

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
LEWIS T. BABCOCK, JUDGE**

Civil Case No. 10-cv-02715-LTB-KLM

JEFFREY L. YARBERRY,

Plaintiff,

v.

TOM J. VILSACK, Secretary, US Department of Agriculture,

Defendant.

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**ORDER**

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This case is before me on the Recommendation of the Magistrate Judge that Defendant's Motion to Dismiss be granted and Plaintiff's Amended Complaint be dismissed without prejudice. The Magistrate Judge further recommends that Plaintiff's Motion to Amend be denied.

The Plaintiff has filed timely specific written objections to the Magistrate Judge's recommendations. The Defendant has filed a timely written reply to the objections. By Minute Order dated June 21, 2011, I afforded Defendant up to and including July 26, 2011, to file a reply. Plaintiff has not filed a timely reply to the Defendant's response. I review the Magistrate Judge's Recommendation *de novo* in light of the file and record in this case. On *de novo* review I conclude that the Recommendation is correct.

Although the Motion to Dismiss is filed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the Magistrate Judge's Recommendation turns upon a factual attack analysis that

this Court has no jurisdiction because of the Plaintiff's failure to exhaust administrative remedies. Specifically, the Magistrate Judge determined that at the conclusion of the Plaintiff's EEOC counseling process, Plaintiff was informed that he needed to file a formal complaint if he wished to pursue his concerns further. Letter to Plaintiff dated November 16, 2007 (Doc 23-22). It is undisputed that Plaintiff never filed a formal complaint with his employer, the Department of Agriculture.

Plaintiff for the first time in his objections to the Magistrate Judge's Recommendation argues that he should be excused for exhausting his EEOC administrative remedies prior to filing this action because he never received a "notice of right to file a formal complaint." But in this circuit, theories raised for the first time in objections to a Magistrate Judge's Recommendation are deemed waived. *U.S. v. Garfinkel*, 261 F.3d 1030, 1031 (10<sup>th</sup> Cir. 2001). By failing to present this issue to the Magistrate Judge before issuance of her recommendations, Plaintiff has waived this pivotal objection.

Accordingly

IT IS ORDERED that Defendant's Motion to Dismiss (Doc 23) is GRANTED and Plaintiff's Amended Complaint is DISMISSED WITHOUT PREJUDICE and Plaintiff's Motion to Amend (Doc 36) is DENIED.

BY THE COURT:

s/Lewis T. Babcock  
Lewis T. Babcock, Judge

DATED: July 27, 2011