No. 24-1953C
(Judge Hadji)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL J. FORBES,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. This Court Lacks Jurisdiction Over Not Only Mr. Forbes's Specific Claims Under The Privacy Act And MWPA Retaliation Claims, But Also Mr. Forbes's Broader Challenge To The Separation Decision As Retaliatory 4

II. Mr. Forbes Fails To Otherwise Demonstrate Error In The Army's Decisions 7

A. The Merits Of The Reprimand, The Relief For Cause Evaluation Report, And The QMP's Separation Decision Are Not Justiciable 7

B. Mr. Forbes Fails to Demonstrate Any Regulations Were Violated And That Any Violation Amounts To Harmful Error 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Adkins v. United States,
68 F. 3d, 1317 (Fed. Cir. 1995) 4
American Renovation & Constr. Co. v. United States,
65 Fed. Cl. 254 (2005) 5
Aquisito v. United States,
70 F.3d 1010 (8th Cir. 1995) 5
Bernard v. United States,
59 Fed. Cl. 497 (2004) 3
Bias v. United States,
722 F. App'x 1009 (Fed. Cir. 2018) 5
Christian v. United States,
337 F.3d 1338 (Fed. Cir. 2003) 10
Dolan v. United States,
91 Fed. Cl. 111 (2010) 11
Driscoll v. United States,
158 Fed. Cl. 399 (2022) 9
eVideo Inc. v. United States,
136 Fed. Cl. 164 (2018) 5
Forbes v. United States Army,
No. 5:24-CV-00176-BO-RJ, 2024 WL 4817138 (E.D.N.C. Nov. 18, 2024) 5, 6
Ghaffari v. United States,
125 Fed. Cl. 665 (2016) 4
Heisig v. United States,
719 F.2d & n.11 8
Kassel v. U.S. Veterans' Admin.,
709 F. Supp. 1194 (D.N.H. 1989) 5
Kelley v. Sec'y, United States Dep't of Labor,
812 F.2d 1378 (Fed. Cir. 1987) 4
Klingenschmitt v. United States,
119 Fed. Cl. 163 (2014) 3, 6
Marshall v. United States,
164 Fed. Cl. 580 (2023) 10
Santana v. United States,
127 Fed. Cl. 51 (2016) 3, 6, 8
Santana v. United States,
732 F. App'x 864 (Fed. Cir. 2017) 3
Soeken v. United States,
47 Fed.Cl. 430 (2000) 5
Tindall v. United States,
176 Fed. Cl. 339 (2025) 5

Wagner v. United States,
365 F.3d 1358 (Fed. Cir. 2004) 9

Statutes

5 U.S.C. § 552 ..... 3, 4
5 U.S.C. § 552a(g)(1) 4
5 U.S.C. § 706(2) 9
10 U.S.C. § 1034 3
10 U.S.C. § 1034(c)-(g) 5
10 U.S.C. § 7233 ..... 9, 10

Rules

RCFC Rule 52.1(c) 1

REGULATIONS

Army Reg. 15-6 7
Army Reg. 635-8 10

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THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS
MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Pursuant to Rule 52.1(c) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of our cross-motion for judgment on the administrative record. In our opening motion, we demonstrated that this Court lacks jurisdiction over *pro se* plaintiff's, Michael J. Forbes's, claims regarding alleged violations of the Privacy Act and the Military Whistleblower Protection Act. In addition, we demonstrated that the administrative record provides substantial evidence that supports the Department of the Army's (Army) decision to issue a General Officer Memorandum of Reprimand (GOMOR), issue a Relief for Cause evaluation report, and subsequently, a Qualitative Management Program (QMP) board decision to separate Mr. Forbes from service. Instead of responding to our arguments raised in our opening motion, Mr. Forbes characterizes the Army's investigation and separation decision as "clandestine" and as a means of retaliation against Mr. Forbes. But in doing so, Mr. Forbes fails to meaningfully engage with the administrative record, relying on documentation outside the administrative record to advance his characterization. *See generally* Pl. MJAR at 14-44. Further, Mr. Forbes fails to refute our jurisdictional arguments. Pl. MJAR at 5-14. Fundamentally, Mr. Forbes seeks for this Court to

conduct a *de novo* review of the administrative record, relying on information and documentation that was not before the deciding officials. This Court should deny Mr. Forbes's MJAR and grant judgment for the United States.

ARGUMENT

This case concern's Mr. Forbes separation from service with the United States Army. In 2022, Mr. Forbes was investigated for disrespect towards a superior commissioned officer and for engaging in counterproductive leadership. AR 92. The investigation thoroughly examined a credible complaint made against Mr. Forbes relating to disrespect and engagement in a pattern of toxic leadership. After the GOMOR was issued, Mr. Forbes had a chance to submit materials in a rebuttal, but like in his MJAR, he instead proffered his subjective belief that the investigation and was an illegitimate retaliation of his previous MWPA claims regarding alleged Privacy Act violations committed by the Army as it related to a psychological screener. *See* AR 135-717; *see generally* Pl. MJAR at 14-50. Ultimately, the QMP board concluded that Mr. Forbes's arguments were unpersuasive, and the QMP recommended separating Mr. Forbes from service upon reviewing the record. AR 1701.

Before this Court, the crux of Mr. Forbes argument attempting to reverse his separation centers on his belief that the Army retaliated against him through the investigation and subsequent removal from service. Mr. Forbes states on unequivocable terms that he "*seeks to prove his separation was retaliatory* and wrongful." Pl. MJAR at 3 (emphasis supplied). Mr. Forbes's MJAR characterizes the investigation as a mere ruse – nothing more than a retaliation for Mr. Forbes identifying alleged violations of the Privacy Act and MWPA. As an initial matter, the administrative record belies this claim. Nothing in the record indicates that Mr. Forbes's separation was retaliation. Indeed, as we demonstrate in our opening motion, the

administrative record provides substantial evidence supporting the Army's investigation and separation decisions. Although Mr. Forbes argues otherwise, he bases his position on an assumption that the Army officials acted in bad faith. Quite the contrary, this Court will presume Army officials act in good faith. *See Bernard v. United States*, 59 Fed. Cl. 497, 501 (2004) (A plaintiff bears the burden of overcoming the "strong, but rebuttable, presumption that the military discharges its duties correctly, lawfully, and in good faith.") (citation omitted).

Moreover, a we explained in our opening MJAR, this Court lacks jurisdiction over Mr. Forbes's claims that the Army violated both the Privacy Act, 5 U.S.C. § 552, and the MWPA, 10 U.S.C. § 1034. Even more, this Court lacks jurisdiction over retaliation claims brought under the Military Pay Act. *See Klingenschmitt v. United States*, 119 Fed. Cl. 163, 184-185 (2014), *aff'd*, 623 F. App'x 1013 (Fed. Cir. 2015); *Santana v. United States*, 127 Fed. Cl. 51, 57-59 (2016), *aff'd in part, vacated in part*, 732 F. App'x 864 (Fed. Cir. 2017).[1] Ultimately, Mr. Forbes's claims regarding retaliation cannot be brought under the Military Pay Act because Mr. Forbes is required to follow the administrative scheme set forth in the MWPA. Thus, this Court lacks jurisdiction over Mr. Forbes's retaliation claims.

Accordingly, the true nature of the dispute between the parties is whether or not the Army was arbitrary or capricious when it separated Mr. Forbes following the investigation. Mr. Forbes attempts to disturb the separation decision by disagreeing with merits of the Army's decision to separate him. But as we explained in our opening motion, the merits of administrative decisions to reprimand, relieve from a duty or position, and involuntarily separate a service member are

[1] The Federal Circuit affirmed in part, and vacated part of the trial court's ruling in *Santana*. *Santana*, 732 F. App'x at 864. However, the vacated portion was remanded back to the trial court for dismissal. *Id*. The Federal Circuit did "not reach the Claims Court's holding that it lacked jurisdiction because [plaintiff's] claims fell under the MWPA." *Id* at 871 n.4.

not subject to judicial review. Def. MJAR at 20 (citing *Adkins v. United States*, 68 F. 3d, 1317, 1323 (Fed. Cir. 1995) (The "merits of a decision committed wholly to the discretion of the military are not subject to judicial review, [however] a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.")). Finally, while Mr. Forbs cites a number of new regulations in his MJAR in an attempt to challenge the underlying decision, Mr. Forbes cannot establish error, that any error was harmful, or that he properly alleged the violations in his complaint. *See generally* Pl. MJAR.

I. This Court Lacks Jurisdiction Over Not Only Mr. Forbes's Specific Claims Under The Privacy Act And MWPA Retaliation Claims, But Also Mr. Forbes's Broader Challenge To The Separation Decision As Retaliatory

Mr. Forbes asserts this Court has "exclusive jurisdiction" over his claims. Pl. MJAR at 7. He is mistaken. As we demonstrated in our opening MJAR, this Court lacks jurisdiction over Mr. Forbes's claims under the Privacy Act, 5 U.S.C. § 552. Def. MJAR at 17. The Privacy Act expressly provides that the District Courts have jurisdiction over civil actions under the statute. 5 U.S.C. § 552a(g)(1). This Court has routinely held that it lacks jurisdiction to entertain claims made under the Privacy Act. *See, e.g.*, *Ghaffari v. United States*, 125 Fed. Cl. 665, 667 (2016) (The Federal Circuit has clearly held ... that [the Court of Federal Claims] lacks jurisdiction to consider Privacy Act claims.").

In response, Mr. Forbes's arguments are unavailing. *First*, Mr. Forbes references the leniency afforded to *pro se* litigants. Pl. MJAR at 6-7. But Mr. Forbes status as a *pro se* litigant does not excuse him from the burden of meeting the Court's jurisdiction requirements. *See Kelley v. Sec'y, United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). *Second*, Mr. Forbes makes a vague reference to supplemental or pendent jurisdiction, Pl. MJAR at 9-10. But pendent jurisdiction "does not extend to powers specifically exclusive from the Court's

jurisdiction[.]" *American Renovation & Constr. Co. v. United States*, 65 Fed. Cl. 254, 260 (2005). *Third*, Mr. Forbes's reliance on *Kassel v. U.S. Veterans' Admin.*, 709 F. Supp. 1194 (D.N.H. 1989), is misplaced. Pl. MJAR at 11. *Kassel* is a district court case and provides no insight into this Court's jurisdiction over Privacy Act claims. *Id*. *Fourth*, to the extent Mr. Forbes seeks transfer of his Privacy Act claims, Mr. Forbes has already had a complaint dismissed for failure to state a claim from district court concerning the Army's alleged Privacy Act violations. *See Forbes v. United States Army*, No. 5:24-CV-00176-BO-RJ, 2024 WL 4817138, at *4 (E.D.N.C. Nov. 18, 2024).[2]

Regarding Mr. Forbes's claims under the MWPA, we demonstrated that not only does the Court lack jurisdiction because the MWPA is not money-mandating, but the statute itself provides the exclusive remedy for recourse under the statute, which requires in relevant part that the servicemember file a petition with the relevant correction board. Def. MJAR. at 18-20; 10 U.S.C. § 1034(c)-(g). "The MWPA provides for a comprehensive administrative review scheme over claims of retaliation—specifically, the correction of military records and disciplinary actions as remedies for prohibited actions—but no private right of action for money damages, which could be enforced in the Court of Federal Claims." *Bias v. United States*, 722 F. App'x 1009, 1014 (Fed. Cir. 2018*); see Soeken v. United States*, 47 Fed.Cl. 430, 433 (2000) (finding that the MWPA "provides solely an administrative process for handling complaints of improper retaliatory personnel actions")); *see also Aquisito v. United States*, 70 F.3d 1010, 1011 (8th Cir.

[2] Indeed, that matter raises an alternative ground for dismissal of Mr. Forbes's Privacy Act claim – res judicata. *See Tindall v. United States*, 176 Fed. Cl. 339, 344 (2025) ("'Dismissals for failure to state a claim upon which relief can be granted are judgments on the merits, and, thus, entitled to res judicata effect.'" (citing *eVideo Inc. v. United States*, 136 Fed. Cl. 164, 169 (2018), *aff'd* 748 F. App'x 327 (Fed. Cir. 2019)). Here, however, this Court need not reach the issue of res judicata because it does not possess jurisdiction over Privacy Act claims.

1995) (finding that the MWPA's "statutory language, the legislative history, and administrative regulations" demonstrate that Congress "did not intend any private cause of action."). Because Mr. Forbes has not followed the comprehensive administrative scheme, and the statute does not grant a private cause of action, Mr. Forbes cannot establish that this Court has jurisdiction over his MWPA claims. Indeed, the Eastern District of North Carolina has already dismissed Mr. Forbes's MWPA claim, holding that "the MWPA does not provide for a private right of action[.]" *Forbes*, 2024 WL 4817138, at *3.

Mr. Forbes's argument to disturb the separation decision as retaliatory goes beyond MWPA claims, and is central to his broader characterization of the investigation and separation decision as retaliatory. *See* Pl. MJAR at 3 ("[Mr. Forbes] now *seeks to prove his separation was retaliatory* and wrongful."). This Court has repeatedly rejected servicemember's "attempts to circumvent the MWPA's administrative process and secure judicial review of alleged retaliation claims as part of [their] Military Pay Act case." *Santana*, 127 Fed. Cl. at 59; *see also Klingenschmitt*, 119 Fed. Cl. at 184-185. The Court in *Klingenschmitt* reasoned the Court of Federal Claims lacks jurisdiction over retaliation claims brought under the MWPA, thus, the plaintiff could not bring suit under the Military Pay Act. *Id*. Further, this Court in *Santana* explained that retaliation claims "fit squarely within the ambit of the MWPA … Indeed, plaintiff started the MWPA process and elected not to pursue the matter after the IG rejected [their] whistleblower complaint. To allow [plaintiffs] to bring a whistleblower claim under the guise of a Military Pay Act claim would undermine Congress's intention of creating an *exclusive remedy within the military*." *Santana*, 127 Fed. Cl. at 59 (emphasis supplied). Here, Mr. Forbes not only brings MWPA claims, but he has pursued the matter to the IG and his complaint remains active as of this filing. *See generally* Pl. Compl.

Like the plaintiff in *Santana*, Mr. Forbes has elected to not pursue his MWPA via the exclusive administrative remedy by appealing to the boards, or even waiting for the outcome of the IG investigation, and he cannot establish his retaliatory claims within the jurisdictional reach of the Military Pay Act. Because Mr. Forbes's challenge to the Army's decision to separate centers on his claim regarding alleged retaliation, and retaliation claims are outside the ambit of this Court's jurisdictional reach, Mr. Forbes's arguments must be rejected by the Court.

II. Mr. Forbes Fails To Otherwise Demonstrate Error In The Army's Decisions

A. The Merits Of The Reprimand, The Relief For Cause Evaluation Report, And The QMP's Separation Decision Are Not Justiciable

Mr. Forbes repeatedly refers to the Army Reg. 15-6 investigation underlying his GOMOR as "clandestine," implying that it was conducted in secret or with procedural irregularity. Pl. MJAR at 17-36. Mr. Forbes characterization is merely rhetorical. He does not allege that the investigation failed to meet the procedural requirements of Army Regulation 15-6, nor does he contend that he was denied the right to respond to the allegations or to present mitigating information. The administrative record demonstrates the opposite, that Mr. Forbes had a full and fair opportunity to be heard before the command; he permanently filed his rebuttal to the GOMOR in his personnel record and filed his rebuttal before the QMP board rendered its decision. *See* AR 135-717, 837-1141.

The vast majority of Mr. Forbes's rebuttal arguments relate to his belief that the investigation was retaliatory (which we address above), but his other arguments regarding the merits of the investigation also fail. For example, Mr. Forbes claims that the investigation relied on "hearsay," "anonymous complaints," and " unsubstantiated opinion and falsities." Pl. MJAR at 18; *see also id*. at 20 (arguing that the investigating officer "relied on a circular, self justifying" reasoning.). Additionally, Mr. Forbes states that the command psychologist, Major

Racaza, had a conflict of interest, but does not explain how Major Racaza's alleged conflict of interest impacted the investigation at all. *Id*. Moreso, Mr. Forbes's statements are merely conclusory.

On the contrary, as we previously explained in our opening motion, substantial evidence supports the Army's decision to separate Mr. Forbes from service. Def. MJAR at 22-24. The Army conducted a thorough investigation after credible complaints were made. 2LT Tolston interviewed witnesses, reviewed sworn statements, and found by a preponderance of the evidence that Mr. Forbes disrespected Major Racaza and engaged in a pattern of toxic leadership. AR 725-728. Witnesses consistently described him as aggressive, erratic, and demeaning. AR 735-773. Major Racaza and Sergeant Aldeguer both described Mr. Forbes's disrespectful behavior during the November 30, 2022, incident. AR 735-740. Officers and enlisted personnel provided independent accounts of his counterproductive behaviors. AR 741-766. Brigadier General Ferguson and the QMP board were entitled to credit these accounts, and their reliance on them meets the substantial evidence standard. Mr. Forbes's subjective belief in the propriety of his conduct does not invalidate 2LT Tolston's investigation, or the administrative consequences of her findings.

As we explained in our opening motion, Mr. Forbes's challenges to the investigation and decision to separate him from service only seek to challenge the conclusions, ultimately asking the Court to conduct its own *de novo* review of the administrative record. Def. MJAR at 20-22. This Court should not do so because this Circuit's precedent has established that when reasonable minds could differ on the evidence, the military's judgment controls. *Heisig v. United States*, 719 F.2d 1153, 1156 & n.11 ("It is equally settled that responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province; and that

courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence.") (internal citations omitted); *see also Driscoll v. United States*, 158 Fed. Cl. 399, 407 (2022).

B. Mr. Forbes Fails to Demonstrate Any Regulations Were Violated And That Any Violation Amounts To Harmful Error

Mr. Forbes asserts that a number of authorities were violated, including Officer's requirements of exemplary conduct, 10 U.S.C. § 7233, Executive Order M-10-23 providing guidance on Federal agency use of third-party websites, and dozens of other statutes and regulations in his MJAR. *See generally* Pl. MJAR. Mr. Forbes identifies a number of new statutes and regulations, the majority of which he did not allege violations of in his complaint, in an attempt to disturb the Army's decision to separate Mr. Forbes from service. But merely identifying these authorities is not enough under this Court's precedent. Mr. Forbes must first demonstrate from the administrative record that the Army violated these authorities while reaching the decisions to reprimand and separate him. He makes no such showing. Even if he did, the violations of regulations must amount to harmful error. "[S]trict compliance with procedural requirements is not required where the error is deemed harmless." *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004); *see also* 5 U.S.C. § 706(2) ("[D]ue account shall be taken of the rule of prejudicial error."). As the Federal Circuit explained in *Christian*:

> To recover back pay, it is not enough for the plaintiff to show merely that an error or injustice was committed in the administrative process; he must go further and either make a showing that the defect substantially affected the decision to separate him or relieve him from active duty, or at least he must set forth enough material to impel the court to direct a further inquiry into the nexus between the error or injustice and the adverse action. If this burden is met, the end-burden of persuasion falls to the Government to show harmlessness — that, despite the plaintiff's prima facie case, there was no substantial nexus or connection.

Christian v. United States, 337 F.3d 1338, 1343 (Fed. Cir. 2003) (citations and quotations omitted). Accordingly, Mr. Forbes cannot establish that he has made a showing that a violation of a number of the statutes and regulations he references had any effect on the decision to separate him, much less that any of these violations were substantial.

The majority of Mr. Forbes's cited authorities relate to his Privacy Act and MWPA claims (such as Executive Order M-10-23), which this Court does not possess jurisdiction to review. Others appear to be conclusory allegations of misconduct by other officers (such as 10 U.S.C. § 7233, *see* Pl. MJAR at 14-15), which are nonjusticiable and unsupported by the record. Below, however, we respond to three arguments Mr. Forbes raises regarding alleged prejudicial violations committed by the Army in his separation.

First, Mr. Forbes alleges that the Army violated Army Reg. 635-8 by failing to provide timely pre-separation counseling. Pl. MJAR at 41-45. As explained in our MJAR, these allegations—even if taken at face value—do not affect the legality or validity of the Army's decision to separate him under the Qualitative Management Program (QMP). Def. MJAR at 24-26. Army Reg. 635-8 governs procedural and administrative requirements related to transition assistance and out-processing. It does not control the substantive basis for separation, nor does it limit the authority of the Army to affect a lawful separation based on adverse personnel records. The QMP decision was based on a GOMOR and a relief-for-cause NCOER—neither of which Mr. Forbes has shown to be legally deficient. Mr. Forbes does not cite any provision of Army Reg. 635-8 that, if violated, would entitle him to reinstatement or render the QMP decision invalid.

Moreover, as this Court recently explained, a procedural defect in pre-separation counseling, even where the Service member receives no mandatory counseling, is harmless

because the alleged defect was not the "catalyst for [the] separation." *Marshall v. United States*, 164 Fed. Cl. 580 (2023). Mr. Forbes has not alleged, let alone demonstrated, that the alleged error in scheduling his pre-separation services prejudiced his ability to contest the QMP determination or materially affected the outcome of his separation. His claim rests entirely on the proposition that a procedural violation, standing alone, invalidates the separation and entitles him to reinstatement.

Second, Mr. Forbes implies that he was retaliated against for raising cybersecurity concerns under USASOC Regulation 25-2, but he fails to identify which specific provision of that regulation was violated, how he raised those concerns through protected channels, or, most importantly, how those concerns were causally connected to the Army's decision to issue a GOMOR and separate him through the QMP process. His theory is speculative and unsupported by the administrative record. The administrative record is clear – Mr. Forbes separation was based on a substantiated finding of disrespect toward a superior commissioned officer and counterproductive leadership. There is no indication that the QMP Board or the GOMOR issuing authority considered, relied on, or was even aware of Mr. Forbes's alleged cybersecurity reports at the time of their decisions. Moreover, this Court is not empowered to review whether the Army fully enforced internal policies like USASOC Regulation 25-2 unless a violation of a mandatory legal standard is shown to have materially influenced the agency's decision. *See Dolan v. United States*, 91 Fed. Cl. 111, 122 (2010). Mr. Forbes makes no such showing here. His references to cybersecurity issues amount to an unsubstantiated narrative disconnected from the documented basis for his separation.

Third, in his MJAR, Mr. Forbes recasts his separation as the result of regulatory noncompliance concerning the Human Performance and Wellness (HPW) program, citing U.S.

Army Special Operations Command (USASOC) Regulation 24-14 as the benchmark against which command actions should be measured. Pl. MJAR. at 34, 44, 45. However, his reliance on this regulation is legally and factually flawed. Mr. Forbes concedes that USASOC Regulation 24-14 was not in effect at the time of the events giving rise to his separation. Rather, he characterizes the regulation as a corrective policy that "remediated" the privacy and consent concerns he raised. Pl. MJAR at 44. The regulation, by his own admission, was promulgated after the Army had already issued his GOMOR and relief-for-cause NCOER.

Even assuming the regulation had been in effect, Mr. Forbes fails to identify any provision that creates an enforceable right or standard applicable to his separation under the QMP. USASOC Regulation 24-14 is not a personnel regulation governing administrative separation or disciplinary action. The Army separated Mr. Forbes under established procedures following a substantiated command investigation, a GOMOR, and a relief-for-cause NCOER. These actions were based on findings of misconduct, not on his alleged resistance to the HPW program.

Moreover, the administrative record confirms that Mr. Forbes's brigade commander relieved him of the requirement to participate in the HPW assessments. This undisputed fact undermines any inference that Mr. Forbes suffered reprisal for objecting to the program. He cannot establish causation between his objections and the adverse action when the record plainly shows he was not required to participate in the very program he now claims was unlawfully implemented.

CONCLUSION

For these reasons, we respectfully request that the Court grant the United States judgment upon the administrative record and deny Mr. Forbes' motion for judgment on the administrative record.

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