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OPINIONS AND ORDERS

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REHEARING ORDER

OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT (OCTOBER 18, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HECTOR M. JENKINS,

Plaintiff-Appellant,

v.

HOUSING COURT DEPARTMENT,
City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant-Appellee,

JEFFREY WINIK, First Justice of The Boston Housing Court; MICHAEL NEVILLE, Chief Housing Specialist of the Boston Housing Court; PAUL BURKE, Deputy Court Administrator of the Massachusetts Housing Courts; PAULA CAREY, Chief Justice of The Massachusetts Trial Courts; HARRY SPENCE, Court Administrator of the Massachusetts Trial Courts; MARK CONLON, Human Resources Director of the Massachusetts Trial Courts; EAMONN GILL, Labor Counsel, Human Resources Department of the Massachusetts Trial Courts; ELIZABETH DAY, Assistant Labor Counsel, HR Department of the Massachusetts Trial Courts; ANTOINETTE RODNEY-CELESTINE, Administrative Attorney, HR Department of Trial Courts; TIMOTHY SULLIVAN, Chief Justice of the

Massachusetts Housing Courts;
MAURA HEALEY, Attorney General,

Defendants.

No. 20-1124

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Patti B. Saris, U.S. District Judge]

Before: LYNCH, LIPEZ, and
BARRON, Circuit Judges.

BARRON, Circuit Judge.

Hector Jenkins was a Housing Specialist Department officer and mediator in the Boston Housing Court for over twenty-three years before he was fired from his job there in July 2016. He thereafter filed suit against a number of defendants in the District of Massachusetts in which he alleged that his termination violated 42 U.S.C. § 1983 and Titles VI and VII of the Civil Rights Act of 1964.

The District Court dismissed Jenkins's § 1983 and Title VI claims, and Jenkins does not contest those rulings here. He challenges on appeal only the District Court's grant of summary judgment to the Housing Court Department ("Trial Court") on his Title VII retaliation claim, its dismissal of his Title VII hostile work environment claim for a failure to exhaust administrative remedies, and its denial of his leave to amend his complaint to add a claim of disability discrimination in violation of § 504 of the

Rehabilitation Act. Finding no merit to Jenkins's challenges, we affirm the rulings below.

I.

Jenkins, who is Black and immigrated to the United States from Costa Rica, began working as a Housing Specialist in the Boston Housing Court in 1993. In 1995, Jeffrey Winik was appointed an associate justice of the Boston Housing Court. Around 2004, the Chief Housing Specialist—Jenkins's immediate supervisor—resigned. By that time, Winik had become the First Justice of the Boston Housing Court and was thus responsible for appointing the Chief Housing Specialist.

Judge Winik ultimately appointed Michael Neville, a white man, to the position. Jenkins complained to superiors, court administrators, and others that the hiring process "violated court rules and constituted illegal patronage." Jenkins was administratively banned from Winik's courtroom and threatened with suspension. Jenkins also contends that Neville, who was aware of Jenkins's repeated complaints about his hiring, treated Jenkins harshly, including yelling at Jenkins, calling him "crazy," and making comments that Jenkins understood as racist, such as "you can complain to your boy Obama if you want" and "we don't want you here," and referring to Jenkins and other minority individuals as "lazy."

In 2015, Jenkins was placed on administrative leave after sending multiple long emails to his co-workers—at least ten emails in the span of a month. These emails largely concerned the 2005 appointment of Neville as Chief Housing Specialist. They also

repeated Jenkins's longstanding complaints about the Trial Court's treatment of litigants.

Upon Jenkins's returning to work after his period on leave had ended, he was reminded of the proper channels through which he could communicate any complaints. He was also informed that his complaints would be investigated.

The investigation took eight months, during which Jenkins continued to voice his complaints by sending long emails to Trial Court staff. The investigation culminated in a meeting to share the findings of the investigation into Jenkins's complaints. Jenkins and the Trial Court disagree about what transpired at the meeting.

Jenkins contends that instead of discussing the legitimacy of his complaints, the meeting focused on disciplining him for making the complaints in the first place. Other attendees at the meeting asserted that Jenkins behaved in an unprofessional manner, talking in a loud voice over others and refusing to listen. They reported that Jenkins "once again acted confrontational, abusive and threatening to the point that they were concerned for their safety."

After that meeting, Jenkins was informed that his "complaint was investigated, findings were issued, and the matter [was] now closed." He was also warned that if he continued to make complaints via email he could be subject to disciplinary action.

Jenkins continued to send emails detailing his complaints, and he was put on administrative leave for a second time on March 17, 2016. This period of administrative leave ended after a disciplinary hearing was held in June 2016.

The hearing was set to address alleged misconduct by Jenkins, including, among other allegations, "insubordination and failure to comply with a reasonable order." The hearing was held on June 21, 2016, and resulted in the Deputy Trial Court Administrator, Paul Burke, recommending that Jenkins "be terminated from employment in the Trial Court at the earliest possible time." Chief Justice Sullivan adopted the recommendation and Jenkins's employment ended on July 22, 2016.

Soon after Jenkins was fired in 2016, he filed this lawsuit pro se in the District of Massachusetts. His First Amended Complaint ("FAC") included three counts: a 42 U.S.C. § 1983 claim for depriving him "of a professional right," namely the ability to "perform[ ] his duties free from obstruction and intimidation"; a retaliation claim under Title VII, 42 U.S.C. § 2000e-3, predicated solely on the fact of his termination from his job at the Trial Court; and a discrimination claim under Title VI, 42 U.S.C. § 2000d. The FAC named as defendants several Massachusetts Housing Court judges and employees, including Jeffery Winik, Michael Neville, Paul Burke, Timothy Sullivan, Mark Colon, Eamonn Gill, Elizabeth Day, Antoinette Rodney-Celestine, Harry Spence, and Paula Carey, as well as the Trial Court itself and Massachusetts Attorney General Maura Healey.

On December 16, 2016, the Trial Court filed a motion to dismiss on the grounds that the Eleventh Amendment barred Jenkins's § 1983 claim, that Jenkins had failed to plead sufficient facts to support his Title VI claim, and that he had failed to exhaust his Title VII claims with the U.S. Equal Employment Opportunity Commission ("EEOC") before filing suit.

The individual defendants also filed a motion to dismiss Jenkins's claims on the same day.

Jenkins thereafter filed, on December 21, 2016, a charge of unlawful employment discrimination and retaliation with the EEOC. He subsequently filed an opposition to the defendants' motion to dismiss on December 29, 2016, in which he explained that he had filed an EEOC charge and attached it to his opposition motion. Jenkins also filed another EEOC charge the following day complaining of disability discrimination, and he received right-to-sue letters from the EEOC for both charges on January 25, 2017.

On August 1, 2016, the District Court assigned this case to a magistrate judge. The Magistrate Judge soon thereafter issued a report and recommendation that addressed the defendants' motions to dismiss Jenkins's claims.

The Magistrate Judge's report recommended that both motions to dismiss be granted in their entirety. The District Court adopted the Magistrate Judge's report and dismissed Jenkins's counts with prejudice with the exception of the Title VII claim, which the District Court granted Jenkins leave to amend.

On June 13, 2017, Jenkins filed his Second Amended Complaint ("SAC"). The SAC claimed that, in violation of Title VII § 2000e-3, Jenkins had been subject to a hostile work environment at the Trial Court because of his race and national origin and that he had been retaliated against for complaining about racial and national origin discrimination. The Trial Court moved to strike the SAC, which the Magistrate Judge recommended granting in its report and recommendation.

The District Court struck Jenkins's Title VII hostile work environment claim in response to the motion but denied the motion with respect to his Title VII retaliation claim. The District Court struck the hostile work environment claim on the ground that Jenkins had failed to exhaust his administrative remedies. The Trial Court and Jenkins both filed motions for reconsideration, which the District Court denied.

On September 11, 2018, Jenkins sought leave to amend the SAC to add a count alleging disability discrimination under the Americans With Disabilities Act ("ADA") and § 504 of the Rehabilitation Act. Jenkins appended to that motion the ADA charge that he had filed with the EEOC on December 30, 2016 and for which he had received a right-to-sue letter from the EEOC in January 2017.

The District Court denied the motion on January 9, 2019, after adopting the Magistrate Judge's finding that the proposed amendment was both untimely and futile. That left only Jenkins's Title VII retaliation claim.

The Trial Court moved for summary judgment in its favor on that claim. The Magistrate Judge recommended that the motion be granted, on the grounds that Jenkins had failed to create a genuine issue of disputed fact as to whether he had made out a prima facie case of retaliation and that even if he had, he failed to point to facts that would permit a juror reasonably to find that the Trial Court's proffered legitimate, non-retaliatory reason for Jenkins's termination was a pretext for retaliation.

The District Court adopted the report and recommendation on January 10, 2020. It thus granted summary judgment for the Trial Court on Jenkins's retaliation claim. Jenkins then filed this timely appeal.

II.

We begin with Jenkins's contention that the District Court erred in granting summary judgment to the Trial Court on his Title VII retaliation claim. We review the "entry of summary judgment de novo and affirm if the record, viewed in the light most favorable to the appellant, reveals no genuine issue of material fact and demonstrates that the movant is entitled to judgment as a matter of law." *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 70 (1st Cir. 2011).

The parties agree that we must assess Jenkins's retaliation claim under the *McDonnell Douglas* burden-shifting framework. *See Ponte v. Steelcase Inc.*, 741 F.3d 310, 321 (1st Cir. 2014) (explaining that we evaluate "[r]etaliatory termination claims based on circumstantial evidence" under *McDonnell Douglas*); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, a plaintiff bringing a retaliation claim must first show "that: (1) he engaged in protected conduct under Title VII; (2) he experienced an adverse employment action; and (3) a causal connection exists between the protected conduct and the adverse employment action." *Sánchez-Rodríguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012) (internal quotation marks omitted).

The parties dispute whether Jenkins has made enough of a showing of a prima facie case to survive summary judgment. But, even assuming that he has, the Trial Court argues, and we agree, he has not made

the necessary showing of pretext to survive summary judgment.

Jenkins bases his Title VII retaliation claim on his ultimate termination and not on any other act that was taken against him for his protected activity.[1] Consequently, the Trial Court bears the burden of production to respond to Jenkins's *prima facie* case by putting forward a legitimate non-retaliatory basis for firing Jenkins. *See Mesnick v.* Gen. *Electric Co.*, 950 F.2d 816, 823 (1st Cir. 1991) (describing the burden as one of "production" not "persuasion"). The Trial Court met that burden by asserting that it fired Jenkins because of his insubordinate behavior, which included engaging in the precise conduct that he had been told to cease—after repeated warnings that failure to do so could result in disciplinary actions including termination—and refusing to accept direction from many of his supervisors.

Thus, to defeat the Trial Court's motion for summary judgment in its favor, Jenkins must point to "specific facts that would demonstrate any sham or pretext intended to cover up defendants' retaliatory motive" for its decision to fire him. *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 26 (1st Cir. 2004). Jenkins argues that he has done so because the record supportably shows that the Trial Court's proffered reason for his termination—that he complained too

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[1] A retaliation claim need not be predicated on a termination, however. "[T]he anti-retaliation provisions of Title VII also cover employer actions that are materially adverse, specifically those that are harmful enough to dissuade a reasonable employee from complaining about discrimination." *Fournier v. Massachusetts*, No. 20-2134, 2021 WL 4191942, at *3 (1st Cir. Sept. 15, 2021) (unpublished).

often, too loudly, at too great a length, and in language considered "inappropriate"—"inherently creates a dispute of fact as to its actual motive" because some of those complaints contained complaints about racial discrimination. We do not agree.

We do not dispute that an employer may not disguise retaliation for protected conduct by portraying it as merely discipline for the manner in which such conduct was undertaken. But, at the same time, an individual is not immune from being disciplined on the basis of the manner in which he makes a complaint of workplace discrimination. *See Mesnick*, 950 F.2d at 828-29 (stating that "while statutes . . . bar retaliation for exercising rights guaranteed by law, they do 'not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers'" (quoting *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988))). Here, the record precludes a reasonable juror from finding that Jenkins was fired for engaging in protected conduct rather than, as the Trial Court contended, on the basis of the insubordinate manner in which he repeatedly lodged his complaints.

The record indisputably shows that a focus of the June 21, 2016, disciplinary hearing, which preceded Jenkins's termination, was his "insubordination and failure to comply with a reasonable order" after he was "instructed on numerous occasions to cease and desist from sending emails to Trial Court employees concerning the issues [he] raised [previously]" but he nevertheless "continued to email Trial Court employees." Moreover, the record establishes that during that

hearing, the Trial Court administrator, Paul Burke, assigned to investigate his complaints

> asked [Jenkins] if there was any way he could put all these issues behind him and return to work as a productive member of the staff. His immediate answer was an emphatic no. Upon reflection however, he did state that he would be willing to return up on the resignation of all senior Trial Court management who have not responded to his complaints in a manner that he deems satisfactory.

In addition, the record shows that, after concluding that Jenkins had "engaged in all the misconduct" he was accused of—including "insubordination and failure to comply with a reasonable order"—Burke's recommendation was as follows:

> I find that Mr. Jenkins cannot return to work as a productive member of the staff. He is unwilling to accept any reasonable direction or instruction from any member of management who does not sympathize with his fixation. He would continue to be a disruptive force amongst the staff. He has received multiple written warnings over the past year and has been placed on administrative leave twice due to his abusive nature with no indication of complying with acceptable behavior.

There is nothing in the recommendation to cast doubt on the Trial Court's assertion that it fired Jenkins for reasons independent of his protected conduct and having only to do with his insubordination.

Indeed, there is no reference in the report to the content of any of his complaints.

The record also provides no basis on which a juror reasonably could find that the recommendation could not have meant what it said. To the contrary, the record indisputably shows that, beginning in at least 2015, Jenkins was specifically told that the manner in which he was lodging complaints—which involved his sending lengthy emails accusing Judge Winik, Judge Pierce and Neville of improper hiring practices and sharing his criticisms of Trial Court practices to the entire housing specialist staff—was inconsistent with the "Housing Specialist Duties and Responsibilities," which he had previously received by email and which required Housing Specialists to "[c]ommunicate in a professional manner with all employees, managers, judges, clerk and [the] public." In addition, the record incontrovertibly shows that Jenkins was told that he had the right to file complaints and to make accusations against Winik and Neville, and could do so by "fil[ing] a complaint with [his] supervisor . . . , [his] supervisor's supervisor," or Human Resources, but "repeated letters and/or emails airing the same complaints to multiple parties, to include the Chief Justice of the Supreme Judicial Court and/or the Chief Justice of the Trial Court, are neither professional nor appropriate."

Nor is there any dispute that the record establishes that, despite this admonition, Jenkins subsequently sent additional letters and emails of just the sort he had been told to stop sending. Indeed, the record shows that Neville issued a written warning in response to this continuing conduct, which described the subsequent emails as being "similar [in] tone and content

to the previous emails," found the conduct "insubordinate," and reminded Jenkins of the "expectations for appropriate behavior."

The record further shows conclusively that the Trial Court responded to Jenkins's subsequent communications by informing him that the Trial Court was investigating his claims and that he could "expect a substantive response to the issues [he] raised" but that "the expectations" previously communicated to him about the proper way to express his complaints "still stand." The record shows in similarly indisputable fashion that the Human Resources attorney investigating Jenkins allegations, Antoinette Rodney-Celestine, met with him to discuss them and that, after she received multiple emails from Jenkins, Rodney-Celestine requested that Jenkins stop emailing her so she could focus on the investigation. Yet, the record also shows without dispute that, despite this request, Jenkins sent subsequent emails to her and others raising similar complaints to the ones that he had expressed in the past about Neville's promotion to Chief Housing Specialist.

That Burke's recommendation was rooted in the concerns that he identified about the way in which Jenkins had been raising his concerns rather than in the substance of them draws still more support from the fact that the record shows without dispute that, in the wake of Jenkins's continued correspondence, Rodney-Celestine sent an email in which she wrote, "[c]onsider this email a directive to you to cease and desist from sending or re-sending any further emails and/or any other written or verbal communication to any Trial Court employee concerning any of the claims

raised by you, while this investigation is pending" (emphasis omitted).

There is no dispute, however, that even then the emails did not cease. Indeed, Jenkins does not dispute that the record shows that, at the close of the investigation, Rodney-Celestine told Jenkins that he "ha[d] the right to initiate litigation" but that he was not to send any further emails concerning the claims raised in his complaint "to any employee of the Judiciary" and that Jenkins thereafter was placed on administrative leave pending a disciplinary hearing concerning his "course of misconduct."

Thus, we do not see any basis in the record on which a reasonable juror could find that the Trial Court's asserted reasons for terminating Jenkins were pretextual. We emphasize in this regard that Jenkins does not identify, for example, any comparator employee of a different race or national origin who was treated differently for similar conduct. *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 62 (1st Cir. 1999). Nor does he credibly dispute that there was an established policy regarding how complaints must be raised that the Trial Court reasonably could have determined had been violated. *See*, *e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Martinez-Burgos v. Guayama Corp.*, 656 F.3d 7, 13-14 (1st Cir. 2011). Nor, finally, does he identify record evidence that could suffice to supply a reasonable basis for a juror to conclude that the Trial Court's assertedly neutral reason for acting as it did was so implausible, given his actual conduct in registering complaints over the years, that it may be considered a sham. *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998).

To be sure, an employer's inaction in the face of serious allegations of race discrimination in the workplace may invite the employee to persist in trying to have them addressed, and the failure of a court to address such discrimination within its workplace would be concerning. We thus do not dispute that a reasonable juror could take that reality into account in assessing whether to credit this employer's assertion that it took an adverse action (here, termination being the only one alleged) in response to insubordination rather than to the protected conduct. But, on this record, we can see no basis for concluding that a finding of pretext would be anything other than wholly speculative. *Cf. McCarthy v. City of Newburyport*, 252 F. App'x 328, 332 (1st Cir. 2007) (finding that "the record evidence compelled the conclusion that the plaintiff . . . [was fired] for nondiscriminatory reasons," namely the "repeated failure to comply" with directives from his employer). We thus affirm the District Court's grant of summary judgment for the Trial Court as to the retaliation claim.

III.

We turn next to Jenkins's argument that the District Court erred in dismissing his hostile work environment claim under Title VII. Here, too, the District Court adopted the Magistrate Judge's report and recommendation with respect to the Trial Court's motion to dismiss, finding "no indication that [the claim] was exhausted at the administrative level."

There is no dispute that Jenkins filed a charge with the EEOC. But, the purposes of the administrative exhaustion requirement are to ensure that the employer has "prompt notice of the claim" and to "create[ ] an

opportunity for early conciliation." *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996); *see also Thornton v. United Parcel Serv.,* Inc., 587 F.3d 27, 31 (1st Cir. 2009) (noting that the "submission of an administrative claim . . . gives notice to both the employer and the agency of an alleged violation and affords an opportunity to swiftly and informally take any corrective action necessary to reconcile the violation"). Thus, the filing of such a charge alone "does not open the courthouse door to all claims of discrimination." *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 71 (1st Cir. 2011). We therefore must determine whether what Jenkins presented to the EEOC was sufficient to alert the agency of the hostile work environment claim. *Id.*

To do that, we must review not only what the specific language of the agency charge states but also what the EEOC's investigation based on that charge "could reasonably be expected to uncover." *Davis v. Lucent Techs., Inc.*, 251 F.3d 227, 233 (1st Cir. 2004). In doing so, though, we must construe Jenkins's pro se administrative charge liberally "in order to afford [him] the benefit of any reasonable doubt." *Lattimore*, 99 F.3d at 464. That review is de novo. *See Vilsack*, 657 F.3d at 70.

Jenkins does not suggest that his second charge that he filed with the EEOC put it on notice that Jenkins was making a hostile work environment claim. Jenkins's sole contention is that the District Court erred in finding that he had not put the EEOC on notice of the hostile work environment claim because the District Court understood the FAC to make out a race-based hostile work environment claim and Jenkins

had provided the EEOC with a copy of the FAC alongside his first EEOC charge.

We assume for present purposes that the FAC was provided to the EEOC.[2] The Trial Court argues in response, however, that even if it was, the FAC "would not have put the EEOC on notice to investigate anything about it." In support of this contention, the Trial Court points out that "it is not within the EEOC's jurisdiction to concurrently investigate Title VII claims pending in a District Court." Because a Title VII claim must first be filed with the EEOC and the EEOC's investigation of that claim must be complete before a claimant can file a federal suit, the Trial Court argues, the EEOC "would have ignored" a hostile work environment claim made out in a complaint on the assumption that its portion of the Title VII process had ended.

Jenkins does not offer any response to the Trial Court's arguments in this regard in his reply brief. Nor does he explain in any of his briefs to us why his provision of the FAC alongside his first EEOC charge would have put the EEOC on notice of its need to investigate his hostile work environment claim. Instead, he asserts only that "[i]f the District Court understood the FAC made out a racially hostile environment claim, then the EEOC also must be presumed to have been on notice when [he] provided the federal agency with a copy of the FAC." But, that assertion

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[2] We note that the defendants dispute whether the EEOC ever received the FAC. But, we do not need to resolve that issue as we conclude that even if the EEOC was provided with the FAC, the FAC would not have put the EEOC on notice to investigate Jenkins's hostile work environment claim.

fails to acknowledge the many possible reasons the EEOC might have had to overlook any allegations of a hostile work environment that Jenkins made out in the FAC—the most obvious of which is that the text of the first EEOC charge styles itself as a retaliatory termination claim and contains no suggestion that Jenkins was making out a racially hostile work environment.[3]

Thus, because Jenkins fails to develop an argument as to why the EEOC would have been alerted to its need to investigate his hostile work environment claim by him simply providing the EEOC with his FAC, we affirm the District Court's dismissal of Jenkins's hostile work environment claim. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (holding that party's failure to develop argument in appellate brief results in waiver).

IV.

Jenkins's final challenge is to the District Court's denial of his motion for leave to amend his SAC to add claims alleging that the Trial Court discriminated

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[3] At oral argument, Jenkins pointed us to *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27 (1st Cir. 2009), and *Powers v. Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990), as support for his assertion that, by providing a copy of the FAC to the EEOC, Jenkins put the EEOC on notice of his hostile work environment claim. But these cases merely explain that "[t]he scope of the civil complaint is accordingly limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge." *Thornton* at 31 (quoting *Powers*, 915 F.2d at 38). Jenkins did not develop an argument, however, as to why in his case the EEOC would have discovered the basis for his hostile work environment claim in the course of investigating his retaliatory termination claim.

against him because of his disability. We review a district court's denial of a motion seeking leave to amend for an abuse of discretion, "defer[ring] to the district court's hands-on judgment so long as the record evinces an adequate reason for the denial." *Torres-Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir. 2007).

While leave to amend should be "freely given when justice so requires," *id.* (quoting Fed. R. Civ. P. 15(a)), "a district court may deny leave to amend when the request is characterized by 'undue delay, bad faith, futility, [or] the absence of due diligence on the movant's part.'" *Nikitine v. Wilmington Tr. Co.*, 715 F.3d 388, 390 (1st Cir. 2013) (quoting *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006)).

Here, the District Court adopted the Magistrate Judge's report and recommendation to deny Jenkins's motion for leave to amend without comment. The Magistrate Judge's report and recommendation first concluded that Jenkins's motion be denied because it "reflect[ed] undue delay and lack of diligence." It explained that although Jenkins had received a right-to-sue letter from the EEOC for his claims of disability discrimination on January 25, 2017, he did not seek to amend his complaint to add these claims until October 2018. Thus, the Magistrate Judge concluded that "[i]t [was] simply too late to add the claims now." In addition, the Magistrate Judge concluded that Jenkins's motion for leave to amend his complaint should be denied because the "proposed amendments would be futile." The Magistrate Judge explained that the addition of Jenkins's claim of disability discrimination under the ADA would have been futile because the Trial Court "was part of the judicial branch of the Commonwealth" and thus his "ADA

claims [were] barred by the Eleventh Amendment." The addition of a claim of disability discrimination under § 504 of the Rehabilitation Act would also have been futile, the Magistrate Judge reasoned, because the proposed claim did not contain "any allegation that [the] defendant . . . is the recipient of federal funding," which was "an element" of his claim under the Act, and because Jenkins "alleged various grounds for his termination" when the Act "requires an individual to have suffered discrimination 'solely by reason of . . . his disability.'"

Jenkins does not challenge the District Court's refusal to grant him leave to amend his complaint to add the ADA claim. He appeals only the denial of his motion to amend with respect to the Rehabilitation Act claim. He contends that both of the Magistrate Judge's reasons for recommending a denial of his motion to amend with respect to that claim were invalid, such that the District Court abused of discretion by adopting them. But, if either ground is sound, we must affirm the denial. Accordingly, we bypass Jenkins's challenge to the futility finding, because we conclude that the District Court did not abuse its discretion in determining that Jenkins acted with "undue delay and a lack of diligence" in amending his complaint to add the Rehabilitation Act claim.

"[W]hen 'a considerable period of time has passed between the filing of the complaint and the motion to amend, courts have placed the burden upon the movant to show some valid reason for his neglect and delay.'" *Nikitine*, 715 F.3d at 390–91 (quoting *Hayes v. New Eng. Millwork Distribs., Inc.*, 602 F.2d 15, 19–20 (1st Cir. 1979)). Here, the record shows that Jenkins contemplated the possibility that the Trial Court had

discriminated against him on the basis of his disability as early as December 30, 2016, when he filed a charge with the EEOC alleging such discrimination and that he subsequently received a right-to-sue letter from the EEOC for those claims on January 25, 2017. Yet, he did not seek to amend his complaint to add a claim of disability discrimination until October 2018—over a year and a half later. During that period, moreover, Jenkins amended his complaint—he filed his SAC on June 13, 2017—but he did not take that opportunity to add these additional claims. As Jenkins provides no explanation for letting over a year pass before seeking leave to amend, we cannot say that the District Court erred in denying Jenkins's motion to amend his complaint. *See, e.g.*, *id.* at 390 (affirming a district court's denial of a motion to amend after a six-month delay); *Villanueva v. United States*, 662 F.3d 124, 127 (1st Cir. 2011) (same but finding undue delay after four months).

V.

For the foregoing reasons, we affirm the District Court's grant of summary judgment for the Trial Court on the retaliation claim, its dismissal of the hostile work environment claim, and its denial of Jenkins's motion to amend his complaint to add disability discrimination counts.

ERRATA SHEET ON
OCTOBER 18, 2021 OPINION
(OCTOBER 25, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HECTOR M. JENKINS,

Plaintiff-Appellant,

v.

HOUSING COURT DEPARTMENT, City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant-Appellee,

JEFFREY WINIK, First Justice of The Boston Housing Court; MICHAEL NEVILLE, Chief Housing Specialist of the Boston Housing Court; PAUL BURKE, Deputy Court Administrator of the Massachusetts Housing Courts; PAULA CAREY, Chief Justice of The Massachusetts Trial Courts; HARRY SPENCE, Court Administrator of the Massachusetts Trial Courts; MARK CONLON, Human Resources Director of the Massachusetts Trial Courts; EAMONN GILL, Labor Counsel, Human Resources Department of the Massachusetts Trial Courts; ELIZABETH DAY, Assistant Labor Counsel, HR Department of the Massachusetts Trial Courts; ANTOINETTE RODNEY-CELESTINE, Administrative Attorney, HR Department of Trial Courts; TIMOTHY SULLIVAN, Chief Justice of the

Massachusetts Housing Courts;
MAURA HEALEY, Attorney General,

Defendant.

No. 20-1124

ERRATA SHEET

The opinion of this Court, issued on October 18, 2021, is amended as follows:

On page 15, line 10, change "Jenkins" to be "Jenkins's"

On page 23, line 17, change "of" to be "its"

ORDER OF THE DISTRICT COURT OF MASSACHUSETTS, DISMISSING CASE (JANUARY 10, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

HOUSING COURT DEPARTMENT, City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant,

Civil Action No. 1:16-cv-11548-PBS

Before: Patti B. SARIS, District Judge

ORDER OF DISMISSAL

SARIS, D.J.

In accordance with the Court's Order dated January 10, 2020 (Dkt. No. 131), it is hereby ORDERED, that the above-entitled action is dismissed.

By the Court,

/s/ Miguel A. Lara
Deputy Clerk

Date: 1/10/2020

ORDER OF THE DISTRICT COURT OF MASSACHUSETTS, ADOPTING MAGISTRATE REPORT AND RECOMMENDATION (JANUARY 10, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

HOUSING COURT DEPARTMENT, City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant,

Civil Action No. 1:16-cv-11548-PBS

Before: Patti B. SARIS, District Judge

ORDER ADOPTING REPORT AND RECOMMENDATION

SARIS, D.J.

After a review of the objection, I adopt the report and recommendation. While plaintiff alleges certain racial comments by Mr. Neville, there is no evidence that either Mr. Burke or Chief Justice Sullivan terminated plaintiff based on racial or retaliatory motivation. I allow the motion for summary judgment.

By the Court,

/s/ Miguel A. Lara
Deputy Clerk

Date: 1/10/2020

ORDER OF THE DISTRICT COURT ADOPTING MAGISTRATE REPORT AND DENYING PLAINTIFF'S MOTION TO RECONSIDER ORDER TO DISMISS PLAINTIFF'S CLAIM OF HOSTILE ENVIRONMENT (JANUARY 9, 2019)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HECTOR JENKINS,

Plaintiff,

v.

BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS TRIAL COURT,

Defendant,

Civil Action No. 16-11548-PBS

Before: Patti B. SARIS, District Judge

I adopt the report and recommendation and deny plaintiff's motion to reconsider (#85)

/s/ Patti B. Saris

ORDER OF THE DISTRICT COURT ADOPTING MAGISTRATE REPORT AND DENYING PLAINTIFF'S MOTION TO ADD DISABILITY COUNT TO COMPLAINT (JANUARY 9, 2019)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS TRIAL COURT,

Defendant,

Civil Action No. 16-11548-PBS

Before: Patti B. SARIS, District Judge

DENIED.

I adopt the report and recommendation and deny the motion to amend.

/s/ Patti B. Saris

REPORT AND RECOMMENDATION OF THE MAGISTRATE ON DEFENDANT MOTION FOR SUMMARY JUDGMENT (DECEMBER 9, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

HOUSING COURT DEPARTMENT,
City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant,

Civil Action No. 16-11548-PBS

Before: M. Page KELLEY,
United States Magistrate Judge.

REPORT AND RECOMMENDATION ON DEFENDANT TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS' MOTION FOR SUMMARY JUDGMENT (#117)

KELLEY, U.S.M.J.

I. Introduction.

A single claim of race-based retaliatory termination in violation of Title VII[1] remains in this case. (#66.) From 1993 through 2016, Hector Jenkins was employed as a mediator in the Housing Specialist Department of the Boston Housing Court. (#54 ¶ 6.) He alleges that on June 17, 2016, he wrote a letter to the Deputy Housing Court Administrator "outlining his charges of racial discrimination in employment and the ongoing failure of the Boston Housing Court to address serious issues of equal access for litigants of all races." (#54 ¶ 55.) In early July 2016, the Deputy Housing Court Administrator recommended that Mr. Jenkins be terminated from employment, a recommendation that was approved later that month by the Chief Justice of the Trial Court, the Chief Administrator of the Trial Court, and the Chief Justice of the Housing Court Department. (#54 ¶¶ 56, 57.) Plaintiff claims he was wrongfully terminated for sending the June 17th letter complaining about racial discrimination.

Defendant Trial Court of the Commonwealth of Massachusetts (Trial Court) has filed a motion for summary judgment, which plaintiff opposes. (##117, 123.) The dispositive motion has been fully briefed (##118, 119, 124, 125) and stands ready for decision.

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[1] As Chief Judge Saris wrote in a previous order concerning a motion to dismiss, Mr. Jenkins' claim is "that he was summarily terminated approximately one month after complaining in writing to [Deputy Court Administrator] Burke about 'racial discrimination in employment,' among other things. Racial discrimination in employment is precisely what Title VII was designed to prohibit. Jenkins has now alleged a plausible, exhausted claim of wrongful [retaliatory] termination." (#66 at 11 (internal citation omitted).)

II. The Facts.

The following facts are undisputed unless otherwise noted.[2] From May 1993 until July 2016, plaintiff was employed by the Trial Court as a Housing Specialist. (#119 ¶ 1; #124 ¶ 1.) In the spring of 2015, plaintiff's immediate supervisor was Michael Neville, Chief Housing Court Specialist. (#119 ¶ 2; #124 ¶ 2.) Judge Jeffrey Winik was the First Justice of the Boston Housing Court; Judge Steven Pierce was the Chief Justice of the Housing Court[3]; Judge Paula Carey was the Chief Justice of the Trial Court; and Paul Burke was the Deputy Court Administrator. *Id.*

In March and April of 2015, plaintiff sent numerous lengthy emails to his co-workers, court administrators, and judges accusing Judge Winik, Judge Pierce and the court administration of "criminal collu-

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[2] Plaintiff has submitted a Statement of Additional Uncontested Material Facts. (#124 at 29-35.) Defendant requests that the Court strike or ignore the proposed facts because they are not material, and the paragraphs do not comply with Local Rule 56.1. (#125.) It is true that certain paragraphs are not supported by citations to admissible evidence. It is also true that many of the paragraphs appear to relate to claims that have been dismissed, *i.e.*, hostile work environment and failure to promote, and therefore are not material. Plaintiff primarily relies on his own deposition testimony (#124 ¶¶ 5-13, 15-24) or emails (#124 ¶ 6) as support for his facts. The deposition testimony and emails were submitted by defendant as exhibits (#119, Exh. 19, 20) and will be considered. In any event, the gist of most of plaintiff's proposed facts is that he had a history of sending emails to numerous Trial Court employees complaining about various issues and he had a confrontational relationship with Mr. Neville. These proposed facts are undisputed.

[3] Judge Pierce was later replaced by Judge Timothy Sullivan. (#119 ¶ 2; #124 ¶ 2.)

sion" and "criminal harassment." (#119 ¶ 3, Exh. 2-8; #124 ¶ 3.)[4] These missives centered on plaintiff's complaints surrounding the appointment of Mr. Neville to the position of Chief Housing Court Specialist a decade earlier in 2005, with Mr. Jenkins "accus[ing] the current administration of collusion in [Neville's] hiring, in a rigged process, and discriminating by fixing the process to hire a white applicant with allegedly an [sic] high school education . . . over an African American, qualified attorney, and that [sic] was already performing the job of assistant Chief Specialist." (#119 ¶ 3, Exh. 3.) Plaintiff wrote that "the collusion involves the First Justice and the current Chief Justice." *Id*. In one email, he "accused the current Administration with Criminal Collusion in filling the Chief's Position and Criminal Harassment as a result of bringing the issue up to the Chief Justice of the Housing Court." (#119 ¶ 3, Exh. 4.)[5] Mr. Jenkins also objected to the fact that judges, especially Judge Winik, "dictate[d] agreements for judgement from the bench," a practice which plaintiff viewed as improper. (#119 ¶ 3, Exh. 2 at 3.)

On April 29, 2015, Christine Hegarty, Esq., Manager, Human Resources of the Trial Court, advised Mr. Burke by email "that based on the latest series of emails sent by Mr. Jenkins, we are placing Mr. Jenkins on paid administrative leave immediately

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[4] While plaintiff admits that the emails speak for themselves, he consistently denies the Trial Court's statements of fact because defendant characterizes plaintiff's emails as "inappropriate."

[5] This seven-page email was sent to Mr. Jenkins' co-workers, Judge Winick, Mr. Burke, two union representatives, and the manager of Human Resources for the Trial Court. (#119 ¶ 3, Exh. 4.)

and arranging for an independent medical exam to determine his fitness for duty." (#119 ¶ 4, Exh. 9.) By letter on the same date, Mark T. Conlon, Esq., Director of Human Resources of the Trial Court, confirmed to Mr. Jenkins that he had been placed on administrative leave "pending an independent medical evaluation to determine [his] fitness for duty pursuant to Section 13.07(j) of the collective bargaining agreement with Local 6." (#119 ¶ 4, Exh. 10.) Mr. Conlon further instructed plaintiff that while on administrative leave, he was "not to contact, either by phone or email, any Trial Court staff, or enter any courthouse without prior permission." *Id*.

Dr. Russell Vasile, Diplomate, American Board of Psychiatry and Neurology, conducted an independent medical evaluation of Mr. Jenkins on May 8, 2015. (#119 ¶ 5, Exh. 11; #124 ¶ 5.) In his report dated May 20, 2015, Dr. Vasile cleared Mr. Jenkins to return to work, finding plaintiff was no risk of harm to himself or others, and that there was no evidence of current depression or psychiatric disorder. (#119 ¶ 5, Exh. 12; #124 ¶ 5.) Mr. Conlon forwarded a copy of Dr. Vasile's report to Mr. Jenkins on June 3, 2015, and further advised plaintiff that he would have to attend a meeting prior to returning to work to "review the events that led to the fitness for duty evaluation" and the Trial Court's expectations for him. (#119 ¶ 6, Exh. 13; #124 ¶ 6.)

On June 12, 2015, while he was on paid administrative leave, Mr. Jenkins visited the offices of the Supreme Judicial Court in the John Adams Courthouse in Boston without receiving prior permission as directed by Mr. Conlon's April 29, 2015 letter. (#119

¶ 7, Exh. 14; #124 ¶ 7.)[6] This conduct was later found to be "insubordinate" by Mr. Neville. *Id.*

On July 1, 2015, in advance of his return to work on July 7, 2015, plaintiff attended a meeting with Judge Winik, Mr. Burke, Mr. Neville, Dick Russell, Business Agent of OPEIU, Local 6, and Eamonn G. Gill, Labor Counsel with Human Resources. (#119 ¶ 8, Exh. 16; #124 ¶ 8.) Mr. Jenkins was provided a copy of a memo detailing Housing Specialists' Duties and Responsibilities, previously sent by email to all Housing Specialists. (#119 ¶ 8, Exh. 15; #124 ¶ 8.) Among the listed duties and responsibilities were the requirements that Housing Specialists "[c]ommunicate in a professional manner with all employees, managers, judges, clerk and [the] public" and that requests for vacation and personal time off were to be submitted in writing and approved in advance. *Id.*

In a letter dated July 2nd, to Mr. Jenkins, summarizing the meeting on July 1st, Mr. Gill wrote as follows:

> We discussed the avenues you have thus far chosen to air your complaints regarding your supervisors. It was explained that you can file a complaint with your supervisor or, if the complaint is about your supervisor, your supervisor's supervisor. If neither of these avenues is sufficient, you can speak to your union representative. In any event, repeated letters and/or emails airing the same complaints to multiple parties, to include the Chief Justice of the Supreme

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[6] Mr. Jenkins denies that he needed permission to enter the courthouse. (#124 ¶ 7.)

Judicial Court and/or the Chief Justice of the Trial Court, are neither professional nor appropriate. Although not discussed during the meeting, complaints may also be filed with me, as a representative of the Trial Court, and I will forward to appropriate parties. You were warned that failure to comply with the above and attached directives could result in your discipline up to and including termination.

When provided with these directives, specifically the Housing Specialist duties and responsibilities, you indicated that you disagreed with some of the contents therein. It was explained to you that the expectation was that you would comply with these directives, but you were free to grieve any of these requirements through your union. Failure to comply could be a basis of discipline.

Finally, based upon your unprofessional attitude and conduct at our meeting on July 1st, 2015, which included talking loudly, talking over individuals who were speaking, and demanding that the meeting adhere to your agenda, you were warned that insubordinate conduct such as this upon your return to work could also result in your discipline up to and including termination. Further, while it is understood that you have levied accusations against both Judge Winik and Mr. Neville, and you have the right to do so, the appropriate forum was and is not during a work meeting focusing on your return to work. This is a topic that will no longer be

> entertained during working hours, unless scheduled by the Trial Court. Your unwillingness or inability to follow this directive may also result in your discipline up to and including termination.

(#119 ¶ 9, Exh. 16.)

Four days later on July 6, 2016, Mr. Jenkins wrote a seventeen-page letter to Mr. Gill[7] entitled "Collusion by Boston Housing Court Judges among other violations, abuse of power an accessory after the fact by Administrative Office of the Massachusetts Court, unfair labor conditions, violations of my Civil Rights, and request for immediate relief." (#119 ¶ 10, Exh. 17.) The letter included a litany of charges and accusations, including the "collusion" of Judge Winik, the "dereliction" of Judge Pierce, the two judges' alleged "lack of integrity, partiality and unfairness," Mr. Gill's "obstruction of justice," and so on. *Id.* Mr. Gill acknowledged receipt of plaintiff's letter and notified Mr. Jenkins "that the Trial Court will be exploring [his] claims" and that he could "expect a substantive response to the issues." (#119 ¶ 11, Exh. 18.)

On the day after returning to work, July 8, 2015, plaintiff sent four emails to Mr. Neville, cc'd to Judge Winik, apparently making a record of what he perceived as continued harassment. (#119 ¶ 13, Exh. 19.) Mr. Jenkins referred to Mr. Neville and Judge Winik as

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[7] This letter was cc'd to the United States Attorney Office Criminal and Civil Rights Division, the Massachusetts Attorney General Division of Public Integrity, the Massachusetts Senate Joint Committee on the Judiciary, Honorable Ralph D. Gants, Honorable Paula Carey, Judge Pierce, Judge Winik, Michael Neville, and Richard Martin/Russell. (#119 ¶ 10, Exh. 17.)

"corrupted officials," noting that he had accused both of corruption. *Id.* When asked at his deposition if he considered charging Mr. Neville and Judge Winik with being corrupt in an email was insubordinate, plaintiff responded "[t]hey were corrupt, it's a fact." (#119 ¶ 13, Exh. 20.) Mr. Jenkins also opined that, given the circumstances, sending the email was "professional." *Id.* On July 10, 2105, plaintiff emailed Mr. Neville regarding the Housing Specialists' Duties and Responsibilities, commenting on three of the rules. (#119 ¶ 14, Exh. 21.) By letter dated July 14, 2015, Mr. Neville addressed Mr. Jenkins' behavior, writing:

> You returned to work on July 7, 2015. Despite what was discussed at the meeting on July 1, 2015, on July 8 and July 10, as memorialized in Labor Counsel Gill's July 2, 2015 letter, you have continued to send emails to me and First Justice Jeffrey Winik, all with a similar tone and content to the previous emails. I find this behavior to be insubordinate.
>
> This is a written warning issued in accordance with Section 16:00 of the Trial Court's Personnel Policies and Procedures Manual and will be placed in your personnel file. You may submit to me a single response to this warning in writing which will be placed in your personnel file.
>
> You have been warned repeatedly that is constant disrespectful behavior is unacceptable and inappropriate. I was to reiterate to you the expectations for appropriate behavior outlines in Labor Counsel Gill's letter of July 2, 2015, and remind you that any continuation

> of this behavior will result in discipline up to and including termination of employment.

(#119 ¶ 15, Exh. 14.)

On August 14, 2015, Mr. Gill assigned Antoinette Rodney-Celestine, Human Resources Attorney, to investigate Mr. Jenkins' complaints. (#119 ¶ 17, Exh. 22.) As parsed by Ms. Rodney-Celestine, plaintiff's claims were "(1) 'rigged' hiring of Chief Housing Specialist Michael Neville, (2) Chief Housing Specialist Michael Neville's 'mistreatment' of his employees, including Mr. Jenkins,[8] (3) the process in which agreements are handled by the Judges sitting at the Boston Housing Court and (4) what Mr. Jenkins alleges as a refusal to provide him with a reason as to why he was placed on administrative leave on April 29, 2015." *Id*. Ms. Rodney-Celestine contacted Mr. Jenkins on September 1, 2015, to advise him she was investigating his complaints, and then met with him on September 9, 2015, to discuss the particulars of his claims. (#119 ¶ 18, Exh. 22, 23.) On December 3, 2015, after receiving multiple emails from Mr. Jenkins, Ms. Rodney-Celestine requested that he stop emailing and allow her focus on his claims in order to complete the investigation. (#119 ¶ 19, Exh. 25.)

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[8] In the second amended complaint, Mr. Jenkins alleges that Mr. Neville told him that "we don't want you here" and "you can complain to your boy Obama if [you] want." (#54 ¶ 26.) Mr. Jenkins viewed these statements as a "racially-motivated attack." *Id*. ¶ 27. There is no indication in the findings of the investigator that Mr. Jenkins ever told her that Mr. Neville's "mistreatment" of him or others included race-based attacks. (#119, Exh. 24.)

On December 4, 2015, Mr. Neville issued a second written warning to Mr. Jenkins. (#119 ¶ 20, Exh. 26.) In relevant part, the warning letter stated:

> On or about November 6, 2015, I provided you with a contact information form ("form") to be completed and returned to me. By November 20, 2015, I had not received your completed form. I provided you with another copy of the form and requested that you return it to me by November 23, 2015. When you did not comply with this subsequent directive, I sent you an email, on November 24, 2015, detailing my numerous requests for return of your form. Furthermore, I gave you until November 25, 2015, to return the form to me. Again, you did not comply with my directive. On November 27, 2015, I provided you with a hard copy of my email. On that date, your provided me with an incomplete form. You left the address field blank. I then approached you and said that the form was incomplete and you told me that I did not need that information.

Id.[9] Mr. Neville concluded that plaintiff's conduct constituted "insubordination and failure to comply with a reasonable order." *Id.* Mr. Jenkins was once again admonished that further misconduct could result in disciplinary action. *Id.*

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[9] Plaintiff denies that he failed to complete the form. (#124 ¶ 20.) However, in an email, he claimed he "had the right to only provide [Neville] with my wife's name and number" and he "declined to put [his] home address and [his] cell phone number" on the form. (#195, Exh. 35.)

On December 9, 2015, plaintiff sent an email to Judge Winik, cc'd to Mr. Burke and Mr. Neville, and then forwarded to Chief Justice Sullivan, questioning the authority and responsibilities of the Chief Housing Specialist. (#119 ¶ 21, Exh. 27.) Judge Winik replied the same day, stating:

> Michael Neville is the Chief Housing Specialist for the Boston Division of the Housing Court. As such he is authorized to manage the Housing Specialist Department and he has supervisory responsibility over all the Housing Specialists assigned to the Boston Division. As an employee you are required to comply with all reasonable work-related orders you receive from your supervisor, Mr. Neville. I remind you that under the provisions of the Trial Court Personnel Policies and Procedure Manua . . . "insubordination or a demonstrated lack of respect for persons in authority" is conduct that would warrant disciplinary action.

Id. Mr. Jenkins responded by sending a six-page email to Judge Winik on December 9th, cc'd to Chief Justice Sullivan, Mr. Neville, Mr. Burke and Mr. Conlon, suggesting, inter alia, that Mr. Gill had "engaged in clear obstruction of the truth," that Mr. Conlon and Mr. Gill were "accessories to the abuse," and that Mr. Conlon and Judge Winick had "coordinated abuse of power." *Id.*

On December 9, 2015, Ms. Rodney-Celestine emailed Mr. Jenkins:

> At our meeting on September 9, 2015, I requested that you refrain from contacting the

newly appointed Chief Justice of the Boston Housing Court, Timothy Sullivan, while my investigation is pending. Most recently, on December 3, 2015, I requested that you refrain from sending any further emails, concerning your claims, while this investigation is pending because they were diverting my attention away from investigating your claims. Despite these requests you have sent an abundance of emails since December 3, 2015, to myself, Mr. Neville, Judge Winik, Chief Justice Paula Carey and Court Administrator Harry Spence. The substance of these emails all involve the same complaints you have repeatedly raised. Furthermore, on or about July 2, 2015, you received a letter from Labor Counsel Eamonn Gill informing you that "repeated letters and/or emails airing the same complaints to multiple parties, to include the Chief Justice of the Supreme Judicial Court and/or the Chief Justice of the Trial Court, are neither professional nor appropriate." You were further advised of the different avenues for filing a complaint. You were also warned that your failure to comply with the directives set forth in Mr. Gill's letter "could result in your discipline up to and including termination." Another copy of this letter is attached for your review.

Consider this email a directive to you to cease and desist from sending or re-sending <u>any further emails and/or any other written or verbal communication to any Trial Court</u>

> employee concerning any of the claims raised by you, while this investigation is pending. You are expected to fully comply with this directive. Any violation of this directive may subject you to disciplinary action.

(#119 ¶ 23, Exh. 28.) Plaintiff emailed Ms. Rodney-Celestine the following day insisting that she recuse herself from the investigation of his complaints due to her "seeming conflict of interest" as well as her being "tone-deaf to [his] request." (#119 ¶ 24, Exh. 29.) At his deposition, Mr. Jenkins testified that he had received Ms. Rodney-Celestine's December 9, 2015 email, but reiterated that she had a conflict of interest because she had been appointed by Mr. Gill and that she was "one of the corrupt officials." (#119 ¶ 25, Exh. 20.) As plaintiff saw it, he was entitled to disregard her directive and to ask Chief Justice Sullivan to investigate his complaints. *Id*.

From mid-December 2015 through February 2016, Mr. Jenkins authored numerous emails to Chief Justice Sullivan, Judge Carey, Mr. Burke, Harry Spence (Court Administrator), Mr. Conlon, and Ms. Hegarty, all of which violated Mr. Gill and Ms. Rodney-Celestine's directives to cease and desist sending such emails. (#119 ¶ 26, Exh. 30-36.) For example, in a February 3, 2016 email, plaintiff reiterated his "complaints of malfeasance by [his] managers at the Boston Housing Court" and Mr. Conlon's "abuse." (#119 ¶ 28, Exh. 33.) Two days later he sent a ten-page email to Messrs. Burke, Conlon, Neville, Ms. Hegarty and his union representatives listing his complaints as "collusion, rigged hiring, abuse of power, abuse of public funds, and willful negligence to address malfeasance of managers." (#119 ¶ 29, Exh. 35.) Plaintiff

again raised the "collusion" between Judge Winik, Mr. Neville and others that resulted in a "rigged and unfair hiring process," accusing Mr. Conlon and Mr. Gill of being "accessories after the fact" in part because Mr. Conlon ordered him to undergo a fitness for duty examination; Ms. Rodney-Celestine's "apparent wilful intent to undermine an investigation," and Mr. Gill's "wilful obstruction of justice." *Id.* Mr. Jenkins forwarded his February 5th email to Chief Justice Sullivan, who in turn emailed Ms. Rodney-Celestine, inquiring "Is there anything that can be done to address Mr. Jenkins' defiance of the earlier directive not to contact me directly?" (#119 ¶ 30, Exh. 36.)

Ms. Rodney-Celestine emailed Mr. Jenkins on March 8, 2016, requesting that he meet with her and Trial Counsel Elizabeth Day the following day to review the findings of her investigation. (#119 ¶ 32, Exh. 37.) Plaintiff responded in short order with a four-page email, cc'd to Mr. Spence, continuing his diatribe concerning his claims of collusion in filling the Chief Housing Specialist position in 2005, the administrative conflicts of interest and malfeasance by managers, etc., and ending with the statement, "after my experience with the hierarchy thus far, and based on our record, your words and actions, I do not trust you and find no nedd [sic] to meet with you again. Again, issue your findings or ask the questions on the records." (#119 ¶ 33, Exh. 38.)

On March 10, 2016, Ms. Rodney-Celestine emailed Mr. Jenkins, acknowledged his March 8, 2016 email and then stated:

> You were previously directed to cease and desist from sending or re-sending <u>any further emails and/or any other written or verbal</u>

> communication to any Trial Court employee concerning any of the claims raised by you, while the investigation was pending. You were expected to fully comply with this directive and you were informed that any violation of this directive may subject you to disciplinary action. You continued your communication with Trial Court employees during the pendency of my investigation. Your communication, today, to Court Administrator Harry Spence was a continuing violation of this directive. Take note, that I am once again reiterating this directive to you.

(#119 ¶ 34, Exh. 39 (emphasis in original).) Plaintiff was ordered to meet with Ms. Rodney-Celestine and Ms. Day on March 14, 2019. *Id.* Mr. Jenkins replied with a multi-page email asking what legal right Ms. Rodney-Celestine had to require a meeting, and that he had "the right to refuse to meet with corrupt officials (sic) unless required by law, the contract, or [his] regular duties." (#119 ¶ 35, Exh. 40.) Ms. Rodney-Celestine responded that management was mandating that he attend the meeting, and that failing to appear could result in disciplinary action. (#119 ¶ 36, Exh. 40.) On Saturday, March 12, 2016, plaintiff emailed back stating he "should [not] be forced again to sit and talk to corrupt mid-level officials[,]" and requested continuance so he could seek legal advice and assistance from his state senator. (#119 ¶ 37, Exh. 40.)

On Monday, March 14, 2016 at 7:35 AM, Mr. Jenkins emailed Ms. Rodney-Celestine, cc'd to Chief

Justice Carey,[10] repeating at length his view of the alleged obstruction and abuse by Messrs. Conlon and Gill, as well as the impropriety of her appointment as investigator, and then advising for the first time that he could not attend the meeting that day "due to a previous doctor's appointment."[11] (#119 ¶ 38, Exh. 41.) Plaintiff did not attend the March 14th meeting with Ms. Rodney-Celestine and Ms. Day. (#119 ¶ 41, Exh. 42.)

On the morning of March 14th, Mr. Jenkins left a telephone message for Mr. Neville, stating he had a 9:00 a.m. appointment; Mr. Neville assumed that appointment was the one scheduled with Ms. Rodney-Celestine, but then learned plaintiff did not attend that meeting. (#119 ¶ 42, Exh. 42.[12]) Later the same day, Mr. Jenkins left a second telephone message for

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[10] Mr. Jenkins understood that cc'ing Chief Justice Carey contravened Ms. Rodney-Celestine's directive not to send emails to court personnel, but he believed he "had a right to ask Paula Carey relief from meeting with these corrupt officials." (#119 ¶ 40, Exh. 20 at 282-83.)

[11] At his deposition, Mr. Jenkins testified that he did not recall telling Ms. Rodney-Celestine earlier about his medical appointment, but in any event he did not owe "her an explanation [because] [s]he was just a corrupt official appointed by Judge Carey" and she did not "deserve any explanation." (#119 ¶ 39, Exh. 20 at 281-82.)

[12] Mr. Jenkins denies this statement of fact and exhibit. (#124 ¶ 42.) However, in his own email dated March 15, 2016, plaintiff confirmed much of the substance of the statement of fact and exhibit: he called Mr. Neville on March 14, 2016, to say that he was taking the day as a personal day, he requested March 15, 2016 as a vacation day, and Mr. Neville thereafter returned the call, denied the vacation day and ordered him to work. (#119, Exh. 45.)

Mr. Neville, explaining that his medical procedure had been completed, he was taking the day as a personal day, and he was taking the following day, March 15, 2016, as a vacation day. (#119 ¶ 43, Exh. 42.) Mr. Neville returned plaintiff's call, denied the request for a vacation day, and ordered him to report to work the next day. *Id*.

On March 15, 2016, Mr. Jenkins attended the scheduled morning meeting with Ms. Rodney-Celestine and Ms. Day. Ms. Rodney-Celestine presented plaintiff with the findings from her investigation. (#119 ¶ 44, Exh. 24, 44.)[13] The parties differ on what transpired during the meeting. Ms. Day stated that Mr. Jenkins was disruptive and kept interrupting Ms. Rodney-Celestine. (#119 ¶ 44, Exh. 44.) According to Ms. Day:

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[13] Ms. Rodney-Celestine's findings included the following: with respect to Complaint #1, the alleged 2004/2005 illegal and rigged process of hiring Mr. Neville, the "investigator found no evidence of an 'illegal hiring' and/or 'rigged' hiring process"; Complaint #2, mistreatment by Mr. Neville, the investigator found evidence that Mr. Neville had said to plaintiff at least once that he 'was not acting right'" and that there was evidence "of a couple of 'shouting matches'" between plaintiff and Mr. Neville in the open office area; Complaint #3, alleged improper process BHC judges use in handling cases, the investigator found plaintiff "ha[d] expressed [his] dissatisfaction with the work of the court, on numerous occasions, through inappropriate channels" despite having been directed to present issues to his supervisor so that issues could be addressed through the appropriate channels; and Complaint #4, no explanation for why plaintiff was placed on administrative leave, the investigator stated that a question of his mental health was raised as a result of the volume of emails he sent to Trial Court staff, the "frequent, repetitive, confusing and often rambling" nature of those emails, and plaintiff's apparent inability to stop sending "these repetitive emails" despite being told to cease and desist." (#119, Exh. 24.)

> Mr. Jenkins said he would not review the findings with us. He indicated that maybe he would review them later and get in touch by e-mail. Attorney Celestine was firm in her response that the matter was now considered closed, her findings were not open to debate, and that if Mr. Jenkins did not want her to go over the findings, he could read them later and seek any outside redress of his choosing, but he was not to have contact with any member of the Trial Court regarding the same complaints or the investigation.

Id. Plaintiff denies this account of events. (#124 ¶ 44.)

On March 15, 2016, Mr. Jenkins sent an email to Chief Justice Sullivan, later forwarded to Judge Winik, entitled "Complaint of persecution and discriminatory practise [sic]" in which he challenged Mr. Neville's denial of his vacation day request, claiming it was "unprecedented, was not based on operational needs, was a denial of [his] right in a legal and fiduciary sense since it represents currency earned—and this denial of access was based on a whimsical, retaliatory and discriminatory pursuit." (#119 ¶ 45, Exh. 45.)

Mr. Jenkins also emailed Ms. Rodney-Celestine on March 15th relating his version of the meeting that had taken place that day. (#119 ¶ 46, Exh. 46.) He thanked Ms. Rodney-Celestine for allowing him to record the meeting. *Id.* According to Ms. Day's recollection of the meeting, Ms. Rodney-Celestine had told plaintiff "she had not allowed him to record the meeting and that it was illegal for him to have done so." (#119 ¶ 45, Exh. 44.)

By letter dated March 16, 2015, Ms. Rodney-Celestine acknowledged Mr. Jenkins' March 15th email containing what she viewed as misstatements of facts. (#119 ¶ 47, Exh. 43.)[14] Ms. Rodney-Celestine explicitly told plaintiff:

> To clarify, you were instructed yesterday that you are to cease and desist from all communication with Trial Court employees concerning the claims you raised in your complaint. Your complaint was investigated, findings were issued and the matter is now closed. This directive includes any member of the Judiciary including the Supreme Judicial Court. As I stated in our meeting yesterday, you have the right to initiate litigation if your so choose but you may not communicate with any member of the Judiciary concerning the claims you raised in your complaint. Therefore, once again, you are being instructed to cease and desist from sending or re-sending <u>any further emails and/or any other written or verbal communication to any employee of the Judiciary concerning the claims raised in your complaint.</u>

Id.

On March 17, 2016, Mr. Jenkins was placed on administrative leave effective immediately pending a disciplinary hearing prompted by his alleged "course of misconduct" up to, and including, his conduct

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[14] Mr. Jenkins denies this statement of fact, asserting that his memory of the details of the meeting differs from those of Ms. Rodney-Celestine and Ms. Day. (#124 ¶ 47.)

during the March 15th meeting. (#119 ¶ 48, Exh. 47.) Plaintiff was instructed that while on leave, he was not to communicate with Trial Court employees or enter any Trial Court facilities. *Id*. He was advised that he would receive a disciplinary hearing notice detailing the charges against him. *Id*.

On June 10, 2016, plaintiff was notified by Mr. Burke that a disciplinary hearing would be held on June 21, 2016, at which time he would have to answer six charges:

Charge #1: Insubordination and failure to comply with a reasonable order

Charge #2: Inability or unwillingness to work cooperatively with others

Charge #3: Violation of or failure to comply with the Federal or State Constitution, statutes, or court rules and regulations and conduct unbecoming

Charge #4: Improper use of Trial Court property, equipment or funds

Charge #5: Unauthorized absence from work

Charge #6: Misstatement of fact with regard to a request for sick leave and other leaves or abuse of such leaves

(#119 ¶ 49, Exh. 48.) Mr. Jenkins responded by email on June 16, 2016, with an attached letter dated June 17, 2016, to Mr. Burke, cc'd to Chief Justice Carey,

and then forwarded to Ms. Rodney-Celestine and Mr. Spence. (#119 ¶ 49, Exh. 49.)[15]

The subject of the June 17, 2016 letter was "Preliminary Formal Administrative Charges Against Chief Justice of the Massachusetts Trial Courts Paula Carey, and against Massachusetts Trial Courts Administrator Harry Spence, to the Chief Justice And Full Members of the Massachusetts Supreme Judicial Court, under Massachusetts Trial Courts Personnel Manual I and Procedures 16.000 Rules and Discipline 16.500 Discipline or Removal of Management Employees and 16.000 Exceptions to Disciplinary Policy for All Employees, due to the Violations of the aforementioned generally and specifically, and for being 'characters' unbecoming an Officer of the Courts, due to consistent and blatant 'conducts', to prevent equal access to justice." (#119 ¶ 49, Exh. 49.) Mr. Jenkins requested that Mr. Burke forward his letter to Chief Justice Gants and the other members of the SJC for emergency action. *Id.* Plaintiff sought removal of Chief Justice Carey and Mr. Pence for ignoring his prior complaints of collusion, rigged hiring process, discrimination based on race, retaliation, violations of the Trial Court Personnel Rules and Regulations, allegedly supporting malfeasance by employees and managers of the Trial Courts, ignoring Haitian-Creole speaking users of the Housing Court, and denying equal justice/ housing under the law. *Id.* Mr. Jenkins protested the 2005 hiring of Mr. Neville as well as the alleged lack of integrity in the investigation of his complaints. *Id.*

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[15] At his deposition, plaintiff testified that this letter to Mr. Burke is the one referenced in paragraph 55 of the Amended Complaint. (#119 ¶ 51, Exh. 20.) According to Mr. Jenkins, he was terminated in retaliation for having sent this letter.

He requested "immediate and emergency relief." *Id.* Between June 17 and 18, 2016, plaintiff sent at least five emails to Ms. Rodney-Celestine and Chief Justice Carey. (#119 ¶ 51, Exh. 50-54.)

On June 21, 2016, Mr. Burke presided over plaintiff's disciplinary hearing. (#119 ¶ 54, Exh. 55.) The attendees included Mr. Jenkins, Richard Russell, Business Agent, Local 6, Mr. Neville, Ms. Day, Ms. Rodney-Celestine, and two members of the Security Department. *Id.* Evidence was presented on the charges brought against plaintiff, and Mr. Burke concluded, "It is clear from Mr. Jenkins' own statements, his behavior, management's witnesses and documents that Mr. Jenkins has engaged in all the misconduct as outlined in the June 10, 2016 notice." *Id.* At the conclusion of the hearing, Mr. Burke:

> asked [Mr. Jenkins] if there was any way he could put all these issues behind him and return to work as a productive member of the staff. His immediate answer was an emphatic no. Upon reflection, however, he did state that he would be willing to return upon the resignation of all senior Trial Court management who have not responded to his complaints in a manner that he deems satisfactory.

Id. On the evening of June 21st, Mr. Jenkins sent an email to Mr. Burke and Chief Justice Carey stating that what he wanted was a "[f]air settlement [and] resignation by the shown to be corrupt[.]" (#119 ¶ 57, Exh. 56.)

Chief Justice Carey contacted Mr. Conlon on June 23, 2019, to complain about the "barrage of emails"

she was receiving every day from Mr. Jenkins. (#119 ¶ 58, Exh. 57.) Mr. Conlon responded that although plaintiff had been told on multiple occasions to cease sending such emails, he refused to follow directives. *Id.*

On July 7, 2016, Mr. Burke issued his findings with regard to Mr. Jenkins' disciplinary hearing:

> I find that Mr. Jenkins cannot return to work as a productive member of the staff. He is unwilling to accept any reasonable direction or instruction from any member of management who does not sympathize with his fixation. He would continue to be a disruptive force amongst the staff. He has received multiple written warnings over the past year and been placed on administrative leave twice due to his abusive nature with no indication of complying with acceptable behavior. Therefore, my recommendation is that he be terminated from employment in the Trial Court at the earliest possible time.

(#119 ¶ 54, Exh. 55.) On July 21, 2016, Chief Justice Sullivan adopted Mr. Burke's findings and recommendation and issued a letter terminating Mr. Jenkins' employment with the Trial Court effective July 22, 2016. (#119 ¶ 60, Exh. 1.)

III. Standard of Review.

Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Bellone v. Southwick-Tolland Reg'l Sch. Dist.*, 748 F.3d 418, 422 (1st Cir. 2014)

(quoting Fed. R. Civ. P. 56(a)). To prevail on a motion for summary judgment, the moving party bears the initial burden of averring the absence of a genuine issue of material fact "and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that demonstrate the absence of any genuine issue of material fact." *Borges ex rel. S.M.B.W. v. SerranoIsern*, 605 F.3d 1, 5 (1st Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party asserts the absence of a genuine issue of material fact, the nonmovant must demonstrate the existence of a factual dispute with requisite sufficiency to proceed to trial. *Murray v. Kindred Nursing Centers W. LLC*, 789 F.3d 20, 25 (1st Cir. 2015) (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991). "[I]mprobable inferences, conclusory allegations, or rank speculation" cannot alone defeat summary judgment. *Ingram v. Brink's, Inc.*, 414 F.3d 222, 229 (1st Cir. 2005); *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 40 (1st Cir. 2011) (internal citation and quotation marks omitted) ("conclusory allegation is not sufficient for purposes of establishing a significant, not trivial, harm").

In determining whether summary judgment is proper, courts view the record in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the nonmovant's favor. *Caraballo-Caraballo v. Corr. Admin*, 892 F.3d 53, 56 (1st Cir. 2018) (citations omitted). Upon a party's motion, Rule 56 requires the entry of summary judgment when the nonmoving party fails to establish the existence of any one essential element on which he will bear the final burden of proof. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal citations and quotation marks omitted); *Murray*, 789 F.3d at 25.

IV. Discussion.

It is unlawful under Title VII "for employers to retaliate against persons who complain about unlawfully discriminatory employment practices." *Ahern v. Shinseki*, 629 F.3d 49, 55 (1st Cir. 2010) (internal citations and quotation marks omitted). "Title VII retaliation claims proceed under the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973)." *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 175 (1st Cir. 2015); *Ponte v. Steelcase Inc.*, 741 F.3d 310, 321 (1st Cir. 2014) ("Retaliatory termination claims based on circumstantial evidence are evaluated using the *McDonnell Douglas* burden-shifting framework."). Plaintiff must first "establish[ ] a *prima facie* case of . . . discrimination." *McDonnell Douglas,* 411 U.S. at 802. "[T]he prima facie case requires only a small showing, one that is easily made." *Caraballo-Caraballo v. Corr. Admin.*, 892 F.3d 53, 57 (1st Cir. 2018) (internal citations and quotation marks omitted). The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action taken. *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 88 (1st Cir. 2018) (citations omitted); *Adamson v. Walgreens Co.*, 750 F.3d 73, 78 (1st Cir. 2014). Once the employer's

burden of production is met, "[t]he presumption [of discrimination], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993) (citation omitted). The burden shifts back to the plaintiff to prove "by a preponderance [of evidence], that the [employer's] explanation is a pretext for unlawful discrimination." *Rivera-Rivera*, 898 F.3d at 88 (quoting *Mariani-Colón v. Dep't of Homeland Sec. ex rel. Chertoff*, 511 F.3d 216, 221 (1st Cir. 2007)); *Adamson*, 750 F.3d at 78-79. Under First Circuit law,

> [a]t the summary judgment stage, the plaintiff must produce evidence to create a genuine issue of fact with respect to two points: whether the employer's articulated reason for its adverse action was a pretext and whether the real reason was . . . discrimination. At this stage, it is insufficient for a plaintiff merely to undermine the veracity of the employer's proffered justification. Instead, [ ]he must muster proof that enables a factfinder rationally to conclude that the stated reason behind the adverse employment decision is not only a sham, but a sham intended to cover up the proscribed type of discrimination.

Tyree v. Foxx, 835 F.3d 35, 41 (1st Cir. 2016) (internal citations and quotation marks omitted); *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 113 (1st Cir. 2015).

Turning to the claim at hand, "[i]n order to establish a prima facie case of retaliation, [plaintiff] must show that (1) [ ]he engaged in protected conduct; (2) [ ]he was subjected to an adverse employment action; and (3) the adverse employment action is

causally linked to the protected conduct." *Rivera-Rivera*, 898 F.3d 94 (citation omitted); *Planadeball*, 793 F.3d at 175. Mr. Jenkins has established the first two factors: It is uncontested that he wrote a letter to a court administrator complaining about racial discrimination and he was terminated from his job. Defendant argues that plaintiff stumbles on the third step because he cannot show a causal connection between his writing the letter and his termination.

The Supreme Court has held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation. . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360, (2013); *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 70–71 (1st Cir. 2019) (citations omitted) ("The causation element of a Title VII retaliation claim is not satisfied by evidence that retaliation was one motivating factor in the adverse action. Instead, [plaintiff] must show 'but-for' causation—that is, that [ ]he 'would not have [been terminated] in the absence of the' protected complaints."); *Abril-Rivera v. Johnson*, 806 F.3d 599, 608 (1st Cir. 2015).

Defendant contends Mr. Jenkins has proffered no direct evidence on this causal link. For example, no deposition testimony, answer to interrogatory, or admission has been submitted to establish that Mr. Burke ever read the June 17, 2016 letter attached to the June 16, 2016 email plaintiff sent to him. Even if it can be inferred in plaintiff's favor that Mr. Burke read the letter, there is a dearth of evidence that Chief Justice Sullivan, the ultimate decisionmaker,

did. "Temporal proximity can create an inference of causation in the proper case. But to draw such an inference, there must be proof that the decisionmaker knew of the plaintiff's protected conduct when he or she decided to take the adverse employment action." *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79, 85 (1st Cir. 2006) (internal citations omitted); *Posada v. ACP Facility Servs., Inc.*, 389 F. Supp.3d 149, 158 (D. Mass. 2019). Neither the email nor the letter was directly sent, cc'd, or forwarded to Chief Justice Sullivan. In short, there is nothing in the record to show that the person who ultimately terminated plaintiff's employment was aware that Mr. Jenkins drafted and sent the June 17, 2016 letter complaining about racial discrimination, which is the protected conduct alleged. Plaintiff advances no contrary argument with respect to Chief Justice Sullivan. (*See* #123.)[16]

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16 In his Supplemental Memorandum (#123), plaintiff blurs the line between his long history of complaints and the protected conduct alleged to have been the but-for cause of his dismissal. Mr. Jenkins notes the "complaint in writing to Burke about 'racial discrimination in employment'" and his "termination about one month after he sent that June 17, 2016 letter." (#123 at 2.) Plaintiff also states that his "long history of complaints . . . and the Trial Court's lack of response and improper responses to them evidence the fact of the retaliation." *Id.* at 4. Mr. Jenkins argues that the Trial Court did not terminate him earlier despite his long history of complaints, and if it had, it would likely have been in retaliation for the early complaints, *id.* at 6-7, and then conversely, "that the Trial Court did terminate him because of the complaints and it was retaliation." *Id.* at 7. While Chief Justice Sullivan knew of Mr. Jenkins' history of complaints, having himself been the recipient of many of plaintiff's emails, there is no evidence to show that Chief Justice Sullivan was aware of the June 17, 2016 letter.

Mr. Jenkins contends that his June 23, 2016 termination coming on the heels of his June 17, 2016 letter establishes the necessary causation. Temporal proximity can give rise to an inference of causation. *See Planadeball*, 793 F.3d at 177; *Soni v. Wespiser*, No. CV 16-10630 TSH, 2019 WL 3891515, at *5 (D. Mass. Aug. 19, 2019). Even assuming, arguendo, that the facts supported both Mr. Burke and Chief Justice Sullivan having knowledge of the June 17, 2016 letter, the temporal proximity between that letter and plaintiff's termination is insufficient to show a causal connection in this case. "Chronological proximity does not by itself establish causality, particularly if [t]he larger picture undercuts any claim of causation." *Ponte*, 741 F.3d at 322 (internal citations, quotation marks and alterations omitted); *Carrero-Ojeda v. Autoridad de Energia Electrica*, 755 F.3d 711, 720 (1st Cir. 2014) ("while temporal proximity is one factor from which an employer's bad motive can be inferred, by itself, it is not enough—especially if the surrounding circumstances undermine any claim of causation").

At the time Mr. Jenkins sent the letter, the disciplinary process had been underway for three months. Plaintiff was placed on administrative leave on March 17, 2016, pending a disciplinary hearing as a result of his alleged "course of misconduct." He was notified on June 10, 2016, that a hearing was set for June 21, 2016, on the six specific disciplinary charges. Moreover, the record is replete with admonishments and warnings to Mr. Jenkins throughout 2015-16 to cease and desist his wide-ranging, inappropriate, and unprofessional email campaign. He was placed on administrative leave twice between April 2015 and March 2016, and he had received warnings for insubordination and

failure to follow the reasonable requests of his supervisor. "Employers need not suspend previously planned [actions] upon discovering that a [protected activity] has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001); *Baldwin v. Goddard Riverside Cmty. Ctr.*, 53 F. Supp.3d 655, 674 (S.D.N.Y. 2014 ("since the record establishes that [plaintiff's] supervisors began the process of terminating her employment before she engaged in protected activity, she cannot rely on temporal proximity to satisfy the causal connection element of a prima facie case of Title VII retaliation") (internal citation, quotation marks and alterations omitted), *aff'd*, 615 F. App'x 704 (2d Cir. 2015); *Ianetta v. Putnam Investments, Inc.*, 183 F. Supp.2d 415, 426 (D. Mass. 2002), *amended* (Feb. 25, 2002). Considering all of the facts and circumstances, the larger picture, a causal connection between Mr. Jenkins' protected activity and his termination cannot be inferred from temporal proximity. *Cf. Nassar*, 570 U.S. at 358. That Mr. Jenkins had complained for years about a variety of issues in the Trial Court, including discrimination, and then wrote the June 17, 2016 letter knowing his disciplinary hearing was already scheduled, simply is too little to establish a causal link between his protected conduct and his dismissal.

Because Mr. Jenkins has failed to establish a prima facie case of retaliatory discharge, his Title VII claim should be dismissed. Even if plaintiff had proven his requisite prima facie case, however, his retaliation claim would still fail, as he has produced

no evidence to undercut the defendant's legitimate, nondiscriminatory reasons for terminating his employment.

Defendant's reasons for Mr. Jenkins' termination are set forth at length in Mr. Burke's decision following the disciplinary hearing conducted on June 21, 2016. In pertinent part, the report reads as follows:

> In March of 2015, Mr. Jenkins commenced writing numerous, voluminous e-mails alleging perceived improprieties in how the Trial Court conducts his business. He was advised to cease and desist with this activity and acknowledged same in an email dated April 28, 2015. Due to the fact he ignored this order, and the nature of the content of his e-mails, he was originally placed on Administrative Leave on April 29, 2015 pending an independent medical evaluation to determine his fitness for duty, and instructed not to contact any Trial Court staff or enter any courthouse without prior permission. On June 12, 2015, he violated that order by appearing at the Adams Courthouse in what was described as in an agitated state.
>
> On July 1, 2015, a meeting was conducted with Mr. Jenkins, the Union representative and others to prepare him for his return to work and advise him of the expected level of conduct. During that meeting, Mr. Jenkins conducted himself in a very unprofessional and confrontational manner and as such was warned in a letter dated July 2, 2015 from Eamonn Gill, Labor Counsel that such

conduct upon his return to work could result in discipline up to and including termination. On July 6, 2016, Mr. Gill notified Mr. Jenkins in writing that the Trial Court will explore all of his claims, give him a response and reinforced his expected level of conduct. On July 14, 2015, Chief Housing Specialist Neville gave Mr. Jenkins a written warning due to his repeated unacceptable behavior. Mr. Jenkins['] unprofessional behavior, continued e-mails, potential abuse of sick leave and failure to work co-operatively with other continued throughout the balance of 2015 and into 2016.

On February 4, 2016, I conducted a Step II Grievance Hearing concerning Mr. Jenkins as a result of an additional written warning dated December 4, 2015 given to him by Mr. Neville. Once again during that hearing, Mr. Jenkins conducted himself in a very confrontational, abusive, unprofessional manner. His grievance was denied.

In March 2016, the HR Department of the Trial Court completed its exploration into all of Mr. Jenkins' alleged complaints. On March 8, 2016 Attorney Rodney-Celestine requested Mr. Jenkins to attend a meeting on March 9 with her and Attorney Day to give him the report they had compiled on his complaints. He refused to attend. On March 10, he was ordered to attend the meeting now scheduled for March 14 at 9:30 AM. In two separate e-mails dated March 11, he once again refused to attend. On March

14 at 7:35 AM, he sent an e-mail indicating for the first time he had a medical appointment that morning and that he would not be present for the meeting. Subsequently, he called Mr. Neville later that morning indicating he had an appointment and would not be reporting for work. After Mr. Neville spoke to Attorney Rodney-Celestine concerning the issue, Mr. Neville was instructed to call Mr. Jenkins and order him to report to work on March 15 for this meeting and that he had failed to follow procedure for requesting time off.

Unfortunately, on March 15, the entire staff of the Housing Court Administrative Office [was] at a Divisional Meeting in Springfield. Therefore when Mr. Jenkins arrived for his meeting, he was alone with Attorneys Rodney-Celestine and Day. They reported that he once again acted confrontational, abusive and threatening to the point that they were concerned for their safety. As such, when he abruptly left the meeting, indicating he would be right back, they left for their personal protection. Later that morning, he wrote an e-mail to [A]ttorney Rodney-Celestine attempting to explain his actions and in that e-mail he acknowledged he recorded the meeting. In a letter dated March 16, 2016 to Mr. Jenkins from Attorney Rodney-Celestine, she clearly stated, "Your complaint was investigated, findings were issued and the matter is now closed." He was further instructed to cease and desist from all communication with

Trial Court employees concerning his claims. As a result of his ongoing misconduct, he was again placed on administrative leave on March 17, 2016 and instructed not to enter any Trial Court Facility or communicate with any Trial Court employee unless directed to do so by me.

On June 10, 2016, at the completion of management's investigation, Mr. Jenkins was notified of the disciplinary hearing scheduled for June 21, 2016 which he acknowledged receiving. He was subsequently sent an electronic copy of all the documents management intended to submit at the hearing and a hard copy was provided on the date of the hearing. At the hearing, Mr. Jenkins at first feigned ignorance as to why the hearing was taking place, then indicated he did not have sufficient time to prepare. He was unwilling at first to go through each of the charges, but wanted to rehash all the issues contained in his complaint. Even though advised that matter is closed, he refuses to accept that and attempts to obfuscate every discussion with those issues. He once again acted in an unprofessional, confrontational and abusive manner and causes representatives of management to be extremely concerned. At one point, I had to advise him that his standing, loud voice and pounding on the table was not helping his cause. He sermonized and made reference to multiple biblical passages and stated it was his responsibility to cut off the head of

> the snake. Hence the need for two members of the Security Department. It is clear from Mr. Jenkins' own statements, his behavior, management's witnesses and documents that Mr. Jenkins has engaged in all the misconduct as outlined in the June 10, 2016 notice. I find as such.

(#119 ¶ 54, Exh. 55.) Based on his findings, Mr. Burke concluded that plaintiff should be dismissed from his employment as soon as possible. (#119, Exh. 55 at 4.)

The reasons relied on by Mr. Burke for terminating plaintiff's employment are substantially supported by the undisputed facts. Chief Justice Sullivan accepted Mr. Burke's recommendation and terminated Mr. Jenkins' employment. As defendant has articulated legitimate, nondiscriminatory reasons for dismissing plaintiff, it is incumbent upon Mr. Jenkins to show that the reasons are pretextual and the real reason for his termination was discriminatory retaliation.

Mr. Jenkins argues that the reasons stated by the defendant are false, and that he was dismissed because he complained about discrimination. It is true that the record is filled with emails and letters from plaintiff complaining about numerous problems and injustices, including discrimination, that he perceived in the Trial Court. What plaintiff does not address is why his undeniably insubordinate behavior and refusal to follow directives, or the manner in which he raised his complaints, *i.e.*, via emails as opposed to through appropriate channels, despite having been told to do so on many occasions, are sham reasons. That Mr. Jenkins believed he had the right to ignore instructions or directions from his supervisor or from Human Resources personnel because those individuals were

"corrupt" does not mean that his failure to comply was not a legitimate basis for dismissal.

The law is clear: "It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must 'elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination.'" *Melendez v. Autogermana, Inc.*, 622 F.3d 46, 52 (1st Cir. 2010) (quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991)). Plaintiff points to nothing in the record, no specific facts, upon which a fact finder could reasonably conclude that defendant's reasons for terminating his employment were a "sham" and that the true reason was racially-motivated retaliation. *Walker v. City of Holyoke*, 523 F. Supp.2d 86, 112 (D. Mass. 2007). An argument that "[p]laintiff's evidence of derogatory and unfair treatment explain [sic] that he is justified in making the complaints and should not have been dismissed for doing them" (#123 at 8) is not enough. *See Melendez*, 622 F.3d at 53.

Mr. Jenkins has not met his burden on step three of the burden-shifting paradigm. As plaintiff has failed to present sufficient evidence to support a Title VII retaliation claim, summary judgment should enter in defendant's favor.

V. Recommendation.

For the reasons stated, I RECOMMEND that Defendant Trial Court of the Commonwealth of Massachusetts' Motion for Summary Judgment (#117) be GRANTED.

VI. Review by the District Judge.

The parties are hereby advised that any party who objects to this recommendation must file specific written objections with the Clerk of this Court within 14 days of service of this Report and Recommendation. The objections must specifically identify the portion of the recommendation to which objections are made and state the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Federal Rules Civil Procedure, shall preclude further appellate review. *See Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ M. Page Kelley
United States Magistrate Judge

December 9, 2019

MEMORANDUM AND ORDER OF THE DISTRICT COURT ON PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDMENT TO THE SECOND AMENDED COMPLAINT (NOVEMBER 15, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS TRIAL COURT,

Defendant,

Civil Action No. 16-11548-PBS

Before: M. Page KELLEY,
United States Magistrate Judge.

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDMENT TO THE SECOND AMENDED COMPLAINT TO ADD A COUNT FOR DISABILITY DISCRIMINATION (#86)

KELLEY, U.S.M.J.

I. Introduction.

The facts of this case have been extensively detailed in prior Reports and Recommendations (*see*, *e.g.,* ##43, 60) and a Memorandum and Order (#66). General familiarity by the reader is presumed, although specific facts necessary to resolve the motion at hand will be recited.

The initial complaint (#1) in this case was filed on July 27, 2016; the first amended complaint was filed over two months later on October 11, 2016. (#24.) In March 2017, this court issued a Report and Recommendation (R&R) (#43) recommending that the motion to dismiss the amended complaint filed by Boston Housing Court of the Commonwealth of Massachusetts, the Massachusetts Trial Court (BHC) be allowed in its entirety. Chief Judge Saris endorsed that R&R as follows: "After a review of the objections, I adopt the report and recommendation and dismiss the claims with prejudice except the Title VII claim in count II which will be dismissed unless plaintiff, who is pro se, amends it to meet the deficiencies outlined by the magistrate judge within 30 days." (#50.) On June 13, 2017, plaintiff Hector M. Jenkins filed a second amended complaint (#54); BHC moved to strike plaintiff's pleading, and sought dismissal of the remaining Title VII claim (#57). On November 3, 2017, this court issued another R&R (#60) recommending that the Title VII failure to promote claim be dismissed as time-barred, and that any remaining claims beyond the failure to promote claim be stricken as outside the scope of amendment allowed by Chief Judge Saris. Plaintiff filed an objection to the recommendation. (#62.) On March 12, 2018, Chief Judge

Saris issued a Memorandum and Order on the R&R. (#66.)

In the March 12th Memorandum, Chief Judge Saris adopted the recommendation that the failure to promote claim be dismissed. *Id*. at 9. She further determined that plaintiff's hostile work environment claim should be dismissed "because there is no indication that it was exhausted at the administrative level." *Id*. Having reviewed the allegations of the second amended complaint, however, Chief Judge Saris concluded that the interests of justice favored permitting Jenkins to prosecute his retaliatory termination claim. *Id*. at 11-12.

BHC filed a motion for reconsideration of the decision that the retaliatory termination claim was viable. (#69.) That motion was ultimately denied on July 9, 2018. (##73, 77, 78.) On July 27, 2018, BHC filed its answer to plaintiff's second amended complaint. (#79.) Approximately a month and a half later, on October 11, 2018, plaintiff filed a motion to amend the second amended complaint (#86) seeking to add claims under the American with Disabilities Act (ADA) and the Rehabilitation Act of 1973. BHC opposes the motion to amend. (#89.)

II. Applicable Standard.

Federal Rule of Civil Procedure 15 provides that "[t]he court should freely give leave [to amend] when justice so requires." However, "a district court may deny leave to amend when the request is characterized by undue delay, bad faith, futility, [or] the absence of due diligence on the movant's part." *Mulder v. Kohl's Dep't Stores, Inc.*, 865 F.3d 17, 20 (1st Cir. 2017) (quoting *Nikitine v. Wilmington Tr. Co.*, 715 F.3d 388,

390 (1st Cir. 2013) (internal quotations and further citation omitted)); *Turner v. Hubbard Sys., Inc.*, No. CIV. A. 12-11407-GAO, 2015 WL 3743833, at *2 (D. Mass. June 15, 2015) ("It is well established [. . .] that leave may be denied if it would reward undue delay or a lack of due diligence.") (citing *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004)).

Even if a proposed amendment does not reflect undue delay or lack of diligence, "[f]utility of the amendment constitutes an adequate reason for a district court to deny [ ] a motion [to amend] [. . . .] In assessing futility, the district court must apply the standard which applies to motions to dismiss under Fed. R. Civ. P. 12(b)(6)." *Morgan v. Town of Lexington, MA*, 823 F.3d 737, 742 (1st Cir. 2016) (internal quotations, internal citations and citations omitted). Under Rule 12(b)(6), it is incumbent upon the plaintiff to provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. Discussion.

A. Plaintiff's Motion Reflects Undue Delay and Lack of Diligence.

The threshold question is whether, considering the totality of circumstances, plaintiff's proposed third amended complaint has been timely filed. *Nikitine*, 715 F.3d at 390. "Plaintiffs must exercise due diligence in amending their complaints. As a corollary of that principle, busy trial courts, in the responsible exercise of their case management functions, may refuse to allow plaintiffs an endless number of trips to the well." *Aponte-Torres v. Univ. of Puerto Rico*, 445

F.3d 50, 58 (1st Cir. 2006). The First Circuit has reiterated that "when a considerable period of time has passed between the filing of the complaint and the motion to amend, courts have placed the burden upon the movant to show some valid reason for his neglect and delay." *Nikitine*, 715 F.3d at 390–91 (internal quotations and citation omitted) (upholding denial of leave to file a first amended complaint where plaintiff waited nine months). Moreover, a plaintiff is not entitled to "scramble[e] to devise 'new theories of liability [ ] based on the same facts pled in his original complaint [. . . and] theories that could and should have been put forward in a more timeous fashion." *Id.* at 391 (internal quotations, internal citations and citations omitted); *Mulder*, 865 F.3d at 21.

In his proposed amendment, plaintiff alleges that he filed a complaint with the Equal Employment Opportunity Commission (EEOC) on or about December 30, 2016, raising ADA and Rehabilitation Act claims (#86-1 ¶ 81), and that the EEOC issued a right to sue letter on January 25, 2017. (#86-1 ¶ 82.) Jenkins filed that right to sue letter in this case on January 30, 2017. (##39, 40.) Despite having had possession of the right to sue letter for five months, plaintiff did not seek to add an ADA or Rehabilitation Act claim in the second amended complaint which he filed on June 13, 2017. Instead, he waited until October 2018, twenty-one months after receipt of the right to sue letter, to attempt to bring these claims. (#86.)

Although Jenkins asserts that he could not bring the claims earlier because he had been busy fending off various motions filed by defendants, this argument simply does not carry the day. "'This is not a case of new allegations coming to light following

discovery, or of previously unearthed evidence surfacing.'" *Mulder*, 865 F.3d at 21 (quoting *Villanueva v. United States*, 662 F.3d 124, 127 (1st Cir. 2011)). Plaintiff had the right to sue letter when he filed the second amended complaint, yet did not assert an ADA or Rehabilitation Act claim. It was well over a year after the second amended complaint was filed that Jenkins requested leave to add these claims. Plaintiff knew he had exhausted his administrative remedies and, despite having had adequate opportunity to add his ADA and Rehabilitation Act claims, chose to do nothing for an extended period of time. It is simply too late to add the claims now.

B. Plaintiff's Proposed Amendments Would Be Futile.

Even if plaintiff had acted diligently, leave to amend would not be granted where such amendment would be futile under the Rule 12(b)(6) pleading standard. *See Morgan*, 823 F.3d at 742. Under Rule 12(b)(6), "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). However, the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

Jenkins, who has been diagnosed with bipolar disorder, contends that his "termination was based on the perception (accurate or inaccurate) that he was 'crazy' and could not perform his job duties" (#86-1 ¶ 76) or, alternatively, that defendants failed to provide him with reasonable accommodations that

would have allowed him to perform his job (#86-1 ¶ 80). These claims fall under Title I of the ADA, 42 U.S.C. § 12111 *et seq.*, which prohibits discrimination in employment "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a).

Defendant BHC[1] is part of the judicial branch of the Commonwealth. *See* https://www.mass.gov/state-a-to-z (last visited 11/01/2018). The law is clear:

> The Supreme Court has consistently held that an unconsenting State is immune [under the Eleventh Amendment] from suits brought in federal courts by her own citizens as well as by citizens of another State. When enacting legislation, however, Congress has the authority to abrogate the States' Eleventh Amendment immunity when it unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. Unless Congress has properly abrogated the Eleventh Amendment State immunity or the State has consented to being sued, a suit against State officials in their official capacity would be similarly barred.

Burnham v. Massachusetts, 299 F. Supp. 3d 319, 322 (D. Mass. 2018) (internal citations and quotation marks omitted). Here, the state enjoys immunity; plaintiff's ADA claims are barred by the Eleventh Amendment. That Jenkins seeks equitable relief in the form of reinstatement (#86-1 at 3) in addition to monetary damages does not change the result. *See Irizarry-*

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[1] The Housing Court is one of seven Trial Court Departments within the Trial Court. *See* https://www.mass.gov/state-a-to-z (last visited 11/01/2018).

Mora v. Univ. of Puerto Rico, 647 F.3d 9, 11 n.1 (1st Cir. 2011) ("In the absence of consent, waiver, or abrogation, the Eleventh Amendment bars suit against states themselves regardless of the form of relief sought."). Because plaintiff's proposed ADA claims are futile, the motion to amend to add those claims will be denied.

Next, BHC argues that plaintiff's attempt to plead a Rehabilitation Act claim is unavailing. In relevant part, § 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The Supreme Court explained the purpose of § 504 as being "to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Alexander v. Choate*, 469 U.S. 287, 304 (1985) (citation omitted).

In order to allege a claim under § 504 of the Rehabilitation Act, plaintiff "must show (1) that [ ]he is disabled; (2) that [ ]he sought services from a federally funded entity; (3) that [ ]he was 'otherwise qualified' to receive those services; and (4) that [ ]he was denied those services 'solely by reason of h[is] . . .disability.'" *Lesley v. Hee Man Chie*, 250 F.3d 47, 52–53 (1st Cir.

2001) (quoting 29 U.S.C. § 794(a)); *Leary v. Dalton*, 58 F.3d 748, 752 (1st Cir. 1995); *Drachman v. Boston Scientific Corp.*, 258 F. Supp. 3d 207, 211 (D. Mass. 2017); *C.D. by & through M.D. v. Natick Pub. Sch. Dist.*, No. CV 15-13617-FDS, 2017 WL 3122654, at *26 (D. Mass. July 21, 2017). There are no factual allegations regarding federal funds either in the second amended complaint or the proposed amendment. Absent any allegation that defendant BHC is the recipient of federal funding, plaintiff has failed to allege an element of a § 504 claim, and the proposed amendment fails. Brown v. Massachusetts Office on Disability, No. CIV A 06-12029-RWZ, 2008 WL 687412, at *6 (D. Mass. Mar. 7, 2008) (further citation omitted); *Crevier v. Town of Spencer*, 600 F. Supp. 2d 242, 264 (D. Mass. 2008); *McDonald v. Com. of Mass.*, 901 F. Supp. 471, 477–78 (D. Mass. 1995) ("There is no question but that receipt of federal financial assistance is an element of the cause of action under the Rehabilitation Act. . . . At no place in his amended complaint does McDonald make any allegation with respect to 'federal financial assistance.' On this ground alone, the amended complaint is fatally deficient under Rule 12(b)(6) for failing to state a claim.").

Lastly, defendant contends that in the second amended complaint, plaintiff has alleged several reasons why he was terminated. For example, Jenkins claims that he suffered retaliatory termination because he complained about racial discrimination in employment. (#54 ¶¶ 55-57.) In his proposed amendment, plaintiff alleges that he was terminated on account of his disability. (#86-1 ¶¶ 75-79.) By its terms, the Rehabilitation Act requires an individual to have suffered discrimination "solely by reason of . . . his

disability." 29 U.S.C. § 794(a) (emphasis added). Because Jenkins has alleged various grounds for his termination, not only disability, the Rehabilitation Act claim must fail. *See Leary*, 58 F.3d at 752 ("Section 504 alone, however, continues to require a showing that the plaintiff's disability was the sole reason for the defendant's adverse action.") (emphasis in original); *Johnson v. Thompson*, 971 F.2d 1487, 1493 (10th Cir. 1992); *Brown*, 2008 WL 687412, at *5 ("her Complaint does not allege that the MOD terminated her "solely because of [her] handicap," rather, it claims that the MOD terminated her for "discriminatory reasons to replace the plaintiff with a politically connected individual as a result of budget cuts." Therefore, it fails to allege an essential element of a Rehabilitation Act claim.") (internal citations omitted); *Alfano v. Bridgeport Airport Servs., Inc.*, No. 3:04-CV1406 (JBA), 2006 WL 1933275, at *3 (D. Conn. July 12, 2006) ("While plaintiff's allegations that two discriminatory reasons motivated his termination, if proved, reflect reprehensible conduct potentially actionable under some federal statute(s), they preclude a successful Rehabilitation Act claim. . . . Indeed, one of the few differences between the Rehabilitation Act and the Americans with Disabilities Act (ADA) is the Rehabilitation Act's limitation to denial of benefits solely by reason of disability, whereas the ADA covers situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action.") (internal citations and quotation marks omitted).

IV. Conclusion and Order.

Because the proposed amendment is untimely, and the proposed claims are futile, it is ORDERED that Plaintiff's Motion for Leave to File an Amendment to the Second Amended Complaint to Add a Count for Disability Discrimination (#86) is DENIED.

/s/ M. Page Kelley
United States Magistrate Judge

November 15, 2018

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (MARCH 12, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR JENKINS,

Plaintiff,

v.

JEFFREY WINIK, ET AL.,

Defendants.

Civil Action No. 16-11548-PBS

Before: Patti B. SARIS,
Chief United States District Judge.

MEMORANDUM AND ORDER

SARIS, C.J.

INTRODUCTION

In his Second Amended Complaint ("SAC") (Docket No. 54), Plaintiff Hector Jenkins, a former mediator in the Boston Housing Court, brings a Title VII claim against the Housing Court Department of the Trial Court of the Commonwealth of Massachusetts ("Trial Court"). Jenkins alleges that he faced a hostile work

environment in the Trial Court and that the Trial Court discriminated against him on the basis of race and national origin when it terminated his employment in 2016.

Previously, the Court dismissed with prejudice most of the claims in Jenkins's First Amended Complaint ("FAC") (Docket No. 24), but granted Jenkins limited leave to amend one Title VII count. *See* Docket No. 50. Subsequently, Jenkins filed his SAC. The Trial Court then moved to strike the SAC and to dismiss the remaining Title VII claim. *See* Docket No. 57. The Magistrate Judge recommended that the Trial Court's motion be allowed. *See* Docket No. 60.

The Court adopts in part the Magistrate Judge's Report and Recommendation (Docket No. 60), and ALLOWS IN PART and DENIES IN PART Defendants' motion to strike (Docket No. 57).

BACKGROUND

I. Factual Background

The following factual background is taken from the allegations in Jenkins's SAC and must be taken as true at this stage. *See Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 71 (1st Cir. 2014).

Jenkins was a mediator in the Boston Housing Court from 1993 to July 2016, when his employment was terminated. SAC ¶¶ 6, 8. Jenkins is Black and originally from Costa Rica. SAC ¶ 7.

When Judge Jeffrey Winik, who is White, was appointed to the Housing Court in 1995, Jenkins began to have disagreements with him. SAC ¶ 9. Jenkins complained that Black, Hispanic, and Asian

tenants were subjected to forced mediation settlements and agreements approved by Judge Winik. SAC ¶ 10. In 2004, Judge Winik became First Justice of the Boston Housing Court and assumed administrative responsibility for the Housing Court Department in Boston. SAC ¶ 12.

The Chief Housing Specialist position in Boston was vacant when Judge Winik took over court administrative duties. *See* SAC ¶ 11. Jenkins and Patrick Yoyo, a Black employee who was the Assistant Chief Housing Specialist at that time, were both interested in the open position. SAC ¶¶ 13-14. However, during the selection process, Judge Winik allegedly indicated that he "did not feel comfortable that [Jenkins or Yoyo] would report violations by another minority manager," which Jenkins understood to refer to Magistrate Robert L. Lewis, who is Black. SAC ¶¶ 15-16. Neither Jenkins nor Yoyo got the Chief Housing Specialist job. *See* SAC ¶¶ 17-18.

Instead, Michael T. Neville, who is White, was appointed to the position of Acting Chief Housing Specialist in late 2004 and then to permanent Chief Housing Specialist in 2005. SAC ¶¶ 17-18. Jenkins began to lodge complaints with superiors, arguing that non-White applicants were not considered for Neville's position and that the in-house job posting and hiring process "constituted illegal patronage in violation of the Equal Opportunity Employment rules of the Trial Court." SAC ¶¶ 18-20.

Jenkins and his new boss Neville did not get along. After Jenkins's complaints, Neville began yelling in Jenkins's face and making comments, such as "you are crazy," "we don't want you here," and "why don't you quit[?]" SAC ¶ 21. Jenkins continued to complain

about mediation results for unrepresented parties and Neville singling Jenkins out for minor infractions at work. *See* SAC ¶¶ 22-23. By 2008, Jenkins had filed complaints with the Trial Court's entire administrative hierarchy and had been banned from Judge Winik's courtroom. SAC ¶¶ 24-25.

At multiple points during Barack Obama's presidency, Neville encouraged Jenkins to quit, saying "we don't want you here" and that Jenkins could "complain to [his] boy Obama if [he] want[ed]." SAC ¶ 26. Jenkins perceived these comments to be a racially motivated attack against him, and specifically interpreted Neville's remarks to express that Jenkins "was an unwanted Black foreigner." SAC ¶¶ 27-28. The SAC does not include a date or more specific time period when Neville allegedly made these comments to Jenkins.

In 2015, Jenkins again complained to his superiors about Judge Winik's treatment of unrepresented parties. SAC ¶ 35. Around that time, Judge Winik, Neville, and Paul Burke, the Deputy Housing Court Administrator, began an investigation and disciplinary process against Jenkins, which he alleges was not in compliance with Housing Court rules. *See* SAC ¶¶ 36, 39. Jenkins was placed on paid leave on April 21, 2015 and was told that he would need to submit to a mental evaluation before returning to work. SAC ¶ 37. Jenkins was evaluated, medically cleared, and allowed to return to work in July 2015. SAC ¶ 40.

Jenkins then filed a complaint with the Attorney General's Office. SAC ¶ 41. The substance of this complaint is not clear from the SAC, but Antoinette Rodney-Celestine, the Human Resources Attorney for the Trial Court Department, began an investigation into Jenkins's allegations about his work environment

in August 2015. *See* SAC ¶ 42. Rodney-Celestine "did find that [Chief Housing Specialist] Neville has yelled at Mr. Jenkins and spoken to him in a manner that was inappropriate for the workplace and Mr. Jenkins has also done the same." SAC, Ex. A at 10. During her investigation, Judge Winik also told Rodney-Celestine that he "thinks Mr. Jenkins is lazy." SAC, Ex. A at 9. Jenkins interpreted this statement by Judge Winik as inappropriate and racially motivated. SAC ¶ 49. Finally, in her report, Rodney-Celestine made recommendations for "new policies and procedures" for "improvement of the office environment." SAC, Ex. A at 12.

But Jenkins alleges that his work environment continued to deteriorate in the spring of 2016. SAC ¶ 51. He logged additional complaints about the same issues he had previously raised. SAC ¶ 51. Rodney-Celestine then ordered Jenkins to stop communicating with all judicial personnel, but later stated that he could raise concerns with the Supreme Judicial Court. SAC ¶¶ 52-53.

In June 2016, Burke, who had been part of the earlier investigation that led to Jenkins's mental evaluation, informed Jenkins of a disciplinary proceeding regarding his alleged failure to comply with the non-communication orders. SAC ¶ 54. Before the scheduled hearing, in June 2016, Jenkins wrote to Burke and outlined his complaints of "racial discrimination in employment" and "the ongoing failure of the Boston Housing Court to address the serious issues of equal access to justice for litigants of all races." SAC ¶ 55. On July 5, 2016, Burke recommended that Jenkins be summarily terminated. SAC ¶ 56. The Chief Judge of the Trial Court, Chief Judge of the

Housing Court Department, and Chief Administrator of the Trial Court approved Burke's recommendation and terminated Jenkins's employment on July 22, 2016. SAC ¶ 57.

In December 2016, Jenkins filed a charge with the Equal Employment Opportunity Commission ("EEOC"), "alleging unlawful discrimination in employment practices that resulted in unfavorable decisions affecting his employment and ultimately in his termination." SAC ¶ 58. The charge specifically alleges that Judge Winik discriminated against Jenkins by failing to promote him in 2004 and that Jenkins's termination was in retaliation for his complaints. *See* Docket No. 38-1. The EEOC issued him a right-to-sue letter on January 25, 2017. SAC ¶ 59.

II. Procedural History

The procedural history of this early-stage case is already complicated. The relevant background begins with the FAC. The FAC included two counts of Title VII violations. *See* FAC ¶¶ 49 67. The Title VII claim in Count II of the FAC was based primarily on the Trial Court's failure to promote Jenkins to Chief Housing Specialist, but also alleged racially based comments by Judge Winik and Neville, which suggested a hostile work environment. *See* FAC ¶¶ 49-58. Count III expressed a Title VII claim based on retaliatory termination. *See* FAC ¶¶ 59-67.

On April 18, 2017, this Court adopted Magistrate Judge Kelley's Report and Recommendation on the Trial Court's motion to dismiss the FAC. *See* Docket No. 50. The Court's order read:

> After a review of the objections, I adopt the report and recommendation and dismiss the claims with prejudice except the Title VII claim in count II which will be dismissed unless plaintiff, who is *pro se*, amends it to meet the deficiencies outlined by the Magistrate Judge within 30 days.

Docket No. 50. Thus, the Court dismissed with prejudice the retaliatory termination claim, but allowed Jenkins to amend his failure to promote and hostile work environment claims.

Jenkins timely filed his SAC in accordance with the Court's order. *See* Docket No. 54. In it, he consolidates his Title VII claims into a single count, alleging that (1) he was subjected to a hostile work environment based on his race or national origin and (2) his termination was in retaliation for his complaints of "racial discrimination and other mistreatment based on race and/or national origin." SAC ¶¶ 60-66. Jenkins does not appear to have amended his failure to promote claim, although he included factual allegations that would be relevant to such a claim. *See* SAC ¶¶ 60-66.

The Trial Court moved to strike Jenkins's SAC and to dismiss the remaining Title VII claim. *See* Docket No. 57. The Trial Court argues that the SAC does not comply with the Court's order allowing a limited amendment and reasserts a retaliatory termination claim that the Court previously dismissed with prejudice. Docket No. 58 at 5-7. Any failure to promote claim raised in the SAC, the Trial Court maintains, would be time-barred, as Neville was hired over Jenkins in 2004. Docket No. 58 at 6-7.

Magistrate Judge Kelley recommended that the Trial Court's motion be allowed. Docket No. 60 at 4. In her Report and Recommendation, she agreed that any failure to promote claim would have accrued outside the 180-day period in which a charge must be filed with the EEOC. Docket No. 60 at 2-3. She also recommended that "any new or additional claims . . . beyond the failure to promote claim" should be stricken, based on this Court's prior order limiting amendments. Docket No. 60 at 2.

DISCUSSION

I. Failure to Promote & Hostile Work Environment Claims

This Court adopts Magistrate Judge Kelley's Report and Recommendation to the extent that it recommends dismissal of any failure to promote claim in the SAC. Neville became the Chief Housing Specialist in 2004, and Jenkins alleges that the Trial Court's failure to promote him to that position constituted discrimination. However, Jenkins did not file a charge with the EEOC until December 2016. An individual must file a charge with the EEOC within 180 days—or, in some cases, 300 days—of an allegedly discriminatory act "or lose the ability to recover for it." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). Because Jenkins did not do so, he cannot bring a failure to promote claim.

Jenkins's hostile work environment claim must also be dismissed, because there is no indication that it was exhausted at the administrative level. The failure to exhaust administrative remedies with the EEOC "effectively bars the courthouse door." *Jorge v.*

Rumsfeld, 404 F.3d 556, 564 (1st Cir. 2005). If a claimant receives a right-to-sue letter from the EEOC and pursues the case in federal court, "[t]he scope of the civil complaint is accordingly limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge." *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 31 (1st Cir. 2009) (quoting *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990)).

The Trial Court sought to dismiss the Title VII claims in Jenkins's FAC because he had not alleged that he had filed an EEOC charge. *See* Docket No. 34 at 8-9. In response, Jenkins filed a charge with the EEOC in December 2016. *See* Docket No. 38-1.

The charge focused on Judge Winik's failure to promote him or Yoyo to the Chief Housing Specialist position in 2004 and Jenkins's allegedly retaliatory termination in July 2016. *See* Docket No. 38-1. In his EEOC charge, Jenkins did not mention allegedly discriminatory comments or actions other than those associated with the 2004 interview process. *See* Docket No. 38-1. But Neville's allegedly racially motivated statements throughout his time as Jenkins's supervisor make up the bulk of the hostile work environment claim in the federal suit. *See* SAC ¶¶ 26-28, 62. Without even cursory allegations of those statements or mention of Neville himself in the EEOC charge, the hostile work environment claim could not "reasonably be expected to grow" out of Jenkins's charge. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464-65 (1st Cir. 1996) (holding hostile work environment claim was not within scope of administrative investigation when plaintiff's charge made "no mention of [the alleged harasser] or any incidents of harassment" and

was based on "qualitatively and temporally" different facts and "the conduct of different individuals"). Thus, the hostile work environment claim must be dismissed, as Jenkins's EEOC charge did not rectify the claim's exhaustion problem.

II. Retaliatory Termination Claim

The Magistrate Judge's Report and Recommendation is correct that this Court's order of April 18, 2017 dismissed with prejudice the retaliatory termination claim and only allowed amendment of the Title VII claim in Count II of the FAC. But the Court now revises its prior order in light of the allegations in the SAC and allows Jenkins to proceed with his retaliatory termination claim.

Here, Jenkins is a pro se litigant who has, in general, complied with the Court's orders. He has fixed the deficiency in the earlier complaint in the SAC. He now alleges that he was summarily terminated approximately one month after complaining in writing to Burke about "racial discrimination in employment," among other things. SAC ¶¶ 55-57. Racial discrimination in employment is precisely what Title VII was designed to prohibit. Jenkins now has alleged a plausible, exhausted claim of wrongful termination. Based on the principles encouraging judicial leniency for pro se litigants, *see Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ.*, 209 F.3d 18, 23-24 (1st Cir. 2000), the Court finds that it would be in the interests of justice to allow Jenkins to raise this claim.

ORDER

Defendants' motion to strike Plaintiff's SAC and to dismiss the remaining Title VII claim (Docket No. 57) is ALLOWED IN PART and DENIED IN PART. Plaintiff's retaliatory termination claim may proceed. Defendants shall file an answer to the SAC by March 30, 2018.

/s/ Patti B. Saris
Chief United States District Judge

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO RECONSIDER ORDER TO DISMISS PLAINTIFF'S CLAIM OF HOSTILE ENVIRONMENT (#85) (NOVEMBER 15, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR JENKINS,

Plaintiff,

v.

BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS TRIAL COURT,

Defendant,

Civil Action No. 16-11548-PBS

Before: M. Page KELLEY,
United States Magistrate Judge

KELLEY, U.S.M.J.

Plaintiff Hector Jenkins filed his initial complaint in late July 2016. Extensive motion practice ensued with the named defendants seeking to have the various iterations of the complaint dismissed. It was in the context of these motions to dismiss that Chief Judge Saris determined in a Memorandum and Order dated

March 12, 2018, that "Jenkins's hostile work environment claim must also be dismissed, because there is no indication that it was exhausted at the administrative level." (# 66 at 9.) Plaintiff seeks reconsideration of that decision.

According to Jenkins, he filed an amendment to his complaint with the Equal Employment Opportunity Commission (EEOC) on or about December 30, 2016. (# 86-2.) With that amendment, he claims also to have submitted a copy of the First Amended Complaint (# 24) to the EEOC. (# 85 at 2.) Relying on these two documents, Jenkins asserts that he presented his hostile work environment claim to the EEOC and so has met the exhaustion requirement. The EEOC issued a right to sue letter on January 25, 2017. (# 86-1 ¶ 82.)

The December 2016 amendment to plaintiff's EEOC complaint is entitled COMPLAINT (American Disability Act). (# 86-2) The introductory paragraph stated that Jenkins "hereby requests to add the following matter regarding violations of the American Disability Act [sic], as an amendment to complaint filed under unequal employment opportunities and other unlawful practices December 2016." *Id*. In paragraph one, plaintiff alleged, "I ended up hospitalized with incredible stress cause by relation upon my complaints, hostile working environment and hypervigilance." *Id*. This is the sole reference to a hostile work environment in the proposed ADA amendment to the EEOC complaint.[1] The remainder of the allegations in the amendment relate to plaintiff allegedly having been

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[1] There was nothing alleged in Jenkins' original EEOC complaint regarding hostile work environment. *See* # 38-1.

terminated on account of his disability of bipolar disorder.

Similarly, Jenkins mentioned a hostile work environment in the First Amended Complaint (# 24).[2] In the Statement of Facts, plaintiff alleged that he "became subject to retaliatory actions in his employment and was subjected to a blatantly hostile working environment." *Id.* ¶ 22. That was the only statement regarding a hostile work environment in this nine-page, sixty-seven-paragraph filing. No claim based on hostile work environment was advanced in the First Amended Complaint.[3]

"The fact that a complainant has filed an EEOC complaint does not open the courthouse door to all claims of discrimination." *Velazquez–Ortiz v. Vilsack*, 657 F.3d 64, 71 (1st Cir. 2011). As explained by the First Circuit: "A later civil action in district court is limited to the allegations of discrimination first presented in the EEO complaint. This exhaustion requirement is no small matter; it is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Rodriguez v. United States*, 852

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[2] The court assumes that the EEOC in fact received a copy of the First Amended Complaint and considered the allegations set forth in it.

[3] It was in the Second Amended Complaint that Jenkins first alleged a hostile work environment claim: "Defendant discriminated against the Plaintiff based on his race (Black) and/or his national origin (Costa Rican) by creating a hostile work environment, including making offensive race-based comments and treating Plaintiff differently based on his race in employment decisions, as described in this Second Amended Complaint." (# 54 ¶ 62.) The Second Amended Complaint was filed on June 13, 2017, after the right to sue letter had issued.

F.3d 67, 79 (1st Cir. 2017) (internal citations and quotation marks omitted). The underlying goal of administrative exhaustion is to "provide the employer with prompt notice of the claim and to create an opportunity for early conciliation." *Id.* at 78 (internal citation and quotation marks omitted); *Powers v. Grinnell Corp.*, 915 F.2d 34, 37 (1st Cir. 1990) ("The administrative charge provides the agencies with information and an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation, and affords formal notice to the employer and prospective defendant of the charges that have been made against it.) (internal citations and quotation marks omitted). That said, "the scope of the investigation rule permits a district court to look beyond the four corners of the underlying administrative charge to consider collateral and alternative bases or acts that would have been uncovered in a reasonable investigation." *Thornton v. United Parcel Service, Inc.*, 587 F.3d 27, 32 (1st Cir. 2009).

In this case, neither the ADA amendment to the EEOC complaint nor the First Amended Complaint purported to include a hostile work environment claim. While plaintiff alluded to a hostile work environment in each document, such passing references were insufficient to put defendant on notice of the claim. Moreover, with a hostile work environment having been alleged only tangentially in the ADA amendment and the First Amended Complaint, it was not reasonable to expect that a hostile work environment claim would have been part of the EEOC investigation. Given these circumstances, a hostile work environment claim was not exhausted at the administrative level.

Recommendation

For the reasons stated, I RECOMMEND that Plaintiff's Motion to Reconsider Order to Dismiss Plaintiff's Claim of Hostile Environment (# 85) be DENIED.

Review by the District Judge

The parties are hereby advised that any party who objects to this recommendation must file specific written objections with the Clerk of this Court within 14 days of service of this Report and Recommendation. The objections must specifically identify the portion of the recommendation to which objections are made and state the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Federal Rules Civil Procedure, shall preclude further appellate review. *See Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ M. Page Kelley
United States Magistrate Judge

November 15, 2018

REPORT AND RECOMMENDATION ON DEFENDANTS MASSACHUSETTS TRIAL COURT AND THE BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS'S MOTION TO STRIKE PLAINTIFF'S PROPOSED SECOND AMENDED COMPLAINT AND FOR DISMISSAL OF THE REMAINING TITLE VII CLAIM (#57) (NOVEMBER 15, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HECTOR M. JENKINS,

Plaintiff,

v.

JEFFREY WINIK, MICHAEL NEVILLE, PAUL BURKE, PAULA CAREY, HARRY SPENCE, MARK CONLON, EAMONN GILL, ELIZABETH DAY, ANTOINETTE RODNEY-CELESTINE, TIMOTHY SULLIVAN, BOSTON HOUSING COURT OF THE COMMONWEALTH OF MASSACHUSETTS, THE MASSACHUSETTS TRIAL COURT, MASSACHUSETTS ATTORNEY GENERAL,

Defendants,

Civil Action No. 16-11548-PBS

Before: M. Page KELLEY,
United States Magistrate Judge.

KELLEY, U.S.M.J.

The facts of this case were detailed in the prior Report and Recommendation on Defendants Boston Housing Court, the Massachusetts Trial Court and the Massachusetts Attorney General's Office's Motion to Dismiss the Amended Complaint. (#43.) Familiarity by the reader is presumed. The District Judge to whom this case is assigned endorsed that Report and Recommendation as follows: "After a review of the objections, I adopt the report and recommendation and dismiss the claims with prejudice except the Title VII claim in count II which will be dismissed unless plaintiff, who is pro se, amends it to meet the deficiencies outlined by the magistrate judge within 30 days." (#50.) Plaintiff Hector M. Jenkins filed a second amended complaint (#54) on June 13, 2017. Remaining defendants, the Massachusetts Trial Court and the Boston Housing Court of the Commonwealth of Massachusetts, have moved to strike plaintiff's pleading and seek dismissal of the remaining Title VII claim. (#57.)

In his first amended complaint (#24), plaintiff advanced two Title VII claims against the court defendants: In Count II, Jenkins claimed that the court defendants engaged in unlawful practices by failing to promote him and, in Count III, he alleged that the court defendants retaliated against him by terminating him. Chief Judge Saris granted plaintiff leave to replead only the failure to promote claim. To the extent Jenkins has attempted to plead any new or additional claims in his second amended complaint beyond the failure to promote claim, those claims should be stricken.

One of the deficiencies noted in the first amended complaint was plaintiff's failure to "allege relevant dates." (#43 at 11.) In his second amended complaint, Jenkins remedies this shortfall by alleging dates pertinent to his failure to promote claim. Specifically, plaintiff was not promoted in "late 2004" when Michael T. Neville was appointed Acting Chief Housing Specialist, the position sought by Jenkins. (#54 ¶ 17.) Alternatively, the latest date upon which Jenkins could be viewed as not having been promoted was "in 2005" when Neville was appointed permanently to the position of Chief Housing Specialist. *Id.* ¶ 18. These dates reveal that the failure to promote claim is time-barred.

Title VII requires that a charge be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful employment practice occurred, or within 300 days if the aggrieved person has initially instituted proceedings with a state or local agency. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104-05 (2002); 42 U.S.C. § 2000e-5. Before an employee may sue in federal court on a Title VII claim, he must first exhaust administrative remedies, which include the timely filing of a charge with the EEOC and the receipt of a right-to-sue letter from the agency. *Franceschi v. U.S. Dep't of Veterans Affairs*, 514 F.3d 81, 85 (1st Cir. 2008) (emphasis added); *Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005). Jenkins filed his EEOC charge based on the 2004/2005 failure to promote on December 21,

2016, well outside the time parameters established by the statute. (#58, Exh. C.[1])

The Supreme Court has identified the failure to promote as a "discrete" act of discrimination. *Morgan*, 536 U.S. at 114.

> [D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180-or 300-day time period after the discrete discriminatory act occurred.

Id. at 113; *see also Svensson v. Putnam Investments LLC*, 558 F. Supp. 2d 136, 139-40 (D. Mass. 2008). Moreover, Chief Judge Saris has concluded: "The discovery rule does not save these failure to promote claims. In an employment discrimination case under federal law, the limitations period begins to run when the claimant learns of the adverse employment action, not when a plaintiff learns of the improper motives." *Svensson*, 558 F. Supp. 2d at 140 (citing *Morris v. Gov't Dev. Bank of P.R.*, 27 F.3d 746, 748–50 (1st Cir. 1994)); *see also Poirier v. Massachusetts Dep't of Correction*, 186 F. Supp. 3d 66, 68-69 (D. Mass. 2016).

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[1] In his EEOC charge, Jenkins did not state when the alleged failure to promote occurred. (#58, Exh. 3.) In its Dismissal and Notice of Rights on plaintiff's charge, the EEOC determined that: "Based on its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge." (#39.)

Because Jenkins did not file a timely charge for discriminatory failure to promote with the EEOC, his Title VII claim for failure to promote is time-barred. I RECOMMEND that Defendants Massachusetts Trial Court and the Boston Housing Court of the Commonwealth of Massachusetts's Motion to Strike Plaintiff's Proposed Second Amended Complaint and for Dismissal of the Remaining Title VII Claim (#57) be ALLOWED.

Review by District Court Judge.

The parties are hereby advised that any party who objects to this recommendation must file specific written objections with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The objections must specifically identify the portion of the recommendation to which objections are made and state the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Federal Rules Civil Procedure, shall preclude further appellate review. *See Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ M. Page Kelley
United States Magistrate Judge

November 3, 2017

ORDER OF THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING (JANUARY 4, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HECTOR M. JENKINS,

Plaintiff-Appellant,

v.

HOUSING COURT DEPARTMENT, City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts,

Defendant-Appellee,

JEFFREY WINIK, First Justice of The Boston Housing Court; MICHAEL NEVILLE, Chief Housing Specialist of the Boston Housing Court; PAUL BURKE, Deputy Court Administrator of the Massachusetts Housing Courts; PAULA CAREY, Chief Justice of The Massachusetts Trial Courts; HARRY SPENCE, Court Administrator of the Massachusetts Trial Courts; MARK CONLON, Human Resources Director of the Massachusetts Trial Courts; EAMONN GILL, Labor Counsel, Human Resources Department of the Massachusetts Trial Courts; ELIZABETH DAY, Assistant Labor Counsel, HR Department of the Massachusetts Trial Courts; ANTOINETTE RODNEY-CELESTINE, Administrative Attorney, HR Department of Trial Courts;

TIMOTHY SULLIVAN, Chief Justice of the Massachusetts Housing Courts;
MAURA HEALEY, Attorney General,

Defendants.

No. 20-1124

Before: HOWARD, Chief Judge, LYNCH, LIPEZ, THOMPSON, KAYATTA, BARRON, and GELPI, Circuit Judges.

ORDER OF THE COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton
Clerk