APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24-50597

Summary Calendar

CHELSEA A HAMILTON,

Plaintiff—Appellant,

versus

LOUIS DEJOY, *Postmaster General, U.S. Postal Service*

Defendant—Appellee.

Filed January 3, 2025

Appeal from the United States District Court

for the Western District of Texas

USDC No. 1:23-CV-1045

Before WIENER, HO, and RAMIREZ, *Circuit Judges.*

PER CURIAM:*

Plaintiff-Appellant Chelsea A. Hamilton appeals the district court's grant of Defendant-Appellee Louis DeJoy's motion to dismiss all claims. For the reasons set forth below, we AFFIRM.

OPINION OF THE COURT

I.

---

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

Hamilton is a former USPS mail processing clerk. On April 13, 2021, Hamilton and a coworker engaged in a physical altercation that she claims was because of actions "orchestrated by management, union stewards and [other USPS] employees." After investigating the incident, USPS management issued a Notice of Removal to Hamilton, which charged her with "Unacceptable Conduct" because she "engaged in inappropriate behavior of a violent and/or threatening nature."[1] Management also informed her that there was video evidence of the altercation. Hamilton's termination became effective on October 31, 2022—nearly a year and a half later.

Hamilton contends that, leading up to the altercation and thereafter, she faced "continuous harassment and retaliatory actions" by her coworkers. Those actions allegedly included stalking, harassment, and collusion. In early 2021, Hamilton reported the incidents to her supervisor—a union steward—hoping that her supervisor would file a formal grievance. However, she claims that her supervisor refused to do so. After her discharge, Hamilton also filed a formal EEOC complaint but alleges that she never received a "notice of right to sue."

In May and October of 2021, Hamilton filed charges with the National Labor Relations Board ("NIRB"), claiming that USPS management and the union bribed NLRB agents, leading to her wrongful termination. Hamilton also claims that management tampered with the video evidence of the altercation.

Hamilton filed suit against DeJoy, asserting retaliation and wrongful termination claims under Title VII of the Civil Rights Act. She also asserted

---

[1] The Notice also provided that she would be removed no sooner than thirty days from receiving the Notice.

a claim alleging breach of the duty of fair representation by the union president, Larry Roberts, and a claim of tampering with evidence, alleging that USPS management altered the video evidence. DeJoy moved to dismiss Hamilton's claims, contending that (1) she failed to state a Title VII or breach of duty of representation claim for relief and (2) her tampering-with-evidence claim lacks jurisdiction. The district court granted DeJoy's motion and dismissed all of Hamilton's claims against him. Hamilton timely appealed.

We first address whether the district court properly dismissed Hamilton's claim of tampering with evidence for lack of jurisdiction. We conclude that it did. "We review de novo the district court's grant of a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction." *Morris v. Thompson*, 852 F.3d 416, 419 (5th Cir. 2017). As the party asserting jurisdiction, Hamilton must "bear the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

Hamilton contends that the district court incorrectly dismissed her claim of tampering with evidence for lack of jurisdiction because USPS management's alleged alteration of the video evidence violated her due process rights and obstructed justice. She claims that the district court failed to recognize her claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999). DeJoy responds by asserting that Bivens does not apply. We agree.

In *Bivens*, the Supreme Court recognized that plaintiffs have a private cause of action against government officials who, when acting under color of federal law, violate such plaintiffs' constitutional rights. 403 U.S. at 397. This cause of action can be used strictly against government officers acting in the individual capacities. *Affiliated Pro. Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) (noting that *Bivens* "provides a cause of action only against government officers in their individual capacities."). Here,

Hamilton contends that her claim "centers on the assertion that the alleged tampering with evidence was a deliberate act by federal officials, acting in their *official capacities* to manipulate the course of legal proceedings." Record evidence does not reveal that DeJoy or any other USPS employee is being sued in their individual capacities. Because *Bivens* does not give Hamilton a cause of action against DeJoy, when acting in his official capacity, we conclude that the district court properly dismissed Hamilton's Bivens claim for lack of subject matter jurisdiction.

Hamilton also contends that the district court failed to recognize her claim of tampering with evidence under the Federal Tort Claims Act ("FTCA"). DeJoy contends that Hamilton abandoned her FTCA claim by failing to plead any such claim. We agree.

"This circuit's well-settled precedent instructs that a party abandons a claim by failing to defend it in response to motions to dismiss and other dispositive pleadings." *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996, 1010 (5th Cir. 2023). A review of the record demonstrates that in her Amended Complaint, Hamilton failed to raise her claim of tampering with evidence under the FTCA. She also failed to substantively refute DeJoy's contention that the FTCA does not provide her with a cause of action in any of her briefing before the district court or this panel. Hamilton thus abandoned her FTCA claim, so we have no jurisdiction over such a claim.

We now turn to the merits of Hamilton's Title VII retaliation and wrongful termination claims, which the district court dismissed under Federal Rule of Civil Procedure 12(b)(6). We review 12(b)(6) dismissals de novo "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018). To state a claim for retaliation, Hamilton has to show that (1) she engaged in conduct protected by Title VII; (2) she suffered

an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Cabral v. Brennan*, 853 F.3d 763, 766-67 (5th Cir. 2017); *Wright v. Union Pac. R.R. Co.*, 990 F.3d 428, 433 (5th Cir. 2021).

We conclude that at this stage of litigation, Hamilton has met her burden establishing the first two elements of her retaliation claim. She first alleges that she reported episodes of stalking and harassment to her management and external agencies. Making such reports is protected conduct under Title VII. *See Badgerow v. REJ Props.*, Inc., 974 F.3d 610, 619 (5th Cir. 2020) ("We have interpreted Title VII's opposition clause to mean that a plaintiff engages in protected activity when she complains of an employment practice that she 'reasonably believes' violated Title VII." (internal quotation marks omitted)). Considering that we must view the facts in a light most favorable to Hamilton, we infer that she engaged in conduct protected under Title VII. *Littell*, 894 F.3d at 622. We next find that Hamilton has alleged facts, which demonstrate that she suffered an adverse employment action when she was fired from her position. *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 502-03 (5th Cir. 2023) (en banc) ("[T]o plead an adverse employment action, a plaintiff need only allege facts plausibly showing discrimination in...firing....").

We ask next whether Hamilton has successfully demonstrated a causal link between her alleged protected Title VII conduct and her discharge from USPS. She can do so either by demonstrating causation through the "cat's paw" theory or meeting the temporal proximity requirement. To demonstrate the former, she must show that "a person who has retaliatory animus uses a decisionmaker to bring about an intended retaliatory action." *Saketkoo v. Adm'rs of Tulane Ed. Fund*, 31 F.4th 990, 1001 (5th Cir. 2022); *see also Wright*, 990 F.3d at 434 (explaining that, at the pleadings stage, plaintiffs are "required to allege facts permitting at least an inference of [their] employer's

knowledge of their protected conduct in order to establish the required causal link between her conduct and the alleged retaliation"). To meet the latter requirement, Hamilton had to "show close enough timing between her protected activity and the adverse employment action." *Saketkoo*, 31 F.4th at 1001. She has done neither.

Hamilton cannot show cat's paw causation because she does not dispute in any of her briefings before us or the district court that the individual who decided to fire her was unaware of her alleged protected activity before making that decision. She also fails to meet the temporal proximity requirement to show causation. Hamilton alleges that she made her internal complaints to USPS management in March and May 2021, and that she filed her NLRB charge in October 2021. Hamilton's discharge occurred on October 31, 2022. The gap between her last protected act and the adverse employment action far exceeds the length of time that we have consistently held to be "temporally proximate." *See e.g., Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 306 (concluding that a nine-month lapse between the plaintiff's protected activity and adverse employment action was insufficient to show causation); *Ajao v. Bed Bath and Beyond, Inc.*, 265 F. App'x 258, 265 (5th Cir. 2008) (concluding that "temporal proximity of four months is not close enough" to demonstrate "a causal connection between the employment action and the protected conduct); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001); ("The cases that accept mere temporal proximity...as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close."). We conclude that Hamilton has failed to establish any causal link between her protected activity and her

discharge, so the district court correctly dismissed her Title VII retaliation claim.[2]

Hamilton next contends that the district court failed to recognize her wrongful termination claim as a separate cause of action under Title VII. We disagree. In its Order, the district court held that Hamilton did not properly plead a separate claim because, even though she styled her first cause of action as "Retaliation and Wrongful Termination," these are two different claims that must be "analyzed separately" from one another. The district court held that Hamilton "failed to properly plead a separate claim for wrongful termination" and only pleaded facts that address a retaliation claim. However, the district court "[a]dditionally" observed that, even if it construed her complaint as pleading such a separate claim, such claim would fail because Hamilton alleged no facts indicating she satisfied the administrative exhaustion requirement for a wrongful termination claim under Title VII. Nor on appeal does Hamilton present anything on this jurisdictional requirement. Without engaging in the arguendo assumptions made by the district court on this matter, and construing the facts alleged in her complaint as most favorably to Hamilton, as we must, we too hold that Hamilton failed to plead a separate cause of action for wrongful termination under Title VII and **AFFIRM** the district court's determination on this matter.

We next address Hamilton's claim of duty of fair representation. She alleges that union president Larry Roberts breached such a duty. However, her lawsuit is against her employer—the Postmaster General—not against

---

[2] Because we have previously held that complaints filed with external agencies after the employment action takes place do not support retaliation claims, Hamilton's alleged EEOC complaint does not save her claim either, since it was filed after she was discharged. *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 n.4 (5th Cir. 2007) ("Because [plaintiff] did not file her EEOC complaint until after the alleged retaliatory employment action occurred, it cannot form the basis of a retaliation claim").

Roberts. Absent any allegations against her employer about this claim, it fails. *See Smith v. Int'l Org. of Masters, Mates & Pilots*, 296 F.3d 380, 382 (5th Cir. 2002) ("When a union representing the employee in the grievance/arbitration procedures acts in... a discriminatory, dishonest... fashion, that union breaches its duty of fair representation); *see also Wes v. S. Airways, Inc.*, 616 F.2d 107, 110 (5th Cir. 1980) ("The duty of fair representation is incumbent upon the labor organization only."). We conclude that the district court properly dismissed Hamilton's claim for breach of the duty of fair representation.

We now turn to Hamilton's contention that the district court abused its discretion when it dismissed her Amended Complaint. She claims that the district court violated "procedural rules" when it granted DeJoy's motion to dismiss seven months after it was filed. However, Hamilton fails to cite any rule to support this contention or explain how she was prejudiced by the delay. DeJoy correctly states that district courts have the "broad discretion and inherent authority to manage [their] dockets." *In re Deepwater Horizon*, 988 F.3d 192, 197 (5th Cir. 2001) (per curiam). We conclude that the district court did not abuse its wide discretion in ruling on that motion seven months after it was filed.

Finally, we address Hamilton's claims of judicial bias and bribery. Since Hamilton never moved for recusal of the district judge when proceedings were before him, her attempt to do so now is of no moment. *Noack v. YMCA of Greater Houston Area*, 418 F. App'x 347, 353 (5th Cir. 2011) ("Because [Plaintiff] never moved for recusal [of the magistrate judge] below, his attempt to raise the issue on appeal now is untimely."). "At most such claims are reviewed for plain error." *Id.* Hamilton contends that the district court's decision to dismiss her claims "was fundamentally compromised by significant evidence of judicial bias and bribery, which was improperly overlooked." She further claims that she has "presented substantial evidence"

showing that the Appellees bribed the district court to influence its decision. However, she does not point to any document in the record to substantiate her claim. Neither does she identify any personal bias held by the district judge. Even though Hamilton may not be pleased with the district court's decision, her dismay alone is insufficient to raise an inquiry about the impartiality of the district judge. We find no error on the judge's part in dismissing this claim.

II.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CHELSEA A HAMILTON.	§	NO. 1:23-cv-01045
	§	
Plaintiff.	§	
vs.	§	
	§	
LOUISDE JOY, POSTMASTER	§	
GENERAL, U.S. POSTAL SERVICE.	§	
	§	
	§	
Defendant.	§	
	§	

Filed July 16, 2024

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is a Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Defendant Louis Dejoy, Postmaster General, U.S. Postal Service ("Defendant" or "USPS") on November 21, 2023. (Dkt. #19.) Defendant seeks dismissal of all claims in Plaintiff's Second Amended Complaint, filed by Plaintiff Chelsea A. Hamilton on October 16, 2023. (Dkt. # 12.) Plaintiff filed a Response to the Motion to Dismiss on November 27, 2023. (Dkt. #20.) Defendant filed a Reply on December 4, 2023. (Dkt. #23.)

After carefully considering the filings, relevant case law, and for the reasons below, the Court **GRANTS** Defendant's motion.

BACKGROUND

I. Factual Background

Chelsea A. Hamilton ("Plaintiff") brings this suit against Louis DeJoy ("Defendant"), the Postmaster General of the United States Postal Service ("USPS"). On April 13, 2021, Plaintiff was involved in a physical altercation with a coworker, allegedly because of actions orchestrated by management and the union stewards at her USPS location. (Dkt. #12 at ¶ 5.) Plaintiff claims that this physical altercation was in retaliation for her prior complaints and reports of harassment and stalking by another USPS employee, Mikeal Scurry. (Id.) Plaintiff reported these instances to her supervisor, a union steward, and filed a formal Equal Employment Opportunity (EEO) complaint. (Id. at ¶ 6.) But Plaintiff claims that agents from the Equal Employment Opportunity Commission (EEOC) "refused to send notice of right to sue" despite her requests. (Id.)

Plaintiff also claims that her efforts to inform her plant manager, Ron Ralph, about "wrongdoing" by management and the union stewards were met with "further retaliation," and that on May 11, 2021, she received a Notice of Removal, but was not terminated at that time. (Dkt. #12 at ¶ 7-8.)

In May 2021 and October 2021, Plaintiff filed charges with the National Labor Relations Board (NLRB) alleging that management and the union bribed NLRB agents, which led to her "wrongful termination on October 31, 2022." (Dkt. #12 at ¶ 19.) Plaintiff further claims that the NLRB agents were

dishonest about their decisions claiming that her evidence was insufficient. (Id. at ¶ 10.) Plaintiff also claims that USPS management altered video evidence of the physical as the timestamp in the alleged altered video differs from the correct time as mentioned in her notice of removal. (Id. at ¶ 11-12.) Finally, Plaintiff alleges that her health and life insurances were terminated on July 20, 2022, in retaliation, even when she had been making payments for both policies. (Id. at ¶ 15.)

Plaintiff makes a claim for retaliation and wrongful termination, alleging that she was "wrongfully terminated in retaliation for reporting harassment, stalking, and other misconduct to her supervisors, union stewards, and the NLRB." (Dkt. #12 at ¶ 17.) Plaintiff also claims a breach of duty of representation by her union president, Larry Roberts. (Id. at ¶ 19.) Lastly, Plaintiff raises a claim for tampering with evidence, asserting that management altered video evidence "related to the physical altercation" she was involved in, thereby concealing facts relevant to her case. (Id. at 21.) Plaintiff demands a total of $10,000,000 in damages for all three claims. (Id. at ¶ 23.)

LEGAL STANDARD

Federal Rule 12(b)(6) allows for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To withstand a 12(b)(6) Motion to Dismiss, a complaint must: (1)

contain enough facts to state a claim "that is plausible on its face," and (2) evidence the grounds for the plaintiff's "entitlement to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint's facial plausibility "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In analyzing a 12(b)(6) Motion to Dismiss, a court accepts "all well pleaded facts as true" and views them "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013). But mere conclusory statements couched as factual allegations are not entitled to the assumption of truth and the failure to nudge a claim from the realm of conceivable to plausible merits dismissal. See Iqbal, 556 U.S. at 680; Twombly, 550 U.S. at 680.

"Federal courts are courts of limited jurisdiction." Gunn v. Minton, 568 U.S. 251, 256 (2013). A federal court properly dismisses a case, or a cause of action, for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998), "[T]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction."

Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001), cert. denied, 536 U.S. 960 (2002). The court may resolve disputes about its subject matter

jurisdiction based on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed fact." Id.

When a Rule 12(b)(1) motion is filed alongside other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on merits. Hitt v. City of Pasadena, 561 F.2d 06, 608 (5th Cir. 1977). In examining a Rule 12(b)(1) motion, the court will consider factual disputes and grant only if the plaintiff cannot prove any set of facts in support of his claim. Home Builders Ass'n of Miss., 143 F.3d at 1010. A complaint must be stated with enough clarity to enable a court or opposing party to determine whether a claim is sufficiently alleged. See Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). The complaint will "be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." Oppenheimer v. Prudential Sec. Inc., 94 F.3d 189, 194 (5th Cir. 1996).

DISCUSSION

II. Motion to Strike

Rule 12 (f) provides a party may move to strike any "insufficient defense, or any redundant, immaterial, impertinent or scandalous matter" from pleadings. Fed. R. Civ. Pro. 12 (f). Striking a pleading is a drastic measure and disfavored. Augustus v. Bd. of Pub. Instruction of Escambia Ctv., Fla., 306 F.2d

862, 868 (5th Cir. 1962).

Plaintiff asks this Court to strike Defendant's reply as Plaintiff alleges that it was untimely filed. (Dkt. #24.) Defendant argues, however, that his reply was filed timely in accordance with the Civil Rules, Local Rules for the Western District of Texas. (Dkt. #25.) See W.D. Tex. Loc. R. CV-7(E)(2) ("[A] reply in support of a motion shall be filed not later than 7 days after the filing of the response to the motion.").

The Court agrees with Defendant and finds that his reply was filed timely on December 4, 2023, seven (7) days after the filing of Plaintiff's response on November 27, 2023. Accordingly, Plaintiff's Motion to Strike Defendant's reply (Dkt. # 24.), is denied.

III. Retaliation Title VII Claim

Defendant alleges that Plaintiff has failed to allege sufficient material facts to state a Title VII retaliation claim in her complaint. (Dkt. # 19 at 4.) "Title VII prohibits retaliation against employees who engage in protected conduct, such as filing a complaint of discrimination." Perez v. Region 20 Educ. Serv. Ctr., 307. F.3d 318, 325 (5th Cir. 2002). See also 42 U.S.C.A. § 2000e-3. To establish a prima facie case of retaliation, a plaintiff must establish that "(1) she participated in an activity protected by Title VII; (2) her employer took an adverse employment action against her, and (3) a causal connection exists between the

protected activity and the materially adverse action." Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 484 (5th Cir. 2008).

Under the McDonnell Douglas burden-shifting framework, Plaintiff must first establish a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If Plaintiff is successful, "then the defendant must articulate a legitimate, nondiscriminatory reason for its actions." Burns v. Nielsen, 456 F. Supp. 3d 807, 824 (W.D. Tex. 2020). "Finally, the burden shifts back to the plaintiff to show that [the defendant's] proffered reason is [a] pretext for discrimination." Id.

This Court notes that "the McDonnell Douglas standard does not govern at the motion-to-dismiss stage." Scott v. U.S. Bank Nat'l Ass'n, 16 F.4th 1204, 1210 (5th Cir. 2021). That is because "[t]he prima facie case under McDonnell Douglas... is an evidentiary standard, not a pleading requirement." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002). But a plaintiff is still required "to plead sufficient facts on *all of the ultimate elements*" of her claim. Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 470 (5th Cir. 2016) (emphasis added). Therefore, "a district court may find it helpful to reference McDonnell Douglas" on a motion to dismiss. Norsworthy v. Houston Indep. Sch. Dist., 70 F.4th 332, 336 (5th Cir. 2023).

Defendant argues that Plaintiff has failed to allege sufficient facts to

establish that she participated in protected activity under Title VII or that there was a causal connection between any such activity and her final employment termination. (Dkt. # 19 at 4.)

A. Engagement in Protected Activity Under Title VII

"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, proceedings, or hearing under Title VII." Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 385 (5th Cir. 2003). Defendant alleges that Plaintiff has not alleged sufficient facts to plausibly infer that she has engaged in a protected activity as her "prior complaints of misconduct to management, the EEOC, her union, and the NLRB" do not concern conduct that is prohibited by Title VII." (Dkt. # 19 at 5.) See Brands-Kousaros v. Banco Di Napoli S.P.A., 1997 WL 790748, at 5 (S.D.N.Y. Dec.23, 1997) ("the protected activity alleged must involve some sort of complaint about a type of discrimination that Title VII forbids"). Defendant argues that Plaintiff's allegations that she reported harassment and stalking are merely "generic" and "do not equate to activity protected by Title VII." (Dkt. # 19 at 6.)

Plaintiff claims, however, that her allegations in the complaint related to her efforts to report harassment and stalking constitute a protected activity under Title VII. (Dkt. #20 at ¶ 8.) Plaintiff also argues that her complaint explicitly

mentions that her EEO complaint was "regarding allegations of stalking and harassment," which could fall within the scope of Title VII. (Id. at ¶ 10.)

Defendant disagrees with Plaintiff and argues that Plaintiff's complaint does not explain whether her alleged protected activities involved conduct forbidden by Title VII such as race, color, religion, sex, or national origin. (Dkt. #23 at 2.) Defendant argues that even when Plaintiff alleges that stalking and harassment could be deemed discriminatory, her Complaint does not properly allege that her complaints concerned discriminatory conduct under the scope of Title VII rather than "generic allegations of workplace misconduct." (Id.)

Here, the complaint is construed "in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." Oppenheimer v. Prudential Sec. Inc., 94 F.3d 189, 194 (5th Cir. 1996). The Court agrees with Plaintiff. When looking at the complaint on its face, it could be plausibly inferred that Plaintiff's complaints of harassment and stalking relate to conduct protected under Title VII, even when not explicitly stated. As a result, the Court finds that Plaintiff was involved in a protected activity under Title VII.

B. Adverse Employment Action

The Supreme Court has adopted a broader standard for adverse employment actions in retaliation claims than in discrimination under Title VII
Burlington N. & Santa Fe Rv. Co. v. White, 548 U.S. 53, 67 (2006). On a

retaliation claim, an adverse employment action is one that "a reasonable employee would have found ... [to be] materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Id, at 57).

Defendant admits in his motion to dismiss that Plaintiff's termination is an adverse employment action. (Dkt. # 19 at 8.) However, Defendant contends that Plaintiff's termination is the only alleged adverse employment action and that Plaintiff's allegation of "further retaliation" is "vague and conclusory." (Id. at 9.)

The Court need not further delve into this issue as one of the elements of a retaliation claim under Title VII requires a plaintiff to establish that "her employer took an adverse employment action against her." Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 484 (5th Cir. 2008). Here, it is clear on the face of the complaint that Plaintiff has properly alleged that her employer took an adverse employment action against her through her termination, which is sufficient at the pleading stage. (Dkt. # 12 at 5.) See Hamilton v. Dallas Cnty., 79 F.4th 494, 502-03 (5th Cir. 2023) ("to plead an adverse employment action, a plaintiff need only allege facts plausibly showing discrimination in hiring, firing, compensation, or in the terms, conditions, or privileges of his or her employment").

C. No Causal Link Between Protected Activity Engagement and the Adverse Employment Action

Defendant alleges that Plaintiff has failed to allege facts that infer a causal connection between a prior protected activity and an adverse employment action. (Dkt. # 19 at 9.) Defendant argues that Plaintiff's allegation that her eventual termination was due to her prior EEO activity and complaints is merely conclusory. (Id. at 10.) And Defendant argues that Plaintiff's notice of removal was based on Plaintiff's unacceptable conduct, not on her involvement in an alleged protected activity. (Id.) Defendant also argues that Plaintiff does not make a plausible inference in her complaint that Katie Addison, the issuer of the notice of removal, had any knowledge of Plaintiff's involvement in a protected activity prior to issuing the notice. (Id.) Further, Defendant mentions that Plaintiff's eventual termination is too remote from the dates when Plaintiff engaged in a protected activity, as alleged in the complaint, to infer a causal link. (Id. at 11.)

Plaintiff argues that even when temporal proximity is relevant to a causal link, the lapse of time between the protected activity and the adverse action should not be the sole determinant in her case. (Dkt. #20 at ¶ 32.) Additionally, Plaintiff argues that the focus "should shift from strict adherence to specific dates to an examination of the overall pattern of behavior." (Id. at¶38.)

Defendant disagrees with Plaintiff and mentions in his reply that Plaintiff still fails to identify in her response the dates when she filed her EEOC

complaint and NLRB charges to show that they preceded the notice of removal. (Dkt. #23 at 5.) Defendant also argues that Plaintiff fails to plausibly allege an inference of causal connection between her final termination date in October 2022 and her alleged protected activity and that it is too remote for causality purposes. (Id.)

The Court agrees with Defendant that Plaintiff has failed to properly plead a causal link between the protected activity engagement and the adverse employment action. A causal link can be established "when the evidence demonstrates that the employer's adverse employment decision was based in part on knowledge of the employee's protected activity." Smith v. Potter, No. 3:07-CV-1509-P, 2008 WL 11347431, at *3 (N.D. Tex. Aug. 21, 2008). Here, Plaintiff has failed to plead in her complaint that the person who issued her notice of removal had knowledge of her protected activity prior to issuing the notice. See Manning v. Chevron Chem. Co. 332 F.3d 874, 883 (5th Cir.2003) ("to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity"); see also Chaney v. New Orleans Pub. Facility Mgmt., Ine., 179 F.3d 164, 168 (5th Cir. 1999) ("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct"); Quamar v. Houston Hous. Auth., No. 4:23-CV-

00814, 2024 WL 2055008, at *6 (S.D. Tex. May 8, 2024) (holding that there is no causal connection "when the adverse employment action complained of precedes the protected activity").

The Court notes that even if Addison had had knowledge of Plaintiff's alleged involvement in a protected activity prior to issuing the notice of removal, that alone would be insufficient evidence to infer a causal link since the notice of removal was issued because of Plaintiff's unacceptable conduct. See Garvin v. Sw. Corr., L.L.C., 391 F. Supp. 3d 640, 653 (N.D. Tex. 2019) (citing Blasingame v. Eli Lilly & Co., 2013 WL 5707324, at *15 (S.D. Tex. Oct. 18, 2013) ("Evidence for a causal connection includes: temporal proximity between a protected act and adverse employment action; an employment record that does not support the adverse action; and an employer's departure from typical policies and procedures"); see also Univ. of Texas Southwestern Med. Ctr. V. Nassar, 570 U.S. 338, 352 (2013) ("Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action").

In retaliation claims under Title VII, "[t]he causal link required by the third prong of the prima facie case does not rise to the level of a 'but for' standard." Gee v. Principi, 289 F.3d 342, 345 (5thr Cir. 2002). "Instead, at the prima facie case stage, a plaintiff can meet his burden of causation by showing close enough timing between his protected activity and his adverse employment

action." Brown v. Wal-Mart Stores E., L.P., 969 F.3d 571, 577 (5th Cir. 2020) (cleaned up) (citation omitted).

In this case, Plaintiff's final termination, her alleged adverse employment action, was on October 31, 2022, about twelve months after her latest NLRB filing on October 2021. (Dkt. # 12 ¶ 9.) This Court finds that Plaintiff's alleged adverse employment action (her final termination date) is too remote from the date when she engaged in an alleged protected activity (filing of the NLRB complaint) to find a causal link between the two. See Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (citation omitted) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close"); see also Garvin v. Sw. Corr., L.L.C., 391 F. Supp. 3d 640, 653 (N.D. Tex. 2019) (mentioning that "temporal proximity alone may suffice when the acts are separated by weeks, but a gap of five months is not sufficient without other evidence of retaliation). Accordingly, this Court agrees with Defendant that Plaintiff's alleged involvement in a protected activity and the adverse employment action of her final termination is too remote to infer a causal link.

IV. Wrongful Termination Claim

Defendant argues that, even if this Court finds that Plaintiff pleads a separate claim for wrongful termination in her Complaint, this Court should dismiss such claim. (Dkt. #19 at 12.) Defendant mentions that Plaintiff has only pleaded a single claim in her complaint for "Retaliation and Wrongful Termination." (Id.) Defendant alleges that those claims are not synonymous with each other under Title VII, and as such, Plaintiff has failed to state a claim for wrongful termination under Title VII. (Id.) See Willis v. Cleco Corp., 749 F.3d 314, 317-20 (5th Cir. 2014) (separately analyzing retaliation and wrongful termination claims under Title VII).

The Court agrees with Defendant that a wrongful termination claim under Title VII needs to be analyzed separately and that here Plaintiff has failed to properly plead a separate claim for wrongful termination. Additionally, Plaintiff's unlawful termination claim would not be acceptable because "[u]nder Title VII a plaintiff must exhaust administrative remedies before pursuing unlawful-employment-practice claims in federal court." Goode v. Greenstream Int'l, L.L.C., No. 1:16-CV-00552-LY, 2016 WL 11812118, at *2 (W.D. Tex. Nov. 30, 2016).

Here, Plaintiff has not alleged in her complaint that she has exhausted administrative remedies for her unlawful termination claim before filing her

complaint. Therefore, to the extent that Plaintiff has pleaded a separate claim for wrongful termination under Title VII, such claim is dismissed.

V. Breach of Duty of Fair Representation Claim

Defendant alleges in his motion to dismiss that in her complaint Plaintiff fails to state a claim against Defendant for a breach of duty of fair representation. (Dkt. # 19 at 13.) Defendant claims that Plaintiff only alleges in her complaint a wrongdoing by the union president, Larry Roberts, not by Defendant himself. (Id.) Defendant therefore claims that he cannot be liable for the union's alleged breach of fair representation, and that Plaintiff's second claim should be dismissed. (Id.)

Plaintiff alleges that because Larry Roberts, as the union president, "had apparent authority to act on behalf of the union," his actions can be attributed to the union and raise a possibility of the union's liability. (Dkt. #20 at ¶ 56.) Further, Plaintiff alleges that her claim does attribute wrongdoing to Defendant because Roberts's involvement, by allegedly conspiring with "management to influence the outcome of her case," might imply liability for Defendant as it might raise questions about the effect of Roberts's actions on Defendant's choices. (Id. at ¶ 59-60.)

Defendant disagrees with Plaintiff and argues that Plaintiff makes clear that her breach-of-duty claim concerns actions by Roberts, the union

president, not Defendant directly. (Dkt. #23 at 7.) And Defendant alleges that Plaintiff has not identified in her complaint any duty that Defendant owed to Plaintiff, only a duty owed by her union, not a party to this suit. (Id.) Defendant also alleges that Plaintiff has failed to provide a legal basis to impute Roberts's or the union's duties or actions to Defendant. (Id.) Therefore, Defendant asks this Court to dismiss Plaintiff's breach of duty of fair representation claim for failing to state a claim for relief. (Id.)

Under the statutory duty of fair representation doctrine, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). However, "[t]he duty of fair representation is incumbent upon the labor organization only." Wells v. S. Airways, Inc., 616 F.2d 107, 110 (5th Cir. 1980). "Along the same lines, fair-representation claims must be pleaded against the labor organization, and not an individual representative." Pegues v. Int'l Ass'n of Machinists & Aerospace Workers, No. A-19-CV-0705-LY, 2020 WL 7973915, at *3 (W.D. Tex. Feb. 27, 2020). This Court agrees with Defendant that Plaintiff has failed to state a claim for relief against Defendant. Here, Plaintiff has only alleged a possible breach of duty of fair representation by her union, not Defendant

himself. Defendant is therefore not a proper party to this action, and the Court dismisses Plaintiff's breach of duty of fair representation claim against Defendant.

This Court acknowledges that Plaintiff's claim about the breach of duty of fair representation by the union's president would be relevant had Plaintiff pled a breach of a collective bargaining agreement claim under Section 301 of the Labor Management Relations Act of 1947. The Supreme Court of the United States has recognized hybrid cases in which the Plaintiff employee can sue either the union or the employer (or both), as explained in DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 165 (1983): Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.

That is not the case here. Although Plaintiff has alleged a breach of duty of fair representation against the union's president, it has failed to properly assert a claim against Defendant even after her second amended complaint. Therefore, the dismissal of this claim is proper.

VI. Tampering with Evidence Claim

Defendant asks this Court to dismiss Plaintiff's tampering with evidence claim for lack of jurisdiction. (Dkt. #19 at 14.) Defendant alleges that Plaintiff fails to identify a legal basis for this cause of action as she appears to assert either a tort claim under the Federal Tort Claims Act ("FTCA"), or a constitutional damages claim under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). (Id.) Defendant also argues that Plaintiff has not alleged in her complaint that Defendant has waived its sovereign immunity to vest this Court with jurisdiction over this claim. (Id.)

Defendant alleges that Plaintiff's claim would fail as a tort claim under the FTCA because Defendant is immune from suit and Defendant has not waived his immunity. (Dkt. # 19 at 14.) See United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"). Further, "A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. Mitchell, 445 U.S. 535, 538 (1980) (citing United States v. King, 395 U.S. 1,4 (1969)). Defendant also claims that this immunity extends to federal officials acting in their official capacities, as is the case here. (Dkt. #19 at 14.) "[C]laims against officers of the United States in their official capacities are actually claims against the sovereign... Where

applicable, therefore, sovereign immunity precludes claims against the officers as well." Danos v. Jones, 652 F.3d 577, 581 (5th Cir. 2011). Finally, Defendant claims that Plaintiff's claim lacks subject matter jurisdiction because it does not fall under the limited waiver of immunity provided by the FTCA under 28 U.S.C. §§ 1346(b)(1). (Dkt. # 19 at 14.)

Defendant also claims that Plaintiff's claim fails as a Bivens claim because it falls outside the recognized Bivens circumstances, the claim is brought against management in their official capacities, and it does not warrant recognizing a new Bivens cause of action (outside the three currently recognized by the Supreme Court) because Plaintiff has other alternatives to relief. (Dkt. # 19 at 15-16.); see Bivens, 403 U.S. 388.

In her response, Plaintiff only responds to the Bivens claim and fails to respond to the possible FTCA cause of action. (Dkt. #20 at 12.) Plaintiff alleges that she has properly pled a Bivens claim related to her tampering with evidence claim by alleging that "management" engaged in altering video evidence related to a physical altercation. (Id.) Plaintiff alleges that Defendant's actions violated her constitutional right to due process. (Id.) Plaintiff also alleges that although her complaint names "management" without specifying certain individuals, this language can be interpreted by this Court as a reference to "federal officials acting in their official capacities." (Id, at 12-13.) Finally, Plaintiff asks

this Court to consider applying a Bivens claim even within its narrow scope as a Bivens claim will properly redress her alleged constitutional violation. (Id. at 13-14.)

Defendant replies that because Plaintiff alleged in her response that "management" acted in their *"official capacities"* her Bivens claim is therefore barred by sovereign immunity as established by case law. (Dkt. # 23 at 7).

"Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." Carlson v. Green, 446 U.S. 14, 18 (1980). But Bivens "provides a cause of action only against government officers in their individual capacities." Affiliated Pro. Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999). The Supreme Court has limited claims under Bivens to three circumstances: "(1) manacling the plaintiff in front of his family in his home and rip-searching him in violation of the Fourth Amendment," see Bivens, 403 U.S. at 389-90; "(2) discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment," see Davis v. Passman, 442 U.S. 228 (1979); and "(3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment," see Carlson v. Green, 446 U.S. 14 (1980). Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020),

This Court agrees with Defendant that this Court lacks subject matter jurisdiction for Plaintiff's tampering with evidence claim. Plaintiff has not established a claim under the FTCA and instead relies on a Bivens claim, which also fails. Although Plaintiff alleges that she has properly pled a Bivens claim in her complaint, this Court lacks jurisdiction because even if there were a properly pled Bivens claim, Plaintiff, by her own allegations, has conceded that her claim is brought against "federal officials acting in their official capacities. (See Dkt. # 20 at ¶ 63.) Precedent has established that Bivens "provides a cause of action only against government officers in their *individual capacities*." Affiliated Pro. Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999). Further, "a Bivens claim is brought against the individual official for his or her own acts, not the acts of others." Ziglar v. Abbasi, 582 U.S. 120, 140-41 (2017). That is because "the purpose of Bivens is to deter the officer." F.D.I.C. v. Meyer, 510 U.S. 471 (1994). "Bivens is not designed to hold officers responsible for acts of their subordinates." Ziglar v. Abbasi, 582 U.S. 120, 140-41 (2017). See also Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*").

Therefore, because Plaintiff has failed to establish subject matter jurisdiction under either a tort cause of action under the FTCA or a Bivens claim,

dismissal of Plaintiff's tampering with evidence claim is proper for lack of subject matter jurisdiction.

CONCLUSION

Based on the above, the Court **GRANTS** Defendant's Motion to Dismiss without prejudice. (Dkt. #19.)

IT IS SO ORDERED.

DATED: Austin, Texas, July 16, 2024.