

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

WILLIAM PARKER,

Plaintiff,

v.

CIENA CORPORATION, et al.,

Defendants.

CIVIL NO.: WDQ-14-4036

* * * * *

MEMORANDUM OPINION

William Parker sued Ciena Corporation ("Ciena") and Mark Gorman (collectively, "the Defendants") for employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII")¹ and state law claims.² Pending is the Defendants' motion to dismiss the complaint for failure to state a claim. No hearing is necessary. Local Rule 105.6 (D. Md. 2014). For the following reasons, the motion will be granted; however, Parker will be given 30 days to amend Count I of the complaint.

¹ 42 U.S.C. §§ 2000e, et seq.

² 29 U.S.C. §§ 621, et seq.

I. Background³

A. Parker's Employment

In June 2011, Parker, an African American, began working for Ciena as its Director of Regional Property Management and Facilities for the Americas. ECF No. 1 (hereinafter "Compl.") at ¶ 6. Gorman was Parker's immediate supervisor. *Id.* at ¶ 7. Before Parker took the position with Ciena, "Gorman made several representations to Parker, designed to induce his acceptance of the offer of employment, which did not come to fruition." *Id.* "The representations included a full support staff and resources to effectively complete all assigned tasks and responsibilities." *Id.*

"Based on initial representations, Parker expected to manage a team of approximately 16 employees[, and] . . . Parker [] require[d] these resources to effectively manage projects in the Americas." Compl. at ¶ 9. After Parker began working at Ciena, he discovered "that he would be forced to satisfy his

³ On a motion to dismiss, the well-pled allegations in the complaint are accepted as true. *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011). The Court will consider the pleadings, matters of public record, and documents attached to the motions that are integral to the complaint and whose authenticity is not disputed. See *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

position duties and responsibilities without support.”⁴ Compl. at ¶¶ 8-9. Gorman transitioned employees off of Parker’s team because Ciena implemented a “first generation outsourcing of the Facility Management function of the organization.” Parker was originally informed that he could hire three staff members “in support of the new organization model.” *Id.* at ¶ 9. However, “[u]pon the conclusion of the transition, Gorman left Parker with a single resource to assist in an overwhelming workload.” *Id.* “Ultimately, Gorman took even that resource (an administrative assistant) away, requiring in 2012 that the resource report directly to Gorman and not Parker.” *Id.*

Parker complained to Gorman about the lack of resources in his department, and “Gorman, at one point, agreed to seek candidates to support Parker, but did not allow Parker to interview or vet the candidates.” Compl. at ¶ 10. “Gorman [also] told Parker that he did not want Parker to hire ‘someone like him.’”⁵ *Id.* Gorman interviewed several candidates, but

⁴ Parker also alleges that “[i]n the first eighteen months of his employment, it became clear that Gorman did not believe Parker, as an African American, should be in a position to supervise any Ciena personnel.” Compl. at ¶ 8. However, on a motion to dismiss, the Court cannot credit such a conclusionary statement without factual support. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁵ Parker asserts that “[g]iven Parker’s exemplary performance and exceptional efforts in completing his assignments, the comment was made to indicate that Gorman did not want other African American candidates.” Compl. at ¶ 10.

"Parker found they did not possess the qualifications necessary to support him in his role as Director." *Id.* at ¶ 11. Gorman hired new employees, who were all white, and required that the employees report directly to him and not Parker. *Id.* Moreover, "Gorman did not allow Parker to supervise the new hires . . . and worked directly with the new hires, usurping Parker's authority as Director and cutting him out of the loop." *Id.*

According to Parker, "Gorman did not treat Parker's Caucasian peers or counterparts in similar fashion." *Compl.* at ¶ 12. These "peers and counterparts" "were permitted to hire and select their own staff . . . , were fully staffed, resourced and in prime position to carry their varied duties and responsibilities." *Id.* Parker provides one alleged example:

Gorman gave David Bains full authority to hire the necessary staff to support his efforts. He, unlike Parker, frequently received bonuses as a result of having the full complement of resources and Gorman's support.

Gorman indicated on several occasions that Parker should emulate Mr. Bains' management style and learn to delegate more so he could focus on being more strategic. This of course was impossible given that Parker did not have a single direct report. Parker queried but never received an acceptable response from Gorman regarding the identity of individuals to whom he would delegate his responsibilities.

Id. at ¶¶ 13-14.

To counter his lack of resources, "Parker worked an average of 80-hour work weeks, frequently working more than 100 hours

in a week in order to accomplish and complete tasks." Compl. at ¶ 15. "By contrast, Parker observed that his Caucasian counterparts were not similarly over-worked or overtasked and often received bonuses and additional compensation for substantially less effort." *Id.*

"Gorman also ensured that his mistakes and short-comings were placed at Parker's feet." Compl. at ¶ 16. Parker details a time when Gorman allegedly made a project go over budget, but "falsely informed upper management that the overruns were as a result of Parker's management and not his own decision-making." *Id.* Gorman "often stepped in on projects initially assigned to Parker, indicated he was taking the lead, [and] return[ed] responsibility back to Parker only when Gorman's sole decision-making and activities went awry." *Id.* at ¶ 17. Additionally, "Gorman engaged in a pattern of verbal abuse." *Id.* at ¶ 21. During one meeting, Gorman allegedly threatened to "punch [Parker] in the face." *Id.* "Gorman also engaged in demeaning verbal assaults and comments." *Id.*

In January 2013, Gorman gave Parker a negative performance review, which "curtailed both Parker's advancement opportunities with the company and the opportunities to receive bonuses or additional compensation." Compl. at ¶ 18. During the rating period, Parker had "received an accolade from the company CEO . . . [however,] neither this accolade nor the others received as

a result of his hard work and efforts were reflected in the performance rating." *Id.*

In May 2013, Gorman and Parker met for Parker's mid-year performance review. Compl. at ¶ 19. Parker informed Gorman that Gorman's expectations could not be met without an adequate staff, but "Gorman indicated that Parker would be expected to move forward without the resources." *Id.* "Parker's Caucasian counterparts were not similarly treated." *Id.* Parker "raised his concerns with upper management, David Rothenstein and Krisie Matevish." *Id.* at ¶ 20. They "indicated that they would look into Parker's allegations regarding the unfairly low performance appraisal, resource concerns and Gorman's general treatment of Parker." *Id.* "Neither, however, followed up with Parker regarding his concerns." *Id.*

In June 2013, Parker again informed Gorman that Parker could not complete his responsibilities without more resources. Compl. at ¶ 22. Parker also requested "that the Human Resources office become involved in order to determine a way forward." *Id.* That same month, Matevish and Gorman informed Parker that his position at Ciena was being eliminated, and Parker would be terminated as of July 12, 2013. *Id.* at ¶ 24. According to Parker, "[t]he reasons supporting the elimination of Parker's position also supported elimination of [] Bains' position. In fact, had the reasons given Parker been sound, they would have

compelled the elimination of [] Bains' position." *Id.* Instead, Bains was promoted to the position of Senior Director of Global Facilities and Operations. *Id.*

After Parker's termination, Ciena advertised for two open positions, which Parker alleges would have been support positions for his old position. Compl. at ¶ 24. "Had these individuals been hired during his tenure, Parker would have [allegedly] been in a better position to excel."⁶ *Id.*

B. Procedural History

On December 30, 2014, Parker sued the Defendants for federal race discrimination and retaliation and state law claims.⁷ ECF No. 1. On March 23, 2015, the Defendants moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6). ECF No. 11. On April 23, 2015, Parker opposed the motion. ECF No. 12. On May 14, 2015, the Defendants replied. ECF No. 13.

⁶ Parker asserts, "upon information and belief" that the two new employees were "Caucasian and directly reported to Gorman." Compl. at ¶ 24.

⁷ The three state law claims are negligent supervision, retention, and hiring (against Ciena); intentional infliction of emotional distress (against Gorman); and tortious interference with prospective advantage (against all Defendants). ECF No. 1.

II. Analysis

A. Legal Standard

Under Fed. R. Civ. P. 12(b)(6), an action can be dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6) tests the legal sufficiency of a complaint, but does not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

The Court bears in mind that Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Migdal v. Rowe Price-Fleming Int'l Inc.*, 248 F.3d 321, 325-26 (4th Cir. 2001). Although Rule 8's notice-pleading requirements are "not onerous," the plaintiff must allege facts that support each element of the claim advanced. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 764-65 (4th Cir. 2003). These facts must be sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

This requires that the plaintiff do more than "plead[] facts that are 'merely consistent with a defendant's liability'"; the facts pled must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). The complaint must

not only allege but also "show" that the plaintiff is entitled to relief. *Id.* at 679 (internal quotation marks omitted).

"Whe[n] the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks and alteration omitted).

B. The Defendants' Motion to Dismiss

1. Federal Race Discrimination Claim

At trial, a plaintiff can prove his employer's discrimination through one of two methods. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). First, he may use "any direct or indirect evidence relevant to and sufficiently probative of the issue," under "ordinary principles of proof." *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 731 (4th Cir. 1996) (internal quotation marks omitted). Absent direct evidence of discrimination, the Court applies the burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the plaintiff must first establish a *prima facie* case of discrimination. *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010). To establish a *prima facie* case of employment discrimination, Parker must show 1) he is a member of a protected class, 2) he suffered an adverse employment action, 3) at the time of the action, he was meeting his employer's legitimate expectations,

and 4) he was treated differently from other similarly situated persons who were not members of the protected class. *Hill*, 354 F.3d at 285; *Pulley v. KPMG Consulting, Inc.*, 348 F. Supp. 2d 388, 394 (D. Md. 2004).

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 515 (2002), the Supreme Court held that "an employment discrimination plaintiff need not plead a prima facie case of discrimination . . . to survive [a] motion to dismiss," because "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement." Applying *McDonnell Douglas* to Rule 12(b)(6) motions would establish a "heightened pleading standard" contravening Rule 8(a)(2). *Id.* at 512. *Swierkiewicz*, however, was decided before *Iqbal* and *Twombly*.

In *McCleary-Evans v. Md. Dept. of Transp.*, 780 F.3d 582, 583 (4th Cir. 2015), the Fourth Circuit reexamined the pleading standard for discrimination cases in light of *Iqbal* and *Twombly*. *McCleary-Evans* had applied for two positions in the Maryland Highway Administration's Environmental Compliance Division. *Id.* "Despite her prior work experience and education, which she alleged made her 'more than qualified' for the two positions, she was not selected for either position. Instead, as the complaint asserted, 'The positions in question were filled by non-Black candidates.'" *Id.* *McCleary-Evans* alleged that she was not hired because her applications were

subject to a review panel significantly influenced and controlled by . . . Gregory Keenan, a White male in the Office of Environmental Design ('OED') who worked under the supervision of OED Director, Sonal Sangahvi, a non-Black woman . . . [and] [d]uring the course of her interview, and based upon the history of hires within OED, . . . both Keenan and Sangahvi predetermined to select for both positions a White male or female candidate.

Id. She also alleged that, "'although African American candidates had been among the selection pool,' 'Keenan and Sangahvi, for reasons of race and gender, overlooked the African American candidates to select White male, preferably, and White female candidates.'" *Id.* at 583-84. The district court granted the defendant's motion to dismiss the complaint because McCleary-Evans had not "stated facts sufficient to meet the pleading requirements as to the fourth prong" of *McDonnell Douglas*. *Id.* at 584.

On appeal, the Fourth Circuit found that *Swierkiewicz* remained binding precedent, and the "the district court erred in its analysis by requiring [the plaintiff] to plead facts establishing a prima facie case of discrimination to survive a motion to dismiss." *Id.* at 585. However, the Fourth Circuit held that *McCleary-Evans* was properly dismissed under the standards of *Twombly*. The Fourth Circuit reasoned that, although a plaintiff need not plead a *prima facie* case of discrimination, she must still state a claim that "is plausible on its face." *McCleary-Evans*, 780 F.3d at 585 (quoting *Iqbal*,

556 U.S. at 678). Therefore, to state a plausible claim of discrimination, a plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *Id.*

McCleary-Evans failed to allege that "the Highway Administration 'fail[ed] or refus[ed] to hire' her 'because of [her] race . . . [or] sex.'" *Id.* (alterations in original).

[S]he alleged that "[d]uring the course of her interview, and based upon the history of hires within [the Office of Environmental Design], . . . both Keenan and Sangahvi predetermined to select for both positions a White male or female candidate." But she alleged no factual basis for what happened "during the course of her interview" to support the alleged conclusion. The allegation that the Highway Administration did not hire her because its decision makers were biased is simply too conclusory. Only speculation can fill the gaps in her complaint-speculation as to why two "non-Black candidates" were selected to fill the positions instead of her. While the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is *consistent* with discrimination, it does not alone support a *reasonable inference* that the decisionmakers were motivated by bias. McCleary-Evans can only speculate that the persons hired were not better qualified, or did not perform better during their interviews, or were not better suited based on experience and personality for the positions. In short, McCleary-Evans' complaint "stop[ped] short of the line between possibility and plausibility of entitlement to relief."

Id. at 585-86 (quoting *Iqbal*, 556 U.S. at 678-79) (internal citations omitted).

In this case, like McCleary-Evans, Parker has failed to allege that Gorman's treatment of Parker was *because of his race*.⁸ The complaint details Gorman's negative behavior toward Parker spanning several years. However, Parker's allegations supporting Gorman's motivations for these actions are insufficient. Throughout the complaint, Parker makes conclusionary statements such as, "it became clear that Gorman did not believe Parker, as an African American," or "the comment was made to indicate that Gorman did not want other African American candidates." Parker's "subjective belief of discrimination, however genuine, [cannot] be the basis of judicial relief." *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 557 (5th Cir. 1983) (quoted in *Moore v. Reese*, 817 F. Supp. 1290, 1295 (D. Md. 1993)).

The only facts in the complaint addressing racial motivation, are Parker's allegations regarding his white "peers and counterparts." See Compl. at ¶¶ 12-14. Parker's conclusionary allegations that he was treated differently are not sufficient to survive a motion to dismiss. As was the case in *McCleary-Evans*, while such allegations are "consistent with discrimination, [they] do[] not alone support a reasonable

⁸ In Title VII suits, a plaintiff must allege sufficient facts to establish that race was a *motivating factor* for the adverse employment action. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

inference that the decisionmakers were motivated by bias.”

McCleary-Evans, 780 F.3d at 585-86.⁹

Parker does alleged one specific comparator--David Bains. See Compl. at ¶¶ 12-14. The complaint, however, contains no information from which to infer that Bains was similarly situated to Parker. See *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010) (“However, the complaint fails to establish a plausible basis for believing Broccolina and Coleman were actually similarly situated or that race was the true basis for Coleman's termination. The complaint does not even allege that . . . any impropriety was comparable to the acts Coleman

⁹ See also *Kamatta v. Burwell*, 2015 WL 4548615, at *4-5 (D. Md. July 27, 2015) (allegations that supervisor “treat[ed] [the plaintiff] differently than other staff” and “no other employee or Committee member was yelled at or harassed” were insufficient to state a plausible discrimination claim); *Fletcher v. Philip Morris USA Inc.*, 2009 WL 2067807, at *6 (E.D. Va. July 14, 2009) (“Plaintiff's Amended Complaint falls short of plausibility, however, because it is devoid of any specific factual allegations that similarly situated employees, who are not members of a protected class, received more favorable treatment than Plaintiff or that Defendants acted with discriminatory intent. Plaintiff's Amended Complaint generally alleges that blacks, and black males in particular, are regularly discriminated against at Philip Morris. To support this allegation, the Amended Complaint describes eight incidents of alleged discrimination or disparate treatment by employees at Philip Morris. The only attempts Plaintiff makes to compare his *specific* situation to another similarly situated employee, however, is to make the conclusory allegations that “similarly situated whites, females and non-black males” were treated differently than Plaintiff, or that he has never heard of a particular action, such as a vice president attending an evaluation meeting of a supervisor's subordinate, happening to another employee.”).

was alleged to have committed. *Absent such support, the complaint's allegations of race discrimination do not rise above speculation.*") (emphasis added). Without citing case law in support, Parker argues that "arguments that the individuals are not true counterparts or peers or are otherwise not similarly situated are not appropriate on a motion pursuant to Rule 12(b)(6)." ECF No. 12-1 at 7. Although in-depth factual analysis is generally inappropriate on a motion to dismiss, a plaintiff is still required to state sufficient facts to support a plausible claim. Multiple courts in this circuit have dismissed complaints that have failed to adequately establish the alleged comparators were similar. *See, e.g., Sawyers v. UPS*, 946 F. Supp. 2d 432, 442 (D. Md. 2013); *Crawford v. Dep't of Correctional Educ.*, 2011 WL 5975254, at *6-7 (E.D. Va. Nov. 29, 2011).

Parker has "alleged no factual basis . . . to support [his] alleged conclusion" that Gorman's actions were motivated by racial bias. *McCleary-Evans*, 780 F.3d at 585-86. "Only speculation can fill the gaps in [his] complaint" *Id.* Therefore, the Court must grant the motion to dismiss. However, the Court recognizes that specific facts about Bains and the other alleged comparators may revive Parker's claim. Accordingly, the Court will grant Parker 30 days in which to

amend his race discrimination claim.¹⁰ If Parker fails to amend the complaint in that time, the substantive discrimination claim will be dismissed with prejudice.

2. Federal Retaliation Claim

Parker alleges that the Defendants "terminated [his] employment in retaliation for his complaints against the discriminatory acts of [] Gorman." Compl. at ¶ 30. To establish a *prima facie* case of retaliation, a plaintiff must show 1) that he engaged in a protected activity; 2) his employer took an adverse employment action against him; and 3) there was a causal link between the protected activity and adverse action.¹¹ *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406 (4th 2005).

The Defendants argue that Parker has failed to allege that he engaged in a protected activity. ECF No. 11-1 at 8-9. There are two categories of protected activity -- opposition and

¹⁰ Federal Rule of Civil Procedure 15(a)(2) instructs that leave to amend should be freely given when justice requires. Leave should be denied only when amendment would unduly prejudice the opposing party, amount to futility, or reward the movant's bad faith. See *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377, 390 (4th Cir. 2008); *Equal Rights Ctr. v. Niles Bolton Associates*, 602 F.3d 597, 603 (4th Cir. 2010).

¹¹ Because retaliation claims under Title VII are also subject to the *McDonnell-Douglas* burden shifting framework, the Supreme Court's holding in *Swierkiewicz v. Sorema N.A.*, applies equally to this claim. See 534 U.S. at 510, 515 ("[A]n employment discrimination plaintiff need not plead a *prima facie* case of discrimination . . . to survive [a] motion to dismiss," because "[t]he *prima facie* case . . . is an evidentiary standard, not a pleading requirement."). Parker, however, must still state a plausible claim for relief.

participation. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). Participation includes "making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing." *Betof v. Suburban Hosp.*, No. DKC-11-1452, 2012 WL 2564781, at *10 (D. Md. June 29, 2012). Opposition is a much broader category and includes "staging informal protests and voicing one's own opinions in order to bring attention to an employer's discriminatory activities,"¹² or "complain[ing] to [] superiors about suspected violations"¹³

The complaint states that after receiving his mid-year performance review, Parker "raised his concerns with upper management," and they "indicated that they would look into Parker's allegations regarding the unfairly low performance appraisal, resource concerns and Gorman's general treatment of Parker." Compl. at ¶ 20. "Mere complaints about unfair treatment are not protected activity." *Rodriguez v. Cellco P'ship*, 2012 WL 2904809, at *4 (D. Md. July 13, 2012). The complaint does not allege that Parker complained of racial discrimination by Gorman. Accordingly, Parker has failed to allege that he engaged in a protected activity, and the Court

¹² *Laughlin*, 149 F.3d at 259.

¹³ *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543-44 (4th Cir. 2003).

will grant the motion to dismiss. See *id.*; *Miller v. Amer. Family Mut. Ins. Co.*, 203 F.3d 997, 1007-08 (7th Cir. 2000) ("An employee can honestly believe she is the object of discrimination, but if she never mentions it, a claim of retaliation is not implicated, for an employer cannot retaliate when it is unaware of any complaints."); *Hemphill v. UPS, Inc.*, 975 F. Supp. 2d 548, 560 (D.S.C. 2013) ("Although Title VII does not protect general complaints of unfair treatment, "an employee's complaint constitutes protected activity when the employer understood, or should have understood, that the plaintiff was opposing discriminatory conduct.") (quoting *Burgess v. Bowen*, 466 Fed. App'x. 272, 282 (4th Cir. 2012)).

3. Maryland Negligent Supervision Claim

For his first state law claim, Parker alleges that "Ciena [] knew or should have known by the exercise of diligence and reasonable care that [] Gorman was capable of inflicting mental anguish and harm against [Parker] based on his repeat and numerous complaints regarding Gorman's conduct to upper management." Compl. at ¶ 34. A claim for negligent supervision requires a plaintiff to establish:

that [his] injury was caused by the tortious conduct of a coworker, that the employer knew or should have known by the exercise of diligence and reasonable care that the coworker was capable of inflicting harm of some type, that the employer failed to use proper care in selecting, supervising or retaining that employee, and that the employer's

breach of its duty was the proximate cause of the Plaintiff's injuries.

Bryant v. Better Business Bureau, 923 F. Supp. 720, 751 (D. Md. 1996) (citations omitted). "[N]egligent supervision claims 'existed at common law' in Maryland and therefore 'may only be predicated on common law causes of action.'" *Braxton v. Domino's Pizza LLC*, 2006 WL 3780894, at *4 (D. Md. Dec. 21, 2006) (quoting *Demby v. Preston Trucking Co., Inc.*, 961 F. Supp. 873, 881-82 (D. Md. 1997)). Thus, an action under Title VII cannot provide the basis for a negligent supervision claim under Maryland law. See *Brown v. The Marjack Co.*, 2010 WL 419389, at *6 (D. Md. Jan. 29, 2010).

Here, Parker concedes that his negligent supervision claims cannot rely on his Title VII claims. See ECF No. 12-1 at 10-11. Instead, the complaint premises Ciena's liability on Gorman's intentional infliction of emotional distress.¹⁴ See Compl. at ¶

¹⁴ In the opposition, Parker asserts that he has "also pled facts sufficient to support a negligent misrepresentation or fraud in the inducement claim but did not assert actual counts in his complaint. These common law theories, however, also serve to support his negligent supervision claim." ECF No. 12-1 at 11 n. 3. Parker's assertion that he has established multiple common law torts is without merit. The complaint clearly premises Ciena's liability on negligent infliction of emotional distress. "It is axiomatic . . . that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Redding v. Ameriprise Auto & Home Ins.*, 2012 WL 1268327, at *4 n. 6 (D. Md. Apr. 13, 2012) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (internal quotations omitted)); see, e.g., *Presley*, 464 F.3d at 483 ("The purpose of Rule 12(b)(6) is to test the sufficiency of a complaint [.]")

34. For reasons that will be discussed, however, Parker has failed to state a claim for intentional infliction of emotional distress.

Moreover, a plaintiff alleging negligent supervision must show that "the employer knew or should have known that the individual was potentially dangerous." *Bryant*, 923 F. Supp. at 751. General allegations to supervisors about "unfairly low performance appraisal, resource concerns and Gorman's general treatment"¹⁵ do not provide a reasonable basis for an employer to conclude that Gorman was "potentially dangerous" and capable of intentional infliction of emotional distress. Expanding negligent supervision claims to cover such facts would allow every employee who ever complained generally about a supervisor's actions to make a negligence claim against the employer.

Accordingly, Parker's negligence claim against Ciena must also fail.

(emphasis added) (internal quotations and punctuation omitted). Even if the Court were to consider Parker's assertion, a bare allegation that Gorman told Parker that Parker would have support at Ciena which Parker did not receive is not sufficient to sustain claims of negligent misrepresentation or fraud in the inducement, particularly because actions sounding in fraud must meet the heightened pleading standard of Rule 9(b).

¹⁵ Compl. at ¶ 20.

4. Maryland Intentional Infliction of Emotional Distress Claim

To state a claim for IIED, a plaintiff must show four elements: (1) intentional or reckless conduct; (2) that is "extreme and outrageous"; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress is "severe." *Lasater v. Guttmann*, 5 A.3d 79, 89 (Md. Ct. Spec. App. 2010) (internal quotation marks omitted). "Extreme and outrageous" conduct is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (internal quotation marks omitted). "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as extreme and outrageous; where reasonable men may differ, it is for the jury to determine" *Harris v. Jones*, 380 A.2d 611, 615 (Md. 1977).

In the past, this Court has emphasized that "[i]n the 30 years since the Maryland Court of Appeals first recognized IIED as a cognizable tort, it has upheld such claims only [on rare occasions]." *Taylor v. Anne Arundel Cnty.*, 2013 WL 4451221, at *5 (D. Md. Aug. 15, 2013).¹⁶ "As inappropriate and repulsive as

¹⁶ See also *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993) (reversing dismissal when HIV-positive surgeon operated on the appellants without their knowledge of his disease); *Figueiredo-Torres v.*

workplace harassment is, such execrable behavior almost never rises to the level of outrageousness, and almost never results in such severely debilitating emotional trauma, as to reach the high threshold invariably applicable to a claim of intentional infliction of emotional distress under Maryland law." *Arbabi v. Fred Meyers, Inc.*, 205 F. Supp. 2d 462, 466 (D. Md. 2002); compare *Rubino v. New Acton Mobile Indus., LLC*, 2014 WL 4267493 (D. Md. Aug. 27, 2014) (complaint was sufficient to state an intentional infliction of emotional distress claim where the plaintiff warned employer of his depression, and the employer purposefully and violently took advantage of the plaintiff's susceptibility), with *Beye v. Bureau of Nat'l Affairs*, 477 A.2d 1197, 1204-06 (Md. Ct. Sp. App. 1984) (employer who gave poor performance reviews, refused to promote the plaintiff, and forced plaintiff to resign was not liable for intentional infliction of emotional distress).

Nickel, 584 A.2d 69 (Md. 1991) (reversing dismissal when plaintiff alleged psychologist engaged in sexual relations with plaintiff's wife during the time he was counseling the couple); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988) (cause of action for IIED could exist when physician had sex with nurse without informing her he had herpes and infected her with the disease); *Young v. Hartford Accident & Indem. Co.*, 492 A.2d 1270 (Md. 1985) (reversing dismissal when workers' compensation insurer insisted that claimant submit to psychiatric evaluation for the "sole purpose" of harassing her and forcing her to drop her claim or commit suicide)).

Here, accepting the well-pled allegations of the complaint as true, Parker has failed to alleged that Gorman's conduct was so extreme or outrageous as to be actionable under Maryland law.¹⁷ See *Beye*, 477 A.2d AT 1204-06; *Harris*, 380 A.2d at 615; see also *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1064 (Md. Ct. Spec. App. 1986) (to be extreme and outrageous, conduct must "strike to the very core of one's being, threatening to shatter the frame upon which one's emotional fabric is hung"; conduct that is "rude, insensitive, callous, and in poor taste" does not suffice"). Accordingly, the Court will grant the motion to dismiss on the intentional infliction of emotional distress claim.

5. Maryland Tortious Interference with Prospective Advantage Claim

Finally, Parker alleges that the Defendants tortuously interfered with his prospective business advantage by "thwarting his ability to earn bonuses and enhanced compensation from Ciena

¹⁷ In his opposition, Parker has requested "to add allegations regarding the sleepless nights he suffered wondering how his son would be able to go to college or whether he and his wife could find work after leaving everything in North Carolina for this position. Parker would like to amend the complaint to add facts about the effects of the stress from the situation during his employment and after his termination on his family and other relationships. Parker would like to amend to allege facts concerning how the shock of Gorman's conduct left him paralyzed emotionally for a time and the time it took to recover from the conduct to which Gorman and Ciena subjected Parker." ECF No. 12-1 at 12-13. None of these facts makes Gorman's conduct extreme or outrageous. Because any amendment would be futile, the Court will not grant leave to amend this claim.

Corporation and impacting his ability to find alternate employment," alleging that the Defendants "gave false information to potential employers with whom Plaintiff sought a position following his employment with Ciena." Compl. at ¶ 47.

To state a claim for tortious interference with business relationships, a plaintiff must allege "(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." *Bagwell v. Peninsula Reg'l Med. Ctr.*, 510, 665 A.2d 297, 314 (Md. Ct. Spec. App. 1995) (internal quotation omitted). "[W]rongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and 'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 650 A.2d 260, 271 (Md. 1994) (quoting *K & K Management v. Lee*, 557 A.2d 965, 979 (Md. 1989)).

First, Parker alleges that the Defendants denied him the opportunity to earn bonuses. Under Maryland law, however, "[r]ecovery for intentional interference with an economic relationship is barred when the plaintiff and defendant are both parties to the economic relationship. A plaintiff also cannot recover against a defendant's employee acting within the scope of his or her employment." *Hejirika v. Md. Div. of Correction*, 264 F. Supp. 2d 341, 347 (D. Md. 2003). Therefore, the Defendants' denial of bonuses cannot support Parker's claim.¹⁸

Parker next asserts that the Defendants interfered with his ability to find another job by providing "false information to potential employers." Parker provides no information about how these communications were made or to whom. A plaintiff alleging tortious interference "must identify a possible future

¹⁸ In his opposition, Parker attempts to revive this claim by arguing that Gorman was acting outside the scope of his employment. See ECF No. 12-1 at 13-15. Parker, however, also apparently concedes that the complaint is devoid of facts supporting this argument, requesting leave to amend to "add this aspect." See *id.*


"[A]n employee suing a fellow employee for tortious interference must allege that the defendant employee 'acted maliciously for his own motives and beyond the scope of his authority without the intent to further the interests of the employer.'" *Hejirika*, 264 F. Supp. at 347 (quoting *Pope v. Bd. of Sch. Comm'rs*, 665 A.2d 713, 719 (Md. Ct. Spec. App. 1995)). Parker has supplied no facts in his complaint or with his request to amend which could support such a showing. Therefore, the Court will not grant leave to amend. Further, even if Parker were able to support such a claim, Ciena would not be liable for any actions of Gorman made outside the scope of employment.

relationship which is likely to occur, absent the interference, with specificity." *Baron Fin. Corp. v. Natanzon*, 471 F. Supp. 2d 535, 542 (D. Md. 2006). There is simply no information in the complaint to support causation, and a conclusionary statement by Parker that he "suffered and will continue to suffer irreparable harm, pecuniary losses, emotional and mental stress and anguish and cannot be made whole absent judicial intervention" does not meet the pleading standards. See *Med. Mut. Liab. Soc. of Md. v. B. Dixon Evander and Assocs., Inc.*, 660 A.2d 433, 439-41 (Md. 1995) (discussing causation). Accordingly, the Court must dismiss this claim. See *Marrs v. Marriott Corp.*, 830 F. Supp. 274, 283-84 (D. Md. 1992) (rejecting tortious interference claim when plaintiff was "unable to identify any specific statement made by any Defendant to any potential employer.").

III. Conclusion

For the reasons stated above, the Court will dismiss Parker's race discrimination claim without prejudice and provide Parker with 30 days in which to amend the complaint; all other claims will be dismissed with prejudice.

1/12/14
Date



William D. Quarles, Jr.
United States District Judge