No. 20-3097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 25, 2020
DEBORAH S. HUNT, Clerk

CHAUNTEL JACKSON,

Plaintiff-Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Defendant-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Chauntel Jackson, an Ohio resident proceeding *pro se*, moves this Court to grant her permission to proceed *in forma pauperis* in her appeal from the district court's judgment dismissing her complaint pursuant to 28 U.S.C. § 1915(e).

On July 23, 2019, Jackson filed this lawsuit against her former employer, the Transportation Security Administration ("TSA"), alleging that the federal agency racially discriminated against, relentlessly harassed, and retaliated against her; and also subjected her to workplace isolation. She alleged that the TSA covered up those illegal actions. Jackson further alleged that those adverse actions forced her to resign from the TSA in April 2016, and that she was subsequently "in [Equal Employment Opportunity Commission] proceedings until August of 2018." She sought pecuniary damages.

On initial screening, the district court construed Jackson's complaint as raising claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e *et seq.*, and dismissed the complaint under § 1915(e) for failing to state a claim upon which relief could be granted. Specifically, the district court determined that Jackson: (1) could not assert a *Bivens* claim against

a federal agency; (2) failed to satisfy the statutory prerequisites for bringing a Title VII claim in federal court; and (3) failed to allege facts that establish a *prima facie* case of race discrimination. The district court further certified, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from its decision could not be taken in good faith.

Where, as here, a district court certifies that a pro se plaintiff's appeal is not taken in good faith, the plaintiff may file a motion in this Court for leave to proceed *in forma pauperis*. Fed. R. App. P. 24(a)(5). This Court will grant an *in forma pauperis* motion only if it is persuaded that the appeal is being taken in good faith, i.e., that the issues to be raised are not frivolous. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962). An appeal is frivolous if it lacks an arguable basis in law or fact. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Accordingly, this Court will grant an *in forma pauperis* motion only where the claims on appeal deserve "further argument or consideration." *Coppedge*, 369 U.S. at 454.

For the reasons stated by the district court, it appears that Jackson's appeal lacks an arguable basis in law. Accordingly, the motion to proceed *in forma pauperis* is **DENIED**. Unless Jackson pays the $505 filing fee to the district court within thirty days of the entry of this order, this appeal will be dismissed for want of prosecution.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-3097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 17, 2021
DEBORAH S. HUNT, Clerk

CHAUNTEL JACKSON,

Plaintiff-Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Defendant-Appellee.

ORDER

BEFORE: COLE, GILMAN and McKEAGUE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 20-3097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 19, 2021
DEBORAH S. HUNT, Clerk

CHAUNTEL JACKSON, Plaintiff-Appellant, v. TRANSPORTATION SECURITY ADMINISTRATION, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: COLE, Chief Judge; GILMAN and McKEAGUE, Circuit Judges.

Chauntel Jackson, a pro se Ohio plaintiff, appeals the district court's judgment sua sponte dismissing her federal employment-discrimination complaint, filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, pursuant to 28 U.S.C. § 1915(e)(2) for failure to state a claim on which relief may be granted. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

The Transportation Security Administration (TSA) employed Jackson as a travel-document checker from March 2013 to April 2016. In January 2016, TSA terminated Jackson for committing security violations and unprofessional conduct. Jackson appealed her termination, and in April 2016, the TSA Office of Professional Responsibility Appellate Board found that management had not proven the alleged violations by a preponderance of the evidence and reinstated Jackson to her position. But believing that the employer-employee relationship had been irretrievably broken, Jackson voluntarily resigned shortly thereafter.

In July 2019, Jackson filed a Title VII employment-discrimination complaint against TSA in the district court, claiming that she had been illegally terminated because of her race and in retaliation for complaining to the Equal Employment Opportunity Commission (EEOC) about perceived discrimination. Jackson moved the district court to proceed without prepayment of the district-court filing fee.

The district court granted Jackson leave to proceed in forma pauperis and then screened her complaint pursuant to § 1915(e)(2)(B)(ii) to determine whether it should be dismissed for failure "to state a claim on which relief may be granted." Noting that Jackson had alleged that her "case was previously in EEOC proceedings until August of 2018," the district court concluded that her complaint was untimely because she filed it more than ninety days after the conclusion of her administrative proceedings. *See* 42 U.S.C. § 2000e-5(f)(1); *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998). The district court also concluded that Jackson had not alleged any basis for equitably tolling the statute of limitations. The court therefore dismissed Jackson's complaint. This appeal followed.

We review de novo the district court's dismissal of a complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 471 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

We conclude that the court's sua sponte dismissal of Jackson's complaint was appropriate because it was apparent that her employment-discrimination and retaliation claims were barred by the statute of limitations. *See Bowman v. Fister*, No. 16-6642, 2017 WL 5495717, at *2 (6th Cir. Mar. 22, 2017); *Alston v. Tenn. Dep't of Corr.*, 28 F. App'x 475, 476 (6th Cir. 2002). As the district court noted, Jackson alleged that her "case was previously in EEOC proceedings until August of 2018," and yet she did not file her complaint in the district court until July 2019. Jackson therefore missed the filing deadline by about eight months.

The statute of limitations is subject to equitable tolling. *See Truitt*, 148 F.3d at 648. But here, according to her own documents, Jackson was aware no later than March 13, 2019, that her

initial EEOC proceedings had concluded, that she needed to obtain a final agency decision on her discrimination complaint, and that she could then appeal the agency's decision to the EEOC Office of Federal Operations within thirty days. Despite Jackson's actual knowledge that her EEOC proceedings had concluded, she did not file her complaint in the district court until July 23, 2019, 132 days later. Thus, even assuming that the ninety-day limitations period was tolled until Jackson had actual knowledge that her EEOC proceedings had concluded, she still missed the filing deadline by six weeks. Jackson gives no reason for that delay. *Cf. Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561-62 (6th Cir. 2000) (holding that a plaintiff who missed the ninety-day filing deadline by eleven days and had no explanation for her delay was not entitled to equitable tolling). We thus find that Jackson did not exercise due diligence in pursuing her claims, and therefore that the district court did not abuse its discretion in concluding that she was not entitled to equitable tolling of the statute of limitations, *see Truitt*, 148 F.3d at 648.

We therefore **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Penthouse, Suite 1300
Philadelphia, PA 19107

Chauntel Jackson, Complainant, v. Kristjen Nielson, Secretary Department of Homeland Security, Transportation Security Administration, Agency.	:	EEOC Hearing No. 530-2017-00107X Agency Case No. HS-TSA-25420-2016 August 2, 2018

ORDER ENTERING JUDGMENT

For the reasons set forth in the Decision, judgment in the above-captioned matter is hereby entered. A Notice to the Parties explaining their appeal rights is attached.

It is so ORDERED
August 2, 2018

For the Commission:

Dawn M. Edge
ADMINISTRATIVE JUDGE

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Order Entering Judgment and Decision within five (5) calendar days after it was sent *via* first class mail. I hereby certify that the Order Entering Judgment and Decision have been sent by regular, first-class mail, postage prepaid, to the following:

Chauntel Jackson
4000 Monticello Blvd., Apt 204
Youngtown, Ohio 44505
(sent via email only: chaunteljackon@live.com)

Keyur Shah
Attorney-Advisor
Office of the Chief Counsel
Department of Homeland Security/TSA
701 Market Street, Suite 3200
Philadelphia PA 19106
(sent via email and FEDSEP: Keyur.Shah1@tsa.dhs.gov)

August 2, 2018
Date

Dawn M. Edge

Dawn M. Edge
Administrative Judge

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty days of receiving this decision and the hearing record, you are required to issue a final order notifying the Complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the Complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit, the right to request appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice or Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. §1614.403, and append a copy of your appeal to your final order. *See* EEO Management Directive 110 (EEO MD-110), November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. §1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Equal Employment Opportunity Commission's Office of Federal Operations when you receive a final order from the Agency informing you whether the Agency will or will not fully implement this decision. 29 C.F.R. §1614.110(a). From the time you receive the Agency's final order, you will have thirty (30) days to file an appeal. If the Agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the Agency's forty (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision to your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the Agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the Agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

BY FACSIMILE:

Fax No. (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, a final action that has not been the subject of an appeal to the Commission or a civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the terms of this decision, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the Agency has not responded to the Complainant in writing, or if the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal thirty-five (35) calendar days after serving the Agency with the allegations of noncompliance, but must file an appeal within thirty (30) calendar days of receiving the Agency's determination. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Penthouse, Suite 1300
Philadelphia, PA 19107

Chauntel Jackson, Complainant, v. Kristjen Nielson, Secretary Department of Homeland Security, Transportation Security Administration, Agency.	:	EEOC Hearing No. 530-2017-00107X Agency Case No. HS-TSA-25420-2016 July 31, 2018

DECISION

This matter came before the U.S. Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the 1964 Civil Rights Act. All procedural prerequisites for the processing of the complaint by the EEOC as set forth in the regulations promulgated by the EEOC at 29 C.F.R. § 1614.101 et. seq., which govern the administrative processing of federal sector complaints of employment discrimination, have been satisfied.

PROCEDURAL HISTORY

On February 2, 2016, the Complainant, Chauntel Jackson, filed a formal complaint of discrimination alleging the Agency discriminated against and subjected her to harassment based on race (African American) and reprisal (prior EEO activity, instant complaint).

On May 15, 2018, the Agency filed a Motion for Decision without a Hearing. The Complainant did not file a response opposing the Agency's Motion.

The regulations governing Federal Sector EEO complaints, 29 C.F.R. § 1614.109(g)(1) and (2), provide for the issuance of a decision without a hearing, also known as summary judgment. The United States Supreme Court has stated that summary judgment is appropriate where the adjudicator determines that no genuine issue of material fact exists, as governed by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An issue is genuine if the evidence is such that a reasonable fact-finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322–23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988).

In order to avoid summary judgment, the non-moving party must produce admissible factual evidence sufficient to demonstrate the existence of a genuine issue of material fact requiring resolution by the fact-finder. *Celotex*, 477 U.S. at 322–24; *Matsushita Elec. Indus. Co. v. Zenith*

Radio, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 247–50. The party opposing a motion for summary judgment may not simply rest upon the allegations contained in his or her pleading, but must set forth specific facts showing that there is a genuine issue still in dispute. *Anderson*, 477 U.S. at 248. Only disputes over facts that might affect the outcome of the case, and not irrelevant or unnecessary factual disputes, will preclude summary judgment. *Id.* Material factual disputes include credibility disputes where two or more people have different versions of the relevant event, and the determination of that credibility dispute will affect the outcome of the case. In determining whether there are no disputed material facts, the fact-finder must draw all inferences from the record in the light most favorable to the party opposing summary judgment. *Id.*

In response to a motion for summary judgment, the fact-finder's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Id.* at 248–49; *Bhuller v. USPS*, EEOC Request No. 05910523 (8/1/91). Finally, the administrative judge may properly issue a decision without a hearing only upon a determination that the parties have had the opportunity to engage in discovery and the record has been adequately developed. *Petty v. Defense Security Service*, EEOC Appeal No. 01A24206 (7/11/03); *Murphy v. Army*, EEOC Appeal No. 01A04099 (7/11/03).

In this case, the Acknowledgement was issued on December 4, 2017. On January 18, 2018, the Scheduling Order was issued and advised the parties of their right to engage in discovery. The Agency's Motion for a Decision Without a Hearing was filed after the 90-day discovery period had passed. I find that Complainant did have the opportunity to engage in discovery and that the record has been adequately developed to issue a decision. Having considered all material documentary evidence in the record, which includes the Report of Investigation (ROI) and the parties' submissions, I have determined that there are no genuine issues of material fact in dispute.

CLAIMS PRESENTED

Whether Complainant, a Transportation Security Officer (TSO) at Cleveland Hopkins International Airport, Cleveland, Ohio, was discriminated against and subjected to harassment because of race (African-American) and subjected to reprisal (Prior EEO activity: instant complaint) when:

1. On an unspecified date in September 2015, a management official spoke to the Complainant in a rude manner and "mimicked" her during a briefing.

2. On an unspecified date in November 2015, the Complainant received a Notice of Proposed Removal after a passenger complaint and for misreading an employee's badge.

3. On December 26, 2015, a management official questioned the Complainant about her reasons for chuckling during a briefing and then threatened to "write her up" when the Complainant refused to answer the question.

4. On an unspecified date, a management official called the Complainant into his office to question her response to the management official that questioned the Complainant about her reasons for chuckling during a briefing.

5. On an unspecified date, a management official told the Complainant to "put her phone away" and later asked her for statements regarding the incident.

6. On an unspecified date, the Complainant went to a management official about the treatment that she received. The management official questioned the Complainant about days missed from work and later "wrote her up" for tardiness on three (3) occasions.

7. On January 7, 2016, the Complainant was removed from federal service

UNDISPUTED MATERIAL FACTS

Based upon the averments in Complainant's complaint, which I must accept as true under the foregoing standard of review, the pertinent facts are as follows:

1. During the relevant period, Complainant, Chauntel Jackson (race: Black), was employed as a Transportation Security Officer (TSO) at the Cleveland Hopkins International Airport in Cleveland, Ohio. (ROI 58). The Complainant held the position of TSO for approximately three (3) years. Id.

2. On August 20, 2015, Transportation Security Manager (TSM), Kristy Clark, issued Complainant a Letter of Counseling for tardiness and Absence Without Leave (AWOL). (ROI 201). The letter notified the Complainant that from May 2015 to August 2014 Complainant was late ten (10) times. Id. In response, Complainant notified Clark that she was late because he had difficulty acclimating to her 3:30 a.m. start time. (ROI 63).

3. On or about September 6, 2015, and while working at the checkpoint, Supervisory Transportation Security Officer (STSO), Jessica Killian, commented to Complainant after Complainant inquired about being relieved, that Complainant needed to stop asking about being relieved from her shift, and should wait until the end of the shift. (ROI 59, 99-100; Agency Motion Ex. C).

4. On an unspecified date, STSO Deborah McCoig called Complainant into her office and questioned Complainant regarding why she laughed during a briefing earlier that day. (ROI 60). McCoig accused Complainant of being unprofessional to which Complainant responded that others were also joking and laughing. Id. Complainant further told McCoig that she did not have to answer her questions because McCoig was not present at the briefing. Id. McCoig threatened to discipline the Complainant, but never did. Id.

5. On an unspecified date, STSO Jeromie Archer told Complainant to put her phone away. (ROI 62). Sometime thereafter, TSM Mark Williams notified Complainant that he confirmed that Complainant was not on her phone and he could not issue her a reprimand. Id.

6. On an unspecified date, Complainant approached TSM Clark about the behavior of STSO Christine Vankeuren and STSO Jeffrey Taylor because the two employees had criticized Complainant, including telling her she could not eat her breakfast and drink coffee on the checkpoint. (ROI 63).

7. On October 16, 2015, TSM Kristy Clark issued Complainant a Letter of Counseling citing Complainant' inappropriate comment and conduct toward LTSO Jessica Killian when Killain notified the staff about "relief time". (Agency Motion Ex. D).

8. On October 31, 2015, TSM Brian Phillips issued Complainant a Notice of Proposed Removal citing Complainant's Lack of Candor and Failure to Follow Procedures. (ROI 131-135). The Notice specifically noted that on October 23, 2015, the Complainant falsely noted that she was not trained on the employee badge reading, and on October 22, 2015, Complainant allowed an unauthorized person into the sterile area. Id.

9. The Complainant sought initial EEO counseling on December 2015, and filed a formal complainant of discrimination on February 2, 2016. (ROI 29, 33).

10. On January 6, 2016, Deputy Assistant Federal Security Director (DAFSD), Steve Hogan, issued the Complainant a Notice of Decision on Proposed Citing:

    a. Failure to Exercise Courtesy in the Performance of Duties for, an October 11, 2015, incident where a passenger complained about Complainant's discourteous tone and unprofessional behavior;
    b. Failure to Follow Procedures, for an October 22, 2015, Complainant allowed an unauthorized person into the sterile area; and,
    c. Lack of Candor, for an October 23, 2015, incident when the Complainant allegedly falsely noted that she was not trained on the employee badge reading.

    (ROI 137-145).

11. The Complainant appealed the January 6, 2016, termination decision and was subsequently reinstated at the Cleveland Hopkins International Airport on April 14, 2016. (ROI 59, 198-199).

12. On April 20, 2016, Complainant submitted a letter of resignation to Human Resources Specialist Jackie Calhoun. (ROI 59).

Based upon the foregoing, Complainant filed the instant claim of discrimination.

APPLICABLE LAW and ANALYSIS

The burdens of proof in discrimination cases are generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case set forth a three-tier test for determining whether there has been discrimination in violation of Title VII. The Complainant has the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not such actions were based on discriminatory criteria. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green, supra.*

If a *prima facie* case of discrimination has been established, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. *Burdine* at 253–4; *McDonnell Douglas* at 802. The Complainant may then show that the legitimate reason offered by the Agency was not the true reason, but merely a pretext for discrimination. *Burdine* at 256; *McDonnell Douglas* at 804. *See also St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993).

Disparate Treatment – Race

In order to establish a *prima facie* case of disparate treatment, the Complainant must show that (1) she is a member of a protected class and (2) she was treated differently, under similar circumstances, than an individual outside her protected class. *McDonnell Douglas* at 802, n. 13. *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864 (6th Cir. 1975), *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D. Mass. 1976). *See Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 at 68 (6th Cir. 1985), which asserts that persons are similarly situated when all of the relevant aspects of the employment situation are nearly identical with those of the Complainant. Alternatively, the Complainant may show a causal connection between membership in a protected class and the actions taken. *Leftwich v. United States Steel Corp., 470 F. Supp. 758 (W.D. PA 1979).*

I find that the Complainant has failed to establish a *prima facie* case of disparate treatment because of race (Black). Specifically, the Complainant fails to identify any similarly situated employees outside of her protected class who were treated more favorably and under similar circumstances.

Except for the removal allegation, the Complainant generally contends that management subjected her to alleged disparate treatment including, being questioned for chuckling during a meeting; subsequently spoken to about refusing to answer questions about that incident; being asked to put away her cellphone; and, alleged mimicking, and discipline for tardiness because "they are White and she is Black." (ROI 59, 60, 61, 62, 63).

The Complainant's bare allegations of discriminatory animus, without more, are insufficient to raise a genuine issue of material fact. *See Arrington v. U.S.*, 473 F.3d 329, 337 (D.C. Cir 2006) citing *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999) ("[c]onclusory, unsubstantiated statements of an opposing party which are unsupported by specific facts are insufficient to overcome a summary judgment motion."); *See also Erby v. U.S. Postal Serv.*, EEOC Appeal No. 0120064377 (Feb. 12, 2008) (concluding that appellant's bare assertions are insufficient to overcome the Agency's legitimate, nondiscriminatory reasons). The Complainant in the present

case fails to put forth any specific facts to support his several allegations of discrimination. I thus find the allegations to be speculation and conjecture.

As for Complainant's allegation of disparate treatment for the proposed and subsequent removal, the Complainant contends that fellow TSO Alin Deak (Romanian) was treated more favorably when he failed to recognize a "SSSS" passenger's boarding pass (notification of required additional screening) and failed to timely inform the passenger of the required additional screening. (ROI 61, 65). The Complainant contends that despite TSO Deak's misconduct, the Agency reassigned him to a temporary assignment and only issued him a suspension while Complainant was terminated. (ROI 61).

Despite the Complainant's contentions, the record shows that the Complainant and TSO Deak are not similarly situated because they have different disciplinary histories. The record shows that the Complainant had numerous Letters of Guidance and/or Reprimands prior to the October 22, 2015, incident wherein she allowed an unauthorized person in the sterile area. Specifically, the record shows the Complainant's disciplinary history as follows: April 20, 2015 (Letter of Guidance); June 15, 2015 (Letter of Reprimand); August 20, 2015 (Letter of Counseling); October 8, 2015 (Letter of Counseling); October 16, 2015 (Letter of Counseling)). (ROI 137-144; 201; Agency Motion, Ex. D). On the contrary, the record shows that comparator Deak was issued only one (1) reprimand prior to his boarding pass incident that lead to a suspension opposed to termination. (Agency Motion, Ex. E).

Thus, I find that the Complainant and alleged comparator TSO Deak are not similarly situated. The Commission holds that to be similarly situated, other comparative employees must have reported to the same supervisor; must have been subject to the same standards governing discipline; *and must have engaged in conduct similar to Complainant's, without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it. See O'Neal v. U.S. Postal Serv.*, EEOC Request No. 05910490 (July 23, 1991) (emphasis added).

I therefore find Complainant has failed to establish a *prima facie* case of disparate treatment because of race.

Reprisal

To establish a *prima facie* case of reprisal discrimination, the Complainant must establish that: (1) she had previously engaged in protected activity; (2) the employer Agency was aware of the protected activity; (3) the Complainant was subsequently subjected to adverse treatment by the Agency or show that the agency's actions would reasonably deter use of the EEO Process. See EEOC Compliance Manual, No. 915.003 (May 20, 1998); and (4) there must be a causal nexus between the protected activity and the adverse employment action, such as proximity in time. *See Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F.Supp. 318, aff'd., 545 F.2d 222 (1st.Cir.1976); *Burrus v. Telephone Co. of Kansas, Inc.*, 683 F2d 339 (10th Cir. 1982), cert den., 459 U.S. 1071 (1982).

I find that the record establishes a *prima facie* case of reprisal only for the January 7, 2016, claim of removal. The Complainant sought initial EEO counseling on December 2015, and filed a

formal complainant of discrimination on February 2, 2016. (ROI 29, 33). The temporal proximity between Complainant's EEO contact and her termination establishes the nexus necessary to establish a prima facie case of reprisal.

It is well settled that nexus may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a retaliatory motive is inferred. *Mallis v. U.S. Postal Serv.*, EEOC Appeal No. 01A55908 (Oct. 3, 2006) (citing *Simens v. Dep't of Justice*, EEOC Request No. 05950113 (March 28, 1996) (citations omitted). I note that in general, the Commission has held that a Complainant can establish a nexus if events occurred within one year of each other. *Id.* (*citing Patton v. Dep't of the Navy*, EEOC Request No. 05950124 (June 27, 1996).

As for the other claims of reprisal, namely Claim Nos. 1-6, the record shows that the acts either occurred prior to Complainant's EEO contact, or the Complainant fails to establish a causal connection between her protected activity and the alleged adverse actions.

For the above reasons, I find that the Complainant has established a *prima facie* case of reprisal only for the removal claim.

Hostile Work Environment

To establish a claim of harassment, a complainant must show that (1) she is a member of the statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; and (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment. 29 C.F.R. § 1604.11; *Humphrey v. USPS*, EEOC Appeal No. 01965238 (October 16, 1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. *Enforcement Guidance on Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.003 (March 8, 1994). Further, the incidents must have been "sufficiently severe and pervasive to alter the conditions of complainant's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *see also Oncale v. Sundowner Offshore Services, Inc.*, 23 U.S. 75 (1998).

In determining that a working environment is hostile, factors to consider are the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and if it unreasonably interferes with an employee's work performance. See *Harris v. Forklift Systems. Inc.*, 510 U.S. 17, 21 (1993). The incidents must have been "sufficiently severe or pervasive to alter the conditions of [Complaint's] employment and create an abusive working environment." *Harris*, 510 U.S. at 21. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on *Harris v. Forklift Systems*, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994) (Enforcement Guidance on Harris).

I find that the Complainant has failed to establish a *prima facie* case of harassment because of her of race because she failed to put forth any evidence, except bare assertions, showing that the

Agency's actions race based. As for the reprisal claims, the record does not establish that they were sufficiently severe or pervasive to rise to the level of harassment.

The Commission recognizes that not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. *See Shealey v. EEOC*, EEOC Appeal No. 0120070356 (Apr. 18. 2011) *(citing Epps v. Dep't of Transp.*, EEOC Appeal No. 0120093688 (Dec. 19, 2009). Put another way, not everything that makes an employee unhappy in the workplace creates a cause of action of discrimination. Discrimination statutes prohibit only behavior that is directed at an employee because of the employee's protected bases.

Title VII does not create a right to work in a pleasant environment, it simply requires that the work environment be free from discrimination and reprisal. *Vore v. Indiana Bell Telephone Co.*, 32 F.3d 1162 (7th Cir. 1994).

As the D.C. Circuit observed:

> Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than "rude treatment by [coworkers]," *Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006), "callous behavior by [one's] superiors," *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), or "a routine difference of opinion and personality conflict with [one's] supervisor," *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 276 (4th Cir. 2000), are not actionable under Title VII.

See Equal Empl. Opp. Comm'n v. Sunbelt Rentals, 521 F.3d 306 (4th Cir. 2008).

Therefore, in the present case, I find that the Complainant has failed to establish that the Agency's actions were because of her protected class or were sufficiently severe or pervasive, thus, failing to establish a *prima facie* case of harassment.

Legitimate, Nondiscriminatory Reason

Despite establishing a *prima facie* case of reprisal, the Agency articulated a non-discriminatory reason for its action and the Complainant has failed to show that the Agency's reason is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks, supra.*

The Agency contends that it terminated the Complainant because of the noted infractions on October 11, 22 and 23, 2015, in conjunction with her history of Letters of Counseling and Reprimands stemming from April 20, 2015. (ROI 137-145). Specifically, Deputy Assistant Steve Hogan averred that the he decided to terminate the Complainant because after reviewing the Agency's table of penalties, he determined that the Complainant's repeated offenses required an aggravated penalty. (ROI 71-72).

The Complainant contends that the Agency's reasons are pretext because after she appealed the Agency's decision to its Office of Professional Responsibility Board, she was reinstated. (ROI 59, 198-199). Despite the Complainant's reinstatement, she fails to put forth evidence that shows that the legitimate reason offered by the Agency was not the true reason, but merely a pretext for discrimination.

The Commission holds that the Complainant must demonstrate by the preponderance of the evidence that the Agency's articulated legitimate, nondiscriminatory reason is pretext for discrimination. "Proving pretext requires that a complainant show discriminatory reasons more likely motivated the agency, or show the agency's proffered explanations are not credible." *Hickmon v. Dep 't of Veterans Affairs*, EEOC App. No. 0120103148 (Nov. 23, 2010).

Thus, I find that the Complainant has failed to offer any such evidence establishing a discriminatory motive or any evidence rebutting the Agency's reasons for its actions that might tend to show that the Agency's reasons were a pretext for discrimination. *St. Mary's Honor Center v. Hick, supra*.

CONCLUSION

For all these reasons, the Agency's Motion for a Decision Without a Hearing is **GRANTED**. I find that the Agency did not discriminate against the Complainant because of her race or reprisal. In making this determination, I have considered all material and relevant evidentiary documents and affidavits in the record. An accompanying Order will be entered.

For the Commission:

Dawn M. Edge

Dawn M. Edge
Administrative Judge

C

~~UNITED STATES OF AMERICA~~
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Penthouse, Suite 1300
Philadelphia, PA 19107

Chauntel Jackson, Complainant, v. Kristjen Nielson, Secretary Department of Homeland Security, Transportation Security Administration, Agency.	EEOC Hearing No. 530-2017-00107X Agency Case No. HS-TSA-25420-2016 August 2, 2018

REVISED ORDER ENTERING JUDGMENT[1]

For the reasons set forth in the Decision, judgment in the above-captioned matter is hereby entered. A Notice to the Parties explaining their appeal rights is attached.

It is so ORDERED
August 2, 2018

For the Commission:

Dawn M. Edge
ADMINISTRATIVE JUDGE

[1] Revised Certificate of Service only with Complainant's corrected email.

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Order Entering Judgment and Decision within five (5) calendar days after it was sent *via* first class mail. I hereby certify that the Order Entering Judgment and Decision have been sent by regular, first-class mail, postage prepaid, to the following:

Chauntel Jackson
4000 Monticello Blvd., Apt 204
Youngtown, Ohio 44505
(sent via email only: chaunteljackson@live.com)

Keyur Shah
Attorney-Advisor
Office of the Chief Counsel
Department of Homeland Security/TSA
701 Market Street, Suite 3200
Philadelphia PA 19106
(sent via email and FEDSEP: Keyur.Shah1@tsa.dhs.gov)

August 2, 2018
Date

Dawn M. Edge

Dawn M. Edge
Administrative Judge

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty days of receiving this decision and the hearing record, you are required to issue a final order notifying the Complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the Complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit, the right to request appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice or Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. §1614.403, and append a copy of your appeal to your final order. *See* EEO Management Directive 110 (EEO MD-110), November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. §1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Equal Employment Opportunity Commission's Office of Federal Operations when you receive a final order from the Agency informing you whether the Agency will or will not fully implement this decision. 29 C.F.R. §1614.110(a). From the time you receive the Agency's final order, you will have thirty (30) days to file an appeal. If the Agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the Agency's forty (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision to your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the Agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the Agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

BY FACSIMILE:

Fax No. (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, a final action that has not been the subject of an appeal to the Commission or a civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the terms of this decision, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the Agency has not responded to the Complainant in writing, or if the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal thirty-five (35) calendar days after serving the Agency with the allegations of noncompliance, but must file an appeal within thirty (30) calendar days of receiving the Agency's determination. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHAUNTEL JACKSON, Plaintiff, v. TRANSPORTATION SECURITY ADMINISTRATION, Defendant.	)	CASE NO. 4:19-CV-1676 JUDGE BENITA Y. PEARSON **MEMORANDUM OF OPINION AND ORDER** [Resolving ECF No. 2]

Pending before the Court is the Complaint of *pro se* Plaintiff Chauntel Jackson against the Transportation Security Administration ("TSA"). ECF No. 1. In the Complaint, Plaintiff alleges she was terminated from her employment with TSA as a result of racial discrimination. Plaintiff seeks monetary relief.

For the reasons that follow, this case is dismissed.

I. Background

Plaintiff was hired to work for TSA in March 2013. ECF No. 1-1 at PageID #: 32 [Sealed]. She was assigned to the position of Travel Document Checker. Beginning in April 2015, Plaintiff committed a series of infractions that led to her dismissal.

On April 9, 2015, Plaintiff's supervisor asked her to help locate a toothbrush and lip balm that were placed in the lost and found on February 5, 2015. ECF No. 1-1 at PageID #: 35. Plaintiff contends she did not volunteer for this collateral duty. She indicated she was not sure if she threw the items away after thirty days or if they were misplaced in the store room but her

supervisor "was on a quest to find out what happened to this toothbrush and lip balm." *Id.* She states she and others with access to the store room were asked to write a statement concerning these two items. Plaintiff then composed a letter to her supervisor resigning from collateral duties. *Id.*

On April 10, 2015, Plaintiff allowed a female passenger to enter the security checkpoint area without a valid boarding pass in her own name. *Id.* at PageID #: 33. The passenger presented her husband's boarding pass to Plaintiff. Plaintiff did not adequately check the name on the boarding pass with the name on the identification and allowed her to pass through. The passenger's husband then arrived at the checkpoint a few minutes later and informed Plaintiff that his wife possessed his boarding pass and he had hers. Plaintiff initially told her superiors that she had discovered the error but her superiors later learned that the husband had alerted her to the mistake. The supervisor issued a Letter of Guidance and Direction to Plaintiff, explaining that the letter was not a disciplinary action and would not be placed in her personnel file. *Id.* at PageID #: 33, 76. Instead, he would keep a copy of the letter for five years in the event that it was needed for later disciplinary actions to show that she had been notified of the violation. He also cautioned her against a lack of candor, particularly in security situations. *Id.* at PageID #: 77.

Another incident occurred on June 15, 2015 in which Plaintiff allowed an individual to pass through the security checkpoint without properly confirming that the name on the boarding pass matched the name on the identification. *Id.* at PageID #: 31, 38, 76, 78. On this occasion

she received a Letter of Reprimand, informing her that further misconduct could lead to more severe discipline, including termination from federal employment. *Id.* at PageID #: 38.

On September 6, 2015, Plaintiff spoke rudely to her supervisor. She indicates that her supervisor had been treating her disrespectfully for some time and had been particularly disrespectful to her in the briefing. She contends no one else intervened so she confronted the supervisor afterward by waving her finger and saying, "You know you was wrong for that briefing you gave." *Id.* at PageID#: 74. On October 8, 2015, she received a Letter of Counseling for this infraction informing her that her behavior was unacceptable and that she was required to act in a professional manner and treat others with dignity and respect. *Id.* at PageID#: 76.

A similar incident occurred with a passenger on October 11, 2015, just three days after receiving the Letter of Counseling. Plaintiff told a female passenger to "put her listening ears on." *Id.* at PageID#: 74. The passenger responded that Plaintiff did not need to talk to her that way and Plaintiff apologized. The passenger complained to Plaintiff's superiors. *Id.*

On October 22, 2015, Plaintiff allowed a former airport employee to gain access to a secure area of the airport with a deactivated employee badge. *Id.* at PageID #: 37, 71, 78. The badge was placed on the badge reader which indicated the badge was invalid. Plaintiff did not pay attention to the indication and admitted the individual to the secure area. When confronted with the error, Plaintiff said she initially saw green when she scanned the badge and then turned so she did not see the negative indication on the reader. *Id.* at PageID #: 72. She told her supervisors that she had not been trained on how to use the scanner and did not know how it

would react if the badge was disabled. Her supervisor determined she was trained on the scanner in 2013 and cited her lack of candor as well. *Id.* at PageID #: 72-78.

Plaintiff states that she was taken off of her regular checkpoint duties and assigned to the "exit" for two months. ECF No. 1 at PageID #: 3. She indicates this assignment made her feel isolated.

Because the disabled badge incident was Plaintiff's third security infraction in twelve months, TSA decided to remove her from her position as a TSA Officer and terminate her employment with the federal government on January 6, 2016. ECF No. 1-1 at PageID #: 71. Plaintiff appealed that decision to the Homeland Security Appellate Board. She alleges the Appellate Board reversed her termination and reinstated her to her employment. ECF No. 1 at PageID#: 2. She returned to work on April 14, 2016. ECF No. 1 at PageID #: 2. She states she resigned on April 20, 2016 because "the employee-employer relationship had been broken and because [she] had lost everything [she] owned because of TSA's actions against [her]." ECF No. 1 at PageID #: 2-3.

Plaintiff contends TSA treated her differently than it treated a Caucasian male who had failed to follow standard operating procedure at a security checkpoint. ECF No. 1 at PageID #: 3. She indicates Alin Deak had two infractions at the screening checkpoint. First, on November 8, 2015, he allowed a passenger to gain access to a flight from Cleveland to Los Angeles using a boarding pass with an incorrect date. Deak was removed from his screening duties until he was retrained. ECF No. 1-1 at PageID #:41-48. Second, on December 4, 2015, Deak subjected a passenger to a standard screening when standard operating procedure required a more thorough

security screening to be used. A supervisor noticed the mistake and screened the passenger more thoroughly before clearing him to enter the secure area. At the second offense, Deak expressed remorse for his mistake and presented an action plan to ensure such a breach would not occur in the future. *Id.* at PageID #: 42. He received a Letter of Reprimand in lieu of a three-day suspension. A Performance Improvement Plan was implemented for Deak on January 22, 2016. *Id.* at PageID #: 45. The Plan states that his performance has been unsatisfactory and he was placed in a probationary period for ninety days. He was told that it was expected that he would have no negative performance events during this period and if he did, he would face adverse personnel action, including removal from federal service. Deak was removed from the document check position and given the job of pushing bins through the x-ray machine. Plaintiff states that because Deak was not fired, he received more favorable treatment than her due to her race. ECF No. 1 at PageID #: 3.

II. Standard for Dismissal

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Court is required to dismiss an *in forma pauperis* action under 28 U.S.C. §1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). An action has no arguable basis in law when a defendant is immune from suit or when a plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when

the allegations are delusional or rise to the level of the irrational or "wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992); *Lawler*, 898 F.2d at 1199.

In determining whether Plaintiff has stated a claim upon which relief can be granted, the Court must construe the Complaint in the light most favorable to Plaintiff, accept all factual allegations as true, and determine whether the Complaint contains "enough fact to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiff's obligation to provide the grounds for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Although the Complaint need not contain detailed factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), further explains the "plausibility" requirement, stating that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Furthermore, "the plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

III. Law and Analysis

As an initial matter, Plaintiff does not indicate what cause of action she is attempting to assert. To the extent she is attempting to bring a *Bivens*[1] action, her claim must be dismissed. *Bivens* provides a cause of action against individual officers acting under color of federal law alleged to have acted unconstitutionally. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). It does not support an action against the United States government or any of its agencies. *See id*; *see also Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994).

To the extent Plaintiff intends to assert a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e[2], *et seq.*, she has failed to state a claim upon which relief may be granted. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e 2(a). The Court is aware that, at this stage, Plaintiff is not required to plead her discrimination claim with heightened specificity. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-14 (2002). Nevertheless, Plaintiff must still provide enough facts to state a claim for relief that is plausible on its face. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. The Sixth Circuit explored the scope of *Twombly* and *Iqbal* noting that "even

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Title VII is the "exclusive remedy" available for federal employees claiming to have been the victim of discriminatory or retaliatory acts by the government. *See Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006); *see also Black v. Runyon*, 2000 WL 254669, at *7 (N.D. Ohio Jan. 4, 2000) (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 829 (1976)). As Plaintiff alleges she was an employee of TSA, a federal agency of the United States Department of Homeland Security, the Court appropriately construes her claim under Title VII analysis.

though a complaint need not contain detailed factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *New Albany Tractor v. Louisville Tractor*, 650 F.3d 1046, 1051 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

Plaintiff's Complaint never rises above the speculative level. The Court is left to guess her race and why she believes race was a motivating factor in her dismissal. Nevertheless, construing the facts most favorably to Plaintiff, the Court proceeds to analyze the Complaint under the established framework for evaluating claims of race discrimination under Title VII the *McDonnell Douglas* burden shifting approach. *McDonnell Douglas*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, Plaintiff must first allege facts to establish a prima facie case of race discrimination. Once Plaintiff has made such a showing, "the burden shifts to [Defendant] to articulate a legitimate, non-discriminatory reason for its decision." *Id.* at 802. To make a prima facie case, Plaintiff must show: (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she was qualified for the position; (4) and that a similarly situated non-protected employee was treated more favorably than Plaintiff. *Gay v. Teleflex Auto.*, 2008 WL 896946, at *8 (N.D. Ohio Mar. 28, 2008) (citing *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1247 (6th Cir. 1995).

Assuming Plaintiff were able to meet the first three factors of the first prong of the *McDonnell Douglas* test, she fails to establish that a similarly situated non-protected employee was treated more favorably than she. Plaintiff grounds her entire discrimination claim in the disciplinary actions taken against her and those taken against Deak, a Caucasian employee, for

security-related infractions. This, however, was Plaintiff's third security-related infraction in twelve months while it was only Deak's second security-related infraction. Deak received a Letter of Reprimand and a warning that his employment could be terminated if he had any other incidents in the next three months. Plaintiff had also received a Letter of Reprimand and a warning at her second infraction. Based on those comparisons, it appears that both employees were treated similarly. Furthermore, Plaintiff also had disciplinary actions taken against her for her lack of candor, and speaking rudely to a passenger and a supervisor. There is no suggestion that Deak had other disciplinary actions taken against him or that he committed a number of other work-related infractions as Plaintiff did. Simply put, Plaintiff has not alleged facts plausibly suggesting she was treated more harshly than her Caucasian coworker; nor has she alleged facts that race was a motivating factor in any disciplinary action taken against her. Rather, she simply concludes that she was subjected to harassment, retaliation and racial discrimination. The Court finds that Plaintiff fails to met the threshold burden of presenting a prima facie case of race discrimination and her allegations are not sufficient to cross the threshold of basic pleading requirements in federal court. *See* Fed. R. Civ. P. 8 (providing a complaint must contain "a short and plain statement of the claim" made by "simple, concise, and direct" allegations.); *see also* *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (finding legal conclusions alone are not sufficient to present a valid claim, and the district court is not required to accept unwarranted factual inferences).

Finally, even when the Court construes Plaintiff's claim as being brought under Title VII, Plaintiff to meet the prerequisites required bring this suit in federal court. Title VII requires a

plaintiff alleging employment discrimination to file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") before bringing suit in federal court. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). When a charge of discrimination is filed, the EEOC must investigate the complaint in order to determine whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If the EEOC determines that the complaint has a reasonable basis, it will issue a right-to-sue letter to the plaintiff.[3] 29 C.F.R. § 1601.28(b). A plaintiff must then obtain a right-to-sue letter from the EEOC in order to file suit under Title VII in federal court. *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir.1999); *see also Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 309 (6th Cir. 2000). Finally, Plaintiff has 90 days after receiving her right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") to bring the action in federal court. *Page v. Metro. Sewer Dist. of Louisville & Jefferson Cty.*, 84 F. App'x 583, 584 (6th Cir. 2003).

Plaintiff's last day of work with TSA was April 20, 2016. And she states the case was "in EEOC proceedings until August of 2018." ECF No. 1 at PageID #:4. Nothing in the record indicates that Plaintiff requested or received a right-to-sue letter from the EEOC a "condition precedent to filing an action in federal court." *Page,* at F. App'x 84 at 585. However, even if Plaintiff were to have produced a right-to-sue letter at the filing this action, the Complaint would be dismissed as untimely. *Id.* (finding plaintiff's complaint to be untimely where she failed to

[3] If the EEOC does not issue a right-to-sue letter within 180 days after the charge of discrimination is filed, the plaintiff may request such a letter. 29 C.F.R. § 1601.28(a).

file the case in federal court within ninety days from receipt of an EEOC right-to-sue letter). Plaintiff filed her Complaint on July 23, 2019, nearly one year from the conclusion of the EEOC proceedings. Plaintiff has not presented the Court with evidence that equitable reasons exist to excuse her failure to comply with the prerequisite to filing her lawsuit. Equitable tolling, waiver, and estoppel are available only in "compelling circumstances which justify a departure from established procedure." *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989) (affirming district court dismissal where plaintiff did not present reason to justify the tolling requirements in Title VII action). Accordingly, if construed as a Title VII claim, Plaintiff's action must be dismissed.

IV. Conclusion

Accordingly, Plaintiff's Application to Proceed *In Forma Pauperis* (ECF No. 2) is granted and this action is dismissed pursuant to 28 U.S.C. §1915(e). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

December 23, 2019
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge