UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONNIE E. WILLIAMS, SR., *et al*., **Plaintiffs,** **v.** **NATIONAL RAILROAD PASSENGER CORPORATION,** **Defendant.**	**Case No. 1:21-CV-01122-EGS**

DEFENDANT NATIONAL RAILROAD PASSENGER CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendant National Railroad Passenger Corporation ("Amtrak" or "Defendant"), by undersigned counsel, respectfully submits this Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Third Amended Complaint, or Alternatively, Motion for Summary Judgment in the above-captioned matter.

I. INTRODUCTION

As the Court is aware, Plaintiffs in this proceeding were putative class members in *Kenneth Campbell et al. v. National Passenger Railroad Corp.*, Case No. 1:99-CV-01979-EGS (D.D.C.) ("*Campbell*"). In *Campbell*, the plaintiffs brought a putative class action on behalf of themselves and similarly situated African American employees and applicants alleging that Amtrak discriminated against them based on their race and created a hostile work environment in violation of 42 U.S.C. § 1981 ("Section 1981") and Title VII of the Civil Rights Act, as amended, 42 U.S.C. §§ 2000e *et seq*. ("Title VII"). On April 26, 2018, this Court denied the *Campbell* plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23, having found that the plaintiffs failed to meet their burden to show that the class members' claims were susceptible to common proof. (*Campbell*, ECF No. 390). Plaintiffs here waited until the last possible day of the limitations period when they filed their lawsuit on April 26, 2021. (ECF No. 1).

It has now been well over two years since Plaintiffs first initiated this action on April 26, 2021 (ECF No. 1). While a great many cases would have been litigated through to completion in that time, this case remains at the initial pleading phase because, simply put, Plaintiffs have failed to put forth a coherent or sufficient pleading in those two years, yet have peppered Amtrak and the Court with numerous iterations of complaints that reflect a failure of counsel to demonstrate that the claims asserted were adequately investigated. Indeed, each new complaint filed by Plaintiffs contained similar failings and lacked cogent allegations for the hundreds of plaintiffs included, as well as the inability to list addresses for many plaintiffs, the inclusion of individuals who had

already released the asserted claims, and even listed individuals who *did not exist*. Moreover, each amended complaint has been riddled with identical conclusory allegations that, far from meeting the pleading standards set forth by U.S. Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), reflected the absence of specific, plausible individual allegations, as the majority of over 200 Plaintiffs identified in each amended complaint only included allegations that consisted of the same five conclusory paragraphs.[1] In short, over the previous different versions of Plaintiffs' complaint that have been filed in this matter, Plaintiffs' allegations were inexcusably insufficient and patently deficient in most areas. As a result, Amtrak has been forced to undertake significant time, cost and effort to respond to each of the previous complaints.

Despite these failings, the Court generously provided Plaintiffs' counsel one last chance to file an adequate and sufficient complaint that included plausible, non-conclusory allegations for hundreds of plaintiffs by July 24, 2023.[2] Plaintiffs' counsel assured the Court that he would meet that obligation, but that promise has not been lived up to, even after seeking two extensions of the deadline and not ultimately filing the Third Amended Complaint ("TAC") until August 28, 2023.

At first glance, although the pleading is still woefully deficient, the TAC has some distinguishable differences from its prior iterations, which is the absolute minimum threshold

[1] Remarkably, in seeking leave to file the proposed Second Amended Complaint ("SAC"), Plaintiffs' counsel even expressly admitted that proposed complaint was *still* deficient and acknowledged that they would ultimately need to file yet another, additional amended complaint to try to meet the required pleading standards. *See* ECF No. 10 at 3 ("Plaintiffs' counsel intends to file another motion to amend *Williams* to add further factual allegations regarding some of the Plaintiffs, as the proposed Second Amended Complaint, attached hereto, does. Other *Williams* Plaintiffs are likely to be voluntarily dismissed at that point or soon thereafter.").

[2] The Court also stated that "[f]or the reasons stated on the record, any additional requests to amend the Complaint beyond the Third Amended Complaint will be looked upon with disfavor in light of the numerous amendments already allowed." (Minute Order, June 7, 2023).

expected in light of the significant amount of time that Plaintiffs' counsel had to prepare the TAC. In a tacit admission that the prior complaints included plaintiffs who could not state a valid claim, the number of named plaintiffs has been reduced from 267 in the SAC to 154 Plaintiffs in the TAC. Second, as a result of the inclusion of additional factual allegations for most plaintiffs, it appears that 146 plaintiffs in the TAC assert race discrimination claims pursuant to 42 U.S.C. § 1981 ("Section 1981"), 129 plaintiffs seek to bring Section 1981 race-based harassment claims, and 8 plaintiffs allege Section 1981 retaliation claims. However, despite this latest attempt, the vast majority of the TAC Plaintiffs cannot survive dismissal based on several grounds.

First, there are nine (9) Plaintiffs identified in the case caption for whom no allegations whatsoever appear in the body of the TAC to support their claims. These nine Plaintiffs should be dismissed outright.

Second, despite the inclusion of additional factual allegations for most named Plaintiffs, the allegations of two (2) named Plaintiffs continue to lack any specificity whatsoever and are the same "cookie cutter" paragraphs that littered the prior complaints – with the Plaintiff's name being the only distinguishable difference from one set of allegations to the next. These "cookie cutter" allegations are precisely the type of conclusory allegations the Supreme Court intended to eliminate through its holdings in *Twombly* and *Iqbal*.

Third, Plaintiffs' counsel has incredibly included eight (8) named Plaintiffs in the TAC who executed valid waiver and release agreements covering the very claims they assert here, despite having had more than a year to investigate their release agreements after Amtrak first raised the issue in its initial dispositive motions. (*See* ECF Nos. 13-14, 17-18).

Fourth, of the 146 Plaintiffs who assert Section 1981 race discrimination claims, the claims of 109 of them should be dismissed outright because they either fail to plead sufficient facts to

establish their claims or, as stated below, their claims are time-barred. Similarly, certain race discrimination claims for twenty-one (21) additional Plaintiffs should be dismissed in part because, while they appear to have sufficiently pleaded at least one Section 1981 race discrimination claim, they have asserted others that are not sufficiently pleaded.

Fifth, 115 named Plaintiffs who assert Section 1981 race harassment/hostile work environment claims cannot survive dismissal. In numerous instances, the basis for Plaintiffs' race harassment claims relies solely on discrete employment actions that are insufficient to support such a claim. For example, numerous Plaintiffs assert that Amtrak failed to promote them to a particular position, then tag on generic "cookie-cutter" language that "Plaintiff [A] was subjected to racial harassment and a racially hostile work environment during Plaintiff's employment at Amtrak." The law is clear that this type of attempt to end-run around the pleading standards for Section 1981 harassment claims is manifestly improper. Such assertions are nothing more than conclusions masked as facts and cannot plausibly establish an actionable claim of harassment or hostile work environment based on existing Supreme Court precedent. In yet other instances, Plaintiffs allege that they were subjected to racially derogatory jokes or comments, but do not support that assertion with anything more than non-specific, conclusory allegations. *See, e.g.*, ECF No. 47 at ¶ 2068 ("Racially derogatory remarks, jokes, and epithets were comment [sic] among the white workers, and Amtrak managers knew and were present and heard these incidents, but did not seem to care, sometimes participated, and frequently laughed under their breath."). As such, these Plaintiffs are incapable of showing that the purported conduct they experienced is severe or pervasive under any objective standard.

Sixth, the Court should dismiss five (5) of the eight (8) named Plaintiffs who asserted retaliation claims because they fail to allege facts sufficient to show they either engaged in a

protected activity or that there is a sufficient causal connection between the alleged protected activity and the adverse employment action.

Seventh, even accounting for equitable tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and tolling agreements that were entered into by the parties in *Campbell*, the claims for eighty-eight (88) named Plaintiffs should be dismissed, either in their entirety or partially, because the alleged conduct giving rise to their claims falls outside of the applicable limitations period, or their allegations omit any dates from which Amtrak and the Court can discern whether the claims are timely.

As the Court made clear at the parties' June 7, 2023 status conference, this TAC was Plaintiffs' final opportunity to set forth sufficiently plausible Section 1981 claims. They largely fail to do that here. Accordingly, and for the reasons set forth herein, Amtrak respectfully requests that the Court grant its Motion to Dismiss, or Alternatively, Motion for Summary Judgment in its entirety and dismiss the claims of the Plaintiffs identified herein with prejudice.

II. FACTUAL BACKGROUND

On April 26, 2021, Plaintiffs' counsel filed this action on behalf of 274 current and former Amtrak employees and applicants, alleging that Amtrak discriminated against them, and created a hostile work environment, based on their race (African American) in violation of Section 1981. (ECF No. 1). The TAC includes not only race discrimination and hostile work environment claims, but eight (8) Plaintiffs also allege retaliation under Section 1981. (ECF No. 47).

A. The Underlying *Campbell* Lawsuit

Plaintiffs are alleged to be former putative class members in *Campbell*. The *Campbell* plaintiffs initially filed their complaint with this Court on November 9, 1999, alleging that Amtrak discriminated against them, and created a hostile work environment, based on their race in violation of Section 1981 and Title VII. (*Campbell*, ECF No. 1). On February 21, 2012, the

Campbell plaintiffs filed a Rule 23 motion for class certification seeking to represent four different classes of Amtrak employees and applicants, as well as numerous sub-classes. (*Id.*, ECF No. 303). On April 26, 2018, the *Campbell* Court denied the class certification motion in its entirety, finding no evidence to support the contention that Amtrak exercised a specific discriminatory employment practice applicable to all putative class members. (*Id.*, ECF No. 390). Following the denial of class certification in *Campbell*, Amtrak and Plaintiffs' counsel agreed to limited tolling of the statute of limitations for certain individuals as the Parties discussed whether to resolve those claims. (*Id.*, ECF Nos. 396, 399, 400, 401). However, those discussions were unsuccessful. On November 30, 2018, the parties submitted a Joint Status Report in *Campbell* stating that, as of December 30, 2018, all tolling would cease for any former putative class member who was not a named plaintiff in *Campbell* by that date. (*Id.*, ECF No. 402).

B. Procedural History in *Williams*

On April 26, 2021 -- exactly three years after this Court denied class certification in *Campbell* -- two separate follow-on lawsuits were filed by the *Campbell* plaintiffs' counsel, ostensibly representing individuals who were putative Rule 23 class members in *Campbell*.[3] (Compl., ECF No. 1; *Harris*, ECF Nos. 1, 11). The original Complaint and the Amended Complaint in this action each included 274 named Plaintiffs, and each contained the same, bare-

[3] One such lawsuit was initially entitled *Steven Harris, et al v. National Railroad Passenger Corp.*, Case No. 1:21-CV-01129-EGS (D.D.C.) ("*Harris*"). Subsequently, all but one of the plaintiffs in *Harris*, Lawrence Loggins, were voluntarily dismissed from the action. On April 13, 2022, Amtrak moved to dismiss Mr. Loggins' case, or alternatively, moved to transfer his case to the United States District Court for the Northern District of Illinois. (*Harris*, ECF No. 27). On December 2, 2023, this Court issued a Report and Recommendation recommending the dismissal of Mr. Loggins' case based on his failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Ultimately, the District Court transferred the case to the Northern District of Illinois and reserved judgment on the substantive aspects of Amtrak's Motion to Dismiss. (*Harris*, ECF No. 38). The case is now currently pending in the U.S. District Court for the Northern District of Illinois, where Amtrak has renewed its Motion to Dismiss.

bones, non-specific conclusory allegations, as well as missing information. (ECF Nos. 1, 8). As a result, Amtrak filed a Motion to Dismiss, or Alternatively a Motion for Summary Judgment ("First *Williams* Motion to Dismiss"), seeking to have the Amended Complaint dismissed. (ECF Nos. 13-14). Specifically, and as set forth in that First *Williams* Motion to Dismiss, Amtrak argued the Amended Complaint was deficient in the following respects:

1. More than 95% of the named Plaintiffs were ripe for dismissal because the full sum and substance of the allegations for each of those named Plaintiffs included nothing more than the same five "cookie-cutter" paragraphs – where the only modification to each set of allegations were the names of the Plaintiffs.
2. Thirty-Six (36) Plaintiffs should have been dismissed for failure to include residential addresses in the case caption.
3. Five (5) of the named Plaintiffs were also named Plaintiffs in either *Campbell* or *Harris*.
4. Twenty-eight (28) Plaintiffs should have been dismissed because they previously executed general release agreements in which they agreed to waive the same claims asserted against Amtrak. Among those Plaintiffs identified by Amtrak in its First *Williams* Motion to Dismiss were [redacted], each of whom are also included in the TAC.
5. 263 of the 274 Plaintiffs should have been dismissed because their race discrimination and harassment allegations did not identify the time period related to their allegations and, as such, were time-barred.

Many of these same deficiencies remained present in Plaintiffs' later proposed Second Amended Complaint and proposed Third Amended Complaint. (ECF Nos. 10-2, 34, 36). Plaintiffs' counsel's lack of care in addressing these aforementioned pleading failures has repeatedly resulted in Amtrak having to spend very significant resources to strenuously oppose these manifestly deficient complaints through motions practice. (ECF Nos. 19, 39).

C. The Filed TAC And Its Continued Deficiencies

Sadly, history repeats itself here. Even though the TAC that is the subject of this Motion contains marginally additional specificity with respect to the remaining Plaintiffs' allegations, it continues to suffer from many of the same sloppy drafting issues and pleading deficiencies that

were all too present in the prior versions. In fact, in some sections, it is clear that the "substantive" allegations were written by the Plaintiffs themselves, and Plaintiffs' counsel simply replaced the first person pronouns with Plaintiffs' names. (*See* ECF No. 47 at ¶ 76 ("…When ***I*** was training and boarding passengers, Settelle started yelling at ***me*** about a small and insignificant matter, belittling ***me*** in front of a group of passengers and co-workers.") (emphasis added); ¶ 405 ("…Other times she would follow Cathey to the ladies room and occupy the stall next to where ***I*** was, just to make Cathey feel uncomfortable or intimidated.") (emphasis added); *see also id.* at ¶¶ 323, 2015).[4]

To aid the Court in reviewing the instant motion given the shambolic nature of the TAC and numerous varieties of pleading deficiencies, the remainder of this section describes the categories of deficient claims in the TAC and the associated named plaintiffs.

Considering Plaintiffs had from the June 7, 2023 status hearing until August 27, 2023 in order to prepare the TAC, it is inexcusable that there is still one Plaintiff (Greg Bowen), who does not appear in the TAC's case caption and another nine (9) Plaintiffs who are identified in the caption, but lack any factual allegations whatsoever in the body of the TAC. (*See generally*, ECF No. 47). These nine Plaintiffs are (collectively, the "No Allegation Plaintiffs"):

Loretta Evans	Angela Mathews	Lawrence Sumpter
Paul Fields	Gail Steward	Valerie Walker
Clifton Green	Danny Stewart	Terrence Williams

[4] As further evidence of the sloppiness with which the TAC was assembled, Plaintiffs include a single paragraph near the end of the TAC alleging that "Amtrak's policies and/or practices have produced a disparate impact against the named Plaintiffs and the class members with respect to the terms and conditions of employment." (ECF No. 47 at ¶ 2301). However, there are no allegations whatsoever in the TAC to support an alleged disparate impact claim and there are certainly no "class members." Upon review, it appears that this paragraph was erroneously copied into the TAC from a proposed amended complaint in *Campbell*. (*See Campbell*, ECF No. 404-1 at ¶ 622).

Moreover, Plaintiffs' counsel promised during the June 7, 2023 hearing that he would remove all of the boilerplate, "cookie-cutter" allegations that pervaded the prior Complaints, proclaiming that he would either replace those with allegations of actual substance or remove those Plaintiffs from the TAC. But, the "allegations" in the TAC for Plaintiffs Lena Faye Johnson and Theresa Williams belie those representations and are nothing more than "Cookie-Cutter 2.0" – a slightly upgraded, but no less deficient version, of the "Cookie-Cutter" allegations Amtrak addressed in the First *Williams* Motion to Dismiss and in its oppositions to Plaintiffs' motions for leave to amend. The allegations of Plaintiffs Johnson and Williams (collectively, the "Cookie-Cutter 2.0 Plaintiffs") are as follows:

> 1183. Plaintiff Lena Faye Johnson is an African-American citizen of the United States and was employed at Amtrak during the former class liability period alleged in Campbell.
>
> 1184. Plaintiff Lena Faye Johnson was employed by Amtrak beginning in 1980 as a Junior Clerk in the Finance Department. She most recently worked as a Computer Tech in the Reprographics Department.
>
> 1185. During such employment, Plaintiff Lena Faye Johnson was represented by TCU, a labor union, for purposes of collective bargaining with Amtrak.
>
> 1186. Plaintiff Lena Faye Johnson experienced intentional racial discrimination by Amtrak in regard to some or all of the following: position selection decisions and processes, including promotions, transfers, testing, and denial of testing opportunities, training, job assignments, work assignments, scheduling of work hours and vacation time, discipline, discharge, furlough and recall from furlough, and other terms and conditions of employment.
>
> 1187. During her employment, Plaintiff Lena Faye Johnson applied for several promotions and was never selected. Instead, white applicants who were less qualified than her were selected.
>
> 1188. Plaintiff Lena Faye Johnson was subjected to racial harassment and a racially hostile work environment during Plaintiff's employment at Amtrak.
>
> 1189. By reason of such racial discrimination in employment by Amtrak, Plaintiff Lena Faye Johnson has suffered the loss of compensation, wages, back pay and front pay, other employment benefits, and, further, has suffered great mental, emotional, and physical harm, including but not limited to embarrassment,

> emotional distress, humiliation, indignity, anxiety, and resulting injury and loss caused by such violations.

(ECF No. 47, ¶¶ 1183-1189). Plaintiff Williams' allegations are even more devoid of substance:

> 2234. Plaintiff Theresa Williams is an African-American citizen of the United States and was employed at Amtrak during the former class liability period alleged in Campbell.
>
> 2235. Plaintiff Theresa Williams was employed by Amtrak for over thirty years, most recently as a Transportation Specialist in the Freight Department.
>
> 2236. During such employment, Plaintiff Theresa Williams was represented by TCU, a labor union, for purposes of collective bargaining with Amtrak.
>
> 2237. Plaintiff Theresa Williams experienced intentional racial discrimination by Amtrak in regard to position selection decisions and processes, including promotions, transfers, testing, and denial of testing opportunities, training, job assignments, work assignments, scheduling of work hours and vacation time, discipline, discharge, furlough and recall from furlough, and other terms and conditions of employment.
>
> 2238. Plaintiff Theresa Williams was subjected to racial harassment and a racially hostile work environment during Plaintiff's employment at Amtrak.
>
> 2239. By reason of such racial discrimination in employment by Amtrak, Plaintiff Theresa Williams has suffered the loss of compensation, wages, back pay and front pay, other employment benefits, and, further, has suffered great mental, emotional, and physical harm, including but not limited to embarrassment, emotional distress, humiliation, indignity, anxiety, and resulting injury and loss caused by such violations.

(*Id*. at ¶¶ 2234-2239).

In addition, eight (8) Plaintiffs previously executed general release agreements in which they expressly agreed to waive all known and unknown claims against Amtrak that arose during the course of their employment with Amtrak up through the date their releases were executed. (SUMF ¶¶ 1-24).[5] These releases clearly bar the claims those Plaintiffs assert here – something

[5] Amtrak simultaneously files its Statement of Material Facts As To Which There Is No Genuine Dispute in Support of Its Motion to Dismiss, or Alternatively, Motion for Summary Judgement. All facts pertinent to its Motion for Summary Judgment shall include references to its Statement, which shall be designated henceforth as "SUMF ¶ __".

Amtrak already argued with respect to these eight (8) Plaintiffs in its earlier Motion to Dismiss – which raises serious questions about the depth of the pre-filing investigation conducted by Plaintiff's counsel and the effort put into assessing the validity of their claims before filing the TAC. The 8 Plaintiffs who executed release agreements (collectively, the "Released Plaintiffs") are:

[redacted]	[redacted]	[redacted]

Perhaps most stunning is that, even with the additional ten weeks Plaintiffs' counsel had to prepare the TAC after the June 7, 2023 status hearing (on top of the 5 years between the denial of class certification in *Campbell* and that status hearing), the claims of 109 of the 146 Plaintiffs (approximately 75%) who allege Section 1981 race discrimination should be dismissed in their entirety for one or more of the following reasons: (1) their claims are time-barred because they either occurred prior to the statute of limitations cut-off dates or their amended allegations altogether fail to include any dates whatsoever; (2) the allegations do not assert an adverse action; or (3) Plaintiffs fail to plead facts to plausibly show that their race was in any way connected to the purported adverse actions taken against them. For the Court's convenience, the 109 Plaintiffs whose Section 1981 race discrimination claims should be fully dismissed (collectively, the "Deficient Discrimination Plaintiffs") are:[6]

Ransford Acquaye	Connie Everett	Henry Jones	Shanetta Scott
Christopher Adams	George Everett	Joseph Jones	Leonard Seamon
Roland Anderson	Devern Fleming, Jr.	Lillie King Shepard	Rudy Singletary
Lachaun Armstead	Brandi Ford	Cheryl Kyler	Linda Stafford
Jon A'Lida Aubry	Riley Freeman	John Laners	Shirley Taliaferro

[6] Deficient Discrimination Plaintiffs Cynthia Edwards, Brenda Matthews, and Gary Williams also allege race discrimination claims pursuant to Title VII. (ECF No. 47, ¶ 2299). Because those claims are analyzed under a similar standard (*see* Section III.W.1, *infra*), their Title VII race discrimination claims also warrant full dismissal.

Thomas Ayers	Owen Funderburke, III	Juanita Macomson	Bryant Thelwel
Elnorah Barbour	Lynn Garland-Solomon	Jacqueline Renee Martin	Leo Thomas
Ulysses Barton	Gail George	Brenda Matthews	William Thomas
Talfourd Berry	Kenneth Gillis	Sabrina McCrae	Eileen Vyhuis
Greg Bowen	Michael Green	Hilry McNealey	Everett Wair, Sr.
Odell Bradley	Reginald Grigsby	Anthony Mellerson	Frederick Wall
Earl Brown	Beverly Hall	Pamela Michaux	Lee Flora Wayne
Roy Brown	Lauren Ashley Hall	Donald Murray	William Waytes
Michael Caldwell	Steven Harris	Michael Neal	Angela Weaver
Hardin Cheatham	Billy Hollis	James Overton	Patricia Wellington
Gary Christian	Shawn Horton	Joseph Peden	Ronald Wells
Edward Clarke	Betty Howard	James Peoples	Jimmy Lee Whitley
Tamia Coleman	Lawrence Howard, Jr.	Gilbert Pete	Evelyn Whitlow
Kirk Collins	Lewis Howard	Gloria Plummer	Frank Williams
Janice Comeaux	Akanke Isoke	Joseph Presha	Gary Williams
Catrina Cooley-Flagg	James Ivey	Robert Redd	Theresa Williams
Charlese Cosby	Leroy Jackson	Faye Reed	Ronnie Williams, Sr.
Alvin Cunningham	Wendy Rowlett Jennings	Derek Reuben	Garner Willis, Jr.
Yvette Cunningham	Lena Faye Johnson	Tim Richardson	Eric Woodruff
Thomas Dawkins	Bobby Johnson	Louis Ricks, III	Curtis Yates
Everett Dubois	Helen Johnson-Gardiner	Frederic Roane	
Cynthia Edwards	Diane Jones	Sharon Montgomery Robinson	
Gertrude Ellison	Douglas Jones	John Scott	

Importantly, there are an additional 21 Plaintiffs who appear to have sufficiently pleaded at least one Section 1981 race discrimination claim, but whose other such claims are not sufficiently pleaded and must fail for the same reasons as the Deficient Discrimination Plaintiffs. The 21 Plaintiffs whose Section 1981 race discrimination claims should be dismissed in part (collectively, the "Partially Deficient Discrimination Plaintiffs") are:[7]

Elaine Barnett	Samuel Cox	Timothy Murphy	Tavio Scott
Phillip Boykin	Davy Dauchan	Brian Richards	Jewell Tilghman

[7] Partially Deficient Discrimination Plaintiff Curtis Capers also alleges race discrimination claims under Title VII. (ECF No. 47, ¶ 2299). Again, because those claims are analyzed under a similar standard, his Title VII race discrimination claims also are also subject to partial dismissal.

Marcus Brunswick	Yvonne Dixon	LaSonya Rivers	Robert Williams, III
Curtis Capers	Carolyn Hamilton	Ramona Ross	
Vernon Carter	Betty Haymer	Moses Rothchild	
Priscilla Cathey	Christopher Larkett	Cynthia Sargent	

As noted above, 129 Plaintiffs in this action assert Section 1981 race harassment/hostile work environment claims.[8] However, only 14 of those 129 Plaintiffs assert plausibly sufficient facts to support such a claim. The hostile work environment claims of the other 115 Plaintiffs must be dismissed because they fail to meet the Supreme Court's minimum pleading standards. The pleading deficiencies with respect to these 115 Plaintiffs fall into four categories: (1) Plaintiffs rely on discrete work-related actions alone to form the basis of their hostile work environment claims; (2) Plaintiffs allege that they either witnessed or were subjected to racial jokes, comments, or conduct, but plead no specific facts, rendering their allegations speculative and conclusory; (3) the allegations are insufficient to establish that the alleged conduct was sufficiently severe or pervasive to satisfy their *prima facie* requirement; and/or (4) Plaintiffs allege sufficient plausible facts, but the alleged conduct occurred outside of the applicable limitations period. The 115 Plaintiffs whose Section 1981 hostile work environment claims should be dismissed (collectively, the "Deficient Harassment Plaintiffs") are:

Ransford Acquaye	Anna Desper	Henry Jones	Moses Rothchild
Christopher Adams	Yvonne Dixon	Joseph Jones	Cynthia Sargent
Roland Anderson	Everett Dubois	Lillie King-Shepard	John Scott
Lachaun Armstead	Gertrude Ellison	Cheryl Kyler	Janet Smith-Cook
Jon A'Lida Aubry	William Ellison	Gilbert Landry	Linda Stafford
Sherryl Aubry	Connie Everett	Christopher Larkett	Shirley Taliaferro
Elnorah Barbour	George Everett	Arthur Logan	Leo Thomas
Elaine Barnett	Devern Fleming, Jr.	Juanita (Thelma) Macomson	William Thomas

[8] The 17 Plaintiffs who did not assert a claim for Section 1981 hostile work environment are: Harold Adams, Thomas Ayers, Earl Brown, Roy Rogers, Curtis Capers, Cynthia Edwards, Betty Howard, Bobby Johnson, Helen Johnson-Gardiner, Robert Parris, Robert Redd, Shanetta Scott, Leonard Seamon, Rudy Singletary, Bryant Thelwel, Lee Flora Wayne, and Gary Williams.

Ulysses Barton	Brandi Ford	Jacqueline Renee Martin	Jewell Tilghman (Deceased)
Talfourd Berry	Riley Freeman	Brenda Matthews	Eileen Vyhuis
Roger Boston	Owen Funderburke, III	Sabrina McCrae	Everett Wair, Sr.
Greg Bowen	Lynn Garland-Solomon	Hilry McNealey	Frederick Wall
Phillip Boykin	Gail George	Anthony Mellerson	William Waytes
Odell Bradley	Kenneth Gillis	Pamela Michaux	Angela Weaver
Marcus Brunswick	Michael Green	Timothy Murphy (Deceased)	Patricia Wellington
Michael Caldwell	Reginald Grigsby	Donald Murray	Ronald Wells
Vernon Carter	Beverly Hall	Michael Neal	Jimmy Lee Whitley
Hardin Cheatham	Lauren Ashley Hall	James Overton	Evelyn Whitlow
Gary Christian	Carolyn Hamilton	Joseph Peden	Carolyn Williams
Edward Clarke	Steven Harris	James Peoples	Robert Williams, III
Tamia Coleman	Billy Hollis	Gilbert Pete	Theresa Williams
Kirk Collins	Shawn Horton	Gloria Plummer	Ronnie Williams, Sr.
Janice Comeaux	Lawrence Howard, Jr.	Faye (Sharon Denise) Reed (Allmond)	Garner Willis, Jr.
Catrina Cooley-Flagg	Lewis Howard	Kurt Rent	Eric Woodruff
Charlese Cosby	Akanke Isoke	Derek Reuben	Curtis Yates
Samuel Cox	Leroy Jackson	Tim Richardson	
Alvin Cunningham	Wendy Rowlett Jennings	Louis Ricks, III	
Yvette Cunningham	Lena Faye Johnson	LaSonya Rivers	
Davy Dauchan	Diane Jones	Frederic Roane	
Thomas Dawkins	Douglas Jones	Sharon Montgomery Robinson	

An additional eight (8) Plaintiffs claim that Amtrak retaliated against them in violation of Section 1981. However, the retaliation claims of five (5) of these eight (8) plaintiffs should be dismissed because their allegations fail to state one or more of the elements necessary to establish a *prima facie* case. For example, as discussed in detail below, two (2) of these five (5) plaintiffs have failed to sufficiently allege that they engaged in protected activity, while the other three (3) fail to plead sufficient factual allegations to show causation between their protected activities and the alleged harm. The Plaintiffs whose Section 1981 retaliation claims should be dismissed (collectively, the "Deficient Retaliation Plaintiffs") are:

Vernon Carter	Gary Christian	Cynthia Edwards
Priscilla Cathey	Kirk Collins	

As explained further, *infra* at Section III.F, the claims of any Plaintiff who alleges that Amtrak failed to hire them or failed to promote them in violation of Section 1981 before March 6, 1999, are time-barred. Similarly, Plaintiffs who allege other claims under Section 1981 that occurred before March 6, 1998, are also time-barred. Moreover, though this Court graciously afforded Plaintiffs one final opportunity to fix all pleading deficiencies via the TAC at the June 7, 2023 status hearing, that is not what has happened here. There remain many instances where Plaintiffs fail to allege any dates or time frames of alleged conduct in the TAC. In full, there are 57 Plaintiffs whose claims should be dismissed in their entirety because they are time-barred due to their failure to specifically state a claim within the applicable limitations period. Those Plaintiffs (collectively, the "Fully Time-Barred Plaintiffs") are:

Ransford Acquaye	George Everett	Sabrina McCrae	John Scott
Roland Anderson	Kenneth Gillis	Hilry McNealey	Leonard Seamon
Thomas Ayers	Michael Green	Anthony Mellerson	Rudy Singletary
Elonrah Barbour	Reginald Grigsby	Pamela Michaux	Shirley Taliaferro
Ulysses Barton	Steven Harris	Donald Murray	William Thomas
Greg Bowen	Shawn Horton	Michael Neal	Eileen Vyhuis
Odell Bradley	Betty Howard	James Overton	Frederick Wall
Roy Brown	Lawrence Howard, Jr.	James Peoples	Lee Flora Wayne
Hardin Cheatham	Lewis Howard	Gilbert Pete	Jimmy Lee Whitley
Gary Christian	Lena Faye Johnson	Gloria Plummer	Evelyn Whitlow
Edward Clarke	Douglas Jones	Faye Reed	Gary Williams
Tamia Coleman	Joseph Jones	Derek Reuben	Theresa Williams
Catrina Cooley-Flagg	Lillie King Shepard	Tim Richardson	
Charlese Cosby	Juanita Macomson	Louis Ricks, III	
Connie Everett	Brenda Matthews	Frederic Roane	

Finally, as many of the Plaintiffs have extensive employment histories with Amtrak, their employment, and portions of the actions giving rise to their claims, crossed over the cut-off date by which they could assert their Section 1981 claims. For 31 Plaintiffs, they allegedly suffered at

least one act that fell within the applicable statute of limitations period, but the remainder of their claims are untimely. Those Plaintiffs (collectively, the "Partially Time-Barred Plaintiffs") are:

Lachaun Armstead	Davy Dauchan	James Ivey	Moses Rothchild
Jon A'Lida Aubry	Thomas Dawkins	Helen Johnson-Gardiner	Tavio Scott
Sherryl Aubry	Gertrude Ellison	Diane Jones	Bryant Thelwel
Marcus Brunswick	Devern Fleming, Jr.	Cheryl Kyler	Jewell Tilghman
Curtis Capers	Riley Freeman	Timothy Murphy	Patricia Wellington
Vernon Carter	Betty Haymer	Joseph Peden	Robert Williams, III
Samuel Cox	Billy Hollis	Joseph Presha	Garner Willis, Jr.
Alvin Cunningham	Akanke Isoke	LaSonya Rivers	

III. ARGUMENT

A. Standard of Review

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court accepts as true the factual allegations contained in a complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 163-65 (1993). The Supreme Court has explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 545. Such "[f]actual allegations must be enough to raise a right to relief above the speculative level," and plaintiffs must state "enough facts to state a claim to relief that is plausible on its face." *Id*. at 555, 570.

In *Ashcroft v. Iqbal*, the Supreme Court held that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678. "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 678-79. A plaintiff's complaint "must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting Fed. Rule Civ. Proc. 8(a)(2)). Only a complaint that states a plausible claim for relief survives a motion to dismiss, and determining whether a complaint states a plausible claim for relief will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

If a motion to dismiss presents matters outside the pleadings, the motion should be treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(b). However, "where a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment." *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999). If the Court converts this Motion, or part of it, into one for summary judgment, summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure when the pleadings, discovery, and exhibits show there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A principal purpose of summary judgment is to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is beneficial because it conserves scarce judicial resources by eliminating or narrowing issues that would otherwise be tried unnecessarily to a jury. *Id.* at 327.

Stressing that summary judgment is "an integral part of the Federal Rules as a whole," and not a "disfavored procedural shortcut," the Supreme Court stated:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims

> and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses had no factual basis.

Id. In deciding a motion for summary judgment, a court must construe the facts in a light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. Once the moving party has shown that no genuine issue of material fact exists, the non-moving party must go beyond the pleadings and come forth with sufficient proof to establish the elements of the party's case upon which that party bears the burden of proof. *Id*. at 323-24. The mere existence of a minor factual dispute will not preclude summary judgment if there is no "genuine" issue of material fact. *Id.* at 247-48. Any disputed facts must be material, meaning they must be facts that might affect the outcome of the claim under governing law. *Id.* at 249. "[P]laintiff, as the non-moving party, is 'required to provide evidence that would permit a reasonable [factfinder] to find' in [his] favor." *Gary v. Washington Metro. Area Transit Auth.*, 886 F. Supp. 78, 83 (D.D.C. 1995) (quoting *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (per curiam)). Also, a plaintiff's speculative testimony cannot create a triable issue of material fact. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (conclusory allegations insufficient to defeat summary judgment motion). A plaintiff must do more than demonstrate there is some "metaphysical doubt as to the material facts." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986); *see also Anderson*, 477 U.S. at 247-48 ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original); *Owens v. Nat'l Med. Care, Inc*., 337 F. Supp. 2d 131, 136 (D.D.C. 2004) ("[T]he non-moving party cannot rely on 'mere allegations or denials . . . but must set forth specific facts demonstrating that there are genuine issues for trial.'").

B. The Nine (9) "No Allegation Plaintiffs" Who Only Appear in the Case Caption Should Be Dismissed For Failure to State a Claim.

In the two and a half years since this lawsuit was filed, Plaintiffs' counsel has fervently insisted – despite filing numerous wildly deficient and insufficiently pleaded proposed and actual complaints that included missing addresses, cookie cutter allegations, and even individuals who did not exist – that he maintained contact with those named as plaintiffs in the original Complaint. Yet, the number of Plaintiffs identified in the case caption of this lawsuit has dwindled over the course of those two years – from 274 to 264 to, now, 154. Moreover, despite this alleged contact, the TAC still includes nine (9) Plaintiffs in the case caption for whom no factual allegations whatsoever appear in the body of the TAC. As such, there are now 146 Plaintiffs for whom allegations actually appear in the TAC.[9] These nine (9) "No Allegation Plaintiffs", identified in Section II.C., *supra*, should be dismissed with prejudice. *See Pantoja v. Enciso*, No. 18CIV11842PAEGWG, 2019 WL 6704684, at *1 (S.D.N.Y. Dec. 10, 2019), report and recommendation adopted, No. 18CIV11842PAEGWG, 2020 WL 70919 (S.D.N.Y. Jan. 6, 2020) ("The operative complaint in this case…lists in the caption a plaintiff identified as 'Raphael M. Pantoja.' Any claims by this individual, however, must be dismissed because he is not mentioned in any of the allegations in the SAC…"); *Wisconsin Carpenters Pension Fund v. Jokipii Demolition LLC*, No. 06-C-0550, 2007 WL 1308847, at *4 (E.D. Wis. May 2, 2007) ("Reimer is listed as a plaintiff in the caption of the complaint. But, the body of the complaint is devoid of any factual allegations about Reimer; there are no facts before the Court upon which Reimer is entitled to relief from the Defendants.").

[9] If it appears that the numbers do not quite add up, it is because Plaintiffs not only included nine Plaintiffs in the case caption for whom there are no actual allegations, but they also included allegations for Greg Bowen in the TAC, but failed to include Mr. Bowen in the case caption.

C. The Two (2) "Cookie-Cutter 2.0 Plaintiffs" Should Be Dismissed For Failure to State a Claim.

As noted above, even though this Court has afforded Plaintiffs' counsel numerous chances to rid the operative complaint in this case of repetitive, generalized "cookie cutter" allegations that entirely fail to state a claim, the TAC still includes such allegations for the two "Cookie-Cutter 2.0 Plaintiffs", Lena Faye Johnson and Theresa Williams. The entirety of Ms. Johnson's non-boilerplate assertions in the TAC can be distilled to two solitary paragraphs, only the second of which speaks to her actual claims by alleging that "During her employment, Plaintiff Lena Faye Johnson applied for several promotions and was never selected. Instead, white applicants who were less qualified than her were selected." (ECF No. 47 at ¶ 1187). This allegation, however, is plainly conclusory and vague, and fails to sufficiently put Amtrak on notice of the claims asserted against it. *See Squires v. Gallaudet Univ.*, No. CV 20-1348 (ABJ), 2021 WL 4399554, at *7 (D.D.C. Sept. 27, 2021) ("It is not enough for plaintiff to merely state that she was discriminated against on the basis of race . . . she must allege that the conduct constituted discrimination on the basis of the protected trait.").

The same can be said of the allegations in the TAC with respect to Ms. Williams, whose non-boilerplate allegations consist of just a single paragraph in which she alleges that she "was employed by Amtrak for over thirty years, most recently as a Transportation Specialist in the Freight Department." (ECF No. 47 at ¶ 2235). The remainder of her allegations are the sort of conclusory, factually vacant allegations that entirely fail to state a claim. (*Id.* at ¶¶ 2234, 2236-2239). These conclusory, boilerplate allegations cannot reasonably be enough "to nudge[] their [Section 1981] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570; *see also Wright v. Eugene & Agnes E. Meyer Found.*, No. CV 20-2471 (FYP), 2021 WL 6134592, at *4-5 (D.D.C. Dec. 29, 2021) (holding that apart from fleeting references to the plaintiffs' race

and contrived guesswork as to the reason that adverse actions were taken against the plaintiff, the plaintiff had not sufficiently stated a Section 1981 claim). As such, the claims of Lena Faye Johnson and Theresa Williams should be dismissed with prejudice.

D. The Eight (8) "Released Plaintiffs" Who Previously Waived and Released The Claims They Assert in the TAC Should Be Dismissed.

In its First *Williams* Motion to Dismiss and oppositions to Plaintiffs' motions for leave to amend, Amtrak put Plaintiffs' counsel on notice that a considerable number of *Williams* plaintiffs had previously executed valid settlement waiver and release agreements in which they released the very claims asserted here, including the eight (8) "Released Plaintiffs" identified in Section II.C., *supra*. (*See* ECF Nos. 13-14, 17-18). Incredibly, even after this Court's admonitions to Plaintiffs' counsel at the June 7, 2023 status hearing, the TAC still includes the eight (8) Released Plaintiffs whose claims have indisputably been waived and released, and who are thus contractually barred from asserting their claims against Amtrak in this lawsuit.

It is well settled that Section 1981 claims may be waived by an employee via a signed release. *Morgan v. Fed. Home Loan Mortg. Corp.*, 172 F. Supp. 2d 98, 105 (D.D.C. 2001), *aff'd*, 328 F.3d 647 (D.C. Cir. 2003); *see also Wright*, 2021 WL 6134592, at *4 n.5 (noting that the plaintiff's Section 1981 claims were covered by the blanket provision in the plaintiffs' severance agreement, which included "any and all claims arising out of . . . [Plaintiff's employment] with and/or separation from the Foundation."); *Sherrod v. Sch. Bd. of Palm Beach Cty.*, 550 F. App'x 809, 812 (11th Cir. 2013) ("[W]e agree with the district court's conclusion that the settlement agreement Sherrod signed bars the claims he makes in this action. In exchange for consideration, Sherrod released the Board from liability for any claims against it, including those under 42 U.S.C. § 1981 . . . ."); *Liegeois v. Johns Hopkins Med.*, No. JFM-15-2919, 2016 WL 1625121, at *3 (D.

Md. Apr. 21, 2016), *aff'd*, 692 F. App'x 714 (4th Cir. 2017) (holding that the plaintiff's Section 1981 claims were barred by her severance and release agreement).

In interpreting a contractual release, a court "must rely solely upon [the] language [of the agreement] as providing the best objective manifestation of the parties' intent." *FDIC v. Parvizian, Inc.*, 944 F. Supp. 1, 3 (D.D.C. 1996) (quoting *Bolling Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 475 A.2d 382, 385 (D.C. 1984)). "[A] release containing language discharging 'any and all claims' is unambiguous and constitutes a general release that should not be construed narrowly." *Parvizian*, 944 F. Supp. at 3-4 (citation omitted). Importantly, "[t]he mere fact that an agreement providing for a general release is silent with respect to certain matters in dispute at the time the release was executed 'does not mean that obligations and documents not expressly mentioned or integrated were not released.'" *Id*. at 4 (quoting *Hershon v. Gibraltar Bldg. & Loan Ass'n*, 864 F.2d 848, 853 (D.C. Cir. 1989)). Specifically, even if agreements signed by the Released Plaintiffs did not explicitly include the words "Section 1981," the mere fact that they executed agreements containing general releases precludes their Section 1981 claims here. *See Keister v. AARP Benefits Comm*., 410 F. Supp. 3d 244, 253 (D.D.C. 2019) ("Indeed, the entire point of a general release is to allow the parties to preclude all future litigation of claims between them without having to identify each and every claim that might exist."), *aff'd*, 839 F. App'x 559 (D.C. Cir. 2021).

Here, each of the Released Plaintiffs executed "General Releases" when they agreed to settle their prior disputed claims against Amtrak. Each of the General Releases include broad language that reasonably covers any claims, known or unknown, that the Released Plaintiffs had, may have had, or could have raised up through the date they executed the General Releases. For example, [redacted] and [redacted] executed valid General Release agreements on [redacted]

[redacted] Their claims should be dismissed with prejudice.

Similarly, four other Released Plaintiffs -- [redacted] -- all signed General Releases in which each of them agreed to waive and release any and all claims they might have against Amtrak as of the date of the release. [redacted] They, too, executed broad General Release agreements on [redacted]). Because the events that gave rise to their Section 1981 claims all plainly predate the date of their releases, their claims should likewise be dismissed with prejudice.

Finally, the last two Released Plaintiffs, [redacted] and [redacted], each signed General Releases that covered the claims asserted by them in the TAC. [redacted]

[redacted]

As such, their claims too must be dismissed with prejudice.[10]

E. Plaintiffs Fail to Sufficiently Plead Section 1981 Claims Against Amtrak.

1. The Deficient and Partially Deficient Discrimination Plaintiffs Have Not Pled Plausible Discrimination Claims.

To establish a discrimination claim under Section 1981, a plaintiff must "initially identify an impaired contractual relationship . . . under which [he or she] has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).[11] Similar to Title VII claims, courts use the *McDonnell Douglas* burden-shifting framework for establishing racial discrimination claims under Section 1981. *See Carney v. Am. Univ.*, 151 F.3d 1090, 1093 (D.C. Cir. 1998); *Doe #1 v. Am. Fed'n of*

[10] In support of this Motion, Amtrak has attached copies of the relevant release documents as exhibits to the [redacted] ("[redacted]."). [redacted] is attached hereto as Exhibit A to Defendant's Statement of Material Facts. In the event that the Court believes that its review of these documents require it to convert this portion of the Motion to one for summary judgment, Amtrak has also filed a separate Statement of Undisputed Material Facts with this Motion and asks that the Court consider Amtrak's arguments as to the Released Plaintiffs on summary judgment.

[11] An allegation of an employment relationship is sufficient to create an inference of the existence of an employment contract and a contractual relationship under section 1981. *See Dickerson v. District of Columbia*, 315 F. Supp. 3d 446, 453 (D.D.C. 2018)

Gov't Emps., 554 F. Supp. 3d 75, 102–103 (D.D.C. 2021); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973); *DeJesus v. WP Company LLC*, 841 F.3d 527, 532 (D.C. Cir. 2016) (stating a plaintiff must first establish a *prima facie* case of prohibited discrimination under Section 1981). Under *McDonnell Douglas*, plaintiffs "without direct evidence of discrimination as it relates to contractual rights" must establish that: (1) they are members of a protected class, (2) they suffered an adverse employment action, and (3) the unfavorable action gives rise to an inference of discrimination. *Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014) (quoting *Forkkio v. Powell*, 306 F.3d 1127, 1130 (D.C. Cir. 2002)); *see also Carter-Frost v. District of Columbia*, 305 F. Supp. 3d 60, 68 (D.D.C. 2018). Ultimately, Plaintiffs must establish a "racially discriminatory purpose for the defendant's misconduct" for the plaintiffs to establish a section 1981 claim. *Apollo v. CVS Pharmacy*, Civ. No. 17-1775, 2019 WL 147475, at *2 (D.D.C. 2019).

Based on the above, the race discrimination claims of the 109 Deficient Discrimination Plaintiffs should be fully dismissed and certain of the race discrimination claims of the 21 Partially Deficient Discrimination Plaintiffs[12] should also be dismissed. Both the Deficient Discrimination Plaintiffs and the Partially Deficient Discrimination Plaintiffs assert claims that consist of "threadbare recitals of the elements [for their Section 1981 discrimination claims]" (*Iqbal*, 556

[12] Only for purposes of this section of this Motion, Amtrak does not contest the sufficiency of the Partially Deficient Discrimination Plaintiffs' discrimination claims alleged in the following paragraphs: Elaine Barnett (ECF No. 47 at ¶ 106); Phillip Boykin (*id*. at ¶¶ 156-168); Marcus Brunswick (*id*. at ¶¶ 242-244, 249-250); Curtis Capers (*id*. at ¶¶ 276-284); Vernon Carter (*id*. at ¶¶ 345-367); Priscilla Cathey (*id*. at ¶¶ 388-390); Samuel Cox (*id*. at ¶¶ 593-610); Davy Dauchan (*id*. at ¶¶ 663-667); Yvonne Dixon (*id*. at ¶¶ 706-709); Carolyn Hamilton (*id*. at ¶¶ 1017-1026); Betty Haymer (*id*. at ¶¶ 1057, 1067-1069); Christopher Larkett (*id*. at ¶¶ 1347-1349); Timothy Murphy (*id*. at ¶¶ 1453-1456); Brian Richards (*id*. at ¶¶ 1656-1659); LaSonya Rivers (*id*. at ¶¶ 1708-1714, 1722-1728); Ramona Ross (*id*. at ¶¶ 1767-1783); Moses Rothchild (*id*. at ¶¶ 1795-1796); Cynthia Sargent (*id*. at ¶¶ 1812-1814); Tavio Scott (*id*. at ¶¶ 1862-1864); Jewell Tilghman (*id*. at ¶ 1999); and Robert Williams, III (*id*. at ¶¶ 2199-2213, 2226-2227). All other race discrimination claims asserted by the Partially Deficient Discrimination Plaintiffs not explicitly identified herein should be dismissed for the reasons set forth in this section.

U.S. at 678), and otherwise fail to set forth "sufficient factual matter" to "raise a right to relief above a speculative level[.]" *Twombly*, 550 U.S. at 555–56. Indeed, the race discrimination claims of the Deficient Discrimination Plaintiffs and certain race discrimination claims of the Partially Deficient Discrimination Plaintiffs cannot survive dismissal for at least one of two principal reasons: (1) they fail to assert that they suffered an adverse action; and/or (2) they do not allege facts sufficient to establish that either similarly situated comparators outside the Plaintiffs' protected class were treated more favorably or that race was the reason for the alleged discriminatory treatment.

a. The Race Discrimination Claims of Plaintiffs Who Fail to State Facts Sufficient To Allege They Suffered An Adverse Employment Action Should Be Dismissed.

With respect to those Plaintiffs who failed to sufficiently state that they suffered an adverse action, the D.C. Circuit, in *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022), acknowledged, in the context of what constitutes an adverse employment action, that "the phrase ['terms, conditions, or privileges of employment'] is not without limits" because "not everything that happens at a workplace affects an employee's 'terms, conditions, or privileges of employment[,]'" *Id*. at 874; *cf. Black v. Guzman*, No. CV 22-1873 (BAH), 2023 WL 3055427, at *8 (D.D.C. Apr. 24, 2023) (dismissing plaintiff's claims that she was discriminatorily "pulled from" two work events because she failed to provide details about any impact on her compensation, benefits, and promotion opportunities); *Garza v. Blinken*, No. 21-CV-02770 (APM), 2023 WL 2239352, at *5 (D.D.C. Feb. 27, 2023) (finding that a "proposed letter of reprimand" issued to plaintiff failed to state a claim for an adverse employment action because the "complaint [was] devoid of any facts suggesting that the proposed letter affected the terms and conditions of [the plaintiff's] employment," and instead merely "assert[ed] in a conclusory manner that the letter of proposed reprimand had a material effect on the terms and conditions of her employment").

Numerous of the Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs have failed to allege facts sufficient to establish that they suffered a cognizable adverse employment action in the TAC. As an example, Plaintiff Brenda Matthews alleges that she was:

> …subjected to discriminatory treatment in regard to work assignments and in the terms and conditions of employment …wherein black employees are marginalized and subjected to demeaning treatment with regard to matters such as the dress code, working hours, changes in job assignments and job duties, removal of responsibilities, and other employment matters, while whites and other non-black employees are treated better and groomed for promotion, and their violations of policy ignored.

(ECF No. 47 at ¶ 1411). Nowhere does Ms. Matthews: (1) specify what actual dress code restrictions were purportedly imposed on her, (2) identify her job duties in comparison to other employees, what responsibilities were allegedly removed, or (3) plead what her original working hours were and what they were changed to. Everything about Ms. Matthews' allegations are speculative and conclusory, and as such, she has failed to sufficiently plead her Section 1981 race discrimination claim. *See Pauling v. District of Columbia*, 286 F. Supp. 3d 179, 203 (D.D.C. 2017) (to be adverse, an action must have "a discernible, as opposed to a speculative, effect") (internal citation omitted).

The race discrimination allegations of Plaintiff Akanke Isoke likewise fail to sufficiently plead an adverse employment action. Plaintiff Isoke claims that "[w]hile [she was] working as a Conductor, her supervisor, John McVay, reported that she had been wearing an improper uniform. While boarding passengers one day, Plaintiff Akanke Isoke had a scarf tied around her hair as a headband." (ECF No. 47 at ¶ 1135). This allegation, however, is devoid of any suggestion that Ms. Isoke was disciplined or that any other terms, conditions, or privileges of her employment were affected. To wit, the TAC only alleges that Ms. Isoke's supervisor "reported" that she was not wearing the appropriate attire, and nothing more. This is plainly insufficient to meet this Circuit's definition of an adverse action. *See Pauling*, 286 F. Supp. 3d at 203; *Gonzalez v. Garland*, No. CV

21-1653 (TSC), 2023 WL 6160013, at *8 (D.D.C. Sept. 21, 2023) (dismissing the plaintiff's disparate treatment claim because "Plaintiff does not allege facts suggesting that his transfer request denial affected the terms and conditions of his employment, such as compensation, benefits, and promotion opportunities."); *Garza v. Blinken*, No. 21-cv-2770, 2023 WL 2239352, at *5 (D.D.C. Feb. 27, 2023) (rejecting notion that a "proposed letter of reprimand" constituted an adverse employment action because the plaintiff failed to "state that the proposed letter of reprimand resulted in an office transfer, a change in responsibilities, or anything to suggest that the terms and conditions of her employment were affected at all"). The race discrimination claims of the other Plaintiffs identified in Exhibit B suffer from the same fatal deficiency.[13]

b. The Race Discrimination Claims of Plaintiffs Who Fail to Allege Facts Sufficient To Plausibly Raise An Inference That Race Was The Reason For An Alleged Adverse Action Should Be Dismissed.

Even if one of the Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs alleged claims sufficient to establish an adverse action (which many do not), they must nevertheless allege sufficient factual matter to support a plausible (and not just conceivable) inference of race discrimination. *Twombly*, 550 U.S. at 570; *Brown v. Children's Nat'l Med. Center*, 775 F. Supp. 2d 125, 135 (D.D.C. 2011) (to state a claim under section 1981, a plaintiff must allege facts that demonstrate that race was the reason for defendant's actions). Plaintiffs "cannot merely invoke . . . race in the course of a claim's narrative and automatically be entitled to pursue relief." *Apollo*, 2019 WL 147475, at *2 (quoting *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990)); *see also Ndondji v. InterPark, Inc.*, 768 F. Supp. 2d 263, 274 (D.D.C. 2011)

[13] For the Court's convenience, Amtrak attaches as Exhibit B a list of the specific 130 Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs who have either: (1) alleged a discriminatory act but failed to allege a requisite adverse employment action or (2) otherwise failed to allege facts sufficient to support a plausible inference of race discrimination.

(plaintiff's occasional reference to his race in his complaint was insufficient to make out a section 1981 action); *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 88 (D.D.C. 2010) (Section 1981 claim was dismissed where the "only suggestion that plaintiff's race or color played any role in her interactions with [defendants we]re plaintiff's conclusory statements that she was terminated based on her race and color"), *aff'd*, 424 F. App'x. 10 (D.C. Cir. 2011). Allegations must be more than just legal conclusions devoid of any factual support, otherwise they do not meet the *Twombly* pleading standard. *Mehuria v. Bank of America*, 883 F. Supp. 2d 10, 15 (D.D.C. 2011).

Relatedly, where Plaintiffs allege that similarly situated comparators of a different race were treated more favorably, they must further show that "all of the relevant aspects of [Plaintiffs'] employment situations were 'nearly identical' to those" of the other employees who did not suffer similar adverse employment actions." *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995). "Factors that bear on whether someone is an appropriate comparator include the similarity of the plaintiff's and the putative comparator's jobs and job duties, whether they were disciplined by the same supervisor, and, in cases involving discipline, the similarity of their offenses." *Burley v. Nat'l Passenger Railroad Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015). And, where Plaintiffs allege that Amtrak purportedly failed to hire or promote them, those Plaintiffs must show that they sought and were denied the position for which they allege they were qualified and that "other employees of similar qualifications" received the position "at the time [Plaintiffs'] request…was denied." *Taylor v. Small*, 350 F.3d 1286, 1294 (D.C. Cir. 2003); *see also Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004) (identifying, as one of four elements to a failure-to-hire claim that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants") (emphasis added).

In the TAC, there are an astounding number of instances where Plaintiffs fail to meet these aforementioned standards and, in those instances, the claims of the Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs should be dismissed. One need look no further than the *first three* Plaintiffs identified in the TAC – Ronnie E. Williams, Sr., Ransford Acquaye, and Christopher Adams – to understand there should be no other outcome than dismissal for the Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs.

As the first example, Mr. Williams alleges that, in or around December 2002, Amtrak's then-Director of Crew Management Services and then-Assistant Director of Crew Management Services forced him to resign or be fired after he purportedly failed to show up for work. (ECF No. 47 at ¶ 12). He further alleges that his resignation came with a stipulation that he could be rehired after one year. However, Mr. Williams claims that when he sought to be rehired, he had been designated as ineligible for rehire by Amtrak. (*Id*. at ¶ 13). Finally, Mr. Williams claims that, in 2012, the then-Director of Amtrak's Consolidated National Operations Center had security escort him off Amtrak property and threatened him with arrest if he returned. (*Id*. at ¶¶ 14-15). Mr. Williams alleges only in vague and general, non-specific terms that "[w]hite employees in [his] position were not subject to this level of discipline for missing a shift of work" and that white employees were not escorted off the premises and threatened with arrest. (*Id*. at ¶¶ 12-15).

Mr. Acquaye's substantive allegations are found in two paragraphs (¶¶ 21 and 22) in which he asserts that he was "falsely accused of running around naked at an Amtrak workplace," "was put out of service on his wedding day," and told that he would be arrested if he returned to the station. (*Id*. at ¶ 21). Similar to Mr. Williams, Mr. Acquaye states in conclusory fashion, "White employees in Ransford Acquaye's position were not subjected to such humiliation." (*Id*.).

Both Mr. Williams and Mr. Acquaye, like the other Deficient Discrimination Plaintiffs and

Partially Deficient Discrimination Plaintiffs, allege no specific occurrences where white employees were treated differently, fail to allege that any white employees identified are proper comparators to them, and offer only conclusory statements. As a result, it is impossible to gauge whether disparate treatment based on Mr. Williams and Mr. Acquaye's race is actually plausible. *See Mesumbe v. Howard Univ.*, 706 F. Supp. 2d 86, 92 (D.D.C. 2010), *aff'd*, No. 10-7067, 2010 WL 4340401 (D.C. Cir. Oct. 19, 2010) (dismissing § 1981 claim where plaintiff "makes a conclusory allegation that similarly situated students of different ... race[s were] treated differently and more favorably [without alleging] that this disparate treatment was racially motivated," and where "none of the supporting facts Plaintiff includes in the Complaint suggest a racially discriminatory motive"). *Keith v. U.S. Gov't Accountability Off.*, No. CV 21-2010 (RC), 2022 WL 3715776, at *4 (D.D.C. Aug. 29, 2022) (highlighting several examples of conclusory allegations contained throughout the plaintiff's complaint and emphasizing that the complaint provides "little to support the assertion that any of these employees were treated differently than [the plaintiff] was).

With respect to Mr. Adams, his allegations are instructive because they illuminate the illogical leap Plaintiffs would ask this Court to take by finding that an adverse action *automatically* infers race discrimination. Mr. Adams specifically alleges that he was laid off in 2001 and subsequently reapplied for employment on two occasions, but was not interviewed or called back for the positions he sought. (ECF No. 47 at ¶ 29). To support his claim that Amtrak's failure to hire him was based on his race, Mr. Adams includes only one meager sentence in which he states: "Upon information and belief, there were other black men who were laid off in around 2001 or 2002 that were not called back for rehire either." (*Id.* at ¶ 30). This is plainly conclusory, and as stated previously, these and similar allegations are endemic throughout the TAC. To be sure, Mr.

Adams' allegation cannot reasonably show Amtrak's inability to rehire him for the *unnamed* positions he sought is tantamount to race discrimination simply because it also did not rehire other unidentified black men. There are, for example, no specifics as to the scope of the layoffs that occurred during that timeframe, the number of open positions, the rehire rates, or whether Amtrak only rehired white men who had also been laid off in that same period.

Finally, with respect to Plaintiffs who allege that Amtrak refused to promote them, and to once again illustrate the conclusory nature of the allegations made by the Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs throughout the TAC, Amtrak notes, as an example, the allegations made by Plaintiff Ulysses Barton. (ECF No. 47 at ¶¶ 109-115). Mr. Barton has alleged that, since 1988, he applied for approximately 20 unidentified, "union-represented" positions. (*Id*. at ¶ 112). He further claims he was qualified for those unidentified positions but was "consistently denied the positions." (*Id*). Moreover, Mr. Barton alleges that, "[u]pon information and belief, many of these positions were awarded to white persons who were equally or less qualified than he was, including less experience working as a locomotive engineer." (*Id*.). But, these failure to promote allegations are conclusory because of Mr. Barton's failure to include allegations pertaining to the specific positions he sought, his qualifications for each position, and the individuals who were promoted instead, and the Court need not accept these allegations as true. *Twombly*, 550 U.S. at 555 (The court is "not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation and citations omitted)).

Because the facts alleged by Mr. Williams, Mr. Acquaye, Mr. Adams, and Mr. Barton cannot plausibly "raise an inference that [their] race was the reason" Amtrak allegedly discriminated against them or that Amtrak's actions were racially motivated, their Section 1981 race discrimination claims must fail. *See Doe #1*, 2021 WL 3550996, at *17 (dismissing Valyria

Lewis' Section 1981 discrimination claim); *Wright*, 2021 WL 6134592, at *5 (dismissing the plaintiff's Section 1981 claim because "Dr. Wright fail[ed] to connect her race to her alleged mistreatment"); *Ramey v. Potomac Elec. Power Co.*, 468 F. Supp. 2d 51, 57 (D.D.C. 2006) (granting dismissal of the plaintiff's Section 1981 discrimination claim and stating, "Plaintiff is not only unable to demonstrate that he was terminated because of his race, he does not even allege facts that would support this being the case."). The Section 1981 race discrimination claims asserted in the TAC by the other Deficient Discrimination Plaintiffs, and certain race discrimination claims asserted by the Partially Deficient Discrimination Plaintiffs in the TAC, suffer from the same failure to allege facts sufficient to establish that either similarly situated comparators outside the Plaintiffs' protected class were treated more favorably or that race was the reason for the alleged discriminatory treatment.

2. The 115 Deficient Harassment Plaintiffs Fail to Sufficiently Allege Their Section 1981 Hostile Work Environment Claims.

To prevail on a race harassment or hostile work environment claim under Section 1981, "a plaintiff must show that [her] employer subjected [her] to discriminatory intimidation, ridicule, and insult that [wa]s sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (internal citations and quotations omitted). Whether a workplace is actionably hostile is both a subjective and objective analysis – "[t]he victim must subjectively perceive the environment to be abusive, and the complained about conduct must be so severe or pervasive that it objectively creates a hostile or abusive work environment." *Toomer v. Mattis*, 266 F. Supp. 3d 184, 193 (D.D.C. 2017).

The Supreme Court has "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . " in order to "filter out" complaints attacking the

"ordinary tribulations of the workplace." *Carter-Frost*, 305 F. Supp. 3d at 75 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). As such, "mere reference to alleged disparate acts of discrimination . . . cannot be transformed, without more, into a hostile work environment." *Nurriddin v. Bolden*, 674 F. Supp. 2d 64, 94 (D.D.C. 2009). And "[o]ccasional instances of less favorable treatment involving ordinary daily workplace decisions are not sufficient to establish a hostile work environment." *Bell v. Gonzales*, 398 F. Supp. 2d 78, 92 (D.D.C. 2005); *see also Wade v. District of Columbia*, 780 F. Supp. 2d 1, 19 (D.D.C. 2011) ("[C]ourts have generally rejected hostile work environment claims that are based on work-related actions by supervisors."); *Nurriddin*, 674 F. Supp. 2d at 94 ("[T]he removal of important assignments, lowered performance evaluations, and close scrutiny of assignments by management [cannot] be characterized as sufficiently intimidating or offensive in an ordinary workplace context."); *Houston v. Sectek, Inc*., 680 F. Supp. 2d 215, 225 (D.D.C. 2010) ("Allegations of undesirable job assignments or modified job functions…are not sufficient to establish that [a] [plaintiff's] work environment was permeated 'with discriminatory intimidation, ridicule, and insult."). Moreover, hostile work environment assertions must not be undermined by "the sporadic nature of the conflicts." *Baloch*, 550 F.3d at 1201. Instead, a plaintiff must "describe the day-to-day insult or intimidation" necessary to demonstrate a "sufficiently pervasive pattern" of hostile conduct. *Carter-Frost*, 305 F. Supp. 3d at 76; *Toomer*, 266 F. Supp. 3d at 196.

a. The Hostile Work Environment Claims of Plaintiffs Who Only Allege Work-Related Decisions As The Basis for The Alleged Harassment Should Be Dismissed.

The hostile work environment claims of each of the 115 Deficient Harassment Plaintiffs fail to satisfy the aforementioned pleading standards. As an example, the only allegation that Plaintiff Steven Harris offers in support of a hostile work environment claim is that he "was subjected to racial harassment and a racially hostile work environment during [his] employment

at Amtrak." (ECF No. 47 at ¶ 1046). However, the only specific facts Mr. Harris pleads in the TAC he could even arguably connect to his hostile work environment claim is that he applied for a Computer Tech position on an unspecified number of occasions, but white employees were allegedly selected to fill the roles. (*Id.* at ¶ 1045). This court has defined these decisions as "work-related actions" and determined that they cannot form the basis for a plaintiff's hostile work environment claim. *Lewis v. Yellen*, No. CV 20-3431 (FYP), 2021 WL 5416634, at *8 (D.D.C. Nov. 19, 2021), reconsideration denied, No. CV 20-3431 (FYP), 2022 WL 1446670 (D.D.C. Mar. 2, 2022), *aff'd*, No. 22-5116, 2022 WL 16859306 (D.C. Cir. Nov. 10, 2022); *Outlaw v. Johnson*, 49 F. Supp. 3d 88, 92 (D.D.C. 2014) (dismissing for failure to state a claim a hostile work environment count "referring only to promotion denials, a subjective performance review, and being hired at a lower grade than Caucasian employees"). The hostile environment claims asserted by more than half of the Deficient Harassment Plaintiffs suffer from this same fatal deficiency, and those claims should be dismissed with prejudice for this reason alone.

b. The Hostile Work Environment Claims of Plaintiffs Who Assert Only Non-Specific, Conclusory Allegations of Harassment Should Be Dismissed.

Separately, a number of the Deficient Harassment Plaintiffs allege that they either witnessed or were subject to alleged comments, jokes, or epithets that were directed at them based on their race, but fail to provide any factual details describing the conduct, including but not limited to who engaged in the conduct, the specific nature of the conduct, when and how often it occurred, and whether Amtrak was made aware of the conduct. For example, Plaintiff Joseph Peden conclusorily alleges that he:

> [E]ncountered many forms of race harassment in New Orleans, Texas, Florida, and other places he worked in. Racial epithets, slurs, derogatory comments and jokes, racist graffiti in employee areas and men's restrooms were frequently encountered by Plaintiff Joseph Peden. There was a general and pervasive atmosphere of disrespect and hostility toward African-Americans in these Amtrak workplaces,

> which Plaintiff Joseph Peden and his black co-workers were plainly able to see, hear, and observe, and be affected by.

(ECF No. 47 at ¶ 1504). Likewise, Plaintiff William Waytes summarily asserts that:

> Racially derogatory remarks, jokes, and epithets were comment [sic] among the white workers, and Amtrak managers knew and were present and heard these incidents, but did not seem to care, sometimes participated, and frequently laughed under their breath.

(*Id*. at ¶ 2068). Simply claiming that alleged conduct was "common," "frequent," or "pervasive" is just as conclusory as merely stating that certain comments were "harassing." Absent more specific detail regarding the alleged conduct, Mr. Peden and Mr. Waytes, and the other Deficient Harassment Plaintiffs, have not stated facts sufficient to assess whether the alleged conduct rises to the level necessary to satisfy the severe and pervasive standard. Indeed, the failure of these Plaintiffs to identify *even one* specific incident belies the notion that the alleged conduct was sufficiently severe or pervasive. *See Johnson v. District of Columbia*, 49 F. Supp. 3d 115, 121 (D.D.C. 2014) (the implication alone that the plaintiff was subjected to severe and pervasive conduct was found to be conclusory and the plaintiff's hostile work environment claim was dismissed); *Akonji v. Unity Healthcare, Inc*., 517 F.Supp.2d 83, 98 (D.D.C. 2007) (concluding that five discrete acts of discrimination in two years, as well as additional "inappropriate comments" by a supervisor, were insufficient to constitute a hostile work environment).

c. The Hostile Work Environment Claims of Plaintiffs Who Fail to Allege Facts Sufficient To Establish That The Alleged Conduct Was "Severe and Pervasive" Should Be Dismissed.

Still other Deficient Harassment Plaintiffs' hostile work environment claims fail to meet the severe and pervasive prong of their Section 1981 *prima facie* cases.[14] For example, Plaintiff

[14] For the Court's convenience, Amtrak attaches as Exhibit C a list of the 115 Deficient Harassment Plaintiffs whose hostile work environment claims should be dismissed on the basis that they have either: (1) improperly alleged only "work-related" actions or (2) improperly alleged conclusory allegations or otherwise failed to sufficiently state a *prima facie* case for hostile work environment.

Eric Woodruff alleges that, in addition to a discrete work-related employment action (which is insufficient to plead a Section 1981 harassment claim), he was "wrongfully accused" by white members of management of "stealing a day's pay". (*Id*. at ¶ 2268). Mr. Woodruff alleges that he was wrongfully suspended after arriving at work 35 minutes late in February 2005 (although he was admittedly paid for that day) while white employees were allegedly not suspended for similar infractions. (*Id*. at ¶ 2267-2269). Similarly, Plaintiff Jimmy Lee Whitley alleges a single instance of failure to promote to a management position and that, when he allegedly expressed his interest in continuing to apply for management positions, his supervisor "replied with 'You like your job.'" (*Id*. at ¶¶ 2141-2144). Mr. Whitley claims that he "took this reply as discouraging him from trying to apply for management positions." (*Id*. at ¶ 2144). The TAC includes no further allegations to support Mr. Whitley's hostile work environment claim. Mr. Woodruff's and Mr. Whitley's allegations, though, fail to plead sufficient facts to link their race to the alleged conduct. *See Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 81 (1998) (the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive...connotations, but actually constituted discrimination...because of" the employee's protected status). Moreover, the conduct alleged by Mr. Woodruff and Mr. Whitley entirely fails to meet the high bar of "discriminatory intimidation, ridicule, and insult" that is so "severe or pervasive" that it gives rise to actionable abuse. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Dudley v. Washington Metro. Area Transit Auth*., 924 F. Supp. 2d 141, 171 (D.D.C. 2013) ("[H]aving a rude, harsh, or unfair boss is not enough for a hostile work environment claim."); *Montgomery v. McDonough*, No. CV 22-1715 (RC), 2023 WL 4253490, at *6 (D.D.C. June 29, 2023) (supervisor's single use of the term, "ghetto," towards a black employee not enough to create a hostile work environment despite the racial connotations associated with the term). Accordingly, the Court should dismiss the hostile work environment

claims for Plaintiff Eric Woodruff and Jimmy Lee Whitley. The similarly threadbare hostile environment claims asserted by other the Deficient Harassment Plaintiffs should be dismissed with prejudice on the same basis.

F. The Court Should Dismiss the Section 1981 Retaliation Claims for the Five (5) Deficient Retaliation Plaintiffs.

To establish a *prima facie* case of retaliation, Plaintiffs asserting such claims must show that: (1) they engaged in protected activity; (2) they suffered from a materially adverse act; and (3) a causal connection exists between the protected activity and the employer's act. *Hunter v. D.C. Child & Family Servs. Agency*, 710 F. Supp. 2d 152, 160 (D.D.C 2010) (internal citation omitted); *Jones v. D.C. Water & Sewer Auth.*, 922 F. Supp. 2d 37, 41 (D.D.C. 2013). The third prong of the *prima facie* case requires proof that the desire to retaliate was the "but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). The five (5) Deficient Retaliation Plaintiffs identified in Section II.C., *supra*, are unable to meet this burden because they have failed to allege facts sufficient to plausibly meet one or more of these requirements.

a. The Retaliation Claims of Plaintiffs Who Fail to Allege Facts Sufficient To Establish They Engaged in Protected Activity Should Be Dismissed.

Plaintiffs Vernon Carter and Gary Christian have failed to sufficiently allege that they engaged in protected activity. Mr. Carter, for example, merely asserts that after failing his conductor promotional exam, he complained to his union representative that he should be permitted to retake the test. (ECF No. 47 at ¶ 366). Mr. Christian, for his part, alleges that he complained to his supervisor and a foreman that he was not being provided with the appropriate tools to complete his duties. (*Id*. at ¶ 499). Neither allegation from Mr. Carter or Mr. Christian purport that the substance of their complaints concerned race discrimination or race harassment. *Lemmons v. Georgetown Univ. Hosp.*, 431 F.Supp.2d 76, 92 (D.D.C. 2006) (explaining that if a

plaintiff alleges retaliation under 42 U.S.C. § 1981, she must demonstrate that she had alleged harassment or discrimination based on her race, or some other category the law protects, before the retaliatory conduct). Therefore, both sets of retaliation claims must fail.

b. The Retaliation Claims of Plaintiffs Who Fail to Allege Facts Sufficient To Establish A Causal Link Between The Alleged Protected Activity and the Challenged Adverse Action Should Be Dismissed.

The remaining Deficient Retaliation Plaintiffs fail to plead sufficient factual allegations to show causation between their protected activities and the alleged harm. For example, Priscilla Cathey states that she made two complaints in which she claimed that her supervisor had discriminated against her. The first complaint occurred in or around April/May 2002 and she claims that as a result of her complaint, she was not selected for a Lead Clerk position in November 2003 and February 2004. This allegation is insufficient for two reasons. First, nowhere does Ms. Cathey claim that those who made the decision to fill the Lead Clerk position were aware of any alleged complaint. Indeed, it is a fundamental requirement for any retaliation claim that the plaintiff demonstrate that the person effectuating the adverse employment action had actual knowledge of the protected activity; without this, the claim fails. *See Laboy v. O'Neill*, 2002 WL 1050416, at *1 (D.C. Cir. Mar. 13, 2002) ("[B]ecause the official responsible for ordering appellant's termination was unaware of appellant's prior EEO activity, appellant failed to establish a *prima facie* case of retaliation." (citing *Clark County School Dist. v. Breeden*, 532 U.S. 268, 272-73)); *Sledge v. District of Columbia*, 63 F. Supp. 3d 1, 19 (D.D.C. 2014) ("[T]o establish the requisite causal nexus between the protected activity and the employer's materially adverse action, a plaintiff must demonstrate by direct or circumstantial evidence that the employer had actual knowledge of the protected activity and took adverse action against [her] because of it."). Second, the alleged adverse action occurred more than a year and a half after Ms. Cathey's alleged complaint concerning her supervisor and, thus, her allegations are insufficient to establish

causation based on temporal proximity. *Jones*, 922 F. Supp. 2d at 42 ("this Circuit has generally found that a two- or three-month gap between the protected activity and the adverse employment action does not establish the temporal proximity needed to prove causation."). Ms. Cathey also alleges that, after she made a second complaint, her supervisor accused her of making personal calls during work time, she stood outside Ms. Cathey's office and laughed, and followed Ms. Cathey into the ladies restroom on occasion. (ECF No. 47 at ¶¶ 401-405). These immaterial acts by Ms. Cathey's supervisor do not rise to the level necessary to demonstrate that Ms. Cathey suffered a materially adverse action as a result of her complaint. *See*, *e.g.*, *Ali v. District of Columbia Gov't*, 810 F. Supp. 2d 78, 86, 88 (D.D.C. 2011) (finding that criticism from a supervisor that does not affect a subordinate's employment status or opportunities is not a materially adverse action).

Plaintiff Kirk Collins alleges that he submitted a written statement in support of another black employee who was terminated in December 2001 and was later terminated after he failed a *second* drug test in October 2002 (after having already gone through rehabilitation for a prior failed drug test). (ECF No. 47 at ¶¶ 530-534). Plaintiff Cynthia Edwards claims, without more, that she was retaliated against because her sister was a plaintiff in *Campbell*. (*Id*. at ¶ 723). Ms. Edwards was terminated in 2002 after losing $5,000 that she was entrusted with depositing at the bank. (*Id*. at ¶¶ 724-25). Like Ms. Cathey, Mr. Collins and Ms. Edwards have failed to plead facts sufficient to establish (1) temporal proximity for purposes of establishing causation or (2) that the decisionmakers at issue were aware of their purported protected activities. As such, the retaliation claims of five (5) Deficient Retaliation Plaintiffs should be dismissed.

G. Many Plaintiffs' Section 1981 Claims Are Time-Barred And Should Be Either Fully or Partially Dismissed.

Since Section 1981 does not contain a statute of limitations, courts have traditionally applied the most analogous state statute of limitations. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004). After enactment of the Civil Rights Act of 1991, a four-year statute of limitations applies "if the plaintiff's claim against the defendant was made possible" by the 1991 or later statute. *Id*. at 382. However, courts continue to apply states' statute of limitations when plaintiffs assert Section 1981 failure-to-promote or failure-to-hire claims. *See Rainey v. United Parcel Serv., Inc.*, 543 F. App'x 606, 608 (7th Cir. 2013) ("[The plaintiff] alleges that unlawful discrimination *prevented* the making of an employment contract, and for claims of discrimination in hiring arising in Illinois, a two-year statute of limitations governs." (emphasis in original)); *Ekweani v. Ameriprise Fin., Inc.*, 444 F. App'x 968, 970 (9th Cir. 2011) ("The district court properly granted summary judgment on [the plaintiff's] failure-to-promote claim under 42 U.S.C. § 1981 because Mr. Ekweani failed to raise a genuine dispute of material as to whether the promotion he sought constituted an opportunity for a new and distinct relationship with Ameriprise and, therefore, a two-year statute of limitations applied and his claim was time-barred."). Where applicable, federal courts in the District of Columbia have applied the District's 3-year statute of limitations to plaintiffs' Section 1981 claims for failure to promote and failure to hire, while applying a 4-year limitations period for "post-contract formation conduct" covering most other claims. *See Kargbo v. Nat'l R.R. Passenger Corp.*, 243 F. Supp. 3d 6, 10 (D.D.C. 2017) (citing D.C. Code § 12–301(8)).

Separately, because Plaintiffs here are purportedly former putative class members in *Campbell*, the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) – that "the commencement of a class action suspends the applicable statute of

limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" – comes into play. However, once class certification is denied, tolling ceases and the now former putative class members must proceed with filing their own lawsuits or intervening in the pending action if they wish to preserve their claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). Moreover, for any claims that accrued prior to the filing of the class action, the statute of limitations only stopped during the pendency of the class certification. Once class certification is denied, the clock unfreezes, and these plaintiffs only have the available time remaining in their statute of limitations period. *See Barryman-Turner v. District of Columbia.*, 115 F. Supp. 3d 126, 134 (D.D.C. 2015) ("Under American Pipe, the filing of a class action thus functions as a pause button for the claims of all purported class members. The statute of limitations ceases to run for the entire period from the day a class action is filed until the class is decertified or the court declines to certify the class, after which it runs for the full number of days that were remaining on the statute when the class action was commenced.").

Plaintiffs in this action are purportedly former putative class members in *Campbell*, where the *Campbell* plaintiffs alleged, *inter alia*, Section 1981 claims. Applying *American Pipe*, the Section 1981 claims of putative class members in *Campbell* were tolled from November 9, 1999 to April 26, 2018, the date on which the court denied Rule 23 class certification. (*Campbell*, ECF Nos. 1, 390). The parties in *Campbell* initially stipulated to continue to toll the claims for certain former putative class members while the parties explored potential settlement. (*Campbell*, ECF Nos. 396, 399, 400, 401). However, their stipulation on all tolling ended as of December 30, 2018, and the limitations period for any former putative class members in *Campbell* began to run again on that date. (*Campbell*, ECF No. 402). This action was filed on April 26, 2021. (ECF No. 1).

Because 848 days passed between December 30, 2018 and April 26, 2021, the 3-year statute of limitations for Section 1981 failure to hire or failure to promote claims bars any such claim in this action if it did not accrue by March 6, 1999 at the earliest. Relatedly, all alleged "post-contract formation" conduct giving rise to a Section 1981 claim in this action must have accrued on or after March 6, 1998 at the earliest to be timely.[15] Moreover, there are numerous Plaintiffs who have altogether failed to connect their claims to any dates or related timeframe by which the Court or Amtrak can determine whether their claims are time-barred.

Because this TAC was Plaintiffs' final opportunity to sufficiently and properly state their claims with specificity, and because Amtrak previously made timeliness arguments in the First *Williams* Motion to Dismiss and in its oppositions to Plaintiffs' motions to amend, Plaintiffs have long been on notice that their allegations in the TAC would need to comply with the applicable Section 1981 limitations periods. Despite this, many Plaintiffs have either: (1) affirmatively alleged that certain challenged conduct occurred on a date outside the limitations period; or (2) failed to allege any specific date when the alleged conduct occurred. As such, the claims of the 57 Fully Time-Barred Plaintiffs should be dismissed in their entirety and the specific claims by the 31 Partially Time-Barred Plaintiffs that are outside the applicable limitations period should also be dismissed.[16]

[15] Three (3) years has 1095 days and 4 years has 1460 days. As there were 848 days that passed before the Complaint in this case was filed, this meant that Plaintiffs' claims are barred unless they accrued within the remaining 247 days and 612 days, respectively, before the Complaint in *Campbell* was filed on November 9, 1999.

[16] For the Court's convenience, Amtrak attaches as Exhibit D a list of the 31 Partially Time-Barred Plaintiffs and an identification of which of their claims are and are not time-barred.

IV. CONCLUSION

In sum, despite having had more than five (5) years since class certification was denied in *Campbell*, more than two (2) years since this action was initiated, and more than four (4) months since the status hearing at which this Court provided Plaintiffs' counsel one last to opportunity to file a legally sufficient complaint that asserted plausible, timely, and valid claims, the TAC is, like its predecessor complaints, woefully deficient. Indeed, it is replete with Plaintiffs who:

- Are identified in the case caption but who make no allegations;
- Fail to plead any specific facts whatsoever;
- Have indisputably released the claims they assert;
- Fail to state sufficient race discrimination claims (in whole or in part);
- Fail to state sufficient hostile work environment claims;
- Fail to state sufficient retaliation claims; and
- Assert untimely claims.

Indeed, the deficiencies in the TAC are so widespread that only 41 Plaintiffs state any claims that, either in whole or in part, are arguably sufficient to survive dismissal at this stage and are timely asserted.[17] For the foregoing reasons, Defendant National Railroad Passenger Corporation respectfully requests that the Court issue an order granting this motion in its entirety.

Dated: October 16, 2023

Respectfully submitted,

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[17] For the Court's convenience, Amtrak attaches as Exhibit E a list of those 40 Plaintiffs and an identification of the claims that would survive.

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