No. 19-1220

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBEL BING,

Plaintiff – Appellant,

v.

BRIVO SYSTEMS, LLC,

Defendant – Appellee.

On appeal from the United States District Court for the District of Maryland
Greenbelt Division
(Paula Xinis, District Judge)

BRIEF OF APPELLANT ROBEL BING

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May 28, 2019

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Maryland had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as the Plaintiff's claims arose under the laws of the United States, specifically 42 U.S.C. §§ 2000e *et seq.* (2018) and 42 U.S.C. § 1981 (2018).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to hear this appeal from the District Court's final decision and order entered on January 22, 2019, granting the Defendant's motion to dismiss. On February 19, 2019, the Plaintiff timely filed a notice of appeal.

This appeal is from a final judgment that disposes of all of the Plaintiff's claims.

STATEMENT OF ISSUES

1. Did the District Court err by dismissing Mr. Bing's disparate treatment claim under Title VII when Mr. Bing alleged that, after he had passed a background check and appeared for his first day of work at Brivo Systems, LLC, his white supervisor saw him, learned he was African-American, departed from Brivo's standard employment practices by performing an internet search of him, and then fired him, resulting in a discharge based on overt racial animus or implicit racial bias against African-Americans?

2. Did the District Court err by dismissing Mr. Bing's disparate impact claim under Title VII when Mr. Bing alleged that his employer, Brivo Systems, LLC, has an employment practice of performing internet searches of its employees, or alternatively, permitting supervisors to perform such searches at their discretion, resulting in a disparate impact on employees of color?

STATEMENT OF THE CASE

Plaintiff-Appellant Robel Bing, proceeding pro se, timely filed the present action on May 29, 2018 in the United States District Court for the District of Maryland, Greenbelt Division against Defendant-Appellee Brivo Systems, LLC (Brivo). J.A. 2. He brought disparate treatment and disparate impact claims of employment discrimination under Title VII of 42 U.S.C. §§ 2000e *et seq.* (2018) and a race discrimination claim under 42 U.S.C. § 1981 (2018). *See generally* J.A. 5–18. On July 26, 2018, Brivo filed a Motion to Dismiss the Complaint in its entirety for failure to state a claim. J.A. 2. Mr. Bing, still pro se, filed an Opposition to the Motion on September 10, 2018. J.A. 3. The District Court issued a final decision and order on January 22, 2019, granting Brivo's Motion to Dismiss without prejudice. J.A. 3. On February 19, 2019, Mr. Bing, through undersigned counsel, timely filed a Notice of Appeal. J.A. 3.

STATEMENT OF FACTS

Defendant-Appellee Brivo Systems, LLC (Brivo) hired Plaintiff-Appellant Robel Bing to be a Customer Care Representative starting on October 17, 2016. J.A. 13. Mr. Bing earned the position after submitting an application, participating in an interview, and passing a background check. J.A. 13, 14.

Mr. Bing is an African-American male. J.A. 13. On his application for the Customer Care Representative position, however, he declined to specify his race. J.A. 14. Mr. Bing's application passed initial screening, and Brivo hiring managers Candice Scott and Baudel Reyes[1] interviewed Mr. Bing. J.A. 13, 14. Because he had the requisite qualifications and because the interview was successful, after the interview they hired him pending passage of a background check. *See* J.A. 13–14, 16.

Brivo used JustiFacts, a third-party vendor, to complete the background check of Mr. Bing. J.A. 13. The background check included examining Mr. Bing's criminal and driving history, checking his references, and looking at other sources of information. J.A. 13. Mr. Bing disclosed all the information JustiFacts requested from him, including his previous criminal convictions. J.A. 13.

[1] Mr. Bing did not indicate the first names of Ms. Scott and Mr. Reyes in his Complaint. Their first names were taken from the District Court's memorandum opinion. *See* J.A. 176.

Nevertheless, Ms. Scott contacted Mr. Bing and gave him written confirmation that the background check was complete and that he had passed. J.A. 14.

After Mr. Bing passed the background check and the rest of the employer's standard hiring process, Ms. Scott contacted him. J.A. 14. She told him that she was "eager" for him to begin working at Brivo and wanted him to begin "as soon as possible." J.A. 14. As a result, Mr. Bing asked his employer at the time to accept an early resignation so that he could begin working at Brivo on October 17, 2016. J.A. 14. That employer agreed. J.A. 14.

Mr. Bing came to his first day of work at Brivo, as scheduled, on October 17, 2016. J.A. 14. Because it was his first day, he had orientation. J.A. 14. During orientation, he met Brivo employee Charles Wheeler, Brivo's Security Architect and his supervisor. J.A. 14. Mr. Wheeler is a white male. J.A. 14. Because Mr. Bing had declined to specify his race on his application, Mr. Wheeler was not aware Mr. Bing was African-American. J.A. 16. Only Ms. Scott and Mr. Reyes knew, prior to Mr. Bing's first day, that he was Black, because they were the only Brivo employees who had participated in Mr. Bing's interview. J.A. 16.

After seeing Mr. Bing—an African-American man—for the first time, Mr. Wheeler searched for Mr. Bing's name on the internet using Google. J.A. 14. Google searches during orientation of a new employee's name are not a part of Brivo's standard process. J.A. 16. Within an hour, Mr. Wheeler pulled Mr. Bing

out of the orientation. J.A. 14. Mr. Wheeler confronted Mr. Bing about a newspaper article in an issue of the Baltimore Sun. J.A. 14. The article described a shooting incident between two other people, but nonetheless including Mr. Bing's name, even though there is no mention of him being arrested or convicted. J.A. 14. Mr. Wheeler did not give Mr. Bing any opportunity to explain or refute any statements in the newspaper article. J.A. 14. Instead, the encounter ended with Mr. Wheeler declaring that Mr. Bing was "unfit for the position" of Customer Care Representative and firing him "on the spot." J.A. 14. Immediately after, Mr. Wheeler "escorted [Mr. Bing] out of the building" on his first, and now last, day working at Brivo. J.A. 14.

Mr. Bing suffers from a chronic, painful, lifelong health condition that requires regular medical care and unpredictable hospitalization. J.A. 18. The stress Mr. Bing experienced from losing his job with Brivo, and subsequent search for a new job, exacerbated his disease. J.A. 18. Losing his position with Brivo also caused Mr. Bing to lose his medical insurance to pay for his medical costs. *See* J.A. 18.

SUMMARY OF ARGUMENT

The District Court erred when, at this early stage, it dismissed Plaintiff-Appellant Robel Bing's disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964 and his race discrimination claim under

§ 1981[2] against his former employer, Brivo. Mr. Bing successfully earned a position at Brivo after applying, interviewing, and passing a background check, i.e., passing the employer's standard hiring process. But after he appeared for his first day of work, his white supervisor, Charles Wheeler, saw Mr. Bing for the first time, learned that he was African-American, departed from company practice and performed a Google search of him, and then fired him, all on his first day.

Mr. Wheeler told Mr. Bing that he was fired because of a newspaper article Mr. Wheeler found during the search. The District Court believed Brivo, inappropriately crediting Brivo's explanation at this stage of the case that the article was the true reason Brivo fired Mr. Bing. To credit Brivo's explanation, the District Court overlooked all of Mr. Bing's allegations related to how Mr. Wheeler found the newspaper article in the first place—by performing a Google search of Mr. Bing motivated by either 1) a desire, out of racial animus, to find pretext that justified firing Mr. Bing, or 2) implicit bias against African-Americans. Moreover, Mr. Wheeler never gave Mr. Bing a nondiscriminatory reason—or any reason at

[2] Even though Mr. Bing did not expressly bring a claim under § 1981, this Court has held that when plaintiffs proceeding pro se—as Mr. Bing did before the District Court—allege employment discrimination, the Court construes the complaint as bringing both a Title VII claim and a § 1981 claim. *See Brown v. Dep't of Health & Mental Hygiene*, No. 92-1228, 1993 U.S. App. LEXIS 23857, at *2–3 (4th Cir. Sep. 16, 1993) (per curiam) (remanding case to the District Court to consider Title VII and § 1981 claims because the plaintiff alleged a wrongful discharge based on racial discrimination but the District Court did not consider those claims).

all—for why he searched for Mr. Bing immediately after seeing that Mr. Bing was Black. Because Mr. Wheeler performed the search for discriminatory reasons, Mr. Bing plausibly alleged that Mr. Wheeler's firing of Mr. Bing was because of unlawful race discrimination under Title VII and § 1981.

Finally, the District Court highlighted that Ms. Scott was involved in both Mr. Bing's hiring and firing to help support its conclusion that Mr. Bing did not sufficiently state his race discrimination claims. Yet the only support for the District Court's conclusion comes from extra-pleading material, which cannot be relied upon at the motion to dismiss stage. And even if the District Court could rely on that extrinsic material, it is unclear from that extra-pleading material whether Ms. Scott fired Mr. Bing. Even if she did, Mr. Bing's allegations still state a race discrimination claim against Brivo.

As for Mr. Bing's disparate impact claim, he alternatively pleaded that Brivo either had a practice of performing permitting internet searches of all its employees or had a practice of permitting such internet searches. The District Court erred because it failed to address this claim, even though Mr. Bing plausibly alleged that the practice has a disparate impact on Brivo's employees of color.

STATEMENT OF STANDARD OF REVIEW

This Court reviews de novo a lower court's decision to grant or deny a

motion to dismiss. *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019) (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999)). When considering a motion to dismiss, a court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Id.* at 212 (citing *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)). To survive a motion to dismiss, the plaintiff must plead enough factual allegations "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In addition, before the District Court, Mr. Bing proceeded pro se. Pro se pleadings are liberally construed and held to a less stringent standard than pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *accord Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010). Pro se complaints are entitled to special care to

determine whether any possible set of facts would entitle the plaintiff to relief. *Hughes v. Rowe*, 449 U.S. 5, 9–10 (1980).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED MR. BING'S DISPARATE TREATMENT CLAIM BECAUSE MR. BING PLAUSIBLY ALLEGED THAT BRIVO FIRED HIM BECAUSE OF UNLAWFUL RACE DISCRIMINATION.

Mr. Bing plausibly alleged that Brivo fired him because of unlawful race discrimination. The District Court erred because it nonetheless inappropriately credited Brivo's pretextual reason for firing him and dismissed his claim on that basis.

A plaintiff bringing an employment discrimination claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, as Mr. Bing does here, must provide supporting evidence "through one of two avenues of proof:" (1) "direct or circumstantial evidence" that discrimination motivated the employer's adverse employment decision, or (2) the familiar *McDonnell-Douglas* "pretext framework" that requires the plaintiff to show that the employer's proffered permissible reason for taking an adverse employment action "is actually a pretext for discrimination." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284–85 (4th Cir. 2004) (en banc).

Here, Mr. Bing made allegations under the latter avenue of proof—the *McDonell-Douglass* pretext framework. Under that framework, a plaintiff must

first establish a prima facie case for discrimination. *Id.* at 285. In the termination context, this means that the plaintiff must show: "(1) membership in a protected group, (2) discharge, (3) while otherwise fulfilling Defendants' legitimate expectations at the time of his discharge, and (4) under circumstances that raise a reasonable inference of unlawful discrimination." *King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003).[3]

Once a plaintiff establishes a prima facie case, "the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason" for the termination. *Hill*, 354 F.3d at 284. If met by the employer, "the burden shifts back to the plaintiff." *Id.* The plaintiff must "prove by a preponderance of the evidence that the employer's stated reasons 'were not its true reasons, but were a pretext for discrimination.'" *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)).

Here, however, the District Court assessed Mr. Bing's allegations at the motion to dismiss stage. Importantly, plaintiffs "are not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). Rather, the complaint must simply include enough "factual allegations . . . to raise a right of relief above

[3] "[T]he elements required to establish a prima facie case are the same under Title VII and [§] 1981." *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 n.1 (4th Cir. 2002).

the speculative level" and "state a plausible claim" of discrimination. *Id.* (alteration omitted) (first quoting *Twombly*, 550 U.S. at 555; then quoting *Iqbal*, 129 S. Ct. at 1950). When determining whether a plaintiff plausibly alleged a claim under "*Iqbal* and *Twombly*," courts must consider "the plausibility of inferring discrimination." *Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017). Courts consider the plausibility of this inference based on the plaintiff's allegations "in light of an 'obvious alternative explanation' for the conduct." *Id.* (quoting *Iqbal*, 556 U.S. at 682). Put differently, while the plaintiff "need not establish a prima facie case at this stage," courts "must be satisfied that the [employer's] explanation" for the adverse employment decision "does not render [the employee's] allegations implausible." *Id.* (alterations in original).

For the employer's explanation to render the plaintiff's allegations of discrimination implausible, it must meet a high bar: it must "obviously" be an "irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation." *Id.* Accordingly, whether "a recovery is very remote and unlikely . . . is not the test." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Nor is the test "whether there are more likely explanations for the [employer's] action." *Woods*, 855 F.3d at 649. Whether the explanation is "in fact pretext is a question to be analyzed under" the *McDonnell-Douglas* framework at a later stage of the case, when the

plaintiff is called on to prove his claim with evidence, "and not under Rule 12(b)(6)." *Id.*

A. Mr. Bing Plausibly Alleged That Brivo's Firing of Him Was Because of Unlawful Race Discrimination Because Mr. Wheeler Saw He Was African-American, Immediately Scrutinized Him More than Other Employees, and Then Fired Him.

The crux of Mr. Bing's disparate treatment claim is that Brivo fired him because he is African-American. Brivo, as a private-sector employer, is governed by § 703(a)(1) of Title VII, which, in relevant part, makes it unlawful for such employers "to discharge any individual . . . because of such individual's race. . . ." 42 U.S.C. § 2000e-2(a)(1). Of course, an employer may discharge an employee because, for example, the employee engaged in "unlawful" or "disruptive acts," or any number of other criteria. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 (1976) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). Whatever the criteria an employer uses, however, it must be "applied alike to members of all races." *Id.* (quoting *McDonnell-Douglas*, 411 U.S. at 804). Showing that race was a "but for cause" of the discharge is sufficient to prove a discriminatory discharge claim. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.6 (1989) (quoting *McDonald*, 427 U.S. at 282, n.10).

Here, the District Court concluded that "no evidence exists by which this Court could infer [Mr.] Bing was terminated on account of race" or that Brivo's explanation for firing Mr. Bing "was put forward to obscure Brivo's discriminatory

animus." J.A. 176. The District Court stated that Brivo "confirmed" the shooting incident described in the newspaper article Mr. Wheeler found. J.A. 176. It was "this new information" that "led to [Mr. Bing's] termination 'on the spot.'" J.A. 176 (quoting J.A. 14). The District Court concluded, therefore, that "he was terminated because of his involvement in the shooting incident." J.A. 176.

The District Court's conclusion was wrong for at least two reasons. To begin, the District Court overlooked all of Mr. Bing's allegations related to how Mr. Wheeler *found the newspaper article in the first place*—by performing a Google search of Mr. Bing motivated by either 1) a desire, out of racial animus, to find a pretext to fire Mr. Bing, or 2) implicit bias against African-Americans.

1. Mr. Bing Plausibly Alleged That Mr. Wheeler Performed a Google Search of Him to Find a Pretext to Fire Him.

Mr. Bing plausibly alleged that but for being African-American, Brivo would not have fired him. When he applied to be a Customer Care Representative, his application passed initial screening, Brivo invited him to an interview, Brivo tentatively hired him pending passage of a background check, and he passed that background check. J.A. 13, 14, 16. What is more, Brivo offered him the position even though Mr. Bing disclosed that he had previous criminal convictions. J.A. 13. Thus, he was hired through Brivo's standard hiring practice. Ms. Scott was "eager" for him to begin working at Brivo "as soon as possible." J.A. 14. But everything changed when Mr. Wheeler met him on his first day at Brivo and saw

that Mr. Bing was African-American. Mr. Bing had not disclosed his race on his application, and Mr. Wheeler had not participated in his interview. J.A. 16.

Immediately after seeing that Mr. Bing was African-American, Mr. Wheeler went searching—literally—for a pretext to fire him by performing a Google search of Mr. Bing. J.A. 14. As Mr. Bing plausibly alleged, it was simply Mr. Bing's "(possibly unexpected) physical appearance as an African-American male" that spurred Mr. Wheeler to suddenly perform the Google search. J.A. 16. To support this allegation, Mr. Bing asserted that the Google search "clearly fell outside of established Brivo hiring processes." J.A. 16. Further, Mr. Bing alleged that Mr. Wheeler did not otherwise have a "reasonable, nondiscriminatory" reason for the Google search. J.A. 14. For that matter, Mr. Bing stated that Brivo "neglect[ed] to offer *any* reason as to why the additional investigation of [him] was performed on the first day of my employment." J.A. 16. (emphasis added).

Indeed, the timing of the Google search adds to the plausibility of inferring unlawful discrimination by Mr. Wheeler. Not only is the search a departure from Brivo's normal hiring process, but it did not occur when Brivo screened his application. *See* J.A. 16. Nor did it occur after his interview with Ms. Scott and Mr. Reyes. J.A. 16. And it did not occur during JustiFact's background check of Mr. Bing. J.A. 16. The search only occurred *immediately after* Mr. Wheeler saw that Mr. Bing was African-American. J.A. 16.

Moreover, the content of the newspaper article, when placed in context with the rest of Mr. Bing's application to Brivo, makes an inference of unlawful discrimination even more plausible. As part of his application, Mr. Bing voluntarily disclosed that he has previous criminal convictions. J.A. 14. He passed his background check anyway, and Brivo hired him. J.A. 14. Mr. Wheeler told Mr. Bing that the newspaper article he found was the basis of Mr. Bing's discharge. J.A. 14. Yet the article only reported that there was an investigation into a shooting[4] and that investigation did not result in any arrest or criminal conviction of Mr. Bing. J.A. 14.

2. Alternatively, Mr. Bing Plausibly Alleged That Mr. Wheeler Performed a Google Search of Him Because of Mr. Wheeler's Implicit Bias against African-Americans.

More charitably to Brivo (and Mr. Wheeler), Mr. Bing also alleged that Mr. Wheeler's "unchecked implicit racial biases" prompted him to perform the Google search of Mr. Bing, rather than a clear intention of firing Mr. Bing motivated by overt racial animus. J.A. 13. Here, too, unlawful discrimination can be plausibly

[4] Mr. Bing also pleaded that he was not present for the shooting the article described, he lawfully owned a firearm, and the Baltimore Police Department cleared him of any wrongdoing in a report of the incident. J.A. 14; *see also* J.A. 156–59 (police report of the incident). The District Court stated that Mr. Bing had loaned the firearm that was used in the shooting. J.A. 176. But the article also reported that Mr. Bing had loaned the firearm so that his friend could use it for "Halloween celebratory gunfire," and the shooting victim had been struck by accident. J.A. 58–59.

inferred. Even if Mr. Wheeler did not decide to fire Mr. Bing until after discovering the newspaper article, Mr. Bing still states a claim of discriminatory discharge. Though Brivo is free to develop its own criteria for firing its employees, that criteria must be "applied alike to members of all races." *McDonald*, 427 U.S. at 282 (quoting *McDonnell-Douglas*, 411 U.S. at 804).

Here, Mr. Bing pleaded that it was not. Mr. Wheeler's Google search of Mr. Bing "fell outside of established Brivo hiring processes," applying to Mr. Bing and no one else because of Mr. Wheeler's implicit racial bias against African-Americans. J.A. 16. But for that implicit bias, the Google search—and subsequent discharge of Mr. Bing—would not have occurred, which is sufficient to state a discriminatory discharge claim. *See Price Waterhouse*, 490 U.S. at 240 n.6 (quoting *McDonald*, 427 U.S. at 282, n.10). As a matter of fact, this Court recently recognized that implicit bias can lead to unlawful employment discrimination. As this Court observed, "many studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes." *Woods*, 855 F.3d at 641.

Thus, whether Mr. Wheeler's Google search was motivated by overt racial animus to find a pretext that justified firing Mr. Bing, or implicit bias against African-Americans, discrimination can be plausibly inferred from Mr. Wheeler's firing of Mr. Bing. This inference can be plausibly made even in light of Brivo's

explanation for firing Bing, its discovery of the newspaper article. Discrimination is still plausible because of all the circumstances surrounding when and why Mr. Wheeler performed the search that led to finding the article to begin with and the content of the article in the context of Mr. Bing's criminal background check. *See Woods*, 855 F.3d at 649 (quoting *Iqbal*, 556 U.S. at 682). Because of all those circumstances that Mr. Bing alleged, Mr. Wheeler's discovery of the article is not "so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation" for firing Mr. Bing. *See id.*

3. The District Court Erroneously Credited as True Brivo's Explanation for Firing Mr. Bing.

The other reason why the District Court's decision is wrong is because the judge concluded that Mr. Bing "was terminated because of his involvement in the shooting incident" rather than because of impermissible racial bias. J.A. 176. The District Court, therefore, categorically sided with Brivo's explanation for firing Mr. Bing. Meanwhile, it left unexamined all of Mr. Bing's plausible allegations outlined above describing the discriminatory intent motivating Mr. Wheeler's Google search of him. So, the District Court completely failed to address whether his allegations render Brivo's explanation implausible. *See Woods*, 855 F.3d at 649. The District Court, then, went much farther than concluding that "a recovery is very remote and unlikely" or that Brivo's explanation is the "more likely explanation" for firing Mr. Bing, both of which are already inappropriate at the

motion to dismiss stage. *Swierkiewicz*, 534 U.S. at 515 (quoting *Scheuer*, 416 U.S. at 236); *Woods*, 855 F.3d at 649. Instead, the District Court concluded that Brivo's explanation was *true*. The District Court, therefore, decided that Mr. Bing's firing was not "in fact pretext," even though that "is question to be analyzed under" the *McDonnell-Douglas* framework at a later stage of the case, after the benefit of discovery, "and not under Rule 12(b)(6)." *Woods*, 855 F.3d at 649.

In fact, this Court specifically cautioned that "particularly [for] claims based on more subtle theories of stereotyping or implicit bias," there is "a real risk that legitimate discrimination claims . . . will be dismissed should a judge substitute his or her view of the likely reason for a particular action in place of the controlling plausibility standard" on a motion to dismiss. *Id.* at 652. That is exactly what happened here. On Mr. Bing's discriminatory discharge claim, premised in part on implicit bias held by Mr. Wheeler, the District Court "substitute[d] . . . her view of the likely reason" for Mr. Bing's firing—that it was solely based on the newspaper article—"in place of the controlling plausibility standard." *Id.* As this Court warned, "[s]uch an approach especially treads through doctrinal quicksand when it is undertaken without the benefit of a developed record, one essential to the substantiation or refutation of common sense allegations of invidious discrimination." *Id.*

B. The District Court Erred When It Concluded That Mr. Bing Did Not Sufficiently Allege Race Discrimination Based Merely, in Part, on Believing Ms. Scott Both Hired and Fired Mr. Bing.

The District Court, relying on *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991), highlighted that Ms. Scott was "involved in both [Mr. Bing's] hiring and firing" to help support its conclusion that racial discrimination cannot be plausibly inferred from Brivo's firing of Mr. Bing. J.A. 177 (quoting J.A. 99). To support its assertion that Ms. Scott was involved in firing Mr. Bing, the District Court cited an email attached to Mr. Bing's Opposition, while proceeding pro se, that he apparently sent to Brivo Chief Executive Officer Steve Van Till. *See* J.A. 99. The District Court's reliance on the email and on *Proud* is flawed for at least four reasons.

1. The District Court Exclusively Relied on Extra-Pleading Material—an Email—to Conclude Ms. Scott Fired Mr. Bing.

By relying on the email, the District Court inappropriately relied on extra-pleading materials at the motion to dismiss stage to establish that Ms. Scott was involved in firing Mr. Bing. Courts may not consider extrinsic evidence when resolving a Rule 12(b)(6) motion. *E.g.*, *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006). And none of the exceptions to this general rule apply to this case. *See id.* (documents attached to the complaint or integral documents attached to a motion to dismiss); *New Beckley Mining Corp. v. United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994) (documents referred to and

relied upon in the complaint); *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (matters of public record).

Putting aside all extra-pleading material, there is no allegation in Mr. Bing's Complaint that Ms. Scott was involved in firing Mr. Bing. Without exception, Mr. Bing alleged that only Mr. Wheeler was involved in firing him. J.A. 14.

2. The Email Only Described What Mr. Wheeler Said to Mr. Bing During Their Confrontation.

Even if the District Court could appropriately rely on the email at this early stage of the case, the email only described what Mr. Wheeler had *said* to Mr. Bing when he confronted Mr. Bing. The email states that after Mr. Wheeler met with Mr. Bing, Mr. Wheeler "*explained* to me that he will have to speak with [Ms. Scott] and the Director of Security,"[5] and they "concluded" Mr. Bing is "not fit for the position." J.A. 99. (emphasis added). Yet what Mr. Wheeler said is not what Mr. Bing alleged in his Complaint. Mr. Bing asserted that during the confrontation, Mr. Wheeler grew angry, "continued to berate" him, fired him "on the spot," and "immediately . . . escorted" Mr. Bing "out of the building," without talking to Ms. Scott or the Director of Security. J.A. 14. The District Court, then, overlooked Mr. Bing's allegations of what happened in favor of what an email stated Mr. Wheeler had asserted about Ms. Scott's involvement. This was

[5] In his Complaint, Mr. Bing did not state the name of Brivo's Director of Security.

inappropriate at an early stage of the case, when the District Court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff, without the benefit of discovery to explore material discrepancies. *King*, 825 F.3d at 212 (citing *E.I. du Pont*, 637 F.3d at 440).

3. Based on the Language of the Email, It is Unclear Whether the *Proud* Inference Applies.

Even if the District Court may appropriately analyze what Mr. Wheeler maintained had occurred, it is not clear whether *Proud* applies. Under *Proud* and its progeny, if the plaintiff was "hired and fired by the *same person* within a relatively short time span," there is an inference that the employer's stated reason for the adverse employment action is not pretextual. *Jiminez v. Mary Wash. Coll.*, 57 F.3d 369, 378 (4th Cir. 1995) (quoting *Proud*, 945 F.2d at 798) (emphasis added).

Here, Ms. Scott and Mr. Reyes hired Mr. Bing. J.A. 16. But it is unclear which Brivo employee decided to fire Mr. Bing—and therefore, whether it was in fact Ms. Scott's decision. As stated above, Mr. Bing asserted that Mr. Wheeler, not Ms. Scott, fired him. J.A. 14. And the email says that, according to Mr. Wheeler, *both* Ms. Scott *and* the Director of Security "concluded" Mr. Bing should be fired, without specifying who made the actual decision. J.A. 99. Even so, the District Court's opinion itself does not go so far as concluding that Ms. Scott fired Mr. Bing: the District Court only concluded that Ms. Scott was "involved" in his

firing, J.A. 177, even though *Proud* requires that the "same person" hire *and* fire the plaintiff. *Jiminez*, 57 F.3d at 378 (quoting *Proud*, 945 F.2d at 798).

Adding to the lack of clarity is that, in the Fourth Circuit, the employer is liable not only for the animus and resulting adverse employment actions of a "formal decisionmaker." *Balas v. Huntington Ingalls Indus.*, 711 F.3d 401, 410 (4th Cir. 2013) (quoting *Hill*, 354 F.3d at 290). The employer is also liable for someone who was "principally responsible for the decision," even if that person was not the formal decisionmaker. *Id.* (quoting *Hill*, 354 F.3d at 291). For instance, an employer is nonetheless liable under Title VII for the decision of a subordinate employee whose decision was "merely rubber-stamped" by a "formal decisionmak[er]." *Hill*, 354, F.3d at 291. On the other hand, an employer is not liable for a subordinate employee who had "no supervisory or disciplinary authority" or even an employee who had a "substantial influence" on, or a "significant" role in, the decision. *Balas*, 711 F.3d at 410–11 (quoting *Hill*, 354 F.3d at 291).

Here, not only is it unclear who was the "formal decisionmaker" that fired Mr. Bing, it is likewise unclear which Brivo employee was "principally responsible" for firing Mr. Bing. *See id.* (quoting *Hill*, 354 F.3d at 290, 291). Based on Mr. Bing's allegations, Mr. Wheeler was both principally responsible for firing him and formally responsible for doing so. *See* J.A. 14. Though the email

said that Ms. Scott and the Director of Security "concluded" Mr. Bing should be fired, it is silent about the nature of that conclusion. It does not say whether Ms. Scott or the Director of Security was principally responsible for the decision to fire Mr. Bing. And as argued above, it is unclear who was formally responsible for the decision.

As a result, even if Ms. Scott formally fired Mr. Bing, if Mr. Wheeler or the Director of Security were principally responsible for firing Mr. Bing, Brivo would still be liable under Title VII. *See Balas*, 711 F.3d at 411 (quoting *Hill*, 354 F.3d at 291). In that case, Ms. Scott would have "merely rubber-stamped" their decision. *See Hill*, 354 F.3d at 291. Or if Ms. Scott had "no supervisory or disciplinary authority" over Mr. Bing, even if she had a "substantial influence" on the decision to fire him, Brivo would still be liable for Mr. Wheeler or the Director of Security's decision. *Id.* at 410–11 (quoting *Hill*, 354 F.3d at 291).[6]

Accordingly, the District Court erred when it dismissed Mr. Bing's Complaint based, in part, on the fact that Ms. Scott fired him. It is unclear from the email whether Ms. Scott fired him. And even if she did, it is unclear whether Mr. Wheeler or the Director of Security was principally responsible for that

[6] What is more, the job titles of Mr. Wheeler, Ms. Scott, and the Director of Security shed no light on whether any of these Brivo employees are subordinate to any other. Mr. Wheeler is Brivo's Security Architect. J.A. 14. Ms. Scott is Brivo's Hiring Manager. J.A. 16.

decision, and Ms. Scott merely rubber-stamped it. Nor is it clear whether Ms. Scott simply influenced a decision by Mr. Wheeler or the Director of Security to fire Mr. Bing. Considering all those uncertainties from the email, it was inappropriate for the District Court to conclude Ms. Scott fired Mr. Bing. Courts may not "resolve contests surrounding the facts" when considering a motion to dismiss and must draw all reasonable inferences in favor of the plaintiff. *King*, 825 F.3d at 212, 214. Discovery is needed to resolve exactly how the decision to fire Mr. Bing played out. What is more, Mr. Bing was proceeding pro se before the District Court, and so, the District Court should have "liberally construed" his Complaint and held it "to a less stringent standard" than pleadings drafted by lawyers. *See Erickson*, 551 U.S. at 94 (quoting *Estelle*, 429 U.S. at 106). The District Court failed to do so.

4. Even if the *Proud* Inference Applies, Mr. Bing Sufficiently Alleged Facts to Overcome That Inference.

Finally, *Proud* only provides an "inference" that the employer's stated reason for the adverse employment action is not pretextual. *Jiminez*, 57 F.3d at 378 (quoting *Proud*, 945 F.2d at 798). Even if *Proud* applied, all the circumstances leading up to Brivo firing Mr. Bing overcome that inference. If Ms. Scott fired Mr. Bing, that decision does not explain why Mr. Wheeler, without explanation, performed an internet search of Mr. Bing after learning he was Black. J.A. 14, 16. Nor does it explain why Mr. Bing was fired based on an article that

did not say Mr. Bing was under investigation for any crime, after already disclosing his criminal history to Brivo, passing Brivo's background check, and getting hired. J.A. 13–14. In other words, if Ms. Scott decided to fire Mr. Bing, the fact remains that, but for Mr. Wheeler's animus or implicit bias against African-Americans, Ms. Scott would not have been confronted with that decision—making Brivo nevertheless liable under Title VII and overcoming the *Proud* inference.

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED MR. BING'S DISPARATE IMPACT CLAIM BECAUSE MR. BING PLAUSIBLY ALLEGED THAT BRIVO HAS A PRACTICE OF PERFORMING INTERNET SEARCHES OF ITS EMPLOYEES, WHICH HAS A DISPARATE IMPACT ON EMPLOYEES OF COLOR.

Along with his disparate treatment claim, Mr. Bing alternatively pleaded a disparate impact claim against Brivo for having a practice of performing internet searches of all its employees or a practice of permitting such internet searches. The District Court erred because it failed to address this claim, even though Mr. Bing plausibly alleged that the practice has a disparate impact on Brivo's employees of color.

Under Title VII, a plaintiff establishes a disparate impact claim by showing, in pertinent part, that an employer uses "a particular employment practice that causes a disparate impact on the basis of race." § 2000e-2(k)(1)(A)(i); *see also Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015) ("Disparate impact

liability requires the identification of a specific employment practice that caused racially disparate results."). An employer may defend the practice by demonstrating that it is "job related for the position in question and consistent with business necessity." *Id.* If shown, a plaintiff may still prevail by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. §§ 2000e-2(k)(1)(A)(ii) and (C).

Here, Mr. Bing asserted that if he was not the only new employee that was subject to a Google search, performing such searches of its employees amounts to a "discriminatory practice" against "protected groups." J.A. 15–16. Mr. Bing alleged that the Equal Employment Opportunity Commission (EEOC) provides guidance that "background information must be responsibly obtained." J.A. 15. Of course, the guidance "generally acknowledge[s]" that employers rightfully have a "commonly accepted" practice of doing "an in-house background screening," including reviewing an employee or applicant's "social media profile(s)." J.A. 15. Yet Mr. Bing asserted that Google searches go "beyond all standard and routine measures of screening," making them discriminatory against Brivo employees of color. J.A. 16.

Mr. Bing pleaded two different possible discriminatory practices by Brivo. Either Brivo had a "common hiring practice of conducting" internet searches of all

"employees' names on the first day of employment," or alternatively, Brivo had a practice of permitting supervisors to perform a Google search of an employee at their discretion. J.A. 16–17. If the latter, Mr. Bing alleged that supervisors exercise this discretion in a way that has a disparate impact on employees of color. He stated that "implicit biases" against minority groups had informed whether a Brivo supervisor will exercise his discretion to perform a search of an employee. J.A. 16. He further asserted that supervisors "commonly" do searches of employees "who declined to indicate race on employment forms," which also has a disparate impact on "protected minorit[ies]." J.A. 16–17. Under either of these practices, Brivo "unlawfully applied" its "discriminatory evaluation criteria," the Google search, to Mr. Bing as a new Brivo employee, resulting in a disparate impact on new Brivo employees of color when Brivo fired him. J.A. 13. Thus, based on Mr. Bing's allegations, he plausibly alleged that Brivo uses "a particular employment practice that causes a disparate impact on the basis of race." § 2000e-2(k)(1)(A)(i).

CONCLUSION

For the foregoing reasons, Mr. Bing respectfully requests that this Court reverse the District Court's decision granting Brivo's motion to dismiss and remand the case to the District Court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Bing respectfully requests oral argument because this case presents an important legal issue regarding whether an allegation that an employer initiates an internet search of employees in a discriminatory manner, motivated either by overt racial animus or by implicit bias against a racial group, sufficiently states a claim of employment discrimination under Title VII and § 1981. It also presents an important legal issue regarding whether an allegation that an employer's practice of performing internet searches of all its employees or permitting supervisors to perform such searches at their discretion sufficiently states a disparate impact claim under Title VII. Oral argument would aid this Court in considering these modern allegations of discrimination.

Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,592 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
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Dated: May 28, 2019

/s/Ejaz H. Baluch, Jr.
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CERTIFICATE OF SERVICE

I certify that on May 28, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Ejaz H. Baluch, Jr.
Ejaz H. Baluch, Jr.