NOT RECOMMENDED FOR PUBLICATION

No. 22-5330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 4, 2023
DEBORAH S. HUNT, Clerk

CHRISTOPHER DALTON THOMAS, Plaintiff-Appellant, v. DEBORAH HAALAND, United States Secretary of the Interior, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

ORDER

Before: SUHRHEINRICH, NALBANDIAN, and MURPHY, Circuit Judges.

Christopher Dalton Thomas appeals the district court's judgment dismissing his employment-discrimination case, filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because Thomas has not shown that the district court erred by dismissing most of his claims under 28 U.S.C. § 1915(e), for failure to state a claim upon which relief may be granted, or by granting summary judgment on his remaining claims, we affirm.

Thomas filed an amended complaint against former United States Department of the Interior Secretary David L. Bernhardt, the Energy and Environment Cabinet of the Kentucky Division of Forestry ("KDF"), the Kentucky Personnel Board ("the Board"), Equal Employment Opportunity Commission ("EEOC") Administrative Law Judge ("ALJ") Aarika Mack-Brown, Mammoth Cave National Park ("MCNP") employees Leslie Lewis and Christopher Clark, South

A

Central Community and Technical College ("SKYCTC"), and "anonymous false accusers." He alleged that the KDF terminated his employment in December 2013 based on false accusations of sexual harassment made by female coworkers and in retaliation for raising safety and environmental concerns about his work assignment. Specifically, he alleged that a female coworker fabricated a story about him watching and potentially videotaping her while she relieved herself in the woods near their worksite. Thomas appealed his firing, arguing that female employees were given preferential treatment, and he alleged that a Board hearing officer slandered him and committed libel by including false facts—the female coworker's allegation—in a recommended order. According to Thomas, his coworker's complaint and the termination of his employment were retaliation for his whistleblowing activity: complaining about an unsafe work environment.

In 2017, Thomas worked for MCNP for approximately one month before his employment was terminated. Thomas alleged that MCNP fired him in retaliation for appealing his KDF termination on gender-discrimination grounds. According to Thomas, his coworkers at MCNP discovered the Board's decision addressing his discrimination claims against the KDF when they searched his name on the internet. Following that discovery, "a string of baseless allegations" were made against him. Thomas alleged that these accusations, as well as the accusations made by his KDF coworkers, defamed his character and caused him emotional distress. He also alleged that MCNP officials falsified his employment records by including the false accusations in those records. In addition to his retaliation claim, Thomas alleged that MCNP discriminated against him based on his gender and disabilities, which make him "socially awkward." Thomas alleged that the accusations leveled against him by his coworkers at both the KDF and MCNP constituted harassment and that he was subjected to a hostile work environment at MCNP.

Thomas's amended complaint also alleged several violations and sought relief under 42 U.S.C. § 1983. First, Thomas contended that he was denied due process because he was never told the identity of two MCNP visitors who filed complaints against him, and he could not cross-examine them. He also alleged that he was deprived of his First Amendment right to petition

the government, his Fifth Amendment right to be free from double jeopardy, and his Sixth Amendment right to a speedy trial. Finally, Thomas alleged that Mack-Brown acted negligently by misconstruing facts in the appeal of his KDF termination, that the Board and the EEOC altered records and committed fraud, and that SKYCTC fired him from a teaching position after finding out about the MCNP investigation. Because the district court had granted Thomas leave to proceed in forma pauperis, it conducted an initial review of his complaint under § 1915(e). It dismissed the majority of Thomas's claims for failure to state a claim upon which relief may be granted, allowing only a single claim to proceed: Thomas's Title VII claim against Bernhardt.

Thomas then filed a third amended complaint, seeking to add the Kentucky Education Professional Standards Board ("EPSB") and the KDF as defendants and expand on several claims that he raised in his prior amended complaint. The district court again reviewed the complaint under § 1915(e) and dismissed most of Thomas's claims for failure to state a claim upon which relief may be granted. The district court allowed Thomas to proceed on discrimination and retaliation claims brought under Title VII and the ADA against the Secretary of the Department of the Interior. It terminated Bernhardt as a defendant and replaced him with Deb Haaland, the current Secretary of the Department of the Interior.

Thomas subsequently moved for leave to file a fourth amended complaint. The district court granted the motion only to the extent that Thomas sought leave to add allegations relating to his Title VII and ADA claims against Haaland. It found that all additional proposed amendments would be futile. Haaland then filed a motion for summary judgment, which the district court granted.

I. *Appellate Motions*

Before tackling the merits of Thomas's appellate arguments, we address the numerous motions that Thomas has filed on appeal. First, Thomas asks us to order Haaland to disclose a password for a DVD that he wishes to submit as evidence. He also moves to file additional evidence and to reopen discovery. In reviewing the district court's decision, we consider only the evidence that was presented to the district court. *See United States v. Murdock*, 398 F.3d 491, 500

(6th Cir. 2005). Because the evidence that Thomas moves to submit is either evidence that was not before the district court or evidence that is available electronically through the district court's docket sheet, we deny Thomas's motions. Thomas also moves to "reinstate defendants," but he acknowledges that he does not "know which [d]efendants would be appropriate to add." We deny these motions as well but note that Thomas's appeal of the final judgment effectuated an appeal from the district court's orders dismissing his claims under § 1915(e), so all the individuals and entities that Thomas named as defendants, aside from Bernhardt, are named as appellees. Finally, Thomas moves to "dismiss all allegations being used against him by Defendant," to be granted "protection[] concerning Title VII action," and to impeach Haaland's evidence. These motions are denied because they raise arguments pertaining to the merits of the appeal.

II. *Appellate Arguments*

On appeal, Thomas challenges the district court's dismissal of his due process, equal protection, 42 U.S.C. §§ 1981 and 1985, defamation, and slander claims. He also argues that the false allegations against him and the misleading statements included in the Board and EEOC decisions are punishable under 18 U.S.C. § 1001. Finally, he challenges the district court's grant of summary judgment on his Title VII retaliation claim, his hostile-work-environment claim, his Title VII gender-discrimination claim, and his ADA discrimination claim. Thomas has forfeited all other claims that he raised in the district court by failing to brief them in his initial appellate brief. *See Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310–11 (6th Cir. 2005).

We review de novo the dismissal of a complaint under § 1915(e). *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010). Under § 1915(e)(2)(B)(ii), a district court "shall dismiss the case at any time" if the complaint "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). To avoid dismissal under § 1915(e)(2)(B)(ii), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

We also review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)).

A. Claims Raised Under 18 U.S.C. § 1001 and 42 U.S.C. §§ 1981, 1983, and 1985

The district court dismissed Thomas's § 1983 claims against the Kentucky Energy and Environment Cabinet and the Board as barred by the applicable one-year statute of limitations. It denied Thomas's request to amend his complaint to include 18 U.S.C. § 1001 and 42 U.S.C. §§ 1981, 1983, and 1985 claims against Haaland, finding that amendment would be futile. In making this finding, the district court stated that the parties had agreed that amendment would be futile. In opposing the motion to amend, Haaland had argued that § 1001, a statute criminalizing false statements, did not create a private right of action, and that any §§ 1983 and 1985 claims were barred by the applicable one-year statute of limitations. Haaland also argued that she was not a state actor for purposes of §§ 1983 and 1985 and that any § 1981 claim was preempted by Title VII. Thomas replied that he "lack[ed] sufficient legal knowledge" to dispute Haaland's arguments with respect to these claims.

On appeal, Thomas argues the merits of his equal protection and due process claims, but he does not address the district court's finding that his § 1983 claims against the KDF and KPB were barred by the one-year statute of limitations. He therefore has forfeited appellate review of that finding, which is wholly dispositive of those constitutional claims. *See Agema v. City of Allegan*, 826 F.3d 326, 331 (6th Cir. 2016); *Geboy*, 489 F.3d at 767. Thomas also does not challenge Haaland's arguments that (1) § 1001 does not create a private right of action, (2) Title

VII preempts Thomas's § 1981 claim against Haaland, and (3) Thomas cannot pursue §§ 1983 or 1985 claims against Haaland because she is not a state actor. Those arguments are correct, in any event. *See AirTrans, Inc. v. Mead*, 389 F.3d 594, 597 n.1 (6th Cir. 2004) (no private right of action under § 1001); *Collyer v. Darling*, 98 F.3d 211, 221 n.9 (6th Cir. 1996) (explaining that individuals who "are not state actors" are not "subject to suit under § 1983 and may not be held liable for conspiracy under section 1983 or section 1985(3)" in absence of an agreement to violate a plaintiff's rights); *Day v. Wayne Cnty. Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) (explaining that Title VII preempts § 1981). Thomas therefore has not shown that the district court erred by dismissing these claims.

B. *Defamation/Slander*

On appeal, Thomas argues that the allegations detailed in his employment records, in the EEOC's ruling, and in the district court's record "all amount to defamation of character." But his appellate arguments do not address the various reasons that the district court dismissed his defamation claims. The district court found that Thomas's defamation and slander claims against the Kentucky Energy and Environment Cabinet and the Board were barred by the applicable one-year statute of limitations, that the EPSB was entitled to sovereign immunity, and that statements made by the "anonymous false accusers" and Mack-Brown were privileged. Because Thomas has presented no appellate arguments that would draw these findings into question, he has forfeited appellate review of the dismissal of his defamation and slander claims. *See Agema*, 826 F.3d at 331; *Geboy*, 489 F.3d at 767.

C. *Title VII Retaliation*

Thomas also challenges the district court's grant of summary judgment on his Title VII retaliation claim against Haaland. "Title VII prohibits discriminating against an employee because that employee has engaged in conduct protected by Title VII." *Laster v. City of Kalamazoo*, 746 F.3d 714, 729 (6th Cir. 2014). "[A] Title VII retaliation claim can be established 'either by introducing direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation.'" *Id.* at 730 (quoting *Imwalle v. Reliance Med. Prods., Inc.*,

515 F.3d 531, 538 (6th Cir. 2008)). Because Thomas did not present direct evidence of retaliation, the district court properly analyzed his claim under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See id.*

Under the *McDonnell Douglas* framework, Thomas bears the burden of establishing a prima facie case of retaliation. *McDonnell Douglas Corp.*, 411 U.S. at 802. To satisfy that burden, Thomas must show that "(1) he engaged in protected activity; (2) [the] defendant[] knew he exercised his protected right; (3) [the] defendant[] subsequently took an adverse employment action against him; and (4) his 'protected activity was the but-for cause of the adverse employment action.'" *Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 605 (6th Cir. 2022) (quoting *Kenney v. Aspen Techs., Inc.*, 965 F.3d 443, 448 (6th Cir. 2020)). If Thomas makes a prima facie showing, the burden then shifts to Haaland to articulate a "legitimate, nondiscriminatory reason" for the adverse employment actions. *See McDonnell Douglas Corp.*, 411 U.S. at 802. If Haaland carries that burden, Thomas then must show that the stated reason was pretext for unlawful retaliation. *Romans v. Mich. Dep't of Hum. Servs.*, 668 F.3d 826, 838 (6th Cir. 2012).

Thomas alleged that MCNP terminated his employment because of the gender-discrimination complaint that he filed against the KDF. And Thomas produced some evidence to suggest that the MCNP employees who decided to terminate his employment were aware of his gender-discrimination complaint against the KDF and terminated his employment shortly after learning about it. Although Thomas cited nothing more than the temporal proximity between the discovery of his complaint against the KDF and the termination of his employment at MCNP to establish causation, "temporal proximity can demonstrate a causal connection for the purposes of a prima facie case." *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 396 (6th Cir. 2017); *see Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 507 (6th Cir. 2014). And the temporal proximity of the protected conduct and the adverse action was close: some of the MCNP employees who made the decision to terminate Thomas's employment learned of his gender-discrimination complaint mere days before firing him. Still, even if Thomas made out a

prima facie case of retaliation, Haaland articulated a legitimate, nondiscriminatory reason for Thomas's firing.

In her motion for summary judgment, Haaland cited evidence presented at an administrative hearing as proof of a legitimate, nondiscriminatory reason for terminating Thomas's employment. Indeed, at Thomas's lengthy EEOC hearing, multiple employees who were involved in the decision to terminate Thomas's employment with MCNP testified that Thomas was fired not because of his gender-discrimination complaint against the KDF but because of two complaints from MCNP visitors. At this stage, Haaland's burden was "one of production, not persuasion," so Haaland met her burden. *Wheat v. Fifth Third Bank*, 785 F.3d 230, 240 (6th Cir. 2015) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000)).

The burden then shifted back to Thomas to show that this proffered reason is a mere pretext for unlawful discrimination. This required Thomas to show "*both* that the reason was false, *and* that [retaliation] was the real reason" for the adverse action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). And the "honest belief rule . . . precludes a finding of pretext when an employer's nondiscriminatory reason for terminating an employee is later proven false, so long as the employer can show that it honestly believed the reason was true when making the termination decision." *Boshaw*, 32 F.4th at 606.

In response to Haaland's summary judgment motion, Thomas appeared to argue that that the first visitor complaint was unfounded because his behavior was not inappropriate and that the MCNP employee who reported the second visitor complaint wholly fabricated it. The evidence in the record shows that a female park visitor reported that Thomas, "who seemed off," approached her while she was eating at the park cafeteria with three children. She alleged that Thomas began speaking to her and appeared to photograph or video record her with his phone. The woman reported the incident because it made her feel uncomfortable. One day after park police received this complaint, another female park visitor complained that Thomas had been "overly friendly, almost too friendly and smirky" while interacting with her at the park's information desk.

Thomas cites no evidence to support his allegation that the MCNP employee who reported the second visitor complaint fabricated it. And even if we accept Thomas's argument that he did not behave inappropriately in the park cafeteria, the undisputed evidence shows that a complaint was made and that the employees who decided to terminate Thomas's employment honestly believed that Thomas's conduct was inappropriate. After recognizing Thomas from a photograph taken by the park visitor who filed the first complaint, park rangers interviewed Thomas about the cafeteria incident. Thomas first stated that he did not recall the incident, but later acknowledged that he had interacted with the woman. Thomas insisted that he did not photograph or record the woman or the children. After refusing to provide a written statement, Thomas returned to the park ranger's office on his own initiative and made several comments, including "I don't even think she was attractive" and "I don't even know what she looked like."

Thomas's termination letter identified the cafeteria incident and Thomas's seemingly inconsistent statements about that incident as the reason for his dismissal. And when asked to explain their reasons for firing Thomas, MCNP employees who were involved in that decision cited the two guest complaints and Thomas's statements to park rangers. Thomas's supervisor, Coleman England, also noted the similarity between the MCNP guest complaints and the complaint made against Thomas by his former coworker at the KDF. He noted that this similarity gave credence to the two MCNP guest complaints. Admittedly, he learned about the KDF complaint from the Board decision that addressed Thomas's gender-discrimination claim. But Coleman was clear that the MCNP decisionmakers were not concerned about the fact that Thomas had previously complained of gender discrimination. Rather, they were concerned about the similarities between the former coworker's complaint and the complaints that MCNP visitors had made and the possibility of "further incidents at the Park." These sworn statements show that the MCNP employees who decided to fire Thomas "honestly believed" that Thomas's behavior had concerned park guests, *Boshaw*, 32 F.4th at 606, and Thomas cited no evidence that would draw those statements into question. Nor did he cite any evidence, other than the temporal proximity between the discovery of the Board decision and his firing, to show that retaliation was the real

reason for his termination. While temporal proximity alone may suffice to make a prima facie showing of retaliation, it cannot serve as "the sole basis for finding pretext." *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285 (6th Cir. 2012) (quoting *Donald v. Sybra, Inc.*, 667 F.3d 757, 763 (6th Cir. 2012)). Accordingly, the district court properly granted summary judgment in Haaland's favor.

D. Title VII and ADA Discrimination Claims

Thomas did not cite any direct evidence of gender or disability discrimination, so his discrimination claims were subject to the same burden-shifting framework as his retaliation claims. *See Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 298 (6th Cir. 2019) (ADA); *Johnson v. Kroger Co.*, 319 F.3d 858, 865-66 (6th Cir. 2003) (Title VII). For reasons just discussed, even if Thomas made out a prima facie case of discrimination, Haaland identified a nondiscriminatory reason for terminating his employment, and Thomas failed to show pretext. The district court therefore properly granted Haaland's motion for summary judgment on Thomas's discrimination claims, as well.

E. Hostile Work Environment

To make a prima facie showing of a hostile work environment, a plaintiff must produce evidence showing that (1) he is a member of a protected class, (2) he was subjected to unwelcome harassment, (3) the harassment was motivated by his membership in a protected class, (4) the harassment "affected a term, condition, or privilege of employment," and (5) the employer knew, or should have known, of the harassment and failed to take action. *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 482 (6th Cir. 2020). Harassment affects a term, condition, or privilege of employment only if it is "severe" and "pervasive." *Phillips v. UAW Int'l*, 854 F.3d 323, 327 (6th Cir. 2017) (citation omitted). To determine whether treatment qualifies as severe or pervasive, courts consider the totality of the alleged harassment, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Khalaf*, 973 F.3d at 482 (quoting *Phillips*, 854 F.3d at 327).

The district court found that Thomas presented no evidence to support his allegations that complaints were made against him because of his male gender or heterosexual orientation and no evidence to show that the harassment he complained of was sufficiently severe or pervasive.[1] On appeal, Thomas argues that "[v]erbal or written comments of a sexual nature" qualify as harassment. But the two complaints that served as the basis for Thomas's termination were not made by coworkers; rather, they were made by park visitors. There is some evidence in the record to suggest that Thomas's female coworkers had complained that he seemed "creepy" and that he made them feel uncomfortable. Thomas also testified at an EEOC hearing that some of his female coworkers seemed to avoid him and "seemed weird around [him]." But Thomas himself acknowledged that he did not perceive this avoidance as harassment, and the district court correctly found that this conduct is not sufficiently "severe" and "pervasive" to create a hostile work environment. *Phillips*, 854 F.3d at 327. Thomas has not shown that the district court erred by granting summary judgment to Haaland on this claim.

For the foregoing reasons, we **DENY** Thomas's motions and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[1] The district court construed Thomas's fourth amended complaint as alleging that he was harassed based on both his gender and his sexual orientation.

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 04/04/2023.

Case Name: Christopher Thomas v. David Bernhardt, et al
Case Number: 22-5330

Docket Text:
ORDER filed : We DENY Thomas's motions and AFFIRM the district court's judgment. Decision not for publication, pursuant to FRAP 34(a)(2)(C). Mandate to issue. Richard F. Suhrheinrich, Circuit Judge; John B. Nalbandian, Circuit Judge and Eric E. Murphy, Circuit Judge. [6829494-2], [6844550-2], [6844628-2], [6905215-2], [6910515-2], [6923188-2], [6924947-2], [6941420-2], [6853338-2], [6861451-2], [6862973-2], [6862980-2], [6867853-2].

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Christopher Dalton Thomas
411 Little Richland Creek Road
Morgantown, KY 42261

A copy of this notice will be issued to:

Mr. Michael D. Ekman
Mr. James J. Vilt Jr.

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DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5330

CHRISTOPHER DALTON THOMAS,

Plaintiff-Appellant,

v.

DEBORAH HAALAND, United States Secretary of the Interior, et al.,

Defendants-Appellees.

Before: SUHRHEINRICH, NALBANDIAN, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Bowling Green.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:19-CV-00157-GNS

CHRISTOPHER D. THOMAS — PLAINTIFF

v.

DEB HAALAND, UNITED STATES SECRETARY OF THE INTERIOR — DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's Fourth Amended Complaint or in the Alternative Motion for Summary Judgment (DN 122), Plaintiff's Motion for Impeachment (DN 129), Plaintiff's Motion for Hearing (DN 134), Plaintiff's Motion to Postpone Summary Judgment Awaiting Discovery Requests (DN 143), Plaintiff's Motion for Summary Judgment (DN 144), Plaintiff's Request to Withdraw Motion for Summary Judgment (DN 147), Plaintiff's Motion to Substitute (DN 148), and Plaintiff's Motion to Clarify Discrepancies Regarding Summary Judgment (DN 150). The motions are ripe for adjudication. For the reasons stated below, Defendant's motion is **GRANTED**, and Plaintiff's motions are **DENIED AS MOOT**.

I. STATEMENT OF FACTS AND CLAIMS

As an initial matter, Plaintiff Christopher Thomas ("Thomas"), proceeding *in forma pauperis*, asserts:

> Most of my claims fall under the Civil Rights Act of 1964 and Title 7 including Gender Based Discrimination, Retaliation, Disparate Treatment and Impact, Hostile Work Environment, and Harassment. Other claims involve the fact MACA did not offer a Constitutional Right to Reply in terminating me for false causes, and placed defamatory "Labels" in my employment records. Additional claims include potential violations of the Whistleblower Act and Americans with Disabilities Act.

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> There are also apparently two forms of retaliation at play. . . . I'm seeking to discredit three rulings with the EEOC and Kentucky Personnel Board.

(Fourth Am. Compl. 2, DN 118). As this Court has previously noted, a Kentucky Circuit Court is the appropriate forum for review of decisions of the Kentucky Personnel Board ("KPB"). (Mem. Op. & Order 7, DN 40). Thomas brings claims under the Whistleblower Protection Act, the False Claims Act, 18 U.S.C. § 1001, and 42 U.S.C. §§ 1981, 1983, and 1985, and alleges a constitutional right to a meaningful reply opportunity and "labels." (*See* Fourth Am. Compl.). In its August 5, 2021, Order, the Court held that Thomas' Fourth Amended Complaint would only be permitted to the extent it expounds upon his remaining causes of action pursuant to Title VII and the Americans with Disabilities Act ("ADA"). (Mem. Op. & Order 5, DN 117). Therefore, only Thomas' claims under Title VII and the ADA will be addressed.

In 2013, Thomas was hired by the Kentucky Division of Forestry ("KDF") and was the only male on a five-person crew. (Fourth Am. Compl. 5). The crew was treating Hemlock trees with pesticide at Natural Bridge State Park, and Thomas asserts that he expressed concerns over the pesticide use. (Fourth Am. Compl. 5). While working with his crew on a hillside, he claims he fell 20 feet while carrying jugs of chemicals. (Second Am. Compl. 11, DN 34).

A member of Thomas' crew, Brittany Shroll ("Shroll"), complained that when she went into the forest to relieve herself, she saw Thomas looking towards her direction and he seemed to have taken a photo of her using the bathroom. (EEOC Hr'g Tr. 408:2-8, July 11, 2019, DN 21). According to Thomas, he was called to headquarters in Frankfort, told of the accusation, refuted it, and was terminated for "no fault." (Second Am. Compl. 11-12). Steven Kull, Assistant Director of Forestry, stated that Thomas' position at the KDF was already precarious due to poor job performance prior to the allegation by Shroll. (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 8, DN 83-2). Thomas alleges the accusation "was an attempt to get [him]

terminated in response to [his] whistleblower complaint." (Second Am. Compl. 12). He was employed with the state for less than a month. (EEOC Hr'g Tr. 404:12-15).

Thomas appealed his termination in 2014 to the KPB. (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 3). He alleged he was terminated due to his complaint of illegal pesticide use and that there was a culture of preferential treatment for women. (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 11-12). The KPB concluded that Thomas was an at-will employee for the KDF and that he had not produced sufficient evidence to suggest he had been improperly terminated. (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 10-11). The KPB found that Thomas provided no evidence of discrimination or unlawful preferential treatment based upon gender, concluding that he "failed to produce any probative evidence that the Division of Forestry's decision to terminate him, without cause, was arbitrary or that he was a victim of any disparate discriminatory conduct." (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 11-12).

On June 25, 2017, Thomas began working at Mammoth Cave National Park ("the Park") in a temporary position as a Visitor Use Assistant. (Lewis Aff. 4). His responsibilities included fee collection, answering the phones, visitor assistance, and the junior range program for kids. (EEOC Hr'g Tr. 324:16-25-325:1-6). On July 13, 2017, Thomas was off-duty and eating in the cafe at the Park when he had an interaction with a woman to whom he introduced himself and told her children about the junior range program. (EEOC Hr'g Tr. 20:3-21:4). Doy Russell ("Russell"), a Park law enforcement officer, testified that the woman complained to the hotel clerk, stating she had an interaction in the cafe with an individual who "seemed a little off." (EEOC Hr'g Tr. 75:14-23). The woman explained the man told her he was single and that she was concerned for her

safety because she thought he was videotaping her or taking a photo. (EEOC Hr'g Tr. 75:14-23, 80:12-15). After the incident, the woman provided a complaint, which stated:

> On 7-13 at 6:30 p.m. at the Mammoth Hotel, was sitting next to a gentleman who seemed off. He was pointing his cell phone at me and my family, including holding his phone down at his feet . . . seemingly videotaping or taking a photo. He tried to talk to us, and then left quickly after he ate. . . . [S]itting in his vehicle (light blue sedan[)] for a few minutes. He drove away. I felt a little unsettled being alone with three kids and I wanted the hotel to know.

(EEOC Hr'g Tr. 217:18-218:3 (internal quotation marks omitted)). Park law enforcement investigated for criminal activity but found none. (EEOC Hr'g Tr. 102:9-25-103:1). The next day, Park Guide Christopher Clark reported to management that another female customer complained about Thomas, saying he was "too friendly" and "snarky." (EEOC Hr'g Tr. 30:12-24). Law enforcement investigated Thomas and found his KPB appeal online through a routine Google search, which revealed the previous accusation against Thomas at the KDF. (EEOC Hr'g Tr. 91:4-25, 93:1-8). Thomas was terminated on July 27, 2017. (First Am. Compl. Exs., at 4, DN 5-1). An Equal Employment Opportunity Commission hearing was held on July 11, 2019. (EEOC Hr'g Tr. 1). Deb Haaland ("Defendant"), the current Secretary of the Interior, is the only remaining Defendant in this action.

II. JURISDICTION

Jurisdiction over this action is based on federal question. *See* 28 U.S.C. § 1331.

III. STANDARD OF REVIEW[1]

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

[1] Because Defendant's motion was styled as a motion to dismiss or, alternatively, a motion for summary judgment, Thomas was on notice that the motion could be treated as a summary judgment motion, and he filed a response. In ruling on the pending motion, the Court will address the motion under Fed. R. Civ. P. 56.

56(a). "[A] party moving for summary judgment may satisfy its burden [by showing] that there are no genuine issues of material fact simply 'by pointing out to the court that the [non-moving party], having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.'" *Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005) (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)). Similarly, the movant may meet its burden by offering evidence negating an essential element of the non-moving party's claim. *See Dixon v. United States*, 178 F.3d 1294, 1999 WL 196498, at *3 (6th Cir. 1999).

After the movant either shows "an absence of evidence to support the nonmoving party's case" or affirmatively negates an essential element of the non-moving party's claims, the non-moving party must identify admissible evidence that creates a dispute of fact for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-8 (emphasis in original). While the Court must view the evidence in a light most favorable to the non-moving party, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Furthermore, "a nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations or subjective evidence." *Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return

a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (internal citation omitted. In other words, Thomas may not rely only on his own subjective version of the facts as sufficient evidence to proceed past the summary judgment stage. The question is whether any evidence supports Thomas' version of events. *Mays v. Pynnonen*, No. 2:17-CV-167, 2019 WL 4439367, at *2 (W.D. Mich. Sept. 17, 2019).

IV. DISCUSSION

As an initial matter, Thomas asserts that much of Defendant's evidence amounts to inadmissible hearsay. (Fourth Am. Compl. 34). The Federal Rules of Evidence define hearsay as an out of court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Defendant responds that the out-of-court statements made by female patrons of the Park and various employees are offered "to demonstrate why the Park officials responded as they did." (Def.'s Mot. Summ. J. 18). As courts readily recognize, an "out-of-court statement may be admitted over a hearsay objection if the statement is offered not for the truth of the matter asserted in the statement but merely to show that a party had knowledge of a material fact or issue," i.e., knowledge of complaints about Thomas. 30B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 6719 (2020 ed. Apr. 2020 update) (footnotes omitted). In this instance, the out-of-court statements are offered to explain why the Park conducted an investigation of Thomas. Out-of-court statements offered to explain a party's actions favor admissibility in this case. The EEOC transcript is also admissible. Under F.R.E. 803(8)(c), public records and reports which detail "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible, even if hearsay, so long as "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." *Id.* Thomas offered the EEOC transcript as evidence (DN 21) and has not challenged its authenticity.

He testified at the hearing and also questioned witnesses. Furthermore, any witness' testimony at the EEOC hearing could be admissible evidence at trial, either through the declarants offering live testimony, or if a witness were unavailable, as former testimony under Fed. R. Evid. 804(b)(1). Accordingly, testimony from the EEOC hearing transcript will be considered.

A. Title VII

1. *Disparate Treatment based on Gender and Heterosexual Orientation*

Thomas claims he was subject to disparate treatment by the Park because of his protected status as a heterosexual male. (Fourth Am. Compl. 13-16). Title VII protects "[a]ll personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). To prove his claim under Title VII, Thomas may put forward direct evidence, "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en banc) (citation omitted). Alternatively, he may rely on circumstantial evidence, which "is proof that does not on its face establish discriminatory animus but does allow a factfinder to draw a reasonable inference that discrimination occurred." *Id.* (citation omitted). For example, if evidence is circumstantial, "an inference is still required to connect the disciplinary measures taken by [the Park] to a bias against [heterosexual] [males]." *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 577 (Ky. 2016).

Without direct evidence of discrimination, which Thomas does not have, he must satisfy the burden shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "If a plaintiff attempts to prove its case using the *McDonnell Douglas* framework, then the plaintiff is not required to introduce direct evidence of discrimination." *Williams v. Wal-Mart*

Stores, Inc., 184 S.W.3d 492, 496 (Ky. 2005) (citing *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 349 (6th Cir. 1997)). To establish a *prima facie* case for gender and sexual orientation discrimination, Thomas is required to show that at the time of his termination: (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was otherwise qualified for the position, and (4) the adverse action was taken under circumstances giving rise to an inference of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802. If Thomas meets the *prima facie* case, the burden shifting of *McDonnell Douglas* requires "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Further, "the defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (internal quotation marks and citation omitted).

a. *Prima Facie* Case

Defendant does not dispute the first three elements of the *prima facie* case, but takes issue with the fourth element: whether Thomas' termination from the Park occurred under circumstances giving rise to discrimination. (Def.'s Mot. Summ. J. 23, DN 122). Defendant argues Thomas' employment with the Park was terminated due to allegations made about his behavior which correlated with separate reports from his employment with KDF. (Def.'s Mot. Summ. J. 24). Regarding the fourth prong, the Sixth Circuit has stated:

> [A] showing that similarly situated non-protected employees were treated more favorably than plaintiff is not a requirement but rather an alternative to satisfying the fourth element of the prima facie case—a plaintiff may satisfy the fourth element by showing either that the plaintiff was replaced by a person outside of the protected class or that similarly situated non-protected employees were treated more favorably than the plaintiff

Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002) (internal quotation marks omitted) (quoting *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1247 (6th Cir. 1995)).

Thomas has not shown a similarly situated female or non-heterosexual person was treated more favorably or that he was replaced with a female or non-heterosexual person once he was terminated. Thomas states that similarly situated persons include "female employees, female Park patrons (i.e. off-duty), female coworkers in the KPB Appeal, and DOI employees who previously filed discrimination complaints." (Pl.'s Resp. Mot. Dismiss Mot. Summ. J. 24). Thomas points to no specific examples of a similarly situated female or non-heterosexual employee being treated more favorably by the Park. Moreover, there is no evidence cited to support the inference that Thomas was terminated due to his status as a man. Thomas points to no *factual* basis other than his own beliefs that he was subjected to discrimination. He provides no evidence or citation to the record that he was replaced by someone outside of the protected class, or that anyone outside of the protected class who was similarly situated was treated more favorably.

The transcript of the EEOC hearing, during which Thomas was provided the opportunity to question and cross-examine Park personnel, provides no basis for inferring discriminatory intent or motive. Thomas repeatedly states that the allegations are false, which he attributes to discriminatory intent. (*See generally* Pl.'s Resp Def.'s Mot. Dismiss). He has pointed to no facts, other than his own version of events, which indicate the allegations are false. The fact that the KPB found insufficient evidence to conclude Thomas was guilty of criminal wrongdoing does not establish that the allegations were manufactured for a discriminatory purpose. As noted above, the salient fact is that there were various similar claims made regarding Thomas' conduct, each completely independent from the others, and no evidence that the Park somehow concocted the complaints.

Thomas also claims he was denied gym access because of his status as a heterosexual male. (Fourth Am. Compl. 19). Lack of gym access, however, is not an adverse action. *See Galeski v.*

City of Dearborn, 435 F. App'x 461, 468 (6th Cir. 2011). Regardless, Thomas' claim still fails. David Wyrick, Chief of Interpretation and Visitor Services for the Park, recalled signing the authorization for the keys to be released to Thomas for gym access. (EEOC Hr'g Tr. 298:21-22, 300:5-10). Thomas' own prior testimony contradicts his claim that he was denied gym access because of his disability. During EEOC hearing testimony, Thomas testified: "I wouldn't say that [Coleman England], like, intentionally, like, prevented me from using the gym or something. I don't—it's—it wasn't—he was new, and he didn't even have access to the key." (EEOC Hr'g Tr. 337:22-25). This coincides with the testimony of Coleman England ("England"), who testified that "[the request for gym access] might've been in the first or second week he started. And then we sent in the request and then—I was brand new in the position. So I think it—these things taken a little bit—some—and then, time we get back, you know, I think it just takes a while." (EEOC Hr'g Tr. 283:12-16).

Thomas also claims he was denied volunteer opportunities due to discriminatory animus. (Fourth Am. Compl. 19). An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Unless the volunteer opportunities denied Thomas were stepping-stones to career advancement, denial of the opportunity is not an adverse employment action. *Martin v. D.C.*, 78 F. Supp. 3d 279, 311 (D.D.C. 2015).[2] Thus, Thomas has failed to establish a *prima facie* case of disparate treatment based on his gender or sexual orientation.

[2] The lack of volunteer opportunities is inconsequential. England stated that he recalled Thomas asking to volunteer outside of the visitor's center and with the Department of Fish and Wildlife. (EEOC Hr'g Tr. 287:20-288:4). In response to this request, England testified: "I said 'that's fine.

b. Employer's Legitimate, Nondiscriminatory Reason

Even if Thomas could satisfy the *prima facie* case, his claim would still fail. Representatives of the Park state that Thomas was fired due to the similarity between the behavior discussed in the KPB appeal and the reports received regarding Thomas at the Park was the motivating factor in his terminatio[redacted]. England, Thomas' direct supervisor, testified that "I'll go with the incident at the park and the complaint and then the previous incident with the State. I think this together is how we came to the decision . . . [to terminate Thomas' employment]." (EEOC Hr'g Tr. 256:4-7). England explained that "with all the incidents that happened, one at the Park, the complaints, and the previous one with the State, we just thought it was in the best interests. That's how we came to our decision on that." (EEOC Hr'g Tr. 259:12-15). The similarities of the allegations in the KPB hearing to those complained of at the Park was what the basis of the Park's decision to terminate Thomas. (EEOC Hr'g Tr. 275:17-22). This nondiscriminatory explanation satisfies the Park's burden under *McDonnell Douglas*.

c. Pretext

Defendant having provided a nondiscriminatory basis for the Park's adverse employment action, "the burden shifts back to the plaintiff to show that the reason put forth by the defendant is pretextual, which can be done by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003) (citation and

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Once we get you on board and we have enough staff available to send them out.' And I said I would accommodate him in that when we get a chance." (EEOC Hr'g Tr. 288:4-7). Thomas then asked England if there was a reason he was not assigned often to the front desk or to collect money, to which English stated, "think, because everybody goes through—collect—you know, a process to learn the different stations." (EEOC Hr'g Tr. 289:2-11). Thomas began work on June 25, 2017. (Lewis Aff. 4). Thomas was terminated after working and training at the Park for a little over a month. (First Am. Compl. Exs., at 4).

quotation omitted). To rebut the employer's proffered reasoning, "the plaintiff must allege more than a dispute over the facts on which [his] discharge was based. [He] must put forth evidence which demonstrates that the employer did not 'honestly believe' in the proffered non-discriminatory reason for its adverse employment action." *Braithwaite v. Timken Co.*, 258 F.3d 488, 493-94 (6th Cir. 2001. The Sixth Circuit has held,

> In deciding whether an employer reasonably relied on the particularized facts then before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.

Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998).

England was involved in making the decision to terminate Thomas. (EEOC Hr'g Tr. 259:3-7). As he testified during the EEOC hearing:

> Q: . . . [D]id you actually believe I had done that [taping people with a cellphone camera]?
> A: Yes, I think that something was going on, you know, usually people don't make these types of complaints to law enforcement.

(EEOC Hr'g Tr. 262:5-9). "An employee cannot allege discrimination like a protective amulet when faced with the possibility that his preexisting disciplinary problem could lead to his termination." *Beard v. AAA of Mich.*, 593 F. App'x 447, 451 (6th Cir. 2014). Thomas provides no evidence to rebut the Park's assertion that he was not employed long enough participate in various training and volunteer opportunities or for his gym access to be fully authorized. Thomas can point to no facts or evidence which rebut the Park's honest belief that the complaints from its customers were made in good faith.

Defendant having met her burden of providing a nondiscriminatory basis for the Park's actions, Thomas' Title VII disparate treatment claim fails as he has not provided evidence to

support his allegations of discriminatory actions taken by the Park as a result of his status as a heterosexual male.

2. *Hostile Work Environment*[3]

In order to sustain a claim under Title VII for a hostile work environment, Thomas must present a *prima facie* case establishing: (1) he was a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his gender [or sexual orientation]; (4) the harassment was so severe and pervasive that it unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable because it knew or should have known of the harassment and failed to take appropriate action. *See Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999) (citation omitted).

To allege a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation omitted). A plaintiff must show the working environment was objectively and subjectively hostile or abusive. *Id.* at 21-22. "The work environment as a whole must be considered rather than a focus on individual acts of alleged hostility." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000) (citation omitted). Thomas must meet both an objective and subjective test: "the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive." *Downs v. Postmaster Gen.*, 31 F. App'x 848, 850 (6th Cir. 2002) (citing *Harris*, 510 U.S. at 2121. Thomas must present a factual showing that he was subjected to a hostile work environment. *See Duncan*

[3] Thomas also alleges a claim for harassment. However, the harassment Thomas alleges is synonymous with his more specific hostile work environment claim under Title VII.

v. Jefferson Cty. Bd. of Educ., No. 3:19-CV-00495-GNS-RSE, 2021 WL 1109355, at *4 (W.D. Ky. Mar. 23, 2021) ("Absent facts directly implicating any Individual Defendant in discriminatory conduct, Plaintiffs have failed to allege Individual Defendants engaged in any active unconstitutional behavior.").

Thomas alleges hostility primarily stemming from "manufactured" and "lurid allegations" targeting him based on his status as a heterosexual male. (Fourth Am. Compl. 19). Thomas states that he was falsely accused of sexual harassment. (Fourth Am. Compl. 19). This Court has ruled on a similar issue in *Watts v. Lyon County Ambulance Services*, 23 F. Supp. 3d 792 (W.D. Ky. 2014), *aff'd*, 597 F. App'x 858 (6th Cir. 2015), where the plaintiff claimed:

> [He] was subject to unwelcome harassment because of his gender in that the Ambulance Service . . . created a hostile work environment . . . by terminating him on the basis of false accusations of sexual harassment, which were solicited and/or known by members of the Lyon County Ambulance Service Board of Directors . . . [b]ut for the fact that he was a male, the defendants would not have contacted a former female employee to fabricate these charges.

Id. at 805-06 (second alteration in original) (internal quotation marks omitted) (internal citation omitted) (citation omitted). This Court found that the plaintiff "offered nothing more than conclusory assertions to show that he was subjected to harassment *based on his sex*." *Id.* at 806. Similarly, Thomas cannot meet the second and third prongs of the *prima facie* case in the instant action. There is no evidence that Thomas was subjected to hostilities because of his gender or sexuality. *See Stewart v. Esper*, 815 F. App'x 8, 13 (6th Cir. 2020) ("Spreading rumors . . . [is] not materially adverse." (citation omitted)); *Boykin v. Mich. Dep't of Corr.*, 211 F.3d 1268, 2000 WL 491512, at *4 (6th Cir. 2000) ("[A]ssuming the truth of these allegations, they were facially neutral and therefore not objectively indicative of harassment on the basis of plaintiff's [gender].").

Furthermore, the conduct complained of is not objectively severe. When referring to being called "creep" or "coworker avoidance" (Fourth Am. Compl. 19-20), this incident amounts to

"mere offensive utterance[s]" which do not rise to the standard of a Title VII hostile work environment claim. *Harris*, 510 U.S. at 23. The burden to prove the *prima facie* case is on Thomas as the plaintiff. *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 706 (6th Cir. 2007). Thomas "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citations omitted). Without any evidence to support the allegations that the customer complaints were fabricated or made because of Thomas' gender and sexual orientation, his hostile work environment claims fail.

B. Americans with Disabilities Act

1. Disability-Based Discrimination

Thomas fails to provide facts showing that any disability was the basis of his termination. Like his Title VII discrimination claim, the *McDonnell Douglas* burden shifting standard applies and "the plaintiff's burden at the summary judgment stage 'is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination.'" *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 703 (6th Cir. 2008) (citation omitted).

Just as Thomas provided no facts supporting his claim of gender or sexual orientation discrimination, he has not cited evidence that he was terminated based on his disability. Regardless, Defendant has established that the similarities between the complaints the Park received and the allegations from Thomas' employment with KDF as the driving force behind his termination. (EEOC Hr'g Tr. 255:6-10, 259:12-15, 262:7-13, 267:12-18; First Am. Compl. Ex. 1, at 4). Thomas testified in the EEOC hearing: "Well, if my disability makes me socially awkward. it could make people complain about me. It could contribute to bogus complaints of people—you know, if I come off the wrong way." (EEOC Hr'g Tr. 355:19-22). Russell testified that the

complainant said she felt unsafe after her interaction with Thomas when he told her he was single. (EEOC Hr'g Tr. 75:21-2). Anti-discrimination statutes do not excuse an employee from disciplinary action for "violating the employer's rules or disrupting the workplace." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Thomas cannot claim disability-based discrimination when Defendant's evidence shows he was terminated from the Park for allegations of inappropriate behavior.[4]

2. *Hostile Work Environment*

Thomas also has not proven that any alleged hostility occurred because of his disability. He asserts the hostility was due to the fact he suffers from "two spinal cord injuries . . . to lumbar and cervical spine, PTSD, and anxiety disorder." (Fourth Am. Compl. 22). Without direct evidence, the same burden shifting applies to the ADA as to Title VII, "when a plaintiff relies on indirect evidence to show discrimination in violation of the ADA . . . , the *McDonnell Douglas* burden-shifting framework applies." *Brown v. Kelsey-Hayes Co.*, 814 F. App'x 72, 79 (6th Cir. 2020) (citation omitted). Thomas must prove: (1) "[he] was disabled; (2) [he] was subject to unwelcome harassment; (3) the harassment was based on [his] disability; (4) the harassment unreasonably interfered with [his] work performance; and (5) the defendant either knew or should have known about the harassment and failed to take corrective measures." *Trepka v. Bd. of Educ.*, 28 F. App'x 455, 460-61 (6th Cir. 2002) (citations omitted).

Thomas has not met the second prong of his *prima facie* case. As evidence of alleged harassment in the workplace, Thomas points to a statement he attributes to his supervisor, Leslie Lewis, which was made in the mediation of this issue: "Oh, he's got a mental disorder." (EEOC

[4] Thomas again asserts that denial of gym access amounted to disparate treatment. This claim similarly fails here because Thomas has not established that the delay in his receipt of a gym key was motivated by discriminatory animus.

Hr'g Tr. 354:12-13). This statement, however, was in the context of litigation that occurred long after Thomas' employment ended. Thomas also claims that coworkers at the Park stated he "seemed off." (Fourth Am. Compl. 22). Either statement would not arise to the level of creating a hostile work environment: "[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment." *Harris*, 510 U.S. at 21 (internal quotation marks omitted) (internal citation omitted). Further, "[a] single incident of explicit reference to [a plaintiff's] disability is not sufficiently severe to constitute harassment under our precedents." *Trepka*, 28 F. App'x at 461.

Thomas alleges further hostility and claims"

> It appears to me that MACA had forged the [gym] authorization, but all I can say is it made zero sense. In any case I was denied access by withholding a key. I think this was indirectly linked to my disability. Basically, some of the females said I was odd so MACA denied multiple opportunities. This was partially due to my disability as far as I can see.

(Fourth Am. Compl. 23). Thomas has not shown that he was subject to a hostile work environment because of his disability.[5]

3. Retaliation

Finally, Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Thomas "may prove unlawful retaliation by presenting direct evidence of such retaliation or by establishing a prima facie case under the *McDonnell Douglas* framework."

---

[5] As discussed above, Thomas' gym access, if even considered an adverse action, was delayed due to his supervisor's need to adjust to his new role, rather than any discriminatory purpose. (EEOC Hr'g Tr. 283:12-16). Accordingly, Defendant is entitled to summary judgment on the hostile work environment claim.

Taylor v. Geithner, 703 F.3d 328, 336 (6th Cir. 2013) (quoting *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir. 2003)). Thomas does not identify evidence of direct discrimination and therefore must demonstrate by a preponderance of the evidence: (1) he engaged in a Title VII protected activity; (2) the employer knew of the protected activity; (3) the employer took an adverse action against Thomas; (4) a causal connection between the adverse employment action and the protected activity. *Id.* at 336 (citing *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 995-96 (6th Cir. 2009). The desire to retaliate must have been the but for cause of the challenged action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 354 (2013).

Thomas asserts that he engaged in protected activity by "opposing Gender Based Discrimination" when he filed the appeal with the KPB. (Fourth Am. Compl. 8-9).[6] Opposing gender discrimination is a protected activity under Title VII. 42 U.S.C. § 2000e-3. The decision of the KPB reveals that Thomas asserted gender discrimination in response to his termination from the KDF. (Def.'s Resp. Pl.'s Mot. Prohibit Use DOI Allegations Ex. 2, at 11). Though it is undisputed that Thomas' employer was aware of the KPB appeal and decision, Thomas fails to identify causation linking his termination from the Park to his gender discrimination claim before the KPB. Any evidence of causation must be "sufficient to raise the inference that [the plaintiff's] protected activity was the likely reason for the adverse action." *Zanders v. Nat'l R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990) (citation omitted).

"In determining whether there is a causal relationship between a plaintiff's protected activity and an allegedly retaliatory act, courts may consider . . . whether there is a temporal

[6]Thomas also claims retaliation against him for, "opposing dangerous and illegal use of pesticides in appeal 2013-291" under 42 U.S.C. § 1987. (Fourth Am. Compl. 8). In accordance with the Court's prior Memorandum and Opinion Order, the only claims remaining are brought under Title VII and the Americans with Disabilities Act. (Mem. Op. & Order 4, DN 117). As this claim further does not fall under the protections of Title VII, it is summarily dismissed.

connection between the protected activity and the retaliatory action." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516-17 (6th Cir. 2009) (citing *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 413 (6th Cir. 1999)). Although Thomas was fired after the Park learned of the appeal of his termination from the KDF, there is no proof that any of the decisionmakers was aware of his gender-based discrimination claim. Indeed, the only significance attributed to the KPB matter was that Thomas had been accused of inappropriate interactions with a female coworker.

To prove causation, courts also may consider "whether the employer treated the plaintiff differently from similarly situated individuals . . . ." *Barrett*, 556 F.3d at 516-17 (citing *Allen*, 165 F.3d at 413). Thomas has not pointed to any other employee who was treated differently and there are no facts indicating Thomas' appeal to the KPB motivated the Park's decision-making. "Mere personal beliefs, conjecture, and speculation" are insufficient to establish retaliatory motives in a Title VII claim. *Siegner v. Twp. of Salem*, 654 F. App'x 223, 230 (6th Cir. 2016) (quoting *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 724 (6th Cir. 2006)). Thomas confuses the Park's consideration of the concerns voiced by Thomas' female coworkers at KDF with retaliation for Thomas filing an appeal. (Pl.'s Mot. Summ. J. 36). Again, Thomas' claim is defeated because Defendant has established Thomas was fired from the Park because of the complaints made by Park visitors that were similar to the allegations involved in his termination from KDF. (EEOC Hr'g Tr. 255:6-10, 259:12-15, 262:7-13, 267:12-18; First Am. Compl. Ex. 1, at 4).

There is no evidence that the Park terminated Thomas *because* he chose to file an appeal. Thomas cannot claim that he was terminated because of discriminatory animus when there is a clear behavior-motivated explanation for the adverse action and no evidence of employer misconduct. *Beard*, 593 F. App'x at 451 (holding that "[e]ven without alleging discrimination, [the plaintiff] still would have engaged in the same conduct that directly preceded his

termination"). For these reasons, the Court will grant summary judgment for Defendant on the retaliation claim.[7]

V. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment (DN 122) is **GRANTED**, and the Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

2. Plaintiff's Motion for Impeachment (DN 129), Plaintiff's Motion for Hearing (DN 134), and Plaintiff's Motion to Postpone Summary Judgment Awaiting Discovery Requests (DN 143), Plaintiff's Motion for Summary Judgment (DN 144), Plaintiff's Request to Withdraw Motion for Summary Judgment (DN 147), Plaintiff's Motion to Substitute (DN 148), and Plaintiff's Motion to Clarify Discrepancies Regarding Summary Judgment (DN 150) are **DENIED AS MOOT**.

3. The Clerk shall strike this matter from the active docket.

Greg N. Stivers, Chief Judge
United States District Court
March 14, 2022

cc: counsel of record
Plaintiff, *pro se*

[7] Because Defendant's motion is being granted, it is unnecessary to address Plaintiff's motions, which will be denied as moot.

No. 22-5330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 21, 2023
DEBORAH S. HUNT, Clerk

CHRISTOPHER DALTON THOMAS,

Plaintiff-Appellant,

v.

DEBORAH HAALAND, UNITED STATES SECRETARY OF THE INTERIOR, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: SUHRHEINRICH, NALBANDIAN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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POTTER STEWART U.S. COURTHOUSE
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Filed: July 21, 2023

Mr. Christopher Dalton Thomas
411 Little Richland Creek Road
Morgantown, KY 42261

Re: Case No. 22-5330, *Christopher Thomas v. David Bernhardt, et al*
Originating Case No.: 1:19-cv-00157

Dear Mt.Thomas,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Michael D. Ekman

Enclosure

RENDERED: AUGUST 19, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0604-MR

CHRISTOPHER D. THOMAS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 20-CI-01007

EDUCATION PROFESSIONAL STANDARDS[1]
BOARD AND KENTUCKY PERSONNEL BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; CETRULO AND K. THOMPSON, JUDGES.

CETRULO, JUDGE: Christopher D. Thomas ("Thomas"), *pro se*, appeals from the order of the Franklin Circuit Court dismissing his claims against the Education

[1] We utilize the spelling of Education Professional Standards Board as it appears in the record on appeal.

D

Professional Standards Board ("Education Board") and the Kentucky Personnel Board ("Personnel Board"). Finding no error, we affirm.

BACKGROUND

We recognize the right to represent oneself *pro se* in certain legal matters. *Taylor v. Barlow*, 378 S.W.3d 322, 326 (Ky. App. 2012). Additionally, we appreciate "the importance of hearing cases on the merits and preserving the constitutional right to an appeal[.]" *Ky. Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015). Therefore, we have done our best to find all applicable legal arguments and to discover the *relevant* facts. However, our review is limited to the *specific order on appeal* as it relates to the *named* Appellees, the Education Board and the Personnel Board.

Thomas admits to being terminated from his position at the Kentucky Energy and Environment Cabinet ("Cabinet")[2] in 2013. He appealed that termination to the Personnel Board, Appeal No. 2013-291 ("Forestry Appeal"). He also admits to being terminated from Mammoth Cave National Park ("Mammoth Cave") in 2017. While both terminations were a result of alleged misconduct, he contests the validity of those terminations and has had other pending legal actions – in state and federal court – as a result of those terminations.

[2] This position, specifically, was within the Kentucky Division of Forestry, a department within the Kentucky Energy and Environment Cabinet.

In February 2019, Thomas completed an application for an emergency substitute teaching certificate. The application included a Character and Fitness section which asked, "Have you ever resigned, entered into a settlement agreement, or otherwise left employment as a result of [an] allegation of misconduct?" Thomas answered "no." The application was approved, and he was issued an emergency certificate for substitute teaching. The certificate expired, without issue, in June 2019.

In September 2019, Thomas again applied for an emergency certificate for substitute teaching. He reported no new information, and as the Education Board had already reviewed his information, his application was processed and approved. Approximately one month later, in October 2019, Thomas self-reported – to the Education Board – his termination from the Cabinet in 2013 and the resulting Forestry Appeal. The Education Board reviewed the matter and – upon a determination that a violation of KRS[3] 161.120 may have occurred – initiated an investigation. *Education Board Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983* ("Administrative Action"). Through the course of the Administrative Action, the Education Board determined that Thomas failed to report two previous employment terminations on both of his applications for certification. Despite this determination, the Education Board stated that the

[3] Kentucky Revised Statute.

charges were dismissed without disciplinary actions, and Thomas's temporary teaching certificate remained active throughout the review process.

In December 2020, Thomas filed a complaint with the Franklin Circuit Court against the Education Board and the Personnel Board. Therein, Thomas made numerous claims chiefly originating from the Education Board's Administrative Action (relating to his emergency teaching certificate applications) and the Personnel Board's Forestry Appeal (challenging his 2013 termination). In March 2021, the circuit court held a hearing[4] on the matter, and in April the Franklin Circuit Court addressed all open motions. The circuit court: a) granted the Personnel Board's motion to dismiss; b) granted the Education Board's motion to dismiss; c) denied Thomas's motion to amend the complaint; d) denied his motion to dismiss the Education Board's Administrative Action; and e) denied his motion for extension of time.

ANALYSIS

On appeal, Thomas argues numerous claims, some applicable, others not; most of Thomas's appellate brief is spent arguing the validity of the terminations, a matter beyond the scope of this review. Relevantly, it appears Thomas is challenging the circuit court order as it relates to the two granted motions to dismiss; accordingly, we will address each motion to dismiss in turn.

[4] A video copy of the hearing was not included in the record on appeal.

A. Personnel Board

We agree with the circuit court that "[i]t is difficult to ascertain what specific claims" Thomas is arguing but it appears that he is "taking issue with the July 16, 2014, Final Order issued by the Personnel Board and making arguments related to its validity and publication."[5] More specifically, it appears Thomas is suing the Personnel Board because the online records of the action are causing him harm. While Thomas argues that these claims are new and ongoing, we agree with the circuit court that they are rooted in the final order of the Personnel Board.

After Thomas's 2013 termination, he filed his Forestry Appeal based on gender discrimination. Due process was satisfied: after proper notice and a hearing, the Personnel Board's final order determined that Thomas failed to establish that gender discrimination was the cause of his probationary dismissal. The Personnel Board's May Order informed Thomas that if he was dissatisfied, there were steps he could take to contest the Personnel Board's decision:

> Pursuant to KRS 13.B110(4), each party shall have fifteen (15) days from the date of this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. . . . Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

[5] The July 16, 2014 final order affirmed – with one alteration – the findings of fact, conclusions of law, and recommended order of the hearing officer dated May 19, 2014 ("May Order").

. . . .

> Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

However, it appears Thomas did not file any of the exceptions and/or allegations specifically authorized by KRS 13B.150 to preserve his appeal. Neither did he contest the final order in Franklin Circuit Court until he filed his complaint in December 2020, more than six years after the Personnel Board finalized the appeal. Consequently, the circuit court found that Thomas's time to appeal the final order had elapsed and his claims must be dismissed due to a lack of jurisdiction. Jurisdiction is a question of law, and our review is *de novo*. *Commonwealth v. B.H.*, 548 S.W.3d 238, 242 (Ky. 2018) (citation omitted).

Now, Thomas states, "I had no means or obligation to continue appealing a 'no-fault' termination simply to prove discrimination. I cannot be faulted for attempting to walk away from the traumatic ordeal." While "walking away" was a legitimate personal choice, that choice now bars him from pursuing these various claims against the Personnel Board and appealing the Personnel Board's final order.

KRS 13B.140(1) allows *30 days* to appeal all final orders of an agency to the appropriate circuit court. Strict compliance under these circumstances is required. *Bd. of Adjustments of City of Richmond v. Flood*, 581

S.W.2d 1, 2 (Ky. 1978). Thomas attempts to defend his delay by stating that he did not know the final order would be posted on the Personnel Board's website until his 2017 termination from Mammoth Cave.[6] However, timing aside, the Personnel Board posted that final order on its website in accordance with KRS 18A.070(5)[7] and KRS 18A.095(27).[8] We agree with the circuit court that "records of the Personnel Board are public record." *See* KRS 18A.070(5). Therefore, we agree with the Franklin Circuit Court that Thomas is not entitled to the relief sought and the Personnel Board's motion to dismiss was properly granted.

B. Education Board

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

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[6] Albeit unnecessary, Thomas does not explain his delay between learning this in 2017 and filing his action in circuit court in late 2020.

[7] "All records of the board shall be public records and open to public inspection as provided in KRS 61.870 to 61.884." KRS 18A.070(5).

[8] "After a final decision in a contested case has been rendered by the last administrative or judicial body to which the case has been appealed, the board shall make the decision available to the public in electronic format on its Web site and shall organize the decisions according to the statutory basis for which the appeal was based." KRS 18A.095(27).

Skeens v. Univ. of Louisville, 565 S.W.3d 159, 160 (Ky. App. 2018) (quoting *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010)).

The Education Board launched the Administrative Action because Thomas failed to honestly report his prior terminations during the certification process. Thomas's failure constituted a violation of the Professional Code of Ethics for Kentucky Certified School Personnel pursuant to KRS 161.120 and 16 KAR[9] 1:020. Thomas contends that the two terminations were not valid, and therefore he had no obligation to report them to the Education Board. Although his argument is a tangled web, it appears from the record that he is under the misconception that the Education Board moved forward with the review process for reasons other than his lack of candor. "The [Education Board] formed their derogatory charges and allegations without having sufficient knowledge to do so and refused to acknowledge the appeals were protected. I could not defeat the [Education Board's] frivolous and baseless charges. . . . The [Education Board's] allegations are fraudulent, no matter where they originated." It is unclear what "baseless charges" Thomas refers to; and it appears that he fails to recognize the error of his omission. Despite this, after the Education Board's investigation, it drafted an agreed order allowing Thomas to continue teaching if he completed an ethics course, an educator preparation program, and a two-year probationary period

[9] Kentucky Administrative Regulation.

without further disciplinary action. It is unclear from the record why Thomas did not sign and agree to that settlement if he wished to remain teaching.

Thomas has not shown, in any way, that the Education Board acted in violation of Kentucky law. The Education Board may act within KRS 161.120 when taking disciplinary actions relating to teaching certificates:

> [T]he [Education Board] may revoke, suspend, or refuse to issue or renew. . . any certificate or license issued under any previous law to superintendents, principals, teachers, substitute teachers, interns, supervisors, directors of pupil personnel, or other administrative, supervisory, or instructional employees for . . .
>
> > (i) Making, or causing to be made, any false or misleading statement or concealing a material fact in obtaining issuance or renewal of any certificate[.]

KRS 161.120(1).

Additionally, Thomas challenges the circuit court's determination that he failed to establish a cause of action for defamation and failed to state a claim upon which relief can be granted because the Education Board is entitled to immunity. However, the circuit court addressed these issues thoroughly, and, upon review, we agree with its disposition. As such, there is no need to expound upon its analysis; and accordingly, we adopt its analysis as follows:

> First, the [Education Board] claims that it is entitled to immunity in this action. The Court agrees. "State agencies performing government functions are clothed in immunity." *Jacobi v. Holbert*, [553] S.W.3d 246, 254

(Ky. 2018) (citing *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007)). The [Education Board] correctly identified the three (3) factors set forth in *Jacobi* that must be used to identify if the Education Board is a state agency: (1) is the [Education Board] a legislatively-created body; (2) is the [Education Board] performing an essential governmental function, rather than a proprietary function; and (3) is the [Education Board] supported by the state treasury. *Id.* at 254-56.

The [Education Board] is clearly a legislatively-created body that is performing an essential governmental function. KRS 161.028 provides:

> The [Education Board] is recognized to be a public body corporate and politic and an agency and instrumentality of the Commonwealth, in the performance of essential governmental functions.

KRS § 161.028(1). Further, in affirmation that the [Education Board] is performing an essential governmental function, by initiating the administrative hearing process, the [Education Board] is fulfilling its statutorily mandated duties. Anyway, "[a] proprietary function is of the type normally engaged in by business or corporations and will likely include an element of conducting an activity for profit." *Jacobi*, 533 S.W.3d at 255 (quoting *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 804 (Ky. 2009) (citing *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003))). The Court agrees with the [Education Board] that by initiating the administrative action, giving [Thomas] due process before taking any statutorily-authorized action against him, the [Education Board] did not engage in a proprietary function. Lastly, the state treasury supports the [Education Board]. *See* 2020 Ky. Act ch 92. The [Education Board] is part of the Department of Education, which receives its funding from the General Fund, the Restricted Fund, and from

Federal Funds. Accordingly, the Court finds that the [Education Board] is entitled to immunity in this matter.

Moreover, the [Education Board] reasons that [Thomas] fails to state an actionable claim for defamation. The Court agrees. The [Education Board] correctly identified the four (4) elements required to establish a cause of action for defamation:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm cause[d] by the publication.

Toler v. Süd-Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014) (quoting Restatement (Second) of Torts § 558 (Am. Law Inst. 1977)).

The [Education Board] argues that [Thomas] has failed to identity a false and defamatory statement made by the [Education Board]. Rather, the [Education Board] asserts that [Thomas] identifies statements made by former coworkers, former superiors, hearing officers, and a federal Administrative Law Judge. The [Education Board] is correct. None of these statements are attributable to the [Education Board]. Thus, [Thomas] has failed to meet the first element.

[Thomas] has also failed to meet the second element. Administrative bodies, such as the [Education Board], that hold quasi-judicial powers, like the power to issue and sanction a professional license, are entitled to absolute privilege. This form of absolute privilege was

> confirmed in *McAlister & Co. v. Jenkins*, when the former Kentucky Court of Appeals held that because the members of the real estate commission were "expressly required by law to conduct [the] hearing and make a finding, they were entitled to the exemption afforded by the rule of absolute privilege." 284 S.W. 88, 91 (Ky. Ct. App. 1926). The *McAlister* Court noted that quasi-judicial bodies have regularly been entitled to absolute privilege to their communications or publications made while exercising these powers. *Id.* The [Education Board] initiated the administrative action in accordance with its statutory obligation. Thus, the Court agrees that its actions are protected by absolute privilege.
>
> Because [Thomas] has failed to meet the first two (2) elements of the *Toler* [test], he has failed to state a claim for defamation against the [Education Board]. Therefore, since the [Education Board] is entitled to immunity and [Thomas] has failed to state an actionable claim for defamation, the Court **GRANTS** the [Education Board's] *Motion to Dismiss*.

Accordingly, we agree with the Franklin Circuit Court that Thomas is not entitled to the relief sought and the Education Board's motion to dismiss was properly granted.

Finally, Thomas argues that the circuit court failed to address his plethora of other claims – harassment, retaliation, libel, slander, indecent exposure, reckless driving, humiliation, "allegations of fornication," "illicit phone use," violation of the Whistleblower Act, and violations of the Kentucky Civil Rights Act – but those claims are either non-legal, frivolous, related to matters outside the

order on appeal, and/or are against parties not named in this appeal; and, therefore, they are beyond the scope of this review.

CONCLUSION

For the foregoing reasons, we AFFIRM the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christopher D. Thomas, *pro se*
Morgantown, Kentucky

BRIEF FOR APPELLEE EDUCATION PROFESSIONAL STANDARDS BOARD:

BreAnna Listermann
Frankfort, Kentucky

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 20-CI-01007

ENTERED
APR 19 2021
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

CHRISTOPHER THOMAS **PETITIONER**

vs.

EDUCATION PROFESSIONAL STANDARDS BOARD

and

KENTUCKY PERSONNEL BOARD **RESPONDENTS**

ORDER

This matter is before the Court upon Respondent, the Kentucky Personnel Board's *Motion to Dismiss*; Respondent, the Education Professional Standards Board's *Motion to Dismiss*; Petitioner's *Motion to Amend Complaint*; Petitioner's *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983*; and Petitioner's *Motion for Extension of Time*. This matter was called before the Court on Wednesday, March 17, 2021. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Respondent, the Kentucky Personnel Board's *Motion to Dismiss*; **GRANTS** Respondent, the Education Professional Standards Board's *Motion to Dismiss*; **DENIES** Petitioner's *Motion to Amend Complaint*; **DENIES** Petitioner's *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983*; and **DENIES AS MOOT** Petitioner's *Motion for Extension of Time*.

E

STATEMENT OF FACTS

Petitioner initiated this action against Respondents, the Educational Professional Standards Board ("the EPSB") and the Kentucky Personnel Board ("the Personnel Board"). He alleges various claims against both Respondents generally stemming from Personnel Board Appeal No. 2013-291, issued on July 16, 2014, and a pending matter before the EPSB, Agency Case No. 1910983, Administrative Action No. 20-EPSB-0067. The EPSB and the Personnel Board each filed a motion to dismiss Petitioner's claims. Petitioner also filed a *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983* and *Motion to Amend Complaint*. The case was called before the Court on Wednesday, March 17, 2021. Following the March 17, 2021, hearing, Petitioner filed a *Motion for Extension of Time* and a filed a second copy of his *Motion to Amend Complaint*. The Court will address each motion in turn.

ANALYSIS

I. Petitioner's *Motion for Extension of Time*

At the March 17, 2021, hearing, the Court allotted Petitioner ten (10) days following the hearing to file any responses or documents that he believed necessary. The Court indicated that it would then take the matter under submission. Petitioner filed the above stated motion seeking thirty (30) days instead of ten (10) days to complete his filings. At the time the Court is issuing this Order, more than thirty (30) days have passed since March 17, 2021. Accordingly, the Court finds that Petitioner has had at least thirty (30) days to complete his filings, thus the Court **DENIES** Petitioner's *Motion for Extension of Time* as moot.

II. Petitioner's *Motion to Amend Complaint*

On March 15, 2021, and March 22, 2021, Petitioner filed motions seeking to amend his complaint. It is difficult to ascertain what specific claims Petitioner is trying to add to his Complaint. Rather, upon review of his *Motion*, it is evident that he is again taking issue with the July 14, 2016, Final Order issued by the Personnel Board and making arguments related to its validity and publication. As discussed below in Sections III, IV, and V, the time to appeal the July 14, 2016, Final Order has passed, Petitioner's remaining claims related to the Final Order and actions of the Personnel Board are barred by the statute of limitations, the Personnel Board is statutorily required to publish its records, and the Court lacks jurisdiction over the administrative action pending before the EPSB. Thus, because permitting Petitioner to amend his complaint would be futile, in the interest of judicial economy, the Court **DENIES** Petitioner's *Motion to Amend Complaint*.

III. Petitioner's *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983*

Petitioner seeks for the Court to dismiss the EPSB's pending administrative action against him, Agency Case No. 1910983, Administrative Action No. 20-EPSB-0067. Petitioner alleges that the administrative action is harassing and fraudulent. The Court does not have jurisdiction to dismiss this matter or consider Petitioner's arguments. The matter is presently pending before the administrative agency. Presently, only the administrative agency, and not this Court, possesses the authority to dismiss the administrative action. Therefore, Petitioner's *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983* is **DENIED**.

IV. Education Professional Standards Board's *Motion to Dismiss*

The EPSB asks the Court to dismiss Petitioner's claims against it for "relief under the Kentucky Human Rights Act" and "Defamation of Character Libel and harassment." The EPSB argues that Petitioner has failed to establish a cause of action for defamation and has failed to state a claim upon which relief can be granted because the EPSB is entitled to immunity.

When considering a motion to dismiss, Civil Rule 12.02 requires the Court to construe the pleadings liberally "in a light most favorable to the plaintiff" and to take all factual allegations in the complaint to be true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) quoting *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. Ct. App. 2002). In *D.F.Bailey, Inc. v. GRW Engineers Inc.*, 350 S.W.3d 818 (Ky. Ct. App. 2011), the Kentucky Court of Appeals discussed a trial court's standard of review when ruling on a motion to dismiss. "[T]he question is purely a matter of law. [...] Further, it is true that in reviewing a motion to dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision. *Id.* at 820 (internal citations omitted).

First, the EPSB claims that it is entitled to immunity in this action. The Court agrees. "State agencies performing government functions are clothed in immunity." *Jacobi v. Holbert*, 533 S.W.3d 246, 254 (Ky. 2018) (citing *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007)). The EPSB correctly identified the three (3) factors set

forth in *Jacobi* that must be used to identify if the EPSB is a state agency: (1) is the EPSB a legislatively-created body; (2) is the EPSB performing an essential governmental function, rather than a proprietary function; and (3) is the EPSB supported by the state treasury. *Id.* at 254-56.

The EPSB is clearly a legislatively-created body that is performing an essential governmental function. KRS 161.028 provides:

> The Educational Professional Standards Board is recognized to be a public body corporate and politic and an agency and instrumentality of the Commonwealth, in the performance of essential governmental functions.

KRS § 161.028(1). Further, in affirmation that the EPSB is performing an essential governmental function, by initiating the administrative hearing process, the EPSB is fulfilling its statutorily mandated duties. Anyway, "[a] proprietary function is of the type normally engaged in by business or corporations and will likely include an element of conducting an activity for profit." *Jacobi*, 533 S.W.3d at 255 (quoting *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 804 (Ky. 2009) (citing *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003))). The Court agrees with the EPSB that by initiating the administrative action, giving Petitioner due process before taking any statutorily-authorized action against him, the EPSB did not engage in a proprietary function. Lastly, the state treasury supports the EPSB. *See* 2020 Ky. Act ch. 92. The EPSB is part of the Department of Education, which receives its funding from the General Fund, the Restricted Fund, and from Federal Funds. Accordingly, the Court finds that the EPSB is entitled to immunity in this matter.

Moreover, the EPSB reasons that Petitioner fails to state an actionable claim for defamation. The Court agrees. The EPSB correctly identified the four (4) elements required to establish a cause of action for defamation:

> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting at least to negligence on the part of the publisher; and
> (d) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication.

Toler v. Süd-Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014) (quoting Restatement (Second) of Torts § 558 (Am. Law Inst. 1977)).

The EPSB argues that Petitioner has failed to identify a false and defamatory statement made by the EPSB. Rather, the EPSB asserts that Petitioner identifies statements made by former coworkers, former superiors, hearing officers, and a federal Administrative Law Judge. The EPSB is correct. None of these statements are attributable to the EPSB. Thus, Petitioner has failed to meet the first element.

Petitioner has also failed to meet the second element. Administrative bodies, such as the EPSB, that hold power quasi-judicial powers, like the power to issue and sanction a professional license, are entitled to absolute privilege. This form of absolute privilege was confirmed in *McAlister & Co. v. Jenkins*, when the former Kentucky Court of Appeals held that because the members of the real estate commission were "expressly required by law to conduct [the] hearing and make a finding, they were entitled to the exemption afforded by the rule of absolute privilege." 284 S.W. 88, 91 (Ky. Ct. App. 1926). The *McAlister* Court noted that quasi-judicial bodies have regularly been entitled to absolute privilege to their communications or publications made while exercising these powers. *Id.* The EPSB

initiated the administrative action in accordance with its statutory obligation. Thus, the Court agrees that its actions are protected by absolute privilege.

Because Petitioner has failed to meet the first two (2) elements of the *Toler*, he has failed to state a claim for defamation against the EPSB. Therefore, since the EPSB is entitled to immunity and Petitioner has failed to state an actionable claim for defamation, the Court **GRANTS** the Educational Professional Standards Board's *Motion to Dismiss*.

V. Kentucky Personnel Board's *Motion to Dismiss*

Finally, the Personnel Board moves to dismiss Petitioner's claims pursuant to KRS 13B.140(1), CR 12.02(e) and (g), and CR 19. The Personnel Board contends that dismissal is appropriate because Petitioner is essentially attacking the validity and contents of the Personnel Board's July 16, 2014, Final Order. The Personnel Board asserts that Petitioner is suing it for actions that were authorized by statute and done while the Personnel Board was performing its quasi-judicial duties. Further, the Personnel Board states that Petitioner's present claims are legally barred because they are outside of the applicable statute of limitations. Thus, the Personnel Board concludes that this Court lacks jurisdiction to now hear this matter.

The Court finds that Petitioner's claims against the Personnel Board must be dismissed. First, the Personnel Board is correct that Petitioner had thirty (30) days from July 16, 2014, to appeal the Final Order. Petitioner failed to appeal the Final Order. Accordingly, once the Final Order achieved finality, on or about August 16, 2014, the Personnel Board posted, as it does with every final order, Petitioner's Final Order to the Personnel Board's website in accordance with KRS 18A.070(5) and KRS 18A.095(27). This conduct by the Personnel Board was within its statutory duties.

Further, the Court must note that appeals of final orders from administrative agencies are not a right, but rather are a legislative grace granted by statute. Petitioner failed to timely appeal the July 16, 2014, Final Order. The Personnel Board correctly cited to *Board of Adjustment of City of Richmond v. Flood*, in which the Kentucky Supreme Court opined:

> There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, strict compliance with its terms is required. Where conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

581 S.W.2d 1, 2 (Ky. 1978). Petitioner argues that he is not attempting to appeal the July 16, 2014, Final Order. Rather, Petitioner states that he is suing the Personnel Board because the online record of the action is causing him harm. However, it is clear that Petitioner's present claims directly concern the July 16, 2014, Final Order, and that Petitioner is seeking revisions to the Final Order. The time to challenge the July 16, 2014, Order has well passed. Moreover, Petitioner seeks damages against the Personnel Board for performing its statutory duties, which is not permitted. Again, records of the Personnel Board are public record. KRS § 18A.070(5). Also, KRS 18A.095(27) specifically requires the Personnel Board to publish any final decision to the public on its website. KRS § 18A.095(27).

Lastly, Petitioner asserts a myriad of claims against the Personnel Board such as defamation, libel, harassment, and whistleblower claims. However, all claims stem from either his December 2013 termination with the Division of Forestry or the July 16, 2014, Final Order. All of Petitioner's remaining claims are time barred as the statute of limitations

for each claim has run,[1] and as discussed above, the thirty (30) day period to appeal the July 16, 2014, Final Order has long passed. Therefore, Petitioner is not entitled to the relief sought and the Kentucky Personnel Board's *Motion to Dismiss* is hereby **GRANTED.**

WHEREFORE, Respondent, the Kentucky Personnel Board's *Motion to Dismiss* is **GRANTED;** Respondent, the Education Professional Standards Board's *Motion to Dismiss* is **GRANTED;** Petitioner's *Motion to Amend Complaint* is **DENIED;** Petitioner's *Motion to Dismiss EPSB Administrative Action No. 20-EPSB-0067 Agency Case No. 1910983* is **DENIED;** and Petitioner's *Motion for Extension of Time* is **DENIED AS MOOT.**

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 19th day of April, 2021.

THOMAS D. WINGATE
Judge, Franklin Circuit Court

[1] Each of Petitioner's claims carry a statute of limitations varying between one (1) and five (5) years. As all injuries claimed stem from the July 16, 2014, Final Order, and/or publication of the Final Order, time has clearly run to bring each claim.

CERTIFICATE OF SERVICE

19th I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of April, 2021, to the following:

Hon. W. Luke Gilbert
Kentucky Department of Education
300 Sower Blvd., 5th Floor
Frankfort, Kentucky 40601

Hon. Stafford Easterling
General Counsel
Kentucky Personnel Board
1025 Capital Center Drive, Suite 105
Frankfort, Kentucky 40601

Mr. Christopher Thomas
115 Oak St.
Midway, Kentucky 40347

Amy Feldman KBM
Amy Feldman, Franklin County Circuit Court Clerk

Supreme Court of Kentucky

2022-SC-0556-D
(2021-CA-0604)

CHRISTOPHER D. THOMAS — MOVANT

V.

FRANKLIN CIRCUIT COURT
20-CI-01007

EDUCATION PROFESSIONAL STANDARDS BOARD, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Thompson, J., not sitting.

ENTERED: August 16, 2023.

CHIEF JUSTICE

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0604-MR

CHRISTOPHER D. THOMAS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 20-CI-01007

EDUCATION PROFESSIONAL STANDARDS BOARD AND KENTUCKY PERSONNEL BOARD — APPELLEES

ORDER
DENYING PETITION FOR REHEARING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; CETRULO AND K. THOMPSON, JUDGES.

Having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, the COURT ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: 12/09/2022

JUDGE, COURT OF APPEALS

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Christopher Thomas, a/k/a
Vaughn C.,[1]
Complainant,

v.

Scott de la Vega,
Acting Secretary,
Department of the Interior
(National Park Service),
Agency.

Appeal No. 2020000303

Hearing No. 470-2019-00060X

Agency No. NPS-17-0608

DECISION

On September 20, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the final action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant occupied a temporary appointment position as a Visitor Use Assistant, GS-0303-04, at Mammoth Cave National Park in Kentucky. On October 31, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment based on sex (male), physical disability (spinal injury, anxiety disorder), and in reprisal for prior protected EEO activity when: (1) a false complaint of sexual harassment was filed against him; (2) he was subjected to an interrogation by National Park Service (NPS) Law Enforcement; (3) he was denied volunteer

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

opportunities in the science department, specifically with water sampling; (4) his coworkers avoided him; (5) his schedule was drastically changed; (6) he was denied access to the gym; (7) management failed to provide a copy of the complaint against him and pictures as he requested in his Freedom of Information Act (FOIA) request; and (8) he was terminated from his temporary appointment of Visitor Use Assistant, GS-0303-04.

After the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. The AJ held a hearing on July 11, 2019 and issued a decision on August 8, 2019, finding that Complainant was not subjected to discrimination or reprisal as alleged. When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

FACTUAL FINDINGS

On June 25, 2017, the Agency appointed Complainant to the position of Visitor Use Assistant, a temporary appointment not to exceed September 16, 2017. Complainant's work unit, Fee Management, is part of the Division of Interpretation and Visitor Services. During the relevant timeframe, the unit included 21 employees. Eight employees, including Complainant, were Seasonal, and seven were Career Seasonal. Of the 21 employees, five were male.

An NPS Law Enforcement Ranger (NPSR1) (male), testified a call came in to Law Enforcement from the Park hotel during the evening of July 13, 2017, reporting that a visitor (Accuser1) (female) had been made to feel unsafe in a restaurant because an individual appeared to take pictures of her from under the table while trying to engage her in conversation. The hotel clerk who called in the report added she was concerned about this visitor. NPSR1 further indicated he went to the hotel with two other officers in response to this call and talked to the clerk, who gave him the room number of Accuser1. NPSR1 and the other officers went to Accuser1's room, where she gave a statement indicating she was in the restaurant with her three children, sitting next to "a gentleman who seemed off" and appeared to be pointing a cell phone at her and her family from under the table, seemingly videotaping or taking photos. NPSR1 also stated that he asked Accuser1 if she could describe the man in the restaurant, at which time she showed him pictures she had taken of him during the incident for identification purposes. NPRS1 recognized Complainant as a new employee with whom he had once spoken briefly. NPRS1 recalled Accuser1 explaining that she told her children they were meeting their father, even though this was not the case, so that Complainant would think she was not at the Park alone. NPRS1 emphasized he "had no reason not to believe" what Accuser1 had told him.

On July 14, 2017, an NPS employee who worked as a tour guide relayed to NPSR1 that a park visitor (Accuser2) (female) verbally stated that she perceived Complainant as "overly friendly, almost too friendly, and smirky." NPSR1 testified that Complainant fit the description of the employee in question given by the visitor. Accuser2 declined to submit a report.

On July 22, 2017, NPSR1 and another NPS Law Enforcement Ranger (NPSR2) interviewed Complainant to investigate the statements made by Accuser1. Complainant testified that he was called in to meet with NPSR1 and NPSR2 one day, with no explanation. Complainant further stated that he was not told anything until he signed certain documents, one of which threatened him with five years of imprisonment if he lied to the officers. He stated he signed the documents, after which he was told about an incident that occurred nine days earlier. Specifically, Complainant was told the incident involved an allegation that he had been videotaping women and children, he asserted he was "shocked and appalled and disgusted," but had no idea what the officers were talking about. Complainant felt the officers were trying to catch him in a lie and accused him of being a pedophile, which he felt was "asinine and absurd." The officers showed him a picture the woman took of him and Complainant claimed that the woman who filed the complaint was doing the very thing she had accused him of doing.

Following the interview, Complainant returned to the station to file a counter-complaint against her for harassment and defamation. Complainant asserted he has been harassed not only by the woman in the restaurant, but by Law Enforcement. Complainant further stated that he experiences complications from Generalized Anxiety Disorder and Post Traumatic Stress Disorder (PTSD). As a result, he is unable to handle stressful situations such as the interrogation by Law Enforcement. He explained that his reaction to the complaint against him during the interview by the law enforcement officers was "triggered" by his condition.

Complainant asserted that he informed his second-line supervisor (S2) (female) that he was "fully disabled." In addition, he maintained he told the law enforcement officers about his spinal cord injuries and told his first-line supervisor (S1) (male) about his spinal surgery. Complainant asserted that if a similar complaint was made toward a female employee, Law Enforcement would have treated her better.

NPSR1 explained that he asked Complainant to come in to the station to be interviewed a few days after he received the report regarding the incident in the restaurant. At that point, he had not informed Complainant's supervisor of the investigation. NPSR1 informed Complainant that the interview would be videotaped, he gave Complainant a rights advisement memorandum, and told him the purpose of the interview was to obtain his version of the incident to determine if any criminal activity took place. NPSR1 explained that having a second Law Enforcement Ranger participate in the interview was standard procedure. NPSR1 testified that Complainant initially denied any recollection of the incident in the restaurant, adding it "sounded absurd and perverse to him." Complainant then told NPSR1 he was merely trying to be "nice" and simply asked the woman if she had heard about the Ranger program for children. NPSR1 noted he then asked Complainant if he would be willing to prepare a written statement, at which point he said he wanted to contact an attorney and the interview was terminated. NPSR1 estimated the interview lasted 20 minutes.

NPSR1 also testified that Complainant left but returned a short time later and told the officers he had been in contact with S1. NPSR1 described Complainant as "upset," "antsy," and "agitated" during the interview.

Complainant told NPSR1 and NPSR2 that he had not taken pictures and felt he was accused of being a pedophile. Complainant then made several statements NPSR1 described as "kind of jumbled" and said he should file charges against the woman in the restaurant because she had taken pictures of him. NPSR1 indicated that the statements Complainant made during the second interview created doubt as to his credibility.

NPSR1 affirmed he prepared the official incident report, which was submitted to NPSR2 and the Law Enforcement Chief (NPSC). NPSR1 further explained that information regarding Complainant's prior employment with the Commonwealth of Kentucky was discovered as part of the standard investigative process via a Google internet search of Complainant.[2] The information obtained became part of the official record for FOIA purposes but was not included in the incident report. However, NPSR1 believes the information may have been presented to management by NPSC since it was part of his file. NPSR1 asserted he did not harass, discriminate against, or retaliate against Complainant. He stated that he was simply performing standard procedures following up on a visitor complaint against someone they did not initially realize was a Park employee.

On July 27, 2017, S2 issued Complainant a notice of termination in the form of a memorandum (Termination Memo). The Termination Memo cited Complainant's response to Accuser1's complaint as set forth by NPSR1 above. S2 found the behavior alleged unacceptable, inappropriate and a detriment to Park visitors and Complainant's coworkers.

On July 27, 2017, Complainant submitted a FOIA request for documents related to the Law Enforcement investigation and his termination. The Acting Regional Chief of Interpretation and Education (ARCIE) (Female) testified that one of her responsibilities was handling FOIA requests. ARCIE testified that the Park initially sent her only a copy of the incident report itself, whereas Complainant had requested anything concerning him at the Park. She believes it was August or early September when she received additional records, including the video of Complainant's law enforcement interview and witness statements, from the Park. ARCIE also states she wanted to coordinate release of the video with the NPS FOIA Officer (NPSFO) (female).

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[2] In December 2013, prior to being employed with NPS, Complainant was terminated from his position as a Forest Ranger Technician with the State of Kentucky Division of Forestry. Complainant appealed his termination to the Kentucky State Personnel Board and, in July 2017, documents relating to this appeal could be found online. As part of his investigation into the July 13, 2017 incident, NPSR1 conducted a Google search of Complainant and through this search, discovered documents relating to Complainant's appeal of his termination from the Kentucky Division of Forestry. These documents revealed that while employed for the Division of Forestry, Complainant was accused of watching and possibly taking pictures of female coworkers as they used the bathroom. NPSR1 later learned that other employees at Mammoth Cave, specifically employees working in the Fee Department, had conducted an internet search of Complainant and found the same information.

However, because the video files were too large for NPSFO to view, she simply began gathering documents responsive to Complainant's request. She indicates she released five documents to Complainant by email and sent the video on a USB drive via FedEx on November 8, 2017.

ARCIE acknowledged there was a delay in getting Complainant's requested documents to him and attributes the delay to her workload at the time. ARCIE also testified that all the documents requested were released to Complainant pursuant to legal review by the Office of the Regional Solicitor on January 19, 2018. She explained that personal identifying information of private individuals who provided statements to law enforcement was redacted. In addition, the faces of private individuals other than Complainant were redacted from photos requested by Complainant. ARCIE further explained the redactions are covered by Exemptions 6 and 7(c) of the FOIA. ARCIE denied that harassment, discrimination, or retaliation was involved in any way, adding she would not know Complainant existed if she had not received his records. S2 denied having any knowledge of Complainant's FOIA request until October 2017. She added she was not involved in collecting documents responsive to the request.

Volunteer Opportunities

Complainant testified he was extremely interested in working in the science department, because of his educational background. He noted he met a woman in the Science Department whom he believed was a secretary or a supervisor. Complainant described his interaction with the woman as "a little odd," but stated she arranged for him to do bat monitoring with another employee. Complainant claimed he returned the next day, only to find the woman to be offensive towards him and not willing to allow him to volunteer. He asserted he was run out of the science building. Complainant stated he noticed most of the volunteers in the Science Department were women and feels he was denied an opportunity because of his sex and his prior protected EEO activity.

S1 asserted that Complainant was not denied any opportunities to volunteer in any department and stated that he advised Complainant that his interest in the Science Department could be accommodated after he finished training for the job he was hired to do.

Avoidance by Coworkers

Complainant testified that he noticed "certain people, like one of the Law Enforcement officer's wives" started to avoid him. He asserted these co-workers had previously been very nice and it gave him the sense that "something was off." He believed NPSR1's wife, one of his co-workers, knew "something was going on."

S2 denied any knowledge of anyone avoiding Complainant and asserted that she never told anyone to avoid him. However, S2 noted that she was told by a Park guide that some of the women in seasonal housing felt "creepy" around Complainant. Before she was able to follow up on this issue, she received two complaints about Complainant from Accuser1 and Accuser 2 and decided she had to take disciplinary action.

S1 testified that there were verbal complaints from female employees at the staff housing quarters who thought Complainant was "creepy." S1 explained the employees live in co-ed housing and some of the women were uncomfortable being around Complainant. He noted the women involved did not want their names mentioned and did not give statements. S1 also noted that he was not aware of co-workers avoiding Complainant.

NPSR1 testified he spoke with several of Complainant's co-workers in seasonal housing as part of his investigation of Accuser1's complaint. He noted he was told there had been no problems with Complainant, but his co-workers found him odd and felt uncomfortable around him. NPSR1 did not make this information a matter of record.

Schedule Changes

Complainant asserted that S1 changed his schedule so that people could avoid working with him. Complainant believed that management was trying to label him "a male sexual deviant."

S2 stated that she has difficulty understanding what Complainant is referring to because he only worked at the Park for one or two pay periods. She further explained that everyone has rotating days and shifts based on responsibilities on a given day, which was standard procedure. In addition, S2 stated that Complainant spent one of his two pay-periods at the Park on the same schedule as S1, for training purposes. His schedule was then changed to what would have been his permanent schedule had he remained at the Park. S1 corroborated S2's testimony. S1 further asserted that Complainant's schedule was comparable to other seasonal staff members and noted that everyone was expected to work weekends and holidays.

Gym Access

Complainant testified he told S1 that he needed to go to the gym as part of a physical therapy routine to ease his physical pain and anxiety. Complainant never formally requested a reasonable accommodation. Complainant also asserted that S2 said something to the effect of "we shouldn't need to worry about that" when he told her of his conditions which Complainant took that to mean she would not need to address his disabilities for his job. Complainant stated his conditions were well documented and everybody knew of his need to use the gym for therapy. He indicated that he called Law Enforcement several times about the denial of gym access because employees had to go through Law Enforcement to receive a key. Complainant believed Law Enforcement may have refused to deal with him because they were investigating him and looking for a reason to get rid of him.

S2 denied that Complainant was ever denied access to the gym. S2 explained the Park has a key authorization process that requires a Division Chief's signature. She noted that S1 completed a key authorization form for Complainant that was forwarded to the Division Chief, who signed and returned the form. In addition, S2 testified that Complainant never spoke with her about using the gym or having a disability.

S1 recalled Complainant told him he wanted to use the gym, but stated he never told him it was because of his conditions. Furthermore, S1 asserted that Complainant was not denied access to the gym. S1 explained that Complainant completed the gym access request form and it was forwarded for approval, but Complainant was terminated before the key could be issued. The record shows that on July 7, 2017, Complainant's application for gym access was signed and approved.

Termination Decision

Complainant alleged that S2 fabricated a "defamatory memo" to him and removed him without ever asking him about what had been alleged. He asserted he was upset when the Law Enforcement officers accused him of being a pedophile. In addition, Complainant believes he was retaliated against because he defended himself and told the Law Enforcement officers that he wanted to file a counter complaint against Accuser1. Complainant further testified he has been characterized as "a sexual harasser of women" based on false accusations and noted that he lost a job with the Kentucky Division of Forestry a few years prior under similar circumstances. Complainant asserted S2 used another case of "wild speculation and false-claimed sexual harassment" to further slander him and label him "a sexual harasser." Further, Complainant asserted that S2 has placed false information in an official record, labelling him "as a male sexual deviant, sexual harasser of women and children." Complainant believed that S2 showed preferential treatment toward Accuser1. Complainant also asserted S2 should not have gotten involved at all, because the incident in the restaurant took place while he was off duty and had nothing to do with his employment.

S2 stated that Complainant was terminated for the reasons set forth in her memorandum of July 27, 2017. She noted Complainant was a term employee and therefore subject to removal at any time without adverse action procedures. S2 explained that the Law Enforcement incident report documented a statement from a Park visitor who complained about Complainant causing her to feel uncomfortable and apparently videotaping or photographing her. She stated Complainant first claimed he had no recollection of this incident but then admitted he did remember and noted the woman who had filed the complaint "wasn't even good looking," after which he said he did not know what the woman looked like. S2 believed this to be unacceptable behavior for a Park employee. S2 also notes that another visitor complained about Complainant around the same time.

S2 explained that she coordinated with her supervisor, the Chief of Law Enforcement, and Human Resources before deciding to remove Complainant. S2 further noted that she learned there had been "some issue" with Complainant's previous employment with the Kentucky Division of Forestry, and that he had "filed something" and, to the best of her recollection, a staff member found the information through a Google search. She asserted Complainant's employment or complaint histories were not factors in her decision to remove him.

S1 testified that there were already complaints from visitors and staff regarding Complainant when he received the incident report pertaining to Accuser1. When management learned of Accuser1's complaint, they decided that Complainant's termination was the appropriate consequence.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEO Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

Disparate Treatment

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on the Agency to articulate a legitimate, nondiscriminatory, reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); see Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981) (applying this analytical framework to cases brought under the Rehabilitation Act).

After reviewing the record and considering the arguments on appeal, the Commission finds that the AJ made reasonable credibility determinations, which are not contradicted by objective evidence, and her factual findings are supported by substantial evidence. In this case, the Agency has articulated legitimate, nondiscriminatory reasons for its actions as discussed above. Specifically, Complainant was investigated after management received complaints from Park visitors of inappropriate behavior. Complainant was subsequently terminated for that conduct. Prior to his termination, Complainant's schedule was initially set to facilitate training and was later changed to what would have been his permanent schedule. Further, Complainant was not denied gym access; rather, his request was forwarded and approved but he was terminated prior to receiving an access key. Finally, Complainant's FOIA request was delayed, but was granted to the extent allowed by law. Substantial record evidence supports that Complainant has not carried his burden to demonstrate that the Agency's proffered reasons were provided as pretext for discriminatory or retaliatory animus.

Hostile Work Environment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, or religion is unlawful, if it is sufficiently severe or pervasive. To establish a claim of harassment a complainant must show that: (1) he or she belongs to a statutorily protected class; (2) he or she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Here, Complainant asserted that based on his protected classes, management officials, Law Enforcement officials, and co-workers subjected him to a hostile work environment. The Commission agrees with the AJ and finds that substantial record evidence supports that the totality of the conduct at issue was insufficiently severe or pervasive to establish a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, there is no persuasive evidence in the record that discriminatory or retaliatory animus played a role in any of the alleged incidents. As a result, the Commission finds that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision in favor of the Agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

February 9, 2021
Date

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