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# [***White v. Wireman***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RM3-DCF1-FBN1-22JT-00000-00&context=)

United States District Court for the Middle District of Pennsylvania

February 8, 2018, Submitted; February 8, 2018, Filed

Civil No. 1:16-CV-675

**Reporter**

2018 U.S. Dist. LEXIS 21711 \*

IVAN WHITE, Plaintiff v. DARRELL WIREMAN, et al., Defendants

**Subsequent History:** Adopted by, Dismissed by, in part, Motion denied by, in part, Remanded by [*White v. Wireman, 2018 U.S. Dist. LEXIS 40175 (M.D. Pa., Mar. 12, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RVK-SJR1-JT42-S2V1-00000-00&context=)

**Prior History:** [*White v. Wireman, 2017 U.S. Dist. LEXIS 29692 (M.D. Pa., Mar. 1, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N0R-PTT1-F04F-40BK-00000-00&context=)

**Core Terms**

second amended complaint, motion to dismiss, district court, allegations, Counts, grievance, recommendations, conferences, pleaded, fail to state a claim, confidential, intimidating, misconduct, prison, prior ruling, conspirators, plausibility, conspiracy, documents, interfere, parties, rights, magistrate judge, federal court, practices, requires, law of the case doctrine, amended complaint, legal sufficiency, law of the case

**Counsel:** **[\*1]**For Ivan White, Plaintiff: Marianne Sawicki, LEAD ATTORNEY, Law Office of Marianne Sawicki LLC, Huntingdon, PA.

For Darrell Wireman, Morris L. Houser, Ulrich Klemm, Shawn Kephart, James Eckard, Angela Duvall, Ron Smith, Department of Corrections, Ray Dunkle, Defendants: Vincent R. Mazeski, Chief Counsel's Office, Pennsylvania Department of Corrections, Mechanicsburg, PA.

**Judges:** Martin C. Carlson, United States Magistrate Judge. (Judge Mannion).

**Opinion by:** Martin C. Carlson

**Opinion**

**REPORT AND RECOMMENDATION**

**I. Statement of Facts and of The Case**

This prisoner civil rights lawsuit comes before us for consideration of a motion to dismiss four counts set forth in the plaintiff's Second Amended Complaint. (Doc. 28.) In addressing this motion we most assuredly do not write upon a blank slate. Quite the contrary, the legal sufficiency of the plaintiff's complaint has been the subject of protracted litigation, a comprehensive Report and Recommendation by our colleague, Judge Saporito, (Doc. 13), and a thoughtful opinion by the district court. (Docs. 17 and 18.) These prior rulings define for us the law of this case, and prescribe for us the course to follow in addressing the instant motion to dismiss, since the plaintiff's**[\*2]** Second Amended Complaint purported to amend this pleading in order to address the specific directions of the court in its prior rulings.

Because the parties are thoroughly familiar with the background of this litigation, which is fully detailed in the prior rulings of this court, we will only address those facts which in our view are necessary to an informed understanding of the present motion to dismiss. (Doc. 28.) This motion to dismiss seeks the dismissal of four counts of the plaintiff's second amended complaint: Counts 1 through 3, and 10. Presently, only the legal sufficiency of Counts 1 through 3 is in dispute; the plaintiff concedes that Count 10 should be dismissed.[[1]](#footnote-0)1

As to Counts 1 through 3, the gravamen of White's complaint is that prison officials interfered with his right to give evidence in a civil case based upon his race, conspired to interfere with this right to testify, and failed to prevent such interference when they allegedly impeded White's ability to have a confidential attorney-client conference at the State Correctional Institution—Huntingdon on May 24, 2015, in preparation for White's testimony as a witness in a separate federal civil rights lawsuit. On this**[\*3]** score, White brought claims against the defendants pursuant to *42 U.S.C. §§1981*, [*1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=), and [*1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=).

On March 1, 2017, Magistrate Judge Saporito issued a comprehensive Report and Recommendation which recommended the dismissal of these counts of White's complaint on a number of grounds. (Doc. 13.) On May 19, 2017, the district court, Caldwell, J., adopted this recommendation, in part, and dismissed these counts, while granting White leave to amend his complaint. (Doc. 17 and 18.) This ruling provided the parties specific guidance regarding the legal sufficiency of these counts, guidance which now constitutes the law of the case.

At the outset, with respect to White's assertion that the conduct of the defendants violated *42 U.S.C. §1981*, the district court described the gist of White's claim in the following fashion:

Plaintiff alleges that defendants Duvall, Smith, and Eckard violated his right to testify and give evidence under *42 U.S.C. § 1981* by interfering with the May 2015 attorney-client conference with the intent to influence Plaintiff's federal testimony. In Count 1's heading, Plaintiff appears to utilize *42 U.S.C. § 1983* as the procedural vehicle to bring his *§ 1981* claim against these state actors.

(Doc. 17, p. 7.)

According to the district court:

[T]he first**[\*4]** two elements of a *§ 1981* claim require showing that a plaintiff "belongs to a racial minority" and that the defendants had the "intent to discriminate on the basis of race." (Doc. 13 at 14 (*quoting* [*Bell v. City of Milwaukee, 746 F.2d 1205, 1232 (7th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VTN0-003B-G540-00000-00&context=) and [*Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 569 (3d Cir. 2002)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45SB-V3M0-0038-X24R-00000-00&context=). Because Plaintiff did not allege facts that would show either of the first two elements of a *§ 1981* claim, Judge Saporito found Plaintiff's *§ 1981* claim to be insufficiently pleaded.

(Doc. 17, pp.7-8.)

The district court then observed that "Plaintiff concedes that specific allegations regarding his race—African American—and the defendants' discriminatory animus were not explicitly pleaded, but could be added on amendment," (Id.,p.8), before concluding that:

when construed liberally and in a light most favorable to Plaintiff, the complaint properly sets forth *§ 1981* as one of the sources of the rights allegedly infringed by the state actors, and Count 1's heading mentions *§ 1983* as the procedural vehicle to pursue a *§ 1981* claim against those actors. Accordingly, Count 1's *§ 1981* claim falls short only insofar as Plaintiff has failed to properly plead facts showing the first two elements required for such a claim [i.e., discrimination based upon race]. Thus, dismissal under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is required, but leave to amend will be granted to cure these**[\*5]** deficiencies.

(Doc. 17, p. 9.)

The district court's opinion also specifically addressed whether the facts alleged in White's initial complaint stated a claim under [*42 U.S.C. §1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=), and held that the original complaint did not adequately plead such a claim, but provided specific guidance regarding what would be necessary to state such a claim. As the district court observed, from the well-pleaded facts set forth in the original complaint: "it can be inferred that Plaintiff is asserting a claim under the first clause of [*§ 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=): conspiracy to interfere with and intimidate Plaintiff regarding his federal witness testimony on May 28, 2015." (Doc. 17, p. 15.) The court then noted that: "In order to plead a cause of action under the first clause of [*42 U.S.C. § 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) for federal witness deterrence, a plaintiff must allege facts that show '(1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff[ ].' [*Rode v. Dellarciprete, 845 F.2d 1195, 1206 (3d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17R0-001B-K038-00000-00&context=) (citation omitted)." (Doc. 17, p. 16.)

Having described this [*§1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) claim in these terms, the district court then explained that the claim, as originally pleaded, failed on a narrow and specific**[\*6]** ground. As the court observed:

Here, Judge Saporito correctly determined that Plaintiff's complaint is bereft of allegations showing an agreement or mutual understanding between the alleged conspirators named in Count 2. The portions of the complaint referenced in Plaintiff's objections are unavailing, as they do not show any type of agreement or coordination between the alleged conspirators. Consequently, Plaintiff's failure to adequately plead the element of conspiracy is fatal to his [*§ 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) claim against Duvall, Dunkle, Smith, and Eckard, and requires dismissal of that portion of Count 2. Leave to amend will be granted.

(Doc. 17, p. 17.)

Finally, with respect to the [*§1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) claim originally lodged by White, the district court also dismissed this count of the complaint with leave to amend, explaining that:

Plaintiff alleges that defendants Eckard and Smith knew that other defendants were conspiring—in violation of [*§ 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=)—to intimidate and interfere with Plaintiff in regards to his upcoming federal court testimony. (Doc. 1 ¶ 146). Eckard and Smith allegedly "neglected or refused to act to prevent this deprivation of Plaintiff's right to testify in federal court," even though they had "power to prevent or**[\*7]** aid in preventing this deprivation," thus violating [*§ 1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=). (*Id.* ¶ 147). As Judge Saporito correctly determined, Count 10 is insufficient because it requires the underlying [*§ 1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) violation to be adequately pleaded, which Plaintiff has failed to do. *See* [*Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6XT0-003B-P3WR-00000-00&context=) ("[T]ransgressions of [*§ 1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) by definition depend on a preexisting violation of [*§ 1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=)[.]" (citation omitted)); [*Brawer v. Horowitz, 535 F.2d 830, 841 (3d Cir. 1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20H0-0039-M4T2-00000-00&context=) ("Having failed to state a claim under [*§ 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=), a fortiori [plaintiffs] failed to state a claim under [*§ 1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=)." (citation omitted)). As discussed above, Plaintiff has failed to adequately plead the conspiracy element of his [*§ 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) claim. Consequently, because Plaintiff has failed to state a claim under [*§ 1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=), he necessarily has failed to state a claim under [*§ 1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=). Leave to amend will be granted.

(Doc. 17, p.20.)

It was against the backdrop of these rulings that the plaintiff began the process of amending this complaint, a process which culminated with the filing of White's Second Amended Complaint on June 27, 2017. (Doc. 27.) That Second Amended Complaint endeavored to re-plead the *§§1981*, [*1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) and [*1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) claims which had initially been dismissed by the district court. (*Id.*, Counts I-III.) In amending this complaint, White specifically heeded the guidance of the district court. Thus, Count I,**[\*8]** White's *§1981* claim, now specifically alleges that in interfering with White's right to give evidence in another federal lawsuit: "Defendants acted with intent to discriminate against Plaintiff on the basis of race because of Plaintiff's African American identity and his efforts to vindicate his rights to follow religious practices and beliefs that the Defendants perceived to be 'Black Muslim,' and they acted with the intent and effect of influencing and hindering Plaintiff's testimony in court." (*Id.*, ¶195.) Therefore, the amended *§1981* count spoke directly to the concern voiced by the district court, namely the failure to allege discrimination based upon race.

Likewise, Count II of White's Second Amended Complaint attempted to rectify the specific shortcoming identified by the district court that related to his [*§1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) conspiracy claim. Thus, the amended complaint asserted that: "Defendants Duvall, Dunkle, Smith, and Eckard conspired one with another to intimidate Plaintiff during a conference with his attorney on May 24, 2015 that was meant to prepare for federal testimony, to interfere with that conference, to compromise its confidentiality, or to cover up that wrongful conduct, with the intent**[\*9]** and effect of influencing and hindering Plaintiff's federal testimony." (*Id.*, ¶198.) White then averred specific facts designed to describe a conspiratorial agreement between the defendants, stating in part as follows:

On information and belief, prior to the May 24, 2015 attorney conference, Eckard conferred with Duvall, who was the officer regularly assigned to manage the visiting room, and with Defendant Smith, who had often served as watch commander on past occasions when Attorney Sawicki attempted to conduct legal conferences at the prison.

Eckard, Duvall, and Smith conferred for the purpose of planning the specific details of legal conferences between White and Attorney Sawicki in the newly renovated visiting room so as to deny them access to the portions of the room where sound-proofing had been enhanced, and in that way to interfere with White's preparations to testify in federal court.

At some time between the site tour on May 12, 2015 and the 2015 Memorial Day Weekend, Defendants Eckard, Smith, and Duvall conferred and formed a plan to prevent White and other prisoners from having access to the newly renovated accommodations for confidential conferences with attorneys, selectively,**[\*10]** depending on their assessment of whether the prisoner's legal interests might be adverse to those of the prison, the Department of Corrections, or its employees, and also depending on the race of the prisoner who sought to have an attorney conference.

On information and belief, Eckard and Smith conferred with Defendant Dunkle about certain grievances in which White and other prisoners complained about interference with attorney visits including denial of access to facilities for confidential conversations.

In the course of those conferences, Eckard, Smith, and Dunkle formulated plans to create false records in the context of their review of such grievances, with the intent and effect of concealing their interference with attorney communications, deflecting administrative and judicial attention from their activities, and thereby enabling the interference to continue so as to prevent White from testifying fully and freely in federal court.

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Defendant Eckard, as superintendent of the prison, caused the furnishings of the visiting rooms at SCI Huntingdon to be arranged in a manner calculated to prevent confidential contact visits between prisoners and their attorneys, although such visits**[\*11]** are provided by the DOC policy on visiting, DC-ADM 812, and by state ***regulations***.

Eckard encouraged Duvall and Smith to harass White and his attorney by restricting their physical access, in violation of DC-ADM 812 and [*37 Pa. Code § 93.3*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SS6-KX30-00F1-W3TG-00000-00&context=), with the intent and effect of discouraging White from seeking redress for violation of his religious rights as an African American Muslim and from giving testimony about prison conditions. Eckard, Smith, Duvall, and Dunkle conferred on numerous occasions between August 2014 and May 2015 during several stages of the renovations of the visiting room, especially during October and November 2014 and during April and May 2015. In that context, they discussed the specific issue of confidential attorney conferences, in part because of grievances filed by White and other prisoners concerning that issue, which the renovations were supposed to address.

Eckard either directly or through communications with Smith, ordered Duvall and Smith to disrupt White's conferences with his attorney, or else Eckard tolerated, encouraged, and acquiesced in their practices of compromising the confidentiality of attorney conferences, intimidating attorneys, and retaliating against prisoners who**[\*12]** testified about prison conditions, in order to prevent prisoners like White from disclosing unconstitutional conditions and practices.

Smith either directly ordered Duvall to plant contraband and disrupt White's conference with his attorney on August 30, 2014, or else Smith tolerated, encouraged, and acquiesced in Duvall's practices of compromising the confidentiality of attorney conferences, intimidating attorneys, and retaliating against prisoners who testify about prison conditions in order to prevent prisoners like White from disclosing unconstitutional conditions and practices.

Defendant Dunkle conspired with Smith and Eckard to cover up the misconduct of Duvall and Smith in disrupting White's legal visit on August 30, 2014, and in intimidating White's attorney at that time.

Dunkle reviewed surveillance video recordings that, on information and belief, showed the activity of Duvall, Smith, and Attorney Sawicki coming and going from booth #3 on August 30, 2014, but Dunkle misrepresented that evidence by entering false statements onto an official document, that is, the Initial Review Response for the remand of grievance #525865, which Dunkle signed on October 28, 2014.

Dunkle falsified**[\*13]** evidence of Duvall's and Smith's misconduct during White's May 24, 2015, legal conference as well. Dunkle entered false and misleading statements onto an official document, that is, the Initial Review Response for grievance #569189, which Dunkle signed on May 27, 2015.

Dunkle explained his motivation in the Initial Review Response for White's grievance for May 24, 2015 itself by referring to pending litigation and stating that the grievance procedure was unavailable to White because of litigation undertaken by someone else. White understood this to be a warning that White himself should not pursue litigation or participate in it.

When White appealed Dunkle's threatening response to Eckard, Eckard affirmed Dunkle's threatening response, and when the grievance was remanded to Eckard for a different response, Eckard entered further false information into the record of the review for grievance #569189.

Both of Dunkle's falsified grievance documents had the intent and effect of shielding Duvall's misconduct so that the infringements of White's constitutional rights could continue unimpeded.

Eckard either ordered Dunkle to cover up the misconduct of Duvall and Smith, or else Eckard tolerated,**[\*14]** encouraged, and acquiesced in Dunkle's cover-ups, in that Eckard affirmed both of Dunkle's falsified grievance documents after White appealed each of them to Eckard and pointed out the falsifications in each instance.

Eckard improperly assigned Dunkle to review grievance #569189, about Duvall's misconduct on May 24, 2015, although White had earlier informed Eckard that Dunkle falsified the review of grievance #525865, about Duvall's and Smith's misconduct on August 30, 2014.

Eckard reviewed but declined to act on White's reports of Dunkle's falsification of grievance documents, thereby enabling Duvall and Smith to continue to hinder White from having a confidential conference with his attorney.

Defendant Smith falsely testified at the hearing in federal court in the Camacho case on May 29, 2015, when Smith contradicted White's testimony that Duvall had repeatedly used her radio to strike the window behind White's attorney's head on August 30, 2014. Smith falsely denied that this misconduct occurred.

It is believed that Smith had reviewed surveillance video showing the actions of Duvall assaulting and intimidating the attorney on August 30, 2014 but nevertheless denied that those events**[\*15]** occurred.

Smith's misleading testimony had the intent and effect of shielding Duvall's misconduct so that the infringements of White's constitutional rights could continue unimpeded.

(*Id.*, ¶¶119-23, 134-51.)

Notwithstanding these efforts by White to amend his pleadings to satisfy the specific concerns previously identified by the district court, the defendants have moved to dismiss Counts 1 through 3 of the Second Amended Complaint, which re-pleaded these claims under *42 U.S.C. §§1981*, [*1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=), and [*1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=). (Doc. 28.) This motion to dismiss is fully briefed, (Docs. 29 and 30), and is, therefore, ripe for resolution.

For the reasons set forth below, it is recommended that the motion to dismiss be granted in part, and denied, in part as follows: the motion to dismiss should be granted with respect to Count 10 of the Second Amended Complaint, which all parties agree fails to state a claim upon which relief may be granted, but the motion should be denied with respect to Counts 1 through 3 of the Second Amended Complaint.

**II. Discussion**

**A. Motion to Dismiss—Standard of Review**

A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) only if the complaint**[\*16]** fails to state a claim upon which relief can be granted. [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). When reviewing a motion to dismiss, the court "must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any reasonable reading of the complaint." [*Mayer v. Belichick, 605 F.3d 223, 229 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YH1-F2D0-YB0V-F000-00000-00&context=). In reviewing a motion to dismiss, a court must "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the [plaintiff's] claims are based upon these documents." [*Id. at 230*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YH1-F2D0-YB0V-F000-00000-00&context=).

In deciding whether a complaint fails to state a claim upon which relief can be granted, the court is required to accept as true all factual allegations in the complaint as well as all reasonable inferences that can be drawn from the complaint. [*Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-73T0-003B-P4X1-00000-00&context=). These allegations and inferences are to be construed in the light most favorable to the plaintiff. *Id.* However, the court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." [*Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RN7-DGS0-0038-X299-00000-00&context=). Further, it is not proper to "assume that [the plaintiff] can prove facts that [he] has not alleged. . ." [*Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=).

Following the rule announced**[\*17]** in *Ashcroft v. Iqbal*, "a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). Rather, a complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. *Id.* To determine the sufficiency of a complaint under the pleading regime established by the Supreme Court, the court must engage in a three step analysis:

First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

[*Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51PJ-8WH1-652R-1000-00000-00&context=)(quoting [*Iqbal, 556 U.S. at 675, 679)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief" and instead must "'show' such an entitlement with its facts." [*Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X1S-WS60-TXFX-52CT-00000-00&context=).

As the court of appeals has observed: "The Supreme Court in *Twombly* set forth the 'plausibility' standard for overcoming a motion to dismiss and refined this approach in *Iqbal*.**[\*18]** The plausibility standard requires the complaint to allege 'enough facts to state a claim to relief that is plausible on its face.' [*Twombly, 550 U.S. at 570, 127 S.Ct. 1955*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). A complaint satisfies the plausibility standard when the factual pleadings 'allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' [*Iqbal, 129 S.Ct. at 1949*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (citing [*Twombly, 550 U.S. at 556, 127 S.Ct. 1955*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). This standard requires showing 'more than a sheer possibility that a defendant has acted unlawfully.' Id. A complaint which pleads facts 'merely consistent with' a defendant's liability, [ ] 'stops short of the line between possibility and plausibility of "entitlement of relief."' " [*Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83GH-R631-652R-11NP-00000-00&context=) *cert. denied*, *566 U.S. 921, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012)*.

In undertaking this task, the court generally relies only on the complaint, attached exhibits, and matters of public record. [*Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PP9-8SR0-TXFX-51VN-00000-00&context=). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." [*Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FFY0-003B-P1RJ-00000-00&context=). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." [*Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45SB-V3M0-0038-X24R-00000-00&context=); *see also,* [*U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4553-5X30-0038-X472-00000-00&context=) (holding that "[a]lthough**[\*19]** a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment.") However, the court may not rely on other parts of the record in determining a motion to dismiss. [*Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-73T0-003B-P4X1-00000-00&context=).

**B. The Law of the Case Doctrine**

In this case, where we are considering a motion to dismiss an amended complaint, which was amended in response to a specific prior ruling by the court, a second legal consideration comes into play—the law of the case doctrine. "Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances .... The purpose of this doctrine is to promote the 'judicial system's interest in finality and in efficient administration. [*Todd & Co., Inc. v. S.E.C., 637 F.2d 154, 156 (3d Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6Y30-0039-W3V8-00000-00&context=).'" [*Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 165 (3d Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-40W0-003B-G29B-00000-00&context=). The contours of this settled doctrine were recently described by the United States Court of Appeals for the Third Circuit in the following terms:

In [*Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-S065-00000-00&context=), the Supreme Court noted:

Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon**[\*20]** a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

[*Id. at 618*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-S065-00000-00&context=) (citations omitted). The "[l]aw of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" [*In re Pharmacy Benefit Managers* ***Antitrust*** *Litigation, 582 F.3d 432, 439 (3d Cir.2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X9F-M430-TXFX-52V1-00000-00&context=)(reversing arbitration order in ***antitrust*** case on law-of-the-case grounds)(citations omitted). It is clear that "[t]he ... doctrine does not restrict a court's power but rather governs its exercise of discretion." *Id. (quoting* [*Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron Inc., 123 F.3d 111, 116 (3d Cir.1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S36-5YG0-00B1-D1JM-00000-00&context=) (citations omitted). In exercising that discretion, however, courts should "be loathe to [reverse prior rulings] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." *Id.*( *quoting* [*Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1D0-003B-43DB-00000-00&context=). In addition to that narrow class of cases where the prior ruling was manifestly unjust, the type of "extraordinary circumstances" that warrant a court's exercising its discretion in favor of reconsidering an issue decided earlier in the course of litigation typically exist only where (1) new evidence is available, or (2) a supervening new law has been announced. [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X9F-M430-TXFX-52V1-00000-00&context=) (*citing,* [*Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 117 (3d Cir. 1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S36-5YG0-00B1-D1JM-00000-00&context=).

In our view, the law of**[\*21]** the case doctrine applies here and guides us in our consideration of the instant motion to dismiss since the district court has already ruled upon the elements needed to properly plead violations of *42 U.S.C. §§1981*, [*1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) and [*1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=), the counts in White's Second Amended Complaint which are the subject of this motion to dismiss. Furthermore, defendants do not argue that any narrow exception to the law of the case doctrine applies here since no new evidence is available, and no supervening new law has been announced. Therefore, we will assess the legal sufficiency of these counts, judging their sufficiency against the benchmarks previously prescribed by the district court. Viewed in this light, the motion to dismiss Counts 1 through 3 of the Second Amended Complaint should be denied.

**C. Under the Law of the Case, White Has Sufficiently Pleaded Alleged Violations of *42 U.S.C. §§1981*,** [***1985***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) **and** [***1986***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) **in His Second Amended Complaint**

Judged against these standards, and viewed through the lens of the law of the case, for the reasons set forth below, we conclude that, with the exception of Count 10 of the Second Amended Complaint, which all parties concede fails to state a claim upon which relief may be granted, the motion to dismiss White's**[\*22]** *§§1981*, [*1985*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) and [*1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) claims should be denied.

Turning first to White's *§1981* claim set forth in Count I of this Second Amended Complaint: "To establish a claim under *§ 1981*, the plaintiff must allege (1) he is a member of a racial minority; (2) the defendant intended to discriminate against the plaintiff on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (*i.e.*, make and enforce contracts, sue and be sued, give evidence, etc.)." [*Coggins v. Cty. of Nassau, 988 F. Supp. 2d 231, 247 (E.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59YR-FTY1-F04F-035Y-00000-00&context=), *aff'd in part, appeal dismissed in part sub nom.* [*Coggins v. Buonora, 776 F.3d 108 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F2G-P0G1-F04K-J12C-00000-00&context=). In the instant case, the district court found White's initial pleading wanting in a single respect: it failed to allege race-based discrimination which interfered with White' exercise of one of *§1981*'s enumerated rights, the right to give evidence. We believe that White's amended complaint, which states that "Defendants acted with intent to discriminate against Plaintiff *on the basis of race because of Plaintiff's African American identity* and his efforts to vindicate his rights to follow religious practices and beliefs that the Defendants perceived to be 'Black Muslim,' and they acted with the intent and effect of influencing and hindering Plaintiff's testimony in court,"**[\*23]** (*Id.*, ¶195)(emphasis added), adequately cures this deficiency. Therefore, under the "plausibility" standards defined for sufficiency of complaints in federal court, [*Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83GH-R631-652R-11NP-00000-00&context=) *cert. denied*, *566 U.S. 921, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012)*, these allegations now plausibly state a claim under *§1981*. Accordingly, this claim cannot be dismissed on the pleadings alone.

Likewise, we believe that White has sufficiently amended Count II of the Second Amended Complaint to state a conspiracy to interfere with testimony claim under [*42 U.S.C. §1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=). As this court previously observed: "In order to plead a cause of action under the first clause of [*42 U.S.C. § 1985(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKJ1-NRF4-4103-00000-00&context=) for federal witness deterrence, a plaintiff must allege facts that show '(1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff[ ].' [*Rode v. Dellarciprete, 845 F.2d 1195, 1206 (3d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17R0-001B-K038-00000-00&context=) (citation omitted)." (Doc. 17, p.16.) The district court then found a single deficiency in White's pleading as it related to this claim: "Plaintiff's complaint is bereft of allegations showing an agreement or mutual understanding between the alleged conspirators." (Doc. 17, p.17.) In our view, liberally construing the allegations set forth in paragraphs**[\*24]** 119-23 and 134-51 of the Second Amended Complaint, this pleading now adequately alleges a mutual understanding or agreement between the defendants to interfere with White's testimony. At this stage of the proceedings, where our review is confined and cabined by the well-pleaded facts in the complaint, this if all that the plaintiff needs to do to survive a motion to dismiss. The question of whether the plaintiff can prove what he has pleaded must await another day.

Finally, finding that Counts I and II of the Second Amended Complaint are now legally sufficient, we conclude, consistent with the law of the case, that Count III of this amended complaint, which alleges a failure to intervene in violation of [*42 U.S.C. §1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=), is also not subject to dismissal at this time. In its prior ruling, the district court dismissed this count of White's original complaint because a [*§1986*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNF1-NRF4-44B2-00000-00&context=) failure to intervene claim is dependent upon an underlying violation and in the court's view the initial pleading of the predicate violations was inadequate. These inadequacies have now been cured. Therefore, Count III of the Second Amended Complaint no longer rests upon this legally infirm footing and should be permitted to proceed forward.**[\*25]**

**III. Recommendation**

For the foregoing reasons, IT IS RECOMMENDED that the motion to dismiss (Doc. 28) be GRANTED in part, and DENIED, in part as follows: the motion to dismiss should be granted with respect to Count 10 of the amended complaint, which all parties agree fails to state a claim upon which relief may be granted, but the motion should be denied with respect to Counts 1 through 3 of the second amended complaint.

The parties are further placed on notice that pursuant to [*Local Rule 72.3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5T0C-RFD0-01Y5-V2SX-00000-00&context=):

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in *28 U.S.C. § 636 (b)(1)(B)* or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in [*Local Rule 72.2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5T0C-RFD0-01Y5-V2SW-00000-00&context=) shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed**[\*26]** findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 8th day of February, 2018.

*/s/ Martin C. Carlson*

Martin C. Carlson

United States Magistrate Judge

**End of Document**

1. 1Count 10 brought a claim under the Religious Freedom Restoration Act. White now concedes that the defendants are correct that relief is unavailable here under that statute. (Doc. 30, p. 5, n. 1.) Therefore this Count of the Second Amended Complaint should be dismissed. [↑](#footnote-ref-0)