

No. 25-

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IN THE  
**Supreme Court of the United States**

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NICHOLAS SELLMAN,

*Petitioner,*

*v.*

ATC,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), this Court held that an employer is liable under a “cat’s paw” theory when a supervisor acts with discriminatory animus, intends that act to cause an adverse employment action, and that act is a proximate cause of the ultimate decision. The Court rejected categorical defenses based on layered decisionmaking or independent review, explaining that causation is severed only when the adverse action rests on reasons unrelated to the supervisor’s original biased act.

The courts of appeals are now divided over how to apply *Staub*. Most circuits treat “cat’s paw” liability as a proximate-cause inquiry, holding that intervening review or multiple decisionmakers do not automatically defeat liability. But the Fourth, Eleventh, and Tenth Circuits treat organizational structure—such as independent investigation or multilayered review—as categorically breaking the causal chain. The question presented is as follows:

Whether, under *Staub v. Proctor Hospital*, an employer is categorically insulated from “cat’s paw” liability whenever higher-level officials conduct independent review or share decisionmaking authority, even if a biased subordinate’s act was a proximate cause of the adverse employment action?

**PARTIES TO THE PROCEEDINGS  
AND RULE 29.6 STATEMENT**

1. Petitioner Nicholas Sellman was the plaintiff in the United States District Court for the Western District of Oklahoma and the appellant before the United States Court of Appeals for the Tenth Circuit.

Respondent Aviation Training Consulting, LLC was the defendant in the district court and the appellee before the court of appeals.

2. Petitioner Nicholas Sellman is an individual.

Respondent Aviation Training Consulting, LLC is a limited liability company. To the best of petitioner's knowledge, Aviation Training Consulting, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its ownership interest.

**STATEMENT OF RELATED PROCEEDINGS**

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioner states:

- *Sellman v. Aviation Training Consulting, LLC*, No. CIV-22-365-D, U.S. District Court for the Western District of Oklahoma. Judgment entered Sept. 14, 2023.
- *Nicholas Sellman v. Aviation Training Consulting, LLC*, No. 23-6138, U.S. Court of Appeals for the Tenth Circuit. Judgment entered Oct. 21, 2025.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Nicholas Sellman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the Tenth Circuit is reported at *Nicholas Sellman v. Aviation Training Consulting, LLC*, 155 F.4<sup>th</sup> 1215 (10th Cir. 2025). (Pet. App. 1a-25a).

The opinion of the District Court for the Western District of Oklahoma is reported at *Sellman v. Aviation Training Consulting, LLC*, No. CIV-22-365-D, 2023 WL 5987215 1 (W.D. Okla. Sept. 14, 2023). (Pet. App. 26a-47a).

### **JURISDICTION**

The judgment of the Tenth Circuit was entered on October 21, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioner sought an extension of the deadline to file his Petition for Writ of Certiorari, which the Court granted setting the new deadline for February 18, 2026.

### **STATUTORY PROVISIONS INVOLVED**

Section 12102(1) of the Americans with Disabilities Act provides:

The term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C. 12102(1).

Section 12112(a) of the Americans with Disabilities Act provides:

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Section 12203(a) of the Americans with Disabilities Act provides:

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a).

## INTRODUCTION

People with bad motives sometimes arrange for others to unwittingly do their dirty work. This case presents just such a situation arising in a workplace and a circuit conflict regarding how such evidence should be considered.

This case presents a recurring and consequential question about the reach of this Court’s decision in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). *Staub* analyzed the “cat’s paw”<sup>1</sup> doctrine and *Staub* held that an employer is liable when a supervisor acts with discriminatory animus, intends to cause an adverse employment action, and that act is a proximate cause of the ultimate decision. The Court rejected rules under which the involvement of additional decisionmakers, the exercise of independent judgment, or the conduct of an internal investigation would automatically sever proximate causation.

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1. The “cat’s paw” doctrine derives its name from a fable conceived by Aesop and made famous by La Fontaine. *Staub*, 562 U.S. 415 n.1 In the fable, a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *Id.* As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey makes off with the chestnuts, leaving none left for the cat. *Id.* Today the term “cat’s-paw” refers to “one used by another to accomplish his purposes.” Webster’s Third New International Dictionary Unabridged 354 (2002). In the employment discrimination context, “cat’s paw” refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998). See also *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990) (Posner, J.) (inaugurating the descriptor “cat’s-paw” for this analysis of employment claim).

The Tenth Circuit applied a markedly different approach. It held that Mr. Sellman failed to establish the “unbroken causal chain” required for “cat’s paw” liability because higher-level officials independently reviewed his performance and did not “blindly follow” the supervisor’s recommendation. 155 F.4th at 1223–24, 1227–29. Although the court acknowledged evidence of discriminatory animus by the supervisor and that a decisionmaker was aware of the employee’s complaint, it concluded that the presence of layered review and independently sufficient grounds for nonrenewal defeated liability as a matter of law. In effect, the court treated independent review and diffused decisionmaking authority as severing proximate causation.

The result is a deep and acknowledged division among the courts of appeals. In most circuits, a case like this would proceed to trial. In the Tenth Circuit, it ends at summary judgment. The question whether *Staub* establishes a causation rule or a structural safe harbor now determines the outcome of federal employment discrimination cases across the country depriving disabled veterans like Sellman protections enacted by Congress. This Court’s review is warranted.

## STATEMENT OF THE CASE

### 1. Employment and Background

Nicholas Sellman was employed by Aviation Training Consulting LLC (“ATC”) as a loadmaster on a C-130 aircraft from April 2017 through April 2018. (10<sup>th</sup> App. at 14)<sup>2</sup>. His role at ATC entailed significant responsibilities in

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2. 10th App. refers to documents contained in the Plaintiff-Appellant Nicholas Sellman’s Required Appendix in the Tenth Circuit Court of Appeals.

the coordination and management of cargo on the aircraft. (10<sup>th</sup> App. at 151-158).

A former Marine who was deployed to Iraq and Afghanistan, Sellman is also a disabled veteran – a fact within the knowledge of ATC upon his hiring. (10<sup>th</sup> App. at 76-91). During the relevant period, Sellman’s immediate supervisor was Richard Sofge, ATC’s Director of Operations in Kuwait. (10<sup>th</sup> App. at 16, 123-124). Graham Mueller served as ATC’s Chief Pilot in Kuwait. (10<sup>th</sup> App. at 34-36). Michael Young was ATC’s Vice President of Operations, and Dennis Stephens was ATC’s Vice President of Internal Operations. (10<sup>th</sup> App. at 18) (10<sup>th</sup> Supp. App., Vol. I, 154, 174)<sup>3</sup>.

Sellman’s disabilities include Post Traumatic Stress Disorder (“PTSD”) as well as blood pressure issues, neuropathy in his hands and feet, and cervical and head pain. (10<sup>th</sup> App. at 103-04, 121). Sellman’s PTSD developed from flying as crew on “angel flights” carrying dead bodies of fellow service personnel from Iraq. (10<sup>th</sup> App. at 107-08).

A turning point in Sellman’s employment at ATC occurred with the approval of his 100% VA Disability Rating by the Veterans Administration. (10<sup>th</sup> App. at 79, 109-12).

## **2. Supervisor Remarks and Complaint**

After learning of Sellman’s 100% VA Disability Rating, Sofge “laid into him.” (10<sup>th</sup> App. 109-12). Sofge loudly questioned the legitimacy of Sellman’s disability,

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3. 10th Supp. App., Vol. I refers to documents contained in the Appellee’s Brief Supplemental Appendix – Volume I in the Tenth Circuit Court of Appeals.

referring to him as a criminal and cripple, and the argument escalated to a point where Sofge stormed out. (10<sup>th</sup> App. 123-124, 132, 148, 160) (10<sup>th</sup> Supp. App., Vol. I, 68-69, 72, 161, 167). Sofge engaged in sarcastic remarks and loud discussion about Sellman's disability and VA disability rating, which lasted for approximately 20-30 minutes. (10<sup>th</sup> App. 123-124, 138) (10<sup>th</sup> Supp. App., Vol. I, 161).

The District Court acknowledged:

After Plaintiff received his 100% VA Disability Rating, he told co-worker Jean Colley and Director of Operations Richard Sofge. It is undisputed that Sofge then made inappropriate comments to Plaintiff regarding his VA disability rating. Although there is some dispute as to Sofge's precise comments, Sofge referred to individuals who "game the system" and how the VA disability system is broken. Plaintiff alleges that Sofge sarcastically called him a "cripple" and a "criminal" for collecting disability benefits, implying that Plaintiff was not actually disabled.

(10<sup>th</sup> App. at 16)(Pet. App. 29a).

The Tenth Circuit likewise observed:

There is evidence—specifically the disparaging comments that Mr. Sofge made to Mr. Sellman about his VA disability rating—that would support finding that Mr. Sofge had an animus against Mr. Sellman because of his disability.

Arguably from this evidence a reasonable factfinder could also infer that Mr. Sofge might have wanted to retaliate against Mr. Sellman for complaining to H.R. about those comments, which resulted in Mr. Sofge being reprimanded.

*Sellman v. Aviation Training Consulting, LLC*, 155 F.4th 1215, 1223 (10th Cir. 2025)(Pet. App. 17a).

On November 17, 2017, Sellman complained to ATC regarding Sofge's treatment of him because of his disability. (10<sup>th</sup> App. at 16, 73, 127-29, 186, 196)(10<sup>th</sup> Supp. App., Vol. I, 161-173). Around December 14, 2017, Vice President of Internal Operations Dennis Stephens counseled Sofge that his comments were inappropriate and would not be tolerated. (10<sup>th</sup> App. at 16, 73, 128-29, 186)(10<sup>th</sup> Supp. App., Vol. I, 161, 169, 173, 181-182).

### **3. Performance Reviews and Recommendation**

Mueller conducted a midyear performance review of Sellman on January 9, 2018, which Sellman duly signed. (10<sup>th</sup> App. at 45-46).

A later performance evaluation dated January 31, 2018, rated Sellman "satisfactory" in teamwork, technical competence, and client focus, but "marginal" in dependability and initiative. (10<sup>th</sup> App. at 98-99). Rick Sofge is identified as "Senior Rater." (10<sup>th</sup> App. at 48). Mueller testified he presented this review to Sellman. (10<sup>th</sup> App. at 47-48, 98-99). Sellman testified that he neither saw nor discussed this January 31 review while employed at ATC. (10<sup>th</sup> App. at 68-69). Sellman's signature was absent from the document. (10<sup>th</sup> App. at 98-99).

Around February 27, 2018, less than 11 weeks after being counseled for his remarks, Sofge recommended that Sellman's contract not be renewed. (10<sup>th</sup> App. at 23, 76, 93, 148, 185). When Sellman discussed his contract non-renewal with Sofge, Sofge told Sellman "that was the first he had heard about it and the decision had come from headquarters." (10<sup>th</sup> App. at 140). However, it was Sofge who first recommended that Sellman's contract not be renewed. (10<sup>th</sup> App. at 18, 93, 140, 185).

#### **4. The Non-Renewal Decision**

ATC states that the non-renewal decision was made by Vice President of Operations Michael Young and Vice President of Internal Operations Dennis Stephens, after consulting with CEO Robert Cox. (10<sup>th</sup> App. at 18) (10<sup>th</sup> Supp. App., Vol. I, 154, 174). Stephens, who counseled Sofge, was aware of Sellman's complaint about Sofge and comments he made about Sellman's VA disability rating. (10<sup>th</sup> App. at 16)(10<sup>th</sup> Supp. App., Vol. I, 150). Young was also aware of Sellman's complaint about Sofge and comments he made about Sellman's VA disability rating. (10<sup>th</sup> Supp. App., Vol. I, 154).

#### **5. District Court Proceedings**

Nicholas Sellman filed suit against Aviation Training Consulting LLC on September 16, 2021. (10<sup>th</sup> App. at 11). The case was transferred to the Western District of Oklahoma on May 3, 2022. (10<sup>th</sup> App. at 9-11).

On September 14, 2023, the District Court granted ATC's Motion for Summary Judgment. (Pet. App. 26a-47a). The court concluded that Sellman failed to demonstrate

a genuine issue of material fact regarding his ADA and USERRA claims.

The District Court noted that ATC provided a legitimate, non-discriminatory reason for its employment decision, citing Sellman’s “marginal” performance as outlined in the January 31 review. (Pet. App. 37a). The court further noted that “[o]n February 27, Sofge gave his recommendation that Plaintiff’s contract not be renewed.” (Pet. App. 30a). The court concluded that the decisionmakers based their decision not on Sofge’s recommendation alone but on a combination of factors, including the performance review and Sellman’s failure to maintain an FAA flight certificate. (Pet. App. 38a-47a).

Sellman filed a Notice of Appeal on September 15, 2023. (10<sup>th</sup> App. at 12).

## **6. Tenth Circuit Decision**

On October 21, 2025, the Tenth Circuit affirmed. *Sellman v. Aviation Training Consulting, LLC*, 155 F.4th 1215 (10th Cir. 2025)(Pet. App. 1a-25a). The court held that Sellman did not “proffer any evidence suggesting that any of these three decisionmakers were acting with a discriminatory and/or retaliatory bias against him.” *Id.* at 1221.

The Tenth Circuit stated that a “necessary” element of a subordinate bias claim is the decisionmaker’s uncritical reliance on facts provided by a biased supervisor, and that if the employer independently verifies the facts and does not rely on the biased source, there is no subordinate bias liability. *Id.* at 1223. The court further concluded that

“there is no evidence that Mr. Sofge duped the decision makers into not renewing Mr. Sellman’s contract.” *Id.* at 1223.

Finally, the court held that Sellman failed to create a triable issue of fact as to whether ATC’s asserted reason for not renewing his contract—that he was a marginal employee—was a pretext for disability discrimination or retaliation. *Id.* at 1225.

### **REASONS FOR GRANTING THE PETITION**

The courts of appeals are divided over a recurring and outcome-determinative question of federal employment law: whether an employer is categorically insulated from “cat’s paw” liability whenever higher-level officials conduct independent review, even if a biased supervisor’s act was a proximate cause of the adverse employment action. In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), this Court adopted a causation-based rule and rejected structural safe harbors. Eight circuits apply *Staub* as written. Three circuits—including the Tenth Circuit in this case—do not. The conflict is acknowledged, entrenched, and dispositive. This Court’s review is warranted.

#### **I. The Courts of Appeals Are Divided Over Whether “Cat’s Paw” Liability Turns on Causation or on Organizational Structure**

In *Staub v. Proctor Hospital*, this Court adopted a causation-based rule for “cat’s paw” liability. 562 U.S. 411 (2011). An employer is liable when a supervisor acts with discriminatory animus, intends that act to cause an adverse employment action, and that act is a proximate

cause of the ultimate decision. *Id.* at 419–22. Proximate cause requires only a “direct relation” between the biased conduct and the injury, excluding links that are “too remote, purely contingent, or indirect.” *Id.* at 419 (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)).

*Staub* rejected categorical defenses based on layered decisionmaking. The involvement of additional decisionmakers does not automatically sever causation, because injuries often have “multiple proximate causes,” and an independent judgment is not a superseding cause unless it is of “independent origin” and “not foreseeable.” *Id.* at 419–20 (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)). Nor does an internal investigation defeat liability unless it results in an adverse action “for reasons unrelated to the supervisor’s original biased action.” *Id.* at 421.

**A. Most Circuits Apply *Staub* as a Causation Rule, Not as a Structural Safe Harbor.**

Most courts of appeals have taken *Staub* at its word. Eight circuits—the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth—treat “cat’s paw” liability as a proximate-cause inquiry grounded in agency principles, not as a doctrine defeated by organizational design. In these circuits, liability turns on whether the biased subordinate’s act was a proximate cause of the ultimate decision—not on whether the final decision was made by a different official, a committee, or after additional review.

The First Circuit treats “cat’s paw” liability as a causation inquiry. In *Brandt v. Fitzpatrick*, it held that an employer may be liable where a decisionmaker relies

on information manipulated by an employee who harbors discriminatory animus. 957 F.3d 67, 80 (1st Cir. 2020). The court rejected liability only because the plaintiff failed to show animus or tainted input—not because independent review or shared decisionmaking categorically severed causation. *Id.* at 80–81.

The Second Circuit likewise applies *Staub* as a causation rule. In *Edelman v. NYU Langone Health System*, it held that an employer may be liable where a biased supervisor’s conduct was the but-for cause of the adverse action, even though higher-level officials made the ultimate decision following review. 141 F.4th 28, 52–55 (2d Cir. 2025). The court emphasized that liability turns on whether the employer gave effect to the biased actor’s intent—not on the formal allocation of authority—and reaffirmed that principle by relying on *Staub* and *Vasquez v. Empress Ambulance Service, Inc.*, 835 F.3d 267 (2d Cir. 2016).

The Third Circuit applies “cat’s paw” liability as a proximate-cause inquiry under *Staub*, requiring proof of retaliatory animus, communication, and reliance by the decisionmaker. It rejects any categorical rule that an imperfect or independent investigation automatically cuts off liability, instead asking whether the non-decisionmaker’s conduct proximately caused the adverse action, while rejecting any rule that independent review automatically cuts off liability. *Crosbie v. Highmark Inc.*, 47 F.4th 140, 148–50 (3d Cir. 2022).

The Fifth Circuit likewise applies *Staub* as a causation rule, holding that a plaintiff may establish but-for causation under a “cat’s-paw” theory even where the

ultimate decisionmaker lacked retaliatory animus, so long as the biased supervisor’s conduct actually caused the adverse action, by showing the biased supervisor exercised influence or leverage in the decision making process. *Brown v. Wal-Mart Stores E., L.P.*, 969 F.3d 571, 579–80 (5th Cir. 2020); *Zamora v. City of Houston*, 798 F.3d 326, 331–33 (5th Cir. 2015); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (noting that “courts will not blindly accept the titular decisionmaker as the true decisionmaker”).

The Sixth Circuit has articulated one of the clearest post-*Staub* formulations, holding that a supervisor’s biased, true-but-selective report may be a proximate—and even but-for—cause of termination, and that an employer’s subsequent investigation does not categorically defeat liability, even where it uncovers additional misconduct that could independently justify discharge. *Gray v. State Farm Mut. Auto. Ins. Co.*, 159 F.4th 1024, 1044–55 (6th Cir. 2025).

The Seventh Circuit treats “cat’s paw” liability as a proximate-cause inquiry, holding that a biased subordinate’s animus is actionable if it was a causal driver of the adverse action, and that decisionmaking layers matter only insofar as they supply independently sufficient, untainted grounds. *McDaniel v. Progress Rail Locomotive, Inc.*, 940 F.3d 360, 369–71 (7th Cir. 2019). It has reaffirmed that framework in rejecting liability where an internal investigation uncovered independently sufficient reasons for termination, while emphasizing that review does not categorically sever causation. *Gaines v. Dart*, 158 F.4th 829, 836–39 (7th Cir. 2025).

The Eighth Circuit likewise treats *Staub* as a proximate-cause rule. In *Bennett v. Riceland Foods, Inc.*, it held that an employer may be liable where a biased manager, though not the final decisionmaker, intentionally and proximately caused the adverse action by proposing job eliminations later approved by higher management. 721 F.3d 546, 552–53 (8th Cir. 2013). The court rejected the argument that subsequent approval automatically severed causation, emphasizing that liability remains where the biased actor set the process in motion and the adverse action would not have occurred but for that animus. Sounds a lot like this case.

The Ninth Circuit applies *Staub* as a causation-based doctrine rather than a structural safe harbor. In *Acosta v. Brain*, it held that “cat’s paw” liability turns on whether the biased actor’s influence was “strong enough to actually cause” the adverse action, making clear that intervening actors or formal decisionmaking layers do not categorically defeat liability. 910 F.3d 502, 515–18 (9th Cir. 2018). Even under a but-for standard, the court emphasized that the inquiry is whether the biased conduct set the adverse action in motion and remained a proximate cause of the outcome—not whether the employer can point to additional review or nominal independence.

**B. A Minority of Circuits Depart from *Staub* by Treating Organizational Structure as a Categorical Bar to Liability.**

A minority of courts of appeals have moved in the opposite direction. Rather than applying *Staub*’s causation-based rule, these courts treat organizational structure—such as independent review, multiple

decisionmakers, or committee action—as dispositive. In practice, that approach replaces *Staub*'s proximate-cause inquiry with structural immunity.

The Tenth Circuit joined this minority approach in this case. In *Sellman v. Aviation Training Consulting, LLC*, the court affirmed summary judgment by holding that “cat’s paw” liability fails where higher-level decisionmakers conducted what the court deemed independent review, concluding that the Sellman had not shown an “unbroken causal chain” between a biased subordinate’s conduct and the ultimate decision. 155 F.4th 1215, 1227–28 (10th Cir. 2025). Although *Sellman* invoked *Staub*'s elements, and acknowledging there was evidence of discriminatory and retaliatory animus, it treated intervening review and multiple decisionmakers as dispositive—effectively requiring Sellman to disprove independence rather than asking whether the biased act remained a proximate cause of the adverse action. That approach converts *Staub*'s causation rule into a structural safe harbor.

The Eleventh Circuit has taken a similar structural approach. It has held that “cat’s paw” liability fails where the ultimate decisionmaker independently investigates the complaint against the employee and does not simply follow a biased subordinate’s recommendation, treating such investigation as breaking the causal chain. See *Harris v. Pub. Health Tr. of Miami-Dade Cnty.*, 82 F.4th 1296, 1308–11 (11th Cir. 2023). In *Harris*, although a supervisor allegedly harbored overt racial animus, the court held that liability was foreclosed because other supervisors and the final decisionmaker conducted their own investigations into the employee’s misconduct and

relied on those findings rather than the biased supervisor's views. In that framework, the existence of independent review functioned as a categorical bar to liability, not merely as evidence bearing on causation.

The Fourth Circuit has likewise adopted a restrictive, authority-focused approach. It requires plaintiffs to show that the biased actor exercised “principal responsibility” for the adverse action or functioned as the “actual decisionmaker,” rejecting “cat’s paw” liability where authority rested with committees or higher-level officials who independently acted. *See Barnhill v. Bondi*, 138 F.4th 123, 154–58 (4th Cir. 2025). In *Barnhill*, the court held that allegations of bias by supervisors who initiated reviews or influenced deliberations were insufficient absent plausible facts showing that those actors controlled or dominated the ultimate decisions. Under that framework, the diffusion of authority across layered decisionmakers breaks the causal chain unless the biased actor can be treated as the true decisionmaker.

These courts do not ask whether a biased subordinate’s conduct was a proximate cause of the adverse action. Instead, they ask whether the employer’s decision-making structure appears sufficiently insulated. If review occurred or authority was shared, liability fails—regardless of whether bias set the process in motion and foreseeably produced the result.

## **II. The Decision Below Is Incorrect Because It Converts *Staub*’s Causation Rule into Structural Immunity**

The Tenth Circuit’s decision squarely conflicts with *Staub* and exemplifies the circuit split warranting

this Court’s review. In *Sellman v. Aviation Training Consulting, LLC*, the Tenth Circuit rejected liability not because bias lacked causal force, but because the employer’s decision-making process included multiple actors and layers of review. 155 F.4th 1215, 1227–28 (10th Cir. 2025). That approach converts *Staub*’s causation inquiry into a structural safe harbor.

Under *Staub*, the question is whether a biased subordinate’s act—undertaken with discriminatory or retaliatory intent—was a proximate cause of the adverse employment action. 562 U.S. 411, 419–22 (2011). The presence of additional decisionmakers, committees, or review does not itself sever causation. Those features matter only if they result in an adverse action “for reasons unrelated to the supervisor’s original biased action.” *Id.* at 421. *Staub* thus makes causation dispositive and structure merely probative.

*Sellman* applies a different rule. There, the panel acknowledged evidence that the Sellman’s supervisor made disparaging comments about his disability and that those comments triggered a complaint and internal process. 155 F.4th at 1218–19. But the court held that “cat’s paw” liability failed as a matter of law because higher-level officials ultimately made the nonrenewal decision, relied on performance evaluations, and did not “blindly follow” the supervisor’s recommendation. *Id.* at 1228–29. Once the court deemed the decision-making structure sufficiently layered, it concluded that the causal chain required by *Staub* was severed as a matter of law.<sup>4</sup>

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4. And the Tenth Circuit glosses over the fact that both decision makers Stephens and Young were aware of Sellman’s disability

That is precisely the reasoning *Staub* rejected. *Staub* explained that an employer is not insulated simply because the final decision is made by someone else, because injuries often have “multiple proximate causes,” and intervening decisionmakers are not superseding causes unless their actions are of “independent origin” and “not foreseeable.” 562 U.S. at 419–20. By treating independent review and diffused authority as dispositive rather than evidentiary, *Sellman* adopts the very structural immunity *Staub* warned against.

The error is outcome-determinative. Under *Staub* and the majority of circuits, the inquiry would ask whether the biased supervisor’s conduct set in motion a process that predictably led to nonrenewal. Indeed, there is ample evidence that the biased supervisor Sofge exerted influence and leverage over the process that led to Sellman’s non-renewal. Under *Sellman*, that inquiry never occurs; the presence of intermediate review ends the case. The same facts thus yield opposite outcomes depending on geography.

This case cleanly presents the conflict. *Sellman* is not an outlier on the margins but a clear articulation of the minority, structure-based rule—one that nullifies *Staub* in practice. Review is warranted to restore *Staub*’s causation framework and to resolve a division that now produces inconsistent results in indistinguishable cases.

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discrimination complaint. (10<sup>th</sup> App. at 16, 18, 73, 128-29, 186)(10<sup>th</sup> Supp. App., Vol. I, 150, 154).

### III. The Question Presented Is Recurring, Important, and Warranted for This Court's Review

The question presented governs a central doctrine of modern employment discrimination law. “Cat’s paw” liability arises across the full range of federal employment statutes, including Title VII, the ADA, the ADEA, and USERRA. *Staub* itself arose under USERRA. 562 U.S. at 413–14. Since *Staub*, courts of appeals have repeatedly applied its framework in cases involving retaliation, disability discrimination, race discrimination, sex discrimination, and age discrimination. The split thus affects a large and recurring body of federal litigation.

The division is also outcome-determinative. Under the majority approach, liability turns on whether a biased subordinate’s act was a proximate cause of the adverse action. Under the minority approach, liability is foreclosed whenever the employer can point to layered review, shared decisionmaking, or an internal investigation deemed “independent.” As this case demonstrates, the same factual record can support trial in one circuit and summary judgment in another. That geographic disparity undermines the uniform application of federal civil rights law.

The practical stakes are substantial. Modern workplaces frequently involve multilayered decisionmaking structures—supervisors, human resources departments, committees, and executive approval. If the mere existence of those structures categorically defeats liability, employers can insulate discriminatory or retaliatory acts through organizational design. *Staub* rejected precisely that result, warning that employers could otherwise

“effectively shield[]” themselves by isolating formal decisionmakers from biased supervisors. 562 U.S. at 420. The minority rule revives the very structural immunity *Staub* disapproved.

The question is unlikely to resolve itself. The Tenth Circuit’s decision below expressly relies on an unbroken causal chain formulation that treats independent review as severing causation as a matter of law. 155 F.4th at 1223, 1227–29. The Fourth and Eleventh Circuits apply similar structure-based frameworks. Other circuits continue to apply *Staub* as a proximate-cause inquiry. The disagreement is entrenched, acknowledged, and doctrinal—not a product of factual variation.

Finally, this case presents the issue cleanly. The Tenth Circuit affirmed summary judgment on a fully developed record and expressly applied its structural approach to “cat’s paw” liability. No jurisdictional obstacle or alternative ground clouds the question presented. The conflict is squarely presented, outcome-determinative, and ready for resolution.

The record sets forth ample evidence of unlawful bias and the pretextual nature of ATC’s articulated reason for Sellman’s non-renewal. Indeed, the Tenth Circuit concluded Sofge’s disparaging remarks would support a finding that Sofge had an animus against Sellman because of his disability and Sofge might want to retaliate against Sellman for his complaint. 155 F.4<sup>th</sup> at 1223. Yet despite Sofge’s influence over the non-renewal of Sellman’s contract, the Tenth Circuit concluded that a self serving “independent” review severed causation. Under *Staub*, this approach cannot stand.

This Court's review is warranted to restore *Staub's* causation framework and ensure uniform application of federal employment discrimination law to prevent biased employees from manipulating an employer into terminating an employee because of a protected status or activity.

**CONCLUSION**

Certiorari should be granted, fully considered, judgment reversed, and the case remanded for trial.

Respectfully submitted,

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## **APPENDIX**

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**APPENDIX A — OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT,  
FILED OCTOBER 21, 2025**

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 23-6138

NICHOLAS SELLMAN,

*Plaintiff-Appellant,*

v.

AVIATION TRAINING CONSULTING, LLC,

*Defendant-Appellee.*

Appeal from the United States District Court  
for the Western District of Oklahoma  
(D.C. No. 5:22-CV-00365-D)

Filed October 21, 2025

Before **HOLMES**, Chief Judge, **EBEL**, and **ROSSMAN**,  
Circuit Judges.

**EBEL**, Circuit Judge.

Plaintiff Nicholas Sellman contends his former employer, Defendant Aviation Training Consulting, LLC (“ATC”), declined to renew his employment contract

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both because he is a disabled veteran and because he complained about comments his supervisor made disparaging his disability. Based on these allegations, Mr. Sellman asserted claims against ATC under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213, and the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§ 4301–35. In this appeal, Mr. Sellman challenges the district court’s decision to grant ATC summary judgment on all his claims. Having jurisdiction under 28 U.S.C. § 1291, we AFFIRM. In doing so, we conclude Mr. Sellman failed to create a triable issue of fact, under the “cat’s paw” doctrine, that his supervisor’s discriminatory and/or retaliatory animus toward Mr. Sellman caused higher level management to decide not to renew Mr. Sellman’s employment contract. We further conclude that, although USERRA protects servicemembers and veterans from employment discrimination related generally to their military service, it does not protect veterans from discrimination because they are disabled.

**I. FACTUAL BACKGROUND<sup>1</sup>**

ATC is an Oklahoma-based company founded by Robert Cox, who is a disabled veteran. The company employs a number of disabled veterans.

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1. We view the evidence in the light most favorable to Mr. Sellman, as the non-moving party. *See Iweha v. Kansas*, 121 F.4th 1208, 1220 (10th Cir. 2024).

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ATC hired Mr. Sellman, a Marine veteran, for one year—from April 2017 to April 2018—to be a Loadmaster Instructor in Kuwait where ATC had a contract to train Kuwaiti Air Force personnel on flying KC-130 cargo planes.<sup>2</sup> Mr. Sellman’s job duties included both classroom and in-flight instruction. When he applied for this job, Mr. Sellman voluntarily disclosed to the company, for affirmative action purposes, “that he had a 90% [Veterans Administration] VA disability rating.” (Aplt. App. 16.) Although not disclosed on the affirmative action form, Mr. Sellman’s disability rating was based on post-traumatic stress disorder (“PTSD”), degenerative back disease, and a sleep disorder. While at ATC, Mr. Sellman spoke only to one co-worker about the bases for his VA disability rating.

For the first five months that he was working for ATC in Kuwait, Mr. Sellman’s immediate supervisor was Chief Pilot Richard Sofge and his second-level supervisor was Director of Operations Michael Young. After September 2017, Mr. Young returned to Oklahoma where he continued to work for ATC as a vice president, Mr. Sofge was promoted to Director of Operations in Kuwait, and Mr. Sellman’s new immediate supervisor was Chief Pilot Graham Mueller. Messrs. Young, Sofge, and Mueller are all disabled veterans.

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2. The loadmaster on a KC-130 cargo plane is responsible for, among other things, distributing and securing the cargo in the plane to ensure that the load is balanced and does not shift in flight, which can cause the plane to crash. The loadmaster also ensures that the types of hazardous cargo are appropriate for each flight.

*Appendix A***A. Director Sofge disparaged Mr. Sellman's VA disability rating and was reprimanded**

In November 2017, Mr. Sellman told both a co-worker and Operations Director Sofge that the VA had increased his disability rating from 90% to 100%. Mr. Sofge responded by making

inappropriate comments to [Mr. Sellman] regarding his VA disability rating. Although there is some dispute as to Sofge's precise comments, Sofge referred to individuals who "game the system" and how the VA disability system is broken. [Mr. Sellman] alleges that Sofge sarcastically called him a "cripple" and a "criminal" for collecting disability benefits, implying that [Mr. Sellman] was not actually disabled.

(*Id.*) According to Mr. Sellman, Mr. Sofge's demeanor toward him cooled after this. So did Mr. Mueller's.

Mr. Sellman complained about Mr. Sofge's comments to ATC's Human Resources ("H.R.") Director, James Williams, who investigated. As a result of that investigation, one of ATC's vice presidents, Dennis Stephens, who is also a disabled veteran, "counseled Sofge that his comments were inappropriate and would not be tolerated. It is undisputed that Sofge did not make any other insensitive or inappropriate comments to [Mr. Sellman] after his counselling." (*Id.* at 16–17.)

*Appendix A***B. Mr. Sellman's flight certificate expired**

It was a condition of Mr. Sellman's employment that he maintain a flight certificate issued by the Federal Aviation Administration ("FAA"). This flight certificate was required in order for Mr. Sellman to be eligible to fly. It was Mr. Sellman's responsibility to maintain his flight certificate. On November 29, 2017, the FAA notified Mr. Sellman that it needed more information about his medical conditions before the agency could renew his flight certificate, which was to expire three months later, at the end of February 2018. Mr. Sellman first responded to the FAA on January 5, 2018. During January and February 2018, the FAA and Mr. Sellman traded correspondence, with the agency continuing to ask for additional medical information and Mr. Sellman responding.<sup>3</sup> During this time, ATC H.R. Director Williams and Operations Director Sofge knew that the FAA had concerns about renewing Mr. Sellman's flight certificate, and both checked with him periodically about the renewal process. "In January and February of 2018, there was confusion within [ATC's] offices as to whether [Mr. Sellman] was eligible

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3. The FAA was concerned about Mr. Sellman's history of depression, PTSD, restless sleep, and use of the prescription antidepressant Zoloft. Regarding his use of Zoloft, Mr. Sellman indicated that he had been "told during his annual airman medical physical certificate" in October 2017 "that he would not be granted an FAA certificate while on Zoloft." (I Aple. App. 27 ¶ 26.) Mr. Sellman informed the FAA on January 5, 2018, that he had "stopped taking Zoloft on October 30, 2017 and reported being in a good mood without any side effects and feeling better than while on Zoloft." (*Id.*)

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to fly due to the uncertainty regarding [his] FAA flight certificate.”<sup>4</sup> (*Id.* at 17.) In mid-February, Mr. Sellman asked to be taken off a training flight so he could remain in Kuwait to work on renewing his flight certificate. By March 1, 2018, with just over a month remaining on his employment contract, Mr. Sellman’s flight certificate expired, making him ineligible to fly. According to ATC’s managerial employees, Mr. Sellman “was the first [ATC] flight crew employee to allow an FAA flight certificate to expire.” (*Id.* at 18.) The FAA ultimately renewed Mr. Sellman’s flight certificate a few days after it expired.

**C. ATC’s negative assessment of Mr. Sellman’s job performance**

While Michael Young was the Director of Operations in Kuwait, ATC did not conduct performance reviews of its employees in Kuwait. When Mr. Sofge became the operations director, however, in September 2017, he began developing a process for conducting annual performance reviews for those employees. Implementing that process, Chief Pilot Mueller, on January 9, 2018, met with Mr. Sellman and went over an “Appraisal Support Form,” which Mr. Sellman reviewed and signed. (*Id.* at 165–66.) That form “serve[d] as a guide for the employee’s performance appraisal.” (*Id.* at 166.) It included the job description for Mr. Sellman’s position, listed accomplishments Mr.

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4. This confusion appears to have been primarily because Mr. Sellman’s flight certificate indicated it expired on February 23, 2018, but ATC eventually discovered from the FAA that the certificate remained valid until the end of the expiration month, February 2018.

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Sellman stated he had achieved during the prior nine months with ATC, and listed three objectives Mr. Sellman hoped to accomplish in the future.

Two weeks later, on January 31, 2018, Mr. Mueller completed Mr. Sellman's "Performance Appraisal." (*Id.* at 167–68.) That form required Mr. Mueller to rate Mr. Sellman's job-related abilities. Mr. Mueller rated Mr. Sellman "satisfactory" in several categories, including teamwork and technical competence.<sup>5</sup> (*Id.*) But Mr. Mueller

rated [Mr. Sellman] as "marginal" in dependability, communication skills, and initiative. Mueller provided additional comments that [Mr. Sellman] "[h]as difficulty completing assigned tasks without direct supervision"; has "difficulty communicating with others in the office" and "will not provide necessary information unless asked directly multiple times"; "[c]onstantly requires direction in order to accomplish assigned tasks"; and "[w]ill not perform any tasks outside directed duties nor provide ideas on improving projects or workspace processes."

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5. ATC also required Mr. Sellman and other flight crew members to pass "an annual NATOPS evaluation," which is a "rigorous" assessment of their flight competency. (Aplt. Br. 6 (citing Aplt. App. 40–44).) Mr. Sellman had successfully passed that exam. ATC has never questioned Mr. Sellman's flight competency.

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(*Id.* at 17.) Mr. Sellman did not sign that second performance review form and says he never saw it.<sup>6</sup>

On February 5, 2018, Mr. Mueller emailed his January 31 performance review of Mr. Sellman to Operations Director Sofge. In the email, Mr. Mueller further noted to Mr. Sofge that Mr. Sellman “ranked 3/3 for loadmaster instructors,” meaning Mr. Sellman was the lowest ranked of the three ATC loadmasters in Kuwait, “and [Mr. Sellman’s] overall average [fell] at the bottom of the aircrew stack.” (*Id.* at 17–18.) Mr. Mueller did not make any recommendation as to whether ATC should renew Mr. Sellman’s one-year employment contract. “Sofge forwarded Mueller’s review to [H.R. Director] Williams and [Vice President] Stephens.” (*Id.* at 18.)

Mr. Mueller’s negative evaluation of Mr. Sellman’s job performance was consistent with Vice President Young’s assessment of Mr. Sellman’s job performance while Mr. Young was the operations director in Kuwait during Mr. Sellman’s first five months there. While operations director, Mr. Young had “observed that [Mr. Sellman’s] performance was below other Loadmaster Instructors and [Mr. Young had] told [Mr. Sellman] he needed to ‘tighten it up’ with his job performance.” (*Id.*)

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6. Mr. Mueller testified in his deposition, to the contrary, that he went over this second form—the performance appraisal—with Mr. Sellman, Mr. Sellman became upset because of the negative review, and he left the office without signing the form. Viewing the evidence in the light most favorable to Mr. Sellman, *see Iweha*, 121 F.4th at 1220, however, we accept his version of events.

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Three weeks after Mr. Sofge forwarded Mr. Mueller's negative performance appraisal of Mr. Sellman to H.R. Director Williams and Vice President Stephens, Mr. Sofge, on February 27, stated in an email to Mr. Williams and Vice President Young that, "[b]ased on [Mr. Sellman's] sub par performance, I do not want to renew his contract." (*Id.* at 184–85.) In the same email, however, Mr. Sofge acknowledged that "this is not my call." (*Id.* at 184.)

**D. ATC decided not to renew Mr. Sellman's contract**

Neither Sofge nor [H.R. Director] Williams had the power to hire, renew contracts, or terminate employees. [Vice Presidents] Young and Stephens made the decision not to renew [Mr. Sellman's] contract because of his subpar performance, as communicated by [Chief Pilot] Mueller's performance review and Young's opinion of [Mr. Sellman] when he was [Mr. Sellman's] supervisor in Kuwait. [ATC's Chief Executive Officer ("CEO")] Cox gave final approval to not renew [Mr. Sellman's] contract based on Mueller's and Young's perceptions of [Mr. Sellman's] subpar performance. Cox found it further indicative of [Mr. Sellman's] performance issues that he did not maintain an FAA flight certificate or flight eligibility, which was required for [Mr. Sellman's] position. When Cox decided to not renew [Mr. Sellman's] contract, he did not know about [Mr. Sellman's] complaint to

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[H.R. Director] Williams regarding Sofge's inappropriate comments or specific reasons why [Mr. Sellman's] FAA flight certificate had expired.

(*Id.* at 18.)

**II. PROCEDURAL BACKGROUND**

After exhausting his administrative remedies and receiving a right-to-sue letter, Mr. Sellman sued ATC, alleging ATC declined to renew his employment contract 1) because he was disabled or was perceived to be disabled, in violation of the ADA; 2) in retaliation for his complaining to H.R. about disability discrimination, in violation of the ADA; and 3) because he is a disabled veteran and complained about discrimination on that basis, in violation of USERRA. The district court granted ATC summary judgment on all claims. Mr. Sellman challenges each of those rulings.<sup>7</sup>

**III. STANDARD OF REVIEW**

This court reviews the district court's summary judgment decision de novo, viewing the evidence in the light most favorable to Mr. Sellman, as the non-moving party. *See Iweha*, 121 F.4th at 1220. A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant

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7. We GRANT ATC's unopposed motion to file part of its supplemental appendix under seal.

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is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

**IV. DISCUSSION****A. Mr. Sellman’s claims under the Americans with Disabilities Act (“ADA”)**

Mr. Sellman asserted two claims under the ADA, alleging ATC decided not to renew his employment contract 1) because of his disability, *see* 42 U.S.C. § 12112 (prohibiting disability discrimination); and 2) in retaliation for his complaining to H.R. about Mr. Sofge’s comments disparaging his disability, *see id.* § 12203(a).<sup>8</sup> Because Mr. Sellman sought to prove these ADA claims using indirect evidence of disability discrimination and retaliation, the familiar McDonnell Douglas<sup>9</sup> three-step analysis applies. *See Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 989, 994 (10th Cir. 2021).

On appeal, Mr. Sellman does not challenge the district court’s ruling at the first and second steps

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8. An employer’s decision not to renew an employee’s contract is an adverse employment action that can support a claim under federal antidiscrimination laws. *See Singh v. Cordle*, 936 F.3d 1022, 1038 n.3 (10th Cir. 2019) (Title VII); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1380–81 (10th Cir. 1994) (Title VII). ATC does not argue to the contrary.

9. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (applying Title VII); *see also Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

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of the *McDonnell-Douglas* analysis. At step one, the court assumed, without deciding, that Mr. Sellman had established prima facie discrimination and retaliation claims. At step two, the district court held that ATC had asserted a legitimate non-discriminatory and non-retaliatory reason why the company decided not to renew Mr. Sellman's employment contract—because Mr. Sellman was a marginal employee.

Mr. Sellman challenges only the district court's decision, at step three, that Mr. Sellman failed to proffer sufficient evidence to create a triable issue of fact as to whether ATC's reason for not renewing Mr. Sellman's employment contract—that he was a marginal employee—was merely a pretext for disability discrimination and retaliation for complaining about such discrimination. It is undisputed that it was ATC's vice presidents, Young and Stephens, as well as its CEO Cox, who decided not to renew Mr. Sellman's employment contract. It is further undisputed that these decisionmakers decided not to renew Mr. Sellman's contract because they deemed Mr. Sellman to be a marginal employee. That assessment was based on Mr. Mueller's negative evaluation of Mr. Sellman's job performance and the corroboration from one of the decisionmakers, Mr. Young, that he, too, deemed Mr. Sellman's job performance to be inadequate when he supervised Mr. Sellman.

Mr. Sellman disputes that his job performance was inadequate. But, “[i]n assessing pretext, this Court examines the facts as they appeared to the decisionmakers, and we cannot second-guess [the employer's] business

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judgment—it matters not if [the employer’s] reasoning was correct, just whether it honestly believed in the reason for the termination.” *Edmonds-Radford*, 17 F.4th at 991. Mr. Sellman points to no evidence indicating that the three decisionmakers did not honestly believe Mr. Sellman’s job performance was inadequate.

Nor does Mr. Sellman proffer any evidence suggesting that any of these three decisionmakers were acting with a discriminatory and/or retaliatory bias against him. Furthermore, there is no evidence that Mr. Young or Mr. Cox even knew about Mr. Sellman’s disability, his VA disability rating, or his complaint to H.R. that Mr. Sofge had disparaged Mr. Sellman’s disability. *See id.* (rejecting pretext argument where there was no evidence decisionmakers knew about the employee’s disability).

Mr. Sellman points only to evidence that one of the three decisionmakers, Stephens, knew about Mr. Sellman’s disability rating and his complaint to H.R. But knowledge about a claimant’s disability or his complaint about disability discrimination alone, without more, is insufficient to create a triable fact as to pretext. *See Christopher v. Adam’s Mark Hotels*, 137 F.3d 1069, 1073 (8th Cir. 1998) (“Mere knowledge of a disability cannot be sufficient to show pretext.”); *Anderson v. AOL, LLC*, 363 F. App’x 581, 586–87 & 587 n.3 (10th Cir. 2010) (unpublished) (holding knowledge of the plaintiff’s protected activity, without more, is insufficient to create a reasonable inference of pretext in a retaliation case).<sup>10</sup> Moreover, the

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10. Although *Anderson* is not binding precedent, we find its reasoning persuasive.

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evidence established that Mr. Stephens knew about Mr. Sellman's VA disability rating and his complaint to H.R. because it was Mr. Stephens, who is himself a disabled veteran, who reprimanded Mr. Sofge for disparaging Mr. Sellman's disability. Mr. Sellman offers no evidence that Mr. Stephens harbored a discriminatory or retaliatory animus toward Mr. Sellman because of his disability or his complaint to H.R. about disability discrimination.

Because Mr. Sellman lacks any evidence that the three decisionmakers were motivated not to renew his contract by a discriminatory or retaliatory animus toward him, Mr. Sellman invokes the "cat's paw," or biased subordinate, theory to show pretext. *See generally Iweha*, 121 F.4th at 1227–28 (discussing "cat's paw" theory). "Essentially, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 1228 (quoting *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006)). "The 'cat's paw' theory of liability 'allows a plaintiff to establish pretext even without evidence that the actual decisionmaker possessed an unlawful motive.'" *Id.* at 1227 (quoting *Singh*, 936 F.3d at 1038).

"Under this theory, an employer is liable for engaging in a discriminatory [or retaliatory], adverse employment action 'if a subordinate to the decisionmaker "performs an act motivated by [discriminatory or retaliatory] animus that is intended by the [subordinate] to cause an adverse employment action . . . .'" *Id.* at 1227–28 (quoting *Singh*,

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936 F.3d at 1038, in turn quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 422, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)). Further, in the ADA context, the subordinate’s act must be the but-for cause of the ultimate adverse employment action. We have held that, for purposes of ADA retaliation claim, the employee must establish that the retaliatory motive was the but-for cause of the adverse employment action. See *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1209 (10th Cir. 2018) In the context of an ADA disability employment discrimination claim, we have said that an employee must establish that his “disability was a determining factor in the employer’s decision” to take adverse employment action. *Hampton v. Utah Dep’t of Corr.*, 87 F.4th 1183, 1187, 1197 (10th Cir. 2023) (applying ADA employment discrimination case law in a Rehabilitation Act disability in employment case); see also *Lincoln*, 900 F.3d at 1193 (addressing prima facie ADA claim for disability employment discrimination). Although we have used the phrase “determining factor,” it is not apparent to us that there is any difference between “determining factor” and “but for” causation.<sup>11</sup> Cf. *Cline v. Clinical Perfusion Sys., Inc.*, 92 F.4th 926, 928–29, 934–35 (10th Cir. 2024) (holding Plaintiff adequately pled state law age discrimination employment claim, which required allegations that age was but-for cause of adverse

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11. Other circuits have recognized that employment disability discrimination claims asserted under the ADA’s Title I require proof that the employer’s discriminatory animus was the but-for cause of the adverse employment action. See *Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 (9th Cir. 2019); *Natofsky v. City of N.Y.*, 921 F.3d 337, 348–49 (2d Cir. 2019) (joining Fourth, Sixth, and Seventh Circuits).

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employment action, where, among other things, Plaintiff pled that age was “determining factor”). We, therefore, hold that, in the employment context, an ADA employment discrimination claim and an ADA retaliation claim require proof that the employee’s disability was the but-for cause of the adverse employment action.

To survive summary judgment, then, when asserting the cat’s-paw theory of liability under the ADA, a plaintiff must show that there is a genuine issue of material fact that (1) the subordinate took action motivated by discriminatory or retaliatory animus; (2) the subordinate intended the action to cause an adverse employment action; and (3) the subordinate’s action was the but-for cause of the intended adverse employment action. *See Singh*, 936 F.3d at 1038; *see also Lincoln*, 900 F.3d at 1209.

“The key element of a successful cat’s paw theory of pretext is an unbroken causal chain connecting the biased employee’s action to the unbiased decisionmaker’s adverse decision.” *Iweha*, 121 F.4th at 1228. Relatedly,

a “necessary” element to a subordinate bias claim is the decisionmaker’s uncritical “reli[ance]” on facts provided by a biased supervisor. . . . If there is no such reliance—that is to say, if the employer independently verifies the facts and does not rely on the biased source—then there is no subordinate bias liability.

*Lobato v. N.M. Env’t Dep’t*, 733 F.3d 1283, 1294 (10th Cir. 2013) (quoting *Staub*, 562 U.S. at 421); *see also BCI*

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*Coca-Cola Bottling*, 450 F.3d at 485. Thus, “[a] cat’s paw theory can be defeated by showing a break in the causal chain, or a lack of uncritical reliance by the unbiased decisionmaker.” *Iweha*, 121 F.4th at 1228.

Mr. Sellman primarily contends that Mr. Sofge was the biased subordinate. There is evidence—specifically the disparaging comments that Mr. Sofge made to Mr. Sellman about his VA disability rating—that would support finding that Mr. Sofge had an animus against Mr. Sellman because of his disability.<sup>12</sup> Arguably from this evidence a reasonable factfinder could also infer that Mr. Sofge might have wanted to retaliate against Mr. Sellman for complaining to H.R. about those comments, which resulted in Mr. Sofge being reprimanded.

We need not decide these issues because there is no evidence that Mr. Sofge duped the decision makers into not renewing Mr. Sellman’s contract. Mr. Sofge did state to H.R. Director Williams and decisionmaker Young, in an email discussion of Mr. Sellman’s poor job performance and what to do with Mr. Sellman if his flight certificate lapsed, that he (Mr. Sofge) did not want to renew Mr. Sellman’s contract because of his subpar job performance. Mr. Sofge further acknowledged, however, that “this is not my call” to make. (Aplt. App. 184.)

Moreover, Mr. Sofge’s statement about not wanting to renew Mr. Sellman’s contract came three weeks after

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12. Technically, the evidence suggested Mr. Sofge was biased against Mr. Sellman because Mr. Sofge did not think Mr. Sellman was disabled and believed, instead, that Mr. Sellman was “gaming” the VA disability system.

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Mr. Sofge had transmitted Mr. Mueller's detailed negative performance appraisal of Mr. Sellman to Mr. Williams and decisionmaker Young, and approximately five months after Mr. Young himself told Mr. Sellman he needed to "tighten . . . up" his work performance (*id.* at 18). The evidence is undisputed that, when Mr. Stephens and Mr. Young decided not to renew Mr. Sellman's contract, and CEO Cox approved that decision, they relied on Mr. Mueller's negative performance evaluation of Mr. Sellman, Mr. Young's own knowledge of Mr. Sellman's inadequate job performance, and the fact that Mr. Sellman let his FAA flight certificate lapse. Those independent grounds for higher-up decisionmakers deciding not to renew Mr. Sellman's contract are sufficient to defeat Mr. Sellman's cat's paw theory. There is no suggestion that the decisionmakers blindly followed Mr. Sofge's brief statement that he did not want to renew Mr. Sellman's contract.

Nor is there any evidence that Mr. Sofge affected Mr. Mueller's critical evaluation of Mr. Sellman. Mr. Sellman suggests that maybe it was Mr. Mueller, the person who completed Mr. Sellman's negative performance appraisal, who was the biased subordinate who duped ATC decisionmakers into not renewing Mr. Sellman's contract. But there is no evidence suggesting that Mr. Mueller harbored any discriminatory or retaliatory bias against Mr. Sellman.

To begin with, there is no evidence that Mr. Mueller even knew about Mr. Sellman's complaint to H.R.—which is the basis for Mr. Sellman's retaliation claim. Nor is

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there any evidence that Mr. Mueller knew about Mr. Sellman's VA disability rating, which is the basis of his discrimination claim. Mr. Sellman speculates that maybe Mr. Mueller was in his nearby office when Mr. Sofge loudly disparaged Mr. Sellman's disability rating. But Mr. Sellman proffers no evidence from which a reasonable jury could find that that was the case.

Even if there was evidence that Mr. Mueller overheard Mr. Sofge disparaging Mr. Sellman's disability rating (and there is none), there is no evidence that Mr. Mueller, also a disabled veteran, had an animus against Mr. Sellman because of his disability rating. The most that Mr. Sellman can muster in support of this assertion is that, after Mr. Sofge's disparaging comments, both Mr. Sofge's and Mr. Mueller's demeanors cooled toward Mr. Sellman. That, alone, is insufficient for a reasonable jury to find that Mr. Mueller knew about Mr. Sellman's VA disability rating and held a discriminatory animus against Mr. Sellman as a result.

Mr. Sellman further asserts that Mr. Mueller's negative performance appraisal of him is not worthy of credence, and thus is evidence of pretext, because of the procedural irregularities, including the fact that Mr. Sellman never signed that evaluation. *See generally Kincaid v. Unified Sch. Dist. No. 500*, 94 F.4th 936, 947 (10th Cir. 2024) (noting "[p]retext can be shown by such weaknesses, implausibilities, inconsistencies, incoherence, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence

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infer that the employer did not act for the asserted [nondiscriminatory] reasons” (quoting *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1267 (10th Cir. 2007)). We are unpersuaded.

First, it is undisputed that ATC had not previously been conducting annual performance reviews with its employees in Kuwait. Notwithstanding Mr. Sellman’s assertion that Mr. Mueller failed to follow ATC’s “normal procedures” when he conducted Mr. Sellman’s review (Aplt. Br. 21), those reviews had not previously been conducted. It would, therefore, be difficult to conclude that Mr. Mueller failed to follow the normal procedures for such a review.

Even if ATC’s normal procedure was to have employees sign their performance appraisals, “[t]he mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that . . . the substantive reasons given by the employer for its employment decision were pretextual.” *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1222 (10th Cir. 2007) (quoting *Randle v. City of Aurora*, 69 F.3d 441, 454 (10th Cir. 1995)). There is no evidence that Mr. Mueller held a discriminatory (or retaliatory) animus against Mr. Sellman because of his VA disability rating. Nor is there any suggestion that Mr. Mueller did not believe that Mr. Sellman was a poor performing employee. In fact, the evidence in the record supported the belief that Mr. Sellman was a poor performer. Mr. Mueller’s review, for instance, was consistent with Mr. Young’s assessment of Mr. Sellman’s poor job performance several months before Mr. Sofge made disparaging comments about Mr. Sellman’s VA disability rating.

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Mr. Sellman further asserts that the evaluation Mr. Mueller conducted “use[d] . . . subjective criteria,” which “can also establish pretext.” (Aplt. Br. 23.) But Mr. Sellman does not explain that assertion further. *See Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1323 (10th Cir. 2017) (rejecting pretext argument based on alleged subjective criteria for how plaintiff could return to her supervisory role because plaintiff failed to explain how the criteria was subjective). We have previously noted that “[c]ourts view . . . subjective evaluation methods” “with skepticism.” *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002). In *Garrett*, for example, supervisors ranked all employees from best to worst, without adopting any criteria, let alone objective criteria, for how that ranking should be determined. *See id.* at 1217–18. Here, on the other hand, Mr. Mueller noted specific deficiencies in Mr. Sellman’s job performance which, although arguably not all based on objective criteria, were specific and detailed. For example, Mr. Mueller noted that Mr. Sellman “[h]as difficulty completing assigned tasks without direct supervision. Examples include coordinating and executing HAZMAT compliance.” (Aplt. App. 167.) For another category, Mr. Mueller noted: “Sellman has difficulty communicating with others in the office regarding personal and professional matters. Whether it’s a personal matter affecting attendance and work output or progress on an assigned task[,] he will not provide necessary information unless asked directly multiple times.” (*Id.* at 168.) Even if we were to conclude that the criteria Mr. Mueller applied to measure Mr. Sellman’s job performance was subjective, “the existence of subjective criteria alone is not considered evidence of pretext.” *Debord v. Mercy*

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*Health Sys. of Kan., Inc.*, 737 F.3d 642, 657 (10th Cir. 2013) (quoting *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1120 (10th Cir. 2007)). We, therefore, reject Mr. Sellman’s cat’s paw theories.

We have assumed, then, as did the district court, that Mr. Sellman was able to assert prima facie discrimination and retaliation claims under the ADA. But we agree with the district court that Mr. Sellman failed to proffer sufficient evidence to create a triable issue of fact as to whether ATC’s asserted reason for not renewing Mr. Sellman’s contract—that he was a marginal employee—was a pretext for disability discrimination or for retaliation for Mr. Sellman’s complaint to H.R. about Mr. Sofge disparaging his disability rating. We, therefore, affirm summary judgment for ATC on both of Mr. Sellman’s ADA claims.

**B. Mr. Sellman’s claims under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”)**

Mr. Sellman also alleged that ATC violated USERRA, 38 U.S.C. §§ 4301–35, by refusing to renew his contract because of his disability, and in retaliation for complaining about disability discrimination. The district court granted ATC summary judgment, ruling “USERRA’s protections do not extend to disability status.” (Aplt. App. 20.) We agree.

Relevant here, Congress enacted USERRA for the purpose of “prohibit[ing] discrimination against persons because of their service in the uniformed services,” 38

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U.S.C. § 4301(a)(3), which include the “Armed Forces,” *id.* § 4303(17). To that end, USERRA provides, in relevant part, that

[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

*Id.* § 4311(a). USERRA also includes an anti-retaliation provision. *See id.* § 4311(b). Thus, “USERRA ‘prohibits employment discrimination on the basis of military service.’” *Kelly v. Omaha Pub. Power Dist.*, 75 F.4th 877, 882 (8th Cir. 2023) (quoting *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010 (8th Cir. 2011)).

Mr. Sellman does *not* allege that ATC discriminated against him because of his military service; that is, because he had previously served in the Marines. *See Starr v. QuickTrip Corp.*, 655 Fed. Appx. 642, 645–46 (10th Cir. 2016) (unpublished) (holding, in USERRA action, that the plaintiff “bears the initial burden of proving by a preponderance of the evidence that his status as a service-member was ‘a motivating factor’” in the employer’s decision to take adverse action against the plaintiff).<sup>13</sup>

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13. Though unpublished, we find *Starr*’s reasoning persuasive.

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Mr. Sellman’s USERRA claim is instead that ATC refused to renew his contract because of the VA disability rating he had as a result of his prior military service. Such a claim does not fall within 38 U.S.C. § 4311(a)’s statutory language. *See Carroll v. Del. R. Port Auth.*, 89 F. Supp. 3d 628, 630 (D. N.J. 2015) (“hold[ing] that claims of discrimination based on a disability arising from military service are not cognizable under USERRA,” citing cases); *Ferrell v. Ezpawn Okla., Inc.*, No. CIV-18-607-SLP, 2019 U.S. Dist. LEXIS 118078, 2019 WL 3207797, at \*3 (W.D. Okla. July 16, 2019) (unreported) (ruling that alleged discrimination based on plaintiff’s “disability suffered during his military service . . . is not within the scope of USERRA’s protections”); 2019 U.S. Dist. LEXIS 118078, [WL] at \*4 (stating that “Plaintiff’s claim is based on his disability, not his military service, and [w]here a veteran argues that something other than his . . . military status was the actual substantial or motivating factor for an adverse employment action, a USERRA claim does not lie” (quoting *Norris v. Glassdoor, Inc.*, No. 2:17-cv-00791, 2018 U.S. Dist. LEXIS 117043, 2018 WL 3417111, at \*6 (S.D. Ohio July 13, 2018) (unreported)); *see also, e.g., Kelly v. Omaha Pub. Power Dist.*, 604 F. Supp. 3d 800, 807–08 (D. Neb. 2022) (in USERRA case involving denial of tuition assistance benefits, discussing analogous cases holding “employer does not violate USERRA if it denies some benefit of employment because an employee suffered a service-related disability”), *aff’d*, 75 F.4th 877 (8th Cir. 2023).

Our conclusion is bolstered by the fact that a different USERRA provision addressing reemployment of service

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members does expressly address the reemployment of disabled servicemembers. *See* 38 U.S.C. § 4313(a)(3), (b)(2)(B). But the provisions Mr. Sellman invokes in this case, the discrimination and retaliation provisions found in § 4311, do not include protections for disabled veterans.

While we agree generally with Mr. Sellman's assertion that USERRA should be broadly construed in favor of military service members, *see, e.g., Kelly*, 75 F.4th at 882, Mr. Sellman asks this court to recognize a USERRA claim that clearly falls outside the relevant statutory language. We, therefore, affirm summary judgment for ATC on Mr. Sellman's USERRA claims.

**V. CONCLUSION**

For these reasons, we AFFIRM the district court's decision granting ATC summary judgment on each of Mr. Sellman's claims.

**APPENDIX B — ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA,  
FILED SEPTEMBER 14, 2023**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-22-365-D

NICHOLAS SELLMAN,

*Plaintiff,*

v.

AVIATION TRAINING CONSULTING, LLC,

*Defendant.*

Filed September 14, 2023

**ORDER**

Before the Court is Defendant Aviation Training Consulting, LLC's Motion for Summary Judgment and Brief in Support [Doc. No. 66]. Plaintiff Nicholas Sellman filed a Response [Doc. No. 86], and Defendant filed a Reply [Doc. No. 92]. Thereafter, the Court allowed Plaintiff to file a Supplemental Response [Doc. No. 96] and Defendant to file a Sur-Reply [Doc. No. 99]. The matter is fully briefed and at issue.

*Appendix B***BACKGROUND**

Plaintiff is a Marine veteran with a disability rating assigned by the United States Department of Veterans Affairs (VA). Defendant is a disabled American veteran-owned company providing aircrew training services to the Kuwaiti Air Force on behalf of the United States Department of Defense. From April 2017 to April 2018, Plaintiff worked for Defendant in Kuwait as a Loadmaster Instructor for the KC-130 military aircraft. Plaintiff's one-year contract was not renewed by Defendant. Plaintiff asserts three causes of action against Defendant: 1) disability discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (ADA), as amended by the ADA Amendments Act of 2008; 2) retaliation prohibited by the ADA; and 3) employment discrimination on the basis of Plaintiff's military service, in violation of the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301, *et seq.* (USERRA).

Defendant seeks summary judgment in its favor with respect to each of Plaintiff's causes of action. For Plaintiff's ADA claims, Defendant argues that Plaintiff is not "disabled" as defined by the ADA; that Defendant decided not to renew Plaintiff's one-year contract due to his marginal job performance; and that Plaintiff cannot show pretext. With respect to Plaintiff's USERRA claim, Defendant contends that Plaintiff's allegations of disability related discrimination cannot support a USERRA claim, which statute prohibits employment discrimination based on a person's military status.

*Appendix B***UNDISPUTED FACTS<sup>1</sup>**

Defendant employed Plaintiff as a Loadmaster Instructor under a one-year contract. Defendant was not obligated to renew or extend Plaintiff's contract past the one year, and Plaintiff knew there was no guarantee of an extension. Plaintiff worked in Defendant's Kuwait offices from April 3, 2017, until his contract ended on April 9, 2018.

As a Loadmaster Instructor, Plaintiff was required to maintain an FAA flight certificate. Under the FAA Regulations, it is unlawful for a person to exercise airman privileges without an FAA flight certificate. Plaintiff understood that he was required to maintain an FAA flight certificate for his position.

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1. This statement includes material facts that are properly supported by the asserting party and not opposed in the manner required by FED. R. CIV. P. 56(c). Plaintiff did not dispute any of Defendant's Undisputed Material Facts (UMF). Pl.'s Resp. at 3; Pl.'s Supp. Resp. at 1-3. Accordingly, the Court accepts as true all material facts asserted and properly supported by Defendant's Motion for Summary Judgment. LCvR56.1(e) ("All material facts set forth in the statement of material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the nonmovant using the procedures set forth in this rule."). The Court may consider evidence in the record not specifically cited by the parties, *see* FED. R. CIV. P. 56(c)(3), but the Court is not required to comb through Plaintiff's evidence to determine the bases for a claim that a factual dispute exists. *See Espinoza v. Coca-Cola Enterprises, Inc.*, 167 F. App'x 743, 746 (10th Cir. 2006) ("[W]here the nonmovant failed to support his case with adequate specificity, we will not fault the court for not searching the record on its own to make his case for him (nor will we take on that role of advocacy).").

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When Plaintiff applied for the Loadmaster Instructor position, he disclosed that he had a 90% VA disability rating. On November 14, 2017, during Plaintiff's employment with Defendant, the VA notified Plaintiff that his disability rating for PTSD and an unspecified sleep disorder had been increased from 30% to 70%, which gave Plaintiff a combined VA disability rating of 100%.

After Plaintiff received his 100% VA disability rating, he told co-worker Jean Colley and Director of Operations Richard Sofge. It is undisputed that Sofge then made inappropriate comments to Plaintiff regarding his VA disability rating. Although there is some dispute as to Sofge's precise comments, Sofge referred to individuals who "game the system" and how the VA disability system is broken. Plaintiff alleges that Sofge sarcastically called him a "cripple" and a "criminal" for collecting disability benefits, implying that Plaintiff was not actually disabled.

On November 17, 2017, Plaintiff made a complaint to James Williams, Defendant's Director of Human Resources, regarding Sofge's comments. Williams investigated the incident, and Vice President of International Operations Dennis Stephens counseled Sofge that his comments were inappropriate and would not be tolerated. It is undisputed that Sofge did not make any other insensitive or inappropriate comments to Plaintiff after his counseling.

Plaintiff was notified on November 29, 2017, that the FAA needed additional information before renewing Plaintiff's flight certificate. Without an FAA flight

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certificate, Plaintiff would not be eligible to fly. Plaintiff responded to the November 29 letter on January 5, 2018. In January and February of 2018, there was confusion within Defendant's offices as to whether Plaintiff was eligible to fly due to the uncertainty regarding Plaintiff's FAA flight certificate. During this time, both Williams and Sofge checked in with Plaintiff on the status of his flight certificate. Ultimately, it was Plaintiff's responsibility to maintain his flight certificate and flight eligibility.

In January of 2018, Graham Mueller, Defendant's Chief Pilot in Kuwait, conducted a performance review of Plaintiff. Mueller rated Plaintiff as "marginal" in dependability, communication skills, and initiative. Mueller provided additional comments that Plaintiff "[h]as difficulty completing assigned tasks without direct supervision"; has "difficulty communicating with others in the office" and "will not provide necessary information unless asked directly multiple times"; "[c]onstantly requires direction in order to accomplish assigned tasks"; and "[w]ill not perform any tasks outside directed duties nor provide ideas on improving projects or workspace processes."

On February 5, 2018, Mueller e-mailed Sofge Plaintiff's performance review with the additional comment that, from Mueller's relative value rankings, Plaintiff was "ranked 3/3 for loadmaster instructors and his overall average [fell] at the bottom of the aircrew stack." On February 5, 2018, Sofge forwarded Mueller's review to Williams and Stephens. On February 27, Sofge gave his recommendation that Plaintiff's contract not be renewed.

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Michael Young, Defendant's Vice President of Operations, had previously held Sofge's position in Kuwait for the first several months of Plaintiff's employment. Before Young left Kuwait, he observed that Plaintiff's performance was below other Loadmaster Instructors and told Plaintiff he needed to "tighten it up" with his job performance.

As of March 1, 2018, Plaintiff's FAA flight certificate had expired and Plaintiff was no longer eligible to fly. For Williams, Stephens, Young, Sofge, and Defendant's founder and CEO, Robert Cox, Plaintiff was the first flight crew employee to allow an FAA flight certificate to expire.

Neither Sofge nor Williams had the power to hire, renew contracts, or terminate employees. Young and Stephens made the decision not to renew Plaintiff's contract because of his subpar performance, as communicated by Mueller's performance review and Young's opinion of Plaintiff when he was Plaintiff's supervisor in Kuwait. Cox gave final approval to not renew Plaintiff's contract based on Mueller's and Young's perceptions of Plaintiff's subpar performance. Cox found it further indicative of Plaintiff's performance issues that he did not maintain an FAA flight certificate or flight eligibility, which was required for Plaintiff's position. When Cox decided to not renew Plaintiff's contract, he did not know about Plaintiff's complaint to Williams regarding Sofge's inappropriate comments or specific reasons why Plaintiff's FAA flight certificate had expired.

*Appendix B***STANDARD OF DECISION**

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). A material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if the facts and evidence are such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. All facts and reasonable inferences must be viewed in the light most favorable to the nonmovant. *Id.* at 255.

A movant bears the initial burden of demonstrating the absence of a dispute of material fact warranting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the movant carries this burden, the nonmovant must then go beyond the pleadings and “set forth specific facts” that would be admissible in evidence and that show a genuine issue for trial. *See Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324. “To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); *see* FED. R. CIV. P. 56(c)(1)(A). The inquiry is whether the facts and evidence identified by the parties present “a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251-52.

*Appendix B***DISCUSSION****I. USERRA**

Plaintiff's USERRA claim fails as a matter of law. "The USERRA prohibits employers from terminating service-members based on their membership in or obligations to the armed services." *Starr v. QuickTrip Corp.*, 655 Fed. Appx. 642, 645 (10th Cir. 2016) (citing 38 U.S.C. § 4311(a)). An employee who brings a claim under USERRA "bear[s] the initial burden of showing by a preponderance of the evidence that [his or her] military service was a substantial or motivating factor in the adverse employment action." *Lewis v. Rite of Passage, Inc.*, 217 F. App'x 785, 786 (10th Cir. 2007) (internal quotation marks and citation omitted). Military status "is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Lewis*, 217 F. App'x at 786 (internal quotation marks and citation omitted).

Plaintiff has failed to establish a genuine issue of material fact as to whether his prior military service was a motivating factor in Defendant's decision to not renew Plaintiff's one-year contract. Plaintiff's USERRA claim is premised not on his prior military service, but on his disability status and, more particularly, his receipt of a combined 100% VA disability rating. In support of his USERRA claim, Plaintiff alleges that Sofge berated him after learning that he had received a 100% VA disability

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rating.<sup>2</sup> As USERRA's protections do not extend to disability status, Plaintiff has failed to establish a claim under USERRA. *See Ferrell v. EZPawn Oklahoma, Inc.*, No. CIV-18-607-SLP, 2019 U.S. Dist. LEXIS 118078, 2019 WL 3207797, at \*3 (W.D. Okla. July 16, 2019) (finding allegation of discrimination "due to the disability [the plaintiff] suffered during his military service" outside the scope of USERRA); *see also Wolfgram v. G4S Secure Solutions (USA), Inc.*, 2018 U.S. Dist. LEXIS 177201, 2018 WL 5016337, at \*3 (N.D. Ind. Oct. 15, 2018) ("[T]he fact that [a plaintiff's] alleged disability began during his military service does not in itself implicate USERRA absent additional facts.").

Plaintiff has similarly failed to provide evidence relating to the factors upon which a discriminatory motivation against military service may be reasonably inferred, which include:

[P]roximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility toward members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.

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2. Sofge is also a disabled American veteran. *See* UMF No. 14.

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*Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 518 (6th Cir. 2009) (citation omitted). Plaintiff does not allege that any comments were made to him regarding his military service or status. It is undisputed that Plaintiff's veteran status was not only known to Defendant before hiring Plaintiff but was a preferred qualification for the Loadmaster Instructor position. *See* UMF No. 3; Def.'s Mot., Ex. 39. Plaintiff has not alleged disparate treatment compared to any non-military employees. Accordingly, Defendant is entitled to summary judgment on Plaintiff's USERRA claim.

**II. ADA Discrimination and Retaliation**

The ADA prohibits discrimination “in regard to . . . the hiring, advancement, or discharge of employees, . . . and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). Further, “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.” 42 U.S.C. § 12203(a).

Where a plaintiff relies on indirect evidence to establish ADA discrimination or retaliation, courts utilize the familiar burden-shifting framework defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).<sup>3</sup> Under this framework,

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3. Plaintiff acknowledges that the *McDonnell Douglas* framework is applicable to his ADA claims. *See* Pl.'s Resp. at 10.

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a plaintiff is first required to establish a prima facie case of discrimination or retaliation, at which point “the burden shifts to the defendant to offer a legitimate nondiscriminatory reason for its employment decision.” *MacKenzie v. City and Cnty. of Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005) (abrogated on other grounds by *Lincoln v. BNSF Railway Co.*, 900 F.3d 1166 (10th Cir. 2018)). Thereafter, the burden shifts back to a plaintiff to “proffer evidence demonstrating the employer’s reason is pretextual.” *MacKenzie*, 414 F.3d at 1274.

**A. Prima Facie Case**

To state a prima facie case of ADA discrimination, Plaintiff is required to show 1) that he is a disabled person as defined by the ADA; 2) that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and 3) that his employer discriminated against him because of his disability. *Id.*

ADA retaliation claims require a plaintiff to show 1) that he engaged in a protected activity; 2) that he was “subjected to adverse employment action subsequent to or contemporaneous with the protected activity”; and 3) a “causal connection between the protected activity and the adverse employment action.” *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1324 (10th Cir. 1997)).

The Court assumes, without deciding, that Plaintiff has satisfied his prime facie burden for his ADA

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discrimination and retaliation claims. It does so because even if Plaintiff established a prima facie case under the ADA, he has failed to identify evidence that Defendant's reason for not renewing Plaintiff's one-year contract was a pretext for discrimination or retaliation. *See Hiatt v. Colorado Seminary*, 858 F.3d 1307, 1317 n.10 (10th Cir. 2017) (“[The Tenth Circuit has] previously affirmed a grant of summary judgment on the basis of failure to show pretext after assuming without deciding that an employee has stated a prima facie case.”).

**B. Legitimate, Non-Discriminatory Reason for Employment Decision**

Because the Court assumes that Plaintiff has satisfied his prima facie burden for both ADA claims, the burden shifts to Defendant to proffer a legitimate, non-discriminatory reason for its employment decision. *See Mackenzie*, 414 F.3d at 1274.

Defendant proffers Plaintiff's marginal performance for its decision not to renew Plaintiff's one-year contract. When Mueller reviewed Plaintiff's performance, he rated Plaintiff as “marginal” in dependability, communication skills, and initiative. Mueller provided additional comments that Plaintiff “[h]as difficulty completing assigned tasks without direct supervision”; “will not provide necessary information unless asked directly multiple times”; “[c]onstantly requires direction in order to accomplish assigned tasks”; and “[w]ill not perform any tasks outside directed duties nor provide ideas on improving projects or workspace processes.” Def.'s Mot., Ex. 20, Plaintiff's Performance Review.

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On February 6, 2018, Sofge forwarded Mueller's review to Williams and Stephens. Def.'s Mot., Ex. 21. Relying on Mueller's performance review and Young's opinion that Mueller's review lined up with his own perception of Plaintiff's performance, Young and Stephens decided to not renew Plaintiff's contract due to his subpar performance. Cox gave final approval of the non-renewal and found that Plaintiff's failure to maintain an FAA flight certificate was another indication of Plaintiff's performance issues. *See* UMF Nos. 52-53.

The Court finds Defendant's proffered reason to be legitimate and nondiscriminatory. Thus, the burden shifts back to Plaintiff to show that Defendant's reason is pretextual. *See MacKenzie*, 414 F.3d at 1274.

**C. Pretext**

"A plaintiff may show pretext by demonstrating 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Anderson*, 181 F.3d at 1179 (citation omitted). In determining pretext, it is not for the Court to decide whether Defendant's reasons for its decision were "wise, fair, or even correct," so long as they were truly the reasons for the decision. *Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076, 1083 (10th Cir. 1999) (quoting *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997)). The

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Court's role is "to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments." *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1233 (10th Cir. 2000) (quotation and citation omitted). "[A] challenge of pretext requires [courts] to look at the facts as they appear to the person making the decision to terminate [a] plaintiff." *Kendrick*, 220 F.3d at 1231. "Mere conjecture that the employer's explanation is pretext is insufficient to defeat summary judgment." *Anderson*, 181 F.3d at 1179 (citing *Morgan*, 108 F.3d at 1323).

Upon consideration of the record presented, and viewing all reasonable inferences in favor of Plaintiff, the Court finds that Plaintiff has failed to present sufficient facts and evidence from which a reasonable finding of pretext could be made.

**i. Subordinate Bias**

Plaintiff argues that Sofge "played a central role in [Defendant's] decision not to renew [Plaintiff's] contract"; that he recommended Plaintiff's contract not be renewed 2.5 months after he was disciplined for his inappropriate comments related to Plaintiff's VA disability rating; and that Sofge "falsely told [Plaintiff] that the decision not to renew his contract came from headquarters and he had nothing to do with it." Pl.'s Supp. Resp. at 14-15. As Plaintiff failed to dispute that Sofge did not make the decision regarding non-renewal of Plaintiff's contract, *see* UMF Nos. 48, 52-53, the Court construes these statements as an attempt to show pretext via a subordinate bias theory (also known as "cat's-paw" or "rubber-stamp" theory).

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Under a subordinate bias theory, “an employer who acts without discriminatory intent can be liable for a subordinate’s discriminatory animus if the employer uncritically relies on the biased subordinate’s reports and recommendations in deciding to take adverse employment action.” *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 514 (10th Cir. 2015) (citing *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484-85 (10th Cir. 2006)).

Even assuming that Sofge acted with discriminatory or retaliatory animus, the Court concludes that a reasonable jury could not infer from Plaintiff’s evidence that Defendant’s decisionmakers uncritically relied on Sofge’s recommendation. It is undisputed that Stephens and Young made the decision to not renew Plaintiff’s contract, with final approval from Cox. *See* UMF No. 49. Their decision was based on Mueller’s performance review which ranked Plaintiff as “marginal” in certain areas and “at the bottom of the aircrew stack.” UMF Nos. 18-19, 52. Cox’s determination was bolstered by Young’s opinion that Plaintiff’s marginal review was consistent with what Young had observed when he was Plaintiff’s supervisor. UMF No. 52. Cox also considered Plaintiff’s failure to maintain his FAA flight certificate as indicative of Plaintiff’s performance issues with communication, initiative, and dependability. UMF No. 53. Plaintiff’s failure to dispute any of these material facts is fatal to his theory that Defendant’s decision-makers merely “rubber-stamped” Sofge’s recommendation.

To the extent that Plaintiff argues a subordinate bias theory for Mueller’s role in reviewing Plaintiff’s

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performance, such an argument fails. The Court previously granted Plaintiff leave to take Mueller's deposition to fully respond to Defendant's Motion for Summary Judgment [Doc. No. 82]. At his deposition, Mueller testified that he was not made aware of Plaintiff's HR complaint until after he stopped working for Defendant. Def.'s Sur-Reply, Ex. 1, Mueller Depo. at 37:20-39:6. Mueller also testified that he was not aware that Plaintiff suffered from PTSD. *Id.* at 40:11-12. Plaintiff has not provided any evidence to support his conclusory statements that Mueller knew about Plaintiff's HR complaint or PTSD when he conducted Plaintiff's performance review. Plaintiff's allegation that Mueller "no longer joked around with [Plaintiff]" after Plaintiff's HR complaint is insufficient for a reasonable jury to infer that Mueller acted with discriminatory or retaliatory animus in reviewing Plaintiff.

**ii. Mere Knowledge of Defendant's HR Complaint and/or Disability**

Plaintiff alleges that Stephens' participation in Defendant's decision to not renew Plaintiff's contract, with knowledge of Plaintiff's HR complaint and disability status, establishes pretext. The Court disagrees. Without more, the fact that Stephens knew of Plaintiff's HR complaint or disability status when he participated in the decision regarding Plaintiff's non-renewal does not create a reasonable inference of pretext. *See Anderson v. AOL, LLC*, 363 F. App'x 581, 586-87 (10th Cir. 2010); *see also Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1073 (8th Cir. 1998) ("Mere knowledge of a disability cannot be sufficient to show pretext; otherwise, summary

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judgment for an employer would be appropriate only in cases where the employer is completely unaware of the plaintiff's disability."<sup>4</sup>

**iii. Temporal Proximity**

Plaintiff refers to “suspicious timing” as evidence of pretext. It is well-settled that temporal proximity, standing alone, is insufficient to establish pretext. *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1213 (10th Cir. 2007) (“Although we may consider evidence of temporal proximity—typically used to establish a prima facie case—in analyzing pretext, . . . temporal proximity alone is insufficient to raise a genuine issue of material fact concerning pretext.”) (internal citation omitted). Although suspicious timing may be considered with other evidence of pretext, the Court finds that the more than three months between Plaintiff's mid-November 2017 HR complaint and Defendant's March 2018 decision to not renew Plaintiff's contract is not sufficient to overcome Defendant's proffered reason for its decision.<sup>5</sup> See *Anderson*, 181 F.3d at 1180.

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4. To the extent that Plaintiff intended to make a similar argument regarding Williams' involvement, it is undisputed that Williams did not make the decision to not renew Plaintiff's contract, nor did Defendant's decisionmakers rely on a recommendation from Williams. Even if they did, Plaintiff has failed to provide any evidence that Defendant's legitimate reasoning is unworthy of credence merely because Williams had knowledge of Plaintiff's HR complaint and/or disability status.

5. The Court notes that the Fifth Circuit case relied upon by Plaintiff involved a five-day period between the plaintiff's protected activity and her supervisor recommending Plaintiff's

*Appendix B***iv. Company Policy**

As other evidence of pretext, Plaintiff alleges inconsistencies in the performance review process conducted by Mueller. Specifically, Plaintiff argues 1) Defendant's review policy required a performance review to be conducted after an employee's 39th week of work and Plaintiff's occurred in his 36th week; and 2) Mueller did not have Plaintiff or Sofge (as Senior Rater) sign Plaintiff's performance review. "A plaintiff may . . . show pretext by demonstrating the defendant acted contrary to a written company policy, an unwritten company policy, or a company practice when making the adverse employment decision affecting the plaintiff." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970 (10th Cir. 2017) (internal quotations and citation omitted). "[T]he standard for establishing pretext requires evidence of not just any procedural shortfall, but of a 'disturbing procedural irregularity,' . . . often exemplified by an employer's 'falsifying or manipulating of relevant criteria.'" *Cooper v. Wal-Mart Stores, Inc.*, 296 F. App'x 686, 696 (10th Cir. 2008) (internal citation omitted).

Plaintiff has not adduced evidence of a disturbing procedural irregularity required for a showing of pretext. Plaintiff alleges Defendant's failure to review his performance after his 39th week establishes pretext. However, it is undisputed that Plaintiff's performance review occurred, at the earliest, on January 9, 2018, which

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demotion. *See Evans v. City of Houston*, 246 F.3d 344, 347 (5th Cir. 2001).

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followed his 39th week of work. *See* UMF Nos. 2, 16; Pl.’s Supp. Resp., Fact No. 14.

Plaintiff further argues that Mueller failed to have Plaintiff or Sofge sign Plaintiff’s performance review, which allegedly went against Defendant’s policy. Viewing this inference in favor of Plaintiff, and assuming Defendant’s policy was to have employees and a supervisor sign all performance reviews, Mueller’s failure to follow this policy is insufficient to establish pretext. *See Doke v. PPG Industries, Inc.*, 118 F. App’x 366, 370 (10th Cir. 2004) (finding failure to follow company policy of providing written warnings insufficient to establish pretext); *see also Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1222 (10th Cir. 2007) (“The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that . . . the substantive reasons given by the employer for its employment decision were pretextual.”) (citation omitted); *Velasquez v. Frontier Medical Inc.*, 375 F.Supp.2d 1253, 1287 (“Resolving all doubts in favor of [the plaintiff], and concluding that the mandatory policy was to have the employee sign all reprimands . . . there is still insufficient evidence to create a genuine issue of material fact that [the defendant’s] reason is pretext.”). No reasonable jury could conclude that Defendant’s understanding of Plaintiff as a marginal employee is unworthy of belief merely because Mueller did not get his performance review of Plaintiff signed. Thus, the Court finds that Mueller’s failure to obtain signatures for Plaintiff’s performance review is not a procedural irregularity sufficient to raise an inference of pretext.

*Appendix B***v. Plaintiff's Self-Evaluation and Colley's Check-Ride**

Plaintiff further alleges that his performance was not sub-par and that a fellow Loadmaster, Jean Colley, observed on a routine check-ride that Plaintiff “was more than capable of doing his job.” Pl.’s Resp. at 14. First, a co-worker’s perception of a plaintiff’s performance is insufficient to show pretext. *See Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) (“It is the manager’s perception of the employee’s performance that is relevant. . . .”). And, even if Colley had been Plaintiff’s supervisor, Colley’s opinion as to Plaintiff’s flight capabilities are not inconsistent with Mueller’s performance review, which ranked Plaintiff as “satisfactory” in *technical competence*, but “marginal” in “initiative,” “communication skills,” and “dependability.” Def.’s Mot., Ex. 20, Plaintiff’s Performance Review. Plaintiff’s self-assessment of his performance similarly fails to show pretext. *See Henson v. Amerigas Propane, Inc.*, 681 F. App’x 697, 700 (10th Cir. 2017) (“[Plaintiff’s] self-assessment of his performance is not enough to show pretext.”).

**vi. Disparate Treatment**

Plaintiff similarly fails to adduce evidence of disparate treatment between himself and similarly situated members of the protected class. In his Supplemental Response, Plaintiff states that Colley had his contract

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renewed by Defendant and served for seven years. Pl.'s Resp., Fact No. 16. Plaintiff further alleges that "other loadmasters signed their evaluations[,] indicating they had had an opportunity to review and dispute any items." Pl.'s Resp., Fact No. 17. Beyond these statements, Plaintiff does not attempt to show how Colley or any of the other Loadmasters were similarly situated to Plaintiff for purposes of showing disparate treatment. For this reason, Plaintiff's disparate treatment argument fails.

**vii. References to Contract Renewal**

Plaintiff alleges that Defendant told Plaintiff he would get a new contract. *See* Pl.'s Resp., Fact No. 18. For support, Plaintiff cites only to his own deposition testimony of a conversation between himself and Williams. Plaintiff testified that Williams received Plaintiff's FAA flight certificate renewal and said that "if there [weren't] any issues, [Williams] would give [Plaintiff] a contract as soon as possible." Pl.'s Resp., Ex. 13, Pl.'s Depo. at 247:2-5.

Viewing the inference in favor of Plaintiff, Plaintiff still fails to show pretext. It is undisputed that Williams did not participate in the decision to not renew Plaintiff's contract, nor did Williams have the authority to make those types of decisions for Defendant. Thus, even assuming that Williams presumed Defendant would renew Plaintiff's contract if his FAA flight certificate were renewed, Williams' perception of Plaintiff's employment situation does not raise an inference that Defendant's decisionmakers' legitimate reasons for not renewing Plaintiff's contract were pretext for discrimination or retaliation.

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**D. ADA Conclusion**

Because Plaintiff has failed to provide evidence supporting a reasonable inference that Defendant's legitimate reason for not renewing Plaintiff's contract was pretext for discrimination or retaliation, Defendant is entitled to summary judgment on Plaintiff's ADA claims.

**III. Mitigation**

Based on the foregoing conclusions, the Court declines to address the issue of mitigation.

**CONCLUSION**

**IT IS THEREFORE ORDERED** that Defendant Aviation Training Consulting, LLC's Motion for Summary Judgment and Brief in Support [Doc. No. 66] is **GRANTED**. A separate judgment will be entered.

**IT IS SO ORDERED** this 14th day of September, 2023.

/s/ Timothy D. DeGiusti  
TIMOTHY D. DeGIUSTI  
Chief United States District Judge