S.D.N.Y.-N.Y.C.
17-cv-3028
McMahon, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of March, two thousand eighteen.

Present:

Barrington D. Parker,
Richard C. Wesley,
Debra Ann Livingston,
Circuit Judges.

Lyman S. Hopkins,

Plaintiff-Appellant,

v. 17-3653

LanguageTesting International,
Diane Archer, Official and Individual Capacity,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYMAN S. HOPKINS,

Plaintiff,

-against-

LANGUAGE TESTING INTERNATIONAL, et al.; DIANE ARCHER, OFFICIAL AND INDIVIDUAL CAPACITY,

Defendants.

17-CV-3028 (CM)

ORDER OF DISMISSAL

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff, appearing *pro se*, brings this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17; the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112-12117; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634; Section 105 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k); and 42 U.S.C. § 1983, alleging constitutional and statutory violations. By order dated July 12, 2017, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*.

On June 16, 2017, Plaintiff filed a motion to amend his complaint, and a memorandum of law in support of the motion (ECF Nos. 4, 5). Under Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiff may amend his complaint once, as a matter of course, within a certain timeline. As Plaintiff's filing of an amended complaint is permitted under Rule 15(a), the Clerk of Court is directed to docket separately the amended complaint, which is attached to the motion (ECF No. 4-1). The Court dismisses the amended complaint for the reasons set forth below.

STANDARD OF REVIEW

The Court must dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when the Court lacks subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

BACKGROUND

Plaintiff, identifying himself as a "physically disabled," 60-year-old black male, asserts that he is a state certified Spanish language teacher who studied Italian for several years, and is seeking an "Italian teacher endorsement" to strengthen his resume, particularly for the Connecticut State Department of Education ("CT DOE"). (Am. Compl. ¶¶ 2, 16.) Plaintiff sought this Italian endorsement from Language Testing International ("LTI"), a foreign language testing agency that "exclusively" administers foreign language tests for the CT DOE and several other states. (*Id.* at ¶ 23.)

On August 14, 2014, and May 28, 2015, Plaintiff took the Italian Oral Proficiency Interview ("OPI"), a 20 to 30-minute telephone language assessment, and was rated "Intermediate Mid." (*Id.* at ¶ 33.) After receiving his results, Plaintiff made "several inquiries" with LTI about retaking the test, and received "evasive or vague replies." (*Id.* ¶ 34.) On April 4, 2016, Plaintiff requested an in-person examination at LTI headquarters, rather than an "OPI

telephone interview," and LTI responded by requesting Plaintiff's feedback on a Diagnostic Request form and indicating a $75.00 fee. (*Id.* ¶¶ 36-37.) Plaintiff sent several subsequent e-mails, reiterating his desire to retake the OPI, and requesting test dates for an "onsite OPI" examination. (*Id.* at ¶ 39.) LTI sent Plaintiff a location and date for the Italian OPI via e-mail, and notified Plaintiff that LTI "no longer offer[ed]" the OPI examination in-person. (*Id.* ¶ 44.) Plaintiff responded to LTI via e-mail, detailing his grievances with "telephone OPI" testing. (*Id.* ¶¶ 46, 47.) Two days later, LTI sent Plaintiff an e-mail requesting he call LTI, to which Plaintiff responded that it was "unfeasible to use his phone minutes" due to his "poor financial resources." (*Id.* ¶¶ 48, 49.) Following an additional back-and-forth via e-mail regarding the application process for the Italian OPI and Plaintiff's grievances with the Italian OPI tester, Plaintiff applied for the OPIc examination – a computer-delivered language assessment – on July 11, 2016. Following the submission of his OPIc application, Plaintiff received a confirmation e-mail for the OPIc, which he claims did not mention a "proctor fee." (*Id.* ¶ 63.)

On July 16, 2016, Plaintiff arrived at LTI's office in White Plains, New York, for the OPIc examination, "utilizing a cane to walk." (*Id.* ¶ 65.) He claims LTI requested a proctor fee at the test site, and discriminated against him by sending a "deficient test confirmation notice" that failed to mention a proctor fee. (*Id.* ¶ 107.) Plaintiff was permitted to take the OPIc examination, despite not having paid the fee, but received an "Intermediate Low" score. (*Id.* ¶¶ 89, 90.) Plaintiff claims that the low score barred his application to the CT DOE for an Italian endorsement, because his written test score expired July 2016, and a retake of the OPIc required a 90-day wait period, preventing him from meeting the CT DOE deadline. (*Id.*)

Plaintiff also alleges that the "Italian OPIc test avatar speech border[ed] on imperceptible due to the prosody rate of speed," and that the exam required knowledge of current TV shows

and film. (*Id.* ¶ 80.) On July 30, 2016, Plaintiff e-mailed LTI, expressing his concerns with the OPIc, and "lack of adherence to the Performance Descriptors principals." (*Id.* ¶ 93, 99.) LTI responded to Plaintiff's grievances three months later, offering Plaintiff a "gratis retest outside of the CT DOE deadline." (*Id.* ¶ 102.) On April 22, 2017, Robert Katz, a contracts director at LTI, e-mailed Plaintiff, asserting that Plaintiff was aware of the exam proctor fee, and referencing the retest offer. (*Id.* ¶ 102, 103.)

Plaintiff brings this action asserting that he is a "member of a protected class who applie[d] for and is qualified to sit [sic] the employment exam and [was] treated adversely as a qualified test candidate" by LTI and Diane Archer, a test administration operations manager at LTI, in violation of his rights under Title VII, the ADA, the ADEA, the Civil Rights Act of 1991, and 42 U.S.C. § 1983. (*Id.* ¶ 10.) Plaintiff seeks punitive and compensatory damages. He also seeks to enjoin LTI from further engaging in discriminatory examination policies.

DISCUSSION

A. Employment Discrimination

Plaintiff brings employment discrimination claims against Defendants under Title VII, the ADA, and the ADEA.[1] These antidiscrimination provisions prohibit employers from mistreating an individual because of the individual's protected characteristics, *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007), or retaliating against an employee who has opposed any

[1] Plaintiff also asserts that LTI's "testing administration practice promotes disparate impact in violation of CRA 1991 § 105." (Am. Compl. ¶ 116.) After the Supreme Court interpreted Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), to "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory in operation," in 1991, Congress amended Title VII by enacting § 105 of the Civil rights Act of 1991 to codify *Griggs*' prohibition on disparate impact discrimination. *See Ricci v. DeStefano*, 557 U.S. 557, 578 (2009). Plaintiff's disparate impact claims under § 105 of the Civil Rights Act are considered together with his other claims under Title VII.

practice made unlawful by those statutes, *see Crawford v. Metro. Gov't*, 555 U.S. 271, 276 (2009). Each of the statutes provides only for the liability of an employer and other covered entity, such as employment agency, labor organization, or joint labor-management committee. *See* 42 U.S.C. § 2000e–2 (Title VII); 42 U.S.C. §§ 12111(2), 12112(a) (ADA); 29 U.S.C. § 623(a), (b), (c) (ADEA. A claim under these anti-discrimination statutes is premised on the existence of an employer-employee relationship. *See Gulino v. New York State Educ. Dep't.*, 460 F.3d 361, 370 (2d Cir. 2006) ("[T]he existence of an employer-employee relationship is a primary element of [a] Title VII claim[ ]."); *Lauria v. Nextel of New York, Inc.*, 438 F. Supp. 2d 131, 140 (E.D.N.Y. 2006) ([I]f an individual is neither an employee, or former employee of a company, he or she does not have the right to sue under the ADA."); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 509 (2d Cir. 1994) (where a plaintiff was not an employee of the defendant, there is no ADEA claim).

Courts have construed the definition of "employer" broadly under Title VII and the other employment discrimination statutes, *see Dortz v. City of New York*, 904 F. Supp. 127, 144 (S.D.N.Y.1995), to "encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an employee's compensation or terms, conditions, or privileges of employment," *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981). For example, "'an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability . . . on the constructive employer, on the theory that this other entity is the employee's joint employer.'" *Tate v. Rocketball, Ltd.*, 45 F. Supp. 3d 268, 273 (E.D.N.Y.2014) (quoting *Arculeo v. On–Site Sales & Mktg., LLC*, 425 F.3d 193, 198 (2d Cir.2005)) (ellipses in original); *see also N.L.R.B. v. Solid*

Waste Servs., Inc., 38 F.3d 93, 94 (2d Cir.1994) ("A joint employer relationship may be found to exist where there is sufficient evidence that the [joint employer] had immediate control over the other company's employees.). In addition, a plaintiff can assert claims against a defendant who is not the plaintiff's *direct* employer, where the plaintiff can "establish that the defendant is part of an 'integrated enterprise' with the employer, thus making one liable for the illegal acts of the other." *Brown v. Daikin Am., Inc.*, 756 F.3d 219, 226 (2d Cir. 2014) (emphasis added) (quoting *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 341 (2d Cir. 2000)). Licensing agencies that control an individual's access to employment are not generally considered employers. *See Nat'l Org. for Women, New York Chapter v. Waterfront Comm'n of New York Harbor*, 468 F. Supp. 317, 320 (S.D.N.Y. 1979) (holding that defendant, "in its licensing role . . . neither pa[id] the wages nor engage[d] the services of persons it register[ed]," and was therefore not an employer for Title VII purposes.); *Lavender-Cabellero v. NYC Dep't of Consumer Affairs*, 458 F. Supp. 213, 215 (S.D.N.Y. 1978) (holding that the defendant was not an "employer" under Title VII since it was "merely" licensing process servers and not employing them).

Plaintiff's employment discrimination claims must be dismissed, because the facts alleged do not suggest that he has or ever had an employment relationship with LTI. Plaintiff does not allege that he was employed by, or sought employment from LTI, or that LTI controlled the terms, conditions, and privileges of his employment or compensation such that it should be considered Plaintiff's employer. Nor does Plaintiff allege facts suggesting that LTI is a labor union, an employment agency, or that a connection exists between LTI and Plaintiff's employer sufficient to constitute an integrated enterprise or a joint employment relationship. Plaintiff's efforts to obtain certification from LTI in order to further his employment prospects with another party, mainly CTDOE, does not establish that a "plausible employment relationship" existed

between LTI and Plaintiff. *O'Connor*, 126 F.3d at 115. Plaintiff therefore fails to state an employment discrimination claim under Title VII, the ADA, or the ADEA, and his claims must be dismissed for failure to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

Plaintiff's employment discrimination claims against Diane Archer must be dismissed because even assuming he had any kind of employment relationship with LTI, individuals are not subject to liability under Title VII, the ADA, or the ADEA. *See Wrighten v. Glowski*, 232 F.3d 119, 120 (2d Cir. 2000); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) ("[I]ndividual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII."); *Darcy v. Lippman*, 356 F. App'x 434, 437 (2d Cir. 2009) (holding that the ADA does not provide for actions against individual supervisors); *Garibaldi v. Anixter, Inc.*, 407 F. Supp. 2d 449, 451 (W.D.N.Y. 2006) ("[T]here is no individual liability under any of the federal anti-discrimination statutes, including Title VII, the ADA, and the ADEA.").

B. 42 U.S.C. § 1983

A claim for relief under § 1983 must allege facts showing that each defendant acted under the color of a state "statute, ordinance, regulation, custom or usage." 42 U.S.C. § 1983. Private parties are not generally liable under the statute. *Sykes v. Bank of Am.*, 723 F.3d 399, 406 (2d Cir. 2013) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) ("[T]he United States Constitution regulates only the Government, not private parties."). For private activity to be deemed state action, there must be "a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). "A challenged activity

by a private entity may be deemed state action . . . when the private actor operates as a willful participant in joint activity with the State or its agents . . . ." *Cranley v. Nat'l Life Ins. Co. of Vermont*, 318 F.3d 105, 112 (2d Cir. 2003) (citation omitted). A complaint that merely alleges that private actors acted in concert with government officials to violate plaintiff's constitutional rights does not satisfy the state action requirement; a "meeting of the minds or intent to conspire" between the private defendants and state actors is necessary. *Dahlberg v. Becker*, 748 F.2d 85, 93 (2d Cir. 1984); *see also Ciambriello*, 292 F.3d at 324 ("A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity."). Nor is a private entity deemed a state actor "merely on the basis of 'the private entity's creation, funding, licensing, or regulation by the government.'" *Fox v. Int'l Conference of Funeral Serv. Examining Bds.*, No. 15-CV-3905 (KMK), 2017 WL 1074464, at *6 (S.D.N.Y. Mar. 17, 2017) (quoting *Cranley*, 318 F.3d at 112); *see also Jaramillo v. Prof'l Examination Serv., Inc.*, 515 F. Supp. 2d 292, 296 (D. Conn. 2007) (holding that a testing service that provides state licensing examinations is not a state actor, despite its status as "government contractor.").

Plaintiff brings this action asserting that LTI is a state actor under § 1983, because it works "jointly with several states," and that LTI violated his rights under the Fourteenth Amendment by "interfer[ing] with the Plaintiff['s] reasonable exam pursuits both before and during the exam day." (Am. Compl. at ¶¶ 112-114.) Plaintiff fails to allege facts suggesting that LTI, apparently a private company that provides language assessments for several states, should be deemed a state actor. The use of LTI's language testing program by government actors does not create a "sufficiently close nexus" to treat LTI's actions, or that of its employees, as that of

the State itself. *Jackson*, 419 U.S. at 351. The Court therefore dismisses Plaintiff's § 1983 claims for failure to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

District courts generally grant a *pro se* plaintiff an opportunity to amend a complaint to cure its defects, but leave to amend is not required where it would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123–24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Because the defects in Plaintiff's complaint cannot be cured with an amendment, the Court declines to grant Plaintiff leave to amend his complaint.

C. Defendants' Motion to Dismiss

Although the Court did not issue a summons in this case, on July 31, 2017, Plaintiff filed a waiver of the service of summons (ECF No. 14), indicating that Defendants agreed to waive service of summons. On August 11, 2017, Defendants filed a motion to dismiss the complaint (ECF Nos. 15-17). In light of the Court's determination above, the Court denies Defendants' motion to dismiss (ECF No. 15) as moot.

CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy of this order to Plaintiff, and note service on the docket. Plaintiff's complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The Court also denies Defendants' motion to dismiss (ECF No. 15) as moot.

The Clerk of Court is further directed to docket separately the amended complaint, which is attached to the motion, (ECF No. 4-1), and to terminate all other pending matters.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: August 22, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYMAN S. HOPKINS, Plaintiff, -against- LANGUAGE TESTING INTERNATIONAL, et al.; DIANE ARCHER, OFFICIAL AND INDIVIDUAL, Defendants.	17-CV-3028 (CM) ORDER

COLLEEN McMAHON, Chief United States District Judge:

Plaintiff filed this action *pro se*. On August 22, 2017, exercising its authority under 28 U.S.C. § 1915(e)(2)(B)(ii), the Court dismissed the complaint for failure to state a claim on which relief may be granted. On September 1, 2017, Plaintiff filed a motion for reconsideration under Local Civil Rule 6.3 (ECF Nos. 23- 24); and on September 18, 2017, he filed a second motion for reconsideration under Fed. R. Civ. P. 60(b) (ECF Nos. 25-26). After reviewing the arguments in Plaintiff's submissions, the Court denies the motions.

DISCUSSION

Plaintiff brings his first motion for reconsideration under Local Civil Rule 6.3, but the Court also construes it as a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006); *see also Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010) (The solicitude afforded to *pro se* litigants takes a variety of forms, including liberal construction of papers, "relaxation of the limitations on the amendment of pleadings," leniency in the enforcement of other procedural rules, and "deliberate, continuing efforts to ensure that a *pro se* litigant understands what is required of him") (citations omitted). The standards governing Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 are the same.

R.F.M.A.S., Inc. v. Mimi So, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009). The movant must demonstrate that the Court overlooked "controlling law or factual matters" that had been previously put before it. *Id.* at 509 (discussion in the context of both Local Civil Rule 6.3 and Fed. R. Civ. P. 59(e)); *see Padilla v. Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206 (S.D.N.Y. 2009) ("A motion for reconsideration is not an invitation to parties to 'treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's ruling.'") (internal quotation & citations omitted).

Plaintiff's submissions reveal that he does not understand the standard the Court used to dismiss his complaint or the basis for the dismissal. Plaintiff contends in both of his motions that the Court should not have dismissed the complaint prior to considering his August 28, 2017 opposition to Defendants' motion to dismiss. The Court did not, however, consider or rely on Defendants' motion to dismiss, but rather exercised its statutory power under 28 U.S.C. § 1915(e)(2)(B) to dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See also Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (A district court must dismiss a complaint when either: (1) the factual contentions are clearly baseless . . . ; or (2) the claim is based on an indisputably meritless legal theory.") (internal quotation marks and citation omitted). After reviewing the complaint, the

Court determined: that because Plaintiff was not employed by Language Testing International ("LTI"), he failed to state an employment discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA"), or the Age Discrimination in Employment Act of 1967 ("ADEA"); that Defendant Diane Archer, as an individual, was not subject to liability under Title VII, the ADA, or the ADEA; and that LTI is not a state actor subject to liability under 42 U.S.C. § 1983. Because Plaintiff has failed to demonstrate in his submissions that the Court overlooked any controlling decisions or factual matters with respect to the dismissed action, the motion under Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 is denied.

Under Fed. R. Civ. P. 60(b), a party may seek relief from a district court's order or judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

The Court has considered Plaintiff's arguments, and even under a liberal interpretation of his motion, Plaintiff has failed to allege facts demonstrating that any of the grounds listed in the first five clauses of Fed. R. Civ. P. 60(b) apply. Therefore, the motion under any of these clauses is denied.

To the extent that Plaintiff seeks relief under Fed. R. Civ. P. 60(b)(6), the motion is also denied. "[A] Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5)." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) (quoting *Smith v.*

Sec'y of HHS, 776 F.2d 1330, 1333 (6th Cir. 1985)). A party moving under Rule 60(b)(6) cannot circumvent the one-year limitation applicable to claims under clauses (1)-(3) by invoking the residual clause (6) of Rule 60(b). *Id.* A Rule 60(b)(6) motion must show both that the motion was filed within a "reasonable time" and that "'extraordinary circumstances' [exist] to warrant relief." *Old Republic Ins. Co. v. Pac. Fin. Servs. of America, Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (per curiam) (citation omitted). Plaintiff has failed to allege any facts demonstrating that extraordinary circumstances exist to warrant relief under Fed. R. Civ. P. 60(b)(6). *See Ackermann v. United States*, 340 U.S. 193, 199-202 (1950).

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Plaintiff and note service on the docket. Plaintiff's motions for reconsideration (ECF Nos. 23, 25) are denied. The Clerk of Court is also directed to terminate all other pending matters and to accept no further submissions under this docket number, except for papers directed to the United States Court of Appeals for the Second Circuit.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: October 4, 2017
New York, New York

COLLEEN McMAHON
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of May, two thousand and eighteen

Present: Barrington D. Parker,
Richard C. Wesley,
Debra Ann Livingston,

Circuit Judges,

Lyman S. Hopkins,

Plaintiff - Appellant

v.

LanguageTesting International, Diane Archer, Official and Individual Capacity,

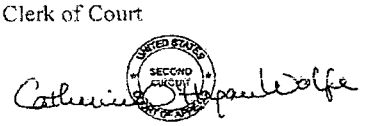
Defendants-Appellees.

ORDER
Docket No. 17-3653

Appellant, Lyman S. Hopkins, filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



Article III

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

42 U.S. Code § 12203

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

28 U.S. Code § 1915

(a)

(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)

(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other

cases, and the same remedies shall be available as are provided for by law in other cases.

(e)

(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)

(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)

(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court

Age Discrimination in Employment Act of 1967 § 623

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization-

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

Americans with Disabilities Act Title I

Title I requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. Religious entities with 15 or more employees are covered under title I.

Federal Rules of Evidence 103

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

Additional material from this filing is available in the Clerk's Office.