UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1157

CHIJIOKE KINGSLEY OFOCHE, MD,

Plaintiff – Appellant,

v.

APOGEE MEDICAL GROUP, VIRGINIA, P.C.; PHC-MARTINSVILLE, INC. d/b/a Sovah Health Martinsville (Martinsville CI), d/b/a Memorial Hospital of Martinsville and Henry County,

Defendants – Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, Senior District Judge. (4:18-cv-00006-JLK-RSB)

Submitted: March 16, 2020 Decided: May 20, 2020

Before NIEMEYER, MOTZ, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Thomas E. Strelka, STRELKA LAW OFFICE, PC, Roanoke, Virginia, for Appellant. Mary Elizabeth Davis, Brendan C. Horgan, LECLAIRRYAN, PLLC, Richmond, Virginia; Amy Mason Saharia, WILLIAMS & CONNOLLY LLP, Washington, D.C.; Steven David Brown, ISLERDARE P.C., Richmond, Virginia; Mark W. Peters, Katherine C. Heard, WALLER LANSDEN DORTCH & DAVIS, LLP, Nashville, Tennessee, for Appellees.

PER CURIAM:

Dr. Chijioke Ofoche brought this employment discrimination action. The district court dismissed the case, finding that he failed to state a claim on which relief could be granted. For the reasons set forth within, we affirm.

I.

We state the facts as set forth in the complaint. Dr. Ofoche, who is Black and Nigerian, is present in the United States on an H-1B visa. In January 2016, Apogee Medical Group, Inc. ("Apogee") and Memorial Hospital of Martinsville and Henry County (the "Hospital") (together, "Employers") jointly hired Dr. Ofoche to work as a hospitalist fourteen days each month at an annual base salary of $280,000.[1]

Dr. Ofoche alleges that from the beginning of his tenure, his Employers required him to care for a large number of patients over long shifts. He further asserts that his Employers imposed similar conditions on each jointly-employed hospitalist, a group composed solely of people of color from a variety of foreign countries, who are present in the United States on H-1B visas. According to Dr. Ofoche, a white, American hospitalist — employed solely by the Hospital — "was not held to the grueling work hours, reduced staffing, and high patient load."

[1] Although not explained in the complaint, the dictionary defines a hospitalist as a physician who "specializes in providing and managing the care and treatment of hospitalized patients," rather than outpatient care. *See Hospitalist*, Merriam-Webster, https://www.merriam-webster.com/dictionary/hospitalist (last visited May 19, 2020).

When Dr. Ofoche complained about his working conditions, Apogee's program director told him to communicate more clearly, provided him with a list of performance concerns, and threatened to fire him. In August 2017, he filed a charge of discrimination with the Equal Employment Opportunity Commission. After filing the charge, Dr. Ofoche's peers and supervisors allegedly ostracized him. Additionally, Apogee temporarily refused to verify his employment for a potential replacement job and took unidentified steps to "negatively affect" his visa status. On January 5, 2018, approximately two years after he was hired, Dr. Ofoche resigned.

Dr. Ofoche exhausted his administrative remedies and filed this action against his Employers, alleging employment discrimination claims based on race and national origin. When his Employers moved to dismiss the complaint, the district court did so with leave to amend. Dr. Ofoche then filed an amended complaint, which the district court dismissed for failure to state a claim.

Dr. Ofoche noted this timely appeal. We review an order granting a motion to dismiss de novo, taking the facts in the light most favorable to the plaintiff to determine whether the complaint states a plausible claim for relief. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

II.

Dr. Ofoche alleges race discrimination under 42 U.S.C. § 1981, as well as race and national origin discrimination under Title VII. Although an employee need not prove a prima facie case of discrimination to survive a motion to dismiss, he must state a plausible

right to relief. *Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017). Dr. Ofoche has not done so. He has failed to allege facts that could establish that he suffered an adverse employment action.

A.

Dr. Ofoche asserts several disparate treatment claims. To establish a disparate treatment claim, an employee must eventually show (1) membership in a protected class, (2) satisfactory job performance, (3) an adverse employment action, and (4) that such adverse employment action occurred "under circumstances giving rise to an inference of unlawful discrimination." *Adams v. Tr. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 558 (4th Cir. 2011). Dr. Ofoche's complaint fails because of the third prong — he has not alleged facts that would establish that he suffered an adverse employment action. "An adverse employment action is a discriminatory act which adversely affects the terms, conditions, or benefits of the plaintiff's employment." *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004) (internal quotation marks and alterations omitted).

Dr. Ofoche's principal claim of adverse employment action is constructive discharge. To establish constructive discharge, an employee must meet a high standard. *See Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1133 (4th Cir. 1995). He must allege facts demonstrating that he resigned and "that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign." *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016). "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Carter v.*

Ball, 33 F.3d 450, 459 (4th Cir. 1994). Although stressful and unpleasant, Dr. Ofoche has failed to plead allegations sufficient to make a constructive discharge plausible. *See Williams v. Giant Food, Inc.*, 370 F.3d 423, 434 (4th Cir. 2004); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 187 (4th Cir. 2004).

Construing Dr. Ofoche's arguments generously, he also claims that discipline, social ostracization, and assignment to less favorable working conditions were themselves adverse employment actions. While such claims might conceivably support an adverse employment action, the alleged facts here do not rise to actionable levels. *See Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 429, 431 (4th Cir. 2015) (discipline); *Honor*, 383 F.3d at 189 (ostracization); *Von Gunten v. Maryland*, 243 F.3d 858, 868 (4th Cir. 2001) (unfavorable assignments).

B.

Dr. Ofoche also asserts retaliation claims. To establish such a claim, a plaintiff must eventually show that (1) he engaged in a protected activity; (2) his employer took adverse action against him, and (3) a causal relationship existed between the two events. *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405–06 (4th Cir. 2005) (Title VII); *Honor*, 383 F.3d at 188 (§ 1981). A retaliatory adverse action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (internal quotation marks omitted).

Here, Dr. Ofoche again primarily contends he was constructively discharged. For the reasons outlined earlier, that claim fails.[2]

C.

Dr. Ofoche additionally maintains that he suffered a hostile work environment. To establish a hostile work environment, a plaintiff must eventually show that (1) he experienced unwelcome harassment, (2) based on his race or national origin, (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) there is some basis for imposing liability on the employer. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

Harassment is severe or pervasive only if the workplace is "pervaded with discriminatory conduct aimed to humiliate, ridicule, or intimidate." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316 (4th Cir. 2008) (internal quotation marks omitted). Rude treatment, callous behavior, and a routine difference of opinion and personality conflict do not suffice to state a hostile work environment claim. *Id.* at 315–16. Dr. Ofoche's allegations that he had a heavy patient load and the comment that his communication abilities were weak fail to reach the requisite level of severe or pervasive harassment that creates a hostile work environment. *See Bass*, 324 F.3d at 765.

[2] In a single sentence devoid of reasoning and legal citations, Dr. Ofoche also argues that the temporary delay in confirming his immigration paperwork for a new job and unnamed efforts to interfere with his visa status also constitute a retaliatory adverse action. Given Dr. Ofoche's scant presentation of them, we deem such arguments abandoned, *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017).

D.

Finally, Dr. Ofoche now attempts to bring claims for alienage discrimination under 42 U.S.C. § 1981. Dr. Ofoche did not allege any alienage claims in his Complaint or Amended Complaint. He admitted as much during a hearing before the district court. Given this unambiguous waiver, we must reject his attempt to assert such claims on appeal. *See United States v. Turner Constr. Co.*, 946 F.3d 201, 208 (4th Cir. 2019).

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.