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"), and 42 U.S.C. § 1981 ("§ 1981"). Ismail alleges that he suffered discriminatory acts by the defendants on the basis of his race, religion, and national origin. The case is presently before us on a motion to dismiss (*doc. 85*) filed by defendants Darius Adamczyk ("Adamczyk"), Judson Weiss ("Weiss"), and Honeywell, collectively the ("Honeywell defendants").[1] Ultimately, we find that Ismail's second amended complaint (*doc. 84*) fails to state

[1] In his second amended complaint, Ismail brings Counts I and II against McDermott, which has not filed a motion to dismiss, under Title VII. *Doc. 84* at 8. Counts III and IV are brought against the Honeywell defendants under § 1981. *Id.*

a claim upon which relief can be granted against the defendants. Accordingly, we recommend that Ismail's second amended complaint against the Honeywell defendants be dismissed without leave to amend.

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*. On January 23, 2020, the case was stayed following defendant McDermott's filing of suggestion of bankruptcy. *Doc. 28*. On July 16, 2020, we lifted the stay. *Doc. 36*. On August 6, 2020, the Honeywell defendants filed a motion to dismiss Ismail's first amended complaint. *Doc. 49*. On February 25, 2021, we issued a Report and Recommendation recommending dismissal of all claims against the Honeywell defendants, but granting Ismail leave to file a second amended complaint as to certain § 1981 claims. *Doc. 76*. On April 16, 2021, Judge Mannion adopted our Report and Recommendation in its entirety. *Doc. 83*.

On April 22, 2021, Ismail filed his second amended complaint against the Honeywell defendants. *Doc. 84*. In his second amended complaint, Ismail alleges that he experienced discrimination based on his race, religion, and national origin

while employed as an Engineer at CB&I (now McDermott International Inc.).[2] *Doc. 84*. Specifically, he claims that sometime in July 2013, he declined to attend a company potluck lunch hosted by client manager Weiss due to his fasting in accordance with the Islamic tradition of Ramadan. *Id*. at 7. As a result, he was allegedly given an increased workload of "3x his peers and subject to dishonest and hostile criticism including profanity by Judson Weiss." *Id*. According to Ismail, on October 28, 2014, he reached out to Honeywell plant manager William Olp (Weiss' manager) and reported the harassment. *Id*. Per Ismail, Olp "promised Plaintiff confidentiality for his complaint;" however, "William offered no help for the reported harassment and disclosed complaint to manager Judson Weiss." *Id*. On February 4, 2015, Ismail was terminated from CB&I. *Id*. Ismail claims he was fired for "[l]oss of [c]onfidence," but claims that he had no performance or disciplinary issues. *Id*.

On February 9, 2015, Ismail claims he applied for an identical job at a different CB&I location but was denied the interview. *Id*. Two days later, Ismail alleges that he emailed Honeywell President Adamczyk regarding an "audio recording of termination proving racist language as well as cover up of life critical safety violations by Judson Weiss." *Id*. Per Ismail, on February 13, 2015, a

[2] Ismail alleges that CB&I employed him to work at a facility for Honeywell, a client of CB&I.

Honeywell HR representative reached out to him to collect evidence regarding his claims. *Id*. Ismail alleges that the HR representative "declined the audio proof of racism." *Id*. According to Ismail, "[w]hen asked what he wanted in exchange for suppling this evidence to Honeywell, the plaintiff requested his job back. The plaintiff was told that would be pending the results of the investigation." *Id*.

On June 11, 2015, Ismail alleges that, after several email requests, Honeywell's HR finally responded, "claiming the internal investigation was concluded and found no wrongdoing." *Id*. at 8. On January 20, 2016, Ismail claims he sent Adamczyk an email containing the allegedly racist audio recording. *Id*. Per Ismail, he sent the recording "in good faith proving that there was no work[-]related reason for termination and asked for accountability against Judson Weiss so this would not happen to anyone else." *Id*. According to Ismail, on February 1, 2016, Adamczyk responded "through his VP refusing to consider the audio evidence, threatened criminal prosecution against plaintiff for illegally recording his manager's harassment without permission, and continued to stand behind manage Judson Weiss' actions." *Id*. Per Ismail, Honeywell decided his case would remain closed since there was no new evidence other than the audio recording. *Id*. On July 12, 2016, Ismail claims that he emailed the entire Honeywell corporate management team with "new evidence … including email proving that he contacted Plant Manager William Olp to report the harassment and

audio showing that retaliation was cited by Judson Weiss during termination for the complaint filed with William Olp." *Id.* Ismail claims that Honeywell did not act on this information. *Id.*

Under Count Three, Ismail claims the Honeywell defendants violated § 1981 because Adamczyk "sent an email through his VP discriminated [*sic*] against plaintiff by upholding Judson Weiss' actions against plaintiff despite being given audio evidence of discrimination and harassment." *Id.* Under Count Four, Ismail claims the Honeywell defendants violated § 1981 because Ismail complied with their February 1, 2016 email and provided new evidence of discrimination, but Honeywell refused to reopen the discrimination investigation. *Id.*

Ismail alleges that he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on July 10, 2015. *Id.* at 9. Ismail claims that on July 26, 2019, the EEOC issued Ismail a right-to-sue letter, which Ismail failed to attach to his second 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. For relief, Ismail seeks reimbursement and payment including but not limited to "back pay, front pay, salary, pay increases, bonuses, medical and other benefits, training, promotions, pension, and seniority." *Doc. 84* at 10. Ismail also requests that those benefits should be accorded from the date on which he first suffered discrimination until the verdict. *Id.* Ismail also seeks punitive damages

and requests that all financial relief be paid to the United Nations World Food Program. *Id*.

On May 4, 2021, the Honeywell defendants filed a motion to dismiss Ismail's second amended complaint and a brief in support. *Docs. 85, 86*. On May 13, 2021, Ismail filed his brief in opposition to the Honeywell defendants' motion to dismiss. *Doc. 89*. On May 24, 2021, the Honeywell defendants filed a reply brief to Ismail's brief in opposition. *Doc. 92*. The motion to dismiss, therefore, is ripe, and we consider it 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 Fails to State a Plausible Claim against the Honeywell defendants.

The Honeywell defendants seek to dismiss the claims against them on the basis that Ismail fails to allege § 1981 claims against them. Specifically, they argue that Ismail and Honeywell had no contractual relationship during the relevant time period. *Doc. 86* at 6. Additionally, they argue that Ismail fails to allege any actionable conduct on the part of Honeywell and that Ismail cannot show that race was a but-for cause of his alleged injury. *Id*. at 7-8.

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). Section 1981 provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Additionally, "the substantive elements of a claim under section 1981 are generally identical to the elements of an employment discrimination claim under Title VII." *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-82 (3d Cir. 2009).

For a § 1981 claim to survive a motion to dismiss, "a plaintiff must plausibly allege that: (1) the plaintiff is a member of a protected class; (2) she is qualified for the position or satisfactorily performed the duties required by her position[3]; and (3) she suffered an adverse employment action." *Jones v. E. Airlines, LLC*, No. 20-cv-1927, 2021 WL 2456650, at *7 (E.D. Pa. June 16, 2021) (citing *Wallace v. Federated Dep't Stores, Inc.*, 214 F.App'x. 142, 144-145 (3d Cir. 2007)). Additionally, "the U.S. Supreme Court recently held that a plaintiff must also plausibly allege that race was a but-for cause of the adverse employment action." *Jones*, 2021 WL 2456650 at *7 (citing *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014-15 (2020)).

In our previous Report and Recommendation, we noted that any of Ismail's § 1981 claims based on events occurring before January 2, 2016 are time barred.[4] *Doc. 76* at 21. Therefore, based on Ismail's second amended complaint, the only non-time barred allegations against the Honeywell defendants relate to a January 20, 2016 email sent to Adamczyk regarding the audio recording, Adamczyk's

[3] The Honeywell defendants do not contend that Ismail is not a member of a protected class or that he was not qualified for the position or satisfactorily performed the duties required by his position. Thus, we will construe their position as one of conceding that Ismail meets these requirements. The Honeywell defendants focus their argument on whether Ismail suffered an adverse employment action based on their alleged failure to reopen the investigation. We, therefore, will also only address this issue.

[4] Ismail concedes this point. *See doc. 55* at 5.

February 1, 2016 response refusing to consider the audio evidence, and the follow-up July 12, 2016 email Ismail sent to Honeywell regarding new evidence.

The Honeywell defendants note that, in his brief in opposition to the motion to dismiss, Ismail raised additional factual allegations not contained in his second amended complaint. *Doc. 92* at 1. 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.

The Honeywell defendants further argue that Ismail's § 1981 claims fail because, during the relevant times of his second amended complaint, he did not have a contractual relationship with Honeywell. Although it is true that Ismail

lacked a contractual relationship when Honeywell opted against reopening its investigation, Ismail's attempts at persuading Honeywell to reopen the investigation could be construed as an attempt to form a contract. *See Domino's Pizza, Inc.*, 546 U.S. at 476. ("Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship."). Thus, we must determine if Ismail has alleged enough to claim that Honeywell's alleged refusal to reopen the investigation amounts to an adverse employment action.

Courts within the Third Circuit have routinely held that an employer's failure to conduct an investigation does not constitute an adverse employment action. *See Hare v. Potter*, 220 F.App'x. 120, 134 (3d Cir. 2007) (finding that a plaintiff failed to show how her employer's deficient investigation constituted an adverse employment action under Title VII); *see also Dellapenna v. Tredyffrin/Easttown Sch. Dist.*, No. 09-cv-6110, 2011 WL 130156, at *11 (E.D. Pa. Jan. 13, 2011), *aff'd*, 449 F.App'x. 209 (3d Cir. 2011) (finding that an employer's failure to conduct an investigation was not an adverse employment action); *see also Ashton v. SCI-Fayette*, No. 16-cv-1795, 2018 WL 2966849, at *6 (W.D. Pa. June 13, 2018) ("Plaintiff's claims regarding Trempus' alleged failure to

investigate her complaint against CO Gregg or the failure to discipline him do not constitute adverse employment actions."). And because the substantive elements of a claim under § 1981 are generally identical to the elements of an employment discrimination claim under Title VII, *see Brown*, 581 F.3d at 181-82, we find that Honeywell's failure to reopen the investigation does not constitute an adverse employment action.

Since Ismail's § 1981 claims against the Honeywell defendants only relate to their failure to reopen the investigation, he fails to allege a plausible adverse employment action. Accordingly, we recommend that motion to dismiss be granted as Ismail fails to state a plausible § 1981 claim against the Honeywell defendants. "[I]f a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile." *Phillips v. County of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008). In a civil rights action, the court "must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend." *Id.*

Although this is Ismail's second amended complaint; it still fails to state a claim upon which relief can be granted against the Honeywell defendants. Accordingly, given that Ismail's second amended complaint contained the only non-time barred claims against the Honeywell defendants, and it still failed to state

upon which relief can be granted, we recommend that further leave to amend would be futile.

IV. Recommendations.

Accordingly, for the foregoing reasons, we recommend that the Honeywell defendants' motion to dismiss (*doc. 85*) be granted. We further recommend that Ismail not be granted further leave to amend as it relates to his claims against the Honeywell defendants.

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 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 1st day of March, 2022.

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