

No. 13-50824

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MOSTAFA DAVOODI,

Plaintiff-Appellant,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

AUSTIN DIVISION

RECORD EXCERPTS



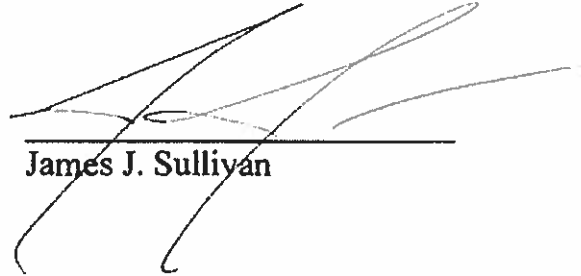
James J. Sullivan
Icenogle & Sullivan, P.L.L.C.
6805 N. Capital of Texas Highway # 220
Austin, Texas 78731
(512) 342-9519
(512) 342-9555 (Fax.)

ATTORNEY OF RECORD FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Record Excerpts has been served via e-filing and facsimile on the persons listed below on this the 9th day of December, 2013.

Abraham F. Barker and Jennifer Powell
Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C.
4201 W. Parmer Lane # A100
Austin, Texas 78727
(512) 476-9944
(512) 472-2599 Fax.



A handwritten signature in black ink, appearing to read 'James J. Sullivan', is written over a horizontal line. The signature is stylized and somewhat cursive.

James J. Sullivan

RECORD EXCERPTS TABLE OF CONTENTS

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District Court Docket Sheet

APPEAL

**U.S. District Court [LIVE]
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:13-cv-00525-LY**

Davoodi v. Austin Independent School District
Assigned to: Judge Lee Yeakel
Case in other court: 5th - USCA, 13-50824
419th Judicial District Court, Travis
County, D-1-GN-13-001738
Cause: 28:1441 Petition for Removal- Civil Rights Act

Date Filed: 06/24/2013
Date Terminated: 08/07/2013
Jury Demand: None
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

Mostafa Davoodi

represented by **James J. Sullivan**
Icenogle & Sullivan, PLLC
6805 N. Capital of Texas Highway -
Ste 220
Austin, TX 78731
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Fax: (512) 342-9555
Email: jsullivan@icesully.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Anthony Lee Icenogle
Icenogle & Sullivan, P.L.L.C.
6805 N. Capital of Texas Highway
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Austin, TX 78731
(512) 342-9519
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ATTORNEY TO BE NOTICED

V.

Defendant

Austin Independent School District

represented by **Abraham F. Barker**
Eichelbaum Wardell Hansen Powell
& Mehl, PC
4201 W. Parmer Lane - Ste A100
Austin, TX 78727
(512) 476-9944
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 Email: jpowell@edlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/24/2013	<u>1</u>	NOTICE OF REMOVAL by Austin Independent School District (Filing fee \$400 receipt number 0542-5628226), filed by Austin Independent School District. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Supplement JS44 Supplement, # <u>3</u> Appendix State Pleadings and Docket Sheet)(Powell, Jennifer) (Additional attachment(s) added on 6/24/2013: # <u>4</u> Corrected Certificate of Service) (os). (Entered: 06/24/2013)
06/24/2013	<u>2</u>	Letter to James J. Sullivan re: non-admitted status. (os) (Entered: 06/24/2013)
06/24/2013		Case Assigned to Judge Lee Yeakel. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE IN THIS CASE. (os) (Entered: 06/24/2013)
06/24/2013	<u>3</u>	ORDER that the removing party supplement the record with state court pleadings. Signed by Judge Lee Yeakel. (os) (Entered: 06/24/2013)
07/01/2013	<u>4</u>	Motion to Dismiss for Failure to State a Claim by Austin Independent School District. (Attachments: # <u>1</u> Proposed Order)(Powell, Jennifer) (Entered: 07/01/2013)
07/01/2013	<u>5</u>	ANSWER to Complaint by Austin Independent School District.(Powell, Jennifer) (Entered: 07/01/2013)
08/07/2013	<u>6</u>	ORDER GRANTING <u>4</u> Motion to Dismiss for Failure to State a Claim. Signed by Judge Lee Yeakel. (dm) (Entered: 08/08/2013)
08/07/2013	<u>7</u>	FINAL JUDGMENT. Signed by Judge Lee Yeakel. (dm) (Entered: 08/08/2013)
08/30/2013	<u>8</u>	MOTION to Appear Pro Hac Vice by Anthony Lee Icenogle <i>for and on behalf of James J. Sullivan</i> (Filing fee \$ 25 receipt number 0542-5813135) by on behalf of Mostafa Davoodi. (Attachments: # <u>1</u> Proposed Order)

		(Icenogle, Anthony) (Entered: 08/30/2013)
09/03/2013	<u>9</u>	ORDER GRANTING <u>8</u> Motion for James J. Sullivan to Appear Pro Hac Vice on behalf of Mostafa Davoodi. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Lee Yeakel. (klw) (Entered: 09/03/2013)
09/06/2013	<u>10</u>	Appeal of Final Judgment <u>7</u> by Mostafa Davoodi. (Filing fee \$ 455 receipt number 0542-5829525) (Icenogle, Anthony) (Entered: 09/06/2013)
09/06/2013		NOTICE OF APPEAL following <u>10</u> Notice of Appeal (E-Filed) by Mostafa Davoodi. Filing fee \$ 455, receipt number 0542-5829525. Per 5th Circuit rules, the appellant has 14 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out <u>Form DKT-13</u> (Transcript Order) and follow the instructions set out on the form. This form is available in the Clerk's Office or by clicking the hyperlink above. (dm) (Entered: 09/09/2013)
10/10/2013		NOTICE of Certification of Electronic Record on Appeal accepted by the USCA re: Notice of Appeal. (dm) (Entered: 10/15/2013)
11/21/2013		Transmitted Record on Appeal via e-mail to Attorney for Plaintiff in re: Notice of Appeal. (dm) (Entered: 11/21/2013)

PACER Service Center			
Transaction Receipt			
12/09/2013 13:07:38			
PACER Login:	is1038	Client Code:	Davoodi
Description:	Docket Report	Search Criteria:	1:13-cv-00525-LY
Billable Pages:	2	Cost:	0.20

Plaintiff's Original Petition

Filed
13 May 23 P4:13
Amalia Rodriguez-Mendoza
District Clerk
Travis District
D-1-GN-13-001738

CAUSE NO. _____

MOSTAFA DAVOODI
Plaintiff,

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

vs.

AUSTIN ISD
Defendant

_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, MOSTAFA DAVOODI, Plaintiff herein, and files this, his Original Petition against AUSTIN INDEPENDENT SCHOOL DISTRICT Defendant, and for cause of action would respectfully show this Court as follows:

I.

DISCOVERY LEVEL

This action is subject to Discovery Level 2, pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

II.

PARTIES

MOSTAFA DAVOODI (hereafter "Plaintiff"), Plaintiff herein, is an individual residing in Travis County Texas.

Defendant AUSTIN INDEPENDENT SCHOOL DISTRICT (hereafter "AUSTIN ISD" or "Defendant" herein), may be served with process through their agent for service Dr. Meria Castarphen, Superintendent located at 1111 W. 6th Street, Austin, Texas 78703

PAGE 1

13-50824.12

III.

VENUE, JURISDICTION AND CLAIM FOR RELIEF

Venue is based in Travis County pursuant to Section 15.002 of the Texas Civil Practice and Remedies Code since all of the events alleged occurred in Travis County.

The Court has jurisdiction over this matter because the amount of damages incurred by Plaintiff due to Defendant's wrongful conduct is within the jurisdictional limits of this Court.

Plaintiff seeks monetary relief over \$200,000.00 but not more than \$1,000,000.00.

IV.

FACTS

On or about June 2, 2011 Plaintiff filed a Charge of Discrimination with the EEOC and the Texas Human Rights Commission. (See Charge attached as Exhibit "A" and fully incorporated herein) This charge alleged that Defendant discriminated against Plaintiff based on his National Origin (Iranian). On February 3, 2012 the EEOC issued a Dismissal and Notice of Rights. The Texas Human Rights Commission did not issue a dismissal/right to sue.

Soon after this charge was filed Plaintiff was terminated from his position. Plaintiff has continued to apply for positions with Defendant to the present day but Defendant continues its pattern of ongoing retaliation by refusing to re-employ Plaintiff right up and through the date of filing this Original Petition.

V.

NATIONAL ORIGIN DISCRIMINATION

Defendants conduct, and that of its agents, servants and employees, acting within the scope of their employment, constituted discrimination based on national origin against Plaintiff in violation of Texas state law. Defendant acted intentionally and with malice aforethought in

PAGE 2

discriminating against Plaintiff because of his national origin; terminating him and refusing to re-hire him to positions for which he is qualified. Each of these acts and omissions, whether singularly or in any combination, was a proximate cause of Plaintiff's injuries and damages as described below.

VI.

RETALIATION

Defendants conduct, and that of its agents, servants and employees, acting within the scope of their employment, constituted retaliation against Plaintiff for the protected activity of bringing a Charge of Discrimination against Defendant. Defendant acted intentionally and with malice aforethought in retaliating against Plaintiff because of his filing of the EEOC charge; terminating him and refusing to this day to re-employ him in positions he is qualified for. Each of these acts and omissions, whether singularly or in any combination, was a proximate cause of Plaintiff's injuries and damages as described below.

VII.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendants conduct, and that of its agents, servants and employees, acting within the scope of their employment, constituted an intentional pattern of inflicting emotional distress upon Plaintiff. Defendant due to Plaintiff's Iranian national origin acted with malice aforethought in stripping Plaintiff of his job and continuing to refuse to re-hire him. Each of these acts and omissions, whether singularly or in any combination, was a proximate cause of plaintiff's injuries and damages as described below.

PAGE 3

13-50824.14

VIII.

DAMAGES

As a result of the Defendants actions Plaintiff has suffered the following damages:

- 1) Past and future mental anguish;
- 2) Past and future loss of earnings/earning capacity.

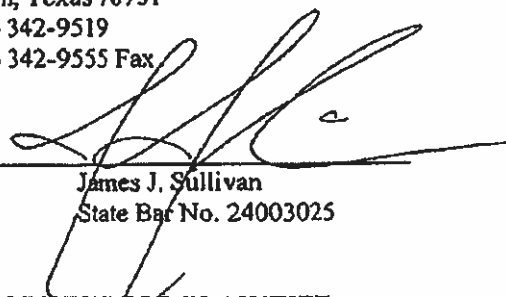
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff herein requests the above stated damages along with punitive damages, attorney's fees, pre-judgment interest, post judgment interest, costs of court and such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

ICENOGLE & SULLIVAN, P.C.
6805 Capital of Texas Highway North #220
Austin, Texas 78731
(512) 342-9519
(512) 342-9555 Fax

By: _____



James J. Sullivan
State Bar No. 24003025

ATTORNEYS FOR PLAINTIFF

PAGE 4

13-50824.15

Case: 13-50824 Document: 00512454990 Page: 7 Date Filed: 11/27/2013

Case 1:13-cv-00525-LY Document 1-3 Filed 06/24/13 Page 7 of 11

EXHIBIT "A"

13-50824.16

EOC Form 5 (501)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):
 FEPA 650-4-246
 EEOC 34A-2011-00246C

Texas Workforce Commission, Civil Rights Division and EEOC
State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.) Mr. Mostafa Davoodi	Home Phone (Incl. Area Code) (512) 608 0240	Date of Birth 08/22/69
Street Address City, State and ZIP Code P. O. Box 1901 Austin, Texas 78767		
<small>Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)</small>		
Name Austin ISD	No. Employees, Members 10,000+	Phone No. (Include Area Code) (512) 414-9222
Street Address City, State and ZIP Code 1111 West 6 th St. Austin, Texas 78703		
Name	No. Employees, Members	Phone No. (Include Area Code)
Street Address City, State and ZIP Code		

DISCRIMINATION BASED ON (Check appropriate box(es).)

RACE COLOR SEX RELIGION NATIONAL ORIGIN
 RETALIATION AGE DISABILITY OTHER (Specify below.)
TCHRA

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
2/16/11	11/1/11
<input checked="" type="checkbox"/> CONTINUING ACTION	

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s).)

I. **PERSONAL HARM:** I will be laid off on or about June 30, 2011.

II. **RESPONDENT'S REASON FOR ADVERSE ACTION:** No reason given.

DISCRIMINATION STATEMENT: I believe that I have been and continue to be discriminated against, in violation of Title VII of the 1964 Civil Rights Act, as amended, the Texas Commission on Human Rights Act, as amended, because of my national origin (Iranian).

I began working for Austin ISD in or about March of 1999 as a Network Technician and I was later promoted to a Network Analyst III. I always perform my job in a highly courteous, proficient, and professional manner. My employment situation began to dramatically change on or about February 16, 2011, when I was told that I would be laid off due to a reduction in force. I received excellent ratings on all of my annual evaluations and I have not received any write-ups or anything derogatory in my file. When I questioned John Alawneh (EX DIR-TECHNOL) and Jordana George (Data SYSTEM MGR/DIR), two of the three persons responsible for making the decision, both Caucasian, American born employees, I was given two contradicting reasons as to why I was picked for the layoff.

***** TEXT CONTINUED ON THE NEXT PAGE *****

<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p> <p>I declare under penalty of perjury that the above is true and correct.</p> <p style="text-align: center;">6-02-11 </p> <p style="text-align: center;">Date Charging Party Signature</p>	<p><small>NOTARY - When necessary for State and Local Agency Requirements</small></p> <p style="text-align: center;"></p> <p>I swear or affirm that I have read the above charge and the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p style="text-align: center;"></p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)</p> <p style="text-align: center;">6-2-11</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> <p><small>NOTARY PUBLIC</small> Jama Patel <small>Notary Public State of Texas My Commission Expires April 22, 2012</small></p> </div>
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EEOC Form 6 (6/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

FEPA
 EEOC

Texas Workforce Commission, Civil Rights Division

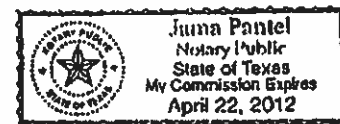
and EEOC

State or local Agency, if any

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)).

I was told that I was compared to Tim Carrington, Caucasian and American born, whose job title is Network Analyst I. Based on the criteria that was to be used to determine the layoffs, I should have never been compared to Mr. Carrington because we had different job titles. I am a Network Analyst III and Mr. Carrington is a Network Analyst I.

I believe that I have been and continue to be discriminated against due to my National Origin, Iranian, by Mr. Alawneh, Ms. George and my manager, Mark Evert (Caucasian and American born).



I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - When necessary for State and Local Agency Requirements

Juna Pantel

I declare under penalty of perjury that the above is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

Mark Evert

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

06-02-11

Mark Evert

Date

Charging Party Signature

6-2-11

13-50824.18

Notice of Removal

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MOSTAFA DAVOODI	§	
<i>Plaintiff,</i>	§	
	§	CAUSE NO. 13-CV-525
V.	§	(State Cause No. D-1-GN-13-001738,
	§	Removed from the 419 th Judicial
AUSTIN INDEPENDENT SCHOOL	§	District Court of Travis County, Texas)
DISTRICT,	§	
<i>Defendant.</i>	§	

NOTICE OF REMOVAL

To the Honorable Judges of the United States District Court for the Western District of Texas:

1. On or about May 23, 2013, Plaintiff Mostafa Davoodi ("Plaintiff") filed Plaintiff's Original Petition with the 419th Judicial District Court, Travis County, Texas, Cause No. D-1-GN-13-001738, asserting claims of violations of federal law under Title VII of the 1964 Civil Rights Act against Defendant Austin Independent School District ("AISD"). AISD was served with the petition on May 30, 2013.

2. Copies of all state court papers are attached hereto and incorporated herein, and serve as all process, pleadings, and orders served in the action.

3. This notice of removal is timely filed under 28 U.S.C. § 1446(b) in that it is filed within thirty (30) days of service of the original petition filed by Plaintiff in which Plaintiff asserted the claims that his rights under a federal statute were violated.

4. Removal of this action is proper under 28 U.S.C. § 1441 because it is a civil action brought in state court, and the district courts of the United States have original jurisdiction over the subject matter under 28 U.S.C. § 1331.

5. The district courts of the United States have original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because at least one of the claims arises under federal law in that the cause of action is created by federal law (*see, e.g.*, Plaintiff's Original Petition at pg. 2, fully incorporating Plaintiff's Charge of Discrimination alleging violations of Title VII of the Civil Rights Act of 1964).

6. Joined in this action with the federal claims described above, is Plaintiff's state tort law claim (*see* Original Petition at pg. 3). These claims fall within the supplemental jurisdiction of the district courts of the United States in that they are so related to Plaintiff's federal claims that they are part of the same case or controversy. *See* 28 U.S.C. § 1367. The state law claim derives from the same nucleus of operative facts as Plaintiff's federal claims, so that ordinarily the claims would be tried together in the same proceeding. Plaintiff's state law claim allegedly arises from the same alleged injury to Plaintiff. Because of the relationship of these claims, the district courts of the United States have jurisdiction over the entire action. *Id.*

7. Defendant AISD expressly reserves the right to raise all defenses and objections in this action after it is removed to this Court.


8. Plaintiff did not demand a jury in the state court action.

9. Defendant AISD will promptly file a copy of this Notice of Removal with the clerk of the state court where the action has been pending.

WHEREFORE, Defendant Austin Independent School District, pursuant to the statutes identified above and in conformance with the requirements set forth in 28 U.S.C. § 1446, removes this action for trial from the 419th Judicial District Court of the State of Texas, County of Travis, to the United States District Court for the Western District of Texas, Austin Division, on June 24, 2013.

Respectfully submitted,

EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

by: 
Jennifer A. Powell
Texas Bar No. 00783554
Abraham F. Barker
Texas Bar No. 24073241
4201 W. Parmer Lane, Suite A100
Austin, Texas 78727
(512) 476-9944
(512) 472-2599 fax
jpowell@edlaw.com
abarker@edlaw.com

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been sent by court-generated electronic means on June 24, 2013, to the following:

James Jude Sullivan
Icenogle & Sullivan, PLLC
6805 N. Capital of Texas Hwy, Suite 220
Austin, TX 78731
(512) 342-9519


Jennifer A. Powell

JS 44 (Rev. 12/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Mosafa Davoodi

DEFENDANTS
Austin Independent School District

(b) County of Residence of First Listed Plaintiff Travis
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Travis
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)
James Jude Sullivan, Icenogle & Sullivan, PLLC, 6805 N. Capital of Texas Hwy, Suite 220, Austin, TX 78731, (512)342-9519

Attorneys (If Known)
Jennifer Powell, Eichelbaum Wardell Hansen Powell & Mehl, P.C. 4201 W. Parmer Lane, Suite A100, Austin, TX 78727 (512) 476-8944

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State 1 1 Incorporated or Principal Place of Business in This State 4 4
- Citizen of Another State 2 2 Incorporated and Principal Place of Business in Another State 5 5
- Citizen or Subject of a Foreign Country 3 3 Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 375 False Claim Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability		<input type="checkbox"/> 424 Copyright 17 USC 101-108	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 425 Patent 35 USC 101-431	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 720 Labor/Management Relations	<input type="checkbox"/> 426 Securities 15 USC 77e-77j	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 427 Securities - Other 15 USC 77k-77s	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 751 Family and Medical Leave Act	<input type="checkbox"/> 428 Securities - Other 15 USC 77t-77v	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans' Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 429 Securities - Other 15 USC 77w-77z	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 430 Securities - Other 15 USC 77aa-77ac	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 442 Employment		<input type="checkbox"/> 431 Securities - Other 15 USC 77ad-77ae	<input type="checkbox"/> 495 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 463 Alien Detainees	<input type="checkbox"/> 795 Immigration and Naturalization Act	<input type="checkbox"/> 432 Securities - Other 15 USC 77af-77ag	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 444 Amer. w/Disabilities - Employment	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 464 Naturalization Application	<input type="checkbox"/> 433 Securities - Other 15 USC 77ah-77aj	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 445 Amer. w/Disabilities - Other	<input type="checkbox"/> 530 General	<input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 434 Securities - Other 15 USC 77ak-77al	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 446 Amer. w/Disabilities - Education	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 435 Securities - Other 15 USC 77am-77an	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 448 Education	<input type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 436 Securities - Other 15 USC 77ao-77ap	<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 240 Torts to Land		<input type="checkbox"/> 550 Civil Rights		<input type="checkbox"/> 437 Securities - Other 15 USC 77aq-77ar	<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 245 Tort Product Liability		<input type="checkbox"/> 555 Prison Condition		<input type="checkbox"/> 438 Securities - Other 15 USC 77as-77at	<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 560 Civil Detainees - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Title VII of the Civil Rights Act of 1964

Brief description of cause:
Plaintiff claims discrimination and retaliation based on national origin

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See Instructions):

JUDGE

DOCKET NUMBER

DATE
06/24/2013

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFF JUDGE MAG. JUDGE

13-50824.7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Supplement to JS 44 Civil Cover Sheet
Cases Removed from State District Court

This form must be filed with the Clerk's Office no later than the **first business day** following the filing of the Notice of Removal. Additional sheets may be used as necessary.

The attorney of record for the removing party **MUST** sign this form.

STATE COURT INFORMATION:

1. Please identify the court from which the case is being removed; the case number; and the complete style of the case.

419th Judicial District Court, Travis County
Cause No. D-1-GN-13-001738
Mostafa Davoodi v. Austin Independent School District

2. Was jury demand made in State Court? Yes No

If yes, by which party and on what date?

Party Name Date

STATE COURT INFORMATION:

1. List all plaintiffs, defendants, and intervenors still remaining in the case. Also, please list the attorney(s) of record for each party named and include the attorney's firm name, correct mailing address, telephone number, and fax number (including area codes).

Mostafa Davoodi, Plaintiff
James Jude Sullivan
Icenogle & Sullivan, PLLC
6805 N. Capital of Texas Hwy, Suite 220
Austin, TX 78731
(512)342-9519
Fax: (512)342-9555

Austin Independent School District, Defendant
Jennifer Powell
Eichelbaum Wardell Hansen Powell & Mehl, P.C.
4201 W. Parmer Lane, Suite A100
Austin, TX 78727
(512) 476-9944
(512) 472-2599

2. List all parties that have not been served at the time of the removal, and the reason(s) for non-service.

N/A

3. List all parties that have been non-suited, dismissed, or terminated, and the reason(s) for their removal from the case.

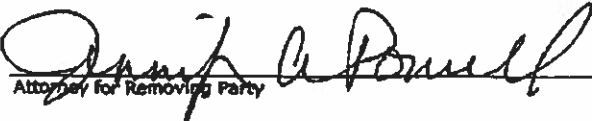
N/A

COUNTERCLAIMS, CROSS-CLAIMS, and/or THIRD-PARTY CLAIMS:

1. List separately each counterclaim, cross-claim, or third-party claim still remaining in the case and designate the nature of each such claim. For each counterclaim, cross-claim, or third-party claim, include all plaintiffs, defendants, and intervenors still remaining in the case. Also, please list the attorney(s) of record for each party named and include the attorney's firm name, correct mailing address, telephone number, and fax number (including area codes).

N/A

VERIFICATION:


 Attorney for Removing Party

6/24/13
 Date

 Party/Parties


Case: D-1-GN-13-001738 with (2) documents

Filed Date	Category	Description	Additional Info
5/23/2013	PET-PL	ORIGINAL PETITION/APPLICATION	PLAINTIFF'S ORIGINAL PETITION
6/10/2013	SRVPROCESS	EXE SERVICE OF CITATION	AUSTIN INDEPENDENT SCHOOL DISTRICT

13-50824.10

Order (Notice of Removal)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2013 JUN 24 PM 12:51
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY 

MOSTAFA DAVOODI

§

§

v.

§

Civil No. 1:13-CV-525-LY

§

AUSTIN INDEPENDENT SCHOOL
DISTRICT

§

ORDER

The above captioned cause, having been removed to this Court on June 24, 2013, from the 419th Judicial District Court of Travis County, Texas, and the Court being of the opinion that a copy of the complete record (minus discovery) in this case is necessary;

IT IS HEREBY ORDERED, pursuant to 28 U.S.C. § 1447(b), that the removing party, if it has not already done so, shall within ten (10) days from the date of this order supplement the record with state court pleadings. The supplement is to be electronically filed and shall include a copy of the complete file, including the docket sheet, in this cause from the Court from which this case has been removed.

SIGNED this the 24th day of June, 2013.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Defendant's Partial Motion to Dismiss

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MOSTAFA DAVOODI
Plaintiff,

V.

AUSTIN INDEPENDENT SCHOOL
DISTRICT,
Defendant.

§
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§
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CAUSE NO. 13-CV-525-LY
(State Cause No. D-1-GN-13-001738,
Removed from the 419th Judicial
District Court of Travis County, Texas)

**DEFENDANT AUSTIN INDEPENDENT SCHOOL DISTRICT'S
PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendant, Austin Independent School District (“AISD” or the “District”) respectfully presents this Partial Motion to Dismiss for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

1. Plaintiff filed this suit in the 419th Judicial District Court of Travis County, Texas, against the District.

2. Defendant AISD timely removed the case to this Court.

3. Plaintiff’s Petition is properly read as attempting to state the following claims:

a. AISD *discriminated* against him by *terminating* him because of his National Origin in violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), and the Texas Commission on Human Rights Act (“TCHRA”);

b. AISD *retaliated* against him by *terminating* him in violation of Title VII and the TCHRA;

- c. AISD *discriminated* against him by *failing to rehire* him because of his National Origin in violation of Title VII and the TCHRA;
- d. AISD *retaliated* against him by *failing to rehire* him in violation of Title VII and the TCHRA;
- e. AISD intentionally inflicted emotional distress on Plaintiff in violation of state law.

II. ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

If a complaint fails to state a claim upon which relief can be granted, a court should dismiss the complaint as a matter of law. See Fed. R. Civ. P. 12(b)(6).

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

Dismissal is appropriate when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face or has failed to raise his right to relief above the speculative level. *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012)(citing *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010)).

B. TERMINATION CLAIMS

1. **Plaintiff has failed to state a claim for discriminatory termination under Title VII because he did not timely file such a claim.**

Plaintiff alleges he received his right to sue notice from the EEOC on February 3, 2012 (*See* Plaintiff’s Petition, sec. IV). Title VII requires a civil action be commenced within ninety

days after the plaintiff has received a right-to-sue notice from the EEOC. *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002). Plaintiff did not file his lawsuit until May 23, 2013. Therefore, any claim for discriminatory termination under Title VII is barred.

2. Plaintiff has failed to state a claim for retaliatory termination under both Title VII and TCHRA.

Plaintiff claims that he was retaliated against for filing his EEOC charge when he was terminated (*See* Plaintiff's Petition, Sec. VI).

Under Title VII a plaintiff making a retaliation claim must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 12-484, 2013 WL 3155234, *16 (U.S. June 24, 2013). Similarly, the standard for a state law claim under the TCHRA is one of but-for causation. *See, e.g., Chandler v. CSC Applied Technologies, LLC*, 376 S.W.3d 802, 823 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

A cause of action for discrimination or retaliation accrues when the employee knew or reasonably knew of the adverse employment decision. *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir.1988). Plaintiff's charge of discrimination, incorporated into Plaintiff's petition,¹ was filed June 2, 2011. The charge states that he was told on February 16, 2011, that he would be laid off effective June 30, 2011. Because the termination decision was clearly made prior to the filing of the EEOC charge, the filing of the charge could not possibly have been a but-for cause of the termination decision. Therefore, Plaintiff cannot state a claim under either Title VII or the TCHRA for retaliatory termination based on the filing of the charge.

¹ Although evaluating a motion to dismiss pursuant to Rule 12(b)(6) is limited to the pleadings, a court may evaluate documents attached to a motion to dismiss that is "restricted ... to documents that are referred to in the plaintiff's complaint and are central to the plaintiff's claim." *Scanlan v. Tex. A & M Univ.*, 343 F.3d 533, 536 (5th Cir.2003) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir.2000)). In this case, not only is the Charge of Discrimination referenced and attached to the pleading, it is "fully incorporated" into the pleading. (*See* Plaintiff's Petition, sec. IV).

C. FAILURE TO REHIRE CLAIMS

- 1. Plaintiff has failed to state a claim for discriminatory and retaliatory failure to rehire under Title VII and the TCHRA because he has failed to allege sufficient facts.**

Plaintiff claims that AISD has failed to rehire him “to this day,” and that this alleged failure to rehire is based on National Origin discrimination (*See* Plaintiff’s Petition, sec. V, p. 3) and/or retaliation for filing the EEOC Charge (*See* Plaintiff’s Petition, sec. VI, p. 3).

Although a plaintiff need not make out a prima facie case of discrimination in order to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–12 (2002), the plaintiff must allege facts that raise his right to relief above the speculative level. *Raj v. Louisiana State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013). In *Raj*, the Fifth Circuit affirmed dismissal of plaintiff’s race discrimination claims because he did not allege any facts, direct or circumstantial, that would suggest LSU’s actions were based on Raj’s race or national origin or that LSU treated similarly situated employees of other races or national origin more favorably. *Id.* (citing *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012)).

In the case at bar, Plaintiff has utterly failed to allege any facts whatsoever related to a claim of discriminatory or retaliatory failure to rehire other than to broadly state that he has continued to apply for positions and that AISD has refused to reemploy him. This broad allegation does not raise a claim that is plausible on its face; Plaintiff has failed to raise any right to relief above the speculative level. Thus, his claims of failure to rehire should be dismissed for failure to state a claim.

- 2. Plaintiff has failed to state a claim for discriminatory and retaliatory failure to rehire under Title VII and the TCHRA because he failed to exhaust his administrative remedies with respect to those claims.**

Even if Plaintiff had adequately alleged discriminatory and/or retaliatory failure to rehire,

Plaintiff has failed to exhaust his administrative remedies, as required by both Title VII and the TCHRA, with respect to these claims.

Employment discrimination plaintiffs must exhaust their administrative remedies before pursuing claims in federal court. *Taylor*, 296 F.3d at 379. Exhaustion under Title VII requires filing a timely charge of discrimination with the EEOC and receipt of a “right-to-sue” letter. 42 U.S.C. § 2000e-5 (e) and (f); *see also Taylor*, 296 F.3d at 379. The TCHRA also requires timely exhaustion, which is accomplished by filing a charge of discrimination.²

Failure to exhaust deprives a trial court of jurisdiction over a claim under the TCHRA. *See Hoffmann-La Roche, Inc., v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004); *City of Waco v. Lopez*, 259 S.W.3d 147, 149, 154 (Tex. 2008). Under Title VII, while it is unclear whether such exhaustion requirement is jurisdictional, it is well established that it is a mandatory pre-requisite to suit and that failure to exhaust requires dismissal of the claim. *See Campos v. Insurance & Bonds Agency of Texas, LLC*, 2013 WL 321865, *4 (W.D. Tex. Jan. 28, 2013).

In dealing with discrete acts of alleged discrimination or retaliation, the plaintiff must exhaust administrative remedies with respect to each act. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). In addition, a decision to discharge an employee and a decision not to hire that employee for a different position are separate and distinct events; thus, a failure to hire charge is beyond the scope of an EEOC charge that alleges only a discriminatory discharge. *Chester v. Am. Tel. & Tel. Co.*, 907 F. Supp. 982, 987 (N.D. Tex. 1994) *aff’d*, 68 F.3d 470 (5th Cir. 1995), *cert. denied*, 516 U.S. 1141, 116 S.Ct. 974, 133 L.Ed.2d 894 (1996)).

In this case, Plaintiff did not exhaust claims for failure to rehire in his charge filed on June 2, 2011. Plaintiff’s charge did not complain about anything other than the decision to lay him off.

² Receipt of a notice of right to sue is not required under state law in order to exhaust.

Plaintiff's Petition reflects that he did not file an amended charge or any additional charges of discrimination or retaliation after his June 2, 2011 charge. Therefore, unless some exception to the exhaustion requirement applies, any claims related to failure to rehire are barred.

The Fifth Circuit had previously recognized (and some Texas state courts had followed) an exception for a retaliation claim growing out of an earlier EEOC charge of discrimination. *See Gupta v. East Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981). As the Fifth Circuit explained,

It is the nature of retaliation claims that they arise after the filing of the EEO charge. Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case—a double filing that would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII.

Id.

However, following the *Morgan* case by the United States Supreme Court, which emphasized the need for “strict adherence to the procedural requirements” of Title VII, some courts began to question whether the pre-*Morgan* judicially created exception to the exhaustion doctrine for retaliation claims remains good law. *See, e.g., Adams v. Mineta*, CIV.A.04-856(RBW), 2006 WL 367895, *4 (D.D.C. Feb. 16, 2006). The Fifth Circuit has not resolved the issue,³ and this Court has determined to follow it until the Fifth Circuit holds that it is

³ The Fifth Circuit recently stated:

We note that *Gupta* may no longer be applicable after the Supreme Court's decision in *Morgan*, 536 U.S. 101, 122 S.Ct. 2061. Our sister circuits appear to be split on this issue. *See, e.g., Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir.2003) (abolishing a *Gupta*-like exception). *But see Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir.2009) (holding that *Morgan* did not abolish a *Gupta*-like exception); *Wedow v. City of Kan. City, Mo.*, 442 F.3d 661, 672–76 (8th Cir.2006) (holding that a narrow exhaustion requirement remains); *Delisle v. Brimfield Twp. Police Dep't.*, 94 Fed.Appx. 247, 252 (6th Cir.2004) (same); *Fentress v. Potter*, No. 09 C 2231, 2012 WL 1577504, at *2 (N.D.Ill. May 4, 2012) (“Given these post-*Morgan* tea leaves from the Seventh Circuit, as well as the three-to-one circuit split against abrogation, the court concludes that the exception remains valid.”); *Gordon v. Bay Area Air Quality Mgmt. Dist.*, No. C08–3630 BZ, 2010 WL 367781, at *1 (N.D.Cal. Jan. 27, 2010) (“The Ninth Circuit authority that has interpreted [a *Gupta*-like exception] in light of *Morgan* has [found it to still be applicable].”). *See also Weber v. Battista*, 494 F.3d 179, 182–84 (D.C.Cir.2007) (discussing other circuits' treatment of the issue). We need not answer this question today.

Simmons-Myers v. Caesars Entm't Corp., 12-60592, 2013 WL 697226, *3 n. 1 (5th Cir. Feb. 26, 2013).

no longer good law. *See Griggs v. Univ. Health Sys.*, CIV. SA-06-CA-0384-XR, 2007 WL 708608, *3 (W.D. Tex. Mar. 7, 2007) (“Given this split of authority and the fact that the Fifth Circuit still has not resolved this issue, the Court will continue to treat *Gupta* as good law unless and until the Fifth Circuit holds otherwise.”).⁴

Even if *Gupta* is still good law, however, the facts of this case, as alleged in Plaintiff’s Petition, do not fit within the *Gupta* exception. The Fifth Circuit has found that a plaintiff still needs to exhaust post-charge *discrimination* claims, and claims where both *discrimination* and *retaliation* are alleged, as they are here:

[T]his court has not applied the *Gupta* exception to claims in which both retaliation and discrimination are alleged. *See Gupta*, 654 F.2d at 414 (creating exception for a claim involving only retaliation “growing out of an earlier charge,” not a retaliation and discrimination claim simultaneously alleged); *see also Scott v. Univ. of Miss.*, 148 F.3d 493, 514 (5th Cir.1998) (holding that *Gupta* “is limited to retaliation claims due to the special nature of such claims”), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Sapp v. Potter*, 413 Fed.Appx. 750, 752–53 (5th Cir.2011) (“Because the *Gupta* exception is premised on avoiding procedural technicalities, it has only been applied to retaliation claims alone [and not] claims in which both retaliation and discrimination are alleged.”). Otherwise, *Simmons–Myers* would be required to return to the EEOC and exhaust her administrative remedies with respect to her discrimination claim, while proceeding with litigation on her retaliation claim. Permitting simultaneous proceedings such as these for the same inciting event would “thwart the administrative process and peremptorily substitute litigation for conciliation.” *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir.2008); *see also Sapp*, 413 Fed.Appx. at 753.

Simmons-Myers v. Caesars Entm’t Corp., 12-60592, 2013 WL 697226, *3 (5th Cir. Feb. 26, 2013).

In this case, Plaintiff claims AISD’s failure to rehire him is *both* discriminatory and retaliatory.

Therefore, he was required to exhaust these claims.

⁴ At least one Texas court of appeals has also recognized that the exception may no longer be recognized. *See Lopez v. Texas State Univ.*, 368 S.W.3d 695, 707 n. 5 (Tex. App.—Austin 2012, pet. denied).

In any event, even if Plaintiff was claiming only retaliatory failure to rehire, it is very difficult to argue that a claim that AISD failed to hire Plaintiff in 2013 flows out of an EEOC charge filed more than two years ago. Thus, AISD would argue that even the retaliation claims are required to be exhausted even under *Gupta*.

In addition, even if Plaintiff was claiming only retaliatory failure to hire, such claims under Title VII would be barred because he never filed suit on his properly exhausted EEOC charge and, thus, there was “no discrimination charge to which his retaliation claim c[ould] attach.” *Wilson v. Shell Oil Co.*, No. 94–3693, 1995 WL 311911, at *3 (E.D.La. May 18, 1995), *quoted in Brown v. Montgomery Surgical Ctr.*, 2:12-CV-553-WKW, 2013 WL 1163427 (M.D. Ala. Mar. 20, 2013).

D. TORT CLAIM

Plaintiff Has Failed to State a Claim Against the District for Intentional Infliction of Emotional Distress.

Plaintiff’s claim for intentional infliction of emotional distress under Texas law is barred by sovereign immunity. Plaintiff has not pleaded a waiver of immunity. Moreover, any waiver of sovereign immunity does not extend to intentional torts under the Texas Tort Claims Act. *Kinnison v. City of San Antonio*, 699 F.Supp.2d 881, 895 (W.D. Tex. 2010)(citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2)(Vernon 2005); *Harris County v. Cypress Forest Public Utility Dist. of Harris County*, 50 S.W.3d 551, 553 (Tex. App.—Houston [14 Dist.] 2001, no pet.)). Therefore, Plaintiff cannot state a claim for intentional infliction of emotional distress.

PRAYER

WHEREFORE, Defendant Austin Independent School District prays that the following claims against it be dismissed: 1) discriminatory termination under Title VII; 2) retaliatory termination under Title VII and TCHRA; 3) discriminatory failure to rehire under Title VII and

TCHRA; 4) retaliatory failure to hire under Title VII and TCHRA; and 5) intentional infliction of emotional distress, and that the Court grant all other relief to which Defendant is entitled.

Respectfully submitted,

EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

by: Jennifer A. Powell
Jennifer A. Powell
Texas Bar No. 00783554
Abraham F. Barker
Texas Bar No. 24073241
4201 W. Parmer Lane, Suite A-100
Austin, Texas 78727
(512) 476-9944
(512) 472-2599 fax

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been sent by certified mail on July 1, 2013, to the following:

James Jude Sullivan
Icenogle & Sullivan, PLLC
6805 N. Capital of Texas Hwy, Suite 220
Austin, TX 78731
(512) 342-9519

Jennifer A. Powell
Jennifer A. Powell

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MOSTAFA DAVOODI
Plaintiff,

V.

AUSTIN INDEPENDENT SCHOOL
DISTRICT,
Defendant.

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CAUSE NO. 13-CV-525-LY
(State Cause No. D-1-GN-13-001738,
Removed from the 419th Judicial
District Court of Travis County, Texas)

ORDER

On this ____ day of _____, 2013, the Court considered Defendant Austin Independent School District's Partial Motion to Dismiss for Failure to State a Claim and finds that the Motion should be GRANTED.

It is, THEREFORE, ORDERED that the following claims are DISMISSED WITH PREJUDICE:

1. Plaintiff's claims of discriminatory termination under Title VII Title VII of the Civil Rights Act of 1964, as amended ("Title VII");
2. Plaintiff's claims of retaliatory termination under Title VII and the Texas Commission on Human Rights Act ("TCHRA");
3. Plaintiff's claims of discriminatory failure to rehire under Title VII and TCHRA;
4. Plaintiff's claims of retaliatory failure to rehire under Title VII and TCHRA; and
5. Plaintiff's claim for intentional infliction of emotional distress under Texas law.

SIGNED this ____ day of _____, 2013.

UNITED STATES DISTRICT JUDGE

13-50824.33

Order (Defendant's Partial Motion to Dismiss)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

2013 AUG -7 PM 2:07

CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY _____

MOSTAFA DAVOODI, §
PLAINTIFF, §

V. §

CAUSE NO. A-13-CA-0525-LY

AUSTIN INDEPENDENT SCHOOL §
DISTRICT, §
DEFENDANT. §

ORDER

Before the court in the above styled and numbered cause is Defendant Austin Independent School District's ("District") Partial Motion [sic] to Dismiss for Failure to State a Claim filed July 1, 2013 (Clerk's Document No. 4). See Fed. R. Civ. P. 12(b)(6). The District moves the court to dismiss Plaintiff Mostafa Davoodi's claim under Title VII of the Civil Rights Act of 1964, as amended, alleging discriminatory termination because Davoodi's cause of action is untimely filed and is, therefore, barred.¹ See *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002). The District also moves to dismiss Davoodi's claims for retaliatory termination under Title VII and the Texas Commission on Human Rights Act ("TCHRA") because Davoodi cannot as a matter of law establish the necessary "but-for" causation.² See *University of Texas S.W. Med. Ctr. v. Nassar*,

¹ Davoodi filed a charge of discrimination with the EEOC and the Texas Human Rights Commission on June 2, 2011. Although he received a right-to-sue notice on February 3, 2012, Davoodi did not file this action until May 23, 2013, which is beyond the statutory 90-day deadline to file a civil action. *Taylor v. Books a Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002). Any claim Davoodi may have for discriminatory termination under Title VII that is related to the complaints raised in the June 2, 2011 charge and February 3, 2013 right-to-sue notice is barred. *Id.*

² Davoodi's charge of discrimination states that he was told on February 16, 2011, that he would be laid off due to a reduction in force effective June 30, 2011. Thus, the District's decision to terminate Davoodi's employment occurred before Davoodi filed his discrimination charge. Therefore, Davoodi is unable to show that his filing the discrimination claim was a but-for cause for his retaliatory-termination claim.

___ U.S. ___; 133 S.Ct. 2517, 2534 (2013); *see e.g., Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 823 (Tex. App.–Houston [1st Dist.] 2012, pet. denied). The District also moves to dismiss Davoodi’s claims for discriminatory and retaliatory failure to rehire under Title VII and TCHRA, arguing that Davoodi makes broad allegations and raises only speculations that fail to state a claim for which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Cu villier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). Finally, the District moves to dismiss Davoodi’s Texas state-law tort claim of intentional infliction of emotional distress, arguing that the claim is barred by sovereign immunity, for which there is no statutory waiver nor any factual allegation that, if true, would waive the District’s immunity. *See* Tex. Civ. Prac. & Rem. Code § 101.057(2) (West 2011).

Davoodi’s response to the District’s motion was due July 15, 2013, however, to date he has filed no response. *See* W.D. Tex. Local R. CV-7(e)(2) (requiring party opposed to motion to respond within 14 days of service of motion and allowing district court to grant motion as unopposed if no timely response is filed). The District’s motion may be granted as unopposed if review of the pleadings and the motion reveals that dismissal is warranted. *Id.*; *See cf. John v. Louisiana Bd. of Trs. for State Colls. & Univs.*, 757 F.2d 698, 707-10 (5th Cir. 1985). Having considered the motion, the case file, and the applicable law, the court finds the District’s motion has merit. The court will, therefore, grant the motion and dismiss Davoodi’s claims.

IT IS ORDERED that Defendant Austin Independent School District’s Partial Motion to Dismiss for Failure to State a Claim filed July 1, 2013 (Clerk’s Document No. 4) is **GRANTED**.

IT IS FURTHER ORDERED that Davoodi’s claims of discriminatory termination under Title VII, retaliatory termination under Title VII and TCHRA, discriminatory failure to rehire under

Case 1:13-cv-00525-LY Document 6 Filed 08/07/13 Page 3 of 3

Title VII and TCHRA, retaliatory failure to rehire under Title VII and TCHRA, and intentional infliction of emotional distress under Texas law are **DISMISSED WITH PREJUDICE**.

In reviewing the case file, although the District's motion is titled "Partial Motion to Dismiss For Failure to State a Claim" it appears to the court that all claims raised by Davoodi are dismissed by this Order. The court will render separately a Final Judgment.

SIGNED this 7th day of August, 2013.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Final Judgment

Notice of Appeal

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

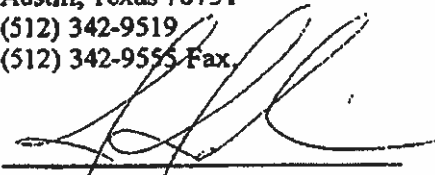
MOSTAFA DAVOODI)	
)	
)	CASE NO.
VS.)	
)	
AUSTIN INDEPENDENT)	A-13-CA-0525-LY
SCHOOL DISTRICT)	
)	
)	
)	
)	

**NOTICE OF APPEAL TO A COURT OF APPEALS FROM A
JUDGMENT OF A DISTRICT COURT**

Notice is hereby given that MOSTAFA DAVOODI, the Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 5th Circuit from the Final Judgment entered in this action on the 7th day of August 2013.

Respectfully submitted,

James J. Sullivan, TBN 24003025
Anthony Icenogle, TBN 10382948
Icenogle & Sullivan, L.L.P.
6805 N. Capital of Texas Highway
220
Austin, Texas 78731
(512) 342-9519
(512) 342-9555 Fax

By: 

James J. Sullivan