IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HESHAM ISMAIL,	:	CIVIL NO.: 3:19-cv-01305
	:	
Plaintiff,	:	
	:	(Judge Mannion)
v.	:	
	:	(Magistrate Judge Schwab)
	:	
MCDERMOTT INTERNATIONAL, INC., f/n/a CB&I, *et al.*,	:	
	:	
Defendants.	:	

REPORT AND RECOMMENDATION

I. Introduction.

The plaintiff, Hesham Ismail ("Ismail"), brings this action *pro se* under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and 18 U.S.C. § 1001. Ismail alleges that he suffered discriminatory acts by the defendants and that he was wrongfully terminated, not hired, given unequal terms and conditions of his employment, and retaliated against on the basis of his race, religion, and national origin.

The case is presently before us on two motions to dismiss and one partial motion to dismiss filed by the defendants. Ultimately, we find that Ismail's amended complaint fails to state a claim upon which relief can be granted against

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

the defendants. We accordingly recommend that Ismail's first amended complaint (*doc. 20*) be dismissed with leave to file a second amended complaint as to two of his claims.

II. Background and Procedural History.

Ismail initiated this case by filing his complaint on July 29, 2019. *Doc. 1*. On January 2, 2020, he filed an amended complaint using a "Complaint for Employment Discrimination" form. *Doc. 20*. We note at the outset that it is unclear from Ismail's amended complaint which claims he brings against which defendants, or which alleged facts support each of his various claims. The amended complaint names as the defendants McDermott International, Ltd. ("McDermott");[1] Honeywell International, Inc. ("Honeywell"),[2] Judson Weiss ("Weiss"), Darius Adamczyk ("Adamczyk"), collectively the ("Honeywell defendants"); and John Neff ("Neff"). *Id.* at 2-3. Ismail brings this case under Title VII, Section 1981, and 18 U.S.C. § 1001. *Id.* at 4.

[1] Ismail incorrectly names McDermott International, Inc. (formerly CB&I), but we refer to McDermott International, Ltd., in accordance with McDermott's briefing. *Doc. 37* at 1. Additionally, CB&I refers to Chicago Bridge & Iron Company. *Doc. 37-1* at 3.

[2] Ismail also incorrectly names Honeywell, but we refer to Honeywell International, Inc., in accordance with Honeywell's briefing. *Doc. 49* at 1.

Ismail alleges that, due to his race, religion, and national origin, the defendants fired him, failed to hire him, provided him unequal terms and conditions of employment, and retaliated against him. *Id.* at 5-6. Ismail alleges that CB&I employed him to work at a facility for Honeywell, a client of CB&I, on February 21, 2013. *Id.* at 7. In July of 2013, Ismail "declined to attend a potluck lunch hosted by" Weiss "because [Ismail] was fasting in accordance with the Islamic tradition of Ramadan." *Id.* Based on this, and within weeks, Ismail believes that his workload tripled as compared to his peers and he was "subject[ed] to dishonest and hostile criticism including profanity" by Weiss. *Id.*

Ismail claims that Neff criticized him during a performance review in August of 2014 using "criticisms from Judson Weiss." *Id.* Ismail continues that he proved these criticisms to be inaccurate, an assessment with which Neff allegedly agreed, and Neff further agreed "to develop verifiable performance criteria." *Id.* Ismail alleges that he reported harassment to the Honeywell plant manager, who promised Ismail confidentiality but "offered no help for the reported harassment and disclosed [the] complaint" to Weiss. *Id.* Ismail alleges he emailed Neff on November 21, 2014, for a transfer out of the Honeywell facility, but Neff did not respond. *Id.* Thereafter, on February 4, 2015, Ismail alleges he was terminated by CB&I for loss of confidence. *Id.* He alleges he applied on February 9, 2015, for an "identical job at a different facility" with CB&I and was denied. *Id.* Two days

later, Ismail claims he emailed Adamczyk about an audio recording of his termination capturing racist language and a coverup of safety violations by Weiss. *Id.* Ismail declined to turn over the audio recording to Honeywell when requested by a human resources representative from Honeywell on February 13, 2015, and he alleges that Honeywell agreed to investigate his harassment claims. *Id.* Ismail claims that on June 11, 2015, Honeywell's investigation found no wrongdoing. *Id.* at 8. Undeterred, on January 20, 2016, Ismail emailed Adamczyk the audio recording, and Ismail alleges that Adamczyk "responded through his VP [we surmise Ismail means vice president] refusing to consider the audio evidence [and] threatened criminal prosecution . . . for illegally recording [Weiss] without permission." *Id.* Afterwards, Ismail claims he notified the Occupational Safety and Health Administration ("OSHA") regarding the alleged safety violations and coverup by Weiss. *Id.* Ismail also emailed the "entire Honeywell corporate management team with new evidence" regarding his harassment claims. *Id.* Finally, Ismail alleges he sent another email to Adamczyk regarding an OSHA coverup. *Id.*

Ismail alleges that he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on July 10, 2015. *Id.* at 8-9. Ismail claims that on July 26, 2019, the EEOC issued Ismail a right-to-sue letter, which Ismail failed to attach to his amended complaint. *Id.* at 9. But Ismail did attach to his original complaint a

July 26, 2019, Dismissal and Notice of Rights form from the EEOC. *Doc. 1* at 9. Ismail seeks "back pay, front pay, salary, pay increases, bonuses, medical and other benefits, training, promotions, pension, and seniority" as well as actual damages, damages for pain, suffering, and humiliation, and punitive damages. *Doc. 20* at 10.

This case is now before us on a partial motion to dismiss and two motions to dismiss. *Docs. 37, 44, 49*. McDermott moves to dismiss only Ismail's Section 1981 claims against it. *Doc. 37* at 1-2. McDermott also filed an answer to the amended complaint. *Doc. 58*. Neff moves to dismiss Ismail's Title VII and Section 1981 claims. *Doc. 44* at 1-2. The Honeywell defendants move to dismiss or for a more definite statement regarding all of Ismail's claims against them. *Doc. 49* at 1. Each of these three motions to dismiss is ripe, and we consider them below.

III. Discussion.

A. Motion to Dismiss and Pleading Standard.

A federal court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require

'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

In deciding whether to dismiss a case for failure to state a claim upon which relief can be granted, a federal court "must accept all facts alleged in the complaint as true and construe the complaint in the light most favorable to the nonmoving party." *Krieger v. Bank of Am.*, 890 F.3d 429, 437 (3d Cir. 2018) (quoting *Flora v. Cty. of Luzerne*, 776 F.3d 169, 175 (3d Cir. 2015)). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no

more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. In practice, this leads to a three-part standard:

> To assess the sufficiency of a complaint under *Twombly* and *Iqbal*, a court must: First, take note of the elements a plaintiff must plead to state a claim. Second, identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Palakovic v. Wetzel, 854 F.3d 209, 220 (3d Cir. 2017) (internal quotation marks and alterations omitted) (quoting *Burtch v. Millberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011)).

Complaints brought *pro se* are afforded more leeway than those drafted by attorneys. In determining whether to dismiss a complaint brought by a *pro se* litigant, a federal district court is "required to interpret the *pro se* complaint liberally." *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018). "[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson*, 551 U.S. at 94 (2007). Nevertheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

B. Ismail cannot state a claim for which relief can be granted under 18 U.S.C. § 1001 against any defendant.

Ismail purports to bring claims against the defendants, though it is unclear which defendants specifically, under 18 U.S.C. § 1001, which deals with fraud and false statements or entries to the government generally. *Doc. 20* at 4, 7-8. We assume that Ismail intends this claim to be related to his allegations of safety violations and an alleged cover up. *Id.* at 8 ("Honeywell and Judson Weiss falsified information to the federal agency of OSHA.").

Section 1001, appearing as it does in Title 18 of the United States Code, Crimes and Criminal Procedure, is a criminal statute, violations of which are punishable by fines or imprisonment or both. 18 U.S.C. § 1001(a). But there exists no private right of action for alleged violations of Section 1001. *Mathis v. Phila. Elec. Co.*, 644 F. App'x 113, 116 (3d Cir. 2016) (citing *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007) (addressing 18 U.S.C. § 1001)); *see also Greenblatt v. Klein*, 634 F. App'x 66, 69 (3d Cir. 2015) ("[T]here is no private cause of action under 18 U.S.C. § 1001."); *Jung v. Bank of Am., N.A.*, No. 3:16-CV-00704, 2016 WL 5929273, at *3 (M.D. Pa. Aug. 2, 2016) ("[A]ll claims brought under . . . 18 U.S.C. § 1001 . . . must be dismissed with prejudice, as these criminal statutes do not provide, explicitly or implicitly, private civil causes of action.") (citations omitted). Neither is there a "federal right to require the government to initiate criminal proceedings." *Rodriguez v. Salus*, 623 F. App'x

588, 590 (3d Cir. 2015); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). At bottom, Ismail cannot bring a private civil claim under Section 1001 because no private right of action exists. *See Pondexter v. Sec'y U.S. Dep't of Hous. and Urban Dev.*, 788 F. App'x 93, 96 (3d Cir. 2019) ("[Section 1001] claims fail because [the plaintiff] lacks a private right of action."). Thus, we recommend that the court dismiss Ismail's claims arising under Section 1001 against all defendants without leave to amend.

C. McDermott's partial motion to dismiss Ismail's Section 1981 claims should be granted without leave to amend.

We recommend that the court grant McDermott's partial motion to dismiss Ismail's Section 1981[3] claims. *Doc. 37*. McDermott notes that it "will address the allegations pled against 'CB&I' as if they referenced McDermott [but b]y doing so, McDermott does not assert or admit" that it employed Ismail. *Doc. 37-1* at 2 n.1. McDermott also notes that it was not served with the amended complaint. *Id.* at 2. McDermott argues that Ismail's claims against McDermott under Section 1981 are

[3] Section 1981, codified at 42 U.S.C. § 1981, allows "a plaintiff who belongs to a racial minority [to] bring a claim for purposeful race-based discrimination." *O'Haro v. Harrisburg Area Cmty. Coll.*, No. 1:18-cv-02073, 2020 WL 5819768, at *14 (M.D. Pa. Sept. 30, 2020) (citing *Brown v. Philip Morris Inc.*, 250 F.3d 789, 797 (3d Cir. 2001)). The alleged "purposeful discrimination must concern an activity identified in 42 U.S.C. § 1981(a)." *Id.* (citing *Brown*, 250 F.3d at 797).

barred by the statute of limitations. *Id.* at 5-6. McDermott also argues that Ismail cannot pursue claims related to discrimination based on his national origin or religion under Section 1981. *Id.* at 6-7. McDermott does not address or move to dismiss any of Ismail's Title VII claims. *See id.*

Ismail retorts that he would suffer prejudice under the statute of limitations "due to the duration of the [Pennsylvania Human Relations Commission ("PHRC")] complaint process which is a pre-requisite for filing a complaint in court." *Doc. 39* at 1. Ismail argues that he filed his PHRC complaint on July 10, 2015, but did not receive a release from the EEOC until July 26, 2019. *Id.* He reasons that his PHRC complaint preserves his rights "with regards to the statute of limitations as the allegations against the defendants have not changed." *Id.* (citations omitted).

McDermott counters that "proceedings before the PHRC have no effect on the timeliness or untimeliness" of Ismail's Section 1981 claims. *Doc. 51* at 1. McDermott argues that Ismail's filing with the PHRC "does not toll the limitations period for Section 1981 claims." *Id.* at 2 (citations omitted). The cases cited by Ismail, argues McDermott, arise under Title VII, which is distinct from Section 1981 and inapposite here. *Id.* at 4 (citations omitted).

Ismail also filed a sur-reply brief. *Doc. 54*. McDermott correctly points out via letter that Ismail's filing was without our leave pursuant to Local Rule 7.7 and

asks us to disregard the sur-reply brief on that basis. *Doc. 59*. But given Ismail's *pro se* status, and given that McDermott has not alleged any prejudice, we will consider his sur-reply brief despite his failure to request our leave to file it. Ismail argues that "when you seek relief under both [Title VII and Section 1981] with regard to the same claim, then they are not independent." *Doc. 54* at 1. He reiterates that filing his PHRC complaint should toll the statute of limitations for his Section 1981 claims. *Id.* at 2. He argues that equitable tolling principles should apply to toll the statute of limitations because his defense counsel "secretly had no intention of representing [him] in court." *Id.* at 3. Finally, Ismail believes he should not be penalized for waiting for his EEOC letter due to the long PHRC process. *Id.* at 4.

Section 1981 claims are subject to a four-year limitations period. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (holding the Section 1981 claim of wrongful termination subject to the four-year statute of limitation found in 28 U.S.C. § 1658.); *see also Johnson v. Fed. Exp. Corp.*, 996 F. Supp. 2d 302, 314 (M.D. Pa. 2014) ("[T]he Supreme Court concluded that a four-year statute of limitations applies to Section 1981 claims."). Although the statute of limitations is an affirmative defense, the court can dismiss a complaint based on the statute of limitations when "the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading."

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994). In other words, where the events giving rise to a Section 1981 plaintiff's allegations occurred on a date more than four years before the filing of his complaint, "it is clear from the face of the complaint that the Section 1981 claim[s are] barred by the statute of limitations." *Baker v. Gichner Shelter Sys.*, No. 1:12-CV-2104, 2013 WL 3863941, at *5 (M.D. Pa. July 23, 2013) (citing *Jones*, 541 U.S. at 382).

Here, McDermott asserts that the events that are the subject of Ismail's allegations in his amended complaint against it occurred, at the latest, on February 9, 2015. *Doc. 37-1* at 5; *see doc. 20* at 7. Accordingly, McDermott argues that the statute of limitations for Ismail's Section 1981 claims expired on February 9, 2019, but Ismail did not file his initial complaint until July 29, 2019, "nearly six months after the statute of limitations expiration date," nor his amended complaint until January 2, 2020, "nearly eleven months after his Section 1981 statute of limitation expired." *Doc. 37-1* at 6. We agree with McDermott that it is clear from the face of Ismail's complaint that his Section 1981 claims against it are barred by the statute of limitations.

Ismail argues that his July 10, 2015, filings with the PHRC, which culminated in a right to sue letter from the EEOC on July 26, 2019, (*doc. 1* at 9) should toll the statute of limitations. *See doc. 54*. He also argues that both Title

VII and Section 1981 claims cannot be asserted independently when seeking relief for the same claim. *Id.* But while Ismail is "required to exhaust his remedies through the EEOC prior to filing a federal lawsuit pursuant to Title VII . . . [such pursuit does] not operate to toll the limitations period" for his Section 1981 claims. *Chatterjee v. Phila. Fed'n of Teachers*, 214 F. App'x 201, 206 (3d Cir. 2007) (finding Section 1981 claims time barred where the plaintiff pursued Title VII administrative remedies); *see Johnson v. Ry. Express Agency*, 421 U.S. 454, 466 (1975) ("We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each [Title VII and Section 1981] claim independently."); *see also Stine v. Pa. State Police*, No. 1:09-CV-944, 2012 WL 959362, at *5 (M.D. Pa. March 21, 2012) ("[T]he pendency of administrative proceedings does not toll [the statute of limitations].") (citing *Johnson*, 421 U.S. at 466). "Since no federal agency has ever been authorized to review [claims brought under Section 1981], an attempt to obtain administrative relief cannot be a prerequisite to action in the district court." *Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983). Additionally, the "avenues of relief available under Title VII and Section 1981 are independent . . . [and] Title VII's administrative machinery are not a prerequisite for maintaining a Section 1981 suit." *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 359 (3d Cir. 1984) (citing *Johnson*, 421 U.S. at 460). Accordingly, Ismail's argument that the statute of

limitations for his Section 1981 claims was tolled while waiting for his EEOC right-to-sue letter is without merit.

Ismail also argues that the statute of limitations should be equitably tolled due to what he categorizes as "malicious counsel." *Doc. 54* at 3. He argues that the counsel he retained during the PHRC process "secretly had no intention of representing [him] in court" and only represented him to "get his contingency fee without providing any legal services." *Id.* Ismail continues that his counsel "intentionally avoid[ed] giving [him] any court options and purposefully engineered the options to [remain] within the PHRC process." *Id.*

"Under equitable tolling, plaintiffs may sue after the statutory time period for filing a complaint has expired if they have been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999) (citations omitted). Per the Supreme Court, "equitable tolling may be appropriate when a claimant received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her." *Id.* (citing *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)). And per the Third Circuit, equitable tolling may also be invoked "when the defendant has actively misled the plaintiff; when the plaintiff 'in some extraordinary way' was prevented from asserting her rights;

or when the plaintiff timely asserted her rights in the wrong forum." *Id.* (quoting *United States v. Midgley*, 142 F.3d 174, 178 (3d Cir. 1998)). "But for an attorney's mistake or misconduct to constitute grounds for equitable tolling, it must be shown that the attorney's mistake or misconduct was more than 'garden variety neglect.'" *Baker v. Office Depot, Inc.*, 115 F. App'x 574, 577 (3d Cir. 2004) (quoting *Seitzinger*, 165 F.3d at 241); *see also Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990).

Here, Ismail has not alleged anything regarding how his counsel affected his ability to file this action. *See doc. 54* at 3. Neither has Ismail argued that he is entitled to equitable tolling on any of the bases addressed above. *Id.* Instead, Ismail makes broad accusations and alleges some nefarious intentions on the part of his counsel and argues that this absolves him from abiding by Section 1981's four-year statute of limitations. *Id.* Indeed, Ismail only makes mention of his counsel's purported ploy after McDermott asked us to disregard Ismail's current *pro se* status. *Doc. 51* at 3. Accordingly, Ismail's argument that equitable tolling principles apply is without merit.

Thus, we recommend that McDermott's partial motion to dismiss be granted and Ismail's Section 1981 claims against McDermott be dismissed without leave to amend because Ismail brought his claims outside of Section 1981's four-year statute of limitations.

D. Neff's motion to dismiss the amended complaint should be granted without leave to amend, and Neff should be dismissed as a defendant.

We further recommend that the court grant Neff's motion to dismiss Ismail's amended complaint as to Ismail's Title VII and Section 1981 claims without leave to amend. *Doc. 45*. Neff argues that he cannot be held individually liable under Title VII and that Ismail's Section 1981 claims are untimely. *Id.* at 8-11. Ismail responds as he did to McDermott that his filings with the PHRC "preserves [his] rights with regard to the statute of limitations as the allegations against John Neff have not changed." *Doc. 56* at 1. Ismail makes no response as to Neff's argument that he cannot be held individually liable under Title VII. *See id.* Neff rejoins that the PHRC proceedings have no bearing on the timeliness of Ismail's Section 1981 claims and reiterate that there exists no individual liability under Title VII. *Doc. 60* at 2-5.

Title VII prohibits unlawful employment practices by an employer and "defines 'employer' as 'a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person.'" *Sheridan v. E.I. Dupont de Nemours and Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996) (quoting 42 U.S.C. §§ 2000e-2(a), 2000e(b)). The Third Circuit has joined the "clear majority of the courts of appeals . . . [holding] that individual employees cannot be held liable under Title VII." *Id.* (collecting cases); *accord Northern v. Susquehanna Univ.*, No. 4:18-CV-1384, 2018 WL 6991259, at *5 (M.D. Pa. Dec. 19, 2018)

("Since deciding *Sheridan* the Third Circuit has since reiterated that 'claims against individual supervisors are not permitted under Title VII.'") (quoting *Cardenas v. Massey*, 269 F.3d 251, 268 (3d Cir. 2001)); *see also Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002) ("[I]ndividual employees are not liable under Title VII."). Neff, who Ismail categorizes as a manager for CB&I, is undoubtedly an individual employee, and as such he cannot be held liable under Title VII. *Doc. 20* at 7. Thus, we recommend that Neff's motion to dismiss Ismail's Title VII claims against him be granted without leave to amend.

Additionally, we recommend that the court grant Neff's motion to dismiss Ismail's Section 1981 claims against him because they are untimely. Ismail first named Neff in his amended complaint on February 4, 2020. *See doc. 20*. Ismail's most recent allegation of discrimination in the amended complaint regarding Neff allegedly occurred on November 21, 2014. *Id.* at 7. Indeed, the last mention in the amended complaint of any involvement on the part of CB&I, Neff's employer, was on February 9, 2015, where Ismail alleges that CB&I denied him a job interview. *Id.* As we addressed regarding McDermott's partial motion to dismiss above, Ismail's Section 1981 claims are barred by the four-year statute of limitations. Regarding Neff, the four-year statute of limitations on Ismail's Section 1981 claims expired, at the latest, on February 9, 2019, while Ismail did not name Neff until he filed his amended complaint on January 2, 2020. *Doc. 20*. Even using

Ismail's original complaint, which does not name Neff as a defendant and which was filed on July 29, 2019, as our reference point, Ismail's claims are still outside of Section 1981's four-year statute of limitations by nearly six months. *See doc. 1*. Also as addressed above, Ismail's filings with the PHRC do not toll the statute of limitations for his Section 1981 claims. *Chatterjee*, 214 F. App'x at 206. Accordingly, we recommend that Neff's motion to dismiss be granted as to Ismail's Section 1981 claims against him without leave to amend, and we further recommend that Neff be dismissed from this action.

E. The Honeywell defendants' motion to dismiss should be granted, Ismail's Title VII claims should be dismissed without leave to amend, and Ismail's Section 1981 claims should be dismissed with leave to amend.

We also recommend that the court grant the Honeywell defendants' motion to dismiss Ismail's Title VII claims without leave to amend. *Doc. 49*. The Honeywell defendants move to dismiss Ismail's amended complaint or to require a more definite statement from Ismail. *Id.* As to Title VII, the Honeywell defendants raise four arguments. First, they argue that Ismail failed to exhaust his administrative remedies against them as to his Title VII claims because Ismail's charge of discrimination with the PHRC and EEOC only named CB&I. *Doc. 50* at 6-7. Second, the Honeywell defendants argue that Ismail's Title VII claims against them are time barred for failing to bring the claims against the Honeywell

defendants covered in his right to sue letter within the allowed 90 days. *Id.* at 8-9. Third, the Honeywell defendants argue that CB&I, not Honeywell, employed Ismail. *Id.* at 9. Fourth, the Honeywell defendants argue that Adamczyk and Weiss cannot be held individually liable under Title VII. *Id.* at 10. As to Ismail's Section 1981 claims, the Honeywell defendants argue that such claims are time barred and cannot be based upon religious or national origin discrimination. *Id.* at 10-12. Finally, for any surviving claims, the Honeywell defendants move to request a more definite statement. *Id.* at 13-15.

Ismail's arguments in response are notable for three reasons. First, Ismail "concur[s] with the [Honeywell defendants] that [he] cannot proceed under Title VII" against them. *Doc. 55* at 5. Second, Ismail concedes that, because his amended complaint was filed on January 2, 2020, "[t]his means that due to the 4-year statute of limitations [under Section 1981, only] any actions after January 2, 2016, are valid." *Id.* at 6. Third, Ismail "note[s] that [his] complaint under Section 1981 [is] based on racial discrimination . . . and not religious or national origin." *Id.* at 7. Ismail's brief in opposition to the Honeywell defendants' motion to dismiss also describes many alleged facts absent from his amended complaint. *Compare id.* at 1-6, *with doc. 20* at 7-8. In their reply brief, the Honeywell defendants note that Ismail "concedes he asserts no Title VII claims or religious/national origin discrimination claims under Section 1981" against them.

Doc. 57 at 1. They argue that Ismail cannot amend his amended complaint through his brief. *Id.* at 1-2. The Honeywell defendants also reiterate that Ismail's Section 1981 claims are time barred and fail to state a claim. *Id.* at 2-4.

The Honeywell defendants are correct that Ismail may not amend his complaint short of filing another amended pleading, and certainly cannot do so via a brief in opposition to a motion to dismiss. *Coda v. Constellation Energy Power Choice, LLC*, 409 F. Supp. 3d 296, 302 n.4 (D.N.J. 2019) ("Plaintiff cannot amend the first amended complaint through a brief.") (citing *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988)) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)); *see also Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109 n.9 (3d Cir. 2002) (A plaintiff "should not be able effectively to amend a complaint through any document short of an amended pleading."). Thus, we do not consider any new factual allegations arising out of Ismail's brief in opposition to the Honeywell defendants' motion to dismiss.

As to any Title VII claims which may have been leveled against the Honeywell defendants, as noted above, Ismail concurs that he does not proceed against the Honeywell defendants under Title VII. *Doc. 55* at 5. We also note that Ismail's amended complaint never made it clear whether he proceeded against the

Honeywell defendants under Title VII in the first instance. *See doc. 20* at 7-8. Additionally, as addressed above, concerning Adamczyk and Weiss, "individual employees cannot be held liable under Title VII." *Sheridan*, 100 F.3d at 1077. As such, Ismail's Title VII claims against Adamczyk and Weiss must fail. We therefore recommend that the court grant the Honeywell defendants' motion to dismiss Ismail's Title VII claims against them without leave to amend.

We further recommend that the court grant the Honeywell defendants' motion to dismiss Ismail's Section 1981 claims against them, and we recommend that Ismail be granted leave to file a second amended complaint as to these claims. Ismail's Section 1981 claims against the Honeywell defendants are based only on alleged racial discrimination. *Doc. 55* at 7. The Honeywell defendants argue, and Ismail concedes, that "any Section 1981 claims against the Honeywell defendants based on events that occurred before January 2, 2016, are time-barred." *Doc. 50* at 10-11 (arguing); *doc. 55* at 5 (conceding). Both parties agree, however, that at least one of Ismail's factual allegations occurred after January 2, 2016, and is therefore not time-barred. *Doc. 50* at 11; *doc. 55* at 5-6. We agree with the Honeywell defendants that Ismail does not successfully plead Section 1981 claims against them here, especially when we consider only those allegations which are not time-barred by the statute of limitations. We therefore recommend that the court grant the Honeywell defendants' motion to dismiss Ismail's Section 1981

claims against them. We further recommend that Ismail be granted leave to file a second amended complaint as to his Section 1981 claims against the Honeywell defendants.

Thus, we recommend that the court grant the Honeywell defendants' motion to dismiss. We further recommend that Ismail be granted leave to file a second amended complaint only as to his Section 1981 claims against the Honeywell defendants, but that his Title VII claims be dismissed without leave to amend.

IV. Recommendations.

Accordingly, for the foregoing reasons, we recommend that McDermott's partial motion to dismiss (*doc. 37*), Neff's motion to dismiss (*doc. 44*), and the Honeywell defendants' motion to dismiss (*doc. 49*) be granted, and Ismail's amended complaint (*doc. 20*) be dismissed. Regarding Ismail's specific claims, we further recommend the following:

First, that Ismail's claims under 18 U.S.C. § 1001 be dismissed as to all defendants with prejudice.

Second, that Ismail's Section 1981 claims against McDermott be dismissed with prejudice.

Third, that all of Ismail's claims against Neff be dismissed with prejudice, and that Neff be dismissed as a defendant from this action.

Fourth, that Ismail's Title VII claims against the Honeywell defendants be dismissed with prejudice, and Ismail's Section 1981 claims against the Honeywell defendants be dismissed with leave to amend. We finally recommend that Ismail be granted leave to file a second amended complaint as to his Section 1981 claims against the Honeywell defendants, and that Ismail include his Title VII claims against McDermott in the second amended complaint.[4]

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in

[4] Should the court adopt this recommendation and grant Ismail leave to file a second amended complaint, for Ismail's benefit, we note the following standards applicable to any such second amended complaint. Any second amended complaint must be titled as a second amended complaint and must contain the docket number of this case. Fed. R. Civ. P. 10(a). "The plaintiff is advised that any amended complaint must be complete in all respects." *Young v. Keohane*, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). "It must be a new pleading which stands by itself as an adequate complaint without reference to the complaint already filed." *Id*. "Also in general, an amended pleading—like [any] amended complaint here—supersedes the earlier pleading and renders the original pleading a nullity." *Palakovic v. Wetzel*, 854 F.3d 209, 220 (3d Cir. 2017). In other words, if a second amended complaint is filed, the original and amended complaints will have no role in the future litigation of this case. Any second amended complaint must also comply with the pleading requirements of the Federal Rules of Civil Procedure, including the requirements that the complaint contain "a short and plain statement of the grounds for the court's jurisdiction," "a short and plain statement of the claim," and "a demand for the relief sought." Fed. R. Civ. P. 8(a)(1)-(3). Further, "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). "A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b). And to the extent it would promote clarity to do so, "each claim founded on a separate transaction or occurrence . . . must be stated in a separate count." *Id*.

28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this **25th** day of **February, 2021**.

S/Susan E. Schwab
Susan E. Schwab
United States Magistrate Judge