



1 faith and fair dealing, and wrongful termination. (ECF No. 3 at 2.) The state court dismissed  
2 these claims without prejudice, and Plaintiff filed a First Amended Complaint (“FAC”)  
3 asserting additional claims under Title VII, 42 U.S.C. § 2000e, et seq., the Family and  
4 Medical Leave Act (“FMLA”), and 42 U.S.C. § 1983. (Id.; ECF No. 1-2.) Defendant  
5 removed to this Court based on federal question jurisdiction. (ECF No. 1 at 1-2.) The Court  
6 then dismissed Plaintiff’s claims for national origin discrimination, discrimination and  
7 retaliation in violation of the FMLA, and violation of the Fourteenth Amendment and  
8 remanded the case. (ECF No. 74 at 8.)

### 9 **III. LEGAL STANDARDS**

10 Plaintiff’s Motion addresses three orders, two of which were issued by Magistrate  
11 Judges: the Court’s September 21, 2018 order granting Defendant’s motion to dismiss  
12 (“Dismissal Order”) (ECF No. 74); the Court’s September 11, 2018 order granting  
13 Defendant’s request for reasonable attorney’s fees (“Fees Order”) (ECF No. 71); and the  
14 Court’s May 24, 2018 order sanctioning Plaintiff (“Sanctions Order”) (ECF No. 39) for  
15 failing to appear at an early neutral evaluation (“ENE”). (ECF No. 83 at 1.) The Dismissal  
16 Order was issued by District Judge Miranda M. Du; the Fees Order was issued by  
17 Magistrate Judge Nancy J. Koppe; and the Sanctions Order was issued by Magistrate  
18 Judge Peggy A. Leen. The Court thus construes Plaintiff’s Motion as a motion for  
19 reconsideration under Fed. R. Civ. P. 60(b) as to the Dismissal Order and as tardy  
20 objections to the Fees Order and Sanctions Order under Fed. R. Civ. P. 72(a) and LR IB  
21 3-1(a).

#### 22 **A. Legal Standard Applicable to Orders by District Judge**

23 A motion to reconsider must set forth “some valid reason why the court should  
24 reconsider its prior decision” and set “forth facts or law of a strongly convincing nature to  
25 persuade the court to reverse its prior decision.” *Frasure v. United States*, 256 F. Supp.  
26 2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court “(1) is presented  
27 with newly discovered evidence, (2) committed clear error or the initial decision was  
28 manifestly unjust, or (3) if there is an intervening change in controlling law.” Sch. Dist. No.

1 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). “A motion for reconsideration is not  
2 an avenue to re-litigate the same issues and arguments upon which the court already has  
3 ruled.” Brown v. Kinross Gold, U.S.A., 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005).

#### 4 **B. Legal Standard Applicable to Orders by Magistrate Judges**

5 Magistrate judges are authorized to resolve pretrial matters subject to district court  
6 review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)(A);  
7 see also Fed. R. Civ. P. 72(a); LR IB 3-1(a) (“A district judge may reconsider any pretrial  
8 matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3,  
9 where it has been shown that the magistrate judge’s ruling is clearly erroneous or contrary  
10 to law.”). “This subsection would also enable the court to delegate some of the more  
11 administrative functions to a magistrate, such as . . . assistance in the preparation of plans  
12 to achieve prompt disposition of cases in the court.” Gomez v. United States, 490 U.S.  
13 858, 869 (1989). “A finding is clearly erroneous when although there is evidence to support  
14 it, the reviewing body on the entire evidence is left with the definite and firm conviction that  
15 a mistake has been committed.” United States v. Ressam, 593 F.3d 1095, 1118 (9th Cir.  
16 2010) (quotation omitted). A magistrate’s pretrial order issued under 28 U.S.C.  
17 § 636(b)(1)(A) is not subject to de novo review, and the reviewing court “may not simply  
18 substitute its judgment for that of the deciding court.” Grimes v. City & County of San  
19 Francisco, 951 F.2d 236, 241 (9th Cir. 1991).

### 20 **IV. DISCUSSION**

#### 21 **A. Dismissal Order**

22 In the Dismissal Order, the Court dismissed Plaintiff’s first claim for national origin  
23 discrimination and sixth claim for violation of his Fourteenth Amendment rights. (ECF No.  
24 74 at 8.) Plaintiff argues that the Court erred in dismissing these claims. (ECF No. 83 at  
25 10-17.)

#### 26 **1. National Origin Discrimination Claim**

27 The Court dismissed Plaintiff’s claim for national origin discrimination because  
28 Plaintiff failed to exhaust administrative remedies. (ECF No. 74 at 5.) Exhaustion of

1 administrative remedies under Title VII requires plaintiffs to file a charge of discrimination  
2 “within 180 days from the last act of alleged discrimination” or, in a state like Nevada that  
3 has its own local agency, within 300 days of the last discriminatory act. 42 U.S.C. § 2000e-  
4 5(e)(1); Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1175 (9th Cir. 1999). The  
5 Court found that the date of the last alleged violation was January 21, 2016, and that  
6 Plaintiff did not file his intake complaint with the Nevada Equal Rights Commission  
7 (“NERC”) until March 31, 2017, more than 400 days later. (ECF No. 74 at 5.)

8 Plaintiff now asserts that the last alleged violation occurred on November 18, 2016,<sup>2</sup>  
9 when Defendant’s internal dispute resolution process concluded. (ECF No. 83 at 10.) But  
10 prior to that, Plaintiff “had notice of all the wrongful acts [he] wished to challenge.” Pouncil  
11 v. Tilton, 704 F.3d 568, 578 (9th Cir. 2012) (citation omitted). Thus, Plaintiff is mistaken in  
12 his belief that “all the events . . . fix[ing] the alleged liability of the party” did not occur until  
13 the internal dispute resolution process concluded. (See ECF No. 83 at 10.) Accordingly,  
14 the Court does not find good cause to accept Plaintiff’s assertion that the last alleged  
15 violation occurred on November 18, 2016.

16 Plaintiff also argues that the exhaustion period should be equitably tolled based on  
17 his participation in the internal dispute resolution process. (Id.) “Generally, a litigant  
18 seeking equitable tolling bears the burden of establishing two elements: (1) that he has  
19 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in  
20 his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)) (citing Irwin v. Dep’t of Veterans  
21 Affairs, 498 U.S. 89, 96 (1990)). Plaintiff’s participation in the internal dispute resolution  
22 process does not constitute an “extraordinary circumstance” that prevented him from filing  
23 a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”)  
24 or NERC. Rather, Plaintiff seems to have misunderstood his legal rights and  
25 responsibilities as an alleged target of employment discrimination.

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<sup>2</sup>Plaintiff erroneously listed the date as November 18, 2018.

1 Plaintiff further argues that exhaustion was futile because Defendant intentionally  
2 delayed the internal dispute resolution process from February 6, 2016, to November 18,  
3 2016. (ECF No. 83 at 11-13.) Plaintiff provides no evidence of Defendant’s intent, and a  
4 delay in the process—to the extent there was such a delay—is not in itself evidence of  
5 futility. Furthermore, while the Ninth Circuit has not decided whether a futility exception  
6 should be read into the exhaustion requirements of Title VII, “bare assertions of futility are  
7 insufficient’ to demonstrate the existence of a viable futility claim in any event.” *Thomas v.*  
8 *McCarthy*, 714 F. App’x 674, 676 (9th Cir. 2017) (quoting *Diaz v. United Agric. Emp.*  
9 *Welfare Benefit Plan & Tr.*, 50 F.3d 1478, 1485 (9th Cir. 1995)).

10 Plaintiff further argues that he is not required to exhaust his administrative remedies  
11 because he raises a colorable constitutional claim that is collateral to his employment  
12 discrimination claims. (ECF No. 83 at 13.) However, the doctrine on which Plaintiff relies  
13 has only been applied to a Medicare exhaustion statute, 42 U.S.C. § 405(g). See, e.g.,  
14 *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Clarinda Home Health v. Shalala*, 100  
15 F.3d 526, 528 (8th Cir. 1996).

16 Plaintiff additionally cites to *Walker v. S. Ry. Co.*, 385 U.S. 196 (1966), amended,  
17 386 U.S. 988 (1967), but that case involved exhaustion requirements under the Railway  
18 Labor Act—not Title VII.

19 Accordingly, the Court declines to reverse its prior decision dismissing Plaintiff’s  
20 claim for national origin discrimination.

## 21 **2. Fourteenth Amendment Claim**

22 The Court dismissed Plaintiff’s claim for violation of the Fourteenth Amendment  
23 because (1) Plaintiff failed to allege that he brought his claim under 42 U.S.C. § 1983 and  
24 (2) Plaintiff failed to allege sufficient facts to show that Defendant was a state actor in  
25 either his FAC or proposed Second Amended Complaint (“SAC”). (ECF No. 74 at 6-7.)

26 Plaintiff now argues that the allegations in his proposed SAC would establish that  
27 Defendant is a state actor (ECF No. 83 at 15), but Plaintiff does not assert a federal

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1 constitutional claim in his SAC. (See ECF No. 11 at 60.) Plaintiff cannot rely on allegations  
2 in the SAC to support a claim that the SAC itself abandons.

3 Plaintiff further argues that he did not intend to assert a claim under 42 U.S.C. §  
4 1983. (ECF No. 83 at 16.) But this argument requires the Court to reaffirm its first ground  
5 for dismissal—that Plaintiff failed to allege that his claim was brought under 42 U.S.C. §  
6 1983. (See ECF No. 74 at 6.)

7 Accordingly, the Court declines to reverse its prior decision dismissing Plaintiff's  
8 sixth claim for relief.

### 9 **B. Fees Order**

10 In the Fees Order, Magistrate Judge Nancy J. Koppe granted Defendant's motion  
11 to compel discovery<sup>3</sup> (ECF No. 40). (ECF No. 71 at 1.) The Court found that Plaintiff failed  
12 to respond to the motion to compel and thereby consented to it being granted under LR 7-  
13 2(d). (Id.) Plaintiff argues that he in fact responded to the motion to compel in his motion  
14 in limine. (ECF No. 83 at 22 (citing ECF No. 48).) However, the portions of the motion in  
15 limine that Plaintiff references do not expressly reference the motion to compel discovery,  
16 and it would be a stretch to say that they even impliedly reference the motion to compel  
17 discovery. (See ECF No. 48 at 11, 16.) While pro se pleadings must be construed liberally,  
18 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010), Plaintiff cannot rely on the Court to  
19 draw every possible inference from his filings—Plaintiff must affirmatively and expressly  
20 advance any arguments he wishes the Court to consider. Accordingly, the Court does not  
21 find that the Fees Order was clearly erroneous.

22 Plaintiff also mistakenly believes that he is permitted to file omnibus motions  
23 because he is proceeding pro se. (ECF No. 83 at 19.) This is not the case. Plaintiff must  
24 file a separate document for each type of relief requested or purpose of the document. LR  
25 IC 2-2(b). Plaintiff must comply with this rule even though he is proceeding pro se and  
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27 <sup>3</sup>The Court also granted Defendant's request for reasonable attorney's fees, but  
28 attorney's fees were not ultimately awarded. (ECF No. 79.) To the extent Plaintiff requests  
reconsideration of the Court's initial order granting Defendant's request for attorney's fees,  
such a request is moot.

1 filing his papers physically rather than electronically. *Dietz v. Bouldin*, 136 S. Ct. 1885,  
2 1892 (2016) (“[D]istrict courts have the inherent authority to manage their dockets . . . .”);  
3 *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984) (pro se litigants must follow the  
4 same rules of procedure that govern other litigants).

5 Finally, Plaintiff’s objection is overruled because it is not timely. The Fees Order  
6 issued on September 11, 2018, and Plaintiff had fourteen days from the date of service of  
7 the order to file a written objection. Fed. R. Civ. P. 72(a); LR IB 3-1(a). Plaintiff did not file  
8 his Motion until October 19, 2018, at the earliest. (ECF No. 81.) “A party may not assign  
9 as error a defect in [a magistrate judge’s] order not timely objected to.” Fed. R. Civ. P. 72.

### 10 **C. Sanctions Order**

11 In the Sanctions Order, Magistrate Judge Peggy A. Leen imposed sanctions  
12 against Plaintiff for \$350 representing one hour of reasonable attorney’s fees incurred by  
13 Defendant for preparing for and attending the ENE at which Plaintiff failed to appear. (ECF  
14 No. 39 at 6.)

15 Plaintiff essentially argues that he should not be subject to sanctions because he  
16 requested that the ENE be postponed. (ECF No. 83 at 25.) But Plaintiff’s requests to  
17 continue the ENE were denied. (ECF No. 39 at 2.) Plaintiff was therefore required to attend  
18 the ENE at the scheduled time.

19 Accordingly, the Court does not find that the Sanctions Order was clearly  
20 erroneous. The Court also overrules Plaintiff’s objection to the Sanctions Order because  
21 it is untimely. The Sanctions Order issued on May 24, 2018, and Plaintiff had fourteen  
22 days from the date of service of that order to file a written objection. Fed. R. Civ. P. 72(a);  
23 LR IB 3-1(a). Plaintiff did not file his Motion until October 19, 2018, at the earliest. (ECF  
24 No. 81.)

### 25 **D. Third Amended Complaint**

26 Plaintiff filed his Third Amended Complaint on October 19, 2018, without first  
27 seeking leave of the Court. (ECF No. 82.) The Court has already denied Plaintiff’s motion  
28 to file a second amended complaint, and the case has been remanded. (ECF No. 74.) If

1 Plaintiff wishes to amend his complaint, he may wish to attempt amendment in state  
2 court—not this Court. The Court will strike Plaintiff's Third Amended Complaint.


3 **V. CONCLUSION**

4 The Court notes that the parties made several arguments and cited to several cases  
5 not discussed above. The Court has reviewed these arguments and cases and determines  
6 that they do not warrant discussion as they do not affect the outcome of the motion before  
7 the Court.

8 It is therefore ordered that Plaintiff's motions for reconsideration (ECF Nos. 81, 83)  
9 are denied.

10 It is further ordered that the Clerk of the Court strike Plaintiff's Third Amended  
11 Complaint (ECF No. 82) from the docket.

12 DATED THIS 9<sup>th</sup> day of November 2018.

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16 MIRANDA M. DU  
17 UNITED STATES DISTRICT JUDGE  
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