No. 24-

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
DANA JOHNSON,

*Petitioner,*

*v.*

RAYTHEON COMPANY,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the standard in *Department of the Navy v. Egan*, 484 U.S. 518 (1988) precludes a private-sector whistleblower case.

## PARTIES

The parties to this proceeding are set out in the caption.

## RELATED CASES

United States of America, ex rel. Dana Johnson v. Raytheon Company, No. 3:17-CV-1098, U.S. District Court for the Northern District of Texas. Judgment entered Sept. 21, 2021.

United States of America, ex rel. Dana Johnson v. Raytheon Company, No. 21-11060, Court of Appeals for the Fifth Circuit. Judgment entered February 15, 2024.

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## PETITION FOR WRIT OF CERTIORARI

Dana Johnson, individually and as relator for the United States, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The trial court entered a judgment dismissing all but one of Johnson's claims for lack of subject-matter jurisdiction. S. App. 19-20.[1] The trial court granted summary judgment on the remaining claim. S. App. 21. The opinion of the Court of Appeals affirming the trial court is reported at *United States ex rel. Johnson v. Raytheon Co.*, 93 F.4th 776 (5th Cir. 2024). App. 1a.

## JURISDICTION

The Court of Appeals decided the case on February 15, 2024. App. 1a. A timely petition for rehearing was denied on March 19, 2024. App. 32a. The Supreme Court granted an application for extension of time to file a petition of writ of certiorari to July 17, 2024. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND RULES INVOLVED

The relevant statute is the United States False Claims Act concerning fraud by private entities in government contracts:

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1. The abbreviation is for the Sealed Appendix page number.

**(a) Liability for certain acts.—**

**(1) In general.**--Subject to paragraph (2), any person who--

**(A)** knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

**(B)** knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

**(C)** conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

**(D)** has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

**(E)** is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

**(F)** knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

**(G)** knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C.A. § 3729.

**(h) Relief from retaliatory actions.—**

**(1) In general.**--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

31 U.S.C.A. § 3730.

## STATEMENT OF THE CASE

### 1. Johnson claims retaliation for reporting Raytheon's fraudulent government billing.

Johnson worked for thirty years without any accusation of an ethical violation or poor performance until he reported concerns to his superiors that Raytheon was falsely telling the United States Navy that it was complying with its contract, which is a concern that Raytheon was knowingly presenting a fraudulent claim payment to the government. 4-CR-1353-54. Raytheon responded by instructing Johnson not to talk to the Navy about Raytheon's contract performance problems and by reporting to the Navy concerns Raytheon had with Johnson, including alleged security violations. 4-CR-1222. Raytheon claimed that Johnson downloaded and used an unauthorized software program called Wireshark. App. 5a. Raytheon also accused him of using a computer designated for Boeing without permission. App. 5a. None of this is true. 4-CR-1222-23, 1358, 1361, 1364-66. Johnson did not download the software, which could not physically happen because of privileges and passcodes. 4-CR-1172, 1176, 1364-65. However, Raytheon itself approved the use of Wireshark software, regularly used by its engineers. 14-CR-364-66. Both Raytheon and Boeing authorized Johnon to use the computer designated for Boeing. 14-CR-1366.

**2. Raytheon terminates Johnson's employment after the Navy's and Raytheon's own investigations.**

A forensic examiner for the Navy investigated the security concerns by analyzing Johnson's hardware and data. 4-CR-1120. The forensic examiner noted that the actions were questionable but found that Johnson's "permitted access allowed all of these activities right, wrong or indifferent." 4-CR-1121. The Navy nevertheless found that Johnson committed the violations and removed him from the contract project. S-2-CR-1886-87.[2] Raytheon relied not only on the Navy's findings, but also on its own purported investigation of the allegations to terminate Johnson's employment. 4-CR-1189-90, 1192.

**3. Whether Johnson's security clearance was revoked is a disputed issue.**

Raytheon says that the Department of Defense told Raytheon that it revoked Johnson's security clearance. S-2-CR-1874. Johnson disputed this allegation. 4-CR-1330. He objected to the evidence on the basis of hearsay. 4-CR-1430. The Navy's report states communications with the Department of Defense concerning Johnson's security clearance "revealed conflicting information regarding Johnson's security clearance status," including that Johnson reportedly still had an active security clearance. S-3-CR-593. However, other documentation, not in the record, reportedly showed his security clearance was revoked in September 2015. S-3-CR-593. This may well have happened but the Department of Defense is required to send notice of revocation to Johnson and he has the right to appeal. *See* Executive Order 12968. Johnson was not

2. Documents part of a sealed record have the prefix S.

given a notice of revocation. Nevertheless, Johnson does not attempt to change any government security decision by his lawsuit. Appellant's Brief 20; Appellant's Reply Brief 2. The claim is solely against Raytheon. 1-CR-262-287. Additionally, Raytheon moved for summary judgment on the basis that its actions were protected and not based on fact issues related to Johnson's conduct, only issues of causation. *See* Raytheon's Brief in Support of Motion for Summary Judgment; S-CR-920 ("While Raytheon denies that Johnson engaged in any protected activity, or that Raytheon knew about such activity, those are questions of fact that Raytheon does not attempt to resolve.").

**4. The truth of the underlying facts are not at issue in this petition.**

The Fifth Circuit itself did not attempt to resolve fact issues concerning the underlying claim, finding only that *Egan* precludes review of claims under the False Claims Act because the factual disputes may implicate the merits of government security decisions. App. 22a. The Fifth Circuit dissent "would not extend *Egan*'s narrow statutory bar to insulate from judicial review adverse actions taken by government contractors." App. 29a.

## REASONS FOR GRANTING THE PETITION

**1. The Fifth Circuit opinion conflicts with opinions in the D.C., Third, and Ninth Circuits.**

A split exists among the circuits concerning the extension of *Egan* to causes of action against private government contractors. The D.C. Circuit holds that a cause of action based on a knowingly false statement by a private entity does not conflict with the standard in

*Egan*. *See Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (Then Judge Kavanaugh dissented on the grounds that false reports by government employees [as opposed to private entities or employees] should also be protected). The Third Circuit held that *Egan* did not prohibit a cause of action against a private entity where the allegations clearly state that it does not depend on whether the security clearance decision was proper. *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008) (allowing a mixed-motive claim discrimination claim). *See also Stehney v. Perry,* 101 F.3d 925, 932 (3d Cir. 1996) ("not all claims arising from security clearance revocations violate separation of powers or involve political questions").

The Ninth Circuit found that *Egan* does not apply if the plaintiff is not contesting the government's decision on a security clearance. *Zeinali v. Raytheon Co.*, 636 F.3d 544, 551-42 (9th Cir. 2011). Johnson asserts a claim that Raytheon knowingly made false statements to the government but Johnson does not contest the government's decision. Appellant's Brief 20; Appellant's Reply Brief 2. The Fifth Circuit's opinion conflicts with the Ninth and D.C. Circuits by prohibiting a cause of action based on knowingly made false to statements to the government where the plaintiff does not contest the government's security clearance decision.

**2. The Fifth Circuit attempts to distinguish the D.C. Circuit opinion.**

The Fifth Circuit distinguishes the D.C. Circuit in *Rattigan* by noting that the ultimate security decision was favorable to the plaintiff. However, the issue is whether the security decision itself is being challenged, not the ultimate outcome of the security decision. The Fifth

Circuit also relies upon the decision in *Bland v. Johnson* which held that *Egan* prevented a claim against the Department of Homeland Security. *See Bland v. Johnson*, 637 F. Appx. 2, 2–3 (D.C. Cir. 2016) (unpublished), aff'g for the reasons stated in 66 F. Supp. 3d 69, 74–75 (D.D.C. 2014). The decision in *Bland* is inapposite because the plaintiff sued the government, not a private entity, and did not allege that employees raised concerns they knew false, which in fact would be eligible for review under *Rattigan*. *Bland v. Johnson*, 66 F. Supp. 3d 69, 75 (D.D.C. 2014), aff'd in part, rev'd in part and remanded, 637 Fed. Appx. 2 (D.C. Cir. 2016).

### 3. The Fifth Circuit attempts to distinguish the Ninth Circuit opinion.

The Fifth Circuit's opinion attempts to distinguish the Ninth Circuit decision in *Zeinali* by noting that *Egan* still bars claims that question the government's motivation behind the decision to deny the plaintiff's security clearance. Op. p. 15. *Zeinali*, 636 F.3d at 550. The Fifth Circuit stretches the Ninth Circuit reasoning too far. The Ninth Circuit held that *Egan* prohibits the revisiting a government decision; it does not prevent an action against a private entity in which the plaintiff does not contest the government's decision. The government is responsible for its own actions, for which it receives special protection. A private contractor should be responsible for its own actions, without the added governmental protection.

### 4. The Fifth Circuit dissent agrees with the Ninth Circuit.

The dissent in the Fifth Circuit rightly concludes, along with the Ninth Circuit, that the majority's "approach

would essentially immunize government contractors from any liability in cases involving employees whose security clearances are revoked or denied"). App. 29a (quoting *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549-52 (9th Cir. 2011).

**5. The decision affects millions of workers.**

This issue is of great concern, as the dissent observes. App. 29a. "As of 2019, a staggering 2.5% of the entire civilian labor force—well over 4 million people—have been adjudicated eligible to hold a clearance, of which over 2.94 million had access to classified information." Max Jesse Goldberg, *Security-Clearance Decisions and Constitutional Rights*, 132 Yale L.J.F. 55, 70 (2022).

## CONCLUSION

The Court should grant the petition for a writ of certiorari to resolve a circuit split concerning the application of *Egan* to causes of action against private employers.

Respectfully submitted,
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# APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 15, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-11060

UNITED STATES OF AMERICA, *ex rel.*;
DANA JOHNSON, *Relator,*

*Plaintiff–Appellant,*

versus

RAYTHEON COMPANY,

*Defendant–Appellee.*

Filed February 15, 2024

Appeal from the United States District Court
for the Northern District of Texas,
USDC No. 3:17-CV-1098

Before STEWART, DENNIS, and HIGGINSON, *Circuit Judges.*

JAMES L. DENNIS, *Circuit Judge.*

Plaintiff-Appellant Dana Johnson sued his former employer Defendant-Appellee Raytheon Co. under the False Claims Act, claiming retaliation for reporting

fraudulent misrepresentations that Raytheon allegedly made to the Navy. The district court held it lacked subject-matter jurisdiction over all but one of Johnson's claims and granted summary judgment to Raytheon on the remaining claim. We conclude that the district court correctly held *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), bars review of Johnson's claims implicating the merits of the decision to revoke his security clearance and that Johnson failed to present a prima facie case of retaliation for the remaining claim we have jurisdiction to assess. Accordingly, we AFFIRM.

## I. Background

### A. Facts

Defendant-Appellee Raytheon Co. is a government defense contractor. The U.S. Navy is one of Raytheon's customers. One of Raytheon's Navy projects is the Advanced Sensor Technology (AST) Program. The AST Program is a "Special Access Program," meaning Raytheon employees must have top-secret security clearance and be deemed mission critical to work on the Program. The federal government has full discretion to grant Raytheon employees security clearances and access to the Program. Raytheon's contract with the Navy includes security requirements, and Raytheon has security plans that are approved by the Navy. As part of its security plan, Raytheon monitors its employees' activities, including their computer and network use. Raytheon is required to report security concerns to the Navy.

*Appendix A*

Plaintiff-Appellant Dana Johnson worked for Raytheon for thirty years, most recently as a systems engineer on the AST Program. Johnson claims that he saw Raytheon make fraudulent misrepresentation to the Navy about the products and equipment that Raytheon was providing through the AST Program, and that he spoke up internally about the problems over a couple of years with a number of supervisors and managers, though he never utilized official channels either with Raytheon or the Navy to express his fraud concerns. Johnson claims he identified and spoke out about four different problems that arose during his employment.

First, Johnson encountered a problem with a "radar mode" in the Navy's planes, and Johnson informed manager Brian Cook. According to Johnson, he fixed the problem in the computer code, but Raytheon did not follow through with the necessary recalibration of the radar because it would have been expensive and time-consuming. Cook told Johnson to sign off on the project anyway. Johnson refused because that would have meant making a false representation to the Navy. Raytheon nevertheless told the Navy that there was no issue.

The second problem involved a faulty computer initialization or "booting" process caused by outdated software that would make radar programs crash. Johnson recommended using updated software to fix the problem, but no software upgrade occurred. Later, Johnson was told that Raytheon had informed the Navy that the problem was fixed, but Johnson knew this was false. He reported this issue to supervisors Mike Leddy and Steve Blazo,

as well as to a test conductor named Rick Scoggins, among others. Sometime in 2013 or 2014, a member of the Raytheon security department, Mack Slater, twice told Johnson to stop talking to the Navy about problems.

The third problem involved equipment called oscilloscopes. According to Johnson, he discovered that the equipment was damaged and that Raytheon was hiding it from the Navy. He reported the issue to a manager and his supervisor and told them that hiding the status of the equipment was a violation of Raytheon's contract with the Navy.

The fourth problem involved the creation of a configuration guide for laptops. Johnson and other software engineers wrote a guide for use by the Navy and submitted it to Raytheon for approval. The guide was approved, but the final version did not include items that the software engineers deemed essential. Johnson told supervisor Rocky Carpenter about this problem. Johnson said that omission of certain information would lead to testing problems, but Raytheon told the Navy that the guide was approved by the engineers anyway.

According to Johnson, after he reported these concerns to managers and supervisors, Raytheon began to subject him to increased monitoring and allegedly fabricated a record of misconduct against him. According to Raytheon, computer auditing that it conducts as part of its contract with the Navy showed Johnson was taking unauthorized actions. Eventually, in January 2015, Raytheon's AST Program Security Officer, Lynne Sharp, reported Johnson

to the Navy for suspected security violations. Raytheon claims the reporting was required by its Navy contract. Johnson claims this was an act of retaliation.

The Navy and the Naval Criminal Investigative Service (NCIS) began an investigation. They conducted forensic audits and eventually interviewed Johnson. Johnson states he did not initially realize that he was the target of an investigation, but instead believed that the Navy was investigating his concerns about Raytheon. Partway through the investigation, the Navy suspended Johnson's AST Program access on an interim basis after a coworker told him he was the target. At the end of the investigation, in July 2015, the Navy found that Johnson had committed security violations and subsequently permanently revoked his access to the AST Program. Specifically, the Navy found that Johnson (1) downloaded and used an unauthorized software program called Wireshark (referred to as a "sniffer" or "analysis software") on a protected network and ran network scans more than 100 times, and (2) used a computer at Raytheon that was designated for Boeing work (not Navy work) without permission, and, in doing so, accessed information without authorization. The Navy instructed Sharp to inform the Department of Defense Central Adjudication Facility (DOD CAF)—the agency that manages security clearances relevant to this case—of the Navy's finding that Johnson committed security violations, and she states she did so. According to the NCIS, in September 2015, the DOD CAF revoked Johnson's top-secret security clearance.

After the Navy completed its investigation, Raytheon conducted its own disciplinary investigation based on the Navy's findings and terminated Johnson's employment. Sarah Humphrey, a member of Raytheon's Human Resources (HR) department, conducted the investigation, interviewed other employees, and provided a report to HR and Security Vice President Gary LaMonte. LaMonte made the final decision to terminate Johnson in October 2015. Johnson claims he was not provided with the findings of the investigations, told of the violations, or allowed to respond to the findings prior to being fired. While Johnson was interviewed as part of both investigations, he states that he was merely asked hypothetical questions and not given a chance to respond to anything specific. At the time of his termination, Johnson says he was qualified to work on other projects at Raytheon that did not require a security clearance but was fired after thirty years with the company instead of being transferred to another project.

### B. Procedural History

Johnson filed a complaint in the United States District Court for the Northern District of Texas, which included both a *qui tam* action on behalf of the United States and a retaliation claim on his own behalf, both pursuant to the False Claims Act, 31 U.S.C. §§ 3729-33. The United States declined to intervene and moved to dismiss the *qui tam* claims. The district court granted the United States' motion and granted Johnson leave to amend his complaint to replead his retaliation claim. In his second amended complaint, Johnson claimed that he engaged in protected activity when he identified and spoke out about

concealing issues from the Navy, and Raytheon retaliated against him in four different ways: (1) Raytheon, through Slater, instructed him not to report problems to the Navy; (2) Raytheon monitored him; (3) Raytheon made false accusations about him to the Navy; and (4) Raytheon fired him.

During the discovery process, the parties had difficulty with requests for production that involved allegedly classified documents or documents stored in classified computer systems that required Navy review. Discovery issues eventually resulted in an agreed-to order that established a process for Raytheon to file a motion to dismiss/motion for summary judgment:

- Raytheon would first file a "summary of the basis" for its motion to enable the parties to narrow the scope of discovery to what was needed to support and oppose the motion.

- Next, the parties would conduct discovery for approximately two months.

- Two weeks after discovery was completed, Raytheon would file its motion to dismiss/motion for summary judgment.

- Then, Johnson would have the choice of either responding to the motion or filing a Federal Rule of Civil Procedure 56(d) declaration identifying what additional discovery was needed to respond.

- Finally, after any Rule 56(d) issue was resolved, Johnson would respond to the motion and Raytheon would reply.

Raytheon timely submitted its summary, and then, after conducting discovery, timely filed a combined motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and motion for summary judgment under Federal Rule of Civil Procedure 56, arguing, in relevant part, that the district court lacked subject-matter jurisdiction over most of Johnson's claims pursuant to *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), and its progeny, and, on the merits, the only act of alleged retaliation that the district court had subject-matter jurisdiction to consider—instructing Johnson not to report problems to the Navy—was not a materially adverse employment action. In response, Johnson filed a Rule 56(d) declaration requesting additional discovery. The district court denied Johnson's request for additional discovery and ordered Johnson to respond to Raytheon's motion, but allowed Johnson to file a supplemental Rule 56(d) declaration with his summary judgment opposition. Johnson filed an opposition, with exhibits. With his opposition brief, Johnson also renewed his initial Rule 56(d) declaration and made a supplemental declaration. Raytheon filed a reply. After oral argument, the district court granted Raytheon's Rule 12(b)(1) motion and dismissed Johnson's retaliation claim in part for lack of subject-matter jurisdiction and granted summary judgment in part on the merits in favor of Raytheon. The district court also denied Johnson's renewed Rule 56(d) request for additional discovery. Johnson timely appealed.

## II. Legal Standards

The district court's grant of Raytheon's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction and its Rule 56 motion for summary judgment are both reviewed *de novo*, applying the same standards as the district court. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017).

Subject-matter jurisdiction may be assessed on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming*, 281 F.3d at 161. "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.* Under the second basis, which is applicable here, "our review is limited to determining whether the district court's application of the law is correct and, if the decision was based on undisputed facts, whether those facts are indeed undisputed." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (first citing *Ynclan v. Dep't of the Air Force*, 943 F.2d 1388, 1390 (5th Cir.1991); and then citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

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). "A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Dyer v. Houston*, 964

F.3d 374, 379 (5th Cir. 2020) (citing *Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018)). "On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009).

The denial of a Rule 56(d) request is reviewed for abuse of discretion. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). The standard for abuse of discretion is generally "whether the evidence requested would affect the outcome of a summary judgment motion." *Id.* at 423. "This court has found an abuse of discretion where it can identify a specific piece of evidence that would likely create a material fact issue." *Id.* "In contrast, this court has found no abuse of discretion where the party filing the Rule 56(d) motion has failed to identify sufficiently specific or material evidence to affect a summary judgment ruling." *Id.*

## III. Analysis

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, is the government's primary litigation tool for the recovery of losses sustained as the result of fraud against the government. *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010) (citing *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008)); *see also* 5B John Bourdeau, et al., Federal Procedure, Lawyers Edition § 10:49, Westlaw (database updated Nov. 2023). The FCA provides for civil penalties and multiple damages for knowingly presenting false

or fraudulent claims to the government, and authorizes civil actions to remedy such fraud, which may be brought by the Attorney General or by private individuals in the government's name. 5B BOURDEAU, ET AL., *supra* § 10:49. To protect internal "whistleblowers," the FCA also includes an anti-retaliation provision:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h)(1). "The purpose of the False Claims Act, of course, is to discourage fraud against the government, and the whistleblower provision is intended to encourage those with knowledge of fraud to come forward." *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994). Relief available to whistleblowers who incurred retaliation includes reinstatement, double back pay with interest, and special damages, including costs and attorneys' fees. 31 U.S.C. § 3730(h)(2).

FCA retaliation claims involving circumstantial evidence are analyzed using the familiar *McDonnell*

*Douglas* burden-shifting framework.[1] *See*, *e.g.*, *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 561 (5th Cir. 2019); *Diaz v. Kaplan Higher Educ., L.L.C.*, 820 F.3d 172, 175 (5th Cir. 2016); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (establishing this framework). "Under this framework, the employee must first establish a prima facie case of retaliation by showing: (1) that he engaged in protected activity; (2) that the employer knew about the protected activity; and (3) retaliation because of the protected activity." *Musser*, 944 F.3d at 561. "If the employee establishes a prima facie case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision." *Musser*, 944 F.3d at 561 (quoting *Garcia v. Pro. Cont. Servs., Inc.*, 938 F.3d 236, 241 (5th Cir. 2019)). "'This burden is one of production, not persuasion,' and it involves no credibility assessment." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). "After the employer articulates a legitimate reason, the burden shifts back to the employee to demonstrate that the employer's reason is

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1. Johnson also briefly argues that he presented direct evidence of retaliation, which is evaluated outside of the *McDonnell Douglas* framework. *Cf. Septimus v. Univ. of Hous.*, 399 F.3d 601, 608 (5th Cir. 2005) (stating in the Title VII context that *McDonnell Douglas* does not apply to cases which there is direct evidence of retaliation). "Direct evidence is evidence which, if believed, proves the fact without inference or presumption." *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) (citing *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512 (11th Cir. 1990)). That is not the case with any of the evidence offered by Johnson. Accordingly, we apply the *McDonnell Douglas* framework.

actually a pretext for retaliation." *Id.* (quotation omitted). To prevail on an FCA retaliation claim, the plaintiff must ultimately prove at trial that the retaliatory motive was a but-for cause of the adverse employment action. *Id.*

Johnson brings four claims of retaliation: (1) a retaliation claim based on Slater advising him not to report problems to the Navy; (2) a retaliation claim based on Raytheon monitoring him; (3) a retaliation claim based on Raytheon reporting false accusations of security violations to the Navy; and (4) a retaliation claim based on Raytheon firing him. However, before we examine the merits of these claims, we must first assure ourselves of our jurisdiction. *See Cleartrac, L.L.C. v. Lanrick Contractors, L.L.C.*, 53 F.4th 361, 364 (5th Cir. 2022).

### A. Subject-Matter Jurisdiction Under *Egan*

Jurisdiction over three of Johnson's four FCA retaliation claims is complicated by the presence of sensitive national security issues. Raytheon's proffered legitimate, non-retaliatory reason for monitoring Johnson (claim two), reporting his conduct to the Navy (claim three), and ultimately firing him (claim four)—the second step of the *McDonnell Douglas* framework—is that the Navy found Johnson had committed several serious security violations, which caused the Navy to revoke his access to the AST Program and the DOD CAF to revoke his top-secret security clearance. Raytheon argues that, even assuming arguendo that Johnson has made out a prima facie case of retaliation as to these three claims, assessment of these claims is largely barred by the

Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), and its progeny because determining whether Raytheon's proffered legitimate, non-retaliatory reason is pretextual would necessarily require scrutinizing the DOD CAF's decision to revoke Johnson's security clearance, which credited the Navy's finding that Johnson committed security violations.[2] The district court agreed with Raytheon, ruling that it lacked subject-matter jurisdiction under *Egan* to determine whether Raytheon's proffered reasons for monitoring, reporting, and terminating Johnson were pretextual. We agree as well.[3]

In *Egan*, the Supreme Court held that the Merit System Protection Board (MSPB) lacked authority "to review the substance of an underlying decision to deny

2. Raytheon does not offer a legitimate, non-retaliatory reason for Johnson's remaining claim of retaliation—that Raytheon retaliated against him when Slater advised him to not raise concerns with the Navy (claim one)—and accordingly does not argue that *Egan* bars review of this claim. Instead, Raytheon argues Johnson has not made out a prima facie case of retaliation on this claim, an argument we address below. As to *Egan*, though, we agree it is not implicated by this claim.

3. Raytheon also argues that, as a government contractor, it is absolutely immune from claims regarding its monitoring and reporting under a purported doctrine of immunity that protects government contractors from claims based on their reporting of security issues to their government clients. The district court did not address Raytheon's "absolute immunity" claim, resolving the case in light of *Egan* instead. Because we do the same, we also decline to reach Raytheon's claim of absolute immunity.

or revoke a security clearance in the course of reviewing an adverse action" taken against a federal employee. 484 U.S. at 520. The Court reasoned that the presumption in favor of review "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. *Egan* did not ultimately ground its holding in the text of the civil service law or any other statute, but instead held that it "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Id. Egan* also explained that security clearance decisions were not subject to review because of their unusually "predictive" nature in assessing a person's potential to compromise sensitive information and the decisions' grounding in specialized expertise that could not be reasonably reviewed by non-experts. *Id.* at 528-29. Courts, accordingly, should be "reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

Courts have not narrowly read *Egan* as merely applying to MSPB agency review of a security clearance revocation decision, but instead as embodying a broader principle that judicial review is not permitted over decisions that implicate the Executive's Article II powers "to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy." *Id.* at 527. We first adopted this understanding of *Egan* in *Perez v. F.B.I.*, 71 F.3d

513, 514-15 (5th Cir. 1995). *Perez* concerned a Title VII retaliation claim brought by a former FBI employee, who claimed that the FBI revoked his security clearance and fired him (as his job required a security clearance) because he had joined a class action lawsuit against the FBI alleging discrimination against Hispanic employees. *Id.* at 514. Under the applicable *McDonnell Douglas* framework, the FBI's proffered nondiscriminatory reasons for revoking the employee's security clearance and subsequently firing him were that he had "fabricated official reports" and "disclosed classified information to unauthorized representatives of the Cuban Government." *Id.* We held that we lacked subject-matter jurisdiction under *Egan* to question these proffered reasons: "Because the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance [under the *McDonnell Douglas* framework], any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision." *Id.* at 514. "As the Supreme Court and several circuit courts have held that such scrutiny is an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security, neither we nor the district court have jurisdiction to consider those matters." *Id.* at 514-15. Raytheon argues that, because the present FCA case also requires use of the *McDonnell Douglas* framework, the same jurisdictional concerns raised in *Perez* are implicated when considering whether Raytheon's proffered legitimate, non-retaliatory reasons are pretextual.

However, before we turn to Johnson's pretext arguments, we must address two preliminary arguments he raises as to the applicability of *Egan* and *Perez*. The first argument is whether, as a factual matter, Johnson's topsecret security clearance was revoked, which the parties have argued over in briefing. *Egan* was specially concerned with reviewing the merits of a security clearance decision. 484 U.S. at 527-29. If Johnson's security clearance was not revoked, the question, then, is whether we may extend *Egan* to the revocation of Johnson's AST Program access.[4] However, because the undisputed facts show the DOD CAF revoked Johnson's top-secret security clearance based on the Navy's findings of security violations, we need not consider extending *Egan*. *See Barrera-Montenegro*, 74 F.3d at 659 (stating we must determine whether the undisputed facts forming the basis of a Rule 12(b)(1) dismissal are indeed undisputed). Raytheon has provided a report by the NCIS as well as affidavits by Raytheon personnel Sharp and LaMonte stating that the DOD CAF revoked Johnson's top-secret security clearance in September 2015 after

4. Several circuits, including our own, have refused to extend *Egan* beyond security clearances to certain other government decisions. *See*, *e.g.*, *Toy v. Holder*, 714 F.3d 881, 885-86 (5th Cir. 2013); *Hale v. Johnson*, 845 F.3d 224, 229-31 (6th Cir. 2016); *Kuklinski v. Mnuchin*, 829 Fed. Appx. 78, 84-86 (6th Cir. 2020) (unpublished); *Rattigan v. Holder*, 689 F.3d 764, 767, 402 U.S. App. D.C. 166 (D.C. Cir. 2012). However, the D.C. and Federal Circuits have extended *Egan* to certain decisions analogous to a security clearance. *Foote v. Moniz*, 751 F.3d 656, 658, 409 U.S. App. D.C. 482 (D.C. Cir. 2014); *Kaplan v. Conyers*, 733 F.3d 1148, 1155-60 (Fed. Cir. 2023).

Sharp informed the DOD CAF of the Navy's findings.[5] In response, the only evidence Johnson points to is his affidavit stating he has obtained a security clearance at his new job, without stating whether it was top-secret or a lower level of clearance. The fact that Johnson has obtained a new unspecified security clearance does not dispute the fact that his top-secret security clearance was previously revoked. Johnson's evidence fails to raise a dispute that his top-secret security clearance was revoked, and the mere statements to the contrary in his briefing, unsupported by the record, are insufficient to create a dispute of fact.

The second preliminary argument is that Raytheon is a private contractor, not a government actor, which raises the legal question of the extent to which *Egan* may apply in the private-employment context. The typical case running afoul of *Egan*'s jurisdictional concern is one against the government agency that made the security clearance decision.[6] However, the Ninth Circuit had the

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5. Johnson forfeited any argument as to the competency of this evidence by failing to brief it on appeal. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021); *Jackson v. Gautreaux*, 3 F.4th 182, 188 n.* (5th Cir. 2021) (stating we cannot consider arguments raised for the first time at oral argument).

6. Raytheon cites only one circuit case in which a suit against a private contractor was found to be barred by *Egan, Beattie v. Boeing Co.*, 43 F.3d 559, 566 (10th Cir. 1994). In that case, the Air Force delegated its authority to make security clearance decisions to a private contractor, and the court found "no compelling reason to treat the security clearance decision by [the private contractor] differently than the similar decision made by the Air Force," as

opportunity to consider *Egan*'s applicability to private government contractors in *Zeinali v. Raytheon Co.*, 636 F.3d 544, 550-51 (9th Cir. 2011). The court held that, while "private employers can rarely avail themselves of *Egan*'s jurisdictional bar" because "[i]n employment discrimination suits against private employers, courts can generally avoid examining the merits of the government's security clearance decision," *Egan* nonetheless bars claims against private employers that "question the [government agency's] motivation behind the decision to deny [the plaintiff 's] security clearance." *Id.* (third alteration in original) (quoting *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008)). We find this reasoning persuasive. If a plaintiff 's arguments question the merits of a government agency's security clearance decision, *Egan* and *Perez*'s concern over a court second-guessing the Executive Branch's exclusive discretion to control information bearing on national security is just as relevant in a case against a private employer as against the government itself. We conclude, therefore, that the mere fact Raytheon is a private contractor does not make *Egan*'s jurisdictional bar inapplicable; the key issue is whether the case requires the court to question the merits of, or motivation behind, the government's security clearance decision or whether the court may avoid such an inquiry by deciding only questions that do not necessarily require consideration of the merits of the security clearance decision. *See id.*;

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"both decisions represent[ed] the exercise of authority delegated by the Executive Branch." *Id.* The present case does not exactly fit that mold.

*Dubuque v. Boeing Co.*, 917 F.3d 666, 667 (8th Cir. 2019) (applying *Zeinali* in the private-employment context); *cf. Egan*, 484 U.S. at 526 (recognizing the MSPB could review certain related issues that did not implicate its concerns, such as "review of the fact of denial, of the position's requirement of security clearance, and of the satisfactory provision of the requisite procedural protections").

Turning, then, to Johnson's pretext arguments, under *Perez*, we are bound to conclude that any analysis of the "possibly pretextual nature of [Raytheon]'s proffered reasons" for monitoring, reporting, and ultimately firing Johnson under the *McDonnell Douglas* framework "would of necessity require some judicial scrutiny of the merits of the [DOD CAF's security clearance] revocation decision." *See* 71 F.3d at 514. Raytheon's stated reason for firing Johnson is the Navy's determination that Johnson committed several serious security violations. Johnson argues this reason is pretextual because he has evidence that he did not commit any security violations. There is no way to assess whether Raytheon's reason was pretextual without treading on the DOD CAF's security clearance decision, which credited the Navy's investigation and finding that Johnson did commit security violations. The same is true for Raytheon's decisions to monitor him and report his suspected security violations to the Navy, even though these actions occurred *before* the Navy's investigation. "The reasons why a security investigation is initiated may very well be the same reasons why the final security clearance decision is made." *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996) (holding the *instigation* of an investigation of a security clearance was

covered by *Egan* because the investigation was closely tied to the security clearance decision). Johnson's claims regarding the monitoring and reporting by Raytheon are that they were based on false accusations of security violations. But the DOD CAF accepted the Navy's finding that these violations actually occurred, and there is no way to assess Raytheon's reason for monitoring and reporting Johnson without second-guessing that determination. *See Wilson v. Dep't of the Navy*, 843 F.3d 931, 935 (Fed. Cir. 2016) (declining to examine plaintiff 's argument that the "initiation of revocation" of a security clearance was "based on 'false' complaints and accusations" because the security investigation—which could not be second-guessed under *Egan*—"specifically found them reliable"); *Hill v. White*, 321 F.3d 1334, 1335-36 (11th Cir. 2003) ("To review the initial stages of a security clearance determination is to review the basis of the determination itself regardless of how the issue is characterized").

Johnson maintains that his pretext arguments do not require us to consider the merits of the DOD CAF's security clearance decision, relying primarily on two cases, but each is distinguishable from his case. Johnson first relies on the D.C. Circuit's decision in *Rattigan v. Holder*, 689 F.3d 764, 402 U.S. App. D.C. 166 (D.C. Cir. 2012). In *Rattigan*, the plaintiff was an FBI employee who alleged he was retaliated against when other employees reported false security concerns about him that resulted in an investigation. *Id.* at 764. Eventually, the security investigation concluded that the allegations "lacked corroboration and were unfounded," and the plaintiff retained his security clearance. *Id.* at 766. The

plaintiff sued, arguing the decision to report false security concerns amounted to retaliation under Title VII. *Id.* at 766. The D.C. Circuit held that *Egan* did not apply because (1) the focus of the pretextual review under the *McDonnell Douglas* framework was on "decisions by other FBI employees who merely report security concerns," not "security clearance-related decisions made by trained Security Division personnel," and (2) the claim was "based on *knowingly false* reporting." *Id.* at 768, 770.

Urging us to adopt and apply the reasoning of *Rattigan*, Johnson argues *Egan* does not bar his claims because he is arguing that Raytheon monitored him under false pretenses; reported false security violations to the Navy; and after the Navy concluded its investigation, chose to fire Johnson, knowing the Navy's findings were based on false information. However, we need not decide whether to adopt *Rattigan*'s reasoning because Johnson's case falls outside of it. In *Rattigan*, judicial review was unlikely to interfere with national security because the security investigation concluded that the allegations were unfounded. In Johnson's case, of course, the Navy's investigation, accepted by the DOD CAF, found that Johnson *had* committed the alleged security violations. Under the circumstances in this case, *Egan* precludes review of the false reporting claims because their resolution would necessarily implicate the merits of the DOD CAF's security clearance revocation. *See Bland v. Johnson*, 637 F. App'x 2, 2-3 (D.C. Cir. 2016) (unpublished), *aff'g for the reasons stated in* 66 F. Supp. 3d 69, 74-75 (D.D.C. 2014) ("In . . . contrast to *Rattigan*, in which the ultimate security decision was favorable to the

plaintiff, *see* 689 F.3d at 766, here, DHS OSCO suspended Mr. Bland's clearance.").

Johnson also cites to the Ninth Circuit's decision in *Zeinali*. In that case, the plaintiff, who was of Iranian descent, claimed that he was discriminated against when he was fired by his employer, a private contractor, after the government denied him a security clearance, while similarly situated non-Iranian employees were retained. 636 F.3d at 546-47. The Ninth Circuit held *Egan* did not deprive the court of jurisdiction because the plaintiff did not argue the government "improperly denied his application for a security clearance," but instead "contend[ed] that [his employer's] security clearance requirement was not a bona fide job requirement, and that [his employer] used the government's security clearance decision as a pretext for terminating [him] in a discriminatory fashion." *Id.* at 551-52. To support his claim, the plaintiff introduced evidence that other similarly situated employees who were not of Iranian descent had been retained even though they also lacked security clearances. *Id.* at 552-54.

Relying on *Zeinali*, Johnson argues *Egan* does not bar this court from considering whether transfer to a non-sensitive position was feasible. Again, we need not decide whether to adopt the distinction made in *Zeinali* because Johnson's case does not fit it. Unlike in *Zeinali*, Johnson vehemently disputes the merits of the Navy's findings, which the DOD CAF credited in revoking his security clearance. While he claims to only be challenging Raytheon's actions, and not directly challenging the Navy's actions, his position is nonetheless that the Navy, and in

turn the DOD CAF, was wrong. Moreover, Johnson has introduced no evidence that similarly situated employees were treated differently, i.e., that another employee was found by the Navy to have committed security violations warranting a revocation of his security clearance but was retained by Raytheon.

In sum, Johnson argues we should have jurisdiction to examine issues that do not call into question his security clearance decision, such as whether transfer to a non-sensitive position was feasible and whether a private party made false statements to the government. In a case that presented different facts, his position could have merit. But his is not that case. There is no dispute that Johnson's top-secret security clearance was revoked; he introduced no evidence concerning whether transfer to a non-sensitive position was feasible; and, on these facts, there is no way to assess whether Raytheon's statements were false without necessarily assessing whether the DOD CAF's decision, which credited the Navy's findings, was wrong. Johnson simply cannot get around the reality that to show that Raytheon fired him even though it knew the Navy's findings were wrong would require assessing the validity of the DOD CAF's decision, which *Egan* and *Perez* forbid. Accordingly, we lack subject-matter jurisdiction to consider Johnson's claims that Raytheon retaliated against him by monitoring him, making false accusations about him to the Navy, and firing him.

### B. Prima Facie Case of FCA Retaliation

Johnson's remaining FCA retaliation claim—that Raytheon retaliated against him when Slater told him

to not share his concerns with the Navy—is not barred by *Egan*, and we therefore proceed to the merits of this claim. Under the first step of the *McDonnell Douglas* framework, Johnson "must first establish a prima facie case of retaliation by showing: (1) that he engaged in protected activity; (2) that the employer knew about the protected activity; and (3) retaliation because of the protected activity." *Musser*, 944 F.3d at 561; *see also Diaz*, 820 F.3d at 176 (describing elements of the prima facie case somewhat differently). Raytheon did not dispute that Johnson engaged in protected activity; however, it argued that Johnson's purported act of retaliation—Slater advising Johnson to not share his concerns with the Navy—is not a materially adverse employment action that amounts to retaliation. The district court agreed.[7] We agree as well.

"[A] retaliatory act must be 'materially adverse, which . . . means it well might have dissuaded a reasonable worker from' engaging in protected activity." *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 326 (5th Cir. 2016) (second alteration in original) (quoting *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir.2014)). The FCA includes a non-exhaustive list of

7. Although the district court held Johnson's claims for Raytheon monitoring him, reporting his conduct to the Navy, and ultimately firing him were barred by *Egan*, it held in the alternative that Johnson had not presented a prima facie case of retaliation as to these three actions and that Johnson could not show Raytheon's reasons for monitoring and reporting him were pretextual. Because we hold these claims are barred by *Egan*, we need not address these alternative holdings.

examples of actionable retaliation, including "discharge[ ], demot[ion], suspen[sion], threat[s, and] harass[ment]." *Id.* (alterations in original) (quoting § 3730(h)(1)).

Under certain circumstances, a request to cease protected conduct may be a materially adverse action. *See, e.g.*, *Fallon v. Potter*, 277 F. App'x 422, 428 (5th Cir. 2008) (unpublished). For example, Johnson cites *Fallon*, 277 F. App'x at 428, in which we held in the Title VII context that an issue of material fact precluded summary judgment as to whether multiple direct statements from a supervisor to an employee to not file a discrimination complaint could have dissuaded a reasonable employee from pursuing the claim, and would therefore have constituted retaliation. In that case, the employee's direct supervisor told the employee: (1) "You just keep filing those EEO complaints and I promise you one thing—there won't be a person in this post office to testify against me"; (2) "You need to call her [an EEOC officer] and talk to her so you can drop this EEO"; (3) "You need to tell her you don't need redress . . . cause you're canceling the EEO complaint;" and "(4) You'll never have anyone in this post office stand up for you. If you continue to file these charges, I'll show you what you're up against." *Id.* On the other hand, in *Hernandez v. Johnson*, 514 F. App'x 492, 498-99 (5th Cir. 2013) (unpublished)—relied on by Raytheon—we distinguished *Fallon*, affirming the grant of summary judgment for an employer on a Title VII retaliation claim. There, the employee's first-level supervisor called the employee at home and stated "she felt threatened by [the employee] telling her about his prior EEO activity." *Id.* at 495. We concluded this "single statement that was not even

a direct threat was not a materially adverse employment action." *Id.* at 499. While these cases are unpublished and nonbinding, they are persuasive. *See Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322 n.1 (5th Cir. 2019) (per curiam) (noting our unpublished opinions issued after January 1, 1996, are "persuasive authority").

Here, Raytheon's conduct is more similar to that in *Hernandez*. Johnson points to two instances of a single Raytheon employee advising him not to report his concerns to the Navy. These statements did not contain threats, and Slater—the one who made these statements—was not Johnson's supervisor. Such conduct would not have "dissuaded a reasonable worker from" reporting to the Navy. *See Bias*, 816 F.3d at 326 (quoting *Halliburton*, 771 F.3d at 259). Because Johnson failed to make out a prima facie case of retaliation as a matter of law, summary judgment was appropriate.

### C. Rule 56(d) Request for Additional Discovery

Finally, Johnson argues that the district court abused its discretion in denying his Rule 56(d) request for additional discovery. Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

According to Johnson's Rule 56(d) declaration, his aim in seeking additional discovery was largely to gather evidence that Raytheon knew that he had not violated any security policies, both when it reported him to the Navy and when it terminated him, as well as to gather evidence to dispute that the Navy's investigation was independent and to prove that its conclusions were wrong. As explained, Johnson's arguments that Raytheon knew he had not violated security policies and that the Navy's investigation was based on false reports is barred by *Egan*, and the district court did not abuse its discretion in denying related discovery because the evidence requested would not have affected the court's ruling on the motion as a matter of law. *See Smith*, 827 F.3d at 423. As to Johnson's sole claim that survives *Egan*—that Raytheon retaliated against him in advising him not to report his concerns to the Navy—Johnson has not cited to any specific facts that he needed and was prevented from discovering that would create a genuine dispute of material fact as to whether the action was materially adverse. *See id.* The district court did not abuse its discretion in denying Johnson's Rule 56(d) request.

## IV. Conclusion

The judgment of the district court is AFFIRMED.

*Appendix A*

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

This case was argued in August of 2022. The parties will benefit greatly from closure. So, I confine my dissent to disagreement with the extension of *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988) to bar Article III judicial review from this private-sector, whistleblower employment-termination dispute. *See Zeinali v. Raytheon Co.*, 636 F.3d 544, 549-52 (9th Cir. 2011) (explaining that "no case . . . has ever adopted a bright-line rule as broad as the one suggested by Raytheon" because "Raytheon's approach would essentially immunize government contractors from any liability in cases involving employees whose security clearances are revoked or denied"). In *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), the Supreme Court clarified that Congress must speak clearly when it intends to bar judicial review altogether. Indeed, scholarship that is critical of courts' overexpansive interpretation of *Egan* points out that, "[a]s of 2019, a staggering 2.5% of the entire civilian labor force—well over 4 million people—have been adjudicated eligible to hold a clearance, of which over 2.94 million had access to classified information." Max Jesse Goldberg, *Security-Clearance Decisions and Constitutional Rights*, 132 Yale L.J.F. 55, 70 (2022). Because I would not extend *Egan*'s narrow statutory bar to insulate from judicial review adverse actions taken by government contractors—here, an allegedly pretextual and retaliatory action against a whistleblower—I respectfully dissent.

**APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED SEPTEMBER 21, 2021**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION

**SEALED OPINION**

Civil Action No. 3:17-CV-1098-D

UNITED STATES OF AMERICA,
EX REL. DANA JOHNSON,

*Plaintiff-Relator,*

VS.

RAYTHEON COMPANY,

*Defendant.*

September 21, 2021, Decided;
September 24, 2021, Filed

**MEMORANDUM OPINION AND ORDER**

Plaintiff-relator Dana Johnson ("Johnson") sues defendant Raytheon Company ("Raytheon"), alleging that it retaliated against him for engaging in protected

activities, in violation of the antiretaliation provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h)(1). Raytheon moves to dismiss and/or for summary judgment. Johnson opposes the motion and requests relief under Fed. R. Civ. P. 56(d). For the reasons that follow, the court grants in part Raytheon's motion to dismiss, grants Raytheon's motion for summary judgment, denies Johnson's request for relief under Rule 56(d), and enters judgment in favor of Raytheon by judgment filed today.

## I

Because the court has addressed the background facts and procedural history of this case in two prior memorandum opinions and orders, *United States ex rel. Johnson v. Raytheon Co.*, 2019 U.S. Dist. LEXIS 220270, 2019 WL 6914967, at *1 (N.D. Tex. Dec. 19, 2019) (Fitzwater, J.); *United States ex rel. Johnson v. Raytheon Co.* (*Johnson I*), 395 F.Supp.3d 791, 793 (N.D. Tex. 2019) (Fitzwater, J.), it will recount them only as necessary to understand this memorandum opinion and order.

Johnson was a systems engineer aircraft test conductor for Raytheon, a defense contractor with the United States Navy ("Navy").[1] Johnson worked on a Navy Special Access Program ("Program") that required that Raytheon employees have top secret clearances and be

1. In recounting the factual background, the court summarizes the evidence in the light most favorable to Johnson as the summary judgment nonmovant and draws all reasonable inferences in his favor. *See, e.g., Owens v. Mercedes-Benz USA, LLC*, 541 F.Supp.2d 869, 870 n.1 (N.D. Tex. 2008) (Fitzwater, C.J.).

mission critical to the Program. The government has sole discretion in determining who is granted top secret clearance and who has access to the Program. Raytheon terminated Johnson's employment in October 2015 following a Navy investigation that resulted in Johnson's losing his security clearance.

Johnson alleges in his second amended complaint that, starting a few years before he was terminated, he became aware that Raytheon was not performing according to its contract with the Navy and had made false claims for payment related to four items. In the first matter, Johnson informed Brian Cook ("Cook"), a software manager at Raytheon, that a radar mode was malfunctioning due to a software problem. Johnson fixed the software issue, but the radar modes needed to be recalibrated in order to function. Cook told Johnson to sign off on the project anyway, and, when Johnson refused because this would involve making a false statement to the Navy, Cook told Johnson that he was going to collect payment from the Navy under the contract in any case.

During the second matter, which also began a few years before Johnson's termination, Johnson told his then-supervisors, Mike Leddy ("Leddy") and Steve Blazo ("Blazo"), that there was a software problem with the radar system initialization. Johnson suggested to Leddy, Blazo, and his other supervisor, Rocky Carpenter ("Carpenter"), that using a newer version of the software would fix the problem. They told Johnson that the software update would occur in the next few months. About six months before his termination, Johnson discovered that

the problem had not been corrected, and he reported this to a Navy flight crew, another test conductor named Rick Scoggins ("Scoggins"), his supervisors, and others. Scoggins angrily told Johnson to be quiet and stop talking to the Navy about the problem. Mark Slater ("Slater"), a member of Raytheon's security department, also instructed Johnson not to talk with the Navy when something was not working properly.

Around the same time that Slater instructed Johnson not to talk to the Navy, Johnson discovered that test equipment purchased by the Navy for Raytheon's use had been damaged and hidden by Raytheon security. Johnson reported this issue to his supervisor and Raytheon's lab managers. He also informed them that their failure to use the equipment violated Raytheon's contract with the Navy.

Johnson then discovered that Raytheon's security department had removed a section of a configuration guide that Johnson had written in order to set up new laptops purchased by the Navy. Johnson informed Carpenter that a section of the guide was missing. Carpenter instructed Johnson to configure the laptops based on his previously submitted instructions, which included the omitted section. Although Johnson was able to complete the configurations, the omission would cause problems for flight test conductors in the field. Raytheon did not report these issues to the Navy, and collected payment under its contract.

Sometime in late 2014, Raytheon began investigating Johnson for possible security violations. According to

Raytheon, regular computer auditing that it conducted under its contract requirements with the Navy revealed that Johnson appeared to be taking actions that the Navy had not approved. Johnson maintains that Raytheon knew that he was not violating any security policies and that Raytheon's decision to report him to the Navy was in retaliation for his investigation of Raytheon's false claims for payment.

In January 2015 Lynne Sharp ("Sharp"), Raytheon's Contractor Program Security Officer, reported her concerns about Johnson's activities to the Navy, as required under Raytheon's contract with the Navy. The Navy alerted the Naval Criminal Investigative Service ("NCIS"), and the Navy and NCIS made the joint determination to investigate Johnson. When Johnson became aware of the investigation, the Navy revoked his access to the Program. The Navy investigated Johnson's activities, and, at the conclusion of the investigation, issued multiple security violations, including for "[u]nauthorized access of need-to-know data" and "[i]ntroduc[ing] network analyzers . . . without advanced approval." D. App. at 14-15. The Navy did not restore Johnson's access to the Program, and Raytheon maintains that Johnson's security clearance was revoked in September 2015.

After receiving the Navy's determination that Johnson had committed multiple security violations, Sarah Humphrey ("Humphrey"), a member of Raytheon's Human Resources department, conducted a disciplinary investigation. At the conclusion of the investigation, Humphrey provided a report to Raytheon's Human

Resources and Security Vice President, Gary LaMonte ("LaMonte"). The report detailed the Navy's findings from its investigation and concluded that Johnson had violated Raytheon's Rules and Regulations. LaMonte terminated Johnson on October 12, 2015.

Following the court's decision in *Johnson I* and the filing of Johnson's second amended complaint, his action against Raytheon has narrowed to the following retaliation claim: in response to his engaging in protected activities concerning the two software problems, the damaged test equipment, and the laptop configuration error, Raytheon retaliated against him in four ways: (1) Raytheon responded with hostility to his reports about the problems and told him not to talk to the Navy; (2) Raytheon increased its monitoring of Johnson; (3) Raytheon made false reports about Johnson to the Navy; and (4) Raytheon terminated Johnson's employment.

In the instant litigation, to address the concerns of Raytheon and the Navy about producing voluminous discovery about classified government information and Johnson's need for discovery to oppose summary judgment, and to avoid a potentially protracted *Touhy* [2] process by the Navy, the court on November 18, 2020 entered an agreed order ("Agreed Order") governing Raytheon's motion for summary judgment and related

2. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-68, 71 S. Ct. 416, 95 L. Ed. 417 (1951) (providing that government agencies are permitted to "prescribe regulations not inconsistent with the law" governing the release of information and documents by agency subordinates).

discovery. Pursuant to the Agreed Order, Raytheon filed a preview of its summary judgment grounds on December 2, 2020; the parties completed discovery related to the summary judgment motion by February 1, 2021; Raytheon filed its summary judgment motion on February 16, 2021; and Johnson filed a Rule 56(d) declaration on March 19, 2021. The court on May 7, 2021 denied Johnson's Rule 56(d) request without prejudice, but allowed Johnson to include a supplemental Rule 56(d) declaration in his response to Raytheon's summary judgment motion. Johnson has responded to Raytheon's motion to dismiss and/or for summary judgment and has supplemented his Rule 56(d) request for relief. The court has heard oral argument on the parties' motions and request.

II

Raytheon moves under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction Johnson's claim that Raytheon retaliated by monitoring, reporting, and terminating him. "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citations omitted).

Raytheon also moves for summary judgment as to Johnson's retaliation claim, on which Johnson will

bear the burden of proof at trial. Raytheon can meet its summary judgment obligation by pointing the court to the absence of admissible evidence to support Johnson's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once Raytheon does so, Johnson must go beyond his pleadings and designate specific facts showing there is a genuine issue for trial. *See id.* at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). An issue is genuine if the evidence is such that a reasonable jury could return a verdict in Johnson's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Johnson's failure to produce proof as to any essential element of his claim renders all other facts immaterial. *See TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 623 (N.D. Tex. 2007) (Fitzwater, J.). Summary judgment is mandatory if Johnson fails to meet this burden. *Little*, 37 F.3d at 1075-76.

III

The FCA provides a cause of action for employees who are subjected to adverse employment actions "because of lawful acts done by the employee . . . in furtherance of an action under [the FCA] or other efforts to stop [one] or more violations of [the FCA]." 31 U.S.C. § 3730(h)(1). The familiar *McDonnell Douglas* burden-shifting framework applies to FCA retaliation claims. *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 561 (5th Cir. 2019).

Under this framework, Johnson must first demonstrate a *prima facie* case of retaliation by showing (1) that he

engaged in protected activity with respect to the FCA, (2) that Raytheon knew Johnson was engaged in protected activity, and (3) that an adverse employment action occurred because Johnson was engaged in protected activity. *See Thomas v. ITT Educ. Servs., Inc.*, 517 Fed. Appx. 259, 262 (5th Cir. 2013) (per curiam) (citing *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994)). As to the third element, the requirement that a plaintiff show at the *prima facie* stage a "causal link" between a protected activity and an adverse employment action is "much less stringent" than the "but-for" causation that a jury must find. *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001); *see also Khanna v. Park Place Motorcars of Hous., Ltd.*, 2000 U.S. Dist. LEXIS 18375, 2000 WL 1801850, at *4 (N.D. Tex. Dec. 6, 2000) (Fitzwater, J.) (characterizing this *prima facie* case burden as "minimal").

If Johnson establishes a *prima facie* case, the burden shifts to Raytheon to articulate a legitimate, nonretaliatory reason for the alleged retaliatory action. *See Musser*, 944 F.3d at 561; *Walker v. Norris Cylinder Co.*, 2005 U.S. Dist. LEXIS 20465, 2005 WL 2278080, at *9 (N.D. Tex. Sept. 19, 2005) (Fitzwater, J.). This burden is one of production, not of proof. *Musser*, 944 F.3d at 561.

If Raytheon meets its production burden, the burden shifts back to Johnson to produce evidence that would enable a reasonable jury to find that retaliation for Johnson's protected conduct, rather than Raytheon's proffered legitimate, nonretaliatory reason, was the but-for cause of the adverse employment action. *Id.*

*Appendix B*

IV

The court first considers Johnson's termination-based retaliation claim.

A

Raytheon moves for summary judgment on the ground, *inter alia*, that Johnson has failed to establish a *prima facie* case of retaliation because he has not adduced evidence of knowledge or causation. Johnson responds that he has produced direct evidence of causation.[3] Johnson also maintains that he has adduced indirect evidence of causation because, at the *prima facie* case stage, the temporal proximity between his protected activity and his termination is sufficient to establish causation.

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3. As Raytheon notes in its reply brief, Johnson's "direct" evidence of causation is aimed at proving that his activity was not actually in violation of any security policies. *See* P. Resp. at 20-22; D. Reply at 15-16. But as the court explains *infra* at § IV(D)(2), the court lacks subject matter jurisdiction to question the Navy's determination that Johnson committed security violations.

Moreover, direct evidence proves the fact of retaliatory animus without inference or presumption. *See West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 n.3 (5th Cir. 2003) (addressing direct evidence of discrimination). "Such evidence typically involves statements made by the employer or certain of its personnel that indicate that an employment decision was based on a forbidden factor." *Bowe v. Exide Corp.*, 2001 U.S. Dist. LEXIS 8591, 2001 WL 705881, at *3 n.1 (N.D. Tex. June 18, 2001) (Fitzwater, J.). The evidence on which Johnson relies at least requires that inferences be drawn and therefore does not qualify as direct evidence of retaliation.

Furthermore, he contends that he has introduced evidence that shows that the relevant decisionmaker had knowledge of his protected activities.

B

To demonstrate a *prima facie* case of retaliation, Johnson "must produce at least some evidence that the decisionmakers had knowledge of his protected activity." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883 & n.6 (5th Cir. 2003). "[M]ere temporal proximity between an employer's knowledge of protected activity and an adverse employment action" may be "sufficient evidence of causality to establish a prima facie case." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam). The temporal proximity, however, must be very close. *See id.* (quoting *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)).

While Johnson's timeline of events is not entirely clear, it appears undisputed that the period between his protected activities and his termination ranges from at least six months to several years. *See* 2d. Am. Compl. at ¶¶ 4, 8, 12, 21; D. Br. at 35-36; D. App. at 812-13. This is likely too great a gap to enable Johnson to establish his *prima facie* case through temporal proximity alone. *See Aguillard v. La. Coll.*, 824 Fed. Appx. 248, 251 (5th Cir. 2020) (per curiam) ("While a four-month gap may be sufficient evidence of causation, a five-month gap is too long absent other evidence.").

But even assuming that the temporal proximity between Johnson's protected activities and his termination

is close enough to help establish causation at the *prima facie* case stage, Johnson has also failed to adduce evidence that LaMonte—the Raytheon employee who made the decision to terminate Johnson—was aware of his protected activity. "Fifth Circuit precedent requires evidence of knowledge of the protected activity on the part of the decision maker and temporal proximity between the protected activity and the adverse employment action." *Ramirez v. Gonzales*, 225 Fed. Appx. 203, 210 (5th Cir. 2007) (per curiam) (citing *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997)); *see also Thompson v. Somervell Cnty. Tex.*, 431 Fed. Appx. 338, 342 (5th Cir. 2011) (per curiam). Johnson admits that he has no personal knowledge of whether LaMonte knew about his protected activity. *See* D. App. at 838, 844. And Johnson does not mention LaMonte in his response to Raytheon's interrogatory requesting details about any interaction or communication Johnson had with Raytheon employees regarding his protected activity. *See id.* at 618-23. Instead, Johnson relies on his own speculation that LaMonte, acting as a reasonable employee in his position, *should have known* about Johnson's protected activity. *See* P. App. at 10; D. App. at 841-44, 954-55, 957. Johnson also relies on circumstantial evidence that, when Humphrey prepared the report that LaMonte relied on when he decided to terminate Johnson, she spoke with individuals who knew about Johnson's protected activity. *See* P. Resp. at 19-20. But Johnson has not adduced any evidence regarding what these individuals told Humphrey during their conversations. *See* D. App. at 848-50. It is therefore questionable whether Johnson has produced enough evidence to establish a *prima facie* case.

But despite these deficiencies in Johnson's proof, "[t]he showing necessary to demonstrate the causal-link part of the *prima facie* case is not onerous," and Johnson "merely has to prove that the protected activity and the negative employment action are not completely unrelated." *United States ex rel. George v. Bos. Sci. Corp.*, 864 F.Supp.2d 597, 609 (S.D. Tex. 2012) (Rosenthal, J.) (quoting *United States ex rel. Dyson v. Amerigroup Tex., Inc.*, 2005 U.S. Dist. LEXIS 47078, 2005 WL 2467689, at *3 (S.D. Tex. Oct. 6, 2005)). Because this is a minimal burden and Johnson's claim fails for other reasons, *see infra* at § IV(D)(2) and IV(E), the court will assume *arguendo* that Johnson has met his burden to establish a *prima facie* case of retaliation.

C

Because the court is assuming *arguendo* that Johnson has met his burden to establish a *prima facie* case of retaliation, Raytheon, under the *McDonnell Douglas* burden-shifting framework, must now articulate a legitimate, nonretaliatory reason for terminating Johnson's employment. Raytheon has produced evidence that it terminated Johnson's employment solely based on the Navy's determination that he committed numerous serious security violations, which broke not only Navy program requirements, but also multiple Raytheon policies. This is a legitimate, nonretaliatory reason for terminating his employment.

*Appendix B*

D

Because Raytheon has met its burden of production, the burden has shifted back to Johnson to produce evidence that would enable a reasonable jury to find that retaliation for Johnson's protected conduct, rather than Raytheon's proffered legitimate, nonretaliatory reason, was the but-for cause of his termination. But before the court can decide whether Johnson has met this burden, it must address Raytheon's contention that the court lacks subject matter jurisdiction to review whether Raytheon's proffered, nonretaliatory reason for Johnson's termination (the Navy's finding that Johnson committed numerous serious security violations) is pretextual.

1

Raytheon first contends that, under *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), the court lacks subject matter jurisdiction to decide whether Johnson's termination was retaliatory. Johnson responds that the court need not consider whether *Egan* is implicated by his pretext argument because *Egan* does not apply to the facts of this case for a variety of reasons.

In *Egan* the Supreme Court held that the Merit Systems Protection Board could not review the plaintiff's challenge to an executive agency's denial of his security clearance. *Egan*, 484 U.S. at 529-30. The Court reasoned that "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to

determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a [security] judgment." *Id.* at 529. Although *Egan* arose in the context of the Merit Systems Protection Board, the Fifth Circuit and other courts have concluded that *Egan* bars judicial review in the context of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq., See, e.g., Perez v. F.B.I.*, 71 F.3d 513, 514-15 (5th Cir. 1995) (per curiam).

Johnson contends that courts, including the Fifth Circuit, have applied *Egan* to Title VII claims only because that statute makes an exception for actions taken against a person in furtherance of national security. *See* 42 U.S.C. § 2000e-2(g). Johnson maintains that, because the FCA does not have such an exception, *Egan* does not apply at all to claims under the FCA. Raytheon responds, and the court agrees, that Johnson's argument is inconsistent with other courts' application of the *Egan* doctrine.

In *Egan* the Court explained that non-expert bodies should not intrude on agency security clearance determinations "unless Congress has specifically provided otherwise." *Egan*, 484 U.S. at 530. Based on this, courts have applied *Egan* to other statutes unless specific statutory language demonstrates that Congress intended judicial review of security determinations. *See, e.g., Hall v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 476 F.3d 847, 852-53 (10th Cir. 2007) (applying *Egan* to whistleblower provisions of various environmental statutes); *Guillot v. Garrett*, 970 F.2d 1320, 1325 (4th Cir. 1992) (applying *Egan* to § 501 of the Rehabilitation Act of 1973). And

although the Fifth Circuit has not addressed the question whether *Egan* applies to the FCA, it did not rely on Title VII's national security exception when it held that *Egan* applied to claims under Title VII. *See Perez*, 71 F.3d at 514. Johnson does not argue that any specific language in the FCA, besides the lack of an explicit national security exception, demonstrates that Congress intended to allow courts to review security-clearance determinations. Accordingly, the court rejects Johnson's contention that *Egan* is inapposite to claims under the FCA.

Johnson also contends that *Egan* does not apply here because it involves revocation of access to a classified government program rather than revocation of a security clearance. Raytheon responds that *Egan* applies both because Johnson's security clearance was revoked and because, even if Johnson's security clearance was not revoked, his removal from the Program was the kind of security decision that *Egan* shields from review.

Johnson relies on the Fifth Circuit's decision in *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013), for the proposition that *Egan* applies only to cases in which the plaintiff's security clearance was actually revoked. In *Toy* the Fifth Circuit held that *Egan* did not apply to a Title VII claim made by a contract FBI employee whose building access had been revoked by her supervisor. *Toy*, 714 F.3d at 882, 885-86. The court explained that the revocation of building access in that case was not the kind of "deliberate, predictive judgment[]" that was meant to be shielded by *Egan*, and that "[a] lack of oversight, process, and considered decision-making separates [Toy's] case from *Egan*, which therefore does not bar Toy's suit." *Id.* at 885-86.

Johnson's *Toy* argument fails for multiple reasons. First, Johnson has not adduced evidence that creates a genuine fact issue with respect to whether his security clearance was or was not revoked. Raytheon has produced evidence that Johnson's security clearance was revoked in September 2015. *See* D. App. at 2, 721, 750-51. Johnson asserts that the Navy revoked his access to the Program, not his security clearance, but he does not produce any evidence that he retained his security clearance after the Navy investigation.

Second, even assuming that Johnson's security clearance was not revoked, this case is distinguishable from *Toy*. In *Toy* the panel contrasted the building access decision made by a supervisor who "[did] not specialize in making security decisions" with "security-clearance decisions [that] are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions." *Toy*, 714 F.3d at 885. The court determined that *Egan* applied to the latter category of decisions, but not the former. *Id.* at 885-86. The decision to revoke Johnson's access to the Program, and the classified information to which he had access as a part of that program, more closely resemble the category of decisions to which *Egan* applies. In this case, the program access decision was made by Navy investigators, not Johnson's supervisors at Raytheon. And the decision was not just about building access; rather, it was about access to the Navy's Program, which required top secret security clearance because it contained sensitive and classified information. Thus the court concludes that *Egan* applies to this case, and the court must consider next whether it

has subject matter jurisdiction to review Johnson's pretext argument.

2

Both parties agree that *Egan* prevents courts from reviewing the Navy's security investigation and decision. But Johnson contends that he is not challenging the Navy's determination. Instead, Johnson posits that he is challenging Raytheon's assertion that it terminated him because of the Navy's security findings, contending it is pretextual because Raytheon knew that Johnson had not actually committed any security violations.

Johnson's retaliation claim is based on an action that is essentially one step removed from the Navy's security determination. Instead of directly alleging that the Navy's security determination is an adverse employment action, Johnson maintains that Raytheon's assertion that it terminated him based solely on the Navy's determination that he committed multiple serious security violations is pretextual. In this way, this case is distinguishable from others in which the plaintiff directly challenged the outcome of an agency's security investigation as an adverse employment action. *See, e.g., Perez*, 71 F.3d at 514-15 (explaining that the court lacked subject matter jurisdiction to review allegations that the FBI's "revocation of [movant-appellant's] security clearance and resulting firing were retaliatory"). Johnson argues that this distinction allows the court to review his claim because he is challenging Raytheon's proffered reason for his termination, not the Navy's underlying security investigation.

The court agrees with Johnson that a court could review a contractor's employment decisions if that review did not implicate the underlying security determination. *See, e.g., Zeinali v. Raytheon Co.*, 636 F.3d 544, 551-52 (9th Cir. 2011). But in the instant case, at least as Johnson frames his primary argument,[4] in order for the jury to determine whether Raytheon's proffered reason for terminating Johnson was legitimate and nonretaliatory or merely pretextual, the jury would inevitably be required to assess the validity of the Navy's investigation and security decision.

Other courts have held that *Egan* bars this type of scrutiny as part of a pretext analysis. *See, e.g., Al-Kaysey v. Engility Corp.*, 2016 U.S. Dist. LEXIS 130518, 2016 WL 5349751, at *10 (E.D.N.Y. Sept. 23, 2016) ("Because [defendants'] proffered reasons for terminating [the plaintiff] were based on the report from the Army that [plaintiff] posed a risk to national security, a review of their decisions, unfavorable to [plaintiff], would require the Court to wade into the same territory that *Egan* prohibits.") (footnote omitted); *Ryan v. Reno*, 168 F.3d 520, 524, 335 U.S. App. D.C. 12 (D.C. Cir. 1999) ("[The] court cannot clear the second step of *McDonnell Douglas*

4. Johnson also maintains that Raytheon's reason for terminating him is pretextual because there were other jobs that he could have performed at Raytheon that did not require a security clearance or access to the Program. Although the court recognizes the possibility that the jury could consider this contention without engaging in questions barred by *Egan*, the court need not now decide this issue because Johnson's termination-based retaliation claim fails for other reasons. *See infra* at § IV(E).

without running smack up against *Egan*." Because "[t]he appellants could not challenge the proffered reason's authenticity without also challenging its validity."); *Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 197 (9th Cir. 1995) (holding that *Egan* prevented court from engaging in pretext analysis because evaluating "whether the given reasons were mere pretext" would be impossible without "evaluating their merits").

Despite Johnson's assertion that he is not challenging the Navy investigation or determination, his evidence and briefing reveal that his pretext argument does just that.[5] Johnson argues that "Raytheon did not terminate Mr. Johnson because of the Navy's findings. Raytheon knew that . . . Mr. Johnson did not have any security violations and that findings were based on Raytheon's false statements to the Navy." P. Resp. at 17. To support this argument, Johnson makes assertions that are contradictory to the Navy statements and reports. For example, Johnson asserts that "[t]he Navy's investigation was not independent. It relied upon Raytheon for its facts and made no independent determination of the violations based on a first-hand examination of the evidence. The first-hand evidence . . . exonerates me." P. App. at 5. Johnson also contends that the Navy has

5. Johnson's attorney also contradicted this assertion during a deposition when he stated that, "[b]ut for the investigation, there would not be [the] conclusion[s] that Navy came out [with]—I'm sorry, Navy, but the conclusions are wrong. There would not be those wrong conclusions that . . . Raytheon knows are wrong and has information to know that they're false, and but for that, [Johnson] would not be terminated. That's our argument." D. App. at 1009.

"limited understanding of the matters," and that "[h]ad Raytheon or the Navy confronted [Johnson] openly about the accusations, [he] could show them to be false, as [he] can do in a court of law." *Id.* at 6. Johnson also directly challenges the Navy's findings, *see* D. App. at 14-15, by declaring that he did not introduce any unapproved network analysis software. *See* P. App. at 13-14. And although Johnson now contends that he is not seeking to have his access to the Program reinstated by the Navy, his second amended complaint seeks relief in the form of reinstatement. *See* 2d. Am. Compl. at ¶ 126. Johnson states that he "would expect since the security violation didn't happen, that there would be no reason why not to . . . reinstate [him]." D. App. at 834.

Johnson's proffered evidence demonstrates that his pretext argument is ultimately aimed at challenging the validity of the Navy's security findings. Thus to resolve Johnson's pretext argument, a jury would have to determine whether the Navy actually conducted an independent investigation, as it asserts that it did, and whether the Navy's findings that Johnson committed multiple security violations were actually incorrect due to their reliance on Raytheon's reports. This is exactly the type of second-guessing of a deliberate, predictive decision made by the Executive Branch that *Egan* forecloses. Because Johnson's pretext argument would require a jury to evaluate the underlying merits of the Navy's security report, the court holds that it lacks subject matter jurisdiction to determine whether Raytheon's proffered reason for Johnson's termination is pretextual.

Because the court lacks subject matter jurisdiction in this respect, it cannot determine whether Johnson can prevail on his termination-based claim based on a showing that Raytheon's proffered reason for terminating his employment is pretextual. Accordingly, it grants Raytheon's motion to dismiss to this extent. *See Ryan*, 168 F.3d at 524 ("Because the district court below could not proceed with the appellants' discrimination action without reviewing the merits of [Department of Justice]'s decision not to grant a clearance, the court was foreclosed from proceeding at all."); *Perez*, 71 F.3d at 514-15 ("Because the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision . . . . [N]either we nor the district court have jurisdiction to consider those matters." (footnote omitted)).

E

Raytheon maintains that, even if court has subject matter jurisdiction, Johnson has failed to produce evidence to rebut Raytheon's legitimate, nonretaliatory reason for terminating him, i.e., he has failed to raise a genuine issue of material fact on the question of pretext. The court now turns to this argument.

Raytheon contends that it is entitled to summary judgment on Johnson's termination-based retaliation claim because he has not adduced evidence that would allow a reasonable jury to find that his engaging in protected

activities was the but-for cause of his termination. Johnson responds that he has produced evidence that Raytheon's proffered reason for his termination is false and that Raytheon actually terminated him due to his protected activities. Raytheon replies, *inter alia*, that Johnson is relying on evidence that improperly challenges the Navy's findings[6] and fails to adduce evidence that the relevant decisionmaker knew about Johnson's protected activities.

Johnson has failed to introduce sufficient evidence for a reasonable jury to find that Raytheon's proffered reason for terminating him is pretextual. As the court has explained above, *see supra* at § IV(B), Johnson has not produced evidence that LaMonte—the relevant decisionmaker—had knowledge of his protected activities. At most, Johnson relies on the circumstantial evidence that Humphrey spoke with individuals who had knowledge of Johnson's protected activities, and LaMonte then relied on the report that Humphrey prepared. But even drawing all reasonable inferences in Johnson's favor, he has not produced sufficient evidence for a reasonable jury to find that someone with knowledge of his protected activities even attempted to influence LaMonte's decision. The report that Humphrey prepared does not mention any protected activities, and Johnson has produced no evidence about the contents of Humphrey's conversations with the relevant individuals. This is not enough to demonstrate a genuine issue with respect to LaMonte's knowledge. *See EEOC v. EmCare, Inc.*, 857 F.3d 678, 683

6. As the court has explained, *see supra* at § IV(D)(2), it does not have jurisdiction to review Johnson's arguments that challenge the Navy's finding that Johnson committed multiple security violations.

(5th Cir. 2017) ("[E]vidence of generalized discussions between a decisionmaker and someone with knowledge of the plaintiff's protected activity creates only a speculative inference regarding the decisionmaker's awareness."); *Turner v. Jacobs Eng'g Grp., Inc.*, 470 Fed. Appx. 250, 252-53 (5th Cir. 2012) (per curiam) (explaining that court could not reasonably infer that decisionmaker was aware of plaintiff's protected activity from decisionmaker's single negative comment and general conversations between decisionmaker and employees with knowledge of the protected activity). The court therefore concludes that, to the extent it has subject matter jurisdiction, Raytheon is entitled to summary judgment dismissing Johnson's termination-based retaliation claim.

V

The court next considers Johnson's retaliation claims based on Raytheon's instructions not to speak with the Navy, Raytheon's monitoring of Johnson, and Raytheon's reporting of Johnson to the Navy.

A

1

Raytheon first contends that the court lacks subject matter jurisdiction under *Egan* to review Raytheon's monitoring and reporting of Johnson because these actions were performed pursuant to Raytheon's contract with the Navy. Johnson responds, *inter alia*, that *Egan* does not bar the court's review of Raytheon's actions because,

under *Rattigan v. Holder*, 689 F.3d 764, 402 U.S. App. D.C. 166 (D.C. Cir. 2012), *Egan* does not apply to false reports made to the government.[7] Raytheon replies that *Rattigan* is distinguishable from the instant case because in *Rattigan* the reports made about the plaintiff were knowingly false and the plaintiff received a favorable final security clearance determination.

2

The court has not found a Fifth Circuit case that discusses the applicability of *Egan* to the initiation of a security investigation. Several other courts, however, have addressed this question and held that the circumstances leading to the instigation of a security clearance investigation are not reviewable. As the Fourth Circuit has explained, "the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference," because "[t]he reasons why a security investigation is initiated may very well be the same reasons why the final security clearance decision is made." *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996); *see also Panoke v. U.S. Army Mil. Police Brigade*, 307 Fed. Appx. 54, 56 (9th Cir. 2009) (unpublished) ("A review of the circumstances surrounding a security clearance [decision] is tantamount to a review of the security clearance itself. Therefore, the circumstances surrounding the revocation of [plaintiff's] security clearance must be precluded from review.");

7. Johnson also argues that *Egan* does not apply to this case at all for the reasons discussed *supra* at § IV(D)(1). As the court has already explained, it is not persuaded by these arguments.

*Hill v. White*, 321 F.3d 1334, 1335-36 (11th Cir. 2003) (per curiam) (rejecting challenge to initiation of security clearance investigation because "[t]o review the initial stages of a security clearance determination is to review the basis of the determination itself regardless of how the issue is characterized"). But not all courts have reached the same conclusion. In *Rattigan* the D.C. Circuit held that *Egan* does not preclude review of security reports or referrals made with a retaliatory motive based on knowingly false information. *Rattigan*, 689 F.3d at 770-71.

The court is not persuaded that *Rattigan*—even if it were controlling in this circuit—should govern this case. Johnson has not adduced evidence, beyond his own speculative statements, that the individuals responsible for monitoring his activities and reporting him to the Navy did so with knowing falsity.

But even assuming *arguendo* that Johnson has adduced sufficient evidence of knowing falsity, this case is distinguishable from *Rattigan*. The plaintiff in *Rattigan*, unlike Johnson, received a favorable final security clearance determination from the government. *Id.* at 766. Other courts have found this to be a meaningful distinction. *See Al-Kaysey*, 2016 U.S. Dist. LEXIS 130518, 2016 WL 5349751, at *9; *Tharp v. Lynch*, 2015 U.S. Dist. LEXIS 164857, 2015 WL 8482747, at *9 (E.D. Va. Dec. 8, 2015). Here, because the Navy ultimately determined that Johnson had committed multiple security violations, it is readily conceivable that questioning the veracity of the information that Raytheon used to initiate the Navy investigation would be the same as questioning

the ultimate conclusions reached by the Navy and NCIS. For example, if the jury were asked, in essence, to assess the accuracy of Raytheon's report that Johnson may have downloaded unapproved software onto the network, *see* P. App. at 60-62; D. App. at 7-8, this would ultimately draw into question the accuracy of the Navy's final report, which concluded that Johnson had, in fact, downloaded unapproved software. *See* D. App. at 14. The court therefore holds that, to the extent that Raytheon's monitoring of and reporting on Johnson initiated the Navy's security investigation, the court lacks subject matter jurisdiction to review these actions.

B

To the extent the court has subject matter jurisdiction to review Raytheon's monitoring of and reporting on Johnson, the court next considers Raytheon's contention that it is entitled to summary judgment on Johnson's retaliation claims that are not based on his termination.

1

Raytheon contends that it is entitled to summary judgment because, *inter alia*, Johnson has failed to raise a genuine issue of material fact regarding whether Raytheon's non-termination actions were materially adverse employment actions.[8] Johnson does not respond

8. Raytheon also maintains that it is absolutely immune from liability with respect to Johnson's monitoring and reporting-based claims because these actions were required by its contract with the Navy. The court need not decide the question whether this immunity

to this argument in his brief, but he appears to maintain that all of Raytheon's actions were materially adverse.

To constitute prohibited retaliation, an employment action must be a "materially adverse" one that would "dissuade[] a reasonable worker from making or supporting a charge of [an FCA violation]." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (internal quotation marks omitted) (discussing retaliation claims in Title VII context). "The purpose of this objective standard is 'to separate significant from trivial harms' and 'filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009) (quoting *Burlington N.*, 548 U.S. at 68). To determine whether a particular employment action is materially adverse, the Fifth Circuit considers whether the action affects factors such as the employee's "job title, grade, hours, salary, or benefits," or whether it caused a "diminution in prestige or change in standing among . . . co-workers." *Paul v. Elayn Hunt Corr. Ctr.*, 666 Fed. Appx. 342, 346-47 (5th Cir. 2016) (per curiam) (quoting *Stewart*, 586 F.3d at 332); *see also Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 827 (5th Cir. 2019).

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applies in the context of retaliation claims brought under the FCA because Johnson's claims fail for other reasons. *See infra* at § V(B)(3)-(4), (C)(2), and *supra* at § V(A)(2). And, in any event, Raytheon does not cite cases that conclude that government contractors have this broad immunity under the FCA; instead, Raytheon relies on decisions holding that government contractors have official immunity from tort liability. *See* D. Br. at 28, 30 n.15.

Johnson has not produced evidence that any pre-termination actions by Raytheon had a direct impact on his title, grade, salary, hours, benefits, or social standing at Raytheon.[9] This suggests that, under Fifth Circuit precedent, none of these actions qualifies as a materially adverse employment action. But even looking beyond these factors, Johnson has adduced little evidence that would enable a reasonable jury to find that Raytheon's actions would have dissuaded a reasonable worker in his position from investigating FCA violations.

2

The court first considers whether Raytheon's instructions to Johnson not to report problems to the Navy were materially adverse employment actions. Although under certain circumstances a reprimand can serve as the basis for a retaliation claim, *see Willis v. Cleco Corp.*, 749 F.3d 314, 318 (5th Cir. 2014), the Fifth Circuit has held that isolated warnings, without evidence of direct threats of consequences, do not constitute adverse employment actions. *See, e.g., Hernandez v. Johnson*, 514 Fed. Appx. 492, 498-99 (5th Cir. 2013) (per curiam) (concluding that district court properly granted summary judgment on plaintiff's Title VII retaliation claim because single harassing phone call and letter identifying misconduct were not adverse employment actions); *DeHart v. Baker Hughes Oilfield Operations, Inc.*, 214 Fed. Appx. 437,

9. Johnson contends that he suffered reputational harm when the Navy interviewed his coworkers, but these adverse consequences are all attributable to actions by the Navy, not Raytheon. *See* D. App. at 860-61, 814.

442 (5th Cir. 2007) (per curiam) (concluding that written warning detailing employee's insubordination was not adverse employment action in Title VII context). Drawing all reasonable inferences in Johnson's favor, he has only adduced evidence that two individuals—who were not his supervisors—told him on isolated occasions not to talk with the Navy. The court therefore concludes that Johnson has not created a genuine issue of material fact with respect to whether a reasonable worker in his position would have been dissuaded from engaging in protected activity based on these interactions.[10]

3

The court next considers Raytheon's monitoring of Johnson. The Fifth Circuit has held that an employee's claim that he was being "watched more closely than other[] [employees]" was not a materially adverse employment action. *Grice v. FMC Techs. Inc.*, 216 Fed. Appx. 401, 404, 407 (5th Cir. 2007) (per curiam). And other courts have reached similar holdings. *See, e.g.*, *Pintro v. Pai*, 422 F.Supp.3d 318, 336 (D.D.C. 2019) ("Monitoring an employee's activity or whereabouts is not generally a materially adverse action."); *Soublet v. La. Tax Comm'n*, 766 F.Supp.2d 723, 735 (E.D. La. 2011) ("The Court finds that plaintiff's complaints of increased

10. Further, Johnson's own testimony reflects that he was *not* dissuaded by these warnings from engaging in future protected activity. Johnson testified at his deposition that, despite the warnings, he "didn't see any need to change [his] behavior" towards the Navy at all and continued to talk to the Navy "[j]ust as [he] had before." D. App. at 862.

or altered supervision, criticism and documentation, even when considered together, would not dissuade a reasonable worker from making or supporting a charge of discrimination."); *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 893 (S.D. Tex. 2010) (holding that a "supervisor closely monitoring [plaintiff's] work" is not a materially adverse employment action). Some courts, however, have suggested that sufficiently intrusive or severe monitoring could be an adverse employment action. *See Tapia v. City of Albuquerque*, 170 Fed. Appx. 529, 533 (10th Cir. 2006) ("We agree with the district court that sufficiently severe harassing, following, and monitoring of an employee could create an adverse employment action.").

Johnson has not adduced evidence that would enable a reasonable jury to find that Raytheon's monitoring of him was so severe or intrusive as to qualify as a materially adverse employment action. In fact, Johnson produces very little evidence about how Raytheon monitored him or how that monitoring changed after he engaged in protected activity. Johnson relies on a timeline of events (the "Timeline") as evidence that Raytheon was closely monitoring him leading up to the Navy investigation. *See* P. App. at 16, 60-62. But Johnson has not produced evidence about how the monitoring detailed in the Timeline was different from the monitoring that other Raytheon employees were subjected to. Additionally, Raytheon has presented unrefuted evidence that the Timeline was prepared at the request of the Navy *after* it began its investigation, not, as Johnson suggests, over a period of time in order to create a false record about him that could

be sent to the Navy.[11] *See* P. Resp. at 23; P. App. at 16; D. App. at 485, 744-45, 767, 814, 822. The court therefore concludes that Johnson has not adduced sufficient evidence for a reasonable jury to find that Raytheon's monitoring of him was a materially adverse employment action.

4

Turning to the component of Johnson's claim based on Raytheon's reporting of Johnson to the Navy, courts have recognized that "an investigation *may* amount to actionable employer conduct." *Rodriguez v. City of Laredo*, 2007 U.S. Dist. LEXIS 61730, 2007 WL 2329860, at *3 (S.D. Tex. Aug. 13, 2007). Some courts have held that, "while the mere initiation of an investigation is generally not sufficient to constitute adverse action for a retaliation claim, an investigation which carries the prospect of material consequences for the plaintiff may constitute adverse action." *Cong. v. D.C.*, 514 F.Supp.3d 1, 18 (D.D.C. 2020) (internal quotation marks omitted). And other courts have held that "[t]he initiation of a formal disciplinary investigation—even one that does not result in formal discipline—would satisfy [the *Burlington Northern*] standard." *Doucet v. Univ. of Cincinnati*, 2006

11. Because Sharp prepared the Timeline after she had already reported Johnson to the Navy, Johnson's argument that Raytheon's monitoring of him was retaliatory, at least to the extent that it relies on the Timeline as evidence, is better characterized as part of Johnson's argument that Raytheon retaliated against him by making false reports about him to the Navy. Raytheon is therefore also entitled to summary judgment on the grounds set out *infra* at § V(C)(2).

U.S. Dist. LEXIS 49022, 2006 WL 2044955, at *22 n.19 (S.D. Ohio July 19, 2006), *aff'd on other grounds*, 2007 U.S. App. LEXIS 21570, 2007 WL 2445993 (6th Cir. Aug. 28, 2007).

The court concludes on the instant summary judgment record, however, that a reasonable jury could not find that Raytheon's reporting of Johnson to the Navy rose to the level of a materially adverse employment action. For example, Johnson has adduced no evidence that Raytheon's act of reporting him, on its own, had any negative impact on factors such as his salary, title, benefits, or hours. And a reasonable employee would have known, as Johnson did, that Raytheon was required under its Navy contract to report any suspected security violations to the Navy.

C

Assuming *arguendo* that Raytheon's reporting of Johnson to the Navy was a materially adverse employment action, the court next considers whether Johnson has rebutted Raytheon's proffered legitimate, nonretaliatory reason for reporting him, i.e., whether he has raised a genuine issue of material fact on the question of pretext.

1

Raytheon contends that, even if Johnson could adduce evidence to support a *prima facie* claim that reporting him to the Navy was retaliatory, Raytheon has produced a legitimate, nonretaliatory reason for its actions: it was required to report Johnson under its Navy contract.

Raytheon posits that Johnson has not produced evidence that Sharp—the Raytheon employee responsible for the decision to report Johnson to the Navy—knew about his protected activity, and, therefore, Johnson cannot establish that his protected activity was the but-for cause of his being reported. Johnson maintains that Sharp had knowledge of his protected activity.[12]

2

As the court has explained above, *see supra* at § III, once Raytheon has produced a legitimate, nonretaliatory reason for its allegedly retaliatory actions, Johnson must produce evidence that would enable a reasonable jury to find that retaliation for Johnson's protected conduct, rather than Raytheon's proffered legitimate,

12. Johnson also contends that his behavior was the same as other similarly situated engineers, but that those engineers were not reported to the Navy. For disparate treatment to evidence pretext, however, Johnson "must submit evidence that would enable a reasonable jury to find that a similarly situated employee was treated differently under nearly identical circumstances." *Turner v. Republic Waste Servs. of Tex., Ltd.*, 2016 U.S. Dist. LEXIS 169476, 2016 WL 7178968, at *4 (N.D. Tex. Dec. 8, 2016) (Fitzwater, J.) (citing *Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 406 (5th Cir. 2005)). Johnson has not adduced such evidence. For example, Johnson avers that "another engineer used Wireshark in the same manner as me, but was not investigated or terminated," P. App. at 14, and that "[o]ther Raytheon employees also used the Boeing desktops." *Id.* at 15. But Johnson has not produced proof about how these employees were otherwise similarly situated to him. Nor does he contend that these employees committed multiple security violations. Accordingly, a reasonable jury could not find that these employees were treated differently under "nearly identical" circumstances.

nonretaliatory reason, was the but-for cause of the adverse employment action. *See Musser*, 944 F.3d at 561. To avoid summary judgment, Johnson must show that the relevant decisionmaker—Sharp[13] —knew about his *protected activity*. It is not enough for Johnson to produce evidence that Sharp knew that Johnson had made general complaints about actions taken by Raytheon, because Johnson must show that Sharp knew that Johnson was investigating fraud or attempting to expose Raytheon's illegal activity. *See U.S. ex rel. Patton v. Shaw Servs., L.L.C.*, 418 Fed. Appx. 366, 372-73 (5th Cir. 2011) (per curiam); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994) (finding no protected activity where employee "never characterized his concerns as involving illegal, unlawful, or false-claims investigations").

Sharp avers that she was not aware that Johnson had engaged in any protected activity when she made the decision to report him to the Navy. And while Johnson asserts that Sharp did know of his protected activity, he has not produced any evidence that he specifically made Sharp aware that he was investigating fraud or was concerned that Raytheon was doing something illegal. Instead, Johnson relies on the fact that Sharp was present at some of the meetings where Johnson raised the issue that the flight laptops were missing a part of their configuration guide. But Johnson does not show which meetings Sharp attended, some of which occurred before she joined the security team for the Program. *See*

13. Although LaMonte was the decisionmaker with regard to Johnson's termination, Sharp was the decisionmaker concerning making the report to the Navy.

D. App. at 844-45. Johnson also does not allege in his second amended complaint or produce evidence that he discussed at these meetings his concerns that Raytheon was engaged in fraudulent activities. Additionally, in his response to Raytheon's interrogatory requesting details about any interaction or communication that Johnson had with Raytheon employees regarding his protected activity, Johnson does not aver that he communicated with Sharp about his protected activities. *See id.* at 618-23. The court therefore concludes that Johnson has failed to raise a genuine fact issue as to whether Raytheon's reporting him to the Navy would not have occurred but for his protected activity.[14]

D

Accordingly, the court concludes that, to the extent Raytheon's monitoring of and reporting on Johnson initiated the Navy's security investigation, the court lacks subject matter jurisdiction to review these actions. But even if the court assumes that it has subject matter jurisdiction, a reasonable jury could not find that Raytheon's instructions to Johnson not to report problems to the Navy, Raytheon's monitoring of him, and Raytheon's reporting of him to the Navy were materially adverse employment actions. And assuming *arguendo*

14. Even if the court assumes *arguendo* that Johnson has adduced sufficient evidence to raise a genuine fact issue as to whether Sharp knew about Johnson's protected activity, which the court doubts, Raytheon is still entitled to summary judgment on the basis that Raytheon's monitoring of and reporting on Johnson were not materially adverse employment actions. *See supra* at V(B)(3)-(4).

that Raytheon's monitoring of and reporting on Johnson to the Navy were materially adverse employment actions, Johnson has failed to raise a genuine fact issue as to whether Raytheon's monitoring him and reporting him to the Navy would not have occurred but for his protected activities.

VI

The court previously denied Johnson's request for Rule 56(d) relief but gave him an opportunity to supplement that request in his response to Raytheon's motion for summary judgment. The court now considers whether Johnson's supplemental declaration meets the standard for obtaining Rule 56(d) relief.

A

"[Rule 56(d)] is an essential ingredient of the federal summary judgment scheme and provides a mechanism for dealing with the problem of premature summary judgment motions." *Parakkavetty v. Indus Int'l, Inc.*, 2004 U.S. Dist. LEXIS 2012, 2004 WL 354317, at *1 (N.D. Tex. Feb. 12, 2004) (Fitzwater, J.) (citing *Owens v. Estate of Erwin*, 968 F.Supp. 320, 322 (N.D. Tex. 1997) (Fitzwater, J.) (referring to former Rule 56(f), which was replaced by Rule 56(d)). Under Rule 56(d), the court can "(1) defer considering the [summary judgment] motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order," provided that the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

justify its opposition." Rule 56(d). Rule 56(d) is "usually invoked when a party claims that it has had insufficient time for discovery or that the relevant facts are in the exclusive control of the opposing party." *See Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987) (referring to Rule 56(f)). Rule 56(d) offers relief where the nonmovant has not had a full opportunity to conduct—not to complete—discovery. The two concepts are distinct. *See McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991) (per curiam) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1985)) (rejecting nonmovant's contention that district court abused its discretion by failing to permit him to complete discovery before granting summary judgment, and holding that "Rule 56 does not require that discovery take place before granting summary judgment").

"[Rule 56(d)] motions are broadly favored and should be liberally granted." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006). Nevertheless, to warrant a continuance for purposes of obtaining discovery, "a party must indicate to the court by some statement . . . why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact." *Stults v. Conoco, Inc.*, 76 F.3d 651, 657-58 (5th Cir. 1996) (quoting *Krim v. BancTexas Grp., Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993)). It is not sufficient for a summary judgment nonmovant to allege that discovery is incomplete or that discovery will produce needed but unspecified facts. *See Washington*, 901 F.2d at 1285. The party must demonstrate "how the additional time will enable [it] to rebut the movant's allegations of no genuine issue of fact."

*Id.* at 1286 (quoting *Weir v. Anaconda Co.*, 773 F.2d 1073, 1083 (10th Cir. 1985)). A nonmovant is not entitled to a continuance if he "fail[s] to explain what discovery [he] did have, why it was inadequate, and what [he] expected to learn from further discovery" and gives only "vague assertions of the need for additional discovery." *Bauer v. Albemarle Corp.*, 169 F.3d 962, 968 (5th Cir. 1999) (quoting *Reese v. Anderson*, 926 F.2d 494, 499 n.5 (5th Cir. 1991)).

B

Johnson incorporates his original Rule 56(d) declaration into his response to Raytheon's motion for summary judgment and supplements it with an additional three page declaration in his appendix to his response brief. Johnson states that he needs to depose several people who had a retaliatory purpose and referred knowingly false information to the Navy or communicated with Humphrey before Johnson's termination. Johnson also contends that Raytheon refused to allow depositions of several of these individuals. Raytheon contends in its reply brief that Johnson's supplemental Rule 56(d) declaration does nothing to cure the deficiencies of the reincorporated declaration. Raytheon also maintains that Johnson has still not satisfied the standard for Rule 56(d) relief because he does not identify what specific facts he expects to learn from these specific witnesses or how this additional discovery will create a genuine issue of material fact. Raytheon also contends that Johnson had the opportunity to depose key witnesses, such as Humphrey, but never requested or noticed such depositions. Johnson did not address the deficiencies of his Rule 56(d) declaration at oral argument.

The court agrees with Raytheon that Johnson's supplemental Rule 56(d) declaration does not cure the defects of his original, incorporated Rule 56(d) declaration. Johnson still has not identified what specific facts he expects to learn from the witnesses he seeks to depose. And although Johnson asserts that Raytheon refused discovery of key witnesses, he does not support that claim with evidence that he even attempted to obtain such discovery. Thus Johnson also fails to identify how the discovery he has already been allowed is inadequate to oppose Raytheon's motion. The court therefore denies Johnson's request for Rule 56(d) relief.

* * *

For the foregoing reasons, the court grants in part Raytheon's motion to dismiss and grants Raytheon's motion for summary judgment, denies Johnson's request for Rule 56(d) relief, and enters judgment in Raytheon's favor.

**SO ORDERED**.

September 21, 2021.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
SENIOR JUDGE

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED SEPTEMBER 21, 2021

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

Civil Action No. 3:17-CV-1098-D

UNITED STATES OF AMERICA, *ex rel.*;
DANA JOHNSON,

*Plaintiff– Relator,*

vs.

RAYTHEON COMPANY,

*Defendant.*

Filed September 21, 2021

For the reasons set out in memorandum opinions and orders filed on July 3, 2019 and today, it is ordered and adjudged that plaintiff-relator Dana Johnson's ("Johnson's") *qui tam* claims under 31 U.S.C. § 3730(c)(2)(A) are dismissed with prejudice, and the balance of his action against defendant Raytheon Company ("Raytheon") is dismissed in part for lack of subject matter jurisdiction and dismissed in part with prejudice on the merits.

*Appendix C*

The taxable costs of court, as calculated by the clerk of court, incurred by the United States of America are assessed against Johnson.

The taxable costs of court, as calculated by the clerk of court, incurred by Raytheon are assessed against Johnson.

Done at Dallas, Texas September 21, 2021.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
SENIOR JUDGE

## APPENDIX D — ORDER ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 19, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-11060

UNITED STATES OF AMERICA, *ex rel.*;
DANA JOHNSON, *Relator*,

*Plaintiff–Appellant,*

versus

RAYTHEON COMPANY,

*Defendant–Appellee.*

Filed March 19, 2024

Appeal from the United States District Court
for the Northern District of Texas,
USDC No. 3:17–CV–1098

**ON PETITION FOR REHEARING EN BANC**

Before STEWART, DENNIS, and HIGGINSON, *Circuit Judges.*

*Appendix D*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

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* Judge Irma Carrillo Ramirez, did not participate in the consideration of the rehearing en banc.