IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOSES T. BILITY, PhD, Plaintiff, v. UNIVERSITY OF PITTSBURGH, DEAN DONALD BURKE, and DEAN MAUREEN LICHTVELD, Defendants.	)	Case No. 2:23-cv-00770-MJH

DEFENDANTS' BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Although it checks in at a lengthy 29 pages, the Amended Complaint falls short of allegations sufficient to support Dr. Bility's claims of hostile work environment, race discrimination, and retaliation. Dr. Bility instead airs a laundry list of perceived workplace wrongs and complains that the scientific community does not respect his "groundbreaking research." Among other things, he alleges that former Dean Dr. Donald Burke plagiarized his ideas, that someone may have planted "listening devices" in his ceiling, that current Dean Dr. Maureen Lichtveld tried to "trick" him into breaking federal law by requesting removal of a citation, and that he is not treated as a "maverick scientist[]" like other innovators in his field.[1] Dr. Bility blames every perceived wrong on discrimination, but he does not—and he cannot truthfully—allege any facts that actually suggest any of them relate to his race.

The Court should not permit Dr. Bility to further attack the Defendants' reputations based on nothing more than conclusory allegations of discrimination. In *Gross v. R.T. Reynolds, Inc.*,

[1] Dr. Bility's theories include the idea that COVID-19 is affected by magnetic rocks and can be warded off with jade amulets. The Amended Complaint provides a link to a downloadable PDF of Dr. Bility's article (the article is attached as Exhibit 1).

the Third Circuit held that these types of allegations are insufficient and upheld the district court's dismissal of the plaintiff's discrimination claims, summarizing the allegations as follows:

> While the Amended Complaint alleges an abundance of wrongdoings by [defendant employer] and its employees, it fails to allege any facts supporting the conclusion that these acts were motivated by discrimination on the basis of race. Instead, it alleges a series of unfortunate events and then states, in conclusory fashion, that the reason for those events is that [the defendant] harbored discriminatory animus towards [the plaintiff.]

487 Fed. Appx. 711, 716 (2012). The same result should follow here. The Court should dismiss the Amended Complaint for failure to state a claim.

STANDARD OF REVIEW

A complaint may be dismissed under Rule 12(b)(6) for "failure to state a claim upon which relief may be granted." Fed.R.Civ.P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. 544, 557 (2007)).

BACKGROUND[2]

Dr. Bility began working at the University in 2015 as an Assistant Professor in the Department of Infectious Diseases and Microbiology. Am. Compl. ¶ 9. In 2019, he was scheduled to make a presentation at the Global Health Inequities and Infectious Disease Workshop on his work concerning geomagnetic fields. *Id.* ¶ 12. Dr. Burke, then Dean of the School of Public Health, asked to meet with Dr. Bility to discuss Dr. Bility's supposed "groundbreaking research"

[2] Defendants dispute many of Dr. Bility's allegations, but for purposes of the Motion to Dismiss, Defendants treat the allegations as assumed to be true.

showing that magnetic fields affect the spread of infectious disease. *Id.* ¶ 13. Dr. Bility says that at that meeting, Dr. Burke "told [him] several times that he had nothing to contribute and tried to persuade him to not present his groundbreaking research and give up pursuing the research." *Id.* ¶ 14. Dr. Bility also alleges that Dr. Burke requested that Dr. Bility's Chair, Dr. Rinaldo, pressure Dr. Bility into not making the presentation, but that Dr. Rinaldo refused to do so. *Id.* ¶ 15. Dr. Bility gave his presentation on April 12, 2019. *Id.* ¶ 17.

In October 2020, Dr. Bility published an article in *Science of the Total Environment* outlining his theory that the spread of COVID-19 would be affected by magnetic fields (Dr. Bility's "COVID-19 magnetism article"). *Id.* ¶ 20. According to Dr. Bility, publication of the article triggered a series of events: his office area was vandalized, a Johns Hopkins University professor purportedly instructed the University to retract the article, and "unnamed senior officials" at the University expressed displeasure with the COVID-19 magnetism article. *Id.* Dr. Bility also claims that students at the University called him "derogatory names" on a Zoom conference. *Id.* ¶ 20(f). Dr. Bility further claims that he received racially derogatory emails "from anonymous individuals who [he] assumes came from the Defendant Pitt community." *Id.* ¶ 20(g). Dr. Bility says he complained about these emails to an Associate Dean and University Police, but they did not investigate and told him that "he should expect such a response if he publishes controversial work." *Id.* ¶ 22. On November 2, 2020, Dr. Bility withdrew the COVID-19 magnetism article from publication. *Id.* ¶ 20.

Then, in the fall of 2020, Dr. Bility "was in the process of transferring his research lab" to the Hillman Cancer Center when the director of the research center told him that "he was instructed by an unnamed powerful individual in the Defendant Pitt Health Sciences not to allow Dr. Bility to move to the center." *Id.* ¶ 20(h). The director purportedly suggested that if Dr. Bility

"apologized for engaging in the research in question, the powerful individual . . . might reconsider the decision to block the transfer." *Id.*

On January 1, 2021, Dr. Lichtveld became the Dean of the School of Public Health. *Id.* ¶ 35. Early in 2021, Dean Lichtveld "commented [at a meeting] that she was informed that Dr. Bility did not have the approval to use fetal tissues from Advanced Bioscience Resources (ABR) in his research." *Id.* ¶ 42. Dr. Bility alleges that he then provided Dean Lichtveld with approval—but she failed to follow up with him. *Id.* Dean Lichtveld later prohibited him from obtaining fetal tissue from Advanced Bioscience Resources. *Id.* ¶ 51.

On August 27, 2021, Dean Lichtveld emailed Dr. Bility to advise that the National Institute of Health asked him to remove acknowledgments to two grants (D43 and R21) from the COVID-19 magnetism article. *Id.* ¶ 36. Dr. Bility says he was "very concerned" about the request to remove acknowledgment to one of those grants, the R21 grant, and, on September 21, 2021, he filed a complaint with the University against Dean Lichtveld for discriminating against him based on race. *Id.* ¶¶ 37-40. Dr. Bility alleges that after an inquiry by Assistant Vice Chancellor Laurel Gift, Dean Lichtveld admitted she made a mistake when she indicated the NIH had requested removal of acknowledgement of the R21 grant. She then emailed Dr. Bility to explain that the error in the email was due to a miscommunication. *Id.* ¶ 46. After conducting an eight-month inquiry into Dr. Bility's discrimination complaint against Dean Lichtveld, the University "reach[ed] the conclusion that his complaint had no merit, and a full investigation was unwarranted." *Id.* ¶ 47.

Next, Dr. Bility shifts back to Dr. Donald Burke. On November 28, 2021, Dr. Bility purportedly learned from a colleague "that Defendant Burke plagiarized his work" in an article Dr. Burke published. *Id.* ¶ 25. Dr. Bility raised a complaint of plagiarism in a letter to Vice Provost

Lu-in Wang, who submitted the complaint to Dr. Wilcox, a University Research Integrity Officer. *Id.* ¶ 26. A three-person University inquiry panel conducted an investigation and unanimously concluded that there was insufficient evidence of plagiarism to warrant a further investigation. *Id.* ¶ 29. Dr. Bility alleges that two of the panel members had a conflict of interest because they "have a close personal friendship with Defendant Burke" and the University has a "financial conflict of interest" with Dr. Burke. *Id.* ¶¶ 31-32.

Months later, Dr. Bility alleges, Dean Lichtveld was still out to get him. In April 2022, she allegedly "blocked" him from mentoring and lecturing high school students during a summer program. *Id.* ¶ 50.

Finally, beginning in April 2022, the University allegedly mishandled Dr. Bility's tenure review by not adhering to its policies. *Id.* ¶ 52. In June 2023, the University denied Dr. Bility tenure. *Id.*

Dr. Bility filed his Complaint in this Court on May 10, 2023. Dkt. 1. After Defendants explained to Dr. Bility that they planned to file a motion to dismiss the Complaint for failure to state a claim, Dr. Bility filed an Amended Complaint on July 3, 2023. Dkt. 9.

ARGUMENT

I. Dr. Bility fails to state a race discrimination claim against Drs. Burke and Lichtveld under Section 1981 or Section 1983 (Counts III and IV)

To set forth Section 1981 and Section 1983 discrimination claims against an individual, a plaintiff must allege, among other things, that the individual intentionally discriminated against the plaintiff and that the discrimination resulted in an adverse employment action against the plaintiff. *See General Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389 (1982) ("We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination."); *Ford v. Cty of Hudson*, 729 Fed. Appx. 188, 194-95 (3d Cir. 2018) (reaffirming

that Section 1981 and Section 1983 claims require an adverse employment action just as Title VII claims do); *Kimber-Anderson v. City of Newark*, 502 Fed. Appx. 210, 214 (3d Cir. 2012) ("In order to sustain an equal protection violation claim under § 1983, Appellants must show they were subject to intentional discrimination."). An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id*. (internal quotation marks and citations omitted). Further, Section 1981 claims require a plaintiff to plead that "but for race, [he] would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S.Ct. 1009, 1019 (2020).

A. *Dr. Bility fails to state a claim against Dr. Burke*

Dr. Bility alleges two recognizable bases for his Sections 1981 and 1983 discrimination claims against Dr. Burke: he says Dr. Burke (a) pressured him not to present his "groundbreaking" research; and (b) plagiarized his work.[3] Am. Compl. ¶¶ 13-15 (the research allegations); 25 (the plagiarism allegations). Even if true, these alleged actions cannot give rise to a Section 1981 or Section 1983 claim.

First, Dr. Bility's allegation that Dr. Burke discriminated against him by discouraging the presentation of his research is time-barred. The statute of limitations for Section 1981 and Section 1983 claims is at most four years. *See Bitner v. Allegheny Cnty Jail*, 2:17-cv-01675, 2018 U.S. Dist. LEXIS 157558, *10-*11 (W.D. Pa. Sept. 17, 2018) (finding that statute of limitations for § 1983 claim is two years under applicable Pennsylvania law); *Douglas v. Nesbit*, 1:16-cv-01836,

[3] Dr. Bility may seek to rely on vague and conclusory allegations that Drs. Burke and Lichtveld discriminated against him by "failing to correct Plaintiff being called the N-word," and "failed to act despite meritorious complaints that have been brought to Defendants Burke and Lichtveld by Plaintiff." Am. Compl. ¶¶ 64; 66. He cannot. There are no allegations anywhere in the Amended Complaint that Dr. Bility complained to Drs. Burke or Lichtveld about discrimination.

2017 U.S. Dist. LEXIS 37793, *12-*13 (M.D. Pa. March 16, 2017) (applying four-year statute of limitation to § 1981 claim).[4] Dr. Bility alleges that his meeting with Dr. Burke took place in February 2019 and that Dr. Bility presented the research at issue in April 2019. Am. Compl. ¶¶ 14-15; 17. Dr. Bility filed his claims against Dr. Burke on May 10, 2023, more than four years later. Dkt. 1.

Second, neither discouraging Dr. Bility from presenting his research nor allegedly plagiarizing his work is an adverse employment action. Dr. Bility does not allege that he suffered any consequences from these purported actions, let alone one that resulted in a significant change in his employment status due to any alleged conduct by Dr. Burke.

Third, Dr. Bility makes only a few conclusory allegations connecting Dr. Burke's alleged actions to race discrimination. Dr. Bility speculates that Dr. Burke is generally biased against Black people because Dr. Burke "kept a bust" of former United States Surgeon General, Dr. Thomas Parran, in the Dean's office, until a professor and "some students protested against Defendant Burke having it in his office." Am. Compl. ¶ 33. According to Dr. Bility, Dr. Parran oversaw the Tuskegee syphilis studies.[5] Dr. Bility does not allege <u>when</u> a bust of Dr. Parran

[4] As the district court in *Douglas v. Nesbit* observed, the law is not settled on whether a two-year or four-year statute of limitations applies to Section 1981 claims brought through Section 1983.

[5] Information regarding the Tuskegee study is available in the transcript of President Clinton's May 16, 1997 apology regarding the Tuskegee study, which is available at the National Archives: https://clintonwhitehouse4.archives.gov/New/Remarks/Fri/19970516-898.html. The study, which lasted between 1932 and 1972, involved Black men who had an existing syphilis infection. Though Dr. Bility alleges otherwise, historical records do not support the contention that men were intentionally infected for the purposes of the study. The study was discriminatory and unethical because the infected men were not offered established treatment and were misled into believing they were receiving adequate medical care for the infection. While not pertinent to the motion to dismiss, in his effort to paint Dr. Burke as a racist, Dr. Bility ignores well-publicized facts about the removal of Dr. Parran's association from the University once concerns about Dr. Parran's role in the Tuskegee study came to light in 2011. As widely reported, based on those concerns, Dr. Burke asked the University's Office of Diversity and Inclusion to consider whether association with Dr. Parran's name was consistent with the University's mission to create a safe and inclusive

resided in the Dean's office.[6] In any event, the bust does not create a reasonable inference that Dr. Burke ***intentionally discriminated*** against ***Dr. Bility***. *See Elmore v. Clarion Univ.*, 933 F.Supp. 1237, 1244 (M.D. Pa. 1996) ("Conclusory allegations of generalized bias do not establish discriminatory intent." (internal quotation marks and citations omitted)); *Argentina v. Gillette*, Civil Action No. 17-2908, 2018 U.S. Dist. LEXIS 14469, *6 (E.D. Pa. Jan. 30, 2018) (finding that the plaintiff's "vague references to discrimination . . . without more, are the type of unadorned accusations that cannot state a claim.").

Fourth, Dr. Bility's Section 1983 claim against Dr. Burke based on supposed plagiarism of his ideas also fails because there are no allegations that Dr. Burke plagiarized Dr. Bility under the color of state law. "It is well settled that an otherwise private tort is not committed under color of law simply because the tortfeasor is an employee of the state." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150 (3d Cir. 1995). The alleged "act must entail misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id*. (internal quotation marks omitted). Dr. Burke's authorship of the supposedly plagiarizing article did not depend on his role as Dean of the School of Public Health. In fact, as alleged in the Amended Complaint, Dr. Burke was no longer Dean when he supposedly authored the article plagiarizing Dr. Bility's work. Dr. Burke posted the article on November 24, 2021. *See* Am. Compl. ¶ 25 (citing and linking to the article); a copy of article is attached as Exhibit 2 (identifying the posted date at pg. 1). Dr. Burke retired as Dean nearly a year earlier. *See id*. ¶ 35 ("On January 1, 2021, Defendant Lichtveld became the new Dean of the School of Public Health

environment. https://www.utimes.pitt.edu/news/parran-hall-name. After a committee review, the University removed Dr. Parran's name from the School of Public Health in 2018. *Id.*

[6] Long before details of the Tuskegee syphilis study became public, Dr. Parran served as Dean of the University's School of Public Health (from 1948-1958), and the University's Public Health building was named after him (in 1969).

following the retirement of Defendant Burke."). Hence, Dr. Burke's alleged plagiarism cannot be the basis for Dr. Bility's Section 1983 claim. *See, e.g., Thomas v. Thomas*, 1:11-CV-2336, 2012 U.S. Dist. LEXIS 83320, *10 (M.D. Pa. June 15, 2012) (dismissing Section 1983 claim because the defendant's status as a state trooper did not make his alleged discriminatory conduct possible).

Fifth, Dr. Bility's Section 1981 claim also fails because he does not allege that he lost any contractual right due to his race, let alone that his race was the "but-for" cause of losing any contractual right. Moreover, Dr. Bility fails to allege that he even has a contract with the University.

B. ***Dr. Bility fails to state a claim against Dean Lichtveld***

Dr. Bility fares no better in trying to assert discrimination claims against Dean Lichtveld. According to Dr. Bility, Dean Lichtveld discriminated against him by (1) purportedly barring him from using fetal tissue from one supplier for his research (Am. Compl. ¶¶ 42; 51); (2) requesting that Dr. Bility remove an NIH grant reference from his COVID-19 magnetism article (*id.* ¶ 36); and (3) "blocking" Dr. Bility from mentoring and lecturing high school students during a summer program. None of those are a valid basis for a discrimination claim under Sections 1981 or 1983.

First, Dr. Bility alleges no adverse employment action. Dr. Bility does not allege that Dean Lichtveld barred him from using fetal tissue for his research. He only alleges that Dean Lichtveld did not permit him to obtain fetal tissue from a single supplier, Advanced Bioscience Resources ("ABR"). Am. Compl. ¶¶ 42, 51. Dr. Bility does not allege that a prohibition on obtaining fetal tissue from ABR had any impact at all on his employment or that he could not obtain fetal tissue from the University's supplier. Nor does Dr. Bility allege any adverse effects on his employment from Dean Lichtveld's request that he remove an NIH grant reference in his COVID-19 magnetism

article.[7] In fact, he alleges that Dean Lichtveld apologized for the miscommunication. Am. Compl. ¶ 46. Dr. Bility does not allege that Dean Lichtveld blocking him from mentoring and lecturing high school students changed his employment status. Dr. Bility's perceived workplace wrongs simply do not rise to the level of a deprived constitutional right. His claims against Dean Lichtveld should be dismissed for that reason alone. *See, e.g., McKinney v. Univ. of Pittsburgh*, Civil Action No. 17-1389, 2018 U.S. Dist. LEXIS 211753, *18 (W.D. Pa. Dec. 17, 2018) ("[N]ot every employee grievance serves as an adverse employment action.") (collecting cases).

Second, Dr. Bility alleges no facts that suggest Dean Lichtveld intentionally discriminated against him. He instead relies entirely on conclusory and vague allegations that Dean Lichtveld "targeted" and "harassed" him because he is Black, and that Dean Lichtveld did not "block" or "target" similarly situated non-Black individuals. Such allegations are insufficient to sustain discrimination claims. *See R.T. Reynolds, Inc.*, 487 Fed. Appx. at 719 ("[Plaintiff's] naked assertion that [defendant] did not require other similarly situated non-minority customers to secure their loans with a home mortgage does not suffice to satisfy Rule 8's pleading standard."); *Weir v. Univ. of Pittsburgh*, Civil Action 21-1206, 2022 U.S. Dist. LEXIS 147984, *22 (W.D. Pa. Aug. 18, 2022) (no facts "support or even suggest, that Defendants' alleged conduct was due to his

[7] Dr. Bility's allegation that Dean Lichtveld tried to trick him into breaking the Stevens Amendment so that he would face legal consequences is outlandish. The Stevens Amendment does not provide for any legal consequences, civil or criminal, for violating its disclosure requirements. In fact, in 2021, House Representative Ralph Norman introduced a bill (H.R. 1937) that includes a penalty for violating the Stevens Amendment. Though the bill has not advanced, the proposed penalty is only that 25% of the government funds will be withheld until compliance with the reporting requirements. https://www.congress.gov/bill/117th-congress/house-bill/1937/text?s=1&r=6. Equally outlandish is Dr. Bility's suggestion (Am. Compl. ¶ 40) that Dean Lichtveld's email was part of a larger plan to have Dr. Bility prosecuted under 18 U.S.C. § 371, which concerns conspiracy to defraud the United States. Dr. Bility posits that he could have been prosecuted if he "had proceeded to remove the NIAID acknowledgement and subsequently altered the progress reports to reconcile his actions." *Id.* Dean Lichtveld's quoted email in the Amended Complaint did not ask Dr. Bility to alter any record. *Id.*

race."); *Wright v. Providence Care Ctr., LLC*, Civil Action No. 17-747, 2017 U.S. Dist. LEXIS 201215, *19 (W.D. Pa. Dec. 7, 2017) ("[Plaintiff's] subjective belief, and bald, conclusory allegation that the alleged mistreatment was due to her race does not satisfy the *Twombly* standard."); *Fisher v. Catholic Soc. Servs.*, 18-CV-04653, 2019 U.S. Dist. LEXIS 133322, *14-*15 (E.D. Pa. Aug. 8, 2019) (bald statements about discrimination "without identifying any comparators or how they were similarly situated is exactly a threadbare recital of the elements of a cause of action that *Iqbal* repudiates." (quotation and modification marks cleaned up)); *accord Doe v. Sizewise Rentals, LLC*, 530 Fed. Appx. 171, 174 (3d Cir. 2013) (dismissal proper where "complaint is replete with details of a workplace where [the plaintiffs] felt undervalued and overworked" but "devoid . . . of factual allegations indicating that [the] defendants acted with any racially discriminatory animus").

Dr. Bility attempts to add the appearance of specificity to his allegations by referring to another researcher as "an Asian American in the same department as Dr. Bility and in a similar position regarding the use of fetal tissues in NIH funded research," who, along with "other non-Blacks in the School of Public Health [who] use fetal tissue in their NIH funded research," was not "target[ed]" or "trick[ed]" by Dean Lichtveld. Am. Compl. ¶ 38. This attempt fails because based on Dr. Bility's own allegations, he is comparing apples to oranges. Dr. Bility obtained his fetal tissue from ABR, which the University told him was prohibited. Am. Compl. ¶¶ 42; 51. He does not allege that any comparator used fetal tissue obtained from ABR, or any other prohibited supplier. Nor does Dr. Bility allege that he was prohibited from using fetal tissue from an approved supplier. Hence, Dr. Bility fails to set forth even a single comparator to whom he can point in accusing Dean Lichtveld of intentional discrimination. Dr. Bility's claims against Dean Lichtveld should be dismissed on this basis as well.

II. The Amended Complaint fails to state a hostile work environment claim against the University under Title VII (Count I)

To state a claim for hostile work environment under Title VII, a plaintiff must allege "(1) that he suffered intentional discrimination because of his race or national origin; (2) that the discrimination was severe and pervasive; (3) that the discrimination detrimentally affected him; (4) that the discrimination would detrimentally affect a reasonable person of the same race in that position; and (5) the existence of respondeat superior liability." *Sanchez v. SunGard Availability Servs. LP*, 362 Fed. Appx. 283, 286 (3d Cir. 2010). "Title VII protects a plaintiff only as to harassment based on discrimination against a protected class." *Ullrich v. United States Secy. of Veterans Affairs*, 457 Fed. Appx. 132, 140 (3d Cir. 2012). "Many may suffer severe or pervasive harassment at work, but if the reason for that harassment is one that is not proscribed by Title VII, it follows that Title VII provides no relief." *Id.* (internal quotation marks and citations omitted). Indeed, Title VII is not a "general civility code" and "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

While Dr. Bility complains about a variety of perceived work-place wrongs over several years, he links only two anonymous emails he received in November 2020 to racial discrimination. Am. Compl. ¶ 26(g). Dr. Bility does not allege that those emails were sent by any University employees or even that they were sent to him at work, though he "assumes" they "came from the Defendant Pitt community." *Id.* No allegations suggest that the University had respondeat superior liability for whoever sent the emails.[8]

[8] The Third Circuit has held that even multiple racial comments by a plaintiff's ***supervisor*** over several years are insufficiently pervasive or severe to amount to a hostile work environment. *See Sanchez*, 362 Fed. Appx. at 285 (finding no hostile work environment involving six "incidents over the course of [plaintiff's] six-year tenure at the company in which his nationality served as the basis for discriminatory comments.").

Dr. Bility complains that there was "no investigation or resolution conducted by Defendant Pitt" despite Dr. Bility's complaints about the emails. *Id.* Though a failure to take action or investigate discriminatory conduct can be evidence of a hostile work environment, that is not the case here. The emails were anonymous. Dr. Bility does not allege what the University could reasonably do to investigate or what "resolution" was possible under the circumstances. In any event, Dr. Bility does not allege that he received any racist emails or other racist communications in the subsequent two and half years. Thus, Dr. Bility cannot connect the University's alleged failure to investigate two anonymous emails to a hostile work environment.

The rest of Dr. Bility's alleged grievances have nothing to do with his race:

- In 2019, Dr. Burke allegedly discouraged Dr. Bility from presenting his "groundbreaking research" and then, in 2021, plagiarized his ideas in an article. Am. Compl. ¶¶ 13-15.
- In the fall of 2020, Dr. Bility's name tag was allegedly thrown on the floor. *Id.* ¶ 20(a).
- Someone allegedly "tampered" with Dr. Bility's ceiling. *Id.*
- In the fall of 2020, on a Zoom presentation, students allegedly called Dr. Bility, "stupid, retarded, unintelligent, etc." *Id.* ¶ 20(f).
- In December 2020, Dr. Bility was allegedly told that an unnamed "powerful individual" at the University would not allow him to transfer labs to the Hillman Cancer Center unless he apologized for his research. *Id.* ¶ 20.
- In August 2021, Dean Lichtveld asked Dr. Bility to remove an acknowledgment to an NIH funded grant from his COVID-19 magnetism article, and then apologized for a misunderstanding. *Id.* ¶ 36.
- In early 2021, Dean Lichtveld "commented" that she was told Dr. Bility did not have approval to use fetal tissue from a particular supplier. Then, in October 2021, she "blocked" Dr. Bility from using that particular supplier. *Id.* ¶¶ 42; 51.

Dr. Bility simply declares, in conclusory fashion, that each of these events occurred because of racial discrimination. *See, e.g.*, Am. Compl. ¶¶ 39 ("Similarly situated non-Black scientists engaging in groundbreaking research at Defendant Pitt Health Sciences are not treated

in similar manner."); 51 ("Defendant Pitt did not block, or target similarly positioned non-Black faculty at Defendant Pitt who perform research involving fetal tissues."). Such allegations are plainly insufficient to plead intentional discrimination. *See R.T. Reynolds, Inc.*, 487 Fed. Appx. at 716 (amended complaint "fails to allege any facts supporting the conclusion that [the alleged acts] were motivated by discrimination on the basis of race"); *Nahas v. Shore Med. Ctr.*, Civil No. 1306537, 2014 U.S. Dist. 137178, *17 (D.N.J. Sept. 29, 2014) ("Alleging wrongdoing, and alleging that the victim of the wrong is a racial minority, without more, is insufficient to plead discrimination."). Even if Dr. Bility properly alleges racial discrimination by the University—and he does not—he alleges neither severe nor pervasive discrimination. Accordingly, Dr. Bility's hostile work environment claim should be dismissed.

III. Dr. Bility fails to state a claim for retaliation against the University (Count II)

To set forth a *prima facie* retaliation claim under Section 1983, a plaintiff must allege (1) that he "engaged in a protected activity;" (2) that he "suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action." *Hanani v. N.J. Dep't of Envtl. Prot.*, 205 Fed. Appx. 71, 80 (3d Cir. 2006). Dr. Bility claims the University retaliated against him in four ways: (1) by appointing, in April 2021, Dr. Jessica Burke, Dr. Donald Burke's daughter, as interim chair of Dr. Bility's department, supposedly to "intimidate Dr. Bility" (Am. Compl. ¶ 49); (2) by allegedly "blocking" Dr. Bility from mentoring and presenting a lecture to high school students in April 2022 (*id.* ¶ 50); (3) by blocking Dr. Bility from obtaining fetal tissue from one supplier (*id*. ¶ 51); and (4) by allegedly holding up Dr. Bility's tenure review, "insisting that Dr. [Jessica] Burke serve as the author of the chair's letter of recommendation," and ultimately denying Dr. Bility tenure at the University (*id*. ¶ 52). None of these allegations establish a plausible causal connection between a protected activity and an adverse employment action.

A. *The appointment of Dr. Jessica Burke to interim chair is neither an adverse employment action nor causally connected to protected activity*

Dr. Bility does not allege that Dr. Jessica Burke took any action that in any way adversely affected him. The mere fact that Dr. Jessica Burke is Dr. Donald Burke's daughter does not somehow make her appointment an adverse employment action against Dr. Bility. *See Wright v. Providence Care Ctr., LLC*, Civil Action No. 17-747, 2017 U.S. Dist. LEXIS 201215, *20-*21 (W.D. Pa. Dec. 7, 2017) (Even assigning plaintiff to an undesirable post "absent any allegations of a change in pay or demotion in form or substances, is not sufficient for this court to reasonably infer that she has a plausible retaliation claim.").

In any event, there are no allegations linking Dr. Jessica Burke's appointment to any protected activity. In fact, she was appointed as interim chair in April 2021. Am. Compl. ¶ 49. Dr. Bility's complaints about alleged discrimination by the University came later. *Id.* ¶¶ 26 (submitted a complaint against Dr. Donald Burke on December 19, 2021); 40 (submitted a complaint against Dr. Lichtveld on September 13, 2021). The only earlier communication Dr. Bility identifies is a "confidential email to Dr. Nobel Maseru, the Associate Dean of Diversity in the School of Public Health," which he sent on February 15, 2019. *Id.* ¶ 24. In that 2019 email, Dr. Bility states his belief that Dr. Donald Burke "thought he could bully Dr. Bility because of the color of his skin." *Id.* Dr. Bility does not allege that anyone other than Dr. Maseru saw this email. In any event, the email was sent ***more than two years before*** Dr. Jessica Burke's appointment. Thus, there is no inference of retaliation. *See Mercer v. SEPTA*, 608 Fed. Appx. 60, 65 (3d Cir. 2015) (To be suggestive of a retaliatory motive, the "adverse action must occur within days, not months, of the protected activity.").

B. ***Dean Lichtveld allegedly "blocking" Dr. Bility from mentoring and lecturing high school students is neither an adverse employment action nor causally connected to protected activity***

Even if Dean Lichtveld prevented Dr. Bility from mentoring and lecturing high school students during a summer program (and she did not), it did not result in a significant change in Dr. Bility's employment status with the University. There are no allegations that the decision caused Dr. Bility to receive less pay or that it affected his employment with the University in any other way. There are no allegations that participation in the summer program had anything directly to do with Dr. Bility's employment. There are no allegations—aside from Dr. Bility's conclusory label of retaliation—that denial of the opportunity to mentor and lecture high school students in April 2022 was causally connected to any protected activity. Nor does the timing suggest a connection with Dr. Bility's complaints of racism, as the denial allegedly occurred ***one and a half years after*** he complained to the University about Drs. Donald Burke and Lichtveld. Am. Compl. ¶¶ 26 (complained in December 2021 about Dr. Burke); 40 (complained in September 2021 about Dr. Lichtveld).

C. ***Dr. Bility's allegation that he was "blocked" from using fetal tissue from one supplier is neither an adverse employment action nor causally connected to protected activity***

The University requiring Dr. Bility to obtain fetal tissue from one supplier and not another is not an adverse employment action. *See supra*, Section I(B). There are no allegations causally connecting the prohibition on using ABR to any protected activity. In fact, Dr. Bility alleges that Dean Lichtveld raised the issue about Dr. Bility's use of fetal tissue from ABR in "[e]arly 2021," long before Dr. Bility lodged discrimination complaints with the University in late 2021. Am. Compl. ¶ 42.

D. *Denial of tenure to Dr. Bility is not causally connected to protected activity*

No factual allegations suggest a causal connection between the tenure decision and Dr. Bility's protected activity. Nor is the timing of the tenure decision suggestive of retaliation. Dr. Bility alleges he complained to the University about supposed discrimination by Drs. Donald Burke and Lichtveld in September and December of 2021. Am. Compl. ¶¶ 26, 40. The University's alleged consideration of Dr. Bility's tenure application did not occur until April 2022, and the University did not render its tenure decision until June 2023. *Id*. ¶ 52. Those actions are too remote in time to suggest retaliation. *See Mercer*, 608 Fed. Appx. at 65 (The "adverse action must occur within days, not months, of the protected activity.").

IV. Dr. Bility fails to state a Section 1981 discrimination claim against the University (Count IV)

Dr. Bility asserts a Section 1981 claim against the University, apparently relying on his allegations against Drs. Donald Burke and Lichtveld. He fails to state a Section 1981 claim against the University for the same reasons he fails to do so against the individual defendants.

CONCLUSION

The federal discrimination laws are not a general civility code for litigating workplace grievances. Here, Dr. Bility alleges no facts actually linking perceived wrongs to either his race or his complaints of discrimination. His conclusory allegations do not satisfy the pleading standards, and his Amended Complaint should be dismissed.

Dated: August 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2023, a true and correct copy of the foregoing was electronically filed and served via operation of the Court's CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record entitled to notice who are registered users of ECF.

/s/ Jeremy D. Engle
Jeremy D. Engle