No. 24-

IN THE

Supreme Court of the United States

HANS GOERZ,

Petitioner,

v.

GARY A. ASHWORTH, SECRETARY,
U.S. DEPARTMENT OF THE AIR FORCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HANS GOERZ
Petitioner Pro Se
118 Meandering Way
Del Rio, TX 78840
(830) 765-8790
hgoerz@stx.rr.com

381617

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

On October 2, 2023 Chief District Judge (CDJ) of U.S. District Court for the Western District of Texas adopted Magistrate Judge's recommendation and issued a summary judgment decision, dismissing the Complaint. On February 9, 2024 District Court's Judgment was entered against Petitioner, Hans Goerz. On December 2, 2024 U.S. Court of Appeals for the fifth Circuit issued decision to affirm the District Court's judgment. On December 2, 2024 the 5th Circuit Judgment was entered for the Defendant, the Secretary of the Air Force. The questions presented in this petition are:

1. Whether the District Judge may dismiss the complaint on summary judgment without requiring answer from the respondent, without authorizing discovery, and without establishing that there is no genuine dispute of material facts.

2. Whether the District Judge may dismiss the complaint on summary judgment, without requiring answer from the respondent and without authorizing discovery, based on purported lack of showing pretext for the removal action alleged to be retaliatory in violation of Title VII of the Civil Rights Act of 1964, when the record is incomplete.

3. Whether the District Judge may determine, without requiring answer from the respondent and without authorizing discovery, that the petitioner failed to sufficiently show pretext for the removal action in question, when the record is incomplete.

4. Whether the District Judge may determine that there is no genuine dispute of material facts (to issue a summary judgment) based on a finding that the petitioner, without requiring answer from the respondent and without authorization for discovery, failed to sufficiently show pretext for the removal action alleged as retaliatory.

PARTIES

Petitioner Han Goerz was a plaintiff in the district court and an appellant below.

Respondent Gary Ashworth, Secretary, U.S. Department of the Air Force, was a defendant in the district court and an appellee below.

RELATED PROCEEDINGS

Goerz v. Kendall, No. 2:20-cv-00049 (W. D. Texas, February 9, 2024).

Goerz v. Kendall, No. 24-50151 (5th Cir. filed December 2, 2024).

Goerz v. Kendall, No. 2:23-cv-00051 (W. D. Texas, April 24, 2024).

Goerz v. Kendall, No. 24-50383 (5th Cir., May 27, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the fifth Circuit is reproduced at Appendix 1a-8a. The summary judgment entered by the district court for the Western District of Texas, unpublished, is reproduced at 9a-20a. The report and recommendation submitted by the magistrate judge for granting summary judgment, unpublished, is reproduced at 21a-41a.

JURISDICTION

The fifth Circuit entered judgment on December 2, 2024. App. 34-35. The clerk of US Supreme Court confirmed that the petition for writ of certiorari was filed on January 30, 2025 and was received by the Court on February 3, 2025. App. 36-38. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56 provides in relevant part:

(a) Motion for Summary Judgment or Partial Summary Judgment.

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

Han Goerz is an adult individual who was unlawfully terminated from the federal employment as a Civilian Simulator Instructor (CSI) Pilot, GS-2181-12, at Laughlin Air Force Base, Texas, U. S. Department of the Air Force, on March 25, 2019, effective April 6, 2019. Goerz alleges that he was removed in retaliation for the prior EEO complaints he filed as follows: In February 2015 Goerz filed EEO complaint. In April 2016 Goerz filed EEO complaint against Lt. Col. Soderstrom, his then first-level supervisor, who subsequently issued a 14-day suspension notice against Goerz. In July 2017 Goerz filed EEO complaint against Soderstrom for the 14-day suspension. In August 2017 and in October 2017 David M. Loftus, his subsequent first-level supervisor, participated in EEO inquiry in Goerz's EEO complaint. In retaliation Loftus proposed Goerz's removal on March 6, 2018, December 18, 2018 (amending the March 2018 notice), and again on March 16, 2019. Col. Corey Jones, the deciding official who issued the removal notice, read Goerz' rebuttal statement (rebutting Loftus's proposed removal notice), in which his prior EEO complaints were discussed, prior to issuing the removal decision. At the time of Goerz's removal in April 2019, his EEO complaints were pending, as the respondent admits.

Respondent Gary Ashworth, Secretary, U. S. Department of the Air Force, was a defendant in the district court and an appellee in the Fifth Circuit Court of Appeals. His management employees at Laughlin Air Force Base, Texas, are alleged to have unlawfully retaliated against Goerz, the petitioner, as referenced below.

On March 25, 2019 Petitioner, Hans Goerz, was issued a notice of removal from federal employment, effective April 6, 2019. ECF no. 42-14.[1] On May 6, 2019 Goerz timely filed a MSPB appeal (DA-0752-19-0318-I-1) on the removal action, alleging retaliation for his prior protected EEO activities. ECF no. 1 at 3, paragraph 7; ECF no. 42-15 at 17-20 and 26-27. On June 16, 2020 MSPB administrative judge (AJ) Mehan issued an Initial Decision, affirming Defendant's 14-day suspension and the removal actions. ECF no. 42-15. On July 21, 2020 the Initial Decision became final. Id. at 38. On August 20, 2020 Goerz sought judicial review of the Board's Final Decision by filing the Complaint with U.S. District Court for the Western District of Texas (2:20-cv-00049-AM).

On November 14, 2022 the Secretary (hereafter "Defendant" or "Appellee") filed a motion for summary judgment. ECF no. 42. On January 3, 2023 Goerz filed a response. ECF no. 52.[2] On February 1, 2023 Magistrate Judge (MJ) Victor Roberto Garcia issued

1. Hereafter "ECF" refers to electronic Case File system maintained by U.S. District Court, For the Western District of Texas, *Goerz v. Kendall*, 2:20-cv-00049-AM.

2. On March 10, 2022 Plaintiff notified the Court of his attorney Chris R. Pittard's disbarment. ECF no. 26.

a Recommendation for granting Defendant's Motion for Summary Judgment ECF no. 58. On February 15, 2023 Goerz responded to MJ's recommendation. ECF no. 62. On May 9, 2023 Goerz, pro se, filed a motion to amend Complaint for adding incidents alleged to be discriminatory and retaliatory, pertaining to adverse actions that occurred between July 2015 and February 2016.[3] ECF no. 64. On May 16, 2023 Defendant responded to the amendment motion. ECF no. 65. On May 25, 2023 Plaintiff replied with additional exhibits. ECF no. 66.

On October 2, 2023 Chief District Judge (CDJ) Alia Moses adopted MJ's recommendation and issued a decision, dismissing the Complaint on summary judgment. ECF no. 77. On the same day, CDJ also denied Goerz motion to amend the Complaint. ECF no. 78. On February 9, 2024 District Court's Judgment was entered against Goerz. ECF no. 80. On December 2, 2024 U.S. Court of Appeals for the fifth Circuit issued decision to affirm the District Court's judgment. 5th ECF 52-1.[4] On December 2, 2024 the 5th Circuit Judgment was entered for the Secretary. 5th ECF 53.

In the Complaint Appellant Goerz alleges unlawful retaliation based on his prior protected EEO activities, when on June 17, 2016 he was suspended for 14-days without pay by Lt. Col. Gregory D. Soderstrom. OC 1,

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3. On February 8, 2023 Office of Federal Operations issued its decision on these claims (OFO no. 2022002573, EEOC no. 510-2022-00040X, Agency case no. 5E0J16002).

4. Hereafter "5th ECF" refers to the e-CF of the fifth Circuit of the U. S. Court of Appeals.

OC 52-6.[5] Retaliation is also alleged when on February 19, 2019 and on March 6, 2019 Appellant was proposed to be removed from federal employment by Mr. David M. Loftus; and on March 25, 2019 he was notified of his removal from federal employment by Col. Carey J. Jones. OC 1, OC 42-10, OC 42-14.

Prior EEO Activities and Ensuing Retaliatory Actions

The following protected activities Goerz engaged in are not in dispute:

(1) EEO complaint filed in February 2015 against Ms. Isbael Castillo, Mr. Danny Williams, Mr. Theodore Glenn, Mr. Greg Thurgood, Mr. Randy Sheppard, and Lt. Col. Craig Allen. OC 58 at 5, OC 62 at 4, OC 77 at 2.

(2) EEO complaint filed in April 2016 against Mr. Theodore Glenn, Mr. Dany Williams, Lt. Col. Soderstrom (the deciding official for the June 17, 2016 suspension action for 14 days), Col. Timothy McGregor, and Ms. Cindy Cardenas. OC 58 at 6, OC 62 at 5, OC 77 at 3, OC 52-6.

(3) EEO complaint filed in July 2017 against Mr. Theodore Glenn, Lt. Col. Soderstrom, and Mr. Danny Williams. OC 58 at 6, OC 62 at 5, OC 77 at 3.

However, Chief District Judge (CDJ) failed to consider in grave error the following additional protected

5. Hereafter "OC" stands for the Originating (District) Court. It is followed by the corresponding e-CF system document number indexed in *Goerz v. Kendall*, 2:20-00049-AM. Appellant's appeal brief (24-50151) was filed on August 3, 2024 at the fifth Circuit Court's eCF document number 31.

activities, in which both Goerz and the proposing official (for the removal action) Mr. Loftus had engaged: On August 30, 2017 Mr. David M. Loftus responded to the EEO investigator's request for documents in the matter pertaining to Plaintiff's EEO complaint (5E0J17011T).

In his response Loftus stated: "Mr. Goerz' description of the event was exaggerated and had ZERO basis for EO discrimination based on religion, sex, or national origin." OC 52-8. Thus, as of August 30, 2017 Loftus knew that Plaintiff had filed an EEO complaint based on his religion, sex, and national origin.

Furthermore, on October 20, 2017 Loftus was questioned by the EEO investigator on the EEO case Plaintiff raised (5E0J17011T). OC 62 at 13-47. Thus, the proposing official Mr. Loftus was an active participant in the EEO administrative proceedings conducted by Defendant on EEO matters raised by Goerz.

In retaliation, Loftus proposed Plaintiff's removal on March 6, 2018 (which was revised and re-issued in December 2018) and again on March 16, 2019. OC 1 at 3, OC 11 at 1, OC 42-9, OC 42-10. Defendant concedes that the Plaintiff had EEO complaints pending at the time of his removal. OC 12 at 2, OC 11 at 5.

A clear nexus exists between Appellant's EEO complaint filed in April 2016 against Mr. Theodore Glenn, Mr. Dany Williams, Lt. Col. Soderstrom, Col. Timothy McGregor, and Ms. Cindy Cardenas; and the June 17, 2016 suspension of 14 days issued by Lt. Col. Soderstrom. OC 58 at 6, OC 62 at 5, OC 77 at 3, OC 52-6.

A clear nexus exists between Loftus's participation in Appellant's EEO investigation process in August 2017 and October 2017 and the proposed removal notice issued by Loftus against Appellant in March 2018, December 2019, and March 2019. OC 52-8, OC 62 at 13-47, OC 11-1 at 3, OC 11-1 at 2.

A clear nexus exists between Appellant's EEO activities and the removal action issued in March 2019, as Defendant concedes that the Plaintiff had EEO complaints pending at the time of his removal. OC 12 at 2, OC 11 at 5, OC 42-14.

Furthermore, MSPB AJ determined, based on a hearing testimony, that the deciding official, Col. Corey Jones, who issued the removal notice on March 25, 2019, was aware of Appellant's EEO activity, when she read Goerz' rebuttal statement rebutting Loftus's March 2019 proposed removal notice prior to issuing the removal notice. OC 42-15 at 26, OC 42-14.

Accordingly, MSPB AJ concluded:

> I find the appellant provided sufficient evidence to establish that prohibited EEO retaliation under 42 U.S.C. § 2000e-16 was a motivating factor in his removal.
>
> OC 42-15 at 27.

However, MSPB AJ found that retaliatory animus was not a "but for" motivating factor in the removal action in question. Id. Such a conclusion requires examination of possible Douglas Factor violations, which MSPB AJ and

CDJ both failed to consider in AJ's 45-page decision and in CDJ's 9-page Order. OC 42-15, OC 77. But this is not the forum to challenge AJ's conclusion at this time regarding the alleged absence of a "but for" factor. The instant appeal strictly addresses CDJ's erroneous dismissal of the Complaint on summary judgment, which was issued without requiring an answer to the Complaint, without authorizing discovery, and without a showing that there is no genuine dispute of material facts in this case.

Material Facts in Genuine Dispute

A summary judgment is inappropriate in this case because there is genuine dispute of material facts, and because the record is not complete so that the dispute cannot be resolved without a trial.

Notwithstanding the undisputed material facts cited above, the following additional material facts are genuinely disputed, however, unless otherwise indicated:

There were three notices of proposed removal issued by Loftus: on March 6, 2018, December 18, 2018, and on March 6, 2019. OC 42-9, OC 42-4, OC 42-10. The December 2018 notice of proposed removal was an "amended" notice (of March 6, 2018 notice) that was claimed to have been served on Plaintiff on February 19, 2019 but was returned undelivered. OC 42-10 at 2.

On March 6, 2019 Loftus pretended that he was merely re-servicing the February 19, 2019 proposal notice unchanged (and undelivered), when in fact he served another and different notice of proposed removal on March 6, 2019. OC 11-1, OC 42-9, 42-10.

In August 2017 and October 2017 Loftus participated in the EEO investigation stemming from Appellant's EEO claims. OC 52-8, OC 62 at 13-47. Thus, in March 2018, December 2018, February 2019, and in March 2019 Loftus was actively engaged in issuing notices of proposed removal actions against Appellant, while his retaliatory animus could not reasonably inferred as the determining factor in his flurry of retaliatory actions in 2018 and 2019.

On March 25, 2019 Col. Corey Jones affirmed Loftus' March 2019 removal proposal and did remove Goerz effective April 6, 2019, knowing full well that Appellant had engaged in prior protected EEO activities, as they were recorded in his rebuttal statement written against Loftus's proposal notice—the rebuttal statement which Col. Jones read prior to issuing her removal decision. OC 42-15 at 26, OC 42-14.

The following timelines further establishes clear nexus, which is entirely ignored by CDJ in grave error:

Plaintiff's first EEO complaint, filed on February 15, 2015, was retaliated against by Defendant on December 17, 2015 when a Notice of Proposed Suspension for 12 days was issued. OC 52 at 2.

Plaintiff's second EEO complaint, filed on April 11, 2016, was retaliated against by Defendant on May 2, 2016 when a Notice of Proposed Suspension for 14 days issued by Danny Williams, whose proposal was affirmed by Lt. Col. Soderstrom on June 17, 2016. Id.

Plaintiff's third EEO complaint, filed on July 7, 2017, was retaliated against by Defendant on March 6, 2018

when the proposed removal notice issued by David Loftus (who in August 2017 and October 2017 participated in the EEO investigation stemming from Appellant's EEO claims raised against Danny Williams) was issued. OC 52 at 2-3, OC 52-8, OC 62 at 13-47, 42-9.

And Loftus' retaliatory actions continued thereafter, as already shown above, with respect to his issuance of the December 2018 proposed removal notice and March 2019 proposed removal notice against Goerz. OC 42-4, OC 42-10. The thick chain of retaliation of the military brace runs deep and long.

Charges Leveled Against Goerz were Pretexts

The finding of the District and the Circuit Courts that Goerz failed to show pretext belies the record. As Goerz argued in his Appellant Brief, on January 11, 2017 Danny Williams (against whom Goerz filed EEO complaints in February 2015 and April 2016) emailed David Loftus, claiming that on January 3, 2017 he, Williams, saw Goerz "smoking . . . outside, with the door open." OC 42-16 at 2. Promptly but without investigation, on January 18, 2017 David Loftus memorialized Williams' January 3, 2017 report with modification and issued a notice for Plaintiff to adhere to the smoking policy. OC 42-16 at 3. Later, similar incidents were cited to support one of the charges (Charge 1) upon which Loftus proposed removal of Plaintiff. OC 42-4, 42-9, 42-10.

Loftus was made aware of other employees' violation of the smoking policy but chose not to take action. On September 29, 2016 Goerz emailed Loftus, informing that Ms. Hennegar and Ms. Gibson were smoking "near the

rear entrance door" outside the smoking area. OC 42-2. And yet, Loftus conducted no investigation and took no disciplinary action against Hennegar and Gibson, as he did against Goerz.

Goerz asserts that Hennegar and Gibson had no history of engaging in prior protected EEO activity. The adverse treatment Goerz received for allegedly violating the smoking policy sufficiently evinces Loftus's retaliatory animus. Goerz would not have been proposed to be removed by Loftus, had it not been but for his prior protected EEO activities, of which Loftus knew at the time of the multiple issuances of the notice of proposed removal.

The following specific material facts are further in genuinely dispute:

The smoking policy prohibits smoking within 50 feet of building entrance. Goerz was beyond the 50 ft restriction when he was smoking. OC 42-13 at 2. Even though numerous cigarette buts were found outside the stairwell within the 50 ft radius from the entrance, only Plaintiff, who was smoking beyond the 50 ft radius, was disciplined by Loftus in retaliation for his prior EEO activities. Id.

On November 5, 2018 Plaintiff arrived at his work station only to find a handwritten note on his desk about an administrative matter. He deemed that the nature of the meeting appeared to be of a disciplinary nature and accordingly sought the union representation, while at the same time he was experiencing "an angina attack." OC 42-13.

Goerz needed immediate medication, which he had left at home. Id. He left the work center and called in sick for the rest of the day. OC 42-13 at 3. However, no one picked up the phone. Eventually he was able to reach a coworker, Carlos Febres.

Goerz asked Febres to relay to his supervisor about his request for sick leave. Id.

Later that evening, Goerz attempted to enter his sick leave request on computer but was unable to do so, because his computer had been blocked by Defendant. Id., at 4. Later that evening both Mr. Burgi (who also filed his own EEO claims and who represented in Goerz 2015 EEO claims) and Plaintiff emptied their respective desks, as someone had put empty boxes next to their desks. Id., at 4.

Goerz had requested FMLA leave on November 6 and November 7, 2018 in order to take his "dying wife" to Wichita Falls, Texas, for medical evaluation. Id. On November 8, 2018 Plaintiff request for more sick leave via Mr. Burghi. Id.

However, on November 8, 2018 Loftus charged Plaintiff with AWOL for November 5, 2018 by entering the time code "KC" (Absent Without Leave) (Charge 2 and Charge 3 in the proposed removal notice). Id., at 4; OC 42-13 at 2-3.

On November 11, 2018, when Plaintiff return to process additional FMLA leave, he was chased by 47 FTW Security Police, after having his car searched. Id., at 4. A Sergeant of the Police informed Plaintiff that he was "banned" from the work center. Id. On November 13, 2018

Plaintiff requested 12 weeks of FMLA in Leave Without Pay (LWOP). Id., at 4.

Even though on November 13, 2018 Loftus denied placing Plaintiff on any personnel action, on or about November 20, 2018 Lt. Col Ogrosky asked Plaintiff why he was at the work center and asked Plaintiff to visit the personnel office. Id., at 4.

Plaintiff's attempts to pay for his LWOP was denied, as his envelopes containing checks were "refused" at one point and otherwise returned undelivered at another point for "unknown" address. Id., at 4 and 5.

On December 6, 2018 the 47th FTW Wing Commander Col Gentile ordered Goerz to pick up his belongings. About 3 hours later, the 47th STUS Squadron Commander Lt. Col. Ogrosky ordered Goerz to do the same. Id., at 5.

On December 7, 2018 Loftus demanded Plaintiff to update his FMLA request. Id.

On December 14, 2018 Plaintiff's wife underwent a heart surgery. Id.

On December 21, 2018 Plaintiff received a note from the 47th FTW/CPO/HR informing him that Defendant was "unable to assist in continued health insurance." Id., at 5.

On the same day, December 21, 2018 Plaintiff received Loftus' proposed removal notice. OC 42-4.

Loftus' Charge 4, as written in his proposed removal notice, is devoid of evidence or any corroboration by witnesses.

Plaintiff was never warned in advance of being "aggressive, loud, abusive, harassing, [using] foul language." OC 42-13 at 4.

Commander Jones failed to consider the circumstances in which Goerz's use the words: "Hennegar better watch himself" and " . . . he may not like what may come to him."

These words were uttered on May 2, 2018 as Plaintiff was flicking through the pages containing false allegations reported by Hennegar to Loftus. OC 42-13 at 4. Hennegar was not present when Goerz uttered those words on Hennegar, while sitting by himself and flicking through the pages.

As of May 5, 2018 an investigative interview was scheduled, as Plaintiff was so informed by Loftus. Goerz legitimately suspected that Hennegar retaliated against him for reporting Hennegar's illegal and personal business activity he conducted in the workplace during the work time, which Goerz reported to the Wing Commander's Hotline multiple times prior to that day. OC 42-13 at 4.

In frustration, Goerz also uttered words: "Reece—you SOB." Id., at 5. He did so because Reece, who, along with Goerz, had been elected as the "best Sim. Instructor," attempted to smear Goerz during his participation in the investigative interview by characterizing Plaintiff's coughing during academic exams as undermining Goerz's "Instructor Integrity." OC 42-13 at 5.

Referring to Reece as "SOB" was uttered in the presence of Plaintiff's coworker, Febres Reece was not present to hear the word said of him. Id.

These circumstances were not taken into consideration by the deciding official, Commander Jones, despite Plaintiff's detailed rebuttal statement presented to her. OC 42-13, OC 42-14.

These material facts were not even referenced in CDJ's summary judgment decision and by the Circuit Court, which affirmed the lower Court's judgment, while both Courts aver that there is no genuine dispute of material facts.

REASONS FOR GRANTING THE PETITION

Rule 56(a) of Federal Rules of Civil Procedure requires the moving party to establish material facts that are not in genuine dispute in moving for summary judgment. Defendant failed to do so. Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Here, there is genuine dispute of material facts, as laid out in the foregoing. Furthermore, as already referenced above, Goerz has shown pretext behind the four charges that were level against him for his removal. The showing of pretext is sufficient to enable any reasonable jury to return a verdict for the nonmoving party, Goerz. Therefore, the summary judgment issued by District Court must be reversed and vacated, as Goerz has shown sufficiently the pretext.

Rule 56(b) requires that "a party may file a motion for summary judgment at any time until 30 days *after* the close of all discovery" (italics added). *Celotex Corp. v.*

Catrett, 477 U.S. 317 (1986) established that the defendant must show the absence of evidence in the discovery record. In this case, no discovery was authorized, as no answer to the complaint was ordered to be filed. However, the defendant's motion for summary judgment, filed prior to authorization of discovery and without having the Defendant's answer to be filed, was inappropriately and prematurely granted by the District Court, whose decision the firth Circuit Court affirmed.

There is genuine dispute of material facts as laid out in the foregoing. Therefore, rendering summary judgment by Chief District Judge was inappropriate and premature. The Circuit Court's decision to affirm is in grave error. Furthermore, the record was not complete to render summary judgment, as no Answer has been filed and no discovery has been authorized by District Judge. Lastly, Defendant in its summary judgment motion failed to provide a list of material facts that are purportedly not in genuine dispute. These failures violate the summary judgment standards set forth in Federal Rules of Civil Procedure, Rule 56(a)(c).

The Circuit Court erred in asserting that Goerz failed to show pretext behind the reasons for the removal action alleged as retaliatory in this case. Goerz has sufficiently refuted the charges level against him as pretext by citing evidence in the record, as shown above. Goerz has sufficiently demonstrated that the four charges were erroneous and were based on misrepresentation of facts. But for his prior protected EEO activities, the alleged violations as charged would not have resulted in removal. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court asserted that the requirement that

actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage. Such determination is rightfully deferred to a jury. Here, the Circuit Court inserted in summary judgment its determination as to pretext behind the reasons for the removal action in question. But such a matter must be left for a jury to decide. It is not appropriate to make such determination at the stage of summary judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HANS GOERZ
Petitioner Pro Se
118 Meandering Way
Del Rio, TX 78840
(830) 765-8790
hgoerz@stx.rr.com

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-50151
Summary Calendar

HANS GOERZ,

Plaintiff—Appellant,

versus

FRANK KENDALL, SECRETARY,
DEPARTMENT OF THE AIR FORCE,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:20-CV-49

Filed December 2, 2024

Before JOLLY, JONES, and WILLETT, *Circuit Judges.*

PER CURIAM:*

In March 2019, the United States Air Force terminated Hans Goerz from his job as a simulator instructor. As a

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

result, Goerz filed the underlying lawsuit against the Secretary of the Air Force, alleging that his termination constituted retaliation under Title VII of the Civil Rights Act of 1964.[1] Goerz now appeals the district court's summary judgment-dismissal of his retaliation claim against the Secretary. Because the district court correctly determined that Goerz failed to show pretext, we AFFIRM.

I.

In 1998, Goerz, who is of German descent, started working for the Air Force as a simulator instructor. Beginning in 2014, the Air Force became increasingly dissatisfied with Goerz's conduct and job performance. In October 2014, the Air Force reprimanded Goerz for failing to follow a syllabus, using offensive language, and striking a student during a simulator mission. Similarly, in December 2015, the Air Force issued a Notice of Proposed Suspension on the grounds that Goerz struck students during a flight training, engaged in conduct unbecoming of an instructor, and failed to properly perform instructor duties. And in May 2016, the Air Force issued another Notice of Proposed Suspension and ultimately suspended Goerz for fourteen days because he struck a student during training and was absent without authorization.

During this period, Goerz grew unhappy with the Air Force's treatment of him. In fact, between 2015 and 2017,

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1. Goerz also alleged discrimination in violation of the Rehabilitation Act of 1973, but this claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) earlier in the case and is not part of this appeal. We thus address it no further.

Appendix A

Goerz filed three Equal Employment Opportunity (EEO) complaints: one in February 2015 alleging discrimination and hostile work environment because of his German national origin; one in April 2016 alleging retaliation due to his first EEO complaint; and one in July 2017 alleging hostile work environment because of his German national origin and retaliation due to his two previous EEO complaints.

In December 2018, over a year after Goerz's last EEO complaint, matters finally came to an end point when Goerz's rating supervisor, David Loftus, issued a Notice of Proposed Removal. The Notice of Proposed Removal articulated four grounds for Goerz's removal: (1) failure to follow the smoking policy, (2) failure to follow his supervisor's instructions, (3) absence without authorization, and (4) a pattern of misconduct that rendered him unsuitable for continued employment. Goerz disputed these charges. Even so, on March 26, 2019, Colonel Carey Jones issued a Notice of Decision to Remove terminating Goerz for the reasons outlined in the Notice of Proposed Removal. Goerz appealed the decision, but his appeal was unsuccessful.

As a result, Goerz retained counsel and filed the underlying lawsuit against the Secretary. The Secretary moved for summary judgment. A magistrate judge issued a report and recommendation, recommending that the Secretary's motion for summary judgment be granted. Applying the framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the magistrate judge found that Goerz

established a prima facie case of retaliation but failed to demonstrate that the Secretary's proffered reasons for his removal were pretext. Goerz filed objections, but the district court judge adopted the magistrate judge's report and recommendation in full and granted the Secretary's motion for summary judgment. Goerz, now proceeding *pro se*, appeals the district court's summary judgment order.

II.

We review summary judgments *de novo*. *Hudson v. Lincare, Inc.*, 58 F.4th 222, 228 (5th Cir. 2023). Summary judgment is proper if "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). "'All reasonable inferences' must be viewed in the light most favorable to the party opposing summary judgment, and any doubt must be resolved in that party's favor." *Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 368 (5th Cir. 2021).

III.

The Secretary first asserts that Goerz abandoned his appeal by failing to address the merits of the district court's order, failing to identify any error in the district court's order, and omitting citations to case law. But Goerz is proceeding *pro se*. We therefore liberally construe and apply less stringent standards to his brief. *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). Additionally, although *pro se* parties must still brief the issues and reasonably comply with Federal Rule of Appellate Procedure 28, we have discretion to consider a noncompliant brief when its

noncompliance does not prejudice the opposing party. *Id.* at 524–25. It is clear enough that Goerz—however inartfully and ineffectively—challenges the district court's adverse pretext holding. The Secretary addresses this argument and, thus, has not been prejudiced. Accordingly, we exercise our discretion to consider Goerz's brief and turn to the merits of Goerz's retaliation claim.

IV.

Title VII retaliation claims are governed by the burden-shifting framework set forth in *McDonnell Douglas*. Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden to show: "(1) that [he] engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Ackel v. Nat'l Communs., Inc.*, 339 F.3d 376, 385 (5th Cir. 2003) (internal quotations and citations omitted).

Once the plaintiff meets his initial burden, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its actions. *See McDonnell Douglas*, 411 U.S. at 802. If the employer proffers a legitimate, nondiscriminatory reason, the burden then returns to the plaintiff to prove that the employer's reason is pretext for unlawful discrimination. *See Septimus v. Univ. of Houston*, 399 F.3d 601, 607 (5th Cir. 2005). At the pretext stage, the plaintiff must offer evidence "that the adverse action would not have occurred but for [his] employer's retaliatory motive." *See Feist v. La., Dep't of*

Just., Off. of the Att'y Gen., 730 F.3d 450, 454 (5th Cir. 2013) (internal quotations omitted).

Because the district court found that Goerz established a prima facie case of retaliation and neither party challenges this on appeal, we begin our analysis with the Secretary's proffered legitimate, nondiscriminatory reason for terminating Goerz. The Secretary asserts that the Air Force terminated Goerz because of his failure to follow its smoking policy, failure to follow his supervisor's instructions, unauthorized absences, and unsuitability for continued employment due to repeated misconduct. Goerz contends that these reasons are pretext because of (1) the temporal proximity between his protected activity—the EEO complaints—and various disciplinary actions taken against him by the Air Force, such as his termination; (2) Loftus's and Jones's knowledge of his EEO complaints; and (3) inaccuracies in the Air Force's account of his misconduct. The Secretary asserts that none of these are sufficient to show pretext.

Although it is true that very close temporal proximity between protected activity and an adverse action can suffice to show causation for purposes of establishing a prima facie case of retaliation, it is also true that temporal proximity alone cannot establish pretext. *See Strong v. Univ. Health Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007). "[T]he combination of suspicious timing with other significant evidence of pretext . . . can be sufficient to survive summary judgment," however. *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999). We thus turn to Goerz's other pretext arguments without

deciding whether there is sufficient temporal proximity. *See id.*; *Strong*, 482 F.3d at 808.

Loftus's and Jone's awareness of Goerz's EEO complaints is similarly unavailing, though. Knowledge of protected activity without evidence that "the employer's decision to terminate was based in part on knowledge of the employee's protected activity" is insufficient to establish prima facie causation, let alone pretext. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 588–89 (5th Cir. 2020) (quoting *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998)). But Goerz offered no evidence connecting Loftus's and Jones's knowledge of his EEO complaints to Jones's decision to terminate him. Goerz's assertion regarding Loftus's and Jones's knowledge of his protected activity therefore does not demonstrate pretext.

Goerz's final argument is to dispute the accuracy of the Air Force's account of his misconduct. "Simply disputing the underlying facts of an employer's decision is not sufficient to create an issue of pretext," though, so this argument also fails. *LeMaire v. La. Dep't of Transp. & Dev*, 480 F.3d 383, 391 (5th Cir. 2007).

As none of Goerz's arguments demonstrate that the reasons for his discharge are pretextual—individually or cumulatively—Goerz has failed to satisfy his burden of showing a genuine dispute of material fact that precludes summary judgment. Thus, the district court did not err in granting the Secretary's summary judgment motion.

Appendix A

V.

In sum, we hold that the district court properly granted summary judgment in favor of the Secretary. Accordingly, the judgment dismissing Goerz's complaint is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRIT COURT FOR THE WESTERN DISTRICT OF TEXAS DEL RIO DIVISION, FILED OCTOBER 2, 2023

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Case No. DR-20-CV-49-AM

HANS GOERZ,

Plaintiff,

v.

FRANK KENDALL, SECRETARY,
DEPARTMENT OF THE AIR FORCE,

Defendant.

Filed October 2, 2023

ORDER

Pending before the Court is the Report and Recommendation of the Honorable Victor Garcia, United States Magistrate Judge. (ECF No. 58.) Magistrate Judge Garcia recommended the Defendant's Motion for Summary Judgment (ECF No. 42) be granted. The Plaintiff subsequently filed objections to the Report and Recommendation. (ECF No. 62.) The Defendant also responded to the Plaintiff's objections. (ECF No. 63.)

Appendix B

The Court hereby finds the Report and Recommendation is **ADOPTED** and **ADOPTED**, the Defendant's Motion for Summary Judgment is **GRANTED**, and Plaintiff's objections to the Report and Recommendation are **OVERRULED**.

I. BACKGROUND

A. Procedural History

This litigation arises from the termination of the employment of the Plaintiff, Hans Goerz, with the Department of the Air Force. According to the Plaintiff's Original Complaint, the Department of the Air Force terminated Goerz's employment as an Airplane Pilot (Simulator Instructor) at Laughlin Air Force Base, Texas, due to his previous EEO complaints against various supervisors and coworkers. (ECF No. 1.) As a result, the Plaintiff sued the Secretary of the Department of the Air Force, the Defendant, in the Western District of Texas on August 20, 2020, alleging violations of the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964. (*Id.*) The Defendant filed a Motion to Dismiss and the Court dismissed Plaintiff's claim under the Rehabilitation Act for failure to state a claim. (ECF No. 12.) Because Plaintiff did not file an amended complaint within 14 days of the Order, that claim was dismissed with prejudice, leaving only his Title VII claim pending. (*Id.*) The Parties have proceeded with litigation leading to this pending Motion for Summary Judgment, filed by the Defendant on November 14, 2022. (ECF No. 42.) The Plaintiff responded to the Defendant's Motion, (ECF No. 52), and the Defendant then filed a sur reply. (ECF No. 55.)

Appendix B

On February 1, 2023, Judge Garcia issued a report and recommendation recommending that the Defendant's Motion for Summary Judgment be granted. (ECF No. 58.) The Plaintiff, himself, objected on February 15, 2023. (ECF No. 62.)

B. Factual History

The factual history of this case was diligently set out by Judge Garcia in his report and recommendation, and this Court largely adopts that summary.

The Plaintiff worked for the Defendant as an Airplane Simulator Instructor at the Laughlin Air Force Base until his removal on April 6, 2019. (ECF No. 1 at 3.) He alleges that during his employment, the Defendant engaged in "unlawful employment practices," specifically that the Defendant retaliated against the Plaintiff by removing him from his position because he filed several Equal Employment Opportunity ("EEO") complaints. (*Id.*)

The Plaintiff's first EEO complaint, filed on February 15, 2015, alleged the Defendant discriminated against him and created a hostile work environment because he was German. (*Id.*) The Defendant investigated the complaint, issued a report on September 10, 2015, and then issued a Notice of Proposed Suspension on December 17, 2015, proposing to suspend the Plaintiff for 12 days. (*Id.*) The Defendant later withdrew the notice. (*Id.*)

The Plaintiff filed a second EEO complaint on April 11, 2016, alleging he was discriminated against for filing the

first EEO complaint. (*Id.*) The Defendant issued another Notice of Proposed Suspension on May 2, 2016, this time proposing a 14-day suspension. (*Id.*) The Defendant did not withdraw this suspension. It went into effect on June 7, 2016. (*Id.*)

The Plaintiff filed a third EEO complaint on July 7, 2017, alleging he was subjected to a hostile work environment based on his religion, his German origin, and in retaliation for filing the first two EEO complaints. (*Id.* at 4.) The Defendant indicated on August 14, 2017, that the complaint would be investigated. (ECF No. 11-3 at 7.) Neither party alleges if, or when, that investigation was completed. The Defendant does concede that the Plaintiff had EEO complaints pending at the time of his removal. (ECF No. 11 at 5.)

On March 6, 2018, the Defendant issued a Notice of Proposed Removal, signed by David M. Loftus, to the Plaintiff, informing him that the Defendant was considering removing him from his position. (ECF No. 11-1 at 3.) On March 6, 2019, the Defendant issued an Amended Notice of Proposed Removal, again signed by Loftus, to the Plaintiff. (Id. at 2.) On March 25, 2019, the Defendant, through Colonel Carey Jones, issued a Notice of Decision to Remove to the Plaintiff, informing him that the Defendant would remove him from his position. (ECF No. 11-2 at 2.) The Plaintiff was removed from his employment on April 6, 2019. (ECF No. 1 at 3.)

The Plaintiff appealed his removal to the Defendant on May 6, 2019. (ECF No. 1 at 4.) He alleges his removal

was confirmed and the Defendant authorized him to file a civil action. (*Id.* at 2.) On August 20, 2020, the Plaintiff, represented by counsel, filed this suit alleging the Defendant unlawfully retaliated against him for filing EEO complaints. (ECF No. 1 at 2-4.)

II. STANDARD

When a party files an objection to any portion of a magistrate judge's report and recommendation, the district court must undertake a *de novo* review of the conclusions to which the party properly objects. Fed. R. Civ. P. 72(b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to."); 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made."). In conducting a *de novo* review, a district court must conduct its own analysis of the applicable facts and legal standards and is not required to give any deference to the magistrate judge's findings. *See United States v. Raddatz*, 447 U.S. 667, 690, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) ("The phrase '*de novo* determination' has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy."). However, the parties filing objections must specifically identify those findings objected to, and district courts need not conduct a *de novo* review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987) (citing *Nettles v. Wainwright*, 677 F.2d 404, n. 8 (5th Cir.1982) (en banc)).

The Plaintiff himself filed objections after he apparently fired his lawyer. *See* (ECF No. 60.) These objections simply reargue the same points previously raised before Judge Garcia, and are conclusive and general in nature. The Plaintiff does not cite a single legal authority in the entire document. Further, nearly all the contentions relate to a part of the case that Judge Garcia spared from summary judgment. The Plaintiff is simply bolstering findings Judge Garcia decided in the Plaintiff's favor. He fails to argue why the findings against the Plaintiff's contentions were decided incorrectly. It is most proper, therefore, for the Court to review the report and recommendation for clear error.

III. ANALYSIS

As stated above, the Plaintiff only made redundant objections to the sections of the report and recommendation where the magistrate judge agreed with the Plaintiff. To the extent the Plaintiff's objections implicate the pretext section of the analysis, the Plaintiff's objections fail to properly address the issues.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party satisfies its burden by:

> (A) citing to particular parts of materials in the record, including depositions, documents,

> electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1)(A). To obtain summary judgment, the moving party need not affirmatively negate the nonmovant's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Instead, the moving party initially bears the burden only of "showing . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has satisfied this burden, the burden shifts to the nonmoving party to "go beyond the pleadings and by...affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324.

A dispute is "genuine" if the evidence permits a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Material facts are "facts that might affect the outcome of the suit under the governing law. . . ." *Anderson*, 477 U.S. at 248. In considering a motion for summary judgment, courts must view the evidence and the inferences drawn from

the record in the light most favorable to the nonmoving party. *Weeks Marine, Inc. v. Fireman's Fund Ins. Co.*, 340 F.3d 233, 235 (5th Cir. 2003). "Although [the Court draws] all justifiable inferences in the light most favorable to the non-moving party, the non-movant must present sufficient evidence on which a jury could find in his favor." *Whitt v. Stephens Cty.*, 529 F.3d 278, 282 (5th Cir. 2008). Further, in evaluating a motion for summary judgment, courts must refrain from making credibility determinations or weighing the evidence. *Tolan v. Cotton*, 572 U.S. 650, 657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam) (reversing grant of summary judgment because the Court of Appeals "failed to view the evidence at summary judgment in the light most favorable to [the nonmovant] with respect to the central facts of th[e] case. . .improperly weighed the evidence[,] and resolved disputed issues in favor of the moving party[.]").

B. The Plaintiff Cannot Show Pretext Regarding His Retaliation Claim

Judge Garcia ably laid out the framework regarding the Plaintiffs retaliation claim. The summary judgment record does not contain any direct evidence of retaliation, merely the Plaintiff's inferences that he deems as good as direct evidence; therefore, the *McDonnell Douglas* framework applies. *Jenkins v. City of San Antonio Fire Dep't*, 784 F.3d 263, 267-68 (5th Cir. 2015). Also, the Plaintiff does not object to this part of the report.

In his objections, the Plaintiff spends the entirety of the document rearguing that a prima facie case of

retaliation is supported by the evidence. That is the first step of the *McDonnell Douglas* framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). However, as Judge Garcia found, when taken in the light most favorable to the Plaintiff, there is a colorable prima facie case of retaliation. The Defendant offered non-discriminatory reasons for the Plaintiffs termination, pursuant to step two of the *McDonnell Douglas* test. *Id.* at 802-04. In step three, Judge Garcia found that the Plaintiff could not show a triable issue of fact. The Plaintiff, in his original motion and in his objections, does not demonstrate that evidence of pretext exists. This step of the analysis is what is fatal to the Plaintiff's claim: not the prima facie case of retaliation as the Plaintiff continues to press. Even when incorporating the objections, the Plaintiff still fails to show that the Defendant would not have terminated him *but for* the filing of the EEO complaints. That failure is fatal to his suit.

This Court agrees with the legal analysis of Judge Garcia. The Plaintiff, in his objections, continues to argue minor details regarding his history of employment with the Defendant, but does not raise any genuine issue of material fact. As Judge Garcia found, "[d]isputing the facts underlying the employment decision does not demonstrate pretext." *LeMaire v. Louisiana*, 480 F.3d 383, 391 (5th Cir. 2007).

The Fifth Circuit, in *Lemaire*, held that "[o]ur anti-discrimination laws do not require an employer to make proper decisions, only non-retaliatory ones . . . [the

Plaintiff] must do more than just dispute the underlying facts and argue that [the Defendant] made the wrong decision in order to survive summary judgment." *Id.* Here, that is exactly what the Plaintiff claims. The Plaintiffs objections are simply an attempt to relitigate the minutiae of his daily employment rather than a clear statement of why he was unlawfully terminated.

The Plaintiff also tries to reargue the temporal proximity of the actions taken. He claims the actions were close enough to establish retaliation, by claiming that the one year between a notice of proposed removal in March 2018 and the notice of removal in March 2019 "evinces the ad hoc, half hazard attempt on the part of Loftus." (ECF No. 62, p. 3.) "But [t]emporal proximity alone is insufficient' to survive summary judgment at the pretext stage in the absence of 'other significant evidence of pretext.'" *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 564 (5th Cir. 2019). The temporal proximity is still not sufficient to deny summary judgment.

Finally, the thrust of the Plaintiff's objections can be summarized by the following sentence, "Loftus' knowledge of Plaintiff's protected activity is sufficient enough to attribute retaliatory animus when he proposed the removal action." (*Id.* at 2.) Mere knowledge of a protected status is insufficient. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 588-89 (5th Cir. 2020). The only argument beyond mere knowledge that the Plaintiff makes in his objections is predicated on pure speculation. The Plaintiff claims, "[i]t is reasonable to assume that the newly arrived Commander Jones was well briefed upon

his arrival by Loftus regarding Plaintiff." (ECF No. 62, p. 3.) The only attempt to substantiate that connection is the Plaintiff's offer of his own email where he previously alleged that such briefing took place, but nothing more. (*Id.*) The Plaintiff offers no objective evidence that this briefing actually took place, that the Plaintiff was discussed at this alleged briefing, or that Loftus and Jones discussed the Plaintiff negatively. The Plaintiff certainly did not prove that Loftus successfully persuaded a brand-new commander that the Plaintiff should be retaliated against. The Plaintiff uses this unsupported assumption to carry over years of alleged retaliatory animus and impute that animus to Colonel Jones. That is not a reasonable inference. Nothing can reasonably be drawn in the Plaintiff's favor here. Mere conclusory allegations are insufficient to defeat summary judgment. *Clark*, 952 F.3d at 579 (citing *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010)). This sort of bare allegation cannot revive the Plaintiff's ease, and as Judge Garcia properly concluded, summary judgment is appropriate.

III. CONCLUSION

The Court agrees that the Defendant is entitled to summary judgment. Accordingly, it is **ORDERED** that the Magistrate Judge's Report and Recommendation (ECF No. 58) is **ADOPTED**, and the Motion for Summary Judgment by the Defendant (ECF No. 42) is **GRANTED**. The Plaintiff's objections (ECF No. 62) are **OVERRULED**.

Appendix B

SIGNED and ENTERED on this 2nd day of October 2023.

/s/ Alia Moses
ALIA MOSES
Chief United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, DEL RIO DIVISION, FILED FEBRUARY 1, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Civil Action No. DR-20-CV-00049-AM-VRG

HANS GOERZ,

Plaintiff,

v.

FRANK KENDALL, SECRETARY,
DEPARTMENT OF THE AIR FORCE,

Defendant.

Filed February 1, 2023

REPORT AND RECOMMENDATION

TO THE HONORABLE ALIA MOSES, CHIEF UNITED STATES DISTRICT JUDGE:

The Court referred the above-captioned matter to the undersigned for initial proceedings consistent with 28 U.S.C. § 636(b). Defendant Frank Kendall, Secretary of the Department of the Air Force, filed a motion for

summary judgment to which Plaintiff Hans Goerz responded. For the following reasons, it is recommended that Defendant's Motion for Summary Judgment [ECF No. 42] be **GRANTED.**

I. BACKGROUND

This litigation arises from the termination of the employment of Plaintiff, Hans Goerz, with the Department of the Air Force. According to Plaintiff's Original Complaint, the Department of the Air Force terminated Goerz's employment as an Airplane Pilot (Simulator Instructor) at Laughlin Air Force Base, Texas, due to his previous EEO complaints against various supervisors and coworkers. (Pl.'s Original Compl. ¶ 7, ECF No. 1.) As a result, Plaintiff filed suit against the Secretary of the Department of the Air Force, Defendant, in the Western District of Texas on August 20, 2020, alleging violations of the Rehabilitation Act of 1973, as amended, and Title VII of the Civil Rights Act of 1964, as amended. (Pl.'s Original Compl. ¶ 8.) After Defendant filed a Motion to Dismiss, the Court dismissed Plaintiff's claim under the Rehabilitation Act for failure to state a claim. (Order, ECF No. 12.) Because Plaintiff did not file an amended complaint within 14 days of the Order, that claim was dismissed with prejudice, leaving only his Title VII claim pending. (*Id.*)

The Parties have proceeded with litigation leading to this pending Motion for Summary Judgment, filed by Defendant on November 14, 2022. (Def.'s Mot. for Summ. J., ECF No. 42.) Plaintiff responded to Defendant's

Motion, (Pl.'s Resp., ECF No. 52), and Defendant replied. (Def.'s Reply, ECF No. 55.) The briefing is closed, and the Motion is ripe for disposition. *See* W.D. Tex. Local Rule CV-7(e).

II. DISCUSSION

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010) (quotation omitted). A dispute is "genuine" if the evidence permits a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Mason v. United Air Lines, Inc.*, 274 F.3d 314, 316 (5th Cir. 2001). Material facts are "facts that might affect the outcome of the suit under the governing law . . . ." *Anderson*, 477 U.S. at 248; *accord Willis v. Roche Biomed. Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). In considering a motion for summary judgment, courts must view the evidence and the inferences drawn from the record in the light most favorable to the nonmoving party. *Weeks Marine, Inc. v. Fireman's Fund Ins. Co.*, 340 F.3d 233, 235 (5th Cir. 2003). Further, in evaluating a motion for summary judgment, courts must refrain from making credibility determinations or weighing the evidence. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 635 (5th Cir. 2011); *see also Tolan v. Cotton*, 572 U.S. 650, 657, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam) (reversing grant of summary judgment in qualified immunity context because the Court of Appeals "failed to view the

evidence at summary judgment in the light most favorable to [the nonmovant] with respect to the central facts of th[e] case, . . . improperly weighed the evidence[,] and resolved disputed issues in favor of the moving party[.]") (quotations and alterations omitted)).

To obtain summary judgment, the moving party need not affirmatively negate the nonmovant's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). Instead, the moving party initially bears the burden only of "showing – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325 (quotation mark omitted); *accord Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 234 (5th Cir. 2010). Once the moving party has satisfied this burden, the burden shifts to the nonmoving party to "go beyond the pleadings and by . . . affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotations omitted); *accord Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 191-92 (5th Cir. 2011).

A. Objections to Summary Judgment Evidence

Plaintiff objects, although informally, to the Declaration of Plaintiff's supervisor, Mr. David Loftus ("Loftus"), as "simply a biased affidavit of an interested witness." (Pl.'s Resp. 36) However, Plaintiff also cites to Loftus' declaration through his response. *See generally*

id. Nonetheless, the declaration is competent summary judgment evidence because it meets the requirements of Federal Rule of Civil Procedure 56(c)(4), and Loftus is not considered an interested witness in this context. *See Wiley v. Am. Elec. Power Serv. Corp.*, 287 F. App'x 335, 339 (5th Cir. 2008) (per curiam) (holding a person is not an interested witness in the Title VII context just by being a decisionmaker or agent of the defendant employer). The objection to the declaration is **OVERRULED.**

B. Facts Appearing in the Summary Judgment Record

The Parties do not significantly dispute the events leading up to Plaintiff's termination. Viewed in the light most favorable to Plaintiff with all reasonable inferences drawn in his favor, the summary judgment evidence demonstrates the following timeline.

Plaintiff worked as a Simulator Instructor at Laughlin Air Force Base since 1998, first as a contract employee and then as a civilian. (Loftus Decl. ¶ 2, Def.'s Ex. A, ECF No. 42-1.) In this role, Plaintiff presented course material and instructed pilot trainees on a flight simulator, among other tasks. (*Id.* at ¶ 3-4.) Loftus was Plaintiff's rating supervisor from May 2016 until Plaintiff's removal in April 2019. (*Id.* at ¶ 5.)

In October 2014, Defendant reprimanded Plaintiff for "failure to follow the AETC syllabus, use of offensive language, and striking a student during a stimulator mission." (Notice of Decision to Reprimand ¶ 1, Def.'s Ex. B-1, ECF No. 42-3.) In February 2015, Plaintiff filed his

first of three EEO complaints. (Report of Investigation 1 at 1, Pl.'s Ex. 1, ECF No. 52-2.) This complaint was against Ms. Isbael Castillo, Mr. Danny Williams, Mr. Theodore Glenn, Mr. Greg Thurgood, Mr. Randy Sheppard, and Lt Col. Craig Allen for discrimination and hostile work environment based on Plaintiff's national origin (German). (*Id.* at 1-2.) An ROI was issued on September 10, 2015. (*Id.* at 1). On December 17, 2015, Defendant issued a Notice of Proposed Suspension to Goerz. (Notice of Proposed Suspension 1, Pl.'s Ex 2, ECF No. 52-3.) Without citing to any evidentiary support, Plaintiff alleges this proposal was withdrawn without reason. (Pl.'s Resp. ¶ 3.)

Then, in April 2016, Plaintiff filed another EEO complaint, alleging discrimination as well as retaliation due to his first complaint against Mr. Theodore Glenn, Dany Williams, Lt. Col. Soderstrom, Col. Timothy McGregor, and Ms. Cindy Cardenas. (Compl. of Discrimination 1 at 1, Def.'s Ex. C-2, ECF No. 42-6; Report of Investigation 2, Pl.'s Ex. 3, ECF No. 52-4.) Mr. Danny Williams, on May 2, 2016, issued a Notice of Proposed Suspension for striking a student during training and unauthorized absences. (Notice of Proposed Suspension 2 at 1, Pl.'s Ex. 4, ECF No. 52-5.) Defendant thereafter suspended Plaintiff for 14 days in July 2016. (Amendment to Notice of Decision 1, Pl.'s Ex. 5, ECF No. 52-6.)

In July 2017, Plaintiff filed his third and final EEO complaint alleging discrimination on multiple grounds, hostile work environment, and retaliation on behalf of Theodore Glenn, Lt Col. Soderstrom, and Danny Williams. (Compl. of Discrimination 2 at 4-5, Pl.'s Ex. 4, ECF No.

52-7.) An investigation of this claim by the Investigations and Resolution Division (IRD), a part of the Department of Defense, began in October 2017. (Mitchell Decl. ¶ 7-8, Def.'s Ex. D, ECF No. 42-8.) Loftus was a witness during the investigation. (Required Information and Documentation, Pl.'s Ex. 7, ECF No. 52-8; Def.'s Ex. A ¶ 12.) No further interviews or investigation occurred after November 2017. (Def.'s Ex. D ¶ 8-11; *see* Def.'s Ex. A ¶ 12; Pl.'s Resp. ¶ 33.)

Although the dates on the documentation differ and are slightly illogical, the Parties agree Loftus informed Plaintiff the Air Force was proposing his removal in December 2018. (Notice of Proposed Removal, Def.'s Ex. E, ECF No. 42-9; Am. Notice of Proposed Removal, Def.'s Ex. E-1, ECF No. 42-10; Def.'s Mot. for Summ. J. at 3; Pl.'s Resp. ¶ 9.) Loftus based the proposal on four charges: 1) "Failure to Follow Air Force Policy on smoking areas," 2) "Failure to Follow Supervisor Instructions," 3) "for being Absent Without Leave (AWOL)," and 4) "because [his] pattern of misconduct due to poor judgment makes [sic] Unsuitable for Continued Employment." (Def.'s Ex. E at 1; Def.'s Ex. E-1 at 2.) Loftus also identified Plaintiff's 2016 suspension and knowledge of tobacco regulations as "aggravating factors." (Def.'s Ex. E at 3; Def.'s Ex. E-1 at 4.) Plaintiff responded in a written statement, not denying the violations of Defendant's smoking policies but however disputing various parts of the other three charges. (Hans Goerz Resp. to Charges, Def.'s Ex. H, ECF No. 42-13.) On March 25, 2019, Defendant sent Plaintiff a Notice of Decision to Remove, citing the reasons listed in the Notice of Proposed Removal and noting consideration of

Plaintiff's Reply. (Notice of Decision to Remove at 1, Def's Ex. I, ECF 42-14.) After Plaintiff appealed, the Merit Systems Protection Board (MSPB) affirmed the removal. (MSPB Initial Decision, Def.'s Ex. J at 1, ECF No. 42-15.)

C. Governing Law and Application to Summary Judgment Evidence

The analysis for retaliation claims differs depending on whether the Plaintiff produces direct or circumstantial evidence of discrimination. *See Jenkins v. City of San Antonio Fire Dep't*, 784 F.3d 263, 268-69 (5th Cir. 2015); *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 547 F. App'x 484, 488 (5th Cir. 2013) (per curiam) (citing *Portis v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 328 (5th Cir. 1994)). Plaintiff appears to indirectly argue that direct evidence of retaliation exists in this case, although within the context of a different part of the retaliation analysis. (Pl.'s Resp. ¶ 12-13.) Further, the summary judgment record suggests other employees made comments regarding Plaintiff. (Notice of Partial Acceptance and Dismissal of EEO Compl., Def.'s Ex. C-3 at 11, 18, 26, 32, 33.) Because Defendant addressed Plaintiff's argument in its reply, and it impacts the framework used, as well as simply for the sake of completeness, an analysis of this issue is appropriate. (Def.'s Reply at 2-5.)

"Direct evidence is evidence that, if believed, proves the fact . . . without inference or presumption. In the Title VII context, direct evidence includes any statement or document that shows on its face that an improper criterion served as a basis for the adverse employment action."

Harry v. Dall. Hous. Auth., 662 F. App'x 263, 266 (5th Cir. 2016) (per curiam) (citing *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 415 (5th Cir. 2003), overruled on other grounds by *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010)). Courts have looked to four factors to determine whether comments in the workplace are "direct evidence:" 1) relation to the protected characteristic, 2) proximity to the employment decision, 3) whether the speaker had authority over the employment decision, and 4) relation to the employment decision. *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 476 (5th Cir. 2015) (citing *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001)). For example, a supervisor stating that she fired the employee because she "had filed an unsubstantiated EEOC claim" was direct evidence that the employer fired the employee in retaliation for filing an EEOC claim. *Fabela*, 329 F.3d at 413. No inferences were needed to establish retaliation. *Id.* at 416.

Direct evidence of retaliation does not exist in this case. Plaintiff first asserts a statement by Loftus in a document sent to the investigator of Plaintiff's EEO complaint is direct evidence of retaliation. (Pl.'s Resp. ¶ 12-13.) The statement reads, in relevant part, "I . . . determined that Mr. Goerz' description of the event was exaggerated and had ZERO basis for EO discrimination . . . ." (Pl.'s Ex. 7 at 1.) The four factors are divided when applied to this comment. The comment does relate to the EEO complaint and was made by an individual with authority, Loftus. On the other hand, the comment, made over a year before the proposed removal, was not close in time to the adverse employment decision and did not relate to that decision.

However, this comment cannot be direct evidence because inferences are required to establish the decision was made in retaliation for that claim. For example, the 5th Circuit Court of Appeals has held that a supervisor's comment about being unhappy about EEO complaints by the employee was not direct evidence because the factfinder would still have to infer that the supervisors acted on those feelings in making their decision. *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 547 F. App'x 484, 488-49 (5th Cir. 2013) (per curiam). The statement by Loftus does not even directly articulate a negative feeling towards Plaintiff's protected activity. Accordingly, to find retaliation based on this statement, the factfinder would need to make even more inferences than required for the statement in *Etienne*. Therefore, this is not direct evidence of retaliation.

Further, comments by Plaintiff's coworkers regarding the Plaintiff are disputed in the summary judgment evidence presented. (Def.'s Ex. C-3 at 11, 18, 26, 32, 33.) Although Plaintiff does not assert this comment is direct evidence in his Response to Defendant's Motion and the comment, as presented, is hearsay, an analysis of it is appropriate for the sake of completeness as well as to meet the summary judgment standard of making all inferences in favor of the nonmovant. The summary judgment evidence mentions a comment by Mr. Jorgenson, Plaintiff's coworker, suggesting Plaintiff is "evil" and "should be avoided." (*Id.*, Pl.'s Ex. 7 at 4.) The factors do not indicate this is direct evidence of retaliation. The statement was not related to the EEO complaints, was made over two years prior to the decision to remove Plaintiff, was by Jorgenson

while he was not a supervisor, and was not related to the removal decision. Accordingly, the comment is also not direct evidence of retaliation.

Because Plaintiff has not offered direct evidence of retaliation, the *McDonnell Douglas* framework applies. *See Jenkins*, 784 F.3d at 268-69; *Etienne*, 547 F. App'x 484, 488 (5th Cir. 2013). Under this framework, the plaintiff must first establish a prima facie case of retaliation, which creates a presumption of retaliation. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 227 (5th Cir. 2015). Then, the burden switches to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 231. Once the defendant satisfies this burden, "the plaintiff must show a conflict in substantial evidence on the question of whether the employer would have taken the action but for the protected activity." *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 949 (5th Cir. 2015) (quoting *Coleman v. Jason Pharms.*, 540 F. Appix 302, 304 (5th Cir. 2013) (per curiam) and citing *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 658 (5th Cir. 2012) (internal quotations omitted)).

1. Prima Facie Case

To establish a prima facie case of retaliation under Title VII, a plaintiff must establish: "(1) that the plaintiff engaged in a protected activity, 2) that an adverse employment action occurred, and 3) that a causal link existed between the protected activity and the adverse action." *Banks v. E. Baton Rouge Parish Sch. Bd.*,

320 F.3d 570, 575 (5th Cir. 2003). The first and second elements are not disputed by the Parties. (Pl.'s Resp. ¶ 39.) Defendant, however, contends Plaintiff cannot show a causal connection between the protected activity and the adverse action. (Def.'s Mot. for Summ. J. at 10-11.) Although there has been some dispute about the causation standard at the prima facie stage of the framework, the 5th Circuit has held that standard is less stringent than the "but-for" standard required at the pretext stage of the analysis. *Garcia v. Pro. Cont. Servs.*, 938 F.3d 236, 243 (5th Cir. 2019).

One way a plaintiff can establish prima facie causation is by demonstrating "temporal proximity between the protected activity and the alleged act." *Porter*, 810 F.3d at 948 (quoting *Washburn v. Harvey*, 504 F.3d 505, 511 (5th Cir. 2007). The two must be "very close in time" to establish causation by timing alone. *Id.* (internal quotations omitted). A period of 2 months or less is generally considered close enough to show the causal link. *Brown v. Wal-Mart Stores E., L.P.*, 969 F.3d 571, 578 (5th Cir. 2020) (citing *Garcia*, 938 F.3d at 243; *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 995 (5th Cir. 2005) and *Porter*, 810 F.3d at 949). Here, Plaintiff filed his most recent EEO complaint in July 2017. (Def.'s Ex. C-2 at 4-5). The challenged employment action, his removal, was not proposed until December 2018 at the earliest and was not decided until April 2019. (Def.'s Ex. E at 1; Def's Ex. E-1 at 1.) Therefore, a period of at least 17 months passed between the protected activity and the adverse employment action. This lengthy period is insufficient to show causation based on temporal proximity. Citing

Fabela, Plaintiff contends that, because direct evidence of animus exists, a longer period of time can still show causation. (Pl.'s Resp. ¶ 13.) However, as discussed above, Plaintiff has failed to provide direct evidence of animus. *Supra* at p. 6-8. Accordingly, this argument fails, and Plaintiff cannot establish a causal connection by temporal proximity.

Plaintiff further contends that the employer's knowledge of the employee's protected activity is sufficient to survive the prima face stage of the analysis. (Pl.'s Resp. ¶ 40 (citing *Lang v. Tex. Dep't of Crim. Just.*, 2021 U.S. Dist. LEXIS 60232, 2021 WL 1199624 at *8 (W.D. Tex.) and *Medlock v. Ace Cash Express, Inc.*, 589 F. App'x 707, 709 (5th Cir. 2014) (per curium))). Yet, this contention is incorrect. The court in *Lang*, in deciding a 12(b)(6) motion to dismiss, noted that an employer's knowledge of the protected activity was sufficient to show a retaliation claim was plausible. *Lang*, 2021 U.S. Dist. LEXIS 60232, 2021 WL 1199624 at *33 (citing *Medlock*, 589 F. App'x at 709). The plaintiff's causation burden at summary judgment is higher than in a motion to dismiss. *See Chimm v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016). Further, *Medlock* merely stands for the proposition that causation cannot be shown if an employer was not aware of the plaintiff's protected activity, *not* that awareness necessarily shows causation. *See* 589 F. App'x at 709. Nevertheless, while analyzing a retaliation claim under the ADA, the 5th Circuit has held that the employment decision being based in part on the employer's knowledge of the protected activity can establish prima facie causation. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 588-89

(5th Cir. 2020) (quoting *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998), superseded by statute on other grounds, ADA Amendments Act of 2008, § 2(b)(4)-(5), as recognized in *Cruz v. R2 Sonic, LLC*, 405 F. Supp. 3d 676, 687 (W.D. Tex. 2019)). The court in *Clark* conflated the prima facie and pretext analysis and affirmed the district court's grant of summary judgment based on the plaintiffs failure to meet the "but-for" causation standard required to show pretext. *Clark*, 952 F.3d at 589. The court held that the plaintiff had failed to show any connection between his termination and the protected activity and, therefore, did not present a prima facie case of retaliation. *Id.* Further, the temporal proximity analysis to establish a prima facie case often considers the time period between the employer's knowledge of the protected activity and the adverse employment action. *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 305 (5th Cir. 2020); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam). If employer knowledge alone were sufficient to establish causation, the time period between knowledge and the adverse employment action would be irrelevant. Additionally, San Antonio division of this Court has held mere knowledge is insufficient to make a prima facie case of retaliation. *Standley v. Rogers*, 202 F. Supp.3d 655, 670 (W.D. Tex. 2016). Here, Plaintiffs supervisors were aware of his participation in protected activities. (Def.'s Ex. A ¶ 12.) However, Plaintiff has failed to show any connection, including temporal proximity, between that knowledge and the adverse employment decision. Therefore, Plaintiff's argument again fails.

Finally, Plaintiff also contends that he can show causation under the cat's paw theory. (Pl.'s Resp. ¶ 42.)

A plaintiff can establish the prima facie causal link by showing "cat's paw causation." *Saketoo v. Adm'rs of the Tulane Educ. Fund*, 31 F.4th 990, 1001 (5th Cir. 2022). Under this theory, a plaintiff must establish that the person with retaliatory motive somehow influenced the decisionmaker to take the retaliatory action." *Zamora v. City of Hous.*, 798 F.3d 326, 331 (5th Cir. 2015). The decisionmaker's review of a recommendation or report from someone with a retaliatory animus in making his or her adverse employment decision can show causation under this theory. *Id.* at 334. Here, Col. Carey J. Jones, in reaching the decision to remove Plaintiff, reviewed Loftus' Proposal to Remove. (Def.'s Ex. I at 1.) Although no direct evidence of Loftus having a retaliatory animus against Plaintiff exists, Loftus was a witness in the investigation of Plaintiff's most recent EEO complaint and believed Plaintiff's claim had "ZERO basis." (Def.'s Ex. A ¶ 12; Pl.'s Ex. 7 at 1.) Making all inference in favor of the nonmovant, a reasonable factfinder could find a retaliatory motive on behalf of Loftus and that Loftus influenced Col. Jones through his proposal. Accordingly, Plaintiff has demonstrated a causal link and shown a prima facie case of discrimination.

2. Employer's Legitimate, Non-discriminatory Reason

Once a plaintiff makes a prima facie showing of retaliation, the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action. *Burton*, 798 F.3d at 227. The burden is a burden of production. *Id.* at 231. Violation of the employer's

policy and poor work performance are legitimate, non-discriminatory reasons for an adverse employment decision. *See Wallace*, 271 F.3d at 220; *Burton*, 798 F.3d at 231. Defendant points to the four charges listed in the Decision to Remove as his legitimate, non-discriminatory reasons for removing Plaintiff. (Def.'s Mot. for Summ. J. at 11-12.) Accordingly, Defendant provides four reasons: 1) "Failure to Follow Air Force Policy on smoking areas," 2) "Failure to Follow Supervisor Instructions," 3) "for being Absent Without Leave (AWOL)," and 4) "because [Plaintiff's] pattern of misconduct due to poor judgment [made him] Unsuitable for Continued Employment." (Def's Ex. I at 1.) Therefore, Defendant has met his burden of production.

3. Pretext

"To survive summary judgment, the plaintiff must show a conflict in substantial evidence on the question of whether the employer would have not taken the action *but for* the protected activity." *Porter*, 810 F.3d at 949 (emphasis added). Substantial evidence is evidence that is of "such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 561-62 (5th Cir. 2019). Further, a plaintiff must rebut each reason given by the employer to survive summary judgment. *Burton*, 798 F.3d at 233.

Pretext can be shown two ways: 1) retaliatory animus "more likely motivated [the] employer's decision" (usually shown through disparate treatment) or 2) the employer's

given reason is not worthy of credence. *Brown*, 969 F.3d at 577 (quoting *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 363 (5th Cir. 2013)). In his Response to Defendant's Motion, Plaintiff does not argue he was treated differently than any other employee. However, he does make multiple other assertions in an attempt to demonstrate pretext. (Pl.'s Resp. ¶ 9-44.)

First, Plaintiff asserts that the *Douglas* factors should aid the analysis of this matter. (Pl.'s Resp. ¶ 22-27.) However, the *Douglas* factors, named for the factors used by the Merit System Protection Board (MSPB) to review the reasonableness of an agency's penalty against an employee in *Douglas v. Veterans Admin.*, is used for a direct appeal of a decision of the MSPB, not for a retaliation analysis. 5 M.S.P.R 280 (1981); *see Williams v. Wynne*, 533 F.3d 360, 374 (5th Cir. 2008) (addressing that the MSPB must ensure the agency considers the factors); *see also Dickerson v. United States VA*, 2022 U.S. Dist. LEXIS 102606 at *16 (S.D. Tex.) (analyzing retaliation under the ADA and the propriety of an MSPB decision without applying the Douglas factors to the retaliation analysis); *see generally Frazier v. Napolitano*, 626 F. Supp. 2d 618 (E.D. La. 2009) (using the same analysis); *see generally also Haskins v. Nicholson*, 900 F. Supp. 2d 712 (S.D. Miss. 2012) (using the same analysis). Further, most of Plaintiff's arguments regarding the *Douglas* factors, and the falsity of his status as AWOL, are disagreement with the facts underlying the charges provided by the Air Force. (Pl.'s Resp. ¶ 22-27, 36.) Disputing the facts underlying the employment decision does not demonstrate pretext. *LeMaire v. Louisiana*, 480 F.3d 383, 391 (5th Cir.

2007); *Denis v. Academy, Ltd.*, 787 F. App'x 250, 252 (5th Cir. 2019) (per curium). Accordingly, these arguments fail.

Within the context of the Douglas factors, Plaintiff also argues that because he had recently received a positive performance review from Loftus prior to his removal, the Air Force's reasons for his removal must be false. (Pl.'s Resp. ¶ 25.) A sudden negative change in performance evaluations can demonstrate pretext if the employer can offer no other explanation. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 685 (5th Cir. 2001). However, Plaintiff has not produced any evaluations in the summary judgment record nor indicated the timing of these evaluations. Further, intervening *positive* employment actions between the protected activity and the adverse employment action cuts against retaliation. *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002); *Brady v. Hous. Indep. Sch. Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997). Accordingly, this is not substantial evidence the removal decision would not have been made but for a retaliatory motive.

Additionally, Plaintiff cites to *Lang* to contend that knowledge alone will demonstrate pretext. (Pl.'s Resp. ¶ 39-40). However, as stated earlier, *Lang* was decided in the context of a 12(b)(6) motion to dismiss and held that knowledge was sufficient to meet the prima facie causation burden in that context, *not* show pretext at the summary judgment stage. *Lang*, 2021 U.S. Dist. LEXIS 60232, 2021 WL 1199624 at *33 (emphasis added). Accordingly, that unpublished opinion is not controlling here. Further, as discussed above, mere knowledge, without a showing of

some type of causal connection between the activity and the decision, will not be sufficient to survive summary judgment. *Clark*, 952 F.3d at 589.

Plaintiff also contends that the temporal proximity between the filing of his most recent EEO complaint and his removal demonstrates pretext. (Pl.'s Resp. ¶ 15.) Yet, temporal proximity alone is insufficient to show pretext. *Musser*, 944 F.3d at 564 (citing *United States ex rel. King v. Solvay*, 871 F.3d 318, 334 (5th Cir. 2017) (per curiam)). Additionally, as discussed above, temporal proximity does not exist in this case. *Prima Facie* Case, *supra* at 1.

Furthermore, Plaintiff summarily states that the Air Force did not issue a final agency decision regarding his last EEO complaint without explanation. (Pl.'s Resp. ¶ 33.) Defendant does not seem to contest the Air Force did not reach a final agency decision in the matter. (*See* Def.'s Ex. D ¶ 11.) No case law appears to exist addressing this lack of agency decision on an EEO complaint as evidence of pretext. The 5th Circuit has held that allegations of an incomplete investigation by the employer into the *plaintiff's* violation of workplace policy does not provide evidence of pretext. *See Pineda v. UPS*, 360 F.3d 483, 489-91 (5th Cir. 2004); *Lawson v. Parker Hannifan Corp.*, 614 F. App'x 725, 731 (5th Cir. 2015). However, in *Guadalajara v. Honeywell Int'l, Inc.*, an almost non-existent investigation into the plaintiff's sexual harassment claim and a 6-day gap between his complaint and his suspension was enough to present a fact issue for pretext. 224 F. Supp. 3d 488, 510-11 (W.D. Tex. 2016). That fact situation, though, is not sufficiently similar to the one presented here. Further, a

plaintiffs burden when facing a summary judgment on its retaliation claim is to show a "conflict in substantial evidence on the question of whether the employer would have not taken the action but for the protected activity." *Porter*, 810 F.3d at 949. First, temporal proximity does not exist. Next, the Air Force did refer the matter to the IRD who completed a lengthy investigation into Plaintiff's complaints. (Def.'s Ex. D ¶ 6-9; Def.'s Ex. C-3 at 25-28.) Finally, Plaintiff has not connected the lack of final agency decision on his EEO complaints to his eventual removal. Accordingly, Plaintiff does not offer substantial evidence that his removal would not have occurred but for his EEO complaint.

Finally, Plaintiff asserts that the documents produced by Defendant were part of a "witch hunt" and that Air Force's reasons for his removal were false. (Pl.'s Resp. ¶ 41, 43). However, he does not offer any evidence or facts to support his bare assertion and speculation. Therefore, these assertions do not help him survive summary judgment. *See Likens*, 688 F.3d at 202; *see also Harry*, 662 F. App'x at 268. Accordingly, Plaintiff has failed to meet his burden under the third prong of the *McDonnell Douglas* framework.

III. CONCLUSION

For the reasons set forth in this report and recommendation, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED.**

The Parties may wish to file objections to the above recommendations. Failure to file written objections to

the findings and recommendations contained in this Report and Recommendation within **fourteen (14)** days from the date of its receipt shall bar an aggrieved party from receiving *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. 636(b)(1)(C), and shall bar an aggrieved party, except on grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). This Report and Recommendation disposes of all issues and controversies referred to the undersigned in the above-captioned cause. The Clerk shall terminate the referral.

SIGNED this 1st day of February, 2023.

/s/ Victor Roberto García
VICTOR ROBERTO GARCÍA
UNITED STATES MAGISTRATE JUDGE