

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-10376

CONEISHA L. SHERROD,
Plaintiff - Appellant

v.

UNITED WAY WORLDWIDE,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-758

(Filed Jul. 30, 2020)

Before OWEN, Chief Judge, and SOUTHWICK and
OLDHAM, Circuit Judges.

PER CURIAM:*

Coneisha Sherrod sued her former employer, the United Way of Tarrant County. That entity is a member of United Way Worldwide, which Sherrod also sued. Sherrod alleged her employment was terminated due

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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to complaints she made that her employer was violating the Employee Retirement Income Security Act and 42 U.S.C. § 1981. The claims against her employer were settled by joint stipulation after a jury trial, but her claims against United Way Worldwide were dismissed prior to the trial. She appeals seeking reinstatement of those claims, but we AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

United Way Worldwide (“UWW”) is an international charity that through its local member organizations is engaged in nearly 1,800 communities around the world. United Way of Tarrant County (“UWTC”) is one of those members. In her complaint, Sherrod, the former Vice President of Human Resources at UWTC, described several incidents that she claimed led to her termination. It causes awkward phrasing, but we will use titles for some individuals because that is how Sherrod identified them in her complaint.

First, Sherrod alleged that she discovered UWTC failed to pay employee benefits and comply with reporting requirements in accordance with the Employee Retirement Income Security Act (“ERISA”). 29 U.S.C. § 1001 *et seq.* Sherrod reported her discovery to UWTC’s Chief Executive Officer (“CEO”). Sherrod also alleged that when she was hired, the CEO told her he would retire in four years and his successor had already been selected. Sometime after Sherrod’s conversation with the CEO, UWTC’s Senior Vice President of Community Development, an African-American

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female, told Sherrod she was interested in the CEO position. Because the position was never posted to permit others to apply, and the selection of the CEO's successor was not announced, Sherrod "express[ed] concern" to UWTC's CEO that failure to follow protocol for selecting a new CEO could result in unlawful discrimination.

Following Sherrod's comments, UWTC created a committee to select the CEO's successor. Sherrod was neither a member of the committee nor otherwise involved in the selection. The naming of a new CEO caused the Senior Vice President of Community Development to complain of racial discrimination. Sherrod claims that UWTC, the chairman of its board, and the CEO prevented Sherrod from investigating the complaint – even though human resources was her portfolio. Sherrod alleged UWTC settled this racial discrimination claim by giving the Senior Vice President of Community Development a pay raise. Sometime after this incident, the Senior Vice President of Community Development was promoted to the role of Executive Vice President of Community Development.

Sherrod further alleged that after UWTC's partner agencies received letters explaining UWTC employees would not receive raises, UWTC board members authorized a pay raise for the CEO. Sherrod expressed concern to the chairman of the board regarding the CEO's pay raise, but the "Chairman of the Board expresse[d] frustration to [Sherrod] for raising the concern."

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After UWTC authorized a pay raise for the CEO, the Executive Vice President of Community Development again complained of racial discrimination and retaliation because she did not receive a raise when she was promoted to Executive Vice President. UWTC and its CEO instructed Sherrod to meet with UWTC's attorney regarding the complaint. According to Sherrod, the CEO said that if the Executive Vice President of Community Development filed a lawsuit, "it would be the kiss of death" for that vice president's employment. Sherrod alleged UWTC's CEO and UWTC's counsel agreed that if another settlement was made with the Executive Vice President of Community Development, termination of that vice president's employment must be part of the settlement. According to Sherrod, she disagreed with that settlement term and expressed her disagreement to the CEO. The Executive Vice President of Community Development did later sue UWTC for racial discrimination and retaliation.

Last, Sherrod alleged that four women complained of mistreatment by UWTC's Finance Manager. When Sherrod attempted to investigate these complaints, the Chief Operating Officer ("COO") told her that he would conduct the investigation himself because the four women were "out to get the finance manager" and because he believed Sherrod did "not have the necessary skills to investigate discrimination or retaliation complaints." On February 21, 2017, sometime after the incident with UWTC's COO, Sherrod complained to UWW that UWTC "retaliated against [Sherrod] for reporting and correcting ERISA violations, for opposing

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race discrimination, for being a witness to race discrimination, and because of her own race.” Sherrod also reported to the Fort Worth division of the Equal Employment Opportunity Commission (“EEOC”) that UWTC was violating discrimination and retaliation laws. Sherrod did not include claims against UWW in this report to the EEOC.

According to Sherrod, she notified UWTC’s CEO of her complaint to the EEOC. She told the CEO that the COO breached the confidentiality of the four complaining women, and Sherrod had contacted the EEOC on their behalf. As alleged by Sherrod, on March 3, 2017, the day after she reported discrimination and retaliation to the EEOC and CEO, UWTC fired her, citing her failure to appear for meetings as the reason. Following Sherrod’s termination, she was sent a severance agreement conditioned on her release of any discrimination or retaliation claims she may have had against UWTC and UWW. Sherrod contacted UWW following her termination and complained about her dismissal. Sherrod alleged that even though UWW told her it would review her termination, a UWW representative later contacted her to explain that UWW would “not be taking any action to help her.”

On September 18, 2017, Sherrod filed suit in the United States District Court for the Northern District of Texas against UWTC and UWW. She claimed UWTC and UWW violated Section 510 of ERISA by “discharging, suspending, expelling, or discriminating against Sherrod because she gave information and was willing to testify about violations of ERISA related to

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employee benefit plans,” and Section 1981 by “discriminating and retaliating against Sherrod” because of her race.

UWW moved for dismissal of Sherrod’s claims under Federal Rule of Civil Procedure 12(b)(6). Sherrod responded by filing an amended complaint, and UWW again moved to dismiss. On April 18, 2018, the district court dismissed Sherrod’s claims against UWW without prejudice, allowing her to file another amended complaint against UWW. Sherrod filed notice informing the district court she would not file another amended complaint against UWW. Instead, she would “stand on the allegations made in her first amended complaint.” On July 12, 2018, the district court dismissed Sherrod’s claims against UWW with prejudice.

Following the dismissal of UWW, Sherrod proceeded to trial against UWTC on her Section 1981 claim. A jury rendered a verdict in her favor. Sherrod and UWTC then settled her Section 510 claim and filed a joint stipulation dismissing all other claims Sherrod may have had against UWTC. The same day that Sherrod and UWTC filed a joint stipulation, Sherrod filed a notice of appeal from the dismissal of her claims against UWW.

DISCUSSION

Our review is *de novo* of a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 385 (5th Cir. 2017). “To survive a

motion to dismiss, the plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). On appeal, we are not concerned with whether the plaintiff was likely to succeed on the claims but only whether the complaint contains any legally cognizable claims that are plausible. *Id.*

Sherrod brought claims against UWW both under ERISA and Section 1981. We examine them in that order.

I. ERISA retaliation claim

“ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.” *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990). Section 510 provides: “It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.” 29 U.S.C. § 1140.

In dismissing Sherrod’s Section 510 claim against UWW, the district court concluded that although the “Fifth Circuit has not spoken directly to the issue of

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whether an employment relationship is required” to bring a case under Section 510, caselaw implied that an employment relationship was the “*sine qua non* of a § 510 claim.” Six months after the district court’s dismissal, we specifically held that Section 510 claims “may be maintained against non-employers.” *Manuel v. Turner Indus. Grp., L.L.C.*, 905 F.3d 859, 871 (5th Cir. 2018). In *Manuel*, though, we had not addressed the circumstances under which a non-employer may be liable under Section 510.

We decline to reach a conclusion on these legal issues concerning the reach of Section 510 liability. Even if UWW were a proper defendant and could be liable under Section 510, and even if Sherrod’s unsolicited internal complaint was a statutorily protected activity,¹ Sherrod still failed to plead a case. UWW did not “discharge, fine, suspend, [or] expel” Sherrod within the meaning of Section 510. There also is not anything in Sherrod’s complaint that sets out any facts explaining

¹ We recognize that the circuits are split over what constitutes statutorily protected activity within the meaning of Section 510. Currently, the Fifth, Seventh, and Ninth Circuits consider unsolicited, informal complaints to be protected activity, and the Second, Third, Fourth and Sixth Circuits have reached contrary conclusions. *Compare Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994), *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 816-17 (7th Cir. 2012), and *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993), with *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (2d Cir. 2005), *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 426-28 (4th Cir. 2003), and *Sexton v. Panel Processing, Inc.*, 754 F.3d 332-42 (6th Cir. 2014). Admittedly, however, *Anderson* does not provide analysis on the topic and is not very clear.

how UWW discriminated against her. Dismissal was proper.

II. Section 1981 claims

Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). Section 1981 reaches “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” § 1981(b). As with the open issues about Section 510 that we just pretermitted, this court has not resolved whether Section 1981 creates liability for a non-contracting party who interferes with making and enforcing a plaintiff’s contract. *See Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997). Yet again, we start with the assumption that the claim Sherrod tries to make is legally cognizable. Even if it is, the claim fails if Sherrod did not allege facts that plausibly support the claim. We thus first examine the factual assertions.

To state a claim of discrimination under Section 1981, “a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute.” *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086 (5th Cir. 1994). Sherrod successfully pled her

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status as a racial minority but failed to allege discriminatory intent. Actually, she alleged the opposite. The facts as stated by Sherrod about her communication with UWW indicate that the organization was sympathetic toward her. Nothing in Sherrod's stated facts indicated that UWW acted with racial animus. Sherrod's assertion that UWW "participated" in or "should have prevented" her termination is not enough to make her claim of discrimination by UWW plausible. She needed to allege facts sufficient to support an inference of discriminatory intent. *Body by Cook*, 869 F.3d at 387 n.1.

Similarly, Sherrod failed to allege facts to support her claim of retaliation under Section 1981. "To assert a successful [Section] 1981 retaliation claim, [a plaintiff] must show (1) that it engaged in activities protected by [Section] 1981; (2) that an adverse action followed; and (3) a causal connection between the protected activities and adverse action." *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020). Even assuming that Sherrod adequately pled the first two elements, she failed to allege facts supporting a causal connection between her protected activity and the adverse action that followed. Sherrod argues that the timeline of events in her case supports an inference that UWW participated in her termination. According to Sherrod, on February 21, 2017, she notified UWW that UWTC was retaliating against her for reporting ERISA violations and for opposing racial discrimination, for being a witness to racial discrimination, and because of her own race, and then on March 3, 2017, she was terminated. Although

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a plaintiff may rely on temporal proximity to support a causal nexus, *see Clark Cnty. Sch. Dist. v. Breeeden*, 532 U.S. 268, 273 (2001), Sherrod alleged no facts supporting an inference that UWW actually did anything that affected her employment.

Sherrod's allegation that UWW could have played a role in her termination is insufficient to make her claim facially plausible. *See Iqbal*, 556 U.S. at 678.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CONEISHA L. SHERROD, §
Plaintiff, §
§
v. § **Civil Action No.**
UNITED WAY OF TARRANT § **4-17-cv-00758-O**
COUNTY, §
§
Defendant. §

CHARGE OF THE COURT

(Filed Feb. 8, 2019)

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

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You should consider all the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict.

Do not let bias, prejudice or sympathy play any part in your deliberations. All persons, including corporations, are equal before the law and must be treated as equals in a court of justice.

The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the

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person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence

Plaintiff Coneisha Sherrod has the burden of proving her case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that Plaintiff Coneisha Sherrod has failed to prove any element of her claim by a preponderance of the evidence, then she may not recover on that claim.

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand,

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any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial.

A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the

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opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.

Instruction 1: Retaliation Claim

Plaintiff Coneisha Sherrod claims that she was retaliated against by Defendant United Way of Tarrant County for engaging in activity protected by Section 1981. Plaintiff Coneisha Sherrod claims that she reported and opposed race discrimination and participated in an investigation of race discrimination. Plaintiff Coneisha Sherrod claims that Defendant United Way of Tarrant County retaliated against her for at least one of those actions by terminating her employment.

Defendant United Way of Tarrant County denies Plaintiff Coneisha Sherrod's claims and contends that it terminated Plaintiff Coneisha Sherrod's

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employment for a legitimate, non-retaliatory reason—insubordination for refusing to meet with her manager.

It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Section 1981. To prove unlawful retaliation, Plaintiff Coneisha Sherrod must prove by a preponderance of the evidence that:

1. Plaintiff Coneisha Sherrod engaged in activity protected by Section 1981. Based on the facts in this case, to prove she engaged in a protected activity, Plaintiff must prove that she reported or opposed racial discrimination, or participated in an investigation of a race discrimination claim;
2. Defendant United Way of Tarrant County terminated Plaintiff Coneisha Sherrod's employment; and
3. Defendant United Way of Tarrant County's decision to terminate Plaintiff Coneisha Sherrod's employment was on account of her protected activity.

You need not find that the only reason for Defendant's decision was Plaintiff Coneisha Sherrod's engagement in the protected activity. But you must find that Defendant's decision to terminate her employment would not have occurred in the absence of—but for—her engagement in the protected activity.

If you disbelieve the reason Defendant has given for its decision, you may, but are not required to, infer

that Defendant would not have decided to terminate her employment but for her engaging in the protected activity.

Question No. 1.

Do you find that Plaintiff Coneisha Sherrod would not have had her employment terminated but for reporting or opposing race discrimination, or participating in an investigation of a race discrimination claim?

Answer “Yes” or “No.”

Yes

If you answer “Yes” to Question No. 1, then proceed to answer Question No. 2. If you answer “No” to Question No. 1, have your foreperson date and sign the verdict in the appropriate location.

Instruction 2: Damages

If you found that Defendant United Way of Tarrant County discharged Plaintiff Coneisha Sherrod for engaging in protected activity, then you must determine whether such conduct has caused Plaintiff Coneisha Sherrod damages and, if so, you must determine the amount of those damages. You should not conclude from the fact that I am instructing you on damages that I have any opinion as to whether Plaintiff Coneisha Sherrod has proved liability.

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Plaintiff Coneisha Sherrod must prove her damages by a preponderance of the evidence. Your award must be based on evidence and not on speculation or guesswork. On the other hand, Plaintiff Coneisha Sherrod need not prove the amount of her losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.

You should consider the following elements of actual damages, and no others:

1. The amount of back pay and benefits Plaintiff Coneisha Sherrod would have earned in her employment with Defendant if her employment had not been terminated from date of adverse employment action to the date of your verdict, minus the amount of earnings and benefits that Plaintiff received from other employment during that time;
2. The amount of other damages sustained by Plaintiff Coneisha Sherrod supported by the evidence, such as pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses.

Back pay includes the amounts the evidence shows Plaintiff Coneisha Sherrod would have earned had she remained an employee of Defendant United Way of Tarrant County. These amounts include wages or salary and such benefits as life and health insurance, stock options, and contributions to retirement. You must subtract the amounts of earnings and benefits Defendant United Way of Tarrant County proves

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by a preponderance of the evidence Plaintiff Coneisha Sherrod received during the period in question.

There is no exact standard for determining actual damages. You are to determine an amount that will fairly compensate Plaintiff Coneisha Sherrod for the harm she has sustained. Do not include as actual damages interest on wages or benefits.

In addition to actual damages, you may consider whether to award punitive damages. Punitive damages are damages designed to punish a defendant and to deter similar conduct in the future.

You may award punitive damages if Plaintiff Coneisha Sherrod proves by a preponderance of the evidence that:

1. The individual who engaged in the retaliatory act or practice was acting in a managerial capacity;
2. He engaged in the retaliatory act or practice while acting in the scope of his employment; and
3. He acted with malice or reckless indifference to Plaintiff Coneisha Sherrod's federally protected right to be free from retaliation.

If Plaintiff Coneisha Sherrod has proved these facts, then you may award punitive damages, unless Defendant United Way of Tarrant County proves by a preponderance of the evidence that the conduct or act

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was contrary to its good-faith efforts to prevent discrimination or retaliation in the workplace.

In determining whether an employee of Defendant United Way of Tarrant County was a supervisor or manager for Defendant United Way of Tarrant County, you should consider the type of authority the employee had over Plaintiff Coneisha Sherrod and the type of authority for employment decisions Defendant United Way of Tarrant County authorized the employee to make.

An action is in reckless indifference to Plaintiff Coneisha Sherrod's federally protected rights if it was taken in the face of a perceived risk that the conduct would violate federal law. Plaintiff Coneisha Sherrod is not required to show egregious or outrageous retaliation to recover punitive damages. Proof that Defendant United Way of Tarrant County engaged in intentional retaliation, however, is not enough in itself to justify an award of punitive damages.

In determining whether Defendant United Way of Tarrant County made good-faith effort to prevent retaliation in the workplace, you may consider whether it adopted anti-retaliation policies, whether it educated its employees on the federal anti-retaliation laws, how it responded to Plaintiffs complaint of retaliation, and how it responded to other complaints of retaliation.

If you find that Defendant United Way of Tarrant County acted with malice or reckless indifference to Plaintiff Coneisha Sherrod's rights and did not make a

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good-faith effort to comply with the law, then in addition to any other damages you find Plaintiff Coneisha Sherrod is entitled to receive, you may, but are not required to, award Plaintiff Coneisha Sherrod an additional amount as punitive damages for the purposes of punishing the Defendant United Way of Tarrant County for engaging in such wrongful conduct and deterring Defendant United Way of Tarrant County and others from engaging in such conduct in the future. You should presume that Plaintiff Coneisha Sherrod has been made whole for her injuries by any actual damages you have awarded.

If you decide to award punitive damages, you should consider the following in deciding the amount:

1. How reprehensible Defendant United Way of Tarrant County's conduct was. You may consider whether the harm Plaintiff Coneisha Sherrod suffered was physical or economic or both; whether there was violence, intentional malice, or reckless disregard for human health or safety; whether Defendant United Way of Tarrant County's conduct that harmed Plaintiff Coneisha Sherrod also posed a risk of harm to others; whether there was any repetition of the wrongful conduct or there was past conduct of the same sort that harmed Plaintiff Coneisha Sherrod.
2. How much harm Defendant United Way of Tarrant County's wrongful conduct caused Plaintiff Coneisha Sherrod and could cause her in the future.

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3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering Defendant United Way of Tarrant County's financial condition, to punish Defendant United Way of Tarrant County for its conduct toward Plaintiff Coneisha Sherrod and to deter Defendant United Way of Tarrant County and others from similar wrongful conduct in the future.
4. The amount of fines and civil penalties applicable to similar conduct.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused Plaintiff.

Question No. 2

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Coneisha Sherrod for the damages, if any, you have found Defendant United Way of Tarrant County caused her?

Answer in dollars and cents for the following items and none other:

Past and future pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

\$ 300,000.00

Wages and benefits from the date of termination to today.

\$ 131,139.00

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If you answered Question No. 2 with a sum of money greater than zero dollars, then answer Question No. 3. If not, the foreperson should date and sign the verdict below.

Question No. 3

Do you find that Plaintiff Coneisha Sherrod should be awarded punitive damages?

Answer “Yes” or “No.”

No

If you answered “Yes” to Question No. 3, then answer Question No. 4. If not, the foreperson should date and sign the verdict below.

Question No. 4

What sum of money should be assessed against Defendant United Way of Tarrant County as punitive damages?

Answer in dollars and cents:

\$_____

July Deliberations

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your

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mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts. When you go into the jury room to deliberate, you may take with you a copy of this charge, and the exhibits that I have admitted into evidence. You must select a presiding juror to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your presiding juror must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the presiding juror should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

/s/ [Illegible]

Presiding Judge

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2/7/19

Date

Jury Certification

The foregoing answers are the unanimous answers of the jury.



Foreperson

2-8-19

Date

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

**CONEISHA L. SHERROD, §
Plaintiff, §
v. § **Civil Action No.**
**UNITED WAY WORLDWIDE, § 4-17-cv-0758-O
and UNITED WAY OF §
TARRANT COUNTY, §
Defendants.** §**

ORDER OF DISMISSAL WITH PREJUDICE

(Filed Jul. 12, 2018)

In the Court's April 18, 2018 Order, Plaintiff's claims against United Way Worldwide ("UWW") were dismissed without prejudice, giving Plaintiff an option to file an amended complaint. Plaintiff filed a notion of decision not to amend complaint (ECF No. 27), filed May 2, 2018. Therefore,

**IT IS HEREBY ORDERED, ADJUDGED, AND
DECREEED** that all of Plaintiff's claims against Defendant UWW in the above-styled and numbered cause are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, ADJUDGED, AND DECREED
that all costs, expenses, and attorney fees

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SO ORDERED on this **12th** day of **July, 2018**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

CONEISHA L. SHERROD,	§
Plaintiff,	§
	§
v.	§
	§
UNITED WAY WORLD- WIDE and UNITED WAY OF TARRANT COUNTY,	§ Civil Action § No. 4:17-cv-00758-O
Defendants.	§
	§
	§
	§

ORDER

(Filed Apr. 18, 2018)

Before the Court are Defendant United Way Worldwide's ("UWW") Motion to Dismiss¹ Plaintiff's First Amended Complaint and Brief in Support (ECF No. 20), filed November 30, 2017; Plaintiff Coneisha L. Sherrod's Response (ECF No. 23), filed December 21, 2017; and Defendant's Reply (ECF No. 24), filed January 4, 2018. Having considered the motion, related briefing, and applicable law, the Court finds that Defendant's Motion to Dismiss (ECF No. 20) should be and is hereby **GRANTED**.

¹ Defendant United Way of Tarrant County is not a party to this motion.

I. BACKGROUND

Plaintiff brings this case under the Civil Rights Act of 1866 and the Employee Retirement Income Security Act (“ERISA”). 1st Am. Compl. ¶ 4, ECF No. 15. Plaintiff, an African-American woman, was the Vice-President of Human Resources for United Way of Tarrant County (“UWTC”), a member organization of UWW. *Id.* ¶ 79. UWW controls its member organizations through the licensing of its brand, which includes membership requirements, reporting, oversight, and training. *Id.* ¶ 85. UWW requires its member organizations to maintain “the highest standards of excellence and accountability, including the prudent use of finances, and accurate and honest disclosures of information.” *Id.* ¶ 90. If a member organization violates any of its requirements, UWW can act by removing the head of the organization, removing the membership of the board of the organization, or terminating the license of the brand. *Id.* ¶ 91. If a member organization violates the law, UWW will first ask the organization to act on its own to correct the problem before intervening. *Id.* ¶ 106.

Plaintiff alleges three separate episodes that led up to her firing and form the basis of her claims. The first episode relates to UWTC’s management of its employee benefits under ERISA. *Id.* ¶¶ 16, 17–18, 21. In the course of her duties at UWTC, Plaintiff alleges she discovered discrepancies, violations of federal reporting laws, and mismanagement of the benefits established by UWTC. *Id.* ¶ 24. Plaintiff related this information to UWTC and its Chief Executive Officer

(“CEO”), who were frustrated with Plaintiff, but told her they would look into the problem. *Id.* ¶ 20.

The second episode relates to UWTC’s early selection of a CEO candidate to replace the current CEO upon his retirement. When UWTC hired Plaintiff, the current CEO told Plaintiff that he would retire in four years’ time and that UWTC had already chosen his replacement—the current Senior Vice-President of Resource Development and Chief Development Officer (“CDO”). *Id.* ¶ 23. Sometime after this conversation, UWTC’s current Senior Vice-President of Community Development (“VP of Community Development”)—who is an African-American woman and was unaware that UWTC had already chosen a replacement CEO—told Plaintiff that she was interested in the CEO position. *Id.* ¶ 28. Plaintiff then spoke with the then-current CEO about her concern that UWTC was not following proper protocols for selecting his replacement and that UWTC should follow those protocols in order to avoid unlawful discrimination. *Id.* ¶ 30. After this conversation, UWTC created a planning committee to select the next CEO, but UWTC did not include Plaintiff in the creation or staffing of this committee. *Id.* ¶ 32.

In response, the VP of Community Development brought a complaint against UWTC for racial discrimination. *Id.* ¶ 34. Plaintiff began to investigate the complaint, but UWTC, its Chairman of the Board, and its CEO prevented her from fully participating in the investigation. *Id.* ¶ 35. Eventually, the presumptive CEO nominee resigned and UWTC settled the complaint by

increasing the VP of Community Development's pay and promoting her to Executive VP. *Id.* ¶¶ 36–37. UWTC then hired a white male as the new Chief Operating Officer ("COO") and Chief Development Officer ("CDO") and told him that he will be CEO when the current CEO retires. *Id.* ¶¶ 42–43.

Additionally, when the Chairman of the Board gave the current CEO a raise, Plaintiff expressed concern to the Chairman that the CEO was receiving a raise when employees of UWTC's partner agencies were not. *Id.* ¶ 45. The Chairman then expressed frustration to Plaintiff for voicing her concern and approved the CEO's raise. *Id.* ¶¶ 46–47. The VP of Community Development, who did not receive a raise when she was promoted to Executive VP,² complained again to the UWTC about race discrimination because she was not told about the opportunity given to the white male, and she was not considered for the CEO position. *Id.* ¶ 48. UWTC and the current CEO then asked Plaintiff to meet with UWTC's attorneys to address the now-Executive VP's new complaint. *Id.* ¶ 49.

The third and final episode occurred just before Plaintiff's termination. Around that time, four women brought complaints to Plaintiff that the UWTC Finance Manager mistreated them, but when Plaintiff

² The settlement for the VP of Community Development's first complaint included an increase in pay but the complaint did not make clear if that counted as a raise for the promotion. The complaint merely states that the VP of Community Development brought a complaint because she did not receive a raise along with her promotion. 1st Am. Compl. ¶ 48, ECF No. 15.

attempted to address these complaints, the COO took over the investigation, telling Plaintiff that she did not have the necessary skills to investigate discrimination or retaliation complaints. *Id.* ¶¶ 61–63. Plaintiff then filed a complaint with UWW that UWTC was violating discrimination and retaliation laws against her and others and contacted the Fort Worth division of the EEOC. *Id.* ¶¶ 64, 66. The day after, UWTC informed Plaintiff that she had breached the confidentiality of the women’s complaints. *Id.* ¶ 70. UWTC claims it terminated Plaintiff’s employment for this violation and for missing meetings.

On February 21, 2017, Plaintiff informed UWW’s Director of Membership Accountability that UWTC retaliated against her for reporting and correcting ERISA violations, for opposing race discrimination, for being a witness to race discrimination, and because of her own race. *Id.* ¶ 118. UWTC terminated Plaintiff on March 3, 2017 and sent her a severance agreement on March 13, 2017, conditioned on release of her discrimination and retaliation claims, including UWW as an affiliate of UWTC. *Id.* ¶¶ 121–22. UWW informed Plaintiff on March 16, 2017 that it is reviewing her termination, Plaintiff told her story again on May 23, 2017 to UWW, who told her that it will investigate further. *Id.* ¶¶ 123–25. Later, the Director called Plaintiff back and informed Plaintiff that UWW would not assist her. *Id.* ¶ 74. Plaintiff claims that UWW was aware of the Executive VP’s complaints against UWTC and the UWTC’s exclusion of four African-American executives. *Id.* ¶ 114.

On September 18, 2017, Plaintiff filed suit against UWTC and UWW for violations of 42 U.S.C. § 1981 (“§ 1981”) for racial discrimination that prevented her from making contracts and retaliation for reporting it. She also brought claims under ERISA § 510 (“§ 510”) against both Defendants for retaliation after bringing forward her concerns about UWTC’s employee benefits plans. UWW moved to dismiss Plaintiff’s ERISA and § 1981 claims against it under Federal Rule of Civil Procedure 12(b)(6), arguing that it is not liable to Plaintiff because Plaintiff did not establish that she had an employment relationship with UWW.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a claim for relief contain “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 does not require detailed factual allegations, but “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). If a plaintiff fails to satisfy Rule 8(a), the defendant may file a motion to dismiss the plaintiff’s claims under Federal Rule of Civil Procedure 12(b)(6) for “failure to state a claim upon which relief may be granted.” FED. R. CIV. P. 12(b)(6).

To defeat a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*,

550 U.S. at 570. “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.” *Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court need not accept legal conclusions as true and will dismiss a complaint unless it states a plausible claim for relief. *Iqbal*, 556 U.S. at 678–79. When there are well-pleaded factual allegations, the Court assumes their veracity and determines whether they plausibly give rise to an entitlement to relief. *Id.*

“Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citations omitted). A court may also consider documents that a defendant attaches to a

motion to dismiss if the plaintiff refers to them in the complaint and they are central to the plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

III. ANALYSIS

A ERISA § 510

Defendant first argues that the Court must dismiss Plaintiff's § 510 claim because Plaintiff failed to allege an employment relationship. Def.'s Mot. Dismiss 9, ECF No. 20. Plaintiff responds that she may bring a § 510 action against "persons other than the employer of the person harmed." Pl.'s Resp. Mot. Dismiss 5, ECF No. 23.³

Section 510 of ERISA makes it unlawful for any "person" to "discharge [or] discriminate" against a participant or beneficiary for exercising any right to which they are entitled under ERISA or for giving information or testifying or being about to testify in any proceeding related to ERISA. 29 U.S.C.A. § 1140. To state a valid § 510 claim, an employee must allege: "(1) prohibited (adverse) employer action (2) taken for the purpose of interfering with the attainment of (3) any right to which the employee is entitled." *Bodine v. Employers Cas. Co.*, 352 F.3d 245, 250 (5th Cir. 2003); *see*

³ At no point does UWW admit to being Plaintiff's employer. Nor does Plaintiff allege facts that she was employed by UWW directly. Instead, Plaintiff bases her claim on UWW's knowing failure to respond to the bad acts of its member organization—UWTC.

Van Zant v. Todd Shipyards Corp., 847 F. Supp. 2d 69, 72 (S.D. Tex. 1994). While the Fifth Circuit has not spoken directly to the issue of whether an employment relationship is required as a preliminary step before bringing a case, *Bodine* does strongly imply that such a relationship is a *sine qua non* of a § 510 claim. *Bodine*, 352 F.3d at 250; *see also Manuel v. Turner Indus. Grp., LLC*, 2016 WL 5349446, at *2 (M.D. La. Sept. 23, 2016) (granting a motion to dismiss for failure to establish an employer relationship with defendant).

In support of her claim that a direct employment relationship is not necessary to state a claim under § 510, Plaintiff cites three out-of-circuit cases dealing with ERISA, each of which involve a plaintiff suing a defendant who was an employer or who, at a minimum, directly interfered with the plaintiff's employment relationship. *See Simons v. Midwest Tel. Sales & Service*, 433 F. Supp.2d 1007, 1013 (D. Minn. 2006) (concerning a plaintiff's claim against the company president); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp.2d 246, 257 (W.D. Va. 2001) (concerning a plaintiff's claim against a part owner and general manager); *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (concerning a plaintiff's claim against a union that demanded the employer dismiss a member under a union-shop agreement); *McCarthy v. Commerce Grp., Inc.*, 831 F. Supp.2d 459, 492 (D. Mass. 2011) (dismissing a claim against a parent company when plaintiff failed to prove that the parent company directly interfered with her employment). None of these cases contemplate a § 510 claim against a defendant who was neither an employer nor

a parent company, and who did not directly interfere with the employee relationship.

Plaintiff makes no allegations that UWW controlled the employment decisions made by UWTC, or that UWW had any part in the decision to let Plaintiff go—merely that UWW was aware and did nothing. Plaintiff did not allege any facts that would show “unscrupulous conduct or intentional act[s]” taken by UWW, taken with the purpose of interfering with Plaintiff’s rights under § 510. *Bodine*, 352 F.3d at 250 (citing *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (holding that a violation of § 510 requires “unscrupulous conduct or intentional act[s]”)). For these reasons, the Court **GRANTS** Defendant’s motion to dismiss Plaintiff’s § 510 claims against it.

B. Civil Rights Act of 1866 (42 U.S.C. § 1981)

Plaintiff brings a discrimination and retaliation claim against UWW under § 1981. 1st Am. Compl. 10, ECF No. 15. UWW argues that Plaintiff failed to state a claim under § 1981 because: (1) Plaintiff failed to allege an employment relationship; and (2) failed to allege UWW’s control over, or involvement in, the acts that led to Plaintiff’s termination. Def.’s Mot. Dismiss 21, ECF No. 20. Plaintiff responds that while the Supreme Court held that claims under § 1981 require an employment relationship, the Supreme Court left open the possibility that a third party could be liable under § 1981 for discrimination and retaliation if it could be shown that it interfered with the plaintiff’s

employment relationship. Pl.'s Resp. Mot. Dismiss 15, ECF No. 23 (referencing *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006)).

Section 1981 of the Civil Rights Act of 1866 protects certain rights of all persons within the jurisdiction of the United States. 42 U.S.C. § 1981. To establish a claim under Section 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the racial discrimination concerns one or more of the activities enumerated in the statute. *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086 (5th Cir. 1994). These rights include the ability “to make and enforce contracts, to sue, be parties, give evidence . . .” and all other rights enjoyed by citizens of the United States. 42 U.S.C. § 1981. Plaintiff is an African-American woman, satisfying the first element. Moreover, Plaintiff alleges that UWW committed racial discrimination that interfered with Plaintiff’s right to “make and enforce contracts.” 1st Am. Compl. ¶ 129, ECF No. 15. The Court will therefore consider whether these allegations are adequately pled.

In order to state a claim for intentional discrimination concerning the right to make or enforce a contract under § 1981, “plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else’s.” *Domino's Pizza, Inc.*, 546 U.S. at 480. Plaintiff must also plead facts of specific instances in which UWW either refused to enter into a specific contract or interfered

with an existing contract. *Grambling Univ. Nat'l Alumni Ass'n v. Bd. of Supervisors*, 286 F. App'x 864, 869–70 (5th Cir. 2008). Here, Plaintiff alleges that UWW has influence over its members, but Plaintiff alleges no facts that show that UWW took intentional actions of a discriminatory nature to interfere with Plaintiff's right to make or enforce her contract with UWTC. *See* Def.'s Mot. Dismiss 24, ECF No. 20; *see also London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981) (holding adverse employment action with intent to discriminate on racial grounds establishes a valid § 1981 claim). Plaintiff does not allege any facts that show intentional actions taken by UWW to interfere with her employment contract.

While Plaintiff believes UWW is liable for what she believes is her wrongful termination, courts are “not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief.” *Elliott v. Grp. Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983). Accordingly, this Court **GRANTS** UWW's motion to dismiss Plaintiff's claim for failure to plead sufficient facts to establish a § 1981 claim.

IV. CONCLUSION

For the reasons stated above, UWW's Motion to Dismiss (ECF No. 21) should be and is hereby **GRANTED**. This Court therefore **ORDERS** that Plaintiff's claims against UWW be **DISMISSED** **without prejudice**. If Plaintiff wishes to file a second

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amended complaint curing these deficiencies, she may do so **on or before May 2, 2018**, or her claims against UWW will be **DISMISSED with prejudice**.

SO ORDERED on this **18th day of April, 2018**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CONEISHA L. SHERROD,	§
<i>Plaintiff,</i>	§
vs.	§ Civil Action
UNITED WAY WORLD-	§ 4:17:cv-00758-O
WIDE, and UNITED WAY	§ JURY DEMANDED
OF TARRANT COUNTY,	§
<i>Defendants.</i>	§

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE REED O'CONNOR:

Plaintiff Coneisha L. Sherrod presents her First Amended Complaint for unlawful discrimination and retaliation in violation of 42 U.S.C. § 1981 and 29 U.S.C. §§ 1132, 1140.

PARTIES

1. Sherrod is a citizen and resident of the United States, residing in Tarrant County, Texas.
2. United Way Worldwide is a New York corporation.
3. United Way of Tarrant County is a Texas corporation.

JURISDICTION AND VENUE

4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(a)(4) and 28 U.S.C. § 1331. This is a retaliation and discrimination suit authorized and instituted pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981 (“Section 1981”) and the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1132, 1140.

BACKGROUND FACTS

5. United Way Worldwide and United Way of Tarrant County retaliated against Sherrod because she gave information and was willing to testify about matters involving benefits and administration of benefits covered by ERISA and because Sherrod opposed Defendants denying persons the “right to make” contracts and denying the same “security of persons and property as is enjoyed by white citizens” in the United States as required by federal law. *See* 42 U.S.C. § 1981.

6. United Way Worldwide and its member United Way organizations have a mission statement that says, “United Way fights for the health, education, and financial stability of every person in every community.”

7. United Way Worldwide and its member United Way organizations distribute money to partner organizations, such as the Catholic Charities, Meals on Wheels, the Women’s Center, and Salvation Army.

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8. United Way World Wide provides guidelines for the operations of local member organizations, such as United Way of Tarrant County.

9. United Way Worldwide monitors and oversees the operations of the member organizations, including United Way of Tarrant County.

10. United Way's brand is interdependent and connected with United Way Worldwide and its member organizations across the country.

11. United Way donors do not generally differentiate between United Way Worldwide and its member United Way organizations.

12. United Way Worldwide can call for the resignation of Board Members of United Way organizations, including United Way of Tarrant County.

13. United Way Worldwide will call for the resignation of Board Members of organizations like United Way of Tarrant County if there is a risk that people in Tarrant County are not getting the services they need because the management team and the organization itself has lost the trust and confidence of the community.

14. United Way of Tarrant County has about 40 board members who are almost all white.

15. United Way of Tarrant County discontinues eligibility for its pension benefits.

16. United Way of Tarrant County sets up a special trust fund pursuant to ERISA 457(b), called a

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Rabbi Trust, for executives to defer the taxability of compensation.

17. United Way of Tarrant County also sets up and sponsors an ERISA 403(b) plan to allow all employees to save and invest money in tax deferred accounts.

18. An ERISA 403(b) plan is similar to a 401k plan but it is for non-profit organizations.

19. United Way of Tarrant County is an administrator of the employees' 403(b) plan.

20. United Way of Tarrant County selects Mutual of America Life Insurance Company to invest the employees' money in the 403(b) plan.

21. United Way of Tarrant County hires a new Vice-President of Human Resources after the previous one retires.

22. United Way of Tarrant County's Chief Executive Officer (CEO) tells the new VP of HR that he is retiring in about four years and that his replacement has already been selected.

23. United Way of Tarrant County's CEO tells the VP of HR that his replacement will be the person who was the Senior Vice-President of Resource Development and Chief Development Officer at the time.

24. United Way of Tarrant County and its CEO receive information from United Way of Tarrant County's VP of HR that she has discovered, because of an inquiry by an executive of United Way of Tarrant

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County, that United Way of Tarrant County has failed to pay all of the benefits to employees as required under the special trust fund; and has discovered from her own audit that the 403(b) plan has failed to comply with federal reporting requirements.

25. United Way of Tarrant County and its CEO express frustration with the Vice-President of HR for notifying them of the failure to pay benefits and the failure to follow the reporting requirements.

26. United Way of Tarrant County's CEO hears the VP of HR say that the investments of the employees' money in the 403(b) plan are not being managed well by Mutual of America Life Insurance Company.

27. United Way of Tarrant County's CEO tells the VP of HR that a comparison of Mutual of America Life Insurance Company with other benefit companies will be considered later.

28. United Way of Tarrant County's Senior Vice President of Community Development expresses interest in the CEO position to the VP of HR.

29. United Way of Tarrant County's CEO tells the VP of HR that the decision to replace him with the Senior VP of Resource Development after he retires has not been announced to the employees and the position has not been posted for others to apply.

30. United Way of Tarrant County's CEO hears the VP of HR express concern that proper protocols for selecting his replacement need to be followed to avoid a violation of the discrimination laws.

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31. United Way of Tarrant County's CEO hears the VP of HR say that the qualifications listed on the resume of the Senior VP of Community Development, who is African-American, are clearly better than the qualifications listed on the resume of the Senior VP of Resource Development, who is white.

32. United Way of Tarrant County creates a planning committee of Board Members to select a successor CEO and eliminates the VP of HR from the selection process.

33. United Way of Tarrant County receives a complaint from the Senior VP of Community Development that United Way is discriminating against her based on her race.

34. United Way of Tarrant County's VP of HR begins to investigate the race discrimination complaint and finds some merit to the claim.

35. United Way of Tarrant County, its Chairmen of the Board, and its CEO exclude the VP of HR, who is African-American, from continuing to fully participate in the investigation of the complaint.

36. United Way of Tarrant County's Senior VP of Resource Development resigns her employment.

37. United Way of Tarrant County settles the complaint by increasing the Senior VP of Community Development's pay.

38. United Way of Tarrant County promotes the Senior VP of Community Development to Executive

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Vice-President of Community Development and Chief Impact Officer.

39. United Way of Tarrant County has over 40 partners, such as the Catholic Charities, Meals on Wheels, and the Salvation Army, that receive money from United Way of Tarrant County.

40. United Way of Tarrant County tells its partners that it will be giving less money to them because the level of donations is down.

41. United Way of Tarrant County's CEO sends a letter to the partners that employees at United Way of Tarrant County will not be receiving raises because the donations are lower.

42. United Way of Tarrant County hires a white male as Chief Operating Officer and Chief Development Officer.

43. United Way of Tarrant County, its Chairman of the Board, and its CEO tell the white male, at the time he is hired, that he will be the CEO when the current CEO retires.

44. United Way of Tarrant County's Chairman of the Board instructs that the current CEO is to receive a raise.

45. United Way of Tarrant County's Chairman of the Board hears the VP of HR tell him she is concerned about the raise because the CEO sent letters to the partner agencies that employees will not be receiving raises at this time.

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46. United Way of Tarrant County's Chairman of the Board expresses frustration to the VP of HR for raising the concern.

47. United Way of Tarrant County's Board Members approve the raise for the current CEO.

48. United Way of Tarrant County receives another complaint by the Executive VP of Community Development about race discrimination and retaliation because she did not receive a raise when she was promoted to Executive VP, because she was not told about the opportunity given to the white male, and because she was not considered for the CEO position.

49. United Way of Tarrant County and its current CEO ask the VP of HR to meet with United Way of Tarrant County's attorneys concerning the new complaints by the Executive VP of Community Development.

50. United Way of Tarrant County's CEO says that if the Executive VP of Community Development brings litigation that it would be the kiss of death of her employment with United Way.

51. United Way of Tarrant County's CEO and its attorneys say that if another settlement is made with the Executive VP of Community Development, the termination of her employment must be a part of the settlement.

52. United Way of Tarrant County's CEO hears the VP of HR say that they know that the promotion of the Executive VP was not part of the settlement and

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that United Way of Tarrant County should not make that legal argument against the Executive VP.

53. United Way of Tarrant County's Board elects a new Chairman of the Board.

54. United Way of Tarrant County's CEO hears the VP of HR express concern again about Mutual of America Life Insurance Company.

55. United Way of Tarrant County's CEO agrees to consider whether another company could invest the employees' money other than Mutual of America Life Insurance Company.

56. United Way of Tarrant County is sued by the Executive VP for race discrimination and retaliation.

57. United Way of Tarrant County's Compensation Committee schedules a meeting.

58. United Way of Tarrant County's CEO tells the VP of HR before she goes into the meeting that the newly elected Chairman of the Board can be abrasive and to just take it.

59. United Way of Tarrant County's newly elected Chairman of the Board tells the VP of HR in front of the Compensation Committee and the past Chairman of the Board that someone more qualified and experienced was needed in the VP of HR position.

60. United Way of Tarrant County agrees that Mutual of America Life Insurance Company needs to be replaced with another company.

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61. United Way of Tarrant County's VP of HR receives complaints from four women complaining about the Finance Manager's treatment of them.

62. United Way of Tarrant County's COO tells the VP of HR that she does not have necessary skills to investigate discrimination or retaliation complaints.

63. United Way of Tarrant County's COO tells the VP of HR that the COO himself will conduct the investigation of the complaints because he said that the complainers were out to get the finance manager.

64. United Way Worldwide receives a complaint from the VP of HR that United Way of Tarrant County is violating discrimination and retaliation laws against her and others.

65. United Way of Tarrant County's assistant to the COO schedules a meeting between the COO and the VP of HR.

66. United Way of Tarrant County's VP of HR contacts the Fort Worth division of the EEOC to report discrimination and retaliation.

67. United Way of Tarrant County's CEO hears the VP of HR say that the COO has breached the confidentiality of the employees' complaints and that she has contacted the Fort Worth division of the EEOC.

68. United Way of Tarrant County's CEO tells the VP of HR that he will discuss the matter with the COO.

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69. United Way of Tarrant County's assistant to the COO sends an email to the VP of HR cancelling the meeting.

70. United Way of Tarrant County terminates the employment of the VP of HR in an email from the COO the day after she reported the discrimination and retaliation to the EEOC and the CEO.

71. United Way of Tarrant County says that the VP of HR is being terminated for not appearing for meetings.

72. United Way Worldwide's Director of Membership Accountability hears the former VP of HR talk about her treatment, the termination, and the cancelling of the meetings.

73. United Way Worldwide's Director of Membership Accountability tells the former VP of HR that she was not being treated properly, that she should be protected as a whistleblower, and that United Way Worldwide would investigate the matter.

74. United Way Worldwide's Director of Membership Accountability gets the former VP of HR's permission to tell the attorneys for United Way Worldwide about what has been happening.

75. United Way Worldwide's Director of Membership Accountability calls the former VP of HR back and tells her in a trembling voice that United Way Worldwide will not help the VP of HR.

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76. United Way of Tarrant County settles with the Executive VP who agrees to resign.

77. United Way of Tarrant County's CEO retires.

78. United Way of Tarrant County makes the COO the new CEO.

79. United Way of Tarrant County's VP of HR is Sherrod.

ADDITIONAL ALLEGATIONS
ABOUT UNITED WAY WORLDWIDE

80. The allegations in this section are made to address issues raised in United Way Worldwide's motion to dismiss. (ECF No. 11).

United Way Worldwide Control and Authority

81. United Way Worldwide says that it "is engaged in nearly 1,800 communities across more than 40 countries and territories worldwide."

82. United Way Worldwide says that "United Way" generates billions of dollars annually in total revenue, referring to United Way Worldwide and all its member organizations.

83. United Way Worldwide says that its standards bring member organizations into line.

84. United Way Worldwide said in 2004 that under its new standards it "Disaffiliated 50 United Ways."

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85. United Way Worldwide controls its member organizations, such as United Way of Tarrant County, by the licensing of its brand, its membership requirements, reporting, oversight, and training.

86. United Way Worldwide's bylaws state that each member organization, such as United Way of Tarrant County, "shall be those United Way organizations admitted into membership which meet the eligibility standards and requirements as set forth in Article VI of these Bylaws."

87. Article VI of United Way Worldwide's Bylaws include as requirements for member organizations in the U.S.A:

- (a) be recognized as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code as well as under corresponding provisions of other applicable state, local, or foreign laws or regulations and file IRS Form 990 annually in a timely manner. Annually, all Metro 1 and 2 members will submit their entire IRS Form 990 to United Way Worldwide.
- (b) comply with all other legal local, state, and federal operating and reporting requirements (e.g., non-discrimination);
- (c) have an active, responsible, and voluntary governing body, which ensures effective governance over the policies and financial resources of the organization;
- (d) adhere to a locally-developed and adopted statement to ensure volunteers and

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staff broadly reflect the diversity of the community it serves;

- (e) represent itself as a United Way in accordance with all United Way Worldwide trademark standards and requirements, including those contained in the licensing agreement;
- (f) provide financial support to United Way Worldwide in accordance with the agreed-upon membership investment formula;
- (g) adhere to a locally-developed and adopted code of ethics for volunteers and staff, which includes provisions for ethical management, publicity, fund-raising practices, and full and fair disclosure. All Metro 1 and 2 members will submit a copy of their current code of ethics to United Way Worldwide;
- (h) have an annual audit conducted by an independent certified public accountant whose examination complies with generally accepted auditing standards and generally accepted accounting principles. Exception: organizations with annual revenue totaling less than the audit threshold approved by the U.S.A. National Board and Board of Trustees may have their financial statements annually reviewed rather than audited by an independent public accountant provided they also conduct an independent internal controls assessment at least once every three years. Annually, all members with annual revenue in excess of a threshold approved by the U.S.A. National Board and Board of Trustees will

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submit audited financial statements to United Way Worldwide;

(i) conduct and submit to United Way Worldwide every three years a community driven self-assessment of their community impact work, financial management, and organizational governance and decision making;

(j) annually submit Database II and Amounts Raised Card to United Way Worldwide;

(k) biannually submit Income and Expense Survey to United Way Worldwide;

(l) adhere to standard accounting guidelines contained in Database II Survey for reporting campaign revenue;

(m) adhere to the following cost deduction standards:

a) charge only actual expenses against a donor's pledge

b) will not deduct fundraising or processing fees from designated gifts originating by or from another United Way organization.

88. A membership requirement particularly related to this case is section (b) requiring that a member organization, such as United Way of Tarrant County, "comply with all other legal local, state, and federal operating and reporting requirements (e.g., non-discrimination)."

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89. A United Way Worldwide code of ethic requirement for member organizations is inclusiveness: involving “every segment of the community in every aspect of our work, . . . act in ways that respect the dignity, uniqueness, and intrinsic worth of every person, . . . and “built from the rich diversity and gifts of all people in all systems.”

90. United Way Worldwide also requires member organizations, such as United Way of Tarrant County, to act with integrity and accountability, maintaining “the highest standards of excellence and accountability, including the prudent use of finances, and accurate and honest disclosures of information.”

91. When member organizations such as United Way of Tarrant County violate the law, such as law governing pension benefits or discrimination, or violate codes of ethics for inclusiveness, integrity, and accountability, United Way Worldwide can remove the head of the organization, remove the membership of the organization, and terminate the license of the brand.

92. United Way Worldwide owns registered trademarks related to the United Way brand.

93. Member organizations must enter into a license agreement for the use of the United Way brand.

94. The license is not assignable and will terminate if membership is terminated or a breach is not cured within sixty days of notice.

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95. Upon termination of the license, a member organization such as United Way of Tarrant County is prohibited from using the brand, United Way.

96. United Way Worldwide trains board members, executives, and employees in the United Way I.

97. All employees of United Way member organizations are part of United Way Worldwide's online network for information and training.

98. United Way Worldwide holds annual and more frequent conferences to instruct and provide training in doing a United Way job or assignment.

99. United Way Worldwide regularly visits member organizations such as United Way of Tarrant County to provide training and instruction.

100. Employees of member organizations, such as United Way of Tarrant County, are encouraged to participate in United Way Worldwide committees.

101. United Way Worldwide maintains oversight of its member organizations through annual certifications and reporting required by United Way Worldwide of its member organizations, including dues payments.

102. United Way Worldwide requires member organizations, such as United Way of Tarrant County, to submit to United Way Worldwide annual Membership Certifications affirming its obligation "to comply with the membership eligibility criteria contained in United Way Worldwide bylaws, and to adhere to the rules and guidelines for use of United Way Worldwide collective

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and service membership marks as contained in the Member Trademark License Agreement.”

103. United Way Worldwide’s annual Membership Certifications also includes in the affirmation, “Failure to comply with United Way Worldwide membership eligibility criteria, including payment of membership investment, or to adhere to trademark policies, may result in termination of United Way Worldwide membership status.”

104. United Way Worldwide also maintains oversight of its member organizations by an ethics or eligibility committee that monitors and investigates member organizations’ compliance with the eligibility criteria.

105. United Way Worldwide also maintains oversight of its member organizations by its Director of Membership Accountability.

106. United Way Worldwide says that when a member organization violates the law, it will first ask the organization to act on its own to correct the problem.

107. United Way Worldwide says that if a member organization does not correct itself in a timely fashion, it is very clear that the first responsibility of United Way Worldwide is to protect the United Way brand.

108. United Way Worldwide says that it wants to send a message to every member organization that it

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will not allow them to participate in violations of the law.

109. United Way Worldwide says that it will take aggressive action against its member organizations when necessary.

110. United Way Worldwide's president has publicly stated that he knows and understands institutional racism and that he likely has benefited from white privilege.

111. United Way Worldwide removed the head of a United Way member organization in Washington, D.C., known as The United Way of the National Capital Area, that was caught up "in accusations of financial mismanagement, excessive overhead expenses and management compensation, and efforts to hamper board oversight."

112. Commenting on United Way Worldwide's removal of the head of a member organization that was violating the law, the president and chief executive of another member organization, United Way of Metropolitan Nashville stated publicly, "Donors do not differentiate between the United Ways." If a member organization violates the law, it is "going to hurt everyone if it isn't brought under control – and quickly . . . The United Way is the United Way is the United Way."

United Way Worldwide Participation

113. United Way Worldwide communicates regularly with its member organizations.

114. United Way Worldwide, in about July 2016, communicates with the Executive VP about her concerns of United Way of Tarrant County's exclusion and marginalization of four executives, including Sherrod. All four of the executives being excluded are African-American. Sherrod is included in the communication.

115. United Way Worldwide responds with instruction as to proper practice for United Way of Tarrant County's board supervision of employees.

116. United Way Worldwide requests the Executive VP to speak at an event and she advises that she has a retaliation claim pending against United Way of Tarrant County.

117. United Way Worldwide tells the Executive VP that it knows about the complaint and that she should speak anyway.

118. United Way Worldwide, on February 21, 2017, hears from Sherrod, who is Vice President and a plan administrator or fiduciary of United Way of Tarrant County's 403(b) plan, that she is being retaliated against for reporting and correcting ERISA violations, for opposing race discrimination, for being a witness to race discrimination, and because of her own race.

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119. United Way Worldwide tells Sherrod that it needs to think how to best handle the situation and will get back with her.

120. United Way Worldwide hears more details from Sherrod during the week of February 21, 2017.

121. United Way of Tarrant County terminates Sherrod on March 3, 2017.

122. United Way of Tarrant County sends a severance agreement to Sherrod on March 13, 2017, that is conditioned on release of her discrimination and retaliation claims, including United Way Worlwide as an affiliate of United Way of Tarrant County.

123. United Way Worldwide informs Sherrod on March 16, 2017, that it is reviewing her treatment and the termination decision.

124. United Way Worldwide hears Sherrod's story again on May 23, 2017, and says it is shocked, that it needs to investigate further, and will get back with her.

125. United Way Worldwide tells Sherrod on May 24, 2017, that the discrimination and retaliation was wrong, that it is continuing its investigation, and will speak to its legal counsel.

126. United Way Worldwide tells Sherrod on June 1, 2017, that it contacted legal counsel and now will not be taking any action to help her.

127. United Way Worldwide tells Sherrod to sign the severance agreement and release her claims.

128. United Way Worldwide either participated in the termination of Sherrod, intentionally interfering with her employment at United Way of Tarrant County and knowingly participated in the discrimination and retaliation; or knew, or should have known, of United Way of Tarrant County's discrimination and retaliation and intentionally refused to prevent the discrimination and retaliation.

CAUSES OF ACTION

Section 1981 Violation

129. Sherrod's claim for recovery under Section 1981 is based upon 42 U.S.C. § 1981, which provides that all persons within the United States shall have the same right to make and enforce contracts and to the full and equal benefit of all laws as is enjoyed by white citizens. This law entitles a person of color to equal opportunity and treatment in employment. Thus, when an employer acts adversely against a person of color because of that person's race, the law has been violated and the person of color may file suit and recover damages.

130. A person is also entitled to file suit and recover damages under Section 1981 for retaliation for opposing or reporting violations of Section 1981, or for participating in an investigation of a violation of Section 1981.

131. United Way Worldwide and United Way of Tarrant County violated the federal statute by

intentionally discriminating and retaliating against Sherrod; and, as a direct result of the discrimination and retaliation caused damages to Sherrod.

ERISA Violation

132. Section 510 of ERISA makes it “unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [the Employee Retirement Income Security Program] or the Welfare and Pension Plans Disclosure Act.” 29 U.S.C. § 1140. United Way Worldwide and United Way of Tarrant County violated Section 510 of ERISA by discharging, suspending, expelling, or discriminating against Sherrod because she gave information and was willing to testify about violations of ERISA related to employee benefit plans.

133. Section 502 of ERISA provides that a participant, beneficiary, or fiduciary may bring an action to enforce rights under benefit plans, clarify rights to future benefits, and for appropriate relief including to enjoin any act or practice which violates a provision of ERISA, to obtain other appropriate equitable relief, to redress the violations, or to enforce any provisions of ERISA or the terms of the plan.

Compensatory and Equitable Relief

134. Sherrod sustained damages, including lost wages and benefits, future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, for which she is entitled to recovery under her causes of action. Sherrod is also entitled to declaratory relief that a violation has occurred and to equitable relief in the form of reinstatement or an injunction against future discrimination or retaliation.

Exemplary Damages

135. Sherrod is also entitled to receive punitive damages because United Way Worldwide and United Way of Tarrant County engaged in a discriminatory or retaliatory practice or in discriminatory or retaliatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Attorney's Fees

136. Sherrod is also entitled to attorneys' fees, interest, and costs of court for services rendered in this cause, including trials and appeals.

JURY DEMAND

137. Sherrod requests a trial by jury to the extent allowed by law.

WHEREFORE, Sherrod requests that United Way Worldwide and United Way of Tarrant County answer and that on final trial, Sherrod have judgment against United Way Worldwide and United Way of Tarrant County for compensatory, declaratory, equitable, and exemplary damages, attorneys' and expert fees, costs of suit, and interest as provided by law, and any further relief to which she may be entitled.

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFF
CONEISHA SHERROD**

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2017, I electronically served the foregoing document on all counsel of record via the Court's electronic filing system.

/s/ Brian P. Sanford

