APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-20660
Summary Calendar

[Filed November 15, 2022]

DEBRA-ANN WELLMAN, *Plaintiff—Appellant*,	)
versus	)
HEB GROCERY COMPANY, *Defendant—Appellee*.	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-3139

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:[*]

Debra-Ann Wellman brings various state and federal law claims against HEB. The district court

[*] Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

granted HEB's motion for judgment on the pleadings. We AFFIRM.

Debra-Ann Wellman was an employee of HEB Grocery Company ("HEB"). Wellman alleges that HEB employees discriminated against, abused, stalked, and harassed her for not participating in their purportedly illegal activities. Proceeding *pro se*, Wellman sued HEB in district court, alleging various state and federal claims in her amended complaint. The district court granted HEB's motion for judgment on the pleadings. Wellman appeals.

We review a district court's decision to grant a motion for judgment on the pleadings *de novo*. *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017).

First, Wellman alleges that HEB "deliberately" caused her "physical bodily harm" through alleged tortious acts of its employees. In Texas, employer liability for intentionally tortious actions of an employee requires that such actions be "closely connected with the employee's authorized duties." *M.D.C.G. v. United States*, 956 F.3d 762, 769 (5th Cir. 2020) (quoting *G.T. Mgmt., Inc. v. Gonzalez*, 106 S.W.3d 880, 884 (Tex. App.— Dallas 2003, no pet.)). Wellman does not proffer any evidence suggesting that the alleged acts were performed within the scope of these employees' employment. Accordingly, HEB is not liable for any intentional torts allegedly committed by its employees.

Second, Wellman also brings claims arising under federal statutes, namely the Americans with Disabilities Act ("ADA"), the Age Discrimination in

Employment Act ("ADEA"), the Genetic Information Nondiscrimination Act ("GINA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). We consider these in turn.

Concerning her ADA claim, we understand that Wellman's alleged physical disability stems from an October 31, 2019 incident when she was electrically shocked and thrown to the ground. Wellman suggests that she was negatively affected after this incident by HEB's failing to provide necessary medical care, continuing to stalk her, and interfering with her ability to obtain counsel. But Wellman's complaint does not suggest that HEB's alleged conduct was on the "basis of [her] disability," 42 U.S.C. § 12112(a), which requires showing, *inter alia*, "that [she] was subject to an adverse employment decision *on account of* [her] disability." *See EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 697 (5th Cir. 2014) (emphasis added). Accordingly, she fails to establish a prima facie case of ADA discrimination.

With respect to her ADEA claim, Wellman did not wait the required sixty days from filing an EEOC charge to file a civil action; therefore, she did not exhaust her administrative remedies. 29 U.S.C. § 626(d); *Julian v. City of Houston*, 314 F.3d 721, 726 (5th Cir. 2002). Wellman also did not exhaust administrative remedies for her GINA claim because her EEOC charge did not allege any GINA-specific facts nor have the requisite checked box indicating a genetic information discrimination claim. *See Jefferson v. Christus St. Joseph Hosp.*, 374 F. App'x 485, 490 (5th Cir. 2010) (district court did not err in determining

unchecked claims on EEOC charges were unexhausted).

Concerning her Title VII disparate treatment claim, Wellman's only alleged adverse employment action is that she was "never allowed to move forward or laterally, in her career." But Wellman does not show the requisite nexus between this alleged action and any alleged protected status sufficient for disparate treatment. *See Raj v. La. State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013). With respect to a Title VII retaliation claim, Wellman does not plead any facts showing that she was engaging in the type of activity that would qualify her for Title VII's antiretaliation protections. 42 U.S.C. § 2000e-3(a). Finally, Wellman's hostile work environment claim cannot succeed because Wellman's proffered evidence of comments from coworkers about her Italian heritage and Catholic religious affiliations were largely episodic and insufficient to support such a claim. *See White v. Gov't Emps. Ins. Co.*, 457 F. App'x 374, 381–82 (5th Cir. 2012) (evidence of only a few incidents does "not rise to the level of severity or pervasiveness required to support a hostile work environment claim.").

Wellman's other arguments challenging various aspects of the district court's adjudication are similarly without merit. She challenges her lack of appointed counsel, but in civil cases, a party has "no automatic right to the appointment of counsel," and "a federal court has considerable discretion in determining whether to appoint counsel." *Salmon v. Corpus Christi Indep. Sch. Dist.*, 911 F.2d 1165, 1166 (5th Cir. 1990).

Her various arguments alleging impropriety by the district court are not supported by the record.[1]

For the foregoing reasons, we AFFIRM.

[1] Any other arguments Wellman did not raise in her brief are waived, even under the more liberal standards we afford *pro se* litigants. *Davison v. Huntington Ingalls, Inc.*, 712 F.3d 884, 885 (5th Cir. 2013).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:20-CV-3139

[Filed December 7, 2021]

DEBRA-ANN WELLMAN,	)
Plaintiff,	)
	)
VS.	)
	)
HEB GROCERY COMPANY,	)
Defendant.	)
	)

ORDER

Before the Court are Defendant HEB Grocery Company, L.P.'s Motion for Judgment on the Pleadings (the "Motion") (Doc. #43), Plaintiff Debra-Ann Wellman's Response (Doc. #50), and Defendant's Reply (Doc. #51). Having reviewed the parties' arguments, the record, and applicable law, the Court grants the Motion.

I. Background

Plaintiff brings this discrimination suit against Defendant, her employer since 2012. Doc. #9 at 2. Plaintiff alleges that in October 2016, she was moved

from one of Defendant's grocery stores in Houston, Texas to another location in Richmond, Texas where she met an employee named Stacy Lovejoy. *Id.* Plaintiff's problems began at this second location, where she alleges various employees discriminated against, physically abused, stalked, harassed, and insulted her for refusing to commit illegal acts, join the "Stacy Lovejoy Tribe," or sell books Plaintiff wrote through the "Terry Williams Tribe." *Id.* at 8, 16, 18-19, 22. Plaintiff also alleges that three employees made offensive remarks about Plaintiff being Italian and Catholic in March 2017. Beginning in late 2017 and "for quite some time" thereafter, one of her unit directors, Brian Nielsen, told other employees to ask Plaintiff out on dates. *Id.* at 22. After one refusal, Mr. Nielsen "dress[ed Plaintiff] down and sa[id] 'When these men come over and ask you out Debra, I have given them permission to do so and they are good people. So do not laugh when they ask you out.'" *Id.* at 22-23.

Additionally, Plaintiff alleges that on October 31, 2019, while "Plaintiff was resting her abdomen against # 69 work station, next to the HEB small shopping cart in the Business Center and between that area being rigged with electrical shocking and the other employee's pointing the taser weapons at the Plaintiff, she was thrown to the floor, it took three (3) people to pick the Plaintiff up and put her in a chair." *Id.* at 21. When a "Manager in Charge" ("MIC") told Plaintiff "get in my car, now, because if you don't, they will tie you to a barbed wire fence and beat it out of you," Plaintiff refused to get in the vehicle and asked for the video footage of the incident. *Id* at 22. The MIC told Plaintiff

she was "not allowed to show [Plaintiff] the video" and Plaintiff "finished her shift in excruciating pain and agony." *Id.* Plaintiff alleges that she "never had problems" doing various physical activities before the October 31 incident, but now cannot drive or walk properly and has various injuries to her knees, ankles, arms, and hands. *Id.* at 4-5. Plaintiff does not allege whether she still works for Defendant or, if not, how the employment relationship ended. *See id.*

Plaintiff filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") on August 18, 2020, describing the events and conduct outlined above. The EEOC issued a Dismissal and Notice of Rights on August 21, 2020, explaining that "[b]ased upon its investigation, the EEOC [wa]s unable to conclude that the information obtained establishes violations of the statutes." Doc. #1 Ex. 1 and Ex. 2. Plaintiff, proceeding pro se, filed suit in this Court on September 9, 2020 and upon Defendant's Motion for a More Definite Statement, Plaintiff filed her First Amended Complaint ("Amended Complaint"). Doc. #1 and Doc. #9. Though the Amended Complaint does not state what claims Plaintiff is pursuing, it does state that this Court has jurisdiction "for several legal reasons, for Title VII (1964), Americans With Disabilities Act, The Genetic Information Nondiscrimination Act, and the Age Discrimination in Employment Act, EEOC Employment Law Violations, Abusive Hostile Work Environment, No Reasonable Work Accommodations/ Conditions, Infringement on Plaintiffs Right To Work In A Harm-Free Work Environment, Harassment (not excluding Sexual Harassment) and Retaliation, HEB

Grocery Company – Deliberately Causing Employee Physical Bodily Harm." Doc. #9 at 1. In light of Plaintiff's pro se status, the Court interprets this sentence to mean that Plaintiff is bringing claims for civil assault and discrimination, retaliation, and hostile work environment in violation of the Genetic Information Nondiscrimination Act ("GINA"), Age Discrimination in Employment Act ("ADEA"), Americans with Disabilities Act ("ADA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). Defendant now moves for judgment on the pleadings to dismiss all claims made against it.[1] Doc. #43.

II. Legal Standard

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "A motion brought pursuant to Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Garza v. Escobar*, 972 F.3d 721, 727 (5th Cir. 2020). "The standard for dismissal under Rule 12(c) is the same as that under Rule 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a

[1] Though Defendant moves to dismiss any claims brought under Chapter 21 of the Texas Labor Code and potential *Sabine Pilot* claims, it concedes that neither claim is asserted in the Amended Complaint and Plaintiff does not argue that she is making such claims in her Response. *See* Doc. #43 at 3, 16; Doc. #50; and Doc. #9. The Court will not adjudicate claims that are not before it.

claim to relief that is plausible on its face." *Id.* (citation omitted). "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." *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019).

Though courts must "accept all well-pleaded facts as true," this does not include "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 210 (5th Cir. 2010). Additionally, courts "may not consider new factual allegations made outside the complaint" when ruling on a motion to dismiss. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). Finally, courts "hold pro se plaintiffs to a more lenient standard than lawyers when analyzing complaints, but pro se plaintiffs must still plead factual allegations that raise the right to relief above the speculative level." *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467, 469 (5th Cir. 2016). "The right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law." *Hulsey v. State of Tex.*, 929 F.2d 168, 171 (5th Cir. 1991).

III. Analysis

a. Civil Assault

Plaintiff alleges that this Court has jurisdiction based on Defendant deliberately causing Plaintiff physical bodily harm and infringing on Plaintiff's right to work in a harm-free work environment. Doc. #9 at 1. While there is no right to work in a harm-free work

environment, there is a common-law "right to be free from physical harm." *Texas Dep't of Pub. Safety v. Cox Texas Newspapers, L.P.*, 343 S.W.3d 112, 115 (Tex. 2011). Under Texas law, "a person commits civil assault if he intentionally, knowingly, or recklessly causes bodily injury to another." *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011). Construing Plaintiff's pleadings liberally, the Court infers that Plaintiff is asserting a claim for civil assault. "In Texas, an employer may be vicariously liable for intentional torts, such as assault . . . , when the act, although not specifically authorized by the employer, is closely connected with the employee's authorized duties." *M.D.C.G. v. United States*, 956 F.3d 762, 769 (5th Cir. 2020) (citation omitted). "In other words, *respondeat superior* liability exists only if the intentional tort is committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity." *Id.* (citation omitted).

Here, Plaintiff alleges that (1) an unnamed employee tased her, (2) unnamed employees would throw trash, food, and liquids on the ground to cause Plaintiff to fall, (3) unnamed employees threw office supplies at her, (4) Ms. Lovejoy told other employees to abuse, harm, and push Plaintiff, and (5) Terry Williams and four other employees were "groping, heavy petting, stroking and laying hands" on Plaintiff while she was trying to board a flight to New York City. Doc. #9 at 9, 16-22. The Amended Complaint does not allege, and the Court cannot infer, how any of these acts were "committed in the accomplishment of a duty entrusted to" the employees of a grocery store. *See M.D.C.G.*, 956 F.3d at 769. Plaintiff's allegations, including name

calling, bullying, and alleged eating disorders, imply that much of the conduct at issue was instead due to personal animosity. *See id.* As such, assuming all of Plaintiff's allegations to be true, Defendant cannot be held liable for the intentional torts inflicted by its employees.

Accordingly, the Motion is granted as to Plaintiff's claims regarding deliberate physical harm and the right to work in a harm-free work environment.

b. GINA

Additionally, Plaintiff alleges that she was discriminated against on the basis of her genetic information. Under the GINA, it is unlawful for an employer to discriminate against or adversely affect the status of an employee "because of genetic information with respect to the employee." 42 U.S.C. § 2000ff-1(a). "Genetic information" is defined as information about (i) an "individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual." 42 U.S.C. § 2000ff(4). A plaintiff must first exhaust administrative remedies in accord with Title VII procedures before seeking judicial relief for GINA violations. 42 U.S.C. § 2000ff-6(a)(1). To do so, a private sector employee must file an administrative charge with the EEOC. *Stanley v. Univ. of Tex. Med. Branch, Galveston, TX*, 425 F. Supp. 2d 816, 822 (S.D. Tex. 2003). "In assessing whether a charge properly exhausts a particular claim, the court is to construe the charge broadly yet only find a claim exhausted if it could have been reasonably expected to grow out of the charge of discrimination." *Richardson*

v. Porter Hedges, LLC, 22 F. Supp. 3d 661, 665 (S.D. Tex. 2014) (cleaned up). A charge does not exhaust a claim if the box for indicating that type of discrimination is not checked and there are no allegations detailing the discriminatory conduct. *Stanley*, 425 F. Supp. 2d at 823.

Here, Plaintiff did not check the box for discrimination based on genetic information nor did she describe any use of genetic tests or family members' diseases or disorders in her Charge. *See* Doc. #1, Ex. 2 and 42 U.S.C. § 2000ff(4). As such, Plaintiff's inclusion of the words "genetic information" in a laundry list of violations alleged in the Charge is insufficient to exhaust administrative remedies. Doc. #1, Ex. 2 at 2; *see also Stanley*, 425 F. Supp. 2d at 823 (explaining that holding otherwise would allow plaintiffs to "always put that one catch-all sentence in their charge to exhaust their administrative remedies, and the EEOC would be left in the dark concerning the substance of plaintiffs' claims").

Accordingly, the Motion is granted as to Plaintiff's claims for GINA violations.

c. ADEA

Plaintiff also alleges age discrimination in violation of the ADEA. Under the ADEA, "[n]o civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d)(1). As such, "the ADEA gives the EEOC 60 days of exclusive jurisdiction to" resolve claims before they can be brought to court.

Barfield v. Fed. Express Corp., 351 F. Supp. 3d 1041, 1051 n.43 (S.D. Tex. 2019). Here, Plaintiff filed her Charge on August 18, 2020 and filed suit on September 9, 2020. Doc. #1 and *id.*, Ex. 2. Because Plaintiff did not wait the statutorily required 60 days before filing suit, her claims for age-based discrimination must be dismissed.

Accordingly, the Motion is granted as to Plaintiff's ADEA claims.

d. ADA

Separately, Plaintiff alleges disability discrimination in violation of the ADA. The ADA establishes that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an . . . employee." 42 U.S.C. § 12112(b)(5)(A). To state a claim for discrimination, an "employee may either [allege] direct evidence that she was discriminated against because of her disability" or show that she (1) "has a disability," (2) "was qualified for the job," and (3) "was subject to an adverse employment decision on account of h[er] disability." *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 695, 697 (5th Cir. 2014).

Here, the only potential disabilities alleged by Plaintiff are her injuries after the October 31, 2019

incident. Doc. #9 at 4-5 ("Plaintiff never had problems walking, running, skipping, stooping, bending, lifting, writing, stretching and kneeling, etc., prior to . . . October 31, 2019."). The only allegations of misconduct after this injury are that 1) Defendant refused to release the security footage from the incident to Plaintiff and 2) the doctors who treated Plaintiff after the incident did not give Plaintiff "proper medical treatment." *Id.* at 5, 12-13. Though it is not clear whether failure to release security footage constitutes discrimination under the ADA, the Court need not resolve this issue because Plaintiff has since received the footage she requested. *See* Doc. #60. As to the failure to provide necessary medical care, claims based on reasoned medical judgments or negligent medical treatment are not actionable under the ADA. *Cadena v. El Paso Cty.*, 946 F.3d 717, 726 (5th Cir. 2020). All other allegations of mistreatment predate October 31, 2019 and therefore cannot be disability-based discrimination. *See* Doc. #9.

Accordingly, the Motion is granted as to Plaintiff's ADA claims.

e. Title VII

Finally, Plaintiff asserts numerous claims in violation of Title VII: discrimination, retaliation, and hostile work environment based on Plaintiff's religion, national origin, and gender.[2] In Texas, a "Title VII

[2] Though Plaintiff does not appear to be asserting racial discrimination claims, she does mention in her Amended Complaint that she is an "adult white female . . . who is of Italian/Scottish de[s]cent" and that the "demographics for age,

plaintiff must file a charge of discrimination with the EEOC within 300 days" of the discriminatory act that serves as the basis for her discrimination or retaliation claim. *Grice v. FMC Techs. Inc.*, 216 F. App'x 401, 405 (5th Cir. 2007) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002)). "However, if the plaintiff is making a hostile work environment claim, then a series of separate acts can collectively constitute one unlawful employment practice and the entire time period of the hostile environment may be considered by the court for the purposes of determining liability." *Id.*

Here, Plaintiff filed her Charge on August 18, 2020. Doc. 1, Ex. 2. Thus, the Court can only consider events alleged to have occurred on or after October 23, 2019 to determine whether Plaintiff has stated a plausible claim from discrimination or retaliation. *See Grice*, 216 F. App'x at 405. However, all events alleged in the Amended Complaint may be considered as to Plaintiff's claim for a hostile work environment. *See id.*

1. Discrimination

Title VII prohibits "intentional discrimination (known as 'disparate treatment')" based on "race, color, religion, sex, or national origin." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). To state such a claim, a plaintiff

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gender, [and] race" were "very one sided" at the store where she worked. Doc. #9 at 3, 16. To the extent Plaintiff is asserting a claim based on racial discrimination, her failure to check the "race" box or describe any incidents of racial discrimination in her Charge constitute a failure to administratively exhaust such claims. *See* Doc. #1, Ex. 2 and *Stanley*, 425 F. Supp. 2d at 823. Accordingly, the Motion is granted as to Plaintiff's racial discrimination claims.

must plead: "(1) an adverse employment action, (2) taken against a plaintiff *because of* her protected status." *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 767 (5th Cir. 2019) (emphasis in original). For intentional discrimination claims, "an employment action that does not affect job duties, compensation, or benefits is not an adverse employment action. Rather, an adverse employment action consists of *ultimate employment decisions* such as hiring, granting leave, discharging, promoting, and compensating." *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004) (citations omitted) (emphasis in original).

Here, the only potential adverse employment action plead by Plaintiff is that she "was never allowed to move forward or laterally, in her career at HEB Grocery Company. Plaintiff asked repeatedly, during the three (3 +) years if she could train as a Bookkeeper or work in Produce or Floral, and Stacy Lovejoy said 'NO, you're not in my Tribe, so No Bookkeeping for you, Debra, stay where you are.'" Doc. #9 at 20. Not only are these allegations insufficient for the Court to infer that the alleged failure to promote took place after October 23, 2019, but the Amended Complaint also alleges that Plaintiff was not a member of "Stacy Lovejoy's Tribe" because she did "not want to steal, lie and commit fraud" to be in the group. *Id.* at 16. As such, Plaintiff has failed to allege that an adverse employment action was taken against her because of her religion, sex, or national origin. *See Cicalese*, 924 F.3d at 767.

Accordingly, the Motion is granted as to Plaintiff's Title VII discrimination claims.

2. Retaliation

"To state a Title VII retaliation claim, the Plaintiff must allege facts that tend to establish: (1) she engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action." *Richards v. JRK Prop. Holdings*, 405 F. App'x 829, 831 (5th Cir. 2010). "Protected activity is defined as opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Id.* For a Title VII retaliation claim, "the desire to retaliate" must be "the but-for cause of the challenged employment action." *Univ. of Texas Sw. Med Ctr. v. Nassar*, 570 U.S. 338, 352 (2013).

Here, the Amended Complaint states that "Plaintiff always reported hostile/abusive workplace incidents to HEB #724 management, HEB HR personnel, or other HEB Grocery Company's corporate headquarters in San Antoni[o], Texas" and that "HEB Service managers would be told what was going on and this behavior was never addressed." Doc. #9 at 8, 9. As explained above, the Amended Complaint does not allege that this reporting happened after October 23, 2019 and is thus a timely basis for a retaliation claim. Additionally, the Amended Complaint does not allege that any of Defendant's employees retaliated against Plaintiff for reporting this allegedly discriminatory conduct or, more importantly, that the abuses Plaintiff endured would not have happened "but-for" her reporting. *See id.* and *Nassar*, 570 U.S. at 352. To the contrary, the

Amended Complaint repeatedly alleges that Plaintiff was subject to abuse and harassment because Plaintiff refused to join the "Stacy Lovejoy Tribe" or sell books through the "Terry Williams Tribe." Doc. #9 at 8, 16, 19. As such, the Amended Complaint does not plausibly allege that Plaintiff engaged in an activity protected by Title VII on or after October 23, 2019 and that doing so was the but-for cause of an adverse employment action against her.

Accordingly, the Motion is granted as to Plaintiff's Title VII retaliation claims.

3. Hostile Work Environment

Finally, to allege a hostile work environment claim under Title VII, a plaintiff must allege that she "(1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) the harassment complained of was based on [her protected status]; (4) the harassment complained of affected a term, condition, or privilege of employment; [and] (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Williams-Boldware v. Denton Cnty., Tex.*, 741 F.3d 635, 640 (5th Cir. 2014). The "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the *conditions* of employment to [a] sufficiently significant degree to violate Title VII." *Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 177 (5th Cir. 2011) (emphasis in original). "[C]onduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The standards for judging hostility are "demanding to

ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.* (citations omitted).

Here, the Amended Complaint includes allegations of harassment that fall into three categories: 1) explicit comments based on national origin and religion, 2) allegations of sexual harassment by Mr. Nielsen, and 3) allegations of general harassment. As to the first, in March 2017, three employees told Plaintiff that they bought Italian food for Defendant's 5-year work anniversary because "Italians only eat Italian food." Doc. #9 at 14. The employees also made remarks about the Pope directing Catholics on what to eat and Italians being lazy. *Id.* Without any other allegations of harassment based on religion or national origin, the "mere utterance" of these offensive remarks "do not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Carder*, 636 F.3d at 177. Similarly, Mr. Nielsen "having" men ask Plaintiff out on dates and commanding that Plaintiff "not laugh when they ask [her] out" is not the sort of "extreme" conduct that amounts "to a change in the terms and conditions of employment." *See* Doc. #9 at 22-23 and *Faragher*, 524 U.S. at 788. Finally, the Amended Complaint includes numerous allegations of harassment that are either not alleged to be due to any specific motivation or are specifically alleged to be due to Plaintiff's refusal to join the Stacy Lovejoy Tribe. *See e.g.*, Doc. #9 at 16 ("Stacy Lovejoy is telling all other . . . employees . . . to abuse, harm, knock Plaintiff down on

the ground and push her around, call her profane names and harass me . . . because I do not want to steal, lie and commit fraud to be in Stacy Lovejoy's Tribe."). As such, the Court finds that Plaintiff has failed to allege harassment "based on" religion, national origin, or gender that affected the conditions of her employment to a "sufficiently significant degree to violate Title VII." *See Carder*, 636 F.3d at 177.

Accordingly, the Motion is granted as to Plaintiff's hostile work environment claims.

IV. Conclusion

For the foregoing reasons, the Court finds that Plaintiff failed to administratively exhaust her claim for discrimination based on genetic information and failed to satisfy the statutory requirements for an age-based discrimination claim. The Court further finds that the Amended Complaint fails to state a claim for civil assault, disability discrimination, or violations of Title VII. Accordingly, the Motion is hereby GRANTED and this case is DISMISSED.

It is so ORDERED.

DEC 03 2021
Date

/s/ Alfred H. Bennett
The Honorable Alfred H. Bennett
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-20660

[Filed January 4, 2023]

DEBRA-ANN WELLMAN, *Plaintiff—Appellant*,	)
versus	)
HEB GROCERY COMPANY, *Defendant—Appellee*.	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-3139

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.