." (citation omitted)); *Adeleke v. Dallas Area Rapid Transit*, No. 3-10-CV-2113-BD, 2011 WL 13185787, at *2 (N.D. Tex. Oct. 3, 2011) ("Without admissible evidence showing that plaintiff was 'clearly better qualified' than the applicants who were hired by DART, he cannot establish pretext under this theory.").

In sum, Grundfos's motion for summary judgment on Thomas's age and race discrimination claims should be granted.

B. Religious Discrimination.

Title VII prohibits discrimination on the basis of religion. As with all Title VII claims, to survive summary judgment on a claim of religious discrimination a plaintiff must show that he: (1) is a member of a protected class; (2) was qualified for his position; (3) suffered an adverse employment action; and (4) was replaced by someone who is not a member of the protected classes to which the plaintiff belongs or was treated less favorably than similarly situated employees of a different religion.[10] *Pollak v. Lew*, No. CIV.A. H-11-2550, 2013 WL 1194848, at *5 (S.D. Tex. Mar. 22, 2013). In this case, Thomas has not alleged a religious discrimination claim, much less presented evidence that he suffered any adverse employment action or was treated less favorably than other employees of a different religion. Thomas does not allege that he was harassed because of his religion. Dkt. 32. Thomas alleges only that he was offended by the culture and homosexual comments at Grundfos because they conflict with his religious views as a Baptist. Dkt. 32 at 3 ("I am a Baptist and homosexuality is not *something* I embrace due to my faith . . . "); Dkt. 85-3 at 57 ("Q: So, again, your religious discrimination claim is based on the sexual harassment and because that homosexual stuff is against your religious beliefs? A. Correct."). In fact, he admitted in his deposition that no one at Grundfos ever said anything to him about his religion:

> Q. All right. But, to be clear, nobody ever said anything about your religion, per se; is that --

[10] Often, religious discrimination cases involve allegations that an employer failed to accommodate an employee's religious beliefs. *See Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000) ("To establish a prima facie case of religious discrimination under Title VII, a plaintiff must establish that he had a *bona fide* religious belief that conflicted with an employment requirement, that he informed the employer of his belief, and that he was discharged for failing to comply with the conflicting employment requirement."). Thomas has not pled a failure to accommodate claim.

A. No, sir.
Q. -- correct?
A. Correct.
Q. Okay. What religion are you?
A. Southern Baptist.
Q. Southern Baptist. Okay. All right. Did you ever even discuss your religion at work with anybody?
A. Oh, no, sir.
Q. Okay. Did anybody ever discuss religion at work that you heard?
A. No, sir.

Dkt. 85-3 at 56-57. Thomas mistakenly believes that Title VII entitles him to a workplace in which the culture, conduct and comments are in harmony with his religious beliefs. That is not the purpose of Title VII. *See Suarez v. Nueces Cty., Tex.*, No. CIV.A. C-08-217, 2009 WL 2868228, at *4 (S.D. Tex. Aug. 31, 2009) (summary judgment granted on plaintiff's claim of hostile work environment based on religion because "[d]iscourtesy or rudeness, 'offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in 'terms and conditions of employment.'" (citation omitted)); *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.* 731 F.3d 444, 460 (5th Cir. 2013) ("Title VII is not a general civility code for the American workplace."). Grundfos is entitled to summary judgment on Thomas' religious discrimination claim because Thomas has not plead or demonstrated a prime facie case for discrimination or hostile work environment based on his religion.

C. Sexual Harassment/Hostile Work Environment

"The creation of a hostile work environment through harassment" is a form of discrimination prohibited by Title VII. *Boh Bros. Const. Co.*, 731 F.3d at 452 (quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013)). Furthermore, the Supreme Court has held that same-sex harassment is actionable under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

A hostile work environment claim based on sexual harassment requires the plaintiff to plead and prove: (1) he belongs to a protected class; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based on protected characteristic [his sex]; and (4) the harassment was so severe or pervasive that it affected a 'term, condition, or privilege' of employment." *Boh Bros. Const. Co.*, 731 F.3d at 453. When the alleged harasser is a co-worker, a plaintiff must also show a fifth element — that his "employer knew or should have known of the harassment and failed to take prompt remedial action." *Gibson v. Verizon Servs. Org., Inc.*, 498 F. App'x 391, 394 (5th Cir. 2012); *Boh Bros. Const. Co.*, 731 F.3d at 452. "An employer can escape liability if it takes remedial action calculated to end co-worker harassment as soon as it knows or should know of the harassment." *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir. 2012). When the alleged harasser is the victim's supervisor, and the victim proves the harassment resulted in a "tangible employment action," the employer is strictly liable. *Boh Bros.Const. Co.*, 731 F.3d at 452.

C.1. Thomas has not met his summary judgment burden with respect to his alleged co-worker sexual harassment claims.

Thomas alleges same-sex harassment by Jorge Sosa (temporary worker), John Taylor (Senior Assembly Mechanic), and Terry Jalufka (Senior Assembly Mechanic Lead). These are the only alleged harassers mentioned in Thomas's June 14, 2016 complaint, his February 2017 EEOC charge, and his Second Amended Complaint. Dkt. 85-6 at 6-7; Dkt. 85-8 at 2; Dkt. 32. To the extent his harassers are co-workers, Thomas's claim must be dismissed because the evidence shows that Grundfos took prompt remedial action to address Thomas's complaint. Thomas admits Grundfos immediately undertook an investigation, including interviewing him on the phone and in person. Dkt. 85-3 at 21-23. As a result of its investigation, Grundfos terminated Jalufka's employment, demoted and issued a final warning to Taylor, and terminated Sosa's temporary

assignment. Dkt. 85-5 at 3. Grundfos also instituted training and awareness programs. *Id.*; Dkt. 85-3 at 36-37. Grundfos's intervening actions to stop the harassment bars liability for any conduct that occurred prior to its actions. *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 329 (5th Cir. 2009) (prompt remedial action reasonably calculated to end the harassment protects an employer from Title VII liability.). Thomas confirmed that he was not harassed after the investigation and remedial actions. Dkt. 85-3 at 35 ("Q: Did anybody ever say or direct anything to you after that investigation took place? A: No, sir"). Therefore, Grundfos is entitled to summary judgment on Thomas's claims of co-worker sexual harassment.

C.2. Thomas has not met his summary judgment burden with respect to any alleged supervisor harassment claims.

A supervisor is someone "empowered by the employer to take tangible employment actions against the victim." *Id.* at 452-53. Thomas asserts that "Terry Jalufka my supervisor was the leader in participating in this offensive conduct."[11] Dkt. 90 at 41. Even assuming Thomas's allegations that Jalufka disciplined him on two occasions and otherwise managed his work assignments (*id.*) is sufficient to establish that Jalufka was his supervisor, Thomas's claim still fails. The strict liability standard for supervisor harassment is triggered only where the victim suffered a "tangible employment action" due to the harassment. Thomas has not alleged that the harassment he suffered culminated in a tangible employment action against him. Thomas alleges that the termination of his assignment was the result of retaliation, he does not allege it was the result of harassment. *See* Dkt. 32; Dkt. 90; Dkt. 94 at 5 ("at no time did I allege I was discriminated against based on race, sex, and age due to the defendants ending my assignment.").

[11] In his Summary Judgment Affidavit, Thomas asserts that Marshall participated in the harassing conduct. Dkt. 90 at 43. Thomas did not raise such a claim with the EEOC, Dkt. 85-8, or plead it in this case, Dkt. 32. But in any event, any such claim must be dismissed for the reasons set forth in this and the following sections of this Memorandum and Recommendation.

In situations where an alleged harasser is supervisor but the supervisor's harassment does not culminate in a tangible employment action, an employer can avoid liability by proving as an affirmative defense that (1) it exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Boh Bros. Const. Co.*, 731 F.3d at 452. Because Thomas cannot show severe or pervasive harassment based on sex, as discussed in Section C.3. below, the Court need not address the affirmative defense.

C.3. Thomas has failed to create a genuine issue of material fact as to whether the harassment was based on his sex and was severe or pervasive under Fifth Circuit precedent.

In addition to the reasons stated above, Thomas's sexual harassment claim should be dismissed because Thomas has not created a genuine issue of material fact on two required elements of the claim: whether the harassment was based on protected characteristic [his sex]; and whether the harassment was so severe or pervasive that it affected a 'term, condition, or privilege' of employment." *See Boh Bros. Const. Co.*, 731 F.3d at 453 (listing elements of a hostile work environment discrimination claim based on sexual harassment). Both of these elements must be met in order to impose liability on an employer. "For example, same-sex harassment that is 'severe or pervasive' enough to create a hostile environment might be excluded from the coverage of [T]itle VII because it was not discriminatory on the basis of sex." *Id.* On the other hand, "same-sex harassment that is indisputably discriminatory might not be serious enough to make out . . . [a] hostile environment claim." *Id.*

A Plaintiff may prove that same-sex harassment was based on sex by showing (1) explicit or implicit proposals of sexual activity if there is credible evidence the harasser is homosexual; (2) the harasser was motivated by general hostility to the presence of others of the

same sex in the workplace; or (3) "direct comparative evidence" about how the harasser treated men and women differently in the workplace. *Oncale*, 523 U.S. at 80-81. "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* ... because of ... sex.'" *Id.* at 81. Thomas has presented no evidence to establish that the harassment he endured constituted discrimination based on his male sex. In fact, his own Affidavit points out that the work environment at Grundfos was hostile to women as well. Dkt. 90 at 45.

While Thomas's allegations paint of a picture of a crude and vulgar work culture, they do not support a claim for hostile work environment based on his sex. *See Oncale*, 523 U.S. at 80 (Title VII is not a general civility code for the American workplace, regardless of whether opposite-sex or same-sex harassment is at issue); *Jones v. Dallas Cnty.*, 47 F. Supp. 3d 469, 484 (N.D. Tex. 2014) ("Merely offensive conduct is not actionable"). Thomas states in his Affidavit:

> All during the day I would bend over to perform a task and a co-workers would make sheep sounds baha, baha, and start laughing. Telling me you may not want *to bend over in front of another co-worker. I see co-workers grabbing each others* buttock and laughing, they come up behind each other and start humping on their butts. Also they would come up and pinch each others nipples. When a co-worker is bend over during a task another co-worker would come over and stand in front of him at his head level and start rubbing his penis and smiling. Everyday my supervisor Terry Jalufka would tell us "Guys lets go home and get some s**t on our d**ks." We come to work each morning asking different co-workers, "You get any s**t on this d**k this weekend or last night. John (JT) Taylor coming to me at least twice a week very week telling me "They are looking for you" and when I ask who, he would say "These Nuts" and start laughing, it is this kind of offensive and abusive behavior that were allowed to take place for 19 months, when I was there, and it have been taking place for over fifteen years, as I had learned after talking to employees like Roy Blair, who had been there for nearly 20 years. Terry Jalufka would drop paper on the floor and tell Jorge Sosa to pick it up and Jorge Sosa would say no and Kjalufka [sic] would say that is what I thought. Sosa would tell me he has given Billy Baxter and Terry Jalufka a b*** j** so he can be hired on full time with Grundfos.

Dkt. 90 at 43. The Affidavit also states that at some point Jorge Sosa told Thomas that Sosa had a dream about Thomas and Sosa being in bed together cuddling and that Sosa woke up hot and sweaty. *Id.* at 45. Thomas contends that this conduct made it difficult for him to work because he was afraid "one of my co-workers and/or supervisors and/or managers were going to grope me, while I was bent over and/or run some object up my rectum, and/or run up behind me and start humping my buttock, as I witnessed this being done to other employees." *Id.* at 43. Thomas states that he witnessed physical contract between others but does not allege that anyone touched him in a sexually offensive manner. *See* Dkt. 90. Other than generally claiming that the environment was crude, offensive, and made his job difficult, Thomas has presented no evidence tending to demonstrate that the alleged sexual harassment altered the terms and conditions of his employment. Indeed, Thomas testified that he was never threatened or intimidated by any of his alleged harassers. Dkt. 85-3 at 31.

None of the offensive conduct Thomas describes rises to the standard of harassment that courts within the Fifth Circuit find so severe and pervasive as to affect a term or condition of employment. *See, e.g., Gibson v. Potter*, Civil Action No. 05-1942, 2007 WL 1428630, at *5-7 (E.D. La. May 10, 2007) (comparing cases and granting defendant's motion for summary judgment where male employee once grabbed plaintiff's buttocks, attempted to stick his tongue in her ear on several occasions, and solicited dates from plaintiff); *Hollins v. Premier Ford Lincoln Mercury, Inc.*, 766 F.Supp.2d 736, 744-45 (N.D. Miss. 2011) (comparing cases and granting summary judgment on hostile work environment claim where plaintiff was cursed at several times, told that she needed to reward customer with sex for purchasing car from her, and was called a "bitch" same day her employment was terminated).

For all of the above reasons, Grundfos's motion for summary judgment on Thomas's

sexual harassment/hostile work environment claim should be granted.

D. Retaliation

To establish a prima facie case of retaliation, Thomas must show that: (1) he engaged in protected activity; (2) he was subjected to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. *Davis*, 383 F.3d at 319 (5th Cir. 2004); *Hackett v. United Parcel Service*, 736 F. App'x 444, 452 (5th Cir. 2018). The definition of an adverse employment action in the retaliation context is broader than the definition used in the discrimination context. *See Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 945–46 (5th Cir. 2015) (noting that adverse employment actions for retaliation claims are not limited to the workplace, and the standard is less demanding than an ultimate employment decision). An adverse employment action in the retaliation context is one that is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 945 (alteration in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). Whether an action meets this standard is judged by the standard of a "reasonable employee," and will often depend upon the particular circumstances. *Id.* (quoting *Burlington*, 548 U.S. at 69); *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 484 (5th Cir. 2008) (a retaliation claim may rest on an action that a reasonable employee would find materially adverse).

D.1. Thomas has met his prima facie burden to show he engaged in protected activity

Thomas undisputedly engaged in a protected activity. Thomas sent a letter to a Grundfos corporate human resources executive, Duncan Copper, on June 14, 2016 in which he made numerous accusations, including the above-described allegations of sexual harassment, and allegations that Grundfos hired younger, non-African Americans instead of him. Dkt. 85-6 at

2-7. The June 14, 2016 letter was Thomas' first complaint of discrimination to anyone at Grundfos. Dkt. 85-3 at 22; 32. Thomas later shared the June 14, 2016 letter with Link Staffing in July or August 2016, Dkt. 85-3 at 15, and Link Staffing reprimanded him for raising the issue with Grundfos without first notifying Link Staffing. Dkt. 85-3 at 17. Thomas testified that he verbally raised the issue of race discrimination with Paddi Riopelle, Grundfos Human Resources Director, on or about October 15, 2016 during a "tool box meeting," a regular meeting held at Grundfos to address safety and work issues, Dkt. 85-3 at 47-48, 50, and again was counseled to raise concerns with Link Staffing first and not with Grundfos management. Dkt. 90 at 80.

D.2. Thomas has met his prima facie burden to show an adverse employment action as to the termination of his assignment.

As a matter of law, only adverse employment actions occurring after the date Thomas first engaged in protected activity can constitute retaliatory conduct. *See Allen v. Envirogreen Landscape Professionals, Inc.*, 721 F. App'x 322, 326 (5th Cir. 2017) (alleged workplace retaliation that pre-dated submission of complaint cannot support retaliation claim). The only possible adverse employment action Thomas faced after his June 14, 2016 complaint is the termination of his assignment with Grundfos. The Court finds the termination of Thomas' temporary assignment with Grundfos on October 18, 2016 constitutes an adverse employment action.

None of the other incidents Thomas alleges (*see* Dkt. 32 at 3-4), rises to the level of an adverse employment action, even under the more lenient standard applicable to retaliation cases. Apart from the termination of his assignment, Thomas' other complaints amount only to the type of "[u]npleasant work meetings, verbal reprimands, exclusion from meetings, improper work requests, and unfair treatment" that generally are not actionable adverse employment actions. *See, e.g., Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 485 (5 th Cir. 2008) ("As a matter of law,

these allegations [of poor treatment by managers] do not rise to the level of material adversity. Instead they fall into the category of 'petty slights, minor annoyances, and simple lack of good manners' that employees regularly encounter in the workplace, and which the Supreme Court has recognized are not actionable retaliatory conduct." (citations omitted)); *King v. Louisiana*, 294 F. App'x 77, 85 (5th Cir. 2008) ("allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation."); *Browning v. Sw. Research Ins.*, 288 F. App'x 170, 179 (5th Cir. 2008) ("heated exchange of words" was not adverse employment action); *Earle v. Aramark Corp.*, 247 F. App'x 519, 524 (5th Cir. 2007) (being excluded from training lunch, given disciplinary write ups, and being micro-managed were not adverse employment actions).

D.3. Thomas has not met his prima facie or ultimate burden to show a causal link between his protected activity and his termination.

To meet the final element of a prima facie case of retaliation, Thomas must produce evidence of a causal connection between his protected conduct and the adverse employment action, termination of his Grundfos assignment. Grundfos argues not only that Thomas cannot meet his prima facie burden to show causation, but that Thomas also cannot show Grundfos' reason for terminating his assignment is pretext. The Court agrees.

Grundfos investigated the allegations in Thomas's June 14, 2016 letter. Dkt. 85-3 at 19-20; 85-5 at ¶8. The investigation corroborated some of Thomas's allegations regarding inappropriate conduct by Terry Jalufka, Jorge Sosa, and John Taylor. As a result, Grundfos terminated Jalufka, terminated Sosa's temporary assignment, and demoted Taylor. Dkt. 85-3 at 33-34; Dkt. 85-5 at ¶9. Grundfos also issued written warnings to all employees in the Facility's Production Department, held training sessions with all permanent employees and temporary workers on its harassment policy and standards of conduct, and issued "badge buddies" which

contained brief instructions on what a worker should do if he is subjected to harassing behavior. Dkt. 85-5 at ¶10.

On October 17, 2016, Thomas approached Paddi Riopelle and Link Staffing representatives at the Brookshire Facility and alleged that Steve Marshall had been dismissed by his previous employer for sexual harassment.[12] Dkt. 85-5 at ¶11; 85-3 at 53-54. Thomas's accusations against Marshall on October 17, 2016 did not involve conduct that occurred at Grundfos and Thomas offered no support for them. Thomas himself asserts that

> while Paddi (Riopell) was sitting in the meeting room I informed Link Staffing that I was also going to see if Corporate knew that Steve Marshall was terminated from BAE for sexual harassment which also caused [sic] him his marriage as a couple of people reported to me.

Dkt. 90 at 32-33 (emphasis in original). Thomas confirms that he "never alleged that a sexual harassment complaint was filed against Marshall at [Grundfos]." *Id.* at 33. Grundfos found the accusations concerning and to be an unfounded attempt to harm Marshall's reputation. Dkt. 85-5 at ¶11. As a result, Grundfos terminated Thomas's assignment at its Brookshire Facility on October 18, 2016. Dkt. 85-5 at ¶12.

Thomas does not dispute Grundfos's factual explanation that it ended Thomas's assignment because Thomas made accusations against Marshall unrelated to any conduct that took place at Grundfos. *See* Dkt. 90. Thomas essentially argues that because Grundfos terminated his assignment shortly after he complained of discrimination in the October "tool box" meeting the termination must be retaliatory. Even if the timing of the adverse employment action was sufficient to state a prima facie case, standing alone the timing does not constitute

[12] Thomas did not plead that he was retaliated against for engaging in protected activity by making an accusation about Marshall on October 17, 2016. *See* Dkt. 32. In any event, protected activity must be based on the plaintiff's "reasonable belief that the employer was engaged in unlawful employment practices." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007). Thomas's statement about Marshall's past conduct at a different company is not a complaint that Thomas's employer was engaged in an unlawful employment practice.

sufficient evidence of causation to survive summary judgment. *See Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 655 (5th Cir. 2004) ("the mere fact that some adverse action is taken *after* an employee engages in some protected activity will not *always* be enough for a *prima facie* case." (emphasis in original)); *Strong v. Univ. Healthcare Sys., LLC.*, 482 F.3d 802, 807-08 (5th Cir. 2007) (temporal proximity insufficient to show causal link on summary judgment where defendant has stated a legitimate, non-discriminatory reason). The record shows that Grundfos investigated Thomas's June 14, 2016 complaint and took remedial action. The termination of Thomas's assignment occurred several months later. Although Thomas engaged in protected activity by making a verbal complaint of discrimination in the October 2016 "tool box" meeting a few days before his termination, Grundfos has offered a legitimate, non-discriminatory reason for its termination decision. Thomas does not deny making the remarks about Marshall, has not shown that Grundfos's explanation is false, and has not presented any evidence supporting an inference that the termination of his assignment resulted from protected activity. Thomas has failed to meet his summary judgment burden to show Grundfos's non-retaliatory reason for the termination is pretext, and therefore, Grundfos is entitled to summary judgment on Thomas's retaliation claim.

IV. Conclusion and Recommendation

For the reasons discussed above, the court **RECOMMENDS** that Grundfos's Motion for Summary Judgment on all of Thomas's claims (Dkt. 85) be **GRANTED.**

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

Signed on May 27, 2020, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-18-557
	§	
GRUNDFOS, CBS, *et al.*,	§	
	§	
Defendants,	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND GRANTING THE DEFENDANTS' MOTION TO DISMISS

This court has reviewed the Memorandum and Recommendation of Judge Christina Bryan signed on September 20, 2019, and made a de novo determination. Rule 72(b), Fed. R. Civ. P.; 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Based on the pleadings and the applicable law, the court adopts the Memorandum and Recommendation as this court's Memorandum and Order. This court finds and concludes that the defendants' motion to dismiss, (Docket Entry No. 60), was properly granted without leave to amend because further amendment would be futile. Judge Bryan's recommendation to dismiss Thomas's retaliation and negligent supervision claims against defendants Baek and Friis is consistent with and supported by the applicable legal standards and with the allegations in the complaint. The court overrules Thomas's objections to the Memorandum and Recommendation. The court finds that the objections are primarily based on a mistaken reading of the RESTATEMENT (SECOND) OF AGENCY. The defendants' motion to dismiss, (Docket Entry No. 60), is granted, with prejudice, because amendment would be futile.

SIGNED on February 4, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-18-557
	§	
GRUNDFOS, CBS, *et al.*,	§	
	§	
Defendants.	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION DENYING MOTION TO DISMISS

The court has reviewed the Memorandum and Recommendation of United States Magistrate Judge Christina Bryan signed on December 12, 2019, and has made a *de novo* determination of Judge Bryan's recommended dispositions. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Based on the applicable law, the court adopts the Memorandum and Recommendation on the motion to dismiss under Rules 37(d) and 41(b), (Docket Entry No. 69), as this court's Memorandum and Order. This court finds and concludes that the motion to dismiss was properly denied. Judge Bryan's recommendations to deny the motion to dismiss are consistent with and supported by the applicable legal standards. Thomas's objection, (Docket Entry No. 78), does not alter this ruling.

SIGNED on January 3, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS, *Plaintiff,*	§ § §	
v.	§	Civil Action No. 4:18-CV-0557
GRUNDFOS, CBS *et al.*, *Defendants.*	§ § §	

MEMORANDUM AND RECOMMENDATION

Defendants have confirmed that they received Plaintiff's Response to Defendants' First Set of Interrogatories on November 15, 2019, after the Motion to Dismiss was filed. Dkt. 76.

Although Plaintiff, who is pro se, did not timely comply with the Court's September 20, 2019 Order, the Court finds that the ultimate sanction of dismissal with prejudice is not warranted at this time under Rule 37(d) or Rule 41(b). The Court therefore RECOMMENDS that Defendants' Motion to Dismiss Under Rules 37(D) and 41(B) (Dkt. 69) be DENIED.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

Signed on December 12, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

APPENDIX H

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF TEXAS HOUSTON
DIVISION

MICHEL THOMAS,
Plaintiff,

v.

GRUNDFOS, CBS *et al.*,
Defendants.

§
§
§
§
§
§
§
§

Civil Action No. 4:18-CV-0557

MEMORANDUM AND RECOMMENDATION

This case is before the court on Defendants Henrik Kirkelund Baek and Astrid Norgaard Friis's Motion to Dismiss Based on the Pleadings (Dkt. 60). Having considered the parties' submissions and the law, the Court recommends that Defendants' motion be granted.

I. Background

Plaintiff Michel Thomas sued Grundfos, Grundfos CBS, and Grundfos Americas for employment discrimination and retaliation under Title VII, 42 U.S.C. § 1981, and the Texas Labor Code. *See* Dkt. 32 at 2 (Second Amended Complaint). Plaintiff's Second Amended Complaint includes claims against two individuals, Henrik Kirkelund Baek and Astrid Norgaard Friis, for retaliation under 42 U.S.C. § 1981 and negligent supervision. *Id.*[1] Baek and Friis now move to dismiss Thomas's claims against them.

II. Motion to Dismiss Standards

Defendants' Motion, filed after the filing of an answer, is properly considered as a motion to dismiss on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the

[1] Thomas named twelve individuals as defendants in his Second Amended Complaint, but all other individual defendants have previously been dismissed. Dkts. 41, 53.

pleadings."). The standard for review of a motion under Rule 12(c) is the same as the standard of review under Rule 12(b)(6). *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004); *Doe v. Myspace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). The Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 701 (5th Cir. 2017) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir.2004)). However, only facts are entitled to an assumption of truth; legal conclusions unsupported by factual allegations do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). To survive a Rule 12(c) or 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Gonzalez v. Kay*, 577 F.3d 600, 603 (2009).

III. Analysis

A. Individual liability under 42 U.S.C. § 1981

Defendants' move to dismiss Thomas's § 1981 claims because he has not sufficiently pled a basis for individual liability. The Fifth Circuit has held that an individual may be liable under § 1981 if the individual is "essentially the same" as the employer in exercising authority over the plaintiff. *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337 (5th Cir. 2003).

In *Foley*, the Fifth Circuit upheld the district court's denial of summary judgment for individual defendants because the court "found genuine issues of material fact as to whether the Appellants exercised control over the faculty positions and titles [at issue]. If so, the Appellants were 'essentially the same' as [the university] for purposes of the retaliatory conduct alleged in this case." 355 F.3d at 337. District courts within the Fifth Circuit have interpreted *Foley* as

recognizing individual liability under § 1981 for supervisors who exercise control over employment decisions and were personally involved in the complained-of conduct, but disallowing § 1981 claims against a mere co-worker. *See, e.g., Miller v. Wachovia Bank, N.A.*, 541 F. Supp. 2d 858, 862-63 (N.D. Tex. 2008) ("the cases that have addressed the issue suggest that a § 1981 suit against a mere coworker is invalid."); *Covalt v. Pintar*, No. CIV.A. H-07-1595, 2008 WL 2312651, at *7 (S.D. Tex. June 4, 2008) ("...Plaintiff's co-worker, was not a party to Plaintiff's employment contract, and there is no allegation that [she] was "essentially the same" as Defendant...when engaging in the alleged retaliatory or harassing acts."). Other circuits also require the plaintiff to show that the individual had personal involvement in the alleged discriminatory or retaliatory acts in order to establish a § 1981 liability of an individual. *See, e.g., Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000) (negligence in implementing a non-discrimination policy does constitute personal involvement or affirmative link necessary to support individual liability); *Flores v. City And Cty. Of Denver*, 30 F. App'x 816, 819 (10th Cir. 2002) ("an individual defendant can be held liable under § 1981 if the individual defendant was personally involved in the discriminatory conduct.").

Plaintiff's Second Amended Complaint does not allege that Baek or Friis were personally involved in any discriminatory or retaliatory actions against him. *See* Dkt. 32. The Complaint alleges: (1) that "the investigation [of his internal complaint of discrimination] was conducted by Atrid [sic] Norgaard Fris [sic], and Henrik Baek from Grundfos corporate (*Id.* at 4);" (2) "no investigation was done on the discrimination and retaliation issues by Atrid Norgaard Fris and Henrik Back (*Id.* at 6); (3) "I contacted Hentik [sic] Baek by phone about the matter and nothing was done" (*Id.* at 8); and (4) "I informed Atrid Norgaard Fris and Henrik Baek of threat Billy

Baxter made to me . . .." (*Id.* at 9). While assumed to be true, these allegations fail to state a § 1981 race discrimination or retaliation claim against Baek and/or Friis individually.

B. Negligent supervision

Plaintiff's Second Amended Complaint asserts a cause of action against Baek and Friis for negligent supervision. *See* Dkt. 32 at 2. No allegations in the Second Amended Complaint support such a claim against Baek and/or Friis. Under Texas law, the duty to supervise employees is a non-delegable duty of an employer. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) ("corporate officers and agents are subject to personal liability for their actions within the employment context only when they breach an independent duty of care."). Thus, "A supervisor's individual liability under state law arises only when the supervisor owes a duty of reasonable care to the injured party that is independent of the employer's duty. *Udoewa v. Plus4 Credit Union*, No. CIV A H-08-3054, 2009 WL 1856055, at *5 (S.D. Tex. June 29, 2009); *see also Ameen v. Merck & Co., Inc.*, No. 05-20068, 226 F. App'x 363, 373 (5th Cir. 2007) (citing *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996)). Thomas has not alleged Baek and Friis owed a duty to supervise Grundfos employees that was independent of the corporate employer's duty. He has not alleged that Baek and Friis supervised any employee whose actions allegedly harmed Thomas. No allegations in the Second Amended Complaint plausibly allege that Baek and Friis owed a duty of reasonable care to Thomas independent of the employer's duty. Thus, Thomas's negligent supervision claims against Baek and Friis must be dismissed.

IV. Conclusion and Recommendation

For the reasons stated above, the Court recommends that Defendants Henrik Kirkelun Baek and Astrid Norgaard Friss's Motion to Dismiss (Dkt. 60) be GRANTED.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

Signed on September 20, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-18-0557
	§	
GRUNDFOS, CBS *et al.*,	§	
	§	
Defendants,	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND ORDER DISMISSING WITHOUT PREJUDICE

This court has reviewed the Memorandum and Recommendation of the United States Magistrate Judge signed on February 15, 2019, and the objections filed by the plaintiff, Michel Thomas, and made a *de novo* determination. Rule 72(b), FED. R. CIV. P.; 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Based on the pleadings, the record, and the applicable law, the court adopts the Memorandum and Recommendation as this court's Memorandum and Order. This court finds and concludes that the motion to dismiss was properly granted and the claims against Jonathan Hamp-Adams, Thomas Brun Larsen, Paddi Riopelle, Chua Nguyen, Steve Marshall, Billy Baxter, Lonnie Palla, and Terry Jalufka properly dismissed without prejudice. The Magistrate Judge's recommendation to dismiss all claims against defendants Jonathan Hamp-Adams, Thomas Brun Larsen, Paddi Riopelle, Chua Nguyen, Steve Marshall, Billy Baxter, Lonnie Palla, and Terry Jalufka based on lack of personal jurisdiction is consistent with and

supported by the applicable legal standards. The defendants' motion to dismiss, (Docket Entry No. 42), is granted.

SIGNED on April 24, 2019, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHEL THOMAS, *Plaintiff*,	§	
	§	
	§	
V.	§	CIVIL ACTION NO. 4:18-CV-0557
	§	
GRUNFOS, CBS, *et al.*, *Defendants*.	§	
	§	

MEMORANDUM AND RECOMMENDATION

This employment discrimination case is before the court on the Motion to Dismiss of Individual Defendants Jonathan Hamp-Adams, Thomas Brun Larsen, Paddi Riopelle, Chua Nguyen, Steve Marshall, Billy Baxter, Lonnie Palla, and Terry Jalufka (Individual Defendants). Dkt. 42.[1] Plaintiff filed a late response. *See* LOC. R. S.D. TEX. 7.3 (opposed motions will be submitted to the judge 21 days from filing), which the court has nonetheless considered. The court recommends that Individual Defendants' motion be granted, and the case against each of them be dismissed without prejudice.

I. Legal Standards for Service of Process and Rule 12(b)(5) Motion To Dismiss

The court lacks personal jurisdiction over a defendant unless that defendant has been served with a summons and complaint in accordance with Federal Rule of Civil Procedure 4. *Kruger v. Hartsfield*, Civil Action No. 3:17-CV-01220, 2018 WL 2090743, *2 (N.D. Tex. April 13, 2018); *Hicks v. Dallas Cty. Community Colleges*, Civil Action No. 3:17-CV-809, 2018 WL 2271174 * 3 (N.D. Tex. April 25, 2018). Federal Rule of Civil Procedure 4(m) requires a plaintiff to effect service on defendants within 120 days after filing a complaint, unless the plaintiff can show good cause for the failure to do so. *Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013).

[1] The district court has referred this matter to this magistrate judge for report and recommendation. Dkt. 29.

Neither a litigant's pro se status, nor ignorance of the Federal Rules of Civil Procedure, will excuse the failure to effect timely service on a defendant. *Id.*; *May v. Texas by Cascos*, Civil Action No. 5:16-cv-238, 2017 WL 7513550, at *2 (N.D. Tex. Nov. 27, 2017).

Federal Rule of Civil Procedure 12(b)(5) permits a named defendant to challenge proper service of the summons and complaint. Once a defendant raises a Rule 12(b)(5) challenge, the plaintiff must show that service was proper. *Kruger*, 2018 WL 2090743, at *2; *May*, 2017 WL 7513550, at *2. When ruling on a 12(b)(5) motion, the court enjoys broad discretion to dismiss the action without prejudice. *Kruger*, 2018 WL 2090743, at *4.

III. Plaintiff Has Failed to Show Proper Service

Plaintiff filed his original complaint against Grundfos CBS and the Individual Defendants on February 23, 2018 and caused a summons to be issued for each of the Individual Defendants on May 11, 2018. The Return of Service form on file for each Individual Defendant states that a summons was served on "Ana Guel, who is designated by law to accept process on behalf of CT Corporation, Wolters Kluwer on 05/17/2018[.]" *See* Dkts. 11-18. Nothing on the Return of Service forms, in the record, or in Plaintiff's Response, demonstrates that Ana Guel is an agent authorized to accept service for any Individual Defendant. To the contrary, each of the Individual Defendants submitted a declaration stating that he does not have a registered agent for service of process, and that neither Ana Guel nor Wolters Kluwer are authorized to accept service on his behalf. *See* Declarations, Dkts. 42-1-42-9, 43.

Plaintiff's response to the Defendants' Rule 12(b)(5) motion includes copies of emails he sent to counsel for Grundfos in late April and early May, asking counsel to accept service on behalf of the Individual Defendants or, alternatively, to provide last known addresses. Dkt. 44, at 5-15.

Grundfos' counsel informed Plaintiff in an email that he did not have authority to accept service on behalf of any defendant named in the lawsuit. Dkt.. 44, at 11.

Plaintiff's response to the motion to dismiss fails to demonstrate any attempt to serve the Individual Defendants after May 17, 2018. On May 24, 2018 Plaintiff filed a motion for additional time to effect service, which the court granted on June 27, 2018. Dkt. 31. On June 29, 2018, Plaintiff filed a second motion for extension of time, and the court signed an order granting Plaintiff until August 23, 2018 to serve all Defendants. Dkt. 33. Also on June 29, 2018, Plaintiff left envelopes with the clerk's office at the federal court, noting that he did not have addresses for the individuals. Dkt. 34. After the August 23, 2018 deadline expired, Plaintiff did not request more time or ask for approval of a substituted method of service.

Plaintiff's pro se status and lack of knowledge of the Federal Rules of Civil Procedure do not constitute good cause to grant a third extension of time. Neither does Grundfos' counsel's failure to provide last known addresses for individuals constitute good cause for Plaintiff's failure to serve the Individual Defendants. Because Plaintiff has failed to show proper service or good cause for failing to timely serve the Individual Defendants, Plaintiff's claims against the Individual Defendants should be dismissed pursuant to Rule 12(b)(5). *See May*, 2017 WL 7513550, at *4 n.4. (noting that dismissal without prejudice was warranted where an extension of time was previously granted and pro se defendant still failed to comply with applicable rules); *Thrasher*, 709 F.3d at 512 ("In *Systems Signs Supplies v. U.S. Department of Justice, Washington, D.C.*, we held that the district court did not abuse its discretion in finding that a litigant failed to show good cause, despite the litigant's pro se status, his multiple attempts to serve defendants within the statutory period, and the fact that defendants has actual notice of the suit." (internal citations in footnotes omitted)).

III. Conclusion and Recommendation

Plaintiff filed this case almost a year ago and has not served the Individual Defendants despite two extensions of time. Therefore, the court **RECOMMENDS** that Defendants' Rule 12(b)(5) motion to dismiss be **GRANTED** and this case be **DISMISSED** without prejudice.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, Room 9513, and to the chambers of the undersigned, Room 8608.

Signed on February 15, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL THOMAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-18-0557
	§	
GRUNDFOS, CBS *et al.*,	§	
	§	
Defendants,	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND ORDER DISMISSING WITHOUT PREJUDICE

This court has reviewed the Memorandum and Recommendation of the United States Magistrate Judge signed on November 5, 2018, and made a *de novo* determination. Rule 72(b), FED. R. CIV. P.; 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Based on the pleadings, the record, and the applicable law, the court adopts the Memorandum and Recommendation as this court's Memorandum and Order. This court finds and concludes that the motion to dismiss was properly granted and the claims against Mads Nipper and Henrik Christiansen properly dismissed without prejudice. The Magistrate Judge's recommendation to dismiss all claims against defendants Nipper and Christiansen based on lack of personal jurisdiction is consistent with and supported by the applicable legal standards. No objections were filed. The defendants' motion to dismiss, (Docket Entry No. 35), is granted.

SIGNED on December 6, 2018, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

APPENDIX L

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF TEXAS HOUSTON DIVISION

MICHEL THOMAS,
Plaintiff,

v.

GRUNDFOS, CBS *et al.*,
Defendants.

Civil Action No. 4:18-CV-0557

MEMORANDUM AND RECOMMENDATION

This case is before the court on Defendants' Mads Nipper and Henrik Christiansen's Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim (Dkt. 35). Having considered the parties' submissions and the law, the court recommends that Defendants' motion to dismiss for lack of personal jurisdiction be granted.

I. BACKGROUND

Plaintiff Michel Thomas has filed a lawsuit against Grundfos,[1] Grundfos CBS, and Grundfos Americas for employment discrimination and retaliation under Title VII and the Texas Labor Code. *See* Dkt. 32 (Second Amended Complaint[2]). Plaintiff has also sued multiple individuals, including Mads Nipper and Henrik Christiansen, alleging race-based discrimination under 42 U.S.C. § 1981 and "negligent supervision." *Id.* Defendants Mads Nipper and Henrick Christiansen, residents of Denmark, move to dismiss all claims against them based on lack of personal jurisdiction and failure to state a claim.[3] Because this court does not have personal jurisdiction

[1] A related suit against Link Staffing and other individuals is also pending in this court. *See Thomas v. Link Staffing*, Civil Action No. H-17-CV-3902.

[2] Thomas has styled this as his "Second Amended Verified Complaint," but it is actually his third Complaint. *See* Dkts. 1, 6.

[3] Nipper and Christiansen do not concede that Plaintiff properly served them by having a summons delivered to their place of work in Bjerringbro, Denmark, (*see* Dkts. 20, 22), but argue that even assuming proper service, the undisputed facts establish the court's lack of personal jurisdiction. Dkt. 35 at 2.

over Nipper and Christiansen, the court recommends that this case be dismissed without prejudice[4] and does not consider the Rule 12(b)(6) arguments.

II. ANALYSIS

A. Personal Jurisdiction Standards.

A defendant may challenge a court's jurisdiction over his person by moving for dismissal under Rule 12(b)(2) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. PRO. 12(b)(2). If a defendant does so, the plaintiff bears the burden to demonstrate the court has jurisdiction over the defendant.[5] *Johnson v. MultidataSys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Unless the court holds an evidentiary hearing, the plaintiff need only establish a prima facie case of jurisdiction. *See id.* (citing *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994).

A prima facie showing of personal jurisdiction may be established by the pleadings, depositions, affidavits, or exhibits of record. *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999). The court must accept as true the party's uncontroverted allegations and resolve any factual conflicts in favor of the party seeking to invoke the court's jurisdiction. *Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 215 (5th Cir. 2000). The law, however, does not require the* court to credit conclusory allegations, even if uncontroverted. *Panda Brandywine Corp. v.*

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[4] *Saudi v. S/T Marine Atl.*, 159 F. Supp. 2d 505, 509 n.1 (S.D. Tex. 2000) ("A dismissal for lack of personal jurisdiction is not a dismissal on the merits and must therefore be without prejudice.").

[5] Defendants move to dismiss for lack of personal jurisdiction under a traditional 14th Amendment analysis. *See* Dkt. 35. Thomas has asserted a federal cause of action under 42 U.S.C.§ 1981. Section 1981 does not contain a nationwide service of process provision. Federal Rule of Civil Procedure 4(k)(2) provides for nationwide service of process where a plaintiff has asserted a federal claim, there is no state that could exercise personal jurisdiction over the defendant, and the exercise of personal jurisdiction is consistent with due process. Here, Thomas had not plead jurisdiction under Federal Rule of Civil Procedure 4(k)(2) as required to invoke that provision. *Nagravision SA v. Gotech. Int'l Tech. Ltd.*, 882 F.3d 494, 499 (5th Cir. 2018), *pet. for cert. filed*, No. 18-119 (July 27, 2018) ("Nagravision had the initial burden to plead and prove the requisite contacts with the United States and plead Rule 4(k)(2)'s applicability."); *Finch Fund, FLP v. Horne*, 327 F. Supp. 3d 1007 (S.D. Tex. 2018), *appeal docketed*, No. 18-20449 (5th Cir. July 18, 2018) ("The plaintiff has the initial burden to plead and prove the requisite contacts with the United States and plead Rule 4(k)(2)'s applicability."). Only after a plaintiff meets this initial burden must a defendant affirmatively prove that there is a state where courts of general jurisdiction could properly exercise jurisdiction over the defendant. *Id.* Therefore, as Defendants' argue, this court will look to the Texas long-arm statute and defendants' minimum contacts with Texas to determine personal jurisdiction. *See* FED. RULE CIV. PRO. 4(k)(1)(A).

Potomac Elec. Power Co., 253 F.3d 865, 868-69 (5th Cir. 2001). "After a plaintiff makes his prima facie case, the burden shifts to the defendant to present 'a compelling case that the presence of some other consideration would render jurisdiction unreasonable.'" *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 769 (N.D. Tex. 2012) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

"A federal court may exercise personal jurisdiction over a nonresident defendant if (1) the forum state's long-arm statute confers personal jurisdiction over that defendant; and (2) the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009). "The Texas long-arm statute authorizes the exercise of jurisdiction over nonresidents 'doing business' in Texas," and "[t]he Texas Supreme Court has interpreted the 'doing business' requirement broadly, allowing the long-arm statute to reach as far as the federal constitution permits." *Grundle Lining Const. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996) (citing *Schlobohm v. Schaptro*, 784 S.W.2d 355, 357 (Tex. 1990)). Thus, the jurisdictional inquiry under the Texas long-arm statute collapses into a single due process inquiry. *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993).

The two-part test for assertion of personal jurisdiction under the due process clause examines (1) whether a defendant "purposefully availed itself of the benefits and protections of the forum state by establishing 'minimum contacts' within the forum state," and (2) whether the assertion of personal jurisdiction would comport with "traditional notions of fair play and substantial justice." *Alpine View*, 25 F.3d at 215; *see also Burger King Corp.*, 471 U.S. at 476-77.

Both prongs of the due process test must be fulfilled in order for this court to exercise personal jurisdiction over the defendants. The first prong of the personal jurisdiction test, referred to as the

"minimum contacts" requirement, may be satisfied if either: (1) the controversy is "related to" or "arises out of" the nonresident defendant's contacts with the forum ("specific jurisdiction"), or (2) the defendant has "continuous and systematic" contacts with the forum ("general jurisdiction"). *Alpine View*, 205 F.3d at 215; *Burger King Corp.*, 471 U.S. at 472-76; *Helicopteros Nacionales de Colombia A.A. v. Hall*, 466 U.S. 408, 413-17 (1984). Under the second prong of the personal jurisdiction test, the "fundamental fairness" requirement, a court examines: (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the states' shared interest in furthering fundamental social policies. *See Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999) (citing *Ruston Gas Turbines, Inc.*, 9 F.3d at 421).

B. Thomas Cannot Meet his Prima Facie Burden to Show General Jurisdiction

Thomas has failed to meet his burden to present a prima facie case of general jurisdiction under Fifth Circuit law. Neither Defendant is a resident of Texas. Defendant Nipper is the Group President of Grundfos Holding A/S and lives and works in Bjerringbro, Denmark. Dkt. 35-1 at 2. Defendant Christiansen is the Group Senior Vice President of Grundfos Holding A/S and also lives and works in Bjerringbro, Denmark. Dkt. 35-2 at 2. They both attest that they do not own or lease property in Texas, do not maintain any bank accounts or funds in Texas, and have not personally negotiated any contracts in Texas. *Id.* Nipper and Christiansen also attest that they have never met, worked with, or supervised Thomas, or made any decision directly or indirectly affecting Thomas's assignment with Grundfos. Dkt. 35-1 at 2; Dkt. 35-2 at 2.

Thomas acknowledges that Nipper and Christiansen are residents of Denmark. Dkt. 37 at 2. Thomas does not contradict any of Nipper's or Christiansen's representations regarding the extent of their contacts with Texas, other than their representation that they have never met him.

Thomas contends that he met the two men at a Grundfos event in Brookshire, Texas in 2015. Dkt. 37 at 1-2. Nipper and Christiansen have submitted supplemental declarations stating that they do no recall meeting Thomas at the referenced event attended by close to 200 workers. In any event, Nipper's and Christiansen's attendance at a single event in Texas in 2015 does not support general jurisdiction. *See Crown Sterling, Inc. v. Clark*, 815 F. Supp. 199, 202 (N.D. Tex. 1993) ("isolated acts may not give rise to a nonresident's foreseeability of being haled into a distant forum . . ..", citing *Burger King Corp.*, 471 U.S. at 475 n.18)). Neither Thomas's Second Amended Complaint (Dkt. 32) nor his response to Defendants' motion (Dkt. 37) alleges any other general contacts by Nipper or Christiansen with Texas.

Under Fifth Circuit precedent, the facts of this case do not even present a close call as to whether the court can exercise personal jurisdiction over Nipper or Christiansen. The only evidence of Nipper's and Christiansen's individual contacts presented by Thomas is their presence at a 2015 company event. The presence of these Defendants at that event is the sort of "random, fortuitous, or attenuated contact[] which will not support an exercise of personal jurisdiction." *See Holt Oil & Gas. Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986) (internal quotations omitted). In *Holt*, the Fifth Circuit held that none of the defendant's various contacts with Texas, taken alone, would support an exercise of general jurisdiction, but the defendant's frequent journeys into Texas for personal and recreational purposes, extensive business dealings in Texas, travel to Texas for business purposes, ownership of real estate in Texas, and status as an investor and former director of a Texas corporation that had drilled for oil in Texas and been involved in litigation in Texas, when viewed *in toto*, constituted the kinds of continuous and systematic contacts required to satisfy the due process prong of the test for the exercise of personal jurisdiction. *Holt Oil & Gas*, 801 F.2d at 779. The contacts between Defendants Nipper and Christiansen and Texas are not nearly as

extensive as the contacts of the defendant in the *Holt* case. Thus, after consideration of the pleadings, exhibits, and the law, it is obvious that Thomas cannot state a prima facie case for general jurisdiction over Nipper or Christiansen.

C. Thomas Cannot Meet his Prima Facie Burden to Show Specific Jurisdiction

Thomas fails to allege any adverse action by Nipper or Christiansen that could constitute discrimination or negligent supervision. *See* Dkt. 32. Thomas's only arguments in his response to the motion to dismiss for lack of personal jurisdiction are: (1) he met Nipper and Christiansen in 2015; (2) he sent correspondence about his complaints to Nipper and Christiansen and they failed to act; (3) that as executives of Grundfos Holding A/S they are responsible for all the acts of Grundfos CBS employees in Texas. By his own description, the 2015 meeting did not in any way relate to Thomas's work conditions or his discrimination complaints. *See* Dkt. 37 at 2. Nipper and Christiansen attest in their declarations that the "never worked with Mr. Thomas or supervised him during his assignment with Grundfos, and [] never made any decision that directly or indirectly affected the terms of his assignment with Grundfos or his employment with Stafflink, Inc. d/b/a Link Staffing Services." Dkt. 38-1 at 2; Dkt. 38-2 at 2. Thomas has submitted nothing to contradict those representations. Because Thomas's causes of action in this case do not arise out of or relate to any action by Nipper and/or Christiansen in Texas, Thomas cannot state a prima facie case for the exercise of specific jurisdiction over Nipper or Christiansen.

D. The Exercise of Personal Jurisdiction Would Violate Traditional Notions of Fair Play and Substantial Justice

Because Thomas has failed to establish a prima facie case of personal jurisdiction by showing that Nipper and Christiansen have the requisite minimum contacts with Texas, it is not necessary to consider the second prong of the due process test, *i.e.*, whether the exercise of personal

jurisdiction comports with "traditional notions of fair play and substantial justice." Nonetheless, the court finds that the exercise of personal jurisdiction over the individual defendants would impose an undue burden on them. The individual defendants live in Denmark, work for a holding company that has a corporate connection to a company that appears to do business in Texas, have very few contacts with Texas (as discussed in paragraph II.B above), and had no involvement in the specific adverse action alleged by Thomas (as discussed in paragraph II.C above). To require them to defend themselves in this court simply because a corporation affiliated with their employer does business in Texas would offend traditional notions of fair play and substantial justice. *See Kistel v. RAS Sec. Corp.*, No. 3:01-CV-294-X, 2001 WL 912425 at *5 (N.D. Tex. Aug. 9, 2001) ("Some courts have held that it offends notions of fair play and substantial justice to force employees, who conduct business by phone or mail in numerous states on behalf of their employers, to defend lawsuits in those states in their individual capacities."). The fact that exercising jurisdiction on these facts would violate traditional notions of fair play and substantial justice simply provides a basis in addition to the absence of specific or general contacts with Texas, for granting Defendants' motion to dismiss.

III. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that Defendants' Motion to Dismiss (Dkt. 35) be GRANTED and Plaintiff's claims against Mads Nipper and Henrik Christiansen be DISMISSED without prejudice.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass*

v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Lee H. Rosenthal, Room 11535, and to the chambers of the undersigned, Room 8608.

Signed on November 05, 2018, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge