APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Memorandum Opinion, U.S. Court of Appeals for the Ninth Circuit (May 12, 2026) 1a

Judgment, U.S. District Court for the District of Oregon (September 17, 2023) 6a

Order, U.S. District Court for the District of Oregon (September 17, 2023) 7a

Magistrate Judge's Findings and Recommendation, U.S. District Court for the District of Oregon (August 7, 2023) 9a

Decision, U.S. Equal Employment Opportunity Commission (July 30, 2020), *Washington v. Yellen*, 3:21-cv-00333-JR, Response in Opposition to Motion for Summary Judgement Exhibit J, Document 54-11 ..... 23a

REHEARING ORDERS

Text Clerk Order Denying Reconsideration, U.S. Court of Appeals for the Ninth Circuit (August 27, 2026) 53a

Order Denying Motion to Recall Mandate and Petition for Rehearing En Banc, U.S. Court of Appeals for the Ninth Circuit (August 7, 2026) 55a

Order Denying Petition for Panel Rehearing, U.S. Court of Appeals for the Ninth Circuit (June 15, 2026) 56a

APPENDIX TABLE OF CONTENTS (Cont.)

Decision on Request for Reconsideration, Excerpts, U.S. Equal Employment Opportunity Commission (September 26, 2023), *Washington v. Yellen*, 23-3693, Motion to supplement or correct Record, Docket Entry 6.3, Pages 1, 4, 14 ..... 57a

OTHER DOCUMENTS

EEO Investigative Affidavit Discrimination (Complainant) Excerpts (July 6, 2017), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 1, Document 15-1 at 96-175, Page 96-101 and 103 ..... 63a

EEO Investigative Affidavit Retaliation and Harassment (Complainant), Excerpts (April 5, 2018), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 4, Document 15-4 at 162-202, Pages 162, 165-167, 169-173, 176-178, 180, 182, 190-191, 200, 202..... 73a

EEO Investigative Affidavit Hostile Environment and Constructive Discharge (Complainant), Excerpts (February 16, 2021), *Washington v. Yellen*, 3:21-cv-00333-JR, Reply to Defendants Opposition to Motion to Adverse Inference, Attachment 8, Document 53-8 at 105-120, Pages 105, 108-116, 119 ..... 92a

Complainant's Provision of Pimentel Affidavit (March 17, 2021), *Washington v. Yellen*, 3:21-cv-0033-JR, Response in Opposition to Motion for Summary Judgement, Exhibit I, Document 54-10..... 114a

APPENDIX TABLE OF CONTENTS (Cont.)

Defendant's EEO Counseling Report for Retaliation, Excerpts (February 2, 2018), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 4, Document 15-4 at 5-115, Pages 5, 9-10 ..... 121a

Defendant's EEO Contact Intake Form and Counseling Report Discrimination, Excerpts (May 1, 2017), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 1, Document 15-1 at 5-78, Pages 5-6, 11, 18-19 ..... 130a

Federal Complaint in U.S. District Court for Employment Discrimination, Excerpts (March 3, 2021), *Washington v. Yellen*, 3:21-cv-00333-JR, Complaint, Document 1 at 1-9, Pages 1, 3, 4 ..... 143a

Complaint of Employment Discrimination – IRS-17-0331-F (May 17, 2017), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 1, Document 15-1 at 1-4 ..... 147a

Complaint of Employment Retaliation and Harassment – IRS-18-0161-F (February 16, 2018), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint Attachment 4, Document 15-4 at 2-4, Pages 2-3 ..... 155a

APPENDIX TABLE OF CONTENTS (Cont.)

Plaintiff Rating for the Period Beginning November 1, 2014 and Ending October 31, 2015, Excerpts (January 11, 2016), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 1, Document 15-1 at 96-175, Page 96, 131 ..... 160a

Plaintiff's Rating for the Period Beginning November 1, 2015 and Ending October 31, 2016, Excerpts (November 21, 2016), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 6, Document 15-6 at 1 ..... 164a

Memorandum Issued by First Line Manager Eippert for Mid-Year Evaluation beginning November 1, 2016 and ending May 31, 2017, Excerpts (May 31, 2017), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 6, Document 15-6 at 96-175, Page 13-14, 30 ..... 168a

Plaintiff's Rating for the Period Beginning November 1, 2016 and Ending October 31, 2017 (November 22, 2017), *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 6, Document 15-6 at 40 ..... 173a

APPENDIX TABLE OF CONTENTS (Cont.)

EEO Investigation Affidavit with Exhibits, Excerpts, *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Attachment 5, Document 15-5, Pages 1, 111, 117-118, 124, 126, 133-134, 141-142, 144-145, 152, 155-160, 162, 164-165, 184-185, 170-172, 180-182, 195-196 ..... 177a

Evidences Received from Defendants, Excerpts, *Washington v. Yellen*, 3:21-cv-00333-JR, Response in Opposition to Motion for Summary Judgement, Exhibit E, Document 54-6 at 1-33, Pages 1-20 ..... 229a

Wilmore Washington Departure Rating, November 1, 2016 Through December 10, 2016, *Washington v. Yellen*, 3:21-cv-00333-JR, Response in Opposition to Motion for Summary Judgement, Exhibit E, Document 54-6 at 1-33, at 22 ..... 259a

Wilmore Emails to First Line Manager Eippert (February 9, 2018 to March 5, 2018) *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint Attachment 6, Document 15-6, Pages 108-109 ..... 261a

2019 National Agreement *Washington v. Yellen*, 3:21-cv-0033-JR, Supplemental Exhibits re Complaint, Attachment 7, Document 13-7, Pages 1, 55 ..... 264a

APPENDIX TABLE OF CONTENTS (Cont.)

Discovery Emails (February 9, 2023), *Washington v. Yellen*, 23-3693, Motion to supplement or correct Record, Docket Entry 5.19 at 1-23, Pages 1, 3, 14 ..... 269a

List of Attachments, *Washington v. Yellen*, 3:21-cv-0033-JR, Supplemental Exhibits re Complaint, Attachment 1, Document 13-1 .... 274a

List of Agency Investigation ROI *Washington v. Yellen*, 3:21-cv-00333-JR, Supplemental Exhibits re Complaint, Document 15 ..... 274a

Plaintiff's List of Exhibits Supporting Opposition to Motion for Summary Judgment (April 24, 2023) *Washington v. Yellen*, 3:21-cv-00333-JR, Response in Opposition to Motion for Summary Judgement, Attachment 1, Document 54-1 ..... 275a

MEMORANDUM* OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (MAY 12, 2026)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILMORE LEE WASHINGTON III,

Plaintiff-Appellant,

v.

SCOTT BESSENT, Secretary, Department of the Treasury; Internal Revenue Service,

Defendant-Appellee.

No. 23-3693

D.C. No. 3:21-cv-00333-JR

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernández, District Judge, Presiding

Submitted April 30, 2026**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: RAWLINSON, VANDYKE, and MENDOZA, Circuit Judges.

MEMORANDUM

Wilmore Lee Washington III appeals the district court's grant of summary judgment in favor of the Department of the Treasury on his Title VII retaliation and hostile work environment claims, as well as the denial of his requests for spoliation sanctions and judicial recusal. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

"We review de novo the district court's grant of summary judgment." *Christian v. Umpqua Bank*, 984 F.3d 801, 808 (9th Cir. 2020). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, no genuine dispute of material fact exists. *See Kama v. Mayorkas*, 107 F.4th 1054, 1058 (9th Cir. 2024) (recounting the summary judgment standard).

We conclude that Washington failed to raise a genuine dispute of fact as to causation on his retaliation claim.[1] To establish retaliation under Title VII, a plaintiff must show protected activity, a materially adverse action, and a causal link between the two. *See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). The undisputed record demonstrates that Washington's supervisors reduced his performance ratings because of consistent documented feedback regarding his case

---

[1] Unlike the district court, we do not reach the issue of whether the employer's actions amounted to an adverse employment action, because Washington's retaliation claim may be disposed of on causation grounds.

management and compliance with statutory deadlines (including similar feedback that *predated* the initiation of EEO activity), not because of his prior EEO complaint.

And despite Washington's suggestions to the contrary, temporal proximity alone is typically insufficient to establish causation where the proximity in time is not unusually suggestive. *See Manatt v. Bank of Am., NA*, 339 F.3d 792, 802 (9th Cir. 2003) (declining to find causation where "approximately nine months lapsed between the date of Manatt's complaint and the Bank's alleged adverse decisions"); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 232–33 (3d Cir. 2007) ("[A] gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment.").[2] Here, although the adverse employment actions alleged by Washington came after his EEOC complaint, those actions were based on feedback that was given to him both before and after the initiation of his protected activity.

Washington likewise failed to create a triable issue on his hostile work environment claim. A hostile environment must be both subjectively and

---

[2] Washington also invokes a "cat's paw" theory of liability, but the record does not support liability on that basis. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 419–22 (2011). Washington identifies no evidence that any allegedly biased supervisor both harbored discriminatory or retaliatory animus and proximately caused the challenged employment actions. Nor does he show that the ultimate decisionmakers merely rubber-stamped a tainted recommendation rather than relying on consistent and documented performance feedback that is independently reflected in the record.

objectively severe or pervasive. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) ("A plaintiff must show that the work environment was both subjectively and objectively hostile."). The conduct alleged here consisted primarily of professional performance-related feedback and workplace supervision, which alone do not establish an objectively hostile environment. *See See Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1108-09 (9th Cir. 2008). (determining that "performance related" comments were insufficiently severe or pervasive to establish a hostile-work environment claim).

The district court did not abuse its discretion in declining to grant Washington's adverse inference motion relating to Washington's discovery concerns. *See United States v. Rosales-Aguilar*, 818 F.3d 965, 972 (9th Cir. 2016) (reviewing refusal to give an adverse inference instruction for abuse of discretion). Appellee certified that it conducted an extensive search and produced roughly seven thousand pages of responsive materials, and Washington presented no evidence showing that additional discoverable information existed or was destroyed. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (noting the standard for bad faith in the spoliation context).

Nor did the district court abuse its discretion in denying Washington's motion for recusal of the district judge and magistrate judge. *See United States v. Hunt*, 153 F.4th 858, 863 (9th Cir. 2025) (reviewing recusal orders for abuse of discretion). Judicial rulings alone rarely constitute a basis for recusal absent evidence of deep-seated favoritism or antagonism. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). Washington's dissatisfaction with adverse rulings and

speculation regarding professional relationships among judges and colleagues do not meet this demanding standard. *See id.*

Because Washington failed to raise a genuine dispute of material fact on any of his claims, the district court properly granted summary judgment.

AFFIRMED.

JUDGMENT, U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON (SEPTEMBER 17, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILMORE LEE WASHINGTON III,

Plaintiff(s),

v.

JANET YELLEN, in her official capacity as Secretary of the Dept. of Treasury,

Defendant.

No. 3:21-cv-00333-JR

Before: Marco A. HERNÁNDEZ, United States District Judge.

JUDGMENT

HERNÁNDEZ, District Judge:

Based on the record, IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and this action is dismissed with prejudice. Pending motions, if any, are denied as moot.

/s/ Marco A. Hernández
United States District Judge

Dated: September 17, 2023

ORDER, U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON (SEPTEMBER 17, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILMORE LEE WASHINGTON III,

Plaintiff(s),

v.

JANET YELLEN, in her official capacity as Secretary of the Dept. of Treasury,

Defendant(s).

No. 3:21-cv-00333-JR

Before: Marco A. HERNÁNDEZ, United States District Judge.

ORDER

HERNÁNDEZ, District Judge:

Magistrate Judge Jolie Russo issued a Findings and Recommendation on August 7, 2023, in which she recommends that this Court grant Defendant's Motion for Summary Judgment, deny Plaintiff's Motion to Adverse Inference, and enter a Judgment for Defendant. F&R, ECF 58. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings and Recommendation. Pl. Obj., ECF 61. When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered Plaintiff's objections and concludes that there is no basis to modify the Findings and Recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court ADOPTS Magistrate Judge Russo's Findings and Recommendation, ECF 58. Therefore, the Court GRANTS Defendant's Motion for Summary Judgment, ECF 20, and DENIES Plaintiff's Motion to Adverse Inference, ECF 50.

IT IS SO ORDERED.

/s/ Marco A. Hernández
United States District Judge

Dated: September 17, 2023

MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION, U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON (AUGUST 7, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILMORE LEE WASHINGTON, III,

Plaintiff,

v.

JANET YELLEN, Secretary of the Treasury, et al.,

Defendants.

Case No. 3:21-cv-00333-JR

Before: Jolie A. RUSSO,
United States Magistrate Judge.

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Pro se plaintiff, Wilmore Washington, brings this action alleging employment discrimination and retaliation relating to his employment as an internal revenue agent in Phoenix, Arizona. After defendants moved for summary judgment on October 15, 2021, the Court appointed volunteer counsel to assist plaintiff with discovery. *See* Orders dated January 24 and 25,

2022 (ECF 33 and 34). Volunteer representation concluded on or about February 10, 2023 (ECF 45).

After allowing defendants' time to respond to plaintiff's further discovery requests, the Court provided plaintiff with an additional 60 days to respond to the motion for summary judgment. (ECF 48). Before responding to the motion for summary judgment, plaintiff moved for an adverse inference asserting defendants failed to fully respond to his discovery requests. For the reasons stated below, the Court should deny the motion for an adverse inference and grant the motion for summary judgment.

BACKGROUND

The Internal Revenue Service (IRS) hired plaintiff as a revenue agent in 2009. On November 18, 2016, plaintiff's supervisor, Damaris Pimental, evaluated plaintiff's performance as generally exceeds fully successful with a performance score of 3.8. Defense Exs. at p. 129 (ECF *21-1).* Pimental did note, with respect to one case, plaintiff:

> did not take the appropriate actions to complete this case in the most efficient manner. You did not have periods of inactivity and you worked on it every month, but it took you 537 days to complete this audit. I noticed that you promptly scheduled a meeting with the taxpayer and 44 days to hold the initial interview on 6/27/2014 and continued working the case every month. It seems that you were not working the case significantly and you were doing little things and slowly working on the case. You also

> needed to summarize the activity you were working on more clearly.

Id. at p. 138

On December 12, 2016, Christopher Eippert took over as plaintiff's supervisor and expressed concerns with plaintiff regarding lack of timely actions and procrastination and provided plaintiff with feedback indicating his performance had decreased in a number of critical job elements. *Id.* at pp. 82-85.

Plaintiff applied for a position as a GS-12 level revenue agent toward the end of 2016 and, after learning he was not selected, initiated a non-selection complaint. Plaintiff initiated a formal complaint on May 17, 2017. That complaint is still under adjudication at the administrative level. *Id.* at p. 218. Plaintiff is not seeking review of that decision in this Court. *Id.*

On July 5, 2017, Eippert completed a mid-year evaluation. *Id.* at pp. 142-67. Eippert noted specific examples of problem areas in plaintiff's performance. Plaintiff refused to sign an acknowledgement of receipt of the review. *Id.* at p. 142.

On November 22, 2017, Eippert completed plaintiff's annual review and rated plaintiff as fully successful with a total score of 3.6. *Id.* at p. 169. Program manager John Murphy acted as the reviewing official. Again, Eippert noted specific areas in which plaintiff could improve. *E.g., id.* at pp. 177 (failure to follow whistleblower guidance, not completing minimum income probe steps); p. 192 (applying time to cases that is not supported by the work done); p. 193 (numerous significant gaps of inactivity). Again, plaintiff refused to sign the evaluation. *Id.* at p. 169.

After the 2017 review, plaintiff contacted an Equal Employment Opportunity (EEO) counselor and lodged a complaint on February 16, 2018. *Id.* at pp. 200-02. Plaintiff asserted:

> the fact that I have filed a discrimination complaint against Southwestern area and others for not getting a promotion, I have suffered employee retaliation and harassment from the southwestern area (territory manager John Murphy and my current group manager Christopher Eippert), I do believe others there as well.
>
> The employee retaliation action occurred November 23, 2017, and it was by my Current Group Manager Christopher Eippert. The harassment has continued since the time I have filed the prior EEO complaint in which my current group manager was aware of it.
>
> Biweekly meetings which went on for two hours, daily visit to my desk to check on me, even when I was on vacation, he came to look at my desk ridiculing me when I was ask for help highly critical of my work making me feel bad for taking time off including sick days requesting for opportunities for training and being denied and opportunities (Territory manager as well) I had a case with NAT and initial interview, he disrespected me in the POA while I was interview by putting me down I missed a meeting by him overextending and then in write up talks about my overage, makes it hard for me to close cases, smirked at me for my overage in

> which he has presided an entire year, based on the last manager, I was able to close and my overage was very low, but he has kept me there he did not respond to email of concerns and rebuttals.
>
> I am still in the same place with cases I was last year, it is a hostile environment, the overage was put on me during that time and it is still there, the cases I closed prior to Christopher Eippert as my manager has been way more. This environment has also affected my health in a negative way which forced me in taking more SL and AL.

Id. at p. 201.

Before this Court, plaintiff alleges claims for retaliation and harassment. Specifically, plaintiff alleges:

> John Murphy, Shelley Foster, and Christopher Eippert held me back because of being an African American Male. This case is about how, due to my race, sex and my prior EEO activity against John Murphy for non-promotion, they reduced my appraisal score to Fully Successful from highly competitive Exceeds Fully Successful, to make me ineligible for future promotions. They tried to downgrade me, failed my prior successfully evaluated cases, my rebuttals were ignored, put me in PIP program, denied me opportunities and these activities coincided with progress of non-promotion EEO (race, sex). Chris micromanaged me, made me feel bad for taking time off, highly critical of my work,

> refused to close cases to create overages. John intentionally targeted due to African American Male, Shelley Foster condoned it.

Complaint (ECF 1) at p. 5.

DISCUSSION[1]

A. Retaliation

To state a claim for retaliation under Title VII, a plaintiff must demonstrate: (1) he engaged in a protected activity; (2) he suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment decision. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2008).

1. 2017 Annual Review

As noted above, plaintiff asserts he suffered adverse employment actions because he filed a complaint of discrimination related to his non-selection for a GS-12 position. The primary action of which plaintiff

---

[1] Plaintiff submits over 400 pages of attachments to his response to the motion for summary judgment. Much of it contains hearsay such as statements of his own version of the facts as stated in his EEO complaints. In recommending the grant of summary judgment, this Court has not considered inadmissible evidence plaintiff purports supports his claims of retaliation and discrimination. In addition, plaintiff repeatedly claims defendants lie under oath and are engaged in a coverup. Plaintiff even suggests the EEO investigator helped protect the lies. Response (ECF 54) at p. 14. In this respect, plaintiff engages in speculation which is insufficient to raise a question of fact. *See Munoz v. Mabus*, 630 F.3d 856, 865 (9th Cir. 2010) ("Merely denying the credibility of the employer's proffered reasons is insufficient to withstand summary judgment.").

complains is his 2017 yearly evaluation in which his overall performance rating dropped from 3.8 to 3.6. While plaintiff alleges this slight drop from "generally exceeds fully successful" to "fully successful" made him ineligible for future promotions, defendants state the performance rating did not affect his compensation or privileges of employment. Plaintiff provides no admissible evidence demonstrating the rating affected his employment conditions. Indeed, despite submitting a 60-page brief in response to the motion for summary judgment and over 400 pages of attachments, plaintiff does not address the issue of how the performance rating resulted in adverse consequences. *See* Response (ECF 54) at pp. 6-7 (plaintiff disputes the facts regarding why he received the evaluation rating but does not address how it resulted in an adverse employment condition). Accordingly, plaintiff fails to present a prima facie case of retaliation with regard to his performance appraisal. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."); *Taitt-Relf v. Olympus Corp. of Americas,* 2019 WL 4261059, at *2 (N.D. Cal. Sept. 9, 2019) (To establish employment retaliation it is not enough to show that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity.).

2. Case Reviews

Plaintiff alleges defendants failed his prior successfully evaluated cases. Plaintiff does not identify

the cases he claims were previously successful. Plaintiff merely asserts John Murphy removed his previous supervisor because she would not agree to participate in discriminating against plaintiff and Christopher Eippert was willing to harass plaintiff in order to get his own promotion. Response (ECF *54)* at pp.7-8. Plaintiff fails to demonstrate the reviews resulted in adverse employment actions. Indeed, as noted above, his performance score dropped only .2 of a point under Pimental which did not adversely impact his compensation or privileges of employment. Accordingly, plaintiff fails to demonstrate a prima facie case of retaliation based on case reviews.

3. Rebuttals

Plaintiff alleges his rebuttals were ignored. It is not clear why plaintiff believes this was an adverse employment action, but the record shows that Eippert provided a written response to plaintiff's rebuttals regarding his 2017 annual rating. Defense Exs. at pp. 204-11 (ECF 21-1). Plaintiff fails to demonstrate a prima facie case of retaliation based on his rebuttals.

4. Training

In his February 2018 EEO complaint, plaintiff asserts he was denied training opportunities. Defense Exs. at p. 201 (ECF 21-1). The record show plaintiff was not selected for a QuickBooks license because there is a limited number of licenses available, plaintiff's group already had a QuickBooks resource person, and it was not relevant to plaintiff's duties. *Id.* at p. 58. Plaintiff asserts he was the only one who did not receive a license in his group, but plaintiff's own submissions show that another person in addition to plaintiff was interested in obtaining a license when

available and non-defendant Mary Lou Silva noted she did not want the current users replaced. Plaintiff's Ex. F at p. 15 (ECF 54-7). Plaintiff does not provide sufficient evidence to allow a trier of fact to infer an adverse employment action or a causal link to his protected activity as plaintiff provided no evidence Silva was aware of the EEO complaint.

Plaintiff asserts he was denied medical marijuana training while a white woman in his group was provided the training. In May 2017, in plaintiff's duty station, two slots for medical marijuana training became available. The selectee from plaintiff's group had experience in auditing medical marijuana issues as she had testified in such cases in Colorado, had a higher pay grade, and at the time, plaintiff was not working at the "fully successful" level. Plaintiff's Ex. H at p. 23 (ECF 54-9); Defense Exs. at pp. 59-60. (ECF 21-1). Plaintiff does not present evidence to connect this decision to retaliation for his complaint. Moreover, plaintiff does not show how the failure to provide training materially affected his job such that it was an adverse employment decision. As such, plaintiff has failed to present a material issue of fact as to whether denials in training opportunities demonstrate a prima facie case of retaliation.

5. Acting Manager Role

Plaintiff asserts John Murphy told Eippert not to select plaintiff for an acting managing role for a day due to vacation conflicts because "it can come back to bite you." As with plaintiff's other allegations of retaliation, he fails to demonstrate this was an adverse employment decision sufficient to make out a prima facie case of retaliation.

6. Biweekly Meetings

Plaintiff asserts Eippert required him to attend biweekly meetings for up to two hours. However, Eippert met with all of his agents at least once a month for one to two hours to discuss their cases. Defense Exs. at pp. 21, 50-51. (ECF 21-1). Plaintiff fails to demonstrate an issue of fact as to any retaliatory motive for the meetings.

7. Time off

Plaintiff alleges Eippert made him "feel bad" for taking time off. However, the record shows Eippert approved plaintiff's request for time off. Defense Exs. at pp.54-57. (ECF 21-1). While Eippert did suggest plaintiff consider shortening one request for 104 hours of leave due to some cases with upcoming deadlines, Eippert nevertheless approved plaintiff's leave request. *Id.* Plaintiff again fails to present a prima facie case of retaliation given the lack of adverse employment action and link to his complaint.[2]

8. Work Critique

Plaintiff alleges Eippert was overly critical of his work. However, Eippert testified to numerous occasions in which he made other revenue agents aware of their mistakes as well. Defense Exs. at pp.17-18. (ECF 21-1). Plaintiff again fails to demonstrate a sufficiently

---

[2] Plaintiff cites an email to John Murphy suggesting that Eippert should deny the 104 hours of leave until the cases with upcoming deadlines were resolved (Plaintiff's Ex. F at p. 20 (ECF 54-7). However, plaintiff testified that Eippert did approve plaintiff's entire vacation request. Deposition of Wilmore Lee at p. 87 (attached to Supplemental Declaration of Austin Rice-Stitt (ECF 56-1) at p. 2).

adverse employment action or a link to his complaint of discrimination.

B. Hostile Work Environment

To state a claim for hostile work environment, a plaintiff must allege that (1) he was subjected to unwelcome verbal or physical conduct because of his race, and (2) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. *Pringle v. Wheeler,* 478 F. Supp. 3d 899, 912 (N.D. Cal. 2020).

To determine whether conduct was sufficiently severe or pervasive to violate Title VII, courts look at the totality of the circumstances. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993). Plaintiff must show a concerted pattern of harassment of a repeated, routine, or generalized nature. *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, (1998); *McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1113 (9th Cir. 2004); *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1463 (9th Cir. 1994). In addition, the working environment must be both subjectively and objectively perceived as abusive. *Vasquez v. Cnty. of Los Angeles,* 349 F.3d 634, 642 (9th Cir. 2003), as amended (Jan. 2, 2004). Subjectively, the evidence must show that the harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, *i.e.*, pollute the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position. *McGinest,* 360 F.3d at 1113. Objectively, courts look at "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or

a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 23; *McGinest,* 360 F.3d at 1113. The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct. *Harris,* 510 U.S. at 23.

Plaintiff's allegations and the little admissible supporting material he provides simply does not rise to the level of severe and pervasive unwelcome conduct based on race such that a trier of fact could reasonably conclude that the conditions of his employment were abusive. While plaintiff complains of several instances of unwanted conduct in the form of critiques and perceived undeserved performance evaluations, he paints a picture of nothing more than a difference of opinion as to his work performance. *See Surrell v. California Water Serv. Co.,* 518 F.3d 1097, 1109 (9th Cir. 2008) (performance related comments insufficient to demonstrate hostile work environment based on race). Accordingly, defendants are entitled to summary judgment on this claim.

To the extent plaintiff's complaint raises a discrimination claim based on the failure to promote or constructive discharge, such claims have not been exhausted and plaintiff agrees they are not before this Court. Defense Exs. at pp.218, 225. (ECF 21-1). As such, defendants are entitled to summary judgment as to all claims alleged in the complaint and the case should be dismissed.

C. Motion for Adverse Inference

Plaintiff moves the Court to make an adverse inference against defendants asserting defendants

have withheld documents to protect John Murphy against whom:

> they have enough evidence that he constantly Discriminated and Harassed Plaintiff until his health deteriorated, but still want him to enjoy the benefits of being Territory Manager and continue his discriminatory practices because of being from privileged race, while Defendant uses all his power to try to suffocate Plaintiff voice by putting their knee on his neck and make it extremely difficult to have a fair chance in this Court Case due to his underprivileged race.

Motion (ECF 50) at p. 23)

This Court has previously denied plaintiff's request for spoilation finding an insufficient basis to demonstrate destruction of evidence. In addition, the Court ordered defendant IRS to provide all records requested by plaintiff or certify it has exhausted all reasonable efforts to locate any such documents. Defendant subsequently certified that all relevant and responsive documents in its possession have been provided to plaintiff (ECF 49). The Court was persuaded the first time plaintiff asserted spoilation and the Court is not persuaded now that defendant withheld any relevant discovery or destroyed such evidence knowing it had a duty to preserve it. The motion should be denied.

CONCLUSION

Defendants' motion for summary judgment (ECF 20) should be granted and plaintiff's motion for an adverse inference (ECF 50) should be denied. A judgment should enter.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 7th of August, 2023.

/s/ Jolie A. Russo
United States Magistrate Judge

DECISION, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (JULY 30, 2020), *WASHINGTON v. YELLEN*, 3:21-cv-00333-JR, RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT EXHIBIT J, DOCUMENT 54-11

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

WILMORE L. WASHINGTON, III
A/K/A RIGOBERTO A.,[1]

Complainant,

v.

STEVEN T. MNUCHIN,
Secretary, Department of the Treasury
(Internal Revenue Service),

Agency.

Appeal No. 2019003131

Agency No. IRS-17-0331-F

---

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

Before: Carlton M. HADDEN, Director,
Office of Federal Operations.

DECISION

On February 2, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 19, 2018, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUES PRESENTED

The issues presented here are whether Complainant filed a timely appeal and whether he established that he was discriminated against based on his race and sex when he was not selected for positions to which he had applied.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Internal Revenue Agent (IRA), GS-11, at the Agency's Phoenix, Arizona location.

On February 16, 2017, Complainant contacted an EEO Counselor, and on May 17, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and sex (male) when, between January and February 2017, he was not selected for any of the IRA

GS-12 positions listed under vacancy no. 17CS4-SBB0001-0512-12-PC (Vacancy).

Complainant stated that, in January 2017, he was notified that he was not selected for the IRA GS-12 position. He stated that he believes that his Territory Manager (TM)/second-line supervisor (S2, Caucasian, male) and Area Director (AD, unknown race, female) were responsible for him not receiving an offer for any of the available positions under the Vacancy.

Complainant's Critical Job Elements (CJE) score on his performance evaluation for the rating period from November 1, 2014 through October 31, 2015, was 5 on a scale from 1 to 5, 5 being the highest score, for portions 1, 3, and 5, and 4 for portions 2 and 4, for an overall CJE score of 3.6. Report of Investigation (ROI) Ex. 3. It is unclear from the record how much weight each portion is given or how those scores averaged to a 3.6. Complainant also received an application rating score of 95.88 based on his application for the position. ROI Aff. A. Complainant stated that the vacancy was advertised October 11, 2016, and the qualifications included his resume, his answers to the questions, and his score. *Id.* Complainant stated that he made the best qualified list (BQL) based on his answers, annual rating, and resume. *Id.*

The Vacancy listed locations in Hawaii, Colorado, Arizona, and Oregon. However, Complainant was not selected for any of the open positions. The Vacancy stated that individuals would be evaluated based on their CJEs; they would be rated and ranked based on their responses to the online questions regarding their experience, education, training, performance appraisals and awards relevant to the duties of the

position; and that their rating may be lowered if their responses to the online questions were not supported by the education and/or experience described in their application.

The selectee in Honolulu, Hawaii was a Caucasian, male with an application rating score (ARS) of 100. The Denver, Colorado selectee (unknown race, female) had an ARS of 97.11 and CJE of 5.00, but subsequently declined the position. The Colorado Area Director (CAD, unknown race, female) noted that when the Denver position was not filled, the position was moved to Lakewood, Colorado. There, the positions were Special Enforcement Group Agents, instead of general program agents, the former being the preference of the CAD. The Special Enforcement Group Agents are under a different position description than general program agents. ROI Aff. D. According to the Vacancy, there were six posts of duty (POD) for Colorado. Complainant applied for the Denver and Lakewood, Colorado PODs. ROI Ex. 2 at 13.

Based on his ARS, Complainant made Arizona's BQL, and the ARSs of those selected ranged from 95.88 to 91.20 (95.88, 95.65, 94.08, 93.85, 93.85, 93.76, 91.20). The Agency did not provide what the corresponding ARS and CJEs were for each candidate; instead, we have a list of the ARSs and CJEs without correlation between the two. The breakdown of the Arizona selectees' CJEs, race, and sex are as follows:

> Selectee 1: Caucasian, male CJE 4.00 on January 27, 2016
>
> Selectee 2: Caucasian, male CJE 4.20 on March 29, 2016

Selectee 3: Asian, female CJE 4.40 on December 29, 2015

Selectee 4: Caucasian, female CJE 4.60 on October 6, 2016

Selectee 5: Caucasian, female CJE 4.60 on May 3, 2016

Selectee 6: Caucasian, male CJE 3.80 on May 18, 2016

Complainant was again placed on the BQL, this time for PODs in Oregon; namely, in Salem and Portland. The Portland selectees' ARSs were 98.65, 97.30, 97.00, and 94.81. The Salem selectees' ARSs were 91.84, 91.39, and 91.05. The breakdown of the Portland and Salem, Oregon selectees by CJEs, race, and sex are as follows:

Portland

Selectee 1: Caucasian, female CJE 4.60 on March 15, 2016

Selectee 2: Race not specified, female CJE 5.00 on March 11, 2016[2]

Selectee 3: Caucasian, female CJE 4.60 on June 8, 2016

Selectee 4: Caucasian, male CJE 4.80 on May 13, 2016

Salem Selectees

---

[2] One Portland, Oregon selectee identified their race as "Hispanic." We note that the Commission considers the term "Hispanic" to denote national origin rather than race. There is no other indication in the record as to the selectee's race.

> Selectee 1: Caucasian, male CJE 4.40 on March 14, 2016
>
> Selectee 2: Caucasian, male CJE 4.00 on November 16, 2015
>
> Selectee 3: Caucasian, male CJE 3.80 on June 24, 2016
>
> Selectee 4: Caucasian, male CJE 3.80 on May 18, 2016 (this individual was selected for both Portland and Salem)

While Complainant made the BQLs, he was not selected in any of the above-listed regions. After learning he was not selected for any of the vacancies, on February 16, 2017, Complainant emailed S2 to inquire why he was not selected. S2's response was as follows:

> I will say that in the selection process several items are considered including the type of inventory one has worked and handled (such as complex issues, TEFRA procedures and the identification of multi-related entities); their inventory management skills; details they have been on; experience they have with the OJI position; and if they have been an instructor/taught workshops, etc. I have reviewed your application and perhaps we should take an in-depth look at your application package altogether. ROI Aff. A.

The area-selecting TMs were interviewed. The California TM (CA TM, Caucasian, male), who was the selecting official for Arizona, stated in his affidavit that he served as the selecting official under announcement 17CS4-SBB0001-0512-12-PC. ROI Aff.

B. CA TM stated that the reason Complainant was not selected was that, after review of the application packages, it was determined that Complainant was not as qualified as the other candidates who were eventually selected. CA TM stated that the process in selecting individuals under the vacancy consisted of review of candidates' questionnaire answers and performance appraisals. CA TM stated that the he believed the BQL was created by an automated system and provided to him by the Personnel office. *Id.* However, CA TM was unable to explain why the other candidates were selected instead of Complainant, because he did not have the selectees' application packages available to him. CA TM later added to his affidavit and stated that each candidate, "had varied experience in dealing with a variety of issues. . . . The final decision came based on the rating of each applicant on their most current appraisal. In this instance, the complainant had the lowest overall rating and thus was not selected." ROI Aff. B at 182. It is unclear what material CA TM reviewed in order to provide the clarification that he did in his later affidavit.

S2 was able to list six of the selectees by name, and he assumed the sex of each, but he did not know the race of any of the six. The certificate listing for Arizona's BQ listed Complainant and others with a column listing the rank, disposition, and feedback. ROI Ex. 2 at 42. Complainant's disposition was listed as "not selected-not contacted." None of the applicants had feedback and all are listed with a rank of zero. A listing of Phoenix applicant scores showed Complainant and his ARS, 95.88, with a status of "NH" (not hired). *Id.* at 53. However, Complainant had the fourth highest ARS (tied) and one applicant with the same

ARS and ten applicants with lower ARSs were listed as "HIRE."

The Oregon TM (OR TM, Caucasian, female), who was the selecting official for Portland and Salem, Oregon, stated that she received the BQL and application packages. ROI Aff. C. OR TM stated that the BQL was generated by the serving Personnel office, and, to the best of her understanding, the best-scoring individuals were placed on the BQL. OR TM stated that she still had one certification available to view and, on that certification, Complainant was listed 10th on the BQL. She stated that the BQL ranking would have been insufficient and she would have relied on information provided in the application, resume, and evaluation. OR TM stated that she was looking for candidates who met or exceeded education and/or experience, whose responses to the ranking criteria questions demonstrated knowledge of specific technical issues and types of cases. OR TM listed the seven selectees by name, race, and sex, but stated that she no longer had access to the application packets in order to state why those applicants were chosen over Complainant. However, three months after her initial affidavit, she stated that she had an opportunity to re-review the applicant packages and stated that she based her decision on the candidates' CJEs. She stated that she chose candidates with an average CJE ranging from 3.80 to 5.00. She further stated that she, "relied heavily on the performance evaluations provided with the packages as they reflect the applicants' actual performance of the duties of a revenue agent." *Id.* at 193. It is again unclear what materials OR TM reviewed to make her later statement, as the documents are not included in the record.

There was a certificate listing for the Portland, Oregon BQ that listed the rank, disposition, and feedback. ROI Ex. 2 at 48. Complainant's disposition was listed as "not-selected" and "not contacted," and none of the applications had feedback.

Complainant's rank is listed as zero while other applicants have a rank, but only if they were selected/declined location. A listing of Portland applicant scores showed Complainant's score tied at the tenth-highest ARS with a status of "NH." However, the applicant who Complainant was tied with had a status of "HIRE," as did seven applicants with lower ARSs. *Id.* at 56-57. A later human resources administrative (HR Admin) spreadsheet for Portland lists applicants by descending ARSs and includes their ranking and disposition. *Id.* at 61. Complainant does not have a ranking and is tenth on the list.

The Salem, Oregon BQ certificate listing again listed Complainant's disposition as "not selected" and "not contacted," and none of the applicants had feedback. All Salem, Oregon applicants were listed with a rank of zero, even the selected applicants. *Id.* at 50. A listing of Salem applicant scores showed Complainant's score as the third highest ARS, with a status of "NH." However, all of the applicants listed as "HIRE" had lower ARSs than Complainant, for a total of nine "HIRE" applicants. *Id.* at 59-60.

The Colorado TM (CO TM, Caucasian, male) stated that he was the selecting official for Denver, Colorado. ROI Aff. D. CO TM stated that after an individual was selected, the selectee subsequently declined to accept the position. It was then decided to move the position to another POD. *Id.* at 196. CO TM stated that Complainant's name was on the BQL, but

in comparing Complainant with the individual who was selected and subsequently declined, he stated that the selectee had an ARS of 97.11 and Complainant's score was 95.88. Additionally, the selectee had a CJE of 5.00, while Complainant's CJE was 3.60. He also stated that he was unaware of Complainant's race and/or sex. CO TM stated that he no longer had access to any candidates' application packet to reference for more specific information as to how Complainant compared to them. Three months after his original affidavit, CO TM added the following regarding the individual who declined the position, compared to Complainant:

> I reviewed all paperwork provided which included the applications, resumes, and performance evaluations. In reviewing [selectee who declined]'s paperwork, she outlined in her resume more specific projects she had worked on and her performance evaluation stated how [she] performed her job at an outstanding level. A review of [Complainant's] paperwork at that time showed that [he] was not as strong in certain critical job elements. Based on the paperwork alone is why I offered the position to [selectee who declined] . . . After that selection the Area Director moved the position to another POD. *Id.* at 200.

The CO TM confirmed that the decision was made to select an applicant from the Special Enforcement Group, instead of a general agent, as each position has a different position description. The Colorado BQ certificate listing, which had a status of "cancelled," listed Complainant's disposition as "not selected-not

contacted." There was no feedback for any of the applicants and the ranks were listed as zero. ROI Ex. 2 at 44. A listing of Denver applicant scores showed Complainant and his ARS with a status of "NH," with the fifth-highest ARS. However, there are ten applicants with lower ARSs than Complainant who were listed as "HIRE." *Id.* at 55-56.

The record is unclear regarding into what PODs these applicants were hired, even though Denver is listed. The Agency indicated that there was one position in Denver and it was moved to Lakewood, Colorado. The record also indicated that there were six positions in Colorado, even though the aforementioned document stated that ten applicants were hired.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination and reprisal as alleged.

In its final decision, the Agency stated that Complainant did not have a higher appraisal rating than any of the selectees at any POD; therefore, the CJE was the primary motivation for not selecting Complainant. The Agency's FAD also found that Complainant's experience teaching and having been an IRA longer than some selectees did not render him a superior candidate. The Agency's FAD stated that Complainant did not provide any evidence to support

his assertion that S1 and S2 played a role in the selection decision.

CONTENTIONS ON APPEAL

On appeal, Complainant states that when he received the final agency decision for another EEO complaint, Agency No. IRS-18-0161-F[3], he realized that he should have received the FAD associated with the instant case, Agency No. IRS-17-0331-F. Complainant states that he reached out to the Agency on the instant matter and he was informed that the FAD was returned as unclaimed. Complainant provides the emails between him and the Agency regarding the FAD, demonstrating that he did not receive the FAD until February 1, 2019.

In an undated supplemental appeal, Complainant also states that the Agency initially averred that its Colorado decision was based on a change of POD, but then later stated it was due to the BQL. Complainant also questions the Agency's rationale for Phoenix, Arizona because he claims that the Agency initially stated that his non-selection was due to a subpar resume, but it now claims it was based on his ARS and CJE.

On appeal, the Agency argues that Complainant's appeal should be denied because he fails to demonstrate that the Agency's legitimate, non-discriminatory reasons are a pretext for discrimination. The Agency also argues that Complainant's appeal was untimely and should be dismissed by the Commission. The

---

[3] This complaint is the subject of EEOC Appeal No. 2019001753.

Agency asserts that the FAD was mailed on January 19, 2018.

However, the Agency argues, Complainant did not file an appeal until November 23, 2018, 308 days after the FAD was issued.[4] The Agency further states that Complainant failed to furnish it with a copy of his appeal, in violation of 29 C.F.R. § 1614.403(b). The Agency notes that Complainant failed to provide it with a copy of his November 23, 2018 appeal. Complainant also filed an appeal on February 2, 2019, once he received the FAD at issue, following the Agency's response to his request for a copy of it.

The Agency further argues that Complainant did not establish a prima facie case of discrimination by a preponderance of the evidence. In furtherance of its argument, the Agency argues that Complainant failed to demonstrate that other similarly-situated employees were treated better. The Agency contends that the selectees either had a higher ARS or CJEs, or both. The Agency contends that candidates were placed on the BQL via an automated system, and that the Agency's manual required that selections must be made from the BQL. The Agency states that the selecting officials aver that, in addition to their electronic application packages, they selected the applications with the highest performance appraisal ratings. The Agency recounts the CJEs of the Arizona, Colorado, and Oregon selectees. The Agency did not discuss the Honolulu, Hawaii selectee's CJE, as

---

[4] Complainant's November 23, 2018 appeal for EEOC Appeal No. 2019001753 lists both Agency numbers. However, Complainant wrote, "There was no decision on the promotion discrimination, my initial EEO complaint."

complainant was not on the BQL for the Honolulu, Hawaii POD. The Agency argues that Complainant's CJE of 3.60 was below the lowest CJE, 3.80, of the selectees. The Agency states that the vacancy announcement disclosed that applicants' average CJEs, located in performance appraisals, would be evaluated. Finally, the Agency argues that, even if Complainant demonstrated an inference of discrimination, he does not establish pretext.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110 (b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). *See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110),* at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

Timeliness of the Appeal

As a threshold matter, the Agency argues that it mailed the FAD to Complainant on January 19, 2018. Complainant did not appeal the FAD until February 2, 2019, more than one-year after the FAD was

issued.[5] In his appeal, Complainant provided email correspondence between him and the Agency in which the Agency stated that the January 19, 2018 FAD was mailed but returned to the Agency as unclaimed. Complainant asserted that he did not receive the FAD until February 1, 2019, when the Agency emailed him a copy, after he began making inquiries about the FAD on November 23, 2018. The record does not contain any evidence that Complainant received the January 19, 2018 FAD prior to February 1, 2019. When, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." *Shanice C. v. Dep't of Veterans Affairs,* EEOC DOC 0120181552 (July 31, 2018) (citation omitted). We find that the Agency has not met its burden, and we therefore determine that Complainant's February 2, 2019 appeal should be deemed timely.

The Agency also argues that Complainant's failure to furnish it with a copy of the appeal is grounds for rejection of his appeal. Although our regulations require notice of appeal filing to be submitted to the agency with the filing of the appeal, we do not in this instance find that Complainant's appeal should be found untimely. We have found that our notice to the agency of Complainant's appeal serves the regulatory purpose of notice to the agency of the same. *See Old Horn v. Dep't of the Interior,* EEOC Appeal No.

---

[5] The Agency references the date as November 23, 2018. The correct date was February 2, 2019. On November 23, 2018, Complainant contacted the Agency to inquire about the status of the FAD. On November 23, 2018, Complainant also appealed a FAD in a different case which is the subject of EEOC Appeal No. 2019001753.

01961337 (Feb. 4, 1998). On April 30, 2019, we advised the Agency of Complainant's appeal of the FAD. For all of the above reasons, we accept Complainant's appeal of the FAD.

Disparate Treatment Claim

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Constr. Co. v. Waters,* 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. *McDonnell Douglas,* 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. *Tx. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to prove, by a preponderance of the evidence, that the reason proffered by the Agency was a pretext for discrimination. *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 143 (2000); *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 519 (1993).

In the nonselection context, Complainant may establish a prima facie case of race and sex by showing that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was not selected for the position; and (4) he was accorded treatment different from that given to persons otherwise similarly situated who are members outside of his protected

group. EEOC Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*, EEOC Notice No. 915.002 (Sept. 18, 1996); *Williams v. Dep't of Educ.*, EEOC Request No. 05970561 (Aug. 6, 1998). Complainant is African-American, and therefore, a member of a statutorily protected class; as such, we find that prong one is satisfied. Complainant was placed on the BQL and was considered for multiple PODs for the Vacancy as a qualified candidate; therefore, prong two is also satisfied. Complainant was not selected for the Vacancy, and all of the individuals selected for the Vacancy were outside of Complainant's protected class of race. Therefore, prongs three and four are satisfied and an inference of race discrimination may be made. Accordingly, we find that Complainant established a prima facie case of racial discrimination.[6]

Because Complainant has established his prima facie case of racial discrimination, the burden now shifts to the Agency to articulate a legitimate nondiscriminatory reason for not selecting Complainant. In its FAD, the Agency asserted that the selectees were candidates with higher CJEs, or there were other factors that made the selectees more qualified. The Hawaii selectee had a demonstrably higher ARS and CJE than Complainant; therefore, we will focus on the positions in Denver and Lakewood, Colorado, Phoenix, Arizona, and Salem and Portland, Oregon.

There were six PODs for Colorado. The CO TM stated that Complainant's ARS and CJE were lower

---

[6] As we find that Complainant established a prima facie case of race discrimination, we need not address his claim on the basis of sex.

than those of the selectee, with the selectee having an ARS of 97.11 and CJE of 5.00 versus Complainant's ARS of 95.88 and CJE of 3.60. However, that selectee declined the position. The decision was subsequently made to move the Denver, Colorado POD (Denver POD) to Lakewood, Colorado (Lakewood POD). However, Complainant applied to both PODs, Denver and Lakewood, Colorado. The CO TM stated that he was the selecting official for the Denver POD. The CO TM did not expressly indicate that he was the selecting official for the Lakewood POD. When asked why Complainant was not selected, the CO TM responded only regarding the Denver POD. He stated that the Denver POD was moved to Lakewood, Colorado. He also stated that the preference for the Lakewood POD IRA was for the selectee to have the qualifications of a Special Enforcement Group member. According to the CO TM, Special Enforcement Group members have a different position description than general program agents. As such, the CO TM stated that Complainant was not selected for the positions in Colorado.

As to the Phoenix selections, the CA TM stated that, after further review in the hiring process, Complainant was not as qualified as the candidates who were eventually selected. However, he was unable to explain why the other candidates were selected instead of Complainant and noted that he no longer had access to the application packets. The CA TM initially stated, without specificity, that the selection was based on candidates' questionnaire answers and performance appraisals/CJEs. He later amended his rationale to state that the selections were based on candidates' CJEs.

As for the Oregon positions, the Agency pointed to the higher ARSs for the Portland, Oregon selectees (Portland POD selectees) as the reason for their selection.

The OR TM stated that she was looking for candidates who met or exceeded education and/or experience, whose responses to the ranking criteria questions demonstrated knowledge of specific technical issues and types of cases. The OR TM stated that the BQL ranking would have been insufficient and she would have relied on information provided in the application, resume, and evaluation. However, she stated that after having an opportunity to review the packets again, she relied heavily on the CJEs. OR TM stated that Complainant ranked 10th on the BQL. She initially stated that she was seeking a candidate who met or exceeded education and/or experience through their responses to the ranking criteria questions, which she stated demonstrated knowledge of specific technical issues and types of cases.

We have stated, "that while the agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for non-selections that complainant is provided with an opportunity to prove that the agency's explanation was a pretext for discriminatory animus." *Koudry v. Dep't of Educ.*, Appeal No. 0120080343 (April 10, 2013). We find that the Agency articulated legitimate, nondiscriminatory reasons for the Colorado and Phoenix selections.

However, the selecting individual for the Oregon positions stated that she did not have the application packages available to them to explain why Complainant was not selected. The OR TM stated that she was

looking for candidates who met or exceeded education and/or experience, whose responses to the ranking criteria questions demonstrated knowledge of specific technical issues and types of cases. However, the OR TM could not provide an explanation how Complainant did not have these qualities or how the selectees met these criteria. As such, Complainant was not provided with an opportunity to prove the Agency's explanation was pretext for discrimination. As the Agency has not articulated legitimate, nondiscriminatory reasons for the Oregon positions, and the record shows that all of the Oregon selectees were outside of Complainant's race, we find that the Agency failed to overcome Complainant's prima facie case of race discrimination, and therefore, Complainant prevails without having to prove pretext. *Chhe v. Dep't of Housing and Urban Dev.,* EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under *McDonnell Douglas* is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), *request for recon. den.,* EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that he was subjected to race discrimination when he was not selected for the GS-12 IRA positions in Oregon.

The Commission now turns to Complainant to establish that the Agency's reasons regarding the Colorado and Phoenix positions were pretext for discrimination based on his race. The selecting officials for these locations each stated that they no longer had access to the candidate application packets and could not provide the packets to the Investigator.

Regarding the Colorado selections, the CO TM stated that Complainant was not selected for the Lakewood positions because they sought candidates who were Special Enforcement Group members.

The record does not include what the position descriptions are for Special Enforcement Group agents and general agents, or how those differ from each other. Additionally, the CO TM did not state what the difference in position description was between a Special Enforcement Group member and general agent/IRA. The CO TM also did not state whether a selection was made for the Lakewood *POD. CO* TM did not state whether, because he was the Denver POD selecting official and the Denver POD was relocated to the Lakewood, Colorado, he was involved in any Lakewood POD selections. According to CO TM's statements, Complainant, despite making the BQL and having applied for the Lakewood POD, was never even considered for the position. The Agency's final decision pointed to individuals largely being selected based on their CJEs. The Agency's appeal also focused on Complainant's lower CJE as the reason why he was not selected. Complainant had the lowest CJE. However, that was not the rationale provided by CO TM. First, he stated that another individual had a higher ARS and CJE, then he stated that the Denver POD was moved to Lakewood, Colorado. When asked about the Lakewood POD, CO TM stated that the decision was made to seek candidates with different position descriptions, namely Special Enforcement Group members instead. It is unclear from the record whether there were then two positions available at the Lakewood POD, after the Denver POD was moved there. The Agency never addressed Complai-

nant's non-selection for the Lakewood POD, whether the original position or the one moved from Denver, even though Complainant also applied for the Lakewood POD. Upon review, we find that Complainant has shown that it is entirely unclear why Complainant was not selected for or even considered for the Lakewood POD. We therefore find that Complainant established that the Agency's reasons were pretext regarding the Colorado positions.

Regarding the Phoenix selections, Complainant had the highest ARS and was on the BQL. The CA TM did not address the evaluation and review of candidates' questionnaire answers, nor does the Agency in its FAD or appeal. As noted above, the record contains no records for the selection process. It is unclear how the CA TM reviewed and evaluated the candidates' questionnaire answers. Additionally, all of these materials were not included in the record, again leaving CA TM's rationale unsubstantiated/ unsupported.

On appeal, the Agency states that the record clearly shows that CJEs were going to be evaluated during the selection process. However, the Agency's appeal and FAD emphasized CJEs as the motivation for the selections made. We find the Agency's rationale lacked consistency, and it has also at times inaccurately reflected the record. Moreover, it appears that some of the selecting officials cited to CJEs only after being asked again by the investigator why they made the decisions they did. Considering there was a larger gap in ARSs than CJEs, and the Agency failed to explain how it determined demonstrated knowledge based on ADRs alone, the Agency's selecting officials, CO TM and CA TM, failed to provide a specific, clear and indi-

vidualized explanation for Complainant's non-selection. Instead, the Agency's rationale vacillates between the other candidates having higher scores, even though that was not clearly the case, and the other candidates demonstrating more knowledge, even though how it was determined that the other candidates did so is also never explained. The Agency's rationale is also inconsistent simply based on whether it is coming from the FAD, appeal, or selecting official, and even differs from one selecting official to the next.

The FAD not only failed to address Complainant's non-selection for the Lakewood POD, it failed to examine why Complainant was not even considered, despite making the BQL. Based upon review of the record, we find that Complainant has shown that the Agency's reasons were pretext for race-based discrimination.[7]

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's finding of no discrimination with respect to the IRA position and REMAND the matter for further processing in accordance with the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

---

[7] As we find that Complainant has established discrimination based on race, we need not reach a determination on his claim of discrimination based on sex.

I. Within sixty (60) days of the date this decision is issued, the Agency shall offer Complainant a position at one of the geographic locations to which Complainant applied, or a substantially equivalent position, for the position of Internal Revenue Agent as advertised under vacancy announcement number 17CS4-SBB0001-0512-12-PC. Complainant shall have 15 days from receipt of the Agency's offer in which to accept or decline the offer.

II. The Agency shall pay Complainant back pay with interest from the date on which it is determined Complainant would have started in the GS-12 Internal Revenue Agent position. If Complainant declines the Agency's offer of a position, the back pay shall terminate on the date of Complainant's declination. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date Complainant either accepts or declines the Agency's offer of a position. The Agency will ensure that all tax consequences are taken into account. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer at the address referenced in the

statement entitled "Implementation of the Commission's Decision."

III.The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in *Carle v. Dep't. of the Navy,* EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date the Complainant receives the Agency's notice to submit his compensatory damages evidence. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.

IV. The Agency is directed to conduct four (4) hours of in-person or interactive training for the selecting officials for the IRA positions in Arizona, Colorado, and Oregon, and all other responsible management officials. The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace and maintaining records which may be subject to a complaint of discrimination. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.

V. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the selecting officials for the IRA positions in Arizona, Colorado, and Oregon. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason (s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

VI. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). *See* 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, includ-

ing evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its IRS facilities in Phoenix, Arizona, Denver, Colorado, Honolulu, Hawaii, and Portland, Oregon, the copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted both in hard copy and electronic format by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). *See* 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the

compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. *See* 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. *See* 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision. A party shall have twenty (20) calendar days of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. *See* 29 C.F.R. § 1614.405; *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector

EEO Portal (FedSEP). *See* 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

FOR THE COMMISSION:

/s/ Carlton M. Hadden
Carlton M. Hadden, Director,
Office of Federal Operations

Date: July 30, 2020

TEXT CLERK ORDER DENYING RECONSIDERATION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 27, 2026)

Gmail Wilmore Washington wwashing2@gmail.com

Washington v. Bessent 23-3693 - 045 – Chambers Text Clerk Order

ACMS@ca9.fedcourts.us ACMS@ca9.fedcourts.us
Thu, Aug 27, 2026 at 10:32 AM

To: wwashing2@gmail.com

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

United States Court of Appeals
for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 08/27/2026 10:26:42 AM PDT and filed on 08/27/2026

Case Name: Washington v. Bessent

Case Number: 23-3693

Docket Text:

TEXT CLERK ORDER. Appellant Wilmore Lee Washington's Motion to Reconsider (DE 43) is denied. No further filings will be entertained in this closed case. [Entered: 08/27/2026 10:31 AM]

Notice will be electronically mailed to:

Wilmore Lee Washington III; wwashing2@gmail.com
Ms. Susanne Beth Luse; susanne.luse@usdoj.gov, keith.ramsey@usdoj.gov, samantha.schultz@usdoj.gov

Case participants listed below will not receive this electronic notice:

ORDER DENYING MOTION TO RECALL MANDATE AND PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 7, 2026)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILMORE LEE WASHINGTON III,

Plaintiff-Appellant,

v.

SCOTT BESSENT, Secretary, Department of Treasury, Internal Revenue Service,

Defendant-Appellee.

No. 23-3693

D.C. No.3:21-cv-00333-JR
District of Oregon, Portland

Before: RAWLINSON, VANDYKE, and MENDOZA, Circuit Judges.

ORDER

Appellant's Motion to Recall the Mandate, filed June 23, 2026, is DENIED as moot.

Appellant's Petition for Rehearing En Banc, filed June 26, 2026, is DENIED as untimely.

ORDER DENYING PETITION FOR PANEL REHEARING, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 15, 2026)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILMORE LEE WASHINGTON III,

Plaintiff-Appellant,

v.

SCOTT BESSENT, Secretary, Department of Treasury, Internal Revenue Service,

Defendant-Appellee.

No. 23-3693

D.C. No. 3:21-cv-00333-JR

Before: RAWLINSON, VANDYKE, and MENDOZA, JR., Circuit Judges.

ORDER

The panel has voted to deny Appellant's petition for panel rehearing, Dkt. No. 34. The petition for panel rehearing is therefore DENIED.

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