Appendix

1. United States Court of Appeals for the Seventh Circuit Order, decided July 1, 2020..... Appendix A

2. United States District Court for the Northern District of Illinois Eastern Division, decided May 21, 2019..... Appendix B

APPENDIX A

NONPRECEDENTIAL DISPOSITION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, IL 60604

Submitted June 30, 2020
Decided July 1, 2020

Before

Joel M. Flaum, Circuit Judge

Michael S. Kanne, Circuit Judge

Amy C. Barrett, Circuit Judge

No. 19-3252

Lewana Howard,
Plaintiff-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

v.

No. 18-cv-04430

Gabriel Defratis, etal
Defendants, Appellees

Andrea R. Wood,
Judge

No. 19-3252

Order

After the Illinois Department of Human Rights dismissed Lewana Howard's complaints of age discrimination and retaliation against her employer for lack of substantial evidence, Howard sued the investigator and his supervisors under 42 U.S.C. 1983. She claimed the investigation was biased in favor the employer, CVS Pharmacy. The district court dismissed her second amended complaint, concluding that Howard had not stated a claim under either the Due Process Clause or the Equal Protection Clause. We agree that her allegations do not add up to a federal constitutional claim, and so we affirm the district court's judgment.

We take Howard's allegations as true, drawing inferences in her favor. See Wigod v wells Fargo Bank, N.A., 673 F.3d 547, 555 (7th Cir. 2012). Howard filed two Complaints with the Illinois Department of Human Rights, alleging, first, that she experienced discrimination in her position at CVS because of her

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* We have agreed to decide the case without oral argument the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. App. P. 34(a)(2)(C).

age, and next, that CVS retaliated against her. The Department began an investigation to determine whether substantial evidence supported the charges. See 775 ILCS 5/7A-102(d)(2). The same investigator assessed both claims. After gathering evidence and interviewing Howard's employer, he concluded that substantial evidence did not support her complaints. See 775 ILCS 5/7A-102(d)(3). Howard then had the option of seeking review with the Illinois Human Rights Commission (the Departments adjudicatory arm or bring an action in Illinois circuit court to appeal the dismissal of her charges. Id.

Instead, Howard sued the investigator and his supervisors in federal court for damages, asserting that they had violated her constitutional rights, she specifically invoked the Equal Protection Clause. In the operative complaint, she alleged that the investigator failed to follow state regulations for investigating discrimination complaints and demonstrated bias in favor of CVS. In particular, she alleged that the investigator did not allow her to conform or cross-examine the witnesses he interviewed; asked CVS to turn evidence late; failed to require CVS to submit relevant evidence and ignored Howard's evidence. The supervisors, meanwhile, "intentionally overlooked and ignored" the investigator's misconduct.

After multiple rounds of pleadings, the defendants moved to dismiss the second amended complaint. The district court first assessed whether Howard stated a class-of-one-equal protection claim. (Howard disclaimed any contention that the investigator or supervisors mistreated her because of membership in a protected class.) It determined, however, that her allegations would not allow an inference that she was targeted for mistreatment with a rational basis. Further the investigator's question about the consequences of the investigation for Howard's supervisor did not imply bias against Howard. Moreover, to the extent that proper procedure were overlooked, the court concluded that Howard's allegations did not plausibly suggest anything beyond negligence, which did not rise to the level of a federal constitutional claim.

Construing Howard's pro se complaint generously, the court also considered whether her allegations could support a procedural due process claim and concluded that they could not. Any such claim failed because Howard had not plausibly alleged that the state procedures failed to ensure her federal due process rights. And to the extent she alleged a

a violation of the permanent injunction entered in Cooper v. Salazar, No 98 C 2930, 2001 I 1351121, *6(n.d. Ill. Nov 1, 2001) requiring Department investigators to allow claimants to cross-examine witnesses in fact-finding conferences and prohibits the Department from weighing evidence in making a substantial evidence determination, she had to file a motion in that case. Howard declined a third opportunity to amend and chose to stand on her existing allegations. The court, therefore, dismissed the complaint with prejudice and entered final judgment.

On appeal, Howard's brief, though light on argument, generally challenges the propriety of the dismissal for failure to state a claim. We review de novo the question whether the complaint stated a claim for relief that is plausible on its face-i.e., that it contains allegations, that if true, allow a reasonable inference that the defendants are liable for a constitutional violation. See Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007); Taha v. Int'l Bhd. of Teamsters, Local 781, 947 F.3d 464, 469 (7th Cir. 2020).

Although Howard emphasizes the alleged denial of her right of equal protection she is not required to choose a legal theory at the pleading state. Koger v. Dart, 950, F.3d 971, 974-75 (7th Cir. 2020) (Complaints plead grievances, not legal theories."). Like the district

court we consider whether she should state a claim under the Due Process Clause because the injury Howard claims is a denial of a fair process.

A federal due process claims depends in the first instance on the existence of a federally protected liberty or property interest. Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Simpson v. Brown City., 860 F.3d 1001, 1006 (7th Cir. 2017). The state-established right to pursue a discrimination claim through adjudicatory procedures can be a property interest, the deprivation of which implicated the Due Process Clause. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-333(1983); Shvartsman v. Apfel, 138 Fed 1196, 1199 (7th Cir. 1998) clarifying that the protected property interest in Logan was the discrimination claim, not the adjudicatory procedures). An administrative investigation may be "adjudicatory" if like the one here it results in the "dismissal of a civil rights claim, where the dismissal acts as a final disposition of the claim on the merits subject only to appeal." Cooper v. Salazar, 196 F. 3d 809, 815 (7th Cir. 1999).

The question turns to what process was due as a matter of federal law. See Mathews, 424 U.S. at 333+34; Simpson, 860 F3d at 1006. Here, Howard does not allege that she was deprived of the hallmark of federal due process; indeed the state provided a

comprehensive process to investigate and adjudicate discrimination claims filed with the Department. That process afforded Howard the opportunity to have the Department decide her case on its merits, so she cannot plausibly argue that she was deprived of the right to pursue her discrimination claim. Cf. Logan, 455 U.S. at 434-35 (dismissal of claim before merits ruling violated due process). Howard argues that she was deprived of meaningful review of her claim, though, because the investigator violated numerous Department requirements for substantial-evidence investigations. She did not, however, avail herself of her right to appeal the dismissal of her charges at the substantial-evidence state, so she faces a high bar in arguing that the state's procedures were inadequate to protect her due process rights. See Tucker v. City of Chicago, 907 F.3d 487, 492 (7th Cir. 2018). Because the violation of state procedural rules is not the concern of federal due process, see id. At 495, her allegations about the investigation do not clear that bar.

In any event, Howard's allegations that the investigation was tainted or unfair do not cross the threshold of plausibility. Given the presumption of a state administrator's impartiality. Howard needed to allege circumstances that seriously threatened her

chances of receiving a fair investigation-such as a fraught personal history or a conflict of interest. (See Hess v. Bd of Trs. of S. Ill. Univ., 839 F.3d 668, 675 (7th Cir 2016). Howard's examples of the investigator's purported bias to the extent they go beyond misapplying procedural rules about evidence and deadlines) do not meet this standard. This is particularly true in light of Howard's concession during a district court hearing that she was "not sure" why the investigator would be biased against her.

Next, we consider Howard's contention that her allegations state a claim under the Equal Protection Claus. Because she does not allege discrimination based on membership in a protected class, Howard's only conceivable equal-protection claim is a class of one claim. See Vill of Willow v. Olech, 528 U.S. 562, 564-65(2000). Here, however, her allegations that the investigator ignored evidence of discrimination and failed to follow procedures (whereas other claimants were treated fairly) cannot support a class-of-one claim. The decision to dismiss her claim after an investigation was discretional and required individualized assessment. Allowing an equal-protection claim on the ground that Howard received unfavorable outcome "even if for no discernible or articulable reason, would be incompatible with the

discretion inherent in the challenged action."Enquist v. Oregon Dep't of Agr., 553 U.S. 591, 603-04 (2008); see Katz-Crank v. Haskett, 843 F.3d 641, 649 (7th Cir. 2016).

Finally, to the extent Howard also seek to enforce the injunction in Cooper, 2001 WL 1351121 at *6, requiring Department investigators to allow claimants to cross-examine witnesses in fact-finding conferences, we agree with the district court that this not the proper forum. A civil-contempt motion in that case is the appropriate channel for seeking enforcement of the injunction. See Ohr ex rel. Nat'l Labor Relations Bd. V Latino Exp., Inc. 776 F3d 469, 479-480 (7th Cir. 2015); D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 458-59 (7th Cir. 1993) We express no opinion on whether such a motion would be appropriate in Howard's case.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Lewana howard	)	
Plaintiff,	)	
v.	)	No. 18-cv-04430
	)	Judge Andrea R. Wood
Gabriel Defrates, et al.,	)	
Defendants	)	

ORDER

Defendants' motion to dismiss for failure to state a claim (18) is granted. Plaintiff's amended complaint is dismissed without prejudice. Plaintiff is granted leave to file a second amended complaint by 6/19/2019. If Plaintiff fails by 6/19/2019 this case will be dismissed with prejudice and closed. Plaintiff's motion to recuse Judge Andrea R. Wood is denied (28). Status hearing set for 5/21/2019 remains firm. See the accompanying statement for details.

STATEMENT

Plaintiff Lewana Howard has filed the present 42 U.S.C 1983 action against Defendants Gabriel Defrates, Linda C. Williams and Janice Glenn, claiming a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants now move to dismiss Howard's

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[1] While the amended complaint uses the spelling "Defratis," Defendants spell that Defendant's last name as "Defrates." The Court adopts Defendants' spelling for purpose s of this Order.

complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In considering Defendants' motion, the court accepts the facts alleged in the amended complaint as true and draws inferences in Howard's favor. See Carlson v. CSX Transp., Inc. 785 F.3d 819, 826 (7th Cir. 2014).

Defendants, who are sued in their individual capacities, are employed at the Illinois Department of Human Rights ("IDHR"). In her amended complaint (Dkt No. 13), Howard alleges that she filed two employment discrimination complaints with the IDHR-claiming age discrimination in one and retaliation in the other. Defrates was assigned as the investigator for both complaints. According to Howard, Defrates failed to meet certain statutory and or court imposed requirements while investigating her complaint. In particular, she claims that Defrates failed to request that her employer submit certain documents and left unresolved several conflicts in testimony. Furthermore, Defrates failed to interview Howard or consider evidence she submitted in support of her complaint. Despite Defrates's deficient investigation, Williams and Glen review and signed off on his "Lack of Substantial Evidence Findings."

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual allegations, accepted as true, to 'state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) quoting Bell Atl. Corp v. Twombly, 550 U.S. 544, 570 (2007). This pleading standard does not necessarily require a

complaint to contain detailed factual allegations. Twombly, 550 U.S. at 555. Rather, "(a) claim has facial plausibility when the plaintiff pleads factual content that allows the court the reasonable inference that the defendant is liable for the misconduct alleged," Adams v City of Indianapolis, 742 F.3d 720, 728 (7th Cir. 2014) (quoting Iqbal, 556 U.S. at 678).

In this case, Howard's pro se amended complaint does not clearly allege how she believes Defendants violated her equal protection rights. As best as the court can discern, she seeks to raise a class-of-one equal protection claim.[2] Although equal protection claims usually deal with "governmental classifications that affect some groups of citizens differently than others, "a plaintiff does not necessarily need to allege class based discrimination to maintain such a claim. Engquist v. Or. Dep't of Agric, 553 U.S. 591, 601 (2008) (international quotation marks omitted). Rather, a plaintiff may bring a valid equal protection claim as a "class of one" by alleging "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam)

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2 In her response to Defendant's motion to dismiss, Howard denies that she is raising a class-of-one claim. (PL's Opp. To Defs. Mot. To Dismiss at 2, Dkt No. 21). Nonetheless, Howard fails to offer an alternative theory. And despite her denial, she goes on to engage in a class-of-one analysis.

Unable to determine whether Howard's complaint challenges her termination or Defendants' investigation. Defendants analyze her class-of-one claim under both scenarios. The Court, however, addresses her claim only as it relates to Defendants' investigatory conduct. That is because if Howard worked for a private employer (as appear to be in the case),[3] the Equal Protection Clause has no application ("The Equal Protection Clause, by it express terms, applies to States not private employers."). And even if she was employed by a public employer, class-of-one claims are prohibited in the public employment context. Engquist, 553 U.S. at 607. Necessarily then, Howard's claim must relate to the conduct of Defendants in investigating her IDHR complaints.

One way a plaintiff may show the absence of a rational basis for differential treatment sufficient to maintain a class-of-one claim is to identify a similarly-situated comparator. See Labella Winnetka, Inc. v . Vill of Winnetka, 628 F3d 937, 942 (7th Cir. 2010); Dyson v city of Calumet City, 306 F. Supp. 3d 1028, 1028, 1037 (N.D. - Ill. 2018) ("A plaintiff is in a class-of-one case typically demonstrates an absence of a rational basis by

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[3] Howard does not specify the identity of the employer who alleged discrimination gave rise to her IDHR complaints. Based on exhibits attached to her opposition to Defendants' motion to dismiss, however it appears her employer was CVS Pharmacy, a private company. (See PPL.'s Oppn, Exs. A, B, E, F, Dkt. No. 21.)

identifying some similarly situated person who was treated differently-that is, a comparator.") An appropriate comparator "must be prima facie identical in all relevant respects or directly comparable in all material respects." United States v. Moore, 542 F3d 891, 896 (7th Cir. 2008). Particularly in the context of government investigations, courts carefully apply "the similarly-situated requirement to distinguish between unfortunate mistakes and actionable, deliberate discrimination." Geinosky v. City of Chicago, 675 F3d 743, 747-48 (7th Cir. 2012).

Here, Howard fails to allege a sufficient similarly-situated comparator. Her amended complaint states that she possesses an IDHR investigative report in which the investigator confronted a similar situation to her and "failed to submit evidence and there as conflicting testimony (Am. Compl. At 4). Unlike Howard's investigator, that investigator drew a negative inference against the employer as a result. (Id.) In her opposition to the motion to dismiss, Howard attached the investigative report as an exhibit. (PL's Opp'n, Ex. D, Dkt No. 21.) Bur for that investigative report to constitute an appropriate comparator, the report would have to be prepared by the same investigator who was assigned to Howard's IDHR complaint, Defrates. See Purze v. Vill. Of Winthrop Harbor, 286 F. 3d 452, 455 (7th Cir. 2002) (finding that comparators who zoning variance request were granted were not similarly situated to plaintiff where they had their plat requests granted by different and previous Boards"). How does

not allege that Defrates prepared the report. And having review the report, the court notes that the investigator is identified by his or her initials, "DSB" those initials do not match either Defrates initials or those of the other two Defendants.

Nonetheless, Howard's failure to allege a comparator is not fatal to her claim. See Dyson 306 F. Supp. 3d at 1037 ("Failure to identify a comparator in the complaint is not fatal to the claim; the existence of a comparator is not an element of the claim by simply a type of evidence that may support it.") Lacking a suitable comparator, Howard must "allege() a pattern of misconduct tor acts of overt hostility that exclude any rational explanation for why local officials targeted her to survive dismissal. Id. Even at this early state, it is necessary for her to "negative any reasonably conceivable state of facts that could provide a rational basis for the classification." Miller c. City of Monona, 784 F.3d 1113, 1121 (7th Cir. 2015); see also D.B. ex rel. Kurtis B. Kopp, 725 F.3d 681, 686 (7th Cir. 2013))"All it takes to defeat the plaintiffs' claim is a conceivable rational basis for the difference in treatment.") (emphasis in original). Howard insist Defendants' various investigative failure evinced a "malicious indifference." However, her claim of malice is merely conclusory-she provides not facts that would demonstrate Defendants malice or even that they specifically singled her out for disparate treatment. Certainly, it is possible that Defendants had some animus toward Howard that caused them to conduct an insufficient investigation. On the other

hand, it is also possible that Defendants simply performed their jobs poorly. The latter possibility does not make an actionable class-of-one claim. See Geinosky, 675 F 3d. at 747 (explaining that class-of-one claims were not meant to turn "ordinary and inevitable mistakes by federal lawsuits"); McDonald v. Village of Winnetka, 371 F. 3d 992, 1009 (7th Cir. 2004) ("[T]he purpose of entertaining a 'class of one' equal protection claim is not...to transform every claim for ...improper provision of municipal services or for improper conduct to an investigation in connection with them into a federal case,"). Because Howard's allegations fail to exclude that possibility, her class-of-one claim fails.

In sum, Howard's amended complaint fails to plead adequately that she was singled out for discriminatory treatment without any rational explanation. Therefore, she has not stated a class-of-one equal protection claim and her amended complaint is dismissed. Howard will be given leave to amend her complaint.

On a final note, Howard has also filed a motion seeking recusal of the presiding judge from her case. In her motion, Howard complains that this court has stricken and reset four times a status hearing. Under 28 U.S.C. 455(a), a judge shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably questions," the inquiry focuses on "whether a

reasonable person perceived a significant risk that the judge will resolve the case on a basis other than the merits." Hook v. McDade, 89 F3d 350, 354 (7th Cir. 1996). While the Court understands Howard's frustration concerning the rescheduling of the status hearing, it finds no basis to believe that a reasonable person would perceive the delay as presenting a significant risk that this court will not resolve Howard's case on a basis other than merits. For that reason, the Court declines to recuse.

Dated 5/21/2019

/s/ Judge Andrea R. Wood
Judge Andrea R. Wood