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APPENDIX A

FILED: July 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1173
(4:19-cv-00018-RAJ-LRL)

LAWRENCE E. MATTISON

Plaintiff - Appellant

v.

DENIS R. MCDONOUGH, Secretary Department of Veterans Affairs; U.S. DEPARTMENT OF VETERANS AFFAIRS

Defendants - Appellees

ORDER

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

Entered at the direction of the panel: Judge Wilkinson, Judge Wynn, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1173

LAWRENCE E. MATTISON,

Plaintiff - Appellant,

v.

DENIS R. MCDONOUGH, Secretary Department of Veterans Affairs; U.S. DEPARTMENT OF VETERANS AFFAIRS,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Raymond A. Jackson, District Judge. (4:19-cv-00018-RAJ-LRL)

Submitted: February 26, 2021 Decided: March 5, 2021

Before WILKINSON, WYNN, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Lawrence Eliot Mattison, Appellant Pro Se. Sean Douglas Jansen, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lawrence Eliot Mattison appeals the district court's order granting Defendants' motion to dismiss and dismissing Mattison's employment discrimination action, brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, and 42 U.S.C. § 1981, for failure to state a claim. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order and judgment. *Mattison v. Wilkie*, No. 4:19-cv-00018-RAJ-LRL (E.D. Va. Feb. 10, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: March 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1173
(4:19-cv-00018-RAJ-LRL)

LAWRENCE E. MATTISON

Plaintiff - Appellant

v.

DENIS R. MCDONOUGH, Secretary Department of Veterans Affairs; U.S. DEPARTMENT OF VETERANS AFFAIRS

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

LAWRENCE E. MATTISON,

Plaintiff,

v.

ACTION NO. 4:19cv18

ROBERT WILKIE,
Secretary of the Department of Veterans Affairs, et al.,

Defendants.

DISMISSAL ORDER

Plaintiff Lawrence E. Mattison ("Plaintiff"), appearing *pro se*, filed this action against Defendants Robert Wilkie, the Secretary of the Department of Veterans Affairs ("Secretary Wilkie"), and the U.S. Department of Veterans Affairs ("VA") (collectively "Defendants"). Compl., ECF No. 3. This matter is before the Court on the following motions: (i) Plaintiff's "Motion for Temporary Prohibitive Injunction" ("Motion for Injunction"); (ii) Defendants' Motion to Dismiss; and (iii) Defendants' "Motion for Leave to File Response Out of Time" ("Motion for Extension"). Mot. Inj., ECF No. 7; Mot. Dismiss, ECF No. 8; Mot. Extension, ECF No. 12. The Court concludes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the parties' briefs. For the reasons set forth below, Defendants' Motion to Dismiss, ECF No. 8, is **GRANTED**. Plaintiff's Motion for Injunction, ECF No. 7, and Defendants' Motion for Extension, ECF No. 12, are **DISMISSED as moot**.

I. Factual and Procedural Background

In his Complaint, Plaintiff alleges that he is an African American male, who previously worked in the Housekeeping Department at the Hampton VA Medical Center. Compl. at 3, ECF

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No. 3. Plaintiff alleges that in June 2014, he "befriended a white female [n]urse" at work, who Plaintiff refers to as "A.P." *Id.* Plaintiff alleges that he and A.P. "maintained a work related and consensual at-work friendship that included: hospital duties, socializing, gift giving and texting by personal phone for work and personal conversation." *Id.*

In February 2015, A.P. "submitted a written statement which contained allegations against Plaintiff," that triggered an investigation by a "[f]ederal police officer/employee." *Id.* at 4. Plaintiff was criminally charged under Virginia law for stalking, making phone calls with the intent to annoy, and violating a protective order.[1] On December 15, 2015, Plaintiff appeared for trial in the Hampton General District Court, and was found guilty of the charges of stalking and making phone calls with the intent to annoy. Plaintiff was sentenced to twelve months in jail, with four months suspended.[2]

On December 28, 2015, the VA issued Plaintiff a notice of his proposed removal from employment ("Notice of Proposed Removal"), which stated:

> It is proposed to remove you from employment with VA based on the following reasons:

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[1] Although Plaintiff did not attach copies of his state court criminal records to his Complaint in this action, they are matters of public record of which this Court may properly take judicial notice. *See Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Plaintiff's case history before the Virginia state courts can be found at http://www.courts.state.va.us/caseinfo/home.html.

[2] Plaintiff appealed his convictions to the Hampton Circuit Court. Following a trial in the Hampton Circuit Court on May 25, 2016, Plaintiff was found guilty of stalking and making phone calls with the intent to annoy, and sentenced to twelve months in jail, with credit for time served. *See* Sentencing Order, *Mattison v. Willis*, No. 4:17cv134 (E.D. Va. May 18, 2018), ECF No. 63-12. Plaintiff appealed his Hampton Circuit Court convictions to the Virginia Court of Appeals; however, his appeal was denied. *See Commonwealth v. Mattison*, No. 0986-16-1 (Va. Ct. App. Apr. 17, 2017) (initial denial); *see also Commonwealth v. Mattison*, No. 0986-16-1 (Va. Ct. App. June 29, 2017) (panel denial). Plaintiff then filed a Petition for Appeal in the Virginia Supreme Court, but his petition was refused. *See Commonwealth v. Mattison*, No. 17-1012 (Va. Dec. 12, 2017). Plaintiff's subsequent Petition for Rehearing was likewise refused by the Virginia Supreme Court. *See Commonwealth v. Mattison*, No. 17-1012 (Va. Feb. 28, 2018).

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a. **CHARGE I**: Conduct Unbecoming a Federal Employee

1. **SPECIFICATION 1**: Beginning in or about January 2014, you followed [A.P.], a Hampton VAMC employee, around the halls of the Hampton VA Medical Center. You acquired [A.P.'s] personal cellular telephone number and frequently called her and sent text messages to her. In February 2015, [A.P.] asked you to cease all contact. You continued to repeatedly call and sent text messages to [A.P.], despite her request that you stop contacting her.

2. **SPECIFICATION 2**: On or about March 9, 2015, you accessed [A.P.'s] cellular phone without her permission and sent a photo in [A.P.'s] cellular phone to your e-mail address.

b. **CHARGE II**: Failure to Follow Supervisory Instructions

1. **SPECIFICATION 1**: At approximately 3:30 p.m., on March 16, 2015, Anthony Curling, EMS Program Manager, spoke to you by telephone and instructed you to remain away from Hampton VAMC property. Despite Mr. Curling's instructions, you were observed on Hampton VAMC property at approximately 6:30 p.m. on March 16, 2015.

Notice Proposed Removal, attached as Exs. 3-1 through 3-3 to Compl., ECF Nos. 3-9 through 3-11. The Notice of Proposed Removal included a section that discussed "aggravating factors" to be considered in determining whether to terminate Plaintiff's employment. This section stated: "On August 5, 2015, you were placed on Indefinite Suspension after being arrested and charged with Stalking and Violation of a Protective Order. These factors will be taken into account by the Deciding Official in determining proper disciplinary action, if one or more of the above reasons are sustained." *Id.*

Plaintiff alleges that his employment was "'officially' terminated" on February 10, 2016. Compl. at 5. Plaintiff further alleges that he was "subsequently replaced" by a "white male," who covered Plaintiff's evening shifts, as well as a "black female," who covered Plaintiff's midnight shifts. *Id.*

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In Count I of his Complaint, Plaintiff claims that Defendants discriminated against him on the basis of his race and sex in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. *Id.* at 5-10, 12-13. To support this claim, Plaintiff alleges that although he "was performing his duties at a level that satisfied and/or exceeded the Agency's expectations," he was suspended without pay, and later terminated, because of his "consensual friendship with a white female." *Id.* at 12. Plaintiff claims that Defendants chose to "retain" the "white female," even though her "written complaint was untruthful." *Id.* Plaintiff further claims that when Defendants experienced "employee-to-employee issues" involving "employees whose race and/or sex [was] the same," Defendants "took minimal action." *Id.*

In Count II of his Complaint, Plaintiff claims that Defendants created a hostile work environment in violation of Title VII and § 1981. *Id.* at 10-11, 13-14. To support this claim, Plaintiff alleges that Defendants "sexualiz[ed]/criminaliz[ed]" the "friendship between a [b]lack male and a white female" (*i.e.*, Plaintiff and A.P.), and wrongfully "induce[ed] State court processes" against Plaintiff.[3] *Id.* at 13.

On May 13, 2019, Plaintiff filed a Motion for Injunction. Mot. Injunction, ECF No. 7. In his motion, Plaintiff states that his home, located at 466 Fort Worth Street, Hampton, Virginia 23699, was purchased by the VA at a foreclosure sale in 2018. *Id.* at 1. Plaintiff believes that

[3] Plaintiff filed two other lawsuits in this Court regarding his state criminal proceedings and subsequent employment termination. In Action No. 4:17cv134, Plaintiff alleged that the Commonwealth of Virginia lacked jurisdiction to prosecute Plaintiff for criminal activity that allegedly occurred on federal property. *See* Dismissal Order at 6-7, *Mattison v. Willis*, No. 4:17cv134 (E.D. Va. Dec. 6, 2018), ECF No. 102. Plaintiff asserted a number of constitutional and statutory claims against those involved in his criminal proceedings and termination process. *See id.* at 7. Action No. 4:17cv134 was dismissed on December 6, 2018, and subsequently affirmed on appeal. *Id.* at 1-28; *Mattison v. Willis*, 774 F. App'x 800 (4th Cir. 2019). Plaintiff also filed Action No. 4:18cv61, in which he asserts a number of tort claims against the United States under the Federal Tort Claims Act. Am. Compl., *Mattison v. United States*, No. 4:18cv61 (E.D. Va. Dec. 18, 2018), ECF No. 20. Action No. 4:18cv61 remains pending.

"there is a very strong probability" that he "will prevail on the merits" of this action, as well as another federal lawsuit. *Id.* at 2. Plaintiff asks the Court to issue an injunction that would prohibit the filing of any state court eviction proceeding against him prior to the resolution of Plaintiff's federal lawsuits. *Id.* at 3.

On May 31, 2019, Defendants filed a Motion for Extension, in which they seek permission to file an untimely Opposition to Plaintiff's Motion for Injunction. Mot. Extension, ECF No. 12; Mem. Supp. Mot. Extension, ECF No. 13. Defendants attached a proposed Opposition to their motion, to which Plaintiff replied. Opp'n, ECF No. 13-1; Reply, ECF No. 15.

On May 20, 2019, Defendants filed a Motion to Dismiss, and provided Plaintiff with a proper *Roseboro* Notice pursuant to Rule 7(K) of the Local Civil Rules of the United States District Court for the Eastern District of Virginia. Mot. Dismiss, ECF No. 8; *Roseboro* Notice, ECF No. 10; E.D. Va. Loc. Civ. R. 7(K). On May 28, 2019, Plaintiff filed a response in opposition to Defendants' Motion to Dismiss ("Opposition"). Opp'n, ECF No. 11. Defendants timely filed a Reply. Reply, ECF No. 14. All pending motions are ripe for decision.

II. Defendants' Motion to Dismiss

A. Standards of Review Under Rule 12(b)(1) and Rule 12(b)(6)

Defendants seek dismissal of this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dismissal is warranted under Rule 12(b)(1) for any claims over which the Court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiff bears the burden of proving that subject matter jurisdiction exists by a preponderance of the evidence. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009). A Rule 12(b)(1) motion to dismiss should be granted "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F.*

Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In determining whether subject matter jurisdiction exists, the district court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 566-67 (E.D. Va. 2009).

A motion to dismiss under Rule 12(b)(6) should be granted if a complaint fails to "allege facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A Rule 12(b)(6) motion "tests the sufficiency of a complaint and 'does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Johnson*, 682 F. Supp. 2d at 567 (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). As such, the Court must accept all factual allegations contained in Plaintiff's Complaint as true, and draw all reasonable inferences in favor of Plaintiff. *Id.*

In ruling on a Rule 12(b)(6) motion, the Court may rely upon the allegations of the Complaint and documents attached as exhibits or incorporated by reference. *Simons v. Montgomery Cty. Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985). In addition, the Court "may properly take judicial notice of matters of public record." *Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

In employment discrimination cases, the United States Supreme Court has held that a complaint need not "contain specific facts establishing a *prima facie* case of discrimination under the framework set forth . . . in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002). The Court explained that the "*prima facie* case under *McDonnell Douglas* . . . is an evidentiary standard, not

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a pleading requirement." *Id.* at 510. The United States Court of Appeals for the Fourth Circuit "has not, however, interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of [his or] her claim." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003). Thus, although a complaint need not contain "detailed factual allegations," a complaint containing mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Further, when analyzing the pleadings of a *pro se* plaintiff, courts are required to construe such pleadings liberally, especially in a civil rights case. *See Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010); *Conyers v. Va. Hous. Dev. Auth.*, No. 3:12cv458, 2012 U.S. Dist. LEXIS 134908, at *7-8 (E.D. Va. Sept. 19, 2012).

B. Discussion

In their Motion to Dismiss, Defendants argue, among other things, that Plaintiff's Complaint fails to state plausible discrimination or hostile work environment claims under Title VII or § 1981 upon which relief may be granted. The Court addresses these arguments below.

i. Race and Sex Discrimination

The Title VII provision that protects employees of the federal government from discrimination states, in relevant part, that "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). To state a *prima facie* claim of race or sex discrimination under Title VII or § 1981, Plaintiff must show (i) membership in a protected class; (ii) satisfactory job performance; (iii) an adverse employment action; and (iv) more favorable treatment of someone outside the protected class with comparable qualifications. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010); *Bryant v. Bell Atl. Md., Inc.*,

288 F.3d 124, 133 n.7 (4th Cir. 2002) (noting that "[t]he required elements of a *prima facie* case of employment discrimination are the same under Title VII and Section 1981").

With respect to the fourth element, the "comparator-employee" who allegedly received more favorable treatment need not be identical to Plaintiff; however, "[t]here should be similarity in all relevant aspects such as conduct, performance, and qualifications." *Rayyan v. Va. Dep't of Transp.*, No. 1:15cv01681, 2017 U.S. Dist. LEXIS 5061, at *9 (E.D. Va. Jan. 12, 2017) (citing *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010)). As the Fourth Circuit has explained:

> "The similarity between comparators and the seriousness of their respective offenses must be clearly established in order to be meaningful." That showing typically includes evidence that the employees "dealt with the same supervisor, . . . [were] subject to the same standards[,] and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct." "The most important variables in the disciplinary context, and the most likely sources of different but nondiscriminatory treatment, are the nature of the offenses committed and the nature of the punishments imposed."

Hurst v. D.C., 681 F. App'x 186, 191 (4th Cir. 2017) (internal citations omitted) (alterations in original).

Defendants argue that Plaintiff's Complaint fails to plausibly allege that similarly situated individuals outside of Plaintiff's protected classes were treated more favorably, or that Plaintiff was satisfying the VA's legitimate job-related expectations at the time of his termination. Mem. Supp. Mot. Dismiss at 15-16, ECF No. 9. Specifically, Defendants argue:

> In attempting to show that Plaintiff was treated differently based on his race and sex, Plaintiff identifies eight "employee-to-employee" incidents between black males, black males and black females[,] and white males and black males in which none of the individuals were terminated. [Compl. at ¶ 27.] Plaintiff's Complaint does not, however, provide any examples of individuals who, like Plaintiff, were convicted of stalking and sentenced to 12 months in jail for their on-the-job conduct. On the contrary, only one of the eight examples Plaintiff provided even involved alleged criminal conduct, and in that one example, the charge of assault and battery

> was dropped. Because none of the putative comparators identified by Plaintiff engaged in conduct even remotely similar to Plaintiff's conduct of stalking a coworker, pursuant to *Haywood*, such putative comparators cannot support an inference that Plaintiff was treated differently based on his race or sex, and thus, Plaintiff's wrongful termination claim must be dismissed.

Id. at 15.

Defendants also argue that although Plaintiff claims that he was satisfactorily performing his duties at the time of his termination, Plaintiff's Complaint "does not meaningfully address the fact that Plaintiff was also stalking a coworker while on the job." *Id.* Defendants argue that "the VA has a legitimate interest in not having its employees stalked by their coworkers," and that based on Plaintiff's criminal convictions, Plaintiff was not meeting that legitimate expectation. *Id.* at 16.

Plaintiff believes that his state court criminal convictions were unlawful. Opp'n at 1-5, ECF No. 11. Specifically, Plaintiff believes that the Commonwealth of Virginia lacked jurisdiction to prosecute Plaintiff's crimes because they allegedly occurred on federal property. *Id.* Plaintiff argues that Defendants cannot rely on Plaintiff's state court convictions as a basis for his termination, and that the true reasons for Defendants' decision to terminate Plaintiff's employment were discriminatory. *Id.* at 12-16.

Additionally, in response to Defendants' argument regarding the lack of adequate comparators, Plaintiff appears to acknowledge that, unlike Plaintiff, the other individuals who were not terminated despite their involvement in "employee-to-employee" incidents were never convicted of any crimes. *Id.* at 13. However, Plaintiff appears to argue that these individuals should nevertheless be considered comparators because they "could have been charged" with various crimes. *Id.* In response to Defendants' argument regarding satisfactory job

performance, Plaintiff maintains that he was "an exceptional to excellent employee at the time in question." *Id.* at 15.

As summarized above, to state a claim for race or sex discrimination under Title VII or § 1981, Plaintiff must show, among other things, more favorable treatment of a comparator outside of Plaintiff's protected classes, and satisfactory job performance. *See Coleman*, 626 F.3d at 190; *Bryant*, 288 F.3d at 133 n.7. Here, Plaintiff, who was convicted of stalking and making phone calls to a co-worker with the intent to annoy, has not identified other individuals outside of his protected class who were convicted of similar criminal offenses and were treated more favorably. Additionally, despite Plaintiff's characterization of his job performance, the Court finds that Plaintiff's criminal convictions prevent Plaintiff from plausibly alleging that he was satisfying Defendants' legitimate job expectations at the time of his termination. As such, the Court finds that Plaintiff's Complaint fails to allege facts sufficient to establish plausible claims of race or sex discrimination under Title VII or § 1981. Accordingly, Defendants' Motion to Dismiss is **GRANTED** as to Plaintiff's race and sex discrimination claims.

ii. Hostile Work Environment

To state a hostile work environment claim under Title VII or § 1981, Plaintiff must allege that (i) he experienced unwelcome harassment; (ii) the harassment was based on a protected characteristic; (iii) the harassment was sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive atmosphere; and (iv) there is some basis for imposing liability on Defendants. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (noting that the elements of a hostile work environment claim "are the same under either § 1981 or Title VII"). In determining whether alleged actions

are "sufficiently severe or pervasive," courts will conduct a "subjective and objective assessment" of the claimed harassment. *Jones v. HCA*, 16 F. Supp. 3d 622, 630 (E.D. Va. 2014). The harassment must be "perceived by the victim as hostile or abusive, and that perception must be reasonable." *Id.* When analyzing whether the alleged harassment is objectively severe or pervasive, "courts consider 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Id.* (citing *Harris*, 510 U.S. at 23); *see also Jones v. Tyson Foods, Inc.*, 378 F. Supp. 2d 705, 712-13 (E.D. Va. 2004). As the Fourth Circuit has explained:

> While a plaintiff is not charged with pleading facts sufficient to prove [his or] her case, as an evidentiary matter, in [his or] her complaint, a plaintiff *is* required to allege facts that support a claim for relief. The words "hostile work environment" are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.

Bass, 324 F.3d at 765 (emphasis in original).

In their Motion to Dismiss, Defendants argue that "Plaintiff cannot satisfy any of the first three elements" necessary to state a hostile work environment claim under Title VII or § 1981. Mem. Supp. Mot. Dismiss at 16, ECF No. 9. Specifically, Defendants argue:

> As to the first element, the allegedly "unwelcome conduct" that Plaintiff complains about is that the VA allegedly has a practice of referring matters between colleagues to state criminal court if the events so warrant. Compl. at ¶ 49. While Plaintiff may have wished that the VA did not refer Plaintiff's stalking to a state court, which in turn resulted in a significant jail term, nothing about referring potential criminal matters to state court constitutes "unwelcome conduct" within the meaning of Title VII. As to the second element, Plaintiff alleges no facts that would allow this Court to infer that the VA referred Plaintiff's actions to a state court based on his race or his sex as opposed to the VA's desire to prevent Plaintiff from stalking his victim. As to the third element, referring potential criminal matters to state courts does not create an "abusive

> work environment." On the contrary, by referring Plaintiff's actions to a state court, the VA was able to create a safer work environment for its employees, including Plaintiff's victim, by allowing VA employees to work with less fear of being stalked by their coworkers.

Id.

In his Opposition, Plaintiff reiterates the allegations of his Complaint, and claims that Defendants "sexualiz[ed]/criminaliz[ed]" Plaintiff's "friendship" with A.P., and wrongfully used the "[s]tate criminal process" against Plaintiff. Opp'n at 16, ECF No. 11.

As summarized above, A.P. submitted an internal complaint regarding Plaintiff in February 2015. Compl. at 4, ECF No. 3. The internal complaint triggered an investigation, and resulted in criminal charges against Plaintiff. *Id.* After Plaintiff was found guilty of stalking and making phone calls with the intent to annoy, the VA issued a Notice of Proposed Removal, and subsequently terminated Plaintiff's employment. *Id.* at 5; Notice Proposed Removal, ECF Nos. 3-9 through 3-11.

Although Plaintiff claims that Defendants' actions created a hostile work environment, the Court finds that the factual allegations set forth in Plaintiff's Complaint, viewed in the light most favorable to Plaintiff, do not establish the required elements of a hostile work environment claim. Specifically, the Court finds that the factual allegations do not establish unwelcome harassment, based on Plaintiff's sex or race, that was sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive atmosphere. Accordingly, Defendants' Motion to Dismiss is **GRANTED** as to Plaintiff's hostile work environment claims under Title VII and § 1981.[4]

[4] Because the Court finds that dismissal of this action is warranted for the reasons stated herein, the Court does not address the alternative arguments for dismissal raised in Defendants' Motion to Dismiss.

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III. Plaintiff's Motion for Injunction and Defendants' Motion for Extension

As summarized above, Plaintiff filed a Motion for Injunction, in which he asks the Court to issue an injunction that would prohibit the filing of any state court eviction proceeding against him prior to the resolution of Plaintiff's federal lawsuits. Mot. Injunction at 3, ECF No. 7. Defendants filed a Motion for Extension, in which they seek permission to file an untimely Opposition to Plaintiff's Motion for Injunction. Mot. Extension at 1, ECF No. 12.

Because the Court hereby grants Defendants' Motion to Dismiss, Plaintiff's Motion for Injunction, ECF No. 7, and Defendants' Motion for Extension, ECF No. 12, are **DISMISSED as moot.**

IV. Conclusion

For the reasons set forth above, Defendants' Motion to Dismiss, ECF No. 8, is **GRANTED**. Plaintiff's Motion for Injunction, ECF No. 7, and Defendants' Motion for Extension, ECF No. 12, are **DISMISSED as moot.**

Plaintiff may appeal this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Newport News Division, 2400 West Avenue, Newport News, Virginia 23607. The written notice must be received by the Clerk within sixty days from the date of entry of this Dismissal Order.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and counsel for Defendants.

IT IS SO **ORDERED**.

Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 10, 2020

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CASE No. 20-1173

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Richmond Virginia Division

Lawrence E. Mattison

Plaintiff-Appellant

V.

Robert Wilkie,
Secretary Department of Veterans Affairs

Defendant

Case No. 20-1173

4th circuit district court No. 4:19-CV-00018-RAJ-LRL

PLAINTIFF-APPELLANT'S INFORMAL BRIEF

I. JURISDICTION

Plaintiff-Appellant appeals the February 10, 2020 Dismissal Order of the United State District Court for the fourth circuit, Newport News Virginia division, to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C.§1291. A Petition for Appeal was filed with the District Court February 12, 2020. The Appeal includes A United States Agency/employee as defendant: *Robert Wilkie; Secretary of the Department of Veterans Affairs*. The District Court granted Plaintiff-Appellant *in forma Pauperis* status and this status is properly at this Court.

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II. INTRODUCTION

Plaintiff-Appellant ("Plaintiff") Appeal specifically relates to the defendant's lack of a legal, nondiscriminatory reasons for termination. Plaintiff claimed that race and sex(gender) are the direct and/or motivating factors, and an unlawful pretext in view of the *McDonnel Douglas theory* on Race discrimination. The facts in dispute is whether the record shows statements by Michael Dunfee (the deciding official) reflect a legal, nondiscriminatory reason for Plaintiff's termination from federal employment.

1. Both plaintiff and defendant were clear that a written complaint against petitioner started an Administrative investigation at Federal Government hospital, and subsequently a Federal police officer's sworn Statement to a Virginia magistrate garnered arrest warrants and conviction. see *ECF No. 3(init. complaint)@ 3-5*; *ECF No.9 @ 2-4(def. motion to dism.)*

2. The specific reason a federal Administrative issue went from a Federal sovereign to a State sovereign is a question of law, to which the response by defendants ECF No. 9 is hollow,

3. Plaintiff's sex & race discrimination complaint relates to <u>the reason</u> a State criminal process was sought but not the legally required federal process afforded other federal employees at this federal hospital who "were" and others "could have

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been" charged in a State of Virginia court but the defendant intervened and then applied the required federal employment process.

4. This Appeal also relates to the Unknown reason, Michael Dunfee ("the deciding official") sustained the allegations as claimed in ECF No. 9 & 18, when a genuine issue of material fact is at issue: what were the specific elements the deciding official had knowledge of when sustaining the removal allegations. (emphasis)

III. SYNOPSIS OF THE ISSUE

The Eastern District of Virginia Court ("E.D. Va.") dismissed Plaintiff's Title VII/ 42 U.S.C. §1981 under Fed. r. Civ. p. 12(b)(6) (seemingly for failure to State a claim). Plaintiff sole issue was that the defendant took discriminatory action against plaintiff based on race and or sex (gender). Plaintiff's sole contention is that the termination was solely based on a white female's "allegations", and the defendant's termination was in violation of: *(1)* Title VII civil rights act of 1964 as amended in 1991, 42 U.S.C. §2000 *et seq*; *(2)* 42 U.S.C. §1981(a)(b) and that process was discriminatory by Law, in relation to other employee-to-employee issues and motivated by race and or sex (gender). *see ECF No. 3*

The defendant's response to the initial complaint clearly show race was the motivating factor and an unlawful pretext. *see ECF No. 9 (def. memo in support)*

After the agency response, through counsel, plaintiff then responded that the defendant's proffered reason was an unlawful pretext.(emphasis) *see ECF No. 11 (Plaintiff memo in support of Roseboro response).*

Therefore, the defendant Never alleged a legal, nondiscriminatory reason for termination. (emphasis) Nor did the defendant allege an "Administrative investigation" found evidence to prove the removal allegation as alleged.' *see ECF No. 18 @ 3*

The E. D. Va. court sustained defendants 12(b)(6) motion alleging that: *(1)* Plaintiff did not present evidence to satisfy a direct/indirect ("mixed-motive") framework; *(2)* Plaintiff's "comparators" did not fit the requirement under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36, L. Ed. 2d 668 (1973) or Haywood v. Locke, 387 F. App'x 355, 359(4th Cir 2010). *ECF No. 18 @ 8-9.*

IV. ISSUES FOR REVIEW

1. Issue one

The E D. Va. court overstepped it's authority by "Assuming", without evidence that the Agency deciding official has a legitimate nondiscriminatory reason for termination.

When the question at issue is whether the " 'decision maker' " acted with discriminatory animus, only the " 'perception of the decision maker' " is " 'relevant' " to the question. *Hux v. City of Newport News, 451 F.3d 311, 319 (4th*

Cir. 2006) (citation omitted). The district court's "function" is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson, 477 U.S. at 249; accord Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 216 (4th Cir. 2016).*

Defendant's allegation in Def. response @ ECF No. 9 at *4 ¶10 claimed

> "On February 10, 2016, the HVAMC director, Mr. Dunfee, sustained the "decision of Plaintiff's supervisor" to remove plaintiff from federal employment based on the *"conduct underlying the stalking conviction"*

Plaintiff contends defendant's ¶10 above is hollow. There is a genuine issue of material fact what Dunfee's perception was. There is nothing in the record to address this issue. Dunfee, being at the time, a director of a federal government hospital should have known that [h]e cannot delegate his authority to discern plaintiff's lawful duties to a State court. Plaintiff clearly demonstrated that race/sex was a motivating factor even if other "factors" were present under a direct/indirect ("mixed-motive") theory to succeed on his race discrimination complaint under Title VII.

Direct evidence of discrimination is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Washington v. Kroger Ltd. P'ship I, No. 3:11–

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cv–00074, 2012 WL 6026138, at *3 (W.D. Va. Dec. 4, 2012) (citing Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 520 (4th Cir. 2006)).

Plaintiff initial complaint established: *(1)* direct and indirect conduct, also known as the "mixed-motive" framework, as the bases for termination. Under the "mixed-motive" framework, a plaintiff succeeds if he "demonstrates that race ... was a motivating factor for any employment practice, even though other factors also motivated the practice." *Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 317 (4th Cir.2005)* (internal quotation marks omitted). The plaintiff may do so through direct or circumstantial evidence. Id. at 318. This evidence must both display a "discriminatory attitude" and bear a causal relationship with the adverse employment action. *Warch v. Ohio Cas. Ins. Co., 435*

There is No nexus between the State court action verses the removal allegations, the record is hollow on this fact. The authoring of the removal allegations is one point related to a racist motivation, Dunfee's sustaining the allegations without regard to facts or evidence, aside from the unlawful is another point related to a racist motivation. *see ECF No. 18 (dismissal order @ 3)*. Until Dunfee's perception is known, the E. D. Va. court was in error for "assuming" the removal allegations have a "relationship" to Dunfee's perceptions.

There is clearly a racially discriminatory attitude as a motive when a white female makes allegations that the employer has evidence the allegations are false.

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see Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 520 (4th Cir.2006) (a plaintiff may present direct or circumstantial evidence that display a "discriminatory attitude" and bear a causal relationship with the adverse employment action.)

2. **Issue two**

The E. D. Va. court abused it's authority by "assuming" a nexus between a State action and the removal allegations under the McDonnell Douglas framework.

A. There is a genuine issue of material fact missing in defendant's response @ ECF No. 9. There is no factual or credible information nor is there a nexus between the removal allegations verses the "elements" of "Stalking in the workplace" verses plaintiff's lawful duties. Plaintiff's claims, "if" taken as true by the E. D. Va., should have moved this case forward and not to dismissal.

To avoid summary judgment, the nonmoving party must demonstrate that there is a genuine dispute of material fact so as to preclude the award of summary judgment as a matter of law. Ricci v. DeStefano, 557 U.S. 557, 585-86 (2009); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see also Gordon v. CIGNA Corp., 890 F.3d 463, 470 (4th Cir. 2018).

B. Plaintiff presented unrefuted claims that the defendant's response was no more than an unlawful pretext. *see Plt. Roseboro response , ECF No. 11@ 1,4, 14* The Law is clear that a federal police officer and employees of the Hampton

Veterans Hospital have no authority to seek a State court's interference in a Federal employment relationship.

3. **Issue Three**

The E. D. Va. court abused it's authority by "Assuming" some type of alleged conduct to defeat Plaintiff's comparators.

To establish a prima facie claim of racial discrimination under McDonnell Douglas, the plaintiff must allege " '(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class.' " Goode v. Cent. Va. Legal Aid Soc., Inc., 807 F.3d 619, 626 (4th Cir. 2015) (quoting Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012)); see also Haynes, 922 F.3d at 223; Rayan v. Va. Dep't of Transp., 719 F. App'x 198, 203 (4th Cir. 2018).

The E. D. Va. court assessment of the 4th element was in error. The Word "stalking" has elements. There is a genuine issue of material fact as to any legitimate statements other than allegations. There is a genuine issue as to material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; see Variety Stores, Inc., 888 F.3d at 659; Sharif v. United Airlines, Inc., 841 F.3d 199, 2014 (4th Cir. 2016); Raynor v. Pugh, 817 F.3d 123,

130 (4th Cir. 2016); Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013).

Defendant's response is hollow on Any legitimate information other than allegations and assumption. The response was pretextual, the case should have moved to discovery not summary judgement. Plaintiff made a prima facia case of discrimination under McDonnel Douglas framework based on his comparators. *see Int compl. ECF No. 3 @ ¶26(A)(B)(G)(H).*

These persons "could have been" charged but were not. Specifically Hendley (a white male) and Porter (a black male) where the defendant intervened for a white male supervisor in the same position as plaintiff, under the same supervisor, under the same administrative procedure. *see ECF 3 ¶27.* In-fact defendant's have not refuted their intervention in favor of Hendley. *see int. compl. ¶26(B)* and ignored state protective orders as claimed. *int. compl. ¶26(A).*

4. **Issue four**

The E. D. Va. court abused it's authority when "assuming" there was no prima facia case by ignored defendants unlawful acts.

Federal Law, DVA policy & procedure require the defendant to intervene in any State act interfering with this sovereign government's federal employment relationship:

A. 38 CFR § 1.201 - Employee's duty to report.

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§ 1.201 Employee's duty to report, states:

All VA employees with knowledge or information about actual or possible violations of criminal law related to VA programs, operations, facilities, contracts, or information technology systems shall immediately report such knowledge or information to their supervisor, any management official, or directly to the Office of Inspector General.
(Authority: 5 U.S.C. App. 3, 38 U.S.C. 902) [68 FR 17550, Apr. 10, 2003]

Id. 38 CFR §1.201

B. 38 CFR § 1.203 - Information to be reported to VA Police.

§ 1.203 Information to be reported to VA Police, states:

Information about actual or possible violations of criminal laws related to VA programs, operations, facilities, or involving VA employees, where the violation of criminal law occurs on VA premises, will be reported by VA management officials to the VA police component with responsibility for the VA station or facility in question. If there is no VA police component with jurisdiction over the offense, the information will be reported to Federal, state or local law enforcement officials, as appropriate.
(Authority: 38 U.S.C. 902) [68 FR 17550, Apr. 10, 2003]

Id. 38 CFR §1.203

C. 38 CFR § 1.205 - Notification to the Attorney General or United States Attorney's Office.

§ 1.205 Notification to the Attorney General or United States Attorney's Office, States:

VA police and/or the OIG, whichever has primary responsibility within VA for investigation of the offense in question, will be responsible for notifying the appropriate United States Attorney's Office, pursuant to 28 U.S.C. 535.
(Authority: 5 U.S.C. App. 3, 38 U.S.C. 902) [68 FR 17550, Apr. 10, 2003]

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Id. 38 CFR §1.205

D. 38 CFR § 14.560 - Procedure where violation of penal statutes is involved including those offenses coming within the purview of the Assimilative Crime Act (18 U.S.C. 13).
§ 14.560 states:

The Department of Justice, or the U.S. Attorneys, are charged with the duty and responsibility of interpreting and enforcing criminal statutes, and the final determination as to whether the evidence in any case is sufficient to warrent prosecution is a matter solely for their determination. If the Department of Justice or U.S. Attorney decides to initiate action, the Regional Counsel will cooperate as may be requested. The Regional Counsel will promptly bring to the attention of the General Counsel any case wherein he or she is of the opinion that criminal or civil action should be initiated notwithstanding a decision by the U.S. Attorney not to bring such action; any case where action has been inordinately delayed; and any case which would cause significant publicity or notoriety.
(Authority: 38 U.S.C. 501)

[50 FR 24767, June 13, 1985, as amended at 68 FR 17551, Apr. 10, 2003]

Id. 38 CFR §14.560

There is a genuine issue of material fact as to why a State court was used against plaintiff, when there is a legal procedure used for ALL federal employees. The defendants have no legal, legitimate, or nondiscriminatory reason. "A.P.'s" race and sex was the "only" reason for defendant to go outside federal law. If a plaintiff establishes a prima facie case of unlawful discrimination, "a presumption of illegal discrimination arises, and the burden of production shifts to the employer" to produce evidence of a legitimate, non-discriminatory reason for its

adverse employment action. *Hoyle v. Freightliner, LLC, 650 F.3d 321, 336 (4th Cir. 2011); see Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); Haynes, 922 F.3d at 223.*

The Defendant Never met this burden. (emphasis) The E.D. Va. court abused it's authority by going outside the framework of McDonnel Douglas and condoning the use of an unlawful act.

5. **Issue Five**

The E. D. Va. court abused it's authority when "assuming" a sovereign federal government does not create a Hostile Environment by using State court criminal processes against their employees. This is related to issue No. four.

The defendant("the DVA") is a sovereign federal government agency. In Plaintiff's initial complaint, ECF No.3 @ ¶¶37-46 and ¶¶49-50 was clear that deciding and proposing officials knew the unlawful act of using a State court criminal process was taking place at this facility. As related to issue No. four above, the defendant knew they have a legal obligation to intervene in these unlawful acts. To allow these type acts to take place and discriminate on which person(s) they choose to intervene, and/or ignore State interference for other employees is a Very hostile environment. *See Init comp ECF No. 3 @ ¶¶37-46 and ¶¶49-50*

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6. RELIEF REQUESTED

Plaintiff-Appellant asks this Appellate Court to: **(i) REVERSE** the Dismissal Order of the E. D. Va. Court; **(ii) RETURN** this case to the E. D. Va. with instruction to allow the defendant reasonable time to state **(a)** a lawful, nondiscriminatory reason for termination, **(b)** a legal explanation why the use of a State court process is authorized for the DVA.

7. Plaintiff-Appellant has filed the following appeals in this court:

A. 19-1020 (4:17-CV-134) Affirmed

B. 20-1147 (4:19-CV-59) Pending

8. there are no transcripts in need of filing

sign

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CERTIFICATE OF SERVICE

I, *pro se* Plaintiff-Appellant; Lawrence E. Mattison do by sign state that copies of this Informal Brief was sent by US. Postal Mail to counsel for each defendant as follows:

Counsel for defendant	**Defendant**
Sean D. Jansen; Assistant U.S.	Robert Wilkie;

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Attorney, Office of the United States Attorney @ 101West Main Street, #8000, Norfolk, Virginia 23510-1671 Sean.jansen@usdoj.gov	*Secretary department of Veterans Affairs*

and one copy w/ return copy was sent to U.S. Court of Appeals, Fourth Circuit @ U.S. Courthouse Annex, 5th Floor, 1100 East Main Street, Richmond, Virginia 23219, this was done on the 4th day of MARCH, 2020

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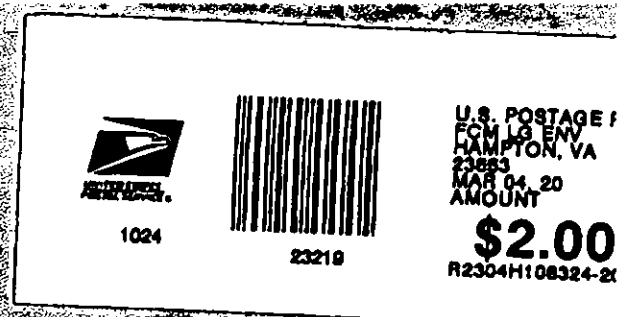

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