OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (MAY 19, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBEL BING,

Plaintiff-Appellant,

v.

BRIVO SYSTEMS, LLC,

Defendant-Appellee.

No. 19-1220

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paula Xinis, District Judge. (8:18-cv-01543-PX)

Before: AGEE and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

TRAXLER, Senior Circuit Judge, writing for the Court in Parts I and II:

Robel Bing, an African-American male, was hired by Brivo Systems, LLC, but fired shortly after starting orientation on his first day of employment. Bing subsequently filed a *pro se* action asserting that he had been discriminated against because of his race in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17.

The district court dismissed the case without prejudice, concluding that Bing failed to plead sufficient facts to plausibly support a claim of discrimination. Bing appeals.[1]

As we will explain, we have appellate jurisdiction despite the district court's dismissal of the complaint without prejudice. On the merits of the appeal, a majority of the panel concludes that the district court did not err by dismissing the Title VII claims at this point in the proceedings, and the district court's decision is therefore affirmed.

I.

Because this is an appeal from the granting of a Rule 12(b)(6) motion to dismiss,[2] we accept as true the facts alleged in Bing's *pro se* complaint and construe the facts in the light most favorable to Bing. *See,*

---

[1] Bing's *pro se* complaint also asserted claims under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681x. He does not pursue those claims on appeal.

[2] Although Brivo's motion to dismiss and Bing's response to the motion included factual materials outside the complaint, the district court did not consider that material when granting the motion to dismiss. Accordingly, the court was not required to convert the motion to dismiss to a motion for summary judgment. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (explaining that if district court considering a Rule 12(b)(6) motion goes beyond the complaint and documents attached or incorporated into the complaint, the court must convert the motion into one for summary judgment).

e.g., *In re Willis Towers Watson plc Proxy Litigation*, 937 F.3d 297, 302 (4th Cir. 2019).

Bing applied for employment as a "customer care representative" with Brivo. He disclosed his prior criminal history as part of the application process. Bing was interviewed in person by two Brivo employees on September 27, 2016 and was extended a job offer on September 28. Bing did not disclose his race on his application, but the Brivo employees who hired him learned of his race during his interview.

The job offer was subject to Bing passing a background check. Bing passed the background check, and his first day of employment was October 17, 2016. When Bing arrived for a new-employee orientation on his first day, he was met by Charles Wheeler, a white male who had not previously been involved in Bing's hiring. Wheeler was introduced to Bing as Brivo's "Security Architect." J.A. 14. Within an hour of starting orientation, Wheeler approached Bing and confronted him about a *Baltimore Sun* article that Wheeler had found after running a Google search on Bing. The article reported Bing's tangential involvement in a shooting for which he faced no charges.[3] Wheeler berated Bing about the incident, declared that he was not fit for employment with Brivo,

[3] The article at issue was included as an exhibit to Brivo's motion to dismiss. The article states that on Halloween in 2006, Bing loaned his lawfully owned handgun to a friend, who fired shots in the air in celebration of the holiday. One of the shots injured a third party. Bing and the others involved did not initially tell the truth about the shooting to the police. When dismissing the complaint, the district court considered only the general outlines of the article as alleged in Bing's complaint; it did not rely on the details of the article not alleged in the complaint.

terminated him on the spot, and escorted Bing out of the building.

Bing filed a charge of discrimination with the Equal Employment Opportunity Commission and received a Notice of Right to Sue letter. He subsequently filed a timely complaint in federal district court alleging unlawful termination and "harassment/discrimination" under Title VII. J.A. 9.

In his complaint, Bing alleged that Wheeler performed a Google search on him after Bing had completed his background check and received an offer of employment. According to Bing, the search "serve[d] as [a] means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment." J.A. 16. Bing stated that he could "find nothing other than [his] (possibly unexpected) physical appearance as an African-American male, to explain actions of race (African-American) and sex (male) discrimination, initiated by Mr. Wheeler, whose actions clearly fell outside of established Brivo hiring processes." J.A. 16. Bing's complaint "question[s] whether or not Brivo can provide historical documentation to replicate my hiring experience, or at the very least, demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company." J.A. 16.

The district court granted Brivo's motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The court concluded that Bing "proffered no facts allowing a plausible inference that his discharge was fueled by unlawful discrimination." J.A. 176. In the

court's view, the facts asserted by Bing showed the absence of any discrimination:

> [T]he Complaint avers facts establishing that he was terminated because of his involvement in the shooting incident – the veracity of which Bing confirmed. By contrast, no evidence exists by which this Court could infer Bing was terminated on account of race or gender. Brivo concluded that Bing's involvement in the firearm incident rendered him unfit for the position. Nothing about this determination, based on the facts averred in the Complaint, demonstrates that this reason was put forward to obscure Brivo's discriminatory animus.

J.A. 176.

In its memorandum opinion, the district court stated that the complaint was dismissed without prejudice. By separate document denominated as an order, the court officially granted the motion to dismiss, stated that Bing's complaint was dismissed, and directed the Clerk's Office to close the case. The order did not qualify the dismissal; it dismissed the complaint without specifying whether the dismissal was with or without prejudice.

II.

Before reviewing the merits of Bing's appeal, we must establish that we have appellate jurisdiction. Subject to certain exceptions not present here, this court has jurisdiction only over appeals from final orders. *See* 28 U.S.C. § 1291 ("The courts of appeals (other than the United States Court of Appeals for

the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts. . . . ").

Although the district court dismissed Bing's complaint, it did so "without prejudice." This disposition raises questions about the finality of the dismissal order, as "[d]ismissals without prejudice naturally leave open the possibility of further litigation in some form." *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 176 (4th Cir. 2007). As we have explained, what makes an order of dismissal without prejudice "final or nonfinal is not the speculative possibility of a new lawsuit, but that they end the litigation on the merits and leave nothing for the court to do but execute the judgment." *Id.* (internal quotation marks omitted).

In *Domino Sugar*, we adopted the rule that dismissals without prejudice generally are not appealable "unless the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case." *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) (internal quotation marks and alteration omitted). The *Domino Sugar* rule "requires us to examine the appealability of a dismissal without prejudice based on the specific facts of the case in order to guard against piecemeal litigation and repetitive appeals." *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005).

When determining the finality of a dismissal without prejudice, we have considered various factors, including the bottom-line effect of the district court's ruling, *see Domino Sugar*, 10 F.3d at 1067 ("The clear import of this order required the Company to pursue remedies within the CBA before filing suit in court. In other words, the district court essentially made a

final ruling that the Company had to proceed to arbitration before seeking judicial relief."); and whether the court dismissed the complaint only, as opposed to dismissing the action entirely, *see Chao*, 415 F.3d at 345 (explaining that the dismissal of an amendable complaint generally is not appealable while dismissal without prejudice of the entire action generally is appealable). We have also held that when the plaintiff elects to stand on the complaint, a dismissal without prejudice is final, as the plaintiff's election amounts to waiver of any right to amend and "protect[s] against the possibility of repetitive appeals that concerned us in *Domino Sugar*." *Chao*, 415 F.3d at 345; *see also In re GNC Corp.*, 789 F.3d 505, 511 n.3 (4th Cir. 2015) (concluding that order dismissing complaint without prejudice and expressly authorizing an amended complaint was a final, appealable order because the plaintiffs declined to amend the complaint: "Because of Plaintiffs' waiver [of the right to amend], we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal."); *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 633 n.2 (4th Cir. 2015) (exercising jurisdiction over appeal from dismissal without prejudice because the government and *qui tam* relator "elected to stand on their complaints and waived the right to later amend" (internal quotation marks omitted)), *cert. granted, judgment vacated on other grounds and remanded for further consideration*, 136 S. Ct. 2504 (2016).

In our view, the rules announced in the above-cited cases establish that the without-prejudice dismissal at issue in this case is a final, appealable order. The district court concluded that the factual allegations

in the complaint were insufficient to support Bing's theories of legal liability, but there is nothing in the opinion indicating that the deficiencies could be corrected by improved pleading. The district court did not suggest that there were other relevant facts that were not included in the complaint, nor is there anything in the record that would permit us to so conclude. We could certainly hypothesize additional facts that could shore up Bing's claims of discrimination—for example, if the employee orientation also included white newly hired employees, but Bing was the only new-hire subjected to the additional Google background search. However, unless the record provides some reason to think that there are additional relevant facts that have not been included in the complaint,[4] we should not treat a without-prejudice dismissal as unappealable simply because we can imagine facts that might be helpful to the plaintiff.

When the district court's opinion is considered in light of the entire record, it is clear that the court held that the circumstances surrounding Bing's hiring and subsequent firing did not expose Brivo to legal liability. The court's decision therefore was a final, legal determination that Brivo's conduct was not actionable, and that decision is a final, appealable order under *Domino Sugar*'s "clear import" approach to the question. *See Domino Sugar*, 10 F.3d at 1067.

---

[4] Because Bing was employed for only a matter of hours, his factual knowledge would necessarily be limited. Brivo did not assert any additional facts in its motion to dismiss, nor does it suggest in its briefs filed with this court that there are any other relevant facts that Bing could have included in his complaint.

The conclusion that the district court's order ended the case is further evidenced by the fact that the district court did not merely dismiss the complaint but instead directed the clerk of court to close the case. *See Chao*, 415 F.3d at 345.[5] To be sure, an administrative closing of a case does not convert an unambiguously not-final order into a final, appealable order. *See Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (concluding that order resolving one of two claims raised in a complaint was not a final appealable order and that the court's order dismissing the case from the active docket did not alter that conclusion: "[A]n otherwise non-final order does not become final because the district court administratively closed the case after issuing the order."). Dismissals without prejudice, however, are not unambiguously not-final orders. Indeed, the premise of *Domino Sugar* and its progeny is that such orders usually are ambiguous and require further analysis to determine whether the district court intended its order to end the case. Here, by issuing an order rejecting all of the claims asserted by Bing and directing the clerk to close the case, the district court signaled that it was finished with the case, which is an indication that we may treat the order of dismissal as a final order. *See Go Computer*, 508 F.3d at 176 (explaining that a without-prejudice dismissal is final if it "end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment" (internal quotation marks omitted)); *cf. United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794-95 n.1 (1949) (concluding that the challenged order, which

---

[5] We see no meaningful difference between the dismissal of the entire action in *Chao* and the closing of the case here.

dismissed an action without prejudice, was appealable because the "denial of relief and dismissal of the case ended this suit so far as the District Court was concerned").[6]

If there could still be any doubt about the finality of the ruling in this case, counsel for Bing represented to this court at oral argument that there were no additional facts available to his client to be asserted in the complaint, and counsel therefore stood on the complaint as originally presented to the district court. That is sufficient to establish the finality and appealability of the district court's order. *See In re GNC Corp.*, 789 F.3d at 511 ("Because of Plaintiffs' waiver [of the right to amend], we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal."); *Chao*, 415 F.3d at 345 (explaining that the plaintiff's decision to stand on the complaint amounts to waiver of any right to amend and permits this court to exercise jurisdiction over an appeal from a dismissal without prejudice).

---

[6] The significance of the direction to close Bing's case is underscored by the approach taken by the same district judge in *Alston v. Ourisman Chevrolet*, another case with a *pro se* plaintiff asserting discrimination claims. In *Alston*, the district court issued an opinion that dismissed the plaintiff's amended complaint without prejudice but explicitly granted the plaintiff permission to file a second amended complaint. *See* 2016 WL 4945010, at *4 (D. Md. Sept. 15, 2016). The order issued in connection with that opinion did *not* include instructions to close the case. *See* Docket Entry #23, 8:15-cv-03740-PX (D. Md.). The district court's different approaches in this case and in *Alston* confirm that the court believed its involvement in this case ended with the entry of the order closing the case.

Brivo, however, insists that we lack jurisdiction based on our decision in *Goode v. Central Virginia Legal Aid Society, Inc.*, 807 F.3d 619 (4th Cir. 2015). In *Goode*, an attorney who was fired after 25 years of employment with the Legal Aid Society filed an action asserting claims of age-, race-, and sex-based discrimination. The district court granted the employer's motion to dismiss for failure to state a claim and dismissed the case without prejudice. This court dismissed the employee's appeal, concluding that the without-prejudice dismissal was not a final order.

After acknowledging that *Domino Sugar* required case-by-case determinations of the finality of without-prejudice dismissals, the *Goode* court identified what it seemed to view as a bright-line rule that without-prejudice dismissals "for failure to plead sufficient facts in the complaint" are not appealable orders:

> [I]n cases in which the district court granted a motion to dismiss for failure to plead sufficient facts in the complaint, we have consistently found, albeit in unpublished, non-precedential decisions, that we lacked appellate jurisdiction because the plaintiff could amend the complaint to cure the pleading deficiency. We think the time has come to enshrine this salutary rule in a precedential opinion, and we do so here.

Id. (citations omitted).

After announcing this rule, the *Goode* court concluded that all of the factual deficiencies in the complaint identified by the district court in that case could be corrected by the pleading of additional facts. *See id.* at 626 ("Goode could have provided facts to

support his allegation that he had always met or exceeded [his employer's] performance expectations" (internal quotation marks omitted); *id.* at 626-27 ("Goode could have rectified the apparent defects by presenting factual allegations to demonstrate why he believed that his termination had been racially motivated"); *id.* at 627 ("Goode could also have responded to the district court's observation that he had apparently pled himself out of court by amending his complaint to clarify that he was not conceding that [the employer's] alleged financial reasons for his termination were true." (internal quotation marks and alteration omitted)). Because the deficiencies could be corrected by additional pleading, the court concluded that the without-prejudice dismissal of the complaint was not a final order. *See id.* at 628 ("[T]he district court did not make clear that no amendment could have cured the grounds for dismissal. Because Goode could have amended his complaint, the district court's order dismissing the complaint without prejudice is not, and should not be treated as, final and appealable.").

The *Goode* court then went on to explain why the plaintiff's appealability arguments were not convincing. First, the court held that plaintiff's insistence that he was standing on his complaint was a relevant factor under *Chao*, but it was not dispositive:

> *Chao* does not stand for the general proposition that a plaintiff may choose not to amend a complaint in order to single-handedly render an order of dismissal final and appealable under all circumstances. As we explained above, it is the province of the district court—not of the party seeking an appeal—to indicate that an order is final and appealable. *Chao*

> also involved a unique set of facts that differ significantly from those in the case before us. In *Chao*, the Secretary of Labor appealed the district court's dismissal of her action against various defendants for violations of the Fair Labor Standards Act. Because the Secretary contended that she must be able to employ similarly-worded complaints throughout the country for consistency, she elected to stand on the complaint presented to the district court. In doing so, the Secretary waived the right to later amend thus protecting against the possibility of repetitive appeals that concerned this Court in *Domino Sugar*.
>
> The Court in *Chao* therefore considered the weighty assurances of the Secretary of Labor that the objectives of Domino Sugar and § 1291 would best be served by the Court's exercise of appellate jurisdiction in that case, particularly in light of the institutional interests of the Executive Branch. Goode, by contrast, cannot and does not attempt to make these assurances, and he does not seek to vindicate such institutional interests. Goode's failure to seek leave to amend the complaint thus does not favor appealability of the district court's order of dismissal.

Id. at 629 (citations, internal quotation marks and alterations omitted).

As to the plaintiff's claim that the order was final because the district court dismissed the case without prejudice rather than merely dismissing the

complaint, the *Goode* court found the wording insignificant:

> [W]e see no indication that the district court intended for its use of the word "case" rather than "complaint" to hold any special meaning or for it to signify any particular finality, especially in light of the court's express statement that the dismissal was "without prejudice"—a phrase that generally indicates that a court's decision is not final.
>
> Given the emphasis in this Circuit's governing precedent on case-by-case review, we are unconvinced that the district court's use of the word "case" rather than "complaint" is determinative, or even highly probative, of the order's appealability.

Id.

Relying on *Goode*, Brivo argues that the without-prejudice dismissal in this case is not a final, appealable order because the court found the factual allegations insufficient; and that the court also directed the case be closed is irrelevant. *See Goode*, 807 F.3d at 624, 629. And because no institutional interests are at stake, Brivo contends that Bing's decision to stand on his complaint does not establish finality. *See id.* at 629.

Thus, while *Goode* provides support for Brivo's view that the appealed order is not final, *Domino Sugar*, *Chao*, and *In re GNC* all provide support for Bing's view that the order is final and appealable. Under the rules of this Circuit, panel decisions are binding on subsequent panels, and we are obligated to reconcile conflicting cases if possible. In our view,

however, much of the language and analysis in *Goode* is in direct conflict with *Domino Sugar*, *Chao*, and *In re GNC*. Because those cases preceded *Goode*, they control our resolution of this case. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en Banc* or the Supreme Court.").

Specifically, *Goode*'s assertion of a bright-line rule that without-prejudice dismissals premised on the failure to plead sufficient facts in the complaint are not appealable is inconsistent with *Domino Sugar*, which emphasized the case-by-case nature of the inquiry, *see Domino Sugar*, 10 F.3d at 1066, and also with *Chao*, which found that very type of dismissal to be appealable, *see Chao*, 415 F.3d at 344 (district court dismissed complaint without prejudice under Rule 12 (b)(6) after finding that complaint failed to allege facts sufficient to support legal liability). *Goode*'s rejection of the significance of the dismissal of the *case* as opposed to the complaint because that language was paired with the phrase "without prejudice" is also inconsistent with *Chao*, which relied on the significance of dismissing the case in the context of a without-prejudice dismissal. *See Chao*, 415 F.3d at 345 ("In *Domino Sugar*, we noted the difference between an order dismissing an action without prejudice and one dismissing a complaint without prejudice, stating that the latter order is generally not appealable.").

Additionally, *Goode*'s refusal to give weight to the plaintiff's decision to stand on his complaint because there were no institutional interests of an executive-

branch agency at stake is inconsistent with *In re GNC*, which gave dispositive effect to that decision in a case involving only private parties. *See In re GNC*, 789 F.3d at 511 n.3 ("Dismissals without prejudice are generally not appealable final orders. But if, as here, a plaintiff declines the district court's offer to amend and chooses to stand on his or her complaint, the plaintiff waives the right to later amend unless we determine that the interests of justice require amendment. Because of Plaintiffs' waiver, we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal." (citations, internal quotation marks and alteration omitted)).

Accordingly, given the conflict between *Goode* and our earlier cases, we must follow the approach set out in the earlier cases. Under *Domino Sugar*, the order in this case is appealable because the district court held that the circumstances surrounding Bing's termination did not expose Brivo to legal liability, and Bing has no additional facts that could be added to his complaint. Under *Chao*, the order is appealable because the district court dismissed the complaint and directed that the case be closed. The order is likewise appealable under *Chao* and *In re GNC* because Bing has elected to stand on his complaint as filed.[7]

---

[7] As this case demonstrates, it can be difficult—even with the guidance provided by *Domino Sugar* and its progeny—to determine whether a without-prejudice dismissal is final. This lack of certainty can be especially problematic for plaintiffs, who have a relatively short period of time to determine their next step before the door to appellate review permanently closes. *See, e.g., Sharp Farms v. Speaks*, 917 F.3d 276, 289 (4th Cir. 2019) (explaining that the 30-day appeal period in civil cases is a jurisdictional limit). A version of the *Domino Sugar* approach is

III.

QUATTLEBAUM, Circuit Judge, writing for the Court in Parts III and IV:

Having determined that we have jurisdiction to consider Bing's appeal, we now consider the merits of his challenge to the district court's dismissal of his Title VII claims. We review de novo a decision to grant or deny a motion to dismiss. *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019).

---

followed in other circuits, *see, e.g., Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) ("Although a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable."); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) ("The dismissal of a complaint is not the dismissal of the lawsuit. . . . If, however, it is plain that the complaint will not be amended, perhaps because the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact and we have jurisdiction. . . ."). However, it is not the universal approach. The Eleventh Circuit, for example, follows a very straightforward path. If the plaintiff chooses to appeal an order dismissing the case without prejudice – even if the dismissal expressly authorizes an amendment, the order is final and appealable because the choice to appeal amounts to a waiver of any right to amend. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 n.2 (11th Cir. 1996); *Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir. 1986) (per curiam). This approach avoids "uncertainty as to whether the dismissal of a complaint constitutes a final judgment. It protects the plaintiff by putting in his hands the decision of whether or not to treat the dismissal of his complaint as final, and simultaneously limits his ability to manipulate the rules." *Schuurman*, 798 F.2d at 445-46.

In reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), we focus on the pleading requirements under the Federal Rules rather than the proof ultimately required to succeed on the claim. Rule 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). But importantly, this rule "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action's elements will not do." *Id.* A complaint must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level. . . ." *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a complaint "tender[ing] 'naked assertion[s]' devoid of 'further factual enhancement'" does not suffice) (quoting *Twombly*, 550 U.S. at 557).

To survive a motion to dismiss, a plaintiff must plead enough factual allegations "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The purpose of a Rule 12(b)(6) motion is to "test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* at 214 (4th Cir. 2016) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999)). Thus, when considering a motion to dismiss, a court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016).

In the context of a Title VII case, "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002).[8] Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). The pertinent statute, Title VII, prohibits an employer from "discharg[ing] any individual, or [] otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Accordingly, our inquiry is whether Bing alleges facts that plausibly state a violation of Title VII "above a speculative level." *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting

---

[8] Ultimately, a plaintiff bringing an employment discrimination claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 must provide supporting evidence through one of two methods: (1) "direct or circumstantial evidence" that discrimination motivated the employer's adverse employment decision, or (2) the *McDonnell Douglas* "pretext framework" that requires the plaintiff to show that the employer's stated permissible reason for taking an adverse employment action "is actually a pretext for discrimination." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004) (en banc), *abrogated in part by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, (2009). Bing relies on the *McDonnell Douglas* framework to establish his claim. To prove a prima facie case of discrimination under the *McDonnell Douglas* framework, Bing must establish (1) membership in a protected class, (2) discharge, (3) while otherwise fulfilling Defendants' legitimate expectations at the time of his discharge, and (4) under circumstances that raise a reasonable inference of unlawful discrimination." *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).

Twombly, 550 U.S. at 555); *see also McCleary-Evans*, 780 F.3d at 585-86.

With these standards in mind, we turn to Bing's pro se complaint. Liberally construing its allegations, he asserted discrimination in two ways. First, Bing claimed he was terminated because of his race. To evaluate the sufficiency of this assertion, we look to the facts Bing alleged. Regarding his termination, Bing pled

> I was pulled aside by Mr. Wheeler and confronted with a Baltimore Sun newspaper article, pursuant to a "Google search," which sensationally reported that I was the subject of a criminal investigation involving a shooting between two individuals, involving a gun I owned at the time, all events having taken place in my absence. Mr. Wheeler continued to berate me for this alleged impropriety, citing only the newspaper article's narrative; and, thereafter declared I was unfit for the position of CCR, effectively terminating my employment with Brivo on the spot.

J.A. 14.

The facts Bing pled about his termination cannot be construed to plausibly state a claim that he was terminated because of his race. In fact, Bing specifically alleged a nonracial reason for the termination. He asserted Wheeler terminated him because of the information from a newspaper article about the shooting incident involving Bing's gun. According to Bing, Wheeler said his involvement in that shooting event disqualified him from continuing to work at Brivo. In light of Brivo's recent decision to hire Bing, Wheeler's

termination decision may have been hasty or even unfair, but it was not racially motivated according to Bing's own allegations.

Second, Bing alleged the Google search that uncovered the article about the shooting was racially discriminatory. But once again, we must review the complaint's factual allegations to determine the sufficiency of this assertion. Bing alleged that, in conducting that search, Wheeler "went beyond all standard and routine measures of screening." J.A. 16. He asserted Wheeler did so because Bing was African-American, a fact Wheeler learned for the first time during Bing's orientation. According to Bing, "Wheeler . . . had no prior knowledge of my race" as he was not involved in the interview and Bing did not disclose his race on the application. J.A. 16.

As we must, we accept as true the factual allegations that Wheeler did not know Bing was African-American until he saw him at orientation and that Wheeler conducted a Google search on Bing during his first hours of employment. But from those allegations, even if liberally construed, we cannot reasonably infer that the search was racially motivated. Missing from Bing's complaint are factual allegations that support such an inference. For example, he did not allege that Google searches were only conducted on African-American employees, that Wheeler searched for additional information about Bing in contrast to white employees or that Wheeler or anyone else said or did anything suggesting the search was racially motivated. Instead, Bing speculated that he "can find nothing other than [his] (possibly unexpected) physical appearance as an African-American male, to explain [Brivo's] actions. . . ." J.A. 16. He also "question[s]

whether or not Brivo can provide historical documentation to replicate [his] hiring experience, or at the very least, demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company." J.A. 16. With these allegations, Bing effectively conceded he did not have facts to support his conjecture. Being aware of no alternative explanation and guessing that conduct is racially motivated does not amount to pleading actual facts to support a claim of racial discrimination. To the contrary, they constitute only speculation as to Wheeler's motivation.

Our *McCleary-Evans* decision is particularly instructive here. In that case an African-American female job applicant sued a state agency, alleging she was not hired for two positions because of her race and gender. *McCleary-Evans*, 780 F.3d at 583. She alleged "[d]uring the course of her interview, and based upon the history of hires within [that agency], . . . both [supervisors] predetermined to select for both positions a White male or female candidate." *Id.* "But she alleged no factual basis for what happened 'during the course of her interview' to support the alleged conclusion." *Id.* at 586. While "she repeatedly alleged that the Highway Administration did not select her because of the relevant decisionmakers' bias against African American women," we found that claim to only amount to a "naked" allegation and "no more than conclusions[.]" *Id.* at 585 (*quoting Iqbal,* 556 U.S. at 678-79 (*quoting Twombly*, 550 U.S. at 555, 557)) (internal quotation marks omitted). We held that these allegations were too conclusory. *Id.* Specifically, we noted that "[o]nly speculation can fill the gaps in

her complaint—speculation as to why two 'non-Black candidates' were selected to fill the positions instead of her." *Id.* at 586. The mere fact that a certain action is potentially consistent with discrimination does not alone support a reasonable inference that the action was motivated by bias. *Id.* Thus, we concluded the plaintiff failed to allege "facts sufficient to claim that the reason it failed to hire her was because of her race or sex." *Id.* at 585.

Likewise, Bing failed to plead sufficient facts to plausibly claim his termination or the Google search that lead to it was racially motivated. Rather than drawing a reasonable inference, we would have to "speculate" to "fill in the gaps" as to Wheeler's motivation for the search and to disregard the reason given to Bing for his termination. Thus, Bing's assertions do not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 585 (quoting *Iqbal*, 556 U.S. at 678).

Last, as noted above, Bing filed his complaint pro se. We are, therefore, compelled to construe his pleadings liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). We have done that. But liberal construction does not mean overlooking the pleading requirements under the Federal Rules of Civil Procedure. *See Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015) (affirming the dismissal of several of pro se plaintiff's claims for failure to allege sufficient facts). Bing's complaint fails not because of unsophisticated language or the failure to adhere to formalities. It fails because he pled a non-discriminatory basis for his termination and no facts to support his conclusory

allegations about the Google search. What's more, at oral argument, his counsel said Bing had no other facts he could assert in good faith to support his claim. Accordingly, we are required to affirm the district court.[9]

IV.

For these reasons, the judgment of the district court is

AFFIRMED.

---

[9] We also note, as did the district court, that under our precedent "a strong inference exists that discrimination was not a determining factor for the adverse employment action taken by the employer" where the hiring and firing took place close in time and involve the same decision makers. *Proud v. Stone*, 945 F. 2d 796, 797 (4th Cir, 1991) Here, as for timing, Bing alleged the hiring and termination took place on the very same day. And as to the decision-makers, Bing alleged that Brivo employees Candace Scott and Baudel Reyes interviewed him and made the hiring decision. J.A. 14. And while Bing attributed much of the blame for his termination to Wheeler, who was not involved in Bing's hiring, he attached an email to his opposition to Brivo's motion to dismiss that alleges Scott and Wheeler "concluded I was unfit for the position." J.A. 99. Thus, Bing alleges Scott was involved in both the hiring and termination decision thereby implicating the *Proud* inference. While this inference provides additional support for the district court's decision, it requires consideration of an email Bing attached to his opposition papers, not his complaint. We decline to consider whether Bing waived any argument that the email should not be considered by including the email in his opposition papers and whether the *Proud* inference applies because the district court can be affirmed on the other grounds recited above.

DISSENTING OPINION OF SENIOR JUDGE TRAXLER

TRAXLER, Senior Judge, dissenting in part:

Because I believe that Bing's *pro se* complaint plausibly alleged that he was discriminated against because of his race, I respectfully dissent from Parts III and IV of this opinion.

In order to "survive a motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Although Title VII cases often involve application of the *McDonnell Douglas* prima-facie case standard, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). Accordingly, the question in this case is whether Bing alleged facts sufficient to make it facially plausible that Brivo fired or otherwise discriminated against him in the conditions of employment because of his race. *See* 42 U.S.C. § 2000e-2(a)(1). And because Bing filed his complaint *pro se*, we are obliged to view his

allegations liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (citation and internal quotation marks omitted).

Bing's factual allegations show a confusing about-face by Brivo. By all appearances, Brivo initially was enthusiastic about Bing, as it extended him an offer a day after the interview and encouraged him to start as soon as possible. Although the offer was contingent on Bing passing a background investigation, he passed that check and was permitted to report for work as expected and to begin the new-employee orientation. But despite the satisfactory background report, Wheeler decided upon meeting Bing that additional investigation was required, and he fired Bing without giving him a chance to explain the information that he uncovered.

From these facts, Bing alleges that he was subject to an additional layer of background investigation because of his race. *See* J.A. 16 (alleging that Wheeler's internet search "serve[d] as a means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment"). In my view, the facts alleged in Bing's complaint, along with the inferences that can reasonably be drawn from those facts, make Bing's claim of discrimination plausible. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

First, because Brivo had already hired a third-party to perform a background check and had made Bing's job offer contingent on passing the background check, it is reasonable to assume that Wheeler's additional investigation of an employee who had already started work was not standard practice. After all, if Brivo believed that the third-party report was inadequate to screen potential employees, Brivo would conduct its additional internet searches of applicants before they reported for work, so that unqualified applicants would never become employees. *See* J.A. 16 (questioning whether Brivo could "demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company"). Moreover, it is reasonable to infer that Wheeler, as Brivo's "Security Architect," would have had access to Bing's employment application and background report before Bing reported for work. Thus, as Bing alleges, the only new information Wheeler would have learned upon meeting Bing was Bing's race. *See* J.A. 16 (alleging that the only explanation for the additional background search was Bing's "(possibly unexpected) physical appearance as an African-American male").

Bing's *pro se* complaint thus contains sufficient factual information to support the allegation that Bing was subject to the additional layer of background investigation because of his race. Bing was qualified for the job at Brivo and he successfully passed the required background check. From the facts alleged in the complaint, the only thing that changed after Bing was hired and began work was Wheeler's knowledge of his race. Those facts take us beyond mere speculation

and make it plausible that Wheeler's actions were motivated by race.

Those facts also distinguish this case from *McCleary-Evans v. Maryland Department of Transportation.* In that case, an African-American female job applicant sued a state agency, asserting that she was not hired for two positions she applied for because of her race and gender. 780 F.3d at 583. In her complaint, the plaintiff alleged that during her interview, "and based upon the history of hires within [that agency], . . . both [supervisors] predetermined to select for both positions a White male or female candidate." *Id.* We found the plaintiff's allegations insufficient to support a discrimination claim because "she alleged no factual basis for what happened during the course of her interview to support the alleged conclusion." *Id.* at 586 (internal quotation marks omitted). While "she repeatedly alleged that the Highway Administration did not select her because of the relevant decisionmakers' bias against African American women," we found those claims to be "naked" allegations and "no more than conclusions." *Id.* at 585 (internal quotation marks omitted). As we explained, "the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is consistent with discrimination, [but] it does not alone support a reasonable inference that the decisionmakers were motivated by bias." *Id.* at 586. Because "[o]nly speculation can fill the gaps in [the plaintiff's] complaint—speculation as to why two 'non-Black candidates' were selected to fill the positions instead of her," we concluded that the complaint was properly dismissed. *Id.* ("McCleary-Evans' complaint stopped short of the line between possibility and plausibility

of entitlement to relief.") (internal quotation marks and alteration omitted).

Unlike in *McCleary-Evans*, no speculation is required in this case. To survive the motion to dismiss, Bing was only required "to allege facts to satisfy the elements of a cause of action created by [Title VII]." *Id.* at 585. Title VII makes it an unlawful employment practice "to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Bing's allegations establish that he was subjected to what can reasonably be understood as an unusually timed, additional layer of background investigation, and Wheeler used the information found in that unusual search as the reason to fire Bing. The only new information Wheeler learned before conducting the unusual background check was Bing's race. Those facts are sufficient to support a reasonable inference that Brivo subjected Bing to additional investigation because of his race and fired him because of his race.

When granting the motion to dismiss, the district court effectively viewed the allegations of the complaint in favor of Brivo rather than Bing when concluding that Bing "was terminated because of his involvement in the shooting incident." J.A. 176. Contrary to the district court's conclusion, Bing did not plead himself out of court by acknowledging the existence of the newspaper article and his involvement in the shooting incident described in the article. While Bing alleged that Wheeler told him he was being fired because of his involvement in the shooting, Bing did not allege that was the true reason he was fired, and it was

error for the district court to conflate the two. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 168 (4th Cir. 2016) (explaining that when considering a motion to dismiss, the court "should have treated [the plaintiff's] allegations [about statements made by defendant police officers] as what they were—allegations that the [o]fficers made the quoted statements, not allegations that the statements themselves were true"). The incident described in the article is Brivo's defense to Bing's claims of discrimination; the district court's premature ruling prevented Bing from attempting to prove that any reason asserted by Brivo was pretext for discrimination.

Moreover, accepting Brivo's claim that Bing was fired because of his involvement in the incident ignores the fact that Bing's complaint, liberally construed, alleges that he was subject to scrutiny and investigation that white employees were not. Thus, even if Brivo could prove that the discovery of the article was the true reason it terminated Bing, that does not make Bing's claim of discrimination in the conditions of employment implausible.

Nothing about the existence or content of the article renders implausible Bing's theories of liability. *See Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("[W]hile BNT need not establish a prima facie case at th[e motion-to-dismiss] stage, . . . we must be satisfied that the City's explanation for rejecting the loan does not render BNT's allegations implausible."). The district court therefore erred by assuming the truth of Brivo's defense when granting the motion to dismiss.

While Bing's complaint does not include exhaustive factual allegations, we must remember the unusual

circumstances of this case. Bing was fired on his first day on the job, not because of anything he did that day, but because of a news article that Bing was not permitted to explain. Under these circumstances, Bing is in no position to assert whether newly hired white employees were subject to the same kind of additional internet background check, or whether any white employees had been fired for similar, decade-old conduct. However, as discussed above, it is reasonable to assume that employers will conduct all necessary background checks before allowing new employees to start work. But in this case, Wheeler conducted the additional background search only after learning that Bing was black, and Wheeler fired Bing without permitting him to explain the article and his involvement in the underlying incident. In my view, these facts make Bing's claim of racial discrimination plausible. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Twombly*, 550 U.S. at 555 (explaining that a complaint must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level").

Because Bing's complaint was sufficient to support a claim of racial discrimination, I believe the district court erred by granting Brivo's motion to dismiss. I therefore respectfully dissent from the affirmance of the district court's dismissing Bing's complaint under Rule 12(b)(6).

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (JANUARY 22, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBEL BING,

Plaintiff,

v.

BRIVO SYSTEMS, LLC,

Defendant.

Civil Action No. PX-18-1543

Before: Paula XINIS, United States District Judge.

Pending in this employment discrimination case is Defendant Brivo Systems, LLC's ("Brivo") Motion to Dismiss. ECF No. 10. Plaintiff Robel Bing has responded, and no hearing is necessary. *See* D. Md. Loc. R. 105.6. For the reasons stated below, Defendant's Motion is GRANTED.

I. Background

In 2016, Bing applied to work at Brivo as a Customer Care Representative. ECF No. 1.[1] Bing submitted an employment application, which, among other information, inquired about Bing's prior criminal convictions. Bing responded, "Misdemeanor 2003 Misdemeanor 2015." ECF No. 10-4 at 1. Brivo employees Candice Scott, who is an African-American woman, and Baudel Reyes interviewed Bing in person, and thus obtained "firsthand knowledge of [Plaintiff's] ethnicity." ECF No. 1-1 at 2 n.2.

Brivo offered Bing the position, which he accepted under the terms of Brivo's written job offer. ECF No. 10-3, 10-5. The employment offer conditioned Bing's employment on Brivo verifying that "[t]he information provided to the Company to evaluate [Plaintiff's] application was complete and true . . . [and Plaintiff] agree[ing] to and successfully pass[ing] a background check. . . . " *Id.* Bing accepted this offer and the parties mutually determined that Bing would begin work at Brivo on October 17, 2016. Bing also executed written authorization allowing Brivo to conduct a background check using Justifacts Credential Verification, Inc. ("Justifacts"). On October 6, 2016, Justifacts had completed its written report on Bing, after the offer letter was sent but before Bing resigned from his previous employment.

---

[1] Although neither party describes the nature of Brivo's business, the Court takes judicial notice that per Brivo's website, it provides physical security systems and technical support services for commercial businesses. *See* Brivo, *Packages*, www.brivo.com/physical-security-packages (last visited January 22, 2019).

On October 17, Bing reported to Brivo for his first day. As part of his orientation, he met with Bing employees, Charles Wheeler and Richard Crowder. During this initial meeting, Wheeler confronted Bing about information Wheeler had learned by googling Bing. Specifically, Wheeler questioned Bing in a hostile and aggressive manner about a Baltimore Sun article that referenced Bing as having given his roommate a loaded gun, which was then used in "Halloween celebratory gunfire," injuring another person. ECF No. 1-1 at 2; ECF No. 10-8 at 1. No formal charges were lodged against Bing. ECF No. 1-1 at 2. After Bing admitted that he was the same Robel Bing referenced in the article, Wheeler "terminated [Bing] on the spot." *Id.* Bing further avers that despite his having notified Brivo that he quit his prior job to take the Customer Care position, and complied in every way with the pre-employment requirements, Bing was given no forewarning that termination may be a possibility and no opportunity to address the nature of the allegations in the Sun article.

Understandably upset, Bing filed suit in this Court, alleging race and sex discrimination and harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), as well as violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). Brivo now moves to dismiss all counts. For the following reasons, the motion must be granted.

II. Standard of Review

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir.

2006) (citation and internal quotation marks omitted). A complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555).

In ruling on a motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true and viewed in the light most favorable to him. *Twombly*, 550 U.S. at 555. The Court may also consider documents attached to the motion to dismiss when "integral to and explicitly relied on in the complaint, and when the [opposing parties] do not challenge the document[s'] authenticity." *Zak v. Chelsea Therapeutics, Int'l, Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015) (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)) (internal quotation marks omitted). However, "[f]actual allegations must be enough to raise a right to relief above a speculative level." *Twombly*, 550 U.S. at 555. "[C]onclusory statements or a 'formulaic recitation of the elements of a cause of action will not [suffice].'" *EEOC v. Performance Food Grp., Inc.*, 16 F. Supp. 3d 584, 588 (D. Md. 2014) (quoting *Twombly*, 550 U.S. at 555). "'[N]aked 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) (quoting *Twombly*, 550 U.S. at 557). Although pro se pleadings are construed liberally to allow for the development of a potentially meritorious case, *Hughes v. Rowe*, 449 U.S. 5, 9 (1980), courts cannot ignore a clear failure to allege facts setting forth a cognizable claim. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990) ("The 'special judicial solicitude' with which a district court should view such pro se complaints does not transform the court into an advocate.").

III. Discussion

A. Title VII

i. Discriminatory Discharge

Bing avers that he was discharged on his first day of work because of his race and gender. Because the Complaint allegations do not aver any direct evidence of discrimination, Bing's discrimination claims are subject to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 278 (4th Cir. 2000); *Riddick v. MAIC, Inc.*, 445 F. App'x 686, 689 (4th Cir. 2011). To sustain a *prima facie* case of discrimination, a plaintiff must demonstrate: (1) membership in a protected group, (2) discharge, (3) while otherwise fulfilling Defendants' legitimate expectations at the time of his discharge, and (4) under circumstances that raise a reasonable inference of unlawful discrimination. *See King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003). If Bing establishes a *prima facie* case, the burden shifts to Brivo to offer a legitimate, non-discriminatory reason

for his discharge. *See Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 216 (4th Cir. 2016). Once Brivo provides such a reason, the burden then shifts back to Bing to raise a genuine dispute as to whether the proffered reason is mere pretext for discrimination. *See id.*

Importantly, however, plaintiff is not required to "plead facts sufficient to establish a prima facie case . . . to survive a motion to dismiss." *Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017). Rather, the complaint must simply include "sufficient factual allegations to support a plausible claim" of discrimination. *Id.*; *see also Chowdhuri v. SGT, Inc.*, No. PX 16-3135, 2017 WL 3503680, at *5 (D. Md. Aug. 16, 2017). Unfortunately for Bing, the Complaint does not meet this threshold.

It is undisputed that Bing is a member of a protected class who was discharged on his first day of work after having been found qualified for the position. However, Bing has proffered no facts allowing a plausible inference that his discharge was fueled by unlawful discrimination. According to the Complaint, the Brivo employees responsible for hiring him—Candice Scott and Baudel Reyes—knew of Bing's race and gender because they had conducted an in-person interview before hiring Bing. ECF No. 1-1. When Bing showed up for work, however, Brivo employees confirmed with Bing an incident involving his loaning a firearm that subsequently was used in a shooting. This new information led to his termination "on the spot." *Id.* In this respect, the Complaint avers facts establishing that he was terminated because of his involvement in the shooting incident—the veracity of which Bing confirmed. By contrast, no evidence

exists by which this Court could infer Bing was terminated on account of race or gender. Brivo concluded that Bing's involvement in the firearm incident rendered him unfit for the position. Nothing about this determination, based on the facts averred in the Complaint, demonstrates that this reason was put forward to obscure Brivo's discriminatory animus.

In fact, where an employee's hiring and firing occur close in time and involve the same decision-makers, "a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991); *see also Liu v. Bushnell*, No. TDC-17-1398, 2018 WL 3093974, at *10 (D. Md. June 22, 2018). Bing specifically avers that he was subject to unlawful discrimination by "one or more employees in management, whose role within the company organization grants a singular decision-making authority with which to initiate and carry out hiring and firing processes within the company." ECF No. 1-1. Bing also confirms that Scott was involved in both his hiring and firing. ECF No. 13-4 at 20 (alleging that both Scott and the Security Director "concluded that I am not fit for the position."). Accordingly, no facts permit this Court to infer plausibly that Brivo's ultimate decision to terminate Bing constituted unlawful discrimination. This claim must be dismissed.

ii. Hostile Work Environment

Bing also alleges that he was "subjected to hostile interrogations, without any basis or prior warning," and "berate[d]" for failing to disclose the shooting incident. ECF No. 1-1 at 1, 2. This questioning, while

unpleasant and unfortunate, does not amount to an actionable Title VII claim.

Most favorably construed, Bing seeks relief for having been subjected to a hostile work environment. To state a hostile work environment claim, Bing must aver facts from which this Court could infer plausibly that: (1) he experienced unwelcome harassment; (2) based on his race or gender; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) liability may be imposed on the employer. *Ruffin v. Lockheed Martin Corp.*, 126 F. Supp. 3d 521, 528 (D. Md. 2015), *aff'd as modified,* 659 F. App'x 744 (4th Cir. 2016) (approving the district court's use of the above-cited elements in granting the defendant judgment on the pleadings); *see also Bonds v. Leavitt*, 629 F.3d 369, 386 (4th Cir. 2011). The severity and pervasiveness of the alleged harassment depends on "the frequency of the discriminatory conduct; . . . whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)) (internal quotation marks omitted). "A hostile environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 276-77 (4th Cir. 2015) (quoting *Harris*, 510 U.S. at 21) (alteration in original). By contrast, harsh or callous exchanges alone are insufficient to support the claim.

Chang Lim v. Azar, 310 F. Supp. 3d 588, 599 (D. Md. 2018) (quoting *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 276 (4th Cir. 2000)).

Bing alleges a hostile environment based on a single incident that he characterizes as an interrogation, and during which he was "berate[d]" about the shooting information discovered during Wheeler's Google search. Although Wheeler's deportment was unwelcome, there is no evidence Wheeler was motivated by discriminatory animus. Nothing about Wheeler's exchange with Bing, directly or indirectly, alludes to Bing's race or gender. Rather, the Complaint details a heated exchange between Wheeler and Bing after Wheeler learned about Bing's having loaned a firearm used in a shooting. Accordingly, viewing the Complaint most favorably to Bing, the hostile work environment claim must be dismissed.

B. Fair Credit Reporting Act

Bing also alleges that Brivo violated the FCRA by relying on a Google search as a basis for his termination and without warning Bing in advance or providing him the opportunity to refute the allegations. ECF No. 1-1. Notably, Bing does not challenge the formal background check that Brivo had performed prior to Bing's first day.[2] Rather, Bing only references

[2] Although the Complaint references the background report that Brivo retained from Justifacts, Bing emphasizes in his Complaint that the Justifacts report was obtained prior to his first day of work, and that he disclosed information consistent with the Justifacts background report prior to being hired for the job. ECF No. 1-1. Accordingly, the Court cannot plausibly infer that Bing's FCRA claim is based on any alleged FCRA violation based on the Justifacts report.

Wheeler's Google search, which generated the Baltimore Sun article, as the basis for Brivo's FCRA liability. Accordingly, Bing's claim must fail.

Section 1681b(b)(3)(A) of the FCRA renders an employer liable under the statute if the employer failed to provide the prospective employee a copy of any consumer report on which the employer's adverse action is based. The FCRA also mandates that the employer describe in writing the "rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title." *Id.*

Critical to the Court's analysis, however, is the FCRA's definition of "consumer report." A consumer report is:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes. . . .

15 U.S.C. § 1681a(d)(1) (emphasis added).

A "consumer reporting agency" is further defined as persons which, "for monetary fees, dues, or on a cooperative nonprofit basis" regularly assemble or evaluate consumer credit information or other consumer information "for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). Nowhere does Bing allege that Brivo is a consumer reporting agency as defined under the statute. Thus, the Google

search that Wheeler, as a Brivo employee, performed on Bing's first day of work cannot as a matter of law constitute a "consumer report" under the FCRA, if for no other reason than it was not generated by a "consumer agency." *See Jolly v. Acad. Collection Serv., Inc.*, 400 F. Supp. 2d 851, 858 (M.D.N.C. 2005) (dismissing FCRA claim where defendant Citibank did not qualify as "consumer reporting agency."); *see also Menefee v. City of Country Club Hills*, No. 08 C 2948, 2008 WL 4696146, at *3 (D. Ill. Feb. 12, 2016) (finding that employer is not a "consumer reporting agency" where it collects information on potential employees without furnishing reports to third parties). When viewing the Complaint allegations as true and most favorably to Bing, the FCRA claim does not survive challenge.

IV. Conclusion

Bing is understandably unhappy at Brivo's decision to renege its employment offer after learning of the incident reported in the Baltimore Sun article, and after Bing had quit his other job to work for Brivo. The Court certainly sympathizes with Bing's predicament, and accepts as true the facts as described. But these facts simply do not, in the Court's view, support a charge of discrimination or harassment under Title VII or an FCRA violation. For this reason, the Court DISMISSES Bing's Complaint without prejudice.

/s/ Paula Xinis
United States District Judge

1/22/2019
Date

COMPLAINT FOR EMPLOYMENT DISCRIMINATION (MAY 29, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBEL BING,
13203 Astoria Hill Court, Apt. D
Germantown, Montgomery County,
Maryland, 20874, 202-714-4588

-against

BRIVO SYSTEMS, LLC,
7770 Old Georgetown Road, Bethesda, Montgomery County, Maryland, 20814, 1(866) 692-7486

Case No. 8:18-cv-01543-PX

I. The Parties to This Complaint

A. The Plaintiff(s)

Provide the information below for each plaintiff named in the complaint. Attach additional pages if needed.

Name Robel Bing
Street Address 13203 Astoria Hill Court, Apt. D
City and County
Germantown; Montgomery County
State and Zip Code Maryland, 20874
Telephone Number 202-714-4588

E-mail Address bing.robel@gmail.com

B. The Defendant(s)

Provide the information below for each defendant named in the complaint, whether the defendant is an individual, a government agency, an organization, or a corporation. For an individual defendant, include the person's job or title (if known). Attach additional pages if needed.

Defendant No. I

Name Brivo Systems, LLC
Job or Title (if known)
Customer Care Representative (CCR)
Street Address 7770 Old Georgetown Road
City and County Bethesda; Montgomery County
State and Zip Code Maryland, 20814
Telephone Number 1(866) 692-7486

C. Place of Employment

The address at which I sought employment or was employed by the defendant(s) is:

Name Brivo Systems, LLC
Street Address 7770 Old Georgetown Road
City and County Bethesda; Montgomery County
State and Zip Code Maryland, 20814
Telephone Number 1(866) 692-7486

II. Basis for Jurisdiction

This action is brought for discrimination in employment pursuant to:

- Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. §§ 2000e to 2000e-17 (race, color, gender, religion, national origin).

(Note: In order to bring suit in federal district court under Title VII. you must first obtain a Notice of Right to Sue letter from the Equal Employment Opportunity Commission.)

- Other federal law:

SUBCHAPTER F-THE FAIR CREDIT REPORTING ACT

III. Statement of Claim

Write a short and plain statement of the claim. Do not make legal arguments. State as briefly as possible the facts showing that each plaintiff is entitled to the damages or other relief sought. State how each defendant was involved and what each defendant did that caused the plaintiff harm or violated the plaintiff's rights, including the dates and places of that involvement or conduct. If more than one claim is asserted, number each claim and write a short and plain statement of each claim in a separate paragraph. Attach additional pages if needed.

A. The discriminatory conduct of which I complain in this action includes:

- Termination of my employment.
- Other acts: Harassment / Discrimination

(Note: Only those grounds raised in the charge filed with the Equal Employment Opportunity Commission can be considered by the federal district court under The federal employment discrimination statutes.)

B. It is my best recollection that the alleged discriminatory acts occurred on date(s) October 17, 2016

C. I believe that defendant(s):

- is/are not still committing these acts against me.

D. Defendant(s) discriminated against me based on my:

- race African-American
- color Brown
- gender/sex Male

E. The facts of my case are as follows. Attach additional pages if needed.

Please see the attached response.

(Note: As additional support for the facts of your claim, you may attach to this complaint a copy of your charge filed with the Equal Employment Opportunity Commission, or the charge filed with the relevant state or city human rights division.)

IV. Exhaustion of Federal Administrative Remedies

A. It is my best recollection that I filed a charge with the Equal Employment Opportunity Commission or my Equal Employment Opportunity counselor regarding the defendant's alleged discriminatory conduct on May 10, 2017

B. The Equal Employment Opportunity Commission:

- issued a Notice of Right to Sue letter, which I received on February 27, 2018

(Note: Attach a copy of the Notice of Right to Sue letter from the Equal Employment Opportunity Commission to this complaint.)

V. Relief

State briefly and precisely what damages or other relief the plaintiff asks the court to order. Do not make legal arguments. Include any basis for claiming that the wrongs alleged are continuing at the present time. Include the amounts of any actual damages claimed for the acts alleged and the basis for these amounts. Include any punitive or exemplary damages claimed, the amounts, and the reasons you claim you are entitled to actual or punitive money damages.

The amount of $4,000,000 reflects the sum total for damages owed, lost wages, health benefits, retirement benefits, employee stock options that were available to me as an employee, per agreement. I was a paid employee, wrongfully terminated due to malicious and racially-motivated actions initiated against me on my first day of employment, by a single individual in a position of authority (Mr. Wheeler) at Brivo Systems, LLC. I am requesting damages for the mental and emotional, and physical stress that Brivo's discriminatory actions have incurred. Lastly, Brivo Systems LLC will match the $4,000,000 amount to be paid to Science, Engineering, Mathematics and Aerospace Academy (SEMAA) program at my alma mater, Morgan State University. I was denied wages and other employment benefits, the total of which would exponentially increase over time as an employee. As I was denied the opportunity to further my employment with the company, the total monetary gains cannot be

accurately assessed (particularly with regard to the employee stock options amount and growth over time.

VI. Certification and Closing

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (I) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule II.

A. For Parties Without an Attorney

I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Signature of Plaintiff /s/ Robel Bing
Printed Name of Plaintiff
Robel Bing

Date of Signing: May 25, 2018

NOTICE OF RIGHT TO SUE LETTER FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

E. The Facts of my case are as follows:

Re: EEOC Charge No. 531-2017-01515C
Bing v. Brivo Systems, LLC

EEOC charge was filed on May 10,2017. Brivo Systems, LLC allowed unchecked implicit racial biases to govern the actions of one or more employees in management, whose role within the company organization grants a singular decision-making authority with which to initiate and carry out hiring and firing processes within the company. The unlawful termination of my employment on October 17,2016 resulted in a direct violation of my civil rights, as protected by Title VII of The Civil Rights Act of 1964.

a. I am a member of a protected group, African-American, as defined by Title VII

b. I was qualified, and was hired for the role of Customer Care Representative (CCR), at Brivo Systems, LLC.

c. I was fired from the position, on my first day of employment with Brivo Systems, LLC, as Brivo Systems, LLC unlawfully applied discriminatory evaluation criteria to effectively terminate my employment; and, was subjected to hostile interrogations, without any basis or prior warning; and,

d. Brivo Systems, LLC continued their search for another similar candidate

Background

On October 17,2016, I was hired by Brivo Systems, LLC ("Brivo") after submitting an application and receiving written confirmation of my background check completion. The vetting process included: a screening of my application, disclosures, criminal background check, reference checks, driving records data, and other direct or third-party standard measures employed by Brivo. The JustiFacts report was the third-party vendor used by Brivo for this process. Brivo had access to all personal information and signed disclosures needed, in order to conduct a full background screening. The application prompted me to make disclosures of any misdemeanor or felony convictions, to which I fully and honestly divulged all requested information.[1] In the application, I declined to self-identify as to my ethnicity. After Brivo's preliminary screening and in-person interview[2], I was deemed qualified for the CCR position with Brivo that I applied for and was contacted by Ms. Scott to begin work on October 17, 2016.[3]

---

[1] A copy of my corrected JustiFacts report was submitted 10 EEOC at Intake, May 10,2017.

[2] Ms. Scott and Mr. Reyes were the only Brivo employees who had firsthand knowledge of my ethnicity, from the time that I was interviewee. until my arrival at Brivo for employee orientation on October 17, 2016 as I did not indicate my ethnicity on the application itself.

[3] Documents submitted during the Intake process with EEOC, establish that Ms. Scott's knowledge of the background check process, and favorable completion status. Specifically, Ms. Scott admits that the process took longer than expected; however, the process had been completed, and she was eager for me to begin my employment with Brivo. As detailed in the email exchanges. Ms. Scott wanted me to begin employment as soon as possible,

Upon appearing for orientation on October 17, 2016, a date that Brivo acknowledges as the first day of my employment, I was met by two Brivo employees who had not participated in my application process, Mr. Charles Wheeler and Mr. Richard Crowder. Mr. Wheeler was introduced as Security Architect for Brivo, and Mr. Crowder as the Director of Technical Services. Both Brivo employees were Caucasian males. Within an hour of orientation, I was pulled aside by Mr. Wheeler and confronted about a Baltimore Sun newspaper article, pursuant to a "Google search", which sensationally reported that I was the subject of a criminal investigation involving a shooting between two individuals, involving a gun that I lawfully owned at the time, all events having taken place in my absence. Mr. Wheeler continued to berate me for this alleged impropriety, citing only the newspaper article's narrative; and, thereafter declared that I was unfit for the position of CCR, effectively terminating my employment with Brivo on the spot. I was never given an opportunity to refute these accusations, as I was immediately being escorted out of the building by Mr. Wheeler. I never withheld or concealed any criminal or felony conviction at any time during my application process or initial employment with Brivo. Additionally, the incident, as detailed in the Baltimore Sun news article, did not result in any arrest or

---

and had knowledge of my desire to give my current employer the customary two weeks' notice prior to my effective resignation. When Ms. Scott noted that she would have to ask permission to extend my hire date to accommodate my desired notice of resignation, I spoke' with my current employer and made them aware of my new job opportunity. Wishing me the best, they were kind enough to accept an early resignation so that I could begin employment with Brivo, on October 17, 2016.

criminal conviction, as the Baltimore Police found me to be innocent of any crime, and reflected as such in the Police Report drafted on the night of the incident. The Baltimore Sun news article was never updated by the publisher to reflect the Baltimore Police Department's conclusion of the reported events.

I even attempted to resolve this through peaceful email dialogue with Brivo's CEO, Steve Van Till, immediately after my termination of employment. He was very receptive at first, then became completely unresponsive after his assertion that the matter had been closed. He was completely comfortable with the violation of my rights, as an employee.

Pursuant to guidance found on EEOC's webpage,[4] background information must be responsibly obtained, and the Federal Trade Commission (FTC) enforces the Fair Credit Reporting Act (FCRA) as follows:

> "FTC
>
> When taking an adverse action (for example, not hiring an applicant or firing an employee] based on background information obtained through a company in the business of compiling background information, the FCRA has additional requirements:
>
> - Before you take an adverse employment action, you must give the applicant or employee:
>   - a notice that includes a copy of the consumer report you relied on to make your decision; and

---

4 EEOC website: https://www.eeoc.gov/eeoc/publications/background_checks_employers.htm

- a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you should have received from the company that sold you the report.

By giving the person the notice in advance, the person has on opportunity to review the report and explain any negative information.

- After you take an adverse employment action, you must tell the applicant or employee (orally, in writing, or electronically):
- that he or she was rejected because of information in the report;
- the name, address, and phone number of the company that sold the report;
- that the company setting the report didn't make the hiring decision, and can't give specific reasons for it; and
- that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days."

Additional guidance regarding the background screening process for job applicants, as well as for active employees, generally acknowledges the employer's right to an in-house background screening. This is commonly accepted as an overview of the employee or applicant's social media profile(s), in order to screen for any potential workplace conflicts that may arise, given the applicant or employee's online presence, possible community influence, and any infor-

mation that they have chosen to make pubic about themselves in a social context. For example, a prospective employer may not wish to hire a candidate who chooses to tweet hate speech, or an employee who may have had inappropriate social media interactions with coworkers at a previous job. Brivo's actions and additional screening measures (Google search of my name on October 17, 2016) violated my rights, as protected by Title VII of the Civil Rights Act of 1964, as well as established standards of employment law, because of the company's choice to use such screening measures to serve as means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment.

In choosing to conduct an ancillary Google search of me, Brivo went beyond all standard and routine measures of screening, which intentionally resulted in the disenfranchisement of my rights as an employee. These measures were not conducted in the month between the date that I submitted my application and the date in which I was hired for the CCR position, but only after I showed up for my first day of work and appeared before Mr. Wheeler; and, to a lesser extent, Mr. Crowder, who took the lead in investigating, confronting, and discharging me. Moreover, I disclosed everything that I was requested to disclose during the application process, and did so fully and honestly. Brivo, by their own admission, considered my job qualifications befitting for the position and results of my character and fitness investigation satisfactory for employment. Brivo, in their Responsive documents, neglect to offer any reason as to why the additional investigation of me was performed on the first day of

my employment, after Brivo had provided me with written confirmation of a favorable conclusion to their established background check procedures. Also of concern, is the blatant disregard for established vetting procedures dictated by federal employment laws, as Brivo has chosen to latch onto the Baltimore Sun news article without demonstrating any effort on their part to verify the factual events through a third-party vendor or search public police records, especially when the content of such news article seems to imply criminal activity. What facts remain, hardly appear to provide Brivo with a reasonable, non-discriminatory pretext for their actions. Specifically, employees Wheeler and Crowder had no prior knowledge of my race, as race was not specified on my application; and, only employees Scott and Reyes had firsthand knowledge of my race, as they were the hiring managers responsible for conducting the interview, and eventually hiring me with the company. I can find nothing other than my (possibly unexpected) physical appearance as an African-American male, to explain actions of race (African-American) and sex (male) discrimination, initiated by Mr. Wheeler, whose actions clearly fell outside of established Brivo hiring processes as well as FTC and FCRA best practices outlined and explained above. I question whether or not Brivo can provide historical documentation to replicate my hiring experience, or at the very least, demonstrate that they have a common hiring practice of conducting ancillary "Google searches" of employees' names on the first day of employment with the company. Furthermore, if Brivo would willingly admit to this discriminatory practice, would the company also acknowledge that this practice is commonly applied to individuals who declined to indicate race

on employment forms, and subsequently proved to (obviously) be a member of a protected minority class, as reflected in my experience? The only other factual information garnered from the news article, was the fact that at one point in the past, I lawfully owned a firearm. Does this fact represent justifiable grounds for termination for all employees, or simply a reason for terminating employment of African-American males? Given these circumstances, I propose that Brivo provide documentation as it relates to past applicants, to be evaluated for its relevance as it applies to Title VII, and previous Supreme Court rulings.[5]

Analysis and Conclusion

I did not self-identify as an African-American male on the application form; and, while I applaud their subsequent efforts in maintaining diversity in the workplace, Brivo's efforts do not excuse their discriminatory actions towards me. As demonstrated in *Connecticut v. Teal*:[6] "... the Supreme Court holds that an employer who is liable for racial discrimination when any part of its selection process has a disparate impact even if the final result of the hiring process is racially balanced. In effect, the Court rejects the

---

[5] In *International Brotherhood of Teamsters v. United States,* the Supreme Court rules that in a pattern or practice discrimination case, once the plaintiff proves that the defendant systematically discriminated, all the affected class members are presumed to be entitled to relief (such as back pay, jobs) unless the defendant proves that the individuals were not the victims of the defendant's pattern or practice of discrimination.

[6] EEOC website, Supreme Court rulings of note: https://www.eeoc.gov/eeoc/history/35th/thelaw/supremecourt.html

"bottom line defense", and makes clear that the fair employment laws protect the individual. The *Teal* decision means that fair treatment of a group is not a defense to an individual claim of discrimination."

My disclosures of criminal history, as they relate to the application process, were complete and transparent in nature. Furthermore, the specific nature of these misdemeanor charges is detailed online, via case search feature of the Maryland Courts website which is available to the public at no cost. Brivo's aggressive interrogation and inflated accusations as to the nature of my criminal record, were an assault on my person, derogatory in action, and resulted in an overall horrifically demeaning experience[7] Not only was I subjected to racially-biased hostility, I was left without health insurance or gainful employment (I had just resigned from my previous job to accommodate Brivo's desired start date), and my previous position had

---

[7] The JustiFacts report obtained by Brivo, contained erroneous criminal records information which was subsequently corrected and provided to EEOC at Intake on May 10,2017. I was denied the opportunity to address these inaccuracies, as per FTC and FCRA laws, prior to any adverse employment action. In fact, I was only provided with the JustiFacts report approximately 3 weeks after Brivo terminated my employment When Ms. Scott emailed the report to me, she omitted the JustiFacts disclaimer which states that the report is not to be used as the sole determining factor in evaluating an employees' suitability for any position, as well as the Statement of Rights portion routinely provided by JustiFacts with each generated report. It was not until I received the Statement of Rights portion along with the corrected report in 2017. generated at my request through direct communications with the JustiFacts company, that I was aware of my rights and also realized that Brivo had gone to great lengths to deny me the opportunity to address the inaccurate report, prior to my termination.

already been filled. I have a chronic, life-long health condition that has required intermittent hospitalizations and regular medical care since birth. Having adequate health insurance not only effects the quality of health care that is available to me, but it also affects my ability to pay for such care. For myself, and for thousands of others who share my diagnosis, life depends on it. The stress of these events, and the subsequent search for new employment has been physically disabling at times, as well as mentally and emotionally scarring. I humbly request that these biases be evaluated, addressed, and some measure of action taken to ensure that Brivo educate itself as an organization and initiate a change within company culture for the betterment of all those aspiring to enter the workforce.

Respectfully,

/s/ Robel Bing

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING (JUNE 30, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBEL BING,

Plaintiff-Appellant,

v.

BRIVO SYSTEMS, LLC,

Defendant-Appellee.

No. 19-1220

(8:18-cv-01543-PX)

Before: AGEE and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Quattlebaum, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor
Clerk