FILED IN CHAMBERS
U.S.D.C ATLANTA
Date: Aug 26 2021
KEVIN P. WEIMER, Clerk
By: s/Kari Butler
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PATRICK DABNEY,

Plaintiff,

v.

ALEJANDRO MAYORKAS,[1]
Secretary, U.S. Department of
Homeland Security,

Defendant.

CIVIL ACTION FILE NO.

1:20-CV-00336-CAP-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff, Patrick Dabney, filed this action against his employer, the Department of Homeland Security ("DHS"), alleging that he was subjected to: (1) a hostile work environment based on his race, color, sex, and protected activity (Comp. [1] Count I); (2) discrimination based on his race, color, and sex when he was not promoted, issued a letter, and investigated (id. Count II); and (3) retaliation for engaging in protected speech (id. Count III). Plaintiff brings these claims under

[1] Pursuant to Federal Rule of Civil Procedure 25(d), the Clerk is **DIRECTED** to substitute Alejandro Mayorkas for Chad Wolf as the defendant.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

After a period of discovery, defendant filed a Motion for Summary Judgment [47], which has been fully briefed. (See Def.'s Mem. in Supp. of Mot. for Summ. J. [47-1]; Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. [51-1]; Reply Br. in Further Supp. of Def.'s Mot. for Summ. J. [59].) For the reasons explained below, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [47] be **GRANTED**.

I. STATEMENT OF FACTS

To assist with framing the undisputed material facts, Local Civil Rule 56.1 requires certain filings by the parties in conjunction with a summary judgment motion. Defendant as movant filed a Statement of Undisputed Material Facts as to Which There Exists no Genuine Issue to be Tried [48-2] ("DSUMF"), to which plaintiff responded. (See Pl.'s Resp. to DSUMF [51-2] ("PR-DSUMF").) As allowed by the Local Civil Rules, plaintiff also filed a Statement of Additional Material Facts [51-3] ("PSAMF"), to which defendant responded. (See Def.'s Resp. to PSAMF [59-1] ("DR-PSAMF").)

The Court uses the parties' proposals and responses as the basis for the statement of facts under the following conventions. When a party admits a

proposed fact (in whole or in part), the Court accepts that fact (or the part admitted) as undisputed for the purposes of this Report and Recommendation and cites only to the proposed fact. When a party denies a proposed fact (in whole or in part), the Court reviews the record cited and determines whether that denial is supported, and if it is, whether any fact dispute is material. The Court sometimes modifies a proposed fact per evidence cited to support it or because of evidence cited in the opposing party's response. The Court rules on objections and includes facts drawn from its review of the record, see Fed. R. Civ. P. 56(c)(3). Given some duplication of facts proposed in DSUMF and PSAMF, the Court sometimes cites to one and references the other with a see also signal. Finally, the Court views all proposed facts in light of the standards for summary judgment set out infra Part II.

A. Plaintiff's Employment with the TSA

Plaintiff's race and color are African American and Black/Brown, respectively. (DSUMF ¶ 2; see also PSAMF ¶¶ 1-2.) He began working for the Transportation Security Administration ("TSA"), which is a component of the DHS, at its Office of Law Enforcement/Federal Air Marshal Service ("OLE/FAMS" or "FAMS") in the Atlanta Field Office ("AFO") in 2002; he has been a Supervisory Federal Air Marshal ("SFAM)" since 2008. (DSUMF ¶ 1.)

Approximately 15-18 months after being promoted to SFAM, defendant selected plaintiff to serve as the Administrative SFAM, which involved various office management duties to include recruitment, oversight of the AFO's Administrative Officer and program assistants, and oversight for disciplinary actions at the AFO. (DSUMF ¶ 3.) During his tenure at the AFO, and while serving as the Administrative SFAM, at various times and in 2016, plaintiff rotated with other SFAMs to serve as the Acting Assistant Supervisory Air Marshal in Charge ("ASAC"), which is the second-in-command position. (Id. ¶ 4.) During the time relevant to plaintiff's Complaint, his direct supervisor and head of the AFO was Supervisory Air Marshal in Charge ("SAC") Arnold Cole, who is also African American. (Id. ¶ 5.)

B. Plaintiff's Non-Selection for Two ASAC Positions

Plaintiff, whose experience prior to working at the AFO included service in the U.S. Air Force as security police and employment with the Atlanta Police Department as an officer, applied for two ASAC positions in 2016, numbered FAMS16-198425-I (posted for TSA's OLE/FAMS Miami Field Office) and FAMS16-198827-I (posted for TSA's OLE/FAMS AFO). (DSUMF ¶ 6.) The ASAC for an OLE/FAMS field office reports directly to the SAC, and provides

senior-level leadership to a Federal Air Marshal workforce, oversees the planning, direction, and coordination of operations for an OLE/FAMS field office. (Id. ¶ 7.)

In 2016, OLE/FAMS used a structured process to make selections for ASAC positions nationwide. (DSUMF ¶ 8.)[2] When a new position became available, a vacancy announcement was broadcast to all FAMS employees announcing a K-Band vacancy on USA Jobs; the vacancy was generally open for ten days. (Id. ¶ 9.)[3] Plaintiff submitted an application, was deemed qualified, and placed on a candidate referral list. (Id. ¶ 11; see also PSAMF ¶ 5, asserting that plaintiff was deemed qualified for both positions.) Each SAC, Regional Director, or Deputy Division Director who had a vacancy to fill was given the opportunity to review the candidate referral list, make recommendations in priority order, and provide comments about the candidates for the advertised position; these recommendations were not binding on the Promotion Panel. (DSUMF ¶ 10.)

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[2] Plaintiff disputes DSUMF ¶ 8, but admits DSUMF ¶ 9, which is supported by the same policy—Overview of K-Band Process [48-5]. (Compare PR-DSUMF ¶ 8, with PR-DSUMF ¶ 9.) Because plaintiff fails to contravene DSUMF ¶ 8, the Court deems it admitted. N.D. Ga. Civ. R. 56.1(B)(2)(a)(2)(i).

[3] Plaintiff's claim that what defendant was looking for in an ASC position changed over time (see PSAMF ¶ 18) is immaterial. It is undisputed that the defendant posted the job vacancy announcement which listed the requirements for the ASC positions.

As part of this process, SAC Cole ranked plaintiff as his first choice recommendation for the AFO ASAC position, Brian Beverly (Caucasian) as his second choice, and the eventual selectee, James Punchard (Caucasian), as his third choice. (DSUMF ¶ 17.) SAC Maria Perez of the Miami Field Office ranked plaintiff as her fifth choice recommendation for Miami, and the eventual selectee, Mark Bishop, as number one. (Id. ¶ 18.)

The referral list and the SAC rankings then went to a Promotion Panel, which was comprised of the Deputy Division Director or a Regional Director from each of the OLE/FAMS divisions, the SAC for the Office of the Director, as well as a member of the Law Enforcement Industry Training Division of the Office of Training and Workforce Engagement. (DSUMF ¶ 12.) The Panel serves as the selecting official, with each voting member having one vote. (Id. ¶ 13.) Once made, selections were submitted to OLE/FAMs Senior Executive Management for concurrence. (Id. ¶ 14.)[4]

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[4] Plaintiff makes argumentative denials of DSUMF ¶¶ 10-14, asserting that the selection process was irregular and unfair, claiming that the Promotion Panel was a "Selection Referral Panel" ("SRP") and not a "Selecting Official" ("SO"), and showing that the Report of Investigation ("ROI") on his EEO Complaint (No. HS-TSA-01285-2017 [48-3]) does not list a SO for the vacancies. (See PR-DSUMF ¶¶ 10-14.) Plaintiff repeats some of these claims in his proposed facts.

The members of the Promotion Panel for the 2016 ASAC vacancies at issue in this case were: (1) Chief Security Officer Larry Smith, (2) SAC Tirrell Stevenson, (3) Regional Director John Wood, (4) Deputy Assistant Director Charles Cook, (5) Jennifer Cromwell (non-voting, representing the Office of the Director), and (6) Rana Khan (non-voting, representing the OLE/FAMS Business Management Office). (DSUMF ¶ 15, modified per record cited[5]; see also ROI [48-3], at 184.)

(See PSAMF ¶ 8 (asserting the ROI lists no SO) & ¶ 17 (asserting Panel was a SRP not a SO).) The contention that the process was irregular or unfair is not supported by a record cite and is argumentative. The fact that a form in the ROI was not signed by an individual as the SO is immaterial. The K-Bank Vacancy Process defendant followed here states that the Promotion Panel is the SO, and the Panel's selections are submitted to the FAMS Senior Executive Management for concurrence. Therefore, plaintiff's claim that there is a material dispute over who the SO was here (see PSAMF ¶ 20) is factually unsupported. Instead, the undisputed fact is that Eric Sarandrea and Roderick Allison had the final word on the promotions. (Khan Dep. [48-7], at 86; see also DSUMF ¶ 26, infra.) Finally, plaintiff's claim that two Panel members (Smith and Stevenson) may not have realized the Panel was the SO (see PSAMF ¶¶ 11-14) is immaterial. Their possible misunderstanding of their role in the K-Bank Vacancy Process does not change the fact that the Panel unanimously selected Messrs. Punchard and Bishop (discussed infra).

[5] Plaintiff points out two errors in the list of Promotion Panel members stated in DSUMF ¶ 15. (See PR-DSUMF ¶ 15; PSAMF ¶¶ 15-16, asserting defendant erroneously identified Mr. Cook as non-voting and erroneously included Fred Harpole as a member when he was not.) Defendant agrees that it erred. (See DR-PSAMF ¶¶ 15-16.) The list of panel members in the text preceding this note is correct.

The Promotion Panel for the 2016 Atlanta and Miami ASAC vacancy positions at issue in this case met on February 17, 2016. (DSUMF ¶ 16, modified per record cited.) Regional Director John Wood, who oversaw Field Operation, including the Atlanta and Miami Field Offices, recommended James Punchard and Mark Bishop for the ASAC positions because he believed they were well qualified based on their considerable breadth of experience and positions at various field offices in comparison to plaintiff. (Id. ¶ 19.)[6]

The Promotion Panel also discussed plaintiff's and Brian Beverly's resumes, taking note that their experience was solely in one field office and that they had no secondary J-Band roles outside of field offices, whereas both Mr. Bishop and Mr. Punchard had both served in positions outside of their OLE/FAMS field offices, to include serving as the Assistant Federal Security Director for Law Enforcement ("AFSD-LE"), which is a non-supervisory airport liaison position with

[6] The Court overrules plaintiff's hearsay objection to the above proposed fact. (PR-DSUMF ¶ 19.) The statements by two panel members (Messrs. Stevenson and Cook) that Mr. Wood recommended Messrs. Punchard and Bishop over plaintiff is not hearsay. Moreover, Mr. Cook's Declaration [48-9] provides the following first person account of the Panel's discussion: "The panel agreed that while all candidates were qualified, Mr. Punchard and Mr. Bishop both had broader experience than Mr. Dabney and Mr. Beverly, as both served as Assistant Federal Security Directors for Law Enforcement (AFSD-LE) and had held multiple assignments in various field offices." (Id. ¶ 6.)

OLE/FAMS. (DSUMF ¶ 20.) Mr. Bishop previously had served as the AFSD-LE for the U.S. Virgin Islands and in Denver; he also had served as a SFAM in Denver, an FBI Joint Terrorism Task Force investigator, a Drug Enforcement Administration agent, and a Deputy Sheriff. (Id. ¶ 21.) Mr. Punchard previously had served as an AFSD-LE, a supervisor in multiple field offices, a Border Patrol Agent, and a local sheriff. (Id. ¶ 22.)

The Promotion Panel agreed with Mr. Wood's recommendation and voted unanimously for James Punchard and Mark Bishop for the Atlanta and Miami ASAC positions, respectively. (DSUMF ¶ 23.)[7] By email dated February 17, 2017, Rana Khan forwarded the Promotion Panel's selections—Mr. Punchard for the

[7] Plaintiff denies the fact preceding this note (see PR-DSUMF ¶ 23; PSAMF ¶ 19), but it is undisputed that Messrs. Punchard and Bishop were unanimously selected by the Panel. The record plaintiff cites to support his claim that the vote was not unanimous is either an obvious error (see ROI [48-3], at 80, where panel member Smith mistakenly avers that Mr. Beverly was selected for the Atlanta ASAC position) or an assertion made without personal knowledge (see Dabney Dep. [49-1] 78.) Plaintiff also claims that Panel member Stevenson told him that he should have been selected for the ASAC position and that he (Stevenson) had advocated for him with the Panel. (PSAMF ¶ 10.) What plaintiff claims Mr. Stevenson said to him after the fact is immaterial. Indeed, because plaintiff already had Mr. Stevenson's Declaration from the ROI in his possession which showed that the vote was unanimous, plaintiff said he knew when talking to Mr. Stevenson that the Panel member was being untruthful to him. (Dabney Dep. [49-1] 85-86.) Plaintiff complains that defendant withheld the ROI from him for a period of time (see PSAMF ¶ 27), but any delay in producing it is immaterial.

ATL ASAC position, and Mr. Bishop for the Miami ASAC Position—to the OLE/FAMS senior leadership team for concurrence. (Id. ¶ 24.) In February 2017, the OLE/FAMS senior leadership team included Director Roderick Allison, Deputy Directors David Hand, Norman Robinson, and Annmarie Lontz, OLE/FAMS Business Management Office Director Rana Khan, and Deputy Assistant Administrator Director Eric Sarandrea. (Id. ¶ 25.)

Eric Sarandrea briefly discussed the Panel's selections with Director Allison, concurred with them, and, on February 23, 2017, responded to the February 17, 2017 email from Rana Khan requesting that the Promotion Panel's selections be notified of their promotion/transfer. (DSUMF ¶ 26.)[8] On the same date, the FAMS sent out a broadcast message communicating the selections to the FAMS. (Id. ¶ 27.) Plaintiff learned of his non-selection for the Atlanta and Miami ASAC vacancy announcements on the date of the broadcast message. (Id. ¶ 28[9]; see also PSAMF ¶ 6, stating plaintiff was not selected.)[10] Both selectees for the positions

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[8] The record plaintiff cites (see PR-DSUMF ¶ 26) fails to contravene the above proposed fact. Accordingly, the Court deems DSUMF ¶ 26 admitted.

[9] The record plaintiff cites (see PR-DSUMF ¶ 28) fails to contravene the above proposed fact. Accordingly, the Court deems DSUMF ¶ 28 admitted.

[10] The Court excludes PSAMF ¶ 7, which asserts that plaintiff was more qualified than the persons selected, as a legal conclusion. See N.D. Ga. Civ. R.

sought by plaintiff are white males, as is Brian Beverly, who applied for the Atlanta ASAC position and was not selected. (DSUMF ¶ 29; see also PSAMF ¶¶ 3-4, stating that Messrs. Bishop and Punchard are white.)

C. Anonymous Complaint Letter About Plaintiff

On March 29, 2017, three divisions within TSA—the Office of Civil Rights, Diversity and Inclusion ("CRDI"), FAMS Field Operations, and TSA's Office of Inspections ("OOI")—received a typed, anonymous letter from "Atlanta Field Office employees" alleging that plaintiff abused, harassed, intimidated, blackmailed, and sexually harassed "women at every level at the ATL field office." (DSUMF ¶ 30.)[11] The anonymous letter also alleged that SAC Cole "favored and shielded" plaintiff. (Id. ¶ 31; see also copy of complaint letter ([48-3], at 319) & PSAMF ¶¶ 21-23, acknowledging defendant received complaint letter.) In addition to the complaints about plaintiff and SAC Cole (both of whom are African American), the anonymous letter raised complaints about the ombudsman (non-

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56.1(B)(1)(c). The Court further excludes PSAMF ¶ 9, which provides a co-worker's opinion about plaintiff's qualifications, as immaterial.

[11] Because plaintiff's denials do not contravene the above proposed fact (see PR-DSUMF ¶ 30), the Court deems it admitted.

African American) and the OOI (leadership of which was non-African American). (PSAMF ¶ 25.)[12]

Upon receipt of the letter, Robert Bond, SAC for Field Operations at FAMS HQ in Reston Virginia, submitted an Incident Tracking Report ("ITR") on plaintiff and SAC Cole, documenting the contents of the letter. (DSUMF ¶ 32.)[13] FAMS also notified TSA's Sexual Harassment Prevention Coordinator, Kevin Hulse (African American), of the allegations. (Id. ¶ 34.) After being notified of the allegations, Mr. Hulse recommended that the FAMS issue a cease and desist order to plaintiff and that OOI conduct an investigation. (Id. ¶ 35.)[14]

In accordance with TSA Management Directive 1100.73-3, "Prevention and Elimination of Sexual Harassment in the Workplace," paragraph 6(B), "supervisors

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[12] Plaintiff complains that TSA did not investigate the allegations against the OOI or the ombudsman. (PSAMF ¶ 32.) The anonymous letter did not accuse either the OOI or the ombudsman of harassment. The letter simply alleges that complaints about plaintiff had been made to the OOI and the ombudsman but to no avail. (See copy of anonymous letter [48-3], at 319.)

[13] An ITR is used by the FAMS to track any notable events, including allegations of discrimination, and are referred to OOI for action as necessary; specifically, an ITR is submitted to the FAMS Incident and Activities Coordination and Trends Office, which then forwards it to OOI. (DSUMF ¶ 33.)

[14] Because the above proposed facts are supported by the record cited, plaintiff's denials (see PR-DSUMF ¶¶ 34-35) are without merit.

and management officials must ensure that prompt and effective corrective action is taken when sexual harassment allegations occur . . . includ[ing], but … not limited to, initiating a fact-finding inquiry and informing the alleged harasser of the alleged sexual harassment." (DSUMF ¶ 36.) Allegations of sexual harassment involving FAMS must be referred to OOI for investigation. (Id. ¶ 37.)

TSA policy does not differentiate between anonymous and identified accusers or their race, color, or sex, when addressing allegations of sexual harassment. (DSUMF ¶ 38.)[15] OOI, which is an independent investigatory office within TSA, refers allegations that name an individual as the harassing employee to the DHS Office of Inspector General regardless of whether the accuser(s) identify themselves or submit anonymous complaints. (Id. ¶ 39.)[16]

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[15] Defendant shows that between 2016 and 2021, the OOI opened 16 investigations based on anonymous complaints of harassment against federal air marshals. (DSUMF ¶ 43.) Plaintiff's relevance objection (see PR-DSUMF ¶ 43) is overruled. Plaintiff's assertion that an anonymous complaint letter cannot be investigated (PSAMF ¶ 41) is excluded an argumentative. Finally, his claim that, in his experience, anonymous complaints are not investigated (see PSAMF ¶ 28), is excluded as lacking foundation. Plaintiff is not in a position to know what the TSA does with anonymous complaints; the undisputed evidence is that TSA investigates them.

[16] Because the above proposed facts are supported by the record cited, plaintiff's denials (see PR-DSUMF ¶¶ 38-39) are without merit.

On April 6, 2017, plaintiff received a "cease and desist order" from Robert Bond, notifying him of the allegations against him and instructing him to refrain from any misconduct or retaliation. (DSUMF ¶ 40.)[17] From April 18 to July 3, 2017, OOI conducted an investigation into plaintiff's conduct, SAC Cole's conduct, and another SFAM, all of whom were employed at the AFO; the investigation did not result in any discipline against plaintiff for gender-based harassment. (Id. ¶ 41.)[18]

The OOI forwarded its Report of Investigation [48-18] in Case No. I 17 0186 to the TSA's Office of Professional Responsibility ("OPR") for review and adjudication. (See Mar. 16, 2018 letter from D. Stark to P. Dabney [60-1], at 1.) Upon review of that Report, the OPR transmitted a Letter of Reprimand ("LOR") to plaintiff that contains the following summary of the OOI's investigation:

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[17] Plaintiff contends that the cease and desist order has never been rescinded (PSAMF ¶ 34), while defendant contends that it has (DR-PSAMF ¶ 34). Any dispute is immaterial because it is not discriminatory or retaliatory to direct someone to conduct themselves in compliance with policy.

[18] Plaintiff makes the hearsay assertion that the investigator and a Panel member told him that the investigation was actually about SAC Cole. (PSAMF ¶¶ 29-30, 35, citing Dabney Dep. [49-1] 103.) Plaintiff neglects to cite his next, non-hearsay statement, which was that the investigation "had a lot to do with me. It had everything to do with me. As a matter of fact, I was the direct subject." (Id.) The Court thus disregards PSAMF ¶¶ 29-30 and 35.

> OOI interviewed approximately sixty (60) former and current employees at the ATL FO and provided an Investigative Analysis of their findings. The results of the OOI Survey Questions showed that you failed to treat employee[s] with dignity and respect, you created a hostile work environment, and employees believed that you would retaliate against them for providing information to OOI about you. Some employees also reported that they felt intimidated by you and you spoke to employees in a demeaning and condescending manner.

(Id.)[19] As a result of these findings, the OPR issued plaintiff the LOR for "conduct unbecoming a supervisor" that was to remain in his personnel folder for up to two years. (Id. at 3; see also PSAMF ¶ 36, noting plaintiff's receipt of the LOR.)[20]

Plaintiff makes a number of claims about the OOI's investigation. First, he asserts that the investigation carried with it the possibility of termination. (PSAMF ¶ 38.) While that may be true, plaintiff was not terminated; he received the LOR. (DR-PSAMF ¶ 38.)[21] Second, Mr. Dabney asserts that the investigation negatively

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[19] Plaintiff is correct that the record cited by defendant does not support DSUMF ¶ 42. (see PR-DSUMF ¶ 42.) The proper record citation for the proposed fact would have been the LOR.

[20] Although plaintiff claims that the LOR negatively impacted his ability to obtain promotions (PSAMF ¶ 37), this claim is immaterial given there is no probative evidence that plaintiff applied for promotions after March 16, 2018 and was unsuccessful because of the LOR.

[21] Plaintiff also claims that the LOR was subsequently referenced in a three-day suspension he received in 2019. (PSAMF ¶ 39.) The Court sustains defendant's materiality objection to this proposed fact, as it relates to an EEO case that is not at issue here. (see DR-PSAMF ¶ 39.)

impacted his relationships at work. (PSAMF ¶ 40.) Although defendant cannot challenge that subjective perception, an employer who receives a harassment complaint must investigate regardless of others' perception of the accused harasser. (DR-PSAMF ¶ 40.) Third, plaintiff claims that he never harassed any women at TSA. (PSAMF ¶¶ 24, 26.) The OOI's investigators and the OPR obviously held different opinions. (DR-PSAMF ¶¶ 24, 26.) Finally, plaintiff makes the argumentative assertion that the TSA did not really believe the allegations of harassment made against him because it failed to follow policy, which would have required that he be separated from all the women in the office. (PSAMF ¶ 31.)[22] The record shows that defendant followed its policy. It chose one of the options provided by the policy—issuance of a cease and desist order. (See supra note 22.) Had plaintiff's accusers identified themselves, then it would have been possible to separate him from the alleged victims. However, given their anonymity, separation from every female in the office would have been impossible without total disruption of the workplace.

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[22] TSA Handbook 1100.73-3, Anti-Harassment at 7 ("appropriate corrective action may include issuing the alleged harasser a Cease and Desist Order, No Contact Order, or separating the alleged harasser from the affected person.").

D. Plaintiff's EEO Process

On April 7, 2017, plaintiff initiated contact with a TSA Equal Employment Opportunity ("EEO") counselor regarding his non-selection for the two ASAC positions and the issuance of the April 6, 2017 cease and desist order, identifying Regional Director John Woods, Division Director David Hand, and Assistant Director Eric Sarandrea as the management officials against whom he made his allegations. (DSUMF ¶ 44.) On June 28, 2017, plaintiff filed a formal complaint of discrimination, No. HS-TSA-01285-2017, which was the first time he had ever filed an EEO complaint. (Id. ¶ 45; see also id. ¶ 49 (before filing HS-TSA-01285-2017, plaintiff had no prior formal EEO activity).)

Plaintiff's formal complaint alleged that he had been discriminated against based on his race, color, and sex, and harassed continuously based on his race, color, sex, and protected activity (i.e., efforts to oppose sexual harassment, efforts to oppose race discrimination, and participation in EEO activities as a member of management), and retaliated against when: on April 5, 2017, he was issued a cease and desist order; on April 5, 2017, an investigation was launched; on April 5, 2017, he was the subject of an investigation, and for the non-selections for FAM16-

198827-I and FAM16-198425-I. (DSUMF ¶ 46.)[23] Plaintiff states that his prior protected EEO activity included handling disciplinary matters as the Administrative SFAM, testifying as a witness on behalf of management, and being associated with former SAC Cole, whom plaintiff claims had opposed discrimination. (Id. ¶ 48; see also PSAMF ¶ 33.)[24]

After filing the EEO Complaint (HS-TSA-01285-2017) that preceded the instant litigation, plaintiff engaged in the EEO process by filing formal EEO complaints (HS-TSA-02348-2018 and HS-TSA-02294-2019), both of which are currently pending before the EEOC, and raised harassment allegations to TSA's Anti-Harassment Program Office, which investigated the incidents and closed them upon finding insufficient evidence to support the allegations. (DSUMF ¶ 50.)

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[23] While plaintiff testified that he is alleging sex discrimination because he has not seen Caucasian males treated or disciplined in the same way as African-American males, he abandoned his gender discrimination claim during his EEO administrative deposition. (DSUMF ¶ 47.) Also, while plaintiff's EEO complaint mentions April 5, 2017, it appears that April 6 is the correct date. However, any dispute is immaterial.

[24] The Court addresses protected activity infra, but notes for now that plaintiff was testifying as a TSA manager in EEO complaints filed by others. (DR-PSAMF ¶ 33.)

II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary

judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

III. ANALYSIS

In Count I, plaintiff alleges that he was subjected to a hostile work environment ("HWE") based on his race, color, and protected activity when defendant investigated the anonymous complaint letter received about him. (Compl. [1] ¶ 78.)

In Count II, plaintiff alleges that he was discriminated against on the basis of his race and color when he was not promoted, by defendant's issuance of the cease and desist letter, and by defendant's investigation of the anonymous complaint letter received about him. (Compl. [1] ¶ 88.)[25]

In Count III, plaintiff alleges that he was retaliated against for engaging in protected speech. (Compl. [1] ¶ 91.)

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[25] Although the Complaint also alleges sex/gender discrimination in Counts I and II, plaintiff abandoned any such claim in the administrative EEO proceedings. (See PR-DSUMF ¶ 47.) Moreover, plaintiff failed to respond to defendant's arguments here that summary judgment should be entered against his sex/gender discrimination claims. (See Def.'s Br. [47-1] 13.) "[A] party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed." Kramer v. Gwinnett Cty., 306 F. Supp. 2d 1219, 1221 (N.D. Ga.), aff'd, 116 F. App'x 253 (11th Cir. 2004) (table decision); see also Burnette v. Northside Hosp., 342 F. Supp. 2d 1128, 1140 (N.D. Ga. 2004) ("Failure to respond to the opposing party's summary judgment arguments regarding a claim constitutes an abandonment of that claim and warrants the entry of summary judgment for the opposing party."). Therefore, the Court does not address the abandoned sex/gender discrimination claims and summary judgment should be entered against them.

Defendant's Motion seeks summary judgment against all three Counts. The Court summarizes defendant's arguments and plaintiff's responses thereto below as it addresses each Count of the Complaint.

A. Plaintiff HWE Claims (Count I)

To establish a prima facie HWE claim under Title VII, Mr. Dabney must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment was based on his race, color, or protected activity; (4) that the harassment "was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"; and (5) a basis for holding his employer liable. See Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).

Demonstrating the fourth element of a prima facie case of a hostile work environment requires the plaintiff to show that the work environment was "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotation marks and citation omitted). As the Supreme Court has stated, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and

conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (internal quotation marks and citation omitted). Thus, the alleged harassing conduct must be "extreme" to amount to a change in the terms and conditions of employment, and the "ordinary tribulations of the workplace" such as "sporadic use of abusive language, . . . jokes, and occasional teasing" are not enough—since Title VII is not a "general civility code." Id. (internal quotation marks and citation omitted).

The conduct must be severe or pervasive not only from the plaintiff's subjective perception but also from a reasonable person's objective perception. Harris, 510 U.S. at 21; see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (in evaluating whether a reasonable person would find conduct to be sufficiently severe or pervasive, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances'"); Mendoza, 195 F.3d at 1246 ("[C]ourts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment.").

Thus, a court must consider the "totality of the circumstances" in determining whether an environment is severe or pervasive enough to be actionable under Title VII; it must consider not only the frequency of the incidents alleged but also the gravity of those incidents. Harris, 510 U.S. at 23. Other factors that are relevant are whether the offensive conduct is physically intimidating or humiliating, and whether it unreasonably interferes with plaintiff's work performance. Id.

As noted above, plaintiff alleges in Count I that he was subjected to a HWE based on his race, color, and protected activity when defendant investigated the anonymous complaint letter received about him. Defendant contends that its investigation of the anonymous complaint letter did not create a HWE for plaintiff. Although plaintiff belongs to a protected class (element one), defendant asserts that the undisputed material facts show that plaintiff was not subjected to unwelcome harassment (element two); that he was not victimized because of his race, color, or protected activity (element three); and that nothing occurred that was sufficiently severe or pervasive to alter the terms and conditions of plaintiff's employment and create a discriminatorily abusive working environment (element four). (Def.'s Br. [47-1] 6-12.) Plaintiff's Response Brief [51-1] completely fails to point the Court to any probative record evidence showing that any conduct by defendant's agents here in investigating the anonymous complaint was sufficiently severe or pervasive

to alter the terms or conditions of his employment and create an abusive working environment.[26]

The undisputed facts show that the TSA received an anonymous complaint letter about plaintiff which it had to investigate. The TSA issued plaintiff a cease and desist order (instead of the more severe possible sanction of removal from the workplace). There is no evidence that plaintiff was abused or maligned by the investigators. After a thorough investigation, plaintiff was not disciplined for gender-based harassment, but he received a LOR. There is no evidence that plaintiff failed to receive a future promotion because of the LOR. Plaintiff's subjective perception that he was not as well liked in the workplace following the issuance of the cease and desist order fails to show that he endured a HWE.[27] Therefore, summary judgment should be entered for defendant on Count I.

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[26] As noted above, plaintiff alleged in Count I that defendant's investigation of the anonymous complaint letter received about him created the HWE. (Compl. [1] ¶ 79.) To the extent plaintiff's Response Brief can be read to argue that other actions created a HWE, like a failure to identify who ordered the investigation (Pl.'s Resp. [51-1] 9), the Court disregards them. See Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

[27] Plaintiff also alleges that he was subjected to retaliatory harassment. (Compl. [1] Count I). The crux of retaliatory harassment depends on whether the alleged harassment would dissuade a reasonable federal-sector employee from

B. Plaintiff's Race/Color Discrimination Claims (Count II)

Title VII makes it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race or color. 42 U.S.C. § 2000e-2(a)(1). "Faced with a defendant's motion for summary judgment, a plaintiff asserting an intentional-discrimination claim under Title VII . . . must make a sufficient factual showing to permit a reasonable jury to rule in h[is] favor." Lewis v. City of Union City, Ga., 918 F.3d 1213, 1217 (11th Cir. 2019). He may do so in a variety of ways, such as by (1) presenting direct evidence of discrimination, (2) satisfying the burden-shifting framework set out in McDonnell Douglas v. Green, 411 U.S. 792, 800 (1973), or (3) demonstrating a "convincing mosaic" of circumstantial evidence that warrants an inference of intentional discrimination under Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011). Lewis, 918 F.3d at 1220 & n.6. Mr. Dabney proceeds down the second lane only.

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making or supporting a charge of discrimination. See Babb v. Sec'y, Dep't of Veterans Affairs, 992 F.3d 1193, 1207 (11th Cir. 2021). Plaintiff's actions clearly demonstrate that the work environment of which he complains did not deter him from exercising his right to engage in protected activity. He filed two subsequent EEO complaints after the one giving rise to the instant case, and filed two separate complaints of harassment with defendant's Anti-Harassment Program. (DSUMF ¶ 50.)

McDonnell Douglas established a three-part framework to analyze discrimination claims. Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the employer meets this burden, the inference of discrimination drops out of the case, and the plaintiff has the opportunity to show by a preponderance of the evidence that the proffered reason was pretextual. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).[28]

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[28] To demonstrate pretext, plaintiff must do more than quarrel with defendant's business decisions or substitute his business judgment for that of defendant's. Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000). "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004). Plaintiff may demonstrate that defendants' reason was pretextual by revealing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [its] proffered legitimate reason[] for its action that a reasonable factfinder could find [it] unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation marks and citation omitted). However, "[a] reason is not pretext for discrimination 'unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.'" Brooks v. Cty. Comm'n of Jefferson Cty., Ala., 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting St. Mary's Honor Ctr., 509 U.S. at 515).

As noted above, plaintiff alleges that he was discriminated against (1) when he was not promoted, (2) by defendant's issuance of the cease and desist letter, and (3) by defendant's investigation of the anonymous complaint letter. The Court addresses these three contentions below.

1. Failure to Promote

Plaintiff asserts that the failure to promote him to one of the ASAC positions constitutes disparate treatment in violation of Title VII. Under the McDonnell Douglas framework, to establish a prima facie case of discriminatory failure to promote, a plaintiff must prove the following:

> (1) that he is a member of a protected class; (2) that he was qualified for and applied for the promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted. Once these elements are established, the defendant has the burden of producing a legitimate, non-discriminatory reason for the challenged employment action. If such a reason is produced, a plaintiff then has the ultimate burden of proving the reason to be a pretext for unlawful discrimination.

Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001) (internal quotations marks and citations omitted).

Here, considering all the facts in the light most favorable to the non-moving party, plaintiff has established his prima facie case. Plaintiff is African American, was qualified for and applied for the promotion, was rejected, and other employees who were not African American were promoted. Therefore, under McDonnell

Douglas, the burden shifts to defendant to produce a legitimate, non-discriminatory reason for the challenged actions. McDonnell Douglas, 411 U.S. at 802.

The defendant has produced legitimate, non-discriminatory reasons for the failure to promote plaintiff. Specifically, both of the selectees, Mark Bishop (Miami) and James Punchard (Atlanta), were well-qualified for the ASAC positions. Both had considerably more experience with the TSA and in other law enforcement roles than plaintiff had. The voting members of the Promotion Panel for the 2016 ASAC vacancies, two of whom were African American (Messrs. Smith and Stevenson), discussed plaintiff's and Brian Beverly's (Caucasian) resumes, noting their experience was limited to one field office and that they had no secondary J-Band roles, whereas both Mr. Bishop and Mr. Punchard had served in positions outside of their OLE/FAMS field offices, including serving as the AFSD-LE. Mr. Bishop had served as the AFSD-LE for the U.S. Virgin Islands and in Denver; he also worked as a SFAM in Denver, an FBI Joint Terrorism Task Force investigator, a Drug Enforcement Administration agent, and a Deputy Sheriff. Mr. Punchard had served as an AFSD-LE, a supervisor in multiple field offices, a Border Patrol Agent, and a local sheriff. The Promotion Panel voted unanimously for Mr. Punchard and Mr. Bishop. Given these articulated reasons, plaintiff must

raise a triable issue over whether these reasons are pretextual. See McDonnell-Douglas, 411 U.S. at 804.

In a failure to promote claim, a plaintiff faces a heavy burden to establish pretext.

> [Plaintiff] "cannot . . . establish pretext simply by showing that [he] is more qualified than [the person hired]. . . . [D]isparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004) (citations omitted); see also Higgins v. Tyson Foods, Inc., 196 F. App'x 781, 783 (11th Cir. 2006) (per curiam) ("Since Ash [546 U.S. 454 (2006)] our Court has used the Cooper test.").

On the record in this case, plaintiff has failed to offer evidence that the disparity in qualifications was such that no reasonable person could have chosen Messrs. Punchard or Bishop over him. To the contrary, the Panel's unanimous decision strongly supports a finding that promoting Messrs. Punchard and Bishop instead of plaintiff was a reasonable decision.[29] Therefore, the Court recommends entry of summary judgment for defendant on plaintiff's failure to promote claim.

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[29] When two of the three voting members of the Promotion Panel were African Americans, plaintiff's pretext argument is unconvincing at best.

2. Issuance of the Cease and Desist Letter

Plaintiff contends that defendant discriminated against him on the basis of race and color when it issued the cease and desist order. Under the McDonnell-Douglas framework, Mr. Dabney can establish a prima facie case of race or color discrimination by showing that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was treated less favorably than a similarly-situated individual outside his protected class. Lewis, 918 F.3d at 1220-21.

Defendant contends, and plaintiff does not refute, that the issuance of the cease and desist order did not constitute an adverse employment action (i.e., element two of the prima facie case). See Sanchez v. California, 90 F. Supp. 3d 1036, 1057 (E.D. Cal. 2015) ("[C]ease and desist memorandum and written counseling were not adverse employment actions as they did not affect the terms, conditions and privileges of Plaintiff's employment."); see also Henderson v. City of Birmingham, Ala., 826 F. App'x. 736, 741 (11th Cir. 2020) (per curiam) (explaining that "an internal investigation—like any alleged adverse employment action—is not sufficient to state a discrimination claim if it did not cause him any of the negative job consequences"); Chapman v. U.S. Postal Serv., 442 F. App'x 480, 484 (11th Cir. 2011) (per curiam) (requiring plaintiff to sit through an

investigative interview and issuing her a letter of warning were not adverse employment actions).[30]

Defendant also shows, and plaintiff again does not refute, that Mr. Dabney fails to establish element four of his prima facie case. This element requires a plaintiff to show that he and his comparator were "similarly situated in all material respects." Lewis, 918 F.3d at 1226. However, plaintiff points to no similarly-situated TSA employee outside his protected class against whom anonymous allegations were made who was not investigated. Given plaintiff's failure to establish a prima facie discrimination claim, summary judgment should be entered for defendant on Count II. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1433 (11th Cir. 1998) ("[S]ummary judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a *prima facie* case.").

3. Investigation of the Anonymous Complaint Letter

Finally, plaintiff alleges that he was discriminated against because of his race or color when the defendant investigated the anonymous complaint letter it

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[30] Plaintiff does not allege in Count II that the LOR was an adverse employment action. But, even if he had, the LOR was not. See Wallace v. Ga. Dep't of Transp., 212 F. App'x 799, 801 (11th Cir. 2006) (per curiam) (written reprimand did not constitute an adverse employment action needed for a prima facie disparate treatment case).

received accusing him of sexual harassment. As a practical matter, what would plaintiff have had the TSA do? Ignore the complaint letter? Ignoring the letter would have violated policy, gone against the TSA's practice of investigating all complaints (whether anonymous or signed), and opened TSA up to lawsuits from the women who had complained. See McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) ("Employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment.").

In situations like this, courts have had no problem rejecting claims like Mr. Dabney's. For example, in Flanagan v. Ashcroft, 316 F.3d 728 (7th Cir. 2003), the plaintiff-agents there, as the basis for their discrimination claim, alleged that the DEA's conduct of its investigation was "egregious" and "unprofessional," that the DEA treated the agents and other witnesses in a "hostile and accusatory manner" and in such a way as to "give credence to false accusations" and to cause the circulation among the Chicago law enforcement community of "untrue rumors concerning [the agents'] professional competence and alleged misconduct," and that the botched investigation resulted in a "sexually charged, racially charged, hostile and offensive working environment." Id. at 729 (internal quotation marks

and citation omitted). In affirming the district court's entry of summary judgment, the Seventh Circuit held as follows:

> Permitting discrimination claims based on such investigations, we explained [in a previous case], would "place[] employer[s] on a razor's edge": ignore complaints of sexual harassment and face Title VII liability if the complaints are meritorious, or investigate them thoroughly and face discrimination claims from the targeted employees.

Id. at 730 (quoting McDonnell, 84 F.3d at 261).

Given that allowing plaintiff to sue for discrimination in this instance would, as the Seventh Circuit held, place an employer like the TSA on "a razor's edge," summary judgment should be granted against him. See Rademakers v. Scott, No. 2:07-CV-718, 2009 WL 3459196, at *2 (M.D. Fla. Jan. 22, 2009), aff'd, 350 F. App'x 408 (11th Cir. 2009) ("An investigation into alleged misconduct, even one that is a 'sham,' . . . does not constitute a tangible employment action for the purposes of Title VII. . . . Moreover, an employer must be permitted to investigate allegations of employee misconduct without facing the possibility that the investigated employees will bring a lawsuit.")

In any event, there is simply no probative evidence suggesting that plaintiff's race or color had anything to do with why the TSA opened the investigation. The record shows that the TSA opened the investigation because it received the

anonymous complaint letter. There is no evidence that if plaintiff had been white, for example, the TSA would have ignored it. What makes a race or color discrimination claim so far-fetched here is that TSA's Sexual Harassment Prevention Coordinator, Kevin Hulse (African American), recommended that the FAMS issue a cease and desist order to plaintiff and that OOI conduct an investigation.

C. Plaintiff's Retaliation Claim (Count III)

As stated above, plaintiff alleges that he was retaliated against for engaging in protected speech. (Compl. [1] ¶ 91.) In response to defendant's Motion, which asserts that plaintiff did not engage in any protected activity before the alleged retaliatory acts occurred, plaintiff contends that his protected EEO activity was participating as a witness for the TSA at EEO hearings from 2010 and continuing through the current time. (Pl.'s Resp. [51-1] 16.)

In the absence of direct evidence of retaliation (and there is none of that here), a retaliation claim is analyzed under the same burden-shifting framework as a discrimination claim, which means that the plaintiff must first establish a prima facie case. See Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). A prima facie case for a retaliation claim requires a plaintiff to establish that (1) he engaged in protected activity, (2) he suffered a materially adverse employment

action, and (3) there was a causal connection between the two events. Manley v. DeKalb Cty., Ga., 587 F. App'x 507, 512 (11th Cir. 2014) (per curiam). If a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to rebut the presumption by articulating a legitimate, non-retaliatory reason for the adverse employment action. Bryant, 575 F.3d at 1308. After the defendant makes this showing, the plaintiff has a full and fair opportunity to demonstrate that the defendant's proffered reason was merely a pretext. Id.

An employee is protected from retaliation if (1) he has opposed any practice made an unlawful employment practice (the "opposition clause") or (2) he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII (the "participation clause"). See Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1350 (11th Cir. 1999).

Plaintiff contends that his testimony as a witness for the TSA in EEO hearings was protected participatory activity. (Pl.'s Resp. [51-1] 16.) The Court agrees, but fails to see how that is relevant here. There is no probative evidence that anything he said in any of those unidentified hearings over so many years would have motivated the TSA to retaliate against him now.

Defendant also contends that, assuming protected activity, plaintiff fails to establish the second element of his prima facie case because he suffered no

materially adverse employment action. An adverse employment action in the retaliation context is one that harmed the plaintiff and "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks and citation omitted). Because there is no probative evidence that plaintiff was harmed here, and no probative evidence that anything the TSA did dissuaded plaintiff from making or supporting an EEO complaint (indeed he filed complaints after he was investigated), summary judgment should be entered for defendant on the retaliation claim alleged in Count III. See Turlington, 135 F.3d at 1433 ("[S]ummary judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a *prima facie* case.").

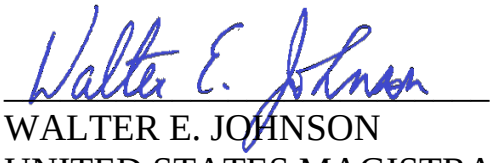
IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that defendant's Motion for Summary Judgment [47] be **GRANTED**.

The Clerk is **DIRECTED** to:

1. substitute Alejandro Mayorkas for Chad Wolf as the defendant; and
2. terminate the reference to the undersigned Magistrate Judge.

SO RECOMMENDED, this 26th day of August, 2021.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE