APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1113

[Filed October 17, 2018]

ASHIDDA FORGUS,

Plaintiff - Appellant,

v.

JAMES MATTIS, Secretary, Department of Defense, (Defense Logistics Agency),

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., District Judge. (3:16-cv-00673-JAG)

Submitted: August 30, 2018 Decided: October 17, 2018

Before DUNCAN and DIAZ, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Scott Gregory Crowley, CROWLEY & CROWLEY, Glen Allen, Virginia, for Appellant. Tracy D. McCormick, Acting United States Attorney, Alexandria, Virginia, Elizabeth C. Wu, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ashidda Forgus appeals the district court's order granting Defendant's motion to dismiss her discrimination, retaliation, and hostile work environment claims,[*] which she brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2012 & Supp. 2018) (Title VII). On appeal, Forgus first asserts that the district court: (1) impermissibly credited factual allegations proffered by the Defendant in deciding the motion to dismiss; (2) erred when it determined that Defendant's failure to transfer or hire her for her preferred position were not adverse employment actions sufficient to support her discrimination claims; and (3) erred when it determined that the actions Forgus experienced after

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[*] Forgus does not challenge the district court's dismissal of her harassment claims and, thus, she has waived any challenge to the district court's disposition. *See IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) (holding that a "[f]ailure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues").

she complained to management were not materially adverse to support her retaliation claims. Finding no reversible error, we affirm.

We review de novo the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *See Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 635 (2018). When ruling on a motion to dismiss, a court must accept as true the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011).

Under Fed. R. Civ. P. 8(a)(2), a complaint must only contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" To survive a motion to dismiss, however, a plaintiff's allegations must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The plausibility standard is not a probability requirement, but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) ("At bottom, a plaintiff must nudge [his] claims across the line from conceivable to plausible to resist dismissal." (internal quotation marks and alterations omitted)).

Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and "[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Iqbal*, 556 U.S. at 678. Thus, "naked assertions of wrongdoing necessitate some factual enhancement within the complaint to cross the line between possibility and plausibility of entitlement to relief." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (internal quotation marks omitted).

Notably, while a Title VII plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15 (2002), "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555. In other words, "the Supreme Court's holding in *Swierkiewicz* . . . did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002).

We reject Forgus' argument that the district court impermissibly credited factual allegations proffered by the Defendant in deciding the motion to dismiss. Forgus attached numerous documents to her complaint, which included sworn affidavits of several of Defendant's employees. The district court's factual findings about which Forgus complains were clearly supported by the documents she attached to her complaint. Forgus does not challenge the district court's reliance on the documents' contents in deciding Defendant's motion to dismiss, and we discern no reversible error in the district court's reliance. *See* Fed. R. Civ. Pro. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for

all purposes"); *see also Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) ("In reviewing a 12(b)(6) dismissal . . . [w]e may also consider documents attached to the complaint.").

We also discern no error in the district court's decision to grant Defendant's motion to dismiss Forgus' race and sex discrimination claims. To establish her discrimination claims, Forgus was required to allege facts sufficient to establish: "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *See Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 626 (4th Cir. 2015). To constitute an "adverse employment action" for purposes of a Title VII disparate treatment claim, the alleged action must "adversely affect the terms, conditions, or benefits of the plaintiff's employment." *See James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004) (internal quotation marks and alteration omitted). Mere dissatisfaction fails to meet the standard; the plaintiff must show "some significant detrimental effect[.]" *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

The allegations in Forgus' complaint consisted of "labels and conclusions" that were insufficient to withstand a motion to dismiss, or complained of actions that were not "adverse[.]" *See, e.g.*, *Wheat v. Fla. Parish Juvenile Justice Comm'n*, 811 F.3d 702, 709 (5th Cir. 2016) (holding that the "mere denial of a reassignment to a purely lateral position (no reduction in pay and no more than a minor change in working conditions), is typically not a materially adverse action" (internal

quotation marks omitted)); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1108 (7th Cir. 2012) (explaining that the denial of a transfer would only be a materially adverse action if "the transfer would have resulted in higher pay or benefits"). We thus agree with the district court that Forgus' complaint failed to sufficiently allege the elements necessary to state her race and sex discrimination claims.

Finally, we discern no reversible error in the district court's decision to dismiss Forgus' retaliation claims. Notably, Forgus failed to oppose Defendant's motion to dismiss her retaliation claims in any meaningful way and, thus, she has waived appellate review over the district court's dismissal of those claims. *See Robinson v. Wax Filtration Corp. LLC*, 599 F.3d 403, 411 n.10 (4th Cir. 2010) ("We have previously made it clear that the failure to present an argument to the district court constitutes waiver before this court."); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421-22 (4th Cir. 2005) (no fundamental miscarriage of justice where plaintiff did not allege a particular ground for relief in opposition to motion to dismiss). In fact, such unpreserved arguments may not be addressed on appeal unless plain error has occurred or exceptional circumstances exist. *See Williams v. Prof'l Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002). Counsel does not argue that it was plain error for the district court to dismiss Forgus' retaliation claims, nor does counsel argue that exceptional circumstances exist justifying this court's consideration of the district court's dismissal. *See IGEN Int'l, Inc.*, 335 F.3d at 308.

We nonetheless discern no error in the district court's rationale for dismissal. To prevail on her

retaliation claims, Forgus was required to allege that: (1) she engaged in a protected activity; (2) an adverse action was taken against her by the Defendant; and (3) there was a causal connection between the first two elements. *See Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). To establish that Defendant's actions were sufficiently adverse, Forgus was required to allege facts sufficient to allow an inference "that a reasonable employee would have found the challenged action[s] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Sante Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks and citations omitted). An action is not materially adverse, however, if it amounts to "petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* To make that assessment, a court must consider the context of the claimed adverse actions. *Id.* at 69. We agree with the district court that none of the actions about which Forgus complains on appeal constitute materially adverse employment actions sufficient to support her retaliation claims.

Based on the foregoing, we affirm the district court's order granting Defendant's motion to dismiss. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1113
(3:16-cv-00673-JAG)

[Filed October 17, 2018]

ASHIDDA FORGUS,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
JAMES MATTIS, Secretary, Department of Defense, (Defense Logistics Agency),	)
	)
Defendant - Appellee.	)

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:16-cv-673

[Filed December 29, 2017]

ASHIDDA FORGUS)
Plaintiff,)
)
v.)
)
JAMES MATTIS, Secretary)
of Defense,)
Defendant.)
)

FINAL ORDER

This matter comes before the Court on its own initiative. On December 12, 2017, the Court entered a Final Order in this case, but did not include in the Final Order a notice to the plaintiff of her right to appeal. (Dk. No. 38.) The Court now VACATES the original Final Order and enters this Order in its place.

The defendant moved to dismiss the plaintiff's claims. (Dk. No. 33.) For the reasons stated in the Opinion (Dk. No. 37), the Court GRANTS the motion and DISMISSES this case.

Should the plaintiff wish to appeal this Order, she must file written notice of appeal with the Clerk of Court within thirty (30) days of the date of this Order. Failure to file a notice of appeal within this period may result in the loss of the right to appeal.

Let the Clerk send a copy of this Order to all counsel of record and to the pro se plaintiff via U.S. mail.

It is so ORDERED.

/s/
John A. Gibney, Jr.
United States District Judge

Date: December 29, 2017
Richmond, VA

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:16-cv-673

[Filed December 12, 2017]

ASHIDDA FORGUS
Plaintiff,

v.

JAMES MATTIS, Secretary of Defense,
Defendant.

OPINION

Ashidda Forgus works at the Defense Logistics Agency ("DLA"), an agency of the Department of Defense, as a Business Process Analyst. The Court ordered Forgus to amend her initial complaint, instructing her to include a clear, brief statement of facts, a separately titled section identifying each legal claim and the facts that support it, as well as the relief sought, a list of defendants, and any documents she wished the Court to consider. After filing her amended complaint, Forgus moved for leave to amend again, which the Court granted. She filed a second amended complaint, containing three claims. She alleges

(1) disparate treatment based on race and sex in violation of Title VII; (2) retaliation in violation of Title VII; and (3) hostile work environment.

Forgus' second amended complaint does not state a claim for relief. She fails to identify the adverse employment action required for her disparate treatment and retaliation claims, and she does not allege sufficient facts to meet the high bar for hostile work environment claims.

Accordingly, the Court grants the defendant's motion to dismiss the second amended complaint.

I. BACKGROUND

Forgus alleges numerous facts spanning several years. The Court, however, may only consider actions or claims contained in the underlying Equal Employment Opportunity Commission ("EEOC") claim. *King v. Seaboard Coast Line R. Co.*, 538 F.2d 581, 583 (4th Cir. 1976). Thus, the Court will not consider any actions before Forgus began working for DLA in 2009, or after March 23, 2012, when she filed her formal EEOC complaint. The Court has summarized the pertinent facts below.

Forgus, a black woman, began working at DLA in December 2009. DLA consists of several directorates, including the Business Process Support Directorate, which includes the Order Fulfillment Division. The Order Fulfillment Division has two branches: Order Management and Inventory Management. Forgus works as a Business Process Analyst, a position which exists in both the Order Management and Inventory Management branches. She works exclusively within the Order Management branch.

Forgus describes several instances in which she made complaints or requests, only to make more complaints or requests once her supervisors acquiesced. These include complaints about seating arrangements, assigned alternates,[1] trainings, informal office meetings, and, in January 2011, her discomfort with the office environment. Similarly, when Forgus complained her workload was too light, her supervisor assigned her to an important project, and then Forgus requested a reduction in her workload. This cycle repeated several times.

Forgus also describes her many attempts to transfer to the Inventory Management branch. On January 6, 2011, DLA posted a vacancy announcement for a Business Process Analyst, and Forgus applied. Although the selecting official put her on a list of qualified candidates, that official said she would not consider Forgus because the vacancy described the position she already held. Her supervisor, Naomi Wilcox, told Forgus she could submit a written request if she wished to transfer to the Inventory Management branch. On January 31, 2011, Forgus emailed Wilcox stating she wanted to work within both branches and broaden the scope of her current job. In February 2011, Forgus had two meetings with her superiors in which she requested a transfer, and voiced concerns about her workload being too light. Wilcox again told Forgus she would have to submit a written request for the specific transfer, rather than utilize the application process. Nevertheless, Forgus told Wilcox to treat her

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[1] Forgus uses the term "alternate" throughout her complaint, and it refers to employees assigned as backup on projects. *See, e.g.*, Second Am. Compl., at 8-9.

application for Business Process Analyst as a written request. At one of these meetings, the selecting official said, "Well anyway, you're not getting the position," referring to the vacancy to which Forgus applied, a comment which Forgus describes as "caustic." (Second Am. Compl., at 11.) Two black men from outside the division were eventually chosen as Business Process Analysts, one in Order Management, and one in Inventory Management.

In October 2011, Wilcox assigned Forgus to a high priority project, which Forgus now argues was an attempt to force her out of her position by giving her too much work. On November 1, 2011, Forgus contacted an EEOC counselor. The next day, Wilcox, unaware of Forgus' EEOC contact, attempted to meet another of Forgus' requests by allowing her to split her time between her normal workload and the special project. When Forgus expressed concern about being fired for failure to keep up with her normal workload, Wilcox assured her she would not be removed. As far as the record shows, Forgus still holds the same position at DLA.

On March 23, 2012, Forgus filed a formal discrimination complaint with the EEOC. She requested a hearing before an Administrative Judge, and on January 8, 2014, the judge disposed of her allegations regarding discrimination, including hostile work environment and retaliation. On February 26, 2014, she filed an appeal with the EEOC, which affirmed the Administrative Judge's findings. Forgus then brought this suit.

II. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss gauges the sufficiency of a complaint without resolving any factual discrepancies, testing the merits of the claim, or judging the applicability of any defenses raised by the non-moving party. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In considering the motion, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). "The tenet that a court must accept as true all of the allegations contained in a complaint[, however,] is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, a complaint must state facts that, when accepted as true, "state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In *Swierkiewicz v. Sorema*, the Supreme Court held that a plaintiff alleging employment discrimination must follow only "the ordinary rules for assessing the sufficiency of a complaint." 534 U.S. 506, 511 (2002). Although *Iqbal* and *Twombly* "did alter the criteria for assessing the sufficiency of a complaint," the Fourth Circuit has held that "those cases did not overrule *Swierkiewicz*'s holding that a plaintiff need not plead the *evidentiary* standard" to survive a motion to dismiss under Rule 12(b)(6) in an employment discrimination case. *McCleary-Evans v. Md. Dept. of Transp., State Highway Admin.*, 780 F.3d 582, 586-87

(4th Cir. 2015) (emphasis in original). Accordingly, at the pleadings stage, the Court must determine only whether a plaintiff has alleged sufficient facts to render plausible her claim.

III. DISCUSSION

A. Disparate Treatment Claim

In order to survive dismissal on a disparate treatment claim, Forgus must allege, as a threshold matter, some sort of adverse employment action. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004). "An adverse employment action is a discriminatory act that 'adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment.'" *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (quoting *James*, 368 F.3d at 375). Mere dissatisfaction fails to meet the standard; the plaintiff must show "some significant detrimental effect." *Id.*

Most of the facts Forgus alleges, such as problems with her seating arrangement and her level of work, fall far short of constituting adverse employment actions. The only event resembling an adverse employment action, and the only one the Court will discuss in more depth, is Forgus' request for a transfer to another branch.

Forgus applied for a position she already held, and the selecting official put her on a list of qualified candidates for the position. That official did not select Forgus; instead, she selected two black men from outside the division. Forgus' supervisor told her she needed to submit a written request to receive a transfer, but Forgus claims she orally requested a transfer in several meetings. In these meetings, Forgus

requested a transfer in addition to changes in her workload. Afterward, her supervisor assigned her to a new project in which she received both an increased workload and experience in Inventory Management, the department to which she desired a transfer.

Forgus pleads insufficient facts to show an adverse action with regard to her transfer requests. An employee cannot expect to receive everything she requests from her employer. *See James*, 368 F.3d at 377 ("an employee's dissatisfaction with this or that aspect of work does not mean an employer has committed an actionable adverse action"). Forgus cannot reasonably argue her requests were ignored, and has not shown any "significant detrimental effect" because she has not received a transfer. *Holland* 487 F.3d at 219. In fact, her supervisor made efforts to give Forgus experience in the Inventory Management branch. She thus fails to state a claim for disparate treatment.

B. Retaliation Claim

A plaintiff bringing a retaliation claim must allege that (1) she engaged in protected activity, (2) the employer took adverse action against her, and (3) a causal relationship existed between the protected activity and the adverse employment action. *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (citation omitted).

Complaining about potential Title VII violations can constitute protected activity. *Okoli v. City of Baltimore*, 648 F.3d 216, 224 (4th Cir. 2011). In this case, the EEOC identifies as the first instance of potential protected activity an internal complaint Forgus made

to her supervisor regarding her work environment in January 2011.[2] Assuming this constitutes protected activity, only actions occurring after that date could possibly be retaliatory.

In the retaliation context, an adverse action is one which "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citations omitted). Forgus alleges several adverse actions, such as increases and decreases in her workload, a "caustic" comment, and refusal to interview or select her for a transfer position. (Second Am. Compl. Exh. 1, at 11.) As with her disparate treatment claim, Forgus has failed to show that any of these actions would have dissuaded a reasonable worker from engaging in protected activity. She thus fails to state a claim for retaliation.

C. Hostile Work Environment Claim

To state a claim for hostile work environment, the plaintiff must plead (1) unwelcome conduct; (2) based on the plaintiff's protected characteristic; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive

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[2] The EEOC decision dated January 8, 2014, attached to the second amended complaint, describes Forgus' internal complaint in January 2011 as the first instance of alleged protected activity. (Second Am. Compl. Exh. 4, at 9.) Though the factual section of the EEOC decision states that Forgus complained about her "discomfort" within the Order Management branch in January 2011, the decision later describes those complaints as pertaining to "disparate treatment" for the purposes of Forgus' retaliation claim. *Id.* at 3, 9.

work environment; and (4) which is imputable to the employer. *Causey*, 162 F.3d at 801.

Forgus belongs to a protected group. Section 15 of the EEOC Compliance Manual describes intersectional discrimination as discrimination based on "the intersection of two or more protected bases." Forgus' status as a black woman thus establishes her as a member of a protected group.

In order to show unwelcome conduct, however, Forgus must show some sort of conduct, based on that protected characteristic, which she made clear was unwelcome. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). Furthermore, that conduct must be severe and pervasive, for which the Fourth Circuit has established a high bar:

> [P]laintiffs must clear a high bar in order to satisfy the severe or pervasive test. Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than "rude treatment by [coworkers]," "callous behavior by [one's] superiors," or "a routine difference of opinion and personality conflict with [one's] supervisor," are not actionable under Title VII.

E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 315-16 (4th Cir. 2008) (internal citations omitted).

Although Forgus has alleged facts indicating she complained to her superiors generally about the office

environment, these allegations are too vague to demonstrate unwelcome conduct. Furthermore, she has not alleged any facts showing the environment about which she complained was a result of her protected characteristic. Even if Forgus could show unwelcome conduct based on a protected characteristic, none of the actions she alleges meet the high burden for severe or pervasive conduct. The actions Forgus alleges constitute, at best, merely rude or callous behavior.

IV. CONCLUSION

Forgus fails to allege sufficient facts to state a claim for disparate treatment, retaliation, and hostile work environment. For the reasons stated, the Court grants the defendant's motion to dismiss.

The Court will enter an appropriate order.

Let the Clerk send a copy of this Opinion to all counsel of record and to the pro se plaintiff.

/s/
John A. Gibney, Jr.
United States District Judge

Date: December 12, 2017
Richmond, VA