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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BHAJAN BADWAL, Plaintiff, v. BOARD OF TRUSTEES OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA, Defendant.	Civil Action No. 12-cv-2073 (KBJ)

MEMORANDUM OPINION AND ORDER

Plaintiff Bhajan Badwal is a former employee of the University of the District of Columbia who was allegedly forced to retire from his position as a professor in the Department of Psychology and Counseling after a period of illness. Badwal has filed a six-count complaint in this Court, claiming that Defendant Board of Trustees of the University of the District of Columbia ("Defendant") unlawfully terminated his employment because of his disability and age, in violation of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796l, the District of Columbia Human Right Act, D.C. Code § 2-1401–2-1431, the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 ("FMLA"), and the District of Columbia Family and Medical Leave Act, D.C. Code § 32-501–32-517 ("DCFMLA"), and in breach of his employment contract.[1] On September 19, 2014, Defendant filed a motion to dismiss the complaint, which this

[1] The operative complaint is Plaintiff's Second Amended Complaint, which Badwal filed on September 5, 2014. (ECF No. 24.)

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Court referred to Magistrate Judge G. Michael Harvey for consideration pursuant to Federal Rule of Civil Procedure 72(b). (*See* ECF Entry dated Feb. 24, 2015.) On July 20, 2015, Magistrate Judge Harvey submitted to this Court a Report and Recommendation that recommends that Counts I and II be dismissed and that Counts III through VI be permitted to proceed, and thus, that Defendant's motion to dismiss be granted in part and denied in part. (ECF No. 31.)[2]

Before this Court at present is Defendant's written objection to the Report and Recommendation. (*See* Def.'s Rule 72(b) Objs. to the R. & R. ("Def.'s Objs."), ECF No. 33.) Upon consideration of the Report and Recommendation, Defendant's objections, the response of Plaintiff thereto, the briefing on Defendant's motion to dismiss, and the entire record herein, this Court has decided to adopt the findings and conclusions of the Report and Recommendation in full. Defendant asserts that the Report and Recommendation "applies the wrong standard of review and makes unreasonable inferences to support Plaintiff's conclusory allegations" (Def.'s Objs. at 12); however, this Court concludes that Magistrate Judge Harvey has correctly, clearly, and carefully explained the applicable legal standards, and having reviewed this case *de novo*, this Court finds that it agrees with the entirety of the Report and will adopt its analysis and conclusions as the Court's own. Accordingly, it is hereby

ORDERED that the findings in the Report and Recommendation are **ADOPTED** in total, and Defendant's [25] Motion to Dismiss is **GRANTED IN PART and DENIED IN PART** as recommended and set forth therein.

* * *

[2] The Report and Recommendation is attached to this Order as Appendix A.

The Court takes this opportunity to opine further as follows on two particularly problematic aspects of Defendants' objection that warrant additional discussion. First, it is clear that, throughout its written objection, Defendant has improperly substituted the legal standard that applies to motions for summary judgment for that which governs consideration of a motion to dismiss. It is clear beyond cavil that a Rule 12 motion tests the sufficiency of the allegations of the complaint, which must be taken as true, in light of Rule 8(a)'s notice requirement and the elements of the alleged claim, *see Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), whereas Rule 56 requires the court to examine the evidence both parties have gathered and determine whether there is any genuine issue of material fact for a jury (*i.e.*, whether the evidence is such that an inference of liability might reasonably be drawn from it), *see Jones v. Bernake*, 557 F.3d 670, 679 (D.C. Cir. 2009). But Defendant here expressly rejects the well-worn and important distinction between the motion to dismiss and summary judgment phases of an employment discrimination action. (*See* Defs.' Objs. at 10 (complaining that the magistrate judge was mistaken to have determined that Defendant's proffered Rule 56 summary judgment cases are inapposite and stating Defendant's view that, "regardless of whether the Court is evaluating the sufficiency of averments made in a pleading or assertions based upon purportedly undisputed facts, the analysis is the same").) And, indeed, Defendant's primary and oft-repeated argument with respect to the Report and Recommendation is the contention that it was an error for Magistrate Judge Harvey to credit Plaintiff's claims about disputed factual issues in order to reach the conclusion that liability plausibly lies, when, in Defendant's view, consideration of "the totality of

the circumstances as averred in the Second Amended Complaint" clearly demonstrates the unviability of Plaintiff's claims. (*Id*.; *see also id*. at 11.)

Defendant's troubling insistence that it was "unreasonable" for the magistrate judge to accept the facts as alleged in the complaint and that, instead, the court should have considered the inferences that can be drawn from the totality of the alleged circumstances—*i.e.,* Defendant's refusal to acknowledge that the procedural phase *matters*—is manifest at several points in the written objection brief. For example, Plaintiff's complaint plainly states that "[b]y September 6, 2011, Dr. Badwal faxed copies of the completed FMLA forms to both his Department Chairwoman and the Human Resources specialist" (Second Am. Compl. ¶ 16), which is relevant to the question of whether or not Badwal actually submitted the necessary paperwork to support his request for leave for the purpose of the FMLA and DCFMLA violations claimed in Counts IV and V, and which, under the motion to dismiss standard, must be accepted as true. But Defendant's objection responds that Badwal did not, in fact, submit the required FMLA paperwork (Def.'s Objs. at 7 n.4), and that, when viewed in light of the totality of the circumstances alleged in Plaintiff's "own pleadings, it can reasonably be inferred that Plaintiff was terminated because he failed to return the necessary FMLA paperwork" (*id*. at 7 (footnotes omitted)).[3] And a careful reading of Defendant's objections reveals numerous other examples of this same phenomenon. (*See, e.g.*, *id.* at 11 (arguing that, based on the totality of the complaint's allegations, "there was no basis to infer that the University, by asking about retirement, was

[3] Defendant does not offer any precedent or other legal authority for the suggestion that, at the motion to dismiss stage, a court can construe the "totality of the circumstances" alleged in the complaint to be making an averment that directly contradicts the express allegations of the complaint, and this Court is aware of none.

targeting Plaintiff for retirement and/or termination solely because of his age[,]" despite the fact that the complaint says otherwise); *see also id.* at 13 (ignoring the complaint's allegation that Badwal was not given sufficient notice with respect to leave, and arguing that "Plaintiff received notice that his leave was being designated as FMLA leave [r]egardless of the fact that it was labeled 'provisional,' [and] it is clear that Plaintiff fully understood that he was on approved leave and he took all of the leave to which he was entitled"); *id.* at 14 (asserting in clear contrast to the complaint's contentions that, "based upon the total circumstances as pled in the Second Amended Complaint, it is reasonable to infer that Plaintiff's termination was not a direct result of the University's alleged failure to provide notice of FMLA leave designation, but instead a direct result of Plaintiff's inability to return to work").) These examples underscore how far off base Defendant's arguments are and why this Court is entirely unpersuaded that the magistrate judge erred in the Report and Recommendation. To the contrary, this Court easily concludes that, because the motion under consideration is one to dismiss the complaint under Rule 12(b)(6) and not a motion for summary judgment under Rule 56, the magistrate judge appropriately assumed the truth of the facts Plaintiff has alleged in light of the claims Plaintiff has brought and reached the well-reasoned conclusion that, with respect to Counts III through VI, those alleged facts satisfy the notice requirements of Rule 8(a) and the plausibility requirements of *Ashcraft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007).

Second, this Court notes that some of the arguments Defendant makes in objecting to the magistrate judge's analysis appear to indicate a fundamental misunderstanding of the Supreme Court's *McDonnell Douglas* burden-shifting

framework and its application at the motion to dismiss stage of employment discrimination cases. Defendant maintains, for example, that "Plaintiff's own allegations fail to plead a prima facie case of age discrimination" (Def.'s Objs. at 9)—thereby suggesting that Plaintiff must allege facts that establish a prima facie case of discrimination as required under the *McDonnell Douglas* framework in order to survive a Rule 12(b)(6) motion to dismiss. But no less an authority than the Supreme Court of the United States has explained that the *McDonnell Douglas* test is only an *evidentiary* standard—*i.e.*, it does not by any means displace the notice pleading requirements of Rule 8(a) or otherwise impact the plaintiff's ultimate burden of establishing the essential elements of a discrimination claim—and thus, that a plaintiff need not plead facts that establish a prima facie case in order for the complaint to survive a Rule 12 motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."); *see also id.* at 512 ("Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases."); *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) ("At the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case.").

Thus, Defendant is manifestly incorrect to suggest in the context of the instant motion that Badwal's age discrimination and retaliation claims must be dismissed because the complaint fails to allege sufficient facts to state a plausible *prima facie* case. (*See* Def.'s Objs. at 9; *see also, e.g.*, Def.'s Mot. to Dismiss, ECF No. 25, at 16 (arguing that Plaintiff has not stated a *prima facie* claim for age discrimination because

he does not allege "that he was replaced by any person, much less a younger person"). As the magistrate judge properly recognized, at the motion to dismiss stage, a plaintiff need only make allegations of fact that, when accepted as true, state a plausible claim for discrimination and retaliation (*see* R. & R. at 7)—and with this standard firmly in mind, this Court agrees with the magistrate judge's conclusions (1) that Plaintiff's complaint fails to state a claim with respect to disability discrimination (Counts I and II), and (2) that the applicable standards are satisfied as far as the complaint's claims of age discrimination, federal and state leave act violations, and breach of contract (Counts III – VI) are concerned.

DATE: September 28, 2015

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge