No. _____

In The Supreme Court of the United States

LEIGH ANN HARRIS,

Petitioner,

v.

THE VANGUARD GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted *Title VII of the Civil Rights Act of 1964, as amended*, ("Title VII") to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. Thirty-Eight years later, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), this Court, in rendering a simple, yet impactful decision, recognizing the grave risk to society and our justice system of obstructing an employment discrimination victim from exercising his rights as a result of an inherent information disadvantage employment discrimination plaintiffs suffer at the pleading stage, held that "an employment discrimination plaintiff need not plead a prima facie case of discrimination . . . to survive [a] motion to dismiss," 534 U.S. at 515, because "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement." 534 U.S. at 510.

Whether the lower court in this case erroneously applied a heightened *evidentiary* standard at the *pleading* stage to Petitioner's claims, a Title VII employment discrimination victim, imposing a significantly higher pleading burden than contemplated by the intent and purpose of Rule 8's *notice* pleading requirement sufficient to survive a Fed.R.Civ.P. 12(b)(6) motion to dismiss, misinterpreting this Court's holdings in *Swierkiewicz, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S.

QUESTION PRESENTED – Continued

662 (2009), resulting in the misapplication of a fragmented and inconsistent pleading standard throughout the majority of district and circuit courts in the United States.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

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OPINION AND JUDGMENT BELOW

At the District Court, a magistrate judge first made findings of fact and issued a recommendation to the District Court, which is reported unofficially at 2015 WL 9685565 and reprinted in Petitioner's Appendix at App. 10-23. The District Court's opinion, unofficially reported at 2016 WL 110600 is reprinted in the Appendix at App. 3-9. The Court of Appeals' unpublished per curiam opinion is unofficially reported at 2016 WL 4119844 and reprinted at App. 1-2.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1446(b). The Court of Appeals issued its judgment on August 3, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The statutory provisions and governing rules involved include Title VII of the Civil Rights Act of 1964 (now codified at 42 U.S.C. § 2000e-2(a)) and various Federal Rules of Civil Procedure, respectively. As the text of the foregoing is lengthy, key provisions are reprinted in Petitioner's Appendix, attached hereto at App. 24-26.

STATEMENT OF THE CASE

A. Procedural Context

Acting pro se, Petitioner Leigh Ann Harris ("Harris" or "Petitioner") initiated this religious discrimination action against The Vanguard Group, Inc. ("Vanguard" or "Respondent"), in North Carolina state court on July 24, 2015 by filing a 26-page complaint against Respondent. Upon Respondent's duly filed Notice of Removal, the case was removed to the United States District Court for the Western District of North Carolina ("District Court"). Vanguard then moved to dismiss Harris' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (App. at 10).

The matter was referred to United States Magistrate Judge David S. Cayer ("Magistrate Cayer") who issued a "Memorandum and Recommendation and Order" pursuant to 28 U.S.C. § 636(b)(1) on November 6, 2015. (App. at 10). Harris timely objected to Magistrate Cayer's findings, specifically, to his findings "supporting his recommendation that concern her failure to plausibly assert that she suffered an adverse employment action and that she was treated differently from other employees who held other religious beliefs." (App. at 4).

United States District Court Judge Max O. Cogburn Jr. conducted a "careful" – but not necessarily *de novo* – review of Magistrate Cayer's findings to evaluate the pending motion to dismiss. (App. at 16). With limited explanation, the District Court concluded that Harris' claims should be dismissed. Harris timely filed

a Notice of Appeal. (App. at 2). The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") found "no reversible error" (albeit, without specifying the standard of review applied) with the District Court's order "accepting the recommendation of the magistrate judge and denying relief" in Harris' claims of religious discrimination under Title VII. (App. at 2). Accordingly, it affirmed the District Court's Order of Dismissal. (App. at 2).

B. Substance of Petitioner's Allegations

Magistrate Cayer stated on the record that he accepted "the allegations of [Harris'] Complaint as true", however, his own choice of language, employing a plain reading, demonstrates that Magistrate Cayer was actually evaluating Petitioner's credibility *viz-a-viz*, the facts presented. Such an evaluation necessarily lends itself to an evidentiary analysis, falling outside the purview of Magistrate Cayer's responsibility, in direct contravention of *Erickson v. Pardus*, 551 U.S. 89, 92-94 (2007), and is a clear error of law. This can be illustrated by a simple exercise, crossing out certain phrases which indicate the weighing of evidence as is typically performed when conducting an evidentiary analysis.

> Accepting the allegations of the *pro se* Complaint [] as true, [Harris] was a certified financial planner employed by [Vanguard] in Charlotte, North Carolina. Beginning in January 2014, [Harris] promoted the creation of an employer resource group ("ERG") called Vanguard Interfaith Network Experience

("VINE") as an interfaith group for employees to meet and discuss their faith. She received permission from Beth Orford, a Senior Manager and Principal, to gauge interest in the ERG. On two occasions, [Harris] met with representatives of various faiths in the Charlotte office. [Harris] contacted employees in another office and was subsequently asked by Ms. Orford to limit her efforts to the Charlotte office and follow the process advocated by Vanguard's Office of Diversity and Inclusion for the creation of ERGs. On April 23, 2014, Brian Fishbone with the Office of Diversity and Inclusion informed [Harris] that all new [ERGs] would be on hold for 2014.

Harris alleges that she was promoted to work with clients having ten million dollar plus portfolios in late February or early March 2014. In April 2014, ~~[Harris] alleges that~~ her manager communicated to her that she "had not set [Harris] up in job [sic] to be successful, [and that instead Harris'] manager set her up for a client failure in May 2014." At Harris' mid-year review on July 11, 2014 her manager advised that she was "tracking further development needed."

~~[Harris] alleges that~~ she received positive comments from co-workers in July 2014. In August 2014, Plaintiff was away from work under the Family Medical Leave Act ("FMLA"). ~~[Harris] believes that~~ this FMLA leave was held against her. Her year-end performance review noted "you responded to the feedback at midyear and upon your return in

September began executing on your plan." [Harris'] year-end review was scheduled for December 8, 2014. [Harris'] manager advised her in advance that she was rated "Further Development Needed." ~~[Harris] alleges that~~ this rating precluded her from receiving a merit increase or a year-end bonus of between $15,000 to $24,000. In response to this review, [Harris] drafted a five page rebuttal outlining her disagreements with her manager's statements.

On January 13, 2015, [Harris] filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 based upon her Christian religion and for retaliation. [Harris] received her right to sue letter from the EEOC on May 5, 2015.

[Harris] resigned her employment on February 6, 2015 as a result of her treatment by ~~Defendant and her belief~~ that Defendant would "continue to be hostile to religious faith if [Harris] continued to work in [that] environment."

~~[Harris'] Complaint alleges~~ one cause of action for "Violation of Title VII under the Civil Rights Act of 1964 as amended Religious Retaliation." ~~[Harris] alleges that~~ Vanguard discriminated against her for promoting a faith based group, for her Christian faith, and for voicing her opposition to Vanguard's ~~alleged~~ boycott of the restaurant chain Chick-fil-A. ~~[Harris] alleges that~~ Vanguard retaliated

> against her by giving her a "Further Development Needed" review and causing her to be ineligible to receive a year-end bonus and merit increase in salary.

(internal citations and footnotes omitted).

Applying Fourth Circuit precedent, Magistrate Cayer continued:

> [Harris] does not allege that she was guaranteed an annual bonus or salary increase from Vanguard as part of her agreed upon compensation. [Harris'] allegations make clear that any bonus was ~~not for a specific amount, but only~~ in the potential range of $10,000-$24,000. ~~Furthermore, Plaintiff's use of the phrase "merit increase" indicates that any increase in her salary was not automatic and had to be earned.~~ Consequently, the Court finds that neither Vanguard's negative assessment of Plaintiff's performance nor its failure to award a discretionary bonus or merit increase rise to the level of adverse employment actions that support a claim of discrimination.
>
> The Court also finds that Vanguard's decision to delay the formation of new ERG's does not constitute a material alteration of the terms, conditions or benefits of Plaintiff's employment and is therefore not an adverse employment action.
>
> Plaintiff's Complaint is also devoid of any facts showing that similarly situated non-Christian employees of Vanguard received

> more favorable treatment. *Elhassan v. Proctor & Gamble Mfg. Co.*, No. 1:12cv1039, 2014 WL 1281231, at *4 (M.D.N.C. March 27, 2014). Plaintiff must do more than simply state that she was treated differently from her non-Christian co-workers. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. She does not identify ~~a single~~ non-Christian co-worker, by name, job title, ~~or even generically~~ who ~~she contends~~ was treated more favorably.
>
> Plaintiff's Complaint fails to meet the standards established by Fourth Circuit precedent for a religious discrimination claim. Consequently, the undersigned respectfully recommends that Defendant's Motion to Dismiss be granted with respect to her claim for religious discrimination.

The District Court accepted Magistrate Cayer's recommendations, explaining in pertinent part:

> In this case Judge Cayer properly concluded that plaintiff has not and apparently cannot allege that she suffered any recognized adverse employment action or that she was treated more harshly than other employees who did not share her religious views. As to the requirement of pleading a plausible adverse employment action, an allegation that a negative year-end performance appraisal that resulted in her not receiving a discretionary bonus is, as a matter of well settled law,

> insufficient to support a claim of employment discrimination.

(citations omitted) (App. at 5-6).

REASONS FOR GRANTING THE PETITION

A. In attempting to reconcile a perceived conflict in *pleading* standards, the majority of circuit courts have inappropriately borrowed and misapplied an *evidentiary* standard at the pleading stage, which imposes a substantially higher and incorrect burden on employment discrimination victims alleging violations of Title VII and other civil rights laws.

In dismissing Petitioner's action without leave to amend, the District Court relied on *Elhassan v. Proctor & Gamble Mfg. Co.*, 2014 WL 1291231, at *4 (M.D.N.C. March 27, 2014) (*see* App. at 8). As explained below, *Elhassan* typifies lower courts' confusion over the appropriate pleading standard. As the *Elhassan* court stated in pertinent part:

> Plaintiff also makes two claims of Title VII disparate treatment on the basis of religion and national origin. Plaintiff relies on the inferential approach to disparate treatment claims outlined in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The elements of such a claim are: (1) membership in a protected class; (2) satisfactory job performance; (3) an

adverse employment action; and (4) different treatment from similarly situated employees outside the protected class. *Coleman v. Md. Court of Appeals*, 626 F.3d 187 (4th Cir.2010), aff'd, ___ U.S. ___, 132 S.Ct. 1327, 182 L.Ed.2d 296 (2012). Defendant's memorandum in support of its motion to dismiss focuses on the final element. (Def.'s Mem. (Doc. 9) at 6-7.)

At the 12(b)(6) stage, a Title VII plaintiff is not required to plead facts sufficient to prove each element of her case, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), but she is "required to allege facts that support a claim for relief." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764-65 (4th Cir.2003). These "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and the complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

A claim of disparate treatment necessarily requires the court to compare Plaintiff's treatment with that of others. Without sufficient facts allowing this comparison, Plaintiff's bare assertion that "[o]ther similarly-situated employees of different faiths were treated more favorably than [Plaintiff]," (Am.Compl.(Doc.17) ¶ 50), is nothing more than a "[t]hreadbare recital[]" of an element of the cause of action, which is not enough to

> survive a motion to dismiss. *Iqbal*, 556 U.S. at 678.

(citations in original).

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, (2002), this Court held that "an employment discrimination plaintiff need not plead a prima facie case of discrimination . . . to survive [a] motion to dismiss," 534 U.S. at 515, because "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement." 534 U.S. at 510. Further, it would not be "appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case." 534 U.S. at 511.

While some circuits have concluded that *Swierkiewicz* either does not control or has been overruled by *Iqbal*, other circuits disagree. *Compare, e.g.*, *McCone v. Pitney Bowes, Inc.*, 582 Fed.Appx. 798 (11th Cir. 2014) and *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (concluding that *Iqbal* overruled *Swierkiewicz*) with *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 54 (1st Cir. 2013) (finding that *Swierkiewicz* still controls the pleading standard for Title VII plaintiffs, despite *Iqbal*).[1] Another example is

[1] District Courts, too, have concluded that *Iqbal* overruled *Swierkiewicz*. *See, e.g.*, *Hughes v. Colo. Dep't of Corr.*, 594 F. Supp.

McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin., 780 F.3d 582 (4th Cir. 2015), in which Circuit Court Judge Wynn filed a cogent dissent, noting that courts and commentators continue to struggle with applying the appropriate pleading standards in cases such as Petitioner's. *Id.* at 590 n.1 (citing *McCauley v. City of Chicago*, 671 F.3d 611, 623 (7th Cir. 2011) (Hamilton, J., dissenting) ("*Iqbal* . . . created tension with *Swierkiewicz* by endorsing its holding while simultaneously appearing to require the same sort of fact-specific pleading of discriminatory intent that the *Swierkiewicz* Court rejected."); *Starr v. Baca*, 652 F.3d 1202, 1215 (9th Cir. 2011) ("The juxtaposition of *Swierkiewicz* . . . on the one hand, and . . . *Iqbal*, on the other, is perplexing"); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 31 (2010) (noting that the tension between *Iqbal* and *Swierkiewicz* has "caus[ed] confusion and disarray among judges and lawyers").

1. The perceived conflict in pleading standards is illusory.

The perceived conflict in pleading standards is illusory, with several interpretive guidelines contributing to the confusion. Chief among them is the rule that "lower court judges are not to deem a Supreme Court decision overruled even if it is plainly inconsistent with a subsequent decision." *See Swanson v.*

2d 1226, 1240 (D. Colo. 2009); *Harley v. Paulson*, No. 07-3559 (JBS), 2008 WL 5189931, at *3 (D.N.J. Dec. 9, 2008).

Citibank, 614 F.3d 400, 410 (7th Cir. 2010) (Posner, J., dissenting) (citing *State Oil Co. v. Khan*, 522 U.S. 3 (1997)). *See also* Suja A. Thomas, The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*, 14 Lewis & Clark L. Rev. 15, 35 (2010).

However, although courts are made up of human beings having personal experiences and motivations driving their interpretation, it does not appear unclear that the appropriate pleading standard is mandated by Rule 8(a)(2), which requires merely a "short and plain statement" of the claim. This Court, in *Hill v. McDonough*, 547 U.S. 573, 582 (2006), chose to highlight the concept that "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure and not, as a general rule, through case-by-case determinations of the federal courts.". On consideration of a 12(b)(6) motion to dismiss, all the well-pleaded allegations of the complaint must be accepted as true. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). The factual allegations in Plaintiff's Complaint need not do more than "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff need only "make a 'showing' . . . of an entitlement to relief" that is something more than "a blanket assertion." *Smith v. Sullivan*, 2008 WL 482469, at *1 (D. Del. Feb. 19, 2008) quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

This standard does not impose a probability requirement at the pleading stage, but simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.

Twombly, 550 U.S. at 556. To be clear, *Twombly* does not require a "heightened fact pleading of specifics," but only "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "When read in the light most favorable to the plaintiff, a pleading that provides sufficient facts to "allow [] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" meets the required level of "facial plausibility." *Iqbal*, 556 U.S. 662. (2009). Nothing in *Twombly, Iqbal*, or *Fowler* altered the "fundamental underpinnings" of the Rule 12(b)(6) standard of review:

> Federal Rule of Civil Procedure 8 still requires only a short and plain statement of the claim showing that the pleader is entitled to relief and need not contain detailed factual allegations. Further, the court must accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. Finally, the court must determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Whambush v. City of Philadelphia, 747 F. Supp. 2d 505, 512 (E.D. Pa. 2010) (citing *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008); *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006); and *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

The Third Circuit has clearly stated that while the formulaic recitation of the elements of a cause of action

is not sufficient, allegations of fact sufficient to raise "a reasonable expectation" that discovery will reveal necessary elements of the claims, are all that is required to defeat a Motion to Dismiss at the pleadings stage. *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). *Compare McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 591(4th Cir. 2015) (Wynn, J., dissenting) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)) ("Rule 8(a)(2) sets forth a 'liberal pleading standard[],' one which does not contemplate the pleading of 'specific facts.'").

2. The *McDonnell Douglas* burden-shifting framework is irrelevant at the pleading stage because it is an *evidentiary* standard, *not* a *pleading* requirement.

In Petitioner's case, the District Court's analysis is flawed in its premise, making plain that – in analyzing the adequacy of her complaint for purposes of a motion to dismiss at the pleading stage – the *elements of the prima facie* case from the *evidentiary* standard in *McDonnell Douglas* were critical, if not dispositive:

> To state a plausible claim of discrimination, a plaintiff is required to allege facts to satisfy the elements of a cause of action created by that statute.
>
> To assert a claim of religious discrimination, Plaintiff must allege that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was performing her job in a satisfactory manner; and

> (4) similarly situated employees outside of the protected class received more favorable treatment.

(App. at 16) (citations omitted).

In *McDonnell Douglas*, this Court articulated the burden-shifting analysis used in Title VII discrimination cases. *McDonnell Douglas* involved a black civil rights activist, Percy Green, who believed his layoff from his mechanic and laboratory technician position was racially motivated. In response to his dismissal, Mr. Green commenced a series of protests that involved disruptive and illegal activity against his employer, McDonnell Douglas. As a black man, Mr. Green was within a protected class specified in Title VII. *See* 42 U.S.C. § 2000e-2. *McDonnell Douglas* articulated a three-stage analysis to balance employment discrimination evidence not a pleading. *McDonnell Douglas*, 411 U.S. at 802.

First, the plaintiff must establish a *prima facie* case of discrimination. *Id.* This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* If a *prima facie* case is established, the burden then shifts to the defendant who must produce evidence of a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* at 802-04.

Upon satisfaction of the defendant's burden, the burden shifts back to the plaintiff, whereby she is given an opportunity to rebut those legitimate, nondiscriminatory reasons and argue that they are mere pretext. *Id.* at 805. Evidence of such pretext may include a showing that a similarly situated individual, outside the plaintiff's protected class, was treated more favorably. *See id.*

Curiously, despite agreement among the courts that *McDonnell Douglas* articulated an *evidentiary* standard, many circuits, including the Fourth, now analyze the adequacy of a Title VII plaintiff's factual allegations with reference to *McDonnell Douglas*. *E.g.*, *Stone v. Louisiana Dep't of Revenue*, 590 Fed.Appx. 332 (5th Cir. 2014); *Mitchell v. Crescent River Port Pilots Ass'n*, 265 Fed.Appx. 363, 370 (5th Cir. 2008) (quoting *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 346 (4th Cir. 2006)). However, such an analysis is improper and has far-reaching and negative implications on our society affecting equal access to our justice system.

3. As a result of confusion among and within the circuits, Title VII and countless other civil rights plaintiffs now face an impractical and unintended burden in stating a claim, which is inconsistent with the standard of notice pleading under Rule 8.

There are three major problems with using the *McDonnell Douglas* framework as a proxy for plausibility at the pleading stage. First, the primary purpose

of the burden shifting framework is to induce the defendant to articulate a "legitimate non-discriminatory reason" for its actions, in recognition of the fact that employment discrimination plaintiffs are typically reliant on circumstantial evidence.[2] Second, it encourages the kind of fact-finding and evidentiary analysis that is necessary and appropriate for the summary judgment stage.[3] Third, and perhaps most importantly, the articulated framework is fundamentally inconsistent with the standard of notice pleading that Rule 8 requires.

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[2] *See, e.g.*, *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572, 580 (1st Cir. 1999), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) ("Because discrimination tends more and more to operate in subtle ways, [therefore] direct evidence is relatively rare[.]"); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) ("[T]he court must be alert to the fact that '[e]mployers are rarely so cooperative as to include a notation in the personnel file'. . . ." (quoting *Thornbrough v. Columbus & Greenville R.R. Co*., 760 F.2d 633, 638 (5th Cir. 1985))); *Dister v. Cont'l Group, Inc*., 859 F.2d 1108, 1112 (2d Cir. 1988) (In reality "direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it.").

[3] Employment discrimination cases are inherently fact-specific. Single acts that may not be cognizable as adverse actions on their own may, over time, cumulatively amount to an unlawful employment practice where they create a hostile work environment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002); *see also Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993). Marla Swartz, The Replacement Dilemma: An Argument for Eliminating a Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims, 101 Mich. L. Rev. 1338, 1349 (2003) ("[E]mployment discrimination suits are by their nature fact intensive.").

One influential treatise notes, " . . . all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity. . . . [T]his portion of Rule 8 indicates that a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved. . . ." Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1215 at 165-173 (3d ed. 2004). As *Erickson* underscored, "[s]pecific facts are not necessary" as a plaintiff "need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." 551 U.S. at 93.

Therefore, a complaint that alleges who, what, and when, as Petitioner has, will be consistent with Rule 8, regardless of any reference to or application of the evidentiary standard developed in *McDonnell Douglas*. *See Swanson v. Citibank, NA*, 614 F.3d 400, 405 (7th Cir. 2010) ("Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), when and how (in connection with her effort in early 2009 to obtain a home-equity loan").[4] *See Swierkiewicz*, at 511-12; *see also*

[4] By way of analogy, the Federal Circuit holds that, under Rule 9(b), identification of the "who, what, when, where and how" is sufficient to plead the defense of Inequitable Conduct in patent cases. *Exergen v. Wal-Mart Stores, Inc*., 575 F.3d 1312, 1318, 1330 (Fed. Cir. 2009).

Fritz v. Charter Twp. of Comstock, 592 F.3d 718, 723-24 (6th Cir. 2010); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 715 (9th Cir. 2009).).[5] In *Swanson*, the complaint was sufficient having met the Rule 8 pleading standard.

Under *Iqbal* and *Twombly*, a complaint survives a motion to dismiss if: (1) avoiding reliance on "labels and conclusions," it sets out facts sufficient to constitute a "short and plain statement of the claim," *Iqbal*, 556 U.S. at 677; and (2) taking into consideration the context of the legal claim asserted, meets a minimal "plausibility" standard. *Twombly*, 550 U.S. at 556; *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). Notice pleading is still the rule, and a complaint need not contain "detailed factual allegations." *Iqbal*, 556 U.S. at 678. As long as the complaint informs defendant of the "how, when, and where", it is sufficient to give defendant the requisite notice of the basis of a plaintiff's claims under both *Iqbal* and *Twombly* standards. *See Fowler*, 578 F.3d 203, 212.

As to the "plausibility" requirement, the Court made clear in *Iqbal* and *Twombly* that plausibility does not require any showing of probable or likely success.

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[5] The *Swanson* court reversed the dismissal of a civil rights complaint under Rule 8 and the Fair Housing Act, which prohibits businesses engaged in residential real estate transactions, including "[t]he making . . . of loans or providing other financial assistance . . . secured by residential real estate," from discriminating against any person on account of race. 42 U.S.C. § 3605(a), (b)(1)(B)).

On the contrary, a claim may proceed even if actual proof is "improbable" and ultimate recovery "unlikely". *Twombly*, 550 U.S. at 556; *Fowler*, 578 F.3d at 213. Furthermore, in determining whether a plaintiff's claim is plausible, the traditional principles favoring non-movants on motions to dismiss apply, in that all factual allegations, so long as not merely conclusory, must be taken as true and construed in plaintiff's favor. *Iqbal*, 129 S. Ct. at 1949-50; *Phillips*, 515 F.3d at 233. All reasonable inferences must also be drawn in plaintiff's favor. This was the rule before *Iqbal* and *Twombly*, and it is still the rule today. *See Phillips*, 515 F.3d at 231 (holding that the Supreme Court's plausibility standard did not "undermine [the] principle" that all reasonable inferences must be drawn in plaintiff's favor; *see also Iqbal*, 129 S. Ct. at 1949; *Revell v. Port Auth.*, 598 F.3d 128, 134 (3d Cir. 2010) ("a court confronted with a Rule 12(b)(6) motion . . . must draw all reasonable inferences in favor of the non-movant."); *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010).

Simply put, at the pleading stage, courts' proper focus should be on what a plaintiff actually *pleaded* and not on what a plaintiff is or might be able to *prove* at some subsequent stage of the litigation. *Fowler*, 578 F.3d at 213 (district court should not conduct an "evidentiary inquiry" at the motion to dismiss stage). Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim. *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999); *see also*

Twombly, 550 U.S. at 556, 570 (plaintiffs may rely on "discovery" [to] "reveal evidence", rejecting a "heightened fact pleading" requirement); *Wynder v. McMahon*, 360 F.3d 73, 78 (2d Cir. 2004) (noting that Rule 8's purpose is to "lower the entry barrier for federal plaintiffs," to facilitate resolution of cases on their merits . . .); *Krupski v. Crociere S.p.A.*, 130 S. Ct. 2485, 2494 (2010) (federal rules express a preference "for resolving disputes on their merits"). It is the defendant that bears the ultimate burden of showing that no claim has been stated. *See Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

B. With courts divided as to: (i) *what* constitutes an "adverse employment action"; and (ii) *who* makes the determination as to whether or not a plaintiff has suffered an "adverse employment action", *i.e.*, whether the determination is made by the court or alternatively if it is a triable issue of fact, reserved for the jury, requiring such information of a plaintiff at the pleading stage is impractical.

The Court need not address at this time any dispute in the lower courts as to what constitutes an "adverse employment action". What may be an "adverse employment action" to one plaintiff may not be to another. Such an inquiry is entirely contextual and requires an analysis of the facts and circumstances surrounding the action to determine whether or not it was in fact "adverse", *e.g.*, the motivation behind the

action and how the action compares to previous actions taken with respect to the plaintiff and plaintiff's comparators. Such an analysis should be performed only by the finder of fact upon the closing of the pleadings and after the parties have the opportunity to engage in discovery. *See Smith v. State of California*, 13-cv-01341-JD (N.D. Cal. Dec. 10, 2014), finding that requiring an applicant to fill out a new I-9 form on tight deadline was a fact question. *See also Stone v. Louisiana Dep't of Revenue*, 590 Fed.Appx. 332 (5th Cir. 2014) (taking away telecommuting privileges held to be an adverse action for a retaliation claim); *Lewis v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 3:12-cv-00406-JBA (D. Conn. Jan. 7, 2015) (delaying an employee's return to work following leave for surgery). *But cf. Morshed v. County of Lake*, No. 13-CV-521 YGR (N.D. Cal. May 1, 2014) and *Richardson v. New York State Office of Mental Health*, 6:11-cv-01007-GLS-ATB (N.D.N.Y Aug. 4, 2014) (Subjecting an employee to internal and criminal investigations).

As noted previously, at the pleading stage, due to the inherent information advantage defendants hold, it is impractical to require Title VII *plaintiffs* to plead with the degree of factual specificity that Magistrate Cayer expected, and the District Court and the Fourth Circuit affirmed, in order to simply survive a motion to dismiss. Ironically, on the one hand Magistrate Cayer notes that "Plaintiff's Complaint is also devoid of any facts showing that similarly situated non-Christian employees of Vanguard received more favorable treatment. *Elhassan v. Proctor & Gamble Mfg. Co.*, No.

1:12cv1039, 2014 WL 1281231, at *4 (M.D.N.C. March 27, 2014)" (App. at 5-6). However, on the other hand, Magistrate Cayer *himself* is performing the fact-finding analysis, taking it upon himself to conduct a *factual* inquiry into Petitioner's allegations, *i.e.*, which facts are present, which are not, why it is important to *him*, and whether certain *facts tend to* demonstrate "more favorable treatment" than others, also requiring further inquiry, ultimately making the determination that Petitioner had not suffered an "adverse employment action" based on the specific facts that she alleged.

Taking it one step further, the District Court erred in accepting Magistrate Cayer's credibility determination of Petitioner as well as Magistrate Cayer's factual conclusion and recommendation that "Plaintiff . . . apparently cannot allege that she suffered any 'recognized' adverse employment action" yet, it was only Magistrate Cayer himself who failed to recognize the defendants actions as "adverse", in a vacuum, without further inquiry, including permitting Petitioner to engage in discovery. *Id*. Finally, Magistrate Cayer's finding that "Petitioner's Complaint is also devoid of any 'facts showing' that similarly situated non-Christian employees of Vanguard received more favorable treatment", demonstrates that Magistrate Cayer's focus fell squarely on whether and to what extent Petitioner *showed*, not *pleaded*, facts regarding similarly situated employees. Such a focus clearly requires another factual interpretation.

Circuits have not even found agreement on the definition of "similarly situated". *Petition for Writ of Certiorari at 7-8, Watts v. City of Norman*, 536 U.S. 976 (2002) (No. 011299), 2002 WL 32134671. The First Circuit utilizes a "prudent person" standard. *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 76 (1st Cir. 2004). "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19, 58 USLW 2311, 57 Ed. Law Rep. 43. In the Second Circuit, the issue of determining whether a coworker is similarly situated to the plaintiff is generally a question of fact for the jury. *See, e.g.*, *Roa v. Mineta*, 51 Fed.Appx. 896, 899 (2d Cir. 2002) ("[W]hether two individuals are indeed similarly situated is ordinarily a question of fact for a jury. . . ."). The Sixth Circuit's test, as articulated in *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) requires that comparators be substantially similar in all respects. *See id*. The Tenth Circuit employs a similar standard. *See Magruder v. Runyon*, 844 F. Supp. 696, 702 (D. Kan. 1994), aff'd, 544 F.3d 787 (10th Cir. 1995). In the Seventh Circuit, applying an evidentiary standard, the fourth element of a *prima facie* case requires that a "similarly situated employee outside the protected class was treated more favorably by the employer." *Gordon v. United Airlines*, 246 F.3d 878, 886 (7th Cir. 2001). Irrespective of how a comparator is defined, and the Court need not address this issue at this time, Magistrate Cayer's requirement that Petitioner allege a specific

"comparator" is not practical at the pleading stage and an error as a matter of law.

This case presents an issue of fundamental national importance as it concerns both the vital process by which victims of discrimination may assert their human and civil rights as well as whether and to what extent victims of discrimination have equal access to our otherwise "blind" and impartial justice system. The resolution of this issue will almost certainly have effects that extend far beyond the parties to this case. The lower courts require clarification as to the applicable pleading standards in order to avoid the unfortunate, yet foreseeable consequence of requiring victims of discrimination to prove their cases, *as if* they were permitted to try their case, but without the legitimacy of a true factfinder, resulting in a process that summarily and prematurely disposes of a plaintiff's civil rights claim at the pleading stage. Without such clarification, this pattern is likely to persist, effectively repealing (*sub rosa*) Acts of Congress that were intentionally designed to protect such individuals' fundamental civil and human rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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2016 WL 4119844

Leigh Ann Harris, Plaintiff-Appellant,
v.
The Vanguard Group, Inc., Defendant-Appellee.

No. 16-1113
|
Submitted: July 29, 2016
|
Decided: August 3, 2016

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte, Max O. Cogburn, Jr., District Judge. (3:15-cv-00382-MOC-DSC)

Attorneys and Law Firms

Leigh Ann Harris, Appellant Pro Se. Shalanna Lee Pirtle, Stacy Kaplan Wood, PARKER, POE, ADAMS & BERNSTEIN, LLP, Charlotte, North Carolina, for Appellee.

Before NIEMEYER, MOTZ, and WYNN, Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Leigh Ann Harris appeals the district court's order accepting the recommendation of the magistrate judge and denying relief in her employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm. *Harris v. The Vanguard Group, Inc.*, No. 3:15-cv-00382-MOC-DSC, 2016 WL 110600 (W.D.N.C. Jan. 8, 2016). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

2016 WL 110600

Leigh Ann Harris, Plaintiff(s),
v.
The Vanguard Group, Inc., Defendant(s).

DOCKET NO. 3:15-cv-00382-MOC-DSC
|
Signed January 8, 2016

Attorneys and Law Firms

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ORDER OF DISMISSAL

Max O. Cogburn, Jr., United States District Judge

THIS MATTER is before the court on review of a Memorandum and Recommendation issued in this matter. In the Memorandum and Recommendation, the magistrate judge advised the parties of the right to file objections within 14 days, all in accordance with 28, United States Code, Section 636(b)(1)(c). Objections have been filed within the time allowed.

The *Federal Magistrates Act of 1979*, as amended, provides that "a district court shall make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir.1983). However, "when

objections to strictly legal issues are raised and no factual issues are challenged, *de novo* review of the record may be dispensed with." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir.1982). Similarly, *de novo* review is not required by the statute "when a party makes general or conclusory objections that do not direct the court to a specific error in the magistrate judge's proposed findings and recommendations." *Id.* Moreover, the statute does not on its face require any review at all of issues that are not the subject of an objection. *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Camby v. Davis*, 718 F.2d at 200. Nonetheless, a district judge is responsible for the final determination and outcome of the case, and accordingly the court has conducted a careful review of the magistrate judge's recommendation.

In particular, plaintiff objects to the magistrate judge's findings supporting his recommendation that concern her failure to plausibly assert that she suffered an adverse employment action and that she was treated differently from other employees who held other religious beliefs. To fully consider such objection, the court must first consider precisely what Rule 12(b)(6), Federal Rules of Civil Procedure, provides.

In determining whether a claim can survive a motion under Rule 12(b)(6), the Supreme Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) that the "no set of facts" standard only describes the "breadth of opportunity to prove what an adequate complaint claims, not the minimum adequate pleading to govern a complaint's survival." *Id.* at 563. The Court specifically rejected use of the "no set of facts" standard

because such standard would improperly allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 561 (alteration in original). Post *Twombly*, to survive a Rule 12(b)(6) motion to dismiss, a claimant must allege facts in his complaint that "raise a right to relief above the speculative level." *Id.*, at 555.

> [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . .

Id. (second alteration in original; citation omitted). Further, a complaint will not survive Rule 12(b)(6) review where it contains "naked assertion[s] devoid of further factual enhancement." *Id.*, at 557. Instead, a claimant must plead sufficient facts to state a claim for relief that is "*plausible* on its face." *Id.* at 570 (emphasis added).

Post-*Twombly*, the Court revisited the Rule 12(b)(6) pleading standard in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court determined that Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.* at 678. The Court explained that, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Id.* (citing *Twombly, supra*; emphasis added). What is plausible is defined by the Court:

> [a] claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, a complaint falls short of the plausibility standard where a plaintiff pleads "facts that are 'merely consistent with' a defendant's liability. . . ." *Id.* While the court accepts *plausible* factual allegations made in a claim as true and considers those facts in the light most favorable to plaintiff in ruling on a motion to dismiss, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkt.'s Inc. v. J.D. Assoc.'s, LLP*, 213 F. 3d 175, 180 (4th Cir. 2000).

In sum, when ruling on a Rule 12(b)(6) motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*) (citations omitted). A complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.*, at 93 (alteration and internal quotation marks omitted). However, to survive a motion to dismiss, the complaint must "state [] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. Further, a plaintiff need not demonstrate that her

right to relief is probable or that alternative explanations are less likely; rather, she must merely advance her claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. If her explanation is plausible, her complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

In this case, Judge Cayer has properly concluded that plaintiff has not and apparently cannot allege that she suffered any recognized adverse employment action or that she was treated more harshly than other employees who did not share her religious views. As to the requirement of pleading a plausible adverse employment action, an allegation that a negative year-end performance appraisal that resulted in her not receiving a discretionary bonus is, as a matter of well settled law, insufficient to support a claim of employment discrimination. *Scott v. Teachers Ins. & Annuity Ass'n of Am.*, No. 3:12-CV-00697-FDW, 2013 WL 2948315, at *6 (W.D.N.C. June 14, 2013) *aff'd sub nom.*, *Scott v. TIAA-CREF*, 542 Fed. Appx. 294 (4th Cir. 2013) (dismissing Title VII retaliation claim and finding poor performance review was not adverse action despite impact on bonus award). As to the requirement of pleading that she was treated differently than a person who did not share her beliefs, plaintiff's obligation was to plead some plausible facts that, if later proven, could

support a jury in finding that similarly situated, non-Christian employees of defendant received better treatment. *Elhassan v. Proctor & Gamble Mfg. Co.*, No. 1:12cv1039, 2014 WL 1281231, at *4 (M.D.N.C. March 27, 2014). Plaintiff's argument that she has no way to know that because she lacks access to defendant's employment database misses the point: to be plausible, an allegation that she was treated differently based on her religious beliefs must be based on something more than mere speculation. Put another way, before a party can haul another party into court on serious charges of employment discrimination, the plaintiff must be able to point to the information which informs her belief that she was discriminated against. She cannot just say she believes she was discriminated against and then go on a fishing expedition through her employer's files in an attempt to find a comparator. At its core, the term discrimination means that a person was treated differently than another similarly situated person based on a protected characteristic or activity. To require otherwise would be to put defendant to task of defending against an unknown. Mere speculation is not sufficient to state a cognizable claim for employment discrimination.

Finally, as to plaintiff's claim of retaliation, Judge Cayer has also correctly analyzed that claim under prevailing law, to wit, *University of Texas Southwestern Medical Center v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517 (2013). The only "protected activity" plaintiff engaged in was filing a charge of discrimination with the EEOC, an activity which took place well after the alleged acts

of discrimination occurred. The court has also considered plaintiff's request to amend her pleadings to allege "retaliation" if the court finds her allegations of "religious retaliation" insufficient. Plaintiff has not, however, alleged any additional facts that inform or support such amendment and that could conceivably make such a claim rise above the possibility of misconduct to the plausibility now required under Rule 12.

After such careful review, the court determines that the recommendation of the magistrate judge is fully consistent with and supported by current law. Further, the factual background and recitation of issues is supported by the applicable pleadings. Based on such determinations, the court will fully affirm the Memorandum and Recommendation and grant relief in accordance therewith.

ORDER

IT IS, THEREFORE, ORDERED that the plaintiff's Objections (# 13) are **OVERRULED**, Judge Cayer's Memorandum and Recommendation (# 12) is **AFFIRMED**, defendant's Motion to Dismiss (# 3) is **GRANTED**, and this action is **DISMISSED**.

2015 WL 9685565

Leigh Ann Harris, Plaintiff,
v.
The Vanguard Group, Inc., Defendant.

CIVIL ACTION NO. 3:15-CV-00382-MOC-DSC
|
Signed November 06, 2015

Attorneys and Law Firms

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MEMORANDUM AND RECOMMENDATION AND ORDER

David S. Cayer, United States Magistrate Judge

THIS MATTER is before the Court on "Defendant's Motion to Dismiss Plaintiff's Complaint," Doc. 3, and the parties' associated briefs and exhibits, Docs. 4, 9, 10 and 11.

This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1), and this Motion is now ripe for consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendant's Motion to Dismiss be *granted*, as discussed below.

I. *PROCEDURAL AND FACTUAL BACKGROUND*

Accepting the allegations of the *pro se* Complaint, Doc. 1, Ex. 1, as true, Plaintiff Leigh Ann Harris ("Plaintiff") was a certified financial planner employed by Defendant The Vanguard Group, Inc. ("Defendant") in Charlotte, North Carolina. Beginning in January 2014, Plaintiff promoted the creation of an employer resource group ("ERG") called Vanguard Interfaith Network Experience ("VINE") as an interfaith group for employees to meet and discuss their faith. She received permission from Beth Orford, a Senior Manager and Principal, to gauge interest in the ERG. On two occasions, Plaintiff met with representatives of various faiths in the Charlotte office. Plaintiff contacted employees in another office and was subsequently asked by Ms. Orford to limit her efforts to the Charlotte office and follow the process advocated by Vanguard's Office of Diversity and Inclusion for the creation of ERGs. On April 23, 2014, Brian Fishbone with the Office of Diversity and Inclusion informed Plaintiff that "all new [ERGs] would be on hold for 2014." *Id.* at 8.

Plaintiff alleges that she was promoted to work with clients having ten million dollar plus portfolios in late February or early March 2014. In April 2014, Plaintiff alleges that her manager communicated to her that she "had not set Plaintiff up in job to be successful, Plaintiff's manager set her up for a client failure in May 2014." At Plaintiff's mid-year review on July 11, 2014 her manager advised that she was "tracking further development needed." *Id.* at 10.

Plaintiff alleges that she received positive comments from co-workers in July 2014. In August 2014, Plaintiff was away from work under the Family Medical Leave Act ("FMLA"). She believes that this FMLA leave was held against her. Her year-end performance review noted "you responded to the feedback at mid-year and upon your return in September began executing on your plan." *Id.* at 10-11. Plaintiff's year-end review was scheduled for December 8, 2014. Plaintiff's manager advised her in advance that she was rated "Further Development Needed." Plaintiff alleges that this rating precluded her from receiving a merit increase or a year-end bonus of between $15,000 to $24,000. In response to this review, Plaintiff drafted a five page rebuttal outlining her disagreements with her manager's statements.

On January 13, 2015, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 based upon her Christian religion and for retaliation. Plaintiff received her right to sue letter from the EEOC on May 5, 2015.[1]

Plaintiff resigned her employment on February 6, 2015 as a result of her treatment by Defendant and her belief that Defendant would "continue to be hostile to religious faith if Plaintiff continued to work in [that] environment." *Id.* at 13.

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[1] Plaintiff did not attach her EEOC charge or right to sue letter to her Complaint.

Plaintiff's Complaint alleges one cause of action for "Violation of Title VII under the Civil Rights Act of 1964 as amended Religious Retaliation." *Id.* at 12. Plaintiff alleges that Vanguard discriminated against her for promoting a faith based group, for her Christian faith, and for voicing her opposition to Vanguard's alleged boycott of the restaurant chain Chick-fil-A. She alleges that Vanguard retaliated against her by giving her a "Further Development Needed" review and causing her to be ineligible to receive a year-end bonus and merit increase in salary.

Defendant filed this Motion to Dismiss arguing that Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because it falls short of the minimum pleading standards required for claims of religious discrimination or retaliation under Title VII. The Motion to Dismiss has been briefed and is now ripe for review.

II. *STANDARD OF REVIEW*

In reviewing a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

Id. at 563. A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In *Iqbal*, the Supreme Court articulated a two-step process for determining whether a complaint meets this plausibility standard. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555) (allegation that government officials adopted challenged policy "because of" its adverse effects on protected group was conclusory and not assumed to be true). Although the pleading requirements stated in "Rule 8 [of the Federal Rules of Civil Procedure] mark[] a notable and generous departure from the hyper-technical, code-pleading regime of a prior era . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79.

Second, to the extent there are well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 679. "Determining whether a complaint contains sufficient facts to state

a plausible claim for relief "will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief,'" and therefore should be dismissed. *Id.* (quoting Fed.R.Civ.P. 8(a)(2)).

The Court is mindful of the latitude extended to the pleadings of *pro se* litigants. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (courts should "[c]onstru[e] [a *pro se*] petitioner's inartful pleading liberally"). However, courts cannot act as the *pro se* plaintiff's advocate or develop claims which the plaintiff failed to raise clearly on the face of her complaint. *Gordon v. Leeke*, 574 F.2d 1147, 1152 (4th Cir.1978) (recognizing that district courts are not expected to assume the role of advocate for the pro se plaintiff). *See also Brock v. Carroll*, 107 F.3d 241, 243 (4th Cir.1997) (Luttig, J., concurring); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir.1985). As a result, even a *pro se* plaintiff's claim for relief "requires more than labels and conclusions. . . ." *Twombly*, 550 U.S. at 555. Like plaintiffs who are represented by counsel, a *pro se* plaintiff must still "allege facts sufficient to state all the elements of [the] claim." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir.2003). In light of this authority, conclusory statements with insufficient factual allegations, even when asserted by *pro se* plaintiffs, will not survive a motion to dismiss under Rule 12(b)(6).

III. *DISCUSSION OF CLAIMS*

Plaintiff only alleges a claim for "Religious Retaliation" in her Complaint. Being mindful of her *pro se* status, the Court will consider whether Plaintiff has pled a claim for religious discrimination or retaliation under Title VII.

A. Religious Discrimination

In *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582 (4th Cir.2015), the Fourth Circuit examined the sufficiency of factual allegations needed to withstand a motion to dismiss a Title VII discrimination case in light of *Iqbal* and *Twombly.* The Court held that while a plaintiff need not plead a prima facie case of discrimination, she must still state a claim that "is plausible on its face." *McCleary-Evans*, 780 F.3d at 585 (quoting *Iqbal*, 556 U.S. at 678). To state a plausible claim of discrimination, a plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *Id.*

To assert a claim of religious discrimination, Plaintiff must allege that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was performing her job in a satisfactory manner; and (4) similarly situated employees outside of the protected class received more favorable treatment. *Huggins v. N.C. Dep't of Admin.*, No. 5:10-CV-414-FL, 2013 WL 5201033, at *8 (E.D.N.C. Sept. 13, 2013) *aff'd per curiam*, 554 Fed.Appx. 219 (4th Cir.2014), *cert. denied*, 135 S.Ct. 285 (2014).

The Fourth Circuit has stated that "[a]n adverse employment action is a discriminatory act that adversely affects the terms, conditions, or benefits of a plaintiff's employment." *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir.2007) (internal citations and quotation marks omitted). The Court defined an adverse employment action as one that "'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir.2011) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

Consistent with the requirement that an adverse action materially alter the terms and conditions of employment, courts in the Fourth Circuit have held that neither the receipt of a negative performance evaluation nor the denial of a discretionary bonus constitute adverse employment actions under Title VII. *See, e.g.*, *Scott v. Teachers Ins. & Annuity Ass'n of Am.*, No. 3:12-CV-00697-FDW, 2013 WL 2948315, at *6 (W.D.N.C. June 14, 2013) *aff'd sub nom., Scott v. TIAA-CREF*, 542 Fed.Appx. 294 (4th Cir.2013) (dismissing Title VII retaliation claim and finding poor performance review was not adverse action despite impact on bonus award); *Freeman v. North State Bank*, No. 5:03-CV-916-BO, 2007 WL 5745936, at *2 (E.D.N.C. Feb. 20, 2007); aff'd, 282 Fed.Appx. 211 (4th Cir.2008) (granting summary judgment on Title VII discrimination claim and finding receipt of discretionary bonus less than that

awarded to comparator employees was not adverse action); *NasisParsons v. Wayne*, No. 4:05CV36, 2006 WL 1555913, at *5-7 (E.D. Va. June 1, 2006) aff'd sub nom. *Parsons v. Wynne*, 221 Fed.Appx. 197 (4th Cir.2007) (granting summary judgment on Title VII retaliation claim and finding negative performance evaluation which resulted in plaintiff not receiving bonus was not adverse action); *Pulley v. KPMG Consulting, Inc.*, 348 F.Supp.2d 388, 394 (D.Md.2004) (finding that "neither the poor evaluation rating," nor the placement on performance improvement program constitute adverse employment actions); *Schamann v. O'Keefe*, 314 F.Supp.2d 515, 531 (D.Md.2004) (granting summary judgment on Title VII discrimination and retaliation claims and finding lowered performance evaluation, which prevented discretionary bonus for plaintiff, was not adverse action).

Plaintiff does not allege that she was guaranteed an annual bonus or salary increase from Vanguard as part of her agreed upon compensation. Plaintiff's allegations make clear that any bonus was not for a specific amount, but only in the potential range of $10,000-$24,000. Furthermore, Plaintiff's use of the phrase "merit increase" indicates that any increase in her salary was not automatic and had to be earned. Consequently, the Court finds that neither Vanguard's negative assessment of Plaintiff's performance nor its failure to award a discretionary bonus or merit increase rise to the level of adverse employment actions that support a claim of discrimination.

The Court also finds that Vanguard's decision to delay the formation of new ERG's does not constitute a material alteration of the terms, conditions or benefits of Plaintiff's employment and is therefore not an adverse employment action.

Plaintiff's Complaint is also devoid of any facts showing that similarly situated non-Christian employees of Vanguard received more favorable treatment. *Elhassan v. Proctor & Gamble Mfg. Co.*, No. 1:12cv1039, 2014 WL 1281231, at *4 (M.D.N.C. March 27, 2014). Plaintiff must do more than simply state that she was treated differently from her non-Christian co-workers. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. She does not identify a single non-Christian co-worker, by name, job title, or even generically who she contends was treated more favorably.

Plaintiff's Complaint fails to meet the standards established by Fourth Circuit precedent for a religious discrimination claim. Consequently, the undersigned respectfully recommends that Defendant's Motion to Dismiss be granted with respect to her claim for religious discrimination.

B. Retaliation Claim

The United States Supreme Court recently addressed the standard for establishing causation in a Title VII retaliation claim in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013). The Supreme Court held that "[t]he text, structure and history of Title VII demonstrate that a

plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer," as opposed to the more lenient causation standard applied in Title VII discrimination claims. *Id.* at 2534. Consequently a plaintiff must plead sufficient facts to plausibly state that her protected activity was the but-for cause of the adverse employment action. Plaintiff asserts that Vanguard retaliated against her for "being the voice of the faith community, [and] for communicating with CEO and upper management on a stand Plaintiff did not see Defendant historically having taken and therefore out of character for Defendant." Doc. 1, Ex. 1 ¶ 26.

Construing Plaintiff's allegations liberally, she states that she engaged in the following protected activity: (1) communicating with Vanguard about her desire to create an interfaith ERG; (2) sending emails to Vanguard's CEO and members of senior management after learning of the alleged boycott of Chick-fil-A; and (3) filing a charge with the EEOC. Doc 1 at ¶¶ 15-17, 20, 26. By definition, Plaintiff's attempts to form an interfaith ERG and her emails about a restaurant boycott do not support a claim for retaliation. These activities were not related to making a charge, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under Title VII. *See* 42 U.S.C.A. § 2000e-3(a).

Plaintiff's EEOC charge is covered under Title VII. However, it has not been causally connected to any adverse action Plaintiff claims to have suffered. She

filed the EEOC Charge on January 13, 2015, more than a month after she received the negative year-end performance rating, and almost nine months after she was informed that the creation of new ERGs was on hold for 2014. Doc. 1 at ¶¶ 15-17. Plaintiff cannot establish any causal connection between those actions and an EEOC charge that was filed months later. Consequently, Plaintiff's retaliation claim necessarily fails and should be dismissed.

For these reasons, the undersigned respectfully recommends that Defendant's Motion to Dismiss be *granted* and Plaintiff's Complaint be dismissed with prejudice in its entirety.

In her Response, Plaintiff "seeks the opportunity to amend complaint to reflect retaliation if Plaintiff unable to satisfactorily meet the four prima facie for religious retaliation." Doc. 9 at 8. The undersigned respectfully recommends that her request be *denied.* Plaintiff has not filed an appropriate motion seeking leave to amend her Complaint as required by Rule 15 of the Federal Rules of Civil Procedure and this Court's Local Rules. As stated in Local Civil Rule 7.1(C)(2), "[m]otions shall not be included in responsive briefs. Each motion should be set forth as a separately filed pleading." More importantly, the Court finds that any amendment to Plaintiff's Complaint would be futile. She has not identified any additional facts that would make her claim "plausible on its face."

IV. *ORDER*

IT IS ORDERED that all further proceedings in this action, including all discovery, are STAYED pending the District Judge's ruling on this Memorandum and Recommendation and Order.

V. *RECOMMENDATION*

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendant's Motion to Dismiss Plaintiff's Complaint, Doc. 3, be GRANTED and that Plaintiff's Complaint be DISMISSED WITH PREJUDICE.

VI. *NOTICE OF APPEAL RIGHTS*

The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen (14) days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to de novo review by the District Judge. *Diamond v. Colonial Life*, 416 F.3d 310, 315-16 (4th Cir.2005); *Wells v. Shriners Hosp.*, 109 F.3d 198, 201 (4th Cir.1997); *Snyder v. Ridenour*, 889 F.2d 1363, 1365 (4th Cir.1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140, 147 (1985); *Diamond*, 416 F.3d at 316; *Page v. Lee*, 337 F.3d 411, 416 n. 3 (4th Cir.2003); *Wells*, 109 F.3d at 201; *Wright*

v. Collins, 766 F.2d 841, 845-46 (4th Cir.1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir.1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to the *pro se* Plaintiff, counsel for Defendant; and to the Honorable Max O. Cogburn, Jr.

SO RECOMMENDED AND ORDERED.

42 U.S. Code § 2000e-2 – Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Rule 12. General Rules of Pleading

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

* * *

(6) failure to state a claim upon which relief can be granted[]

* * *

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at

trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.