IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Maxwell Little, et al., Plaintiffs, v. JB Pritzker for Governor, et al., Defendants.	No. 1:18-CV-06954 Honorable Virginia M. Kendall

DEFENDANT JB PRITZKER FOR GOVERNOR'S
REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE AND DISMISS

Dated: January 18, 2019

Respectfully Submitted,

JB PRITZKER FOR GOVERNOR

By: */s/ William B. Stafford*
One of Their Attorneys

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TABLE OF CONTENTS

Page

I. INTRODUCTION

Nothing in Plaintiffs' response to JB Pritzker for Governor's (the "Campaign") motion to (a) strike parts of the Second Amended Complaint ("Complaint") and (b) dismiss all claims against the Campaign saves their Complaint. At this point, it is clear that Plaintiffs have not pled plausible claims for relief against the Campaign because they cannot.

Perhaps recognizing the basic shortfall noted in the Campaign's Motion—the Complaint is full of speculation, incendiary language, and unwarranted inferences but not well-pleaded factual allegations establishing plausible claims—Plaintiffs respond to the Campaign's motion by raising new factual allegations not contained in their Complaint and mischaracterizing the factual allegations they have pled. But they do themselves no favors because—regardless of the propriety of those new allegations and mischaracterizations—Plaintiffs fail to adequately plead their claims. Moreover, Plaintiffs decline to even address several of the Campaign's arguments, conceding many inadequacies.

Despite filing four versions of the Complaint, Plaintiffs still have not alleged plausible claims for relief. They allege no material adverse employment action that could support a discrimination claim based on race. They allege no harassing behavior that could remotely be considered severe or pervasive. And they allege no adverse action that they suffered because of protected activity or retaliatory animus motivating any adverse action. Plaintiffs have had enough chances to state plausible claims. The Court should grant the Campaign's motion and dismiss the Complaint with prejudice.

II. ARGUMENT

A. The Court should strike Plaintiffs' irrelevant and inflammatory statements

Plaintiffs' allegations about Kayla Hogan's unionization discussions and Tiffany Madison's reports of sexual harassment have no relevance to this case. *See E & J Gallo Winery*

v. Morand Bros. Beverage Co., 247 F. Supp. 2d 979, 982 (N.D. Ill. 2003) (court can strike immaterial allegations "so unrelated" to plaintiff's claims as to be "devoid of merit, unworthy of consideration, and unduly prejudicial") (internal quotation marks omitted); *see also* Fed. R. Civ. P. 12(f). Rather than plead facts suggesting Defendants' knowledge of alleged *race-based* discrimination, Plaintiffs attempt to inject inflammatory—but ultimately irrelevant—matters into this case. Plaintiffs bring no claims (nor could they) under laws such as Section 7 of the National Labor Relations Act or Title VII of the Civil Rights Act of 1964. It is hard to see how discussions of unionization could show that Defendants knew of the allegedly "widespread and pervasive problems" of *racial* discrimination or that Ms. Madison's attempts to report alleged sexual harassment could show that Defendants ignored *racial* discrimination. *See* MTS Resp., ECF No. 36, at 3. Even the experiences of a coworker in the *same* protected class are not relevant when the circumstances surrounding the alleged discrimination are not sufficiently similar. *Cf. Martinez v. Clarian Health Partners, Inc.*, No. 1:12–cv–00567–TWP–DKL, 2014 WL 545893, at *3 (S.D. Ind. Feb. 10, 2014). And although Plaintiffs' response says that Ms. Madison's reports were ignored because of her race, she does not actually allege that in the Complaint. *See* MTS Resp. at 3; *see also* Compl. ¶¶ 22-24. The Court should reject Plaintiffs' attempt to reframe their allegations and should strike the irrelevant allegations.

B. The Court should disregard and strike purported facts and evidence that are not properly pled

Plaintiffs filed this lawsuit shortly before Illinois's gubernatorial election, but never served it, instead opting to provide it to the press. Plaintiffs then amended their complaint on Election Day, followed by another amendment in response to the Campaign's first motion to dismiss. *See* FAC, ECF No. 11; Defs. 1st MTD, ECF No. 15; Defs. 1st Memo., ECF No. 16; Mot. to Amend, ECF No. 20. The Court permitted the Plaintiffs to amend a second time,

11/26/18 Min. Entry, ECF No. 19, and Plaintiffs ultimately filed a third version of an amended complaint—not previously vetted or approved by the Court, *compare* Prop. SAC, ECF No. 21, *with* Compl.

Now that they finally respond to the Campaign's arguments in favor of dismissal, Plaintiffs attempt to include new, unpled factual allegations and distort the ones they have already pleaded. For example, Plaintiffs argue that they were forced to work in a rat-infested office, but their Complaint nowhere states that alleged fact. *See* MTD Resp., ECF No. 35, at 7. Plaintiffs also say that they communicated directly with Mr. Pritzker and Ms. Stratton about their concerns about alleged discrimination. *Id.* at 2. Their Complaint, however, states merely that Mr. Pritzker and Ms. Stratton had knowledge of alleged discrimination. Compl. ¶ 9. And as a final example, they assert that the Campaign ignored Tiffany Madison's alleged sexual harassment because she is African American. MTD Resp. at 2. But the Complaint makes no connection whatsoever between how the Campaign treated her report and her race. *See* Compl. ¶¶ 22-24.

A party cannot defeat a motion to dismiss by slipping unpled allegations into their response brief. *See* *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 348 (7th Cir. 2012) ("[I]t is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss . . . ." (internal quotation marks omitted)). The Court should not permit Plaintiffs to dodge their failure to state factual allegations in their Complaint and should disregard the new facts raised for the first time in response.

C. The Court should dismiss Plaintiffs' claims because they fall far short of plausible

Plaintiffs fail to demonstrate that their Complaint plausibly alleges claims under Section 1981 for race-based discrimination, hostile work environment, or retaliation. Although Plaintiffs do not have to plead a prima facie case, they must do more than lob "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The

Complaint must allow the Court to make the "reasonable inference" that the Campaign engaged in the conduct Plaintiffs allege. *See id.*

1. Plaintiffs concede several bases for dismissal

To start, Plaintiffs concede several bases for dismissal of some or all claims against some Plaintiffs. First, they do not even attempt to address the Complaint's lack of any specific, relevant facts about the employment of seven of them: Jason Benton, Jelani Coleman, Erica Kimble, Nathaniel Madison, James Tinsley, Mark Walker, and Tiffany Madison. The Campaign argued that Plaintiffs merely describe their employment backgrounds prior to working on the Campaign and set forth a generalized, vague, and insufficient list of allegedly discriminatory acts. *See* Campaign Memo. ISO MTD at 7-8; Compl. ¶¶ 3(a)-(1), 26. Without any relevant allegations about their employment on the *Campaign*, those seven Plaintiffs fail to state any plausible claim for relief, and their failure to respond to this argument only drives home that point. *See* *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) ("An unresponsive response is no response."). For this reason alone, the Court should grant the Campaign's motion as to those seven Plaintiffs.

Second, as to Kasmine Calhoun, Kayla Hogan, and Eric Chaney—the three Plaintiffs who alleged anything that could conceivably be an adverse action—Plaintiffs offer no argument about the insufficiency of the facts alleged as to those Plaintiffs. In its motion to dismiss, the Campaign argued that Ms. Calhoun had not alleged an adverse action because (a) she quit and (b) an employer has no obligation to pay for and arrange housing for its employees or to provide housing at the hotel of the employee's choice. *See* Campaign Memo. ISO MTD, ECF No. 30, at 9. And the Campaign further argued that Ms. Hogan and Mr. Chaney failed to plead that their alleged termination had any connection to their protected class (particularly in light of the fact that many others' employment ended at the same time). *See* *id.* at 10. Plaintiffs do not address

those arguments, and they therefore waive any argument against dismissal of the discrimination claims against those Plaintiffs. *See* *Kyle v. Brennan*, No. 17 C 7646, 2018 WL 3232794, at *4 (N.D. Ill. July 2, 2018) ("A person waives an argument by failing to raise it . . . .).

And third, Plaintiffs do not respond to the Campaign's contention that Ms. Hogan and Mr. Chaney plead themselves out of their retaliation claim. *See* Campaign Memo. ISO MTD, ECF No. 30, at 15. Plaintiffs do not address how Ms. Hogan and Mr. Chaney could have allegedly reported concerns with discrimination at the cultural sensitivity training or were retaliated against when they were not even *employed* when the training or alleged retaliation occurred. *See* Compl. ¶¶ 38, 52; *Atkins v. City of Chi.*, 631 F. 3d 823, 832 (7th Cir. 2011) (plaintiffs can plead themselves out of claim). Their retaliation claim is not plausible.

Because Plaintiffs do not contest any of those arguments, the Court can (and should) grant the Campaign's motion as to the Plaintiffs and claims identified above.

2. Plaintiffs' discrimination claim fails: they allege no materially adverse employment action

Even putting those concessions aside, Plaintiffs still fall far short of showing that their discrimination claim under Section 1981 is plausibly pled. Plaintiffs begin by explaining that there is "an exceptionally low bar to the pleading of causation in racial discrimination cases." MTD Resp. at 7 (internal quotation marks omitted) (quoting *Baker v. Nw. Medicine Lake Forest Hosp.*, No. 16-cv-05669, 2017 WL 2908766, at *4 (N.D. Ill. July 7, 2017)). To be sure, Plaintiffs in discrimination cases do not need to prove causation in the pleadings, but they must still allege "some connection" between their protected class and an adverse employment action. *Shankle v. Village of Melrose Park*, No. 16 C 2582, 2018 WL 844422, at *2 (N.D. Ill. Feb. 12, 2018). These Plaintiffs have not. Their Complaint contains no allegations that any allegedly adverse action was *because of* their race. But besides that, Plaintiffs miss the Campaign's main point: They

have alleged no plausible facts suggesting that the Campaign took any adverse employment action against them. The causal link between Plaintiffs' protected class and any action of which Plaintiffs complain matters little if there has been no adverse action. And here, taking all of Plaintiffs' allegations as true, there has not.

Based on Plaintiffs' response, the only conceivable basis for an adverse action that Plaintiffs raise is their alleged working conditions. *See* MTD Resp. at 7-8. But Plaintiffs offer no facts in their Complaint that plausibly suggest anything in their workplace rose to an actionable level. *See* *Parks v. Speedy Title & Appraisal Review Servs.*, 318 F. Supp. 3d 1053, 1065 (N.D. Ill. 2018) (dismissing discrimination claim because plaintiff did not plead anything "sufficiently egregious to support" constructive discharge or hostile work environment as adverse action); *infra* § III.B.3.

Indeed, Plaintiffs begin this line of argument by conjuring completely new allegations, essentially amending their Complaint a fifth time by way of their response. For example, Plaintiffs argue that they had to "work in an environment that was unsanitary—it was rodent [-]infested." MTD Resp. at 7 (citing Compl. ¶ 45)). But that is simply not what their Complaint says. Instead, their Complaint alleges that crimes occurred near the Region 6 Office—it does not allege anything about an unsanitary (let alone rat-infested) workplace. *See* Compl. ¶ 45. Nor does it contain any allegations that the Region 6 Office was located in a crime-prone area *because of* Plaintiffs' race (or, for that matter, that the cleanliness of the office in which Plaintiffs and others worked was somehow connected to their race). The Court should reject Plaintiffs' attempts to (at best) mischaracterize and (at worst) improperly amend their Complaint in response to the Campaign's motion. *See* *Agnew*, 683 F.3d at 348 (plaintiffs cannot amend their complaints by "briefs in opposition to a motion to dismiss").

Even putting aside those new allegations, Plaintiffs otherwise offer no argument as to how what they have actually alleged amounts to an adverse action. They reiterate their conclusory allegations that the Campaign did not allow them to telecommute, micromanaged and belittled them, permitted discriminatory language, denied resources, and restricted access to Mr. Pritzker. *See* MTD Resp. at 7 (citing Compl. ¶ 26). And they baldly state that "they were subjected to discrimination on the basis of their race." *Id.* But as the Campaign has explained, those allegations do not suggest that any of those actions amount to a material change to the terms and conditions of Plaintiffs' employment, as required to support a discrimination claim. Campaign Memo. ISO MTD at 9-10. Plaintiffs do not allege that any of those actions decreased their pay or benefits, amounted to a demotion or meaningful reduction in responsibilities, or reduced future employment prospects. *See id.* That Plaintiffs may have wanted *different* working conditions—to telecommute, to have extra resources, to interact more with Mr. Pritzker—cannot support a discrimination claim, even at the pleading stage. *See Shankle*, 2018 WL 844422, at *2 (failure to "explain" how something constitutes adverse action is "not permitted even at the pleadings stage"); *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), *cert. denied*, 540 U.S. 1004 (2003) ("subjective preference" for different working conditions is not adverse action). The Court should dismiss Plaintiffs' discrimination claim.

3. Plaintiffs fail to allege any severe or pervasive harassment

Plaintiffs next claim that they have sufficiently stated a hostile work environment claim, but they have not pled any facts amounting to harassment—let alone *severe* or *pervasive* harassment. *See* MTD Resp. at 5-6. Severe or pervasive harassment alters the conditions of employment and creates an abusive environment. *See Dandy v. United Parcel Serv.*, 388 F.3d 263, 271 (7th Cir. 2004). For that reason, whether the alleged conduct creates a hostile work environment depends on all of the circumstances, including: "(1) the frequency of the

discriminatory conduct; (2) how offensive a reasonable person would deem it to be; (3) whether it is physically threatening or humiliating conduct as opposed to verbal abuse; (4) whether it unreasonably interferes with an employee's work performance; and (5) whether it was directed at the victim." *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 601 (7th Cir. 2014).

None of Plaintiffs' allegations suggests severe or pervasive harassment. Most of the allegations Plaintiffs identify as supporting this claim—that Plaintiffs were micromanaged, overworked, "reminded . . . that they were valued less," belittled, and intimidated—describe the type of workplace strife that, although unpleasant, cannot state a hostile work environment claim. *See* MTD Resp. at 5; *Atanus v. Perry*, 520 F.3d 662, 676 (7th Cir. 2008) ("loud, unprofessional tone during one meeting" is not "severe [or] pervasive"); *Adam v. Obama for Am.*, 210 F. Supp. 3d 979, 991 (N.D. Ill. 2016) (same, in general, as to "rude or impolite interactions with co-workers"); *Monroe*, 2018 WL 4074190, at *5 (same, as to "hyper-surveillance"); *Porter v. City of Chi.*, 700 F.3d 944, 956 (7th Cir. 2012) (same, as to "vague and conclusory allegations of being 'harassed' and 'intimidated'" by supervisors); *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 535 (7th Cir. 1993) (same, as to supervisor's condescension). And Plaintiffs' allegations of unidentified "racially discriminatory language" at some undefined time by some undefined person either heard by or somehow otherwise known to some unidentified Plaintiff are too vague to save their Complaint from dismissal. *See* *Nichols*, 755 F.3d at 601. Although the Campaign would not tolerate any use of racially derogatory language, the Seventh Circuit is clear that even minimal use of such language or the use of language that might have racial connotations is not enough to create a hostile work environment. *See id.*; *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 647-49 (7th Cir. 2011) (ambiguous use of potentially offensive word, fellow employee's confederate flag clothing, and offensive remark about African American person did not create

hostile workplace); *Poullard v. McDonald*, 829 F.3d 844, 858 (7th Cir. 2016) (reference to African American man as "sugar daddy" and comment on his former afro hairstyle were "at worst mild and ambiguous" comments). The Court cannot reasonably infer that any of the things Plaintiffs allege altered their working conditions to the point of abusiveness.

Nor can the cultural sensitivity training support Plaintiffs' claim. Plaintiffs allege that their supervisor told them not say anything stupid at the training and that Ms. Pharo sat between two African American men. *See* MTD Resp. at 5 (citing Compl. ¶¶ 31, 33, 35). To start, the training itself is an isolated incident that is not enough to plausibly allege a hostile workplace. *See* *Nichols*, 755 F.3d at 601; *Dandy*, 388 F.3d at 271. But in any event, that conduct is not severe enough to support a claim. *See* *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002) ("interracial strife" at diversity training insufficient to support hostile work environment claim). As a matter of law, the supervisor's comment and Ms. Pharo's seat location could not have altered the conditions of Plaintiffs' employment and created an abusive workplace.

Plaintiffs argue that although certain events may seem innocuous, those events can nevertheless amount to a hostile work environment when aggregated. *See* MTD Resp. at 6. True enough in the abstract. But viewing the totality of Plaintiffs' allegations *here*, it is simply an unreasonable inference that Plaintiffs experienced a hostile work environment. Indeed, courts in the Seventh Circuit have routinely held that far more egregious conduct than Plaintiffs allege here is insufficient. *See, e.g.*, *Ellis*, 650 F.3d at 647-49 (ambiguous use of potentially offensive word, fellow employee's confederate flag clothing, and offensive remark did not create hostile workplace); *Poullard v. McDonald*, 829 F.3d 844, 858 (7th Cir. 2016) (same, as to reference to African American man as "sugar daddy" and his former afro hairstyle); *Hobbs v. City of Chi.*,

573 F.3d 454, 464-65 (7th Cir. 2009) (same, as to vandalism of African American employee's car); *Adam*, 210 F. Supp. 3d at 989 (same, as to touching African American employee's hair and skin). The test is objective—Plaintiffs do not plead a hostile work environment just because their workplace subjectively offended them. *See* *Ellis*, 650 F.3d at 647-49.

Indeed, the very cases Plaintiffs cite for this proposition address allegations describing truly reprehensible actions, unlike the conduct alleged here. In *Henderson v. Irving Materials, Inc.*, the African American plaintiff alleged that one of his coworkers—a self-proclaimed Ku Klux Klan member—threatened to drag the plaintiff behind the coworker's truck. 329 F. Supp. 2d 1002, 1010 (S.D. Ind. 2004). And in *Shanoff v. Illinois Department of Human Services*, the plaintiff's supervisor allegedly "emphatically expressed . . . hostility to [the plaintiff's] race and religion," took "steps to hinder his career," and referred to his "race and religion in an intimidating manner." 258 F.3d 696, 705 (7th Cir. 2001). There are no allegations remotely like that here.

4. Plaintiffs fail to plausibly allege retaliation

Plaintiffs also fail to show that their claim of retaliation is plausible. They contend that the fact that some (not all) Plaintiffs were placed paid administrative leave amounts to an adverse action because the Campaign has not reinstated them and did not investigate their misconduct to their satisfaction. *See* MTD Resp. at 8-9. In the Seventh Circuit, paid leave is not an adverse action because it does not affect Plaintiffs' "position, salary, or benefits." *See* *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 786-87 (7th Cir. 2007) (collecting cases and holding that paid leave pending investigation is not materially adverse as a matter of law); *see also* *Graham v. AT&T Mobility LLC*, No. 09 C 6564, 2011 WL 4538453, at *9 (N.D. Ill. Sept. 29, 2011) ("[A]dministrative leave is not a materially adverse employment action" in a retaliation case.). And the mere fact of an investigation is likewise not an adverse action. *See* *Keeton v.*

Morningstar, Inc., 667 F.3d 877, 886 (7th Cir. 2012) ("investigation itself" could not be adverse action); *see also* *Sedwick v. West*, 92 F. Supp. 2d 813, 822 (S.D. Ind. 2000) (even investigation that makes employee feel "targeted and uncomfortable" is not retaliatory adverse action).

Those Plaintiffs placed on leave pending investigation do not allege that they were paid any less or received fewer benefits as a result of the leave or investigation. Instead, they say—although not in their Complaint—that they have not been reinstated to their positions, which they contend somehow turns the paid administrative leave into an adverse action. *See* MTD Resp. at 9. But even an indefinite suspension is not an adverse action unless coupled with something more, like no pay or eventual termination. *See* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 73 (2006) (indefinite suspension *without* pay); *Cervantes v. Caterpillar, Inc.*, No. 11 C 8185, 2013 WL 3224451, at *4 (N.D. Ill. June 25, 2013) (indefinite suspension *and* termination), *appeal docketed*, No. 13-2581 (7th Cir. 2013); *Hansen v. Illinois*, No. 17-cv-3256, 2018 WL 6834698, at *3 (N.D. Ill. Dec. 28, 2018) (indefinite suspension *without* pay). Here, Plaintiffs allege no facts supporting that they were indefinitely suspended, received no pay, or were terminated from their positions.[1] Indeed, there was no indefinite suspension where the leave commenced on October 24, 2018, and Election Day was less than two weeks later (November 6, 2018), and field organizers' employment naturally ended as the Campaign winded down.

Plaintiffs next argue that the paid administrative leave was an adverse employment action because it stunted their skills. *See* MTD Resp. at 9. But they allege only that Defendants placed them on paid administrative leave pending an investigation. Compl. ¶ 52. There is simply no basis for Plaintiffs' argument that the paid administrative leave "deprived" them "of

[1] Contrary to Plaintiffs' position, the timing of their paid administrative leave does not matter because the leave was not itself an adverse action. *See* MTD Resp. at 8 (arguing that "the timing of an *adverse action* supports an inference of retaliation" (emphasis added)).

opportunities for advancement, promotion, and increases in salary." MTD Resp. at 9. They allege no facts supporting an inference that they were eligible for any promotions and salary increases or would have otherwise been able to advance in the short time from their administrative leave until the Campaign wrapped up. *See* Compl. ¶ 52. On these factual allegations, a reasonable person in Plaintiffs' shoes would not have been dissuaded from engaging in protected activity. *See* *Poullard*, 829 F.3d at 856 (action must be significant enough to dissuade reasonable employee from engaging in protected activity).

For these reasons, Plaintiffs fail to allege retaliation based on their engagement in protected activity, and the Court should dismiss the claim.

5. The Court should dismiss with prejudice

The Court should dismiss with prejudice. Plaintiffs have filed four versions of their Complaint, each failing to state plausible claims for relief. Plaintiffs have continued to throw out more conclusory statements—even in their response to Defendants' motions. But they have "had four bites at the apple," and "[e]nough is enough." *Atkins*, 631 F.3d at 832. Because any further amendment would be futile, the Court should dismiss with prejudice Plaintiffs' claims against the Campaign. *See* *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 869 (7th Cir. 2013).

III. CONCLUSION

Plaintiffs' Complaint contains no allegations giving rise to plausible claims of racial discrimination, hostile work environment, or retaliation. In all four Complaints Plaintiffs have filed, they have come up short. The Court should strike their irrelevant—and prejudicial—allegations and dismiss the Complaint with prejudice.

CERTIFICATE OF SERVICE

I, William B. Stafford, certify that on January 18, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may also access this filing through the Court's ECF system.

By: */s/ William B. Stafford*