Oral argument requested

No. 18-1096

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Sue Cirocco,
Plaintiff-Appellant,

v.

Linda McMahon,
in her official capacity as Administrator of the
United States Small Business Administration,

Defendant-Appellee.

On appeal from a final judgment of the United States District Court
for the District of Colorado, Hon. Magistrate Judge Nina Y. Wang
No. 1:17-cv-01588-NYW

OPENING BRIEF OF APPELLANT SUE CIROCCO

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Statement of Related Cases

There are no prior or related appeals.

Glossary

EEOC	U.S. Equal Employment Opportunity Commission
EEO	Equal employment opportunity
ROI	Report of Investigation
SBA	U.S. Small Business Administration

Introduction

Appellant Sue Cirocco spent over two-and-a-half years in an administrative process to resolve her Title VII claims before filing this suit against the U.S. Small Business Administration (SBA), her federal-agency employer. SBA has never disputed that Ms. Cirocco met all statutory and regulatory deadlines for advancing through that administrative process and filing suit. Rather, SBA argued in the district court—but not in the administrative process itself—that Ms. Cirocco had not cooperated in the process in two ways. The district court accepted these arguments, but both are wrong.

First, SBA argued that Ms. Cirocco failed to cooperate because she declined the agency investigator's request for a deposition. The district court's decision to accept this argument is incorrect for a host of reasons detailed below. But one reason is basic. Ms. Cirocco declined the deposition because she had not yet recovered from severe emotional injuries caused by the unlawful harassment alleged in her EEO complaint. An employee has not failed to cooperate when the purported non-cooperation was caused by the unlawful conduct that gave rise to the EEO complaint in the first place.

Second, SBA argued that Ms. Cirocco did not cooperate because she filed suit before an optional process in front of an EEOC administrative judge had ended. But the EEOC expressly instructs claimants that they may do exactly what Ms. Cirocco did once the only statutory prerequisite to suit—a 180-day investigation period—has passed, as it had here: "You also have the right to file a lawsuit anytime after the 180-

day investigation period has passed, *even if your complaint is before an EEOC Administrative Judge*."[1] It cannot be that a federal employee has failed to cooperate for doing exactly what Congress and the EEOC gave her every right to do.

For these and other reasons discussed below, this Court should reverse.

Statement of Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). App. 6. The district court granted SBA's motion to dismiss on February 14, 2018, App. 84, and entered final judgment disposing of all claims of all parties on February 15, 2018, App. 102. The notice of appeal was filed on March 15, 2018. App. 103. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

Ms. Cirocco brought this Title VII suit alleging sex discrimination and retaliation by her federal-agency employer. The district court dismissed her case for lack of subject-matter jurisdiction, holding that she had not exhausted her claims because she had not cooperated in the agency's administrative process. It is undisputed that Ms. Cirocco met all statutory and regulatory deadlines prior to filing suit and that the agency itself did not dismiss her claims for failure to cooperate in the administrative process.

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[1] EEOC, *Federal Complaint Process: Hearings*, https://www.eeoc.gov/federal/fed_employees/hearing.cfm (permalink at https://perma.cc/G8AV-MY2M) (emphasis added).

The issues are:

1. Whether Ms. Cirocco exhausted her Title VII discrimination claim.

2. Whether Ms. Cirocco exhausted her Title VII retaliation claim.

3. Alternatively, whether exhaustion of administrative remedies is a jurisdictional prerequisite to filing suit under Title VII.

Statement of the Case

Appellant Sue Cirocco maintains that she suffered sex discrimination and retaliation in violation of Title VII at the hands of her federal government employer, the U.S. Small Business Administration (SBA). The district court dismissed her suit for lack of subject-matter jurisdiction on the ground that she did not exhaust her administrative remedies. We first explain the administrative process for exhausting federal-sector employment discrimination complaints. We then describe the facts giving rise to Ms. Cirocco's claims and her compliance with the administrative process. Finally, we detail Ms. Cirocco's suit and the decision below.

I. Title VII's complaint process for federal employees

Title VII prohibits employment discrimination on various bases, including sex. 42 U.S.C. § 2000e-2. It also prohibits retaliation by employers against individuals who seek to protect their rights under Title VII. *Id.* § 2000e-3(a); 29 C.F.R. § 1614.101(b). A federal employee such as Ms. Cirocco generally must pursue administrative remedies at

her employing agency before bringing suit. *See Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 828-33 (1976).

This federal-sector administrative process has several stages. First, a federal employee must make an informal complaint to her agency within 45 days of the alleged discrimination by contacting an agency EEO counselor. 29 C.F.R. § 1614.105(a). If the matter is not resolved within 30 days, the counselor notifies the employee that she may file a formal EEO complaint with the agency. 29 C.F.R. § 1614.105(d).

The employee must then file a formal complaint within 15 days of receiving the counselor's notice. 29 C.F.R. § 1614.106(b). Filing this formal complaint starts a 180-day clock, after which the employee may file a civil suit if the agency has not resolved the complaint. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(b). Unlike private-sector employees (who may bring a lawsuit only after filing a charge with the EEOC and receiving a right-to-sue notice, 42 U.S.C. § 2000e-5(f)(1)), federal-sector employees need no notice or authorization before bringing suit. The Equal Employment Opportunity Commission (EEOC) puts it simply: a federal employee has "the opportunity to quit the process and file a lawsuit in court" once this 180-day clock has passed. EEOC, *Filing a Lawsuit in Federal Court: Points in the Administrative Complaint Process for filing a lawsuit.*[2]

[2] https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (permalink at https://perma.cc/XXG3-NR6A)

After an employee files a formal complaint, the agency conducts an investigation. The agency may unilaterally dismiss any part of a complaint that, in its judgment, fails to state a claim. 29 C.F.R. § 1614.107(a)(2). Any decision to dismiss part of a complaint is unreviewable administratively until the investigation of remaining issues is complete. *Id.* § 1614.107(b). During the investigation, the agency may seek "[a]dditional background and detailed information" from the employee through various means, including "written questions and answers," "recorded interviews (using handwritten notes or verbatim transcription)," and "exchange[s] of letters or memoranda." EEOC, *EEO Management Directive for 29 C.F.R. Part 1614* at 6-12 (Aug. 5, 2015).[3] The agency must dismiss a complaint if it lacks enough information to process it and the employee refuses to respond to written requests for additional information. 29 C.F.R. § 1614.107(a)(7). But the agency may proceed so long as it has sufficient information, even if the employee does not reply to all of the agency's requests for more information. *Id.* The agency must first give the employee formal notice and 15 days to respond before dismissing a complaint for failure to provide information. *Id.*

After concluding an investigation, the agency must provide the employee with a copy of the investigative file, 29 C.F.R. § 1614.108(f), commonly called the Report of Investigation (ROI). After the ROI is completed, the employee may request an optional

[3] https://www.eeoc.gov/federal/directives/upload/md-110.pdf (permalink at https://perma.cc/7HVT-CHP5).

hearing before an administrative judge, *id.* § 1614.108(h), or a final agency decision, *id.* § 1614.108(f). As noted earlier, the employee may go directly to court if the agency has not issued a decision once 180 days has passed from the filing of the formal complaint. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(b).

When the employee requests an optional hearing, an administrative judge employed by the EEOC assumes responsibility for adjudicating the complaint. 29 C.F.R. § 1614.109(a). Requesting and participating in this optional hearing does not cut off or suspend an employee's right to sue. As the EEOC explains to claimants, a federal employee has "the right to file a lawsuit anytime after the 180-day investigation period has passed, even if your complaint is before an EEOC Administrative Judge." EEOC, *Federal Complaint Process: Hearings*.[4] The administrative judge must dismiss the complaint while the hearing process is pending if, among other things, the employee files a lawsuit after the 180-day clock has run out. *Id.* §§ 1614.109(b), 1614.107(a)(3).

During the hearing process, if either party fails to provide relevant information, the administrative judge may take actions or make findings adverse to the non-responsive party. 29 C.F.R. § 1614.109(f)(3). The administrative judge may also grant summary judgment without a hearing, including on the merits of the EEO claim. *See id.* § 1614.109(g). Either party may appeal an administrative judge's decision to the

[4] https://www.eeoc.gov/federal/fed_employees/hearing.cfm (permalink at https://perma.cc/G8AV-MY2M).

EEOC's Office of Federal Operations. *Id.* § 1614.401(a)-(b). Unlike the decision to request a hearing, an appeal from an administrative judge's decision to the Office of Federal Operations restarts the 180-day clock for the employee to file suit. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(d).

II. Factual and administrative background

In 2009, Ms. Cirocco began work as SBA's regional Finance Division Manager. App. 85. She already held a Masters of Business Administration and was both a Certified Public Accountant and a Certified Internal Auditor. App. 36. While at SBA, she earned a Masters in Federal Financial Management. App. 36. Until the events leading to this suit, she received "positive reviews, raises, and promotions." App. 5.

A. In December 2012, Ms. Cirocco was promoted to Finance Director of the Denver Finance Center, a GS-15 position. App. 32, 85. Two male SBA employees also sought this promotion, and, after Ms. Cirocco was selected, things around the office changed. App. 85. These men, whom Ms. Cirocco now supervised, "suggested the promotion was on account of gender" and filed EEO complaints alleging reverse sex discrimination. App. 85. Although the hostility in Ms. Cirocco's office grew over the next two years, for a while Ms. Cirocco still felt that SBA management was treating her fairly. App. 57. For example, her boss, Roxanne Banks, noted in Ms. Cirocco's 2014 mid-year review that she was "doing a fabulous job." App. 85.

But then management at SBA changed. Ms. Banks left SBA and was replaced by Timothy Gribben. App. 7, 38 (noting Ms. Banks was Ms. Cirocco's "former boss"). Ms. Cirocco's supervisors and male supervisees then effectively cut her out of the chain of command, having meetings without her knowledge and overriding Ms. Cirocco's managerial decisions. App. 35, 37-38. Her supervisors "fostered a hostile work environment," in "an effort to ensure I fail in my duties" or "to force me to leave the SBA." App. 36. These supervisors moved Ms. Cirocco's office far away from her staff, publicly discredited her workplace initiatives, and prevented her from disciplining her male employees who had made derogatory remarks to other women in the office. App. 38-40.

In late 2014—the same year that Ms. Banks noted Ms. Cirocco was doing a "fabulous job"—Ms. Cirocco learned that Mr. Gribben had given her a year-end performance rating lower than she had ever received. App. 85. Mr. Gribben had not conducted the standard year-end performance review with Ms. Cirocco and told her only after he had submitted the rating to the human resources office that he based it "exclusively on alleged complaints about [her] professional conduct." App. 37. This low rating denied her an opportunity for a raise. App. 86.

B. Ms. Cirocco then pursued relief through SBA's internal EEO process. She sought informal counseling, but it did not produce a resolution. *See* App. 32. Instead, as explained below, it provoked retaliation. Ms. Cirocco then filed a formal EEO

complaint on February 4, 2015. App. 32. She attached nine appendices of supporting materials and chronologies that detailed increasingly severe discrimination over the past two years that she maintained created a hostile work environment. *See* App. 35-40.[5]

Ms. Cirocco also explained in her formal EEO complaint that her supervisors "stepped up their efforts" to create a "hostile work environment" in retaliation for using the agency's EEO process. App. 40 (listing seven relevant dates detailed in an attached chronology). "[T]he retaliation continued" after she filed her formal EEO complaint. App. 86; *see also* App. 11-14. This hostile work environment became "a living hell." App. 5. Her mental health deteriorated to the point where she could no longer work:

> I could not sleep. I could not eat. I could not concentrate. Going to work every day was torture. After many months of hostility I got to the point, I could not function.

App. 58. To recover, she had to use up all her sick leave, followed by all her annual leave, and ultimately unpaid leave. App. 5, 12.

C. SBA began investigating Ms. Cirocco's formal complaint while she was on leave. App. 50-51. The agency dismissed the bulk of her discrimination and retaliation allegations for failure to state a claim under Title VII. App. 42-45. It accepted for

[5] As noted, Ms. Cirocco's formal EEO complaint attached extensive supporting materials including a detailed chronology of relevant events, which were cross-referenced throughout her formal complaint. SBA's motion to dismiss in the district court attached the formal EEO complaint, App. 31-40, but omitted all of its attachments. Ms. Cirocco, who was proceeding pro se, did not include those attachments in her response to the motion to dismiss. Therefore, they are not in the record.

investigation only one narrow issue occurring on one date: her low year-end performance rating from Mr. Gribben. App. 42.

Ms. Cirocco was then contacted by an SBA investigator, Ralph Gay. App. 47, 50-51. Mr. Gay requested a witness list and other documents and noted that he wanted to take her testimony under oath. App. 50-51. Ms. Cirocco replied that same day, sending Mr. Gay the requested documents and adding "I hope this helps." App. 50. She explained separately that she was "not yet feeling recovered enough for [a] meeting." App. 50. Mr. Gay said that this would be okay and noted he might request an extension to the investigation period. App 50. He assured Ms. Cirocco that "[y]our recovery is the most important thing at this time." *Id.*

Mr. Gay later emailed Ms. Cirocco, seeking to take her in-person testimony with a court reporter. App. 48-50. She replied that her doctor had not cleared her for a deposition of this sort, given her mental-health condition and the stress it would impose. *Id.* She asked "[i]s there anything I can assist with in the investigation without going through the intimidation of having a court reporter present?" App. 49.

Mr. Gay replied that he had consulted with the SBA, which apparently insisted that Mr. Gay use a court reporter if he was planning to take Ms. Cirocco's testimony. App. 49. Mr. Gay then suggested that "we should wait" to consider a deposition until Ms. Cirocco's doctor cleared her for return to work. App. 49. He therefore asked Ms. Cirocco to voluntarily extend the investigation period, and she consented the same day.

App. 49. Later, he continued to press for a deposition, stating that it would be "non-confrontational." App. 48. Ms. Cirocco explained: "As I said before, it is too stressful to be deposed. My physician did not clear me for this or to return to work." *Id.* Mr. Gay replied, "if you believe that this would be stressful, I respect your judgment and will conclude the investigation without your input." *Id.* Mr. Gay then completed the investigation, and SBA issued the ROI. App. 97, 28-29.

D. Ms. Cirocco then timely requested a hearing before an administrative judge. *See* 29 C.F.R. § 1614.108(h). The administrative judge took no action on her request for more than a year—well beyond the judge's regulatory deadline for making a decision. Notice of Receipt of Hearing Request, No. 541-2016-0025X (EEOC Phoenix Dist. Office) (Dec. 13, 2016)[6]; *see* 29 C.F.R. § 1614.109(i) (setting out deadline). By this point, the statutory waiting period for filing suit in federal court had long since passed. *See* 42 U.S.C. § 2000e-16(c). And Ms. Cirocco had left the SBA for a different job rather than return to a "toxic, hostile work environment." App. 5; *see also* App. 58, 86.

The administrative judge eventually held an initial phone conference with SBA and Ms. Cirocco, who was, for the first time, represented by counsel. App. 29. At this conference, the administrative judge identified the narrow issue accepted for investigation by SBA: "Whether Complainant was discriminated against on the basis of

[6] For the Court's convenience, documents filed in the administrative-judge proceeding and cited in this brief are reproduced in Attachment B to this brief.

sex (Female), when on December 10, 2014, she learned that her FY2014 performance rating of three (3) was submitted as a final rating" to the agency's office of human resources. App. 96-97. The administrative judge issued an order setting deadlines, including completion of discovery by May 12, 2017. App. 97; Order Following Initial Conference, No. 541-2016-0025X (EEOC Phoenix Dist. Office) (Feb. 6, 2017).

Shortly after issuance of this order, the parties voluntarily suspended discovery while they attempted to settle. App. 75-77; Agency's Motion for a Decision Without a Hearing, at 2, No. 541-2016-0025X (EEOC Phoenix Dist. Office) (June 16, 2017) ("Motion for Summary Judgment") (SBA explaining that "[b]ased on settlement negotiations, the Agency verbally agreed to extend the discovery period"). But on May 12, 2017, settlement discussions broke down. *See* App. 75, 77; Motion for Summary Judgment, at 2. That afternoon—hours before the discovery period expired—SBA's attorney reinstated his discovery requests. App. 77. He indicated that Ms. Cirocco's counsel should respond "if you wish to continue before the EEOC," and suggested that "[i]f you feel it is in your client's best interest to pursue this in federal court then you should file there." *Id.* The record shows no further contact between the parties about discovery or anything else in the administrative process.

About a month later, SBA filed a motion for summary judgment before the administrative judge. App. 29, 97; Motion for Summary Judgment, EEOC No. 541-2016-0025X (EEOC Phoenix Dist. Office) (June 16, 2017). SBA's motion sought

judgment solely on the merits of Ms. Cirocco's EEO complaint, arguing that she had not shown unlawful discrimination under the familiar *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Ms. Cirocco had until July 17, 2017 to respond to the motion. Order Following Initial Conference, at 9.

III. Lawsuit and dismissal by administrative judge

A. More than two weeks before the due date for responding to SBA's motion, on June 29, 2017, Ms. Cirocco filed suit in the District Court for the District of Colorado. App. 5. She promptly notified the administrative judge, who in an order dated July 17, 2017 entitled "Order Dismissing Case Due to Filing of Federal Court Complaint," dismissed her administrative complaint solely under 29 C.F.R. §§ 1614.107(a)(3) and 1614.109(b). App. 54. Those regulations provide for dismissal if "at least 180 days have passed since the filing" of a complaint that is now "the basis of a pending civil action in a United States District Court." 29 C.F.R. § 1614.107(a)(3); *see also id.* § 1614.109(b) (administrative judges "may dismiss complaints pursuant to § 1614.107"). The administrative judge made no findings about the cooperation of either party in the administrative process. App. 54-55.

B. SBA then moved to dismiss Ms. Cirocco's federal-court complaint under Federal Rule of Civil Procedure 12(b)(1), claiming for the first time that Ms. Cirocco had not exhausted her administrative remedies because she had "fail[ed] to cooperate

with the administrative proceedings" and had "abandon[ed] her EEO Complaint." App. 21, 22.[7]

Ms. Cirocco then discharged her counsel and proceeded pro se. App. 86. She opposed the motion to dismiss by sending an email with several documents attached to the federal judge's chambers and opposing counsel, explaining that she was "out resourced at this point" because her former counsel "said it could cost up to $100K to pursue this case." App. 58.

The district court held a telephone status conference to confirm that Ms. Cirocco wanted her email and its attachments to serve as her response to the motion to dismiss. App. 104-14. The court then docketed Ms. Cirocco's email and its attachments. App. 4 (ECF No. 24); *see* App. 56-79 (Ms. Cirocco's response and relevant attachments).

Ms. Cirocco stated in the body of her email that "[m]y former attorney advised me to file my case in federal court after discussions with SBA attorneys. He did not believe the SBA attorney acted in good faith with him and started the attached [draft] Rule 11 notice as a response attached." App. 57. In the draft Rule 11 notice, Ms. Cirocco's former attorney stated, among other things, that he "attempted in good-faith to engage in constructive conversation starting in February 2017 to resolve Ms. Cirocco's case,"

[7] SBA also moved to dismiss for failure to state a claim under Rule 12(b)(6), arguing that Ms. Cirocco's complaint did not adequately plead exhaustion. The district court never reached that issue. App. 98 n.5.

and that, as part of those efforts, "the parties stayed discovery among other deadlines in the EEO process." App. 75.

Ms. Cirocco's email further explained: "This motion is a mystery to me because it requests dismissing my complaint because you do not have jurisdiction (?) and because I have not stated a claim (?)." App. 57. She elaborated:

> I followed all the procedures and processes available to open up the discussion about the discrimination and high risk environment at the SBA Finance Center. I have spent hundreds of hours, and thousands of dollars on attorney's fees, compiling documentation regarding specific details describing how I was harassed and discriminated against after I was promoted to Finance Center Director. Initially, the discriminatory hostility was not tolerated by Senior Executive Management in Washington, D.C. However, when Senior Management changed, the inappropriate behavior was not only tolerated, but encouraged. The SBA has all of this detail in the ROI.

App. 57.

C. The district court dismissed Ms. Cirocco's claims under Rule 12(b)(1) for lack of subject-matter jurisdiction. The court acknowledged a recent shift in this Court's decisions on whether exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII. App. 91-94. It noted that this Court's older holdings in *Khader v. Aspin*, 1 F.3d 968 (10th Cir. 1993), and *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304 (10th Cir. 2005), stood for the proposition that exhaustion of the federal-sector EEO process is a jurisdictional prerequisite to suit. App. 91-93. But it also observed that, in *Gad v. Kansas State University*, 787 F.3d 1032, 1039-40 (10th Cir. 2015), this Court held that recent Supreme Court cases "cast doubt" on the

jurisdictional holdings of *Khader* and *Shikles*. App. 94-95 (dist. ct. op.). Nevertheless, the district court viewed *Khader* and *Shikles* as binding. App. 95-96.

The district court then held that Ms. Cirocco had not exhausted her discrimination claim, agreeing with SBA that she "failed to participate" in the investigation and hearing phases of the administrative process. App. 98. The court noted its belief that Mr. Gay concluded SBA's investigation "without [Plaintiff's] input." App. 97 (brackets in original). The court also thought it significant that, before the administrative judge, Ms. Cirocco had not responded to the agency's discovery requests or to its motion for summary judgment. *Id.*

The district court then turned to the facts stated in the draft Rule 11 notice submitted with Ms. Cirocco's response to the motion to dismiss. That letter, the court noted, would "at a minimum, create[] an issue [of fact] as to whether Ms. Cirocco failed to cooperate during the EEOC [hearing] process, which is not properly resolved at the motion to dismiss phase." App. 98 n.4. But the court apparently concluded that it could not consider the letter's content because Ms. Cirocco had not complied with Federal Rule of Civil Procedure 11(c)(2)'s safe-harbor provision—which requires litigants to follow certain procedures before filing a sanctions motion. *Id.* (Ms. Cirocco submitted the draft Rule 11 letter as part of her response to the motion to dismiss, not as a motion for sanctions. App. 57.)

The district court also concluded that Ms. Cirocco had not exhausted her Title VII retaliation claim. It distinguished between retaliation that occurred before and after Ms. Cirocco filed her formal EEO complaint. Regarding pre-complaint retaliation, the court noted that SBA decided to dismiss all parts of her complaint other than her low year-end rating. App. 99. Because, according to the district court, Ms. Cirocco had not "sought review of the SBA's decision," she had not exhausted the pre-complaint retaliation. App. 99. As to post-complaint retaliation, the district court concluded that Ms. Cirocco had not exhausted because she had not filed a new or amended EEO complaint alleging that retaliation. App. 100.

Summary of Argument

I. Ms. Cirocco exhausted her administrative remedies because she met all statutory and regulatory deadlines and the agency itself never sought to dismiss her complaint for failure to cooperate during the administrative process. A district court may not find a failure to cooperate where the agency itself has not dismissed the complaint for that reason. In any case, even if the district court could, in the first instance, determine whether Ms. Cirocco cooperated, the record here shows that she cooperated with the agency in good faith during both the investigative and hearing phases of the administrative process. She thus exhausted her administrative remedies.

II. The district court also erred in holding that Ms. Cirocco had not exhausted her Title VII retaliation claim. First, SBA's decision not to investigate Ms. Cirocco's

retaliation claim during the administrative process does not prevent her from raising it in federal court because federal courts review an employee's Title VII complaint de novo. Further, Ms. Cirocco's request for a hearing before the administrative judge was itself a request for review of SBA's dismissal decision, so, contrary to the district court's view, she did seek review of the agency's decision. Finally, Ms. Cirocco did not have to separately exhaust post-complaint retaliation because her EEO complaint alleges a retaliatory hostile work environment, and this Court has held that employees need not separately exhaust each incident that contributes to a hostile work environment.

III. If this Court finds that Ms. Cirocco's claims are exhausted, then it need not address the district court's decision to treat exhaustion as a jurisdictional prerequisite to suit. If this Court does address the issue, however, it should reverse. Both the Supreme Court and this Court have held that preconditions to suit like exhaustion are not jurisdictional unless Congress clearly states otherwise. Here, Congress has not made exhaustion a jurisdictional requirement. Therefore, the district court erred in holding that non-exhaustion is a jurisdictional bar to suit and in dismissing Ms. Cirocco's suit under Rule 12(b)(1).

The district court's error is important for two reasons. First, the district court based its exhaustion analysis on information beyond Ms. Cirocco's complaint. Had the court viewed exhaustion correctly, as non-jurisdictional, it would have been required to address SBA's motion under Rule 12(b)(6). In turn, the court would have been limited

to the facts alleged in Ms. Cirocco's complaint and required to take as true her allegations that she exhausted. *See* App. 6. Second, and even assuming that Ms. Cirocco did not exhaust her administrative remedies, the district court's error prevented the court from considering any equitable defense, such as SBA's waiver of any non-cooperation argument by failing to raise non-cooperation in the administrative process.

Standard of Review

This Court reviews de novo the district court's Rule 12(b)(1) dismissal. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013). Ms. Cirocco maintains (at 47-49) that the district court should have reviewed SBA's motion to dismiss under Rule 12(b)(6). This Court reviews Rule 12(b)(6) dismissals de novo. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). When addressing a Rule 12(b)(6) motion, both the district court and this Court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011).

Argument

As explained below, this Court need not reach the question whether exhaustion is a jurisdictional prerequisite to suit if it finds Ms. Cirocco has exhausted her Title VII claims on the current record. Therefore, in Parts I and II below, Ms. Cirocco demonstrates that she exhausted her claims. Part I addresses both Ms. Cirocco's discrimination and retaliation claims, while Part II rebuts the district court's additional

reasons for finding that Ms. Cirocco had not exhausted her retaliation claim. Part III then explains that the district court erred nonetheless in dismissing her case for lack of subject-matter jurisdiction because administrative exhaustion is not a jurisdictional prerequisite to suit.

I. Ms. Cirocco exhausted her Title VII claims.

This section of the brief proceeds in two parts. First, Part A shows that Ms. Cirocco met all preconditions to suit because (1) she met all statutory and regulatory requirements, and (2) the judicially-inferred cooperation requirement does not apply when, as here, the agency itself did not seek to dismiss the complaint for failure to cooperate during the administrative process. This Court should reverse for these reasons alone.

Second and alternatively, Part B demonstrates that, even under the district court's flawed understanding of the cooperation requirement, Ms. Cirocco cooperated. The Court may reverse on this basis as well.

A. Ms. Cirocco met all preconditions to suit.

1. Ms. Cirocco met all statutory and regulatory requirements.

a. Title VII's federal-sector provision, 42 U.S.C. § 2000e-16, imposes only one precondition to filing a civil suit: that the complainant wait 180 days after seeking formal administrative relief. As the statute puts it, "after one hundred and eighty days from the filing of the initial charge with the department, agency or unit or with the Equal Employment Opportunity Commission on appeal … an employee or applicant for

employment, if aggrieved by the final disposition of his [agency] complaint, or by the failure to take final action on his complaint, may file a civil action." 42 U.S.C. § 2000e-16(c). Ms. Cirocco indisputably met this precondition. Her administrative complaint was filed on February 4, 2015. App. 42. This suit was filed on June 29, 2017, App. 16, more than two years later.

b. Ms. Cirocco also complied with all regulatory requirements for processing her administrative complaint. *See* 29 C.F.R. Part 1614. She timely sought informal counseling. *See* App. 32. She then timely filed a formal EEO complaint. App. 32.

Shortly after the agency concluded its investigation, the statutory timeline expired and, as just discussed, Ms. Cirocco was then authorized under Title VII to file suit without taking any further administrative steps. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(b). As the EEOC instructs federal employees, an employee may "quit the process and file a lawsuit in court," once "180 days have passed from the day you filed your complaint, if the agency has not issued a decision and no appeal has been filed." EEOC, *Filing a Lawsuit in Federal Court: Points in the Administrative Complaint Process for filing a lawsuit.*[8]

Instead of immediately filing suit, Ms. Cirocco requested a hearing before an administrative judge. *See* App. 29. From the time the administrative judge received Ms.

[8] https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (permalink at https://perma.cc/XXG3-NR6A).

Cirocco's complaint file, Ms. Cirocco waited over a year before the administrative judge even acknowledged her hearing request. Ms. Cirocco then spent another six months in the hearing process before deciding to file suit. *Notice of Receipt of Hearing Request and Investigative File, and Order Scheduling Initial Conference*, EEOC No. 541-2016-00025X, at 1 (Dec. 13, 2016) (noting that the EEOC received her request on November 10, 2015); App. 16 (district court complaint filed June 29, 2017).

The administrative judge was authorized by regulations to dismiss Ms. Cirocco's case for lack of cooperation if she thought Ms. Cirocco had not cooperated. 29 C.F.R. §§ 1614.107(a)(7), 1614.109(b). But the administrative judge did not do so. Rather, she dismissed Ms. Cirocco's administrative complaint only because Ms. Cirocco had filed a timely civil action. App. 54-55 ("Order Dismissing Case Due to Filing of Federal Court Complaint"). As the administrative judge explained, that way Ms. Cirocco would not be "simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, or creating the potential for inconsistent or conflicting decisions." *Id.* (citing 29 C.F.R. §§ 1614.107(a)(3) and 1614.109(b)).

To sum up: Ms. Cirocco met all statutory and regulatory preconditions to filing her civil suit, and no one ever suggested otherwise in the nearly two-and-a-half-year-long administrative process.

c. After Ms. Cirocco filed her district-court suit, SBA argued below, and the district court held, that Ms. Cirocco had not exhausted her administrative remedies in part

because she filed suit before the hearing process had concluded. *See* App. 97-98. This contention runs headlong into applicable regulations and precedent and should be rejected. Ms. Cirocco had no obligation to complete the hearing process and she could, without abandoning her claim, sue in court as soon as the initial 180-day period had passed.

The EEOC's regulations did not require Ms. Cirocco to complete the hearing process. To the contrary, reflecting 42 U.S.C. § 2000e-16(c), the regulations authorize a complainant to file suit "[a]fter 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken," 29 C.F.R. § 1614.407(b). When, on the other hand, a complainant does appeal (to the EEOC Office of Federal Operations), or the agency takes final action on the employee's complaint, the statute and the regulations set new timelines for suit. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(a), (c), (d). No similar provision governs the hearing process. Because Ms. Cirocco had not appealed and no final agency action had been taken on her case, her suit was governed by Section 1614.407(b), and she was authorized to sue after 180 days had passed.

Not surprisingly, then, courts of appeals have held that a complainant who chooses to file suit during the hearing process has not failed to exhaust her administrative remedies (so long as she has waited the requisite 180 days, as Ms. Cirocco did here). In *Munoz v. Aldridge*, 894 F.2d 1489, 1493-94 (5th Cir. 1990), the Fifth Circuit rejected the

government's attempt to rely on "the plaintiffs' exercise of their right to seek judicial relief after the lapse of 180 days as an indication of uncooperativeness," holding instead "that there ha[d] been no failure to exhaust administrative remedies." Relying on *Munoz*, the Fifth Circuit confirmed in *Martinez v. Department of U.S. Army*, 317 F.3d 511 (5th Cir. 2003), that "withdrawing a request for an EEOC hearing was not a failure to cooperate with the administrative process." *Id.* at 511, 512-14. *See also Thomas v. Napolitano*, 449 F. Appx. 373, 376 (5th Cir. 2011). Similarly, in *McRae v. Librarian of Congress*, 843 F.2d 1494, 1496-97 (D.C. Cir. 1988) (per curiam), the D.C. Circuit held that there was no reason to bar a plaintiff who withdrew from an administrative hearing from filing suit.

The EEOC confirms this proposition to claimants: "You also have the right to file a lawsuit anytime after the 180-day investigation period has passed, *even if your complaint is before an EEOC Administrative Judge*." EEOC, *Federal Complaint Process: Hearings* (emphasis added).[9] That is, the EEOC has affirmatively adopted Ms. Cirocco's position and expressly rejected the position advanced by SBA and embraced by the district court below. It would be intolerable for the EEOC to expressly advise claimants that they may file suit, only to have their claims dismissed in district court for doing exactly what the EEOC has said they may do.

[9] https://www.eeoc.gov/federal/fed_employees/hearing.cfm (permalink at https://perma.cc/G8AV-MY2M) (emphasis added).

2. A district court may not dismiss a complaint for failure to cooperate when the agency itself did not seek to dismiss on those grounds during the administrative process.

Courts have inferred from the regulatory structure that, to exhaust her claims, a claimant must cooperate with the agency during the EEO process. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1314-15 (10th Cir. 2005). The district court wrongly applied that requirement here by finding that Ms. Cirocco had failed to cooperate even though the agency itself had not made that finding in the administrative process.

a. A district court may not dismiss for a failure to exhaust based on non-cooperation when the agency itself never sought to dismiss the complaint on that ground during the administrative process. The purpose of exhaustion is to give "the agency the information *it* needs to investigate and resolve the dispute," *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993) (emphasis added) (quoting *Wade v. Sec'y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986)). A "[g]ood faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information" is all that cooperation requires. *Id.* For this reason, a claimed lack of cooperation becomes a failure to exhaust only when "a complainant refuses or fails to provide the agency information sufficient to evaluate the merits of the claim." *Id.*

When the agency does not have sufficient information to process a complaint, it should dismiss the complaint for failure to cooperate during the administrative process.

See 29 C.F.R. § 1614.107(a)(7). But "if sufficient information … is available," then "the complaint may be adjudicated" rather than "dismissing for failure to cooperate," even if the employee has not responded to the agency's requests for additional information. *Id.* Therefore, an agency's contemporaneous decision either to dismiss an EEO complaint for failure to cooperate or to continue to consider it on its merits indicates whether an agency believed it had information "sufficient to evaluate the merits of the claim," *Khader*, 1 F.3d at 971. The EEOC treats an agency's decision to complete its investigation and proceed with the merits of a complaint as proof that the agency had sufficient information, and thus the Commission has reversed agency dismissals for failure to cooperate after the agency takes those steps. *See Gutierrez v. Roche*, EEOC Doc. 01A23422, 2003 WL 1203781 at *1 (Office of Fed. Ops. Mar. 10, 2003); *Brown v. Potter*, EEOC Doc. 0120082926, 2008 WL 4287673 at *2-3 (Office of Fed. Ops. Sept. 12, 2008).

For these reasons, courts have held that agency dismissal for failure to cooperate is a necessary condition for a later dismissal by a district court on that ground. Where the agency does *not* dismiss and, as here, proceeds with a merits-based evaluation of the complaint, a complainant has sufficiently cooperated for purposes of exhausting her administrative remedies. *See Jasch v. Potter*, 302 F.3d 1092, 1095–96 (9th Cir. 2002). As the D.C. Circuit has explained, dismissal of a civil suit for a failure to cooperate is "justified only when the lack of cooperation forces an agency to dismiss or cancel the

complaint by failing to provide sufficient information to enable the agency to investigate the claim." *Doak v. Johnson*, 798 F.3d 1096, 1104-05 (D.C. Cir. 2015) (internal quotation marks omitted). When an agency chooses "to reach the merits of the case rather than dismiss the claim for a failure to cooperate, it has determined that sufficient information exists for such adjudication." *Jasch*, 302 F.3d at 1095.

If, on the other hand, the agency moves to dismiss a complaint during the administrative process for failure to cooperate, a court may subsequently dismiss the civil suit on the same grounds (assuming, of course, that the court finds the dismissal justified after de novo review). *See Jasch*, 302 F.3d at 1095. This Court's precedent addresses cases in this latter category. S*ee, e.g.*, *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993) (dismissing case for failure to exhaust when plaintiff was advised her complaint would be cancelled for failure to prosecute if she did not respond with requested information); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1306-07 (10th Cir. 2005) (finding failure to exhaust when EEOC dismissed charge for failure to cooperate after plaintiff did not to respond to requests for information).

b. The requirement that an agency must first dismiss for failure to cooperate during the administrative process before a district court may do so on the same basis dovetails with regulatory requirements and exhaustion's purposes.

First, dismissing a case based on a failure to cooperate for the first time in federal court (often years after the agency investigation, as occurred here) would deprive the

complainant of the notice, mandated by regulation, that she must correct her behavior or lose her claims. Before an agency may dismiss a complaint for failure to cooperate, it must issue the complainant a written notice proposing dismissal and allowing the complainant 15 days to respond and resolve any deficiency. 29 C.F.R. § 1614.107(a)(7); *Brown v. Potter*, EEOC Doc. 0120082926, 2008 WL 4287673 at *2 (Office of Fed. Ops. Sept. 12, 2008); *see, e.g.*, *Khader*, 1 F.3d at 970 (plaintiff was informed that she had 15 days to provide agency with requested information or her complaint would be dismissed). The EEOC will reverse a dismissal for failure to cooperate where the agency failed to give the required notice. *See Posey v. Snow*, EEOC Doc. 01A23427, 2003 WL 21048381, at *2 (Office of Fed. Ops. May 2, 2003); *see also Alcocer v. Rubin*, EEOC Doc. 05960833, 1998 WL 108690, at *2 (Office of Fed. Ops. Mar. 5, 1998) (confirming prior holding that an agency's failure "to provide appellant with notice of the proposed dismissal, render[ed] improper its dismissal on the basis of failure to cooperate"); *Angel v. Potter*, EEOC Doc. 01A34412, 2003 WL 22532433 at *1-2 (Office of Fed. Ops. Oct. 30, 2003).

Here, the required notice was not given to Ms. Cirocco *precisely because* SBA never proposed to dismiss for lack of cooperation. Without that notice, a complainant has no chance to cure her alleged non-cooperation, and so dismissal here for non-cooperation was inappropriate.

Second, when a failure to cooperate is raised for the first time in federal court, the district judge, rather than the agency, is put in the position of determining in the first instance exactly how much cooperation was required. A court is not well-suited to this role, especially when these determinations are being made years later and, as here, with an incomplete picture of what actually happened during the administrative process. *See supra* note 5 (describing limited nature of district-court record). Rather, "the agency itself is in a strong position to evaluate whether the complainant has sufficiently complied with its own requests for information." *Jasch*, 302 F.3d at 1095.

c. This case, in particular, underscores why a district court may consider a claim of non-cooperation only when the agency itself has dismissed for a failure to cooperate. Ms. Cirocco was never given any notice, at any step in the administrative process, that her actions might amount to a failure to cooperate that could lead to dismissal of her claims. In fact, the agency's actions suggest just the opposite. Rather than inform Ms. Cirocco of potential consequences if she did not give a deposition, the agency investigator told her that he would "respect [her] judgment" and conclude the investigation without the deposition. App. 48. He then completed the ROI based on his own investigation and Ms. Cirocco's extensive written input. *See* App. 28, 48. SBA allowed Ms. Cirocco to continue pursuing her claims on their merits before an administrative judge for another year and a half. Once the hearing process started, SBA moved the process forward, including by filing a motion for summary judgment on the

merits of Ms. Cirocco's claims. *See* Motion for Summary Judgment, EEOC No. 541-2016-0025X (EEOC Phoenix Dist. Office) (June 16, 2017). Nor did the administrative judge give any indication that Ms. Cirocco was not cooperating. Rather, as the law demands, the administrative judge dismissed Ms. Cirocco's complaint solely because she had sued in federal court after the 180-day investigation period had passed. App. 54-55; *see* 29 C.F.R. § 1614.107(a)(3); EEOC, *Filing a Lawsuit in Federal Court: Points in the Administrative Complaint Process for filing a lawsuit* (EEOC explaining to claimants that "[i]f you file a lawsuit, the agency or EEOC will stop processing your complaint").[10]

For the district court to determine, on SBA's motion two years later, that Ms. Cirocco did not cooperate because the agency did not have enough information to evaluate her claims was inconsistent with the agency's contemporaneous actions. In sum, because SBA itself did not dismiss Ms. Cirocco's claims for non-cooperation either during the initial investigation or during the subsequent hearing, the district court erred in dismissing her complaint for non-cooperation with the administrative process.

B. Alternatively, on the record here, Ms. Cirocco cooperated in "good faith" in the administrative process.

As just shown in Part A, the district court erred in dismissing Ms. Cirocco's claims because a district court may not dismiss a case for non-cooperation when, as here, the

[10] https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (permalink at https://perma.cc/XXG3-NR6A).

agency does not seek to dismiss the complaint on those grounds during the administrative process. That argument alone is dispositive and demands reversal.

To be sure, unlike here, when an agency has dismissed a complaint for non-cooperation during the administrative process, the district court may likewise dismiss on that basis if it finds on de novo review that the employee did not cooperate in "good faith." *See Wade v. Sec'y of Army*, 796 F.2d 1369, 1376-77 (11th Cir. 1986) (relied on by *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993)). Because the agency did not dismiss for non-cooperation during the administrative process here, the district court erroneously applied that good-faith standard in this case. But even overlooking that error, Ms. Cirocco's behavior constituted good-faith cooperation during both the investigative and hearing phases of the administrative process. This Court may, if it chooses, reverse on that basis.

1. Ms. Cirocco provided in good faith the information the investigator needed to evaluate her claims.

Ms. Cirocco provided the SBA investigator with sufficient information to evaluate her claims, which is all that a "good faith effort" to cooperate demands. *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993). This Court's primary cases on cooperation emphasize that "[p]erfect cooperation with the EEOC is not required" and an employee must simply make "a good faith attempt to allow the EEOC a reasonable opportunity to reach the merits of his or her charge." *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1311 (10th Cir. 2005). "It is only in cases where the complainant has engaged in delay

or contumacious conduct and the record is insufficient to permit adjudication that" the EEOC "has allowed a complaint to be dismissed for failure to cooperate." *Dawson v. Principi*, EEOC Doc. 01A13486, 2001 WL 966054 at *1 (Office of Fed. Ops. Aug. 14, 2001); *see also Walls v. Brown*, EEOC Doc. 01953005, 1996 WL 506311 at *2 (Office of Fed. Ops. Aug. 23, 1996) (dismissal for failure to cooperate is appropriate "only in cases where there is a clear record of delay or contumacious conduct by the complainant."). Thus, it is only when the employee's lack of compliance turns the administrative process into "a sham or meaningless proceeding that a charging party's non-cooperation will amount to a failure to exhaust administrative remedies." *Shikles*, 426 F.3d at 1311.

In *Khader*, 1 F.3d 968, the employee flatly (and profanely) refused to provide any clarifying information after the EEOC lost her initial submission. The employee instead responded this way:

> Mr. Frame: You're a lying son of a bitch (per your 21 Mar. 89 letter) *and I can prove it!* I have had it. How dare you try to continue to humiliate and torture me—a poor, disabled woman who has had to contend with welfare, etc. because of AAFES. Screw you. See you in court. With Total Sincerity—/s/ Megan Khader.

Id. at 970 (emphasis in original). The employing agency then, as required by regulation, sent the complainant notice that her complaint would be dismissed if she did not provide the information. *Id.*; *see* 29 C.F.R. § 1614.107(a)(7). She did not supply the information and instead sued, resulting in dismissal for failure to cooperate. *Khader*, 1 F.3d at 970-71.

In *Shikles*, 426 F.3d at 1306-07, the complainant and his attorney cancelled three telephone interviews, repeatedly failed to return the investigator's calls, and generally failed to submit any information requested by the investigator. After giving the complainant notice and over 30 days to respond and hearing nothing, the EEOC dismissed the charge for failure to cooperate. *Id.* The court then found that the combination of these facts "indicates the total lack of a good faith effort at cooperation." *Id.* at 1317.

Ms. Cirocco's case is a far cry from *Khader* and *Shikles*. Ms. Cirocco made a good-faith effort to provide the investigator, Mr. Gay, with enough information to evaluate the merits of her claims. Her formal EEO complaint included a ten-page narrative detailing the alleged discrimination and retaliation, to which she attached nine appendices with supporting materials, including an in-depth chronology. App. 35-40. When Mr. Gay first contacted her, she responded that same day, despite being on medical leave, and she responded promptly to his emails throughout. App. 48-51. When Mr. Gay asked Ms. Cirocco to send information about potential witnesses, she sent him the relevant documents and pointed him to the specific pages where she had identified relevant officials and witnesses. App. 50.

When Mr. Gay followed up, Ms. Cirocco offered to set a time to speak with him, despite her continuing medical leave. App. 50. Only when Mr. Gay asked for a formal deposition did she say that she could not agree without her physician's release. App. 50.

She then asked if "there [is] anything I can assist with in the investigation without going through the intimidation of having a court reporter present?" App. 49.

The investigator did not ask her to provide any other type of information, stating that SBA required a deposition. *Id.* When Mr. Gay next followed up, Ms. Cirocco suggested that "my doctor advised I could participate in the investigation if it does not create too much stress." App. 48. But when he again asked for a formal deposition, saying it would be non-confrontational, Ms. Cirocco reiterated that she had not been cleared by her physician for a deposition. App. 48. Mr. Gay ended their communications by stating that "if you believe that this would be stressful, I respect your judgment and will conclude the investigation without your input." App. 48.

The district court relied on the lack of a deposition to conclude that Ms. Cirocco failed to cooperate. App. 96-98. Yet the reason she was unable to bear the stress of a deposition was that it would interfere with her recovery from a mental breakdown caused by the hostile work environment at SBA. *See* App. 12, 13, 48. It cannot be right that the agency may benefit from its unlawful harassment in this manner. If, for example, an employee invoked the EEO process because an agency had refused to accommodate her efforts to manage her diabetes, leading to hospitalization, the agency could not then demand a deposition while the employee was hospitalized and dismiss that employee's claims for failure to cooperate when she could not attend. The situation here is no different.

In any case, Ms. Cirocco's experience does not compare to the complete breakdowns of the administrative process caused by the intransigent complainants in *Khader* or *Shikles*. Here, SBA actually had information on what Ms. Cirocco was alleging, including her detailed written accounts and lists of witnesses, and was able to communicate with her to request additional information if needed. Indeed, the agency completed the investigation and moved forward with her claims on their merits. App. 28, 48. Her inability to give a deposition did not alone turn the investigation into a "sham or meaningless proceeding." *Shikles*, 426 F.3d at 1311.

2. Ms. Cirocco participated in good faith in the hearing phase of the administrative process.

In support of SBA's allegations of non-cooperation before the administrative judge, SBA's lawyer, William Gery, submitted a declaration in the district court asserting that Ms. Cirocco had never served discovery requests, had not responded to SBA's discovery requests, and had not responded to SBA's motion for summary judgment in the agency hearing process. App. 29.

This declaration was incomplete and, as a result, misleading. The declaration does not mention that Mr. Gery and Ms. Cirocco's attorney were engaged in settlement negotiations during this period and had suspended discovery. App. 75. Ms. Cirocco raised these facts in her pro se response to SBA's motion to dismiss before the district court, by attaching a draft Rule 11 letter that disputed the facts relied on in SBA's motion. App. 75, 77. SBA itself acknowledged these facts in its motion for summary

judgment before the administrative judge. Motion for Summary Judgment, at 2, EEOC No. 541-2016-0025X (EEOC Phoenix Dist. Office) (June 16, 2017) ("Based on settlement negotiations, the Agency verbally agreed to extend the discovery period at the request of Complainant's counsel.").[11]

Although SBA now protests Ms. Cirocco's purported failure to respond to discovery, there is no record of the agency contemporaneously raising any failure with

[11] The district court's reasons for disregarding this factual dispute are unclear. The district court first stated that "[i]f true, the allegations in the [Rule 11] Letter would suggest that Plaintiff's participation in phases of the EEO proceeding ceased as a result of her attorney's agreement with SBA representatives and their efforts at reaching a resolution, and, at a minimum, creates an issue as to whether Ms. Cirocco failed to cooperate during the EEOC process, which is not properly resolved at the motion to dismiss phase." App. 98. This statement was followed immediately by the district court's puzzling (and contradictory) conclusion that "[p]laintiff fails to provide any account of what occurred prior to filing her lawsuit, and, therefore, Defendant's assertion that Plaintiff did not participate in the EEOC investigation remains uncontroverted." App. 98.

If this conclusion was based on the fact that Ms. Cirocco's responsive allegations were contained in a draft Rule 11 letter, it would be incorrect. Whether Ms. Cirocco complied with the safe-harbor provisions of Rule 11 is irrelevant because the letter was submitted below only as evidence to dispute the allegations of non-cooperation, not to request sanctions. Further, Ms. Cirocco was pro se when she responded to the motion to dismiss, and the court was required to "review [her] pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007).

the administrative judge, as required under EEO guidance. EEOC, *EEO Management Directive for 29 C.F.R. Part 1614*, 7-24–7-25 (Aug. 5, 2015).[12]

In an apparent attempt to portray Ms. Cirocco as uncooperative, Mr. Gery's declaration also asserted that Ms. Cirocco never responded to SBA's agency-level motion for summary judgment. App. 29. The district court relied on this assertion to find that Ms. Cirocco had "failed to respond" to SBA's summary-judgment motion. App. 97. This statement was misleading.

At the relevant time, Ms. Cirocco was under no duty to respond to the summary-judgment motion because her response was not due until July 17, 2017. *Order Following Initial Conference*, at 9, EEOC No. 541-2016-00025X (Feb. 6, 2017). Well before that date, on June 29, 2017, Ms. Cirocco had exercised her right to sue in district court, *and*, on July 7, 2017, the administrative judge had dismissed the case, ending the administrative process and making it impossible (and fruitless) for her to respond. App. 54. Characterizing this chain of events as a failure to respond incorrectly implies that Ms. Cirocco missed the deadline and was not cooperating.

* * *

To recap: The district court erred in concluding that Ms. Cirocco failed to exhaust her administrative remedies because (1) she complied with all statutory and regulatory

[12] https://www.eeoc.gov/federal/directives/upload/md-110.pdf (permalink at https://perma.cc/7HVT-CHP5).

requirements during the administrative process, and (2) the agency never sought to dismiss her complaint on non-cooperation grounds during the administrative process. In any case, as just explained, Ms. Cirocco's behavior constituted good-faith cooperation, requiring reversal.

II. Ms. Cirocco exhausted her Title VII retaliation claim.

The district court held that Ms. Cirocco had not exhausted her retaliation claim for two reasons. First, it held that Ms. Cirocco had not exhausted the part of her retaliation claim alleged in her EEO complaint because she had not challenged the agency's partial dismissal of her EEO complaint for failure to state a retaliation claim. App. 99. Second, the court held Ms. Cirocco had not exhausted the part of her retaliation claim based on retaliatory conduct that occurred after she filed her EEO complaint because she had not filed a new or amended EEO complaint. App. 100. Both holdings were wrong.

A. Ms. Cirocco may pursue her retaliation claim in federal court regardless of whether she pursued optional administrative review of SBA's partial dismissal.

Ms. Cirocco's EEO complaint described a classic hostile work environment—a range of discriminatory and retaliatory conduct over multiple years, characterized by repeated harassment, resulting in humiliation, interference with work, and psychological harm. *See Harris v. Forklift Sys.*, 510 U.S. 17, 22-23 (1993). Her EEO complaint states that her supervisors "stepped up their efforts to create a hostile work environment for me" after she "contacted EEO regarding the discriminatory and retaliatory treatment I

had been experiencing." App. 39-40 (also enumerating seven dates relevant to the harassment detailed in an attached chronology). This specific retaliation for engaging in the EEO process exacerbated a hostile work environment that Ms. Cirocco endured over the prior year. *See* App. 35, 36 (explaining that her supervisors "fostered a hostile work environment" with cross-references to chronology); *see also* App. 32 (complaint noting "working conditions" as one basis of her EEO complaint, with "various" relevant dates described in more detail in the attachments).

Despite this claim of ongoing and pervasive retaliation, SBA accepted only one narrow issue, occurring on only one date, for investigation: her low year-end rating from Mr. Gribben. App. 42. SBA dismissed all other allegations in Ms. Cirocco's EEO complaint for failure to state a claim. App. 43-45. The district court held that Ms. Cirocco failed to exhaust the part of her retaliation claim based on the retaliatory conduct described in her EEO complaint because she had not "sought review of the SBA's decision" that she had failed to state a claim. App. 99. That holding was wrong for two independent reasons.

First, an agency's administrative findings may not limit the scope of a federal court's review. Under 42 U.S.C. § 2000e-16(c), federal employees are entitled to de novo review of their claims in a federal court, *Chandler v. Roudebush*, 425 U.S. 840, 861 (1976), meaning a "new trial on the *entire* case—that is, on both questions of fact and issues of law"—"unfettered by any prejudice from the [prior] agency proceeding," *Timmons v.*

White, 314 F.3d 1229, 1233 (10th Cir. 2003) (emphasis and brackets in original). The district court's holding that, to exhaust her claim, Ms. Cirocco was required to seek review of the agency's partial-dismissal decision cannot be squared with these precedents.

The district court appears to have relied on several regulations, 29 C.F.R. §§ 1614.107(b), 1614.401(a), and 1614.402. App. 99. But those regulations do not impose any requirements on employees. Rather, they *permit* employees to pursue an *optional* hearing before an administrative judge or an *optional* administrative appeal. None purports to add preconditions to suit under 42 U.S.C. § 2000e-16(c). The district court's conclusion that Ms. Cirocco must appeal the agency's findings or lose her claims is therefore inconsistent with both those regulations and Ms. Cirocco's right to judicial review of all claims in her EEO complaint despite the agency's view of their merits. *See Dossa v. Wynne*, 529 F.3d 911, 913-14 (10th Cir. 2008) (holding that a federal employee had exhausted her Title VII claim when she lost on the merits before the agency).

Second, Ms. Cirocco *did* seek review of the SBA's decision not to investigate her claims by requesting the optional hearing before the administrative judge. EEOC's management directive governing the hearing process explains that an administrative judge "shall review" the agency's "dismissal determination if [the employee] requests a hearing on the remainder of the complaint." EEOC, *EEO Management Directive for 29*

C.F.R. Part 1614 at 5-27 (Aug. 5, 2015).[13] Once the employee "requests a hearing," the administrative judge "will evaluate the agency's reasons for believing that a portion of the complaint met the standards for dismissal" and revive the dismissed portions if the administrative judge finds that the agency's reasons were not "well taken." *Id.* So when an employee requests a hearing before an administrative judge, that request *is* a request for review of the agency's decision not to investigate parts of the employee's complaint. The district court was simply wrong that Ms. Cirocco had not sought review of SBA's decision not to investigate some of her claims. Her request for a hearing was just that.

For these two independent reasons, this Court should reverse the district court's holding that Ms. Cirocco had not exhausted the parts of her retaliation claim alleged in her EEO complaint.

B. Ms. Cirocco exhausted the post-complaint retaliation because her claim is based on a hostile work environment.

Ms. Cirocco's district-court complaint alleged that SBA's retaliation continued after she filed her EEO complaint, exacerbating the hostile work environment designed to push her out of SBA. App. 11-12. In the district court, Ms. Cirocco explained that "[a]fter filing my complaint, the intensity of the hostility increased to unbearable" as her supervisors and coworkers "escalated" the retaliation against her: "My voice was silenced. False rumors about why I was selected were spread about me freely. The

[13] https://www.eeoc.gov/federal/directives/upload/md-110.pdf (permalink at https://perma.cc/7HVT-CHP5).

resources I needed to perform my job were denied. I was publicly humiliated often. My staff was encouraged not to listen to me and my biggest concern was that I would not be able to perform the job in my job description." App. 57. "I was being set up to fail." App. 58. "I know of others at SBA who have suffered similar circumstances, including a subordinate female Asian manager that I was unable to defend." App. 58. By the time SBA's conduct forced her to take mental-health leave, the workplace had become so toxic that "every day was torture." App. 58.

The district court held that Ms. Cirocco had not exhausted her post-complaint retaliation allegations because she had not filed a new or amended EEO complaint. Citing this Court's decisions in *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), and *Eisenhour v. Weber County*, 744 F.3d 1220 (10th Cir. 2014), the district court observed that "[e]ach act of retaliation must be separately exhausted, even when acts that post-date the EEO complaint reasonably relate to others presented to the EEOC." App. 100. Those decisions invoked *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), where, to be sure, the Supreme Court explained that each "discrete act" that violates Title VII—such as "termination, failure to promote, denial of transfer, or refusal to hire"—must be exhausted, *id.* at 113-14.

But that is not the part of *Morgan* relevant here, where Ms. Cirocco has alleged a hostile work environment. As *Morgan* itself explained: "Hostile environment claims are different in kind from discrete acts" because "[t]heir very nature involves repeated

conduct" and "the cumulative effect of individual acts." 536 U.S. at 115. As a result, courts look to "the entire time period of the hostile environment" when "determining liability," including "[s]ubsequent events" that "may still be part of the one hostile work environment claim." *Id.* at 117. *See also Green v. Brennan*, 136 S. Ct. 1769, 1778 (2016) (describing *Morgan* as "holding that a hostile-work-environment claim is a single 'unlawful employment practice' that includes every act composing that claim, whether those acts are independently actionable or not"). Thus, as this Court has explained, "*Morgan* specifically provides that the hostile work environment underlying a Title VII claim may include acts taking place after the plaintiff files an EEOC charge if those acts contribute to the same hostile work environment." *Duncan v. Manager, Dep't of Safety, City & Cty. of Denver*, 397 F.3d 1300, 1310 (10th Cir. 2005).

The district court therefore erred in requiring Ms. Cirocco to separately exhaust the post-complaint retaliation that perpetuated the hostile work environment described in her EEO complaint. Neither *Martinez* nor *Eisenhour*, the cases cited by the district court, involved hostile-work-environment claims, and so they do not apply here. *See Martinez*, 347 F.3d at 1211; *Eisenhour*, 744 F.3d at 1226-27. Rather, as just explained, Ms. Cirocco did not have to file a new or amended EEO complaint to support her retaliation claim with conduct that occurred after she filed her EEO complaint because all of that conduct is part of the same retaliatory hostile-work-environment claim.

III. Alternatively, the district court erred in holding that exhaustion is a jurisdictional prerequisite to suit.

As discussed in Parts I and II, Ms. Cirocco exhausted her Title VII claims even under the district court's view that non-exhaustion under Title VII is a jurisdictional bar to suit. This Court should reverse for those reasons alone and remand for proceedings on the merits. This Court, therefore, need not reach the question whether exhaustion is a jurisdictional prerequisite to suit.

If this Court addresses this issue, however, it should reverse. This argument proceeds in two steps. Part A demonstrates that the district court incorrectly held that exhaustion is a jurisdictional prerequisite to suit. Part B shows that the district court's error prejudiced Ms. Cirocco in two ways.

A. Preconditions to suit are non-jurisdictional unless Congress clearly indicates otherwise.

Recognizing that federal courts have in the past often "confused or conflated" subject-matter jurisdiction with statutory preconditions to suit—such as time limits, complaint verification, and other exhaustion provisions—the Supreme Court has recently and repeatedly held that these preconditions are *not* jurisdictional unless Congress clearly states otherwise. *See, e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Under this clear-statement rule, the statutory text "must plainly show that Congress imbued a procedural bar with

jurisdictional consequences." *Kwai Fun Wong*, 135 S. Ct. at 1632. In other words, "Congress must do something special" to "tag" a precondition "as jurisdictional." *Id.*

In Title VII cases, whether Congress has tagged a precondition as jurisdictional "turns in large part on whether it is located in Title VII's jurisdictional subsection—42 U.S.C. § 2000e-5(f)(3)." *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1038 (10th Cir. 2015). The Supreme Court has twice found a statutory precondition for filing suit under Title VII non-jurisdictional because the requirement was not located in Section 2000e-5(f)(3). *Arbaugh,* 546 U.S. at 514-16 (employee numerosity); *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385, 393 (1982) (timeliness).

Following this Supreme Court precedent, this Court recently held in *Gad v. Kansas State University* that Title VII's verification requirement is "a non-jurisdictional condition precedent to suit" because the requirement did not appear in Section 2000e-5(f)(3), and so there was no clear statement that "jurisdiction turns on verification." 787 F.3d at 1034, 1038. The same goes for Title VII's exhaustion requirement. Congress did not clearly identify exhaustion as jurisdictional in 42 U.S.C. § 2000e-5(f)(3), which simply gives federal district courts jurisdiction over suits to enforce Title VII and does not breathe a word about administrative exhaustion. And federal-sector exhaustion—the particular issue here—stems from 42 U.S.C. § 2000e-16(c), which says nothing about jurisdiction. That is why, nearly three decades ago, the Supreme Court held that Section 2000e-16(c)'s time limit for filing suit after a final EEOC decision is *not* jurisdictional

(and, thus, subject to equitable tolling). *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93-96 (1990). It is not surprising, then, that the majority of circuits have held, in both private-sector and federal-sector cases, that Title VII exhaustion is not a jurisdictional prerequisite to suit.[14]

The conclusion that exhaustion is a non-jurisdictional precondition to suit applies here in spades because a requirement to *cooperate*, as opposed to a requirement to exhaust more generally, exists nowhere in Title VII. Rather, cooperation is, as discussed above (at 25-26), a judicially-inferred element of exhaustion. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1314-15 (10th Cir. 2005). It should go without saying that if cooperation is not expressly mentioned anywhere in a statute, Congress did not "tag" cooperation as jurisdictional in that statute. *See Kwai Fun Wong*, 135 S. Ct. at 1632. And it should also go without saying, then, that in a legal regime where *Congress* must expressly tag a precondition to suit as jurisdictional, a *court* lacks the power to do so. *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

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[14] *See Vera v. McHugh*, 622 F.3d 17, 29-30 (1st Cir. 2010); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384-85 (2d Cir. 2015); *Buck v. Hampton Twp. School Dist.*, 452 F.3d 256, 262-63 (3d Cir. 2006); *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002); *Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855-56 (6th Cir. 2013); *Teal v. Potter*, 559 F.3d 687, 691 (7th Cir. 2009); *Tyler v. Univ. of Ark. Bd. of Trustees*, 628 F.3d 980, 989-90 (8th Cir. 2011); *Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009); *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009).

In the face of these principles, the district court should not have relied on this Court's decisions in *Khader v. Aspin*, 1 F.3d 968 (10th Cir. 1993), and *Shikles*, 426 F.3d 1304 (10th Cir. 2005), to hold that exhaustion is a jurisdictional prerequisite to suit. App. 95-96. The jurisdictional holdings in those cases are relics of a prior era and have been abrogated. *Gad* addressed *Khader* and *Shikles* head-on, noting that their logic "is at odds with the Supreme Court's instructions in subsequent cases and cannot be squared with current law." *Gad*, 787 F.3d at 1039. In sum, if this Court reaches this issue, it should reverse.

B. The district court's error undermined Ms. Cirocco's ability to litigate her case in two ways.

1. The district court's erroneous ruling that exhaustion is a jurisdictional prerequisite to suit under Title VII mattered here because it permitted the court to look beyond the pleadings under Rule 12(b)(1), rather than accept the complaint's allegations as true under Rule 12(b)(6). Thus, as allowed under Rule 12(b)(1), SBA went "beyond the factual allegations of the complaint and present[ed] evidence in the form of affidavits or otherwise to challenge the court's jurisdiction." *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010).

The district court should not have addressed exhaustion under Rule 12(b)(1), however, because, as just shown, exhaustion is not a jurisdictional prerequisite to suit under Title VII. The district court should have instead reviewed SBA's motion to dismiss under Rule 12(b)(6), which would have required the district court to "accept as

true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011).

Ms. Cirocco's complaint states that she "filed an EEO complaint on February 3, 2015" and that her EEO complaint had been pending in the administrative process "for more than 180 days." App. 6. Ms. Cirocco therefore pleaded that she had exhausted her claim under 42 U.S.C. § 2000e-16(c). Accepting these allegations as true, the district court would have been required to deny the agency's motion to dismiss.[15]

The district court's consideration of Mr. Gery's declaration and its attachments was especially detrimental to Ms. Cirocco's ability to litigate her case. *See* App. 91, 96-97, 99; App. 27-30. The district court relied heavily on Mr. Gery's declaration to find that Ms. Cirocco "did not participate in the EEOC investigation." App. 98 n.4. But under Rule 12(b)(6), the district court could not have considered Mr. Gery's declaration at all.

On remand, if SBA still wishes to pursue its non-exhaustion defense, it could move for summary judgment on that issue. In that case, Ms. Cirocco would have the opportunity to respond after more fully developing the record. *Cf.* Fed. R. Civ. P. 12(d)

[15] Although Ms. Cirocco pleaded exhaustion, she maintains that non-exhaustion is an affirmative defense, and so she was "not required to specially plead or demonstrate exhaustion in [her] complaint[.]" *McQueen v. Colo. Springs School Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007) (quoting *Jones v. Bock*, 549 U.S. 199, 216 (2007)); *see also Kansas v. SourceAmerica*, 874 F.3d 1226, 1247 (10th Cir. 2017) ("the usual practice . . . is to regard exhaustion as an affirmative defense.") (quoting *Jones*, 549 U.S. at 212).

(when a district court converts a Rule 12(b)(6) motion to one for summary judgment, the non-moving party "must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

2. Because the district court (incorrectly) regarded exhaustion as a jurisdictional prerequisite to suit, it thought itself powerless to consider any equitable exceptions, such as that SBA waived its non-cooperation defense because it failed to raise that defense during the administrative proceedings. When characterized correctly as a non-jurisdictional precondition to suit, exhaustion, like any other Title VII procedural requirement, would have been "subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also, e.g.*, *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1043 (10th Cir. 2015) (remanding the "case for the district court to determine whether the verification requirement was waived"); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385-86 (2d Cir. 2015) (noting that "the mischaracterization of a Title VII plaintiff's administrative exhaustion requirement as 'jurisdictional'" has the "practical effect" of eliminating "potential equitable defenses" and remanding for consideration of those defenses). *Cf.* 29 C.F.R. § 1614.604(c) ("The time limits in this part are subject to waiver, estoppel and equitable tolling.").

When an agency fails to raise a non-exhaustion defense in the administrative proceedings and instead renders a decision on the merits, the agency's "failure to raise the issue in the administrative process may lead to waiver of the defense when the

complainant files suit." *Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997). In *Buck v. Hampton Township School District*, 452 F.3d 256 (3d Cir. 2006), the court characterized a school district's motion to dismiss on the grounds that the employee failed to verify her charge as "'an afterthought, brought forward at the last possible moment' to preclude 'consideration of the merits.'" *Id.* at 265 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952)). And "where … an employer has actual notice of a discrimination charge and chooses to respond to the merits of the claim before the EEOC without asserting lack of verification as a defense[,] it waives its right to secure dismissal of the federal court proceedings on that basis." *Id.*

Here, SBA did not raise failure to cooperate as a basis for dismissal of Ms. Cirocco's claims at any stage of the administrative process. Rather, it proceeded through the administrative process to consider the merits of Ms. Cirocco's claims. The investigator "conclude[d] the investigation" and did not stop the process because of a failure to cooperate. App. 97 (dist. ct. op. (citing App. 48)). Then, at the hearing stage before the administrative judge, SBA moved for summary judgment *solely on the merits*. *See* Motion for Summary Judgment, at 6, EEOC No. 541-2016-0025X (EEOC Phoenix Dist. Office) (June 16, 2017). And when the administrative judge dismissed Ms. Cirocco's case, she did so only because Ms. Cirocco "had a pending civil action" in the district court, not because of failure to cooperate. App. 54-55. So, SBA waived its right to raise a non-cooperation defense in the district court. *See Buck,* 452 F.3d at 264-65.

Conclusion

This Court should reverse the district court's decision and remand for proceedings on the merits of Ms. Cirocco's claims.

Respectfully submitted,[*]

/s/Brian Wolfman

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[*] Counsel gratefully acknowledge the work of Karma Orfaly Farra, Genevieve Mesch, and Stephen Schultze, students in Georgetown Law's Appellate Courts Immersion Clinic, who played key roles in researching and writing this brief.

Statement Regarding Oral Argument

Appellant Sue Cirocco requests oral argument. Oral argument would aid the Court in considering the boundaries of the exhaustion requirement in federal-sector Title VII cases and in resolving the question whether, as the district court held, that requirement is a jurisdictional prerequisite to suit, or, as Ms. Cirocco maintains, a non-jurisdictional precondition to suit.

Certificate of Compliance

1. I certify that this document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,620 words.

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Brian Wolfman

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Date: July 2, 2018 /s/ Brian Wolfman
Brian Wolfman

Certificate of Service

I certify that on July 2, 2018 I electronically filed this Opening Brief of Appellant Sue Cirocco using the Court's CM/ECF system, which will send notification of its filing to the following person:

Katherine Ann Ross (katherine.ross@usdoj.gov).

Date: July 2, 2018 /s/ Brian Wolfman
Brian Wolfman

Statutory and Regulatory Addendum

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42 U.S.C. § 2000e-5(f) - Civil action by Commission, Attorney General, or person aggrieved; … jurisdiction and venue of United States courts … .

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-16(c) - Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

29 C.F.R. § 1614.107 - Dismissals of complaints

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:

(1) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(2) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance

with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory, unless the complaint alleges that the proposal or preliminary step is retaliatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(i) Evidence of multiple complaint filings; and

(ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or

(iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.

(b) Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

29 C.F.R. § 1614.109 - Hearings

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Upon appointment, the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances.

(b) Dismissals. Administrative judges may dismiss complaints pursuant to § 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

* * *

(f) Procedures.

* * *

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(g) Summary judgment.

(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

29 C.F.R. § 1614.407 - Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

29 C.F.R. § 1614.604 - Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

Attachment A

District Court Opinion and Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01588-NYW

SUE CIROCCO,

Plaintiff,

v.

LINDA MCMAHON, in her official capacity as
Administrator of the United States Small Business Administration,

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendant Linda McMahon's Motion to Dismiss. [#7, filed October 10, 2017]. The Motion to Dismiss is before the court pursuant to 28 U.S.C. § 636(c) and the Order of Reference dated November 21, 2017 [#19]. The court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and, for the reasons stated below, GRANTS the Motion to Dismiss.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Sue Cirocco ("Plaintiff" or "Ms. Cirocco") initiated this lawsuit through counsel on June 29, 2017, by filing a Complaint asserting unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1), and for retaliation. [#1].[1] The court draws the following facts from Ms. Cirocco's Complaint, and

[1] Ms. Cirocco initially sued the United States Small Business Administration and Linda McMahon in both her individual and official capacities. *See* [#1]. Plaintiff thereafter filed a notice of voluntary dismissal as to Ms. McMahon in her individual capacity and as to the United

accepts them as true for the purposes of considering the Motion to Dismiss. Ms. Cirocco began working at the United States Small Business Administration ("SBA") in August 2009 as a Finance Division Manager. [#1 at ¶ 9]. In December 2012, she was promoted to Finance Director over two male colleagues, Mr. Bates and Mr. Berges, who "vocally expressed" their displeasure, suggested the promotion was on account of gender, and "went as far to file an EEO complaint regarding Mr. Cirocco's selection."[2] [*Id.* at ¶¶ 10-13]. In October 2013, Mr. Gribben was hired as the Deputy Chief Financial Officer and he became Ms. Cirocco's manager. [*Id.* at ¶¶ 15-16]. Ms. Cirocco alleges that Mr. Gribben and Mr. Bates began working together to her exclusion and "outside the normal chain of command." [*Id.* at ¶ 17]. At one point, Mr. Gribbon reversed Ms. Cirocco's performance review of Mr. Bates, [*id.* at ¶¶ 20-22]; he also instructed Ms. Cirocco not to issue written discipline to Mr. Bates after Mr. Bates had been insubordinate to her and verbally abusive toward one of his female co-workers. [*Id.* at ¶¶ 26, 27-28, 31-32]. Mr. Gribben also instructed Ms. Cirocco against further communicating with Mr. Bates, an employee whom she managed. [*Id.* at ¶¶ 33-34].

Ms. Cirocco alleges that not only was Mr. Gribben "complicit in supporting Mr. Bates' discriminatory behavior," he reprimanded her for retaliating against Mr. Berges for his filing of an EEO complaint, when in fact Mr. Berges "routinely confided in Ms. Cirocco about the stress he experienced in filing his complaint." [#1 at ¶¶ 35, 37-38, 40]. Ms. Cirocco asserts that Mr. Gribben gave her a poor annual review ("FY14") that was lower than any review she had ever received at the SBA, and in stark contrast to her mid-year performance review that she was "doing a fabulous job." [*Id.* at ¶¶ 42-43, 49]. When Plaintiff asked Mr. Gribben about the FY14,

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States Small Business Administration, leaving only Ms. McMahon in her official capacity. *See* [#6].

[2] "EEO complaint" refers to a complaint of discrimination filed with the Equal Employment Opportunity Commission.

he said he "based his decision on 'complaints about [her] professional conduct,'" which Plaintiff alleges referred to her "efforts to discipline Mr. Bates for verbally berating a female employee." [*Id.* at ¶¶ 45, 47]. Ms. Cirocco lost the opportunity for a raise as a result of the FY14. [*Id.* at ¶ 52].

Plaintiff filed her own EEO complaint in February 2015, and alleges the retaliation continued thereafter. She was moved to a less desirable office away from her team; she received a written reprimand for failing to treat Mr. Bates "with respect"; and she was placed under investigation in February and March 2015. [*Id.* at ¶¶ 60-62]. In March, the chief financial officer of the SBA visited the Denver office and announced that Ms. Cirocco's staff would be reduced by approximately 50 percent so as to comply with "best practices." [*Id.* at ¶ 65]. Ms. Cirocco alleges that, without adequate staffing and no change in the description of her position, it was impossible to perform her job. [*Id.* at ¶ 72]. Ms. Cirocco thereafter took a medical leave of absence and ultimately sought employment elsewhere.

Defendant filed the instant Motion to Dismiss on October 10, 2017, [#7], and, three days later, counsel for Plaintiff moved to withdraw his representation. *See* [#8, #9]. Plaintiff has proceeded *pro se* since that time. The Parties then consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), [#18]. On November 28, 2017, the court held a telephonic Status Conference at which the undersigned discussed with the Parties the Motion to Dismiss, and Ms. Cirocco represented that she had intended for certain email correspondence, which she had sent to counsel for Defendant, to serve as her response to the Motion. *See* [#22]. Accordingly, the court docketed the correspondence as Plaintiff's Response, *see* [#23], and Defendant thereafter filed a Reply, [#25]. The Motion to Dismiss is now ripe, and the court has determined that oral argument would not materially assist in its disposition.

STANDARD OF REVIEW

I. Rule 12(b)(1)

Defendant moves to dismiss the Complaint for lack of subject matter jurisdiction, arguing that Plaintiff failed to exhaust her administrative remedies because she failed to participate in the SBA's investigation of her claims and the underlying administrative proceeding. *See* [#7]. Federal courts, as courts of limited jurisdiction, must have a statutory basis for their jurisdiction. *See Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (citing *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994)). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (emphasis added). As the party seeking to invoke the jurisdiction of this court, Plaintiff bears the burden of alleging facts that support jurisdiction. *See Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013) ("Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction").

When a party's Rule 12(b)(1) motion challenges the facts upon which subject matter is based, "a district court may not presume the truthfulness of the complaint's factual allegations." *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) (citation and quotations omitted). Instead, the court has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995). The court's reliance on evidence outside the pleadings in addressing such a motion does not, as a general rule, require conversion of the motion to one for summary judgment under Rule 56. *Id.* (citation omitted).

II. Rule 12(b)(6)

Defendant also moves to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6), which authorizes a court to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations … and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). However, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citation omitted). "The burden is on the plaintiff to frame 'a complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

III. *Pro se* Litigants

Ms. Cirocco is currently proceeding *pro se* and filed her Response as a *pro se* litigant. Accordingly, the court engages in a liberal review of the Response and holds it to a less stringent standard than if it were drafted by an attorney. *See, e.g., Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, the court does not afford the Complaint the same level of review, because an attorney drafted and filed that pleading. Ultimately, regardless of the standard of review applied, the court will not act as an advocate for a *pro se* litigant, and will not assume that a plaintiff can prove facts that she has not alleged or that a defendant has violated laws in ways that a plaintiff has not alleged. *See Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009) ("[Court's] role is not to act as [*pro se* litigant's] advocate"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) ("the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues") (internal citation omitted).

ANALYSIS

Title VII prohibits discrimination against any individual "with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Harris v. Forklift Sys, Inc.*, 510 U.S. 17, 21 (1993) (citing 42 U.S.C. § 2000e–2(a)(1)); *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012); *James v. James*, 129 F. Supp. 3d 1212, 1221 (D. Colo. 2015). Title VII also makes it unlawful to retaliate against an employee for opposing practices made unlawful by that statute. *See Hansen v. SkyWest Airlines*, 844 F.3d 914, 92425 (10th Cir. 2016) (citing 42 U.S.C. § 2000e3(a)). The Equal Employment Opportunity Commission ("EEOC") is vested with the authority to enforce § 2000e–16(a). *See* 42 U.S.C. § 2000e–16(b).

The governing regulations require that an employee first attempt to resolve the matter by filing an informal complaint that triggers counseling with an EEOC Counselor, 29 C.F.R. § 1614.105(a), and, if an informal resolution is not reached, the employee must then file a formal complaint for a decision by an ALJ. *See id.* §§ 1614.105(d), 1614.106. Thereafter, the employee may file a civil action in federal district court within 90 days of receiving notice of final agency action on the employee's formal complaint by the ALJ, or after 180 days from the filing of the complaint if no final action has been taken by that time. 29 C.F.R. § 1614.407(a)-(b); 42 U.S.C. § 2000e–16(c) (stating more specifically that after 180 days from the filing of the formal complaint, the complainant may file a civil action if aggrieved by the final disposition of his complaint or by the failure to take final action on his complaint). "Although § 2000e–16(c) permits an employee to file suit in federal court alleging a violation of § 2000e–16(a)," federal employees must exhaust their administrative remedies before filing suit under Title VII. *Id.* at § 2000e-16(c). Requiring a Title VII claimant to exhaust administrative remedies serves the purpose of "giv[ing] the agency the information it needs to investigate and resolve the dispute between the employee and the employer." *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993) (citation omitted). Historically, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") has held that a plaintiff's exhaustion of his or her administrative remedies is a jurisdictional prerequisite to suit under Title VII, not merely a condition precedent to suit. *See, e.g.*, *Jones v. Runyon*, 91 F.3d 1398, 1399 & n.1 (10th Cir. 1996).

Defendant argues that Plaintiff's claims for sex discrimination and retaliation fail because she did not exhaust her administrative remedies. Specifically, after filing the EEO Complaint in February 2015, Plaintiff "failed to participate in its adjudication and ultimately abandoned her administrative claims"; and Plaintiff "never pursued any administrative remedies," with respect

to the retaliation claim. [#7 at 1]. Defendant further argues that Plaintiff's Complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) because she alleges only in conclusory terms that she exhausted her administrative remedies. [*Id.* at 2]. In support of these arguments, Defendant attaches to her Motion the declaration of William L. Gery, an attorney in the SBA's Office of General Counsel, [#7-1], to which the following exhibits are attached: Ms. Cirocco's EEO Complaint, [#7-2]; a letter from the SBA Office of Diversity, Inclusion and Civil Rights, [#7-3]; a copy of the EEO investigator's Memorandum to File regarding the EEO Complaint, [#7-4]; and an order of dismissal issued by the Administrative Law Judge ("ALJ") assigned to the matter, [#7-5].

I. State of the Law

As an initial matter, the court considers whether Plaintiff's failure to participate in the EEOC investigation and proceeding before the ALJ implicates its jurisdiction. The court has an independent obligation to consider its own subject matter jurisdiction, and, conversely, whether an issue is actually one of jurisdiction. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 1240, 1244, 163 L.Ed.2d 1097 (2006); *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). In arguing that the court lacks subject matter jurisdiction as a result of Plaintiff's failure to participate in the EEOC process, Defendant relies heavily on an unpublished case from the Tenth Circuit, *Douglas v. Norton*, 167 F. App'x 698 (10th Cir. 2006), which in turn relies upon *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993). *See* [#7 at 5]. Curiously, Defendant omits any mention or discussion of the ambiguity in the law as reflected in more recent, published decisions.[3]

[3] *Cf.* Colo. RPC 3.3 ("(a) A lawyer shall not knowingly:… (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

In *Khader*, the court stated that exhaustion is satisfied by a "[g]ood faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information"; and advised that, conversely, "when a complainant refuses or fails to provide the agency information sufficient to evaluate the merits of the claim, he or she cannot be deemed to have exhausted administrative remedies." *Khader*, 1 F.3d at 971 (finding plaintiff's "angry refusal to resubmit the requested materials," which the agency received but ultimately lost, contradicted any argument of good faith effort to comply with administrative procedures) (citation and internal quotation marks omitted). Courts within the Tenth Circuit have routinely cited to *Khader* to find that a claimant who begins an administrative procedure but abandons it to file suit in federal court fails to exhaust her administrative remedies, and accordingly, is jurisdictionally barred from suit. *See, e.g., Laughter v. Gallup Indian Medical Center*, 425 F. App'x 683, 686 (10th Cir. 2011) ("Abandoning a complaint of discrimination filed with an employing agency prior to the agency's final action on the complaint constitutes a failure to exhaust") (citing *Khader*, 1 F.3d at 971).

In 2005, the Tenth Circuit reaffirmed its position, within the context of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, that a complainant's failure to cooperate in the EEO's investigation of his charge constituted a failure to exhaust administrative remedies that deprived the district court of subject matter jurisdiction. *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304 (10th Cir. 2005). The court stated that "when a plaintiff's non-cooperation effectively prevents the EEOC's investigation and conclusion efforts such that the EEOC proceeding essentially becomes a sham or meaningless proceeding[,] [] a charging party's non-cooperation will amount to a failure to exhaust administrative remedies." *Id.* at 1311. In turn, the *Shikles* court concluded that the failure to exhaust administrative

remedies was a jurisdictional bar to suit. In so holding, the court relied on precedent from two other Circuits and several federal district courts. *Id.* at 1312 (citing *Rann v. Chao*, 346 F.3d 192, 196 (D.C. Cir. 2003) (dismissing case for lack of jurisdiction, finding that plaintiff was not only uncooperative, the agency had dismissed the administrative complaint due to the lack of cooperation) (further citations omitted). In its discussion, the court acknowledged both the EEOC's amicus curie brief that an employee's failure to cooperate with the EEOC during the administrative process does not preclude him from later proceeding against his employer in court, *id.* at 1315-16, and the Supreme Court's guidance that courts not read into Title VII and the ADEA "procedural prerequisites to suit that are not expressly provided in the text of the statute." *See id.* at 1314.

The Seventh Circuit disagreed with *Shikles* the following year, and observed that the statutory language contained no requirements to filing suit other than timely filing an EEOC charge and timely filing suit following the right to sue letter:

> There is...no basis in the language of Title VII for that position. The Tenth Circuit acknowledged the Supreme Court's "admonition that no requirements beyond those in the statute should be imposed" ... but it imposed them anyway. So the Tenth Circuit's gloss on Title VII is confessedly adventurous, and this will distress originalists. It is also in severe tension with the Supreme Court's recent observation, concerning the "exhaustion" provisions in both Title VII and the Age Discrimination in Employment Act, that "neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision." *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2390, 165 L.Ed.2d 368 (2006). Title VII imposes procedural requirements as a precondition to bringing a suit in federal court that is an original proceeding rather than one to review agency action. Doe satisfied all those requirements. Title VII does not incorporate anything like the full apparatus of exhaustion, an apparatus designed as we have noted for cases in which judicial review of an adjudication or a rule is sought.

Doe v. Oberweis Dairy, 456 F.3d 704, 710 (7th Cir. 2006). *See also Mohamed v. 1st Class Staffing, LLC*, --- F. Supp. 3d ----, 2017 WL 6383611, at *10-11 (S.D. Ohio Dec. 14, 2017) (discussing *Shikles* and *Oberweis* and applying the rationale articulated in *Oberweis*).

Almost ten years later, in 2015, the Tenth Circuit determined that Title VII's verification requirement that a claimant verify the charges against an employer is not a jurisdictional requirement, but rather a non-jurisdictional condition precedent to suit that can be waived. *Gad v. Kansas State University*, 787 F.3d 1032 (10th Cir. 2015). In so holding, the court relied on a series of Supreme Court decisions, beginning with *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), in which the Court determined that the statutory time limit for filing EEOC charges was subject to waiver and estoppel, and culminating with *United States v. Kwai Fun Wong*, --- U.S. ----, 135 S.Ct. 1625, 1632, 191 L.Ed.2d 533 (2015), in which the Supreme Court advised that "procedural rules ... cabin a court's power only if Congress has 'clearly state[d]' as much." *Id.* at 1037-40. From these cases the *Gad* court distilled a key principle that "a Title VII statutory requirement's classification as jurisdictional or non-jurisdictional turns in large part on whether it is located in Title VII's jurisdictional subsection—42 U.S.C. § 2000e–5(f)(3)." *Id.* at 1038.

The *Gad* court cast doubt on the *Khader* and *Shikles* holdings that failure to exhaust administrative remedies is a jurisdictional issue. However, *Gad* addressed only Title VII's verification requirement; and while the court observed that "the subsequent development of the law underscores the limited force our earlier cases retain today," it did not expressly overturn *Shikles*. *Id.* at 1040. *See Wickware v. Manville*, 676 F. App'x 753, 767 & n.4 (10th Cir. 2017) (acknowledging on review of an order of summary judgment that "*Gad* raises the question of whether the district court's jurisdictional rationale here remains legally viable," but stating that

"even if exhaustion is not jurisdictional, it is a condition precedent to suit"); *Hung Thai Pham v. James*, 630 F. App'x 735, 738 (10th Cir. 2015) (reviewing Rule 12(b)(1) dismissal of Title VII complaint and declining to address whether exhaustion of administrative remedies is jurisdictional on basis that defendant had "not waived or forfeited the issue," noting that the court may affirm dismissal "on a rationale different from the district court's"); *Arabalo v. City of Denver*, 625 F. App'x 851, 859-60 (10th Cir. 2015) (declining to decide the impact of *Gad* on the Circuit's "earlier decisions concluding we lacked subject-matter jurisdiction for other failures to meet Title VII's requirements," agreeing that plaintiff was required to first assert certain allegations to the EEOC as a condition precedent to suit, if not a jurisdictional prerequisite).

Since *Gad*, at least two of our sister courts have recognized the tension within the applicable Circuit law. *See Moreno v. Kansas City Steak Company, LLC*, No. 17-cv-02029-DDC-KGS, 2017 WL 2985748, at *3 (D. Kan. July 13, 2017); *Dolin v. ThyssenKrupp Elevator Corporation*, 2:16-cv-00529-MCA-GBW, 2017 WL 1551990, at *3-4 (D.N.M. Mar. 31, 2017) (putting aside the jurisdictional question and dismissing claim for plaintiff's failure to assert it in the EEOC charge). Like the *Moreno* court, while mindful of the questionable status of *Shikles* as good law, "[t]his court is bound by the published Tenth Circuit decisions unless they have been overruled by the Tenth Circuit sitting *en banc* or superseded by a contrary Supreme Court decision." *Moreno*, 2017 WL 2985748, at *3 (citations omitted). *See, e.g., In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (citing *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent)) (further citation omitted). Accordingly, despite its hesitation given the subsequent development of Supreme Court case law, the court applies here the rule of law as stated in *Shikles* and *Khader*, and finds under a Rule

12(b)(1) standard of review that Plaintiff's failure to cooperate in the EEOC investigation and subsequent proceedings divests the court of subject matter jurisdiction.

II. Application

A. Title VII Claim

The record before the court demonstrates that Ms. Cirocco filed the EEO Complaint on February 3, 2015. [#7-2]. In the EEO Complaint, Ms. Cirocco alleged that in December 2014 Mr. Gribben discriminated against her in the FY14 performance on account of her sex, and retaliated against her for "her efforts to comply with the Federal Managers' Financial Integrity Act of 1982 (FMFIA) and the 'Standards for Internal Control in the Federal Government.'" [*Id.* at 5, 6]. On February 26, 2015, the SBA issued to Plaintiff a Notice of Partial Acceptance/Dismissal (the "Notice"). [#7-3]. The Notice explained that the SBA had accepted for investigation a single issue: "Whether Complainant was discriminated against on the basis of sex (Female), when on December 10, 2014, she learned that her FY2014 performance rating of three (3) was submitted as a final rating to OHRS." [*Id.* at 2]. The Notice also explained that Plaintiff's claim for retaliation was dismissed because Plaintiff had "failed to identify a specific harm to a term, condition, or privilege of your employment where you suffered a direct, personal deprivation at the hands of the employer on a basis covered by EEO statutes." [*Id.* at 5].

The EEO assigned investigation of Ms. Cirocco's claim to Ralph Gay, who contacted Ms. Cirocco on May 28, 2015. [#7-4 at 2]. Mr. Gay wrote in a memorandum to file that Ms. Cirocco advised she had taken leave pursuant to the Family Medical Leave Act and was not physically well enough to participate in an interview. [*Id.*] Mr. Gay subsequently corresponded with Ms. Cirocco on several occasions in an effort to schedule an interview, and wrote that Ms. Cirocco ultimately informed him on August 24, 2015, that "it would be too stressful to be deposed and

that her doctor had not cleared her to be deposed." [*Id.*] Mr. Gay thereafter "conclude[d] the investigation without [Plaintiff's] input," [*id.* at 3], and, after the Report of Investigation was issued, the parties sought a hearing before the ALJ. [#7-1 at ¶ 11].

On February 6, 2017, the ALJ held a telephonic conference in which Plaintiff and her counsel participated, as did Mr. Gery. [#7-1 at ¶ 12]. The ALJ issued an order identifying the single claim, stated above, and directing the parties to initiate discovery within twenty days and complete discovery by May 12, 2017. [*Id.* at ¶¶ 13-14]. Mr. Gery thereafter sent initial discovery requests to Plaintiff's counsel; the SBA did not receive Plaintiff's responses and Plaintiff never served discovery on the SBA. [*Id.* at ¶¶ 15, 17-18]. On June 16, 2017, Mr. Gery filed a Motion for Decision Without a Hearing, to which Plaintiff failed to respond. [*Id.* at ¶¶ 19, 20]. On June 29, 2017, Plaintiff initiated this action, and filed with the EEOC a Notice of Commencement of Civil Suit. [*Id.* at ¶ 22]. On July 7, 2017, the ALJ issued an order dismissing Plaintiff's case before the EEOC on the grounds that Plaintiff had filed this lawsuit. [*Id.* at ¶ 23; #7-5]. Based on this record, the court finds that Ms. Cirocco failed to cooperate with the EEOC investigation, and thus failed to exhaust her administrative remedies.

The court notes that Ms. Cirocco filed a *pro se* Response, in which she references her former counsel's efforts to negotiate with opposing counsel and asserts a number of allegations that relate to the merits of her claims. *See* [#23]. In relevant part, Ms. Cirocco states that her "former attorney advised me to file my case in federal court after discussions with SBA attorneys," and that her attorney "did not believe the SBA attorney's acted in good faith with him [sic]." [*Id.* at 2]. Ms. Cirocco also details the retaliation she allegedly endured after she filed her EEO Complaint. Finally, she represents that she is "out resourced at this point," that her "attorney has said it could cost up to $100k to pursue this case," and "[s]ince I am only looking

to be made whole with the time I was forced to take in medical leave and I would like to retire soon, I simply cannot proceed with this expense." [*Id.* at 3]. Notably, however, Ms. Cirocco does not address Defendant's contention that she failed to participate both in Mr. Gay's investigation and the proceedings before the ALJ. As a *pro se* litigant, Ms. Cirocco is entitled to a liberal construction of her Response; however, the court is not tasked with articulating the pertinent arguments on her behalf. Neither legal training nor expertise is required for Plaintiff to describe her version of events with respect to what transpired during the EEOC investigation and before the ALJ.[4] For these reasons, I find Plaintiff fails to demonstrate the court has subject matter jurisdiction over her Title VII claim.[5]

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[4] Plaintiff attaches a copy of a Rule 11 Letter that her former attorney drafted. *See* [#23-2]. The Letter is addressed to Defendant's counsel and alleges several violations of Federal Rule of Civil Procedure 11, including that Mr. Gery's declaration "intentionally misleads the court and was made in bad faith," that Plaintiff's former counsel and Mr. Gery "attempted in good-faith to engage in constructive conversation starting in February 2017 to resolve Ms. Cirocco's case," and that, as part of those efforts, "the parties stayed discovery among other deadlines in the EEO process." [*Id.* at 1]. Plaintiff's former counsel also wrote that he had sent a separate email to Defense counsel, on October 11, 2017, "detailing more facts with regard to Mr. Gery's bad-faith affidavit." [*Id.*] In its Reply, Defendant contends that "Plaintiff has not complied with the 'safe harbor' provision of Fed. R. Civ. P. 11(c)(2)— which requires that a motion for sanctions must be served, but not filed or presented to the court until 21 days after service," and thus the allegations asserted in the Letter are not properly before the Court; Defendant additionally contends, "[i]n any event, it is wholly without merit." [#25 at 2 n.1]. If true, the allegations in the Letter would suggest that Plaintiff's participation in phases of the EEO proceeding ceased as a result of her attorney's agreement with SBA representatives and their efforts at reaching a resolution, and, at a minimum, creates an issue as to whether Ms. Cirocco failed to cooperate during the EEOC process, which is not properly resolved at the motion to dismiss phase. However, Plaintiff fails to provide any account of what occurred prior to filing her lawsuit, and, therefore, Defendant's assertion that Plaintiff did not participate in the EEOC investigation remains uncontroverted.

[5] In so finding, the court must dismiss the action; it cannot then assume jurisdiction exists and address Defendant's Rule 12(b)(6) argument in the alternative. *See Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016).

B. Retaliation Claim

Ms. Cirocco's claim for retaliation claim similarly fails for lack of jurisdiction because it was not included in the underlying EEOC proceedings. Administrative remedies generally must be exhausted as to each discrete instance of discrimination or retaliation. *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1194–95 (10th Cir. 2004). It is undisputed that the SBA accepted only the Title VII claim for investigation: "Whether Complainant was discriminated against on the basis of sex (Female), when on December 10, 2014, she learned that her FY2014 performance rating of three (3) was submitted as a final rating to OHRS." [#7-3 at 2]. The SBA explained in the Notice that Plaintiff's claim for retaliation was dismissed because Plaintiff had "failed to identify a specific harm to a term, condition, or privilege of your employment where you suffered a direct, personal deprivation at the hands of the employer on a basis covered by EEO statutes." [*Id.* at 5]. The governing regulations permit the agency to dismiss some but not all of the claims in a complaint, and advise that such a determination "is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint." 29 C.F.R. § 1614.107(b). *See id.* at §§ 1614.401(a), 1614.402 ("a complainant may appeal an agency's final action or dismissal of a complaint," and any such appeal must be filed "within 30 days of receipt of the dismissal, final action or decision"). *See also id.* at § 1614.407(c)(d) (providing that a complainant may file an action in federal court within 90 days of receipt of Commission's final decision on appeal, or after 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission). Plaintiff does not allege that she sought review of the SBA's decision from the ALJ or further appealed the ALJ's dismissal of the action; accordingly, Plaintiff cannot pursue that retaliation claim in federal court.

Additionally, in her Response, Plaintiff discusses the particulars of the retaliation she experienced after she filed her EEO Complaint. *See* [#23 at 2-3]. However, federal courts lack jurisdiction over Title VII claims that were not previously covered in a claim presented to the EEOC, and Plaintiff does not allege that she filed either a supplement to her EEO Complaint or a new EEO Complaint raising the allegations of retaliation that occurred subsequent to the filing of her initial Complaint. *See Eisenhour v. Weber Cty.*, 744 F.3d 1220, 1227 (10th Cir. 2014) ("federal courts lack jurisdiction over incidents occurring after the filing of an EEOC claim unless the plaintiff files a new EEOC claim or otherwise amends her original EEOC claim to add the new incidents") (citing 29 C.F.R. § 1601.12(b)). Each act of retaliation must be separately exhausted, even when acts that post-date the EEO complaint reasonably relate to others presented to the EEOC. *Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003) (noting this policy was particularly important where plaintiff claimed an ongoing pattern of retaliation, as Ms. Cirocco claims here). Additionally, to the extent the retaliation claim is ancillary to the Title VII claim, the court has jurisdiction to hear it only when the main administrative charge is properly before the court. *Jones v. Runyon*, 91 F.3d at 1402 (citing *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 479 (5th Cir. 1991) ("because one of plaintiff's ADEA claims was untimely and the other had not been presented first to the EEOC, claims were not properly before the court and retaliation charge had 'no charge on which to attach itself,' therefore, court had no jurisdiction over retaliation claim"). For these reasons, the court lacks subject matter jurisdiction over Plaintiff's retaliation claim.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that:

(1) Defendant Linda McMahon's Motion to Dismiss [#7] is **GRANTED**; and

(2) This action is **DISMISSED** without prejudice.

DATED: February 14, 2018

BY THE COURT:

s/Nina Y. Wang
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01588-NYW

SUE CIROCCO,

Plaintiff,

v.

LINDA MCMAHON,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Memorandum Opinion and Order [26] of Magistrate Judge Nina Y. Wang issued on February 14, 2018 it is

ORDERED that this action is DISMISSED without prejudice. It is

FURTHER ORDERED that Final Judgment is entered in FAVOR of Linda McMahon and AGAINST Sue Cirocco.

Dated at Denver, Colorado this 15th day of February, 2018.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ B. Wilkins

B. Wilkins
Deputy Clerk

Attachment B

Cited Administrative Filings

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Phoenix Status Line: (602) 640-5000
TTY (602) 640-5072
FAX (602) 640-4729
Website: www.eeoc.gov

Sue Cirocco, Complainant, v. Maria Contreras-Sweet, Secretary, US Small Business Administration, Agency.	) EEOC No. 541-2016-00025X) Agency No. 12-15-016))))))))) Date: December 13, 2016

NOTICE OF RECEIPT OF HEARING REQUEST AND INVESTIGATIVE FILE, AND ORDER SCHEDULING INITIAL CONFERENCE

Administrative Judge Nancy Griffiths has been assigned to this case. The parties are required to follow the orders of Judge Griffiths. Failure to follow these orders, may result in sanctions.

The EEOC Regulations, EEO MD-110, and information regarding process, procedures, definitions, and expectations are available on the Commission's website at www.eeoc.gov (click on *Federal Agencies*). Additional case processing information is contained in the attached Order. The parties are expected to review the attached Order and be prepared to ask any questions about the Order at the scheduling conference.

Notice of Receipt of Hearing Request and Complaint File

1. On November 10, 2015, this office received Complainant's hearing request. On November 23, 2015, this office received a complaint file from Agency in the above referenced matter.

An Administrative Hearing takes the form of a bench trial at which Complainant must prove his/her case by offering evidence that supports his/her claims in the form of live testimony of witnesses or documentary evidence. The Complainant bears the ultimate burden of proof that discrimination occurred.

Designation of Representative

2. The parties are entitled to be represented. However, the complainant is not required to be represented. The EEOC does not provide representatives for either party. Each party shall inform this

office of the name, address, telephone number, and e-mail address of his/her respective representative, (or of the Complainant himself/herself, if unrepresented) by submitting the attached designation of representation form **within five days** of receipt of this Order. A copy of the completed designation of representation form must be ***simultaneously submitted*** to your opposing party so that each party is aware of the others' representation. If a party's representative changes during the course of litigation, or if a currently unrepresented complainant obtains representation in the future, the party shall notify the Administrative Judge and the other party immediately by resubmitting the designation of representation form with updated information.

To the extent that the Agency has not yet determined the identity of its designated representative in this matter, the Agency official in receipt of this Notice, as indicated in the certificate of service, is ORDERED to forward this document to its Office of General Counsel, or whichever office designates the agency's representatives, immediately, as matters contained herein are time-sensitive. Failure to do so may result in sanctions.

Initial Conference

3. An Initial Conference in the above referenced case is scheduled for:

Monday, February 6, 2017 at 2:00 p.m. AZ time[a]

Both parties and their respective representatives must attend. The Agency is responsible for initiating the Initial Conference via telephone at the appointed time by calling Complainant and the Administrative Judge or by providing a toll free teleconference number for all the parties to call. **The Agency shall notify the Administrative Judge and Respondent how it will initiate the call at least two days in advance of the Initial Conference**.

4. Complainant and/or his/her representative, and the Agency's representative must notify both the Administrative Judge and the Agency representative of the telephone number where he/she may be reached for the Initial Conference.

5. At the Initial Conference, the parties should be prepared to discuss:

a. the issues and bases raised in the case
b. issues and bases dismissed by the Agency during its investigation of the allegations;
c. phases of litigation (e.g. discovery, dispositive motions, pre-hearing conference, hearing)
d. whether and/or to what extent discovery is necessary to supplement the existing record (e.g. what is discovery, methods of discovery, what is evidence, etc.);
e. any amendments or consolidations either party anticipates seeking;
f. settlement/mediation efforts between the parties to date, including:

    1. description of efforts made by the parties to negotiate a settlement;
    2. the last offer each party made before an impasse, if any, was reached;
    3. whether the parties would like a settlement conference facilitated by an Administrative Judge or mediator.

[a] Arizona State can operate on either PDT or MST, depending on the time of year. It is the parties' obligation to confirm the applicable time zone and appear at the correct time.

g. scheduling of key milestones during litigation (e.g. discovery end date if discovery is granted, deadlines for filing Summary Judgment/Decision Without a Hearing and associated briefing by parties);
h. general processes/procedures of the administrative hearing process (e.g. appropriate methods of communication with the Administrative Judge, proper delivery of written material to judge and parties, etc); and
i. any other matters related to the case or questions the parties may have about this process.

Requests to Reschedule

6. To request that the Initial Conference be rescheduled, a party must immediately provide a justification for the request and two alternate dates, no later than two weeks after the scheduled date, after consulting with the other party to determine availability. The administrative judge will not consider any rescheduling requests that fail to comply with these instructions.

Motions, Responses, Replies--Pleadings

7. Throughout the pendency of this case, requests to the Administrative Judge shall occur in writing by submitting a Motion (e.g. Motion for Extension of Time, Motion for Decision Without a Hearing, Motion to Amend, etc.). If a party files a Motion, the opposing party should submit a Response. After the Response, the party who submitted the motion may (but is not required to) file a Reply. Collectively, Motions, Responses, and Replies may be referred to as "Pleadings." **All pleadings, submissions, or other correspondence for the Administrative Judge should be sent directly to the Administrative Judge via e-mail or first class mail. Submitting documents through FedSEP does not constitute adequate service to the Administrative Judge.**

Each party must provide the opposing party with a copy of all pleadings that s/he sends to the Administrative Judge. The attachment of a certificate of service may demonstrate that the opposing party was provided a copy. Failure to provide a copy of submissions to the opposing party may result in return of submissions without consideration. Parties have an ongoing obligation to keep this office informed of their representatives' current mailing address, or in the case of an unrepresented Complainant, Complainant must inform this office any changes to his/her mailing address.

Discovery

8. **Not all cases require discovery.** Discovery is a phase in litigation whereby the parties, through the use of interrogatories, requests for production documents, requests for admissions, and depositions, obtain relevant evidence from the other party that is not already in the Report of Investigation. The Parties are hereby notified that they shall be prepared to discuss the necessity for and duration of discovery during the initial conference.

9. The following definitions are provided to facilitate the parties' analysis of whether discovery is warranted in this case: (1) **Interrogatories:** Written questions asked of the other party regarding relevant factual matters; (2) **Requests for Production of Documents:** Requests to the other party for relevant documents; (3) **Requests for Admissions:** A factual statement that the other party is asked to admit or deny, or if unable to do either, to so state and provide and explanation; and (4) **Depositions:** formal interview of witness taken under oath and transcribed by a court reporter.

Request for Final Agency Decision

10. A Complainant may request a Final Agency Decision (FAD), at any time during the pendency of this litigation. Such a request will result in the dismissal of this administrative hearing process and the case will be returned to the Agency for issuance of a FAD, which may be appealed to the EEOC's Office of Federal Operations. Should Complainant wish not to proceed with this administrative hearing process, a FAD request form is attached.

Sanctions

11. The Parties are also hereby notified that failure to follow this order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. §1614. 109(f)(3). These sanctions include the following:

a. Draw an adverse inference that the requested information or the testimony of the requested witness would have reflected unfavorably on the party refusing to provide the requested information;
b. Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
c. Exclude other evidence offered by the party failing to produce the requested information or witness;
d. Issue a decision fully or partially in favor of the opposing party; or
e. Take such other actions as appropriate including the denial of the right to a hearing (as noted above).

It is so ORDERED.

For the Commission:

s/ Nancy Griffiths
Nancy Griffiths
Administrative Judge
Telephone: (602) 640-4632
Nancy.Griffiths@eeoc.gov

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing **NOTICE OF RECEIPT OF HEARING REQUEST AND INVESTIGATIVE FILE AND ORDER SCHEDULING INITIAL CONFERENCE** within five (5) calendar days after the date it was sent *via* First Class Mail. I certify that December 13, 2016, the foregoing Order was sent *via* First Class Mail to the following:

Complainant

Sue Cirocco
30 Garfield Street, Unit B
Denver, CO 80206

Agency

Sandra L. Winston
US Small Business Administration
409 Third Street, SW, Suite 600
Washington, DC 20416

/s/ Julia Darby
Federal Hearings Unit

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Phoenix Status Line: (602) 640-5000
TTY (602) 640-5072
FAX (602) 640-4729
Website: www.eeoc.gov

Sue Cirocco, Complainant, v. Maria Contreras-Sweet, Secretary, US Small Business Administration, Agency.	) EEOC No. 541-2016-00025X) Agency No. 12-15-016)))))) Administrative Judge Nancy Griffiths)) Date: December 13, 2016

DESIGNATION OF REPRESENTATIVE

OPTION A: ELECTION TO PROCEED WITH A REPRESENTATIVE

I hereby designate the following individual as the representative for the __ COMPLAINANT or ___ AGENCY in the above-referenced EEOC case:

_____
Name of Representative Telephone No. Facsimile No.

Address: _____
_____
_____
E-mail Address: _____

OPTION B: ELECTION TO PROCEED WITHOUT A REPRESENTATIVE

I, _____, will proceed without a representative in the above-referenced EEOC case. I understand that I must notify the Administrative Judge and the agency immediately if I obtain representation at a later date.

_____
Signature of Party Date

Complainant, please also provide your current address, telephone number, fax number, and E-mail Address:

_____
_____
_____
E-mail Address: _____

_____,Complainant	)	
	)	
v.	)	EEOC #
	)	
	)	Agency #
	)	
_____,Secretary	)	
	)	
Department of_____	)	
Agency .	)	

REQUEST TO WITHDRAW HEARING REQUEST AND FOR A FINAL AGENCY DECISION

TO: _____
ADMINISTRATIVE JUDGE

FROM: _____
COMPLAINANT

PLEASE BE ADVISED THAT I NO LONGER WISH TO PROCEED WITH THIS ADMINISTRATIVE HEARING PROCESS. INSTEAD, I NOW REQUEST A FINAL DECISION FROM THE AGENCY, WITH ALL OF MY APPEAL RIGHTS TO THE EEOC, IN WASHINGTON, D.C., ALONG WITH THE RIGHT TO PROCEED IN THE APPROPRIATE FEDERAL DISTRICT COURT, AT A LATER TIME, IF NECESSARY. PLEASE SEND MY CASE TO THE APPROPRIATE AGENCY OFFICIAL, FOR PROCESSING, CONSISTENT WITH THIS REQUEST.

_____ _____
DATE SIGNATURE
COMPLAINANT OR REPRESENTATIVE

(Return this form to the Administrative Judge only if you no longer want a hearing.)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
Direct Line: (602) 640-4632
TTY (602) 640-5072
FAX (602) 640-4729
Nancy.Griffiths@eeoc.gov

Sue Cirocco, Complainant, v. Maria Contreras-Sweet, Secretary, US Small Business Administration, Agency.	) EEOC No. 541-2016-00025X) Agency No. 12-15-016)))))))) Date: February 6, 2017

ORDER FOLLOWING INITIAL CONFERENCE

An initial conference on the above-referenced case was conducted by telephone on February 6, 2017 during which the parties and the Administrative Judge discussed the case status including, but not limited to, the issues to be addressed in the case, any other pending EEO complaints filed by Complainant, discovery, settlement, and Summary Judgment. A summary of rulings is as follows:

PRESENT:

Complainant: Sue Cirocco
Email: Cirocco30b@gmail.com

Complainant's Representative: Evan Lange
Email: elange@robwiley.com

Agency Counsel: William Gery
Email: William.gery@sba.gov

GOVERNING PROCEDURES:

Title 29 of the Code of Federal Regulations, Section 1614.109 (cited as 29 C.F.R. § 1614.109), and Chapter 7 of the Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, revised August 5, 2015 (cited as EEO-MD-110, Ch. 7 (2015)), govern the conduct of hearings. The regulations and EEO-MD-110 are available on the EEOC's website at: https://www.eeoc.gov/federal/directives/md110.cfm.

The Federal Rules of Evidence (cited as Fed.R.Evid.) will be followed in hearings. The Federal Rules of Evidence are available at: www.uscourts.gov/file/rules-evidence.

This Order, in conjunction with the regulations, EEO-MD-110, and the Federal Rules of Evidence, governs the hearing of this case; **the Commission expects the parties to read, be familiar with, and to follow them in all respects.**

If the complainant is not currently represented by an attorney and wishes to retain counsel, s/he should do so immediately. Failure to obtain representation promptly will not be grounds for a delay in the proceedings. A complainant is expected to proceed timely and properly with his or her complaint, whether or not s/he is represented.

The complainant is reminded that the hearing takes the form of a trial at which s/he is expected to prosecute his or her case by eliciting testimony and producing documentary evidence as in a court. If representing oneself, a complainant must have a thorough understanding of standards of proof for an employment discrimination case and be prepared to present his or her case in accordance with these standards of proof. A complainant at all times bears the "ultimate burden of persuasion" to show that discrimination occurred. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993).

CLAIMS AND BASES:

Whether Complainant was discriminated against on the basis of sex (female), when on December 10, 2014, she learned that her FY2014 performance rating of three (3) was submitted as a final rating to OHRS.

The parties confirmed this statement of the claims during the initial conference.

FedSEP: Regardless of whether an Agency uploads documents using the FedSEP system, all documents (i.e. pleadings, motions, replies, correspondence) must be emailed directly to the Administrative Judge at Nancy.Griffiths@eeoc.gov. **Submitting documents through FedSEP does not constitute adequate service to the Administrative Judge.**

ELECTRONIC COPY OF CASE FILE:
The Agency shall send Complainant's representative and me a CD containing an electronic copy of the Investigative Record, **with bookmarks for all tabs describing the contents of each tab**, no later than **March 8, 2017.** *See* EEOC Management Directive ("MD") 110, Ch. 6 VIII(E) at 6-21. The Record shall be Bates Stamped consecutively throughout.

OTHER CURRENT COMPLAINTS: Complainant has no other cases before the EEOC and no other EEO complaints before the Agency.

SETTLEMENT NEGOTIATION NOTICE:

The parties are hereby ordered to work cooperatively with each other to file with the Administrative Judge a **Joint** Notice of Settlement Negotiation **no later than March 8, 2017,** including the following:

1. description of efforts made by the parties to negotiate a settlement (including dates of communications, whether discussions occurred by phone or in-person, duration of discussions);

2. the last offer each party made before an impasse, if any, was reached, and

3. whether the parties would like a settlement conference facilitated by an EEOC administrative judge or mediator.

DISCOVERY:

Discovery is the parties' opportunity to obtain additional relevant information to support their claims or defenses. Each discovery request should be tailored to the specific claims or defenses in this case.

The parties are expected to cooperate during discovery and have assured me that they will do so. The parties are discouraged from making blanket objections. The parties shall provide requested material that is relevant or could lead to relevant evidence.

Commencement: The Parties may commence discovery immediately. **Discovery must be initiated within 20 days of the date of this order.** If a party does not submit a timely discovery request, the Judge may determine that the party has waived the right to pursue discovery.

Complete: **May 12, 2017**. A party must respond to a request for discovery within 30 calendar days from receipt of the request. Requests for discovery and objections to such requests must be specific. A notice of deposition does not require a written response. However, any objection to a notice of deposition must be served promptly on the moving party. A deposition may be noticed and taken at any time during the discovery period.

The parties shall not unilaterally, or by agreement, change discovery or other deadlines set by the Administrative Judge. Prior to entering into any informal agreement that could have an impact on deadlines

set by the Administrative Judge, they should move for an extension of the deadline.

Any request for an extension of time must be made prior to the deadline set forth above.

Disclosure Obligations: Any document a party intends to use in summary judgment pleadings or at hearing must be disclosed prior to the discovery deadline by the party who intends to use it, whether or not it is expressly requested during discovery. Failure to disclose may result in exclusion of the document from consideration at summary judgment and hearing. Material found after the close of discovery may be disclosed if good cause exists for not finding and disclosing the material sooner.

Discovery Definitions:

Interrogatories: Written questions asked of the other party regarding relevant factual information.

Requests for Production of Documents: Written requests to the other party asking for relevant documents.

Requests for Admissions: A factual statement that the other party is asked to admit or deny or, if unable to admit or deny, to so state and provide explanation.

Depositions: A formal interview of a witness taken under oath and transcribed by a court reporter.

Limits:

Interrogatories shall be limited to one set. The set of interrogatories shall contain no more than thirty (30) questions including subparts.

Requests for Production of Documents must be specific and identify the documents or types of documents requested. Requests for Production of Documents shall contain no more than thirty (30) requests including subparts.

Requests for Admissions shall not exceed thirty (30) in number including subparts. This limit does not apply to admissions relating to the authenticity of documents.

Depositions – ***The limits set forth in Rule 30, Fed. R. Civ. P., governing the number and time for depositions shall apply. (10 depositions per side, no more than seven hours in length).*** The Agency must make employees available for deposition. In addition, the Agency must arrange for the appearance at deposition of former employees currently employed by the federal government.

Requests for Medical and/or Tax Records: Agency requests for the medical records of complainants shall only occur (1) to address disability status or the right to reasonable accommodation in disability cases, or (2) when a complainant is asserting a claim for compensatory damages and has sought medical treatment for stress-related conditions. These Agency requests for medical records shall be narrowly tailored to the condition(s) and temporal scope at issue. **When a complainant is *pro se*, agencies shall request the Administrative Judge's prior permission before making requests for medical information**. **The requests, including medical releases, must be attached to the Motion.** A complainant shall contact the Judge to request a protective order if the complainant believes the Agency is seeking overly broad or intrusive medical records. EEOC Management Directive ("MD") 110, Chapter 7, § IV(B)(4).

Agency requests for wage information shall only occur when the complainant is making a back pay claim and has received compensation for subsequent employment. **When a complainant is *pro se*, agencies shall request the Administrative Judge's prior permission** before requesting production of a complainant's tax records except with respect to W-2 (earned income) and Schedule C (profit or loss) documents. MD-100, Ch. 7, § IV(B)(4).

Discovery motions: The parties shall **not** file written discovery motions (such as a motion to compel) without leave of the Judge. If a discovery dispute arises, the parties shall contact the Judge to request a telephone conference concerning the dispute within **7 days after receipt of a deficient response or after the response to the discovery is due, whichever occurs first.**

<u>However, parties shall not contact the Judge without first seeking to resolve the matter through personal consultation and sincere effort, via telephone at minimum.</u>

A request for a telephone conference shall be made by sending **an e-mail to the Administrative Judge**.

- The **subject line of the e-mail** shall state the **case name and words "discovery dispute"** (i.e. Smith v. DOJ/Discovery Dispute).
- The e-mail shall clearly identify which discovery requests and corresponding responses are at issue.
- The e-mail shall **attach the discovery request and corresponding discovery response** at issue.
- Only those requests and corresponding responses **at issue** shall be attached to the email.
- The body of the email shall **identify 3 options for dates and times** that both parties are available for the telephone conference.
- Such e-mails must be copied to the opposing party.

All discovery requests and responses are sent solely to the opposing party and not to the Judge. Requests and responses sent to the Judge will be discarded. The parties must seek approval from the Judge to extend discovery deadlines.

WITNESS DISCLOSURE STATEMENTS: Each party shall file a preliminary a Witness Disclosure Statement **within 15 days of receiving this order**. This disclosure shall identify by name, mailing address, phone number, title, and whether the witness is currently a federal employee, every witness a party wants to have at the administrative hearing. For each person identified, a description should be provided about what *relevant* testimony is expected to be provided by the witness. For example:

John Doe, Supervisor
Address
Phone

Mr. Doe was Complainant's supervisor and the selecting official in the promotion at issue. He will testify about Complainant's past performance evaluations and disciplinary actions, the job selection process, and his reasons for not selecting Complainant for promotion. Mr. Doe continues to work for the Agency.

Throughout discovery, **the parties shall supplement the witness disclosure statements to the other party if they determine that there are additional witnesses whose testimony they may seek.** If witnesses are not disclosed, the opposing party may seek to have them excluded from the hearing on that basis.

SUBMISSION OF MOTIONS, RESPONSES, and REPLIES ("PLEADINGS"):

Any request to the Administrative Judge is made by submitting a motion.

1. **Case Identifying Information:** All pleadings should use the case caption above, or, at minimum, set forth the parties name, the case number, and the date of submission.

2. **Method of Submission:** Motions should generally be submitted by e-mail to the Judge at: nancy.griffiths@eeoc.gov. Motions submitted by e-mail must not contain: dates of birth, social security numbers, or any medical issue, including disability. Motions which **exceed 20 pages** including attachments **must also be submitted to the judge by mail**.

   The **subject line of any e-mail must** reflect the case name and name of the motion (i.e. Doe v. Dep't of Justice/Complainant's Motion for Extension).

3. **Submission of Responses and Replies to Motions:** If a party files a Motion, the opposing party shall submit a response within 10 days of receipt of the Motion. The parties shall have 15 days to submit a response to a Motion for Summary Judgment. The parties shall have 5 days to submit a Reply to a response.

   No surreplies are allowed without advance leave of the Administrative Judge.

4. **Proposed Order:** A proposed order, **in Word format**, must be attached to any motions that are filed. The requirement to provide a proposed order does not apply to dispositive motions, such as a motion to dismiss or motion for decision without a hearing (motion for summary judgment).

5. **Page Limits for Motions:** Motions, responses, and replies are not to exceed the following page limits:

   Motion for Decision Without A Hearing (also known as Motion for Summary Judgment), and Response thereto: 30 pages, excluding exhibits.

   Reply: 10 pages, no exhibits.

   All other Motions and Responses: 15 pages, excluding exhibits, Reply: 5 pages, no exhibits.

   Any content beyond the page limits allowed will not be considered.

6. **Exhibits:** If any exhibits are submitted, they must be submitted with the pleadings and cited in the pleadings. Exhibits are to be attached only if cited in the Motion or Response to support the statements therein. If depositions are attached as exhibits, only relevant excerpts cited in the pleadings shall be included. The parties shall not send entire depositions as exhibits. The parties shall not send case law as exhibits.

   An index of attached exhibits shall be included with a Motion or Response. The index shall contain sequential numbers or letters for each exhibit, and shall briefly describe the contents of the exhibit. The exhibits shall be tabbed. No exhibits shall be attached to Replies.

   Any request for an extension of time must be made prior to the deadlines set forth above.

Service of Copies: Each party **must provide the opposing party with a copy** of all pleadings that s/he sends to the Administrative Judge. Failure to provide a copy of submissions to the opposing party may result in return of submissions without consideration. Every pleading shall include a **Certificate of Service** reflecting that it was served on the opposing party, the manner in which it was served (*i.e.*, by U.S. Mail, e-mail, FAX, or hand-delivery) and the date on which it was so served. (As an example, see the Certificate of Service at the end of this Order.)

AMENDMENT OF COMPLAINTS

Pursuant to 29 C.F.R. § 1614.106(d), the complainant may move to amend his/her complaint to add claims that are like or related to the original complaint. In order to amend the complaint to add any claims about conduct that already has occurred, the complainant shall submit a motion **within thirty (30) days** of receipt of this order stating:

- the new claim,
- the date(s) when it occurred,
- and why it is like or related to the original complaint.

The Administrative Judge may amend the original complaint to include the new claim(s) if he/she finds the new claim is like or related to the original complaint.

SUMMARY JUDGMENT (MOTION FOR DECISION WITHOUT A HEARING):

Motions for Summary Judgment, if granted, result in a decision in favor of the party who submitted the motion. Therefore, the party opposing summary judgment must set forth facts to show that a dispute exists and a hearing is required.

Motions for Summary Judgment and Responses must contain citations to the evidence for each fact set forth. Citations may be to the Record of Investigation ("ROI"). The parties also may attach, and cite, additional evidence, including a declaration or affidavit by witnesses as well as any other relevant evidence.

Due Date:	**June 16, 2017**
Response Date:	**July 17, 2017**
Reply Date:	**July 29, 2017**

Any request for an extension of time must be made prior to the deadlines set forth above.

Surreplies are not allowed without advance leave of the Administrative Judge.

These pleadings should be sent to the Administrative Judge by e-mail as well.

The Report of Investigation is automatically part of the record and the parties may refer to it or its contents at any time without attaching portions as exhibits.

CONTACT WITH THE ADMINISTRATIVE JUDGE: E-mail is a means of submitting pleadings as attachments. Other than submitting pleadings (such as motions) by e-mail attachment, parties and their representatives **shall not** communicate with the Administrative Judge by e-mail unless authorized by the Administrative Judge or in extraordinary circumstances. This prohibition includes copying the Administrative Judge on communications between parties that do not fall within the excepted circumstances. All e-mails sent to the Administrative Judge **must also be addressed to the opposing party**.

The Administrative Judge does not consider or respond to text, including questions or comments, contained in the body of an e-mail to avoid confusion over whether an e-mail should be considered a motion. All contact with the Administrative Judge **must** be made through written motion and/or correspondence.

E-mails that do not meet these requirements will not be read and will be discarded without notice to the parties.

The parties are reminded that the Administrative Judge **will not** entertain telephone conversations with one party in the absence of the other party to address matters beyond questions of procedure.

CONTACT INFORMATION:

Assigned Administrative Judge:	Nancy Griffiths
Tel:	602-640-4632
FAX:	602-640-4729
Email:	nancy.griffiths@eeoc.gov
Address:	3300 N. Central Ave. Ste. 690 Phoenix, AZ 85012

PARTY CONTACT INFORMATION:

The parties shall submit a notice if there are any changes in their contact information.

FAQs REGARDING THE HEARING PROCESS:

The parties are encouraged to visit the EEOC's website for useful information regarding the hearing process. The link is as follows:
https://www.eeoc.gov/federal/fed_employees/faq_hearing.cfm

[[SUPPLEMENTATION OF RECORD: The Agency shall supplement the ROI by submitting the following material no later than **, 2017.** The documents shall be numbered, tabbed, and attached to Notice of Supplementation of Record. If requested documents are already in the Record, the Agency may so advise in the Notice, and identify where they are located.]]

SANCTIONS: Failure to submit ordered material, to appear for scheduled events, or otherwise comply with the orders of the Administrative Judge may result in sanctions, up to and including dismissal or default judgment, in accordance with EEOC Regulations and Commission case law. *See* 29 C.F.R. § 1614.109(f)(3); EEO MD-110, Chapter 7, Section III(D)(10).

It is so ORDERED.

For the Commission:

Nancy Griffiths
Nancy Griffiths
Administrative Judge

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ORDER within five (5) calendar days after the date it was sent *via* first class mail and one (1) day after it was sent via facsimile or e-mail. I certify that, on February 6, 2017, the foregoing ORDER was sent to the following in the manner noted:

Complainant

Sue Cirocco
152 Meadow Glen Circle
Coppell, TX 75019
Cirocco30b@gmail.com

Complainant's Representative

Evan Lange
Rob Wiley PC
2613 Thomas Ave.
Dallas, TX 75204
elange@robwiley.com

Agency's Representative

William L. Gery
Small Business Administration
409 3Rd St. SW
Washington, DC 20416
William.gery@sba.gov

Nancy Griffiths
Nancy Griffiths
Administrative Judge

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

Sue Cirocco, Complainant,	)	
v.	)	EEOC No. 541-2016-0025X Agency No. 12-15-016
Linda McMahon, Administrator, U.S. Small Business Administration, Agency.	)	Administrative Judge Nancy Griffiths Date: June 16, 2017

AGENCY'S MOTION FOR A DECISION WITHOUT A HEARING

Pursuant to 29 C.F.R § 1614.109(g), the U.S. Small Business Administration ("Agency" or "SBA"), through its undersigned attorney, hereby moves for a decision without a hearing in this matter. Sue Cirocco, Complainant, alleges that she was subject to discrimination based on her sex (female). The Agency respectfully requests that its Motion for a Decision Without a Hearing be granted, because Complainant is unable to establish a *prima facie* case that she was discriminated against on the basis of sex and, the Agency has set forth legitimate non-discriminatory reasons for its personnel decisions, which Complainant cannot prove is pretext for discrimination.

I. Procedural Background

On February 4, 2015, Complainant filed a formal complaint of discrimination with the Agency's EEO Office. Report of Investigation ("ROI"), Exhibit (Ex.) A1, C2. (SBA0011, SBA 0225)[1] By letter dated February 26, 2015, the Agency accepted the following single claim for investigation, while dismissing the claim of retaliation:

[1] For clarity, the Agency has listed both the ROI Section/page number and the SBA Bates stamp number.

Whether Complainant was discriminated against on the basis of sex (Female) when on December 10, 2014, she learned that her FY 2014 performance rating of a three (3) was submitted as a final rating to OHRS.

ROI Ex. C2 (SBA 0225).

On February 6, 2017, Judge Griffiths issued an Order Following Initial Conference in this case. Pursuant to the Order, the Agency submitted its discovery requests to the Complainant on February 24, 2017. Based on settlement negotiations, the Agency verbally agreed to extend the discovery period at the request of Complainant's counsel. The parties exchanged settlement proposals but were unable to resolve the matter. While no formal agreement to extend discovery was memorialized, the last discussion of a settlement occurred by email on May 12, 2017 (the final day for discovery according to the February 6, 2017 Order) and at that time it was apparent that a settlement was not possible. In this exchange, Agency counsel advised Complainant's counsel that this was the Agency's final offer and if he wished to proceed he should respond to the Agency's discovery request.[2] Since May 12, 2017, the Agency has not heard from counsel for the Complainant. The Complainant has not responded to the Agency's discovery requests and the Complainant has never served discovery on the Agency.[3] Judge Griffith's February 6, 2017 Order stated that Motions for Summary Judgment in this matter were to be filed by June 16, 2017. The Agency now timely files its Motion for a Decision Without a Hearing.

II. Material Facts Not In Dispute

The Complainant served as the Agency's Denver Finance Director from December, 2012 until leaving the Agency in 2015. Just prior to the Complainant giving her staff their mid-year

[2] The Agency has not attached this email as it contains settlement negotiations but will produce it if the Court requests.

[3] It should also be noted that the Complainant never made herself available to be interviewed for the ROI. *See* ROI Ex. E1 p. 1 – 6 (SBA 0466 – (SBA 0470). As such, the Agency has relied on the Complainant's own words in the chronology attached to her complaint to assemble the material facts not in dispute.

reviews in April, 2013, Complainant was informed by a member of her staff, James Bates, that he had filed a formal EEO complaint regarding his failure to be selected for the position held by the Complainant. ROI Ex. A3, p.2 (SBA 0028). Complainant perceived this as a threat and attempted to retaliate against Mr. Bates by filing a complaint with the Agency EEO office. ROI Ex. A3, p.2 (SBA 0028).

On April 24, 2014, Complainant received her mid-year review from Roxanne Banks, Director, SBA Denver Finance Center. In her review of the Complainant, Ms. Banks included the following comment:

> *Sue is doing a fabulous job. I rely on Sue to exercise leadership and management over her division. I am very pleased with her progress on her division's SWOT analysis. It laid the ground work for 2 very important initiatives....Sue took both efforts and stamped each her own version of creativity as a means to gain buy-in from her entire organization. Impressive! I encouraged Sue to continue to work collaboratively and to take any of my feedback constructively. I expressed upon her that this was important to me because I consider her my "2nd in command." Mutual trust and collaboration is key for our success. Again, Sue is doing a fabulous job. I am fortunate to have her as part of this team.*

ROI Ex. A4F, p. 29 (SBA 0166).

After Ms. Banks completed this mid-year review she sent an email to her supervisor in Washington, DC, Timothy Gribben, Deputy Chief Financial Officer of SBA. (Exhibit 1 attached) In this email Ms. Banks shared some comments she had made to the Complainant but did not document in the review so as not to demoralize the Complainant. Ms. Banks informed Mr. Gribben that she had expressed concern to the Complainant regarding Complainant's aggressive reaction to feedback. ROI Ex. E2, p. 9, lines 10-18 (SBA0481) *See also* Exhibit 1 attached.

During the week of May 12, 2014, Mr. Gribben visited the Denver Financial Office. On May 16, 2014, Mr. Gribben met with the Complainant. Mr. Gribben advised the Complainant that there had been complaints regarding her management style and that she had a "tendency to

verbally attack employees or criticize them in a demeaning manner." ROI Ex. E2, p.14, line 12 – p.15, line 20 (SBA 0486 – SBA0487). Mr. Gribben spoke with the Complainant for over two hours in an attempt to counsel her regarding her behavior. *Id.* at 15, line 5 (SBA 0487). Despite this counseling, the Complainant continued her aggressive behavior in the office. A few weeks after this meeting, an employee of the Denver Finance Center advised Roxanne Banks that she had witnessed the Complainant lashing out at another employee. The witness stated that the Complainant had been "rude, demanding and discourteous." ROI Ex. E2.1, p. 11 (SBA 0527). When Ms. Banks approached the Complainant regarding this incident, the Complainant became upset and claimed that she had never been counseled or spoken to regarding this behavior. *Id.* When Ms. Banks reminded the Complainant that she had previously counseled her, the Complainant claimed to have no recollection of the incident. *Id.* Ms. Banks further counseled the Complainant that all of the good work she was doing was being overshadowed by her behavior. ROI Ex. B1, p. 17 (SBA 0211).

On July 24, 2014, Mr. Gribbens was told by two Denver Finance Center managers that the Complainant was discussing an employee's EEO case with the employee who had filed the EEO complaint. ROI Ex. E2 p. 16, line 18 – p. 17, line 9 (SBA 0488 – SBA 0489). This employee believed that the Complainant was retaliating against him for filing the complaint. *Id.* at p. 16, line 22 (SBA 0488). Mr. Gribben immediately called the Complainant and told her to never discuss an EEO complaint with an employee. ROI Ex. E2 p.17, lines 6 – 8 (SBA 0489).

On September 3, 2014, Ms. Banks advised all employees who reported to her, including the Complainant, that as she was leaving the Agency, she was required to conduct "out of cycle" evaluations with all of her direct reports. ROI Ex. E2, p.7, lines 15 – 22 (SBA 0479). Ms. Banks encouraged her direct reports to submit a statement of accomplishments to be considered in their

reviews. ROI Ex. E2.1, p. 6 (SBA 0522). The Complainant submitted such a statement by email and Ms. Banks reviewed and considered this statement in her evaluation of the Complainant. RO1 Ex. E2 p. 7, line 22 – p 8, line 11 (SBA 0479 – SBA 0480).

Ms. Banks completed the Complainant's out of cycle review for FY 2014 and gave the Complainant a 3.40 out 5.00 for FY2014.[4] A reading of the review show the Complainant received the following ratings on five critical elements:

Organizational Representation - 3
People Management - 3
Leadership - 3
Implementation of Funds Control - 4
Proactive in activity to assure an unmodified audit - 4

ROI Ex. D3 (SBA 0425).

A closer look at this review shows that while the Complainant received the Exceeds Expectations rating of a 4 in those area that were more technically oriented, her ratings for all her management / people skills elements were the Met Expectations of a 3. A reading of the comments by Ms. Banks in the management elements shows that Ms. Banks was highly complementary of the Complainant's efforts as a manager, but had reservations regarding the Complainant's harsh reactions to situations that did not weigh in her favor. ROI Ex. D3 pp. 3, 6, 8 (SBA 0427, SBA0430, SBA 0432). Mr. Gribben agreed with this evaluation as the Approving Official and this became the Complainant's final rating for FY 2014. ROI Ex. E2, p. 13, line 13 – p. 20, line 8 (SBA 0485 – SBA 0492).

[4] Ms. Banks was officially the Complainant's Rating Official for FY 2014 and Mr. Gribbens was the Approving official. The process normally flows from the Rating Official to the Approving Official. Once the Approving Official signs off on the Rating Official's recommendation, the Rating Official then enters the rating in the system. Here, Mr. Gribben did not sign off on the rating (9/22/14) until after Ms. Banks had left the Agency, effectively leaving the Complainant's rating in limbo. When Mr. Gribben discovered this problem he resolved it with HR by signing as the Rating Official. ROI E2, p. 10-12 (SBA 0482 – SBA 0484).

III. LEGAL STANDARD

A motion for a finding of no discrimination without a hearing is akin to a motion for summary judgment, which is appropriate where the judge determines that there is no genuine issue as to any material fact, as governed by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Agency maintains that there are no genuine issues as to material facts, as governed by applicable substantive law. Thus, this case is ripe for summary judgment.

Under the rule of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) *(hereinafter "McDonnell Douglas"*), to prevail in a case of discrimination, the plaintiff must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Id.* at 802. The burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. at 248, 253. The defendant's burden is production only, not persuasion. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct.2742, 2747 (1993) *(hereinafter "Hicks").* If the agency is successful, the burden reverts to the plaintiff to demonstrate by a preponderance of the evidence that the agency's reasons were a pretext for discrimination. At all times, the plaintiff has the burden of persuasion and the obligation to show by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715-716 (1983).

Furthermore, "[s]ummary judgment for a defendant is most likely when a plaintiff's claim is supported solely by plaintiff's own self-serving, conclusory statements." *Bonieskie v.*

Mukasey, 540 F. Supp. 2d 190, 195 (D.D.C. 2008); *Lindsey v. Rice*, 524 F. Supp. 2d 55,60 (D.D.C. 2007).

IV. ARGUMENT

For the reasons set forth below, the Agency should be granted summary judgment because (1) there are no material facts in genuine dispute; (2) Complainant has failed to establish a *prima facie* case as to any of her allegations; and (3) Complainant has failed to demonstrate by a preponderance of the evidence that the Agency's legitimate management reasons are merely pretext for prohibited discrimination.

Complainant Was Not Discriminated Against When She Received a Rating of Met Expectations for FY 2014

Complainant fails to establish a case of Title VII discrimination under *McDonnell Douglas* because, as discussed below, she cannot establish a *prima facie* case of discrimination based on sex, nor can she rebut the Agency's legitimate, non-discriminatory reasons for its actions. Thus, her Complaint should be dismissed as a matter of law.

To establish a *prima facie* case of prohibited discrimination, Complainant must show (1) that she is a member of a statutorily protected group; (2) that she was subject to adverse treatment; and (3) that she was treated differently than similarly situated employees outside of her protected group. *McDonnell Douglas*, 411 U.S. at 802. A similarly situated employee is one that comes under the same manager's supervision and performs the same job function. *Mitchell v. U.S. Postal Service*, E.E.O.C. Appeal No. 01A40524 (July 22, 2004). "It is well established that in order for employees to be considered similarly situated, all relevant aspects of the employees' work situation must be identical or nearly identical, i.e., that the employees report to the same supervisor, perform the same job duties and functions, and work during the same time

periods." *Wickersham v. Dept. of Homeland Security*, E.E.O.C. Appeal No. 0120061742 (July 16, 2007) (emphasis in original). Complainant must show specific evidence of similarly situated employees outside of the protected class that were treated differently. *See Hall v. U.S. Postal Service*, 2009 WL 2135152 (E.E.O.C.) (affirming on appeal a decision that Complainant had failed to make a *prima facie* case because he could point to no such similarly situated employees outside of the protected class). Complainant must present facts that, if unexplained, reasonably give rise to an inference of discrimination. *See Ng v. Snow*, E.E.O.C. Appeal No. 01A41567 (Sept. 8, 2005). Complainant's self-serving statements are not sufficient. *Barnett v. U.S. Postal Service,* E.E.O.C. Appeal No. 0120083625 (July 14, 2010).

A. Complainant Cannot Establish a *Prima Facie* Case of Discrimination On the Basis of Sex

Complainant fails to establish a *prima facie* case of sex discrimination because she has not shown that she was subject to an adverse employment action and has not shown an evidentiary link between the alleged discriminatory action and her membership in a protected class. Complainant has also failed to establish that a similarly situated employee outside her protected class was treated more favorably than her.

1. A Rating of Met Expectations Is Not an Adverse Employment Action

An adverse employment action is defined as a "materially adverse change in the terms and conditions of [plaintiff's] employment because of [the] employers conduct." *Smith v. City of Salem,* 378 F. 3d 566 (6th Cir. 2004), quoting *Hollins v. Atlantic Co.*,188 F3d 652, 662 (6th Cir. 1999). "[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Hollins*, 188 F. 3d at 662. "Examples of adverse employment actions include firing, failure to promote,

reassignment with significantly lower responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation. *Smith,* 378 F. 3d at 575-76, quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

Here, the Complainant merely received the rating that her rating official and approving official determined was appropriate. The Complainant did not suffer any materially adverse change in the terms and conditions of her employment. She was not removed from her position, reassigned, suspended nor did she in any way suffer financial consequences. She believed she deserved a higher rating based on positive comments made at her mid-year review, but failed to correct the management style that was creating problems with her staff that had also been pointed out at the mid-year review.

2. Complainant has failed to establish a similarly situated employee

The Complainant has failed to demonstrate that she was treated differently than similarly situated employees outside of her protected group. She has failed to respond to the Agency's discovery request and thereby failed to present any information to the Agency regarding similarly situated employees and their treatment.

B. <u>The Agency Has Articulated Legitimate, Non-Discriminatory Reasons For Its Decision To Rate the Complainant Fully Successful</u>

Assuming, without admitting, that the Complainant has established a *prima facie* case of discrimination the Agency has articulated legitimate non-discriminatory reasons for the Complainant's FY 2014 rating.

Following her mid-year review of the Complainant in April, 2014, Roxanne Banks wrote complimentary comments regarding the Complainant's performance to that date. Along with these comments, Ms. Banks counseled the Complainant regarding her aggressive reaction to previously provided feedback. (Exhibit 1 attached). The Complainant herself states that she

received further counseling from Tim Gribbens regarding her tendency to verbally attack employees or criticize them in a demeaning manner." ROI Ex. E2, p.14, line 12 – p. 15, line 20 (SBA 0486 – SBA0487). On June 20, 2014 in another attempt to counsel the Complainant, Ms. Banks advised her that all the good work she did was being overshadowed her behavior. ROI Ex. B1, p. 17 (SBA 0211).

When it came time for the Complainant's year-end review these factors were taken into consideration and the critical elements regarding her management were rated as a 3 (Met Expectations). While her technical critical elements were higher (4, Exceeds Expectations) the overall rating was a 3.40 resulting in the Met Expectations ration for FY 2014.

Unfortunately, the Complainant believed that due to the complimentary comments Ms. Banks made at mid-year, she could ignore the counseling she received from Ms. Banks and Mr. Gribben, or deny that ever occurred (*See* Banks Memo to File at ROI E2.1 p. 11, (SBA 0527)). The mid-year review was not a rating and no numerical quality (3,4,5) attached to it. It was a discussion of the positive aspects of the Complainant's work along with suggestions for improvement. The Complainant's final rating of a 3.40 was not an adverse action based on the Complainant's sex, but rather a fair rating based on her performance.

C. Complainant Cannot Prove Pretext

Other than the Complainant's unsubstantiated assertions that the reason she received the rating of Met Expectations for FY 2014 could only have been due to discrimination she has failed to produce any evidence (or respond to any of the Agency's discovery requests) to support her claim, let alone establish that the Agency's actions were pretexual.

Because the Agency has articulated legitimate non-discriminatory justifications for its actions, any presumption raised by Complainant's (assumed) *prima facie* case has been nullified

and "drops from the case." *Hicks*, 509 U.S. at 507. The ultimate burden rests with the Complainant to prove by a preponderance of the evidence that the Agency's reasons for its actions were pretext for discriminatory conduct. *See Burdine*, supra, at 256. Courts consistently hold that mere conjecture and speculation of pretext are wholly insufficient to overcome judgment for the employer. *See e.g., Branson v. Price River Coal Co.*, 853 F. 2d 768 (10th Cir. 1998). Here, the Complainant's claims of discrimination rest solely on her own subjective beliefs and conjecture and consequently should be dismissed.

V. CONCLUSION

In conclusion, the record establishes that Complainant has failed to state a cognizable claim or a *prima facie* case as to her allegations. Therefore, for the reasons set forth above, the Agency respectfully requests that its Motion for a Decision Without a Hearing be granted and the complaint dismissed.

Respectfully submitted,

William L. Gery
Agency Representative
U.S. Small Business Administration
Office of General Counsel
409 3rd Street, S.W., 7th Floor
Washington, D. C., 20416
Telephone (202) 401-2803
Fax (202) 481-6106
william.gery@sba.gov

EXHIBIT 1

Gery, William L.

From: Banks, Roxanne J.
Sent: Monday, May 19, 2014 7:08 PM
To: Gribben, Timothy E.
Subject: Midterm feedback - Sue

Follow Up Flag: Follow up
Flag Status: Flagged

Tim,

In my mid-term feedback sessison with Sue, I expressed my concern for her occasional aggressive reaction to my feedback. I focused only on my experience with her as I was unaware of recent instances with others. I down-played it the written feedback within the TMC system because I didn't want to demoralize her. I'll give her a few more days before I bring anything up...

"Sue is doing a fabulous job. I rely on Sue to exercise leadership and management over her division. I am very pleased with
her progress on her division's SWOT analysis. It layed the ground work for 2 very important initiatives. 1) Documentation of
processes and procedures within the Finance Division; and 2) Internal controls training. Sue took both efforts and stamped
each her own version of creativity as a means to gain buyin from her entire organization. Impressive! I encouraged Sue to
continue to work with me collaboratively and **to take any of my feedback constructively**. I expressed upon her that this was
important to me because I consider her my "2nd in command". Mutual trust and collaboration is key for our success. Again,
Sue is doing a fabulous job. I am fortunate to have her as a part of this team."

ROXANNE J. BANKS
Director, Denver Finance Center
Senior Procurement Executive
US Small Business Administration
Voice: (303) 844-0402

CERTIFICATE OF SERVICE

I, William L. Gery, certify that a copy of the foregoing Motion for Decision Without a Hearing was served on the following *via* electronic mail:

FOR THE COMMISSION
Administrative Judge Nancy Griffiths
U.S. Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Via email to: nancy.griffiths@eeoc.gov

FOR THE Complainant
Evan Lange
Attorney for the Complainant
Rob Wiley, PC
2613 Thomas Avenue
Dallas, TX 75204
***Via email to*:** elange@robwiley.com

June 16, 2017

William L. Gery
Agency Counsel