Appeal No. 22-1385

United States Court of Appeals
For The Fourth Circuit

Gregory Krehbiel,

Plaintiff-Appellant,

v.

BrightKey Corp.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Introduction

The relevant complaint in this action is straightforward. Various employees at BrightKey, motivated by plaintiff's race, asked management at BrightKey to fire him. Management at BrightKey agreed to fire plaintiff knowing that these employees wanted him fired because of his race. One need not explore the nuances of agency law to conclude that BrightKey discriminated on the basis of race. By agreeing to fire plaintiff because of his race, the decision-makers at BrightKey acted with discriminatory intent.

It is basic Title VII law that an employer acts with discriminatory intent when it accommodates another's preference for discrimination. Much case law supports this view, and BrightKey does not bother even to mention – much less distinguish – any of it. Instead, it relies on an inapposite decision of this Court in which it was undisputed after much discovery that the actual decision makers were not affected by, or aware of anyone else's, discriminatory intent. It then goes on to claim that the amended complaint's allegation of discriminatory motive are "conclusory," an argument it never made in the court below. Further, it does not identify what additional facts prior to any discovery could possibly be alleged to satisfy it.

Argument

I. BRIGHTKEY ERRS IN ITS ARGUMENT THAT THE AMENDED COMPLAINT FAILS TO ALLEGE A CLAIM FOR RACE DISCRIMINATION

BrightKey asserts that the first claim for relief in the amended complaint did not properly allege a claim for race discrimination under Title VII, the Maryland Fair Employment Practices Act, or the Howard County Human Right Law. Brief of Appellee ("BrightKey Br.") 3, 5. Curiously, it makes no argument at all regarding Krehbiel's allegation that BrightKey violated 42 U.S.C. § 1981 and does not try to defend the district court's dismissal of that claim.

A. BrightKey's "Cat's Paw" Authorities Are Inapposite

Like the court below, BrightKey claims that the race discrimination claim in this case is foreclosed by *Hill v. Lockheed Martin Logistics Management,* 354 F.3d 277 (4th Cir. 2004) (en banc). *Hill* is discussed at length in Krehbiel's opening brief. Plaintiff-Appellant's Principal Brief ("Krehbiel Br.") 9-10. It is distinguishable not only because it was decided after discovery and on summary judgment, but because the relevant pleading in this case alleges that BrightKey knew of the discriminatory motivations of those asking it to fire plaintiff, and agreed to fire him with that knowledge and to accommodate them. *E.g.*, *Craddock v. Lincoln Nat'l Life Ins.*, 533 Fed. Appx. 333, 336 (4th Cir. July 22, 2013) (reversing dismissal of complaint on

12(b)(6) grounds, noting that the requirements in *Hill* were not a pleading requirement; "Crucially, *Hill* applied the test at the summary judgment stage – a fact the district court did not recognize."). Unlike the record in *Hill*, which set forth a number of serious work errors by the plaintiff that provided a non-discriminatory basis for her termination, the amended complaint here says nothing about any flaws at all in the manner in which Krehbiel was doing his job, nor does it allege that BrightKey identified any such purported flaws in its abrupt firing of him.

Accordingly, this case is governed by the authorities holding that an employer that relies upon the discriminatory preferences of others in taking adverse action against an employee has itself engaged in intentional discrimination. *See* Krehbiel Br. 7-8. *See also, e.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (holding that an employer could not rely upon a BFOQ defense on the ground that Latin American clients would react negatively to a woman vice-president of international operations); *Bollenbach v. Board of Education*, 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (failure to assign female school bus drivers to certain routes violated Title VII; "the fact that the Hasidic clientele strongly prefer male drivers does not make being male a BFOQ"). Title VII does not require that Krehbiel allege that the employees asking BrightKey to terminate Krehbiel because of his race had any supervisory power over him any more than it would require the plaintiff bus drivers

in *Bollenbach* to show that the Hasidic schoolchildren had supervisory authority over them.

BrightKey concedes that the amended complaint alleges that "BrightKey knew that the objecting employees were motivated by his race," and that it "quickly acceded" to their wishes, but argues that this is insufficient because there was no "factual allegation that the decision makers themselves harbored discriminatory intent in terminating Krehbiel." BrightKey Br. 9. This argument is wrong as a matter of law. Knowingly accommodating the discriminatory preferences of another by imposing an adverse employment action against an employee *is* acting with discriminatory intent. BrightKey cannot cite one case in which such knowing accommodation of discriminatory preferences is deemed insufficient to constitute discriminatory intent. To Krehbiel's knowledge, no such case exists.

BrightKey argues that Krehbiel's line of cases all should be ignored because they are "non-binding precedent from sister circuits, whose views are markedly different from that expressed by this Court in *Hill* and subsequent decisions." BrightKey Br. 12. But BrightKey cites only authority showing that other courts' "cat's paw" theory may differ from this Court's, not cases where the employer knowingly accommodated the discriminatory preferences of a third party. Krehbiel has never cited or relied upon "cat's paw" cases from other circuits.

BrightKey's cases are not relevant here because they involve situations where (as one explicitly states) a decision-maker acted as an "unwitting dupe" for an employee with discriminatory animus. *McKenna v. City of Philadelphia*, 2010 U.S. Dist. LEXIS 73667, at *82 (E.D. Pa. July 20, 2010) (cited at BrightKey Br. 12). Krehbiel does not allege that BrightKey management acted as "unwitting dupes," but rather as knowing accomplices. Thus, whether this Court's "cat's paw" theory is broader or more narrow than any other circuit's "cat's paw" analysis is just irrelevant here. The cases Krehbiel relies upon are not "cat's paw" cases at all, and Krehbiel has never argued that anyone else other than management at BrightKey agreed to fire Krehbiel because of his race.

As set forth in Krehbiel's opening brief, cases like *Hill* are inapposite because the decision-makers there (unlike here) were not aware of, *and did not accommodate or agree to accommodate*, anyone else's discriminatory intent. BrightKey nonetheless claims that Krehbiel "relies on an erroneous reading of the facts" in *Hill*. BrightKey Br. 13. Specifically, it asserts that this Court in *Hill* "acknowledged plaintiff's allegation that she informed her supervisor that the safety inspector was making discriminatory comments during the same time period the inspector issued a number of reports that deemed plaintiff's work unsatisfactory, and that these reports ultimately led to her third reprimand." Krehbiel Br. 14. This argument is misleading in several

respects.

First, the plaintiff in *Hill* only complained to her *immediate* supervisor (Dixon) regarding the safety inspector's comments. Dixon did not make the decision to terminate Hill. Rather, two individuals in management above Dixon (Griffin and Prickett) made that decision (*Hill*, 354 F.3d at 282, 296); Dixon did not even *recommend* that they fire Hill (*id.* at 297). BrightKey points to nothing in the decision to suggest that either of the two decision-makers were even aware of the safety inspector's discriminatory comments.

Second, Dixon did not rely upon the safety inspector's findings of rules violations. Rather, he made his own independent investigation of each, and reached his own non-discriminatory conclusion that rules had been violated. *Id.* at 294 (describing one-on-one meeting between Hill and Dixon after his investigation and conclusion that a second reprimand was warranted), 296 ("[I]t is undisputed that Dixon personally investigated and verified the accuracy of the discrepancy reports, and made an independent, non-biased decision" with respect to the third reprimand). Not only was there no evidence that Dixon agreed to accommodate anyone else's discriminatory preference, Hill conceded that his decisions were made without any animus. *Id.* at 293 ("Hill freely agrees [that Dixon] was acting without a personal discriminatory motivation."), 295 ("As before, Hill does not contend that Dixon acted

with a discriminatory animus when he made the decision that the third reprimand was warranted.").

Third, and perhaps most importantly, there was no allegation, much less evidence on summary judgment, that *anyone*, including the decision-makers (Griffin and Prickett), had accommodated or agreed to accommodate the safety inspector's alleged discriminatory animus.

In short, neither *Hill* nor any other "cat's paw" case is relevant here because the amended complaint alleges the knowing accommodation of a discriminatory preference.

B. BrightKey Errs In Claiming That The Amended Complaint Fails To Allege Discriminatory Intent

BrightKey argues that the amended complaint does not provide sufficient details to support its allegation of racial motivation. BrightKey Br. 16-23. But in the court below, BrightKey argued only that the allegations of race discrimination were inadequate because of *Hill* and its progeny. Doc. 20-1 (Memorandum In Support of Motion to Dismiss) at 4-8.[1] Accordingly, it has waived any other argument. *E.g.*,

[1] Thus, while BrightKey briefly cited the "plausibility" standard (Doc. 20-1 at 3-4), its only argument as to why the amended complaint's allegations were not "plausible" was based on *Hill* and similar "cat's paw" cases. It did not argue that the allegations of discriminatory intent of the co-workers were implausible or inadequate.

BrightKey Br. 24 (quoting *Karpel v. Inova Health System Services*, 134 F.3d 1222, 1227 (4th Cir. 1998)); *Montoya v. City and County of Denver*, 2022 U.S. App. LEXIS 15338, at *21-22 (10th Cir. June 3, 2022) (holding that defendants waived any qualified immunity defense to a conspiracy claim where they made no specific argument to that effect in the court below).

Even if that were not so, BrightKey's argument still should be rejected. The amended complaint alleged that other employees at BrightKey complained to BrightKey's management that Krehbiel had been engaging in speech and conduct reflecting his *white* privilege. Specifically mentioning Krehbiel's race in their complaints to BrightKey is direct evidence that they were motivated by it. *E.g.*, *McCray v. Pee Dee Reg'l Transp. Auth.*, 263 Fed. Appx. 301, 306 (4th Cir. Feb. 6, 2008) ("isolated statements can constitute direct evidence of discrimination" if they are "contemporaneous to the adverse employment action"); *Moser v. Driller's Service, Inc.*, 988 F. Supp. 2d 559, 564 (W.D.N.C. 2013) (allegation in complaint that president said they wanted to find a younger person is direct evidence of a discriminatory animus even though "[t]he record does not establish whether [president] played an integral role in terminating [plaintiff]"). *Cf. Obrey v. Johnson*, 400 F.3d 691, 697 (9th Cir. 2005) (holding that trial court abused its discretion in excluding evidence that an official had said that "the 'local' workers 'were not good

enough' and 'can't do a good job'"; such evidence went to a possible discriminatory state of mind).

BrightKey cites cases in which the amended complaint itself identifies an alternative motivation for an adverse employment action. BrightKey Br. 18-22. BrightKey claims that these cases are on point because the amended complaint here alleges a possible alternative motivation: Krehbiel's "controversial" views on government policies. But, unlike in the cases BrightKey cites, the amended complaint alleges that the employees specifically referred to Krehbiel's race in their complaints to BrightKey. If the only complaint they had was Krehbiel's political opinions, why did they do so?

Of course, Krehbiel does not dispute that both the employees and BrightKey itself were motivated in part by his political opinions. That is the basis for the claim of "political opinion" discrimination under the Howard County Charter. But it alleges that they also were motivated by the fact that a *white* person was expressing those opinions, and alleges that that fact was specifically mentioned, in a pejorative way, to BrightKey management. Accordingly, it properly alleges that race was a motivating factor in their complaint and their explicit use of plaintiff's race supports the allegation that BrightKey management knew that. It is, of course, perfectly appropriate for a complaint to allege that an employer was motivated by more than

one *prohibited* criteria. *E.g.*, *Fagan v. U.S. Carpet Installation, Inc.*, 770 F. Supp. 2d 490, 496 (E.D.N.Y. 2011) (rejecting claim that plaintiff could not allege plausible claim of age discrimination because she also had alleged sex discrimination):

> [R]eading the complaints in the light most favorable to the Plaintiffs, the Court finds that by identifying multiple "significant factors" that may have motivated the Defendants' ultimate decision to terminate their employment, the Plaintiffs did not, as a matter of law, affirmatively allege that age was *not* the "but for" cause.

Houchin v. Dallas Morning News, Inc., 2010 U.S. Dist LEXIS 33389, at *7 (N.D. Tex. Apr. 1, 2010) (rejecting argument that "[p]laintiffs are precluded from asserting age discrimination claims because they have brought claim of both age and sex discrimination" since they are allowed to plead in the alternative).

BrightKey asserts that the amended complaint is best read to allege that the employees were motivated by Krehbiel's perceived racism rather than his race, but it takes great liberties with the amended complaint to do so. BrightKey Br. 20 (arguing that Krehbiel "identified a non-discriminatory basis for his termination – the desire for its executive team to refrain from publicly expressing controversial views warranting subordinate opposition"); *id.* at 21 (arguing that the amended complaint "at most, describe[s] adverse employment actions based upon the perception that he himself was disseminating racist ideologies by advocating for 'white privilege.'"). BrightKey states this as if the "perception" that he was "advocating . . . *white*

privilege" (*id.*, emphasis added) has nothing to do with his race. That is hardly making all inferences in Krehbiel's favor.

In any event, the amended complaint does not say what BrightKey claims. It does not allege that Krehbiel was disseminating racist ideologies or that anyone perceived him as doing so. Complaints must be read with inferences favoring the plaintiff, not with speculation favoring the defendant. *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) ("The complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests . . . And all reasonable inferences must be drawn in favor of the complainant.") (cleaned up). Reading it properly, the amended complaint alleges that BrightKey's employees sought adverse action against Krehbiel, and BrightKey took such action, based upon statements that would not have led to that outcome had Krehbiel been of a different race. The employees' insistence on using Krehbiel's race in complaining to BrightKey supports that reading.

"Often defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 458 (6th Cir. 2011). *Id.* (denying motion to dismiss Sherman Act claim based on conspiracy to restrain trade in which carpet supplier was alleged to have agreed not

to sell carpet to plaintiff; although plaintiff had previously sued defendant, providing another possible explanation for defendant's refusal to deal, "the plausibility of [plaintiff's] litigiousness as a reason for the refusals to sell carpet does not render all other reasons implausible"); *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (vacating order that had dismissed complaint alleging disability discrimination; "A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . ."). *See also* 42 U.S.C. § 2000e-2(m) (Title VII violation is complete if race "was a motivating factor for any employment practice, even though other factors also motivated the practice.").

II. BRIGHTKEY ERRS IN ASSERTING THAT THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE WAS NOT AN ABUSE OF DISCRETION

BrightKey asserts that Krehbiel waived any complaint about the failure of the court below to grant leave to amend because he did not move for such an amendment. BrightKey Br. 24. But Krehbiel is not claiming that the district court denied a motion to amend, but rather that it abused its discretion by dismissing the race discrimination claim with prejudice. BrightKey does not cite authority that Krehbiel *had to* file a motion to amend *after* dismissal of his claim with prejudice in order to raise that issue on appeal and, indeed, Krehbiel could not do so directly. *Britt v. Dejoy*, 2022 U.S. App. LEXIS 22844, at *13 (4th Cir. Aug. 17, 2022) (en banc) (holding that if a district

court fails to give leave to amend, "a plaintiff may only amend her complaint by first filing a motion to reopen or to vacate the judgment under Rule 59 or Rule 60"). BrightKey does not dispute that the court below first identified the alleged defects in the amended complaint and concluded that the race discrimination claim should be dismissed with prejudice in the same memorandum opinion. Nor does it dispute the general principle that plaintiffs should be given at least one opportunity to cure any pleading defects.

This argument takes on even greater importance here given BrightKey's new rationale for upholding the judgment of the court below. As noted, BrightKey never made its "inadequate allegations of racial motivation" argument in the court below; it is asserted for the first time here on appeal. Assuming it was not waived for purposes of this appeal, it is unfair to preclude Krehbiel from addressing that argument with additional allegations. Plainly, and contrary to BrightKey's argument (BrightKey Br. 24), Krehbiel was not given fair warning of an argument that BrightKey did not make in the court below.

BrightKey also argues that the court below properly dismissed Krehbiel's race discrimination claim with prejudice because any amendment would be futile. BrightKey Br. 25. It asserts *ipse dixit* that "Krehbiel cannot amend his race discrimination claim without setting forth factual allegations that contradict, rather

than elaborate, on his existing theory of liability." *Id.* It does not explain why any additional allegations supporting the proposition that BrightKey treated Krehbiel differently because of his race would contradict his theory of liability.

Conclusion

For the foregoing reasons, and the reasons set forth in Krehbiel's principal brief, the judgment below dismissing Krehbiel's race discrimination claim with prejudice and declining jurisdiction over his state law claims should be reversed.

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