APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 24-10339

United States Court of Appeals
Fifth Circuit
FILED
November 6, 2024
Lyle W. Cayce
Clerk

ERIC ELLIS,

Plaintiff—Appellant,

versus

CARGILL MEAT SOLUTIONS; ULTIMATE KRONOS GROUP,

Defendants—Appellees,

ERIC ELLIS,

Plaintiff-Appellant,

versus

CARGILL MEAT SOLUTIONS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 4:22-CV-1020, 4:22-CV-864

No. 24-10339

Before CLEMENT, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

I

Eric Lamar Ellis worked for Cargill Meat Solutions ("Cargill") as a Food Safety Quality Representative. He is a gay black man. Ellis alleges that, during his employment, he experienced racially motivated drug testing, slurs, retaliation, and other discrimination on the basis of race and sexual orientation in violation of Title VII. He further alleges that the discrimination caused him to resign.

His employer, Cargill, used software from Ultimate Kronos Group ("UKG") for HR functions including timekeeping and payroll. In December 2021, UKG suffered a ransomware attack that compromised its customers' personal data, including Cargill's data. Ellis alleges this attack caused delays and inaccuracies in his paychecks, and potential disclosure of his personal information.

In September 2022, Ellis filed a complaint against Cargill and UKG in the Northern District of Texas.[1] His claims primarily related to the cybersecurity incident. Then in November, Ellis filed an additional complaint against Cargill that contained his discrimination claims. The district court consolidated the two cases. Ultimately, the suit proceeded based on Ellis's Second Amended Complaint.

The district court first dismissed all but one claim against Cargill and dismissed all claims against UKG. Count V remained—Ellis's claim under

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

[1] Ellis is well-known in the Northern District of Texas. *See Ellis v. City of White Settlement*, 22-CV-1028-P, 2 n.2 (N.D. Tex. Sep. 5, 2023) (listing eight other suits by Ellis and citing a district court order describing him as a "vexatious litigant").

the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, for Cargill's alleged overtime violations. *Id.* It then dismissed Count V and Ellis's entire case with prejudice in a final order.[2]

II

We begin, as always, with jurisdiction. And we have it under 28 U.S.C. § 1291.

Appellants must "designate the judgment—or the appealable order—from which the appeal is taken." FED. R. APP. P. 3(c)(1)(B). But "we generously interpret the scope of the appeal, and require a showing of prejudice to preclude review of issues fairly inferred from the notice and subsequent filings." *Williams v. Henagan*, 595 F.3d 610, 616 (5th Cir. 2010) (quotations omitted). We offer additional solicitude to *pro se* plaintiffs like Ellis. *Carmouche v. Hooper*, 77 F.4th 362, 367 (5th Cir. 2023).

In his notice of appeal, Ellis identified two orders that he intended to appeal: the district court's October 2023 and March 2024 dismissals. But his briefing includes claims arising from two additional orders. These orders appear fairly inferred from Ellis's notice of appeal. And the various orders merged into the district court's final judgment. *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983). So our jurisdiction is proper.

III

We review *de novo* the district court's grant of a motion to dismiss under Rules 12(b)(6) and 12(b)(1). *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020); *Carver v. Atwood*, 18 F.4th 494, 496 (5th Cir. 2021). We review

[2] The district court initially dismissed without prejudice Ellis's Title VII claims against Cargill and all his claims against UKG in an October 2023 order. The district court then dismissed his FLSA claims with prejudice in a March 2024 order.

the district court's decision to consolidate for abuse of discretion. *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 432 (5th Cir. 2013).

A

The district court did not err in dismissing Ellis's Title VII claims for failure to state a claim. To make a *prima facie* case of discrimination under Title VII, Ellis was required to show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated employees outside the protected class were treated more favorably. *See Alvarado v. Tex. Rangers*, 492 F.3d 605, 611 (5th Cir. 2007).

Ellis's allegations are conclusory at best. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). That requires allegations of fact which "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Ellis makes none.

Start with racial discrimination. Ellis alleges that he experienced harassment "by repetitive use of racial slurs" and retaliation on the basis of race. But his complaint does not say who used these slurs, what was said, or when any harassment occurred. Such "naked assertions" do not "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quotation omitted).

Likewise with sexual-orientation discrimination. Ellis alleges extra reprimands and discipline compared to heterosexual employees, demeaning remarks, and airing of heterosexual sex scenes in movies and television in Cargill's break rooms. But he does not describe a single event or explain *how* the events rose to the level of actionable discrimination. The facts alleged do

not support "more than the mere possibility of misconduct," so this claim was properly dismissed. *Iqbal*, 556 U.S. at 679.[3]

B

The district court also properly dismissed Ellis's FLSA claims for lack of subject matter jurisdiction. Cargill's unconditional tender of maximum compensation under the FLSA mooted his claims. *See United States v. Sanchez-Gomez*, 584 U.S. 381, 385–86 (2018) ("A case that becomes moot at any point during the proceedings is . . . outside the jurisdiction of the federal courts.") (quotation omitted).

Ellis alleges the ransomware attack on UKG's timekeeping product resulted in Cargill incorrectly calculating his entitlement to overtime. He thus sought damages under the FLSA, which entitles affected employees to damages in the amount of the unpaid wages and an equal amount as liquidated damages. 29 U.S.C. § 216(b). The section also entitles employees who bring FLSA claims to costs and attorneys' fees. *Id.*

Cargill's subsequent compensation moots Ellis's FLSA claims. After the ransomware attack, Cargill engaged in a "reconciliation process" with affected employees, including Ellis, to calculate compensation for hours worked during the outage. Ellis's calculated overtime wages totaled $549.46, which he was paid after the reconciliation. Cargill also made an unconditional

[3] The district court did not address Ellis's claims that he "was forced to resign after being placed on an indefinite unpaid suspension." He did not make these claims in his Second Amended Complaint, and the district court may only consider material in the complaint. *Roebuck v. Dothan Sec., Inc.*, 515 F. App'x 275, 280 (5th Cir. 2013); *see also Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir. 2004).

tender to Ellis for the equivalent amount. This represented the total amount of damages recoverable by Ellis under the FLSA.[4]

Where an employer's compensation makes an FLSA plaintiff whole, his claim is moot. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008); *see also Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) ("In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot . . . ."). Ellis insists the amount of damages "has always been disputed." But when ordered to show cause why his case is not moot, Ellis merely repeated that he disputed the amount and argued that Cargill's tender did not moot his case because he has not accepted it by cashing the check. Such conclusory allegations do not establish an ongoing controversy. *See Cantu Silva v. United States*, 110 F.4th 782, 787 (5th Cir. 2024) ("The party asserting jurisdiction bears the burden of proving its existence."). And Ellis's purported refusal of the tender has no import: Cargill rendered a direct payment with no conditions, surrendering its own claims to the money. Ellis therefore has no "personal stake in the outcome of the action." *Genesis Healthcare*, 569 U.S. at 71.

C

We also cannot conclude that the district court abused its discretion in consolidating Ellis's cases. A district court may consolidate multiple cases that "involve common questions of law and fact" if "the district judge finds that consolidation would avoid unnecessary costs or delay." FED. R. CIV. P. 42(a); *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 761–62 (5th Cir. 1989). "The trial court's managerial power is especially strong and flexible in matters of consolidation." *In re Air Crash Disaster at Fla. Everglades on Dec. 29,*

[4] Ellis is proceeding as a *pro se* plaintiff *in forma pauperis*, so he has incurred no costs or attorney's fees.

1972, 549 F.2d 1006, 1013 (5th Cir. 1977). The district court found that "the docket of this action [was] in disrepair" as Ellis maintained two active cases and multiple complaints, all concerning his employment with Cargill. The district court also determined that consolidating the actions promoted "the interests of avoiding prejudice and delay, ensuring judicial economy, and safeguarding principles of fundamental fairness." And the consolidation did not prejudice Ellis, as the district court ably and timely handled his claims. *See id.* at 1013 n.9.

D

Finally, the district court properly dismissed Ellis's privacy claims against UKG for lack of standing. Article III requires that a "plaintiff must have suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant, and that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Ellis fails at the first hurdle.

Ellis's injuries are too speculative to support standing. He makes no allegation that any hacker, identity thief, or third party accessed his data. An injury in fact based on the risk of future harm must be "certainly impending" rather than "speculative." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 401 (2013). "If the risk of future harm materializes . . . the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 436 (2021). But Ellis only alleges the UKG cyberattack placed him at "continued risk of exposure to hackers and thieves of his" personally identifying information and subjected him to "potential fraud and identity theft." He does not allege that risk has materialized. While his complaint references "fraudulent activities" and "unauthorized charges" due to the ransomware attack, he alleges no

underlying facts to support these allegations. Thus, Ellis fails to carry his burden here, too. *See Cantu Silva*, 110 F.4th at 787.

* * *

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-864-Y
	§	
CARGILL MEAT SOLUTIONS, et al.	§	
	§	
AND	§	
	§	
ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-1020-Y
	§	
CARGILL MEAT SOLUTIONS	§	

ORDER OF CONSOLIDATION

Before the Court are two separate cases filed by Plaintiff, which bear cause numbers 4:22-CV-864-Y and 4:22-CV-1020-Y. After review of the pleadings, the Court concludes that cause number 4:22-CV-1020-Y should be, and is hereby, **CONSOLIDATED** with cause number 4:22-CV-864-Y.

All future papers filed must bear the number "4:22-CV-864-Y" and the legend "(Consolidated with 4:22-CV-1020-Y)." In addition, due to the consolidation, cause number 4:22-CV-1020-Y is hereby **ADMINISTRATIVELY CLOSED**, and the clerk of the Court must reflect this closing on the Court's docket.

SIGNED December 8, 2022.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-864-Y
	§	
CARGILL MEAT SOLUTIONS, et al.	§	
	§	
AND	§	
	§	
ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-1020-Y
	§	
CARGILL MEAT SOLUTIONS	§	

ORDER OF CONSOLIDATION

Before the Court are two separate cases filed by Plaintiff, which bear cause numbers 4:22-CV-864-Y and 4:22-CV-1020-Y. After review of the pleadings, the Court concludes that cause number 4:22-CV-1020-Y should be, and is hereby, **CONSOLIDATED** with cause number 4:22-CV-864-Y.

All future papers filed must bear the number "4:22-CV-864-Y" and the legend "(Consolidated with 4:22-CV-1020-Y)." In addition, due to the consolidation, cause number 4:22-CV-1020-Y is hereby **ADMINISTRATIVELY CLOSED**, and the clerk of the Court must reflect this closing on the Court's docket.

SIGNED December 8, 2022.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-864-Y
	§	
CARGILL MEAT SOLUTIONS, et al.	§	

ORDER GRANTING MOTIONS TO DISMISS

Before the Court is the motion of Cargill Meat Solutions ("Cargill") for partial dismissal for failure to state a claim (doc. 54) and the motion of Ultimate Kronos Group ("UKG") to dismiss for lack of jurisdiction and failure to state a claim (doc. 56). For the reasons below, the Court will grant both defendants' motions.

BACKGROUND

Plaintiff is an African-American homosexual man formerly employed in Cargill's production facility as a Food Safety Quality Representative. (Doc. 52, at 6-9.) UKG is a third-party contractor that provides workforce management services to businesses, including timekeeping and payroll software applications. (Doc. 56, at 9.) Cargill uses UKG's payroll software services, the provision of which requires maintenance and storage of individual employees' personal data—including employees like Plaintiff. (*Id.*, at 9-10.)

Plaintiff's allegations fall into two main categories: (1) various claims against Cargill for discrimination under Title VII and for unpaid overtime under the Fair Labor Standards Act ("FLSA"), and (2) claims against UKG for breach of contract and injuries resulting from a data breach. (See Doc. 52.)

As against Cargill, Plaintiff claims he was the victim of discrimination, retaliation, and the creation of a hostile work environment based on his race and sexual orientation. (Doc. 1, at 3-8, 18-20.) Specifically, Plaintiff claims that he was subjected to a sexually hostile work atmosphere and to sexually explicit and demeaning remarks toward homosexuals. (*Id.*) He further claims that Cargill's homosexual employees were generally subjected to unnecessary scrutiny, discipline, and false accusations of wrongdoing. (*Id.*) Finally, he alleges that Cargill failed to compensate him for "all hours worked" in violation of the FLSA. (*Id.*, at 9-17.)

As against UKG, Plaintiff claims he was injured by a criminal data breach which compromised employee data maintained by UKG for Cargill. (Doc. 56, at 10.)

Defendants filed the instant motions to dismiss.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal

of a suit when the court lacks subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). Because Article III standing is necessary for the court's exercise of subject-matter jurisdiction, it is properly addressed under Rule 12(b)(1). *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016). The party seeking federal jurisdiction has the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Rule 12(b)(6) authorizes dismissal of a complaint if it fails to provide fair notice of a claim and plausible factual allegations to support it. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) is analyzed together with Rule 8(a), which calls for a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

Under either rule, a reviewing court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th. Cir. 2007). But the court need not accept conclusory statements as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). After disregarding any conclusory statements, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S., at 570. And a claim has facial plausibility when a plaintiff pleads enough factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S., at 663.

ANALYSIS

I. Cargill's Partial Motion to Dismiss

Cargill seeks dismissal of every claim except Plaintiff's claim for unpaid overtime under the FLSA set out in Count IV of his complaint. (Doc. 54, at 7.) The Court will therefore address each remaining count in turn and as labelled in Plaintiff's amended complaint.

A. Count I.

Count I contains Plaintiff's claim for "respondeat superior," based on Plaintiff's allegation that "Defendant's officers, agents, servants, employees, or representatives did such [alleged discriminatory acts] with [Defendant's] full authorization." (Doc. 52, at 18.) Plaintiff further contends—without any factual allegations in support—that each violative act "was done in the normal and routine course and scope of employment" of Defendant and its agents. (*Id.*)

To hold an employer liable for the actions of its employees, a claimant must first assert that an employee committed a tort

giving rise to liability. *See e.g. Prim v. Stein*, 6 F.4th 584, 592 (5th Cir. 2021). Here-aside from the role that individual employees allegedly played in Plaintiff's discrimination claim against Cargill—Plaintiff asserts no claim in tort against any *individual employee* for which Cargill could be held liable. This renders Count I conclusory, and the Court therefore disregards it.

B. Counts II, III, VIII, IX, and X.

Counts II, III, VIII, IX, and X together comprise the thrust of Plaintiff's discrimination, hostile-work-environment, and retaliation claims under Title VII.

1. Discrimination

To allege a claim for discrimination under Title VII, a plaintiff must show: (1) that he is a member of a protected class; (2) he was qualified for the position he sought; (3) he suffered an adverse employment action at the hands of his employer; and (4) others outside the protected class were treated more favorably. *See Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 420 (5th Cir. 2006). At the motion-to-dismiss stage, a plaintiff need not submit evidence to **prove** a case of discrimination, but he must plead sufficient facts on all the elements of a disparate-treatment claim to make his case for discrimination **plausible**. *Olivarez v. T-*

Mobile USA, Inc., 997 F.3d 595, 600 (5th Cir. 2021).

At the outset, Plaintiff claims that he was disparately treated for his sexual orientation **and** race, but fails to levy a single race-based factual allegation in support beyond an unsubstantiated contention that he was "harassed with racial slurs." (*See* Doc. 52, at 6-8, 19.) While repeated harassment could rise to an actionable claim, Plaintiff offers no allegation as to who levied the slurs, what slurs were used, when, or through what means—the needed facts which could allow the Court's inference as to Cargill's liability. Therefore, the Court considers Plaintiff's Title VII claims based on racial discrimination conclusory and disregards them.

Insofar as Plaintiff claims discrimination based on sexual orientation, he alleges generally that he was subject to "sexually explicit remarks, demeaning hateful homosexual remarks, [and] frequent heterosexual sex scenes (from movies and tv shows) that appeared in multiple breakrooms [and] violent vandalism, resulting in his constructive discharge." (Doc. 52, at 6-7.) He further claims that homosexual employees were consistently falsely accused of wrongdoing while similarly situated heterosexual employees, "actually guilty of wrongdoing," were not disciplined. (*Id.*) But Plaintiff's numbered counts asserting his claims for discrimination contain no more than recitations of these

allegations and of the elements of each claim. (*Id.*, at 6-7, 18-19.) In sum, Plaintiff provides no further detail about these alleged discriminatory occurrences, the "other heterosexual employees" allegedly treated better than him, or any facts regarding the alleged "violent vandalism" he experienced.

Without more, these allegations are conclusory, unsubstantiated, and rife with buzz words to give the appearance of discrimination. But vague and unsubstantiated claims do not have facial plausibility when a plaintiff fails to plead enough factual content to allow the court to infer that the defendant is indeed liable. *Iqbal*, 556 U.S. at 663. Thus, Plaintiff's allegations of discrimination under Title VII (Counts II and VIII) are conclusory, and the Court disregards them.

2. Retaliation

Count IX includes Plaintiff's claim for retaliation, in which he alleges that Defendant's management "materially disciplined" him after he complained to management about his supervisors. (Doc. 52, at 31.) Other than supplying a photo of a document which purports to show that Plaintiff was "coached" regarding workplace misbehavior (*Id.* at 32), he provides no factual allegations to support that he was retaliated against for his alleged complaint—let alone any information to indicate he filed a formal complaint

at all.

As such, Plaintiff's retaliation claims are conclusory because of a lack of factual content allowing this Court to infer Cargill's liability. *Iqbal*, 556 U.S. at 663. Therefore, his retaliation claim (Count IX) is disregarded.

3. Hostile Work Environment

Count III contains Plaintiff's claim for hostile work environment, in which he alleges that "Defendant violated Title VII of the Civil Rights Act of 1964 by creating a hostile work environment by repetitive use of racial slurs and also by retaliating against him because of his race and sexual orientation." (Doc. 52, at 19.)

For the same reasons as his claims for discrimination and retaliation, Plaintiff's claim for hostile work environment (Count III) is conclusory and must be dismissed. *Iqbal*, 556 U.S. at 663.

4. Conspiracy to Violate Plaintiff's Civil Rights

Count X alleges that Cargill conspired to violate Plaintiff's civil rights in violation of 42 U.S.C. § 1985(3). (Doc. 52, at 19). To establish a claim for conspiracy, a plaintiff must plead: (1) that there was a conspiracy involving two or more individuals; (2) that its purpose was to deprive Plaintiff of equal protection

of the laws; (3) an act was taken in furtherance of the conspiracy; and (4) that act caused Plaintiff's injury or deprivation of the rights of a citizen of the United States. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994).

Plaintiff's claim for conspiracy fails for the same reasons as his other Title VII claims. Plaintiff presents no factual support to identify Cargill's alleged co-conspirator (see doc. 52, at 19), and the Court therefore cannot infer liability for conspiracy when only one party is alleged to have taken part in it.

C. Counts IV and XIV[1]

Counts IV and XIV contain claims for intentional infliction of emotional distress. (Doc. 52, at 19, 35.) Plaintiff contends that Defendant "intentionally or recklessly harassed the plaintiff [with] racial slurs [and that] Defendant's conduct was extreme and outrageous and proximately caused Plaintiff severe emotional distress." (*Id.*)

Without more, these allegations amount to a recitation of the elements of Plaintiff's claim, with vague contentions of racial and sexual animus accompanied by insufficient factual content to

[1] Plaintiff's complaint mistakenly asserts a second "Count IX" as a claim for intentional infliction of emotional distress. Thus, the Court will address this claim as "Count XIV" to correct the complaint's numeration.

allow this Court to infer Defendant's liability for them. *Iqbal*, 556 U.S. at 663. Thus, they are conclusory and will be dismissed.

D. Counts VI and VII.

Counts VI and VII, respectively, constitute Plaintiff's claim for breach of contract and an ancillary claim for breach of the "implied covenant of good faith and fair dealing." (Doc. 52, at 26-30.) Plaintiff relies on excerpts of Cargill's code of conduct and data-privacy policies to allege that Cargill breached a contract with Plaintiff when Cargill allegedly discriminated and retaliated against Plaintiff and when UKG suffered its data breach. (*Id.*)

Under Texas law, in an at-will employment relationship an employee handbook or ancillary policy manual does not by itself constitute a binding contract regarding its contents without clear language indicating the contrary. *See Green v. Medco Health Solutions of Texas, LLC*, 947 F.Supp.2d 712, 730-31 (N.D. Tex. May 27, 2013) (Boyle, J.) (citing *Gamble v. Gregg Cnty.*, 932 S.W.2d 253, 255 (Tex.App.-Texarkana 1996, no writ)).

Thus, as pled, Plaintiff fails to state a claim for breach of contract because he has not adduced any language from Cargill's code of conduct or data-privacy policy clearly indicating that their terms form a binding contract with Cargill employees.

Likewise, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is foreclosed because the employer/employee relationship is not recognized as one conferring the duty to deal fairly and in good faith under Texas law. *Cty. of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000).

E. Counts XI, XII and XIII.

Counts XI, XII, and XIII contain Plaintiff's various claims under Texas state law. Counts XI and XII are Plaintiff's allegations of violations of the Texas state labor code. (Doc. 52, at 33-34.) Plaintiff alleges that Defendant "violated Texas Labor Code §21.510(1)," and "violated Texas Labor Code §21.056 in that Cargill abetted, incited and coerced its employees to engage in discriminatory practices against Ellis." (*Id.*, at 33, 34.)

Plaintiff offers no further factual contentions to support these allegations other than those already recited, and merely repeats a litany of damages for which he offers no factual content in support. (*Id.*) Thus, Plaintiff's contentions that Defendants violated the Texas Labor Code are conclusory and must be disregarded.

Count XIII contains Plaintiff's allegation of negligent hiring and retention. Specifically, Plaintiff alleges that "Defendant . ... knew or reasonably should have known that at the

time they hired Supervisor Yanet Hernandez [] she would retaliate against the Plaintiff if she was paired with the harasser Supervisor Mike Calixto." (Doc. 52, at 34.) For the first time in his complaint, Plaintiff offers the names of individuals alleged to be liable for the harassment he contends occurred. But because Plaintiff does not present sufficient facts to show he was subject to discrimination by his supervisors, he therefore cannot substantiate an allegation that Cargill "should have known" of such a discriminatory tendency. Thus, his claim for negligent hiring and retention is conclusory and the Court will dismiss it.

II. UKG's Motion to Dismiss

UKG filed its motion to dismiss for lack of jurisdiction and failure to state a claim (doc. 56), contending that Plaintiff lacks standing to sue.

To establish Article III standing, a plaintiff must allege an injury in fact that is concrete, particularized, actual, or imminent. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Although imminence is an elastic standard, it ensures that an alleged injury is not too speculative for the purposes of Article III. *Id.* Only injuries that are "certainly impending" are sufficiently imminent to constitute an injury in fact. *Id.*

In the data privacy context, the mere exposure to a risk of

future harm alone is insufficient to constitute a concrete injury, unless that exposure is itself the injury. *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190, 2210-11 (2021). And while the circuit courts are split on the question whether an increased risk of identity theft after a data breach is sufficient to confer standing, the cases in which they do confer standing at least include allegations of **actual** misuse of the plaintiff's data by a nefarious third party. *See Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1340 (11th Cir. 2021).

Here, Plaintiff's alleged injuries include the failure to be paid on time due to disruptions in the payroll system, fear and anxiety as to whether payroll disruptions would continue, the loss in value of his personal information, and increased risks of identity theft, fraud, and other potential damages. (Doc. 52, at 42-44.) But plaintiff adduces no evidence to show **what** data was stolen, that **his** data in fact landed in the hands of a third party, nor that his data was **actually** misused. Plaintiff indeed makes vague references to "unauthorized charges" and "lowered credit scores resulting from credit inquiries," but offers no detail to expound upon those allegations. (*Id.*) He likewise avers no further factual detail as to how the value of his information was diminished—or that **his** data was ever actually stolen, just that it was potentially exposed. Because exposure to a future possibility

of injury alone is not an imminent injury, Plaintiff does not plead that he suffered an injury in fact.

Therefore, the Court will dismiss all claims against UKG without prejudice for Plaintiff's lack of standing.

CONCLUSION

Because Plaintiff fails to state a claim against Cargill in Counts I-IV and VI-XIV of his amended complaint, the Court **GRANTS** Defendant's motion (doc. 54) and **DISMISSES without prejudice** those claims as against Cargill. As against UKG, The Court **GRANTS** UKG's motion (doc. 56) and, because Plaintiff lacks standing, **DISMISSES without prejudice** all claims against UKG. Thus, **only** Count V of Plaintiff's amended complaint against Cargill—which contains his claim for overtime pay violations under the FLSA—remain.

Accordingly, Plaintiff's subsequent motions for summary judgment (doc. 76), judicial notice, (doc. 96), and judgment on the pleadings (doc. 97) are **DENIED**.

SIGNED October 31, 2023.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-864-Y
	§	
CARGILL MEAT SOLUTIONS, et al.	§	

ORDER GRANTING MOTION TO DISMISS

Before the Court is defendant Cargill Meat Solutions' renewed motion to dismiss for lack of subject-matter jurisdiction (doc. 122). For the reasons below, the Court will grant the motion.

BACKGROUND

Plaintiff Eric Ellis is an African-American homosexual man formerly employed in Cargill's production facility as a Food Safety Quality Representative. (Doc. 52, at 6-9.) UKG is a third-party contractor that provides workforce management services to businesses, including timekeeping and payroll software applications. (Doc. 56, at 9.) Cargill uses UKG's payroll software services. (*Id.*, at 9-10.)

As against UKG, Ellis asserted claims for violation of his data privacy rights in the aftermath of an outage affecting UKG's payroll processing system. (*Id.*, at 9-17.) As against Cargill,

Ellis levied claims for discrimination under Title VII and alleged that Cargill failed to compensate him for "all hours worked" in violation of the Fair Labor Standards Act ("FLSA") as a result of the same UKG outage. (*Id.*, at 9-17.)

On October 31, 2023, the Court granted Cargill's and UKG's motions to dismiss. (Doc. 104.) The Court dismissed Ellis's claims against UKG in full for his lack of standing and dismissed his discrimination claims against Cargill. (*Id.*, at 14.) Thus, the only remaining claim was Ellis's claim against Cargill for alleged overtime pay violations under the FLSA. (*Id.*)

Ellis then filed an amended complaint, which re-asserts both his FLSA and discrimination claims against Cargill. (Doc. 105.) Ellis subsequently filed a motion in limine (doc. 106), an application and motion for default judgment (doc. 111), a self-styled motion for judgment (doc. 113), a motion for a certificate of appealability (doc. 110), and a motion to amend or correct his pleadings (doc. 126). The Court previously denied a separate motion for Ellis to amend his complaint (doc. 121) and instructed him to cease filing documents in this case until the record could be resolved. (Doc. 121.) Ellis then filed a notice of interlocutory appeal (doc. 125), which he later voluntarily withdrew. (Doc. 131.)

Cargill filed a motion to strike the amended complaint that Ellis filed after this Court's order granting its motion to dismiss

(doc. 107), and a renewed motion to dismiss the remaining FLSA claim. (Doc. 122.) The Court granted Cargill's motion to strike. (Doc. 134.) Therefore, Cargill's renewed motion to dismiss is now before the Court. (Doc. 122.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal of a suit when the court lacks subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). Article III limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III § 2. So, our courts only have the authority to resolve "the legal rights of litigants in **actual** controversies" where a plaintiff "demonstrate[s] that he possesses a legally cognizable interest, or 'personal stake,' in the outcome of the action." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (emphasis added). Thus, where intervening circumstances deprive a plaintiff of his personal stake in the outcome, "the action can no longer proceed and must be dismissed as moot." *Id.*, at 72. "When challenging a 12(b)(1) motion, the party asserting jurisdiction bears the burden of proof." *Martin v. PepsiAmericas, Inc.*, 628 F.3d 738, 740 (5th Cir. 2010).

At the dismissal stage, a reviewing court must accept all

well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th. Cir. 2007). But the court need not accept conclusory statements as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678--79 (2009). After disregarding any conclusory statements, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S., at 570. And a claim has facial plausibility when a plaintiff pleads enough factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S., at 663.

ANALYSIS

Cargill now moves to dismiss Ellis's remaining claim for unpaid overtime as moot. (Docs. 122; 123, at 1.) Cargill contends that it made an unconditional tender of the sum representing all damages that Ellis could recover at trial, and that there is therefore no remaining relief that the Court could award. (Doc. 123, at 11.)

In *Genesis Healthcare*, the Supreme Court left open a circuit split over the question whether "an unaccepted offer that fully

satisfies a plaintiff's claim is sufficient to render the claim moot" under the FLSA. *Genesis Healthcare*, 569 U.S., at 72. Eschewing the holding in that case, our circuit followed its dissent, opining that "an unaccepted offer of judgment to a named plaintiff in a class action 'is a legal nullity, with no operative effect.'" *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 315 (5th Cir. 2015) ("It is hornbook law that a rejection of an offer nullifies the offer."); *see also Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (affirming that defendants ought not to be able to "pick off" named plaintiffs in collective actions through tender of judgment).

But even in these class- and collective-action contexts, courts have affirmed the mootness of an entire case where **individual** claims were satisfied by offers of judgment before the certification of a class. *See Sandoz*, 553 F.3d, at 919 ("[W]hen Cingular made its offer of judgment, Sandoz represented only herself, and the offer of judgment fully satisfied her individual claims. If our analysis stopped there, Sandoz's case would be moot."); *Genesis Healthcare*, 569 U.S., at 73 ("In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action . . . [and] the

mere presence of collective-action allegations in the complaint cannot save the suit from mootness **once the individual claim is satisfied**.") (internal citations omitted) (emphasis added).

But Ellis's case involves neither a collective action nor an "offer of judgment" in its traditional sense under Rule 68. Rather, Cargill made "an unconditional tender of payment" for all the damages that he could hope to recover. (Doc. 123, at 2.) And Ellis sued only on his own behalf. (Doc. 52.) With the dearth of authority on the question whether an "unconditional tender" of judgment moots an individual's claim under the FLSA, the Court is satisfied that common principles of mootness will resolve the matter.

It is settled law that, for a plaintiff to take something, the Court must have something to give. To this end, a case must be dismissed as moot "if an intervening circumstance . . . makes it impossible for the court to [give] any effectual relief [] to the prevailing party." *Payne v. Progressive Fin. Servs. Inc.*, 748 F.3d 605, 607 (5th Cir. 2014) (citing *Chafin v. Chafin*, 568 U.S. 165, 171-72 (2013)); *Sandoz*, 553 F.3d, at 919. "It is not enough that a dispute was very much alive when suit was filed; the [plaintiff] must continue to have a personal stake in the ultimate disposition of the lawsuit." *Chafin*, 568 U.S., at 172.

In short, Cargill's tender of judgment makes this matter open and shut. After UKG's outage, Cargill engaged in a reconciliation process to determine what payment it owed to Ellis. (Doc. 123, at 5.) It determined that Ellis was owed $549.46 in overtime compensation, which it promptly paid. (*Id.*, at 6.) Cargill then "unconditionally" tendered an additional $549.46, reflecting the maximum liquidated damages to which he could be entitled under the FLSA. (*Id.*) Given that Ellis is proceeding in forma pauperis (obviating an award of costs) (doc. 5) and is representing himself pro se (obviating an award of attorney's fees), Ellis may only recover his entitlement to actual and liquidated damages under the statute. Here, those are the tendered compensation for unpaid overtime and the tendered duplicate award for liquidated damages.

Out of an abundance of caution, and to eliminate the risk in dismissing this action based on a one-sided calculation of damages, the Court ordered Ellis to show cause as to why Cargill's tender **did not** moot his claim. (Doc. 135.) In that order, the Court required Ellis to "submit a sworn declaration with the Court setting forth the specific amount—in dollars—to which he is legally entitled under the FLSA as damages, and why Cargill's unconditional tender is insufficient to compensate him fully." (Doc. 135, at 1-2.)

In response, Ellis failed to allege any specific dollar figure to refute Cargill's calculation of his damages, nor did he provide any explanation for the "bona fide dispute" he insists exists over "the amount of hours worked and/or compensation due." (Doc. 136, at 2.) But without any allegation to assert **what** Ellis believes he is owed or how many **additional** hours he believes have not yet been credited by Cargill, the Court cannot conclude that Cargill's unconditional tender is insufficient to satisfy his claims. Ellis only claims that Cargill's tender is insufficient because he did not agree to receive it.

But the fact remains that this was not an "offer" of judgment—it was a direct payment. And while Ellis may claim that he refuses it, he is now in possession of everything that would make him whole because Cargill has surrendered any legal interest in the contested funds. Moreover, Ellis failed to allege any specific damages in his original complaint. (See Docs 1; 52.) So, without more, Cargill has done precisely what the Court hopes that more defendants would do: acknowledge the validity of plaintiffs' claims and compensate them without the need for the Court's intervention.

The Court has given Ellis more than a little bit of its time. It has tolerated multiple amended complaints and marshaled this case for nearly eighteen months. But now, with Cargill's payment

in full, Ellis has been "deprive[d] [] of his personal stake in the outcome." *Genesis Healthcare*, 569 U.S., at 71. Since Cargill previously remitted his back pay, and has since tendered an equal duplicate amount, there is no further relief for the Court to award under the FLSA. See 29 U.S.C.A. § 216(b).

CONCLUSION

Accordingly, the Court **GRANTS** Cargill's motion (doc. 122) and **DISMISSES** this case **with prejudice**. Ellis's motion in limine (doc. 106); Ellis's motion for a certificate of appealability (doc. 110); Ellis's application and motion for default and default judgment (doc. 111); Ellis's motion for judgment (doc. 113); and Ellis's motion to amend or correct his pleadings (doc. 126) are **DENIED as moot**.

SIGNED March 15, 2024.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERIC L. ELLIS	§	
	§	
VS.	§	ACTION NO. 4:22-CV-864-Y
	§	
CARGILL MEAT SOLUTIONS, et al.	§	

FINAL JUDGMENT

This judgment is issued as required by Federal Rule of Civil Procedure 58. In accordance with the Court's order granting Defendant's motion to dismiss, dated this same day, this case is **DISMISSED with prejudice.**

The clerk shall transmit a true copy of this judgment to the parties.

SIGNED March 15, 2024.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX G

United States Court of Appeals for the Fifth Circuit

No. 24-10339

United States Court of Appeals
Fifth Circuit
FILED
December 27, 2024
Lyle W. Cayce
Clerk

ERIC ELLIS,

Plaintiff—Appellant,

versus

CARGILL MEAT SOLUTIONS; ULTIMATE KRONOS GROUP,

Defendants—Appellees,

ERIC ELLIS,

Plaintiff-Appellant,

versus

CARGILL MEAT SOLUTIONS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-864
USDC No. 4:22-CV-1020

ON PETITION FOR REHEARING

AND REHEARING EN BANC

Before CLEMENT, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.

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*Chief Judge Jennifer Walker Elrod, did not participate in the consideration of the rehearing en banc.