**RECORD NO. 22-1385**

In The
# United States Court of Appeals
For The Fourth Circuit

## GREGORY KREHBIEL,

***Plaintiff – Appellant,***

**v.**

## BRIGHTKEY, INC.,

***Defendant – Appellee.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE**

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# BRIEF OF APPELLEE

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**Stephen M. Cornelius**
**Courtney M. Watkins**
**ECCLESTON & WOLF, P.C.**
**Baltimore-Washington Law Center**
**7240 Parkway Drive, 4th Floor**
**Hanover, Maryland 21076**
**(410) 752-7474**

***Counsel for Appellee***

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 22-1385 Caption: Gregory Krehbiel v. BrightKey, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

BrightKey, Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

The Travelers Companies, Inc., Insurer

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Stephen M. Cornelius Date: 4/22/2022

Counsel for: BrightKey, Inc.



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## JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Appellant's causes of action pursuant to 28 U.S.C. §§ 1331, 1343, and 1367. After dismissing Appellant's race discrimination claim, with prejudice, the District Court declined to exercise supplemental jurisdiction over Appellant's remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3). This Court has appellate jurisdiction over the issues presented in this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Appellant's Amended Complaint for failure to state a claim for race discrimination after Appellant failed to allege facts demonstrating that one or more decisionmaker(s) terminated his employment because of his race.

2. Whether Appellant's decision not to move for leave to amend the operative complaint precludes review of his present contention that he was improperly denied leave to amend a second time.

## STATEMENT OF THE CASE

Appellant Gregory Krehbiel ("Krehbiel") filed his original Complaint on November 15, 2021, in the United States District Court for the District of Maryland, setting forth claims against his former employer, BrightKey, Inc. ("BrightKey"). (JA5-11). In response, BrightKey initially moved for the partial dismissal of

Krehbiel's Complaint and filed an Answer addressing Krehbiel's remaining claims. (JA12-17). Before the District Court had an opportunity to consider or rule on BrightKey's Partial Motion to Dismiss, on January 3, 2022, Krehbiel filed an Amended Complaint, rendering the initial motion moot. (JA18-24). In his Amended Complaint, Krehbiel attempted to state four claims against BrightKey in connection with the termination of his employment, including claims for race and political opinion discrimination, breach of contract, and negligent misrepresentation. (JA18-24).

Relevant to Krehbiel's race discrimination claim, he alleged that after BrightKey hired him in February 2020 as the Vice President of Operations, Krehbiel's podcast, in which he and a co-host "sp[oke] about various issues of the day," came to the attention of a number of unidentified employees who objected to the views that Krehbiel expressed therein. (JA19-20). In particular, Krehbiel alleged that unidentified employees objected to two podcasts broadcasted in 2020, where he and his co-host purportedly "discussed various government policies" such as "diversity requirements" and "the promulgation of 'hate crimes[.]'" (JA20 ¶ 8). During those podcasts, Krehbiel purportedly "expressed skepticism over the propriety of government policies relating to diversity goals and 'hate crimes[,]'" which prompted unidentified employees to claim that Krehbiel was advocating "white privilege" and demand that he be terminated from his employment. (JA20 ¶¶

8-9). Krehbiel baldly alleged that the unidentified employees "were motivated by [Krehbiel's] race and political opinions in demanding that he be terminated" and that BrightKey "knew that the objecting employees were motivated by [Krehbiel's] race and political opinions in insisting that he be fired." (JA20-21 ¶¶ 10-11). Krehbiel claimed that by acceding to the demands of the objecting unidentified employees in terminating Krehbiel's employment "because of his race," BrightKey violated Title VII of the Civil Rights Act of 1964 ("Title VII"), as codified, 42 U.S.C. §§ 2000e, *et seq.*, the Maryland Fair Employment Practices Act ("FEPA"), MD. CODE ANN., STATE GOV'T, §§ 20-601, *et seq.*, and the Howard County Human Rights Act ("HCHRA"), Howard County Code §§ 12.200, *et seq.* (JA20-21).

On January 18, 2022, BrightKey filed a Motion to Dismiss the Amended Complaint, arguing, *inter alia*, that Krehbiel failed to sufficiently allege that the decisionmaker(s) responsible for terminating his employment harbored the necessary discriminatory intent to support his claim for race discrimination. On March 4, 2022, the District Court granted the Motion to Dismiss as to Krehbiel's race discrimination claim under Title VII, FEPA, and the HCHRA, and declined to exercise supplemental jurisdiction over Krehbiel's remaining state law claims. (JA34). Krehbiel filed his Notice of Appeal of the District Court's Order. (JA35).

## SUMMARY OF ARGUMENT

The District Court properly dismissed Krehbiel's claims for race discrimination arising under Title VII, FEPA, and the HCHRA, as the allegations set forth in Krehbiel's Amended Complaint failed to plausibly state a violation of the anti-discrimination statutes above a speculative level. Instead, Krehbiel baldly alleged that a number of unidentified subordinate employees, who did not possess any supervisory or disciplinary authority over him, harbored discriminatory motivations in requesting that Krehbiel be terminated from his position as Vice President of Operations, while failing to address the intent of the decisionmakers, which remains crucial in the Court's assessment of a discrimination claim. Krehbiel's Amended Complaint left open to speculation the motivations of both the unidentified employees who objected to his continued employment and the unidentified decisionmakers who ultimately decided to terminate Krehbiel's employment, asking the District Court to unreasonably infer discriminatory intent without any factual support. Because Krehbiel's allegations amounted to nothing more than bare assertions devoid of further factual enhancement, the District Court correctly found that Krehbiel failed to allege facts to show that he was terminated because of his race.

Further, the District Court did not abuse its discretion in dismissing Krehbiel's race discrimination claim with prejudice, as Krehbiel never moved for leave to

amend or even suggest that the deficiencies in the operative complaint could be cured through amendment, and ultimately, any proposed amendment would have been futile in light of the fundamental deficiencies in Krehbiel's theory of liability. Irrespective of the merits of such an amendment, the District Court did not abuse its discretion in declining to grant a motion to amend that was never actually made.

## STANDARDS OF REVIEW

### I. The District Court's Dismissal of Krehbiel's Race Discrimination Claim is Reviewed *De Novo*.

The District Court's dismissal under Rule 12(b)(6) is reviewed *de novo*. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). In assessing the sufficiency of a complaint, the Court must "accept the well-pled allegations of the complaint as true" and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997) (citing *Little v. FBI*, 1 F.3d 255, 256 (4th Cir. 1993)). However, "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet*, 591 F.3d at 255 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Pursuant to Federal Rule of Civil Procedure 8(a)(2), a pleading must contain, "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Ultimately, to survive a motion to dismiss, the facts alleged in a complaint "'must be enough to raise a right to relief above

the speculative level'—that is, [a] complaint must contain 'enough facts to state a claim for relief that is plausible on its face.'" *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

## II. The District Court's Denial of Leave to Amend is Reviewed for Abuse of Discretion.

Although Rule 15(a) of the Federal Rules of Civil Procedure states that "'leave shall be freely given when justice so requires,' leave to amend is not to be granted automatically." *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987) (citations omitted). Rather, whether to allow amendment rests "within the sound discretion of the district court." *Id.* Accordingly, a district court's denial of leave to amend is reviewed for abuse of discretion. *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008). A district court's denial of leave to amend is appropriate when "(1) 'the amendment would be prejudicial to the opposing party;' (2) 'there has been bad faith on the part of the moving party;' or (3) 'the amendment would have been futile.'" *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 121 (4th Cir. 2013) (quoting *Laber v. Harvey*, 438 F.3d 404, 426-27 (4th Cir. 2006)). The appellate court "may affirm on any ground supported by the record regardless of the ground on which the district court relied." *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (citing *United States v. Moore*, 709 F.3d 287, 288 (4th Cir. 2013)).

## ARGUMENT

### I. The District Court Was Legally Correct in Ruling that Krehbiel's Complaint Failed to Plausibly State a Claim for Race Discrimination Above a Speculative Level.

"[A] Title VII plaintiff is 'required to allege facts to satisfy the elements of a cause of action created by that statute,'" and those facts must "plausibly state a violation of Title VII 'above a speculative level.'" *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020) (quoting *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015); *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555)). Title VII "prohibits an employer from 'discharg[ing] any individual, or [] otherwise discriminat[ing] against any individual . . . because of such individual's race.'" *Bing*, 959 F.3d at 616-17 (quoting 42 U.S.C. § 2000e-2(a)(1)). Thus, this Court's "inquiry is whether [Krehbiel] alleges facts that plausibly state a violation of [the anti-discrimination statute] 'above a speculative level.'" *Id.* at 617 (quoting *Coleman*, 626 F.3d at 190 (quoting *Twombly*, 550 U.S. at 555)).

In assessing an employment discrimination claim pursued under a theory of disparate treatment, such as the one Krehbiel endeavored to allege in his Amended Complaint, the ultimate question is "whether the plaintiff was the victim of intentional discrimination." *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 286 (4th Cir. 2004) (en banc), *abrogated in part on other grounds*, *Univ. of Tex. Sw.*

*Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (quoting *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153 (2000)).[1] To that end, "an individual alleging disparate treatment based upon a protected trait" must show that the protected trait "actually motivated" the adverse employment action. *Id.* (quoting *Reeves*, 530 U.S. at 141) ("The protected trait must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome."). Ordinarily, "[i]t is the decision maker's intent that remains crucial" in this assessment; however, "[i]n limited circumstances, discriminatory intent can be imputed to the formal decisionmaker 'when that official has no discriminatory animus but is influenced by previous company action that is the product of a like animus [in] someone else[.]'" *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 300 (4th Cir. 2010); *Lim v. Azar*, 310 F. Supp. 3d 588, 602 (D. Md. 2018) (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011)).

[1] Title 20 (FEPA) is the "state law analogue of Title VII" and accordingly, "Maryland courts routinely look to federal anti-discrimination statutes, particularly Title VII, in determining the scope of liability under Title 20." *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780, 784 (D. Md. 2014); *Hall v. Greystar Mgmt. Servs., L.P.*, 28 F. Supp. 3d 490, 498 (D. Md. 2014). Similarly, the United States District Court for the District of Maryland has found that the Howard County Code uses "language essentially the same as used in the Maryland and federal counterpart provisions," and accordingly, the courts will look to federal decisions interpreting similar provisions for guidance. *Greene v. Harris Corp.*, No. MJG-13-190, 2013 U.S. Dist. LEXIS 103286, at *8 (D. Md. July 24, 2013).

### A. Krehbiel is precluded from imputing any alleged discriminatory animus of unidentified subordinate employees onto unidentified decisionmaker(s).

In the matter at hand, Krehbiel failed to allege facts that plausibly state a claim for race discrimination above a speculative level. *See Bing*, 959 F.3d at 617. Instead, Krehbiel averred only that two of his podcasts "came to the attention of employees of BrightKey who objected strenuously to a white person like [Krehbiel]" expressing the viewpoints contained therein, and that these unidentified employees, motivated by Krehbiel's race and political opinions, demanded that he be terminated. (JA20-21 ¶¶ 9-11). From those allegations, Krehbiel concluded that BrightKey knew that the objecting employees were motivated by his race and political opinions, but nonetheless "quickly acceded" to their wishes and terminated Krehbiel's employment. (JA20-21 ¶ 11). Notably absent from Krehbiel's Amended Complaint, however, was any factual allegation that the decisionmakers themselves harbored discriminatory intent in terminating Krehbiel from his position as Vice President of Operations. (*See generally* JA18-24). Rather, Krehbiel speculated that BrightKey was pressured into terminating his employment by unidentified employees who harbored discriminatory animus because Krehbiel is white. (JA20-21 ¶¶ 9-11). Although Krehbiel argues that these allegations are sufficient to demonstrate that that BrightKey adopted the discriminatory motive of the objecting employees, this theory is explicitly foreclosed by this Court's holding in *Hill v. Lockheed Martin*

*Logistics Management*, 354 F.3d 277 (4th Cir. 2004) (en banc), *abrogated in part on other grounds*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

In *Hill*, this Court considered the circumstances under which an employer may be held liable under Title VII based on the discriminatory animus of a subordinate employee who influenced, but did not make, the adverse employment decision. *Id.* at 291. Guided by agency principles, this Court looked to the language of the discrimination statutes, and determined that Title VII does not hold "employers vicariously liable for the discriminatory acts and motivations of everyone in their employ, even when such acts or motivations lead to or influence a tangible employment action."[2] *Id.* at 287. Instead, this Court reiterated the holding of the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, noting that employer liability is limited to "the acts of its employees holding supervisory or other actual power to make tangible employment decisions." *Id.* (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762 (1998)). Based on its review of the discrimination statutes and Supreme Court precedent, this Court held that "an aggrieved employee who rests a discrimination claim under Title VII . . . upon the discriminatory motivations of a subordinate employee" must show "that the subordinate employee possessed such

[2] This Court noted that "by defining employer to include 'any agent' of the employer, Congress 'evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.'" *Id.* at 287 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)).

authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." *Id.* at 291 ("Regarding adverse employment actions, an employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision.").

In assessing the sufficiency of Krehbiel's race discrimination claim, the District Court aptly noted that, although "Title VII does not 'limit the discrimination inquiry to the actions or statements of formal decisionmakers for the employer[,]'" in *Hill*, this Circuit

> decline[d] to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

(JA31 (quoting *Hill*, 354 F.3d at 290-91)). Applying the agency-centered principles of *Hill*, the District Court determined that Krehbiel failed to allege that the purportedly biased, unidentified employees had any supervisory or disciplinary authority over Krehbiel, or that they made the formal decision to terminate his employment. (JA31). In finding that the Amended Complaint did not sufficiently allege discriminatory motivation on the part of the decisionmakers, the District Court

appropriately concluded that Krehbiel failed to state a claim for race discrimination. (JA31).

In an attempt to evade this Circuit's express limitation on the imputation of a subordinate employee's alleged discriminatory motivations, Krehbiel relies on non-binding precedent from sister circuits, whose views are markedly different from that expressed by this Court in *Hill* and subsequent decisions. *See*, *e.g.*, *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (noting that the Fourth Circuit's holding in *Hill* "is not the view of this court, even though the 'cat's paw' formula apparently originated in our decision."); *McKenna v. City of Phila.*, No. 98-5835, 2010 U.S. Dist. LEXIS 73667, at *82-83 (E.D. Pa. July 20, 2010) (reviewing the Fourth Circuit's holding in *Hill* and finding that "[o]ther circuits have declined to adopt this restrictive interpretation and have adopted different approaches, allowing a plaintiff to recover upon a showing that a non-decision-maker's bias 'caused' the adverse decision or 'substantially influenced' or 'tainted' it."); *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 19 n.24 (1st Cir. 2008) (noting that the Fourth Circuit has recognized a "very limited and more restrictive version" of a theory of liability based on a subordinate's bias).

Krehbiel attempts to comport this Circuit's reading of the relevant anti-discrimination statutes with the employee-favored views of its sister circuits by providing a narrow interpretation of the application of *Hill*. Appellant's Brief pp. 7-

11. However, the Court in *Hill* reflected upon the various cases decided by its sister circuits relating to the imputation of discriminatory intent, but noted that these cases "have not always described the theory in consistent ways, and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application." *Hill*, 354 F.3d at 290. Ultimately, this Court refused to "embrac[e] a test that would impute the discriminatory motivations of subordinate employees having no decisionmaking authority to the employer, and make them agents for purposes of the employment acts, simply because they have influence or even substantial influence in effecting a challenged decision." *Id.* at 291.

Recognizing the fatal effect that *Hill* has on his race discrimination claim, Krehbiel endeavors to distinguish the facts of his case from those considered by this Court in rendering its decision. Appellant's Brief pp. 9-11. However, Krehbiel's position not only unjustifiably restricts this Court's holding in *Hill*, it also relies on an erroneous reading of the facts underlying that Opinion. (JA9-11). In *Hill*, the plaintiff worked as an aircraft mechanic, but was terminated after receiving three reprimands from her employer for rule and standard violations. *Hill*, 354 F.3d at 282-83. In pursuing claims for sex and age discrimination and retaliation against her employer, the plaintiff acknowledged that the actual decisionmakers behind her reprimands and ultimate termination did not harbor discriminatory animus; however, she argued that a biased safety inspector, motivated by sex and age discrimination,

reported plaintiff for the safety infractions that resulted in her second and third reprimand, and ultimately, her termination. *Id.* at 283. This Court noted that in order for the plaintiff to be successful on her claims, it would have to find that her employer could be liable for the alleged discriminatory animus of the safety inspector that reported the violations to the plaintiff's supervisor even though he "held no formal disciplinary or supervisory authority over [the plaintiff.]" *Id.* at 291. This Court declined to do so. *Id.* at 295.

Krehbiel contends that the relevance of *Hill*, and the cases cited therein, "is the fact that the actual decisionmakers were unaware of any improper motivations[,]" arguing that in *Hill*, "there was no evidence presented that the actual decisionmakers were aware of any discriminatory motivation of the safety inspector who had identified plaintiff's errors." Appellant's Brief p. 10. This argument demonstrates an incomplete reading of *Hill*. In assessing whether the plaintiff offered sufficient evidence to demonstrate that she was the victim of intentional discrimination or retaliation, this Court considered the facts surrounding each of plaintiff's reprimands and her ultimate termination. *Hill*, 354 F.3d at 291-99. In doing so, the Court 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. *Id.*

at 295-96. In his dissent, Judge Michael similarly confirmed that the plaintiff reportedly told her supervisor about the safety inspector's discriminatory conduct on a number of occasions, noting that she complained to her supervisor that the safety inspector was discriminating against her just days before the inspector submitted six reports documenting the plaintiff's errors. *Id.* at 300 (Michael, J., dissenting). This Court found that if it were to "accept the proffered inference that [the safety inspector] was motivated by discriminatory and retaliatory animus towards [plaintiff] to issue the discrepancy reports"—a complaint that plaintiff claimed to have communicated to her supervisor— "this fact d[id] not transform [the safety inspector] into the actual decisionmaker or the one principally responsible for [the supervisor's] decision to issue the third reprimand." *Id.* at 296.

Ultimately, this Court's holding in *Hill* was not dependent on the fact that the actual decisionmakers were in the dark regarding the subordinate employee's improper motivations as Krehbiel has suggested. Rather, the actual decisionmakers "must possess the requisite discriminatory motivation behind the adverse employment decision that they make or for which they hold principal responsibility." *Id.* at 289.

Krehbiel's Amended Complaint offered no facts to support a theory concerning the decisionmakers' intent, which remains crucial in the assessment of Krehbiel's employment discrimination claims. *Merritt*, 601 F.3d at 300. Although

Krehbiel alleged that a number of unidentified BrightKey employees advocated for his termination, he did not plead any facts that support the conclusion that the subordinate employees in question possessed the requisite level of authority that would classify them as the actual decisionmaker for the employment action in question, or any disciplinary authority at all for that matter. (*See generally* JA18-24). Rather, without providing the names or positions of these employees, or their relationship to the decisionmakers responsible for Krehbiel's termination, he alleged only that BrightKey acceded to the wishes of the "objecting employees," prescribing no discriminatory animus to the decisionmakers themselves, and without even identifying the purported decisionmakers. (JA20-21 ¶¶ 9-11). In line with this Court's holding in *Hill*, Krehbiel cannot maintain his employment discrimination claims upon the discriminatory motivations of subordinate employees, unless he shows "that the subordinate employee[s] possessed such authority as to be viewed as the one[s] principally responsible for the decision or the actual decisionmaker[s] for [BrightKey]." *Hill*, 354 F.3d at 291. Accordingly, Krehbiel failed to allege a plausible claim for relief for race discrimination, and this Court should affirm the District Court's dismissal of his claim.

### B. Krehbiel's claims of race discrimination are conclusory and devoid of further factual enhancement.

Even if Krehbiel were permitted to proceed on a theory that unidentified decisionmakers at BrightKey adopted the objecting employees' allegedly

discriminatory intent, his Amended Complaint nevertheless failed "to state a claim to relief that is plausible on its face." *Bing*, 959 F.3d at 616. As the District Court correctly noted, "[i]n the context of a Title VII case, 'an employment discrimination plaintiff need not plead a *prima facie* case of discrimination' to survive a motion to dismiss." (JA30 (quoting *Bing*, 959 F.3d at 616 (quoting *Swierkiewicz*, 534 U.S. at 515)). However, a pleading "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *McCleary-Evans*, 780 F.3d at 585 (quoting *Twombly*, 550 U.S. at 555).

In his Amended Complaint, Krehbiel alleged that he was initially retained as a consultant for BrightKey in December 2019 and subsequently hired as a full-time employee in February 2020 with the title Vice President of Operations. (JA19 ¶ 5). Despite Krehbiel entering his employment with BrightKey as a white individual, a trait that naturally remained unchanged during his tenure with the Company, he averred that the unidentified employees only objected to his continued employment after they discovered two of his podcasts later in 2020, which Krehbiel himself described as "controversial." (JA19-21). In particular, Krehbiel admitted that employees expressed concerns that Krehbiel was advocating "white privilege" after he conveyed skepticism over the propriety of policies relating to diversity goals and hate crimes. (JA20 ¶¶ 8-9). Krehbiel attempted to prescribe discriminatory animus to the complaining employees by baldly proclaiming that "they were motivated by

[Krehbiel's] race and political opinions in demanding that he be terminated." (JA20 ¶10). However, Krehbiel's allegations amount to nothing more than "bare assertions devoid of further factual enhancement . . . ." *Nemet Chevrolet*, 591 F.3d at 255 (citing *Iqbal*, 556 U.S. at 678); *McCleary-Evans*, 780 F.3d at 585 (quoting *Iqbal*, 556 U.S. at 678-79 (quoting *Twombly*, 550 U.S. at 555, 557)) (finding that the plaintiff's repeated allegations that an employer did not hire her "because of the relevant decisionmakers' bias against African American women" were "'no more than conclusions' and therefore d[id] not suffice.").

In *Bing v. Brivo Systems, LLC*, this Court affirmed the dismissal of a plaintiff's race discrimination claim, finding that the complaint, even when liberally construed, did not allow for the court to "speculate" or "fill in the gaps" as to the employer's motivation for terminating plaintiff's employment. 959 F.3d 605, 618 (4th Cir. 2020). There, the plaintiff, an African-American male, reported for orientation only to be pulled aside by a white manager and confronted with a newspaper article about a shooting that involved a gun owned by the plaintiff for which he faced no charges. *Id*. at 609. The white manager determined that the plaintiff was unfit for the job and terminated him on the spot. *Id.* In his claim for employment discrimination, the plaintiff alleged that the manager only conducted the search for the newspaper article after discovering that plaintiff was an African-American male, a fact that the manager purportedly learned on the first day of plaintiff's employment. *Id.* at 617.

From there, the plaintiff alleged that the search and subsequent termination were racially discriminatory. *Id.* at 617. This Court found that it could not reasonably infer that the adverse employment actions were racially motivated, noting that the complaint lacked any factual allegations that would support such an inference (e.g., an allegation that the additional searches were only conducted on African-American employees). *Id.* In affirming the dismissal of plaintiff's complaint, this Court noted that "[t]he mere fact that a certain action is potentially consistent with discrimination does not alone support a reasonable inference that the action was motivated by bias." *Id.* at 618.

Like the plaintiff in *Bing*, Krehbiel has asked this Court to speculate as to the motivation of both (i) the unidentified employees who purportedly objected to the views expressed by Krehbiel in his podcasts, and (ii) the unidentified decisionmakers who ultimately decided to terminate Krehbiel's employment, primarily through his use of conclusory statements. (JA19-20). However, Krehbiel's Amended Complaint is devoid of further factual enhancement that would support a reasonable inference of discriminatory intent. For example, Krehbiel did not allege that the objecting employees displayed animus towards him or other white employees prior to their discovery of the offending podcasts, or that other non-white employees expressed similar "controversial" views and did not receive the same appropriate backlash from the workforce. (*See generally* JA18-24). Instead, Krehbiel's Amended

Complaint "leaves open to speculation" the motivations of the unidentified employees and decisionmakers, and asks this Court to infer a cause – invidious discrimination – that "is not plausible in light of the 'obvious alternative explanation'" that BrightKey employees simply disagreed with the Vice President of a company publicly expressing controversial viewpoints, particularly related to sensitive subjects such as diversity initiatives and hate crimes. *McCleary-Evans*, 780 F.3d at 588 (quoting *Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567)); *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263 (1st Cir. 2022) (affirming the dismissal of plaintiffs' racial discrimination claim, noting that the grocery store's enforcement of its policy that prevented employees from wearing Black Lives Matter masks "may be explained by the 'obvious alternative explanation' that [the store] did not want to allow the mass expression of a controversial message by employees in their stores.").

Krehbiel has presented no facts to support his conclusory allegations about the racial motivations of the unidentified employees or decisionmakers, but instead, identified a non-discriminatory basis for his termination – the desire for its executive team to refrain from publicly expressing controversial views warranting subordinate opposition. (JA20 ¶ 9); *Bing*, 959 F.3d at 618 (finding that the plaintiff's claim for race discrimination failed, in part, because he pled a non-discriminatory basis for his termination). Krehbiel's conclusory statements regarding the objections being raised because a "white person like [Krehbiel] express[ed] such views" simply do not

"nudge h[is] claim" of race discrimination "across the line from conceivable to plausible." (JA20 ¶ 9); *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392, 399 (4th Cir. 2021) (quoting *Twombly*, 550 U.S. at 570); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 282 (4th Cir. 2000) ("Law does not blindly ascribe to race all personal conflicts between individuals of different races.").

Despite Krehbiel casting his claim for discrimination in generalities regarding his status as a member of a racial majority, in actuality, Krehbiel's factual averments, at most, describe adverse employment actions based upon the perception that he himself was disseminating racist ideologies by advocating for "white privilege." (JA20 ¶9). Although Title VII prohibits an employer from "discharg[ing] any individual, or [] otherwise discriminat[ing] against any individual . . . because of such individual's race[,]" its protections do not extend to the perceived racism of an employee. 42 U.S.C. § 2000e-2(a)(1)). "'Racism' is not a race, and discrimination on the basis of alleged racism is not the same as discrimination on the basis of race." *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 97 (2d Cir. 2013); *Lovelace v. Wash. Univ. Sch. of Med.*, 931 F.3d 698, 708 (8th Cir. 2019) ("While 'falsely accusing someone of being a racist is morally wrong,' such accusations cannot form the basis of [a] racial discrimination claim."); *Ledda v. St. John Neumann Reg'l Acad.*, No. 4:20-CV-700, 2021 U.S. Dist. LEXIS 31043, at *17 (M.D. Pa. Feb. 18, 2021) ("no court has deemed the holding of racist views, or the

perceived adherence to racist beliefs, to fall within the ambit of the term 'race' as it is used in Title VII.").

In an analogous case, *Lacontora v. Geno Enterprises, LLC*, the United States District Court for the Eastern District of Pennsylvania dismissed the plaintiff's race discrimination claim which alleged that the plaintiff was terminated after he made an insensitive comment regarding a coworker. No. 21-03948, 2022 U.S. Dist. LEXIS 51739, at *2 (E.D. Pa. Mar. 23, 2022). In particular, the plaintiff saw his African-American co-worker standing outside in the rain, and stated that he looked like a protester. *Id.* This comment came "just days after the death of George Floyd and subsequent protests" and prompted other employees to complain to management, which culminated in plaintiff's termination. *Id.* The court found that the plaintiff's complaint suggested "at best that Defendant wrongfully perceived Plaintiff as making a racist comment[,]" but did not allege that the employer's motive for terminating the plaintiff was based on his race. *Id.* at 11. Accordingly, the court dismissed the race discrimination claim, noting that the plaintiff "wrongfully conflate[d] the ideas of race and racism." *Id.*

In his Amended Complaint, Krehbiel has similarly conflated the ideas of race and racism. (JA19-21). Although Krehbiel contends that the objecting employees only took issue with him expressing the views contained in his podcast because he is white, he provides no factual enhancement to support such allegations. (*See*

*generally* JA19-22); *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Because Krehbiel's Amended Complaint establishes, at most, that he was perceived as perpetuating intolerant views, he has "failed to establish a plausible basis for believing . . . that race was the true basis for [his] termination." *Coleman*, 626 F.3d at 191. Accordingly, this Court should affirm the decision of the District Court and hold that Krehbiel failed to state a plausible claim for relief for race discrimination.

## II. The District Court Did Not Abuse its Discretion in Failing to Grant a Motion for Leave to Amend that was Never Initiated.

In a final effort to resurrect his unsuccessful claim for race discrimination, Krehbiel argues that even if his Amended Complaint failed to state a claim, the District Court abused its discretion in dismissing the claim with prejudice, denying Krehbiel an opportunity to further amend. Appellant's Brief pp. 11-13. In support of this position, Krehbiel appears to fixate on a single footnote in the District Court's Memorandum Opinion, which states: "Given that Plaintiff had an opportunity to amend his initial Complaint, dismissal with prejudice of [the race discrimination claim] is appropriate." Appellant's Brief 11-12 (quoting JA33). Although Krehbiel goes on to scrutinize the District Court's statement and the legal authority cited therewith, going as far as to call the Court's statement "disingenuous," ultimately, this Court need not consider the merits of the lower court's stated justification for dismissing Krehbiel's race discrimination claim with prejudice, as Krehbiel never

sought leave to amend. As this Court has uniformly held, "[r]egardless of the merits of the desired amendment, a district court does not abuse its discretion 'by declining to grant a motion that was never properly made.'" *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (quoting *Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 630-31 (4th Cir. 2008)); *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998) ("We have repeatedly held that issues raised for the first time on appeal generally will not be considered.").

Although Krehbiel does not directly address his failure to preserve this issue for review, in criticizing the District Court's ruling, he states "that neither BrightKey nor the court identified, or gave Krehbiel notice of, any defects in the racial discrimination claim." Appellant's Brief p. 12. This position defies logic. By the very nature of BrightKey filing a Motion to Dismiss for Krehbiel's failure to state a claim, he was put on notice of the purported defects in his race discrimination claim. *See United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 305 n.6 (4th Cir. 2017) (finding that the plaintiff was put on notice of the deficiencies in his complaint by the defendant's motion to dismiss). Despite Krehbiel filing a response in opposition to BrightKey's motion to dismiss, and the district court expending forty-five days to issue its ruling, Krehbiel never so much as suggested that he could cure the deficiencies in his Amended Complaint, let alone filed a motion for leave. (JA3). Under these circumstances, Krehbiel cannot show abuse of discretion by the

District Court. *Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 630-31 (4th Cir. 2008) (finding no abuse of discretion where plaintiffs requested leave to amend in their response to defendants' motion to dismiss but did not file a motion to amend or a proposed amended complaint).

Beyond Krehbiel's failure to move for leave to amend, the District Court did not abuse its discretion in dismissing Krehbiel's race discrimination claim with prejudice, as the claim was "incurable through amendment" and any attempt would be futile. *Carson*, 851 F.3d at 305 n.6 (4th Cir. 2017); *Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) ("a district court may deny leave if amending the complaint would be futile."); *Save Our Sound OBX, Inc. v. N.C. DOT*, 914 F.3d 213, 228 (4th Cir. 2019) ("A proposed amendment is also futile if the claim it presents would not survive a motion to dismiss."); *Frank M. McDermott, Ltd. v. Moretz*, 898 F.2d 418, 420-21 (4th Cir. 1990) ("There is no error in disallowing an amendment when the claim sought to be pleaded by amendment plainly would be subject to a motion to dismiss under Fed. R. Civ. P. 12(b)(6)."). As detailed *supra*, Krehbiel rests his claim of race discrimination on the speculative biases of unidentified employees, who did not have supervisory or disciplinary authority over Krehbiel. Krehbiel cannot amend his race discrimination claim without setting forth factual allegations that contradict, rather than elaborate, on his existing theory of liability. Accordingly, "it is clear that amendment would be futile in light of the

fundamental deficiencies in [Krehbiel's] theory of liability[,]" and that the District Court did not abuse its discretion in dismissing Krehbiel's claim for race discrimination with prejudice. *Cozzarelli*, 549 F.3d at 630.

## CONCLUSION

For the foregoing reasons, Appellee, BrightKey, Inc., respectfully requests that the decision of the District Court be affirmed.

Respectfully submitted,

*/s/ Stephen M. Cornelius*
Stephen M. Cornelius
ECCLESTON & WOLF, P.C.
Baltimore-Washington Law Center
7240 Parkway Drive, 4th Floor
Hanover, MD 21076-1378
(410) 752-7474 (phone)
(410) 752-0611 (fax)
E-mail: cornelius@ewmd.com
*Attorney for Appellee*

*/s/ Courtney M. Watkins*
Courtney M. Watkins
ECCLESTON & WOLF, P.C.
Baltimore-Washington Law Center
7240 Parkway Drive, 4th Floor
Hanover, MD 21076-1378
(410) 752-7474 (phone)
(410) 752-0611 (fax)
E-mail: watkins@ewmd.com
*Attorney for Appellee*

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Dated: August 11, 2022

/s/ Stephen M. Cornelius
*Counsel for Appellee*

/s/ Courtney M. Watkins
*Counsel for Appellee*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 11th day of August, 2022, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Michael E. Rosman
Michelle Scot
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Avenue, N.W., Suite 625
Washington, DC 20036
(202) 833-8400

*Counsel for Appellant*

/s/ Stephen M. Cornelius
*Counsel for Appellee*

/s/ Courtney M. Watkins
*Counsel for Appellee*