UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

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| JOSHUA BONADONA | CIVIL ACTION NO. 18-cv-0224 |
| VERSUS | JUDGE DRELL |
| LOUISIANA COLLEGE, ET AL | MAGISTRATE JUDGE HORNSBY |

**REPORT AND RECOMMENDATION**

**Introduction**

Joshua Bonadona ("Plaintiff") was born to a Catholic father and a Jewish mother. He was raised in the Jewish religion but converted to Christianity while attending Louisiana College ("LC") as a student and a football player. Years later, the LC head coach invited Plaintiff to apply for an assistant coach position. Plaintiff alleges that Dr. Rick Brewer, the president of LC, refused to hire him because of what Brewer called Plaintiff's "Jewish blood."

Plaintiff filed this civil action against LC and Dr. Brewer pursuant to Title VII and 42 U.S.C. § 1981. He alleges that Defendants unlawfully refused to hire him because of his race. Before the court is Defendants' Motion to Dismiss Plaintiff's Title VII claims (Doc. 13) on the grounds that (1) discriminating based on Jewish ethnic heritage is not discrimination based on race within the meaning of Title VII and (2) Dr. Brewer is not an "employer" who can be liable under Title VII. Plaintiff concedes that he does not have a Title VII claim against Dr. Brewer, but he contests the challenge to his Title VII race discrimination claim against LC. For the reasons that follow, it is recommended that the

motion to dismiss be granted in part by dismissing the Title VII claim against Dr. Brewer but denied in all other respects.

**Relevant Facts**

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Plaintiff alleges in his Amended Complaint (Doc. 5) that he was born in Baton Rouge "into a Jewish family" and "was raised both culturally and religiously as a member of the Jewish community". His mother is Jewish, "both racially and religiously." Amended Complaint, ¶ 5.

Plaintiff graduated high school in 2008, attended a state university for one year, and then transferred to LC. He earned a position on the school's football team as a kicker and on the punt block team. While attending LC, Plaintiff "converted to Christianity." ¶¶ 6-8.

While Plaintiff was playing football for LC, his family, chiefly his mother, became active supporters of the team. It was "a widely known fact" that Plaintiff's mother, Miriam, was Jewish and that Plaintiff was of Jewish heritage. Plaintiff, however, had converted to Christianity, often led the team's Christian devotional, and made it known to the team and coach that he had converted to Christianity. ¶¶ 9-11.

Plaintiff graduated from LC in 2013. The school hired him as an assistant football coach, and he worked there until June 2015, when he resigned to pursue a graduate degree and a football coaching position at Southeast Missouri State University. ¶¶ 12-14.

LC hired Justin Charles to be the new head coach of its football team in 2017. Charles reached out to Plaintiff about returning to LC as a defensive backs coach. Plaintiff

submitted an application for the job on which he identified himself as a Baptist, described his salvation experience, and stated that he understood and supported the mission statement of the college. The mission statement is several pages of statements about the scriptures, God, the church, salvation, baptism, and other religious principles. ¶¶ 15-18.

Plaintiff had an in-person interview with Coach Charles and Dr. Brewer. During the interview, Dr. Brewer asked Plaintiff about his parents' religious affiliations, to which Plaintiff replied that his father was Catholic and mother was Jewish. Plaintiff repeatedly made clear during the interview that he was a "practicing member of the Christian faith." ¶¶ 19-21.

Coach Charles made a full recommendation for LC to hire Plaintiff, and he told Plaintiff that the position "was his" and required only the formality of a final approval by Dr. Brewer. Plaintiff was the highest qualified candidate for the position, and Plaintiff was the only candidate recommended by Coach Charles. Plaintiff returned to Missouri and submitted his resignation. ¶¶ 22-25.

About a week after the interview, Coach Charles called Plaintiff and told him that "despite the recommendation to Dr. Brewer, Louisiana College had decided not to hire [Plaintiff] because of his 'Jewish descent.'" Plaintiff asked Coach Charles what that meant, and Charles "stated that Dr. Brewer refused to approve [Plaintiff's] hiring because of what Dr. Brewer called [Plaintiff's] 'Jewish blood.'" Plaintiff alleges that LC failed or refused to hire him "because of his Jewish heritage" and that the refusal was not based upon Plaintiff's religious beliefs because he is a practicing member of the Baptist faith. ¶¶ 26-30.

**Rule 12(b)(6)**

Defendants have challenged Plaintiff's Title VII claims by filing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In assessing the motion, the court must accept as true all well-pleaded facts in the complaint and view those facts in the light most favorable to the plaintiff. In re Katrina Canal Breaches Litigation, 495 F.3d 191, 205 (5th Cir. 2007). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007), quoting Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007).

**Dr. Brewer**

Title VII makes it an unlawful employment practice for "an employer" to fail or refuse to hire an individual because of the individual's race. 42 U.S.C. § 2000e-2(a). Dr. Brewer argues that he is not an "employer" within the meaning of Title VII so he cannot be liable under the Act. He is correct. "Individuals are not liable under Title VII in either their individual or official capacities." Ackel v. National Communications, Inc., 339 F.3d 376 n.1 (5th Cir. 2003), citing Smith v. Amedisys, Inc., 298 F.3d 434, 448-49 (5th Cir. 2002).

Plaintiff concedes that Dr. Brewer cannot be held liable for his Title VII claim, but he points out that he still has a claim against Dr. Brewer (and LC) pending under 42 U.S.C. § 1981. Defendants' motion did not attack the Section 1981 claims. It is recommended that all Title VII claims against Dr. Rick Brewer be dismissed for failure to state a claim

on which relief may be granted, but Dr. Brewer should remain a party because of the pendency of the Section 1981 claim against him.

**Title VII Race Discrimination Claim**

**A. Introduction**

Title VII provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII requires that an employee file an administrative charge of discrimination with the EEOC and exhaust his administrative remedies before filing suit in court. Taylor v. Books A Million, Inc., 296 F.3d 376, 379 (5th Cir. 2002).

Plaintiff filed a charge of discrimination with the EEOC. He stated in the charge his belief that he had been discriminated against "because of my race (Caucasian-Jewish), in violation of Title VII …" The charge form provided boxes to check to indicate whether discrimination was alleged to be based on race, religion, national origin, or other reason. Plaintiff checked only one box: race. He later filed this civil action, and his amended complaint alleges that his Title VII claim is based on discrimination because of his race. Doc. 5, ¶ 29. The pleading also describes the alleged discrimination as being based on Plaintiff's Jewish heritage or Jewish ancestry (¶¶ 30, 31 and 45). LC argues that Title VII's prohibition against discrimination based on race does not protect Plaintiff from such discrimination.

**B. No National Origin Claim Pleaded**

Plaintiff argues that, if his Title VII race claim is not viable, he should be allowed to assert a national origin claim because the scope of the EEOC investigation stemming from his charge would be broad enough to exhaust such a claim. See Pacheco v. Mineta, 448 F.3d 783, 792 (5th Cir. 2006). Defendants respond that the amended complaint does not identify a country of origin for Plaintiff's mother or other ancestors, and the lack of such an allegation precludes a national origin discrimination claim. Defendants cite decisions that have held that an allegation that one is "Jewish" does not state a Title VII nation origin claim because stating that one is Jewish does not indicate the country of origin for the person or his ancestors. Benjamin v. Sparks, 173 F. Supp. 3d 272, 287-88 (E.D. N.C. 2016); Larson v. Portage Township School Corp., 2006 WL 1660752, *5 (M.D. Ind. 2006); and LaPine v. Edward Marshall Boehm, Inc., 1990 WL43572, *5 (M.D. Ill. 1990).

Plaintiff has not squarely alleged in his amended complaint that he was discriminated against based on his national origin, and he has not asked to amend his complaint to plead a national origin claim. Accordingly, the focus will be on whether he has stated a Title VII claim of discrimination based on his race.

**C. Title VII and Race**

Title VII does not define the word "race." There are few reported decisions on the issue. A treatise states that one reason for the general lack of controversy is the broad language of Title VII, including not only race but also color, national origin, and religion. "Thus, there is ordinarily no particular need to worry about whether the reference to 'race' in Title VII includes Native Americans, Jews, Mexican-Americans, Eskimos, and others,

since they would in any event be covered by at least one of these terms." Lex K. Larson, Employment Discrimination, § 49.06 (2d Ed.). The unique facts of this case force the issue of whether discrimination based on Jewish heritage is discrimination based on race, given that Plaintiff's amended complaint does not invoke any of the other protected categories.

The Supreme Court has not defined race under Title VII, but it has addressed whether Jews and persons of Arab origin were protected by statutes that forbid racially discriminatory behavior. The plaintiff in St. Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987) was a professor who was born in Iraq and asserted an employment discrimination claim under 42 U.S.C. § 1981. The statute provides that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens. Although the statute did not itself use the word race, the Court had construed it in prior decisions to forbid all "racial" discrimination in the making of contracts. The defendant college argued that the Iraqi professor was a Caucasian and could not allege the kind of discrimination covered by the statute.

The Court noted that modern biologists and anthropologists criticize racial classifications as arbitrary and of little use in understanding the variability of humans. Some scientists have concluded that racial classifications are for the most part socio-political rather than biological in nature. But the Court based its interpretation of the statute on what the understanding was when Section 1981 became law in 1870. It held that Congress intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination "because of their ancestry or ethnic characteristics"

whether or not it would be classified as racial in terms of modern scientific theory. St. Francis College, 107 S.Ct. at 2028.

On the same day St. Francis College was decided, the Supreme Court issued a unanimous decision that addressed whether Jews are a racially distinct group entitled to protection under Section 1982's guarantee that all citizens have the same right as enjoyed by white citizens to purchase and hold property. An appellate court had rejected the Jewish plaintiffs' claim based on the court's notion that Jews were no longer thought to be members of a separate race so they could not make out a claim of racial discrimination. The Supreme Court again looked to the definitions of race when the statute was passed and concluded that Jews were a group of people that Congress intended to protect when it enacted Section 1982. Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987).

Those two decisions demonstrate how the Supreme Court interpreted statutes enacted in 1870, but their holdings do not apply directly to Title VII enacted in 1964. Guidance on Title VII and race/ethnicity can be found in Village of Freeport v. Barrella, 814 F.3d 594 (2d Cir. 2016), one of the few cases on the issue. Barella addressed whether Hispanics constitute a race for purposes of Title VII. The court first held that the meaning of the word "race" in Title VII was a question of law for the court. It then concluded that "discrimination based on ethnicity, including Hispanicity or lack thereof, constitutes racial discrimination under Title VII." Barrella, 814 F.3d at 607. In sum, "for purposes of Title VII, 'race' encompasses ethnicity, just as it does under § 1981." Id.

Barella noted that the Second Circuit had assumed in a prior decision that an employee could state a claim under Title VII for racial discrimination based on his status

as "white, Jewish, and/or not Hispanic." Krulik v. Board of Education, 781 F.2d 15, 21 (2d Cir. 1986). It also pointed out a similar assumption by the Supreme Court in Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2412 (2006) ("The antidiscrimination provisions seeks a workplace where individuals are not discriminated against because of their racial, *ethnic*, religious, or gender-based status.") (Emphasis added).

Title VI was enacted, along with Title VII, as part of the Civil Rights Act of 1964. It provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Students in T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332 (S.D. N.Y. 2014) alleged that they were subjected to extreme harassment because they were Jewish. The defendants "sheepishly" raised the question of whether anti-Semitic harassment was protected by the statute, noting the lack of cases on the issue.

The court noted that courts have "regularly held that anti-Semitic harassment and discrimination amount to racial discrimination." T.E. v. Pine Bush, 58 F. Supp. 3d at 354 (citing Shaare Tefila Congregation and other decisions that addressed § 1981 and § 1982). The court also observed that the Office for Civil Rights has written that "anti-Semitic harassment can trigger responsibilities under Title VI ... when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices." Id. at 355.

The complaint in T.E. v. Pine Bush alleged that the students faced discrimination on the basis of their "Jewish ancestry." The harassment alleged was rooted in the students'

actual or perceived national origin or race rather than their faith or religious practices. The court found that, "regardless of whether they assert their claims on 'national origin' or 'race,' Plaintiffs are within their rights to assert a claim under Title VI based on anti-Semitic discrimination." T.E. v. Pine Bush, 58 F. Supp. 3d at 355. This holding addresses a statute with language similar to that found in Title VII and that was enacted at the same time. The district court decision is not binding on this court, but its rationale is logical and persuasive with respect to how Title VII should be applied in this case.

Modern sociologists and anthropologists, especially with advancements in DNA studies, debate whether Judaism is a people, a religion, or both. There is no doubt, however, that many people have and continue to view being Jewish as a racial identity. "Jews have been variously perceived as black, Asian, or white, depending on the nature of the perceiver's bias." Kenneth L. Marcus, Jurisprudence of the New Anti-Semitism, 44 Wake Forest L. Rev. 371, 421 (2009). See also Zahava Moerdler, Racializing Antisemitism: The Development of Racist Antisemitism and Its Current Manifestations, 40 Fordham Int'l L.J. 1281, 1282 (2017) ("Antisemitism is not only the expression of religious discrimination, but a form of racism.").

Some eschew the term race, arguing that there are no meaningful differences between ethnic groups, but others embrace the concept that the Jewish people have a common genetic history. The question here, though, is not a scientific or socio-political one. It is a legal question of whether Title VII's prohibition of discrimination because of race affords protection to a man who is declined a job because of his Jewish heritage or "blood."

America is no stranger to anti-Semitism, which is often rooted in prejudice against a person based on his heritage/ethnicity without regard to the person's particular religious beliefs. Jewish citizens have been excluded from certain clubs or neighborhoods, and they have been denied jobs and other opportunities based on the fact that they were Jewish, with no particular concern as to a given individual's religious leanings. Thus, they have been treated like a racial or ethnic group that Title VII was designed to protect from employment discrimination based on membership in that group. The undersigned is of the opinion that Plaintiff's amended complaint alleges facts that state a claim of Title VII employment discrimination based on race.

Accordingly,

**IT IS RECOMMENDED** that Defendants' **Motion to Dismiss Plaintiff's Title VII Claims (Doc. 13)** be (1) **granted in part** by dismissing all Title VII claims against Rick Brewer (who remains a defendant due to other claims) and (2) **denied in all other respects**.

**Objections**

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 13th day of July, 2018.

Mark L. Hornsby
U.S. Magistrate Judge