Appendix A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHRISTOPHER WAYNE FILLMORE, Plaintiff, *vs.* INDIANA BELL TELEPHONE CO., INC., Defendant.	CAUSE NO. 1:16-cv-323-SEB-DML

ENTRY
on
Defendant's Motion for Summary Judgment [doc. 59],
Plaintiff's Motion for Summary Judgment [doc. 66], and
Plaintiff's Objections [to] Defendant's Evidence and Motion To Strike Parts thereof [doc. 69]

After his employment was terminated, Christopher Wayne Fillmore sued his employer, Indiana Bell Telephone Co., Inc. ("Indiana Bell"), for wrongful retaliation under federal law and for negligence and intentional torts under state law. Indiana Bell and Mr. Fillmore now cross-move for summary judgment on all of Mr. Fillmore's claims and Mr. Fillmore moves to strike some of Indiana Bell's evidence. For the reasons explained herein, the Court grants Indiana Bell's motion with respect to the federal-law claims, declines to exercise supplemental jurisdiction over Mr. Fillmore's state-law claims, and denies Mr. Fillmore's motions. This case, accordingly, will be dismissed.

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a dispute about a material fact is genuine only if, on the presented evidence, a reasonable jury could return a verdict for the nonmoving party," *id.*, at 248.

"As the '"put up or shut up" moment in a lawsuit,' summary judgment requires a non-moving party to respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." *Grant v. Trustees of Indiana University*, No. 16-1958, 2017 WL 3753996, *4 (7th Cir., August 31, 2017). "If there is no triable issue of fact on even one essential element of the nonmovant's case, summary judgment is appropriate." *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016). A court construes the cited evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). However, the non-moving party "is not entitled to the benefit of inferences that are supported only by speculation or conjecture." *Boss*, 816 F.3d at 916. A court does not weigh the evidence or determine credibility because those tasks are reserved for the fact-finder at trial. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011).

Because Mr. Fillmore is proceeding *pro se* in this case, the Court construes his filings liberally, *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 811 (7th Cir. 2017), but

the Court is not obligated "to scour the record looking for factual disputes," and may require strict compliance by Mr. Fillmore with the requirements of Rule 56, *Federal Rules of Civil Procedure*, and the Court's local rule, S.D. Ind. L.R. 56-1, *Zoretic v. Darge*, 832 F.3d 639, 641 (7th Cir. 2016); *Greer v. Board of Education of the City of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001).

Undisputed facts

The following facts have been established by the parties through citations to admissible evidence in the record and have not been genuinely disputed by cited evidence or have been admitted in the parties' pleadings. Fed. R. Civ. P. 56(c)(1)(A); *Perez v. El Tequila, L.L.C.*, 847 F.3d 1247, 1254 (10th Cir. 2017).[1]

Indiana Bell employed Mr. Fillmore as a Premises Technician for seven-plus years, from September 7, 2007, through March 11, 2015. A Premises Technician drives to various locations to install and repair internet-provider, television, web, and telephone services. He primarily reported to Indiana Bell's garage on Moller Road in Indianapolis, Indiana. *Plaintiff's Second Amended Complaint* [doc. 47-1] ("*Complaint*"), ¶ 1; *Defendant's Answer and Affirmative Defenses* [doc. 53] ("*Answer*"), ¶ 1. Mr. Fillmore reported to multiple supervisors during his term of employment before finally

[1] Mr. Fillmore was granted leave to submit an amended response to Indiana Bell's motion for summary judgment in order to add evidence and arguments. *Motion To Amend* [doc. 65], ¶ 6.b.; *Entry and Order* [doc. 70]. Rather than file a complete, superseding response that attached all of his evidence, Mr. Fillmore attached only his added Exhibit E to his amended brief. *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* [doc. 66], Exhibit E [doc. 66-1]. In its discretion, the Court will consider his previously submitted exhibits, [docs. 64-1, -2, -3, and -4].

reporting to Thomas Koepp in February 2014. He had received no disciplinary suspension from January 1, 2010, to December 31, 2013, and his evaluations for the years 2010 through 2013 rated his performance as "meets expectations." *Complaint*, ¶¶ 2, 3; *Answer*, ¶¶ 2, 3.

From early 2014 through early 2015, Indiana Bell coached and disciplined Mr. Fillmore several times for violations of company technical and employment policies and rules. *Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment* [doc. 60] ("*Defendant's Brief*"), Statement of Undisputed Material Facts ("*Defendant's SMF*"), at 5-10;[2] *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* [doc. 66] ("*Plaintiff's Response*"), Statement of Material Facts That Are Not in Dispute ("*Plaintiff's SMF Undisputed*"), at 3; Statement of Material Facts That Are in Dispute ("*Plaintiff's SMF Disputed*")at 3-8.

On January 22, 2015, Mr. Koerr issued to Mr. Fillmore a Final Written Warning and a three-day suspension for a violation of a technical rule that occurred on January 9, 2015, the suspension to be served on January 22, 23, and 26, 2015. *Complaint*, ¶¶ 3, 4; *Answer*, ¶¶ 3, 4; *Defendant's SMF*, at 10-12 (undisputed); Employee Discussion Forms

[2] In support, *Defendant's SMF* cites the exhibit "Charting Party's Action/Steps" [doc. 37-1] (chart of Mr. Fillmore's disciplinary history submitted by Indiana Bell in response to Mr. Fillmore's EEOC charge), *Declaration of Lisa Brantley* [doc. 61-2], *Declaration of Thomas J. Koepp* [doc. 61-1], and Indiana Bell Employee Discussion Forms [doc. 32-8] (apparently used to record discipline matters).

[doc. 32-8, pp. 2-5]; *Declaration of Thomas J. Koepp* [doc. 61-1], ¶¶ 19, 21, Exhibit 10; *Declaration of Lisa Brantley* [doc. 61-2], ¶¶ 5, 20, Exhibit 9.

Lisa Brantley, who was Mr. Koepp's supervisor,[3] met with Mr. Fillmore on January 27, 2015, his first day of work following his three-day suspension. *Complaint*, ¶ 16; *Answer*, ¶ 16; *Plaintiff's SMF Undisputed*, at 3, § II b (citing *Answer* ¶ 16). These are the only evidence-supported facts regarding this meeting that are before the Court.

Mr. Fillmore alleged that, during this meeting, he "complained" to Lisa Brantley, "in an attempt to preserve his livelihood and report long held suspicions of receiving unfavorable treatment from Koepp . . . ." *Complaint*, ¶ 4. See also *id.*, ¶ 16 ("Without what he believed would be a solid reason [f]or his suspicions — nevertheless, a good-faith and **valid** suspicion — and after having just served yet another suspension given by Koepp, the Plaintiff went to Lisa Brantley, Koepp's supervisor, on January 27, 2015, and complained about him."). Because Indiana Bell denied those pleading allegations, *Answer*, ¶¶ 4, 16, they do not constitute admissions.

In its present motion for summary judgment, Indiana Bell asserts as an undisputed material fact that Mr. Fillmore did *not* complain specifically about racial discrimination by Mr. Koepp to Ms. Brantley during their meeting, citing statements that Mr. Fillmore included in his reply in support of his own, earlier motion for summary judgment. *Defendant's SMF*, at 12 (citing *Plaintiff's Reply to Defendant's*

[3] *Defendant's SMF*, at 11 (undisputed). See also *Koepp Declaration* [doc. 61-1], ¶ 4; *Complaint*, ¶ 16.

Response in Opposition to Motion for Summary Judgment [doc. 37], at 6). But Mr. Fillmore counters that the content of his communication with Ms. Brantley during their meeting, specifically whether he communicated to her that Mr. Koepp was discriminating against him on the basis of race, is a disputed material fact and he makes several assertions about the nature and details of their meeting. *Plaintiff's Response*, at 6-8; *Plaintiff's Reply in Support of His Summary Judgment Motion* [doc. 72] ("*Plaintiff's Reply*"), at 6-7.

Arguments, assertions, and statements included in briefs are not evidence that a court may consider on summary judgment. *U. S. v. Funds in the Amount of One Hundred Thousand, One Hundred, and Twenty Dollars*, 730 F.3d 711, 718 (7th Cir. 2013). This rule applies equally to *pro se* parties. *Burkett v. Wicker*, No. 3:06-cv-058 AS, *Opinion and Order*, 2007 WL 891695, *1 (N.D. Ind., March 20, 2007). The federal rules and this Court's local rules require that all facts that a party asserts on summary judgment be supported by specific citation to admissible evidence. Fed. R. Civ. P. 56(c)(1)(A); S.D. Ind. L.R. 56-1(e) ("A party must support each fact the party asserts in a brief with a citation to a discovery response, a deposition, an affidavit, or other admissible evidence") and (f). The Court specifically instructed Mr. Fillmore that he "*must* follow the requirements of Fed. R. Civ. P. 56 and Local Rule 56-1." *Order on Defendant's Motion To Stay Case Deadlines* [doc. 52], at 2 n. 1; *Order on Defendant's Motion for Extension of Time* [doc. 56], at 1, n. 1.

Because Indiana Bell did not cite admissible evidence in support of its assertion that Mr. Fillmore did not complain about or report racial discrimination by Mr. Koepp to Ms. Brantley and because Mr. Fillmore did not cite any admissible evidence that he did so complain,[4] the only facts regarding the meeting between Ms. Brantley and Mr. Fillmore that are before the Court in the context of the pending motions are the admitted pleadings that they met on January 27, 2015.

On February 3, 2015, Mr. Fillmore was called to a meeting with Ms. Brantley and Mr. Brian Halterman, an official with the Communications Workers of America ("CWA") Local 4900 Divison 1, Area 1 Representative,[5] after which Ms. Brantley suspended Mr. Fillmore pending termination. *Complaint*, ¶¶ 5, 18; *Answer*, ¶¶ 5, 18; *Plaintiff's SMF Undisputed*, at 3, § II c (citing *Answer*, ¶ 18). On March 6, 2015, Mr. Fillmore was given a review board hearing attended by Ms. Brantley; Mr. Halterman; Grace Biehl, Indiana Bell's Labor & Employee Relations Manager; and Larry Robbins, Vice President of CWA Local 4900, Division 1. *Complaint*, ¶ 19; *Answer*, ¶ 19. On March 11, 2015, Ms. Biehl mailed a letter to Mr. Robbins stating that Indiana Bell had terminated Mr. Fillmore's employment. *Complaint*, ¶ 20; *Answer*, ¶ 20; *Defendant's SMF*, at 15-16; *Plaintiff's SMF Disputed*, at 3-8.

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[4] Ms. Brantley did not mention the January 27, 2015, meeting in her declaration, *Brantley Declaration*, and Mr. Fillmore did not submit his own affidavit or declaration providing his version of what was said during the meeting.

[5] Mr. Fillmore was represented by the CWA union and the terms and conditions of his employment with Indiana Bell were governed by a collective bargaining agreement. *Defendant's SMF*, at 4.

Mr. Fillmore's Claims

Mr. Fillmore has pled five causes of action, which he labeled in the title of his *Complaint* as "Constructive Discharge," "Wrongful Termination," "Intentional Infliction of Emotional Distress," "Negligent Infliction of Emotional Distress," and "Negligent Hiring, Retention, and Supervision."

For his first cause of action, "Constructive Discharge," Mr. Fillmore alleges that, despite performing his duties "to the utmost diligence and competence," Mr. Koepp "unjustly reprimanded" him. *Complaint*, ¶ 22. From Mr. Koepp's awareness of, but failure to "participate in resolving," grievances that Mr. Fillmore filed against him, "an intrinsic inference of retaliatory animus can thus be concluded as motive." *Id.*, ¶ 23. He alleges that his "work environment undoubtedly became so hostile that if he was not granted a transfer to another work location by Brantley, he considered quitting." *Id.* On these alleged facts, Mr. Fillmore claims that Mr. Koepp's conduct violated the prohibition against retaliation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

It is unclear whether Mr. Fillmore intends this first cause of action to assert a claim only for retaliation or whether he also intends to assert a claim for constructive discharge. "Constructive discharge" entails a forced resignation compelled by intolerably discriminatory work conditions. However, because Mr. Fillmore did not quit but was terminated, about which fact there is no dispute, any claim for constructive discharge is untenable. *Smith v. Bray*, 681 F.3d 888, 908 (7th Cir. 2012). Indiana Bell has

advanced this argument and Mr. Fillmore has not challenged it. Thus, we deny his constructive discharge claim, reserving our analysis of his retaliation claim for discussion below.

For his second cause of action, "Wrongful Termination," Mr. Fillmore alleges that Ms. Brantley's disciplinary actions against him from February 3, 2015, onward constituted retaliation against him "for reporting suspicions of being retaliated against." *Complaint*, ¶ 29. He did not cite a legal basis for his claim, but the Court presumes that he intended to claim a violation of, at least, Title VII. *Complaint*, ¶¶ 28-30.

For his third cause of action, "Intentional Infliction of Emotional Distress," Mr. Fillmore alleges that Ms. Brantley ensured that he would be "made a pariah" by, "among other things," forwarding an e-mail that he had sent to a higher official of Indiana Bell (in order to "circumvent [Ms. Brantley's] influence") to Ms. Biehl with an appended "backhanded comment about his attempt" to go over Ms. Brantley's head. Mr. Fillmore sent the e-mail "in the months after his termination." *Complaint*, ¶ 33.

His fourth cause of action, "Negligent Infliction of Emotional Distress," alleges that Indiana Bell "engaged in extreme and outrageous conduct by intentionally and/or recklessly subject[ing] the Plaintiff, or permitting the Plaintiff to be subjected to, excessive and harsh inspections, being held accountable for the actions of others from said inspections, ignoring the Plaintiff's complaints, retaliation, and discrimination" and "failed to investigate the matter in an adequate fashion and failed to take steps

reasonably necessary to prevent harm to the Plaintiff from both Koepp and Brantley." *Complaint*, ¶¶ 36, 37.

For his fifth cause of action, "Negligent Hiring, Retention, and Supervision," Mr. Fillmore alleges that, as an employee, he was owed a duty of care "to ensure that he was not exposed to foreseeable harms;" that his "unanswered grievances" showed that "they" were aware of his complaints; and, yet, that they "failed to act on them" and, instead, Indiana Bell, willfully, maliciously, intentionally, oppressively, and despicably, failed to exercise its duty of care to prevent its employees, managers, supervisors, and/or officers from discriminating and retaliating against Mr. Fillmore. *Complaint*, ¶¶40-43.

The Court notes two self-imposed limitations by Mr. Fillmore as to his claims. First, he has specifically disavowed making any claim that race was the, or a, motivation for any adverse employment action for which he claims relief. *Plaintiff's Response*, at 7;[6] *Plaintiff's Reply*, at 1.[7] He claims only that Indiana Bell, through Ms. Brantley and Mr. Koepp, retaliated against him for his engagement in a protected

[6] "Moreover, the Plaintiff has also respectfully rescinded [in his *Complaint*] race being the sole (or a) motivating factor against Koepp, as once *presumed*; and the Court acknowledged as much in their Order [dkt. 51] when granting him leave to file said amendment. Therefore, and notwithstanding the Defendant's promulgation of the unsubstantiated claim, the retaliation claim that is also at issue is mutually exclusive, and thus survives on its own as a triable matter." *Plaintiff's Response*, at 7.

[7] "As the Court already knows, this matter isn't about 'meritless race allegations of Thomas Koepp,' it's about the retaliation the Plaintiff suffered from him (considering those enumerated and unrequited grievances which were only brought to light in the time thereafter discovery); and, more importantly, the retaliation the Plaintiff also suffered from Lisa Brantley when attempting to make complaint about what was at one time the good-faith suspicion that Koepp's actions were indeed of a racial animus." *Plaintiff's Reply*, at 1.

activity, namely, complaining about Mr. Koerr's suspected racial discrimination against him. *Id.* Second, despite alleging that Mr. Koerr's and Ms. Brantley's acts and omissions violated his rights as well as their duties of care to him, he did not sue either individual; Indiana Bell is the sole defendant.

Discussion

A. Indiana Bell's motion for summary judgment.

Indiana Bell has moved for summary judgment on all of Mr. Fillmore's claims.

1. Mr. Fillmore's Title VII claims — first and second causes of action. Indiana Bell argues that it is entitled to summary judgment on Mr. Fillmore's Title VII claims because they are untimely. If the Equal Employment Opportunity Commission ("EEOC") dismisses an aggrieved person's charge of unlawful employment practices by an employer, the aggrieved person may bring a civil suit against the employer "within ninety days" after the EEOC gives notice to the aggrieved person. 42 U.S.C. § 2000e-5(f)(1). The 90-day period is not jurisdictional but it is a prerequisite to bringing suit, one that can be waived, forfeited, and equitably estopped. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 234 (1982).

On March 20, 2015, following his termination, Mr. Fillmore filed a charge with the EEOC that alleged race discrimination and retaliation. *Charge of Discrimination*, No. 470-2015-01370 (March 17, 2015) [doc. 61-3, p. 3]. He named "AT&T" as his employer and alleged that, "[o]n March 11, 2015, I was terminated by Lisa Brantley [Race: Black], Area Manager as a result of the discipline issued by Koepp. I believe I have been

discriminated against, based on my Race: Black, and retaliated against in violation of Title VII . . . ." *Id.*

On August 15, 2015, Mr. Fillmore, who was represented by counsel at the time, filed an amendment to his first charge. He filed it on another "Charge of Discrimination" form and stated that he was amending "his original charge (#470-2015-01370) to include Indiana Bell Telephone Company, Inc., as a named Respondent in this matter." He further stated therein that the "amended charge relates back to the date of his original charge, which is March 17, 2015." *Charge of Discrimination*, No. 470-2015-02783 (August 15, 2015) [doc. 61-4, p. 2]. The EEOC assigned a new charge number to this amendment, rather than referencing his original charge number. *Id.* On this form, Mr. Fillmore elaborated on the details of his charge, stating that, "[o]n January 27, 2015, [he] complained to Lisa Brantley of race discrimination" and that respondents violated Title VII "for retaliation" by terminating him "because of his protected activity under Title VII." *Id.*, at p. 2-3. He also reiterated his charge of race discrimination, stating that he was terminated because of his race. *Id.*, at p. 3.

On August 31, 2015, the EEOC dismissed Mr. Fillmore's first charge and issued a right-to-sue letter. *Dismissal and Notice of Rights* (August 31, 2015) [doc. 61-6, p. 2]. On November 4, 2015, the EEOC sent a letter to Mr. Fillmore that referenced the charge numbers for his original charge and his amendment, Nos. 470-2015-01370 and 470-2015-02783, stating that its review showed that he "filed two (2) separate charges with similar allegations against the same respondent" and that, because it had already determined

his original charge, it would administratively dismiss the amendment charge number "as a duplicate." *Letter from EEOC to Chris Fillmore* (Nov. 4, 2015) [doc. 61-7, p. 2]. The letter was not a form notice and did not include any right-to-sue notice.

On an unknown date, the EEOC file stamped and assigned a third charge number to a copy of Mr. Fillmore's August 15, 2015 amendment. *Charge of Discrimination*, No. 470-2016-00189. Indiana Bell asserts, without citation to any supporting evidence, that this second charge was filed on November 2, 2015. *Defendant's Brief*, at 16. (The file stamp is illegible in the copy submitted to the Court.) Mr. Fillmore denies filing the charge and disputes Indiana Bell's date, contending that the date written beside his signature, August 15, 2015, is the applicable time. *Plaintiff's Response*, at 13. He explains that this duplicate of his amendment was filed on the same date that his original amendment was filed. It is unclear whether this duplicate was separately filed with the EEOC (and when and by whom) or whether a copy of Mr. Fillmore's amendment was mistakenly file stamped and assigned a new charge number by the EEOC.

On November 25, 2015, Mr. Fillmore filed suit against AT&T and Indiana Bell, alleging that Mr. Koepp discriminated against him on the basis of race and that Ms. Brantley retaliated against him after he "attempted to complain" to her. *Fillmore v. AT&T*, No. 1:15-cv-1878-WTL-MJD, *Complaint Form* [doc. 1] and *Statement of Claim* [doc. 1-1], at 1 (S.D. Ind., Nov. 25, 2015). About one month later, on December 22, 2015, the

EEOC issued a *Dismissal and Notice of Rights* letter dismissing the third charge no. 470-2016-00189 and notifying Mr. Fillmore of his right to sue. [Doc. 61-8.]

On January 22, 2016, Mr. Fillmore moved to dismiss his lawsuit. *Fillmore v. AT&T, Motion for Dismissal of Current Claim in Light of New Information Attained after Filing* [doc. 6]. His motion stated that he intended "to file a new claim based upon information that was received after the date of filing the current/original claim on November 25, 2015," and, while the new suit would maintain the same defendants, it would "account for the significant factual and procedural developments that have occurred since the original complaint was filed." He explained that at some time after he filed his previous suit an EEOC investigator contacted him by telephone and informed him that his case was being actively investigated. Mr. Fillmore told the investigator that his case had been concluded, he had received his right-to-sue letter, and, in reliance thereon, he had already filed suit. Mr. Fillmore further asserted that, when he later received the December 22, 2015, right-to-sue letter dismissing the third charge number, it was his first indication that a third charge had been pending. In his motion to dismiss his first suit, Mr. Fillmore stated that his discovery of "presumably new findings" regarding the third charge (that he had requested through a Freedom of Information Act request), "may dramatically change the dynamic of the argument presented in the original claim." *Id., Motion for Dismissal* [doc. 6] at 3-4. He argued that there would be no prejudice to the defendants "because both the Defendants and allegations will remain," and he argued that the factual changes of a new charge

number and EEOC investigator "are substantial enough to go beyond simply motioning for amending the original claim." *Id.*, at 4. On January 26, 2016, the Court granted his motion and dismissed the suit without prejudice. *Id., Entry Granting Plaintiff's Motion To Dismiss* [doc. 7] and *Final Judgment Pursuant to Fed. R. Civ. Pro. 58* [doc. 8].

Mr. Fillmore filed the present suit on February 9, 2016. *Complaint Form* [doc. 1]. The Court ordered him to supplement his complaint with the EEOC's right to sue letter, *Entry Directing Further Proceedings* [doc. 4] and he responded by filing the December 22, 2015, *Dismissal and Notice of Rights* that closed the third charge number, [doc. 6-1].

Indiana Bell argues that the only operative EEOC charge, for statute-of-limitations purposes, is Mr. Fillmore's first one, filed on March 17, 2015, and that the dismissal of that charge on August 31, 2015, started the 90-day clock running. Because he did not file the present suit until February 9, 2016, approximately 162 days after his first charge was dismissed, Indiana Bell argues that this action is time barred. Mr. Fillmore firmly agrees that his first EEOC charge is his only charge and that he "does not know the how or why others were produced." *Plaintiff's Response*, at 12-13. He insists that his attorney's August 15, 2015, filing was only an amendment in order to name Indiana Bell as an additional respondent and that it should not have led to the assignment of a new charge number "as it maintained the same allegations, facts, and, more or less, the same respondent." *Id.*, at 13. He insists that the third charge was filed on August 15, 2015, and he wonders if the file stamps of the second and third charge documents were "doctored" or "manipulated." *Id.*, at 13-14. He does not know how

the third charge came about but he "swears, under penalty of perjury, that it was not actuated by either himself or, to the Plaintiff's knowledge and belief, Mr. Sink [his attorney at the time]." *Id.*, at 14. Later, he concedes that "the production of the duplicate 'right to sue' notice appears to have been a clerical mistake on behalf of the EEOC, and not one due to any action/inaction affected [*sic*] by the Plaintiff." *Id.*, at 15.

Despite his insistence that he was not responsible for the third charge and that it appears to have been a mistake by the EEOC, Mr. Fillmore asserts that "on the validity and authority of the second 'right to sue' notice" — the one dated December 22, 2015 — he "refiled" his charges in court on February 9, 2016, that is, he filed the present suit. He argues that, regardless of Indiana Bell's arguments, his civil actions were timely filed both times: his first was filed only 86 days after the EEOC's August 31, 2015, right-to-sue letter, dismissing the first charge number, and this present case was filed only 49 days after the EEOCs December 22, 2015, right-to-sue letter, dismissing the third charge number.

Title VII's 90-day period to file suit is not suspended or restarted by subsequent charges based on allegations that are reasonably related to or similar enough to be within the scope of an earlier charge. *Freeman v. Travelers Companies, Inc.*, 63 F.Supp.3d 867, 872-73 (N.D. Ill. 2014); *Ervin v. Purdue University Calumet*, No. 2:09-cv-136-PRC, *Opinion and Order*, 2010 WL 3021521, *4 (N.D. Ind., July 28, 2010); *Felix v. City and County of Denver*, 729 F.Supp.2d 1243, 1250 (D. Colo. 2010) ("Courts have generally found that, where an employee files multiple Charges of Discrimination encompassing

the same events, the employee's 90-day period to commence suit begins running from the first date on which the EEOC gives the employee notice of the right to sue on one of the charges."), *aff'd*, 450 Fed.Appx. 702 (10th Cir. 2011). *See Noel v. Chase Investment Services Corp.*, No. 11 Civ. 3147 (PAC), *Opinion and Order*, 2011 WL 5041346, *3 (S.D. N.Y., Oct. 24, 2011).

There is no genuine dispute that the second and third charges merely duplicated the allegations of Mr. Fillmore's original charge. Both Mr. Fillmore and the EEOC treated the "second charge" only as an amendment and the EEOC dismissed the second charge as duplicative of the first charge. The third charge is in fact an exact duplicate of the amendment/second charge save for the file stamp, and Mr. Fillmore denies any involvement with initiating or maintaining the third charge. Thus, Title VII's 90-day countdown began on August 31, 2015.[8] Although he filed suit 86 days later, with four days to spare, his subsequent voluntary dismissal of that suit without prejudice caused the 90-day period to expire four days later:

> The filing of a suit stops the running of the statute of limitations, though only contingently. It is true that if the suit is later dismissed with prejudice, any issue concerning the bar of the statute of limitations to the refiling of the suit will be moot because a suit that has been dismissed with prejudice cannot be refiled; the refiling is blocked by the doctrine of res judicata. But if the suit is dismissed without prejudice, meaning that it can be refiled, then the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing.

[8] Mr. Fillmore did not allege or show a later date for his receipt of the EEOC's August 31, 2015, dismissal and right-to-sue letter.

> In other words, a suit dismissed without prejudice is treated for statute of limitations purposes as if it had never been filed. Were this not the rule, statutes of limitations would be easily nullified. The plaintiff could file a suit, dismiss it voluntarily the next day, and have forever to refile it. The strongest case for the rule that the running of the statute of limitations is unaffected by a dismissal without prejudice is therefore the case in which the plaintiff procured the dismissal, as by voluntarily dismissing the suit. But that cannot place limits on the scope of the rule, since a plaintiff can almost always precipitate a dismissal without prejudice, for example by failing to serve the defendant properly or by failing to allege federal jurisdiction, even if he does not move to dismiss it. The rule is therefore as we stated it: when a suit is dismissed without prejudice, the statute of limitations is deemed unaffected by the filing of the suit, so that if the statute of limitations has run the dismissal is effectively with prejudice.

Elmore v. Henderson, 227 F.3d 1009, 1011 (7th Cir. 2000) (citations omitted). Therefore, Mr. Fillmore's "refiling" of his Title VII claims in the present suit came 76 days too late and are thus untimely.

Mr. Fillmore argues that his claims can, or should, survive the time bar in any one of four ways. First, the Court could grant relief from a judgment/order "due to harmless error," under Fed. R. Civ. P. 60. Second, the Court could apply equitable tolling, as held in *Jones v. Res-Care, Inc.*, 613 F.3d 665, 670 (7th Cir. 2010). Third, the Court, "[o]n its own motion," could reinstate his former case. Finally, he argues that his claims are viable under § 1977 of the Revised Statutes of the United States, as amended, 42 U.S.C. § 1981, which is subject to a four-year statute of limitation.

Regarding Rule 60 relief, the Court presumes that he seeks relief from the judgment dismissing his previous suit without prejudice, which would revive that suit, thereby also incorporating his third avenue of relief. However, he has not filed any

motion for Rule 60 relief and such a motion would have to be filed in the case with the judgment from which he wants relief, not this case. Therefore, the Court cannot grant his requested relief in this case.

"Equitable tolling may only extend a deadline when 'despite all due diligence, a plaintiff cannot obtain the information necessary to realize that he may possibly have a claim.'" *Jones*, 613 F.3d at 670. Mr. Fillmore's modification of his quotation from the *Jones* decision — "'despite all due diligence, a plaintiff cannot obtain the information necessary to realize that he many possibly have [an additional] claim'" (Mr. Fillmore's brackets) — indicates that Mr. Fillmore contends that equitable tolling should apply to the period when he was attempting to discover whether new facts involving the "third charge" existed that could have supported additional claims against Indiana Bell. However, he himself made the decision to dismiss his timely first suit while he pursued his inquiries, rather than simply maintain the suit while he inquired and later seek to amend his complaint to add any new facts, claims, or defendants that he discovered. As it turned out, his inquiries uncovered no additional useful information involved in the third charge. He already knew the factual bases for his present claims, he knew that he had 90 days in which to sue after receiving his right-to-sue letter, and he timely filed suit, but he made the unfortunate strategic decision to dismiss that suit in hopes of uncovering and including more information in a new suit.

Mr. Fillmore could not have reasonably relied on the EEOC's right-to-sue notice regarding his third charge for the timeliness of the present suit because he concedes that

he had nothing to do with filing a third charge; the third charge is clearly nothing more than a duplicate of his August 2015 amendment and, thus, added nothing to the previous allegations; and he concedes that the third charge was an administrative mistake by the EEOC. Thus, his failure to assert a timely Title VII claim is not attributable to any inability to discover viable claims despite due diligence, but to his decision to take what turned out to be a costly risk by dismissing his timely suit while investigating the circumstances of the dismissed third EEOC charge. Thus, grounds do not exist to equitably toll Title VII's period of limitation in this case.

Indiana Bell argues that Mr. Fillmore cannot rely on § 1981 at this stage because he has not pled a § 1981 claim; after two prior amendments to his complaints, it is now too late. Indiana Bell's argument is only about timing; it does not argue that his retaliation claims are outside the scope of § 1981. As explained above, a complaint need not identify legal theories. "'Later documents, such as the pretrial order under Rule 16(e), refine the claims; briefs and memoranda supply the legal argument[s] that bridge the gap between facts and judgments.'" *Order on Motion for Leave To File Amended Complaint and Motion for Summary Judgment* [doc. 51], at 4 (quoting *Bartholet v. Reishauer, A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992)). Mr. Fillmore can, in the present motion, identify viable legal theories that allow his claims to go forward. By identifying § 1981 as a basis for his claims, he is not attempting to add new factual allegations or defendants. The relevant question, therefore, is simply whether § 1981 is a valid legal

theory under which Mr. Fillmore could obtain a judgment for relief of his alleged retaliation.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). The term "make and enforce contracts" is defined as including "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). Retaliation claims may be brought under § 1981, *Baines v. Walgreen Co.*, 863 F.3d 656, 661 (7th Cir. 2017), and the legal analysis of them is identical under both Title VII and § 1981, *Smith v. Chicago Transit Authority*, 806 F.3d 900, 904 (7th Cir. 2015). Administrative exhaustion is not required for § 1981 actions, *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539 (7th Cir. 2007), and a longer four-year statute of limitation applies, 28 U.S.C. § 1658(a) (four-year catch-all limitation period for actions after December 1990); *Jones v. R. R. Donnelley & Sons, Co.*, 541 U.S. 369 (2004). Because Mr. Fillmore brought the present suit within four years of his March 11, 2015, termination, his first and second causes of action are not untimely under § 1981.

There is no genuine dispute of a material fact and Indiana Bell is entitled to judgment as a matter of law on the Title VII retaliation claims pled in Mr. Fillmore's first and second causes of action. Indiana Bell is not entitled to judgment as a matter of

law on any § 1981 claims that are included in Mr. Fillmore's first and second causes of action on the grounds of failure to plead or statute of limitations.

2. Mr. Fillmore's § 1981 claims. To prevail on a § 1981 claim of retaliation, a plaintiff must prove "'(1) that he engaged in activity protected by the statute; (2) that [the defendant] took an adverse employment action against him; and (3) that there is a causal connection between [his] protected activity and the adverse employment action.'" *Mintz v. Caterpillar, Inc.*, 788 F.3d 673, 680-81 (7th Cir. 2015). "If there is no triable issue of fact on even one essential element of the nonmovant's case, summary judgment is appropriate." *Boss*, 816 F.3d at 916. When defending against a motion for summary judgment, a plaintiff may elect to proceed under the indirect method of proof authorized by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[9] Under this method, a plaintiff must first establish a *prima facie* case of retaliation by proving that he "(1) engaged in statutorily protected activity; (2) met [his employer's] legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who did not engage in protected activity." *Mintz*, 788 F.3d at 681. "'Failure to satisfy any one element of the *prima facie* case is fatal to an employee's retaliation claim.'" *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006).

[9] The Court of Appeals for the Seventh Circuit specifically has held that the indirect method of proof survived the Court's elimination of the "longstanding practice of distinguishing between 'direct' and 'indirect' evidence in analyzing discrimination claims." *Grant*, 2017 WL 3753996, *4. The indirect method "remains 'a means of organizing, presenting, and assessing circumstantial evidence in frequently recurring factual patterns found in discrimination cases.'" *Id.*

a. **Mr. Fillmore's first cause of action — retaliation by Mr. Koepp.** In his first cause of action, Mr. Fillmore alleges that, despite his diligent and competent performance, Mr. Koepp unjustly reprimanded him and that a motive of "retaliatory animus" can be inferred from the fact that he was aware of but did not participate in resolving grievances that Mr. Fillmore filed against him. *Complaint*, ¶¶ 22-23. See also *Plaintiff's Reply in Support of His Summary Judgment Motion* [doc. 72], at 6 ("... how several grievances from the Plaintiff against Koepp were essentially allowed to fester, is proof positive for the jury to glean that he indeed expressed retaliatory animus toward the Plaintiff."). Mr. Fillmore claims that this conduct of Mr. Koepp violated § 1981's prohibition of retaliation. *Id.*, ¶ 24. The only evidence that Mr. Fillmore submitted in support is a chain of two e-mails dated April 28, 2015 (after Mr. Fillmore's termination), between Ms. Brantley and "KELLER, ML (LABOR)" that mention grievances filed by Mr. Fillmore. However, the e-mails do not indicate against whom the grievances were filed or the content of the grievances, particularly whether the grievances complained of racial discrimination by Mr. Koepp.

Because Mr. Fillmore neither adduced nor cited any other evidence of grievances that he filed against Mr. Koepp charging him with racial discrimination, there is no admissible evidence before the Court that Mr. Fillmore engaged in protected activity and that Mr. Koepp retaliated against him because of it. Therefore, there is no admissible evidence to support an essential element of the *Complaint*'s first cause of action's claim that Indiana Bell retaliated against Mr. Fillmore in violation of § 1981.

b. Mr. Fillmore's second cause of action — retaliation by Ms. Brantley. Mr. Fillmore alleges that he believed that Mr. Koepp was disciplining him more severely than other subordinates and that he had a "good-faith and valid suspicion" that Mr. Koepp's motivation for doing so was racial discrimination. *Complaint*, ¶¶ 15, 16. He further alleges that he "went to Lisa Brantley, Koepp's supervisor, on January 27, 2015, and complained about him," *id.*, ¶ 16, and that Ms. Brantley then suspended and terminated him in retaliation for his complaint, *id.*, ¶¶ 28, 29.

However, as noted above in the recitation of undisputed facts, although Mr. Fillmore has pled the elements of a claim of retaliation by Ms. Brantley, he has presented no admissible evidence that he engaged in the alleged protected activity, namely, that he complained or reported to Ms. Brantley that Mr. Koerr was racially discriminating against him. That is the only protected activity in which he alleges he engaged and the only cause that he alleged for Ms. Brantley's retaliation. With no evidence of this essential element of his action, he cannot fend off summary judgment on this claim.

Because there are no triable issues of fact regarding whether Mr. Fillmore engaged in a protected activity, Indiana Bell is entitled to summary judgment on Mr. Fillmore's § 1981 claims of retaliation.

3. Mr. Fillmore's state-law claims — third, fourth, and fifth causes of action. Because summary judgment is granted on all of Mr. Fillmore's federal-law claims, the Court shall exercise its discretion to decline supplemental jurisdiction over his state-law claims, dismissing them without prejudice. 28 U.S.C. § 1367(c)(3).

B. Mr. Fillmore's motion for summary judgment.

For the reasons explained above, Mr. Fillmore's cross-motion for summary judgment is denied.

C. Mr. Fillmore's motion to strike Indiana Bell's evidence.

In its evaluation of Indiana Bell's motion for summary judgment, the Court considered Mr. Fillmore's arguments against the authenticity and admissibility of certain items of evidence that Indiana Bell submitted in support thereof, but the Court denies his motion to strike those exhibits. Such motions to strike generally are disfavored. S.D. Ind. L.R. 56-1(i).

Conclusion

Defendant's Motion for Summary Judgment [doc. 59] is **GRANTED in part** and **DENIED in part**: summary judgment is granted against Mr. Fillmore's Title VII and § 1981 claims and denied regarding Mr. Fillmore's state-law claims. *Plaintiff's Cross Motion for Summary Judgment* [doc. 66] is **DENIED**. The Court **DISMISSES** Mr.

Fillmore's state-law claims **without prejudice**. *Plaintiff's Motion To Strike* [doc. 69] is **DENIED**.

SO ORDERED:

Date: 9/22/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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Appendix B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

CHRISTOPHER WAYNE FILLMORE, Plaintiff, *vs.* INDIANA BELL TELEPHONE CO., INC., Defendant.	CAUSE NO. 1:16-cv-323-SEB-DML

ENTRY

Plaintiff's Motion and Memorandum To Set Aside Judgment and Remand for Further Fact-Findings [doc. 82]

On September 22, 2017, the Court granted defendant Indiana Bell Telephone Co., Inc.'s motion for summary judgment. *Entry* [doc. 78]. Now before the Court is plaintiff Christopher Wayne Fillmore's motion for relief from that judgment under paragraphs (1), (3), and (6) of Rule 60(b), *Federal Rules of Civil Procedure*:

> (b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; . . .
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

Mr. Fillmore makes two preliminary objections to the judgment. First, he states that he did not specifically disavow his claim of race discrimination against Thomas

Koepp but only "rescinded" it because it did not rise above speculation. He argues that, while he did not assert a *claim* of discrimination against Mr. Koepp, he did allege that he had a reasonable *belief* at the time that Mr. Koepp was discriminating against him and, therefore, that he had a good faith basis for his complaint to Ms. Brantley. *Motion and Memorandum To Set Aside Judgment and Remand for Further Fact-Findings* [doc. 82] ("*Motion*"), at 1. Mr. Fillmore does not specify what he contends the *Entry* got wrong about this distinction and what it might be is not apparent to us. The Court specifically noted that he "disavowed making any claim that race was the, or a, motivation for any adverse employment action for which he claims relief," *Entry*, at 10, and, in support, it quoted his own statement in his brief that he "respectfully rescinded [in his *Complaint*] race being the sole (or a) motivating factor against Koepp, as once *presumed*," *id.*, n. 6. The Court also noted Mr. Fillmore's allegation that he complained about Mr. Koepp to Ms. Brantley "[w]ithout what he believed would be a solid reason [f]or his suspicions – nevertheless, a good-faith and valid suspicion . . . ." *Entry*, at 5 (quoting *Plaintiff's Second Amended Complaint* [doc. 47-1] ("*Complaint*"), ¶ 16). Mr. Fillmore has not shown that the Court erred.

Second, Mr. Fillmore argues that he "*could not* complain to Lisa Brantley [about Mr. Koepp's disparate treatment] on January 27, 2015, because she effectively interfered with this action (an act that in and of itself can be considered retaliation) . . . ." *Motion*, at 2 (footnote omitted). Mr. Fillmore thus has changed his allegations, claims, and arguments but it is too late. Up to now, he alleged and argued that, while he did not or

could not go into detail because Ms. Brantley appeared agitated and preoccupied due to other unrelated matters during their brief meeting on January 27, 2015, he did report his good faith suspicions about Mr. Koepp's discrimination to her. Now, he asserts that he could not report his suspicions to her because she interfered with his attempt to do so and that that interference was an act of retaliation itself. Because Mr. Fillmore does not provide any reason why he did not present this inconsistent version of the facts before now, he has not shown that it warrants Rule 60(b) relief.

Rule 60(b)(1) — mistake, inadvertence, surprise, or excusable neglect. Under the heading of excusable neglect, Mr. Fillmore makes a vague argument that, as a *pro se* litigant, he was in "an almost impossible position of litigating his case concurrently with also having to learn and apply *all* applicable Local Rules, Federal Rules, and statutes which support his underlying claims and, moreover, incorporate his endeavor into his life outside of these matters" and, therefore, the Court should excuse his lack of "instinct," forgive his errors, and grant him additional grace. *Motion*, at 4-5. He does not cite a specific are of ignorance, or lack of understanding, or "instinct," or error that the Court should graciously excuse and, therefore, fails to present a meaningful argument. If he means his failure to submit any supporting evidence that he complained to Ms. Brantley about Mr. Koepp's racially discriminatory treatment and, thus, that he engaged in protected activity under 42 U.S.C. § 1981, then, as the *Entry* noted, the rules and procedures governing summary judgment apply equally to *pro se* parties and Mr. Fillmore was specifically notified of those rules and his need to support

his allegations by specific citation to admissible evidence. *Entry*, at 6. Mr. Fillmore has not shown that any of his neglect was excusable or warrants relief from the judgment.

Regarding inadvertence, Mr. Fillmore makes the same argument: he inadvertently relied on only his pleadings and briefs, not citations to admissible evidence, to support his allegations and arguments on summary judgment. He also states that he attempted to mend his inadvertent error by submitting his own declaration two months after briefing on summary judgment had closed (*Motion To Supplement Record with Declaration of Plaintiff* [doc. 74]).[1] The Court correctly denied him leave to submit his declaration because it was untimely and prejudicial to Defendant. *Order on Plaintiff's Motion to File Supplemental Evidence* [doc. 77]. The Court's rules governing the briefing of summary-judgment motions are clear, bind *pro se* parties, and were pointed out to Mr. Fillmore. He has not shown any ambiguity or lack of clarity in therein.

In addition, the Court notes that the declaration that Mr. Fillmore sought to submit still does not assert that he reported to Ms. Brantley that Mr. Koepp discriminated against him because of his race. Rather, it declared that Mr. Koepp disciplined him more extensively and severely than prior supervisors; that Mr. Fillmore "had long-held suspicions" that Mr. Koepp's treatment of him was disparate and

[1] Mr. Fillmore attached a new declaration to the present motion which augments his previous declaration with a statement that "Koepp's treatment of me was suspected to have been based on racial discrimination as he is Caucasian and I am African-American." *Declaration of Plaintiff* [doc. 82-2], ¶ 5. Obviously, it is far too late to submit this declaration.

"beyond the pale of just cause;" and that he told Ms. Brantley that "'certain managers' (chief among them, Koepp) demonstrated a disparate enforcement of the rules which cause 'certain technicians' to suffer." *Declaration of Plaintiff* [doc. 74-1], ¶¶ 3 and 4. Thus, in this declaration as in his briefs, Mr. Fillmore did not assert or prove that he engaged in protected activity by complaining about racial discrimination. Mr. Fillmore has not shown that his litigation conduct was inadvertent or warrants Rule 60(b) relief.

Under the heading of mistake, Mr. Fillmore asks for relief from the judgment because he dismissed his first (timely) suit in mistaken reliance on the EEOC's mistaken opening of a third charge and its mistaken issuance of a second right-to-sue letter. However, the *Entry* found that Mr. Fillmore knew that the EEOC's actions regarding the third charge were administrative mistakes and, yet, he unreasonably relied on the mistakes to dismiss his first suit. Thus, he made a deliberate litigation decision, while in possession of the relevant facts, to dismiss his first timely suit. His decision was, at it turned out, unfortunate, but it was not a mistake and does not warrant Rule 60 relief.

Rule 60(b)(3) — fraud, misrepresentation, or misconduct by an opposing party.

Mr. Fillmore argues that Defendant committed fraud and misconduct by *possibly* withholding from its discovery production grievances against Mr. Koepp that were filed on his behalf by his union. The *Complaint* alleges that, after Mr. Fillmore was called into a number of disciplinary meetings with Mr. Koepp, accompanied by Mr. Fillmore's shop steward, "a number of grievances were reflexively filed to the Union on his behalf." *Complaint*, ¶ 14. It further alleges that, because Mr. Koepp was aware of the

grievances, *id.*, ¶¶ 14 and 23, but did not participate in resolving them, "an intrinsic inference of retaliatory animus can thus be concluded as motive," *id.*, ¶ 23. The *Complaint* also alleges that the grievances, two of which were reported to Ms. Brantley, were "otherwise unanswered," which shows that Defendant was aware of Mr. Fillmore's complaints but failed to act on them. *Id.*, ¶ 41. The *Complaint* does not allege the content of the grievances, specifically what disciplinary actions they concerned and whether they alleged racial discrimination, or whether Mr. Fillmore ever saw the grievances, participated in their drafting, or attempted to follow up on them.

Now, in the present motion, Mr. Fillmore indicates that the grievances might not exist, *Motion*, at 7, and that, because they were filed by the union, they might not specify racial discrimination against Mr. Koepp, *id.*, at 8. Even so, he argues that, Ms. Brantley's admission that she was aware of two of the grievances "would also indisputably establish protected activity as to her." *Id.*, at 8.

The *Entry* noted that, because Mr. Fillmore neither adduced nor cited any evidence of grievances against Mr. Koepp, there was no admissible evidence before the Court that Mr. Fillmore engaged in protected activity or that Mr. Koepp retaliated against him because of it. *Entry*, at 23. Now that Mr. Fillmore admits that the grievances might not even exist and might not have mentioned racial discrimination, there is no reason to find that Defendant engaged in misconduct or that Mr. Fillmore suffered resulting prejudice. Moreover, Mr. Fillmore did not move to compel production of the grievances and did not submit a Rule 56(d) affidavit or declaration

that he was unable to present facts essential to his opposition to summary judgment because of uncertainty over the grievances. The relevant facts regarding the possible non-production of grievances were known to Mr. Fillmore long before the motions for summary judgment were filed and it is now too late to rely on their non-production for Rule 60(b)(3) relief.

Rule 60(b)(6) — any other reason that justifies relief. Mr. Fillmore makes no new arguments under this paragraph.

Conclusion

Mr. Fillmore makes no arguments that were not available to him before and during summary-judgment briefing. He essentially asks for a do-over, a second bite at the apple, but has shown no grounds under Rule 60(b) to grant him one. Therefore, his *Motion and Memorandum To Set Aside Judgment and Remand for Further Fact-Finding* [doc. 82] is **DENIED.**

DONE this date: 11/9/2017

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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CHRISTOPHER WAYNE FILLMORE
713 W. 31st Street
Indianapolis, IN 46208

Appendix C

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 29, 2018*
Decided June 29, 2018

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-3367

CHRISTOPHER W. FILLMORE,
Plaintiff-Appellant,

v.

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-323-SEB-DML

Sarah Evans Barker,
Judge.

ORDER

Christopher Fillmore filed suit against his former employer, Indiana Bell, alleging that he was fired in retaliation for complaining about race discrimination, among other things. The district court entered summary judgment for the employer because Fillmore lacked evidence that he had complained of discrimination. We affirm.

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* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. See FED. R. APP. P. 34(a)(C).

Indiana Bell fired Fillmore after he had worked there for about seven years as an installation and repair technician. Before he was fired, Fillmore had been disciplined for failing to run quality checks, seal grommet holes, or properly ground network-interface devices. Finally, in March 2015, Indiana Bell fired Fillmore for improperly using an Ethernet adapter.

Fillmore then sued Indiana Bell, alleging that his immediate supervisor, Thomas Koepp, discriminated against him because of his race by disciplining him. He also alleged that Koepp retaliated against him with more discipline after Fillmore filed grievances about Koepp's conduct. Further, Fillmore alleged, Koepp's supervisor, Lisa Brantley, retaliated against him by pushing for his termination. In January 2015, he said, he attempted to complain to Brantley about his belief that Koepp was singling him out for punishment because of his race. But an agitated Brantley hastily ejected him from her office before he could fully articulate his concern, and she later attended the meetings with upper management that led to his firing.

After filing his complaint, Fillmore moved for court-recruited counsel, see 28 U.S.C. § 1915(e). A magistrate judge denied his motion, concluding that Fillmore was competent to litigate his claims based on his "organized and detailed" filings and his ability to coherently present facts and argument.

Both parties moved for summary judgment, but the evidence they submitted was sparse. In particular, neither party submitted admissible evidence about the substance of the meeting between Fillmore and Brantley. But two months after the deadline for dispositive motions, Fillmore moved to supplement the record with a declaration asserting that he had met with Brantley to report his concerns about Koepp's purported race discrimination. He attests: "Among other things, my conversation indicated that 'certain managers' (chief among them, Koepp) demonstrated a disparate enforcement of the rules, which caused 'certain technicians' to suffer." The magistrate judge rejected this declaration because it was untimely and therefore it would be unfair to Indiana Bell to add it to the record at that point.

The district judge then entered summary judgment for Indiana Bell. First the judge concluded that Fillmore's claims were untimely under Title VII of the Civil Rights Act of 1964. Next, the judge considered Fillmore's claims of discrimination and retaliation through the lens of 42 U.S.C. § 1981. As for retaliation by Brantley, the judge observed that neither side had submitted evidence about the content of the meeting between Fillmore and Brantley, so there was no proof that Fillmore had reported

discrimination to her. Thus Fillmore could not show that he engaged in any protected activity. And as for Fillmore's claims against Koepp, the judge concluded that Fillmore had supplied no evidence that Koepp had disciplined him with discriminatory or retaliatory intent.

Fillmore moved for relief from the judgment under Federal Rule of Civil Procedure 60(b)(1) and (6), asserting that his status as a pro se litigant entitled him to another try at the merits of the case. The judge denied the motion, pointing out that she had repeatedly warned Fillmore about the requirement that he cite admissible evidence in support of his arguments, see FED. R. CIV. P. 56(c).

On appeal, we first note that Fillmore has waived several arguments. For example, Fillmore has waived his argument that the magistrate judge erred by declining to recruit him counsel and by denying leave to file his supplemental declaration about his meeting with Brantley. He did not object in the district court to the magistrate judge's denial of these motions, so he cannot challenge those decisions now. See FED. R. CIV. P. 72(a), (b); *Banco Del Atlantico, S.A. v. Woods Indus.*, 519 F.3d 350, 354 (7th Cir. 2008). Further, in Fillmore's appellate briefs, he does not discuss the dismissal of any of his claims under Title VII or his claims under § 1981 arising from Koepp's actions; he has thus waived any challenge to those dismissals. See *Bernard v. Sessions*, 881 F.3d 1042, 1048 (7th Cir. 2018).

That leaves Fillmore's challenge to the entry of summary judgment for Indiana Bell on his § 1981 claim of retaliation by Brantley. To succeed on a retaliation claim under § 1981, a plaintiff must show that he engaged in protected activity and suffered an adverse employment action as a result. *Baines v. Walgreen Co.*, 863 F.3d 656, 661 (7th Cir. 2017). Although reporting discrimination to a supervisor can be statutorily protected, the plaintiff must complain of discrimination based on race (or another protected basis) or describe sufficient facts to raise that inference. *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663–64 (7th Cir. 2006). Here Fillmore needed to provide evidence that he either expressly complained to Brantley about Koepp's racially discriminatory conduct or provided enough information to raise an inference that he was alleging racial discrimination.

But no evidence adduced by either party at summary judgment sheds light on the conversation between Fillmore and Brantley other than the undisputed fact that it happened. Fillmore could not rely on his pleadings; instead, he needed to cite to particular parts of the record that supported his assertion that he complained to

Brantley about race discrimination. See FED. R. CIV. P. 56(c)(1)(A); *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013). He failed to do so.

Fillmore's other argument on appeal is that the district court improperly denied him relief under Federal Rule of Civil Procedure 60(b)(1) and (6) because he was "merely a layman" whose pro se status entitled him to relief from judgment. This argument best fits under 60(b)(1), which permits reopening within one year of judgment if the party shows "mistake, inadvertence, surprise, or excusable neglect." But without further explanation of the circumstances, one's pro se status does not automatically entitle a litigant to 60(b)(1) relief. *Jones v. Phipps*, 39 F.3d 158, 163 (7th Cir. 1994). And because Fillmore's argument falls within the 60(b)(1) framework, he cannot also argue that he is entitled to relief under 60(b)(6). See *Arrieta v. Battaglia*, 461 F.3d 861, 865 (7th Cir. 2006). The district court did not abuse its discretion when it decided that Fillmore's pro se status did not entitle him to another bite at the apple. See *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009).

AFFIRMED

Appendix D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 22, 2018

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-3367

CHRISTOPHER W. FILLMORE,
Plaintiff-Appellant,

v.

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-CV-00323

Sarah Evans Barker,
Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on August 6, 2018. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

[1] Judge Ilana Diamond Rovner did not participate in the consideration of this matter.