IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEREK CHAPMAN,	*	
Plaintiff,	*	
v.	*	Case No. 1:23-cv-442-ADC
MARYLAND DEPARTMENT OF STATE POLICE	*	
OFFICE OF THE STATE FIRE MARSHALL.	*	
Defendant.	*	

* * * * * * * * * * * *

DEFENDANT'S MOTION TO DISMISS

Defendant, the Maryland Department of State Police, Office of the Fire Marshal, by its attorneys, Anthony G. Brown, Attorney General of Maryland, Phillip M. Pickus, and Mark H. Bowen, Assistant Attorneys General, moves, pursuant to Rule 12(b), for this case to be dismissed.

The grounds for this Motion, as more fully explained in Defendant's attached memorandum of law in support, include:

1. Plaintiff has failed to state a claim upon which relief can be granted; and

2. Defendant is entitled to immunity.

WHEREFORE, it is respectfully requested that this Court dismiss this action. A proposed order is attached.

Respectfully submitted,

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FOR THE DISTRICT OF MARYLAND

DEREK CHAPMAN,	*	
Plaintiff,	*	
v.	*	Case No. 1:23-cv-442-ADC
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* * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF THE MARYLAND STATE POLICE'S MOTION TO DISMISS

Defendant, the Maryland Department of State Police, Office of the Fire Marshal, by its attorneys, Anthony G. Brown, Attorney General of Maryland, Phillip M. Pickus, and Mark H. Bowen, Assistant Attorneys General, provides the following Memorandum of Law in support of its Motion to Dismiss Plaintiff's Complaint and states:

INTRODUCTION

In this employment discrimination case, Plaintiff alleges that he was subjected to unlawful harassment and discrimination based on race and color, and retaliation while working for the Office of the State Fire Marshall, an agency within

the Maryland State Police.[1] Many of Plaintiff's claims, however, are banned by Eleventh Amendment immunity. Additionally, Plaintiff has failed to properly allege discrimination, unlawful harassment, and retaliation claims. Plaintiff's Complaint, therefore, should be dismissed by this Court.

PROCEDURAL HISTORY

Plaintiff filed his Complaint on February 17, 2023 (Doc. 1). Plaintiff did not serve Defendant, but counsel for the parties communicated and Defendant agreed to waive service on March 20, 2023, making Defendant's initial response due May 20, 2023.

FACTUAL BACKGROUND

In his Complaint, Plaintiff Derek Chapman states that he "has been employed by the Maryland Department of State Police ("MDSP") since 1998." *See* Compl., Doc.1, at ¶18. Plaintiff states that after approximately 22 years of service with the Office of the State Fire Marshal ("OSFM"), and after rising to the position of Deputy Chief Fire Marshal, he was "summarily and involuntarily transferred, had a baseless investigation launched against him, and was subsequently suspended from his employment." *Id*., at ¶19. Chapman states that he was the Deputy Chief State Fire Marshal for the Northeast Region, and his duties included submitting fire origin and cause reports to the Chief Deputy State Fire Marshall ("CDFM"). *Id.* at ¶ 20.

[1] The Office of the State Fire Marshall is a statutorily created unit with the Maryland Department of State Police. *See* Md. Code Ann., Public Safety § 6-301.

Plaintiff alleges that the various actions taken against him were "due to his race and color, and in retaliation for both raising concerns with supervisors as to racial issues he was subjected to from two commanders in the Department, and for requesting additional resourced or overtime to handle the workload that corresponded with providing reports." *Id.*, at ¶ 21. Plaintiff claims that his reputation has been damaged as a result of this harassment and retaliation. Plaintiff claims that he "felt that the Fire Marshal saw him and other Black colleagues as more akin to dogs than as equals to White Officers." *Id.* at ¶ 27.

Plaintiff states he was on medical leave and upon his return in March of 2021, the Fire Marshall "alleged that Mr. Chapman failed to file required reports, despite backlogged reports being a department-wide issue." *Id.*, at ¶ 23. Plaintiff alleges that the backlogs were a department-wide issue, and that he was "the only one singled out and subjected to disparate treatment, regardless of him having just returned from leave." *Id.*, at ¶ 29. Shortly thereafter, Plaintiff claims that he learned that the Fire Marshal had planned to make "unilateral changes to his region, without his knowledge" and Plaintiff believes he was singled out for change. *Id.*, at ¶ 31.

Plaintiff further alleges that he informed the State Fire Marshall "about two Commanders with whom he had issues regarding race-related comments made specifically in his presence." *Id.* at ¶ 32. Plaintiff claims he faced retaliation for these complaints when "the Fire Marshal stated he was removing Cecil County from Plaintiff's purview and reassigning it to the Upper Shore office, apparently due to

his use of sick leave and his overdue reports." *Id.*, at ¶ 32. Plaintiff asserts that the State Fire Marshall yelled at him and his employees. *Id.*, at ¶ 32.

On June 16, 2021, Plaintiff claims that he was transferred without notice and was relieved of his duties under the pretext of the backlogged reports. *Id.*, at ¶ 36. Plaintiff was "given personnel counseling" for not submitting the overdue reports. *Id.* at ¶ 37. One week later, Plaintiff filed a formal internal complaint about the Deputy Fire Marshall. *Id.*, at ¶38. Plaintiff states that on September 3, 2021, he attempted to discuss the backlogged reports with the Deputy Fire Marshal but that he was not given a fair chance to show realistic improvement on this issue *Id.*, at ¶42.

On October 12, 2021, Plaintiff asserts that he was suspended from his duties. *Id.* at ¶ 43. Plaintiff claims that "a detailed report was created and placed in Plaintiff's personnel file." *Id.* at ¶ 44. Plaintiff states that "on December 7, 2021, an Internal Affairs Investigation was launched against him for the same failure to complete reports." *Id.*, at ¶ 48.

On March 16, 2022, Plaintiff learned that he had been reinstated. *Id.* at ¶ 50. Plaintiff was advised that he needed to complete the open reports and that he could do so in the office or "wherever he felt comfortable." *Id.* at ¶ 50. Plaintiff asserts that his personal belongings and work items were removed from his Elkton office to the Bel Air Office without his knowledge or consent on May 10, 2022. *Id.*, at

¶52. Plaintiff claims he was told that he had been transferred and that the office he had occupied was needed for evidence storage. *Id*. at ¶ 52.

Plaintiff alleges that "on February 13, 2023, while on FMLA leave pending a surgical procedure and one day before his birthday, Plaintiff received a letter containing a performance evaluation dated December 14, 2022 rating his performance unsatisfactory, highlighting his reports as an ongoing area of concern and claiming that he was failing to follow orders." *Id*. at ¶ 59. Plaintiff claims that "similarly-situated Officers have received more favorable treatment than Plaintiff." *Id*. at ¶ 60.

PLAINTIFF'S CAUSES OF ACTION

Plaintiff brings a six-count Complaint naming the Maryland State Police--Office of the State Fire Marshal, as the sole defendant. Count I alleges a Title VII race discrimination claim; Count II brings a Title VII color discrimination claim; Count III asserts a Title VII retaliation claim; Count IV alleges a violation of the Maryland Fair Employment Practices Act ("MFEPA"); Count V alleges a violation of the Family and Medical Leave Act ("FMLA"); and Count VI appears to allege claims pursuant to both 42 U.S.C. § 1983 and § 1981.

LEGAL STANDARDS

A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A preliminary motion to dismiss is proper when the complaint fails "to state a claim upon which relief can

be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This now well-recognized plausibility test demands that a complaint must assert a modicum of factual support and a plausible basis for relief before a case is "permitted to go into its inevitably costly and protracted discovery phase." *Twombly*, 550 U.S. at 558 (quoting *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)). When there is insufficient factual or legal basis for plausible relief, the "basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id*., (quoting 5 Wright & Miller, Federal Practice and Procedure § 1216, at 233–234 (3rd Ed. 2004)).

The "short and plain statement" required by Fed. R.Civ. Pro. 8(a)(2) serves to "give the defendant fair notice of what the... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, at 555). Likewise, a complaint does not survive a motion to dismiss when "it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, at 557).

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS SUIT AGAINST MSP FOR THE 42 U.S.C. §1983, §1981, MFEPA AND FMLA CLAIMS.

Because Plaintiff has sued a state entity in federal court, many of his claims are banned by the Eleventh Amendment. In Count VI, Plaintiff references both 42 U.S.C. §1983 and §1981, and it is unclear which statute is the basis of the claim. Fortunately, it does not matter how this ambiguity is resolved; the claim is barred because Defendant MSP is protected from both §1983 and §1981 claims by the Eleventh Amendment. The MFEPA claim and the FMLA claimed brought in Counts IV and V are also barred by the Eleventh Amendment. In short, all claims except for the Title VII claims are barred by the Eleventh Amendment.

Under the Eleventh Amendment, "(a)n unconsenting State is immune from suits brought in federal courts," and this protection extends to "'state agents and state instrumentalities' as well as the States themselves." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F. 3d 474, 479 (4th Cir. 2005) (quoting *Regents of Univ. of California v. Doe*, 519 U.S. 425, 429 (1997)). This protection from suit applies not only to the State and its agencies, but also to its officials acting in their official capacity. *Pennhurst State School & Hospital v. Haldeman*, 465 U.S. 89, 100 (1984).

A. The 42 U.S.C. § 1983 Claim.

The Supreme Court has also long held that states are not "persons" as contemplated by §1983 and therefore cannot be sued under §1983. *Will v. Michigan*

Dept. of State Police, 491 U.S. 58, 71 (1989). MSP is not an independent corporate entity, but is a principal department of Maryland state government. *See* Md. Code Ann., State Gov't § 8-201(b); Md. Code Ann., Pub. Safety § 2-201. State agencies have no corporate existence and exist merely as the State's hands or instruments to execute the State's will. *See Mayor & City Council of Balto. City v. State*, 173 Md. 267, 271 (1937); *see also Drummond v. Wolfe*, 2020 WL 5759760 (D. Md., 2020) (principal departments of Maryland state government are arms of the state and therefore not a "person" under §1983).

A suit against MSP is the same as a suit against the State of Maryland itself. The Supreme Court held that "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy *against a State* for alleged deprivations of civil liberties." *Will*, 491 U.S. at 66. (emphasis added). Therefore MSP cannot be sued under §1983 and should be dismissed from Count II.

B. 42 U.S.C. § 1981 Claim.

Similarly, 42 U.S.C. § 1981 claims are also barred by the Eleventh Amendment. There is no congressional intent to waive the States' immunity for § 1981 claims and "[t]hus, the Eleventh Amendment bars a § 1981 action against a state." *Freeman v. Michigan Department of State Police*, 808 F.2d 1174, 1178 (6th Cir. 1987). This Court has also held that § 1981 claims are prohibited against the State of Maryland because of Eleventh Amendment immunity. *See Khan v. Maryland*, 903 F. Supp. 881 889 (D. Md. 1995); *see also Bishop v. Lewis*, 2011 WL

1704755, at *2 (D. Md. 2011) (unpublished opinion finding § 1981 are barred by the Eleventh Amendment). Thus, Plaintiff's 42 U.S.C. § 1981 claim against the State of Maryland is barred by the Eleventh Amendment.

C. The MFEPA Claim.

Even though MFEPA is a state law, the State of Maryland and its agencies have not waived its Eleventh Amendment immunity as to this claim being brought in federal court. The Fourth Circuit has explicitly held that the State of Maryland has not waived its immunity to be sued in federal court for a MFEPA Claim. *See Pense v. Maryland Department of Public Safety and Correctional Services*, 926 F.3d. 97, 102 (4th Cir. 2019). In *Pense*, the Fourth Circuit held that MFEPA does not "specify the State's intention to subject itself to suit in federal court." *Id*. at 102. There is no issue of waiver here because Plaintiff chose to file in this Court, this is not a removal case. *Pense*, therefore is dispositive, so the MFEPA claim must now be dismissed on Eleventh Amendment immunity grounds.

D. The FMLA Claim.

Defendant MSP is also entitled to Eleventh Amendment Immunity for the FMLA claim found in Count V. It is true that the Supreme Court has found States' waiver of Eleventh Amendment immunity for FMLA claims based on the family care provision of the FMLA. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003). However, the Supreme Court came to the opposite conclusion regarding FMLA's self-care provision. In *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 33 (2012), the Supreme Court examined the self-care

provision of the FMLA and determined that "suits against States under this provision are barred by the State's immunity as sovereigns in our federal system." This Court has relied on *Coleman* when dismissing FMLA claims based on the self-care provision against state entities. *See Hayes v. Maryland Transit Admin*., No. RDB-18-0691, 2018 WL 5809681 (D. Md. 2018).

Here, it is clear that Plaintiff's FMLA claim is based on the self-care provision of FMLA. Plaintiff has alleged that he took medical leave for his kidney cancer. *See* Complaint, Doc. 1, at ¶137. Plaintiff has provided no allegations that his FMLA leave was based on caring for family members. Consequently, because Plaintiff's claims are based on the self-care provision of the FMLA, and because Plaintiff has lodged the claim against a state entity, the FMLA claim should now be dismissed based on Eleventh Amendment immunity.

II. PLAINTIFF HAS FAILED TO PLEAD A TITLE VII CLAIM.

Plaintiff has brought three Title VII claims, include a racial discrimination claim (Count I), a color discrimination claim (Count II), and a retaliation claim (Count II)). All three of these claims fail as a matter of law.

A. Plaintiff Has Not Properly Alleged Any Actions Based On Race.

Plaintiff's Title VII race discrimination claim in Count I fails because he has not alleged facts suggesting his treatment was based on race. To establish a prima facie case of racial discrimination, Plaintiff must show that: (1) he was a member of a protected class; (2) he was qualified for his job and his performance was

satisfactory; (3) he was fired or disciplined; and (4) other employees who are not members of the protected class were retained or disciplined less harshly under apparently similar circumstances. *See Bryant v. Bell Atlantic Maryland, Inc*., 288 F.3d 124, 133 (4th Cir. 2002); *Cook v. CSX Transp. Corp*., 988 F.2d 507, 511 (4th Cir. 1993).

Plaintiff alleges in a conclusory manner that he has suffered adverse employment actions directly related to being African American. He claims that "he was repeatedly discriminated again and harassed by his Caucasian male supervisors, involuntarily transferred, investigated for backlogged reports despite being on medical leave and the fact that similarly-situated Caucasian Officers were not also investigated for the same, and suspended." *Id*. at ¶ 67. Plaintiff provides no support for the notion that these actions were based on his race. Simply stating that a particular action was based on his race does not allege facts sufficient to claim that the complained of behavior was in fact based on race. These are the sort of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that the Supreme Court held "do not suffice." *Iqbal*, 556 U.S. at 678.

An essential element of a racial discrimination claim under Title VII, is that the Plaintiff "must show that 'but for' his race, he would not have been the victim of the alleged discrimination." *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). Plaintiff repeatedly asserts that he is a member of a protected class as an African American man and that because of his race he was subject to alleged discrimination.

Specifically, Plaintiff states in his Complaint, "Because of his race, Plaintiff was subjected to the unlawful conduct and alleged adverse actions alleged throughout this Complaint in violation of Title VII." Compl, Doc. 1, at ¶69.

Here, Plaintiff provides no facts to support his allegation of adverse employment actions was due to his race or that it was pretextual. Writing for this Court, Judge Nickerson succinctly explained that "[t]he phrase "because of Plaintiff's race" *is not a fact*… but a recitation of an element for which [a plaintiff] *must provide facts*." *Pearson v. Northrup Grumman Sys. Corp.*, 2015 WL 132605, at *2 (D. Md. 2015) (emphasis added). Plaintiff provides no such facts. He merely repeats conclusory allegations that his alleged adverse employment allegations were based on race. Thus, Plaintiff has not made out a claim of a violation of Title VII for racial discrimination.

B. Plaintiff Has Not Properly Alleged Any Actions Based On Color.

Plaintiff's Title VII claim based on color discrimination fails for the same reasons as his Title VII claim based on race--because he has not alleged facts suggesting his treatment was based on color. **"**Title VII makes it "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1734 (2020) (citing 42 U.S.C. § 2000e–2(a)(1)). As such, the 'but for' standard required for a racial discrimination claim under Title VII applies to a claim for color discrimination. "Color discrimination arises when the particular hue of the

plaintiff's skin is the cause of the discrimination, such as in the case where a dark-colored African–American individual is discriminated against in favor of a light-colored African–American individual." *Bryant*, 288 F.3d at 132, fn 5 (citing *Walker v. Sec'y of the Treasury,* 713 F.Supp. 403, 406–07 (N.D.Ga. 1989). Given that Plaintiff claims he was treated differently to other Caucasians under a theory of racial discrimination, Plaintiff's color discrimination has no merit.

Plaintiff alleges in a conclusory manner that he has suffered adverse employment actions directly related to being Black man when "he was repeatedly discriminated against and harassed by his White male supervisors, involuntarily transferred, investigated for backlogged reports despite being on medical leave and the fact that similarly-situated non- Black Officers were not also investigated for the same, and suspended." Doc. 1 at ¶ 89. Plaintiff provides no support for the notion that these actions were based on his color. In fact, he provides no facts to demonstrate his particular skin tone, color, or complexion motivated the alleged discrimination. Plaintiff merely repeats verbatim the same allegations for his color discrimination argument as he did for his racial discrimination claim. These are the sort of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that the Supreme Court held "do not suffice." *Iqbal*, 556 U.S. at 678.

C. Plaintiff Has Failed To Allege A Title VII Retaliation Claim.

Plaintiff fails to demonstrate that he faced retaliation for engaging in activities protected by Title VII. To establish a prima facie case of retaliation under

Title VII, retaliation he must prove that: "(1) [he] engaged in a protected activity; (2) the employer acted adversely against [him]; and (3) there was a causal connection between the protected activity and the asserted adverse action." *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008) (citing *Holland v. Washington Homes, Inc*., 487 F.3d 208, 218 (4th Cir. 2007)). Specifically, Plaintiff alleges he faced retaliation for complaints he submitted internally with the Department and externally with the EEOC. Doc. 1 ¶ at 111. Plaintiff alleges that shortly after complaining he was subjected to the alleged adverse actions in violation of Title VII. *Id.* at ¶ 112.

Plaintiff's Title VII retaliation claim fails because he has not alleged facts demonstrating a causal link between the complaints that he submitted and the alleged adverse actions taken against him. Plaintiff baldly asserts that his prior protective activity was a motivating factor in the Defendant's conduct toward him. Once again, Plaintiff provides conclusory statements in support of his claim that the actions taken against him were pretextual without legitimacy. Plaintiff merely claims that he filed complaints, and was subsequently subjected to adverse employment actions. Plaintiff presents no other allegations establishing a causal link between the complaint and the alleged adverse action. This amounts to insufficient pleadings and Plaintiff has failed to allege a Title VII retaliation claim.

III. PLAINTIFF HAS NOT ALLEGED A VIOLATION OF THE MARYLAND FAIR EMPLOYMENT PRACTICES ACT.

Plaintiff attempts to bring a claim pursuant to the Maryland Fair Employment Practices Act ("MFEPA"). MFEPA is codified in Md. Code Ann., State Gov't, § 20-601 *et seq*. Specifically, Md. Code Ann., State Gov't § 20-602 states:

> "It is the policy of the State, in the exercise of its police power for the protection of the public safety, public health, and general welfare, for the maintenance of business and good government, and for the promotion of the State's trade, commerce, and manufacturers:
>
> > (1) to assure all persons equal opportunity in receiving employment and in all labor management-union relations, regardless of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment; and
> >
> > (2) to that end, to prohibit discrimination in employment by any person."

"MFEPA is 'the state law analogue of' and in large part modeled after Title VII." *Doe v. Catholic Relief Servs.*, 529 F.Supp.3d 440, 446 (D. Md. 2021); *Schwenke v. Ass'n of Writers & Writing Programs*, 510 F. Supp. 3d 331, 335–36, (D. Md. 2021) (quoting *Alexander v. Marriot Int'l, Inc., No. RWT-09-cv-2402, 2011 WL 1231029, at *6 (D. Md. Mar. 29, 2011))*. Therefore, "the Maryland Court of Appeals frequently looks to federal case law arising under Title VII when it interprets provisions of MFEPA." *See, e.g., Taylor v. Giant of Md., LLC*, 423 Md. 628, 652, 33 A.3d 445 (2011); *Molesworth v. Brandon*, 341 Md. 621, 632–33 (1996), *Chappell v. S. Md. Hosp., Inc.*, 320 Md. 483, 494 (1990).

Plaintiff claims that the Defendant's "conduct has been intentional, deliberate, willful, malicious, reckless and in callous disregard of the rights of Plaintiff because of his race and color." Doc. 1 at ¶ 131. Plaintiff further states "harassment is unwelcome or offensive conduct that is based on "race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability." *Id*. at ¶ 130. But beyond these blanket assertions lacking specificity, Plaintiff provides no facts to support his allegation that his alleged discrimination was based on his race or color giving rise to a viable MFEPA claim. Plaintiff has provided no information that but for his race, he would not have been subjected to the alleged discrimination. Thus, like his Title VII claim, Plaintiff has failed to allege a MFEPA claim.

IV. PLAINTIFF HAS FAILED TO ESTABLISH A FAMILY MEDICAL LEAVE ACT RETALIATION CLAIM.

In Count V, Plaintiff attempts to bring a claim pursuant to the Family Medical Leave Act ("FMLA"), which is codified at 29 U.S.C. § 2601 *et seq*. FMLA retaliation claims are "analogous" to Title VII retaliation claims. *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 550-51 (4th Cir. 2006). Therefore, in order for Plaintiff to establish a prima facie case of FMLA retaliation, he must prove that: "(1) [he] engaged in a protected activity; (2) the employer acted adversely against [him]; and (3) there was a causal connection between the protected activity and the asserted adverse action." *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008) (citing *Holland v. Washington Homes, Inc*., 487 F.3d 208, 218 (4th Cir. 2007)).

Plaintiff alleges that he "engaged in protected activity by reporting several instances of misconduct that occurred in the Department, including but not limited to, racial harassment, discrimination, and abuse of power." Doc. 1 ¶ 136. Plaintiff then states that as a result of these reports, he was unlawfully and arbitrarily met with adverse actions during his medical leave of absence and punished for not dealing with a backlog of reports while on FMLA. *Id*. at 137.

It is difficult to ascertain from Plaintiff's Complaint what exactly he claims to be the retaliatory acts resulting from his FMLA claims. It appears that Plaintiff claims many of the same acts he claims are the result of discrimination. If that is the case, such contradictory arguments cannot meet Title VII and FMLA pleading standards. The alleged misconduct can only be based on discriminatory intent, or an intent to retaliate. Plaintiff cannot have it both ways.

Additionally, Plaintiff's FMLA retaliation claim fails because he has not alleged facts demonstrating a causal link between the complaints that he submitted and the alleged adverse actions taken against him. Plaintiff fails to demonstrate that he was intentionally discriminated against for having exercised his FMLA rights. Because Plaintiff has not demonstrated the necessary causal link to establish a Title VII retaliation claim, this claim should now be dismissed.

V. COUNT VI IS IMPROPERLY AMBIGOUS AND FAILS TO STATE A CLAIM

In Count VI, Plaintiff references both 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and also references both the First and Fourteenth Amendment. It is impossible for Defendants to determine what claim this count is actually asserting. This alone justifies dismissal of this court because Plaintiff has not given Defendant "fair notice of what the . . .claim is and the grounds for which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). It should also be noted, as explained above, that MSP cannot be sued under § 1981 or § 1983 due to Eleventh Amendment immunity.

Substantively, it does not matter whether Count VI brings a § 1981 or § 1983 claim, because the standard is the same and Plaintiff has failed to meet this standard. An essential element for § 1983 Equal Protection claims under the Fourteenth Amendment is that "but for" the Plaintiffs' race, they would not have been subjected to the discrimination. *Causey v. Balog*, 162 F.3d 795, 804 (4th Cir. 1998) (quoting *Gairola v. Virginia Dept. of General Services*, 753 F.2d 1281, 1285 (4th Cir.1985) (elements of a prima facie case of racial discrimination are the same under Title VII, § 1981, and § 1983)). The Supreme Court recently addressed § 1981 claims and confirmed that "a plaintiff bears the burden of showing that race was a but-for cause of its injury." *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1014-15 (2020). After *Comcast*, a plaintiff asserting a §1981 claim must show the "defendant intended to discriminate" and that the adverse action

"would not have happened but for the plaintiff's race." *Nadendla v. WakeMed*, 24 F.4th 299, 305 (4th Cir. 2022). It is also clear this burden applies from "filing to judgment" and is thus appropriately challenged on a motion to dismiss prior to discovery. *Comcast,* 140 S. Ct. at 1015.

Plaintiff claims that "as a result of his being African American, Black, or because he engaged in protected activities, he was illegally harassed, subjected to a pattern of harassment and disparate treatment, involuntarily transferred, investigated, and suspended by the Defendant." *Id*. at ⁋ 146. Plaintiff further alleges that the acts described "are part of an institutional practice of custom, constituting an official policy of the Maryland Department of State Police to cover up employee misconduct, discrimination, and retaliation against fellow employees who stand up against the MDSP for violations of their civil rights that should protect them from discrimination and retaliation in the workplace." *Id*. at ⁋ 147. Plaintiff, however, does not allege any facts that suggest that his treatment was based upon his being African American, or because he engaged in protected activities. Moreover, he does not allege any facts to support that this was part of a systemic institutional practice condoning discrimination and retaliation in the workplace.

The Fourth Circuit previously addressed a deficient pleading such as this one and held that it is insufficient for a pleading to merely contain conclusory allegations that a plaintiff was subjected to adverse employment actions "based on his race" but that a plaintiff must "assert facts establishing the plausibility of that allegation." *Coleman v. Maryland Ct. of Appeals*, 626 F.3d 187, 190–91 (4th Cir. 2010) (*aff'd*

sub nom. Coleman v. Ct. of Appeals of Maryland, 566 U.S. 30 (2012)). *Coleman* is dispositive here. Plaintiff does not allege any facts that establish that the alleged discrimination or retaliation what not have occurred "but for" the fact that he is African American or because he engaged in protected activities. Moreover, he does not allege any facts that to support that this was part of a systemic institutional practice condoning discrimination and retaliation in the workplace, nor does he provide any evidence to support a conclusion that his alleged adverse employment actions, were pretextual.

As stated previously, "[t]he phrase "because of Plaintiff's race" *is not a fact*… but a recitation of an element for which [a plaintiff] *must provide facts*." *Peterson v. Northrop Grumman Sys. Corp.*, 2015 WL 132605, at *2 (D. Md. 2015) (emphasis added). Plaintiff provide no such facts. He merely repeats his conclusory allegations that his treatment was based on race, color, or because he engaged in protected activities. Therefore, it does not matter whether this claim is brought pursuant to § 1981 or § 1983; either way Plaintiff has failed to plead a proper cause of action.

CONCLUSION

Defendant the Maryland State Police respectfully moves this Court to dismiss this case against them with prejudice, or enter judgment in their favor.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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DEREK CHAPMAN,	*	
Plaintiff,	*	
v.	*	Case No. 1:23-cv-442-ADC
MARYLAND DEPARTMENT OF STATE POLICE	*	
	*	
OFFICE OF THE STATE FIRE MARSHALL.	*	
Defendant.	*	

* * * * * * * * * * * *

ORDER

Upon consideration of the foregoing Defendant's Motion to Dismiss, and any opposition filed, it is this ____ day of _____, 2023, by the United States District Court for the District of Maryland,

ORDERED, that:

Defendants' Motion to Dismiss is hereby GRANTED.

_____
A. DAVID COPPERTHITE
United States Magistrate Judge