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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gerald Morgan,

Plaintiff,

v.

Elaine Chao, Secretary, U.S. Department of Transportation,

Defendant.

No. CV-16-04036-PHX-DLR

ORDER

Plaintiff Gerald Morgan works for the Federal Aviation Administration as an airway systems specialist. He has filed a complaint against Defendant Secretary of Transportation asserting Title VII race discrimination and retaliation claims. (Doc. 1.) The complaint purports to seek damages for injuries Plaintiff sustained in a car accident while driving to work. (*Id.* ¶¶ 62, 100.)

Defendant has filed a motion to dismiss the Title VII claims to the extent they arise from Plaintiff's car accident and to strike Plaintiff's orthopedic expert witness. (Doc. 28.) The motion is fully briefed. (Docs. 35, 37.) Neither side has requested oral argument. For reasons stated below, the motion is granted.

I. Background

Plaintiff alleges that he was falsely accused of harassing an African-American coworker who claimed that Plaintiff was a racist and that he suffered various adverse employment actions because of his race. (Doc. 1 ¶¶ 25-26, 36-38, 90-91.) In the fall of

2012, Plaintiff complained of discrimination to an Equal Employment Opportunity counselor. (¶ 4.) Plaintiff alleges that after his supervisors learned about the complaint, he was reassigned from his work location at Phoenix Sky Harbor Airport to the Tucson International Airport. (¶¶ 53-57.)

On February 19, 2013, Plaintiff was injured in a car accident while commuting to Tucson in his government vehicle and missed more than a month of work due to his injuries. (¶ 62.) Plaintiff claims that but for the alleged retaliatory change in work location, he would not have been traveling to Tucson on the day of the accident. (¶ 100.) Plaintiff has identified the treating physician, Dr. Mark Sullivan, as an expert witness who will testify about the causation and extent of Plaintiff's accident-related injuries. (Doc. 28-1 at 3-6.)

Defendant argues that any claim for accident-related injuries fails for lack of proximate cause and is barred under the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 et seq., which provides the exclusive remedy for on-the-job injuries sustained by federal employees. (Doc. 28 at 4-7.) The Court agrees.

II. Title VII Violations Did Not Proximately Cause Plaintiff's Accident Injuries

"The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011). Whether a defendant's misconduct "is a proximate cause of the plaintiff's injury entails a judgment, at least in part policy based, as to how far down the chain of consequences a defendant should be held responsible for its wrongdoing." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 178 (2007). "The traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 n.13 (1982). As explained in *Palsgraf*, a landmark case in American tort law, "but for" causation has its legal, if not logical, limits:

> [W]hen injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . We may regret that the line was drawn just where it was, but drawn somewhere it had to be.

Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103-04 (N.Y. 1928) (Andrews, J., dissenting).

The Court has little difficulty in concluding that the line of proximate causation in this case must be drawn at a point where Defendant has no legal liability under Title VII for injuries sustained in a car accident undisputedly caused by the negligence of an unrelated third party. (*See* Doc. 28-1 at 36-40 (Arizona Crash Report).) Plaintiff asserts that "but for Defendant's actions, [he] never would have been in position to be rear-ended that day." (Doc. 35 at 8.) But proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged," *Staub v. Proctor Hospital*, 562 U.S. 411, 419 (2011), or at least "indirect consequences that are foreseeable," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 25 (2010) (Breyer, J., dissenting).

In this case, there is no direct relation between the alleged Title VII violations and the car accident, and this is true even if, as Plaintiff notes, a person driving more miles has a greater chance of being involved in an accident. (Doc. 35 at 8.) Although auto accidents are commonplace and the chance of having one is greater the more one drives, the accident in this case was not a reasonably foreseeable consequence of Defendant's alleged misconduct – that is, discrimination and retaliation in violation of Title VII. Rather, the negligence of the other driver was a superseding cause of Plaintiff's accident-related injuries for which Defendant simply cannot be held liable. *See Staub*, 562 U.S. at 420 (a cause is deemed to be "superseding" where it is a "cause of independent origin that was not foreseeable").

In short, the Court finds that Plaintiff's claim for damages arising from the car accident is so remote and attenuated from the alleged Title VII misconduct that it must be dismissed for lack of proximate causation. *See Stepper v. England*, 14 Fed. Appx. 859, 860 (9th Cir. 2001) (finding that the causal nexus between plaintiff's knee injury suffered at a navy shipyard and the alleged shipyard's discriminatory conduct was too attenuated to warrant damages and that Title VII did not justify awarding lost future earnings under the plaintiff's theory of "but for" causation).

III. FECA Is the Exclusive Remedy for Plaintiff's Accident-Related Injuries

Defendant argues, correctly, that FECA is the exclusive remedy for Plaintiff's accident-related injuries and Title VII provides no exception in this case. (Doc. 28 at 4-7.) FECA provides compensation to federal employees for certain lost wages and medical costs incurred as a result of an injury sustained in performance of their duties. 5 U.S.C. § 8102(a). Pursuant to § 8116(c), the liability of the United States for a workers' compensation claim is governed exclusively by FECA's administrative scheme, and civil actions for tort or other claims arising from a work-related injury are barred. In other words, the "remedies provided under FECA are exclusive of all other remedies against the United States for job-related injury[.]" *Figueroa v. United States*, 7 F.3d 1405, 1407 (9th Cir. 1993). Title VII, by contrast, compensates employees for damages caused not by accidental injury, but unlawful workplace discrimination and retaliation. 42 U.S.C. § 2000e-2.

Plaintiff contends that the question is not whether the FECA benefits he received for his accident injuries were proper, "but whether Title VII creates an additional claim [he] can raise and recover damages from regarding the same factual pattern[.]" (Doc. 35 at 3.) Plaintiff cites *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), for the proposition that courts are not barred from awarding additional payments under Title VII "for harms that fall *outside* of FECA's definition of 'injury.'" 42 F.3d at 515. But Plaintiff's accident injuries fall squarely within this definition: FECA expressly provides that the term "injury" includes "injury by accident." 5 U.S.C. §§ 8101(5).

Plaintiff's reliance on *Nichols* is misplaced. In that case, the plaintiff had received payments under FECA for post-traumatic stress disorder but sought separate damages under Title VII for the other harm she suffered from the underlying quid pro sexual harassment by her supervisor. The Ninth Circuit found that the plaintiff was barred from recovering any other sums from the United States relating to her post-traumatic stress disorder because it was a compensable "injury" for purposes of FECA (a "disease proximately caused by employment"). 42 F.3d at 515. The Ninth Circuit made clear, however, that the other harm the plaintiff suffered "from sex discrimination is *not* an 'injury' within the meaning of FECA." *Id.* First and foremost, because such harm was "not an 'injury by accident." *Id.* Rather, the harm was caused by the supervisor's sex discrimination, which "was an intentional – not an accidental – act." *Id.* Thus, the exclusivity provisions of FECA did not apply to the Title VII damages.

Here, however, Plaintiff seeks additional payments for injuries caused by his on-the-job auto accident. (Doc. 1 ¶¶ 62, 100.) These injuries, however, were not proximately caused by the alleged Title VII violations but instead were the result of an "injury by accident." 5 U.S.C. §§ 8101(5). "[A] plaintiff may not avoid FECA's jurisdictional bar by characterizing what is essentially a FECA claim as a Title VII action." *Wade v. Donahoe*, No. CIV.A. 11-03795, 2012 WL 3844380, at *6 (E.D. Pa. Sept. 4, 2012); *see Davis v. Johnson*, 2007 U.S. Dist. LEXIS 40116, at *24-26 (E.D. Cal. May 14, 2007) (relying on *Nichols* to distinguish between Title VII remedies and workers' compensation under FECA and finding that the plaintiff was limited to his FECA benefits for his back injury); *Moe v. United States*, 326 F.3d 1065, 1068 (9th Cir. 2003) (noting that "if compensation is available under FECA, all other statutory remedies for claims arising under the same facts are preempted").

In short, FECA provides the sole and exclusive remedy for Plaintiff's accident-related injuries. *See Figueroa*, 7 F.3d at 1407. Plaintiff may, consistent with *Nichols*, recover "payments for *discriminatory* harm to the full extent allowed by Title VII." 42 F.3d at 516 (emphasis added). But additional payments in this lawsuit for the accident

injuries are barred by FECA.

IV. Defendant's Motion to Strike Plaintiff's Orthopedic Expert

Plaintiff does not dispute that the motion to strike is dependent on the outcome of the motion to dismiss. (Doc. 35 at 10.) Having decided to dismiss Plaintiff's accident-related claim for damages, the Court finds the expert testimony of Dr. Sullivan to be irrelevant to any issue in the case. *See* Fed. R. Evid. 702(a). His testimony in this matter therefore is precluded.

IT IS ORDERED that Defendant's motion to dismiss claims stemming from Plaintiff's car accident and to strike Plaintiff's orthopedic expert (Doc. 28) is **GRANTED**.

Dated this 28th day of July, 2017.

Douglas L. Rayes
United States District Judge