IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUE CIROCCO, **Plaintiff-Appellant,** **vs.** **LINDA MCMAHON,** in her official capacity as Administrator of the United States Small Business Administration, **Defendant-Appellee.**	**C.A. 18-1096** **D.C. No.: 17-CV-01588-NYW**

APPELLEE MCMAHON'S ANSWER BRIEF

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Oral argument is not requested.
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JURISDICTIONAL STATEMENT

The district court lacked subject matter jurisdiction over Sue Cirocco's claims. Cirocco brought two Title VII claims against Linda McMahon in her official capacity as Administrator of the Small Business Administration. Because Circocco failed to administratively exhaust these claims, sovereign immunity deprived the district court of subject matter jurisdiction.

The court of appeals has jurisdiction under 28 U.S.C. § 1291. Final judgment disposing of all claims was entered by the court on February 15, 2018. A: 102.[1] Cirocco filed a timely notice of appeal on March 11, 2018. A: 103. *See* Fed. R. App. 4(b)(1)(B)(ii).

STATEMENT OF THE ISSUES

I. Did Cirocco waive the arguments she raises on appeal?

II. Did Cirocco fail to exhaust her administrative remedies?

III. Is failure to exhaust a jurisdictional defect?

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[1] In this brief, the citation format of A: 102 references page 102 of Appellant's Appendix.

STATEMENT OF THE CASE

i. Cirocco filed her complaint in district court before an administrative decision on the merits.

Cirocco is a former employee of the Small Business Administration ("SBA"). A: 5. She timely filed an EEO administrative complaint alleging 1) sex discrimination in the form of "evaluation/ appraisal" and 2) retaliation for her efforts to comply with the Federal Managers' Financial Integrity Act of 1982. A: 32. Her claim was investigated by the SBA. A: 28, ¶ 7, 9, 11. Upon the conclusion of the investigation, Cirocco elected to pursue a hearing before the EEOC in lieu of a final agency decision from the SBA. A: 29, ¶ 11. The EEOC proceedings terminated without a hearing or decision on the merits when Cirocco filed suit in district court. A: 30, ¶¶ 22-23. Cirocco never amended her EEO complaint, nor did she file any subsequent EEO complaint. A: 29-30, ¶¶ 21, 24.

ii. The district court granted the government's motion to dismiss for lack of jurisdiction.

In the federal district court, the government moved to dismiss the case for lack of jurisdiction. A: 17-55. It argued that Cirocco's failure to participate in the administrative complaint process, and subsequent abandonment of that process, constituted failure to exhaust. A: 17-25.

It followed that Cirocco's failure to exhaust constituted a jurisdictional bar or, at least, a failure to state a claim. A: 17-25. The district court dismissed the case for lack of jurisdiction. A: 84-101.

SUMMARY OF ARGUMENT

Cirocco's arguments before this court are too little, too late.

I. Even construed liberally, Cirocco's *pro se* response to the government's motion to dismiss did not address the government's contention that she failed to participate in both the SBA's investigation of her claims and the hearing process before the ALJ. Consequently, she has forfeited the arguments that she raises on appeal. Although a forfeited argument may be raised on appeal if the forfeiting party can show plain error, Cirocco waived *that* argument by failing to raise plain error in her opening brief. Facts and documents that were not before the district court below (like those she attaches to her brief) must also be disregarded.

II. Because Cirocco failed to cooperate with and then abruptly abandoned the administrative process, the district court is correct that she did not exhaust her administrative remedies:

- Over three months, she failed to provide the EEO investigator with requested information and rebuffed his repeated attempts to schedule a sworn interview.
- After then electing to proceed with an EEOC hearing, she remained unavailable for a deposition and unresponsive to written discovery requests.
- She finally abandoned her claim by filing suit in district court rather than respond to the agency's motion for a decision without a hearing.

Having consistently deprived the SBA of the opportunity to resolve her claims on the merits, she cannot be said to have exhausted her administrative remedies.

III. Cirocco now argues, for the first time, that her failure to exhaust is not a jurisdictional defect. Because sovereign immunity permits only those claims against the government that are specifically authorized by statute, failure to exhaust is jurisdictional here.

ARGUMENT

I. Cirocco has waived any argument that she exhausted her administrative remedies.

Issue raised and ruled upon: Cirocco did not address her failure to exhaust below. In response to her complaint, the government moved for dismissal based on failure to exhaust. A: 17-25. Three days later,

Cirocco dismissed her counsel. A: 2 (Dkt. 8&9); 61. Now *pro se*, Cirocco sent a lengthy email to chambers, attaching various documents and correspondence. A: 56-79. The email expressed confusion about the legal arguments in the motion to dismiss, acknowledged that she may have received poor counsel, and reiterated her substantive allegations about her treatment at the SBA.

The parties participated in a telephonic status conference before the magistrate judge,[2] in which Cirocco confirmed repeatedly that she intended for her email and attachments to constitute her response to the motion to dismiss. A: 106:5-9, 20; 108:5-8; 111:18-23. She also confirmed that she was not requesting any additional time to respond. A: 111:18-23. Following the status conference, the government filed a brief reply. A: 80-83.

The district court expressly recognized that Cirocco's *pro se* status entitled her to a liberal construction of her response, but not to advocacy by the court. A: 89. It then dismissed Cirocco's case given her failure to "address Defendant's contention that she failed to participate

[2] The parties consented to a magistrate judge. A: 3 (Dkt. 18).

both in [the SBA] investigation and the proceedings before the ALJ." A: 98, 100-101.

Standard of review: Because Cirocco never addressed exhaustion below, she has forfeited her exhaustion arguments. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).

While forfeited arguments are ordinarily reviewed for plain error, *id.*, an appellant's failure to argue plain error on appeal waives those arguments. *Id.* at 1130-31 (citing *McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010)). Even if Cirocco had not waived plain error review, the plain error standard is a "nearly insurmountable burden" in civil appeals. *Id.* at 1130.

Argument: It is only here on appeal for the first time that Cirocco argues she has exhausted her administrative remedies. Because she had not argued for plain error review, her exhaustion arguments should be considered waived. *Richison*, 634 F.3d at 1130-31.

Although issues "regarding jurisdiction and sovereign immunity" are among "the most unusual circumstances" in which this court will consider issues not raised in the district court, *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1166 (10th Cir. 2003), that refers only to this

court's responsibility to ensure that it has subject matter jurisdiction. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992). It does not refer to this court's "discretion to eschew untimely raised legal theories which may support that jurisdiction." *Id.* The court "ha[s] no duty under the general waiver rule to consider the latter." *Id.*

In Cirocco's case, the argument for waiver is bolstered by her attempts to introduce some 30 pages of documents that were not presented to the district court. Aplt. Br. at Attachment B, "Cited Administrative Filings." She has not sought leave of court or the government's stipulation. Instead, she simply violates Rule 10 of the Federal Rules of Appellate Procedure by citing documents not in the record "[f]or the Court's convenience." Aplt. Br. at 11 n.6.

As a general rule, this court will not consider material not included in the district court record. *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000). References to extra-record evidence must similarly be excluded. *See New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1240 n.1 (10th Cir. 2017).

Although a party may supplement the record when a dispute exists regarding "whether the record truly discloses *what occurred in*

the district court," or when "anything material ... is omitted from or misstated in the record *by error or accident*," these exceptions in Rule 10(e) do "not grant a license to build a new record." *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1158 n.4 (10th Cir. 2010) (emphasis supplied; internal quotation marks omitted).

This court's "inherent equitable power to supplement the record on appeal" is a "rare" additional exception. *Kennedy*, 225 F.3d at 1192. It requires reviewing three factors that do not exist here, especially in light of Cirocco's unilateral inclusion of the materials solely to support legal arguments not raised to the district court:

1. whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue;

2. whether remand for the district court to consider the additional material would be contrary to the interests of justice and a waste of judicial resources; and

3. whether supplementation is warranted in light of the unique powers that federal appellate judges have in the context of habeas corpus relief or motions to vacate sentence.

Kennedy, 225 F.3d at 1191.

Cirocco's *pro se* status in the district court does not afford her additional latitude. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (*quoting Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)) ("'[t]his court has repeatedly insisted that *pro se* parties follow the same rules of procedure that govern other litigants'"). The rule that this court will not consider material outside the record before the district court applies equally to *pro se* parties. *United States v. Green*, 886 F.3d 1300, 1307 (10th Cir. 2018).

II. Cirocco failed to exhaust her administrative remedies.

Issue raised and ruled upon: As discussed above, Cirocco did not raise this argument below.

Standard of review: If this court does review Cirocco's claim of exhaustion, it must be reviewed for plain error due to her failure to raise it below. *Richison*, 634 F.3d at 1128.

Plain error requires (1) an error, (2) that is plain, which (3) affects substantial rights and (4) would seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.*

Argument: Claims of unlawful discrimination in federal employment cannot be entertained by the district court unless the

plaintiff has first exhausted the administrative process provided for by the federal sector statute, 42 U.S.C. § 2000e-16. *Brown v. GSA*, 425 U.S. 820, 832 (1976). "[A]n administrative exhaustion rule is meaningless if claimants may impede and abandon the administrative process and yet still be heard in the federal courts." *Vinieratos v. U.S. Dept. of Air Force*, 939 F.2d 762, 772 (9th Cir. 1991).

Exhaustion is not just a matter of letting the clock run out. Rather, it requires a "[g]ood faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information." *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993) (internal quotation marks and citations omitted). 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. *Id.* A complainant who abandons his or her claim before the agency has reached a determination has also failed to exhaust. *Id.*

Over the course of 29 months between filing her EEO complaint and filing this lawsuit, Cirocco never provided the SBA or any administrative tribunal with documents or testimony. As a matter of

law, her protracted refusal to cooperate constitutes failure to exhaust administrative remedies. She failed to cooperate with the EEO investigator assigned to assist with the SBA's administrative adjudication of her claim. She failed to cooperate in the hearing process before an EEOC administrative judge. And she eventually abandoned the administrative process altogether.

A. Cirocco failed to cooperate with the EEO investigator.

Because she repeatedly failed to provide requested information, Cirocco did not exhaust her administrative claims. She repeatedly refused to allow the EEO investigator, Robert Gay, to interview her. Gay first reached out to Cirocco on May 27, 2015. A: 51. All told, he attempted to schedule Cirocco's interview nine times in three months. A: 47-52. Each time, Cirocco claimed that she was not well enough to participate. *Id.* She ignored Gay's suggestion that perhaps she could participate by phone and did not acknowledge his assurances that the interview would be non-confrontational. A: 48. Not once did Cirocco initiate contact with Gay to provide him with an update, request a stay, or negotiate an alternative means of providing testimony. A: 47-52.

She now argues that she made a good-faith effort to provide Gay "with enough information to evaluate the merits of her claims," because her original EEO complaint "included a ten-page narrative … to which she attached nine appendices with supporting materials." Aplt. Br. at 33. (She cites to a six-page narrative; no appendices appear on the record.) Less than two pages of that narrative relate to the single claim that was accepted for investigation. A: 35-40, 42.

In any event, it is the investigator who decides what evidence is necessary. 29 C.F.R. § 1614.108(c)(1) ("The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimony evidence *as the investigator deems necessary*." (emphasis supplied)). Here, the investigator made clear that the information in Cirocco' EEO complaint was insufficient.

In one of their earliest communications, Gay advised Cirocco that he had already reviewed her complete EEO complaint. A: 51. He then asked her for a list of witnesses, along with their contact information and a brief description of their anticipated testimony. A: 51. Cirocco merely attached the same EEO complaint that Gay had just informed her he already had. A: 50. That complaint did not provide the

additional information requested. A: 32-40. Gay subsequently made eight attempts to schedule her for an interview. A: 47-52. She cooperated with none of them. *Id*.

Cirocco's own citations establish that a complainant's refusal to be interviewed constitutes a failure to exhaust. An employee "must make a good faith attempt to allow the EEOC to reach the merits of his or her challenge." *Shikles v. Sprint*, 426 F.3d 1304, 1311 (10th Cir. 2005); App. Br. at 31 (citing *Shikles*). And an EEO complaint may be dismissed "where the complainant has engaged in delay or contumacious conduct and the record is insufficient to permit adjudication." *Dawson v. Principi*, EEOC Doc. 01A13486, 2001 WL 966054 at *1 (Office of Fed. Ops. Aug. 14, 2001); App. Br. at 32 (citing *Dawson*).

If the refusal of a complainant to answer questions under oath over a three-month period does not clear this threshhold, it is hard to imagine what would. Testimony of the complainant is essential to the administrative process. It allows a trained investigator to probe the legally significant facts as they relate to the elements of the claim. It also gives the complainant the opportunity to rebut management

contentions about their reasons for taking the complained-of action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792,802 (1973). An unsworn, *pro se* EEO complaint does not meet these needs. *See* A: 32.

Nor is there any material difference between Cirocco's failure to cooperate and that of the complainants in *Khader*, 1 F.3d at 970, and *Shikles,* 426 F.3d at 1307. In *Khader*, the complainant sent an angry letter to the investigator refusing *to re-send* information *she had already timely provided. Khader*, 1 F.3d at 970. Here, Cirocco refused to provide information in the first instance. The *Shikles* complainant, like Cirocco, refused to be interviewed over a period of three months. *Shikles*, 426 F.3d at 1307. The fact that Cirocco was civil, and responded to emails, does not make the information she refused to provide any less necessary to the adjudication of her case. Nor does it ameliorate her delay. "[O]ne can communicate without being cooperative." *McBride v. CITGO Petroleum Corp*., 281 F.3d 1099, 1107 (2002) (affirming dismissal of plaintiff's EEOC claim for failure to cooperate).

Cirocco further argues that it was the hostile work environment at the SBA that rendered her unable to bear the stress of a deposition, and

that "[it] cannot be right that the agency may benefit from its unlawful harassment in this manner." Aplt. Brief at 34. In the abstract, this is generally consistent with the rule that Title VII deadlines may be equitably tolled. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). But (again) Cirocco did not raise this argument below, and there is no competent record evidence that she was in fact unable to bear the stress of a deposition, for any reason. We have only her self-serving statements in an email chain, unsworn and lacking corroboration. A: 48, 50.[3]

B. Cirocco failed to cooperate with the EEOC hearing.

Following the investigator's report of investigation, Cirocco had the choice between asking the agency for a final decision on her appeal or deferring a decision in favor of an EEOC hearing. *See* 29 C.F.R. § 1614.108(f), (h). She chose the latter.

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[3] Cirocco cites to portions of her district court complaint as further evidence. Aplt. Brief at 34 (A: 12-13). But the cited paragraphs allege only that her deteriorated mental state necessitated leave from work, not that it prevented her from being interviewed or otherwise cooperating with the administrative process.

Having elected a hearing, Ciroccoa remained uncooperative. She never responded to the written discovery propounded by the SBA. A: 29, ¶¶ 16-17. And she remained unavailable for deposition, despite being served with a notice. *Id*.

Cirocco suggests that she should be excused from the obligation to cooperate because the parties suspended discovery during settlement negotiations. Aplt. Br. at 15. Even overlooking the evidentiary deficiencies in this claim,[4] it has no merit. The SBA served a timely request for production of documents, interrogatories, and notice of deposition for Plaintiff on February 24, 2017. A: 29, ¶¶ 14-16. When settlement negotiations broke down nearly three months later—on the last day of the discovery period—SBA counsel told Cirocco that if she "wish[ed] to continue before the EEOC," she should "complete [the SBA's] discovery requests." A: 77. Another two and a half months went by before Cirocco filed suit in district court without responding to a single discovery request. A: 29, ¶ 17; 54.

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[4] In support of this argument, Cirocco cites to A: 75, a Rule 11 letter prepared by Cirocco's former counsel and submitted to the district court as part of her response. Of course, this letter is not competent evidence. It is unsworn hearsay.

C. Cirocco abandoned her claim.

Rather than respond to an SBA motion for decision without a hearing, Cirocco simply abandoned her claim by filing suit in district court. A: 29, ¶¶ 19-20; 54. This failure to exhaust her administrative remedies deprived the SBA of the opportunity to resolve her claims on the merits, thwarting the policy aims of the administrative process.

The administrative process gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). And it promotes efficiency. *Id.* "Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Id.*

Efficiency benefits the complainant as well as the agency. *Id.* Cirocco has repeatedly asserted that the litigation has emptied her of physical, financial, and emotional resources. A: 56-57; 106:12-19; 110:4-8. But had she given the agency the opportunity to resolve her claim on the merits, she might have had resolution years ago. Even with the investigation extension—necessitated by Cirocco's refusal to be interviewed—and the additional 60 days afforded by the regulations for

the issuance of a final agency decision, the initial administrative process would have concluded in well under a year. A: 49; 29 C.F.R. § 1614.108(e); 29 C.F.R. § 1614.110(b). Instead, Cirocco opted to prolong the process by pursuing an EEOC hearing process in which she never really participated. Her district court filing then forced the administrative judge to dismiss her administrative claim without reaching the merits. 29 C.F.R. § 1614.107(a)(3).

Because she filed her suit more than 180 days after filing her EEO complaint, Cirocco argues (again for the first time) that she has met all of the statutory and regulatory requirements. Aplt. Br. at § I.A. But this ignores the well-established principle that a claimant who obstructs the administrative process forecloses judicial review. *Vinieratos*, 939 F.2d at 772.

Even if Cirocco was aggrieved by a delayed ALJ determination, she had a safety hatch. The ALJ advised her, more than eight months before she abandoned the hearing process, that she could request a final agency decision at any time during its pendency. Aplt. Br., Cited Administrative Filings, Notice of Receipt of Hearing Request at 4. Cirocco was provided with a form specifically for this purpose. *Id.* at 11

(this page is not internally numbered, but is part of the same document, and immediately follows page 10). Had she executed it, the EEOC would have dismissed the hearing process and returned the case to the agency, which would then have had 60 days to issue its decision. *Id.* at 4; 29 C.F.R. § 1614.110(b). She did not avail herself of this procedure.

Additionally, Cirocco's view that a complainant may file in district court at any time after 180 days have passed, regardless of whether there has been a decision on the merits, is perverse. It suggests that a complainant may deprive an agency of its opportunity for administrative adjudication simply by electing a hearing in lieu of a final agency decision, thereby running out the clock. And even if Cirocco's argument can be read to suggest that the 180-day clock re-sets when an EEOC hearing is elected, this would mean that a failure *by the EEOC* to complete its proceedings within 180 days could prejudice the right of *a different federal agency* "to correct its own mistakes ... before it is haled into federal court." *Woodford*, 548 U.S. at 89.

Cirocco is to blame for the absence of an administrative ruling on the merits. "It is not the role of the federal judiciary to straighten out a mess that is the complainant's own doing." V*inieratos,* 939 F.2d at 773.

D. Cirocco also failed to exhaust her retaliation claim.

Cirocco raised her retaliation claim for the first time in the district court. Because it was not first raised in an administrative process, it has not been exhausted. 42 U.S.C. § 2000e-16(c).

The retaliation claim dismissed by the district court relates to actions taken by SBA personnel *after* she filed her EEO complaint in February 2015. A: 11. Cirocco's EEO complaint addresses retaliation in December 2014. A: 32, 36. That administrative claim was dismissed in part because the EEO complaint *did not* allege prior EEO activity. Cirocco offered nothing to rebut this fatal flaw below, nor does she now.

It is obvious that raising a distinct retaliation claim in administrative proceedings cannot provide exhaustion for a completely different retaliation claim in the district court. *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003) (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Because Cirocco did not file either a supplement or a new EEO complaint raising the allegation of

retaliation *for the EEO activity* constituted by her administrative complaint, she has not exhausted that claim.[5] *Eisenhour v. Weber Cty.*, 744 F.3d 1220, 1227 (10th Cir. 2010); A: 29-30, ¶¶ 21, 24; 100.

Cirocco's retaliation claim is not, as she claims, based on a hostile work environment claim. As an initial matter, "retaliation" and "hostile work environment" are legally distinct claims. *See* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation); 42 U.S.C. § 2000e-2(a) (prohibiting discrimination on the basis of sex, race, etc.). Furthermore, Cirocco cites allegations made *to the district court* years after she submitted her formal EEO complaint as the sole basis for claiming a hostile work environment. Aplt. Br. at 41-42. Her EEO complaint alleges sex discrimination during "evaluation/appraisal," not a harassment claim. A: 32, 35. Any claim of sex discrimination in the form of a hostile work environment is thus wholly unexhausted.

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[5] It appears that the district court overlooked the distinction between the retaliation claim in the EEO complaint versus the district court complaint, instead characterizing the latter claim as having first been raised in Cirocco's response to the motion to dismiss. A: 99-100. Nevertheless, the court's reasoning is sound.

Cirocco is correct that the hostile work environment underlying a Title VII claim may include acts taken after the plaintiff files an EEOC charge if those acts contribute to the same hostile work environment. *See Morgan*, 536 U.S. at 117, and *Duncan v. Manager, Dep't of Safety, City & Cty. of Denver*, 397 F.3d 1300, 1310 (10th Cir. 2005). But the lack of a hostile work environment claim in Cirocco's EEO complaint renders that point irrelevant.

E. An agency can raise failure to exhaust in the district court without previously seeking administrative dismissal for failure to cooperate.

Cirocco argues that a complaint cannot be dismissed for failure to cooperate when the agency did not seek dismissal on those grounds during the administrative process. Aplt. Br. at § I.A.2. She is mistaken.

First, Cirocco's own actions prevented the agency from seeking dismissal for failure to cooperate. Because she requested an EEOC hearing, the SBA had no opportunity to make a final decision. The investigator was powerless to do more than make clear that he believed Cirocco failed to cooperate. 29 C.F.R. § 1614.108(c)(3); A: 47-52.

Second, the agency should not be penalized for its repeated efforts to adjudicate the matter on the merits. In the hearing before the EEOC, the SBA's motion for a decision without a hearing inured to Cirocco's benefit by giving her an additional opportunity to present evidence in support of her claim. Its decision not to simply punish her lack of cooperation then should not be held against it now.

Finally, as a jurisdictional bar (see below), exhaustion cannot be waived. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (abrogated on other grounds by *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014)) (citing *Ins. Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982)).

III. Exhaustion of administrative remedies is jurisdictional.

Issue raised and ruled upon: The district court dismissed Cirocco's claims based on its lack of jurisdiction over unexhausted administrative matters. A: 98, 100.

Standard of review: This court reviews whether a district court has jurisdiction over a matter *de novo*. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004).

Argument: Cirocco is incorrect that exhaustion is not a jurisdictional bar when it comes to suits against the federal government. Waivers of sovereign immunity are limited to the scope of immunity waived. Because the United States has only waived immunity for exhausted Title VII claims, the district court lacked the authority to consider Cirocco's unexhausted claims.

In the case of federal employees, Title VII authorizes suit in the district court only when an employee has sought an administrative remedy and is "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint." 42 U.S.C. § 2000e-16(c). Thus, this court has held for some forty years that exhaustion is a jurisdictional prerequisite to suits brought against federal employers. *See Sampson v. Civiletti*, 632 F.2d 860, 862 (10th Cir. 1980) (citing 42 U.S.C. § 2000e-16). Ten years after this court decided *Sampson*, the Supreme Court confirmed that "§ 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin* 498 U.S. at 94.

In her reply, Cirocco likely will argue that the applicable rule is found, not in *Irwin* or *Civiletti*, but in *Lincoln v. BNSF Ry. Co.*, 900 F.3d

1166 (10th Cir. 2018). In *Lincoln*, this court recently decided that "[its] precedent that the filing of an EEOC charge is a jurisdictional prerequisite to suit is no longer correct." *Lincoln*, 900 F.3d at 1185.

But *Lincoln*, crucially, was a suit against a private sector employer. As such, the rule it announces does not necessarily extend to the federal employment context.[6] Nor should it.

Lincoln extends the reasoning of *Zipes v. Trans World Airlines, Inc.*, in which the Supreme Court held that timeliness in filing a charge of discrimination with the EEOC is not a jurisdictional prerequisite. 455 U.S. 385, 393 (1982). *Zipes*, like *Lincoln*, is a private sector case, and both cases rely on a close reading of § 2000e-5(e)(1)—a provision of Title VII that does not apply to claims by federal employees. *See* 42 U.S.C. § 2000e-16(d), (f).

This is no mere triviality. As the Seventh Circuit has observed, "the statutory framework [for federal] employees is different." *Doe v. Oberweis Dairy*, 456 F.3d 704, 712 (7th Cir. 2006). In private-sector

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[6] In *Lincoln*, this court identifies *Khader* and *Sampson* as examples of the precedent it was overturning. However, as set forth herein, it appears that dicta overreaches beyond the holding.

cases, administrative recourse is limited to attempts at conciliation. *See* 42 U.S.C. § 2000e-5(b). If this fails, suit in district court is the only avenue for relief. *Id.* at § 2000e-5(f)(1). But in federal-employee cases, the EEO office of the employer agency, in conjunction with the EEOC, is empowered to enforce the requirements of Title VII and afford relief directly to the claimant. *Doe,* 456 F.3d at 712 (citing 42 U.S.C. § 2000e-16(b)). "That is a situation in which exhaustion is invariably required." *Id.*

Nor is the Court's willingness to allow equitable tolling of timeliness requirements dispositive. Filing deadlines are mere "claim-processing rules," *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015), and equitable tolling "amounts to little, if any" expansion of the government's waiver. *Irwin*, 498 U.S at 95. In the context of the Federal Tort Claims Act, this court has maintained that administrative exhaustion is jurisdictional. *Gabriel v. United States*, 683 F. App'x 671, 672-73 (10th Cir. 2017) (declining to extend *Wong* to the FTCA's exhaustion requirement). In the context of Title VII's comprehensive scheme of administrative remedies and conditional waiver of sovereign immunity, it should do so again.

CONCLUSION

The dismissal of Cirocco's claims should be affirmed.

DATED: October 1, 2018.

Respectfully submitted,

ROBERT C. TROYER
United States Attorney

/s/ Katherine A. Ross
KATHERINE A. ROSS
Assistant United States Attorney

CERTIFICATE OF DIGITAL SUBMISSION

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s/ Amanda Bell
Amanda Bell
U.S. Attorney's Office

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As required by Fed. R. App. 28.1(e)(2) & 32(a)(7)(C), I certify that the **APPELLEE MCMAHON'S ANSWER BRIEF** is proportionally spaced and contains 5011 words, according to the Microsoft Word software used in preparing the brief.

s/ Amanda Bell
Amanda Bell
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I certify that on October 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

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s/ *Amanda Bell*
Amanda Bell
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