

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 21 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL BOTELHO,

Plaintiff-Appellant,

v.

ALEJANDRO N. MAYORKAS, U.S.
Secretary of Homeland Security,

Defendant-Appellee.

No. 21-17006

D.C. No.

1:18-cv-00032-ACK-WRP

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted June 7, 2023**
Honolulu, Hawaii

Before: BADE, BUMATAY, and SANCHEZ, Circuit Judges.

Michael Botelho appeals the district court's order dismissing his
Rehabilitation Act claim and its separate order granting summary judgment in
favor of the government on his Title VII claims. We have jurisdiction under 28

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

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

U.S.C. § 1291. We review de novo. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018) (dismissal); *Zetwick v. Cnty of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017) (summary judgment). We may affirm on any basis supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 811 (9th Cir. 2004).

1. The district court properly dismissed the Rehabilitation Act claim brought by Botelho, a TSA security screener, as preempted by the Aviation and Transportation Security Act (“ATSA”). We recently joined several of our sister circuits and numerous district courts in holding that Congress’s decision to vest the TSA Administrator with broad authority over the TSA screening workforce and to create and require specific physical qualifications for these positions conflicts with the Rehabilitation Act’s broader and more general standards. *Galaza v. Mayorkas*, 61 F.4th 669, 670–71 (9th Cir. 2023). Accordingly, the ATSA preempts Botelho’s Rehabilitation Act claim.¹ *See id.*

2. Botelho forfeited his argument that the Whistleblower Protection Enhancement Act (“WPEA”) overrides the ATSA’s preemption of Rehabilitation Act claims brought by TSA security screeners because he presents this argument for the first time on appeal. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018)

¹ Although *Galaza* was decided after the briefing in this case closed, in April 2023, the government filed a letter under Fed. R. App. P. 28(j) arguing that *Galaza* forecloses Botelho’s Rehabilitation Act and Botelho did not respond.

(explaining that generally, “arguments raised for the first time on appeal . . . are deemed forfeited” (citation omitted)). Botelho has not shown that an exception to the presumption against considering newly raised arguments on appeal applies. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1214 (9th Cir. 2020). Even if we considered the merits of his argument, Botelho was terminated on March 9, 2012 before the WPEA took effect, and our precedent establishes that the WPEA does not apply retroactively. *See Galaza*, 61 F.4th at 673–74 (citations omitted).

3. The district court properly entered summary judgment for the government on Botelho’s Title VII retaliation claim because he failed to establish a genuine dispute of material fact on the causation element of his prima facie case. *See Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1140–41 (9th Cir. 2001) (setting forth prima facie case); *see also Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (“Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.”). Accordingly, we do not reach Botelho’s claims regarding pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing burden-shifting analysis).

4. The district court properly entered summary judgment for the government on Botelho’s hostile work environment claim because his conclusory allegations are insufficient to establish a genuine dispute of material fact related to

this claim. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (discussing circumstances relevant to hostile work environment claims); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008) (“Conclusory statements without factual support are insufficient to defeat a motion for summary judgment.”).

AFFIRMED.