XI. APPENDIX
Appendix A: Court of Appeals Opinion

United States Court of Appeals
for the Fifth Circuit
No. 21-50606
Derek Rodgers,
Plaintiff—Appellant,

United States Court of Appeals
Fifth Circuit
FILED
July 8, 2022
Lyle W. Cayce Clerk

versus
United Services Automotive Association, also known as USAA,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:19-CV-620
Before King, Elrod, and Southwick, Circuit Judges.
Per Curiam:*

Derek Rodgers appeals the judgment of the district court confirming an arbitration award and denying his motion to vacate. We affirm.

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

I.

Derek Rodgers, represented by counsel, filed a complaint against his former employer, the United Services Automotive Association ("USAA"), alleging that he was wrongfully terminated in violation of the Family Medical Leave Act ("FMLA"). Specifically, he claimed that USAA terminated him because he took several months of FMLA leave.

After filing his complaint, Rodgers also filed a motion to refer the case to arbitration. The district court granted the motion and administratively closed the case. During the arbitration proceedings, Rodgers remotely deposed USAA employee relations advisor Erin Redmond. While Redmond was being deposed, Rodgers's attorney discovered that Redmond was texting with USAA's attorney. Counsel for both parties then, off the record, contacted the arbitrator and reached an agreement that Redmond would be required to keep her phone out of reach for the remainder of the deposition. Both USAA's counsel and Redmond immediately deleted the text messages. Redmond then testified that USAA may have stored Rodgers's termination memo in an internal system called Documentum, but she was not sure. Separately, USAA produced the termination memo to Rodgers.

After discovery, USAA filed a motion for summary judgment. Rodgers filed a response through his attorney, but also personally sent a letter to the arbitrator complaining that USAA had withheld unspecified relevant records stored in Documentum. USAA objected to considering the letter, arguing that it was an inappropriate ex parte communication. The arbitrator granted USAA's motion for summary judgment, finding that Rodgers could not show a prima facie case of wrongful termination under the

FMLA because he could not show he was treated differently from employees who did not take FMLA leave; she further noted that she did not consider the ex parte letter in making this determination.

After the arbitrator granted USAA's motion for summary judgment, USAA filed a motion to confirm the arbitration award in the district court. Rodgers's counsel then sought, and was granted, a motion to withdraw. Proceeding pro se, Rodgers filed a motion to vacate the arbitration award. In his motion to vacate, Rodgers argued that vacatur under 9 U.S.C. § 10(a)(1) was appropriate because the award was procured by undue means, first because the arbitrator considered Redmond's deposition testimony despite the texting between Redmond and USAA's attorney and second because the arbitrator failed to consider the allegedly withheld Documentum evidence that Rodgers raised in his ex parte letter. He further argued that the arbitrator exceeded her powers, entitling him to vacatur under 9 U.S.C. § 10(a)(4), by finding Rodgers could not demonstrate a prima facie case because the arbitrator failed to take into account the allegedly withheld evidence. 1

The district court granted the motion to confirm the arbitration award and denied Rodgers's motion to vacate. It explained that Rodgers was not entitled to vacatur under § 10(a)(1) because he could not show that the improper behavior of USAA was "not discoverable by due diligence before or during the arbitration hearing." It further found no error in the arbitrator's decision to strike the ex parte letter, and it concluded that Rodgers was not entitled to relief under § 10(a)(4) because he failed to plead how the arbitrator actually exceeded her powers. Rodgers, proceeding pro se, now timely appeals these holdings.

1 Rodgers also argued that he was entitled to vacatur under § 10(a)(3), but he does not brief that argument on appeal and thus it need not be considered. See United States v. Davis, 603 F.3d 303, 307 n.5 (5th Cir. 2010).

II.

"[F]ederal courts have 'an independent duty to examine the basis of [their] jurisdiction.'" Biziko v. Van Horne, 981 F.3d 418, 420 (5th Cir. 2020) (quoting Feld Motor Sports, Inc. v. Traxxas, L.P., 861 F.3d 591, 595 (5th Cir. 2017)). Both this circuit and others have recognized that, when a district court with jurisdiction over a case refers the case to arbitration and orders it administratively closed, the court retains jurisdiction over the case; in turn, we have jurisdiction to review the district court's subsequent decision to vacate or confirm an arbitration award after it reopens the case. See Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 279–81 (5th Cir. 2007) (en banc) (reviewing a district court's decision to vacate an arbitration award after it submitted the matter to arbitration and stayed the case); Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 246–49 (3d Cir. 2013); Davis v. Fenton, 857 F.3d 961, 962–63 (7th Cir. 2017); Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC, 12 F.4th 1212, 1227–28 (10th Cir. 2021).

That is precisely what happened here. The district court had subject matter jurisdiction over the initial complaint, which brought FMLA claims against the defendant. See Gilbert v. Donahoe, 751 F.3d 303, 310–11 (5th Cir. 2014). It administratively closed the case pending arbitration but retained its jurisdiction to review the outcome. Thus, it had jurisdiction to review the arbitration award and

confirm or vacate it, and we in turn have jurisdiction to review that decision.

III.

We review a district court's confirmation of an arbitration award de novo. Rainier DSC 1, L.L.C. v. Rainier Cap. Mgmt., L.P., 828 F.3d 362, 364 (5th Cir. 2016). That said, "[j]udicial review of an arbitration award is extraordinarily narrow and this [c]ourt should defer to the arbitrator's decision when possible." Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990). A district court may vacate an arbitration award only when (1) "the award was procured by corruption, fraud, or undue means"; (2) "there was evident partiality or corruption in the arbitrator[]"; (3) the arbitrator was guilty of misconduct by, inter alia, refusing to consider certain evidence; or (4) the arbitrator exceeded his or her powers. 9 U.S.C. § 10(a)(1)–(4); Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 352–58 (5th Cir. 2009). On appeal, Rodgers argues the district court erred in denying his motion to vacate the arbitration award under § 10(a)(1) and (4).

As a preliminary matter, Rodgers argues for the first time on appeal that the arbitration clause in his employment agreement was deficient, that his letter to the court was not truly an ex parte communication,2 and that the arbitrator violated the rules of professional conduct. Because these arguments are raised for the first time on appeal, we need not consider them. Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1163 (5th Cir. 1992).

Rodgers points to three violations under § 10(a)(1). He argues that the award must be vacated as procured by undue means because USAA's counsel coached Redmond via text message in her deposition, Redmond did not sign her deposition transcript, and

USAA allegedly withheld records from Documentum. But a party alleging that an arbitration award was procured through undue means "must demonstrate that the improper behavior was . . . not discoverable by due diligence before or during the arbitration hearing." In re Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 304 (S.D. Tex. 1997), aff'd and adopted by 161 F.3d

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2 Rodgers did challenge the letter's ex parte classification in his reply brief before the district court. However, "[a]rguments raised for the first time in a reply brief, even by pro se litigants . . . are [forfeited]." United States v. Jackson, 426 F.3d 301, 304 n.2 (5th Cir. 2005); see also Jones v. Cain, 600 F.3d 527, 540–41 (5th Cir. 2010). In any case, the argument is inadequately briefed and thus is forfeited. See Davis, 603 F.3d at 307 n.5.

314, 319 (5th Cir. 1998). All three of these issues were either discovered or discoverable at the time of the arbitration hearing. First, Rodgers and his counsel did discover the alleged coaching at the time and worked to rectify it. Second, they could have readily noticed that the deposition transcript was not signed. Third, they learned of the Documentum database on September 16, 2020, four months prior to the hearing. Thus, they could have investigated, and indeed did investigate, whether USAA had produced everything relevant within that database. It follows that Rodgers does not show any undiscoverable improper behavior to support his § 10(a)(1) claims.

Rodgers also seems to argue that the district court erred when it found that the arbitrator did not "exceed [her] powers" for the purposes of § 10(a)(4) when she found that Rodgers did not establish a prima facie case. Rodgers contends that the district court misapplied the law when it confirmed the

arbitration award that found Rodgers did not meet his burden of proof. It did so, he posits, by failing to speculate favorably about the contents of the allegedly withheld documents.

For an arbitrator to exceed her powers, however, it is not enough for her to render an error in law or fact. See Citigroup Glob. Mkts., 562 F.3d at 352–53 (explaining that awards may be affirmed despite an erroneous conclusion of law or finding of fact). Rather, she must exceed the powers granted to her by the arbitration agreement. See Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397, 401 (5th Cir. 2007), overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–86 (2008).

Rodgers's argument merely contends that the arbitrator (and district court in confirming the award) made errors in law and fact, and his argument does not even attempt to explain how she exceeded her powers as outlined in the arbitration agreement. Therefore, he failed to support his § 10(a)(4) argument, and the district court properly confirmed the award.

IV.

For the foregoing reasons, the judgment is AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

July 08, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc
No. 21-50606 Rodgers v. United Svc Automotive Assoc USDC No. 5:19-CV-620

Enclosed is a copy of the court's decision. The court has entered judgment under **Fed. R. App. P.** 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.) **Fed. R. App. P.** 39 through 41, and **5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. 5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly

demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that plaintiff-appellant pay to defendant-appellee the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,
LYLE W. CAYCE, Clerk

By: s/ Nancy F. Dolly,
Deputy Clerk

Enclosure(s)
Mr. Matthew Gizzo
Mr. Bryant Scott McFall I
Mr. Derek Rodgers

Appendix B: District Court Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DEREK RODGERS, No. 5:19-CV-620-DAE

Plaintiff,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION
Defendant.

ORDER GRANTING MOTION TO CONFIRM ARBITRATION AWARD AND DENYING MOTION TO VACATE ARBITRATION AWARD

Before the Court are two motions. The first is United Services Automotive Association's ("Defendant" or "USAA") Notice of Arbitration Completion and Motion to Confirm Arbitration Award. (Dkts. ## 6, 8.) The second is Derek Rodgers's ("Plaintiff" or "Rodgers") Motion to Vacate Arbitration Award. (Dkt. # 21.) Under Local Rule CV-7(h), the Court finds these matters suitable for disposition without a hearing.

After careful consideration, and for the reasons given below, the Court GRANTS Defendant's Motion to Confirm Arbitration Award (Dkts. ## 6, 8) and DENIES Plaintiff's Motion to Vacate Arbitration Award (Dkt. # 21).

BACKGROUND

This cases arises out of an employment dispute between Plaintiff and Defendant. Plaintiff alleges that on August 26, 2016, he applied for leave under the Family and Medical Leave Act ("FMLA") to assist and care for his mother. (Dkt. # 1.) Plaintiff alleges that his supervisor, Teresa Mays ("Mays"), objected to his absence and verbally warned him about communication issues. (Id.) When his mother's condition worsened, Plaintiff went on continuous FMLA leave and sought the assistance of Erin Redmond, USAA's Human Resources representative, to help resolve the dispute between him and Mays. (Id.) After his mother passed away on October 31, 2016, Plaintiff continued his FMLA leave until November 11, 2016, so that he could be with his father. (Id.)

Plaintiff made a request to USAA's Dispute Resolution Program called "Dialogue" for assistance concerning the conflict with Mays. (Id.) Dialogue is USAA's process for resolving employment disagreements and difficult situations at work. (Id.) Shortly after Plaintiff returned to work, Redmond advised Plaintiff that he needed to share his family situation with leadership, presumably because his failure to discuss his mother's illness was a source of tension with Mays. (Id.)

On June 16, 2017, seven months after Plaintiff returned to work, Mays and Redmond called Plaintiff into a meeting and informed him that he was being terminated for a "recurring issue with time entry." (Id.) According to Plaintiff, USAA had never disciplined or warned him, much less about a "recurring issue with time entry." (Id.) Plaintiff also

alleges that although Defendant has a progressive disciplinary process, they did not utilize such process in addressing his alleged job performance deficiencies. (Id.)

Plaintiff filed this lawsuit in federal court on June 6, 2019, claiming that Defendant unlawfully retaliated against him in violation of the FMLA. (Id.) On July 5, 2019, Plaintiff filed a motion for referral to arbitration and for a stay. (Dkt. # 2.) Defendant did not oppose arbitration but opposed the stay. (Dkt. # 4.) On August 5, 2019, the Court granted the motion for referral to arbitration and administratively closed the case. (Dkt. # 5.) The Court ordered the parties to inform the Court within thirty days of completion of the arbitration whether dismissal would be appropriate. (Id.)

Plaintiff thereafter initiated arbitration by filing a Demand for Arbitration with the American Arbitration Association ("AAA"). See Osyve Derek Rodgers v. United Services Automobile Association, No. 01-19-0002-6677. The AAA appointed former Texas state district court judge, the Honorable Mary Katherine Kennedy, as the arbitrator in the matter. (Dkt. # 6-1 at 26.)

On November 6, 2020, USAA filed a Motion for Summary Judgment in the arbitration case, seeking dismissal of Plaintiff's sole FMLA retaliation claim for failure to establish a prima facie case or that his termination was a pretext for retaliation. (See id. at 24.) Plaintiff filed a response to the motion, and Defendant filed a reply. (See id.) The Arbitrator held a hearing on the motion on January 5, 2021, which according to Defendant, lasted approximately two hours. (See id.; Dkt. # 22.)

About one week later, before the Arbitrator ruled on the motion for summary judgment, Plaintiff

submitted an ex parte letter to the Arbitrator (not through or by his counsel) raising perceived discovery concerns and restating his subjective beliefs as to why the Arbitrator should rule in his favor. (Dkts. ## 6-1 at 26, 21-2.) The AAA provided USAA with a copy of the letter, and the Arbitrator afforded USAA an opportunity to respond. (Id.) Defendant objected to consideration of the letter because the issues had been fully briefed and argued before it was submitted. (Id.; Dkt. # 22.) The Arbitrator struck the letter and explained her reasons for doing so in her order. (See Dkt. # 6-1 at 26.)

On February 4, 2021, the Arbitrator issued a take-nothing award via written order granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's only claim, finding that Plaintiff could not establish a prima facie case of FMLA retaliation. (Dkt. # 6-1 at 26.) The award stated the following:

> Respondent's Motion for Summary Judgment is GRANTED, and the claims asserted by the Claimant Osyve Derek Rodgers are dismissed. It is further ordered Claimant Rodgers take nothing against Respondent USAA.
>
> The administrative fees and expenses of the American Arbitration Association totaling $2,950.00 and the compensation and expenses of the Arbitrator totaling $3,667.50 shall be borne as incurred.
>
> This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

(Id.)

On March 5, 2021, Defendant filed a Motion to Confirm the Arbitration Award (Dkts. ## 6, 8) and

Plaintiff's counsel filed a motion to withdraw (Dkt. # 9) with this Court. On March 15, 2021, the Court issued an order reopening the case, granting the motion to withdraw, and granting Plaintiff's request for an extension to respond to Defendant's motion. (Dkt. # 11.) The Court reasoned that an extension was warranted given the fast-approaching deadlines and "the fact that Plaintiff ha[d] not yet retained new counsel." (Id.)

Although Plaintiff was given time to find new counsel,1 he is now proceeding pro se. (Dkts. ## 10, 12.) After filing a response to Defendant's motion (Dkt. # 19), Plaintiff filed his Motion to Vacate Arbitration Award (Dkt. # 21).

The matters before the Court are Defendant's Motion to Confirm Arbitration Award (Dkts. ## 6, 8) and Plaintiff's Motion to Vacate Arbitration Award (Dkt. # 21).

The motions have been fully briefed and are ripe for review. The Court will first analyze Plaintiff's Motion to Vacate Arbitration Award (Dkt. # 21) before reaching Defendant's Motion to Confirm the Arbitration Award (Dkts. ## 6, 8).

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1 Plaintiff buried in his response to Defendant's Motion to Confirm Arbitration Award a request for a stay until May 5, 2021, to obtain new counsel to file a motion to vacate. (Dkt. # 14.) The Court had already granted Plaintiff's request for a thirty-day extension to his deadline to respond to Defendant's motion for purposes of finding counsel (Dkt. # 11), and without a request for a motion to extend the deadline to file a motion to vacate, a stay would have yielded little benefit. However, the Court did wait until Plaintiff's three-month deadline to file a motion to vacate passed to rule on Defendant's motion. However, Plaintiff still did not obtain counsel. Plaintiff was represented by counsel throughout the arbitration process and had ample opportunity not only to address any discovery concerns but also to retain new counsel within three months after the Arbitrator's ruling.

LEGAL STANDARD

"[J]udicial review of an arbitration award is extraordinarily narrow." Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 471–72 (5th Cir. 2012) (quoting Brook v. Peak Int'l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002)). Under the FAA, an arbitrator's decision will be vacated "only in very unusual circumstances" and must be given a high level of deference. Rainier DSC 1, L.L.C. v. Rainier Cap. Mgmt., L.P., 828 F.3d 362, 364 (5th Cir. 2016) (quoting First Options of Chic., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)); Gulf Coast Indus. Workers Union v. Exxon Co, USA, 991 F.2d 244, 248 (5th Cir. 1993), cert. denied, 510 U.S. 965 (1993). The court must resolve any doubts or uncertainties in favor of upholding the award. Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 385 n.9 (5th Cir. 2004).

In reviewing an arbitration award, the court asks whether the arbitration proceedings were "fundamentally unfair." Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995). "[W]hatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so." Forsythe Intern., S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990). The burden of proof is on the party moving to vacate the arbitration award. Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 549 (N.D. Tex. 2006); Lummus Global Amazonas, S.A. v. Aguaytia Energy del Peru, S.R. Ltda., 256 F. Supp. 2d 594, 604 (S.D. Tex. 2002).

DISCUSSION

I. Plaintiff's Motion to Vacate Arbitration Award

Courts may disturb arbitration awards only on

grounds set out in the Federal Arbitration Act ("FAA"). Gulf Coast, 70 F.3d at 850. Under the FAA, courts may vacate an arbitration award only under the following circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Plaintiff argues that the Court must vacate the arbitration award under 9 U.S.C. § 10(a)(1), (a)(3), and (a)(4). (See Dkts. ## 21, 23.) The Court will evaluate Plaintiff's arguments in turn.

A. Section 10(a)(1)

Plaintiff maintains that the Court must vacate the arbitration award under section 10(a)(1). According to Plaintiff, the award was "procured by . . . undue means" because Erin Redmond texted defense counsel during her fact witness deposition and USAA allegedly failed to produce certain documents

maintained on its internal server known as "Documentum." (Dkt. # 21 (quoting 9 U.S.C. § 10(a)(1)).)

A party who alleges an arbitration award was procured through fraud or undue means must demonstrate that the improper behavior was "(1) not discoverable by due diligence before or during the arbitration hearing; (2) materially related to an issue in the arbitration; and (3) established by clear and convincing evidence." Matter of Arb. Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 304 (S.D. Tex. 1997), aff'd sub nom. Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp., 161 F.3d 314 (5th Cir. 1998). The party must also show a nexus between the alleged fraud or undue means and the basis for the arbitrator's decision. Id.; Forsythe, 915 F.2d at 1022.

The words "fraud" and "undue means" are not defined in section 10(a), but courts interpret the terms together. Trans Chem. Ltd., 978 F. Supp. at 304. "Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence." Id. "Similarly, undue means connotes behavior that is 'immoral if not illegal' or otherwise in bad faith." Id. (quoting A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992)).

Section 10(a)(1) does not apply here. First, the issues that Plaintiff raises were discoverable by due diligence during arbitration. Plaintiff's former counsel raised concerns about Redmond's communications with defense counsel by calling the Arbitrator during the deposition. (Dkt. # 21-1 at 21–22.) After the parties reached a resolution,2the parties' agreement was read into the record during

the deposition. (Id. at 22–23.) The parties moved forward with the deposition and it was completed that day. (Dkt. # 21-1.) The issue was fully resolved by the Arbitrator, and it does not appear that Plaintiff's counsel raised the issue again at any point thereafter.3 (See id.)

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2 The parties agreed to the following: Redmond could not access her phone or any messaging services while questions were pending and if defense counsel needed to speak with Redmond during the deposition, he could ask the court reporter to take the deposition off the record and then Redmond could retrieve her phone and defense counsel could discuss with Redmond whatever they needed to discuss, and then Redmond could return her phone to a location where she would not have access to it during questioning and the deposition would go back on the record. (Dkt. # 21-1 at 22–23.)

3 Because the issue was resolved, the Court also rejects Plaintiff's arguments that "Defendant USAA and Defendant USAA's Counsel corrupted the [a]rbitration hearings by committing and admitting to committing [p]erjury and [e]thics violations during the [a]rbitration proceedings." (Dkt. # 15.)

The Court finds no evidence that Plaintiff's counsel ever raised the issue of Defendant's alleged failure to produce all relevant documents on Documentum. Although Redmond testified that some USAA documents were maintained on Documentum, Plaintiff's counsel never expressed concern about whether USAA produced all relevant and responsive information. (See Dkt. ## 22-1 at 16.) If this were an issue, Plaintiff's counsel could have filed a motion to compel additional production, discussed the issue in response to Defendant's motion for summary judgment, or raised the issue during the motion hearing. He did none of these things. Plaintiff raised the issue for the first time in his ex parte letter a week after the motion hearing, and the Arbitrator explained in the order why the letter would not be

considered. (Dkt. # 6-1 at 26.) Section 10(a)(1) does not apply because the issues that Plaintiff raises were discoverable by due diligence before or during the arbitration hearing. *

Even if the issues were not discoverable before or during the arbitration hearing, Plaintiff has failed to show how they are materially related to the pertinent issues in the arbitration. The Arbitrator decided the following:

> Claimant Rodgers has failed to establish a prima facie case of FMLA retaliation as a matter of law. Too much time passed between the end of Rodgers' FMLA leave and his termination for there to be a causal connection between the events. Furthermore, the intervening events described above including his positive performance reviews, raise, and bonus, extinguish any causal connection between his FMLA leave and his discharge.

(Dkt. # 6-1 at 26.) The Court fails to see how Redmond's communications with defense counsel during her deposition—an issue that the parties resolved—is relevant to establishing a prima facie case of retaliation under the FMLA, or more specifically, the causal connection between the FMLA leave and Plaintiff's termination. Plaintiff has also failed to show how additional documentation may have been material to establishing a prima facie case.4 Because these issues were discoverable by due diligence during arbitration and were not materially related to the pertinent issues in arbitration, section 10(a)(i) is not a basis for vacatur.

B. Section 10(a)(3)

Plaintiff also argues that the Court must vacate the arbitration award under section 10(a)(3). According to Plaintiff, the arbitrator was "guilty of

misconduct . . . in refusing to hear evidence pertinent and material to the controversy" by striking Plaintiff's improper ex parte communication, which addressed (1) Defendant's alleged failure to produce documents from Documentum and (2) Defendant's failure to offer evidence demonstrating Plaintiff did not properly code paid time off ("PTO"). 9 U.S.C. § 10(a)(3); (Dkt. # 21.)

4If any additional documents existed, it is likely that they would have been pertinent to USAA's legitimate nonretaliatory reasons for terminating Plaintiff or to the pretext analysis.

"To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." Laws v. Morgan Stanley Dean Witter, 452 F.3d 398, 399 (5th Cir. 2006) (quoting El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co., 247 F.3d 843, 848 (8th Cir. 2001)); MPJ v. Aero Sky, L.L.C., 673 F. Supp. 2d 475, 498 (W.D. Tex. 2009).

There is no evidence of misconduct or that the Arbitrator refused to hear pertinent or material evidence. The PTO issue was addressed by the parties in the Motion for Summary Judgment briefing and during the motion hearing. (Dkt. # 22-1 at 93, 117–18; see Dkt. # 21-2.) Plaintiff raised the Documentum and the PTO issues in his ex parte letter, which the Arbitrator struck but explained why it was not being considered. (Dkt. # 21-2.) The ex parte communication is not material or pertinent evidence in this matter, as the letter merely sets forth unfounded assertions, re-hashes fully briefed issues, and conveys Plaintiff's subjective beliefs about how the Arbitrator should

have ruled on the motion. (Id.) Moreover, the Fifth Circuit has explained that

> [e]very failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings.

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 301 (5th Cir. 2004) (quoting Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985)). Because these issues were addressed during arbitration and because there is no evidence of misconduct, section 10(a)(3) is not a basis for vacatur.

C. Section 10(a)(4)

Plaintiff argues that the Court must vacate the arbitration award under section 10(a)(4). According to Plaintiff, the Arbitrator "exceeded [her] powers." (Dkt. # 21.) However, Plaintiff does not provide any evidence to support this assertion beyond merely repeating the arguments described above. Because there is no evidence that the Arbitrator exceeded her powers,5section 10(a)(4) does not apply and the Court will not vacate the arbitration award.

II. Defendant's Motion to Confirm Arbitration Award

Pursuant to Dialogue, the parties agreed that any federal or state court of competent jurisdiction could enter judgment upon the award of the arbitrator. (See Dkts. ## 6, 6-1.) Since the parties consented to the entry of judgment upon an

arbitration award, USAA was entitled to seek confirmation of the award within one

5 The fact that the Arbitrator did not cite case law does not amount to conduct exceeding her powers. See Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 412 (5th Cir. 1990) ("It has long been settled that arbitrators are not required to disclose or explain the reasons underlying an award.").

year after it was issued. See 9 U.S.C. § 9. Because this matter was fully resolved through arbitration less than one year ago and because the Court finds no reason to vacate the award based on the grounds asserted by Plaintiff in his motion, the Court will grant Defendant's motion to confirm the arbitration award.6

CONCLUSION

Based on the forgoing, the Court DENIES Plaintiff's Motion to Vacate Arbitration Award (Dkt. # 21) and GRANTS Defendant's Motion to Confirm Arbitration Award (Dkts. ## 6, 8). IT IS ORDERED that this case is DISMISSED WITH PREJUDICE. The Clerk's Office is INSTRUCTED to ENTER JUDGMENT and CLOSE THIS CASE.

IT IS SO ORDERED.

DATED: San Antonio, Texas, June 23, 2021.

s/David Alan Ezra
Senior United States District Judge

6 Because the Court grants Defendant's Motion to Confirm Arbitration Award, the Court denies any other relief that Plaintiff requests in his filings, including his request for the Court to hold a scheduling conference with the parties and to issue a scheduling order for a trial on the merits. (See Dkt. # 14.)