IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOSEPH DESOTO,	:	
	:	
Plaintiff,	:	
	:	**Civil No. RWT-10-3208**
v.	:	
	:	
DEPARTMENT OF DEFENSE,	:	
	:	
Defendant.	:	

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Joseph DeSoto, M.D. (DeSoto) filed the predecessor to his current Complaint in June 2010, less than two months after he filed his formal EEO complaint of discrimination. See Case No. DKC-10-1610, Docket No. 1 (June 17, 2010). The first time he filed, his complaint was premature, directed at the incorrect Defendant, conclusory, full of basic factual errors, and insufficient to support its claims. The United States moved to dismiss that complaint for lack of subject matter jurisdiction because it was premature. Id., Docket No. 8. DeSoto voluntarily withdrew it. Id., Docket No. 9.

DeSoto's current Complaint is no longer premature, but it is otherwise identical in form and substance. From August 2007 until his appointment expired by its terms on June 30, 2010, DeSoto was an Assistant Professor at the Graduate School of Nursing (GSN) in the Uniformed Services University for Health Sciences (USUHS) located in Bethesda, Maryland. DeSoto alleges that the Department of Defense violated Title VII of the Civil Rights Act of 1964 by creating a hostile work environment because of his religion and protected EEO activity, by retaliating for his protected EEO activity, and by subjecting him to religious discrimination. The Complaint contains disturbing allegations about anti-Semitic graffiti painted on DeSoto's car, death threats purportedly made against DeSoto, "slander" against DeSoto, and charged remarks regarding DeSoto's religion. What the Complaint does not contain are allegations sufficient to impute the disturbing allegations to USUHS; to reveal remarks that were so "severe or pervasive" as to permeate USUHS with discriminatory intimidation, ridicule, and insult; to permit a reasonable inference that the decision not to renew DeSoto's faculty appointment was motivated by retaliation or discrimination; or to

suggest that any employee similarly situated to DeSoto was treated more favorably. The Complaint, because of its vagueness, also does not demonstrate that the actions underlying DeSoto's hostile work environment claim were submitted to an EEO counselor within the jurisdictional forty-five day limit. Furthermore, the evidence submitted with this motion will show that DeSoto was not meeting USUHS's legitimate expectations and that Dean Hinshaw had ample and legitimate non-discriminatory reasons for choosing not to renew DeSoto's appointment. In particular, Dean Ada Sue Hinshaw of the Graduate School of Nursing found DeSoto's research performance lacking, his interactions with others hostile, and his behavior disruptive.

This Court should dismiss DeSoto's complaint for failure to state a and failure to bring timely claims. To the extent DeSoto's claims are not dismissed, this Court should enter summary judgment on the remaining claims.

II. STATEMENT OF FACTS

The Graduate School of Nursing (GSN) is a school within the Uniformed Services University for Health Sciences (USUHS). Exhibit 1, ¶¶ 1-2. The mission of the GSN is as "a diverse interdisciplinary community providing the nation with the highest quality, advance practice nurse clinicians, scientists and scholars dedicated to the Federal Health Service." Ex. 1, Declaration of Hinshaw, ¶ 3. The GSN student body consists of military officers from the uniformed services who go to USUHS to complete a Master's or Doctorate of Philosophy degree in a variety of nursing specialties. Ex. 1, ¶ 6. The faculty consists of both military and civilian individuals. Ex. 1, ¶ 5. In 2009-2010, there were approximately 160 students and 30 faculty members in the GSN. Ex. 1, ¶¶ 5, 6. The faculty members have Master's degrees and/or doctoral degrees with practical expertise

in advanced practice nursing. Ex. 1, ¶ 5. Dean Hinshaw places major emphasis on faculty publishing and submitting grants for research. Ex. 1, ¶ 8.

A. The Graduate School of Nursing Hires DeSoto As An Assistant Professor In Non-Tenure Track, Term-Limited Appointment Until June 2010.

During the first half of 2007, the GSN conducted a six-month search to fill two doctoral faculty positions. Ex. 5A (Search Committee Report). DeSoto was interviewed on two separate occasions for one of these positions. Id. One reviewer was concerned that DeSoto "at time misrepresents himself." The same reviewer expressed concerns about DeSoto's temperament in that he was "very belligerent" and opined that DeSoto was "socially immature." Ex. 2 (5/22/2007 Talbot Email). Ultimately, DeSoto was selected for the position. Ex. 5A.

On August 6, 2007, the Acting Dean of the GSN, General William Bester, hired Desoto as an Assistant Professor with a term-limited appointment until June 30, 2010. Ex.5B (SF-50). DeSoto was hired as a non-tenured, non-tenure track Assistant Professor. Ex. 5C.

B. GSN Management Receives Sporadic Reports Of Aggressive, Hostile Behavior And Other Questionable Conduct By DeSoto.

Several aggressive, accusatory incidents occurred between DeSoto and other faculty and staff colleagues both within the GSN and the wider University community. Ex. 1, ¶ 18. Within the GSN, a pattern of troubling behavior by DeSoto was evident to Dean Hinshaw. Id. When involved in professional disagreements with faculty colleagues or staff, DeSoto would engage in intimidating behavior. Id. For example, he would often stand or lean over the individual he was speaking with, raise his voice, raise his hand, thrust his finger in the individual's face, make personal accusations, and speak in an overall disrespectful manner and tone. Id.

In September 2007, a co-occupant of DeSoto's building approached DeSoto to discuss verbal abuse of the cleaning staff by DeSoto. Ex. 2D (Tackitt Memorandum). The co-occupant was a retired Captain of the U.S. Navy Nurse Corps. Id. During the brief encounter, the retired Captain found DeSoto's behavior "extremely irrational and frankly, very scary." Id. The retired Captain submitted a Memorandum for the File regarding the incident to DeSoto's department head. Ex. 2E (9/27/2007 Tackitt Email); see also Exs. 2B & 2C.

In October 2008, DeSoto and another Faculty Senate member disagreed over whether non-billeted faculty members should be allowed to vote as faculty members. One faculty Senator protested that disallowing votes would disenfranchise those non-billeted faculty members. DeSoto responded that "[t]alk about dis-infrachisement [sic] is nonsense and juvenile." Ex. 2F at 2 (10/15/2008 Wilson Email). In a follow-on exchange of email, DeSoto maintained that "[f]or you to use racially charged words like disenfranchisement to a person of color and compare those historical actions to a policy of the GSN . . . is outrageous." Ex. 2F at 1. DeSoto further advised that "[n]ext time you talk about inappropriate or nasty take a good hard look in the mirror before you say anything on an email or when you slander someone behind their back." Id.

In the fall of 2008, the newly appointed Dean of the GSN, Ada Sue Hinshaw, observed angry behavior directed by DeSoto toward a GSN colleague, Dr. Gloria Ramsey, during a Faculty Council meeting. Ex. 1, ¶ 20. Dean Hinshaw counseled DeSoto following that meeting and told him that such behavior was unacceptable. Id.

In early June 2009, DeSoto attended a professional conference in Florida while on temporary duty and at government expense. Ex. 1, ¶ 25; Ex. 2G (Orange County Sherriff's report). One

evening, while DeSoto was receiving a private lap dance in the apartment of an unidentified woman, his rental car was stolen. Ex. 2G. In the trunk of the car were two laptop computers that had been bought with research funds. Id.; Ex. 2H (6/8/09 Almeda Email String). When an employee of the foundation that tracks grant laptops pressed for details on the incident, DeSoto responded that "it was resolved last week" and that the car rental company was "preparing to get a restraining order" against that employee. Ex. 2H at 1. In late June 2009, when notified by email of discrepancies in his lab, DeSoto demanded an apology for the outrageous violation of due process and invading his personal property. Ex. 1, ¶ 22.

C. DeSoto Is Counseled About Changes Needed For Tenure-Eligible Track.

In the fall of 2008, DeSoto requested to move to the tenure-eligible track from the tenure-ineligible track. Ex. 2J at 2 (9/25/2008 DeSoto Request). His request was supported by his Department Head, Diane Padden. Ex. 2J (10/8/2008 Padden Memorandum). Dean Ada Hinshaw concurred with Padden's support of the request based in large part on the research grants DeSoto had brought with him. Id. Dean Hinshaw had been hired in part to build the research program at the GSN and wanted to encourage a faculty member who appeared to be embracing the new emphasis on research. Ex. 1, ¶¶ 8, 13. At that time, Dean Hinshaw been the Dean for a few months.

In October 2009, the USUHS Chief of Staffing & Classification, Civilian Human Resources, returned the request for change in tenure track to the Dean's Executive Assistant, Dr. Ernest Hepler. Ex. 2K (10/20/2009 Justice Email). The request for change in track had not included the required approval of the faculty Committee on Appointments, Promotion, and Tenure (CAPT). Id.; Ex. 1,

¶ 14. The requirement for approval by the CAPT committee is stated in the governing University instruction. Ex. 5D (Excerpt, USUHS Inst. 1100, Encl. 4).

When DeSoto's request to switch to the tenure-eligible track was returned, Dean Hinshaw took a fresh look at DeSoto's research performance and resume. Ex. 1, ¶ 15. She determined that DeSoto had been unproductive in his over two years of research at the GSN. Id. In particular, his peer-reviewed, data-based publications were limited, and only one grant application had been submitted. Id. In contrast, publications and grant applications had increased substantially from the faculty as a whole. See Ex. 1, ¶ 8.

On October 22, 2009, Dean Hinshaw counseled DeSoto regarding his limited scholarly productivity. She told DeSoto that with the amount of research funding support provided to him, much more was expected of him. Ex. 1, ¶ 16; Ex. 2M at 2 (10/22/2009 Memorandum for Record). Dean Hinshaw and DeSoto discussed what would be necessary to support a recommendation for a transfer to the tenure track. Id. at 2-3. DeSoto's progress would be evaluated in six months and a determination made whether to "recommend transfer to the tenure track, support Dr. DeSoto's renewal of a clinical appointment, or take further action as appropriate." Id. at 3.

D. Colonel Schoneboom, Acting on a Student Complaint, Interrupts DeSoto's Class; DeSoto Files A Faculty Grievance.

On December 1, 2009, Col. Bruce Schoneboom was Acting Dean of the GSN due to the absence of Dean Hinshaw. Ex. 1, ¶ 29. At approximately 10 a.m., Major Bob Arnold went to Col. Schoneboom's office and reported that a student had left one of DeSoto's lectures and complained about "the use of profanity, grotesque images and inappropriate clinical scenarios." Ex. 7B

(12/1/2009 Memorandum for Record). Col. Schoneboom went to the lecture room to listen to the lecture first-hand. Id., ¶ 1. At some point Col. Schoneboom informed DeSoto that the Colonel wanted to address the students privately and that DeSoto should take his lecture and personal belongings with him. Id., ¶ 2. Col. Schoneboom then apologized to the students about the offensive use of profanity in the lecture. Id.

Col. Schoneboom called Dean Hinshaw to inform her of the situation, and Dean Hinshaw stated that a counseling session in private with Dr. DeSoto and Dr. Hepler was appropriate. Id., ¶ 3. Col. Schoneboom intended to counsel Dr. DeSoto regarding the incident that day. Id. Col. Schoneboom, however, was informed by Assistant Dean Hepler that DeSoto refused to meet. Id., ¶ 4.

Dr. DeSoto submitted a memorandum to the Faculty Grievance Committee complaining of the incident and requesting a formal public apology. Ex. 4A at 5-6. A Preliminary Hearing Subcommittee of the Grievance Committee reviewed evidence from faculty members and GSN students. Ex. 4A at 2. The subcommittee found that "while Dr. DeSoto has established a prima facie case of a violation of the principles of academic freedom followed by the Uniformed Services University, his grievance does not merit further consideration by the Faculty Grievance Committee." Id. The subcommittee also agreed "that a formal apology to the student body and to Dr. DeSoto would be in order." Id.

Dean Hinshaw reviewed the incident. Ex. 2P (Hinshaw Memorandum). After considering the dichotomy between the military and academic communities at the GSN, Dean Hinshaw concluded that Col. Schoneboom could have dealt with the issue differently. Id. However, she "did

not think his actions warrant a public apology by anyone on the GSN leadership team." Id. Dean Hinshaw met with Col. Schoneboom "and discussed with him the sensitivity of faculty rights and their freedom to deliver curriculum within a broader set of boundaries." Id.

On February 5, 2010, the President of USUHS, Dr. Charles Rice, was informed of the subcommittee report and that "COL Schoneboom has verbally declined to provide the apology identified by the subcommittee members." Ex. 4A at 1. Dr. Rice later acknowledged the report and concurred "with the finding that COL Schoneboom temporarily relieved Dr. DeSoto of his responsibilities by terminating the class session early, and that this was an issue of academic freedom." Ex. 4B. Dr. Rice was also "satisfied with the actions taken by the Graduate School of Nursing regarding this matter" and did not believe that a formal apology was necessary or that further action was warranted. Id.

E. DeSoto Makes Criminal Allegations Based On Hearsay That Are Investigated And Found To Be Unsubstantiated.

On December 3, 2009, two days after Col. Schoneboom interrupted DeSoto's class, DeSoto spoke with the Brigade Judge Advocate General regarding rumors related to alleged inappropriate relationships between Col. Schoneboom and USUHS students. Ex. 6 (12/15/2009 Wempe Memorandum). An inquiry was conducted into the purported source of the rumors. Id. By a memorandum dated December 15, 2009, the Brigade Commander concluded that additional review or forwarding of DeSoto's complaint was not warranted. Id. at 2.

Col. Schoneboom was traveling on temporary orders during the week of December 7 to December 11, 2009. Ex. 7, ¶ 6. When Col. Schoneboom returned on December 14, 2009, he was

informed of the investigation conducted by the Brigade Commander. Id. At that time, Dean Hinshaw instructed Col. Schoneboom not to communicate with Dr. DeSoto. Id. From December 14, 2009 until the signing of his Declaration, Col. Schoneboom has not spoken to or otherwise communicated with Dr. DeSoto. Id.

G. Dean Hinshaw Counsels DeSoto After Multiple Complaints Of Aggressive, Hostile Behavior.

On January 14, 2010, a meeting of the Student Promotion Committee was convened to review the performance of a student. Ex. 1, ¶ 23. Faculty members present at the meeting reported "volatile," "threatening," or "hostile" behavior by DeSoto. Exs. 2V, 2U, 2W; see also Exs. 2R-2T. The Chair of the Student Promotions Committee noted that "Dr. DeSoto's behavior escalated, becoming more and more animated, angry and hostile towards the other members of the committee." Ex. 2W.

Following the committee meeting, DeSoto suggested to the chair of the committee that he had taped the meeting. Ex. 3B (1/15/2010 Smith Memorandum with email attachment). The same day, he reported to Dr. Dale Smith, Senior Vice President of USUHS, that he had not actually recorded the meeting, because he knew that would be illegal. Id. DeSoto opined that "they will all be upset that I have a recording and might send it out." Id. During the meeting with Dr. Smith, DeSoto also expressed his belief that there was a conspiracy of senior nursing leadership under Col. Schoneboom and that this "sorority" had been after him since he was hired. Id. On January 15, 2010, DeSoto sent Dr. Smith an email identifying the purported members of the "sorority" who,

according to DeSoto, "have run the school of nursing and undermined the processes in place for their own gain." Ex. 3B at 2.

H. DeSoto Raises A Variety Of Issues With The Executive Assistant to the Dean.

On January 29, 2010, DeSoto met twice with Dr. Ernest Hepler, the Executive Assistant to the Dean, to discuss various concerns. Ex. 2Y (2/1/2010 Hepler Memorandum). During the meetings, DeSoto made various allegations regarding Dean Hinshaw, Col. Schoneboom, and others. Id. DeSoto told Dr. Hepler that he felt the conflicts he had encountered at USU were racial or religious discrimination. Id. at 2.

I. Dean Hinshaw Decides Not To Renew DeSoto's Appointment.

After consulting with the Acting President of USUHS and other University officials, Dean Hinshaw decided not to renew Dr. DeSoto's appointment as a GSN faculty member. Ex. 1, ¶ 34. Dr. DeSoto's limited research productivity; his aggressive, accusatory behavior which is destructive to a positive work environment; his divisive nature with students and faculty; his loss of government equipment; and his unsubstantiated accusations against other USUHS and GSN faculty were all factors in Dean Hinshaw's decision. Id.

Although there was no requirement that Dean Hinshaw inform DeSoto that his appointment would be allowed to expire, Dean Hinshaw nevertheless wanted to provide DeSoto with ample opportunity to look for another position before the end of the semester. Ex. 1, ¶ 35. Dean Hinshaw prepared a memorandum to inform DeSoto of the decision not to renew the appointment. Ex. 2Z (3/19/2010 Hinshaw Memorandum). Despite repeated efforts, Dean Hinshaw was unable to schedule a meeting for delivery of the memorandum. Ex. 1, ¶¶ 35-37; Ex. 2AA. DeSoto simply

refused to meet with Dean Hinshaw. On March 25, Dean Hinshaw sent the memorandum to DeSoto as an attachment to an email. Ex. 2AB. Copies of the memorandum were also sent to his recorded addresses, his lab, and his office. Ex. 1, ¶ 37.

J. DeSoto Reports Vandalism To His Car And The Investigators Find No Leads.

On April 23, 2010, DeSoto contacted the National Naval Medical Center (NNMC) Police Department via telephone and reported vandalism to his vehicle located in building 70E parking garage. Ex. 12 (U.S. Naval Criminal Investigative Service, Report of Investigation (Closed)). The police responded and discovered that unknown persons had painted a Nazi Swastika and the words "DIE" and "JUDE" on DeSoto's car while it was parked in the parking lot at USUHS. Ex. 12 at 9. According to information provided by DeSoto, the painting had occurred sometime between when he arrived at 5:45 a.m. in the morning and when he returned to his car between 11:15 a.m. and noon. Ex. 12 at 7.

The NNMC Police and the U.S. Naval Criminal Investigative Service conducted an investigation. Ex. 12. When questioned by the police on the day of the accident, DeSoto was asked if he had experienced any other offenses like this before. DeSoto stated that he had previously filled out an equal opportunity complaint on December 17, 2009. Ex. 12 at 7. Later, on April 27, 2010, DeSoto completed a sworn, handwritten statement concerning "Communicating A Threat." Ex. 12 at 12. That statement purportedly describes the events from the time DeSoto arrived at work on April 23, 2010 until the police responded to his call following discovery of his car. Ex. 12 at 12-14.

Numerous people were interviewed over the course of the investigation, including Dean Hinshaw, Dr. Dale Smith, and Col. Schoneboom. Ex. 12 at 3-4. Col. Schoneboom reported that he

was in San Diego on the date of the incident. Ex. 12 at 3, ¶ 8. NCIS determined that the investigation had "not led to the identification of the suspect(s) or established any additional investigative leads." Ex. 12 at 4. The investigation was closed on June 23, 2010. Id.

K. DeSoto Is Placed On Administrative Leave For Disruptive Behavior.

Following the reported vandalism to DeSoto's car, DeSoto publicly accused several faculty of committing that act. Ex. 1, ¶ 39; Ex. 12 at 21-22. On April 30, 2010, Dean Hinshaw signed a letter memorandum to DeSoto directing him "to cease any such activity immediately" and advising him that failure to comply would result in his being placed on administrative leave until the end of his term-limited appointment. Ex. 2AC (4/30/2010 Hinshaw Memorandum). Dean Hinshaw sent a staff member to escort DeSoto to her office so that she could deliver the memorandum, but DeSoto refused to report to the Dean's office. Ex. 2AE (5/5/2010 Hinshaw Memorandum). After a further request, DeSoto eventually scheduled a meeting with Dean Hinshaw for May 5, 2010. Ex. 1, ¶ 41. At that meeting, attended by Dean Hinshaw, DeSoto and his attorney, and various USUHS officials, DeSoto was informed that Dean Hinshaw was placing him on administrative leave. Ex. 1, ¶ 42. A letter memorandum regarding the decision to place DeSoto on administrative leave was provided to DeSoto at the meeting. Ex. 2AE.

L. EEO Activity.

On December 17, 2009, DeSoto made initial contact with an EEO Counselor regarding alleged discrimination. Ex. 8 (EEO Counselor's Report). An initial interview with DeSoto was conducted on March 18, 2010. Id. A final counseling interview was conducted on April 12, 2010. Id. DeSoto was informed of his right to file a formal complaint within 15 calendar days and the

Notice of Final Interview, along with a formal complaint form, was given to him. Id. at 5. According to the EEO Counselor's Report, DeSoto claimed discrimination and reprisal because he was not placed on the tenure track when he was initially hired; he had been subjected to racial and religious comments; and his contract was not renewed following the filing of his EEO complaint. Id. at 2.

On April 23, 2006, DeSoto purported to file a formal EEO complaint via an email attachment. Ex. 9 (4/23/2010 Email with attachments). On April 26, 2010, DeSoto filed a formal complaint of discrimination using DD Form 2655. Ex. 10 (EEO Complaint Cover). In the various memoranda submitted to the EEO Counselor, DeSoto claimed (among other things) that he had been subjected to derogatory racial and ethnic comments by Col. Schoneboom and that he had informed Dr. Smith of death threats. See, e.g., Ex. 9 at 5, 7. Col. Schoneboom denies ever making derogatory religious or ethnic comments to DeSoto. Ex. 7, ¶ 3. Dr. Smith denies that DeSoto ever informed him of any death threat. Ex. 3, ¶¶ 5-7.

On June 10, 2010, DeSoto was informed by letter of the acceptance of his formal complaint of discrimination. Ex. 11 (6/10/2010 Acceptance of Claim). The following claim was accepted for investigation:

> You allege that you were discriminated against based on your race (Mexican), sex (male), religion (Jewish), reprisal for filing subject complaint, and subjected to a continuing hostile work environment by management when you were not placed on the tenure track when you was [sic] originally hired, subjected to racial and religious comments, and your contract was not renewed in retaliation for filing subject complaint.

Ex. 11.

M. DeSoto Prematurely Files The Predecessor To His Current Complaint.

On June 17, 2010, DeSoto filed a Complaint in Federal Court claiming hostile work environment based on religion, hostile work environment based on retaliation, retaliation, and disparate treatment, all under Title VII. See Civil No. DKC-10-1610, Docket No. 1. Defendant filed a Motion to Dismiss due to lack of subject matter jurisdiction based on DeSoto's failure to wait 180 days after filing his formal complaint to file a civil action. Id., Docket No. 8. DeSoto withdrew his complaint on October 25, 2010. Id., Docket No. 9. DeSoto filed the current Complaint on November 12, 2010.

III. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Motions to dismiss for failure to exhaust administrative remedies are governed by Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Khoury v. Meserve, 268 F. Supp. 2d 600, 606 (D. Md. 2003). A motion to dismiss based on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the question of whether the court has the authority to hear and decide the case. See Davis v. Thompson, 367 F. Supp. 2d 792, 799 (D. Md. 2005). The plaintiff bears the burden of proving that subject matter jurisdiction exists. See Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). When a defendant challenges subject matter jurisdiction, the court "is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Id. The court may properly grant a motion to dismiss for lack of subject matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." Davis, 367 F. Supp. 2d at 799.

B. Motion to Dismiss for Failure to State a Claim.

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the plaintiff's complaint. See Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir.1999). Although a complaint need only satisfy the "simplified pleading standard" of Rule 8(a), Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002), Rule 8(a) nonetheless "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.3 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965 (internal citations omitted); see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (holding that complaint against federal government should have been dismissed because plaintiff failed to allege sufficient facts which demonstrated any "plausible claim for relief").

In considering a motion to dismiss, the court need not accept unsupported legal allegations, Revene v. Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, Papasan v. Allain, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979). Furthermore, while "notice pleading requires generosity in interpreting a plaintiff's complaint .... generosity is not fantasy." Bender v. Suburban Hosp., Inc., 159 F.3d 186, 191 (4th Cir.1998).

C. Motion for Summary Judgment.

Summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). "A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact." Bello v. Bank of Am. Corp., 320 F. Supp. 2d 341, 344 (D. Md. 2004). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. See Khoury v. Meserve, 268 F. Supp. 2d 600, 607 (D. Md. 2003). Nevertheless, "'[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp., 455 F. Supp. 2d 399, 410 (D. Md. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511 (1986)). "Unsupported speculation is insufficient to defeat a motion for summary judgment." Axel v. Apfel, 171 F. Supp. 2d 522, 525 (D. Md. 2000). "Additionally, the existence of only a 'scintilla of evidence' is not enough to defeat a motion for summary judgment." Id. A district court has an "affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial.'" Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting Celotex Corp., 477 U.S. at 323, 106 S. Ct. at 2553).

IV. ARGUMENT

A. The Complaint Fails To State A Hostile Work Environment Claim And Should Be Dismissed Or Summary Judgment Should Be Entered.

DeSoto claims that he was subjected to a hostile work environment because of his religion and because of his EEO activity. Complaint ¶¶ 52-74 (Counts I and II). The allegations of the Complaint are insufficient to support a plausible claim of a hostile work environment either due to religious discrimination or retaliation for EEO activity. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Iqbal, 129 S. Ct. 1937, 1949 (2009). Plausibility requires more than "a sheer possibility" that a defendant has acted unlawfully. Id. When a plaintiff pleads facts "merely consistent" with a defendant's liability, the plausibility requirement is not met. Id. Here, DeSoto has pleaded a disconnected assortment of events that do not reflect religious animus, are not sufficiently "severe" or "pervasive," are not imputable to USUHS, or are simply too conclusory to provide any meaningful basis for a hostile work environment claim.

A claim for hostile work environment must demonstrate: (1) DeSoto experienced unwelcome harassment; (2) the harassment was based on his race, color, religion, national origin, or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. Baqir v. Principi, 434 F.3d 733, 745-46 (4th Cir. 2006).

The first element of the claim is subjective; the remainder of the elements are objective and based on a "reasonable person" standard. Pueschel v. Peters, 577 F.3d 558, 565 (4th Cir. 2009)

(citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The Fourth Circuit has held that "in order to prove the second element, a plaintiff must show that 'but for' the employee's [protected characteristic or activity], he or she would not have been the victim of the discrimination." Pueschel, 577 F.3d at 565 (citing Jennings v. Univ. of N.C., 482 F.3d 686, 723 (4th Cir. 2007)). As for the third element, harassment is considered sufficiently severe or pervasive to alter the terms or conditions of the employment if a workplace is "permeated with discriminatory intimidation, ridicule, and insult." Harris, 510 U.S. at 21. When determining whether an environment is hostile, a Court should look at the totality of 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.

1. The Religious Remarks Alleged In The Complaint Were Not Sufficiently Severe Or Pervasive To Create An Abusive Work Environment.

Complaint paragraphs 31, 32, 33, 34 (2nd), and 46 contain allegations regarding purported remarks "heard" by DeSoto or made by Colonel Schoneboom and "[o]ther employees." Assuming for the purposes of this motion that these remarks were made, they are neither individually nor collectively "severe or pervasive" enough to alter the terms or conditions of DeSoto's employment.[1]

The allegations of paragraphs 31 and 33 are simply too vague. DeSoto alleges that "on several occasions [he] heard the statement of 'he smells like a dirty Mexican Jew.'" Compl. ¶ 31.

[1]The allegation of Complaint paragraph 46, that Colonel Schoneboom frequently referred to a "Mexican odor" when DeSoto was around, does not purport to relate to DeSoto's Jewish religion and therefore contributes nothing to analysis of these religious discrimination claims.

There is no indication of when he heard these statements, who made the statements, where the statements were made, or whether the statements were made in the presence of USUHS management. Compl. ¶ 33. DeSoto similarly alleges that "[o]ther employees made religious disparaging remarks against the plaintiff," but again there is no indication of when, who (precisely), where, or how the purported statements were made. These are conclusory factual allegations devoid of any reference to actual events that should be disregarded by the Court. See United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979).

The allegations of paragraphs 32 and 34 recount two purported statements made by Colonel Schoneboom related to DeSoto's religion. DeSoto provides no time frame for one of these remarks and for the other indicates only that the remark occurred in 2009. It is impossible to tell from the face of the Complaint (as with the other alleged remarks above) whether these remarks occurred more than 45 days before DeSoto sought EEO counseling. Thus, if this Court finds that the other allegations of the Complaint are insufficient to support a hostile work environment claim premised on religious discrimination (Count I), then DeSoto will not have met his burden of showing that he timely sought counseling for his Count I hostile work environment claim. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)(holding that one act of harassment must fall within the relevant statutory time period for making a claim); 29 C.F.R. § 1614.105(a)(1)("An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory").

Moreover, the allegations of paragraphs 32 and 34 each appear to relate to single incidents and thus are not "pervasive." Furthermore, neither of these isolated remarks, considered individually

or collectively, would be sufficiently severe to permeate the workplace with discriminatory intimidation, ridicule, and insult. Morgan, 536 U.S. at 116. As offensive as the remark "filthy Jew" would be if directed towards a colleague "in public," it still does not approach the level of extremity required to create a hostile work environment. See Dwyer v. Smith, 867 F.2d 184, 187 (4th Cir. 1989) (affirming directed verdict in favor of defendant because plaintiff's complaints that she was subjected to pornographic material in her mailbox, was accused of having sex with other workers, and was subject to sexually explicit conversations was not sufficiently severe or pervasive); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996) (affirming summary judgment for defendant because supervisor's alleged harassment in sexual innuendos, jokes, and physical contact with plaintiff did not establish a sufficiently hostile working environment), cert. denied 519 U.S. 818 117 S.Ct. 70 (1996); Raley v. Board of St. Mary's County Comm'rs, 752 F.Supp. 1272, 1280 (finding no abusive work environment where supervisor offensively touched plaintiff on two occasions, made isolated sexual remarks to plaintiff, and had kissed and touched other women in the workplace); Carter v. Ball, 33 F.3d 450, 461 (4th Cir. 1994)(holding that the display of a poster potentially offensive to African American employees, along with joking comments of supervisor are not acts of racial harassment severe or pervasive enough to create a hostile work environment). Furthermore, while the alleged remark that "I do not care about primitive religious superstition; you look like an animal" is callous, callousness alone does not create a hostile work environment. Proa v. NRT Mid Atlantic, Inc., 618 F.Supp.2d 447, 470 (D. Md. 2009)(observing that callous behavior by superiors is not actionable).

While DeSoto alleges that neither Colonel Schoneboom "nor anyone else at Department of Defense made any attempt to stop the treatment against the plaintiff," he does not allege when, other than his general allegation that he made an EEO complaint on December 17, 2009, that he challenged Colonel Schoneboom on his alleged inappropriate behavior or that he told anyone at the Department of Defense about "the treatment" he was subjected to. Compare EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 314 (4th Cir. 2008)(finding Muslim employee made multiple verbal and written complaints to his supervisor regarding inappropriate treatment).

Furthermore, even if the Court were to determine that one or more of the above alleged incidents were sufficiently pled for a plausible claim of "severe or pervasive" conduct that is related to DeSoto's religion or EEO complaint and imputable to USUHS, DeSoto can still not put forth admissible evidence to show that the events alleged happened as he alleged or in a way that satisfies the prima facie elements of a hostile work environment claim or at a time that is not time-barred.[2]

2. The Other Events Alleged Are Either Not Related to DeSoto's Religious Beliefs or EEO complaint, Not "Severe or Pervasive," Or Not Imputable To USUHS.

DeSoto makes various other allegations in his Complaint. With the exception of his allegations that USUHS staff planned to feign ignorance of his Jewish faith and that his car was vandalized with anti-Semitic graffiti, none of the incidents alleged have any connection to DeSoto's

[2]With respect to time, Colonel Schoneboom has testified that at Dean Hinshaw's direction he did not communicate with Desoto after December 14, 2009. Ex. 7, ¶ 6. Absent proof of events imputable to USUHS and evidencing discriminatory animus that occurred after November 2, 2009 (45 days prior to DeSoto's December 17 informal complaint), DeSoto's claim of hostile work environment based on religion are time-barred and this Court lacks subject matter jurisdiction.

religious beliefs and thus no nexus with religious discrimination. Furthermore, the alleged events are either not "severe or pervasive" or cannot be imputed to USUHS.

DeSoto alleges that Colonel Schoneboom stopped DeSoto's class, told DeSoto to leave, and "slander[ed]" DeSoto in front of student or to other faculty. Compl. ¶¶ 12-14. These allegations contain no reference to religion and instead contain both factual allegation devoid of relevant detail and legal conclusions devoid of an underlying basis, i.e. references to "slander." On their face, these allegations have no nexus to DeSoto's complaints regarding religious harassment. Furthermore, because these alleged events occurred prior to the DeSoto's EEO complaint, they are also irrelevant to DeSoto's claim of a hostile work environment based on retaliation.

DeSoto alleges that on January 11, 2010 he received a voice mail death threat "over his discrimination complaint" and that he "met with Dale Smith and informed him of the death threat and records in Human Resources being altered." Compl. ¶¶ 22-23. These allegations are again spare on detail. There is no indication of what phone the purported death threat was received on, what the voice sounded like on the phone, or how DeSoto knew the threat was "over his discrimination complaint." Nevertheless, assuming the allegations are true, there is no indication that anyone connected with USUHS management made the calls or that they are otherwise imputable to USUHS. Moreover, Dr. Smith unequivocally stated that DeSoto did not report the "death threats" to him. Ex. 3, ¶ 5 (Smith Declaration). Dr. Smith stated further that USUHS management was "extremely sensitive to any type of threats since the shootings at Fort Hood took place less than two months earlier." Id. at ¶ 6. Also, there is no mention of prior telephone death threats in the police investigation of "Die Jude" being written on DeSoto's car. See Ex. 12 at 7, 12-14, 17.

Paragraphs 24-27 of the Complaint allege that the USUHS Grievance Committee found Col. Schoneboom guilty of misconduct and that "no further action was taken against Col. Schoneboom." There is no allegation regarding what type of conduct Col. Schoneboom was found guilty of, much less that the conduct would be relevant to a charge of religious discrimination against DeSoto.[3] Nor is there any allegation of why a finding of misconduct against Col. Schoneboom, if not pursued further, would constitute harassment or retaliation against DeSoto. These poorly pleaded allegations fall well short of plausibly supporting a harassment claim.

Paragraphs 36-42 and 45 of the Complaint allege, in part, that "DeSoto was informed that USUHS is going to pretend they did not know he is Jewish" and suggest that General William Bester, Acting President of USUHS, lied about knowing DeSoto was Jewish. DeSoto also alleges that he "was informed that USUHS is going to drop they did not know he is Jewish strategy and delay the investigation." Compl. ¶ 46. Even assuming these allegations are true, these allegations would not constitute harassment (or retaliation or disparate treatment against DeSoto for that matter). None of these events would alter the terms and conditions of DeSoto's employment or create an abusive atmosphere. Employers are not required to notice an employee's religion, nor are they required to respect an employee's religious belief, so long as neither of those actions create an abusive atmosphere both subjectively and objectively. If USUHS pretended to be blind to DeSoto's religion as alleged, it would not impinge upon DeSoto's practice of his religion, nor does DeSoto allege that it did. These allegations are irrelevant to DeSoto's harassment claims.

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[3]In fact, the finding was limited only to the issue of academic freedom. See Ex. 4A at 4.

Paragraphs 43 and 44 of the Complaint contain allegations regarding a swastika and the words "Die Jude" that were spray painted on DeSoto's car and an allegation that the "fuel had also been tampered with." Subjectively and objectively, anti-Semitic vandalism of DeSoto's car would be harassment if done by or with the knowledge of someone in the USUHS management. There is no allegation, however, about who might have spray painted DeSoto's car. Nor is there an allegation that USUHS or GSN management condoned the alleged vandalism to DeSoto's car.[4] As shocking as the event may be, there is no basis for imputing it to USUHS. Akop v. Goody Goody Liquor, Inc., Civ. No. 04 CV 2058-D, 2006 WL 119146, at *2, 4 (N.D. Tex. Jan. 17, 2006)(finding no basis for imputing to employer the painting of "Die Jew die" and swastikas on automobile parked near employer where no evidence linking employer to the act). Furthermore, with respect to DeSoto's hostile work environment through retaliation claim, there is no allegation that would suggest causal relationship between DeSoto's December 17, 2009 complaint for EEO counseling and the spray painting on DeSoto's car on April 23, 2009. The four month gap in time defeats any argument that temporal proximity alone would support such a causal relationship. Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001)(observing temporal proximity must be "very close" and collecting cases finding three and four month periods are too long)

Even if the Court were to determine that one or more of the above alleged incidents were sufficiently pled for a plausible claim of "severe or pervasive" conduct that is related to DeSoto's religion or EEO complaint and imputable to USUHS, DeSoto can still not put forth admissible

[4]In fact, the incident was reported to NCIS and USUHS cooperated in the ensuing investigation. See Ex. 12; Ex. 1, ¶ 9.

evidence to show that the events alleged happened as he alleged or in a manner that meets satisfies the prima facie elements of his harassment claims. The Court should therefore enter summary judgment for Defendant on both hostile work environment claims.

B. DeSoto Cannot Make A Prima Facie Showing On His Disparate Treatment Claim.

The allegations in the Complaint do not show that discriminatory animus had any part in the decision not to renew DeSoto's appointment as a GSN faculty member. No allegation in the complaint relating to discriminatory animus bears directly on the decision not to renew DeSoto's appointment. Furthermore, no allegation in the complaint supports a reasonable inference that Dean Hinshaw, the person who decided not to renew DeSoto's faculty appointment, was motivated by discriminatory animus.

Because DeSoto has provided no direct evidence of discriminatory animus, he must provide proof to demonstrate each element of the prima facie case for disparate treatment: "(1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he suffered an adverse employment action; and (4) he was treated differently than similarly situated employees outside his protected class." Frank v. England, 313 F.Supp.2d 532, 538 (D.Md. 2004). DeSoto cannot show that, at the time his appointment expired, his job performance was satisfactory. Furthermore, DeSoto has not sufficiently alleged, nor can he show, that similarly situated employees outside his protected class received more favorable treatment than he did.

1. DeSoto Has No Direct Evidence Of Discriminatory Animus.

Absent direct evidence of discriminatory animus, a plaintiff must demonstrate that he can prove the McDonnell Douglas elements to survive summary judgment on a disparate treatment

claim. Direct evidence is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision. Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 520 (4th Cir. 2006)(quotations and citations omitted). Derogatory remarks may constitute direct evidence only if the remarks were related to the employment decision in question and were not stray or isolated. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir.1999), abrogated on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

Here, DeSoto makes few allegations regarding remarks related to a discriminatory attitude, including the allegations in paragraphs 31-33 and 34 (2nd) of the Complaint. Even assuming these allegations are true, none of the alleged comments (purportedly made by Col. Schoneboom) bear directly on the decision not to reappoint DeSoto. The remarks appear to have been isolated. Escobar v. Montgomery County Bd. Of Educ., AW 99-1964, 2001 WL 98600, at *6 (D.Md. Feb. 1, 2001)(holding that stray remarks will not be deemed direct evidence of discrimination). In addition, none of alleged remarks are attributed to Dean Hinshaw, the official who ultimately made the decision. Furthermore, any remark made by Colonel Schoneboom to DeSoto would have been made before December 14, 2009, the day Colonel Schoneboom was instructed not to communicate with DeSoto. Ex. 7 at ¶ 6. At a minimum, any remark ascribed to Colonel Schoneboom happened at least three months prior to March 19, the date of the memorandum informing DeSoto that he would not be reappointed. Ex. 2Z. The alleged remarks are thus too temporally distant from the decision not to reappoint to be considered direct evidence. When temporal proximity is used to infer causation in retaliation claims, periods much less than six months have been deemed too long to

support the inference. Clark County School Dist. V. Breeden, 532 U.S. 268, 273 (2001)(observing temporal proximity must be "very close" and collecting cases finding three and four month periods are too long); McCallum v. Maryland, Case No. RDB 08-0660, 2010 WL 3549773, at *5 (D.Md. Sept. 10, 2010)(five months too long); Westmoreland v. Prince George's County, Case No. AW-09-2453, 2010 WL 3369169, at *10 (D.Md. Aug. 23, 2010)(three and a half months too long). Furthermore, as pointed out above, the remarks in paragraph 31 and the graffiti discussed at paragraph 43 are not attributed to anyone at USUHS.

Because his allegations regarding discriminatory animus bear no direct relationship to the decision not to reappoint him, DeSoto must provide evidence that demonstrates, more likely than not, each element of the prima facie case for disparate treatment.

2. DeSoto's Job Performance Was Not Satisfactory When His Appointment Expired.

DeSoto relies on his Performance Evaluation covering the period from June 2008 to May 2009 to show that his job performance was satisfactory at the time his appointment expired. Compl. ¶ 30. The record reveals, however, that DeSoto's performance and conduct were unsatisfactory throughout the period from June 2009 until June 2010. Indeed, DeSoto's conduct became increasingly hostile and divisive after Dean Hinshaw counseled him about needed performance improvements in October 2009.

In October 2009, DeSoto's request to move to the tenure-eligible track was reevaluated. Ex. 1, ¶¶ 14-15. Dean Hinshaw determined that DeSoto's research productivity was not meeting expectations. Id.; Ex. 2M at 2, 3. She conducted a counseling session with DeSoto on October 22, 2009 and discussed with him changes needed to justify his movement to the tenure-eligible track or

renewal of his appointment. Ex. 2M (10/22/2009 Memorandum). These changes included more research productivity in the form of published, peer-reviewed papers as well as grant applications. Id. Months later, DeSoto had reported no additional publications and had submitted no additional grant applications. Ex. 1, ¶¶ 16-17.

In early June 2009, DeSoto attended an academic conference in Florida on temporary duty and at government expense. Ex. 1, ¶ 25; Ex. 2G (6/1/2009 Orange County Sherrif's report); Ex. 2H (6/8/2009 Almeda Email String). DeSoto had his rental car and research laptops stolen while he was receiving a lap dance from a woman who he had met at a gas station. Ex. 2G at 2. When questioned about the details of the theft by employees of the foundation that owned the laptops, DeSoto was combative and evasive. Ex. 2H at 1-3. In late June 2009, DeSoto reacted with hostility to a routine inspection of his lab by USUHS's industrial safety inspectors. Ex. 1, ¶ 22; see Hux v. City of Newport News, Virginia, 451 F.3d 311, 318 (4th Cir. 2006)("[W]e see nothing in Title VII to indicate that Congress wished to require companies to disregard the successful personal interactions that make for a productive workplace.").

In December 2009, a few days following Col. Schoneboom's interruption of DeSoto's class, DeSoto reported certain rumors of criminal activity by Col. Schoneboom to military lawyers at USUHS. Ex. 6 (Wempe Memorandum). DeSoto's report was investigated. The allegations were found to be unsubstantiated and DeSoto's alleged source of the purported rumors denied having made the statements DeSoto relied upon in making his report to military lawyers. Ex. 6 at 1-2; compare Ex. 6B with Ex. 6C.

In January 2010, DeSoto's volatile behavior during the course of a Student Promotions Committee meeting prompted multiple faculty members to protest in writing. Exs. 2R-2W. DeSoto admitted to Dr. Dale Smith that after the meeting he intentionally provoked his fellow faculty members by falsely claiming that he had illegally taped the meeting. Ex. 3B; see Olivares v. NASA, 934 F.Supp. 698, 703 (D.Md. 1996)("Such contrariness, such inability to get along with employers, supervisors and coworkers, fully qualify as legitimate nondiscriminatory reasons to decline to promote an employee."). DeSoto also accused six of his fellow faculty members – fully 20% of the GSN faculty – with having "run the school of nursing and undermined the processes in place for their own gain." Ex. 3B at 2. One of the faculty members accused was Col. Schoneboom, and two of the others had opposed DeSoto before and after the Student Promotions Committee meeting. Id.; see Olivares, 934 F. Supp. at 705 ("[T]he fact that an employee may have filed an EEO claim gives him no license to vilify supervisors or coworkers or indeed to make every response of theirs to such vilification the basis of a claim for retaliation.")

DeSoto's disruptive behavior continued even after Dean Hinshaw decided not to reappoint him as a faculty member in March 2010. See, e.g., Ex. 1, ¶ 39. After reporting vandalism to his car, DeSoto publicly accused other faculty members as suspects. Id. When instructed to report to the Dean's office following these accusation, DeSoto at first refused to meet. Ex. 1, ¶¶ 39-40. Ultimately, on May 5, 2010, Dean Hinshaw placed DeSoto on administrative leave with pay until the expiration of his appointment term because of his disruptive conduct. Ex. 1, ¶ 42; Ex. 2AE; see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)("Petitioner may justifiably refuse to

rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

It was on the basis of the foregoing behavior that Dean Hinshaw has concluded "I would never hire someone who had a record of conduct like Dr. DeSoto's. Nor would I reappoint them." Ex. 1, ¶ 28. Nor can DeSoto rebut this evidence that his performance did not meet the legitimate expectations of USUHS. This Court should grant summary judgment on the disparate treatment claim because DeSoto was not meeting the legitimate expectations of USUHS either when his appointment expired or well before that date.

3. DeSoto Has Not Sufficiently Alleged And Cannot Show That Similarly Situated Employees Were Treated More Favorably Than He Was.

"McDonnell Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). The requirement that comparative employees be "similarly situated" has been narrowly construed. In particular, "[s]imilarly situated employees are alike "with respect to performance, qualifications, and conduct.'" Popo v. Giant Foods LLC, 675 F.Supp.2d 583, 589 (D.Md. 2009)(quoting Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617 (7th Cir. 2000)). The Fourth Circuit has rejected comparisons with employees who have not engaged in similar (mis)conduct as an employment discrimination plaintiff. See Bryant v. Bell Atlantic Maryland, Inc., 288 F.3d 124, 134 (4th Cir. 2002)(finding "none of these employees were engaged in the same type of misconduct" attributed to plaintiff).

In his Complaint, DeSoto alleges, in conclusory fashion, that "[o]ther similarly situated employees who have not engaged in protected activity were not subject to the same conditions of employment as Plaintiff." Compl. ¶ 78. This legal conclusion couched as a factual allegation does not make a "showing" that he is entitled to relief for religious discrimination. Papasan v. Allain, 478 U.S. 265, 286 (1986); Fed.R.Civ.P. 8(a)(2). On this basis alone DeSoto's disparate treatment claim should be dismissed. Moreover, DeSoto does not identify any faculty member at the GSN with a similar performance and conduct record because there is no such faculty member. Because DeSoto cannot identify a similar situated faculty member to meet this required element of his case, this Court should enter summary judgment on his disparate treatment claim (if it is not dismissed).

C. The Complaint Does Not Identify Who Determined That DeSoto's Appointment Should Not Be Renewed, Nor Does It Support A Reasonable Inference That The Deciding Official Acted Out of Retaliatory Animus.

To establish a prima facie case of retaliation, DeSoto must show that he engaged in a protected activity, that adverse action was taken against him, and that a causal relationship existed between the protected activity and the adverse employment activity. Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004).

The Complaint contains bare allegations that "[t]he non-renewal of the plaintiff's contract was a foreseeable event of retaliation" and "reasonably related to the aforementioned defendant's actions." Compl. ¶¶ 50, 51. The Complaint, however, nowhere identifies the individual who determined that DeSoto's appointment should not be renewed, or even the time period during which the determination was made. Moreover, the Complaint does not link the motivation of the deciding official to the events and actions alleged. In this regard, the Complaint is an example of pleading

that fails to cross the line from "possibility" to "plausibility." Iqbal, 129 S. Ct. 1937, 1949 (2009). This Court should dismiss the retaliation claim for failure to adequately plead a causal link between DeSoto's EEO activity and the non-renewal of his contract.

In the alternative, DeSoto cannot show that retaliation for his protected EEO activity caused Dean Hinshaw to allow his appointment to expire. See Olivares, 934 F.Supp. at 705 ("Simply because certain events occurred after he initiated his complaints, he asserts their causal connection, the classic *post hoc ergo propter hoc* fallacy.") It is telling that DeSoto was counseled for his research activities in October 2009, nearly two months prior to his December 17, 2009 EEO contact. Ex. 2M. Dean Hinshaw sets forth many more reasons why she would not hire or reappoint someone with DeSoto's record. Ex. 1, ¶¶ 11-28. Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)(finding mere knowledge of discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharge). This Court should enter summary judgment on the retaliation claim because there is no evidence (even alleged) that would suggest a causal link between DeSoto's EEO activity and Dean Hinshaw's decision not to reappoint him.

D. Dean Hinshaw Had Legitimate, Non-Discriminatory Reasons For Not Renewing DeSoto's Term-Limited Contract and Summary Judgment Is Therefore Appropriate On DeSoto's Retaliation And Disparate Treatment Claims.

If DeSoto's retaliation and disparate treatment claims are not dismissed, it is clear as shown above at Parts II and IV.B.2 that Dean Hinshaw and USUHS had many legitimate, non-discriminatory reasons for not renewing DeSoto's faculty appointment. See Price, 380 F.3d 209, 212 (4th Cir. 2004)(applying McDonnell Douglas shifting burdens framework to retaliation claims).

Both DeSoto's performance and his conduct were lacking. Dean Hinshaw determined in October 2009 that his research performance was deficient. Holland v. Washington Homes, Inc., 487 F.3d 208, 217 (4th Cir. 2007) (observing that it is the perception of the decision maker that is relevant). Furthermore, his documented hostility towards faculty members and other federal employees was repeated and disruptive. See Amirmokri v. Baltimore Gas and Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995)(finding an employer can properly take into account subjective factors like good interpersonal skills). These are more than adequate bases for Dean Hinshaw to have allowed DeSoto's appointment to expire, and DeSoto cannot show that these reasons were pretext.

E. Any Claim Premised On The Failure To Place DeSoto On Tenure -Eligible Track Was Untimely When DeSoto Sought EEO Counseling in December 2009.

DeSoto's Complaint alleges that on October 10, 2009 he was "placed on the Tenure Track by Dr. Padden." Compl. ¶ 11. Strictly speaking, the new status would have been tenure-eligible track. See Exhibit 5D, § 11.1.3. The faculty committee responsible for approving a request for change to tenure-eligible track never considered DeSoto's request. Ex. 2K. When the request was returned to the GSN in the fall of 2009, Dean Hinshaw evaluated DeSoto's research performance and determined that moving DeSoto to tenure-eligible track was not then warranted. Ex. 1, ¶¶ 15-17. Dean Hinshaw counseled DeSoto regarding her decision on October 22, 2009. Ex. 2M.

Assuming *arguendo*, that a decision not to move DeSoto to tenure-eligible track would be an adverse employment action, DeSoto should have challenged the decision within 45 days if he believed it to have some discriminatory basis. 29 C.F.R. 1614.105(a)(1). Forty-five days from October 22, 2009 would have been December 6, 2009. DeSoto did not, however, make EEO contact

until December 17, 2009. Ex. 8 at 1. As a result, any claim by DeSoto challenging the decision not to put him on tenure-eligible track is both untimely and unexhausted. This Court should dismiss any such claim.

V. CONCLUSION

For these reasons, the Defendant requests that this Court dismiss or, in the alternative, enter summary judgment for Defendant on all of DeSoto's claims.

Respectfully submitted,

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