IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

Clive B. Hilgert[1], et al ,	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 7:07-cv-00094
	§	
George S. May International Company,	§	
	§	
	§	
Defendant.	§	
	§	

DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFF'S TITLE VII, ADEA, FLSA, CONSTITUTIONAL, GOOD FAITH AND FAIR DEALING, AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

George S. May Company ("May" or "the Company") files this motion to dismiss all of Plaintiff Clive B. Hilgert's ("Hilgert") claims under Federal Rule of Civil Procedure 12(b)(6), with the exception of his common law claim for failure to pay commissions to which he contends he is entitled and his claim for intentional infliction of emotional distress. May anticipates moving for summary judgment on the latter claims at an appropriate time.

I. INTRODUCTION

Hilgert takes a shotgun approach to pleading, alleging numerous unfounded causes of action against his former employer, May. The majority of Hilgert's claims are barred or not recognized by Texas or federal law. Undoubtedly, Hilgert's misunderstanding of the law is attributable to his *pro se* status, but his status as a *pro se* plaintiff does not permit him to proceed with plainly invalid claims. *See, e.g., Newsome v. EEOC*, 301 F.3d 227 (5th Cir. 2002) (affirming District Court's Rule 12(b)(6) dismissal of a *pro se* plaintiff's claims against the EEOC). For the following reasons, the Court should dismiss the majority of Hilgert's claims:

[1] The docket sheet incorrectly lists the Plaintiff's name as "Hilbert."

Hilgert's Title VII and ADEA claims fail because he did not exhaust his administrative remedies before filing suit. *See* 29 U.S.C. § 626(d); 42 U.S.C. §2000e-5. Hilgert's FLSA claim is invalid because (1) he does not assert a claim for minimum wage or unpaid overtime and (2) he concedes that he was an exempt employee. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500. Hilgert's First Amendment and Fifth Amendment claims are not actionable because, as Hilgert correctly pleads in his Complaint, May is a *corporation*—not a state actor. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Hilgert's claim for breach of an implied covenant of good faith and fair dealing is misplaced because Texas does not recognize this duty in basic contractual relationships between an employer and employee. *See City of Midland v. Bryant*, 18 S.W.3d 209, 215 (Tex. 2000). Finally, Hilgert's negligent infliction of emotional distress claim fails because (1) Texas does not recognize this cause of action, and (2) even if it did, Hilgert's negligence claim is barred by the exclusive remedy provision of the Texas Workers Compensation Act. *See* Texas Labor Code § 408.001(a); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993). The Court should, therefore, grant May's motion to dismiss all of these claims.

II. BACKGROUND FACTS

May provides business consulting services throughout the United States. It employs commissioned outside sales representatives (whose job titles are "Special Representative") to find suitable clients to purchase a "business survey" to be performed by May. After performing the business survey, May hopes to be engaged by the clients for other consulting services.

Hilgert is a former employee of May. He worked as a sales representative and was therefore a party to a written employment agreement with May called the "Special Representative Employment Agreement" ("the Employment Agreement") (Exhibit 1). Among other things, the Employment Agreement specifies Hilgert's pay arrangement with the Company.

The Employment Agreement provides, in essence, that commissions are only paid for "qualified sales." Qualified sales are determined from survey authorizations obtained from prospective clients that meet certain minimum standards established by May, involving the business size of the client measured by various metrics. The sales employees receive commissions for qualified sales accepted by the Survey Department, and receive reimbursement for certain expenses, as set out in the Employment Agreement. The sales employees are "outside sales" employees as that term is used in FLSA § 13, 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.500, as they customarily and regularly are engaged in sales activities away from May's place of business. As such, they are exempt from the FLSA minimum wage and overtime provisions. Indeed, Hilgert correctly pleads that he was an exempt employee (*See* Complaint ¶¶ 28, 29, 43, 107).

Apparently displeased with the Employment Agreement, Hilgert filed a 67 page, handwritten *pro se* complaint ("the Complaint") and two affidavits (one as an attachment to the complaint (doc. 1)[2] and the other on June 13, 2007 after his employment was terminated (doc. 7)). Collectively these documents appear to allege the following legal claims: Title VII race discrimination and retaliation; age discrimination under the Age Discrimination in Employment Act ("ADEA"); violation of the Fair Labor Standards Act ("FLSA"), breach of contract, breach of an implied covenant of good faith and fair dealing, failure to pay wages, negligent and intentional infliction of emotional distress, and violations of the First and Fifth Amendments to the United States Constitution. Additionally, the *pro se* Complaint is styled as a class action in which Hilgert seeks to assert unspecified claims on behalf of current and former outside commissioned sales representatives in the United States.

[2] The "doc" references are to the court's docket sheet as reflected on PACER.

In essence, Hilgert's complaint is that (1) he found prospective clients willing to purchase business survey services, but May rejected them, and/or (2) that May cheated him out of commissions for some clients to whom May, in fact, provided survey services. He asserts a novel "derivative discrimination claim" that May rejected prospective clients he found because the prospective clients are Hispanic, and thus by discriminating against them by declining to sell them services, May was also discriminating against him, though he is Caucasian. (*See* Complaint ¶¶ 102, 141, 172). In his second affidavit, Hilgert says that he was fired in retaliation for filing his lawsuit, and because of his age and the fact that as a Caucasian, he is in the minority in the Rio Grande Valley. (See doc. 7 ¶¶ 19, 31, 34). Cutting through the mass of repetitive contentions in Hilgert's pleadings, it is plain that regardless of the legal labels he attaches, the substance of his complaints is that May (1) did not accept certain prospective clients he located, and (2) May cheated him out of commissions for clients that it, in fact, performed services for.

III. MOTION TO DISMISS

A motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted if it clearly appears on the face of the complaint that the plaintiff's claims are barred or otherwise cannot succeed according to well established legal principles. *See Bush v. United States*, 823 F.2d 909, 910 (5th Cir. 1987). When considering a motion to dismiss, the court accepts as true the well-pled factual allegations in the complaint, and construes them in the light most favorable to the plaintiff. *McConathy v. Dr.Pepper/Seven Up Corp.*, 131 F.3d 558, 561 (5th Cir. 1998). However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 786 (5th Cir. 2001). "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be

exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1966 (2007) (quotations and citations omitted).

A. HILGERT'S DISCRIMINATION AND RETALIATION CLAIMS UNDER TITLE VII AND THE ADEA MUST BE DISMISSED BECAUSE HE NEITHER INITIATED NOR EXHAUSTED THE ADMINISTRATIVE REMEDIES THAT ARE PREREQUISITES FOR SUING UNDER THOSE STATUTES.

Hilgert cannot bring discrimination and retaliation claims under Title VII and the ADEA because he failed to initiate (and thus failed to exhaust) his administrative remedies by first filing a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). The law is clear that an employee must file an administrative charge with the EEOC prior to filing suit under Title VII. *See* 42 U.S.C. §2000e-5; *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 379 (5th Cir. 2002) (The filing of an EEOC charge "is a precondition to filing suit in district court.") (quoting *Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5th Cir. 1996)). The same rule applies to lawsuits filed under the ADEA. *See* 29 U.S.C. § 626(d); *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir. 1988) ("A charge of discrimination must be timely filed with the EEOC prior to the initiation of a civil action under the ADEA."). Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue. *See Dao*, 96 F.3d at 788-89. Only then may a plaintiff file a lawsuit alleging violation of Title VII or the ADEA. *See id.*

In this case, Hilgert failed to file a charge with the EEOC. Not surprisingly then, he fails to plead (nor can he in good faith plead) that he satisfied this prerequisite to bringing suit. Thus, according to well established law, the Court should dismiss all of his Title VII and ADEA claims. *See* 29 U.S.C. § 626(d); 42 U.S.C. §2000e-5; *Dao*, 96 F.3d at 788-89; *Resistoflex*, 854 F.2d at 765.

B. HILGERT'S FLSA CLAIM MUST BE DISMISSED BECAUSE HE DOES NOT SEEK MINIMUM WAGE OR OVERTIME PAY AND BECAUSE HE IS ADMITTEDLY AN EXEMPT EMPLOYEE.

1. Hilgert's FLSA Claim Fails Because He Is Not Seeking To Recover Minimum Wage Or Overtime Pay.

Hilgert wrongfully attempts to assert a claim under the FLSA to recover commission pay, allegedly due under the Employment Agreement with May. The Court should dismiss Hilgert's FLSA claim because such a claim is not cognizable under the FLSA. The FLSA provides for an employee's right to (1) a minimum wage and (2) overtime pay at a premium rate. *See* 29 U.S.C. §§ 206 (minimum wage), 207 (overtime premium). "All that the FLSA requires is that an employee be paid at least the minimum wage for all hours worked, and if no exemption applies, overtime pay for each hour in excess of the statutory minimum." *Bolick v. Brevard County Sheriff's Dept.*, 937 F. Supp. 1560, 1568 (M.D. Fla. 1996) (citing 29 U.S.C. §§ 206, 207; *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942)). The FLSA does **not** create a cause of action for regular, unpaid wages (unless it is an integral part of a claim for unpaid overtime). *See Arnold v. Arkansas*, 910 F. Supp. 1385, 1393 (E.D. Ark. 1995). Thus, a plaintiff's claim under the FLSA fails as a matter of law if there is no dispute regarding overtime pay or minimum wage. *Id.*

In *Arnold*, the plaintiffs brought a claim for unpaid straight time under the FLSA and conceded that they were not seeking overtime pay as part of the claim. The Court noted that, ordinarily, it has the power to adjudicate a claim for unpaid straight time as part of a claim for unpaid overtime—*if the plaintiff asserts a claim for unpaid overtime*:

> [A] Court, in dealing with an overtime claim (clearly covered by the FLSA) would need the authority to assure itself that the nonovertime work for the same pay period was fully compensated. But here, there is no claim for overtime.

Id. Because the plaintiffs did not assert a claim for overtime pay, the Court concluded that it "has no jurisdiction over the general claims here for straight time compensation for the hours

worked." *Id*. The Court also concluded that "the plaintiffs' claim for straight time pay for work periods when no overtime was worked [] is **not** a violation of section 207 of the FLSA." *Id*. (emphasis added). Accordingly, the Court dismissed the plaintiffs' claims for regular pay under the FLSA.

This Court should dismiss Hilgert's FLSA claim for the same reason. Hilgert does not plead (nor can he in good faith plead) a cause of action for unpaid overtime.[3] Even when affording him the benefit of his *pro se* status, the Court cannot extrapolate a claim for unpaid overtime from Hilgert's 67 page Complaint because he does not mention "overtime," "hours worked," or any other similar wording that is indicative of a claim for unpaid overtime. The logical conclusion, then, is that Hilgert wrongfully asserts a state law claim for breach of contract under the FLSA. However, a breach of contract claim is not cognizable under the FLSA. *See Bolick*, 937 F. Supp. at 1569 ("The FLSA was designed to assure the payment of a minimum wage plus overtime, nothing more."); *see also Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800, 806 (11th Cir. 1991) (city could have violated its contract, but not the FLSA). Because Hilgert does not seek to recover minimum wage or unpaid overtime, his regular commissions claim is not a viable cause of action under the FLSA. *See Arnold*, 910 F. Supp. at 1393. Thus, the Court should therefore dismiss this claim.

2. Hilgert Admits That He Was Exempt From The FLSA's Minimum Wage And Overtime Pay Requirements.

Even if Hilgert brings a claim for minimum wage or unpaid overtime, Hilgert's pleading demonstrates that he is exempt from the FLSA's coverage. Sections 206 (minimum wage requirement) and 207 (overtime premium) do not apply to "outside salesmen," as defined by the

[3] Indeed, pleads an *exemption* from the overtime requirements of the FLSA, and therefore is prevented from asserting a claim for minimum wage or overtime premium pay. (*See* Complaint ¶¶ 28, 29, 43, 107).

Department of Labor's ("DOL") interpretive regulations. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500. Under the DOL's regulations, an employee meets the outside sales exemption if (1) his primary duty is making sales (or securing contracts for services) and (2) he regularly works away from (i.e. "outside") the employer's place of business. *See* 29 C.F.R. § 541.500(a)(1)-(2). An outside sales employee may be compensated on a commissions only basis. *Id*. § 541.5000(c).

Hilgert's pleading establishes that he meets the outside sales exemption. He admits that "the FLSA classifies commission only [outside sales] employees as exempt," (*See* Complaint ¶ 117) and concedes that he performed work as a "commission only outside sales employee." (*See* Complaint ¶ 43). More specifically, he concedes that his job duty was to "sell to any client the management services (MS) by and through the running of a survey," (*See* Complaint ¶ 28) and that he "received only a commission for selling the survey." (*See* Complaint ¶ 29). Given his acknowledgments, Hilgert cannot (and indeed does not) seek minimum wage or unpaid overtime under the FLSA.

C. HILGERT'S CONSTITUTIONAL CLAIMS MUST BE DISMISSED BECAUSE MAY IS NOT A STATE ACTOR AND THERE WAS NO STATE ACTION ASSOCIATED WITH HIS EMPLOYMENT.

Hilgert asserts two claims against May under the United States Constitution. He alleges that May violated his Constitutional rights afforded under the First Amendment (*See* Complaint, Count 1, p. 18) and Fifth Amendment (*See* Complaint, Count 2, p. 22). Hilgert does not specify which clause he is attempting to proceed under for his First Amendment claim. For his Fifth Amendment claim, it appears that Hilgert is alleging a cause of action under the "takings" clause. *See* U.S. Const. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

Hilgert's Constitutional claims are nonstarters. The threshold inquiry when a plaintiff alleges violations of his constitutional rights is whether the defendant can rightfully be said to be

an actor of the state. *See*, *e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1002-03 (1982). "[I]t is well settled that private action is not subject to the restrictions of the United States and Texas Constitutions." *Stevenson v. Panhandle Eastern Pipeline Co.*, 680 F. Supp. 859, 860 (S.D. Tex. 1987) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Gerena v. Puerto Rico Legal Serv. Inc.*, 697 F.2d 447 (1st Cir.1983)); *see also Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 266 (2d Cir. 1999) ("The First Amendment only applies to state actors."). Hilgert does not plead (and cannot in good faith plead) that any of May's actions towards him were state actions. Nor does Hilgert plead facts sufficient to show a nexus between May and a government official or entity. The undisputed fact is that May is a privately held company, with no relevant ties to the government. (*See* Complaint ¶ 20: "Upon information and belief, George S. May International Company is a *corporation*… .") (emphasis added). Therefore, under well-established law, the Court should dismiss Hilgert's Constitutional claims. *See*, *e.g.*, *Loce*, 191 F.3d at 266.

D. HILGERT'S CLAIM FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS NOT ACTIONABLE UNDER TEXAS LAW.

Hilgert also wrongly asserts a cause of action for breach of an implied covenant of good faith and fair dealing. (*See* Complaint, p. 26). Hilgert's claim is based on May's alleged refusal "to pay to Plaintiff(s) timely their commissions… ." (*See id.* ¶ 96). Thus, Hilgert is essentially alleging that May breached an implied covenant of good faith and fair dealing by failing to pay him commissions that he allegedly earned, pursuant to the Employment Agreement. (*See id.*) Even if May breached the agreement by not paying Hilgert commissions that he earned, Hilgert's good faith and fair dealing claim is not actionable.

Texas does not recognize an implied covenant of good faith and fair dealing in ordinary contractual relationships. *See*, *e.g.*, *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 709

(Tex. 1990) (no duty between secured creditor and guarantor); *Nautical Landings Marina v. First Nat.*, 791 S.W.2d 293, 299 (Tex. App.—Corpus Christi 1990, pet denied) (no duty between lender and borrower); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 481 (Tex. App.—Corpus Christi 1989, pet. denied) (no duty between supplier and distributor). Indeed, the Texas Supreme Court has "specifically rejected the implication of a general duty of good faith and fair dealing in all contracts." *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 n. 5 (Tex. 1992), *rev'd on other grounds*, *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212 (Tex. 2002) (citing *English v. Fischer*, 660 S.W.2d 521, 522 (Tex.1983)). A duty of good faith and fair dealing does not exist, absent some special relationship, such as the one between an insurer and its insured. *See Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987).

Hilgert's former relationship with May does not give rise to an implied covenant of good faith and fair dealing. He pleads no facts to establish a special relationship with May. The relationship between Hilgert and May is nothing more than a garden-variety employment relationship, where one party has agreed to pay the other commissions for making qualified sales. Moreover, there does not appear to be any authority under Texas law to support Hilgert's theory that his relationship with May creates an implied covenant or duty of good faith and fair dealing. In fact, the Texas Supreme Court has stated that "the elements which make the relationship between an insurer and an insured a special one are absent in the relationship between an employer and its employees." *See City of Midland v. Bryant*, 18 S.W.3d 209, 215 (Tex. 2000) (declining to find an implied covenant of good faith and fair dealing in an employment relationship "in light of the variety of statutes that the Legislature has already enacted to regulate employment relationships.") *accord Guzman v. El Paso Natural Gas Co.*,

756 F. Supp. 994, 1001 (W .D. Tex. 1990). Therefore, the Court should dismiss Hilgert's claim for breach of an implied covenant of good faith and fair dealing.

E. HILGERT'S NEGLIGENT INF LICTION OF EMOTIONAL DIS TRESS CLAIM MUST B E DISMISSED BECAUSE TEXAS DOES NOT RECOGNIZE SUCH A CAUSE OF ACTION AND BECAUSE THE TEXAS WORKERS COMPENSATION ACT PROVIDES THE E XCLUSIVE REMEDY FOR AN EMPLOYEE HARMED BY AN EMPLOYER'S NEGLIGENCE.

Hilgert also attempts to bring a ca use of action for negligent infliction of emotional distress. The Court should dismiss this claim for two reasons: First, Texas does not recognize a cause of action for negligent infliction of e motional distress. *See Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) ("[W]e have refused to adopt the tort of negligent infliction of emotional distress.") (citing *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993)). Second, even if Texas recognized a claim for negligent infliction of emotional distress, Hilgert's claim fails as a matter of law because May is a s ubscriber under Workers' Compensation Act and thus, th e exclusive-remedy provision of the Workers' Compensation Act bars all of Hilgert's work-related negligence claims *See* TEX. LAB. CODE § 408.001(a); *Garcia v. Exel Logistics, Inc*., 161 S.W.3d 473, 475 (T ex. 2005). Accordingly, the Court shou ld dismiss Hilgert's claim for negligent infliction of emotional distress.

IV. CONCLUSION

With the dismissal of claims discussed above, Hilgert's lawsuit should proceed as a claim for intentional infliction of emotional distress and a claim for breach of contract, based on May's alleged failure to pay him comm issions. Ma y anticipates m oving for summary judgm ent on these remaining claims after discovery has been taken. If the Court should allow Hilgert to replead, May respectfully requests that the Court admonish him to limit his Amended Complaint

to "a short and plain statement of the claim showing that the pleader is entitled to relief," as required by Federal Rule of Civil Procedure 8(a)(2).

Respectfully submitted

S/John L. Collins

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he caused a copy of the foregoing DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS'S TITLE VII, ADEA, FLSA, CONSTITUTIONAL, GOOD FAITH AND FAIR DEALING, AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS to be served upon Plaintiff Clive B. Hilgert by causing the same to be placed in the United States Mail, proper first class postage prepaid, certified, return receipt requested, addressed as follows on July 23, 2007:

Clive B. Hilgert
2500 N. 32nd Street
Apt. 2
McAllen, TX 78501

s/John L. Collins