

Appendix A

United States Court of Appeals for the Fifth Circuit

No. 23-10508

United States Court of Appeals

Fifth Circuit

FILED

February 21, 2024

██████████ XIA,

Lyle W. Cayce
Clerk

Plaintiff—Appellant,

versus

LINA T. RAMEY, AND ASSOCIATES; WILLIAM MARTINEZ,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-3072

Before JOLLY, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

██████████ Xia, a pro se litigant, sued her employer for employment discrimination and harassment, fraud, promissory estoppel, and violations of the H-1B visa statute. The district court dismissed Xia's lawsuit under 12(b)(6) for failing to state a claim. Xia now appeals that dismissal and moves us to appoint her counsel. We AFFIRM the district court's dismissal and DENY Xia's motion.

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

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I.

On September 16, 2019, Linda T. Ramey, and Associates (“LTRA”) offered Xia, a Chinese national working in America on an H-1B visa, a job as a design engineer. After several months on the job, however, LTRA terminated Xia. In response, Xia sued LTRA.

Xia later amended her initial complaint and added William Martinez, an LTRA employee and Xia’s supervisor, as a codefendant, though it essentially alleged the same claims as Xia’s initial complaint. Eight days later, Xia submitted a “Plaintiff’s Brief,” which the district court accepted as Xia’s second amended complaint. In that same order, the district court directed Xia to make no further amendments unless permitted by the court.

If we construe her pro se pleadings liberally, Xia alleges employment discrimination based on sex, race, and national origin. She further alleges a hostile working environment claim and claims related to her H-1B visa. Xia further alleges that: (1) her supervisor told an inappropriate joke around her, glanced at her inappropriately, invited her to lunch, and followed her to her car, as well as other grievances; (2) her male coworkers invited her to drink alcohol with them during working hours; and (3) her coworkers gossiped about her and made comments about and asked her insensitive questions relating to her Chinese heritage. Regarding her visa claim, Xia further alleges that LTRA defrauded her when it promised to help her earn her green card, fraudulently induced her to accept the employment offer based on that promise, and fired her in violation of the H-1B statute. Xia’s initial complaint also alleged that LTRA defamed her to other employers following her termination.

On June 9, 2022, LTRA and Martinez (“Appellees”) filed the instant motion to dismiss. Instead of responding to the motion, Xia moved to clarify her pleadings and to remove her second amended complaint. The district

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court granted Xia's motion to clarify, which reinstated her first amended complaint as the operative pleading, and referred the motion to dismiss to a magistrate judge. In a report and recommendation, the magistrate judge recommended that the district court dismiss each of Xia's claims with prejudice. The district court adopted the R&R, over Xia's objection, and dismissed the case with prejudice. The district court then declined to certify the order for an in forma pauperis appeal, ruling that Xia's claims were frivolous.

II.

Now on appeal, Xia argues that: (1) the district court erred by dismissing her claims under Rule 12(b)(6); (2) the district court erred by failing to rely on the factual allegations in both of her amended complaints; and (3) the district court abused its discretion in refusing to allow Xia to amend her complaint for a third time. Furthermore, Xia moves for appointment of counsel to represent her. We will discuss each issue below.

i.

We first turn to Xia's argument that the district court erred in dismissing her claims under Rule 12(b)(6). A district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed de novo. *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020). We accept all well-pled facts as true, construing all reasonable inferences in the complaint in the light most favorable to the plaintiff. *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020). “But we do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Id.* (internal quotation marks and citations omitted). “To survive a Rule 12(b)(6) motion to dismiss, a complaint ‘does not need detailed factual allegations,’ but must [establish] the plaintiff’s grounds for entitlement to relief—including factual allegations in a complaint that when assumed to be true ‘raise a right to relief above the

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speculative level.’’ *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Notwithstanding her three pleadings, Xia’s claims fail to satisfy the standard for survival. Dismissal was thus proper. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). Xia’s discrimination claim, which for example involves her allegations surrounding her supervisor and coworkers, is deficient because she failed to establish that her claims were caused by her race, national origin, sex, or any other protected characteristic. *Sanchez v. Chevron N. Am. Expl. & Prod. Co.*, No. 20-30783, 2021 WL 5513509, at *5 (5th Cir. 2021). Xia’s hostile work environment claim, which involves essentially the same facts as her discrimination claim, fails because the alleged instances of abuse are too infrequent and inconsequential to be legally significant. *E.E.O.C. v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 453 (5th Cir. 2013) (en banc). Xia’s promissory estoppel and fraud claims, which involve her employer’s alleged promise to help transfer Xia’s H-1B via to a green card, fail because her attached exhibit refutes the existence of that promise. Without such a promise, both claims necessarily fail. *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 305 (Tex. App. – Dallas 2009, no pet.); *Elson v. Black*, 56 F.4th 1002, 1008 (5th Cir. 2023). Xia’s H-1B visa statutory claim fails because she failed to allege that she had exhausted her administrative remedies as required by 8 U.S.C. § 1182(n); therefore, she has no private right of action. *See Watson v. Elec. Data Sys.*, 191 F. App’x 315 (5th Cir. 2006); *see also Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 648 (S.D.N.Y. 2000). Finally, Xia’s defamation claim from her initial complaint also fails for its vagueness because she did not identify a specific defamatory statement or when or where it was made. *Mandawala v. Ne. Baptist Hosp.*, Counts 1, 2, & 11, 16 F.4th 1144, 1153 (5th Cir. 2021); *Ameen v. Merck & Co.*, 226 F. App’x 363, 370 (5th Cir. 2007).

ii.

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In sum, Xia cannot show that the district court erred by: (1) dismissing her claims, (2) not relying on the allegations found in both of her amended complaints, or (3) refusing to permit her to further amend her claims. Nor can Xia show that she is entitled to appointed counsel, and her motion is DENIED. Accordingly, the district court's judgment dismissing the complaint is in all respects

AFFIRMED.

Appendix B

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

ELLEN XIA,

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Plaintiff,

§

v.

§

Civil Action No. 3:21-CV-3072-L-BN

LINA T. RAMEY AND ASSOCIATES,
and WILLIAM MARTINEZ,

§

Defendants.

§

ORDER

The Findings, Conclusions and Recommendation of the United States Magistrate Judge (“Report”) (Doc. 51) was entered on January 20, 2023, recommending that the court grant pro se Plaintiff Ellen Xia’s (“Plaintiff” or “Ms. Xia”) Motion to Clarify and Remove the Filing of Second Amended Complaint (“Motion to Clarify”) (Doc. 49), and grant Defendant Lina T. Ramey and Associates (“Ramey”) Second Motion to Dismiss (Doc. 43), dismissing with prejudice Plaintiff’s claims against Ramey and Ramey’s employee William Martinez (collectively, “Defendants”). Doc. 51.

Plaintiff filed Objections to the Report (“Objections”) (Doc. 52) on February 2, 2023, which appear to make three substantive objections:¹ (1) that she did not intend that the Second Amended Complaint (“SAC”) replace the First Amended Complaint (“FAC”) or show abandonment of claims made in the FAC, and therefore the Report should not rely on the SAC to dismiss her claims; (2) the Report’s recommendation to construe her Motion to Clarify as brought under Rule 54(b) rather than Rule 60(a) is an incorrect application of the Federal Rules of Civil

¹ The court notes that Plaintiff’s Objections are difficult to follow and include extended case quotes from Sixth Circuit and Second Circuit opinions, and the California Civil Code, none of which are controlling precedent for this court. This court is only bound by rulings from the Fifth Circuit and the Supreme Court.

Procedure; and (3) the Report incorrectly determines Plaintiff's alleged facts as insufficient under Rule 8, and therefore should not grant Defendants' Motion to Dismiss under Rule 12(b)(6). *See* Doc. 52. The court will address each objection in turn.

First, Plaintiff argues that she did not intend for the SAC to supersede the FAC, and as the SAC presents "no material change, [P]laintiff did not [a]mend her claim." *Id.* at 1. She contends that the Report misunderstands the SAC because it does not use the "traditional tools of construction," citing Supreme Court opinion *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *Id.* at 2. That case, however, addresses deference to commentary associated with agency regulations and is not applicable to the issues presented here. More to the point, the Report clearly states that the magistrate judge reviewed Plaintiff's factual allegations in both the FAC and SAC when considering the Motion to Dismiss. Doc. 51 at 5. The Report did not rely exclusively on the SAC, which is the bases for Plaintiff's objection. Accordingly, Plaintiff's objection to the Report's reference to the SAC is **overruled**.

Second, Plaintiff objects that the Report improperly construed her Motion to Clarify as one brought under Rule 54(b), rather than Rule 60. Doc. 52 at 6. She appears to argue that Rule 60's provision that allows reconsideration for "mistake, inadvertence, surprise, or excusable neglect" is the provision under which she must seek relief. Rule 60, however, is reserved for relief from final judgment. *Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 193-94 (5th Cir. 2011). Because Plaintiff seeks reconsideration of the court's acceptance of her SAC, which is not a final judgment, Rule 60 is not the proper vehicle. Rule 54(b)'s liberal provision that permits a court to reconsider "any order or other decision, however designated" is the correct rule for a party seeking reconsideration of an interlocutory order, that is, an order that is not a final judgment. Fed. R. Civ. P. 54(b); *see also Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017). Because Plaintiff's Motion to

Clarify sought reconsideration of an interlocutory order, Rule 54(b) was the proper vehicle, and the Report's recommendation is the correct application of the Federal Rules of Civil Procedure. Accordingly, the court **overrules** this objection.

Finally, Plaintiff objects to the Report's finding that she failed to set forth sufficient facts to plead her claims for sexual harassment, race discrimination, and fraud related to Defendant's alleged offer of assistance in converting her H1B visa into a green card. Doc. 52 at 7-9. She states that the Report misunderstood her claim for sex harassment as a hostile work environment claim, and under that mistaken understanding, the Report incorrectly recommended the court dismiss her claims for failure to state a claim upon which relief may be granted. *Id.* Plaintiff argues that “[w]hen [her] claims of sexual harassment are considered together, such allegations constitute a claim of the creation of a hostile work environment by the alleged sexual harassment of Defendants.” *Id.* at 9. Although Plaintiff objects to the Report's characterization and analysis of her alleged work-based discrimination as a hostile work environment claim, she appears to assert that the totality of her claims as set forth sufficiently allege a hostile work environment. She repeats similar arguments related to her race discrimination and fraud claims, arguing that her filings have already satisfied the pleading standard. Plaintiff fails to set forth any new facts for the court to consider.

After a *de novo* review of Plaintiff's factual allegations in the Complaint, FAC, SAC, and responses to magistrate judge's questionnaire (Doc. 8), the court finds that she has not set forth sufficient facts to allege sex harassment, a hostile work environment, race discrimination, or fraud. Taking her allegations as true, as the court must when considering a motion to dismiss pursuant to Rule 12(b)(6), Plaintiff has not alleged facts, if proven to be true, showing severe or pervasive behavior such that it interferes with a term, condition, or privilege of employment. *See Johnson v.*

PRIDE Indus., Inc., 7 F.4th 392, 399-400 (5th Cir. 2021). Likewise, Plaintiff has failed to point to any similarly situated employees who are male or of other races who Defendants treated more favorably. *See Raj v. Louisiana State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013). Thus, her allegations of sex or race-based discrimination fail to state a claim.

As to her claim for fraud for Defendants' failure to help her transfer her H1B visa to a green card as she contends was promised, she fails to allege that Defendants made a definite promise but rather asserts that Defendants made a statement regarding possible future aid. For these reasons, the court concludes that Plaintiff has not set forth sufficient facts to successfully plead the elements of fraud. Accordingly, for the reason stated, the court **overrules** Plaintiff's objection to the Report's recommendation to grant Defendants' Motion to Dismiss.

Having considered the Complaint, FAC, SAC, Plaintiff's responses to magistrate judge's questionnaire, Report, file, and record, and having conducted a *de novo* review of the portions of the Report to which objections were made, the court determines that the magistrate judge's finding and conclusions in the Report are correct, and **accepts** them as those of the court. The court **grants** Plaintiff's Motion to Clarify and Remove the Filing of Second Amended Complaint (Doc. 49). Further, Plaintiff fails to point to controlling law or offer new facts showing that the Report's recommendations are incorrect. Accordingly, the court **grants** grant Defendant Lina T. Ramey and Associates' Second Motion to Dismiss (Doc. 43), and **dismisses with prejudice** Plaintiff's claims and this action against Lina T. Ramey and Associates and William Martinez for failure to state a claim upon which relief may be granted.

Further, the provision of Rule 15(a)(2) of the Federal Rules of Civil Procedure that states “[t]he court should freely give leave when justice so requires” is not without limitation. The decision to allow amendment of a party's pleadings is within the sound discretion of the district

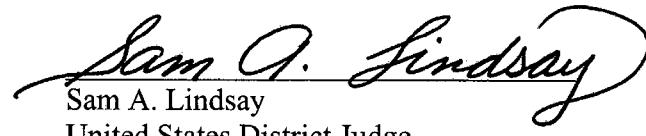
court. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) (citation omitted). In determining whether to allow an amendment of the pleadings, a court considers the following: “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” *Foman*, 371 U.S. at 182; *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003) (citation omitted).

Plaintiff has had ample opportunity to present her factual allegations to the court because she amended her claims twice through the FAC and SAC—even though she contends that she did not want the SAC to replace the FAC—and responded to the magistrate judge’s questionnaire. Further, she had the opportunity to object to the Report and provide the court with factual bases for her allegations, which she did. She has failed to present sufficient factual bases for her claims, despite these opportunities to do so, and the court concludes that Plaintiff has stated her “best case.” See *Schiller*, 342 F.3d at 566. The court therefore determines that permitting further pleading attempts would be an inefficient use of the parties’ and the court’s resources, cause unnecessary and undue delay, and also be futile. For these reasons, the court will not allow Plaintiff an opportunity to amend her pleading regarding her claims against Defendants Lina T. Ramey and Associates and William Martinez.

The court prospectively **certifies** that any appeal of this action would not be taken in good faith. See 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). In support of this certification, the court **incorporates** by reference the Report. See *Baugh v. Taylor*, 117 F.3d 197, 202 and n.21 (5th Cir. 1997). Based on the magistrate judge’s Report, the court concludes that any appeal of this action would present no legal point of arguable merit and would therefore be frivolous. *Howard v.*

King, 707 F.2d 215, 220 (5th Cir. 1983). In the event of an appeal, Plaintiff may challenge this certification by filing a separate motion to proceed *in forma pauperis* on appeal with the clerk of the United States Court of Appeals for the Fifth Circuit. *See Baugh*, 117 F.3d at 202; Fed. R. App. P. 24(a)(5).

It is so ordered this 17th day of April, 2023.



Sam A. Lindsay
United States District Judge

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

ELLEN XIA,

§

Plaintiff,

§

v.

Civil Action No. 3:21-CV-3072-L-BN

LINA T. RAMEY AND ASSOCIATES
and WILLIAM MARTINEZ,

§

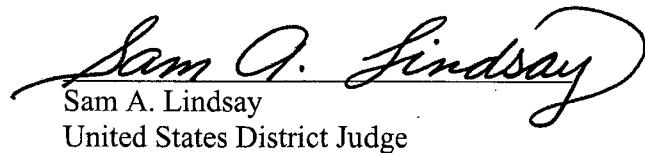
Defendants.

§

JUDGMENT

The court issues this judgment pursuant to its Order issued earlier today. It is therefore **ordered, adjudged, and decreed** that Plaintiff Ellen Xia's First Amended Complaint is **dismissed with prejudice** as to her claims and this action against Lina T. Ramey and Associates, and William Martinez for failure to state a claim upon which relief may be granted. The clerk of court shall transmit a copy of this judgment and a copy of the order dated April 13, 2023, accepting the Findings, Conclusions, and Recommendations of the United States Magistrate Judge, to Plaintiff. The parties shall bear their own costs of court.*

Signed this 17th day of April, 2023.


Sam A. Lindsay
United States District Judge

* Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Rule 54(d) creates a strong presumption that the prevailing party will be awarded costs. *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985). In this case, however, Plaintiff, the losing party, is *pro se* and proceeding *in forma pauperis*. She does not have the means to pay costs. Under these circumstances, the court does not believe that the imposition of costs against Plaintiff is warranted.