IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50530

TODD A. ENGLISH,

Plaintiff-Appellant,

v.

SONNY PERDUE, Secretary, USDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:16-CV-306.

(Filed Jun. 19, 2019)

Before: HIGGINSON and WILLETT, Circuit Judges, and BROWN, District Judge.[1]

STEPHEN A. HIGGINSON, Circuit Judge.*

Todd English, an employee of the United States Department of Agriculture (USDA), brought claims for

---

[1] Debra M. Brown, United States District Judge, Northern District of Mississippi.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sex- and age-based discrimination, hostile work environment, and retaliation against the Secretary of Agriculture in his official capacity. The district court granted the Secretary's motion to dismiss for failure to state a claim, and we affirm.

English, through counsel, filed his original complaint in July 2016 and an amended complaint in July 2017. The Secretary moved to dismiss, and a magistrate judge recommended that the motion be denied. Shortly afterwards, English filed a second amended complaint with the magistrate judge's leave.[2] English's counsel then withdrew.[3] Contrary to the magistrate judge's recommendation, the district court granted the

---

[2] The magistrate judge provided leave at a telephonic status conference. A minute entry for the conference reflects that English's counsel had said he intended to file a second amended complaint. "He asked if he needed leave of Court to file it and [Magistrate] Judge Manske told him to go ahead and file it since [Assistant U.S. Attorney] Cooper did not have an objection."

[3] English has proceeded *pro se* since then. In this appeal, he challenges the magistrate judge's approval of his counsel's motion to withdraw. The magistrate judge had denied two previous motions to withdraw. The magistrate judge granted counsel's third motion, which was accompanied by an affidavit citing fundamental disagreement over the scope of representation, among other problems. The depth of that disagreement is evident from the lengthy portion of English's brief addressing the issue.

"An attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client." *Matter of Wynn*, 889 F.2d 644, 646 (5th Cir. 1989). The matter of attorney withdrawal is "entrusted to the sound discretion of the court and will be overturned on appeal only for an abuse of that discretion." *Id.* (quotation omitted). We see no abuse of discretion here.

Secretary's motion to dismiss, prompting English's appeal.

For the purposes of this appeal, we focus on the second amended complaint, taking its well-pleaded allegations as true. *See Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 177 (5th Cir. 2018).[4]

English's complaint explained that he is a man over age 40 who, at the relevant time, was employed by the USDA Office of Rural Development's Single Family Housing Division in Temple, Texas. English alleged that his supervisor, Theresa Jordison, and the state director, Francisco Valentin, discriminated against him based on his age and sex, created a hostile work environment, and retaliated against him after he filed an Equal Employment Opportunity complaint. He invoked both Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*[5]

---

[4] English's brief adds extensive detail not present in his complaint. His arguments against the district court's dismissal of his lawsuit are based largely on this new detail. We cannot and do not consider English's many allegations advanced for the first time on appeal. *See Edionwe v. Bailey*, 860 F.3d 287, 293 n.1 (5th Cir. 2017). If we did consider English's new allegations, their focus on civil-service rules and on an apparent union-related dispute in English's workplace—to the near-total exclusion of the antidiscrimination laws on which his suit is based—would strengthen our conclusion, explained below, that English's sex or age did not plausibly cause his troubles at work.

[5] English cited the ADEA for the first time in his second amended complaint. He mentioned age discrimination in his first amended complaint, but without citing or naming the statute.

English's disparate-treatment allegations centered on a female coworker under age 30 who was allegedly "groom[ed] for promotion" by Jordison and given "assignments and opportunities" that English believed he should have received. English asserted that Valentin likewise gave female coworkers preferential treatment. English also said that he received an unwarranted "Does Not Meet" performance review from Jordison that rendered him ineligible for promotion.

English's complaint also alleged that he experienced a work environment made hostile by the conduct of Jordison and his coworkers. He said that Jordison ridiculed and berated him publicly, subjected him to unwarranted scrutiny, and dealt unfairly and capriciously with his work leave, among other wrongs. Jordison also allegedly tolerated snide remarks toward English by his coworkers[6] and, when English complained, told him to find another job.

English further claimed that he experienced retaliation "for pursuing a Charge of Discrimination." The complaint did not say when he filed that charge, but it did say that, "subsequent to [English] filing his Charge," Valentin undertook various retaliatory acts. Those acts included an "unreasonable and warrantless investigation," unjustified placement of English on administrative leave, restrictions on him in the workplace, and a transfer to another job. Though it seems

---

[6] A "younger female coworker" allegedly called English a "dumb sh*t."

from English's complaint that the allegedly hostile work environment existed before he filed his Charge, English alleged that the environment grew yet more hostile afterwards.

Reviewing English's first amended complaint, the magistrate judge recommended denying the Secretary's motion to dismiss as to two Title VII claims: English's hostile work environment claim, and the retaliatory hostile work environment claim that English seemingly intended to bring.[7] The magistrate judge also recommended granting leave to amend, due to English's complaint conflating the various types of claims under Title VII. The magistrate judge later granted that leave himself.

The district court, contrary to the magistrate judge's recommendation, granted the Secretary's motion to dismiss. Focusing on English's first amended complaint, the district court concluded that English's complaint failed to plead the requisite causal links adequately. In the district court's view, English did not plausibly allege that he experienced discrimination or hostility due to his sex or his age, nor did he plausibly allege that the alleged retaliatory acts he endured

---

[7] This court has not yet recognized the latter claim, though the other circuit courts have. *See Heath v. Bd. of Supervisors for So. Univ. and Agric. and Mech. College*, 850 F.3d 731, 741 n.5 (5th Cir. 2017).

were due to the protected activity of filing a Charge of Discrimination.[8]

"We review a district court's grant of a motion to dismiss based on failure to state a claim de novo, accepting all well-pleaded facts in the complaint as true." *Raj v. La. State Univ.*, 714 F.3d 322, 329–30 (5th Cir. 2013). "We affirm the district court's grant of a motion to dismiss when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face or has failed to raise its right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 330 (quotation omitted). "To state a claim that is facially plausible, a plaintiff must plead factual content that 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009)).

We begin with English's hostile work environment claims. To establish a hostile work environment claim under Title VII, the plaintiff must prove that he (1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) the harassment complained of was based on his membership in the protected group; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment

[8] Though the district court focused on English's first amended complaint, it acknowledged the second amended complaint and ruled that it did not remedy the deficiencies of the earlier filing.

in question and failed to take prompt remedial action. *Williams-Boldware v. Denton County, Tex.*, 741 F.3d 635, 640 (5th Cir. 2014). To establish the equivalent claim under the ADEA, the plaintiff must show that (1) he was over the age of 40; (2) he was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer. *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441 (5th Cir. 2011).

The district court correctly concluded that English did not adequately plead that his allegedly hostile work environment was based on his sex or his age. Nothing in his allegations makes it more than merely speculative that his sex or age caused the various forms of hostile treatment he allegedly endured. His complaint lacks, for instance, allegations of hostile age-based remarks that we have previously found adequate to state a claim. *E.g., Dediol*, 655 F.3d at 438 (concerning an elderly man berated as "old man," "pops," and "old m*****f*****"). The one allegedly hostile remark directed at English, *supra* note 16, was not sex- or age-related. Even if it were, "isolated incidents (unless extremely serious)" are insufficient for a hostile work environment claim. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007). Moreover, though English alleged a variety of inconsiderate and even mean conduct in his workplace, he described that conduct only in a conclusory fashion. None of his allegations plausibly shows that his sex or age was the

basis of the allegedly hostile conduct he experienced. As such, dismissal was the appropriate course. *See Raj*, 714 F.3d at 331.

We turn next to English's retaliation claims. To state a retaliation claim under Title VII, a plaintiff must show that (1) he engaged in conduct protected by Title VII; (2) he suffered a materially adverse action; and (3) a causal connection exists between the protected activity and the adverse action. *Jenkins v. City of San Antonio Fire Dep't*, 784 F.3d 263, 269 (5th Cir. 2015). A retaliation claim under the ADEA entails the same showing. *See Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 496–97 (5th Cir. 2015).

The district court correctly concluded that English failed to state a retaliation claim because he did not show a causal link between protected activity and adverse action. In retaliation cases, "causation is difficult to prove" and calls for "a highly fact specific" analysis. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 508 (5th Cir. 1994). Among other factors, we have suggested that an employee's "past disciplinary record," an employer's departure from "typical policy and procedures," and "the temporal relationship between the employee's conduct and discharge" might shed light on the causal component of a retaliation claim. *Id.*

As the district court noted, English's complaint contained no temporal detail other than that various alleged acts by the state director, Valentin, were "subsequent to" English's protected activity and that the frequency and degree of mistreatment increased.

"[T]he mere fact that some adverse action is taken *after* an employee engages in some protected activity will not *always* be enough for a *prima facie* case." *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997). Indeed, we look for close temporal proximity when reviewing pleadings for sufficient allegations. *Compare Wooten*, 788 F.3d at 499 (deeming complaint plausible where all retaliatory acts occurred within seven months of protected activity, after a decade of unblemished employment), *with Heggemeier v. Caldwell County, Tex.*, 826 F.3d 861, 870 (5th Cir. 2016) (deeming twenty-one-month lag too long for plausibility), *and Leal v. McHugh*, 731 F.3d 405, 417 (5th Cir. 2013) (three- to nine-year lag too long). By failing to provide temporal detail, English left unused an important means of showing causation. His complaint also lacked other allegations that might have made up for the deficiency.[9]

This absence of detailed allegations is likewise fatal to English's retaliatory hostile work environment claims. Because he has not plausibly alleged a causal connection between his protected activity and the various misfortunes that befell him thereafter, we need

---

[9] English's allegation that Jordison did not place him on a "performance improvement plan" as required by departmental rules before she gave him a poor performance review might seem like a departure from "typical policy and procedures," which can have causal significance according to *Nowlin*. *See* 33 F.3d at 508. But without temporal detail, there is no way to tell whether this alleged departure occurred before or after English's protected activity and thus no way to decide whether it lends plausibility to English's claims.

not decide whether to join the rest of the circuit courts in recognizing a retaliatory hostile work environment claim. *See Heath*, 850 F.3d at 741 n.5.

Next, we read English's complaint as attempting to state a disparate-treatment claim based on sex and age, given the allegations about the preferential treatment enjoyed by a younger female coworker.[10] At the pleading stage, a plaintiff is not required to "make out a prima facie case of discrimination in order to survive a Rule 12(b)(6) motion to dismiss." *Raj*, 714 F.3d at 331. Nevertheless, the plaintiff's allegations still must plausibly address "the ultimate question in a Title VII disparate treatment claim," that is, "whether a defendant took the adverse employment action against a plaintiff *because of* [his or] her protected status." *Raj*, 714 F.3d at 331 (quotation omitted). Likewise for the ADEA. *See Leal*, 731 F.3d at 410–12.[11]

Much of what English identifies as preferential treatment is not cognizable as an adverse employment action. "Adverse employment actions are ultimate employment decisions such as hiring, firing, demoting, promoting, granting leave, and compensating." *Stroy v.*

---

[10] The district court did not deal expressly with disparate treatment.

[11] Though English is a federal employee, the parties and the district court did not address the difference between the causal element of ADEA claims for federal employees versus private or local-government employees. *See Leal*, 731 F.3d at 410–12 (contrasting the lesser showing required under 29 U.S.C. § 633a, concerning federal employees, with "the more restrictive burden of proof" under § 623(a), concerning non-federal employees). We apply *Leal*'s treatment of federal employees' required showing here.

Gibson on behalf of Dep't of Vet. Affairs, 896 F.3d 693, 699 (5th Cir. 2018) (quotation omitted). "[A]n employment action that does not affect job duties, compensation, or benefits is not an adverse action." *Id.* (quotation omitted). Complaints that coworkers got to socialize with higher-ups, for instance, do not count.

To the extent any of English's claimed misfortunes did "affect job duties, compensation, or benefits," his disparate-treatment theory has the same weakness as his hostile work environment claims: a dearth of allegations showing he was mistreated due to his sex or age. That another employee was treated better and given more opportunities does not become actionable under federal law just because she was female or because she was younger. More is needed to raise English's claims above a speculative level. Consequently, English's disparate-treatment claims do not warrant reversing the district court and permitting this suit to proceed.

Finally, we do not consider the issues raised in English's brief regarding the U.S. Attorney's representation of the Secretary. "We consider issues raised for the first time on appeal only in extraordinary instances to avoid a miscarriage of justice." *United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1042 n.32 (5th Cir. 2016) (quotation omitted). Nothing out of the ordinary is evident here.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50530

D.C. Docket No. 6:16-CV-306

TODD A. ENGLISH,

Plaintiff - Appellant

v.

SONNY PERDUE, Secretary, USDA,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINSON and WILLETT, Circuit Judges and BROWN, District Judge*.

JUDGMENT

(Filed Jun. 19, 2019)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

---

* District Judge of the Northern District of Mississippi, sitting by designation

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

[SEAL]
Certified as a true copy and issued as the mandate on Sep 16, 2019

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

TODD A. ENGLISH,	§	
Plaintiff,	§	
	§	
v.	§	
SONNY PERDUE,	§	**W-16-CV-00306-FM**
Secretary, U.S. Department of Agriculture,	§	
	§	
Defendant.	§	

ORDER DENYING AS MOOT MOTION TO RECONSIDER ORDER AND MOTION TO DELAY RESPONSES UNTIL APPEAL IS RULED UPON.

(Filed Jun. 4, 2018)

On this day, the court considered the "Motion to Reconsider Order" ("Motion to Reconsider") [ECF No. 59], filed May 23, 2018 by Todd A. English ("Plaintiff") and "Motion to Delay Responses Until Appeal Is Ruled Upon" ("Motion to Delay") [ECF No. 60], filed May 23, 2018 by Plaintiff. In his Motion to Reconsider, Plaintiff asks this court to reconsider the court's previous order permitting Jon R. Ker ("Ker") to withdraw as the attorney of record for Plaintiff.[1] The Motion to Delay

[1] Mot. to Reconsider 1; "Order," ECF No. 56, entered May 14, 2018.

requests a "delay in responding until 10 days after the appeal is ruled upon."[2]

The Motion to Reconsider stems from a conflict in the attorney-client relationship between Ker and Plaintiff. The court will provide a brief background on the issue of withdrawal in this case. On February 20, 2018, Ker filed a "Motion to Withdraw as Attorney of Record," wherein he sought to withdraw as counsel of record on the following grounds: (1) There is a conflict that "goes to the heart of the attorney/client relationship, and continuing said relationship would violate the attorney code of ethics"; (2) Plaintiff has failed to pay for legal services rendered; and (3) Plaintiff has threatened to file a complaint with the Texas State Bar.[3] Plaintiff filed in opposition,[4] and the Magistrate Judge subsequently entered a text order denying the motion to withdraw.

On March 20, 2018, Ker filed once again to withdraw as the attorney of record.[5] On March 29, 2018, the Magistrate Judge entered a text order denying Ker's request. Ker requested for the third time on April 24, 2018 to withdraw as attorney of record.[6] On May 14, 2018, the Magistrate Judge issued an order permitting

---

[2] Mot. to Delay 1.

[3] Mot. to Withdraw as Attorney of Record 1.

[4] "Motion to Deny Motion to Withdraw as Attorney of Record," ECF No. 32, filed Feb. 22, 2018.

[5] *See generally* "Movant's First Amended Motion to Withdraw as Attorney of Record," ECF No. 42.

[6] "Supplemental Motion to Withdraw as Attorney of Record," ECF No. 48, filed Apr. 24, 2018.

Ker to withdraw as counsel of record, explaining that a sealed affidavit submitted by the attorney "establish[ed] that the attorney-client relationship ha[d] irretrievably broken down."[7]

Unrelated to the issue of withdrawal, this court entered its final disposition of the "Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted"[8] on May 23, 2018.[9] In the "Order Adopting in Part and Rejecting in Part the Report and Recommendation of the United States Magistrate Judge and Closing Case" ("Order"),[10] the court dismissed Plaintiff's suit in its entirety.[11] Specifically, the court held that Plaintiff's complaint failed to state a claim of hostile work environment on the bases of sex and age under Title VII, a claim of retaliation on the basis of engaging in protected activity under Title VII, and a claim of retaliatory hostile work environment on the basis of engaging in protected activity under Title VII.[12] The court therefore granted the Defendant's motion to dismiss.[13] In other words, the case is now closed.[14]

---

[7] "Order," ECF No. 56, entered May 14, 2018.

[8] ECF No. 24, filed Oct. 13, 2017.

[9] ECF No. 58, entered May 23, 2018.

[10] *Id.*

[11] *See id.*

[12] Ord. 24.

[13] *Id.*

[14] *See id.*

As this case has been terminated, the conflict over Ker's withdrawal is no longer at issue. Consequently, the court lacks the power to consider the Motion to Reconsider and the Motion to Delay. Accordingly, the court DENIES AS MOOT the "Motion to Reconsider Order" ("Motion to Reconsider") [ECF No. 59] and the "Motion to Delay Responses Until Appeal Is Ruled Upon" ("Motion to Delay") [ECF No. 60].

SO ORDERED.

SIGNED this 4 day of **June, 2018**

/s/ Frank Montalvo
FRANK MONTALVO
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

TODD A. ENGLISH,	§	
Plaintiff,	§	
	§	
v.	§	
SONNY PERDUE,	§	**W-16-CV-00306-FM**
Secretary,	§	
U.S. Department of	§	
Agriculture;	§	
	§	
Defendant.	§	

ORDER ADOPTING IN PART AND REJECTING IN PART THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND CLOSING CASE

(Filed May 23, 2018)

On this day, the court considered the "Report and Recommendation of the United States Magistrate Judge" ("Report and Recommendation"), entered March 2, 2018 by United States Magistrate Judge Jeffrey C. Manske ("Magistrate Judge") and "Defendant's Objection to the Report & Recommendation of the United States Magistrate Judge" ("Objection") [ECF No. 41], filed March 16, 2018 by Sonny Perdue, in his official capacity as Secretary of the Department of

Agriculture[1] ("Defendant"). Plaintiff Todd A. English ("Plaintiff") did not file a response. The deadline has passed, and the court will no longer await a response to the Objection.[2] In conjunction, the court considered "Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted" ("Motion") [ECF No. 24], filed October 13, 2017 by Defendant, "Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss" ("Response") [ECF No. 25], filed October 25, 2017 by Todd A. English ("Plaintiff"), and "Defendant's Reply in Support of His Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted" ("Reply") [ECF No. 27], filed November 11, 2017 by Defendant. After due consideration of the Report and Recommendation, Objection, Motion, Response, Reply, and the applicable law, the court **ADOPTS IN PART AND REJECTS IN PART** the Report and Recommendation and **GRANTS** the Motion for the reasons discussed below.

---

[1] "Complaint" ("Original Complaint"), ECF No. 1. The original complaint names the then Secretary of the Department of Agriculture, Thomas J. Vilsack, as the named defendant, but the current briefing names the current Secretary of Department of Agriculture, Sonny Perdue, as the defendant.

[2] *See* FED. R. CIV. P. 72(b)(2) ("A party may respond to another party's objections within 14 days after being served with a copy."). The Objection was filed on March 16, 2018, and Plaintiff therefore had until March 30, 2018 to file a response.

I. BACKGROUND

A. Factual Background

This suit arises out of alleged unlawful employment practices and acts by the Secretary of the Department of Agriculture in regard to Plaintiff, a Caucasian male residing in the County of Bell in Texas.[3] On July 29, 2017, Plaintiff filed suit, asserting Title VII claims on the bases of sex and age, as well as a Title VII claim on the basis of engaging in protected activity.[4]

Plaintiff asserts that he performed his job in a satisfactory manner ever since he began working as a Housing Technician (GS-1101-07) for the Rural Development, Single Family Housing Division in Temple, Texas, and later the Community Programs division in August 2009.[5] Plaintiff contends that his supervisor Theresa Jordison, the Housing Program Director, and Francisco "Paco" Valenin Jr., the Texas State Director, created, allowed, and encouraged a hostile work environment against Plaintiff on account of his sex and age.[6] Plaintiff further adds that he was subject to retaliatory treatment for pursuing a claim through the Equal Employment Opportunity Commission ("EEOC") complaint process.[7] Plaintiff's grievances against Jordison and Valenin include: (1) referring to

---

[3] "Amended Complaint" ("Amended Complaint") ¶ 1, 2 ¶ 4, ECF No. 17, filed July 13, 2017.

[4] *Id.* at ¶ 6.

[5] *Id.* at ¶ 5.

[6] *Id.*

[7] *Id.*

Plaintiff as a "dumb shit," (2) falsely accusing him of acts he did not commit, threatening termination of his employment, (3) giving him unsatisfactory performance reviews which eliminated his chances of being promoted, (4) denied leave requests without justification, subjecting him to an unreasonable investigation, and (5) placing him on administrative leave for ten weeks while the investigation was conducted, amongst other allegations.[8]

Plaintiff seeks compensation for lost wages and benefits, reasonable compensatory damages, and damages for physical illness, severe mental anguish, and emotional distress.[9] Plaintiff also states that he exhausted his administrative remedies by filing three written Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC") of the United States Department of Agriculture, and that Plaintiff's amended complaint was filed within ninety days of receipt of the final agency decision.[10]

B. Procedural Background

Plaintiff filed this suit on July 29, 2016.[11] Plaintiff filed his "Amended Complaint" ("Amended Complaint")[12] on July 13, 2017.[13] On October 13, 2017, Defendant

---

[8] *Id.* at 2–4, ¶¶ 8, 9, 12 & 13, 6–7 ¶ 21.

[9] Am. Compl. 8 ¶ 23.

[10] *Id.* at 8 ¶ 24.

[11] *See generally* Orig. Compl.

[12] ECF No. 17.

[13] *See generally id.*

filed "Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted"[14] pursuant to Federal Rule of Civil Procedure 12(b)(6).[15] After consideration of the Motion, Response, Reply, and the applicable law, the Magistrate Judge filed the Report and Recommendation regarding the disposition on the Motion on March 2, 2018.[16] Defendant subsequently objected to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b).[17]

On April 24, 2018, Plaintiff filed a "Second Amended Complaint" ("Second Amended Complaint")[18] without first requesting leave to file an amended complaint. Shortly thereafter on May 16, 2018, Defendant filed "Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted,"[19] requesting the court dismiss the Second Amended Complaint as well.[20]

C. The Magistrate Judge's Recommendation

The Magistrate Judge recommends denying the motion, concluding that Plaintiff stated enough factual assertions to plausibly state a claim for relief under

---

[14] ECF No. 24.

[15] *See generally id.*

[16] *See generally* Rep. & Rec.

[17] *See generally* Obj.

[18] ECF No. 47.

[19] ECF No. 50.

[20] *See generally id.*

Title VII on the basis of sex discrimination.[21] The Magistrate Judge did, however, reject Plaintiff's Title VII claim for age discrimination. Concerning his retaliation claim on the basis of engaging in protected activity, the Magistrate Judge concluded that the Amended Complaint adequately states a claim for relief, but noted that Plaintiff "appear[s] to conflate claims for discriminatory work environment, retaliatory work environment, and retaliatory hostile work environment."[22] Although the Magistrate Judge advises the denial of the Motion, he recommends the court order Plaintiff to replead his complaint.[23]

II. APPLICABLE LAW

A. Review of a Magistrate Judge's Report and Recommendation

Any party may contest the Magistrate Judge's findings by filing written objections within fourteen days of being served with a copy of the Report and Recommendation.[24] The objections must specifically identify those findings or recommendations that the party wishes to have the district court consider.[25] A district court need not consider "[f]rivolous, conclusive, or

---

[21] Rep. & Rec. 8.

[22] *Id.* at 11.

[23] *Id.* at 12.

[24] 28 U.S.C. § 636(b)(1)(C).

[25] *Thomas v. Arn*, 474 U.S. 140, 151, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

general objections."[26] The court must conduct a *de novo* review of any of the Magistrate Judge's conclusions to which a party has specifically objected.[27] On the other hand, findings to which no specific objections are made do not require *de novo* review; the court need only determine whether the Report and Recommendation is clearly erroneous or contrary to law.[28]

B. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure Rule 12(b)(6) allows dismissal of a complaint for "failure to state a claim for which relief can be granted."[29] "The central issue is whether, in the light most favorable to the Petitioner, the complaint states a valid claim for relief."[30] To survive a motion to dismiss, a petitioner must plead "enough facts to state a claim to relief that is plausible

---

[26] *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 410 n. 8 (5th Cir. 1982), *overruled on other grounds by Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)).

[27] *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

[28] *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

[29] FED. R. CIV. P. 12(b)(6).

[30] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (internal quotation marks and citation omitted); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)).

on its face."[31] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a Respondent has acted unlawfully."[32] "[F]acial plausibility" exists "when the Petitioner pleads factual content that allows the court to draw the reasonable inference that the Respondent is liable for the misconduct alleged."[33] A complaint is not required to set out "detailed factual allegations," but it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."[34] Although the court must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.[35]

C. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[36] A Title VII complaint need not contain greater particularity, as this would too narrowly constrict the role of the pleadings; rather,

---

[31] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[32] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[33] *Id.* (citing *Twombly*, 550 U.S. at 556).

[34] *Twombly*, 550 U.S. at 555.

[35] *See Kaiser Aluminum & Chem. Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

[36] 42 U.S.C. § 2000e-2(a)(1).

the ordinary rules for assessing the sufficiency of a complaint apply to Title VII actions.[37]

III. DISCUSSION

Defendant takes issue with a number of conclusions by the Magistrate Judge, contending that: (1) Plaintiff has not provided non-conclusory factual assertions that would show the harassment he alleges was based on his sex and (2) Plaintiff has failed to plead specific, non-conclusory factual assertions that suggest a causal link between his participation in a protected activity and an adverse employment action or harassment.[38]

Consequently, the court first engages in a *de novo* review of the Magistrate Judge's finding that Plaintiff's Amended Complaint provides sufficient factual contentions to state a Title VII sex discrimination claim of hostile work environment. Second, the court will conduct a *de novo* review with respect to the Magistrate Judge's conclusion that Plaintiff adequately alleged factual contentions to support a Title VII claim for either retaliation or retaliatory hostile work environment on the basis of engaging in protected activity. The remaining findings by the Magistrate Judge are reviewed for plain error.

---

[37] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

[38] Obj. 2.

A. Hostile Work Environment

1. Age Discrimination Under Title VII

a. The Magistrate Judge's Recommendation

The Magistrate Judge concluded that Plaintiff failed to adequately plead a claim for age discrimination under Title VII.[39] The Magistrate Judge highlighted two critical deficiencies in Plaintiff's Amended Complaint: (1) Plaintiff did not plead specific, age-related facts and (2) Plaintiff did not sue under the appropriate act – the Age Discrimination in Employment Act ("ADEA").[40]

b. Plain Error Review

As neither party objects to the Magistrate Judge's conclusion, this court reviews for plain error. After due consideration, the court finds no plain error with the Magistrate Judge's finding that Plaintiff may not pursue a claim for age discrimination under Title VII. Accordingly, the court **DISMISSES** this claim and **ADOPTS** this section of the Report and Recommendation as the opinion of the court.

---

[39] *See* Rep. & Rec. 7 ("If Plaintiff wishes to show the hostile or retaliatory work environment he was subjected to was the result of age discrimination, a Title VII suit is the incorrect cause of action. Based on plaintiff's allegation, the Age Discrimination in Employment Act appears to be a more viable vehicle.").

[40] *Id.*

2. Sex Discrimination Under Title VII

a. The Magistrate Judge's Recommendation

The Magistrate Judge concluded that Plaintiff asserted enough factual contentions to state a plausible claim to relief for sex discrimination in violation of Title VII.[41] In support of this finding, the Magistrate Judge pointed to a number of grievances raised by Plaintiff, including: "unjustified denials of leave requests, a higher level of scrutiny than his similarly situated coworkers, having female coworkers who had no supervisory control over him monitor his coming and going and report them to Jordison, changing his status from leave to AWOL, openly mocking him in the workplace, being told that he should 'find another job' when he complained of discriminatory treatment, and at that one point he was banned from entering the east side of the State Office building which detracted from his ability to do his job."[42]

b. Objections

Defendant takes issue with the Magistrate Judge's conclusion, arguing that Plaintiff has failed to assert specific, non-conclusory factual contentions that suggest the harassment was on the basis of his sex.[43]

---

[41] *Id.*

[42] Rep. & Rec. 8.

[43] Obj. 2.

As Defendant objects to the Magistrate Judge's recommendation, the court reviews this issue *de novo*.

c. Analysis

Defendant correctly points out that Plaintiff is required to plead facts that would give rise to a reasonable inference of the causal link between the alleged conduct and his sex.[44] Under Title VII, a "hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment."[45] To state a case of hostile work environment under Title VII, Plaintiff must establish that: (1) he is a member of a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his membership in a protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) his employer knew or should have known of the harassment and failed to take prompt remedial action.[46] Plaintiff is required to "plead sufficient facts on all of the ultimate elements . . . to make his case plausible."[47]

---

[44] *Id.* at 6.

[45] *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009) (internal quotation marks omitted).

[46] *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002). Defendant correctly points out [sic]

[47] *See Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016) (in a disparate treatment claim). Plaintiff has not clearly pleaded whether he seeks relief based on direct evidence

Under Federal Rule of Civil Procedure 8(a)(2), a plaintiff must provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[48] In *Ashcroft v. Iqbal*,[49] the Court laid out the pleading requirements of Rule 8:

> [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."[50]

The Court's decision in *Twombly*, as reiterated in *Iqbal*, crafted a two-pronged approach to evaluate the sufficiency of a complaint.[51] To survive a motion to dismiss, Plaintiff's complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[52] A claim is plausible where the "plaintiff pleads factual content that allows

---

or disparate treatment. However, at this stage of the litigation, such a distinction is not critical. Plaintiff is only required to plead facts giving rise to a plausible claim.

[48] FED. R. CIV. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).

[49] 556 U.S. 662 (2009).

[50] *Id.* at 678 (internal citations omitted).

[51] *Id.* at 678.

[52] *Id.* (citing 550 U.S. at 570) (internal quotation marks omitted).

the court to draw the *reasonable inference* that the defendant is liable for the misconduct alleged."[53]

First, Plaintiff's complaint fails because it relies on conclusory allegations rather than factual contentions. The Report and Recommendation erroneously concludes that Plaintiff stated a claim because he listed a number of hostile actions and alleged they were "due to his sex."[54] However, he pleads no facts linking the hostile actions taken by his supervisor, coworkers, and the State Director to his sex. Throughout the Amended Complaint, Plaintiff asserted that hostile actions were taken "on account of Plaintiff's sex (male)," which is a mere recitation of the required causal element.[55] This is not a factual contention and is only a conclusory subjective belief.

Nor does Plaintiff's contention that he received poor evaluations on account of his sex pass muster. Plaintiff asserts that these poor evaluations "assured that female employees under 40 years of age favored by Jordison would be selected for promotion rather than Plaintiff."[56] This is a subjective belief that Jordison was motivated by discriminatory animus. It is conclusory and speculative. An allegation that consists

---

[53] *Id.*

[54] Rep. & Rec. 8.

[55] Am. Compl. 2.

[56] *Id.* at 3.

of "threadbare recitals of the elements, supported by mere conclusory statements" is not sufficient.[57]

Second, Plaintiff's complaint fails as he has not stated a *plausible* claim for relief. Plaintiff charges that female coworkers with "no supervisory control" monitored various aspects of Plaintiff's employment.[58] As a preliminary matter, this allegation is broad and vague.

However, the crux of the matter is that it fails to allege causal connection. Indeed, it fails to give rise to a reasonable inference that this alleged monitoring was due to his sex, and not for any other reason. The mere fact that co-workers, who were women, were assigned to monitor him does not show that he was subject to unfavorable treatment based on his sex. While this court cannot speculate the actual cause of the monitoring, it is equally possible that the monitoring was due to non-discriminatory reasons. It is feasible that Plaintiff was monitored more closely due to a discriminatory animus, but feasible does not satisfy the requisite pleading standards.

Plaintiff lists a number of hostile actions against him, including one instance in which a female coworker allegedly called him a "dumb shit" and stated that she would like to see a bullet in his head.[59] While this inappropriate comment is certainly of an unkind,

---

[57] *See Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007)).

[58] Am. Compl. 4.

[59] *Id.* at 7 ¶ 21(o).

hostile nature, it does not suggest that it occurred *because* of his sex. This is the only comment alleged by Plaintiff. A single comment on its own does not create a reasonable inference of a causal link between the hostile comment and motivation based on gender animus.

At times, Plaintiff's complaint rests on allegations of preferential treatment of female employees.[60] These accounts of preferential treatment mainly involve Amanda Ayers, a female coworker under thirty years old.[61] Plaintiff specifically asserts that his supervisor favored Ayers "in an effort to groom Ayers for promotion" and thus gave her special assignments and opportunities, including a specialist position, committee assignments beneficial for promotion, positive evaluations, assigning tasks "of a higher level outside the scope of her employment."[62] These allegations fail to raise a reasonable inference that such preferential treatment was because of her gender. He does not provide any other accounts of co-workers receiving preferential treatment or other interactions that plausibly suggest preferential treatment based on sex; rather, he makes broad, conclusory statements.[63] The allegations

---

[60] *See* Am. Compl. 3 ¶ 12, 4–5 ¶ 14, 5–6 ¶ 20

[61] *See e.g.*, *id.* at 4 ¶ 14, 5 ¶¶ 15, 18, 20.

[62] *Id.* at 4–5 ¶ 14.

[63] *See e.g.*, *id.* at 5 ¶ 16 ("Jordison cultivated a pervasive attitude in her office which favored female employees as demonstrated by only male employees under her supervision receiving 'Does Not Meet' performance appraisals"); *id.* at 5–6 ¶ 20 ("The State Director gave discriminatory and preferential treatment to the younger female employees within the Single Family Housing

fail to make a connection between the preferential treatment and sex.

In conclusion, while the Amended Complaint paints a picture of poor treatment by his supervisor and coworkers, Plaintiff's allegations are non-specific, vague, and contain numerous conclusory statements. Further, the complaint's allegations fall short of a reasonable inference that the hostile conduct was based on sex. While it is conceivable that harassment occurred as a result of Plaintiff's sex, he has failed to provide factual content that "'nudg[es]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"[64] Consequently, Plaintiff has failed "to state a claim that is plausible on its face."[65] The court **DISMISSES** Plaintiff's Title VII claim of hostile work environment on the basis of sex and **REJECTS** the Report and Recommendation with respect to the instant claim.

Division including Amanda Ayers by taking them on out-of-town trips associated with the Agency and socializing with them to the exclusion of Plaintiff.").

[64] *Iqbal*, 556 U.S. 662, 683 (2009).

[65] *Id.* at 678 (citing 550 U.S. at 570) (internal quotation marks omitted).

B. Retaliation and Retaliatory Hostile Work Environment

1. The Magistrate Judge's Recommendation

The Magistrate Judge recommends this court deny the Motion, explaining that Plaintiff has successfully stated a claim for retaliation on the basis of engaging in protected activity.[66] First, the Magistrate Judge concluded that Plaintiff had properly alleged that he engaged in protected activity, consisting of a charge of discrimination and a hotline complaint with the Office of the Inspector General.[67] Second, the Magistrate Judge found that Plaintiff had adequately alleged an adverse employment action.[68] The Magistrate Judge reasoned that while disciplinary warnings or negative performance evaluations are not adverse employment actions for purposes of Title VII, their interference with his ability to be promoted may nevertheless constitute an adverse employment action.[69] Further, the Magistrate Judge pointed to Plaintiff's denied leave requests, which are actionable employment decisions.[70]

With regard to causality between the protected activity and adverse employment action or harassment, the Magistrate Judge found that Plaintiff sufficiently

---

[66] Rep. & Rec. 11.

[67] *Id.* at 9–10.

[68] *Id.* at 10.

[69] *Id.*

[70] *Id.*

alleged a causal link between the two.[71] In support of this conclusion, the Magistrate Judge pointed to allegations that: (1) Jordison had repeatedly singled him out for ridicule before his coworkers after the filing of his EEOC complaint, (2) the State Director ridiculed him during staff meetings after his hotline complaint, (3) denied leave requests, (4) Jordison told Plaintiff that he should find another job after he complained of unequal treatment, and (5) Jordison's failure to use a performance improvement plan before downgrading his performance.[72] The Magistrate Judge therefore concluded that Plaintiff's Amended Complaint adequately states a claim.[73]

2. Objections

Defendant objects to the Magistrate Judge's Findings, arguing that it is not clear whether Plaintiff asserts a claim for relief of retaliation or whether Plaintiff asserts a claim for relief of retaliatory hostile work environment.[74] Defendant argues that, either way, Plaintiff has failed to allege facts that would give rise to a reasonable inference of the causal link between the protected activity and the adverse employment action or hostile work environment.[75]

---

[71] *Id.* at 11.

[72] Rep. & Rec. 11.

[73] *Id.*

[74] Obj. 9.

[75] *Id.*

3. Analysis

As a preliminary matter, the court notes that the Amended Complaint does not clearly state which claim for relief Plaintiff seeks. Plaintiff may be pursuing a claim of retaliation, but it is also possible that Plaintiff is attempting to assert a claim for retaliatory hostile work environment. Regardless, the court considers whether Plaintiff has stated a plausible claim for relief for either.

a. Retaliation

To assert a retaliation claim, Plaintiff must plead that: (1) he engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action.[76] To state a Title VII retaliation claim, Plaintiff must establish a causal link between the protected activity and the adverse employment action and harassment.[77]

Defendant does not dispute that Plaintiff engaged in protected activity, consisting of the filing of the EEOC claim and the hotline complaint.[78] The filing of an EEOC complaint is protected activity within the meaning of Title VII.[79] Further, Defendant does not

---

[76] *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007).

[77] *Id.*

[78] *See id.* at 12.

[79] *Harvill v. Westward Comm'ns., L.L.C.*, 433 F.3d 429, 439 (5th Cir. 2005).

object to the Magistrate Judge's finding that Plaintiff has pleaded an adverse employment action. Defendant's Objection rests upon the third prong. Defendant asserts that Plaintiff's Amended Complaint lacks the requisite causal link between the protected activity and the alleged adverse employment actions and harassments.[80]

The only relevant allegation to causation is Plaintiff's contention that the State Director "undertook acts against Plaintiff *subsequent* to Plaintiff filing his Charge of Discrimination and after Plaintiff made a direct complaint to the [State Director]."[81] The court finds the use of the word "subsequent" troubling and considers whether the use of the word "subsequent" and the following list of hostile acts satisfy the requisite pleading standards.

The court will delve into a brief discussion of the requisite pleading requirements as relevant to this case. Federal Rule of Civil Procedure 8(a)(2) provides that "[a] pleading that states a claim must contain a short and plain statement of the claim showing that the pleader is entitled to relief." Modem pleading requirements have their roots in *Bell Atlantic Corporation v. Twombly*[82] and *Ashcroft v. Iqbal*.[83]

---

[80] *See* Obj. 12–13.

[81] Am. Compl. 6 (emphasis added).

[82] 550 U.S. 544 (2007).

[83] 566 U.S. 662 (2009).

i. Bell Atlantic Corp. v. Twombly

Twombly arose out of AT&T's divestiture of its local telephone business in 1984, resulting in a system of regional service monopolies.[84] Following several mergers between the remaining companies, Congress enacted the Telecommunications Act of 1996 withdrawing the approval of the local telephone companies' monopolies with the purpose of facilitating market entry.[85] Plaintiffs William Twombly and Lawrence Marcus represented a class action on behalf of telephone consumers, asserting that the phone companies were unlawfully conspiring in violation of § 1 of the Sherman Act.[86] The complaint alleged that the telephone companies had: (1) "engaged in parallel conduct in their respective service areas to inhibit the growth of upstart [companies]" and (2) refrained from competing against one another.[87]

The Court held that the complaint failed to plead a plausible claim, pointing to: (1) the lack of direct proof of agreement[88]; (2) refusal to compete is not unlawful[89]; (3) the history of the telecommunications industry, where regulation monopoly was the norm, among other factors.[90] The Court noted that the

---

[84] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

[85] *Id.* at 549.

[86] *Id.* at 550.

[87] *Id.* at 550.

[88] *Id.* at 564.

[89] *Id.* at 553–54.

[90] *Twombly*, 550 U.S. at 567–68.

complaint even suggested that it was, in fact, in the telephone companies' best interest to maintain their geographic dominance.[91] The Court explained that "sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation."[92] Accordingly, the Court dismissed the complaint, explaining that "the plaintiffs here have not nudged their claims across the line from conceivable to plausible."[93]

ii. Ashcroft v. Iqbal

In *Iqbal*, the plaintiff, a native of Pakistan and a Muslim, alleged that the Attorney General and Director of the Federal Bureau of investigations authorized, and had knowledge of, an unconstitutional policy imprisoning the plaintiff on the bases of race, religion, and national origin.[94] Like *Twombly*, the court's analysis included the consideration of an alternative explanation, specifically "that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[95] While the complaint's allegations were consistent with

---

[91] *Id.* at 568.

[92] *Id.*

[93] *Id.* at 570.

[94] *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

[95] *Id.* at 683.

discriminatory treatment based on race, religion, or national origin, there were "more likely explanations" and thus did not move the complaint from conceivable to "plausible."[96]

iii. Analysis

Twombly and *Iqbal* are instructive in two ways relevant to this court's analysis. First, they stress the necessity of a "context-specific" analysis, and that the judge must "draw on its judicial experience and common sense."[97] Second, they highlight that equally likely alternative explanations are important to the context-specific analysis by the court. In this case, while Plaintiff cannot peer into the minds of his supervisor and the State Director, Plaintiff is required nevertheless to allege facts that suggest it is more than mere conjecture that the alleged adverse employment actions and harassment resulted from engaging in protected activity.

In Title VII claims, temporal proximity can prove to be a powerful tool in establishing causality. Courts generally look to the timing between an employee's protected activity and the adverse action against him or her.[98] The Supreme Court has explained that

---

[96] *Id.* at 681.

[97] *Id.* at 679.

[98] *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("[C]ases that accept *mere* temporal proximity . . . as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'"); *Swanson v. General Services Admin.*, 110 F.3d 1180, 1188 (5th

"[C]ases that accept *mere* temporal proximity . . . as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be '*very close*.'"[99] Here, while Plaintiff is certainly not required to establish a prima facie case at this stage of litigation, Plaintiff must allege enough facts for this court to determine whether his claim is plausible.

Plaintiff's failure to detail the timing of the relevant events beyond "subsequent" is not sufficient. In his Amended Complaint, Plaintiff enumerated fifteen alleged hostile actions taken against him "subsequent" to the filing of his EEOC complaint and after a direct complaint to the State Director.[100] Plaintiff has provided *no timeline* of the alleged adverse employment actions or the alleged hostile actions in relation to the filing of the EEOC complaint or hotline complaint. It is impossible to know how close in time or removed in time these acts occurred. It is quite possible that some are a continuation of the conduct that occurred prior to the filing of the complaint. It is also possible that some actions occurred more than a year after, suggesting less connection between the protected activity and the hostile acts. In fact, the Amended Complaint as a

---

Cir. 1997) ("Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a prima facie case of retaliation.").

[99] *Breeden*, 532 U.S. at 273 (describing temporal proximity in the summary judgment context) (emphasis added).

[100] *See* Am. Compl. 6 ¶ 21.

whole is devoid of allegations describing the timing of events. It merely lists the dates that Final Agency Decisions were "received" by Plaintiff[101] and the time of his employment with the USDA: a time period spanning from August 2009 to the present.[102] This is insufficient to survive a motion to dismiss.

Plaintiff's Amended Complaint revolves around hostile treatment at his workplace, but it is, unfortunately, not uncommon for people to experience poor treatment in the workplace. Like *Twombly* and *Iqbal*, it is equally likely that an alternative explanation, one that is lawful but unkind, exists for the charged hostile acts. The fact that hostile treatment occurred in this case does not necessarily lend itself to a reasonable inference that the hostile activity occurred because of the protected activity. For example, it is equally likely that Plaintiff was not invited to the 2016 Office Christmas Party for a number of other reasons and not because Plaintiff filed the complaints.[103] Plaintiff has not "nudged" his claim "across the line from conceivable to plausible,"[104] and therefore his claim of retaliation must be dismissed.

b. Retaliatory Hostile Work Environment

Although the Fifth Circuit has explicitly "not recognized a retaliatory hostile work environment cause

---

[101] *Id.* at 1 ¶ 2.

[102] *Id.* at 2 ¶ 5.

[103] *See id.* at 7 ¶ 21(1).

[104] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

of action,"[105] it has not foreclosed such a claim either. The Fifth Circuit has evaded the question by deciding cases on other grounds, typically concluding that the claimant had failed to establish a prima facie case of either retaliation or hostile work environment.[106] The current ambiguity in Fifth Circuit jurisprudence does not foreclose this court's consideration of Plaintiff's claim. A number of our sister courts have considered such a claim, and this court follows suit.[107] While the

---

[105] *Heath v. Bd of Supervisors for S. Univ. and Agric. and Mech. College*, 850 F.3d 731, 741 n.5 (5th Cir. 2017). Twelve circuits have recognized such a cause of action. *Id.* at 741 n.5.

[106] *See Tejada v. Travis Ass'n for the Blind*, 617 Fed. Appx. 325, 328 (5th Cir. 2015); *Fallon v. Potter*, 277 Fed. Appx. 422, 424 n.3, 426 (5th Cir. 2008) (per curiam) (declining to decide whether retaliatory hostile work environment was cognizable, explaining that plaintiff did not make out a prima facie case as Plaintiff failed to establish the causal link between the protected activity and the alleged retaliatory conduct); *Bryan v. Chertoff*, 217 Fed. Appx. 289, 293 (5th Cir. 2007) ("We need not decide whether to recognize a retaliatory hostile work environment claim" as "Bryan cannot establish a prima facie case of hostile work environment.").

[107] *See, e.g., McCorvey v. Univ. of Tex. Health Sci. Ctr at San Antonio*, No. 5:16-CV-631-DAE, 2016 WL 8904949, at *10 ("So while the Fifth Circuit has not decided whether "retaliatory hostile work environment" is a cause of action, that has not stopped it – nor this Court and nor this Court's sister courts – from addressing the component elements of a retaliatory hostile work environment claim in substance; *Tejada v. Travis Assoc. for Blind*, No. A-12-CV-997-DAE, 2014 WL 2881450, at *3 (W.D. Tex. June 25, 2014), *aff'd*, 617 F. App'x 325 (5th Cir. 2015) ("The Court will leave for the Fifth Circuit the question of whether such a cause of action exists, and will assume for the purposes of this motion that Tejada may pursue a 'retaliatory hostile work environment' theory."); *Perez v. Brown*, No. CIV.SA-97-CA-289-PMA, 1999 WL 33289707, at *7 (W.D. Tex. May 10, 1999) (reasoning that

elements of this potential cause of action have not been articulated, sister courts have applied a hybrid approach of a Title VII retaliation claim and a Title VII hostile work environment claim.[108] Under this hybrid approach, a plaintiff must show that the harassment was a result of protected activity.[109]

Plaintiff's claim of retaliatory hostile work environment must fail for the same reason as the retaliation claim. As discussed above, Plaintiff has not provided sufficient factual detail of the timing of the alleged fifteen hostile acts with the filing of the EEOC complaint and hotline complaint. Consequently, he has not stated a claim for retaliatory hostile work environment under Title VII.

In sum, "subsequent" is not enough to plead the requisite element of causality between the protected activity and the alleged unlawful actions. Plaintiff's pleading fails to move his claim from conceivable to plausible. While he is not required to make out a prima facie case of retaliation at this stage of the litigation, he must still provide sufficient factual allegations that

---

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1977), "implicitly recognized a separate cause of action for a retaliatory hostile work environment.").

[108] *See McCorvey v. Univ. of Tex. Heatlh Sci. Ctr. at San Antonio*, No. 5:16-CV-631-DAE, 2016 WL 8904949, at *11 (W.D. Tex. Dec. 21, 2016); *see also Tejada*, 2014 WL 2881450, at *3; *Cavazos v. Berry*, 2010 WL 785860, at *7 (Mar. 8, 2010 S.D. Tex.).

[109] *See McCorvey*, 2016 WL 8904949, at *11; *Cavazos*, 2010 WL 785860, at *7 ("the Plaintiff would have to present evidence that the harassment was a result of her protected activity").

plead a plausible claim of relief.[110] The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,"[111] and Plaintiff's Amended Complaint is too vague to provide fair notice of the claim.

Consequently, the court **REJECTS** the Report and Recommendation and **DISMISSES** Plaintiff's second claim for relief. The court notes again that it is not clear if Plaintiff is pleading retaliation, retaliatory hostile work environment, or both, but Plaintiff's claim fails regardless.

C. Second Amended Complaint

Interestingly enough, Plaintiff filed a Second Amended Complaint following the Report and Recommendation, but prior to the disposition of this Motion.[112] First, Plaintiff erred when he did not request leave to file an amended complaint as required by Federal Rule of Civil Procedure 15. Second, the Second Amended Complaint fails to remedy the deficiencies of the Amended Complaint.

The only significant difference between the two complaints is that Plaintiff asserts relief under the Age

---

[110] *See Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016) (in a disparate treatment claim). Plaintiff has not clearly pleaded whether he seeks relief based on direct evidence or disparate treatment.

[111] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted).

[112] *See generally* Second Am. Compl.

Discrimination in Employment Act of 1967 ("ADEA") in the Second Amended Complaint.[113] However, the Second Amended Complaint, like the Amended Complaint, does not provide adequate age-related factual contentions. The extent of Plaintiff's age-related allegations are largely conclusory, consisting of: (1) that hostile actions occurred "because of his . . . age . . . "[114]; (2) that Jordison gave Plaintiff poor evaluations "which assured that female employees under 40 years of age . . . would be selected rather than Plaintiff"[115]; (3) that Ayers, who is under 30 years of age received preferential treatment; (4) that the State Director gave preferential treatment to younger female employees[116]; and (5) "created a working environment hostile to Plaintiff based upon Plaintiff's sex and age. . . ."[117] These allegations are conclusory. Further, the correlation between Ayers and her age does not necessarily suggest that she received preferential treatment based on age and not another reason. Accordingly, Plaintiff's Second Amended Complaint does not affect this court's dismissal of his age-related claim.

With respect to his Title VII hostile work environment claim on the basis of sex, the Second Amended Complaint fails to provide any additional detail. The allegations continue to be vague and conclusory, and Plaintiff fails to provide any additional detail

---

[113] *See id.* at 2 ¶ 3.

[114] *Id.* at 3 ¶ 8.

[115] *Id.* at 3–4 ¶ 12.

[116] *Id.* at 6 ¶ 20.

[117] Second Am. Compl. 7 ¶ 21(m).

remedying the lack of a causal link between sex discrimination and hostile work environment. With regard to his Title VII claim on the basis of engaging in protected activity, the Second Amended Complaint does not provide any further detail beyond "subsequent" with respect to timing.[118]

In conclusion, the Second Amended Complaint does not alter the disposition of this Motion for two reasons: (1) Plaintiff did not request leave to file this additional amended complaint; and (2) the Second Amended Complaint fails to remedy the deficiencies of the First Amended Complaint and therefore does not adequately state a claim for relief.

IV. CONCLUSION AND ORDERS

In conclusion, Plaintiff has failed to state a Title VII claim for hostile work environment on the bases of sex or age. Moreover, Plaintiff has failed to state a Title VII claim of retaliation and retaliatory hostile work environment. Accordingly, the court enters the following orders:

1. The "Report and Recommendation of the United States Magistrate Judge" [ECF No 38] is **ADOPTED IN PART AND REJECTED IN PART**.

2. "Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted" [ECF No. 24] is **GRANTED**.

---

[118] *See id.* at 6 ¶ 20.

3. The above-captioned cause is **DISMISSED WITHOUT PREJUDICE**.

4. "Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted" [ECF No. 57] is **DENIED AS MOOT**.

5. The Clerk of the Court is **INSTRUCTED to CLOSE** the above-captioned cause.

SO ORDERED.

SIGNED this **22nd** day of **May, 2018**.

/s/ Frank Montalvo
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

TODD A. ENGLISH, *Plaintiff*	§	
VS	§	**Case No. W-16-CA-00306-FM**
THOMAS J. VILSACK, SECRETARY, USDA; *Defendant*	§	

ORDER

(Filed May 14, 2018)

Before the Court is Jon Ker's Supplemental Motion to Withdraw. ECF No. 48. Counsel for the plaintiff, Jon Ker, has twice previously moved to withdraw, and the Court denied the motions. In the instant Motion, counsel asserts that an irreconcilable conflict has arisen between him and his client, Todd English. Counsel's affidavit, filed under seal, details the properly-supported factual basis of the Motion. ECF No. 51. Without detailing the information contained in the sealed affidavit, the Court finds that the affidavit effectively establishes that the attorney-client relationship has irretrievably broken down, and that the Motion should be granted.

The Court notes that this case is currently not set for trial until October 29, 2018, giving Plaintiff adequate time to retain new counsel. Accordingly, it is

ORDERED that the Supplemental Motion to Withdraw (ECF No. 48) is **GRANTED**. Jon R. Ker is permitted to withdraw as attorney of record for Plaintiff Todd A. English.

SIGNED this 14th day of May, 2018.

/s/ Jeffrey C. Manske
JEFFREY MANSKE
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

TODD A. ENGLISH	§	
Plaintiff,	§	
	§	
v.	§	
	§	**C.A. No. 6:16-cv-**
SONNY PERDUE,	§	**306-FM-JCM**
Secretary, U.S. Department	§	
of Agriculture	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 2, 2018)

TO: THE HONORABLE FRANK MONTALVO, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(d) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. This court has jurisdiction to review the Plaintiff's claims pursuant to 23 U.S.C. § 1331.

Pending before the Court is Sonny Perdue's, Secretary of the U.S. Department of Agriculture, ("Defendant") Motion to Dismiss for Failure to State a Claim against Plaintiff Todd English. ECF No. 24. As

explained in detail below, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss (ECF No. 24) be DENIED. The undersigned also **RECOMMENDS** that the Court order Plaintiff to replead his action with sufficient factual detail.

I. FACTUAL BACKGROUND

Plaintiff Todd English is a citizen of the State of Texas and an employee of Defendant. Pl.'s Compl. ¶ 1. English, a Caucasian male above the age of 40, alleges that he was subjected to discrimination due to his age and sex, which led to a hostile and retaliatory work environment. *Id.* at ¶¶ 6, 7. English alleges that he performed his employment services in a satisfactory manner since he began his employment as a Housing Technician (GS-1101-07) for the Rural Development, Single Family Housing Division in Temple, Texas, and later the Community Programs division under Defendant in August 2009. *Id.* at ¶ 5.

Despite his satisfactory performance, English alleges that his supervisor Theresa Jordison, Housing Program Director, and the Texas State Director, Francisco "Paco" Valenin Jr., created, allowed and encouraged a hostile work environment against English because of his sex and age, as well as in retaliation for his pursuit of a claim through the EEOC complaint process. *Id.* at ¶ 5. English alleges Jordison and Valenin, who were empowered by Perdue, created a hostile and retaliatory work environment by referring to English as a "dumb shit," falsely accused him of acts

he did not commit, threatening termination of his employment, giving him unsatisfactory performance reviews which eliminated his chances of being promoted, denying his leave requests without justification, subjecting him to an unreasonable investigation, and placing him on administrative leave for ten weeks while the investigation was conducted, amongst other allegations. *Id.* at ¶¶ 8, 9, 12, 13, 21.

English alleges that due to this hostile and retaliatory conduct from his superiors, he was denied promotional opportunities for which he was qualified but declared ineligible due to discriminatory performance appraisal that Jordison gave him. *Id.* at ¶ 23. English also alleges that these positions were filled by females who were discriminatorily protected by Perdue. English seeks compensation for lost wages and benefits, reasonable compensatory damages, and damages for physical illness, severe mental anguish, and emotional distress. *Id.* at ¶ 23. English also alleges that he exhausted his administrative remedies by filing three (3) written charges of discrimination with the EEO office of the USDA, and that English's amended complaint was filed within ninety (90) days of receipt of the Final Agency Decision. *Id.* at ¶ 24.

English alleges two claims for relief in his complaint. First, that Perdue violated Title VII by undertaking a pattern of discrimination based on English's sex (male) and age (40) that created a retaliatory and hostile work environment. *Id.* at ¶¶ 26, 29. Second, that Perdue's behavior was retaliatory toward English for his participation in protected activity. *Id.* at ¶ 31.

This motion is fully briefed. English's Amended Complaint ("Complaint") was filed July 13, 2017. ECF No. 17. Perdue filed a Motion to Dismiss for Failure to State a Claim ("Motion") on October 13, 2017. ECF No. 24. English filed a Response ("Response") October 25, 2017. Pl.'s Resp.; ECF No. 25. Perdue filed a Reply to English's Response ("Reply") on November 1, 2017. Def.'s Reply; ECF No. 27.

II. RELEVANT LAW

Defendant moves to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). To survive 12(b)(6) dismissal, a plaintiff must plead enough facts to state a claim to relief that is both legally cognizable and plausible on its face, but the court should not evaluate the plaintiff's likelihood of success. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The Federal Rules of Civil Procedure require a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant 'fair notice' of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). This requires Plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. *See id.* at 555, n.3. Plaintiff is required to "plead enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when a

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A pleading that offers "labels and conclusions," "naked assertion[s]" devoid of "further factual enhancement," or "a formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555, 557; *see also Taylor v. Books A. Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). Evaluating the plausibility of a claim is a context specific process that requires a court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 679.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII complaint need not contain greater particularity, as this would too narrowly constrict the role of the pleadings; rather, the ordinary rules for assessing the sufficiency of a complaint apply to Title VII actions. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

III. DISCUSSION

Defendant contends that Plaintiff fails to properly state sufficient factual assertions to show that Plaintiff is entitled to the relief sought. Def.'s Mot. at 1. Defendant argues that Plaintiff's Amended Complaint does not adequately state a claim for hostile work environment, nor does it state a claim for a retaliatory work environment. *Id.* at 1, 3.

A. Hostile Work Environment

Plaintiff alleges that Defendant violated Title VII by unlawfully undertaking in a pattern of discriminatory, retaliatory, and hostile manner towards Plaintiff due to his age and his sex. Pl.'s Compl. ¶¶ 26, 29. Defendant asserts in its Motion that Plaintiff fails to make factual allegations sufficient to establish all elements of a hostile work environment claim pursuant to Title VII. Def.'s Mot. at 1. More specifically, Defendant argues 1) that age discrimination is not supported by a Title VII claim for a hostile work environment, and 2) that Plaintiff's complaint does not contain specific facts that show the harassment was based solely on his sex. *Id.* at 2.

A hostile work environment claim under Title VII is actionable when a workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To establish the elements of a hostile work

environment claim under Title VII, Plaintiff must sufficiently plead: 1) he belongs to a protected group; 2) he was subjected to unwelcome harassment; 3) the harassment complained of was based on his sex; 4) the harassment complained of affected term, condition, or privilege of employment; and 5) his employer knew or should have known of harassment in question and failed to take prompt remedial action. *Ramsey v. Henderson*, 286 F.3d 264 (5th Cir. 2002); *Wyly v. W.F.K.R., Inc.*, 1 F. Supp. 3d 510, 513 (W.D. Tex. 2014) (citing *Hockman v. Westward Commcns, LLC*, 407 F.3d 317, 325 (5th Cir. 2004)).

This standard requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victims subjective perception that the environment is abusive. *Id.* at 21; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). To be actionable under Title VII as "abusive/hostile work environment" harassment, the conduct need not seriously affect employees psychological well-being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive. *Id.* at 22.

i. Age is not a class covered by Title VII

Title VII deals with discrimination due to an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII does not include age as a protected class. *Id.* Plaintiff attempts to maneuver around this fact by using Fifth Circuit precedent

regarding the Age Discrimination in Employment Act of 1967 ("ADEA") claims in *Dediol*. *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435 (5th Cir. 2011). However, Plaintiff's reliance on *Dediol* in his Response is misguided. Pl.'s Resp. at 3.

In *Dediol*, a 65-year old employee was frequently denigrated by his supervisor with terms such as "old motherf-er", "old man", and "pops." *Id.* at 337. Dediol's supervisor also mocked his religion and physically intimidated him. The plaintiff in *Dediol* sued using an ADEA cause of action, and the ruling expressly held that "a plaintiff's hostile work environment claim based on age discrimination under the ADEA may be advanced in [the Fifth Circuit]." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 442 n.7 (5th Cir. 2012). The ruling clearly dealt with the issue that was before the court: whether the ADEA included possible hostile work environment claims. The court did not hold that ADEA claims and Title VII claims were synonymous, but instead stated that the two claims are statutorily distinct and did not "read in" age as a protected class under Title VII. As the Supreme Court has ruled, the differences between the ADEA and the protected classes of Title VII are relevant, and that Congress intended to treat the two differently. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 236 (2005).[1] *Dediol* is

[1] In *Smith v. City of Jackson, Miss.*, Justice Sandra Day O'Connor ruminated on the differences between the ADEA and Title VII when she stated that "the ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such [age discrimination] claims. Moreover, the significant differences between the ADEA and Title

distinguishable from the case at hand in two critical respects: 1) Plaintiff English does not plead specific, age-related facts in his pleading, and 2) Plaintiff English is not suing under the ADEA. If Plaintiff wishes to show the hostile or retaliatory work environment he was subjected to was the result of age discrimination, a Title VII suit is the incorrect cause of action. Based on Plaintiff's allegation, the Age Discrimination in Employment Act appears to be a more viable vehicle.

ii. Sex is a protected class under Title VII

Plaintiff also alleges that he was harassed due to his sex. Sex is a protected class under Title VII, meaning that Plaintiff can properly bring a hostile work environment claim under Title VII. 42 U.S.C. § 2000e-2(a)(1).

In order to properly plead a hostile work environment claim, a plaintiff must show that 1) he belongs to protected group; 2) he was subjected to unwelcome harassment; 3) harassment complained of was based on his sex; 4) harassment complained of affected term, condition, or privilege of employment; 5) employer knew or should have known of harassment in question and failed to take prompt remedial action. *Ramsey v. Henderson*, 286 F.3d 264 (5th Cir. 2002); *McCorvey v. Univ. of Texas Health Sci. Ctr. at San Antonio*, 2016 WL 8904949, at *12 (W.D. Tex. Dec. 21, 2016). Defendant

---

VII of the Civil Rights Act counsel against transposing to the former our construction of the latter in *Griggs v. Duke Power.*" *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 236 (2005).

argues that Plaintiff fails to adequately allege that the harassment complained of was based on his sex. Def.'s Mot. at 2.

At this stage, this Court simply looks to whether Plaintiff has pleaded enough facts to plausibly state a claim to relief under Title VII. *Twombly*, 550 U.S. at 570. In his complaint, Plaintiff alleges several factual assertions that if true, would sufficiently show that the harassment complained of was due to his sex. Plaintiff offers several factual assertions that prevent this Court from granting Defendant's Motion to Dismiss for Failure to State a Claim. Plaintiff alleges that, due to his sex and because he pursued a claim through the EEOC process, he was subjected to harassing behavior from Jordison, including: unjustified denials of leave requests, a higher level of scrutiny than his similarly situated coworkers, having female coworkers who had no supervisory control over him monitor his coming and going and report them to Jordison, changing his status from leave to AWOL, openly mocking him in the workplace, being told that he should "find another job" when he complained of discriminatory treatment, and at that one point he was banned from entering the east side of the State Office building which detracted from his ability to do his job. Pl.'s Compl. at ¶¶ 6, 8, 21

It is not incumbent on the Court at this stage to make definitive factual determinations, but simply to decide whether or not the pleading states enough factual assertions to plausibly state claims to relief under Title VII. *Twombly*, 550 U.S. at 570. The Court

RECOMENDS that Defendant's Motion to Dismiss be denied with regard to the instant claim.

B. Retaliatory Work Environment

While both parties are correct in asserting that the Fifth Circuit has not specifically recognized a cause of action for retaliatory work environment or harassment under Title VII, the Circuit has not foreclosed such a cause of action. *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 742 n.5 (5th Cir. 2017) ("we have not recognized a retaliatory hostile work environment cause of action"); *Fallon v. Potter*, 277 Fed. Appx. 422, 424 (5th Cir. 2008) (Fifth Circuit holding that it did not need to decide whether to recognize retaliatory hostile work environment claim because plaintiff could not establish a prima facie case of hostile work environment). Given the absence of binding authority, courts in the Fifth Circuit have assumed that a retaliatory work environment claim can be brought. *Zavala v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 3:16-CV-1034-D, 2017 WL 274133, at *2 (N.D. Tex. Jan. 20, 2017) (*See Rowe v. Jewell*, 88 F. Supp. 3d 647, 673 (E.D. La. 2015) ("[T]his court will assume, as other district courts in this circuit have done, that [plaintiff] has a cause of action for a retaliatory hostile work environment)). In fact, in *Barnes v. McHugh*, the Eastern District of Louisiana rejected an argument similar to Defendant's. In that case, the court rejected a motion to dismiss plaintiff's retaliatory work environment claim because "the Fifth Circuit has considered a retaliatory hostile work

environment claim [in *Fallon*], it has therefore recognized its potential validity." *McCorvey v. Univ. of Texas Health Sci. Ctr. at San Antonio*, 2016 WL 8904949, at *10 (W.D. Tex. Dec. 21, 2016) (citing *Barnes v. McHugh*, 2013 WL 3561679 (E.D. La July 11, 2013)).

To establish a prima facia case of retaliatory work environment under Title VII, Plaintiff must show that 1) he engaged in conduct protected by Title VII; 2) he suffered a materially adverse action; and 3) a causal connection exists between the protected activity and the adverse action. *Jenkins v. City of San Antonio Fire Dept.*, 784 F.3d 263, 269 (5th Cir. 2015) (*See Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484 (5th Cir. 2008); *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). Protected conduct has been held to include the filing of an EEOC charge. *Harvill v. Westward Commcns, LLC*, 433 F.3d 428, 439 (5th Cir. 2005).

Perdue argues in his Motion that two of these elements are not met: 1) that Plaintiff did not suffer an adverse employment action, and 2) that Plaintiff does not properly plead that there is a causal connection between Plaintiff's participation in protected activity and an adverse employment action. Def.'s Mot. at 3-4.

First, Defendant does not dispute that Plaintiff properly alleges that he engaged in protected conduct twice: 1) Plaintiff filed a Charge of Discrimination, and 2) Plaintiff filed a "hotline" complaint with the Office of the Inspector General. Pl.'s Compl. at ¶¶ 8, 21; *Westward Commcns, LLC*, 433 F.3d 428.

Second, Plaintiff adequately alleges an adverse employment action as a result of the alleged discrimination based on his sex. The Fifth Circuit has a "strict interpretation of the adverse employment element of [the] prima facie intentional discrimination case" under Title VII that is limited to ultimate employment decisions such as "hiring, granting leave, discharging, promoting, or compensating." *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)). This does not include disciplinary warnings or negative performance evaluations. *Noel v. Shell Oil Co.*, 261 F. Supp. 3d 752, 768 (S.D. Tex. 2017) (citing *Arrieta v. Yellow Transp., Inc.*, 2008 WL 5220569 (N.D. Tex. Dec. 12, 2008)). While his negative performance reviews alone would not constitute an adverse employment action under *Shell Oil* or *Yellow Transp.*, their deleterious impact on his ability to be promoted, and in fact barring him from promotion, may constitute an adverse employment action. Also, Plaintiff alleges that Defendant denied his leave requests without reasonable justification, which is considered an ultimate employment decision. Pl.'s Compl. at ¶ 13; *McCoy*, 492 F.3d at 559.

Lastly, Plaintiff must plead a causal link between the protected activity and the adverse employment action. *Jenkins*, 784 F.3d 263. The Fifth Circuit has held that this process is "highly fact specific" and identified several factors that may be considered in determining whether a causal, "but-for" link has been demonstrated: 1) the employees past disciplinary record; 2) whether the employer followed its usual disciplinary

procedures when taking the adverse action; and 3) the temporal relationship between the protected activity and the adverse action. *Cavazos v. Berry*, 2010 WL 785860, at *5 (S.D. Tex. Mar. 8, 2010) (citing *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507–08 (5th Cir.1994). Close timing alone may be a significant factor, but not necessarily determinative of retaliation. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir.1995).

Plaintiff has pleaded several factual allegations that appear to meet this prong of the test: Jordison repeatedly singled him out for ridicule in front of his coworkers even after he filed his EEOC complaint; the State Director ridiculed him during staff meetings after he filed a "hotline" complaint with the Office of the Inspector General; Jordison denied his leave requests without giving justification; Jordison allegedly told Plaintiff he "needed to find another job" after he complained to her of unequal treatment; and Jordison did not place him on a performance improvement plan before downgrading his performance, which is allegedly required by the agency. Pl.'s Compl. at ¶¶ 6, 8, 13, 21. Taken together, Plaintiff pleads sufficient facts to potentially show a causal link between the protected activity and the adverse employment action.

When viewed in the light most favorable to Plaintiff, the Court finds that Plaintiff's Amended Complaint adequately states a claim. *Twombly*, 550 US at 570. However, Plaintiff does appear to conflate claims for discriminatory work environment, retaliatory work environment, and retaliatory hostile work

environment in his Response and Amended Complaint, even though his second claim for relief simply asks for relief from "acts, actions, and practices of Defendant [that] were *retaliatory.*" Pl.'s Compl. at ¶ 31. Therefore, while this Court **RECOMMENDS** that Defendant's Motion to Dismiss be denied as to Plaintiff's claim of hostile work environment under Title VII, the Court should order Plaintiff to submit a Second Amended Complaint.

IV. RECOMMENDATION

Rather than dismiss the complaint in its entirety, the Court should allow Plaintiff an opportunity to amend. Accordingly, the Court **RECOMMENDS** that Defendant's Motion to Dismiss (ECF No. 24) be **DENIED**. It is further **RECOMMENDED** that Plaintiff be ordered to replead his complaint.

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report

and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). To the extent that a party has not been electronically served by the Clerk with this Report and Recommendation pursuant to the CM/ECF procedures of this district, the Clerk is directed to send such party a copy of this Report and Recommendation by a national overnight delivery service having confirmation of pickup and delivery.

SIGNED this 2nd day of March, 2018.

/s/ Jeffrey C. Manske
JEFFREY MANSKE
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50530

TODD A. ENGLISH,

Plaintiff-Appellant

v.

SONNY PERDUE, Secretary, USDA,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 6, 2019)

(Opinion June 19, 2019, 5 Cir. _____, _____ F.3d _____)

Before HIGGINSON and WILLETT, Circuit Judges, and BROWN, District Judge.*

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

---

* Debra M. Brown, United States District Judge, Northern District of Mississippi.

Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Debra M. Brown
UNITED STATES CIRCUIT JUDGE