No. 20-1083

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ANTHONY KELLY,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:19-cv-553-LO (HON. LIAM O'GRADY)

APPELLEE'S RESPONSE BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
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No. 20-1083 Caption: Anthony Kelly v. City of Alexandria

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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: s/Laura Metcoff Klaus Date: August 7, 2020

Counsel for: City of Alexandria

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TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF JURISDICTION 1

II. COUNTERSTATEMENT OF THE ISSUES 3

III. COUNTERSTATEMENT OF THE CASE 4

IV. SUMMARY OF ARGUMENT 7

V. ARGUMENT 8

A. Kelly's Title VII Claims are Time-Barred 8

1. Standard of Review 9

2. Equitable Tolling Does Not Rescue Kelly's Untimely Filing 9

B. Having Found Kelly's Claims Were Time-Barred, The District Court Did Not Err in Denying Kelly's Motion for Leave to Amend as Futile 15

1. Standard of Review 15

2. The District Court Did Not Abuse Its Discretion in Denying Leave to Amend Due to Futility 16

VI. CONCLUSION 24

REQUEST FOR ORAL ARGUMENT

CERTIFICATIONS

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Chiropractic v. Trigon Healthcare,
367 F.3d 212 (4th Cir. 2004) 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....15

Baldwin County Welcome Ctr. v. Brown,
466 U.S. 147 (1984).....13

Beaudett v. City of Hampton,
775 F.2d 1274 (4th Cir. 1985) 20

Beaudry Motor Co. v. Abko Properties, Inc.,
780 F.2d 751 (9th Cir. 1986) 1

Brinkman v. Nasseff Mechanical Contractors Inc.,
251 F. Supp. 3d 1266 (D. Minn. 2017).....14

Brown v. Fifth Third Bank,
730 F.3d 698 (7th Cir. 2013) 2

Cale v. City of Covington,
586 F.2d 311 (4th Cir. 1979) 23

In Re Canonico,
No. 16-34088 (Bankr. D. N.J. June 16, 2017).....11

Carey v. Throwe,
957 F.3d 468 (4th Cir. 2020) 18, 19

Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n, 781 F.2d 935 (D.C. Cir. 1986).....1

Chao v. Virginia Dep't of Transp.,
291 F.3d 276 (4th Cir. 2002) 9

Chaudhry v. Gallerizzo,
174 F.3d 394 (4th Cir. 1999) 15

City of Los Angeles v. Heller,
475 U.S. 796 (1986).....22

Cohen v. Rosenstein,
804 F.App'x 194 (4th Cir. 2020).....16

Crabill v. Charlotte Mecklenburg Bd. of Ed.,
423 Fed. App'x. 314 (4th Cir. 2011).....9

Cruz v. Maypa,
773 F.3d 138 (4th Cir. 2014).....9

Cunningham v. Comm'r, *Internal Revenue Serv.*,
No. 17-1433 (4th Cir. Jan. 18, 2018).....10

Dalembert v. Pendergrass,
376 B.R. 473 (Bankr. E.D. Pa. 2007).....11

Deabreu v. Novastar Home Mortg.,
536 Fed. App'x 373 (4th Cir. 2013).....21

Dyson v. District of Columbia,
808 F. Supp. 2d 84 (D.D.C. 2011), *aff'd*, 710 F.3d 415 (D.C. Cir. 2013).....22

E. I. du Pont de Nemours & Co. v. Kolon Indus.,
637 F.3d 435 (4th Cir. 2011).....24

Eisenberg v. Wachovia Bank, N.A.,
301 F.3d 220, 222 (4th Cir. 2002).....24

Fessenden v. Reliance Standard Life Ins. Co.,
No. 15-370 (N.D. Ind. 2016).....12

Foman v. Davis,
371 U.S. 178 (1962).....15, 17

Fuller v. Dep't of Revenue, Oregon,
No. 100933C (Tax Ct. Or. 2010).....12

Gainey v. PEC Solutions, Inc.,
418 F.3d 379 (4th Cir. 2005).....17

Gayle v. United Parcel Serv., Inc.,
401 F.3d 222 (4th Cir. 2005) 10, 12

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002).....18

HealthSouth Rehabilitation Hosp. v. Am. Nat'l Red Cross,
101 F.3d 1005 (4th Cir. 1996) 17, 18

Hensley v. Koller,
722 F.3d 177 (4th Cir. 2013) 18

Herrera v. First No. Sav. and Loan Ass'n,
805 F.2d 896 (10th Cir. 1986) 1

Huckabay v. Moore,
142 F.3d 233 (5th Cir. 1998) 19

Hughes v. Halifax County School Bd.,
823 F.2d 832 (4th Cir. 1987) 2, 3

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990).....10, 12

Johnson v. City of Shelby,
574 U.S. 10 (2014)..... 21

Johnson v. McBride,
381 F.3d 587 (7th Cir. 2004) 15

Johnson v. Oroweat Foods Co.,
785 F.2d 503 (4th Cir. 1986) 16

Kellum v. Comm'r,
295 Fed.Appx. 47 (6th Cir. 2008).....14

Kelly v. City of Alexandria, *et al.*,
No. 19-cv-985, *appeal filed*, No. 19-2377 (Nov. 29, 2019).....2, 3, 20

Kisor v. Willkie,
139 S. Ct. 2400 (2019).....15

Laber v. Harvey,
438 F.3d 404 (4th Cir. 2006) 15, 21

Lane Hollow Coal Co. v. Dir, Office of Workers' Comp. Programs,
137 F.3d 799 (4th Cir. 1998) 17

Mader v. United States,
654 F.3d 794 (8th Cir. 2011) 14

Maine v. Thiboutot,
448 U.S. 1 (1980).....22

Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.,
576 F.3d 172 (4th Cir. 2009) 17

Menominee Indian Tribe of Wisconsin v. United States,
577 U.S. __, 136 S. Ct. 750 (2016).....10

Miller v. Maryland Dep't of Nat. Res.,
No. 18-2253, 2020 WL 3127788 (4th Cir. June 12, 2020) 16

Molina v. Richardson,
578 F.2d 846 (9th Cir. 1978) 24

Moore v. Equitrans, LP.,
No. 19-1065, 2020 WL 3484067 (4th Cir. June 26, 2020) 17

Owen v. City of Independence,
589 F.2d 335 (8th Cir. 1978) 24

Perkins v. United States,
55 F.3d 910, 917 (4th Cir. 1995) 16

Perry v. Housing Auth. of Charleston,
664 F.2d 1210 (4th Cir. 1981) 22

Raplee v. United States,
842 F.3d 328 (4th Cir. 2016) 12

Rouse v. Lee,
339 F.3d 238 (4th Cir. 2003) 9, 11, 12

Rubie v. Mayor of Balt.,
No. S-01-1303, 2003 U.S. Dist. LEXIS 28250 (D. Md. Jan. 28, 2003) 23

Safar v. Tingle,
859 F.3d 241 (4th Cir. 2017) 19

Small v. Endicott,
998 F.2d 411 (7th Cir. 1993) 21

Thomas v. Shipka,
818 F.2d 496 (6th Cir. 1987) 24

Turpin v. Mailet,
591 F.2d 426 (2d Cir. 1979) 24

United Community Bank v. Harper,
489 B.R. 251 (Bankr. N.D. Ga. 2013) 11

Varner v. Illinois State Univ.,
150 F.3d 706 (7th Cir. 1998), *vacated and remanded*, 528 U.S. 1110 (2000) 19

Waybright v. Frederick County,
528 F.3d 199 (4th Cir. 2008) 22

Witasick v. Minnesota Mut. Life Ins. Co.,
802 F.3d 184 (3d Cir. 2015) 1

Constitutions:

U.S. Const., Amend. IV 19

U.S. Const., Amend. XIV 19, 24

Statutes and Rules:

Law Enforcement Officer Safety Act, 18 U.S.C. § 921 *et seq.* 18, 19

Civil Rights Act of 1991, 42 U.S.C. §§ 1981 *et seq.*
42 U.S.C. § 1981 5
42 U.S.C. § 1981a 6, 18, 19, 20
42 U.S.C. § 1981(a) 19, 22

42 U.S.C. § 1983 ..... *passim*

Civil Rights Act of 1964, Title VII
42 U.S.C. § 2000e–2(a)(1) 8
42 U.S.C. § 2000e-3(a) 8
42 U.S.C. § 2000e-5(b) 9
42 U.S.C. § 2000e-5(e)(1) 5, 9
42 U.S.C. § 2000e-5(f)(1) 5, 9

Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* 19

Federal Rules of Civil Procedure
Rule 12(b)(6) 22
Rule 58 ..... 1, 2

I. COUNTERSTATEMENT OF JURISDICTION

This case is before the Court on an appeal by Anthony Kelly from the dismissal of claims alleging race discrimination against the City of Alexandria ("the City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"). Kelly's statement of jurisdiction is complete, but the City respectfully notes its disagreement with Kelly's assertion that his January 23, 2020 appeal from the district court's July 30, 2019 decision[1] is timely.

The timeliness of Kelly's appeal depends on whether the district court's order was entered as a judgment in a separate document under Rule 58 of the Federal Rules of Civil Procedure. The City believes that the docket entry is a "document" that satisfies the content requirements of the separate order requirement, particularly in the current electronic environment. *See Witasick v. Minnesota Mut. Life Ins. Co.*, 802 F.3d 184, 188 (3d Cir. 2015)("We agree, however, with the Appellees' larger point: electronic entries made by a district court via the federal CM/ECF System can, in certain circumstances, satisfy Rule 58's requirement. This is hardly controversial.")(footnote omitted); *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 755 (9th Cir. 1986)(minute order satisfies the requirements of a separate document); *Herrera v. First No. Sav. and Loan Ass'n*, 805 F.2d 896, 898-99 (10th Cir. 1986) (appeal time begins to run from the date the order is entered on the civil docket); *Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 938-39 (D.C. Cir. 1986) (same).

Here, the docket listing entered by the Clerk's Office did more than attach the order granting the City's Motion to Dismiss for Failure to State a Claim and denying Kelly's Motion to Amend/Correct. The clerk's office set out the parameters of the order, leaving no doubt that the appeal time ran from July 30, 2019, when it stated:

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[1] Kelly mistakenly identified the date of the district court's decision as July 30, 2017. Brief for Appellant Anthony Kelly at 1.

"Plaintiff's amended complaint is dismissed with prejudice as untimely. Signed by District Judge Liam O'Grady on 7/30/2019. (awac,) (Entered: 07/30/2019)." Joint Appendix ("J.A.") 2. This entry should be deemed sufficient to satisfy Rule 58's separate document requirement. *Cf. Brown v. Fifth Third Bank*, 730 F.3d 698, 701 (7th Cir. 2013) (rejecting docket entry as a separate document because "[t]he docket entry in question in this case has no line for a signature, no signature, and not even initials, which would suffice if … the initials were those of the clerk."). It identifies the action taken, the judge who signed the order, the date the order was entered and the initials of the clerk who entered the order.

In the alternative, this Court has recognized that even if the additional statement by the clerk's office were not sufficient to constitute a separate document, the requirement can be waived. This Court has explained:

> In limited situations, such a waiver may occur. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). The Mallis Court set out three factors necessary for a waiver: (1) the district court must clearly intend that the order it issues represents the final judgment; (2) the judgment must be recorded in the clerk's docket; and (3) the parties must show that they view the order as a final judgment, by proceeding with a timely appeal.

Hughes v. Halifax County School Bd., 823 F.2d 832, 835-36 (4th Cir. 1987). Here, there is no dispute that the judge intended the order issued on July 19, 2019, to represent the final judgment. He commented that after he dismissed the Amended Complaint in this case and denied the motion for leave to file a second amended complaint, "Plaintiff did not file a motion under Fed. R. Civ. P. 59 or under Fed. R. Civ. P. 60, nor did Plaintiff appeal in *Kelly I*." *Kelly v. City of Alexandria*, *et al.*, No. 19-cv-985, Memorandum Opinion and Order (Nov. 6, 2019) at 2, *appeal filed*, No. 19-2377 (Nov. 29, 2019)("*Kelly II*"). Nor can there be any dispute that the judgment was recorded in the clerk's docket. J.A. 2. The issue here, as in *Hughes*,

is whether the parties showed that they viewed the order as a final judgment. In *Hughes*, the Court found that requirement was not satisfied because Hughes did not "proceed with a timely appeal." Admittedly, Kelly did not proceed with a timely appeal either. He instead proceeded to file a new case intended to circumvent the consequences of the court's order dismissing his first case with prejudice. But by all outward appearances, he, like the City and the judge, believed that the decision in this case was final and the time for appeal had expired. When the judge stated in *Kelly II* that no timely appeal had been filed in this case, Kelly did not disagree. *See Kelly II*, Memorandum Opinion and Order (Nov. 6, 2019) at 2. The City respectfully requests that the Court reconsider its prior denial of the motion to dismiss for these reasons.

II. COUNTERSTATEMENT OF THE ISSUES

In this case, Mr. Kelly has appealed from the district court's decision to grant the City's motion to dismiss his complaint alleging violations of Title VII's prohibition of racial discrimination. The Court also denied Kelly's motion for leave to file a second amended complaint seeking to add claims under 42 U.S.C. § 1983 against the City and naming several individual firefighters as defendants. After conducting a hearing, reviewing the allegations in the complaint, and giving Kelly's attorney ample opportunity to be heard, the Court held that the Title VII claims were untimely because they were filed more than ninety days after the issuance of the right to sue letter by the Equal Employment Opportunity Commission. The Court also found that permitting Kelly a third try to state a cause of action against the City was futile and therefore denied his motion for leave to file a second amended complaint.

Two questions are presented by this appeal:

1. Did the district court abuse its discretion when it granted the motion to dismiss Kelly's complaint to the extent its decision turns on questions of fact or, alternatively, is the district court's decision consistent with this Court's well-established precedent limiting equitable tolling of the ninety-day limitations period only to instances where a plaintiff was prevented from timely asserting a claim because of wrongful conduct by the defendant or "extraordinary circumstances" beyond the plaintiff's control, neither of which are present here.

2. Did the district court abuse its discretion when it denied Kelly's motion to amend his complaint a second time as futile when the proposed amendments did not and could not cure the fact that the claims were time-barred and failed to allege a proper statutory basis for any additional claims.

III. COUNTERSTATEMENT OF THE CASE

Kelly has been a valued member of the Alexandria Fire Department since September 28, 2002. J.A. 32: First Amended Complaint ("FAC") at ¶ 7. Since that time, he received promotions based on his performance and in August 2015, he was selected as a Battalion Chief. J.A. 32: FAC at ¶¶ 9,10. Kelly, however, believes that certain individuals in the Fire Department, superior to him in rank, discriminated against him and others by failing to include him in personnel decisions or consult with him about those decisions. He felt that his superiors not only excluded him, but also retaliated against him when he complained about those decisions. Kelly attributed their actions to racial discrimination. He embarked on a mission to have his superiors removed by sowing discontent within the Fire Department and accusing at least one of his supervisors of racism.

Ultimately, Kelly filed a charge of discrimination with the City of Alexandria Office of Human Rights on April 16, 2018. J.A. 31: FAC at ¶ 5. After the Office of Human Rights conducted an investigation and found no evidence to support his claims of discrimination, the case proceeded to the Equal Employment Opportunity Commission ("EEOC"). The EEOC likewise found no basis on which to bring

charges on Kelly's behalf against the City. On February 4, 2019, the EEOC issued a "right-to-sue" letter by emailing a copy of the letter to Kelly's lawyer. J.A. 31: FAC ¶ 6. Kelly alleges that he received that letter "on or about" February 5, 2019[.]" *Id.*

Under Title VII, after the EEOC issued the right-so-sue letter, Kelly had ninety days, *i.e.*, until May 6, 2019 (since May 5 fell on a Sunday), to file a complaint in the district court. *See* 42 U.S.C. § 2000e-5(f)(1)("within ninety days after the giving of such notice a civil action may be brought against the respondent"). The complaint here fell outside that limitations periods. Kelly did not file a complaint in the Eastern District of Virginia until May 7, 2019, alleging claims under 42 U.S.C. §§ 1981 and 1983. J.A. 4-29. In an amended complaint, filed on May 29, 2019, Kelly charged the City with race discrimination in violation of Title VII of the Civil Rights Act (Count I), retaliation in violation of Title VII (Count II), and hostile work environment in violation of Title VII (Count III). J.A. 51-54: FAC ¶¶ 103-128. The FAC eliminated any reference to violations of 42 U.S.C. § 1981 or 1983.

The City filed a motion to dismiss the complaint with prejudice because the Title VII claims were time-barred, having been filed on May 7, when the time for filing expired on May 6. The City also pointed out that the FAC failed to state a cause of action on which relief could be granted.[2]

Kelly responded that his complaint was not late at all. He argued that neither the date of the EEOC letter nor even the date he actually received the letter was

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[2] Title VII contains a second limitations period: When proceedings are filed with a State or local agency, any charge of discrimination must be filed at the EEOC within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). Kelly's complaint alleged that actions that took place in June 2016 (FAC ¶¶ 15-21, 73), October 2016 (FAC ¶ 73), March 2017 (FAC ¶¶ 30-31), and June 2017 (FAC ¶ 40) violated Title VII. J.A. 33-34, 36-37, 43. These claims fell outside that 300-day period. Most of the claims did not involve Kelly. The remaining allegations did not state a cause of action for a hostile work environment.

controlling. Rather, he believed an additional three days should be added to the time for filing a complaint, extending the filing window to May 8, 2019.

The district court held a hearing on July 26, 2019. At the hearing, Kelly's counsel confirmed that she represented him when his case was before the EEOC and that the EEOC had sent her the right-to-sue letter by email on February 4, 2019. J.A. 63: Tr. at 3. She argued that if the complaint were late, it was only two minutes late, "which could have reasonably been the result of network connectivity … Not that, you know, Murphy's Rules matters in a court of law." J.A. 64-65: Tr. 4-5. She also defended the timeliness of the allegations in Kelly's hostile work environment claim. J.A. 78: Tr. 18. The district court dismissed Kelly's hostile work environment claim without prejudice and took the question relating to the timeliness of the entire complaint under advisement. On July 29, 2019, Kelly filed a motion for leave to file a second amended complaint in an effort to salvage the timeliness of his Title VII claims, to add the individual firefighters he had mentioned in the FAC as defendants, and to assert claims under 42 U.S.C. §§ 1981a and 1983. J.A. 81-82 (motion for leave), 83-117 (proposed second amended complaint).

On July 30, 2019, the district court issued an order granting the motion to dismiss and denying Kelly's motion for leave to file a second amended complaint. J.A. 118-21. The court dismissed the first amended complaint with prejudice as untimely and found the request for leave to amend a second time futile. *Id.*

Kelly did not file an appeal from that decision. Nor did he file a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. Instead, the day the district court dismissed his complaint, Kelly filed a new complaint—reasserting the allegations in the proposed second amended complaint that the district court judge had barred him from filing under Title VII. On November 6, 2019, the district court dismissed that complaint. This time, Kelly filed an appeal within thirty days of the

district court's opinion and order—on November 29, 2019. That appeal in *Kelly II* is now fully briefed.

On January 23, 2020, however, Kelly filed the instant appeal from the district court's July 30, 2019 dismissal of his first amended complaint and denial of his motion for leave to file a second amended complaint. It is this second-filed appeal from the district court's first decision that is before the Court ("*Kelly I*").

IV. SUMMARY OF ARGUMENT

Although this case presents an appeal from the dismissal of the first lawsuit filed by Anthony Kelly against the City of Alexandria, it was filed after the disposition of virtually identical claims filed by Kelly in a second lawsuit and after Kelly appealed to this Court from the dismissal of that second case. Kelly's appeal in this case should be denied.

First, the appeal is untimely because it was filed long after the entry of the district court's order dismissing his claims and denying, with prejudice, his motion for leave to file a second amended complaint.

Second, even if his appeal were timely, the allegations in his complaint were not timely filed. Kelly's first amended complaint alleged only violations of Title VII of the Civil Rights Act of 1964, which required that he file any claim within ninety days after the EEOC gave him notice of his right to sue. Kelly, however, filed his complaint after the ninety-day period had expired. Kelly admits that much. He argues that "extraordinary circumstances" justify consideration of his tardy filing, but he had only himself to blame for the circumstances he created by literally waiting until the last minute to file his papers. The district court's decision to grant the City's motion to dismiss is amply supported. No court has held that the operation of Murphy's Law justifies extending equitable relief to excuse a late filing.

Finally, the district court did not err when it denied Kelly's motion for leave to amend his complaint a second time. To the extent he reasserted claims under Title

VII, they were time-barred. To the extent he sought to avoid the impact of his late filing by asserting the same claims as violations of 42 U.S.C. § 1983 and the Equal Protection Clause, Kelly failed to identify a proper predicate statute for asserting those claims. Having failed to identify a proper statutory basis for his claims after two tries, the Court found any further amendment was futile. Here too, Kelly does not dispute that his proposed second amended complaint was defective. He instead asks this Court to excuse his mistakes or to require the district court to provide a more expansive explanation for denying his motion to amend. This Court has not imposed an obligation of long-windedness on the lower courts, and there is no reason to do so in this case.

The district court's decision should be affirmed in all respects.

V. ARGUMENT

A. KELLY'S TITLE VII CLAIMS ARE TIME-BARRED

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin and retaliation against a person who asserts his or her rights under the statute. 42 U.S.C. § 2000e–2(a)(1), 2000e–3(a). In order to bring a Title VII action in federal court, a complainant must first file a charge with the EEOC and, if the EEOC determines there is "n[o] reasonable cause to believe that the charge is true," it dismisses the charges and notifies the complainant of his or her right to sue in court, a civil action must be filed within ninety days following "the giving of such notice." 42 U.S.C. § 2000e–5(b), (e)(1), (f)(1). Although Kelly initially denied that he filed his complaint late, on appeal, he no longer claims that his complaint was timely filed. He now takes issue only with how late it was filed (two minutes versus two days) and whether his failure to timely file should be excused by extraordinary circumstances or a decision on it should be postponed until after discovery is conducted, ignoring that

the district court conducted a hearing to evaluate whether equitable tolling was warranted. The district court committed no error here.

1. Standard of Review

Although this Court generally reviews a district court's decision to grant a motion to dismiss *de novo*, typically, a decision to reject an equitable tolling argument is reviewed for abuse of discretion when factual issues are challenged. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir. 2014) (citing cases); *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003)(*en banc*) ("where the relevant facts are undisputed and the district court denied equitable tolling as a matter of law, we review the district court's decision de novo. In all other circumstances, we review the denial of equitable tolling for an abuse of discretion."); *Chao v. Virginia Dep't of Transp.,* 291 F.3d 276, 279-80 (4th Cir. 2002)("We review the district court's ruling on equitable tolling for abuse of discretion."); *Crabill v. Charlotte Mecklenburg Bd. of Ed.*, 423 Fed. App'x. 314 (4th Cir. 2011)("In the non-habeas context, we review the district court's decision to utilize equitable tolling for an abuse of discretion."), *quoting Rouse v. Lee*, 339 F.3d at 247 n.6.

2. Equitable Tolling Does Not Rescue Kelly's Untimely Filing

The Supreme Court has articulated the framework for deciding whether an untimely suit filed against the government is subject to equitable tolling:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990). Thus equitable tolling is used only "sparingly" and only when a party establishes both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. __, 136 S. Ct. 750 (2016). *See also id.* at 756 ("Indeed, the diligence prong already covers those affairs within the litigant's control; the extraordinary circumstances prong, by contrast, is meant to cover matters outside its control."); *Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 226 (4th Cir. 2005) ("The rarity of our resort to equity does not spring from miserliness. Rather, equitable tolling 'must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.'"), *quoting Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *id.* ("To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation."); *Cunningham v. Comm'r*, *Internal Revenue Serv.*, No. 17-1433 (4th Cir. Jan. 18, 2018)(same)

The facts here do not satisfy either element of equitable tolling. The EEOC sent Kelly's attorney the right-to-sue letter that triggered the 90-day filing period. No one disputes the date of the right-to-sue letter was February 4, 2019. No one disputes that it was given to—and received by—Kelly's attorney that day (although she claims she did not open the email until February 5). And, although Kelly's attorney was not able to identify the date that Kelly actually received the letter, as a matter of law, that date is not relevant for purposes of triggering the 90-day filing period because it is well-established that service on Kelly's lawyer triggers the date for filing. *Irwin*, 498 U.S. at 92-93 ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."' … To

read the term 'receipt' to mean only 'actual receipt by the claimant' would render the practice of notification through counsel a meaningless exercise.")(citation omitted). Finally, there is no dispute that Kelly's lawyer was in fact his counsel-of-record in the EEOC proceedings. J.A. 63: Tr. at 3. So to be timely, Kelly had to file his cause of action on or before May 6, 2019. Kelly no longer disputes that his cause of action was filed late.

Kelly argues that the delay should be excused, but does not—and cannot—claim that he diligently pursued his rights. The courts that have considered similar situations have held that waiting until the eleventh hour (literally) on the last day for filing does not warrant equitable tolling. *See, e.g.*, *In Re Canonico*, No. 16-34088 (Bankr. D. N.J. June 16, 2017)(no equitable tolling where counsel waited until minutes before the deadline for filing using the court's CM/ECF system, but the complaint was not docketed until 12:02:13 a.m., the next day); *United Community Bank v. Harper*, 489 B.R. 251 (Bankr. N.D. Ga. 2013) (equitable tolling not warranted when the plaintiff waited until 11:45 pm on the night of the deadline to access the CM/ECF system, but the complaint was not uploaded until 12:02:44 am); *Dalembert v. Pendergrass*, 376 B.R. 473, 479 (Bankr. E.D. Pa. 2007) ("[m]ere attorney error does not fall within any of the legal theories" giving rise to equitable tolling).

This Court too has recognized that "[p]rinciples of equitable tolling do not extend to garden variety claims of excusable neglect." *Rouse v. Lee*, 339 F.3d at 246. The Court thus found that equitable tolling did not excuse a tardy filing that was late due to the plaintiff's medical condition, or a mistake of the plaintiff's former counsel. *Rouse*, 339 F.3d at 248-49, citing *Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir. 2003) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling")(internal quotation marks omitted). It further explained that errors

by a plaintiff's lawyer, current or former, are attributable to the plaintiff "because they were his agents, and their actions were attributable to him under standard principles of agency." *Rouse*, 339 F.3d at 249; *see also Irwin*, 498 U.S. at 92 ("Under our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.")(internal quotation marks omitted); *Gayle v. United Parcel Serv., Inc.*, 401 F.3d at 226-27 (attorney's negligent failure to observe a required procedure, even if an innocent mistake, did not constitute grounds for equitable tolling); *Raplee v. United States*, 842 F.3d 328, 334 (4th Cir. 2016)(late filing due to a law firm's inadvertent failure to handle a personnel change and review incoming mail to a departed attorney was not an extraordinary circumstance for purposes of equitable tolling). As the Court in *Gayle* stated: "Many attorney mistakes are innocent in that they involve oversights or miscalculations attributable in some part to the sheer press of business. To accept such mistakes as a ground for equitable tolling, however, would over time consign filing deadlines and limitations periods to advisory status." *Gayle*, 401 F.3d at 227.

None of the arguments proffered by Kelly on appeal provide a reason to reverse the district court's decision that Kelly's Title VII claims were time-barred and that equitable tolling did not rescue the late filing. First, Kelly contends, for the first time, that his complaint was submitted only one day—or two minutes—late rather than the two days assumed by the district court. Kelly's Brief at 34. This is a distinction without a difference. Kelly does not contend that the complaint was timely filed; the amount of time is not relevant to the analysis. "For better or worse, the law does not differentiate between a day, a week, a month, or a year — late is late." *Fuller v. Dep't of Revenue, Oregon*, No. 100933C (Tax Ct. Or. 2010). *See also Fessenden v. Reliance Standard Life Ins. Co.*, No. 15-370 (N.D. Ind. 2016)("the tolling argument is simply a dispute over whether Reliance was 30 days late or 6,

none of which appears to have much consequence in the dispute before the Court. Late is late.")

Second, Kelly argues that the unexpected delay his counsel encountered in the court's electronic payment system coupled with the lack of prejudice to the City constitutes an "extraordinary circumstance" that justifies application of equitable tolling. The argument glosses over that fact that Kelly's lawyer waited until shortly before midnight on the last day for filing, circumstances that were completely within her control. Kelly cites no support for his belief that this is a reason to permit equitable tolling and, as noted above, the authority goes the other way.

Similarly, as Kelly seems to recognize (Brief for Appellant at 35), the Supreme Court has rejected any reliance on the absence of prejudice to a defendant where, as here, a basis for applying equitable tolling has not first been established:

> Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.
>
> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U. S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984).

Third, Kelly suggests that whether his claim was time-barred is an affirmative defense and argues that the district court should have permitted discovery on the timeliness question to assure that there were no circumstances that would cause the petition to be timely. Brief for Appellant at 36. But that is precisely what the district

court did. Kelly glosses over the fact that the district court held a hearing on July 26, 2019, and inquired, in detail, about the circumstances surrounding the untimely filing of Kelly's complaint. J.A. 61-80. Kelly's counsel admitted to the district court that the late filing "*could have* reasonably been the result of network connectivity." J.A. 64: Tr. at 4 (emphasis supplied). She then stated that it was her "recollection … that it dealt with the payment of the -- what was it? The credit card for the $400 filing fee, Your Honor." J.A. 65: Tr. at 5. Kelly undertook no effort to detail the amount of the delay. The only "due diligence" his counsel undertook was after the fact, when, prior to the July 26, 2019, hearing she informed the court that she called Kelly to ask him when he received the right-to-sue letter, but he could not remember. J.A. 65-66. Tr. 5-6. The district court underscored that it was the giving of the right-to-sue letter to Kelly's counsel on February 4, 2019, that mattered; the court gave Kelly's counsel every opportunity to address the court's concerns, but she did not provide any additional clarity. *See* J.A. 78-79: Tr. 18-19.

That is not an extraordinary circumstance—as counsel herself admitted to the district court: "Not that, you know, Murphy's Rules matters in a court of law." J.A. 65: Tr. at 5. The observations of the courts of appeal support Kelly's counsel's statement. *See, e.g., Mader v. United States*, 654 F.3d 794, 814 (8th Cir. 2011)(Bye, Murphy, Melloy, Smith & Shepherd, JJ., dissenting)("It is hard to feel badly for this claimant and particularly her counsel, for 'attorneys who wait until the last day of a statute-of-limitations period to file a complaint have only themselves to blame when Murphy's Law comes knocking.' *Kellum v. Comm'r*, 295 Fed.Appx. 47, 52 (6th Cir. 2008)."); *Brinkman v. Nasseff Mechanical Contractors Inc.,* 251 F. Supp. 3d 1266, 1275 (D. Minn. 2017)(citing *Mader* in holding: "Equitable tolling is predicated on excusable neglect, … but such an assertion rings hollow when a plaintiff such as Brinkman—despite being represented by several experienced attorneys—sits on her claims without explanation and then races to court just before the filing deadline.");

Johnson v. McBride, 381 F.3d 587, 589 (7th Cir. 2004)(rejecting equitable tolling based on counsel's decision to wait until the last day of the statutory year to assert a claim, stating: "Prudent lawyers act sooner, so that Murphy's Law will not undermine a client's interests.").

Moreover, if there is a factual dispute here, Kelly's argument proves too much. It proves that the district court did not abuse its discretion in declining to find equitable tolling or in finding the facts that Kelly was trying to place in dispute did not matter to the analysis. Kelly does not contend otherwise.

The district court properly dismissed the FAC in its entirety because the Title VII claims which are the entirety of the three counts contained in the FAC were untimely. That decision should be affirmed by this court.

B. HAVING FOUND KELLY'S CLAIMS WERE TIME-BARRED, THE DISTRICT COURT DID NOT ERR IN DENYING KELLY'S MOTION FOR LEAVE TO AMEND AS FUTILE

Kelly devotes most of his opening brief to defending the detail he provided in his complaint and the plausibility of the violations he alleges in his second amended complaint.[3] What he ignores is the context of his motion. However, here, "[i]t is background that matters." *Kisor v. Willkie*, 139 S. Ct. 2400, 2410 (2019).

1. Standard of Review

It is well-established that the grant or denial of an opportunity to amend a complaint is within the discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus the court reviews the district court's denial of a motion to amend a complaint for an abuse of discretion. *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006) (*en banc*) (citing *Foman*, 371 U.S. at 182); *Chaudhry v. Gallerizzo,*

[3] Kelly asserts that the City has never disputed the factual sufficiency of his claims. Brief for Appellant at 20. That ignores that the parties must accept the facts alleged in a complaint as true for purposes of a motion to dismiss. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

174 F.3d 394, 404 (4th Cir. 1999)("'a motion to amend may be denied when it has been unduly delayed and when allowing the motion would prejudice the non-movant.' … The trial court is generally in a better position to make such a determination…. We, therefore, review the court's decision for abuse of discretion.")(citations omitted).

2. The District Court Did Not Abuse Its Discretion in Denying Leave to Amend Due to Futility

The Fourth Circuit has held, repeatedly, that futility is an appropriate ground for denying a motion for leave to amend a complaint. *See, e.g.*, *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986); *Miller v. Maryland Dep't of Nat. Res.*, No. 18-2253, 2020 WL 3127788 at *9 (4th Cir. June 12, 2020)(citing *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.2d 370, 376 (4th Cir. 2008). As this Court recently recognized:

> Although leave to amend should be "freely give[n] when justice so requires," Fed. R. Civ. P. 15(a)(2), "[a] district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile." *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2020). "A proposed amendment is futile when it is clearly insufficient or frivolous on its face," or "if the claim it presents would not survive a motion to dismiss." *Save our Sound OBX, Inc. v. N.C. Dep't of Transp.*, 914 F.3d 213, 228 (4th Cir. 2019) (internal quotation marks omitted).

Cohen v. Rosenstein, 804 F.App'x 194, 196 (4th Cir. 2020). *See also Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995)(same).

Kelly does not dispute that leave to amend may be denied when it is futile; he instead argues that the district court failed to explain the basis for its futility finding. The district court's explanation was adequate. As long as the district court states its

reason for rejecting an amended complaint, it need not articulate that reason in any detail. *See Gainey v. PEC Solutions, Inc.,* 418 F.3d 379, 391 (4th Cir. 2005); *HealthSouth Rehabilitation Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1010 (4th Cir. 1996). This is especially so when those reasons are apparent from the record. *Moore v. Equitrans, LP.*, No. 19-1065, 2020 WL 3484067, at *5 (4th Cir. June 26, 2020), citing *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 194 (4th Cir. 2009). As this Court has recognized, "[a]n adequate explanation can be a succinct one…. Brevity can foster clarity." *Lane Hollow Coal Co. v. Dir, Office of Workers' Comp. Programs*, 137 F.3d 799, 803 (4th Cir. 1998).

Kelly has decided that the brevity of the district court's reasoning means that it failed to justify its reasoning. But this Court has recognized a distinction between the two. In *Matrix Capital*, the Fourth Circuit held that:

> In denying plaintiffs leave to amend, the district court merely repeated the reasons it had previously offered for dismissing the operative complaint. The district court made no determinations about prejudice, bad faith, or futility with respect to the proposed second amended complaint. That alone may constitute an abuse of discretion.

Matrix Capital, 576 F.3d at 194 (citing *Foman*, 371 U.S. at 182). However the court went on to find that "a district court's 'failure to articulate [its] reasons [for denying leave to amend] does not amount to an abuse of discretion' so long as its reasons 'are apparent.'" *Id.* (citing *PEC Solutions*, 418 F.3d at 391). The *Matrix Capital* court found that the district court had provided sufficient reasoning; it determined that "the only reasons mentioned by the district court—those reasons the court had previously given for dismissing the operative complaint with prejudice—did not justify denying plaintiffs post-judgment leave to amend." *Id.*

In *Wells v. Liddy*, the plaintiff similarly argued "that the district court abused its discretion by not giving a reason for its decision." 37 F. App'x 53, 67 (4th Cir.

2002). The language of the district court's order was not substantial, however it referred to "correspondence from counsel" as the basis for its determination. *Id*. The Court held that "the reasons underlying the district court's denial of Wells's motion were apparent and 'as long as its reasons are apparent, a district court's failure to articulate grounds for denying a plaintiff's leave to amend does not amount to an abuse of discretion.'" *Id*. (quoting *HealthSouth Rehabilitation Hosp*., 101 F.3d at 1010.

Here, the district court found that Kelly's Title VII claims were time-barred. Kelly understood the consequences of that conclusion. He could not contest it, so he attempted an end-run by recasting the same time-barred allegations in a new complaint stating a different—and incorrect—statutory predicate, 42 U.S.C. § 1981a, in addition to Title VII. But here, too, the complaint would not have survived a motion to dismiss because the Title VII claims were time-barred and the failure to identify a proper statutory basis for his section 1983 claims is a proper reason to dismiss a complaint.

A plaintiff is required to "demonstrate[] that a statute confers an individual right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002) (a private plaintiff may not bring an action under the Family Educational Rights and Privacy Act of 1974 because that statute does not create personal rights to enforce under 42 U.S.C. § 1983). This Court has recognized that "a plaintiff cannot recover unless it can properly plead a violation of [a] statutory right." *Hensley v. Koller*, 722 F.3d 177, 182 (4th Cir. 2013). Thus, this Court recently held that a plaintiff's "claim must fail because § 1983 is not an available remedy for purported violations of LEOSA [Law Enforcement Officer Safety Act]." *Carey v. Throwe*, 957 F.3d 468, 479 (4th Cir. 2020). In *Carey*, the plaintiff identified a statute that served as the predicate for his complaint under 42 U.S.C. § 1983. The Fourth Circuit evaluated whether the

plaintiff had a section 1983 claim under that statute and concluded that the LEOSA did not confer a right of action to redress under section 1983.

The first step under the analysis of any 1983 claim "is to pinpoint the specific right that has been infringed." *Safar v. Tingle*, 859 F.3d 241, 245 (4th Cir. 2017) (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979)). The plaintiff—not the court—is required to supply that "specific right." *See, e.g., id*. (stating that plaintiffs "assert that the alleged omissions breach two constitutional guarantees: the Fourth Amendment and the Fourteenth Amendment's Due Process Clause"); *Carey*, 957 F.3d at 478 (noting that plaintiff "argues that the defendants violated his right to carry a concealed firearm under the Law Enforcement Officer Safety Act").

Here, Kelly alleged that section 1981a provided the statutory underpinning for his section 1983 claims. That proposed amendment was clearly insufficient on its face to state a cause of action. Kelly concedes as much, stating that the reference to section 1981a was a mistake; he should have identified section 1981(a). Brief for Appellant at 31, 32. That concession was necessary because section 1981a does not confer any enforceable right. It is neither a cause of action nor does it give Kelly the right to sue. Rather, it is a remedial statute that identifies what damages are available to a plaintiff for claims arising under Title VII and the Americans with Disabilities Act ("ADA"). *See Varner v. Illinois State Univ.*, 150 F.3d 706, 718 (7th Cir. 1998), *vacated and remanded*, 528 U.S. 1110 (2000); *Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998); *Reyes-Ortiz v. McConnell* Valdes, 714 F. Supp. 2d 234, 239 (D.P.R. 2010). Here, though, Kelly's proposed complaint could not obtain any remedy under Title VII because his claims were time-barred and he made no claims under the ADA.

Kelly's mistake-based theory is presented for the first time on appeal, and if not waived, it is a hollow defense.[4] This is not a case in which the plaintiff simply made a typographical error that was obvious from reading the rest of the proposed second amended complaint in its entirety. The claimant relied on section 1981a as the predicate for his section 1983 claims not just once or twice, but seventeen times. *See* J.A. 83-84, 86, 107-08, 111, 114-16: Second Amended Complaint at ¶¶ 1, 2, 14, Count II, ¶¶ 154, 157, 158, Count IV, ¶¶ 178, 179, 180, 181, 182, Count VI, ¶¶ 201, 207, Relief Section B. The attempt to amend the complaint a second time was admittedly necessary to salvage Kelly's case after the judge raised concerns about both the timing and substance of the FAC at the July 26, 2019 hearing. Given those circumstances, it was imperative that Kelly get it right.

But Kelly did not get it right. And where, as here, Kelly was represented by experienced counsel, the judge was not obligated to develop Kelly's case or figure out first if his counsel mistakenly referred to the wrong statutory provision and then to correct it. *Cf. Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)(recognizing that in cases involving *pro se* litigants, the trial court should generously construe a complaint, but even those principles have limits: "It does not require those courts to conjure up questions never squarely presented to them. District judges are not mind readers. Even in the case of pro se litigants, they cannot be expected to construct full blown claims from sentence fragments ….").

Kelly's appellate counsel brings a new theory to the court that was not fairly presented below. This Court has not

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[4] Even when Kelly filed a new cause of action rather than an appeal from the denial of his claims in this case, Kelly continued to assert that section 1981a was the predicate statute for his section 1983 claims and disavowed any mistake. *See Kelly v. City of Alexandria*, No. 19-cv-985 (E.D. Va.), Opposition to Motion to Dismiss, Dkt. 13, at 6.

> require[d] the district courts to anticipate all arguments that clever counsel may present in some appellate future. To do so would not only strain judicial resources by requiring those courts to explore exhaustively all potential claims of a pro se plaintiff, but would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party.

Id. *See also Laber v. Harvey,* 438 F.3d at 413 n.3 (liberal construction does not require the court to rewrite a complaint or to "discern the unexpressed intent of the plaintiff, but what the words in the complaint mean."). *See also Deabreu v. Novastar Home Mortg.*, 536 Fed. App'x 373, 375 (4th Cir. 2013) (per curiam) (same); *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993) (holding that a court may not re-write a plaintiff's legal theories for him).

Kelly argues that explanations are a one-way street. On the one hand, he faults the district court for failing to provide a sufficient explanation for the decision to dismiss his complaint. On the other hand, he disavows any obligation to notify the City of the statutory basis for his complaint. But Kelly himself admits that, at a minimum, a plaintiff must give defendants "fair notice of what the … claim is and the grounds upon which its rests." Brief for the Appellant at 30, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Here, although he gave the wrong notice—seventeen times in the FAC—he likens his failure to identify the correct statutory provision on which his claims rest to the failure to set out a legal theory in his complaint and, relying on *Johnson v. City of Shelby*, 574 U.S. 10 (2014), declares the mistake of no moment.

Kelly's reliance on *Johnson* is misplaced. There, police officers sued their city employer, alleging they were fired for improper reasons. The plaintiffs set forth sufficient factual allegations to state a claim, but alleged that they sought only compensatory relief for the violation of their rights and did not formally invoke section 1983 as the basis for their complaint. The district court dismissed their

claims for that reason and the Fifth Circuit affirmed, stating that invoking section 1983 was not a mere pleading formality; it triggered certain defenses, such as qualified immunity, which would otherwise be unavailable. *Johnson*, 574 U.S. at 10, 11. The Supreme Court reversed. First, it held that there was "no heightened pleading rule" that required a plaintiff to expressly invoke section 1983 to state a claim for relief. *See id.* at 11. Second, the Fifth Circuit's reference to the qualified immunity defense did not support its decision because the defense was not available since the only defendant in Johnson's case was the municipality. *See id.* at 11-12. Thus the omission was a mere formality, without any impact.

Kelly's case is nothing like *Johnson*. Unlike Johnson, Kelly expressly invoked section 1983. As noted, the defect in Kelly's proposed second amended complaint was his failure to correctly plead the statutory predicate for invoking section 1983. As both the Supreme Court and this Court have repeatedly held, a plaintiff must plead an underlying statutory or constitutional violation; a mere invocation of section 1983 is not sufficient to state a claim against a municipality. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Maine v. Thiboutot*, 448 U.S. 1, 100 (1980) (no direct cause of action under section 1983); *Waybright v. Frederick County*, 528 F.3d 199, 203 (4th Cir. 2008) (supervisors and municipalities cannot be liable under section 1983 without some predicate constitutional injury; upholding dismissal for failure to state adequate constitutional claim); *Perry v. Housing Auth. of Charleston*, 664 F.2d 1210, 1217 (4th Cir. 1981) (upholding dismissal for failure to identify statute conferring rights on plaintiff beyond invoking section 1983). *See also Dyson v. District of Columbia*, 808 F. Supp. 2d 84, 88 n.5 (D.D.C. 2011), *aff'd*, 710 F.3d 415 (D.C. Cir. 2013) (dismissing a complaint under Rule 12(b)(6), noting that the plaintiff cited section 1981a as "part and parcel" of her Title VII claims, but, having found her Title VII claims time-barred, whether she cited Section 1981a or 1981(a), there were no "claims" to

dismiss). Even if Kelly had simply neglected to formally invoke section 1983, here, unlike Johnson, Kelly proposed naming individual firefighters in his second amended complaint for whom a qualified immunity defense would be available. Thus, *Johnson* is neither binding nor particularly instructive.

Kelly failed to identify a proper statutory predicate for his claim. The district court did not err in believing that Kelly meant what he said. And, if Kelly is correct that he made a mistake, then there is no doubt he would have to return to the court seeking leave to file a third amended complaint to correct that mistake. Thus, the district court correctly dismissed Kelly's section 1983 claims for failing to identify a statutory right upon which his claims could rest.

Finally, Kelly claims that the district court erred in dismissing his Equal Protection Clause claim. Brief for Appellant at 32. That proposed count (Count VII, ¶¶ 206-208), three paragraphs in total, simply incorporated prior allegations (¶ 206), referred to section 1981a as the predicate statute for section 1983 to prohibit the denial of equal protection (¶ 207), and concluded that Kelly had been denied equal protection due to his race (¶ 208). J.A. 115. Because Kelly's Fourteenth Amendment claim explicitly relies on section 1981a, which, on its face, does not support a claim under section 1983 and confers no rights, the district court did not err in finding Kelly's attempt to plead that he was "denied equal protection" futile.

There is neither a direct nor implied cause of action under the Fourteenth Amendment against municipalities or their employees. *See Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1979) (no implied cause of action under the Fourteenth Amendment against municipalities or its employees); *Rubie v. Mayor of Balt.*, No. S-01-1303, 2003 U.S. Dist. LEXIS 28250, at *7-8 n.1 (D. Md. Jan. 28, 2003) (internal citations omitted) (dismissing a direct constitutional claim holding that "[a]lthough a plaintiff may bring a direct action for damages based on certain constitutional provisions against federal officials and agents, no such action lies

against a state, a municipality, or their agents."). *See also Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979) (*en banc*); *Thomas v. Shipka*, 818 F.2d 496, 501 (6th Cir. 1987); *Owen v. City of Independence*, 589 F.2d 335 (8th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978). Because cities and their agents cannot be sued directly for violations of the Fourteenth Amendment under Fourth Circuit precedent, Count VII had to be dismissed independent of Kelly's reliance on section 1981a. This, too, requires that the decision to deny leave to amend be affirmed. *See E. I. du Pont de Nemours & Co. v. Kolon Indus*., 637 F.3d 435, 450 (4th Cir. 2011) ("[W]e can affirm the dismissal of the complaint 'on any basis fairly supported by the record.'") (*quoting Eisenberg v. Wachovia Bank, N.A*., 301 F.3d 220, 222 (4th Cir. 2002)); *accord Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 232-33 (4th Cir. 2004).

VI. CONCLUSION

The district court did not abuse its discretion in dismissing Kelly's complaint because his Title VII claims were time-barred; that decision also is amply supported by well-established precedent confirming that equitable tolling under these circumstances is not available. Nor did the district court abuse its discretion when

it denied Kelly's motion to amend his complaint a second time as futile. The Title VII claims still were time-barred and the remaining claims failed to allege a proper statutory basis. For the reasons set forth above, the district court's decision should be affirmed in all respects.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Although the City believes that this appeal can be resolved by this Court's and the Supreme Court's precedent as well as the plain language of Title VII, Mr. Kelly has requested oral argument and the City agrees that the give-and-take of such argument may assist the Court in deciding this appeal.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 20-1083 **Caption:** Anthony Kelly v. City of Alexandria

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(s) Laura Metcoff Klaus

Party Name City of Alexandria

Dated: August 13, 2020

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Date