IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JACOB E. ABILT, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	Case No. 1:14-cv-01031-GBL-IDD

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendant John O. Brennan, the Director of the Central Intelligence Agency ("Director," "CIA"), has asserted the state secrets privilege and statutory privileges over information essential to litigating Plaintiff's claims. *See generally* Decl. and Formal Claim of State Secrets Privilege and Statutory Privilege by John O. Brennan, Dir. of the CIA ("Brennan Decl.") (attached as Ex. A. to Mem. in Supp. of Defs.' Mot. to Dismiss, Dkt. No. 29 ("Defs.' Mem. in Supp.")). This privilege assertion covers, among other things, the nature of Plaintiff's covert work for the CIA; his and his former coworkers' job duties, work performance, and assignments; the CIA's reasons for making its employment decisions about Plaintiff and his coworkers; and the identities of Plaintiff's former CIA coworkers and supervisors. *See id.* ¶ 9. Plaintiff's claims of employment discrimination and retaliation cannot sufficiently be litigated without this privileged information, and, thus, Defendants have moved to dismissed Plaintiff's Complaint in its entirety. *See generally* Defs.' Mot. to Dismiss, Dkt. No. 28.

Plaintiff does not contest the validity of the Director's assertion of the state secrets and statutory privileges. *See generally* Mem. in Supp. of Pl.'s Opp'n to Defs.' Mot. to Dismiss, Dkt. No. 45 ("Pl.'s Opp'n"). Likewise, Plaintiff nowhere argues that this privileged, classified information about his covert CIA employment could be publicly disclosed without seriously damaging the national security of the United States. *See id*. Despite this tacit acknowledgment that relevant information is privileged and should not be disclosed, Plaintiff nonetheless claims this case can be litigated meaningfully without such information. In other words, although Plaintiff concedes that there is relevant classified information that cannot be disclosed, he contends that a factfinder could reach an informed decision about whether the CIA terminated Plaintiff because of discriminatory bias or, instead, because of his poor performance without hearing critical evidence regarding Plaintiff's job duties, actual performance, and assignments.

Plaintiff's argument has been squarely rejected by the Fourth Circuit in a virtually identical case and similarly should be rejected here. "[L]itigation centering around a covert agent's assignments, evaluations, and colleagues" necessarily threatens the disclosure of privileged information because "the whole object of the suit and of the discovery is to establish a fact that is a state secret – namely, the methods and operations of the Central Intelligence Agency." *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (internal quotation marks and citation omitted). In such circumstances, no efforts or procedures designed to confine the evidence necessary to dispose of the claims in this case to unprivileged information could adequately protect against the risk that privileged information will be disclosed, and the case must be dismissed. *Id.* "Courts are not required to play with fire and chance . . . disclosure – inadvertent, mistaken, or even intentional – that would defeat the very purpose for which the [state secrets] privilege exists." *Id.* at 344.

ARGUMENT

Courts have found three circumstances in which a case implicating privileged state secrets should be dismissed: (1) if the privilege deprives the *plaintiff* of evidence necessary to prove his claims; (2) if the privilege deprives the *defendant* of evidence that would support a valid defense; and (3) if litigating the claim to judgment on the merits would present an unacceptable risk of revealing state secrets, even if the claims and defenses might theoretically be established without the privileged evidence. *See, e.g.*, *Sterling*, 416 F.3d at 348; *El-Masri v. United States*, 479 F.3d 296, 308-10 (4th Cir. 2007); *Trulock v. Lee*, 66 F. App'x 472, 476 (4th Cir. 2003); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc).

Each of these circumstances is present here, as discussed in Defendants' Memorandum in Support of their Motion to Dismiss. *See* Defs.' Mem. in Supp. 15-27. For example, "[i]t would be impossible" for Plaintiff "to show that he was treated worse than similarly situated non-African American agents," as necessary to show racial discrimination, without evidence of "the comparative responsibilities of [Plaintiff] and other CIA agents, the nature and goals of their duties, the operational tools provided (or denied) to them, and their comparative opportunities and performance in the field" – all privileged state secrets. *See Sterling*, 416 F.3d at 346. Likewise, the CIA could not show that Plaintiff performed his duties poorly or otherwise explain the basis of its decisions regarding his employment without disclosing privileged information about Plaintiff's and his coworkers' work assignments and performance, as well as the criteria the CIA used to make assignments and evaluate performance. *See* Brennan Decl. ¶¶ 19-21; *Sterling*, 416 F.3d at 347. Finally, even if Plaintiff's claims and Defendants' defenses somehow could be established without reliance on privileged information, any litigation of these claims and defenses would necessarily risk disclosure of privileged information, both because the

identities of many potential witnesses are themselves privileged and because the core facts of this case are so infused with privileged information that any "probing in open court would inevitably be revealing." *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam).

I. The CIA's and Equal Employment Opportunity Commission's Ability to Internally Consider Plaintiff's Claims and then Discuss Them in Unprivileged Terms Does Not Indicate that Those Claims Could Be Litigated In District Court Without Revealing Privileged Information.

Plaintiff contends that this case could be fully litigated without risking the disclosure of privileged information, noting that his discrimination and retaliation claims were reviewed (and rejected) by both the CIA's internal administrative process and the Equal Employment Opportunity Commission ("EEOC") after a "rigorously documented" investigation. Pl.'s Opp'n 4. Plaintiff also notes that the CIA created a classified report of its investigation, which it in turn used to create a redacted, unclassified version. *See id*. Plaintiff suggests that the CIA's and EEOC's ability to consider the merits of his claims and create unclassified summaries of their decisions indicates that his claims could be litigated in this Court without exposing privileged information. *Id.*[1]

As Plaintiff implicitly acknowledges, however, both the CIA and the EEOC relied on classified national security information – the same information over which the Director claims privilege – to reach their decisions regarding Plaintiff's claims. Pl.'s Opp'n at 4. Thus, their

[1] Plaintiff also claims that this administrative history distinguishes this case from the Fourth Circuit's decision in *Sterling*. Pl.'s Opp'n 4. The plaintiff in *Sterling*, however, also sought to resolve his claims through the CIA's internal review process before pursuing them through this Court. *Sterling*, 416 F.3d at 348 ("We take comfort in the fact that Sterling and those similarly situated are not deprived of all opportunity to press discrimination claims. The CIA provides, and Sterling has utilized, an internal EEO process where his claims may be heard and resolved.").

ability to reach a decision *with* this privileged information says nothing about the ability of a factfinder *without* this information to resolve Plaintiff's claims. To the degree that Plaintiff is suggesting that this Court conduct classified or *in camera* proceedings using this privileged information, the Supreme Court and the Fourth Circuit have firmly rejected this approach.[2] As the Fourth Circuit stated in *El-Masri*, an *in camera* trial using privileged state secrets evidence is

> expressly foreclosed by *Reynolds*, the Supreme Court decision that controls this entire field of inquiry. *Reynolds* plainly held that when 'the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'

479 F.3d at 311 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).[3] *See also Sterling*, 416 F.3d at 348 ("Inadvertent disclosure during the course of a trial – or even in camera – is precisely the sort of risk that *Reynolds* attempts to avoid."); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) ("[T]he Court finds that an *in camera* trial, utilizing court staff with security

[2] Plaintiff cites an EEOC policy document for the proposition that defendants "cannot, merely by invoking national security, exempt themselves from coverage of the nondiscrimination provisions." Pl.'s Opp'n 3 (citing EEOC Guidance, *Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as Amended* (May 1, 1989), 1989 WL 1000615, *available at* http://www.eeoc.gov/policy/docs/national_security_exemption.html). That EEOC document is not discussing the state secrets privilege or any other privilege relevant here. Rather, it is discussing Section 703(g) of Title VII, 42 U.S.C. § 2000e-2(g), which simply clarifies that it is lawful for employers to impose security clearance requirements on their employees under United States national security programs, a matter not at issue here. Regardless, Defendants are not in any event arguing that they can exempt the CIA from nondiscrimination provisions by invoking national security. Defendants agree that the CIA is subject to nondiscrimination laws, but that does not mean that Plaintiff's specific claims can be litigated in this Court.

[3] A classified proceeding would be especially problematic here because Plaintiff has demanded a jury trial. Compl. ¶ 112, Dkt. No. 1. No authority under the state secrets doctrine remotely suggests that state secrets may be shared with jurors in a secure manner in a case such as this. Indeed, this Court in *Sterling* expressly discounted that possibility. *See* Mem. Order at 9, *Sterling v. Tenet*, No. 03-cv-329 (E.D. Va. Mar. 3, 2004), Dkt. No. 52, *aff'd*, 416 F.3d 338 (4th Cir. 2005) (noting that a trial with cleared jurors is "an impossible goal to reach").

clearances, and swearing all participants to secrecy would not sufficiently safeguard the secrets outlined by the Director of Central Intelligence.").[4]

Likewise, the CIA's ability to create a redacted, unclassified version of its investigative report and the EEOC's ability to create an unclassified decision summarizing its reasons for rejecting Plaintiff's claims (after reviewing the CIA's classified report) does not mean that those claims could be litigated using only unclassified, unprivileged evidence. "The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of state secrets." *El-Masri*, 479 F.3d at 308 (emphasis in original). In this regard, as in so many others, this case parallels *Sterling*, many facts of which could be described in general terms without revealing state secrets but which the Fourth Circuit held was properly dismissed:

> Sterling's allegations could be stated with no detrimental effect on national security; his assertion that the CIA had engaged in race discrimination compromised no confidential information. Yet we concluded that the very subject matter of his action, the facts central to its litigation, consisted of state secrets, because a judicial resolution of the matter would have required disclosure of how the CIA makes sensitive personnel decisions, and would have involved the production of witnesses whose very participation in a court proceeding would risk exposing privileged information.

Id. at 311 (citing *Sterling*, 416 F.3d at 347-48).

Thus, although some very basic facts of Plaintiff's CIA employment can be safely described at a high level of generality, litigation regarding those facts would nonetheless not be possible without revealing privileged information. For example, here Plaintiff states that he

[4] *Tilden* also rejected a related argument that the CIA, by using privileged information in its internal administrative process, had somehow waived its claim of privilege. *See Tilden*, 140 F. Supp. 2d at 627 (concluding that a regulation governing "internal EEO process of the CIA . . . ha[d] no bearing on post-EEO judicial proceedings.").

received a performance evaluation of "unsuccessful" in 2011, but alleges that his performance during this period was satisfactory and that he was only given a poor evaluation because he was African American, suffered from narcolepsy, and had previously complained of discrimination. *See* Compl. ¶¶ 34, 69. Such general contentions about Plaintiff's performance do not themselves compromise privileged information. Any attempt by Plaintiff, however, to prove in court that he performed satisfactorily during this period, or by Defendants to prove he performed poorly, would inevitability disclose privileged information. Given that both the nature of his work and all of his assignments are privileged, any meaningful examples of his good or bad performance are themselves privileged, and the identities of the witnesses most likely to have relevant information – Plaintiff's former coworkers and supervisors – also are privileged. *See* Brennan Decl. ¶ 9.

II. Attempting to Litigate Plaintiff's Claims Using Pseudonyms or Other Special Procedures Would Be Fruitless and Unacceptably Risk Revealing Privileged Information.

Plaintiff next contends that "protective procedures," such as the use of pseudonyms for covert CIA employees and the redaction of privileged information from classified documents, could allow this litigation to proceed without threatening the exposure of state secrets. *See* Pl.'s Opp'n 4-5. Given the centrality of privileged information to Plaintiff's claims, however, such an approach would fail to protect adequately the classified, privileged information at issue. As discussed above, Plaintiff could not establish his claims and Defendants could not present their defenses without privileged information – the evidence that the Parties would need to prove their cases would be the very information redacted from documents or excluded from testimony as privileged. Attempting to proceed with the litigation, subject to such protective procedures, thus

would accomplish nothing – the case would still eventually have to be dismissed because properly privileged information is needed to litigate the claims.

In addition, even if purported safeguards were in place, attempting to proceed still would pose an unacceptable risk of harm to national security resulting from the disclosure of privileged information. First, any testimony from covert CIA employees, such as Plaintiff's former supervisors and coworkers, inherently would risk exposing their identities, even if pseudonyms or other protective measures were used. *See Sterling*, 416 F.3d at 347 ("Forcing such individuals to participate in a judicial proceeding – or even to give a deposition – risks their cover."); *El-Masri*, 479 F.3d at 309 (upholding dismissal in part because plaintiff "would need to rely on witnesses whose identities . . . must remain confidential in the interest of national security.").

Second, courts have recognized that any protective procedures would not adequately prevent the risk national security privileged information being disclosed inadvertently or indirectly during the course of litigation. Although Plaintiff claims that there is no "empirical support" for the idea that privileged information has ever been inadvertently or indirectly disclosed during the course of litigation touching on state secrets, Pl.'s Opp'n 3-4, binding precedent explicitly recognizes this as a risk that must be considered when a court is deciding whether to dismiss a case involving state secrets. *See, e.g.*, *Sterling*, 416 F.3d at 347 ("Almost any relevant bit of information [provided by a covert agent's testimony] could be dangerous to someone, even if the agent himself was not aware that giving the answer could jeopardize others."); *Farnsworth Cannon*, 635 F.2d at 281 ("In an attempt to make out a prima facie case during an actual trial, the plaintiff and [his] lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing."); *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011) ("Each

assertion of the privilege can provide another clue about the Government's covert programs or capabilities."). Indeed, it is precisely because courts dismiss cases risking the inadvertent or indirect exposure of privileged information that they are often able to prevent such information from being exposed. *See, e.g*., *Sterling*, 416 F.3d at 348; *Tilden*, 140 F. Supp. 2d at 627. Even so, classified information is at times accidentally disclosed during the course of legal proceedings. *See, e.g.*, *id.*, 131 S. Ct. 1904 ("At a deposition that month, a former Navy official's responses to questions by petitioners and the Government revealed military secrets neither side's litigation team was authorized to know. Copies of the unclassified deposition were widely distributed and quoted in unsealed court filings . . . ."); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (discussing a classified document that an agency official inadvertently gave to the plaintiff during a prior administrative proceeding to freeze its assets). The risks of inadvertent and indirect disclosure are far from hypothetical.

Courts sometimes have allowed a case to proceed after excluding state secrets, when those secrets are clearly discrete and segregable from the core evidence at issue in a case. But this is not such a case. To the contrary, this is the rare case in which state secrets infuse every aspect; and, thus, any litigation of Plaintiff's claims inevitably threatens the exposure of state secrets, even if protective procedures were to be employed. As the Ninth Circuit explained,

> Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication. In these rare circumstances, the risk of disclosure that further proceedings would create cannot be averted through the use of devices such as protective orders or restrictions on testimony.

Jeppesen, 614 F.3d at 1089; *see also Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 81 (D.D.C. 2004), *aff'd*, 161 F. App'x 6, 2005 WL 3696301(D.C. Cir. 2005) (dismissing action by

former contract translator for Federal Bureau of Investigation challenging her termination in part because "the Court is satisfied that is not possible for sensitive information [regarding her employment] to be disentangled from nonsensitive information"). Here, the Court should conclude that protective procedures are inadequate to safeguard the privileged information at issue here, as the Fourth Circuit did in *Sterling*:

> Sterling's argument that the court could devise special procedures that would allow his suit to proceed must therefore fail. Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial – or even in camera – is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Sterling, 416 F.3d at 348. *See also Tilden*, 140 F. Supp. 2d at 627 ("[T]here are no safeguards that this Court could take that would adequately protect the state secrets in question."). Because procedural protections are not adequate to safeguard the privileged information in this case, it should be dismissed.

III. The Allegedly Unprivileged Evidence Plaintiff Cites Would Not Allow Him to Prove His Claims or Defendants to Prove Their Defenses, But Would Potentially Compromise Related Privileged Information.

Plaintiff contends that he can prove his claims – and Defendants can present their defenses – using only certain unprivileged information, thereby eliminating any risk of disclosing state secrets. *See* Pl.'s Opp'n 5-7. A plaintiff in an employment discrimination case, however, cannot simply cherry-pick some but not all of the available evidence and then declare that his case be litigated entirely on that limited evidence alone. Not only would such an approach necessarily exclude relevant evidence, it also would render it impossible for the parties to satisfy the pertinent legal standards and burdens of proof. Moreover, in this case, even if the unprivileged information was sufficient to support Plaintiff's claims or Defendants' potential

defenses, this purported evidence is closely bound up with privileged information, and any litigation regarding it would pose a risk of disclosing the associated privileged information.

Discrimination and Hostile Work Environment Claims: Plaintiff argues that he could prove that he suffered discrimination because of his race and his alleged narcolepsy and that he was subjected to a hostile work environment using only the following purported evidence:

> the repeated negative statements made by Mr. Abilt's supervisors regarding his disability, the history of his exceptional performance (which can be redacted to only show his rating), providing him with benefits only provided to those successfully performing their duties during the time of his alleged deficient performance, and providing him with positive feedback during the time period of this alleged deficient performance.

Pl.'s Opp'n 5. Even assuming such evidence exists and is unprivileged, it would not suffice to support Plaintiff's discrimination and hostile work environment claims.

For example, to make a *prima facie* claim of disability discrimination, Plaintiff would first have to show that he was "qualified" for his covert position such that he could "perform the essential functions of the . . . position." 42 U.S.C. §§ 12111(8), 12112(a); *see also Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir.1995); Defs.' Mem. in Supp. 18-19. This necessarily would require evidence regarding the CIA's judgment as to which functions are essential, the work experience of past incumbents in the position, and the current work experience of incumbents in the job. *See* 29 C.F.R. § 1630.2(n)(3). Thus, the purported evidence Plaintiff cites could not show that he was "qualified" for his position and thus would not allow him to establish a *prima facie* case of disability discrimination.

Similarly, Plaintiff's purported evidence would not allow him to establish a *prima facie* case of racial discrimination. To do so in this context, Plaintiff would have to provide evidence that he was treated differently than similarly situated colleagues. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d

277, 285 (4th Cir. 2004) (en banc); *see also* Defs.' Mem. in Supp. 20-22. But even determining which of Plaintiff's coworkers were "similarly situated" would require detailed information regarding Plaintiff's and his coworkers' positions, experience, and job performance – information far beyond that cited by Plaintiff. *See Sterling*, 416 F.3d at 346 (stating that it would be "impossible" for Sterling "to show that he was treated worse that similarly situated non-African American agents" without investigation "into the comparative responsibilities of Sterling and other CIA agents, the nature and goals of their duties, the operational tools provided (or denied) to them, and their comparative opportunities and performance in the field.").

Likewise, this purported evidence would not allow Plaintiff to make a *prima facie* case that he was subjected to a hostile work environment. Among other things, to make such a case, he would have to prove that his work environment was objectively hostile, which would depend on "the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [his] work performance." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (internal citation omitted); *see also* Defs.' Mem. in Supp. 22-23. The only "negative statement[] made by Mr. Abilt's supervisors regarding his disability," Pl.'s Opp'n 5, that Plaintiff actually references in his Complaint is an alleged request by his supervisors that Plaintiff "try not to fall asleep at his desk." Compl. ¶ 27. Such a statement, standing alone, is obviously not "sufficiently severe or pervasive to alter the conditions of [Plaintiff's] employment and create an abusive work environment." *See Ziskie v. Mineta*, 547 F.3d 220, 224 (4th Cir. 2008). Thus, evidence that Abilt's supervisors made this or similar statements would not allow Plaintiff to make a *prima facie* case that he was subjected to a hostile work environment at the CIA.

Moreover, the presentation of such purported evidence, even if itself not privileged, would risk exposure of privileged information. Most obviously, the testimony of current or former covert CIA employees would be required as evidence of any "negative statements" about Plaintiff sleeping at work or "positive feedback" about his performance that Plaintiff verbally received from his supervisors, potentially revealing their identities and other privileged information about the work performed by the component within which Plaintiff was employed. More fundamentally, the purported evidence Plaintiff cites relates directly to his work performance – even the alleged "negative statements [about] his disability" relate to him sleeping on the job. But, aside from broad generalities such as his overall rating for a period, all information regarding the specifics of Plaintiff's performance of his duties is privileged. *See* Brennan Decl. ¶ 9. Any effort to look beneath such generalities and meaningfully consider this cited evidence – any effort to prove *why* Plaintiff's performance was assessed as good or bad during a particular period, for instance – would inevitably compromise privileged, classified details about the nature of his work and how the CIA makes employment decisions. *See Sterling*, 416 F.3d at 346 ("There is no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim."). Thus, any presentation of the purported evidence Plaintiff cites unacceptably risks the disclosure of state secrets.[5]

[5] For this reason, this Court rejected a very similar argument made by Sterling, who had claimed that he could prove his claims using only unclassified, redacted documents:

> Although Plaintiff argues that the redacted administrative EEO record contains sufficient unclassified direct and indirect evidence of discrimination for him to make his prima facie case, it is not for the Court, in this case, to second guess the judgment of the [CIA Director] in asserting the state secrets privilege. The potential for inadvertent exposure of classified information, even relying upon the EEO file, is simply too great.

Retaliation Claim: For similar reasons, Plaintiff could not attempt to show that the CIA retaliated against him without revealing privileged information. To establish a *prima facie* case of retaliation, Plaintiff would have to show that he engaged in some prior protected activity, that he was subsequently subjected to an adverse employment action, and that a causal link exists between the two. *See, e.g.*, *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). Plaintiff, for example, could not establish the necessary causal link between his complaints of discrimination and the CIA's decision to give him an "unsuccessful" evaluation and terminate him without using privileged evidence regarding how the CIA evaluated his performance, the details of his performance, and why the CIA decided to terminate him. *See* Defs.' Mem. in Supp. 19-20.

Plaintiff alleges that the temporal proximity between his complaints of discrimination and the CIA's actions alone shows that causal link: he claims that he filed a formal complaint of discrimination on July 1, 2011, and was notified that he was receiving an "unsuccessful" performance review and was being considered for termination by August 2011. *See* Compl. ¶¶ 31, 34-35; Pl.'s Opp'n 5-6. Contrary to Plaintiff's argument, however, mere temporal proximity by itself does not demonstrate a causal link between protected activity and an adverse action sufficient to make a *prima facie* case of retaliation. At the very least, a plaintiff also must show that the relevant decision maker *knew* of the protected activity when he or she took the adverse action. *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) ("Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is

---

Mem. Order at 13, *Sterling v. Tenet*, No. 03-cv-329 (E.D. Va. Mar. 3, 2004), Dkt. No. 52, *aff'd*, 416 F.3d 338 (4th Cir. 2005).

absolutely necessary to establish the third element of the prima facie case"). And demonstrating that the relevant decision makers at the CIA had knowledge of Plaintiff's discrimination claims would risk revealing privileged information regarding the identities of CIA employees and how the CIA makes its employment decisions.

Moreover, even if mere temporal proximity were adequate to establish a *prima facie* case of retaliation, temporal proximity is clearly not sufficient to prove retaliation when an employer has offered an alternative explanation for its conduct. *See Williams v. Cerberonics, Inc*., 871 F.2d 452, 457 (4th Cir. 1989) ("Plainly, mere knowledge on the part of an employer that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee."); *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (same). Plaintiff acknowledges he received an "unsuccessful" performance evaluation and otherwise was informed by his supervisors that he was performing his duties poorly, *see* Compl. ¶¶ 34, 69, providing a plausible, legitimate reason for the CIA's actions.

Thus, if Plaintiff were to attempt to actually prove retaliation in court, he would have to demonstrate much more than mere temporal proximity to show a causal link between his discrimination complaints and his termination. He would need to rebut his supervisors' negative evaluation of his work – which could only be done by explaining the essential functions and standards for his position and offering evidence that he adequately fulfilled those functions and met those standards. All such evidence is privileged, *see* Brennan Decl. ¶ 9, and thus Plaintiff could not prove he experienced retaliation without using privileged information.

Defenses: Defendants also could not prove that Plaintiff had performed his duties poorly – or make any other such defense – without disclosing privileged information regarding

Plaintiff's work and the criteria the CIA uses to make its employment decisions. *See* Def.'s Mem. in Supp. 24-25. Plaintiff claims that Defendants could use Plaintiff's 2011 "unsuccessful" performance evaluation – redacted to remove all privileged details about his work – to argue that the CIA's actions were the result of Plaintiff's poor performance. Pl.'s Opp'n 6-7. But redacting all privileged details about Plaintiff's work from the evaluation would mean removing essentially all significant information about why Plaintiff received a poor performance evaluation. Under Plaintiff's proposal, Defendants could reveal that Plaintiff's performance had been criticized by his supervisors and deemed "unsuccessful," but they could not explain the reasoning behind this criticism, offer any concrete examples of his poor performance, or otherwise defend the assertion that Plaintiff had performed his duties unsuccessfully. Any other documentary evidence or testimony that would support the conclusion that Plaintiff's performance was unsatisfactory also would be privileged.

Defendants, in other words, could not adequately support the conclusion of the 2011 evaluation – could not actually prove that Plaintiff's performance was poor – without detailed privileged evidence regarding his performance, his coworkers' performance, the nature and requirements of his position, and the criteria the CIA used to evaluate performance. Especially given that Plaintiff contends that his supervisors' criticisms of his performance were false and driven by discriminatory motives, *see, e.g.*, Compl. ¶ 47, Defendants thus could not mount an effective defense by relying on only generic written statements from Plaintiff's supervisors indicating that his performance was unsuccessful. Privileged evidence would be required. For this reason, among others, this case should be dismissed.

CONCLUSION

Plaintiff does not contest the validity of the Director's assertion of the state secrets privilege and statutory privileges, and he cannot show any way that his claims could be litigated without threatening the disclosure of this privileged information. For this reason and those discussed in the Defendants' Memorandum in Support of their Motion to Dismiss and in the Director's public and *in camera, ex parte* declarations, the Court should uphold the Director's privilege assertions and dismiss Plaintiff's Complaint in its entirety.

Dated: January 9, 2015

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

DANA J. BOENTE
United States Attorney

SUSAN K. RUDY
Assistant Branch Director
Federal Programs Branch

CARLOTTA P. WELLS
Senior Trial Counsel
TIMOTHY A. JOHNSON
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 514-4522
Fax: (202) 616-8470
carlotta.wells@usdoj.gov

/s/
LAUREN A. WETZLER
Civil Chief
R. JOSEPH SHER
Deputy Civil Chief
Assistant United States Attorneys
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Tel: (703) 299-3747
Fax: (703) 299-3983
joe.sher@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

FRAZER WALTON, JR.
LAW OFFICES OF FRAZER WALTON, JR.
1913 D Street, N.E.
Washington, DC 20002
Office: (202) 398-8920
Email: frawalton@verizon.net

Dated: January 9, 2015

/s/
R. JOSEPH SHER
Deputy Civil Chief
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Tel: (703) 299-3747
Fax: (703) 299-3983
joe.sher@usdoj.gov

Counsel for Defendants