IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

L. DOUGLAS WILDER	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case No.: 3:25-cv-597**
	)	
MICHAEL RAO, *et al.*	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Defendants Michael Rao ("Rao") and Suzanne Milton ("Milton") (collectively "Defendants"), in both their official and individual capacities,[1] by counsel, and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and Civil Rule 7(F)(1) of the Local Rules for the Eastern District of Virginia, respectfully request that this Court dismiss the Complaint filed by Plaintiff L. Douglas Wilder ("Plaintiff").[2]

INTRODUCTION

Plaintiff's Complaint is devoid of factual allegations that support any cause of action against Defendants. In sum, Plaintiff filed this lawsuit because Virginia Commonwealth University ("VCU") conducted a confidential investigation into alleged misconduct at the Wilder School of Government and Public Affairs ("the Wilder School").[3] VCU conducted this routine

[1] Given the ambiguities with service for both Rao and Milton, Defendants opted to jointly file their Motion to Dismiss to expedite and simplify the Court's review of this case.
[2] For ease of reference, Defendants have included a summary chart as **Exhibit A,** setting forth each Count (I – IV) in the Complaint and the corresponding basis for dismissal, *e.g.*, immunity, pleading deficiencies, failure to exhaust administrative remedies, etc.
[3] VCU, a public university of the Commonwealth of Virginia, is not a named Defendant in this action. However, both Defendants are sued in their official capacities as employees of VCU, and by extension, the Commonwealth.

inquiry in compliance with all applicable university procedures and legal requirements, including Title VI and Title VII of the Civil Rights Act of 1964. Nonetheless, Plaintiff appears to think that he is entitled to unfettered access to VCU's confidential investigation materials. Consistent with its legal duties, VCU informed Plaintiff regarding the nature of the complaints against the Wilder School and gave him an opportunity to be heard. All interviews in this workplace inquiry were conducted by an outside law firm, Husch Blackwell, hired by VCU to perform the investigation. The investigation was done "by the book," so to speak, without exception.

Due to VCU's refusal to grant Plaintiff unrestricted access to an ongoing workplace investigation, Plaintiff now claims that two specific Defendants, Rao and Milton (rather than VCU itself) violated his civil rights, defamed him, and retaliated against Plaintiff. But this righteous indignation cannot save the deficiencies on the face of the Complaint. This case cannot proceed as filed and must be dismissed.

As an initial proposition, both Defendants, in their official capacities, are protected from suit under 42 U.S.C. § 1983 (Counts I and II) by the doctrine of sovereign immunity. Both Defendants have qualified immunity from suit in their personal capacities because Plaintiff does not enjoy a "clearly established right" to be exempt from participating in workplace misconduct investigations, despite his claims to the contrary.

Assuming, arguendo, that Defendants were not immune from suit, however, there are no facts alleged supporting any of Plaintiff's claims. He has not alleged any facts related to:

- Any protected speech or public criticism in which he engaged;
- The alleged defamatory comments by Rao;
- Any protected activity by which he opposed unlawful conduct under Title VI or VII; or

- Any adverse employment action he suffered.

Furthermore, Plaintiff has not identified any liberty or property interest he has been deprived of by virtue of Defendants investigating workplace complaints at the Wilder School. Last but not least, Plaintiff has not filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging Title VII retaliation, nor has he received a right to sue letter from the Commission. Thus, he has failed to exhaust his administrative remedies as they pertain to his claims under Title VII.

Taken individually and collectively, all of these deficiencies are fatal to the Complaint.[4] As such, the Court should grant Defendants' Motion to Dismiss.

MATERIAL ALLEGATIONS IN THE COMPLAINT[5]

Plaintiff is a professor at VCU's Wilder School. Compl. at 2:1-3.[6] In June, Milton requested that Plaintiff participate in an interview with a law firm contracted by VCU to conduct an investigation into claims of a hostile workplace at the Wilder School. Compl. at 2:16-23; Pl. Decl. ¶ 4. Rather than comply, Plaintiff assumed the claims had been levied against him and demanded to know the specific complaint and the names of the complainants. Compl. at 2:23-25. As per VCU policy, Milton maintained the confidentiality of the complainants. Compl. at 2:26. Defendant Milton did, however, disclose that the investigation was into:

- The existence of a threatening environment at Wilder School;
- The conduct of one of the Wilder School's Deans;

[4] Plaintiff failed to comply with Fed. R. Civ. P. 11(a) and provide all the required information upon signing the Complaint.

[5] Defendants recite the allegations set forth in the Complaint only for purposes of this Motion to Dismiss and do not admit their truth.

[6] Plaintiff's Complaint is not compliant with Fed. R. Civ. P. 10(b) because it fails to set forth Plaintiff's claims in numbered paragraphs. As a result, Defendants will refer to the allegations by the page and line number(s) used in Plaintiff's noncompliant template.

- Threats levied by Plaintiff against his colleagues;
- A misuse of school property by Plaintiff; and
- Improper involvement in personnel decisions by Plaintiff.

Pl.'s Decl. ¶ 7. Despite this detailed summary of the allegations, Plaintiff refused to cooperate, demanding copies of the complaint(s) and all facts that VCU had supporting these allegations. Pl.'s Decl. ¶ 10. Milton informed Plaintiff that there was no formal, written complaint. Pl.'s Decl. ¶ 13. Plaintiff finally agreed to an interview with the lawyers conducting the investigation. Pl.'s Decl. ¶ 15. No action was taken against Plaintiff as a result of this interview or investigation. Pl.'s Decl. ¶¶ 16-17.

Plaintiff also alleges that Defendant Rao made statements that "malign [Wilder's] character." Pl.'s Decl. at 18. The sum and substance of the alleged statements are entirely absent from the Complaint. Plaintiff further alleges, without any specifics, that Rao instructed individuals to not engage with Plaintiff. Pl.'s Decl. ¶ 19.

Plaintiff filed the present suit alleging First Amendment retaliation (Count I), denial of procedural due process (Count II), defamation and defamation *per se* (Count III), and retaliation under Title VI and VII of the Civil Rights Act of 1964 (Count IV). Compl. at 3-4.

STANDARD OF REVIEW

Defendants seek dismissal of Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) – lack of subject matter jurisdiction, and 12(b)(6) – failure to state a claim.

Motion Under Rule (12)(b)(1):

Defendants' motion to dismiss based on sovereign immunity challenges the Court's subject matter jurisdiction and is brought pursuant to Rule 12(b)(1). *See, e.g., Sigma Lambda Upsilon/Señoritas Latinas Unidas Sorority v. Rector & Visitors of the Univ. of Va.,* 503 F. Supp.

3d 433, 441 (W.D. Va. 2020) (sovereign immunity challenges subject matter jurisdiction) (citing *Cunningham v. Gen. Dynamics Info. Tech., Inc*., 888 F.3d 640, 649 (4th Cir. 2018)); *Lunsford v. Wythe Cty. Sheriff*, 2019 WL 691787, at *1 (W.D. Va. Feb. 19, 2019) ("A finding of sovereign immunity precludes federal courts from exercising subject matter jurisdiction.") (citing *Hendy v. Bello*, 555 Fed. Appx. 224, 226 (4th Cir. 2014)); *Virginia ex rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) ("[f]ederal courts have no jurisdiction to decide moot cases").

A 12(b)(1) motion may assert a facial challenge or a factual challenge. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). A facial challenge accepts the allegations in the complaint as true, and based on those allegations, asserts a lack of subject matter jurisdiction. *Id.* at 193. A factual challenge relies on declarations or other evidence to establish the lack of subject matter jurisdiction. *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). Here, Defendants' motion based on sovereign immunity is a facial challenge.

Motion Under Rule 12(b)(6):

When considering a Rule 12(b)(6) Motion to Dismiss, the Court "should accept as true all well-pleaded allegations" and should construe those allegations in the light most favorable to the plaintiff. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). As the Supreme Court of the United States noted, a complaint need not assert detailed factual allegations, but must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

Furthermore, even assuming the factual allegations in the complaint are true, there "must be enough to raise a right to relief above the speculative level." *Id*. In addition, the Court "need not accept the legal conclusions drawn from the facts," and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd.*

P'ship, 213 F.3d 175, 180 (4th Cir. 2000); *accord Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 n. 26 (4th Cir. 2009). Moreover, "elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet Chevrolet, Ltd. V. Consumeraffairs.com*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Accordingly, the Complaint must be dismissed if it does not allege "enough *facts* to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (emphasis added).

ARGUMENT

I. Defendants Have Immunity From Plaintiff's Constitutional Claims (Counts I and II).

Plaintiff has sued Defendants in both their official capacities as VCU (*i.e.*, state) employees and in their individual capacity. For the two claims asserted under 42 U.S.C. § 1983, Defendants are protected by immunity: sovereign in their official capacity and qualified in their individual capacities.

A. Defendants, in Their Official Capacities, Are Protected by Sovereign Immunity.

In Counts I and II, Plaintiff alleges First Amendment retaliation and violations of procedural due process under Section 1983. Compl. at 3:10-26. Under the Eleventh Amendment, however, "an unconsenting State is immune from suit brought in federal court by her own citizens as well as by citizens of another State." *Stover v. College of William and Mary in Virginia*, 635 F. Supp. 3d 429, 439 (E.D. Va. 2022) (citation omitted). That protection extends to the state's agencies and instrumentalities, including state universities like VCU. *Id.* When an employee of the Commonwealth is sued in their official capacity, that is a suit not against the individual, but that individual's office and, by extension, the Commonwealth itself. *Id.* (citing *Will v. Mich Dep't of State Police*, 491 U.S. 58, 71 (1989)). As a result, Defendants share the Commonwealth's

sovereign immunity and are protected from suit in their official capacities. *Id.* (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Harter v. Vernon*, 101 F.3d 334, 337 (4th Cir. 1996)).

Thus, the Eleventh Amendment bars Plaintiff's Section 1983 claims against Defendants Rao and Milton in their official capacities.

B. Defendants, in Their Individual Capacities, Are Protected by Qualified Immunity.

Just as Defendants' sovereign immunity protects them in their official capacity, their qualified immunity protects them in their individual capacity. Qualified immunity protects government officials sued in the personal capacities under Section 1983 if the right was not "clearly established" at the time of the alleged violation. *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 724 (E.D. Va. 2015) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). "Officials lose the protection of the immunity only if it appears that (1) they violated a statutory or constitutional right of the plaintiff and (2) the right was 'clearly establish[ed]' at the time of the acts complained of such that an objectively reasonable official in their position would have known of the right." *McVey v. Stacy*, 157 F.3d 271, 276 (4th Cir. 1998). Furthermore, even if a right is "clearly established," the state actor still enjoys qualified immunity if an objective person would believe the actions complained of were lawful. *Herron v. Va. Commonwealth Univ.*, 366 F. Supp. 2d 355, 361 (E.D. Va. 2004) (citing *Davis v. Scherer*, 468 U.S. 183 (1984)).

A right is "clearly established" if controlling authority in the jurisdiction has said so. *Dean v. McKinney*, 976 F.3d 407, 417 (4th Cir. 2020). Absent such controlling authority, courts should examine the consensus of persuasive authority from other jurisdictions. *Id*

The purpose of qualified immunity is to protect state officials from bad guesses in gray areas of the law. *Id.* at 419. It protects state actors from having to go to trial over such guesses.

Saucier, 533 U.S. at 200-01. As a result, the burden of proof is on the defendant that qualified immunity shields them from trial. *Durham v. Jones*, 737 F.3d 291, 299 (4th Cir. 2013).

In addition, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Instead, "the dispositive question is whether the violative nature of *particular* conduct is clearly established." *Brown v. Elliott*, 876 F.3d 637, 642 (4th Cir. 2017) (cleaned up) (emphasis in original). In other words, "[t]he 'clearly established' standard also requires that the legal principle *clearly prohibit* the officer's conduct in the *particular circumstances* before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in *the situation he confronted*. This requires a *high degree of specificity*." *Wesby,* 138 S. Ct. at 590 (cleaned up) (emphasis added).

Here, both Defendants, in their individual capacity, are clearly protected by qualified immunity. Plaintiff alleges constitutional violations because VCU investigated complaints of workplace misconduct. As explained in greater detail below, Defendants did not violate any of Plaintiff's rights. Furthermore, Defendants are aware of no authority holding that investigating "hostile work environment claims" (as Plaintiff contends occurred here) is unlawful. Indeed, VCU could be subject to liability on a litany of claims should it *fail* to conduct an investigation into hostile work environment claims. *See Wilson v. Gaston Cnty.*, 685 F. App'x 193, 197 (4th Cir. 2017) (employer is liable for employee-on-employee harassment if it negligently responds to a complaint of such harassment). Thus, a finding that Plaintiff had some clearly established right to be free from participating (or being subject to) a workplace misconduct investigation would put state entities in an untenable bind. Public employers are required by numerous laws to investigate workplace complaints but, under Plaintiff's theory, would not be granted qualified immunity

should the subject of that investigation take some issue with that investigation. Put differently: if Defendants are not protected by qualified immunity, government employees everywhere would have *carte blanche* to commit all sorts of misdeeds without critical oversight by their employers, who will fear liability for investigating those acts and omissions.

Because Defendants did not violate Plaintiff's rights, particularly a clearly established right shielding him from being subject to workplace misconduct investigations, Defendants are entitled to qualified immunity.

As set forth above in Part I.A and B, the Court should dismiss Counts I and II against both Defendants, in their official and individual capacities, with prejudice.

II. Plaintiff Has Failed to Allege a Cause of Action for First Amendment Retaliation (Count I).

Plaintiff has alleged that Defendants retaliated against his criticism of VCU by initiating an investigation into workplace misconduct at the Wilder School. To maintain this claim, Plaintiff is required to allege (1) that he engaged in protected First Amendment Activity; (2) Defendants took some action that adversely affected his First Amendment rights; and (3) there was a causal relationship between the protected activity and Defendants' conduct. *Snoeybos v. Curtis*, 60 F. 4th 723, 730 (4th Cir. 2023).

When a First Amendment retaliation claim stems from government employment, there is an added burden on the employee/plaintiff. He must show that "(1) he spoke as a citizen on a matter of public concern, rather than as an employee on a matter of personal interest; (2) the employee's interest in his expression outweighed the employer's 'interest in providing effective and efficient services to the public'; and (3) the employee's speech was a 'substantial factor' in the adverse employment action." *Massaro v. Fairfax Cnty.*, 95 F. 4th 895, 905 (4th Cir. 2024). The first element is a "threshold question." *Id.* If the employee is speaking about issues of social,

political, or other concern for the community, then the speech is protected. *Id.* at 906. If it is a private grievance related to the general operation of the workplace, it is not protected speech. *Id.* "[R]un-of-the-mill employee complaints" cannot be transformed "into social and political commentaries backed by the full weight of the Constitution. To do so would turn the workplace into a constitutional landmine, while offering public employees inflated speech rights not shared by their private counterparts." *Id.* at 906-07. In other words, unless the speech concerns matters of political or social concern, public employers should be granted "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. 138, 146 (1983). As a result, when a government employer takes action against an employee speaking on matters of personal concern, the courts will not weigh in on the wisdom of the personnel decision. *Id.* at 147.

In the present case, Plaintiff has failed to satisfy the threshold question: that he was speaking on matters of public concern. All Plaintiff has alleged was that he made "public criticisms of VCU leadership." Compl. at 3:13. At its core, this allegation is not factually sufficient to "raise a right to relief above a speculative level." *Iqbal*, 556 U.S. at 663-64. Indeed, Plaintiff has not alleged any specific political, social, or other public concern in the context of his alleged criticisms of, or "advocacy" regarding, the university. Plaintiff's vague pronouncements regarding his "public criticisms" are not sufficient to invoke constitutionally protected speech. *Brooks v. Arthur*, 685 F.3d 367, 372 (4th Cir. 2012). This failure to allege specific facts to meet this high threshold is fatal to Plaintiff's First Amendment retaliation claim.

Even if Plaintiff had alleged sufficient facts to meet the burden placed on employees to show their speech is of public concern, his First Amendment retaliation claims fail because he also failed to allege an actionable adverse action. In First Amendment retaliation claims, the adverse

action must be something that is more than a "*de minimis* inconvenience" to Plaintiff's exercise of his First Amendment rights. *Snoeybos*, 60 F. 4th at 730. To make this determination, the Court should ask if the retaliatory actions would deter a person of "ordinary firmness" from exercising their First Amendment rights. The Fourth Circuit Court of Appeals has provided examples of adverse actions that are nothing more than a *de minimis* inconvenience:

- A governor directing staff to not speak to specific reporters due to their reporting on the administration. *The Baltimore Sun v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006);
- A public transit authority barring a union from using its property after it criticized the administration. *McClure v. Ports*, 914 F.3d 866 (4th Cir. 2019).

In both of these examples, the Fourth Circuit focused on the fact that the plaintiffs were inconvenienced, but not deterred, by the state actor's adverse action. The newspaper kept reporting on the governor, and the union continued its activities. The same is true here. Plaintiff may have been inconvenienced by having to speak to the independent investigators VCU hired regarding alleged workplace misconduct, but there are no allegations the Plaintiff himself was, in any way, deterred from speaking out against VCU or its employment practices. Indeed, this lawsuit shows the opposite: Plaintiff is ready, willing, and able to publicly spar with VCU and its leadership. Thus, Plaintiff has failed to allege sufficient adverse action taken against him.

Lastly, Plaintiff fails to sufficiently allege a causal connection between his speech and the alleged adverse employment action that adversely affected his First Amendment rights. Indeed, Plaintiff merely recites the elements of a First Amendment retaliation claim. *Twombly*, 550 U.S. at 557. Plaintiff does not offer any facts from which the Court could reasonably infer there is a connection between his alleged criticism of VCU and the investigation. *Iqbal*, 556 U.S. at 663-64. Indeed, the facts alleged show the opposite: that the investigation was in response to

complaints made about Plaintiff and other VCU employees. *See* Compl. at 2:16-27; Pl.'s Decl. ¶¶ 4-14. Thus, the only reasonable conclusion the Court can make based on the sparse facts in the Complaint is that the investigation was in response to employees' complaints and it was completely independent of any alleged criticisms levied by Plaintiff against VCU or its leadership.

For these reasons, the Court should dismiss Plaintiff's First Amendment retaliation claim.

III. Plaintiff Has Not Alleged Sufficient Facts to Sustain a Claim for Procedural Due Process Protections in the VCU Workplace (Count II).

"The Fourteenth Amendment prohibits the States from 'depriv[ing] any person of life, liberty, or property without due process of law.'" *Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 145 (4th Cir. 2014) (quoting U.S. Const. amend. XIV) (alterations in original). The procedural rights that stem from this amendment are to ensure that there are no unjust or erroneous deprivations. *Id.* To establish a procedural due process claim, a plaintiff must show (1) a constitutionally recognized life, liberty, or property interest; (2) deprivation of that interest by a state action; and (3) the procedures to make such deprivation were constitutionally inaccurate. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 540 (4th Cir. 2013). In a broader sense, due process requires there be notice and a chance to be heard prior to the deprivation of the aforementioned interests. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is not, however, some technical concept with fixed elements divorced from context. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

As an initial proposition, Plaintiff must allege that there is a liberty or property interest at stake here. *Guerra v. Scruggs*, 942 F.2d 270, 277.[7] "Liberty" means the right of "the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge…and generally to enjoy those privileges long recognized…as essential to the orderly pursuit of

[7] Plaintiff has not alleged in the Complaint that Defendants took his life interest.

happiness by free men." *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (internal quotations omitted). In the context of public employment, liberty also includes the employee's reputation and choice of occupation. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 307 (4th Cir. 2006). Thus, a public employee is entitled to notice and hearing before the deprivation of these interests. *Roth*, 408 U.S. at 573, n. 12.

The definition of a property interest is more nebulous but can include a public employee's employment. *Roth*, 408 U.S. 481-84. There are, however, limitations to such interests:

> Property interests, of course are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. In short, a property right does not exist because of a "subjective expectancy." *Guerra*, 942 F.2d at 278. Put differently: there must be "a legitimate claim of entitlement" to the property right. *Roth*, 408 U.S. at 577.

The Fourth Circuit, however, has explicitly rejected the concept that there is a due process interest in investigative procedures. *See, e.g., Weller v. Dep't of Social Servs. for City of Balt.*, 901 F.2d 387, 392 (4th Cir. 1990) (father had no property or liberty interest in the investigative procedures dictated by state law for removal of children from his home to prevent child abuse). Particularly on point here is the decision in *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311 (4th Cir. 2009). There, the plaintiff's procedural due process claims surrounded a Department of Social Services investigation that resolved in her favor. *Id.* at 314-17. She alleged that the investigation was based on false statements and could have been handled better. *Id.* at 322. The Fourth Circuit recognized that the investigation may have been imperfect and inconvenient to the plaintiff. *Id.* at 323. But, it also found that the investigation did not violate Plaintiff's due process rights because she had a chance to be heard. *Id.*

These cases are very similar to the facts at hand. Plaintiff's due process claim centers on his complaints as to how VCU (and really the outside attorneys at Husch Blackwell hired by VCU) conducted the subject investigation. There are no allegations that Plaintiff was deprived of anything other than certain types of investigative materials that Plaintiff believes he is entitled to. Plaintiff was not terminated nor was his reputation damaged. Indeed, had Plaintiff not filed this lawsuit in the Court's docket, it is likely that the subject investigation regarding a "hostile work environment" at Plaintiff's namesake school would not have become public knowledge. Furthermore, the Complaint confirms that Plaintiff was *not* deprived of notice or an opportunity to be heard. In fact, Milton repeatedly described the contours of the investigation and repeatedly requested Plaintiff provide a statement to the investigators. These interactions fulfilled the due process concepts of notice and opportunity to be heard, which is all that is required for procedural due process. Indeed, under VCU's investigation policies, confidentiality/privacy is one of the utmost concerns. Details, particularly the names of those involved are only to be shared on a "need to know" basis, especially with witnesses and subjects. *See* **Exhibit B**, VCU's Investigation Guidelines, found publicly at https://acs.vcu.edu/our-offices/ico/resource-library/.[8]

In sum, Plaintiff was not deprived of any liberty or property right because of the investigation; instead he was given notice of the reason for the investigation, and he was given ample opportunity to be heard. For these reasons, Plaintiff's procedural due process claims fail, and should be dismissed with prejudice.

[8] The Court may consider documents attached to a Rule 12(b)(6) motion that are integral to the complaint or matters of public record without converting the motion to one for summary judgment. *Lokhova v. Halper*, 441 F. Supp. 3d 238, 252 (E.D. Va. 2020) (citing *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (movant may attach items that are integral to the complaint to a 12(b)(6) motion without converting it to a motion for summary judgment); *Hall v. Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004) (court may take judicial notice of items in the public record for purposes of Rule 12(b)(6) motions)).

IV. Plaintiff Has Not Alleged Sufficient Facts to Support His Defamation Claim (Count III).

Plaintiff's defamation claim cannot survive this Motion to Dismiss because he alleges no facts to support it. To maintain this claim, Plaintiff would need to allege that there was the publication of an actionable statement with defamatory intent. *Schaecher v. Bouffault*, 290 Va. 83, 91, 772 S.E.2d 589, 594 (2015). An "actionable statement" is both false and "tend[ing] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* at 91-92, 594 (quoting Restatement (Second) of Torts § 559) (internal quotations omitted). Put differently: it must have a "sting" that "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." *Id.* at 92, 594 (quoting *Moss v. Harwood*, 102 Va. 386, 392, 46 S.E.2d 385 (1904)) (internal quotation omitted). This can only be determined by analyzing the statements themselves. *Id.* at 93, 594. This is a threshold question of law; if a statement is not defamatory, then the plaintiff cannot proceed with the case. *Id.* at 94, 595.

Here, Plaintiff has not presented the Court with any alleged defamatory statements, let alone an "actionable statement" or how, when, and to whom it was published. Further, Plaintiff has provided no basis whatsoever to support a claim that the allegedly defamatory statements made by Defendants to some unknown individual(s), on an unspecified date, were uttered with "actual malice" – as is required for a public figure such as Plaintiff to plead and prove a defamation case. Thus, Plaintiff cannot maintain such a claim here. Indeed, this failure to allege the statements not only violates a binding decision from the Supreme Court of Virginia, but Rule 8 as well. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a state court's decision on a question of state law

is binding in federal court). As with most of Plaintiff's other claims here, he has done nothing more than present the Court with a bare recitation of the elements of a cause of action. *Twombly*, 550 U.S. at 557. This is not sufficient to meet the basic pleading requirements set forth in the Federal Rules of Civil Procedure. *Id.* As a result, Plaintiff's defamation claim fails as a matter of law, and the Court should dismiss it with prejudice.

V. Plaintiff Has Failed to Exhaust His Administrative Remedies (Count IV).

Plaintiff's claim under Title VII must fail because he has failed to exhaust his administrative remedies. Before filing a lawsuit under Title VII, a plaintiff must file an EEOC charge and receive a right to sue letter. *Walton v. Harker*, 33 F. 4th 165, 172 (4th Cir. 2022). *See also Fort Bend Cty. V. Davis*, 587 U.S. 541, 543 (2019) ("As a precondition to the commencement of a Title VII action in court, a complainant must first file a charge with the Equal Employment Opportunity Commission (EEOC or Commission).") This exhaustion requirement puts the employer on notice of any alleged violations of the law so that the employer may remedy the issue prior to court intervention. *Cowgill v. First Data Tech, Inc.*, 41 F. 4th 370, 384 (4th Cir. 2022).

Plaintiff has failed to comply with this basic requirement. The events complained of took place between June 12 and June 20, 2025, which is approximately 50 days prior to Plaintiff's filing of this lawsuit, including claims under Title VII. Plaintiff's Complaint is devoid of any allegation that he filed a charge with the EEOC, much less received a right to sue letter. As a result, Plaintiff cannot proceed with his Title VII claim.

VI. Plaintiff Has Not Alleged Protected Activity Shielded by the Anti-Retaliation Provisions of Title VI and Title VII (Count IV).

Plaintiff's Title VI and VII claims fail because he cannot allege any "protected activity." Title VI and VII retaliation claims have substantially the same elements. Title VI requires (1) protected activity; (2) a materially adverse employment action; and (3) a causal connection

between the protected activity and the adverse action. *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003). Title VII also requires protected activity, a materially adverse employment action, and a causal connection between the two. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015). Under both laws, the protected activity is any action the claimant reasonably believes is in opposition to an unlawful employment practice. *Peters*, 327 F.3d at 320.

Here, the Complaint makes no mention of Plaintiff's resistance to any unlawful employment practices, particularly ones that involve the types of discrimination prohibited under Titles VI and VII. Indeed, the only mention of an employment practice is the investigation into complaints by *other* employees against Plaintiff himself and a dean of the Wilder School. Pl. Decl. ¶ 7. As detailed above, this investigation was done by an outside law firm engaged by VCU in an effort to comply with the law, not to violate it. There are no allegations that the investigation was motivated by any unlawful discriminatory animus prohibited by Title VI or VII, nor can there be. It was in response to good faith complaints by Plaintiff's coworkers regarding an alleged "hostile work environment" at the Wilder School. If anything, the facts alleged suggest that the complaints and investigation arise out of a personal animus between Plaintiff and his fellow VCU employees – as contrasted with Plaintiff and the named Defendants herein. But federal anti-discrimination laws are not intended to shield employees from personal conflict with their co-workers. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (Title VII is not a general civility code); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (events that lead to "bruised or wounded feelings" are not violations of anti-discrimination laws); *Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006) (no claim under Title VII for rude co-workers); *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2004) (no claim for callous behavior by supervisors); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 276 (4th Cir. 2000) (no claim for personality

conflicts with co-workers).

As a result of Plaintiff's failure to allege protected activity, his Title VI and VII claims cannot continue and must be dismissed.

VII. Plaintiff Did Not Suffer an Adverse Employment Action, Further Barring Claims under Title VI and VII (Count IV).

As stated above, Title VI and VII retaliation claims require that there be a materially adverse employment action. An adverse employment action is "one that 'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Being subjected to an internal investigation that does not result in any change to an employee's employment status is not an adverse employment action. *Johnson v. Baltimore Police Dept.*, Civil Action MJM-22-1356, 2023 WL 6381487, at *7 (D. Md. Sept. 29, 2023) (citing *Jenkins v. Balt. City Fire Dep't*, 862 F. Supp. 2d 427, 446 (D. Md. 2012) *aff'd*, 419 F. App'x 192 (4th Cir. 2013)). In sum, an investigation by itself cannot be an adverse employment action, only the action taken as a result of one.

Here, Plaintiff was only subject to an investigation. He does not allege that Defendants or VCU took any action as a result of that investigation, nor can he. Indeed, Plaintiff admits that nothing further has come from the investigation into him. Pl.'s Decl. ¶¶ 16-17. Thus, Plaintiff concedes that Defendants have not taken any adverse employment action against him, dooming his Title VI and Title VII retaliation claims. Consequently, the Court should grant Defendants' Motion to Dismiss Count IV for these reasons, as well.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss Plaintiff's Complaint in its entirety.

Date: August 25, 2025

Respectfully submitted,
MICHAEL RAO and
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2025, I filed the foregoing Memorandum in Support of Motion to Dismiss via the Court's Electronic Case Filing (ECF) system, which will automatically send electronic notification of such filing to all counsel of record.

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