# APPENDICES

# APPENDIX A

# United States Court of Appeals
# for the Fifth Circuit



No. 21-20066
Summary Calendar

MICHEL THOMAS,

*Plaintiff—Appellant,*

*versus*

STAFFLINK, INC., *doing business as*, LINK STAFFING SERVICES; BILL PITTS; KAREN PITTS; MARIO TAMEZ; MATT TRIMBLE; CHRISTINE O'BRIEN; LINK STAFFING MANAGEMENT, L.L.C.,

*Defendants—Appellees.*

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3902

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Michel Thomas, acting *pro se*, filed an employment discrimination lawsuit against the Defendants. The district court dismissed some of his claims and granted summary judgment on others. We AFFIRM.

We first examine our jurisdiction. On August 4, 2020, the district court entered final judgment against Thomas. On August 31, 2020, Thomas filed a "motion to dismiss" under Federal Rules of Civil Procedure 60(b)(3), 60(b)(4), and 60(b)(6), arguing that the final judgment was void because it was inconsistent with due process.

On November 9, 2020, the district court denied the motion to dismiss and re-entered final judgment. On December 4, 2020, Thomas filed another "motion to dismiss" under Rules 60(b)(3), 60(b)(4), and 60(b)(6). Like his first motion, the second post-judgment motion argued that the final judgment was void because it was inconsistent with due process. The district court denied Thomas's second post-judgment motion on January 4, 2021. Thomas filed his notice of appeal on February 2, 2021.

Generally, a party must file a notice of appeal "within 30 days after entry of the judgment or order appealed from." FED. R. APP. P. 4(a)(1)(A). Certain timely filed post-judgment motions, including a motion under Rule 60(b), interrupt the time for filing the notice of appeal. *See* FED. R. APP. P. 4(a)(4)(A). An appellant generally can take advantage of this interruption only once. We have explained that successive post-judgment motions are "condemned by well-established authority in this and other circuits." *Charles L.M. v. N.E. Indep. Sch. Dist.*, 884 F.2d 869, 870 (5th Cir. 1989). As a result, "where an appellant files a second motion to reconsider 'based upon substantially the same grounds as urged in the earlier motion,' the filing of the second motion does not interrupt the running of the time for appeal." *Id.* (quoting *Ellis v. Richardson*, 471 F.2d 720, 721 (5th Cir. 1973)).

Here, Thomas's first Rule 60(b) motion was timely filed and interrupted the deadline for filing a notice of appeal. *See* FED. R. APP. P. 4(a)(4)(A). Thomas's second Rule 60(b) motion was based on substantially similar grounds and therefore did not interrupt the time for filing a notice of appeal. The 30-day time for appeal ran from the district court's denial of his first Rule 60(b) motion. Since Thomas did not file his notice of appeal within 30 days of that denial, we have no jurisdiction to review the final judgment entered in this case.

Because Thomas's notice of appeal was filed within 30 days of the court's denial of his second Rule 60(b) motion, we may review the court's decision on that motion. We review the denial of a Rule 60(b) motion for abuse of discretion. *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 871 (5th Cir. 1989).

After a review of the record and briefs, we conclude that the district court did not abuse its discretion by denying Thomas's second Rule 60(b) motion. Thomas's motion principally makes arguments that he made or could have made earlier in the proceedings. He argues that the district court colluded with the defendants but provides no evidence in support of his claim. He otherwise offers no "extraordinary circumstances" to justify relief. *See Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995).

AFFIRMED.

The judgment entered provides that appellant pay to appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Ms. Elizabeth L. Bolt
Mr. Allan Huddleston Neighbors
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-17-3902 |
| | § | |
| LINK STAFFING, *et al.*, | § | |
| | § | |
| Defendant. | § | |

**FINAL JUDGMENT**

For the reasons stated in this court's Memorandum and Opinion entered this date, this civil action is dismissed with prejudice.

This is a final judgment.

SIGNED on November 9, 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-17-3902 |
| | § | |
| LINK STAFFING, *et al.*, | § | |
| | § | |
| Defendants. | § | |

**ORDER**

The plaintiff, Michel Thomas, representing himself, has filed what he terms a motion to dismiss, citing Federal Rule of Civil Procedure 60(b)(3), (4), and (6). Rule 60(b) provides for relief from a judgment or order, which is the relief Thomas seeks. He asks the court to vacate the prior rulings denying his claims and entering judgment against him.

Thomas has not met the standards of, or made the showings required by, Rule 60(b). The rule provides that a court may relieve a party from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered earlier; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or it is based on an earlier judgment that has been reversed or vacated, or applying the judgment prospectively is no longer equitable; or (6) any other reason that justifies relief. Thomas cites sections (3), (4), and (6). There is no basis to find fraud in this record, or any ground to find the judgment void. The "catch all" clause of Rule 60(b)(6) is "a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances." *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 303 (5th

Cir. 2007) (quoting *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 604–05 (5th Cir. 1986)). Motions under this subsection "will be granted only if extraordinary circumstances are present." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). In *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981), the Fifth Circuit set out the following factors to consider: (1) that final judgments should not lightly be disturbed; (2) that a Rule 60(b) motion should not be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether, if the case was not decided on its merits due to a default or dismissal, the interest in deciding the case on its merits outweighs the interest in the finality of the judgment and there is merit in the claim or defense; (6) whether, if the judgment was rendered on the merits, the movant had a fair opportunity to present his claims; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. *Id.* at 402.

Thomas at best simply reurges some of the same grounds that he previously presented. He had a fair opportunity to present his claims, which were denied on their merits, and he had the opportunity to appeal the judgment to the Fifth Circuit. There are no extraordinary circumstances that demonstrate a reason to disturb the rulings and judgment. Thomas's motion to dismiss, (Docket Entry No. 95), is denied.

SIGNED on January 4, 2021, at Houston, Texas.

Lee H. Rosenthal

Lee H. Rosenthal
Chief United States District Judge

## APPENDIX D

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

| | | |
|---|---|---|
| MICHEL THOMAS, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| VS. | § | CIVIL ACTION NO. H-17-3902 |
| | § | |
| LINK STAFFING, et al., | § | |
| | § | |
| Defendant. | § | |

**ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND DENYING THE PLAINTIFF'S OBJECTIONS AND MOTION TO VACATE**

This court has reviewed the *Memorandum* and Recommendation of Judge Christina A. Bryan signed on July 8, 2020, and made a de novo determination. Fed. R. Civ. P. 72; 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 Judge Bryan's decisions granting Link Staffing's motion for summary judgment is supported by substantial evidence in the record and that Judge Bryan properly applied the legal standards. As a result, the court finds that Michel Thomas's motion to vacate and objections to Judge Bryan's report and recommendation are meritless. (Docket Entry Nos. 83, 89). Link Staffing's motion for summary judgment, (Docket Entry No. 77), is granted. Thomas's motion to vacate, (Docket Entry No. 83), is denied. Thomas's objections to Judge Bryan's report and recommendation, (Docket Entry No. 89), are overruled. Final judgment is separately entered.

SIGNED on November 9, 2020, at Houston, Texas.

Lee H. Rosenthal
Chief United States District 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-17-3902 |
| | § | |
| LINK STAFFING SERVICES, *et al.*, | § | |
| | § | |
| Defendants. | § | |

**FINAL JUDGMENT**

The defendants' motion for summary judgment, (Docket Entry No. 77), is granted. The court dismisses the case with prejudice.

SIGNED on August 3, 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-17-3902 |
| | § | |
| LINK STAFFING SERVICES, *et al.*, | § | |
| | § | |
| Defendants. | § | |

**ORDER ADOPTING THE MEMORANDUM AND RECOMMENDATION**

Based on a de novo review of the memorandum and recommendation issued on July 8, 2020, by United States Magistrate Judge Christina A. Bryan, (Docket Entry No. 80), this court adopts it as this court's own memorandum and opinion. The plaintiff, Michel Thomas, did not object to the memorandum and recommendation.

The defendants' motion for summary judgment, (Docket Entry No. 77), is granted. The court holds that Thomas did not present a *prima facie* case of race discrimination or retaliation under Title VII or 42 U.S.C. § 1981; Thomas cannot bring a "pattern and practice" of discrimination claim in an individual, non-class-action suit; and he has not raised a factual dispute material to determining pretext.

The court dismisses the case with prejudice and will enter final judgment by separate order.

SIGNED on August 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,<br>*Plaintiff*, | § | |
| v. | § | CIVIL ACTION NO. 4:17-CV-3902 |
| STAFFLINK, INC. D/B/A LINK STAFFING SERVICES, ET AL.,<br>*Defendants*. | § | |

**MEMORANDUM AND RECOMMENDATION**

Defendants Link Staffing Services and Christie O'Brien filed a Motion for Summary Judgment seeking dismissal of Plaintiff Michel Thomas's Title VII and 42 U.S.C. § 1981 race discrimination and retaliation claims against them.[1] Dkt. 77. Thomas filed a response.[2] Dkt. 78. Having considered the parties' submissions and the law, the Court recommends that the Motion for Summary Judgment be granted and all claims against Link Staffing and O'Brien be dismissed with prejudice.

## I. Background

Thomas was an employee of Link Staffing, a temporary staffing agency, and was assigned to work at the Brookshire, Texas, location of a company called Grundfos in December 2014. Grundfos terminated Thomas's assignment on October 18, 2016, and Thomas never worked a temporary assignment through Link Staffing again. In December 2017, Thomas filed this lawsuit against Link Staffing, O'Brien, and other individual employees alleging that while employed by Link Staffing and assigned at Grundfos he suffered sexual and religious harassment, was passed

[1] The District Court referred this case to this Magistrate Judge for Report and Recommendation. Dkt. 20.
[2] Defendants' Motion was filed on May 29, 2020 and Thomas's response was due 21 days later, on June 19, 2020. *See* Loc. R. S.D. Tex. 7.3, 7.4. Thomas signed the Response on June 22, 2020 and it was docketed June 24, 2020. The Court has nonetheless considered the late-filed response.

over for permanent positions based on his race and age, and was retaliated against for complaining about discrimination in the workplace. For purposes of the instant Motion for Summary Judgment only, Link Staffing does not contest Thomas's contention that Link Staffing is liable for conduct that occurred at Grundfos on the basis of joint employer liability. Dkt. 77 at 7 n.1.

The Court previously dismissed some of Thomas's claims against Link Staffing on grounds his allegations did not state plausible claims for violation of Chapter 21 of the Texas Labor Code, age discrimination and retaliation in violation of the ADEA, religious discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981, and hostile work environment discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. *See* Dkts. 35, 43. The Court dismissed Thomas's § 1981 race discrimination claim against O'Brien for failure to state a claim, but declined to grant her Rule 12(b)(6) motion to dismiss his § 1981 retaliation claim against her. *See* Dkts. 36, 43. The Court dismissed without prejudice all claims against other individual named defendants for lack of service. *See* Dkts. 54, 57. As a result, the only claims remaining in this case are Title VII and Section 1981 race discrimination and retaliation claims against Link Staffing and a Section 1981 retaliation claim against Christie O'Brien.

In February 2018, Thomas filed a related lawsuit against Grundfos employees and affiliates. The District Court issued a Final Judgment dismissing with prejudice all of Thomas's claims in the Grundfos case on June 17, 2020. *Thomas v. Grundfos et al.*, Civil Action No. 4:18-cv-0557, 2020 WL 3318287 (S.D. Tex. May 27, 2020), *report and recommendation adopted*, 2020 WL 3288128 (S.D. Tex. June 17, 2020).

## 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 Transmisston Co.*, 290 F.3d 303, 310 (5th Cir. 2002). The court construes the evidence in the light 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 for discrimination and retaliation under Title VII and 42 U.S.C. § 1981 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."). Pursuant to the *McDonnell Douglas* framework, a plaintiff relying on circumstantial evidence of discrimination or retaliation must first demonstrate a prima facie case. *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 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.'" *Id.* 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

Link Staffing moves for summary judgment on Thomas's Title VII and Section 1981 race discrimination claims on grounds that (1) certain Title VII claims are unexhausted and time-barred; (2) Thomas cannot meet his prima facie burden to show an actionable adverse employment action based on Grundfos's failure to hire him in a permanent position; (3) Thomas has no evidence of race discrimination by Link or Grundfos; and (4) Thomas cannot assert a "pattern and practice" claim as a matter of law. Dkt. 77 at 11-19. Link Staffing moves for summary judgment on Thomas's Title VII and Section 1981 retaliation claims on grounds that (1) certain acts of alleged retaliation are not actionable adverse employment actions and do not satisfy his prima facie burden; (2) Grundfos has stated a legitimate reason for terminating Thomas's assignment and Thomas has no evidence to show that Grundfos's decision was due to his protected activity of complaining about discrimination; and (3) Link Staffing has stated a legitimate reason for terminating Thomas's employment and Thomas has no evidence to show that Link Staffing's decision was due to his protected activity of complaining about discrimination . Dkt. 77 at 19-23. O'Brien moves for summary judgment on Thomas's § 1981 retaliation claim against her because her verbal discipline and Employee Counseling Report do not satisfy the adverse employment action component of a prima facie case of retaliation. Dkt. 77 at 23-24.

As a threshold matter, the Court addresses Thomas's argument that Defendants' Motion

for Summary Judgment constitutes an inappropriate attempt to relitigate issues decided by the Court on Defendants' Rule 12(b)(6) Motions to Dismiss. *See* Dkt. 78. Thomas is mistaken in his view that the Court previously found he met his summary judgment burden to prove prima facie cases of race discrimination and retaliation. When ruling on the Defendants' Rule 12(b)(6) motions to dismiss, the Court held *only* that Thomas's race discrimination and retaliation claims should not be dismissed merely on the basis of the allegations in his pleading. *See* Dkts. 35, 36. The Court has never found that Thomas has satisfied his summary judgment burden of proof to demonstrate a prima facie case of race-based discrimination or retaliation. The Court has made no prior rulings on the merits of Thomas's claims against Link Staffing or O'Brien and nothing precludes their Motion for Summary Judgment.

**A. Summary judgment should be granted on Thomas's Title VII and Section 1981 race discrimination claims.**

**1. Thomas has failed to present a prima facie case of race discrimination based on Grundfos's failure to hire him.**

To establish a prima facie case of race discrimination Thomas must show: (1) he was a member of a protected class; (2) he was qualified for the position he sought; (3) he suffered an adverse employment action, *i.e.*, his application for the position was rejected; and (4) his employer hired someone outside of his protected class or treated him less favorably than other similarly situated employees outside his protected group. *Hassen v. Ruston Louisiana Hosp. Co., L.L.C.*, 932 F.3d 353, 356 (5th Cir. 2019); *Haynes v. Pennzoil Co.*, 207 F.3d 296, 300 (5th Cir. 2000). 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).

Thomas's operative Amended Complaint alleges Link Staffing is liable for race discrimination because Grundfos gave permanent positions to "European-Americans" Rick Stephens and Todd Kirchkoff, and to "Mexican-Americans" Bernie Flores and Alex Siva, instead of him.[3] Dkt. 60 at 2. Link Staffing argues that (1) Thomas's Title VII claims are unexhausted and time-barred; (2) Thomas cannot demonstrate a prima facie case of race discrimination based on Grundfos's failure to hire him as a permanent employee; and (3) Thomas cannot show Link Staffing or Grundfos discriminated against him based on his race. Link Staffing's second ground for dismissal is dispositive and the Court does not address the other two.

Thomas has failed to establish a prima facie case of race discrimination resulting from Grundfos's failure to hire him because the uncontroverted summary judgment evidence establishes that Thomas never applied for a permanent position at Grundfos. Dkt. 77-11 at 3 (D.Ex. K) (establishing that Thomas was informed in writing that his Grundfos assignment was "NOT a working interview," and that he was invited to apply for consideration of jobs posted on the internet). Thomas confirmed in his deposition that he never applied for a position with Grundfos. Dkt. 77-5 at 9; Dkt. 77-4 at 38 (Thomas Depo. D.Ex. D). Thomas's failure to apply for a permanent position at Grundfos precludes his race discrimination claim. *See McFall v. Gonzalez*, 143 F. App'x 604, 607 (5th Cir. 2005) ("plaintiff must prove that . . . he applied for and was qualified for the position he sought"); *Grice v. FMS Techs, Inc.*, 216 F. App'x 401, 406 (5th Cir. 2007) (finding plaintiff's failure to apply fatal to his prima facie case); *Shackelford v. Deloitte & Touche, LLP*,

[3] Thomas's Amended Complaint does not allege liability for race discrimination against Link based on Grundfos's failure to train him. *See* Dkt. 60. Any such claims would be subject to dismissal for the reasons set forth in *Thomas v. Grundfos, et al.*, Civil Action No. 4:18-cv-0557, 2020 WL 3318287, at *3 (S.D. Tex. May 27, 2020), *report and recommendation adopted*, 2020 WL 3288128 (S.D. Tex. June 17, 2020) (noting Grundfos did not have a sequential training program in place and "the denial of training does not constitute an 'ultimate' employment decision or actionable adverse employment action" (citing *Pollak v. Lew*, Civil Action No. H-11-2550, 2013 WL 1194848, *6 (S.D. Tex. Mar. 22, 2013) and *Brooks v. Firestone Polymers, LLC*, 70 F. Supp. 3d 816, 836 (E.D. Tex. 2014))

190 F.3d 398, 406 (5th Cir. 1999) (dismissing claim based on failure to apply for position); *Irons v. Aircraft Serv. Int'l, Inc.*, 392 F. App'x 305, 312 (5th Cir. 2010) (rejecting plaintiff's argument that he was denied opportunity to apply because employer picked who they wanted to fill positions). Because Thomas did not apply for a position, Grundfos could not have taken the adverse employment action of rejecting him. *See Colbert v. Infinity Broad. Corp.*, 423 F. Supp. 2d 575, 583 (N.D. Tex. 2005) ("There can be no rejection unless one first applies for a position.").

Furthermore, any claim Thomas could make based on Grundfos's failure to hire him after April 2016 cannot survive summary judgment because the uncontroverted evidence establishes that Grundfos was under a hiring freeze from April 26, 2016 through the end of Thomas's employment. Dkt. 77-18 ¶7 (Marshall Aff. D.Ex. R); Dkt. 77-4 at 46-47 (Thomas Depo. D.Ex. D). An employer does not discriminate by failing to hire a plaintiff if it has no job opening. *Adams v. Groesbeck Indep. Sch. Dist.*, 475 F.3d 688, 691 (5th Cir. 2007). In addition, Thomas has failed to present evidence demonstrating that he was qualified for a position he sought, as is required to establish a prima facie case based on a failure to hire. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994) (plaintiff who was not qualified for position at time she applied was unable to make out a prima facie case of discrimination).[4] For these reasons, Thomas cannot satisfy his prima facie burden to show an adverse employment action based on Grundfos's failure to hire him for a permanent position.

[4] Even if he could satisfy his prima facie burden, he cannot meet his summary judgment burden to show pretext. A Plaintiff in a failure to promote case may show pretext by demonstrating he was "clearly better qualified (as opposed to merely better or as qualified) than the chosen employee," or "by showing that the employer's proffered explanation is false or unworthy of credence." *Roberson-King v. Louisiana Workforce Comm'n*, 904 F.3d 377, 381 (5th Cir. 2018). Employers are free to weigh the qualifications of candidates and use their own judgment in making choices, as long as their choices are not motivated by race. *Id.* at 382. Thomas admittedly has no evidence regarding the qualifications of the individuals outside of his protected class allegedly hired by Grundfos. Dkt. 77-4 at 44-45 (D.Ex. D at 226, 228); Dkt. 77-5 at 16-17 (D.Ex. E at 182-185; 202-203).

**2. As a matter of law, Thomas cannot recover based on Grundfos's alleged "pattern and practice" of discrimination.**

Thomas also alleges Link Staffing is liable for discrimination based on an alleged Grundfos practice of requiring "African-Americans" and "Mexican-Americans" to work twice as long as "European-Americans" before being hired as permanent employees. Dkt. 60 at 2. To the extent Thomas intends by this allegation to assert what is commonly known as a "pattern and practice" discrimination claim, it should be dismissed on summary judgment.

First, Thomas did not assert this type of claim in his EEOC charge and therefore did not exhaust his administrative remedies regarding claims involving a pattern and practice of discrimination. Dkt. 77-17 (EEOC charge, D.Ex. Q); *Kelly v. Capitol One Auto Fin.*, Civil Action No. 3:08-CV-0266-D, 2008 WL 2653202, at *3-4 (N.D. Tex. July 7, 2008) (declining to consider pattern and practice claim that was not included in EEOC charge). Second, "pattern and practice" claims may only be prosecuted in class action lawsuits. *Williams v. Target Corp.*, Civil Action No. H-12-2958, 2013 WL 1415619, at *1 (S.D. Tex. Apr. 1, 2013) (citing *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001)). Evidence relating to discrimination against other employees is not relevant to an individual plaintiff's claims of discrimination. *Vrzalik v. Potter*, No. 3:05-CV-1875-K, 2008 WL 2139529, *5 (N.D. Tex. May 21, 2008). Thomas's claims of racial discrimination based on a "pattern and practice" should be dismissed.

**B. Summary judgment should be granted on Thomas's Title VII and Section 1981 retaliation claims.**

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). 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." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)).

Thomas alleges that after he complained of race discrimination, Link Staffing retaliated against him by issuing an October 17, 2016 written Employee Counseling Report, ending his assignment at Grundfos, and terminating his employment. Dkt. 60. Thomas alleges that O'Brien retaliated against him by verbally disciplining him and issuing the October 17, 2016 written Employee Counseling Report. *Id.*

1. **Thomas cannot meet his prima facie case of retaliation against Link Staffing based on the Employee Counseling Report.**

Contrary to the provisions in the Link Staffing Employee Handbook, (Dkt. 77-3), Thomas raised his complaints of discrimination directly with Grundfos management. After Link Staffing learned that Thomas had communicated his complaints to Grundfos, Christie O'Brien, the Human Resources Manager for Link Staffing, counseled Thomas on three separate dates (August 23; September 1; September 30) and informed him that he was required to report workplace concerns to Link Staffing. Dkt. 77-1 ¶5 (Trimble Aff. D.Ex. A). The summary judgment record reflects that after repeated counseling, Thomas ignored Link Staffing's policy and again complained directly to Grundfos management on October 12, 2016. Dkt. 77-12 (D.Ex. L). O'Brien then gave Thomas a written "Employee Counseling Report" on October 17, 2016. *Id.*; Dkt. 77-14 (Employee Counseling Report, D.Ex. N).

The written "Employee Counseling Report" does not constitute an actionable adverse employment action. *See, e.g., King v. Louisiana*, 294 F. App'x 77, 85 (5th Cir. 2008) (holding verbal reprimands are not actionable as retaliation); *Gallentine v. Hous. Auth.*, 919 F. Supp. 2d 787, 807 (E.D. Tex. 2013) ("The write-up, however, which was classified as a verbal warning,

cannot satisfy the second prong of a prima facie case of retaliation."); *Mendoza v. Bell Helicopter*, 548 F. App'x 127, 130 (5th Cir. 2013) (verbal counseling and a written warning are not materially adverse employment actions); *DeHart v. Baker Hughes Oilfield Ops., Inc.*, 214 F. App'x 437, 442 (5th Cir. 2007) (written disciplinary warning not actionable retaliation); *Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 286 (5th Cir. 2014) (a written reprimand, without evidence of consequences, does not constitute an adverse employment action); *Perez v. Brennan*, 766 F. App'x 61, 64 (5th Cir. 2019) (warning letter was not an adverse employment action); *Molina v. Equistar Chems., L.P.*, Civil Action No. C-05-327, 2006 WL 1851834, at *10 (S.D. Tex. June 30, 2006) ("Last Chance Agreement" not actionable as retaliation). Because he has failed to provide summary judgment evidence demonstrating an adverse employment action, Thomas's retaliation claim based on the written Employee Counseling Report should be dismissed.

**2. Thomas cannot meet his summary judgment burden to show that Grundfos's stated reason for ending his assignment is pretext for retaliation.**

On October 17, 2016, Thomas approached the Grundfos Human Resources Director, Paddi Riopelle, and Link Staffing representatives at the Brookshire Facility and alleged that Grundfos employee Steve Marshall had been dismissed by his previous employer for sexual harassment. Dkt. 77-1 ¶6; Dkt. 77-6 ¶12 (O'Brien Aff. D.Ex. F). Thomas's accusations against Marshall on October 17, 2016 did not involve conduct that occurred at Grundfos and Thomas offered no support for them. Grundfos had never received any complaint of sexual harassment by Marshall. Therefore, "Grundfos found Thomas's statements to be concerning and simply an attempt to harm Mr. Marshall's reputation." Dkt. 77-18 ¶ 11. Thomas does not deny that he made the accusation about Marshall. The uncontroverted summary judgment evidence demonstrates that Grundfos terminated Thomas's temporary assignment the very next day due to his comments about Marshall.

*Id.*[5]

Thomas has failed to present summary judgment evidence demonstrating a causal link between the termination of his temporary assignment at Grundfos and protected activity such as his complaints of racial discrimination. The termination of Thomas's assignment at Grundfos occurred in close temporal proximity to his complaint about discrimination at the October 12, 2016 meeting. However, even if temporal proximity were sufficient evidence of a causal link to state a prima facie case of retaliation, standing alone, it fails to provide 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). Thomas's retaliation claim based on the ending of his Grundfos assignment should be dismissed because (1) Link has offered a legitimate, non-discriminatory reason for Grundfos's termination decision; (2) Thomas does not deny making the remarks Link offers as the basis of the legitimate, non-discriminatory reason for Grundfos's termination decision; (3) Thomas has presented no evidence indicating Grundfos's explanation is false; and (4) Thomas has presented no evidence supporting an inference that Grundfos ended his assignment because he engaged in the protected activity of complaining about racial discrimination.

[5] 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, which he admitted he did not know was true, is not a complaint based on the belief that his employer was engaged in an unlawful employment practice, and does not constitute protected activity.

**3. Thomas cannot meet his summary judgment burden to show that Link Staffing's stated reason for terminating his employment is pretext for retaliation**

Thomas alleges that he was terminated by Link Staffing after complaining about race discrimination. See Dkt. 60. On October 18, 2016, Link Staffing notified Thomas that although his assignment at Grundfos had ended, he remained employed by Link Staffing and was eligible for assignments. Dkt. 77-1 ¶ 7. Thomas's Field Staff Agreement required Thomas to provide Link Staffing with his availability for work. *Id.*; Dkt. 77-3 at 7 (FSA, D.Ex. C). Yet, Thomas never provided his availability or reported to the Link Staffing office. Dkt. 77-1 ¶ 8; Dkt. 77-5 at 12, 14. Despite the total lack of contact, Link Staffing waited more than year before "deactivating" Thomas's employment on October 25, 2017. Dkt. 77-1 ¶ 8.

Thomas has presented no evidence whatsoever to contradict Link Staffing's legitimate explanation for ending Thomas's employment. It is clear under these circumstances that Thomas cannot meet even his prima facie burden to show a causal link between any of his protected activity in 2016 and the termination of his employment with Link Staffing in October 2017. Thomas's retaliation claim against Link Staffing should be dismissed.

**4. Thomas cannot meet his prima facie burden on his § 1981 retaliation claim against O'Brien based on her verbal counseling or the written Employee Counseling Report.**

As explained above, O'Brien counseled Thomas about Link Staffing policy on three separate dates (August 23; September 1; September 30) before issuing the "Employee Counseling Report" on October 17, 2016. Dkt. 77-14 (Employee Counseling Report, D.Ex. N). Also as explained above, the verbal discipline and Employee Counseling Report do not qualify as adverse employment actions for purposes of Thomas's retaliation claim. *See, e.g., Mendoza v. Bell Helicopter*, 548 F. App'x 127, 130 (5th Cir. 2013) (verbal counseling and a written warning are not

materially adverse employment actions). Even if Thomas could establish an adverse employment action, he cannot satisfy his burden to show a causal link between the discipline and his protected activity. Thomas's opinion that the discipline was unfair does not satisfy his burden to show the discipline resulted from retaliation. *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."). Therefore, Thomas's Section 1981 retaliation claim against O'Brien should be dismissed.

## IV. Conclusion and Recommendation

For the reasons discussed above, the Court recommends that Link Staffing and Christi O'Brien's Motion for Summary Judgment (Dkt. 77) be **GRANTED** and all claims in this case be **DISMISSED** with 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.

Signed on July 08, 2020, 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. | § | Civil Action No. 4:17-CV-3902 |
| LINK STAFFING, *et al.*, *Defendants*. | § | |

**ORDER**

This matter is before the court on Defendants' Motion to Strike Plaintiff's Amended Complaint (Dkt. 62).[1] The motion is denied.

After multiple orders of the court, most recently on June 18, 2019 (Dkt. 59), Plaintiff, who is pro se, filed an Amended Complaint on July 9, 2019 (Dkt. 60). Defendants object that Plaintiff's Amended Complaint names individuals who have been already been dismissed from this case, as well as three new entities, Link Staffing Management LLC, Link Staffing Services, and Stafflink, that have not previously been named or served in this case. Plaintiff lists the individuals and the new entities only in the case caption; he does not include any allegations or claims against them in the body of the Amended Complaint. The court does not construe the Amended Complaint as asserting any claims against the referenced individuals or entities. To the extent Plaintiff intends the Amended Complaint as a motion for leave to add parties or to amend previously dismissed claims against the individuals, it is denied. The named individuals and new entities are not defendants in this lawsuit.

[1] Plaintiff has not filed a timely response to the motion. Nonetheless, given Plaintiff's pro se status and the fact that granting the motion would operate as a death-knell sanction, the court declines to grant the motion as unopposed under Local Rules of the S.D. Tex. 7.3 and 7.4.

The Amended Complaint was filed 6 days beyond the last deadline set by the court and does not contain numbered paragraphs. Nonetheless, in light of the history of this case and Plaintiff's pro se status, the Amended Complaint is sufficient to allow Defendants to answer. The case may now proceed to resolution on the merits. For these reasons, it is

ORDERED that Defendants' Motion to Strike (Dkt. 62) is denied. It is further

ORDERED that all prior rulings and orders of this court remain in effect, including the Scheduling Order entered April 25, 2019 (Dkt. 52).

Signed on September 06, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

# APPENDIX I

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MICHEL THOMAS, *Plaintiff*, | § | |
| | § | |
| | § | |
| v. | § | Civil Action No. 4:17-CV-3902 |
| | § | |
| LINK STAFFING, *et al.*, *Defendants*. | § | |
| | § | |

**ORDER**

On March 19, 2019 (Dkt. 48), and again on April 25, 2019 (Dkt. 53), the court ordered Plaintiff to file an Amended Complaint that is consistent with the court's Memoranda and Recommendations (Dkts. 35, 36), which have been adopted by the district court (Dkt. 43). Plaintiff's last deadline to file his Amended Complaint was May 16, 2019. He did not comply with the deadline.

Plaintiff's stated reasons for refusing to file an Amended Complaint (*see* Response to Defendant's Notice, Dkt. 58) have been addressed by the court on the record at hearings and in prior rulings. The court recognizes that Plaintiff, who is appearing in this case pro se, disagrees with the court's dismissal of certain claims and defendants from this case, and intends to challenge the dismissals on appeal. While Plaintiff is entitled to challenge this court's rulings on appeal at the conclusion of the case, he may not in the meantime ignore court orders. The court has ordered Plaintiff to file an Amended Complaint because his prior pleadings do not comply with Rules 8(a)(2) and 10 of the Federal Rules of Civil Procedure, are not contained in a single document, and impede Defendants' ability to prepare a response in accordance with Federal Rule of Civil Procedure 8(b). Therefore, it is

ORDERED that on or before July 3, 2019, Plaintiff shall file an Amended Complaint that:

1. Complies with Federal Rules of Civil Procedure 8(a)(2) and 10;
2. Names Stafflink, Inc. d/b/a Link Staffing Services and Christi O'Brien as the only defendants.[1]
3. Asserts against Stafflink, Inc. d/b/a Link Staffing Services only causes of action pursuant to Title VII and 42 U.S.C. §1981 for race discrimination and retaliation for complaining about race discrimination; and
4. Asserts against Christi O'Brien only a cause of action pursuant to 42 U.S.C. §1981 for retaliation for complaining about race discrimination.

**Plaintiff is warned that pursuant to Federal Rule of Civil Procedure 16(f), failure to comply with this order will result in the court recommending sanctions authorized by Federal Rule of Civil Procedure 37(b)(2)(A)(ii)-(vii), including dismissal of Plaintiff's lawsuit.**

Signed on June 18, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

[1] On June 5, 2019, the district court adopted this court's Memorandum and Recommendation and dismissed Plaintiff's claims against all individual defendants other than O'Brien. Dkt. 57.

# APPENDIX J

Federal Rule of Civil Procedure 4(m) provides:

> If a defendant is not served within 90 days after that complaint is filed, the court—on motion or *on its own after notice to the plaintiff*—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.

(emphasis added). Neither a litigant's pro se status, nor ignorance of the Federal Rules of Civil Procedure, excuses the failure to effect timely service on a defendant. *Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013); *May v. Texas by Cascos*, Civil Action No. 5:16-cv-238, 2017 WL 7513550, at *2 (N.D. Tex. Nov. 27, 2017), *adopted by* 2018 WL 798738 (Feb. 8, 2018).

The court notified Thomas in person at a hearing and by an Order entered on April 25, 2019, that the individual defendants, Karen Pitts, Mario Tamez, Matt Trimble, and Bill Pitts, had not been properly served and were subject to dismissal. Thomas confirmed, on the record, in open court, on May 16, 2019, that he has no evidence of service on any of these defendants, Karen Pitts, Mario Tamez, Matt Trimble, or Bill Pitts, other than the "Proof of Service" forms showing that they were sent to Vanessa A. Hernandez.

This court adopts Judge Bryan's Memorandum and Recommendation to find and conclude that Thomas failed to timely or effectively serve the individual defendants named above, despite being given extra time to do so, and that Thomas's claims against Karen Pitts, Mario Tamez, Matt Trimble, and Bill Pitts be dismissed, without prejudice, for failure to serve and for lack of jurisdiction. *See* Rule 4(m), FED. R. CIV. P.

The claims against Karen Pitts, Bill Pitts, Mario Tamez, and Matt Trimble are dismissed.

SIGNED on June 5, 2019, at Houston, Texas.

Lee H. Rosenthal

Lee H. Rosenthal
Chief United States District Judge

# APPENDIX K

# UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF TEXAS
## HOUSTON DIVISION

MICHEL THOMAS,
*Plaintiff,*

v.

LINK STAFFING, *et al.*,
*Defendants.*

§
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Civil Action No. 4:17-CV-3902



**MEMORANDUM AND RECOMMENDATION**

On May 16, 2019, after notice to Plaintiff (Dkt. 53), this court held a Show Cause Hearing to allow Plaintiff an opportunity to present evidence showing the individual defendants (other than O'Brien) named in his initial complaint in this case were properly served by June 29, 2018 deadline set by the district court (Dkt. 11).

This case was filed approximately 15 months ago, and the individual defendants named in the original complaint (other than Christie O'Brien) have not been properly served in accordance with Federal Rule of Civil Procedure Rule 4(e), which sets forth the proper methods for serving an individual within a Judicial District of the United States. This court lacks personal jurisdiction over a defendant who has not been with a summons and complaint in accordance with Rule 4. *Kruger v. Hartsfield*, Civil Action No. 3:17-CV-01220, 2018 WL 2090743 at *2 (N.D. Tex. Apr. 13, 2018). On May 25, 2018, Plaintiff filed a "Proof of Service" for the Karen Pitts, Mario Tamez, Matt Trimble, and Bill Pitts. Dkts. 15-18. Each Proof of Service states that the summons was served on May 16, 2018 on Vanessa A. Hernandez, "who is designated by law to accept service of process on behalf of Corporation Service Company (CSC)." There is no evidence that Vanessa A. Hernandez is authorized to accept service on behalf of any of the individuals named above.

Federal Rule of Civil Procedure 4(m) provides:

> If a defendant is not served within 90 days after that complaint is filed, the court—on motion or *on its own after notice to the plaintiff*—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.

(emphasis added). 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. *Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013); *May v. Texas by Cascos*, Civil Action No. 5:16-cv-238, 2017 WL 7513550, at *2 (N.D. Tex. Nov. 27, 2017), *adopted by* 2018 WL 798738 (Feb. 8, 2018). The court notified Plaintiff in person at a hearing on April 25, 2019 and by Order entered the same day, that the individual defendants Karen Pitts, Mario Tamez, Matt Trimble, and Bill Pitts had not been properly served and were subject to dismissal. Dkt. 53. Plaintiff confirmed on the record in open court on May 16, 2019 that he has no evidence of service on Karen Pitts, Mario Tamez, Matt Trimble, or Bill Pitts other than the "Proof of Service" forms previously filed with the court.

Plaintiff has failed to timely or effectively serve the individual defendants named above despite being given extra time to do so. Therefore, the court recommends that Plaintiff's claims in this case against Karen Pitts, Mario Tamez, Matt Trimble, and Bill Pitts be dismissed without prejudice pursuant to Rule 4(m).

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 at Houston, Texas on May 16th, 2019.

Christina A. Bryan
United States Magistrate Judge

# APPENDIX L

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

| | | |
|---|---|---|
| MICHEL THOMAS, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. H-17-3902 |
| | § | |
| LINK STAFFING, *et al.*, | § | |
| | § | |
| Defendants. | § | |

**ORDER ADOPTING MEMORANDUM AND RECOMMENDATIONS**

This court has reviewed the two Memorandum and Recommendations of the United States Magistrate Judge signed on January 8, 2019, and the objections filed by the plaintiff, Michel Thomas, 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 pleadings, the record, and the applicable law, the court adopts the Memorandum and Recommendations as this court's Memorandum and Order. The court grants the defendants' motions to dismiss, with prejudice, Thomas's claims against Link Staffing for age discrimination and retaliation, for religious discrimination and retaliation, and for sex discrimination and hostile work environment, and to dismiss Thomas's claim against Christine O'Brien for racial discrimination. The court denies the defendants' motions to dismiss Thomas's racial-discrimination claim against Link Staffing and his race-based retaliation claims against both Link Staffing and O'Brien. (Docket Entry Nos. 13, 21).

SIGNED on February 7, 2019, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

# APPENDIX M

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| MICHEL THOMAS, *Plaintiff*, | § | |
| v. | § | Civil Action No. 4:17-CV-3902 |
| LINK STAFFING, *et al.*, *Defendants*. | § | |

## MEMORANDUM AND RECOMMENDATION

This case is before the court on Defendant Christie O'Brien's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. 13), and Plaintiff Michel Thomas's *Motion for* Leave to Amend (Dkt. 22). Plaintiff's motion for leave to amend is granted. The court recommends that the motion to dismiss be granted in part and denied in part, as set forth below.

## I. BACKGROUND

The following factual allegations are gleaned from a careful reading of Thomas's operative pleading in this case.[1] On or about December 14, 2014, Plaintiff was assigned by the temporary staffing agency that employed him, Link Staffing, to work at the Brookshire, Texas, location of a company called Grundfos. His assignment was terminated on October 18, 2016.

Thomas alleges that in September 2015, Grundfos told him there were currently no permanent positions available, but that he would be next in line when one came up. In November 2015, Thomas complained about a safety issue. When two positions became available in February

[1] Initially, Thomas filed a "Verified Complaint," along with several attachments from his employment records, EEOC file, and an Affidavit dated August 2016. Dkt. 1. His Amended Complaint (Dkt. 22-1) contains a shorter and somewhat clearer description of his claims, but asks the court "to still consider the original verified complaint and its parts labeled Affidavit, Complaint, Claimant's Response to Interrogatories, as well as other documents that were in the original verified complaint as part of the amended complaint in whole." Dkt. 22-1 at 1. Usually an amended complaint replaces an original complaint in full, but because Thomas is *pro se* and the court construes his pleading liberally, the court will consider all the documents together as Thomas's Amended Complaint for purposes of the pending motions to dismiss.

2016, Thomas did not get one of them. Grundfos hired someone named Todd who had recently started working at Grundfos, whom Thomas describes as a "European-American."

Thomas alleges that he complained to "Corporate Grundfos" about discrimination in June 2016. This complaint apparently involved what he felt was a hostile environment based on rampant offensive homosexual comments and innuendo. Thomas further alleges he raised the issue of racial discrimination on October 13, 2016. At that time, Thomas complained that African-Americans and Mexican-Americans were forced to work as temporary employees longer than European-Americans before being offered a permanent, full-time position. He alleges Grundfos's scheme was to offer an African-American or Mexican-American a position only if there was also a position available for a European-American, or if the minority candidate threatened to quit. He believes Grundfos's goal was never to hire more African-Americans or Mexican-Americans than European-Americans.

Link Staffing disciplined Thomas for contacting Grundfos directly with his complaints instead of going through Link Staffing. Link Staffing wrote up an Employee Counseling Report reprimanding Thomas on October 17, 2016. The report says:

> Michael [Thomas] approached Grundfos HR Manager last week about a concern he had with this client. Michael did not follow company guidelines in addressing his concerns. Found on page 3 of the Employee Handbook, 'If, for any reason, you have a problem reporting to work, missing work, or any issues while on assignment - contact Link.' Michael [Thomas] was verbally counseled about this same issue during employee meetings with Link on August 23, September 1 and September 30.

Dkt. 1-2 at 8. The Counseling Report further states that "Michael needs to follow his conditions of employment by recognizing Link as his employer." *Id.* Thomas's handwritten comments in response state that he would like permission to raise his concerns about discrimination with Grundfos corporate, and that he deemed his treatment retaliatory. *Id.* at 8-9.

On October 18, 2016, a day after Thomas received the Counseling Report, a Grundfos employee, Chau Nguyen, called employees together at Grundfos and asked if anybody had any issues they wanted to raise with human resources. Thomas stayed silent because he felt like he was being set up as a pretext for termination after the October 17 warning from Link Staffing not to complain to Grundfos representatives. Later that day, Thomas was told that the password had been changed on the computer in the "kitting room," so he could not use it. Still later, there was an issue regarding Thomas's use of a forklift. Thomas continued working that day, but felt things were tense, and he "got the feeling in [his] gut that they were getting ready to end [his] assignment and they were going to use the forklift situation as the reason." Dkt. 1 at 17. As he expected, at 5:40 on October 18, Thomas got a call from Matt Trimble and another man from Link Staffing informing him that his assignment at Grundfos was over. He was told he was still a Link Staffing employee, but they didn't have any work for him at that time. *Id.*

Thomas has implicated Link, and specifically Christie O'Brien, as conspiring with Grundfos to discriminate and retaliate against him. Thomas alleges that Grundfos "Human Resources and Link Staffing began working in concert to find a way to silence [him]" (Dkt. 1 at 8); that Link Staffing personnel, including O'Brien, met with him in the Grundfos office on October, 17, 2016 (the day before his position with Grundfos was terminated), and told him he was "prohibited from raising the issue [of discrimination] with Corporate Grundfos, that [Link] would do the investigation" into the discrimination and that O'Brien signed the Employee Counseling Report. Dkt. 1 at 13-14. Thomas alleges that Link Staffing "attempted to prevent [him] from reporting the discrimination" and retaliated against him to "suppress [his] pursuit of the issue of discrimination" by disciplining him with the Employee Counseling Report. Dkt. 1 at 21-22. Furthermore, in his response to the Motion to Dismiss, Thomas alleges that, as the Human

Resource Manager for Link Staffing, O'Brien was "the person responsible for overseeing personnel, hiring, firing, benefits, promotion, etc., and [that] she signed the [Employee Counseling Report.]" Dkt. 23 at 3.

Plaintiff filed a complaint with the Texas Workforce Commission (TWC) alleging discrimination based on age, race, religion, and sex as well as retaliation for filing a complaint of discrimination. Dkt. 1 at 6. The TWC issued a right to sue letter on August 31, 2017. Dkt. 21-2. Plaintiff also filed a charge of discrimination with the EEOC alleging discrimination under Title VII and the ADEA for race, color, sex, and age discrimination, as well as for retaliation. Dkt. 21-3. The EEOC issued a right to sue letter on September 28, 2017. Dkt. 1 at 4. Plaintiff filed this federal lawsuit on December 28, 2017.

## III. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) LEGAL STANDARDS

To survive a Rule 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 conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this 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) (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). However, the court does not apply the same presumption to conclusory statements or legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Generally, when ruling on a 12(b)(6) motion, the court may consider only the allegations in the complaint and any attachments thereto. If a motion to dismiss refers to matters outside the

pleading it is more properly considered as a motion for summary judgment. *See* FED. R. CIV. P. 12(d). However, the court may take judicial notice of public documents, and may also consider documents a defendant attaches to its motion to dismiss under 12(b)(6) if the documents are referenced in the plaintiff's complaint and central to the plaintiffs' claims. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000); *King v. Life Sch.*, 809 F. Supp. 2d 572, 579 n.1 (N.D. Tex. 2011); *Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir.2007). Here, the court will consider Thomas's original complaint and all attachments (Dkt. 1), and Thomas's Amended Complaint (Dkt. 22-1).[2]

## III. ANALYSIS

Thomas asserts causes of action against Christie O'Brien individually for race discrimination and retaliation under 42 U.S.C. § 1981. Thomas expressly states in his response to O'Brien's motion that he is not asserting claims against her under Title VII or Chapter 21 of the Texas Labor Code. Dkt. 23 at 1. Therefore, all claims against O'Brien, arising under Title VII and the Texas Labor Code, are dismissed. The remainder of this memorandum and recommendation addresses the Section 1981 claims.

### A. Individual Liability Under Section 1981

O'Brien moves to dismiss Thomas's Section 1981 claims because he has not sufficiently pled a basis for her individual liability. While the scope of individual liability under § 1981 remains unclear, the Fifth Circuit has held that an individual may be liable under § 1981 if she 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); *Miller v. Wachovia Bank, N.A.*, 541 F. Supp. 2d 858, 863 (N.D. Tex. 2008).

[2] *See* n.1, supra.

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. The *Foley* court noted some tension in its prior decisions with respect to individual liability, but stated "we do not believe that this is the proper case in which to decide the outer boundaries of § 1981 liability as it applies to individual non-employer defendants, nor to attempt to catalogue every fact situation which might subject an individual to such liability." *Id.* at 338.

District courts within the Fifth Circuit generally have interpreted *Foley* to recognize individual liability under § 1981 for supervisors who exercise control over employment decisions and were personally involved in the complained-of conduct, but have refused to allow a claim under Section 1981 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) (discussing several district court and circuit cases and noting that "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."). In *Medina v. Houston Intern. Ins. Group, Ltd.*, Civil Action No. 4:13-CV-3343, 2015 WL 459256, at *4 (S.D. Tex. Feb. 2, 2015), the district court noted that "[i]ndividual liability under Section 1981 is unsettled in the Fifth Circuit," but that individuals can be held liable under Section 1981 if they "are essentially the same as the [employer]

for the purposes of the complained-of conduct."[3] The *Medina* plaintiff alleged that two defendants discriminated against her on behalf of a prospective employer by rejecting her application for the position of assistant to the CEO based on her race. The court denied the individual defendants' motions to dismiss, finding that plaintiff's allegation that she was rejected by the interviewer based on her race permitted a reasonable inference that the CEO communicated a racial preference for the position in violation of §1981.

In this case, O'Brien is the human resources manager for Link Staffing. She met with Thomas and representatives of Grundfos at Grundfos the day before Thomas's assignment at Grundfos was terminated. Thomas alleges that in the meeting with O'Brien he was told he was "prohibited from raising the issue [of discrimination] with Corporate Grundfos, [and] that [Link] would do the investigation" into the alleged discrimination. Dkt. 1 at 13-14. He also alleges that O'Brien signed and he was required to sign, the Employee Counseling Report. *Id.* Thomas alleges that Grundfos and Link "attempted to prevent [him] from reporting the discrimination" and retaliated against him to "suppress [his] pursuit of the issue of discrimination" by disciplining him with the Employee Counseling Report. Dkt. 1 at 21-22. Furthermore, in his response to the Motion to Dismiss, Thomas alleges that, as the Human Resource Manager for Link Staffing, O'Brien was "the person responsible for overseeing personnel, hiring, firing, benefits, promotion, etc., and [that] she signed the [Employee Counseling Report.]" Dkt. 23 at 3.

In short, Thomas has alleged O'Brien's participation in the conduct he complains of in this suit. Under the precedent discussed above, for purposes of pleading, the court concludes that it is plausible that O'Brien exercised control over the instructions not to report the discrimination, the issuance of the Employee Counseling Report, and that she personally participated in the alleged

[3] The court in *Medina* noted that *Foley* stopped short of requiring that individuals be "essentially the same" as an employer to be liable. *Id.* at *4.

conspiracy to prevent Thomas from reporting discrimination. Thus, at this stage of the proceedings and for purposes of the motion to dismiss, Thomas has alleged sufficient facts to meet the "essentially the same" test for individual liability under § 1981. The claims against O'Brien should not be dismissed for failure to allege individual liability, and the court will address whether Thomas has stated claims against O'Brien for race discrimination and retaliation.

**B. Section 1981 Race Discrimination**

**1. Legal Standards**

In the absence of direct evidence of discrimination and under the *McDonnell Douglas* framework, a plaintiff seeking to establish a claim of racial discrimination under § 1981, must first make out a prima facie case of discrimination. *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 512–14 (5th Cir. 2001). To establish a prima facie case, a plaintiff must show that he (1) is a member of a protected class; (2) was qualified for his position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, that others similarly situated were treated more favorably. *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016). 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).

**2. Thomas's allegations fail to state a claim of racial discrimination against O'Brien as a matter of law.**

Thomas has asserted claims for discrimination and retaliation under 42 U.S.C. § 1981 against O'Brien. Dkt. 22-1 at 2. In his original complaint, Thomas alleged that "on September 1st, 2016 th[e] issue of discrimination was address [sic] in a meeting that was held with me with Steve

Marshall and Jonathan Hamp Adam of Grundfos and Christine O'Brien and Jeff Weaver of Link Staffing, in which all agreed that no discrimination took place . . .." Dkt. 1 at 21-22. His pleading also references his handwritten note on the October 17, 2016 Counseling Report that says: "Matt and Christy inform [sic] me they would get back on with me on the answer if I can contact corporate Grundfros" and "Matt and Christy also stated they will provide me with [an] employee handbook." Dkt. 1-2 at 9. In his Amended Complaint, Thomas gives the following narrative statement in support of his claims:

> Christine O'Brien is the human resource person for the above mention [sic] employers and she retaliated against Plaintiff when he raised the issues mentioned above, she worked in concert with Grundfos to retaliate against me by intimidation, isolation and retaliation through disciplinary actions. She was present with Matt Trimble when they presented me with the final written warning (and they both signed it) for raising the issue of race discrimination with Grundfos, and verbally threatened me that if I raised the issue again I would be terminated and told me that I could only bring the issue to the[m] and they would decide if it would be escalated, that they would be my advocate. Once I told them I would be my own advocate and they had 48 hours to give me an answer on whether I could report the issue to Grundfos Corporate office they conspired with Grundfos to end my assignment and then the above mention[ed] employers terminated my employment with them.

Dkt. 22-1 at 3. The Amended Complaint also expressly alleges that O'Brien is "European-American." Dkt. 22-1 at 4.

Thomas has failed to state a claim of discrimination against O'Brien. He fails to allege any adverse employment action taken by O'Brien or any conduct by her that was motivated by race. All his allegations regarding O'Brien's conduct relate to her disciplining him, attempting to silence him, or threatening him with adverse consequences as a result of his complaints of discrimination to Grundfos. Therefore, the court recommends that O'Brien's motion to dismiss Thomas's Section 1981 race discrimination claim against her be granted.

**C. Section 1981 Retaliation**

**1. Legal Standards**

Section 1981(b) allows an employee to recover for retaliation suffered because he complained of race discrimination. *See Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003). To present a prima facie case of retaliation under § 1981, 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 v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004).

The standard for what qualifies as an adverse employment action with respect to a retaliation claim is broader than that needed to support a discrimination claim. *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.* at 945–46 (quoting *Burlington*, 548 U.S. at 69, 126 S.Ct. 2405)." *Stringer v. N. Bolivar Consol. Sch. Dist.*, No. 17-60282, 2018 WL 1192999, at *7 (5th Cir. Mar. 7, 2018).

**2. Thomas's pleading states a plausible retaliation claim against O'Brien.**

The factual allegations contained in Thomas's complaint related to O'Brien are set forth above. Thomas has alleged in engaged in protected activity by complaining about race

discrimination. He further alleges that O'Brien, among others, gave him a final warning and told him not to make any further complaints to Grundfos. He also alleges that after his complaints, his assignment with Grundfos was terminated and Link Staffing did not give him another assignment. He alleges that O'Brien was either responsible for these actions or conspired with others to take them. The court concludes that Thomas has alleged a plausible claim against O'Brien for Section 1981 retaliation, and O'Brien's motion to dismiss this claim should be denied at this stage of the proceedings.

## IV. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court **RECOMMENDS** that O'Brien's motion to dismiss Thomas's Section 1981 race discrimination claim with prejudice should be **GRANTED**, and O'Brien's motion to dismiss Thomas's Section 1981 retaliation claim should be **DENIED**.

The court further **RECOMMENDS** that the court order Thomas to file within 14 days of the adoption of this Memorandum and Recommendation and the Memorandum and Recommendation on Link Staffing's Motion to Dismiss, if any, a Second Amended Complaint that complies with Federal Rule of Civil Procedure 8 and is limited to the claims remaining in this case.

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 January 08, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

# APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| MICHEL THOMAS, *Plaintiff*, | § | |
| v. | § | Civil Action No. 4:17-CV-3902 |
| LINK STAFFING, *et al.*, *Defendants*. | § | |

## MEMORANDUM AND RECOMMENDATION

This case is before the court on Defendant Link Staffing Services' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. 21). The court recommends that the motion to dismiss be granted in part and denied in part, as set forth below.

## I. BACKGROUND

The following factual allegations are gleaned from a careful reading of Thomas's operative pleading in this case.[1] On or about December 14, 2014, Plaintiff was assigned by the temporary staffing agency that employed him, Link Staffing, to work at the Brookshire, Texas, location of a company called Grundfos. His assignment was terminated on October 18, 2016.

Thomas alleges that in September 2015, Grundfos told him there were currently no permanent positions available, but that he would be next in line when one came up. In November 2015, Thomas complained about a safety issue. When two positions became available in February

[1] Initially, Thomas filed a "Verified Complaint," along with several attachments from his employment records, EEOC file, and an Affidavit dated August 2016. Dkt. 1. His Amended Complaint, (Dkt. 22-1), contains a shorter and somewhat clearer description of his claims, but asks the court "to still consider the original verified complaint and its parts labeled Affidavit, Complaint, Claimant's Response to Interrogatories, as well as other documents that were in the original verified complaint as part of the amended complaint in whole." Dkt. 22-1 at 1. Usually an amended complaint replaces an original complaint in full, but because Thomas is *pro se* and the court construes his pleading liberally, the court will consider all the documents together as Thomas's Amended Complaint for purposes of the pending motions to dismiss.

2016, Thomas did not get one of them. Instead, Grundfos hired someone named Todd who had recently started working at Grundfos, whom Thomas describes as a "European-American."

Thomas alleges that he complained to "Corporate Grundfos" about discrimination in June 2016. This complaint apparently involved what he felt was a hostile environment based on rampant offensive homosexual comments and innuendo. Thomas further alleges he raised the issue of racial discrimination on October 13, 2016. At that time, Thomas complained that African-Americans and Mexican-Americans were forced to work as temporary employees longer than European-Americans before being offered a permanent, full-time position. He alleges Grundfos's scheme was to offer an African-American or Mexican-American a position only if there was also a position available for a European-American, or if the minority candidate threatened to quit. He believes Grundfos's goal was never to hire more African-Americans or Mexican-Americans than European-Americans.

Link Staffing disciplined Thomas for contacting Grundfos directly with his complaints instead of going through Link Staffing. Link Staffing wrote up an Employee Counseling Report reprimanding Thomas on October 17, 2016. The report says:

> Michael [Thomas] approached Grundfos HR Manager last week about a concern he had with this client. Michael [Thomas] did not follow company guidelines in addressing his concerns. Found on page 3 of the Employee Handbook, 'If, for any reason, you have a problem reporting to work, missing work, or any issues while on assignment - contact Link.' Michael [Thomas] was verbally counseled about this same issue during employee meetings with Link on August 23, September 1 and September 30.

Dkt. 1-2 at 8. The Counseling Report further states that "Michael needs to follow his conditions of employment by recognizing Link as his employer." *Id.* Thomas's handwritten comments in response state that he would like permission to raise his concerns about discrimination with Grundfos corporate, and that he deemed his treatment retaliatory. *Id.* at 8-9.

On October 18, 2016, a day after Thomas received the Counseling Report, a Grundfos employee, Chau Nguyen, called employees together at Grundfos and asked if anybody had any issues they wanted to raise with human resources. Thomas stayed silent because he felt like he was being set up as a pretext for termination after the October 17 warning from Link Staffing not to complain to Grundfos representatives. Later that day, Thomas was told that the password had been changed on the computer in the "kitting room," so he could not use it. Still later, there was an issue regarding Thomas's use of a forklift. Thomas continued working that day, but felt things were tense, and he "got the feeling in [his] gut that they were getting ready to end [his] assignment and they were going to use the forklift situation as the reason." Dkt. 1 at 17. As he expected, at 5:40 on October 18, Thomas got a call from Matt Trimble and another man from Link Staffing informing him that his assignment at Grundfos was over. He was told he was still a Link Staffing employee, but they didn't have any work for him at that time. *Id.*

Plaintiff filed a complaint with the Texas Workforce Commission (TWC) alleging discrimination based on age, race, religion, and sex as well as retaliation for filing a complaint of discrimination. Dkt. 1 at 6. The TWC issued a right to sue letter on August 31, 2017. Dkt. 21-2. Plaintiff also filed a charge of discrimination with the EEOC alleging discrimination under Title VII and the ADEA for race, color, sex, and age discrimination, as well as for retaliation. Dkt. 21-3. The EEOC issued a right to sue letter on September 28, 2017. Dkt. 1 at 4. Plaintiff filed this federal lawsuit on December 28, 2017.

## II. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) LEGAL STANDARDS

To survive a Rule 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 conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this 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) (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). However, the court does not apply the same presumption to conclusory statements or legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Generally, the court may consider only the allegations in the complaint and any attachments thereto in ruling on a Rule 12(b)(6) motion. If a motion to dismiss refers to matters outside the pleading it is more properly considered as a motion for summary judgment. *See* FED. R. CIV. P. 12(d). However, the court may take judicial notice of public documents, and may also consider documents a defendant attaches to its motion to dismiss under 12(b)(6) if the documents are referenced in the plaintiff's complaint and central to the plaintiffs' claims. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000); *King v. Life Sch.*, 809 F. Supp. 2d 572, 579 n.1 (N.D. Tex. 2011); *Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir.2007). Here, the court will consider Thomas's original complaint and all attachments (Dkt. 1), the TWC and EEOC documents attached to Link Staffing's motion (Dkt. 21-2, 21-3), and Thomas's Amended Complaint (Dkt. 22-1).[2]

## III. ANALYSIS

Thomas asserts claims against Defendant Link Staffing (correctly named Stafflink, Inc. d/b/a Link Staffing Services)[3] under Title VII of the Civil Rights Act and Section 1981 for race

[2] *See* n.1, supra.

[3] In an attempt to sue the correct party, Thomas's Amended Complaint adds Link Staffing Management LLC and Link Staffing Services as defendants. Stafflink, Inc. d/b/a Link Staffing Services has appeared in this action and does not

discrimination and retaliation, and under Title VII alone for age discrimination, religious discrimination, sexual harassment/hostile work environment, and associated retaliation. Link Staffing moves to dismiss all claims against it.

Thomas concedes that his claims under Chapter 21 of the Texas Labor Code are untimely. Dkt. 25 at 1. Therefore, Texas Labor Code claims should be dismissed with prejudice. The remainder of Thomas's claims are addressed below.

## A. Age Discrimination

### A.1. ADEA Legal Standards

Title VII protects against discrimination on the basis of "race, color, religion, sex, or national origin," while the Age Discrimination in Employment Act (ADEA) protects against discrimination on the basis of age. *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 188 (5th Cir. 2003). Thomas does not mention the ADEA in his pleading. However, ADEA and Title VII discrimination claims are analyzed under a similar framework. *See id.* at 196. Given that Thomas is pro se,[4] the court will not recommend dismissal of his age discrimination and retaliation claims solely on the basis that he did not cite the statute, and will proceed to analyze his age discrimination claim under Rule 12(b)(6).

To establish a prima facie case of age discrimination, Thomas must show that 1) he is within the protected class; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) he was replaced by someone younger or treated less favorably than similarly situated younger employees because of his membership in the protected age class. *Smith*

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dispute that it was Thomas's employer at all relevant times and is the proper defendant. Dkt. 21 at 1, n.1. The docket will be corrected to reflect Stafflink, Inc. d/b/a Link Staffing Services as the named defendant.

[4] *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("a document filed *pro se* is "to be liberally construed [] and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers" (internal citation omitted)).

*v. City of Jackson, Miss.*, 351 F.3d 183, 196 (5th Cir.2003) (citations omitted). Under the ADEA, the protected class includes individuals who are at least forty years old. *See* 29 U.S.C. §§ 631(a), 633a(a). *Leal v. McHugh*, 731 F.3d 405, 410–11 (5th Cir. 2013).

**A.2. Thomas's pleading fails to state an ADEA claims as a matter of law.**

Link Staffing contends that Thomas's factual allegations are insufficient to state a claim for age discrimination. Thomas's Amended Complaint contains a single sentence alleging age discrimination: "two European-Americas under the age of forty were moved ahead of me in training to become an Assembly Mechanic. Plaintiff was over the age of 40 when this took place." Dkt. 22-1 at 4. His operative pleading contains no further factual allegations related to his claim for age discrimination.

He has failed to allege a viable claim under the ADEA because he does not allege that the two referenced "European-Americans" were similarly situated and given more training *because* they were outside the protected age class. The mere fact that two younger employees moved ahead of him in training, without an allegation that he was treated differently because of his age, fails to meet the minimum pleading standard for an age discrimination claim. Absent allegations that could establish the fourth element of his age discrimination claim, Thomas has failed to state a claim.

In addition, Thomas has failed to allege facts that could establish the third element of his age discrimination claim. He has failed to identify an ultimate adverse employment action based on his age. *See Ogden v. Brennan*, 657 F. App'x 232, 235 (5th Cir. 2016) (Adverse employment actions under ADEA, as under Title VII, "include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating."). He alleges only that two employees under the age of forty moved ahead of him in training, but those allegations are not sufficient to show that Thomas suffered an adverse employment action. *See Pollak v. Lew*, 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). Further, Thomas fails to allege that he complained to Link about age discrimination. Absent allegations that he engaged in a protected activity by reporting or complaining of age discrimination, Thomas cannot state a claim for retaliation on that basis. In short, Thomas has failed to state a plausible claim for relief under the ADEA and his claims for age discrimination and retaliation should be dismissed.

**B. Religious Discrimination**

**B.1 Exhaustion of the religious discrimination claim**

Title VII protects individuals from discrimination based on religion, 42 U.S.C. § 2000e-2(a)(1), but requires a plaintiff to exhaust administrative remedies before pursuing claims in federal court. *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 376-79 (5th Cir. 2002). A plaintiff's claims in federal court are limited to those that "could reasonably be expected to grow out of the initial charges of discrimination." *Martineau v. Arco Chem. Co.*, 203 F.3d 904, 913 (5th Cir. 2000). The exhaustion requirement under Title VII is not jurisdictional, but it is a precondition to filing suit. *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 169 (5th Cir. 2018). "Filing a complaint with the EEOC generally satisfies the requirement to file a complaint with the TCHRA, and vice versa, if, as here, the complainant indicates he is dual-filing." *Seghers v. Hilti, Inc.*, No. 4:16-CV-0244, 2016 WL 6778539, at *2 (S.D. Tex. Nov. 16, 2016).

Thomas did not check the box on his EEOC charge indicating discrimination on the basis of religion. Dkt. 21-3. He did, however, check that box on his TWC charge of discrimination and identified himself as Baptist. Dkt. 1 at 6. Thomas contends that he "filed a dual complaint which only required me to file with one of the agencies . . . as long as I made them aware that I was filing dually." Dkt. 25 at 3. The record is not entirely clear on this point. On his TWC charge, Thomas

did *not* indicate that he had also filed with the EEOC. Dkt. 1 at 6. However, it appears that Thomas included the TWC as the relevant state or local agency for dual filing purposes on his EEOC charge. *See* Dkt. 21-3 at 4. Because Thomas's religious discrimination claim cannot survive Link's 12(b)(6) motion for the reasons stated below, the court will assume, for purposes of the motion, that Thomas exhausted his administrative remedies on the claim.

**B.2. Thomas fails to state a claim for religious discrimination.**

To establish a prima facie claim for religious discrimination, Thomas must allege and prove: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) his employer was informed of that belief; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. *See Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000). Put another way, in order "[t]o survive Rule 12(b)(6) for a claim of religious discrimination under Title VII, [Thomas] must plead that he suffered an adverse employment action because of his religious beliefs." *Chatmon v. W. Texas Counseling & Rehab.*, No. 3:14-CV-945-P, 2015 WL 13544782, at *3 (N.D. Tex. Dec. 1, 2015) (citing *Stone v. Louisiana Dep't of Revenue*, 590 F. App'x. 332, 339 (5th Cir. 2014), *appeal dismissed*, 688 F. App'x 291 (5th Cir. 2017). Furthermore, Thomas must support the allegation with facts that allow the court to make a reasonable inference that religious discrimination occurred. *Id.*

Thomas has failed to allege a prima facie case of religious discrimination or any facts that would allow the court to make a reasonable inference of religious discrimination. He has not alleged any bona fide religious belief that conflicted with an employment requirement. He has not alleged any facts showing any adverse employment action by Link Staffing based on his Baptist religion. In fact, he makes only a passing reference to his religion in his amended complaint. Dkt. 22-1 at 3 ("The sex and religious discrimination . . . is derived from the homosexual behavior that

took place the first day I started to work at Grundfos . . ..). Finally, he has not alleged that he complained to management about religious discrimination. The court concludes that Link Staffing's motion to dismiss Thomas's Title VII religious discrimination and retaliation claims should be granted. *See Chatmon*, 2015 WL 13544782, at *4 (Granting 12(b)(6) motion to dismiss religious discrimination claim where pro se plaintiff failed to plead any facts linking his discharge to a religious-based discriminatory motive).

### C. Race Discrimination and Retaliation under Title VII and Section 1981

#### C.1 Thomas's race-based discrimination claims.

Under the *McDonnell Douglas* framework, a plaintiff seeking to establish a claim of racial discrimination under Title VII without direct evidence of racial animus must first make out a prima facie case of discrimination. *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 512–14 (5th Cir. 2001). To establish a *prima facie* case, a plaintiff must show that he (1) is a member of a protected class; (2) was qualified for his position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, that others similarly situated were treated more favorably. *Outley v. Luke & Assocs., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016). 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).

Link Staffing first argues that Thomas fails to state race-based discrimination and retaliation claims because he does not allege his race. Thomas's African-American race is apparent from his TWC and EEOC charges, which are considered as part of his complaint for purposes of

this motion to dismiss. In addition, Thomas's Amended Complaint expressly corrects any deficit in this regard by identifying his race as African-American. Dkt. 22-1 at 1.

Link Staffing next argues for dismissal of the race-based discrimination claims because Thomas has failed to allege facts showing similarly situated employees outside his race were treated more favorably than he was treated. While Thomas's pleading is not well-organized, it is clear from the allegations that Thomas contends he was treated less favorably by Grundfos by being passed over for a permanent position because he is black and not "European-American." Thomas names John Kroll and "Todd" as European-American employees who were treated more favorably than he was in being selected to fill permanent positions. Dkt. 1 at 11. Thomas also alleges that "two European males were treated more favorably than Plaintiff" in regard to training. Dkt. 1 at 2. It is clear Thomas is alleging that as a joint employer, Link Staffing is also liable for that discriminatory conduct. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015) ("A staffing agency is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control."). Although Thomas has not pleaded detailed facts demonstrating that the employees outside of his protected class that were treated more favorably were similarly situated to him, as a pro se litigant Thomas's pleading is entitled to a liberal construction, and the court makes all reasonable inferences in his favor at this stage of the proceedings. The court concludes that Thomas has sufficiently alleged the prima facie elements of a claim for racial discrimination against Link Staffing. Therefore, the motion to dismiss the race-based discrimination claim should be denied.

**C.2. Thomas's race-based retaliation claims.**

To present a prima facie case that he was retaliated against in violation of Title VII because he complained of race discrimination, a plaintiff must show that: (1) he engaged in protected activity, *i.e.*, complaining of discrimination; (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 v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004). 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); *Stringer v. N. Bolivar Consol. Sch. Dist.*, No. 17-60282, 2018 WL 1192999, at *7 (5th Cir. Mar. 7, 2018).

Link Staffing asserts that Thomas's race-based retaliation claim should be dismissed because Thomas does not identify any materially adverse action taken by Link Staffing in response to Thomas's alleged protected activity. However, Thomas alleges that Link Staffing retaliated against him by disciplining him for complaining to Grundfos, by joining with Grundfos in terminating his assignment, and by not giving him another assignment. These allegations meet the

minimum pleading standards for a retaliation claim and the motion to dismiss the retaliation claim should be denied.

**D. Thomas's sex discrimination/retaliation claims based on a hostile work environment.**

**D.1. Sex discrimination based on the alleged hostile work environment**

Thomas's Amended Complaint, response to Link Staffing's motion to dismiss, and August 2016 Affidavit, make clear that he alleges a hostile work environment claim and not a traditional sex discrimination claim, or a *quid pro quo* sexual harassment claim. *See* Dkt. 22-1 at 3 ("The sex and religious discrimination, sexual harassment, and hostile work environment is derived from the homosexual behavior that took place the first day I started to work at Grundfos with the homosexual comments that were directed at me and that were made in my presence at others as well as the homosexual physical acts that I witnessed that were acted upon others."); Dkt. 25 at 4 ("Plaintiff['s] sex discrimination claims fall under the sexual harassment claim, from the constant and daily homosexual remarks and acts committed in front of Plaintiff and/or at Plaintiff."); Dkt. 1-2 at 4-5 ("It was just one homosexual story, gesture, and/or innuendo after another it is just the culture created by Grundfos, creating this hostile work environment."). Link Staffing argues that Thomas's complaint does not comply with Rule 8(a) regarding this cause of action because it is rambling, incoherent, and does not state a plausible claim for relief. The court agrees that Thomas has not alleged a plausible hostile work environment claim.

"The creation of a hostile work environment through harassment" is a form of discrimination prohibited by Title VII. *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.* 731 F.3d 444, 452 (5th Cir. 2013) (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, 78 (1998). An employer's liability under Title VII

for workplace harassment depends on the status of the harasser: If the harassing employee is the victim's supervisor, and the victim proves the harassment resulted in a "tangible employment action," the employer is strictly liable. *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 452 (5th Cir. 2013) (quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013)). However, if the harasser is simply the victim's co-worker, the employer can be held liable only upon a showing that it was negligent in controlling the working conditions. *Id.* Thus, an employer's liability for its employee's harassing conduct can hinge on whether the harasser is a supervisor or simply a co-worker. *Id.*

A supervisor is someone "empowered by the employer to take tangible employment actions against the victim." *Id.* at 453. Thomas alleges harassing comments and actions by Jorge Sosa, his "zone leader," Terry Jalufkas, "the Lead," (Dkt. 1-2 at 4-5), and John Taylor (Dkt. 1 at 22). However, Thomas fails to plead any facts establishing that these men were his supervisors or empowered to make tangible employment actions with respect to him, such as hiring, firing or disciplining him. Having failed to plead any facts showing the alleged harassers were his supervisors, Thomas also fails to allege any facts showing that Link Staffing was negligent in controlling the working conditions that allegedly allowed co-workers to harass him.

Even assuming Thomas had alleged that the harassers were his supervisors, and Link Staffing could be held responsible for their conduct under a strict liability standard, Thomas has failed to plead facts to support the required elements of his claim.[5] In the context of a same-sex hostile work environment claim, the Fifth Circuit utilizes a two-step inquiry to evaluate first whether the alleged harassment was based on the victim's sex and, second, whether the conduct

[5] A hostile work environment claim based on a supervisor's conduct 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 the protected characteristic [his sex]; and (4) the harassment affected a 'term, condition, or privilege' of employment." *Boh Bros.*, 731 F.3d at 453.

meets the severe and pervasive standards for a hostile-work-environment claim. *E.E.O.C. v.Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 453 (5th Cir. 2013). Both 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.*

Thomas has failed to allege a crucial requirement of his same-sex hostile work environment claim--that the conduct was so objectively offensive as to alter the terms, conditions, or privileges of his employment. *See Boh Bros.*,731 F.3d at 455 (citing *Oncale* at 80-81). The severity and pervasiveness of the conduct are judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale* at 81. Thomas completely fails to allege that the terms of his employment were altered in any way as a result of the alleged same-sex harassment. He alleges that his assignment was terminated by Grundfos and disciplined by Link Staffing as a result of his complaints of racial discrimination. However, his only allegations regarding the effect of the alleged sexual harassment are that Sosa's comments "placed an image in [his] mind that he cannot get rid of," that he is "subconscious about bending over at work and [incidentally] brushing up against other male employees at work, and that he "become[s] enraged" any time he hears Sosa's voice. Dkt. 1-2 at 4. He does not allege any physical, threatening, or menacing conduct. The physical acts he alleges in his initial Verified Complaint include other employees "groping each other," and "running things up the crack of each other buttock and on and on." Dkt. 1 at 22. Assuming the truth of these allegations, as the court must in this context, none of the alleged conduct rises to the standard of harassment that courts within the Fifth Circuit

generally find so severe and pervasive as to affect a term or condition of employment. *See, e.g., Gibson v. Potter*, No. 05-1942, 2007 WL 1428630, at *6 (E.D. La. May 10, 2007) (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 (N.D. Miss. 2011) (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).

While Thomas's allegations paint of a picture of a crude and vulgar work culture, they are not enough to state a claim for a hostile work environment based on sexual harassment. *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). Thomas has failed to plead facts necessary to support a claim against Link Staffing for sex-based discrimination resulting from a hostile work environment and the claim should be dismissed.

**D.2. Retaliation based on complaints about a hostile work environment**

The same legal standards apply to Thomas's retaliation claim based on complaints of sexual harassment or hostile work environment as apply to his race-based retaliation claim. To make out a sex harassment/hostile work environment retaliation claim, Thomas must demonstrate that he engaged in protected activity by complaining about sexual harassment, that he suffered an adverse employment action, and that there is a causal link between the two. *See Hackett v. United Parcel Service*, No. 17-20581, 2018 WL 2750297, at *5 (5th Cir. June 6, 2018).

Thomas's Amended Complaint clearly alleges retaliation based on his complaints about *racial* discrimination (Dkt. 22-1 at 2-3, detailing racial discrimination and retaliation claim), but

makes no allegation of retaliation based on complaints of sexual harassment or a hostile work environment resulting from that harassment (Dkt. 22-1 at 3, detailing sex harassment and hostile work environment claim). The court concludes that Thomas has failed to state a plausible claim for retaliation for complaining of a sexually hostile work environment and recommends that this claim be dismissed.

## IV. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court **RECOMMENDS** that Link Staffing's motion to dismiss with prejudice Thomas's claims for violation of Chapter 21 of the Texas Labor Code, age discrimination and retaliation, religious discrimination and retaliation, and hostile work environment sex discrimination and hostile work environment retaliation should be **GRANTED**. Link Staffing's motion to dismiss Thomas's race discrimination and retaliation claims should be **DENIED.**

The court further **RECOMMENDS** that Thomas be ordered to file a Second Amended Complaint consistent with these rulings and compliant with Rule 8 of the Federal Rules of Civil Procedure within 14 days of entry of an Order of Adoption, if any, of this Memorandum and Recommendation and the Memorandum and Recommendation on Christie O'Brien's Motion to Dismiss.

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 January 08, 2019, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge

# APPENDIX O

# *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

September 10, 2021

Mr. Michel Thomas
1127 Eldridge Parkway
Suite 300-167
Houston, TX 77077

No. 21-20066 Thomas v. Stafflink
USDC No. 4:17-CV-3902

Dear Mr. Thomas,

We will take no action on your petition for rehearing. The time for filing a petition for rehearing under FED. R. APP. P. 40 has expired and the mandate has issued.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Ms. Elizabeth L. Bolt
Mr. Allan Huddleston Neighbors

# APPENDIX U

# *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**

October 05, 2021

Mr. Michel Thomas
1127 Eldridge Parkway
Suite 300-167
Houston, TX 77077

No. 21-20066 Thomas v. Stafflink
USDC No. 4:17-CV-3902

Dear Mr. Thomas,

We received your motion for reconsideration of no action taken on your petition for panel rehearing. Pursuant to 5th Circuit Rule 26.1, additional 3 days after service does not apply to such matters as petitions for rehearings under Fed. R. App. P. 40. Accordingly, we are taking no action on this motion.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Ms. Elizabeth L. Bolt
Mr. Allan Huddleston Neighbors

# APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 21-20066

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APPELLANT' S REQUEST FOR PANEL REHEARING

---

Michel Thomas,

Plaintiff- Appellant

v.

Stafflink, Inc, doing business as Link Staffing Services; Bill Pitts; Karen Pitts; Mario Tamez; Matt Trimble: Christine O' Brien, Link Staffing Management L.L.C.,

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Court of Appeals Case No. 21-20066

U. S. District Court Case No. 4:17-cv-03902

---

Michel Thomas/ Pro Se
1127 Eldridge Parkway
#300-167
Houston, Tx 77077

Date: 08/28/2021

UNITED STATES COURT OF APPEALS
OF FIFTH CIRCUIT

| | | |
|---|---|---|
| **Michel Thomas** | ) | |
| | ) | |
| | ) | |
| | ) | **No. 21-20066** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **Stafflink, Inc., doing bussiness as** | ) | |
| **Link Staffing Services** | ) | |
| **Bill Pitts** | ) | |
| **Karen Pitts** | ) | |
| **Mario Tamez** | ) | |
| **Matt Trimble** | | |
| **Christine O' Brien** | | |
| **Link Staffing Management L.L.C.** | | |

## CERTIFICATE OF INTEREST PERSONS

Come now Michel Thomas, Appellant is filing this Certificate of Interest Persons with the United States Court of Appeals 5th Circuit. The following persons may have an interest in the out come of this appeal. They are as follow.

### PERSONS OF INTEREST

Lee H. Rosenthal

District Court Judge in lower case 4:18-cv-00557

Christina A. Bryan

Magistrate Judge in lower case 4:18;cv-00557

Grundfos

Corporation/Parent Company for Grundfos CBS and Grundfos American

Grundfos Americas
being represented by Michael Mitchell

EEOC in Washington, DC/ Susan Oxford

Grundfos CBS
represented by Michael Mitchell

Mad Nipper
represented by Michael Mitchell

Henrik Christiansen
represented by Michael Mitchell

Thomas Braun Larsen
represented by Michael Mitchell

Jonathan Hamp- Adam
represented by Michael Mitchell

Steve Marshall
represented by Michael Mitchell

Paddi Riopelle
represented by Michael Mitchell

Billy Baxter
represented by Michael Mitchell

Chau Nguyen
represented by Michael Mitchell

Terry Jalufka
represented by Michael Mitchell
Lonnie Padilla
represented by Michael Mitchell

Link Staffing Management LLC
related case no. 21-20066
represented by Elizabeth Bolt

Stafflink
related case no. 21-20066
represented by Elizabeth Bolt

Link Staffing Services
related case no.21-20066
represented by Elizabeth Bolt

William Pitts
related case no. 21-20066
represented by Elizabeth Bolt

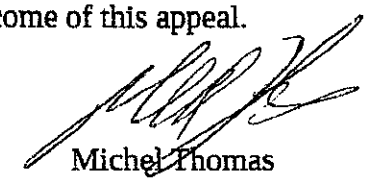
Karen Pitts
related case no. 21-20066
represented by Elizabeth Bolt

Mario Tamez
related case no.21-20066
represented by Elizabeth Bolt

Matt Trimble
related case no. 21-20066
represented by Elizabeth Bolt

Christine O'Brien
related case no. 21-20066
represented by Elizabeth Bolt

Those of all the persons who may have an interest in the outcome of this appeal.



Michel Thomas

1127 Eldrifdge Parkway # 300-167 Houston, Texas 77077/ 770-255-8917/ Date: 08/28/2021

**CERTIFICATE OF SERVICE**

I Hereby certify a true and correct copy of this Certificate of Interested Persons were sent to defendants' attorney at 1301 McKinney Street #1900 Houston, Texas 77010 via United States Postal Service Certified Mail with signed receipt on 08/28/2021

Michel Thomas

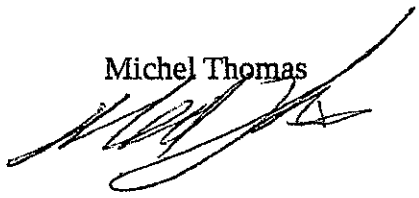


Table of Authority Page

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

| | |
|---|---|
| **Michel Thomas** | ) |
| **Appellant** | ) |
| **v.** | ) |
| | ) |
| | ) |
| **Stafflink, Inc, doing business as,** | ) |
| **Link Staffing Services;** | ) |
| **Bill Pitts;** | ) **No. 21-20066** |
| **Karen Pitts** | ) **USDC No. 4:17-cv-03902** |
| **Mario Tamez** | ) |
| **Matt Trimble** | ) |
| **Christine O' Brien** | ) |
| **Link Staffing Management L. L. C.** | ) |

## REQUEST FOR A PANEL REHEARING

The panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed(with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision; or.

Come now Michel Thomas is requesting this Honorable Court for a panel rehearing pursuant to Rules 35 and 40, for all the reasons stated within.

## STATEMENT OF ISSUES

**1. Did the panel err in using abuse of discretion, instead of de novo when it was a Rule 60(b)(4) motion and are allowing void judgments to be enforced ,conflict with Supreme Court.**

**2. Did the panel err when it did not apply statute 28 USC 1291 properly, at all, and/or fully to determine if the Final Judgment ROA.826; was the final decision decision made, and if not could Thomas have legally filed a notice of appeal, after the district court entered in additional**

decisions subsequent to the final judgment, ROA.826; and the panel failed to consider all the decisions the district court made after the first final judgment, did all the other decision the district court made, render that first final judgment moot, invalid, and/or void.

3. The panel use the wrong standard of review when it came to Thomas argument that the Final Judgment, ROA.826; as well as the Memorandum and Recommendation, ROA.812-824; and the Order adopting the Memorandum and Recommendation, ROA.825; violated Thomas' due process rights, the panel did not use the right standard of review which is de novo for due process issue or constitutionality issues, instead the panel use the abuse of discretion which is in conflict to Court's prior ruling on standard of review. This Court has over looked Thomas' brief

4. The panel did not consider Thomas' lack of subject matter jurisdiction argument he made in his Rule 60 (b)(4)motion on the first Final Judgment entered, where the standard of review is de novo under other 5th Circuit Court of Appeals cases.

5. Did the panel created a conflict within this Court, when it applied it general practice standard when it comes to filing multiple Rule 60(b) motion, instead of using the standard of applying the statutory text plainly, in his fairest reading.

6. Did the panel create a conflict with this Court when it did it not use the full, plain and fairest reading of the statutory text of 28 USC 636. 28 USC 1291, and Federal Appellate Rules of Civil Procedure 4(a)(4)(A)and Rule 4(a)(4)(A)(vi) and did the panel err when it rule Thomas did not timely file his notice of appeal.

## STATEMENT OF PROCEEDING

Thomas filed an employment discrimination case in the district court it was dismissed and Thomas then filed a notice of appeal with the United States Court of Appeals Fifth Circuit and is now requesting a panel rehearing.

## Argument

### 1. Rule 60(b)(4) motions standard of review is de novo

The Employers' argument that the standard of review is abuse of discretion is a frivolous and harassing argument and the Employers know it. The Employers state in their argument, see page 24 of Employers' Reply Brief that Thomas filed his August 31st, 2020 motion to dismiss (see ROA.827-831.) under Rule 60(b)(3), **60(b)(4),** and 60(b)(6).

The Employers were well aware also in the August 31st, 2020 ,Rule 60 motion, Thomas also cited cases that supported his arguments, that the Memorandum and Recommendation, see ROA.812-824; the order adopting the Memorandum and Recommendation, see ROA.825; and Final Judgment, see ROA.826 should be vacated. One of those cases were **Oless Brumfield et al v. United States of America, no. 14-31010 (5th Circuit decided 11/10/2015).** The Employers knew it was a Rule 60(b)(4) motion to void judgment and was informed of the case **Oless Brumfield et al,** this court always start it analysis and/or discussion of a case with the standard of review and true to practice and pattern, it starts this case analysis and discussion with the standard of review and stated this " This Court review of intervenor's **Rule 60(b)(4) motion is de novo. Jackson v. FIE Corp., 302 F. 3d 515, 521-22 (5th Circuit 2002).** "The rule states that a "court may relieve a party or its representative from a **final**

**judgment**, order, or proceeding for the following reasons: (4) if the judgment is void." Fed R. Civ. P. 60(b)(4). **Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgment themselves are by definition either legal nullities or not."**

## 2. 28 USC 1291; Final Decisions were not properly applied

The Employers' knew the order adopting the Memorandum and Recommendation, see ROA.825; and the Final Judgment, see ROA.826, were void, because the Employers mislead this Court through omission. The Employer did not inform this Court that the district court had issue an order, advising Thomas he would be permitted to file his objection, (see ROA.832.) that is a legal decision that reinstated Thomas's claims for the time being, so the Final Judgment, ROA.826; is no longer the **final decision (Thomas can only file a notice of appeal to a final decision that have disposed of all the claims, under 28 USC 1291)** the Employers did not inform this Court that the district court issue another order adopting the Memorandum and Recommendation, (see ROA.851.), so the Final Judgment, ROA.826; was not the final decision of the district court, the Employers also attempted to hide from this Court the fact that the district Court issue anew **Final Judgment**, see ROA.852; so the Final Judgment, ROA.826 was not the district court's final decision. The district court's final decision in this case came on November 9th, 2020. Thomas could not legally appeal the **Final Judgment,** ROA.826; because it was not the final decision disposing all the claims and 28 USC 1291 is clear the Federal Appeal Courts only have jurisdiction of notice of appeals from **final decision of the federal district courts.** The Employers knew all of this and still wasted this Court's time and force Thomas to

spend time, money, and mental resources to respond to a bogus argument that the Employers knew were bogus and frivolous, but was looking for a technicality. When the Employers fail to reveal to the Court those facts, rendered the Employers' argument baseless.

This Court did not have the legal right (jurisdiction) to have a notice of appeal filed in this Court on that first Final Judgment, ROA.826; because it was not the final decision and all of Thomas claims had not been disposed of.

### 3. Constitutionality Questions De Novo Review

This Court's ruling conflicts with these cases because it gives legal protection and enforcement of the Memorandum and Recommendations, the orders adopting the Memorandum and Recommendations, the Final Judgments and the orders to Strike. When they are all void for no due process, lack of subject matter jurisdiction, and no actual recording of the proceedings.

The claims were null and void before the motion for summary judgment was granted, because there was no notice or hearing held on the claims prior to the motion for summary judgment being granted.

The fact that this entire case was without due process and the district court lacked subject matter jurisdiction are **UNDISPUTED FACTS, THEREFORE AS A MATTER OF LAW SHOULD BE REVERSED. AT NO POINT AT NO LEVEL HAVE THE EMPLOYERS DISPUTED THAT FACT, IT DOES NOT EXIST IN THE RECORD, ANY WHERE.**

**United States v. Martinez, 151 F. 3d 384, 390 (5th Circuit 1998),** " Whether disclosures of

impeachment information violate any constitutional or statutory right of the defendant is determined as a question of law. **East v. Scott, 55 F. 3d 996, 1002 (5th Circuit 1995).** This Court reviews questions of law **de novo. In the Matter of Taylor, 132 F. 3d 256, 259 (5th Circuit 1998).**

The Memorandum and Recommendation, (ROA.812-824.), the order adopting the Memorandum and Recommendation, (ROA.825.), and the Final Judgment was already null and void before the district court ever sent them, because Thomas due process rights were violated on those claims, when Thomas did not get notice as required under Rule 12(c),( **Motion for Judgment on the Pleadings: After the pleadings are closed- but early enough not to delay trail- a party may move for a judgment on the pleadings.)** and did not get a hearing as required under Rule 12(i), **Hearing Before Trial: If a party so moves , any defense listed in 12(b)(1)-(7)- whether made in a pleading or by motion- and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.** Thomas due process rights were violated under the Fifth Amendment of the United States Constitution, which states no person shall be deprived of life, liberty, or property without due process of law. There were a double violations of Thomas' due process rights during the entire proceedings leading up to the entry of the Memorandum and Recommendation, ROA.812-824; the order adopting the Memorandum and Recommendation, ROA.825; and the Final Judgment, ROA.826, Thomas did not get notice, a hearing, there is no record of the proceedings and the district court did not adhere to 28 USC 636, in failing to send Thomas a copy of the Memorandum and Recommendation and giving Thomas 14 days to file objection, so the district court did a do over.

Therefore for this Court to affirm the district court's Memorandum and Recommendations,

Orders adopting the Memorandum and Recommendation, Final Judgments and the Orders to Strike will run in direct conflict with the following cases that comes from both the U, S. Court of Appeals Fifth Circuit and the United States Supreme Court.

**Griffin v. Griffin, 327 U.S. 220, 66 S. Ct. 556, 90 L. Ed 635 (02/25/1946), " A judgment obtained in violation of procedural due process is not entitled to full faith and credit when used in another jurisdiction." " Moreover due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process, Restatement of Judgment 11, comment, (c).' "DUE PROCESS FORBIDS ANY EXERCISE OF JUDICIAL POWER WHICH, BUT FOR THE CONSTITUTIONAL INFIRMITY, WOULD SUBSTANTIALLY AFFECT A DEFENDANTS RIGHT."**

**Scheuer v. Rhodes, 416 U. S. 232, 94 S. Ct. 1683, 1687 (1974), "When a judge acts as a trespasser of the law, when the judge does not follow the law, the judge loses subject matter jurisdiction, and the judges orders are not just voidable, but void with no legal force or affect."**

**"When a state officer (federal officer in this case) acts under a state law ( Federal law in this case) in a manner violative of the Federal Constitution, he becomes in conflict with the superior authority of that constitution and is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct."**

**Old Wayne Mutual Associate v. McDonough, 240 U. S. 8, S. Ct. 236 (1907), voiding the Court's judgment stating, "It was wanting in due process of law.**

" The lack of statutory authority to make a particular order of judgment is akin to lack of subject matter jurisdiction and is subject to collateral attack." 46 Am Jur. 2D Judgments, 25, pp388-389.

Assad v. Phelps, 307 S. Ct. 361, 362, 425 S. E. 2d 397, 398(1992), "It is fundamental that no judgment or order affecting the rights of a party to the cause shall be rendered without notice to the party whose rights are to be affected."

Earle v. McVeigh, 91 U. S. Ct. 503, 23 L. Ed. 398, February 14th, 1876, 1873 Lexus 1374, " Due notice to the defendant is essential to jurisdiction 504 of all courts sufficiently it appears to the legal maxim, that no one shall be condemned in his person and property without notice and the opportunity to be heard in his defence, is a maxim of universal application."

Oless Brumfield et al v. United States of America, no. 14-31010 decided November 10th, 2015 citing Williams v. New Orleans Pub. Serv. Inc., 728 F. 2d 730, 735 (5th Circuit 1984), " An order is void only if the Court that rendered it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process."

United States Aids Funds Inc., v. Espinosa, 557 U. S. 260, 270, 130 S. Ct. 1367, 1377 (2010), " Although the term "void" describes as a result, rather than the condition rendered a judgment unenforceable it is suffices to say that a void judgment, is one that is affected by a fundamental infirmity that the infirmity may be raised EVEN AFTER THE JUDGMENT BECOMES FINAL....

The list of of these infirmities is exceedingly short, otherwise, Rule 60(b)(4)'s exception to

finality would wallow the rule."

"The Court decided however that Espinosa presented no opportunity to review lower court's assertions. Construing Rule 60(b)(4) that a judgment is void because because of a jurisdiction defect only in the exceptional case, in which the court that rendered judgment lacked even an arguable basis for jurisdiction."

Sabariego et al v. Maverick, 124 U. S. 261 (8 U. S. Ct. 461, 31 L. Ed. 430) 01/12/1888 citing Windsor v. McVeigh, 93 U. S. 274, 277, " This was said, it is true of the effect to be given in our courts to the decree of a court in a foreign jurisdiction. But the rule is the same in regard to domestic judgments, THE RECORD OF WHICH TO BE EFFECTIVE AS EVIDENCE MUST SHOW UPON THE FACE A CASE WITHIN THE APPARENT JURISDICTION OF THE COURT. IF THE MERE DECREE AND SENTENCES OF A COURT STANDING BY ITSELF WITH THE RECORD OF THOSE PROCEEDINGS NECESSARY IN A LAW TO SUPPORT THE JUDGMENTS IS NOT RECEIVABLE IN EVIDENCE OF PROOF OF ITS LEGALITY, a FORTIORI , NO AFFECT CAN BE GIVEN TO THE PROCEEDINGS IN THIS, UNLESS SUSTAINED BY PROOF OF ACTUAL PROCEEDINGS."

Also it states, 'Wherever one is assailed in his person or property, said this Court in Windsor v. McVeigh, 93 U. S. 274, 277 there may defend, for liability and the rights are inseparable. This is a principle of natural justice, recognized as such by common intelligence of all nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to

**respect in any other tribunal."**

**Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940), " A void judgment which includes judgments entered in by a court which lacks jurisdiction over parties or subject matter or lacks inherent power to enter the particular judgment, or an order procured by fraud can be attacked at any time, in any court, either directly or collaterally."**

**4. Lack of Subject Matter Jurisdiction Dismissal Reviewed De Novo**

**Bank of Louisana et al v. Federal Deposit Insurance Company, no.17-30044 (5th Circuit decided 03/28/2019), " We review a dismissal for lack of subject matter jurisdiction de novo accepting all well- pleaded facts as true and viewing those facts facts in the light most favorable to Plaintiff. Griener v. United States, 900 F. 3d 700, 703 (5th Circuit 2018).**

It is undisputed that the district court lacked subject matter jurisdiction to enter in the Memorandum and Recommendations, the orders adopting the Memorandum and Recommendation, the Final Judgments, and the Orders to strike. The burden is upon the Employers to prove subject matter jurisdiction and to affirm the district court's Final judgments is in conflict with **Bank of Louisana et al v. Federal Deposit Insurance Company where it states, " A district court should dismiss where it appears certain that the Plaintiff can not prove a plausible set of facts that establish subject matter jurisdiction." Venable v. La Workers Comp. Corp., 740 F. 3d 937, 941 (5th Circuit 2014) (cleaned up).**

**" A court may find that a plausible set of facts by considering (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidence in the record; or (3) the complaint**

**supplemented by undisputed facts plus the court's resolution of the facts." Spotts v. United States, 613 F. 3d 559, 565-66 (5th Circuit 2010) ( citation omitted) THE PARTY ASSERTING THE JURISDICTION BEARS THE BURDEN OF PROOF. Griener, 900 F. 3d at 703.**

**5. This Court created a conflict using the general practice standard**

This Court using the general practice of this Court as the standard for affirming the district court's orders and judgments conflicts with **Joseph Thomas et al v. Tate Reeves et al, no. 19-60133 (5th Circuit 06/18/2020). " The Supreme Court has put it plainly "a long- established practice" does not justify a rule that denies statutory text it fairest reading.**

**"Our loyalty runs to congress and its commands"**

**"Our duty is to legislative text, not to litigation habits that, until now, have gone merrily along unexamined."** This Court is bound to apply the plain reading and fairest reading of the entire applicable statute.

**" The surplusage canon lauded as a cardinal principle of statutory construction, teaches, it is no more the court's function to revise by subtraction than by addition."**

**"Its the business of courts to take lawmakers at their word, and to presume they meant what they said, on this vital point, the Supreme Court has been unsubtle [W]E MUST GIVE EFFECT TO EVERY WORD CONGRESS USED IN THE STATUTE." National Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 632 (2018) citing Reiter v. Sonatone Corp., 442 U. S. 330, 339 (1979).**

**" That canon advises that a statute should be construed so that effect is given to all**

**provisions, so that no part will be inoperative or superfluous, void, or insignificant. Corley v. United States, 556 U. S. 303, 314 (2009) (cleaned up) (quoting Hibbs v. Winn, 542 U. S. 88, 201 (2004).**

**" Our duty instead is to follow natural, everyday meaning of the words enacted into law. Id. At 33 (The interpretive approach we endorse is that of the fair reading: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in language, would understand the text at the time it was issued.")**

**" This approach accords with the principle that words are to be understood in their everyday meaning. First, we start off with the plain meaning of the text, and if its obviously a spade we call it a spade.**

**6. The Panel did not apply the full text of the applicable statues**

If this Court apply that principle then it is clear under 28 USC 1291 Thomas could not appeal until the **"Final Decision"** and the Final decision did not occur until January 4th, 2021, see ROA.859.

**28 USC 1291: Final Decisions of District Courts; The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdictions of appeals from all final decisions of the district courts of the United States.**

Clearly this Court did not and do not have jurisdiction of the Final judgment, ROA.826; because it was not the final decision by any stretch and that is why the Employers are attempting to mislead this Court by not disclosing all the other decisions the district court made after the Final Judgment, ROA.826; see ROA.832; ROA.837;ROA.851;ROA.852;ROA.859; all these decisions came after Final

Judgment, ROA.826; This Court had and have no jurisdiction over it, because it as not the district court's final decision, all of Thomas claims were not disposed of, that is a spade.

**28 USC 636: Jurisdiction, Powers, and temporary assignment;**

**28 USC 636((b)(1)(c), The Magistrate Judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those proportions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.**

With that statute, it is clear the proceedings had not concluded, the claims were still alive, so the Final Judgment, ROA.826; was clearly not the final decision that would give this Court jurisdiction, there was no final judgment (Final Decision) to file a notice of appeal where this Court would have jurisdiction under 28 USC 1291. If Thomas would have filed a notice of appeal and the district court decided to reject the Memorandum and Recommendation Thomas notice of appeal would have been rejected, as no jurisdiction.

It is also clear that the district court did not have subject matter jurisdiction, because the district court did not mail Thomas a copy of the Memorandum and Recommendation, ROA.812-824; as

mandated by statute, so Thomas could receive a de novo review, a statutory right under 28 USC 636(b)(1)( C ). Also it is void because Thomas therefore did not get notice of the Memorandum and Recommendations and an opportunity to file objections.

Thomas notice of appeal was file timely in accordance with Federal Appellate Civil Procedure Rule 4(a)(4)(A) and Rule 4(a)(4)(A)(vi). Because their were TWO FINAL JUDGMENTS ENTERED.

**Rule 4(a)(4)(A) states If a party files in the district court ANY OF THE FOLLOWING MOTIONS under the Federal Rules of Civil Procedures and DOES SO WITHIN THE TIME ALLOWED BY THOSE RULES-"THE TIME TO FILE AN APPEAL RUNS FOR ALL PARTIES FROM THE ENTRY OF THE ORDER DISPOSING OF THE LAST SUCH REMAINING MOTION*". Thomas had the legal right to file a second 60(b) motion.**

**Rule 4(a)(4)(A)(vi) states, for relief under Rule 60 if the motion is filed no later THAN 28 DAYS AFTER THE JUDGMENT IS ENTERED.**

**Osternick v, Ernst & Whinney, 489 U. S. 169, 174 (1989), "[T]he policy of Congress embodied in [28 USC 1291] is inimical to piece meal appellate review of trial court decisions.**

**Because Federal Rules of Appellate Rule 4(a)(4)(A) RENDERS IN EFFECTIVE ANY NOTICE OF APPEAL FILED WHILE A RULE 59(e) MOTION IS PENDING."**

**"But if he timely submits a rule 59(e) motion, THERE IS NO LONGER A FINAL JUDGMENT TO APPEAL FROM. ONLY THE DISPOSITION OF THAT MOTION "RESTORES THE FINALITY" OF THE CLOCK OF THE ORIGINAL JUDGMENT *THUS STARTING THE 30 DAY CLOCK.** Before the amendment of 1993 to rule 4(a) rule 60(b0 motions

were done under 59(e) motions and that changed in 1993.

A plain and fair reading of statutory text, clearly Thomas notice of appeal was timely filed. Thomas timely filed his Rule 60(b) motion on both final judgments within the 28 days allowed and once the district disposed of the last such remaining motion, within 30 days Thomas filed his notice of appeal. Thomas timely filed his Rule 60(b) motion to both final judgment so the clock did not restart. until the last remaining 60(b) motion was disposed of. A Rule 60(b) motion that only challenges the legal integrity of the proceeding can not be deemed successive, **Bannister v. Davis, no.18- 6943 (06/01/2020) quoting Gonzalez v. Crosby, 545 U. S. 524 (2005).** Thomas Rule 60(b) Motion only challenged the legal integrity of the proceedings, and can be successive.

## CONCLUSION

This Honorable Court should grant Thomas a panel rehearing and reverse its ruling affirming the district court's final Judgment. The Employer misrepresented the facts and the standard of review, The Employer stated Thomas motion was a Rule 60(b)(4) motion and in the same breath stated that the standard of review was abuse of discretion knowing the standard of review was de novo.

The Employer then mislead the Court by omitting the fact about the final decision. For all the reason stated within Thomas asks this Court for a panel rehearing.

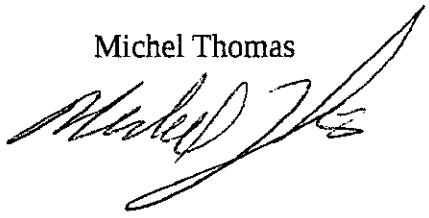
Michel Thomas

1127 Eldridge Parkway #300-167 Houston, Texas 77077/ 770-255-8917/ Date: 08/28/2021

## CERTIFICATE OF COMPLIANCE

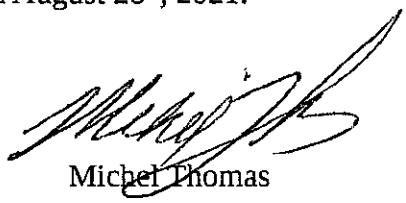
Thomas certify that this request for rehearing complies with Rule 40(b)(2) and is only 15 pages.

Michel Thomas



## CERTIFICATE OF SERVICE

I Hereby certify a true and correct copy of this request for a panel rehearing and certificate of compliance were sent to the Employers' attorney at 1310 McKinney Street #1900 Houston Texas 77010 via United States Postal Service Certified Mail with return receipt on August 28th, 2021.



Michel Thomas

# United States Court of Appeals
## for the Fifth Circuit



No. 21-20066
Summary Calendar

MICHEL THOMAS,

*Plaintiff—Appellant*,

*versus*

STAFFLINK, INC., *doing business as*, LINK STAFFING SERVICES; BILL PITTS; KAREN PITTS; MARIO TAMEZ; MATT TRIMBLE; CHRISTINE O'BRIEN; LINK STAFFING MANAGEMENT, L.L.C.,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3902

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

* 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.

Michel Thomas, acting *pro se*, filed an employment discrimination lawsuit against the Defendants. The district court dismissed some of his claims and granted summary judgment on others. We AFFIRM.

We first examine our jurisdiction. On August 4, 2020, the district court entered final judgment against Thomas. On August 31, 2020, Thomas filed a "motion to dismiss" under Federal Rules of Civil Procedure 60(b)(3), 60(b)(4), and 60(b)(6), arguing that the final judgment was void because it was inconsistent with due process.

On November 9, 2020, the district court denied the motion to dismiss and re-entered final judgment. On December 4, 2020, Thomas filed another "motion to dismiss" under Rules 60(b)(3), 60(b)(4), and 60(b)(6). Like his first motion, the second post-judgment motion argued that the final judgment was void because it was inconsistent with due process. The district court denied Thomas's second post-judgment motion on January 4, 2021. Thomas filed his notice of appeal on February 2, 2021.

Generally, a party must file a notice of appeal "within 30 days after entry of the judgment or order appealed from." FED. R. APP. P. 4(a)(1)(A). Certain timely filed post-judgment motions, including a motion under Rule 60(b), interrupt the time for filing the notice of appeal. *See* FED. R. APP. P. 4(a)(4)(A). An appellant generally can take advantage of this interruption only once. We have explained that successive post-judgment motions are "condemned by well-established authority in this and other circuits." *Charles L.M. v. N.E. Indep. Sch. Dist.*, 884 F.2d 869, 870 (5th Cir. 1989). As a result, "where an appellant files a second motion to reconsider 'based upon substantially the same grounds as urged in the earlier motion,' the filing of the second motion does not interrupt the running of the time for appeal." *Id.* (quoting *Ellis v. Richardson*, 471 F.2d 720, 721 (5th Cir. 1973)).

Here, Thomas's first Rule 60(b) motion was timely filed and interrupted the deadline for filing a notice of appeal. *See* FED. R. APP. P. 4(a)(4)(A). Thomas's second Rule 60(b) motion was based on substantially similar grounds and therefore did not interrupt the time for filing a notice of appeal. The 30-day time for appeal ran from the district court's denial of his first Rule 60(b) motion. Since Thomas did not file his notice of appeal within 30 days of that denial, we have no jurisdiction to review the final judgment entered in this case.

Because Thomas's notice of appeal was filed within 30 days of the court's denial of his second Rule 60(b) motion, we may review the court's decision on that motion. We review the denial of a Rule 60(b) motion for abuse of discretion. *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 871 (5th Cir. 1989).

After a review of the record and briefs, we conclude that the district court did not abuse its discretion by denying Thomas's second Rule 60(b) motion. Thomas's motion principally makes arguments that he made or could have made earlier in the proceedings. He argues that the district court colluded with the defendants but provides no evidence in support of his claim. He otherwise offers no "extraordinary circumstances" to justify relief. *See Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995).

AFFIRMED.

The judgment entered provides that appellant pay to appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Ms. Elizabeth L. Bolt
Mr. Allan Huddleston Neighbors
Mr. Michel Thomas

# APPENDIX Q

**UNITED STATES COURT OF APPEALS**
**FIR THE FIFTH CIRCUIT**

| | | |
|---|---|---|
| **Michel Thomas** | ) | |
| **Appellant** | ) | |
| **v.** | ) | |
| | ) | |
| | ) | |
| **Stafflink, Inc, doing business as,** | ) | |
| **Link Staffing Services;** | ) | |
| **Bill Pitts;** | ) | **No. 21-20066** |
| **Karen Pitts** | ) | **USDC No. 4:17-cv-03902** |
| **Mario Tamez** | ) | |
| **Matt Trimble** | ) | |
| **Christine O' Brien** | ) | |
| **Link Staffing Management L. L. C.** | ) | |

**RULE 26(b) MOTION FOR GOOD CAUSE IN SUPPORT**
**RULE 27 (b) MOTION FOR RECONSIDERATION**

Come Now, pursuant to Rule 26(b), Appellant, Michel Thomas is filing this Rule 26(b) motion for good cause in support of Rule 27(b) Motion to Reconsider.

This Court affirmed the Final Judgment of the District Court which was entered in on August 13th, 2021, but Thomas was not served (actually mailed out) until August 16th, 2021, please see attachment #1.

This paper was mailed out to Thomas, therefore Thomas had 3 additional days from the 14 days that Thomas had from Federal Rule 40(a)(1), which gave Thomas 14 days to have Thomas motion for panel rehearing in the clerk's office.

This statute is governed by Rule 26(a), where it states, **"The following rules apply in computing any time period specified in these rules, in any local rule, or court order, or statute that does not specify a method of computing time.**

Thomas had 14 days and since the court order was mailed, once Thomas was **served three additional days were added to the 14 days, from the service date (mail out date), which was August 16th, 2021, please see attachment #1.** These three additional days after service comes from Rule 26(c), where it states, **" When a party may or must act within a specified time after being served and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under rule 26(a).**

Thomas 14 days after service on August 16th, 2021, would have made Thomas motion for panel rehearing due in the clerk's office by August 30th, 2021, and since the order was mailed, Thomas had 3 additional days, which would have made the date Thomas needed to have his motion for panel rehearing in the clerk's office by **September 2nd, 2021.**

Thomas put his motion for panel rehearing in the mail on August 28th, 2021 at 9:49am and sent it express mail for overnight delivery, but since that was a Sunday August 29th, 2021, it was two day delivery having it scheduled to be delivery in the clerk's office on August 30th, 2021, please see attachment #2.

Unfortunately Hurricane Ida hit New Orleans, La. and that resulted in the clerk's office and this Court being closed on August 30th, 2021 through September 2nd, 2021, which this Court posted on its website and granted a 7 day extension of time to have the pleadings filed, but the clerk's office did not open on September 2nd, 2021, and this court then granted an additional 7 days to have all pleadings filed. That would be a total of 14 days added to the due day of September 2nd, 2021 (which was the original due date for Thomas to have his motion for panel rehearing into the clerk's office), which puts

the motion for panel rehearing due in the clerk's office on September 16th, 2021. It was actually delivered a week early (two days after the clerk's office and this court open for regular operations, September 7th, 2021), on September 9th, 2021, see attachment #2.

Thomas motion for panel rehearing was filed with this within the first 7 day extension in which this Court granted. Also, but for Hurricane Ida, Thomas motion for rehearing would have been in the clerk's office on August 30th, 2021, within 14 days after the order was mailed out, on August 16th, 2021, see attachment #1, it was mailed out, without the need for the additional 3 days, that Thomas was allowed under Rule 26 (c).

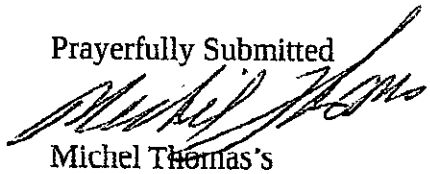
Therefore Thomas has made a good cause showing for why Thomas motion for panel rehearing was not in the clerk's office by August 30th, 2021 through September 2nd , 2021, because this Court was closed due to Hurricane Ida, and Thomas was checking tracking and seen where the package was on the move to the clerk's office starting on September 4th, 2021 and arrived in New Orleans, La. on September 8th, 2021, see attachment #2, where Thomas had being prepared to overnight another copy of the motion for panel rehearing on September 9th, 2021, but once Thomas seen it was in New Orleans on September 8th, 2021 Thomas held off one day, until September 9th, 2021 to see if it would be delivered and it was, see attachment #2.

For all the reason stated above Thomas have made a good cause showing of why Thomas motion for panel rehearing was not in the clerk's office by September 2nd, 2021, but it was also timely filed in accordance with the 14 days of extension of time granted by this Court due to Hurricane Ida.

Thomas ask this Court to rule that Thomas has in fact made a good cause showing and

reconsider the ruling that Thomas motion for panel rehearing was untimely and this Court should consider Thomas's motion for panel rehearing and reverse the affirmation of the district court's final judgment.

Prayerfully Submitted

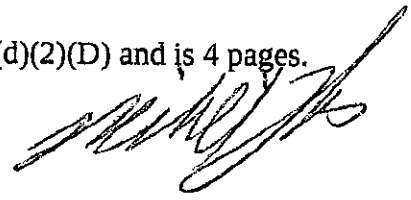


Michel Thomas's

1127 Eldridge Parkway #300-167 Houston, Texas 77077/770-255-8917/ Date 09/22/2021

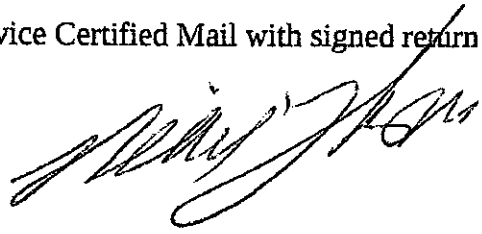
**CERTIFICATE OF COMPLIANCE**

I Hereby certify that this motion is in compliance with Rule 27(d)(2)(D) and is 4 pages.



**CERTIFICATE OF SERVICE**

I Hereby certify a true and correct copy of Thomas' Rule 26(b) motion for good cause in support of Thomas' motion for reconsideration was sent to the appellee's attorney at 1301 McKinney Street #1900 Houston, Texas 77077 via United States Postal Service Certified Mail with signed return receipt on September 22nd, 2021.



Attachment

#1

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
F. EDWARD HEBERT BUILDING
600 S. MAESTRI PLACE
NEW ORLEANS, LOUISIANA 70130-3408

OFFICIAL BUSINESS

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08/16/2021 $000.71⁹

ZIP 70130
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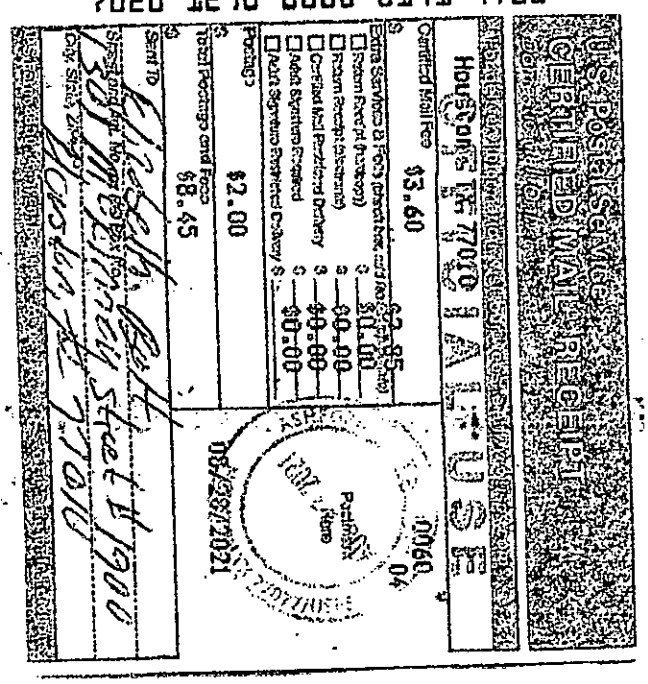
Mr. Michel Thomas
Suite 300-167
1127 Eldridge Parkway
Houston, TX 77077

77077-177275

Attachment

# 2

7020 1290 0000 8141 4766




UNITED STATES POSTAL SERVICE

ASHFORD WEST
12655 WHITTINGTON DR
HOUSTON, TX 77077-9998
(800)275-8777

08/28/2021 09:50 AM

| Product | Qty | Unit Price | Price |
|---|---|---|---|
| First-Class Mail® Large Envelope<br>Houston, TX 77010<br>Weight: 0 lb 5.10 oz<br>Estimated Delivery Date<br>Tue 08/31/2021 | 1 | | $2.00 |
| Certified Mail®<br>Tracking #:<br>70201290000081414766 | | | $3.60 |
| Return Receipt<br>Tracking #:<br>9590 9402 6628 1028 4376 01 | | | $2.85 |
| Total | | | $8.45 |
| PM Express 2-Day<br>New Orleans, LA 70130<br>Weight: 1 lb 2.10 oz<br>Signature Requested<br>Scheduled Delivery Date<br>Mon 08/30/2021 06:00 PM<br>Money Back Guarantee<br>Tracking #:<br>EJ963392651US | 1 | | $31.15 |
| Insurance<br>Up to $100.00 included | | | $0.00 |
| Total | | | $31.15 |
| Grand Total: | | | $39.60 |
| Debit Card Remitted<br>Card Name: MasterCard<br>Account #: XXXXXXXXXXXX4174<br>Approval #<br>Transaction #: 953<br>Receipt #: 045770<br>Debit Card Purchase: $39.60<br>AID: A0000000042203<br>AL: Debit<br>PIN: Verified | | Chip | $39.60 |

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USPS is experiencing unprecedented volume increases and limited employee

# APPENDIX R

**UNITED STATES COURT OF APPEALS**
**FIR THE FIFTH CIRCUIT**

| | | |
|---|---|---|
| **Michel Thomas** | ) | |
| **Appellant** | ) | |
| **v.** | ) | |
| | ) | |
| | ) | |
| **Stafflink, Inc, doing business as,** | ) | |
| **Link Staffing Services;** | ) | |
| **Bill Pitts;** | ) | **No. 21-20066** |
| **Karen Pitts** | ) | **USDC No. 4:17-cv-03902** |
| **Mario Tamez** | ) | |
| **Matt Trimble** | ) | |
| **Christine O' Brien** | ) | |
| **Link Staffing Management L. L. C.** | ) | |

## MOTION TO RECONSIDERATION

COME NOW, Appellant, Michel Thomas is filing this motion for reconsideration pursuant to Rule 27(b) in conjunction with Thomas' Rule 26(b) motion for good cause in support of Rule 27(b) motion for consideration.

Thomas is asking this court to consider both motions, (Rule 27 (b) motion to reconsideration and Rule 26(b) good cause motion in support of Rule 27(b) motion for reconsideration), as it considers Thomas' motion for reconsideration.

Thomas timely filed his motion for panel rehearing. The order affirming the district court's final judgment was entered in on August 13th, 2021, but was not served (mailed out), until August 16th, 2021, see attachment #1, Thomas 14 days did not start until the order was mailed out and that is governed by Rule 26(a) and Rule 26(c). Thomas had 14 days to the have his motion for panel rehearing filed, which would have made it due on August 30th, 2021, to be in the clerk's office, but since it was mailed,

Thomas had three additional days, which made the due date September 2nd, 2021.

**Rule 26(a) states, "The following rules apply in computing any time period specified in these rules, in any local rule, or court order, or statute that does not specify a method of computing time."** Statute, Rule 40(a)(1) gives Thomas 14 days to have his motion for panel rehearing filed in the clerk's office, So Rule 26(a) governs Rule 40(a)(1) as it pertains to the computing of time.

**Rule 26(c) states, "When a party may or must act within a specified time after being served and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days added after the period would otherwise expire under rule 26(a)."**

Thomas' motion for panel rehearing was due by September 2nd, 2021 which includes the 3 additional days, since the order (paper) was mailed out (served), on August 16th, 2021.

Thomas put the motion for panel rehearing in the mail on Saturday August 28th, 2021, via United States Postal Service Express Mail (Overnight, next day delivery), but the next day was a Sunday, August 29th, 2021, the service date was set for Monday, August 30th, 2021 delivery. Please see attachment #2.

Hurricane Ida hit New Orleans La. And this Court as well as the clerk's office was closed for regular operation and due to the damage from the hurricane, it prevented Thomas' motion for panel rehearing from being delivered on August 30th, 2021, and since this Court and the clerk's office was closed, this Court posted on its website that it was granting a 7 day extension of time for all pleading that was due between the period of August 30th, 2021 through September 2nd, 2021, which included

# United States Court of Appeals
# for the Fifth Circuit

ORDER
General Docket No. 2021-8

Hurricane Ida caused catastrophic damage to dwellings, businesses, and infrastructure in the New Orleans area, forcing the closure of the court. In advance of the storm, General Order No. 2021-7 extended for 7 days deadlines for pleadings.

As conditions require, the court hereby extends pending deadlines for pleadings and briefs by an additional 7 days, EXCEPT in cases previously designated for expedited briefing, or filings due cases scheduled for September En Banc hearings.

This order does not extend the time to file a notice of appeal or petition for review (*see* FEDERAL RULE OF APPELLATE PROCEDURE 26(B)) as the time for filing an appeal in a civil case is mandatory and jurisdictional.

Despite the closure of the courthouse and Clerk's Office, employees who evacuated are teleworking, handling both emergency and routine matters.

Dated this 2nd day of September 2021.

Lyle W. Cayce

LYLE W. CAYCE
*Clerk of Court*

BY DIRECTION