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FILED: February 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2037
(3:18-cv-01874-PJG)

CLARENCE B. JENKINS, JR.

Plaintiff - Appellant

v.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT WORKFORCE;
SOUTH CAROLINA BUDGET AND CONTROL BOARD; OFFICE OF
SOUTH CAROLINA GOVERNOR

Defendants - Appellees

ORDER

For reasons appearing to this court, this case is placed in abeyance pending a decision by this court in *Bing v. Brivo Sys., LLC*, No. 19-1220, orally argued December 11, 2019.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

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FILED: August 10, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2037
(3:18-cv-01874-PJG)

CLARENCE B. JENKINS, JR.

Plaintiff - Appellant

v.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT WORKFORCE;
SOUTH CAROLINA BUDGET AND CONTROL BOARD; OFFICE OF
SOUTH CAROLINA GOVERNOR

Defendants - Appellees

JUDGMENT

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

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-2037

CLARENCE B. JENKINS, JR.,

Plaintiff - Appellant,

v.

SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT WORKFORCE;
SOUTH CAROLINA BUDGET AND CONTROL BOARD; OFFICE OF SOUTH
CAROLINA GOVERNOR,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at
Columbia. Paige Jones Gossett, Magistrate Judge. (3:18-cv-01874-PJG)

Submitted: July 22, 2020

Decided: August 10, 2020

Before NIEMEYER and KEENAN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Clarence B. Jenkins, Jr., Appellant Pro Se. Kenneth A. Davis, Tierney F. Dukes, BOYKIN
& DAVIS, LLC, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Clarence B. Jenkins, Jr., appeals the magistrate judge's order dismissing his amended complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2018). *See* 28 U.S.C. § 636(c) (2018). We have found no evidence supporting Jenkins' assertion that the magistrate judge and Defendants engaged in misconduct during the proceedings. And because Jenkins' opening informal brief does not challenge the grounds for the magistrate judge's disposition, he has forfeited appellate review of those rulings. *See* 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."); *United States v. Copeland*, 707 F.3d 522, 530 (4th Cir. 2013) ("[G]enerally we will not consider issues raised for the first time in a reply brief."). Accordingly, we affirm the magistrate judge's order.* 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

* Although the magistrate judge dismissed some claims without prejudice, we have jurisdiction to consider Jenkins' appeal. *See Bing v. Brivo Sys., LLC*, 959 F.3d 605, 615 (4th Cir. 2020).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|--|---|-----------------------|
| Clarence B. Jenkins, Jr., |) | C/A No. 3:18-1874-PJG |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | ORDER |
| |) | |
| S.C. Department of Employment Workforce; |) | |
| S.C. Budget and Control Board; Office of |) | |
| South Carolina Governor, |) | |
| |) | |
| Defendants. |) | |
| |) | |

The plaintiff, Clarence B. Jenkins, Jr., a self-represented litigant, filed this employment action against the above-captioned defendants. This matter is before the court pursuant to 28 U.S.C. § 636(c) and Local Civil Rule 73.02(B)(1) (D.S.C.) for final adjudication with the consent of the parties. Pending before the court is the motion of Defendant South Carolina Department of Employment Workforce (“SCDEW”) to dismiss the Complaint. (ECF No. 31.)

Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Jenkins of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendant’s motion. (ECF No. 33.) Jenkins filed a response in opposition. (ECF No. 44.) Having reviewed the parties’ submissions and the applicable law, the court concludes that Jenkins’s Title VII claim against SCDEW must be dismissed under Rule 12(b)(6) because it was not timely filed.

BACKGROUND

Plaintiff indicates that between 2011 and 2018, he sought employment with SCDEW but he consistently was rejected when he applied for jobs. (Am. Compl., ECF No. 11 at 5.) Plaintiff alleges SCDEW incorrectly barred him from applying for further positions because it “falsely applied the classification of nepotism to my master profile.” (*Id.*) Plaintiff further alleges, quoted verbatim, “ ‘Barred from applying’ and ‘does not meet minimum qualification’ applied by SCDEW and willingly known by” the South Carolina Budget and Control Board¹ and the Office of the South Carolina Governor. (*Id.* at 6.) By previous order, the court construed Jenkins’s Complaint as attempting to assert a claim pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e, et seq., for failure to hire, retaliation, and “deprivation.” (Order at 1, ECF No. 17 at 1; Am. Compl., ECF No. 11 at 3-4; see also Order, ECF No. 35.)

DISCUSSION

A. Applicable Standards

In its motion, the defendant seeks dismissal of Jenkins’s claims based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dismissal under Federal Rule of Civil Procedure 12(b)(1) examines whether the complaint fails to state facts upon which jurisdiction can be founded. It is the plaintiff’s burden to prove jurisdiction, and the court is to “regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

¹ The South Carolina Budget and Control Board is now the South Carolina Department of Administration. See <https://dc.statelibrary.sc.gov/handle/10827/29> (last visited on Jan. 4, 2019).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the plaintiff's complaint. Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The “complaint must contain sufficient factual matter, 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 Twombly, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. Id. When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89, 94 (2007). The court “may also consider documents attached to the complaint, see Fed. R. Civ. P. 10(c), as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.” Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (citing Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).

Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson, 551 U.S. 89, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Procedural History

Before the parties consented to proceeding before a magistrate judge for final adjudication of all matters, the assigned magistrate judge issued a Report and Recommendation determining that any claims asserted against Defendants South Carolina Budget and Control Board and Office of South Carolina Governor should be summarily dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and (iii). The Report and the plaintiff's objections thereto were still pending before the assigned district judge for consideration when he referred it to the assigned magistrate judge as a consent case under § 636(c). For the reasons contained in the Report, the plaintiff's claims against those defendants are hereby summarily dismissed. Plaintiff's objections are without merit and do not warrant a different result.

C. Timeliness of Remaining Claim (Title VII Against DEW)

After a charge is filed with the Equal Employment Opportunity Commission ("EEOC"), the EEOC must "notify the person aggrieved and *within ninety days* after the giving of such notice a civil action may be brought against the respondent." 42 U.S.C. § 2000e-5(f)(1) (Title VII) (emphasis added). The record reflects that Jenkins received his right-to-sue letter from the EEOC on December 12, 2014 and filed his Complaint on July 9, 2018—over three years later. (Am. Compl., ECF No. 11-1 at 5, Right-to-Sue Letter, ECF No. 11-1 at 14.) Accordingly, Jenkins's claims are untimely. See 42 U.S.C. § 2000e-5(f)(1).

The defendant incorrectly asserts that this deficiency deprives the court of jurisdiction. To the contrary, the law is clear that the time requirements in Title VII are not jurisdictional, but are subject to waiver, estoppel, and equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (holding that the timely filing of an administrative charge "is not a jurisdictional

prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); Crabill v. Charlotte Mecklenburg Bd. of Educ., 423 F. App'x 314, 321 (4th Cir. 2011) (noting that the "90-day filing requirement is 'not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling' ") (quoting Laber v. Harvey, 438 F.3d 404, 429 n.25 (4th Cir. 2006)). Here, however, Jenkins has presented no argument to justify his failure to meet the statutory deadline. Rather, he addresses in his response only the defendant's alternative argument that his claim is barred by *res judicata* because it could have been brought in a prior state action. (See generally Pl.'s Resp. Opp'n Mot. Dismiss, ECF No. 44.)

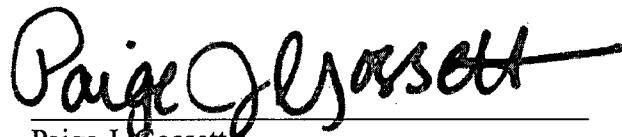
Accordingly, it is

ORDERED that the plaintiff's claims against Defendant South Carolina Budget and Control Board and Defendant Office of South Carolina Governor are hereby summarily dismissed without prejudice and without service of process. It is further

ORDERED that the plaintiff's Title VII claim against the Department of Employment and Workforce is hereby dismissed for failure to state a claim upon which relief can be granted. It is further

ORDERED that all other pending motions are terminated from the docket as moot.

IT IS SO ORDERED.



Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

January 4, 2019
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF SOUTH CAROLINA
 COLUMBIA DIVISION

| | | |
|---|---|----------------------------------|
| Clarence B. Jenkins, Jr., |) | C/A No. 3:18-1874-TLW-PJG |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| South Carolina Department of Employment and |) | REPORT AND RECOMMENDATION |
| Workforce; South Carolina Budget and Control |) | |
| Board; Office of the South Carolina Governor, |) | |
| |) | |
| Defendants. |) | |
| |) | |

The plaintiff, Clarence B. Jenkins, Jr., proceeding *pro se*, brings this action for employment discrimination. The Amended Complaint has been filed *in forma pauperis* pursuant to 28 U.S.C. § 1915. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). Having reviewed the Amended Complaint in accordance with applicable law, the court concludes the South Carolina Budget and Control Board and the Office of the South Carolina Governor should be summarily dismissed without prejudice and issuance and service of process.¹

I. Factual and Procedural Background

Plaintiff indicates that between 2011 and 2018, he sought employment with the South Carolina Department of Employment and Workforce (“SCDEW”) but he consistently was rejected when he applied for jobs. (Compl., ECF No. 11 at 5.) Plaintiff alleges SCDEW incorrectly barred him from applying for further positions because it “falsely applied the classification of nepotism to

¹ In a contemporaneous order, the court authorized the issuance and service of process against the South Carolina Department of Employment and Workforce.

my master profile.” (Id.) Plaintiff further alleges, quoted verbatim, “ ‘Barred from applying’ and ‘does not meet minimum qualification’ applied by SCDEW and willingly known by” the South Carolina Budget and Control Board² and the Office of the South Carolina Governor. (Id. at 6.) Plaintiff indicates he brings this action pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e, et seq., for failure to hire, retaliation, and “deprivation.” (Id. at 3-4.) Plaintiff also indicates he brings a claim pursuant to 42 U.S.C. § 1983. (Id. at 4.) Plaintiff seeks damages for his injuries. (Id. at 6.)

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Amended Complaint. The Amended Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. This statute allows a district court to dismiss the case upon a finding that the action “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

In order to state a claim upon which relief can be granted, the plaintiff must do more than make mere conclusory statements. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Rather, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Iqbal, 556 U.S. at 678; Twombly, 550

² The South Carolina Budget and Control Board is now the South Carolina Department of Administration. See https://dc.statelibrary.sc.gov/handle/10827/29 (last visited on Aug. 14, 2018).

U.S. at 570. The reviewing court need only accept as true the complaint's factual allegations, not its legal conclusions. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555.

This court is required to liberally construe *pro se* complaints, which are held to a less stringent standard than those drafted by attorneys. Erickson v. Pardus, 551 U.S. 89, 94 (2007); King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016). Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Iqbal, 556 U.S. at 684 (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions").

B. Analysis

The court finds the South Carolina Budget and Control Board and the Office of the South Carolina Governor should be summarily dismissed for Plaintiff's failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). As to Plaintiff's Title VII claim, Plaintiff fails to make any allegation that he worked for or sought work with the South Carolina Budget and Control Board and the Office of the South Carolina Governor. Thus, he fails to plausibly allege that either of these defendants committed acts that are prohibited by Title VII. See 42 U.S.C. §§ 2000e-2, 2000e-3 (providing unlawful employment practices). At most, Plaintiff appears to allege these defendants knew about SCDEW's purported refusal to hire Plaintiff and incorrect classification of him as an applicant. Accordingly, Plaintiff's Title VII claims against the South Carolina Budget and Control Board and the Office of the South Carolina Governor should be dismissed for failure to state a claim upon which relief can be granted.

As to Plaintiff's claims pursuant to 42 U.S.C. § 1983, a legal action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). But, because Plaintiff only seeks damages in this action, (see Compl., ECF No. 11 at 6), the South Carolina Budget and Control Board and the Office of the South Carolina Governor—offices of the State of South Carolina—are immune from suit for any § 1983 claims. See Alden v. Maine, 527 U.S. 706, 712-13 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Hans v. Louisiana, 134 U.S. 1 (1890). Such immunity extends to arms of the state, including a state's agencies, instrumentalities, and employees. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984); see also Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997); Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that neither a State nor its officials acting in their official capacities are "persons" under § 1983).³ Therefore, to the extent Plaintiff even raises cognizable § 1983 claims against these

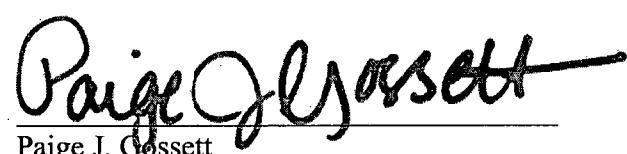
³ While sovereign immunity does not bar suit where a state has given consent to be sued, or where Congress abrogates the sovereign immunity of a state, neither of those exceptions applies in the instant case. Congress has not abrogated the states' sovereign immunity under § 1983, see Quern v. Jordan, 440 U. S. 332, 343 (1979), and South Carolina has not consented to suit in federal district court. S.C. Code Ann. § 15-78-20(e). Also, states are not immune where a plaintiff seeks prospective injunctive relief in § 1983 actions, see Ex parte Young, 209 U.S. 123 (1908) and McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010), but Plaintiff does not seek injunctive relief in this action.

defendants,⁴ the claims should be summarily dismissed because the defendants would be immune from any claim for damages. See 28 U.S.C. § 1915(e)(2)(B)(iii).

III. Conclusion

Accordingly, the court recommends that the Amended Complaint be summarily dismissed against the South Carolina Budget and Control Board and the Office of the South Carolina Governor without prejudice and without issuance and service of process.

August 14, 2018
Columbia, South Carolina


Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

Plaintiff's attention is directed to the important notice on the next page.

⁴ Notably, Plaintiff fails to make any allegation that the South Carolina Budget and Control Board or the Office of the South Carolina Governor violated his constitutional rights.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

**Additional material
from this filing is
available in the
Clerk's Office.**