APPENDIX A:

- U.S. Fourth Circuit Court of Appeals Judgment/ Unpublished Opinion (August 18, 2022)
- Temporary Stay of Mandate (August 25, 2022)
- Mandate of September 28, 2022

21-1097

Ehonam M. Agbati
Apartment 2
714 North Arthur Ashe Boulevard
Richmond, VA 23220

FILED: August 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097, Ehonam Agbati v. VDACS
3:19-cv-00512-JAG

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

U.S. COURT OF APPEAL FOR THE FOURTH CIRCUIT BILL OF COSTS FORM

(Civil Cases)

Directions: Under FRAP 39(a), the costs of appeal in a civil action are generally taxed against appellant if a judgment is affirmed or the appeal is dismissed. Costs are generally taxed against appellee if a judgment is reversed. If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed as the court orders. A party who wants costs taxed must, within 14 days after entry of judgment, file an itemized and verified bill of costs, as follows:

- Itemize any fee paid for docketing the appeal. The fee for docketing a case in the court of appeals is $500 (effective 12/1/2013). The $5 fee for filing a notice of appeal is recoverable as a cost in the district court.
- Itemize the costs (not to exceed $.15 per page) for copying the necessary number of formal briefs and appendices. (Effective 10/1/2015, the court requires 1 copy when filed; 3 more copies when tentatively calendared; 0 copies for service unless brief/appendix is sealed.). The court bases the cost award on the page count of the electronic brief/appendix. Costs for briefs filed under an informal briefing order are not recoverable.
- Cite the statutory authority for an award of costs if costs are sought for or against the United States. See 28 U.S.C. § 2412 (limiting costs to civil actions); 28 U.S.C. § 1915(f)(1) (prohibiting award of costs against the United States in cases proceeding without prepayment of fees).

Any objections to the bill of costs must be filed within 14 days of service of the bill of costs. Costs are paid directly to the prevailing party or counsel, not to the clerk's office.

Case Number & Caption: _____

Prevailing Party Requesting Taxation of Costs: _____

Appellate Docketing Fee (prevailing appellants):			**Amount Requested: _____**			**Amount Allowed: _____**	
Document	**No. of Pages**		**No. of Copies**		**Page Cost (≤$.15)**	**Total Cost**	
	Requested	**Allowed** (court use only)	**Requested**	**Allowed** (court use only)		**Requested**	**Allowed** (court use only)
TOTAL BILL OF COSTS:						$0.00	$0.00

1. If copying was done commercially, I have attached itemized bills. If copying was done in-house, I certify that my standard billing amount is not less than $.15 per copy or, if less, I have reduced the amount charged to the lesser rate.
2. If costs are sought for or against the United States, I further certify that 28 U.S.C. § 2412 permits an award of costs.
3. I declare under penalty of perjury that these costs are true and correct and were necessarily incurred in this action.

Signature: _____ **Date:** _____

Certificate of Service

I certify that on this date I served this document as follows:

Signature: _____ **Date:** _____

FILED: August 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097
(3:19-cv-00512-JAG)

EHONAM M. AGBATI, a/k/a Roger Agbati

Plaintiff - Appellant

v.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Office of Charitable and Regulatory Programs

Defendant - Appellee

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

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097

EHONAM M. AGBATI, a/k/a/ Roger Agbati,

Plaintiff - Appellant,

v.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Office of Charitable and Regulatory Programs,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., Senior District Judge. (3:19-cv-00512-JAG)

Submitted: July 29, 2022 Decided: August 18, 2022

Before WYNN and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Ehonam M. Agbati, Appellant Pro Se. Gregory Clayton Fleming, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ehonam M. Agbati appeals the district court's orders granting in part Appellee's motion to dismiss Agbati's initial complaint, granting Appellee's partial motion to dismiss Agbati's amended complaint, and granting summary judgment to Appellee on Agbati's failure to promote claim. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. *Agbati v. Va. Dep't of Agric. & Consumer Servs.*, No. 3:19-cv-00512-JAG (E.D. Va. Apr. 6, 2020; Aug. 5, 2020; Jan. 7, 2021). 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

21-1097

Ehonam M. Agbati
Apartment 2
714 North Arthur Ashe Boulevard
Richmond, VA 23220

FILED: August 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097
(3:19-cv-00512-JAG)

EHONAM M. AGBATI, a/k/a Roger Agbati

Plaintiff - Appellant

v.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Office of Charitable and Regulatory Programs

Defendant - Appellee

TEMPORARY STAY OF MANDATE

Under Fed. R. App. P. 41(b), the filing of a timely petition for rehearing or rehearing en banc stays the mandate until the court has ruled on the petition. In accordance with Rule 41(b), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

FILED: September 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097
(3:19-cv-00512-JAG)

EHONAM M. AGBATI, a/k/a Roger Agbati

Plaintiff - Appellant

v.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Office of Charitable and Regulatory Programs

Defendant - Appellee

MANDATE

The judgment of this court, entered August 18, 2022, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

APPENDIX B:

- U.S. District Court for the Eastern District of Virginia – Richmond, VA.
  - Court Order of April 6, 2020
  - Court Memorandum Order of May 12, 2020
  - Court Memorandum Order of August 5, 2020
  - Court Memorandum Order of January 7, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EHONAM M. AGBATI,
Plaintiff,

v. Civil Action No. 3:19-cv-512

VIRGINIA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
Defendant.

OPINION

Ehonam "Roger" M. Agbati has sued his former employer, the Virginia Department of Agriculture and Consumer Services ("VDACS"), alleging discrimination based on race, color, and national origin. Agbati asserts claims under Title VII of the Civil Rights Act of 1964 and the Virginia Human Rights Act ("VHRA"). VDACS has moved to dismiss Agbati's complaint for failure to state a claim. For the reasons set forth below, the Court will grant in part and deny in part the motion to dismiss. The Court will deny the motion as to Agbati's failure to promote claim under Title VII, but will grant the motion as to Agbati's remaining claims. The Court, however, will grant Agbati leave to file an amended complaint as to his retaliation and pay discrimination claims under Title VII.

I. FACTS ALLEGED IN THE COMPLAINT

Agbati, an African American immigrant from Togo, began working at VDACS as a part-time hourly employee in July, 2013. Before working at VDACS, Agbati earned a bachelor's degree from Virginia Commonwealth University in political science, government, and politics, with a minor in nonprofit management and administration. In November, 2013, Agbati became a full-time employee at VDACS. Michelle Townsend served as Agbati's supervisor.

During Townsend's supervision, "there was harmony" among Agbati's team. (Dk. No. 3, at 9.) But the workplace "started going 'south'" when Alison Foster replaced Townsend as Agbati's supervisor. (*Id.*) VDACS hired Kathryn Land to fill Foster's role after Foster received a promotion. Around that time, VDACS also hired Alyssa Royer. During Royer's first week, Agbati noticed her "anti-social and discriminatory behavior." (*Id.* at 9-10.) Royer greeted Agbati with a "sarcastic smile" when they walked past one another in the hallway, and he noticed similar treatment toward other African American employees. (*Id.* at 10.)

When Agbati complained to Foster about the discriminatory behavior, Foster told him that others reported similar treatment. Foster also said that she would try to talk to Royer about the behavior. Royer then began closing her office door to avoid contact with "people she [did not] want to talk to." (*Id.*) Foster resigned in the fall of 2016. Around the same time as Foster's resignation, VDACS promoted Agbati's African American coworker, Joseph Cason.

Agbati alleges that Royer did not like how closely Agbati and Cason worked together. Agbati says that Royer created "a coalition of people who look like her" with whom she took walks, ate lunch, and took breaks. (*Id.*) Land (Foster's replacement) assumed "the role of the coalition's bully." (*Id.* at 11.) When Land heard Agbati answering calls, she slammed her door closed. Cason resigned after white female employees began complaining about him.

When a supervisory position became available in November, 2017, Agbati applied for the promotion. VDACS instead promoted Royer, a white woman. Agbati alleges that he had "the most seniority" and was "the most qualified person" for the promotion. (*Id.*) Agbati also says that VDACS promoted Royer because she had a "close relationship" with management. (*Id.* at 12.)

In April, 2018, Agbati filed a grievance with human resources, alleging that Royer created a hostile work environment. (*See* Dk. No. 3-9.) Agbati advanced his grievance through three

levels of internal review pursuant to the VDACS grievance procedure. After each reviewer concluded that his claim lacked merit, the Director of the Office of Equal Employment and Dispute Resolution denied Agbati's request to have his grievance reviewed at a hearing. Agbati alleges that he was "completely outcast[ed]" after he filed the grievance. (Dk. No. 3, at 8.)

Agbati later made several requests under the Virginia Freedom of Information Act ("Virginia FOIA") to determine his coworkers' compensation. Because VDACS determined that the cost to retrieve the records would exceed $200, VDACS charged Agbati a deposit pursuant to Va. Code § 2.2-3704(H).[1] (*See* Dk. No. 3-7, at 164.) Agbati refused to pay the deposit. Agbati later retrieved some salary information from public reports available online.

Agbati resigned from VDACS effective April 18, 2019. In his resignation letter, he cited the "employment/promotion discrimination perpetrated again [him] and the hostilities" resulting from his "actions to fight the injustices committed against [him]." (Dk. No. 3-6, at 5.)

After exhausting his administrative remedies, Agbati filed this case. Agbati's complaint raises the following claims[2]: a failure to promote claim under Title VII (Count One); a hostile work environment claim under Title VII (Count Two); a constructive discharge claim under Title VII (Count Three); a retaliation claim under Title VII (Count Four); a pay discrimination claim under Title VII (Count Five); and a claim under the VHRA (Count Six).

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[1] "[W]here a public body determines in advance that charges for producing the requested records are likely to exceed $200, the public body may . . . require the requester to agree to payment of a deposit not to exceed the amount of the advance determination." Va. Code § 2.2-3704(H).

[2] Liberally construed, the three "claims" in Agbati's complaint raise allegations of failure to promote, hostile work environment, constructive discharge, retaliation, and pay discrimination under Title VII. Thus, the Court enumerates his Title VII allegations as five separate counts.

II. LEGAL STANDARD

VDACS has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). A Rule 12(b)(6) motion gauges the sufficiency of a complaint without resolving any factual discrepancies or testing the merits of the claims. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In considering the motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)).

The principle that a court must accept all allegations as true, however, does not apply to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, a complaint must state facts that, when accepted as true, state a claim to relief that is plausible on its face. *Id.* "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." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When the plaintiff appears pro se, as Agbati does here, courts do not expect the pro se plaintiff to frame legal issues with the clarity and precision expected from lawyers. Accordingly, courts construe pro se complaints liberally. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). This principle of liberal construction has its limits. *Id.* Courts do not need to discern the unexpressed intent of the plaintiff or take on "the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Id.*

III. DISCUSSION

A. Title VII Claims

1. Count One: Failure to Promote

In Count One, Agbati asserts that VDACS failed to promote him based on his race or nationality. To state a claim for discrimination claim based on a defendant's failure to promote, a plaintiff must plead facts showing that "(1) [he] is a member of a protected group, (2) there was a specific position for which [he] applied, (3) [he] was qualified for the position, and (4) [his employer] rejected his application under circumstances that give rise to an inference of discrimination." *McCaskey v. Henry*, 461 F. App'x 268, 270 (4th Cir. 2012) (per curiam). VDACS argues that Agbati fails to plead facts giving rise to an inference of discrimination.

Agbati, an African American immigrant from Togo, alleges that VDACS promoted Royer, a white woman, for the supervisory position over him. He says that he had "the most seniority" and was "the most qualified person" for the promotion. (Dk. No. 3, at 11.) Thus, Agbati alleges "that a member outside the protected class received a promotion instead of [him]," which "is sufficient to create an inference of discrimination." *McCaskey v. Henry*, 461 F. App'x 268, 270 (4th Cir. 2012) (per curiam). Because Agbati pleads sufficient facts to state a failure to promote claim, the Court will deny the motion to dismiss Count One.[3]

2. Count Two: Hostile Work Environment

In Count Two, Agbati alleges that VDACS maintained a hostile work environment in violation of Title VII. To state a hostile work environment claim, plaintiff must plead facts

[3] VDACS argues that it did not promote Agbati simply because he lacked the necessary supervisory experience. For support, VDACS cites its promotion criteria and Agbati's application, both of which Agbati attached to his complaint. (*See* Dk. No. 3-8, at 119-132.) Although Agbati pleads facts sufficient for his failure to promote claim to survive a motion to dismiss, VDACS may raise those arguments again on summary judgment.

showing that "(1) he experienced unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Perkins v. Int'l Paper Co.*, 936 F.3d 196, 207-08 (4th Cir. 2019). VDACS argues that Agbati fails to allege facts to meet the "severe or pervasive" standard.

Agbati's complaint "must clear a high bar" to meet the severe or pervasive standard. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008). Title VII prohibits "extreme" conduct that "must . . . amount to a change in the terms and conditions of employment." *Faragher v. Boca Raton*, 524 U.S. 775, 778 (1998). It does not create "a 'general civility code,'" nor does it impose liability for "the ordinary tribulations of the workplace." *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). To determine if conduct qualifies as severe or pervasive, courts consider the totality of the circumstances, including (1) frequency; (2) severity; (3) whether the conduct was physically threatening or humiliating, or merely an offensive utterance; and (4) whether the conduct unreasonably interfered with the plaintiff's work performance. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001).

Here, Agbati alleges that his supervisor treated him in an "anti-social and discriminatory" manner, greeted him with a "sarcastic smile," closed her office door to avoid him, and excluded him from a clique of coworkers. (Dk. No. 3, at 9-11.) Agbati also asserts that a coworker slammed her door closed when he answered the phone. At most, Agbati's allegations show that he experienced "rude treatment," "callous behavior," and "personality conflict[s]" during his time at VDACS, but those experiences fall short of a plausible hostile work environment claim. *Sunbelt Rentals, Inc.*, 521 F.3d at 315. Because Agabti fails to plead that he experienced severe or pervasive harassment, the Court will dismiss Count Two with prejudice.

3. Count Three: Constructive Discharge

In Count Three, Agbati asserts that the alleged discrimination he suffered amounts to constructive discharge, forcing him to resign. To proceed on a constructive discharge theory of discrimination, a plaintiff must plead facts showing "(1) the deliberateness of [the defendant's] actions, motivated by [discriminatory] bias, and (2) the objective intolerability of the working conditions." *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014).

Agbati's allegations do not meet the "objective intolerability" standard. Agbati proceeds on the same factual allegations to support his constructive discharge claim as his hostile work environment claim. Because his allegations do not support a hostile work environment claim, his constructive discharge claim also fails. *See Nnadozie v. Genesis HealthCare Corp.*, 730 F. App'x 151, 162 (4th Cir. 2018) ("The 'intolerability' standard governing constructive discharge claims is more stringent than the 'severe [or] pervasive' standard for hostile work environment claims.").[4] Agbati, therefore, cannot proceed on a constructive discharge theory. Accordingly, the Court will dismiss Count Three with prejudice.

4. Count Four: Retaliation

In Count Four, Agbati alleges that VDACS retaliated against him after he filed his April, 2018 grievance. To state a retaliation claim, a plaintiff must plead facts showing "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected

[4] Indeed, "mere dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so unpleasant as to compel a reasonable person to resign." *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 262 (4th Cir. 2006). "Even yelling, public chastisements, and forced work under unsafe conditions cannot support [a constructive discharge] claim." *Kenion v. Skanska USA Bldg., Inc.*, No. RDB-18-3344, 2019 WL 4393296, at *11 (D. Md. Sept. 13, 2019). Agbati's allegations of "workplace discomforts and inequitable treatment," *id.*, do not qualify as "objectively intolerable" working conditions to support a constructive discharge claim.

activity and the employment action." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd sub nom. Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012). Adverse employment actions may involve "discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion." *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999). VDACS argues that Agbati fails to plead facts showing that he suffered any adverse employment action.

Agbati asserts that he was "completely outcast[ed]" after he filed his grievance. (Dk. No. 3, at 8.) To qualify as an adverse employment action, "an employer's conduct must be 'so materially adverse as to dissuade a reasonable employee from engaging in protected activity.'" *Michael v. Va. Commonwealth Univ.*, No. 3:18cv125, 2018 WL 3631888, at *3 (E.D. Va. July 31, 2018) (quoting *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 831 (E.D. Va. 2016)). Agbati does not explain how he was "completely outcast[ed]" or what actions led to his feelings of being ostracized. Agbati simply pleads no facts showing that his "treatment at work changed dramatically" after he filed his grievance. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 544 (4th Cir. 2003). Moreover, his allegations of hostile behavior by his supervisor and coworker all appear to predate his April, 2018 grievance.

Nonetheless, to give Agbati an opportunity to comply with the pleading standard, the Court will grant Agbati leave to file an amended complaint as to Count Four.[5] Accordingly, the Court will dismiss Count Four without prejudice.[6]

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[5] Should Agbati continue to rely on his assertion that he was "completely outcast[ed]" after he filed his grievance, his amended complaint must allege facts that more precisely explain what happened and when it happened.

[6] Agbati also appears to argue that his decision to resign qualifies as a retaliatory adverse employment action under a constructive discharge theory. "Constructive discharge may serve as the adverse employment action in a Title VII retaliation claim." *Bailey v. Va. Dep't of Alcoholic*

5. Count Five: Pay Discrimination

In Count Five, Agbati asserts a pay discrimination claim under Title VII. To state a pay discrimination claim under Title VII, a plaintiff must plead facts showing "that (1) [he] is a member of a protected class; (2) [he] was paid less than an employee outside the class; and (3) the higher paid employee was performing a substantially similar job." *Kess v. Mun. Emps. Credit Union of Balt., Inc.*, 319 F.2d 637, 644 (D. Md. 2004). Agbati generally asserts that white employees at VDACS earn more than nonwhite employees.

When a plaintiff "base[s] [his] allegations 'completely upon a comparison to an employee from a non-protected class[,] . . . the validity of [his claim] depends upon whether that comparator is indeed similarly situated.'" *Lawrence v. Global Linguist Sols LLC*, No. 1:13cv1207, 2013 WL 6729266, at *4 (E.D. Va. Dec. 19, 2013) (quoting *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010) (per curiam)). A plaintiff must plead facts showing that the comparators "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 or the employer's treatment of them for it." *Id.*

Beverage Control, No. 2:18cv392, 2019 WL 123903, at *7 (E.D. Va. Jan. 7, 2019). A "retaliatory constructive discharge claim," however, "requires 'something more' than actionable retaliation." *Shetty v. Hampton Univ.*, No. 4:12cv158, 2014 WL 280448, at (E.D. Va. Jan. 24, 2014) (adopting report and recommendation). A plaintiff must plead facts showing "(1) the deliberateness of [the defendant's] actions, motivated by [discriminatory] bias, and (2) the objective intolerability of the working conditions." *Freeman*, 750 F.3d at 425. As the Court has explained, Agbati's allegations do not meet the "objective intolerability" standard. Moreover, any retaliatory constructive discharge claim would fail because Agbati cannot show a causal link between filing his grievance and his resignation one year later. Such "a lengthy time lapse . . . negates any inference that a causal connection exists between the two." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). Accordingly, Agbati cannot state a "retaliatory constructive discharge" claim based on his resignation.

Agbati does not point to any comparator to support his pay discrimination claim. The exhibits attached to Agbati's complaint appear to show his coworkers' salaries, but wage discrimination claims under Title VII require plaintiffs to plead facts showing that a comparator performed "substantially equal work." *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019). Indeed, plaintiffs must plead facts showing that comparators outside the protected class "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 or the employer's treatment of them for it." *Lawrence*, 2013 WL 6729266, at *4. Because Agbati fails to identify a comparator or otherwise plead that a comparator performed substantially equal work, he fails to state a plausible pay discrimination claim.

Nonetheless, to give Agbati an opportunity to comply with the pleading standard, the Court will grant Agbati leave to file an amended complaint as to Count Five.[7] Accordingly, the Court will dismiss Count Five without prejudice.

B. Count Six: VHRA Claim[8]

In Count Six, Agbati asserts a discrimination claim under the VHRA. The VHRA prohibits employers with more than five but fewer than fifteen employees from discriminating against employees based on protected characteristics. *See* Va. Code § 2.2-3903(B). The VHRA "provides

[7] The Court cautions Agbati that a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Thus, Agbati must identify a comparator and must plead sufficient facts to render his claim plausible that higher-paid white employees "were actually similarly situated." *Coleman*, 626 F.3d at 191.

[8] VDACS moved to dismiss Agbati's VHRA claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). But the grounds for dismissal concern whether Agbati states a claim under the VHRA. Accordingly, the Court will decide the motion as to Agbati's VHRA claim under Rule 12(b)(6) rather than Rule 12(b)(1). *See Rose-Stanley v. Virginia*, No. 2:15cv7, 2015 WL 6756910, at *3 n.1 (W.D. Va. Nov. 5, 2015).

protection against discrimination that federal laws do not cover." *Michael*, 2018 WL 3631888, at *4.

Agbati does not allege that VDACS employs fewer than fifteen employees. In fact, VDACS employs well over fifteen employees. *See Richardson v. Prince William Cty.*, No. 1:17cv761, 2018 WL 548666, at *3 (E.D. Va. Jan. 24, 2018) (taking judicial notice that the defendant employs more than fifteen employees and dismissing the plaintiff's VHRA claim). Because Agbati does not and cannot plead that VDACS has the requisite number of employees to state a claim under the VHRA, the Court will dismiss Count Six with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part the motion to dismiss. The Court will deny the motion as to Agbati's failure to promote claim under Title VII. The Court will grant the motion as to Agbati's remaining claims. The Court, however, will grant Agbati leave to file an amended complaint as to his retaliation and pay discrimination claims.

The Court will issue an appropriate Order.

Let the Clerk send a copy of this Opinion to all counsel of record and to the pro se plaintiff.

Date: 6 April 2020
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EHONAM M. AGBATI,
Plaintiff,

v. Civil Action No. 3:19-cv-512

VIRGINIA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
Defendant.

ORDER

This matter comes before the Court on the defendant's motion to dismiss. (Dk. No. 14.) For the reasons stated in the accompanying Opinion, the Court ORDERS as follows:

1. The Court GRANTS IN PART and DENIES IN PART the motion. (Dk. No. 14.) The Court DENIES the motion as to the failure to promote claim (Count One). The Court GRANTS the motion and DISMISSES WITH PREJUDICE the following claims: the hostile work environment claim under Title VII (Count Two); the constructive discharge claim under Title VII (Count Three); and the Virginia Human Rights Act claim (Count Six). The Court DISMISSES WITHOUT PREJUDICE the retaliation claim under Title VII (Count Four) and the pay discrimination claim under Title VII (Count Five).

2. Should the plaintiff wish to amend his retaliation and pay discrimination claims, he must file an amended complaint within **twenty-one (21) days** of this Order. The amended complaint may only assert claims for (1) failure to promote under Title VII, (2) retaliation under Title VII; and (3) pay discrimination under Title VII. In the amended complaint, the plaintiff may not refer to or rely on any previous pleadings or filings in this case or any other case. Although the Court has not dismissed the failure to promote claim, the plaintiff should assert that claim in his amended complaint. Once filed, the amended complaint will become the operative complaint

in this case, so it needs to have all the relevant claims in it. At the top of the amended complaint, the plaintiff must place the following caption: AMENDED COMPLAINT FOR CIVIL ACTION NO. 3:19-cv-512. The amended complaint must comply with the following directives:

a. First, the amended complaint should include a section titled "FACTS." In separately numbered paragraphs, the plaintiff must set forth a short statement of the facts giving rise to his claims for relief. The plaintiff should list the facts in the other in which they happened.

b. Next, the amended complaint should include a section titled "CLAIMS." In separately titled subsections, the plaintiff must clearly identify his legal claims. In this case, the plaintiff may **only** assert legal claims for (1) failure to promote under Title VII; (2) retaliation under Title VII; and (3) pay discrimination under Title VII. For each legal claim, the plaintiff must explain why he believes the defendant is liable to him. Such explanation should refer to the specific numbered paragraphs in the "FACTS" section that support each legal claim.

c. Finally, the amended complaint should include a section titled "RELIEF." The plaintiff should include a list of the relief he seeks. If he seeks money damages, the plaintiff should include the dollar amount of damages.

d. Failure to file an amended complaint as directed will result in dismissal of the retaliation and pay discrimination claims with prejudice. *See* Fed. R. Civ. P. 41(b).

3. The defendant shall respond to the amended complaint within fourteen (14) days of the date the plaintiff files his amended complaint.

4. The Court DENIES AS MOOT the defendant's motion to strike the plaintiff's sur-reply. (Dk. No. 19.)

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record and to the pro se plaintiff.

Date: 6 April 2020
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EHONAM M. AGBATI,
Plaintiff,

v. Civil Action No. 3:19-cv-512

VIRGINIA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
Defendant.

MEMORANDUM ORDER

This matter comes before the Court on the "memorandum and motion to reconsider in part" filed by the pro se plaintiff, Ehonam M. Agbati. (Dk. No. 23.) The Court will construe Agbati's motion as a motion for reconsideration under Federal Rule of Civil Procedure 59(e). For the reasons set forth below, the Court will deny the motion to reconsider and will grant Agbati a second opportunity to file an amended complaint.

I. BACKGROUND

On April 6, 2020, the Court granted in part and denied in part the defendant's motion to dismiss Agbati's initial complaint. (Dk. Nos. 21, 22.) The Court denied the motion to dismiss Agbati's failure to promote claim under Title VII of the Civil Rights Act of 1964. Although the Court dismissed Agbati's remaining claims, the Court granted Agbati leave to file an amended complaint as to his retaliation and pay discrimination claims under Title VII. The Court directed Agbati to file an amended complaint within twenty-one days "[s]hould [he] wish to amend his retaliation and pay discrimination claims." (Dk. No. 22, ¶ 2.) The Court also explained to Agbati that his amended complaint should include his failure to promote claim because the amended complaint "needs to have all the relevant claims in it." (*Id.*)

Agbati did not file an amended complaint as directed. Instead, Agbati filed a motion for reconsideration. Essentially, Agbati takes issue with the Court's summary of his factual allegations, citing assertions and arguments he set forth in various exhibits attached to his complaint and in his other filings in this case. Agbati also objects to the Court's legal analysis regarding the sufficiency of several of his claims.

II. DISCUSSION

In the Fourth Circuit, courts grant motions for reconsideration in the following circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice." *LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12-cv-363, 2014 WL 2121563, at *1 (E.D. Va. May 20, 2014). "[A] motion for reconsideration under Rule 59(e) is inappropriate if it asks the court to 'reevaluate the basis upon which it made a prior ruling' or 'merely seeks to reargue a previous claim.'" *Projects Mgmt. Co. v. DynCorp Intern., LLC*, 17 F. Supp. 3d 539, 541 (E.D. Va. 2014) (quoting *United States v. Smithfield Foods*, 969 F. Supp. 975, 977 (E.D. Va. 1997)).

Agbati's motion does not meet any of three circumstances in which courts grant motions for reconsideration. Essentially, Agbati tries to "re-litigate issues already decided [and] highlight previously-available facts." *Wooten v. Commonwealth of Va.*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016). In other words, Agbati's motion for reconsideration is an improper effort "to put a finer point on [his] old arguments and dicker about matters decidedly adversely to [him]." *Evans v. Trinity Indus., Inc.*, 148 F. Supp. 3d 542, 546 (E.D. Va. 2015).

Although Agbati did not file an amended complaint as directed, the Court will give Agbati a second opportunity to do so. Because Agbati's motion reflects a misunderstanding of the

pleading requirements in federal court and the stage of this lawsuit,[1] the Court finds it necessary to emphasize several points.

First, the Federal Rules of Civil Procedure require a plaintiff's complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Because the complaint puts the defendant and the Court on notice of the plaintiff's claims, the complaint must "allege facts sufficient to state all the elements of [the plaintiff's] claim[s]." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003). Second, while a plaintiff may attach important documents as exhibits to a complaint to support his allegations, the plaintiff may not bury his allegations or legal claims that do not appear on the face of the complaint "in a mass of exhibits." *Cecala v. Nationsbank Corp.*, No. 3:00mc39-MU, 2001 WL 36127812, at *1 (W.D.N.C. Apr. 4, 2001). Finally, a plaintiff may not amend his complaint or assert new factual allegations or legal claims in a brief or other filing. *See Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 748 n.4 (D. Md. 1997) (noting that a plaintiff "is bound by the allegations contained in [his] complaint and cannot, through the use of motion briefs, amend the complaint").

Thus, should Agbati choose to amend his retaliation and pay discrimination claims, his amended complaint must plead sufficient facts to state claims for (1) failure to promote under Title VII, (2) retaliation under Title VII; and (3) pay discrimination under Title VII.[2] While Agbati may attach important documents as exhibits to his amended complaint—such as a right-to-sue

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[1] In his motion, Agbati says that "[t]here should not be a need for [him] to file an amend[ed complaint] . . . to state the same thing over and over." (Dk. No. 23, at 7.)

[2] Agbati asks the Court to "correct its statements" regarding his factual allegations in his initial complaint. (Dk. No. 23, at 4.) If Agbati disagrees with the Court's summary of the allegations in his initial complaint, he remains free to set forth his allegations as he sees fit in his amended complaint.

letter from the U.S. Equal Employment Opportunity Commission—he may not bury factual allegations or legal claims in those attachments that do not appear in the amended complaint itself.[3] Nor may Agbati raise additional allegations or claims in subsequent briefs or other filings. Agbati's amended complaint must contain every factual allegation on which he intends to rely to support his claims. In other words, the amended complaint must stand on its own, and he may not rely on his previous complaints or other filings in this case. If Agbati fails to file an amended complaint as directed, the Court will dismiss his retaliation and pay discrimination claims with prejudice and this case will proceed only as to his failure to promote claim. *See* Fed. R. Civ. P. 41(b).

III. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. The Court DENIES Agbati's motion to reconsider. (Dk. No. 23.) The Court, however, will grant Agbati another opportunity to file an amended complaint.

2. Should Agbati wish to amend his retaliation and pay discrimination claims, he must file an amended complaint within **twenty-one (21) days** of this Order. The amended complaint may only assert claims for (1) failure to promote under Title VII, (2) retaliation under Title VII; and (3) pay discrimination under Title VII. In the amended complaint, Agbati may not refer to or rely on any previous pleadings or filings in this case or any other case. Although the Court has not dismissed the failure to promote claim, Agbati must assert that claim and all supporting factual allegations in the amended complaint. Once filed, the amended complaint will become the operative complaint in this case, so it needs to have all the relevant claims in it. At the top of the

[3] In Agbati's motion, he says that Exhibit 8 to his complaint "is technically [his] statement of facts." (Dk. No. 23, at 6.) Agbati submitted over 500 pages of documents as attachments to his initial complaint.

amended complaint, Agbati must place the following caption: AMENDED COMPLAINT FOR CIVIL ACTION NO. 3:19-cv-512. The amended complaint must comply with the following directives:

a. First, the amended complaint should include a section titled "FACTS." In separately numbered paragraphs, Agbati must set forth a short statement of the facts giving rise to his claims for relief. Agbati should list the facts in the other in which they happened.

b. Next, the amended complaint should include a section titled "CLAIMS." In separately titled subsections, Agbati must clearly identify his legal claims. In this case, Agbati may **only** assert legal claims for (1) failure to promote under Title VII; (2) retaliation under Title VII; and (3) pay discrimination under Title VII. For each legal claim, Agbati must explain why he believes the defendant is liable to him. Such explanation should refer to the specific numbered paragraphs in the "FACTS" section that support each legal claim.

c. Finally, the amended complaint should include a section titled "RELIEF." Agbati should include a list of the relief he seeks. If he seeks money damages, Agbati should include the dollar amount of damages.

d. Should Agbati fail file an amended complaint as directed, the Court will dismiss the retaliation and pay discrimination claims with prejudice and this case will proceed only as to Agbati's failure to promote claim. *See* Fed. R. Civ. P. 41(b).

3. The defendant shall respond to the amended complaint within fourteen (14) days of the date Agbati files his amended complaint.

It is so ORDERED.

Let the Clerk send a copy of this Opinion to all counsel of record and to the pro se plaintiff.

Date: 12 May 2020
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EHONAM M. AGBATI,
Plaintiff,

v. Civil Action No. 3:19-cv-512

VIRGINIA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
Defendant.

MEMORANDUM ORDER

This matter comes before the Court on the defendant's partial motion to dismiss the plaintiff's amended complaint. (Dk. No. 30.) The plaintiff, Ehonam M. Agbati, has sued his former employer, the Virginia Department of Agriculture and Consumer Services ("VDACS"), alleging discrimination based on race, color, and national origin under Title VII of the Civil Rights Act of 1964. The Court previously dismissed all of Agbati's claims other than his failure to promote claim. The Court, however, granted Agbati leave to file an amended complaint as to his retaliation and pay discrimination claims. VDACS has now moved to dismiss the retaliation and pay discrimination claims in Agbati's amended complaint. For the reasons set forth below, the Court will grant the partial motion to dismiss and will dismiss the retaliation and pay discrimination claims with prejudice.

I. FACTS ALLEGED IN THE AMENDED COMPLAINT

Agbati, an African American immigrant from Togo, began working at VDACS as a "Registration Analyst/Licensing Specialist" in July 2013. (Am. Compl. ¶ 1.) Agbati holds a bachelor's degree from Virginia Commonwealth University in political science, government, and politics, with a minor in nonprofit management and administration. In November 2013, Agbati began working full-time for VDACS as a Registration Analyst within the Office of Charitable and

Regulatory Programs. Michelle Townsend served as the Team Leader. Agbati worked alongside Alison Foster, who was a full-time investigator. At that time, "there was harmony, collaboration, and respect within the team." (*Id.*)

At some point thereafter, Townsend resigned from VDACS, and Foster became the new Team Leader. (*Id.* ¶¶ 3, 4.) VDACS hired Kathryn Land to fill Foster's vacant investigator position. Land often "redirect[ed] questions regarding charitable registrations to [Agbati] instead of dealing with [those questions] herself." (*Id.* ¶ 5.)

In early 2016, VDACS hired Alyssa Royer as an additional investigator, which "is when things . . . started going very badly in the office." (*Id.* ¶ 6.) Agbati says that Royer displayed "anti-social and discriminatory behavior" toward him, including "not talking or interacting with [him] and keeping her distance to avoid any conversation." (*Id.*) Agbati alleges that Royer behaved in that manner toward her nonwhite coworkers. Royer also "closed her office door to avoid any contact with people" with whom she did not want to speak. (*Id.*) Agbati raised concerns regarding Royer's behavior with Foster, who told Agbati that others had reported similar issues with Royer.

Foster resigned from VDACS in the fall of 2016. Following Foster's resignation, Joseph Cason, an African American man, became the new Team Leader. Agbati did not seek the Team Leader position because "Cason . . . is a Veteran protected by law." (*Id.* ¶ 8.) Agbati and Cason enjoyed a close working relationship, which did not "sit[ ] well" with Royer. (*Id.* ¶ 10.)

In response, Royer "created a coalition of people who look like her," which included Land, Caly Emerson, Anne-Cabrie Forsythe, and Michael Meneffe (the Program Manager). (*Id.* ¶¶ 11-12.) Royer and her associates complained to human resources about Cason. After an investigation by human resources, Cason resigned as Team Leader. Meanwhile, Royer's alleged discriminatory

behavior continued and worsened. Agbati points to various incidents involving members of Royer's "coalition" and related discussions with Menefee. (*Id.* ¶¶ 13-15.)

In November 2017, Agbati applied for the Team Leader position vacated by Cason. He says that he was "the only one in the office with an educational degree related to [the] line of work," and that he had the most seniority and experience. (*Id.* ¶ 16.) VDACS declined to promote Agbati and deemed him unqualified "to be interviewed for the position." (*Id.*) A white colleague and an Asian colleague were both interviewed for the position. Agbati says that those two colleagues lacked the qualifications that he had. VDACS instead promoted Royer to the position of Team Leader. Agbati describes various incidents during Royer's tenure that he says demonstrate her incompetence and inexperience and her general hostility toward Agbati. He alleges that VDACS promoted Royer "simply because she is white and had [a] closer relationship with management." (*Id.* ¶ 22.)

Agbati filed an internal grievance in April 2018, and a discrimination complaint with the Virginia Department of Human Resource Management ("VDHRM") in May 2018. Agbati's grievance and discrimination complaint proceeded through the administrative process. Eventually, both the Director of the Office of Equal Employment and Dispute Resolution and the Director of VDHRM denied Agbati's requests for a hearing. Agbati then filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC").

Agbati alleges that VDACS retaliated against him for filing his various discrimination complaints. He says that VDACS' "biggest 'weapon' to retaliate against [him] was to outcast [him]." (*Id.* ¶ 28.) Agbati also says that he became essentially "nonexistent" as an employee. (*Id.*)

Specifically, Agbati alleges that various management officials, including Menefee and the Division Director, no longer visited his work area or joked around with him as they did in the past.

He further alleges that nobody met with him to conduct his annual employment evaluation in October 2018. At a meeting with the Consumer Protection Chief in November 2018, Agbati tried to describe the issues within his office. He received a write-up for going off-script during the meeting. He also alleges that nobody responded to his work-related emails between December 2018 and February 2019. In March 2019, Agbati's colleagues excluded him from meetings regarding an "online registration processing platform" that he had worked on. (*Id.* ¶ 33.)

Finally, Agbati says that VDACS "has a history of . . . pay discrimination practices" and that he "was most likely being paid less as compared to [his] colleagues that are white or nonblack." (*Id.* ¶ 34.) He alleges that three of his white or nonblack colleagues earned more "for performing the same work": Terri Larus, Caly Emerson, and Edievith Pollard. (*Id.* ¶ 36.) Agbati says that Larus, who is white, had a starting salary of $4,000 more than Agbati's salary; Emerson, who is white, had a starting salary of $7,376 more than Agbati's salary and earned $4,000 more than Agbati when she left to work for another agency; and Pollard, who is Asian, had a starting salary of $2,000 more than Agbati's salary.

Agbati resigned from VDACS effective April 18, 2019. In his resignation letter, he cited the "employment/promotion discrimination perpetrated again [him] and the hostilities" resulting from his "actions to fight the injustices committed against [him]." (Dk. No. 3-6, at 5.) In his amended complaint, Agbati asserts claims for failure to promote, retaliation, and pay discrimination in violation of Title VII.

II. LEGAL STANDARD

VDACS has moved to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A Rule 12(b)(6) motion gauges the sufficiency of a complaint without resolving any factual discrepancies or testing the merits of the claims. *Republican Party*

of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). In considering the motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). The principle that a court must accept all allegations as true, however, does not apply to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, a complaint must state facts that, when accepted as true, state a claim to relief that is plausible on its face. *Id.* "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." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When the plaintiff appears pro se, as Agbati does here, courts do not expect the pro se plaintiff to frame legal issues with the clarity and precision expected from lawyers. Accordingly, courts construe pro se complaints liberally. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). This principle of liberal construction has its limits. *Id.* Courts do not need to discern the unexpressed intent of the plaintiff or take on "the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Id.*

III. DISCUSSION

A. Retaliation Claim

To state a retaliation claim, a plaintiff must plead facts showing "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th

Cir. 2010), *aff'd sub nom. Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012). To satisfy the second element of a retaliation claim, a plaintiff need only plead facts showing that he suffered a "materially adverse action." *See Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 826 (E.D. Va. 2016). "[A]lthough 'adverse employment actions' in the discrimination context must 'affect employment or alter the conditions of the workplace,' a 'materially adverse action' in the retaliation context need not [affect] conditions in the workplace to be actionable." *Id.* (citing *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 64-67 (2006)). VDACS argues that Agbati fails to plead facts showing that he suffered any materially adverse employment action or a causal link between filing his various complaints and the adverse action.

In this case, Agbati alleges that VDACS "outcast[ed]" him to the extent that he became essentially "nonexistent" in the workplace. (Am. Compl. ¶ 28.) He points to various incidents that he says constitute an adverse employment action: that management stopped visiting his work area or joking around with him, that nobody met with him to conduct his annual employment evaluation, that he received a "write-up" for trying to discuss issues within the office, that nobody responded to his work-related emails, and that his colleagues excluded him from a meeting. Even assuming that those incidents qualify as materially adverse employment actions, Agbati has failed to allege facts showing a causal link between filing his various complaints and the adverse action.

To show a causal link, a plaintiff may plead facts showing "'some degree of temporal proximity' between the protected activity and the retaliatory conduct." *Rigg v. Urana*, 113 F. Supp. 3d 825, 829 (M.D.N.C. 2015) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005)). While a plaintiff can show an inference of causation when a short gap existed between the protected activity and the adverse action, "a gap of three to

four months of temporal proximity has been held insufficient, standing alone, to establish causation." *Id.*

In this case, the incidents giving rise to the alleged adverse action took place long after Agbati filed his grievance (April 2018) and his complaint with VDHRM (May 2018). The issues regarding Agbati's annual employment evaluation took place in October 2018. He received the "write-up" in November 2018. His colleagues stopped responding to his work-related emails between December 2018, and February 2019. He was excluded from a meeting in March 2019.[1]

Given the substantial length of time between the protected activity and the allegedly retaliatory conduct, Agbati has failed to plead facts showing the required causal link. Indeed, the Fourth Circuit has "held that a three- or four-month lapse between the protected activities and discharge was 'too long to establish a causal connection by temporal proximity alone.'" *Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012) (quoting *Pascual v. Lowe's Home Ctrs., Inc.*, 193 F. App'x 229, 233 (4th Cir. 2006) (per curiam)).[2] Accordingly, the Court will dismiss Agbati's retaliation claim with prejudice.

B. Pay Discrimination Claim

To state a pay discrimination claim under Title VII, a plaintiff must plead facts showing "that (1) [he] is a member of a protected class; (2) [he] was paid less than an employee outside the class; and (3) the higher paid employee was performing a substantially similar job." *Kess v. Mun. Emps. Credit Union of Balt., Inc.*, 319 F.2d 637, 644 (D. Md. 2004).

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[1] Agbati does not allege the dates on which management stopped visiting his work area or joking around with him. But even under a relaxed definition of adverse action, these complaints do not qualify.

[2] Nor has Agbati plausibly alleged "other relevant evidence to establish causation," such as "continuing retaliatory conduct and animus" in the intervening period. *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007).

When a plaintiff "base[s] [his] allegations 'completely upon a comparison to an employee from a non-protected class[,] . . . the validity of [his claim] depends upon whether that comparator is indeed similarly situated.'" *Lawrence v. Global Linguist Sols. LLC*, No. 1:13cv1207, 2013 WL 6729266, at *4 (E.D. Va. Dec. 19, 2013) (quoting *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010) (per curiam)). A plaintiff must plead facts showing that the comparators "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 or the employer's treatment of them for it." *Id.*

In this case, Agbati points to three potential comparators who he says earned more than him: Terri Larus, who is white; Caly Emerson, who is white; and Edievith Pollard, who is Asian. Agbati, however, does not allege any facts showing that those employees were similarly situated. As the Court previously explained to Agbati, wage discrimination claims under Title VII require plaintiffs to plead facts showing that a comparator performed "substantially equal work." *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019). The Court also cautioned Agbati that he must identify a higher-paid comparator and must plead sufficient facts to render his claim plausible that the comparator was "actually similarly situated." *Coleman*, 626 F.3d at 191. Agbati's amended complaint continues to fall short. Accordingly, the Court will dismiss Agbati's wage discrimination claim with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the partial motion to dismiss Agbati's amended complaint. (Dk. No. 30.) The Court DISMISSES WITH PREJUDICE Agbati's retaliation and pay discrimination claims. This case will process only as to Agbati's failure to promote claim.

It is so ORDERED.

Let the Clerk send a copy of this Opinion to all counsel of record and to the pro se plaintiff.

Date: 5 August 2020
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EHONAM M. AGBATI,
Plaintiff,

v. Civil Action No. 3:19-cv-512

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Defendant.

MEMORANDUM ORDER

This matter comes before the Court on cross-motions for summary judgment filed by the plaintiff, Ehonam M. Agbati, and the defendant, the Virginia Department of Agriculture and Consumer Services ("VDACS"). (ECF Nos. 51, 63.)

Agbati, a black immigrant from Togo, began working at VDACS in 2013. In 2017, he applied for a promotion to a supervisory position. The position required prior supervisory experience. Agbati admitted that he had no such experience. Thus, VDACS selected someone else for the job.

Agbati, proceeding pro se, alleges that VDACS wrongfully failed to promote him based on his race and nationality, in violation of Title VII of the Civil Rights Act of 1964.

Both parties have moved for summary judgment.[1] Because Agbati did not meet the minimum requirements of the job he sought, the Court grants VDACS's motion and denies Agbati's motion.

[1] VDACS's motion contains the proper notice required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and Local Rule 7(K).

I. FACTS

VDACS hired Agbati in 2013 as a registration analyst in the Office of Charitable and Regulatory Programs ("OCRP").

In 2017, VDACS advertised a Team Leader position within OCRP. Because of high turnover at that position and the "business needs of the work unit," (ECF No. 64-8 ¶ 27), VDACS revised the "minimum qualifications" for the position to include "[d]emonstrated ability to effectively supervise and oversee the work of others." (ECF No. 64-15, at 2.) The VDACS employee who screened applications for the Team Leader position interpreted "a 'demonstrated ability'" to mean "actual experience." (ECF No. 64-8 ¶ 29.)

Despite admitting that he had no prior supervisory experience, Agabti applied for the Team Leader position. He did not, however, move past the first level of screening. In fact, only applicants with at least some supervisory experience received interviews. VDACS eventually selected a white woman, Alyssa Royer, for the Team Leader position.

II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure directs courts to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a summary judgment motion, the court must draw all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nevertheless, if the non-moving party fails to sufficiently establish the existence of an essential element to its claim on which it bears the ultimate burden of proof, the court should enter summary judgment against that party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Where parties file cross-motions for summary judgment, courts consider 'each motion separately on its own merits to determine whether either of the parties

deserves judgment as a matter of law.'" *Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co.*, 261 F. Supp. 3d 680, 687 (E.D. Va. 2017) (quoting *Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392-93 (4th Cir. 2014)).

III. DISCUSSION

1. VDACS's Motion for Summary Judgment

VDACS argues that "Agbati's claim fails because he cannot prove that he was qualified for the Team Leader position." (ECF No. 64, at 11.)[2]

Agbati does not provide direct evidence of racial discrimination. Accordingly, he must proceed under the *McDonnell Douglas* burden-shifting test. *Strothers v. City of Laurel*, 895 F.3d 317, 327 (4th Cir. 2018). Under the *McDonnell Douglas* test, Agbati must first establish a prima facie case of racial discrimination. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2005). If he does, then VDACS must "'articulate some legitimate, nondiscriminatory reason' for the decision not to promote." *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). If VDACS does that, then Agbati must show that VDACS offered that explanation as "a pretext for discrimination." *Id.*

To establish a prima facie failure to promote claim under Title VII, Agbati must show that (1) he "is a member of a protected group," (2) he "applied for the position in question," (3) he "was qualified for that position," and (4) VDACS "rejected [his] application under circumstances that give rise to an inference of unlawful discrimination." *Id.* Agbati cannot establish the third element of his claim because he admits that he lacked supervisory experience when he applied for

[2] Agbati suggests that VDACS "recreated" the documents that show prior supervisory experience as a minimum requirement for the Team Leader position to support its "new and bogus argument." (ECF No. 65, at 3.) But he produces no evidence to support these allegations.

the Team Leader position. (Agbati Dep., ECF No. 64-4, Agbati Dep., at 83:21-22.) This entitles VDACS to summary judgment.[3]

Agbati argues that VDACS discriminated against him because Royer and "those former colleagues of mine who are outside my protected class by race or national origin did not all necessarily compare to me as far as my educational level and major related to our line of work, my tenure, expertise, experience, mentorship, and supporting role to the team at" VDACS. (ECF No. 65, at 2.)[4] This argument misses the point. Agbati concedes that he lacked supervisory experience, a requirement for the position for which he applied. Thus, Agbati did not qualify for the promotion.

The undisputed facts show that Agbati cannot establish a prima facie case of failure to promote. The Court, therefore, grants VDACS's motion for summary judgment.

2. Agbati's Motion for Summary Judgment

For the reasons discussed above, Agbati cannot establish a prima facie case of failure to promote. Accordingly, the Court denies his summary judgment motion.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Agbati's motion for summary judgment, (ECF No. 51), and GRANTS VDACS's motion for summary judgment, (ECF No. 63). The Court DIRECTS the Clerk to close the case.

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[3] Agbati's lack of prior supervisory experience also provides a legitimate, nondiscriminatory reason for not promoting him. And Agbati has not produced evidence to support finding that VDACS offered that reason as a pretext for discrimination. This provides another basis for granting VDACS's summary judgment motion.

[4] Agbati does not cite any evidence to support this lofty self-assessment. Indeed, despite repeated admonitions from the Court to familiarize himself with the Federal Rules of Civil Procedure and Local Rules, Agbati's disjointed briefs contain scant record citations, which violates Federal Rule of Civil Procedure 56(c)(1)(A) and Local Rule 56(B).

Should Agbati wish to appeal this Memorandum Order, he must file a written notice of appeal with the Clerk of Court within thirty (30) days of the date of entry. Failure to file a notice of appeal within that period may result in the loss of the right to appeal.

It is so ORDERED.

Let the Clerk send a copy of this Memorandum Order to all counsel of record and mail a copy via U.S. mail to the pro se plaintiff.

Date: 7 January 2021
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge

APPENDIX C:

Hostile Work Environment Claim Excerpt from Court of Appeals Appeal Brief

Issue 2: Hostile Work Environment

Despite all the issues of hostile work environment conditions and circumstances leading to my promotion discrimination situation and continuing after my promotion discrimination situation as elaborated in my initial and amended complaints and supported with the following facts below, the Trial Court dismissed my hostile work environment claim with its Order of April 6, 2020 stating that, "Agbati's allegations show that he experienced 'rude treatment,' 'callous behavior,' and 'personality conflict[s]' during his time at VDACS, but those experiences fall short of a plausible hostile work environment claim." Based on the supporting facts and the arguments presented below, this ground on which the Trial Court dismissed my hostile work environment claim demonstrates the Trial Court misinterpretation of facts, ignoring evidences, misinterpretation of legal standards, and abuse of discretion.

Supporting Facts:

As stated in my complaint, despite the fact that I have made upper management (the Defendant) aware of the ongoing issues Alyssa Royer was the center of at the office; when the Defendant decided to illegally and discriminatorily promote her over me to the position of team leader/supervisor without even attempting to resolve any of the issues she was the center of; the Defendant, basically not only encouraged her to carry on with her hostile and racially discriminatory behaviors but made her feel empowered as the team leader/supervisor to use every little situation to try to create problems for me. On March 21, 2018, I left work 2 hours early because I came to work on time despite the fact that it snowed that day and we had an "official 2 hours state agencies business day delay" due to inclement weather. This was not anything new in our office or throughout the agency and no other previous team leader/supervisor ever had any issue with me or any of my former colleagues who happened to come to work on time on an inclement weather day and living early to account for the inclement weather hours issued for state agencies on such day. Even Program Manager Michael Menefee approved such timesheets for me in the past and the latest approved by him was a couple

weeks before Royer took over as team leader/supervisor to find that to be issues with my timesheet in the case of March 21, 2018. (Refer to evidences titled Proof #1 filed with my initial complaint). Yet, even after meeting with Menefee and Division Director Larry Nichols and explaining to them that such issue being raised by Royer has nothing real to do with my timesheet but rather an opportunity for Royer to harass and create issues for me, Menefee and Nichols in support of Royer made me used my family and personal leaves to cover those 2 hours.

Referring this Court (The United States Court of Appeals for the Fourth Circuit) to my Amended Complaint, as I talked about in its paragraph (2), you may recall the ongoing issue of us, registration analysts, being pressured by management to review more registration weekly since I started working at the Defendant and which was a situation eventually handled in an acceptable way by all previous team leaders/supervisors before Alyssa Royer. When Royer was illegally promoted over me to become our team leader/supervisor; this situation came back at it highest and most aggressive form and despite the fact that an internal audit of our office resulting from such previous situations as I have discussed in my Amended Complaint established an average number of registrations that was possible to be reviewed weekly by each registration analyst and the team as a whole. Nevertheless, Royer and Program Manager Menefee were always pressuring registration analysts to review 75 registrations weekly instead of 34 or 45 registrations a week base on that internal audit numbers and the average of three (3) to four (4) usual registration analysts on staff. (Refer to evidence filed with my complaint and labeled Exhibit 1. I have attached page 1 and page 16 of that internal audit for a quick reference). Royer was in the face of the registration analysts via email and in person about not reviewing enough registrations especially me. She has gone as far as one day scheduling a meeting with me at her office and had me logged into her computer as she sat behind me because she wanted to teach me how to review registrations and reviewing them fast. Keep in mind that I have been working in that office for years before she was hired, and because of my experience and expertise and the fact that she did not know the answers to

questions from registrants that reached out to our office, she had sent registrants to me a number of times for my assistance as I demonstrated in evidences supporting my Complaint. But now she had to sit me in her office chair, had me logged into her computer, and her sitting behind me with a timer on her phone to teach me how to review registrations and reviewing them fast. Is this really a 'rude treatment' and 'callous behavior' as the Trial Court and presiding judge sees it to be a right ground on which to dismiss my hostile work environment claim? This was the most humiliating experience of my life that I can never forget and which has been heavily weighing on me psychologically. Royer was basically using her newly found power of being discriminatorily promoted over me to the position of team leader/supervisor to harass me and to make life uncomfortable for me at that office as she has done for some time before getting promoted to the position of team leader/supervisor.

There were a number of situations like these and by which Royer tried to use any situation to create issues for me without any basis or reason to rightly do so. View the number of times such situations occurred and as I stated in my complaint, I advised the Trial Court that I will present more of such situation in detail during oral argument or at trial as supporting evidences to my Complaint. I then referred the Trial Court to **Exhibit #8** filed in support of my Complaint which has a summary of such numerous situations of harassments and situations in which Royer continuously tried to create issues for me out of nothing, but all of these were ignored by the Trial Court. I would like to refer this Court (The United States Court of Appeals for the Fourth Circuit) to **Exhibit #8** filed in support to my complaint which is a categorized summary of all the evidences and supporting facts that I have presented in detail to some degree in my complaint as facts. For me to write a detail of each such situation would have turned my complaint into hundreds of pages more than it already has been. I have attached Exhibit #8 to this informal brief for this Court to easily refer to it.

Argument:

The Trial Court cited the precedent that to state a hostile work environment claim, plaintiff must plead facts showing that "(1) he experienced unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." Perkins v. Int'l Paper Co.; 936 F.3d 196, 207 -08 (4th Cir. 2019). Then, from all aspects of this precedent, the Trial Court could only argue that I failed to allege facts to meet "severe or pervasive" standard. First and foremost, my hostile work environment claim in this case cannot be compared to the case of Perkins v. Int'l Paper Co. view the different circumstances in both cases. This argument by the Trial Court failed on its face. Were the Defendant's (management/supervisor [co-workers]) actions discriminatory based on race? View the treatments of Alyssa Royer toward me and toward persons of color in our office and upper management not willing to address any of those issues reported to them, the answer is yes; for proof, refer to video/audio evidence recording Proof #40 as discussed throughout this litigation and provided to the Trial Court as Exhibit #10 during summary judgment. Were the Defendant's actions in this case discriminatory based on race and toward a protected class? Did the Defendant's actions create an intimidating environment? The answers to each one of these questions is yes. Were the Defendant's actions offensive behavior and created mental abuse and interfered with the work environment and work conditions? The answer is yes. Do all of these situations demonstrate conditions of hostile work environment? The answer to this question is also yes.

According to the EEOC, "harassment is unwelcome conduct that is based on race, color, religion, sex, national origin ... Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive... Offensive conduct may include ... intimidation, ridicule or mockery, insults or put-downs, and interference with work performance ... The harasser can be the victim's supervisor, a supervisor in another area, and

agent of the employer, a co-worker, or a non-employee ... Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment ... and taking immediate and appropriate action when an employee complains ... If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: (1) it reasonably tried to prevent and promptly correct the harassing behavior; and (2) the employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer." (eeoc.gov/harassment). What is very grave about this case is that the Defendant never attempted to address any of the harassing situations that I complained about; it has instead discriminatorily and illegally promoted the offender (Alyssa Royer) over me to the position of team leader/supervisor giving here more authority and excuse to continue her offenses toward me. There is nothing about what I have endured as presented in this lawsuit, which according to the EEOC, a reasonable person would not consider intimidating, hostile, or abusive. Everything about this case meets a condition of hostile work environment.

Also, as discussed in the failure to promote case above the Defendant, (Program Manager & Hiring Manager Michael Menefee, admits later in summary judgment and argued that, even though "[he] is aware of Agbati's complaints about Royer's competence and behavior (Menefee Decl. at 38);" "Agbati's complaints did not impact [his] later decision to promote Royer or impugn her ability to be an effective leader because [he] believe that the issues Agbati raised were trivial (Menefee Decl. at 39)." The same question I asked in the failure to promote claim also applies in this hostile work environment case. If Menefee as he has now admit to have found complaints made to him about Royer to be trivial, why did he said that he will report my complaint about Royer to Division Director Nichols and human resource office (Refer to video evidence Exhibit #10), but he never did anything about my complaints regarding Royer harassments and racist discriminatory behaviors? Menefee's admissions as quoted here are proof of how the Defendant failed to address harassment and hostile work environment complaints.

To determine if conduct qualified as severe or pervasive, courts consider the totality of the circumstances, including (1) frequency; (2) severity; (3) whether the conduct was physically threatening or humiliating, or merely an offensive utterance; and (4) whether the conduct unreasonably interfered with the plaintiff's work performance. Clark Cty. Sch. Dist. V. Breeden, 532 U.S. 268, 270-71 (2001). If the Trial Court has considered the totality of the circumstances regarding this case, it is incomprehensible to how it found this hostile work environment claim to have no merit. The situations I was subjected to at the Defendant were the most humiliating and mentally abusive experiences that affected my work at the Defendant and that no one should have ever endured. That day when Alyssa Royer had me sat in her office chair as discussed above, asked me to log into her computer to teach me how to review registrations and review them fast while she sat in the other chair behind me with a timer on her cell phone was the most humiliating and traumatizing experience of my life that continues to haunt me to date and will stay with me for the rest of my life. Based on the circumstances and facts involving this claim, the Trial Court decision to dismiss the hostile work environment claim from my complaint demonstrates its misinterpretation of facts, ignoring evidences, misinterpretation of legal standards, and abuse of discretion.

APPENDIX D:

Retaliation Claim Excerpt from Court of Appeals Appeal Brief

Issue 3: Retaliation Claim

Initially, the Trial Court rightfully denied the Defendant's Motion to dismiss my failure to promote claim in violation of Title VII of the Civil Rights Act of 1964; however, despite the provided facts supported by evidences that demonstrated the continuing retaliatory acts committed against me by the Defendant, the Trial Court dismissed my retaliation claim with its Memorandum Order of August 5, 2020 (Docket 36). The Trial Court dismissed my retaliation claim arguing that "the incidents giving rise to the alleged adverse action took place long after" I filed my grievance (April 2018) and my complaint with VDHRM (May 2018), and "given the substantial length of time between the protected activity and the allegedly retaliatory conduct", I have failed to plead facts showing the required causal link. (Docket 36, page 7). Based on the facts, this decision by the Trial Court is incomprehensible and demonstrates misinterpretation of facts, ignoring evidences, misinterpretation of legal standards, and abuse of discretion.

Supporting Facts:

Here are the facts as provided in my Amended Complaint in support to my retaliation claim. Again, it is important to note the causal link between my claims starting with my primary failure to promote claim.

Having been tormented enough and having had enough with all and each one of the situations from my previous claims especially my hostile work environment and my failure to promote discrimination claims which nobody was willing to address and nobody did anything about at all levels of management up to Deputy Commissioner Charles Green who was also Acting Commissioner at the time before handing the baton to the new commissioner, Commissioner Jewel Bronaugh; I filed a grievance in April 2018, and I also filed a discrimination complaint with the Virginia Department of Human Resource Management in May 2018. Both my grievance and discrimination complaint went through all the administrative grievance processes and steps and were denied for hearing by the director of VDHRM

Office of Equal Employment and Dispute Resolution, Christopher Grab as well as by Director of VDHRM Emily Elliott. I also filed a discrimination complaint with the EEOC in May 2018 and received the right to sue letter from the EEOC to file this lawsuit.

For standing my grown fighting these injustices through grievance and discrimination complaints, I was retaliated against. The Defendant's biggest "weapon" to retaliate against me was to outcast me. Dictionary definition of the word outcast is a person or anything thrown out or rejected or cast out; a person who is rejected or excluded from a social group; one that has been excluded from a society or system. Considering the Defendant as a society or more so as a system that, as an employee, I was part of; when I said I was outcast, this is exactly what I meant. I was technically, officially on paper or legally, which any way it can be recognized, an employee of the Defendant; but in person, I was nonexistent. Michael Menefee (Program Manager/Hiring Manager) used to stop by our work area to say hello to me and to my colleagues, but **since I filed my grievance and discrimination claims**, that was the end of that; he never came around. Each time we see each other in the office and said hello, Larry Nichols (Division Director) and I used to joke all the time about missing his tie because he once told me he would only wear a tie when he had to do so for official business; but **after filing my grievance and discrimination complaints**, that was the end of that too. At least and unlike in the case of Alyssa Royer and Kathryn Land (the only remaining members of Royer's clique at one point and until the day I resigned), Menefee, Nichols, and I will say hi to each other if and when we ever run into each other in the office; other than that, the only way they would have known that I have been at work was when I submitted my timesheet and work report at the end of each week.

As this Court can imagine, this could not have ever become a better situation where I could one day have the chance and opportunities for progress and promotion working for the Defendant; and it did get worse. The sense of being avoided by management (the Defendant) and Alyssa Royer's clique was obvious and more intense **since I filed my grievance and discrimination complaints**. Even my

former colleagues whom I had no problem with at all and have mentored for years had to refrain from being around me because of all the ongoing issues in the office and my legal and administrative fight with management (the Defendant); they were afraid or at least uncomfortable with anyone in management seeing them having a talk with me; Alyssa Royer then told the team that any questions regarding our work, which I would have been the one my former colleagues would have come to for assistance or for a mentorship moment as was in the past should no longer be the case, and must go to Kathryn Land or to herself; this was because I complained about Royer in my grievance and stated in my Complaints that Royer was not qualified than me to have been promoted over me to the position of team leader/supervisor and the fact that I have been the mentor for my colleagues throughout the years.

There are a number of evidences supporting my Complaint and which will further demonstrate the fact that I was ostracized by the Defendant in retaliation. Evidence titled "Proof #28" is one of the most obvious and strong situation and evidence which demonstrates how even when the time came for my annual employee evaluation, not even one person in management (the Defendant) from my direct supervisor Alyssa Royer, to the program manager Michael Menefee, or the division director Larry Nichols met with me if any other one of them was not willing to do it. My annual employee evaluation had Royer's name on it, but she never signed it; instead, Program Manager Michael Menefee signed it as dated **10/15/18** and it was left on my desk for me to sign on **10/18/18**; I never met with anyone of them to discuss my annual employee evaluation as they did for my other colleagues and as I have had it done with me by all previous supervisors throughout the years that I worked at the Defendant. Program Manager Michael Menefee himself met with me for the 2017 annual employee evaluation when we did not have any team leader/supervisor at that time; but in 2018, even though he (Menefee) signed my employee annual evaluation, nobody in management met with me for my annual employee evaluation **due to the ongoing legal matters between me and the Defendant (Management) throughout that**

year. I came to work one morning to find my annual employee evaluation left on my desk with a note to sign it and to return it to my supervisor Alyssa Royer who then scanned and emailed my copy back to me. Evidence/Proof #28 also includes proof of work related emails that involved me and which among other such email communications were never replied to; this was how much I was ostracized in that office as the result of my grievance and discrimination Complaints filed against the Defendant.

Evidences/Proofs #30 and #31(November 2018) in support of my Complaint demonstrate how not only that I was ostracized by the Defendant especially after filing my grievance and discrimination Complaint, but they are more proof of how every and any situation was being used in retaliation to create conditions under which disciplinary actions can be taken against me to build up bad reports in my employee profile that can be used against me and to fire me. Evidences/Proof #30 and #31 are in most part about the situation when Consumer Protection Chief Richard Schweiker, at the Virginia Attorney General Office, out of the blue, decided to call a meeting of all the Consumer Protection Divisions to share with each other information about our individual divisions and the challenges of what we do. To make sure none of the issues at our office gets out during that meeting, the Defendant decided to write short paragraphs of what each one of us must specifically read out and must not say anything more or less. Program Manager Michael Menefee tried to interrupt and stop me when I started telling about the issues with our office which were not exactly the same things as what the Defendant put on paper and Alyssa Royer handed out to us to read from or to memorize to say. From that situation I was written up.

Evidences/Proof #32(December 2018), #37(January 2019), and #41(December 2018 - February 2019) as in support of my Complaint demonstrate how work related emails involving me were never replied to.

Evidence/Proof #43(March 2019) confirms information about a situation that I had to report to the EEOC to add to my discrimination Complaint as evidence of retaliation by the Defendant and which also demonstrates the extent to which I was ostracized by the Defendant. As the result of my grievance

and Complaint, the Defendant, after many years, has finally decided to start working on an online registration processing platform that myself, former colleagues, and former supervisors, who have since resigned and left, have been pushing for as the best way to make our work conditions better. When the Defendant finally started to set up meetings with the IT department and our office for the IT department to learn about our work and how to design and build the online registration platform, the Defendant never said a word to me about these meetings and it was organizing such meetings with my other colleagues that I have been working there for years before they were hired and to whom I have been a mentor.

Argument:

The Trial Court in its summary of the Facts Alleged in the Amended Complaint stated that "Agbati's **colleagues** excluded him from meetings regarding an 'online registration processing platform' that he had worked on." This is another complete misinterpretation and misrepresentation of the facts I provided in support of my complaint. As anyone can tell, it is not up to employees of an organization to make decisions such as engaging in research meetings and exploring how to change or create an organization's operational platform such as moving from or going away form paper applications to an online registration platform; such big decision comes from the organization's administrators or officials, which in this case is the Defendant. I did not say that my **colleagues** excluded me from such meetings as it will not have made any sense in relation to my retaliation claim. This misinterpretation and misrepresentation of facts was put forth in section III. Discussion (Paragraph 2) of the Memorandum Order (Docket 36) and used by the Trial Court to make legal conclusion and to dismiss my retaliation claim. As stated above, what I clearly stated throughout my complaint including in the Amended Complaint was that "as the result of my grievance and Complaint, **the Defendant**, after many years, has finally decided to start working on an online registration processing platform that myself, former colleagues, and former supervisors, who have since resigned and left, have been pushing for as the best

way to make our work conditions better. **When the Defendant** finally started to set up meetings with the IT department and our office for the IT department to learn about our work and how to design and build the online registration platform, **the Defendant** never said a word to me about these meetings and was organizing such meetings with my other colleagues that I have been working there for years before they were hired and to whom I have been a mentor." (Docket 28 at 33). If it was not for its intentional retaliation against me and ostracizing me because of my legal fights against the Defendant, why didn't the Defendant informed me of such meetings it was setting up for the IT department and my former colleagues that I have been working there for years before they were hired and to whom I have been a mentor? Why didn't the Trial Court demand that the Defendant answers all these questions I have raised?

At the beginning of section II., Legal Standard (Paragraph 1) of the Memorandum Order (Docket 36), the Trial Court at first, correctly stated that "VDACS has moved to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure" **which would have given reason to dismiss a complaint or a specific claim of a complaint for failure to state a claim upon which relief can be granted**. As a matter of fact, (VDACS) the Defendant's Partial Motion to Dismiss (Docket 30) and the Memorandum in Support of Defendant's Partial Motion to Dismiss (Docket 31) were all filed with the notion of failure to state claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. All the facts I provided in support of my claims are actually not alleged facts, but rather proven facts as supported by the evidences filed with my complaint. The Defendant did not provide **any valid argument** to how my retaliation claim failed to state claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Therefore, the Defendant's Partial Motion to Dismiss (Docket 30) and the Memorandum in Support of Defendant's Partial Motion to Dismiss (Docket 31) that were all filed with the notion of failure to state claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure had no ground to stand and

should have been without doubt and hesitation denied by the Trial Court. Nevertheless, for some incomprehensible reason that proves nothing other than misinterpretation of facts, ignoring evidences, misinterpretation of legal standards, and demonstration of abuse of discretion, **the Trial Court changed the story on behalf of the Defendant** stating that "VDACS argues that Agbati fails to plead facts showing that he suffered any materially adverse employment action or a causal link between filing his various complaints and the adverse action." (Section III. Discussion, paragraph 2, Docket 36). These arguments by the Trial Court to be the reason why it dismissed my retaliation claim are not and **were never arguments put forth by the Defendant** upon which the Trial Court would have rightfully and correctly dismissed my retaliation claim; these arguments were **unjustly made up by the Trial Court on behalf of the Defendant** to unjustly dismissed my retaliation claim. As clearly demonstrated above, the Trial Court misinterpreted the facts, ignored evidences, misinterpreted legal standards, and demonstrated abuse of its discretion.

Referring to the incidents presented as facts in support to my retaliation claim, the Trial Court in section III. Discussion (Paragraph 2) of the Memorandum Order (Docket 36) stated that "even assuming that those incidents qualify as materially adverse employment actions, Agbati has failed to allege facts showing a causal link between filing his various complaints and the adverse action." **The Trial Court here, basically, aligned its legal conclusion with its own made up arguments on behalf of the Defendant as cited in the last paragraph above in order to dismiss my retaliation claim.** How differently could I have shown a causal link between filing my complaints and the adverse action I suffered at the Defendant's hand? As I stated in my Amended Complaint and referenced by the Trial Court in section III., Discussion (Paragraph 2) of its Memorandum Order (Docket 36), let me recall the fact that in addition to all other adverse actions put forth here, the main adverse action perpetrated against me in retaliation **for having filed my grievance and complaints was the fact that I was SINCE ostracized and outcast to the point of nonexistence in the workplace for many months until I could no**

longer psychologically support such treatment and had to resign. This was also an act of constructive discharge which the Trial Court also denied in my complaint and is another reason why the United States Court of Appeals for the Fourth Circuit must review the Trial Court's Order (Docket 22) as previously requested above. As this Court (United States Court of Appeals for the Fourth Circuit) can see, the Trial Court's arguments upon which it dismissed my retaliation claim stating that, "the incidents giving rise to the alleged adverse action took place long after" (*id*) I filed my grievance (April 2018) and my complaint with VDHRM (May 2018) were incorrect and misinterpretation of facts. Likewise, the Trial Court's dismissal of my retaliation claim because, "given the substantial length of time between the protected activity and the allegedly retaliatory conduct" (*id*), I have failed to plead facts showing the required causal link is therefore a misinterpretation of legal standards. **As provided above with dates as well as provided in my Complaint filed with the Trial Court, the number of incidents that happened throughout and later that year (2018) SINCE I filed my grievance and complaints and into the first few months of 2019 before I could no longer support being outcast and mistreated in such ways and had to resign prove among others the continuous primary adverse action (being ostracized and outcast) perpetrated against me in retaliation for having filed my grievance and complaints earlier that same year and as my legal fight with the Defendant has been ongoing.**

The Trial Court, again, in section III. Discussion (Paragraph 4) through (Paragraph 5) of its Memorandum Order (Docket 36) stated that "in this case, the incidents giving rise to the alleged adverse action took place long after Agbati filed his grievance (April 2018) and his complaint with VDHRM (May 2018) ... Given the substantial length of time between the protected activity and the allegedly retaliatory conduct, Agbati has failed to plead facts showing the required causal link." Perry v. Kappos, 489 F. App'x 637, 643 (4th Cir. 2012) (quoting Pascual v. Lowe's Home Ctrs., Inc., 193 F. App'x 229, 233 (4th Cir. 2006) (per curiam)). The Trial Court's argument here citing these precedents does not compare, does not apply, and cannot be used in this case because Perry v. Kappos and Pascual v. Lowe's Home Ctrs. cases

involved different circumstances and notably in Perry and Pascual, the plaintiffs being directly discharge for reasons put forth by the Defendants in those cases, whereas in my case it was a calculated adverse action by the Defendant **to outcast me SINCE I filed my grievance and complaints until I am psychologically broken and constructively forced to resign; as demonstrated and proven with evidence, I, contrary to the Defendant's own agency policy, was even denied the opportunity to meet with management for my annual employee evaluation. More importantly and as I have previously stated and proved with filed evidences in support of my complaint; WHILE THIS LEGAL MATTER WAS PROGRESSING, the number of incidents that happened throughout and later that year (2018) and into the first few months of 2019 before I could no longer support being outcast and mistreated and had to resign actually prove the continuous primary adverse action (being ostracized and outcast) perpetrated against me in retaliation for having filed my grievance and complaints.**

As obviously demonstrated and proved with evidences filed in support of my Complaint, and contrary to the Trial Court's arguments upon which it based its dismissal of my retaliation claim, the incidents giving rise to the adverse actions committed against me by the Defendant did not take place long after I, the Plaintiff, filed my grievance (April 2018) and my discrimination complaint with VDHRM (May 2018).

As stated in my complaint and throughout every document of this lawsuit, let me once again recall the fact that the main adverse action perpetrated against me in retaliation for having filed my grievance and complaints was the fact that I was ostracized and outcast to the point of nonexistence in the workplace for many months **SINCE** I filed my grievance and complaints; and this lasted throughout 2018 and into early months of 2019 as the legal processes progressed and until I could no longer psychologically support such treatment and had to resign. As put forth in my Amended Complaint, the number of incidents that happened later that year (2018) and into the first few months of 2019 before I could no longer support being outcast and mistreated and had to resign prove the continuous primary

adverse action (being ostracized and outcast) perpetrated against me in retaliation for having filed my grievance and complaints. As I stated in my complaint and throughout every document that I have filed with the Trial Court discussing my retaliation claim, I made it known each time that I was outcast in retaliation **SINCE** I filed my grievance and complaints. As quoted above, the dates when I filed my grievance and complaints are well known to the Trial Court as discuss throughout each document I have filed with the Trial Court discussing my grievance and complaints. Therefore, the Trial Court's argument elaborated on page 7 footnote (Docket 36) stating that "Agbati does not allege the dates on which management stopped visiting his work area or joking around with him" does not make any sense and cannot stand as legal argument. This was something that happened **SINCE** I filed my grievance and complaints respectively in APRIL 2018 AND MAY 2018 and the Trial Court already knew these dates when I filed my grievance and complaints as it cited.

And above all, the Trial Court's main argument on which it based its dismissal of my retaliation claim is that there was substantial length of time between the protected activity and the allegedly retaliatory conduct(s). Additionally, (VDACS) the Defendant's Partial Motion to Dismiss (Docket 30) and the Memorandum in Support of Defendant's Partial Motion to Dismiss (Docket 31) on the other hand and as I stated early above were all filed with the notion of failure to state claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and **the Defendant could not and did not put forth any arguments as anything similar or closed to what the Trial Court put forth as stated above and as to the why the Trial Court should and would have justly dismissed my retaliation claim.** I may be repeating myself again, but that is because this is a crucial point proving that the Trial Court's argument upon which it dismissed my retaliation discrimination claim failed on its face, is a misinterpretation of fact, and cannot be a legal argument on which my retaliation claim is justly dismissed on legal standards.

As I have stated throughout every filed document of my complaint discussing my retaliation discrimination claim, I have stated over and over again the fact that the main adverse action perpetrated against me in retaliation **for having filed my grievance and complaints** was the fact that **I was ostracized and outcast** to the point of nonexistence in the workplace for many months **SINCE** I filed my grievance and complaints. The Trial Court knows well the circumstances regarding my administrative grievance and complaint filed at the agency level and has referenced their respective filing dates of (April 2018) and (May 2018) throughout its Orders regarding this lawsuit. By stating throughout every document of my complaint discussing my retaliation claim that I was ostracized and outcast **SINCE** I filed my grievance and complaint, and the Trial Court knowing well the dates when I filed my grievance and complaint, that tells the Trial Court the dates it argued I have not provided as to when the Defendant started its retaliatory action against me as outcast and ostracizing me.

Additionally and very importantly, the Trial Court again knowing well the case regarding my grievance and complaint filed at agency administrative levels is well aware of the fact that my grievance and complaints respectfully filed (April 2018) and (May 2018) at agency administrative levels were not completed until late **October 2018 and early November 2018.** The last communication letter with Christopher M. Grab, Director, Office of Equal Employment and Dispute Resolution, at the Virginia Department of Human Resource Management (VDHRM) provided as supporting evidence to my complaint is **dated October 5, 2018;** and the last communication letter with Emily S. Elliott, Director of VDHRM, to whom I appealed Christopher M. Grab, Director, Office of VDHRM - EEDR, decisions to deny my grievance and complaint for hearing is dated **November 6, 2018.** In addition to being ostracized and outcast **SINCE** I filed my grievance and discrimination complaints, many of the retaliatory acts committed against me as reported above and throughout this litigation clearly happened around late October 2018 and early November 2018 when my grievance and discrimination complaint at the administrative level were denied by Christopher M. Grab and Emily S. Elliott as stated above. For

instance, the situation regarding my employee annual evaluation when no one in Management at the Defendant met with me as they did with my colleagues took place in **October 15, 2018 through October 18, 2018** and the situation regarding that meeting at the AG's office that led to Menefee and Royer giving me a written notice took place in **mid November 2018**. Documents serving as proof of evidence to all these statements have been filed with the Trial Court in support to this lawsuit. Thus, as this Court (The United States Court of Appeals for the Fourth Circuit) can see, the Trial Court's main argument on which it based its dismissal of my retaliation claim stating there was substantial length of time between the protected activity and the allegedly retaliatory conduct(s) failed on its face and cannot stand as valid legal argument to dismiss my retaliation claim. As I have demonstrated, the retaliatory conduct(s) that started **SINCE** I filed my grievance and complaint respectively in (April 2018) and (May 2018) and those that occurred in October 2018, November 2018, December 2018, February 2018, and March 2019 as stated in my complaint and cited by the Trial Court in its Order (Docket 36, page 7) occurred at the time when my grievance and complaint at agency administrative levels were still ongoing or shortly after Christopher M. Grab, Director, Office of EEDR, and Emily S Elliott, Director of VDHRM in cahoots with the VDACS (the Defendant), denied my grievance and complaint to go to a hearing in front of a judge, and I shortly after filed this lawsuit after receiving my right to sue letter from the EEOC. And all of these documents with their respective dates were filed with my Complaint to the Trial Court as supporting evidences.

Furthermore, the Trial Court in its Order (Docket 22) put forth that adverse employment actions may involve "discharge, demotion, decrease in pay or benefits, loss of job title, or supervisory responsibility, **or reduced opportunities for promotion**." Boone v. Goldin, 178 F.3d 253, 255 (4th Cir. 1999). I have made this argument before as submitted to the Trial Court and I have raised this question in my Amended Complaint which the Trial Court has ignored. Keeping in mind the fact that I was once already and discriminatorily denied promotion and which is one of the main issues that led to this legal

action and having been ostracized and outcast by the Defendant in retaliation, what chances were there that any of the issues that led to this lawsuit would have ever gotten better and I would have one day have any opportunity for promotion? By being ostracized and outcast for having filed my grievance and complaints, the Defendant not only reduced but closed any and every opportunity to me for any future promotion. As a matter of fact, such adverse action(s) committed against me by the Defendant had no other purposes other than to make me so uncomfortable in that office and thus indirectly forcing me to resign. These facts as put forth in my complaint demonstrate adverse action and causal link, but the Trial Court simply ignored them.

One other question to ask, if it was not for its intentional retaliation against me, why no one in management (the Defendant) met with me for my annual evaluation that same year 2018 while my grievances against the Defendant were ongoing?

As this Court (United States Court of Appeals for the Fourth Circuit) can see, the Trial Court's arguments upon which it dismissed my retaliation claim stating that, "the incidents giving rise to the alleged adverse action took place long after" (id) I filed my grievance (April 2018) and my complaint with VDHRM (May 2018) were incorrect, ignoring, and misinterpreting the facts. Therefore, the Trial Court's dismissal of my retaliation claim because, "given the substantial length of time between the protected activity and the allegedly retaliatory conduct" (id), I have failed to plead facts showing the required causal link is a misinterpretation of legal standards and must be overturned by this Court.

APPENDIX E:

Information from a separate lawsuit from a former colleague of mine demonstrating the lower Courts ignoring evidences in my case

EXHIBIT (A)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SHENIQUA L. WATSON, **Plaintiff,** **v.** **VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,** **Defendant.**	**Civil Action No. 3:19-cv-466 (JAG)**

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

Watson brings this lawsuit on a feeling that VDACS wanted her fired. But VDACS did not want Watson fired and would have continued to employ her had she not resigned. In fact, VDACS accommodated Watson throughout her employment, twice granting her requests to transfer to new positions when she found herself in conflicts with coworkers. VDACS also continued to employ Watson despite multiple citations for poor work performance, and even realigned her job duties to focus on Watson's strengths to help her success. These are not actions of an agency who wants an employee fired. Watson claims she was not paid fairly, but at all times during her classified employment at VDACS, her salary was within her pay band. VDACS set her salary using the same guidelines utilized for every other VDACS employee, and nothing about her salary was due to her being an African American female. Because Watson's claims are untimely, she does not identify a proper comparator, and her claims otherwise fail, VDACS respectfully moves the Court to dismiss all of Plaintiff's claims with prejudice, to enter final judgment in Defendant's favor, and to award Defendant all other just relief.

EXHIBIT (A)

51. VDACS promoted Cason to a Pay Band 5 position on January 10, 2017 at a salary of $43,988. (Cole Dec., ¶86.) Cason took a voluntary demotion on September 10, 2017, returning to his prior position (Pay Band 3) at a salary of $42,000 after internal alignment study determined this to be an appropriate salary based on his related experience and other qualifications. (*Id.* at ¶88.)

L. Ehonam "Roger" Agbati

52. Ehonam "Roger" Agbati (African American male) began working for VDACS as a Licensing and Registrations Specialist (Pay Band 3), beginning on November 25, 2013 at a salary of $31,096. (Cole Dec., ¶¶91-92; Attach. Y.) Agbati was earning $13.00 per hour (equates to $27,040 annually) as a temporary employee in OCRP. (*Id.* at ¶ 93.) VDACS offered Mr. Agbati a 15% increase, which was the most allowed by policy at the time, because he demonstrated that he could already successfully process an average of 48 registrations per week, which was close to meeting the teams' established goal of an average of 50. (*Id.*) Agbati's demonstrated ability to interpret and apply statutory and regulatory requirements was the driving factor in VDACS's offering Agbati this salary. (*Id.* at ¶ 93.) However, Agbati also came to the position with a Bachelor's of Art degree from VCU in Political Science with a minor in non-profit management, demonstrated customer service experience, and team leadership skills. (*Id.* at ¶ 94.)

53. After receiving a pay increase to $31,718 on August 10, 2015 as the result of a statewide General Assembly pay increase for Commonwealth of Virginia employees, Agbati received an in-band adjustment due to an internal alignment on August 10, 2016 to $34,889. (Cole Dec., ¶¶ 95-96.) He received this adjustment because internal alignment data had changed

FILED: September 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1097
(3:19-cv-00512-JAG)

EHONAM M. AGBATI, a/k/a Roger Agbati

Plaintiff - Appellant

v.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Office of Charitable and Regulatory Programs

Defendant - Appellee

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wynn, Judge Thacker, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk