2022 WL 1682420
Only the Westlaw citation is currently available.
United States District Court, N.D. Georgia, Atlanta Division.

Joseph DIBENEDETTO, Plaintiff,
v.
AT&T SERVICES, INC., Defendant.

CIVIL ACTION NO. 1:21-cv-04527-MHC-RDC
|
Signed 05/19/2022

Attorneys and Law Firms

Marissa Torgerson, Steven Eric Wolfe, Legare, Attwood & Wolfe, LLC, Decatur, GA, for Plaintiff.

Chang (Alice) Yu, Kilpatrick Townsend & Stockton, LLP, Raleigh, NC, Sheldon W. Snipe, AT&T Services, Inc. Legal Department, Atlanta, GA, Yendelela N. Holston, Kilpatrick Townsend & Stockton LLP, Atlanta, GA, for Defendant.

NON-FINAL REPORT AND RECOMMENDATION

REGINA D. CANNON, United States Magistrate Judge

***1** This is an employment discrimination case. Plaintiff Joseph DiBenedetto has sued his former employer, Defendant AT&T Services, Inc., alleging unlawful race, age, and gender discrimination. Pending before the Court is AT&T's Motion to Dismiss, (Doc. 4). For the reasons below, the undersigned **RECOMMENDS** that the Motion be **DENIED**.

I. BACKGROUND

The dispute concerns Plaintiff's termination from employment. The facts taken from his complaint, (Doc. 1), show the following. [1]

Plaintiff is a white man, and he was 58-years old when AT&T terminated him in November 2020 in connection with a reduction in force ("RIF"). (Doc. 1 ¶¶ 20–21, 68–71, 78). At the time of his termination, Plaintiff was the company's Assistant Vice President ("AVP") of Tax Research and Planning. (*Id.* ¶ 23).

According to Plaintiff, the events leading up to and including his termination were principally engineered by several individuals occupying multiple levels of AT&T's chain of command. (*Id.* ¶¶ 24–27, 43, 49–52, 55–61, 63–65, 68–71, 76–77, 80, 88). They are listed here at the outset, in descending order of authority, for ease of reference going forward:

- John Stankey, Chief Executive Officer ("CEO")
- John Stephens, Chief Financial Officer ("CFO") and head of the Finance Department
- Paul Stephens, Senior Vice President ("SVP") and head of the Tax Department
- Gary Johnson, Vice President ("VP") and head of the Property Tax Group

(*Id.* ¶¶ 24–27). Moving backwards up the chain—the Property Tax Group was one of many such groups within the Tax Department, which, in turn, was one of several departments falling under the umbrella of the Finance Department. The lines of authority were organized accordingly. (*Id.*). Plaintiff began reporting to VP Johnson in March 2017. (*Id.* ¶ 24). By 2020, nine AVPs, including Plaintiff, fell under VP Johnson's command as head of the Property Tax Group. (*Id.* ¶ 47). All nine of those AVPs were white, with six men and three women. (*Id.*)

Plaintiff began his career with AT&T as a Tax Director in October 2000 before working his way up to AVP. (*Id.* ¶ 22). Along the way, he consistently received positive feedback, including positive performance evaluations plus merit-based compensation awards, and was chosen to take on additional leadership responsibilities. (*Id.* ¶¶ 28–40). As most pertinent here, in his final evaluation—delivered in February 2020 but covering his performance during 2019—VP Johnson rated Plaintiff as having a "Meaningful Impact," meaning that he met or exceeded expectations. (*Id.* ¶ 29). VP Johnson elaborated, adding that Plaintiff was "a very talented, creative and resourceful valuation professional ... [who] is clearly capable of running a successful project, which at AT&T is extremely challenging, as it typically involves several other groups outside of Tax." (*Id.* ¶ 30). The year before, Plaintiff scored even better—another supervisor gave Plaintiff a rating of "Extraordinary Impact," the highest rating available, while lauding his tax-planning and communication skills. (*Id.* ¶¶ 31–32).

***2** In July 2020, after learning that VP Johnson planned to retire within the next two years, Plaintiff expressed interest in succeeding him as head of the Property Tax Group. (*Id.* ¶ 56). While VP Johnson thought Plaintiff was "qualified for the VP role and should pursue it," he didn't believe Plaintiff would have a realistic shot at the promotion because, as he explained, "[Plaintiff] was an old, white male with not enough 'runway' left in his career." (*Id.* ¶ 57). Not dissuaded, Plaintiff requested that VP Johnson raise the issue with his superior, SVP Stephens. (*Id.* ¶ 58). Two weeks later, Plaintiff again spoke with VP Johnson, who confirmed that SVP Stephens "wanted a departmental succession plan with people who 'have a little bit more runway ahead of them.' " (*Id.* ¶ 59). During the meeting, VP Johnson explained to Plaintiff that "in these roles, you know, you've got to be able to adapt and move, and I'm not saying you can't, but a 58-year-old white guy, I don't know if that's going to happen." (*Id.* ¶¶ 60–61).

VP Johnson's comments were in line with what Plaintiff perceived to be the Tax Department's age-based employment policies. (*Id.* ¶¶ 45–46, 49–55). According to Plaintiff, VP Johnson frequently commented about age as a basis for promotion and retention decisions—albeit oftentimes through the corporate euphemism, "runway." (*Id.* ¶¶ 49–55). To illustrate, in mid-2020—not long before Plaintiff expressed interest in the VP position—VP Johnson instructed Plaintiff to prepare for the upcoming departure of a colleague, Gary Wiggins, whose position was being eliminated. (*Id.* ¶ 55). VP Johnson explained to Plaintiff on multiple occasions that Wiggins, another AVP in the Property Tax Group, was being terminated because he lacked sufficient "runway." (*Id.*). Wiggins was 71 at the time and the oldest AVP under VP Johnson's command. (*Id.* ¶¶ 53–55).

Insofar as VP Johnson also mentioned Plaintiff's race and gender, he believes the references may have had roots in AT&T's corporate-wide Diversity & Inclusion Plan ("DIP"), which was adopted years earlier. (*Id.* ¶¶ 41–46). The DIP's stated goal was to increase and foster workplace diversity throughout the company. (*Id.* ¶¶ 41–42; Doc. 4-3 at 2, 6). To that end, AT&T provided detailed workforce demographic information to its senior leaders—such as VP Johnson, SVP Stephens, and CFO Stephens—who, in turn, implemented the DIP through hiring and retention policies that altered the racial, ethnic, and gender composition of the company's workforce, especially in the leadership ranks like those occupied by Plaintiff. (Doc. 1 ¶¶ 42–46, 63–65, 72–75; *see* Doc. 4-3 at 6).

Anecdotally, as far back as 2018, the Finance Department began disproportionately hiring non-whites and women. (Doc. 1 ¶¶ 45–46). But in July 2020, just months before Plaintiff's termination, CFO Stephens sent an email to the entire U.S. Finance Department, entitled "More work to do in Finance." (*Id.* ¶¶ 63–65; Doc. 4-3). [2] The email, which included detailed information about racial and gender demographics inside (but not outside) the company, [3] stated: "Our demographics demonstrate that we must focus more on attracting and retaining diverse employees throughout our organization, especially at our senior levels." (*Id.* ¶ 65; Doc. 4-3 at 6).

***3** Sometime in 2020, amid AT&T's ongoing DIP efforts, the company implemented a RIF and eliminated several positions across the Finance Department, including the Tax Department. (Doc. 1 ¶¶ 67–71, 80). Plaintiff's position was one of them, as he learned in September 2020. (*Id.* ¶ 67). VP Johnson and SVP Stephens both spoke with Plaintiff about the decision and confirmed that it was not related to his individual performance. (*Id.* ¶¶ 68–70). Instead, per VP Johnson, the decision was "numbers related." (*Id.* ¶ 68). In other words, the RIF—which had been approved up the chain by CFO Stephens and CEO Stankey—was purportedly adopted in response to the company's recent financial struggles. (*Id.* ¶¶ 68, 70–71). Under the RIF, the Tax Department terminated a dozen employees—nine were male, all were white, and all were over 50 years old. (*Id.* ¶ 80). Plaintiff was one of two AVPs in the Property Tax Group to be cut, both of whom were male. (*Id.* ¶¶ 83, 85). The effect of the cut was to rebalance the ratio of males to females under VP Johnson's charge from 6:3 to 4:3. (*Id.* ¶¶ 47, 85).

In early October 2020, shortly after Plaintiff had been notified that his position would be eliminated but before he was actually terminated, AT&T's Controller, Debbie Dial, and its SVP of Human Resource Operations, Scott Smith, led a webcast about the company's ongoing DIP progress. (*Id.* ¶ 72). During that webcast, Smith stated that the company was "doubling down" on its DIP efforts. (*Id.* ¶ 74). Specifically, the company had been formulating DIP operating plans for its senior leaders, and it planned to hold them accountable through quarterly DIP operations reviews. (*Id.* ¶ 73). Dial and Smith both indicated that the DIP emphasized workplace demographics at the director level of the company, which included AVPs like Plaintiff. (*Id.* ¶ 75).

Around the same time, CEO Stankey presented a separate internal webcast on the company's performance for the third quarter of 2020, which had just concluded. (*Id.* ¶ 77). In advance of the webcast, he circulated an email whose subject line read, "Thumbs up! Q3 earnings recap in less than 3 minutes." (*Id.*). The email stated: "We announced strong third-quarter results this morning." (*Id.*). During the ensuing webcast, CEO Stankey reported that AT&T had "a solid third quarter," citing multiple business performance metrics in support. (*Id.*). The webcast took place just weeks after Plaintiff had been informed his position would be eliminated, ostensibly due to financial trouble. (*Id.* ¶¶ 67, 76). Plaintiff's last day at AT&T was November 2, 2020, and his separation paperwork indicated he should look for work outside the company. (*Id.* ¶¶ 78–79).

On November 2, 2021, after exhausting his administrative remedies, Plaintiff filed a complaint in this Court challenging his termination on three separate grounds. (Doc. 1). Specifically, his complaint asserts claims of: (1) race discrimination, under both 42 U.S.C. § 1981 ("Section 1981") (Count I) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") (Count II); (2) age discrimination, under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA") (Count III); and (3) gender discrimination, under Title VII (Count IV).

AT&T moved to dismiss under Federal Rule 12(b)(6), arguing that Plaintiff's complaint fails to state any plausible claim against it. (Doc. 4). The motion is fully briefed and ripe for review.

II. LEGAL STANDARD

When evaluating a motion to dismiss, the reviewing court looks to see whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The touchstone is *plausibility* rather than mere *possibility. Id.* ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). And a claim's plausibility must be buoyed by facts over fancy. *Id.* (explaining that a complaint must include more than "an unadorned, the-defendant-unlawfully-harmed-me accusation"). That means "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Although a court is required to accept well-pleaded facts as true and make reasonable inferences in favor of the plaintiff, it is not required to accept the plaintiff's legal conclusions or unwarranted deductions of fact. *See Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012). In other words, the plaintiff's allegations must sketch an actual (*i.e.*, factual)—not just hypothetical—claim. *Iqbal*,

556 U.S. at 678 ("[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " (citation omitted)).

***4** Moreover, the pleaded facts themselves must be more than just consistent with an entitlement to relief—they must reasonably suggest as much. *Twombly*, 550 U.S. at 557 (underscoring "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with)" the plaintiff's entitlement to relief). Ultimately, the pleading standard requires the plaintiff to allege sufficient facts to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. As relevant here, in the employment context, a plaintiff need not allege the same measure of facts necessary to make out a *prima facie* case, but he must nevertheless include sufficient factual allegations to plausibly suggest an adverse employment action took place due to an unlawful motive. *See Henderson v. City of Birmingham, Ala.*, 826 F. App'x 736, 740 (11th Cir. 2020).

III. DISCUSSION

In its Motion to Dismiss, AT&T attempts to sweep away all claims against it with two arguments—one hinges principally on logic, the other on facts. First, AT&T insists that Plaintiff's Section 1981 (Count I) and ADEA (Count III) claims *must* fail because he has simultaneously asserted multiple discriminatory bases for his termination—*i.e.*, race, age, and gender. Yet, AT&T continues, a plaintiff can only prevail under these statutes if he pleads and can later show that a *single* unlawful motive was the but-for cause of his employer's decision. The U.S. Supreme Court has previously explained that both Section 1981 and ADEA claims are premised upon but-for causation, and as AT&T sees it, a but-for cause means a *sole* cause. Because logic precludes multiple simultaneous sole causes, the argument goes, these claims cannot stand. Next, regarding Plaintiff's Title VII race and gender claims (Counts II & IV), AT&T maintains that Plaintiff has not alleged sufficient facts to suggest either that its decisionmakers acted with "hostility" toward white men, or that his termination was related to any supposed discriminatory animus. (Docs. 4, 12). [4]

In response, Plaintiff rejects the notion that but-for causation as required for Section 1981 and ADEA claims must be singular, but in any case, he insists that liberal pleading standards allow him to plead multiple inconsistent claims. So, in his view, these claims should be allowed to proceed to discovery. As for his Title VII claims, Plaintiff argues that his lengthy complaint does in fact plead sufficient content to plausibly infer that his race or gender played a part in his termination. (Doc. 9).

After careful consideration, the undersigned finds that Plaintiff makes the better case. The discussion that follows tracks AT&T's arguments, discussing first Plaintiff's claims under Section 1981 and the ADEA before turning to his Title VII claims.

A. Section 1981 and the ADEA

As explained above, AT&T's argument urging the dismissal of Plaintiff's Section 1981 and ADEA claims turns on the availability—or unavailability, as the company would have it—of multiple simultaneous claims premised on but-for causation. Section 1981 and ADEA claims both require but-for causation—that much is established. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S.Ct. 1009 (2020) (Section 1981); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (ADEA). The crux of AT&T's argument is that, in its view, a but-for cause means a *sole* cause. Regrettably, federal courts from the Supreme Court on down have not been uniform in their interpretation of this causal concept, which explains why trained and competent counsel can disagree—as is the case here. [5]

***5** That said, at this stage, the undersigned need not dwell on the disputed premise because, as Plaintiff points out, the liberal pleading standard under Federal Rule of Civil Procedure 8(d) allows a plaintiff to assert multiple inconsistent claims. In other words, *even if* Plaintiff's claims are at odds, that is no reason to dismiss them before discovery. Indeed, the Eleventh Circuit has said as much in rejecting an argument identical to the one AT&T has raised here.

Rule 8(d)(3) provides that "[a] party may state as many separate claims or defenses as it has, *regardless of consistency.*" Fed. R. Civ. P. 8(d)(3) (emphasis added). The text couldn't be clearer—inconsistent claims are allowed. Indeed, the Rule permits a plaintiff to plead multiple theories of liability "even if it would be impossible for both to be simultaneously [true]." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009); *see also Savage v. Secure First Credit Union*, No. 15-12704, 2016 WL 2997171, at *1 (11th Cir. May 25, 2016). The reason being that, at the initial pleading stage, the plaintiff usually will not be "in a position to know all of the [factual] particulars" relevant to his claims. *United Techs. Corp.*, 556 F.3d at 1274. Given this "clear informational disadvantage," a plaintiff who has "pled a reasonable good faith basis for [his] claims" shouldn't be penalized for lacking conclusive details at the outset. *See id.* at 1273–74. After all, "[t]hat is why we have discovery." *Id.* at 1273.

Invoking the liberal pleading standard under Rule 8(d), the Eleventh Circuit has directly rejected the argument that AT&T makes here. In *Savage v. Secure First Credit Union*, the district court conditionally granted the employer's motion to dismiss and ordered the plaintiff to pick just one of her claims asserted under multiple employment discrimination statutes. 107 F. Supp. 3d 1212, 1218 (N.D. Ala. 2015). Among other things, the plaintiff had claimed age discrimination under the ADEA and retaliation under Title VII—both of which require but-for causation. *Id.* at 1214–16. Just as AT&T advocates in this case, the district court held that "there can, in theory and in logic, be only one 'but-for' cause." *Id.* at 1216. Therefore, the district court ordered the plaintiff to reform her pleading accordingly. *Id.* at 1218. The Eleventh Circuit reversed and remanded, explaining that "[i]t is a well-settled rule of federal procedure that plaintiffs may assert alternative and contradictory theories of liability." *Savage*, 2016 WL 2997171, at *1 (quoting *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1175 (11th Cir. 2014)).

The Eleventh Circuit did not flesh out but-for causation in *Savage*—it wasn't necessary—but the court held, in any event, that multiple inconsistent employment discrimination claims could be pled under Rule 8(d). *Id.* Although the *Savage* decision was unpublished, "the fact remains that the Eleventh Circuit reversed a district court for doing exactly what Defendant[ ] ask[s] this Court to do." *Bird v. Univ. of Fla. Bd. of Trustees*, No. 1:18-cv-221, 2019 WL 13087801, at *3 (N.D. Fla. Aug. 23, 2019) (J. Winsor).

Recognizing the liberal pleading standard set forth under Rule 8(d), and following the Eleventh Circuit's lead, the undersigned **RECOMMENDS** that AT&T's Motion to Dismiss be **DENIED** as to Plaintiff's Section 1981 (Count I) and ADEA (Count III) claims. [6]

B. Title VII

***6** Turning next to Plaintiff's Title VII claims, the question is whether Plaintiff has alleged sufficient facts to plausibly support an inference that his termination was motivated in part by his race or gender. AT&T says no, and Plaintiff obviously disagrees. While a plaintiff cannot rely on conclusory allegations and speculation to state a claim but must instead allege sufficient facts to suggest the defendant acted unlawfully, the undersigned concludes that Plaintiff met his pleading burden here.

Title VII makes it unlawful for employers to discharge or otherwise discriminate against an employee because of his race or sex. 42 U.S.C. § 2000e–2(a)(1). A plaintiff raising a discrimination claim under Title VII may be entitled to relief if he shows that an illegal bias was "a motivating factor" for an adverse employment action, even if other factors also motivated the employer's decision. *Id.* § 2000e-2(m); *see also Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). Notably, to show intentional discrimination under Title VII, a plaintiff need not prove that his employer "harbored some special 'animus' or 'malice' towards [his] protected group." *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1284 (11th Cir. 2000). In other words, ill will, enmity, or hostility "are not prerequisites of intentional discrimination"—instead, it is enough for the plaintiff to show that an adverse employment decision was consciously and deliberately motivated by a protected characteristic. *Id.*

Although a plaintiff need not plead a *prima facie* case of discrimination at the outset, the *prima facie* elements can nevertheless aid a reviewing court in organizing the allegations and identifying any material omissions at the pleading stage. With that said, a plaintiff can make out a *prima facie* case of disparate treatment by showing that he: (1) is a member of a protected class; (2) was

qualified for the position; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly situated individual outside his protected class. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220–21 (11th Cir. 2019) (*en banc*).

Here, Plaintiff has pled sufficient details to support his claims of race and gender discrimination. With reference to the *prima facie* elements, there is no question that Plaintiff satisfied the first three. That leaves just the final element—whether he was treated less favorably than comparable non-white and female employees. Although evidence may ultimately defeat his claims, Plaintiff has at this point sketched a sufficiently detailed picture to plausibly suggest he was.

According to Plaintiff, AT&T's DIP was a companywide initiative that had the purpose and effect of biasing hiring and retention decisions in favor of non-white and female employees. Importantly, Plaintiff didn't just point to the DIP alone to stake his claims—he also presented details about how it worked in practice, up to and including its alleged application in his case. It started with senior leadership circulating detailed company demographic information to decisionmakers—explicitly broken down in terms of race and sex—to both inform and, according to Plaintiff, influence employment decisions. And Plaintiff observed that, dating back to 2018, non-white and female candidates were indeed disproportionately hired in the Finance Department as the DIP was implemented. Although this anecdotal report may not count heavily in the end, Plaintiff was employed at AT&T for twenty years and his personal observations provide a barometer—albeit an imperfect one—of shifting practices aligned with the DIP's goals. *See Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985) (noting that anecdotal evidence may be relevant to a plaintiff's disparate treatment claim).

***7** All of this is still rather in the clouds, so to speak, but Plaintiff's allegations hit the ground once they reach the period leading up to his termination. In July 2020, CFO Stephens sent an email to the Finance Department explaining that decisionmakers "must focus more on attracting and retaining diverse employees throughout our organization, especially at our senior levels." Construing the allegation in Plaintiff's favor, CFO Stephens's statement seems to convey a sense of operational urgency under the DIP. At or around this same time, while CFO Stephens was stressing that there was "[m]ore work to do" in implementing the DIP, Plaintiff's supervisor—VP Johnson—told him that he was unlikely to succeed to VP of the Property Tax Group because he was "an old, white male."

It was just two months later, in September 2020, that Plaintiff received notice he would be let go under the RIF, ostensibly due to the company's recent financial struggles. The RIF cut at least a dozen employees from the Tax Department—all were white, and seventy-five percent were male. And the effect of the cut was to rebalance and more closely equalize the ratio of males to females under VP Johnson's charge. Shortly afterward, in October 2020, CEO Stankey appeared to undermine the company's RIF rationale, however, as he reported via webcast that AT&T's third-quarter financial results were "strong" and "solid." The timing and substance of that report at least render plausible the idea, advocated here by Plaintiff, that the stated reason for his termination—again, financial trouble—was merely pretext.

Further to the point, at around that same time, in an announcement consistent with CFO Stephens's earlier July 2020 email advising that there was "[m]ore work to do" in implementing the DIP, AT&T's head of human resources announced that the company was "doubling down" on its DIP efforts. To that end, the company was formulating DIP operating plans for its senior leaders and would be conducting quarterly DIP reviews to hold them accountable for progress. And again, like CFO Stephens's email, the announcement emphasized workplace demographics in the upper corporate echelons—specifically, the director level.

The upshot of Plaintiff's allegations is that AT&T implemented a company-wide employment policy that programmatically favored non-white persons and women for hiring and retention based solely or at least principally on internal company demographics; that the company ramped up efforts under that policy—specifically with respect to upper corporate ranks—in the months leading up to his termination; and that, based on anecdotal evidence and inconsistent statements regarding the company's financial health, the stated reason he—a white, male director-level employee—was terminated should not be credited. Each of these broad strokes is supported by detailed factual allegations, and together they at least plausibly suggest that Plaintiff's race or gender may have played an unlawful role in his termination. *See Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 636–37 (1987) (explaining that an employment plan is suspect under Title VII if it "fail[s] to take distinctions in

qualifications into account in providing guidance for actual employment decisions" but is instead guided "solely by reference to statistics"); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208–09 (1979) (permitting race-conscious affirmative action plans under Title VII so long as they do not, for example, require the discharge and replacement of white workers or create an absolute bar to their advancement).

Plaintiff's complaint does not consist merely of threadbare recitals of legal elements, but instead includes "nonconclusory descriptions of specific, discrete facts of the who, what, when, and where variety." *Watts v. Ford Motor Co.*, 519 F. App'x 584, 587 (11th Cir. 2013) (citation omitted) (concluding that the plaintiff stated a Title VII claim of unlawful discrimination after being terminated in connection with a reduction in force); *see also Castillo v. Allegro Resort Mktg.*, 603 F. App'x 913, 918–19 (11th Cir. 2015) (same).

***8** To be clear, the undersigned's current recommendation does not—and this case, whatever the ultimate result, will not—constitute an appraisal of the virtue of AT&T's effort, or others like it, to promote diversity and inclusion in the workforce. Such efforts are permitted under Title VII and promote the statute's underlying purpose. *See Weber*, 443 U.S. at 208 (holding that Title VII does not prohibit private, voluntary efforts to "abolish traditional patterns" of segregation and hierarchy); *Johnson*, 480 U.S. at 641–42.

The only question presented here is a very narrow one: whether AT&T's DIP—however laudable in theory—was unlawfully applied in *this* case. Or, to restate with a finer point reflecting the current posture, whether Plaintiff adequately stated Title VII claims that, based on a rigid reliance on the company's internal demographics, decisionmakers unlawfully considered his race and gender when terminating him under the pretext of financial strain. On that question, the undersigned finds in Plaintiff's favor.

Plaintiff's allegations could, through discovery, yield evidence of unlawful intentional discrimination. *See Twombly*, 550 U.S. at 556 (explaining that a complaint contains sufficient factual content if it raises a "reasonable expectation" that discovery will reveal evidence of unlawful conduct). Accordingly, the undersigned **RECOMMENDS** that AT&T's Motion to Dismiss be **DENIED** as to Plaintiff's Title VII claims (Counts II & IV). [7]

IV. CONCLUSION

***9** For the reasons stated above, the undersigned **RECOMMENDS** that AT&T's Motion to Dismiss, (Doc. 4), be **DENIED**.

IT IS SO **RECOMMENDED** on this 19th day of May 2022.

All Citations

Slip Copy, 2022 WL 1682420

Footnotes

1 When reviewing a motion to dismiss, the Court must take the allegations of the complaint as true and construe those allegations in the light most favorable to the plaintiff. *Rivell v. Priv. Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008).

2 AT&T submitted a copy of CFO Stephens's email along with its Motion to Dismiss. (Doc. 4-3). This Court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment so long as

the document's authenticity is undisputed and it is central to the plaintiff's claim. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Both parties, and the undersigned, agree that is the case here. *See* (Doc. 4-1 at 3 n.2; Doc. 9 at 4 n.2).

3 As relevant here, statistics showed that in AT&T's U.S. Finance Department, white employees represented 39% of non-management positions, 60% of management positions, and 86% of senior leadership positions. (Doc. 4-3 at 3). In addition, while men represented 42% of AT&T's global finance workforce, they occupied 47% of management positions and 86% of senior leadership positions. (*Id.* at 5).

4 AT&T has also moved to dismiss Plaintiff's Section 1981 race claim, together with his Title VII claims, for factual insufficiency. (Doc. 4 at 2; Doc. 4-1 at 14, 20). However, for similar reasons relied on with respect to Plaintiff's Title VII race discrimination claim and discussed more fully below, the undersigned concludes that Plaintiff has sufficiently stated a race discrimination claim under Section 1981. *See infra* Section III.B, n.7. AT&T has not challenged the factual sufficiency of Plaintiff's ADEA claim. *See* (Docs. 4, 12).

5 As the text above indicates (and its relegation to a footnote demonstrates), the question of but-for causation can largely be bypassed for present purposes. But to briefly illustrate the incongruous interpretations that underlie the dispute, compare *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1739–48 (2020) (rejecting the notion that but-for causation under Title VII requires a sole cause), and *Burrage v. United States*, 571 U.S. 204, 211–12 (2014) (explaining that traditional but-for causation, the background principle against which Congress legislates, does not exclude other causal factors), with *Gross*, 557 U.S. at 176 (at least suggesting that but-for causation as construed under the ADEA requires a single cause), and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 370, 383–84 (2013) (Ginsburg, J., dissenting) (suggesting the same for Title VII retaliation claims, with disapproval). Not surprisingly, lower court decisions are also inconsistent on the matter. Although one district judge in this circuit, the late Judge William Acker, expressly endorsed AT&T's understanding of but-for causation *and* its pleading requirements, *see, e.g., Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270 (N.D. Ala. 2009) (J. Acker), the weight of authority in this circuit lies decidedly on the other side in holding that but-for causation in the employment context does *not* require a sole cause, *see, e.g., Keller v. Hyundai Motor Mfg.*, 513 F. Supp. 3d 1324, 1330–31 (N.D. Ala. 2021) (J. Thompson); *Pearson v. Lawrence Med. Ctr.*, No. 5:12-cv-1064, 2012 WL 5265774, at *3–6 (N.D. Ala. Oct. 24, 2012) (J. Smith); *Freeman v. Koch Foods of Ala.*, No. 2:09-cv-270, 2010 WL 9461668, at *2 (M.D. Ala. June 15, 2010) (J. Fuller). It should be noted that Judge Acker's approach was reversed by the Eleventh Circuit, as will be further addressed below.

6 Before and after *Savage*, lower courts have applied similar reasoning at both the motion-to-dismiss and summary-judgment stages. *See, e.g., Bird*, 2019 WL 13087801, at *3; *Goodridge v. Siemens Energy, Inc.*, 276 F.R.D. 540, 542 (N.D. Ala. 2011) (J. Hopkins); *Pearson*, 2012 WL 5265774, at *3–7; *Freeman*, 2010 WL 9461668, at *2; *Keller*, 513 F. Supp. 3d at 1330–31 (summary judgment stage); *Hawthorne v. City of Prattville*, No. 2:19-cv-139, 2020 WL 5880135, at *12 (M.D. Ala. Oct. 2, 2020) (J. Huffaker) (same); *Kemp v. Gen. Growth Servs., Inc.*, No. 1:15-cv-01180, 2016 WL 10988806, at *6–7 (N.D. Ga. Dec. 28, 2016) (J. Baverman), *adopted in relevant part by* 2017 WL 8217632 (N.D. Ga. Mar. 6, 2017) (J. Jones) (same); *Smitherman v. Decatur Plastics Prods., Inc.*, No. 4:15-cv-1576, 2017 WL 3668176, at *8 (N.D. Ala. Aug. 24, 2017) (J. Ott) (same).

7 As mentioned above, *supra* note 4, AT&T has also attacked the factual sufficiency of Plaintiff's Section 1981 race discrimination claim. And as discussed above, *supra* Section III.A, Section 1981 unequivocally requires that a plaintiff plead and prove but-for causation, which stands in contrast to Title VII's reduced motivating factor requirement. *See Comcast*, 140 S.Ct. at 1017–18. That means the pleading burden under Section 1981 is higher than under Title VII. *See Henderson*, 826 F. App'x at 740 n.2 (explaining that, after *Comcast*, "§ 1981's pleading standard for discrimination claims is at least as, if not more, restrictive than Title VII"). Nevertheless, the undersigned concludes that, based on the facts alleged in Plaintiff's complaint, he has successfully stated race discrimination claims under *both* Title VII and Section 1981.

With respect to Section 1981—to start, in Count I of the complaint asserting his Section 1981 claim, Plaintiff alleges he was terminated "based on" and "because of" his race. (Doc. 1 ¶¶ 94, 96). As AT&T points out, however, he does

not plead the phrase "but-for cause." (Doc. 4-1 at 9; Doc. 12 at 7). That shouldn't matter. Plaintiff tied his termination to race using causal terms nearly identical to those the Supreme Court itself has construed to entail but-for causation. *See Comcast*, 140 S.Ct. at 1016 (describing the Supreme Court's prior use of the phrases "*on the basis of*" and "*because of*" to support Section 1981's but-for causation requirement). Since the Supreme Court took the phrases invoked by Plaintiff to mean but-for causation, the undersigned will follow suit. Next, with Plaintiff having pled the requisite causal nexus, his factual allegations plausibly suggest that but-for his race he would not have been terminated under the RIF. Although the different causation standards make it a closer call under Section 1981 than under Title VII, in answer to the counterfactual—*what would have happened if Plaintiff was not white?*—the complaint plausibly suggests, and evidence could ultimately show, that a different employment decision would have been reached. *See Comcast*, 140 S.Ct. at 1015 (explaining that Section 1981's but-for causation requirement directs a court to ask what would have happened if the plaintiff's race were different).

End of Document