UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES T. HAYES, JR., Plaintiff, v. JANET NAPOLITANO,[1] Secretary, Department of Homeland Security, Defendant.	)	Civil Action No. 12-825 (ABJ)

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

Defendant Janet Napolitano, Secretary, Department of Homeland Security ("Defendant"), by and through undersigned counsel, respectfully moves to dismiss Plaintiff James T. Hayes, Jr.'s ("Plaintiff") complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As demonstrated more fully by Defendant's Memorandum of Points and Authorities, Plaintiff's complaint fails to state a claim for reprisal as a matter of law. Additionally, Plaintiff's complaint consists of allegations related to claims that Plaintiff failed to timely exhaust and, therefore, Plaintiff's complaint is barred as a matter of law. Finally, Plaintiff's complaint contains allegations that are irrelevant to this action and unfounded; those allegations should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Plaintiff's complaint should be dismissed, and portions of it should be stricken from the public record.

[1] Pursuant to 42 U.S.C. § 2000e-16(c), Secretary Napolitano must be named as the proper defendant. The complaint contains no allegations against the Secretary herself.

Dated: August 16, 2012
Washington, DC

Respectfully submitted,

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

Plaintiff James T. Hayes, Jr.'s ("Plaintiff" or "Hayes") complaint in this case should not be allowed to proceed as Plaintiff has failed to state a claim for retaliation for protected activity. Should the Court find that Plaintiff has stated a claim for retaliation, Plaintiff failed to timely exhaust his administrative remedies regarding the vast majority of the allegations in his complaint and, therefore, those allegations should be dismissed for failure to state a claim. Finally, several allegations contained in Plaintiff's complaint contain unsupported and irrelevant allegations that, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, should be stricken. Defendant Janet Napolitano, in her official capacity as Secretary, Department of Homeland Security ("Defendant," "DHS," the "Agency," or the "government"), by and through undersigned counsel, therefore files this Memorandum of Points and Authorities in Support of her Motion to Dismiss Plaintiff's Complaint and to Strike Portions of the Complaint.

I. SUMMARY OF RELEVANT FACTS

Plaintiff has never been discriminated against or the subject of retaliation during his federal government career. Hayes first started his career as U.S. Border Patrol Agent in Del Rio, Texas. (Compl. at 3, ¶ 13.) Two years later, Plaintiff became a Special Agent for the U.S. Immigration and Naturalization Service ("INS") in Orange County, California. (*Id.* ¶ 14.) In 2002, Plaintiff was assigned to a Program Manager position at INS Headquarters, National Security Unit. (*Id.* ¶ 16.) Two years after that, Hayes was designated the Section Chief of the U.S. Immigration and Custom's Enforcement ("ICE") Counterterrorism Operations Section within DHS. (*Id.* ¶ 17.) Plaintiff then received a promotion in 2005 to a Unit Chief position at ICE Headquarters. (*Id.* ¶ 18.) The next year, Plaintiff was reassigned to Los Angeles, California as the ICE Field Office Director, Detention and Removal Operations ("DRO"). (*Id.* ¶ 19.) Hayes was then assigned to ICE Headquarters as the DRO Assistant Director for Field Operations and became a member of the Senior Executive Service ("SES")[1] in 2008. (*Id.* ¶ 20.) In September of that same year, Plaintiff was designated Director, ICE DRO. (*Id.* ¶ 21.)

After the change in administration in January 2009, new senior staff came on board at ICE and DHS. (*See id.*) On or around May 15, 2009, Hayes alleges that he met with Assistant Secretary for ICE John Morton to discuss this transition. (*See id.* ¶¶ 50-51.) On or around June 17, 2009, Plaintiff alleges that Morton met with Plaintiff and advised Plaintiff that Morton intended to bring in his own team. (*See id.* ¶¶ 55-58.) Subsequently, Plaintiff requested a

[1] The Senior Executive Service was envisioned by Congress as a flexible group of federal executives who can move from position to position or from one agency to another as the needs of the federal government require. As a result, agencies maintain flexibility in assigning or reassigning their SES personnel to different geographic locations or offices. An agency may reassign a career SES appointee to any SES position in the same agency for which the executive is qualified. 5 USC § 3395(a); 5 CFR § 317.901.

transfer to Los Angeles; Morton advised Hayes on or about June 25, 2009, that the position Plaintiff requested was no longer available. (*Id.* ¶¶ 59, 62.) On or around July 2, 2009, Plaintiff claims that Morton and Plaintiff again met and at that meeting, Morton allegedly confirmed that the Los Angeles position was not available. At this meeting, Plaintiff further alleges that he informed Morton he was being discriminated against, and that he wanted to file an Equal Employment Opportunity ("EEO") complaint.[2] (*Id.* ¶ 66.)

Less than two weeks later, on July 14, 2009, Plaintiff claims that he met with Alonzo Pena, Deputy Assistant Secretary for Operations, to discuss Plaintiff's options. (*Id.* ¶ 68.) Plaintiff alleges that Pena advised Hayes at this meeting that the only positions available to Plaintiff were in Denver and Baltimore as Morton intended to select a lower-graded employee than Plaintiff for the New York position.[3] (*Id.* ¶ 69.) Plaintiff further alleges that he advised Pena (a male) that he believed he was being discriminated against on the basis of his gender, and intended to file a complaint. (*Id.* ¶ 70.) Approximately two weeks after this meeting, on or about July 28, 2009, Pena allegedly informed Plaintiff that, apparently contrary to their prior conversation, Plaintiff could go to New York on detail until the Special Agent in Charge ("SAC") there retired, at which point Plaintiff would fill that position. (*Id.* ¶ 78.)[4]

At some point after this meeting, around August 11, 2009, Plaintiff claims in his complaint that he learned that several investigations by the Office of Professional Responsibility

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[2] It is unclear what grounds Plaintiff would have had for filing a complaint – Morton, Plaintiff's supervisor, is the same gender and race as Plaintiff, and Plaintiff does not allege he had participated in protected activity prior to this meeting.

[3] Plaintiff's complaint is unclear whether Plaintiff expressed a desire for the New York position at this meeting – the position about which Plaintiff complains later in his pleading.

[4] Plaintiff's complaint (at Paragraph 84) states "[w]ithin thirty days of the *meeting* during which Plaintiff threatened to go to the EEO office . . ." (emphasis added), but elsewhere Plaintiff claims a "threat" of filing an EEO complaint in two meetings. (*See* Compl. ¶¶ 66, 70.)

("OPR") had been opened investigating him. (*Id.* ¶¶ 84-86.) None of these investigations resulted in disciplinary action against Plaintiff. (*See id.* ¶¶ 86-141.) On or about September 25, 2009, Plaintiff received his reassignment to New York, New York. (*Id.* ¶ 142.) Later, Plaintiff alleges that on or about April 20, 2011, Plaintiff learned the "extent" of one of the aforementioned OPR investigations. (*Id.* ¶¶ 144-46.) Subsequently, on May 6, 2011, Plaintiff learned he would not be offered the SAC position in Los Angeles.[5] (*Id.* ¶ 151.)

Plaintiff made his initial contact with the ICE EEO Office on May 30, 2011.[6] (*Id.* ¶ 162.) Plaintiff filed his administrative complaint with the Agency on September 29, 2011. (*Id.* ¶ 163.) A copy of Plaintiff's administrative complaint is attached hereto as Exhibit "1."[7] Plaintiff amended his administrative complaint several times, and then received a notice of acceptance, in part, of his claims for discrimination and retaliation on April 16, 2012. (*See id.* ¶ 165.) Prior to any administrative investigation's completion or discovery, Plaintiff then filed his complaint in this Court on May 21, 2012. (*See id.*)

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[5] It is unclear from the complaint whether Plaintiff had applied for this position – a lateral transfer as Plaintiff was then (and still is) SAC for New York, New York.

[6] In accordance with 29 CFR § 1614.105(a)(1), "an aggrieved person must initiate contact with an Agency's EEO office within 45 days of the date of the matter alleged to be discriminatory, or, in the case of a personnel action, within 45 days of the effective date of the action." An administrative complaint that fails to meet these time limits shall be dismissed by the Agency pursuant to 29 CFR § 1614.107(a)(2).

[7] As Plaintiff's complaint incorporates his administrative complaint, *see* Compl. ¶ 163, Defendant's attachment of the administrative complaint should not convert this motion to dismiss into one for summary judgment. *See, e.g.*, *Atherton v. District of Colum. Office of Mayor*, 567 F.3d 672, 677 (D.C. Cir. 2009); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) ("In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice.").

II. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests whether a complaint has properly stated a claim upon which relief may be granted. *Woodruff v. DiMario*, 197 F.R.D. 191, 193 (D.D.C.2000). For a complaint to survive a Rule 12(b)(6) motion, Federal Rule of Civil Procedure 8(a) requires that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8(a) does not require "detailed factual allegations," a plaintiff is required to provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)), in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (omission in original). In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 669 (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A complaint alleging facts which are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

In evaluating a Rule 12(b)(6) motion under this framework, although the Court must accept the plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pled with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 669. If

"the [C]ourt finds that the plaintiff[ ] has failed to allege all the material elements of [his] cause of action," then the Court may dismiss the complaint without prejudice, *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997), or with prejudice, if the Court "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citations omitted).

B. Motion to Strike Pursuant to Rule 12(f)

Federal Rule of Civil Procedure 12(f) permits a court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Generally, motions to strike are disfavored by federal courts." *Wiggins v. Philip Morris, Inc.*, 853 F. Supp. 457, 457 (D.D.C.1994) (Lamberth, J.). However, if allegations in a complaint are irrelevant and prejudicial to the defendant, a motion to strike may be granted. *Id.* (citing *Todhunter, Mandava, & Assocs. v. I.C.C.I. (Holdings) Pty. Ltd.*, C.A. No. 88-3031, 1991 WL 166585 (D.D.C. Aug. 14, 1991) (Lamberth, J.)).

III. ARGUMENT

A. Plaintiff's Complaint Fails to State a Claim as Plaintiff Cannot Sustain a Claim for Retaliation Because He Did Not Participate in Any Protected Activity

Plaintiff's complaint is comprised primarily of allegations related to claimed retaliation in 2009 for Plaintiff's supposed "intention" to file some form of complaint. (*See* Compl. at 4-15, ¶¶ 26-143.) This "intention" is Plaintiff's only alleged protected activity until he initiated contact with a counselor on May 30, 2011 (*Id.* at 17, ¶ 162.) Thus, Plaintiff has failed to state a claim related to any allegations that pre-date May 30, 2011 for two reasons: 1) he did not engage in any EEO protected activity; and 2) he failed to timely meet with an EEO counselor and therefore his claims are time-barred for failure to exhaust his administrative remedies.

First, Plaintiff cannot sustain a claim for reprisal based on the "intention" to potentially engage in protected activity. Plaintiff's nebulous claims of, for example, telling "Morton that he believed he was being discriminated against, and that he *wanted* to file an EEO complaint," (*see* Compl. at 8, ¶ 66), even if true, do not rise to the level of protected activity. *See, e.g.*, *Akridge v. Gallaudet Univ.*, 729 F. Supp. 2d 172, 185 (D.D.C. 2010) (Urbina, J.); *Jones v. Billington*, 12 F. Supp. 2d 1, 13 (D.D.C. 1997) (Kollar-Kotelly, J.) (retaliation must be "based on the fact that an employee has opposed any practice that is an unlawful employment practice, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing"). The plaintiff in *Akridge* attempted to sustain a claim for retaliation based on alleged failure to "kowtow" to her supervisor. Judge Urbina held that the plaintiff had failed to demonstrate that the behavior "was in protest of an unlawful employment practice." *Id.* Further, Judge Urbina noted that the only specific protected activity in the record there was the administrative complaint filed subsequently, and vague references to "prior complaints of discrimination" did not allow his claim for retaliation to survive. *Id.*

Additionally, Plaintiff cannot claim that his expression of an "intention" to file an EEO complaint constitutes opposition to protected activity. *See, e.g.*, *Gilbert v. Napolitano*, 670 F.3d 258, 297 (D.C. Cir. 2012) (discussing *Crawford v. Metropolitan Govt. of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) ("The opposition clause makes it 'unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter." § 2000e-3(a). The term 'oppose,' being left undefined by the statute, carries its ordinary meaning, *Perrin v. United States*, 444 U.S. 37, 42 (1979): "to resist or antagonize . . .; to contend against; to confront; resist; withstand," *Webster's New Int'l Dictionary* 1710 (2d ed.1958)). Plaintiff, like the plaintiff in *Gilbert*, cannot point to any specific

practice he sought to oppose nor any specific actions that he took in an attempt to oppose any allegedly unlawful practices. *See also Beyah v. Dodaro*, 666 F. Supp. 2d 24, 38-39 & n.15, 17 (D.D.C. 2009) (Huvelle, J.).

In *Beyah*, Judge Huvelle held that a plaintiff who told told his supervisors during a meeting that he was documenting their discussions because he believed that the supervisors were discriminating against him based on his race and gender had not participated in protected activity under Title VII and therefore could not state a claim for retaliation. *See id.* Specifically, Judge Huvelle noted first that "plaintiff cannot base his retaliation claim on a theory that he 'participated' in statutorily protected activity . . . [as] his statement that he "inform[ed] his supervisors that he was documenting their discriminatory behavior does not fall under the statutory definition of participating in an EEO 'investigation, proceeding, or hearing.'" *Id* at 38 n.15 (quoting 42 U.S.C. § 2000e-3(a)) (additional citation omitted). Next, Judge Huvelle noted that the plaintiff's statements to his supervisors did not constitute "opposition" to discrimination as there was no reasonable belief that he was opposing any unlawful employment practice when he had only stated he would document discriminatory behavior in their meetings dealing with his performance. *Id.* at 39 & n.17.

Plaintiff, just like the plaintiff in *Beyah*, cannot sustain a claim for retaliation based on the "opposition" clause as his mere expression of an intention to file an EEO complaint does not constitute opposition to any unlawful employment practice. Further, Plaintiff's complaint fails to demonstrate that Plaintiff reasonably believed he was genuinely opposing any activity that violated Title VII as Plaintiff's discussions with his male supervisors addressed his transfer to New York, not any allegedly unlawful behavior. *See id.* ("'To come within the opposition clause of Section 2000e-3(a), one must demonstrate an objectively reasonable belief that the practice

'opposed' actually violated Title VII; otherwise, the activity . . . was not statutorily protected activity.'") (quoting *Burton v. Batista*, 339 F. Supp. 2d 97, 114 (D.D.C. 2004)). Thus, Plaintiff cannot sustain a claim for retaliation based on his alleged intention to file an EEO complaint.

In fact, Hayes's only protected activity first began on May 30, 2011 – twenty months after his reassignment to the position in New York – and any allegations of retaliation that precede this date should be dismissed for failure to state a claim as Plaintiff cannot point to any protected activity for which the Agency could have retaliated against him. As Plaintiff has failed to identify in his complaint any materially adverse actions that have allegedly occurred after May 30, 2011, Plaintiff's entire complaint should be dismissed.

B. Should Plaintiff's Intent to Possibly File a Complaint Be Viewed as Protected Activity, Any Allegations Prior to April 2011 Fail to State a Claim as Plaintiff Never Properly Exhausted His Administrative Remedies

Alternatively, should the Court find that Plaintiff's "intention" to file an EEO complaint constitutes protected activity, Plaintiff's claims are untimely and should be dismissed. "'It is well-established that a federal employee may assert a Title VII claim in federal court only after a timely complaint has been presented to the agency involved.'" *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 9 (D.D.C. 2010) (Walton, J.) (quoting *Nurriddin v. Goldin*, 382 F. Supp. 2d 79, 92 (D.D.C. 2005) (Bates, J.)). "Thus, a 'federal employee filing a Title VII action must exhaust his . . . administrative remedies before seeking judicial review.'" *Id.* (quoting *Rhodes v. Napolitano*, 656 F. Supp. 2d 174, 179 (D.D.C. 2009) (Sullivan, J.) (citing *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832-33 (1976)). "Specifically, a federal employee must initiate contact with an EEO counselor within forty-five days of the date of the event believed to be the discriminatory or retaliatory action." *Id.* (citing 29 C.F.R. § 1614.105(a)(1)). Where, as here, a plaintiff foregoes or circumvents the administrative process, the "defendant agency is stripped of the opportunity to

reach an internal resolution regarding the matter." *Id.* (citing Pearsall v. Holder, 610 F. Supp. 2d 87, 98 (D.D.C. 2009) (Friedman, J.)). Further, the requirement of timely administrative exhaustion "works to preserve the court's time and resources by authorizing only the presentation of claims that have been 'diligently pursued' by the plaintiff." *Id.* (citation omitted).

It is not disputed that Plaintiff first contacted an EEO counselor on May 30, 2011. (Compl. at 17, ¶ 162.) Thus, Plaintiff's claims for retaliation related to his 2009 alleged expressions of "intention" to file an EEO complaint (if found to be protected activity) must fail as Plaintiff failed to timely exhaust his administrative remedies. In fact, any allegations of retaliation prior to April 14, 2011, should be dismissed because they occurred outside of the 45 day period. *See, e.g.*, *Hamilton*, 743 F. Supp. 2d at 9; *Drewrey v. Clinton*, 763 F. Supp. 2d 54, 61-62 (D.D.C. 2011) (Urbina, J.) (dismissing plaintiff's retaliation claims for failure to exhaust within 45 days). In particular, if the Court credits Plaintiff's claim that he expressed an "intention" to file an EEO complaint (and that this expression constitutes protected activity) to either Assistant Secretary Morton on or around July 2, 2009 (Compl. at 8, ¶ 66), or Deputy Assistant Secretary Pena on or around July 14, 2009 (Compl. at 8, ¶ 70), then the majority of Plaintiff's allegations (which relate to his transfer to the prestigious New York office, a transfer he admits he first learned about on July 28, 2009, *see* Compl. at 9, ¶ 78), should be dismissed as Plaintiff failed to exhaust his administrative remedies within 45 days of the allegedly materially adverse action, namely, the transfer to New York.

Additionally, Plaintiff's allegations related to the Office of Professional Responsibility investigations[8] opened against him are untimely. Plaintiff admits in his complaint that, at least

[8] Defendant in no way concedes that the investigations by the Office of Professional Responsibility could alone sustain a claim for retaliation as this issue remains unsettled in this jurisdiction. *See, e.g.*, *Velikonja v. Gonzales*, 466 F.3d 122, 123-24 (D.C. Cir. 2006); *Ginger v.*

by August 11, 2009, Plaintiff had learned of six different investigations into allegations of misconduct against him. (Compl. at 10, ¶ 86 *et seq.*) Again, should the Court credit Plaintiff's assertion that he expressed an "intention" to file an EEO complaint in July 2009 and that this expression constitutes protected activity, Plaintiff's allegations related to the investigations should be dismissed as Plaintiff failed to contact a counselor within 45 days of August 11, 2009. *See, e.g.*, *Hamilton*, 743 F. Supp. 2d at 9; *Drewrey*, 763 F. Supp. 2d at 61-62.

Finally, should Plaintiff attempt to argue that he first knew of the allegations related to one of the OPR investigations (Kovacs) on or about April 20, 2011, *see* Compl. at 16, ¶ 144, that argument is unavailing. *See Pearsall*, 610 F. Supp. 2d at 97 & n.6 (argument that plaintiff first learned sufficient information about a retaliation claim at a later date fails as a matter of law as "(1) the time limits for contacting an EEO counselor run from when a complainant suspects or should suspect a violation-not when a complainant obtains confirmation or evidence of a violation . . . and (2) [where] according to [the plaintiff], 'he suspected that he was the subject of retaliation as far back as June 2001.'") (citing *Aceto v. England*, 328 F. Supp. 2d 1, 7 (D.D.C. 2004)). Thus, Plaintiff's claims related to the allegedly retaliatory investigations fail to state a claim as Plaintiff failed to exhaust his administrative remedies.

Dist. of Colum., 477 F. Supp. 2d 41, 53 (D.D.C. 2007) ("The mere initiation of an investigation into a plaintiff's conduct is not an adverse employment action when it has no effect on the plaintiff's employment. *See Runkle v. Gonzales*, 391 F. Supp. 2d 210, 226-27 (D.D.C. 2005); *Ware v. Billington*, 344 F. Supp. 2d 63, 76 (D.D.C. 2004) ("[A]lthough the discipline imposed as a result of an investigation may have a sufficiently adverse effect on plaintiff's employment to be actionable, the mere initiation of the investigation does not."); *Mack v. Strauss*, 134 F. Supp. 2d 103, 114 (D.D.C. 2001), *aff'd*, 2001 WL 1286263 (D.C. Cir. Sept. 28, 2001) ("[M]ere investigations by plaintiff's employer cannot constitute an adverse action because they have no adverse effect on plaintiff's employment.")). *But see Rhodes v. Napolitano*, 656 F. Supp. 2d 174, 186 (D.D.C. 2009); *Rattigan v. Holder*, 604 F. Supp. 2d 33, 52 (D.D.C. 2009).

Therefore, all of Plaintiff's claims related to allegations about his transfer to the prestigious SAC position in New York, New York and the investigations launched by the Office of Professional Responsibility in 2009 should be dismissed.

C. Several Paragraphs of Plaintiff's Complaint Should Be Stricken

In his complaint, Plaintiff makes several unfounded allegations that are wholly immaterial and irrelevant to these proceedings and serve only as an attempt to embarrass or harass senior government officials. In fact, there can be no good-faith basis for these allegations as, in addition to their being unsupported, there is no connection between them and Plaintiff's single count claim seeking relief for alleged reprisal for participation in EEO activity. Further, these allegations were never referenced in his administrative complaint.[9] (*See* Ex. 1, Pl. Admin. Compl.) As these unsupported allegations are not only immaterial to Plaintiff's complaint, but also prejudicial and impertinent, they should be stricken from the complaint and removed from the public record.

Specifically, Paragraphs 43, 46-49, contain allegations that, even if true (which Defendant disputes) are wholly irrelevant to Plaintiff's complaint. Plaintiff, in his complaint signed by his attorney, has included allegations related to persons who do not directly supervise Plaintiff and related to events that Plaintiff himself *did not witness*. Additionally, these allegations contain material that is both prejudicial and impertinent, and has no relationship to

[9] Therefore, in addition to being irrelevant, impertinent, and impertinent within the meaning of Rule 12(f), they are probably not actionable. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Romero-Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 148-50 (D.D.C. 2005) (Lamberth, J.) ("Although *Morgan* bars recovery for, on its facts, discrete acts occurring before the statutory time period, *Morgan* has, on the whole, been understood to also bar discrete acts occurring after the time period, after the filing of an administrative complaint, when a plaintiff does not file a new complaint or amend the old complaint but instead presents these acts for the first time in federal court") (citations omitted); *Coleman-Adebayo v. Leavitt*, 326 F. Supp. 2d 132, 138 (D.D.C. 2004) (Friedman, J.).

Plaintiff's own, personal experiences as a senior-level employee at DHS. Yet Plaintiff's personal experiences – i.e., his alleged protected activity and any materially adverse actions he claims to have suffered as a result of the protected activity – are the material facts in a reprisal claim. Plaintiff does not allege that he was subjected personally to any of the conduct he attributes to Barr, and has raised no gender discrimination claim in this suit. Rather, these allegations are designed solely to harass senior government officials who have no connection to the alleged conduct that underlies his claims. The allegations in Paragraphs 43, 46-49 are therefore not relevant in any way to Plaintiff's single-count reprisal complaint. Therefore, as their sole purpose seems to be to distract from the merits (or lack thereof) of his case and to prejudice the Defendant, the allegations should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. *Wiggins v. Philip Morris, Inc.*, 853 F. Supp. at 457. Thus, as Plaintiff's complaint is not only untimely and fails to state a claim, it contains immaterial, irrelevant, and prejudicial allegations that should be stricken from the public record pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiff's complaint and strike portions of Plaintiff's complaint from the public record. A draft order is attached.

Dated: August 16, 2012
Washington, DC

Respectfully submitted,

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DRAFT ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss.

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED. Additionally, the Clerk of Court shall STRIKE Paragraphs 43, 46-49 of Plaintiff's complaint from the record. Plaintiff's Complaint is DISMISSED and this case is CLOSED.

DONE AND ORDERED in Chambers in Washington, District of Columbia, this _____ day of _____, 2012.

_____
AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE