# APPENDIX A

record 11/5/2021

# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2021
Lyle W. Cayce
Clerk

No. 20-10158

SONYA R. EDWARDS,

*Plaintiff—Appellant*,

*versus*

MESQUITE INDEPENDENT SCHOOL DISTRICT,

*Defendant—Appellee.*

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2620

Before DENNIS and ENGELHARDT, *Circuit Judges*, and HICKS*, *Chief District Judge*.

JUDGMENT

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

* Chief District Judge of the Western District of Louisiana, sitting by designation.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

JAMES L. DENNIS, *Circuit Judge*, dissenting.

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*Defendants—Appellees*,

Appeal from the United States District Court
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Before DENNIS and ENGELHARDT, *Circuit Judges*, and HICKS*, *Chief District Judge*.

S. MAURICE HICKS, JR., *Chief District Judge*:

* Chief District Judge of the Western District of Louisiana, sitting by designation.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Plaintiff Sonya R. Edwards appeals the district court's dismissal of her discrimination and retaliation claims under Fed. Rule Civ. Proc. 12(b)(6). After careful review of the arguments and relevant portions of the record, we AFFIRM.

I.

Edwards was hired by the Mesquite Independent School District ("MISD") in 2006 as a substitute teacher and was assigned exclusively to Mesquite High School beginning in 2014. Beginning in February 2017, Edwards claims the high school secretary started making racist remarks to her, spreading false stories about her, and continuously harassing her. At one point, another school administrator was made aware of the situation and told Edwards "to keep doing what she is doing," there was "no need to investigate," and that "everything was ok." On May 19, 2017, Edwards was terminated from her substitute teaching position and was transferred to Agnew Middle School within the MISD.

Edwards subsequently submitted to the EEOC a Form 238 Intake Questionnaire on or about May 22, 2017, and a Form 5 Charge of Discrimination on May 29, 2018, alleging that she experienced discrimination based on her race and retaliation for reporting the alleged mistreatment. She then filed multiple complaints against MISD in the district court asserting similar claims. MISD filed a motion to dismiss Edwards's first amended complaint because she failed to exhaust her administrative remedies.

Prior to filing a claim in the district court for employment discrimination under Title VII, a plaintiff must exhaust all administrative remedies by filing a timely charge of discrimination with the EEOC, or other state administrative agency, and receiving a statutory right-to-sue notice. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109, 122 S.Ct. 2061, 2070

(2002). In Texas, a plaintiff has up to 300 days after the alleged discriminatory employment practice to file a charge with the EEOC. *Id.* at 110.

The district court granted MISD's motion to dismiss Edwards's first amended complaint because her Form 5 Charge was untimely and she did not provide "any argument or legal authority supporting the notion that the [c]ourt should consider the date of her Intake Questionnaire, rather than her EEOC charge, for the purpose of the 300-day requirement." Additionally, the district court found she failed to "state a claim for Title VII discrimination or retaliation." MISD filed another motion to dismiss Edwards's second amended complaint on the same grounds, to which Edwards never responded.

In reviewing MISD's second motion, the district court noted that Edwards's second amended complaint contained "few differences" from the first and was, in fact, identical. The district court dismissed her second amended complaint with prejudice finding that she was "given the chance to amend her complaint to demonstrate that she filed a timely charge of discrimination and has failed to make any new allegations that do so." Edwards timely appealed.

## II.

We review motions to dismiss *de novo* on the pleadings. *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 318 (5th Cir. 2009). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The complaint must allege more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citation omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that

all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 127 S. Ct. 1955, 1965 (2007). Central to the analysis is whether, when "[v]iewing the facts as pled in the light most favorable to the nonmovant, …a complaint provides 'enough facts to state a claim to relief that is plausible on its face.'" *Jebaco*, 587 F.3d at 318 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974).

Further, we may affirm on any grounds raised in the district court below and supported by the record, even if not relied upon by the district court. *Raj v. Louisiana State Univ.*, 714 F.3d 322, 330 (5th Cir. 2013). In this case, we affirm because Edwards has waived all arguments regarding the sufficiency of her Intake Questionnaire.

Generally, we will not consider an issue that a party failed to raise in the district court. *Black v. North Panola School Dist.*, 461 F.3d 584, 593 (5th Cir. 2006). This is particularly the case when a party fails to present an argument in response to a motion. *Lavigne v. Cajun Deep Found., LLC*, 654 Fed. Appx. 640, 644 (5th Cir. 2016). MISD argues, and we agree, that Edwards had multiple opportunities to argue that the district court should consider the date of her Intake Questionnaire rather than her Charge filing when determining whether she exhausted her administrative remedies. Indeed, the district court noted in its memorandum order dismissing the second amended complaint that Edwards was given a chance to amend her complaint to provide argument and authority in support of the notion that the district court should consider the date of her Intake Questionnaire, but she failed to do so. And, as MISD points out, Edwards missed yet another opportunity to present the argument when she failed to respond to MISD's second motion to dismiss.

Now, for the first time, Edwards asserts that her Intake Questionnaire is a charge under *Federal Express Corporation v. Holowecki*, 552 U.S. 389, 128

S.Ct. 1147 (2008), and that a charge may be later verified under *Edelman v. Lynchburg College*, 535 U.S. 106, 115, 122 S.Ct. 1145, 1150 (2002). We may not consider Edwards's arguments absent a showing of extraordinary circumstances, meaning proof that the issue involves a question of law and failure to address it would result in a miscarriage of justice. *Black*, 461 F.3d at 593. Edwards does not meet this burden.

*Holowecki* requires a fact-intensive inquiry to determine whether an Intake Questionnaire meets EEOC regulatory requirements for a charge and expresses an intent to be considered as a charge. 552 U.S. at 396-98, 128 S.Ct. at 1154-56. *Edelman*, similarly, requires examination of whether the initially filed document ultimately contains an oath verifying the legitimacy of the charge before the employer is required to respond. 535 U.S. at 116, 122 S.Ct. at 1151. Neither argument presents a pure question of law. *Lavigne*, 654 Fed. Appx. at 644. Likewise, Edwards cannot demonstrate the likelihood of a miscarriage of justice from our failure to consider her arguments. As previously recounted, Edwards was given the opportunity to present her arguments in any of her three complaints or in a response to MISD's second motion to dismiss, but she failed to do so. We find her claims raised for the first time on appeal have been waived and we decline to consider them here.

III.

For the foregoing reasons, we AFFIRM the district court's order.

JAMES L. DENNIS, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's conclusion. Sonya R. Edwards adequately pleaded that she exhausted all required administrative remedies prior to filing this suit in federal court and thus the district court erred in granting Mesquite Independent School District's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Contrary to the majority's holding, Edwards's failure to raise before the district court the specific legal arguments she makes on appeal as to *how* she exhausted her administrative remedies has not waived her argument that she did, in fact, exhaust them.

As Edwards points out in her brief to this court, she stated in her first amended complaint that "[o]n or about May 22, 2017, [Edwards] filed a charge of employment discrimination and/or Intake Questionnaire against Defendant with the Dallas District Office of the Equal Employment Opportunity Commission ("EEOC") within 300 days of the last discriminatory act." In her second amended complaint, Edwards pleaded that she "timely completed her Charge of Discrimination and EEOC Intake Questionnaire and mailed to the EEOC Dallas office on May 22, 2017 (within 300 days after the discriminatory employment practices complained of in Plaintiff's First Amended Complaint)," and that "[t]he EEOC responded and confirmed receipt of [her] correspondence on August 14, 2017." Thus, she argues, her "EEOC charge was instituted and timely filed [and] she has exhausted her administrative remedies with respect to her claims in this lawsuit."

Edwards clearly pleaded that she exhausted her administrative remedies. This is sufficient to survive Rule 12(b)(6) review. Contrarily, the

majority holds that Edwards has waived her argument by failing to make the specific legal arguments to the district court that she now raises on appeal; namely that her Intake Questionnaire may be construed as a charge of discrimination under *Federal Express Corporation v. Holowecki*, 552 U.S. 389, 403–04 (2008), and that a such a charge may be later verified under *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002). But these are legal arguments speaking specifically to the manner in which Edwards has exhausted her administrative remedies: these are not factual claims, and do not bear on whether Edwards adequately pleaded the fact that she exhausted her administrative remedies. Even if we do not consider these new legal arguments, on *de novo* review Edwards adequately pleaded administrative exhaustion in her amended complaints. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). For these reasons, I would reverse the district court's dismissal of this case and remand for further proceedings.

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| SONYA R. EDWARDS, | § | |
| | § | |
| Plaintiff, | § | |
| | § | Civil No. 3:18-CV-02620-E |
| v. | § | |
| | § | |
| MESQUITE INDEPENDENT SCHOOL DISTRICT, | § | |
| | § | |
| | § | |
| Defendant. | § | |

**MEMORANDUM OPINION AND ORDER**

Before the Court is Defendant Mesquite Independent School District's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 27). In her Second Amended Complaint (Doc. 26), Plaintiff Sonya R. Edwards alleges that Mesquite Independent School District (MISD), her employer, violated Title VII of the Civil Rights Act of 1964. Plaintiff contends MISD discriminated against her on the basis of race and retaliated against her for complaining about the discriminatory treatment. In its Motion to Dismiss, among other things, MISD asserts the Court should dismiss Plaintiff's claims because she failed to exhaust her administrative remedies by timely filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).

This case was transferred to the undersigned judge on September 18, 2019. On May 20, 2019, the previous judge granted MISD's Motion to Dismiss Plaintiff's First Amended Complaint without prejudice. The judge determined

that Plaintiff failed to exhaust her administrative remedies and failed to state a claim for Title VII discrimination or retaliation. Plaintiff later sought and was granted leave to file a Second Amended Complaint. MISD then moved to dismiss Plaintiff's Second Amended Complaint, and Plaintiff has not responded.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). If a plaintiff fails to satisfy Rule 8(a), the defendant may move to dismiss the plaintiff's claims for "failure to state a claim upon which relief may be granted." *Id.* 12(b)(6). To survive such a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In reviewing a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to plaintiff. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019).

Title VII provides for private causes of action arising out of employment discrimination and gives federal courts subject matter jurisdiction to resolve

such disputes. *Davis v. Fort Bend Cty.*, 893 F.3d 300, 303 (5th Cir. 2018). Before seeking judicial relief, however, a Title VII plaintiff must exhaust her administrative remedies by filing a timely charge of discrimination with the EEOC and receiving a statutory notice of right to sue. *Id.*; *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 378–79 (5th Cir. 2002). Administrative exhaustion is important because it provides an opportunity for voluntary compliance before a civil action is instituted. *Stroy v. Gibson*, 896 F.3d 693, 698 (5th Cir. 2018). In Texas, a Title VII plaintiff must file her EEOC charge within 300 days of the date on which the alleged unlawful employment practice occurred. *See* 42 U.S.C. § 2000e-5(e)(1); *Newton v. Securitas Sec. Servs., USA, Inc.*, 250 F.App'x 18, 20 (5th Cir. 2007). Administrative exhaustion is not a jurisdictional requirement, but is still a requirement. *Stroy*, 896 F.3d at 698; *see Davis*, 893 F.3d at 306.

Plaintiff's Second Amended Complaint contains few differences from her First Amended Complaint. As alleged in the Second Amended Complaint, MISD hired Plaintiff as a substitute teacher in 2006. In January 2014, Plaintiff began to work exclusively at Mesquite High School. The alleged racial discrimination forming the basis for Plaintiff's complaint began on or about February 28, 2017. On that day, the school secretary inquired about Plaintiff's whereabouts. When Plaintiff told the secretary where she had been, the secretary replied, "No you were not. You people lie." Plaintiff alleges "people" meant "blacks/African Americans." Plaintiff alleges she

complained to the EEOC and to MISD employee Terri Craig about this incident. After her complaints to the EEOC and Craig, the secretary began harassing Plaintiff almost daily in various ways and did not treat Caucasian employees in the same manner. On March 1, 2017, the secretary falsely told other school employees that Plaintiff does not stay where she is supposed to stay at work, clocks in and leaves campus, and is untrustworthy and undependable. Plaintiff met with a district administrator on March 3, 2017, regarding the false accusations. The administrator told Plaintiff not to worry about the accusations. After that, the secretary began to harass Plaintiff even more. On or about May 19, 2017, MISD terminated Plaintiff from substitute teaching at Mesquite High School "based on Substitute Evaluation Form that was false and inaccurate." Plaintiff was transferred to a middle school in the district.

Plaintiff alleges she suffered discrimination based on her race and retaliation based on her complaints about the school secretary's racially offensive remarks and harassing actions. She alleges she suffered materially adverse employment actions in the form of being blocked from substitute teaching at Mesquite High School and being transferred to a middle school. Plaintiff alleges that any reason given by MISD for its employment actions is a mere pretext for discrimination.

The section of the Second Amended Complaint in which Plaintiff alleges she exhausted her administrative remedies is identical to her previous

complaint. As before, she alleged that, on or about May 22, 2017, she "filed a charge of employment discrimination and/or Intake Questionnaire against Defendant with the Dallas District Office of the Equal Employment Opportunity Commission ('EEOC') within 300 days of the last discriminatory act." She also alleges that "[a]ny allegations in this action which pertain to events that occurred after 300 days after the last discriminatory act pertain to allegations of continuing violation."

MISD contends Plaintiff has not exhausted her administrative remedies because she did not timely file an EEOC charge. Plaintiff complains about the conduct of MISD personnel from late February to mid-March of 2017 and about her May 19, 2017 termination from substitute teaching at Mesquite High School. MISD asserts that, at the latest, Plaintiff's EEOC charge needed to be filed by March 15, 2018—300 days after May 19, 2017. Plaintiff's EEOC charge is dated May 29, 2018.

Plaintiff's EEOC charge was not filed within 300 days of the alleged discrimination or retaliation. Plaintiff appears to argue in her complaint that her May 22, 2017 Intake Questionnaire, attached to her pleading, constitutes a timely charge of discrimination. The Court previously determined that, although an Intake Questionnaire may constitute an EEOC charge or at least provide a basis for equitable tolling of the time to file a charge, Plaintiff "did not provide any argument or legal authority supporting the notion that the Court should consider the date of her Intake Questionnaire, rather than her

EEOC charge, for purpose for the 300-day requirement." Plaintiff was given the chance to amend her complaint to demonstrate that she filed a timely charge of discrimination and has failed to make any new allegations that do so. To the extent Plaintiff relies on the continuing violation doctrine, her complaint does not identify any discriminatory act that falls within 300 days of her filing an EEOC charge. *See Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983) (plaintiff who claims continuing violation is relieved of burden to prove entire violation occurred within actionable period if she can show series of related acts, at least one of which falls within appropriate time frame prior to EEOC charge). Accordingly, the Court **GRANTS** Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint because Plaintiff did not exhaust her administrative remedies. Plaintiff has already been given an opportunity to cure the pleading deficiencies in her complaint. The Court concludes that further amendment is not warranted. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). Accordingly, Plaintiff's claims are DISMISSED WITH PREJUDICE.

**SO ORDERED.**

Signed January 13, 2020.

ADA BROWN
UNITED STATES DISTRICT JUDGE

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