

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 21-3193

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 25, 2022

DEBORAH S. HUNT, Clerk

MAHESH KHATRI,)
v.)
Plaintiff-Appellant,)
OHIO STATE UNIVERSITY, et al.,) ON APPEAL FROM THE UNITED
Defendants-Appellees.) STATES DISTRICT COURT FOR
) THE NORTHERN DISTRICT OF
) OHIO
)
)

OR D E R

Before: WHITE, THAPAR, and READLER, Circuit Judges.

Mahesh Khatri, an Ohio resident proceeding pro se, appeals the district court's judgment dismissing his amended complaint under Federal Rule of Civil Procedure 12(b)(6). 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).*

In 2008, Khatri began working as a research scientist for the Ohio State University at the Ohio Agricultural Research and Development Center in the University's Food Animal Health Research Program, located in Wooster, Ohio. Khatri alleged that, starting in 2010 and while working in defendant Chang-Won Lee's lab, he observed the misuse of federally regulated infectious agents and viruses. Khatri subsequently transferred to defendant Yehia Mohamad Saif's lab, and in October 2011 he reported the alleged misuse to the campus police. Khatri alleged that he faced retaliation following his report. Among other things, Khatri claimed that: his employment applications to outside schools were blocked; defendant David Benfield required him to attend the Employee Assistance Program and relinquish technology that Khatri had developed; and Saif wrote negative comments in his annual reviews, moved lab equipment, and threatened to terminate

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his employment. In 2013, following Saif's retirement, Khatri alleged that he again raised the issue of misuse to Saif's replacement, Jeffrey LeJeune, as well as to the Wooster campus administration. Khatri generally alleged that the defendants took advantage of the fact that he needed the health insurance benefits provided through his University employment to care for his son, who has a chronic disability.

Khatri further alleged that, in 2015, he met with defendant Elayne Siegfried, a human resources employee, and Benfield to discuss mistreatment resulting from his 2011 police report. Following this meeting, LeJeune wrote negative comments in Khatri's annual review. Additionally, Khatri alleged that LeJeune continued to block his job applications and told him that he would impose so much stress on Khatri that his adrenal glands would stop working, like his son's did. In 2016, Khatri submitted an employee dispute form concerning the retaliation; Khatri further alleged that Benfield altered the contents of his form. Khatri also alleged that, in addition to submitting the form, he provided campus security with names of witnesses and evidence of the misuse. After these submissions, Siegfried placed Khatri on administrative leave and had him undergo a fitness-for-duty evaluation.

In 2016, defendant Gireesh Rajashekara took over as acting department head. Khatri asserted that Rajashekara blocked his application for a faculty position with a different university, allegedly to keep Khatri's grant money within the department. In 2017, Khatri returned to work following the fitness-for-duty evaluation and was told to meet with Rajashekara on a biweekly basis. Khatri alleged that he was the only research scientist in the department required to do so and that Rajashekara put negative comments in his annual performance review. Khatri filed a complaint in 2017 against Rajashekara, after which Rajashekara put him on a performance improvement plan. In late December 2017, Khatri contacted the University president and other senior administration officials, but no action was taken. On March 5, 2018, the University terminated Khatri's employment, citing his failure to complete the performance improvement plan.

On May 14, 2018, Khatri filed a charge against the University with the Equal Employment Opportunity Commission ("EEOC"), alleging retaliation, disability discrimination, religious

discrimination, and national origin discrimination. The EEOC dismissed Khatri's claim and issued a notice-of-rights letter.

Based on these allegations, Khatri asserted in his amended complaint that the defendants: (1) retaliated against him for exercising his First Amendment right to freedom of speech and conspired with each other to do so; (2) discriminated against him based on his perceived disability and his son's disability, in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA); (3) discriminated against him due to his religion and national origin in violation of Title VII of the Civil Rights Act; and (4) violated state law. The defendants moved to dismiss the amended complaint pursuant to Rule 12(b)(1) and (b)(6), and Khatri moved for partial judgment on the pleadings.

On January 17, 2020, a magistrate judge issued a report recommending that the district court deny Khatri's motion for partial judgment and grant the defendants' motion to dismiss. The magistrate judge concluded that: (1) Khatri's First Amendment claims were untimely in part and in any event failed because he did not engage in protected speech; (2) Khatri's ADA and RA claims were barred in part by the Eleventh Amendment and in any event failed on the merits; (3) Khatri's Title VII claims were untimely and, as to Benfield and Siegfried, failed to state a claim; and (4) the district court should decline to exercise supplemental jurisdiction over Khatri's state law claims.

On February 3, 2020, the district court adopted the report and recommendation and dismissed the complaint. Khatri filed his objections to the report and recommendation the next day. After the defendants responded, the district court entered an additional order dismissing Khatri's complaint, noting that Khatri's objections were untimely but addressing them on the merits "in order to bring finality" to the case. Khatri timely appealed. We denied the defendants' motion to dismiss the appeal based on Khatri's failure to file timely objections.

We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6). *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). In determining whether a complaint states a claim, a court must construe it in the light most favorable to the plaintiff, accept the factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. *Id.* To survive a motion to dismiss, the complaint must contain "enough facts to state a claim to relief that

is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Exhibits attached to the complaint or the motion to dismiss may be considered “so long as they are referred to in the complaint and are central to the claims contained therein.” *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016). As a pro se litigant, Khatri is entitled to a liberal construction of his pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam).

First Amendment Claims

Khatri claims that the defendants conspired to interfere with his right to freedom of speech and retaliated against him for exercising that right. To establish a First Amendment retaliation claim, a plaintiff must prove that: (1) he engaged in protected conduct; (2) the defendant took an adverse action against him; and (3) the adverse action was motivated by the protected conduct. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 723 (6th Cir. 2010). For a public employee, like Khatri, to show that he was engaged in protected conduct, he must speak on a matter of public concern, his speech interest must outweigh the interests of the State, and he “must speak as a private citizen and not as an employee pursuant to his official duties.” *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017); *see Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”).

The defendants do not dispute that Khatri spoke on issues of public concern. At issue, then, is whether he spoke as a private citizen or pursuant to his official employment duties. In making that inquiry, we have “recognized several non-exhaustive factors to consider, including: the speech’s impetus; its setting; its audience; and its general subject matter.” *Mayhew*, 856 F.3d at 464. The “critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Lane v. Franks*, 573 U.S. 228, 240 (2014). Khatri’s allegations indicate that he spoke as a public employee, as opposed to a private citizen, when he reported the alleged misuse of infectious agents. As a research scientist in the Food Animal Health Research Program, Khatri was tasked in part with training and supervising students and other personnel. Moreover, Khatri stated that when Lee brought visiting scholars and students from Egypt to work on H5N1 avian influenza, he noticed that the visitors

were untrained in lab techniques and were handling apparently leaky shipments; Khatri asserted that he taught basic lab techniques to these new lab members. It was in this context that Khatri first reported the misuse. Although Khatri's job description did not require the reporting of malfeasance, the subject of his report was inherently related to his job as a research scientist. *See Mayhew*, 856 F.3d at 465-66. Properly handling infectious agents in the lab, and training others on the techniques for doing so, were explicitly part of his job description. And Khatri made his report to his employer, through campus police. When an employee "raises complaints or concerns up the chain of command at his workplace about his job duties" even if he bypasses his immediate supervisors, he still speaks as a public employee. *See id.*, 856 F.3d at 465; *see also Fledderjohann v. Celina City Sch. Bd. of Educ.*, 825 F. App'x 289, 295-96 (6th Cir. 2020).

Discrimination based on Disability

Khatri additionally alleges that the defendants discriminated against him in violation of the ADA and the RA. Specifically, Khatri claims that he was perceived as disabled and subjected to a fitness-for-duty exam and that the defendants discriminated against him due to his son's medical condition.

Claims brought under the ADA and the RA are analyzed under the same framework. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201 (6th Cir. 2010). To make out a prima facie case of disability discrimination, "a plaintiff must demonstrate that (1) she has a disability, (2) she is 'otherwise qualified for the position, with or without reasonable accommodation,' (3) she 'suffered an adverse employment decision,' (4) her employer 'knew or had reason to know' of her disability, and (5) she was replaced or her position remained open." *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 395 (6th Cir. 2017) (quoting *Macy v Hopkins Cnty. Sch. Bd. of Educ.*, 484 F.3d 357, 365 (6th Cir. 2007)). An individual who is "regarded as" disabled meets the statutory definition of disabled. 42 U.S.C. § 12102(1)(C).

Khatri argues that he was perceived as disabled, as evidenced by the requirement he complete a fitness-for-duty examination, and was subjected to such an examination. The ADA permits employers to require examinations that are "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A); *see Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d

308, 321 (6th Cir. 2019). Requiring an employee to undergo a fitness-for-duty exam is not sufficient to demonstrate a perception of disability. *See Pena v. City of Flushing*, 651 F. App'x 415, 420-21 (6th Cir. 2016); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 810-12 (6th Cir. 1999). Because Khatri alleged only that he was required to undergo a fitness-for-duty exam, he did not put forth sufficient facts to demonstrate that he was perceived as disabled, thus failing to establish an element of ADA and RA claims. Moreover, Khatri did not allege any facts establishing a connection between the alleged perception of disability and any adverse employment action, and he passed the fitness-for-duty exam more than a year before his employment was terminated. Accordingly, Khatri's "perceived as" claim is unsupported.

Khatri's disability discrimination claim related to his son's disability likewise fails. An employer may not exclude or otherwise deny "equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). In order to establish a claim of associational discrimination, the plaintiff must show that "the adverse employment action occurred under circumstances that raise a reasonable inference that the disability of the relative was a determining factor in the decision." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 487 (6th Cir. 2011). Khatri alleged several examples of employees telling him that he needed to maintain his employment, and consequently his health insurance, because he needed to care for his son. However, Khatri did not allege facts connecting his son's medical condition to the termination of his employment or any other adverse employment action, an absence that is fatal to his claim. *See id.* at 489.

Title VII Claims

Finally, Khatri alleged that the defendants, with the exception of Dr. Rajashekara, discriminated against him based on his Hindu religion and Indian national origin in violation of Title VII. Khatri abandoned the national origin claim, however, by failing to address it on appeal. "[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (alteration in original) (quoting *United States v. Still*, 102 F.3d 118, 122 n.7 (5th Cir. 1996)). And the district court properly concluded

that Khatri's religion-based claim was untimely. "Plaintiffs must typically file a timely discrimination charge with the EEOC in order to bring a Title VII lawsuit." *Amini v. Oberlin Coll.*, 259 F.3d 493, 498 (6th Cir. 2001). "Pursuant to the statutory language of Title VII, the applicable statute of limitations begins to run from the date of 'the alleged unlawful employment practice[.]'" *Id.* (alteration in original) (quoting 42 U.S.C. § 2000e-5(e)(1)). The alleged unlawful practice occurred in Ohio, a deferral state, so Khatri had 300 days from the alleged discriminatory act to file suit. *See id.* Khatri filed his charge with the EEOC on May 14, 2018, so the unlawful act would have had to occur on or after July 18, 2017.

With regard to religious-based discrimination, Khatri alleged that, in 2008, another student told him that Saif "likes Muslims" and that Saif, until his retirement in 2013, blocked Khatri's applications to other schools; used Khatri's grant money to pay personnel from Egypt, Lebanon, and Pakistan; and forced Khatri to pay his own salary from his grants. Khatri also alleged that, in 2013 and 2014, LeJeune pressured him to attend Bible study and then blocked his job applications, refused to offer him a faculty position, appropriated his grant money, and denied him lab facilities for his work. In 2015 and 2016, Dr. LeJeune and Dr. Benfield allegedly blocked other job applications. The district court concluded that, because these instances all occurred outside the limitations period, Khatri's religious discrimination claim was untimely. Khatri, however, broadly asserts that he suffered continuous discrimination, allowing him to escape the 300-day filing window, because these discriminatory acts lasted until his employment was terminated in March 2018.

When a Title VII claim is based on discrete acts of discrimination, "the continuing violation doctrine may not be invoked to allow recovery for acts that took place outside the filing period." *Sharpe v. Cureton*, 319 F.3d 259, 267 (6th Cir. 2003) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)). Although an employee may allege that he suffered from a series of related discriminatory acts over the course of his employment, "only incidents that took place within the timely filing period are actionable." *Morgan*, 536 U.S. at 114. In contrast, when an employee's claim is based on a hostile work environment, the claim may be timely even if some of the component acts fall outside the limitations period. *Id.* at 116-17; *see Hunter v. Sec'y of U.S.*

Army, 565 F.3d 986, 993-94 (6th Cir. 2009) (noting that such claims by their nature involve repeated conduct). Some of the actions alleged by Khatri—the failure to promote him to faculty positions, the preventing of his transfer to other departments and blocking of applications to outside institutions, and his discharge—are discrete discriminatory acts each subject to the EEOC filing deadline. *Morgan*, 536 U.S. at 114; *Hunter*, 565 F.3d 994. To the extent he alleged a timely hostile work environment claim, *see Morgan*, 536 U.S. at 116-17, that claim fails on the merits because his complaint contained no factual allegations that any harassment was based on his religion. *See Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 411 (6th Cir. 2021). And as to Khatri’s discharge, which falls within the limitations period, he neither alleged that his discharge was connected to his religion nor alleged that he was replaced by someone outside of his religion or was treated differently because of his religion. *See Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000). Accordingly, his claim of religious discrimination fails.

District Court Bias

Khatri alleges that the district court exhibited bias against him throughout the proceedings. One instance occurred when the judge allegedly questioned Khatri’s ability to secure a job if he raised the issues he did in his complaint. But this does not rise to the level of judicial bias. *See In re Adams*, 31 F.3d 389, 396 (6th Cir. 1994). A judicial comment made during proceedings that is critical or disapproving of the parties is not, standing alone, sufficient to find impermissible bias. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994). And Khatri’s remaining allegations amount to disagreements with the district court’s rulings, which also do not establish judicial bias. *See id.* at 555.

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Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

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MAHESH KHATRI,

Plaintiff-Appellant,

v.

OHIO STATE UNIVERSITY, ET AL.,

Defendants-Appellees.

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ORDER

BEFORE: WHITE, THAPAR, and READLER, 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

*Chief Judge Sutton recused himself from participation in this ruling.