PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1220

ROBEL BING,

Plaintiff - Appellant,

v.

BRIVO SYSTEMS, LLC,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paula Xinis, District Judge. (8:18-cv-01543-PX)

Argued: December 11, 2019 Decided: May 19, 2020

Before AGEE and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Traxler wrote the opinion for the court as to Parts I and II, in which Judge Agee and Judge Quattlebaum joined. Judge Quattlebaum wrote the opinion for the court as to Parts III and IV, in which Judge Agee joined. Senior Judge Traxler wrote a separate dissenting opinion as to Parts III and IV.

ARGUED: Dena Elizabeth Robinson, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Appellant. Edward S. Schenk, III, WILLIAMS MULLEN, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Ejaz H. Baluch, Jr., Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Appellant. Joseph R. Pope, WILLIAMS MULLEN, Richmond, Virginia, for Appellee.

TRAXLER, Senior Circuit Judge, writing for the Court in Parts I and II:

Robel Bing, an African-American male, was hired by Brivo Systems, LLC, but fired shortly after starting orientation on his first day of employment. Bing subsequently filed a *pro se* action asserting that he had been discriminated against because of his race in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17. The district court dismissed the case without prejudice, concluding that Bing failed to plead sufficient facts to plausibly support a claim of discrimination. Bing appeals.[1]

As we will explain, we have appellate jurisdiction despite the district court's dismissal of the complaint without prejudice. On the merits of the appeal, a majority of the panel concludes that the district court did not err by dismissing the Title VII claims at this point in the proceedings, and the district court's decision is therefore affirmed.

I.

Because this is an appeal from the granting of a Rule 12(b)(6) motion to dismiss, [2] we accept as true the facts alleged in Bing's *pro se* complaint and construe the facts in the

[1] Bing's *pro se* complaint also asserted claims under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681x. He does not pursue those claims on appeal.

[2] Although Brivo's motion to dismiss and Bing's response to the motion included factual materials outside the complaint, the district court did not consider that material when granting the motion to dismiss. Accordingly, the court was not required to convert the motion to dismiss to a motion for summary judgment. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (explaining that if district court considering a Rule 12(b)(6) motion goes beyond the complaint and documents attached or incorporated into the complaint, the court must convert the motion into one for summary judgment).

light most favorable to Bing. *See, e.g.*, *In re Willis Towers Watson plc Proxy Litigation*, 937 F.3d 297, 302 (4th Cir. 2019).

Bing applied for employment as a "customer care representative" with Brivo. He disclosed his prior criminal history as part of the application process. Bing was interviewed in person by two Brivo employees on September 27, 2016 and was extended a job offer on September 28. Bing did not disclose his race on his application, but the Brivo employees who hired him learned of his race during his interview.

The job offer was subject to Bing passing a background check. Bing passed the background check, and his first day of employment was October 17, 2016. When Bing arrived for a new-employee orientation on his first day, he was met by Charles Wheeler, a white male who had not previously been involved in Bing's hiring. Wheeler was introduced to Bing as Brivo's "Security Architect." J.A. 14. Within an hour of starting orientation, Wheeler approached Bing and confronted him about a *Baltimore Sun* article that Wheeler had found after running a Google search on Bing. The article reported Bing's tangential involvement in a shooting for which he faced no charges.[3] Wheeler berated Bing about the incident, declared that he was not fit for employment with Brivo, terminated him on the spot, and escorted Bing out of the building.

[3] The article at issue was included as an exhibit to Brivo's motion to dismiss. The article states that on Halloween in 2006, Bing loaned his lawfully owned handgun to a friend, who fired shots in the air in celebration of the holiday. One of the shots injured a third party. Bing and the others involved did not initially tell the truth about the shooting to the police. When dismissing the complaint, the district court considered only the general outlines of the article as alleged in Bing's complaint; it did not rely on the details of the article not alleged in the complaint.

Bing filed a charge of discrimination with the Equal Employment Opportunity Commission and received a Notice of Right to Sue letter. He subsequently filed a timely complaint in federal district court alleging unlawful termination and "harassment/discrimination" under Title VII. J.A. 9.

In his complaint, Bing alleged that Wheeler performed a Google search on him after Bing had completed his background check and received an offer of employment. According to Bing, the search "serve[d] as [a] means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment." J.A. 16. Bing stated that he could "find nothing other than [his] (possibly unexpected) physical appearance as an African-American male, to explain actions of race (African-American) and sex (male) discrimination, initiated by Mr. Wheeler, whose actions clearly fell outside of established Brivo hiring processes." J.A. 16. Bing's complaint "question[s] whether or not Brivo can provide historical documentation to replicate my hiring experience, or at the very least, demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company." J.A. 16.

The district court granted Brivo's motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The court concluded that Bing "proffered no facts allowing a plausible inference that his discharge was fueled by unlawful discrimination." J.A. 176. In the court's view, the facts asserted by Bing showed the absence of any discrimination:

> [T]he Complaint avers facts establishing that he was terminated because of his involvement in the shooting incident – the veracity of which Bing confirmed. By contrast, no evidence exists by which this Court could infer

> Bing was terminated on account of race or gender. Brivo concluded that Bing's involvement in the firearm incident rendered him unfit for the position. Nothing about this determination, based on the facts averred in the Complaint, demonstrates that this reason was put forward to obscure Brivo's discriminatory animus.

J.A. 176.

In its memorandum opinion, the district court stated that the complaint was dismissed without prejudice. By separate document denominated as an order, the court officially granted the motion to dismiss, stated that Bing's complaint was dismissed, and directed the Clerk's Office to close the case. The order did not qualify the dismissal; it dismissed the complaint without specifying whether the dismissal was with or without prejudice.

II.

Before reviewing the merits of Bing's appeal, we must establish that we have appellate jurisdiction. Subject to certain exceptions not present here, this court has jurisdiction only over appeals from final orders. *See* 28 U.S.C. § 1291 ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

Although the district court dismissed Bing's complaint, it did so "without prejudice." This disposition raises questions about the finality of the dismissal order, as "[d]ismissals without prejudice naturally leave open the possibility of further litigation in some form." *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 176 (4th Cir. 2007). As we have explained, what makes an order of dismissal without prejudice "final or nonfinal is not the speculative possibility of a new lawsuit, but that they end the litigation

on the merits and leave nothing for the court to do but execute the judgment." *Id.* (internal quotation marks omitted).

In *Domino Sugar*, we adopted the rule that dismissals without prejudice generally are not appealable "unless the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case." *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) (internal quotation marks and alteration omitted). The *Domino Sugar* rule "requires us to examine the appealability of a dismissal without prejudice based on the specific facts of the case in order to guard against piecemeal litigation and repetitive appeals." *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005).

When determining the finality of a dismissal without prejudice, we have considered various factors, including the bottom-line effect of the district court's ruling, *see Domino Sugar*, 10 F.3d at 1067 ("The clear import of this order required the Company to pursue remedies within the CBA before filing suit in court. In other words, the district court essentially made a final ruling that the Company had to proceed to arbitration before seeking judicial relief."); and whether the court dismissed the complaint only, as opposed to dismissing the action entirely, *see Chao*, 415 F.3d at 345 (explaining that the dismissal of an amendable complaint generally is not appealable while dismissal without prejudice of the entire action generally is appealable). We have also held that when the plaintiff elects to stand on the complaint, a dismissal without prejudice is final, as the plaintiff's election amounts to waiver of any right to amend and "protect[s] against the possibility of repetitive appeals that concerned us in *Domino Sugar*." *Chao*, 415 F.3d at 345; *see also In*

re GNC Corp., 789 F.3d 505, 511 n.3 (4th Cir. 2015) (concluding that order dismissing complaint without prejudice and expressly authorizing an amended complaint was a final, appealable order because the plaintiffs declined to amend the complaint: "Because of Plaintiffs' waiver [of the right to amend], we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal."); *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 633 n.2 (4th Cir. 2015) (exercising jurisdiction over appeal from dismissal without prejudice because the government and *qui tam* relator "elected to stand on their complaints and waived the right to later amend" (internal quotation marks omitted)), *cert. granted, judgment vacated on other grounds and remanded for further consideration*, 136 S. Ct. 2504 (2016).

In our view, the rules announced in the above-cited cases establish that the without-prejudice dismissal at issue in this case is a final, appealable order. The district court concluded that the factual allegations in the complaint were insufficient to support Bing's theories of legal liability, but there is nothing in the opinion indicating that the deficiencies could be corrected by improved pleading. The district court did not suggest that there were other relevant facts that were not included in the complaint, nor is there anything in the record that would permit us to so conclude. We could certainly hypothesize additional facts that could shore up Bing's claims of discrimination -- for example, if the employee orientation also included white newly hired employees, but Bing was the only new-hire subjected to the additional Google background search. However, unless the record provides some reason to think that there are additional relevant facts that have not been

included in the complaint,[4] we should not treat a without-prejudice dismissal as unappealable simply because we can imagine facts that might be helpful to the plaintiff.

When the district court's opinion is considered in light of the entire record, it is clear that the court held that the circumstances surrounding Bing's hiring and subsequent firing did not expose Brivo to legal liability. The court's decision therefore was a final, legal determination that Brivo's conduct was not actionable, and that decision is a final, appealable order under *Domino Sugar*'s "clear import" approach to the question. *See Domino Sugar*, 10 F.3d at 1067.

The conclusion that the district court's order ended the case is further evidenced by the fact that the district court did not merely dismiss the complaint but instead directed the clerk of court to close the case. *See Chao*, 415 F.3d at 345.[5] To be sure, an administrative closing of a case does not convert an unambiguously not-final order into a final, appealable order. *See Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (concluding that order resolving one of two claims raised in a complaint was not a final appealable order and that the court's order dismissing the case from the active docket did not alter that conclusion: "[A]n otherwise non-final order does not become final because the district court administratively closed the case after issuing the order."). Dismissals without

[4] Because Bing was employed for only a matter of hours, his factual knowledge would necessarily be limited. Brivo did not assert any additional facts in its motion to dismiss, nor does it suggest in its briefs filed with this court that there are any other relevant facts that Bing could have included in his complaint.

[5] We see no meaningful difference between the dismissal of the entire action in *Chao* and the closing of the case here.

prejudice, however, are not unambiguously not-final orders. Indeed, the premise of *Domino Sugar* and its progeny is that such orders usually *are* ambiguous and require further analysis to determine whether the district court intended its order to end the case. Here, by issuing an order rejecting all of the claims asserted by Bing and directing the clerk to close the case, the district court signaled that it was finished with the case, which is an indication that we may treat the order of dismissal as a final order. *See Go Computer*, 508 F.3d at 176 (explaining that a without-prejudice dismissal is final if it "end[s] the litigation on the merits and leaves nothing for the court to do but execute the judgment" (internal quotation marks omitted)); *cf. United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794-95 n.1 (1949) (concluding that the challenged order, which dismissed an action without prejudice, was appealable because the "denial of relief and dismissal of the case ended this suit so far as the District Court was concerned").[6]

If there could still be any doubt about the finality of the ruling in this case, counsel for Bing represented to this court at oral argument that there were no additional facts available to his client to be asserted in the complaint, and counsel therefore stood on the

[6] The significance of the direction to close Bing's case is underscored by the approach taken by the same district judge in *Alston v. Ourisman Chevrolet*, another case with a *pro se* plaintiff asserting discrimination claims. In *Alston*, the district court issued an opinion that dismissed the plaintiff's amended complaint without prejudice but explicitly granted the plaintiff permission to file a second amended complaint. *See* 2016 WL 4945010, at *4 (D. Md. Sept. 15, 2016). The order issued in connection with that opinion did *not* include instructions to close the case. *See* Docket Entry #23, 8:15-cv-03740-PX (D. Md.). The district court's different approaches in this case and in *Alston* confirm that the court believed its involvement in this case ended with the entry of the order closing the case.

complaint as originally presented to the district court. That is sufficient to establish the finality and appealability of the district court's order. *See In re GNC Corp.*, 789 F.3d at 511 ("Because of Plaintiffs' waiver [of the right to amend], we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal."); *Chao*, 415 F.3d at 345 (explaining that the plaintiff's decision to stand on the complaint amounts to waiver of any right to amend and permits this court to exercise jurisdiction over an appeal from a dismissal without prejudice).

Brivo, however, insists that we lack jurisdiction based on our decision in *Goode v. Central Virginia Legal Aid Society, Inc.*, 807 F.3d 619 (4th Cir. 2015). In *Goode*, an attorney who was fired after 25 years of employment with the Legal Aid Society filed an action asserting claims of age-, race-, and sex-based discrimination. The district court granted the employer's motion to dismiss for failure to state a claim and dismissed the case without prejudice. This court dismissed the employee's appeal, concluding that the without-prejudice dismissal was not a final order.

After acknowledging that *Domino Sugar* required case-by-case determinations of the finality of without-prejudice dismissals, the *Goode* court identified what it seemed to view as a bright-line rule that without-prejudice dismissals "for failure to plead sufficient facts in the complaint" are *not* appealable orders:

> [I]n cases in which the district court granted a motion to dismiss for failure to plead sufficient facts in the complaint, we have consistently found, albeit in unpublished, non-precedential decisions, that we lacked appellate jurisdiction because the plaintiff could amend the complaint to cure the pleading deficiency. We think the time has come to enshrine this salutary rule in a precedential opinion, and we do so here.

Id. (citations omitted).

After announcing this rule, the *Goode* court concluded that all of the factual deficiencies in the complaint identified by the district court in that case could be corrected by the pleading of additional facts. *See id.* at 626 ("Goode could have provided facts to support his allegation that he had always met or exceeded [his employer's] performance expectations" (internal quotation marks omitted); *id.* at 626-27 ("Goode could have rectified the apparent defects by presenting factual allegations to demonstrate why he believed that his termination had been racially motivated"); *id.* at 627 ("Goode could also have responded to the district court's observation that he had apparently pled himself out of court by amending his complaint to clarify that he was not conceding that [the employer's] alleged financial reasons for his termination were true." (internal quotation marks and alteration omitted)). Because the deficiencies could be corrected by additional pleading, the court concluded that the without-prejudice dismissal of the complaint was not a final order. *See id.* at 628 ("[T]he district court did not make clear that no amendment could have cured the grounds for dismissal. Because Goode could have amended his complaint, the district court's order dismissing the complaint without prejudice is not, and should not be treated as, final and appealable.").

The *Goode* court then went on to explain why the plaintiff's appealability arguments were not convincing. First, the court held that plaintiff's insistence that he was standing on his complaint was a relevant factor under *Chao*, but it was not dispositive:

> *Chao* does not stand for the general proposition that a plaintiff may choose not to amend a complaint in order to single-handedly render an order of dismissal final and appealable under all circumstances. As we explained

> above, it is the province of the district court—not of the party seeking an appeal—to indicate that an order is final and appealable. *Chao* also involved a unique set of facts that differ significantly from those in the case before us. In *Chao*, the Secretary of Labor appealed the district court's dismissal of her action against various defendants for violations of the Fair Labor Standards Act. Because the Secretary contended that she must be able to employ similarly-worded complaints throughout the country for consistency, she elected to stand on the complaint presented to the district court. In doing so, the Secretary waived the right to later amend thus protecting against the possibility of repetitive appeals that concerned this Court in *Domino Sugar*.
>
> The Court in *Chao* therefore considered the weighty assurances of the Secretary of Labor that the objectives of Domino Sugar and § 1291 would best be served by the Court's exercise of appellate jurisdiction in that case, particularly in light of the institutional interests of the Executive Branch. Goode, by contrast, cannot and does not attempt to make these assurances, and he does not seek to vindicate such institutional interests. Goode's failure to seek leave to amend the complaint thus does not favor appealability of the district court's order of dismissal.

Id. at 629 (citations, internal quotation marks and alterations omitted).

As to the plaintiff's claim that the order was final because the district court dismissed the *case* without prejudice rather than merely dismissing the *complaint*, the *Goode* court found the wording insignificant:

> [W]e see no indication that the district court intended for its use of the word "case" rather than "complaint" to hold any special meaning or for it to signify any particular finality, especially in light of the court's express statement that the dismissal was "without prejudice"-- a phrase that generally indicates that a court's decision is not final.
>
> Given the emphasis in this Circuit's governing precedent on case-by-case review, we are unconvinced that the district court's use of the word "case" rather than "complaint" is determinative, or even highly probative, of the order's appealability.

Id.

Relying on *Goode*, Brivo argues that the without-prejudice dismissal in this case is not a final, appealable order because the court found the factual allegations insufficient;

and that the court also directed the case be closed is irrelevant. *See Goode*, 807 F.3d at 624, 629. And because no institutional interests are at stake, Brivo contends that Bing's decision to stand on his complaint does not establish finality. *See id.* at 629.

Thus, while *Goode* provides support for Brivo's view that the appealed order is not final, *Domino Sugar*, *Chao*, and *In re GNC* all provide support for Bing's view that the order is final and appealable. Under the rules of this Circuit, panel decisions are binding on subsequent panels, and we are obligated to reconcile conflicting cases if possible. In our view, however, much of the language and analysis in *Goode* is in direct conflict with *Domino Sugar*, *Chao*, and *In re GNC*. Because those cases preceded *Goode*, they control our resolution of this case. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court.").

Specifically, *Goode*'s assertion of a bright-line rule that without-prejudice dismissals premised on the failure to plead sufficient facts in the complaint are not appealable is inconsistent with *Domino Sugar*, which emphasized the case-by-case nature of the inquiry, *see Domino Sugar*, 10 F.3d at 1066, and also with *Chao*, which found that very type of dismissal to be appealable, *see Chao*, 415 F.3d at 344 (district court dismissed complaint without prejudice under Rule 12(b)(6) after finding that complaint failed to allege facts sufficient to support legal liability). *Goode*'s rejection of the significance of the dismissal of the *case* as opposed to the *complaint* because that language was paired with the phrase "without prejudice" is also inconsistent with *Chao*, which relied on the

significance of dismissing the case *in the context of a without-prejudice dismissal*. *See Chao*, 415 F.3d at 345 ("In *Domino Sugar*, we noted the difference between an order dismissing an *action* without prejudice and one dismissing a *complaint* without prejudice, stating that the latter order is generally not appealable.").

Additionally, *Goode*'s refusal to give weight to the plaintiff's decision to stand on his complaint because there were no institutional interests of an executive-branch agency at stake is inconsistent with *In re GNC*, which gave dispositive effect to that decision in a case involving only private parties. *See In re GNC*, 789 F.3d at 511 n.3 ("Dismissals without prejudice are generally not appealable final orders. But if, as here, a plaintiff declines the district court's offer to amend and chooses to stand on his or her complaint, the plaintiff waives the right to later amend unless we determine that the interests of justice require amendment. Because of Plaintiffs' waiver, we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal." (citations, internal quotation marks and alteration omitted)).

Accordingly, given the conflict between *Goode* and our earlier cases, we must follow the approach set out in the earlier cases. Under *Domino Sugar*, the order in this case is appealable because the district court held that the circumstances surrounding Bing's termination did not expose Brivo to legal liability, and Bing has no additional facts that could be added to his complaint. Under *Chao*, the order is appealable because the district court dismissed the complaint and directed that the case be closed. The order is likewise

appealable under *Chao* and *In re GNC* because Bing has elected to stand on his complaint as filed. [7]

III.

QUATTLEBAUM, Circuit Judge, writing for the Court in Parts III and IV:

Having determined that we have jurisdiction to consider Bing's appeal, we now consider the merits of his challenge to the district court's dismissal of his Title VII claims. We review de novo a decision to grant or deny a motion to dismiss. *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019).

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[7] As this case demonstrates, it can be difficult -- even with the guidance provided by *Domino Sugar* and its progeny -- to determine whether a without-prejudice dismissal is final. This lack of certainty can be especially problematic for plaintiffs, who have a relatively short period of time to determine their next step before the door to appellate review permanently closes. *See, e.g.*, *Sharp Farms v. Speaks*, 917 F.3d 276, 289 (4th Cir. 2019) (explaining that the 30-day appeal period in civil cases is a jurisdictional limit). A version of the *Domino Sugar* approach is followed in other circuits, *see, e.g.*, *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) ("Although a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable."); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) ("The dismissal of a complaint is not the dismissal of the lawsuit. . . . If, however, it is plain that the complaint will not be amended, perhaps because the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact and we have jurisdiction. . . ."). However, it is not the universal approach. The Eleventh Circuit, for example, follows a very straightforward path. If the plaintiff chooses to appeal an order dismissing the case without prejudice – even if the dismissal expressly authorizes an amendment, the order is final and appealable because the choice to appeal amounts to a waiver of any right to amend. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 n.2 (11th Cir. 1996); *Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir.1986) (per curiam). This approach avoids "uncertainty as to whether the dismissal of a complaint constitutes a final judgment. It protects the plaintiff by putting in his hands the decision of whether or not to treat the dismissal of his complaint as final, and simultaneously limits his ability to manipulate the rules." *Schuurman*, 798 F.2d at 445-46.

In reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), we focus on the pleading requirements under the Federal Rules rather than the proof ultimately required to succeed on the claim. Rule 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). But importantly, this rule "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action's elements will not do." *Id*. A complaint must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level . . . ." *Id*.; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a complaint "tender[ing] 'naked assertion[s]' devoid of 'further factual enhancement'" does not suffice) (quoting *Twombly*, 550 U.S. at 557).

To survive a motion to dismiss, a plaintiff must plead enough factual allegations "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The purpose of a Rule 12(b)(6) motion is to "test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* at 214 (4th Cir. 2016) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999)). Thus, when considering a motion to dismiss, a court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016).

In the context of a Title VII case, "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v.*

Sorema N.A., 534 U.S. 506, 515 (2002).[8] Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). The pertinent statute, Title VII, prohibits an employer from "discharg[ing] any individual, or [] otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Accordingly, our inquiry is whether Bing alleges facts that plausibly state a violation of Title VII "above a speculative level." *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555); *see also McCleary-Evans*, 780 F.3d at 585-86.

With these standards in mind, we turn to Bing's pro se complaint. Liberally construing its allegations, he asserted discrimination in two ways. First, Bing claimed he was terminated because of his race. To evaluate the sufficiency of this assertion, we look to the facts Bing alleged. Regarding his termination, Bing pled

[8] Ultimately, a plaintiff bringing an employment discrimination claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 must provide supporting evidence through one of two methods: (1) "direct or circumstantial evidence" that discrimination motivated the employer's adverse employment decision, or (2) the *McDonnell Douglas* "pretext framework" that requires the plaintiff to show that the employer's stated permissible reason for taking an adverse employment action "is actually a pretext for discrimination." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284–85 (4th Cir. 2004) (en banc), *abrogated in part by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, (2009). Bing relies on the *McDonnell Douglas* framework to establish his claim. To prove a prima facie case of discrimination under the *McDonnell Douglas* framework, Bing must establish (1) membership in a protected class, (2) discharge, (3) while otherwise fulfilling Defendants' legitimate expectations at the time of his discharge, and (4) under circumstances that raise a reasonable inference of unlawful discrimination." *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).

> I was pulled aside by Mr. Wheeler and confronted with a Baltimore Sun newspaper article, pursuant to a "Google search," which sensationally reported that I was the subject of a criminal investigation involving a shooting between two individuals, involving a gun I owned at the time, all events having taken place in my absence. Mr. Wheeler continued to berate me for this alleged impropriety, citing only the newspaper article's narrative; and, thereafter declared I was unfit for the position of CCR, effectively terminating my employment with Brivo on the spot.

J.A. 14.

The facts Bing pled about his termination cannot be construed to plausibly state a claim that he was terminated because of his race. In fact, Bing specifically alleged a non-racial reason for the termination. He asserted Wheeler terminated him because of the information from a newspaper article about the shooting incident involving Bing's gun. According to Bing, Wheeler said his involvement in that shooting event disqualified him from continuing to work at Brivo. In light of Brivo's recent decision to hire Bing, Wheeler's termination decision may have been hasty or even unfair, but it was not racially motivated according to Bing's own allegations.

Second, Bing alleged the Google search that uncovered the article about the shooting was racially discriminatory. But once again, we must review the complaint's factual allegations to determine the sufficiency of this assertion. Bing alleged that, in conducting that search, Wheeler "went beyond all standard and routine measures of screening." J.A. 16. He asserted Wheeler did so because Bing was African-American, a fact Wheeler learned for the first time during Bing's orientation. According to Bing, "Wheeler . . . had no prior knowledge of my race" as he was not involved in the interview and Bing did not disclose his race on the application. J.A. 16.

As we must, we accept as true the factual allegations that Wheeler did not know Bing was African-American until he saw him at orientation and that Wheeler conducted a Google search on Bing during his first hours of employment. But from those allegations, even if liberally construed, we cannot reasonably infer that the search was racially motivated. Missing from Bing's complaint are factual allegations that support such an inference. For example, he did not allege that Google searches were only conducted on African-American employees, that Wheeler searched for additional information about Bing in contrast to white employees or that Wheeler or anyone else said or did anything suggesting the search was racially motivated. Instead, Bing speculated that he "can find nothing other than [his] (possibly unexpected) physical appearance as an African-American male, to explain [Brivo's] actions. . . ." J.A. 16. He also "question[s] whether or not Brivo can provide historical documentation to replicate [his] hiring experience, or at the very least, demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company." J.A. 16. With these allegations, Bing effectively conceded he did not have facts to support his conjecture. Being aware of no alternative explanation and guessing that conduct is racially motivated does not amount to pleading actual facts to support a claim of racial discrimination. To the contrary, they constitute only speculation as to Wheeler's motivation.

Our *McCleary-Evans* decision is particularly instructive here. In that case an African-American female job applicant sued a state agency, alleging she was not hired for two positions because of her race and gender. *McCleary-Evans*, 780 F.3d at 583. She

alleged "[d]uring the course of her interview, and based upon the history of hires within [that agency], . . . both [supervisors] predetermined to select for both positions a White male or female candidate." *Id*. "But she alleged no factual basis for what happened 'during the course of her interview' to support the alleged conclusion." *Id*. at 586. While "she repeatedly alleged that the Highway Administration did not select her because of the relevant decisionmakers' bias against African American women," we found that claim to only amount to a "naked" allegation and "no more than conclusions[.]" *Id*. at 585 (*quoting Iqbal*, 556 U.S. at 678–79 (*quoting Twombly*, 550 U.S. at 555, 557)) (internal quotation marks omitted). We held that these allegations were too conclusory. *Id*. Specifically, we noted that "[o]nly speculation can fill the gaps in her complaint—speculation as to why two 'non-Black candidates' were selected to fill the positions instead of her." *Id*. at 586. The mere fact that a certain action is potentially consistent with discrimination does not alone support a reasonable inference that the action was motivated by bias. *Id*. Thus, we concluded the plaintiff failed to allege "facts sufficient to claim that the reason it failed to hire her was because of her race or sex." *Id*. at 585.

Likewise, Bing failed to plead sufficient facts to plausibly claim his termination or the Google search that lead to it was racially motivated. Rather than drawing a reasonable inference, we would have to "speculate" to "fill in the gaps" as to Wheeler's motivation for the search and to disregard the reason given to Bing for his termination. Thus, Bing's assertions do not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at 585 (quoting *Iqbal*, 556 U.S. at 678).

Last, as noted above, Bing filed his complaint pro se. We are, therefore, compelled to construe his pleadings liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). We have done that. But liberal construction does not mean overlooking the pleading requirements under the Federal Rules of Civil Procedure. *See Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015) (affirming the dismissal of several of pro se plaintiff's claims for failure to allege sufficient facts). Bing's complaint fails not because of unsophisticated language or the failure to adhere to formalities. It fails because he pled a non-discriminatory basis for his termination and no facts to support his conclusory allegations about the Google search. What's more, at oral argument, his counsel said Bing had no other facts he could assert in good faith to support his claim. Accordingly, we are required to affirm the district court.[9]

[9] We also note, as did the district court, that under our precedent "a strong inference exists that discrimination was not a determining factor for the adverse employment action taken by the employer" where the hiring and firing took place close in time and involve the same decision makers. *Proud v. Stone*, 945 F. 2d 796, 797 (4th Cir, 1991) Here, as for timing, Bing alleged the hiring and termination took place on the very same day. And as to the decision-makers, Bing alleged that Brivo employees Candace Scott and Baudel Reyes interviewed him and made the hiring decision. J.A. 14. And while Bing attributed much of the blame for his termination to Wheeler, who was not involved in Bing's hiring, he attached an email to his opposition to Brivo's motion to dismiss that alleges Scott and Wheeler "concluded I was unfit for the position." J.A. 99. Thus, Bing alleges Scott was involved in both the hiring and termination decision thereby implicating the *Proud* inference. While this inference provides additional support for the district court's decision, it requires consideration of an email Bing attached to his opposition papers, not his complaint. We decline to consider whether Bing waived any argument that the email should not be considered by including the email in his opposition papers and whether the *Proud* inference applies because the district court can be affirmed on the other grounds recited above.

IV.

For these reasons, the judgment of the district court is

AFFIRMED.

TRAXLER, Senior Judge, dissenting in part:

Because I believe that Bing's *pro se* complaint plausibly alleged that he was discriminated against because of his race, I respectfully dissent from Parts III and IV of this opinion.

In order to "survive a motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Paradise Wire & Cable Defined Ben. Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Although Title VII cases often involve application of the *McDonnell Douglas* prima-facie case standard, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). Instead, a Title VII plaintiff is "required to allege facts to satisfy the elements of a cause of action created by that statute." *McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). Accordingly, the question in this case is whether Bing alleged facts sufficient to make it facially plausible that Brivo fired or otherwise discriminated against him in the conditions of employment because of his race. *See* 42 U.S.C. § 2000e–2(a)(1). And because Bing filed his complaint *pro se*, we are obliged to view his allegations liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) ("A document filed *pro se* is to be liberally construed, and a *pro*

se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (citation and internal quotation marks omitted).

Bing's factual allegations show a confusing about-face by Brivo. By all appearances, Brivo initially was enthusiastic about Bing, as it extended him an offer a day after the interview and encouraged him to start as soon as possible. Although the offer was contingent on Bing passing a background investigation, he passed that check and was permitted to report for work as expected and to begin the new-employee orientation. But despite the satisfactory background report, Wheeler decided *upon meeting Bing* that additional investigation was required, and he fired Bing without giving him a chance to explain the information that he uncovered.

From these facts, Bing alleges that he was subject to an additional layer of background investigation because of his race. *See* J.A. 16 (alleging that Wheeler's internet search "serve[d] as a means for discrimination of protected groups, by allowing personal and perhaps implicit biases to explicitly permeate the work environment"). In my view, the facts alleged in Bing's complaint, along with the inferences that can reasonably be drawn from those facts, make Bing's claim of discrimination plausible. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

First, because Brivo had already hired a third-party to perform a background check and had made Bing's job offer contingent on passing the background check, it is reasonable to assume that Wheeler's additional investigation of an employee who had already started

work was not standard practice. After all, if Brivo believed that the third-party report was inadequate to screen potential employees, Brivo would conduct its additional internet searches of applicants *before* they reported for work, so that unqualified applicants would never become employees. *See* J.A. 16 (questioning whether Brivo could "demonstrate that they have a common hiring practice of conducting ancillary 'Google searches' of employees' names on the first day of employment with the company"). Moreover, it is reasonable to infer that Wheeler, as Brivo's "Security Architect," would have had access to Bing's employment application and background report before Bing reported for work. Thus, as Bing alleges, the only new information Wheeler would have learned upon meeting Bing was Bing's race. *See* J.A. 16 (alleging that the only explanation for the additional background search was Bing's "(possibly unexpected) physical appearance as an African-American male").

Bing's *pro se* complaint thus contains sufficient factual information to support the allegation that Bing was subject to the additional layer of background investigation because of his race. Bing was qualified for the job at Brivo and he successfully passed the required background check. From the facts alleged in the complaint, the only thing that changed after Bing was hired and began work was Wheeler's knowledge of his race. Those facts take us beyond mere speculation and make it plausible that Wheeler's actions were motivated by race.

Those facts also distinguish this case from *McCleary-Evans v. Maryland Department of Transportation*. In that case, an African-American female job applicant sued a state agency, asserting that she was not hired for two positions she applied for

because of her race and gender. 780 F.3d at 583. In her complaint, the plaintiff alleged that during her interview, "and based upon the history of hires within [that agency], . . . both [supervisors] predetermined to select for both positions a White male or female candidate." *Id.* We found the plaintiff's allegations insufficient to support a discrimination claim because "she alleged no factual basis for what happened during the course of her interview to support the alleged conclusion." *Id.* at 586 (internal quotation marks omitted). While "she repeatedly alleged that the Highway Administration did not select her because of the relevant decisionmakers' bias against African American women," we found those claims to be "naked" allegations and "no more than conclusions." *Id.* at 585 (internal quotation marks omitted). As we explained, "the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is *consistent* with discrimination, [but] it does not alone support a *reasonable inference* that the decisionmakers were motivated by bias." *Id.* at 586. Because "[o]nly speculation can fill the gaps in [the plaintiff's] complaint -- speculation as to why two 'non-Black candidates' were selected to fill the positions instead of her," we concluded that the complaint was properly dismissed. *Id.* ("McCleary–Evans' complaint stopped short of the line between possibility and plausibility of entitlement to relief.") (internal quotation marks and alteration omitted).

Unlike in *McCleary-Evans*, no speculation is required in this case. To survive the motion to dismiss, Bing was only required "to allege facts to satisfy the elements of a cause of action created by [Title VII]." *Id.* at 585. Title VII makes it an unlawful employment practice "to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Bing's allegations establish that he was subjected to what can reasonably be understood as an unusually timed, additional layer of background investigation, and Wheeler used the information found in that unusual search as the reason to fire Bing. The only new information Wheeler learned before conducting the unusual background check was Bing's race. Those facts are sufficient to support a reasonable inference that Brivo subjected Bing to additional investigation because of his race and fired him because of his race.

When granting the motion to dismiss, the district court effectively viewed the allegations of the complaint in favor of Brivo rather than Bing when concluding that Bing "was terminated because of his involvement in the shooting incident." J.A. 176. Contrary to the district court's conclusion, Bing did not plead himself out of court by acknowledging the existence of the newspaper article and his involvement in the shooting incident described in the article. While Bing alleged that Wheeler *told* him he was being fired because of his involvement in the shooting, Bing did not allege that was the *true* reason he was fired, and it was error for the district court to conflate the two. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 168 (4th Cir. 2016) (explaining that when considering a motion to dismiss, the court "should have treated [the plaintiff's] allegations [about statements made by defendant police officers] as what they were -- allegations that the [o]fficers *made* the quoted statements, not allegations that the statements themselves were true"). The incident described in the article is Brivo's *defense* to Bing's claims of discrimination; the district court's premature ruling prevented Bing from attempting to prove that any reason asserted by Brivo was pretext for discrimination.

Moreover, accepting Brivo's claim that Bing was fired because of his involvement in the incident ignores the fact that Bing's complaint, liberally construed, alleges that he was subject to scrutiny and investigation that white employees were not. Thus, even if Brivo could prove that the discovery of the article was the true reason it terminated Bing, that does not make Bing's claim of discrimination in the conditions of employment implausible.

Nothing about the existence or content of the article renders implausible Bing's theories of liability. *See Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("[W]hile BNT need not establish a prima facie case at th[e motion-to-dismiss] stage, . . . we must be satisfied that the City's explanation for rejecting the loan does not render BNT's allegations implausible."). The district court therefore erred by assuming the truth of Brivo's defense when granting the motion to dismiss.

While Bing's complaint does not include exhaustive factual allegations, we must remember the unusual circumstances of this case. Bing was fired on his first day on the job, not because of anything he did that day, but because of a news article that Bing was not permitted to explain. Under these circumstances, Bing is in no position to assert whether newly hired white employees were subject to the same kind of additional internet background check, or whether any white employees had been fired for similar, decade-old conduct. However, as discussed above, it is reasonable to assume that employers will conduct all necessary background checks *before* allowing new employees to start work. But in this case, Wheeler conducted the additional background search only *after* learning that Bing was black, and Wheeler fired Bing without permitting him to explain the article

and his involvement in the underlying incident. In my view, these facts make Bing's claim of racial discrimination plausible. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Twombly*, 550 U.S. at 555 (explaining that a complaint must contain "[f]actual allegations [sufficient] to raise a right to relief above the speculative level").

Because Bing's complaint was sufficient to support a claim of racial discrimination, I believe the district court erred by granting Brivo's motion to dismiss. I therefore respectfully dissent from the affirmance of the district court's dismissing Bing's complaint under Rule 12(b)(6).