IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROB PENDERS,	§	
***Plaintiff*,**	§	
	§	
v.	§	**CASE NO. 1:22-CV-00178-DE**
	§	
SAINT EDWARD'S UNIVERSITY, INC.	§	
***Defendant*.**	§	

DEFENDANT ST. EDWARD'S UNIVERSITY, INC.'S,
RULE 12(B)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE DAVID EZRA:

Defendant St. Edward's University, Inc. ("SEU" or "Defendant") files this Rule 12(b)(6) Motion to Dismiss Plaintiff Rob Penders' ("Penders" or "Plaintiff") Original Complaint ("Complaint"), and in support thereof, would respectfully show the Court as follows:

I. INTRODUCTION

1. The Plaintiff in this case, Rob Penders, alleges race discrimination. His theory is as equally farfetched as it is offensive. According to Plaintiff, SEU embarked on a campaign to oust him as SEU's baseball coach for one reason alone: Penders is white. Penders' entire lawsuit hinges on the implausible and speculative theory that the term "social justice" equates to "racism against white people." It is therefore unsurprising that Penders' Complaint is completely devoid of factual allegations that could support his race discrimination claim under the applicable pleading standard. SEU did not fire Penders because he was white, but because his conduct did not conform with SEU's operating principles and values.

2. Plaintiff's Complaint fails to state a plausible claim for relief. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, SEU respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

II. LEGAL STANDARD

3. A complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's first task on a motion to dismiss is to separate the complaint's legal conclusions—which do not receive a presumption of truth—from its factual allegations. *See id*. at 678–79. Once the legal conclusions are set aside, the remaining factual allegations must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

4. If the complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In other words, where an "obvious alternative explanation" provides a more likely reason for the complained-of conduct, the plaintiff's claim does not cross the plausibility threshold. *See Twombly*, 550 U.S. at 567–69 (holding that industry norm and business incentives provided a more plausible explanation for the defendants' noncompetition than the plaintiff's allegation that the defendants conspired to engage in antitrust activity); *Iqbal*, 556 U.S. at 682.

III. ARGUMENT & AUTHORITIES

5. Plaintiff asserts two causes of action against SEU under 42 U.S.C. § 1981: (i) race discrimination, and (ii) retaliation. Specifically, Plaintiff alleges that SEU "intentionally discriminated against [him] because of his race and in retaliation for his complaint and opposition

to race discrimination . . . in violation of 42 U.S.C. § 1981 by unlawfully discharging him." Dkt. 1, ¶ 133.

6. Section 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). This statute "serves as a deterrent to employment discrimination and a means of punishing employers who discriminate on the basis of race." *Carroll v. Gen. Accident Ins. Co. of Am*., 891 F.2d 1174, 1176 (5th Cir. 1990).

7. The elements of an employment discrimination claim asserted under § 1981 are nearly identical to a discrimination claim asserted under Title VII. *See, e.g., Williams v. Waste Mgmt.,* 818 Fed. Appx. 315, 325 (5th Cir. 2020). Relevant here, the only meaningful difference is that (unlike Title VII) section 1981 "requires a showing of but-for causation." *Id.* (citing *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) ("To prevail [on a § 1981 claim], a plaintiff must ***initially plead*** and ultimately prove that, ***but for race***, it would not have suffered the loss of a legally protected right.")).[1]

8. As such, section 1981 "reaches only purposeful discrimination." *Gen. Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). A section 1981 plaintiff cannot state a claim by alleging that the defendant uses a policy that has a disparate racial impact. *See id.* at 390. Rather, the plaintiff must plead factual allegations that are "sufficient to plausibly suggest [the defendant's] discriminatory state of mind." *Aschroft v. Iqbal*, 556 U.S. 662, 683 (2009).

9. Plaintiff's lawsuit bears a striking resemblance to *Iqbal*. In both instances, the plaintiff pled that the defendant intentionally discriminated on the basis of a protected class. *Compare* Dkt. 1, ¶ 135 ("But for his race, Penders would not have [been] terminated."), *with Iqbal,*

[1] Although not relevant here, unlike a Title VII plaintiff, a § 1981 plaintiff need not exhaust her remedies as a prerequisite to filing suit. *See Scarlett v. Seaboard C.L.R. Co.,* 676 F.2d 1043, 1050 (5th Cir. 1982).

556 U.S. at 669 (alleging that defendants singled out plaintiff "solely on account of his religion, race, and/or national origin"). In both instances, the complaint could not survive dismissal for the same reason: After setting aside conclusory assertions, the factual allegations did not state a plausible claim for relief and failed to exclude an obvious, non-discriminatory purpose. *See Iqbal,* 556 U.S. at 682.

10. In *Iqbal,* the plaintiff was detained by federal authorities after the September 11 terror attacks. *See id.* at 666. He alleged that the former U.S. Attorney General and Director of the FBI violated the Constitution by discriminating against him on the basis of race, religion, and/or national origin. *See id.* The U.S. Supreme Court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.*

11. The Court's starting point was identifying the conclusory allegations in the complaint that were not accorded a presumption of truth. *See id.* at 680. It noted that legal conclusions included "[t]hreadbare recitals of the elements of [the] cause of action, supported by mere conclusory statements." *Id.* at 678. According to the Court, these included the plaintiff's contention that the defendants "'each knew of, condoned, and willfully and maliciously agreed to subject' [plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest.'" *Id.* at 680–81 (alteration omitted).

12. Having set aside the plaintiff's conclusory assertions, the Court went on to consider whether the factual allegations in the complaint asserted a plausible claim for relief. *See id.* at 681–84. It noted that a claim has facial plausibility when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly,* 550 U.S. at 556). The Court clarified that if a complaint pleads facts that are

"'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 678 (quoting *Twombly,* 550 U.S. at 557). Thus, the facts alleged by the plaintiff did not plausibly establish intentional discrimination given the "obvious alternative explanation"—that the defendants acted with nondiscriminatory intent to securely detain persons with potential connections to the September 11 terror attacks. *Id.* at 682.

13. Here, Plaintiff's Complaint fails for the same reasons as *Iqbal.* It merely recites the elements of a § 1981 cause of action by way of conclusory assertions that SEU terminated Plaintiff on the basis of his race: white. None of the factual allegations contained within plausibly show discriminatory intent. Penders' Complaint does not allege that he was subject to any racist or racially insensitive remarks, or that a similarly situated non-white employee was treated more favorably than him. In fact, Plaintiff's Complaint repeatedly references alternative explanations for his termination: Plaintiff was fired because his conduct did not conform with SEU's operating principles and values.

14. As explained in greater detail below, Plaintiff's Complaint is marred by the same defects as the complaint in *Iqbal*. It should be dismissed in kind.

A. The Conclusory Assertions in Plaintiff's Complaint Should Be Disregarded

15. Under *Iqbal,* the Court's first task is to set aside those portions of the Complaint that are not entitled to a presumption of truth: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Iqbal,* 556 U.S. at 678. Here, Plaintiff cannot survive dismissal by making the threadbare allegation that "[b]ut for his race, Penders would not have [been] terminated." Dkt. 1, ¶ 135. Indeed, these are precisely the type of conclusory assertions that the Supreme Court rejected in *Iqbal. See* 556 U.S. at 680–81.

16. Thus, Penders is not entitled to a presumption of truth for his assertion that "Penders' race was an essential but-for factor in the decision President Fuentes and St. Edward's made to fire him." Dkt. 1, ¶ 135. Nor is Penders entitled to a presumption of truth for his assertion that President Fuentes' "decision to terminate Penders' employment, which she would not have taken but for his race, was unlawful." *Id.* And as it relates to his retaliation claim, Penders is not entitled to a presumption of truth that SEU made Penders' termination effective immediately "in retaliation for his complaint and opposition to race discrimination." Dkt. 1, ¶ 133.

B. Plaintiff's Section 1981 Race Discrimination Claim Should Be Dismissed

17. To survive a motion to dismiss on a section 1981 discrimination claim, a plaintiff must plead factual allegations that are "sufficient to plausibly suggest [the defendant's] discriminatory state of mind." *Iqbal*, 556 U.S. at 683. "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). If a complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (*Twombly*, 550 U.S. at 557).

18. In *Comcast Corp. v. National Ass'n of African Am.-Owned Media,* the U.S. Supreme Court was confronted with the heightened pleading standard under a section 1981 race discrimination claim. *See* 140 S. Ct. 1009, 1019 (2020). It held:

> All the traditional tools of statutory interpretation persuade us that § 1981 follows the usual rules, not any exception. To prevail, a plaintiff must ***initially plead*** and ultimately prove that, ***but for race***, it would not have suffered the loss of a legally protected right.

Id. (emphasis added). Because the lower court failed to apply a "but-for" pleading standard, the Supreme Court remanded for further determination. *Id.*; *see also, e.g., Hoyt v. Am. Nat'l Ins. Co.,* 2021 U.S. Dist. LEXIS 125069, at *5 (N.D. Tex. July 6, 2021) (combined with the plausibility

pleading standard, a plaintiff has "the burden of initially pleading facts that, taken as true, permit the court to plausibly infer that, but for race, [he] would not have suffered the loss of a legally protected right").

i. Penders' Core Factual Allegation—that "Social Justice" Equates to "Racism Against Whites"—Stops Short of the Line Between Possibility and Plausibility of Entitlement to Relief

19. Penders' Complaint hinges on the speculative allegation that SEU President Montserrat Fuentes' ("President Fuentes") "intention was to terminate Penders because of his race and to thereby falsely perpetuate a narrative that she was taking bold action to combat White racism and achieve 'social justice.'" Dkt. 1, ¶ 124.[2] In other words, the central factual allegation advanced by Penders is that SEU President Fuentes' supposed manifestation of her commitment to social justice was terminating Penders on the basis of his white race.

20. Penders' allegation defies "judicial experience and common sense." *Iqbal,* 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"). Equating the terms "social justice" and "racism against white people" is speculative, entirely unsupported by Penders' Complaint, and counter-intuitive to common sense.

21. In fact, the opposite is true. In his Complaint, Penders alleges that President Fuentes defines "social justice" as a "commitment to diversity, equity, and inclusive excellence in all aspects of St. Edward's University[.]" Dkt. 1, ¶ 78. If President Fuentes was committed to social justice, as Penders alleges, the term "social justice" would encompass "diversity, equity, and

[2] *See also, e.g.,* Dkt. 1, ¶ 119 (alleging that Fuentes "terminated Penders' employment because of his race to advance her false narrative and bolster her self-proclaimed status as a fighter for 'social justice'"); Dkt. 1, ¶ 112 (alleging that Fuentes "made the decision to terminate Rob Penders' employment . . . to appear to be fighting for 'social justice' by firing a White employee").

inclusive excellence" as to all races, white included.[3] To that end, under the definition advanced by Penders, "social justice" means "combating racism against all races."

22. Further, none of the factual allegations in Penders' Complaint support the claim that his termination had anything to do with the color of his skin. Nor do his allegations suggest any discriminatory intent. But, under Penders' implausible theory of the case, because President Fuentes is committed to "social justice," any white employee of SEU who is terminated under President Fuentes' leadership can assert a claim for race discrimination. Once again, this allegation defies "judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

23. The only other conceivable factual allegation asserted by Penders to support his theory of racist intent is equally contrived. Penders' Complaint states: "President Fuentes' communication plan further demonstrates that she terminated Penders' employment because of his race to advance her false narrative and bolster her proclaimed status as a fighter for 'social justice.'" Dkt. 1, ¶ 119.

24. Putting aside that this allegation *again* rests on equating the terms "social justice" and "racism against white people," Penders' Complaint lacks sufficient factual allegations to support this attenuated and conclusory assertion. Penders cites to an email sent to the SEU community on December 3, 2021 regarding Penders' termination. *Id.* ¶¶ 120–23. He highlights that the email referenced the reason SEU terminated Penders—that Penders' conduct was "not in alignment with [SEU's] values." *Id.* ¶ 122. Penders goes on to allege that the two investigations into Penders's conduct concluded that the allegations of racial discrimination against him were "without merit[.]" *Id.* ¶ 123.

[3] In his Complaint, Penders mentions that Bryan Faulds replaced him as St. Edward's head baseball coach. *See* Dkt. 1, p. 31. Penders fails to mention, however, that Bryan Faulds is white. This severely undercuts Penders' equation of the terms "social justice" and "racism against white people."

25. As Plaintiff is well aware, the investigations into Penders' conduct did not "exonerate" him of all impropriety, as Penders repeats throughout his Complaint. Yet, even taking Penders' allegation as true, his factual allegations lack any nexus among his termination, his race, and any alleged discriminatory intent on the part of SEU. Simply put, Penders' Complaint is marred by a fatal logical gap. Penders' core allegation—that "social justice" equates to "racism against white people"—is not entitled to a presumption of truth, and without it, Penders' Complaint merely speculates discriminatory intent.

26. In *Simmons v. Triton Elevator, LLC,* an African-American plaintiff brought a section 1981 race discrimination claim against his former employer, contending that he was terminated because of his race. *See* 2020 U.S. Dist. LEXIS 244133, at *3 (N.D. Tex. Dec. 30, 2020). To support his claim of discriminatory intent, the plaintiff alleged other employees made racially offensive comments to him, such as referring to him as "homeboy" and "boy." *See id.* at *2. Additionally, the supervisor informed plaintiff that he had once dated an African-American woman, but had never told anyone his "secret." *See id.* On the day that the plaintiff was terminated, he alleged that he heard his supervisor refer to him as "that n!**er." *See id.*

27. The defendant moved to dismiss. *See id.* at *3. It argued that the plaintiff's section 1981 claim failed because the plaintiff had not adequately pleaded that his "race was a but-for cause of his injury." *Id.* at *6. The court agreed and dismissed the plaintiff's section 1981 discrimination claim. *See id.* at *8.

28. The court concluded that, although the plaintiff alleged "multiple racially discriminatory comments made by individuals" employed by the defendant, the plaintiff "d[id] not allege facts creating the inference that he was fired *because of* his race." *Id.* (emphasis in original). The court held: "Under these circumstances, [plaintiff's] allegations are 'not sufficient factual

matter . . . to state a claim that is plausible on its face under the but-for causation standard.'" *Id.* (quoting *Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020)).

29. Here, Penders' Complaint does not even allege that SEU employees subjected Penders to racially offensive comments. Much like the plaintiff in *Simmons*, Penders has not alleged any facts to suggest that he was terminated because of his race. At best, Penders' Complaint merely concludes that he is white and that SEU discriminated against him on that basis. The Fifth Circuit has held that such "naked allegations" are insufficient, without more, to survive dismissal on a section 1981 action. *See Body by Cook, Inc. v. State Farm Mut. Auto Ins.,* 869 F.3d 381, 386 (5th Cir. 2017) (holding that "naked allegations of discriminatory intent are too conclusory to survive a motion to dismiss"). Penders' only attempt to link his termination and his race is the speculative and unsupported allegation that "social justice" necessarily means "racism against white people." This defies common sense. Because Penders' Complaint hinges on this attenuated and unsupported allegation, it fails to allege sufficient facts to support an inference of discriminatory intent, and is therefore insufficient to state a plausible claim for relief under section 1981 and its but-for causation pleadings standard. *See Sherrod v. United Way World Wide,* 821 Fed. Appx. 311, 316 (5th Cir. 2020) (affirming motion to dismiss § 1981 race discrimination claim where complaint failed to "allege facts sufficient to support an inference of discriminatory intent"); *Body by Cook,* 869 F.3d at 387 (affirming dismissal of § 1981 race discrimination claim where "allegations [were] not specific enough to plead discriminatory intent").

ii. Plaintiff's Complaint Fails to Allege that Similarly Situated Non-White Individuals at SEU Were Treated More Favorably

30. Penders' Complaint tellingly lacks other factual allegations that could support a section 1981 race discrimination claim. In the Fifth Circuit, allegations showing that a similarly

situated individual outside of the plaintiff's protected group was treated more favorably can "create the necessary inference [of discrimination] and set the predicate for establishing a section 1981 claim." *Body by Cook,* 869 F.3d at 386 (quoting *Crosby v. Kilgore,* 9 F.3d 104 (5th Cir. 1993)); *see also Hall v. Cont'l Airlines, Inc*., 252 F. Appx. 650, 653–54 (5th Cir. 2007) (holding the plaintiff "fails to establish a prima facie case for race discrimination" because she made no showing that "similarly situated individuals outside of her protected class were treated more favorably").

31. In *Body by Cook,* the Fifth Circuit affirmed dismissal of the plaintiffs' section 1981 race discrimination claims to all but one of the defendants. *See* 869 F.3d at 386. The Fifth Circuit found that the plaintiffs made only "generalized allegations regarding Defendants' alleged disparate treatment of Body by Cook versus non-minority-owned shops. . . . They fail to identify which Defendant discriminated or specific instances where Body by Cook was refused a contract but a similarly situated non-minority owned body shop was given a contract." *Id.*

32. Here, Penders' Complaint does not even attempt to allege that non-whites at SEU were treated more favorably. Although Penders' Complaint mentions in passing that Bryan Faulds replaced him as SEU's head baseball coach, it fails to mention that Bryan Fauls is white. *See* Dkt. 1, p. 31. Penders' failure to so much as allege that non-whites were treated more favorably further underscores that his Complaint does not state a plausible claim of discriminatory intent, and that it should be dismissed.

iii. Plaintiff's Complaint Does Not Exclude an Obvious, Non-Discriminatory Reason for His Termination

33. Under the Rule 12(b)(6) inquiry, where an "obvious alternative explanation" provides a more likely reason for the complained-of conduct, the plaintiff's claim does not cross the plausibility threshold. *See Twombly*, 550 U.S. at 567–69; *Iqbal*, 556 U.S. at 682.

34. Penders' Complaint does not exclude an obvious, non-discriminatory reason for his termination. To the contrary, it recognizes one. Following the two investigations into Penders' conduct, SEU determined that Penders' "behavior [was] not in direct alignment with the operating principles, with the values, and with the position [SEU was] taking[.]" Dkt. 1, ¶ 114; *see also id.* ¶ 122 (President Fuentes: "New information and allegations have been identified regarding the head baseball coach that are not in alignment with our values").

35. None of the Complaint's miscellaneous factual allegations can render plausible Penders' theory that he was terminated because SEU allegedly manifested its commitment to social justice by discriminating against him on the basis of his white race. Just like in *Iqbal* and *Twombly*, there is an "obvious alternative explanation" that provides a more likely reason for the complained-of conduct, and Penders' claim cannot cross the plausibility threshold. *See Twombly*, 550 U.S. at 567–69; *Iqbal*, 556 U.S. at 682

C. Plaintiff's Section 1981 Retaliation Claim Should Be Dismissed

36. Although he spends little time on it in his Complaint, Penders asserts a section 1981 retaliation claim against St. Edward's. *See* Dkt. 1, ¶¶ 118, 133. Yet, much like his race discrimination claim, Penders has failed to allege sufficient facts to support this cause of action.

37. "To assert a successful [Section] 1981 retaliation claim, [a plaintiff] must show (1) that it engaged in activities protected by [Section] 1981; (2) that an adverse action followed; and (3) a causal connection between the protected activities and adverse action." *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020). Because section 1981 deals with race discrimination, to satisfy the first element, the protected activity must relate to a complaint regarding race discrimination. *See Gonzalez v. Cooper,* 2015 U.S. Dist. LEXIS 60766, at *2 (W.D. La. May 8, 2015) (explaining that, to state a claim under § 1981, a plaintiff must allege

retaliation for race-based protected activity); *cf. Payne v. Travenol Laboratories, Inc.,* 673 F.2d 798, 815 (5th Cir. 1982) ("Section 1981, of course, does not embrace sex discrimination claims").

i. Plaintiff Did Not Engage in a Section 1981 Protected Activity

38. In the portion of his Complaint pertaining to section 1981 retaliation, Penders alleges that he engaged in a protected activity by telling SEU employee Melissa Esqueda "that he considered [his] termination to be 'wrongful termination.'" Dkt. 1, ¶ 117. Penders goes on to allege that SEU "retaliated against him . . . by making his termination effective immediately." *Id.* ¶ 118.

39. The Fifth Circuit has "consistently held that a vague complaint, without any reference to an unlawful employment practice . . . does not constitute protected activity." *Davis v. Dallas Indep. Sch. Dist.,* 448 Fed. Appx. 485, 493 (5th Cir. 2011) (citing *Tratree v. BP N. Am. Pipelines, Inc*., 277 Fed. Appx. 390, 395 (5th Cir. 2008) ("Complaining about unfair treatment without specifying why the treatment is unfair . . . is not protected activity"); *Harris-Childs v. Medco Health Solutions, Inc.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (no protected activity when plaintiff never "specifically complained of racial or sexual harassment, only harassment"); *Moore v. United Parcel Serv., Inc.*, 150 Fed. Appx. 315, 319 (5th Cir. 2005) ("Moore . . . was not engaged in a protected activity, as his grievance did not oppose or protest racial discrimination or any other unlawful employment practice under Title VII.")).[4] Stated differently, "an employee cannot simply complain that she received unfair or undesirable treatment." *Carter v. Target Corp*., 541 Fed. Appx. 413, 418 (5th Cir. 2013).

40. *Badaiki v. Schlumberger Holdings Corp.* demonstrates this standard. *See* 2021 U.S. Dist. LEXIS 234427, at *16–17 (S.D. Tex. Aug. 23, 2021). In *Badaiki*, the court dismissed the

[4] "The analysis of discrimination claims under § 1981 is identical to the analysis of Title VII claims." *Body by Cook, Inc. v. State Farm Mut. Auto Ins.,* 869 F.3d 381, 386 (5th Cir. 2017) (citing *Jones v. Robinson Prop. Grp. L.P.*, 427 F.3d 987, 992 (5th Cir. 2005)).

plaintiff's section 1981 retaliation claim on the basis that the plaintiff failed to allege that he engaged in a section 1981 protected activity. *See id.* The court noted that the plaintiff's complaint "generally fail[ed] to allege what behaviors he complained about, who he complained about, or any other facts indicating he framed his complaints around race at the time." *Id.* Thus, as to his retaliation claim, the plaintiff's complaint contained "only conclusory statements that [he] complained of racial harassment," which was insufficient to survive dismissal. *See id.* at *16.

41. Here, Penders alleges that he engaged in a protected activity when he told SEU that he generally considered his termination to be "wrongful termination." Dkt. 1, ¶ 117. Critically, Penders does not allege that he told SEU that he considered his termination wrongful on the basis of racial discrimination.

42. Thus, like the plaintiff in *Badaiki*, Penders has failed to allege that he engaged in an activity protected under section 1981, and his retaliation claim should be dismissed. *See Badaiki,* 2021 U.S. Dist. LEXIS 234427, at *16–17; *see also Moore,* 150 Fed. Appx. at 319 (holding that plaintiff "was not engaged in a protected activity, as his grievance did not oppose or protest racial discrimination or any other unlawful employment practice").

ii. Plaintiff Has Failed to Adequately Plead Retaliatory Causation

43. Even assuming that Penders can satisfy the first prima facie element, he cannot satisfy the Rule 12(b)(6) standard on the third element of a section 1981 retaliation claim: "a causal connection between the protected activities and adverse action." *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020). Under this element, "a plaintiff must initially plead and ultimately prove that, ***but for race***, he would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (emphasis added).

44. Here, Penders fails to allege facts sufficient to demonstrate a causal connection between his alleged protected activity (opposing his termination at the end of the 2022 baseball season) and SEU's alleged adverse action (making Penders' termination effective immediately). *See Leal v. McHugh,* 731 F.3d 405, 417 (5th Cir. 2013). To the contrary, the Complaint alleges that SEU had ***already*** determined to terminate Penders at the end of the 2022 baseball season, which was before Penders had engaged in the allegedly protected activity (opposing his "wrongful termination").

45. This suggests that Penders' act of opposing his termination at the end of the 2022 baseball season did not cause SEU to immediately terminate Penders "but for" his white race. Penders' subjective beliefs that SEU "retaliated against him" on the basis of his race "by making his termination effective immediately"[5] is inadequate to demonstrate a causal connection. *See, e.g., Body by Cook, Inc. v. State Farm Mut. Auto Ins.,* 869 F.3d 381, 390 (5th Cir. 2017) (holding that plaintiff's "subjective belief" that he was retaliated against, without more, was insufficient to establish prima facie case of section 1981 retaliation); *Eberle v. Gonzales,* 240 Fed. Appx. 622, 629 (5th Cir. 2007) (same). As such, Penders' subjective beliefs are insufficient to survive dismissal.

IV. CONCLUSION AND PRAYER

WHEREFORE, Defendant St. Edward's University, Inc., respectfully requests that this Court grant this Rule 12(b)(6) Motion to Dismiss, and:

a. Dismiss Plaintiff Rob Penders' § 1981 race discrimination claim with prejudice;

b. Dismiss Plaintiff Rob Penders' § 1981 retaliation claim with prejudice;

c. Order that Plaintiff Rob Penders take nothing by this action; and

[5] Dkt. 1, ¶ 118.

d. Award Defendant St. Edward's University, Inc., all such other relief to which it is entitled or for which this Court may deem just and proper.

Respectfully submitted,

MCGINNIS LOCHRIDGE LLP
1111 West Sixth Street, Building B, Suite 400
Austin, Texas 78703
512.495.6000 (telephone)
512.495.6093 (telecopier)
mshaunessy@mcginnislaw.com
mkabat@mcginnislaw.com
idavis@mcginnislaw.com

By: */s/ Michael Shaunessy*
MICHAEL SHAUNESSY
State Bar No. 18134550
MICHAEL KABAT
State Bar No. 24050547
IAN DAVIS
State Bar No. 24120793

Attorneys for Defendant St. Edward's University, Inc.

CERTIFICATE OF SERVICE

I hereby certify, by my signature below that, on the 4th day of May, 2022, I electronically the foregoing document with the Clerk of the Court using the CM/ECF system and that the CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following parties:

Thomas A. Nesbitt
DESHAZO & NESBITT L.L.P.
809 West Avenue
Austin, Texas 78701
tnesbitt@dnaustin.com

Attorney for Plaintiff Rob Penders

/s/ Michael Shaunessy
MICHAEL SHAUNESSY