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OPINIONS AND ORDERS

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OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 14, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, EMPLOYEE RELATIONS LABOR, LAUGHLIN AIR FORCE BASE,

Defendants-Appellees.

No. 23-50844
Summary Calendar

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-646

Before: CLEMENT, DUNCAN, and DOUGLAS, Circuit Judges.

PER CURIAM:*

This is a Title VII case. Because the plaintiff, Arturo S. Lopez, Sr., failed to exhaust his administrative remedies, we AFFIRM.

I.

Lopez is a former employee at the Laughlin Air Force Base in Del Rio, Texas. Proceeding *pro se*, Lopez filed suit against the Secretary of the Air Force and Mary Garcia, a human resources employee at the base, alleging that he was discriminated against in retaliation for participating in protected activities. Lopez alleges that Garcia retaliated against him by "intentionally and maliciously ma[king] and falsif[ying] entries on [his] official [] records" to deny him access to disability benefits. Lopez claims that he first "became aware" of Garcia's actions via a May 14, 2020 email that he received from the Office of Personnel Management. Lopez initiated contact with the Air Force's Equal Employment Opportunity ("EEO") counseling services on August 6, 2020.

Initially, the district court dismissed Lopez's suit because he failed to initiate EEO counseling within forty-five days of the alleged discriminatory or retaliatory act, as required by 29 C.F.R. § 1614.105(a)(1). This court reversed and remanded after determining that the district court relied on an EEO complaint and EEO counselor's report that were neither attached to nor referenced in Lopez's complaint.

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

Back at the district court, the defendants moved for summary judgment, which the district court granted at the recommendation of a magistrate judge. The district court held that Lopez failed to exhaust his administrative remedies and did not show that he was entitled to equitable tolling or that the administrative deadlines were waived. In recommending that the court grant summary judgment, the magistrate judge explained that: (1) Lopez failed to cite any materials in the record to support his conclusory assertions that he was entitled to equitable tolling because he did not read the May 14, 2020 email alerting him of the alleged discriminatory action until August 6, 2020; and (2) the Air Force's acceptance of the EEO complaint does not support the inference that the 45-day deadline was waived. The district court also rejected Lopez's request for injunctive relief. Lopez timely appeals.

II.

"We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013) (citation omitted).

III.

As we understand Lopez's arguments on appeal, he asserts that: (1) he complied with the 45-day requirement because he only became aware of the alleged discriminatory action the week before he sought EEO counseling; (2) the Air Force's acceptance of his EEO complaint waived the 45-day deadline; and (3) exhaustion should not be required because the administrative

proceedings violated his constitutional rights and certain federal regulations.[1]

To toll the forty-five-day deadline, Lopez was required to show that (1) he "was not notified of the time limits and was not otherwise aware of them," (2) he "did not know and reasonably should not have [] known that the discriminatory matter or personnel action occurred," or (3) "despite due diligence he . . . was prevented by circumstances beyond his . . . control from contacting the counselor within the time limits." 29 C.F.R. § 1614.105(a)(2).

Lopez asserts that he was recovering from surgeries until August 6, 2020, which prevented him from reviewing the May 14, 2020 email and thus the deadline should have been tolled. But, as the district court explained, "Lopez does not cite any materials in the record to support his conclusory assertions that he was entitled to equitable tolling because he did not read the May 14, 2020, email while recovering from surgeries." For instance, Lopez points to no record evidence that he did not read the May 14, 2020 email until August 6, 2020. *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1337 (5th Cir. 1980) ("Statements . . . in briefs are not evidence."). Moreover, the surgeries at issue

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[1] The government argues that Lopez has abandoned his appeal by failing to address the district court's reasons for granting the motion for summary judgment and denying his motion for injunctive relief. But we do not address this issue because, regardless of whether Lopez has properly preserved the issues on appeal, he has failed to show that the 45-day deadline should have been equitably tolled, was waived, or otherwise should not have applied.

did not occur until July 14, 2020, after the 45-day deadline had already expired.[2]

As to Lopez's argument that the Air Force waived the 45-day deadline by accepting his complaint, binding precedent establishes otherwise. The Air Force did not waive its timeliness objection merely by docketing and acting on Lopez's untimely complaint. *See Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986) ("Such a broad rule is unacceptable because agencies may inadvertently overlook timeliness problems and should not thereafter be bound."). Rather, "[i]n order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992). The Air Force made no such finding here. To the contrary, the Air Force EEO counselor informed Lopez his EEO complaint was "outside of the 45 calendar day timeline to file a complaint."

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[2] What's more, the Air Force EEO counselor informed Lopez that his complaint fell outside the 45-day window and that he would have to write a letter seeking a waiver. But Lopez failed to produce any evidence he complied with this requirement.

Lopez's final argument—that exhaustion was not required because the Air Force's administrative proceedings concerning his EEO complaint allegedly violated his constitutional rights and certain federal regulations—also lacks merit. Lopez's federal-court complaint raised no issue with the way in which his EEO complaint was adjudicated, and he has identified no caselaw or other authority establishing such an exception to the exhaustion requirement.[3]

AFFIRMED.

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[3] We also affirm the district court's denial of Lopez's request for injunctive relief. It was unclear what injunctive relief Lopez was seeking. The only remedy sought in his motion for injunctive relief wasn't an injunction at all; it was damages.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 14, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, EMPLOYEE RELATIONS LABOR, LAUGHLIN AIR FORCE BASE,

Defendants-Appellees.

No. 23-50844

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-646

Before: CLEMENT, DUNCAN, and DOUGLAS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellant pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(b). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MARCH 9, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, Employee Relations Labor, Laughlin Air Force Base,

Defendants-Appellees.

No. 22-50411
Summary Calendar

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-646

Before: CLEMENT, OLDHAM, and WILSON, Circuit Judges.

PER CURIAM:*

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

Arturo S. Lopez, Sr., brought retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq., against the Secretary of the Air Force and Mary Garcia, an Air Force Human Resources Specialist. Lopez's civil complaint alleges that Garcia retaliated against him for engaging in protected activity in violation of Title VII. The only relevant document attached to the pleading is a memorandum sent by the Air Force to Lopez informing him that he could file a federal suit because an investigation into his Equal Employment Opportunity ("EEO") complaint had not been completed within 180 days.

The defendants moved to dismiss Lopez's civil complaint under Federal Rule of Civil Procedure 12(b)(6) on administrative exhaustion grounds. The defendants attached Lopez's EEO complaint to their motion to dismiss. That document states that Garcia "discriminated against [Lopez] on May 14, 2020[,] when [Lopez] was made aware through [an] e[-]mail that [he] received [from] the . . . Merit Systems [P]rotection [B]oard" that Garcia "intentionally and maliciously made and falsified entries" on his records. The defendants also attached an EEO counselor's report to support a time-based affirmative defense that Lopez did not contact an EEO counselor until August 6, 2020, which was past the statutorily required period for reporting his claim. *See* 29 C.F.R. § 1614.105(a)(1) (45-day requirement for reporting). Neither the EEO report nor the alleged facts on which defendants based their affirmative defense were expressly referenced in Lopez's civil complaint or contained in the documents attached thereto.

Relying on the EEO complaint and EEO counselor's report, the magistrate judge recommended that the district court dismiss Lopez's civil complaint because Lopez failed timely to contact an EEO counselor before filing suit. *See id.* The district court adopted the recommendation and dismissed Lopez's claims. Lopez now appeals. Because we conclude that the district court misapplied the Rule 12(b)(6) standard, we reverse and remand.

Our review is de novo. *Pacheco v. Mineta*, 448 F.3d 783, 788 (5th Cir. 2006). And, like the district court, our consideration is "limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (emphasis added); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000) (defendants may attach documents to a motion to dismiss to "assist[] the plaintiff in establishing the basis of the suit" if the documents "are referred to in the plaintiff's complaint and are central to [his] claim").

Because it is a mandatory claims processing rule, not a jurisdictional requirement, failure to exhaust administrative remedies under Title VII is an affirmative defense. *See Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1850-51 (2019). "[D]ismissal under [R]ule 12(b)(6) may be appropriate based on a successful affirmative defense," when the defense "appear[s] on the face of the complaint." *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank*, 467 F.3d 466, 470 (5th Cir. 2006); *see also Stevens v. St. Tammany Par. Gov't*, 17 F.4th 563, 571 (5th Cir. 2021) ("[T]he [affirmative]

defense is abundantly clear on the face of the pleadings, which incorporate and repeatedly refer to the state court litigation. Therefore, it was properly considered here at the motion to dismiss stage.").

To exhaust his administrative remedies prior to bringing a Title VII action in federal court, Lopez was required to "initiate contact with [an EEO] [c]ounselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). Indeed, "[f]ailure to notify the EEO counselor in a timely fashion may bar a claim" unless the claimant successfully asserts "a defense of waiver, estoppel, or equitable tolling." *Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992). Relevant here, the 45-day time limit is extended when the claimant "shows that . . . he or she did not know and reasonably should not have [] known that the discriminatory matter or personnel action occurred." 29 C.F.R. § 1614.105(a)(2). The district court dismissed Lopez's claims because he failed timely to exhaust his administrative remedies, i.e., his "EEO counseling exceed[ed] the 45-day deadline required by statute[.]"

But in dismissing Lopez's claims, the district court relied on documents, the EEO complaint and the EEO counselor's report, that were not attached to or explicitly referenced by the civil complaint. *See Lone Star Fund V*, 594 F.3d at 387.[1] Relying on those

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[1] It is at least arguable that the EEO complaint is "referenced by the complaint" and by the Air Force memorandum attached to it, *Lone Star Fund V*, 594 F.3d at 387, and it is certainly central to Lopez's civil complaint, as Garcia's alleged discrimination is the subject of both the EEO complaint and this action. But our decision does not turn on the EEO complaint. To glean both the initial date Lopez purportedly had knowledge of the alleged

documents, the district court concluded that Lopez had access to information about the alleged retaliation on May 14, 2020, yet failed to contact an EEO counselor until August 6, 2020, well more than 45 days later. Neither Lopez's civil complaint nor the Air Force memorandum attached to it mention the August 6 EEO contact. And even assuming that Lopez's EEO complaint was appropriately considered in deciding the defendants' motion to dismiss, that document does not refer to an August 6 contact, either. The EEO complaint merely includes a checkmark indicating that Lopez "discussed [his] complaint with an [EEO] counselor." Therefore, the district court appears to have plucked August 6 as Lopez's initial EEO contact solely from the EEO counselor's report, which was not attached to or referenced in Lopez's civil complaint or the documents attached to it.

The district court thus improperly relied upon the EEO counselor's report in determining that the defendants' administrative exhaustion defense appeared "on the face of the complaint." *EPCO Carbon Dioxide Prods.*, 467 F.3d at 470; *cf. Lone Star Fund V*, 594 F.3d at 387. Doing so ran afoul of the Rule 12(b)(6) standard, such that dismissal on the pleadings was premature.

Accordingly, the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings.

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discrimination and the date of his initial EEO contact, the district court could not rely upon Lopez's EEO complaint alone.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MARCH 9, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, Employee Relations Labor, Laughlin Air Force Base,

Defendants-Appellees.

No. 22-50411

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-646

Before: CLEMENT, OLDHAM, and WILSON, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED, and the

cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (NOVEMBER 7, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARTURO S. LOPEZ, SR.,

Plaintiff,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, Employee Relations Labor, Laughlin Air Force Base,

Defendants.

Civil Action No. SA-21-CA-00646-FB

Before: Fred BIERY,
United States District Judge.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court are the Report and Recommendation of United States Magistrate Judge (docket no. 71) recommending that Defendants' Motion for

Summary Judgment (docket no. 62) be granted and Plaintiff's Motion to Enter Injunctive Relief (docket no. 62) be denied, along with Plaintiff's written objections (docket nos. 74 & 75) thereto, Defendants' response (docket no. 76) to Plaintiff's written objections, and Plaintiff's reply (docket no. 79) to Defendants' response.

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Report and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed the parties' submissions in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After

due consideration, the Court concludes the objections lack merit.

This Court agrees with the Magistrate Judge that Plaintiff failed to his exhaust administrative remedies, and he has neither shown himself to be entitled to equitable tolling of the administrative deadlines nor that said deadlines were waived. Defendant's Motion for Summary Judgment (docket no. 62) shall be granted.

This Court further agrees with the Magistrate Judge that: (1) aside from the way Plaintiff styled his motion, it is unclear whether he actually seeks any injunctive relief; (2) presuming Plaintiff is actually seeking injunctive relief under 42 U.S.C. § 1983, that section applies only to state actors, not federal actors like the Defendants in this case; (3) construing Plaintiff's motion as asserting a claim under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than under § 1983, the claim would still fail because a *Bivens* cause of action is currently recognized in only three limited circumstances not applicable here; and (4) while courts may create additional causes of action in new *Bivens* contexts and although Plaintiff states that Defendants violated several provisions of the Code of Federal Regulations, he did not identify a particular regulation that they allegedly violated.

In his objections, Plaintiff identifies 29 C.F.R. §§ 1614.105 and 1614.106 as the provisions of the Code of Federal Regulations which Defendants allegedly violated. (Docket no. 74 at 5); (Docket no. 75 at 3, 6). As Defendant points out (docket no. 76 at page 3), even presuming these violations occurred, such regulatory violations would not support creation of a new *Bivens*

cause of action because "a Bivens remedy exists, if at all, to 'remedy . . . constitutional violations.'" *SAI v. Department of Homeland Sec.*, 149 F. Supp. 3d 99, 125 (D.D.C. 2015) (emphasis added) (quoting *Wilson v. Libby*, 535 F.3d 697, 704 (D.C.Cir.2008)). Plaintiff's Motion to Enter Injunctive Relief (docket no. 55) shall be denied.

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 71) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motion for Summary Judgment (docket no. 62) is GRANTED and Plaintiff's Motion to Enter Injunctive Relief (docket no. 55) is DENIED.

IT IS FURTHER ORDERED that remaining motions pending with the Court, if any, are Dismissed as Moot and this case is CLOSED.

It is so ORDERED.

SIGNED this 7th day of November, 2023.

/s/ Fred Biery
United States District Judge

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (OCTOBER 4, 2023)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARTURO S. LOPEZ, SR.,

Plaintiff,

v.

FRANK KENDALL, III, Secretary of the Air Force, and MARY D. GARCIA, Human Resource Specialist, Employee Relations Labor, Laughlin Air Force Base,

Defendants.

SA-21-CV-646-FB (HJB)

Before: Henry J. BEMPORAD,
United States Magistrate Judge.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation concerns Defendants' Motion for Summary Judgment (Docket Entry 62) and Plaintiff's Motion to Enter Injunctive Relief (Docket Entry 55). Pretrial matters in this case have been referred to the undersigned for consideration.

(Docket Entry 38.) For the reasons set out below, I recommend that Defendants' Motion for Summary Judgment (Docket Entry 62) be GRANTED and that Plaintiff's Motion to Enter Injunctive Relief (Docket Entry 55) be DENIED.

I. Jurisdiction

Plaintiff Arturo Lopez asserts a retaliatory discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3a, *et seq.* (Docket Entry 1 at 3), and he moves for injunctive relief under 42 U.S.C. § 1983 for alleged violations of provisions of the Code of Federal Regulations (Docket Entry 55 at 1-2). The Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. § 1331. I have authority to issue this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Background

Lopez was previously employed at Laughlin Air Force Base in Del Rio, Texas. (Docket Entry 13-1 at 1.) He alleges that he was discriminated against in retaliation for participating in protected Equal Employment Opportunity ("EEO") activity. (*Id.*) Specifically, he claims that, on May 14, 2020, Defendant Garcia retaliated against him when she "intentionally and maliciously made and falsified entries on [his] official OPM [Office of Personnel Management ("OPM")] records" for the purposes of denying Lopez access to disability benefits. (*Id.*)

Lopez initiated contact with the Air Force's EEO counseling services on August 6, 2020, and was interviewed on August 10, 2020. (Docket Entry 13-2 at 2.) Proceeding *pro se,* he then filed suit in this Court

on July 8, 2021. (Docket Entry 1.) Defendants subsequently moved to dismiss, based on Lopez's failure to timely exhaust his administrative remedies. (Docket Entry 13.) Upon the undersigned's recommendation (Docket Entry 21), the Court granted the motion (Docket Entry 30). Lopez appealed. (Docket Entry 32.)

The Fifth Circuit reversed and remanded, concluding that the Court misapplied Federal Rule of Civil Procedure 12(b)(6) by relying on exhibits attached to Defendants' motion that were neither attached to Lopez's complaint nor explicitly referenced therein. (Docket Entry 37 at 6.) On remand, Defendants filed a second motion to dismiss, re-urging their exhaustion argument and asking the Court to rely on the same documents the Fifth Circuit held were impermissibly considered the first time—now based on judicial notice. (Docket Entry 50 at 3-5 & n.1.) Pursuant to Federal Rule of Civil Procedure 12(d), the undersigned required Defendants to present their exhaustion argument by way of a motion for summary judgment. (*See* Docket Entry 60.) Defendants filed the motion (Docket Entry 62), Lopez has responded (Docket Entry 64), and Defendants replied (Docket Entry 67).

III. Applicable Legal Standard

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. US. Postal Sere*, 63 F.4th 292, 300 (5th Cir. 2023) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A disputed fact is material if it "might

affect the outcome of the suit under the governing law." *Id.* (quoting *Anderson*, 447 U.S. at 248). In making this assessment, the Court "is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party." *Air Evac EMS, Inc. v. Sullivan*, 331 F. Supp. 3d 650, 657 (W.D. Tex. 2018) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)).

Failure to exhaust administrative remedies is an affirmative defense. *Davis v. Fort Bend Cnty.*, 893 F.3d 300, 307 (5th Cir. 2018), *aff 'd,* 139 S. Ct. 1843 (2019); *Lopez v. Kendall*, No. 22-50411, 2023 WL 2423473, at *1 (5th Cir. Mar. 9, 2023). When defendants move for summary judgment on an affirmative defense, they "must come forward with evidence that establishes 'beyond peradventure all the essential elements of the claim or defense to warrant judgment in [their] favor.' *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 851 (N.D. Tex. 2009) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). In other words, they must "make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the defendants." *Mary Kay, Inc.*, 601 F. Supp. 2d at 851 (citing *Anderson*, 477 U.S. at 248).

Once the moving party carries its burden, "the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). "While all of the evidence must be viewed in a light most favorable to the motion's opponent . . . neither conclusory allegations nor unsubstantiated assertions will satisfy the non-movant's summary judgment burden." *Id.* (citing *Anderson*, 477 U.S. at 255; *Little*

v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)).

IV. Analysis

This Report and Recommendation first considers Defendants' administrative-exhaustion argument. It then turns to Lopez's request for injunctive relief.

A. Administrative Exhaustion

To exhaust administrative remedies, a federal employee like Lopez must first report his grievance to an EEO counselor within 45 days of the alleged discrimination. 29 C.F.R. § 1614.105(a)(1) (1998); *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir.2002). Failure to notify the EEO counselor by the 45-day deadline will bar a claim unless the claimant successfully asserts "a defense of waiver, estoppel, or equitable tolling." *Lopez*, 2023 WL 2423473, at *2 (quoting *Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992)).

Section 1614.105(a)(2) states that the 45-day deadline "shall be extended . . . when the individual shows [1] that he or she was not notified of the time limits and was not otherwise aware of them, [2] that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, [3] that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or [4] for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105 (a)(2). The Fifth Circuit has explained that § 1614.105(a) (2) "codified the doctrine of equitable tolling," and district courts "should make an independent judgment about an employee's tolling request" under that section.

Teemac v. Henderson, 298 F.3d 452, 455 (5th Cir. 2002). Equitable tolling applies only in "rare and exceptional circumstances," *id.* at 457, and the party asserting that the 45-day deadline was tolled bears the burden of proof on that issue. *Molina v. Vilsack*, 748 F. Supp. 2d 762, 706-07 (S.D. Tex. 2010) (citing *Mendoza v. Potter*, 2009 WL 700608, at *2 (S.D. Tex. Mar. 17, 2009)).

In their motion, Defendants point to Lopez's EEO complaint, in which he asserted unequivocally that he became aware of Defendant Garcia's alleged retaliation on May 14, 2020, after receiving an email from the OPM. (Docket Entry 13-1 at 1.) Defendants then point to the report of EEO Counselor Michael Parizo, which states that Lopez did not report his grievance until 85 days later, on August 6, 2020. (Docket Entry 13-2 at 2.) According to the report, Parizo informed Lopez that he may have missed the 45-day deadline and advised him to submit a written request for a waiver of that deadline. (*Id. at* 5.) Lopez has presented no evidence that he ever submitted a written request.

Lopez responds that the 45-day deadline does not apply here because, despite the lack of a written request, the deadline was extended. (Docket Entry 64 at 6 (citing 29 C.F.R. § 1614.105(a)(2).) To support his assertion, Lopez argues he was entitled to the extension because he did not actually become aware of the alleged retaliation "until August 6, 2020," when he finally read the May 14, 2020, email. (*Id.*) Lopez explains that the email contained a 171-page document and he put off reading it because "he was recovering from medical surgeries" and, thus, was "unable to concentrate." (*Id.*) Lopez also states that he assumed he did not need to read the email promptly because he

had a hearing before the OPM that "was not scheduled to take place until August 17, 2020." (*Id.*) Lopez infers that an extension to his 45-day deadline was granted from the facts that: (1) Parizo wrote "August 1, 2020," rather than May 14, 2020, as the date of the alleged retaliation, (*id.* at 4; *see* Docket Entry 13-2 at 2.); and (2) Lopez's complaint was ultimately accepted, and his allegation of retaliation investigated. (*Id.* at 5 (reasoning that, had deadline not been extended, his "EEO Complaint would have been instantly denied. . . . ").)

To defeat summary judgment on Defendants' administrative-exhaustion argument and carry his burden and create a genuine dispute as to the issue of equitable tolling as incorporated into § 1614.105(a)(2), Lopez must either "cit[e] to particular parts of materials in the record" or show "that the materials cited [by Defendants] do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A)-(B). Lopez does not cite any materials in the record to support his conclusory assertions that he was entitled to equitable tolling because he did not read the May 14, 2020, email while recovering from surgeries.[1] (*See* Docket Entry 64 at 3.) As for his inference that the extension was granted, the only evidence Lopez offers are two letters he received from Parizo: the first, on November 13, 2020, notifying Lopez of his right to proceed with filing his discrimination complaint; and the second, on December 9, 2020, notifying Lopez that his complaint

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[1] "Indeed, contrary to Plaintiff's assertion, Defendants previously argued—and the Court previously found—that Lopez's back surgery did not occur until July 14, 2020, after the 45-day deadline had already expired. (*See* Docket Entry 28, at 3 n.2; Docket Entry 30 at 5-6.)

had been accepted for investigation. (*See* Docket Entry 64, at 4 (citing Docket Entry 17-2 at 3-4), 15.)

Contrary to Lopez's argument, neither the agency's acceptance of the complaint nor its decision to proceed with an investigation supports the inference that the 45-day deadline was waived. *See Molina*, 748 F. Supp. 2d at 709 (rejecting argument that agency's acceptance of untimely complaint, and subsequent investigation, waived 45-day EEOC contact deadline). This is especially true when, as in this case, the EEO counselor expressly advised Lopez that he may have missed his 45-day deadline and instructed him to submit a written request for a waiver. (Docket Entry 13-2 at 5.) "[T]o waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." *Rowe v. Sullivan*, 967 F.2d 186, 194 (5th Cir. 1992); *see Marquardt v. Leavitt*, Cause No. 3:06-CV-0893-AH, 2008 WL 320194, at *3 (N.D. Tex. Feb. 6, 2008) (same). "[A]n agency's docketing and acting on a complaint [does not] constitute a waiver of the timeliness requirement. . . . " *Marquardt*, 2008 WL 320194, at *3 (citations omitted).

Lopez makes the conclusory arguments that "[t]he Agency did not have to wa[i]ve any timelines," that he "was never asked []or tasked to submit any requests by anyone. . . . " (Docket Entry 64, at 5.) Lopez has presented neither evidence nor legal authority to support either contention. Moreover, they are contrary to the cases cited above, and belied by Parizo's clear instruction to Lopez to submit a formal, written request for a waiver of the 45-day deadline. (Docket Entry 13-2 at 5.)

For the foregoing reasons, Lopez failed to exhaust administrative remedies, and he has neither shown

himself to be entitled to equitable tolling of the administrative deadlines, nor that said deadlines were waived. Defendants' Motion for Summary Judgment (Docket Entry 62) should therefore be granted.

B. Injunctive Relief

Lopez invokes 42 U.S.C. § 1983 as the basis for his Motion to Enter Injunctive Relief. (Docket Entry 55 at 1.) Aside from the way Lopez styled the motion, it is unclear whether he actually seeks any injunctive relief. Nowhere in his motion does Lopez ask the Court to order Defendants to affirmatively do or refrain from doing anything. (*See id.* at 1-2.) *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2060 ("When a court 'enjoins' conduct, it issues an 'injunction,' which is a judicial order that 'tells someone what to do or not to do.'"); *Injunction,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court order commanding or preventing an action."). Rather, Lopez states that he "[s]eeks relief in the form of compensatory damages equal to $300,000." (Docket Entry 55 at 2 (emphasis added).)

In any event, whether Lopez seeks compensatory damages or injunctive relief, his motion must be denied. As courts in this District have repeatedly held, 42 U.S.C. § 1983 applies only to state actors, not federal actors like the Defendants in the case. *See, e.g., Eriksen v. Ten Unknown Named Fed. Agents*, No. EP-15-CV-216-DB-ATB, 2015 WL 13804250, at *5 (W.D. Tex. Oct. 16, 2015), *report and recommendation adopted,* No. EP-15-CV-216-DB, 2015 WL 13804248 (WD. Tex. Nov. 17, 2015) (dismissing § 1983 claims "because the named [defendants [we]re federal actors, not state actors"); *Doe v. Neveleff*, No. A-11-CV-907-LY, 2013 WL 489442, at *3 (W.D. Tex. Feb. 8, 2013),

report and recommendation adopted, No. A-11-CV-907-LY, 2013 WL 12098684 (W.D. Tex. Mar. 12, 2013) ("A civil rights lawsuit asserting claims of constitutional violations against federal government actors must be brought under *Givens*. . . . "); *Munoz v. Orr*, 559 F. Supp. 1017, 1019 (W.D. Tex. 1983) (dismissing § 1983 claims against Secretary of the Air Force and other federal actors who were not acting "under color of state law"). Accordingly, 42 U.S.C. § 1983 does not afford Lopez a cause of action against Defendants.

Even if the Court were to construe Lopez's motion as asserting a claim under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than under § 1983, the claim would still fail. In *Bivens*, the Supreme Court provided a "federal counterpart" to § 1983, "extend[ing] the protections afforded by § 1983 to parties injured by federal actors" who would not otherwise be liable. *Abate v. S. Pac. Transp. Co.*, 993 F.2d 107, 110 n.14 (5th Cir. 1993). However, a *Bivens* cause of action is currently recognized in only three limited circumstances not appliable here. *See Carlson v. Green*, 446 U.S. 14 (1980) (recognizing cause of action against federal prison officials for prisoner's inadequate care under the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing cause of action against Congressman by former staffer for sex-based discrimination under the Fifth Amendment); *Bivens*, 403 U.S. at 388 (recognizing cause of action against federal agents for excessive force under the Fourth Amendment).

Lopez does not assert any of the recognized *Bivens* claims listed above. While courts, in principle, may create additional causes of action in "new *Bivens* context[s]," doing so is "a disfavored judicial activity."

Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022). Specifically, the Court cannot create a new *Bivens* action if "the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (citing *Ziglar v. Abbasi*, 582 U.S. 120, 137 (2017)). This limitation is a strict one: if there is "[e]ven a single sound reason. . . . to think Congress might doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it]." *Egbert*, 142 S. Ct. at 1803 (quoting *Ziglar*, 582 U.S. at 137).

Here, the Court need not decide whether Congress is better equipped to create a cause of action for a specific violation because, while Lopez states Defendants violated several provisions of the Code of Federal Regulations, he does not identify a particular regulation that they allegedly violated. (*See* Docket Entry 55 at 1-2 (generally asserting that Defendants "violated Code of Federal Regulations (CFR's) during the [P]laintiff's [d]iscrimination complaint process").) In any event, such regulatory violations would not support creation of a new cause of action; "a *Bivens* remedy exists, if at all, to 'remedy . . . constitutional violations." *SAI v. Dep 't of Homeland Sec.*, 149 F. Supp. 3d 99, 125 (D.D.C. 2015) (quoting *Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) (emphasis in original)). For all these reasons, Lopez's putative injunction request should be denied.

V. Conclusion and Recommendation

Based on the foregoing, I recommend that Defendants' Motion for Summary Judgment (Docket Entry 62) be GRANTED and that Plaintiff's Motion to Enter Injunctive Relief (Docket Entry 55) be DENIED.

VI. Notice of Right to Object

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed within fourteen (14) days after being served with a copy of the same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The parties shall file any objections with the Clerk of the Court and serve the objections on all other parties. An objecting party must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections. *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Am*, 474 U.S. 140, 149-52 (1985); *Aczdia v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on October 4, 2023.

/s/ Henry J. Bemporad
United States Magistrate Judge

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (APRIL 21, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARTURO S. LOPEZ, SR.,

Plaintiff,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, Employee Relations Labor, Laughlin Air Force Base,

Defendants.

Civil Action No. SA-21-CA-00646-FB

Before: Fred BIERY,
United States District Judge.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court are the Report and Recommendation of United States Magistrate Judge (docket no. 21) concerning the motion to dismiss filed by Defendants

Frank Kendell and Mary Garcia (docket no. 13), Plaintiff's with written objections (docket nos. 24) thereto, Defendants' response (docket no. 28), and Plaintiff's reply (docket no. 29) to Defendants' response to his objections.

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Report and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed the parties' submissions in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes the objections lack merit.

Plaintiff alleges that he has been subjected to retaliation for participating in protected activity under Title VII. Defendants move to dismiss the complaint in its entirety. The Magistrate Judge concluded that Plaintiff's claim is subject to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiff failed to exhaust his administrative remedies.

STANDARD OF REVIEW

In deciding a Federal Rule of Civil Procedure 12 (b)(6) motion, the Court must "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205B06 (5th Cir. 2007). To state a claim upon which relief may be granted, Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level." *Id.* at 555. "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A claim for relief is implausible on its face when 'the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.'" *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679).

DISCUSSION

Plaintiff was previously employed at Laughlin Air Force Base in Del Rio, Texas. He contends that he was discriminated against in retaliation for participating in a protected Equal Employment Opportunity ("EEO") activity. Specifically, Plaintiff alleges that, on May 14, 2020, Defendant Garcia retaliated against him when she "intentionally and maliciously made and falsified entries on [his] official OPM [Office of Personnel Management] records" for the purpose of denying Plaintiff access to disability benefits." (Motion to Dismiss, docket no. 13-1 at page 1).

Plaintiff initiated contact with the Air Force's EEOC counseling services on August 6, 2020, and was interviewed on August 10, 2020. Proceeding *pro se*, he then filed suit in federal court on July 8, 2021. Defendant subsequently moved to dismiss based on Plaintiff's failure to exhaust his administrative remedies. The Magistrate Judge recommends that the motion be granted.

To exhaust administrative remedies, a federal employee like Plaintiff must first report his grievance to an EEO counselor of the agency charged with discrimination within 45 days of the alleged discrimination. (Report and Recommendation, docket no. 21 at pages 3-4) (citing 29 C.F.R. § 1614.105(a)(1); *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002)). As discussed in the Report and Recommendation, Plaintiff alleges that he learned about the discriminatory conduct that occurred on May 14, 2020, and documents show that he did not initiate the required EEO counseling until August 6, 2020. *Id.* at pages 4-5 (citing Motion to Dismiss, docket no. 13-1 at page 2 & 13-2 at page 2).

Because Plaintiff's initiation of EEO counseling exceeds the 45-day deadline required by statute, he failed to timely exhaust his administrative remedies. *See* 29 C.F.R. § 1614.105(a)(1).

Absent a showing of justification for failure to follow exhaustion procedures, a Title VII claim must be dismissed if the exhaustion defense is adequately raised. *Story v. Gibson on behalf of Dep't of Veterans Affs.*, 896 F.3d 693, 698 (5th Cir. 2018). In response to the motion to dismiss, Plaintiff argued agency waived its timeliness defense because the Air Force accepted his EEO complaint for filing on December 9, 2020. (Docket no. 17 at page 2) (explaining that Defendant's motion to dismiss should be denied because "Laughlin Air Force Base Agency accepted my complaint after being reviewed for acceptability and issued notice of acceptance letter Since December 9, 2020."). Plaintiff makes this same argument in his objections to the Report and Recommendation. (Objections, docket no. 24 at page 4) ("[T]he Laughlin Air Force Base Agency accepted my EEO claim on December 09, 2020.").

The filing of an EEO complaint is insufficient to show that the Agency waived its timeliness defense. *Molina v. Vilsack*, 748 F. Supp. 2d 702, 709 (S.D. Tex. 2010) (rejecting plaintiff's argument that agency's acceptance of his claim and subsequent investigation waived 45-day EEOC contact timeliness issue). "In order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." *Rowe v. Sullivan*, 967 F.2d 186, 194 (5th Cir. 1992); *see also Marquardt v. Leavitt*, Cause No. 3:06-CV-0893-AH, 2008 WL 320194, at *3 (N.D. Tex. Feb. 6, 2008) ("However, in order to waive a timeliness objection, the agency must make a specific finding

that the submission was timely. Nor does an agency's docketing and acting on a complaint constitute a waiver of the timeliness requirement . . . .") (citing *Rowe,* 967 F.2d at 191; *Oaxaca v. Roscoe*, 641 F.2d 386, 390 (5th Cir. 1981)).

Here, Plaintiff has not shown any specific finding of timeliness made by the Agency regarding his EEO complaint and an independent review of the record has revealed none. Indeed, the Agency documented in the EEO counselor's report that it advised Plaintiff that May 14, 2020, was outside the 45 day timeline to file an EEO complaint. (Motion to Dismiss, docket no. 13-2, Exhibit B at page 5).

Plaintiff raises a new argument in his objections to the Report and Recommendation. The evidence attached to Plaintiff's response to the motion to dismiss shows that the adverse employment action of which he complains–Mary D. Garcia's incorrect marking of "No" when asked whether Plaintiff had at least 18 months of service under the Federal Employees Retirement System on Plaintiff's retirement application paperwork–took place on December 6, 2019. (Plaintiff's Response, docket no. 17-3, Exhibit C at page 1). According to Plaintiff's EEO complaint, he learned of this alleged discrimination on May 14, 2020 via an OPM email. (Motion to Dismiss, docket no. 13-1 at Exhibit A). Plaintiff now alleges that he did not learn of this act until August 6, 2020. (Plaintiff's Objections, docket no. 24 at page 5). Plaintiff asserts he did not read the OPM email until August 6, 2020, "due to ongoing medical issues, doctors' back and forth appointments with my injured foot and herniated discs." *Id.* He alleges that his "lower back surgery was done on July 14, 2020." *Id.*

While a party is entitled to *de novo* review before the District Court upon filing objections to the Report and Recommendation of the United States Magistrate Judge, this does not entitle him to raise issues which were not previously presented to the Magistrate Judge. *See Cupit v. Whiteley*, 28 F.3d 532, 535 (5th Cir. 1994) (explaining that arguments which could have been raised before the Magistrate Judge, but were raised for the first time in objections before the District Court, were waived); *Freeman v. County of Bexar*, 142 F.3d 848, 850 (5th Cir. 1998) (recognizing that, absent compelling reasons, requirement that district court conduct de novo review does not permit parties to raise "new evidence, argument, and issues that were not presented to the Magistrate Judge"). Moreover, as Defendant points out, "Plaintiff's back surgery also occurred outside the 45-day deadline, which ran on Monday, June 29, 2020, at the latest." (Defendant's Response to Plaintiff's Objections, docket no. 28 at page 3 n.2). Accordingly, Plaintiff's surgery does not provide an adequate reason for his delay in seeking initial EEO counseling. "In addition, if timeliness were calculated from an earlier date, such as the alleged act of discrimination at the time Mary Garcia submitted OPM disability forms, his claim would have been barred several months earlier." *Id.*

In sum, it is undisputed that the information was available to Plaintiff by May 14, 2020, even if he did not access it. Plaintiff failed to contact an EEO counselor regrading the alleged discrimination until August 6, 2020, 87 days after he contends in his EEO complaint to have learned of the alleged retaliation. Defendants have adequately raised the issue of Plaintiff's failure to exhaust his administrative remedies and Plaintiff

has not articulated a justifiable reason for his delay in seeking initial EEO counseling as required by the applicable regulations. Therefore, Defendants are entitled to dismissal of this suit pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 21) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motion to Dismiss (docket no. 13) is GRANTED.

IT IS FINALLY ORDERED that remaining motions pending with the Court, if any, are Dismissed as Moot and this case is CLOSED.

It is so ORDERED.

SIGNED this 21st day of April, 2022.

/s/ Fred Biery
United States District Judge

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (MARCH 11, 2022)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARTURO S. LOPEZ, SR.,

Plaintiff,

v.

FRANK KENDALL, III,[1] and MARY D. GARCIA,

Defendants.

SA-21-CV-646-FB (HJB)

Before: Henry J. BEMPORAD,
United States Magistrate Judge.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Fred Biery:

[1] Pursuant to Federal Rule of Civil Procedure 25, Frank Kendell III, the current Secretary of the Air Force, has been substituted for named Defendant John P. Roth.

This Report and Recommendation concerns the Motion to Dismiss filed by Defendants Frank Kendell and Mary Garcia. (Docket Entry 13.) Dispositive motions in this case have been referred to the undersigned for recommendation. (See Docket Entry 5.) For the reasons set out below, I recommend that Defendants' Motion to Dismiss (Docket Entry 13) be GRANTED.

I. Jurisdiction

Plaintiff's suit presents a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-3a, et. seq. (Docket Entry 1, at 3.) This Court has original jurisdiction over the federal claim pursuant to 28 U.S.C. § 1331. I have authority to issue this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Background

Plaintiff Arturo Lopez Sr. was previously employed at Laughlin Air Force Base in Del Rio, Texas. (Docket Entry 13-1, at 1.) He alleges that he was discriminated against in retaliation for participating in a protected Equal Employment Opportunity ("EEO") activity. (*Id.*) Specifically, he claims that, on May 14, 2020, Defendant Garcia retaliated against him when she "intentionally and maliciously made and falsified entries on [his] official OPM [Office of Personnel Management] records" for the purposes of denying Plaintiff access to disability benefits. (*Id.*)

Plaintiff initiated contact with the Air Force's EEO counseling services on August 6, 2020, and was interviewed on August 10, 2020. (Docket Entry 13-2, at 2.) Proceeding prose, he then filed suit in this Court on June 8, 2021. Defendants subsequently moved to dismiss based on Plaintiff's failure to timely exhaust his

administrative remedies. (Docket Entry 13.) Plaintiff responded (Docket Entry 17), and Defendants replied (Docket Entry 19).

III. Legal Standard

Rule 12(b)(6) authorizes the dismissal of a cause of action in a complaint when it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12 (b)(6). When considering a motion to dismiss for failure to state a claim, the "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464,467 (5th Cir. 2004)). For a claim to survive a motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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 misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In determining whether a plaintiff's claims survive a Rule 12(b)(6) motion to dismiss, the factual information the court considers is limited to (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence

201. *Gomez v. Galman*, 18 F.4th 769, 775 (5th Cir. 2021). Judicial notice may be taken of matters of public record. *Firefighters' Ret. Sys., v. EisnerAmper, L.L.P.*, 898 F.3d 553, 558 n.2 (5th Cir. 2018). When a defendant attaches documents to its motion that are referred to in the complaint and are central to the plaintiff's claims, the court may also properly consider those documents. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285,288 (5th Cir. 2004); *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205. "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496,499 (5th Cir. 2000).

IV. Analysis

Defendants seek to dismiss Plaintiff's complaint on the basis that he failed to exhaust his administrative remedies in a timely manner. (Docket Entry 13, at 4.) Exhaustion of administrative remedies is not a jurisdictional requirement; instead, failure to exhaust is an affirmative defense that should be plead. *Davis v. Fort Bend Cty.*, 893 F.3d 300, 306-07 (5th Cir. 2018) (citing *Flagg v. Stryker Corp.*, 819 F.3d 132, 142 (5th Cir. 2016) (en banc)). It is nevertheless an important presuit requirement that can result in the dismissal of a case. *Stroy v. Gibson on behalf of Dep't of Veterans Affs.*, 896 F.3d 693, 698 (5th Cir. 2018).

To exhaust administrative remedies, a federal employee like Plaintiff must first report his grievance to an EEO counselor of the agency charged with discrimination within 45 days of the alleged discrimination. 29 C.F.R. § 1614.105(a)(1) (1998); *Ramsey v.*

Henderson, 286 F.3d 264, 269 (5th Cir. 2002). If the matter cannot be resolved within 30 days, the employee is notified in writing of his right to file an administrative discrimination complaint (EEO claim) within 15 days after receipt of the notice. *See id.* § 1614.105(d).

After the employee files an EEO claim, the agency conducts an investigation; at the conclusion of that investigation, the employee has the right to request a hearing before an administrative law judge or to receive an immediate final decision from the agency. *See id.* § 1614.108. If he is not satisfied with the agency's decision, the employee has two options: (1) he may appeal to the Equal Employment Opportunity Commission ("EEOC") within 30 days of receipt of the final agency decision, *see id.* § 1614.402; or (2) he may commence a civil court action within 90 days of receipt of the final agency decision, *see* 42 U.S.C. § 2000e-16(c). If the employee elects to appeal to the EEOC, he may file a civil action within 90 days of receipt of the EEOC final decision letter or, if there has been no final decision, within 180 days from the date of filing an appeal with the EEOC. *See* 29 C.F.R. § 1614.408 (1998).

In this case, Defendants support their motion by submitting Plaintiff's EEO counseling intake form and his EEO complaint for the purposes of showing the dates that Plaintiff sought administrative relief. (*See* Docket Entries 13-1 & 13-2.) Plaintiff does not challenge the authenticity of these documents, and the Court may therefore consider them in conjunction with Defendant's motion. *See Causey*, 394 F.3d at 288.

Plaintiff alleges that he learned about discriminatory conduct that occurred on May 14, 2020.

(Docket Entry 13-1, at 1.)[2] The documents show that Plaintiff initiated the required EEO counseling on August 6, 2020 (Docket Entry 13-2, at 2), and he states that he "filed [his] case on August 10, 2020" (Docket Entry 17, at 5). As Plaintiff's initiation of EEO counseling exceeds the 45-day deadline required by statute, he failed to timely exhaust his administrative remedies. *See* 29 C.F.R. § 1614.105(a)(1) (1998).

Absent a showing of justification for failure to follow exhaustion procedures, a Title VII claim must be dismissed if the exhaustion defense is adequately raised. *Stroy*, 896 F.3d at 698. In this case, Defendants have adequately raised the issue of Plaintiff's failure to exhaust his administrative remedies, and Plaintiff has not articulated a reason for his delay in seeking initial EEO counseling as required by the applicable regulations. Therefore, Defendants are entitled to dismissal of this suit.

V. Conclusion

Based on the foregoing, I recommend that Defendants' Motion to Dismiss (Docket Entry 13) be GRANTED.

VI. Instructions for Service and Notice of Right to Object

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written

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[2] The retaliatory allegedly occurred between January 2017 and November 2017. (Docket Entry 17, at 8.)

objections to this Report and Recommendation must be filed within fourteen (14) days after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on March 11, 2022.

/s/ Henry J. Bemporad
United States Magistrate Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JULY 11, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, Secretary of the Air Force; MARY D. GARCIA, Human Resource Specialist, EMPLOYEE RELATIONS LABOR, LAUGHLIN AIR FORCE BASE,

Defendants-Appellees.

No. 23-50844

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-646

Before: CLEMENT, DUNCAN, and DOUGLAS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 24, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTURO S. LOPEZ, SR.,

Plaintiff-Appellant
Pro Se,

v.

FRANK KENDALL, III, Secretary of the Air Force;
MARY D. GARCIA, Human Resource Specialist,
EMPLOYEE RELATIONS LABOR,

Defendants-Appellees.

No. 23-50844

On Appeal from the United States District Court
for the Western District of Texas,
San Antonio Division
Civil Action No. 5:21-CV-00646 FB

Plaintiff's Petition for Panel Rehearing

Jurisdiction: Because this is an appeal of a final Judgment of a district court, this court has jurisdiction under 28 U.S.C. 1291.

District Court Case Reference # 5:21-cv-00646-FB

Plaintiff/Petitioner: Arturo S. Lopez Sr. Respectfully enters his petition for a Panel Rehearing for Case # 23-50844 in accordance with Fed. R. App. P. 40. Judgment was filed and entered on June 14, 2024. *See* 5th Cir. R. 35.1, 2, 3, 4, 5 and 5th Cir. R. 37.1, 2

Petitioner respectfully presents the following issues. The court has overlooked or misapprehended information on the Plaintiffs case and this caused a negative impact on his case.

1. The court misapprehended when and how the plaintiff became aware of Ms. Mary Garcia's discriminatory actions towards him. The plaintiff did not become aware of Ms. Garcia's action on May 14, 2020 as stated by the court. *See* 5th Cir R. 35.2. The Plaintiff became aware of Ms. Garcia's discriminatory action on August 06, 2020. The Plaintiff describes in detail how it is that he became aware of Ms. Garcia's action and clearly shows on what date he became physically aware. *See* ROA.392, 393.

2. The court misapprehended and overlooked the previous decision that was made by the 5th Circuit. *See* 22-50411 Cir. R. 53.1. To exhaust his administrative remedies prior to bringing a Title VII action in federal court, Lopez was required to "initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory.' 29 C.F.R. 1614.105(a)(1). Indeed, "Failure to notify the EEO Counselor in a timely fashion may bar a claim" unless the claimant successfully asserts "a defense of waiver, estoppel, or equitable tolling." *Pacheco v. Rice*, 966F.2d 904,905 (5th Cir. 1992). Relevant here, the 45-day time limit is extended when the claimant shows that . . . he or she did not know and reasonably should not have

known that the discriminatory matter or personnel action occurred." 29 C.F.R. 1614.105(a)(2). The Plaintiff here clearly shows that he had no way of knowing of Ms. Garcias discriminatory action when it occurred on December 06, 2019. There is no way the Plaintiff would have had knowledge that the discriminatory matter had occurred by Ms. Garcia. He had no knowledge of what false information Ms. Garcia was providing to the OPM Office on this date. *See* ROA.392, 393. This information fulfils this C.F.R that has been referenced as Relevant by the 5th Circ. The court has overlooked that the Plaintiff has also asserted a defense of estoppel as described in 29 C.F.R 1614.105(a)(2). *See* ROA.399. direct evidence shows The Final decision was made by the Head Wing Commander at Laughlin Air Force Base that is authorized to approve or deny EEO Complaints. The Following were the two deciding officials that accepted and allowed the plaintiff to file his Formal EEO complaint on November 13, 2020. One was the leading Flight Training Wing Commander Col Craig D. Prather, and the other was the EEO Counselor S.Sgt. Michael Parizo. The plaintiff's EEO Complaint would have not been allowed without the Wing Commanders Approval. These individuals were the deciding officials for my EEO Complaint 4 years ago. They made their decision to allow me to move forward with my EEO complaint. The EEO acceptance letter was issued by this same EEO counselor on December 09, 2020, after getting final approval from the wing Commander on November 13, 2020, *See.* ROA. 117, 118. I also reached out to the New EEO Counselor S.Sgt. Mitchell Keedrick at Laughlin Air Force Base to confirm if there were ever any timeline issues when I filed this EEO complaint after his thorough review he Replied No there were never any

Timeline issues or any other issues with your case. I showed him the Acceptance letters and all the corresponding acceptance letters that were issued to me by Mr. Parizzo and asked him are these valid letters or not. He stated yes, they are valid. *See* ROA.434. This further confirms that there never were any timeline issues on my EEO Complaint. The Defendants claim that the Air Force did not waive its timeliness objection merely by docketing and acting on Lopez's untimely complaint and further adding such a broad rule is unacceptable because agencies may inadvertently overlook timeliness problems and should not thereafter be bound. *See* 23-50844 Cir R. 35-1.4. This is a Frivolous Speculative defense. The Appellees further added Rather in order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely. The agency did make a finding that the plaintiff's submission was timely. This finding was made by the EEO Counselor Mr. Parizzo when he discussed with the plaintiff the reasons for filing his Complaint 45 days after the discriminatory act was committed. *See* ROA.392, 393. This was discussed during his initial EEO intake on August 12, 2020. Mr. Parizzo stated since there was no way of you knowing of Ms. Garcia's discriminatory action towards you on December 06, 2019, and you became aware on August 06, 2020, you are allowed to file your complaint and enter this date as the date that you became aware. This clearly shows a defense of Equitable tolling since I was unaware and had no Knowledge of the harm that was being done to me the Appellant. From this day forward my EEO complaint was accepted by the deciding officials. I explained to Mr. Parizzo that I learned of Ms. Garcia's discriminatory action when I began reading and looking at the

attachments that were contained in the Email from the OPM Office. The OPM office sent me an E mail concerning my Federal Disability benefits case with the MSPB on May 14, 2020. The OPM Office sent me this information so that I could prepare for the MSPB. Hearing case that I had coming up on August 17, 2020. I had no Knowledge of what the email contained until I began to review its contents on August 06, 2020. This is why Mr. Parizzo stated that August 06, 2020, is the date to be entered as the date that I became aware. This is why you see this date repeatedly entered throughout the EEO Counselors report and acceptance Letter. *See* ROA.117, 118. The Agency did not inadvertently overlook my EEO Complaint. Defendants are making frivolous arguments and have no factual material evidence to support their argument. They have only made hypothetical assumption arguments that have no merit. The Plaintiff has proven this by the direct evidence that he has submitted. The Defendants have no right to change a decision that was made by the Laughlin Air Force Base deciding officials 4 years ago, solely because of personal hypothetical speculation theories. To fit their needs.

3. The court overlooked and misapprehended the plaintiffs' arguments that the Defendants have violated several C.F.R'S "Codified Federal Regulations" that place a negative impact on the Plaintiff's right to fair and due process. All C.F.R 'S' that have been listed in the plaintiff's case are important and affect a party's outcome in an EEO Civil case. To overlook violations of a C.F.R contradicts the Rules of Law as C.F.R.'S are backed by the U.S Constitution. When C.F.R's are not being followed to maintain transparency and fairness this has negative impacts on one or both

party's The court overlooked and did not acknowledge the previous Relevant C.F.R that was pointed out by the 5th Circ. 29 C.F.R 1614.105(a)(2) when pointing out the 45-day timeline. The court also overlooked all the other following C.F.R.S that have been violated by the Appellees and referenced throughout the Plaintiff's complaint process. The court contradicts itself when it accepts one paragraph of the EEO Summary report but does not accept the Full Report which includes all the different Final acceptance letters that were issued to the Appellant by the same EEO Counselor that wrote the report. The same EEO Counselor entered the date I became aware throughout his entire report and all the proceeding acceptance letters that followed. The following is a list of the C.F.R's that were overlooked and never addressed by the court. This caused a serious negative impact against the Appellant. The court never issued any response to the Appellant concerning these C.F.R violations.

29 C.F.R. 1614.105(a)(2) *See* 22-50411 Cir. R. 53.1

29 C.F.R. 1614.106(e)(2) *See* 23-50844 Cir. R. 331, 332, 378

29 C.F.R. 1614.107 Dismissal of complaints *See* 23-50844 Cir. R. 358

29 C.F.R. 1614.108 *See* 23-50844 Cir. R. 174, 175, 418

Injunctive Relief: Plaintiff requested injunctive relief and asked the court to intervene. The plaintiff repeatedly raised concern that the Appellees were using information from an invalid, inadmissible IRD Report which contained an EEO Counselors report that has inaccurate material. The court failed to acknowl-

edge the Plaintiffs concerns and continued to allow the Appellees to use this inaccurate information as part of their defense. This action by the court violated the plaintiff's rights and liberties to due process because the Appellees had violated 29 C.F.R 1614.106(e)(2) *See* ROA.331, 332, 378. and 29 C.F.R. 1614.108 *See* ROA.174, 175, 418. The court did not advise the Appellees to remove this invalid, inadmissible Report. This is why the Appellant was seeking damages for the harm that this would cause to the Appellant. Plaintiff asks for injunctive relief and seeks relief for damages incurred because of not removing this IRD Report and the information that it contained. Plaintiff request that this IRD report and the information that came from this report be removed from the record.

Conclusion: Plaintiff Respectfully Requests that the Appellees case be dismissed as they have no Factual material evidence and for submitting frivolous, speculative information without any Genuine Material Evidence to support their claim. Plaintiff respectfully ask that this court rule in favor of the Plaintiff.

Positive Note:

When the court states "viewing all evidence in the light most favorable to the nonmoving party and all reasonable inferences in the party's favor" this has repeatedly shown to be a false recital statement as the court overlooks and misapprehends Genuine material facts that have been entered. The Rule of Law pertaining to following and enforcing violated C.F.R's has proven to be untrue. I respectfully ask the court to please review my written brief in its entirety. To Rule in favor of the Appellant.

Very Respectfully,

/s/ Arturo S. Lopez Sr.

Signature of Counselor Party:

/s/ Arturo S. Lopez Sr.

SUPREME COURT
PRESS