2021 WL 3635151 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Anthony J. WOODS, Plaintiff - Appellant,

v.

Latoya CANTRELL, Mayor, Officially; New Orleans City, Officially; French Market Corporation, Officially; Rhonda Sidney, Officially and Individually; N'Gai Smith, Officially and Individually; Robert Matthews, Officially; Elizabeth S. Robins, Officially and Individually, Defendants - Appellees.

No. 21-30150.
August 9, 2021.

Civil Proceedings on Appeal from the United States District Court
for the Eastern District of Louisiana, Hon. Lance Africk Presiding
Civil Action No. 2:20-cv-00482
Motion to Dismiss Granted, Action Dismissed

Original Brief of Appellees

Renee Goudeau (#33157), Assistant City Attorney, Corwin M. St. Raymond (#31330), Deputy City Attorney, Churita H. Hansell (#25694), Deputy City Attorney, Donesia D. Turner (#23338), Sr. Chief Deputy City Attorney, Sunni J. Lebeouf (#28633), City Attorney, 1300 Perdido Street, Suite 5E03, New Orleans, Louisiana 70112, Telephone: (504) 658-9800, Facsimile: (504) 658-9868, Email: regoudeau@nola.gov, for the defendants-appellees.

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***1** *STATEMENT OF JURISDICTION*

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the ... laws ... of the United States." Plaintiff Anthony Woods's (hereinafter, "Woods") suit against Latoya Cantrell, City of New Orleans, French Market Corporation, Rhonda Sidney, N'Gai Smith, Robert Matthews, and Elizabeth Robins (hereinafter, "Defendants") was based upon 42 § U.S.C. 2000(e)-2 (hereinafter "Title VII"),

42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 1985. This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291 because the judgment below is a final judgment of the United States District Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The primary issue on appeal is whether the district court properly granted Defendants' motion to dismiss for failure to state a claim. In particular, Defendants assert the following issues for review:

1. Whether the district court properly dismissed with prejudice Woods's Title VII race discrimination based on his alleged termination, failure to promote, and hostile work environment claim.

2. Whether the district court properly dismissed with prejudice Woods's claim of race discrimination under 42 U.S.C. § 1981 based on his termination.

3. Whether the district court properly dismissed with prejudice Woods's religious discrimination and retaliation claims under Title VII.

4. Whether the district court properly dismissed with prejudice Woods's First Amendment claim under 42 U.S.C. § 1983 related to his termination.

***2** 5. Whether the district court properly dismissed without prejudice Woods's Fourteenth Amendment claim under 42. U.S.C. § 1983 related to his termination.

6. Whether the district court properly dismissed with prejudice Woods' conspiracy claim under 42 U.S.C. § 1985.

STATEMENT OF THE CASE

This case arises out of an employment dispute over the events preceding and surrounding Plaintiff Anthony Woods's termination from employment with the French Market Corporation [1] (hereinafter "French Market"). The French Market terminated Woods for disrespectful and offensive behavior towards his supervisor during an interaction on August 23, 2019. Specifically, Woods refused to follow instructions given by his supervisor, proceeded to use profane language, and then pushed his supervisor against the office wall in an aggressive and threatening manner. Woods, as a public employee, appealed his termination to the City of New Orleans Civil Service Commission ("the Commission"). He also filed this lawsuit alleging violations of numerous federal statutes.

***3** A. *Woods's Termination and Commission's Proceedings*

On August 23, 2019, the French Market sent Woods a "Notice of Termination" letter. [2] The letter terminated Woods for his disrespectful and inappropriate behavior towards a supervisor, Robert Matthews. [3] Woods appealed his termination to the Commission on or about August 26, 2019. [4] Defendants submit that this case was assigned CS No. 9067. Because the French Market failed to conduct a pre-termination hearing prior to taking this action, the French Market rescinded the termination on September 5, 2019 and reimbursed Woods for the days he had been scheduled to work. [5]

On the same day it rescinded the original termination, September 5, 2019, the French Market issued Woods a letter entitled "Notification of Emergency Suspension and Notification of Pre-Termination Hearing." [6] By way of this letter, the French

Market placed Woods on a thirty (30) day suspension without pay and notified him of a pre-termination hearing scheduled for September 11, 2019.[7] The reasons for Woods's emergency suspension and pre-termination hearing are the same as those stated in the August 23, 2019 termination letter. Following a pre-termination hearing, Woods was ultimately terminated from employment on ***4** September 20, 2019.[8] Woods then appealed his September 20, 2019 termination to the Commission.[9] Defendants submit that this case was assigned CS No. 9082.

An administrative hearing was conducted before a hearing officer on November 21, 2019 for both appeals, CS Nos. 9067 and CS 9082.[10] Defendants submit that immediately prior to the hearing, the parties agreed that CS 9067 had been resolved because the August 23, 2019 termination was rescinded for procedural reasons and because Woods was reimbursed for the days he had been scheduled to work.[11] Thereafter, the hearing proceeded under CS 9082 for the September 20, 2019 termination.

Counsel for the French Market, Deputy City Attorney Elizabeth Robins, and Woods, who represented himself, presented their arguments regarding the disputed facts surrounding Woods's termination.[12] The second issue Woods disputed at this hearing was whether he received adequate notice of the September 11, 2019 pre-termination hearing.[13] Woods claimed he did not receive the September 5, 2019 letter and was unaware that the pre-termination hearing had been scheduled and conducted until after the fact.[14] The French Market asserted that he was properly ***5** notified because this letter was sent by regular and certified mail to Woods's last known address.[15] Woods's appeal of his termination to the Commission was pending when he filed his federal lawsuit.

B. *Woods's Allegations in this Federal Lawsuit*

Woods's Original and Amended Complaint alleged a plethora of federal claims, including Title VII race discrimination[16] and hostile work environment claims, a 42 U.S.C. § 1981 race discrimination claim, a religious discrimination claim, 42 U.S.C. § 1983 violations of the First and Fourteenth Amendments and a 42 U.S.C. § 1985 conspiracy claim.[17]

Woods's Title VII and 42 U.S.C. § 1981 race discrimination claims were described as follows. Woods, a black man, claims that "French Market's hiring practice was such that White, light skinned, and Hispanic employees were treated more favorably than dark-skinned and Black employees."[18] Woods alleged no other facts regarding the treatment of similarly situated individuals.

Next, Woods claimed that Defendants Kathleen Turner, Executive Director of French Market; Rhonda Sidney, Human Resources Director of the French Market; and N'Gai Smith, Woods's supervisor, are light-skinned people who were biased ***6** and prejudiced against him because he is dark-skinned.[19] As a result, Woods claims that he was denied promotional opportunities, improperly terminated, and subject to a hostile work environment.[20] Specifically, he claims that the justification for his termination was "pretexual [*sic*]" and that Defendants concocted a scheme to terminate him.[21] Woods also claimed that he was subjected to illegal suspensions, Turner referred to his work as "sloppy," Smith physically assaulted other employees, and Smith called Woods and another employee a racial epithet, "Lazy Monkey A - N - ."[22]

In addition, Woods contends there was a broad conspiracy between Defendants in violation of 42 U.S.C. § 1985 to unlawfully terminate him on the basis of his race/color. He claims Turner, Sidney, Robins, and Smith had an agreement of mind to conspire and collude to unlawfully terminate his employment. [23] According to Woods, they conducted "esoteric and ex-parte meetings and communications with each other, Robert Matthews and another employee without plaintiff's knowledge, fabricated and disseminated false termination letters" and "improperly influenced the Civil Service Commission to cancel plaintiff's original ***7** complaint filed with the Commission to redress his grievances" on the basis of his race/color. [24]

Concerning his religious discrimination claim, Woods avers that Smith, after being informed of his religious practices, arbitrarily changed his work schedule to compel Woods to work weekends. [25] Woods claims this was purposefully done to prevent Woods from participating in his religious practices. [26] Woods never identified his religion or religious practice in his Original or Amended Complaint.

Woods alleged a violation of his First Amendment rights, claiming he "'exercised his freedom of speech' by reporting to Rhonda Sidney, French Market's human resources director, that Kathleen Turner delegated authority to N'Gai Smith to monitor his activities and fire him for any reason." [27] Woods claims that no action was taken by Sidney to address his job-related concerns [28] and that the administration then targeted him and retaliated against him by firing him. [29]

Finally, Woods alleged a due process violation under the Fourteenth Amendment that is difficult to decipher. Woods's Original Complaint detailed his version of the events leading to his termination. [30] He claimed that he received the ***8** August 23, 2019 notice of termination letter which terminated him "without affording him an opportunity to be heard or a grievance process." [31] However, he appealed his August 23, 2019 termination to the Commission. Next, Woods alleged that on September 5, 2019, Turner drafted a second correspondence titled Notification of Emergency Suspension and Notice of Pre-Termination Hearing. [32] On September 30, 2019, he received the second notice of termination which alleged "the same falsified reasons" for his termination. [33] Woods also appealed this second notice of termination to Commission. [34]

Woods further alleged that Elizabeth Robins, an attorney for the City of New Orleans, refused to identify herself and solicited him to agree to waive his appeal regarding the first termination on August 23, 2019, and misrepresented that Woods's first appeal had been resolved on the basis of agreement. [35] At Woods's hearing before the Commission regarding his termination, he alleged that the French Market administrative and managerial staff had a ministerial duty to investigate the incident but failed to do so, Turner and Sidney collaborated to file the notice of terminations, and conflicting testimony was presented. [36] He concluded by stating that "Defendants falsely and wrongfully terminated his employment without providing a ***9** right to confront his accusers and evaluate the evidence against him before termination of his job position" and that the administration celebrated by announcing his termination at a group meeting. [37]

Woods's Amended Complaint alleged "[he] was a civil service employee with a protected right and interest in his job position entitling him to a grievance process prior to termination, but was denied his protected right by [Defendants]." [38] The Amended Complaint further alleges that Defendants "deprived and denied [Woods's] protected constitutional right to confront his accuser and obtain evidence of his charges prior to terminating his employment with French." [39]

C. *Procedural History*

Woods filed an Original and Amended Complaint in this matter.[40] Defendants filed a motion to dismiss Woods's allegations based on his failure to state a viable claim.[41] The district court issued an Order and Reasons on March 16, 2021, finding that Woods's allegations were conclusory and failed to state a claim.[42] Regarding Woods's Title VII and § 1981 race discrimination claims, the district court found that Woods asserted an adverse employment, his termination, but failed to allege ***10** facts from which the district court could draw a reasonable inference that Defendants were liable for the misconduct alleged.[43] Similarly, the district court determined Woods alleged one incident in support of his hostile work environment - the racial epithet. However, it found this single incident was not sufficient to establish a hostile work environment claim.[44] The district court also dismissed Woods's religious discrimination, First Amendment retaliation, and § 1985 conspiracy claims as wholly deficient.[45] All of these claims were dismissed with prejudice.

By contrast, the district court determined that Woods's Fourteenth Amendment claim was not yet ripe because Woods alleged that the ongoing Commission process suffers from numerous defects which run afoul to the Fourteenth Amendment.[46] Because his appeal of the termination was still pending before the Commission, the district court could not rule on his Fourteenth Amendment claim without evaluating the complete Commission record and ruling.[47] Woods's Fourteenth Amendment claim was therefore dismissed without prejudice.

Woods appealed the district court's March 16, 2021 Judgment dismissing all claims against Defendants.[48] Woods's appellate brief alleges that Judge Africk denied and deprived him due process under the Fifth Amendment and that this ***11** conduct constituted an infringement on Woods's rights under the Seventh and Fourteenth Amendments.[49] Woods's assignment of errors and issues for review also question whether the district court properly dismissed his complaint. The United States Department of Justice, Civil Rights Division (hereinafter "DOJ") filed an amicus curiae brief in support of Woods's appeal to address one narrow issue: whether the district court erred in holding that "a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim" under Title VII.[50]

STANDARD OF REVIEW

Appellate courts "review the grant of a motion to dismiss under Rule 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff."[51] Rule 12(b)(6) governs dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' ... it demands more than ... 'labels and conclusions.'"[52] Furthermore, ***12** "[a] complaint survives a motion to dismiss only if it pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[53]

SUMMARY OF THE ARGUMENT

The district court properly granted Defendants' motion and dismissed all of Woods's claims against Defendants. The district court correctly determined that Woods's allegations failed to plead sufficient facts to establish a cause of action under any of the legal theories he asserted. Therefore, the district court did not err by dismissing the Fourteenth Amendment claim without prejudice and dismissing all other claims with prejudice.

First, the district court did not err in its analysis of the multiple claims of race discrimination Woods asserted under Title VII and § 1981 claims based on his alleged termination, failure to promote, and hostile work environment. The single allegation related to Woods's hostile work environment claim was the alleged use of a single racial epithet by Smith. The district court cited controlling precedent to find that "a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim." [54] The district court also liberally construed all of Woods's allegations that were even tangentially related to a hostile work ***13** environment claim and found that Woods did not offer anything but vague and conclusory allegations.

The DOJ contends the district court improperly dismissed Woods's hostile work environment claim under Title VII. While the DOJ argues the supervisor's alleged use of a racial epithet on one occasion is sufficient to state a claim for a hostile work environment under Title VII, Fifth Circuit precedent clearly dictates otherwise. The district court properly followed the existing law and dismissed Woods's hostile work environment claim.

Like the hostile work environment claim, the district court correctly found that Woods's allegations regarding his termination were largely conclusory and insufficient to state a claim for relief against Defendants. Woods's race-based conspiracy claim under § 1985 was also equally inadequate. Woods improperly attempted to assert a § 1985(3) conspiracy claim under Title VII. Even construing Woods's factual allegations under the appropriate statute, Woods failed to offer anything more than conclusory allegations that a conspiracy was directed at him on the basis of his race/color. Woods's claims for failure to promote and religious discrimination claims were properly dismissed because he did not exhaust his Title VII administrative remedies.

Last, the district court did not erroneously dismiss Woods's claims pursuant to 42 U.S.C. § 1983 for violation of his constitutional rights under the First and ***14** Fourteenth Amendments. Even liberally construing Woods's allegations, his First Amendment claim was based only on speech directed to a human resources professional concerning workplace conduct. That speech is not protected as "a citizen on a matter of public concern." Finally, after noting that Woods's Fourteenth Amendment claim was difficult to understand, the district court construed Woods's Fourteenth Amendment claim as an assertion that the ongoing disciplinary appeal process before the Commission suffers from numerous defects which, combined, run afoul of the Fourteenth Amendment. The district court determined that such a claim is not ripe for review because it could not address the fairness or adequacy of a review process that is not complete. Woods's Fourteenth Amendment procedural due process claim was properly dismissed without prejudice.

The sound reasoning of the district court's opinion and ruling should not be disturbed. As such, this Court should affirm the dismissal by the district court.

*IV *STATEMENT REGARDING ORAL ARGUMENT*

Pursuant to Fed. R. App. P. 34(a)(2)(C), Appellees respectfully submit that oral argument is not necessary. The briefs and the record adequately present the factual and legal arguments raised in the District Court. Additionally, because this appeal involves the application of well-established principles of law, oral argument is unnecessary to aid the Court's decisional process.

*14 *LAW AND ARGUMENT*

The district court correctly determined that Woods's allegations were largely conclusory and failed to plead sufficient facts to establish a cause of action for his multiple federal claims, specifically: 1) Woods's Title VII claims for race discrimination; 2)

Woods's race discrimination claim under 42 U.S.C. § 1981; 3) Woods's religious discrimination and retaliation claims under Title VII; 4) Woods's First Amendment claim under 42 U.S.C. § 1983; 5) Woods's Fourteenth ***15** Amendment claim under 42. U.S.C. § 1983 related to his termination; and 6) Woods's conspiracy claim under 42 U.S.C. § 1985.

A. *Title VII Race Discrimination*

Woods alleged that the Defendants discriminated against him in violation of Title VII by 1) terminating him, 2) failing to promote him, and 3) creating a hostile work environment. The claim for failure to promote was properly dismissed because Woods failed to exhaust his administrative remedies. [55]

1. *Disparate Treatment Claim*

The district court correctly evaluated the merits of Woods's termination under a Title VII claim for disparate treatment. "[T]here are two ultimate elements a plaintiff must plead to support a disparate treatment claim under Title VII: 1) an adverse employment action, 2) taken against a plaintiff because of her protected status." [56] Woods clearly alleged an adverse employment action - his termination. However, Woods failed to plead facts establishing that this action was taken against Woods *because of* his race/color.

Woods vaguely alleged: 1) "defendants conspired and colluded to unlawfully terminate his employment on the basis of his race/color;" [57] 2) he was treated less ***16** favorably than other white, Hispanic and light skinned employees; [58] and 3) Turner, Sidney and Smith "are very light skinned people who are bias[ed] and prejudice[d] against him because he is dark skinned." [59] These facts simply fail to articulate the requisite amount of detail to meet the pleading standard. As the district court explained, Woods's complaints do not allege any facts from which the Court "might draw the reasonable inference that the defendant is liable for the misconduct alleged." [60] For this reason, the district court properly dismissed Woods's disparate treatment claim regarding his termination. [61]

2. *Hostile Work Environment Claim*

The district court did not err in dismissing Woods's hostile work environment claim. "To state a claim for hostile work environment, a plaintiff must allege 'that an employer has created a working environment heavily charged with ... discrimination.'" [62] In determining whether a workplace constitutes a hostile work environment, courts must consider the following circumstances: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or ***17** humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. [63]

A hostile work environment is one that "is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [64] To ensure that Title VII does not become a "general civility code," only "extreme" conduct will be found sufficiently severe or pervasive: "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." [65] An isolated incident, if egregious, can alter the terms and conditions of employment. [66] However, a "mere utterance of an epithet which engenders offensive feelings" will not itself violate the statute. [67]

Defendants argued that the only allegation supporting Woods's hostile work environment claim was the alleged use of a single racial epithet by Smith. [68] The alleged use of a single, racial epithet - although offensive - does not alone state a ***18** hostile work environment claim. [69] Relying on case law from this Circuit and the Eastern District of Louisiana, the district court

found "the defendants are correct that a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim."[70] The district court relied upon *Curry v. Lou Rippner, Inc.,* which explained that "Courts in the Fifth Circuit have dismissed similar claims under Rule 12(b)(6) where the only perceived conduct alleged in the complaint was a single offensive remark."[71]

The DOJ intervened and filed an amicus curiae brief to address only this issue. It argues that the supervisor's use of a racial epithet on one occasion is sufficient to state a claim for a hostile work environment under Title VII. The DOJ cited numerous Fifth Circuit cases for the holding that a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.[72] However, only one of the Fifth Circuit cases cited by DOJ found the isolated incident at issue gave rise to a hostile work environment. *Henry v. CorpCar Servs. Houston., Ltd*., is an example egregious race-based incident arose when a company's supervisors brought in a white woman in a gorilla suit who made sexually and racially offensive ***19** comments about black employees on Juneteenth.[73] The *Henry* court determined that the single incident was sufficiently egregious to create a hostile work environment, considering the social context of the gorilla costume and Juneteenth; the incident's physically humiliating nature; and the demonstrable impact on black employees' job performance and outlook.[74]

In contrast, the conduct alleged by Woods - the single use of a racial epithet by Smith - does not meet this standard. This Court affirmed in 2019 and 2020 that the single, use of a racial slur is not the type of egregious incident creating a hostile work environment. In *Peterson v. Linear Controls, Inc.*, this Court found the "[plaintiff's] claim that black employees were given unfavorable working conditions ... and the allegation that a supervisor referred to [plaintiff] as the n-word" did not allege an egregious incident creating a hostile work environment.[75] Similarly, in *Collier v. Dallas Cnty. Hosp. Dist*., this Court held that two instances of racial graffiti and being called "boy" - though disturbing - were insufficient to establish a hostile work environment under Fifth Circuit precedent.[76] Although the DOJ cites *Collier* in support of its claim that "this Court recently acknowledge in *Collier* that use of a severe term like 'n ' could support a hostile work environment ***20** claim,"[77] the DOJ's reliance is misplaced. The *Collier* court was examining other court of appeals decisions regarding the use of racial slurs versus racially offensive graffiti.[78]

The DOJ also contends that Smith's use of the term "lazy" and "monkey" as modifier to the n-word makes the single use of this slur exceptionally egregious.[79] It is undisputed that using a racial slur - with or without degrading adjectives - is offensive. This Court has found that the allegation of a single offensive statement, as alleged in this case, is not sufficient to establish a hostile work environment. The cases cited by DOJ are inapplicable, as they do not involve an isolated instance, but rather multiple instances of harassment over an extended period of time.

The DOJ primarily relies upon the Third Circuit's decision in *Castleberry v. STI Group* for the proposition that one instance [of a supervisor using the n-word] can support a claim for hostile work environment.[80] However, the Third Circuit also acknowledged "a plaintiff must plead the incident to 'be extreme to amount to a change in the terms and conditions of employment' for it to serve as the basis of a harassment claim."[81] Here, Woods's Complaints failed to demonstrate or plead how ***21** Smith's alleged racial slur was so extreme that it altered the terms and conditions of his employment.

Last, the DOJ erroneously contends that the district court failed to consider the totality of circumstances in assessing Woods's hostile work environment claim.[82] The district court liberally construed every conceivable allegation by Woods that was tangentially linked to his hostile work environment claim. This included allegations that 1) "Smith continued his abusive behavior against" Woods; 2) Turner monitored Woods's work and called it "sloppy"; and 3) Woods needed to file multiple complaints for illegal suspensions.[83]

The district court properly dismissed Woods's claim of abusive behavior as too vague to be helpful. The DOJ's contention that the district court failed to analyze Woods's claim that Smith made "false accusations against him" fails for the same reason.

Moreover, it appears this allegation is related to Woods's termination, not his hostile work environment claim. [84] The district court also properly found that the allegations regarding Turner's statement to Woods and false suspensions offered no hint of an unlawful hostile work environment based on Woods's race or color. [85]

***22** The DOJ also claims the district court should have addressed Woods's claims that he was forced to work alone. First, it is unclear whether Woods's assertion that he was "forced to work alone" was related to his race/color, religious discrimination claim, or some other claim. [86] Nevertheless, this allegation fails as a matter of law because it not plausibly linked to his race/color. [87]

The district court properly found that the alleged racial epithet by Smith was the only fact that Woods sufficiently plead in support of his hostile work environment claim. Because the current law provides that a single offensive statement of this type does not create a hostile work environment, the district court properly dismissed Woods's hostile work environment claim. This rationally based ruling should not be disturbed on appeal.

B. *Race Discrimination in Violation of 42 U.S.C. § 1981*

The district court addressed Woods's § 1981 race discrimination claims related to his termination. However, the district court did not consider Woods's failure to promote under § 1981 because it was improperly raised in his opposition. [88]

The Fifth Circuit has repeatedly stated that the "analysis of employment discrimination claims under Title VII and § 1981 is 'identical,' because 'the only substantive differences' between the two statutes are 'their respective statutes of ***23** limitations and the requirement under Title VII that the employee exhaust administrative remedies.'" [89] The district court properly determined that Woods § 1981 claim regarding his termination fails for the same reasons his Title VII claims based on the same adverse employment action fails - because Woods has not offered anything but vague and conclusory allegations that his termination was race-based. [90]

C. *Religious Discrimination Under Title VII and § 1981*

The district court properly dismissed Woods's religious discrimination claim. First, the district court agreed with Defendants, finding that Woods's EEOC charge made no mention of religious discrimination. [91] Thus, Woods's Title VII claim based on religious discrimination had not been properly exhausted prior to filing suit. Next, § 1981 does not address religious discrimination. [92] Thus, the district court properly determined that Woods cannot raise a claim for religious discrimination under either statute.

D. *Retaliation in Violation of First Amendment under § 1983*

The district court properly dismissed Woods's First Amendment claim. To succeed on a First Amendment retaliation claim under § 1983, a public employee ***24** must show: "1) he suffered an adverse employment action; 2) he spoke as a citizen on a matter of public concern; 3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and 4) the speech precipitated the adverse employment action." [93]

"In determining whether an employee was speaking as part of his duties or had stepped outside that role to speak as a citizen and thus receive First Amendment protection, [courts] consider 'factors such as job descriptions, whether the employee, communicated with coworkers or with supervisors, whether the speech resulted from special knowledge gained as an employee,

and whether the speech was directed internally or externally.'" [94] "[C]omplaints made up the chain of command about conditions in a workplace are often held ... unprotected." [95]

Woods vaguely alleged that he "exercised his freedom of speech by reporting to [Sidney] that, [Turner] delegated authority to [Smith] to monitor his activities and fire him for any reason" and Defendants "retaliated by wrongfully terminating his job position." [96] Defendants asserted that Woods's Complaint failed to properly identify any speech that was protected. [97] The district court agreed and also found ***25** that to the extent that any speech occurred, it was to a human resources professional about workplace conduct. [98] That is not speech as "a citizen on a matter of public concern." [99] Furthermore, Woods did not compare his interest in the speech with the government's interest in efficiently providing services to the public - another required element. Thus, the district court properly concluded that Woods failed to state a First Amendment retaliation claim.

E. *Fourteenth Amendment Procedural Due Process Claim under 42 U.S.C. § 1983*

The district court dismissed Woods's Fourteenth Amendment procedural due process claim under 42 U.S.C § 1983 without prejudice, finding that it was not ripe for review. [100] Woods's procedural due process claim was difficult for Defendants and the district court to interpret.

Defendants were unclear if the basis for Woods's procedural § 1983 Fourteenth Amendment due process claim related to the August 23, 2019 termination letter *or* the adequacy of the notice regarding his pre-termination hearing held on September 11, 2019, the same issue Woods raised in his civil service appeal. [101] Defendants construed the allegations in his federal complaint to assert a procedural due process claim based on the notice and adequacy of his September 11, ***26** 2019 pre-termination hearing. [102] This due process allegation was the single overlapping issue pending before district court and Commission. [103] Defendants cited *Jackson v. St. Charles Parish* [104] regarding the district court's discretion to adjudicate a due process claim when it is simultaneously pending before a civil service commission and federal district court. The district court in *Jackson* determined that it would not stay the case pending resolution of the commission's decision.

However, the district court determined Woods's procedural due process claim related to his initial firing and to the alleged efforts by the Defendants to "improperly influence the civil service commission to cancel his appeal of the original decision firing him." [105] Essentially, the district court construed Woods's argument to mean that the ongoing Commission process suffers from numerous defects which, combined, mean that it runs afoul of the Fourteenth Amendment. [106] The district court distinguished this case from *Jackson*, finding that Woods's claims contain an "ongoing and continuous" conspiracy related to his termination. [107] Therefore, the district court determined that it could not address a claim about the fairness or adequacy of a review process that is ongoing and will need to review the complete ***27** Commission record and ruling once it is rendered. [108] Thus, the district court properly determined Woods's § 1983 Fourteenth Amendment procedural due process was not yet ripe for review and dismissed this claim without prejudice. [109]

F. *Conspiracy Claim under 42 U.S.C. § 1985(3)*

The district court properly dismissed Woods's § 1985(3) conspiracy claims for failure to state a claim. "To state a cognizable claim under §1985(3), plaintiff must allege that (1) a racial or class based discriminatory animus lay behind the conspiracy and (2) the conspiracy aimed to violate rights protected against private infringement." [110] Specifically, plaintiff must allege that

1) The defendants conspired 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and 3) one or more of the conspirators committed some act in furtherance of the conspiracy; whereby 4) another person is injured in his person or property or deprived

of having and exercising any right or privilege of a citizen of the United States; and 5) the action of the conspirators is motived by racial animus. [111]

***28** "It is well settled in the Fifth Circuit that 'mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a substantial claim for federal conspiracy.'" [112]

The provision "does not itself provide any substantive rights. Instead, the rights, privileges, and immunities protected by § 1985(3) 'must be found elsewhere.'" [113] And a "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1983(3)." [114]

The district court agreed with Defendants, finding that Woods improperly attempted to assert his § 1985(3) conspiracy claim under Title VII. [115] The district court also found that his complaint fails to offer anything more than conclusory allegations that the conspiracy was directed at him on the basis of his race/color. [116] Specifically, Woods alleged that Defendants "had an agreement of mind to conspire and collude to unlawfully terminate [his] employment" on the "basis of his race/color." [117] The district court found that this statement was a legal conclusion ***29** that did not come close to the level of specificity required to support a federal conspiracy claim and dismissed Woods's § 1985 claim with prejudice. [118]

CONCLUSION

The District Court properly granted the Motion to Dismiss. Thus, Appellees pray that this Honorable Court will affirm the dismissal by the district court.

Respectfully submitted,

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Footnotes

1 The French Market Corporation oversees and operates the French Market properties that are owned by the City of New Orleans. The French Market Corporation employees are members of the City of New Orleans classified civil service.
2 ROA.17-18. ROA.205-206.
3 ROA.17-18. ROA.205-206.
4 ROA.17-18. ROA.205-206.
5 ROA.18. ROA.207.
6 ROA.18. ROA.208-210.
7 ROA.18. ROA.208-210.
8 ROA.18. ROA.211-212.
9 ROA.20.
10 ROA.20.
11 ROA.258-259.
12 ROA.20.
13 ROA.284.
14 ROA.284.
15 ROA.262. ROA.277-278.
16 Woods asserted a race discrimination claim. However, the district court noted that this is better thought of as a color discrimination or race/color discrimination claim. ROA.829.
17 ROA.14-26. ROA.177-182.
18 ROA.22. ROA.178.
19 ROA.22.
20 ROA.21-24. ROA.180.
21 ROA.21.
22 ROA.181.
23 ROA.180.
24 ROA.179-180.
25 ROA.22-23. ROA.158.
26 ROA.22-23. ROA.158.
27 ROA.178.
28 ROA.21.
29 ROA.178.
30 ROA.17.
31 ROA.18.

32 ROA.18.
33 ROA.18.
34 ROA.20.
35 ROA.19.
36 ROA.20.
37 ROA.20.
38 ROA.178.
39 ROA.179.
40 ROA.14-26. ROA.177-182.
41 ROA.183.
42 Woods's claims against Kathleen Turner were dismissed without opposition on December 23, 2020. ROA.490.
43 ROA.826.
44 ROA.829.
45 ROA.833-839.
46 ROA.843.
47 ROA.844.
48 ROA.847-848.
49 Plaintiff-Appellant's Brief, Rec. Doc. 005158944014, page 9.
50 Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, Rec. Doc. 00515902670, page 10.
51 *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018).
52 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
53 *Meador*, 911 F.3d at 264.
54 ROA.830.
55 ROA.822-824.
56 *Barthelemy v. CHS-SLE LAND, L.L.C.*, No. 19-10086, 2006 WL 3605931, at * 6 (E.D. La. July 2, 2020) (quoting *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 767 (5th Cir. 2019).
57 ROA.180-181.
58 ROA.22.
59 ROA.22.
60 *Stone v. Louisiana Dep't of Revenue*, 590 F. App'x 332, 339 (5th Cir. 2014) (quoting *Raj v. Louisiana State Univ.,* 714 F.3d 322, 331 (5th Cir. 2013)).
61 ROA.826-827.
62 *Conner v. Orleans Parish Sheriffs Office*, No. 19-561, 2019 WL 4393137, at *3 (E.D. La. September 13, 2019) (quoting *Raj*, 714 F.3d at 330-31).
63 *Id*. (quoting *Whitlock v. Lazer Spot, Inc.,* 657 F. App'x 284, 287 (5th Cir. 2016).
64 *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986).
65 *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998).
66 *Harvill v. Westward Communications, L.L.C.,* 433 F.3d 428, 436 (5th Cir. 2005) (citing *Faragher*, 524 U.S. at 788).
67 *Harris*, 510 U.S. at 21.
68 ROA.195-196.
69 ROA.195-196.
70 ROA.830.
71 No. 14-1908, 2015 WL 2169804, at *4 (E.D. La. May 8, 2015) (citing cases); *see also Mosley v. Marion Cnty.*, 111 F. App'x 726, 728 (5th Cir. 20014).
72 Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, Rec. Doc. 00515902670, page 20.
73 625 F. App'x 607, 608-609 (5th Cir. 2015).
74 *Id.* at 613.
75 757 F. App'x 370, 375-376 (5th Cir. 2019).

76 827 F. App'x 373, 377-78 (5th Cir. 2020).
77 Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, Rec. Doc. 00515902670, page 25.
78 827 F. App'x at 377.
79 Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, Rec. Doc. 00515902670, page 23-24.
80 863 F.3d 259, 264 (3d. Cir. 2017).
81 *Castleberry*, 863 F.3d at 264.
82 Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, Rec. Doc. 00515902670, page 29-30.
83 ROA.830.
84 ROA.181.
85 ROA.830.
86 ROA.23.
87 *Conner*, 2019 WL 4393137 at *4 (citing *Twombly*, 550 U.S. at 570).
88 ROA.831.
89 *Chen v. Oschner Clinic Found.*, 630 F. App'x 218, 227 (5th Cir. 2015) (quoting *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 992 (5th Cir. 2005).
90 ROA.832.
91 ROA.832.
92 *Rhyce v. Martin*, 173 F. Supp. 2d 521, 529 (E.D. La. 2001) ("[T]he great weight of authority indicates that § 1981 applies only to instances of racial discrimination[.]")
93 *Wilson v. Tegre*, 787 F.3d 322, 325 (5th Cir. 2015).
94 *Johnson v. Halstead*, 916 F.3d 410, 422 (5th Cir. 2019) (quoting *Rogers v. City of Yoakum*, 660 F. App'x 279, 283 (5th Cir. 2016).
95 *Id.* at 423 (citing *Gibson v. Kilpatrick*, 773 F. 3d 661, 670 (5th Cir. 2014).
96 ROA.178. Plaintiff-Appellant's Brief makes similar allegations, Rec. Doc. 005158944014, page 30.
97 ROA.178.
98 ROA.838-839.
99 *Wilson*, 787 F. 3d at 325.
100 ROA.845.
101 ROA.618.
102 ROA.618.
103 ROA.618.
104 441 F. Supp. 3d 341 (E.D. La. 2020).
105 ROA.839-840.
106 ROA.843.
107 ROA.844.
108 ROA.844-845.
109 Woods's disciplinary appeals have not yet concluded. On May 3, 2021, the Commission issued a decision upholding Woods's termination, but Woods appealed the Commission's decision to the Louisiana Fourth Circuit Court of Appeal. Woods's appeal to the Louisiana Fourth Circuit is currently pending.
110 *Horaist v. Dr.'s Hosp. of Opelousas*, 255 F.3d 261, 270 (5th Cir. 2001) (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993)).
111 *Id.* at 270, no. 12 (quoting *Wong v. Stripling*, 881 F.2d 200, 202-03 (5th Cir. 1989)).
112 *Zuniga v. Masse Contracting, Inc.*, 290 F. Supp. 3d 581, 587 (E.D. La. 2017) (quoting *McAfee v. 5th Cir. Judges*, 884 F.2d 221, 222 (5th Cir. 1989)).
113 *Roe v. Abortion Abolition Soc.*, 811 F.2d 931, 933 (5th Cir. 1987) (quoting *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983)).
114 *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979).
115 ROA.836.
116 ROA.836.

117 ROA.180-181.
118 ROA.836.

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