NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-13888
Non-Argument Calendar

ELIJAH TIMOTHY SPEED,

Plaintiff-Appellant,

versus

REDDY ICE LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:24-cv-03404-SDG

Before NEWSOM, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Elijah Speed, pro se, appeals the district court's order dismissing his third amended complaint with prejudice. He argues that the district court erred in dismissing his claims of retaliation,

hostile work environment, and disparate treatment under Title VII of the Civil Rights Act of 1964 ("Title VII") and his claims of negligent retention and supervision under Georgia state law and spoliation of evidence. He also asserts that the court abused its discretion in dismissing his third amended complaint with prejudice.

We review a district court's ruling on a Rule 12(b)(6) motion de novo. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). The complaint is viewed in the light most favorable to the plaintiff, and all of the plaintiff's well-pleaded facts are accepted as true. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). Pro se pleadings are held to a less stringent standard than formal pleadings drafted by lawyers and will be liberally construed. *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014). Nevertheless, the leniency afforded pro se litigants with liberal construction "does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action." *Id.* at 1168-69 (quoting *GJR Invs., Inc. v. Cnty. Of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998), *overruled on other grounds, as recognized in Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010)) (italics omitted).

Additionally, a pro se plaintiff's complaint must still contain facts sufficient to support a plausible claim to relief, and mere legal conclusions "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). To survive a Rule 12(b)(6) motion to dismiss, the party's complaint must include more than "a formulaic recitation of the elements of [the] cause of action." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The factual allegations presented in the complaint "must be enough to raise a right to relief above the speculative level." *Id.*

Generally, where it appears that a pro se plaintiff's complaint might state a claim if more carefully drafted, the district court must provide the plaintiff at least one opportunity to amend before dismissing his complaint with prejudice, but the court need not do so when "a more carefully drafted complaint could not state a claim." *Woldeab v. Dekalb Cnty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (quoting *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *overruled in part by*, *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 & n.1 (11th Cir. 2002) (en banc)).

Eleventh Circuit Local Rule 3-1 states:

> A party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.

11th Cir. R. 3-1.

Where a litigant fails to adequately brief an issue on appeal, the issue is "deemed abandoned." *Timson v. Sampson*, 518 F.3d 870,

874 (11th Cir. 2008). "A party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (quotation marks omitted). An appellant abandons a claim when, for example: (a) he makes only passing reference to it, (b) raises it in a perfunctory manner without supporting arguments and authority, (c) refers to it only in the "statement of the case" or "summary of the argument," (d) refers to the issue as mere background to his main argument, or (e) raises it for the first time in his reply brief. *Id.* at 681-83.

Exhibits attached to a complaint may be considered on a Rule 12(b)(6) motion, as they are considered part of the complaint. *Gill v. Judd*, 941 F.3d 504, 511 (11th Cir. 2019); *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). If exhibits contradict general and conclusory allegations in the complaint, we resolve those contradictions in favor of the exhibit. *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1218 (11th Cir. 2020).

Title VII prohibits employers from discriminating against employees on the basis of their race. *See* 42 U.S.C. § 2000e-2(a). Title VII also prohibits a racially hostile work environment where "a series of separate acts . . . collectively constitute one unlawful employment practice." *McCann v. Tillman*, 526 F.3d 1370, 1378 (11th Cir. 2008) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536

U.S. 101, 117 (2002)) (quotation marks omitted). To establish a racially hostile work environment claim under Title VII, a plaintiff must show that:

> (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his membership in the protected group; (4) it was severe or pervasive enough to alter the terms and conditions of employment and create a hostile or abusive working environment; and (5) the employer is responsible for that environment under a theory of either vicarious or direct liability.

Jones v. UPS Ground Freight, 683 F.3d 1283, 1292 (11th Cir. 2012) (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th Cir. 2010)).

The fourth prong of this test has an objective and a subjective component, meaning that a reasonable person in the plaintiff's position would have found the work environment hostile or abusive and the plaintiff subjectively perceived the work environment as hostile or abusive. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002). When evaluating the objective severity of the harassment, we consider, among other factors, "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Id.* (citing *Allen v. Tyson Foods*, 121 F.3d 642, 647 (11th Cir. 1997)).

As to the fifth prong, an employer may be held liable for an employee's harassment of another employee under a theory of vicarious liability. *Wilcox v. Corr. Corp. of Am.*, 892 F.3d 1283, 1287 (11th Cir. 2018). "When . . . the perpetrator of the harassment is not the plaintiff's supervisor, the employer will be held directly liable only if it knew or should have known of the harassing conduct but failed to take prompt remedial action." *Id.* "To avoid liability for an employee's harassment, an employer must take prompt remedial action upon learning about the harassment," which "must be reasonably likely to prevent the misconduct from recurring." *Id.* at 1288 (quoting *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (quotation marks omitted)).

To state a claim for disparate treatment under Title VII, a complaint "need not allege facts sufficient to make out a classic *McDonnell Douglas*[1] prima facie case, [but] it must provide enough factual matter (taken as true) to suggest intentional race discrimination." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) (quotation marks and citation omitted), *abrogated on other grounds by, Twombly*, 550 U.S. 544. A plaintiff may establish an inference of discrimination through allegations that: (1) he is a member of a protected class, (2) he was qualified for the position, (3) he suffered an adverse employment action, and (4) he was treated less favorably than a similarly-situated individual outside his protected class. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir.

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2008), *overruled in part on other grounds by*, *Pearson v. Callahan*, 555 U.S. 223 (2009). To satisfy the fourth prong, a plaintiff must identify a comparator who is "similarly situated in all material respects," meaning that the plaintiff and the comparator are "sufficiently similar, in an objective sense" and "cannot reasonably be distinguished." *Lewis v. City of Union City*, 918 F.3d 1213, 1228 (11th Cir. 2019) (en banc) (quoting *Young v. United Parcel Serv., Inc.*, 572 U.S. 206, 231 (2015)). This standard requires a case-by-case analysis, and minor differences in job functions between a plaintiff and a comparator are not dispositive as to whether they are similarly situated. *Id.* at 1227. However, a similarly situated comparator will ordinarily have engaged in the same basic conduct as the plaintiff, will have been subject to the same employment policy, will ordinarily have had the same supervisor, and will share the plaintiff's employment or disciplinary history. *Id.*

To state a prima facie case of Title VII retaliation, a plaintiff must allege sufficient facts to establish the following: (1) he engaged in a statutorily protected activity or expression, (2) he received an adverse employment action, and (3) there was a causal link between his protected expression and the adverse employment action. *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1244 (11th Cir. 2020).

Regarding the causation requirement for a retaliation claim,

> The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action. But mere temporal proximity, without more, must be very close. A three to four month disparity between

> the statutorily protected expression and the adverse employment action is not enough. Thus, in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law.

Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (citations and quotation marks omitted).

Generally, a party's failure to comply with discovery by failing to preserve electronically stored information may only be challenged at the discovery stage of litigation. *See*, *e.g.*, Fed. R. Civ. P. 37(e). The Northern District of Georgia's Local Rules state that "[t]he discovery period shall commence thirty days after the appearance of the first defendant by answer to the complaint, unless the parties mutually consent to begin earlier." N.D. Ga. LR 26.2.

Here, first, the district court did not err in finding that Speed failed to state a racially hostile work environment claim. As the district court noted, at least some of Speed's allegations for his claim, such as another employee referring to him as a "hand-stacker," did not appear to be harassment based on Speed's membership in a protected group, nor did he allege that it was severe or pervasive. *Jones*, 683 F.3d at 1292. However, at least one of Speed's allegations—that Wilcher, a Black employee, referred to Speed as a "fake Mexican Bitch" and "Nig**r boy" and physically attacked him—qualifies as harassment based on Speed's membership in a protected group. *Jones*, 683 F.3d at 1292. Next, though Speed's third amended complaint contains little to indicate that Wilcher's

harassing conduct was pervasive, his assertion that Wilcher fought him at least arguably qualifies as both objectively and subjectively severe. *Miller*, 277 F.3d at 1276. However, assuming that Wilcher's conduct toward Speed satisfies the first four prongs of a prima facie hostile work environment claim, Speed has not satisfied the fifth prong because the attachments to his third amended complaint plainly establish that Reddy Ice took remedial action by suspending Wilcher for three days and ultimately firing him. *Wilcox*, 892 F.3d at 1287. Speed has not alleged that Wilcher was one of his supervisors, nor does he assert that Reddy Ice's managerial team knew or should have known of Wilcher's propensity to harass Speed until the point at which Speed and Wilcher began fighting. *Id.* Further, though Speed argues on appeal that Dowdy repeatedly touched him and humiliated him by asking if he was cheating on his wife, these allegations were not included in Speed's third amended complaint. Therefore, though Speed asserts that physical touching can be enough to state a hostile work environment claim, his third amended complaint contained no such allegations. Because Speed cannot establish a basis upon which to hold Reddy Ice liable, he failed to state a hostile work environment claim, and the district court properly dismissed the complaint on that ground.

Turning to Speed's disparate treatment claim, as the district court noted, Speed elected in his third amended complaint to establish an inference of discrimination based on the four-prong test stated in *Crawford*. To the extent Speed used Wilcher as a comparator, the police report included in his third amended complaint established that, though Wilcher and Speed were similarly situated,

Speed was "at a minimum . . . treated no worse than Wilcher" because he was suspended for one day after the October 2023 altercation, while Wilcher was suspended for three days. Additionally, the report indicated that Reddy Ice conducted an investigation and ultimately fired Wilcher. Therefore, the district court did not err in its conclusion that Speed failed to show that he was treated any worse than Wilcher. *Crawford*, 529 F.3d at 970. As to Speed's use of Dowdy as a comparator, the magistrate judge correctly noted that Speed's third amended complaint merely noted that Dowdy was not penalized for violating Reddy Ice's no smoking policy, but he failed to allege that he and Dowdy shared the same disciplinary history or allege that Dowdy was not penalized for the smoking policy while he was. *Lewis*, 918 F.3d at 1227. Though Speed asserts that the court failed to consider his allegations that other employees received more favorable treatment than him, the court expressly did so in its assessment of Dowdy as a comparator and its discussion of Speed's nepotism allegations. The other allegations Speed notes in his appellate brief, including those about firing seasonal employees or providing favored employees lenience with Reddy Ice's attendance policy, were not alleged in Speed's third amended complaint. Because Speed failed to allege that similarly situated comparators received favorable treatment, the district court did not err in dismissing Speed's disparate treatment claim. *See Crawford*, 529 F.3d at 970; *Lewis*, 928 F.3d at 1227-28.

Next, the district court did not err in dismissing Speed's retaliation claim with prejudice because Speed failed to plead facts showing causation or sufficient to infer causation from suspicious

timing. *Thomas*, 506 F.3d at 1364. Even assuming that Speed's complaints to Reddy Ice's human resources department constituted protected activity, he failed to allege facts establishing close temporal proximity between his protected activity and his adverse employment actions, *Thomas*, 506 F.3d at 1364. Speed failed to allege at what point in time he was transferred to the night shift and demoted in his duties at the company. Moreover, the facts in his amended complaint alleged that his other adverse employment action—his termination—occurred at least three months after his protected activity. Speed failed to allege facts to establish an inference of causation from the temporal proximity of his protected activity to his adverse employment action because, as this Court has held, a three - or four-month gap is insufficient to establish temporal proximity. *Thomas*, 506 F.3d at 1364. Speed correctly notes on appeal that a shift change may constitute an adverse employment action; however, he failed to allege causation between either of his adverse employment actions and his protected activity. *Thomas*, 506 F.3d at 1364. Though Speed asserts on appeal that he reported touching and harassment to Reddy Ice's human resources department, these allegations are absent from the third amended complaint. Accordingly, this district court did not err in dismissing Speed's retaliation claim for failure to state a claim.

As to Speed's Georgia state negligence claim, he failed to object to the magistrate judge's R&R as to this claim, so pursuant to this Court's local rules, review of the issue will only be "for plain error if necessary in the interests of justice." 11th Cir. R. 3 1. However, because Speed also failed to brief the issue in his opening brief

to this Court, he abandoned his challenge as to the claim. *Sapuppo*, 739 F.3d at 681.

Next, the district court correctly determined that the magistrate judge did not err in denying Speed's motion for sanctions based on his allegation that Reddy Ice destroyed or failed to turn over camera footage from the October 2023 altercation because Speed's spoliation claim was premature. Spoliation of evidence is a claim made during the discovery phase of litigation, and the district court's local rules clarify that discovery commences thirty days after the defendant files an answer to the complaint or if both parties consent. *See* Fed. R. Civ. P. 37(e); N.D. Ga. LR 26.2. The record does not indicate that Reddy Ice filed an answer to Speed's complaint, nor does it show that both parties consented to commence discovery before an answer was filed. Contrary to Speed's assertion on appeal that the district court wholly ignored his allegations of spoliation, the court discussed his claim and concluded that the magistrate judge did not err in denying his motion for sanctions. Therefore, the district court did not err in dismissing Speed's claim for spoliation of evidence.

Lastly, the district court did not err in dismissing Speed's third amended complaint with prejudice and declining Speed leave to amend his complaint for a fourth time. Though Speed broadly asserts that dismissal with prejudice was an abuse of discretion because there are factual disputes to be resolved, the district court acted within its discretion to dismiss the complaint because Speed was provided multiple opportunities to redraft his complaint and

failed to state a claim as to any of his claims in his third amended complaint. *Woldeab*, 885 F.3d at 1291. In the magistrate judge's order on Reddy Ice's motion to dismiss Speed's initial complaint, he flagged the deficiencies in Speed's complaint and stated that, because Speed was proceeding pro se, the court needed to provide him an opportunity to correct his deficiencies by amending the complaint. Thereafter, Speed amended or attempted to amend his complaint multiple times before submitting his third amended complaint. Therefore, the district court did not err in dismissing Speed's third amended complaint with prejudice. *Woldeab*, 885 F.3d at 1291.

AFFIRMED.