

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 31 2026

FOR THE NINTH CIRCUIT

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

FREDERICK PAYNE,

Plaintiff - Appellant,

v.

SEAN DUFFY, Secretary, Sued in his
official Capacity; UNITED STATES
DEPARTMENT OF TRANSPORTATION,
Federal Aviation Administration,

Defendants - Appellees.

No. 25-3179

D.C. No.

3:22-cv-00277-MMS

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Matthew M. Scoble, Magistrate Judge, Presiding

Submitted August 11, 2026**
Anchorage, Alaska

Before: CALLAHAN, BEA, and BUMATAY, Circuit Judges.

Plaintiff Frederick Payne filed this Title VII retaliation lawsuit against
Defendants Secretary of the Department of Transportation and the Department of

* 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).

Transportation, Federal Aviation Administration (collectively, the “Agency”).

Payne asserts that in 2013, an employee he supervised, Craig McFarland, filed two EEO complaints against him. In approximately May 2014, Payne responded to McFarland’s complaints by submitting two EEO affidavits. Around that time, Payne’s supervisors asked Payne if he had any negative information about McFarland, to which Payne replied that he did not. Payne claims that in retaliation for that protected EEO activity, the Agency gave him a negative performance review in 2017.¹ The district court granted summary judgment for the Agency. Payne timely appeals the summary judgment order. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

A district court’s decision to grant or deny summary judgment is reviewed de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). Our “review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c).” *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003) (citation omitted).

¹ To the extent that Payne intended to bring claims based on his negative performance reviews from 2015, 2016, or 2018, the Agency argues that Payne failed to exhaust his administrative remedies. Payne has never responded to that argument. He has thus forfeited claims related to performance reviews other than the one from 2017. *See CFPB v. CashCall Inc.*, 35 F.4th 734, 743 (9th Cir. 2022) (“[Appellee] forfeited that argument twice over by failing to present it to the district court or in its briefing before us on appeal.” (citing *Hawkins v. Kroger Co.*, 906 F.3d 763 (9th Cir. 2018))).

As an initial matter, the Agency argues that Payne’s brief lacks appropriate citations to the record and therefore violates Federal Rule of Appellate Procedure 28(a)(6), (a)(8)(A) and Ninth Circuit Rule 28-2.8. We agree. However, we decline to exercise our discretion to dismiss the appeal on this basis. *See Grant v. City of Long Beach*, 96 F.4th 1255, 1256 (9th Cir. 2024) (“We have discretion to dismiss appeals because of deficiencies in the briefs.” (citing *N/S Corp. v. Liberty Mut. Ins.*, 127 F.3d 1145, 1146 (9th Cir. 1997))).

The parties’ central dispute is whether Payne satisfies the causation element of a Title VII retaliation case. He does not.

To establish a *prima facie* case of Title VII retaliation, a plaintiff must “adequately allege that: (1) she engaged in an activity protected under Title VII; (2) her employer subjected her to adverse employment action; [and] (3) there was a causal link between the protected activity and the employer’s action.” *Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024) (quotation omitted). “If a plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged action.” *Id.* (quotation omitted). “If such a reason is asserted, then the burden shifts back to the plaintiff to show that the asserted reason is merely a pretext for retaliation.” *Id.* (citation omitted). Temporal proximity between an employee’s protected activity and the employer’s retaliatory adverse action “can support both a *prima facie* case

of retaliation and a showing of pretext.” *Id.* (citation omitted).

Payne cannot rely on temporal proximity, as the Agency’s adverse action, a 2017 performance review, occurred years after Payne’s protected EEO activity in approximately 2014. Moreover, Payne’s theory of causation rests on speculation and unreasonable inference. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002) (“At summary judgment, this court need not draw *all* possible inferences in [the employee]’s favor, but only all *reasonable* ones.” (citation omitted)). Payne alleges that when he refused to share negative information about McFarland, his supervisors “perceived him as assisting Mr. McFarland” with the EEO matter. But Payne never explains why his supervisors would assume that he would assist McFarland with complaints that McFarland had filed against him.

Payne also speculates about a phone call that he overheard, during which one of his supervisors told another supervisor to “find something on him.” Payne knows little about the call. He does not know the date, does not know whether anyone else dialed into the call, does not know if any other employees overheard the call, and does not know why his supervisors would have missed the “obvious” noise that signaled Payne had joined the call. Notably too, the supervisor who wrote Payne’s negative performance review in 2017 was not one of the supervisors on the call.

Even if Payne were to show causation, the Agency provides significant evidence of a legitimate, nondiscriminatory reason for Payne’s negative performance review. The record reflects that in an industry focused on safety, Payne failed to meet the requirements of a manager, especially when it came to communication with his team, his superiors, and his stakeholders. Payne fails to rebut this showing, providing only conclusory language and unsupported allegations. *See Kama*, 107 F.4th at 1059 (“If there is ‘abundant and uncontroverted independent evidence’ supporting the defendant’s stated motive, then ‘plaintiff’s “creat[ion of] only a weak issue of fact as to whether the employer’s reason was untrue” will not suffice.’” (quoting *Opara v. Yellen*, 57 F.4th 709, 724 (9th Cir. 2023))).

For these reasons, we affirm the district court’s order granting summary judgment for the Agency.

AFFIRMED.