

**United States Court of Appeals
for the Fifth Circuit**

No. 24-10327
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
August 14, 2024

Lyle W. Cayce
Clerk

ASEM FAROOQ,

Plaintiff—Appellant,

versus

DONNA BOLT; LYNETTE BOWLES; YARO ABDUL,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:24-CV-120

Before JOLLY, JONES, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Asem Farooq, pro se, sued his former employer for employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). The district court dismissed Farooq's complaint for failing to exhaust his administrative remedies and for failing to state a claim upon

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

No. 24-10327

which relief can be granted. Farooq now appeals that judgment. We AFFIRM.

I.

On February 20, 2024, Farooq sued Donna Bolt, Lynette Bowles, and Abdul Yaro, his managers at his former place of employment, for discrimination under Title VII and USERRA. Farooq alleged discriminatory acts of termination, unequal terms and conditions, and retaliation that occurred on October 15, 2019. He further alleged that he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on November 1, 2019, and that the EEOC issued him a right to sue letter on September 17, 2021. The district court granted Farooq in forma pauperis (IFP) status.

On March 6, 2024, a magistrate judge recommended that the district court dismiss the case. Specifically, the magistrate judge found that Farooq: (1) failed to comply with the 90-day time limit to file suit after receiving a right to sue letter from the EEOC; and (2) failed to state a claim under the USERRA. The district court adopted the magistrate judge's recommendation and dismissed the case with prejudice. Farooq now appeals that judgment.

II.

We review de novo a district court's dismissal for failure to state a claim. *Newsome v. E.E.O.C.*, 301 F.3d 227, 231 (5th Cir. 2002). A complaint fails to state a claim upon which relief can be granted when, assuming that all the allegations in the complaint are true even if doubtful in fact, such allegations fail to raise a right to relief above the speculative level. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

III.

No. 24-10327

On appeal, Farooq challenges the dismissal of his USERRA claim.¹ USERRA prohibits employment discrimination against individuals based on service in a uniformed service. Farooq's complaint, however, does not allege any USERRA violation. He merely lists the statute as a basis of jurisdiction without further specificity or factual support. Accordingly, Farooq did not sufficiently allege a USERRA violation above the speculative level. *See Twombly*, 550 U.S. at 555. Consequently, the district court properly dismissed this claim.

Farooq also requests that the magistrate judge recuse himself and that his case should be transferred within the Northern District of Texas from the Fort Worth Division to the Dallas Division or, alternatively, to the District Court for the District of Columbia. Because we affirm the dismissal of Farooq's claims, we decline to address these requests.

IV.

In sum, Farooq failed to state a claim for relief under USERRA, and the judgment of the district court is, therefore, in all respects,

AFFIRMED.

¹ Farooq does not challenge or brief the dismissal of his Title VII claims. Consequently, he has waived appellate review of those claims. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 14, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 24-10327 Farooq v. Bolt
USDC No. 4:24-CV-120

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

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

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

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Melissa B. Courseault, Deputy Clerk

Enclosure(s)

Mr. Asem Farooq

**United States Court of Appeals
for the Fifth Circuit**

No. 24-10327

United States Court of Appeals
Fifth Circuit

FILED

October 1, 2024

ASEM FAROOQ,

Lyle W. Cayce
Clerk

Plaintiff—Appellant,

versus

DONNA BOLT; LYNETTE BOWLES; YARO ABDUL,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:24-CV-120

ON PETITION FOR REHEARING

Before JOLLY, JONES, and WILLETT, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 01, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

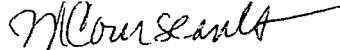
No. 24-10327 Farooq v. Bolt
USDC No. 4:24-CV-120

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Mr. Asem Farooq

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ASEM FAROOQ,

Plaintiff,

v.

No. 4:24-cv-0120-P

MANHEIM AUTO AUCTION, ET AL.,

Defendants.

ORDER

Before the Court are the Findings, Conclusions, and Recommendation ("FCR") of the United States Magistrate Judge in this case. ECF No. 18. The Magistrate Judge recommended that Plaintiff's claims be dismissed as untimely. ECF No. 18 at 3. Plaintiff, appearing *pro se*, filed several documents that this Court will liberally construe as Objections to the FCR. ECF Nos. 19–26. Accordingly, the Court reviewed the FCR *de novo* as required by 28 U.S.C. § 636(b)(1). And the Court concludes that the findings and conclusions of the Magistrate Judge are correct.

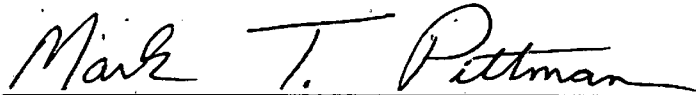
Plaintiff's Objections include a copy of his Complaint and a form Motion for Continuance. ECF Nos. 19, 21–24. Because Plaintiff fails to state *what* he is seeking to continue, his request for a continuance is **DENIED**. Plaintiff goes on to request a hearing because he claims that evidence relevant to his case has been "suppressed for years." ECF No. 24 at 1. That request is also **DENIED**.

As for Plaintiff's substantive objections, he fails to address any legal basis on which the Court could reverse the FCR. The FCR recommended dismissal because Plaintiff failed to file suit within ninety days of his receipt of a right-to-sue letter as required by Title VII. ECF No. 18 at 2. And "[t]he ninety-day limitations period is strictly construed." *Crabtree v. Cyberonics*, 2006 WL 1581971, at *2 (S.D. Tex. June 7, 2006) (Werlein Jr., J.). Because any supposed legal arguments raised in Plaintiff's

Objection do not refute his failure to sue within the requisite limitations period, Plaintiff's Objections (ECF Nos. 19–26) are **OVERRULED**.

Accordingly, the Court **AFFIRMS** the conclusion in the Magistrate Judge's FCR, **ADOPTS** its reasoning, and **ORDERS** that this case be **DISMISSED with prejudice**.

SO ORDERED on this 13th day of March 2024.

A handwritten signature in black ink, reading "Mark T. Pittman". The signature is written in a cursive, flowing style. The first name "Mark" is written in a larger, more prominent script, followed by "T." and then "Pittman". The signature is positioned above a horizontal line.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ASEM FAROOQ,

Plaintiff,

v.

No. 4:24-cv-0120-P

MANHEIM AUTO AUCTION, ET AL.,

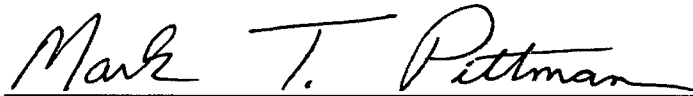
Defendants.

FINAL JUDGMENT

This Judgment is issued as required by Federal Rule of Civil Procedure 58. In accordance with the Court's Order affirming the Findings, Conclusions, and Recommendation of the United States Magistrate Judge in this case, dated the same day, this case is **DISMISSED with prejudice.**

The Clerk shall transmit a true copy of this Judgment to the Parties.

SO ORDERED on this 13th day of March 2024.

A handwritten signature in black ink, reading "Mark T. Pittman", written over a horizontal line.

Mark T. Pittman

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

ASEM FAROOQ,
Plaintiff,

v.

DONNA BOLT, ET AL.,
Defendants.

§
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§
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§

CIVIL ACTION NO. 4:24-CV-120-P

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION REGARDING DISMISSAL
OF PLAINTIFF'S CLAIMS AND RETURNING CASE TO DISTRICT JUDGE**

On February 6, 2024, *pro se* Plaintiff Asem Farooq ("Farooq") filed, *inter alia*, a Complaint against Manheim Auto Auction and Remarketing Inc. [doc. 1]. In an order dated February 20, 2024, Farooq was granted permission to proceed In Forma Pauperis ("IFP"). Thereafter, on February 21, 2024, Farooq filed an Amended Complaint [doc. 8] in which he dropped the original Defendants and named Donna Bolt, Lynette Bowles, and Abdul Yaro as Defendants. In the Amended Complaint, Farooq alleged claims for employment discrimination while employed at Manheim Auto Auction based on gender and age in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). (Plaintiff's Amended Complaint ("Pl.'s Am. Compl.") at 2-4.) Farooq stated that the alleged discriminatory acts of termination, unequal terms and conditions, and retaliation occurred on October 15, 2019, and are not still occurring. (*Id.*) Farooq further indicated that he filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on November 1, 2019, and that he received a Notice of Right to Sue letter on September 17, 2021. (*Id.* at 5.)

Section 1915 of Title 28 of the United States Code sets forth provisions for claimants proceeding IFP. Pursuant to 28 U.S.C. § 1915(e)(2), the Court shall, *sua sponte*, dismiss a case

proceeding IFP if the court determines that, *inter alia*, it is frivolous or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B). A complaint is frivolous if it “lacks an arguable basis either in law or fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A complaint fails to state a claim upon which relief can be granted when, assuming that all the allegations in the complaint are true even if doubtful in fact, such allegations fail to raise a right to relief about the speculative level. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citations omitted). A complaint must “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (quoting *Bell Atl. Corp.*, 550 U.S. at 550).

As to Plaintiff’s claims pursuant to Title VII, “before a plaintiff may file a civil action under Title VII . . . , he must exhaust administrative remedies, which include filing a charge of discrimination within 300 days after the alleged violations occurred and filing suit within 90 days after receiving a right-to-sue letter from the EEOC.” *Wilson v. Texas Higher Educ. Coordinating Bd.*, No. SA05CA1137-XR, 2006 WL 505549, at *2 (W.D. Tex. Jan. 30, 2006) (internal quotations and citations omitted); *see* 42 U.S.C. §2000e-5(f)(1). The ninety-day period begins to run “on the date that the EEOC right-to-sue letter is delivered . . . to the claimant.” *Ringgold v. Nat’l Maint. Corp.*, 796 F.2d 769, 770 (5th Cir. 1986); *see Crabtree v. Cyberonics, Inc.*, No. H-05-4221, 2006 WL 1581971, at *2 (S.D. Tex. June 7, 2006) (“The 90-day period begins to run with the notice is received.”) “The ninety-day limitations period is strictly construed[,]” and “[c]ourts within this Circuit have repeatedly dismissed cases in which the plaintiff did not file a complaint until after the ninety-day limitation period had expired.” *Crabtree*, 2006 WL 1581971, at *2 (internal quotations and citations omitted). The “failure to exhaust administrative remedies in the context of the ADA is not a jurisdictional bar but rather a prudential prerequisite to suit.” *Spann v. Frisco*

Indep. Sch. Dist., No. 4:19-CV-00603-SDJ-CAN, 2020 WL 2167624, at *2 n.4 (E.D. Tex. Apr. 14, 2020).

As set forth above in Plaintiff's Amended Complaint [doc. 8], which is the live pleading in this case, Plaintiff received his Notice of Right to Sue Letter on September 17, 2021.¹ (Pl.'s Am. Compl. at 5, 7.) Plaintiff filed his original Complaint, in this case, on February 6, 2024, which is several years beyond the ninety-day limitations periods. Consequently, as to Plaintiff's claims under Title VII, the Court **FINDS and CONCLUDES** that Plaintiff's suit is untimely, and Plaintiff has alleged no facts which would warrant equitable tolling. Thus, the Court **RECOMMENDS** that Plaintiff's claims under Title VII be **DISMISSED** for Plaintiff's failure to exhaust administrative remedies.

As to Plaintiff's claims under the USERRA, this act "prohibits discrimination against individuals because of their service in the uniformed service." *King v. Life Sch.*, 809 F. Supp. 572, 580 (N.D. Tex. Aug. 9, 2011). "It specifically prohibits any state, federal, or private employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services." *Id.* "It also prohibits an employer from retaliating against a person by taking adverse employment action against that person because he or she has taken an action to enforce a protection afforded under USERRA." *Id.*

In this case, Farooq has failed to make any allegations, in either his original Complaint or Amended Complaint, that he was discriminated against on the basis of his membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. In addition, Farooq has failed to make any allegations that he was retaliated

¹ Plaintiff attached a copy of his Notice of Right to Sue letter to his Amended Application to Proceed in District Court Without Prepaying Fees or Costs [doc. 6].

against because he took an action to enforce a protection afforded under USERRA. Other than mentioning the USERRA in his Amended Complaint and a passing reference to receipt of “VA disability” in his original Application to Proceed in District Court Without Prepaying Fees or Costs [doc. 2], Farooq has provided no facts or allegations that support a claim under the USERRA. Thus, the Court **FINDS, CONCLUDES, and RECOMMENDS** that Farooq’s claims under the USERRA be **DISMISSED** for failure to state a claim upon which relief may be granted.²

Courts ordinarily err in dismissing *pro se* complaints for failure to state a claim without first extending an opportunity to amend the pleadings. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998). However, in this case, Plaintiff has already filed an Amended Complaint that does not evidence a viable legal claim or cause of action and appears to be Plaintiff’s best case. Nevertheless, Plaintiff has fourteen days to respond to the undersigned’s recommendation, which provides Plaintiff both notice of the Court’s intention and an opportunity to cure the deficiencies noted. *See Alexander v. Trump*, 753 F. App’x 201, 208 (5th Cir. 2018) (finding that the objection period following a magistrate judge’s recommendation for *sua sponte* dismissal of claims provided Plaintiff with adequate notice and opportunity).

² The Court notes that, on December 10, 2021, Farooq filed a suit against Defendants Manheim Remarketing, Inc. and Cox Automotive Corporate Service LLC d/b/a Manheim Dallas-Fort Worth in the 96th Judicial District Court, Tarrant County, Texas. Farooq asserted claims for race and sex discrimination under the Texas Commission on Human Rights and retaliation in violation of the USERRA. The case was removed by Defendants to this Court on January 12, 2022, and assigned cause number 4:22-cv-26-O. The Court dismissed this case with prejudice on March 16, 2023, after finding in favor of Defendants on their motion for summary judgment. It appears that Farooq is now attempting to bring the same claims which were already decided in the previous action against new defendants, who are in privity with the Defendants in the initial action filed in 2021. Thus, Plaintiff’s claims also appear to be barred under the doctrine of res judicata. *See Irregular IP, LLC v. Patagonia, Inc.*, No. 1:23-CV-00333-ADA, 2023 WL 8792160, at *2 (“Res judicata has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.”) (internal citations and quotations omitted). *See also Wang v. Prudential Ins. Co. of Am.*, No. 3:09-cv-1309-O-BF, 2010 WL 1640182, at *2 (N.D. Tex. Apr., 2, 2010), *rep. and recommendation adopted*, 2010 WL 2000521 (N.D. Tex. May 18, 2010), *aff’d*, 439 F. App’x 359 (5th Cir. 2011); *Luna v. Rambo*, 841 F. Supp. 2d 193, 196 (D.C. 2012) (finding that a lawsuit against a supervisor employed by SCS Contracting Group, LP (“SCS”) was barred by doctrine of res judicata based on a prior suit against SCS and two of the principles of SCS that contracted with Plaintiff to perform work on Plaintiff’s house as Plaintiff could have sued such supervisor in the initial lawsuit).

**NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

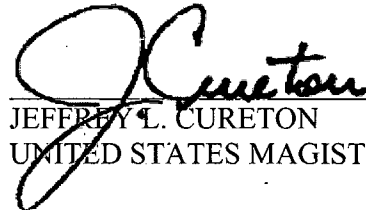
Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions and recommendation within fourteen (14) days after the party has been served with a copy of this document. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(b)(1). Failure to file, by the date stated above, a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual findings and legal conclusions accepted by the United States District Judge. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending time to file objections from ten to fourteen days).

ORDER

Under 28 U.S.C. § 636, it is hereby **ORDERED** that each party is granted until **March 20, 2024**, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation. It is further **ORDERED** that if objections are filed and the opposing party chooses to file a response, the response shall be filed within seven (7) days of the filing date of the objections.

It is further **ORDERED** that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED March 6, 2024.



JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**