United States District Court
Middle District of Florida
Jacksonville Division

KENYATTA MAXWELL BLAKE,

Plaintiff,

v. **NO. 3:24-cv-418-TJC-LLL**

WASTE MANAGEMENT, INC.,

Defendant.

Report and Recommendation

Before the Court is plaintiff's Amended Complaint, doc. 4, and Application to Proceed in District Court Without Prepaying Fees or Costs (short form), doc. 5. The Court denied without prejudice plaintiff's previous motion to proceed in forma pauperis and permitted her to amend the complaint. Docs. 2, 3. Because the amended complaint fails to correct the deficiencies identified in the Court's Order, I respectfully recommend plaintiff's renewed motion to proceed in forma pauperis be denied without prejudice and the amended complaint be dismissed.

Authority

The Court undertakes a two-step inquiry when considering a plaintiff's request to proceed as a pauper. First, under 28 U.S.C. § 1915(a)(1), the Court may permit a plaintiff to proceed without prepayment of fees if she demonstrates she is "unable to pay such fees or give security therefor." Second, the Court considers the plaintiff's

allegations under section 1915(e)(2) to determine whether the complaint: "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." *Id.* § 1915(e)(2)(B). If the Court finds these factors apply, it "shall dismiss the case." *Id.* § 1915(e)(2).

Further, "a district court may *sua sponte* consider subject matter jurisdiction at any stage in the litigation and must dismiss a complaint if it concludes that subject matter jurisdiction is lacking." *Jackson v. Farmers Ins. Grp./Fire Ins. Exch.*, 391 F. App'x 854, 856 (11th Cir. 2010) (per curiam) (emphasis in original) (citations omitted). District courts exercise subject matter jurisdiction either through 28 U.S.C. § 1331 (federal question) or 28 U.S.C. § 1332 (diversity). *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Federal question jurisdiction is invoked when an action "aris[es] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "All plaintiffs must be diverse from all defendants" to establish federal diversity jurisdiction. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999). Additionally, the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a).

When determining whether a complaint "fails to state a claim on which relief may be granted" under section 1915(e)(2)(B)(ii), the Court applies the standard from Federal Rule of Civil Procedure 12(b)(6). *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008). The complaint 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). The "complaint

must contain 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) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A pleading containing "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Twombly*, 550 U.S. at 555).

Pro se pleadings—where a plaintiff files without a lawyer—are "held to a less strict standard than pleadings filed by lawyers and thus are construed liberally." *Alba*, 517 F.3d at 1252 (citing *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998)). Nevertheless, "a court's duty to liberally construe a plaintiff's complaint . . . is not the equivalent of a duty to re-write it for her." *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 912 (11th Cir. 1993). A pro se litigant is subject to the same laws and court rules as an individual represented by counsel, including the Local Rules of the United States District Court for the Middle District of Florida and the Federal Rules of Civil Procedure. *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989). Moreover, "a litigant's *pro se* status in civil litigation . . . will not excuse mistakes [s]he makes regarding procedural rules." *Thompson v. U.S. Marine Corp.*, 398 F. App'x 532, 535 (11th Cir. 2010) (per curiam) (emphasis in original) (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993)).

The Court must give a pro se plaintiff an opportunity to amend her complaint "if it appears a more carefully drafted complaint might state a claim upon which relief

can be granted even if the plaintiff never seeks leave to amend." *Silva v. Bieluch*, 351 F.3d 1045, 1048-49 (11th Cir. 2003) (internal quotations and citation omitted).

Analysis

In line with the authority discussed above, I first review and evaluate plaintiff's financial condition. § 1915(a)(1). The Eleventh Circuit has held that when considering a motion for leave to file in forma pauperis, "the only determination to be made by the court . . . is whether the statements in the affidavit satisfy the requirement of poverty." *Martinez*, 364 F.3d at 1307. (citation omitted). Based upon the affidavit submitted by the plaintiff regarding her financial status, I find that she would likely qualify as a pauper. *See* doc. 2.

Before the case can proceed, however, I must also evaluate plaintiff's amended complaint as required under § 1915(e)(2). Construing plaintiff's amended complaint liberally, I find dismissal is warranted.

Jurisdiction

Plaintiff alleges this Court "has jurisdiction pursuant to Article V of the Florida Constitution, Chapter 47 and Chapter 760 of the Florida Statutes" and the "amount in controversy exceeds $50,000." Doc. 4 at 2. Because plaintiff does not allege the amount in controversy exceeds $75,000 and the parties are both citizens of Florida, she fails to establish diversity jurisdiction under 28 U.S.C. § 1332. *See id.* Additionally, her jurisdictional statement does not identify a federal question. However, construing the complaint liberally, it appears plaintiff has invoked the jurisdiction of the Court under 28 U.S.C. § 1331 based upon her Title VII claims.

Counts I and II – Hostile Work Environment

Under counts I and II, plaintiff seeks to proceed on a hostile work environment theory according to the FCRA and Title VII. The Court analyzes FCRA and Title VII claims under the same framework. *Fuller v. Edwin B. Stimpson Co.*, 598 F. App'x 652, 653 (11th Cir. 2015). A workplace qualifies as a hostile work environment when plaintiff can show "the workplace 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." *Rojas v. Florida*, 285 F.3d 1339, 1344 (11th Cir. 2002) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993)). To establish a hostile work environment claim under the FCRA and Title VII, plaintiff must show:

> (1) she belongs to a protected group; (2) she has been subject to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) the employer is responsible for such environment under a theory of either vicarious or direct liability.

Alhallaq v. Radha Soami Trading, L.L.C., 484 F. App'x 293, 295 (11th Cir. 2012) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002)). In its previous Order, the Court found that plaintiff failed to plausibly allege a claim of hostile work environment because she did not provide allegations specific enough to establish the defendant and its employees allegedly harassed plaintiff because of her race. Doc. 3 at 6.

Upon review of plaintiff's amended complaint, I find plaintiff still fails to plausibly allege a claim of hostile work environment. Although plaintiff is a member of a protected group as a black female, she does not provide allegations specific enough to establish the defendant and its employees allegedly harassed plaintiff because of her race or gender. *See generally* doc. 4 ¶¶ 1-16. Plaintiff alleges that she was "belittled, yelled at, and mistreated daily by Paula Davey in front of her peers. This constant verbal abuse and derogatory treatment created an abusive and hostile working environment." Doc. 4 ¶ 4. She further alleges that after she reported the behavior her "work was tampered with, and misrepresentations were made about her performance. This tampering increased in frequency following Plaintiff's report of a significant data breach involving customer addresses and information. The company's failure to address the tampering exacerbated the hostile environment and retaliation." *Id.* ¶ 6. However, the complaint fails to allege that the harassment was based on a protected characteristic. For this reason, plaintiff's hostile work environment claims fail.

Counts III and IV- Race Discrimination

To establish a Title VII race discrimination claim, plaintiff must show the following elements: "(1) [S]he belongs to a protected class; (2) she was qualified to do her job; (3) she was subjected to adverse employment action; and (4) her employer treated similarly situated employees outside her class more favorably." *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). Count III reads in full: "Plaintiff, an African American, faced adverse employment actions due to race, including demotion and unwarranted discipline." Doc. 4 ¶ 17. Count IV reads in full: "Plaintiff was

terminated after filing a race discrimination complaint, unlike her non-African American peers." *Id.* ¶ 18. Both claims are conclusory and lack sufficient factual detail to set forth a claim for Title VII or FCRA race discrimination.

Regarding Count III, plaintiff does not provide any further facts other than those above including facts establishing that defendant treated similarly situated employees outside her class more favorably. While plaintiff alleges her treatment was "unlike her non-African American peers[,]" she fails to allege facts showing that she and her comparator are "similarly situated in all material respects." *Id.*; *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019). Regarding Count IV, plaintiff similarly fails to allege with sufficient factual detail that "her employer treated similarly situated employees outside her class more favorably." *Crawford*, 529 F.3d at 970.

Counts V and VI – Retaliation/Constructive Termination

Plaintiff seeks to proceed on retaliation and constructive termination causes of action under counts V and VI. When considering plaintiff's claims on their merits, plaintiff does not plausibly allege a constructive termination or retaliation cause of action under the FCRA or Title VII. "[D]ecisions construing Title VII guide the analysis of claims under the Florida Civil Rights Act." *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998).

For plaintiff to succeed on a retaliation claim under both the FCRA and Title VII, she must show "(1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was causally related to the

protected activity." *Patterson v. Ga. Pac., L.L.C.*, 38 F.4th 1336, 1345 (11th Cir. 2022) (quoting *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020)). A plaintiff may demonstrate she engaged in a statutorily protected activity by showing she had a "good faith, *reasonable belief* that the employer was engaged in unlawful employment practices." *Adams v. Cobb Cnty. Sch. Dist.*, 242 F. App'x 616, 621 (11th Cir. 2007) (emphasis in original) (quoting *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997)).

A constructive termination claim requires a plaintiff to meet two elements: (1) Plaintiff must show she was discriminated against by her employer to the point where a reasonable person in her position would have felt compelled to resign, and (2) the employee must show she actually resigned. *Green v. Brennan*, 578 U.S. 547, 555 (2016) (citing *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004)).

Count V reads in full: "Plaintiff's termination and demotion were retaliatory actions in response to her complaints about race discrimination and the data breach." Doc. 4 ¶ 19. Count VI reads in full: "Plaintiff's termination, following protected activities and harassment, constitutes unlawful retaliation." *Id.* ¶ 20. These allegations alone are conclusory and lack the factual detail necessary to state a claim. Looking to the factual allegation preceding her claims, plaintiff alleges that she "faced race-based discrimination, including bullying and professional isolation, which she reported to HR." *Id.* at 2.

Plaintiff also alleges that "[o]n or around September 2021, [she] reported a significant customer data breach involving over 5 million Florida customers.

Following this report, Plaintiff experienced retaliation, including isolation and a demotion to a secretary role." *Id.* at 3. She goes on to allege that "[o]n September 2021, during a team meeting, Plaintiff's manager, Paula Davey, laughed at, belittled, and name-called Plaintiff. After the meeting, a colleague contacted Plaintiff expressing concern. This incident was reported to HR, who confirmed the inappropriate conduct but failed to take corrective action." *Id.* Finally she alleges her "work was tampered with and misrepresented, adversely affecting her relationships with colleagues and her job performance. Despite repeated complaints to HR and the company hotline, Plaintiff continued to endure retaliation and a hostile work environment, culminating in her termination on March 2, 2022." *Id.*

While plaintiff claims that she suffered an adverse action by being terminated from her job, she fails to allege with factual detail that the adverse action was caused was related to statutorily protected activity. The complaint also fails to identify what activity she is alleging to be the statutorily protected activity that caused her termination. Given these deficiencies, plaintiff fails to state a retaliation claim.

Plaintiff titles Counts V and VII "Constructive Termination" but includes no allegation that she resigned. Thus, I find that Counts V and VI fail to state a claim for constructive termination.

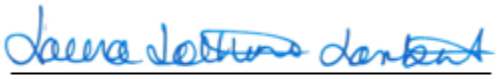
Recommendation

I respectfully **recommend**:

1. Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form), doc. 5, construed as a motion to proceed in forma pauperis, be **denied**.

2. Plaintiff's amended complaint, doc. 4, be **dismissed,** any **pending motions be terminated**, and the Clerk be directed to **close** the file.

Entered in Jacksonville, Florida, on October 8, 2024.



LAURA LOTHMAN LAMBERT
United States Magistrate Judge

Notice

Plaintiff has fourteen days from the date the party is served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). "Within 14 days after being served with a copy of [a report and recommendation on a dispositive issue], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." Id. A party's failure to serve and file specific objections to the proposed findings and recommendations changes the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. See Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Order (Doc. No. 3), No. 8:20-mc-100-SDM, entered October 29, 2020, at 6.

c:
The Honorable Timothy Corrigan, Chief United States District Judge
Kenyatta Maxwell Blake, pro se plaintiff
9093 Galloway Drive
Jacksonville, Florida 32291