IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONNIE F. WILLIAMS, SR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO.: 1:21-CV-01122-EGS**
	)	
	)	
NATIONAL RAILROAD PASSENGER CORPORATION,	)	**REDACTED**
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

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Other Authorities

Plaintiffs, by undersigned counsel, respectfully submit this Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint, or Alternatively, Motion for Summary Judgment (herein, "Motion" or "MTD" or "MTD/MSJ") in the above-captioned case.

I. INTRODUCTION

This case alleges racial discrimination and hostile work environment claims under 28 U.S.C. § 1981. Every Plaintiff is either a current or former employee of Defendant National Railroad Passenger Corporation ("Defendant" or "Amtrak"); each was a putative class member in *Campbell et al. v. National Passenger Railroad Corp.*, Case No. 1:99-cv-01979-EGS (D.D.C.) ("*Campbell"*) which has been pending in this Court since 1998.

Defendant once again makes its intent clear with its Motion – to eliminate almost every individual listed Plaintiff's claim(s) and irreversibly take away their day in court. Without even filing an Answer, Defendant would have this Court allow Defendant to avoid, for most of the Plaintiffs, all discovery obligations and dismiss their claims before a single interrogatory or request for production is served. To do so, Amtrak wields the pleading standard like a cudgel in a case with a 25-year related case history, and, for some Plaintiffs, Defendant seeks to swoop in with evidence that has not been found to be authentic and which has not yet been tested in discovery, also in an attempt to knock out Plaintiffs' rightful claims.

In the process, Amtrak pounds its rhetorical shoe on the table to complain about prior filings by Plaintiffs in this case despite the fact that this Court expressly authorized Plaintiffs' filing of the Third Amended Complaint ("TAC"). Amtrak apparently remains discontented with the Court having so ruled, or, perhaps, Amtrak merely has relatively little of substance to say about the TAC.

More importantly, Amtrak's motion is improperly formatted, and indeed it is structured in an impossibly obtuse fashion: Amtrak attempts to move to dismiss by chart, with just a few examples of each, without actually discussing the merits of almost all of the individual Plaintiffs' allegations in the TAC. Not only is a motion-by-chart completely inappropriate and unfair to the Plaintiffs because it is virtually impossible to address in many respects, but the practical result is that Amtrak seeks to transfer to this Court the hard work of sorting out any potential application of Amtrak's alleged grounds for dismissal as to each individual Plaintiff.

For all except the retaliation and waiver- and-release Plaintiffs, all Amtrak does is indicate in its exhibits which paragraphs of the TAC it deems unworthy under a few of the most general labels, with no discussion whatsoever of the Plaintiffs' claims, save for a few indicated as examples in its brief. Indeed, the Court cannot know whether or not the charts and their categories of grounds for dismissal actually apply to any given Plaintiff without itself parsing the allegations of the TAC and then determining whether or not the generalized types of dismissal grounds asserted in this fashion are well-grounded or not. Setting aside the question of whether or not this is bad lawyering, a subject to which Amtrak has devoted much of its time and energy in all of its motions so far in this case, the more important point is that this Court has no obligation to do Amtrak's lawyers' work for them, and it should not. Defendant's Motion – as a whole – should be denied on this ground alone. In fact, the Court would be justified in denying the Motion entirely without even waiting for Amtrak's reply brief because Amtrak cannot fix this deficiency in a final reply.[1] This Court's Local Rules provide: "Each motion shall include or be

[1] Alternatively, for this reason, this Court would be entirely justified in holding the Motion in abeyance for a period of time with instructions for the parties to engage in mediation to try to resolve these claims, for three reasons. First, the predecessor *Campbell* case is now settled or virtually settled (see Joint Status Report filed yesterday in *Campbell*) through this Court's ordered mediation process, and the parties had, at one point, agreed to try to settle the claims of

accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of facts." LCRr47(a). For almost all of the Plaintiffs for whom Defendant move dismissal, Defendant fails to provide any statement at all to support such dismissal. Out of the 154 Plaintiffs, Amtrak's memorandum actually addresses any of the grounds for dismissal for only a small handful. The rest of the work, Defendant has left for Plaintiffs and this Court.

Once again also, and again of lesser importance, Defendant seeks to sow discontent among the Plaintiffs with more over-the-top invective about Plaintiffs' counsel. This time, however, it is especially ironic, given the amateurish, massively confusing, short-cut Defendant's attorneys have taken in their MTD.

For those claims where the legal issues are actually discussed, albeit in truncated fashion, Amtrak's arguments are without merit, not least because, stunningly, Amtrak knowingly uses inapposite case law time after time in a brazen effort to convince this Court to rewrite the pleading standards long ago laid out by the Supreme Court. The Court should decline to do so.

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some of the putative *Campbell* class members, all of whom are *Williams* plaintiffs. That effort gave way to a more concentrated effort to resolve the claims of the *Campbell* named plaintiffs, which they now have accomplished. Second, the parties themselves are far more familiar with the claims of the *Williams* plaintiffs, and the format of the Defendant's Motion To Dismiss does the Court no favors in evaluating the merits of the asserted grounds of dismissal for well over one hundred of the *Williams* Plaintiffs' claims. Doubtless, the Court will have to devote a tremendous amount of time and effort to do so. Yet, even if Defendant were to be entirely successful, claims of at least 40 Plaintiff will still remain to be adjudicated. MTD, Ex. E. Third, at this point, the parties are well-positioned to try to resolve all the *Williams* claims because they now have the information gained by each side from the filings of the TAC, the MTD/MSJ (such as it is), and this Opposition, as well as an anticipated Defendant's Reply. After that Reply, it would seem to make sense for the parties to try to save the Court the great amount of time and judicial resources needed to resolve the MTD/MSJ. Plaintiffs would welcome such a direction by the Court.

In some instances, Plaintiffs have decided to withdraw certain claims, particularly some of the racial harassment-hostile work environment claims. In a few instances, Plaintiffs also attempt to clarify where Defendant seems to moving to dismiss certain paragraphs of the TAC which do not embody claims but rather contain background, intent, or qualifications information.

The law pertaining to motions to dismiss and summary judgment have been briefed several times in this case already, and this Opposition provides a shorter discussion of same. Instead, this Opposition focuses mainly on the factual allegations in the TAC, the improper format of Defendant's Motion, and Defendant's blatant misuse of the case law. Because of the improper MTD-by-chart utilized by the Defendant, the former has been no small task, as Plaintiff, like the Court, must interpret, figure out, or guess at Amtrak's actual argument. In so doing, Plaintiffs attempt to address the issues in a manner that will be helpful to the Court. Accordingly, a portion of this Opposition takes an unconventional format in which Plaintiffs' arguments are inserted into an exhibit table in which the designated paragraphs of Defendant's Exhibits are addressed by Plaintiffs.

For the reasons stated herein, this Court should deny Defendants' Motion to Dismiss, or Alternatively, Motion for Summary Judgment.

II. BACKGROUND

Plaintiffs are former putative class members in the longstanding *Campbell* case and are represented by the same counsel. After the Court denied the *Campbell* plaintiffs' class certification motion on April 26, 2018, negotiations began to attempt to settle the entire *Campbell* case – for both the named Plaintiffs and the members of the putative *Campbell* classes who had been active in the investigation and litigation. Those negotiations proceeded for approximately eight months. After eight months, during which the identities of such members of the putative *Campbell* class members who had been active in the investigation and litigation,

most of them now Plaintiffs in this case, were disclosed to Amtrak, Amtrak unilaterally ceased to negotiate regarding them. Negotiations continued for the *Campbell* named Plaintiffs. On April 26, 2021, while such negotiations continued, Plaintiffs filed this employment race discrimination Complaint against Amtrak.

In the long history of *Campbell*, Amtrak never served a single interrogatory on any plaintiff. It should be prepared to do so here: they are very easy to formulate and serve, and they will draw out any information Amtrak desires about the claims that are not present in the TAC. Indeed, Amtrak knows that there is a long history in *Campbell* of defining the employment practices that Amtrak's African-American employees and applicants for jobs have complained about as discriminatory, and discovery in this case will give Amtrak every opportunity to find out exactly how those practices harmed each of the Plaintiffs. Still, the TAC greatly expands the factual allegations of the Plaintiffs, while substantially trimming the number of Plaintiffs in the case.

III. STANDARD OF REVIEW

A party moving for dismissal under Rule 12(b)(6) has the burden to prove that the nonmovant has failed to state a claim upon which relief can be granted. *M.K. v. Tenet*, 99 F.Supp.2d 12 (D.D.C. 2000). A court may only grant a motion to dismiss if the complaint fails to contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The standard requires "more than a sheer possibility that a defendant has acted unlawfully" but "is not akin to a 'probability requirement.'" *Id*. In a motion to dismiss, the court accepts the "complaint's factual

allegations as true and construe all reasonable inferences in the plaintiffs' favor." *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1137 (D.C. Cir. 2020).

Although Rule 8(a)(2) requires more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," it does not require detailed factual allegations. *Iqbal*, 556 U.S. at 678. Rule 8(a)(2) is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677; see also *Conley v. Gibson*, 335 U.S. 41, 47 (1957)("[Rule 8(a)(2)] requires only a short and plain statement of the claim showing that the pleader is entitled to relief, [in order to] give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.")

A motion for summary judgment, on the other hand, is granted only if, looking at the totality of admissible evidence, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Arrington v. United States*, 473 F.3d 329, 333, 374 U.S. App. D.C. 189 (D.C. Cir. 2006). To establish whether a fact is or is not genuinely disputed, a party must cite to specific parts of the record, including deposition testimony, documentary evidence, affidavits or declarations, or other competent evidence, to support its position. *Mason v. Geithner*, 811 F. Supp. 2d 128, 174 (D.D.C. 2011). Pursuant to Federal Rule of Civil Procedure 56(a), "[i]f the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." *Beard v. Preston*, 576 F. Supp. 2d 93, 101 (D.D.C. 2008) (internal quotations omitted).

"The decision to convert a motion to dismiss into a motion for summary judgment . . . is committed to the sound discretion of the trial court." *Bowe-Connor v. Shinseki,* 845 F. Supp. 2d

77, 85 (D.D.C. 2012)(quoting *Flynn v. Tiede-Zoeller, Inc.*, 412 F. Supp. 2d 46, 50 (D.D.C. 2006)). In exercising its discretion, a court must "assure itself that summary judgment treatment would be fair to both parties." *Id.* at 85-86 (internal citation omitted). As the D.C. Circuit has consistently cautioned, summary judgment "ordinarily 'is proper only after the plaintiff has been given adequate time for discovery.'" *Americable Int'l, Inc. v. Dep't of Navy*, 129 F. 3d 1271, 1274 (D.C. Cir. 1997)(quoting *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988)). This practice recognizes that a nonmovant can hardly identify disputes of fact to stave off summary judgment if he or she has had only limited opportunity to develop and understand the facts. *See Gilliard v. Gurenberg,* 302 F. Supp. 3d 257, 290 (D.D.C. 2018). Indeed, in the context of discrimination cases, courts in this jurisdiction have acknowledged that "summary judgment must be approached with special caution." *Gray v. Universal Serv. Admin. Co.*, 581 F. Supp. 2d 47, 57 (D.D.C. 2008). In such cases, plaintiffs often face difficulty uncovering clear proof of discriminatory intent. *See Nurriddin v. Bolden*, 40 F. Supp. 3d 104, 115 (D.D.C. 2014); *see also Gilliard*, 302 F. Supp. 3d at 290 ("Given the information asymmetry, it is hardly fair to expect that a (purported) victim will arrive in Court with a smoking gun in her hand.")

Under Rule 56(f), a court "may deny a motion for summary judgment or order a continuance to permit discovery if the party opposing the motion adequately explains why, at that timepoint, it cannot present by affidavit facts needed to defeat the motion." *Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989); *Londrigan v. Fed. Bureau of Investigation*, 670 F.2d 1164, 1175 (D.C. Cir. 1981). "[T]he purpose of Rule 56(f) is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *Dickens*

v. Whole Foods Market Group, Inc., 2003 U.S. Dist. LEXIS 11791, at *2 n.5 (D.D.C. Mar. 18, 2003)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). The district court has discretion in determining whether it should permit additional discovery before the motion for summary judgment is resolved. *Stella v. Mineta*, 284 F.3d 135, 147 (D.C. Cir. 2002).

IV. ARGUMENT

Defendant argues again that Plaintiffs' claims should be dismissed under a heightened and unworkable pleading rubric that goes far beyond what the Supreme Court years ago laid out in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The TAC comprises 230 pages, with 2304 paragraphs, and it that provides a tremendous amount of factual detail about the Plaintiffs, their claims, their qualifications for promotions, facts about disciplinary proceedings, intent of Amtrak managers and supervisors, and many other salient facts. Although *Iqbal* make it clear that the TAC need not contain detailed factual allegations, 556 U.S. at 678, it largely does. It may not contain, for every Plaintiff, each and every fact that may be lead to a verdict in Plaintiff's favor after a trial. But Amtrak advocates a stringent and heightened pleading requirement that far transcends anything in *Twombly* or *Iqbal*, indeed, seemingly that Plaintiffs must have included in the TAC virtually every fact needed to be proven at trial, knowing well that rank-and-file employees, let alone terminated employees and never-hired applicants, do not have access to Amtrak's human resources files, job files, discipline files, and other records which would show the names of white employees who gained promotions or were hired, or who committed a similar infraction of workplace rules but were punished more leniently, or not at all.

It is, of course, very hard to tell because some of the cited TAC paragraphs do contain information about, for example, whites who received the promotions for which a Plaintiff applied. Yet Amtrak still deems such information, in whatever form it may be, to be insufficient

in almost every case, but it utterly fails to say how. It leaves that question for the Court to figure out – for some 135 plaintiffs, many of who present multiple claims. It appears that Amtrak also advocates that some paragraphs must be some type of holistically complete mini-complaint in themselves because it designates by paragraph those it deems to be lacking in one or more of the afore-mentioned general categories at the top of its charts. That cannot be right, but it is not at all clear that it could mean anything else.[2]

If Amtrak's advocated approach to pleading were actually the law, few employment civil rights initial pleadings could pass muster. But Amtrak does not cite a single case where such stringent pleading is sanctioned by the courts, and for good reason: pleading standards do not require plaintiffs to be omniscient or to have access to the employer's personnel records. In the TAC, Plaintiffs in this case meet their burden to identify the claims, include information that tends to meet a *prima facie* case (which is not actually required), and allege facts that permit a reasonable inference that race discrimination was the cause of the adverse employment action. In those instances where they do not, mostly in for claims of race harassment and hostile work environment, the claims are being withdrawn.

In some cases, Defendant moves alternatively for summary judgment – a process that should occur in this Court only after both parties have had the chance to engage in discovery with a full and fair opportunity to obtain, authenticate, and present the evidence in support of their allegations or defenses. Indeed, the D.C. Circuit has been clear, if somewhat ironically for

[2] To illustrate: Amtrak virtually universally designates as a "Failure to Allege Adverse Employment Action" paragraphs in which Plaintiffs allege the Amtrak employment practice regarding which s/he claims race discrimination. *E.g.*, ¶1113: "Plaintiff Betty Howard experienced intentional racial discrimination by Amtrak in regard to testing and hiring." It is entirely unclear what designation of that paragraph actually means or why it should result in a dismissal of Betty Howard's claims.

this case, that "the purpose of Rule 56(f) is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *Dickens v. Whole Foods Market Group, Inc.*, 2003 U.S. Dist. LEXIS 11791, at *2 n.5 (D.D.C. Mar. 18, 2003)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). Plaintiffs have neither had an opportunity to conduct any discovery nor even the benefit of an Answer to the Amended Complaint by Defendant. Moreover, the lack of a developed factual record handicaps this Court's ability to consider the issues in this case. Therefore, this Court should deny Defendant's alternative motion for summary judgment as premature and inappropriate at this early stage of litigation.

Defendant's motion should be dismissed because its improper chart format does not allow either the Plaintiffs or the Court to understand Amtrak's asserted grounds. The chart reveals nothing other than that Amtrak deems the cited paragraphs either (1) to not allege an adverse employment action – virtually universally inaccurate, except for paragraphs which actually do not comprise elements of claims but exist for other purposes; (2) do not create a plausible inference of discrimination – also virtually universally inaccurate, except for paragraphs that do not exist to do that but rather exist for other reasons; or (3) contain what Amtrak deems to be insufficient allegations of "work-related" actions – entirely unclear; or (4) are conclusory or fail, in Amtrak's estimation, to sufficient satisfy a *prima facie* case – also virtually always either unclear or wrong. Indeed, Amtrak's chart lists paragraph numbers of the TAC, not claims, so the chart is virtually useless to the Court, especially as it makes no attempt whatsoever to discuss the underlying claims allegations or how they purportedly fail to meet these self-labeled standards. In its supporting memorandum, Amtrak includes only perfunctory discussion of a very few of the claims.

The Court should find that this will do. The Court should deny the motion for this reason alone, and indeed could do so without waiting for Amtrak's reply brief because this is a problem that cannot be fixed in a reply. It is wholly unfair to the Plaintiffs because, in this Opposition, Plaintiffs have no choice but to attempt to do Amtrak's work for it by clarifying what each entry seems to be about. Further, and most importantly, the practical result is that Amtrak's format transfers to this Court the hard work of sorting out any potential application of Amtrak's alleged grounds for dismissal for each individual Plaintiff and his or her multiple claims.

Defendant does not even present part of the picture. Rather, Defendant's Motion To Dismiss is basically a jigsaw puzzle with two thousand pieces dumped onto a table: its Motion asks this Court (and Plaintiffs) to put the puzzle together. The Court should not even consider doing so – despite Amtrak's provision of the Exhibits B and C lists of puzzle pieces that it provided "[f]or the Court's convenience," *see* Mem. footnotes 13 and 14 – because Defendant's improperly formatted Motion To Dismiss utterly fails to meet its burden to demonstrate that the Plaintiffs can prove no set of facts that would entitle them to relief. Plaintiffs had little choice but to try to work on the puzzle, an onerous task to be sure, but if the Plaintiffs succeeded in whole or in part, that should not save Amtrak's motion. It should be dismissed out of hand and the case set for litigation or mediation (see footnote 1, *supra*). If Plaintiffs succeeded in whole or in part, the picture that does emerge is that Amtrak's motion lacks merit altogether and should be denied.

Plaintiffs have alleged facts showing that Defendant violated Section 1981 in its treatment of Plaintiffs. Plaintiffs' Amended Complaint stated the applicable law, the relevant facts, and the basis for relief. Section 1981 protects the individual "right . . . to make and enforce contracts" free from racial discrimination. *See* 42 U.S.C. § 1981(a). The statute specifically

provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." *Id.* The provision defines the phrase "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* 42 U.S.C. § 1981(b).

To establish a Section 1981 violation, a plaintiff must "identify an impaired 'contractual relationship', under which the plaintiff has rights." *Domino's Pizza v. McDonald*, 546 U.S. 470 (2006)(citing 42 U.S.C. § 1981(b)). Furthermore, courts use the burden-shifting *McDonnell Douglas* framework for establishing racial discrimination claims under Section 1981. *See DeJesus v. WP Company LLC*, 841 F.3d 527, 532 (D.C. Cir. 2016). However, this court has acknowledged that addressing a Rule 12(b)(6) challenge to an employment discrimination claim involves an extra wrinkle. *See Thomas v. Wash. Metro. Area Transit Auth.*, 305 F. Supp. 3d 77, 84 (D.D.C. 2018). While the plaintiff ultimately bears the burden under the *McDonnell Douglas* framework of establishing the specific requirements of a prima facie case of employment discrimination, that burden does not apply with full force at the motion to dismiss stage. *Id.* Indeed, the Supreme Court "has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

Courts should not demand that plaintiffs fully plead the specific requirements of a prima facie case under *McDonnell Douglas. Id.* at 511 ("[I]t is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not

apply in every employment discrimination case); *Twombly*, 550 U.S. at 569-70 (rejecting arguments that it should abrogate *Swierkiewicz*). The most straightforward way to read the current pleading standard is to refer to the D.C. Circuit's general formulation of a prima facie case of employment discrimination – as opposed to the specific requirements for a prima facie case per *McDonnell Douglas. Thomas*, 305 F. Supp. 3d at 85. Pleading each element of the general prima facie case is sufficient, although not even necessary, to survive a Rule 12(b)(6) motion to dismiss. *See Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 70 (D.C. Cir. 2015). Contrary to Defendant's arguments, the Plaintiffs have cleared the bar.

This case, even more by virtue of the detailed TAC than prior iterations, is not the extreme case where the plaintiff proved incapable of presenting coherent allegations in a complaint with wild accusations and incoherent causes of action. *See, e.g., Shallal v. Gates*, Civ. No. 07-2154 (RCL) (D.D.C. 2008). Nor is this a case where Plaintiffs have refused or failed to comply with any earlier court order. *See, e.g., Thompson v. Johnson*, 253 F.2d 43 (D.C. Cir. 1958). Indeed, Plaintiffs have complied by filing the TAC which not only provides rich detail of underlying facts, but it also removes numerous plaintiffs for whom it could not do so.

Adverse employment actions and plausible inferences

Amtrak would have this Court create new pleading standards based on what evidence must be adduced at trial in order to prevail on a Section 1981 claim. Amtrak pretends that the standards it pulls from cases having nothing to do with proper pleading in a complaint, but rather bearing on much later aspects of litigation of the merits, somehow in this case define the "standards" by which the TAC must be judged on a motion to dismiss. The Court should soundly reject this argument and should not for a moment entertain Amtrak's proposed radical revision of the well-defined standards of pleading. Incredibly, Amtrak cites, at pp. 29 of its Memorandum, four cases that neither define nor even address motions to dismiss or the pleading

standards at all, but rather discuss legal requirements for prevailing on the merits. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507 (D.C. Cir. 1995) (proof at trial); *Burley v. National Railroad Passenger Corporation*, 801 F.3d 290 (D.C. Cir. 2015) (summary judgment); *Taylor v. Small*, 350 F.3d 1286 (D.C. Cir. 2003) (summary judgment); and *Carter v. George Washington University*, 387 F.3d 872 (D.C. Cir. 2004) (summary judgment). Nevertheless, Amtrak brazenly then asserts: "*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." Mem. at p. 30 (emphasis supplied).

Tellingly, Amtrak did find cases such as *Mehuria [sic: Mekuria] v. Bank of America*, at 883 F. Supp. 2d 10 (D.D.C. 2011), and *Middlebrooks v. Godwin Corp.*, 722 F. Supp. 2d 82, 88 (D.D.C. 2010) that do address Rule 12 motion to dismiss standards, citing them for minor stock points at the bottom of p. 28 and top of p. 29. However, Amtrak apparently recognized that these holdings and the discussion in those cases could not possibly support the employer's argument here because those cases state that "plaintiff merely asserts that defendants terminated her employment and took other actions against her on the basis of race and color without providing any specific factual allegations that support an inference of discrimination on those bases," *Middlebrooks* at 88; and "Plaintiff has simply failed to plead a single fact to suggest that the Bank or any of its employees discriminated against him based on his race. He has not, for example, alleged that any of the tellers at the Bank made any negative comments to him or treated him in a hostile or inappropriate manner while he attempted to make his deposits or while he challenged the Bank's decision not to credit the disputed funds to his account." *Mekuria* at 15. Instead, Amtrak proceeded in the following paragraph on p. 29 to attempt to pass off *Neuren*,

Burley, *Taylor*, and *Carter* as being cases setting forth pleading "standards," which they most assuredly are not. Amtrak's briefing ploy should be seen for what it is: cynical, unbecoming, and just plain wrong.

Ronnie Williams, Sr., and Vernon Carter. Defendant incorrectly asserts that Ronnie Williams, Sr., and Vernon Carter fail to meet the pleading standard regarding their racial discrimination claims by putting form over substance, and not very well at that. Both Plaintiffs allege specific facts that show the humiliation and mistreatment they faced as African Americans at Amtrak. Ronnie Williams, Sr., alleges that he was escorted off the property and told that if he returned, he would be arrested. He states those facts before and after he alleges race discrimination and harassment. He doesn't need to add "and that also happened because of my race" to each paragraph.

Vernon Carter states that he was discriminated against because of his race, then, in the ensuing paragraphs, recites a litany of facts as to how that occurred, the type of facts that Amtrak says must be presented, rather than conclusions, yet Amtrak then complains that those subsequent paragraphs do not contain the conclusions that it also argues are improper. Amtrak cannot have it both ways. The matter is straightforward: Williams' and Carter's facts plausibly raise an inference that race was the reason that Amtrak discriminated against them. These allegations of fact state directly that race was the reason that Amtrak discriminated against them and present a set of events that, when proven, plausibly raise at least an inference of race discrimination.

Apparently, Amtrak would have the Court read the Complaint in a stilted style that requires "race" to be explicitly stated in every paragraph. That is incorrect: pleadings are to be read in a more integrated fashion. Both Williams and Carter allege that they were discriminated

against, then they describe what happened to them, and then they make the clear allegation, again, that race was the reason. It is not necessary for Plaintiff to allege specifically and repetitively the racial basis for these claims. These are the two examples that Amtrak uses to make its basic point, and, as such, Amtrak fails utterly, but then urges the Court to dismiss multitudes of Plaintiffs and their claims solely on the basis of these few examples. The Court should deny Defendant's request to dismiss categorically nearly all of the individual Plaintiffs' racial discrimination and hostile work environment claims in this totally improper and novel manner.

Lena Faye Johnson and Theresa Williams. Amtrak argues that two Plaintiffs, Lena Faye Johnson and Theresa Williams, present "cookie cutter" allegations. It is true that these two are not detailed. And, Plaintiff's counsel meant to, but did not, edit ¶1186 to include only a promotion claim. A simple email to counsel would have remedied that, and Plaintiff Lena Faye Johnson hereby withdraws all but her promotion claims. Her promotion claims do not include more specific information because she does not have it, as years have passed and she does not have access to Amtrak's employment records. However, she states her background, at ¶1184, and she clearly states that she was denied several promotions because of her race and that white employees were awarded those promotions. ¶1187. Her allegations are not conclusory and they are not vague, nor do they fail to sufficiently put Amtrak on notice of the claims asserted against it. Amtrak is not required to guess who she is, or what she is claiming, although it may have to consult its records to see what promotions she applied for. During the discovery phase, these fact matters would be readily addressed, not least because the Plaintiff herself would get her HR file and probably could name the promotions she was denied. In any event, the promotions claim is articulated. Discovery is called for; dismissal, at this stage is not.

Plaintiff Theresa Williams was not supposed to be included in the TAC; she was supposed to be dropped. It was an editorial mistake. Again, a simple email exchange would have remedied this issue. The Theresa Williams claims are hereby withdrawn.[3]

Brenda Matthews and Akanke Isoke. Amtrak's two lonely examples of §1981 claims that do not identify a cognizable adverse employment actions are Brenda Matthews and Akanke Isoke. Amtrak argues that Matthews does not specify what actual dress code restrictions were purportedly imposed on her, does not identify her job duties in comparison to other employees, what responsibilities were allegedly removed, or plead what her original working hours were and what they were changed to, and, from this, concludes that "[e]verything about Ms. Matthews' allegations are speculative and conclusory" and therefore and as such, she has failed to sufficiently plead her Section 1981 race discrimination claim." Mem. at p. 27.

First, Plaintiff Brenda Matthews is one of the handful of Title VII plaintiffs in this case (see TAC ¶¶1407, 2298-2304), and Amtrak has, by limiting its motion to her Section 1981 claim, waived the grounds for dismissing the Title VII claim. Further, Plaintiff Matthews' allegations upon which Amtrak grounds its argument are descriptive of a "terms and conditions of employment" claim, and they are not conclusory or speculative. A conclusory allegation would be that Amtrak discriminated against her in regard to the terms and conditions of employment. Matthews, in contrast, describes exactly which terms and conditions she claims are racially discriminatory, specifically alleges that they are differently applied to blacks and whites, and she alleges exactly where this occurred: "in the Washington D.C. crew base and headquarters, including, but not limited to the Corporate Payroll Department, wherein black employees are

[3] Neither was Lawrence Sumpter supposed to be included in the TAC caption. He was to be dropped, and his name remaining in the TAC caption was merely an editorial oversight. Again, a simple email would have remedied this issue.

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." TAC ¶1411. She does not need to lay out the dress code, or her working hours, or each and every one of her job assignments and duties: that is plainly the stuff of discovery. Amtrak does not have to guess, it just has to look inward, or send Plaintiffs an interrogatory or two, neither of which Amtrak has ever been willing to do. That time has come.

Plaintiff Akanke Isoke is the other example on which Amtrak leans to urge dismissal of a broad swath of Plaintiffs' claims on the ground that she did not allege an adverse employment action. First, it should be noted that Amtrak cites only her improper uniform disciplinary claim, and not her light duty denial claim, so it should not be inferred as reaching both. In any event, Amtrak seizes the wording of a single paragraph, where Isoke alleges that her supervisor "reported" her for wearing a scarf as a headband and shuts its eyes to the other paragraphs where she clearly identifies that she is asserting a discriminatory discipline claim. See TAC ¶1135. No speculation is required. After all the intervening years, and Isoke having not worked at Amtrak in more than 20 years, the specific discipline need not be alleged, and probably, in this instance, could not be. Simple discovery of Plaintiff Isoke's HR or discipline files would clarify the question immediately.

Amtrak's usage of Brenda Matthews and Akanke Isoke as examples – and nothing more – of its argument to dismiss the claims (unclear whether it is all claims or a subset, and if so, which subset) of 130 plaintiffs in this case cannot be sufficient. Again, Amtrak has left it to the Court to determine how to evaluate hundreds of claims challenged on this ground. Here is the

entirety of Amtrak's legal argument concerning application of its points and authorities regarding Matthews and Isoke to the rest of the Plaintiffs in this case: "The race discrimination claims of the other Plaintiffs identified in Exhibit B suffer from the same fatal deficiency." Mem. at p. 28. The Matthews and Isoke examples are actually examples of how Amtrak has utterly failed to support its Motion to Dismiss properly. Exhibit B, filed, as Amtrak states "for the Court's convenience," is not only inconvenient, it is also entirely unworkable, massively confusing, and nowhere in the ballpark of legally sufficient.

Ronnie E. Williams, Sr., Ransford Acquaye, and Christopher Adams. As to the issue of whether Plaintiffs' allegations raise an inference that race was the reason for the adverse employment action, Amtrak brazenly states, "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." Mem. at p. 30. This statement is false for the reasons stated above, and the provision of Exhibit C "for the Court's convenience" does not help at all. Neither do the three examples.

Amtrak argues that Williams and Acquaye "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" and therefore, "it is impossible to gauge whether disparate treatment based on Mr. Williams and Mr. Acquaye's race is actually plausible." Mem. at pp. 30-31. This is literally the sum total of Amtrak's argument, and yet it apparently applies to every one of the other 134 plaintiffs listed on Exhibit B. It does no such thing, and it also does not support dismissal of Williams' and Acquaye's claims.

Plaintiff Ronnie Williams, Sr. was forced to resign (or be fired) after being unable to show up to work on just one occasion. He was taken out of service and then given the option of either resigning with the possibility of being rehired or be fired. He alleges that white employees in Ronnie Williams, Sr.'s position were not subject to this level of discipline for missing a shift of work. The fact that he does not name the names of the white employees is not a ground of dismissal, and Amtrak cites no case where that requirement has ever been applied. Williams further alleges that his resignation occurred upon an agreement that he could come back to work at Amtrak in one year, but a year later, when he tried to come back, he found that Amtrak had altered his file in Philadelphia to indicate he was not eligible to return. Williams can prove this, too, because, as he alleges, he had a copy of his file that was in Washington, D.C., in which it was stated that he was eligible to return in one year. Yet Williams was still not allowed to return. He found out that his file had been changed by someone in Human Resources in Amtrak's Philadelphia offices. Amtrak has completely ignored these circumstances alleged in the TAC to pretend that there no plausible inference can possibly be drawn to connect his race and the adverse employment action. If that is not enough, when Ronnie Williams, Sr., continued to try to get his job back, the Director of CNOC (Amtrak's Consolidated National Operations Center in Wilmington, Delaware) had him escorted out of the building and the Director's assistant or staff member told Williams that he if he ever returned to the CNOC building, he would be arrested. Williams also alleges that white applicants were not subjected to such humiliation.

None of these allegations conclusory, but rather are affirmative factual statements that such treatment does not happen to whites and these incidents alone are severe enough to raise a plausible inference of a racial motivation. Alteration of his personnel file by someone in HR in

Philadelphia to indicate he was not eligible to return, a threat by Director of CNOC of physical removal from premises, and a threat by Director's assistant or staff member that he if he ever returned to the CNOC building, he would be arrested are all sufficient facts from which to draw an inference of racial animus and racial harassment. It is neither possible nor necessary to name the white employees, candidates for rehire, or other applicants, who were not treated in such fashion. It would be difficult to produce a specific comparator on these facts without targeted discovery into Amtrak's discipline files, harassment complaints, or logs of summarized precedents. Regardless, on the face of the fact allegations, it is entirely plausible to infer that such drastic adverse actions as being taken out of service for a single absence, or having a personnel file altered, or being threatened with physical removal from the premises or arrest occurred because of race. One does not need to see film footage of white protesters in Birmingham in the 1960's not being sprayed by police using water cannons or threatened by snarling police dogs to plausibly infer that the reason black protesters were assaulted in that manner had something to do with their race. Discovery will shed further light on these issues, but these factual allegations plainly suffice. If it were not so, it would be easy enough for Amtrak to offer that the company routinely falsifies white employees' personnel files, has whites escorted off the property if they ever seek a job after termination, and have them arrested for even showing up at the CNOC building. Amtrak has not done that because Amtrak does not treat white employees in that fashion.

Similarly, Plaintiff Ransford Acquaye was the victim of a false accusation of running around naked at an Amtrak workplace, which was later admitted by an Amtrak manager to have been false and was put out of service on his wedding day. Amtrak management then told him if he came to the station for any reason, or even took the train for personal reasons, he would be

arrested. In the disciplinary proceedings, management denied the existence of an audio tape, known by Plaintiff to have existed, containing an admission by an Amtrak manager that the accusation was false. Denial of exculpatory testimony is a manipulation of the discipline process, which is a feature of the collectively-bargained agreement and therefore a term and condition of employment. On their face, these facts support an inference of racial motive, as false accusations for no other reason, and a threat of arrest for perfectly lawful actions, again for no other reason, are classic examples of racial animus. Again, there is nothing conclusory about these allegations; rather, they are affirmative statements of what happened and, to be sure, the Acquaye alleges that such treatment does not happen to white employees. One does not need to name a specific white employee who was falsely accused of running around naked at the workplace, or a white employee who had exculpatory audio tape evidence hidden from him, or a white employee who was threatened with arrest for the perfectly legal act of boardings a train in order to create a plausible inference of race motivation sufficient to avoid dismissal of a black plaintiff's discrimination claim without any discovery. One would hope that such false accusations and threats are relatively rare in any event.

Amtrak argues that the claims of Plaintiff Christoper Adams are similarly defective. Amtrak asserts that Adams' 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." Mem. at 31. Plaintiffs do nothing of the sort. Adams 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. TAC ¶ 29. Adams also alleges that other black men who were laid off in the same time frame were also not called back for rehire. TAC ¶ 30. Contary to Amtrak's assertion, this is not conclusory, it is a fact allegation. Plaintiff Adams

will not be able to prove at trial that he was not recalled or rehired solely because he knows of other blacks who were laid off. At the same time, it is not necessary to plead that whites were hired or rehired. Obviously, some were, and this basic fact need not be pled as such. Such hiring or rehiring claims will depend on discovery of the actual recall and hiring data and similar information. Neither side needs to pretend that a pleading that states, or doesn't state, that white employees were hired by Amtrak over a period of year, is somehow key to the case. Plaintiffs did not ask the Court to make an illogical leap to assume that race *was* the reason, only that it is plausible to infer that race was the reason. There is nothing "automatic" about that because the discovery will show whether the claim has merit or not. Again, it is Amtrak, not the Plaintiff, who has access to the "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." Mem. at p. 32.

Ulysses Barton. Amtrak also cites the allegations of Plaintiff Ulysses Barton, who alleges that he applied for approximately 20 promotions, which he was denied and which were awarded instead to white employees who were less qualified than he was, including less time as a locomotive engineer. All Amtrak can muster is that these allegations are "conclusory," and the Court need not accept them as true because he did not provide specific position vacancies or specific names of the whites who were awarded the jobs. Mem. at p. 32. That Plaintiff Barton did not name the positions or discuss the qualifications in detail (he did note his time as a locomotive engineer) or name the white employees who received the jobs does not make the allegation conclusory. Conclusory would be an allegation that Amtrak discriminated against him in promotions. It is descriptive to state that he applied for 20 promotions, was better qualified, and whites got those jobs. Discovery of Amtrak's records, including Barton's own personnel

records, will provide those details, but they are not necessary in advance to state a claim. Indeed, Amtrak implicitly concedes, as it must, that the Court may accept those allegations as true.

Indeed, Amtrak should know that a listing of the specific positions for which Plaintiff Barton – and all other Plaintiffs in this case who were unable to list specific positions applied for in the TAC – is not required in a complaint. A Section 1981 case not only cited by Amtrak in its Memorandum, but in which Amtrak was the employer defendant, *Kargo v. National Railroad Passenger Corporation*, 243 F.Supp. 3d 6 (D.D.C. 2017), presented this exact same situation. In *Kargo*, at issue was a motion for summary judgment, and the plaintiff had pled race and national origin discrimination for 70 positions for which he had applied. "… Because the plaintiff's Complaint does not specify the specific positions to which he applied, . . . he produced during discovery a list of the various positions he is contesting in this matter." Plaintiff Barton, and all Plaintiffs in the instant case should be able to do the same.

Again, as above, whether Amtrak's few examples have merit or not (and they do not), they cannot suffice for the Court "automatically" (to use Amtrak's word) to assume that the other 131 plaintiffs on Exhibit B also should have their claims dismissed simply because Amtrak has included them on its convenient list of Plaintiffs whose TAC allegations supposedly lack enough information to draw a plausible inference or racial motivation. Amtrak's invitation to do so should be rejected out of hand. If the Court needs further reason, Plaintiff attempts to address these issues plaintiff-by-plaintiff on its table.

Race harassment and hostile work environment claims. Amtrak's argument with respect the race harassment and hostile work environment claims states that the case law pronouncements about what is required to prevail in such a case are "the aforementioned pleading standards." Mem. at p. 34. They are not; "the aforementioned standards" are what is

needed to win at trial or survive a motion for summary judgment. Amtrak cannot convert those into "pleading standards." Every single case cited by Amtrak for this proposition is a summary judgment case, not a Rule 12 case. See *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) (summary judgment); *Carter-Frost v. District of Columbia*, 305 F. Supp. 3d 60 (D.D.C. 2018) (summary judgment); *Toomer v. Mattis*, 266 F. Supp. 3d (D.D.C. 2017) (summary judgment); *Bell v. Gonzalez*, 398, F. Supp. 2d 78, 92 (D.D.C. 2005) (summary judgment); *Wade v. District of Columbia*, 780 F. Supp. 2d 1 (D.D.C. 2011) (summary judgment); *Nurriddin v. Bolden*, 674 F. Supp. 2d 64 (D.D.C. 2009) (summary judgment); *Houston v. Sectek, Inc.*, 680 F. Supp. 2d 215 (D.D.C. 2010) (summary judgment). Upon this disingenuous premise, Amtrak seeks dismissal of 115 plaintiffs' claims. Because its legal argument is fatally flawed as premised upon case law pertaining to a different stage of litigation, Amtrak's analysis can be disregarded as an unwarranted invocation to create a heightened pleading standard entirely without precedent.

In any event, Amtrak's proffered examples of deficient pleadings on this issue are bad examples indeed. Amtrak cites the allegations of Plaintiff Joseph Peden and William Waytes, respectively, that:

> 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.
> . . . .
> 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.

TAC at ¶¶1504, 2068, quoted by Amtrak's Mem. at pp. 35-36.

Amtrak's next two sentences demonstrate its misunderstanding, intentional or not:

> 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.

Amtrak's Mem. at p. 36.

Amtrak's misunderstanding is that it is citing the standard for prevailing at trial or getting past summary judgment, not to survive a motion to dismiss. Amtrak's argument, improperly premised as it is, lacks merit. Moreover, it fails to recognize that both Peden and Waytes do allege details, not a conclusion: The hostile work environment was comprised of racial epithets, slurs, derogatory comments and jokes, as well as racist graffiti; these were found in employee areas and men's restrooms where they were frequently encountered; managers were present and heard the epithets and seemed not to care and sometimes participated, and frequently laughed under their breath. Even if these claims could be better grounded as to Plaintiffs Peden and Waytes, although what is included is certainly sufficient, it would nevertheless be improper to assume that the other 113 Plaintiffs whose harassment and hostile work environment claims were insufficient.[4] Again, Amtrak leaves the hard work of examining the claims of the other 113 Plaintiffs to the Court. The Court should decline to spend its time and resources doing Amtrak's lawyers' work.

Amtrak also cites two Plaintiffs, Eric Woodruff and Jimmy Whitley, as not pleading enough facts to support a claim that the harassment was severe and pervasive. Amtrak's Mem. at pp. 36-37. Again, Amtrak incorrectly describes as pleading requirements the standard of evidence needed to prevail on the merits, citing cases that do not address pleading requirements at all. *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75 (1998) (summary judgment); *Harris v.*

[4] Plaintiffs do note in the table a number of Plaintiffs whose harassment or hostile work environment claims are to be dismissed voluntarily. In some instances, no such claims were actually raised in the TAC and these instances are noted as well.

Forklift Systems, Inc., 510 U.S. 17 (1993) (evidentiary hearing on the merits); *Dudley v. Washington Metro Area Transit Auth.*, 924 F. Supp. 2d 141 (D.D.C. 2013) (summary judgment). These cases cannot support a motion to dismiss because they do not rule upon, or even discuss, the propriety of the plaintiffs' complaints in those cases.

Again, regardless of the merits of Amtrak's motion with respect to Plaintiffs Woodruff and Whitley, there is no justification for automatically assuming that the other 113 Plaintiffs on Amtrak's Exhibit C must be dismissed as well, simply because Amtrak has deemed their allegations not to support a finding of being severe and pervasive. See, however, footnote 4.

Retaliation claims. Amtrak does actually address the retaliation claims of the five Plaintiffs who raise them.

Vernon Carter. Amtrak's only argument against Vernon Carter's harassment and retaliation complaints is that Carter did not allege that he complained the actions taken against him were due to his race. This is plainly wrong. The fulsome allegations by Vernon Carter are unmistakably grounded in race. Carter's complaints pertained to the fallout from how he was treated by a Mr. Kopecki in a training class for conductors ¶¶ 351-368, 371-381 ¶¶ 347-350. Those allegations are replete with references to differential treatment between Carter and comparable white employees. There may be a misunderstanding, however, about the retaliation aspect of Carter's allegations. In ¶371, Carter refers to retaliation against him in the form of discrimination against his wife, Kim McKay, who was refused promotions and treated harshly, and eventually, by terminating her. Plaintiffs concede that this particular allegation is not sufficiently set forth, and therefore, it is withdrawn. This withdrawal affects only ¶371.

Gary Christian. Christian does not present a retaliation claim as such. He presents several claims, but he never uses the word "retaliation." He did complain that he was not

provided tool, but he never alleges that he was retaliated against because of that complaint. It is unclear what claim Amtrak is trying to have dismissed, and none should be.

Priscilla Cathey. Amtrak asserts that Plaintiff Cathey's retaliation claim must be dismissed, first, because there are no allegations that the decision maker(s) knew of her having lodged a discrimination complaint. Amtrak cites for this proposition two cases, *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001), *and Sledge v. District of Columbia*, 63 F. Supp. 3d 1 (D.D.C. 2014). Both cases are inapposite because, once again, both are summary judgment cases, and neither addresses the pleading standard for a motion to dismiss. The Plaintiff cannot be expected to plead what the decision maker(s) knew because the Plaintiff does not have access to the information. It is the sort of fact question that will be the subject of discovery. Amtrak cites no authority for the notion that this particular fact must be pled.

Additionally, Amtrak argues that the time between the complaints and the adverse action is too long, citing several cases in which retaliation claims failed because of a time lapse of several months. See *Jones v. DC Water and Sewer Authority*, 922 F.Supp.2d 37 (D.D.C. 2013). Amtrak is wrong for several reasons. First, Cathey's complaint was not restricted to a moment in time: she was subjected to disciplinary proceedings in which she raised her complaints throughout the process, which went all the way to arbitration later. Second, Cathey raised not one but at least two complaints at different times, one to director Winkler and another to the Amtrak Dispute Resolution Office of the Business Diversity Department. TAC ¶¶391, 401. Third, the cases cited by Amtrak refer to a causal connection established by temporal proximity *alone*, with no other evidence of who knew about the complaints, or what transpired potentially to connect the complaint to the adverse employment actions. While Cathey's first complaint may have been too remote to establish causation by temporal proximity alone, the same is not

true of her complaint to DRO, and, in any event, discovery is necessary to establish who knew about the complaints, what they knew, and when they knew it. Dismissal is unwarranted; discovery is.

Kirk Collins. Similarly to Plaintiff Cathey, in Plaintiff Collins' case, the adverse employment action occurred farther in time from the protected activity than the time period discussed in *Jones*, about ten months. *Jones*, however, acknowledged that "neither the Supreme Court nor the [D.C. Circuit] has established a bright-line three-month rule," 922 F.Supp. at 42, citing *Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012), and Plaintiffs submit that, under the circumstances presented by Plaintiff Collins – where he submitted a statement in support of an black employee that Amtrak wanted to fire (co-Plaintiff here Earl Brown), and where the adverse employment action was in connection with Plaintiffs' self-admitted drug relapse, a time lapse of less than a year may be found to establish temporal causation. However, that issue can only be determined after discovery of all the facts and circumstances surrounding these events. Nevertheless, Collins does present facts that are indicative of a causal connection that does not rely on temporal proximity alone, namely, that, shortly after his statement in support of Earl Brown, Plaintiff Collins voluntarily requested to re-enter Amtrak's EAP program, and he was thereafter treated less favorably than white employees in the EAP were treated in the same circumstances, and, significantly, out-of-step with Amtrak's drug program precedents. TAC ¶¶530-35. Again, discovery, not dismissal, of this retaliation claim (as well as his discrimination claim) is warranted.

Cynthia Edwards. Amtrak argues that Plaintiff Cynthia Edwards' retaliation claim must be dismissed because she "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)." Amtrak's Mem. at 40. However, Amtrak fails to acknowledge that Charmin Edwards was not just any plaintiff in the *Campbell* case when her sister Cynthia was terminated. On May 26, 2000, Charmin Edwards had obtained an Emergency Temporary Restraining Order against Amtrak restraining Amtrak from retaliating against the Campbell plaintiffs and putative class members. See *Campbell* Doc. Nos. 51, 52, 57, 66. Although this Court ultimately did not find it necessary to enter a preliminary injunction due to certain representations that Amtrak's then-attorneys made to the Court, see *Campbell* Doc. No. 62, the matter involved a bruising battle between the parties at a still-early stage of the *Campbell* litigation. Cynthia Edwards' retaliation claim here must be viewed in that context because what happened soon thereafter was that Amtrak got a chance to terminate Campbell plaintiff Charmin Edwards' sister in 2002, and it did so, even though, as Cynthia Edwards alleges, she gave reasons to believe the loss of the money was an accident, Amtrak had alternatives other than termination, and Amtrak had meted out less punishment to white employees under similar circumstances. TAC ¶¶724-29. For these reasons, her retaliation claim should not be dismissed.

Releases

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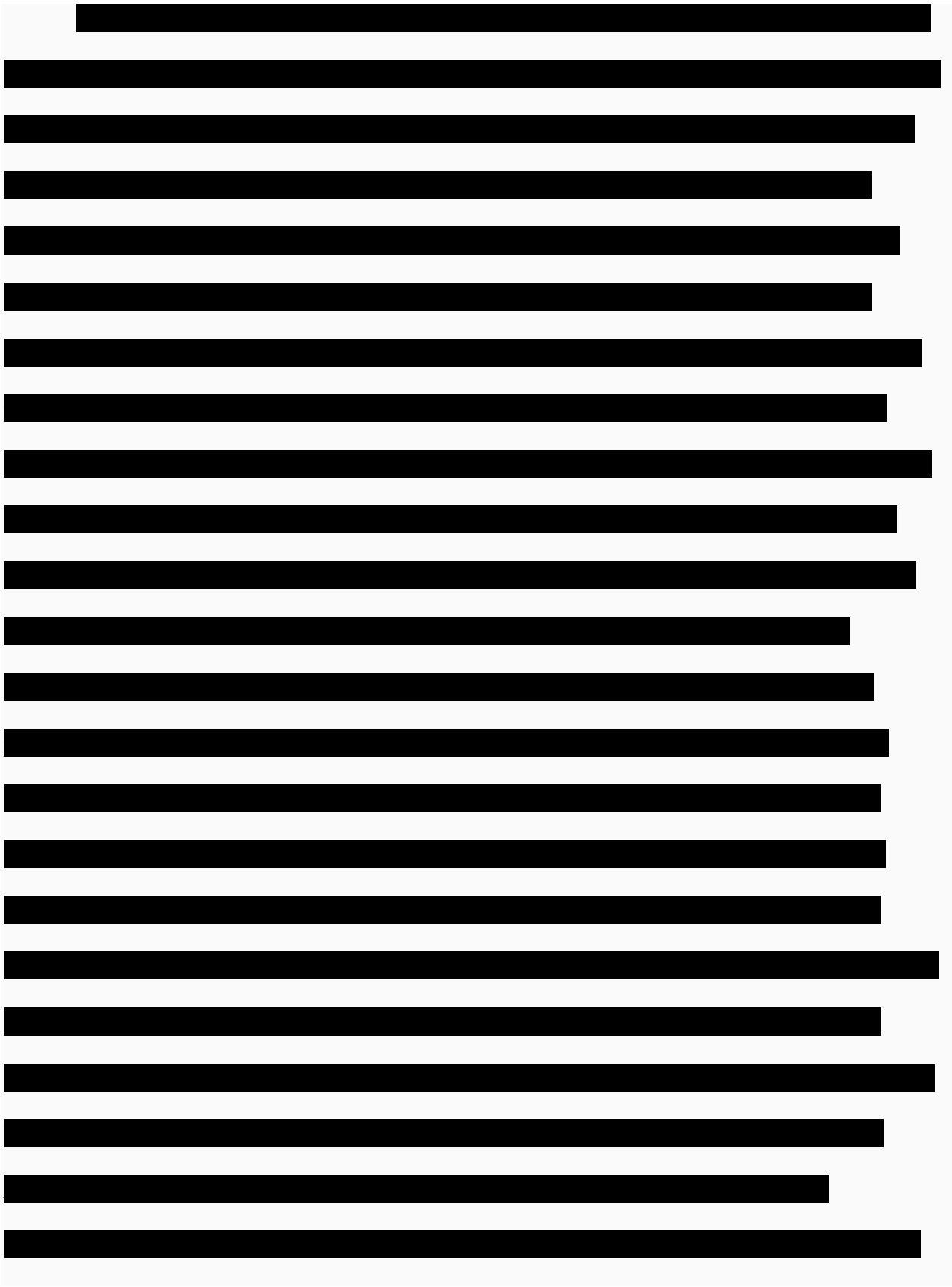

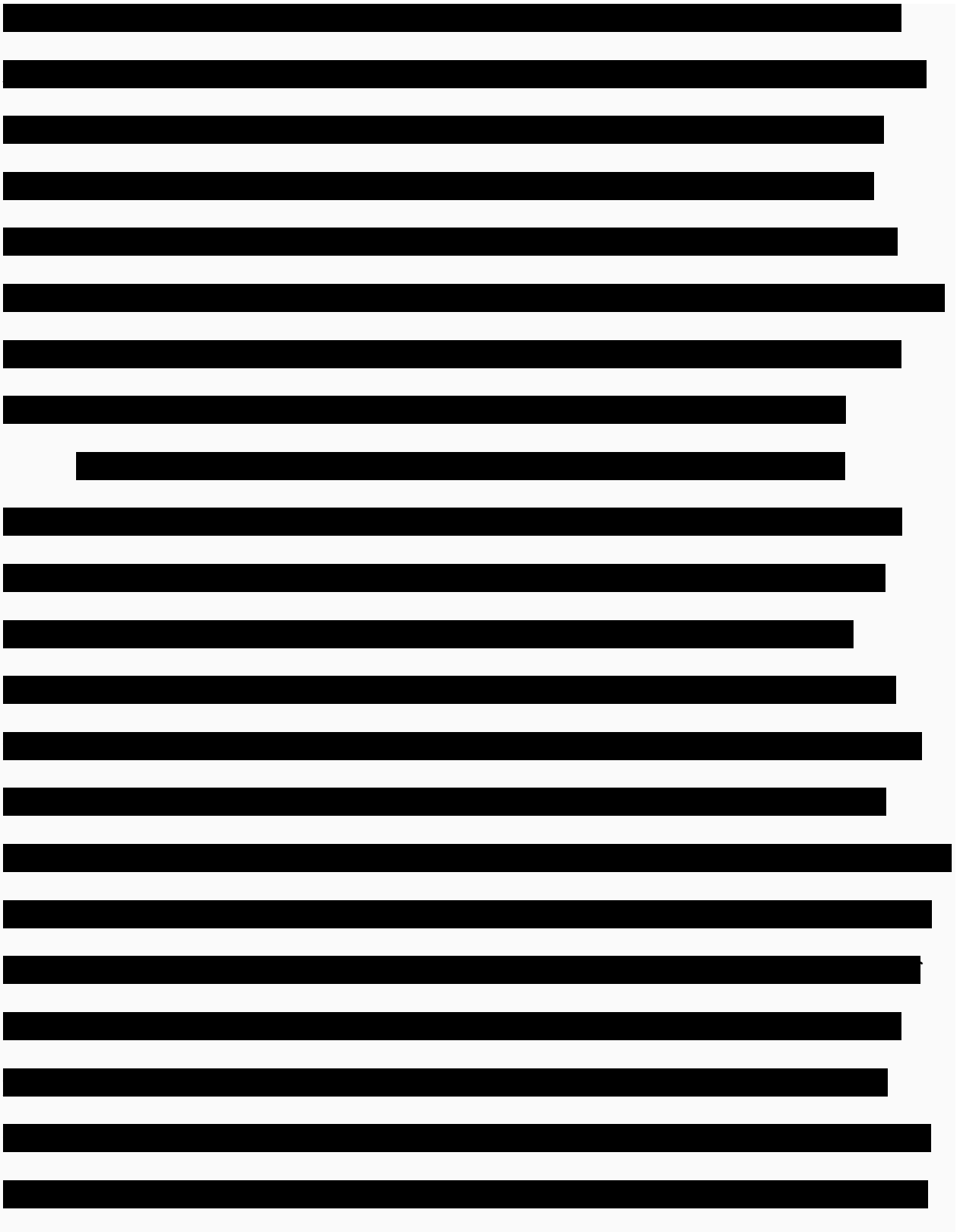

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Statute of Limitations

Amtrak also moves to dismiss based on the statute of limitations, but its motion is premature. This Court ruled in *Campbell*, 222 F.Supp.2d 8 (D.D.C. 2002) that fact issues that may affect the application of the statute of limitations, such as equitable tolling and the continuing violation doctrine, are better determined after the development of a factual record. The Court should do the same again here. See also *Campbell*, 163 F.Supp.2d 19, (D.D.C. 2001). Additionally, where the dates of pertinent events are not entirely clear in the TAC, it is incumbent upon the Defendant to move for summary judgment, if appropriate, based on evidence developed in a factual record. That is the case here not only because each and every date is not necessary to state a claim, engage in discovery, and proceed until the summary judgment stage, *e.g., Kargo, supra*, but also because statute of limitations is an affirmative

defense that must be raised by the answering party. That Amtrak has done so now is evident, however, the factual record has not been developed.[5]

To the extent Amtrak could have raised the issue effectively through the instant motion, it has not done so. Once again, Amtrak includes only an exhibit with a list of Plaintiffs and paragraph numbers, once again, "[f]or the Court's convenience…." Mem., footnote 16. Oddly, Amtrak list asserts, wrongly, that there are "Time-Barred Paragraphs" and "Paragraphs Not Time-Barred." See Amtrak's Exhibit D. Claims may be time-barred, but complaint paragraphs are not time-barred, and of course cannot be time-barred in and of themselves because statute pf limitations is an affirmative defense. Fed. R. Civ. P. 8(c)(1). As with its Exhibits B and C, Amtrak attempts to make this Court do its legal work for it by simply listing what it deems to be the "Time-Barred Paragraphs" in the TAC and leaving it to the Court to figure out why. The Court should decline and should instead deny the Motion outright.

V. CONCLUSION

For all of the reasons stated herein, the Court should deny Defendant Amtrak's Motion to Dismiss.

November 17, 2023

Respectfully Submitted,
/s/ Timothy B. Fleming

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[5] However, the Plaintiffs have dropped from the TAC numerous claims and plaintiffs that were present in the Second Amendment Complaint, some for statute of limitations reasons.