UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL BELMONTE.,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	3:19-CV-2656-G-BK
CITY OF DALLAS, TEXAS,	)	
	)	
Defendant.		

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renée Harris Toliver made findings, conclusions, and a recommendation in this case. Objections were filed, and the Court has made a de novo review of those portions of the proposed findings, conclusions, and recommendation to which objection was made. The objections are overruled, and the Court accepts the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. Defendant's motion to dismiss, docket entry 7, is **GRANTED**.

Plaintiff's section 1983 equal protection, Title VII pay disparity, breach of contract, FSLMRA, and Payday Act claims are **DISMISSED WITH PREJUDICE**. Plaintiff's federal and state race and national origin employment discrimination claims are **DISMISSED WITHOUT PREJUDICE**.

Within 14 days of this Order, Plaintiff may file an amended petition as to his state and federal employment discrimination claims only, if desired. However, if Plaintiff fails to do so or the amended complaint does not cure the deficiencies outlined in the magistrate judge's report, Plaintiff's state and federal employment discrimination claims will be **DISMISSED WITH PREJUDICE**.

SO ORDERED.

July 7, 2020.

A. JOE FISH
Senior United States District Judge

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 12, 2021
Lyle W. Cayce
Clerk

No. 21-10163

ABEL BELMONTE,

Plaintiff—Appellant,

versus

CITY OF DALLAS, TEXAS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-2656

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). In this civil rights action, the plaintiff filed a notice of appeal from the magistrate judge's findings, conclusions and recommendations entered June 03, 2020 and February 9, 2021.

"Federal appellate courts have jurisdiction over appeals only from (1) a final decision under 28 U.S.C. § 1291; (2) a decision that is deemed final due to jurisprudential exception or that has been properly certified as final

pursuant to FED. R. CIV. P. 54(b); and (3) interlocutory orders that fall into specific classes, 28 U.S.C. § 1292(a), or that have been properly certified for appeal by the district court, 28 U.S.C. § 1292(b)." *Askanase v. Livingwell, Inc.*, 981 F.2d 807, 809-10 (5th Cir. 1993). The report and recommendation of a magistrate judge is not a final order and it does not fall into any of the other categories that would make it appealable. *See United States v. Cooper*, 135 F.3d 960, 961 (5th Cir. 1998). Moreover, although the district court subsequently adopted the report and recommendation docketed June 3, 2020, the present notice of appeal is not effective for purposes of appealing that judgment. *Id.* at 962 ("[T]he recommendation of a magistrate judge is not a final decision and does not in any way dispose of a party's claims."). Accordingly, the appeal is DISMISSED for want of jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL BELMONTE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	
CITY OF DALLAS, TEXAS,	)	3:19-CV-2656-G (BK)
	)	
Defendant.	)	
	)	
	)	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renée Harris Toliver made findings, conclusions and a recommendation on Defendant's *Motion to Dismiss Plaintiff's Amended Petition and Brief in Support*. No objections were filed. The Court finds that the Findings and recommendations of the Magistrate Judge are correct.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions, and Recommendation of the United States Magistrate Judge are accepted.

SO ORDERED.

May 10, 2021.

A. JOE FISH
Senior United States District Judge

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

ABEL BELMONTE,	§	
PLAINTIFF,	§	
	§	
V.	§	**CASE NO. 3:19-CV-2656-G-BK**
	§	
CITY OF DALLAS, TEXAS,	§	
DEFENDANT.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this case has been referred to the undersigned United States magistrate judge for pretrial management. The Court now considers Defendant's *Motion to Dismiss Plaintiff's Amended Petition and Brief in Support*, Doc. 27. Upon review, Defendant's motion should be **GRANTED**.

I. BACKGROUND

Plaintiff filed this *pro se* lawsuit against his former employer, Defendant City of Dallas, for (1) race and national origin employment discrimination under Title VII and the Texas Labor Code, (2) violation of the 14th Amendment Equal Protection Clause, (3) violation of the Lilly Ledbetter Act, (3) breach of contract, and (4) violation of the Federal Service Labor-Management Relations Act ("FSLMRA") and Chapter 61 of the Texas Labor Code (the "Payday Act"). Doc. 3 at 5-7. The Court subsequently granted Defendant's motion to dismiss, Doc. 7, dismissing Plaintiff's § 1983, Title VII, breach of contract, FSLMRA, and Payday Act claims with prejudice, Doc. 18; Doc. 21. The Court dismissed Plaintiff's federal and state race and national origin employment discrimination claims without prejudice, however, granting leave to

amend. Doc. 18; Doc. 21. Plaintiff then filed his amended complaint[1], Doc. 22, and included a new claim for a DTPA violation. This motion followed.

Plaintiff, a Hispanic male and Mexican national, alleges that while working at Defendant's jail, he was required to perform additional tasks because he spoke Spanish but was not compensated for the extra work. Doc. 22 at 3-4. Plaintiff had to translate for Spanish-speaking prisoners and work nights and extra shifts because Defendant required every shift to have at least one Spanish-speaker, and he was often the only Spanish-speaker available. Doc. 22 at 4. Though Plaintiff sought additional pay for his linguistic skills and extra work, he never received any. Doc. 22 at 9.

II. APPLICABLE LAW

A plaintiff fails to state a claim for relief under Rule 12(b)(6) when the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this determination, the court accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks and citations omitted). However, the court cannot "accept as true conclusory allegations or unwarranted deductions of fact." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (internal citation and quotation marks omitted). In sum, a plaintiff's factual 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)." *Twombly*, 550 U.S. at 555 (internal citations and footnote omitted).

[1] In his amended complaint, Plaintiff reasserts his claims under the Lily Ledbetter Act, Doc. 22 at 9, and the Equal Protection Clause, Doc. 22 at 13, that the Court previously dismissed with prejudice. *See* Doc. 18 at 5-7; Doc. 21. These reasserted claims contain the same allegations as the original claims. As the Court did not grant leave to amend those claims, they are not addressed again here.

III. PARTIES' ARGUMENTS AND ANALYSIS

A. Race and National Origin Discrimination

Plaintiff claims Defendant discriminated against him based on his race and national origin because Defendant did not pay him extra for using his Spanish language skills on the job. Doc. 22 at 10-11. Defendant argues that Plaintiff has failed to allege the essential factual basis required to state race and national origin discrimination claims. Doc. 27 at 13-14.

The Court analyzes Plaintiff's Title VII and TCHRA race and national origin claims together because the two contain identical allegations and analogous statutes and caselaw apply. *See Reed v. Neopost USA, Inc.*, 701 F.3d 434, 439 (5th Cir. 2012) (quoting *Mission Consol. Indep. Sch. Distr. v. Garcia*, 372 S.W.3d 629, 633-34 (Tex. 2012)). Such claims can be dismissed together through one 12(b)(6) analysis. *See Lewis v. City of Dallas*, No. 3:16-CV-0259-N, 2016 WL 11474104, at *5 (N.D. Tex. Dec. 20, 2016) (Godbey, J.).

To properly allege a claim for both race and national origin discrimination, a plaintiff must plausibly plead two ultimate elements: (1) that he suffered an adverse employment action; and (2) the adverse action was because of Plaintiff's protected status. *See Cicalese v. Univ. of Tex. Medical Branch*, 924 F.3d 762, 767 (5th Cir. 2019) (detailing elements of Title VII race and national origin discrimination claims). Even liberally construed, Plaintiff's *pro se* complaint does not meet this pleading standard. *See Johnson v. Pfeiffer*, 821 F.2d 1120, 1122 (5th Cir. 1987) (*pro se* complaints must be held to a less rigorous standard than pleadings prepared by lawyers).

Language is not a racial or national origin trait and, thus, cannot be the basis of a race or national origin discrimination claim. *Garcia v. Gloor*, 618 F.2d 264, 268-71 (5th Cir. 1980). While language may be used as a covert basis for national origin discrimination, that is the exception rather than the rule. *Id.* at 268. And in those exceptional instances, such discrimination is focused on forbidding the use of a language as an expression of culture, not encouraging, or even requiring, the use of a specific language as part of someone's job. *Id.* at 270-71.

Although Plaintiff alleges that he is a Mexican citizen and is of Mexican descent, Doc. 22 at 3, he has not alleged any facts that suggest a disparity of treatment, an adverse action, or denial of income on account of being Mexican. To the contrary, Plaintiff's allegations suggest that any differential treatment was solely the result of his ability to speak Spanish. *See, e.g.* Doc. 22 at 4 ("If a co-worker did not speak Spanish, plaintiff [sic] would have to stop with the booking process of his prisoner and go translate for a co-worker. . ."). It is of no moment that Plaintiff's Mexican heritage may be *why* he speaks Spanish fluently, since obviously all fluent Spanish speakers are not Mexican.

As Plaintiff has not sufficiently alleged the essential elements of his race and national origin employment discrimination claims, they should thus be dismissed.

B. Title VII Claim: Disparate Impact

Plaintiff contends he was the victim of disparate impact discrimination because he was treated unfavorably for speaking Spanish, was given a Spanish test, and used his Spanish-language skills on the job but was not compensated for it. Doc. 22 at 6-8. Defendant argues that Plaintiff has not stated the necessary elements of a disparate impact claim. Doc. 27 at 14-15.

Disparate impact claims involve employment practices that are facially neutral but fall more harshly on one group and cannot be justified as a business necessity. *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996). A plaintiff claiming disparate impact must plead sufficient facts to show (1) the particular employment practice that caused the disparity and (2) an identifiable factor responsible for the alleged disparate impact. *Id.*

Plaintiff's allegations again fall short. Even if he has identified a facially neutral policy, to-wit, the requirement that at least one Spanish speaker work each shift, he does not identify a specific factor that causes a disparate impact under the policy on all employees who are Mexican nationals. Plaintiff's chief complaint is that he is the only one—not every employee of Mexican descent or nationality—who was made to work longer hours without additional compensation due to a dearth of available Spanish speakers. *See Garcia*, 97 F.3d at 813 ("It would, of course, be insufficient for a claim under Title VII if Garcia were the only pregnant woman adversely

affected; she must show that pregnant women as a group would be subject to this medical restriction.").

Because Plaintiff fails to state a factually plausible case of disparate impact discrimination, his claim should be dismissed.

C. Title VII Claim: Hostile Work Environment

Plaintiff also claims Defendant created a hostile work environment because of Plaintiff's Mexican race and national origin. Doc. 22 at 4-5. Defendant argues Plaintiff has not stated the necessary elements for a hostile work environment claim because he has not alleged any instances of discriminatory harassment. Doc. 27 at 16.

A plaintiff claiming a hostile work environment under Title VII must plead that: (1) the plaintiff belongs to a protected group, (2) the plaintiff suffered unwelcome harassment, (3) the harassment was based on a protected characteristic, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known about the harassment and failed to take prompt remedial action. *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

Plaintiff's amended complaint fails to plausibly allege a claim under this standard. Notwithstanding that the alleged conduct does not rise to the level of harassment, it clearly was based not on Plaintiff's race or national origin but, as discussed *supra*, on Plaintiff's ability to speak Spanish. *See* Doc. 22 at 3 ("[P]laintiff would have to stay over every time if a Spanish speaker was needed on the next shift and plaintiff was the only Spanish speaker on his shift."). Plaintiff's amended complaint does not allege any instances of derogatory comments or actions based on his race or national origin.

Plaintiff's hostile work environment claim therefore fails and should be dismissed.

D. DTPA Claim

In his amended complaint, Plaintiff added a new claim, alleging that Defendant violated the Texas Deceptive Trade Practices Act by using Plaintiff's language skills without his approval and without pay. Doc. 22 at 9. Defendant argues that because this claim was filed without the

Court's leave, it should be stricken. Doc. 27 at 10-11. Defendant argues in the alternative that it cannot be sued under the DTPA because it has governmental immunity. Doc. 27 at 11-12. Defendant is correct on both accounts: (1) Plaintiff did not request, and the Court did not grant, leave to file new claims in his amended complaint, *see* Doc. 21, and (2) even if this claim was permissibly filed, the Court would still lack the necessary subject matter jurisdiction to hear it.

Governmental immunity bars a suit against a Texas government entity unless the Texas Legislature has expressly consented to the suit. *See Levy v. City of Rio Grande City*, No. 3:04-CV-0381-B, 2006 WL 3831299, at *2 (N.D. Tex. Dec. 28, 2006) (Boyle, J.). Absent legislative consent, the trial court lacks the subject matter jurisdiction necessary to hear the suit. *Id.* The DTPA does not contain the clear and unambiguous language necessary to waive governmental immunity; the Texas Legislature has not consented to suit under the act. *See Dallas County v. Rischon Dev. Corp.*, 242 S.W.3d 90, 95 (Tex. App.—Dallas 2007) (concluding that the legislature did not express a clear and unambiguous waiver of governmental immunity under the DTPA).

Here, Defendant is a government entity—a city. The Texas Legislature has not consented to suits against a government entity under the DTPA, so the Court does not have the necessary subject matter jurisdiction to hear the claim. Plaintiff's DTPA claim should be dismissed.

F. Leave to Amend

"As a general rule, a court should not dismiss a *pro se* complaint without affording the plaintiff the opportunity to amend. Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998). However, the court is not required to grant leave to amend "if the plaintiff has already pleaded his 'best case.'" *Brewster v. Dretke*, 587 F.3d 764, 767-768 (5th Cir. 2009). Here, Plaintiff has previously been granted leave to amend to cure the identified defects in his pleading. Nevertheless, Plaintiff's claims for state and federal employment discrimination are still deficient and his DTPA violation claim is cannot be cured. Thus, the Court assumes Plaintiff has already

pled his best case. Granting additional leave to amend under these circumstances would be futile and cause needless delay.

IV. CONCLUSION

For the foregoing reasons, Defendant's *Motion to Dismiss Plaintiff's Amended Petition and Brief in Support*, Doc. 27, should be **GRANTED**. All of Plaintiff's claims should be **DISMISSED WITH PREJUDICE**.

SO RECOMMENDED on February 9, 2021.

RENÉE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). An objection must identify the finding or recommendation to which objection is made, the basis for the objection, and the place in the magistrate judge's report and recommendation the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996), *modified by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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ABEL BELMONTE,	)	
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Plaintiff,	)	
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CITY OF DALLAS, TEXAS,	)	3:19-CV-2656-G (BK)
	)	
Defendant.	)	
	)	
	)	

JUDGMENT

The Court has entered its Order Accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's *Motion to Dismiss Plaintiff's Amended Petition and Brief in Support* (docket entry 27) is **GRANTED**, and Plaintiff's claims are DISMISSED WITH PREJUDICE.

SO ORDERED.

May 10, 2021.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

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

ABEL BELMONTE,	§	
PLAINTIFF,	§	
	§	
V.	§	**CASE NO. 3:19-CV-2656-G-BK**
	§	
CITY OF DALLAS, TEXAS,	§	
DEFENDANT.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this case has been referred to the undersigned United States magistrate judge for pretrial management. The Court now considers Defendant's *Motion to Dismiss Plaintiff's Original Petition and Brief in Support*, Doc. 7. As detailed here, Defendant's motion should be **GRANTED**.

I. BACKGROUND

On November 7, 2019, Plaintiff filed this *pro se* lawsuit against his former employer, Defendant City of Dallas, for race and national origin employment discrimination under Title VII and the Texas Labor Code, violation of the 14th Amendment Equal Protection Clause, violation of the Lilly Ledbetter Act, and breach of contract. Doc. 3 at 5-7. Plaintiff's Original Petition also makes fleeting references to section 7116 of the Federal Service Labor-Management Relations Act ("FSLMRA") and Chapter 61 of the Texas Labor Code (the "Payday Act"). Doc. 3 at 5-6.

Plaintiff, a Hispanic male, alleges that while working as a detention officer in the Dallas City Marshal's Office, he was required to perform additional tasks because he spoke Spanish. Doc. 3 at 2. Plaintiff had to translate incident reports for Spanish-speaking prisoners and work

nights and extra shifts because a Spanish speaker was required for every shift. Doc. 3 at 3-4. After Plaintiff sought additional pay for his linguistic skills, he was given a Spanish test via telephone, ostensibly to determine how much more he should be paid, but Plaintiff never received any additional pay. Doc. 3 at 4.

- On November 15, 2017, Plaintiff resigned. Doc. 3 at 4. Plaintiff alleges that he filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on January 3, 2018 (charge number 451-2019-3146, hereinafter referred to as "the 3146 charge") and a complaint with the Texas Workforce Commission ("TWC") in August 2018. Doc. 3 at 4-5.

II. APPLICABLE LAW

A plaintiff fails to state a claim for relief under Rule 12(b)(6) when the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this determination, the court accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks and citations omitted). However, the court cannot "accept as true conclusory allegations or unwarranted deductions of fact." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (internal citation and quotation marks omitted). In sum, a plaintiff's factual 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)." *Twombly*, 550 U.S. at 555 (internal citations and footnote omitted). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [his] claim." *Katrina Canal*, 495 F.3d at 205 (internal citation omitted).

III. PARTIES' ARGUMENTS AND ANALYSIS

A. Plaintiff's Race and National Origin Discrimination Claims

Defendant argues that Plaintiff's race and national origin employment discrimination claims should be dismissed for failure to timely exhaust administrative remedies. Doc. 7 at 11, 13. Defendant offers as evidence a copy of the 3146 charge. Doc. 8-1 at 1. In response, Plaintiff avers that his claims are not time barred, as equitable tolling applies. Doc. 10 at 2-3.

"Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court. Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002). In states such as Texas, which provide a state administrative mechanism to address claims of employment discrimination, a Title VII plaintiff must file a charge of discrimination with the EEOC within 300 days after the discriminatory conduct alleged. 42 U.S.C. § 2000e-5(e)(1); *Griffin v. City of Dallas*, 26 F.3d 610, 612 (5th Cir. 1994). Also, a complaint of discrimination under Texas state law "must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred." TEX. LAB. CODE. § 21.202(a). Discrimination claims must include facts showing that there was timely exhaustion of administrative remedies to survive a motion to dismiss under Rule 12(b)(6). *See Stroy v. Gibson on behalf of Dep't of Veterans Affairs*, 896 F.3d 693, 698 & n.2 (5th Cir. 2018) (affirming district court's dismissal without prejudice of plaintiff's retaliation claim under Rule 12(b) when plaintiff offered no justification for his failure to administratively exhaust his claim).

Defendant argues that Plaintiff filed the 3146 charge on September 27, 2019—more than 300 days after his resignation on November 15, 2017. Doc. 7 at 12. In response, Plaintiff avers that he timely filed charge of discrimination number 450-2018-01881 (the "1881 charge") with

the EEOC, which was subsequently transferred to the TWC and then back to the EEOC where it was given the new charge number 450-2019-0314.[1] Doc. 10 at 2-3. Plaintiff's argument fails.

To survive a Rule 12(b) challenge, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Here, however, the Complaint is silent as to the purported 1881 charge and administrative delays caused by transfer of that charge between the EEOC and the TWC. Indeed, the only EEOC discrimination charge Plaintiff references in his Complaint is the 3146 charge, which he alleged was filed January 3, 2018. Doc. 3 at 4. In addition, the 3146 charge clearly shows a "RECEIVED" date of September 27, 2019. Doc. 8-1 at 1. Thus, based on the latest possible date of discrimination, November 15, 2017 (the day Plaintiff resigned), the 3146 charge was filed well after the 300-day deadline under federal law (September 11, 2018) and the 180-day deadline under state law (May 14, 2018). *See Tapley v. Simplifile, LC*, No. 3:19-CV-00227-E, 2020 WL 208817, at *2 (N.D. Tex. Jan. 14, 2020) (Brown, J.) (dismissing plaintiff's Chapter 21 claims under Rule 12(b)(6) for failure to exhaust administrative remedies when the date stamp on the charge of discrimination established that the charge was filed the same day as the complaint and therefore not timely, even though the complaint alleged that the charge was timely filed).

Additionally, as Defendant correctly argues, even if Plaintiff can establish that he exhausted the administrative remedies, his Complaint is wholly devoid of any allegations that he was discriminated against in his employment on account of his race or national origin. He has not suggested, much less alleged, that he was denied extra pay because he is Hispanic. *See* discussion *infra* Part III. B.

[1] It is unclear whether Plaintiff has misidentified the 3146 charge or is referring to yet another EEOC charge. *See* Doc. 8-1 at 1; Doc. 3 at 4.

Accordingly, Plaintiff's Complaint fails to state plausible facts which, if proven true, establish that he exhausted the administrative remedies as required. Thus, Plaintiff's race and national origin employment discrimination claims should be dismissed.

B. Plaintiff's Equal Protection Claim

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). To state an equal protection claim, a section 1983 plaintiff must allege that either (1) "a state actor intentionally discriminated against the plaintiff because of membership in a protected class[,]" *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999) (internal quotation marks and citation omitted), or (2) the plaintiff has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment[,]" *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (characterizing the later as a "class of one," equal protection claim). Plaintiff's Complaint fails to allege either.

Although Plaintiff alleges that he is Hispanic, he has not alleged any facts that suggest a disparity of treatment on account of his race or national origin, to-wit, that he was treated less favorably than similarly situated employees—non-Hispanic detention officers called upon to perform extra translation duties. Doc. 3 at 5-6. Nor does Plaintiff allege facts that even suggest he was denied extra compensation and made to work extra hours and night shifts on account of his race or national origin. Indeed, Plaintiff's allegations only suggest that any disparate treatment or maltreatment was the result of his ability to speak Spanish and not the fact that he is Hispanic. *Cf. Chhim v. Spring Branch Indep. Sch. Dist.*, 396 F. App'x 73, 74 (5th Cir. 2010) (affirming district court's Rule 12(b)(6) dismissal because "[n]on-bilingual individuals are not a

protected class under Title VII" and "a preference, or even requirement, that employees have bilingual ability does not give rise to a discrimination claims based on national origin or race."). Plaintiff also fails to allege that Defendant "deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to [Defendant's] duties." *Williams v. Curtis*, No. 3:16-CV-151-D-BH, 2017 WL 979053, at *3 (N.D. Tex. Jan. 18, 2017) (Ramirez, J.), *adopted by* 2017 WL 976948 (N.D. Tex. Mar. 13, 2017) (Fitzwater, J.); *see Olech*, 528 U.S. at 564.

Notwithstanding the foregoing, fatal to Plaintiff's claim is that he has not pled a basis for municipal liability, as Defendant correctly notes. "[M]unicipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't. of Social Services,* 436 U.S. 658, 694 (1978)). Plaintiff has not and cannot establish either element here. Plaintiff argues in his response that he "did display that Defendant has a custom and/or practice. The defendant had clearly [sic] constructive [] knowledge of its custom and/or practice." Doc. 10 at 4. However, such conclusory allegations will not suffice. Consequently, he cannot state a claim against the City of Dallas under section 1983 for alleged violation of his Constitutional right to equal protection.

Accordingly, Plaintiff's 14th Amendment equal protection claim should be dismissed for failure to state a claim.

C. Plaintiff's Lilly Ledbetter Act Claim

The Lilly Ledbetter Fair Pay Act of 2009 does not create a separate cause of action. *Obondi v. UT Sw. Med. Ctr.*, No. 3:15-CV-2022-B, 2017 WL 2729965, at *2 n.9 (N.D. Tex. June

23, 2017) (Boyle, J.). "Rather, it provides that the statute of limitations on Title VII claims based on unequal compensation begins to run anew following each receipt of unequal pay." *Id.* (citation and internal quotation marks omitted); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 503 (Tex. 2012) ("when a claimant files a discriminatory pay claim under federal law, the 180-day limitations period begins each time a claimant receives a paycheck containing a discriminatory amount."). Thus, the Court construes Plaintiff's Lilly Ledbetter claim as a Title VII claim for pay disparity. *See Obondi*, 2017 WL 2729965, at *2 n.9. As such, it should be dismissed for failure to exhaust administrative remedies. *See supra* Part III, subpart A.

D. Plaintiff's Breach of Contract Claim

Plaintiff does not allege the existence of a formal employment contract with Defendant. Instead, he avers that "[t]he [p]olicies and procedures of the City formed part of [P]laintiff's employment contract" and that Defendant agreed "to pay [P]laintiff for his Spanish skills after he was tested," but never did. Doc. 3 at 7. Defendant argues that Plaintiff's breach of contract claim fails because, *inter alia*, municipalities are immune from contract suits. Doc. 7 at 23 (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 344-45 (Tex. 2006) (concluding municipalities are immune from suit for contract liability unless there is a clear and unambiguous waiver of immunity)).

Governmental immunity is the form of sovereign immunity that protects cities, as political subdivisions of the state, from lawsuits and liability. *Bell v. City of Grand Prairie*, 221 S.W.3d 317, 321 (Tex. App.—Dallas 2007). Governmental immunity may be waived by clear, unambiguous legislative enactment or by governmental entities themselves through certain actions such as bringing claims for affirmative relief in litigation. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

Plaintiff has alleged no plausible facts that would support a finding that the City of Dallas has waived its immunity as to his contract claims. Accordingly, Plaintiff's breach of contract claim should be dismissed.

E. Plaintiff's FSLMRA and Payday Act Claims

The FSLMRA is inapplicable in this case because the FSLMRA governs labor relations between federal employees and the federal government. 5 U.S.C. § 7101(b); *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 615 (5th Cir. 2003). Based on the allegations in the Complaint, Plaintiff clearly was not a federal employee and the City of Dallas is not a federal entity. Accordingly, Plaintiff's FSLMRA claim should be dismissed for failure to state a legally cognizable claim.

Similarly, chapter 61 of the Texas Labor Code, otherwise known as the Payday Act, "does not apply to the United States, this state, or a *political subdivision* of this state." TEX. LAB. CODE § 61.003 (emphasis added). The City of Dallas is a political subdivision of the state of Texas. Plaintiffs allegations do not and cannot establish the applicability of the Payday Act. Thus, Plaintiff's claim under the Payday Act should be dismissed. *See City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 WL 3820798, at *8 (Tex. App.—Houston [1st Div.] Aug. 25, 2011) (affirming trial court's dismissal of workers' Payday Act claim against the city).

F. Leave to Amend

"As a general rule, a court should not dismiss a *pro se* complaint without affording the plaintiff the opportunity to amend. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998). However, while "a *pro se* litigant should be offered an opportunity to amend his complaint before it is dismissed," the court is not required to grant leave to amend "if the plaintiff has already pleaded his 'best case.'" *Brewster v. Dretke*, 587 F.3d 764, 767-768 (5th Cir. 2009).

Here, Plaintiff's section 1983 equal protection, Title VII pay disparity, breach of contract, FSLMRA, and Payday Act claims are fatally infirm for the reasons outlined here and cannot be cured by amendment. Thus, granting leave to amend these claims would be futile and cause needless delay.

However, based on Plaintiff's response to the motion to dismiss, it is not clear that he cannot cure the deficiencies in his state and federal employment discrimination claims. Under these circumstances and mainly because Plaintiff is *pro se* and has not previously amended his complaint, he should be granted the opportunity to do so only as to those claims. *Bazrowx*, 136 F.3d at, 1054.

IV. CONCLUSION

For the foregoing reasons, Defendant's *Motion to Dismiss Plaintiff's Original Petition and Brief in Support*, Doc. 7, should be **GRANTED**. Plaintiff's section 1983 equal protection, Title VII pay disparity, breach of contract, FSLMRA, and Payday Act claims should be **DISMISSED WITH PREJUDICE**. Plaintiff's federal and state race and national origin employment discrimination claims should be **DISMISSED WITHOUT PREJUDICE**, and Plaintiff should be granted a reasonable period following the acceptance of this Recommendation to amend those claims to cure the deficiencies noted herein, if he can do so. If, however, Plaintiff fails to do so, his race and national origin employment discrimination claims should likewise be **DISMISSED WITH PREJUDICE**.

SO RECOMMENDED on June 3, 2020.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). An objection must identify the finding or recommendation to which objection is made, the basis for the objection, and the place in the magistrate judge's report and recommendation the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996), *modified by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

United States Court of Appeals for the Fifth Circuit

No. 21-10163

ABEL BELMONTE,

Plaintiff—Appellant,

versus

CITY OF DALLAS, TEXAS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-2656

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). In this civil rights action, the plaintiff filed a notice of appeal from the magistrate judge's findings, conclusions and recommendations entered June 03, 2020 and February 9, 2021.

"Federal appellate courts have jurisdiction over appeals only from (1) a final decision under 28 U.S.C. § 1291; (2) a decision that is deemed final due to jurisprudential exception or that has been properly certified as final

pursuant to FED. R. CIV. P. 54(b); and (3) interlocutory orders that fall into specific classes, 28 U.S.C. § 1292(a), or that have been properly certified for appeal by the district court, 28 U.S.C. § 1292(b)." *Askanase v. Livingwell, Inc.*, 981 F.2d 807, 809-10 (5th Cir. 1993). The report and recommendation of a magistrate judge is not a final order and it does not fall into any of the other categories that would make it appealable. *See United States v. Cooper*, 135 F.3d 960, 961 (5th Cir. 1998). Moreover, although the district court subsequently adopted the report and recommendation docketed June 3, 2020, the present notice of appeal is not effective for purposes of appealing that judgment. *Id.* at 962 ("[T]he recommendation of a magistrate judge is not a final decision and does not in any way dispose of a party's claims."). Accordingly, the appeal is DISMISSED for want of jurisdiction.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

May 04, 2021

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

No. 21-10163 Belmonte v. City of Dallas, Texas
USDC No. 3:19-CV-2656

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc w/encl:
Mr. Abel Belmonte
Ms. Jennifer Carter Huggard