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OPINIONS AND ORDERS

OPINION, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT (MAY 12, 2025)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL F. KISSELL,

Appellant,

v.

PENNSYLVANIA OFFICE OF THE BUDGET LEGAL OFFICE; BRIAN ZWEIACHER; PATSY IEZZI; CHRISTOPHER P. SKATELL; PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

No. 24-2254

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 2:22-cv-01715)
District Judge: Honorable Christy Criswell Wiegand

Submitted Pursuant to Third Circuit LAR 34.1 (a)
February 4, 2025

Before: KRAUSE, PHIPPS, and ROTH,
Circuit Judges.

OPINION*

PER CURIAM

Appellant Michael Kissell appeals the District Court's July 1, 2024 order adopting the Magistrate Judge's Report and Recommendation in full, granting Defendants' motions to dismiss, and dismissing his complaint with prejudice. Because the District Court properly dismissed Kissell's complaint as barred by sovereign immunity, res judicata, the statute of limitations, and for failure to state a claim, we will affirm the District Court's order and judgment.

I.

Kissell filed his current suit against the Pennsylvania Department of Corrections ("DOC"), the Pennsylvania Office of the Budget Legal Office, and Brian Zweiacher, a former Office of the Budget attorney, and two of his former attorneys, Christopher Skatell and Patsy Iezzi, in December 2022. Defendants all filed motions to dismiss the complaint. Kissell then filed his first amended complaint which Defendants again moved to dismiss. The District Court, based on the Magistrate Judge's recommendation, dismissed Kissell's complaint without prejudice for failure to comply with Federal Rule of Civil Procedure 8. Kissell then filed his second amended complaint.

Kissell's second amended complaint alleged that Defendants had been involved in a years-long conspiracy to deprive him of the monetary award and reinstatement he had won in a jury trial against his former employer, the DOC. Kissell alleged that this conspiracy

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

forced him to retire early from his reinstated position and caused him to commit tax fraud, and violated his rights under the First and Fourteenth Amendments, 42 U.S.C. § 1983, and 42 U.S.C. § 2000e-3(a) (Title VII), among other related state law claims. Defendants again moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6).

The Magistrate Judge recommended that the District Court dismiss with prejudice the entire second amended complaint for, inter alia, failure to comply with Rule 8, failure to state a claim, and as barred by the relevant statutes of limitation, sovereign immunity, and res judicata. The District Court adopted the Magistrate Judge's report in full, granting Defendants' motions to dismiss and dismissing with prejudice Kissell's second amended complaint. Kissell timely appealed.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of a dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is plenary. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 360 (3d Cir. 2016); *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 172 (3d Cir. 2009). We review a dismissal for failure to comply with Rule 8 for an abuse of discretion. *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702 (3d Cir. 1996). However, to the extent that the District Court determined that Kissell's complaint failed to state a claim under the standard articulated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007), and reiterated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), our review is de novo. *See Klotz v. Celentano*

Stadtmauer & Walentowicz LLP, 991 F.3d 458, 462 (3d Cir. 2021).

Under the *Twombly-Iqbal* standard, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (cleaned up). Although pro se pleadings must be held to "less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

III.

After our de novo review of the record, we agree that Kissell's § 1983 claims against Defendants Skatell and Iezzi fail because they are not state actors. We are also satisfied that Kissell's § 1983 and state law claims against the DOC and the Office of the Budget are barred because of sovereign immunity, while his Title VII claim against the DOC is barred by res judicata. We further agree that all of Kissell's claims against Zweiacher are barred by the statute of limitations. Finally, we agree that Kissell failed to state a claim as to any of his remaining state law claims.

A.

Kissell's § 1983 claims against Defendants Skatell and Iezzi fail because they are not state actors. "[A] plaintiff seeking to hold an individual liable under § 1983 must establish that [they were] deprived of a federal constitutional or statutory right by a state actor." *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009). "A person may be found to be a state actor when (1) he

is a state official, (2) he has acted together with or has obtained significant aid from state officials, or (3) his conduct is, by its nature, chargeable to the state." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 1999) (cleaned up). "Attorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court." *Id.* The District Court correctly found that Skatell and Iezzi could not be found to be state actors based on the facts as alleged by Kissell. Additionally, Kissell's § 1983 conspiracy claim against Skatell and Iezzi fails because he did not "allege specific facts showing an agreement and concerted action amongst the defendants." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998).

B.

Kissell's § 1983 claims against the DOC and the Office of the Budget are barred by sovereign immunity. The Eleventh Amendment "make[s] states generally immune from suit by private parties in federal court [and] [t]his immunity extends to state agencies and departments." *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 503 (3d Cir. 2001) (cleaned up). Congress did not override the states' immunity from suit when it enacted § 1983, *see Quern v. Jordan*, 440 U.S. 332, 345 (1979), and Pennsylvania has expressly not waived its Eleventh Amendment immunity in federal courts. 42 Pa. Cons. Stat. Ann. § 8521(b). The District Court correctly found that because the DOC and Office of the Budget are state agencies and departments, they are immune from civil rights suits under § 1983. We further agree with the DOC and the Office of the Budget that their Eleventh Amendment immunity in federal courts extends to Kissell's state law claims.

See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 103 n.12 (1984).

C.

To the extent Kissell brought Title VII claims against any party apart from the DOC, his former employer, the claims fail as a matter of law. "Title VII prohibits unlawful employment practices by employers," *see Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002), and it does not provide for individual liability. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996). As for Kissell's Title VII claims against the DOC, we agree that they are barred by res judicata.

This is the fourth time Kissell has argued before us that the DOC violated his Title VII rights. Specifically, Kissell has argued that the DOC retaliated against him for continuing to report sexual misconduct after his reinstatement and created a hostile work environment that forced him into early retirement. *See Kissell v. Dep't of Corr.*, 634 F. App'x 876, 879 (3d Cir. 2015) (per curiam) ("*Kissell I*"); *Kissell v. Dep't of Corr.*, 670 F. App'x 766, 767-68 (3d Cir. 2016) (per curiam) ("*Kissell II*"); *Kissell v. Pa. Dep't of Corr.*, 808 F. App'x 58, 59 (3d Cir. 2020) (per curiam) ("*Kissell III*").

In *Kissell I*, we vacated to allow Kissell to file an amended complaint. 634 F. App'x at 879-80. In *Kissell II*, we then affirmed the District Court's with-prejudice dismissal of his Title VII claim against the DOC because Kissell had "not sufficiently allege[d] the second and third elements of retaliation." 670 F. App'x at 768. In *Kissell III*, we affirmed the District Court's dismissal of Kissell's complaint on the grounds of res judicata because "(1) a judgment on the merits

was entered in *Kissell II*; (2) *Kissell II* and *Kissell III* involve[d] the same set of parties (Kissell and the DOC); and (3) the claims raised in *Kissell III* inarguably [were] the same as those raised in *Kissell II*." *Kissell III*, 808 F. App'x at 59. We agree that Kissell's current Title VII claims of retaliation, hostile work environment, and forced retirement are also barred by res judicata because they are inarguably the same claims he brought before us in *Kissell II* and *Kissell III*.

D.

Kissell's claims against Zweiacher in his personal capacity are barred by the statute of limitations. "[W]e permit a limitations defense to be raised by a motion under Rule 12(b)(6) only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (cleaned up). Kissell identified his specific claims against Zweiacher in Count I of his complaint. Within Count I, Kissell specifically asserted the timeframe of Zweiacher's alleged actions ranged from 2005 when he first was assigned to Kissell's case to 2012 when Kissell was advised that "overpayments were made in his name and his wages would be attached." Kissell alleges under Count II, where he identified his specific claims against Iezzi, that his claims did not accrue until December 8, 2020 when he received a transcript of his 2004-2008 taxes, because only then did he realize the full extent of the injury and that a conspiracy had occurred. However, the facts as alleged in his complaint indicate that Kissell knew in 2012 there were issues with his taxes that had yet to be resolved. Because all of his federal claims against Zweiacher rest on Kissell's tax issues, the District Court properly found that

Pennsylvania's discovery rule did not delay the accrual of the statute of limitations. The same statute of limitations bar applies to Kissell's state law claims against Zweiacher.

E.

Finally, to the extent any state law claims remain, we agree that Kissell failed to include "factual allegations to support any of [his] claims" sufficient to meet the *Twombly-Iqbal* standard. Kissell's complaint offers "formulaic recitation[s] of the elements of a cause of action" for his state law claims, *Twombly*, 550 U.S. at 555, while making "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678. The District Court correctly found that Kissell's "recitation of the elements" and his "assertions" did not suffice to state a claim.

IV.

For the foregoing reasons, we will affirm the District Court's order and judgment.[1]

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[1] Kissell brought a motion for Federal Rule of Civil Procedure 11 sanctions against Appellees Skatell and Iezzi because "the defendants[']] representatives [on appeal] make the argument that the appellant shows no inference or does not present facts to support his assertions." Dkt. No. 32 at 1. We deny Kissell's motion because the actions for which he seeks sanctions occurred during the appeal and not during the District Court proceedings. "On its face, Rule 11 does not apply to appellate proceedings . . . [and] [n]either the language of Rule 11 nor the Advisory Committee Note suggest that the Rule could require payment for any activities outside the context of district court proceedings." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 406 (1990). In any event, the conduct Kissell complains about is not sanctionable under Rule 11(b) or any other ethical rules.

JUDGMENT, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT (MAY 12, 2025)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL F. KISSELL,

Appellant,

v.

PENNSYLVANIA OFFICE OF THE BUDGET LEGAL OFFICE; BRIAN ZWEIACHER; PATSY IEZZI; CHRISTOPHER P. SKATELL; PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

No. 24-2254

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 2:22-cv-01715)
District Judge: Honorable Christy Criswell Wiegand

Submitted Pursuant to Third Circuit LAR 34.1 (a)
February 4, 2025

Before: KRAUSE, PHIPPS, and ROTH,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1 (a) on February 4, 2025. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered July 1, 2024 be and the same is hereby AFFIRMED. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 12, 2025

**MEMORANDUM ORDER,
U.S. DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
(JULY 1, 2024)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL F. KISSELL,

Plaintiff,

v.

PENNSYLVANIA OFFICE OF THE BUDGET
LEGAL OFFICE; BRIAN ZWEIACHER;
PATSY IEZZI; CHRISTOPHER P. SKATELL;
PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,

Defendants.

No. 2:22-CV-01715-CCW

Before: Christy Criswell WIEGAND,
United States District Judge.

MEMORANDUM ORDER

This case has been referred to Chief United States Magistrate Judge Richard A. Lanzillo for pretrial proceedings in accordance with the Magistrates Act,

28 U.S.C. §§ 636(b)(1)(A) and (B), and Local Rule of Civil Procedure 72.

On June 14, 2024, the Magistrate Judge issued a Report, ECF No. 94, recommending that the Motion to Dismiss, ECF No. 77, by Defendant Christopher P. Skatell; the Motion to Dismiss, ECF No. 80, by Defendants Pennsylvania Department of Corrections, Pennsylvania Office of the Budget Legal Office, and Brian Zweiacher; and the Motion to Dismiss, ECF No. 84, by Defendant Patsy Iezzi be granted; and the Second Amended Complaint, ECF No. 73, be dismissed with prejudice. Service of the Report and Recommendation ("R&R") was made on the parties, and pro se Plaintiff Michael F. Kissell has filed Objections. See ECF No. 95.

After a *de nova* review of the pleadings and documents in the case, together with the R&R and the Objections thereto, the following Order is entered:

The Motions to Dismiss, ECF Nos. 77, 80, 84, are **GRANTED**; the Second Amended Complaint, ECF No. 73, is **DISMISSED WITH PREJUDICE**; and the R&R, ECF No. 94, is adopted as the Opinion of the District Court.

IT IS SO ORDERED.

DATED this 1st day of July, 2024.

BY THE COURT:

/s/ Christy Criswell Wiegand
United States District Judge

JUDGMENT, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (JULY 1, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL F. KISSELL,

Plaintiff,

v.

PENNSYLVANIA OFFICE OF THE BUDGET LEGAL OFFICE; BRIAN ZWEIACHER; PATSY IEZZI; CHRISTOPHER P. SKATELL; PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Defendants.

No. 2:22-CV-01715-CCW

Before: Christy Criswell WIEGAND, United States District Judge.

JUDGMENT

FINAL JUDGMENT is hereby entered in favor of Defendants Pennsylvania Office of the Budget Legal Office, Brian Zweiacher, Patsy Iezzi, Christopher P. Skatell, and the Pennsylvania Department of Correc-

tions, pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

DATED this 1st day of July, 2024.

BY THE COURT:

/s/ Christy Criswell Wiegand
United States District Judge

MAGISTRATE REPORT AND RECOMMENDATION, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (JUNE 14, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA, PITTSBURGH

MICHAEL F. KISSELL,

Plaintiff,

v.

PENNSYLVANIA OFFICE OF THE BUDGET LEGAL OFFICE; BRIAN ZWEIACHER; PATSY IEZZI; CHRISTOPHER P. SKATELL; PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Defendants.

No. 2:22-CV-01715-CCW

Before: Christy Criswell WIEGAND, United States District Judge, Richard A. LANZILLO, Chief United States Magistrate Judge.

REPORT AND RECOMMENDATION

RICHARD A. LA ZILLO, CHIEF UNITED STATES MAGISTRATE JUDGE.

I. Recommendation

Pro se Plaintiff Michael F. Kissell ("Plaintiff") initiated this action against Defendants Pennsylvania Office of the Budget Legal Office ("OBLO"), attorneys Brian Zweiacher, Patsy Iezzi, and Christopher P. Skatell, and the Pennsylvania Department of Corrections ("DOC"), alleging a years-long conspiracy among them that he asserted resulted in violations of his constitutional, statutory, and common law rights. Three motions to dismiss Plaintiff's Second Amended Complaint (SAC) (ECF No. 73) are pending before the Court:

(1) Defendant Skatell's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(2) (ECF No. 77);

(2) Defendants OBLO, DOC, and Zweiacher's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1) (ECF No. 80); and

(3) Defendant Iezzi's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 84).

This Court has subject matter jurisdiction under 28 U.S.C. § 1331. The motions have been fully briefed and are ripe for disposition. *See* ECF Nos. 78, 81, 82, 85, 87, 88, 89.

Because the facts alleged in the SAC support none of the claims asserted therein and, additionally, all such claims are barred by the statute of limitations, sovereign immunity, or *res judicata*, it is respectfully recommended that the Court grant each of the pending motions (ECF Nos. 77, 80, 84) and dismiss all claims of the SAC with prejudice as to all Defendants.

II. Report

A. Factual Background

Plaintiff's 133-paragraph SAC is a disjointed and frequently incomprehensible collection of allegations regarding Plaintiff's initial period of employment as a DOC corrections officer commencing in 1988, Plaintiff's successful lawsuit against the DOC following the termination of his employment in 1994, a subsequent unspecified period of employment with the DOC during which Plaintiff was subjected to unspecified acts of harassment and retaliation by unnamed DOC personnel, and vaguely described errors and misconduct allegedly committed by multiple attorneys in connection with Plaintiff's tax obligations and filings between 2004 and 2007. The SAC charges a vast conspiracy among unassociated attorneys, OBLO, and the DOC that apparently spanned several years. Plaintiff's pleading invokes a plethora of constitutional, statutory, and common law theories of liability, including claims pursuant to 42 U.S.C. § 1983 based on violations of his rights under the First and Fourteenth Amendments to the U.S. Constitution (ECF No. 73 at ¶¶ 1, 111-113, 125), claims of retaliation, sex discrimination, and hostile work environment in violation of Title VII, 42 U.S.C. § 2000e-3(a) (*id.* at ¶¶ 2, 113, 119, 122, 123), and references to state law claims for negligence, fraud, and violations of the Pennsylvania Wage Payment and Collection Act ("WPCL"), 43 Pa. Cons. Stat.§§ 260.1 *et seq.* (*Id.* at ¶¶ 103, 121; *see also* Counts I, V).

The SAC relates that the DOC hired Plaintiff as a corrections officer at its state correctional institution at Greensburg on January 25, 1988 and that, in 1994, it terminated his employment after he reported co-

workers for sexual harassment and "other crimes." *Id.* at ¶¶ 18-20. Following the termination of his employment, Plaintiff sued the DOC for retaliation and, in 2002, a jury awarded him reinstatement with full back pay. *Id.* at ¶¶ 21-22. At some point in 2004, Plaintiff's attorney in the retaliation lawsuit, Leonard Sweeney ("Sweeney"), received one of Plaintiff's back payment checks from the Commonwealth. *Id.* at ¶ 27. Sweeney continued to receive his checks in 2005, which Sweeney "illegally endorse[d]" to "embezzl[e] [his] [m]oney." *Id.* at ¶¶ 27, 32, 45. The DOC knew about this, which created "hostilities" at his workplace. *Id.* at ¶ 27. Plaintiff was unaware of these payments and, as a result, they were not taxed properly. *Id.* at 21-22. Plaintiff acknowledges, however, that he received a letter from the IRS in December 2005 notifying him that he had to report any "overpayments" as wages on his W-2. *Id.* at ¶ 47.

Also in 2005, Defendant OBLO assigned Defendant Zweiacher "to rectify" Plaintiff's "[t]ax problems and reinstatement." *Id.* at ¶ 36. Zweiacher knew the DOC "was responsible for the back payment through payroll" and "concealed overpayments issued in [Plaintiff's] name that should have been taxed . . . in the years 2004, 2005, and 2006." *Id.* at ¶¶ 36, 108. In 2007, Plaintiff hired a tax attorney, Defendant Iezzi, to correct his taxes. *Id.* at ¶ 55. Plaintiff appears to allege that both Iezzi and Zweiacher told him that his taxes had been corrected, which were "false statements" made in furtherance of a "civil conspiracy" against him. *Id.* at ¶¶ 50, 55, 60, 90.

In 2012, Plaintiff wrote a letter to then-Pennsylvania Governor Tom Corbett about some of his "personal concerns." *Id.* at ¶ 29. At some point there-

after, Plaintiff learned that "overpayments were made in his name" and that "his wages would be attached." *Id.* at ¶ 57. Plaintiff's work environment became so hostile that he was forced to retire in 2014, after which his pension was attached. *id.* at ¶¶ 58-59, 126. Plaintiff hired another attorney, Defendant Skatell, to represent him at his pension hearing. *id.* at ¶ 92. Thereafter, Skatell negligently handled other matters for him, including another employment discrimination suit against the DOC and an appeal to the Supreme Court of the United States. *See id.* at ¶¶ 92, 93, 96.

Because Plaintiff oscillates between disjointed factual allegations and various legal labels and conclusions of law, it is difficult to discern which claims are asserted against which Defendants. Liberally construing the SAC, as the Court must based on Plaintiff's pro se status, Plaintiff appears to assert that (1) all Defendants conspired against him in retaliation for his 1994 employment lawsuit against the DOC, *id.* at ¶¶ 21, 32, 109, (2) he "was deceived by his attorneys [Zweiacher, Iezzi, and Skatell] and entrapped in [t]ax [f]raud" and discovered this tax fraud when he received a transcript of his 2004-2008 taxes from the IRS on December 8, 2020, which conflicted with the information he had previously been provided by his attorneys, *id.* at ¶¶ 33 73, 86, and (3) the DOC continued to retaliate against Plaintiff for reporting sexual misconduct, which led to his 2014 "forced retirement and attachment of [his] wages." *id.* at ¶ 104. Aside from Plaintiff's inclusion of OBLO in his general conspiracy claim, it is unclear what, if any, claims he may be asserting against it. Zweiacher, Iezzi, and Skatell are sued in their individual capacities, *see id.* at ¶¶ 91, 63, 36, but

Zweiacher is the only individual alleged to have acted under the color of law. *See id.* at ¶¶ 36, 108.

Plaintiff asserts that the Defendants' conduct violated his First Amendment rights to "access the Courts" as he inadvertently committed tax fraud, *id.* at ¶ 111, and to "freedom of speech" because his wages were attached after he wrote a letter to Governor Corbett, *id.* at ¶ 112, as well as his Fourteenth Amendment right to equal protection of the laws. *See id.* at ¶ 113. Plaintiff also asserts violations of the WPCL, although it is entirely unclear upon what he bases this claim. *See id.* at ¶¶ 103, 121; *see also* Counts I, V. Finally, the SAC includes references to several other causes of action, such as intentional infliction of emotional distress, *see id.* at ¶ 31, negligence, breach of contract, ineffective assistance of counsel, civil conspiracy, and fraud. *See id.* at Counts I-V.

B. Standard of Review

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the complaint and views them in a light most favorable to the plaintiff. *See U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). The "court[ ] generally consider[s] only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim" when considering the motion to dismiss. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

In making its determination under Rule 12(b)(6), the court is not opining on whether the plaintiff is likely to prevail on the merits; rather, the plaintiff must only present factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004)); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Furthermore, a complaint should only be dismissed pursuant to Rule 12(b)(6) if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (rejecting the traditional Rule 12(b)(6) standard established in *Conley v. Gibson*, 355 U.S. 41, 78 (1957)).

While a complaint does not need detailed factual allegations to survive a motion to dismiss, a complaint must provide more than labels and conclusions. *See Twombly*, 550 U.S. at 555. A "formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Moreover, a court need not accept inferences drawn by a plaintiff if they are unsupported by the facts as explained in the complaint. *See California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)). Nor must the court accept legal conclusions disguised as factual allegations. *See Twombly*, 550 U.S. at 555; *McTernan v. City of York, Penn.*, 577 F.3d 521, 531 (3d Cir. 2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Put another way, while the Court must view the factual allegations of the complaint as true, the Court is "not compelled to accept unwarranted

inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007).

Finally, because Plaintiff is proceeding pro se, the allegations of the SAC must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972). If the Court can reasonably read a pro se complaint to state a claim upon which relief can be granted, it will do so despite the litigant's failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or unfamiliarity with pleading requirements. *See Boag v. MacDougall*, 454 U.S. 364 (1982); *United States ex rel. Montgomery v. Bierley*, 141 F.2d 552, 555 (3d Cir. 1969). Despite this leniency, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citing *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996)).

C. Discussion

While Defendants separately move to dismiss Plaintiff's claims, the undersigned will address certain grounds for dismissal common to all Defendants. Because these grounds provide ample reason for dismissal of this action with prejudice, the undersigned will not reach all arguments raised by the Defendants.

1. The SAC violates Fed. R. Civ. P. 8 and Fails to Allege Facts Sufficient to Support Any of the Legal Conclusions and Labels Included in the SAC

Rule 8(a) requires a pleading 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). Rule 8(d)(1) speaks to factual allegations, requiring that "[e]ach allegation . . . be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). These rules task the plaintiff to provide "the defendant notice of what the . . . claim is and the grounds upon which it rests." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555). Legal labels, conclusory assertions, and inferences unsupported by factual allegations will not suffice: a complaint must include enough facts to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Plaintiff's SAC is replete with conclusory assertions of conspiracy, retaliation, harassment, and discrimination, among many others. What is lacks, however, are factual allegations to support any of these claims. To the extent the SAC alleges facts, they do not support an inference that any Defendant engaged in conduct triggering potential liability under any of the myriad legal theories Plaintiff invokes. This deficiency is common to all claims against all Defendants and warrants dismissal of the SAC.

2. The Statute of Limitations Bars Plaintiff's § 1983 Claims

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]" 42 U.S.C. § 1983. Defendants argue that Plaintiff's First Amend ment and Fourteenth Amendment claims pursuant to § 1983 are barred by the statute of limitations. The Third Circuit permits a statute of limitations defense to be raised in a Rule 12(b)(6) motion "only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (internal quotation marks omitted) (quoting *Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002)). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Id.* (alteration in original) (internal quotation marks and citation omitted). Here, Plaintiff's civil rights claims are barred on the face of the SAC.

Section 1983 borrows its statute of limitations from the personal injury tort law of the state where the cause of action arose. *See Nguyen v. Pennsylvania*, 906 F.3d 271, 273 (3d Cir. 2018) (citing *Wallace v. Kato*, 549 U.S. 384, 387 (2007)). Under Pennsylvania law, the statute of limitations for personal injury actions is two years. *See* 42 Pa. Con. Stat. Ann. § 5524. Although courts apply the applicable statute of limitations under state law, the determination of when a civil rights claim accrues is a question of federal law. *Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009) (citing *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991)). Under federal law, a civil rights claim

accrues "when the plaintiff knew or should have known of the injury upon which its action is based." *Id.* (quoting *Sameric Corp. v. City of Phila.*, 142 F.3d 582, 599 (3d Cir. 1998)). "The determination of the time at which a claim accrues is an objective inquiry; we ask not what the plaintiff actually knew but what a reasonable person should have known." *Id.* (quoting *Barren v. United States*, 839 F.2d 987, 990 (3d Cir. 1988)). Generally, a cause of action is considered to have accrued "at the time of the last event necessary to complete the tort, usually at the time the plaintiff suffers an injury." *Id.* (citing *United States v. Kubrick*, 444 U.S. 111, 120 (1979)).

Plaintiff commenced this action on December 2, 2022. *See* Compl. (ECF o. 1). Therefore, Plaintiff's § 1983 claims are barred by the statute of limitations to the extent they accrued prior to December 2, 2020. The SAC reveals that the events upon which Plaintiff bases his claims occurred between his jury award in 2002 and his forced retirement in 2014. *See* SAC (ECF No. 73) at ¶¶ 21-22, 126. Thus, Plaintiff's § 1983 claims are time-barred on the face of the SAC.

Plaintiff has presented no legitimate basis for tolling the statute of limitations. "Although federal law governs the accrual date of § 1983 action, tolling is generally governed by the law of the forum state." *Rajkumar v. Gateway Sch. Dist.*, 2022 WL 2805126, at *2 (3d Cir. July 18, 2022) (unpublished). Pennsylvania's discovery rule allows the statute of limitations to be tolled "until the point when the plaintiff reasonably should know . . . he has been injured." *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Miller v. Phila. Geriatric Ctr.*, 463 F.3d 266, 276 (3d Cir. 2006)). The discovery rule "is measured by an

objective reasonableness standard." *Id.* But "[a] plaintiff's ignorance regarding the full extent of his injury is irrelevant to the discovery rule's application, so long as the plaintiff discovers or should have discovered that he was injured." *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015).

Plaintiff argues that his claims did not accrue until he received a transcript of his 2004-2008 taxes from the IRS on December 8, 2020. *See* SAC (ECF No. 73) at ¶¶ 73, 86. However, Plaintiff was on notice regarding the proper reporting procedures for "over-payments" once he received a letter in December 2005 from the IRS stating as much. *Id.* at ¶ 47. To the extent he alleges that he was prevented from learning about his injury until December 2020, a docket review of the various actions he has initiated in the Western District of Pennsylvania demonstrates otherwise.[1] *See Kissell v. Pa. Dep't of Corr., et al.*, Civ. No. 2:97-cv-00786-GLL ("Action 786"). In 2010, eight years after he received his jury award, Plaintiff filed a Motion to Enforce Judgment in Action 786 requesting, *inter alia*, that the defendants correct the tax consequences of his 2002 verdict because the "DOC did not properly calculate and issue tax paperwork following the 2002 verdict." Action 786, ECF No. 163 at ¶ 9. The District Court denied his motion, stating:

> Putting aside the merits of Kissell's request for relief; we find as an initial matter that his

[1] As these proceedings are matters of public record, the Court may consider them on a motion pursuant to Rule 12(b)(6). *See Pension Ben. Guar. Corp.*, 998 F.2d at 1196. Moreover, a court "ruling on Rule 12(b)(6) motions may take judicial notice of public records." *Anspach ex rel. Anspach v. City of Phila., Dep't. of Pub. Health*, 503 F.3d 256, 273 (3d Cir. 2007).

> request is untimely. Kissell has offered no explanation as to why he failed to raise these issues when he moved to enforce judgment in 2005, or after the court of appeals issued its opinion in 2006, or at any time between 2006 and 2010. Even accepting as true Kissell's contention that the DOC "has . . . stalled the process," the DOC' s actions alone cannot explain Kissell's multi-year delay in bringing these issues to the attention of the court. As such, we will deny Kissell's motion on the basis that it is untimely.

Id., ECF No. 166. The foregoing demonstrates that Plaintiff was aware or at least on notice of his tax problems no later than 2010. By that point, Plaintiff had "discovered" his injury, making his alleged ignorance of "the full extent of his injury . ... irrelevant to the discovery rule's application." *Clash*, 796 F.3d 281 at 288.

Prior litigation commenced by Plaintiff in this Court also confirms that no later than 2014, he was well-aware of the injury he now associates with his "forced retirement" from the DOC. Viewing his allegations in the light most favorable to him, his forced resignation in 2014 is the latest event that could qualify as "necessary to complete the tort." *See Kach*, 589 F.3d at 634. In 2015, Plaintiff initiated a prose action against the DOC and his union at No. 3:15-cv-00058-KAP-KRG). The defendants in that case moved to dismiss the complaint. In his Report and Recommendation that the action be dismissed, the Magistrate Judge observed, "Kissell asserts that 'defendants' and former counsel 'attempted to deceive the plaintiff involving proper protocol by failure to pay

the back pay award through proper procedure . . . '." *Kissell v. Commonwealth of Pa. Dep't of Corr.*, No. 3:15-CV-58-KRG-KAP, 2015 WL 11070889, at *1 (W.D. Pa. May 6, 2015). The Magistrate Judge also noted the District Court's 2010 holding that Plaintiff's claims in that earlier action were time-barred:

> This court has no jurisdictional basis (certainly none under Title VII) for presiding over Kissell 's controversy over the award in Case No. 2:97-cv-786-GLL was paid or how the taxes on that award were structured. If the court had jurisdiction over those matters, Judge Lancaster's unappealed from July 27, 2010 order has already held that Kissell was untimely in his attempt to have the court intervene in his controversies with his employer and former counsel over accounting for the award.

Id. at *2. As his own prior litigation reveals, no later than 2015, Plaintiff knew of his forced retirement from the DOC, and no later than 2010, he knew of problems with payments and taxes associated with his prior jury verdict, and he associated these injuries with conduct of the DOC and his "former counsel." This knowledge was more than sufficient to commence the running of the statute of limitations on all claims regardless of what he may have later discerned from the transcript of his 2004-2008 taxes that he received in December 2020. *See Rajkumar*, 2022 WL 2805126, at *2. Most of Plaintiff's § 1983 claims are predicated on the negative tax consequences he encountered following his 2002 jury award, *i.e.*, his right to "access the Courts" and to equal protection of the laws, as well as the alleged conspiracy whereby the Defendants

somehow prevented resolution of these problems. But, as described above, Plaintiff was cognizant of his tax problems and any related malfeasance by at least 2010. Moreover, the injury Plaintiff suffered due to the alleged retaliatory attachment of his wages following his letter to Governor Corbett in 2012 was equally direct and clear. Thus, Plaintiff's First Amendment free speech claims are also barred by the statute of limitations as his wage attachment occurred before his retirement in 2014.

Because all of Plaintiff's § 1983 claims are barred by the two-year statute of limitations and no basis for equitable tolling exists, it is respectfully recommended that the Court dismiss Plaintiff's § 1983 claims with prejudice as to all Defendants.

3. To the Extent Plaintiff Asserts § 1983 Claims Against Defendants Iezzi and Skatell, They Also Fail Due to the Absence of State Action

In addition to being barred by the statute of limitations, Plaintiff's § 1983 claims against his former attorneys, Iezzi and Skatell, are unsustainable because neither acted under color of state law. The Court of Appeals for the Third Circuit has identified three circumstances under which a private entity or individual may be considered to have engaged in "state action" for § 1983 purposes: (1) where "the private entity has exercised powers that are traditionally the exclusive prerogative of the state"; (2) where "the private party has acted with the help of or in concert with state officials"; and (3) where "the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint

participant in the challenged activity." *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (alteration in original) (internal quotation marks and citation omitted). "The principal question . . . is whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005) (internal quotation marks and citations omitted); *see also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). "Attorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 1999). If a plaintiff's § 1983 claim "arises exclusively from [his private attorney's] conduct during the course of representation," then he has failed to allege any "state action" under § 1983. *Perez v. Griffin*, 2008 WL 2383072, at *5 (M.D. Pa. June 9, 2008), aff'd, 304 Fed. Appx. 72 (3d Cir. 2008) ("Purely private transactions between attorneys and clients are incapable of supporting a claim for redress under § 1983.").

Plaintiff has not alleged any facts to support an inference that his former private tax attorneys, Iezzi and Skatell, acted under the color of law. Plaintiff's claims against Iezzi concern his efforts to resolve his personal tax problems. And the allegations against Skatell relate to Plaintiff's dissatisfaction with his representation during and after Plaintiff's pension hearing. No nexus exists between Iezzi and Skatell's private representation and alleged malpractice and the State. *See Leshko*, 423 F.3d at 339. Plaintiff had no constitutional or statutory right to counsel in his civil case, and even in criminal matters where such a

right exists, an attorney "does not act under color of state law when performing a lawyer's traditional functions as counsel . . . " *Polk Cnty.*, 454 U.S. at 325. To the extent Plaintiff alleges that his private attorneys "conspired" with the State to entrap him into "committing tax fraud," Plaintiff offers absolutely no facts to support this "bald assertion." *Morse*, 132 F.3d at 906. For a § 1983 conspiracy claim to survive a motion to dismiss, the plaintiff "must allege specific facts showing an agreement and concerted action amongst the defendants." *Harmon v. Delaware Sec'y of State*, 154 Fed. Appx. 283, 285 (3d Cir. 2005) (emphasis added) (citations omitted). Plaintiff has not done so here. All claims against Iezzi and Skatell should be dismissed with prejudice.

a. Eleventh Amendment Immunity

The Eleventh Amendment protects a non-consenting State "from suits brought in federal courts by her own citizens as well as by citizens of another state," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal quotation marks and citation omitted), which "extends to suits against departments or agencies of the state having no existence apart from the state." *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). The DOC and OBLO are state agencies[2] and therefore immune from suit in federal court "unless Congress has overridden that

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[2] *See* 71 Pa. Stat. Ann. § 229(a) ("The Office of the Budget is hereby established as an administrative agency within the Governor's Office."); 4 Pa. Code § 9 Appendix A; *Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 310 (3d Cir. 2020) ("The Pennsylvania Department of Corrections is undoubtedly a state instrumentality . . . .").

immunity or the State has waived its immunity." *Sims v. Wexford Health Sources*, 635 Fed. Appx. 16, 19 (3d Cir. 2015). either circumstance applies here. "When enacting 42 U.S.C. § 1983, Congress did not override Pennsylvania's immunity from suit," and "Pennsylvania has expressly withheld its consent to be sued." *Id.* (citing *Quern v. Jordan*, 440 U.S. 332, 340-45 (1979) and 42 Pa. Cons. Stat. Ann. § 8521(b)). Accordingly, the DOC and OBLO remain immune from Plaintiff's civil rights claims. *See, e.g., Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 310 (3d Cir. 2020) (holding that the DOC is immune from claims for retrospective relief under the Eleventh Amendment); *Lavia v. Pa. Dep't of Corr.*, 224 F.3d 190, 195 (3d Cir. 2000) (recognizing that Eleventh Amendment immunity applies to parts of the executive department of the Commonwealth); *Malcomb v. Beaver Cnty. Penn. (Prothonotary)*, 616 F. App'x 44, 45 (3d Cir. 2015) ("The Department of Connections . . . and the Attorney General's Office are immune from [Defendant's] § 1983 claims under the Eleventh Amendment."). Further, the DOC and OBLO are entitled to Eleventh Amendment immunity from suit because neither is "[a] 'person(s)' within the use of that term in . . . § 1983 and hence [they are] not subject to suit under that section of the Civil Rights Act." *Curtis v. Everette*, 489 F.2d 516, 521 (3d Cir. 1973). Plaintiff's § 1983 claims against the DOC and OBLO should be dismissed with prejudice.

4. Plaintiff's Title VII Claims Fail as a Matter of Law

a. Non-Employer Liability

To state a Title VII claim, Plaintiff "must allege an employment relationship with the defendants,"

Covington v. Int'l Ass'n of Approved Basketball Offs., 710 F.3d 114, 119 (3d Cir. 2013), as it is well settled that "Title VII prohibits unlawful employment practices by employers." *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002) (emphasis added). No Defendant except the DOC is alleged to have employed Plaintiff, and Plaintiff acknowledges that his employment with the DOC ended in 2014. A Title VII claim against any individual Defendant in this action also fails as a matter of law because "Title VII does not provide for individual liability." *Newsome v. Admin. Off of the Cts. of the State of New Jersey*, 51 Fed. Appx. 76, 79 (3d Cir. 2002); *see also Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996). The only viable Defendant to Plaintiff's Title VII claim is the DOC and, as discussed below, the claim against it is barred by *res judicata*.

b. Plaintiff's Title VII Claim Against the DOC Is Barred by Res Judicata

Plaintiff alleges that after his reinstatement, the DOC continued to retaliate against him and subject him to a hostile work environment in violation of Title VII until he was forced to retire in 2014. While the DOC does not dispute that it is Plaintiff's former employer, it argues that his Title VII claims should be dismissed on the grounds of res judicata. *See* DOC Br. (ECF No. 81).

Res judicata, or claim preclusion, is a doctrine which "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy and . . . promot[es] judicial economy by preventing needless litigation." *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008) (alteration in original)

(citation omitted). "A party seeking to invoke *res judicata* must establish three elements: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *Est. of Roman v. City of Newark*, 914 F.3d 789,804 (3d Cir. 2019) (quoting *Duhaney v. Att'y Gen.*, 621 F.3d 340, 347 (3d Cir. 2010)). When evaluating these elements, the Court of Appeals for the Third Circuit does "not apply this conceptual test mechanically," instead it focuses "on the central purpose of the doctrine, to require a plaintiff to present all claims arising out [of] the same occurrence in a single suit." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 260 (3d Cir. 2010) (alteration in original) (quoting *Churchill v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir. 1999)). "In short, the focus is on facts rather than legal theories." *Davis v. Wells Fargo*, 824 F.3d 333, 342 (3d Cir. 2016).

Both parties reference Plaintiff's prior litigation in their respective filings. *See* SAC (ECF No. 73) at 22-23; DOC Br. (ECF No. 81) at 10-12. The relevant dockets confirm that Plaintiff prosecuted the following Title VII claims against the DOC after his reinstatement:

- Plaintiff's 2015 pro se complaint against the DOC and his union included § 1983 and Title VII claims against both defendants. The District Court dismissed the complaint with prejudice on defendants' motion. *See Kissell v. Commonwealth of Pa. Dep't of Corr.*, 2015 WL 11070890 (W.D. Pa. 2015) ("*Kissell I*").
- Plaintiff appealed *Kissell I*, which the Third Circuit affirmed in part, vacated in part, and remanded for further proceedings. *See Kissell*

v. Dep't of Corr., 634 Fed. Appx. 876 (3d Cir. 2015).

- On remand, Plaintiff filed an amended complaint reasserting his § 1983 claim and his Title VII claim, which alleged that DOC personnel retaliated against him for his continued reporting of sexual harassment. The defendants again moved to dismiss these claims. *See Kissell v. Commonwealth of Pa. Dep't of Corr.*, 2016 WL 1271080 (W.D. Pa. 2016) ("*Kissell II*"). The District Court adopted the Magistrate Judge's recommendation to grant the DOC's motion. *See Kissell v. Commonwealth of Pa. Dep't of Corr.*, No. 3:15-CV-58-KRG-KAP, 2016 WL 1237821, at* 1 (W.D. Pa. Mar. 21, 2016).
- Plaintiff appealed *Kissell II* and the Third Circuit affirmed the District Court's dismissal. *See Kissell v. Dep't of Corr.*, 670 Fed. Appx. 766 (3d Cir. 2016) (explaining that Kissell "did not sufficiently allege the second and third elements of retaliation," and that he "also failed to plead facts sufficient to allege discrimination").

In 2018, Plaintiff commenced another action against the DOC alleging Title VII retaliation due to his reporting sexual misconduct. The DOC moved to dismiss on the grounds of *res judicata* arguing that, *inter alia, Kissell II* involved the same claim, *i.e.* that the DOC, "through its employees and supervisors . . . began harassing the Plaintiff and subjecting him to a hostile work environment," and that "[the DOC's] retaliatory conduct continued until they in essence forced the Plaintiff to retire" in 2014. *Kissell v. Pa.*

Dep't of Corr., No. CY 18- 1409, 2019 WL 4058704, at *1 (W.D. Pa. Aug. 27, 2019) (internal quotation marks omitted) ("*Kissell III*"). The District Court agreed, granted the DOC's motion, and dismissed Plaintiff's complaint with prejudice. *See id.* Plaintiff once again appealed, and the Third Circuit affirmed the dismissal, holding that:

> *Kissell* [*III*] checks all of the boxes for application of the claim-preclusion strand of res judicata under federal law: (1) a judgment on the merits was entered in *Kissell* [*II*]; (2) *Kissell* [*II*] and *Kissell* [*III*] involve the same set of parties (Kissell and the DOC); and (3) the claims raised in *Kissell* [*III*] inarguably are the same as those raised in *Kissell* [*II*].

Kissell v. Pa. Dep't. of Corr., 808 Fed. Appx. 58, 59 (3d Cir. 2020) (citations omitted). Plaintiff's Title VII claims in *Kissell III* were based on allegations of "retaliatory conduct" that subjected Plaintiff to a "hostile work environment" until he was "in essence forced . . . to retire" and were appropriately barred by res judicata. *Kissell*, 2019 WL 4058704 at *2. These were substantially the same allegations that Plaintiff raised in *Kissell II*, and they are substantially the same allegations raised in this action. As was the case in *Kissell III*, Plaintiffs Title VII claim in this case checks all the boxes for application of the claim-preclusion strand of *res judicata* and should be dismissed with prejudice.

5. In Addition to Being Unsupported by Factual Allegations, All Remaining State Law Claims are Barred by the Statute of Limitations

To the extent that Plaintiff asserts state law claims for intentional infliction of emotional distress ("IIED"), negligence, breach of contract, civil conspiracy, or fraud, such claims are also barred by Pennsylvania's applicable statute of limitations. *See* 42 Pa. Cons. Stat. § 5524 (two-year statute of limitations for actions sounding in tort); *see also* 42 Pa. Cons. Stat. Ann. § 5525 (four-year statute of limitations for actions sounding in contract). Under Pennsylvania law, "a cause of action accrues, and thus the applicable limitations period begins to run, when an injury is inflicted." *Wilson v. El-Daief*, 964 A.2d 354, 361 (2009). Because the final injury Plaintiff allegedly suffered was his forced retirement from the DOC, his claims accrued, at the latest, in 2014. Similarly, the statute of limitations for a claim of unpaid wages or liquidated damages under the WPCL is three years from the date such wages were due and payable. *See* 43 Pa. Stat. Ann. § 260.9a(g). And "[i]t is well-established that the 'wages or compensation' at issue must have been 'earned,' or vested, at the time the employee's separation with the employer occurred." *Mentecky v. Chagrin Land, L.P.*, No. CV 22-206, 2023 WL 5530305, at *6 (W.D. Pa. Aug. 28, 2023) (citations omitted). Therefore, Plaintiff's state law claims are barred by the statute of limitations based on the face of the SAC, and as set forth above, Pennsylvania's discovery rule does not provide a basis to toll the claims. *See supra* Section II.C.2.

6. Further Leave to Amend Should be Denied

The Third Circuit has held that in civil rights cases, "a district court must permit a curative amendment unless such an amendment would be inequitable or futile." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008). Amendment is futile where it cannot withstand a renewed motion to dismiss. *See Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000).

Any further amendment in this case would be futile. Plaintiff's claims fail on multiple grounds that cannot be cured by amendment, including expiration of the statute of limitations, immunity, and *res judicata*. In addition, Plaintiff has already received two opportunities to amend after being placed on notice of his pleading deficiencies. *See* ECF Nos. 41, 44, 47, 70. Finally, the Report and Recommendation on Defendants' previous motions to dismiss cautioned that "his failure to submit a second amended complaint that is simple, concise, and direct will be considered a failure to comply with an Order of Court and may lead to the dismissal . . . with prejudice." Fr. R&R (ECF No. 70) at 8. Plaintiff's SAC again fails to satisfy the requirements of Rule 8(a) or to allege facts to support the elements of any claim. It is, therefore, respectfully recommended that the Court dismiss Plaintiff's SAC with prejudice.

D. Conclusion

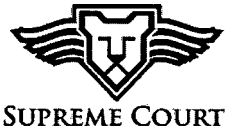
For the foregoing reasons, it is respectfully recommended that the Court grant Defendants' motions to dismiss, (ECF Nos. 77, 80, 84), and dismiss the SAC with prejudice as to all Defendants.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72, the parties have until June 28, 2024 to file objections to this report and recommendation. Unless otherwise ordered by the District Judge, responses to objections are due fourteen days after the service of the objections. Failure to file timely objections will constitute a waiver of any appellate rights. *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Respectfully submitted,

/s/Richard A. Lanzillo
Chief United States Magistrate Judge

Dated: June 14, 2024



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